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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES *v.* BOOKER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 04–104. Argued October 4, 2004—Decided January 12, 2005*

Under the Federal Sentencing Guidelines, the sentence authorized by the jury verdict in respondent Booker's drug case was 210-to-262 months in prison. At the sentencing hearing, the judge found additional facts by a preponderance of the evidence. Because these findings mandated a sentence between 360 months and life, the judge gave Booker a 30-year sentence instead of the 21-year, 10-month, sentence he could have imposed based on the facts proved to the jury beyond a reasonable doubt. The Seventh Circuit held that this application of the Guidelines conflicted with the *Apprendi* v. *New Jersey,* 530 U. S. 466, 490, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Relying on *Blakely* v. *Washington,* 542 U. S. ___, the court held that the sentence violated the Sixth Amendment and instructed the District Court either to sentence Booker within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury. In respondent Fanfan's case, the maximum sentence authorized by the jury verdict under the Guidelines was 78 months in prison. At the sentencing hearing, the District Judge found by a preponderance of the evidence additional facts authorizing a sentence in the 188-to-235-month range, which would have required him to impose a 15- or 16-year sentence instead of the 5 or 6 years authorized by the jury verdict alone. Relying on *Blakely*'s majority opinion, statements in its dis-

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*Together with No. 04–105, *United States* v. *Fanfan,* on certiorari before judgment to the United States Court of Appeals for the First Circuit.

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senting opinions, and the Solicitor General's brief in *Blakely,* the judge concluded that he could not follow the Guidelines and imposed a sentence based solely upon the guilty verdict in the case. The Government filed a notice of appeal in the First Circuit and a petition for certiorari before judgment in this Court.

Held: The judgment of the Court of Appeals in No. 04–104 is affirmed, and the case is remanded. The judgment of the District Court in No. 04–105 is vacated, and the case is remanded.

No. 04–104, 375 F. 3d 508, affirmed and remanded; and No. 04–105, vacated and remanded.

JUSTICE STEVENS delivered the opinion of the Court in part, concluding that the Sixth Amendment as construed in *Blakely* applies to the Federal Sentencing Guidelines. Pp. 5–20.

(a) In addressing Washington State's determinate sentencing scheme, the *Blakely* Court found that *Jones* v. *United States,* 526 U. S. 227; *Apprendi* v. *New Jersey,* 530 U. S. 466; and *Ring* v. *Arizona,* 536 U. S. 584, made clear "that the '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*." 542 U. S., at ___. As *Blakely*'s dissenting opinions recognized, there is no constitutionally significant distinction between the Guidelines and the Washington procedure at issue in that case. This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges. Were the Guidelines merely advisory—recommending, but not requiring, the selection of particular sentences in response to differing sets of facts—their use would not implicate the Sixth Amendment. However, that is not the case. Title 18 U. S. C. A. §3553(b) directs that a court "*shall* impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in specific, limited cases. Because they are binding on all on judges, this Court has consistently held that the Guidelines have the force and effect of laws. Further, the availability of a departure where the judge "finds . . . an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described," §3553(b)(1), does not avoid the constitutional issue. Departures are unavailable in most cases because the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is legally bound to impose a sentence within the Guidelines range. Booker's case illustrates this point. The jury found him guilty of possessing at least 50 grams of crack cocaine, based on evidence that he

had 92.5 grams. Under those facts, the Guidelines required a possible 210-to-262-month sentence. To reach Booker's actual sentence—which was almost 10 years longer—the judge found that he possessed an additional 566 grams of crack. Although, the jury never heard any such evidence, the judge found it to be true by a preponderance of the evidence. Thus, as in *Blakely,* "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." 542 U. S., at ___. Finally, because there were no factors the Sentencing Commission failed to adequately consider, the judge was required to impose a sentence within the higher Guidelines range. Pp. 5–12.

(b) The Government's arguments for its position that *Blakely*'s reasoning should not be applied to the Federal Sentencing Guidelines are unpersuasive. The fact that the Guidelines are promulgated by the Sentencing Commission, rather than Congress, is constitutionally irrelevant. The Court has not previously considered the question, but the same Sixth Amendment principles apply to the Sentencing Guidelines. Further, the Court's pre-*Apprendi* cases considering the Guidelines are inapplicable, as they did not consider the application of *Apprendi* to the Sentencing Guidelines. Finally, separation of powers concerns are not present here, and were rejected in *Mistretta.* In *Mistretta* the Court concluded that even though the Commission performed political rather than adjudicatory functions, Congress did not exceed constitutional limitations in creating the Commission. 488 U. S., at 393, 388. That conclusion remains true regardless of whether the facts relevant to sentencing are labeled "sentencing factors" or "elements" of crimes. Pp. 13–20.

JUSTICE BREYER delivered the opinion of the Court in part, concluding that 18 U. S. C. A. §3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with today's Sixth Amendment "jury trial" holding and therefore must be severed and excised from the Sentencing Reform Act of 1984 (Act). Section 3742(e), which depends upon the Guidelines' mandatory nature, also must be severed and excised. So modified, the Act makes the Guidelines effectively advisory, requiring a sentencing court to consider Guidelines ranges, see §3553(a)(4), but permitting it to tailor the sentence in light of other statutory concerns, see §3553(a). Pp. 2–26.

(a) Answering the remedial question requires a determination of what "Congress would have intended" in light of the Court's constitutional holding. *E.g., Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 767. Here, the Court must decide which of two approaches is the more compatible with Congress' intent as embodied in the Act: (1) retaining the Act (and the Guidelines) as written, with today's Sixth Amendment requirement engrafted onto

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it; or (2) eliminating some of the Act's provisions. Evaluation of the constitutional requirement's consequences in light of the Act's language, history, and basic purposes demonstrates that the requirement is not compatible with the Act as written and that some severance (and excision) is necessary. Congress would likely have preferred the total invalidation of the Act to an Act with the constitutional requirement engrafted onto it, but would likely have preferred the excision of the Act's mandatory language to the invalidation of the entire Act. Pp. 2–6.

(b) Several considerations demonstrate that adding the Court's constitutional requirement onto the Act as currently written would so transform the statutory scheme that Congress likely would not have intended the Act as so modified to stand. First, references to "[t]he court" in §3553(a)(1)—which requires "[t]he court" when sentencing to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"—and references to "the judge" in the Act's history must be read in context to mean "the judge without the jury," not "the judge working together with the jury." That is made clear by §3661, which removes typical "jury trial" limitations on "the information" concerning the offender that the sentencing "court . . . may receive." Second, Congress' basic statutory goal of diminishing sentencing disparity depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* underlying the crime of conviction. In looking to real conduct, federal sentencing judges have long relied upon a probation officer's presentence report, which is often unavailable until *after* the trial. To engraft the Court's constitutional requirement onto the Act would destroy the system by preventing a sentencing judge from relying upon a presentence report for relevant factual information uncovered after the trial. Third, the Act, read to include today's constitutional requirement, would create a system far more complex than Congress could have intended, thereby greatly complicating the tasks of the prosecution, defense, judge, and jury. Fourth, plea bargaining would not significantly diminish the consequences of the Court's constitutional holding for the operation of the Guidelines, but would make matters worse, leading to sentences that gave greater weight not to real conduct, but rather to counsel's skill, the prosecutor's policies, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime. Fifth, Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward,* yet that is what the engrafted system would create. For all these reasons, the Act cannot remain valid in its entirety. Severance and excision are necessary. Pp. 6–15.

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(c) The entire Act need not be invalidated, since most of it is perfectly valid. In order not to "invalidat[e] more of the statute than is necessary," *Regan* v. *Time, Inc.,* 468 U. S. 641, 652, the Court must retain those portions of the Act that are (1) constitutionally valid, *ibid.*, (2) capable of "functioning independently," *Alaska Airlines, Inc.* v. *Brock,* 480 U. S. 678, 684, and (3) consistent with Congress' basic objectives in enacting the statute, *Regan, supra*, at 653. Application of these criteria demonstrates that only §3553(b)(1), which requires sentencing courts to impose a sentence within the applicable Guidelines range (absent circumstances justifying a departure), and §3742(e), which provides for *de novo* review on appeal of departures, must be severed and excised. With these two sections severed (and statutory cross-references to the two sections consequently invalidated), the rest of the Act satisfies the Court's constitutional requirement and falls outside the scope of *Apprendi* v. *New Jersey,* 530 U. S. 466. The Act still requires judges to take account of the Guidelines together with other sentencing goals, see §3553(a)(4); to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant," pertinent Sentencing Commission policy statements, and the need to avoid unwarranted sentencing disparities and to restitute victims, §§3553(a)(1), (3)–(7); and to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed training and medical care, §3553(a)(2). Moreover, despite §3553(b)(1)'s absence, the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range). See §§3742(a) and (b). Excision of §3742(e), which sets forth appellate review standards, does not pose a critical problem. Appropriate review standards may be inferred from related statutory language, the statute's structure, and the "sound administration of justice." *Pierce* v. *Underwood*, 487 U. S. 552, 559–560. Here, these factors and the past two decades of appellate practice in cases involving departures from the Guidelines imply a familiar and practical standard of review: review for "unreasonable[ness]." See, *e.g.,* 18 U. S. C. §3742(e)(3) (1994 ed.). Finally, the Act without its mandatory provision and related language remains consistent with Congress' intent to avoid "unwarranted sentencing disparities . . . [and] maintai[n] sufficient flexibility to permit individualized sentences when warranted," 28 U. S. C. §991(b)(1)(B), in that the Sentencing Commission remains in place to perform its statutory duties, see §994, the district courts must consult the Guidelines and take them into account when sentencing, see 18 U. S. C. §3553(a)(4), and the

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courts of appeals review sentencing decisions for unreasonableness. Thus, it is more consistent with Congress' likely intent (1) to preserve the Act's important pre-existing elements while severing and excising §§3553(b) and 3742(e) than (2) to maintain all of the Act's provisions and engraft today's constitutional requirement onto the statutory scheme. Pp. 15–22.

(d) Other possible remedies—including, *e.g.,* the parties' proposals that the Guidelines remain binding in cases other than those in which the Constitution prohibits judicial factfinding and that the Act's provisions requiring such factfinding at sentencing be excised—are rejected. Pp. 22–24.

(e) On remand in respondent Booker's case, the District Court should impose a sentence in accordance with today's opinions, and, if the sentence comes before the Seventh Circuit for review, that court should apply the review standards set forth in this Court's remedial opinion. In respondent Fanfan's case, the Government (and Fanfan should he so choose) may seek resentencing under the system set forth in today's opinions. As these dispositions indicate, today's Sixth Amendment holding and the Court's remedial interpretation of the Sentencing Act must be applied to all cases on direct review. See, *e.g., Griffith* v. *Kentucky*, 479 U. S. 314, 328. That does not mean that every sentence will give rise to a Sixth Amendment violation or that every appeal will lead to a new sentencing hearing. That is because reviewing courts are expected to apply ordinary prudential doctrines, determining, *e.g.,* whether the issue was raised below and whether it fails the "plain-error" test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine. Pp. 24–25.

STEVENS, J., delivered the opinion of the Court in part, in which SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. BREYER, J., delivered the opinion of the Court in part, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and GINSBURG, JJ., joined. STEVENS, J., filed an opinion dissenting in part, in which SOUTER, J., joined, and in which SCALIA, J., joined except for Part III and footnote 17. SCALIA, J., and THOMAS, J., filed opinions dissenting in part. BREYER, J., filed an opinion dissenting in part, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined.