State v. Martinez: The Boundaries of Judicial Discretion and the Sixth Amendment Right to Trial by Jury in Arizona

> [The United States Supreme Court's] commitment to *Apprendi* . . . reflects not just respect for long standing precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.[1]

Introduction

How far does a guarantee extend? A satisfaction or your money back guarantee at a restaurant probably extends to all aspects of the food, but not as far as the service or décor are concerned. A dry cleaner's guarantee that your clothes will be ready in two days or your order is free, is a simple promise that if your clothes are not ready in two days then you will not have to pay for the cleaning. *Black's Law Dictionary* defines a guarantee as "[t]he assurance that a contract or legal act will be duly carried out."[2] But how far does a constitutional guarantee extend? Particularly, what is the extent of the Sixth Amendment's guarantee of the right to a speedy and public trial by an impartial jury?[3] This guarantee, on its face, appears to give a criminal defendant the right to have a group of his fellow citizens decide the facts of his case in a timely manner. *Black's* defines a constitutional guarantee as "[a] promise contained in the United States Constitution that supports or establishes an inalienable right."[4] Does the Sixth Amendment

[1] Blakely v. Washington, 542 U.S. 296, 305-06 (2004).

[2] BLACK'S LAW DICTIONARY 723 (8th ed. 2004).

[3] U.S. CONST. amend. VI.

[4] BLACK'S LAW DICTIONARY 331 (8th ed. 2004) (i.e., the right to due process).

qualify as an inalienable right, and if so, does it extend to all phases of the proceedings, including those in which the jury has no active role, such as a preliminary hearing or during sentencing?

This Comment will discuss the Sixth Amendment's guarantee of the right to a jury trial and evaluate whether judicial fact finding of aggravators[5] during sentencing compromises that right. Part I will address the Sixth Amendment, applicable federal and state statutes, and legislative history. This section will address the differences between federal and state sentencing schemes and will lay the foundation for a discussion of the Sixth Amendment's application to state sentencing schemes, particularly Arizona's presumptive sentencing system.

Part II will address background information and will introduce the United States Supreme Court's Sixth Amendment jurisprudence. This section will discuss landmark United States Supreme Court cases, such as *Apprendi v. New Jersey*,[6] *Blakely v. Washington*,[7] and *United States v. Booker*,[8] and their impact on state sentencing schemes and the scope of the Sixth

---

[5] Aggravators are facts which, when found by a jury or judge, can increase a defendant's punishment beyond the presumptive sentence, so long as the punishment stays within the permissible range. State v. Alvarez, 205 Ariz. 110, 112 (Ariz. App. 2003). A sentence enhancement actually elevates the entire range of punishment. *Id.* Aggravators were historically classified as either an element of a crime or a sentencing factor. *See infra* Part II.A. Their classification as either elements or sentencing factors altered the standard of proof and who was allowed to do the fact-finding. *See infra* Part II.A.

[6] 530 U.S. 466 (2000).

[7] 542 U.S. 296 (2004).

[8] 543 U.S. 220 (2005).

Amendment. Additionally, this section will address the respective roles of the judge and jury, along with the difference between elements and sentencing factors.

Part III will analyze the split in the Arizona Court of Appeals and discuss the trouble the court had in applying *Blakely v. Washington*.[9] Part III will also discuss the resolution of that split by *State v. Martinez*[10] and *State v. Henderson*.[11] This section of the Comment will evaluate the aforementioned laws, statutes, and cases with respect to their application in *State v. Martinez*.[12] Part III will also include some speculation as to how *State v. Martinez*[13] will affect Arizona's sentencing scheme and cases pending appeal.

Part IV will attempt to resolve any questions presented within this Comment. This section will also examine bifurcated trials and judicial discretion during sentencing. Lastly, the Comment will conclude that the Arizona Supreme Court correctly applied United States Supreme Court precedent in *Martinez* and that decision will not damage or significantly alter Arizona's presumptive sentencing scheme. Arizona's sentencing scheme is safe because it permits a judge to exercise her discretion and find aggravating factors during sentencing only after a jury found the facts legally essential to a defendant's punishment. Once the jury's findings and verdict establish the sentencing range, the Sixth Amendment is satisfied and the judge may aggravate the sentence, so long as the aggravated sentence remains within the authorized sentencing range.

---

[9] *Blakely*, 542 U.S. 296.

[10] 115 P.3d 618 (Ariz. 2005).

[11] 115 P.3d 601 (Ariz. 2005).

[12] *Martinez*, 115 P.3d 618.

[13] *Id.*

I. Sentencing Schemes and the Sixth Amendment

The Sixth Amendment rollercoaster has twisted and turned through the federal and state criminal justice systems and recently clicked its way up a steep track prior to the United States Supreme Court sending its passengers down a high speed chute with only one eye open. The recent Supreme Court decisions in *Blakely v. Washington*[14] and *United States v. Booker*[15] will have a major impact on many state sentencing schemes if those schemes are blocking the tracks of the Sixth Amendment rollercoaster.

A. The Sixth Amendment

The Sixth Amendment of the United States Constitution states: "[i]n all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . [and] to be informed of the nature and cause of the accusation . . . ."[16] The purpose of this Amendment to the United States Constitution was to check the power of a tyrannical State and to protect the accused by forcing the State to submit all accusations to "the unanimous suffrage of twelve of his equals and neighbours."[17]

"This right was designed to guard against a spirit of oppression and tyranny on the part of rulers, and was from very early times insisted on by our ancestors in the parent country, as the

---

[14] *Blakely*, 542 U.S. 296.

[15] United States v. Booker, 543 U.S. 220 (2005).

[16] U.S. CONST. amend. VI; For Arizona's statutory provision for the right to a jury trial and the rights of accused, *see* ARIZ. CONST. art. 2, § 24. Arizona's declaration of rights of the accused is parallel to and provides protection equal to the Sixth Amendment of the U.S. Constitution.

[17] *See Blakely*, 542 U.S. at 301 (quoting William Blackstone, 4 Commentaries *343).

bulwark of their civil and political liberties."[18] The Founding Fathers expressed their interest in protecting trial proceedings from state corruption and arbitrary accusations and punishment resulting from judicial despotism.[19] Both sides of the convention agreed to establish such a protection.[20]

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[21]

The Sixth Amendment enshrined these concerns of both friends and adversaries of the Constitution and established the fundamental right to trial by jury.[22]

The United States Supreme Court described the Sixth Amendment in criminal cases as "fundamental to the American scheme of justice, and therefore applicable in state proceedings."[23] The Due Process clause of the Fourteenth Amendment[24] incorporates the Sixth

---

[18] United States v. Gaudin, 515 U.S. 506, 510-11 (1995); *see also* Glasser v. United States, 315 U.S. 60, 84 (1942) ("Since it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression. . . . Our Constitution transforms that privilege into a right in criminal proceedings in a federal court.").

[19] *See* THE FEDERALIST NO. 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[20] *See id.*

[21] *Id.*

[22] *See* U.S. CONST. amend. VI; THE FEDERALIST NO. 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[23] Sullivan v. Louisiana, 508 U.S. 275, 277 (1993).

Amendment[25] in state proceedings and constitutionally "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[26] Although there is not much disagreement over the Sixth Amendment's application to state criminal proceedings, the scope of the Sixth Amendment's guarantee is the source of much controversy and debate. This Comment will attempt to resolve some of the controversy inherent in sentencing schemes that permit judicial fact finding, particularly of aggravators, and will examine whether such fact-finding falls within the scope of the Sixth Amendment.

B. Federal and State Sentencing Schemes

1. The Federal System and the Sentencing Reform Act of 1984

In order to guide a judge in his determination of an appropriate sentence and maintain some uniformity and proportionality in sentencing, Congress passed the Sentencing Reform Act

---

[24] *See* U.S. CONST. amend. XIV. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* at § 1.

[25] *See* Mills v. Singletary, 63 F.3d 999, 1009 (11th Cir. 1995); *see also* Pyles v. Johnson, 136 F.3d 986, 992 (5th Cir. 1998) (stating that the Sixth Amendment is "enforceable against the states as a result of incorporation through the Fourteenth Amendment's due process clause [and] implies at the very least that the evidence developed against a defendant shall come . . . in a public courtroom where there is full judicial protection of the defendant's right[s] . . . ."); Sullivan v. Louisiana, 508 U.S. 275, 277 (1993).

[26] United States v. Rogers, 94 F.3d 1519, 1524 (11th Cir. 1996).

of 1984 ("the Act").[27] The United States Sentencing Commission ('the Commission"), under authority of 28 U.S.C. § 994(a) (1984), was responsible for compiling the sentencing guidelines.[28] The Commission possessed broad authority to review and hopefully rationalize the federal sentencing process.[29] In the Commission's enabling act, Congress instructed them to "create categories of offense behavior and offender characteristics" and to prescribe sentencing guidelines based on the combination of those categories.[30] The Commission's "principal purpose

---

[27] *See* Pub. L. No. 98-473, §§ 211-38, 98 Stat. 1987 (1984) (sub-section of The Comprehensive Crime Control Act of 1984); U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004); for a brief historical overview leading up to the Act, *see generally* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693 (2005) (discussing the evolution of America's sentencing from an indeterminate system, in which the judge had ultimate discretion as "master of his courtroom," to sentencing reform and ultimately United States v. Booker, which made the Act only advisory).

[28] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004). The Act established the Commission as an "independent agency in the Judicial Branch, and directed it to develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes." *Id.*

[29] *Id.*

[30] *Id.* An offense behavior category could be "bank robbery/committed with a gun/$2500 taken" and an offender characteristic could be "offender with one prior conviction who was not sentenced to imprisonment." *Id.* This combination of categories would expose the defendant to seventy-eight to ninety-seven months of imprisonment. *See id.* (calculated range found in § 5A and based on offense levels set forth in §§ 2B3.1, 4A1.1).

[was] to establish sentencing policies and practices for the federal criminal justice system that [would] assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for convicted offenders of federal crimes."[31]

The Act required judges to consider the guidelines' sentencing range and then establish "the applicable category of offense committed by the applicable category of defendant, pertinent [to] sentencing commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims."[32] The guidelines were intended to help judges impose sentences that were sufficient, but not greater than necessary, and to comply with the overall purposes of the Act.[33] According to 18 U.S.C. § 3553 (a)(2), the purposes of the Act were:

> to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[34]

The United States Supreme Court recently interpreted the federal guidelines as advisory and not mandatory.[35] Federal judges are now supposed to consider the guidelines in conjunction

---

[31] *Id.*

[32] Marcia G. Shein, United States v. Booker*: Where Are We Now?*, 52 FED. LAW. 22, 23 (May 2005).

[33] 18 U.S.C.A. § 3553(a) (2) (West 2003).

[34] *Id.*

[35] 18 U.S.C.A. §§ 3551-3553; *see* United States v. Booker, 543 U.S. 220, 221 (2005). The Court declared that the "mandatory nature" of the guidelines – particularly 18 U.S.C.A. §§ 3553(b)(1) and 3742(e) – was unconstitutional and the Court severed those portions from the Act. The result

with the goals of sentencing in order to establish an appropriate sentence within the guideline range.[36] If a federal judge departs from the guideline range and imposes a mitigated or aggravated sentence, then he must specify his reasons for the departure.[37] Although the Commission's categories should cover all possible combinations of crimes and criminal behavior, discretionary departures are permitted because rigid adherence to the guidelines is not mandatory or feasible in all cases.[38] Any departure from the recommended guideline range must be justified by the judge's specific findings and reasons for imposing the deviant sentence.[39] On

---

made the "Guidelines effectively advisory, requiring a sentencing court to consider the Guidelines ranges, but permitting it to tailor the sentence in light of other statutory concerns." *Booker*, 543 U.S. at 221; *see infra* Part II.C.3.

[36] *See Booker*, 543 U.S. at 221; Shein *supra* note 32, at 23.

[37] *See* 18 U.S.C.A. § 3553 (b); U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004). Judicial discretion was not one of the goals Congress wanted the Commission to further through the guidelines. Congress' intent was to make sentences uniform and proportional and to basically prevent judges from having any sentencing discretion that could jeopardize their goals. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004)

[38] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004) ("The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless."). Additionally, *United States v. Booker* made the guidelines only advisory and officially condoned some departures. *Booker*, 543 U.S. at 221.

[39] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004); Shein *supra*, note 32 at 23.

appeal, the judge's justification for the departure will be reviewed under a reasonableness standard.[40]

2. State Sentencing Schemes

While the Federal sentencing guidelines were recently interpreted as advisory,[41] state sentencing schemes vary across the country in both form and application.[42] Similar to their federal counterparts, many states share the goals of increasing sentencing uniformity and limiting judicial sentencing discretion.[43] In order to achieve their goals, states either created commissions to establish their own guidelines or enacted guidelines through legislative action.[44]

---

[40] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004); 18 U.S.C.A. § 3742. See *infra* Part III.B for a discussion on *Blakely*-error and the standard of review applicable to alleged Sixth Amendment violations.

[41] *See Booker,* 543 U.S. at 221; *infra* Part II.C.3.

[42] John Wool & Don Stemen, 17 FED. SENTENCING REP. 60, 2004 WL 2566156, at *3-4 (Vera. Inst. Just.) (2004).

[43] *See* Ben Trachtenberg, *State Sentencing Policy and New Prison Admission*, 38 U. MICH. J.L. REFORM 479, 486 (2005). Although there was little uniformity at first, "[t]hrough mandatory minimums, sentencing guidelines, and other policies, each jurisdiction has limited judicial discretion in sentencing." *Id*. *See also*, Michael Limrick, *Senate Bill 96: How General Assembly Returned Problem of Uniform Sentencing to Indiana's Appellate Courts*, 49-FEB Res Gestae 18 *18 (2006).

[44] *See* Trachtenberg *supra* note 43, at 487-88. All states enforced a mandatory minimum sentence for some crimes by 1996 and about half used guidelines similar to the federal system. *Id*. Mandatory minimum sentences were created for habitual offenders (two strikes and you are out

One variation of sentencing reform, used in ten states, is a voluntary guidelines system.[45] Under a voluntary guidelines system, the legislature or commission establishes a range of sentences for each offense; however, the sentencing guidelines do not bind the judge.[46] In roughly half the voluntary systems, the judge is encouraged to use the guidelines, but may impose an aggravated sentence outside the guidelines range. The judge may do so, even without any additional fact finding, so long as the sentence remains within the statutory maximum.[47] Additionally, if a judge departs from the recommended guidelines, he need not provide any justification for doing so.[48]

---

laws), drunk driving, crimes of possession of a deadly weapon (use a gun--go to prison laws), and drug possession and distribution crimes. *See* Bureau of Justice Assistance, U.S. Dep't of Justice, NCJ 169270, 1996 National Survey of State Sentencing Structures 29 (1998).

[45] Wool & Stemen *supra* note 42, at *5-6. Arkansas, Delaware, the District of Columbia, Louisiana, Maryland, Missouri, Rhode Island, Utah, Virginia, and Wisconsin all use voluntary sentencing systems. *Id.*

[46] *Id.* at *3-4.

[47] *Id.* at *4-6. The District of Colombia, Louisiana, Missouri, and Wisconsin all fall under the judge-encouraged voluntary guidelines category and base the statutory maximum either on the defendant's plea or on the jury's verdict. *See id.* The United States Supreme Court specifically curtailed judicial discretion under voluntary guideline schemes in the landmark decision of Apprendi v. New Jersey. 530 U.S. 466 (2000); *see infra* Part II.C.1.

[48] *See* Wool & Stemen *supra* note 42, at *4-6. These state systems do not violate the Sixth Amendment because they require the judge to confine his sentence, even when it is an

Voluntary guidelines systems differ over whether the judge must provide any justification for a departure. In the remaining six voluntary guidelines states, the judge must first apply the discretionary guidelines, but may impose an enhanced sentence thereafter.[49] Depending on the degree of departure, each of these state systems requires the judge to specify his findings and reasons for departing from the guidelines' range.[50] In these voluntary guideline states, a departure signifies an enhanced sentence based on circumstances or facts found by the judge and not admitted by the defendant or based on the jury's verdict.[51]

A variation of the presumptive sentencing guidelines system, employed by five states, requires a judge to impose the presumptive or recommended sentence and provide justification for departing from the recommended sentencing range.[52] Under this system, the guidelines set forth a range for the offense, with the maximum based on the jury's verdict or defendant's guilty plea.[53] Only when a judge finds aggravating factors, can he impose an "enhanced" or

---

unexplained aggravated sentence, to the statutory maximum based on the jury's verdict or defendant's guilty plea. *See id.*

[49] *Id.* at *5-6. Arkansas, Delaware, Maryland, Rhode Island, Utah, and Virginia all fall under the justification-required voluntary guidelines category. *See id.* at *4-6.

[50] *See id.* at *5-6.

[51] *Id.* at *6-7.

[52] *Id.* at *2-3. Kansas, Minnesota, North Carolina, Oregon, and Tennessee employ presumptive sentence guidelines systems. *Id.* These systems are likely in Constitutional jeopardy, as they are similar to Washington's system recently ruled unconstitutional by the United States Supreme Court in *Blakely v. Washington*. *See* 542 U.S. 296 (2004); *see infra* Part II.C.2.

[53] Wool & Stemen *supra* note 42, at *2-3.

"exceptional" sentence above the maximum range.[54] States that employ presumptive sentencing guidelines systems are in constitutional jeopardy because under those systems, the judge, not the jury, is responsible for finding aggravating circumstances. The United States Supreme Court recently ruled that that practice violates the Sixth Amendment right to trial by jury.[55]

Arizona, along with seven other states, does not have formal guidelines, but instead employs a determinate sentencing or presumptive sentencing system.[56] States with presumptive sentencing systems enact statutes that have a presumptive sentence or range of sentences for each

---

[54] *Id.* at *2-4. These states' guidelines systems differ in only minor ways, however they all share judicial fact finding for sentence aggravation beyond the standard range, and that is where they conflict with the Sixth Amendment. *See id.*

[55] *See* Blakely v. Washington, 542 U.S. 296 (2004); *But see* Wool & Stemen *supra* note 42, at *4-5 ("Kansas's system is not generally implicated by Blakely because it has amended its statutes to require that a jury find any fact that forms the basis of an enhanced sentence.")

[56] *See* Wool & Stemen *supra* note 42, at *4-5 (Alaska, Arizona, California, Colorado, Indiana, New Jersey, New Mexico, and Ohio all have similar non-guideline systems). Indiana's scheme sets forth a fixed term with upper and lower boundaries, however the maximum permissible sentence absent aggravators was Indiana's fixed or presumptive term. IND. CODE. ANN. §§ 35-50-2-3, -38-1-7.1 (West 2004). Only after the judge considers and finds aggravating factors can she impose an upward departure from the fixed term. *Id.* The judge has to identify the factors, specify her findings and reasons, and articulate the factors and balancing she did to determine an upward departure is warranted. *See id.*; Trowbridge v. State, 717 N.E.2d 138, 149 (Ind. 1999).

class of crime.[57] The sentencing judge is required to impose a sentence within the presumptive range and can only impose a higher sentence after a finding of aggravating factors.[58]

Under Arizona's system, judges must follow the presumptive sentence range associated with a crime and if they deviate from the presumptive sentence, they must provide justifications on the record for their departure.[59] In order for the judge to impose an aggravated sentence, at least one aggravating circumstance must be found by the jury beyond a reasonable doubt,

---

[57] *See* Wool & Stemen *supra* note 42, at *4-5.

[58] *Id.*

[59] ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702 (2005):

> Sentences provided in § 13-701 for a first conviction of a felony, except those felonies involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another or if a specific sentence is otherwise provided, may be increased or reduced by the court within the ranges set by this subsection. . . . The upper or lower term[s] . . . may be imposed only if one or more of the circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt, or in mitigation of the crime are found to be true by the trial judge, on any evidence or information introduced or submitted to the court or the trier of fact before sentencing or any evidence presented at trial, and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing. . . . If the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances. In determining what sentence to impose, the court shall take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to call for the lesser term. If the trier of fact finds aggravating circumstances and the court does not find any mitigating circumstances, the court shall impose an aggravated sentence.

admitted by the defendant, or be a prior felony conviction.[60] Once the jury finds at least one aggravator beyond a reasonable doubt, Arizona's sentencing statutes basically open the door for the judge to find additional aggravators under the preponderance of the evidence standard and then impose an aggravated sentence. [61] The judge may find facts under a lower standard of proof because the jury already found the particular facts necessary to constitute the crime with which the defendant was charged and to sustain the sentencing range. Thus, the Sixth Amendment right to jury trial was constitutionally satisfied and the defendant's right to jury fact finding does not control additional fact-finding during sentencing.[62]

Most state schemes share a common goal of promoting uniformity and proportionality according to the offense and the circumstances surrounding the offense.[63] In theory, they also serve a deterrent purpose similar to the federal system because they classify characteristics of both the offense and the circumstances, which provides notice and creates a system that punishes

---

[60] *Id.* Although the jury must find aggravators beyond a reasonable doubt, a judge may find mitigating circumstances based on any evidence or information presented at trial or submitted to the court. *Id.*; *see infra* Part III.B.

[61] *Id.* Once the jury "finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances." *Id.*; *see infra* Parts III.B.-III.C.

[62] *See infra* text accompanying notes 125, 170; *infra* note 180.

[63] *See* Shein *supra* note 32, at 23; Wool & Stemen *supra* note 42, at *10-11.

as advertised.[64] However, some of the systems may not properly apply Constitutional principles, and those schemes are at risk of being mauled by the Sixth Amendment rollercoaster.

II. The Tracks Laid Down by the United States Supreme Court

A. Elements v. Sentencing Factors: What Impact and Who Decides?

The classification of facts as elements of a crime as opposed to sentencing factors is a point of controversy among scholars, attorneys, and judges.[65] Simply put, the controversy revolves around whether the judge or the jury is the fact finder and which burden of proof is applicable.[66]

"The Due Process Clause of the Fifth Amendment requires that prosecutors prove, beyond a reasonable doubt, every fact necessary to constitute the crime with which a defendant is

---

[64] *See* Blakely v. Washington, 542 U.S. 296, 305-07 (2004); 18 U.S.C.A. § 3553(a)(2)(A)-(B) (West 2003) (considering just punishment and adequate deterrence to criminal conduct as factors used in drafting sentencing schemes).

[65] *See generally*, Catherine M. Guastello, *The Tail That Wags the Dog: The Evolution of Elements, Sentencing Factors, and the Functional Equivalent of Elements – Why Aggravating Factors Need To Be Charged in the Indictment*, 37 ARIZ. ST. L.J. 199 (2005) (discussing the historical debate over sentencing factors versus elements of a crime and the impact of *Blakely v. Washington*, 542 U.S. 296 (2004), *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)).

[66] *See* John M. Parese, *Putting The Tail Between The Dog's Legs: The Danger of* Apprendi v. New Jersey, 21 QUINNIPAC. L. REV. 645, 648-50 (2002); Guastello *supra* note 65, at 199-203.

charged. Elements, however, are what make up an offense, not sentencing factors."[67] While elements of a crime undoubtedly merit proof beyond a reasonable doubt, sentencing factors historically did not carry the same weight.[68]

A distinction, often debated in respect to evidence, is whether the determination of sentencing factors is a question of law or one of fact. According to the Federal Rules of Evidence, the judge decides questions of law, while the jury determines questions of fact.[69] Thus, a prosecutor must prove all questions of fact to the jury in order for them to influence the final verdict and eventual punishment.

However, with regard to aggravating factors, the fact-law line often blurs because "not all facts are equally susceptible to jury determination."[70] Occasionally a judge may find sentencing factors, while other times the judge must determine certain factors because submitting them to a jury would be unfairly prejudicial or would demand an overexertion of impartiality on behalf of the jury.[71] For example, "aggravating factors that compare the defendant to other defendants or

---

[67] Parese *supra* note 66, at 648-49. A prosecutor must charge all elements of a crime in the indictment, try each element before a jury, and the jury must find each element beyond a reasonable doubt. *Id.*

[68] U.S. Const. amend VI; *see* United States v. Booker, 543 U.S. 220, 230 (2005); State v. Gaudin, 515 U.S. 506, 511 (1995); *In re* Winship, 397 U.S. 358, 364 (1970).

[69] *See* FED. R. EVID. 104.

[70] Wool & Stemen *supra* note 42, at *4-5.

[71] *See Booker*, 543 U.S. at 230-33. Once a jury finds one aggravating factor or the defendant has a prior conviction or admits to an aggravator, the judge *may* find additional aggravating factors in determining an appropriate sentence within an established range. *See infra* Parts II.B-II.C.

circumstances of the offense to the circumstances in other offenses charged under the same statute would be extremely difficult for jurors to decide."[72] Such a comparison at first glance appears to be a fact question and should be submitted to the jury, however the comparison implicates both law and policy, which a judge may be more adept at evaluating.

If a sentencing factor is not an element of the crime charged in the indictment,[73] then need it be submitted to the jury to protect the defendant's procedural rights guaranteed by the Sixth Amendment?[74] If so, how much will this additional safeguard burden the criminal justice system and should that burden even be a consideration?[75] The following section addresses the United States Supreme Court's resolution of the factor-element debate.

B. The Twists and Turns Constructed by the United States Supreme Court

1. Pre-*Apprendi v. New Jersey*[76]

---

[72] Wool & Stemen *supra* note 42, at *4-5. It is doubtful that juries have sufficient background to determine whether an aggravated sentence is necessary to protect the public from a hate crime defendant or whether a presumptive term will suffice. *Id.* If juries are required to make such determinations, then trial proceedings will be further extended to encompass a grandiose sentencing hearing involving expert witnesses, rather than simple pre-sentencing reports. *See id.*

[73] *See Booker*, 543 U.S. at 228 (Not only must the State submit all accusations to a jury, but the State must also prove beyond a reasonable doubt, every fact necessary to constitute the crime charged in the indictment).

[74] See *infra* Part II.B for discussion on Supreme Court decisions resolving the element-factor controversy, particularly in respect to aggravating facts and circumstances.

[75] *See infra* Part IV.

[76] 530 U.S. 466 (2000).

The United States Supreme Court tug-of-war with the guarantees of the Sixth Amendment and the constitutional distinction between elements of a crime and sentencing factors has left many Sixth Amendment rollercoaster passengers spinning and uneasy. Prior to *Apprendi v. New Jersey*,[77] the Court addressed this distinction in three significant five-to-four vote cases which each added its own twist to the analysis.

2. McMillan v. Pennsylvania[78]

In *McMillan v. Pennsylvania*,[79] the United States Supreme Court addressed a mandatory minimum sentencing scheme and a judge's upward departure from that scheme.[80] The jury found the defendant guilty of aggravated assault and possession of an instrument of a crime,[81] which garnered respective sentencing ranges of three to ten years and two and a half to five years to be served concurrently.[82] In *McMillan*, the trial judge found, based on the preponderance of the evidence, that the defendant visibly possessed a firearm and thereafter she increased the minimum sentence from three to five years imprisonment.[83]

---

[77] *Id.*

[78] 477 U.S. 79 (1986) (affixing the label of a "sentencing factor" to a fact not found by the jury and recognizing that it could affect the sentence imposed by a judge).

[79] *Id.*

[80] *Id.* at 81-82.

[81] 18 PA. CONS. STAT. § 2503 (1982).

[82] *McMillan*, 477 U.S. at 82-83.

[83] *Id.* at 81, 83. Pennsylvania's mandatory minimum sentencing scheme divested the judge of any discretion and required him to aggravate the sentence to no less than five years once he found the visible possession aggravator. *See id.*

The Court examined Pennsylvania's legislative intent and determined that the legislature deliberately chose not to include "visible possession" as an element of the crime, but rather as a sentencing factor to be determined after the jury returned a guilty verdict.[84] Relying on *Patterson v. New York*,[85] the Court concluded that Pennsylvania need not prove beyond a reasonable doubt every fact influencing the severity of the punishment.[86] Thus, for the first time, the Court distinguished facts designated as 'sentencing factors' from elements of a crime and specified that sentencing factors do not merit equivalent constitutional protection.

3. Almendarez-Torres v. United States[87]

---

[84] *See id*. at 83-87 (explaining that the legislature specifically distinguished between elements and sentencing factors).

[85] 432 U.S. 197 (1977) (rejecting the notion that whenever a State links the "severity of punishment" to the "presence or absence of an identified fact" the state must prove that fact beyond a reasonable doubt).

[86] *See McMillan*, 477 U.S. at 83-84. The *McMillan* Court based its reasoning on *Patterson*, stating:

> *Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive: [T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged. While there are obviously constitutional limits beyond which the States may not go in this regard, [t]he applicability of the reasonable-doubt standard ... has always been dependent on how a State defines the offense that is charged in any given case.

Id. (emphasis in original) (internal quotations omitted).

[87] Almendarez-Torres v. United States, 523 U.S. 224 (1998).

The next time the Court confronted the factor-element issue was in *Almendarez-Torres v. United States*, in which the defendant was a deported alien convicted of returning to the United States without permission, which warranted a maximum sentence of two years.[88] The sentencing judge increased the maximum sentence from two to twenty years, based on the defendant's admission that his three prior aggravated felony convictions lead to his earlier deportation.[89] The Court affirmed the sentence, stressing that Congress intended recidivism to be an aggravating sentencing factor, and held that the Constitution did not require recidivism to be classified as an element of the crime, nor included in the indictment.[90]

The *Almendarez-Torres* decision established that there was no right to a jury trial, nor proof beyond a reasonable doubt, for a prior conviction accusation, even when that factor drastically increases the maximum possible sentence.[91] This decision plays a controversial role in the factor-element debate and serves as a hairpin turn on the Sixth Amendment rollercoaster because it exempted prior convictions from a second round of jury fact-finding and authorized judges to consider prior convictions during sentencing.

4. Jones v. United States[92]

---

[88] *See id.* at 226-27; 8 U.S.C. §§ 1326(a), (b)(2) (1994).

[89] *Almendarez-Torres*, 523 U.S. at 226-27.

[90] *See id.*; Michelle Reiss Drab, *Constitutional Law: Fact or Factor: The Supreme Court Eliminates Sentencing Factors and the Federal Sentencing Guidelines*, 57 FLA. L. REV. 987, 990 (2005).

[91] *See* Wool & Stemen *supra* note 42, at *7.

[92] Jones v. United States, 526 U.S. 227 (1999) (addressing the application of the Sixth Amendment jury trial requirement to the determination of aggravating factors).

In a final major pre-*Apprendi* case and in an effort to clarify another facet of the factor-element debate, the Court addressed *Jones v. United States*. In *Jones*, the Court considered a federal carjacking statute with three separate maximum sentences that were dependent on the severity of harm suffered by the victim.[93] The base maximum sentence was fifteen years, the intermediate level increased to twenty-five years if serious bodily harm resulted, and the third level was life imprisonment if death resulted.[94] The defendant was charged with carjacking in violation of 18 U.S.C. § 2119 (1) and faced a maximum sentence of fifteen years imprisonment.[95] However, the judge sentenced the defendant to twenty-five years after finding that one victim suffered serious bodily injury after the defendant jammed his gun in the victim's ear, perforating his eardrum and causing some permanent hearing loss.[96]

The Court acknowledged, "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."[97] In the federal statute, the "extent of the harm" provisions appeared to be a sentencing factor and only relevant to punishment; however the Court concluded that they were actually elements of three distinct crimes.[98]

---

[93] *See id.* at 229-30; 18 U.S.C. § 2119 (1996).

[94] 18 U.S.C. § 2119.

[95] *See Jones*, 526 U.S. 227; 18 U.S.C. § 2119 (1) (1996).

[96] *See Jones*, 526 U.S. at 229-31.

[97] *Id.* at 232.

[98] *Id.* at 229.

> While we think the fairest reading of § 2119 treats the fact of serious bodily harm as an element, not a mere enhancement, we recognize the possibility of the other view. Any doubt that might be prompted by the arguments for that other reading should, however, be resolved against it under the rule repeatedly affirmed, that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which questions are avoided, our duty is to adopt the other.'[99]

Thus, the Court chose to limit the judge's interpretation of the sentencing statute, prohibit the use of alleged sentencing factors that raise the punishment beyond the statutory maximum based on the facts charged in the indictment, and require the government to prove such facts to a jury beyond a reasonable doubt.[100]

C. Apprendi and its Progeny

1. Apprendi v. New Jersey[101]

The following year, in *Apprendi v. New Jersey*, the Court strengthened the stance it took in *Jones* when it held that the prosecution must submit to the jury and prove

---

[99] *Id.* at 239 (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

[100] *See id.* (requiring jury determinations of facts that raise a sentencing ceiling in state and federal sentencing guidelines systems). The Court further noted that:

> under the Due Process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increase the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id. at 243.

[101] Apprendi v. New Jersey, 530 U.S. 466 (2000).

beyond a reasonable doubt any fact other than a prior conviction, which increases a penalty beyond the statutorily prescribed maximum.[102]

The police arrested the defendant after he fired several .22-caliber shots into the home of an African-American family who had just moved into a previously all-white neighborhood.[103] In *Apprendi*, the defendant was charged with a weapons violation and pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful possession of an anti-personnel bomb.[104]

---

[102] *Id.* at 490.

> This rule reflects two longstanding tenets of common-law jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors,' and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of the common law, and it is no accusation in reason.

Blakely v. Washington, 542 U.S. 296, 300 (2004) (quoting 4. W. Blackstone, Commentaries on the Laws of England 343 (1769); 1 J. Bishop, Criminal Procedure § 87, at 55 (2d ed. 1872)).

[103] *Apprendi*, 530 U.S. at 469.

[104] *Id.* at 469-70. Under New Jersey sentencing statutes, a second-degree offense carries a five to ten year penalty range and a third-degree offense carries a three to five year penalty range. *Id.* at 470 (citing N.J. STAT. ANN. § 2C:43-6(a)(2)-(3) (West 1999)).

After the judge accepted the guilty plea, she held an evidentiary hearing to decide the issue of the defendant's "purpose" for the shooting.[105] The defendant offered character evidence through expert testimony and several character witnesses, in an attempt to prove that he had no reputation for racial bias.[106] However, the sentencing judge found the police officer's testimony was more credible and concluded that the crime was motivated by racial bias.[107] The judge then sentenced the defendant to an aggravated sentence of twelve years, based on judicial findings by a preponderance of the evidence that the defendant's actions were committed with the purpose to intimidate and thus triggered New Jersey's hate crime enhancement.[108] The New Jersey Supreme Court affirmed the trial court's ruling even though it exposed the defendant to greater and additional punishment.[109]

The Court disagreed with the sentencing judge and the New Jersey Supreme Court and found that a defendant charged with a weapons violation was entitled to have a

---

[105] *Id.* at 470-71. The statute classified a purpose to intimidate as an aggravator, when it is based on race, color, gender, handicap, religion, sexual orientation, or ethnicity. N.J. REV. STAT. § 2C:44-3(e) (1999).

[106] *Apprendi*, 530 U.S. at 470-71.

[107] *Id.* at 471. Apprendi made a statement to the police, later retracted, that he did not know the occupants of the house, but "because they are black in color he does not want them in the neighborhood." *Id.* at 469.

[108] *Id.* at 471 (discussing the appellate court's interpretation of the hate crime enhancement as a sentencing factor, rather than an element of a crime, based on New Jersey legislative history).

[109] *See* 731 A.2d 485 (1999).

jury decide whether a hate crime enhancement was applicable.[110] As a matter of procedure, the Court declared that the Sixth and Fourteenth Amendments "indisputably entitle a criminal defendant to a 'jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"[111] These constitutional protections extend to aggravating circumstances that potentially increase the maximum range of punishment beyond that which a defendant would receive if punished solely on properly found facts reflected in the jury's verdict.[112]

These restrictions on judicial discretion are important for uniformity and proportionality in sentencing, but even more crucially, they provide notice as to the maximum punishment possible under the facts charged in the indictment.[113] In *Apprendi*, the defendant was punished as if he violated a first-degree offense, which violated his Sixth Amendment protections because the facts charged in the indictment only exposed the defendant to punishment for a second-degree offense. Such a practice, based solely on judicial fact-finding of aggravating circumstances, which enhanced a sentence beyond the

---

[110] *See Apprendi*, 530 U.S. at 471-72.

[111] *Id*. at 476-78 (citing State v. Gaudin, 515 U.S. 506, 510 (1995)).

[112] *See id.* at 480-84. When judges use their discretion in imposing a sentence, they are restricted by statutory limits and by a jury's verdict, when available. *Id.* at 481-84.

[113] *See id.* at 483 (explaining that the indictment allows a defendant to discern the maximum possible punishment under a particular statute and that the judge's role is restricted by the facts charged in the indictment and found by a jury).

prescribed statutory maximum, could not stand because it violated the defendant's rights under the Sixth and Fourteenth Amendments.[114]

In *Apprendi*, the New Jersey statute defined the hate crime enhancement as a sentencing factor, which required a finding of a "purpose to intimidate."[115] Such a query, probing a "defendant's intent in committing a crime, is perhaps as close as one might hope to come to a core criminal offense 'element.'"[116] However, New Jersey's classification of this fact as a sentencing factor instead of an element should not be evaluated on a form basis, but rather on an effect basis. The question that must be asked

---

[114] *See id.* at 490-92. The constitutional conflict falls squarely on the fact that the only aggravating factor was found by the judge and not by the jury. *Id.* at 491-92. Furthermore, the Court reiterated that States do not have unbound authority to define facts as either elements of a crime or sentencing factors, particularly when those classifications expose a defendant to an aggravated sentence. Rather, the States are checked by constitutional principles that constrict their ability to create sentencing schemes that remove facts from the jury that could enhance a sentence beyond that authorized by a jury's verdict. *See id.* at 486; McMillan v. Pennsylvania, 477 U.S. 79, 85-88 (1986).

[115] *Apprendi*, 530 U.S. at 491-93 (citing N.J. Stat. Ann. N.J. STAT. ANN. § 2C:43-6(a)(1) (West 1999)) The inquiry into a "purpose to intimidate" is a question of motive, which requires an evaluation of the defendant's mental state, and it is a question that should be reserved for the jury. *See id.*

[116] *Id.* at 493.

is, does the required finding expose the defendant to a greater punishment than that authorized by either the defendant's plea agreement or the jury's guilty verdict?[117]

2. Blakely v. Washington[118]

Four years later in *Blakely v. Washington*,[119] the Court addressed that question posed in *Apprendi*.[120] The Court found that Washington's determinate sentencing guidelines system violated the defendant's Sixth Amendment jury right because it gave judges, rather than juries, the authority to make factual determinations necessary to

---

[117] *Id.* at 494. "When the term 'sentencing enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one authorized by the jury's guilty verdict." *Id.* In *Apprendi*, the aggravated sentence enhanced the crime's punishment from second to first-degree, based on judicial fact-finding beyond facts admitted by defendant in his plea agreement. *Id.* How New Jersey classified a "purpose to intimidate" is irrelevant because the effect of the finding on Apprendi's punishment was that it aggravated the authorized sentencing range. *Id.* Such an enhancement has not only a nominal effect on Apprendi's sentence, but additionally increases the severity of the stigma attached to a higher sentence, both of which should be constitutionally curtailed by restricting judicial fact finding. *See id.* at 494-95 (also comparing this classification to the "tail which wags the dog of the substantive offense" as described in McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).

[118] Blakely v. Washington, 542 U.S. 296 (2004).

[119] *Id.*

[120] *See supra* note 117.

aggravate sentences.[121] In *Blakely*, the defendant pled guilty to second degree kidnapping involving domestic violence and the use of a firearm.[122] Based on the facts of the defendant's plea, he was subject to a statutory maximum sentence of fifty-three months, however, the judge found the defendant acted with "deliberate cruelty" and enhanced the sentence to ninety months.[123]

Washington's scheme allowed the judge to impose an enhanced sentence beyond the guidelines' range, only after finding a statutorily enumerated aggravating factor and setting forth the findings of fact and conclusions of law supporting his decision.[124] After granting certiorari, the Court clarified the rule established by *Apprendi*, stating 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*."[125] Any departure from the statutory maximum is an abuse of discretion

---

[121] *Blakely*, 542 U.S. at 299-300.

[122] *Id.* at 298-99.

[123] *Id.* at 298; WASH. REV. CODE ANN. § 9.94A.390 (West 2000) (providing an illustrative, but not exhaustive list of statutorily enumerated grounds for departure based on aggravating circumstances).

[124] *Blakely*, 542 U.S. at 299-300; WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000) (permitting a judge to impose a sentence beyond the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence").

[125] *Blakely*, 542 U.S. at 299-300 (internal quotations omitted) (emphasis in the original). The statutory maximum is established prior to any additional judicial fact finding. It is the maximum the judge may impose without any additional findings. *Id.* In *Blakely*, the

because the jury has not found all facts legally essential to justify the punishment and the judge has thus exceeded his proper authority.[126]

In *Blakely*, the judge's abuse of discretion by enhancing the sentence beyond the statutory maximum, while permissible under Washington's sentencing scheme, was a violation of the defendant's Sixth Amendment jury right because it exposed him to greater punishment than that authorized by his plea agreement.[127] The Court held that the Washington sentencing scheme did not comply with the Sixth Amendment and the defendant's enhanced sentence was therefore invalid.[128]

3. United States v. Booker[129]

---

maximum range for a second-degree kidnapping, a class B Felony, is forty-nine to fifty-three months. *Id.*; WASH. REV. CODE ANN. § 9.94A.320 (West 2000).

[126] *Blakely*, 542 U.S. at 299-300 (discussing 1 J. Bishop, Criminal Procedure § 87, at 55 (2d ed. 1872)).

[127] *Id.* at 303-04. Had defendant opted for a jury trial rather than a plea, then a jury would have had to find beyond a reasonable doubt all the facts legally essential to his punishment. *Id.* at 303-05.

[128] *Id.* at 305.

[129] United States v. Booker, 543 U.S. 220 (2005). The Court granted certiorari for *Booker* and combined it with *United States v. Fanfan*, a similar case in which Fanfan was convicted by a jury of possession with intent to distribute 500 or more grams of cocaine, an offense garnering a sentence of seventy-eight months according to the Guidelines. *Id.* at 228. However, contrary to *Booker*, when the judge found additional aggravating factors that enhanced Fanfan's sentence to

The Court's most recent major Sixth Amendment decision came in January of 2005, where the Court applied *Apprendi* and its progeny to the Federal Sentencing Guidelines ("the Guidelines").[130] In *United States v. Booker*,[131] a jury convicted the defendant of possession with intent to distribute at least fifty grams of crack cocaine,[132] an offense carrying a sentence range of 210 to 262 months imprisonment according to the Guidelines.[133]

During the sentencing hearing, the judge found, by a preponderance of the evidence, that the defendant possessed an additional 566 grams of crack cocaine and was guilty of obstructing justice.[134] The judge's additional findings, according to the Guidelines, exposed the defendant to a sentence of 360 months to life imprisonment.[135] Based on the judge-found aggravating factors, the defendant received the 360-month

---

188 to 235 months, the judge adhered to the teachings of *Blakely* and refused to depart from the jury's verdict. *Id.*

[130] *See supra* Part I.B.1.

[131] 543 U.S. 220 (2005).

[132] *Id.* at 227 (finding beyond a reasonable doubt that defendant possessed ninety-two and one-half grams of crack cocaine); *see* 21 U.S.C. § 841(a)(1) (1999).

[133] *Booker*, 543 U.S. at 227; *see* U.S. SENTENCING GUIDELINES MANUAL, §§ 2D1.1(c)(4), 4A1.1 (Nov. 2003).

[134] *Booker*, 543 U.S. at 227.

[135] *Id.*

minimum enhanced sentence, 98 months greater than the maximum established by the jury's verdict.[136]

The Court, applying *Apprendi* and its progeny, held that "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."[137] Additionally, the Court severed and excised the provisions of the Sentencing Reform Act that made the Guidelines mandatory[138] because they were incompatible with the *Apprendi* progeny.[139] Following *Booker*, the Guidelines are only advisory, but judges can still discretionarily use them to determine an appropriate sentence based on a particular set of facts and circumstances.[140]

III. Application of the United States Supreme Court's Jurisprudence to Arizona's Sentencing Practices

The aforementioned cases are the backbone of the United States Supreme Court's Sixth Amendment jurisprudence. Apart from *Booker*, nearly all the cases dealt with state sentencing schemes and served to clarify what the Sixth Amendment currently guarantees

---

[136] *Id.*

[137] *Id.* at 244.

[138] 18 U.S.C. § 3553(b)(1) (Supp. 2004).

[139] *Booker*, 543 U.S. at 242-46.

[140] *Id.* at 245-46. See *supra* note 129, for a leading example, although pre-*Booker*, of a judge adhering to his oath to uphold the Constitution and recognizing that the mandatory nature of the Guidelines is not feasible when it violates a defendant's Sixth Amendment jury right.

in state proceedings. However, the Court's jurisprudence is not always fluidly applied in state proceedings and can occasionally encounter resistance and confusion.[141] The Arizona Court of Appeals split over how to interpret *Blakely* and how to apply it to Arizona's presumptive sentencing system. *State v. Martinez*[142] and *State v. Munninger*[143] embodied the competing schools of thought within the Arizona Court of Appeals.

A. Arizona's Blakely Split

1. State v. Martinez[144]

The Arizona Court of Appeals is just one of several state courts that struggled with their application of the *Apprendi* progeny, particularly *Blakely v. Washington*.[145] A series of

---

[141] *Compare* State v. Estrada, 108 P.3d 261, 262 (Ariz. App. 2005), *and* State v. Martinez, 100 P.3d 30, 31-32 (Ariz. App. 2004), *with* State v. Munninger, 104 P.3d 204 (Ariz. App. 2005), *and* State v. Alire, 105 P.3d 163, 166-67 (Ariz. App. 2005); *see infra* Part III.A. For another state's trouble with *Apprendi/Blakely*, see also Traylor v. State, 817 N.E.2d 611, 622 (Ind. App. Ct. 2004); Strong v. State, 817 N.E.2d 256, 261 (Ind. App. Ct. 2004); Krebs v. State, 816 N.E.2d 469, 475-76 (Ind. App. Ct. 2004).

[142] *Martinez*, 100 P.3d 30.

[143] *Munninger*, 104 P.3d 204.

[144] *Martinez*, 100 P.3d 30.

[145] 542 U.S. 296 (2004).

conflicting decisions demonstrated the split in the Arizona Court of Appeals over how to interpret *Blakely*.[146]

In *State v. Martinez* ("*Martinez I*"),[147] the jury convicted the defendant of first-degree murder of his sixty nine-year-old landlord, second degree burglary, and theft of a means of transportation.[148] After the jury found the defendant guilty on all counts charged, the jury found that the state failed to prove the aggravating circumstances that the murder was committed for pecuniary gain or in an especially cruel, heinous, or depraved manner.[149] However, the judge imposed a natural life sentence for the murder conviction and consecutive sentences of seven years each for the burglary and theft convictions.[150] The defendant contested all three sentences

---

[146] *Compare Munninger*, 104 P.3d 204, *and Alire*, 105 P.3d 163, *with Martinez*, 100 P.3d 30, *and Estrada*, 108 P.3d at 262 ("Our difference of opinion on how to apply *Blakely* is one on which reasonable minds can, and obviously do, differ") (Kessler, J., dissenting).

[147] *Martinez*, 100 P.3d 30.

[148] *Id.* at 32. Defendant admitted to having an accomplice and killing victim and was charged with first-degree murder for causing victim's death with premeditation. *Id.* The second-degree burglary charge stemmed from entering and remaining in victim's residence with the intent to commit a felony or theft. *Id.* Theft of a means of transportation was charged because the defendant controlled the victim's truck with the intent to permanently deprive her of its use. *Id.*

[149] *Id.*

[150] *Id.* at 32-33. A person convicted of first-degree murder may receive a sentence of death, natural life without the possibility of parole, or life in prison with the possibility of parole after twenty-five years. *Id.* The jury did not find aggravators that would make defendant death eligible, so the judge imposed the presumptive natural life sentence. *Id.* at 33 (discussing ARIZ.

and claimed that the court violated *Blakely* because it imposed aggravated rather than presumptive sentences and did so based on judge-found aggravators.[151]

According to Arizona's sentencing scheme, the judge "must impose the presumptive sentence unless 'circumstances alleged to be in aggravation or mitigation of the crime are found to be true.'"[152] Arizona's presumptive sentencing scheme[153] set forth the sentencing range for first-degree murder and declared natural life as the presumptive sentence.[154] In *Martinez I*, the judge merely increased the natural life sentence within the statutory range[155] and did not use judge-found sentencing factors to enhance the sentence beyond that range.[156] The court concluded that this manner of imposing a sentence based on aggravating factors did not violate

---

REV. STAT. ANN. § 13-703(A) (2000)). Both the burglary and theft convictions were class three felonies, each carrying a three and one-half year presumptive sentence. *Id.* at 34; *see* ARIZ. REV. STAT. ANN. §§ 13-1507(B), -1814(C), -701(C)(2) (Supp. 2000).

[151] *Martinez*, 100 P.3d at 32-33 (defendant failed to object to these claims at trial, so they are waived absent fundamental error).

[152] *Id.* at 34 (quoting ARIZ. REV. STAT. ANN. § 13-702(B) (2000)). The judge is required to impose the presumptive sentence, not the minimum sentence, if no mitigators or aggravators are present. *Id.*

[153] *See supra* Part I.B.2.

[154] *Martinez*, 100 P.3d at 33; ARIZ. REV. STAT. ANN. § 13-703(A) (2000).

[155] *Martinez*, 100 P.3d at 33-34.

[156] *Id.*

Blakely because the sentence remained within the confines of the established statutory maximum authorized by the jury's verdict.[157]

> Because a guilty verdict for first-degree murder authorizes the court to impose a life sentence either with or without the possibility of release, the court may properly consider the statutory sentencing factors, without the need for jury findings regarding those factors, in deciding whether to allow the possibility of release.[158]

Therefore, in *Martinez I* the court did not violate *Blakely* when it properly sentenced the defendant to an aggravated presumptive sentence of natural life imprisonment for first-degree murder.

However, the major debate in *Martinez I* was not in regards to whether defendant should be eligible for release, but rather whether his aggravated sentences for burglary and theft violated *Blakely*.[159] The sentencing ranges applicable to burglary and theft are a minimum of two and a half years, a presumptive term of three and one-half years, and a maximum of seven years.[160] After finding eight aggravating factors, the judge sentenced the defendant to two consecutive seven-year sentences.[161]

---

[157] *Id.* at 33.

[158] *Id.* at 34.

[159] Blakely v. Washington, 542 U.S. 296, 299-300 (2004).

[160] *Martinez*, 100 P.3d at 34. Both the burglary and theft convictions were class three felonies, each carrying a three and one-half year presumptive sentence. *Id.*; *see* ARIZ. REV. STAT. ANN. §§ 13-1507(B), -1814(C), -701(C)(2) (2000); *supra* note 150.

[161] *Martinez*, 100 P.3d at 34. The trial court found in aggravation:

> (1) the presence of an accomplice, (2) the use of a knife as a weapon, (3) the severe injuries and death of the victim, (4) the emotional and physical pain suffered by the victim, (5) the emotional and financial harm to the victim's

The judge was authorized to find additional aggravating factors because implicit in the jury's verdict was the aggravating factor that the victim died.[162] "[T]he jury having found the existence of one aggravating factor, its verdict expanded the sentencing range and the scope of the trial court's sentencing discretion. When one aggravating factor is authorized by the jury, *Blakely* is satisfied"[163] because "the facts 'legally essential to the punishment' have been found."[164] Thereafter, the judge may use his discretion in imposing an aggravated sentence.[165]

The procedural facts of *Martinez I* are distinguishable from *Blakely* and *Apprendi* because in neither of those cases was an aggravating factor found by the jury, implicitly or otherwise.[166] In fact, *Martinez I* appears to fit perfectly within the Supreme Court's Sixth

---

family, (6) the brutal nature of the crime, (7) pecuniary gain, and (8) the victim's age.

Id.; ARIZ. REV. STAT. ANN. § 13-702(C) (Supp. 2000).

[162] *Martinez*, 100 P.3d at 34; *see* ARIZ. REV. STAT. ANN. §§ 13-702(B), -702(C)(9) (Supp. 2000).

[163] *Martinez*, 100 P.3d at 34; *see Washington*, 542 U.S. at 302-03.

[164] *Martinez*, 100 P.3d at 34-35 (quoting Blakely v. Washington, 542 U.S. 296, 313 (2004)).

[165] *Id.*

[166] *Id.* In *Blakely,* the defendant pled guilty to second-degree kidnapping involving domestic abuse and use of a firearm. Based solely on judicial fact-finding that defendant acted with deliberate cruelty, the judge imposed an enhanced sentence, thirty-seven months beyond the statutory permissible range. *See Washington*, 542 U.S. 296. In *Apprendi*, the defendant pled guilty to unlawful possession of a firearm for unlawful purpose and unlawful possession of a prohibited weapon. After the judge found in aggravation that defendant acted with purpose to

Amendment jurisprudence because the sentences remained within the permissible range authorized by the jury's verdict.[167] Additionally, "Arizona's *non-capital* felony sentencing provisions have accommodated a scheme where some factual determinations which increase a defendant's sentence are found by the jury while others are found by the judge, with the ultimate sentencing decision made by the latter."[168] Arizona's presumptive sentencing scheme, as applied in *Martinez I*, does not appear to violate the Sixth Amendment's jury right guarantee because an Arizona judge may only impose an aggravated sentence after a jury's verdict or a defendant's admission authorizes her to do so.[169] Thus, the jury's verdict satisfied the constitutional aspect of sentencing because they found the facts legally essential to the defendant's punishment, which allowed the judge to exercise her sentencing discretion within the established sentencing range.[170]

---

intimidate based on race, the judge imposed an enhanced sentence that doubled the defendant's range of punishment. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).

[167] *Martinez*, 100 P.3d at 34-35 (implicit finding by jury, that victim of burglary and theft was killed by defendant, authorized sentences of up to seven years per charge).

[168] *Id.* at 35 (discussing State v. Beasley, 205 Ariz. 334, 341 (Ariz. App. 2003)); ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702 (2005) (emphasis in original).

[169] *See Martinez*, 100 P.3d at 35; Almendarez-Torres v. United States, 523 U.S. 224, 226-27 (1998) (finding of prior conviction also need not be submitted to jury and is sufficient to open the door to aggravated sentencing).

[170] See *infra* note 180 for jury findings supporting the verdict and aggravated sentence.

2. State v. Munninger[171]

While *Martinez I* appeared to properly interpret the Supreme Court's Sixth Amendment jurisprudence, subsequent decisions by the Arizona Court of Appeals demonstrated that the *Apprendi* progeny was not entirely clear.[172] *State v. Munninger*[173] was the epitome of the opposing interpretive view of *Blakely*. In *Munninger*,[174] the defendant was charged and convicted of aggravated assault and the jury, by proof beyond a reasonable doubt, properly found that the offense was dangerous.[175] The permissible sentencing range was a minimum of five years, a presumptive term of seven and one-half years, and a maximum of fifteen years.[176]

The judge imposed a twelve and one-half year aggravated sentence, which the appeals court characterized as an enhanced sentence.[177] Extraordinary suffering and severity of harm to

---

[171] 104 P.3d 204 (Ariz. App. 2005).

[172] *See supra* note 141.

[173] *Munninger*, 104 P.3d 204.

[174] *Id.* The defendant encountered the victim outside of a bar late at night, approached the victim, and stabbed the victim under the left armpit with a sharp instrument. *Id.* at 207. The victim's artery, major nerves, veins, and lymph nodes were severed; resulting in an inability to control the use of his left arm or hand. *Id.* at 207-08.

[175] *Id.* at 207-08. Dangerousness is an aggravating factor that increases the presumptive sentence to seven and one-half years for aggravated assault, a class three dangerous felony. *Id.* at 207; ARIZ. REV. STAT. ANN. § 13-604(I) (Supp. 2004).

[176] *Munninger*, 104 P.3d at 207-08; ARIZ. REV. STAT. ANN. § 13-604(I) (Supp. 2004).

[177] *Munninger*, 104 P.3d at 208; *see supra* note 2.

the victim was the primary aggravator supported by overwhelming evidence.[178] However, the trial judge additionally found that the defendant's actions were committed viciously and that the defendant used a dangerous instrument or deadly weapon.[179] The appeals court held that an enhanced sentence based on a single properly found aggravating factor violated *Blakely* because the sentence rested on additional aggravating factors not found by the jury.[180] *Munninger* recognized that the right to jury trial is only violated when a factor increases the sentence beyond that authorized by the jury's verdict and stated that any punishment beyond the presumptive sentence requires jury fact finding.[181]

---

[178] *Munninger*, 104 P.3d at 215. The superior court stated:

> The victim was hospitalized for weeks. He nearly died. He's undergone . . . at least 15 surgeries already. His pain is enormous. His suffering is enormous, and it will continue for the rest of his life. His left arm is paralyzed. He continues physical therapy. He came very close to dying in this case.

Id.

[179] *Id.* at 215-16; ARIZ. REV. STAT. ANN. §§ 13-702(C)(2), (5), (9) (Supp. 2000).

[180] *Munninger*, 104 P.3d at 210; *see State v. Ring*, 65 P.3d 915, 943 (2003). While criticizing *Martinez I*, the *Munninger* court rejected the State's argument that,

> any error was harmless because only one aggravating factor need be properly found. . . . [I]f one such factor is present, the imposition of an aggravated sentence is for the judge's discretion. The judge may then consider additional aggravating circumstances even if they were not found by a jury. In other words . . . a single aggravating factor confers sentencing discretion upon the judge anywhere within the range of the presumptive sentence to the maximum sentence, and additional aggravating factors may be determined by the judge alone.

Munninger, 104 P.3d at 210; *see also* State v. Martinez, 100 P.3d 30 (Ariz. App. 2004).

[181] *Munninger*, 104 P.3d at 211-12.

The *Munninger* court attacked *Martinez I* on the grounds that the implicit finding of death solely supported the sentence and that the additional judge-found aggravators violated *Blakely*.[182] A single aggravating factor may make a defendant "eligible" for an aggravated sentence, however a jury must still "consider *all* aggravating factors urged by the state and not either exempt from *Ring II*, implicit in the jury's verdict, or otherwise established beyond a reasonable doubt."[183]

Munninger also declared that the Supreme Court's Sixth Amendment jurisprudence does not differentiate between capital and non-capital sentencing with respect to aggravators and that all factors used to aggravate a sentence must be submitted to the jury.[184] The reasoning behind the *Munninger* court's interpretation of the *Apprendi* progeny rests two-fold on "the constitutional requirement that the jury decide beyond a reasonable doubt all elements of the offense, and the absence of any real 'distinction between elements and sentencing factors.'"[185]

---

[182] *Id.* at 210-11.

[183] *Id.* (emphasis in original). *Ring II* is *Ring v. Arizona*, in which the Supreme Court found Arizona's sentencing scheme permissibly rendered a defendant death eligible upon a single finding of an aggravator. 536 U.S. 584 (2002).

[184] *Munninger*, 104 P.3d at 211 (discussing *Apprendi*, *Blakely*, and Ring v. Arizona, 536 U.S. 584 (2002)). "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." *Id.* at 210-11 (emphasis in original) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

[185] *Id.* at 212 (quoting Apprendi v. New Jersey, 530 U.S.466 , 494 (2000)).

Furthermore, "[t]he difference between a judicial finding and a jury finding is *no mere procedural formality*, but a *fundamental reservation of power* in our constitutional structure."[186]

The *Munninger* court stressed the need for the jury to consider *all* facts and statutorily enumerated aggravators and mitigators *before* the judge may use her discretion in sentencing.[187] Prior to the judge's imposition of punishment based on aggravating factors, the jury must find not one, but all facts that can be used to increase the punishment.[188] Only after the jury makes those findings may the judge exercise her discretion, otherwise the judge unconstitutionally abuses her discretion because her authority derives "wholly" from the jury's findings.[189] Thus, the trial judge in *Munninger* abused her authority because she imposed a sentence based on two additional aggravators not found by the jury, which was a violation of the defendant's Due Process and Sixth Amendment right to trial by jury.[190]

As discussed above, *Munninger* prohibits sentencing based on aggravating factors when the jury found only one aggravator.[191] Additionally, *Munninger* requires that the jury must find all aggravators considered during sentencing.[192] This interpretation of the United States Supreme

---

[186] *Id.* (emphasis added).

[187] *Id.* at 211-13.

[188] *Id.* at 214 (explaining that "the horse must precede the carriage").

[189] *Munninger*, 104 P.3d at 214 (quoting Blakely v. Washington, 542 U.S. 296, 306 (2004)). "Without that restriction, the jury would not exercise the control that the Framers intended." *Washington*, 542 U.S. at 306.

[190] U.S. CONST. amends. V, VI; *Munninger*, 104 P.3d at 216-17.

[191] *Munninger*, 104 P.3d at 210.

[192] *Id.*

Court's Sixth Amendment jurisprudence directly conflicts with *Martinez I* and the two views cannot stand together.

B. The Resolution

On July 8, 2005, the Arizona Supreme Court issued two opinions that temporarily resolved the controversy over the application of *Blakely* to sentencing in Arizona.[193] The eagerly anticipated decisions of *State v. Martinez* ("*Martinez II*")[194] and *State v. Henderson*[195] were enthusiastically welcomed by a few appeals court judges who wrestled with the rest of the court over how to interpret *Blakely*.[196]

In *Martinez II*, the defendant claimed that the trial judge found facts legally essential for the aggravated sentences for burglary and theft and that those findings and consecutive aggravated sentences violated *Blakely*.[197] The defendant asserted that the jury must find beyond a reasonable doubt all facts legally essential to his punishment.[198] Additionally, he insisted that

---

[193] The resolution was temporary because as more cases come out, more light will be shed on *Blakely's* application and the interpretation will continue to be tweaked within Arizona.

[194] 115 P.3d 618 (Ariz. 2005).

[195] 115 P.3d 601 (Ariz. 2005).

[196] Only five of the twenty-two court of appeals' judges interpreted *Blakely* as did the Arizona Supreme Court. Judges Thompson, Hall, Barker, Timmer, and Espinoza led the way. *See generally* State v. Estrada, 108 P.3d 261, (Ariz. App. 2005); State v. Martinez, 100 P.3d 30 (Ariz. App. 2004); State v. Henderson 100 P.3d 911 (Ariz. App. 2004).

[197] *Martinez*, 115 P.3d at 624 (defendant does not contest his sentence of natural life for the murder conviction).

[198] *Id.*; *see supra* Part III.A.2.

Arizona Revised Statutes section 13-702(A) required the court to conduct a balancing test between all aggravating and mitigating circumstances prior to imposing an aggravated sentence.[199]

However, the judge-found facts did not violate *Blakely* because those aggravating factors did not expose the defendant to a punishment unauthorized by the jury's verdict.[200] "[I]n a non-capital context, a jury need find only that fact or those facts that are 'legally essential' to expose a defendant to a particular range."[201] Under Arizona's sentence scheme, once such a finding is made, the judge may sentence the defendant to the maximum punishment available under the applicable statute.[202] Additionally, the imposition of consecutive sentences for the burglary and theft did not violate *Blakely* and were well within the court's discretion.[203]

---

[199] *Martinez*, 115 P.3d at 623; ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702(A) (2005).

[200] *Martinez*, 115 P.3d at 624; ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702(A) (2005).

[201] *Martinez*, 115 P.3d at 624 (quoting *United States v. Booker*, 543 U.S. 220 (2005) and *Blakely v. Washington*, 542 U.S. 296 (2004)). Arizona's non-capital sentencing scheme conflicts with the capital scheme because the capital fact-finding role is solely in the hands of the jury. A capital jury decides aggravating and mitigating factors and determines whether a death sentence is appropriate, whereas a non-capital judge may find aggravators once authorized to do so. *See* State v. Ring, 65 P.3d 915, 926 (Ariz. 2003); *Martinez*, 115 P.3d at 625. See *supra* note 184 for conflicting interpretation by the *Munninger* court.

[202] *See Martinez*, 115 P.3d at 624; ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702 (2005).

In opposition to the *Munninger* line of thinking, the court clarified that the jury need not find all potential aggravating facts.[204] The role of the fact-finder is not a unique position in a non-capital jury trial, but rather shared between the jury and the judge.[205] The distinction between the two fact-finders lies in the timing of the fact-finding. The jury is required to find at least one aggravating factor beyond a reasonable doubt before the judge may find additional aggravating factors by a preponderance of the evidence.[206]

---

[203] *See* Blockburger v. United States*,* 284 U.S. 299, 304 (1932) (under the Double Jeopardy Clause of the United States Constitution, consecutive sentences are permissible only if each crime requires proof of at least one additional fact that the other does not); People v. Black, 113 P.3d 534 (Cal. 2005) (*Blakely* applies to a single conviction and not to consecutive sentencing, so the court's choice to impose consecutive sentences is within its discretion).

[204] *See Martinez*, 115 P.3d at 621, 624; ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702 (2005); *see also* State v. Johnson, 111 P.3d 1038, 1041 (Ariz. App. 2005) (judicial fact-finding will not violate *Blakely* if the ultimate sentence does not exceed the maximum authorized by the jury verdict alone).

[205] *Martinez*, 115 P.3d at 625. "Arizona's non-capital sentencing statutes provide no indication that the legislature intended to vest responsibility for finding all aggravating facts in a single factfinder." *Id.* Defendants do not have a right to jury findings of fact to in sentencing, but rather only in establishing the facts legally essential for a range of punishment. McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986).

[206] *Id.* A judge may also find aggravating factors after the defendant admits to certain facts or has prior convictions. *Id.*

If the jury fails to find aggravating factors that authorize an aggravated sentence, then the judge may not enhance the sentence.[207]Furthermore, if a judge does enhance the sentence, the sentence will be invalid because it rests on judge-found facts that operate as the "functional equivalent of an element."[208] Long enshrined in this country's legal history is the need for the prosecutor to prove all elements of a crime beyond a reasonable doubt.[209] Anything less is a violation of the defendant's procedural rights under both the Fifth and Sixth Amendments.[210]

Thus, *Martinez* complied with the *Apprendi* progeny because the jury, and not the judge, implicitly found the initial aggravating factor.[211] Once the jury found that the defendant murdered his sixty-nine year old landlord, the door was open for the judge to find additional aggravating factors and to impose an aggravated sentence within the authorized statutory range.[212] The murder conviction and implicit jury finding of death constitutionally satisfied the Sixth Amendment because the facts legally essential to support the sentencing range were established and the judge could then use her discretion to aggravate the sentences to the maximum punishment within that range.[213]

---

[207] *See supra* notes 111-112 and accompanying text.

[208] Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000); *see supra* Part II.A.

[209] *See supra* Part I.A.

[210] U.S. CONST. amends. V, VI; *see* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *In re* Winship, 397 U.S. 358, 364 (1970); State v. Ring, 204 Ariz. 534, 545 (2003).

[211] *See supra* text accompanying note 162.

[212] *See supra* text accompanying notes 125, 163-165.

[213] *See Apprendi*, 530 U.S. at 490, 481 (once all facts legally essential to the punishment are established, judges may exercise discretion in sentencing within statutory limits); State v.

However, had the judge abused her discretion and improperly found aggravators without the jury's authorization, then the appeals court would have had to review *Martinez* for *Blakely* error. In order to determine whether there was a violation of a defendant's procedural rights, the reviewing court will look for either trial error or structural error. In Arizona, *State v. Henderson*[214] established the error-analysis for *Blakely* as trial error and not structural error.[215] Structural errors "'deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for guilt or innocence.'"[216] Not only do structural errors deprive defendants of their constitutional rights, but they also "taint 'the framework within which the trial proceeds.'"[217] *Blakely* error does not permeate the entire trial, but rather is simply an error in a portion of the trial process.[218]

Griswold, 422 P.2d 693, 694 (1967) (sentencing is a matter of judicial discretion and is only reviewable for an abuse of discretion).

[214] State v. Henderson, 115 P.3d 601, 607 (Ariz. 2005) (Henderson satisfied his burden of persuasion and convinced the court that fundamental error occurred and that it caused him prejudice at sentencing).

[215] *Id.* at 604-05.

[216] *Id.* at 605 (quoting Neder v. United States, 527 U.S. 1, 8-9 (1999)).

[217] State v. Anderson, 197 Ariz. 314, 323 (2000) (quoting Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991)).

[218] *See Henderson*, 115 P.3d at 606.

Blakely error is trial error and can be either harmless or fundamental.[219] The two types of trial error differ on whether or not there was an objection at trial.[220] If there was an objection, then harmless error analysis applies because the defendant preserved that issue for appeal.[221] On the other hand, a failure to object at trial results in a waiver of that issue and a forfeiture of the right to obtain appellate relief absent fundamental error.[222] Only in rare cases will an appellate court disregard a forfeiture because the error is so severe that it "takes from a defendant a right essential to his defense" and is "of such magnitude that the defendant could not possibly have received a fair trial."[223]

When a reviewing court conducts harmless error review, the burden is on the state to prove beyond a reasonable doubt that the error did not influence the verdict or the sentence.[224] On the other hand, the burden of persuasion is on the defendant to prove that fundamental error occurred.[225] The burden switches with fundamental error because the defendant had the

---

[219] *Id.* at 604 (facts admitted by a defendant or implicit in the jury's verdict will fall outside the scope of *Blakely* error).

[220] *Id.* at 604-05.

[221] *Id.*

[222] *Id.* at 607. Although a failure to object at trial is a forfeiture of the right to appeal that issue, the Arizona Appeals Court ignored that waiver in *Martinez* and reviewed the sentencing procedure for fundamental error because *Blakely v. Washington* was not decided at the time of the trial. *See* State v. Martinez, 100 P.3d 30, 33 (Ariz. App. 2004); *Henderson*, 115 P.3d at 607.

[223] *Henderson*, 115 P.3d at 607.

[224] *Id.*; State v. Bible, 175 Ariz. 549, 588 (Ariz. 1993).

[225] *Henderson*, 115 P.3d at 607.

opportunity to preserve his rights at trial and failed to do so. Thus, his ability to obtain relief is limited in order to "discourage a defendant from 'taking his chances on a favorable verdict, reserving the [w]hole card of a later appeal on a matter that was curable at trial, and then seeking appellate reversal.'"[226]

If a defendant successfully proves that fundamental error occurred, he must next demonstrate that the error caused him prejudice in the trial or at sentencing.[227] The inquiry into prejudice is fact-intensive and varies from case to case.[228] The prejudice must violate the defendant's procedural rights for the reviewing court to overturn the sentence.[229] When the alleged error is a deprivation of an inalienable right such as Fifth Amendment due process or the Sixth Amendment right to trial by jury, the defendant "must show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result than did the trial judge" in respect to any or all aggravators.[230] If a defendant satisfies this additional burden, then the reviewing court must decide whether there are sufficient facts to support the defendant's aggravated sentence.[231] A lack of recorded factual support for the aggravated sentence signifies an adequate showing of prejudice.[232]

---

[226] *Id.* (quoting State v. Valdez, 160 Ariz. 9, 13-14 (Ariz. 1989)).

[227] *Id.* at 608-09.

[228] *Id.* at 608.

[229] *See id.* (stating that the sentencing procedure denied the defendant the right to have certain facts decided by a jury and that such a procedure constituted fundamental error because it went to the foundation of the defendant's case).

[230] *Henderson*, 115 P.3d at 609.

[231] *Id.*

Applying this *Blakely* trial error analysis to *Henderson*, the defendant was sentenced in violation of *Blakely*, however, he failed to object at trial and therefore, fundamental error review was appropriate.[233] In *Henderson*, the state conceded that *Blakely* error occurred because the judge did find facts by a preponderance of the evidence and used those findings to impose an aggravated sentence, and both constituted fundamental error.[234] Additionally, the *Blakely* error caused the defendant prejudice because it exposed him to a sentence beyond which the jury's unlawful imprisonment verdict authorized.[235] The jury failed to find the defendant intended to inflict serious bodily injury upon his victim, which was the only element distinguishing unlawful imprisonment from kidnapping.[236] However, after the trial judge made several additional findings, she sentenced the defendant to an aggravated term equivalent to kidnapping.[237] Therefore, in *Henderson*, the judge's additional findings prejudiced the defendant because it exposed him to a sentence unauthorized by the jury's verdict and was a violation of his inalienable Sixth Amendment right to trial by jury.

While the defendant in *Henderson* was prejudiced by fundamental error, *Martinez* did not involve fundamental error, nor would the defendant in *Martinez* have been able to prove any

---

[232] *Id.*

[233] *Id.* at 604, 608. (Henderson's trial concluded prior to the *Blakely* decision).

[234] *Id.* at 608.

[235] *Id.* at 609.

[236] *Henderson*, 115 P.3d at 609; ARIZ. REV. STAT. §§ 13-1304 (kidnapping), -1303 (unlawful imprisonment), -1304.A.3 (requiring intent to inflict serious injury upon the victim) (2004).

[237] *Henderson*, 115 P.3d at 609-10 (*Henderson* mirrors the fact pattern and procedural error of *Blakely* and warrants the same result).

prejudice occurred.[238] Assuming, just for argument, that fundamental error did occur in *Martinez*, no reasonable jury would fail to find that the murder victim suffered serious physical injury or was over the age of sixty-five.[239] Additionally, it is unquestionable that the victim died and the record contained sufficient findings of facts to sustain the aggravated sentences.[240] Therefore, in *Martinez* the defendant's procedural rights were not violated, no fundamental error or prejudice occurred, and the trial and aggravated sentences complied with *Blakely*.

C. State v. Martinez' Impact on Arizona's Sentencing Scheme

Arizona's presumptive sentencing scheme is not in constitutional jeopardy according to the Arizona Supreme Court's decision in *Martinez II*. This is partly due to expeditious amendments made by the Arizona State legislature to Arizona's sentencing provisions shortly after the United States Supreme Court decided *Blakely*.[241] The amendments clarified who the aggravating fact-finder had to be in capital and non-capital cases and stated what factors are *Blakely*-exempt and which must comply with *Blakely*.[242]

---

[238] *See* State v. Martinez*,* 115 P.3d 618, 620 (Ariz. 2005). The appeals court reviewed the sentencing procedure for fundamental error, found none, and affirmed the sentences holding that they complied with *Blakely* and the Sixth Amendment. *Id.*

[239] *Id.* at 619-20; ARIZ. REV. STAT. ANN. § 13-702 (C)(9), (13) ((Supp. 2000), amended by ARIZ. REV. STAT. ANN. §§ 13-702 (C)(9), (13) (2005).

[240] *See supra* note 161.

[241] *Martinez*, 115 P.3d at 625 (noting legislature amended sections 13-702 and 13-702.01 to comply with *Blakely*).

[242] State v. Lamar, 115 P.3d 611, 617 (Ariz. 2005). A *Blakely*-exempt factor, such as a prior conviction, authorizes the judge to impose an aggravated sentence within the established

Although Arizona's sentencing scheme has a sentencing range with presumptive, mitigated, and aggravated sentencing possibilities, the scheme is distinguishable from Washington's fixed-term scheme invalidated by *Blakely*.[243] Unlike Washington's invalidated presumptive guidelines scheme, Arizona's scheme requires the jury to find the initial aggravating factors.[244] Once a *Blakely*-compliant or -exempt factor is found, the judge may then exercise her discretion in imposing an aggravated sentence within the prescribed statutory range.[245] *Blakely*-compliant factors include facts found by the jury beyond a reasonable doubt,[246] facts inherent in the jury's verdict,[247] and admissions by the defendant.[248] In other words, *Blakely*-compliant facts are those that are properly found or admitted as true by a defendant. *Blakely*-exempt factors

---

statutory range. *Id*.; *see also* ARIZ. REV STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702 (2005).

[243] *See supra* Part I.B.2.

[244] *See supra* notes 55, 59.

[245] *See supra* text accompanying note 61; State v. Urquidez, 2006 WL 233431 *4 (Ariz. App. 2006); Brief for Petitioner-Appellant, State v. Moon, 2005 WL 3606079 *7 (Colo. 2005) ("an extraordinary circumstance that accompanies a Blakely-compliant or -exempt circumstance only affects the choice of sentence within the prescribed statutory range as widened by the Blakely-compliant or exempt fact").

[246] State v. Aleman, 109 P.3d 571, 581 (Ariz. App. 2005) (citing State v. Oaks, 104 P.3d 163, 168 (Ariz. App. 2004)).

[247] State v. Ruggiero, 120 P.3d 690, 696 (Ariz. App. 2005); State v. Martinez, 115 P.3d 618 (Ariz. 2005).

[248] *Aleman*, 109 P.3d at 581.

include prior convictions[249] and a defendant's parole status,[250] either of which only needs to be supported by reasonable evidence in the record.[251] While a *Blakely*-exemption usually only applies to felony convictions, misdemeanor convictions can also be *Blakely*-exempt if previously secured in a Sixth Amendment-compliant manner.[252] Additionally, *Blakely*-exempt factors are sufficient to uphold an aggravated sentence even if a reasonable jury failed to find other aggravating factors.[253] Thus, under Arizona's scheme, an increase from the presumptive to the maximum sentence within the authorized statutory range does not violate the Sixth Amendment, so long as a *Blakely*-compliant or -exempt factor is present.[254]

---

[249] State v. Burdick, 125 P.3d 1039, 1042 (Ariz. App. 2005) (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Blakely v. Washington, 542 U.S. 296, 301 (2004)); State v. Carreon, 107 P.3d 900, 911 (Ariz. 2005) (prior conviction burden is met when prosecutor offered into evidence a certified copy of defendant's conviction and established that defendant was the person convicted) (citing State v. Marlow, 786 P.2d 395, 400 (1989)).

[250] *Carreon*, 107 P.3d at 911-13 (parole status burden is met when prosecution offered into evidence the document establishing defendant's release status and established that defendant was the person on the document) (citing State v. Hurley, 741 P.2d 257, 265 (1987)).

[251] State v. Molina, 118 P.3d 1094, 1101 (Ariz. App. 2005); *Carreon*, 107 P.3d at 919-20.

[252] *Aleman*, 109 P.3d at 580.

[253] *Carreon*, 107 P.3d at 919-20 (*Blakely*-exempt factors are even sufficient to uphold a death sentence).

[254] State v. Estrada 108 P.3d 261, 267 (Ariz. App. 2005) "The existence of a single Blakely-compliant or . . . Blakely-exempt aggravating factor raises the sentencing ceiling to the

Even though Arizona's sentencing provisions set forth a sentencing range, the legislature bifurcated the responsibility for finding aggravating factors between the jury, which must find at least one aggravating factor beyond a reasonable doubt, and the judge, who may then find additional aggravating factors by a preponderance of the evidence.[255] Once the jury makes the initial fact-finding, establishing the verdict and sentencing range, the Sixth Amendment is satisfied so long as the judge imposes a punishment within the authorized range. By separating the aggravator fact-finding roles of the judge and the jury, the Arizona sentencing scheme complied with the *Apprendi* progeny because it curtailed judicial discretion and preserved the Sixth Amendment guarantee of having a jury find all facts legally essential to a defendant's punishment. Thus, Arizona's sentencing scheme is not in constitutional jeopardy, it complies with the United States Supreme Court Sixth Amendment jurisprudence, and is safely out of the path of the Sixth Amendment rollercoaster.

Furthermore, Arizona's sentencing provisions dictate how many aggravators are required to sustain a particular enhanced sentence.[256] The presumptive sentencing scheme comports with

---

legislatively prescribed maximum, thereby permitting (indeed, requiring pursuant to § 13-702) judicial fact-finding in noncapital cases without violating Blakely." *Id.*

[255] *See* ARIZ. REV. STAT. ANN. § 13-702.01 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702.01 (2005).

[256] *See* ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702 (2005); State v. Henderson, 115 P.3d 601, 609 (Ariz. 2005) (requiring finding of two aggravators for super-aggravated sentence); State v. Martinez,115 P.3d 618, 624 (Ariz. 2005) (increase from presumptive to maximum sentence permissible upon finding of one or more aggravating factors).

Blakely because the judge's role as a fact-finder is only relevant once the jury explicitly or implicitly finds an aggravating factor, the defendant admits to an aggravating factor, or the defendant has a prior conviction.[257] Arizona's sentencing scheme controls judicial discretion and maintains sentencing uniformity and predictability by only allowing judges to increase sentences within the authorized statutorily permissible range.[258] Therefore, when a judge aggravates a sentence, like the trial judge in *Martinez*, the aggravated sentence is justified so long as it comports with *Blakely* and the *Apprendi* progeny.[259] On the other hand, the sentence will not be

---

[257] *See* Blakely v. Washington, 542 U.S. 296, 299-300 (2004); Almendarez-Torres, 523 U.S. 224, 226-27 (1998); *Martinez*, 115 P.3d at 624; ARIZ. REV. STAT. ANN. §§ 13-702(A), (C) (Supp. 2000), amended by ARIZ. REV. STAT. ANN. §§ 13-702(A), (C) (2005).

[258] *See* ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702 (2005). The consideration of any additional aggravating circumstance, while still relevant to the determination of the specific sentence within the aggravated range, becomes irrelevant to the threshold determination of whether an aggravated sentence is permissible under Sixth Amendment standards. *See Martinez*, 115 P.3d at 624; ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702 (2005); *supra* notes 113 and 202.

[259] *See Martinez*, 115 P.3d at 623, 625-26. Applying *Henderson* to *Martinez II*, it is unlikely that a reasonable jury would fail to find the aggravating factor of "infliction or threatened infliction of serious physical harm" and therefore Martinez was not prejudiced by the sentence and fundamental error did not occur. *See id.* at 620 (quoting ARIZ. REV. STAT. ANN. § 13-702(C) (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702(C) (2005)). *See also* State v. Gomez 123 P.3d 1131, 1139 (Ariz. 2005) (sentencing defendant to aggravated term for sexual assault

upheld, as in *Henderson*, when the judge finds aggravating facts under the preponderance of the evidence standard and uses those facts to increase the sentence beyond that authorized by the jury's verdict.[260]

While Arizona's presumptive sentencing scheme complied with the *Apprendi* progeny, other presumptive sentencing schemes, such as Indiana's,[261] clashed in a similar fashion as did Washington's presumptive guidelines. Unlike Arizona's scheme, Indiana's scheme required the judge to consider aggravating factors on her own and only after she found and articulated those factors, could she depart from the fixed term.[262] Indiana's scheme violated the Sixth Amendment because it mandated a fixed term, which was the functional equivalent of Washington's standard range, and then permitted the judge to find aggravators and use her discretion to depart from the fixed term based on her findings.[263]

By allowing the judge to find aggravating factors, Indiana deprived defendants of their inalienable right to have a jury decide the facts legally essential to their punishment. Rather than abandon and sever the fixed term requirement from Indiana's scheme, the Indiana Supreme Court decided to keep fixed term sentencing and require jury fact-finding of aggravators in order

---

did not violate *Blakely* because jury's finding of dangerousness established the serious physical injury aggravating factor necessary to justify an aggravated term).

[260] *See Henderson*, 115 P.3d at 610.

[261] *See supra* note 56.

[262] *See supra* note 56.

[263] Smylie v. State, 823 N.E.2d 679, 685-86 (Ind. 2005) (reversed and remanded for sentencing with jury considering aggravating factors).

to comply with *Blakely*.[264] Shortly thereafter, Indiana's legislature took further measures to modify their fixed term requirement by changing their presumptive sentencing language to make their scheme advisory.[265] Now, both Indiana and Arizona's schemes comply with the *Apprendi* progeny and are safely off the tracks of the Sixth Amendment rollercoaster.

IV. The Burdens and Benefits of Blakely and Martinez

A. Are Bifurcated Trials Necessary?

In response to *Blakely* challenges and the need to preserve defendants' Sixth Amendment rights, Arizona now conducts bifurcated trials in some cases.[266] In cases involving aggravating factors, an aggravation phase will always follow the guilt phase and come before the sentencing or penalty phase.[267] However, after a jury convicts a defendant in the normal guilt phase of a trial, the trial court may conduct a separate *Blakely* "mini trial."[268] While Arizona's sentencing scheme requires the trial court to consider aggravating and mitigating factors prior to determining a sentence, a separate jury trial is not mandatory, nor does a defendant have the right

---

[264] *Id.* at 687.

[265] *See* Michael Limrick, *Senate Bill 96: How General Assembly Returned Problem of Uniform Sentencing to Indiana's Appellate Courts*, 49-FEB Res Gestae 18 *22 (2006) (amended to read as the court "may voluntarily consider"); *Smylie*, 823 N.E.2d at 687 (maintaining and modifying was more favorable to Indiana's legislative intent and goals of sentencing reform).

[266] *See* State v. Urquidez, 2006 WL 233431 (Ariz. App. 2006).

[267] *See* ARIZ. REV. STAT. ANN. § 13-703 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-703 (2005).

[268] *Urquidez*, 2006 WL 233431, at *4.

to a separate trial.[269] A *Blakely* "mini trial" is a separate second jury trial solely for the purpose of determining aggravating facts. It is an additional constitutional protection, however it has the potential to add an unnecessary burden to an already overworked criminal justice system.[270]

A second separate jury trial to determine aggravating factors will burden the criminal justice system in both a financial and a temporal manner.[271] While protecting a defendant's Sixth Amendment right is as valid and worthy a cause as one might encounter in American courts, a separate jury trial as of right will only amount to increased inefficiency and a waste of resources. As Justice Breyer indicated in his dissent in *Blakely v. Washington*, "[i]n the context of noncapital crimes, the potential need for a second indictment alleging aggravating facts, the likely need for formal evidentiary rules to prevent prejudice, and the increased difficulty of obtaining relevant sentencing information, all will mean greater complexity, added cost, and further delay."[272]

---

[269] "[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986). *See also* ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702 (2005); 88 C.J.S. *Trial* § 18 (2005) (explaining that a trial court has the power and discretion to bifurcate a trial on a case-by-case basis).

[270] *See* Blakely v. Washington, 542 U.S. 296, 335-38 (2004) (Breyer, dissenting).

[271] *See id.*; *Urquidez*, 2006 WL 233431, at *4.

[272] *Blakely*, 542 U.S. at 336 (Breyer, dissenting).

In all "run-of-the-mill"[273] cases, the trial court should deal with aggravators at the completion of the guilt phase, thus complying with Arizona's sentencing scheme, and the same jury should evaluate their merit.[274] By using the same jury, the state will not have to go through the unnecessary burden of enlisting a new jury, to whom the prosecutor and defense counsel will have to re-explain the facts and possibly complex history of the case.[275] Once a jury sits through an entire trial, in which they hear from the prosecution, defense counsel, the witnesses, the judge, and possibly the defendant, it makes absolutely no sense to excuse them from deciding what

---

[273] *Id.* All non-capital cases are considered "run-of-the-mill" because they require much less time and money than capital cases involving a guilt phase and mandatory penalty phase in which a defendant can spend almost unlimited time and resources. *See* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run on Sentence*, 46 Case W. Res. L. Rev. 1, 11-16 (1995) (citing one case in which a defendant took over two weeks to explain his life story as a mitigating circumstance). Additionally, in California it costs over $90,000,000 a year for death penalty cases, equally over $200,000 per year per defendant. *Id.* at 13-14.

[274] There is no language in Arizona's sentencing provisions allowing a defendant to demand a new jury to hear and decide aggravating factors. *See* ARIZ. REV. STAT. ANN. §§ 13-702, -703.01 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. §§ 13-702, -703.01 (2005). In fact, § 13-702 only requires that the trier of fact determine and the court consider the aggravating circumstances. *See* ARIZ. REV. STAT. ANN. § 13-702 (Supp. 2000), amended by ARIZ. REV. STAT. ANN. § 13-702 (2005).

[275] *See* State v. Anderson, 111 P.3d 369, 389 (Ariz. 2005) (aggravation phase jury must consider evidence from guilt phase and state must present all evidence it wishes to be considered in aggravation); ARIZ. REV. STAT. § 13-703.01(E) (Supp. 2000).

facts are aggravating and which are mitigating. To do so would be a waste of the taxpayers' money, the prosecution, defense counsel, and jury's time, and the judge's accessibility.[276] Additionally, the defendant will not be deprived of the aggravation phase of trial, but rather is not being awarded the opportunity to have a second jury determine potential aggravating factors.

While the defendant has a constitutional right to have the jury decide all facts that are legally essential to his punishment, the jury need not explicitly find all facts that will be considered in his punishment.[277] Some facts will automatically be considered as aggravators simply because they are implicit in the jury's verdict.[278] For instance, if a defendant shoots and kills his eighty year old step-father and the jury convicts the defendant for murder, then even if not explicitly stated, it is implicit in the jury's verdict that the murder victim died and the victim was over the age of sixty-five.[279] Both of those facts are aggravating factors under Arizona

---

[276] *See Anderson*, 111 P.3d at 390 ("aggravation and penalty phases were essentially a full-blown re-presentation of the entire case. Nearly every trial exhibit was admitted" and almost every witness re-testified).

[277] U.S. CONST. amend. VI; *see supra* Parts I.A, II.C.2.

[278] *See* State v. Urquidez, 2006 WL 233431, *4 (Ariz. App. 2006); *Anderson*, 111 P.3d at 1221 (jury convicted defendant of three counts of murder which established beyond a reasonable doubt the aggravator of serious physical injury); State v. Martinez, 118 P.3d 618, 619 (Ariz. 2005**)** (jury convicted defendant of murder of sixty-nine year old landlord, which established beyond a reasonable doubt the aggravators of severe injury or death and victim's age over sixty-five).

[279] ARIZ. REV. STAT. ANN. §§ 13-702 (C)(9), (13) (Supp. 2000), amended by ARIZ. REV. STAT. ANN. §§ 13-702(C)(9), (13) (2005).

sentencing provisions and will be used to aggravate the sentence, so long as no mitigating circumstances preclude aggravation.[280] It would be a complete waste of the trial court's time and taxpayers' money to hold a *Blakely* "mini trial," even with the same jury, because these *Blakely*-compliant[281] aggravating factors are undisputable and no reasonable jury would fail to find those factors. Likewise, it is unnecessary to hold a *Blakely* "mini trial" on prior convictions because they are *Blakely*-exempt and need only be supported by reasonable evidence in the record.[282]

Thus, once a prior conviction or *Blakely*-compliant factor is established, a defendant has no constitutional right to jury findings on additional aggravating factors because they are not legally essential to his punishment and it is up to the judge to decide where the sentence falls within the permissible range.[283] Accordingly, only in rare cases should the court conduct a *Blakely* "mini trial" in order to further protect a defendant's procedural rights. In capital cases where the death penalty is at stake, enlisting a separate jury to determine aggravating factors is certainly not a waste of time or money. When a defendant's mortal life is at stake, the utmost available protection is required. Otherwise, for "run-of-the-mill" cases in which the aggravation door is not already open, the aggravating phase that follows the guilt phase is sufficient to ensure that the jury has the opportunity to find all facts legally essential to the defendant's punishment.

B. Judicial Discretion

---

[280] ARIZ. REV. STAT. ANN. §§ 13-702 (C)(9), (13) (Supp. 2000), amended by ARIZ. REV. STAT. ANN. §§ 13-702(C)(9), (13) (2005).

[281] *See supra* notes 245 and 247.

[282] *See supra* text accompanying note 249.

[283] State v. Estrada, 108 P.3d 261, 264 (Ariz. App. 2005); *see supra* note 290.

> The Sixth Amendment to the United States Constitution guarantees a criminal defendant's right to a trial by jury. That right continues through sentencing. The Sixth Amendment, however, does not remove from a trial judge the traditional sentencing discretion afforded the judge, so long as the judge exercises that discretion within a sentencing range established by the fact of a prior conviction, facts found by a jury, or facts admitted by a defendant.[284]

The United States Supreme Court Sixth Amendment jurisprudence has made clear that the "jury requirement does not entirely remove from the purview of judges any consideration of aggravating factors."[285] Likewise, *Martinez* does not expand judicial discretion, but rather complies with the *Apprendi* progeny and enunciates the permissible boundaries within Arizona's sentencing scheme.

The recently amended sentencing provisions applied in *Martinez II* permit Arizona judges to use their discretion during the aggravation and penalty phases, so long as they stay within the authorized sentencing range.[286] In most situations, the judge is required to at least consider aggravating factors, however she need not impose an aggravated sentence.[287] Therefore, the judge may use her discretion when balancing aggravating and mitigating circumstances because she is only allowed to consider those circumstances after all facts legally essential to the

---

[284] State v. Carreon, 116 P.3d 1192, 1193 (Ariz. 2005).

[285] State v. Martinez, 115 P.3d 618, 621 (Ariz. 2005). When "[t]he judge performs sentencing in a non-capital case, [it] is not a fact-finding function. Instead, it is an exercise of discretion." State v. Munninger, 104 P.3d 204, 211 (Ariz. App. 2005).

[286] ARIZ. REV. STAT. ANN. §§ 13-702 (B), (C) (Supp. 2000), amended by ARIZ. REV. STAT. ANN. §§ 13-702 (B), (C) (2005).

[287] ARIZ. REV. STAT. ANN. § 13-702 (C)(11) (2001).

punishment have already been determined.[288] Only when the judge finds one or more aggravating circumstances and no mitigators, is her judicial discretion curtailed. In that situation, the judge is statutorily required to impose an aggravated sentence and may not depart from the sentencing provisions recommendations.[289]

Furthermore, "[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."[290] Although the defendant has no constitutional right to jury fact-finding at this stage, his rights are still protected against a tyrannical abuse of judicial power. The judge must articulate which factors she found and used to aggravate the sentence.[291] Thus, if a case is appealed, the reviewing court will have an on the record account of what factors affected the defendant's sentence. Absent this safeguard, unfettered judicial discretion could lead to an erosion of the guarantees provided by the Sixth Amendment and Arizona would be back on the Sixth Amendment's rollercoaster tracks.

While judicial discretion needs to be restrained, it is also a necessary component of the criminal justice system. The judge's role in sentencing is to sufficiently punish the defendant for criminal wrongdoing.[292] If the judge had no discretion in this stage of the proceedings, then all

---

[288] *See supra* text accompanying notes 245 and 254.

[289] State v. Estrada, 108 P.3d 261, 264 (Ariz. App. 2005) (citing ARIZ. REV. STAT. ANN. 13-702 (D)(5)).

[290] State v. Manzanado, 110 P.3d 1026, 1031 (Ariz. App. 2005) (quoting United States v. Booker, 543 U.S. 220, 233 (2005)) (internal quotations omitted).

[291] *See supra* text accompanying note 59.

[292] *See supra* text accompanying notes 33-34.

defendants who commit the same type of crime will be punished in exactly the same manner, regardless of the factual circumstances surrounding the crime. Discretion is absolutely necessary to equitably punish defendants for their specific criminal conduct.[293] Some situations will merit leniency, while others may demand the most severe punishment available. It is essential that judges have some leeway to protect the public from further crimes and to deter future criminal conduct. Again, abuse of judicial discretion will be restricted by statutes and by the appeals process. Moreover, the judge is in the best position to further the goals of sentencing reform, and discretion must be allowed for the judge to sufficiently and equitably punish defendants for their wrongdoing.[294]

Conclusion

The Sixth Amendment acts as a moat around the sacrosanct jury trial and prevents a possible tyrannical government from tainting our ability to have our peers and neighbors decide our fate in criminal matters. The United States Supreme Court's Sixth Amendment jurisprudence sheds light into the depth of the moat and lowers an occasional drawbridge clarifying how sacred the right to jury trial truly is.

One clear constitutional principle to which all federal and state sentencing schemes must adhere, is that all facts legally essential to a defendant's punishment must be submitted to a jury and proven beyond a reasonable doubt.[295] The classification of facts and circumstances as factors or elements is irrelevant if their presence increases a defendant's possible punishment.[296]

---

[293] *See supra* notes 33-40 and accompanying text.

[294] *See supra* note 34.

[295] *See supra* notes 26, 126, 205 and accompanying text.

[296] *See supra* note 86.

Anything that can enhance a defendant's sentencing range must be admitted by the defendant, found by a jury, or satisfy *Blakely*.[297]

The United States Supreme Court clarified that sentence aggravation is distinguishable from enhancement and only the latter requires additional jury findings. However, a defendant does not have a constitutional right to have a jury find all aggravating factors when they are not all legally essential to the defendant's punishment.[298] The aggravation phase of a trial follows the guilt phase and the guilt phase is where the facts legally essential to punishment must be determined. The jury's verdict is a telltale sign of what a defendant's maximum punishment can be. Judicial discretion only comes into play after the maximum sentencing range is established.

Thus, judicial discretion within an authorized sentencing range is permissible and warranted when *Blakely* is satisfied and the facts demand additional punishment.[299] Judicial discretion is not open ended, but rather clearly defined by both the United States Supreme Court's Sixth Amendment jurisprudence and Arizona statutory and case law.[300] Judicial discretion does not jeopardize the goals of sentencing uniformity and predictability, but rather clarifies them. Judges are able to use the specific facts involved in a crime and cater the punishment to those facts. By recording their justifications for aggravation, judges constantly supply notice to potential criminals and to legislators, who may amend sentencing provisions if they feel judges are drifting from the legislature's sentencing goals.

---

[297] *See supra* Part III.B.

[298] *See supra* note 290.

[299] *See supra* notes 286-289 and accompanying text.

[300] *See supra* Part IV.B.

These Sixth Amendment interpretation twists and turns, applied to Arizona's sentencing scheme and cases such as *State v. Martinez*, produce carefully crafted boundaries to judicial discretion and the inalienable right to trial by jury. Accordingly, Arizona's current status with aggravator fact-finding complies with the *Apprendi* progeny because once the jury finds the initial aggravating factors, the Sixth Amendment is satisfied and the judge may consider additional aggravators during sentencing, so long as the sentence remains within the range authorized by the jury's verdict. Therefore, Arizona's presumptive sentencing scheme is safely off the tracks of the Sixth Amendment rollercoaster. Nevertheless, the United States Supreme Court may lower another drawbridge, and if so, Arizona may have to rework its' sentencing provisions so that criminal defendants' constitutional guarantees are not under siege.