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A PROSECUTOR'S VIEW OF *BLAKELY V WASHINGTON*

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Blakely and Michigan

The Question: Does *Blakely v Washington*[1] affect Michigan law?

I. The Big Bang: Apprendi v New Jersey

Because *Blakely* is built on *Apprendi*,[2] the discussion must begin with that case. The Court considered a state statutory scheme where the offense in question, possession of a firearm for an unlawful purpose, was punishable by a determinate term to be set between 5 and 10 years, so that the maximum statutory penalty was 10 years. Under a separate provision, known as the state's "hate crime" law, the sentence range was extended to 10 to 20 years—thereby changing the maximum possible incarceration from 10 years to 20 years—on a finding by a preponderance of the evidence by the trial judge at sentencing that in committing the crime the defendant acted with a particular purpose; namely, to "intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."

The United States Supreme Court phrased the question before it as "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing *an increase in the maximum prison sentence* for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt."[3] Observing that the answer to this question was "foreshadowed by our opinion in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute," where the Court had held that "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that *increases the maximum penalty* for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt'" the Court concluded that "the Fourteenth Amendment commands the same answer in this case involving a state statute."[4]

Critically, the Court distinguished determinations of a sentence that falls *within* the statutory range from sentences that *elevate the maximum permitted by law*:

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[1] *Blakely v Washington*, 542 U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

[2] *Apprendi v New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000).

[3] *Apprendi*, 530 US 466, at 469-469, 120 S Ct 2348, 2351.

[4] *Apprendi*, 530 US 466, 476, 120 S Ct 2348, 2355.

> We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion –taking into consideration various factors relating *both to offense* and offender– in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.[5]

The holding, then, of *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,"[6] by its own terms, has nothing to do with "imposing a judgment *within the range* prescribed by statute," where the trial judge is free to take "into consideration various factors relating *both to offense* and offender," and thus the state is free to create a statutory scheme including offense variables to establish that sentence within the range prescribed by statute. Then came *Blakely*; does anything in *Blakely* extend *Apprendi* to indeterminate sentencing schemes, and the establishment of the minimum sentence within the range established by statute?

II. Blakely—The Shot Heard Round the Country

Blakely concerns a determinate sentencing scheme. The State of Washington has a *determinate* sentencing scheme, and parole does not exist; the defendant simply does his sentence and is released without restriction. Blakely was convicted of kidnaping, which under state law was punishable by a term not to exceed 10 years. But the state sentencing scheme provided that the defendant be sentenced to a determinate term of between 49 to 53 months, under calculation of sentencing guidelines factors. In other words, the trial judge was required by statute to set a fixed, determinate sentence, and the maximum that determinate term could be by law was 53 months (no parole board could exercise discretion to keep the defendant longer). The defendant pled guilty. The sentencing scheme in Washington, however, allowed a trial judge to impose a determinate term *above the maximum* of the standard range for the determinate term on a finding of "substantial and compelling reasons justifying an exceptional sentence," the statute giving an illustrative list of such aggravating factors, with those factors and any other aggravating factor employed by the judge required to be outside of those used in computing the standard range sentence for the offense (and allowing findings with regard to the manner in which the offense was committed). The trial judge, after ultimately conducting a lengthy hearing, found that Blakely had acted with "deliberate cruelty," and

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[5] *Apprendi*, 530 US 466, 481, 120 S Ct 2348, 2358 (first emphasis supplied; second supplied by the Court).

[6] *Apprendi*, 530 US 466, 490, 120 S Ct 2348,2362-2363.

exceeded the top of the determinate sentence range by 37 months, giving Blakely a "flat" or determinate sentence of 90 months. Thus, Blakely's maximum sentence (not the minimum within the statutory range) set by statute was enhanced slightly more than 3 years by a determination by the trial judge at sentencing that the crime had been committed in a certain manner.

What is the "statutory maximum"? The Supreme Court held that for purposes of *Apprendi* the "statutory maximum" 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."[7]

Did the Court mean what it said—that its holding applied to the *maximum* the judge may sentence the defendant to without additional factfinding, and not to a *minimum* set within the statutory maximum? Justice O'Connor in dissent argued that "because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, *the constitutionality of the latter* [that is, *indeterminate* sentencing schemes] implies the constitutionality of the former." Justice Scalia for the Court replied that indeterminate sentencing does *not* suffer from the constitutional infirmities of determinate sentencing, where the *maximum* may be enhanced by judicial factfinding, because indeterminate sentencing

> increases judicial discretion, to be sure, *but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty*. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) *may implicitly rule on those facts he deems important to the exercise of his sentencing discretion*. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence–*and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned*. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence–and by

[7] *Blakely*, 124 S Ct 2540 (emphasis supplied).

> reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.[8]

Blakely, then, applies to determinate sentencing schemes where the statutory guidelines *require* a fixed sentence be imposed within a range, with the statutory scheme permitting the judge to enhance the maximum sentence based on judicial factfinding. Where the facts which enhance the statutory determinate maximum sentence determined under the guidelines must be found by the judge because not admitted by the defendant at a plea or found necessarily by way of the verdict, the scheme is unconstitutional.

III. Booker: The Fallout

Immediately after the decision in *Blakely* federal sentencing, which is much akin to the Washington State scheme, was drawn into question, ultimately resulting in the decisions of *United States v Booker*.[9] Under the federal sentencing guidelines the maximum determinate term the defendant could have received was 21 years and 10 months based on the variables that included "offense" variables. He instead was given a determinate term of 30 years because of a determination by the judge at sentencing regarding the *amount* of drugs involved, which raised the sentencing bar.[10] The Court, in one majority, simply found that "there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case."[11] A separate majority—Justice Ginsberg switching sides—held that the remedy was to hold the guidelines to be advisory, require their use by trial judges, and create an appellate review standard of "reasonableness."

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[8] *Blakely*, 124 S Ct 2540 (emphasis supplied).

[9] *United States v Booker*, __US__, 125 S.Ct. 738 (2005). The companion case decided at the same time involved a defendant named Fanfan.

[10] A similar result occurred to Fanfan.

[11] 125 S.Ct. 738 at 749.

IV. Claypool: out of the Line of Fire

A number of other jurisdictions with indeterminate-sentencing schemes have concluded that *Blakely* does not affect their sentencing.

- *State v Stover*: "The *Blakely* Court recognized that an indeterminate sentencing system does not violate the Sixth Amendment:

  > 'First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty.'"[12]

- *State v Rivera*: "the *Blakely* majority's declaration that indeterminate sentencing does not abrogate the jury's traditional factfinding function effectively excises indeterminate sentencing schemes such as Hawaii's from the decision's sixth amendment analysis. *See People v. Claypool,* 470 Mich. 715, 684 N.W.2d 278, 286 (2004)."[13]

- *Commonwealth v Smith*: "Pennsylvania utilizes an indeterminate sentencing scheme with presumptive sentencing guidelines which limit the judge's discretion only concerning the minimum sentence....The United States Supreme Court has previously determined that this system does not violate the Sixth Amendment..."[14]

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[12] *State v. Stover,* 104 P.3d 969, 973 (Idaho,2005).

[13] *State v. Rivera,* 102 P.3d 1044, 1055 (Hawaii,2004).

[14] *Commonwealth v. Smith* 863 A.2d 1172, 1178 -1179 (Pa.Super.,2004).

- *Commonwealth v Junta*: "The recent United States Supreme Court decision in *Blakely v. Washington*, --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), has no application here, as the Massachusetts sentencing scheme provides for indeterminate sentences."[15]

- *People v Claypool*: "Michigan...has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. The maximum is not determined by the trial judge but is set by law. M.C.L. § 769.8. The minimum is based on guidelines ranges....The trial judge sets the minimum but can never exceed the maximum (other than in the case of a habitual offender, which we need not consider because *Blakely* specifically excludes the fact of a previous conviction from its holding). Accordingly, the Michigan system is unaffected by the holding in *Blakely*..."[16]

Michigan and Claypool: The Michigan sentence-guidelines scheme is dramatically different than that of the State of Washington and that in the federal system. The sentence imposed, when a prison sentence, must be indeterminate,[17] and the maximum is not determined by the sentencing judge (and thus cannot be exceeded by the judge by "judicial factfinding" as in the Washington scheme) but set by law.[18] In Michigan, the guidelines result only in a range within which the trial judge must set the minimum sentence–they do not permit the trial judge to exceed the maximum (other than in the case of a habitual offender, and *Apprendi/Blakely* specifically exclude the fact of a prior conviction from their holdings). Even a departure from

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[15] *Commonwealth v Junta*, 815 N.E.2d 254, 262 (Mass.App.Ct.,2004).

[16] *People v. Claypool*, 470 Mich. 715, 730 (2004).

[17] Other than for a few specified crimes, such as felony-firearm, and there the trial judge does not determine the sentence at all, but simply imposes the determinate term set by statute.

[18] MCL 769.8: "The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence." And even in those cases where the trial judge sets the maximum–that is, where imposing a term of years where the statute allows any term of years or life, whatever maximum set by the trial judge is not an "enhanced" maximum but within that set by the statute.

the guidelines range in Michigan for substantial and compelling reasons does not affect the maximum, but only the minimum, and thus is wholly unaffected by the holding in *Blakely*. *And it is quite possible for the defendant in Michigan to serve beyond the minimum sentence set by the judge without being paroled*; indeed, a fair number do. The trial judge, in setting the minimum, even by departing from the guidelines for substantial and compelling reasons, is not setting the "statutory maximum" as in *Blakely*.[19]

[19] A possible exception exists with the intermediate sanction. If the guidelines are 0-17 months, a sentence with a minimum in that range to the statutory maximum (assume hypothetically a statute with a 5-year maximum), such as 1-5, is in fact a departure, as the guidelines require that probation or a flat (determinate) county jail sentence be imposed. Because the statute requires this determinate sentence, it is arguable that a departure to a prison sentence, based on facts having to do with the commission of the crime and not found by the jury, is inconsistent with *Blakely*.