The Anticipated Resolution of the *Blakely* Split of Authority in the States: Will the United States Supreme Court Dance the Tennessee Waltz?

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I remember the night and the Tennessee Waltz
Now I know just how much I have lost
Yes I lost my little darlin' the night they were playing
The beautiful Tennessee Waltz.
—Tennessee Waltz[1]

Does *United States v. Booker*[2] trump *Blakely v. Washington*?[3] That question has been given a national forum because the practical effect of the *Blakely* decision was to require each state to assess whether its statutory scheme passed constitutional muster. It is an understatement to say that the results of the inquiry are certainly mixed.

This article addresses the ensuing, significant national split of authority that has been fostered by courts of last resort in Tennessee, California, and New Mexico, all of whom have fundamentally misunderstood the subsequent *Booker* case. The Supreme Court has the opportunity to resolve this split by agreeing to dance with the Tennessee Supreme Court's opinion in *State v. Gomez*,[4] which represents the minority view suggesting that *Booker* does indeed trump *Blakely*.

I. Introduction

Enough time has passed and enough judicial opinions have been released so that it is apparent that the states' interpretations of *Blakely* have broken out into several camps. The primary controversy among the states is whether *Booker* effectively "overruled" *Blakely*. In summary, some state supreme courts have held that a presumptive sentencing scheme may survive constitutional scrutiny because the enhancements are not as "mandatory" as were the point increases required under the old federal system examined in *Booker*. Thus, so the argument goes, a discretionary enhancement scheme is only "advisory" and therefore valid even though the base presumptive sentence is mandatory.

The Tennessee Supreme Court upheld Tennessee's presumptive sentencing scheme in *State v. Gomez* on April 15, 2005. The defendants in that case filed a petition for certiorari in the Supreme Court of the United States which is pending as this article goes to press. Thus, Tennessee may have waltzed its way into this larger dispute by joining those jurisdictions which have interpreted *Booker* as significantly altering *Blakely*.

While not citing *Gomez*, the California Supreme Court also upheld that state's presumptive sentencing scheme in *People v. Black*.[5] *Black* held that, notwithstanding a presumptive sentencing "term" or range, "the judicial fact-finding that occurs when a judge exercises discretion to impose an upper term sentence . . . under California law does not implicate a defendant's Sixth Amendment right to a jury trial." Conversely, the North Carolina Supreme Court applied the rule in *Blakely* to that state's structured sentencing scheme and determined that the "statutory maximum"[6] is equivalent to a "presumptive range" and thus "those portions of [North Carolina law] which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence" violate the Sixth Amendment.[7]

Despite superficial differences, California's sentencing scheme is much like North Carolina's statutes. Yet, the two courts—as have other states[8]—reached diametrically and irreconcilable results on the question of whether the sentencing schemes were unconstitutional under *Blakely*.

The New Jersey Supreme Court recently summarized the significant national split of authority and characterized the now-minority view as the "California approach."[9] Actually New Jersey may have exhibited some "coastal bias" since the Tennessee Supreme Court's opinion in *Gomez* predated California's *Black* opinion by over two months and thus *Gomez* is the point of the spear of those state courts which have rendered significantly aberrant interpretations of *Blakely*. This naturally raises the question of whether the United States Supreme Court will respond to the invitation to the dance and resolve the split through the Tennessee case.

II. The Tennessee Sentencing Scheme

Tennessee's historic system of jury-imposed sentencing was altered in 1982 to judicial sentencing for all but capital crimes.[10] The 1982 statutes were replaced by the comprehensive Tennessee Criminal Sentencing Reform

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Act of 1989—the law under which Mr. Gomez and his codefendants were sentenced—which was addressed in detail in an earlier Tennessee Supreme Court opinion:[11]

> Included in the Tennessee Criminal Sentencing Reform Act of 1989 is the structure for imposing punishment on felony offenders. The Act divides felonies into five classifications according to the seriousness of the offenses [Class A, B, C, D and E]; it separates offenders into five classifications according to the number of prior convictions [Range I, II, III, etc.]; it assigns a span or range of years for each class of crime committed by each class of offenders; and it employs enhancement and mitigating factors to assess the definite sentence within each range. Tenn. Code Ann. §§ 40-35-105, 40-35-114. . . . The only discretion allowed the sentencing court is to accommodate variations in the severity of the offenses and the culpability of the offenders within the ranges of penalties set by the legislature. Even this discretion is restrained under the Act through the establishment of a "presumptive sentence" and the mandatory use of enhancing and mitigating factors. The minimum sentence [within each range] is the presumptive sentence. Tenn. Code Ann. § 40-35- 210(c). [This was later changed by statute to the mid-range for Class A felonies.] The sentence imposed cannot exceed the minimum sentence in the range unless the State proves enhancement factors. If there are enhancement but no mitigating factors, then the court "may set the sentence above the minimum in that range but still within the range." Tenn. Code Ann. § 40-35-210(d). If there are enhancement and mitigating factors, "the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors." Tenn. Code Ann. § 40-35- 210(e). However, only those enhancement factors specifically authorized by statute may be used to increase a sentence.

In any given case the potential punishment for each offender can be found by cross-referencing the felony classification (Class A, B, C, D, or E) for the crime for which the offender had been convicted with the number of prior felony convictions, if any. This yields a "block" on the sentencing grid to disclose the potential minimum and maximum sentence for that particular offender and offense. For example, an offender convicted of a Class C felony with no prior convictions can receive a sentence of between three and six years. Each range has a statutorily defined presumptive sentence that, in most instances, is the minimum sentence in the sentencing spread.

In the example of the offender convicted of the Class C felony, the presumptive sentence is three years. The judge then considers any enhancement factors—which have no statutorily defined weight—that the state has proven by a preponderance of evidence at the sentencing hearing and any mitigating factors advanced by the offender. The judge then fixes a specific sentence length within the spread of years in that sentencing block and also determines how that sentence should be satisfied by incarceration or probation where eligible. Appellate review of sentencing in Tennessee is *de novo* with a "presumption that the determinations made by the court from which the appeal is taken are correct."[12]

III. Analysis of *State v. Gomez*

The Tennessee Supreme Court granted review on October 4, 2004, and specifically directed briefing of the *Blakely* issue. Mr. Gomez and his codefendant argued to the Tennessee Supreme Court that their sentences violated the Sixth Amendment, as construed in *Blakely*. The State, acknowledging that Tennessee's system for imposing enhanced sentences was in all relevant respect the same as Washington's, conceded that the system violated the Sixth Amendment. The State, however, argued that Mr. Gomez and his codefendant were not entitled to relief because they had not raised the *Blakely* issue below and thus they could not satisfy the several prongs of Tennessee's "plain error doctrine."[13]

On April 15, 2005, the Tennessee Supreme Court, by a 3-2 vote, refused to accept the unanimous view of all parties that Tennessee's system for imposing enhanced sentences violates the Sixth Amendment. The Court reaffirmed the well-settled proposition that when no enhancement factors are found, Tennessee statutory law "mandates imposition of the presumptive sentence." However, the Tennessee Supreme Court found that this interpretation did not resolve the constitutional issue:

> [T]o determine whether the defendants' sentences were in violation of the Sixth Amendment, the relevant inquiry is not . . . whether the Reform Act sets a determinate point at which judges must begin the exercise of their discretion and provides a determinate sentences which must be imposed in the absence of enhancement and mitigating factors. Rather, the relevant inquiry is whether the Reform Act mandates imposition of a sentence increased above the presumptive sentence when a judge finds an enhancement factor. Although the dissent is correct that the Reform Act requires trial judges to determine whether enhancement factors exist, the dissent fails to recognize that the finding of an enhancement factor does not mandate an increased sentence. *Booker* explains that the mandatory increase of a sentence is the crucial issue which courts must consider in determining whether a particular sentencing scheme violates the Sixth Amendment.

Of course, the Washington system invalidated in *Blakely* did not mandate an increased sentence upon finding an aggravating fact; the decision whether to impose a sentence above the standard range was left, just as in Tennessee, to the trial judge's discretionary judgment. Perhaps due to this undeniable fact, the Tennessee Supreme Court majority also stated that:

Blakely itself includes language which can be broadly construed to require the result the defendants seek. We are unwilling to adopt that broad reading of *Blakely*. *Blakely* must be read in light of *Booker*. Not only has *Booker* provided further insight into the constitutional differences between "determinate" and "mandatory" sentencing schemes versus "indeterminate" and "non-mandatory" sentencing schemes, this Court has a duty to resolve doubts in favor of the constitutionality of statutes.

Justice Anderson (joined by Justice Birch) dissented in relevant part, asserting that "[t]he Washington state scheme struck down in *Blakely* was effectively the same as Tennessee's Reform Act." Turning to the majority's argument that *Booker* modified *Blakely*'s holding, Justice Anderson explained that "the 'mandatory' facet of the Federal Sentencing Guidelines to which the Court in *Booker* objected was not the fact that the Guidelines mandated upward departures based upon particular judicial findings of fact. Rather, it was the fact that no departures could be justified based on the jury verdict alone, because the jury verdict authorized only the base range sentence."

Following the Tennessee Supreme Court's April 15 decision, both the defendants and the State petitioned for rehearing, explaining once again to the Tennessee Supreme Court that Tennessee's sentencing system was indistinguishable from the Washington system invalidated in *Blakely*. On May 18, 2005, the Tennessee Supreme Court, by the same 3-2 vote, refused to reconsider. Without disputing that Tennessee's system is the same as Washington's, the majority stated on rehearing that "[w]e remain convinced that *Blakely* must be read in light of *Booker*. . . . If the Sixth Amendment countenances a sentencing scheme that permits judges to find facts relevant to sentencing and affords judges discretion to select a sentencing anywhere within a statutory range, even in the absence of enhancing facts, we are unable to conclude that the Sixth Amendment forbids a sentencing scheme in which a state legislature limits judicial discretion by designating the presumptive sentence that must be imposed when a judge finds no enhancement or mitigating factors."

IV. Where Things Went Awry

The Tennessee Supreme Court—as did the California Supreme Court in *Black*—misread *Booker* as somehow modifying or overruling *Blakely*. *Booker* involved the federal sentencing scheme, which had a mandatory beginning point or base number and certain mandatory enhancements. The Tennessee Supreme Court was of the view that only a mandatory, presumptive sentence coupled with a mandatory enhancement scheme—resulting in a so-called mandatory sentence—violates the Sixth Amendment. The Tennessee Supreme Court's majority ruling in *Gomez* can therefore be reduced to three points: (1) Tennessee has a mandatory presumptive sentence,[14] (2) the Tennessee sentencing enhancements are not mandatory,[15] and (3) thus, the entire scheme passes constitutional muster.[16]

The first two points do not lead inevitably to the conclusion that Tennessee sentencing laws are constitutional. The Tennessee sentencing scheme violates the Sixth Amendment since it is the *possibility* of a judicially imposed sentence, above the mandatory, presumptive minimum, which triggers both *Blakely* and *Booker*. The fallacy in *Gomez* is that it makes absolutely no difference if the judicially imposed enhancements are mandatory or discretionary. Once it is concluded that the statutory scheme includes a mandatory presumptive sentence or base point, the Sixth Amendment prohibits a judicially determined increase predicated on additional fact-finding.

An increased sentence was not mandated by the Washington guidelines at issue in *Blakely*. Indeed, the constitutional relevance of merely exposing a defendant to a greater punishment based on a judicial fact-finding, but still leaving it to the judge's discretion whether to impose the heightened punishment, was discussed in *Blakely* itself. *Blakely* says quite clearly that it is immaterial for Sixth Amendment purposes "whether the judicially determined facts require a sentence enhancement or merely allow it."[17]

Blakely concerns the idea of a defendant being entitled to a particular legislatively defined ceiling unless certain specific findings of fact are made which justify enhancements to higher sentences. It is that concept of "entitlement" which dictates an inquiry as to whether the statutory scheme creates a legislative guarantee of a specific maximum sentence in the absence of additional fact-finding. In Tennessee a defendant is entitled, as a matter of law, to a sentence at the presumptive, statutory minimum for all but Class A felonies (and then at the mid-range) when he or she begins the sentencing hearing. In the absence of proof of enhancement factors at the end of the hearing, the defendant is still entitled to the presumptive sentence.

Booker does not salvage the Tennessee sentencing provisions. *Booker* found unconstitutional the "mandatory" portion of the federal statute. Sheared of the mandatory language, the entire federal sentencing system then became "advisory." The obvious fallacy here is that the Tennessee Supreme Court read *Booker* as meaning that the sentencing calculus must also be mandatory for the entire scheme to run afoul of the Sixth Amendment: "*Booker* explains that the mandatory increase of a sentence is the crucial issue which courts must consider in determining whether a particular sentencing scheme violates the Sixth Amendment."[18] *Booker* said no such thing and, in any event, it is hardly the "crucial issue." It is true that the federal statute contained both a mandatory base starting sentence and mandatory numerical enhancements, but simply because the federal system had more "mandatory" components did not mean that only a system which mirrors the federal structure is deficient.

Everyone agrees that the Tennessee scheme certainly does not mandate an increased sentence. The question is

not what sentence is required but rather what the statute forbids. The determinative constitutional question is, instead, whether under Tennessee law a judge is forbidden by statute from enhancing a sentence unless he or she make a finding of fact to justify an enhancement which permits a greater sentence. The ruling by the Tennessee Supreme Court that the Tennessee statute "fixes a [mandatory, presumptive,] determinate point, not a range, and the trial judge has no discretion to deviate from this determinate point unless he or she makes additional findings that enhancement factors are present" *ends* the inquiry.

It matters not that the Tennessee enhancement factors are less rigid than the federal approach or that the Tennessee judge has the discretion to impose the minimum notwithstanding the enhancement factors. The Tennessee defendant has an entitlement to the statutory presumptive sentence and the Sixth Amendment prohibits enhancement factors from increasing the sentence unless found by a jury. Thus, that the Tennessee enhancements are only discretionary—and the result of the calculus is also ostensibly discretionary—makes not a bit of constitutional difference.

To his credit, the Tennessee Attorney General advanced a similar analysis on Petition to Rehear in an attempt to convince the Tennessee Supreme Court that its initial April 15 opinion was off the mark:

> The Court places much emphasis on the fact that, under the Reform Act, "the finding of an enhancement factor does not mandate an increased sentence" Slip op. at 27. That is true enough, in that a court is always free to sentence a defendant at or below the presumptive minimum sentence, even when an enhancement factor is applicable. But that was equally true of the Washington guidelines under review in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the New Jersey statute at issue in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the statute involved in *Jones v. United States*, 526 U.S. 227 (1999), and Arizona's capital sentencing statute under scrutiny in *Ring v. Arizona*, 536 U.S. 584 (2002), all of which were found to violate the Sixth Amendment.
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> The critical inquiry under the Sixth Amendment is not whether the finding of an enhancement factor mandates an increased sentence above the presumptive minimum, but whether, under the applicable statutes, the judge can increase the sentence above the presumptive minimum only by finding additional facts. "Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence." *Blakely*, 124 S.Ct. at 2538, n.8. It is as plain as a pikestaff that a Tennessee judge has no authority to impose a sentence above the presumptive minimum—the sentence authorized by the jury verdict alone—unless an enhancement factor is found. See Tenn, Code Ann. § 40-35-210 (c), (d). Except for the fact of a prior conviction or a fact stipulated by the defendant, *Apprendi* holds that any such fact must be found by a jury beyond a reasonable doubt. 530 U.S at 490.
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> The decision in *United States v. Booker*, 125 S.Ct. 738 (2005), does not alter the conclusion that Tennessee's scheme violates the *Apprendi* rule. While *Booker* acknowledges that sentencing guidelines that are "merely advisory provisions" and not "mandatory and binding on all judges" do not implicate the Sixth Amendment, *Booker*, 125 S.Ct. at 750, it is clear from the context in *Booker* that the Court regarded the federal sentencing guidelines to be mandatory and binding because the only means of imposing an upward departure from the base range sentence was through the application of the guidelines, which in turn required findings of fact beyond the facts necessarily found by the jury verdict. In other words, an upward departure could only be reached by following the guidelines. It was in that sense that the Court viewed the guidelines as mandatory and binding; it was not because they required a particular sentence. See *Booker*, 125 S.Ct. at 750-51.
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> The same is true of Tennessee's statutory scheme, which authorizes a sentence above the presumptive minimum only when enhancement factors are found. Tenn. Code Ann. § 40-35-210(c), (d).

The United States Supreme Court has already said in *Booker* "there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue [in *Blakely*]."[19] That should have resolved the matter, yet the *Gomez* and *Black* decisions remain unfathomable.

Notwithstanding the Tennessee Supreme Court's pronouncements in *Gomez*, the Tennessee General Assembly enacted a "*Blakely* fix" to minimize the disruption caused by the obvious infirmity in the state's sentencing scheme. This legislation (which was signed into law on June 7, 2005, and became effective the same day) repealed the prior presumptive sentence provision.[20]

The new Tennessee statute is only prospective and, by its terms, has no application to crimes committed before the effective date of the act. Thus, the remedial legislation is of no comfort to Mr. Gomez or legions of other defendants, including but perhaps not limited to so-called pipeline defendants whose cases were still pending when the U.S. Supreme Court decided *Blakely*. Until this constitutional defect is corrected, these defendants will have no choice but to resort to federal district courts for relief. On a case-by-case basis, these defendants will be forced to rely on United States District Judges to hold Tennessee to its constitutional obligations. Defendants should not have to turn to § 2254 habeas petitions to obtain constitutionally required protections. This is especially true here where justice is so clearly and easily available in state court, if only the Tennessee Supreme Court would allow it. The mischief caused by the Tennessee Supreme Court's obvi-

ously incorrect interpretation of *Booker* and *Blakely* is incalculable.

V. Conclusion

While there are minute differences between the Tennessee sentencing structure and the Washington structure examined in *Blakely*, at bottom, both systems contain a mandatory, "presumptive" base sentence beyond which a trial judge may not exceed without additional judicial fact-finding. *Gomez* is functionally indistinguishable from *Blakely*, which held that such additional judicial fact-finding violated the Sixth Amendment.

Proper implementation of the Sixth Amendment is "of surpassing importance."[21] The Supreme Court may well conclude that enough cases have been decided for it to intervene and resolve the national split of authority. *Gomez* is perfectly postured to allow the Supreme Court to address the question of *Booker*'s impact, if any, on *Blakely*.[22] The Tennessee waltz is playing. Let the dancing begin.

Notes

* Mr. Raybin previously served as a member of the Tennessee Sentencing Commission and chaired the Substantive Law Subcommittee that drafted the Sentencing Reform Act of 1989. He is the author of TENNESSEE CRIMINAL PRACTICE AND PROCEDURE (West 1984).

1 The State Song of Tennessee. Tenn. Code Ann. § 4-1-302 lists four additional songs that have been adopted from time to time as the "State Song" but the Tennessee Waltz is by far the most popular. It was written in 1946 by Redd Stewart and Pee Wee King after they heard Bill Monroe's Kentucky Waltz on the radio while returning to Nashville. The story goes that Stewart emptied a matchbox and tore it open to compose the song. They first released the song in 1948. Patti Page's 1950 version topped the charts and within six months sold almost 5 million copies.

2 125 S. Ct. 738 (2005).

3 124 S. Ct. 2531 (2004).

4 *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005). In the interest of full disclosure Mr. Raybin, the author of this article, wishes to advise that he represents a defendant indicted with Mr. Gomez who was tried separately. Mr. Raybin has consulted extensively with the attorneys in *Gomez* since his client is also impacted by the decision.

5 *People v. Black*, 35 Cal.4th 1238 (2005).

6 *Blakely* stated that "'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." 124 S. Ct. at 2537.

7 *State v. Allen*, 2005 WL 1539186 (N.C., July 1, 2005).

8 Relying on *Black*, the New Mexico Supreme Court recently held that *Blakely* did not impact that state's presumptive sentencing scheme. *New Mexico v. Lopez*, No. 28 483 (N.M. Oct. 14, 2005).

9 *State v. Natale*, 2005 WL 1802084 (N.J. August 2, 2005). *Natale* performed "judicial surgery" on the New Jersey statutes and excised the "presumptive sentence." Such appellate procedures are always curious activities since such surgery is frequently performed with blunt instruments and without benefit of anesthetic.

10 *See State v. Moss*, 727 S.W.2d 229 (Tenn. 1986).

11 *State v. Jones*, 883 S.W.2d 597 (Tenn. 1994).

12 Tenn. Code Ann. § 40-35-401(d). Since the enhancement factors are not accorded specific numerical weight, even where some enhancement factors are upheld as legitimate, the illegality or inapplicability of other factors may result in a reduction of the sentence by the appellate court itself or a remand for the trial judge to reassess the sentence. *State v. Imfeld*, 70 S.W.3d 698,707 (Tenn. 2002) ("We must now determine whether the elimination of these [inapplicable] enhancement factors warrants a reduction in the length of the sentences . . . [which] requires review of the evidence supporting any remaining enhancement factors, as well as the strength and substance of the evidence supporting any mitigating evidence."). In some instances the inapplicability of a single factor may not necessarily result in a reduction, but where multiple enhancement factors are found to be inapplicable or invalid, appellate modification or a remand is more common particularly where the maximum sentence was imposed.

13 The "failure" to raise the *Blakely* issue is understandable since *Blakely* was released during the twilight between Mr. Gomez's appeal to the Court of Criminal Appeals and the Tennessee Supreme Court. It was only then that Mr. Gomez definitively articulated the Sixth Amendment issues. Prior to *Blakely* even the Tennessee Supreme Court determined that there were no Sixth Amendment infirmities in Tennessee sentencing law. *Graham v. State*, 90 S.W.3d 687 (Tenn. 2002).

14 The Tennessee Supreme Court held that "when no enhancement or mitigating factors are found, Tenn. Code. Ann. § 40-35-210(c) mandates imposition of the presumptive sentence."

15 The majority in *Gomez* repeatedly emphasized that the sentencing statutes do "not mandate an increased sentence upon a judge's finding of an enhancement factor."

16 The majority concluded that the Tennessee statute is constitutional because it "sets out broad sentencing principles, enhancement and mitigating factors, and a presumptive sentence, all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature."

17 *Blakely*, 124 S.Ct. at 2538, n.8

18 163 S.W.3d. at 661.

19 125 S. Ct., at 749.

20 *See* David Raybin, *The* Blakely *Fix*, 41 TENN. BAR ASSOC. J 14 (July 2005).

21 *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

22 The Tennessee Attorney General continues to agree with the petitioners on the substantive Sixth Amendment issue but is complaining that the United States Supreme Court has "no jurisdiction" because the Tennessee Supreme Court's opinion ostensibly rested on some independent "plain error" state ground. The question of whether the Tennessee sentencing statute violates the Sixth Amendment is clearly a federal question. Indeed, there was no other question that was definitively resolved in *Gomez*. The Tennessee Supreme Court held that the Tennessee sentencing statutes did not violate *Blakely* as subsequently interpreted by *Booker*. This led to the conclusion that:

> [W]e are unable to accept the State's concession that the defendants' sentences were imposed in violation of the Sixth Amendment. In light of our holding that the defendants' sentences were not imposed in violation of the Sixth Amendment, the defendants are not entitled to relief because the record reflects no plain error.

S.W.3d, at 662-663. The intricacies of Tennessee plain error law are best left to Tennessee.