Blakely and the Centralizers in North Carolina

In North Carolina, it was clear from the start that the Supreme Court's decision in Blakely v. Washington would require some refurbishing of the state's sentencing structure. Policy debate centered right away on two possible blueprints. One plan added jury procedures to the existing structure, while a second plan increased the range of sentences available without any special factual findings, making more room for judicial and prosecutorial discretion. After months of debate, the Sentencing Commission and the General Assembly chose the jury procedures plan.

This outcome happened because actors with a statewide centralizing perspective prevailed over the field actors from the trial courts. Policy designers in the capital saw jury procedures as the best way to maintain predictable sentences and better central control over correctional resources. In this state with an institutional history and support for central planning in criminal sentences, the statewide actors successfully converted the Blakely debate into a referendum on the value of their work.

Blakely and the Existing North Carolina System

In 1993, the North Carolina legislature followed the recommendations of the state's new sentencing commission and created a "structured sentencing" system, using a familiar sentencing grid with a vertical axis based on seriousness of offense and a horizontal axis based on prior criminal record. Each cell of the grid lays out three ranges for the judge to use in selecting the proper duration for a prison sentence: a presumptive, aggravated, and mitigated range. The statute also requires the judge to make certain factual findings about the offense or the offender's background to justify selection of a sentence from the aggravated or mitigated range. A wide range of statutory and non-statutory reasons can support a move out of the presumptive range, and appellate review of the sentencing judge's justification remains quite weak. Nevertheless, fact-finding and explanations are clear preconditions to the judge's selection of an aggravated or mitigated sentence.

It was obvious to criminal justice actors throughout the state that the Blakely decision would affect several aspects of this system. Immediately after Blakely, defense attorneys filed motions requiring juries to make the factual findings necessary to impose any sentence in the aggravated range. Analysts from an institute responsible for training prosecutors declared that Blakely applied to aggravated range sentences and possibly to other aspects of the system, such as the extra point added to the criminal history score because the current crime was committed while the defendant was on probation or parole status.

Prosecutors initially responded to Blakely by dropping their requests for aggravated sentences. Since the difference between the presumptive and aggravated range was not large for most crimes, the effort of proving an aggravating circumstance to a jury was not worthwhile for high-volume crimes. For a few more serious crimes like homicide, prosecutors followed a familiar procedure that the North Carolina Supreme Court had developed in 2001 for a statutory firearms enhancement: they filed a superseding indictment alleging the aggravating circumstance and proved the aggravating fact at trial. Although prosecutors considered this arrangement tolerable in the short run, many saw Blakely as a larger opportunity to shift the overall structure of the sentencing laws to make aggravated sentences easier to obtain.

Centralizers and Trial Court Players

Because the 2004 legislative session ended shortly after the appearance of the Blakely decision, the General Assembly passed no substantive legislation on the topic but asked the Sentencing Commission to study the affect of Blakely on state sentencing and to propose any necessary statutory revisions.

During the Commission deliberations between September and December 2004, commissioners with the strongest connections to trial court actors argued for a more discretionary sentencing structure. The representative for the Conference of District Attorneys proposed a combination of the presumptive and aggravated ranges in each cell on the sentencing grid, leaving the judge to choose between one expanded presumptive range and a mitigated range that still required special fact-finding. The representative for the Conference of Superior Court Judges upped the bid, asking for a combination of both the aggravated and mitigated ranges into the presumptive

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range for each cell on the grid. This would allow judges to choose a sentence within the expanded range without any need for additional factual or legal findings.6

Other commissioners, such as the designees for the Department of Correction, the Attorney General, and the Court of Appeals, favored centralized monitoring and control of sentences. The Chair of the Sentencing Commission and the staff also approached the Blakely questions from this centralized perspective. For them, the proposal by the trial court actors to collapse the three smaller ranges into a single larger range threatened the predictability of sentences.

This emphasis on predictable sentences played to a traditional strength of the Sentencing Commission. From its earliest days, the Commission staff created regular projections of the prison beds that the state would need to provide each year if current sentencing policies were to continue ten years into the future. The staff also projected the future impact on corrections resources of many of the crime bills pending in the legislature. Because these projections proved remarkably accurate, legislators came to value the information in these reports, even if they often brought unwelcome news.7

These accurate projections, however, built on a system that held judicial sentencing discretion within relatively narrow bounds. A structured set of sentencing rules allowed the Commission to say with more confidence the likely pattern of sentencing outcomes five or even ten years down the road. With less predictable sentences, the Commission could not forecast the prison beds necessary, making fiscal planning far more difficult for corrections officials.8 The Commission staff and the commissioners representing the statewide planning organizations treated juries as the necessary procedural price to pay for accurate projections.

Data about sentencing practices pushed the Commission debate in the direction of centralization. The staff presented data to show that 78 percent of all sentences under the existing structure were placed at the top or bottom of the available range, suggesting a possible desire by many judges to move the sentence higher or lower if the legally approved sentencing range expanded.9 Even if sentencing practices remained fairly close to prior practice for a few years after any change in the law, over time the sentences would start to disperse or shift in other unpredictable ways.

The staff drew on sentencing and trial rate data to estimate a small number of extra jury proceedings in the future, in response to the trial court actors’ concerns about the possible costs of increased jury fact-finding. The commissioners also relied on accounts of the Kansas experience with the expanded jury role for sentencing, showing that extra jury proceedings became necessary in very few cases.

Interestingly, the discussion in North Carolina about the Kansas experience did not highlight the importance of consecutive and concurrent sentences. For defendants convicted of more than one crime in a single proceeding, the North Carolina sentencing structure gives the trial judge complete discretion whether to impose the sentences consecutively or concurrently.10 Although this discretion makes it possible for judges to change their practices in ways that could make sentences less predictable, judicial practices on this question were stable enough that the legislature left the choice unregulated. As Kansas demonstrates, however, the use of consecutive sentences becomes much more common after Blakely. If an enhanced sentence for a single count is possible only after jury findings of fact, prosecutors might invest more time in filing a second count. When the defendant is convicted on both counts, a judge can select the ordinary sentencing range for two separate counts but extend the overall length of the sentence by setting the terms to run consecutively. None of these changes to charging or sentencing practices implicate the Blakely right to jury trial. Although the North Carolina commissioners passed over this point without extended debate, it may become necessary to return to the issue in the future.

In addition to the data dealing with potential changes in sentence patterns and the number of potential jury proceedings, a political calculation also influenced the commissioners. If the Commission were to follow the prosecutors’ views and eliminate the dividing line between presumptive and aggravated sentences, then the only distinction left in the grid would lie between the expanded presumptive range and the mitigated range. Eventually, policy makers might have to explain why they endorsed a “soft on crime” structure that allows the judge to move down to a lower range but not to go above the normal sentencing range.

The Procedural Details in the General Assembly

After the Commission sent its recommendations to the General Assembly in January 2005, the legislators never seriously questioned the basic choice in favor of a greater role for juries in sentencing rather than larger discretionary ranges for judges. The debate on the bill was confined to committee hearings, and even then the legislators argued about the procedural details in the package rather than the larger question of the use of juries for sentencing facts.

One procedural detail concerned the time to introduce the evidence to the jury. Presenting the aggravating evidence to the jury during the trial would be most efficient, but a bifurcated jury proceeding that separates the evidence on the substantive crime elements from the evidence on the aggravated sentence might best protect the defendant from prejudice. The key priority for the legislators, however, was the predictability of corrections budgets rather than the precise impact on courtroom dynamics. Because the costs of jury findings for aggravated sentences were still uncertain, a single combined jury proceeding best served the goal of a centralized and efficient sentencing system. The legislators endorsed the single jury proceeding as the norm.11
A second timing question proved more difficult: when the prosecutors should inform defendants of their intention to rely on particular facts to aggravate the sentence. North Carolina case law suggested that no notice was necessary for any factors listed in a statute as a possible basis for aggravating a sentence; non-statutory aggravators, however, had to appear in the indictment. During the Commission debate, representatives for the district attorneys and the attorney general argued for no additional notice, because a notice requirement would force prosecutors during their pretrial preparation to forecast which aggravators they would prove at trial.

Originally a subcommittee took the prosecutors’ position and recommended no notice at all, but the full Commission settled instead on a compromise that required the prosecutors, either ten days before trial or on the date of the guilty plea hearing, to notify the defendant of any statutory aggravating facts they intended to prove or argue at sentencing. Such a short notice period, the commissioners believed, would not shift the ordinary timing of prosecutorial investigation or preparation. The General Assembly, with two attorney-legislators taking the lead, expanded the notice period to thirty days when they passed the bill. The key legislators believed this change was consistent with expanded criminal discovery rights passed in 2004.

There was no guarantee that the General Assembly would act at all on questions in the 2005 session. During the early months of 2005, the North Carolina Supreme Court heard oral arguments in cases to determine whether Blakely applied at all to the state system, and what remedy would be necessary. The legislators might have waited for guidance from the Supreme Court, for the Court in the past had proven willing to create its own solutions to notice and other procedural problems growing out of sentencing enhancements. The key legislators on the committees, however, became convinced that a legislative solution would prove quicker than a common law fix. Any judicial solution would take a long time to work through the system, and the appellate litigation might lead to inconsistent practices around the state for a while.

The governor signed the jury procedures bill on June 30; the next day, the state Supreme Court issued its decision confirming that Blakely did apply to the state’s sentencing laws. The Court held that aggravated range sentences based on facts (other than prior record) not found by a jury violated the Sixth Amendment and amounted to structural error that would invalidate a sentence automatically, without any harmless error inquiry. On the other hand, the Court treated other aspects of the statute as severable, meaning that sentences from the presumptive or mitigated ranges would remain valid.

The Lobbying Non-Event

Perhaps the most surprising event in the legislative response to Blakely in North Carolina is what did not occur. Key prosecutors hoped that the General Assembly would make aggravated sentences easier to obtain. Early in the debates within the Sentencing Commission, trial judges and some defense attorneys also endorsed the idea of greater sentencing discretion without extra jury involvement. Yet at the end of the legislative line, the prosecutors and the other trial court players did not get their first choice. The new statute required prosecutors to prove more facts about aggravated sentences to the jury and instructed them to notify defendants further in advance about their plans to seek an increased sentence.

Why did the legislators decline to take sides with their traditional allies, the prosecutors? Perhaps a lack of unity or intensity among prosecutors left room for such an outcome. In previous legislative sessions, when prosecutors united to oppose various changes to the sentencing structure designed to reduce growth in the prison system, their lobbying made a difference. When the Commission proposed changes to the “habitual felon” statute, district attorneys and police chiefs from around the state boarded buses, converged on the capital, and packed the committee hearing rooms. Year after year, the bills that the prosecutors opposed never made it out of committee.

By contrast, after the prosecutors lost the Blakely debate at the Sentencing Commission level, the district attorneys did not attempt to get a different outcome in the legislature. The Conference of District Attorneys did not organize the opposition, and prosecutors did not attend committee hearings in large numbers. Perhaps prosecutors around the state were inhibited by the potential cost of a more discretionary system. The data from the Commission suggested that judges tend to select sentences clustered around the high and low points in the designated ranges, and if the designated top of the presumptive range were to increase, average sentence length would also increase. Ultimately, as a cost-control measure, the legislature might reduce the top of the presumptive range. Prosecutors may have preferred to keep the existing structure that preserved the option of much higher sentences in a few cases, rather than risk a lower maximum sentence across all cases.

The response to Blakely in North Carolina offers a window into the complexity of crime politics. Observers usually emphasize the legislature’s tendency to pass bills that appear to be “tough on crime,” bills that prosecutors and law enforcement officials favor. The wishes of prosecutors, however, only provide one variable in the complicated calculus of crime politics. Sometimes the views of other routine actors in the criminal courtroom, such as trial judges and defense attorneys, influence the legislature. In this North Carolina debate, actors who collect data and manage the system’s assets played a crucial role.

Such actors from the statewide criminal justice bureaucracy can sometimes point out the common ground they hold with legislators, for the legislators also depend on a system with predictable outcomes when they plan the
state budget and appropriate funds for law enforcement, courts, and corrections. Legislators need the centralizing actors to maintain their own control over criminal justice outcomes.

Thus, a critical question in states responding to the Blakely decision is the influence of the statewide criminal justice bureaucracy. In states like North Carolina with an active group of players who advocate for predictability and resource planning, an expanded role for juries at sentencing is likely to result. One subtle indicator of the impact of the centralizing actors in North Carolina was the fate of a bill that would have brought DWI cases in line with Blakely. Because DWI offenses fell outside the sentencing structure, the Commission did not take a leading role to advocate changes in those statutes. As a result of this lack of active lobbying from the Commission or other centralizing actors, even though the DWI cases represent a high-volume category of criminal cases, the General Assembly never amended the DWI statute to comply with Blakely.

In states with less influential actors at the center of crime and corrections policy, the trial court actors in the field will by default have more influence with the legislature. Changes to the sentencing laws that give those trial actors more discretion are likely to result. In the legislative debates over the best responses to the jury trial rights announced in Blakely, the tension in North Carolina between the central planners and the trial actors is more important than the debate between the prosecution and defense.

Notes
4 In the fiscal year before the Court handed down the Blakely decision, aggravated sentences accounted for only 7 percent of the felony sentences imposed.
5 See State v. Lucas, 548 S.E.2d 712 (N.C. 2001) (imposition of enhanced sentence under firearm enhancement statute required government to plead enhancing factors in indictment, submit factors to jury, and prove them beyond a reasonable doubt). In 2003, the legislature amended the statute to codify the procedural solution that the Lucas court crafted for firearm enhancements. N.C.G.S. § 15A-1340.16A(d), (e).
10 N.C.G.S. § 15A-1340.15.
11 Although a single proceeding is the default position, the legislation also allows the trial judge to bifurcate the proceedings in the interests of justice.