

REPORT OF THE GOVERNOR'S TASK FORCE
ON THE USE OF ENHANCEMENT FACTORS
IN CRIMINAL SENTENCING

By Public Chapter 591 of the Public Acts of 1989, the General Assembly of the State of Tennessee adopted the Criminal Sentencing Reform Act of 1989 (hereinafter "Act"). In this Act, the General Assembly sought to achieve uniformity, consistency and predictability in criminal sentencing. (See, T.C.A. § 40-35-102 and 103) This Act has stood the test of time and remains the law governing the sentencing of persons convicted of crimes in the State of Tennessee.

On the 24th day of June, 2004, the United States Supreme Court announced its opinion in *Blakely v. Washington*, 124 S.Ct. 2531 (2004). Though some significant differences exist between the Tennessee statute and the Washington statute which was before the Court, the essential element of a presumptive sentence in the Act is undoubtedly unconstitutional and a violation of a citizen's right to a jury trial on an issue of fact which would enhance or increase a person's punishment.

Because of the immediate and substantial impact of *Blakely* on the administration of criminal justice in the State of Tennessee, Governor Phil Bredesen appointed a Task Force for the purpose of immediately studying the implications of *Blakely v. Washington* and recommending changes to our sentencing laws to remove the constitutional infirmities of the statute. (The Governor's Press Release and the Executive Order are included in the Appendix to this report)

The Governor appointed the Honorable Barbara Haynes, Circuit Court Judge of the 20th Judicial District, Davidson County, Tennessee, to Chair the Task Force. Judge Haynes had served as Chair of the Tennessee Sentencing Commission which recommended the 1989 Act. The Task Force members are:

Judge Barbara N. Haynes, 20th Judicial District Circuit Court
Judge William B. Acree, Jr., 27th Judicial District Circuit Court
Joseph N. Barker, Attorney at Law, Davidson County
Senator Steve I. Cohen, Lt. Gov. Wilder's Designee
Representative Joe F. Fowlkes, Speaker Naifeh's Designee
Claudia S. Jack, District Public Defender, 22nd Judicial District
Victor ("Torry") S. Johnson, III, District Attorney General, 20th Judicial District
James F. Logan, Jr., Attorney at Law, Bradley County

Judge Loyce Lambert Ryan, 30th Judicial District General Sessions Court
Gordon W. Smith, Attorney General and Reporter's Designee
Chairman Charles Traughber, Tennessee Board of Probation and Parole
Judge Gary R. Wade, Court of Criminal Appeals, Eastern Section
Commissioner Quenton I. White, Tennessee Department of Correction

Ex-Officio Appointees of the Chair:

Sue Cain, Deputy Director of Metro Nashville Law Department
Professor Neil Cohen, University of Tennessee, College of Law
Professor Donald J. Hall, Vanderbilt University School of Law
Professor Nancy King, Vanderbilt University School of Law
David Raybin, Attorney at Law, Nashville

At its initial meeting, the Task Force heard testimony of various individuals who had been designated by the Chair to serve in an advisory capacity to the Task Force. The responses of Tennessee courts to the *Blakely* opinion had been varied. Some courts were only imposing the minimum sentence, except in those instances in which the defendant had a prior criminal record or the defendant had admitted the existence of other enhancement factors. Some courts were empanelling jurors to determine the existence of enhancement factors beyond a reasonable doubt. Other courts were not because there is no authority for such procedure under the current statutes.

By unanimous vote, the Task Force decided that the issue confronting the State of Tennessee was of such complexity and uncertainty that any immediate response was ill-advised. The Task Force also determined that a crisis was not present because criminal defendants were still being sentenced and the worst of the criminal defendants were still eligible for an increased sentence. Thus, the Task Force unanimously advised the Governor against calling a special session of the General Assembly.

Subcommittees were appointed to analyze various aspects of the Criminal Sentencing Reform Act of 1989 and the implications of the *Blakely* opinion. The Task Force engaged in an exchange of information and posted various proposals on the website of the Administrative Office of the Courts and to the Tennessee District Attorneys General Conference, District Public Defenders Conference, the Tennessee Judicial Conference, and the Tennessee Association of Criminal Defense Lawyers.

After considering various options, the Task Force developed two distinctly different approaches to amending the Tennessee statutes. The first proposal established a bifurcated procedure for jury trials on factual issues regarding

enhancement factors. The second proposal eliminated presumptive sentences and provided that the presence of enhancement factors and mitigating factors would be advisory only. The impact of each alternative on the administration of justice was unknown.

Concerns were expressed that the first proposal would increase service time of jurors, increase jury trial time on the court docket, impose increased burdens on public defenders and district attorneys, and otherwise increase the costs of the administration of justice. The second proposal caused many concerns regarding the potential for reducing the consistency, uniformity and predictability of sentencing in Tennessee and potentially resulting in significant increased cost resulting from increased sentences. In view of these concerns, the Task Force chose to await the United States Supreme Court decisions in *United States v. Booker* and *United States v. Fanfan* before making its final recommendation to the Governor. *Booker* and *Fanfan* were decided by the United States Supreme Court on the 12th day of January, 2005.

The decisions in *Booker* and *Fanfan* allowed the Task Force to develop a compromise proposal which is calculated at maintaining the uniformity, consistency and predictability of sentencing in Tennessee without incurring the additional cost and burdens of either of the initial alternatives. The Task Force is pleased to recommend to the Governor for presentation to the General Assembly, the Criminal Sentencing Reform Act of 2005, which is included in the Appendix on page A6.

This proposed Act eliminates presumptive sentencing from Tennessee sentencing law so as to comply with the United States Supreme Court decisions. The former presumptive sentence provisions are replaced with a series of guidelines that include enhancement and mitigating factors and a statement of principles and sentencing considerations. The proposed Act requires the judge to consider, but not be bound by, these advisory guidelines to arrive at an appropriate sentence which is subject to appellate review.

Although we recommend necessary changes, the essential components of this proposed Act will retain the policies and purposes of the 1989 Act that have served our State well. Defendants who are convicted of crimes in the State of Tennessee will continue to be sentenced within the ranges of punishment established by the General Assembly. Trial judges will continue to set forth their reasons for the sentence which is imposed; however, there will be no presumptive sentence. Because the ranges of punishment are relatively narrow and because the policies and purposes of the statute will serve as a basis for evaluation of the sentence actually imposed, it is believed that the proposed

Criminal Sentencing Reform Act of 2005 will achieve its purpose without substantial adverse impact on the criminal justice system of the State of Tennessee.

Minutes of the Meetings of the Task Force which are included in the Appendix beginning on page A18.

The Task Force wishes to express its gratitude to the following:
Connie Clark, Director, Administrative Office of the Courts
Robert Cooper, Counsel to the Governor
Professor Neil Cohen, University of Tennessee College of Law
Professor Donald J. Hall, Vanderbilt University School of Law
Professor Nancy King, Vanderbilt University School of Law
John Oliva, Tennessee Association of Criminal Defense Lawyers
David Raybin, Attorney at Law, Nashville
Libby Sykes, Deputy Director, Administrative Office of the Courts
Tom Tigue, Office of Legal Services for the General Assembly
District Public Defenders Conference
Tennessee District Attorneys General Conference
Tennessee Judicial Conference

Respectfully submitted this the 17th day of February 2005.

Barbara N. Haynes, Chair