PRE-*APPRENDI* SENTENCING: ISSUES SURROUNDING THE RETROACTIVITY OF AN UNCONSTITUTIONAL SENTENCE

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I. INTRODUCTION

For over two centuries, the United States Constitution has guaranteed Americans a right to trial by jury in criminal prosecutions.[1] In exercising this right, a jury must apply the "beyond a reasonable doubt" standard to each element of the crime.[2] However, the understanding of what constitutes an "element" of a crime has fluctuated over the years and these changes have had a significant impact on federal sentencing.[3]

In *Apprendi v. New Jersey*,[4] one of the United States Supreme Court's most influential decisions on federal sentencing, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[5] Years later in *Blakely v. Washington*,[6] the same Court clarified 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*."[7] Most federal courts have found that the federal sentencing guidelines and statutory minimums fell within the *Blakely* rule, yet sentencing determinations under these laws required that a

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1. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.
2. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
3. *See* Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249, 250–51 (1998). In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the U.S. Supreme Court acknowledged the possibility of future issues regarding the state's power to classify a fact as a sentencing factor rather than an element but no constitutional violations were found in that case. Priester, *supra* at 255. The dissenters argued that, if the prohibited conduct increased the sentence at all, those facts must be proven using the same standard as elements. *Id.*
4. *Apprendi*, 530 U.S. at 466.
5. *Id.* at 490.
6. Blakely v. Washington, 542 U.S. 296 (2004).
7. *Id.* at 303.

judge adjust a defendant's sentence based on post-conviction findings of fact.[8] The Court reserved its ruling in *Blakely* as to whether its decision applied to the federal sentencing guidelines.[9] In response to the turmoil caused by these decisions, the Court heard two cases, *United States v. Booker*[10] and *United States v. Fanfan*[11] concurrently.[12] In an attempt to address the constitutionality of the guidelines without completely abolishing their existence, the Court held the mandatory guidelines were unconstitutional and should therefore be treated as discretionary rather than mandatory.[13] The Court allowed for application of this new rule to cases that were not yet finalized and on direct review.[14] However, defendants that have exhausted their ability to appeal can only rely on habeas corpus review and remain incarcerated under the unconstitutional guidelines.[15]

The rationale behind the Court's refusal to apply the decisions retroactively[16] has not been addressed.[17] The retroactive application of new standards in the law is not an unfamiliar concept. In the 1950s, the Boggs Act[18] established severe mandatory minimum sentences for drug-related crimes.[19] However, the harsh punishments failed to deter criminal activity

8. Michael D. Wysocki, Comment, *Beyond a Reasonable Doubt: The Effects of* Blakely v. Washington, United States v. Booker, *and the Future of the Federal Sentencing Guidelines*, 38 TEX. TECH L. REV. 495, 498 (2006).

9. *Blakely*, 542 U.S. at 305 n.9 (stating that "[t]he Federal Guidelines are not before us, and we express no opinion on them.").

10. United States v. Booker, 375 F.3d 508 (7th Cir. 2004).

11. United States v. Fanfan, 468 F.3d 7 (1st Cir. 2006).

12. United States v. Booker, 543 U.S. 220, 229 (2005).

13. *See id.* at 232–33.

14. *Id.* at 268.

15. *See, e.g.*, Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (declining to apply retroactively the holding in *Ring v. Arizona*, 536 U.S. 584 (2002), requiring that all aggravating factors used to determine the death penalty be reviewed by a jury); Teague v. Lane, 489 U.S. 288, 310 (1989) ("[T]he application of new rules to cases on collateral review . . . *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards."); *see also* United States v. Mandanici, 205 F.3d 519, 529 (2d Cir. 2000) (describing eleven Supreme Court decisions that denied retroactive application of a new legal standard); BLACK'S LAW DICTIONARY 778 (9th ed. 2009) (defining habeas corpus as "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal").

16. BLACK'S LAW DICTIONARY 1432 (defining retroactive as "extending in scope or effect to matters that have occurred in the past).

17. *See* Jon Wool, *Beyond* Blakely*: Implications of the* Booker *Decision for State Sentencing Systems*, 17 FED. SENT'G REP. 285, 288–89 (2005) ("[U]nless the Supreme Court chooses to weigh in on a case arising from a state prosecution, state courts will be left to resolve a host of state statutory and federal constitutional issues on their own.").

18. *See* Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 651 (1956).

19. *See id.*

as was intended.[20] The legislature withdrew the mandatory minimum sentences and enacted laws primarily focused on rehabilitation.[21] The decision was applied retroactively and those sternly sentenced under the Boggs guidelines received the benefits.[22]

This comment ventures to provide a manageable resolution to the issues that have arisen from the implementation and subsequent limitations of the federal sentencing guidelines.[23] Part II discusses the sentencing guidelines' history, creation, and evolution.[24] This part also reviews the pertinent cases that have shaped the relevance and application of the sentencing guidelines by the U.S. Supreme Court.[25] Part III details the successful retroactivity of the Boggs Act as a real-world example of the feasibility of retroactivity.[26] Finally, Part IV provides an administrative solution to the problems with retroactive application of the *Booker*/*Fanfan* decision in order to remedy the unconstitutional federal sentences being served today.[27]

II. A HISTORY OF FEDERAL SENTENCING REFORM

The purpose of punishment in a democratic nation has varied over the years: from rehabilitation to retaliation and back again.[28] For a majority of the twentieth century, offenders were sentenced based on the primary objective of rehabilitation.[29] The discretionary system was intended to allow judges to impose just punishment in order to promote the main goal

20. Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, 21 FED. SENT. R. 55, 55 (2008).

21. Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 57 FED. PROBATION 9, 9 (1993).

22. *Id.* at 10.

23. *See generally* David Yellen, *Saving Federal Sentencing Reform After* Apprendi, Blakely *and* Booker, 50 VILL. L. REV. 163 (2005) (discussing the current state of federal sentencing).

24. *See infra* Part II.

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part IV.

28. *See* Yellen, *supra* note 23, at 164–65. Rehabilitative sentencing meant that a judge had broad discretion in sentencing, limited only by the maximum sentence allowed in the criminal statute. *Id.* at 164. After serving a third of the sentence, an inmate would usually become eligible to meet with a parole board to determine whether the sentence should be reduced or eliminated altogether. *Id.* at 165. The individualized decision would take into account the offender's progress while incarcerated and, if rehabilitated, the offender could potentially be released with two-thirds of his or her sentence still remaining. *Id.*

29. *See* Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1317 (2005).

of rehabilitation which may have been lost in the strict criminal justice process.[30]

Doubts as to the effectiveness of the rehabilitative design drove reformers to establish a structured sentencing model in most jurisdictions.[31] Today, the structured sentencing guidelines are applied on an advisory basis.[32] Understanding the issues surrounding current federal sentencing practices requires a history of the structure and the cases that have shaped today's system.[33]

A. THE EVOLUTION OF FEDERAL SENTENCING

Prior to the twentieth century, federal judges were entrusted with extensive sentencing discretion.[34] For nearly two hundred years, there were virtually no cases where an appellate court challenged a federal judge's sentencing discretion.[35] The main focus of prison sentences at the time was the successful reintegration of the offender into society.[36] In furtherance of that goal, the federal system created a parole board that would ultimately determine when an individual would be released from prison.[37] Theoretically, the indeterminate sentencing structure would motivate prisoners to rehabilitate themselves in order to be released from prison early.[38] In the 1970s, however, reformers criticized the system for creating

30. *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURTS 30 (1998).

31. *See* Bowman, *supra* note 29, at 1318; Yellen, *supra* note 23, at 165–66; *see also* Robert W. Kastenmeier & Howard C. Eglit, *Parole Release Decisionmaking: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477, 485–86 (1973). In reality, it was difficult for parole boards to determine which inmates were truly rehabilitated and which were only portraying an ideal citizen in order to have their sentences reduced. Kastenmeier & Eglit, *supra* at 485–86; *see* Yellen, *supra* note 23, at 165. The lack of accuracy and the substantial disparity in sentences prompted the legislatures to create a structured sentencing scheme that included either sentencing guidelines or statutory mandatory minimum sentences. *Yellen*, *supra* note 23, at 167.

32. *See* Yellen, *supra* note 23, at 163.

33. *See* Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of* United States v. Booker *and* United States v. Fanfan, 56 MERCER L. REV. 1131, 1132–33 (2005).

34. *See, e.g.*, Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892–93 (1990); Mistretta v. United States, 488 U.S. 361, 363 (1989) (stating that judicial discretion in sentencing has been prominent for nearly a century).

35. STITH & CABRANES, *supra* note 30, at 9.

36. William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 308 (1993).

37. *See* Act of June 25, 1910, ch. 387, 36 Stat. 819.

38. *See* CASSIA SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 225 (2d ed. 2009); Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 455 (1928).

inconsistent sentences[39] and the parole board's decision for premature release was based on discriminatory factors.[40] Others claimed the sentencing disparity was rooted in the individual federal judge's temperament and background.[41] In an attempt to limit sentence disparity and provide predictable punishments, the legislature signed into law the Comprehensive Crime Control Act of 1984, which also included the Sentencing Reform Act ("SRA").[42] The SRA established a Sentencing Commission intended to be an impartial committee that would establish a new sentencing scheme to eliminate sentence disparity.[43]

The SRA's primary objectives were to encourage just punishment, provide deterrence of future criminal conduct, confine dangerous criminals, and provide training, medical care, and correctional treatment to offenders.[44] Among other things, the Sentencing Commission abolished the Parole Commission and established sentencing guidelines that required

39. Wilkins, Jr., *supra* note 36, at 308. United States District Judge Frankel criticized the sentencing discretion by stating,

> We claim, remember, to have a government of laws, not men. That promise to the ear is broken to the hope when a sentence may range from zero up to thirty or more years in the unfettered discretion of miscellaneous judges . . . . The result . . . is a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice.

Id.

40. *See* Leo Carroll & Margaret E. Mondrick, *Racial Bias in the Decision to Grant Parole*, 11 LAW & SOC'Y REV. 93, 104 (1976) (stating that, although black and white prisoners were paroled in approximately the same proportion, black prisoners were required to meet additional criteria, namely participation in the institution's treatment programs). *See generally* Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121, 123–24 (1975–76) (illustrating the statistical discrepancy between black male sentencing and white male sentencing).

41. STITH & CABRANES, *supra* note 30, at 31.

42. 28 U.S.C § 991(a) (2008); PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984) (codified as amended in sections of 18 U.S.C. and 28 U.S.C). The members of the SRA were nominated by the President and confirmed by the Senate. 28 U.S.C. § 991(a). The board consisted of seven voting members and only four could be members of the same political party. *Id.* The requirement that at least three members be federal judges was abolished in 2003. 117 Stat. at 650. Instead, the maximum number of judges that can serve on the panel has been capped at three. *Id.*

43. STITH & CABRANES, *supra* note 30, at 48. In reality, the Sentencing Commission was wrought with controversy and political influence from the start. *Id.* The members of the commission, although experienced in politics and social science research, had little knowledge of criminal law and sentencing. *Id.* The only member who possessed any sentencing experience at all was the Commission's chairman. *Id.*

44. *See* 18 U.S.C. § 3553(a)(2) (1996). In addition, the courts considered the need for the sentence to reflect the seriousness of the crime and to "promote respect for the law." *Id.* § 3553(a)(2)(A). The only discretion awarded to the sentencing judge was the ability to consider aggravating or mitigating circumstances only if the sentencing guidelines had not already predetermined a sentence taking those factors into consideration. *Id.* § 3553(b).

judges to sentence an offender within a specified range.[45] When it enacted The SRA, Congress hoped to eliminate inconsistent and discriminatory punishments by limiting judicial discretion.[46]

B. SRA SENTENCING GUIDELINES

The Sentencing Commission was given complete law-making authority unless its decisions were rejected by both houses of Congress and the President.[47] In creating the SRA guidelines, the Commission decided which factors were relevant to sentencing and which should be ignored.[48] Despite the Commission's lack of experience in criminal sentencing, Congress gave the Commission the power to establish severe mandatory sentencing guidelines.[49]

The SRA guidelines and accompanying sentencing table are exceedingly complex.[50] The guidelines themselves are a detailed explanation of the sentencing table which indicates the current offense on the vertical axis and the defendant's criminal history on the horizontal axis.[51] The table contains forty-three offense levels, six criminal history categories, and a total of 258 grid boxes.[52]

The offense level, located on the vertical axis, is a determination by the sentencing judge in considering the following: (1) the "base offense level," which is the seriousness of the crime based on the conviction of the statutory elements; (2) "specific offense characteristics," which are factors, aside from the elements of the crime, considered in determining the seriousness of the crime; and (3) additional enhancements permitted under chapter three of the guidelines.[53] Once the judge determines the current

45. STITH & CABRANES, *supra* note 30, at 2; Bowman, *supra* note 29, at 1323.

46. *See* Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN L. REV. 1, 1 (2010). Both Democrats and Republicans agreed that sentencing reform was necessary. *Id.* at 8. Democrats stressed the concern that race discrimination was driving the indeterminate sentences. *Id.* On the other hand, Republicans wanted to get "tough on crime" and thought judges were too tolerant. *Id.*

47. STITH & CABRANES, *supra* note 30, at 77.

48. *Id.* The "real offense" conduct which is considered in determining whether sentencing enhancements apply are labeled as: "'offense conduct,' quality and other 'specific offense characteristics,' 'relevant conduct,' aggravating and mitigating 'adjustments,' 'criminal history score,' and permitted bases for 'departure.'" *Id.*

49. *Id.* at 49.

50. *See* Bowman, *supra* note 29, at 1325.

51. 2011 FED. SENTENCING GUIDELINES MANUAL § 5A (2011), *available at* http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/5a_SenTab.htm; *see also* Bowman, *supra* note 29, at 1324.

52. 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51.

53. *See id.*; Bowman, *supra* note 29, at 1325 n.48 (providing a brief summary of the

offense level and criminal history, the intersecting section of the grid provides the appropriate sentencing range.[54] According to chapter three of the sentencing guidelines, judges are required to increase the guideline range based on additional criminal behavior related to the present offense.[55] In theory, the guidelines not only punish an offender based on the elements of the present crime and his criminal history, but also for his "relevant conduct."[56]

Once the base offense level has been determined, the judge must then decide whether the relevant guideline factors are present in the case.[57] Each factor requires the judge to add or subtract points that would increase or decrease the offenders "level" and determine the sentence to be imposed.[58] This process virtually eliminated judicial discretion in sentencing and limited the judge's role to an arithmetic operation.[59]

The SRA guidelines have been widely criticized for being too harsh and imposing excessive punishments for disproportionate crimes.[60] Since the SRA "abolished parole and requires defendants to serve at least eighty-five percent of the prison term imposed," the average length of sentences

guidelines' structure and application). The introduction to chapter three states that adjustments may be made to an offender's base offense level depending on the role they played in the crime. 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 3B1. This role is determined by relevant factors that are not elements to the crime itself such as obstruction of justice and multiple counts of the conviction. *Id*. at § 1B1.

54. *See* Bowman, *supra* note 29, at 1324.

55. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976, 1987 (1984) (codified as amended in sections of 18 U.S.C. and 28 U.S.C); 18 U.S.C § 3553(a)(2) (1996); 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 3. For example, if during the commission of a crime the defendant was "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," then the offense rating would increase four levels. 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 3B1.1.

56. *See* Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G. REP. 180, 183 (1999). According to Justice Breyer, "relevant conduct" sentencing was actually intended to reduce the amount of power given to prosecutors:

> Prosecutors should find it more difficult than under pre-Guideline practice to control the sentence by manipulating the charge. For, within broad limits, the offender's actual conduct, not the charge, will determine the sentence. For this same reason plea bargaining over charges should have diminished, because again within broad limits, a defendant's promise to plead guilty to a particular, perhaps less serious, charge likely will not affect the sentence. Nor can the prosecutor simply urge the judge to overlook certain aspects of the offender's conduct. The process is transparent; that conduct will appear in the presentence report and the judge must use it for sentencing.

Id. However, it seems that an extended sentence based on enhancements that are not proven beyond a reasonable doubt gives judges the ability to control the prison term without having to meet the beyond a reasonable doubt burden of proof. *Id.*

57. STITH & CABRANES, *supra* note 30, at 83.

58. *Id.*

59. *Id.*

60. Bowman, *supra* note 29, at 1328–29.

has almost tripled and the federal inmate population has increased over 600 percent.[61] During the pre-guideline era, only about fifty percent of federal defendants faced prison time.[62] After the guidelines were established, nearly eighty-five percent of defendants were incarcerated.[63] The judiciary relied less on probation and increased both the length and instance of prison terms.[64]

C. INTRODUCTION OF MANDATORY MINIMUMS INTO SENTENCING GUIDELINES

In addition to the limitations placed on the judiciary through the sentencing table, judges were also required, by statute, to increase the guideline range if additional criminal behavior was present.[65] Statutory mandatory minimums had to be complied with in conjunction with the sentencing guidelines.[66] If the guideline range fell below the minimum mandatory sentence mandated by the statute, the minimum mandatory sentence would need to be followed.[67] Despite these additional safeguards to ensure severe sentences were imposed, the guidelines were structured to require more than the statutory minimum in most cases.[68]

Statutory mandatory minimums require a specific criminal penalty for certain conduct associated with the commission of a crime.[69] Once the SRA was signed into law, new mandatory minimum statutes were passed

61. *Id.* at 1328–29 (discussing that federal inmate populations have increased "by more than 600%" since the 1980s).

62. STITH & CABRANES, *supra* note 30, at 62. The purposeful increase in punishment severity caused a significant increase in the prison population. *Id.* The most notable increase can be seen in the population of women incarcerated. *Id.* Although the total number of women who were sentenced in federal court decreased post-guidelines, the number of women in prison grew faster than the number of men. *Id.* The significant increase in average time served was most impacted by non-violent drug offenders who were sentenced under severe guidelines combined with statutory mandatory minimums. *Id.* at 64.

63. *Id.* at 63.

64. *See generally id.* at 64 (discussing the impact of the sentencing guidelines on the severity of prison sentences and the time spent in prison versus probation).

65. *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 64 (1993).

66. *See* STITH & CABRANES, *supra* note 30, at 123. In addition to the mandatory minimums created by statute, the Sentencing Commission has, in effect, created mandatory minimums within the bottom of the sentencing guideline ranges. *Id.*

67. *Id.*

68. *Id.* at 123.

69. *See* Michael M. Baylson, *Mandatory Minimums: A Federal Prosecutor's Point of View*, 40 FED. B. NEWS & J. 167, 167 (1993).

with greater frequency.[70] For example, the 1986 Anti-Drug Abuse Act established an array of mandatory minimums for drug related offenses.[71]

The most well-known mandatory minimum sentences are the five-year and ten-year minimums for drug distribution and drug importation respectively.[72] A judge would decide if a minimum sentence applied by determining the "quantity of any 'mixture or substance' containing a 'detectable amount' of the prohibited drugs."[73] Another problem regarding mandatory minimum sentences can be seen in *McMillan v. Pennsylvania*.[74] The U.S. Supreme Court upheld the constitutionality of the Pennsylvania Mandatory Minimum Sentencing Act,[75] which required the judge to apply a five-year minimum sentence for the visible possession of a firearm during the commission of a felony.[76] Because the facts pertaining to the visibility of the firearm were not presented to the jury, the jury could not apply the "beyond a reasonable doubt" standard to those facts.[77] Nevertheless, after the jury deliberated as to the elements of the crime, the judge determined that the defendants had "visible possession of a firearm" while committing

70. Wallace, *supra* note 21, at 10; *see* 21 U.S.C. § 841(b) (1986); Firearms Owners Protection Act, 18 U.S.C. § 924(c) (1986).

71. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM § 2A (1991) [hereinafter SPECIAL REPORT], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm (providing a detailed look at all mandatory minimum sentencing provisions available at the time). In response to heightened public concern for drug offenses during the 1980s, the 1986 Anti-Drug Abuse Act ("ADAA") created mandatory minimum sentences (without the opportunity for parole) relating to the amount of drugs that were the subject of the offense. *Id.* High-level drug dealers were subject to a ten-year minimum for a first time offense and twenty years for a repeat offense. *Id.* Mid-level offenders were also given a mandatory minimum of five years for a first time offense and ten years for the second offense. *Id.* Under the Omnibus Anti-Drug Abuse Act of 1988, a mandatory minimum of five years was put into effect for possession of more than five grams of crack cocaine. *Id.* In addition, an offender who was involved in a continuing drug enterprise required a minimum twenty year sentence. *Id.* Although those involved in drug enterprises have different levels of involvement, the statute increased the potential that a mid or lower-level conspirator would receive the same sentence as a high-level conspirator. *Id.*

72. Wallace, *supra* note 21, at 10.

73. *Id.* Wallace argues that the implementation of numerous mandatory minimum sentencing statutes correspond with congressional election years. *Id.* The infamous "war on drugs" may have fueled politicians to enact stricter sentencing laws to gain popularity with their constituents. *See id.*

74. McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986) (holding that Pennsylvania's mandatory minimum statute was constitutional insofar as visible possession of a firearm was a sentencing factor that only needed to be viewed by the judge and was not an element to be presented to the jury).

75. 42 PA. CONS. STAT. § 9712 (1982).

76. *McMillan*, 477 U.S. at 81.

77. *See id.* at 93.

the felony.[78] The judge then applied the enhancement statute, thereby extending the defendants' sentences.[79]

In applying sentencing enhancements, through either the SRA's chapter three adjustments or the statutory minimum mandatory, a judge had the power to substantially increase an offender's sentence without proving the enhancement factors beyond a reasonable doubt.[80] In order to justify these inflated sentences, the facts that a jury would consider in determining guilt were the "elements" of the crime.[81] On the other hand, the facts that a judge would consider—post–conviction—were "sentencing factors."[82] Although both the "elements" and "sentencing factors" contributed to the amount of time the defendant would be incarcerated, only those facts that considered elements of the crime would need to be proven "beyond a reasonable doubt."[83] The Due Process Clauses of the Fifth and Fourteenth Amendments provide protection "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[84] By making a distinction between the elements and the sentencing factors, judges were able to use a lower standard of proof in applying sentencing enhancements and while defending the enhancement's constitutionality.[85]

In effect, the SRA guidelines developed into a statutory mandatory sentencing scheme that judges were bound to follow.[86] The mandatory

78. *See id.* at 84.

79. *See id.* at 81.

80. *See* Monge v. California, 524 U.S. 721, 738 (1998) (Scalia, J., dissenting); Priester, *supra* note 3, at 250. In his dissent, Scalia describes his concerns with sentencing enhancements based on levels of *mens rea*, type of injury, and other factors which are not presented to the jury for deliberation. *Monge*, 524 U.S. at 738; Priester, *supra* note 3, at 250. Scalia argued that the SRA guidelines had the same effect as laws passed by Congress yet were created by an appointed Commission instead of the elected legislature. *Monge*, 524 U.S. at 738.

81. *See* Priester, *supra* note 3, at 250.

82. *See id.*

83. *Id.*

84. *In re* Winship, 397 U.S. 358, 364 (1970).

85. *See* Priester, *supra* note 3, at 250; 8 U.S.C. § 1326 (2013); Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998). An alien re-entry statute made it a felony, punishable by up to two years in prison, for a deported individual to re-enter the United States without the government's permission. *Almendarez-Torres*, 523 U.S. at 227. If the deportation was the result of an aggravated felony, the punishment would increase to a maximum of twenty years in prison. *See id.*; 8 U.S.C. § 1326. In *Almendarez-Torres*, the prosecution failed to provide proof of the defendant's prior felony at trial or in the indictment. *Almendarez–Torres*, 523 U.S. at 227. Instead, the evidence was presented at sentencing and the defendant was sentenced to seven years imprisonment. *Id.* The U.S. Supreme Court held that the recidivism enhancement was not an element of the offense but a sentencing factor, which could be considered post-conviction. *Id.* at 247.

86. Lowenthal, *supra* note 65, at 61–62.

sentencing statutes "generally provide that when a specified circumstance exists in connection with the commission of a crime: (1) the court *must* sentence the defendant to prison; and (2) the duration of the defendant's incarceration will be substantially longer than it would have been in the absence of the circumstance."[87] Members of the judiciary, defense attorneys, and even prosecutors voiced their concerns as to post-conviction enhancements and the rigid nature of the guidelines.[88] There were also mounting concerns as to the effectiveness of the SRA guidelines coupled with the mandatory minimum statutes.[89] Nevertheless, in *Mistretta v. United States*,[90] the U.S. Supreme Court negated the opposition to the SRA guidelines and held them to be constitutional on the basis of separation of powers.[91]

In theory, mandatory minimum sentencing is an attempt to treat offenders equally, setting a base sentence for the crime committed and taking past criminal history into account.[92] Judges were bound to apply the minimum sentence without considering a defendant's background, circumstances, state of mind, or remorsefulness.[93] However, if a defendant provided "'substantial assistance' in prosecuting another offender," he was exempt from the strict minimum sentence.[94] This created additional disparity in sentencing for comparable offenses.[95] Those who committed the most severe crimes usually provided more useful information than minor offenders.[96] Thus, prosecutors were willing to offer a lesser sentence

87. *Id.* at 64.

88. *See* Albert W. Aschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 87 (2005); Gill, *supra* note 20, at 55–56.

89. *See* Wallace, *supra* note 21, at 11.

90. Mistretta v. United States, 488 U.S. 361 (1989).

91. *See id.* at 412.

92. *See* Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 941–42 (2001); Wallace, *supra* note 21, at 14.

93. *See* Wallace, *supra* note 21, at 11.

94. *Id.*; 18 U.S.C. § 3553(e) (1994). Judges were only allowed to lower the sentence based on a prosecutor's motion. Wallace, *supra* note 21, at 11. Jurisdictions varied as to the meaning of "substantial" and the goal of predictable and comparable sentences dwindled. *See id.*

95. Wallace, *supra* note 21, at 11–12.

96. *See id.* Wallace gives examples of apparent inconsistencies with the minimum mandatory sentencing scheme. *See id.* One such example is that of Stanley Marshall who was arrested and charged with selling less than one gram of LSD and was sentenced to twenty years in prison. *Id.* By the same token, Jose Cabrera was sentenced to merely eight years in prison for agreeing to testify against Manuel Noriega, despite being convicted of importing cocaine valued at over $40 million, which qualified him to receive life plus an additional 200 years in prison. *Id.*

to individuals who committed more severe crimes but offered more valuable information.[97]

D. *APPRENDI, BLAKELY, BOOKER,* AND *FANFAN*

In *Apprendi v. New Jersey*,[98] the defendant (Apprendi) pled guilty to a weapons charge with a statutory maximum of ten years imprisonment.[99] A minimum mandatory statute was applied and required a ten-year sentence if the judge found the crime was racially motivated.[100] After determining that the crime was racially motivated, the trial court judge sentenced Apprendi to twelve years in prison.[101] However, the Supreme Court reversed and held that "any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[102]

Four years later, in *United States v. Blakely*,[103] the defendant was charged with first degree kidnapping of his wife.[104] Blakely pled guilty to second-degree kidnapping, which carried a more lenient punishment range of forty-nine to fifty-three months in prison.[105] An enhancement in the sentencing guidelines allowed a judge to surpass the required fifty-three months if there was a finding of "substantial and compelling reasons justifying an exceptional sentence."[106] By applying a preponderance of the evidence standard, the judge determined that Blakely acted with "deliberate cruelty" during the kidnapping and sentenced him to ninety months

97. *See id.*

98. Apprendi v. New Jersey, 530 U.S. 466 (2000).

99. *Id.* at 469–70.

100. *Id.*

101. *Id.* at 471.

102. *Id.* at 490; Douglas A. Berman, *Assessing* Apprendi*'s Aftermath*, 15 FED. SENT'G REP. 75, 75 (2002); *see* Ring v. Arizona, 536 U.S. 584, 609 (2002). *But see* Harris v. United States, 536 U.S. 545, 560 (2002). The decision in *Apprendi* continued to cause confusion, even within the U.S. Supreme Court itself. *See* Berman, *supra* at 75. Only two terms later, in *Harris*, the Court held that additional facts not defined in the criminal statute which increased the offenders mandatory minimum sentence would be treated as sentencing factors which would not require submission to a jury. *Id.* On the same day, the Court held in *Ring*, that facts which establish a defendant's eligibility for the death penalty must be treated as elements of the crime and be submitted to a jury to apply the beyond a reasonable doubt standard. *Id.* The expansion and restriction on the *Apprendi* ruling led to uncertainty as to how the sentencing guidelines and minimum mandatories should be applied. *See id.*

103. Blakely v. Washington, 542 U.S. 296 (2004).

104. *Id.* at 298.

105. *Id.* at 299. Blakely also plead guilty to a charge of second-degree assault involving domestic violence. *Id.* at 299 n.2. The additional charge ran concurrently with the second-degree kidnapping charge and, therefore, was not an issue on appeal. *Id.*

106. *Id.* at 299.

imprisonment.[107] The U.S. Supreme Court applied the *Apprendi* rationale and held that the enhancements, which increased the maximum sentence a judge could impose pursuant to the SRA guideline table, must be based on "the facts reflected in the jury verdict or admitted by the defendant."[108] Since "deliberate cruelty" was not admitted by the defendant, the jury would need to find the enhancement applied in the case beyond a reasonable doubt.[109]

Less than three months after the Court handed down its decision in *Blakely*, *United States v. Booker*[110] and *United States v. Fanfan*[111] were heard concurrently in an attempt to resolve the issues that emerged from the unconstitutionality of sentencing enhancements.[112] In *Booker*, the jury found the defendant guilty of possession with intent to distribute at least fifty grams of crack cocaine.[113] Those charges placed Booker's sentence within the range of 210 to 262 months according to the SRA guidelines.[114] During a post-sentencing hearing, the judge applied a preponderance of the evidence standard to determine that Booker possessed an additional 566 grams of crack cocaine and was guilty of obstruction of justice.[115] After applying the additional facts, Booker was sentenced to thirty years in prison, which was, in fact, at the low end of the enhanced sentencing range.[116]

107. *Id.* at 300; *see also* State v. Gore, 21 P.3d 262, 277 (Wash. 2001) ("A reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.").

108. *Blakely*, 542 U.S. at 305; *see also* Cakmis, *supra* note 33, at 1142 (quoting *Blakely*, 542 U.S. at 303 (clarifying that the statutory maximum sentence described in *Apprendi* was not the maximum years allowed under the criminal statute, but the maximum a judge could impose based solely on the facts in the jury verdict or those admitted by the defendant)).

109. *See Blakely*, 542 U.S. at 305; Cakmis, *supra* note 33, at 1142–43. The inconsistencies among jurisdictions swelled as some courts applied the reasoning in *Apprendi* and *Blakely* to the federal sentencing guidelines, while others, including the Eleventh Circuit, rejected the idea that the sentencing guidelines were affected. Cakmis, *supra* note 33, at 1145. In her dissenting opinion, Justice O'Connor foresaw the "havoc" the U.S. Supreme Court was "about to wreak on trial courts across the country." *Blakely*, 524 U.S. at 324 (O'Connor, J., dissenting). Specifically, she argued that the sentencing guidelines were indistinguishable from the Washington guidelines and were "vulnerable to attack." *Id.* at 325.

110. United States v. Booker, 543 U.S. 220 (2005).

111. *Id.*

112. *See id.*

113. *Id.* at 227.

114. *Id.*

115. *Id.*

116. *Booker*, 543 U.S. at 227. Booker appealed his thirty–year sentence and the Court of Appeals of the Seventh Circuit reversed and remanded, finding that Booker's sentence violated the Sixth Amendment. *Id.* at 227–28.

During the same time the Court was deciding *Booker*, Fanfan was convicted of conspiracy and possession with intent to distribute 500 grams of cocaine.[117] The maximum allowable sentence according to the federal guidelines was seventy–eight months in prison.[118] Additional facts presented after sentencing convinced the district court that Fanfan had 2.5 kilograms of cocaine powder, 261.6 grams of crack cocaine, and had been the "organizer, leader, manager, or supervisor in the criminal activity."[119] If those enhancements had been applied, Fanfan's sentence would have been increased from the guidelines' required five to six years of imprisonment to fifteen or sixteen years of imprisonment.[120] Instead of applying the enhanced sentence, the trial judge cited *Blakely* and sentenced the defendant according to the SRA guidelines without the enhancements.[121] The government appealed the trial court's ruling.[122]

Both *Booker* and *Fanfan* were argued before the U.S. Supreme Court as one overriding issue: whether the Court's reasoning in *Apprendi* and *Blakely* should be applied to the Federal Sentencing Guidelines.[123] After nearly twenty years in effect and numerous cases of lower court opposition,[124] the Court held that the sentencing guidelines, and the post–sentencing enhancements which accompanied them, were unconstitutional and should only be applied in an advisory capacity.[125]

117. *Id.* at 228.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 228–29.

122. *Booker*, 543 U.S. at 228–29.

123. *Id.* at 229; *see* Margareth Etienne, *Into The Briar Patch?: Power Shifts Between Prosecution and Defense After* United States v. Booker, 39 VAL. U. L. REV. 741, 747 (2005). The decision in *Booker* consisted of two majority opinions. Etienne, *supra*. The first opinion addressed the constitutionality of the SRA guidelines and was authored by Justice Stevens who was joined by Justices Scalia, Souter, Thomas and Ginsburg. *Id.* The second majority opinion detailed the remedy of making the SRA guidelines advisory and was authored by Justice Breyer, who was joined by Justices Rehnquist, O'Connor, Kennedy and Ginsburg. *Id.*

124. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986).

125. *Booker*, 543 U.S. at 232–34; *see also* Cakmis, *supra* note 33, at 1149; Michelle Reiss Drab, *Constitutional Law: Fact or Factor: The Supreme Court Eliminates Sentencing Factors and the Federal Sentencing Guidelines*, 57 FLA. L. REV. 987, 988 (2005). The Court reasoned that since the SRA guidelines are mandatory and provide additional criteria for an increase to the range maximum, they created a statutory maximum, which would be exceeded if enhancement-prompting facts were present. Cakmis, *supra* note 33, at 1149. Those facts would therefore need to be presented to a jury to apply the beyond a reasonable doubt standard. *Id.* The Court concluded that, (1) any fact, other than a prior conviction, that increases a defendant's sentence past the maximum allowed based solely on the indictment or admission by the defendant would need to be presented to a jury and proven beyond a reasonable doubt; and (2) the SRA guidelines mandatory nature is unconstitutional and they may only be applied in an advisory capacity. Drab, *supra* at 988.

Although the judiciary has solidified the unconstitutionality of the post-conviction enhancements, the rulings in *Apprendi*, *Blakely*, *Booker* and *Fanfan* were not applied retroactively by the Court.[126] The combination of determinate sentencing through the SRA and mandatory minimum sentencing laws has created the indeterminate disparate sentences that Congress attempted to do away with in the first place.[127]

III. BOGGS ACT: RETROACTIVITY IN ACTION

Prior to the turmoil caused by the SRA guidelines, the legislature had previously attempted the mandatory minimum sentencing experiment.[128] On more than one occasion, Congress addressed the public's concerns relating to particular crimes by passing harsh mandatory minimums that failed to deter criminal activity.[129] A shining example was Congress's enactment of the Boggs Act in the 1950s.[130]

The influence of mandatory minimums can be seen as early as the sixteenth century when the crime of piracy was punishable by life in prison without the opportunity of parole.[131] Centuries later, the Boggs Act of the 1950s established severe minimum mandatory drug distribution penalties.[132] Wrongdoers were facing five years imprisonment for a first time offense, ten years imprisonment for a second offense, or distribution to a minor, and a life sentence or even the death penalty for a third offense.[133] Not only were the mandatory minimums ineffective in deterring drug related crimes, but they were also followed by an epidemic of drug

126. *See* United States v. Sanders, 247 F.3d 139, 146 (4th Cir. 2001) (holding *Apprendi* not to be retroactive); Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000) (holding *Apprendi* did not apply retroactively). *But see* Darity v. United States, 124 F. Supp. 2d 355, 363–65 (W.D.N.C. 2000) (applying *Apprendi* retroactively); United States v. Murphy, 109 F. Supp. 2d 1059, 1063 (D. Minn. 2000) (applying *Apprendi* retroactively as "implicit in the concept of ordered liberty").

127. *See* Lowenthal, *supra* note 65, at 65.

128. *See* Wallace, *supra* note 21, at 9.

129. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 7–8, 10 (1991) [hereinafter SPECIAL REPORT II], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm.

130. *See* Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767 (1951).

131. *See* SPECIAL REPORT II, *supra* note 129, at 6.

132. *See id.*

133. *See* Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567 (1956); Pub. L. No. 82-255, 65 Stat. 767 (1951); Wallace, *supra* note 21, at 9; *Sentencing History Repeating?*, 17 FAMM*GRAM*, FAMILIES AGAINST MANDATORY MINIMUMS 3, 3 (Spring 2007) [hereinafter FAMM], *available at* http://www.famm.org/Repository/Files/Boggs%20feature.pdf. These penalties are from the second "Boggs Act" as compared to the first "Boggs Act" (named for its sponsor, Hale Boggs, D-La) which contained lesser punishments. FAMM, *supra.*

use and distribution in the 1960s.[134] When President Richard Nixon took office in 1969, his administration negotiated the Drug Abuse Prevention and Control Act of 1970 with the main objective of rehabilitating drug offenders and removing harsh mandatory minimums.[135] After nearly fourteen years in effect, the Boggs Act and virtually all mandatory minimum statutes for drug offenses were repealed and those changes were applied retroactively.[136]

Under the new Act, first time possession of a controlled substance without the intent to distribute was classified as a misdemeanor while manufacturing and distribution carried a maximum sentence of up to fifteen years for a first time violation and up to thirty years for subsequent violations.[137] This new scheme would allow judicial discretion in

134. *See* Gill, *supra* note 20, at 9–10. The Federal Bureau of Narcotics Commissioner, Harry J. Anslinger, avidly supported the antidrug laws and argued that lenient judges were to blame for increased violence and addiction among juveniles. *Id.* at 8. Anslinger described drug addiction as a disease for which rehabilitation would be ineffective and long prison terms were required to deter criminal conduct. *Id.* A subcommittee report stated that "[d]rug addiction is contagious. Addicts, who are not hospitalized or confined, spread the habit with cancerous rapidity to their families and associates." *Id.*

135. *See id.*, at 12–13; Lowenthal, *supra* note 65, at 64 n.9. A poll conducted by the Judiciary Subcommittee on Juvenile Delinquency found that ninety-two percent of federal prison wardens, eighty-two percent of probation officers, and seventy-three percent of federal judges were opposed to mandatory minimum sentences. Gill, *supra* note 20, at 10. The main purposes of the Comprehensive Drug Abuse Prevention and Control Act of 1970 was to (1) address drug addiction, not through harsh sentences, but through the rehabilitation of drug addicts; (2) provide law enforcement with the support it needed to combat drug trafficking and manufacturing; and (3) provide a more consistent and proportional scheme of criminal penalties for drug offenses. *Id.* at 14. It is also notable that Congress enacted the primary federal mandatory sentence statutes during election years. Lowenthal, *supra* note 65, at 64 n.9. In 1968, Nixon's tough on crime approach was the catalyst of his campaign. *Id.* That same year, Congress enacted a law that required a consecutive sentence if a firearm is used during the commission of a crime. *Id.* In both 1984 and 1986, Congress increased the mandatory minimum sentence for crimes involving firearms. *Id.* Punishments for drug trafficking were also enhanced during election years. *Id.* The Controlled Substances Penalties Amendment Act was passed in 1984, only one month before Congressional elections. *Id.* Similarly, the Anti-Drug Abuse Act of 1986 and the 1988 version substantially increased penalties for simple possession of certain drugs. Lowenthal, *supra* note 65, at 64 n.9. In 1990, the Judicial Conference recommended that the existing mandatory minimums be repealed. *Id.* Congress enacted even more mandatory minimums that same year. *Id.*

136. *See* Wallace, *supra* note 21, at 9 (explaining how mandatory minimums were criticized for "treat[ing] casual violators as severely as they treat hardened criminals" without providing the expected reduction in drug violations); FAMM, *supra* note 133, at 5. *See generally* Gill, *supra* note 20, at 2–3 (noting that the Comprehensive Drug Abuse Prevention and Control Act of 1970 repealed the majority of minimum drug sentences). Then-congressman George W. Bush supported the repeal of the Boggs Act's harsh sentences as did an overwhelming majority of Congressmen at the time. Gill, *supra* note 20, at 3.

137. *See* Gill, *supra* note 20, at 14. Members of Congress agreed that the overreaching sanctions of mandatory minimums for minor drug offenses were unfair. *Id.* at 15–16. The only

sentencing below the maximum allowed in order to properly punish drug traffickers and prescribe rehabilitative alternatives for drug users.[138] These new guidelines were strongly supported by the judiciary and by law enforcement personnel that saw first-hand the lack of deterrent value of harsh sentences.[139]

Although the failure of a minimum mandatory sentencing scheme was acknowledged, less than fifteen years later the SRA guidelines were established and mandatory minimums were reinstated throughout the nation.[140] The downfall of the Boggs Act and previous mandatory minimums was not addressed, and the lessons that had presumably been learned were forgotten.[141] Just as in the past, the current mandatory minimums have failed to deter the criminal activity they so harshly punish.[142] Although the U.S. Supreme Court has patched the snag caused by the SRA guidelines and mandatory minimums, a question still remains: How will inmates who were severely sentenced under the unconstitutional SRA guidelines receive the benefits of the Court's jurisprudence?[143]

IV. AN ADMINISTRATIVE SOLUTION

Although the U.S. Supreme Court has addressed the injustice caused by the SRA guidelines, thousands of federal prisoners remain incarcerated under unconstitutional sentences.[144] The retroactive application of new

mandatory minimums for drug offenses that were retained pertained to a "continuing criminal enterprise." *Id.* at 16. Professional drug traffickers were given more severe penalties in accordance with the mandatory minimums in place. *Id.*

138. *See id.* at 58.

139. *See id.* at 59.

140. *See* Wallace, *supra* note 21, at 9–10.

141. *Id.* at 10. It is argued that the reasons for the reemergence of mandatory minimums after their initial failure was fueled by the death of University of Maryland basketball player Len Bias from a crack overdose. *Id.* Congressmen stood behind the story and rallied for tougher punishments for drug related crimes. *Id.*

142. *See* Gill, *supra* note 20, at 60. In addition to not providing deterrence for criminal activity, mandatory minimums are also a burden on the United States economy. *Id.* Between 1990 and 2000, drug offenders constituted fifty-nine percent of growth in federal prisons. *Id.* Drug offenses are the largest category of federal convictions with more than sixty-five percent of inmates serving mandatory minimum sentences. *Id.* In 2007 alone, federal prisoners cost taxpayers over $5.4 billion and correctional spending increased 550 percent. *Id.* at 60–61.

143. Nicholas J. Eichenseer, *Reasonable Doubt in the Rear-View Mirror: The Case for* Blakely–Booker *Retroactivity in the Federal System*, 2005 WIS. L. REV. 1137, 1137–38 (2005). Although it is clear that the *Blakely*/*Booker* is not applied retroactively on collateral review, Justice O'Connor assumed the decision would apply retroactively in her dissenting opinion in *Blakely*. *Id.* at 1179.

144. *Sentencing Appeals and Class Action Lawsuits will Cost the Judiciary*, THE THIRD BRANCH (Admin. Office of the U.S. Courts Office of Pub. Affairs, Wash., D.C.), Mar. 2005, *available at* http://host4.uscourts.gov/ttb/mar05ttb/appeals/index.html. Once the *Booker*/*Fanfan*

legal rules is typically not permitted in cases where a final decision has been reached.[145] Once convictions are finalized and the deadlines for filing appeals or petitions for certiorari have passed, offenders must resort to the federal habeas statute to dispute their sentence.[146] However, relief through habeas is only permitted when there is an established "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable."[147] Appellate courts will not have the authority to review these cases until the Supreme Court states that its holdings in *Apprendi*/*Booker* should be applied retroactively.[148]

Generally, new legal rules do not apply to cases on collateral review.[149] Yet the ban on automatic retroactivity is limited to rules regarding criminal procedure.[150] Substantive rules, on the other hand, automatically apply retroactively.[151] As stated in the *Blakely* opinion, the right to a jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[152] Unfortunately,

decision was made, the federal government scrambled to provide the courts with the estimated $100 million in additional funds needed to cover the expected caseload. *Id.* The judiciary had already suffered a budgetary hit in 2004 when it lost 1,350 employees and experienced an increase in its caseload. *Id.* Additional expenses included "$40.5 million for district and appellate courts; $60 million for defense counsel services; $400,000 for Federal Judicial Center training workshops for judges, probation officers, federal defenders, and other court personnel; and $900,000 for the U.S. Sentencing Commission." *Id.*

145. *See* Teague v. Lane, 489 U.S. 288, 310 (1989); Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., dissenting). "If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all." *Mackey*, 401 U.S. at 679. The U.S. Supreme Court held that cases on direct review would be permitted to benefit from new rules, yet those cases on collateral review would not receive the same benefits. *Teague*, 489 U.S. at 304–05. The Court relied heavily on Justice Harlan's view that the courts interest in finality of judicial decisions and the limited resources available make collateral retroactive application impractical. *Id.* at 310. Justice Harlan also provided three justifications for applying new rules to cases on direct review: (1) failing to apply new rules retroactively would diminish the lower courts' ability to resolve constitutional ambiguities; (2) those with minimal financial resources would be deterred from bringing constitutional claims; and (3) failing to do so would undercut the force of precedent. *Mackey*, 401 U.S. at 680.

146. *See* Nancy J. King & Susan R. Klein, *Après Apprendi*, 12 FED. SENT'G REP. 331, 333 (1999).

147. *See id.*; Eichenseer, *supra* note 143, at 1137–38 n.15. A "collateral" claim is one that is brought in a new proceeding after the trial is concluded and the time period to appeal has elapsed. Eichenseer, *supra* note 143, at 1139. Habeas motions brought under 28 U.S.C. § 2255 are considered collateral challenges. *Id.* at 38.

148. King & Klein, *supra* note 146, at 333–34.

149. *See* Eichenseer, *supra* note 143, at 1140.

150. *Teague*, 489 U.S. at 310; Eichenseer, *supra* note 143, at 1141.

151. Eichenseer, *supra* note 143, at 1141.

152. Blakely v. Washington, 542 U.S. 296, 305–06 (2004).

most courts have held the *Blakely*/*Booker* decision a non-retroactive procedural rule.

Courts are hesitant to apply a decision retroactively when retrials are necessary in order to implement a new legal rule.[153] The burden imposed on the judiciary due to diminished resources, crowded dockets, and the lack of effective retrial years after the case has been finalized make the benefits of retroactive application difficult to realize.[154] However, in the cases involving unconstitutional sentencing guidelines, the need for retrial is removed.[155] Defendants can be resentenced according to the new constitutional scheme by just removing the invalid enhancements without the need for a retrial.[156]

Although concerns do exist regarding the scarce resources involved in retroactive application of legislation, adjusting sentences without the need for a retrial has been done in the past.[157] In *Furman v. Georgia*,[158] William Furman was convicted and sentenced to death for killing J. Mike, Jr. during the commission of a burglary.[159] The U.S. Supreme Court heard *Furman* and two other cases[160] concurrently to determine the constitutionality of capital punishment statutes.[161] The Court held five-to-four that the death penalty, as applied, was unconstitutional as a violation of the Eighth and Fourteenth Amendments.[162] The Court based its decision on the death

153. Solem v. Stumes, 465 U.S. 638, 654 (1984).

154. Notes, *Rethinking Retroactivity*, 118 HARV. L. REV. 1642, 1661 (2005). Although the concern over cost and lack of resources is factored into a court's decision, *Teague* does not state that administrative costs should be relevant in determining retroactivity. *Id.* Basing retroactivity on the possibility of a flood of potential claimants also raises issues of fairness. *Id.* at 1660. Should the decision as to whether an unconstitutional sentence is remedied rest on the imagined problems that may arise? *Id.* The increase in potential claims is expected, yet a court's decision should focus primarily on the appropriate way to handle the burden and not if relief will be granted to those whose trials were conducted too early. *Id.*

155. *See generally* United States v. Booker, 543 U.S. 220, 232, 245 (2004). It is unnecessary to completely retry a defendant in these cases. *Id.* at 279. Since the guideline enhancements are advisory and no longer mandatory, those enhancement points can simply be subtracted from the base offense level in order to reach a new guideline range. *Id.* at 318.

156. *See id.* at 279 (addressing overlapping provisions).

157. *See* Furman v. Georgia, 408 U.S. 238, 398 (1972) (addressing sentencing guidelines' relation to the Eighth Amendment).

158. *Id.*

159. *Id.* at 315.

160. *Id.*

161. Rupert V. Barry, Furman *to* Gregg*: The Judicial and Legislative History*, 22 HOW. L.J. 53, 78 (1979). During the time the cases were heard, crime was on the rise. *Id.* The public was placing significant pressure on the government and the legislature to get tough on crime. *Id.*

162. *Id.* at 79; *Furman*, 408 U.S. at 239–40. Although a majority held the death penalty to be unconstitutional, they did not reach a consensus as to the reason. *See* Barry, *supra* note 161, at 79. Justice Brennan and Justice Marshall found the death penalty to be constitutional per se,

penalty's discriminatory administration, lack of deterrent value, and inconsistent application.[163] The decision immediately required the re-sentencing of "600 death-row inmates" and invalidated the statutes of forty jurisdictions.[164] States were required to amend their death penalty statutes to reduce the amount of judicial discretion permitted during sentencing.[165] Inmates sentenced to death prior to *Furman* were given leave to file a motion with the court for mitigation of their sentence from death to life in prison with the possibility of parole.[166] The retroactive impact of *Furman* was limited to the re-sentencing of inmates on appeal or those on death row.[167] There was no need for retrial since the sentence, not the trial, was held to be unconstitutional.[168] The effect of a retroactive application of the *Booker*/*FanFan* decision would be limited to re-sentencing in a similar way.[169]

Four years after the *Furman* decision, the U.S. Supreme Court once again addressed the death penalty issue in *Gregg v. Georgia*.[170] The Court held seven-to-two that the death penalty was not inherently cruel and unusual punishment and was, in fact, constitutional.[171] Although capital punishment was reinstated, those inmates who were resentenced under the *Furman* decision would not be affected due to the prohibition on ex post facto laws.[172]

The Constitution's prohibition on ex post facto laws in criminal proceedings is a well-founded judicial limitation that ensures innocent behavior will not be penalized by retroactive legislation.[173] The four main

while the opinions of Justices Douglas, Stewart, and White focused on the death penalty's unconstitutional imposition in violation of the defendant's due process rights. *Id.* The majority did agree that the death sentence itself, or its application, was "cruel and unusual punishment" and should be held unconstitutional. *Furman*, 408 U.S. at 239–40.

163. *See* Barry, *supra* note 161, at 79.

164. *Id.* at 84.

165. *See id.* at 84–86.

166. Charles W. Ehrhardt & L. Harold Levinson, *Florida's Legislative Response to* Furman*: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10, 12 (1973).

167. *See id.* (discussing judicial responses to *Furman*).

168. *Id.*

169. *See id.*; *supra* note 164 and accompanying text.

170. Gregg v. Georgia, 428 U.S. 153, 158 (1976).

171. Barry, *supra* note 161, at 108.

172. *See* U.S. CONST. art. I, § 10, cl. 1; Robert Woll, *The Death Penalty and Federalism: Eighth Amendment Constraints on the Allocation of State Decisionmaking Power*, 35 STAN. L. REV. 787, 825 (1983) (discussing the effects of ex post facto laws); *Gregg*, 428 U.S. at 169 (holding that the death penalty is not unconstitutional in all cases).

173. *See* U.S. CONST. art I, § 9, cl. 3; U.S. CONST. art I, § 10, cl. 1; U.S. CONST. amend. XIV, § 1. Article I of the Constitution contains two Ex Post Facto Clauses: § 9, cl. 3 is directed at Congress, and § 10, cl. 1 applies to the states. U.S. CONST. art I, § 9, cl. 3; U.S. CONST. art I, §

categories of ex post facto laws are: (1) any laws that retroactively make an innocent action a criminal one; (2) any law that makes a crime more serious than when it was committed;[174] (3) any law that inflicts a greater punishment for an offense after it was committed;[175] and (4) any law that requires less evidence for a conviction than was required when the offense was committed.[176] The decision to reinstate the death penalty would be a violation of the ex post facto clause since those who had their sentences reduced to life in prison would be given an increased punishment with retroactive application.[177] In applying these concepts to the Drug Abuse Prevention and Control Act of 1970, the ex post facto prohibition would not apply.[178] Much like the retroactive application of the *Furman* decision, the removal of sentencing enhancements would only benefit those who were convicted prior to the decision to repeal the act.[179]

In order to streamline resentencing and determine which cases contain invalid sentencing enhancements, a court need only look to its own case file.[180] Once a trial has been conducted and a jury has deliberated, a judgment order is executed by the presiding judge.[181] The counts detailed in the judgment order make up the "base offense level" used to determine

10, cl. 1. The Due Process Clause of the Fourteenth Amendment also protects the right to fair notice of retroactive legislation. U.S. CONST. amend. XIV, § 1.

174. Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 42 (1997). The first two categories of *Calder*, which ban the punishing of an action that was innocent when done or increasing the severity category of the crime after it has been committed, have rarely been challenged. *Id.*

175. *Id.* at 42. On many occasions the Court has challenged the retroactive application of a law that would increase the defendant's sentence. *Id.*

176. Calder v. Bull, 3 U.S. 386, 390 (1798); Krent, *supra* note 174, at 42.

177. *See* Krent, *supra* note 174, at 43.

178. *See id.* at 43 (showing how the courts reacted after the Supreme Court's decision in *Miller v. Florida* and similar circumstances).

179. *See* Beazell v. Ohio, 269 U.S. 167, 170–71 (1925); *Calder*, 3 U.S. at 391; Elmore v. State, 409 S.E.2d 397, 400 (S. C. 1991); Wallace, *supra* note 21, at 9–10. Since the ex post facto clause and the test set out in *Calder* apply to situations where subsequent laws punish the offender more than previous laws, the prohibition would not apply to the advisory SRA guidelines. *See Beazell*, 269 U.S. at 169–70. "The *ex post facto* clause protects against retroactive legislative provisions which are disadvantageous to the offender. A mere procedural change in law, not increasing punishment or changing elements of the offense, does not result in an *ex post facto* violation." *Elmore*, 409 S.E.2d at 399 (citing Miller v. Florida, 482 U.S. 423, 430 (1987)).

180. *See* Mark H. Luttrell, *The Impact of the Sentencing Reform Act on Prison Management*, 55 FED. PROBATION 4, 55–56 (1991).

181. *See* FED. R. CRIM. P. 32(k); Judgment Including Sentence under the Sentencing Reform Act, United States v. Alegria-Moreno, No. H-89-00394 (S.D. Tex. 1989) [hereinafter Alegria Judgment]; *accord* Indictment at 1–2, United States v. Alegria-Moreno, No. H-89-00394 (S.D. Tex. 1989) [hereinafter Alegria Indictment].

the starting sentencing range in the SRA guidelines.[182] A presentence report is then prepared which contains the base offense level calculation, as well as additional sentencing enhancements for any aggravating factors.[183] These additional factors are added to the base offense level and, in turn, increase the sentence that must be imposed.[184] To determine whether unconstitutional post-conviction sentencing factors were used to enhance a defendant's sentence, it would be as easy as comparing these two documents, eliminating the presentence report's enhancements, and resentencing the defendant based solely on the charges found on the judgment order.[185]

In order to alleviate a court's concerns regarding high costs and lack of resources, an administrative resolution would be better suited to remedy the misguided sentences.[186] Every six months, inmates meet with their Unit Classification Team ("Team") to discuss available programs, work assignments, activities, transfers, and the inmate's case.[187] Teams consist of unit managers, case managers, counselors, and other Bureau of Prison employees who assist an inmate during their term of incarceration.[188] Case managers, in particular, are directly responsible for an inmate's case, progress while in prison, and release plan.[189] They also have unfettered access to judgment orders and presentence reports contained in a defendant's case file.[190] Due to their control of the necessary documentation and personal knowledge of an inmate's history, case managers would be the ideal administrators to initiate the resentencing process.[191]

182. *See* Presentence Report at 10, United States v. Alegria-Moreno, No. H-89-00394 (S.D. Tex. 1989) [hereinafter Alegria Presentence Report].

183. *See id.* at 10–11; FED. R. CRIM. P. 32(d).

184. Alegria Presentence Report, *supra* note 182, at 10–11.

185. *See* Alegria Judgment, *supra* note 181; Alegria Indictment, *supra* note 181, at 1–2; Alegria Presentence Report, *supra* note 182, at 10–11.

186. Solem v. Stumes, 465 U.S. 638, 654 (1984). In his concurring opinion, Justice Powell describes the issues surrounding retroactive application of new constitutional rules, including excessive cost, lack of resources, the ability for guilty defendants to undermine the system, and the need for finality. *Id.*

187. FED. BUREAU OF PRISON, INMATE INFORMATION HANDBOOK 5–6 (2012), *available at* http://www.bop.gov/locations/institutions/spg/SPG_aohandbook.pdf [hereinafter INMATE HANDBOOK]; *see* Luttrell, *supra* note 180, at 55–56.

188. INMATE HANDBOOK, *supra* note 187, at 5.

189. *Id.*

190. PUBLIC ACCESS TO COURT ELECTRONIC RECORDS (PACER), http://www.pacer.gov (last visited May 15, 2013); *see* Luttrell, *supra* note 180, at 55–56.

191. *See* Luttrell, *supra* note 180, at 56.

In order to solidify the feasibility of this solution, a current example would be beneficial.[192] In *United States v. Alegria–Moreno*,[193] the defendant was charged with conspiracy to possess with intent to distribute in excess of five kilograms of cocaine.[194] Alegria's base offense level was thirty-eight and he had no prior criminal history.[195] If Alegria would have been sentenced today applying the *Booker*/*Fanfan* decision, his sentence would have been between nineteen and twenty-four years.[196] Alegria received a two point increase because four handguns and ammunition were found by the police at the location of the seizure.[197] A three point adjustment was also made after the judge determined that Alegria was the organizer or leader of the criminal activity.[198] The offense level increased to forty-three, and Alegria was sentenced to life in prison.[199]

Injustice can also be found in *United States v. Yepez*.[200] In this case, Yepez was charged with one count of conspiracy to import cocaine.[201] In order to establish the appropriate base offense level, the court first needed to determine the amount of cocaine that was the subject of the case.[202] The indictment did not include the amount of drugs for which Yepez was to be charged.[203] Despite the fact that Yepez was a first time offender and that no description of the amount of drugs found was listed on the indictment or judgment order, the judge determined Yepez was guilty of possessing 300 kilograms of cocaine and assigned a base offense level of thirty-eight.[204]

192. *See supra* text accompanying notes 130–35.

193. United States v. Alegria-Moreno, No. H–89–00394 (S.D. Tex. 1989).

194. Alegria Judgment, *supra* note 181, at 1.

195. Alegria Presentence Report, *supra* note 182, at 10.

196. 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 5.2 (removing the enhancements detailed on the report and basing the guideline range solely on the base offense level with no criminal history, the appropriate level is a thirty-eight); *see* Alegria Presentence Report, *supra* note 182, at 10–11. Alegria was arrested in connection with these charges at thirty years old. Alegria Presentence Report, *supra* note 182, at 1. If the modified sentencing structure had been applied, he would have been released from prison between the ages of forty-nine and fifty-four years old. *See id.*; 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 5.2. Alegria is now fifty-three years old and will spend the remainder of his life behind bars. *See* Alegria Presentence Report, *supra* note 182, at 1.

197. Alegria Presentence Report, *supra* note 182, at 10.

198. *Id.*

199. *Id.* at 11; 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 5A.

200. Judgment in a Criminal Case, United States v. Yepez, No. 90-14015-CR-ZLOCK (S.D. Fla. 1991) [hereinafter Yepez Judgment].

201. *Id.*

202. 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 2D1.1(a)(5).

203. Yepez Judgment, *supra* note 200.

204. *Id.*

Sentencing enhancements were then incorporated.[205] A two-point enhancement was added for obstruction of justice, since Yepez was arrested under an alias, and a four-point enhancement was added for being the organizer or leader of the criminal activity.[206] These enhancements increased Yepez's offense level to forty-four.[207] He received a two-point reduction for accepting responsibility for the crime.[208] With a final offense level of forty-two, Yepez was required to be sentenced anywhere between 360 months to life in prison.[209] He is currently serving a fifty-year sentence.[210]

The enhancements in both *Yepez* and *Alegria* are identical to those the U.S. Supreme Court held to be unconstitutional in its subsequent decisions.[211] A jury found Booker guilty of possession of fifty grams of crack cocaine, yet the judge determined he should be sentenced with an additional 566 grams.[212] In Yepez's case, the indictment did not state any drug amount, yet the judge determined he was guilty of possessing 300 kilograms of cocaine.[213] Both Yepez's and Alegria's sentences were enhanced based on their designation as "leader/organizer."[214] Prosecutors argued that FanFan should receive the same enhancement, yet the judge correctly held that the enhancement could not be applied in light of the *Apprendi* decision.[215] If the exact same enhancements were struck down in *Apprendi*/*Blakley*/*Booker*, how does a court justify a ban on retroactivity

205. Telephone Interview with Jose Yepez (Oct. 10, 2012). During a telephone interview with Mr. Yepez, he explained how the judge determined his sentence:

> I was enhanced four points for leader, organizer and supervisor, and two points for obstruction of justice—none of which were charged in the indictment. Altogether, put me at level forty-four, Category I, which means an automatic life sentence. However, because I accepted responsibility, which amounted to me saying "I am sorry, I will not do it again," or something like that, two points were deducted, leaving me at level forty-two, 360 months to life. But because I was a first-time offender, the judge refused to give me life. However, because of the quantity of drugs that the judge determined, not the jury, the judge refused to give me the bottom of the guidelines—360 months. I was sentenced to 600 months, 50 years. But what makes this even worse is that the statute I was charged with calls, if I recall correctly, for a sentence of 0-20 years.

Id.

206. *Id.*

207. *Id.*

208. *Id.*

209. 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 2D1.1.

210. Telephone Interview with Jose Yepez, *supra* note 205.

211. *See* United States v. Booker, 543 U.S. 220, 227–29 (2004).

212. *Id.* at 227.

213. Yepez Judgment, *supra* note 200.

214. Presentence Report at 6, United States v. Yepez, No. 90-14015-CR-ZLOCK (S.D. Fla. 1991) [hereinafter Yepez Presentence Report].

215. *Booker*, 543 U.S. at 228–29.

when inmates are currently sentenced under the unconstitutional sentencing scheme?[216]

If the proposed resolution was applied, a prison case manager could receive and process Alegria's and Yepez's requests for sentence re-evaluation and submit the proposed adjustments to a judge for approval and resentencing.[217] By comparing the judgment order and presentence report, it would be clear that the enhancements that were applied were unconstitutional as per the *Booker*/*Fanfan* decision and should therefore be removed.[218] Alegria's offense level would decrease to thirty-eight, and he would need to be released immediately since he has currently served more than four years past the constitutional version of his sentence.[219]

If a court resentences Yepez solely on the removal of the unconstitutional sentencing enhancements, his base offense level would decrease from forty-two to thirty-eight, which would have made him eligible for release four years ago.[220] In actuality, Yepez has an even more extreme case. Since no drug amount is listed on Yepez's indictment, the base offense level would need to correspond with the lowest category possible—an amount less than twenty-five grams.[221] Once the unconstitutional enhancements are eliminated and the base offense level is adjusted to reflect an omitted drug amount in the indictment, Yepez's base offense level would be reduced to twelve.[222] Under the adjusted version of his sentence, Yepez would have been released over twenty-two years ago, after serving only ten to sixteen months in prison.[223]

216. *See id.*; Alegria Presentence Report, *supra* note 182; Yepez Presentence Report, *supra* note 214.

217. *See* Luttrell, *supra* note 180, at 56. Prison case managers are an inmate's main point of contact regarding their case, transfers, release, and other issues pertaining to their incarceration. *Id.* Case managers have full access to an inmate's case file and work closely with the judiciary to ensure proper handling of the offender's term at the institution. *Id.*

218. *See* Alegria Judgment, *supra* note 181; Alegria Presentence Report, *supra* note 182, at 10–11.

219. *See* Alegria Judgment, *supra* note 181; Alegria Presentence Report, *supra* note 182, at 10–11.

220. *See* 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 2D1.1.

221. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *see* FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 2D1.1; Yepez Judgment, *supra* note 200. Since the drug amount was not listed on the judgment order, this fact was not presented to the jury for deliberation. Yepez Judgment, *supra* note 200. As *Apprendi* stated, "*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." *Apprendi*, 530 U.S. at 490 (emphasis added).

222. *See* 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 2D1.

223. *See* Yepez Presentence Report, *supra* note 214; Yepez Judgment, *supra* note 200; 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at §2D1.1.

V. CONCLUSION

The original objective of the SRA guidelines was a noble one.[224] In the mid-1980s, drug trafficking and violence became a major concern for lawmakers and the public.[225] Harsher sentences were purposely imposed to respond to the community's fears.[226] The excessive sentences issued to first time offenders far outweighed the seriousness of the crimes.[227] In addition, the deterrent value of the determinate sentencing structure was negated.[228] The SRA guidelines failed to meet the intended results and the tension between the guidelines' and the Constitution's due process protections could not be resolved.[229]

As can be clearly seen in the cases of *Alegria* and *Yepez*, the unconstitutional sentencing enhancements have caused many first time, non-violent offenders to serve excessive sentences for incomparable crimes.[230] If these two individuals had been sentenced for the same crimes today, they would have been released long ago.[231] Instead, they have each spent over twenty years of their lives behind bars.[232]

The long road through the *Apprendi*/*Blakley*/*Booker* decisions has caused considerable chaos in federal sentencing.[233] The decisions have finally reached a constitutional end, yet many defendants remain incarcerated with no hope for relief.[234] The retroactive application of these decisions would allow thousands of federal prisoners serving over ten years to be released immediately.[235] The costs and resources involved in

224. *See* Lowenthal, *supra* note 65, at 67 n.21 (citing purposes of mandatory sentencing laws to include "retribution, deterrence, incapacitation, elimination of disparity, inducement of cooperation, and inducement of pleas."); Wilkins, *supra* note 36, at 305.

225. Lowenthal, *supra* note 65, at 67 n.21.

226. *Id.*

227. *Cf. id.*; Wilkins, *supra* note 36, at 315.

228. *Cf.* Lowenthal, *supra* note 65, at 67 n.21.

229. *See* Wilkins, *supra* note 36, at 319; McMillian v. Pennsylvania, 477 U.S. 79, 84 (1986); In Re Winship, 397 U.S. 358, 364 (1970). "[W]e have rejected the claim 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." *McMillian*, 477 U.S. at 89. "[T]he Due Process Clause 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." *In Re Winship*, 397 U.S. at 364.

230. *See* 2011 FED. SENTENCING GUIDELINES MANUAL, *supra* note 51, at § 2D1.1.

231. *Id.*

232. *Id.*

233. Eichenseer, *supra* note 143, at 1137 n.3; *see also* Pamela A. MacLean, *Circuits Wrestle with Fallout from* 'Booker,' NAT'L L.J., 1 (2005) (chronicling the confusion and chaos characterizing federal sentencing post-*Booker*).

234. Eichenseer, *supra* note 143, at 1137–38.

235. *See id.*

retroactive application are minimal as compared to the benefits that will be realized from a decrease in the prison population.[236] Case managers have the necessary skills, knowledge, required documentation, and contacts to make the resentencing process a streamlined operation.[237] If authorized by the U.S. Supreme Court case, managers could complete the entire retroactivity process within six months.[238] The main concern ultimately rests on fairness.[239] As it stands now, "[t]he distinction between those entitled to relief and those not entitled to relief is the date on which they were convicted and sentenced."[240]

236. Newt Gingrich & Pat Nolan, *Prison reform: A smart way for states to save money and lives*, WASH. POST (Jan. 7, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html. The article stated,

> There is an urgent need to address the astronomical growth in the prison population, with its huge costs in dollars and lost human potential. We spent $68 billion in 2010 on corrections - 300 percent more than 25 years ago. The prison population is growing 13 times faster than the general population. These facts should trouble every American. Our prisons might be worth the current cost if the recidivism rate were not so high, but, according to the Bureau of Justice Statistics, half of the prisoners released this year are expected to be back in prison within three years. If our prison policies are failing half of the time, and we know that there are more humane, effective alternatives, it is time to fundamentally rethink how we treat and rehabilitate our prisoners. We can no longer afford business as usual with prisons.

Id.

237. INMATE HANDBOOK, *supra* note 187, at 6.

238. *Id.* Case managers meet with their assigned inmates every six months to discuss their progress, work, release, and other related issues. *Id.*

239. Eichenseer, *supra* note 143, at 1180.

240. *Id*.