

HOUSE BILL REPORT

EHB 2070

As Amended by the Senate

Title: An act relating to exceptional sentences.

Brief Description: Concerning exceptional sentences.

Sponsors: By Representatives O'Brien, Goodman and Pearson.

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 2/21/07 [DP].

Floor Activity:

Passed House: 3/8/07, 96-0.

Senate Amended.

Passed Senate: 4/10/07, 48-0.

Brief Summary of Engrossed Bill

- Grants the superior court the authority to empanel a jury in new trials and sentencing hearings for purposes of imposing exceptional sentences above the standard range.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: Do pass. Signed by 7 members: Representatives O'Brien, Chair; Hurst, Vice Chair; Pearson, Ranking Minority Member; Ross, Assistant Ranking Minority Member; Ahern, Goodman and Lovick.

Staff: Jim Morishima (786-7191).

Background:

When a person is convicted of a crime, a court must generally sentence the offender within a standard range determined by the person's criminal history and the seriousness level of the crime. Prior to 2004, a court could sentence an offender above the standard range if it found, by a preponderance of the evidence, that aggravating circumstances existed. This type of sentence is known as an "exceptional sentence." In 2004, the United States Supreme Court

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ruled that sentencing an offender above the standard range in this manner is unconstitutional. *Blakely v. Washington*, 542 U.S. 296 (2004). Under the *Blakely* decision, any factor that increases an offender's sentence above the standard range, other than the fact of a prior conviction, must be proved to a jury beyond a reasonable doubt.

In 2005, the Legislature responded to the *Blakely* decision by changing the manner in which exceptional sentences are imposed. Under this new procedure, the prosecutor must provide notice that he or she is seeking an exceptional sentence above the standard range at any time prior to trial or the entry of a guilty plea as long as the substantial rights of the defendant are not prejudiced. The prosecutor must then prove the aggravating circumstances justifying the exceptional sentence to a jury (or to the judge if the jury is waived) beyond a reasonable doubt.

In 2007, the Washington State Supreme Court ruled that changes the Legislature made in 2005 do not apply to cases where trials have already begun or guilty pleas have already been entered prior to the effective date of the legislation (April 15, 2005). *State v. Pillatos*, 2007 Wash. LEXIS 62 (2007). The court in *Pillatos* also held that courts do not have the inherent power to empanel sentencing juries; i.e., the courts must have statutory authority to do so.

Summary of Engrossed Bill:

In any case where a new trial or new sentencing hearing is required, the superior court has the authority, at the new trial or sentencing hearing, to empanel a jury to consider any aggravating circumstances alleged by the state and that require a jury verdict under the procedures put in place in 2005 in response to *Blakely*.

EFFECT OF SENATE AMENDMENT(S):

The amendment allows the court to impanel a jury only in new sentencing hearings in cases where an exceptional sentence above the standard range was imposed, instead of in all new trials and all new sentencing hearings. The amendment requires the court, in the new sentencing hearing, to consider only the aggravating circumstances relied upon in imposing the previous sentence, instead of any alleged aggravating circumstance that requires a jury verdict under the procedures put in place in 2005 in response to *Blakely*. The amendment creates the Task Force on Sentencing of Persistent Offenders to: examine existing evidence concerning the types of offenses committed by individuals convicted only of the crimes of Assault in the second degree and Robbery in the second degree and sentenced to life in prison as persistent offenders; evaluate whether the inclusion of Assault in the second degree and Robbery in the second degree as most serious offenses has resulted in disproportionate sentencing; and assess the objectives of the three-strikes law and evaluate whether the crimes of Assault in the second degree and Robbery in the second degree should continue to be classified as most serious offenses. The amendment adds the following offense to the definition of "most serious offense" for purposes of the persistent offender law: any out-of-

state conviction for a felony with a finding of sexual motivation if the minimum sentence imposed was 10 years or more.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) This bill has the potential to affect a significant number of cases; the *Blakely* decision applies to both sentences imposed after the decision and to convictions that were still being appealed on or after the date of the decision. The number of cases affected could increase if the United States Supreme Court rules that *Blakely* is retroactive. Under the current law, the state does not have the ability to impose an aggravated exceptional sentence upon re-sentencing, but could if a new trial was ordered. Cases where aggravated exceptional sentences have been imposed are the worst of the worst. This bill would give the court the ability to impose an exceptional sentence upon re-sentencing, but only in cases where an aggravated exceptional sentence was imposed at the original sentencing. The bill does not open the door to the imposition of a new exceptional sentence.

(Opposed) This bill is unnecessary. The bill only affects cases during the period of time between the day on which *Blakely* was decided and the day on which the "*Blakely* fix" went into effect. During this window of time, courts adapted to the *Blakely* decision by staying proceedings, pleading cases, and imposing standard range sentences. Therefore, the number of cases affected by this bill is very small. If this bill were to go forward, it should be amended so that only legal aggravating factors can be charged in the new sentencing proceeding.

Persons Testifying: (In support) Tom McBride, Washington Association of Prosecuting Attorneys; and Brian McDonald, King County Prosecuting Attorneys Office and Washington Association of Prosecuting Attorneys.

(Opposed) Sheryl Gordon McCloud, Washington Association of Criminal Defense Lawyers and Washington Defenders Association.

Persons Signed In To Testify But Not Testifying: None.