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Judge, Jury and Sentencing Guidelines: Their Respective Roles Following the Supreme Court's Decision in Blakely v. Washington

name redacted
Senior Specialist
American Law Division

Summary

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that except in the case of recidivists a judge could not sentence a criminal defendant to a term of imprisonment greater than that which the statutory maximum assigned to the crime for which he had been convicted by the jury. In *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the Court made it clear that *Apprendi* meant that when sentencing a criminal defendant under sentencing guidelines a judge may proceed up the severity scale only so far as the specific findings of the jury will allow. Facts new to a jury's verdict or to a defendant's guilty plea may not be relied upon for a judicially determined "upward departure" or other enhancement in order to impose a sentence more severe than the verdict or plea alone will support. Although it arose out of a state sentencing proceeding, *Blakely* has obvious implications for the federal guidelines system. It appears that to the extent to which that system permits sentence enhancements based on judicial findings of "relevant conduct," "sentencing factors," or grounds for "upward departures," the facts upon which they are based must have been presented to the jury or the right must have been clearly waived. Although it may constitute prosecutorial inconvenience, the obligation apparently may be honored by including the facts establishing the relevant conduct, sentencing factors or grounds for upward departure in the indictment or information prior to trial. In cases decided by plea without a trial, it apparently need only be reflected in the plea agreement

The Supreme Court has agreed to consider *Blakely*'s implications for the federal sentencing guidelines, *United States v. Booker*, *cert. granted*, _ U.S. __ (2004); *United States v. Fanfan*, *cert. granted*, _ U.S. __ (2004). Related reports include CRS Report RL32573, *United States Sentencing Guidelines and the Supreme Court: Booker, Fanfan, Blakely, Apprendi, and Mistretta*, available in abridged form as CRS Report RS21932, *United States Sentencing Guidelines After Blakely: Booker and Fanfan – A Sletch*.

Background. Blakely kidnaped his estranged wife, bound her with duct tape, stuffed her into a wooden crate in the bed of his truck, and then drove from Washington

to Montana.[1] He eventually pled guilty to second degree kidnaping involving domestic violence and use of a firearm, a class B felony.[2] Class B felonies were punishable by imprisonment for a maximum of 10 years.[3] The applicable statutory sentencing guidelines called for a "standard range" of imprisonment of from 49 to 53 months.[4] Consistent with the plea bargain, the prosecution recommended a sentence at the top of the 49 to 53 month range.[5] The guidelines, however, authorized the court to impose a more severe sentence (an "upward departure"), when it found additional aggravating factors present.[6] The court took advantage of this authority to sentence Blakely to a term of 90 months imprisonment, based on several factors including the fact that the offense had been committed with "deliberate cruelty."[7]

The Washington appellate court rejected Blakely's *Apprendi* argument.[8] The sentencing court's factual determinations upon which it based its sentencing enhancement did not define a new crime with separate penalties nor did it carry Blakely beyond the statutory maximum sentence, the court believed. Even though the 90 month sentence exceeded the 53 month limit of the applicable standard sentencing guideline range, it came within the 10 year statutory ceiling set for the crime for which he was convicted, a class B second degree kidnaping felony. Thus, the Washington court concluded, *Apprendi* had been avoided. The United States Supreme Court disagreed.

Apprendi. Several years prior to *Apprendi*, the Supreme Court announced a decision that seemed to encourage legislative bodies to explicitly authorize judges to weigh various aggravating and mitigating circumstances when determining how long a sentence to impose upon a criminal defendant. In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court rejected a constitutional challenge to a sentencing scheme under which a defendant might be sentenced to a mandatory minimum term of imprisonment if the court found by a preponderance of the evidence the presence of a particular sentencing factor, in this case that the defendant had brandished a firearm during commission of the underlying offense. As the popularity and diversity of these judicial sentencing factor schemes grew, the Court became increasingly uneasy with their implications. If facts that might otherwise have been cast as elements of a crime could instead be classified as judicial sentencing factors, what would become of the constitutional right to a jury trial and the due process right to conviction only upon proof beyond a reasonable doubt?[9]

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[1] *State v. Blakely*, 111 Wash.App. 851, 47 P.3d 149 (Wash.App. 2002).

[2] Wash.Rev.Code Ann. §9A.40.030(3)(1997).

[3] Wash.Rev.Code Ann. §9A.20.021(1)(b)(1997).

[4] Wash.Rev.Code Ann. §§9.94A.320. Table 2.V; 9.94A.310. Table 1(1) V[2], (3)(b) (1997).

[5] 111 Wash.App. at 860, 47 P.3d at 154.

[6] Wash.Rev.Code Ann. §§9.94A.120(2); 9.94A.390 (1997).

[7] 111 Wash.App. at 860, 47 P.3d at 154.

[8] 111 Wash.App. at 870-71, 47 P.3d at 159.

[9] *See e.g., Jones v. United States*, 526 U.S. 227 (1999), where in an exercise of constitutional avoidance, the Court adopted a strained "element-of-the-crime," statutory construction in order to avoid a constitutionally suspect but otherwise more plausible "judicial-sentencing-factor"

The Court's doubts took shape in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Apprendi had been convicted of a crime punishable by imprisonment for not more than 10 years. He had been sentenced to imprisonment for 12 years, however, based on the sentencing judge's determination (by a preponderance of the evidence) of the applicability of a statutory hate crime enhancement. This, the Court declared, neither due process nor the Sixth Amendment permits, for "[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," 530 U.S. at 460.

Response to Apprendi. After *Apprendi*, the Supreme Court affirmed the continued vitality of *McMillan*: judicial determination by preponderance of the evidence of a fact that results in the imposition of a mandatory minimum sentences offends neither due process nor the Sixth Amendment as long as it falls beneath the statutory maximum penalty.[10] It confirmed that the principles identified in *Apprendi* applied with equal force to the right to grand jury indictment in federal felony cases,[11] and to the right to have a jury determine the presence or absence of the aggravating factors required for imposition of the death penalty.[12]

Among the state and lower federal appellate courts, a narrow construction settled upon the statement in *Apprendi* that "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." *Apprendi* governed the world beyond the statutory maximum penalty set for a crime, it was often said. Sentencing guidelines and the exercise of judicial sentencing authority beneath that statutory ceiling rested beyond the shadow of *Apprendi*, they believed.[13] They were wrong.

Blakely. The question in *Blakely* is simply does *Apprendi*'s "statutory maximum" refer to the 10 year maximum for second degree kidnaping or the 53 month ceiling of the applicable sentencing guideline. The question turns on what the jury found or the defendant conceded, since "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the*

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construction.

[10] *Harris v. United States*, 536 U.S. 545, 568 (2002).

[11] *United States v. Cotton*, 535 U.S. 625, 632 (2002).

[12] *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

[13] *See generally*, Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limitation Errors*, 94 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1 (2003). Justice O'Connor's dissent in *Blakely* notes that "Prior to today, only one court had ever applied *Apprendi* to invalidate application of a guidelines scheme," 124 S.Ct. at 2547 n.1, *citing inter alia, State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), and *contra, United States v. Goodine*, 326 F.3d 26 (1st Cir. 2003); *United States v. Luciano*, 311 F.3d 146 (2d Cir. 2002); *United States v. DeSumma*, 272 F.3d 176 (3d Cir. 2001); *United States v. Kinter*, 235 F.3d 192 (4th Cir. 2000); *United States v. Randle*, 304 F.3d 373 (5th Cir. 2002); *United States v. Helton*, 349 F.3d 295 (6th Cir. 2003); *United States v. Johnson*, 335 F.3d 598 (7th Cir. 2003); *United States v. Piggie*, 316 F.3d 789 (8th Cir. 2003); *United States v. Toliver*, 351 F.3d 423 (9th Cir. 2003); *United States v. Mendez-Zamora*, 296 F.3d 1013 (10th Cir. 2002); *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001); *United States v. Fields*, 251 F.3d 1041 (D.C.Cir. 2001).

jury verdict or admitted by the defendant. In other words 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 facts," 124 S.Ct. at 2537 (emphasis in the original; internal citations, quotations and captions omitted). Thus, "[b]ecause the State's sentencing procedure did not comply with the Sixth Amendment, [Blakely]'s sentence is invalid," 124 S.Ct. at 2538.

Without actually saying so, the Court's opinion, coming on the heels of Blakely's guilty plea makes it clear that a guilty plea without more is not enough to overcome the defects found in *Apprendi* and *Blakely*, "When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding," 124 S.Ct. at 2541. The dissenters protest that the results in *Blakely*, as in *Apprendi*, are neither constitutionally necessary nor well advised.[14]

Federal Consequences. On its face the federal sentencing guidelines scheme seems very similar to the Washington scheme. More troubling, it seems to assign federal judges sentencing authority that the Court in *Blakely* identified as within the exclusive domain of the jury. The federal sentencing guideline system requires the sentencing court to consider all "relevant conduct" whether presented to the jury or nor, U.S.S.G. §1B1.3. In fact, it permits consideration and reliance upon charges that the jury has never seen or ones that it has rejected by acquitting the defendant.[15] More specifically, without any demand that the matter be mentioned in the indictment or presented to the jury, the guidelines permit the court to increase a defendant's sentence should it find by a preponderance of the evidence any of the sentence enhancing factors listed in the basic applicable guideline or in the collection of factors prescribed in chapters 3 and 5 of the guidelines.[16]

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[14] "The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries. The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you – dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi* to the present context, will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform. . . . Because I find it implausible that the Framers would have considered such a result to be required by the Due Process Clause or the Sixth Amendment, and because the practical consequences of today's decision may be disastrous, I respectfully dissent," 124 S.Ct. at 2543-544 (O'Connor, J., with Breyer, J., and except with respect to the impact on the federal sentencing guidelines, Rehnquist, Ch.J. and Kennedy, J, dissenting).

[15] *Witte v. United States*, 515 U.S. 389, 399-401 (1995); *United States v. Watts*, 519 U.S. 148, 153-57 (1997).

[16] For example, the guideline covering robbery, extortion, and blackmail calls for sentencing enhancements based upon the amount of money involved, U.S.S.G. §2B3.1(b)(7). Chapter 3 envisions sentencing enhancements based upon the presence of a hate crime motivation or vulnerable victim, U.S.S.G. §3A1.1; if the victim is a pubic official, U.S.S.G. §3A1.2; if the victim was restrained, U.S.S.G. §3A1.3; if the offense was a crime of terrorism, U.S.S.G. §3A1.4; if the offender played some leadership role in an offense involving several individuals, U.S.S.G. §3B1.1; if the offense involved an abuse of a position of trust or the use of a special skill, U.S.S.G. §3B1.3; if the offense involved the use of a minor, U.S.S.G. §3B1.4; if the offense involved the use of body armor in a drug trafficking offense or crime of violence, U.S.S.G. §3B1.5; if the offender obstructed justice in the investigation or prosecution of the offense,

The Court in *Blakely* specifically declined to address the impact of the decision on sentencing under the federal sentencing guidelines.[17] Both Justices O'Connor and Breyer in their dissents saw obvious and severe consequences for the federal sentencing guidelines.[18] Although the Justice Department's brief in support of the State of Washington makes what Justice O'Connor calls a half-hearted attempt to distinguish the federal sentencing guidelines, 124 S.Ct. at 2549 (O'Connor, J. dissenting), the brief concedes the differences may be constitutionally inconsequential.[19]

If, as it seems, the obligations identified in *Blakely* apply with equal force to sentencing under the federal sentencing guidelines, compliance in future cases seems possible without either statutory or guideline alterations. In cases where the defendant pleads guilty, the Government "is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding," 124 S.Ct. at 2541. In other cases, the obligation may be met by including the relevant facts in the indictment.

The Supreme Court has granted certiorari in two cases which each raise questions of whether the principles announced in *Blakely* apply to the United States Sentencing Guidelines and if so whether constitutionally invalid portions of the Guidelines may be severed, *United States v. Booker, cert. granted*, __ U.S. ___ (2004); *United States v. Fanfan, cert. granted*, _ U.S. __ (2004).

Questions concerning retrospective application of *Blakely* are a bit more complicated. In *Schriro v. Summerlin*, 124 S.Ct. 2519 (2004), announced the same day as *Blakely*, the Court held that *Ring* which applied *Apprendi* in capital punishment cases did not apply retroactively to cases already final on direct appeal when *Ring* was handed down. *Apprendi* applied to cases pending final appeal at the time where the defendant had previously raised the issue. Yet in cases pending final appeal when *Apprendi* was decided and in which the defendant had failed to preserve an *Apprendi* argument, the

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U.S.S.G. §3C1.1; or if the offender created reckless endangerment during flight, U.S.S.G. §3C1.1. Chapter 5 permits upward departures seemingly comparable to those in *Blakely* for conduct "unusually heinous, cruel, brutal, or degrading to the victim," U.S.S.G. §5K2.8; or for possession of a weapon during the commission of the offense, U.S.S.G. §5K2.8; or for abduction or unlawful restraint in furtherance of some other crime, U.S.S.G. §5K2.4.

[17] "The Federal Guidelines are not before us, and we express no opinion on them,"124 S.Ct. at 2538 n.9.

[18] "If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would. What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost. . . ." 124 S.Ct. at 2550 (O'Connor, J. dissenting). "Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how. As a result of today's decision, federal prosecutors, like state prosecutors, must decide what to do next, how to handle tomorrow's case. . . . Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew." 124 S.Ct. at 2561-562 (Breyer, J. dissenting).

[19] "**A decision invalidating Washington's departure mechanism would raise questions about the federal Sentencing Guidelines' constitutionality.** It is nonetheless not certain that this Court would ultimately conclude that the differences between the Washington system and the federal Guidelines are of constitutional magnitude." Amicus Curiae Brief for the United States, at 29-30 (bold in the original).

defendant was required to bear the substantial burden of demonstrating that failure to vacate the *Apprendi* offending sentencing would threaten to cast doubt upon the "fairness, integrity, or public reputation of judicial proceedings," *United States v. Cotton*, 535 U.S. 625, 632-33 (2002). The same principles would presumably apply should the principles in *Blakely* be found applicable to cases under the federal sentencing guidelines.