



**AN UNCERTAIN LANDSCAPE:  
THE POSSIBLE IMPACT OF  
U.S. SUPREME COURT DECISIONS  
ON NEW JERSEY SENTENCING  
PRACTICE**

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## STATE OF NEW JERSEY

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**The Honorable Edwin H. Stern, P.J.A.D., did not  
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## **Introduction**

Last month the United States Supreme Court issued decisions in two federal drug cases that could very well compel further revision of sentencing laws and which represent an ongoing historic transformation in the way judges impose criminal sentences. This report is intended to provide legislators, policy makers, practitioners and the general public information about these decisions and the profound impact they will inevitably have on federal and state sentencing practices.

The necessary starting point is a criminal defendant's right to a jury trial, as guaranteed by the Sixth Amendment to the United States Constitution. This right requires prosecutors to establish beyond a reasonable doubt each element of a crime for which a criminal defendant is charged. Once a defendant is convicted, whether by a guilty verdict or guilty plea, a sentencing judge has the authority to fix his or her sentence based on the case presented, a review of defendant's background, recommendations from the prosecution and defense attorneys, and, in some instances, factual findings made by the judge.

In recent years, the federal and state sentencing processes have imposed statutory constraints on sentencing discretion pursuant to guidelines enacted by legislatures and/or sentencing commissions across the country. The recent decisions by the United States Supreme discussed below raise serious questions about the constitutional viability of these sentencing frameworks in New Jersey and elsewhere

## **All Roads Lead Directly Back to Vineland, New Jersey**

It is doubtful that New Jersey resident Charles C. Apprendi, Jr., intended to precipitate a revolution in sentencing jurisprudence when he fired several shots into the home of African-American neighbors in Vineland, New Jersey. But Apprendi v. New Jersey turned out to be a watershed case, which today serves as the foundation for an ongoing revolution relating to the constitutional legalities of judge-crafted sentences.

Pursuant to a guilty plea, Apprendi was convicted of a second-degree weapons offense in New Jersey Superior Court. At sentencing, the judge found that Apprendi's crime was motivated by racial bias based on police testimony that he had admitted that his attack against the African-American family was motivated by racial bias – testimony which Apprendi disputed. Importantly, the sentencing judge made the finding by applying “a preponderance of the evidence” standard of proof. This standard, in marked contrast to the “proof beyond a reasonable doubt” standard that applies to jury findings regarding guilt or innocence in criminal trials, is the level of proof required to prevail in most civil cases. Under this standard, the judge or jury must be persuaded that the facts are more probably one way than another.

The trial judge sentenced Apprendi pursuant to N.J.S.A. 2C:44-3(e). This provision of the New Jersey Code of Criminal Justice provided for enhanced sentences of between 10 to 20 years instead of the ordinary five to 10 years for a second-degree crime, based upon a judicial finding that the defendant acted with a purpose to intimidate an individual or group because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. The trial court imposed a sentence of 12 years – a sentence appropriate for a first-degree conviction. In a 1999 decision, the New Jersey Supreme Court rejected Apprendi's constitutional argument that the enhanced sentence was illegal as based on a judicial finding of bias by a preponderance of the evidence. The United States Supreme Court subsequently granted Apprendi's application for certiorari, thereby agreeing to hear his appeal.

The Supreme Court's decision in Apprendi v. New Jersey was issued on June 26, 2000. Writing for a five-member majority, Justice Stevens noted that the constitutionality of enhanced sentencing on the basis of Apprendi's racial bias was not at issue in this case. Rather, the issue was the constitutionality of New Jersey's procedure for imposing such a sentence -- specifically, whether the Apprendi had a constitutional right under the Sixth Amendment to have a jury, as opposed to a sentencing judge, find that he acted with bias on the basis of proof beyond a reasonable doubt. In a 5-4 decision, the Court agreed with Apprendi.

The Supreme Court specifically found that the sentencing provision at issue undermined Apprendi's constitutional right for a jury to decide beyond a reasonable doubt each element of the crime charged and for which he was sentenced. The problem with the New Jersey statute, the majority concluded, was that it exposed Apprendi to a greater punishment, on the basis of a judicial finding, than did the jury's verdict. Thus, the statute fit the description of the sort of law the Supreme Court said in earlier decisions would be unconstitutional -- "a tail which wags the dog of the substantive offense."

The Supreme Court distilled the foregoing observations into a clearly-stated rule applicable to both state and federal courts: any fact, other than a prior conviction, that increases the penalty for a crime beyond a prescribed statutory maximum sentencing range must be submitted to a jury and proved beyond a reasonable doubt. In practical terms the decision meant that Apprendi's sentence for his second-degree conviction could only be increased beyond the second-degree range (five to 10 years) if a jury found beyond a reasonable doubt that Apprendi acted with racial bias.

### **Blakely v. Washington: Defining What is a "Statutory Maximum"**

On June 24, 2004, the United States Supreme Court issued its landmark decision in Blakely v. Washington. The Blakely decision involved a defendant who had pled guilty in state court to a second-degree kidnapping charge. The prosecution recommended, consistent with state sentencing guidelines, that the judge sentence the defendant to a 49-53 month period of imprisonment, but the judge, citing the defendant's "deliberate cruelty" in the way he committed the kidnapping, imposed a sentence in excess of 90 months.

Importantly, the length of the sentence ultimately imposed by the judge was well within the statutory range for a second-degree crime. However, under Washington's Sentencing Reform Act, judicial sentencing discretion is further limited by "presumptive sentencing guidelines." The guidelines at issue in Blakely established a range of between 48 to 53 months for the offense at issue. Under state law, an exceptional sentence -- one beyond the guidelines range but within the statutory range -- is authorized only upon the finding by the judge of an aggravating factor. Aggravating factors are identified in a non-exhaustive statutory list, and are circumstances relating to the offense or the offender that elevate the seriousness of the crime. Other aggravating factors - - except those used to determine the standard guideline range for the offense such as the defendant's criminal history or an element of the offense -- may be identified by a judge, so long as they provide "a substantial and compelling reason" to impose an exceptional sentence. The standard of proof a judge is to apply to make this factual determination is a preponderance-of-the-evidence standard. In addition, the facts supporting such a finding are not required to be included in an indictment.

In an opinion by Justice Antonin Scalia, the Supreme Court appeared to refine the definition of “statutory maximum” espoused in Apprendi. For example, the Supreme Court decisively rejected the prosecutor’s assertion that the statutory maximum in Blakely was the upper limit of the second-degree sentencing range – 10 years. Rather, the Supreme Court stated that the “statutory maximum” referred to in the Apprendi opinion 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 the maximum he or she may impose *without* any additional findings, and not the maximum sentence a judge may impose after finding additional facts. Put differently, the Supreme Court in Blakely held that guideline maximums which are subsumed within a larger statutory scheme are themselves to be treated as “maximum sentences” for purposes of the Sixth Amendment.

Under the Sixth Amendment, as explained in Apprendi, a judge's authority to sentence is based on the jury's verdict. To depart from that principle would mean that a judge could sentence a defendant for murder even if the jury convicted him only of illegally possessing the firearm used to commit the murder. The Supreme Court in Blakely found it unlikely that the Framers of the United States Constitution would have delegated to judges the function historically performed by juries.

Although the case involved only one aspect of one state's sentencing system, the Supreme Court's decision in Blakely raised serious questions as to whether the sentencing guidelines relied on by federal courts and in many state courts are constitutional under the Sixth Amendment. Indeed, the impact of the Blakely decision on sentencing jurisprudence in both state and federal courts was immediate. State and federal courts around the country concluded that the procedures that had long been used in sentencing were no longer constitutionally adequate. In the federal system, where the sentencing guidelines are especially dependent on fact-finding by judges, there was particular uncertainty and conflicting rulings about how sentencing can now be conducted.

In August 2004, the United States Supreme Court agreed to hear two federal cases -- United States v. Booker from Chicago and United States v. Fanfan from Maine -- on the opening day of its new term in order to address whether and how the Blakely ruling impact sentencing in federal courts. The Supreme Court handed down its much-anticipated decision on January 12, 2005. In effect, the Supreme Court issued two decisions in one, with each ruling reflecting views of different factions of justices. In one opinion authored by Justice Stevens, the majority reaffirmed the vitality of Blakely as constitutional doctrine and concluded that the application of the Federal Sentencing

Guidelines violated the Sixth Amendment to a jury trial by impermissibly authorizing judges to assume the role of juries and mete out sentences that exceeded the prison terms authorized by a particular verdict.

While Justice Steven's opinion addressed the constitutional infirmities of the Federal Sentencing Guidelines, Justice Breyer's opinion discussed the appropriate remedy. Specifically, Justice Breyer and four other justices concluded that the guidelines could be salvaged from constitutional infirmity by striking the provision that makes the guidelines "mandatory," i.e., legally binding. By striking the mandatory requirement, the guidelines would become merely advisory, thus allowing judges to fashion particular sentences in light of what Justice Breyer described without elaboration as "other legally authorized concerns."

### **The Impact In New Jersey: A Primer on State Sentencing**

Does Blakely apply to New Jersey's sentencing scheme as codified in the New Jersey Code of Criminal Justice? When recently confronted with the issue, different panels of judges on New Jersey's intermediate appellate court, the Appellate Division, Superior Court, did not agree in two published opinions, State v. Abdullah and State v. Natale. Our Supreme Court will endeavor to answer this question when it reviews these two cases, which have been consolidated for purposes of the appeal. The Supreme Court of New Jersey will hear argument in both matters on March 1, 2005.

To appreciate the respective arguments, the following is a basic primer on how sentencing is conducted in New Jersey. The Code of Criminal Justice categorizes indictable crimes by degree: there are four degrees of crimes, each with a corresponding and escalating range of imprisonment. For example, a first degree crime is punishable by a term of imprisonment [of] between ten to twenty years. The range of imprisonment for a second degree offense is between five and ten years; a third degree offense is between three and five years, and a fourth degree offense is up to 18 months.

In imposing an appropriate sentence, the judge must therefore determine in the first instance the degree of the crime for which the defendant has been convicted. This degree of the crime determines not only the range of punishment, but whether the defendant will be sentenced to imprisonment. Under the Code, a defendant must, absent the most extraordinary circumstances, be sentenced to a term of imprisonment upon conviction for a first or second degree crime. On the other hand, for any crime, other than a

crime of the first or second degree, there is a presumption of non-incarceration for first offenders. There is no presumption either for or against imprisonment with regard to repeat offenders convicted of a third or fourth-degree crime.

Upon ascertaining the degree of the crime and whether incarceration is required, the sentencing court must then determine the appropriate sentence within the applicable range. The starting point is the presumptive term, which is the mid-point within each of the four ranges of incarceration. For example, the presumptive term applicable to sentence for a first-degree crime is 15 years. The applicable provision, N.J.S.A. 2C:44-1f(1), states that unless “the preponderance of aggravating and mitigating factors weigh in favor of a higher or lower term, the court ‘shall’ impose the presumptive term for the offense.” Aggravating and mitigating factors are specific circumstances about the offender or offense that are enumerated in the Code and are intended to guide the court in fashioning an appropriate sentence within a specified range with objective criteria. If the applicable aggravating and mitigating circumstances are in “equipoise” – i.e., balance each other – the presumptive sentence must be imposed.

The following is an illustration of the above principles: suppose a defendant has pleaded guilty to second-degree robbery. A presentence report prepared prior to the defendant’s sentencing discloses that he has never been arrested before the instant offense. The report also discloses, however, that the victim of the crime was seventy years old when robbed. Because the conviction was for a second degree crime, the defendant can be sentenced anywhere from five to ten years – the range applicable to a second-degree crime. If the court determines that the applicable aggravating factor (the victim’s age) and the applicable mitigating factor (defendant’s lack of a criminal history) are in equipoise, it must impose a presumptive term of seven years. However, a court also has the discretion and authority to sentence a defendant below or above a presumptive term within an applicable range depending on the particular weight a judge assigns to the applicable aggravating and mitigating factors.

The narrow but critical issue before the Supreme Court of New Jersey with respect to Blakely is what constitutes the “statutory maximum” of a particular sentencing range. One panel of the Appellate Division has ruled that a statutory maximum is the highest sentence within a particular range applicable to one of the four degrees. See State v. Abdullah. More recently, however, another panel of appellate judges concluded that the “statutory maximum” is the presumptive sentence established by N.J.S.A. 2C:44-1f (1). See State v. Natale. In that opinion, the Appellate Division based its holding on its view that the Code:

permits only the presumptive sentence embodied in N.J.S.A. 2C:44-1f (1) to be imposed based on the jury's verdict. The presumptive sentence embodied in that section "shall" be imposed unless the sentencing judge finds that an aggravating and mitigating factor or factors exist and weigh "in favor of a higher or lower term within the limits provided in N.J.S.A. 2C:43-6." Therefore, the presumptive sentence, on its face, "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict." Stated differently, in the words of Blakely, the "presumptive sentence" is "the [maximum [the judge] may impose without [making] any additional findings not made by the jury." [citations omitted].

Under the holding of Natale, a defendant can only be sentenced above a presumptive term within a particular sentencing range if one of two conditions is met: 1) the prosecutor charges the aggravating factors as elements of the crime and submits them to the jury for a finding; or 2) the defendant explicitly waives his or her Sixth Amendment right to a jury finding with regard to the judge's consideration of aggravating factors. The latter circumstance would typically occur in the context of a plea agreement. Indeed, in the Blakely decision itself, the United States Supreme Court acknowledged that defendants may explicitly waive their right to have a jury determine any and all facts relevant to the sentence and agree to have a judge determine those facts.

It should be noted that since the vast majority of criminal matters are resolved by plea bargains, the impact of the Blakely decision may be relatively limited with respect to those cases. However, in cases that proceed to trial, the Supreme Court of New Jersey's affirmance of the Natale decision would necessarily have a far-reaching impact on the manner in which courts have been fashioning sentencing under the Code since its advent in 1979. In particular, judges would be foreclosed from sentencing defendants above a presumptive term based on consideration of aggravating factors based on circumstances not encompassed in the verdicts.