



# For the Defense

New Mexico

CRIMINAL DEFENSE LAWYERS ASSOCIATION

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"I should be able to love my country and love justice"  
- Camus

## Supreme Court To Address Constitutionality Of State Sentencing Procedure

Zachary A. Ives

When the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), we got excited. We hoped *Blakely* would end guideline sentencing in federal court and benefit our clients in state court. The biggest battle in federal court ended disappointingly with *United States v. Booker*, 543 U.S. 220 (2005). In state court, we have argued, among other things, that *Blakely* prohibits the imposition of aggravated felony sentences based on facts found only by a judge by a preponderance of the evidence. The New Mexico Supreme Court rejected our argument, but the United States Supreme Court will address the issue next term. A favorable decision could require appellate courts to vacate aggravated sentences imposed under the current scheme and change how our clients are sentenced in state court.

**Issue.** Do the Fourteenth Amendment and Sixth Amendment prohibit a district court from imposing an aggravated sentence under NMSA 1978, § 31-18-15.1 (1993) based on facts a judge found by a preponderance of the evidence, but that a client never admitted and that the state never proved to a jury beyond a reasonable doubt? This issue arises when the state asks a district court judge to impose an aggravated sentence under § 31-18-15.1, rather than the basic sentence in § 31-18-15. Consider, for example, the sentencing of a client for a first degree felony. The basic sentence is eighteen years under § 31-18-15(A)(2). Under § 31-18-15.1(A), a court may only increase that sentence "upon a finding by the judge of any . . . aggravating circumstances surrounding the offense or concerning

the offender." The state must only prove aggravating circumstances to a judge by a preponderance of the evidence. Under our statutory scheme, if a judge finds at least one aggravating circumstance, she may impose a sentence up to one third longer than the basic sentence. This is no small matter—six more years in prison for a client convicted of a first degree felony. The issue is whether our clients have a constitutional right to require the state to prove aggravating facts to a jury beyond a reasonable doubt or whether the constitution allows the imposition of increased sentences based on facts found by a judge by a mere preponderance of the evidence.

**Litigation.** In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the United States Supreme Court held that the Sixth Amendment and Fourteenth Amendment require that "[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." *Apprendi*, 530 U.S. at 490. In the wake of *Apprendi*, courts disagreed about what the Supreme Court meant by "statutory maximum."

Our Court of Appeals first addressed the issue in *State v. Wilson*, 2001-NMCA-032, 130 N.M. 319. The district court had increased Wilson's sentence under § 31-18-15.1 based on facts the judge found by a preponderance of the evidence. Wilson argued that § 31-18-15.1 is unconstitutional under *Apprendi* because it allows a judge to increase a defendant's sentence beyond the statutory maximum,

which he argued was the basic sentence in § 31-18-15(A), solely on the basis of aggravating facts the state proved to a judge under a preponderance standard. In a split decision, the Court disagreed, rejecting defendant's contention that "the maximum sentence authorized by a jury's verdict is the basic sentence prescribed by Section 31-18-15." *Id.* ¶ 13. Instead, the Court held that the statutory maximum "is the basic sentence plus a one-third increase under Section 31-18-15.1." *Id.* ¶ 16. Judge Bustamante dissented from this holding. He explained that "under Section 31-18-15, the jury verdict itself cannot result in a sentence greater than the basic sentence for each level of felony absent a factual finding supporting an enhancement. Thus, the Section 31-18-15 basic sentence is the maximum sentence which can be imposed based on the jury verdict alone." *Id.* ¶ 53 (Bustamante, J., dissenting in part).

Faced with conflicting lower court decisions about the meaning of "statutory maximum," the Supreme Court granted certiorari in *Blakely*. The Court explained that the "statutory maximum" 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.

*Blakely*, 542 U.S. at 303-04.

When our Court of Appeals revisited the constitutionality of our aggravated sentencing procedure, it held that "under *Blakely* our *Wilson* decision can no longer control or be considered controlling authority." *State v. Frawley*, 2005-NMCA-17, ¶ 13, 137 N.M. 18, *overruled by State v. Lopez*, 2005-NMSC-036, 137 N.M. 266. The Court "read *Blakely* to say" that

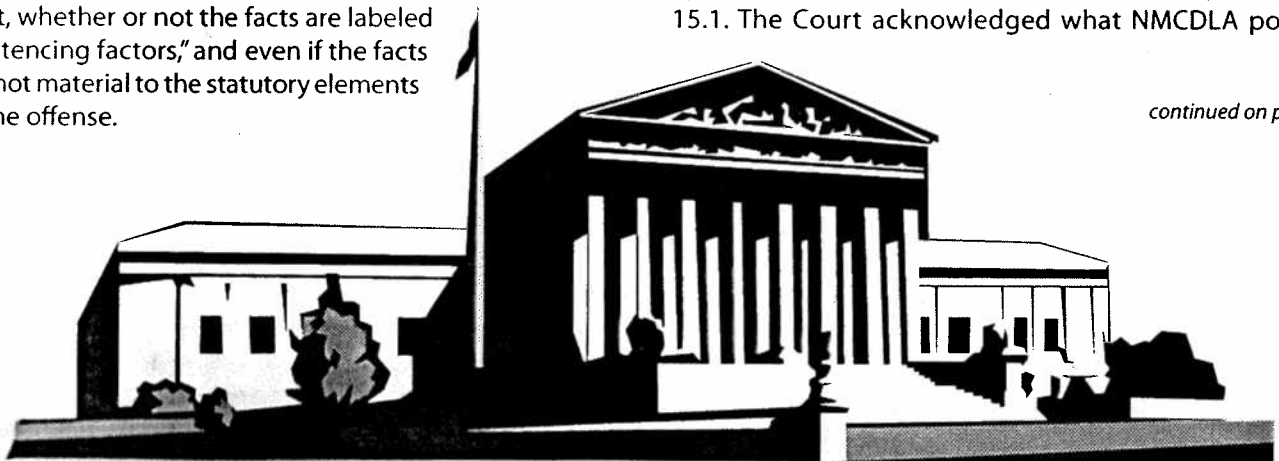
When the jury considers the facts relevant to the elements of an offense in determining guilt or innocence, the criminal sanctions for that offense cannot be increased after the verdict based on facts the jury has not specifically considered in connection with its finding of guilt, whether or not the facts are labeled "sentencing factors," and even if the facts are not material to the statutory elements of the offense.

*Frawley*, 2005-NMCA-17, ¶ 12.

The New Mexico Supreme Court granted certiorari in *Frawley* and other cases to decide the *Blakely* issue. The Appellate Division of the New Mexico Public Defender and *amicus curiae* NMCDLA briefed and argued the issue for the defense. Citing *Blakely*, the plain language of the sentencing statutes, and the decisions of other state courts addressing the constitutionality of similar sentencing schemes, we argued that the "statutory maximum" is the basic sentence in § 31-18-15 because § 31-18-15.1 does not permit a judge to impose a longer sentence, unless she finds facts beyond the elements of the offense. Therefore, under *Blakely*, any enhancement of the basic sentence must be based on facts that the defendant has admitted or that the state has proven to a jury beyond a reasonable doubt. Stated differently, the Constitution prohibits the enhancement of basic sentences based on facts a judge has found by a preponderance of the evidence. This means that district courts apply our felony sentencing statutes unconstitutionally when they enhance a sentence based on judicial findings, though they may apply it constitutionally by, for example, choosing to impose a basic sentence or decreased sentence when they find both aggravating and mitigating circumstances. To remedy the constitutional defect, we argued that the Court should require the state to prove all aggravating circumstances to juries beyond a reasonable doubt. We asked the Court to implement jury fact finding by exercising its power of superintending control to adopt new procedural rules, uniform jury instructions, and special interrogatories for district courts to use whenever the state seeks to enhance a basic felony sentence.

A divided Court overruled *Frawley* and held that New Mexico's aggravated sentencing procedure is not constitutionally infirm. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521.<sup>1</sup> The Court identified several ambiguities in *Blakely's* definition of "statutory maximum," noted that the resolution of the constitutional issue hinges on the exact meaning of that phrase, and rejected our argument that the "statutory maximum" is the applicable basic sentence in § 31-18-15. Instead, the Court held, as the Court of Appeals had in *Wilson*, that the "statutory maximum" is the longest applicable enhanced sentence available under § 31-18-15.1. The Court acknowledged what NMCDLA pointed

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## “Supreme Court”

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out in its *amicus* brief and in post-argument letters to the Court regarding supplemental authority—that a majority of state supreme courts with similar schemes had struck those schemes down. However, the Court followed the California Supreme Court’s reasoning in *People v. Black*, 35 Cal. 4th 1238, 29 Cal.Rptr.3d 740, 113 P.3d 534 (2005), which held California’s sentencing scheme is constitutionally sound because the longest enhanced felony sentence is the “statutory maximum.” Justice Chavez dissented from the *Blakely* holding. He agreed with the defense that our sentencing scheme is unconstitutional as applied, and that the proper remedy is jury fact-finding.

The United States Supreme Court has issued a writ of certiorari in *California v. Cunningham*, No. 05-6551, to review the California Supreme Court’s resolution of the *Blakely* issue. The question presented is “[w]hether California’s Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.” Because the New Mexico Supreme Court’s decision in *Lopez* hinged on the California Supreme Court’s reasoning, a favorable decision in *Cunningham* could overrule or cast doubt on *Lopez*.<sup>2</sup>

**Practice tips.** During every stage of the case, our clients should avoid admitting aggravating circumstances. Even if we win *Cunningham*, district courts can arguably use such admissions to increase our clients’ sentences without running afoul of the Constitution.<sup>3</sup> At sentencing, we should preserve the issue by objecting to the aggravation of our clients’ sentences based on facts found by judges. On appeal, we should include the *Blakely* issue in our docketing statements and briefs, regardless of whether the issue was preserved.<sup>4</sup> We should also raise the issue in post-conviction proceedings, even if our clients’ sentences were imposed before *Blakely*.<sup>5</sup> To avoid giving courts the impression that we are ignorant of the law or that we are making frivolous arguments, we should explain that the New Mexico Supreme Court’s decision in *Lopez* controls at this point, but the law could change when the United States Supreme Court decides *Cunningham*. If we keep

raising the issue at every juncture, our clients in state court just might benefit from *Blakely* in ways our clients in federal court have not.

### ENDNOTES

<sup>1</sup> The Court ordered NMCDLA to file its *amicus* brief in *Jernigan*, but reached the issue in *Lopez*.

<sup>2</sup> A petition for writ of certiorari is pending before the United States Supreme Court in *Frawley v. New Mexico*, No. 05-9004, which presents New Mexico’s version of the issue in *Cunningham*. Because the issues in *Cunningham* and *Frawley* are closely related, the Court is likely to grant the *Frawley* petition and hold the case until it decides *Cunningham*.

<sup>3</sup> When our clients admit aggravating circumstances in trial testimony, we should argue that their admissions cannot be used to enhance their sentences without a knowing and voluntary waiver of *Blakely* rights. See *Blakely*, 542 U.S. at 310 (requiring “appropriate waivers”); *United States v. Thomas*, 389 F.3d 424, 426 (3rd Cir. 2004) (listing types of admissions that may be used to enhance sentence); *State v. Paredes*, 2004-NMSC-36, ¶ 7, 136 N.M. 533, 101 P.3d 799 (holding that waiver of right to jury trial must be knowing and voluntary).

<sup>4</sup> If the *Blakely* issue was not preserved, we can argue on appeal that the error was fundamental. See Rule 12-216(B)(2) NMRA. If the issue was preserved, the state is likely to argue that the error was harmless. See *State v. McDonald*, 2004-NMSC-033, ¶¶ 9-18, 136 N.M. 417, 99 P.3d 667 (holding that *Blakely* error is not structural and may be harmless). In addition to arguing that the error was not harmless, we should argue that the continued validity of *McDonald* is unclear because the United States Supreme Court will decide the harmless error issue in *Washington v. Recuenco*, No. 05-83.

<sup>5</sup> Using *Blakely* in post-conviction challenges is a complex subject that is beyond the scope of this article. One significant obstacle is the growing body of case law holding that *Blakely* is not retroactive. Professor Douglas A. Berman’s sentencing blog is a good starting point for research on this and other *Blakely* issues: <http://sentencing.typepad.com>.

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## “Confronting our Fears”

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Phoenix, Arizona. Mikhell “Kelly” Branham works out of a federal public defender office on the east coast. If you have a Federal Public Defender or federal CJA capital case, you can call Tammy Krause at (602) 382-2886 or email her at [Tammy\\_Krause@fd.org](mailto:Tammy_Krause@fd.org) to discuss your case and find out whether victim outreach would be appropriate in your case.

Tammy and Kelly will also be able to refer you to a victim outreach specialist – or work on the case themselves. If you have a case in state court, you can call Kathy Smith at the JustBridges program at Eastern Mennonite University in Harrisonburg, Virginia at 540-432-4696 for a referral to a DBVO specialist in your area.

*For more info, contact Laurie Knight at [knightlaurie@qwest.net](mailto:knightlaurie@qwest.net)*