HOUSE BILL REPORT
2SSB 6497

As Reported by House Committee On:
Criminal Justice & Corrections

Title: An act relating to felony sentences.

Brief Description: Revising felony sentence ranges.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Kline, Franklin and Hargrove).

Brief History:
Committee Activity:
Criminal Justice & Corrections: 2/21/06, 2/23/06 [DPA].

Brief Summary of Second Substitute Bill
(As Amended by House Committee)

- Establishes a new sentencing grid.
- Makes changes to the manner in which exceptional sentences are imposed.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: Do pass as amended. Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Pearson, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Kirby, Strow and Williams.

Staff: Jim Morishima (786-7191).

Background:

I. Standard Sentence Ranges

Prior to 1984, courts were required to impose "indeterminate" sentences upon persons convicted of crimes. Under this system, a court would impose a minimum term and a maximum term. The Board of Prison Terms and Paroles (now called the Indeterminate Sentence Review Board) would evaluate the offender and determine whether he or she could be paroled prior to the expiration of the maximum term. Indeterminate sentencing still applies to offenders convicted of offenses committed prior to July 1, 1984.

In 1981, the Legislature enacted the Sentencing Reform Act (SRA), which imposed "determinate" sentences on offenders convicted on or after July 1, 1984. Under determinate

sentencing, a court must sentence an offender to a term within a standard range. The standard range is determined using a grid with the offender's criminal history (called "offender score") on the horizontal axis and the severity of the crime (called "seriousness level") on the vertical axis.

II. Exceptional Sentences

Prior to 2004, a court could sentence, on its own initiative, an offender above or below the standard range if it found, by a preponderance of the evidence, that aggravating or mitigating circumstances existed. This type of sentence is known as an "exceptional sentence." In 2004, the United States Supreme Court ruled that sentencing an offender above the standard range in this manner is unconstitutional. *Blakely v. Washington*, 542 U.S. 296 (2004). According to the court, any factor that increases an offender's sentence above the standard range, other than the fact of a prior conviction, must be proved to a jury beyond a reasonable doubt. *Blakely* did not affect a court's ability to impose an exceptional sentence below the standard range.

In 2005, the Legislature amended the procedure for imposing exceptional sentences in light of *Blakely*. Under this new procedure, the court no longer has the authority to impose an aggravated exceptional sentence on its own initiative in most circumstances. Instead, the prosecutor must provide notice that he or she is seeking a sentence above the standard range. The prosecutor must then prove the aggravating circumstances justifying such a sentence to a jury beyond a reasonable doubt. The new procedure put in place by the Legislature preserved the court's ability to impose exceptional sentences above the standard range only in the following situations: (a) the defendant and the prosecutor both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the SRA, (b) the defendant's prior un-scored misdemeanor or prior un-scored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of the SRA, (c) the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished, and (d) the failure to consider the defendant's prior criminal history, which was omitted from the offender's offender score calculation, results in a presumptive sentence that is clearly too lenient. However, in April of 2005, the Washington Supreme Court ruled that the question of whether a standard range sentence is too lenient, or whether allowing a current offense to go unpunished is too lenient, is a factual determination that may not be made by the court under *Blakely*. *State v. Hughes*, 154 Wn.2d 118 (2005).

Other methods to address *Blakely* have been considered by other jurisdictions, including the federal government. For example, in *United States v. Booker*, 543 U.S. 220 (2005), the United States Supreme Court invalidated a portion of the federal sentencing guidelines. This decision, in effect, made the federal sentencing guidelines advisory only. This enabled a court to sentence an offender on its own initiative, and for reasons that do not have to be proved to a jury beyond a reasonable doubt, without violating *Blakely*.

Summary of Amended Bill:

I. Standard Sentence Ranges

The current sentencing grid for non-drug offenses is replaced. Most of the standard ranges of greater than one year are expanded by increasing the maximum of the range. A new column is added to the grid for offender scores of 10 or more.

II. Exceptional Sentences

A new mitigating circumstance is added to the list of circumstances that may lead to an exceptional sentence below the standard range: when the offender score, due to other current offenses (as opposed to prior offenses) results in a presumptive sentence that is clearly excessive.

Three aggravating circumstances that currently can be found by a judge, are moved to the list of aggravating circumstances that must be found by a jury beyond a reasonable doubt: the defendant's prior un-scored misdemeanor or prior un-scored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of the SRA; the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished; and the failure to consider the defendant's prior criminal history, which was omitted from the offender's offender score calculation, results in a presumptive sentence that is clearly too lenient. It is clarified that if a defendant pleads guilty to the underlying crime, but not to the aggravating circumstances supporting the imposition of an aggravated exceptional sentence, or if a case is remanded for re-sentencing, the court may empanel a jury to determine beyond a reasonable doubt whether any aggravating circumstances alleged by the state exist. The trial on the aggravating circumstances must take place within 90 days, unless it is extended for good cause.

Amended Bill Compared to Second Substitute Bill:

The minimum and maximum terms in the grid in the original bill are increased. The minimum terms are increased to where they are under the current law. The maximum terms are increased so that the difference between the minimum and maximum terms is the same as in the grid in the original bill.

Appropriation: None.

Fiscal Note: Available on substitute bill.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: (In support) The Legislature cannot give the judges back all the discretion they lost in the *Blakely* decision. However, this bill is a balanced approach at giving them back some of the discretion they lost; it makes the best out of a bad situation. This bill gives judges more discretion across the board, without taking us back to advisory guidelines. This

bill helps to address the issue of chronic property offenders, which is an important issue in many communities; under this bill, a judge can give a chronic property offender up to the statutory maximum for the crime. This bill widens both the minimum and maximum ends of the ranges. To broaden them more would lead to disparity in sentencing.

(Neutral with concerns) This bill will affect phase three of the OMNI project, which is a critical stage for the new offender tracking system. Anything that changes sentencing may lead to delays or cost overruns for the OMNI project.

Testimony Against: This bill does not give the judges the discretion they need. The bill does not allow the judge to do anything in a case where a plea bargain is entered and no aggravating circumstances have been alleged. The State Constitution requires victims to be given a meaningful role in the criminal justice system. This bill does not give the judges the discretion they need to adequately respond to a victim impact statement. This bill shifts the midpoint of the ranges down, which may lead to shorter sentences. Judges need more discretion in cases involving violent offenses. This bill may have a higher fiscal impact because of the new ranges for offenders with offender scores of 10 or more.

Persons Testifying: (In support) Senator Kline, prime sponsor; David Boerner, Sentencing Guidelines Commission; Norm Maleng, King County Prosecutor; and Russ Hauge, Kitsap County Prosecuting Attorney and Washington Association of Prosecuting Attorneys.

(Neutral with concerns) Melanie Roberts, Department of Corrections.

(Opposed) Dave Johnson, Washington Coalition of Crime Victim Advocates; and Catherine Shaffer, Washington Superior Court Judges Association.

Persons Signed In To Testify But Not Testifying: None.