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## CRIMINAL LAW

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### What Does *Blakely* Mean for New Jersey?

The future of the state's sentencing system is most definitely uncertain

The future of federal sentencing as we have come to know it has certainly been cast in doubt over the last few months. In a case that has become virtually a household name — *Blakely v. Washington* — the United States Supreme Court struck down Washington State's sentencing scheme, holding that it inappropriately gave discretion to judges to find facts that allow for the imposition of longer sentences than would otherwise be allowed. In finding that such a scheme violates defendants' Sixth Amendment right, the Court held that not only must such facts be found by juries as opposed to judges, but they must be proved beyond a reasonable doubt, not by a preponderance of the evidence.

In the days following the decision, many lawyers and legal scholars speculated on the effect of *Blakely* on the federal sentencing guidelines. Similar to Washington's sentencing scheme, the federal guidelines allow judges to find similar facts by the much lower preponderance standard. Regardless of how one felt about the guidelines, the universal prediction was that *Blakely* would place the federal courts in turmoil and the weeks that followed con-

firmed that chaos would reign. At least six circuit courts of appeal reached differing conclusions on the impact of *Blakely*. District courts across the country disagreed as well. In fact, Judges in the District of New Jersey could not agree on *Blakely*'s import, and actually chose different methods of dealing with the Supreme Court's decision. Articles flooded legal periodicals with commentary and predictions. After muddling through the flood of confusion, federal courts at both the trial and circuit levels began to make sentencing decisions on the assumption that *Blakely* had effectively nullified the federal rules.

In the wake of this confusion, the United States Supreme Court agreed to hear two cases that will undoubtedly have a profound impact on the future of the federal sentencing guidelines. These cases — *U.S. v. Fanfan* and *U.S. v. Booker* — were reviewed by the Court at the opening of this term in a special two-hour session. Those who observed the Justices' questioning of the parties have predicted that the guidelines will be found unconstitutional. What has remained unclear, however, in light of *Blakely*, *Booker* and *Fanfan*, is our own state's sentencing system. Most likely overshadowed by the deafening collapse of the Bush administration's confidence in its sentencing of criminal defendants, the

future of New Jersey's sentencing system is most definitely uncertain.

The New Jersey sentencing structure is not unique. Each crime is statutorily defined and categorized by an offense level. Each offense level — first, second, third, fourth, disorderly persons, and petty disorderly persons — subjects a defendant to a statutory range of imprisonment. Each range of imprisonment is accompanied by a legislatively determined "presumptive" sentence, and the criminal code requires that the presumptive sentence "shall" be given unless the judge finds either aggravating or mitigating factors that justify a departure.

The sentencing court undertakes a balancing test. Basically, if the court finds by a preponderance of the evidence that the aggravating factors outweigh the mitigating, the court can impose a greater sentence. The reverse is also true. Either way, however, the court must nevertheless sentence a defendant within the original range. For example, a conviction for second-degree manslaughter subjects a defendant to a jail term of five to 10 years, but has a presumptive term of seven years. Thus, by statute, a defendant convicted of second-degree manslaughter will, in the normal course, be sentenced by statute to seven years of imprisonment. However, if a judge determines that

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aggravating factors outweigh mitigating factors, the defendant could be sentenced to eight, nine or 10 years in prison. Conversely, if a judge determines that mitigating factors outweigh aggravating factors, the defendant could be sentenced to six or even five years in prison. Doesn't this sound strikingly similar to the Washington sentencing scheme that *Blakely* rendered unconstitutional? Well, it is.

In Washington, the statutory maximum for the second-degree kidnapping conviction at issue in that case was ten years. The Washington legislature also provided that a defendant convicted of such a crime should receive a sentence of between 49 and 53 months. Like New Jersey, however, a judge under the pre-*Blakely* Washington system was permitted to impose a greater sentence upon the findings of certain aggravating factors. In *Blakely*, the sentencing court did just that. It found that the defendant acted with "deliberate cruelty," a statutorily enumerated ground for an upward departure. Instead of imposing a sentence within the standard range of

49 to 53 months, the judge sentenced the defendant to 90 months — a sentence still within the statutory maximum of 10 years.

The Supreme Court was sympathetic to Mr. Blakely's plight and held that its 2000 decision in *Apprendi v. New Jersey* required that any fact, other than a prior conviction, which raises a penalty beyond the standard or presumptive term, must be submitted to a jury and found beyond a reasonable doubt. The Court clarified 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." To permit a judge, as opposed to a jury, to increase a sentence above the relevant maximum, the Court concluded, would violate a defendant's Sixth Amendment right.

There is no meaningful difference between that which the Supreme Court threw out in *Blakely* and the procedure followed on a daily basis in New Jersey. In the Washington example, *Blakely* would require that the defen-

dant be sentenced somewhere in the range of 49 to 53 months. Similarly, in our New Jersey manslaughter example, *Blakely* would seem to limit the sentence to seven years.

Should the state's defense bar be poised to attack this blatant violation of our clients' Sixth Amendment rights?

Just as with *Booker* and *Fanfan*, clarity of the issue is not too far away. At least one Monmouth County judge has been presented with the argument that she cannot impose a sentence greater than seven years on a second-degree conviction. Although Presiding Criminal Judge Bette Uhrmacher initially found aggravating factors sufficient in her opinion to sentence defendant Barry Sherman to nine years for second-degree kidnapping, she permitted counsel to brief the issue. Regardless of what the Supreme Court decides to do with federal sentencing guidelines, it would appear that *Blakely* has already disposed of New Jersey judges' discretion in departing upward from the presumptive term. Mr. Sherman, along with all other defendants, should be grateful ...for now. ■