
**Criminal Justice & Corrections
Committee**

SB 5477

Brief Description: Revising sentencing procedures for exceptional sentences.

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

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.

Hearing Date: 3/29/05

Staff: Kathryn Leathers (786-7114).

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 proceedings 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 term 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 5 - 4 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 6th 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, 10 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; and

(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 his or her offender score), not the maximum penalty that may be imposed by law for the crime charged.

Summary of Bill:

This bill brings the Sentencing Reform Act (SRA) into compliance with the rulings in *Apprendi* and *Blakely* by amending the SRA as follows:

- The list of aggravating factors used to justify an upward departure from the standard sentence range 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: Preliminary fiscal note available.

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