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Don Stemen

Loyola University Chicago, dstemen@luc.edu

Daniel F. Wilhelm

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Finding the Jury: State Legislative Responses to *Blakely v. Washington*



**DON
STEMEN
AND DANIEL
F. WILHELM¹**

Don Stemen is Senior Research Associate and Daniel F. Wilhelm directs the State Sentencing and Corrections Program at the Vera Institute of Justice in New York.

The United States Supreme Court created turmoil in the criminal justice world in June 2004 by declaring that certain long-accepted practices for sentencing criminal defendants violated the Constitution. In *Blakely v. Washington*,² the Court struck down important provisions of the guidelines that established criminal sentences in the state of Washington. Many other states immediately recognized that their systems would likely be affected by the ruling. In the months following the decision, much discussion revolved around doomsday scenarios in which entire state sentencing structures would have to be rebuilt from the ground up. Justice O'Connor, in her dissenting opinion in *Blakely*, predicted that the ruling would trigger the end to "over 20 years of sentencing reform"³ and with it the gains to fairness and efficiency those policies created in many states.

A funny thing has happened, however, on sentencing reform's trip to the dustbin of history. Despite dire predictions, enormous national attention, and the demise of federal sentencing guidelines at the hands of a subsequent Supreme Court case, *Blakely's* principal consequence in a majority of affected states appears not to have hastened the eradication of sentencing innovations. Rather, the case appears to have strengthened many officials' resolve to preserve their existing sentencing structures. Perhaps to the surprise of many, the policy changes that have emerged in a number of statehouses are notable for their efforts to minimize *Blakely's* impact by appealing to notions of fairness, proportionality, and political legitimacy.

Blakely in a Nutshell

To understand how states have responded (and in some cases, still are responding) to *Blakely*, it may first be helpful to rehearse briefly the highlights of the decision. Like other jurisdictions, Washington employs sentencing guidelines that establish the presumptive sentences a judge must impose in typical cases.⁴ The guidelines are based principally on the seriousness of the offense and the defendant's criminal history. Like other state systems prior to *Blakely*, Washington also permitted a judge to impose an aggravated or enhanced sentence—a sentence longer than the one established by the guidelines—if he or

she determined one or more factors existed to support an extended sentence. Deliberate cruelty on the part of the defendant is one typical aggravating factor.

In *Blakely*, the Supreme Court invalidated the provisions of Washington's guidelines that allowed a judge alone to make the factual findings necessary to impose such an aggravated sentence. The Court ruled that when the law sets a presumptive sentence for an offense, the Sixth Amendment's right to trial by jury prohibits a judge from imposing a longer sentence if based on a fact determined solely by the judge. The only exception relates to prior criminal convictions. Any other fact must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

While Washington was the only state directly involved in the case, the decision had wide implications for other jurisdictions. Twelve additional states—Alaska, Arizona, California, Colorado, Indiana, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, Oregon, and Tennessee—employed similar sentencing systems. Though not all favored a guidelines-based approach, all thirteen states established presumptive sentences for offenses (sentences trial courts were required to apply in most cases) and allowed judges to impose longer sentences based on judicially determined facts. It was in these states—and perhaps in several voluntary sentencing guideline systems as well—that Justice O'Connor and many others presumed the *Blakely* decision threatened to change everything, forcing significant alterations to how these jurisdictions approached criminal sentencing. For the most part, it has not turned out this way, as can be seen by the policy responses states have embraced and rejected.

How Have States Responded?

In the immediate aftermath of *Blakely*, both supporters and opponents of presumptive sentencing systems offered competing options for modifying state sentencing regimes to comply with the Court's decision. Some, like the complete abandonment of presumptive sentences, would require significant changes to foundational philosophies and procedures of criminal sentencing in certain states. Others would involve fewer changes to procedure but

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would demand a shift in the underlying principles of sentencing. One such proposal involves transforming presumptive sentences that judges are required to follow into purely advisory recommended sentences; another is the adoption of “topless” guidelines, where a recommended minimum term is established by law and judges may impose sentences as lengthy as the maximum term authorized by an underlying criminal statute.

In sorting through the options, states appear to have favored one particular proposition above all others: the preservation of presumptive sentencing and of aggravated sentences but with the notable new twist of jury fact-finding. This addition means asking juries—not judges—to find beyond a reasonable doubt the facts required to justify an aggravated sentence. So far, six of the thirteen states affected by *Blakely*—Alaska, Arizona, North Carolina, Minnesota, Oregon, and Washington—adopted jury fact-finding in the 2005 legislative session.⁵ Three additional states—Colorado, Indiana, and New Mexico—proposed but failed to pass bills adopting this solution.⁶ Jury fact-finding as a response to *Blakely* allows states to continue to adhere to the principles on which their systems were based and to do so with minimal changes to sentencing procedures. States may be turning to this approach in part because a workable model of such a solution was already in place in Kansas.

Many have pointed to the Kansas model as the easiest solution to comply with *Blakely* while preserving the structure of presumptive sentences. After the Kansas Supreme Court invalidated that state’s sentencing guidelines system in 2001,⁷ the legislature chose to retain presumptive guidelines by incorporating jury fact-finding as the basis of any aggravated or “enhanced” sentence.⁸ Kansas’s experience has provided guidance for states affected by *Blakely*. Under the revised system, Kansas prosecutors must file a motion thirty days before trial if they wish to seek an enhanced sentence above the guidelines presumptive sentence. The judge then decides whether, in the interests of justice, the evidence of enhancing factors must be presented to a jury at a post-trial sentencing hearing or as part of the prosecution’s case at trial. If the jury unanimously finds that a factor has been proved beyond a reasonable doubt, the judge nonetheless retains the discretion to sentence within or beyond the guidelines presumptive sentence.

A number of elements came together to make jury fact-finding feasible in Kansas. Importantly, enhanced sentences have been a historical rarity in Kansas. Most sentences are reached through plea negotiations, a process that decreases the opportunity to impose aggravated sentences. In addition, penalties are already stiff for many of the violent offenses where an aggravated sentence might be most warranted. No formal evaluation has been completed, but anecdotal evidence from judges, prosecutors, and defense attorneys indicates that jury fact-finding is infrequently employed, and when it is, the procedure does not place significant additional burdens on the system.

Finally, Kansas statutes afford judges great latitude in imposing consecutive sentences, which allows a judge to impose long sentences without jury fact-finding.

This straightforward approach may also be driving other states. In the four sentencing guidelines states adopting jury fact-finding—Minnesota, North Carolina, Oregon, and Washington—sentences above the presumptive guidelines sentence occur infrequently. In Washington, for example, only 3 percent of all sentences imposed in 2004 (841 sentences) were above the sentence recommended by guidelines.⁹ In the other three guidelines states, such departures occur in just 6 to 8 percent of cases annually.¹⁰ Thus, jury fact-finding may impose a manageable burden in these states because it only becomes a possibility in a limited number of cases. In Alaska, Arizona, Colorado, Indiana and New Mexico, the five non-guidelines states adopting or proposing jury fact-finding, it is unclear how many sentences are imposed above presumptive sentences. There is some indication that policy makers have considered the potential impact of an increase in jury trials in their decision to adopt or propose jury fact-finding.

In Alaska, for example, officials decided to modify slightly the underlying structure of their presumptive sentencing scheme to accommodate jury fact-finding. Under Alaska law, statutes established single, presumptive sentence terms for different groups of offenses. A judge was required to impose these terms and could impose a longer sentence only after finding aggravating factors. Recently adopted legislation establishes a series of presumptive ranges—rather than single presumptive terms—for different groups of offenses and allows a judge to impose any sentence within the new range. The law also allows the court to go above the presumptive range after a finding of fact by the jury. Minnesota adopted a similar change, widening the presumptive sentence ranges for offenses within its sentencing guidelines. According to the Minnesota Sentencing Commission, which drafted the changes, the wider ranges were intended to create greater flexibility for the courts in determining an appropriate sentence and to reduce the need for jury determination of aggravating factors.¹¹ If wider ranges prove inadequate to a particular case, jury fact-finding would be available.

While jury fact-finding emerged as the most popular response among most states, it was not the only solution proposed. In Washington and Colorado, competing bills were introduced in response to *Blakely*. In both jurisdictions, one proposal would have converted presumptive sentences into a voluntary regime, while another sought to incorporate jury fact-finding into the existing presumptive scheme. In Washington, for example, the voluntary proposal would not have changed the guidelines structure and sentence recommendations, but it would have made them advisory, allowing judges to impose any sentence above that recommended by the guidelines without having to base that decision on a finding of fact.¹² (Since *Blakely*, the Supreme Court has made it clear that such voluntary

systems do not encounter Sixth Amendment problems.¹³) The competing Washington bill adopting jury fact-finding, however, was passed by the legislature. This bill preserved the underlying structure of Washington's guidelines system and likely represented to many policy makers the *Blakely* response most proportionate to the need for change.¹⁴

The results in Colorado were quite different—neither of the competing bills in the state came to a vote in the general assembly. A Senate bill proposed converting the presumptive sentence range for each felony class into a “suggested range” and allowing a judge to impose any sentence in the higher aggravated sentencing range for each felony class.¹⁵ The bill was assigned to the Senate Committee on the Judiciary and consideration by the Committee was “postponed indefinitely.” A competing bill in the House would have created jury fact-finding for sentences above the presumptive range (i.e., in the aggravated range) for each felony class.¹⁶ The House bill was similarly assigned to the House Committee on the Judiciary, and no action was taken on it before the end of the legislative session.

Other states similarly did not see the preservation of presumptive sentences in the same favorable light. In addition to Colorado, three other states—Indiana, New Mexico, and Tennessee—have so far chosen not to adopt jury fact-finding in response to *Blakely*. Rather, Tennessee and Indiana have abandoned the presumptive nature of their systems altogether, making recommended sentences voluntary rather than presumptive.¹⁷ New Mexico, like Colorado, failed to pass legislation to make any changes to their sentencing structure. However, in New Mexico, the state Supreme Court ruled that the state's sentencing system is unaffected by *Blakely*; the Colorado Supreme Court reached the opposite conclusion, holding that Colorado's structure ran afoul of *Blakely*.¹⁸ Since the Colorado decision specified no immediate remedy, the state is left without a solution to their *Blakely* problems.

Policy makers in Tennessee, as in the other guidelines states previously discussed, may have considered the feasibility of jury fact-finding in adopting a response. While it is unclear how many sentences are imposed above those recommended by the state's presumptive sentencing guidelines, concerns were raised that should the state opt for jury fact-finding, the number could be large enough to result in a high number of jury trials. The Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing—which proposed the switch to a voluntary system—noted that jury fact-finding could “increase service time of jurors, increase jury trial time on the court docket, impose increased burdens on public defenders and district attorneys and otherwise increase the costs of the administration of justice.”¹⁹

By contrast, in Indiana, the conversion to a voluntary system was not necessarily policy makers' first choice. The Indiana Senate initially passed a bill proposing the adop-

tion of jury fact-finding. However, the House Committee on Courts and Criminal Code amended the bill to make the presumptive sentencing terms currently established in the Indiana code advisory. Under the amended bill, which was signed by the governor, the state retained the recommended terms for each offense. However, these terms became advisory, permitting the court to impose any longer sentence without a finding of fact.²⁰

The New Mexico House similarly proposed the adoption of jury fact-finding.²¹ While the bill passed the House by unanimous vote, the legislation failed to reach the Senate floor for a vote before the end of the legislative session. However, as noted above, such a legislative solution is now unnecessary in light of the New Mexico Supreme Court's decision finding the state's sentencing system unaffected by *Blakely*. As a result of the Court's ruling, New Mexico's sentencing scheme is now voluntary.

In three states—California, New Jersey, and Ohio—policy makers have not proposed any legislative changes to the state's sentencing procedures. In Ohio, legislators appear to be waiting for the state high court to rule on the applicability of *Blakely* to its system before introducing legislative fixes. In New Jersey, the state Supreme Court has recently ruled that the state's sentencing system is affected by *Blakely* and itself fashioned a remedy that allows judges to impose sentences up to the maximum allowed by the underlying range provided by law.²² The Supreme Court in California, however, reached a contrary conclusion, holding that the state's determinate sentencing regime was not affected by *Blakely*.²³

Why Are States Preserving the Presumptive Structure?

Most of the states' responses discussed here indicate a desire to preserve current sentencing structures by modifying procedures for imposing sentences rather than discarding presumptive sentencing structures entirely. Why is this happening?

While no state model is perfect, most states intent on preserving their systems likely have some confidence in the ability of those mechanisms to achieve particular sentencing goals, such as reducing unwarranted sentence disparities, enhancing the predictability of correctional resource needs, and establishing balance and proportionality among sentences. These reasons are likely most applicable to states with sentencing guidelines, which often are created with such policy outcomes in mind.

As the Minnesota Sentencing Commission noted in its recommendations for a response to *Blakely*, “The sentencing guidelines [have] served as the sentencing model in Minnesota for over 20 years, focusing on uniformity, proportionality and certainty in sentencing, while ensuring fair and equitable sentences for all offenders regardless of gender, race or geographic location.”²⁴ States are reluctant to give up systems that achieve—or at least strive for—these goals. Indeed, the presumptive structures in many

states have great political and popular legitimacy. Preserving the presumptive nature of their systems through jury fact-finding speaks to the belief that such systems achieve the state's goals better than the alternatives.

The systems in states that have abandoned or contemplated abandoning their presumptive sentencing structures may not engender the same confidence or may not enjoy substantial political and popular authority. Yet, it is interesting to note that no state discussed here is entirely rejecting the idea of recommended sentences. Even the embrace of voluntary sentencing recommendations appears to reflect some confidence in their ability to achieve sentencing goals. In Tennessee, the governor's task force noted that the adoption of voluntary sentencing guidelines was "calculated at maintaining the uniformity, consistency and predictability of sentencing in Tennessee without incurring the additional cost and burdens of [jury fact-finding]."²⁵

Some practical balancing is also taking place in crafting possible solutions. In several states—such as Minnesota, North Carolina, Oregon, and Washington—where very few sentences were regularly imposed above the presumptive sentences, a modest response to introduce jury fact-finding may well be most appropriate to address *Blakely's* requirements. In Indiana and Tennessee—where historically, a majority of sentences appear to have been imposed above the presumptive sentences—the more drastic response of changing the fundamental nature of sentencing philosophy may be a more practically appropriate reaction than the creation of jury fact-finding. Other states—such as Alaska, Arizona, California, Colorado, New Jersey, New Mexico, and Ohio—are likely engaging in a similar balancing act.

Does a Strong Sentencing Commission Matter?

Immediately after the *Blakely* opinion was issued, sentencing commissions in several states sprang into action. With dedicated staff and proficiency in evaluating the impact of case law and legislation, sentencing commissions were well-suited to determine quickly the impact of *Blakely* on states' criminal justice systems. Indeed, states' responses to *Blakely* may be partially identified by the recommendations put forth by these commissions. States with strong commissions appear to be crafting solutions that maintain their presumptive sentencing structures. The Minnesota Sentencing Commission, for example, submitted a report to the governor just six weeks after the *Blakely* decision clearly describing the many ways the decision affected the state and highlighting procedural changes required in response.²⁶ Based on an extensive evaluation, the Commission later recommended the adoption of jury fact-finding and the expansion of guidelines ranges—recommendations proposed in the House and Senate without amendment. The sentencing commissions in New Mexico and North Carolina weighed in with similar reports and recommendations prior to the proposal of jury fact-finding in each jurisdiction.²⁷

While the presence of a strong sentencing commission may not guarantee the preservation of a presumptive sentencing scheme, the absence of such a commission may lead more directly to abandoning the presumptive nature of the system. The three states seeking to abandon their presumptive systems—Colorado, Indiana, and Tennessee—all lack a strong sentencing commission. Indeed, none has a continuing entity within state government that serves the same deliberative, analytical, and policy-recommending functions as a sentencing commission.

Conclusion

The surprise of *Blakely* is that most states are not throwing out their presumptive sentencing regimes or even drastically altering the underlying structures of their systems in response to the Court's ruling. Given the significant investment in constructing these systems and their perceived success in achieving their goals, many policy makers appear reluctant to dispose of them. Rather, states are searching for responses proportional to the actual challenge presented by *Blakely* and that speak to the political and popular legitimacy of such presumptive sentencing systems.

Whether the attention lavished on *Blakely* has whetted the appetites of other states to evaluate and restructure their sentencing systems has not been definitively answered. There are stirrings of interest in some states, but no ambitious reforms have been launched that were not already under way a year ago. Those who are intrigued, however, might want to pay attention to those states that responded to the Court's decision by preserving the fundamental characteristics of their systems. Systems worth preserving may also be worth examining and, perhaps, emulating.

State Responses to *Blakely*

Alaska—SB 56 signed by governor 3/23/05; creates new presumptive sentence ranges in place of single presumptive terms for each felony class; creates jury fact-finding for sentences above the presumptive sentence ranges.

Arizona—HB 2522 signed by governor 4/1/05; creates jury fact-finding for sentences above the single presumptive term for each felony class.

California—No legislative response.

Colorado—SB 215 assigned to Senate Committee on the Judiciary 4/27/05, consideration postponed indefinitely; converts the presumptive range for each felony class into a "suggested range" and allows the court to impose any sentence up to the statutory maximum sentence for each felony class.

Colorado—HB 1327 assigned to House Committee on the Judiciary 4/19/04, no action; creates jury fact-finding for sentences above the presumptive range for each felony class.

Indiana—SB 96 signed by governor 4/25/05; converts the presumptive term for each felony class into advisory terms and allows the court to impose any sentence up to

the statutory maximum sentence for each felony class without a finding of facts or a stating of reasons.

Minnesota—HF 1 signed by governor 6/2/05; creates jury fact-finding for sentences above the presumptive sentencing guidelines range and creates wider sentence ranges in each guidelines cell.

New Jersey—No legislative response; *State v. Natale* (184 N.J. 458, 878 A.2d 724) declared the state's sentencing system unconstitutional under *Blakely*.

New Mexico—HB 694 failed to reach Senate floor before end of legislative session; creates jury fact-finding for sentences above the single presumptive term for each felony class.

North Carolina—HB 822 signed by governor 6/30/05; creates jury fact-finding for sentences above the guidelines presumptive sentence range in each cell.

Ohio—No legislative response; *State v. Foster* and *State v. Quinones* pending before the Ohio Supreme Court.

Oregon—SB 528 signed by governor 7/7/05; creates jury fact-finding for sentences above the presumptive sentencing guidelines range.

Tennessee—SB 2249/HB 2262 signed by governor 6/7/05; converts the presumptive sentencing guidelines into voluntary sentencing guidelines.

Washington—SB 5477 signed by governor 4/15/05; creates jury fact-finding for sentences above guidelines presumptive range.

Legislative Responses

State	No Action	Jury Fact-Finding	Voluntary Sentences	Alters Recommended Sentences
Alaska		•		•
Arizona		•		
California	•			
Colorado ²⁸	•			
Indiana			•	
Minnesota		•		•
New Jersey	•			
New Mexico ²⁹	•			
North Carolina		•		
Ohio	•			
Oregon		•		
Tennessee			•	
Washington		•		

Notes

- ¹ This piece builds on an article that appeared in the June/July 2005 issue of *State News*, published by the Council of State Governments.
- ² 542 U.S. 296, 124 S.Ct. 2531 (2004).
- ³ *Blakely*, 124 S.Ct. at 2550 (O'Connor, J., dissenting).

- ⁴ See generally Wash. Rev. Code §9.94A.
- ⁵ See S.B. 56, 24th Leg., First Sess. (Alaska 2005); H.B. 2522, 47th Leg., First Reg. Sess. (Ariz. 2005); H.B. 822, Gen. Assem., 2005 Sess. (N.C. 2005); H.F. 1, 2005 Leg., 84th Sess. (Minn. 2005); S.B. 528, 73rd Leg. Assem., Reg. Sess. (Or. 2005); S.B. 5477, 59th Leg., Reg. Sess. (Wash. 2005).
- ⁶ See S.B. 215, 65th Gen. Assem., First Reg. Sess. (Colo.); H.B. 694, 47th Leg., Reg. Sess. (N.M.).
- ⁷ See *State v. Gould*, 23 P.3d 801 (Kan. 2001).
- ⁸ Kan. Stat. Ann. §21-4718(b).
- ⁹ Washington Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing, Fiscal Year 2004*, at 22.
- ¹⁰ See, e.g., Minnesota Sentencing Guidelines Commission, *Sentencing Practices Annual Summary Statistics for Felony Offenders Sentenced in 2003*, at 29 (Dec. 2004); North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing Statistical Report for Felonies and Misdemeanors Fiscal Year 2003/04 (July 1, 2003–June 30, 2004)*, at 16 (Jan. 2005); State of Oregon Criminal Justice Commission, *Sentencing Practices: Summary Statistics for Felony Offenders Sentenced in 2001*, at 13 (Jan. 2003).
- ¹¹ See Minnesota Sentencing Guidelines Commission, *Report to the Legislature* (Jan. 2005).
- ¹² See S.B. 5476, 59th Leg., Reg. Sess. (Wash.).
- ¹³ See *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005).
- ¹⁴ See S.B. 5477.
- ¹⁵ S.B. 215.
- ¹⁶ See H.B. 1327, 65th Gen. Assem., First Reg. Sess. (Colo.).
- ¹⁷ See S.B. 96, 114th Gen. Assem., First Reg. Sess. (Ind. 2005); S.B. 2249/H.B. 2262, 104th Gen. Assem., First Reg. Sess. (Tenn. 2005).
- ¹⁸ See *State v. Lopez*, 2005-NMSC-036, __P.3d__ (N.M. 2005); *Lopez v. People*, 113 P.3d 713 (Colo. 2005).
- ¹⁹ Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing, *Report of the Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing*, at 3 (Feb. 2005) ("Governor's Task Force").
- ²⁰ See S.B. 96.
- ²¹ See H.B. 694.
- ²² See *State v. Natale*, 184 N.J. 458, 878 A.2d 724 (N.J. 2005).
- ²³ See *People v. Black*, 35 Cal.4th 1238, 29 Cal. Rptr.3d 740 (Cal. 2005).
- ²⁴ Minnesota Sentencing Guidelines Commission, *The Impact of Blakely v. Washington on Sentencing in Minnesota: Short Term Recommendations*, at 1 (Aug. 6, 2004) ("Impact of Blakely").
- ²⁵ *Governor's Task Force*, at 3.
- ²⁶ See *Impact of Blakely*.
- ²⁷ See, e.g., New Mexico Sentencing Commission, *Blakely v. Washington: Impact on Sentencing Statutes in New Mexico* (2005); North Carolina Sentencing and Policy Advisory Commission, *Report on Study of Structured Sentencing Act in Light of Blakely v. Washington Pursuant to Session Law 2004-161, Section 44.1* (2005).
- ²⁸ Legislation failed to exit judiciary committee.
- ²⁹ Legislation passed by House but failed to reach Senate floor for vote before the end of the legislative session.