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## OUTSIDE COUNSEL

BY ALAN VINEGRAD AND JONATHAN SACK

### 'Blakely': The End of the Sentencing Guidelines?

On June 24, the U.S. Supreme Court issued its decision in *Blakely v. Washington*.<sup>1</sup> Read narrowly, the decision overturned the sentence of a Washington state defendant on the ground that the facts that led the judge to depart from the normal sentencing range and impose a higher sentence were not proven to a jury beyond a reasonable doubt, as required under *Apprendi v. New Jersey*. Read broadly, the decision casts a dark cloud over the constitutionality of the federal sentencing guideline regime.

#### 'Blakely' Decision

Ralph Howard Blakely, Jr. pleaded guilty to kidnapping his estranged wife. Under Washington's sentencing law, he faced a sentence within the "standard range" of 49 to 53 months imprisonment, but the possibility of a higher sentence if the judge found "substantial and compelling reasons justifying an exceptional sentence." After a three-day evidentiary hearing, the judge held that the defendant acted with "deliberate cruelty" — a statutory ground for departure — and imposed a sentence of 90 months, below the statutory maximum



Alan Vinegrad

Jonathan Sack

of 10 years but 37 months more than the standard range. The sentence was upheld on appeal in the Washington state courts.

The U.S. Supreme Court reversed, with the same 5-4 vote and alignment of justices as in *Apprendi*.<sup>2</sup> Justice Antonin Scalia, writing for the majority, framed the issue as whether the holding of *Apprendi* — that any fact that increases the penalty for a crime beyond the statutory maximum must be proven to a jury beyond a reasonable doubt — applied to Blakely's sentence. He cited Blackstone's 1769 "Commentaries on the Laws of England" for the proposition that "the truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," and Bishop's 1872 criminal procedure treatise for the proposition that "an accusation which lacks any particular fact which the law makes essential to the punishment is ...no accusation within the requirements of the common law, and it is no accusation in reason."

In more practical terms, the Court explained that " 'statutory maximum' for *Apprendi* purposes 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" (italics in original). Because Blakely's 90-month sentence was based on facts beyond those he admitted in his plea, the sentence was unlawful.

Recognizing the decision's potentially far-reaching implications, the Court nevertheless held that the decision "cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." According to the Court, "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment" (italics in original). The Court pointed out that defendants who feel disadvantaged by this rule may simply waive their *Apprendi* rights and consent to judicial factfinding regarding all facts necessary to sentencing.

Justice Scalia said little about the proverbial "elephant in the room" — the implications of the Court's decision on the federal sentencing guidelines. He instead disposed of the issue in a footnote, noting that the United States had endeavored to distinguish the Washington sentencing scheme from its own but concluding that "[t]he Federal Guidelines are not before us, and we express no opinion on them." In one limited exception, the majority called into question the constitutionality of the obstruction-of-justice enhancement based on trial perjury, observing that it was "unclear" why trial perjury should be the basis for a judicial sentencing enhancement, as opposed to a separate, jury-triable offense.

Three Justices wrote separate dissents. Justice Sandra Day O'Connor, writing on

**Alan Vinegrad**, a former U.S. attorney for the Eastern District of New York, is a partner at Covington & Burling. **Jonathan Sack**, a former chief of the Criminal Division of the U.S. Attorney's Office for the Eastern District of New York, is a principal at Morvillo, Abramowitz, Grand, Iason & Silberberg.

behalf of all four dissenting justices, observed that the decision would result in “greater judicial discretion and less uniformity in sentencing” and that the “practical consequences of today’s decision may be disastrous.” She recounted how sentencing schemes such as Washington’s had helped reduce sentencing disparities and provided defendants with a far better idea of what sentences they are likely to receive and the facts that are likely to determine those outcomes. She noted that although the decision did not prohibit guideline schemes entirely, it “exact[s] a substantial constitutional tax” on them. For example, she noted that because certain sentencing-related information, such as prior bad acts or criminal history, may unfairly influence a jury’s determination of guilt, “the State may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding” during which these factors would be litigated.

Justice O’Connor’s dissent was considerably more pointed than the majority in casting doubt on the viability of the federal sentencing guideline scheme. According to her dissent, “facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range — such as drug quantity, role in the offense, risk of bodily harm — all must now be charged in an indictment and submitted to a jury[.]” She observed that “[n]umerous other States have enacted guidelines systems, as has the Federal Government ... Today’s decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy.”

Then, in a section of her dissent joined only by Justice Stephen Breyer, Justice O’Connor took direct aim at the federal guidelines issue. According to Justice O’Connor, “Washington’s scheme is almost identical to the upward departure regime

established by 18 U.S.C. §3553(b) and implemented in USSG §5K2.0. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack.” Ultimately, Justice O’Connor observed that the Court’s decision “suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate” as the Washington scheme.

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Justices Anthony Kennedy and Breyer echoed these sentiments in their separate dissents. Justice Kennedy stated bluntly that “[n]umerous States that have enacted sentencing guidelines similar to the one in Washington State are now commanded to scrap everything and start over.” Justice Breyer was only slightly more guarded: “Perhaps the Court will distinguish the Federal Sentencing Guidelines,” he wrote, “but I am uncertain how.” According to Justice Breyer, because the decision did not resolve this issue, “[f]ederal prosecutors will proceed with ... prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew.”

Justice Breyer described four potential legislative responses to the Court’s decision — in his view, all flawed. These included the enactment of (1) determinate sentencing schemes for crimes (for example,

5 years imprisonment for every robbery), resulting in an inability to treat different cases differently and giving “tremendous power to prosecutors to manipulate sentences through their choice of charges,” (2) indeterminate sentencing schemes, with the length of a sentence left largely in the hands of a judge or (in certain states) a parole board, resulting in a lack of uniformity, (3) statutes allowing judges to downwardly depart from presumptive sentences but requiring enhancements to be proven to a jury beyond a reasonable doubt, which, in turn, may require bifurcated trials — a costly and time-consuming process that heretofore has generally been limited to death penalty cases, or (4) statutes “attaching astronomically high sentences to each crime, followed by long lists of mitigating facts,” thus legislating around the constitutional rulings of *Apprendi* and its ever-expanding progeny.

The immediate reaction to *Blakely* was unsurprising. Many federal courts in New York reportedly adjourned pleas and sentences. The Justice Department issued internal guidance to prosecutors, evidently with a view towards distinguishing *Blakely* from the federal guideline scheme, a position that no member of the Court embraced. And defense attorneys are gearing up for what promises to be a wave of post-*Blakely* litigation of the type seen after other momentous criminal procedure decisions, such as *Apprendi*.

While it will undoubtedly take some time for the implications of *Blakely* to become clear, a few preliminary observations are in order.

It seems beyond dispute that, absent a defendant’s waiver or admission, upward departures under the federal sentencing guidelines cannot be imposed absent a jury finding beyond a reasonable doubt that the requisite facts have been proven. Such departures are the closest federal counterpart to the particular sentencing adjustment that was overturned in *Blakely*. That said, it remains to be seen whether prosecutors will

expend the extra effort to plead and prove these facts — including the separate penalty-phase jury proceeding that such an effort would likely entail — or whether a judge would retain discretion not to impose the departure, just as judges have discretion in any case not to impose a departure even if supported by the facts and the law.

A more intriguing question is what will happen to the myriad of specific offense characteristics and upward adjustments that inform, if not drive, the determination of a defendant's sentence. The answer has significant consequences. A defendant convicted of fraud, for example, starts off with a presumptive sentence of 0-6 months in jail, the lowest sentencing range available, and faces a longer sentence only if a series of other aggravating factors apply, for example, identifiable loss, a large number of victims or the use of weapons. In addition, defendants face the possibility of other upward adjustments, such as the existence of a vulnerable or official victim, an aggravating role, abuse of trust, or obstruction of justice.

Does *Blakely* now require that such adjustments be proven to a jury beyond a reasonable doubt? Justice O'Connor's dissent comes closest to saying that it does, and the other dissents are not far behind. Indeed, the logic underlying the majority's decision suggests that, in a future case, the Court may well apply *Apprendi* to these sentencing factors. It could be argued that the difference between a "departure" and an "enhancement" or "upward adjustment" is semantic, not constitutional, and that each of them possesses a common characteristic — the potential for increasing a defendant's maximum punishment beyond what the offense of conviction alone would justify — that would render *Blakely* applicable to them all.

Support for this conclusion comes from two unexpected sources — the Department of Justice, and the Supreme Court's prior *Apprendi* jurisprudence. In the Justice Department's amicus brief in *Blakely*, it

warned the Court that, if the Washington sentencing scheme were invalidated, the federal guidelines would be called into question since "facts other than the elements of the offense enter into almost all of the calculations under the Guidelines, beginning with the most basic calculations for determining the offender's presumptive sentencing range."

And in *Ring v. Arizona*,<sup>3</sup> in which the Supreme Court applied *Apprendi* to invalidate an Arizona statute authorizing a judge to find an aggravating factor subjecting a defendant to the death penalty, the Court stated that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — *no matter how the State labels it* — must be found by a jury beyond a reasonable doubt" (italics added).

This, in turn, leads to the ultimate question: has *Blakely* rendered the entire federal guideline scheme unconstitutional? At first blush, one might conclude that it survives *Blakely*, at least in part. Since the fundamental premise of *Apprendi* is that a defendant is entitled to a jury determination of facts that increase the maximum punishment, a judge could continue to award downward adjustments or departures without a separate jury finding, and pursuant to a preponderance-of-the-evidence standard.

At least one district court, however, already has rejected this approach. In *United States v. Croxford*,<sup>4</sup> decided five days after *Blakely*, the court pointed out that this approach would be "fundamentally unfair to the United States and would distort the Guidelines" by allowing a defendant to benefit from downward adjustments but prohibiting the government (absent consent or a jury finding) from seeking upward adjustments.

The court also found that to require juries, rather than judges, to make the panoply of guideline findings inherent in many sentences would require a substantial reworking of sentencing procedure — changes that, in the court's view, only

Congress can bring about. As a result, the court held the guidelines unconstitutional and imposed a sentence constrained only by the statutory minimum and maximum, considering the guidelines only as "providing useful instruction on the appropriate sentence."<sup>5</sup>

In the event *Blakely* has rendered the federal guidelines unconstitutional, it would represent an extraordinary evolution in federal sentencing law. Twenty years ago, the guidelines were authorized in order to curtail what was perceived as excessive disparity in sentences. Before that, judges had virtually unlimited discretion to impose any sentence within statutory bounds, with the freedom to rely on a host of aggravating and mitigating factors and no suggestion that this was constitutionally impermissible.

The Court now appears headed in the direction of holding that, absent a defendant's admission or waiver, these same aggravating factors — if embodied in duly enacted guidelines — can increase a defendant's sentence only if proven to a jury beyond a reasonable doubt. And if that is so, then the entire federal guidelines scheme is on precarious constitutional ground.

As Justice Breyer made clear, it is too soon to tell how the criminal justice system will respond to *Blakely*. Given that, it is likewise too soon to tell which parties within that system will be the decision's ultimate beneficiaries.

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1. 2004 WL 1402697 (U.S. June 24, 2004).

2. Justice Scalia wrote the majority opinion in *Blakely*, with Justices Stevens, Souter, Thomas and Ginsburg joining. Justices O'Connor, Breyer, Rehnquist and Kennedy dissented.

3. 536 U.S. 584 (2002).

4. Case No. 2-02-CR-00302PGC (D. Utah June 29, 2004).

5. Six days before *Blakely*, another district court held the guidelines unconstitutional in light of *Apprendi*. *United States v. Green*, 2004 WL 1381101 (D. Mass. June 18, 2004).