HOUSE BILL REPORT
SB 5477

As Passed House - Amended:
April 12, 2005

Title: An act relating to sentencing outside the standard sentence range.

Brief Description: Revising sentencing procedures for exceptional sentences.

Sponsors: By Senators Kline, Brandland, Hargrove, Esser, Fairley, Kastama, Shin, Pridemore, Weinstein, Haugen, Berkey, Prentice and Rockefeller.

Brief History:
Committee Activity:
Criminal Justice & Corrections: 3/29/05, 3/31/05 [DP];
Appropriations: 4/2/05 [DP].
Floor Activity:
Passed House - Amended: 4/12/05, 96-1.

Brief Summary of Bill

- Amends the Sentencing Reform Act to require that any fact used to support the imposition of an exceptional sentence above a defendant's standard sentencing range be proven at trial beyond a reasonable doubt.
- Clarifies the intent of the Legislature by recognizing the need to restore judicial discretion in sentencing.
- Directs the Sentencing Guidelines Commission to study the Sentencing Reform Act and report its findings to the Legislature by December 1, 2005.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: Do pass. Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Pearson, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Kagi, Kirby and Strow.

Staff: Kathryn Leathers (786-7114).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass. Signed by 28 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Alexander, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; McDonald, Assistant Ranking Minority Member; Bailey, Buri, Clements, Cody, Conway, Darneille, Dunshee, Grant, Haigh, Hinkle, Hunter, Kagi, Kenney, Kessler, Linville, McDermott, McIntire, Miloscia, Pearson, Priest, Schual-Berke, Talcott and Walsh.

Staff: Nona Snell (786-7153).

Background:

Washington has used determinate sentencing since the Sentencing Reform Act (SRA) went into effect in 1984. Under this system, an offender's sentence is calculated based on the seriousness level of the crime(s) for which he or she was convicted and on the offender's criminal history (or, "offender score"). This calculation results in a standard sentencing range, and any sentence imposed that falls within that range may not be appealed.

Prior to the *Apprendi* and *Blakely* decisions (discussed below), a judge could nonetheless impose a sentence above the standard range based on facts that were not proven beyond a reasonable doubt at trial if there were substantial and compelling reasons to justify the imposition of an exceptional sentence.

Case Law:
Apprendi v. New Jersey, 530 U. S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000): In 2000, the United States Supreme Court articulated the following rule: Other than the fact of a prior conviction, any fact that increases the penalty for a crime above the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

Blakely v. Washington, 542 U. S. __, 159 L.Ed.2d 403, 124 S.Ct. 2531 (2004): Mr. Blakely and his wife were married in 1973. In 1995, Mrs. Blakely filed for divorce and obtained a restraining order against Mr. Blakely. In 1998, Mr. Blakely abducted his then estranged wife from their home, binding her with duct tape and forcing her at knife-point into a wooden box in the bed of his pickup truck. The box was about the same length and width of Mrs. Blakely's body, it had airholes drilled into each end, and was capable of being locked. In the process, he begged her to dismiss the divorce and related proceedings, and told her to cooperate or he would kill her and their son. When their 13-year-old son returned home from school, Mr. Blakely ordered him to follow him in another car, threatening to shoot the box if he did not do so. When they stopped at a gas station the boy escaped, and Mr. Blakely continued on in his truck with his wife still trapped in the box. In all, Mrs. Blakely was locked in the box for over four hours. Mr. Blakely was finally arrested and charged with first degree kidnapping, a class A felony with a seriousness level of X.

The state and Mr. Blakely entered into a plea agreement, whereby Mr. Blakely agreed to plead guilty to one count of kidnapping in the second degree, a class B felony with a seriousness level of V, and one count of domestic violence assault in the second degree, a class B felony with a seriousness level of IV. Because Mr. Blakely entered a plea of guilty, there was no trial. Based on his offender score of two and the firearm enhancement, Mr. Blakely's standard sentencing range for the second degree kidnapping charge was 49 - 53 months (or, four years

and one month to four years and five months). The state recommended the high end of that range to run concurrently with a sentence of 12 - 14 months for the assault.

The judge rejected the state's recommendation and, instead, imposed an exceptional sentence of 90 months (or seven years and six months). This exceptional sentence was 37 months above Mr. Blakely's standard range but 30 months below the maximum sentence for a class B felony (120 months). The exceptional sentence was justified on several grounds, including that the crime was committed with "deliberate cruelty," a statutorily enumerated ground for departure from the standard range in domestic violence cases.

Mr. Blakely objected to the exceptional sentence. As a result, the trial judge held a three-day evidentiary hearing (but not a jury trial), at which testimony was heard from Mrs. Blakely, their son, a police officer, and medical experts. At the conclusion of the hearing, the court issued 32 findings of fact and adhered to its initial determination of deliberate cruelty. An exceptional sentence of 90 months was imposed for the kidnapping charge, to run concurrently with 14 months imposed for the assault. Mr. Blakely appealed. The Washington Court of Appeals affirmed and the Washington Supreme Court denied discretionary review. Upon his petition, the United States Supreme Court granted certiorari.

In a five to four decision, the United States Supreme Court agreed with Mr. Blakely that the imposition of the exceptional sentence under these facts was a violation of his Sixth Amendment right to trial by jury because the facts supporting the trial court's finding of "deliberate cruelty" were neither admitted by Mr. Blakely in his guilty plea nor found by a jury. The United States Supreme Court clarified that the relevant statutory maximum is the top of the standard range for the offender in question (here, 53 months), not the maximum sentence possible for the charged crime (here, 120 years). The United States Supreme Court further found that the judge could not have made a finding of "deliberate cruelty" based solely on the facts stated in the guilty plea, and that an exceptional sentence can only be imposed if it takes into account factors other than those which were used in computing the standard range for the offense.

The judgment of the Washington Court of Appeals was reversed and remanded for further proceedings.

In summary, the rulings in *Apprendi* and *Blakely* result in the following:

(1) Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be either admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt.

(2) Any reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in calculating the standard range sentence for the offense.

(3) In terms of imposing an exceptional sentence outside the maximum sentence, the term "maximum" means the maximum sentence in a particular defendant's standard

sentencing range (based on the seriousness level of the offense and his or her offender score), not the maximum penalty that may be imposed by law for the crime charged.

Summary of Amended Bill:

This bill brings the SRA into compliance with the rulings in *Apprendi* and *Blakely* by amending the SRA. It also clarifies the intent of the Legislature by recognizing the need to restore judicial discretion in sentencing that has been limited by the Blakely decision. Finally, it directs the Sentencing Fuidelines Commission to study the SRA and report its findings to the Legislature by December 1, 2005.

The SRA is amended as follows:

- The list of aggravating factors used to justify an upward departure from the standard sentence range is now an exclusive (not illustrative) list. The aggravating factors list is expanded to include current judicially recognized factors.

The trial court may impose an exceptional sentence above the standard range without a finding of fact by a jury in four circumstances. Those four circumstances are: (1) the defendant and the state agree, and so stipulate, that justice is best served by the imposition of an exceptional sentence and the court finds that imposing such a sentence is consistent with the interests of justice; (2) the defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is "clearly too lenient;" (3) the defendant has committed multiple current offenses and his or her offender score results in some of the current offenses going unpunished; and (4) the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation results in a sentence that is "clearly too lenient." All other aggravating factors must be submitted to a jury.

Except in the limited circumstances identified above, a judge may no longer independently seek a sentence above the standard range. At any time prior to trial or entry of a guilty plea, the state may give notice that it is seeking a sentence above the standard sentencing range. The court must then make an initial determination regarding whether the evidence allegedly supporting a sentence above the standard sentence range can be admitted during the trial for the underlying offense or whether: (1) the evidence supporting the exceptional sentence is not part of the evidence required to prove the crime; (2) the evidence supporting the exceptional sentence is not otherwise admissible; and (3) admission of the evidence supporting the exceptional sentence would be unfairly prejudicial at trial. If the evidence is not admitted at the trial for the underlying offense and the defendant is found guilty, a separate sentencing departure hearing is conducted using the same jury.

The state has the burden of proving, beyond a reasonable doubt, the existence of one or more aggravating factors. In order for an aggravating factor to form the basis of an exception sentence, the jury's verdict on that factor must be unanimous. Following the jury's unanimous verdict on any aggravating factors, the court must then find that the aggravating factors constitute substantial and compelling reasons justifying the exceptional sentence and must set forth those reasons in written findings of fact and conclusions of law.

The list of mitigating factors justifying a mitigated sentence (downward departure) remains illustrative only. The process for determining whether a mitigated sentence is appropriate remains unchanged. Either party or the court may initiate proceedings for a mitigated sentence and the court determines, by a preponderance of the evidence, whether substantial and compelling reasons exist to impose a sentence below the standard sentence range.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect immediately.

Testimony For: (Criminal Justice & Corrections) (In support) The *Blakely* decision only had a minor impact on the SRA. The so-called *Blakely*-fix in this bill is very simple – it requires a jury finding of an aggravating factor. The prosecutor must plead the factor, give notice to the defendant, and prove each factor beyond a reasonable doubt. It is appropriate for the jury to make this finding. This bill is the product of a collaborative process, including prosecutors and defense attorneys, in response to an immediate need in the wake of the *Blakely* decision. The Superior Court Judges' Association (SCJA) raises an additional, different policy issue that also resulted from the *Blakely* decision – that is, that judges in Washington can no longer independently find an aggravating factor and go forward from there and impose an exceptional sentence. As a result, judges have lost discretion. The SCJA's proposed amendment raises maximum sentences for certain offenses to give judges greater discretion. The SRA is a superb sentencing system. It doesn't mean, however, that there can't be changes. The need for additional judicial discretion effects about 100 cases out of 30,000 per year, but they are very serious cases. This issue needs to be addressed rationally and seriously. However, there is some concern that the cost issues associated with the SCJA's proposed amendment will prevent prosecuting attorneys from doing what we need to do in the aftermath of *Blakely* – that is, to get back to the business of prosecuting criminal cases. The broader policy issue raised in the SCJA's amendment should not be dealt with as part of this bill's procedural fix in response to the *Blakely* case it should be dealt with in a separate bill because it will raise funding, fairness and other issues.

Since *Blakely*, there have been a few occasions in which prosecutors have wanted to seek aggravating factors and different judges have had different responses. We need consistency across the state that passes constitutional muster. This bill fixes this immediate need and the costs are predictable. With the SCJA's amendment, the costs will be unpredictable. Also, this will create confusion. The amendment creates indeterminate sentencing. Like pre-SRA, this will result in disparate sentencing for a variety of reasons. Changing to advisory guidelines is a significant change and needs to be studied. The issues raised by the judges are important but they are different from the need to respond to *Blakely*. The amendment isn't advisory – it really creates new, expanded guidelines, without requiring judges to explain why they impose the sentence imposed. It also has a perverse effect in that it restricts judicial discretion in the very cases in which it is needed most that is, judges would be limited to twice the standard range, not the maximum possible sentence for the crime. Under both pre- and post-*Blakely*,

before a judge can accept a plea, the judge must make findings that the plea is consistent with the prosecutorial standards and also consistent with the interests of justice. Absent that finding, the judge would not allow the plea and the case would proceed on to trial. Why wasn't that finding made in the *Blakely* case? That is the issue that needs to be addressed, and this cannot be addressed "on the fly." The Sentencing Guidelines Commission (SGC) has started to look comprehensively at this issue and many more. The SGC's focus is on reducing the complexity of the SRA, and on the issue of discretion and whether appropriate checks and balances are in place. The Legislature should allow this process to work its way out.

(Concerns) The *Blakely* case took away judges' sentencing discretion in Washington, but the SRA contemplated that judges would have some discretion in sentencing decisions. This legislation is only a *Blakely* procedural fix and the bill should be amended with language that allows the upper sentence ranges to be merely advisory. The Legislature should keep in mind the crucial significance to the concept of justice that someone, independent of the rough-and-tumble of plea-bargaining, should have the authority and the power to insist that compelling facts are responded to with an exceptional sentence. Over the next year or two, the Legislature is going to have to re-address the SRA. It is broken, not only in terms of *Blakely* but also in terms of other issues alluded to by the United States Supreme Court. *Blakely* has damaged, if not eliminated, the concept of checks and balances. When the SRA was enacted, a judge could impose a sentence either above or below the sentencing range with guidance and parameters set by the Legislature and the appellate courts. That was a check on the discretion of the prosecutors to make the type of plea agreements made in the *Blakely* case. After *Blakely*, judges don't have that check and balance because they can't do anything. If prosecutors make an agreement that judges don't agree with, they have no authority to go above the standard range, even in egregious situations. In many counties, the work load is so great that it effectively prevents judges from being able to reject plea agreements. Therefore, the checks and balance system that is currently written into the statute can't be used because there are simply too many cases, there is no time, there is no ability. Judges don't have real conduct before them at the time of taking pleas, they don't have victim statements, and they don't have pre-sentencing reports.

The fatal flaw in this bill is that only prosecutors can seek an exceptional sentence – this may be unique in history. That is all that the judges are seeking – to go above the standard range in egregious situations, to give the defendant a sentence that is merited by the conduct engaged in. The amendment proposed by the SCJA gives some of that discretion back to the judges by providing, in cases of violent offenses only, that a judge would have authority to impose a sentence up to twice the standard range (or the maximum sentence allowed, whichever is less). We know that advisory guidelines pass constitutional muster. This is a narrow proposal and the SCJA would like to look at a broader proposal down the road. This amendment is also mindful of additional costs that would be impacted by this bill's new jury trials on sentencing. The statistics have shown that judges do not routinely go above the standard range and therefore do not routinely impact the prison population. But in certain situations it is important for the judges to have the authority to do that. Judges like guided discretion and they have that with the SRA.

The amendment is a practical, narrow proposal, and there will be no immediate fiscal impact. Also, many years ago, a task force was created in Washington that ultimately led to the creation of victims' rights. Under *Blakely*, if the prosecutor has not asked for a jury trial on aggravating circumstances and victims come in at the sentencing hearing and tell the judge about being victimized, the judge cannot do anything. Those victim rights that have been established are now a sham because judges have no authority to take those concerns into consideration. Unlike the prosecutor, a judge is not a party to the case. The public expects that judges are the place where the buck stops. The public expects that when they come into court and speak, judges will be able to do something. With the current bill, judges will have no ability. Judges will only be able to say, "thank you for the information but, the Legislature has not given us any authority to do anything about it." Until we fix that, we will not have justice in Washington.

The purpose behind having a bifurcated trial is to protect a defendant's constitutional right to a fair trial. The current language of the bill only includes four factors for which the court may provide a bifurcated trial, but a bifurcated trial is not provided for all the aggravating factors. By definition, the facts used to prove these aggravating factors are prejudicial. The evidence that will be used to support any aggravating factor would never be admitted at trial on the underlying offense due to the rules of evidence. As a result, juries will convict off of their emotions, not the facts. The Legislature is strongly urged to amend this bill so that a bifurcated trial is required when any aggravating factor is alleged.

Testimony For: (Appropriations) The sixth amendment right to a jury trial means that if there is a fact used to give a longer sentence, a jury trial is required regarding the aggravating factor. The bill accomplishes this.

The fiscal note is not correct with regard to guilty pleas, because there are not separate trials after guilty pleas. Pleas are designed to avoid jury trials. The costs associated with the bill are due to jury trials lengthened by an hour or two.

Testimony Against: (Criminal Justice & Corrections) None.

Testimony Against: (Appropriations) Superior court judges are opposed to the bill based on policy and fiscal grounds. It usurps traditional judicial responsibility. Jury trials are not the only way to fix the exceptional sentence issue. Advisory guidelines are an acceptable fix. The bill violates the sentencing reform act. Fiscally strapped counties will have significant expenses from jury trials for the aggravating factors sentencing phase.

Despite guilty pleas, a sentencing trial would have to be decided by a jury trial, which is a large expense to counties. An amendment offered by the judges would eliminate the costs through the use of advisory guidelines.

Persons Testifying: (Criminal Justice & Corrections) (In support) Norm Maleng, King County Prosecutor; Russ Hauge, Kitsap County Prosecutor; Ramona Brandes, Washington Association of Criminal Defense Lawyers and Washington Defenders Association; and David Boerner, Sentencing Guidelines Commission.

(Concerns) Judge Leonard Costello, Kitsap County Superior Court; Judge Evan Sperline, Grant County Superior Court; Judge Brian Gaines, Sentencing Guidelines Commission and King County Superior Court; Judge Deborah Fleck, King County Superior Court; and Jason Amala and Jason Laurine, law students.

Persons Testifying: (Appropriations) (In support) Tom McBride, Washington Association of Prosecuting Attorneys.

(Opposed) Judge Deborah Fleck, Superior Judges Association.

Persons Signed In To Testify But Not Testifying: (Criminal Justice & Corrections) None.

Persons Signed In To Testify But Not Testifying: (Appropriations) None.