CRIMINAL PROCEDURE — FEDERAL SENTENCING GUIDELINES — THIRD CIRCUIT DEEPENS SPLIT OVER NOTICE REQUIREMENT FOR NON-GUIDELINES SENTENCES. — *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir.), *cert. denied*, 127 S. Ct. 424, *reh'g denied*, 127 S. Ct. 761 (2006).

The Supreme Court's holding in *United States v. Booker*[1] that rendered the Federal Sentencing Guidelines advisory has generated several challenging questions in the lower courts. One issue that has divided those courts is the continuing applicability of Federal Rule of Criminal Procedure 32(h), which requires a sentencing court to provide advance notice of any ground on which it is considering departing from the sentencing range prescribed by the Guidelines.[2] Recently, in *United States v. Vampire Nation*,[3] the Third Circuit weighed in on the debate, holding that the district court did not err by imposing a sentence three months higher than the advisory Guidelines range without providing advance notice. This holding is inconsistent with Supreme Court precedent. Furthermore, resolving the circuit split[4] in favor of the notice requirement would help to maintain the relevance and utility of the advisory Guidelines by making sentences more predictable and thus more susceptible to adversary testing, all without overstepping constitutional bounds.

Frederick Banks was convicted of mail fraud, copyright infringement, money laundering, uttering and possessing counterfeit or forged

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[1] 125 S. Ct. 738 (2005).

[2] Rule 32(h) provides:

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

FED. R. CRIM. P. 32(h).

[3] 451 F.3d 189 (3d Cir.), *cert. denied*, 127 S. Ct. 424, *reh'g denied*, 127 S. Ct. 761 (2006).

[4] *Vampire Nation* makes the Third Circuit one of five circuits to have held that Rule 32(h)'s notice requirement does not apply when a district court exercises its post-*Booker* discretion to impose a sentence that deviates from the Guidelines range. *See* United States v. Mejia-Huerta, No. 05-11391 (5th Cir. filed Feb. 28, 2007); United States v. Irizarry, 458 F.3d 1208, 1212 (11th Cir. 2006); United States v. Walker, 447 F.3d 999, 1001 (7th Cir.), *cert. denied*, 127 S. Ct. 314 (2006); United States v. Long Soldier, 431 F.3d 1120, 1122 (8th Cir. 2005). Three other circuits have held that a district court sentencing outside the Guidelines range must still provide reasonable notice of its intent to do so in order to comply with Rule 32(h). *See* United States v. Evans-Martinez, 448 F.3d 1163, 1164 (9th Cir. 2006); United States v. Davenport, 445 F.3d 366, 371 (4th Cir. 2006); United States v. Dozier, 444 F.3d 1215, 1218 (10th Cir. 2006). The Second Circuit has taken a slightly different approach, declining to decide whether Rule 32(h) applies to non-Guidelines sentences post-*Booker*, but finding a notice requirement for such sentences in Rule 32(i)(1)(C), which guarantees the parties an opportunity to comment on matters relevant to the sentencing decision. *See* United States v. Anati, 457 F.3d 233, 236 (2d Cir. 2006).

securities, and witness tampering.[5] The district court sentenced him on February 25, 2005, just over a month after the decision in *Booker*.[6] The advisory Guidelines recommended a sentence of forty-six to fifty-seven months' imprisonment, but the district court, after considering both the Guidelines range and the sentencing factors set forth in 18 U.S.C. § 3553(a),[7] sentenced Banks to sixty months in prison.[8] Banks appealed,[9] arguing that Rule 32(h) entitled him to advance notice of the court's intent to impose a sentence outside the advisory Guidelines range (a non-Guidelines sentence).[10]

The Third Circuit affirmed. Writing for a unanimous panel, Judge Van Antwerpen[11] held that Banks's sentence was procedurally sound because the notice requirement of Rule 32(h) did not apply to non-Guidelines sentences imposed pursuant to the court's post-*Booker* sentencing discretion.[12] Judge Van Antwerpen relied, first, on an interpretation of Rule 32(h) imported from the Eighth Circuit, construing the term "departure" in the Rule to mean only an adjustment of the sort expressly permitted under the Guidelines.[13] This concept of departure reflected the fact that before *Booker*, a district court could impose a sentence outside the Guidelines range only pursuant to a specific finding of "an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission."[14] After

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[5] *Vampire Nation*, 451 F.3d at 194.

[6] *See id.*

[7] Section 3553(a) lists seven factors that a district court must consider in choosing a sentence: "the nature and circumstances of the offense and the history and characteristics of the defendant"; the need for the sentence to serve the ends of punishment, deterrence, incapacitation, and rehabilitation; "the kinds of sentences available"; the applicable Guidelines range; "any pertinent policy statement" issued by the Sentencing Commission; "the need to avoid unwarranted sentence disparities" among similarly situated defendants; and "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a) (2000 & Supp. IV 2004).

[8] *Vampire Nation*, 451 F.3d at 194.

[9] Banks filed his notice of appeal under the alias "Vampire Nation," the name of his band. *See* Posting of David B. Chontos to Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/third_circuit_d.html (June 21, 2006, 19:09:43 EST).

[10] *Vampire Nation*, 451 F.3d at 195. Banks raised numerous other issues on appeal but prevailed on none of them. *See id.* at 192.

[11] Judges Weis and Rendell joined Judge Van Antwerpen's opinion.

[12] *See Vampire Nation*, 451 F.3d at 195. The *Booker* Court held that the imposition, pursuant to the Guidelines, of an enhanced sentence based on facts found only by the sentencing judge violated the defendant's Sixth Amendment right to a jury trial. *See* United States v. Booker, 125 S. Ct. 738, 746 (2005) (Stevens, J., delivering the opinion of the Court in part). It further held that the proper remedy for this violation was to sever and excise two provisions of the United States Code: 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory, and 18 U.S.C. § 3742(e), which governed standards of appellate review for sentences imposed pursuant to the Guidelines. *See id.* at 764 (Breyer, J., delivering the opinion of the Court in part).

[13] *See Vampire Nation*, 451 F.3d at 195 & n.2 (citing United States v. Sitting Bear, 436 F.3d 929, 932–33 (8th Cir. 2006)); *see also id.* at 197–98.

[14] 18 U.S.C. § 3553(b)(1) (2000 & Supp. IV 2004). The Guidelines list prohibited factors, such as race, U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2006); discouraged factors, such as

Booker, however, a district court is free to impose a non-Guidelines sentence without making any specific findings, subject only to the broad sentencing objectives outlined in § 3553(a).[15] The Eighth Circuit has declared that a district court's decision to sentence a defendant outside the Guidelines range after considering all the § 3553(a) factors is a "variance," not a departure.[16] Adopting this terminology and the underlying conceptual distinction, Judge Van Antwerpen concluded that the notice requirement should continue to apply to "departures from the advisory Guidelines range," but should not apply to "variances . . . based on the [c]ourt's discretion under *Booker*."[17]

To bolster this construction, Judge Van Antwerpen explained that the reasons underlying the adoption of Rule 32(h) did not apply to post-*Booker* discretionary variances. He began by acknowledging[18] that Rule 32(h) was a codification of the Supreme Court's decision in *Burns v. United States*.[19] In *Burns*, a case decided while the Guidelines were mandatory, the Court addressed the meaning of what was then Rule 32(a),[20] which directed a sentencing court to afford the parties "an opportunity to comment upon . . . matters relating to the appropriate sentence."[21] The Court held that Rule 32(a) required a district court to give the parties to a criminal case "reasonable notice" if it was considering departing from the Guidelines based on a ground not previously identified.[22] In 2002, Congress codified the *Burns* holding as Rule 32(h).[23] However, Judge Van Antwerpen distinguished *Burns* on the ground that its rationale of preventing "unfair surprise" was anachronistic because *Burns* was decided when sentencing under the Guidelines was largely a deterministic enterprise, and because *Booker* had effectively put defendants on notice that courts would consider all the factors set forth in § 3553(a) when imposing a sentence.[24] As a re-

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age, *id.* § 5H1.1; and encouraged factors, such as extreme conduct, *id.* § 5K2.8; but do not otherwise limit the factors that can be considered as bases for departure, *see id.* § 5K2.0; *see also id.* § 1A1.1 cmt. ed. note, ch. 1, pt. A, § 4(b) (explaining the types of departures envisioned by the Sentencing Commission). For a discussion of departure rules under the mandatory Guidelines, see *Koon v. United States*, 518 U.S. 81, 92–96 (1996).

15 *See Booker*, 125 S. Ct. at 757, 767 (Breyer, J., delivering the opinion of the Court in part).

16 *See, e.g.*, *Sitting Bear*, 436 F.3d at 932.

17 *Vampire Nation*, 451 F.3d at 197–98.

18 *See id.* at 195–96.

19 501 U.S. 129 (1991).

20 When it amended Rule 32 in 2002, Congress moved the right to comment interpreted in *Burns* to Rule 32(i)(1)(C). *See* United States v. Anati, 457 F.3d 233, 235–36 (2d Cir. 2006).

21 *Burns*, 501 U.S. at 135 (quoting FED. R. CRIM. P. 32(a)(1) (current version at FED. R. CRIM. P. 32(i)(1)(C))) (internal quotation marks omitted).

22 *Id.* at 138.

23 *See* FED. R. CRIM. P. 32 advisory committee's note ("Rule 32(h) is a new provision that reflects *Burns v. United States*."); *see also Anati*, 457 F.3d at 235–36.

24 *See Vampire Nation*, 451 F.3d at 196 (quoting United States v. Walker, 447 F.3d 999, 1007 (7th Cir. 2006)) (internal quotation marks omitted).

sult, he concluded, the "considerations that motivated the enactment of Rule 32(h)" were no longer present.[25]

Further, Judge Van Antwerpen reasoned that applying the notice requirement to discretionary sentencing would contravene the spirit of *Booker*'s remedial holding. He declared that requiring advance notice of sentences outside the Guidelines range, but not of sentences within that range, would "elevate the advisory sentencing range to a position of importance that it no longer can enjoy"[26] and would "come close to restoring the mandatory nature of the guidelines excised in *Booker*."[27]

The Third Circuit's conclusion that notice is not required for post-*Booker* discretionary departures from the Guidelines is inconsistent with Supreme Court precedent for two reasons: first, because the Third Circuit's construction of the term "departure" is contrary to the Supreme Court's implicit conceptualization of that term in *Booker*, and second, because its holding is at odds with the *Burns* Court's insistence that discretionary sentencing decisions be subject to meaningful adversary testing. Furthermore, *Booker*'s constitutional mandate that sentences be authorized by facts found by a jury is not inconsistent with requiring notice for non-Guidelines sentences. Far from being required by *Booker*, elimination of the notice requirement prevents the advisory Guidelines from performing one of their most useful remaining functions: lending a measure of predictability to sentencing hearings and thus facilitating the adversary testing of sentencing decisions.

The narrow construction of "departure" adopted by the Third Circuit is at odds with the *Booker* Court's implicit construction of the term to include discretionary variances. In *Booker*, the Court severed and excised two provisions of the Sentencing Reform Act of 1984[28] (SRA): § 3553(b)(1), which made the Guidelines mandatory, and § 3742(e), which provided for "de novo review of *departures* from the applicable Guidelines range."[29] If the Court had given the same narrow construction to the term "departs" in the SRA that the Third Circuit gave to "departure" in Rule 32(h), it would not have found the provision for de novo review of departures to be constitutionally problematic. By excising § 3553(b)(1), the Court had already rendered the

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[25] *Id.*

[26] *Id.*

[27] *Id.* at 196–97 (quoting United States v. Cooper, 437 F.3d 324, 331 (3d Cir. 2006)) (internal quotation mark omitted).

[28] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[29] United States v. Booker, 125 S. Ct. 738, 764 (2005) (Breyer, J., delivering the opinion of the Court in part) (emphasis added). Section 3742(e) states: "Upon review . . . the court of appeals shall determine whether the sentence . . . departs from the applicable guideline range based on [an impermissible factor]." 18 U.S.C. § 3742(e) (2000 & Supp. IV 2004).

Guidelines purely advisory.[30] If there were no such thing as a "departure" from an advisory sentencing range, the requirement that departures be reviewed de novo would have been irrelevant and the Court would not have needed to invalidate it.[31] Given this construction, the only constitutional problem with § 3742(e) — its elevation of the Guidelines to binding status — would have been fully addressed by the invalidation of § 3553(b)(1). That the Court found it necessary to strike § 3742(e) as well demonstrates that it was reading the term "departure" as including any variance from the Guidelines, even one founded on the sentencing discretion it had just created by making the Guidelines advisory.[32] The departure/variance distinction relied on by the Third Circuit to declare Rule 32(h) inapplicable to discretionary non-Guidelines sentences is, therefore, inconsistent with the Supreme Court's understanding of the relevant terms.

Additionally, the Third Circuit's interpretation should have been foreclosed by the Supreme Court's decision in *Burns*. In *Burns*, the Court interpreted a defendant's statutory right to comment on sentencing matters — still extant today as Rule 32(i)(1)(C) — as requiring notice of intent to depart from the then-binding Guidelines.[33] The Court observed that the right to comment was intended to facilitate "adversarial resolution of the legal and factual issues" at sentencing.[34] Finding that there was "essentially no limit" on the factors a district court might use to justify a departure, the Court concluded that the right to comment would be "meaningless" if the parties were not given advance notice of all grounds on which the court was considering depart-

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[30] *See id.*

[31] Even if district courts are still required to conduct a traditional departure analysis — as the Third and Eighth Circuits have held, *see, e.g.*, *Vampire Nation*, 451 F.3d at 197–98; United States v. Long Soldier, 431 F.3d 1120, 1122 & n.2 (8th Cir. 2005) — their freedom to sentence outside the Guidelines range based on a separate *variance* analysis, subject only to implied reasonableness review, would make the requirement of de novo review of *departures* entirely benign. That review would be limited to reexamining a district court's finding that a particular factual circumstance identified as a basis for departure had not been taken into account by the Sentencing Commission — a legal question for which de novo review is appropriate.

[32] Although Justice Breyer, writing for the Court's remedial majority, seemed at one point to suggest that § 3742(e) had to be severed and excised simply because it contained "critical cross-references" to § 3553(b)(1), *see Booker*, 125 S. Ct. at 765 (Breyer, J., delivering the opinion of the Court in part), it seems clear that *Booker*'s remedial majority found that § 3742(e) contributed to the constitutional violation. That majority declared that it would sever and excise only those portions of the SRA that either were themselves unconstitutional or were incapable of "functioning independently" of the unconstitutional provisions in a manner consistent with Congress's intent. *See id.* at 764. Given a narrow construction of the term "departs" in § 3742(e)(3)(B), § 3742(e) at least arguably could have independently provided for de novo review of decisions concerning the application of Guidelines departure provisions as it had before *Booker*, with variances reviewed under an implied reasonableness standard. *See id.* at 765–66. That the Court did not consider this possibility further suggests that it was reading "departs" more broadly than the Third Circuit.

[33] Burns v. United States, 501 U.S. 129, 134–35 (1991).

[34] *Id.* at 137.

ing from the Guidelines.[35] *Burns*'s goal of reducing the danger that a "critical sentencing determination" would not be anticipated by the parties, and thus would "go untested by the adversarial process,"[36] is still relevant today. Indeed, the Third Circuit's holding that *Burns* no longer controls the interpretation of Rule 32 because the "concerns that animated" that decision are not valid after *Booker*[37] comes close to violating the principle that Supreme Court case law continues to govern in the lower courts until the Court expressly overrules it.[38]

Even assuming that *Burns* is not controlling, the Third Circuit's refusal to extend *Burns*'s reasoning about departures to variances ignores the strong similarity between post-*Booker* sentencing decisions and pre-*Booker* departure decisions. The Third Circuit drew a distinction between judges' supposedly unbounded discretion to identify departure factors under the mandatory guidelines[39] and their more circumscribed authority to identify relevant sentencing factors under § 3553(a).[40] In reality, however, when the Court decided *Burns*, judges departing from the Guidelines were required to conform to § 3553(a). At that time, § 3742(e)(3)(A) provided that departures would be reviewed for their consistency with "the factors to be considered in imposing a sentence, as set forth in chapter 227 of [Title 18]."[41] This provision effectively put defendants on notice that a judge departing from the Guidelines could consider only those factors enumerated in § 3553(a) ("Factors To Be Considered in Imposing a Sentence"). That *Burns* found such statutory notice inadequate makes it dubious to maintain that *Booker* provides sufficient notice simply because its holding alerts defendants that courts will make sentencing decisions based on § 3553(a) factors.

Moreover, the "concerns that animated" *Burns* remain relevant to the extent that the *Burns* Court was concerned with providing notice of the specific basis for a discretionary sentence. The notice provided

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[35] *Id.* at 136.

[36] *Id.* at 137.

[37] *Vampire Nation*, 451 F.3d at 196 (quoting United States v. Walker, 447 F.3d 999, 1006 (7th Cir. 2006)).

[38] *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)).

[39] *See Vampire Nation*, 451 F.3d at 195–96; *see also. Walker*, 447 F.3d at 1006 ("[T]he Guidelines place essentially no limit on the number of potential factors that may warrant a departure . . . ." (quoting *Burns*, 501 U.S. at 136–37) (internal quotation mark omitted)).

[40] *See Vampire Nation*, 451 F.3d at 196; *see also. Walker*, 447 F.3d at 1007 (noting that the district court had imposed a non-Guidelines sentence based on the "discrete set of factors specified in § 3553(a)").

[41] 18 U.S.C. § 3742(e)(3)(A) (1988 & Supp. II 1990) (current version at 18 U.S.C. § 3742(e)(3)(A) (2000 & Supp. IV 2004)). In its current form, the statute mandates reversal of any sentence that departs from the Guidelines range based on a factor that does "not advance the objectives set forth in section 3553(a)(2)." 18 U.S.C. § 3742(e)(3)(B)(i) (2000 & Supp. IV 2004).

by *Booker* is inadequate under *Burns* in part because it prevents only unfair surprise resulting from a judge's unannounced *decision* to depart, not unfair surprise resulting from a judge's reliance on an unannounced *basis* for departure. That *Burns* requires more is apparent from its mandate that a court contemplating a departure provide notice "specifically identify[ing] the ground" on which it is considering departing.[42] This requirement of specificity is consistent with the Court's understanding of the elements of a meaningful opportunity to comment, which include notice that not only prevents unfair surprise, but also encourages "full adversary testing of the issues."[43] As a result, *Booker* cannot do the work of Rule 32(h) simply by warning defendants that courts will consider all of the statutory factors. Indeed, if a defendant had sufficient notice merely because he knew the judge would sentence him pursuant to § 3553(a), then the *Burns* Court would have exceeded its authority under the right-to-comment provision of Rule 32 by requiring more than bare notice of an intention to depart. *Burns*, therefore, stands for the proposition that a defendant's right to comment is not meaningful unless the broad factors in § 3553(a) are narrowed through notice in advance of the sentencing hearing. This proposition is as relevant to discretionary sentencing today as it was to departures when *Burns* was decided.

Finally, applying a notice requirement to sentences that vary from the advisory Guidelines range is not incompatible with *Booker*'s remedial holding that made the Guidelines advisory.[44] Enforcing a notice requirement exclusively for sentences outside the Guidelines is a far cry from making the Guidelines mandatory. A notice requirement does not impose any additional burden of rationalization or articulation upon non-Guidelines sentences because a district court must *always* state a basis for whatever sentence it chooses to impose.[45] The only additional burden arising from a notice requirement is a relatively minor one involving timing: if Rule 32(h) applies, a court must determine before the sentencing hearing what considerations are likely to affect its sentencing decision. Such a requirement does not evince a

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[42] *Burns*, 501 U.S. at 138–39.

[43] *Id.* at 135; *see also* United States v. Anati, 457 F.3d 233, 237 (2d Cir. 2006); United States v. Evans-Martinez, 448 F.3d 1163, 1167 (9th Cir. 2006).

[44] *Contra Vampire Nation*, 451 F.3d at 196.

[45] This requirement derives both from 18 U.S.C. § 3553(c) — which instructs a district judge to "state in open court the reasons for its imposition of the particular sentence," whether the sentence is within the Guidelines range or not — and from *Booker*'s mandate that appellate courts review all sentences for reasonableness. *See* United States v. Booker, 125 S. Ct. 738, 765–66 (2005); *see also, e.g.*, United States v. Johnson, 467 F.3d 559, 563–64 (6th Cir. 2006) (holding that a district court must articulate on the record the reasons for its sentence, even when that sentence is within the range prescribed by the Guidelines, "in order to facilitate appellate review" (quoting United States v. Webb, 403 F.3d 373, 385 n.8 (6th Cir. 2005)) (internal quotation mark omitted)).

design to restore the Guidelines surreptitiously to their pre-*Booker*, mandatory status. Rather, it simply recognizes the inherent predictive value of advisory sentencing Guidelines compiled from the actual practices of district courts.[46] One way in which the Guidelines can continue to enhance the fairness of the sentencing process after *Booker* is by making it easier for parties preparing their sentencing arguments to predict what the court is likely to do. A notice requirement tells the court that it must advise the parties if it perceives a reason why past practice as embodied in the Guidelines is not a good predictor of the sentence it will impose. Such a requirement facilitates the adversary process by making it easier for the parties to present arguments that are directed toward the specific concerns the court has about the case. A notice requirement does not, however, reduce the court's discretion to impose any sentence within statutory limits.[47]

Booker decreed an end to the mandatory Guidelines because it recognized a defendant's constitutional right not to be sentenced to a more severe penalty than that authorized by the jury's factual findings.[48] The problem with the pre-*Booker* system of federal sentencing was that it permitted judges to make *factual findings* that raised the maximum sentence they could impose, thus allowing them to invade the province of the jury. In contrast, a system that requires a judge to fulfill certain *procedural requirements* before imposing a particular sentence does not infringe on the jury's constitutional role of finding the facts necessary to authorize the sentence imposed. Whereas such factfinding is exclusively within the province of the jury, ensuring that a trial is procedurally fair is the quintessential judicial role.[49] A rule that makes the procedural safeguard of advance notice a prerequisite to the imposition of a particular sentence does not mean that that sentence is not authorized by the facts found by the jury. So long as she gives notice, the judge can impose the sentence without making any additional factual findings. Such an arrangement does not implicate the constitutional right at issue in *Booker*.

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[46] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. ed. note, ch. 1, pt. A, § 5; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17–18 (1988).

[47] The Third Circuit's concern that judges should retain discretion to sentence based on new information that comes to light at the sentencing hearing, *see Vampire Nation*, 451 F.3d at 197 & n.4, is ultimately unfounded. At most, Rule 32(h) tells a judge who changes her mind at the sentencing hearing that she must give notice and a second opportunity for the parties to be heard.

[48] *See, e.g.*, *Booker*, 125 S. Ct. at 748 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)) (internal quotation marks omitted)).

[49] For the same reason, the Constitution does not forbid using judicially found facts to calculate a Guidelines range when the only consequence of that range is to determine which of the available sentences require the additional *procedural* protection of advance notice.