Nos. 04-104 and 04-105

IN THE

Supreme Court of the United States

United States, *Petitioner*,
v.
Freddie J. Booker.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

United States, *Petitioner*,
v.
Ducan Fanfan.

On Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the First Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense attorneys, public defenders, and law professors.[1] The NACDL seeks to promote the proper administration of justice and to ensure that findings that affect the length of criminal sentences are made according to constitutionally required procedures. NACDL's intense concern for the fullest protection of fundamental Fifth and Sixth Amendment rights has led it to appear as *amicus curiae* in this Court on numerous occasions, including in *Blakely* v. *Washington*, 124 S. Ct. 2531, 2542 (2004) (noting NACDL's position), *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *United States* v. *Cotton*, 535 U.S. 625 (2002).

SUMMARY OF THE ARGUMENT

I. A Federal District Court violates the Fifth and Sixth Amendment rights of a criminal defendant when it relies on facts that were not both charged in the indictment and either found by a jury beyond a reasonable doubt or admitted by the defendant to increase the maximum sentence dictated by the United States Sentencing Guidelines ("Guidelines"). It does so regardless of whether the sentencing rules it applies were promulgated by a legislature, by courts, by an executive agency, or by an independent commission. There is therefore no meaningful distinction between the Guidelines and the Washington sentencing law that this Court examined in *Blakely*. Accordingly, that decision compels the conclusion

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

that the Guidelines establish mandatory limits on judicial discretion and are therefore equivalent to statutory limits for Sixth Amendment purposes.

The government's primary argument distinguishing *Blakely* is that the federal Sentencing Guidelines are judicial rather than legislative in character. This distinction is constitutionally irrelevant and also inaccurate. As a long line of cases in this Court and others applying the Ex Post Facto Clause to sentencing guideline schemes confirms, the Guidelines are fundamentally legislative in character.

Furthermore, the Guidelines' content and application are closely controlled by Congress, as reflected in legislation that dramatically altered the Guidelines by congressional fiat, the PROTECT Act. An essential component of the Guidelines was the preservation of limited judicial discretion in the form of reserved judicial authority to depart from the Guidelines in atypical cases. This departure authority is critical to the balance Congress struck in the Sentencing Reform Act between the need to eliminate disparity in sentencing while still providing individualized consideration to offenders' cases. In *Koon* v. *United States*, this Court accordingly recognized sentencing judges' discretion to depart on grounds that were not enumerated in the Guidelines themselves; it also applied a deferential abuse-of-discretion standard of review to departure decisions. The PROTECT Act narrowly circumscribed the departure powers of judges and abrogated this Court's decision in *Koon*, requiring de novo review of all departure decisions and also drastically limiting downward departures in certain sexual offense cases to grounds specifically approved in the Guidelines. The PROTECT Act further directed the U.S. Sentencing Commission ("Commission") to enact amendments to the Guidelines that "ensure that the incidence of downward departures are substantially reduced."

Nor did the PROTECT Act merely curtail sentencing judges' departure authority. Congress also drafted specific

guidelines for certain sexual offenses, and even wrote commentary in the Commission's name for those guidelines. The Act also repealed the requirement that at least three members of the Commission be federal judges; there is now no requirement that the Commission include any judges at all. Ominously, it also directed the collection of sentencing decisions by individual judges for review by the executive branch and Congress.

Even before the PROTECT Act, Congress had repeatedly dictated the form and content of specific Guidelines. More than sixty times since the Guidelines were first enacted, Congress has issued directives to the Commission that essentially dictated amendments to the Guidelines, sometimes directly specifying those amendments' language; mandated enhancements for certain types of crimes; and rejected amendments proposed by the Commission. Just as significant is Congress's creation of mandatory minimums, which short-circuit the Commission's role in determining appropriate punishments for conduct and distort the application of the Guidelines. By contrast, federal judges, individually or collectively, have no special voice in the Commission's policymaking role. In short, the proposition that the Guidelines reflect the "collective wisdom" of the judiciary, however valid at the inception of the Guidelines, has been disproven by years of legislative encroachment.

II. The second question presented by these cases addresses the consequence of a determination by this Court that the Guidelines are subject to the holding of *Blakely*. The provisions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 ("SRA"), and the Guidelines that are inconsistent with the Sixth Amendment under *Blakely* are severable. Congress, of course, remains "free to reconstruct a sentencing system to achieve its goals in a manner consistent with constitutional requirements." U.S. Br. 44.

This Court should hold that, in the interim, sentencing must follow the process *already employed* by the Department

of Justice. The government must allege in indictments those facts that give rise to enhanced sentences under the Guidelines. In those few cases that do not result in a plea bargain, the same jury that determined guilt must decide the facts relevant to the enhancement in a bifurcated proceeding under the traditional "beyond a reasonable doubt" standard. The jury would itself have no sentencing authority. Instead, judges must exercise their discretion to impose sentences in the range determined by the Guideline provisions applicable to the facts found by the jury.

This Court should reject the Solicitor General's contrary view that the Guidelines are rendered "advisory" in – but only in – cases implicating the *Blakely* rule, such that the jury has no role to play and district judges have discretion to impose any sentence within the range set by the statute of conviction. That proposal is profoundly illogical as it, in fact, relies on a selective severing of portions of the SRA that Congress could never have imagined, and it furthermore flies in the face of Congress's determination to promulgate a binding guidelines scheme that would rationalize federal sentencing.

We note, however, that, even if this Court applies the *Blakely* rule retroactively, the Constitution's Ex Post Facto and Due Process Clauses prohibit the retroactive application of either the government's discretionary sentencing proposal or the use of juries to find sentencing facts to the cases of respondents and similarly situated defendants. For these defendants, the only constitutional solution is to reduce their sentences to the maximum permitted under applicable statutes and the Guidelines based on the existing jury verdict.

ARGUMENT

I. Under *Blakely*, the Federal Sentencing Guidelines Violate The Sixth Amendment.

The United States argues that the Guidelines are not subject to the Sixth Amendment rule announced in *Blakely* because the Commission effectively performs the sentencing

function that judges individually performed in the pre-Guidelines system, voicing the "accumulated judicial wisdom about the facts that matter at sentencing." U.S. Br. 24. The distinction on which the government primarily relies – that the Guidelines are judicial and not legislative – is immaterial and furthermore inaccurate, largely ignoring the dominant role of Congress in the Commission's work.

A. The Sixth Amendment Protects Against Encroachments on the Right to Jury Trial by Any Branch of Government.

The government's singular focus on what it views as the judicial character of the Guidelines completely misses the mark. The right of an "accused" to trial by jury is protected in our Constitution twice – in Article III, § 2, cl. 3, and in the Sixth Amendment. The placement of this core constitutional right in the Bill of Rights, rather than in Article I, shows that it makes no difference whether the Guidelines are "legislative" or "judicial" in character. The discussion of jury trials in Article III demonstrates that the judicial branch, in particular, is charged with protecting that right.

As respondents discuss at length, the Guidelines' provenance is simply irrelevant to the question whether their application violates defendants' Sixth Amendment rights. A criminal defendant has a "*right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 124 S. Ct. at 2543 (emphasis in original). When these essential facts are not submitted to the jury but are instead determined by a judge by a mere preponderance of the evidence, this right is violated, no matter who created the rules authorizing or directing the judge to do so. Thus, if the Judicial Conference were to adopt, and this Court were to promulgate, a rule of criminal procedure authorizing a federal judge to find facts that could raise a statutory maximum, that rule would violate *Blakely* no less than a statute adopted by Congress to the same effect. Cf. Fed. R. Crim. P. 32(i)(3).

B. The Federal Sentencing Guidelines Establish Mandatory Legislative Rules.

In any event, the distinction the government draws is inaccurate. As the Solicitor General points out, the Guidelines are the product of the Sentencing Commission, an agency located within the judicial branch, while the Washington State sentencing law was promulgated directly by the legislature. The mere location of the Commission in the judicial branch, however, is not a meaningful difference. As this Court and others have consistently recognized, the Guidelines are essentially legislative in character.

The Commission is a creation of the SRA, which authorizes the Guidelines. Accordingly, the Guidelines carry the force of law and are "binding on federal courts." *Stinson* v. *United States*, 508 U.S. 36, 42 (1993). As uniformly interpreted by the courts of appeals, Section 3553(b) of Title 18 of the U.S. Code prohibits sentences exceeding the top of the applicable Guidelines range unless the court makes findings of fact that justify an upward departure.[2] Even though the Commission is located in the judicial branch, this Court has treated the Guidelines as "the equivalent of legislative rules adopted by federal agencies." *Stinson*, 508 U.S. at 45. Guidelines promulgated pursuant to congressional delegation under the SRA are subject to the Sixth Amendment in the same fashion as any statute or other legislative rule.

This conclusion is reflected in the courts' consistent application to the Guidelines of the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3; see also *id.* art. I, § 10, cl. 1 (barring states from adopting ex post facto laws). That constitutional provision applies only to legislative acts or rules. See *Splawn* v. *California*, 431 U.S. 595 (1977). It applies to the Guidelines because they are mandatory and

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[2] See, *e.g.*, *United States* v. *Davern*, 937 F.2d 1041 (CA6 1991) (en banc); compare *id.* at 1042 (Merritt, J., dissenting).

legislative in character. Indeed, every circuit that has considered the issue has concluded that the Ex Post Facto Clause applies to the Guidelines. See, *e.g.*, *United States* v. *Schnell*, 982 F.2d 216, 218 (CA7 1992) (collecting cases from all other circuits); see also U.S. Br. 25 (effectively conceding that "the *Ex Post Facto* Clause applies to changes in the Guidelines" (citing *United States* v. *Bell*, 991 F.2d 1445, 1447 n.4 (CA8 1993)). This Court itself applied the Clause to a similar state sentencing scheme in *Miller* v. *Florida*, relying on the fact that the guidelines, far from being "flexible 'guideposts' for use in the exercise of discretion," significantly constrained judicial discretion by requiring judges to make particular findings to justify departures from the guidelines sentencing range. 482 U.S. 423, 435 (1987).

As this Court has held, the Commission, although placed administratively in the judicial branch, does not perform judicial functions. *Mistretta* v. *United States*, 488 U.S. 361, 384-85 (1989) ("Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power."); *id.* at 394 (listing ways in which Commission differs from a court that exercises judicial power.); *id.* at 404 (observing that judges serving on the Commission assume a "wholly administrative role" and do not exercise judicial powers).

C. Congress Has Repeatedly Exercised Broad Control Over the Guidelines.

The government furthermore ignores several respects in which Congress directly controls the contents and application of the Guidelines. These include congressional oversight of judicial departures from the Guidelines, statutes mandating changes in the content of specific Guidelines, and laws creating mandatory minimum sentences that constrain the Guidelines' application.

1. Congressional Control of Guidelines Departures Restricts Judicial Discretion.

Congress exercises direct control over the primary discretionary authority retained by sentencing judges under the Guidelines – namely, the power to depart from an otherwise mandatory Guidelines range. Pursuant to the PROTECT Act, Pub. L. No. 108-21, § 401(n), 117 Stat. 667 (2003), judges must report all departures to the Sentencing Commission, which must in turn report them to Congress; the Commission is also specifically required to amend the Guidelines in such a way as to substantially reduce the incidence of departures.

The authority to depart from an otherwise mandatory sentencing range is a cornerstone of the SRA. In developing the original Guidelines under the Act, the Commission reviewed sentencing decisions in more than 10,000 cases. U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 21-39 (*Supplementary Report*) (June 18, 1987). Based on this analysis, the Commission developed a set of relatively narrow sentencing ranges corresponding to each offense and criminal history category. *Id.* at 17. The Commission recognized, however, that this formulaic, grid-based approach would "omit distinctions" important in many individual cases. *Ibid*. The Commission therefore protected the authority of a sentencing judge to depart from the Guidelines to ensure that each case would still be considered on the individual basis required by the SRA. *See id.* at 54; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 14 (1988) (noting that the Guidelines permit flexibility for departures when necessary); 28 U.S.C. 991(b)(1)(B); see also S. REP. No. 255, 98th Cong., 1st Sess. 51-52 (1983) (asserting that the Guidelines are intended to preserve judicial discretion).

Thus, although a district court must issue a sentence within the applicable Guidelines range in most cases, it

retains the authority to depart – either upward or downward – from that range in atypical cases. 18 U.S.C. 3553(b); *Koon* v. *United States*, 518 U.S. 81, 92-96 (1996); *Mistretta*, 488 U.S. at 367 ("[Congress] rejected strict determinate sentencing because it concluded that a guideline system would be successful in reducing sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case.") (citation omitted); see also Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14-SPG CRIM. JUST. 28, 35 (1999) (proposing that the Commission "increase * * * the discretionary authority of the sentencing judge" to depart in cases outside of the "heartland" by simplifying the Guidelines). In *Koon*, recognizing "the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances" via the departure power, this Court applied a deferential abuse-of-discretion standard of review to departure decisions. 518 U.S. at 92, 113 (citing 28 U.S.C. 991(b)(1)(B)). The Court also held that the basis for departure need not be limited to the specific reasons listed in the Guidelines. *Id.* at 82.

The PROTECT Act, however, upset this carefully crafted balance between the goals of consistency and individualized treatment in sentencing. The purpose of the sentencing provisions of the PROTECT Act was to "address[] the longstanding problem of downward departures from the Federal Sentencing Guidelines." H.R. CONF. REP. NO. 108-66, at 58, *reprinted in* 2003 U.S.C.C.A.N. 683, 694. The legislation aims to eviscerate judicial discretion in sentencing through the departure mechanism. The Judicial Conference of the United States has recognized the effect of the PROTECT Act and has sought repeal of some of its provisions. News Release, Administrative Office of the U.S. Courts (Sept. 23, 2003), *available at* http://www.uscourts.gov/Press_Releases/jc903.pdf. Thus far, such efforts have been unsuccessful. See American Bar Ass'n, Justice Kennedy Commission, *Reports with Recommendations to the ABA House of Delegates*, *available at* http://www.abanet.org/

crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf (Aug. 2004) (criticizing the PROTECT Act's effect on judicial discretion); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 S.M.U. L. REV. 211 (2004).

Among other requirements, the statute specifically directs the Commission to promulgate amendments to the Guidelines that "ensure that the incidence of downward departures [is] substantially reduced." Pub. L. No. 108-21, § 401(m)(2)(A).[3] It also abrogates this Court's decision in *Koon* by mandating that departures be reviewed de novo on appeal, *id.* § 401(d)(2), and, in cases involving certain sexual offenses, by forbidding departures on any ground not "affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code," *id.* § 401(b)(1)(B). Congress also abolished many pre-existing grounds of departure for certain crimes, *id.* § 401(b) (adding § 5K2.22), and expressly prohibited the Commission from adding any new grounds of downward departure, or from amending the Guidelines in a manner "inconsistent with" any of the congressional amendments to the Guidelines themselves, *id.* § 401(j). With the judiciary now stripped by Congress of much of its departure power, the government cannot credibly argue that the Guidelines merely "channel" traditional judicial discretion, or that they are judicial rather than legislative in nature.

The PROTECT Act also requires the Chief Judge of each district to report to the Commission with a statement providing reasons for every sentence in her district that

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[3] Obeying this congressional directive, the Commission amended the Guidelines to sharply curtail the available grounds for downward departures. See U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, app. C at 352-58, amend. 653 (2003); see also *United States* v. *Mateo*, 299 F. Supp. 2d 201, 205 (S.D.N.Y. 2004).

departs from the otherwise applicable Guidelines range. Pub. L. No. 108-21, § 401(h). The Commission in turn must make these reports available to the Attorney General and to the Judiciary Committees of the House and Senate. This provision pointedly requires that "the identity of the sentencing judge" be included in these reports. *Ibid.* In addition, the Attorney General must report any downward departure, except for substantial assistance departures requested by a prosecutor, to the Judiciary Committees of the House and Senate, again including "the identity of the district court judge." *Id.* § 401(l)(2)(B)(iii).[4]

Taken together, these provisions of the PROTECT Act substantially limited the ability of sentencing judges to exercise the departure authority that was so central to the SRA. As one district judge has put it: "[T]he day of the downward departure is past. Congress and the Attorney General have instituted policies designed to intimidate and threaten judges into refusing to depart downward, and those policies are working." *United States* v. *Kirsch*, 287 F. Supp. 2d 1005, 1006 (D. Minn. 2003). In the short history of the PROTECT Act, other judges have recognized its coercive impact on departure authority. See, *e.g.*, *United States* v.

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[4] The potential for intimidation of individual judges is not illusory. After a respected district judge testified on sentencing issues before a House committee, the committee threatened to subpoena the judge's records regarding sentences he had imposed and publicly accused him of judicial misconduct in those decisions. See Zlotnick, *supra*, at 227-28; see also Hon. William H. Rehnquist, Remarks of the Chief Justice to the Federal Judges Ass'n Bd. of Directors Mtg. (May 5, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html ("[O]ne portion of the [PROTECT Act] provides for the collection of such information on an individualized judge-by-judge basis * * * [that] could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties.").

Mellert, No. CR 03-0043 MHP, 2003 WL 22025007, at *2 (N.D. Cal. July 30, 2003) ("[T]he wisdom of the years and breadth of experience accumulated by judges and the Sentencing Commission * * * is shucked * * *."); *United States* v. *Kim*, No. 03 Cr. 413 (RPP), 2003 WL 22391190, at *7 (S.D.N.Y. Oct. 20, 2003) (noting that the legislature has taken departure authority away from judges in favor of Assistant U.S. Attorneys), *United States* v. *Green*, No. Cr. A. 02-10054-WG4, 2004 WL 1381101, at *15 (D. Mass. June 18, 2004).

2. Congress Increasingly Dictates Specific Guidelines.

At the time of this Court's *Mistretta* decision, the relationship between Congress and the Commission was relatively new and developing. Since then, Congress has increasingly dictated the form, content, and specific language of the Guidelines. Steven L. Chanenson, *Hoist With Their Own Petard?*, 17 FED. SENT. REP. (forthcoming Sept. 2004), draft at 15, *available at* http://papers.ssrn.com/sol3/papers/cfm?abstract_id=586782. Thus, although the government characterizes the Guidelines as "the product of * * * a body in the Judicial Branch," U.S. Br. 12, it is forced to concede that Congress "has rejected proposed guidelines," "has directed the Commission to review and, if appropriate, amend Guidelines," and "has even enacted Guidelines amendments itself," *id.* at 24-25 (citations omitted). Even these concessions, however, substantially understate the frequency and intrusiveness of congressional intervention in the Guidelines process.

Since *Mistretta* was argued in October 1988, Congress has enacted over sixty laws that either directly dictate the content of particular Guidelines or mandate that the Commission enact specified revisions. These directives fall into several discrete categories, each a substantial legislative interference in a supposedly "judicial process." The specific measures are collected in the Appendix, *infra*.

Congress has issued fifty-five directives that directly alter the Guidelines. Four enactments redrafted Guidelines provisions into language of the legislature's choosing, such as when Congress in the PROTECT Act increased the base offense level for kidnapping from twenty-four to thirty-six, see Pub. L. No. 108-21, § 104(a), and furthermore dictated the text of and even the "commentary" to the Guidelines provisions dealing with sexual offenders, *id.* § 401(b), (g), (i). Fifty-one statutory provisions directed the Commission to make a specific change to particular provisions of the Guidelines without specifying the precise language. Examples range from a sweeping mandate to increase by at least two the offense level for certain drug offenses involving List I chemicals, see Pub. L. No. 104-237, § 302(c), 110 Stat. 3105 (1996), to a narrowly focused enhancement of at least two levels for property offenses at national cemeteries, see Pub. L. No. 105-101, § 2, 111 Stat. 2202 (1997).

On twelve additional occasions, Congress directed the Commission to enhance the sentencing ranges for certain types of conduct, leaving only the precise level of enhancement to the Commission. Again, these mandatory changes ranged widely in scope and content. Compare Pub. L. No. 103-322, § 110501, 108 Stat. 2015 (1994) (mandating that the Commission enact an enhancement for all crimes of violence or drug trafficking involving a semiautomatic firearm) with *id.* § 180201(c), 108 Stat. 2047 (1994) (requiring an enhancement for drug offenses committed at truck stops and safety rest areas).

Eleven additional provisions, while not expressly requiring amendments, have nevertheless "requested" or "recommended" changes. Each has resulted in a Guidelines change, nine of which expressly refer to Congress's instructions. For example, as part of the Sarbanes-Oxley Act of 2002, Congress issued a directive to the Commission to "ensure that the guideline offense levels and enhancements under Guideline § 2B1.1 (as in effect on the date of enactment of this Act) are sufficient for a fraud offense when the number

of victims adversely involved is significantly greater than 50." Pub. L. No. 107-204, § 1104(b)(5), 116 Stat. 809 (2002). The Commission revised the Guidelines accordingly. See U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, app. C, at 286-94, amend. 647 (2003).

Furthermore, Congress has specifically rejected the Commission's proposals for amendments to the Guidelines that would have lowered sentences for money-laundering offenses and offenses involving crack cocaine. See Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995). In the Anti-Drug Abuse Act of 1986, Congress mandated that, for sentencing purposes, any given quantity of crack cocaine be treated as equivalent to one hundred times its weight in powder cocaine. See 21 U.S.C. 841(b)(1)(A)(ii), (iii). The crack-powder distinction, which was subsequently incorporated into the Guidelines, resulted in gross sentencing disparities along racial lines. U.S. Sentencing Comm'n, *1995 Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995). Seeking to redress this problem, the Commission proposed an amendment to the Guidelines that would reduce those disparities. 60 FED. REG. 25,074 (May 10, 1995). Congress rejected that amendment despite the Commission's strong recommendation and two subsequent Commission reports advising that "the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives * * * [of] the Sentencing Reform Act." U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy*, 91 (May 2002); see also U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* (Apr. 29, 1997).

3. Congress Controls the Guidelines Through Its Enactment Of Mandatory Minimum Sentences.

Congress has repeatedly enacted mandatory minimum sentences that supersede the otherwise applicable Guideline and control a sentence regardless of the appropriate

Guidelines range for the offense, U.S.S.G. 5G1.1(b). See, *e.g.*, 21 U.S.C. 841(b)(1)(A), (B) (mandatory minimums for manufacture or distribution of controlled substances); 18 U.S.C. 924(c) (mandatory minimums for use of a firearm in the commission of a crime of violence or drug trafficking crime).[5] Such congressionally mandated minimums thus "prevent the commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments." Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, Speech at the University of Nebraska College of Law (Nov. 1998), *in* 14-SPG CRIM. JUST. 28, 33; see generally U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991) (*Mandatory Minimum Penalties*). They also "transfer sentencing power from the courts to the prosecution" by precluding a district court from departing below the mandatory minimum except on the request of the prosecution. *Mandatory Minimum Penalties*, *supra*, at iii; see 18 U.S.C. 3553(e); *Melendez* v. *United States*, 518 U.S. 120 (1996).[6]

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[5] There are dozens more such mandatory minimum provisions in the federal code. Ian Weinstein, *Fifteen Years After The Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 99 & n.56 (2003) (citing U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991)).

[6] See also Hon. Anthony M. Kennedy, Address to the American Bar Association (Aug. 9, 2003), *at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html ("Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is a debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided * * * . Most of the sentencing discretion should be with the judge, not the prosecutors.").

In short, mandatory minimums "skew the entire set of criminal punishments, for Congress rarely considers more than the criminal behavior directly at issue when it writes these provisions." Speech of Justice Breyer, *supra*, at 33. When a court sentences in a case involving a mandatory minimum that exceeds the applicable Guidelines range, it has no discretion at all, but rather must sentence exactly at the statutory minimum, so as to come as close as possible to satisfying the Guidelines without violating the conflicting statute. The fact that Congress can and often does impose this kind of distortion further demonstrates that sentencing under the Guidelines operates pursuant to a legislative scheme, not a judicial one.

D. The Commission Does Not Express the Collective Voice of Individual Sentencing Judges.

Despite the government's description of the Guidelines as "accumulated judicial wisdom * * * collectively reflected," U.S. Br. 24, the Commission offers no controlling voice or role for the judiciary. Although judges do serve on the Commission, that agency is not in any meaningful respect a vehicle for gathering and expressing the views of judges. Testimony of Deputy Att'y Gen. Larry Thompson Before U.S. Sentencing Comm'n (Mar. 19, 2002), *available at* http://www.ussc.gov/hearings/031902.htm ("In our constitutional system, we believe the sentencing commission exists to effectuate the express will of Congress.").

A key part of the PROTECT Act repealed the prior requirement that at least three judges must be members of the Commission, replacing it with a mandate that *no more than* three judges may serve. This provision thus expressly forbids judges from constituting a majority of the Commission, and even permits a Commission with no judicial members at all. And even if the Commission were composed entirely of judges, it could hardly be said that the few chosen represented the "collective[]" wisdom of the hundreds of members of the federal judiciary.

The governing statutes and the Commission's rules prescribe no special role for the judiciary. New and amended Guidelines may be proposed by anyone, and no institutional preference exists to ensure that the views of judges will receive special weight. The Commission repeatedly explains its amendments as "responding to congressional directives," "addressing Commission interests," and "resolving circuit conflicts." See, *e.g.*, U.S. Sentencing Comm'n, 2001 Annual Report 9 (2001), *at* http://www.ussc.gov/ANNRPT/2001/ch2-2001/PDF. Nowhere does it cite a direct response to judicial comment or opinion as a reason for a change to the Guidelines. And despite the fact that more than 650 Guideline amendments have been effected since 1988, we have not found more than three or four instances in which the Commission reported that a Guideline amendment was in any way influenced by judges who were not members of the Commission. See U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, app. C (2003) (setting forth amendments and reasons for adoption); 1995-2002 U.S. Sentencing Comm'n Ann. Reps., *at* http://www.ussc.gov/ANNRPT/1999/ar99toc.htm. Nor, as a practical matter, are judges substantially involved in the Guidelines revision process. During the past eight years, fewer than fifteen judges appeared to testify before the Commission on matters pertaining to the Guidelines; by comparison, non-judicial testimony was offered by more than 150 witnesses at those same hearings. See U.S. Sentencing Comm'n, Public Hearing Testimony and Transcripts, *at* http://www.ussc.gov/hearings.htm (last visited Sept. 18, 2004); 1995-2002 U.S. Sentencing Comm'n Annual Reports and Statistical Sourcebook, *at* http://www.ussc.gov/annrpts.htm (last visited Sept. 18, 2004) (collecting the Commission's annual reports from 1995-2002 with public hearing witness lists).

The Court should accordingly hold that factual findings that enhance sentences under the federal Guidelines are subject to the strictures of the Sixth Amendment.

II. Federal Sentencing Practices Can Be Adapted To The Requirements Of The Sixth Amendment Without Eliminating The Binding Effect Of The Federal Guidelines That Congress Deemed Essential To Reduce Sentencing Disparities.

In answering the second question presented, this Court should reject the government's argument that the district courts should treat the Guidelines as merely "advisory," a proposal that both lacks any internal coherence and runs contrary to Congress's principal goal of reducing sentencing disparity. The Court should instead require sentence-enhancing facts to be alleged in the indictment and proven beyond a reasonable doubt to the jury in a bifurcated sentencing hearing. Under this system, the jury would not act as a "sentencing jury" – *i.e.*, it would not actually "select an appropriate sentence from within a statutory range of punishment," Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004) – but instead would simply find the relevant facts. The judge would determine an appropriate sentence within the Guidelines range that those facts generate.

For example, in fraud cases, the applicable sentencing range is determined in significant part based on the monetary value of the loss inflicted by the offense. U.S.S.G. 2B1.1(b)(1). Thus, in a typical fraud case, the loss amount should be charged in the indictment, and the jury at sentencing should be instructed to identify, through an interrogatory or special verdict form, the amount of loss that is proven by the government beyond a reasonable doubt. The judge would then determine the appropriate Guidelines range based, in part, on the applicable offense level, which would in turn be based on the jury's findings regarding, *inter alia*, the amount of loss. The judge would retain the discretion to select a sentence within that range and to determine if departures permitted by law are appropriate. The principal difference between this system and the one employed pre-

Blakely would be that more rigor, and thus enhanced reliability, would be introduced into the fact-finding process.[7]

Preliminarily, however, we note that the second question presented will not resolve the disposition of *these cases*. For a variety of reasons, the government is precluded from seeking to have respondents re-sentenced. In *Fanfan*, the government had the opportunity to seek jury findings of the relevant sentencing facts in the wake of *Blakely*, but made no such request. And to the extent the Court concludes that a single jury must determine a defendant's guilt and the facts relevant to any enhancement (albeit in bifurcated proceedings), re-sentencing is precluded in both cases because the juries have been discharged.

Re-sentencing of these respondents would also likely be unconstitutional, although (for the reasons just stated) the Court need not reach that issue in these cases. It would violate the Ex Post Facto Clause to adopt a rule under which respondents would be re-sentenced subject only to the range set by the statute of conviction. That approach would substitute the higher statutory maximum for the lower Guidelines maximum to which respondents previously had a "legal right" at the time of the offense, *Blakely*, 124 S. Ct. at 2540, in violation of the Ex Post Facto Clause, see *Miller* v. *Florida*, 482 U.S. 423, 424 (1987).[8]

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[7] Federal courts may impose appropriate procedural safeguards, such as bifurcation of the guilt and sentencing phases, to protect defendants' rights. *Holmes* v. *United States*, 363 F.2d 281, 283 (CADC 1966) (Bazelon, C.J.). See also FED. R. CRIM. P. 57(b) .

[8] The scheme imposed pursuant to the Court's severability analysis would be subject to the Ex Post Facto Clause rather than the Due Process Clause because the Court's ruling would constitute a determination of "legislative intent," *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999), as opposed to an act of "common law judging," such as "the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent," *Rogers* v. *Tennessee*, 532

Re-sentencing respondents – as the Solicitor General strongly suggests, U.S. Br. 53 – would furthermore violate the Double Jeopardy Clause. The government omitted from its indictments of respondents the facts that, under the *Apprendi* line of cases, were required to be alleged because they trigger the enhancements of respondents' sentences. Those facts are, at the least, "the functional equivalent[s] of * * * element[s] of a greater offense than the one covered by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494 n.19. To now re-indict respondents would thus be to prosecute them unconstitutionally for greater offenses than the ones for which they have already been convicted, see *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932); *Brown* v. *Ohio*, 432 U.S. 161 (1977), as there is "no principled reason to distinguish * * * between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause," *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-12 (2003) (plurality opinion). Alternatively, even if such additional "enhancing facts" were not deemed further "elements" for purposes of double jeopardy analysis, subsequent indictments in these cases would unconstitutionally prosecute respondents further for the *same* offenses for which they were previously convicted.[9]

U.S. 451, 460, 461-62 (2001). But even were that not so, the retroactive application of such a scheme to respondents would violate the Due Process Clause. See *Bouie* v. *Columbia*, 378 U.S. 347, 353 (1964) ("An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law."); *Marks* v. *United States*, 430 U.S. 188 (1977).

[9] A subsequent prosecution would not be saved by the fact that jeopardy has not terminated with respect to respondents' sentencing. The very point of *Apprendi* and its progeny is that these are not mere sentencing facts, but rather that, like any elements, they must be alleged in an indictment and proved to a jury beyond a reasonable doubt (unless admitted). In circumstances

For this reason, if this Court applies the *Blakely* rule retroactively, it should hold that defendants in respondents' situation made be sentenced only on the basis of the existing indictments and jury verdicts in their cases.

A. The Government's Proposal Would Thwart the SRA's Principal Goal of Reducing Unwarranted Sentencing Disparities.

Despite the strong presumption in favor of severability, see *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion), the Solicitor General contends that the SRA and Guidelines – including judicial fact-finding by a bare preponderance of "reliable," albeit non-evidentiary, "information," U.S.S.G. 6A1.3(a) – "embod[y] a single coherent policy," such that the provisions deemed violative of the Sixth Amendment cannot be severed from the whole. U.S. Br. 45 (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999)). On that basis, he contends, this Court should deem the entire Guidelines scheme "advisory" and empower the district courts with the discretion to impose a sentence within the range set by the statute of conviction. That view of severability is inconsistent with both the government's own proposed solution and Congress's intent in enacting the SRA.

1. The government's proposal to authorize district court judges to impose any sentence within the range set by the statute of conviction flies in the face of Congress's principal objective in passing the SRA: the adoption of a binding sentencing system to reduce sentencing disparity. Congress

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like these, where the facts in question must determined in a proceeding with "the hallmarks of a trial on guilt or innocence," double jeopardy protections apply. *Bullington* v. *Missouri*, 451 U.S. 430 (1981). Compare *Monge* v. *California*, 524 U.S. 721, 728 (1998) (sentencing proceedings generally "do not place a defendant in jeopardy for an 'offence'").

would not have intended federal sentencing to operate in a manner contrary to that fundamental goal. As the Solicitor General elsewhere acknowledges, "both the decrease in uniformity and the decrease in proportionality would be *directly contrary* to Congress's intent that the Guidelines would avoid unwarranted disparities and ensure just punishment." U.S. Br. 54-55 (emphasis added).

Congress thus directed the Commission to pay "particular attention" to "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. 994(f). The Senate Report that accompanied the SRA reiterated Congress's belief that "[t]he shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform," S. REP. NO. 98-225, at 65, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3248 and declared that, as a result of the SRA's passage, "[f]or the first time, federal law will assure that the federal criminal justice system will adhere to a consistent sentencing philosophy," *id.* at 59, *reprinted in* 1984 U.S.C.C.A.N. at 3242.

Indeed, the government would have this Court enact a proposal that Congress explicitly spurned. See *Mistretta*, 488 U.S. at 367. In rejecting Senator Mathias's attempts to make the Guidelines only advisory, the Senate Judiciary Committee specifically cited the "poor record[s]" of states with voluntary guideline systems: the district attorney for Middlesex County Massachusetts, testified that "the voluntary guidelines in that state" were completely ineffective in reducing sentencing disparities and imposing a rational order on criminal sentencing in the state, because judges generally did not follow them." S. REP. NO. 98-225, at 79, *reprinted in* 1984 U.S.C.C.A.N. at 3262.

2. The Solicitor General's claims of non-severability are, moreover, profoundly inconsistent with its proposed solution, which would in fact cherry-pick for retention as binding law the provisions of the SRA and Guidelines that the government

prefers. Thus, the government argues that basic provisions of the SRA – such as the sentencing factors set out in 18 U.S.C. 3553(a) – would remain in force even if this Court held other provisions of the SRA unconstitutional. See U.S. Br. 67. Similarly, the government apparently *would leave the Guidelines in place* in the myriad cases that do not involve an enhancing fact triggering the Sixth Amendment. Even in those cases in which the Guidelines were deemed no longer binding, the government would not dispense with them altogether but instead would treat them as "advisory," a characterization that would presumably give the Guidelines some unspecified authoritative role – one that could be enforced on appeal – in cabining judicial discretion. And, perhaps most dramatically (but never discussed in the Solicitor General's brief), the government presumably would not reinstate parole, which was eliminated as a central element of the compromise embodied in the SRA.

Notwithstanding the government's reliance on the selective severance of the SRA and Guidelines, it notably makes no effort at all to defend its position under this Court's severability precedents. Nor could it do so, because its proposal is indefensible. Congress would not have intended the determination whether a particular case is subject to mandatory Guidelines sentencing to hinge (as it would under the government's position) solely on whether it involves an enhancing fact, or that the Sentencing Commission would have anticipated such a scheme.

2. The prosecutorial authority inherent in the government's proposal would moreover be so sweeping as to violate basic principles of due process. After a trial or guilty plea, prosecutors alone would have the complete discretion whether to assert enhancing facts that would not merely trigger an increase in sentence pursuant to a given sentencing scheme, but would trigger a shift to another sentencing scheme entirely. That is, under the government's proposal, whether the Guidelines control the sentence in any given case would depend solely on whether the prosecutor asks for an

enhancement based on facts not charged to the jury. The prosecutor would be free to decide what facts to allege on the basis of her assessment of whether application of the Guidelines would increase or decrease the defendant's sentence. The result would be to compound the sentencing disparities that originally plagued pre-Guidelines sentencing, because disparities would be introduced not just within but between sentencing schemes. This system would exacerbate the grave due process concerns that arise from the government's proposal to permit virtually indiscriminate judicial sentencing without any of the protections of the Sixth Amendment.

In 1987, the Commission anticipated that increased formality would be required in the fact-finding portion of the sentencing process that would accompany a determinative guidelines system. See U.S. Sentencing Comm'n, *Supplementary Report*, *supra*, *reprinted in* Federal Sentencing Guidelines 313, 363 (PLI Litig. & Admin. Practice Course, Handbook Series No. 146, 1987) (citing Note, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258 (1986)). The Commission thus recognized in its initial Guidelines that because "[t]he court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment[,] * * * [m]ore formality is * * * unavoidable if the sentencing process is to be accurate and fair." U.S.S.G. 6A1.3 cmt. (1987). However, the Commission opted not to mandate formal fact-finding procedures, instead relying on the federal courts to resolve the "procedural details" of the sentencing process. See *Supplementary Report*, *supra*, at 363.

The ad hoc fact-finding procedures subsequently developed by federal courts under the very general language of Federal Rule of Criminal Procedure 32(i)(3) and Guideline § 6A1.3 to resolve disputed factual issues in the federal sentencing scheme do not even begin to approach the formal, reliable procedures envisioned by the Commission and guaranteed by the Due Process Clause. By retaining the

current system's use of unfair and unreliable fact-finding procedures despite their deleterious effects on the defendant's constitutionally protected interests, while at the same time eliminating the restraints on judicial discretion imposed by the Guidelines scheme, the government's proposal would exacerbate those constitutional concerns immeasurably. Just to cite the most prominent examples:

(1) defendants are not guaranteed the right to a hearing on disputed factual issues, see, *e.g.*, *United States* v. *Robles-Torres*, 109 F.3d 83, 85 (CA1 1997);

(2) sentencing factors need be proved only by the lesser preponderance-of-the-evidence standard, thereby leading to the inclusion of uncharged and even acquitted conduct in the calculation of a defendant's guideline range, see, *e.g.*, Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459 (1993); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1186-1207 (1993);

(3) the factual reliability provided by the Federal Rules of Evidence, including protection against the use of hearsay, does not apply in sentencing hearings, see, *e.g.*, Fed. R. Evid. 1101(d)(3); 18 U.S.C. 3661, 21 U.S.C. 850; *United States* v. *Miele*, 989 F.2d 659, 663 & n.5 (CA3 1993) (Becker, J.) (citing authorities); Frank O. Bowman III, *Completing the Sentencing Revolution: Reconsidering Sentencing Procedure in the Guidelines Era*, 12 FED. SENT. R. 187, at *7 (2000);

(4) defendants may also be denied the right to subpoena witnesses to challenge factual allegations at sentencing, see, *e.g.*, *United States* v. *Jimenez Martinez*, 83 F.3d 488, 498 (CA1 1996); and

(5) prosecutors are consistently engaging in fact- and charge-bargaining, with the result that the facts which are ultimately presented to the court seldom constitute a complete and accurate report, see, *e.g.*, *United States* v. *Green*, No. CR. A. 02-10054-WGY, 2004 WL 1381101, at *9 (D. Mass. June 18, 2004) ("The most repugnant of the Department's tactics is

to lie to the Court in order to induce a guilty plea. This is the process known as 'fact bargaining.'"); Tony Garoppolo, *Fact Bargaining: What the Sentencing Commission Has Wrought*, 10 CRIM. PRAC. MAN. (BNA) 405, 405 (Oct. 9, 1996) (terming fact-bargaining "the dirty little secret in the prosecution of federal criminal cases").

B. The Proper Approach Is to Require That Enhancing Facts Be Alleged in Indictments And Proved to the Jury Beyond a Reasonable Doubt.

Rather than defending its own position, the government concentrates on attacking the use of juries to determine facts under the Guidelines as inconsistent with congressional intent and thus militating against severability. The government argues principally that Congress (and in turn the Sentencing Commission) anticipated that the Guidelines generally "would be applied based on fact-finding by the sentencing court, not a jury." See U.S. Br. 46-49. That is not, however, an argument against severability; it is instead a recitation of the characteristic of the Guidelines that violates the Sixth Amendment. Judicial fact-finding is not so inextricably intertwined with the essential elements of federal sentencing that the Guidelines cannot function without it.

The government does correctly note that "Congress was responding to perceived problems with the sentences imposed by judges, not juries, and so the Senate Report made clear that the projected guidelines 'are designed to structure judicial sentencing discretion.'" U.S. Br. 48. But this is an argument *against* the government's position. The SRA and the Guidelines were both developed with the explicit and overriding purpose of limiting judicial sentencing discretion. Congress's concern with the role of judges in sentencing was clear both to the SRA's supporters and opponents. Compare 130 CONG. REC. 976 (1984) (statement of Sen. Laxalt) ("The present problem with disparity in sentencing * * * stems precisely from the failure of [f]ederal judges – individually and collectively – to sentence similarly situated defendants in

a consistent, reasonable manner. There is little reason to believe that judges will now begin to do what they have failed to do in the past.") with *id.* at 973 (statement of Sen. Mathias) ("The proponents of the bill * * * argue in essence that judges cannot be trusted. You cannot trust a judge * * * you must not trust a judge."). By transforming judicial fact-finding from a vice that Congress sought to limit into a value that it sought to preserve, the government thus turns both logic and history on their heads.

The government's contention that the use of juries would be inconsistent with this Court's statement that the "'relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress,'" U.S. Br. 45 (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) (emphasis in U.S. Br.)), is incorrect as well. It is fair to say, as the Solicitor General does, that "Congress's means of achieving particular goals, as well as its ultimate ends, must be considered." *Ibid*. But that argument cuts against the government's position as well, for the relevant *means* that Congress enacted to rationalize federal sentencing was to direct the promulgation of binding sentencing guidelines. The Solicitor General's contention that the Guidelines should be merely "advisory" obviates Congress's choice; the use of juries preserves it.

Faced with the choice of junking the Sentencing Guidelines in their entirety or, on the other hand, using juries to determine sentencing facts, "Congress would probably have thought that [the use of juries to determine sentencing facts] was an effective (though, perhaps, not the most effective) means of pursuing its objective." *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 767-68 (1996) (plurality opinion). Although the legislative history of the SRA does not endorse the use of juries to find sentencing facts, "Congress' silence is just that – silence – and does not raise a presumption against severability." *Alaska Airlines, Inc.*, 480 U.S. at 686. If Congress really is as opposed to an expanded role for the jury in sentencing as the

government claims, then it can easily enact an alternative solution. Until then, however, it would cause far less disruption to require that sentence-enhancing facts be found by the jury than to strike down the entire Guidelines scheme pending possible congressional action.

The Solicitor General also argues against the use of juries on the ground that the fact-finding required would be "unfeasibly complex." U.S. Br. 54. Of course, in ninety-seven percent of all federal criminal prosecutions, the case never reaches the jury. But in all events, the government's argument here "is not so much a criticism of *Apprendi* as an assault on jury trial generally." *Blakely*, 124 S. Ct. at 2543. "Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury." *Ibid.* In our system, juries are trusted to resolve matters of considerable complexity, such as complicated matters involving statistical evidence and/or conflicting expert testimony.[10]

The means for conducting jury fact-finding are moreover well established – so much so that, on directions from the Department of Justice following *Blakely*, federal prosecutors

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[10] Thus, for example,

> Antitrust litigation * * * involves evidence concerning market definition, market shares, and a host of other highly technical questions of economic theory and effects on competition and prices. Securities litigation often involves a long chain of intricate commercial and financial transactions, comprehension of which requires immersion in arcane terminology, practices, and concepts. The same is true of some white collar crime prosecutions under RICO. Patent litigation is also technically demanding, as are medical malpractice cases and litigation involving engineering issues.

Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 501 (1998).

have been alleging enhancing facts in indictments and proving them to juries at sentencing. And ever since *Apprendi*, the government has regularly pleaded drug quantity and type in indictments and secured special jury findings on those questions. The government never explains how its claim that jury fact-finding is impracticable can be reconciled with this actual experience. Indeed, several lower federal courts have already called for juries to be convened if prosecutors insist on seeking enhanced sentences based on facts that were neither admitted by the defendant nor found by a jury. See, *e.g.*, *United States* v. *Ameline*, 376 F.3d 967, 983 (CA9 2004); *United States* v. *Booker*, 375 F.3d 508, 514 (CA7 2004). See generally *United States* v. *Khan*, 325 F. Supp. 2d 218, 231-32 (E.D.N.Y. July 20, 2004) (describing history of jury sentencing). In several states' criminal justice systems, moreover, juries have for centuries been responsible for determining the sentence itself – a role that encompasses and extends beyond the mere fact-finding role that we urge and that the Constitution requires. See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953 n.1 (2003) (listing states).

"There is no novelty in a separate jury trial with regard to the sentence." *Booker*, 375 F.3d at 514. Such bifurcated jury trials are already a mandatory part of capital prosecutions, *Ring* v. *Arizona*, 536 U.S. 584 (2002), and are commonly used to adjudicate criminal forfeiture allegations, Fed. R. Crim. P. 32.2(b)(4). Federal civil trials typically involve (and, under the Seventh Amendment, arguably require) a jury to determine liability and damages in separate proceedings. Cf. *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) ("The [Seventh Amendment's] right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any."). Indeed, the only anomaly in the federal system today is the *absence* of jury fact-finding for criminal sentencing. See Hoffman, *supra*, at 954 ("Apparently, jurors are necessary and trustworthy only at the two ends of the 'importance' continuum—in civil cases where

only money is at stake and in capital cases where a life is at stake. They are somehow unnecessary or untrustworthy in the vast middle, where only judges are trusted to impose prison sentences that can run from one day to a lifetime.").[11]

CONCLUSION

For the foregoing reasons, the judgments should be affirmed.

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[11] The practicality of requiring jury determination of sentencing facts, while judges retain control over sentencing, is demonstrated by the positive experience of Kansas. In the wake of *Apprendi* and a Kansas Supreme Court decision applying *Apprendi* to the Kansas sentencing guidelines, *State* v. *Gould*, 23 P.3d 801, 809-14 (2001), the Kansas legislature enacted legislation requiring a post-conviction jury proceeding to determine any facts that could increase the length of a defendant's sentence. See Kan. Stat. Ann. 21-4718(b) (2003); see also Kansas Sentencing Comm'n Report to the 2002 Kansas Legislature (2002), *reprinted in* 15 FED. SENT. REP. 32 (2002). Cf. Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, N.Y. TIMES, July 13, 2004, at A12 (quoting a Kansas prosecutor as saying that the new procedure "tacked about an hour onto a four-day trial").

Respectfully submitted,

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APPENDIX

SELECTED CONGRESSIONAL DIRECTIVES PERTAINING TO THE SENTENCING GUIDELINES

Congressional Directives Amending the Guidelines Directly (4)

Pub. L. No. 108-21, § 104(a), 117 Stat. 653 (2003) (enhancing penalties for kidnapping)

Pub. L. No. 108-21, § 401(b), 117 Stat. 668 (2003) (limiting downward departures for child crimes and sexual offenses)

Pub. L. No. 108-21, § 401(g), 117 Stat. 671 (2003) (limiting the availability of certain acceptance of responsibility reductions)

Pub. L. No. 108-21, Title I, § 401(i), 117 Stat. 672 (2003) (enhancing penalties for certain sexual offenses)

Congressional Directives Prohibiting the Commission from Enacting Certain Types of Amendments (3)

Pub. L. No. 108-21, § 401(j)(2)-(3), 117 Stat. 673 (2003) (prohibiting the Commission from altering certain changes Congress itself wrote into the Guidelines)

Pub. L. No. 108-21, § 504(c), 117 Stat. 682 (2003) (prohibiting the Commission from promulgating amendments that lower the penalties specified by Congress for obscene visual representations of child sexual abuse)

Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995) (rejecting amendments proposed by the Commission relating to crack cocaine and money laundering)

Congressional Directives Mandating Changes to the Guidelines (51)

Pub. L. No. 108-275, § 5, 118 Stat. 833 (2004) (enhancing penalties for identity theft offenses involving abuse of trust)

Pub. L No. 108-21, § 401(m), 117 Stat. 675 (2003) (ordering the Commission to "assure that the incidence of downward departures are substantially reduced")

Pub. L. No. 107-273, § 11009(c), 116 Stat. 1819 (2002) (requiring an enhancement of two levels for offenses involving the use of body armor)

Pub. L. No. 107-155, § 314, 116 Stat. 107 (2002) (specifying enhancements for election law violations)

Pub. L. No. 107-56, § 814(f), 115 Stat. 384 (2001) (stating that the Commission "shall amend" the Guidelines to assure that individuals convicted under 18 U.S.C. 1030 "can be subjected to appropriate penalties, without regard to any mandatory minimum term of imprisonment")

Pub. L. No. 106-420, § 3, 114 Stat. 1868 (2000) (specifying that the penalty for a certain type of fraud should be comparable to the base offense level for another type of fraud)

Pub. L. No. 106-310, § 3611, 114 Stat. 1228 (2000) (requiring that penalties for amphetamine laboratory operators be equivalent to those for methamphetamine laboratory operators)

Pub. L. No. 106-310, § 3612, 114 Stat. 1228 (2000) (specifying enhancements for manufacturing amphetamine and methamphetamine)

Pub. L. No. 106-310, § 3651, 114 Stat. 1238 (2000) (mandating increased penalties for trafficking in list I chemicals)

Pub. L. No. 106-310, § 3663, 114 Stat. 1242 (2000) (mandating increased penalties for trafficking in ecstasy)

Pub. L. No. 105-314, § 502, 112 Stat. 2980 (1998) (mandating enhancement for transportation of persons for illegal sexual activity)

Pub. L. No. 105-314, § 503, 112 Stat. 2980 (1998) (mandating enhancement for using a computer in the sexual abuse or exploitation of a child)

Pub. L. No. 105-314, § 504, 112 Stat. 2980 (1998) (mandating enhancement for misrepresenting the defendant's identity in the sexual abuse or exploitation of a child)

Pub. L. No. 105-314, § 505, 112 Stat. 2980 (1998) (mandating enhancement for a pattern of activity involving the sexual abuse or exploitation of a minor)

Pub. L. No. 105-314, § 506, 112 Stat. 2980 (1998) (mandating that the Commission promulgate amendments clarifying that "distribution of pornography" applies to distribution both for monetary remuneration and nonpecuniary interests)

Pub. L. No. 105-184, § 6, 112 Stat. 521 (1998) (mandating "substantially increased" penalties for telemarketing fraud)

Pub. L. No. 105-147, § 2(g), 111 Stat. 2680 (1997) (mandating that the penalties for electronic copyright infringement be dependent upon the retail value and quantity of the items involved)

Pub. L. No. 105-101, § 2, 111 Stat. 2202 (1997) (mandating an enhancement of at least two levels for offenses against property at national cemeteries)

Pub. L. No. 104-237, § 301, 110 Stat. 3105 (1996) (mandating enhancement for manufacturing and trafficking of methamphetamine)

Pub. L. No. 104-237, § 302(c), 110 Stat. 3105 (1996) (mandating a two-level increase for offenses involving list I chemicals)

Pub. L. No. 104-208, § 203(e), 110 Stat. 3009-566 (1996) (mandating precise enhancements for alien smuggling)

Pub. L. No. 104-208, § 211(b), 110 Stat. 3009-569 (1996) (mandating precise enhancements for fraudulent acquisition and use of government-issued documents)

Pub. L. No. 104-208, § 218(b), (c), 110 Stat. 3009-573, 3009-574 (1996) (mandating amendments to apply specific enhancements for crimes of involuntary servitude)

Pub. L. No. 104-208, § 334, 110 Stat. 3009-635 (1996) (mandating an increase in the base offense level for failure to depart, illegal reentry, and passport and visa fraud)

Pub. L. No. 104-132, § 730, 110 Stat. 1303 (1996) (requiring amendment so that an adjustment for international terrorism applies only to federal crimes of terrorism)

Pub. L. No. 104-132, § 805, 110 Stat. 1305 (1996) (mandating amendment to assure that individuals convicted of terrorist activity damaging a federal interest computer are imprisoned for at least six months)

Pub. L. No. 104-132, § 807(h), 110 Stat. 1308 (1996) (mandating enhancement for conviction of international counterfeiting of United States currency)

Pub. L. No. 104-71, § 2, 109 Stat. 774 (1995) (mandating two-level increases in the base offense level for two statutes involving sex crimes against children)

Pub. L. No. 104-71, § 3, 109 Stat. 774 (1995) (mandating two-level increases in the base offense level for using a computer in committing certain sex crimes against children)

Pub. L. No. 104-71, § 4, 109 Stat. 774 (1995) (mandating a three-level increase in the base offense level for transporting minors across state lines for the purposes of engaging in illegal sexual activity)

Pub. L. No. 103-322, § 80001(b), 108 Stat. 1986 (1994) (mandating amendments to add a "safety valve" to limit the applicability of mandatory minimum sentences for certain drug defendants)

Pub. L. No. 103-322, § 90102, 108 Stat. 1987 (1994) (mandating enhancements for drug-dealing in "drug-free" zones)

Pub. L. No. 103-322, § 90103(b) 108 Stat. 1987 (1994) (mandating enhancement for use or distribution of illegal drugs in the federal prisons)

Pub. L. No. 103-322, § 110501, 108 Stat. 2015 (1994) (mandating enhancement for use of semiautomatic firearm during crime of violence or drug trafficking)

Pub. L. No. 103-322, § 110502, 108 Stat. 2015 (1994) (mandating enhancement for a second offense of using explosive to commit felony)

Pub. L. No. 103-322, § 110512, 108 Stat. 2019 (1994) (mandating enhancement for using firearm in commission of counterfeiting or forgery)

Pub. L. No. 103-322, § 110513, 108 Stat. 2019 (1994) (mandating enhancement for firearms possession by violent felons and serious drug offenders)

Pub. L. No. 103-322, § 120004, 108 Stat. 2022 (1994) (mandating enhancement for felonies promoting international terrorism)

Pub. L. No. 103-322, § 140008, 108 Stat. 2033 (1994) (mandating enhancement for soliciting a minor to commit a crime)

Pub. L. No. 103-322, § 180201(c), 108 Stat. 2047 (1994) (mandating enhancement for possession or distribution of drugs at truck stops or safety rest areas)

Pub. L. No. 103-322, § 240002, 108 Stat. 2081 (1994) (mandating review and suggesting enhancement for crimes against victims over 65)

Pub. L. No. 103-322, § 280003, 108 Stat. 2096 (1994) (mandating enhancement of at least three levels for hate crimes)

Pub. L. No. 102-141, § 632, 105 Stat. 876 (1991) (mandating specific offense levels for sexual abuse or exploitation of minors)

Pub. L. No. 101-647, § 401, 104 Stat. 4819 (1990) (mandating specific enhancements for kidnapping offenses involving children)

Pub. L. No. 101-647, § 2507, 104 Stat. 4862 (1990) (mandating specific offense levels for certain major bank crimes)

Pub. L. No. 101-647, § 2701, 104 Stat. 4912 (1990) (mandating a two-level enhancement for methamphetamine convictions involving smokable crystal methamphetamine)

Pub. L. No. 100-700, § 2(b), 102 Stat. 4631 (1988) (mandating enhancement for fraud resulting in personal injury and suggesting that the enhancement be two levels)

Pub. L. No. 100-690, § 6453, 102 Stat. 4371 (1988) (specifying precise penalties for importation of controlled substances by aircraft and other vessels)

Pub. L. No. 100-690, § 6454, 102 Stat. 4372 (1988) (specifying precise penalties for drug offenses involving children)

Pub. L. No. 100-690, § 6468(c),(d), 102 Stat. 4376 (1988) (specifying precise penalties for drug offenses within federal prisons)

Pub. L. No. 100-690, § 6482(c), 102 Stat. 4382 (1988) (specifying precise penalties for operating a common carrier under the influence of alcohol or drugs)

Congressional Directives Suggesting Penalty Enhancement (11)

Pub. L. No. 108-187, § 4(b), 117 Stat. 2705 (2003) (specifying enhancement factors for the Commission to consider in adding guidelines for the offense of sending unsolicited electronic mail), *implementation pending in* Amendments to the Sentencing Guidelines 63-64 (2004), *at* http://www.ussc.gov/2004guid/RFMay04.pdf.

Pub. L. No. 107-296, § 225(b), 116 Stat. 2156 (2003) (specifying enhancement factors to consider for computer fraud and abuse), *implemented by* Guidelines, app. C, at 1448-50 (2003)

Pub. L. No. 107-273, § 11008(e), 116 Stat. 1819 (2003) (suggesting enhancement for assaults and threats against judicial officers)

Pub. L. No. 107-204, Title VIII, § 805, 116 Stat. 802 (2002) (requesting amendments to enhance the penalty for obstruction of justice), *implemented by* Guidelines, app. C, at 1373 (2003)

Pub. L. No. 107-204, Title IX, § 905, 116 Stat. 805 (2002) (requesting amendments to enhance the penalties for white collar crimes), *implemented by* Guidelines, app. C, at 1440 (2003)

Pub. L. No. 107-204, § 1104, 116 Stat. 808 (2002) (suggesting enhancement for fraud by officers of publicly traded corporations), *implemented by* Guidelines, app. C, at 1373 (2003)

Pub. L. No. 106-386, § 112(b), 114 Stat. 1489 (2000) (suggesting reconsideration of the penalties for interstate human trafficking and suggesting specific sentencing enhancements), *implemented by* Guidelines, app. C, at 1192 (2003)

Pub. L. No. 105-318, § 4, 112 Stat. 3009 (1998) (suggesting enhancements for intellectual property crimes), *implemented by* Guideline, app. C, at 1144-46 (2003)

Pub. L. No. 104-201, § 1423, 110 Stat. 2725 (1996) (urging penalty increases for offenses relating to importation and exportation of nuclear, biological, or chemical weapons or technologies)

Pub. L. No. 103-322, § 40112, 108 Stat. 1903 (1994) (suggesting enhanced penalties for certain types of sex crimes), *implemented by* Guidelines, app. C, at 983 (2003)

Pub. L. No. 103-322, Title XXV, § 250003, 108 Stat. 2085 (1994) (suggesting enhancement for fraud against victims over 55), *considered by* Guidelines, app. C, at 1003 (2003)