Sentencing in Washington after Blakely v. Washington

I. Historical Setting
Prior to 1984, every felony conviction in Washington carried a sentence of five years (Class C felonies), ten years (Class B felonies), or twenty years to life (Class A felonies). The court could impose a deferred or suspended sentence, on condition of probation and up to one year in jail; or it could sentence a person to prison for the maximum term. The court could recommend a minimum term to be served, but the parole board determined the ultimate release date based on finding the defendant was adequately rehabilitated.

The Washington Legislature enacted its Sentencing Reform Act (“SRA”) in 1981, to become effective in 1984. The SRA was intended to “bring law to sentencing.” It created a system that “structures, but does not eliminate, discretionary decisions affecting sentences.” One purpose of the SRA was to provide uniform sentences regardless of the county or the courtroom in which a sentencing occurred.

The SRA also signaled a significant philosophical shift for the state: instead of committing someone to a course of probation and treatment, or even to prison until they were rehabilitated, each person convicted would be sentenced to a determinate period of confinement within a statutory range. The standard range was determined from a grid. One axis displayed a numerical seriousness level of the crime of conviction; the other, an offender score determined by a person’s prior or other current criminal convictions.

The SRA intended courts to sentence people for criminal conduct, not for personal characteristics. Under the act, people were to be punished for the crime or crimes they had committed, instead of who they were or what they might do in the future. A court would sentence a person to a specific number of months; the state would release him when the sentence was completed. Sentencing was to occur in public, in the courtroom, with an actual sentence decided and announced, rather than in a parole board’s administrative process out of the public eye. The SRA contemplated no more parole board, no more efforts at treatment, no more quibbling over whether the person was adequately rehabilitated.

II. Standard Ranges and Exceptional Sentences
The Legislature anticipated that the standard-range sentences in the grid would be appropriate for the vast majority of cases. It also provided, however, that for those cases far removed from the norm of a particular crime, the court should be able to go above or below the standard range.

To sentence outside the standard range and impose an “exceptional” sentence, the court was required to make written findings of fact specifying what “substantial and compelling circumstances” set this case apart from the norm. The Legislature provided a list of illustrative factors the court could consider in going beyond the range. Once the court found that an exceptional sentence was warranted, the length of that sentence was left to the court’s discretion, up to the underlying statutory maximum of five years, ten years, or life.

A standard-range sentence was determined by what the prosecution chose to and was able to prove, or what the defendant admitted having done. The court could not go above the standard range based on factors that would make the charge a more serious crime. It could rely only on factors not otherwise calculated in the standard range. It also had to have evidence before it to support the findings. These facts either had to be admitted by the defendant or proven to the court during trial or at the sentencing hearing by a preponderance of the evidence.

A sentence within the standard range could not be appealed; a sentence outside the standard range was appealable. The appellate court would reverse the sentence if it found that (1) the reasons supplied by the sentencing court were not supported by the record before the trial court; (2) the reasons given did not justify a sentence outside the range; or (3) the sentence was “clearly excessive or clearly too lenient.”

III. Blakely v. Washington
Washington functioned under the SRA for twenty years on the understanding that felony crimes had two distinguishable components: “elements” to be charged by the prosecutor and proven to a jury beyond a reasonable doubt or admitted in a plea, and “sentencing factors” the judge

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could consider at the time of sentencing, if shown by a preponderance of the evidence. The sentencing factors could be proposed by any party, by a presentence report, by a victim, or by the court. A guilty plea did not bind the court to any sentence. Even if the state agreed to a standard-range recommendation, the court could impose an exceptional sentence if it found aggravating factors. Without an aggravating factor, however, the court was not permitted to go above the standard range.

Blakely v. Washington\textsuperscript{14} held that the “statutory maximum sentence” for a crime under the SRA was, in fact, the top of the applicable standard range. The court could not impose a sentence above that range without finding additional facts; thus, the defendant had a right not to be sentenced above that range without such a finding. Blakely held that, except for a prior conviction, any finding of fact that permitted a sentence above the standard range must be made by a jury and proven beyond a reasonable doubt.

With the decision in Blakely in June 2004, Washington’s Sentencing Reform Act was left with no procedure for imposing a sentence above the standard range.\textsuperscript{15} The Legislature would not meet until January.

IV. Response
After twenty years, the Sentencing Reform Act had been amended so many times that appellate courts were openly concerned about its complexity.\textsuperscript{16} By 2004, two members of the state’s Senate Judiciary Committee began discussing a comprehensive review of the entire statute—a project considered long-term.

After Blakely, however, the state’s Sentencing Guidelines Commission saw an immediate need to fill the gap created by the Supreme Court and to develop a mechanism to impose exceptional sentences above the standard range. A subcommittee of the Commission began meeting to draft a “legislative fix” for Blakely—perceived to be a small, perhaps temporary, amendment, pending the more complete review of the statute contemplated by some in the Legislature. We who served on the subcommittee shared one goal: to provide an amendment that changed the overall statute as little as possible.

We produced a recommendation that became Senate Bill 5477, which was passed and signed into law. In the process of reaching consensus, we encountered and chose among various options.

A. Advisory or Mandatory Guidelines?
Making the guidelines advisory rather than mandatory was an elegantly simple solution to Blakely. Removing the mandatory nature of the guidelines would remove the defendant’s right not to be sentenced above the range absent specific findings. It would grant judges the authority to impose the sentence they believed to be appropriate, taking the guidelines as a starting point. It would certainly end the many appeals of exceptional sentences.

As this possibility was discussed, it was interesting to see the response of the humans in the system. The Legislature was wary of returning power to judges—generally believing that they would be too lenient. Prison officials and state budgetary staff were aware of how prison populations would burgeon without guidelines controlling the length of sentences. Judges advocated for more discretion in sentencing, on one hand, yet, on the other, when confronted with making the guidelines merely advisory, some asked how they would decide what a sentence should be in any given case. An entire generation of practitioners knew only the SRA. Private defense counsel saw an opportunity for lower sentences for their clients, while public defenders foresaw only higher sentences—fears grounded in perceptions about economic disparity.

Everyone in the system was accustomed to the level of certainty and predictability offered by the guidelines. The superior court judges eventually proposed making the guidelines advisory in a particular way. They suggested removing the upper limit on standard sentencing ranges for more serious offenses and for offenders with higher offender scores. This, in effect, would turn the upper-right-hand corner of the state’s sentencing guidelines grid into a “topless” system. In this realm, judges would be permitted to impose sentences as lengthy as those provided for in the underlying statute—that is to say, five years, ten years, or life.

The Commission, and ultimately the Legislature, chose not to adopt either the judges’ recommendation or the broader suggestion that the entire system be made advisory. The concerns voiced by different constituencies about such a dramatic change in the state’s approach to sentencing made such a shift both substantively unappealing and politically untenable.

B. Legislatating a Blakely Procedure
In examining possible alternate policy responses, the subcommittee, which was composed of prosecutors, defense lawyers, and a law professor, looked to the experience of Kansas.\textsuperscript{17} Kansas was the only sentencing guideline state that had earlier changed its laws on exceptional sentences in ways that presaged—and insulated it from—the Supreme Court’s holding in Blakely. It therefore provided the most relevant example in the nation of an extant policy response.

The Kansas experience suggested that attention be paid to four key areas: (1) the respective roles of charging elements and sentencing factors; (2) the structuring of a list of aggravating factors; (3) the desirability and feasibility of bifurcating trials in guilt and penalty phases; and (4) the proper allocation of factual determinations between judges and juries.

1. Charging Elements vs. Sentencing Factors The subcommittee’s study immediately suggested that Blakely would require Washington to rethink its distinction between elements of a crime and sentencing factors. One of the cases creating the framework that was later filled in by Blakely, and which prompted the changes in Kansas,
was Apprendi v. New Jersey. In that case, the Court announced the following rule:

Other 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.18

The Blakely Court explained that the Apprendi rule reflects long-standing common-law criminal jurisprudence requiring that accusations contain every fact essential to the punishment, and that each accusation be confirmed by a jury.19 We on the Washington subcommittee concluded that this meant any aggravating sentencing factor would have to be alleged in the criminal charge.

We considered two options. The first was to provide a menu of potential aggravating sentencing factors in one section of the criminal code. A prosecutor could choose factors from this list to add to any crime charged. The second option was to add specific potential aggravating factors to definitions of crimes themselves.

The single-menu option was less disruptive to the sentencing law and the criminal code of the state in that it resembled the approach under the SRA. We chose to retain that format. The prosecution could charge any felony and could add to that charge any of the aggravating factors it believed it could prove beyond a reasonable doubt.20

2. Illustrative vs. Exclusive List of Aggravating Factors

The original SRA contained an illustrative list of aggravating factors. Twenty years of litigation had provided many additional factors as bases for sentences above the standard range.

Senate Bill 5477 listed all the factors the subcommittee was able to derive from case law supporting exceptional sentences. They included factors such as the following: the offense involved an invasion of the victim’s privacy; the defendant demonstrated an egregious lack of remorse; the offense involved a destructive and foreseeable impact on persons other than the victim; or the defendant committed the offense against a victim who was acting as a Good Samaritan.21

The Commission offered the Legislature the choice of making the list exclusive or keeping it illustrative, as its shorter predecessor had been. The Legislature chose to make the list exclusive. This decision recognized that, after Blakely, sentencing factors were much more like offense elements than previously conceived. The bill specified that it intended merely to codify existing case law, not to expand the law beyond its scope at the time of enactment.22

3. Single Trial or Bifurcation

Under Washington law, separating trials into distinct guilt and penalty phases is strongly disfavored. Washington had conducted such a bifurcated procedure only for potential death-penalty cases: if the jury found a defendant guilty of aggravated first-degree murder, it then would hear additional evidence to consider whether there were reasons for lenity.23

Many people predicted that bifurcating the trial of aggravating sentencing factors from the underlying crime would create a huge additional cost to the system. They feared the logistics would be too complicated. Despite reports from Kansas practitioners and a few local examples that the procedure was not difficult,24 resistance to bifurcation was strong.

Others were concerned that prosecutors might pile on sentencing allegations in order to bring into a trial prejudicial information that otherwise would be excluded under evidence rules.25 Everyone agreed there were some sentencing factors that, if tried with the underlying crime, would be hopelessly prejudicial as to the crime itself. In such cases, bifurcation seemed required.

The Commission proposed to the Legislature two alternative approaches: (1) permit the trial judge to determine when bifurcation would be appropriate, based on whether the evidence to support the aggravating factor would otherwise be admissible at trial on the underlying charge; or (2) require a single trial proceeding, unless the state alleged one of the specified list of aggravating sentencing factors.

Perhaps because of concerns over burdens to the system, the Legislature chose the more limited latter approach.26 SB 5477 specified that the jury’s verdict as to each aggravating factor “must be unanimous, and by special interrogatory,” finding it proven beyond a reasonable doubt.27

4. Facts for Juries vs. Judges

Aggravating factors are necessary, but not sufficient, to impose an exceptional sentence. The SRA required that such factors not merely be present, but that they be “substantial and compelling,” setting a particular crime apart from other crimes of its ilk.28 This qualitative decision was originally left to a judge’s discretion; the court would serve as a gatekeeper to limit exceptional sentences to a small minority of cases sentenced.

It was difficult to contemplate presenting to a jury how a particular crime was different from the norm of that crime, or sufficiently different to warrant a sentence outside the range. Would Blakely require the parties to present evidence of the “normal” second-degree rape or first-degree murder?

This seemed impractical, if not impossible. We concluded that the jury would determine whether the aggravating factor existed. The judge would still determine whether the quality of the aggravating factor was sufficient to support an exceptional sentence. Thus a jury may find that a victim was “particularly vulnerable” in a child sex abuse case, or that a violent crime involved “deliberate cruelty.” But the court would have to find that the vulnerability or cruelty of the particular case was “substantial and compelling” to set the case apart from the norm.

Case law also had created grounds for exceptional sentences based on an offender score that underrepresented the offender’s true criminal history. If the offender’s history was substantially greater than this top range, the court
could find that the range was "clearly too lenient" and sentence above it.39

Because these grounds were based on the fact of criminal convictions, the exception to the Apprendi/Blakely rule, we specified that these factors would be determined by the court without a jury determination.39 To this list we added the situation in which the parties stipulate in the plea agreement that justice is best served with an exceptional sentence above the range.31

5. Enactment The Legislature enacted SB 5477 on April 13, 2005. The governor signed it into law on April 15, 2005.

C. A Judicial Response: State v. Hughes

On April 14, 2005, the Washington Supreme Court issued its interpretation of Blakely in State v. Hughes.34

Hughes was a consolidation of three cases in which exceptional sentences above the standard range had been imposed based on facts not supported by jury findings. The court held that the exceptional-sentence provisions of the SRA were facially constitutional,35 but as applied in these cases, the statute violated the right to a jury trial. It also held that such violations can never be harmless. And because the statute was left with no method of providing a jury trial on the sentencing factors, it held that empanelling juries on remand for resentencing would usurp the legislature's authority. The court remanded all three cases for resentencing within the standard range.

The Hughes court analyzed Blakely and the SRA in largely the same manner the subcommittee had in drafting the legislation. It concluded that Blakely left intact the sentencing judge's authority to determine whether facts alleged and found are sufficiently substantial and compelling to warrant imposing an exceptional sentence.34

Hughes went further, however, and held it unconstitutional for the trial court to find that a defendant's criminal history, as reflected in his offender score, would result in a sentence range that was "clearly too lenient" because of crimes that were not included in the offender score.

Under Washington law, however, the court may not consider criminal history per se in issuing exceptional sentences because prior convictions are used to compute presumptive sentences. . . Therefore, prior convictions alone can never be enough to warrant an exceptional sentence under Washington law—a aggravating factors require something more than just prior conviction history.35

This aggravating factor also required "the conclusion of whether the presumptive sentence calculated is clearly too lenient in light of the other convictions."36 The court held that this "too lenient conclusion is one that must be made by the jury."37 The fact to be found is whether there is "some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive sentencing range."38

Similarly the court held that "rapid recidivism" required a jury to determine that the short time since a prior offense "demonstrated a flagrant disregard for the law" and a "complete lack of remorse," and that an "ongoing pattern of the same criminal conduct" must include a combination of similar offenses and a heightened harm or culpability the pattern indicates—both of which must be determined by a jury.39

Hughes essentially held that, short of a stipulation by the defendant to the aggravating factors, there could be no exceptional sentence above the standard range without a jury finding the factor existed. It thus invalidated SB 5477, Sec. 3(2)(b)-(d), leaving no basis whatsoever by which a court could initiate an exceptional sentence above the standard range.

D. Ongoing Discussions

When it enacted SB 5477, the Legislature added a directive to the Sentencing Guidelines Commission. The Commission is to review the entire SRA as it relates to the grid, exceptional sentences above and below the standard ranges, and judicial discretion in sentencing. It is to draft proposed legislation “that seeks to address the limitations placed on judicial discretion in sentencing as a result of the Blakely decision” and submit it to the Legislature by December 1, 2005.40

From a numeric standpoint, there are very few cases in which the courts seek to impose a sentence higher than the standard range against the wishes of the parties. Out of about 30,000 felony sentences in Washington last year, only about 100 involved upward departures without the defendant’s consent.41 Only one-quarter of those departures were made without the prosecutor requesting it.42

Washington's elected judges, however, face a particular quandary. The public perceives the sentencing hearing as the forum in which it can see justice done. It is the only part of the process in which the crime victim has a right to appear and be heard regarding what sentence should be imposed.43 Yet following Blakely and Hughes, the sentence has already been determined by the prosecutor's charging decision, and either the guilty plea or the jury's verdict. For plea agreements, which represent more than 90 percent of criminal cases, the sentence essentially has been determined behind closed doors, out of the public eye.

Thus, particularly for the most egregious and highest-profile cases, where the public is most attentive and demanding of high sentences, the judges perceive that they may only shrug and say they have no power.

The SRA has always required the court, when it accepts a guilty plea, to specifically find that the agreement “is consistent with the interests of justice” and with the prosecuting standards.44 Thus at a plea hearing, a court has the discretion to reject a plea agreement reached by the parties if it believes an exceptional sentence is warranted but is not possible within the agreement.

There are two practical problems with the court exercising this discretion. In some counties, the parties could
simply reset the hearing before a different judge who would accept the plea. But in two large urban counties, the courts have streamlined their calendars by appointing a judge pro tem to accept all guilty pleas. The judge pro tem does not review the file; he has authority only to ensure that the plea is entered knowingly and voluntarily. No elected judge reviews the case file before the plea is entered.

A proposal to move this discretion to the sentencing hearing also met with objection. If the judge finds that the plea agreement is not in the interests of justice, the plea is not accepted. The case cannot proceed to sentencing but has to be renegotiated to a resolution. It is particularly disruptive to have this occur when all the parties and victims have appeared for sentencing, expecting the case to be over.

Considering aggravating factors that the prosecution chose not to charge also requires the court to second-guess the prosecutor’s assessment of the evidence. Although allegations may exist, the court cannot know that some witnesses are unwilling to appear or have great weaknesses in their credibility.

Recognizing the aggravating factors as elements, however, demonstrates a further problem with the court being involved in rejecting a plea agreement. To initiate an exceptional sentence, the court must give notice of, or involved in rejecting a plea agreement. To initiate an exceptional sentence, the court must give notice of, or

V. Conclusion

The Commission chose to propose to the Legislature a new grid with each of the ranges slightly expanded an equal distance up and down. The bottom of each range would now be 2/3 of the top, instead of the previous 75%. The midline of each range would remain the same. The new grid also contains a new column for an offender score of “10 or higher.” This column’s range goes from the bottom of the range for an offender score of 9 to the statutory maximum of five years, ten years, or life.

If enacted, this proposal gives the courts slightly more discretion within each standard range, and no upper limit for offenders with a particularly long criminal history, regardless of the offense. The Commission also will recommend a new mitigating factor to permit a downward departure when the offender score reflects other current offenses instead of prior offenses.

Any plans for an advisory guidelines system will be subject to further study and discussion for a future legislative session.

Notes

1. Ms. Nussbaum’s participation informs her observations in this article, but any opinions expressed here are hers alone and should not be considered the opinion of the Commission in any way.
3. RCW chapter 9A.4A.
5. RCW 9.94A.010.
7. The Legislature has resurrected some of the aspects initially discarded in the SRA: e.g., sentences for certain sex crimes are again indeterminate, leaving the Indeterminate Sentence Review Board to determine when the offender will be released, RCW 9.94A.712; certain drug crimes now have an alternative involving early release and outpatient treatment, RCW 9.94A.660, and a completely separate grid, RCW 9.94A.517-.518; and the Department of Corrections conducts risk assessments of each offender to determine the amount of supervision upon release, RCW 9.94A.501.
8. RCW 9.94A.535. One report showed that 91.9 percent of all felonies were sentenced within the standard range; only 2.3 percent were above the standard range, and 5.8 percent were below the standard range (including first-time offender waivers and special sex offender sentences, as well as those cases with mitigating factors). Sentencing Guidelines Commission, State of Washington, Adult Felony Sentencing I-15 (1996).
9. Former RCW 9.94A.535. These include factors like the following: the defendant’s conduct manifested deliberate cruelty to the victim; the defendant knew the victim was particularly vulnerable or incapable of resistance; the offense was a violent offense and the defendant knew the victim was pregnant; the offense was a "major economic offense" as defined, or a "major violation of the Uniform Controlled Substances Act" as defined, Former RCW 9.94A.535(2)(a)-e).
10. "Defendants will be held accountable for what they have been convicted of, but not for crimes that the prosecution either could not or chose not to prove. . . . This policy . . . will go far to bring integrity to the process of determining guilt and imposing punishment, and thus fulfill the purpose of the Sentencing Reform Act." D. Boerner, Sentencing in Washington 9-18 (1985), quoted with approval in State v. Barnes, 117 Wn.2d 701, 707, 818 P.2d 1088 (1991).
12. Former RCW 9.94A.530(2).
13. RCW 9.94A.585(4). To date, no sentence has been found to be “clearly excessive” so long as it did not exceed the underlying statutory maximum for the crime set out in RCW 9A.20.021, i.e., five years, ten years, or life.
15. Blakely did not affect the court’s ability to impose a sentence below the standard range.
16. “[W]e want to observe that the trial court should not be faulted for the defects in its judgment and sentence. Since 1981, the SRA has been amended by 175 session laws, an average of almost eight per year! It has become so astounding and needlessly complex that it cannot possibly be used both quickly and accurately. It is extremely difficult to identify what statute applies to a given crime, much less to coordinate that statute with others that may be related. The situation was recognized but not remedied—it may even have been exacerbated—by wholesale recodifications in 2001. The SRA screams for thoughtful simplification.” State v. Jones, 118 Wn. App. 199, 210, 76 P.3d 258 (2003) (court’s emphasis).
18. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely, 124 S. Ct. at 2536. The exception for prior convictions was upheld in Almendarez-Torres v. United States, 523 U.S. 224 (1997); but see Jones v. United States, 526 U.S. 227 (1999) (Thomas, J., concluding Almendarez-Torres was wrongly decided although he was one of the five members of majority opinion).
20. Senate Bill 5477, Sec. 3 (amending RCW 9.94A.535).
SB 5477, Sec. 1. Preparing jury instructions to define and limit these factors within the meaning of the case law will be more complicated.

RCW 10.95.060-.070.

Kansas reported that bifurcation was not difficult. After a guilty verdict, the jury is retained while evidence of the additional sentencing factors is presented. The jury then retires to answer special interrogatories. This author had a Washington State trial in February 2005, before the Blakely fix was enacted, at which just such a proceeding was held. It took less than an hour of additional court time.

E.g., ER 609, ER 404(b), ER 403.

SB 5477, Sec. 4(3). The excluded factors are:

(e) The current offense was a major violation of the Uniform Controlled Substances Act . . . related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: . . . [and]

(v) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy: . . .

(h) The current offense involved domestic violence . . . and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

. . .

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

. . .

(t) The defendant committed the current offense shortly after being released from incarceration.

SB 5477, Sec. 4(2).

RCW 9.94A.535.

An offender score does not include misdemeanor convictions, some convictions are not counted after a certain period of crime-free life, and the grid extends only as high as an offender score of “9 or above.” Thus if one has an offender score of 15, the standard range is the same as for 9, leaving an offender with “free crimes.”

SB 5477, Sec. 3(2) (amending RCW 9.94A.535).

It held that the procedure was constitutional if the defendant stipulated to the aggravating factors or waived his rights under Apprendi. Hughes, 154 Wn.2d at 133.

Hughes, 154 Wn.2d at 137.

Id. at 135.

Id. at 136.

Id. at 137.

Id. at 140 (court’s emphases).

Id. at 141-42.

Id. at 140.

SB 5477, Sec. 5.


RCW 9.94A.500(1).

RCW 9.94A.431(1).