

Sentencing Law Under the Knife: Judicial Surgery, the New Jersey Supreme Court and *State v. Natale*

I. Introduction

New Jersey is indeed the "Garden State" with respect to sentencing law. Six years ago, the state's highest court unknowingly planted the seeds of the ongoing sentencing revolution when it upheld the state's hate-crime sentence enhancement provision against a challenge by defendant Charles C. Apprendi that the statute violated his Sixth Amendment right to jury trial. That provision authorized a judge to increase a defendant's sentence by ten to twenty years above the maximum sentence he could otherwise receive for the second-degree crime of unlawful possession of a firearm based on a finding by the judge that Apprendi had committed the underlying crime with the intention of intimidating his victims because of their race. Apprendi argued unsuccessfully before New Jersey's intermediate appellate court, the Appellate Division, and, subsequently, the Supreme Court of New Jersey that his right to a jury trial guaranteed by the Sixth Amendment required that a jury, not a judge, find those facts which served to increase his sentence beyond the statutory maximum.

Following the affirmance of Apprendi's sentence in state court, the United States Supreme Court granted Apprendi's petition for *certiorari* on November 29, 1999. The rest, as they say, is history. The United States Supreme Court's watershed opinion in *Apprendi*² laid the jurisprudential foundation for subsequent decisions—specifically, *Ring v. Arizona*,³ *Blakely v. Washington*,⁴ and *United States v. Booker*⁵—that collectively and profoundly altered the national landscape of sentencing law and practice in a way that few—Justice Sandra Day O'Connor notwithstanding—could have possibly envisioned. Ingrained sentencing practice in numerous jurisdictions across the nation was abruptly cast into doubt based on the newly minted requirement of constitutional symmetry between sentences and convictions.

The Supreme Court of New Jersey addressed the impact of *Apprendi* and its progeny on New Jersey's statutory sentencing scheme set forth in the New Jersey Code of Criminal Justice in three opinions issued on August 2, 2005.⁶ The focus of this article is on the most significant of the three, *State v. Natale*, wherein the Court surveyed in detail the sea change in sentencing jurisprudence precipi-

tated in part by its decision in *Apprendi* six years earlier and further endeavored to harmonize New Jersey's sentencing scheme with the new constitutional strictures enunciated by its federal counterpart.

II. New Jersey's Sentencing Scheme

Justice Sandra Day O'Connor easily can be forgiven for not counting New Jersey among those jurisdictions whose sentencing schemes she believed were imperiled by the majority's ruling in *Blakely*. After all, New Jersey's statutory sentencing structure bears little resemblance to the guideline systems addressed in *Blakely* and *Booker*. The sentencing regime adopted by the New Jersey Legislature as part of its enactment of a comprehensive Code of Criminal Justice in 1979 (hereinafter "the Code"), although structurally different from guideline systems, was intended to advance a similar policy goal. Underlying both systems is a common objective to substantially diminish, if not entirely eliminate, unwarranted disparate treatment of similarly situated criminal defendants through the implementation of a rational and standardized sentencing mechanism.

Prior to enactment of the Code, judicial discretion in New Jersey with respect to sentencing was essentially unbridled. This was directly attributable to the absence of a coherent and rational legislative statutory framework for channeling or guiding a judge's decision-making process with regard to formulating sentences. Trial courts were guided only by the general sentencing goals of rehabilitation, retribution, deterrence, and protection of the public.⁷ Moreover, because the primary focus was on rehabilitation of the offender, sentencing was intrinsically "offender-oriented," with the punishment governed more by the particular circumstances and characteristics of the offender than by the severity of the crime or crimes for which he or she was convicted.

Patterned closely after Articles 6 and 7 of the American Law Institute's 1962 Model Penal Code, Chapters 43 and 44 of the New Jersey Penal Code represented a dramatic and fundamental break with sentencing philosophy and practice that prevailed prior to its adoption. In 1984, the Supreme Court of New Jersey expounded on this paradigmatic shift in two seminal sentencing decisions, *State v.*



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*Roth*⁸ and *State v. Hodge*.⁹ The Court emphasized that the transcendent theme of the Code's sentencing provisions was the replacement of the unfettered discretion of sentencing judges with a structured system that identifies the permissible aims of punishment and establishes a general framework to guide judicial discretion in a manner that promotes greater uniformity in sentencing. This entailed the abandonment of the rehabilitative model and its replacement with a system premised on "just deserts" with the paramount goal being that the punishment fit the crime, not the criminal, and that there be a predictable degree of uniformity in sentencing. The Code's elevation of uniformity as its preeminent objective was eloquently articulated by Justice Daniel J. O'Hern, who proclaimed on behalf of the Court in *Hodge* that "there can be no justice without a predictable degree of uniformity in sentencing," and that the "loss of unfettered discretion may be the price of evenhanded justice."

To that end, the Code categorizes indictable crimes by degree: specifically, there are four degrees of crimes of escalating severity, each with a corresponding range of imprisonment. For example, a first-degree crime is punishable by an ordinary term of imprisonment [of] between ten to twenty years. The ordinary range of imprisonment for a second-degree offense is between five and ten years, a third-degree offense is between three and five years, and a fourth-degree offense is up to eighteen months. In imposing an appropriate sentence, the judge must determine in the first instance the degree of the crime for which the defendant has been convicted, because the degree of the crime determines not only the range of punishment but also whether the defendant will be sentenced to imprisonment. Under the Code, a defendant must, absent the most extraordinary circumstances, be sentenced to a term of imprisonment upon conviction for a first- or second-degree crime. On the other hand, for any crime, other than a crime of the first or second degree, there is a presumption of non-incarceration for first offenders. There is no presumption either for or against imprisonment with regard to repeat offenders convicted of a third- or fourth-degree crime. These facets of the Code are graphically depicted below in Diagram A.

Diagram A.
Ordinary Terms of Imprisonment Authorized by the NJ Code of Criminal Justice

Degree	Bottom Range	Presumptive Term	Top Range
3rd	3 years	4 years	5 years
4th	0 months	9 months	18 months

* Presumption of Non-Incarceration For First-Time Offenders

Upon ascertaining the degree of the crime and whether incarceration is required, the sentencing court must then determine the appropriate sentence within the applicable range. Central to this determination is the presumptive

term, which is the midpoint within each range (including ordinary and extended terms) of incarceration. The applicable provision, N.J.S.A. 2C:44-1f(1), expressly requires that the court "shall impose" the presumptive term for the offense unless "the preponderance of aggravating and mitigating factors weigh in favor of a higher or lower term." Stated differently, if the applicable aggravating and mitigating circumstances are in equipoise, the presumptive sentence must be imposed. As will be discussed shortly, this previously unprovocative feature of the Code would underpin the basis of the subsequent constitutional challenges to New Jersey's sentencing scheme under *Blakely*.

The Code also provides an additional sentencing alternative for crimes of the first or second degree. In such cases, where the court is clearly convinced that the mitigating factors substantially outweigh the aggravating ones, it may sentence the offender to a term appropriate for a crime one degree lower. Consistent with the "just deserts" philosophy of the Code, the trial court must weigh the factors with a focus on the seriousness of the offense rather than on the defendant and his or her prospects of rehabilitation. The court's determination to impose a downgraded sentence does not bar imposition of any sentence within the range of that lower-degree offense. The court must reweigh the factors in selecting the length of sentence. It cannot use the mitigating factors previously relied upon to reduce a defendant's exposure also to justify the imposition of a sentence less than the presumptive term. To do so would constitute impermissible double counting.

Statutory aggravating and mitigating factors serve two distinct purposes under the Code. In the first instance, their applicability and the weight determine the length of a particular term of imprisonment within the appropriate range. In addition, these factors also govern the imposition of discretionary terms of parole ineligibility. N.J.S.A. 2C:43-6b confers on trial judges the authority to impose a period of parole ineligibility as part of a sentence provided it is "clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in subsections a. and b. of 2C:44-1." In such circumstances, the court may fix a minimum term up to one-half of the sentence imposed on a particular count "during which the defendant shall not be eligible for parole provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole." The standard for imposing a period of parole ineligibility is higher than that required for the imposition of a term of imprisonment greater than the presumptive sentence. In order to impose a term greater than the presumptive, the court need only be satisfied that a preponderance of aggravating factors weighed in favor of a higher term. However, in order to impose a period of parole ineligibility, except where mandated by a particular statute, the sentencing court must be "clearly convinced" that the aggravating factors "substantially outweigh" the mitigating factors.

The following is an illustration of the above principles: assume that a defendant has pleaded guilty to second-

degree robbery. A presentence report prepared prior to the defendant's sentencing discloses that he has never been arrested before the instant offense. The report also discloses, however, that the victim of the crime was seventy years old when robbed. Because the conviction was for a second-degree crime, the defendant can be sentenced anywhere from five to ten years, the range applicable to a second-degree crime. If the court determines that the applicable aggravating factor (the victim's age) and the applicable mitigating factor (defendant's lack of a criminal history) are in equipoise, it must impose a presumptive term of seven years. However, a court also has discretion to sentence a defendant below or above a presumptive term, within the appropriate range, depending on the weight a judge assigns to aggravating and mitigating factors.

Finally, the Code's sentencing framework is two-tiered by virtue of a second set of sentencing ranges and corresponding presumptive terms (depicted below in Diagram B) applicable to those defendants eligible for extended terms of imprisonment. The Code authorizes the imposition of both discretionary and mandatory extended terms of imprisonment when certain conditions are found by the sentencing court. These statutory predicates include the number and type of prior convictions incurred by the defendant or the existence of an operative fact about the offense that elevates its severity.¹⁰ Prior to being declared facially unconstitutional by the Supreme Court of New Jersey, the Graves Act extended-term provision¹¹ embodied both findings. Before imposing a mandatory extended-term provision under the Graves Act, a judge was required to find by a preponderance of the evidence at a post-trial hearing that the defendant used or possessed a firearm during the commission of the instant offense and that the defendant previously had been convicted of at least one firearms-related crime.

Diagram B.
Extended Terms of Imprisonment Authorized by the NJ Code of Criminal Justice

Degree	Bottom Range	Presumptive Term	Top Range
1st	20 years	50 years	Life
2nd	10 years	15 years	20 years
3rd	5 years	7 years	7 years
4th	None	None	None

III. *Blakely* in the Garden State

The narrow but critical issue before the Supreme Court of New Jersey was whether *Blakely's* definition of "statutory maximum" referred to the top end of each sentence range (i.e., ten years for a second-degree crime) or the presumptive term (i.e., seven years). Shortly after *Blakely* was decided, a split developed between two panels of the Appellate Division. In *State v. Abdullah*,¹² one panel of judges ruled that a statutory maximum is the highest sentence within a particular range applicable to one of the four degrees. Shortly thereafter, another panel in *State v.*

*Natale*¹³ concluded that the statutory maximum is the presumptive sentence established by *N.J.S.A. 2C:44-1f(1)*. In that opinion, the Appellate Division based its holding on its view that:

There is no doubt that the New Jersey Code of Criminal Justice permits only the presumptive sentence embodied in *N.J.S.A. 2C:44-1f(1)* to be imposed based on the jury's verdict. The presumptive sentence embodied in that section "shall" be imposed unless the sentencing judge finds that an aggravating and mitigating factor or factors exist and weigh in favor of a higher or lower term within the limits provided in *N.J.S.A. 2C:43-6*. Therefore, the presumptive sentence, on its face, is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict. Stated differently, in the words of *Blakely*, the "presumptive sentence" is "the maximum [the judge] may impose without [making] any additional findings" not made by the jury. (Citations omitted)

Pursuant to the Appellate Division's holding in *Natale*, a defendant could be sentenced above a presumptive term within a particular sentencing range only if one of two conditions was satisfied: (1) the prosecutor charged the aggravating factors as elements of the crime and submitted them to the jury for a finding, or (2) the defendant explicitly waived his or her Sixth Amendment right to a jury finding with regard to the judge's consideration of aggravating factors.

The Appellate Division in *Natale* stayed its decision pending review by the Supreme Court of New Jersey. The Court swiftly agreed to review the decisions in both *Natale* and *Abdullah* in a consolidated appeal by order dated December 9, 2004. During the intervening period between certification of the cases and oral argument on March 14, 2005, the United States Supreme Court handed down its bifurcated decision in *United States v. Booker*. Spurred by decisions in other states following oral argument, the parties engaged in a flurry of supplemental briefing until the issuance of the Court's decisions on August 2, 2005.

IV. The New Jersey Supreme Court's *Natale* Decision

Justice Barry T. Albin authored the *Natale* decision on behalf of a unanimous Court. Similar to the United States Supreme Court's *Booker* decision, *Natale* addressed both the threshold issue of *Blakely's* applicability to the Code and the appropriate remedy. As to the first issue, the Court vindicated the Appellate Division's conclusion in *Natale* that for purposes of the Sixth Amendment, "the statutory maximum" was established by the presumptive-term provision, *N.J.S.A. 2C:44-1f(1)*.

In arriving at that conclusion, the Court decisively rejected the two central arguments advanced by the state. First, the state implausibly asserted that the United States Supreme Court's definition of a "statutory maximum" in *Blakely* was rigidly synonymous with the one employed by

it in *Apprendi* when referring to the top of a particular sentencing range. What many commentators and practitioners identified as the core of the *Blakely* ruling—that “the statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings”—was construed by the state as little more than dicta. The Supreme Court of New Jersey thought otherwise, noting that the United States Supreme Court in *Blakely* had clearly “refined,” that is, enlarged, the definition of “statutory maximum” for *Apprendi* purposes.¹⁴

The Court was no more persuaded by the state’s reliance on Justice Stevens’s pronouncement in *Booker* that “when 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.” The state construed this passage to mean that the rule in *Blakely* applied only to those provisions that mandated judicial enhancement of sentences above a presumptive range. As support for its position, in a supplemental brief, the state cited the Tennessee Supreme Court’s recent opinion in *State v. Gomez*,¹⁵ decided after oral argument. There, by a 3-2 vote, the Tennessee court incongruously refused to accept the unanimous view of all parties to the appeal that Tennessee’s system for imposing enhanced sentences violates the Sixth Amendment because that state’s presumptive-term provision also conferred discretion upon judges to sentence defendants above the presumptive term.

The *Natale* Court squarely addressed this contention in a lengthy footnote. Citing the *Gomez* opinion among others, it acknowledged that several state courts had determined that judicial fact-finding serving as the basis for a sentence in excess of the range permitted by a jury verdict is constitutionally unobjectionable, provided that the judge is not compelled to increase the sentence. However, the Court observed that such a crabbed reading of *Booker* would effectively “gut the core principle enunciated in *Apprendi* [and its progeny] . . . that judicial fact-finding that is the basis for increasing a sentence beyond the maximum authorized by the jury verdict or the defendant’s admissions at his guilty plea runs afoul of the jury trial guarantee of the Sixth Amendment.” Citing to a seemingly dispositive footnote in the *Blakely* decision, the Court further added that “[w]e do not believe a fair reading of *Booker, supra*, renders a discretionary increase above the permissible sentencing range any more constitutionally palatable than a mandatory increase when either is based on judicial fact-finding.” Because the presumptive-term provision, N.J.S.A. 2C:44-1f(1), established a ceiling that could not be exceeded absent a finding of at least one aggravating factor, presumptive terms constituted “statutory maximums” for *Blakely* and *Booker* purposes.

Having resolved this preliminary question, the Court turned to the issue of a suitable remedy—a remedy, it emphasized, that would necessarily be informed by the Code’s paramount objective of uniformity. This pro-

nouncement was followed by two key assumptions regarding what the Legislature did and did not desire. Initially, the Court posited that the Legislature would clearly prefer that the overarching structure of the Code’s sentencing scheme remain intact. Second, the Court asserted that “it is clear that the Legislature would not have wanted us to substitute jurors for judges as the fact finders determining the applicability of aggravating factors.” Notably, the Court did not cite to any provision in the Code itself in support of this proposition but instead adverted to Justice O’Hern’s observation in the *Hodge* decision that the Code’s sentencing framework provides for “a strong judicial role in sentencing.”

Perhaps more to the point, the Court enumerated “potential problems” that would, in its view, inevitably ensue if an aggravating factor were treated as the substantial equivalent of an element of an offense to be decided by a jury. These hardships included the incorporation of aggravating factors into indictments and the necessity of “separate, costly, unwieldy and perhaps protracted penalty trials at the conclusion of guilty phase trials.” The Court further opined without elaboration that substituting “experienced and trained judges” with jurors with respect to findings of fact at sentencing hearings would not advance the principles of uniformity and fairness that animate the Code.

Based on the foregoing concerns, the Court invoked its authority to engage in “judicial surgery” and excised N.J.S.A. 2C:44-1f(1) from the Code. Consequently, the “statutory maximum” authorized by a jury verdict or the facts admitted by a defendant in a guilty plea returned to the top of each range of imprisonment. Moreover, judges would no longer be constrained by the fixed point of a statutory presumptive term when determining a sentence. The Court surmised that the impact of its remedy on sentencing practice would be negligible, premised on its intuition “that many, if not most, judges will [continue] to pick the middle of the sentencing range as a logical starting point for the balancing process.” Ultimately, the Court expressed its confidence that by excising the presumptive-term provision from the Code and thereby preserving the remainder of the sentencing provisions in compliance with *Blakely*, uniformity would in no way be sacrificed or otherwise diminished.¹⁶

V. Critiquing *Natale*

Doubtless, the Court’s decision in *Natale* was heavily influenced by the two majority decisions that compose the *Booker* ruling. And, as with *Booker*, it is the remedial component of the *Natale* decision that immediately invites greater scrutiny, comment, and concern. To be certain, the Court’s elimination of the presumptive-term provision from the Code insulated, to a degree, New Jersey’s criminal justice system from some disruption that would result from treating aggravating factors as the functional equivalent of elements. But did the Court exaggerate this concern or accord it undue weight? Perhaps. According to

the New Jersey Attorney General's Office, 98 percent of all convictions in 2004 resulted from plea agreements. It stands to reason that bifurcated sentencing proceedings would transpire only in a very small fraction of the criminal cases disposed of annually. Moreover, it is highly unlikely that such proceedings would entail the investment of time and resources comparable to, for example, penalty trials of capital proceedings.

Of equal importance, jurors at such proceedings would neither be authorized nor be required to fix and impose the appropriate punishment (and thereby entirely usurp the role of the judge) but would instead serve only as evidentiary gatekeepers regarding those aggravating factors alleged by the state to justify a sentence above the presumptive term. It is ironic that the Court rejected this practice as undesirable in *Natale* yet dictated this exact procedure in *Franklin* whenever the state anticipates seeking an extended term of imprisonment authorized by the Graves Act.

Also difficult to square with the remedy embraced by the Court is the rationale repeatedly cited for its selection, namely, the Code's preeminent goal of fostering uniformity in sentencing. To use the Court's own characterization, the presumptive-term provision was indeed pivotal in effectuating this objective. On this point, there can be no serious dispute given the expansive ranges of imprisonment established by the Code, particularly those applicable to first- and second-degree crimes. Indeed, the substantial body of case law that developed since the adoption of the Code in 1979 is replete with decisions emphasizing the significance of the presumptive term in ascertaining the reasonableness of a given sentence. Stated bluntly, the presumptive-term provision kept sentencing under the Code—as well as appellate review of sentences—firmly grounded in a way that directly facilitated sentencing uniformity. Viewed in this light, the Court's categorical assertion that its judicial redaction of the presumptive-term provision will leave uniform sentencing perfectly intact in perpetuity suggests a disconnection between theory and practice.

The Court perhaps could have ameliorated these concerns had it forthrightly acknowledged, as Justice Breyer did in his *Booker* opinion, that the remedy it espoused represented a pragmatic and commonsense stopgap solution to a problem that would inevitably necessitate legislative intervention.¹⁷ After repeatedly paying fealty to the assumed intent of the Legislature in crafting its remedy, it is odd that the Court perceived no prospective role the legislative branch or a jury could play in addressing the conspicuous crater left in the Code because of its decision.

VI. Conclusion

In the final analysis, a close reading of the *Natale* decision reveals a conflicted Court attempting to square the proverbial circle. On the one hand, the Court obviously understood that pursuant to *Blakely*, only jurors can make findings to justify an enhanced sentence. On the other

hand, the Court betrayed an implicit mistrust of a jury's capacity to fulfill a responsibility routinely discharged in ordinary trials. By straining, moreover, to maintain exclusive dominion over sentencing practice in New Jersey in the post-*Apprendi* era, the Court was obligated to eliminate from the state's sentencing system a provision that for more than twenty-five years directly furthered the Code's most important policy objectives. Although the impact of the *Natale* decision has yet to be felt, there is ample reason to be less sanguine than the Court that all will remain well.

Notes

¹ The views expressed in the article are those of the author and do not necessarily reflect the view of the Commission to Review Criminal Sentencing, the Office of the Attorney General, or the Division of Criminal Justice. The author would like to thank Richard G. Singer, Distinguished Professor, Rutgers School of Law, Camden, and Deputy Attorney General Charles Ouslander, New Jersey Division of Criminal Justice, for their insights and constructive criticism. Contact: DAG Ben Barlyn, New Jersey Commission to Review Criminal Sentencing, PO Box 095, New Jersey, 08625-0095, Phone (609) 341-2813, bennett.barlyn@lps.state.nj.us.

² *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

³ *Ring v. Arizona*, 122 S.Ct. 2428 (2002).

⁴ *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

⁵ *United States v. Booker*, 125 S.Ct. 738 (2005).

⁶ *State v. Natale*, 878 A.2d 724 (2005); *State v. Abdullah*, 878 A.2d 746 (2005); *State v. Franklin*, 878 A.2d 757 (2005).

⁷ *State v. Whitaker*, 401 A.2d 509 (1979); *State v. Leggeadrini*, 380 A.2d 1112 (1977); *State v. Ivan*, 162 A.2d 851 (1960).

⁸ *State v. Roth*, 471 A.2d 370 (1984).

⁹ *State v. Hodge*, 471 A.2d 389 (1984).

¹⁰ The extended-term provision declared unconstitutional by the United States Supreme Court in *Apprendi* was representative of the latter variant of statutory predicates.

¹¹ *N.J.S.A. 2C:44-3d*.

¹² *State v. Abdullah*, 858 A.2d 19 (2004).

¹³ *State v. Natale*, 861 A.2d 148 (2004).

¹⁴ Justice Stevens evidently sought to dispel any lingering confusion regarding the term "statutory maximum" by avoiding its use entirely and by restating the rule in *Blakely* as follows: "Any fact 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." *Booker*, 125 S.Ct. at 756.

¹⁵ *State v. Gomez*, 163 S.W.3d 632 (2005).

¹⁶ The Court in *Natale* concluded its opinion by holding that the ruling announced therein would be given limited or "pipeline" activity. It would therefore apply to defendants with cases on direct appeal as of the date of the decision and to those defendants who raised *Blakely* challenges to their sentences at trial or on direct appeal. In the companion case to *Natale* issued the same day, the Court held that a defendant's Sixth Amendment right is not infringed when the judge makes factual findings in support of the imposition of a life sentence for murder since that crime has a unique sentencing range under the Code that does not include a presumptive term. In addition, the Court in *Abdullah* adhered to the weight of out-of-state authority by concluding that a court's determination to impose consecutive or concurrent sentences does not implicate the Sixth Amendment. Lastly, the Court reaffirmed its unwillingness to depart, on state constitutional grounds, from the decision in *Harris v. United States* that upheld judi-

cial fact-finding with respect to imposition of minimum terms of imprisonment. In *State v. Franklin*, the Court concluded that a jury's failure to consider facts that elevated a defendant's sentence above the statutory maximum could not be remedied by consideration of even "overwhelming" evidence of a relevant fact gleaned from the trial record. The jury had convicted the defendant of second-degree manslaughter and had acquitted him of all weapons offenses despite the fact that uncontested evidence had been elicited at trial that he had shot the victim to death with a handgun. The trial judge imposed an extended term of imprisonment, i.e., that appropriate for a first-degree offense, based on his finding that the defendant had facilitated the crime with a firearm. Although convinced that evidence of the defendant's use of the firearm was overwhelming, the Supreme Court

nonetheless vacated the enhanced sentence because the aggravating fact—the defendant's possession and use of the firearm—had not been found by the jury. Notably, the Court rejected the state's assertion that such errors were amenable to harmless error analysis and emphasized that under no circumstance can a sentencing court "engage in an after-the-fact review of the record to determine whether the state's evidence fits an offense with which defendant was never charged."

¹⁷ Justice Breyer all but directly solicited the involvement of Congress. Addressing the remedy in *Booker*, he wrote: "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." 125 S. Ct. at 768.