

New Jersey Law Journal

VOL. CLXXVII – NO. 7 – INDEX 620

AUGUST 16, 2004

ESTABLISHED 1878

IN PRACTICE

CRIMINAL LAW

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The *Blakely* Fallout

The unknown future of sentencing guidelines

In June, the United States Supreme Court decided *Blakely v. Washington*, 124 S. Ct. 2531 (2004)—a 5-4 decision certain to continue to wreak havoc on sentencing schemes across the country. The Court held all facts that would enhance a criminal defendant's sentence over the standard range otherwise appropriate for the offense(s) must be either admitted by the defendant or found beyond a reasonable doubt by a jury, since judicial determination of any of those facts in any other form violates the defendant's Sixth Amendment rights.

Legislators, courts, commentators and attorneys alike are anxiously awaiting clarification from the Supreme Court as to its position on the future of the Federal Sentencing Guidelines and other similar state systems. Since its decision, the Court has been inundated with requests to reconsider its decision or, at the very least, clarify the impact of its decision on sentencing under the guidelines. While some say the Court should be ashamed that the rules governing something as basic to the justice system as criminal sentencing are now unknown, others argue that this is one step closer to a more equitable system of sentencing where judges, not legislators, decide a defen-

dant's fate. The Court's duty now is the same as it was in *Marbury v. Madison*, 5 U.S. 137 (1803): "Say what the law is."

Ramifications of *Blakely*

To say that *Blakely* has left the country confused is an understatement. The second, fifth, sixth, seventh, eighth and ninth circuits have reached differing results. The second circuit has even taken the unusual step of certifying questions directly to the Supreme Court. District courts from Maine, Utah, West Virginia, Connecticut, Florida and New York have likewise dealt with the implications of *Blakely* differently. The common uncertainty shared by all courts rests primarily with the implications of the constitutionality of the guidelines and the future of sentencing in general. As Justice O'Connor pointed out in her dissenting opinion, "[t]he consequences of today's decision will be as far reaching as they are disturbing."

Justice Breyer also addressed the implications of the decision on the guidelines in his dissent and outlined four possibilities for the future of federal sentencing.

First, and perhaps most appalling, is

the option to "create a simple, pure, or nearly pure 'charge offense' or 'determinate' sentencing system." In this system, an indictment would charge a few facts which, taken together, would constitute a crime. This crime would carry a single sentence and every person convicted of that crime would receive that sentence. As Breyer aptly points out, this system allows for perfect uniformity, but at intolerable costs. "When dramatically different conduct ends up being punished the same way, an injustice has taken place."

Another problematic option is to return to a system of indeterminate sentencing as was suggested by the Sixth Circuit in *United States v. Montgomery*, 2004 U.S. App. LEXIS 15438 (July 27, 2004). In this type of system, the length of the sentence is entirely up to the discretion of the judge or the parole board. These systems were previously heavily criticized for "producing unfair disparities, including race-based disparities, in the punishment of similarly situated defendants."

Third, we could retain "structured schemes that attempt to punish similar conduct similarly and different conduct differently, [by] modifying them to conform to *Apprendi's* dictates." In this situation, judges could base downward departures on judge-found mitigating factors, but would not be able to depart upward unless a prosecutor charged the aggravating conduct to a jury and proved it beyond a reasonable doubt or a defendant stipulated to such a fact. Breyer suggests that this option could be implemented in two different ways: (1) To subdivide each crime into a list of complex crimes, each defined to include commonly found sen-

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tencing factors (e.g., drug quantity, type of victim, presence of violence), the presence of which, found by a jury, would increase punishment; and (2) To require at least two juries for each defendant whenever aggravating facts are present—one to determine guilt, and the other to determine sentencing. Breyer points out the limitations of each of these mechanisms. The first may be criticized for the same reasons as the “pure” determinate sentencing system. The second would result in inordinate costs, both monetarily and in judicial time.

Breyer’s final option, to require Congress and state legislatures to rewrite their respective criminal codes, “attaching astronomically high sentences to each crime, followed by long lists of mitigating facts, which, for the most part, would consist of the absence of aggravating facts,” seems less an option, and more a pointed comment directed at Justice Scalia, reflecting his cynical opinion on the nature of *Blakely*’s holding.

Justice Department Response

In a July 2, 2004 Justice Department memo to all federal prosecutors, Deputy Attorney General James Comey announced the “Departmental Legal Positions and Policies in Light of *Blakely v. Washington*.” Comey states, “[t]he position of the United States is that the rule announced in *Blakely* does not apply to the Federal Sentencing Guidelines, and that the Guidelines may continue to be constitutionally applied in their intended fashion, i.e., through fact-finding by a judge, under the *preponderance of the evidence* standard, at sentencing.” The position of the United States if *Blakely* were held to be applicable to the guidelines is to argue vigorously for a sentence consistent with what would have been the guidelines sentence.

Comey suggests several protective practices that defense attorneys should expect to see:

1) Prosecutors should include all readily provable guidelines upward adjustment or upward departure factors in the indictment.

2) In pending prosecutions that have not yet resulted in a guilty plea or a trial, prosecutors should obtain superseding

indictments alleging all readily provable upward adjustment or upward departure factors.

3) Prosecutors should clearly explain to courts in pretrial filings that the indictment alleges these factors as a protective measure and should urge the court to rule on whether it will apply *Blakely* to the guidelines before the trial begins. In addition, the government should offer to strike these factors in the indictment if the defendant agrees to waive any *Blakely* objection to his sentence.

4) Prosecutors should immediately seek to obtain plea agreements that contain waivers of all rights under *Blakely*.

5) Prosecutors should urge courts to continue to direct probation officers to prepare PSR reports containing guidelines’ sentencing calculations.

6) Prosecutors should ask district courts to articulate the alternative sentences in order to enable prompt re-sentencing in the event later appellate courts apply *Blakely* to the sentencing guidelines.

7) The U.S. Attorneys’ offices and DOJ should immediately establish standardized data collection procedures, to ensure collection of information about sentences actually imposed on defendants after *Blakely* and the guidelines range that would have applied before *Blakely*, to monitor the effect of *Blakely* on sentencing.

ABA’s Position

In a July 12, 2004, letter to Senate Judiciary Committee Chairman Orrin Hatch (R-Ut.) and ranking Democratic member Patrick Leahy (D-Vt.), American Bar Association President Dennis Archer urged Congress “not to respond in haste to the decision in *Blakely*.” Archer emphasized the ABA’s opposition “to any reform measures, whether interim or permanent, that compel waiver of *Blakely* rights” which it regards as “extremely problematic in a just society.” Archer clarifies that “*Blakely* presents an opportunity to revisit priorities and, possibly, to develop even more humane and just sentencing policies and procedures that incorporate the invaluable lessons learned over the past two decades on both the state and federal level.”

District of New Jersey Options

On July 21, 2004, Association of Criminal Defense Lawyers in New Jersey (ACDL-NJ) President John P. McDonald wrote a memo to all members regarding the Federal Court meeting on *Blakely*, in which Chief Judge Bissell, the United States Probation Office, the Federal Public Defenders’ Office, the United States Attorney’s Office, Pre-Trial Services, Clerk William Walsh and McDonald participated. Judges Brown, Chessler, Cooper and Thomson participated by telephone.

Judge Bissell explained that there are three potential options to deal with the Supreme Court’s decision:

1) *Blakely* does not apply to the guidelines.

2) The guidelines survive but any upward adjustments or enhancements to the sentence beyond what is contained in the guilty plea have to be decided by a jury prior to sentencing unless the defendant consents to judicial fact-finding.

3) A judge cannot parse the unconstitutional provisions from the constitutional provisions and the guidelines should be used as recommendations.

The Probation Department’s position was described as “wait and see.” Although certain members in attendance expressed a concern with this approach, probation officers will continue to produce PSR’s that are based on the guidelines until they hear differently either from the courts or counsel in Washington. The ACDL-NJ and Federal Public Defenders Office, though they have no official “unified” position, both suggested Rule 11(c) pleas with the stipulation of an actual sentence. Judge Bissell believed that most judges will proceed under the statute alone, using the sentencing guidelines as merely that—a “guideline.”

The fate of the guidelines translates into anxiety for both prosecutors and defense attorneys alike. But if *Blakely*’s predecessor decisions (*Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000)) are an indication of the direction in which the dominos may fall, those of us who see the guidelines as the bane of our practice see hope on the horizon. ■