

BEYOND BLAKELY
Brainstorming Sentencing Issues Under The *Blakely* Bill
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I. INTRODUCTION

In response to the United States Supreme Court decision in *Blakely v. Washington*, our legislature substantially amended the Structured Sentencing Act. Session Law 2005-145, referred to as the *Blakely* bill, went into effect on June 30, 2005 and applies to prosecutions for all offenses committed on or after that date. In many ways, the *Blakely* bill truly embraces the spirit of *Blakely*, rather than trying to limit or circumvent *Blakely* as much as possible as some other states have done. As attorneys representing defendants charged with felony offenses, the bill gives us a lot to work with in the event we reach the sentencing stage of a trial.

To date, there are no appellate cases addressing the proper application of the *Blakely* bill. The field is wide open, and it is up to us to figure out how best to protect our client's rights and advance their interests in felony sentencing under the bill. This paper and presentation will briefly address residual *Blakely*-type constitutional issues under the bill, and then address some of the nuts and bolts procedural issues which appear likely to arise under the bill, hopefully with substantial input from all of you. Given that the bill re-writes some of the most critical aspects of Structured Sentencing, I suspect that we will barely scratch the surface of possible issues.

II. RESIDUAL CONSTITUTIONAL ISSUES IN SENTENCING

In my opinion, the *Blakely* bill addresses just about all of the constitutional concerns raised by the Supreme Court in *Blakely*. The biggest question remaining concerns offenses committed prior to the effective date of the bill.

A. Can Aggravated Sentences be Imposed for Pre- June 30, 2005 Offenses?

Although this issue has not been directly addressed by our appellate courts, the Court of Appeals has indicated in *dictum*, and in remand instructions in some cases, that it is possible to submit aggravating factors to juries in pre-bill cases. One case, *State v. Alexander*, __ N.C.App. __, 627 S.E.2d 501 (4/4/2006), expressly upheld an aggravated sentence in a pre-bill case based on a jury-found aggravator, but the appeal failed to raise any issues regarding whether it was permissible to submit aggravators to juries in pre-bill cases, or regarding the procedure for doing so. Some Superior Court judges have allowed this practice, while others have ruled that there is no constitutionally valid procedure to

impose an aggravated range sentence for a pre-bill case. Ultimately, I think the North Carolina Supreme Court must resolve this issue. In the meanwhile, I think it is absolutely critical for trial attorneys to raise this issue in every contested case, both in attempt to secure a better sentence for the client in the first instance and to preserve the issue for appellate review.

The argument against allowing jury trials on aggravating factors for pre-bill offenses is based on: (1) the bill specifically provides that it applies only to offenses committed on or after its effective date, June 30, 2006 and states that prosecutions for offenses committed prior to the effective date are not affected by the bill and that “the statutes that would be applicable but for this Act remain applicable to those prosecutions” (S.L. 2005-145, §5); and (2) in *State v. Allen*, 359 N.C. 425, 448-49, 615 S.E.2d 256, 272 (2005) the North Carolina Supreme Court specifically held that although it could envision several ways to remedy the constitutional defects of the Structured Sentencing Act (as it read before the *Blakely* bill), it believed that task was properly left entirely to the legislative branch. The opinion in *Allen* expressly acknowledges that the *Blakely* bill had been passed by the legislature when the opinion was issued (it was actually signed and went into effect the day before *Allen*). This suggests that the courts should or must defer to the legislature’s decision not to have the bill apply to all future trials regardless of offense date. In sum, since the statutes applicable to pre-bill offenses which govern the imposition of aggravated sentences were struck down in *Allen* and the legislature chose not to apply the new statutory provisions to trials for pre-bill cases, but instead provided that those unconstitutional statutes still apply to pre-bill cases, there is no procedure for imposing aggravated range sentences for pre-bill offenses which is both constitutionally valid and authorized by statute. In the absence of a valid statutory procedure, and where the legislature has expressly said that the (unconstitutional) pre-bill statutes continue to apply to pre-bill offenses, judges may not create *ad hoc* procedures for imposing aggravated range sentences without violating various constitutional provisions including Article I, §6 of the North Carolina Constitution (separation of powers); Article I, §19 of the North Carolina Constitution and Article I, §10 of the United States Constitution (*ex post facto*); Article IV, §12(3) of the North Carolina Constitution (supervisory authority of NC Supreme Court over lower courts); and Article I, §19 of the North Carolina Constitution and the Amendment XIV to the United States Constitution (due process).

If you find yourself trying a pre-bill case and a judge rules that the State can submit aggravating factors to the jury, not only must you object to this procedure generally (and cite your constitutional as well as statutory grounds for objecting), but you must then also object to any specific errors which arise under whatever procedure the judge adopts. You should insist that your client get no less protection than defendants in post-bill cases, and you should make any objections you would make in a post-bill case, as discussed in more detail below.

B. What About a Judge Finding Prior Record?

Many observers believe that the prior record exception to *Blakely* will not last long. The exception is based on a case called *Almendarez-Torres v. United States*, 523

U.S. 224 (1998), which pre-dates *Blakely* and was specifically acknowledged in *Blakely*. However, *Almendarez-Torres* was a 5-4 decision and Justice Thomas, who was part of the majority in *Almendarez-Torres*, has acknowledged that he was wrong and has expressly called for the Court to reconsider and overrule *Almendarez-Torres*. *Shepard v. United States*, 544 U.S. 13 (2005) (Thomas, J. concurring in the judgment).

At this point in time, it may be worth objecting to the judge finding a defendant's prior record in order to preserve the issue in case the US Supreme Court does overrule *Almendarez-Torres*, but it is probably not worth spending a lot of time or effort to litigate in detail.

C. Can a Judge, rather than a Jury, Find the Prior Juvenile Adjudication Aggravator, §15A-1340.16(d)(18a)?

For some reason, the *Blakely* bill singles out this factor and allows the judge to find this factor rather than requiring it to be submitted to a jury as with all other aggravating factors. *Blakely* expressly exempts prior convictions from the constitutional requirements it applies to all other facts necessary to support a sentence. This leaves us with the question of whether a juvenile adjudication is a prior conviction for *Blakely* purposes. This question is directly presented in a case now pending before the North Carolina Supreme Court, *State v. Yarrell*, 448PA05 (argued 4/18/06). In its opinion below, the Court of Appeals, citing N.C.G.S. §7B-2412, held that a juvenile adjudication is not a conviction and that *Blakely* therefore applied to this aggravating factor. Courts in other jurisdictions are split. The US Supreme Court has not addressed the question. If our Supreme Court should reverse the Court of Appeals and hold that this factor may be left up to the judge without violating *Blakely*, we should still object to it on constitutional grounds in order to preserve the issue for federal review.

D. DWI Trials In Superior Court

The principles enunciated in *Blakely* clearly apply to DWI trials in which the state seeks to impose level 1, 2, or 3 punishment based on aggravating or grossly aggravating factors other than prior record. In the companion case to *Allen*, *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005), one of the defendant's convictions was for DWI. The trial court found the grossly aggravating factor of serious injury to another person and imposed level 2 punishment. The North Carolina Supreme Court held that this was error under *Blakely*.

The *Blakely* bill applies only to felony sentencing under the Structured Sentencing Act, and does not affect DWI trials. The DWI sentencing statute, N.C.G.S. §20-179, still reads as it did prior to *Blakely* – it calls for the judge to find aggravating or grossly aggravating factors and to do so under the greater weight of the evidence (i.e. preponderance) standard. Despite the absence of any amendment to N.C.G.S. §20-179, the pattern jury instruction folks have drafted and adopted pattern jury instructions to submit aggravating and grossly aggravating factors to juries in DWI trials.

I would handle DWI trials just like trials for pre-bill felonies. I would first argue that there is no constitutionally valid and statutorily authorized procedure to submit aggravating or grossly aggravating factors to a jury. Second, if the trial judge does not agree with the first argument, I would insist on equivalent protections to those provided in the *Blakely* bill, including 30 days advanced notice of the State's intention to rely on any specific factors.

III. ISSUES WHICH ARE LIKELY TO ARISE UNDER THE *BLAKELY* BILL

A. Bifurcation

The *Blakely* bill only provides for bifurcation if the trial judge determines that the interests of justice require a separate sentencing procedure. In my opinion, the interests of justice will always require a bifurcated procedure. Unfortunately, this view is not easily reconciled with the legislature's failure to mandate bifurcation in every case.

I think the biggest factor in favor of bifurcation would be if the State plans on introducing evidence which is only relevant to an aggravating factor and would be irrelevant in the guilt/innocence phase if the trial were bifurcated. By its very nature, aggravating evidence would tend to be highly prejudicial and of no probative value with respect to whether your client is guilty or not guilty. The new pattern jury instruction for aggravating factors (see below) has a footnote suggesting that the aggravating factor of committing the current offense while on pretrial release for another charge may require a bifurcated proceeding. While I agree, I think the same logic applies to other statutory aggravators. They just make our clients look bad for reasons which have nothing to do with whether they are guilty of the offense with which they have been charged.

Even if the evidence which supports an aggravating factor is relevant to the commission of the offense itself and would be admissible during the guilt/innocence phase of a bifurcated trial, I think instructing the jury to consider aggravating factors during the same deliberation process at which guilt/innocence is decided has the effect of suggesting to the jury that a defendant is guilty. For example, when a jury is instructed to decide whether the defendant was armed with a deadly weapon at the time of the crime, this implies that the defendant is the person who committed the crime.

For all these reasons, I think we need to request bifurcation in every case, and try to create an environment where bifurcation is the rule, not the exception. Conducting a bifurcated procedure is not complicated and should not be especially time-consuming. It is no different than current practice in habitual felon prosecutions. Requesting bifurcation in every case will put pressure on judges to routinely grant the requests. Why should a judge risk creating an appeal issue which would result in not merely a new sentencing hearing but a new trial. Moreover, not only is the bifurcation decision itself a potential appeal issue. If bifurcation is denied, any trial error which would previously have impacted only the sentencing decision now infects the entire trial; errors which would otherwise only result in resentencing will likely require new trials if bifurcation is denied.

B. Do the Rules of Evidence Apply?

Rule 1101(b)(3) of the Rules of Evidence, N.C.G.S. §8C-1, provides that the Rules of Evidence do not apply to miscellaneous proceedings, including sentencing. However, at least one commentator, Professor Jessica Smith at the Institute of Government, has suggested that because the US Supreme Court has equated aggravating factors with elements of an offense, the Rules of Evidence will be held to apply. Jessica Smith, North Carolina Sentencing After *Blakely v. Washington* and the *Blakely* Bill, p. 8, Institute of Government, September, 2005.¹ I have heard anecdotally that at least one judge has ruled that the Rules apply to a sentencing hearing under the *Blakely* Bill. While I understand the argument that since the portion of a sentencing hearing devoted to establishing aggravating factors is now a jury trial it should be governed by the same rules as all jury trials, I am not sure this can override the plain language of Rule 1101(b)(3), which was left unchanged by the *Blakely* bill.

Although my first gut instinct was that we will generally be better off if the Rules do apply to sentencing hearings, I have become somewhat ambivalent now. The biggest reason why we might be at an advantage if the Rules do not apply is that we will be free to introduce reliable hearsay, while the State will still be constrained by the confrontation clause and *Crawford*.

Until our appellate courts resolve this question, feel free to argue whichever position suits your need. If the State wants to introduce hearsay evidence in support of an aggravator, object. If you have hearsay evidence to want to introduce to refute an aggravating factor, try to get it in.

C. Notice and Pleading Requirements.

The pleading and notice requirements under the *Blakely* bill are codified as new subsections N.C.G.S. §15A-1340.16(a4), and (a6). Non-statutory aggravating factors under the catch-all aggravating factor (N.C.G.S. §15A-1340.16(d)(20)) must be alleged in an indictment or other charging instrument. Statutory aggravators need not be alleged in the indictment, but the State must give 30 days prior written notice of each aggravating factor the State seeks to establish, as well as notice if it seeks to establish the prior record point under §15A-1340.14(b)(7) (defendant on probation, parole or post-release supervision, or escape).

These are very favorable provisions. They use mandatory language which does not appear to give the State much wiggle room. We need to argue that these provisions mean exactly what they say and that no aggravating factor for which statutory notice was not properly provided may be used to impose an aggravated range sentence against our clients. Any judge-created exception to the notice and pleading requirements would gut the protections provided by these subsections.

¹ available at <http://iog.unc.edu/programs/crimlaw/Blakely%20Update.pdf>

To me, this means (at least):

- (1) no amending indictments with respect to non-statutory aggravators. N.C.G.S. §15A- 923(e). If an indictment fails to properly allege every element necessary to establish the State's intended aggravator, or if there is some variance between the alleged aggravator and the proof at trial, you must move to dismiss the aggravator and oppose any amendment of the indictment.
- (2) object if the State tries to use a different statutory aggravator(s) than the one for which they gave notice, or tries to switch between a statutory aggravator and a similar-sounding non-statutory aggravator.
- (3) object strenuously if the State tries to excuse its failure to provide timely notice by saying they were unaware of the facts supporting an aggravating factor in time to provide timely notice, or if they try to make any other excuse for failing to provide timely notice.
- (4) unless there is a specific tactical reason to do so (*e.g.* an express condition of a favorable plea offer), do not waive the 30 day notice requirement. If there is a violation of the 30 day notice requirement you should affirmatively object and move to dismiss the aggravating factor(s) in question. The language of the statute allows the notice requirement to be waived, and it is possible (probable?) that our appellate courts will treat a failure to raise the issue at trial as a form of waiver.

D. Jury Instructions

Before the ink was dry on the *Blakely* bill, the committee in charge of pattern jury instructions adopted a pattern jury instruction designed to be a “one-size fits all” omnibus pattern jury instruction for all aggravating factors. The new instruction appears as P.J.I. Crim. – 204.25 (July 2005). In my opinion, this new pattern jury instruction is defective. Among its problems, (1) it does not include an instruction that evidence which was used to prove an element of the offense may not be used to prove an aggravator;² (2) it does not break down any of the aggravating factors into component elements or provide any definition of the terms used (Compare, for example, P.J.I. Crim. – 150.10, the pattern instruction for capital punishment aggravators); (3) it does not include any of the judicial gloss which has been applied to some aggravators. For example, our courts have held that in order for the (d)(11) aggravating factor to apply, there must be evidence that the defendant specifically targeted the victim because of age or infirmity, or that the victim was especially vulnerable to the specific conviction offense because of age or infirmity, but the pattern instruction does not reflect this requirement.

One question which may come up in connection with non-statutory aggravating factors is whether the jury must determine whether a particular non-statutory aggravating factor has aggravating value in the context of a particular case. This would be parallel to the requirement in capital sentencing that when non-statutory mitigating factors are

² There is language to this effect in the “Note Well” preamble to the pattern instruction but this is not actually part of the instruction to be read to the jury.

submitted to the jury, the jury must determine not only whether the factor exists, but whether it has mitigating value. The only down side I see to asking for an instruction to this effect is that if a judge allows it and the jury finds that a particular non-statutory factor has aggravating value, the trial judge might feel more compelled to impose an aggravated range sentence than if the jury were silent on this point.

E. Sufficiency and Other Attacks

The *Blakely* bill does not directly address whether sentencing trials need or will be governed by any special trial procedures. I think we need to treat aggravating factors just like substantive offenses and sentencing trials (or sentencing phases of bifurcated trials) just as if they were trials for substantive offenses. Move to dismiss at the close of the evidence on grounds that the evidence is insufficient to prove the aggravating factor(s) beyond a reasonable doubt, or if there is a fatal variance between the proof and the allegation. If a factor is unconstitutionally vague or overbroad, or is constitutionally infirm for some other reason, move to dismiss the factor on those grounds. If a proposed non-statutory aggravating factor does not actually aggravate the conviction offense, move to dismiss. If you need more information, move for a bill of particulars or move to dismiss for insufficient notice (in this regard, I think the fact that so many of the statutory factors include disjunctive alternatives gives us a lot of ammunition).

Virtually any grounds which might form the basis for a motion to dismiss or for a motion for some other form of sanction with respect to a criminal offense can also apply with respect to an aggravating factor.

IV. ISSUE PRESERVATION AT SENTENCING

Until now, trial lawyers have largely gotten a free pass on issue preservation during the sentencing process. Cases have held that the contemporaneous objection rule, N.C.R.App.P. 10(b)(1) does not apply at sentencing. *See, State v. Hargett*, 157 N.C.App. 90, 577 S.E.2d 703 (2003), *citing State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991). The basis for this exemption was that App. Rule 10(b)(1) applies to “trial error” and that errors occurring during sentencing did not constitute “trial error.” No more. Now that sentencing is a jury trial proceeding, we must expect that all of the usual issue preservation concerns now apply to sentencing.

This means OBJECT, OBJECT, OBJECT!!! If the State tries to introduce irrelevant evidence or hearsay, object (and state your grounds, specifically including constitutional grounds). If the jury instructions are too vague, fail to require the jury to find all the necessary facts, or are otherwise deficient, object. If the prosecutor has failed to give proper notice of an aggravator, object. If the prosecutor makes an improper jury argument during sentencing phase closing arguments, object. Ask for complete recordation of sentencing phase arguments. If the evidence is insufficient, move to dismiss. If the aggravator is constitutionally infirm as applied to your case, move to dismiss.

V. CONCLUSION

As I mentioned at the outset, right now we are all working with a clean slate when it comes to trials of aggravating factors for felony sentencing. This creates a great window of opportunity. Soon, this window will close. The North Carolina Court of Appeals and Supreme Court will address the various questions arising under the *Blakely* bill and will tell us all how it will really work in the courtroom. However, the answers the courts give to these questions will depend, in large part, on how you, as trial practitioners, frame the questions. In order to give appellate practitioners the best chance to argue for favorable answers to the questions arising under the bill, you must object to anything which violates the protections afforded our clients under the bill, must be specific in your objections, and must argue how your client is prejudiced by whatever violations occur. You must be creative in thinking about how the bill interacts with existing rules of criminal procedure and substantive criminal law, and try to use existing rules in a manner which helps put your clients in the best position to win their sentencing trials.

Good luck!