

State v. Gomez: Tennessee Sentencing Law Violates the Sixth Amendment

By David L. Raybin



After a judicial odyssey of more than two years, the Tennessee Supreme Court held that the United States Constitution prohibits statutory enhancement factors from increasing a defendant's sentence above the presumptive minimum term for crimes that occurred prior to June 7, 2005. The Oct. 9, 2007, ruling in *State v. Gomez*,¹ finally brings Tennessee's sentencing law in harmony with the Sixth Amendment jury trial right that prohibits judicial fact-finding to

enhance a sentence beyond the legislatively prescribed, presumptive minimum. *Gomez* is important but it is also an example of how appellate jurisprudence can be dramatically altered by shifting opinions of the United States Supreme Court.

The Appellate Background

Recently, modern sentencing statutes and their concern for parity in sentencing like offenders under like circumstances have implicated the Sixth Amendment. Prior to these modern statutes — approximately 20 years ago

— sentencing would typically occur by a judge exercising his or her discretion to sentence an offender to a determinate amount within a range set by statute. Although, in exercising this discretion, a judge would necessarily consider facts extraneous to the verdict itself, there was no Sixth Amendment problem since every fact necessary for imposition of any sentence within the range set by statute had already been found by a jury or admitted in a plea.

The new statutes, in an effort to promote uniformity, created sentencing guidelines that frequently contained

mandatory or presumptive sentences. Tennessee was no exception and the 1989 Tennessee Sentencing Reform Act contained a presumptive sentence for all crimes. The judge could only impose a higher sentence if the judge found certain statutory enhancement factors.

In *Apprendi v. New Jersey*,² which eventually upset modern sentencing schemes throughout the nation, the United States Supreme Court found that judicial fact-finding was unconstitutional so as to enhance a defendant's sentence. In *Apprendi*, the defendant pled guilty to, among other things, the crime of possessing a firearm for an unlawful purpose, a second-degree offense in New Jersey.

New Jersey law provided for a sentencing range of five to 10 years for a second-degree offense. A hate-crime statute allowed the sentencing court to impose an "enhanced" sentence of up to 20 years if the defendant's possession of a firearm was for a biased purpose. After finding by a preponderance of the evidence that the hate-crime statute applied, the judge sentenced the defendant to 12 years on the possession charge — two years above the statutory maximum of 10 years.

The United States Supreme Court held the defendant's sentence to be unconstitutional, stating: "[O]ther 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." At the same time, however, the court took pains to emphasize that it is entirely constitutional "for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment within the range prescribed by statute." Thus, had the judge exercised discretion in choosing a sentence anywhere between five and 10 years, there would have been no constitutional problem since any penalty within that range would not have been above "the prescribed statutory maximum."

Apprendi lay dormant as precedent

because it was assumed that the ruling was governed by the peculiarities of the New Jersey law. This misunderstanding was disabused in *Blakely v. Washington*.³ In *Blakely*, the Supreme Court held that a defendant's Sixth Amendment right to a trial by jury was violated when the trial court sentenced the defendant to an "exceptional sentence" of 90 months after judicially determining that the defendant had acted with "deliberate cruelty," even though the defendant only admitted in his plea agreement to facts subjecting him to a maximum sentence of 53 months.

Relying on *Apprendi*, the defendant in *Blakely* argued that he was deprived of his constitutional right to have all facts essential to his sentence determined by a jury beyond a reasonable doubt. The State of Washington countered with the argument "that there was no *Apprendi* violation because the relevant 'statutory maximum' [was] not 53 months, but the 10-year maximum for class B felonies." The United States Supreme Court rejected this argument:

Our precedents make clear ... 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*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

What was previously elusive was now crystal clear: judicial enhancements to presumptive sentences were unconstitutional. Defense lawyers raised the *Blakely* issue all across the nation.

To everyone's astonishment, notwithstanding *Blakely*, in *State v. Gomez*,⁴ (Gomez I) the Tennessee Supreme Court held that Tennessee's sentencing laws did not violate the Sixth Amendment. The court held that the Tennessee sentencing law passed constitutional muster because, although there was a presumptive sentence, the judge was not required

to impose the higher sentence.

In 2005, I commented that the Tennessee Supreme Court asked the wrong question:

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. ... 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.⁵

It should have been clear that the Tennessee presumptive sentencing law was governed by *Blakely*, but the Tennessee Supreme Court (as did the California, New Mexico, and Hawaii Supreme Courts) clung to the notion that the trial judge's option not to follow the presumptive sentence somehow salvaged the sentencing structure.

The Tennessee *Blakely* Fix

Not all of Tennessee was in denial. Even the Tennessee attorney general was of the view that our statutes were doomed; he conceded that the defect was "as a plain as a pikestaff." So it was that the governor established an advisory commission to draft legislation to remedy our defective scheme. The essence of the remedy was to remove the "presumptive sentence" and replace it with a discretionary sentencing "consideration."⁶ The "*Blakely* fix" became law effective June 7, 2005.

The heart of the 2005 legislation provided that: "In imposing a specific sentence within the range of punishment, the court shall consider, *but is not bound by*, the following advisory sentencing guidelines" (emphasis supplied). This was clearly the post-*United States v.*

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Booker,⁷ federal formulation that created a guideline system mandating that the judge consider specific factors but without working from a mandatory base number. This formulation was critical since it assured that all judges used an identical process of arriving at a sentence but without creating an entitlement to a presumptive sentence or, for that matter, any specific sentence. It was agreed that since the new Tennessee sentencing consideration did not create an entitlement, the Tennessee fix was unquestionably constitutional.⁸

Lighting Strikes

As noted, Tennessee was among the minority of jurisdictions that held that *Booker* somehow altered *Blakely*. It was only a matter of time until the United States Supreme Court would settle the matter.

The determinative ruling came in *Cunningham v. California*,⁹ which examined the similar California presumptive sentencing law. The Supreme Court in *Cunningham* held that allowing a judge to impose an “upper term” sentence on a finding of aggravating circumstances was unconstitutional because it bypassed the jury’s role as fact-finder. In essence, because “aggravating circumstances depend on facts found discretely and solely by the judge ... the middle term prescribed in California’s statutes, not the upper term, is the relevant statutory maximum.” The United States Supreme Court rejected the California Supreme Court’s effort to interpret its statute as an actual *range* in which the judge could choose a sentence:

Under California’s system, judges are not free to exercise their “discretion to select a specific sentence within a defined range.” California’s Legislature has adopted *sentencing triads*, three fixed sentences with *no ranges* between them. *Cunningham*’s sentencing judge had no discretion to select a sentence within a range of 6 to 16 years, but had to impose 12 years, nothing less and nothing more, unless

the judge found facts allowing a sentence of 6 or 16 years. Factfinding to elevate a sentence from 12 to 16 years, this Court’s decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies.

Thus, the mandatory California mid-range sentence which prohibited a greater sentence was the maximum a judge could impose since any enhancement required a judicial finding of fact of certain factors. It was now plain as the proverbial pikestaff that, except for a prior conviction, any fact that increased the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

Once *Cunningham* was decided *Gomez I* was doomed. Granting the defendants’ Petition for a Writ of Certiorari, the United States Supreme Court remanded *Gomez* and directed that the Tennessee Supreme Court reconsider the decision in light of *Cunningham*.

Gomez II

On Oct. 9, 2007, the Tennessee Supreme Court released *Gomez II* and found that the pre-June 7, 2005, Tennessee presumptive sentencing statute violated the Sixth Amendment. The court further held that the two defendants in *Gomez* were entitled to new sentencing hearings and that the government could not use prohibited, judge-determined enhancement factors to increase the sentence beyond the statutory minimum.

The fundamental holding in *Gomez II* was that because Tennessee had a presumptive sentencing scheme, the trial judge was prohibited from imposing any sentence above the minimum unless the judge found certain facts. This factfinding was to be made by a jury and not a judge, and thus judge-found enhancement factors violated the Sixth Amendment. An exception was made for enhancement factors that rested on

prior convictions.

As applied to the two defendants in *Gomez II*, the case was remanded for a new sentencing hearing where the judge could only consider “prior conviction” enhancement factors. Other types of enhancement factors could not be applied to increase the sentence.

The impact of *Gomez II* to other defendants is that unless a defendant has prior convictions, the defendant *must* receive the minimum (or presumptive) sentence within the sentencing range. Any increase above the minimum violates the Sixth Amendment.

The holding has a somewhat limited impact since, as noted, the legislature anticipated this ruling in 2005 and remedied Tennessee sentencing laws by removing the mandatory presumptive sentence. The new law was effective for crimes that occurred on or after June 7, 2005. Thus, *Gomez II* only applies to crimes committed prior to June 7, 2005.

Retroactivity

Gomez II used a “plain error” framework to address the merits of the Sixth Amendment issue since neither defendant had raised the issue in the trial court. This is important because it answers another fundamental question of “how far back” *Gomez II* will reach. The Tennessee Supreme Court held that “defense counsel, like many others in the legal community, did not realize until *Blakely* was decided [June 24, 2004] that the defendants had a potential claim for relief [under the Sixth Amendment].” This may signal that the Court will “reach back” as far as *Blakely* to grant retroactive relief.

In my view, defendants who were sentenced between June 24, 2004 and June 7, 2005 will have a legitimate argument that any sentence above the minimum violates the Sixth Amendment. This would only apply where the sentence was contested — such as after a trial — and not where there was a plea agreement and an agreed sentence.

The direct appeal and post-conviction “pipeline” cases are the greater problem. Had *Gomez I* been correctly decided,

those defendants who were actively seeking relief on or after June 24, 2004 would have prevailed. This would have applied to cases in post-trial status or on direct appeal. Given the denial of appellate relief because of *Gomez I*, many defendants had no other remedy but post-conviction relief petitions which are now in various stages of litigation. All these defendants should now be given the benefit of *Gomez II* as the courts “unwind” the process and put defendants back where they should have been had the court determined that the enhancements were unconstitutionally applied in *Gomez I*.

This is not to say that *Gomez II* will be given retroactive effect to the beginning of time. Arguably, *Apprendi*, decided in 2000, but certainly *Blakely* marks a bright line for the application of the Sixth Amendment to sentencing enhancements. At least at this point, no federal court has given the *Apprendi-Booker-Blakely* line of cases retroactive effect in federal habeas proceedings.¹⁰

For now, it will take months — if not years — to untangle the *Gomez* Gordian knot. Courts will have to look at each defendant’s case to determine if that person should receive a new sentencing hearing. This may ultimately grant relief to dozens of inmates not to mention the hundreds more who will claim they should be granted a sentence reduction.

Collateral Issues

On October 15, 2007 the Tennessee Supreme Court granted review in two cases to determine if the Sixth Amendment prohibits judicial fact-finding in determining whether to impose consecutive sentences.⁹ Both decisions of the Court of Criminal Appeals followed the cases from other states which find that the Sixth Amendment has no impact on consecutive sentences. Now that the Tennessee Supreme Court has granted review, the issue is squarely on the table.

As noted, *Gomez II* held that the pre-1995 presumptive sentencing law prohibited the use of enhancement factors to increase a sentence above the minimum. That decision had limited impact because the legislature “fixed” the prob-

lem for crimes that took place after June 7, 2005. However, the “fix” did not impact consecutive sentences that are now suspect because current law mandates concurrent sentences unless the judge finds certain statutory facts. It is that judicial “fact-finding” that may impact the Sixth Amendment.

I believe *Gomez II* may well apply to consecutive sentences under the current Tennessee law. In short, unless the judge makes a factual finding that one of the consecutive sentencing factors exists, the defendant is absolutely entitled to a concurrent sentence and, more to the point, the judge is forbidden to impose consecutive sentences. *Tenn. Code Ann.* § 40-35-115 (d) provides that: “Sentences shall be ordered to run concurrently, if the criteria noted previously in [this section] are not met, unless consecutive sentences are specifically required by statute or the Tennessee Rules of Criminal Procedure.”

This “entitlement” in the absence of judge-found facts is no different than the presumptive minimum sentence under prior Tennessee law. It matters not that the Tennessee judge has the authority to run the sentences concurrently even if a consecutive sentence factor may exist. That is not the question. Recall the question posed in *Rita v. United States*¹²: “The Sixth Amendment question, [this] Court has said, is whether the law *forbids* a judge to increase a defendant’s sentence unless the judge finds facts that the jury did not find.”

Clearly, the current Tennessee consecutive sentence scheme forbids a consecutive sentence unless a consecutive sentence factor is found by the judge. The potential judicial “doubling” of sentences in Tennessee rests not on a finding by the jury but by a judge and may violate the Sixth Amendment. Read literally, our consecutive sentence statutes are indistinguishable from our sentencing laws and so the Tennessee Supreme Court may well find the current law invalid, prohibiting consecutive sentences unless based on prior convictions.

The *Gomez II* decision is certainly of enormous significance to current cases and not just for those defendants whose

alleged crimes occurred prior to June 7, 2005. It will take several more years before all these questions are resolved and certainly decades for all the affected defendants to pass through our criminal justice system. ¹¹



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Notes

1. ___ S.W.3d ___, 2007 WL 2917726 (Tenn.2007).
2. 530 U.S. 466 (2000).
3. 542 U.S. 296 (2004).
4. 163 S.W. 3d 632 (Tenn. 2005).
5. Raybin, “The Anticipated Resolution of the Blakely Split of Authority in the States: Will the United States Supreme Court Dance the Tennessee Waltz?” 18 *Federal Sentencing Reporter No.1* (October, 2005). The United States Supreme Court was to later hold that for purposes of the Sixth Amendment the issue is “whether [the sentencing] law forbids a judge to increase a defendant’s sentence unless the judge finds facts that the jury did not find (and the offender did not concede).” *Rita v. United States*, ___ U.S. ___, 127 S. Ct. 2456, 2466 (2007).
6. See, Raybin, “The Blakely Fix: New Tennessee Law Restores Judicial Discretion in Criminal Sentencing,” 41 *Tennessee Bar Journal*, July No. 7 (2005)
7. 543 U.S. 220, 125 S. Ct. 738 (2005).
8. Indeed, even the United States Supreme Court was to expressly “bless” the new Tennessee statute in the concluding footnote in *Cunningham*: “Other States [citing *Tenn. Code Ann.* § 40-35-210] have chosen to permit judges genuinely ‘to exercise broad discretion ... within a statutory range,’ which, ‘everyone agrees,’ encounters no Sixth Amendment shoal.”
9. ___ U.S. ___, 127 S. Ct. 856 (2007).
10. See, *United States v. Price*, 400 F.3d 844, 846, 849 (10th Cir. 2005) (finding that

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PAINE ON PROCEDURE *continued from page 30*

transfer it to the proper court in the proper county. ⚖️

spent time in Florida, he died in Tennessee on Oct. 9, 1966, and was buried at National Cemetery in Chattanooga. I thank John Shearer for this new information.

Erratum

In my June 2007 article about the trial of Eugene D. Blanchard, "Murder in the Churchyard," I was mistaken about his life after release from prison. He went to Chattanooga and worked for his older cousin's manufacturing company. He remarried. Although he

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Blakely is only a new procedural rule); *Humphres v. United States*, 398 F.3d 855, 861-63 (6th Cir. 2005) (reaching same conclusion for *Booker*); *United States v. Mora*, 293 F.3d 1213, 1218-19 (10th Cir. 2002) (reaching same conclusion for *Apprendi*).

11. *State v. Allen*, 2007 WL 1836175 (Tenn. Crim. App. 2007) and *State v. Lumpkins*, 2007 WL 1651881 (Tenn. Crim. App. 2007).

12. *Rita v. United States*, ___ U.S. ___, 127 S. Ct. 2456, 2466 (2007).

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