

# Is The Sentencing Reform Act Fair To Criminal Defendants, And Are The Rulings In *Apprendi*, *Blakely* And *Booker* The Answer?

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## Introduction

### The Apprendi Doctrine

The conflict between the Sixth Amendment right to a jury trial for criminal acts and the federal and state sentencing guidelines came to light in a series of cases beginning with *Apprendi v. New Jersey*.<sup>1</sup> *Apprendi* held that judges cannot enhance the sentence of a defendant using facts which have not been proven to a jury by the “reasonable doubt” standard beyond the statutory maximum. Against the backdrop of this decision, other courts refused to follow *Apprendi*. The Supreme Court, realizing the lower courts needed clarification, took the opportunity presented in the landmark case, *Blakely v. Washington*<sup>2</sup>, to clarify *Apprendi*.

In *Blakely v. Washington* 124 S. Ct. 2531 (2004), following *Apprendi v. New Jersey*, 530 US 466 (2000), the Supreme Court upheld the right of a defendant to be sentenced using only facts submitted to a jury. The Court also called into question portions of the Sentencing Reform Act.<sup>3</sup> Until that time, the Act was used by courts to enhance the sentences of defendants beyond the statutory maximum, based upon facts not submitted to a jury. *Blakely* appeared to signal the end of the Act, but created considerable confusion about future implications. *US v. Booker* 125 S. Ct. 738 (2005) was the next important decision in this line of cases, invalidating portions of the Sentencing Reform Act.

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1. *Apprendi v. New Jersey*, 530 US 466 (2000).

2. *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

3. 18 U.S.C.S. § 3551 and 28 U.S.C.S. § 991; The Sentencing Reform Act will hereinafter be referred to as the Act.

In the latest *Booker* decision in California, *People v. Black*<sup>4</sup>, the court points to what it claims are important differences between California's sentencing guidelines and those guidelines promulgated by the state of Washington and the federal government. It is because these guidelines are different that the California Supreme Court felt compelled to rule that California's sentencing laws were constitutional, thus claiming that law of *Blakely/Booker* was inapplicable.

### The Sentencing Reform Act

Prior to 1984 when Congress passed the Sentencing Reform Act, federal judges had broad sentencing discretion within a wide statutory range. The Act was passed in an effort to avoid disparate sentences for similar crimes and to provide fairness and predictability in sentencing. The Federal Sentencing Commission was formed under the Act, and the Commission established a set of mandatory guidelines for the federal judiciary. During the last 25 years, most state courts have also done away with the discretionary sentencing style of the past and adopted their own guidelines. These vary from state to state but follow the intention of providing certainty in sentencing. This was the prescribed goal of the Commission.

There was widespread criticism of these new sentencing laws. Critics pointed out that judges used facts not submitted to a jury in order to sentence defendants to terms much longer than the maximum allowable for the crime charged. Prosecutors tried cases under a reasonable doubt standard, but for more than two decades judges had the discretion to enhance the sentence of the defendant under the preponderance of the evidence standard.

### *Blakely v. Washington*

In an unexpected and fractured five-four decision in *Blakely v. Washington*, the Court held per Justice Scalia that the Washington State sentencing guidelines violated the Sixth Amendment right to a jury trial.<sup>5</sup> Citing *Apprendi*, the majority followed the rule which states "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."<sup>6</sup> Although the *Apprendi* rule had been applied in previous cases, it was later limited in its application by subsequent lower court rulings. This absolute and unqualified rule in *Blakely*<sup>7</sup> turned twenty years of sentencing reform upside down.

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4. *People v. Black*, 35 Cal. 4<sup>th</sup> 238 (2005).

5. *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

6. *Apprendi*, 530 US 466 (2000).

7. Interestingly, although the Ninth Circuit Court of Appeal has now stated in *People v. Black*, 35 Cal. 4<sup>th</sup> 1238 (2005), that there is no bright-line rule that requires a court to only use

Justice O'Connor pointed out in her dissent (in which she scathingly referred to this decision as a "Godzilla raging through Tokyo") that the *Blakely* decision would probably not be limited to Washington state law, but would clearly affect the Federal Sentencing Guidelines as well.<sup>8</sup>

Since the Washington state guidelines struck down in *Blakely* were almost identical to the federal guidelines, the decision raised more questions than it answered. U.S. District Judge Susan Bucklew said, "I'm not sure what I'm going to do. I don't think anybody is sure what to do. . . . It is an extremely stressful time."<sup>9</sup>

Douglas Berman, an Ohio State University law professor and one of the foremost experts on sentencing law, stated that *Blakely* is "like an earthquake," and that "Twenty years of investment in structured sentencing has essentially come crashing down. . . .(and now) they're trying to figure out which parts have come down and how to put them back up again."<sup>10</sup>

### ***United States v. Booker***

The Supreme Court, well aware of the confusion that the decision created, attempted to clarify the questions, or at least some of them, in the form of the Jan. 12, 2005 decision in *US v. Booker*.<sup>11</sup> The decision manifests Justice O'Connor's concerns over the fate of the Federal Sentencing Guidelines. In a decision that generated six different opinions, *Booker* applied the *Blakely* decision to Federal law, going so far as to invalidate and excise a portion of the United States Code.<sup>12</sup>

Freddie Booker was charged with possession with intent to distribute at least 50 grams of crack cocaine (statutory minimum of 10 years prison, life maximum). The jury heard evidence that Mr. Booker had 92 grams in his duffel bag, and found him guilty of the charge. Based on the jury's finding, combined with Mr. Booker's prior criminal history, federal sentencing

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facts found by a jury during sentencing, this contradicts the widely held view in accordance with the second circuit that indicates the opposite view.

8. See "*The Roots and Realities of Blakely*," by Douglas A. Berman, from *Criminal Justice*, Volume 19, No.4 Winter 2005 by the American Bar Association.

9. <http://news.tbo.com/news/MGBDF500KWD.html> "Confusion Rules In Federal Courts" By Elaine Silvestrini, TBO news.

10. <http://www.washingtonpost.com/wp-dyn/articles/A45192-2004Jul12.htm>.

11. *United States v. Booker*, 125 S. Ct. 738 (2005)

12. See 18 U.S.C.S. §§ 3553(b)(1) and 3742(e). Thus the courts were now bound by 18 U.S.C. § 3553(a) and the important prerequisite was that the sentence be "sufficient, but not greater than necessary" to:

- A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- B) afford adequate deterrence to criminal conduct
- C) protect the public from further crimes of the defendant; and
- D) provide the defendant with needed educational and vocational training, medical care, or other correctional treatment in the most effective manner.

guidelines required the judge to assign a “base” sentence of 210 months minimum.

In post-trial sentencing proceedings, the judge concluded by a preponderance of the evidence that Mr. Booker possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Those findings required the judge to impose a 360 months minimum sentence. The judge sentenced Booker to 30 years (360 months) in prison; over twelve years longer than the base sentence. The findings were not proven beyond a reasonable doubt to the jury.

On appeal, the Seventh Circuit Court of Appeals held the sentence was an unconstitutional violation of Booker’s Sixth Amendment rights, citing the *Apprendi* rule and relying on the recent *Blakely* decision. The case was remanded to the District Court with instructions to resentence within the range consistent with jury findings, or hold a separate sentencing hearing before a jury. The Government petitioned the Supreme Court for a writ of certiorari, asking the Court to determine whether the *Apprendi* line of cases applied to the Guidelines, and if so, what portions of the Guidelines remain in effect.

Justice Stevens delivered the first part of the *Booker* majority opinion. The court held that current sentencing guidelines violated the Sixth Amendment. They affirmed the rule in *Blakely*, citing *Apprendi*, and stating 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.”<sup>13</sup>

To the majority, there was no significant distinction between Washington State procedure in *Blakely* and the Federal Sentencing Guidelines; thus, the rule applied in Federal court as well as in state court. The court found both systems unconstitutional because they imposed mandatory guidelines on judges. Justice Stevens explained:

“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.<sup>14</sup> Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the Act the provisions that make the Guidelines binding on district judges. . . . When a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deemed relevant.”<sup>15</sup>

Justice Breyer delivered the second part of the opinion, further clarifying statements made by Stevens as to the application of the rule. The majority found portions of the U.S Code to be incompatible with the Court’s

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13. *Apprendi*, 530 US 466, 490.

14. *See Apprendi*, 530 U.S. 466, 481; *Williams v. New York*, 337 U.S. 241, 246 (1940).

15. *Booker*, 125 S. Ct. 725, 750.

holding, and addressed the question of whether this finding invalidated the Guidelines “as a whole.”

The analysis included a discussion of the probable legislative intent of Congress with regard to sentencing statutes in light of the Court’s holding. Breyer concluded that the Guidelines need not be eliminated entirely, but must be modified:

“One approach. . . would retain the Sentencing Act (and the Guidelines) as written, but would engraft onto the existing system today’s Sixth Amendment “jury trial” requirement. The addition would change the Guidelines by preventing the sentencing court from increasing a sentence on the basis of a fact the jury did not find (or that the offender did not admit). The other approach, which we now adopt, would make the Guidelines system *advisory*<sup>16</sup> while maintaining a strong connection between the sentence imposed and the offender’s real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.”<sup>17</sup>

Many believe the *Booker* decision did little to alleviate the problems and confusion created by *Blakely*. By allowing each federal circuit court to build their own interpretation of the “reasonableness standard” through precedent, the problems Congress sought to avoid in passing the Act are perpetuated: disparate sentencing for the same crimes based upon the jurisdiction in which the defendant was charged and convicted. In fact, in the recent decision in *US v. Shannon*, 414 F.3d 921 (2005), the court handed down a sentence of 58 months, when the standard range for that type of crime was only 6-12 months. The 8th Circuit Court of Appeals concluded that such a sentence was not unreasonable.<sup>18</sup>

### ***People v. Black***

The latest *Booker* decision in California, *People v. Black*<sup>19</sup>, points to what the court claims are important differences between California’s sentencing guidelines and those guidelines promulgated by the state of Washington and the federal government. It is because these guidelines are different that the California Supreme Court felt compelled to rule that California’s sentencing laws were constitutional, claiming that the *Blakely/Booker* rule was thus inapplicable.

California uses “determinate” sentencing. In this type of sentencing, the judge decides between three different sentences, rather than any number within a chosen range (for example five years, ten years, or fifteen years rather than any sentence from five to twenty years). California judges are

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16. Emphasis added.

17. *Booker*, 125 S. Ct. 738, 756.

18. <http://www.ca8.uscourts.gov/opndir/05/07/042895P.pdf> see also [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/booker\\_in\\_the\\_circuits/](http://sentencing.typepad.com/sentencing_law_and_policy/booker_in_the_circuits/)

19. *Black*, 35 Cal. 4<sup>th</sup> 1238 (2005).

required to give the middle-range unless aggravating factors are found from which the judge may enhance the sentence unilaterally.

California's guideline, as argued in *Black*, essentially gives the court the same type of power *Blakely* held unconstitutional: the power to make determinations of fact from which one may enhance the sentence.<sup>20</sup>

The majority in *Black* disagreed with *Blakely*, arguing that the type of facts usually found by juries were not like the ones being used here. They said that "Because an aggravating factor under California law may include any factor that the judge reasonably deems to be relevant, the determinate sentencing law's requirement that an upper term sentence be imposed only if an aggravating factor exists is comparable to *Booker*'s requirement that a federal judge's sentencing decision not be unreasonable."<sup>21</sup> Gene Vorobyov rejected the reasoning of the majority in *Black* and commented that the decision was "spectacularly wrong"<sup>22</sup>

### Conclusion

The historic sanctity of jury sentencing was evidenced in the eighteenth century when Blackstone commented that juries were part of a "strong and two-fold barrier . . . between the liberties of the people and the prerogative of the crown" because "the truth of every accusation . . . [must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion."<sup>23</sup>

The *Apprendi/Blakely/Booker* rulings by the Supreme Court continue to create confusion in American jurisprudence. *Booker* has not helped courts to apply *Blakely*. While 8 states have ruled that *Blakely* impacts sentencing, 6 courts, including California, have concluded otherwise.<sup>24</sup> Other states still have *Blakely* cases in the works. It is possible that what has been characterized as an attempt by the California Supreme Court to dodge the main issues in *Blakely*<sup>25</sup> with their opinion in *Black* will result in the U.S. Supreme Court being forced to rule yet again. The dust from *Apprendi/Blakely/Booker* is still settling; but is the path clear?

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20. See <http://writ.news.findlaw.com/amar/20050624.html> for an in-depth analysis "An Important Sentencing Ruling from the California Supreme Court: " from Vikram David Amar.

21. *Black*, 35 Cal. 4<sup>th</sup> 1238, 1261 (2005).

22. [http://appellate.typepad.com/appellate/2005/06/people\\_v\\_black.html](http://appellate.typepad.com/appellate/2005/06/people_v_black.html).

23. [http://appellate.typepad.com/appellate/2005/06/people\\_v\\_black.html](http://appellate.typepad.com/appellate/2005/06/people_v_black.html).

24. Blackstone, Commentaries on the Laws of England \*349-\*350 (T. Cooley 4th ed. 1896).

25. [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2005/07/another\\_view\\_of.html](http://sentencing.typepad.com/sentencing_law_and_policy/2005/07/another_view_of.html).

25. [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2005/06/california\\_supr.html](http://sentencing.typepad.com/sentencing_law_and_policy/2005/06/california_supr.html).