

RECENT DEVELOPMENTS IN CRIMINAL LAW

Federal Sentencing Guidelines Called Into Question

In *Blakely v. Washington*, 124 S.Ct. 2531, 2004 WL 1402697 (2004), decided June 24, 2004, the United States Supreme Court extended the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435(2000), casting the constitutionality of the Federal sentencing system into doubt.

Ralph Blakely was involved in a divorce and custody suit, and had a restraining order against him prohibiting contact with his ex-wife. He had been diagnosed with various mental illnesses, including paranoid schizophrenia. Blakely kidnapped his wife and son, binding the wife, and threatening wife and child with a shotgun. His son escaped as Blakely tried to flee to Montana, and Blakely was ultimately arrested.

The State of Washington charged Blakely with first degree kidnapping, but let him plea to second-degree kidnapping involving domestic violence and use of a firearm. Blakely entered a guilty plea admitting only the elements of second degree kidnapping, domestic violence and firearm allegations, but no other relevant facts. The statutory maximum for the charge, a class B **felony**, is 10 years.

The Washington state sentencing guidelines provides a standard range of 49-53 months for the offense of second degree kidnapping with a firearm. At sentencing, the State recommended the standard range of 49-53 months, but the Judge rejected this recommendation and imposed an exceptional sentence of 90 months, justifying the sentence on the ground that Blakely had acted with deliberate cruelty – a statutorily enumerated ground for departure in domestic violence cases.

Blakely objected, and the Judge conducted a three day bench hearing with testimony from Blakely, the wife, the son, a police officer, and medical experts. The judge issued 32 findings of fact at the conclusion of the hearing, and affirmed his initial determination of deliberate cruelty. Blakely appealed, arguing that this procedure deprived him of his federal constitutional right to have a jury determine all facts legally essential to his sentence beyond a reasonable doubt. The Court of Appeals affirmed, and the Washington Supreme Court denied discretionary review, but the United States Supreme Court granted certiorari.

In a 5-4 decision, the Supreme Court ruled that the procedure used by the Washington State Court violated the 6th Amendment. The Court first recounted the holding of *Apprendi*, that any fact other than a prior conviction which increases the penalty for a crime beyond the statutory maximum, must be proved to a jury beyond a reasonable doubt. The Court then clarified that:

“ . . . the “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*. 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 findings.” (*Blakely*, at 2537, citations omitted, emphasis in original)

Justice Scalia, writing for the majority, made clear that “[t]his case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.” Justice Scalia was also careful to note that the opinion does not squarely address the Federal Sentencing Guidelines, and purports to take no position on the guidelines. The dissenting justices did not find this reassuring, and as stated by Justice O’Connor, “The structure of the Federal Guidelines likewise does not, as the Government halfheartedly suggests, provide any grounds for distinction. 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.” (*Blakely*, at 2549, citations omitted)

The effect of the holding, according to the dissent of Justice O’Connor, is that “. . . 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” (*Blakely*, at 2546) Justice Breyer, also dissenting, chastised the majority for not being clear about the applicability of the holding to the guidelines, suggesting that the case would affect “tens of thousands of prosecutions, including federal prosecutions.”

The resultant confusion anticipated by Justice Breyer quickly materialized. The Circuits have split, with the Fifth Circuit ruling that *Blakely* does not apply to the Federal Sentencing Guidelines (*U.S. v. Pineiro*, 2004 WL 1543170 (5th Cir.(La.) Jul 12, 2004)), while the Seventh Circuit has ruled that *Blakely* does apply to the guidelines (*U. S. v. Booker*, 2004 WL 1535858 (7th Cir. July 9, 2004)). All of the Circuits have taken a position, primarily applying *Blakely* to invalidate the Guidelines in whole or in part. In the First Circuit, the Department of Justice has sought and been granted direct appeal from the District Court ruling in *U.S. v. Fanfan* (D. Me., June 28, 2004), which in turn has been consolidated with the Government’s appeal from *U.S. v. Booker*. The Supreme Court has issued a briefing and argument schedule, and oral argument is set for Monday, October 4, 2004.

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