

Minority Report: Restoring Judicial Discretion to Impose Exceptional Sentences for Violent Crimes

In SB 5477, the legislature restored the discretion of prosecutors to seek an exceptional sentence lost as a result of the *Blakely* decision by establishing a jury trial procedure. The legislature deferred the issue of restoring judicial discretion to impose an exceptional sentence upward and instead required the Sentencing Guidelines Commission to “consider how to restore the judicial discretion which has been limited as a result of the *Blakely* decision” and to “review all provisions providing for exceptional sentences both above and below the standard sentencing ranges.” It further required the Sentencing Guidelines Commission to “consider the use of advisory sentencing guidelines for all or any group of crimes.”¹

Prior to the United States Supreme Court decision in *Blakely v. Washington*, judges had the ability to impose an exceptional sentence upward following a trial or a plea, if the judge made findings that an aggravating factor or factors existed from the non-exclusive statutory list or additional factors identified in case law. The majority of such sentences were imposed in cases in which the prosecutor sought an exceptional sentence upward. However, in a limited number of cases where the prosecutor did not seek an exceptional sentence upward, such as *Blakely*, the judge had the ability under Washington law to impose an aggravated sentence.

Under the current state of the law, judges do not have their historical, independent authority to impose sentence. Rather, judges’ sentencing discretion is limited to the imposing standard range sentences within the generally narrow

¹ Legislative intent and tasks assigned to the Sentencing Guidelines Commission in SB 5477 include the following:

While the legislature intends to bring the sentencing reform act into compliance as previously indicated, the legislature recognizes the need to restore the judicial discretion that has been limited as a result of the *Blakely* decision.

Sec. 5 (1) The sentencing guidelines commission shall review the sentencing reform act as it relates to the sentencing grid, all provisions providing for exceptional sentences both above and below the standard sentencing ranges, and judicial discretion in sentencing. As part of its review, the commission shall:

- (a) Study the relevant provisions of the sentencing reform act, including the provisions in this act;
- (b) Consider how to restore the judicial discretion which has been limited as a result of the *Blakely* decision;
- (c) Consider the use of advisory sentencing guidelines for all or any group of crimes;
- (d) Draft proposed legislation that seeks to address the limitations placed on judicial discretion in sentencing as a result of the *Blakely* decision; and
- (e) Determine the fiscal impact of any proposed legislation.

(2) The commission shall submit its findings and proposed legislation to the legislature no later than December 1, 2005.

cells of the sentencing grid. Judges currently have no authority to impose an exceptional sentence upward unless the prosecutor seeks such a sentence and either the defendant agrees or the prosecutor proves the alleged aggravating factors to a jury.

The Sentencing Guidelines Commission received correspondence from Judge Michael Trickey, President of the Superior Court Judges' Association, advising the Commission of the Association's strong support of advisory guidelines. Given the short timeline for the Commission's report to the legislature, Judge Trickey also advised the Commission of the Association's interest in restoring, on an emergency basis, judicial discretion to impose an exceptional sentence upward for violent offenses, a subset or "group of crimes" as authorized by the legislature.

The Sentencing Guidelines Commission also received correspondence from Governor Christine Gregoire. Governor Gregoire noted that the law she signed, SB 5477, required the Commission to consider how to restore "the judicial discretion which was lost as a result of *Blakely*." She stated that SB 5477 "reduces the role of victims in the sentencing process [and] fails to make the fullest use of the experience, understanding, and wisdom that judges bring to sentencing, especially in the most difficult cases." Noting that she shared the judges' concerns, Governor Gregoire stated that she expected the Commission "to take those concerns and problems seriously, and work diligently with trial court judges and others to draft a legislative proposal that recognizes the value of that discretion and allows for its greater use in felony sentencing."

An emergency proposal to restore judicial discretion under the SRA to impose an exceptional sentence upward for violent offenses is contained in SB 5476 filed in the 2005 legislative session. In order to ensure that the fiscal impact of this proposed legislation is very low on both state and local government, the proposal has been further narrowed and contains the following provisions:

1. For offenders convicted of a violent offense, the upper limit of the standard sentencing range is advisory up to two times the top of the standard range where the standard range is a prison sentence (a sentence where the lower limit of the standard range is more than 12 months).
2. If the offender's standard range is a jail sentence (the top of the standard range is 12 months or less), the judge may impose twice the upper limit of the standard range or 12 months, whichever is less.
3. The prosecutor must assert a statutory aggravating factor in cases in which the state, through the prosecuting attorney, seeks an aggravated sentence.

This narrow emergency proposal restores the role of victims, particularly in cases in which the prosecutor has not sought an exceptional sentence upward, it restores the check and balance of the judicial branch on the decisions of the

executive branch through the prosecutors' plea bargaining decisions and it is also consistent with the stated purpose of the Sentencing Reform Act "to structure, but not eliminate" sentencing discretion.

The fiscal note developed for this proposal indicates that under the two most reasonable scenarios, there would be 1) a slight decrease in prison population until 2015 when the bed demand will increase by two beds, rising to 31 additional beds by 2025 or 2) a slight decrease until 2016 when the bed demand will increase by three beds, rising to 37 additional beds by 2025. This proposal accomplishes, with little or no cost, the legislative goal of restoring some of the judicial discretion to impose an exceptional sentence upward in the category of violent offenses lost as a result of the *Blakely* decision.

Some Sentencing Guideline Commission members wish to see an increase in the judges' authority to impose "exceptional sentences both above *and below* the standard sentencing ranges," part of the larger task given to the Commission "to review the SRA as it relates to the sentencing grid, all provisions providing for exceptional sentences both above and below the standard sentencing ranges, and judicial discretion in sentencing." Because the judges' ability to impose an exceptional sentence below the standard range was not affected by the *Blakely* decision, the Superior Court Judges' Association seeks to restore on an emergency basis the judicial discretion to impose an exceptional sentence upward for violent offenses as outlined in the amended version of SB 5476, similar to the action taken by the legislature in 2005 to restore the state's ability to seek an aggravated sentence. The Association also supports increasing judicial discretion to impose an exceptional sentence below the standard range.²

SB 5476, as modified, meets the Legislature's statement in SB 5477 of the "need to restore the judicial discretion that has been limited as a result of the *Blakely* decision." The most realistic analysis reveals that the fiscal impact of this proposal would be minimal. A minority of the membership of the Sentencing Guidelines Commission supports the restoration of judges' discretion to impose an exceptional sentence as outlined in the version of SB 5476 contained in Appendix A and finds that this proposal complies with the legislative directive to the Sentencing Guidelines Commission contained in SB 5477.

² As noted earlier, the Association strongly supports advisory guidelines. In addition, the Association supports a thorough re-assessment of the 25-year old Sentencing Reform Act.

APPENDIX A

1 NEW SECTION. **Sec. 2.** A new section is added to chapter 9.94A RCW to read as follows:

1) For offenders convicted of a violent offense, the upper limit of the standard sentencing range shall be advisory only; **provided however, that the state must assert a statutory aggravating factor in cases in which the state seeks an aggravated sentence.** Notwithstanding any other provision of law, the maximum sentence that a court may impose for a violent offense where the lower limit of the standard sentencing range is more than 12 months is the maximum sentence for the current offense under chapter 9A.20 RCW, or twice the upper limit of the standard sentencing range, whichever is less; the maximum sentence that a court may impose for all other violent offenses is twice the upper limit of the standard range or 12 months, whichever is less. This provision shall not apply to any offender sentenced under RCW 9.94A.712 or section 7 of this act.

(2) In making its determination of the sentence length to be imposed, the court shall consider the risk assessment prepared by the department of corrections, the presentence report and other materials provided by the offender, and any information provided by the victim or victims of the crime.

(3) A sentence imposed under this section shall be a determinate sentence unless it is imposed on an offender sentenced under RCW 9.94A.712. The sentence may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

Sec. 3. RCW 9.94A.480 and 2002 c 290 s 16 are each amended to read as follows:

(1) A current, newly created or reworked judgment and sentence document for each felony sentencing shall record any and all recommended sentencing agreements or plea agreements and the sentences for any and all felony crimes kept as public records under RCW 9.94A.475 shall contain the clearly printed name and legal signature of the sentencing judge. The judgment and sentence document as defined in this section shall also provide additional space for the sentencing judge's reasons, if any, for going either above or below the presumptive or advisory sentence range for any and all felony crimes covered as public records under RCW 9.94A.475. Both the sentencing judge and the prosecuting attorney's office shall each retain or receive a completed copy of each sentencing document as defined in this section for their own records.

(2) The sentencing guidelines commission shall be sent a completed copy of the judgment and sentence document upon conviction for each felony sentencing under subsection (1) of this section and shall