OHIO CRIMINAL SENTENCING COMMISSION
65 South Front Street · Second Floor · Columbus · 43215 · Telephone: (614) 387-9305 · Fax: (614) 387-9309

Chief Justice Thomas J. Moyer
Chairman

David J. Diroll
Executive Director

JUDICIAL DECISION MAKING AFTER *BLAKELY* AND *BOOKER*

By David Diroll & Scott Anderson
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This memo expands our earlier analysis of the United States Supreme Court's *Blakely* decision in light of the court's subsequent rulings in the *Booker* and *Fanfan* cases. The memo recaps the cases and applies their logic to judicial fact-finding under Ohio's criminal sentencing structure, which was not directly implicated by the cases.

I. THE SKINNY ON *BLAKELY* AND *BOOKER*

Last June, the U.S. Supreme Court struck down part of Washington state's numerical grid sentencing scheme in *Blakely v. Washington* (542 U.S. ___ (2004)). By a 5-4 vote, the court held that the 6th Amendment's right to trial by jury requires that facts considered by a judge in criminal sentencing—other than criminal history—must be authorized by the jury's verdict or the defendant's plea.

Last month, the same justices again lined up 5-4 to apply *Blakely* to the U.S. Sentencing Guidelines grid. The case, which combined appeals in *U.S. v. Booker* and *U.S. v. Fanfan* (543 U.S. ___ (2005)), tracked the 6th Amendment reasoning of the court in a line of cases from *In re Winship* through *Blakely* (see Appendix—Part V). The court simply applied the analysis to the Federal grid for the first time and—as we and others suspected—found parts of the Federal guidelines wanting.

Booker did not add much to 6th Amendment law. (Arguably, it subtracted.) Nor did it provide Ohio courts with any particular direction in interpreting Ohio's unique approach to sentencing guidance under R.C. Ch. 2929.

What's new with *Booker* is a second opinion that provides an interesting remedy for problems with the Federal guidelines. In a move that

surprised many observers (including us), Justice Ruth Bader Ginsburg switched sides to form a new 5-4 block that saved the U.S. Guidelines by declaring that the mandatory boxes in the grid (with their internal maximum terms) are now advisory. A sentence is constitutional under the 6th Amendment if it doesn't exceed the overall maximum term set by law (as opposed to the maximum in the box). In so doing, the remedial majority expressly (and ironically) rejected the alternative remedy of expanding the role of juries to review all facts.

What do these cases say about Ohio's felony sentencing statutes? How courts answer the question could mean that Ohio's criminal sentencing structure is virtually unscathed or that substantive changes are needed. (Full disclosure: Ohio's sentencing statutes are based on Sentencing Commission proposals enacted by the General Assembly in Senate Bill 2, effective 7.1.96.)

II. THE FACTS IN *BLAKELY*, *BOOKER*, AND *FANFAN*

A. *Blakely* Facts

Blakely reacted to his wife's filing for divorce by abducting, duct-taping, and forcing her at knifepoint into a box in his truck. He then drove her from Washington to Montana. Blakely pled guilty to 2nd degree kidnapping, domestic violence, and brandishing a gun.

Under Washington state's sentencing grid, Blakely faced a presumptive sentence of 13 to 17 months, plus 36 months if the judge determined that he brandished a gun. He pled guilty to both, which placed him in a statutory range of 49 to 53 months. The statutes further allowed "exceptional" confinement up to 10 years if a judge found certain "enhancing departure" factors. The judge found such a factor—"deliberate cruelty"—and added 90 months to Blakely's sentence. A Washington state court of appeals upheld the total sentence.

B. *Booker* Facts

A jury found the defendant guilty of possessing "at least" 50 grams of crack cocaine. The relevant statute set a penalty range of 10 years to life in prison. The U.S. Guidelines placed Booker within a grid box of 210 to 262 months in prison (within the larger 10 to life box). However, post-trial, the judge concluded that Booker actually possessed 566 more grams of crack. The judge then moved the disposition into another box (still within the larger 10 to life box) that gave a range of 360 months to life. The judge sentenced Booker to 30 years, the minimum in the new box. Booker appealed.

C. *Fanfan* Facts

Fanfan was convicted of possessing "at least" 500 grams of cocaine. The Guidelines maximum was 78 months. However, at the sentencing hearing, the judge found that Fanfan actually had 2.5 kilos of powder cocaine and 261.6 grams of crack. This moved the defendant to a new Guidelines box of 15 or 16 years. The judge did not impose the enhanced penalty in light of *Blakely*. The government appealed.

In this naked statement of facts, you may have noticed that Booker and Fanfan faced substantially different penalties for what ultimately seems like similar conduct. That can be explained—at least partially—by other facts that weren't included here. See the cases if you are curious, but don't expect the differences to be wholly logical.

III. THE HOLDINGS IN *BLAKELY* AND *BOOKER/FANFAN*

A. *Blakely* Holding

By a 5-4 vote, the U.S. Supreme Court reversed the state court. Justice Antonin Scalia wrote for the majority. He was joined by Justices Thomas, Stevens, Souter, and Ginsburg. Chief Justice Rehnquist dissented, as did Justices O'Connor, Breyer, and Kennedy. Remember these lineups.

The majority held that the defendant should have been sentenced only from the presumptive box of 49 to 53 months. Relying heavily on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (summarized in the Appendix), the court found that the facts supporting the "exceptional" 90-month sentence for deliberate cruelty were neither admitted by the defendant, nor found by a jury. The court held that Blakely's sentence violated the defendant's 6th Amendment right to trial by jury.

Thus, the court redefined "maximum" sentences for purposes of the 6th Amendment, irrespective of the 10-year maximum set by the Washington legislature.

Writing for the majority, Justice Scalia held:

- "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury [or admitted by the defendant] and proved beyond a reasonable doubt."

- "The defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed … without the challenged factual finding."

- "The relevant 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

    - "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings."

- In short, to justify additional time based on "deliberate cruelty," the issue should have been before the jury or admitted by the defendant.

- Note, however, that Justice Scalia also wrote that *Blakely* follows a line of cases that includes the court's decisions in *Jones v. U.S.*, 526 U.S. 227 (1999) and *Harris v. U.S.*, 536 U.S. 545 (2002).

    - Those cases make clear: "It is not of course, that … every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution. Judicial fact finding in the course of selecting a sentence within the authorized range does not implicate the … jury-trial and reasonable doubt components of the Fifth and Sixth Amendments."

B. *Booker* & *Fanfan*: The Constitutional Issue

The substantive issue in the two new cases was whether *Blakely* applies to the U.S. Sentencing Guidelines. More specifically, are sentences involving upward departures beyond the maximum in the range authorized by the jury's verdict constitutional? On this issue, the justices who voted to strike the post-conviction finding of racial motivation in *Apprendi* and deliberate cruelty in *Blakely* again formed the 5-4 majority.

After holding that the U.S. Guidelines are substantially similar to those invalidated in *Blakely*, the High Court found that the additional prison term imposed on Booker—based on the judge's post-conviction finding of a larger amount of drugs—violated Booker's 6th Amendment right to trial by jury. For the same reason, the trial court's refusal to impose added time on Fanfan was upheld.

Justice John Paul Stevens wrote the constitutional majority opinion. Echoing *Apprendi* and *Blakely*, it held:

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

- The maximum constitutional penalty that Booker faced was 21 years and 10 months in stir, not the 30 years imposed after a belated fact finding.

- This does not mean that a jury must determine *every* fact that could increase a defendant's sentence.

    - For purposes of the 6th Amendment, the relevant factual determination concerns only facts that "increased the sentence that the defendant could have otherwise received."

    - That is, the line of cases leading to this point foreshadowed a "rule requiring jury determination of facts that *raise* a sentencing *ceiling*" [emphasis added].

    - Judicial fact finding *within* a statutory range was left unscathed: "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."

    - The court then planted a constitutional hedge around the judge's discretion: "[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."

    - "There would be no *Apprendi* problem" with a scheme that instead bound a judge only by the range of penalties set by a statutory maximum, rather than mandating a maximum within an internal box.

- Thus, the 6th Amendment problem stems from the Washington and Federal guidelines *mandating* sentences from a narrow range—internal to the larger range set by law—and then allowing the judge, post-conviction, to increase the sentence beyond the narrower range by adducing other significant facts.

- Had the decision to move outside presumptive boxes been "merely advisory … their use would not implicate the Sixth Amendment. … Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted … the provisions that make the Guidelines binding on district judges."

C. *Booker* & *Fanfan*: The Remedy

The second issue in *Booker/Fanfan* was whether the unconstitutional aspects of the Guidelines could be severed from the rest. A new 5-4 majority formed to salvage the Federal guidelines by picking up on the last point noted above: that advisory boxes within the larger sentencing ranges would have saved the added time imposed on Booker.

The four dissenters in *Apprendi*, *Blakely*, and the substantive part of *Booker/Fanfan* joined with Justice Ginsburg to form this new majority. Justice Breyer wrote for the remedial majority.

- "We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory … incompatible with today's constitutional holding. We conclude that this provision must be severed and excised. … So modified, the Federal Sentencing Act … makes the Guidelines effectively advisory."

- In short, the boxes in the grid become advisory rather than mandatory. While headline writers picked up on this, it is important to note that the court left other mandatory aspects of the Guidelines untouched.

    - Justice Breyer made clear that judges are still required to: consider sentencing goals, policies, and purposes; consider offense and offender categories; minimize sentencing disparity; foster victims' restitution; "reflect the seriousness of the offense"; promote respect for the law; provide just punishment; afford adequate deterrence; protect the public; and provide the offender with rehabilitation and care.

- The remedial majority rejected the proposal (offered by Justice Stevens in dissent) to graft onto the existing system a constitutional jury trial requirement to deal with added fact

findings. In short, the court refused to require a jury determination of all facts that might increase a defendant's sentence. Instead:

- "The other approach, which we now adopt, would (through severance and excision . . .) make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct.

D. Confusion

In some respects, *Booker/Fanfan* is more confusing than *Blakely*. The constitutional majority certainly reinforces *Blakely*. But, if the remedial reasoning were applied to *Blakely* today, the result might differ.

To explain, let's return to the facts in *Blakely*. The sentencing court moved from one box on the Washington grid to another box—with a longer range of prison terms—because the judge made a post-conviction finding (deliberate cruelty) that mandated use of the higher box.

Booker/Fanfan tells us that had the guidelines instead been advisory and the judge made the same post-conviction finding, if the judge, in his *discretion*, imposed a sentence from the higher box, the sentence would be constitutional.

The remedy seems more concerned with saving the Federal Guidelines than it is with vindicating the 6th Amendment. Perhaps that isn't surprising since the remedy was largely crafted by justices who dissented in *Apprendi*, *Blakely*, and substantive *Booker/Fanfan*.

In short, one can contend that *Booker* gives new weight to *Blakely*. But one can also argue that *Booker*, *in toto*, actually weakens *Blakely*'s 6th Amendment principle, especially when you consider that the remedial opinion rejected the broader use of juries to "solve" the problems raised. The court explicitly rejected the argument that the 6th Amendment requires the jury does not have to hear every sentencing-enhancing fact.

IV. WHAT DO *BLAKELY*, *BOOKER*, & *FANFAN* MEAN TO OHIO?

A. Lessons From the Cases

This seems to be the law after *Booker/Fanfan*:

- The 6th Amendment guarantees each criminal defendant the right to have a jury determine each element of his criminal case prior to finding him guilty.

- The 6th Amendment does not require a jury to determine every fact that might have a bearing on sentencing, however.

- Labels such as "element" and "sentencing factor" are insufficient by themselves to determine whether a jury or a judge must consider certain facts. The test turns on a deeper issue: whether the fact in question is "essential to the punishment." If the fact is essential to the defendant's punishment, then the jury must determine that fact in finding him guilty.

- Under the 6th Amendment, a judge cannot make a finding of fact that would increase a defendant's sentence beyond the maximum sentence a jury could authorize with its guilty verdict. To do so would divest the jury of its authority to find the facts essential to the defendant's punishment.

- However, a judge can make fact findings that enhance a defendant's sentence *within* the range authorized by the jury's guilty verdict.

- The range authorized by the jury's verdict, under the *Booker* remedy, seems to be the overall maximum set by statute. The "maximum" in any internal sentencing boxes must be seen as advisory only.

The Appendix (Part V) runs through the line of relevant cases from *Winship* to *Blakely*. Knowledge of those cases—not just of *Apprendi*, *Blakely*, and *Booker*—is helpful in understanding the kinds of sentence-enhancing facts that the U.S. Supreme Court views as "essential" versus those that a judge historically considered regarding sentencing. *Apprendi*, *Blakely*, and *Booker* allow the historical considerations, even when they increase the defendant's punishment.

B. Applying the Lessons Generally

1. Indeterminate Schemes Are Constitutional. Indeterminate schemes (*e.g.*, "5 to 25 years") do not present constitutional problems because, in such schemes, the judge can't increase a defendant's sentence beyond the maximum sentence a jury could authorize. The jury's guilty verdict authorizes the judge to use discretion in sentencing the defendant to any term within the

statutory range. The judge's use of discretion does not violate the defendant's right to a jury trial under the 6th Amendment.

2. Some Determinate Schemes Are Unconstitutional. A particular kind of determinate sentence structure—one based on the Minnesota Guidelines developed in the late 1970s (and employed by the Federal Guidelines of 1984 and several states, including Washington)—violates the 6th Amendment.

In the Federal and Washington schemes, there are two applicable ranges of sentences for each offense category: 1) the range bounded by the statutory maximum and 2) the internal range bounded by the mandatory guidelines. The former was designed to set the broad parameters for the offense, the latter to foster greater uniformity in sentencing.

In *Blakely*, the defendant faced a statutory maximum of 10 years. However, the mandatory guidelines range for the offense was 49 to 53 months. The Washington system permitted a judge to consider (post-conviction) certain facts that required an upward departure from the offense's guidelines range. The judge found that that Mr. Blakely acted with deliberate cruelty—a fact that a jury could not consider—and sentenced him to 90 months. The constitutional problem was that a jury's verdict could not have authorized a sentence between 53 months and 10 years.

Unlike in the indeterminate schemes where a judge has discretion to sentence within the full statutory range, in Washington, the judge was restricted to the narrow box of ranges prescribed for the offense. The guidelines had, in effect, reduced the authority of the judge to impose—and of the jury to authorize—a sentence longer than 53 months. In short, the Court determined that the legislature had invalidated its wider box of sentencing options by injecting within its sentencing scheme a very narrow box of sentences that a judge must use.

Since the facts supporting a judge's upward departure from the mandatory guideline range were not determined by the jury, the U.S. Supreme Court determined that, in Washington, the maximum sentence for purposes of the 6th Amendment was the maximum sentence provided by the mandatory guideline range (that is, the lid of the box within the box).

3. Fixing Broken Schemes. There appear to be four ways to fix the constitutional infirmity evinced by Federal style schemes.

- **Every Fact to Jury.** Require juries to determine every fact that could increase a defendant's sentence. This cures the infirmity by decreasing the judge's power to fashion sentences. It gives the jury power to determine any fact that might increase a defendant's sentence. Kansas took this approach after *Apprendi*. The catch is that the remedial majority in *Booker* rejected it for the Federal system. Hence, jury sentencing on every fact that could increase a sentence is not required under the 6th Amendment.

- **Some Facts to Jury.** Require juries to determine some, but not all facts, that could increase a defendant's sentence. This approach attempts to separate the sheep from the goats, to make a principled decision between facts a jury must decide and facts a judge may decide in sentencing a criminal defendant. The U.S. Supreme Court hinted at this by excluding the defendant's criminal history (and concomitant considerations of recidivism) from the purview of the 6th Amendment, while stating that facts like "deliberate cruelty" (*Blakely*) and requisite drug amounts (*Booker* and *Fanfan)* should be determined by a jury.

  The underlying principle might be one of separating factual judgments from value judgments and letting juries decide the former and judges decide the latter. The problem is that the fact-value distinction is notoriously difficult to maintain. Factual inquiries are grounded in the inquirers' values, the purposes for which the person initiates the inquiry. Facts (the things we choose to adopt as evidence) imply values (the reasons we are seeking evidence). Given the strong connection between facts and values, separating them into usable categories for sentencing purposes would be difficult. Moreover, none of the Court's decisions mention—even in *dicta*—that the fact-value distinction is at the core of their 6th Amendment analysis.

- **Advisory Boxes.** Make the narrow guideline ranges advisory instead of mandatory. This cures the constitutional infirmity by making a determinate system more like an indeterminate system. It makes the statutory maximum the true maximum sentence for purposes of the 6th Amendment. Any departure from a narrow range is valid so long as the overall maximum isn't exceeded. This straightforward solution is the one the Court chose in *Booker* and *Fanfan*.

- **Facts Beyond Maximum to Jury.** Require juries to determine *every* fact that could increase a defendant's statutory maximum sentence. This may be the best option in the spirit of *Apprendi*, *Blakely*, and part one of *Booker*. "Essential" facts are those that increase the defendant's sentence beyond what she otherwise could have received.

  (This analysis also comports with the court's decision to apply *Blakely* to guilty pleas. On first blush, guilty pleas seem to be outside the purview of the right to a jury trial. After all, a guilty plea waives the jury trial right. However, a jury trial waiver is presumed to be knowingly and voluntarily made. The 6th Amendment argument is that a defendant cannot possibly waive her right to a jury trial knowingly if, for instance, a jury's guilty verdict could net 53 months, while the court's sentence could net 10 years.)

  In *Blakely*, the court collapsed the 10 year statutory maximum into the 53 month sentence mandated by the guidelines. In *Booker* and *Fanfan*, the court increased the maximum sentence under the guidelines to the much greater statutorily defined maximum. Thus, in all three cases, the Court ensured that the maximum sentence a jury's verdict could authorize equaled the maximum sentence a judge could impose. This equality seems to be the constitutional principle underlying *Blakely, Booker*, and *Fanfan*.

C. Quick Recap of Ohio Sentencing Law

1. Ohio's Hybrid Approach. Ohio's unique system uses aspects of both determinate and indeterminate sentencing.

- **Indeterminate Aspects.** S.B. 2 used fairly broad ranges for each level of offense (without formally creating smaller boxes within each range). Ohio also makes every prison-bound offender eligible for parole-like supervision after serving a prison term. These are indeterminate principles.

- **Determinate Aspects.** At the same time, S.B. 2 instructs Ohio judges to impose a definite prison term ("truth in sentencing"). With a few narrow exceptions, parole release was abolished and administrative reductions (such as "good time") were eliminated. Caps on consecutive terms were repealed. The time meted out at sentencing is to be the time served. These are determinate principles.

2. Key Ohio Sentencing Concepts. Here are other characteristics of Ohio's system:

- **No Grid.** To afford greater judicial discretion in a structured scheme, Ohio rejected the grid sentencing system, with presumptive sentencing boxes, adopted by various jurisdictions (including Washington state and the Federal Guidelines).

- **Fixed Maximums.** Ohio's approach authorizes ranges of prison terms for each degree of offense, with fixed maximum terms (e.g., 10 years for F-1s).

- **Guiding Principles.** Sanctions must be designed to punish the offender and protect the public. Sanctions should not demean the seriousness of the offender's conduct. They should be consistent with sentences for similar offenders under similar circumstances.

- **Specified Exceptions.** There are no upward "departures" from the maximums unless the surpenalty is specified in the indictment and admitted or proved to a jury or judge beyond a reasonable doubt.

    - These add-on "specs" include possible added time for offenses involving firearms, for repeat violent offenders (RVOs) and major drug offenders (MDOs) etc.

- **Presumption of Prison for High-Level Felons.** Judges are told to presume that 1st and 2nd degree felons should go to prison unless certain findings are made.

- **Guidance Against Prison for Low-Level Felons.** 4th and 5th degree felons are steered to community sanctions unless the judge finds one of nine aggravating factors, together with other findings.

- **Balancing Factors.** Ohio statutes authorize judges alone to balance certain seriousness and recidivism factors and to make findings.

- **Consecutive Sentences.** For two or more offenses, the judge may consider consecutive terms by weighing certain factors.

- **Appellate Review.** Many sentencing provisions are subject to appellate review.

D. Applying the Lessons to Ohio

1. Is *Blakely* Relevant? Before turning to substantive *Blakely* challenges, it is noteworthy that the 9th and 12th Districts have held that Ohio's sentencing scheme is not unconstitutional under *Blakely* because Ohio has indeterminate sentencing. It is indeterminate in the sense that the sentencing code presents a range of sentences within each felony level from which a judge can choose an appropriate sentence. Since *Blakely* was held not to apply to indeterminate sentences, *Blakely* issues are not relevant here. Thus, no *Blakely* challenge to any particular sentencing statute in Ohio should be upheld. See *State v. Jenkins*, 2005-Ohio-11 (Ohio App. 9 Dist., Jan 5, 2005), *State v. Rowles* 2005-Ohio-14 Ohio App. 9 Dist., Jan 5, 2005), and *State v. Hibbard* 2004-Ohio-7318 (Ohio App. 12 Dist., Dec. 30, 2004), each citing *State v. Berry*, 2004-Ohio-6027 (Ohio App. 12 Dist., Nov. 15, 2004).

Since it is unclear whether the 9th and 12th Districts' reading will become the law statewide, let's look at the individual provisions in S.B. 2 that have raised *Blakely* issues.

2. Maximum Sentences. Some commentators believe that Ohio sentencing law created a box within the sentencing range regarding maximum terms.

Ohio law sets out a range of prison terms for each felony level (§2929.14(A)). For instance, a first degree felon (F-1) faces a term that ranges from a minimum of three years to a maximum of 10 years. The judge may select any term from the range.

But §2929.14(C) further says that a judge "may impose the longest prison term authorized for the offense pursuant to division (A) of this section [the ranges]" only upon those offenders who committed "the worst forms of the offense" or "pose the greatest likelihood of committing future crimes."

Does this effectively create a box within a box?

- **Argument: There Is a Problem.** The argument that §2929.14(C) creates an internal mandatory maximum term comes from a literal application of the holding in *Blakely*.
    - Since the judge must make post-conviction findings before imposing the maximum, the statute effectively

presumes that the true maximum term is one notch lower than the statutory maximum.
    - Thus, the presumptive maximum is nine years for an F-1, rather than the 10-year maximum set by the statutory range.
    - The 10 year term in, say, the F-1 range only can be imposed if the judge makes the "worst form" or "greatest likelihood of recidivism" finding.
    - Because a jury is not permitted to make these findings, the 6th Amendment right to a jury trial under *Blakely* and *Booker* is violated.

- **Argument: There Isn't a Problem.** Here is the counter argument:

    - The §2929.14(A) maximum sets the true maximum prison term for the offense. Unlike jurisdictions with sentencing grids, there was no legislative intent in Ohio to create internal maximum terms. That is, Ohio did not intend boxes within a larger box.
        - For an F-1, say, the whole three to 10 range is considered when advising a defendant as to the punishment faced, whether it's by counsel or by a judge in accepting a guilty plea. And the entire range is authorized by a jury's verdict on that level of offense.
    - Findings such as the "worst form of the offense" and "greatest likelihood of future crime" were designed to compare conduct in the case with cases involving other offenses and offenders. As Judge Burt Griffin states, these are very different from the facts in *Apprendi*, *Blakely*, and *Booker*, where the facts effectively redefined the crime. The "worst form" and "greatest likelihood" probably aren't "facts" at all in the literal sense.
    - *Blakely* and *Booker* clearly allow post-conviction judicial fact finding within statutory ranges. Internal boxes, even those that appear to be mandatory, become advisory under the *Booker* remedy. The statutory maximum is the constitutional maximum.
    - Besides, it's unfair to ask jurors to find the "worst form of the offense" or the "greatest likelihood of recidivism" since their experience is one case old. These are decisions historically and appropriately left to judges.

- *Blakely* and *Booker* recognize this in making clear that all facts do not have to be found by the jury. As noted in *Jones*, "Judicial fact finding in the course of selecting a sentence within the authorized range does not implicate the … jury trial … [component] of the Sixth [Amendment]."

- **Ohio Maximum Sentence Cases to Date.** Only one Ohio court has reduced a maximum sentence on *Blakely* grounds. The court in *State v. Bruce,* 2005-Ohio-373 (Ohio App. 1 Dist., Feb. 4, 2005), announced that, although the statutory maximum for an F-1 was 10 years, the maximum sentence that could be given under the 6th Amendment was nine years. The court stated that its decision in *Bruce* was a reversal of its prior holdings, a reinterpretation of *Blakely* brought about by *Booker*.

  The court did not make clear, however, in what manner *Booker* could be seen as modifying the *Blakely* holding sufficient to support a reversal of precedent.

  All other Ohio appellate courts that have decided the issue determined that *Blakely* does not require the reduction of maximum sentences. The courts have reasoned that *Blakely* proscribes increases over the maximum sentence allotted, not sentences going up to the maximum. *State v. Murphy,* 2005-Ohio-412 (Ohio App. 11 Dist., Feb 4, 2005); *State v. Stillman,* 2004-Ohio-6974 (Ohio App. 5 Dist., Dec. 20, 2004); *State v. Henry,* 2004-Ohio-6711 (Ohio App. 5 Dist., Dec. 13, 2004); *State v. Ford,* 2004-Ohio-5610 (Ohio App. 8 Dist., Oct. 21, 2004).

  However, in two 8th District Court of Appeals cases, judges have remanded cases involving maximum sentences for re-sentencing in light of *Blakely*. *State v. Murrin,* 2004-Ohio-6301 (Ohio App. 8 Dist., Nov. 42, 2004); *State v. Quinones,* 2004-Ohio-4485 (Ohio App. 8 Dist., Aug. 26, 2004). On January 28, 2004, the *Quinones* case was accepted for review by the Ohio Supreme Court.

3. Sentences Exceeding the Maximum. It is uncontested in Ohio that, under *Blakely* and *Booker*, sentences greater than the maximum authorized by statute are not permitted unless authorized by a jury's verdict.

Questions have been raised in two related areas: consecutive sentences and specifications calling for added prison terms.

- **Consecutive Sentences.** An Ohio court may impose consecutive sentences on a convicted felon, but only after making certain findings, namely that consecutive terms 1) are necessary to protect the public or to punish the offender, 2) are not disproportionate to the seriousness of the offense, and 3) are, based on the circumstances of the offenses or the offender's criminal history, otherwise appropriate (2929.14(E)(4)). Each of the cases in the *Apprendi* line deal with "an offense", so the U.S. Supreme Court hasn't provided any guidance on this issue.

  - **Argument: There Is a Problem.** Consecutive terms may be suspect in Ohio because there is guidance in favor of concurrent terms unless the judge makes certain findings to justify stacked sentences. This could be viewed as a presumption of concurrence that would require an admission or jury finding to make consecutive.

  - **Argument: There Isn't a Problem.** *Blakely* and *Booker* focus on whether the maximum that a judge imposes for an offense does not exceed the maximum term authorized by a jury's verdict. The rules apply individually to *each* case that is part of consecutive sentences. Besides, the High Court held that the jury does not have to consider every fact that affects a sentence.

    - Findings such as "necessary to protect the public" and "disproportionate to seriousness" are comparative findings for judges to make. Again, as Judge Griffin notes, these are very different from the facts in the *Apprendi* line which effectively redefine the offense. "Necessary to protect" and "disproportionate to seriousness," while findings, probably aren't "facts" in the *Apprendi* sense.

  - **Ohio Consecutive Sentence Cases To Date.** Ohio appellate courts have roundly rejected *Blakely* challenges to consecutive sentences. *Blakely* only prohibits a judge from increasing *a* sentence beyond the maximum permitted and that sentences on *multiple* offenses do not unconstitutionally circumvent that prohibition. *State v. Monford,* 2004-Ohio-5616 (Ohio App. 1 Dist., Oct. 22,

2004); *State v. Henry,* 2004-Ohio-6711 (Ohio App. 5 Dist., Dec 13, 2004); *State v. Madsen,* 2004-Ohio-4895 (Ohio App. 8 Dist., Sep. 14, 2004); *State v. Jenkins*, 205-Ohio-11 (Ohio App. 9 Dist., Jan 05, 2005); *State v. Taylor,* 2004-Ohio-5939 (Ohio App. 11 Dist., Nov 09, 2004).

One exception to this general trend is the relatively early case of *State v. Lativius Moore,* 2004-Ohio-5583 (Ohio App. 8 Dist., Oct 07, 2004).

- **Specifications Resulting in Longer Prison Terms.** Ohio statutes authorize prison terms beyond statutory maximums for having firearms, engaging in drive-by shootings, gang membership, and other evils (see §2929.14(D)(1), *etc.*).

  With two narrow exceptions (below), these do not seem to raise a problem under anyone's reading of *Blakely* and *Booker*. The Sentencing Commission in its proposals, and the General Assembly in its enactments, have been careful to require that these surpenalties be specified in the indictment and proved beyond a reasonable doubt to the jury. The criminal will not get more punishment than bargained for when guilt is determined by a jury or by his admission.

- **RVO & MDO Exceptions.** Here are the exceptions. Time beyond the maximum in the basic ranges may be added for those who are found to be repeat violent offenders ("RVO" under §2941.149 & §2929.14(D)(2)(a)) or major drug offenders ("MDO" under §2941.1410 & §2929.14(D)(3)(a)). In each case, the misconduct must be specified in the indictment. However, the actual finding is made by the judge rather than the jury. Arguably these provision run afoul of *Blakely* and *Booker*.

  RVOs. Since the RVO surpenalty turns on the offender's criminal history, some argue that *Blakely's* prior history exception eliminates the need for jury fact finding on RVO issues. So far, Ohio courts have not addressed the issue.

  MDOs. The MDO presents a different problem. The surpenalty always turns on one issue: was a sufficient quantity of drugs involved? The standard is objective, since MDO weights are set by statute. If the weight is part of the indictment and subject to the jury's finding, then there may not be a problem even though the judge must make the

formal MDO finding. However, Commission members generally believe it makes sense to tweak the MDO language to avoid possible *Blakely* problems.

4. Sentences Greater Than the Minimum Term. An Ohio statute requires the court, when imposing a prison term on a person who has not previously been sentenced to prison, to "impose the shortest prison term authorized for the offense unless the court finds that the shortest prison term will demean the seriousness of the offender's conduct" or "not adequately protect the public from future crime" (§2929.14(B)).

- **Argument: There Is a Problem.** Since a sentence other than the shortest prison term cannot be made unless there is an additional finding by the judge, the minimum term in the range becomes the maximum punishment for a person facing his or her first prison stay. For example, an F-1 with no prior prison term can only be sentenced to three years, rather than another term within the three to 10 year statutory range.

- **Argument There Isn't a Problem.** The maximum prison term from the range remains the maximum available. *Booker* makes pellucid that the 6th Amendment issue involves fact finding that leads to punishment exceeding the *maximum*. The additional finding is an historic sentencing factor relating to where the person should fall in the entire range authorized by the jury's verdict or defendant's admission. The jury need not decide every enhancing fact.

    - Again, "demean the seriousness" and "not adequate to protect the public" are comparative findings for judges to make. They differ dramatically from the element-like facts that increased penalties in the *Apprendi* line. In fact, they arguably aren't "facts" in the *Apprendi* sense.

- **Ohio Greater-Than-the-Minimum Cases To Date.** Even before *Booker*, Ohio courts generally rejected *Blakely* challenges to "more than the minimum" sentences. Courts have reasoned that *Blakely* applies only when the maximum sentence has been breached. See, for example, *State* ex rel *Calabrese,* 2004-Ohio-6616 (Ohio App. 8 Dist., Dec. 06, 2004).

  The 1st, 5th, 8th, 9th, 11th, and 12th Districts have all rejected *Blakely* challenges to "more than minimum sentences". *State*

v. Eckstein, 2004-Ohio-5059 (Ohio App. 1 Dist., Sep. 24, 2004)(NO. C-030139); *State v. Henry,* 2004-Ohio-6711 (Ohio App. 5 Dist., Dec. 13, 2004); *State v. Perry,* 2005-Ohio-27 (Ohio App. 8 Dist, Jan. 06, 2005); *State v. Jenkins,* 2005-Ohio-11 (Ohio App. 9 Dist., Jan. 05, 2005); *State v. Sanders,* 2004-Ohio-5937 (Ohio App. 11 Dist., Nov. 09, 2004); and *State v. Berry,* 2004 WL 2580555, 2004-Ohio-6027 (Ohio App. 12 Dist., Nov. 15, 2004.

There is some dissention in the 8th District on this issue, however. In a cluster of early cases, "more than the minimum" sentences were reversed and remanded. *State v. Angel Glass,* 2004-Ohio-4495 (Ohio App. 8 Dist., Aug. 26, 2004); *State v. Rayshun Glass,* 2004-Ohio-4912 (Ohio App. 8 Dist., Sep 16., 2004); *State v. Martin,* 2004-Ohio-5034 (Ohio App. 8 Dist., Sep. 23, 2004); *State v. Mason,* 2004-Ohio-5388 (Ohio App. 8 Dist., Oct. 07, 2004); and *State v. Washatka,* 2004-Ohio-5384 (Ohio App. 8 Dist., Oct. 07, 2004). But later 8th District cases have followed the general pattern.

5. Other Issues. By clearly making an exception for facts that do not push a sentence beyond the maximum in the range, *Booker* and other law probably settle these issues.

- **Seriousness & Recidivism Factors.** Seriousness and recidivism factors must be weighed in all felony cases before a judge decides in favor of or against imposing a prison sentence and where the offender falls within the standard ranges of prison terms. We read these as historical factors to be weighed by judges in selecting where an offender falls in the sentencing ranges. (See §2929.12(B) & (C)) & §2929.12(D) & (E).)

- **Community Control for F-4s & F-5s.** The Code requires a court to give an F-4 or F-5 offender a community control sanction, unless the court makes one of nine listed findings (involving criminal history, the impact on the victim, etc.) (§2929.13(B)(1)). Again, we see these as factors that a judge historically considered in making a decision about the appropriate range of sanctions. The General Assembly made clear that this is not a legal presumption.

- **Violators.** Similarly, *Blakely* and *Booker* don't seem to be implicated by the penalties available for community control violations and post-release control violations (§2929.15(B) & §2929.141), since violation sanctions are within the scope of the

initial sentences. In fact, applying *Blakely* to the judicial fact-finding needed to sanction violators could effectively negate *any* sanctions. It's very unlikely the court intends such a reading.

E. Staff Conclusions

Ohio's sentencing scheme appears to be constitutional. It assures that the maximum sentence a jury's verdict could authorize equals the maximum sentence a judge could impose.

Ohio's sentencing guidance statutes begin by clearly preserving judicial discretion (§2929.12(A)). The ensuing provisions then guide that discretion and authorize appellate review of certain sentences to foster adherence to that guidance. With the exceptions noted in the next paragraph, nothing in this guidance authorizes a judge to impose a sentence beyond the maximum term available for an offense.

A judge can only exceed the sentencing ranges provided in statute when a specification is found. With two narrow exceptions, the jury makes the factual determination contained in each such specification, as required by *Apprendi*, *Blakely*, and *Booker*. Thus, any increase beyond the statutory range is authorized by the jury verdict. The maximum sentence a judge can give is the maximum sentence a jury can authorize.

The two exceptions are the surpenalties for repeat violent offenders and major drug offenders. Although they are included in the indictment, they require the *court*, not the jury, to determine facts that could increase a sentence. Arguably the MDO spec should change to require juries to make these findings of fact.

As for the RVO spec, the additional sentence is based on the defendant's prior criminal conduct, an explicit exception to jury requirement propounded in the cases culminating in *Booker* and *Fanfan.* However, the cases remind us that labels don't decide constitutional issues. The key is court's constitutional principle: the maximum sentence a jury may authorize and the maximum sentence a judge may impose must be equal. With that in mind, the RVO spec also may need to be refined. The issue will turn on the breadth of the criminal history exception.

Some argue that Ohio's sentencing scheme is unconstitutional with respect to maximum, consecutive, or more-than-the-minimum sentences. The crux of each of these arguments is that, in order to give these sentences, a court must make an additional finding on the record. The putative constitutional principle is that any fact that increases a sentence at all requires a jury determination.

Booker and *Fanfan* explicitly rejected this principle; the 6th Amendment does not require that a jury determine *every* fact that could increase a defendant's sentence. Ohio statutes are designed to structure how a judge evaluates the offense and offender within the statutory ranges.

Besides, the nature of the findings in these situations ("demean the seriousness of the conduct", "likely recidivism," appropriately use correctional resources, etc.) are very different from the facts that caused problems in the *Apprendi* line. Ohio's findings are historical judicial factors. Arguably, they aren't "facts" at all in the *Apprendi* sense.

Put another way, there is a meaningful difference between facts such as "deliberate cruelty" and "racial motivation" (that sound like findings on elements that fit the jury's traditional role) and factors about the "most serious form of the offense," "demeaning the seriousness," "consistent with sentences in similar cases," and the like. The latter findings historically are the types of things we elect judges to do. A jury isn't well prepared to handle them.

Not only is Ohio's system not broken, it appears to be working as intended. The guidance toward community sanctions for less menacing offenders, toward minimum sentences, toward sending high level felons to prison, toward using the maximum term for the worst offenders, and toward increasing consistency are working (see the Commission's January 2005 Monitoring Report).

V. Appendix: THE ROAD TO *BOOKER*/*FANFAN*

Blakely, *Booker*, and *Fanfan* did not occur in a vacuum. Here are the key U.S. Supreme Court cases on the road to *Booker* and *Fanfan*.

- ***In Re Winship*** (397 U.S. 358 (1970): A criminal defendant cannot be convicted unless there is proof beyond a reasonable doubt (BRD) of every fact necessary to constitute the crime charged. The court drew a distinction between facts that are *elements* of the crime, which must be proved BRD, and other facts considered in defenses or as *sentencing determinations*.

- ***Mullaney v. Wilbur***, 421 U.S. 684 (1975) & ***Patterson v. N.Y.***, 432 U.S. 197 (1977): Proof BRD is required if a factor ("malice aforethought") is an element. However proof BRD is not required under the 14th Amendment if the same factor is an affirmative defense, but *not* an element.

- ***McMillan v. Pa.***, 477 U.S. 79 (1986): Mandatory minimum sentences are permissible since, unlike elements, sentencing factors need not be proved BRD to a jury.

    - Sentencing factors are facts that a judge, not a jury, may consider in sentencing. Here, a judge's post-conviction finding that the defendant possessed a firearm triggered a 5-year mandatory minimum term.

- ***Mistretta v. U.S.***, 488 U.S. 361 (1989): The U.S. Sentencing Guidelines are constitutional under the 14th Amendment's Due Process Clause.

- ***U.S. v. Gaudin***, 515 U.S. 506 (1995): A defendant has "the right to demand that a jury find him guilty of all the elements of the crime".

- ***Almendarez-Torres v. U.S.***, 523 U.S. 224 (1998): This 5-4 case held that a prior conviction may be considered by the judge as a sentencing factor, rather than as an element for the jury's review and proof BRD.

- ***Jones v. U.S.***, 526 U.S. 227 (1999): Since the Federal carjacking statute's penalties turned on the severity of harm to the victim, that harm is an element for the jury to find BRD. The court said its finding is consistent with a "rule requiring jury determination of facts that raise a sentencing ceiling". However, it also found that "judicial fact finding in . . . selecting a sentence within the authorized range" does not raise similar concerns.

- ***Apprendi v. N.J.***, 530 U.S. 466 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." It doesn't matter whether the fact is called a "sentencing factor" or an "element".

    - In this 5-4 case, the court held that a judicial finding that an offense was motivated by racial hatred—and the imposition of additional prison time beyond the statutory maximum—violated the 6th Amendment.

    - Unsurprisingly, the five justices who formed the majority in *Apprendi* were the same five as in *Blakely*, *Booker*, and *Fanfan*. And the four dissenters were the same in each case, until the remedy phase of *Booker*/*Fanfan*.

- ***Ring v. Arizona***, 536 U.S. 584 (2002): "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."

    - This 5-4 decision invalidated Arizona statutes that allowed a judge, after a jury found the defendant guilty of capital murder, to hold a hearing on aggravating and mitigating factors. In effect, the jury's verdict only authorized a life term since the judge had to find at least one aggravating factor BRD (provided there was no offsetting factor) for death to be imposed. The majority found the aggravating factors were not sentencing enhancements. Instead they were material elements that had to be proved BRD to a jury (or acknowledged by defendant), since the maximum penalty could only be imposed with such a finding.

- ***Harris v. U.S.***, 536 U.S. 545 (2002): Issued the same day as *Ring*, *Harris* limits *Ring* and upholds *McMillan* in the face of *Apprendi* & *Ring*. It holds that every fact used to increase a maximum or minimum punishment does <u>not</u> have to go to a jury for proof BRD.

    - Many of those who give *Blakely* a "strict" reading (see "Applying Blakely to Ohio" below) contend that *Harris* is simply inconsistent with *Ring*. Some argue that it is a mandatory minimum case without much sweep.

    - Others contend that *Harris* is inconsistent only with the strict view of *Blakely* (every enhancing factor must go to the jury). They argue that if Justice Scalia intended that result, he could have stayed with his four *Apprendi* colleagues and turned their dissent into a different *Harris* majority.

    - The majority cautioned against reading *Ring* to mean that a jury must find BRD *any* fact that supports *any* increase in punishment. Here, the defendant received a "mandatory minimum" sentence below the maximum allowed. The sentence was imposed by a judge who found that a particular factor (brandishing a gun) was present. The court explicitly rejected the argument that *any* fact used to increase a maximum or minimum punishment must go to a jury.

- As noted, in this 5-4 case, Justice Scalia switched sides from *Apprendi*, putting Thomas, Stevens, Souter, & Ginsburg in the minority (he rejoined the same four to create the *Blakely* majority). He did this to participate in Part III of the majority opinion. That part:

    - Distinguished *Apprendi* by noting that it involved a punishment that "went beyond the maximum authorized by the jury's verdict." *McMillan* is good law because it involved a fact that increased the minimum, but not beyond the maximum.

    - Reiterated language from *Jones*: "It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution. Judicial fact finding in the course of selecting a sentence within the authorized range does not implicate the . . . jury-trial, and reasonable doubt components of the Fifth and Sixth Amendments."

- Perhaps because it is so confusing—and because of their split—*Booker*/*Fanfan* did not mention *Harris*.