IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
Appellee,	)	
	)	**DAVIDSON COUNTY**
v.	)	**No. M2002-01209-SC-R11-CD**
	)	
EDWIN GOMEZ and	)	
JONATHAN S. LONDONO,	)	
	)	
Appellants.	)	

ON APPEAL BY PERMISSION FROM THE JUDGMENT OF THE COURT OF CRIMINAL APPEALS

PETITION TO REHEAR OF *AMICUS CURIAE* THE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (TACDL) IN SUPPORT OF APPELLANTS

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PETITION TO REHEAR

For the following reasons this Court should reconsider the Sixth Amendment *Blakely* issue and the companion procedural waiver issue because of material and fundamental misapprehensions of law. In summary, *Booker* does not trump *Blakely* to the extent that a Tennessee judge may apply the non-prior-conviction-related enhancements to the mandatory presumptive sentence. Whether the Tennessee sentencing enhancement factors are construed to be mandatory or discretionary makes absolutely no difference to the Sixth Amendment issue since it is the *possibility* of a judicially imposed sentence above the mandatory minimum which triggers both *Blakely* and *Booker*. There is no waiver of the Sixth Amendment claims. "Plain error" is unnecessary to review enhancement factor defects on direct appeal under Tennessee law. For the same reason it is unnecessary to determine if *Blakely* is a "new rule."

A.

With respect to waiver of the Sixth Amendment arguments, this Court held that under Tennessee procedure the sentencing claims could only be reviewed for plain error because the "defendants did not raise this constitutional challenge at their April 4, 2002, sentencing hearing or in their motions for new trial, nor did they raise it in the Court of Criminal Appeals." Thus, this Court implicitly held that had the Sixth Amendment question been raised at any one of these three points the issue would have been preserved and the merits of the Sixth Amendment controversy ripe for review.

It is not at all clear why this Court held that the Court of Criminal Appeals is the point of "final issue preservation" as a matter of state law. Why does not a failure to object to a "sentencing question" at the sentencing hearing itself permit review of enhancement factors only by "plain error" in the Court of Criminal Appeals? A review of Tennessee law establishes that neither this Court nor the Court of Criminal Appeals have ever imposed waiver barriers to enhancement factor sentencing issues litigated in either court, notwithstanding lack of an "objection" at the trial court level.

"Sentencing appeals" dictate an inquiry as to the type of question at issue. The issue in this Court is not whether the sentence is illegal nor is it even whether the sentence violates the Sixth Amendment. The precise question is whether the several enhancement factors – apart from those resting on prior convictions – may be used to enhance the defendants' sentences above the statutory presumptive minimum. That the sentencing defect claims here rest on constitutional rather than statutory grounds are not relevant to the fact that this Court may reach the merits without "plain error" or a trial court level objection.

A trial objection may be necessary for routine evidentiary propositions such as hearsay. For example, in *State v. Pugh*, 713 S.W.2d 682 (Tenn. Crim. App. 1986), the trial judge was entitled to consider evidence which was included in the presentence report where the presentence report was introduced without objection.

The Sixth Amendment questions here do not depend upon the introduction of testimony or the objection to a specific piece of evidence at trial or at the sentencing hearing. Rather, the Sixth Amendment question deals *only* with whether certain enhancement factors

could or could not be utilized against these two defendants. Tennessee has never imposed a waiver rule on the litigation of enhancement factors in an appellate court. In other words, until this case, no Tennessee court has denied appellate review of enhancement factors because of some failure to "object" at the trial level.

Distinguishable are cases which involve sentencing questions where some event must have occurred prior to the jury trial itself. For example, in *State v. Stephenson*, 752 S.W.2d 80 (Tenn, 1988), this Court was concerned about pretrial notice of prior convictions used to enhance the sentence into a higher range. The Court held that if the defendant does not seek a continuance following a delayed notice, "any objection to the delayed notice . . . ordinarily should be deemed to have been waived."

Unlike the mandatory pretrial notice of prior convictions used to enhance a sentence into a higher range, there is no requirement of notice of enhancement factors used to enhance a sentence within the range. Compare Tenn. Code Ann. § 40-35-202(a) with subsection (b) noting that enhancement factor notice is only required where the judge orders notice. Given that notice of enhancement factors is not mandatory there is no waiver imposed for failing to object to the utilization of enhancement factors. Indeed this Court has held that enhancement factors which were not relied upon by the trial court might be considered by an appellate court in conducting *de novo* review. See *State v. Pearson*, 858 S.W.2d 879 (Tenn., 1993) which held that an appellate court is authorized to consider any statutory enhancement factors supported by the record. See also, *State v. Adams*, 864 S.W.2d 31 (Tenn., 1993).

Given that, under Tennessee law, all of the enhancement factors are still "in play" at any time on direct appeal leads to the inescapable conclusion that a party can object to the utilization of enhancement factors at any time on direct appeal. This Court can certainly consider enhancement factors not considered by the trial court or the Court of Criminal Appeals in adjudicating an appropriate sentence. This is so because "we must review the length, range or manner of service of a sentence *de novo* with a presumption that the determinations made by the trial court were correct." *State v. Imfield*, 70 S.W.3d 698 (Tenn., 2002). As noted, even this Court is authorized to consider any enhancement as part of *de novo* review. *State v. Pearson, supra*.

At bottom, the Sixth Amendment issue depends on whether a trial court may constitutionally utilize enhancement factors to increase the length of a defendant's sentence. This is no different than whether an enhancement factor is properly supported by the record, is already utilized as an element of the crime, or where there is some other problem with the enhancement factor in that particular case. As noted, enhancement factors may be contested at any time on direct appeal and, indeed, may be advanced by the state for the first on appeal or even by the appellate court itself because of *de novo* review. How then can an enhancement factor be "raised" for the first time on appeal by an appellate court itself but be immune to the defendants' "belated" complaint that the enhancement factor violates the constitution?

"Plain error" can be noticed even though not raised in the motion for new trial or assigned as error on appeal. Rule 52(b) Tenn. R. Crim. P. Sentencing issues are never raised

in a motion for new trial for obvious reasons and the Sixth Amendment claim was "assigned" as error in this Court.

"Plain error" rules are simply unnecessary to review the Sixth Amendment claims here. Appellate courts in Tennessee have routinely reviewed the application of enhancement factors given that (1) there is no requirement of pretrial notice, (2) lawyers do not object to rulings by judges when they explain the factors used to justify a sentence at the end of the hearing, (3) there are no motions for new trials for sentencing questions, and (4) appellate review is *de novo* which permits consideration of previously unaddressed enhancement factors at the behest of the State or by the appellate court itself.

It is also unnecessary to determine if *Blakely* is a "new rule" or not. *Blakely* is clearly the law today. The appeals of these defendants are here today on direct appeal. The enhancement factors have been "in play" from the beginning of the sentencing hearing, through the Court of Criminal Appeals, and in this Court *once* it accepted review of the entire case including the sentencing issues.

In *Gomez* this Court imposed an unprecedented state procedural waiver barrier to the merits of the Sixth Amendment claim as it relates to the utilization of the enhancement factors. At any time on direct appeal the enhancement factors could have been modified, eliminated or increased in number by the State or this Court itself. The enhancement factors could also be assailed by the defense on any statutory or constitutional grounds on direct appeal; they were, and thus there is no waiver here.

B.

As to the merits of the Sixth Amendment issue, *Gomez* was wrongly decided. Apparently this Court was of the view that **only** a ***mandatory*** presumptive sentence coupled **with** a ***mandatory*** enhancement scheme violates the Sixth Amendment. The majority ruling in *Gomez* can be reduced to three points: (1) **Tennessee has a *mandatory* presumptive sentence**,[1] (2) **our sentencing enhancements are *not mandatory*,**[2] (3) ***thus*, the entire scheme passes constitutional muster.** [3]

As to the first point, there is and can be no dispute by any party that Tennessee has a mandatory presumptive sentence. This is a construction exclusively within the purview of this Court. As to the second point, there is and can be no dispute by any party that the Tennessee enhancement provisions are effectively discretionary when considering our statutory scheme as a whole. This is a construction exclusively within the purview of this Court. The Tennessee Association of Criminal Defense Lawyers agrees that these two interpretations of the majority are sound and are supported by legislative history and ample judicial precedent.

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[1] This Court held that "when no enhancement or mitigating factors are found, section 40-35-210(c) mandates imposition of the presumptive sentence."

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

[3] This Court 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."

The Tennessee Association of Criminal Defense Lawyers assert that the first two points do not lead inevitably to the conclusion that Tennessee sentencing laws are constitutional. Our 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. No state or federal court has upheld a sentencing scheme, even where the enhancements were discretionary, once it was concluded that the statutory scheme included a mandatory presumptive sentence or base point which prohibits a judicially determined increase absent additional fact-finding.

An increased sentence was not mandated by the Washington guidelines at issue in *Blakely*.[4] 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. Footnote 8 of the majority opinion in *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."

Blakely concerns the idea of a defendant being entitled to a particular minimum sentence unless certain specific findings of fact are made. It is that concept of "entitlement"

[4] The petitioner's reply brief *Blakely* should lay to rest any misconceptions on Washington law: http://www.abanet.org/publiced/preview/briefs/pdfs_03/1632PetReply.pdf

which dictates an inquiry as to whether the statutory scheme creates an entitlement to a specific minimum sentence in the absence of additional fact-finding. *Blakely*, 124 S.Ct. at 2540. 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. The dissent in *Gomez* addressed this presumptive sentence doctrine at great length. The majority concurred on this critical point:

> The dissent, the defendant, and the State point out that when no enhancement or mitigating factors are found, section 40-35-210(c) mandates imposition of the presumptive sentence. Although we do not disagree with this proposition, we also do not view it as dispositive of the constitutional issue. Unlike the "standard range" statute in *Blakely*, section -210(c) does not lower the ceiling for felony sentences, nor is it like the statute in *Apprendi* which exposed the defendant to a punishment greater than that otherwise legally prescribed. Section -210(c) operates solely to limit the sentencing court's discretion in selecting a penalty within the available range by mandating imposition of the presumptive sentence when there "are no enhancement or mitigating factors." Tenn. Code Ann. § 40-35-210(c) (2003). The dissent contends that section -210(c) "fixes a 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." The dissent's observation about how the statute functions is accurate. However, the dissent misinterprets the constitutional relevance of this observation [in light of *Booker*].

Booker does not salvage our 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 only remaining

"entitlement" was that the federal judge consider all the factors but sentencing within statutory ranges was now discretionary and all the federal guidelines became advisory.

The current Tennessee guidelines are not *totally* "advisory" given this Court's correct interpretation of Tennessee law that the current "presumptive sentence" provision "operates solely to limit the sentencing court's discretion in selecting a penalty within the available range by ***mandating*** imposition of the presumptive sentence when there 'are no enhancement or mitigating factors.' " With the utmost respect, a finding that the Tennessee statute "fixes a [mandatory,] 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 "point system" 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.

Booker did not attempt to distinguish any of the Court's prior cases on the basis of how "mandatory" the enhancements might have been. Indeed, the statutes which were found to be in violation of the Sixth Amendment in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and in *Ring v. Arizona*, 536 U.S. 584 (2002), all contained non-mandatory enhancements. It is imperative that one be aware of this critical fact when reading the following passage of Justice Steven's majority opinion in *Booker* which discusses *Blakely*:

> For reasons explained in *Jones*, *Apprendi*, and *Ring*, the requirements of the Sixth Amendment were clear [in *Blakely*]. The application of Washington's sentencing scheme violated the defendant's right to have the jury find the existence of " 'any particular fact' " that the law makes essential to his punishment. 542 U.S., at ___ (slip op., at 5). That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." Id., at ___ (slip op., at 7) (emphasis deleted). We rejected the State's argument that the jury verdict was sufficient to authorize a sentence within the general 10-year sentence for Class B felonies, noting that under Washington law, the judge was required to find additional facts in order to impose the greater 90-month sentence. Our precedents, we explained, 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." Ibid. (slip op., at 7) (emphasis in original). The determination that the defendant acted with deliberate cruelty, like the determination in *Apprendi* that the defendant acted with racial malice, increased the sentence that the defendant could have otherwise received. Since this fact was found by a judge using a preponderance of the evidence standard, the sentence violated Blakely's Sixth Amendment rights.
>
> As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case. See, e.g., 542 U.S., at ___ (opinion of O'Connor, J.) (slip op., at 12) ("The structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for distinction. … If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack"). This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges.

It is probable that the final sentence in this passage is what led this Court to conclude that *all* provisions of the current Tennessee sentencing law must be mandatory to run afoul of the Sixth Amendment. To suggest as this Court did that " all nine justices agreed in *Booker* that the relevant constitutional inquiry is not whether a judge exercises sentencing discretion by finding facts, but rather whether the judge's finding of a fact mandates an

increased sentence" is an incorrect reading of *Booker*, and of the cases that the *Booker* Court applied to the federal sentencing guidelines – *Blakely*, *Ring*, and *Apprendi*. It is true that the federal statute contained both a mandatory base starting sentence and mandatory numerical enhancements but it was not the nature of the enhancements which condemned the federal statute.

In *Blakely*, *Ring*, and *Apprendi*, the judge retained the discretion to choose *not* to impose an enhanced sentence after finding the enhancing fact. Yet in each case, the United States Supreme Court found the defendant's enhanced sentence violated the Sixth Amendment. What condemned each of these sentencing structures is that each made the discretionary authority to impose an "enhanced sentence" contingent upon the presence of a fact not "reflected in the jury verdict or admitted by the defendant." Whether the enhancements themselves are more rigid (such as the former federal system) or the enhancements are only discretionary (such as those in Washington)[5] makes not a bit of constitutional difference.

Logically, if there would have been any meaningful difference between discretionary and mandatory enhancements, the United States Supreme Court in *Booker* would have made "advisory" only the previously mandatory enhancements and left intact the mandatory federal

[5] The phrase in the just-quoted passage from *Booker* – " under Washington law, the judge was required to find additional facts in order to impose the greater 90-month sentence" – does not mean the enhancements were mandatory. It only means that it is mandatory that the judge make the required factual findings before there is the possibility of a greater sentence. To that extent, Washinton disretionary enhancements are like our disretionary enhancement since, in Tennessee, a judge must make certain findings before he or she can impose a greater sentence.

base sentence. No party or any dissenting judge suggested such a thing because it made absolutely so difference.

In *Gomez*, this Court said that "the relevant inquiry is whether the [Tennessee] Reform Act mandates imposition of a sentence *increased* above the presumptive sentence *when a judge finds an enhancement factor*." That this passage becomes the determinative question in this case justifies a rehearing because it constitutes a material and fundamental misapprehension of law.

Everyone agrees that the Tennessee statute certainly does not mandate an increased sentence. The question is not what sentence is required but what the statute forbids. Under any of the sentencing structures examined in the recent string of Supreme Court cases, whenever a higher sentence is *forbidden,* absent a finding of fact (other than prior conviction), that fact must be admitted by the defendant or established to a jury beyond a reasonable doubt. The determinative 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. This Court has already answered that question given that the majority agreed with the dissent that under the Tennessee statute, "the trial judge has no discretion to deviate from this determinate point unless he or she makes additional findings that enhancement factors are present."

Booker confirmed that removing all entitlements to specific sentence "determinate starting point," beyond which a judge could not go without additional fact-finding, renders a sentencing guidelines system advisory and thus constitutional. This is exactly what the

recent legislation proposed by the Governor's Task Force is designed to accomplish in Tennessee; the proposed legislation removes the rule that absent an enhancement, a judge may impose a sentence that exceeds the presumptive sentence at the bottom of the range (or in the middle of the range for Class A felonies). The proposed legislation permits a judge to sentence anywhere within the appropriate range and does not entitle the defendant to the minimum as a matter of law.

As long as Tennessee's statutes designate sentences above which judges are not permitted to go without additional fact-finding, Tennessee does not have an advisory guidelines system. Instead, it has a system with the very same constitutional flaw that the United States Supreme Court found in *Blakely*, *Ring*, and *Apprendi*, and in the federal guidelines prior to the Court's remedial fix in *Booker*.

Unlike Tennessee's current sentencing statute, the federal guidelines as modified by the Court in *Booker* are now entirely advisory. Under the federal sentencing system as revised in *Booker,* a federal judge has the discretion to impose any "reasonable" sentence as high as the statutory maximum penalty for the offense of conviction, without finding enhancing facts, as long as the judge *considers* the guidelines and designated statutory factors. The recent legislation proposed by the Governor's Task Force also allows for sentencing guidelines and requires the judge to consider the advisory guidelines, but, as noted, does not contain any mandatory entitlement to a minimum sentence.

Tennessee's current guidelines are different. In Tennessee we start with a presumptive sentence, which the judge must not exceed absent an enhancement factor. It is this mandatory rule, capping a defendant's sentence at the presumptive sentence, enforceable by a defendant on appeal, which triggers the right to a jury finding on enhancing facts. As *Booker* itself held: "That right is implicated whenever a judges *seeks* to impose a [greater] sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'" It is ***this*** sentence from *Booker* which dictates the determinative question.

The agreement of the dissent and the majority in *Gomez* that a Tennessee "trial judge has no discretion to deviate from this [mandatory, presumptive] determinate point unless he or she makes *additional findings* that enhancement factors are present" means that this entire Court acknowledges how the 1989 law was designed and has consistently been interpreted by this Court. *Blakely* and *Booker* both dictate that a jury make these "additional findings" so as to permit the *possibility* of an enhanced sentence beyond the statutory entitlement guaranteed by the current 1989 Tennessee law. This Court was in error in *Gomez* when it concluded that the judge's discretion not to impose an enhanced sentence made a constitutional difference.

Since the non-prior-conviction-related enhancement factors in this case were found only by a judge, these enhancements – although discretionary – do not authorize a sentence beyond the statutory presumptive sentence. Accordingly, this Court should find that the enhancement factors cannot apply to the sentences imposed on these defendants under the 1989 Sentencing Reform Act.

C.

Returning briefly to the waiver issue, should the Court continue to adhere to the requirement of 'plain error" and an inquiry of whether *Blakley* is a new rule, the preceding Sixth Amendment discussion should cause this Court to reexamine the relief to be accorded these defendants. *Blakely* is continuation of judicial precedent made clearer by hindsight. Yet its application to each state's sentencing structure must be resolved on a case-by-case basis which depends on an interpretation of the intricacies of the sentencing laws of each jurisdiction.

Respectfully, if a majority of this Court in *Gomez* misread *Apprendi*, *Ring*, *Blakely*, and *Booker* and misapplied all these cases to Tennessee law then how can it be determined which was the watershed ruling in *our* State. In truth it was not until *Blakely* that lawyers in our jurisdiction began immediately raising Sixth Amendment sentencing issues because of the obvious similarity of Washington law to our state. Thus, *Blakely* may be a "new rule" in some states and not in others, depending on the application of these cases to state law.

There should be no "floodgates" concern. The reality is that this is very much of a pipeline issue in that only those defendants who raise the issue at any time on direct appeal can obtain relief. There is an obvious bright-line date for *Blakely* issues and that should end the matter. Parsing out those defendants whose cases had happened to have left the Court of Criminal Appeals and were pending in this Court on direct appeal when *Blakely* was rendered, splits the pipeline into arbitrary portions.

For all these reasons the defendants' petitions to rehear should be granted. Respectfully submitted this _____ day of April, 2005.

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I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage pre-paid to:

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this the _____ day of April, 2005.

_____
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