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MEMORANDUM

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DATE: July 8, 2004

RE: Supreme Court Decision in *Blakely v. Washington*

This memorandum presents the initial impressions of this Office as to *Blakely*'s effects on Tennessee's statutory sentencing scheme and outlines the various procedural postures in which the *Blakely* issues are likely to be encountered. While new issues will continue to arise and will need to be addressed separately, hopefully this memorandum will assist district attorneys and their assistants in the immediate aftermath of the decision.

The proper approach to take as *Blakely* issues arise is certainly a work in progress. Please distribute this memorandum to each district attorney general. We solicit any comments or continued questions as *Blakely* works its way through Tennessee's system. As always, please ask the district attorneys general and their assistants to contact Mark Fulks for West cases at 615-741-6439 (Mark.Fulks@state.tn.us); Elizabeth Ryan for Middle cases at 615-741-4492 (Elizabeth.Ryan@state.tn.us); and John Bledsoe for East cases at 615-532-7911 (John.H.Bledsoe@state.tn.us). Mike Moore, Gordon Smith, and Amy Tarkington, 615-741-2216 (Amy.Tarkington@state.tn.us), are also available to discuss evolving *Blakely* issues.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490 (emphasis added). If not, the sentence has been imposed in violation of the defendant's Sixth Amendment right to trial by jury. In *Blakely v. Washington*, 2004 WL 1402697 (U.S. June 24, 2004) (No. 02-1632), the Court now has made clear that the "statutory maximum" for *Apprendi* purposes 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.*" Id. at *4. In other words,

> the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

Id. (citation omitted).

Under Tennessee's sentencing scheme, the "statutory maximum" sentence for an offense would be the presumptive minimum sentence for that offense, before application of any enhancement factor is applied. Because Tennessee's statutory "ranges" are all determined on the basis of the defendant's prior convictions, *see* Tenn Code Ann. § 40-35-105, -106, -107, -108, -109, the "range" determination by a judge, and not a jury, presumably would be permissible under the *Apprendi/Blakely* rule. Therefore, for felonies, the "statutory maximum" will be the presumptive statutory minimum within each range, except for Class A felonies, for which the presumptive minimum sentence is the midpoint of the range, Tenn. Code Ann. § 40-35-210(c), and Career Offenders, for which the sentence is required by statute to be the statutory maximum sentence. Tenn. Code Ann. § 40-35-108(c).

Because Tennessee's statutory scheme was not directly before the Court in either *Apprendi* or *Blakely*, the Supreme Court's ruling does not immediately operate to invalidate any sentence already imposed that conflicts with the decisions. *See Bowen v. State*, 488 S.W.2d 373, 375 (Tenn. 1972) (Supreme Court's *Furman* decision, holding Georgia capital punishment statute unconstitutional, did not have the immediate effect of voiding Tennessee judgments not involved in that proceeding or before the Court). However,

prudence dictates that compliance with the decisions be undertaken immediately so as to minimize any future invalidations of sentences on Sixth Amendment grounds.

Because there is now no statutory authority in this state for any participation by the jury in the sentencing process (except in capital cases and life without parole cases), it is doubtful whether there is any authority for the trial judge simply to shift the application of enhancement and mitigating factors to the jury, either at trial or in a separate sentencing hearing. Rather, until the General Assembly takes corrective action, sentences should be imposed under the present statutes, except where inconsistent with *Apprendi/Blakely*.

In those cases presently before the trial courts for sentencing, except for cases in which the sole enhancement factor is the fact of the defendant's prior convictions, the only authorized sentence for a felony is the presumptive minimum sentence within each range (except for Class A felonies and for Career Offenders, as discussed above). Those cases already final in the trial court but now in the pipeline on direct appeal will be subject to correction by the appellate courts in light of *Blakely*. In many cases the trial court's error will not amount to "plain error." Usually, in light of the facts proven at trial, the error will be harmless beyond a reasonable doubt because a jury given the opportunity to find the enhancement factors would have done so. It follows, then, that, it could not be "plain error" because consideration of the error is not necessary to do substantial justice. *See State v. Smith*, 24 S.W. 3d 274, 282 (Tenn. 2000). Of couse, if plain error is found, any sentence imposed contrary to the rule should be modified to the presumptive sentence.

Consecutive sentencing by a judge should be permissible under the *Blakely/Apprendi* rule since consecutive sentencing involves only the manner of service of the sentences but not the intrinsic length of the sentences imposed.

Judicial sentences entered on guilty pleas, whether involving a negotiated sentence or a "blind" plea, arguably would be permissible so long as the defendant executes a written waiver of his right to trial by jury when he enters the plea. But the safest practice would be for the State to secure as a condition of any plea a written waiver of the defendant's right to have enhancement factors found by a jury.

It is the State's position that the rule is not required to be applied retroactively to sentences already final on direct review when *Blakely* was handed down on June 24, 2004. *See Schriro v. Summerlin*, 2004 WL 1402732 (U.S. June 24, 2004) (No. 03-526) (holding analogous *Ring v. Arizona* rule a new procedural rule not retroactively applicable to

judgments final on direct review). Thus, post-conviction petitioners challenging sentences final on direct review before June 24, 2004, should not be able to obtain relief under the new rule. For the same reason, a prior post-conviction petition cannot be reopened because the claim does not involve a newly recognized constitutional right of which "retrospective application. . . is required." *See* Tenn. Code Ann. § 40-30-117(a)(1).

It is conceivable, however that the Court will conclude that *Blakely* was dictated by its earlier decision in *Apprendi*, in which case the relevant date would be June 26, 2000, the date *Apprendi* was decided. In that event, the analysis changes only slightly. Post-conviction petitioners challenging sentences final on direct review before June 26, 2000, should not be able to obtain relief (or to reopen a prior post-conviction petition) because *Apprendi* itself is a new procedural rule not entitled to retroactive application. *See Summerlin*. For those post-conviction petitioners sentenced after June 26, 2000, whose sentences were final on direct review before *Blakely* was handed down and who did not raise an *Apprendi* claim at trial and/or on direct review, the claim has been waived. *See* Tenn. Code Ann. §40-30-106(g).

Finally, a state habeas corpus challenge to the sentence is not viable because the error did not render the judgment void, a requirement for habeas relief. *See State v. Ritchie*, 20 S.W. 3d 624, 630 (Tenn. 2000). "Void" means lack of jurisdiction of the subject matter or the parties. *N.Y. Cas. Co. v. Lawson*, 160 Tenn. (7 Smith) 329, 336, 24 S.W.2d 881 (1930). But the sentencing court clearly had jurisdiction (the sentence was authorized by statute, and a jury could have imposed it); imposition of the sentence merely violated the *Apprendi/Blakely* procedural rule, thus making the judgment only "voidable."