How does a Supreme Court decision about the sentencing of a felon in a Washington State court impact Indiana?

In *Blakely v. Washington*, Ralph Howard Blakely pled guilty to the kidnapping of his estranged wife. The general penalty for second-degree kidnapping, a Class B felony, was up to 10 years. However, the presumptive sentence for the facts admitted in his plea was 49 to 53 months.

The law in Washington State allowed the trial judge court to enhance this sentence. After making a judicial determination that Blakely had acted with deliberate cruelty, the judge added an additional 37 months to the statutory maximum of 53.

Blakely appealed his case, saying that he was entitled to have a jury make any findings that he had not pled to. He argued that the 6th Amendment's guarantee of trial by jury meant the judge could not make these determinations on his own.

In a 5-4 decision issued last month, the Supreme Court agreed with Blakely. Justice Scalia wrote the majority opinion, joined not only by the conservative Justice Thomas, but by the more moderate Justices Stevens, Souter, and Ginsberg.

The *Blakely* ruling builds upon the Court's decision in *Apprendi v. New Jersey* that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Blakely* "let the other shoe drop," holding that the "statutory maximum" in the Washington statute was not the general "up to 10 years," but the maximum applicable to the facts pled to or found by a jury, 53 months.

The <u>federal</u> sentencing guidelines are similar to the Washington system. As Justice O'Connor remarked in her dissent: "Washington's sentencing system is by no means unique. Numerous other States have enacted sentencing guidelines systems, as has the Federal Government. ... The Court ignores the havoc it is about to wreak on trial courts across the country." Then this prediction: "What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."

The first federal appellate court to act, only two weeks later, was our 7th Circuit Court of Appeals in Chicago, covering the federal trial courts in Indiana, Illinois and Wisconsin.

A three-judge panel considered the sentence of a Wisconsin man, Freddie Booker, convicted of possessing with intent to distribute at least 50 grams of cocaine base. At sentencing, under the federal guidelines, the trial judge enhanced Booker's sentence after determining how much cocaine base Booker possessed and that he had obstructed justice.

The panel reversed and remanded, ruling 2-1 that Booker had a right to have a jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice.

Writing for the majority, Judge Posner said: "It would seem to follow," as the dissenters in *Blakely* warned, "that *Blakely* doomed the [federal] guidelines insofar as they require that sentences be based on facts found by a judge." Posner continued: "[W]e think the guidelines ... violate the Sixth Amendment as interpreted by *Blakely*. We cannot be certain of this. ... If our decision is wrong, may the Supreme Court speedily reverse it."

A rush of decisions by federal trial and appellate courts, and state courts, has followed. And each day reveals new *Blakely* ramifications.

What next? The 7th Circuit *Booker* case is now on an unprecedented “fast track” to the Supreme Court. We may learn, before the end of the year, more about the status of the federal sentencing guidelines.

What about our Indiana state court system? Our attorney general has said that *Blakely* does not affect Indiana sentences. But defense counsels argue otherwise, pointing out that our law also permits a judge to enhance a sentence.

[640]

The sentencing schemes of the various states differ greatly. The basic models include the determinate sentence, the indeterminate sentence, and the presumptive sentence.

A determinate sentencing law may flatly set the penalty for kidnapping at 10 years. An indeterminate sentencing law may set the penalty for kidnapping at 0 to 10 years, with the length of any specific sentence to be left solely within the discretion of the judge and the parole board.

The determinate sentence leaves no room for mitigating factors. The indeterminate sentence means that the penalty imposed for the same crime may vary widely from judge to judge and from case to case.

A presumptive sentencing scheme, such as that adopted by the State of Washington in 1981, places constraints on the discretion of judges when sentencing offenders within the statutory ranges.

Many trial judges have argued against sentencing guidelines, saying they often result in unreasonably high sentences and allow for no judicial discretion. Unfortunately, the upshot of the confusion and uncertainly resulting from *Blakely*, and the press for quick answers, could be legislative solutions eliminating all such discretion.

[822]

M. Oddi

7/25/04