What is the Impact of *Blakely v. Washington* on Sentencing in Tennessee?

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Tennessee permits a judge to impose higher sentences when there are statutory enhancement factors such as the presence of a gun or where the victim was particularly vulnerable, e.g. an elderly person. *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004) called into question the constitutionality of such judge-imposed sentencing enhancements over and above the elements of the crime for which the defendant is convicted. This article addresses the impact of this decision in Tennessee.

The Constitution requires that the prosecutor prove all elements of the crime to a jury. *Blakely v. Washington* held that beyond the elements of the crime, "every defendant has the right to insist that the prosecutor prove to a *jury* all facts legally essential to the *punishment*."

In light of this holding, I believe that *Blakely v. Washington* limits a Tennessee judge to the statutory presumptive sentence since sentencing enhancements are now considered part of the defendant's Sixth Amendment right to trial by jury. This new ruling will not impact plea agreements since the defendant can waive a jury for sentencing determinations. Thus, the short-term impact will not be catastrophic.

To remedy what I believe are constitutionally mandated limitations on judicial sentencing, I suggest in this article that we now consider amending the 1989 Sentencing Act. This does not require wholesale revisions of the law. Instead I advocate a bifurcated jury trial where – after guilt is assessed – the jury determines the existence of statutory enhancement factors. That accomplished, the judge may then impose a sentence, considering only those factors that the jury determined were proven by the government beyond a reasonable doubt.

There is no requirement that the jury impose the sentence, only that the jury determine the existence of enhancement factors that increase the sentence above the presumptive sentence fixed by the legislature. The remaining framework of our Tennessee sentencing laws can remain untouched and still comply with the new ruling. Until our laws are amended

however, I have concluded that the judge may not impose a sentence beyond the presumptive sentence.

A.

In *Blakely v. Washington*, the United States Supreme Court found that the Sixth Amendment right to jury trial makes unconstitutional the imposition of any sentence above the statutory maximum prescribed by the facts found by a jury or admitted by the defendant. *Blakely* considered whether the sentencing procedure followed by courts in the State of Washington deprived the defendant of his "federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence."

Mr. Blakely had originally been charged with first-degree kidnapping, but the charge was reduced upon reaching a plea agreement. He pleaded guilty to second-degree kidnapping involving domestic violence and use of a firearm. Under the Washington Criminal Code, second-degree kidnapping is a class B felony that carries a maximum statutory sentence of ten years. The Washington Sentencing Reform Act further limited the sentencing range to 49-53 months. The Washington statute, however, permitted the judge to impose a sentence above that range upon finding "substantial and compelling reasons justifying an exceptional sentence."

During the defendant's sentencing proceeding, the judge imposed an "exceptional sentence" of 90 months. This enhanced sentence was based on the judge's finding that the defendant used "deliberate cruelty," which is a statutorily enumerated ground for departure in domestic violence cases under the Washington Act. The sentence was upheld on rehearing and on appeal to the Washington State Court of Appeals. The Washington Supreme Court denied discretionary review.

On review to the United States Supreme Court, the Court held that the State's sentencing procedure violated the defendant's Sixth Amendment right to trial by jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny.

In *Apprendi*, the Court determined 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." The Court reasoned that the Due Process Clause and the Sixth Amendment right to a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt." Further, in *Ring v. Arizona*, 536 U.S. 584(2002) the Court struck down a statute on the basis of *Apprendi*, stating that "[i]f a State makes an increase

in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt . . . . A defendant may not be 'expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" In *Blakely*, the Court applied this precedent to the Washington state guideline scheme, explaining:

> our precedents make 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. . . 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.

2004 WL 1402697. Thus, the rule of *Apprendi*, as explained in *Ring* and now *Blakely*, establishes that any fact "legally essential to the punishment" must be proven beyond a reasonable doubt to a jury or admitted by the defendant.

Application of the *Blakely* analysis to Tennessee sentencing law requires a very detailed comparison with the Washington sentencing scheme to examine similarities and differences between the two. The Washington Sentencing Reform Act establishes "presumptive sentencing ranges" based

on the "seriousness level" of the offense and the defendant's "offender score." Wash. Rev. Code § 9.94A.310(1). The offense seriousness level is determined by the offense of conviction and the offender score is based upon the defendant's criminal history. This presumptive range is adjusted upward if the offender or an accomplice was armed with a deadly weapon. The Act requires that the court impose a sentence within the presumptive range unless it finds that "there are substantial and compelling reasons justifying an exceptional sentence." An "exceptional sentence" is appropriate "when the circumstances of a particular crime distinguish it from other crimes within the same statutory definition." *See, State v. Fisher*, 739 P.2d 683, 688 (Wash. 1987).

The Washington act provides a non-exhaustive list of factors the judge may consider. Wash. Rev. Code § 9.94A.390. Relevant facts must be proven to the judge by a preponderance of the evidence. Id. at § 9.94A.370(2). Ultimately, the defendant's sentence may not exceed the statutory maximum prescribed for the class of felony, even if the presumptive range or an exceptional sentence exceeds this limit. *State v. Gore*, 21 P.3d 262 (Wash. 2001). The key to a proper analysis here is that Washington law expressly provides that a sentence in excess of the statutory guideline range is contingent on the finding of aggravating circumstances.

The Washington statutes are structured somewhat differently than the federal Sentencing Guidelines. The majority in *Blakely* said that the federal sentencing guidelines were not before the Court. Nevertheless, it is instructive briefly to address the federal guidelines since the federal guidelines are more familiar to Tennessee practitioners and thus may offer some guidance in resolving the question of *Blakely's* application to Tennessee sentencing statutes.

The federal sentencing guideline range, unlike the Washington system, is not based solely on the circumstances involved in the actual crime of conviction and the defendant's criminal history. Instead, in addition to the defendant's criminal history, the federal guideline range depends upon a far more complicated calculus designed to arrive at the "total offense level."

The federal total offense level is comprised of the "base offense level" and any relevant "specific offense characteristics." See U.S.S.G. § 1B1.1. Drug offenses, for example, are subject to a particular guideline, but the base offense level is not determined solely by the offense conduct, meaning the facts comprising the crime of conviction. In drug cases the base offense level is heavily dependent upon the amount of drugs involved in the offense.

Frequently, the specific drug quantity used to calculate the defendant's sentence is neither alleged in the indictment nor admitted by the

defendant. Pursuant to the sentencing guidelines, the court makes a factual finding as to the quantity of drugs using information compiled by the United States Probation Officer. This factual finding must be supported by a preponderance of the evidence. After this base offense level is established, it may be adjusted upward or downward by a number of specific offense characteristics. The enhancements and reductions, like the factors contributing to the base offense level, must be established by a preponderance of the evidence.

This "exceptional sentence" determination under Washington law is not identical to determinations of offense conduct, relevant conduct, or sentencing enhancements under the federal sentencing guidelines. In fact, the Washington exceptional sentence is more closely analogous to an "upward departure" permitted by the federal sentencing guidelines. Both the Washington exceptional sentence and a federal upward departure allow the court to sentence *above* the guideline range where the factors establishing the guideline range do not adequately reflect the seriousness of the offense. The dissenting judges in *Blakely* utilized this similarity to express veiled predictions of doom for the federal sentencing guidelines:

> Washington's scheme is almost identical to the upward departure regime established by [the federal sentencing laws]. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack. The

> [Washington] provision struck down here provides for an increase in the upper bound of the presumptive sentencing range if the sentencing court finds, "considering the purpose of [the Act], that there are substantial and compelling reasons justifying an exceptional sentence." The Act elsewhere provides a nonexhaustive list of aggravating factors that satisfy the definition. § 9.94A.390. The [majority] flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of discretion, survive *Apprendi*. ... This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate.

2004 WL 1402697 (O'Connor, J. dissenting)

These – and other – observations by Justice O'Connor have been widely quoted to give some insight into the majority opinion. The most common citation to Justice O'Connor's dissenting opinion is her listing of nine states (which she lists by example) that have sentencing guidelines. Although Tennessee is not mentioned, this is no comfort since Justice O'Connor also said that, "Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments."

Tennessee sentencing laws are different from the federal and Washington systems. We can only glean so much by analogy, and thus the following section explores Tennessee statutes in detail to assess the precise impact *Blakely* may have on our jurisdiction.

B.

For an extensive history of two hundred years of sentencing practices in Tennessee see, http://www.hwylaw.com/CM/Articles/Articles84.asp which appears on my firm's web site. Suffice it to say that for much of our history the jury, not the judge, imposed the sentence. Tennessee's system of jury sentencing was altered in 1982 and more definitively in 1989.

Our current structure for imposing punishment on felony offenders under the Tennessee Criminal Sentencing Reform Act of 1989 was addressed in detail in *State v. Jones*, 883 S.W.2d 597 (Tenn.1994):

> Included in the Tennessee Criminal Sentencing Reform Act of 1989 is the structure for imposing punishment on felony offenders. The Act divides felonies into five classifications according to the seriousness of the offenses [Class A, B, C, D and E]; it separates offenders into five classifications according to the number of prior convictions [Range I, II, III, etc.]; it assigns a span or range of years for each class of crime committed by each class of offenders; and it employs enhancement and mitigating factors to assess the definite sentence within each range. Tenn. Code Ann. §§ 40-35-105, 40-35-114. This sentencing plan was developed by the Sentencing Commission, in response to a mandate by the legislature, "for use by a sentencing court in determining the appropriate sentence to be imposed in a criminal case." Tenn. Code Ann. § 40-37- 203(a) (1990). ...The nature and extent of the punishment to be imposed for similar offenses committed by similar offenders has been determined by the classification of offenses according to their seriousness and the classification of offenders according to their prior convictions. The only discretion allowed the sentencing court is to accommodate variations in the severity of the offenses and the culpability of the offenders within the ranges of penalties set by the

> legislature. Even this discretion is restrained under the Act through the establishment of a "presumptive sentence" and the mandatory use of enhancing and mitigating factors.
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> The minimum sentence is the presumptive sentence. Tenn. Code Ann. § 40-35- 210(c) (1990). [This was later changed by statute to the mid-range for Class A felonies.] The sentence imposed cannot exceed the minimum sentence in the range unless the State proves enhancement factors. If there are enhancement but no mitigating factors, then the court "may set the sentence above the minimum in that range but still within the range." Tenn. Code Ann. § 40-35-210(d). If there are enhancement and mitigating factors, "the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors." Tenn. Code Ann. § 40-35- 210(e). However, only those enhancement factors specifically authorized by statute may be used to increase a sentence. Further, there are two significant limitations on the use of enhancement factors that may be established by the proof – enhancement factors must be "appropriate for the offense" and "not themselves essential elements of the offense." Tenn. Code Ann. § 40-35-114. The obvious purpose of these limitations is to exclude enhancement factors which are not relevant to the offense and those based on facts which are used to prove the offense. Facts which establish the elements of the offense charged may not also be the basis of an enhancement factor increasing punishment. The legislature, in determining the ranges of punishment within the classifications of offenses, necessarily took into account the culpability inherent in each offense.

As noted, the 1989 Tennessee Sentencing Act divides criminal penalties for each felony classification into several increasing Ranges of punishment. This objective sentencing system, as explained in the sentencing commission comments to Tenn. Code Ann. §40-35-101, imposes

mandatory penalties for persons classified as "multiple," "persistent," or "career" offenders.

Under Tennessee law these enhanced sentence Ranges are only available for defendants who have a certain number of required "prior convictions." *Blakely v. Washington* makes crystal clear that prior convictions may be used to enhance a sentence without running afoul of the *Apprendi* doctrine.

Unlike Washington and, for that matter, federal law, Tennessee has no "departure" sentences that permit a judge to deviate *upwards* from the prior-conviction driven Range determination. A judge may deviate lower into the "mitigated offender" category, Tenn. Code Ann. § 40-35-109 but this could hardly be the topic of a constitutional challenge.

Recall the earlier observation that it was the Washington "exceptional" sentence – sentencing outside (or above) the normal range – which was condemned in *Blakely*. This is analogous to an "upward departure" allowed in the federal sentencing guidelines. Both the Washington exceptional sentence and a federal upward departure permit the judge to sentence *above* the guideline range where the factors establishing the guideline range do not adequately reflect the seriousness of the offense. Clearly these "departures" are no longer permissible under *Blakely* absent a

jury determination that the facts justifying such a departure exist beyond a reasonable doubt.

Tennessee does not have such an upward departure scheme. It may be the absence of such a departure device that arguably removes Tennessee from the ambit of *Blakely*. A court interpreting Tennessee law could find that the key to all of this is whether the sentence "range" is reasonably anticipated by either the plea or the nature of the conviction. As Justice Scalia, writing for the *Blakely* majority, said: "Faced with an unexpected increase of more than three years in his sentence, petitioner objected." Why was this "unexpected?" The answer may lie in the use of the phrase "standard sentence" used by the majority:

> Petitioner argued below that second-degree kidnapping with deliberate cruelty was essentially the same as first-degree kidnapping, the very charge he had avoided by pleading to a lesser offense. The [Washington] court conceded this might be so but held it irrelevant. ...Petitioner's 90-month sentence exceeded the 53-month standard maximum by almost 70%; the Washington Supreme Court in other cases has upheld exceptional sentences 15 times the standard maximum. ... Did the [Washington] court go too far in any of these cases? There is no answer that legal analysis can provide. With too far as the yardstick, it is always possible to disagree with such judgments and never to refute them.

Another passage from the majority provides:

> Any evaluation of *Apprendi*'s "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea,

> would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment,.... based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. We can conceive of no measure of fairness that would find more fault in the utterly speculative bargaining effects Justice Breyer [dissenting] identifies than in the regime he champions. Suffice it to say that, if such a measure exists, it is not the one the Framers left us with.

The *Blakely* majority embraces the concept of the realistic "maximum potential sentence." Thus a "departure" from this norm violates the Sixth Amendment because the jury did not make this factual finding justifying the exceptional sentence.

As noted, Tennessee has no such exceptional sentences. Indeed, the defendant must receive pretrial notice of prior convictions used to trigger higher Ranges. See Tenn. Code Ann. §40-35-210(g): "A sentence must be based on the . . . record of prior felony convictions filed by the attorney general with the court as required by §40-35-202(a)." The pretrial notice provisions are based on "a defendant's prior record" so that a defendant can evaluate the risks and chart a course of action before trial. *State v. Lowe*, 811 S.W.2d 526, 527 (Tenn. 1991), discussing current Tenn. Code Ann. §40-35-202(a). See also *State v. Stephenson*, 752 S.W.2d 80 (Tenn. 1988) which continues to apply to the 1989 sentencing law, *State v. Gilmore*, 823 S.W.2d 566, 571 (Tenn. Crim. App. 1991).

Arguably *Blakely* could be limited to such "exceptional" or "departure" sentences, which means that the case may have no impact in Tennessee save to prohibit our legislature from enacting such provisions in the future. I believe, however, that *Blakely* will not be limited to just the "exceptional" out-of-range sentence. Indeed, it would have been too easy for the majority to have limited the holding to the departure sentence and have left the within-the-range enhancement issue "for another day."

There is no "other day." *Blakely* prohibits all judicially imposed sentencing "enhancements" even within the "expected" Range. I am of this view since I cannot read *Blakely* in anything but a literal manner.

Blakely, applied to Tennessee law, requires that we first consider that our sentencing ranges encompass a significant span of years. The "expected" sentencing range under the Washington Sentencing Reform Act examined in *Blakley* was limited to 49-53 months. In Tennessee a "first offender" can be sentenced to 8 to 12 years within Range I for a Class B felony. The difference between the high and low in *Blakely* was only 4 months; in the Tennessee example it is 4 years! In this light, Tennessee does not need a "departure" sentence since the Tennessee judge can impose a 50% increase if there are sufficient statutory enhancement factors.

Without question the Tennessee statutory enhancement factors have not been found by the jury since, as noted by *State v. Jones*, 883 S.W.2d 597 (Tenn.1994), our system precludes double dipping whereby an element of the crime can be once again used to enhance the sentence. Many of these factors are highly relevant to the sentence but should never be in evidence when the jury is considering guilt or innocence. For example, Tenn.Code Ann. §40-35-114(2) provides, as an enhancement factor, that the defendant "has a previous history of ... criminal behavior." No defendant could receive a fair trial if there were wholesale introduction of prior sins that a judge could appropriately consider at the later sentencing hearing. Yet it is the very existence of non-jury found "extra factors" which precludes an enhanced sentence according to this extended passage from the *Blakely* majority:

> In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021 (1)(b). It observes that no exceptional sentence may exceed that limit. See § 9.94A.420. Our precedents make clear, however, 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.* ... "the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 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.
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> The judge in this case could not have imposed the exceptional 90- month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense, ...which in this case included the elements of second-degree kidnapping and the use of a firearm, ... Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. ... The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi (*because that is what the judge could have imposed upon finding a hate crime) or death in *Ring (*because that is what the judge could have imposed upon finding an aggravator).

This extended passage is telling because it alerts us to the fact that sentencing enhancements apart from the elements of the crime may be beyond the judge's constitutional authority to consider where they involve factfinding on potentially contested issues. I have earlier suggested that *Blakely* clearly prohibits "departure sentences outside the Range." However, enhancements inside the Range may also be constitutionally suspect. This is so because of Tennessee's "presumption" that, absent proof of enhancement factors, the defendant must be sentenced at the minimum within the Range (or at mid-Range for a Class A felony.)

Since our statutory sentencing enhancements can dramatically increase the sentence from the presumptive minimum to the maximum within the Range, I believe such enhancements are precisely the sort of factual determinations that must now be assessed by a jury beyond a reasonable doubt. Try as I may, I can read *Blakely* in no other fashion. This is particularly the case since our Ranges have presumptive minimums and have such an enormous spread of not just months but years.

The just-quoted passage from *Blakely* ends with a citation to *Ring v. Arizona,* 536 U.S. 584 (2002). *Ring* applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. The Supreme Court concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding.

Ring was given little attention in Tennessee because it dealt with a judge-imposed death penalty where ours is imposed by a jury. However, upon closer inspection, *Ring* stands for a much broader doctrine. *Ring* held that the Constitution does not require that the jury impose the death penalty. *Rather,* the Constitution requires that it is the jury that must make the

finding that a particular aggravator exists beyond reasonable doubt, which then authorizes a death penalty determination by either a judge or jury.

Footnote 4 in *Ring v. Arizona*, 536 U.S. 584, 597 (2002) answers a host of *Blakely*-related questions:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. See *Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. See *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. See *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi*, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Fourteenth Amendment "has not ... been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

Given that nothing in *Blakely* calls into questions the continued vitality of these precedents, I believe I can make some suggestions which will maintain

the integrity of Tennessee's sentencing laws without resorting to our discarded practice of full-blown jury sentencing at a unified trial.

First, we should remember that the overwhelming majority of cases are resolved by a negotiated settlement via plea negotiations. *Blakely* makes crystal clear that a defendant may always waive his *Apprendi* rights:

> When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. ... If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.

It is beyond the scope of this paper to make more specific suggestions as to guilty pleas except to say that all Tennessee jurisdictions now use pre-printed waiver forms and thus appropriate waivers can be included where there will be a later sentencing hearing. I strongly suggest that the guilty plea colloquy include a waiver of the right to a jury trial as to guilt and as to sentencing enhancement factors.

Recall that *Blakely* squarely held that: "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Once we accept that sentencing enhancement factors are "facts legally essential to the punishment" it is a relatively simple matter to have a

defendant waive that right just as he or she does regarding elements of the crime when entering a guilty plea.

Over-reliance on plea bargaining is not the only solution since sentencing negotiations are often a function of what the judge will impose in a contested case. What should we do in the contested case where there is no waiver of jury-determined sentencing enhancements? In my view, the unsatisfactory answer is that until we can amend the sentencing laws the judge is now limited to imposing the statutory presumptive sentence. The concluding passage from *Blakely* makes this inevitable:

> Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

Confining sentences to the presumptive minimum is not the end of the world given the length of even the lower ends of some of the Ranges under Tennessee law. Our most serious offenses are Class A felonies which "presume" a mid-Range sentence and most of these crimes require 85% of the sentence to be served before the offender is released. Thus, there will be no mass release of dangerous criminals.

While I believe that a jury must now determine enhancement factors, there may be one exception for the enhancement factor permitting consideration of prior convictions not otherwise used to move the defendant to a higher Range. Tenn. Code Ann. § 40-35-114(2). Certainly, if *Blakely* allows prior convictions to justify a departure to higher Ranges, the opinion would permit prior convictions to increase the sentence within the same Range. We should exercise caution that such increases should be commensurate with increases prior to *Blakely*, lest this lone factor be used to compensate for the fact that other enhancements are prohibited until we can amend the law.

Recall also that defendants are often charged with multiple crimes. Rare is the case where a prosecutor cannot carve out a host of separate charges from a single criminal episode. Multiple convictions allow for the possibility of consecutive sentencing. We must be cautious that consecutive sentences are not inappropriately used as a vehicle substantially to increase a total sentence structure where *Blakely* compels the minimum sentence for each crime. There is nothing (at least yet) that suggests that a defendant must receive a jury trial on consecutive sentencing factors, but an "end run" around *Blakely* should not be tolerated.

What about retroactivity? Are sentences imposed three years ago suspect? Probably not. Decided the same day as *Blakely, Schriro v. Summerlin*, __ S.Ct.__, 2004 WL 1402732 (U.S. June 24, 2004) held that *Ring* does not apply retroactively to cases already final on direct review. There is no reason to suppose that *Blakely* will be treated any differently.

The retroactivity "solution" begs the question of the disposition of cases that are not yet final on direct appeal. The answer is that if the defense lawyer raises the issue on appeal (even belatedly while the appeal is still pending), the case should be remanded for re-sentencing along the lines suggested here in that the presumptive sentence should be imposed. But I believe the judge is free to alter other sentencing determinations such as consecutive sentencing. There is nothing novel in this approach since other pipeline sentencing determinations had to account for new laws. Indeed, the 1989 Tennessee law applied to all pending cases and spawned a significant amount of litigation. See generally, *State v. Pearson*, 858 sw2d 879 (Tenn. 1993).

What about misdemeanors? Misdemeanor sentencing is governed by Tenn. Code Ann. § 40-35-302. Although otherwise entitled to the same considerations under the Sentencing Reform Act of 1989, unlike a felon, a misdemeanant is not entitled to the presumption of a minimum sentence.

State v. Seaton, 914 S.W.2d 129 (Tenn.Crim.App.1995). Moreover, as a sentencing hearing is not mandatory, trial courts are not required to explicitly place their findings on the record.

In determining the percentage of the misdemeanor sentence that must be served in confinement, the court may consider enhancement and mitigating factors as well as the legislative purposes and principles related to sentencing. *State v. Gilboy*, 857 S.W.2d 884 (Tenn. Crim.App.1993). However, the statutory enhancement and mitigating factors do not have to be the only factors considered by the trial court in determining the appropriate sentence. Indeed, consideration of the statutory enhancement factors may very well be futile in the area of misdemeanor sentencing since the very terms of certain enhancement factors limit their application solely to felony offenses. See generally, *State v. Palmer*, 902 S.W.2d 391 (Tenn 1995).

Fortunately, since our felony system of enhancement factors is not mandatory for misdemeanors and a judge has discretion to impose the full range of statutory penalties with no presumptive minimum, I am firmly of the view that *Blakely* has no application to Tennessee misdemeanors.

In the short term, we can accommodate the *Blakely* holding by assessing the statutory presumptive sentence for all felony cases where the defendant declines to waive his or her Sixth Amendment sentencing rights.

Cases on direct appeal will have to be remanded but we have encountered similar dilemmas previously and survived. For example, some twenty-five years ago the jury instruction on parole was struck down and a number of cases were remanded as a result. See, *Farris v. State*, 535 S.W.2d 608 (Tenn. 1976) and *Adams v. State*, 547 S.W. 2d 553 (Tenn. 1977).

C.

To remedy what I believe are constitutionally mandated limitations on judicial sentencing, I suggest we selectively amend the 1989 Sentencing Act. This does not require wholesale revisions of the law. Instead I advocate a bifurcated jury trial where – after guilt is assessed – the jury determines only the existence of statutory enhancement factors. That accomplished, the judge may then impose a sentence considering only those factors that the jury determined were proven by the government beyond a reasonable doubt. This system is workable because there is no requirement that the jury impose the sentence, only that the jury determines the existence of enhancement factors that increase the sentence above the presumptive sentence fixed by the legislature. This ignores for the moment that in Tennessee a jury must impose a fine of over fifty dollars because of our state constitution.

Recall that critical footnote 4 in *Ring v. Arizona*, 536 U.S. 584, 597 (2002). The judge can consider prior convictions even if it increases the statutory maximum sentence. Thus, we can use the existing Tennessee framework that drives a defendant to higher ranges based on prior convictions.

There is no requirement that statutory factors in mitigation be submitted to a jury except to the extent that they disprove enhancement factors. *Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation"). Thus, once the jury has found the appropriate enhancement factors the judge may conduct a hearing where he or she weighs the various factors as contemplated by our current law. As *Ring* also observes, the higher courts can modify the sentence thus preserving our system of appellate review.

Finally, the right to an indictment extends to elements of the offense and thus arguably the indictment need not include any statutory enhancement factors. In my view, Due Process dictates that the defendant be notified of the government's intent to seek a higher sentence and thus we may want to require that enhancement factors be included in pretrial notice provisions as we do now for prior convictions.

The sentencing hearing can then be conducted exactly as it is now complete with a presentence report. Informed decision-making is critical and I believe *Blakely* did not intend to tamper with the procedural components of enlightened sentencing schemes.

What we must do is amend the law to require that whatever enhancement factors the government believes exist must be submitted to a jury. The framework for this already exists in our bifurcated system for determining aggravating factors in death penalty cases and in cases in which the government seeks life without parole. The same jury comes right back in after guilt is determined and the prosecutor puts on his or her proof, the judge charges the jury, and the jury returns a special verdict signifying if these factors have been proven beyond a reasonable doubt.

What about the various mitigation factors contained in our sentencing law? As noted in the *Ring* footnote, addressed earlier, a jury need not assess the separate statutory mitigation factors. Thus, a bifurcated proceeding should not require defense proof of mitigation. Such evidence is simply not relevant to the jury-determination of the statutory enhancement factors the government must establish for use at the later sentencing hearing conduced by the judge alone.

Since the jury does not impose any sentence these separate proceedings should not consume much time. Indeed, the government's proof in the guilt phase may have already supplied the necessary evidence. For example, even though it is not an element of the crime, the state may chose to prove that a pistol caused the murder. If the firearm were the only sentencing enhancement factor, few attorneys would waste the daylight to have a separate hearing if that factor was not contested.

In other cases, the statutory enhancement factor may be the "whole ball of wax" and thus substantial time would be devoted to proving or rebutting the existence of a particular factor. Enhancement factor 22 relating to a "criminal street gang" comes to mind as a factor that could be hotly contested in a rural area where there may be gangs but very few streets.

It is precisely such a factual contest in front of a jury that convinces me that *Blakely* makes sense: why should the judge be allowed to enhance a sentence from say, three years to the statutory maximum of six based only on a preponderance of the evidence of dubious facts? This is particularly true given that our enhancement factors have no assigned weight. Perhaps it is appropriate that the Constitution now entrusts these enhancement findings to a jury.

For this proposal to work efficiently with a lay jury, we need to reassess our statutory enhancement factors. Some factors are highly subjective and needed improvements in language are obvious. Definitions for the enhancement factors are necessary for those factors that are retained. Careful attention must be given to how these factors will interact with each other. While daunting, this process is not as difficult a task as the four years of effort the Sentencing Commission needed to rewrite our substantive code and sentencing laws.

I believe we should avoid the "quick fix" solution that suggests we should do away with guidelines as a method of avoiding *Blakely* problems. Another purported remedy is to have a presumptive *maximum* and allow the defense to mitigate the sentence downward. Such solutions smack of a "Hanging Judge" mentality and are inconsistent with an enlightened sentencing system. I am not overly concerned about such proposals given the astronomical fiscal note that would accompany such legislation.

We have a sound sentencing system. Compared to other jurisdictions that may have to revise their entire Codes, our sentencing laws need no more than a modicum of procedural tinkering to comply with the dictates of *Blakely*.

D.

Since I have been involved with sentencing laws for thirty years, my colleagues have asked my opinion about the correctness of *Blakely*. I agree that exceptional or departure sentences should be in the realm of the jury rather than the judge, somewhat like our old habitual criminal law. The problem is, as the Supreme Court held, where does one draw the line? When does the gun become an element of the crime, and when does it become a "sentencing factor" that the judge can use to double the sentence?

The dissenters in *Blakely* complained: "The consequences of today's decision will be as far reaching as they are disturbing." I agree that the decision is far reaching, but it is certainly not disturbing. I am not offended by the proposition that enhancements -- be they labeled element of the crime or sentencing factors -- can only apply against the defendant if the jury says so. That, in my opinion, is the beauty of *Blakely*, which views the Sixth Amendment in a new light: "[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." I applaud this observation since our Constitution must always be assessed in new lights so we can admire it the better.

END