

IN THE SUPREME COURT  
OF THE STATE OF NEW MEXICO

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No. 28,525

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STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

TREMAINE JERNIGAN,

Defendant-Petitioner.

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**BRIEF OF AMICUS CURIAE**  
**NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION**

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On Writ of Certiorari to the  
Court of Appeals of the State of New Mexico  
Following a Direct Appeal from the Twelfth Judicial District Court,  
The Honorable James Waylon Counts Presiding

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Zachary A. Ives  
FREEDMAN BOYD DANIELS  
HOLLANDER & GOLDBERG P.A.  
20 First Plaza, Suite 700  
Albuquerque, N.M. 87102

Counsel for Amicus Curiae New Mexico  
Criminal Defense Lawyers Association

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## SUMMARY OF RELEVANT PROCEEDINGS

A jury found Petitioner Tremaine Jernigan guilty of second-degree murder, attempted second-degree murder, and tampering with evidence. RP 198, 200, 202. The jury also returned special verdicts indicating that it found beyond a reasonable doubt that Jernigan used a firearm in the commission of second-degree murder and attempted second-degree murder. RP 199, 201. The guilty verdicts authorized the district court to impose basic sentences of fifteen years for second-degree murder, three years for attempted second-degree murder, and eighteen months for tampering with evidence. See NMSA 1978, § 31-18-15(A) (2003). The special verdicts required the district court to impose two one-year enhancements. See NMSA 1978, § 31-18-16(A) (2003).

The state filed a notice of intent to seek enhancements of Jernigan's basic sentences pursuant to NMSA 1978, § 31-18-15.1 (1993). RP 284-85. The state alleged the following aggravating circumstances: (1) the level of anger and ill will Jernigan displayed towards the victims; (2) Jernigan's gang affiliation, history of violence, and criminal history as a child; (3) Jernigan's avoidance of prosecution; (4) Jernigan's incitement of disorder and turmoil while incarcerated; and (5) Jernigan's failure to show remorse for his crimes. RP 284-85. The notice listed the names of witnesses whose testimony the state hoped would prove its allegations to the district court judge. RP 284-85.

The district court judge held a sentencing hearing as required by NMSA 1978, § 31-18.15.1(A) (1993). Tr. 3/25/02 at 1. Just before the state began to examine its first witness, Jernigan's counsel lodged a constitutional objection to any enhancement based on aggravating circumstances the state had not proven to a jury beyond a reasonable doubt. Id. at 8. Jernigan's counsel argued that Apprendi v. New Jersey, 530 U.S. 466 (2000), prohibited such enhancements and that State v. Wilson, 2001-NMCA-32, 130 N.M. 319—which held that such enhancements did

not run afoul of Apprendi—was wrongly decided. Tr. 3/25/02 at 9-13. The district court rejected Jernigan’s argument, reasoning that it was “bound by the decisions of the superior courts in New Mexico.” Id. at 15-16.

After the hearing, the district court judge made the following findings, which it included in the record as required by § 31-18.15.1(A):

IT IS THE FINDING OF THE COURT that there is [sic] aggravating circumstances surrounding the event and the offender because of the defendant hunting the victims, the multiple gun shots (15), defendant acting as an enforcer for a drug dealer, the defendant was clearly the aggressor and had violence on his mind all day, defendant’s actions showed extreme anger and ill will toward the victims, he avoided prosecution by using aliases and by fleeing the jurisdiction, and that even in the Defendant’s statements to a victim and relatives, he fails to accept responsibility for his actions or show remorse . . .

RP 303. Under § 31-18-15.1, these judicial findings allowed, but did not require, the district court to enhance each of Jernigan’s basic sentences by up to one-third. The district court judge chose not only to enhance Jernigan’s basic sentences, but to impose the longest possible enhanced sentence for each offense. The judge enhanced the second-degree murder sentence by five years, the attempted second-degree murder sentence by one year, and the tampering with evidence sentence by six months. RP 303-04. The judge ordered all the enhanced sentences to run consecutively, which resulted in a total sentence of twenty-eight years. RP 304. The enhancements increased Jernigan’s total sentence by six and a half years.

Jernigan appealed. In addition to challenging his second-degree murder and attempted murder convictions, Jernigan claimed that the procedure used to enhance his sentence was unconstitutional under Apprendi. The Court of Appeals affirmed Jernigan’s convictions and sentence. See State v. Jernigan, No. 23,095 (memo op. Feb. 12, 2004) (“Jernigan”). The Court’s

rejection of Jernigan’s Apprendi argument rested only on its decision in Wilson. “Until our Supreme Court wishes to revise State v. Wilson, 2001-NMCA-32, 130 N.M. 319, 24 P.3d 351 (Bustamante, J., dissenting in part), Defendant’s sentence can be aggravated by the district court in this case without resort to a jury’s making findings of fact[.]” Jernigan at 2.

This Court granted Jernigan’s petition for a writ of certiorari on three issues, including whether Jernigan’s enhanced sentence is invalid under Apprendi. After the parties filed their briefs, the United States Supreme Court decided Blakely v. Washington, 124 S. Ct. 2531 (2004). After oral argument, the Court decided United States v. Booker, 125 S. Ct. 738 (2005).

### **ARGUMENT**

In Apprendi, the United States Supreme 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.” Apprendi, 530 U.S. at 490. The year after the Court decided Apprendi, our Court of Appeals addressed the issue presented here in Wilson, which the district court, the Court of Appeals, and the state have relied on in this case. See Tr. 3/25/02 at 15-16; Jernigan at 2, Answer Brief at 31-33, State’s Supplemental Brief (“State Supp.”) at 5, 7, 12. In Wilson, the defendant—whose sentence had been enhanced pursuant to § 31-18-15.1—challenged the constitutionality of New Mexico’s enhancement procedure under Apprendi. See Wilson, 2001-NMCA-32, ¶ 3. Wilson argued that § 31-18-15.1 is unconstitutional to the extent that it allows a judge to increase a defendant’s sentence beyond the statutory maximum in § 31-18-15(A) solely on the basis of aggravating facts the state has proven to a judge under a standard less rigorous than beyond a reasonable doubt. See id. ¶¶ 1-3, 13. A two-judge majority of the Court of Appeals panel disagreed, rejecting defendant’s contention that “the maximum sentence authorized

by a jury's verdict is the basic sentence prescribed by Section 31-18-15." Id. ¶ 13. Instead, according to the majority, the statutory maximum "is the basic sentence [in § 31-18-15(A)] plus a one-third increase under Section 31-18-15.1." Id. ¶ 16. Judge Bustamante dissented from the Court's Apprendi holding. He explained that "under Section 31-18-15, the jury verdict itself cannot result in a sentence greater than the basic sentence for each level of felony absent a factual finding supporting an enhancement. Thus, the Section 31-18-15 basic sentence is the maximum sentence which can be imposed based on the jury verdict alone." Id. ¶ 53 (Bustamante, J., dissenting in part).

In Blakely, the Court definitively answered the question that divided our Court of Appeals in Wilson by adopting Judge Bustamante's definition of "statutory maximum." See State v. Frawley, 2005-NMCA-17, ¶ 13, 106 P.3d 580 ("[U]nder Blakely, our Wilson decision can no longer control or be considered controlling authority."). The "statutory maximum" is the basic or presumptive sentence in § 31-18-15(A) because that 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."<sup>1</sup> Blakely, 124 S. Ct. at 2537. Then, in Booker, the Court reaffirmed that "the statutory maximum" is "the maximum authorized by the facts established by a plea of guilty or a jury verdict[.]" Booker, 125 S. Ct. at 756.

Because a jury verdict or guilty plea authorizes no greater sentence than the appropriate presumptive sentence in § 31-18-15(A), enhancement of an enhanced sentence solely on the basis of judicial findings made under a preponderance of the evidence standard under § 31-18-15.1 violates the Sixth Amendment and the Fourteenth Amendment. The district court applied § 31-18-

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<sup>1</sup> Amicus curiae New Mexico Criminal Defense Lawyers Association ("NMCDLA") frequently refers to the basic sentences in § 31-18-15(A) as "presumptive sentences." See State v. Yarborough, 1996-NMSC-68, ¶ 19, 122 N.M. 596 (referring to basic sentence in § 31-18-15(A) as "presumptive sentence").

15.1 in this unconstitutional manner when it enhanced Jernigan’s sentence, as the persuasive authority in other states confirms.

In order to allow New Mexico’s district courts to impose valid sentence enhancements, the Court should exercise its power of superintending control to implement the constitutional requirements described in Apprendi, Blakely, and Booker. Appropriately drafted sentencing rules, uniform jury instructions, and special verdict forms would solve the constitutional problem that arises in the relatively small number of cases in which § 31-18-15.1 could be applied unconstitutionally, but would not significantly change actual sentencing proceedings in cases which present no constitutional problem.

**I. THE DISTRICT COURT UNCONSTITUTIONALLY APPLIED SECTION 31-18-15.1(A) WHEN IT ENHANCED JERNIGAN’S PRESUMPTIVE SENTENCES BASED ON FACTS FOUND BY A JUDGE, BUT NEITHER ADMITTED BY JERNIGAN NOR PROVEN TO A JURY BEYOND A REASONABLE DOUBT.**

A. Jernigan’s Enhanced Sentence Is Invalid Under Apprendi, Blakely, and Booker.

District courts run afoul of Apprendi, Blakely, and Booker where, as here, they employ § 31-18-15.1 to enhance a defendant’s sentence beyond the statutory maximum based only on facts proven to a judge by a mere preponderance of the evidence.<sup>2</sup> The United States Supreme Court announced the controlling constitutional rule in Apprendi. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted

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<sup>2</sup> The applicable standard of review for all sentencing issues that hinge on statutory interpretation is de novo. See State v. Brown, 1999-NMSC-4, ¶ 8, 126 N.M. 642 (“Because this case involves issues concerning the district court’s interpretation and application of sentencing law, it is subject to de novo review.”). “When dealing with a facial constitutional challenge to a statute, the legislation enjoys a presumption of constitutionality.” Marrujo v. New Mexico State Highway Transp. Dep’t, 118 N.M. 753, 756, 887 P.2d 747, 750 (1994) (emphasis added; internal quotation marks and citations omitted). “A party challenging the constitutionality of a statute has the burden of proving it is unconstitutional beyond a reasonable doubt.” City of Albuquerque v. One (1) 1984 White Chevy, 2002-NMSC-14, ¶ 5, 132 N.M. 187. It is not clear whether the same standard of review governs constitutional challenges to particular applications of a statute.

to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490. In Blakely, the Court clarified the Apprendi rule by defining the critical phrase “statutory maximum” as “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely, 124 S. Ct. at 2537.

The Blakely Court invalidated a sentence enhanced solely on the basis of judicial findings made by a preponderance of the evidence pursuant to the Washington Sentencing Reform Act (“WSRA”). The WSRA required imposition of a sentence within a presumptive range, unless the judge found mitigating or aggravating circumstances, in which case the WSRA permitted, but did not require, the judge to impose a sentence outside the presumptive range. See Blakely, 124 S. Ct. at 2535. The judge had the authority to increase the presumptive sentence only if the judge found aggravating circumstances other than those used to determine the presumptive sentence and included his or her findings in the record. See id. Although the presumptive range for Blakely’s offense was forty-nine to fifty-three months, Blakely received an enhanced sentence of ninety months based on an aggravating circumstance (deliberate cruelty) found by the judge. See id. On appeal, Blakely challenged his sentence under Apprendi. Washington argued that its sentencing procedure was consistent with Apprendi because the statutory maximum was the ten-year maximum sentence for class-B felonies, not the fifty-three-month cap on the presumptive range. See id. at 2538. The Court squarely rejected that argument, explaining that “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” Id. at 2537. For Blakely, the statutory maximum was fifty-three months because the judge could impose no greater sentence without finding aggravating circumstances. Because Blakely’s exceptional sentence exceeded the statutory maximum and was

based on a fact that the state had not “submitted to a jury, and proved beyond a reasonable doubt,” Apprendi, 530 U.S. at 490, the Court held that it was invalid, see Blakely, 124 S. Ct. at 2536.<sup>3</sup>

Similarly, the United States Sentencing Guidelines (“USSG”), which were at issue in Booker, required imposition of a presumptive sentence absent judicial findings of aggravating or mitigating circumstances. See Booker, 125 S. Ct. at 750 (citing 18 U.S.C. § 3553(b), which required imposition of sentence within guideline range before Booker). Booker’s presumptive sentence for possession with intent to distribute at least 50 grams of crack cocaine was between 210 to 262 months. See Booker, 125 S. Ct. at 751. However, a judge sentenced Booker to 360 months based on a judicial finding, under a preponderance of the evidence standard, that Booker “possessed an additional 566 grams of crack and that he was guilty of obstructing justice.” Id. at 751. Applying the Apprendi rule, as clarified in Blakely, the Court held that Booker’s sentence was invalid because the judge lacked the authority to enhance the sentence based on the jury verdict alone and only gained that authority by finding additional facts. See id. at 7151 (“Thus, just as in Blakely, ‘the jury’s verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.’” (Quoting Blakely, 124 S. Ct. at 2531.)). By applying the Apprendi/Blakely rule to invalidate a sentence imposed under the USSG, the Court “reaffirm[ed] [its] holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the

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<sup>3</sup> In State v. Blakely, 47 P.3d 149, 159 (Wash. Ct. App. 2002), which the Court reversed, the Washington Court of Appeals affirmed Blakely’s sentence over his Apprendi challenge because the Washington Supreme Court had previously held that the statutory maximum under Apprendi was the absolute maximum sentence for the offense, not the maximum sentence authorized by the jury’s verdict. See State v. Gore, 21 P.3d 262, 275-77 (Wash. 2001) (en banc), overruled by State v. Hughes, 2005 Wash. LEXIS 362 (Wash. Apr. 14, 2005) (en banc). Wilson rested on the same rationale. See Wilson, 2001-NMCA-32, ¶ 16 (holding that statutory maximum is absolute maximum sentence court may impose under § 31-18-15.1).

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.

New Mexico’s felony sentencing scheme is identical to the schemes at issue in Blakely and Booker in all constitutionally significant respects. Section 31-18-15(B) states that the presumptive sentence in § 31-18-15(A) “shall be imposed . . . unless the court alters the sentence pursuant to the provisions of Section 31-18-15.1” or other statutes not at issue here. The district court may only alter the presumptive sentence in § 31-18-15 after “hold[ing] a sentencing hearing to determine if mitigating or aggravating circumstances exist” and “upon a finding by the judge of any mitigating or aggravating circumstances surrounding the offense or concerning the offender.” § 31-18-15.1(A) (emphasis added). The burden of persuasion for such findings is “a preponderance of the evidence.” State v. Woodruff, 1997-NMSC-061, ¶ 31, 124 N.M. 388. If the judge makes such findings and exercises his or her discretion to alter the presumptive sentence, the judge must “issue a brief statement of the reasons for the alteration and incorporate that statement in the record of the case.” § 31-18-15.1(A). The district court may not rely upon the essential elements of the offense—as reflected in a guilty verdict or plea—as aggravating circumstances to justify enhancement of a presumptive sentence. See Swafford v. State, 112 N.M. 3, 37-38, 810 P.2d 1223, 1236-37 (1991) (holding that “section 31-18-15.1 . . . does not by its own terms permit the trial judge to consider the elements of . . . the offense for which the defendant was sentenced” because “the elements of the offense are ipso facto incorporated by the legislature into the base level [or presumptive] sentencing for the offense”). “The amount of alteration of the basic sentence,” if any, “shall be determined by the judge,” but can never exceed one-third of the presumptive sentence in adult felony cases. § 31-18-15.1(C).

New Mexico’s enhancement scheme allows, but does not require, a judge to impose a sentence longer than the statutory maximum based on facts that a judge has found by a preponderance of the evidence, but neither proven to a jury beyond a reasonable doubt nor admitted by the defendant. In New Mexico, the “statutory maximum” for Apprendi purposes is the appropriate presumptive sentence in § 31-18-15 because a guilty verdict or plea to the elements of the offense only authorizes the district court to impose the presumptive sentence in § 31-18-15(A), not an enhanced sentence under § 31-18-15.1. See Blakely, 124 S. Ct. at 2537 (“[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.”). The district court can only enhance a presumptive sentence under § 31-18-15.1 if the prosecutor proves additional facts to the judge “by a preponderance of the evidence.” Woodruff, 1997-NMSC-061, ¶ 31. Because the presumptive sentence is the “statutory maximum” for Apprendi purposes, “any fact that increases the penalty for a crime beyond” the presumptive sentence must “be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490. Therefore, absent a valid waiver of Apprendi rights, when a district court’s application of § 31-18-15.1 results in enhancement based exclusively on aggravating factors the state has proven only to a judge by a mere preponderance of the evidence, the enhancement is invalid. Such an application of § 31-18-15.1 is unconstitutional because “the jury’s verdict alone does not authorize the [enhanced] sentence. The judge acquires that authority only upon finding some additional fact.” Blakely, 124 S. Ct. at 2538. By “inflict[ing] punishment that the jury’s verdict alone does not allow,” the district court judge “exceeds his proper authority.” Id. at 2537.

Jernigan’s greatly enhanced sentence resulted from just such an unconstitutional application of § 31-18-15.1. The verdicts authorized the district court to impose presumptive sentences of fifteen years for second-degree murder, three years for attempted second-degree murder, and eighteen months for tampering with evidence.<sup>4</sup> See § 31-18-15(A)(2), (6), and (8). The special verdicts required the district court to enhance the presumptive sentence for second-degree murder by one year and the presumptive sentence for attempted second-degree murder by one year based on Jernigan’s use of a firearm during the commission of those offenses.<sup>5</sup> See § 31-18-16(A). Therefore, the statutory maximum under Apprendi and Blakely was a consecutive sentence of twenty-one years, six months. However, applying § 31-18-15.1, the district court enhanced Jernigan’s sentence by six and a half years based entirely on aggravating circumstances the state proved to the judge by a mere preponderance of the evidence. RP 303-04. As the Court recognized in Blakely, “[t]he Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unambiguous suffrage of twelve of his equals and neighbours rather than a lone employee of the State.” Blakely, 124 S. Ct. at 2543 (internal quotation marks and quoted authority omitted). The district court applied § 31-18-15.1 in a manner that deprived Jernigan of an additional six and a half

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<sup>4</sup> Imposition of the fifteen-year basic sentence in § 31-18-15(A)(2) for “a second degree felony resulting in the death of a human being” does not implicate Apprendi and Blakely in this case because the jury found beyond a reasonable doubt that Jernigan killed one of the alleged victims. RP 163 (second-degree murder instruction); 198 (second-degree murder verdict). But see State v. MacDonald, 2004-NMSC-33, ¶¶ 7-8, 99 P.3d 667 (holding that jury did not find that defendant’s actions resulted in death of human being, although Blakely required such a finding for imposition of the fifteen-year basic sentence for a second-degree felony resulting in death under § 31-18-15(A)(2)).

<sup>5</sup> The two one-year firearm enhancements imposed under § 31-18-16(A), see RP 303 (judgment and sentence), raise no constitutional issue under Apprendi and Blakely because they were based on facts the state proved to a jury beyond a reasonable doubt, see RP 199, 201 (special verdicts).

years of his liberty without affording him the fundamental procedural protection the Constitution requires. It follows that Jernigan’s enhanced sentence is invalid.

Although § 31-18-15.1 can be unconstitutionally applied, as it was here, the statute is not unconstitutional on its face because it allows judges to impose constitutionally valid sentences under a wide variety of circumstances. See United States v. Salerno, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid[.]”); Conoco, Inc. v. Taxation and Revenue Dept., 1997-NMSC-5, ¶¶ 19-20, 122 N.M. 736 (recognizing that some courts have questioned “the no-set-of-circumstances standard” and that some courts have applied “the less stringent large fraction test”); see, e.g., State v. Dilts, 103 P.3d 95, 100 (Or. 2004) (“[T]he fact that the sentencing guidelines may be applied unconstitutionally, as they were in this case, does not mean that we must reject the sentencing guidelines themselves as unconstitutional.”).<sup>6</sup> For example, a judge who finds no aggravating or mitigating circumstances must impose the appropriate presumptive sentence. See § 31-18-15(B). In addition, a judge who finds at least one mitigating circumstance under § 31-18-15.1(A) may impose either (1) the presumptive sentence or (2) a sentence that is up to one-third less than the presumptive sentence. See § 31-18-15.1(A) (“The court may alter the basic sentence . . . upon a finding by the judge of any mitigating or aggravating circumstances surrounding the offense

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<sup>6</sup> The Court can decide this case without determining whether the Salerno test or some less stringent test should be used to determine whether a statute is unconstitutional on its face. Regardless of which test the Court applies, § 31-18-15.1 is unconstitutional as applied because of the large number of cases in which its application results in valid sentences.

or concerning the offender.”). Finally, even a judge who finds at least one aggravating circumstance may impose either (1) a presumptive sentence or (2) a reduced sentence, if the judge has also found at least one mitigating circumstance. See id. All of these presumptive and reduced sentences would be valid under Apprendi and Blakely because they do not exceed the statutory maximum.<sup>7</sup> For example, had the district court judge chosen to impose only the presumptive sentences in this case, those sentences clearly would have been valid. But the judge’s chosen application of § 31-18-15.1 was unconstitutional in this case because it resulted in an enhanced sentence the jury’s verdicts did not support.

In an attempt to salvage Jernigan’s enhanced sentence, the state asserts that Jernigan testified at trial to facts that could have supported the judicial findings upon which his enhanced sentence rests. State’s Supp. at 10. However, a defendant’s mere testimonial admission of a potentially aggravating fact cannot be used to enhance a defendant’s sentence because the Constitution requires a knowing and voluntary waiver of Apprendi rights:

[N]othing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, a State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.

See Blakely, 124 S. Ct. at 2541 (emphasis added; internal citations omitted). The Third Circuit Court of Appeals has explained that a defendant’s admissions can only include (1) facts in an

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<sup>7</sup> As explained above, presumptive sentences can be invalid under Apprendi under certain circumstances. See MacDonald, 2004-NMSC-33, ¶¶ 7-8 (holding that jury did not find that defendant’s actions resulted in death of human being, although Blakely required such a finding for imposition of the fifteen-year basic sentence in § 31-18-15(A)(2)).

indictment to which the defendant pled guilty, (2) facts in a written plea agreement, (3) “facts necessary to prove a violation of the offense charged in the indictment,” or (4) facts admitted during a plea colloquy. United States v. Thomas, 389 F.3d 424, 426 (3<sup>rd</sup> Cir. 2004); see United States v. Mueffleman, 327 F. Supp. 2d 79, 84 (D. Mass. 2004) (“Blakely directed that . . . facts had to be found by a jury, with all the safeguards of the Constitution, or admitted by the defendant in a plea agreement or plea colloquy.”). This exhaustive list does not include a defendant’s trial testimony. Instead, the Court identified only admissions accompanied by a defendant’s knowing and voluntary waiver of Apprendi rights. See Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973) (“Almost without exception, the requirement of a knowing and intelligent waiver has been applied . . . to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.”); State v. Paredez, 2004-NMSC-36, ¶ 7, 101 P.3d 799 (holding that waiver of right to jury trial must be knowing and voluntary). But Jernigan never waived those rights. He exercised them at trial and affirmatively asserted them at sentencing through defense counsel’s Apprendi objection. Tr. 3/25/02 at 8-13. Without a knowing and voluntary waiver, Blakely does not permit enhancement beyond the statutory maximum based on findings that might have rested on Jernigan’s trial testimony.

In addition, the record does not support the state’s argument. The judge found that Jernigan was “acting as an enforcer for a drug dealer,” “had violence on his mind all day,” “hunted the victims,” and “showed extreme anger and ill will toward” them. RP 303. However, Jernigan testified repeatedly on both direct and cross-examination that he acted impulsively in self-defense because he was afraid that the alleged victims, with whom he was in an altercation, were about to draw their guns. Tr. 8/29/01 at 573-74, 610, 612, 615, 646-47, 651-53. Similarly, the district court judge found that Jernigan fired 15 shots, RP 303, but Jernigan testified that he did not know how

many shots he fired, Tr. 8/29/01 at 651, 654. Nor did Jernigan’s testimony that he was “sorry for that man’s death,” Tr. 8/29/01 at 561 (trial), and that he “reacted violently” and “shouldn’t have reacted at all like that,” Tr. 3/25/02 at 54 (sentencing), support the judge’s findings that Jernigan “faile[ed] to accept responsibility for his actions or show remorse.” RP 303. Finally, although Jernigan testified that he left New Mexico and used a false name after the incident, Tr. 8/29/01 at 561, 638-39, neither this Court nor the Court of Appeals has recognized those facts as aggravating circumstances. Even if those facts could justify enhancement, the Court cannot be confident that the district court would have imposed the maximum six-and-a-half-year enhancement based on those facts alone.

Because the district court judge’s decision to enhance Jernigan’s presumptive sentence based on judicial findings was an unconstitutional application of § 31-18-15.1, Jernigan’s enhanced sentence is invalid under Apprendi, Blakely, and Booker. Accordingly, the Court should vacate Jernigan’s sentence.

B. The Highest Courts In Four States Have Invalidated Enhancements Of Presumptive Sentences That Rest Solely On Aggravating Circumstances Found By A Judge.

In the wake of Blakely and Booker, the highest courts in Arizona, Oregon, Minnesota, and Indiana have invalidated enhanced sentences imposed just as Jernigan’s enhanced sentence was.<sup>8</sup> Although a three-judge majority of the Supreme Court of Tennessee recently reached the opposite result, its incorrect decision was based on a fundamental misunderstanding of Blakely and Booker, as the dissenting justices recognized. The well-reasoned, persuasive authority confirms that that Jernigan’s sentence rests on an unconstitutional application of § 31-18-15.1.

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<sup>8</sup> After Apprendi but before Blakely, the Kansas Supreme Court invalidated a sentence enhancement procedure similar to the one the district court followed here. See State v. Gould, 23 P.3d 801 (Kan. 2001) (holding that enhancement of presumptive sentence based solely on facts found by jury was unconstitutional under Apprendi). Blakely and Booker confirm that Gould was correctly decided.

Sitting en banc, the Supreme Court of Arizona unanimously held that it is unconstitutional to enhance a presumptive sentence based on facts found only by a judge. See State v. Brown, 99 P.3d 15 (Ariz. 2004) (en banc). Like New Mexico law, Arizona law mandated a presumptive sentence and only allowed enhancement of that sentence based on aggravating circumstances found by a judge. See Brown, 99 P.3d at 17-18. Before Blakely, the Arizona Court of Appeals held, in an decision similar to Wilson, that the statutory maximum was the longest possible enhanced sentence a judge could impose. See Brown, 99 P.3d at 18. On certiorari review, the state conceded that the intermediate appellate court's decision could "not withstand analysis in light of Blakely." Id. The Arizona Supreme Court agreed, holding that the statutory maximum was the presumptive sentence, not the longest aggravated sentence that could be imposed only after judicial findings of aggravating circumstances. See id.

The Supreme Court of Oregon unanimously reached the same result in State v. Dilts, 103 P.3d 95 (Or. 2004). In its original opinion in Dilts, the Court held that the statutory maximum was the absolute maximum sentence allowed for the offense, not the maximum sentence authorized by the jury verdict alone. See id. at 97. On remand from the United States Supreme Court for further proceedings in light of Blakely, the Oregon Supreme Court reversed its original opinion. See Dilts, 103 P.3d at 98. On remand, the Court noted that Oregon law required imposition of a presumptive sentence, unless the judge found aggravating circumstances, in which case the judge could impose an enhanced sentence. See id. at 99. Based on its conclusion that the presumptive sentence was the statutory maximum, the Court vacated Dilts' enhanced sentence because it exceeded the presumptive sentence and was based only on a judicial finding that Dilts' offense was racially motivated. See Dilts, 103 P.3d at 99. The Court reasoned that "[t]he trial court had authority to impose the upward

departure only because it made additional findings of fact. That is precisely the procedure that the Court in Blakely found did not comply with the Sixth Amendment’s jury trial guarantee.” Id. For these reasons, the Court held that its sentencing scheme was “applied unconstitutionally” to the defendant. Id. at 100.

In State v. Shattuck, 689 N.W.2d 785, 786 (Minn. 2004) (per curiam), the Supreme Court of Minnesota unanimously held that “the district court’s imposition of an upward durational departure . . . from the Minnesota Sentencing Guidelines’ presumptive sentence violated appellant’s Sixth Amendment right to trial by jury.” The Court explained that:

because imposition of the presumptive sentence is mandatory absent additional judicial findings . . . the presumptive sentence is the maximum penalty authorized by the jury’s verdict for purposes of [Apprendi]. . . . Because the Guidelines regime permits the district court to durationally depart upward from a presumptive sentence after finding aggravating factors not considered by the jury, it unconstitutionally usurps the jury’s role and undermines the function of the jury.

Id.

“Attempt[ing] to take account of both Blakely and Booker,” the Supreme Court of Indiana recently held that “Indiana’s sentencing scheme runs afoul of the Sixth Amendment . . . because it mandates . . . a fixed term and permits judicial discretion in finding aggravating or mitigating circumstances to deviate from the fixed term.” Smylie v. State, 823 N.E.2d 679, 681-82, 685 (Ind. 2005). Indiana’s enhancement procedure closely resembled New Mexico’s. Indiana required imposition of a “given presumptive term for each class of crimes, except when the judge f[ound] aggravating or mitigating circumstances deemed adequate to justify adding or subtracting years.” Id. at 683; see, e.g., Ind. Code Ann. § 35-50-2-4 (2004) (providing for a presumptive sentence of 30 years for a Class A felony, but permitting enhancement of up to 20 years based on aggravating

circumstances). The Court explained why Indiana's procedure was inconsistent with Blakely and therefore unconstitutional:

Indiana's 'fixed term' is the functional equivalent of Washington's 'standard sentencing range.' Both establish a mandatory starting point for sentencing criminals based on the elements of proof necessary to prove a particular offense and the sentencing class into which the offense falls. The trial court judge then must engage in judicial fact-finding during sentencing if a sentence greater than the presumptive fixed term is to be imposed. It is this type of judicial fact-finding that concerned the Court in Blakely.

Smylie, 823 N.E.2d at 683.

The Court also rejected the sentencing range analysis upon which the Wilson majority opinion, the Court of Appeals' decision in this case, and the state's arguments are founded. See Wilson, 2001-NMCA-32, ¶ 15 (concluding "that Sections 31-18-15 and 31-18-15.1 must be read together to create permissible ranges of sentences, with the basic sentences prescribed by Section 31-18-15 being the midpoints of these ranges"). In Smylie, Indiana argued that "the 'statutory maximum' is the upper limit of the [sentencing] range, rather than the presumptive sentence." Smylie, 823 N.E.2d at 684. The Court disagreed. "[T]he presumptive sentence is the relevant statutory maximum." Id. (internal quotation marks and quoted authority omitted).

Of the five highest state courts that have considered the issue, only the Supreme Court of Tennessee has upheld—by a vote of three to two and over the state's concession—enhancements of presumptive sentences based on facts found only by a judge, but the Court's holding flies in the face of Blakely and Booker, as the two dissenting justices recognized. See State v. Gomez, 2005 Tenn. LEXIS 350 (Tenn. Apr. 15, 2005). Tennessee's scheme mandates imposition of fixed presumptive sentences for each class of felony and authorizes enhancements of those sentences within a defined range only if judges find enhancement factors. See id. at \* 63-65. The majority's misunderstanding

of Booker led it to conclude that “Booker explains that the mandatory increase of a sentence is the crucial issue which courts must consider in determining whether a particular sentencing scheme violates the Sixth Amendment.” Id. at \* 69 (emphasis added). The majority determined that Tennessee’s statutes:

do[] not mandate an increased sentence upon a judge’s finding of an enhancement factor. Rather, upon finding an enhancement factor under the [statutes], a judge has the discretion to select a sentence at or above the presumptive minimum. Imposition of a sentence above the presumptive sentence represents an exercise of the judge’s discretion.

Id. at \* 66. According to the majority, the Tennessee enhancement scheme is constitutional under Blakely and Booker because a judge who finds an enhancement factor is free not to enhance a defendant’s presumptive sentence. See Gomez, 2005 Tenn. LEXIS at \* 66. That analysis allowed the majority to reject “the State’s concession that the defendants’ sentences were imposed in violation of the Sixth Amendment.” Id. at \* 71.

Under the Gomez majority’s analysis, Jernigan’s sentence would be valid simply because § 31-18-15.1(A) permitted, but did not require, the district court judge to enhance Jernigan’s sentence after finding aggravating circumstances. That analysis is wrong. As the Court explained in Blakely:

Nor does it matter that the [Washington] judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence.

Blakely, 124 S. Ct. at 2538 n.8. Indeed, the Court invalidated Blakely’s sentence, which—like Jernigan’s—was enhanced at the sentencing judge’s discretion based only on judicial findings. See id. at 2535 (noting that Washington statute gives judges discretion to enhance presumptive sentence);

Wash. Rev. Code Ann. § 9.94A.535 (“The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.”). If Booker prohibits only mandatory enhancements, as the Gomez majority concluded, then Blakely was wrongly decided. However, “Booker did not change Blakely’s holding that the Washington state scheme was unconstitutional.” See Gomez, 2005 Tenn. LEXIS at \* 86 (Anderson and Birch, JJ., dissenting in part).

Contrary to the Gomez majority’s analysis, the United States Supreme Court did not retreat from its holdings in Apprendi and Blakely when it decided Booker. See Gomez, 2005 Tenn. LEXIS at \* 74 (Anderson and Birch, JJ., dissenting in part) (“Apprendi’s core holding did not change with Booker[.]”). Instead, the Court “reaffirm[ed]” those holdings: “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” Booker, 125 S. Ct. at 756. All sentences that violate this “bright-line rule” are invalid, regardless of whether the judge could have chosen to impose a valid sentence. Blakely, 124 S. Ct. at 2540. After all, the Apprendi/Blakely rule protects the constitutional rights of all those accused of crimes by preventing them from suffering deprivations of liberty based on facts proven only to a judge by a mere preponderance of the evidence. See Blakely, 124 S. Ct. at 2543. Whether the judge was free not to impose such a deprivation makes no difference to a person who has lost his or her liberty. Nor does it make any difference under the Constitution. As the Court explained in Booker, “there is no distinction of constitutional significance between” Washington’s scheme, with its discretionary enhancements, and the federal scheme, with its mandatory

enhancements. Booker, 125 S. Ct. at 749; see id. at 751 (“There is no relevant distinction between the sentence imposed pursuant to the Washington statutes in Blakely and the sentences imposed pursuant to the Federal Sentencing Guidelines in these cases.”). Booker does not draw the constitutional distinction the Gomez majority used to justify its incorrect result.

The Gomez majority reached that result by seizing on Booker’s focus on the mandatory nature of the USSG. See Gomez, 2005 Tenn. LEXIS at \* 55-60. The Gomez majority concluded that only mandatory enhancements are invalid, but that conclusion rests on a fundamental misunderstanding of what the Booker Court described as “mandatory”:

[T]he “mandatory” facet of the Federal Sentencing Guidelines to which the court in Booker objected was not the fact that the Guidelines mandated upward departures based upon particular judicial findings of fact. Rather, it was the fact that no departures could be justified based on the jury verdict alone, because the jury verdict alone authorized only the base range sentence. “Whether the judicially determined facts require a sentence or merely allow it, the verdict alone does not authorize the sentence.”

Gomez, 2005 Tenn. LEXIS at \* 85-86 (Anderson and Birch, JJ., dissenting in part) (quoting Blakely, 124 S. Ct. at 2538 n.8). Because all of the schemes described above, including Tennessee’s and New Mexico’s, are “mandatory” as that term is used in Booker, those schemes permit or require imposition of invalid enhanced sentences based only on facts found by a judge. Apprendi, Blakely, and Booker hold that the Constitution prohibits such enhancements.

## **II. THE COURT SHOULD EXERCISE ITS POWER OF SUPERINTENDING CONTROL TO IMPLEMENT THE CONSTITUTIONAL PROTECTIONS RECOGNIZED IN APPRENDI, BLAKELY, AND BOOKER.**

Absent new rules mandating enhancement procedures that are consistent with Apprendi, Blakely, and Booker, district courts will be unable to impose valid enhanced sentences in cases like Jernigan’s. In order to permit district courts to impose valid enhancements in such cases when

appropriate, the Court should exercise its “boundless” power of superintending control under Article VI, § 3 of the New Mexico Constitution to create such rules. Dist. Court of the Second Judicial Dist. v. McKenna, 118 N.M. 402, 405, 881 P.2d 1387, 1390 (1994); see State v. Roy, 40 N.M. 397, 422, 60 P.2d 646, 662 (1936) (holding that the power of superintending control is “unlimited, being bounded only by the exigencies that call for its exercise.” (Internal quotations and quoted authority omitted.)). The power of superintending control includes “the power to . . . promulgate rules regarding the pleadings, practice, and procedure affecting the judicial branch of government.” Hudson v. State, 89 N.M. 759, 760, 557 P.2d 1108, 1009 (1976). The Court has often exercised its rule-making power when necessary to enforce constitutional rights or ensure that the judicial branch functions smoothly. See, e.g., State v. Brown, 1998-NMSC-37, ¶ 61, 126 N.M. 338 (holding that power of superintending control includes the power to enact rules governing use immunity because such immunity “establish[es] an evidentiary safeguard to protect the right against self-incrimination”); State v. Ogden, 118 N.M. 234, 239, 880 P.2d 845, 850 (1994) (exercising power of superintending control to create a new “pretrial procedure for evaluating aggravating circumstances” in capital cases). The Court should exercise that authority to promulgate rules, uniform jury instructions, and special verdict forms that implement both the unchallenged provisions of the existing felony sentencing scheme and the constitutional requirements explained in Apprendi and Blakely without significantly impacting how sentencing proceedings are actually conducted in many cases. See Blakely, 124 S. Ct. at 2540 (noting that schemes like New Mexico’s “can be implemented in a way that respects the Sixth Amendment”).

The rules could require the following constitutionally valid procedures. The state would file a notice of intent to aggravate sentence before trial to give defendants timely notice of the alleged aggravating circumstances. See Caristo v. Sullivan, 112 N.M. 623, 631-32, 818 P.2d 401, 409-10

(1991) (holding that “under Section 31-18-15.1 a defendant must be given notice of the state’s intention to seek aggravation and of the aggravating circumstances on which it intends to rely, unless the circumstance was itself an element of the underlying offense or a fact used to establish such an element”); see, e.g., Rule 5-704(A) NMRA 2005 (notice of alleged aggravating circumstances in capital cases). Were the state to allege aggravating circumstances not unfairly prejudicial to the defendant, the parties would present evidence to prove or disprove those allegations to the jury at trial. The district court would instruct the jury regarding the alleged aggravating circumstances and submit a special verdict form or form of aggravated circumstances findings to the jury. See, e.g., UJI 14-7014 to -19, -22 to -23 NMRA 2005 (essential elements of aggravating circumstances in capital sentencing); UJI 14-7026 NMRA 2005 (burden of proof for aggravated circumstances in capital sentencing); UJI 14-7027 NMRA 2005 (procedure for considering aggravating circumstances in capital sentencing); UJI 14-7032 NMRA 2005 (sample form of aggravating circumstances findings in capital sentencing); UJI 14-6013 NMRA 2005 (use of firearm during commission of offense); UJI 14-6014 (special interrogatory for use of firearm). Were the state to allege unduly prejudicial aggravating circumstances, the district court would bifurcate the proceedings. See, e.g., NMSA 1978, § 31-20A-1 (1979) (bifurcation of capital proceedings); Rule 5-704(G) NMRA 2005 (same). In bifurcated cases resulting in one or more convictions, the district court would hold an evidentiary hearing after the trial during which the jury would consider evidence and receive instructions and a special verdict form. Regardless of whether the proceeding was bifurcated, the district court judge would hold the requisite sentencing hearing under § 31-18-15.1(A) in order to consider evidence of mitigating circumstances. Based on any jury findings as to aggravating circumstances, any judicial findings as to mitigating circumstances, and any other relevant sentencing considerations such as

prior convictions or firearm use, the judge would impose an appropriate sentence in accordance with § 31-18-15, § 31-8-15.1, and any other applicable statutory provisions.

In a large number of cases, the proposed rules would not significantly impact actual sentencing proceedings. Jury factfinding as to aggravating circumstances would not occur in six categories of cases: (1) those in which the state does not seek enhancements under § 31-18-15.1; (2) those in which defendants waive their Apprendi rights as part of a plea agreement and stipulate to aggravating circumstances in a plea agreement or plea colloquy; (3) those in which defendants waive their Apprendi rights as part of a plea agreement and consent to judicial factfinding with respect to aggravating circumstances; (4) those in which defendants consent to a bench trial and waive their Apprendi rights; (5) those in which defendants exercise their right to a jury verdict beyond a reasonable doubt with respect to guilt, but waive their Apprendi rights; and (6) those in which the district court judge determines that, even if the jury were to find aggravating circumstances, the judge would choose not to enhance the sentence. In all of these cases, district courts could continue to follow the procedure in § 31-18-15.1 without running afoul of Apprendi.

The proposed procedure would only impact sentencing procedure in the remaining cases to the extent the Constitution requires. It would not impact the sentencing authority or discretion of district court judges. District court judges would no longer make findings with respect to aggravating circumstances, but they would retain both the authority to determine, by a preponderance of the evidence, whether mitigating circumstances exist under § 31-18-15.1(A) and the discretion to impose the appropriate sentence based on any judicial findings of mitigating circumstances and jury findings as to aggravating circumstances in accordance with § 31-18-15(A) or § 31-18-15.1(C).

The proposed procedure is also workable. New Mexico's district court judges and juries are more than capable of adjusting to jury factfinding and making it work efficiently, just as judges and

juries have done in Kansas and are currently doing in Indiana, Oregon, and Washington. Nearly three years ago, in response to Apprendi, Kansas incorporated jury factfinding into its sentencing scheme. See Kan. Stat. Ann. § 21-4718 (2003 Cum. Supp.). Indiana, Oregon, and Washington followed suit in the wake of Blakely and Booker. See S.B. 5477, 2005 Leg., 59<sup>th</sup> First Reg. Sess. (Wash. 2005) (LEXIS through 2005 legislation) (incorporating jury factfinding); Smylie, 823 N.E.2d at 686 (“We thus hold that the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury under Indiana’s existing sentencing laws.”); Dilts, 103 P.3d at 100 (“[O]ur holding simply requires Oregon courts to apply the guidelines ‘in a way that respects the Sixth Amendment.’”) (Quoting Blakely, 124 S. Ct. at 2540.)). New Mexico can and should do the same. Although the proposed procedure might delay the disposition of cases that require jury factfinding, “the interest in fairness and reliability protected by the right to a jury trial—a common law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.” Booker, 125 S. Ct. at 756.

## **CONCLUSION**

Amicus curiae NMCDLA respectfully suggests that the Court hold that enhancement of presumptive sentences under § 31-18-15.1 is unconstitutional where, as here, the enhancement rests solely on judicial findings of aggravating circumstances made by a preponderance of the evidence. Accordingly, if the Court reverses Jernigan’s convictions for second-degree murder and attempted second-degree murder, the Court should vacate Jernigan’s enhanced sentence for tampering with evidence and remand for imposition of the appropriate presumptive sentence. However, if the Court affirms either or both of the convictions before it, the Court should vacate the remaining enhanced sentences and remand for imposition of appropriate presumptive sentences and applicable firearm enhancements. To permit district courts to enhance sentences in a manner that respects the

constitutional rights of the accused, the Court should adopt procedural sentencing rules that require the state to prove all aggravating circumstances to a jury beyond a reasonable doubt, unless the defendant knowingly and voluntarily waives his or her constitutional right to that procedure.

Respectfully submitted,

FREEDMAN BOYD DANIELS  
HOLLANDER & GOLDBERG P.A.

By: \_\_\_\_\_

Zachary A. Ives  
20 First Plaza, Suite 700  
Albuquerque, NM 87102  
phone: 505.842.9960  
fax: 505.842.0761

Counsel for Amicus Curiae New Mexico  
Criminal Defense Lawyers Association

**CERTIFICATE OF SERVICE**

It is hereby certified that a true and correct copy of the foregoing was this 20th day of  
May, 2005, sent by U.S. Mail to:

Margaret McClean, Esq.  
Assistant Attorney General  
Office of Attorney General  
Appellate Division  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

William A. O'Connell, Esq.  
Assistant Appellate Defender  
301 North Guadalupe St. - #101  
Santa Fe, New Mexico 87501-5502

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Zachary A. Ives