IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 04-104

FREDDIE J. BOOKER; and :

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UNITED STATES, :

Petitioner :

: No. 04-105

v. :

DUNCAN FANFAN :

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Washington, D.C.

Monday, October 4, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

T. CHRISTOPHER KELLY, ESQ., Madison, Wis.; on behalf of the Respondent Booker.

ROSEMARY SCAPICCHIO, ESQ., Boston, Mass.; on behalf of the Respondent Fanfan.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 04-104, United States against Freddie J. Booker and 04-105, United States against Duncan Fanfan.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Thank you, Mr. Chief Justice, and may it please the Court:

This case, and these cases, concern the constitutionality of the twelve hundred criminal sentencings that take place in Federal court each week. If this Court re-affirms its traditional understanding of the relationship between the Guidelines, and the statutory maximum penalties set forth in the United States Code, an understanding reflected in a series of this Court's decisions dealing with the Guidelines, than the constitutionality of those criminal sentencings remains secure.

On the other hand, if this Court takes a different view, and treats the outer bounds of the Guideline ranges as if they were statutory

maximums, then the majority of those criminal sentencings become constitutionally dubious, and this Court must confront difficult remedial issues.

This is, of course, not the first time that this Court has confronted a challenge to the constitutionality of the Guidelines or to the Commission. To be sure, in those previous cases, this Court has never considered the precise Sixth Amendment issue before the Court today. But, nonetheless, those previous cases are instructive, because all of those cases, Dunnigan, Witte, Watts, and Edwards, all reflect a particular understanding of the relationship between the Guidelines and the statutory maximum sentences for each specific crime defined in the United States Code. And all of those decisions suggest that the statutory maximum in the Code is the relevant focal point for constitutional analysis.

So, in the Witte case, for example, the finding of relevant conduct in the Witte case increased his sentence under the Guidelines by two hundred months. Nonetheless, this Court rejected the double jeopardy challenge before the Court by emphasizing that that consideration of relevant

conduct did not increase his penalty beyond the statutory maximum.

Likewise in the Edwards case, this Court considered the propriety of a judicial finding of crack cocaine that increased the Guideline sentence, when the jury was instructed in the alternative, to find cocaine or crack. Now, even though the judicial finding had the effect of raising the punishment under the Guidelines, this Court found no serious Sixth Amendment issue raised precisely because the effect of the judge's finding did not take the sentence beyond the maximum for a cocaine-only conspiracy.

JUSTICE SCALIA: And you say we found no serious Sixth Amendment issue raised. Was the right of jury trial issue argued in that case, and decided?

MR. CLEMENT: In the Edwards case, a Sixth Amendment issue and, I think, fairly including the jury trial, was raised in that case. Now, I've tried to go back and look briefs in that case and I have to admit, they're a little difficult to get through in terms of the precise issue that was being raised.

JUSTICE SCALIA: The right to jury trial

is fairly clear and stark, and I just don't recall that being argued in any of those cases.

MR. CLEMENT: Well, it was argued, I think, fairly clearly in the Watts case, I mean, there was a section -- Watts, of course, was a summary reversal, so you have to go and look at the brief in opposition in the Watts case. And if you do, there's a separate paragraph in the argument section denominated the jury trial right.

And I think in some respects, the Watts case is a particularly clear indicator that this Court has rejected the view of the Guidelines that Respondents embrace. Because Justice Stevens was quite prophetic in his dissent in that case. He embraced the precise understanding of the significance of the outer bound of the Guidelines range in his Watts dissent, and no member of this Court joined that dissent, and no member found the disposition with respect to Watts

JUSTICE STEVENS: That just proves they don't listen to me as much as they should.

MR. CLEMENT: It may very well prove that, Justice Stevens, because you were very clear about the point, just to remind you, in the Watts case

there were two cases before the Court, there was the Putra case, and there was the Watts case, they were consolidated. And with respect to Putra, you can envision that case, or characterize that case as being sort of a collateral estoppel, double jeopardy case, but as you correctly recognized, very clearly, in your Watts dissent, with respect to Mr. Watts, the finding, the criminal finding of acquittal was based on 924(c), which requires use of a gun. The sentencing enhancement was done based on an enhancing factor that only requires possession of a gun. So there wasn't any collateral estoppel effect in that case.

But, nonetheless, in your dissent you pointed out, in footnotes 2 and 4 that it still had the effect of raising his sentence above the outer bound of the Guidelines range, and that, because that was done on the basis of a preponderance of the evidence, rather than a beyond a reasonable doubt standard, that that raised a constitutional problem, and you would have reversed. The rest of the Court was happy to summarily reverse in that case.

JUSTICE SCALIA: Mr. Clement, here's the problem I have with the Government's argument

insofar as it does not urge that we reverse Blakely, I know that you want us to do that as well. But assuming we adhere to Blakely, it seems to me you have a cure that doesn't correspond to the disease. You say that the reason the right to jury trial does not apply here is because, after all, these sentences have not been prescribed, or these maximums have not been prescribed by the legislature, but rather, have been prescribed by a quasi-judicial agency.

But the right of jury trial is meant to protect against whom? Who are you worried about when you say, "I want to be tried by a jury." You're not worried about the legislature, you're worried about the judges, precisely. So I don't care if the upper level of the Guidelines were actually prescribed by a court, as opposed to the Commission which is, I don't know what it is, but it's not a court.

But even if it were prescribed by a court, how would that eliminate the jury trial problem? The whole reason for jury trial is we don't trust judges.

MR. CLEMENT: With respect, Justice Scalia, I'd like to make two observations. One, I

don't think the jury trial right is just a juxtaposition of the role of the jury versus the role of the judge, because if that were the only factor at issue in this Court's Sixth Amendment jurisprudence, it would be very difficult to explain why it is that judicial fact-finding can have the effects that it can under a purely discretionary system, yet this Court has upheld that time and time again.

The second point I'd like to make, is I do think that this Court's Apprendi to Blakely line of cases -

JUSTICE GINSBURG: Can we just go back to the point you just made, it's a little different when the judge has discretion and there's no -- the judge has discretion to take a whole bunch of things into account, but they're not quantified. And I think that was dramatically illustrated, the difference, by the decision of Judge Lynch when he said, "Well, I'll go back to the old ways of doing it, I'll look at the Guidelines for some advice," he comes out with twenty-four months instead of thirty-three months.

So I think there is a huge difference between a judge taking account of many, many

factors, not giving them a specific quantity as the Guidelines require.

MR. CLEMENT: Well, Justice Ginsburg, I think there -- there certainly is a difference between sentencing under the Guidelines, versus a system of discretionary sentencing, or even a system of discretionary sentencing where the Guidelines have an advisory character, I'd certainly concede that.

My point was, though, in making a distinction between the role of the jury and the judge, it's not just as simple as saying that the jury trial right exists precisely to protect the jury from the judge, because if that were the case, the kind of fact-finding that Judge Lynch engaged in, or the kind of fact finding that was commonplace under discretionary sentencing also takes roles away from the jury, and gives them to the judge.

JUSTICE SCALIA: Yes, but we're talking here about one precise role of the judge or of the jury, and that is, to find a fact that is necessary to keep you in jail for an additional number of years. And the difference with discretionary sentencing is if it's, you know, ten

to twenty years, what you know when you do the crime is that you've laid yourself open to twenty years.

Now, if you get a merciful judge, good for you, I mean, that's lagniappe as they say in Louisiana, but if you get a hanging judge, you've got twenty years, and you know that when you commit the crime, whereas we have a system now where you are entitled to no more than so much. And I find it just incompatible with jury trial right to say that that fact must be determined, before you can be kept in jail. And yet we're going let it be determined by a judge. That bears no resemblance to the discretionary sentencing system.

MR. CLEMENT: With respect, Justice Scalia, I think you've built in some assumptions into that question, because under our system, generally speaking if somebody wants to know what the maximum exposure for a particular criminal offense is, they would be well-advised to look at the U.S. Code provision that specifies what the maximum sentence is for that offense, because that is their exposure, that's what they're told about in their Rule 11 colloquy if they plead to the

crime, and if the judge makes certain findings, to be sure, upward departure, whatever it takes in a particular case, that is the maximum exposure that the individual

JUSTICE SCALIA: It's not the maximum exposure. If, for example, one of the factors is whether the crime was committed with a firearm, I know that if I don't use a firearm, under the Guidelines, I can only get so many years, so somebody has to find that I used a firearm, and if I didn't, my maximum exposure is less.

MR. CLEMENT: Unless the judge departs for some other reason, or the like. I mean, but certainly that's true -

JUSTICE STEVENS: Or he makes a mistake in finding.

MR. CLEMENT: I suppose that's true, too.

JUSTICE STEVENS: He finds a gun when there really wasn't one.

MR. CLEMENT: So there are different ways that you could get that sentence under the Guidelines system. But if there's no mistake, and no departure on some other grounds, we both understand, I think, how the Guidelines work and you're describing it correctly. But still, that

is a finding that is only necessary because of the determination of the Commission and the Guidelines, and that brings us back to the question -

JUSTICE GINSBURG: Suppose the determination, as is occasionally true of the Guidelines, is made not by the Commission, but by Congress itself? Or made by the Commission at the direction of Congress? Then the distinction that you're making between the maximum set by the legislature and the guidance provided, or the guidance to discretion under the Guidelines, really doesn't stand up. So at least to the extent that Congress directly enacts Guidelines, would you concede that then, the critical finding has to be made by the jury?

MR. CLEMENT: I would not concede that, Justice Ginsburg, but let me first make clear that in the case before us today, the Guidelines that we have are promulgated by the Commission, and were not the direct or indirect result of a Congressional act the way that the, say, the Protect Act added particular amendments to the Guidelines, so that question is not directly posed in this case.

The reason I would say that even in that case there is a difference is because it is still different when Congress goes in and amends a particular Guideline in a sense in a sea of Guidelines provided by the Commission. And I think that's true, one, because amending a single Guideline doesn't change the overall character of the Guidelines.

But also because, when Congress decides to take action not as a statute, but as an amendment to a Guideline, it doesn't change the fundamental character of the Guideline as a Guideline. And so after -- the Protect Act for example, specifies a period in which -- after which the Commission can then amend that Guideline. Which is obviously not a case that you can have with a statute consistent with the Presentment Clause.

And to just give you another example, the Sentencing Reform Act that has brought us here today, one of the things it did was make specific amendments to Federal Rule of Criminal Procedure 32. I think when Congress does that, it doesn't make Federal Rule of Criminal Procedure 32 a statute, it continues to be a Federal Rule, the Federal Rules Advisory Committee could still modify

it after the fact, and so I think even in that case, there's a difference in effect.

JUSTICE SOUTER: What is the difference in effect? I mean, that's where I'm having trouble, and I guess others are having trouble. Yes, there's a difference in process, there may be a difference, in some sense, in ultimate status, but there isn't, it seems to me, any difference in effect. The defendant in the courtroom is going to suffer the same effect either necessitated or sufficed by this fact which is just as crucial, whether it's a rule, whether it's a guideline, whether it's a statute, why should that make any difference for the Sixth Amendment?

MR. CLEMENT: I think it should make -- well, I guess what I would respond to that, Justice Souter, is this. I think that one thing that emerges from this Court's recent Sixth Amendment jurisprudence, is that the impact on the defendant himself or herself is not the only test that this Court looks to. Because from the perspective of an individual defendant, they don't care if they've gotten five extra years because a judge made a finding under a discretionary regime, or they got five extra years because the judge

made a finding that the legislature told the judge to make, the practical effect is the same.

JUSTICE SOUTER: Well, the practical effect is the same but in the moment before either in theory they commit the crime or in the moment before the trial is over or in the moment before the sentence comes down, there is one big difference in the two classes of cases. The defendant is entitled to claim that he can not be sentenced to the higher range unless a fact is found. In a case of discretionary sentencing range, within that range, he can not make that claim, he can not make that assumption, and the -- that, it seems to me, is the point at which the jury trial right has got to focus.

MR. CLEMENT: Well, I think again, as Justice Stevens suggested earlier, I mean, that may be true if you focus in on that single fact under the Guideline system, but under the myriad of various ways that your Guidelines sentence can go up or down, it may be inappropriate under the Federal Guideline system to focus in on the point of analysis on that particular interval, of just the one -

JUSTICE SOUTER: Why not?

MR. CLEMENT: Because, again, as a defendant, you may have a case where there are five or six potential enhancements, and there are five or six potential departures, and your sentence is going to be a product of the judicial fact finding that goes in, in making those various conclusions -

JUSTICE SCALIA: And each one is appealable separately, each one is appealable separately, it's a separate legal finding. And the judge doesn't, in discretionary sentencing, he doesn't have to make any factual finding, he can just look at you and say, "I think you're a bad actor, you've got forty years." We have a system here where the judge must make factual findings, and each one is appealable if he's made them incorrectly.

MR. CLEMENT: I don't disagree with that characterization of the Guidelines, but I still think that is a difference from a pure statutory scheme, it's different from a scheme like this Court had before it in Blakely against Washington, where the statute focuses you in on just a couple of factors and you really can re-conceptualize that regime as providing for a base

offense level and one or two aggravated grades of the offense. As Judge Lynch observed in language that we quoted on page four of our reply brief, you really can't re-conceptualize the Guideline system that way.

JUSTICE SOUTER: Well, the principal reason you can't, or I think the principle reason that you're advancing is, that the Guideline system is so complicated. There are a myriad of factors. As Justice Scalia says, why isn't each one in that myriad subject to the same claim? Surely, the argument can't be just because it's more complicated, that the Sixth Amendment evaporates.

MR. CLEMENT: I agree, Justice Souter, and the point isn't that it's more complicated. If I just continue with Judge Lynch's observation, which, as I say, is quoted on page four of our reply brief, it's not just that it's complicated, it's that the mission of the Guidelines system is, once, assuming that somebody's been convicted of some Federal crime with certain elements defined by Congress, then, what the Guidelines ask the judge to do is evaluate the incident of criminal activity and assess an appropriate punishment

without regard to whether it has met the certain elements of a particular Federal crime. And so, the really, the focus is quite different, and in that sense, I think there is, there is more than a difference of form between a set of guidelines produced by a legislature and a set of guidelines produced by the sentencing commission.

JUSTICE SCALIA: I find very little difference between telling him to evaluate it with regard to particular elements of a crime and asking him to evaluate it with regard to particular sentencing facts. The result is the same. You're asking him to evaluate it in light of certain facts that he has to find. Whether you call them the one or the other, he's doing the same thing. If he finds this fact you get three more years; if he doesn't find it, you don't. I mean, you know, as far as the real outcome is concerned, what difference does it make whether you call it an "element" or a "required fact for sentencing"?

MR. CLEMENT: Well, I think there are differences between the two. I think if you look at the Washington system that you had before you in the Blakely case, it was a product of the

legislature, and so, not surprisingly, there was a focus on the crimes as defined by the legislature, there was a presumptive range for each crime, and then there were a handful of things that got you into - added three years, like a firearm, and then there was basically the upward departure authority or the downward departure authority, and that was it. And that makes sense; a legislature is going to be predominantly focused on the statutorily defined crimes.

In the context of the Guidelines, on the other hand, it is a much more widely variant focused, and what it's focusing on is the criminal activity as a whole. There are many factors that can increase it, there's many factors that can decrease it, and

JUSTICE GINSBURG: Is that complexity, is the key or, suppose these Guidelines were proposed by the Commission, just as they are, with all their complexity, but they were proposed as legislation, and then Congress enacted these Guidelines, would you be able to make the argument that you're making, still? The Federal system, now legislative guidelines is viable after Blakely?

MR. CLEMENT: I don't think so. I think in that, in that context we would be limited to an argument to asking this Court to overrule Blakely. But that is not to say that, that, what I want to make the point, though, is ultimately if pushed - and your hypothetical pushes us - if pushed, the argument is one of form, that the fact that these emanate from the sentencing commission makes a constitutional difference. But I don't want to lose the fact in making that concession that there is still a real difference between the way the Federal Guidelines work and the way the Washington Guidelines work, and the Federal Guidelines work exactly as you would expect: sentencing guidelines promulgated by an entity located in the Article III branch, and consisting of Article III members; and the Washington Guidelines system works

JUSTICE GINSBURG: But that's not so clear anymore, it just happens that there are three members, but they don't have to be any judicial members, under the current legislation.

MR. CLEMENT: That's true, Justice Ginsburg, but there

JUSTICE SCALIA:They're still in the judicial branch, right?

MR. CLEMENT: Still in the judicial branch, Justice Scalia, and there are the same number of judicial members on the Commission now as there were when this Court considered the Mistretta decision. And I think Mistretta itself recognized that you could have bodies located in the judicial branch that were auxiliary to the judicial branch, even if they consisted, quote, "solely of non-judges."

So I don't think that's what's dispositive. I think what's dispositive ultimately is what this Court recognized in the Mistretta decision. In the Mistretta decision, this Court made clear that the Commission was constitutionally located in the Article III branch precisely because it did not take on the quintessentially legislative tasks of setting maximum punishments and defining the elements of Federal crimes.

CHIEF JUSTICE REHNQUIST: Mistretta might have come out the other way had it not been for that observation.

MR. CLEMENT: I think that's exactly right, Mr. Chief Justice. And I can talk more about that in terms of the severability issue,

which is question two. But I think especially if you get to the point where prospectively the proposal is to treat sentencing enhancement factors under the Guidelines exactly as if they're elements of Federal crimes, they would have to be included in indictments and have to be charged to the jury on beyond a reasonable doubt.

Then I don't see how Mistretta survives anymore or at least how Mistretta allows that particular judicial remedy to go forward. Because at that point, you've really had the Commission become transformed into precisely what this Court said it wasn't, as a matter of constitutional law, in the Mistretta case.

JUSTICE KENNEDY: The paradigm that the cases discuss in Blakely and in the cases leading up to it from Apprendi, are facts such as the amount of drugs, was there a weapon, was there violence performed against the victim. And if the Court finds that these are so much like an element that they have to be proved, and adheres to its jurisprudence and invalidates the Guidelines to that effect, is there any argument that either the Government makes or that some of the commentators would make, that there are other kinds of

sentencing considerations that can be called factual, to be sure, but that should be the judge: say, lack of remorse as demonstrated after the verdict; the fact that after the verdict, investigation shows that of the two defendants, one was the real ringleader, streetwise, the other was kind of a naive dupe; or that there was a failure to cooperate with the person presenting the -- preparing the sentencing report.

These are facts in a certain way. Is it for a penny, in for a pound? Do we have to treat all of these as factual, or is there any progress to be made in trying to see if there are some, some facts that are, are like elements and some that are not. That would be a -- it would take a number of cases, I suppose, to elaborate that.

MR. CLEMENT: Justice Kennedy, I think that the thrust of respondents' position -- they can obviously speak for themselves to this point, but I think the thrust of their position is in for a penny, in for a pound, that if you extend Blakely to the guidelines, then that's it, the guidelines go out. I think the consequence of accepting the Government's position here, that the guidelines are different, would not foreclose the

possibility for a more fine-tuned analysis that focused on the particular effects of particular guidelines ranges, or the particularly enhancing factors and the like.

And I think one thing that ought to give the Court caution before it extends Blakely all the way to the guidelines is, if you look at the guidelines, there are certainly some enhancing factors or some factors that increase punishment under the guidelines, that look nothing like any traditional element of any crime.

JUSTICE KENNEDY: What, what, what tests would you propose, or the commentators? How do we distinguish the permitted kind of fact that the judge can find, and those that must be for the jury?

MR. CLEMENT: Well, I mean, two things, Justice Kennedy. I don't want to get too far afield in the sense that we think that for purposes of this case, the Court could distinguish the guidelines and could still maintain the very bright line of Blakely as applies to legislative enactments. But if this Court were going to either, with respect to legislative enactments or in the particular field of the guidelines, try to

develop another test to differentiate elements from - I'm sorry, elements from sentencing factors, I think this Court could get guidance in the same kind of analysis that it's done in the context of affirmative defenses.

As Apprendi itself recognized, in the Patterson case, this Court decided that in that context, it would not adopt one bright line or another and just give up the enterprise of drawing lines in between. And I think a similar enterprise could be done under the guise of dealing with the guidelines. But I think the thrust of the Government's position here today is that you shouldn't accept the Respondent's particular challenge to the guidelines because that does have the effect of "in for a penny, in for a pound," and wiping the guidelines out.

JUSTICE STEVENS: Mr. Clement, following up on Justice Kennedy's thought, if we adhere to the strict language in Apprendi itself, as quoted below, any - solely on the fact reflected in the jury verdict or the plea of the plea bargain, that's - that establishes the maximum. What percent of the total number of sentences that are imposed in the, by the Federal system today would violate that

rule?

MR. CLEMENT: Well, Justice Stevens, let me try to answer it as best as I can. I want to make the observation, though, that the only estimate I can give you is based on retrospective data, obviously, and it could be -

JUSTICE STEVENS: Well, let's look at the future and assume that in 97 percent of the cases which are plea bargains, you could agree on what the relevant facts are. That certainly could be done. And in the 3 percent that are trialed, it is my impression that a very small number of those actually involve violations of the Apprendi rule. Is that correct?

MR. CLEMENT: I'm not sure that's right, Justice Stevens. Let me answer it this way, because I can only answer it based on the data I have.

JUSTICE STEVENS: See, it's relevant because underlying all this is a question do the guidelines fail in toto, or do they only fail with respect to those relatively small number of cases in which there's a violation of the Apprendi rule?

MR. CLEMENT: I understand, and let me answer it this way, which is looking

retrospectively at the data from 2002. If you consider all the cases that either went to trial or pled and that, they're not differentiated, the two aren't differentiated, then about 65 percent of the cases raise a potential Blakely or Apprendi type issue, so that would be the starting point for the analysis. Now, as you pointed -

JUSTICE STEVENS: In raising the issue, it depends on what - the issue you describe. A lot of people describe it as an issue when you just use the guidelines at all. Do they raise an issue, involve it in a sentence over and above the amount that would be authorized by either the jury verdict or the plea bargain?

MR. CLEMENT: Yes, that's 65 -

QUESTION: Do you think 65 percent of the cases do?

MR. CLEMENT: The numbers that we have is 65 percent. Basically, you have 44 percent of the cases involve some chapter II or chapter III enhancement or adjustment to the base level. And then we've kind of looked, in addition to the 44 percent, we've looked at the drug cases, which by the nature of the drug sentencing table, virtually all of the drug cases, if they don't implicate a

mandatory minimum, involve a potential Blakely upward adjustment. And so what we've done is, in looking at these numbers, is to basically take all the drug cases and then subtract that

JUSTICE STEVENS: They all, of course, involve a potential upward adjustment. But do they all involve actual sentences above the amount that the jury verdict would have authorized?

MR. CLEMENT: Well, again, Justice Stevens, I don't know, because that comes to a second question, which is, if I understand your question, which is, we know that 65 percent of the cases raise a potentially, a potential Blakely issue. Then the question is, well, if 97 percent of the cases settle, is there a way to sort of waive Blakely rights and the like, and make this workable going forward? And it's hard to know what the, what, what system will emerge.

JUSTICE STEVENS: The thing that -- I'm sorry, but I really, it's important to me. Raising an issue, the issue is always raised when there's a possibility of a higher sentence, but I don't think it's fair to assume that that 65 percent of the sentences of tried cases actually resulted in sentences higher than what the jury verdict would

have authorized.

MR. CLEMENT: Well, again, I can only give you the numbers -

JUSTICE STEVENS: It's potentially that every case does. But if in fact, most sentences come within the maximum anyway, it's of course a serious problem in those cases, but system-wide, it's not nearly the problem that the figures you've mentioned suggest.

MR. CLEMENT: Again, Justice Stevens, I want to answer as best I can. The figures I have suggest that 65 percent of the cases do involve an upward adjustment of some kind. And so there is a Blakely problem. So the only real question is, all right, 65 percent of cases in the world where nobody thought Blakely was a problem for the guidelines involve those kind of upward adjustments. There may be ways through plea agreements and the like to have people waive their Blakely rights in certain ways that may make the system work a little bit better or deal with a slightly reduced number of cases. But I think any way you slice this, this is going to have a tremendous impact on the reality of criminal sentencing in the Federal system.

JUSTICE SCALIA: Well, as to past. I mean, it may have a significant one-shot impact with respect to cases that were decided without Blakely in mind. But for the future, I, I just don't agree with you that changes could make some reduction. I think changes could provide for jury findings whenever, whenever there's a need for a higher sentence based on facts. I don't know; what is the problem with that?

MR. CLEMENT: Well, I, well let me try to address the remedial question then going forward. If this Court were to find that Blakely is fully applicable to the guidelines, then that's going to raise some very serious and complex remedial questions. One question, though, I think ought to be clear, is that one option that shouldn't be on the table is the idea that on a prospective basis, the guidelines are severable in a way that makes all enhancements or all upward adjustments completely unavailable, and all downward departures fully available. Because that system is obviously nothing that Congress intended.

Now Respondents, for their part, don't propose that rule, although they want to benefit from effectively that rule for their own cases.

What they suggest is that on a going-forward basis, you could include the sentencing enhancing factors as, in the indictment and then send them to the jury as effectively de facto elements of the crime to be found by the jury beyond a reasonable doubt. Now with respect, I think that so-called Blakely-ization of the guidelines creates an enormous amount of judicial lawmaking and raises very serious separation of powers problems.

JUSTICE SOUTER: What is, what is the lawmaking part? I mean, if I have a choice -- if I have -- let's put the question this way. Congress has authorized the Commission and the Commission has said, "If fact X is found, then the range is higher." Is there a lot of lawmaking in concluding that Congress and the Commission would have preferred that range to be higher regardless of whether a jury found the fact or a judge found the fact? That doesn't seem like much of a stretch to me. There may be other reasons not to do it. But in terms of judicial lawmaking, it doesn't seem like much to me.

MR. CLEMENT: Well, with respect, Justice Souter, I think it is fairly ambitious judicial

lawmaking. You do have to take out a fair amount of text to get the sentencing judge effectively out of the business of fact-finding.

JUSTICE SCALIA: What text do you have to take out?

MR. CLEMENT: You have to take out the reference in 3553(b), that talks about what the court finds, and then it makes a definite reference to the court needing to find things in order to have upward and downward departures.

JUSTICE SCALIA: It depends on what you mean by the "court," doesn't it?

JUSTICE STEVENS: Just consider the word court to mean jury. Jury or a judge.

MR. CLEMENT: And I think then -

JUSTICE SCALIA: Which - which is sometimes done, there are statutes that refer to the court, that -

MR. CLEMENT: And as we point out in our brief, there are plenty of statutes that refer to the court in distinction from the jury. I think then if you look at 3742(e), which is the appeal right, if you look at 3742(e), makes it quite clear that on appeal, courts of appeals are supposed to defer to the, to the fact, the facts

found by the district court. Now I think in the context of the overall provision for judicial review, that is clearly a reference to the judge, not to the jury.

JUSTICE SCALIA: It seems to me, when there is an ambiguity that construed one way creates a constitutional statute and construed another way creates an unconstitutional one, it's an easy call.

MR. CLEMENT: Well, with respect, I don't think there's any way to avoid a potentially unconstitutional system going forward, because if you treat these guideline factors that were clearly created by the Commission and in some cases created by Congress, on the assumption that they would be used for judge fact-finding, and then send them to the jury, then what you've done prospectively -- it's one thing -- let me put it this way. It's one thing to recognize that the guideline factors that are enhancements have the effect of increasing sentences and operate like elements of crimes for retrospective constitutional analysis, for finding a Sixth Amendment problem, but it is quite another thing to prospectively treat those factors exactly as if

they're elements of crimes, force them to be included in the indictment, send them to the jury beyond a reasonable doubt.

JUSTICE STEVENS: It just means that if a different procedure is followed, you'll reach precisely the same sentences the guidelines reached.

MR. CLEMENT: Well, I actually don't think that follows, Justice Stevens, because I think taking guidelines that were clearly designed for judge fact finding and sending them to the jury --

JUSTICE STEVENS: You think judges reach different results on factual issues than juries do? Is that part of your submission?

MR. CLEMENT: No. What my submission is, is that taking guidelines that were designed for judge fact finding and sending them and using them for jury fact finding is going to have a very disproportionate impact on some cases. Let me give you an example if I could, to make the point. If you think of two fraud cases that under the guidelines

JUSTICE STEVENS: But keep it simple because we're assuming that in most cases, there aren't a host of factors but usually just two or

three, such as the drug quantity and did he find a gun. Now in those where there's a fairly simple fact to identify, would it make any difference in the ultimate sentence that's imposed whether the jury finds it or the judge finds it?

MR. CLEMENT: I think it would, Justice Stevens. And if I could -- I'll keep it a very simple fraud example.

JUSTICE STEVENS: Keep to that example I've given you. The gun and the drug quantity. Why would it make a difference?

MR. CLEMENT: Well, it might not make as much a difference in the drug case --

JUSTICE STEVENS: Wouldn't it make any difference?

MR. CLEMENT: Well, here's how it could make a difference, if I could use the fraud example.

MR. CLEMENT: And then you may be able to see how it could or could not relate to the marijuana example or a drug example. In the context of a fraud case, two fraud cases that are sentenced the exact same way and treated as uniform and proportional under the current system

JUSTICE STEVENS: And there's a difference

in sentence depending on the amount of money that the fraud involved.

MR. CLEMENT: In the number of victims. And what you'll have is -- if you think of one fraud that involved one victim and a slightly higher amount of money, and another fraud that involved many victims and a slightly lower amount of money, the current guideline system basically tries to treat them the same.

Now with a single fraud victim, the idea of Blakely-izing the guidelines may be relatively straightforward. You include the loss amount in the indictment. You put a special verdict form with the amount of loss on it. And you call in that one witness, and you can prove up your case beyond a reasonable doubt.

But if you have a case of telemarketing --

JUSTICE STEVENS: In that case -- let's take them one at a time. In that case, would it make any difference whether the jury made the finding or the judge made the finding?

MR. CLEMENT: I don't think it would, Justice Stevens.

JUSTICE STEVENS: Okay. Then what

MR. CLEMENT: But that's what, what I want

to contrast it is with

JUSTICE STEVENS: Now can you give me a case in which it would make a difference?

MR. CLEMENT: Sure. Imagine that you have a telemarketing fraud where a thousand peoples -- a thousand individuals have been milked out of a couple of dollars each. Now under the current system, proving up the fraud amount for the judge is not that difficult because you can get the probation officer to testify, or some other way to get the total amount of the fraud in front of the judge. Under the system that Respondents propose, you're going to have to call in every one of 2,000 individuals who was defrauded. Otherwise, I think it's going to be very difficult to prove that fraud amount in front of the jury beyond a reasonable doubt. And that just is one example of the disproportionate and disuniform effects

JUSTICE STEVENS: You don't think a very large fraud such as you've described could be proved through two or three witnesses?

MR. CLEMENT: I think it would be very

JUSTICE STEVENS: They used the Internet and they had all said -- I am not persuaded.

MR. CLEMENT: Well, I suppose -

JUSTICE SCALIA: And if it can't be, maybe the judges shouldn't go, be going around guessing how many people have been defrauded. Or you know, saying "more likely than not, on the basis of the kind of evidence we usually don't accept in criminal trials." Why is that okay? I don't understand it.

MR. CLEMENT: Well, again, I think whatever else is true, what you would be doing with such a system is you'd be taking factors that I think everyone concedes were designed by a Commission that was upheld as constitutional precisely because it did not have the effect of creating new Federal crimes and statutory limits.

JUSTICE SCALIA: It doesn't make me feel any good if I spend another 10 years in jail because of it. Say, "Oh, well, don't worry about it, it wasn't an element of the crime, after all."

[Laughter.]

MR. CLEMENT: No, I understand that, Justice Scalia. I'm trying to talk about the remedial question, though.

JUSTICE GINSBURG: May I ask

JUSTICE GINSBURG: - about practical

experience in that regard. I understand the Department of Justice has told prosecutors that now you allege these sentencing enhancers -- like drug quantity, like amount of property stolen -- you allege them in the indictment, you prove them beyond a reasonable doubt. Has that proved intractably difficult in cases where it has been attempted?

MR. CLEMENT: Well, Justice Ginsburg, I think we don't have enough experience to know. I think I can tell you one thing: that with a lot of enhancements, putting something in the indictment is not necessarily the difficult step. There are some things like relevant conduct that can be very challenging to try to formulate in an indictment. But for a lot of the factors that enhance a sentence, it's relatively easy to put it in the indictment itself.

I think the trickier difficulties come up in terms of trying to instruct the jury, especially in cases where there are multiple enhancements.

CHIEF JUSTICE REHNQUIST: Well certainly in the case of, say, perjury at trial, you couldn't possibly allege that in the indictment

because you won't know.

MR. CLEMENT: That's completely right, Mr. Chief Justice. And those cases are just out.

JUSTICE SOUTER: They're not out. They've got to be separately prosecuted.

MR. CLEMENT: And that's never been the under -- I mean, that's true, there may be some cases that you could bring a separate perjury prosecution, but this court

JUSTICE SOUTER: Well, I don't know of any case in which you can't.

MR. CLEMENT: Well, there may be situations where there's an obstruction of justice that wouldn't necessarily make out all the elements of a perjury prosecution.

JUSTICE SOUTER: Then I guess, we ought to have an obstruction of justice crime with defined elements that can be prosecuted.

MR. CLEMENT: Well, Justice Souter, with respect, I mean, this Court, both before the guidelines and after the guidelines, rejected the argument that the only way to enhance a sentence for obstruction of justice was to bring a separate perjury prosecution.

JUSTICE SOUTER: And I, I would, I would

take the same position today, unless you were going to define it, in terms of a condition that is both necessary and sufficient to expand the sentencing range of the crime that you are nominally prosecuting the person for. I mean, that's the rub.

MR. CLEMENT: But that's

JUSTICE SOUTER: Let me go --

MR. CLEMENT: That's what this Court had before it in Dunnigan. And this Court said that that was not problematic. It was obstruction during the trial. And this Court upheld it on reliance on Grayson, a pre-guidelines case, and this Court said that the additional rigor and predictability instilled by the guidelines did not make a constitutional difference.

JUSTICE BREYER: I've listed four categories of things that you think would be very difficult to prove to a jury at the trial, but not to a judge at sentencing. The first is the vast amount of information now and prior to guidelines that were contained in the presentence report. That information, most of which was used since history was begun, maybe a hundred years ago, is simply not available until the trial is over.

The second happens to be the things that the Chief brought up, matters committed at trial, such as perjury.

The third sort of thing are those things that just get too complicated when you try to list 15 in indictment, such as victim -- put them all together -- victim, brandishing the gun, et cetera.

And the fourth kind of thing are the things that are too difficult to explain to a jury. Try explaining even "brandishing" to a jury, and if you can do that one, which may be easy, try the multiple-count rules.

All right. So I have those four things. Now, are there others?

MR. CLEMENT: I think that's a fair summary, Justice Breyer. I think on sort of how complicated it gets to take something that was designed for a judge and then send it before the jury in jury instructions, I would ask the Court to look at the Medas case, which we cite on page 15 of our reply brief.

JUSTICE BREYER: All right, if I believe that that is just out of the question, it's so complicated, nobody could do it, it would

be a radical change, Congress could never have intended that, what about a much simpler approach? What you would do is take 3553(b), and you say, "Read the word 'shall' -- i.e. 'shall apply the guidelines' -- to 'may,'" so that the guidelines become advisory, either because the "shall" becomes a "may" or because you give each judge the power to give any reasonable reason at all as to why the Commission's guideline, they didn't actively consider this factor. In other words, read 3553(b) as permissive.

And now, assuming I've expressed myself on the underlying Apprendi questions, so I, but suppose Blakely does apply, would you -- is -- what would be wrong with taking that approach?

MR. CLEMENT: Assuming I understand the approach you propose, there would be nothing wrong with taking that approach.

JUSTICE BREYER: All right, I have thought of one thing that might be wrong.

[Laughter.]

JUSTICE BREYER: So I'll ask you about it, if you want.

[Laughter.]

JUSTICE SCALIA: Could it be that "shall"

does not mean "may"? Right?

[Laughter.]

JUSTICE SCALIA: Oh, that's not it? "Shall" --

JUSTICE BREYER: All right, well, I -- you see nothing wrong with that. That makes the guidelines advisory, and there are a number of objections -- maybe not, maybe big, maybe small. One objection I was worried about is -- I'm giving you my thought process, you know, and I -- because I'm trying to get a -- your response -- is that if we did take that approach, you'd leave the appellate section in place. That means every time the judge didn't use the guideline, the appeals courts would have to review for reasonableness. Now that would be in place. We would discover judges all over the country having different views on that. Courts of appeals would have different views about was or what was not reasonable. We would be here to review those differences, and we would become the sentencing commission. I thought I had escaped.

[Laughter.]

JUSTICE BREYER: Now, how, how serious an objection is that? Or do you recommend that, if

you lose on this point, we take the approach of, in that way, making the guidelines advisory?

MR. CLEMENT: I would -- I would take the approach that you should make the advisory -- the advisory guidelines -- the guidelines as advisory.

Now, with respect to whether or not you've escaped from the burden of serving on the sentencing commission, I don't think that the reading of 3742, the appeal provision, that you've envisioned is necessarily foreordained. I think --

JUSTICE KENNEDY: Well, have you escaped Apprendi? If discretion is cabined by guidelines and appellate courts review, for the abuse of discretion in applying those guidelines, why isn't that the same kind of entitlement that the Apprendi/Blakely opinion is predicated on to begin with?

JUSTICE SCALIA: Absolutely. Vote me for that. I mean, after all, judges used to define the elements of crimes, didn't they? And the mere fact that the elements at common law were defined by judges rather than by the legislature didn't mean that you didn't have to have a jury find them. So if courts are going to establish the

guidelines, so long as they are still binding, it seems to me you still need a jury finding, or you haven't escaped Apprendi.

MR. CLEMENT: A couple of observations, Justice Scalia. First of all, you're exactly right, since 1812 we've abandoned a system where judges can define the elements of crimes. And that's why, if I leave you with one thought on the remedy, I would think that it's inappropriate to allow an entity within the judicial branch to have that effect on a prospective basis. I think that would be a very serious separation of powers problem. I think it would dwarf the separation of powers problem that at least you found quite significant in the Mistretta case.

Now, if I can address Justice Kennedy's question about the appeals system simply replicating the Apprendi or the Blakely problem. First of all, we would suggest that the appeal process that you've envisioned would not violate Apprendi and Blakely. And that's one of the reasons that we think the Commission wouldn't violate Blakely. Because what we see is a distinction in this court's cases. They have said this Court has said that judicial discretionary

sentencing doesn't implicate the Sixth Amendment. This Court has said that legislative-directed sentencing does implicate the Sixth Amendment. What the guidelines present is a situation of judicial sentencing that's directive. We would suggest -- we would suggest --

JUSTICE SCALIA: Judicial discretionary sentencing, as I understood it, never permitted an appellate court to increase the sentence given by the district judge. Do you have any cases, where an appellate court said the district judge did not give enough years, where there was discretionary sentencing?

MR. CLEMENT: Well, Justice Scalia, I can point you to the DiFrancesco case, where this Court approved an earlier Federal statute that allowed for appeals in sentencing.

JUSTICE SCALIA: That may be under statute, but I do not know, at common law, that when you talked about the discretion in the courts, it meant that in a criminal case a court of appeals could increase the sentence because of a -- because of an abuse of discretion by the sentencing judge. I'm unfamiliar with any such case.

JUSTICE BREYER: Well, there are lots. There are lots, actually. If you -- if -- I ask, "Is it right, that?"

[Laughter.]

JUSTICE BREYER: But, I mean, if you take common law to mean England, as well as the United States, there weren't here, because the sentences weren't appealable, but in England, they were appealable, and they had a common law work out of what they called the "tariff," which is what the range of reasonableness was or wasn't. And the prosecution, I believe, could appeal it of being too low; and the defense, being too high. And the question was, Was the sentence reasonable? The appellate court could set it.

Now, if we had a system like that -- and this is my serious question -- is it unconstitutional under Apprendi if appeals court judges reviewing a sentence could say, "This is the range of reason, this is arbitrary up here, or this is arbitrary down there"?

MR. CLEMENT: Well, I think our position would be that that kind of system would be constitutional. As I was suggesting to Justice Kennedy, we think, because that system would be

constitutional, we think the guidelines are also constitutional. I think Justice Kennedy is right, though, that somebody that says that that system is unconstitutional and the guidelines is unconstitutional is not going to be particularly impressed by that reading of 3742 that gets you to that result.

And that's why I want to leave you with an important thought, which is, that reading of 3742 is not foreordained. This court could say that the guidelines should be applied in an advisory fashion, and that all that would be left of the Government --

JUSTICE O'CONNOR: That just seems so contrary to what Congress intended. There's no evidence that they intended this scheme to be advisory. They told the Commission to set up a scheme that would be applied, because they wanted to make sentencing more uniformly applied in the Federal scheme of things. I think it's a real stretch to try to argue for the position taken by some Federal judges in one of the amicus briefs that, "It's just advisory, don't worry." And I find it very difficult to understand how appellate review could be applied to such a scheme.

MR. CLEMENT: But, Justice O'Connor, that's why, to be clear, we've only argued in favor of an advisory view of the guidelines if we get to the remedial question, because I think you're absolutely right, if you look at what Congress actually intended, it's crystal clear they did not intend the guidelines to be advisory. But it's equally crystal clear they didn't intend the guidelines to be the basis for jury fact-finding.

CHIEF JUSTICE REHNQUIST: Well, what if this Court said the guidelines are unconstitutional, period, and then judges simply looked to the guidelines, figuring, well, this is as good an idea as anybody else has about sentencing?

[Laughter.]

MR. CLEMENT: I think that actually would be the proper remedy. That's effectively what we ask for, Mr. Chief Justice. And --

JUSTICE GINSBURG: And if it were done that way, why would it be that you would try to change the word "shall" to "may" in (b)? Why not just have Section 3553(a), which does list the

judges may take into account in sentencing, one of -- among three or four others?

MR. CLEMENT: No, I think that's fair, Justice Ginsburg. I mean, in responding to Justice Breyer's hypothetical, I didn't mean that was the only way to get to the result we've propose. And the particular way, in our briefs, that we suggest that you would get to an advisory use of the guidelines on a prospective basis is precisely as you suggest. You don't read 3553(b) to change "may" to "shall"; instead, you read it, unfortunately, I guess, if we've reached the remedial question, to be unconstitutional. And then, at that point, you focus in on 3553(a) --

JUSTICE GINSBURG: Which has the guidelines --

MR. CLEMENT: Absolutely. Absolutely.

JUSTICE GINSBURG: -- as one of other factors.

MR. CLEMENT: Exactly. And then if I could just --

JUSTICE SCALIA: Except that that, as Justice O'Connor suggests, deprives the statute of its principal purpose, which was to constrain -- to constrain judicial discretion. If there's

anything clear about it, that was clear about, it was that they did not want judges to have as much discretion as they had. And now you say these things are just advisory. It seems to me much easier to -- I wanted to ask you one very precise question. Assuming I think "court" can mean "jury" -- it doesn't have to mean "the judge" -- where in, in the whole guideline system, how many sections do not permit the use of "court" to mean "jury"?

MR. CLEMENT: Well, I think --

JUSTICE SCALIA: I think there's only one where, where it may not work.

MR. CLEMENT: Well, I don't see how it works in 3742(e), because if you read that section in context it's talking about determinations made by the court, it's talking about determinations made by the court after the presentence report comes in --

JUSTICE SCALIA: That -- that may be the one.

MR. CLEMENT: -- and so I think that 3742(e) has to go. I think the fairer --

JUSTICE SCALIA: All right. Anything else has to go?

MR. CLEMENT: Well, I think the fairer reading of 3553(b) is that it has to go, too. I know that you don't agree with --

JUSTICE SCALIA: I don't know about fairer.

MR. CLEMENT: I think you disagree with me on that. I think 994 -- 99 -- 994(a), in Title 28, which talks about the guidelines being for the use of the sentencing court, I would suggest that has to go, but I assume you would say sentencing court can mean sentencing judge. Then at that point, there's a provision of rule 32 of the Federal Rules of Criminal Procedure that must go, because it talks about the role of the district court in a way that I don't think you can, sort of, find to mean the jury. And then I think, obviously, the sentencing guidelines provision that makes clear that it is the judge that's to make the findings by a preponderance of the evidence, has to go, as well. So I think that is -- that is -- that is the sum total of the carnage of deciding --

[Laughter.]

MR. CLEMENT: -- that the guidelines are fully applicable with Blakely.

JUSTICE KENNEDY: If you -- if you

interpret "court" to mean "jury," how many of the sentencing factors which will be submitted to the jury are -- would be a radical departure from the tradition, the role of the jury in the criminal system in the Anglo-American tradition?

MR. CLEMENT: I think very, very many of them. I mean, I can't give you a better answer than that, in terms of the number. But the Medas case, on page 15 of a reply brief that I suggested the Court look at, provides one example. There, you had a case where it had already gone to the, to the jury on a general verdict, and it had the typical kind of general verdict form you see. It's had a six-count indictment. There were 12 boxes, guilty/non-guilty for each of the six crimes in the indictment. Then when there was a concern that Blakely might require jury findings on all the various enhancements, the Government tried to put in a 20-page supplemental special verdict that tried to walk through the various factors that the jury would try to find. I think that just, in miniature, shows you the kind of transformation you're talking about. You go from a 12-line general verdict form, which is the classic kind of verdict form used in the criminal system, to 20

pages of a supplemental special verdict form.

JUSTICE SCALIA: Well, you ought to get rid of that prosecutor. That didn't seem to me very sensible at all.

MR. CLEMENT: With respect, Justice Scalia, I think if you look at that supplemental verdict form, and you look at the guidelines, there's no other way to do it. And I think, as the judge in that case said, one of the things that comes up in virtually every guidelines case is the issue of relevant conduct. Now, that is a very, very difficult thing to try to instruct the jury on. The application notes that the Commission itself have come up in span eight and a half pages of very small, single spaced text. To try to give that as jury instructions, I think, would leave the jury completely bewildered.

Then, you'd also, though, even if you could get past the instruction problems, the effect of considering relevant conduct is going to have a transformative effect on what goes before the jury, because relevant conduct asks the jury not to focus on the elements of the specific crime; the relevant conduct focuses on the other acts of that individual defendant and, if there's

joint criminal, if there's a joint criminal undertaking, the reasonably foreseeable events of acts of others taken in furtherance of the joint undertaking. Now, the effect of using that guideline, designed for judges, and sending it to the jury, is effectively to transform many, many cases from individual defendant cases to scheme cases or conspiracy cases.

So in tallying up the carnage and the wreckage of applying these guidelines designed clearly for judge fact-finding and willy - nilly sending them to the jury, I think you have to include the confusion and the difficulty of that.

JUSTICE STEVENS: Mr. Clement can I -- you don't have an awful lot of time left, and I want to ask you one rather important question, to me. There's been a lot of talk about severability of the statute, and I can understand the concept that we'll only apply it in certain categories of cases. But normally when I consider severability, I'm thinking of the text of a written statute. Is there a particular provision of the sentencing guidelines that you think can be severed from the rest of the statute?

MR. CLEMENT: Well, Justice Stevens, I

think with respect to the Sentencing Reform Act itself, the statute, the provision that we think needs to be severed is 3553(b). Then, with respect to the Guidelines, I think our view on the guidelines --

JUSTICE STEVENS: Just sticking to the statute, take out 3553(b) in its entirety, you just --

MR. CLEMENT: Well, the specific reference to "shall" -- this is basically the "shall/may" issue -- I think that needs to be severed. I'm not quite sure what of 3553(b) is left after you do that, but that's -- that's the important thing.

JUSTICE STEVENS: I'm just not sure what's left of the whole statute if you take that provision out entirely.

MR. CLEMENT: Well, I think, as Justice Ginsburg suggests, 3553(a) still stands alone as telling the court that it should consider that. And I think, in fact, if you look at the legislative history, I actually think the language in 3553(b) was, was a floor amendment that was added later. So it certainly doesn't pull the whole statute down to take that one provision out of the statute.

If I could reserve the remainder of my time.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Clement.

Mr. Kelly, we'll hear from you.

ORAL ARGUMENT OF T. CHRISTOPHER KELLY

ON BEHALF OF RESPONDENT BOOKER

MR. KELLY: Thank you, Mr. Chief Justice, and may it please the Court:

The first 22 years of Freddie Booker's sentence punished him for crimes that were proved to a jury. But the judge added another eight years to his sentence, years that were only authorized by the judge's finding that Booker probably committed other crimes. Like thousands of other Federal defendants, Booker's sentence was increased based on crimes that were never proved to a jury beyond a reasonable doubt. The final years of a Federal sentence are as worthy of constitutional protections against undeserved punishment as are the first years.

JUSTICE BREYER: Suppose that the judge had simply sentenced the defendant, let's say, to ten years, but looked at these other crimes and said, "In my practice, I go to 15." All right?

That's the basic situation. Is that unconstitutional?

MR. KELLY: Under the guidelines or under the --

JUSTICE BREYER: No, no, there are no guidelines.

MR. KELLY: No, that is not unconstitutional.

JUSTICE BREYER: All right. Now suppose the people who do exactly the same thing is the Court of Appeals applying the word "reasonable," these officials of the judicial branch. See, they're reviewing the sentence for reasonableness. They say, "In our practice when a person commits bank robbery, if it's just an ordinary case, we think it's reasonable five years; but if he has a gun, seven years." So if there's no gun, five years is the most that isn't arbitrary. But if there's a gun, you can go to seven years. In other words, an English-type tariff system. Is that unconstitutional?

MR. KELLY: I believe it would be, Justice Breyer.

JUSTICE BREYER: You would think it would be. So --

MR. KELLY: Right.

JUSTICE BREYER: -- now suppose the people who do it are the parole commission -- as happen to be in the United States, executive branch officials. For the last hundred years, they get sentences, for example, that were indeterminate, or might have been for 30 years. And what they say, "It is our practice, assuming good behavior, that if it was just an ordinary bank robbery we'll keep him in for five years, but if he had a gun, he's going to stay in for seven." Is that unconstitutional?

MR. KELLY: Parole commissions don't increase sentences. Parole commissions decrease sentences.

JUSTICE BREYER: No, what they have is an indeterminate sentence.

MR. KELLY: Right.

JUSTICE BREYER: California.

MR. KELLY: Yes.

JUSTICE BREYER: And what they say is, "In our practice, what we do is, we think it's reasonable, and we will keep a person in prison for five years in an ordinary bank robbery, but for seven years if he has a gun." I'm asking if

that's constitutional. Because that's the practice that they follow under parole commission guidelines, and they've done it now for a decade, I make up.

MR. KELLY: That is constitutional, Your Honor. And the reason is --

JUSTICE BREYER: That's constitutional.

JUSTICE SCALIA: Does he have an entitlement to a certain number of years under any of these questions?

MR. KELLY: As I --

JUSTICE SCALIA: When you're sentenced to an indeterminate sentence, he's not entitled to parole at any time --

MR. KELLY: Other than venues --

JUSTICE SCALIA: -- is he?

MR. KELLY: No, not at all. And as I --

JUSTICE BREYER: What I'm trying to drive at -- and I'll be -- is that I can't imagine a court holding that a parole commission in the executive branch that has exactly this same system would be behaving unconstitutionally. It's difficult for me to imagine -- though you say I'm wrong on that -- a court holding it's unconstitutional when a court of appeals does the

same thing reviewing for arbitrariness.

MR. KELLY: Well, perhaps I misunderstood your second hypothetical, Your Honor. But my understanding of the hypothetical was that if the judge gave five years and the appellate court said, "No, you should have given seven years because of the existence of a certain fact" --

JUSTICE BREYER: You know, I --

MR. KELLY: "you must -- you must increase the sentence --"

JUSTICE BREYER: I'm not phrasing the question well. I'm trying to imagine sentencing guidelines run by a parole commission, executive branch officials. I'm trying to imagine sentencing guidelines run under the word arbitrary by ordinary courts of appeals panels reviewing the sentences. And if those are both constitutional, then, I would ask, why is it unconstitutional to put the executive branch and judicial branch officials together in one group called the sentencing commission?

MR. KELLY: The relevant constitutional principle doesn't have to do with whether it's the executive branch of Government or the judicial branch of Government; it has to do whether a fact

is necessary in order to increase a sentence.

JUSTICE BREYER: I understand that. And -- well, maybe I'm just not going to get my question across. I am trying to imagine Apprendi. Would Apprendi apply to parole commission guidelines? I should think the answer, unless we're going to reverse a hundred years of history, is no. Would Apprendi apply to a court of appeals panel with the power to review sentences for arbitrariness?

MR. KELLY: No.

JUSTICE BREYER: I would think the answer is no. And, therefore, I wonder why it applies if we take judicial officials and executive branch officials, and they do exactly the same thing under the heading Sentencing Commission.

MR. KELLY: In your hypotheticals, Justice Breyer, as I understand them, each of those entities is decreasing a sentence. We're talking about a sentencing commission that authorizes a court and, in fact -- well, authorizes a court to increase a sentence after finding a particular fact, and that is what triggers the Sixth Amendment protection. It's the fact that a judge is authorized to give a longer sentence because of

the existence of a fact than he would otherwise be authorized to impose. And that is the essential protection against which the Sixth Amendment jury trial right protects. That is a fact that has to be found by a jury, not by a judge.

JUSTICE KENNEDY: But what is your position if judges simply have complete discretion to sentence within a maximum range, and Judge A gives a lot of maximum sentences, and Judge B doesn't? Is that system constitutional?

MR. KELLY: There is no Sixth Amendment problem with that system, Your Honor.

JUSTICE KENNEDY: What is it in our legal tradition -- what policies are served by preferring unexplained, unarticulated, standardless discretion to a system in which the judge gives reasons and follows careful standards and follows -- and follows standards that give consistency from one sentence to the other? Why should the former be preferred? What are we doing here?

MR. KELLY: I think, Justice Kennedy, that Blakely answers that question. Blakely distinguishes between a discretionary system in which the judge has the authority to consider a

number of different factors in order to do what the judge thinks is fair, but is not required to --

JUSTICE KENNEDY: What policies --

MR. KELLY: -- give any particular weight --

JUSTICE KENNEDY: -- are being furthered by that, other than wooden adherence to Apprendi and Blakely?

MR. KELLY: The policy is that if a judge's sentencing authority increases by finding of fact, which is not the case in a discretionary system. That fact is the kind of finding that we leave to a jury, because juries --

JUSTICE KENNEDY: But isn't that, isn't that ultimately formalistic and contrary to our whole design of our system, which is to learn over experience and to codify and to explain what considerations we take into account in applying the law?

MR. KELLY: I don't think it's contrary to our system, Your Honor, to say that if a more serious sentence attaches to a more serious crime, or to a more serious version of a crime, that it's up to the jury to decide whether the more serious

crime or more serious version was committed. In fact, that is essential to our system.

JUSTICE KENNEDY: So suppose, in Justice Breyer's hypothetical -- like the California indeterminate sentencing regime which applied until about 20 years ago, after an indeterminate sentence, the parole board interviews two people convicted for the same crime; one was the ringleader, street-hardened offender, and the other was just a novice, a guy that went along, although he -- they both committed the same crime. Under the California system, the former would be given a projected release date of ten years; and the other, a projected release date of about two years. Would that be constitutional?

MR. KELLY: Yes, it would, because, again, under a discretionary system, the judge's sentencing authority is unaffected by the finding of a fact. If the parole commission determines that one offender's sentence should be decreased and the other offender's should not be decreased, that has no Sixth Amendment application or Sixth Amendment --

JUSTICE BREYER: Look, we're trying to go to the same point, and I think you're actually

given me a pretty good answer. The --

MR. KELLY: Thank you.

JUSTICE BREYER: I'm imagining my system being the system that Apprendi forbids. So I'm not doing increase/decreases. I'll think of the very kind of system. And I take it your answer is this -- and remember, I dissented in Apprendi.

MR. KELLY: I remember.

JUSTICE BREYER: I didn't agree with it. Right. But there we are. And so I'm trying to see how far it goes. So I wonder, we take our Apprendi system and now it's being administered by a parole commission. We take our Apprendi system, and now it's being administered by a court of appeals using the legal standard arbitrariness. And I take it your answer is those are just as unconstitutional.

MR. KELLY: No, no, again, I'm not --

JUSTICE BREYER: Now you understand what I'm doing, because I'm saying you either have to follow the force of your logic and make those unconstitutional, too, or you have to say there's a difference. And, by definition, the only difference is who promulgated it. And then, of course, I'm going to ask you, if there's a

difference right there, why doesn't this one, which is executive plus judicial, fall on my side of the difference?

MR. KELLY: Well, maybe I -- maybe I don't understand your hypothetical, Justice Breyer, because parole commissions do not increase sentences; parole commissions decrease sentences.

JUSTICE BREYER: No, I -- in my imaginary parole commission --

MR. KELLY: Okay.

[Laughter.]

JUSTICE BREYER: -- I will argue a different point.

MR. KELLY: Yes.

JUSTICE BREYER: I mean, I will argue it another time. I've seen a lot of parole commission guidelines, and I would say they, a lot of them did fall within the Apprendi boundaries. But if we did take it and have the parole commission do it -- "it," being the Apprendi forbidden system, in your view, is it unconstitutional?

MR. KELLY: It would certainly be unconstitutional for a parole commission to find a fact that increased a sentence.

JUSTICE BREYER: All right. Okay.

MR. KELLY: Yes.

JUSTICE BREYER: And then the same thing is true of a -- of a court of appeals panel.

MR. KELLY: If it could find a fact that increased a sentence, yes, because those facts must be found by a jury.

JUSTICE SCALIA: Mr. Kelly, I would be interested in hearing you address some of the severability problems that the Government has been raising.

JUSTICE KENNEDY: If I could just ask one more question, because this is important to me.

JUSTICE KENNEDY: What about the previous California system in which it was an indeterminate sentence and the correctional authority made findings which set the sentence? They were -- they were committed to the California --

MR. KELLY: Sure.

JUSTICE KENNEDY : -- correctional authority for the term prescribed by law, and that was set after the fact, post hoc, by the California Adult Authority.

MR. KELLY: If the agency were increasing

an authorized sentence --

JUSTICE KENNEDY: They're not increasing it.

MR. KELLY: -- on the basis of a finding --

JUSTICE KENNEDY: It's an indeterminate sentence.

MR. KELLY: Right.

JUSTICE KENNEDY: They set the sentence.

MR. KELLY: After the -- instead of the judge or after the judge?

JUSTICE KENNEDY: Yes. It was just sentenced, the judge, for the term prescribed by law. And an agency, after interviewing the defendant, after looking at the probation report, set the sentence. The term prescribed by law could be for life.

MR. KELLY: If there were facts which were necessary to authorize --

JUSTICE STEVENS: He sets the sentence within the range authorized by the jury's verdict. That's the question.

MR. KELLY: Right, that's fine. If it's within the range authorized by the jury's verdict, it's fine.

CHIEF JUSTICE REHNQUIST: Well. What if, what if the statute says "every felony in this state shall be punished by a term of not less than one year, or, on the other side, life," and you're committed to the parole authority, and the parole authority will decide between those boundaries?

MR. KELLY: Assuming that authority is given to the parole commission to select a sentence, and no further findings need to be made beyond those made by the jury, there's no Sixth Amendment problem with that.

JUSTICE SCALIA: There might be a due process problem.

MR. KELLY: In fact, there might be a lot of other constitutional problems, but not a Sixth Amendment problem.

JUSTICE GINSBURG: I hope you will go over to the -- to the severability problem, because, as I understood it, you and the Government were very much at odds about what should be severed and what shouldn't, and we didn't get to ask Mr. Clement about his severance, which was going to be that to the extent no plus factors are involved, no sentence-enhancing factors are involved, the

guidelines remain binding. He didn't get a chance to say that in his argument, and I hope he'll address it.

And you say, "Whatever you do, don't make it half binding and half advisory."

MR. KELLY: Yes.

JUSTICE GINSBURG: And why would it be so terrible to say, "Well, to the extent that there are no sentencing enhancing factors, let's preserve what Congress did, let's make them binding when the jury doesn't have to find anything"?

MR. KELLY: For a couple of reasons, Justice Ginsburg. The first is that Congress certainly didn't intend to have dual systems. That destroys the congressional purpose of uniformity because you would have sentences, I suppose, being uniform under systems -- the system where guidelines applied, but certainly not under the system where the guidelines don't apply, because there are guideline facts that need to be found. So that congressional purpose is not advanced.

The second problem is that it's such an easily manipulable system, particularly by the

Government. If the Government wants to be in the guidelines, it doesn't allege a sentence-enhancing fact, or a guideline fact. If the Government doesn't want to be bound by the guidelines, it alleges a guideline fact, and that takes sentencing out of the guidelines. And that cannot be what Congress intended.

JUSTICE SOUTER: Is it any less uniform, any more manipulable, than on your proposal?

MR. KELLY: Our --

JUSTICE SOUTER: I mean, uniformity is gone. A certain manipulability has got to be faced as a fact, and I'm not sure that you're proposing a better solution, I gather.

MR. KELLY: Well, I think our proposal doesn't really allow for any manipulation at all, Justice Souter. We're simply saying that the fact finder must be a jury instead of a judge.

JUSTICE SOUTER: Well, except that the manipulation, at that point, is the manipulation, in a way, in the present system, and that is it's the manipulability of charge bargaining.

MR. KELLY: Well, that's certainly true, and that exists under the guidelines. It exists without the guidelines. It exists in

discretionary systems.

JUSTICE SOUTER: Yeah.

JUSTICE BREYER: It does exist under the guidelines? How does it?

MR. KELLY: I think it does, because --

JUSTICE BREYER: How?

MR. KELLY: Well, certainly, to the extent that prosecutors make decisions about what charges they're going to bring --

JUSTICE BREYER: No, only, only, only if you have statutes that have mandatory minimums or that have lesser sentences. That's true.

MR. KELLY: Right.

JUSTICE BREYER: But compared to the status quo, if you have the guidelines alone, one of their basic objectives was to prevent that kind of manipulation. And, by and large, I thought they had succeeded on that point.

JUSTICE SCALIA: Well, hasn't charge bargaining simply been replaced with fact bargaining?

MR. KELLY: It has, to a large extent.

JUSTICE BREYER: Is that lawful under the guideline? Is the judge required to accept the facts as the -- as the prosecution and defense

agree to present them?

MR. KELLY: The judge is not required to --

JUSTICE BREYER: No.

MR. KELLY: -- accept the facts. The judge typically does.

JUSTICE STEVENS: I'm not sure that I understand why you wouldn't have the same alternatives under your view. Because is it not correct that if the, if the sentence -- the change under consideration is a decrease, those findings could be made by a judge. Whereas, if it's an increase, you'd say they have to be found by a jury. So why don't you have the same possibility of a two-track system under your view?

MR. KELLY: I guess -- I wouldn't view that as a two-track system, because the guidelines would continue to apply in either case. It would not be a situation in which the guidelines apply to some criminal sentencings, but don't apply to other criminal sentencings. The guidelines will apply in every criminal sentencing. Whether a fact finder needs to be a judge or a jury depends upon whether the fact to be found increases the judge's sentencing authority.

JUSTICE STEVENS: So you would say -- you would say your proposal is closer to what Congress really wanted, because it would leave in place all of the sentences that would be commanded by the guidelines, but just require a different fact finder in some of the cases.

MR. KELLY: That's exactly right, Justice Stevens. You --

JUSTICE GINSBURG: But then what about all the factors -- Justice Breyer outlined four categories of, of guideline factors that are not easily, if at all, presented to the jury. The Chief Justice mentioned the one of perjury at the trial itself. Could never give that to a jury because it hasn't happened until the trial. And some of the others that become very complicated, like he mentioned, other -- other relevant conduct, relevant conduct, yeah.

MR. KELLY: I agree that perjury is not something that could be submitted to a jury -- perjury during trial is not something that could be submitted to a jury. That's --

JUSTICE GINSBURG: So that would just be out.

MR. KELLY: That would be out. That's one

of the very few.

JUSTICE GINSBURG: It would have to be prosecuted as a separate --

MR. KELLY: It would have to be prosecuted as a separate crime.

JUSTICE SCALIA: Well couldn't he have a sentencing phase afterwards? I don't know.

JUSTICE STEVENS: Could I interrupt for that?

JUSTICE SCALIA: Sure.

JUSTICE STEVENS: There's one thing that's running through my mind. What if the defendant gets on the stand and testifies to a version of the events that the jury must have disbelieved in order to convict? Could not the judge -- in effect, he would be making the finding -- he would say, "The jury has really found this fact, and, therefore, I can rely on it."

MR. KELLY: I don't think so, Justice Stevens, because the judge is still making the finding that the witness deliberately lied, as opposed to being mistaken in his testimony. And that is a finding of fact that increases sentencing authority. So I don't think that a jury returning a guilty verdict in every case

means that the jury disbelieved, or thought at least, that the defendant was lying.

JUSTICE BREYER: What is your answer to Justice Ginsburg's question? And I'd appreciate your focusing on what I thought were the two most important ones, which is, first, the -- I thought that sentencing for a hundred years had gone on primarily on the basis of the presentence report. And the idea was, the person is convicted and now we're going to decide what to do with this individual who's convicted, and we're going to read what the probation officer writes about it, and he'll go interview people after, as he does. And many, many, many, if not most, of the facts in that presentence report were not available at the time of trial. They're about the history of the individual, and they're more about the manner in which the crime was carried out.

And the other main thing is the -- is the vast number of really complex operations, multiple-count rules, relevant conduct, all kinds of things that -- try even "brandishing." I mean, that's the second thing, the complexity.

So the presentence report --

MR. KELLY: Sure.

JUSTICE BREYER: -- and the complexity.

JUSTICE KENNEDY: In other words, the tradition was that we asked the jury to determine what crime was committed, and the sentencing judge to determine the context in which it was committed.

MR. KELLY: And that still happens, even under our proposal, to a large extent, Your Honor, because the presentence report has historically guided a judge in exercising his discretion at sentencing. To the extent that the judge exercises discretion in selecting a sentence within a guideline range, the judge will still rely upon the presentence report. And, frankly, most of what's in a presentence report doesn't have to do with finding extra facts; it has to do with guiding discretion in selecting a sentence. So I don't think that that really changes under our system.

With regard to the complexity, it's been my experience in defending Federal criminal cases that although the guidelines are lengthy, there are only two or three that are likely to apply in any particular case, and it's not particularly complex to figure out what those are, and it

wouldn't be all that complex to charge a jury with regard to how to determine facts that are required by the guidelines. We give juries jury instructions that are complicated all the time. We do it in RICO --

JUSTICE BREYER: Congress's basic -- that's a good answer. Congress's basic objective here is -- was uniformity. I think it was a noble objective, whether or not it's been achieved or, but are you saying to Congress, Sorry, the Constitution prohibits you, in Congress, from trying to create uniformity, or greater uniformity, of sentencing among district judges? There's just no way you can do it, because if you throw everything to a jury, you know, you throw it right into the hands of the prosecutor to determine what to charge, what not to charge, what facts to agree upon, et cetera, no way to do it? We're back to our two cellmates -- one day served, 50 years served -- though the real conduct was the same.

MR. KELLY: The real conduct can still be proved to a jury, as long as it's charged and proved to a jury.

CHIEF JUSTICE REHNQUIST: How about the

form of verdict under your system? Is there one line for the basic offense, and then other lines for each additional factor that's alleged in the indictment?

MR. KELLY: There may be, depending on the case. There may be cases in which a general verdict is adequate because there are no guideline facts to find that would increase sentencing --

CHIEF JUSTICE REHNQUIST: But you're suggesting, then, a special -- a special verdict in every case where there are guideline facts to be found.

MR. KELLY: Just as special verdicts have been used since Apprendi to find drug quantities and other facts that increase maximum sentences.

JUSTICE GINSBURG: But a special verdict wouldn't do from the point of view of the defendant, I think would resist it very heavily, if what the findings have to be are, say, a much larger drug quantity, the relevant conduct. These are things that could be damning for a defendant. So a defendant surely would not want that, all of this to be tried to the jury that's going to try the basic case. The defendant would much prefer to have the jury not know about that it wasn't

five ounces, that it was 500 grams, or that, at the same time, the defendant did a lot of other bad things.

MR. KELLY: Your Honor, I think we can trust district judges to fashion procedural protections that assure that trials are fair. That might, in some cases, mean bifurcating the underlying elements of the offense and the determination of those elements from the finding of guideline facts --

JUSTICE GINSBURG: So you would have to have, then, essentially two trials.

MR. KELLY: In some cases, yes.

JUSTICE SOUTER: Well, isn't it -- isn't it -- isn't that going to be so in every relevant conduct case in which the Government thinks the relevant conduct is a serious factor? There's either going to have to be a separate jury verdict on sentencing, or the district judge is going to be limited simply to whatever range the jury fact finding provides as the maximum range. There are no other possibilities, are there?

MR. KELLY: Well, in some of those cases, Your Honor, the additional facts would come in on the main trial anyway, as 404(b) kind of evidence

that is relevant to proving the underlying charges. And if it's going to come in anyway, then there probably wouldn't be a second part of the trial. So I think --

JUSTICE SOUTER: But isn't the defendant in that case going to say look, I, I'm claiming a serious problem, if you're asking the jury to make a specific finding that I committed relevant facts A, B, C, D, and E, even though I don't happen to have been subjected to a criminal guilty verdict with respect to each one. By, by requiring those findings, you're going to skew the jury's mind to the point where I'm not going to get a fair shake on the guilty/not guilty finding or special fact finding most immediately relevant to this case. Every defendant is going to demand a separate jury proceeding for that, isn't he?

MR. KELLY: It's certainly possible that they'll demand separate, or bifurcation --

JUSTICE SOUTER: Yes, but you wouldn't sit back and allow that focus, if you're the defense lawyer you're not going to allow that focus to be made at the time of the basic guilty/non guilty finding, are you?

MR. KELLY: Well, I've had experience with

that. And my experience has been, as I've said before, I might ask for a bifurcated trial, but if the judge thinks that that evidence is going to come in against my client anyway, the judge is going to deny bifurcation. If the judge says you're right, this would be prejudicial to introduce this evidence in the main case, then we'll bifurcate the trial, and we'll let the jury find guilty not guilty and then find sentencing facts if a guilty verdict is returned.

JUSTICE GINSBURG: Do you know what the Kansas system is? I mean, right after Apprendi, they transformed their guideline system into one where the jury makes the findings, but are all of their trials bifurcated?

MR. KELLY: I don't know if they bifurcate all their trials. My understanding is that it works in a way that's similar to what I'm suggesting could happen in Federal court.

JUSTICE BREYER: As long as you're on the subject, I'm quite --- you're going to --- what is your reaction to what I've written, which you've, you're just going to say wrong, wrong, wrong, but I want to know why. And what I know why in particular is I

speculated somewhat, that the reason that this might work, your side of it, if it works despite the, the complication, the bifurcated trials, etc., is that 97 percent of the cases are handled through plea bargaining, and this will give you a little bit of a leg up, which I speculated the defense bar likes. I'm not surprised. But then, I thought with in the long run, you just can't have a system of justice that depends for its workable nature upon plea bargaining, which in fact depends on the weapons you give to prosecutors. And so I ended up thinking, I just can't underwrite such a thing. And I'd like to get your, your, your reaction to that.

MR. KELLY: Your Honor, here's how plea bargaining works now. The prosecutor charges the easiest crime to prove that he can prove. There is no effective plea bargaining in most of those cases because the prosecutor knows he's going to win that trial. So the defendant pleads guilty because he doesn't want to lose his, his reduction for acceptance of responsibility. I think what changes is probably if our proposal is accepted, that there is more meaningful negotiation and that

prosecutors and defense attorney's will come to an understanding in most cases of what sentencing facts are provable, and what are not, and cases will continue to plead out much the same as they do right now, except more effectively because we eliminate the problem of the prosecutor being able to prove the easiest charge and save the heart of the case for sentencing.

I think with that, Your Honor, I will, unless there are other questions, defer to my colleague.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kelly. Ms. Scapicchio.

ORAL ARGUMENT OF ROSEMARY SCAPICCHIO

ON BEHALF OF RESPONDENT FANFAN

MS. SCAPICCHIO: As to question one, there's no meaningful difference between the Federal Sentencing Guidelines and the Washington State Guidelines. The Government conceded as much in their brief to this Court in Blakely. When they filed an amicus brief in Blakely they told this Court, or they urged this Court not to invalidate the Washington State Guidelines because, they told this Court, if you do, they are so similar to the Federal Guidelines that the

Federal Guidelines will fall as well. And here they are, less than five months later, standing before the same Court, saying something completely different. Now, it's not that they're so similar to the Washington State Guidelines, but that they're completely different, and that they don't operate in the same manner at all.

And what it comes down to is that for Sixth Amendment purposes, the source of the law doesn't matter. The Government got it right when they filed their amicus brief in Blakely. It doesn't matter to a defendant whether or not the source of the law is legislative, or the source of the law is by commission or regulatory body. If the sentence is going to increase, based on a fact that, that the law makes essential to punishment, that fact must be pled and proved to a jury beyond a reasonable doubt.

JUSTICE BREYER: So can I ask you the same question? Imagine that the statute says bank robbery is zero to twenty years. Case one, a separate statute says a guideline commission will make distinctions, and the guideline commission says, "five years in the ordinary case, seven years with a gun." Case two, the same thing but a

parole commission does it. Case three, the same thing, but a court of appeals panel does it, under the guise of what's arbitrary, what isn't. They're all, in your opinion, to be treated alike.

MS. SCAPICCHIO: If there's a fact necessary to increase the sentence --

JUSTICE BREYER: Well, there is just what I said, just what I said.

MS. SCAPICCHIO: Then yes.

JUSTICE BREYER: Okay.

MS. SCAPICCHIO: With respect to Mr. Fanfan in this case, Mr. Fanfan's sentence was promulgated based on the jury verdict alone. Mr. Fanfan, the Government chose to indict Mr. Fanfan on a single count of conspiracy. He went to trial on a single count of conspiracy.

CHIEF JUSTICE REHNQUIST: Conspiracy to what?

MS. SCAPICCHIO: Conspiracy to distribute 500 grams of cocaine. The Government knew at the time of trial that Mr. Fanfan was arrested with 281 grams of crack cocaine at the time of his arrest. The Government chose not to indict him for that 281 grams of crack cocaine, and instead, they chose to prove the easiest possible

indictment before the jury. Once the jury was dismissed in this case, the Government then sought to increase Mr. Fanfan's sentence by 157 months, based on the possession of the crack cocaine that they knew about at the very beginning, and we're suggesting that Judge Hornby did the right thing in limiting Mr. Fanfan's sentence to that which was supported by the jury verdict alone and nothing else.

JUSTICE GINSBURG: Judge Hornby had some distress in doing that, didn't he, because the difference was quite large? Based on what the judge found, it would have been fifteen or sixteen years as opposed to five or six years?

MS. SCAPICCHIO: What Judge Hornby did for Mr. Fanfan was, he conducted what he called a presentence, a pre-Blakely hearing, and at the pre-Blakely hearing he allowed the prosecutor to present evidence relative to relevant conduct involved in the offense. And the prosecutor presented evidence that the relevant conduct included this possession of 281 grams of crack cocaine, as well as a case agent who claimed that Mr. Fanfan was the leader of this entire conspiracy. And then Judge Hornby went on to say,

based on everything that he heard in the pre-Blakely hearing, if given the opportunity, he would sentence my client to between 188 to 235 months.

JUSTICE GINSBURG: He didn't say it, that that was his discretionary choice. He said that --

MS. SCAPICCHIO: He was required.

JUSTICE GINSBURG: He made, he made those findings of fact, that -- leadership role and the quantity of drugs.

MS. SCAPICCHIO: He did.

JUSTICE GINSBURG: And on the basis of those two he said the guidelines would require me to come up with this higher sentence, not that using the guidelines as advisory he would have gotten --

MS. SCAPICCHIO: Absolutely. It was the guidelines required him to impose sentence between 188 to 235 months.

JUSTICE GINSBURG: And then the other, that's the high range, and the low range is, I'll just stick with the crime that he was indicted for, and that's five or six years.

MS. SCAPICCHIO: He, what Judge Hornby did

is, is he sentenced Mr. Fanfan based solely on the jury's verdict. The jury only heard evidence of the conspiracy to distribute 500 grams of crack cocaine. Because the jury only heard evidence, and thus returned a verdict based solely on the 500 grams of crack cocaine, then Mr. Fanfan's sentence, according to Judge Hornby after this Court decided Blakely, was limited to the jury verdict alone.

JUSTICE GINSBURG: That's quite a windfall for Mr. Fanfan, isn't it?

MS. SCAPICCHIO: Well, in this particular case I would say no, because the Government knew when this Court decided Apprendi, and certainly knew by the time this Court decided Ring, that if they wanted to increase a defendant's sentence beyond the statutory max, that they should plead it and prove it in the indictment. And in this case, they chose not to. And so, whether or not Mr. Fanfan may -- get some benefit because of this Court's decision in Blakely, certainly he does. I'm not denying that he doesn't. But only because the Government didn't do what this Court told them they should do in both Apprendi and Ring.

CHIEF JUSTICE STEVENS: Did the trial judge give any indication of what sentence he would have imposed if he were not constrained by the guidelines?

MS. SCAPICCHIO: He did not. He indicated that, if the guidelines applied, that he believed Mr. Fanfan fell between 188 and 235 months. There was no discussion at all as to whether or not he had discretion to sentence anywhere outside the guidelines during this proceeding.

And, with respect to question two in this case, whether or not the guidelines are severable, which of course is the more difficult question before the Court, our proposal to sever out those portions of the guidelines that require judicial fact finding by a preponderance of the evidence will accomplish the sentencing reform goals. The goals of the sentencing reform were uniformity, proportionality, and certainty.

CHIEF JUSTICE REHNQUIST: You wouldn't sever out the ones that would permit a downward departure, would you?

MS. SCAPICCHIO: Would we sever the portions of the statute that require ---

CHIEF JUSTICE REHNQUIST: You would leave

in place the provisions for downward departures?

MS. SCAPICCHIO: We would leave in place the majority of the sentencing guidelines.

CHIEF JUSTICE REHNQUIST: Well, and -- but could you answer my question?

MS. SCAPICCHIO: Mr. Chief Justice, would I sever out --

CHIEF JUSTICE REHNQUIST: Would you leave in place the provisions for downward departure?

MS. SCAPICCHIO: Yes.

JUSTICE STEVENS: How can you do that? The statute that makes the guidelines mandatory applies to both upwards and downwards departures, so I have always had trouble knowing what provision of the statute anybody severs. I can understand your saying that there's a bunch of unconstitutional applications of the statute, and you have to set aside the sentences in those particular cases, but I simply don't understand severing a single provision that covers both upward and downward departures. How do you sever it?

MS. SCAPICCHIO: Well, I think you sever it by severing out the unconstitutional portions of it. And you sever it by getting rid of anything

that indicates that it's a judicial fact finding by a preponderance of the evidence.

JUSTICE STEVENS: But that's the same, that's the same provision that allows departures for the same -- by the same procedure.

MS. SCAPICCHIO: Well, the departures in --

JUSTICE STEVENS: It seems to me you're not severing a piece of a statute, you're just severing a bunch of applications of the statute you think are invalid.

MS. SCAPICCHIO: The applications of the statute that are invalid in this case are the ones that require judicial fact finding by a preponderance of the evidence.

JUSTICE STEVENS: Correct. I understand.

MS. SCAPICCHIO: Those under Blakely need to be severed. What we're left with now is a statute that needs to, that needs to function in terms of saving the guidelines.

CHIEF JUSTICE REHNQUIST: But would it -- would it really save the guidelines in the way that Congress intended them, to strike basically the provision for enhancements, and leaving in place the provisions for downward departures?

MS. SCAPICCHIO: It's not going to operate exactly the way Congress intended. Because Congress never intended to pass a statute that was unconstitutional. And so it has to undergo some change. And in this particular case, what we're saying is, minimize the amount of changes that the statute has to undergo in order to preserve it.

JUSTICE O'CONNOR: Well, maybe we should just leave it to Congress to decide, because it doesn't sound like the scheme Congress intended.

MS. SCAPICCHIO: Well, Congress intended a mandatory system. It's clear that Congress intended a mandatory system. The Government --

JUSTICE O'CONNOR: And it intended fact finding by a preponderance for both upward adjustments and downward.

MS. SCAPICCHIO: Not necessarily fact finding by the judiciary. It's not one of the listed goals of the sentencing reform act. Those listed goals are uniformity, proportionality and certainty, and those goals can still be met under the proposal that we're suggesting the Court adopt. There will still be uniformity in sentencing, there will still be proportionality and there will still be certainty of sentence.

CHIEF JUSTICE REHNQUIST: Well, but will there be proportionality if the sentences, sentences can be downward, the jury verdict could be adjusted downward, but not upward?

MS. SCAPICCHIO: If it turns out, Mr. Chief Justice, that there is some, some difference in the severity of a sentence that a defendant receives, certainly Congress could, could come in and make the appropriate changes if that's the result of the proposal that we're suggesting, but the proportionality wouldn't change. You know, the degree of crimes is still going to line up in the exact same manner.

CHIEF JUSTICE REHNQUIST: But you can say the same thing if we simply said that the whole guidelines fall, and they're simply there for judges to apply if they wish. You can say, "Well, if Congress doesn't like that they can come in and put a new system." That's true any time Congress acts.

MS. SCAPICCHIO: But -- absolutely, Mr. Chief Justice, it is true any time Congress acts, but in this particular case, the Government has the burden of proving the inseverability of the statute. We're attempting to show that the

statute is severable to save the guidelines in this case, and we're attempting to show that by suggesting to the Court that you don't have to throw out twenty years of sentencing reform. That the guidelines should still be mandatory; we're suggesting that the mandatory portions of the guidelines remain, the bulk of the guidelines remain, and we're changing the fact finder.

JUSTICE SCALIA: Why do you -- why do you have to call it severability? Suppose we just said it's clear that whenever these facts have not been found by a jury, the guidelines cannot be applied? That the guidelines are unconstitutional, as applied, when there's been no jury finding, and leave it. We're not severing any particular language, we're just saying that that portion, that proceeding in that fashion produces an unconstitutional sentence. And then let the Government work out how it wants to find its way around that problem.

MS. SCAPICCHIO: That's certainly an option that the Court could consider.

JUSTICE SCALIA: I'm just not sure, I share Justice Stevens' perplexity as to whether that's really properly described as severing part of the

statute.

JUSTICE STEVENS: And may I add this thought, that it seems to me, I don't know whether this is true; Mr. Clement and I had a dialogue that was inconclusive; I had been under the impression, perhaps erroneous, that in fact the number of unconstitutional departures if one follows Apprendi as being the constitutional rule, is actually a small percentage of the total, and if it should follow that only three, four, five, six percent of the sentences that have heretofore been imposed or will be imposed in the future would be unconstitutional, that's a pretty weak reason for saying the whole statute is unconstitutional on its face, or even in one provision of the statute. It seems to me you just say, "Oh, okay, you can't impose those sentences in those three percent of the cases." I don't know why that's a departure from our prior practice.

MS. SCAPICCHIO: I, Well, I think because what's left is, is that the system will then be open to some manipulation, under that scenario. If the Government can control who it is that will be sentenced under the guidelines and who will not

be sentenced under the guidelines, then the system is, is ripe for manipulation.

JUSTICE STEVENS: No, my suggestion is everybody is going to be sentenced under the Guidelines; the only difference is that in three or four percent of the cases you may have to bring a jury in to get an enhanced sentence.

MS. SCAPICCHIO: In, under that scenario, if any fact that needed to increase a defendant's sentence was pled and proved to a jury, that would suffice.

JUSTICE SCALIA: You wouldn't care whether you call this severing, severability or not, would you?

MS. SCAPICCHIO: Absolutely not.

JUSTICE SCALIA: I didn't think you would.

MS. SCAPICCHIO: It produces the same results, whether it's, you call it severance or the way that the statute works.

JUSTICE SCALIA: And I assume, don't you, that any solution we come up to is likely to be an interim solution anyway?

MS. SCAPICCHIO: It's very likely to be an interim solution and the legislature will tell us what they really want us to do and we'll all make

the appropriate adjustments.

JUSTICE BREYER: But the idea is that this works because most cases are plea bargained.

MS. SCAPICCHIO: Most cases are plea bargained.

JUSTICE BREYER: So what you'll do if you're right, is all you would say is any time that the prosecutor wants to say that you committed the bank robbery or you committed the drug offense with more than a minimal amount of money or more than a minimal amount of drug, or there were guns, they get into a bargain, and they end up with a sentence once they bargain -- if that's the sentence, because they're not even going to contest it before the judge, both sides will come in and agree. But in those few cases where they do contest it, you would have to have the jury find the facts.

MS. SCAPICCHIO: Yes.

JUSTICE BREYER: Now, the only reason that I find it disturbing is to think that Congress could have wanted such a system is given other developments in Congress, mandatory minimums and all kinds of things, that seems to me to be a system that would really, might make non-

uniformity in reality, worse than it was before 1986. See, I mean, my goodness, every prosecutor's going to be doing something different, every defense attorney; everything will depend upon the bargains. The judges when they come in will think different things. I mean --

MS. SCAPICCHIO: The --

JUSTICE BREYER: Should we uphold something like that in the face of a Congress that wanted uniformity?

MS. SCAPICCHIO: Yes, and I'll tell you why. Because that's exactly the way that the guidelines operate now. The only thing that's changing is the identity of the fact finder. That the Government can come in now and charge whatever it wants, because it's free to charge whatever it wants, and that, the Government in this case, or in any case, could then bargain with defense counsel and the defendant as to which facts they may want to plead to, as to which portions of the indictment they may want to plead to, happens every day. And, and, and so, if that's the case, changing the identity of the fact finder isn't going to change that process at all.

JUSTICE BREYER: Did you find out anything

in your research on this where anybody in the -- this discussion on the guidelines began, I think, in the early 70's, it's been around for 30 years. The guidelines have been law for 17 years, and until recently with Apprendi, is there a history of anything being written on the guidelines being unconstitutional for the Sixth Amendment reason? Did any group of judges, or defense attorneys, or academics or anybody write anything that we could look at until quite recently in which they thought this was a possibility?

MS. SCAPICCHIO: Before quite -- before this Court's decision in Apprendi?

JUSTICE BREYER: Yeah, before we began with Apprendi? .

MS. SCAPICCHIO: I don't believe so.

JUSTICE BREYER: Nothing.

MS. SCAPICCHIO: I'm not aware of any.

JUSTICE STEVENS: Have you read Justice Thomas's opinion in Apprendi? He's got a lot of prior law that's in there that maybe would be of interest to you.

MS. SCAPICCHIO: And with respect to Mr. Fanfan in this case, Your Honors, we're asking that this Court give intelligible content to the

jury's verdict by affirming the district court's imposition of a 78-month sentence based solely on the facts found by the jury beyond a reasonable doubt.

JUSTICE STEVENS: May I ask just one, one last question? Do you agree that within the guidelines ranges, which sometimes are fairly large, the judge does have the discretion to impose any sentences he wants to based on the conduct of the defendant, whether or not it's proved by the jury?

MS. SCAPICCHIO: Within the guideline range? Yes.

JUSTICE STEVENS: You get to the range by the jury finding, the judge still retains substantial discretion within the, within the range.

MS. SCAPICCHIO: Substantial discretion within the range, yes. If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you Ms. Scapicchio. Mr. Clement, you have four minutes remaining.

REBUTTAL ARGUMENT OF PAUL D. CLEMENT
ON BEHALF OF PETITIONER

MR. CLEMENT: Thank you, Mr. Chief Justice.

This Court in Mistretta expressed its understanding that the commission was constitutional because it would pursue traditional judicial tasks related to sentencing, and it would not get involved in quintessentially legislative acts of setting maximum penalties, or defining the elements of the crime. Now, we of course, think that's quite relevant for the Sixth Amendment issue that's raised in question one; but even if you disagree with us on that, even if you think the non-legislative origins of the guidelines don't matter for purposes of question one, surely they do matter for purposes of the severability analysis under question two. Because if one takes those elements, those enhancement factors in the guidelines, and treats them like true elements of crimes that must go to the jury, then you are giving this non-legislative body's work product the effect of Federal criminal statutes, and that's something that not only Mistretta suggests is problematic, but United States v. Hudson in 1812 suggests is problematic. And the effect is really breathtaking; it is an understatement to

say that the effect of that judicial remedial decision would be to create thousands of new Federal crimes.

Now, let me talk just for a second about the language of severability. There's been some questions about whether what we're really talking about is severability. First of all you're going to have some cases where there's going to be no enhancing factor at all. And in those cases you don't need to talk about severability. If there's no Sixth Amendment issue raised in a case, there's no reason to strike anything down and that would be a simple matter of traditional principles of third party standing and facial challenges. The fact that you might have a constitutional problem in this case, doesn't mean that you invalidate the guidelines in those other cases, where they apply without problem.

The real question becomes, what do you do in a case where there is a Sixth Amendment problem, assuming Blakely applies to the guidelines? At that point, I think severability is the right way to talk about it. One way of dealing with the case at the point you recognize there's a Sixth Amendment problem in this case is

to say, "Well, there's nothing we can do about it, we can't sentence this individual to any more than the upper bound of the sentencing range." The second thing you can do is you can say, "Well, okay, there's a constitutional problem, but the result is that we sever 3553(b), we don't make the guidelines mandatory, and we allow the judge to impose a discretionary sentence within the range of the statute." That is what we think is the appropriate solution.

As a couple of you have mentioned, what we may be talking about here is an interim solution Anyway. Congress may well get involved. That's why in considering what regime of remediability or severability best serves the interests of Congress in uniformity and proportionality, it pays to pay particular attention to the cases that are in the pipeline now. And on those cases, there's no question which proposal better serves the interest of uniformity and proportionality. Respondents have to admit that they are seeking a huge sentencing windfall here.

One other point that bears mention is this idea of, the suggestion that because the guidelines will not be binding in every case, the

Government somehow controls the decision as to whether or not it's a guidelines case or not. That is not the case. That decision under the system will rest with the judge. If there is an enhancement sought, but it's not found in the basis of the judge, then there's no Sixth Amendment problem in that case, and the case can go forward.

The irony, of course, is that the consequence of applying Blakely to the guidelines is to create more power with the prosecutor, because as Justice Breyer pointed out, under the current system of the guidelines, the prosecutor cannot control through the indictment exactly what sentencing factors the judge will consider. The Burns case, for example, that this Court had involved a situation where the judge sua sponte took notice of sentencing factors that neither the prosecutor nor the defendant very much wanted in front of the court. That will no longer be possible under a system where everything has to be in the indictment, so the result is to strengthen the hand of the Government.

The last thing is this idea of bifurcation is not a panacea. I know Justice Scalia, you've

thrown that out in a number of instances, but the traditional rule in cases with real elements of real Federal crimes is that you don't get to bifurcate out one element that the defendant doesn't want to put before the jury. That's the, that's the binding law in cases like Collamore out of the First Circuit and Barker out of the Ninth Circuit. So, I think it's wrong to simply suggest that, that bifurcation is going to solve all these problems. Thank you, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Clement, the case is submitted.

(Whereupon at 2:46 p.m., the case in the above-entitled matter was submitted.)