

Sentencing After *Blakely* & the *Blakely* Bill

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Apprendi, 530 U.S. 466 (2000)

Any fact, other than a prior conviction, that increases punishment beyond “prescribed statutory maximum” must be submitted to the jury & proved beyond a reasonable doubt



***State v. Lucas, 353 N.C. 568
(2001)***

- **“Prescribed statutory maximum” is the sentence in the aggravated range at the highest prior conviction level**



Blakely, 542 U.S. 296 (2004)

**“Prescribed 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*”**



***Blakely* Implications**

- **SSA felony sentencing**
 - Aggravating factors
 - PRL points
- **Non-SSA sentencing: GS 20-179**

The NC Response

- The Legislature: The *Blakely* Bill

The NC Response

- **The Legislature: The *Blakely* Bill**
 - Only covers SSA felonies; does not cover non-SSA offenses, such as impaired driving
 - Even for SSA felonies, only covers those committed on or after 6/30/2005

The NC Response

- The Courts



Allen, 359 NC 425 (2005)

- “Prescribed statutory maximum” under NC law is presumptive range
- Aggravators need not be alleged in the indictment
- *Blakely* errors are structural



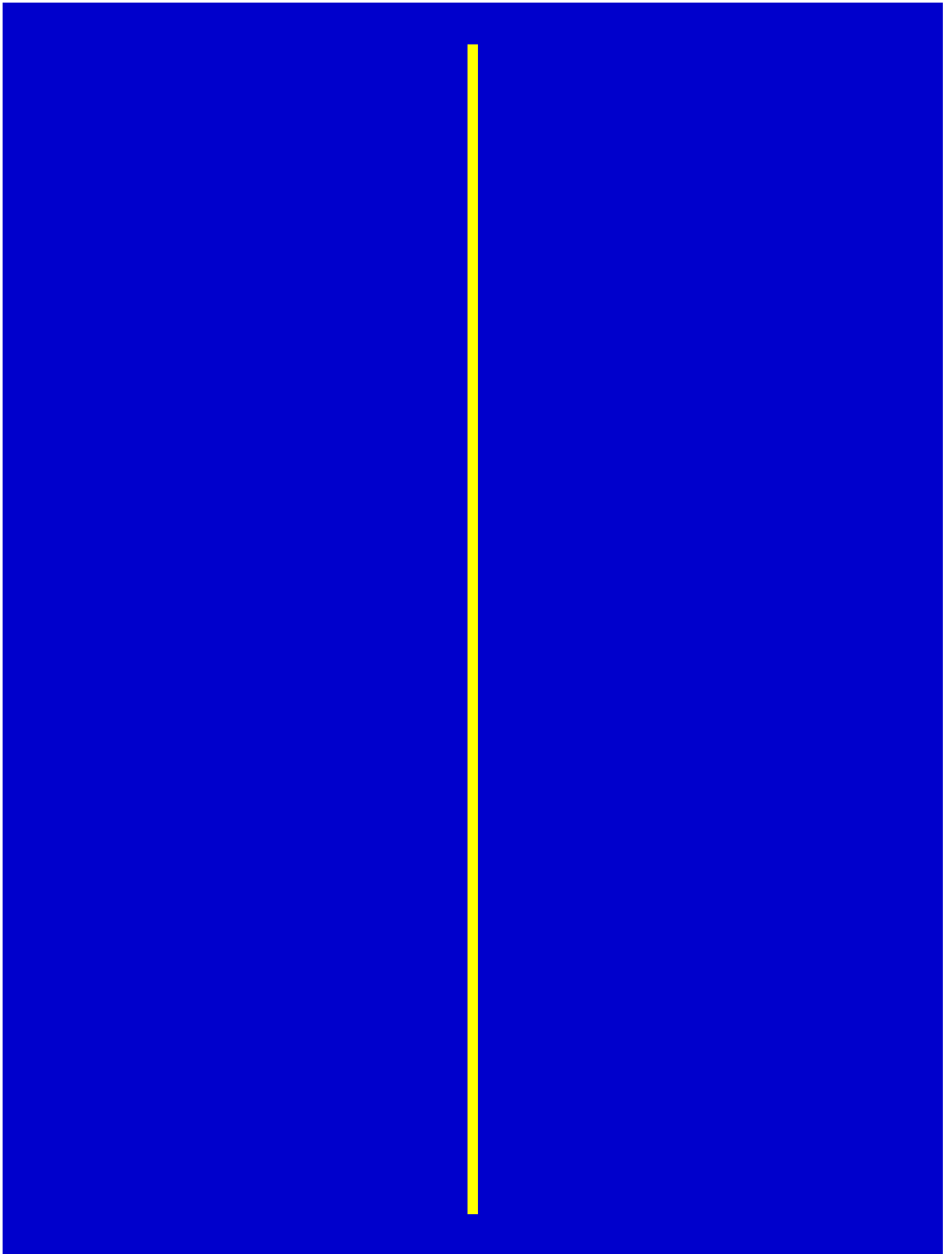
***Speight*, 359 NC 602 (2005)**

- Applied *Allen* to impaired driving grossly aggravating factors
- Also held error was structural



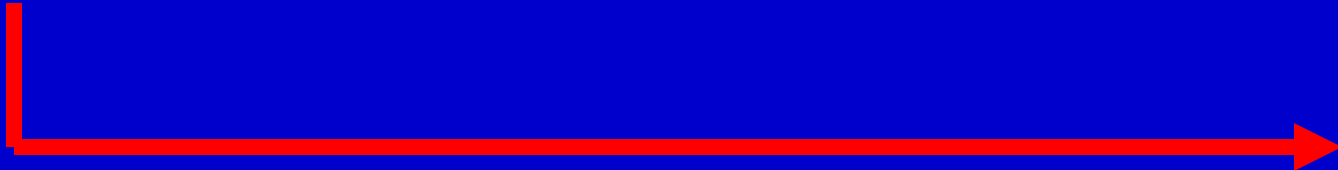
NC App. Cases

- **Cases on aggravating factors**
- **Cases on prior record level points**
- **Cases involving presumptive range sentencing**
- **Many have been stayed by the NC Supreme Court**
- **Some hard to reconcile**



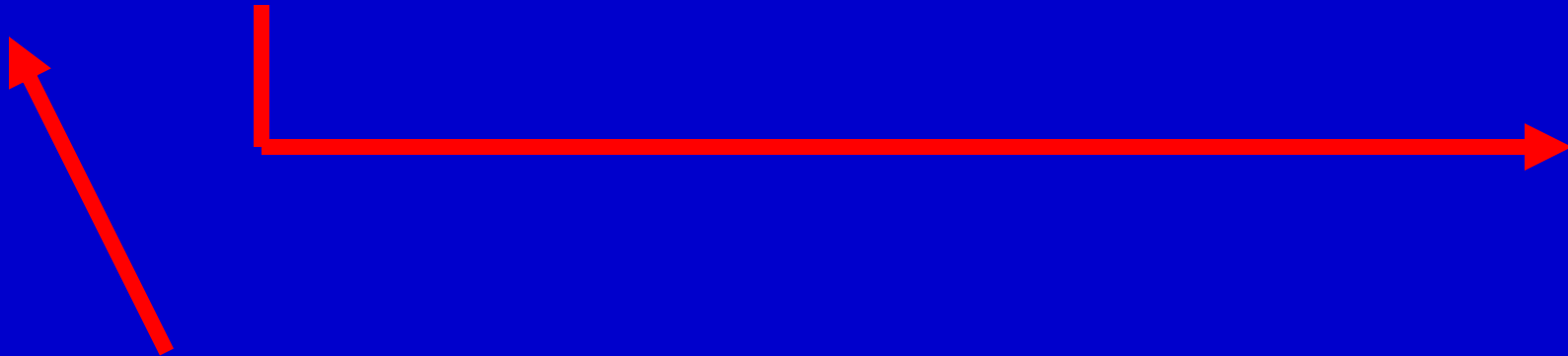
Blakely

**Decided
6/24/2004**



Blakely

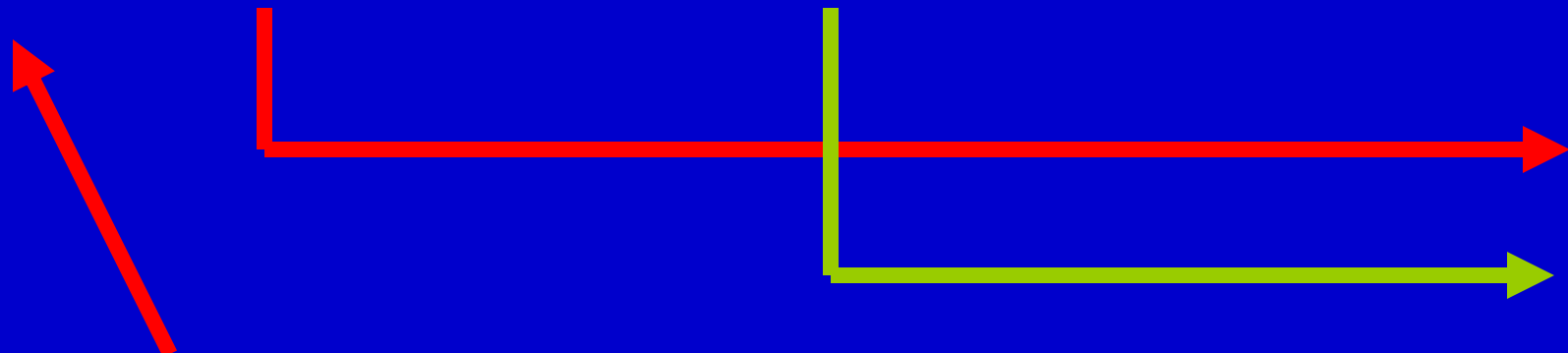
Decided
6/24/2004



Retroactivity?

Blakely
Decided
6/24/2004

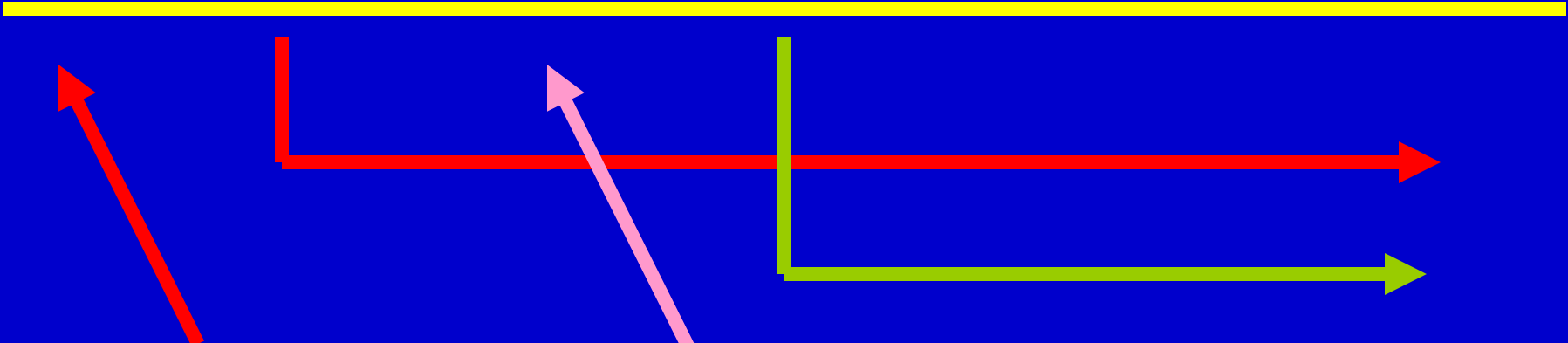
***Blakely* Bill**
SSA
Felonies
Committed
on or after
6/30/2005



Retroactivity?

Blakely
Decided
6/24/2004

Blakely Bill
SSA
Felonies
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6/30/2005

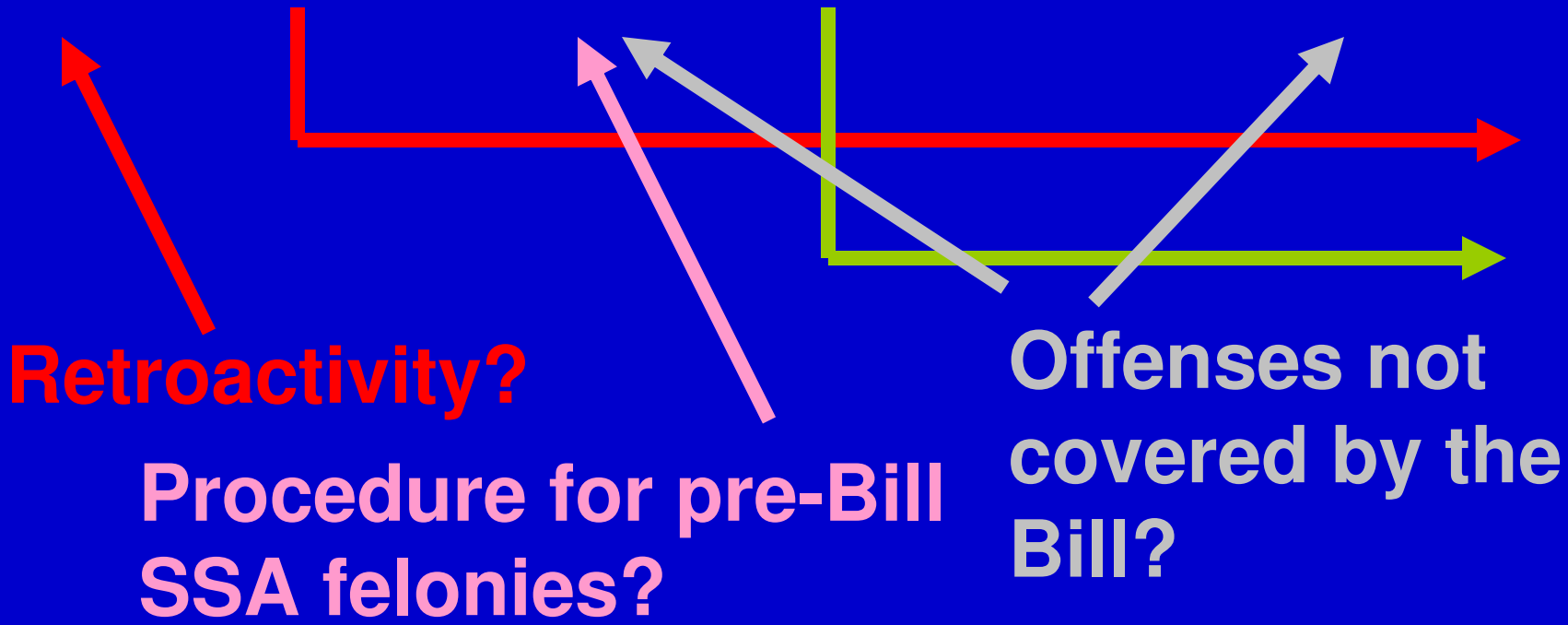


Retroactivity?

**Procedure for pre-Bill
SSA felonies?**

Blakely
Decided
6/24/2004

***Blakely* Bill**
SSA
Felonies
Committed
on or after
6/30/2005



Blakely

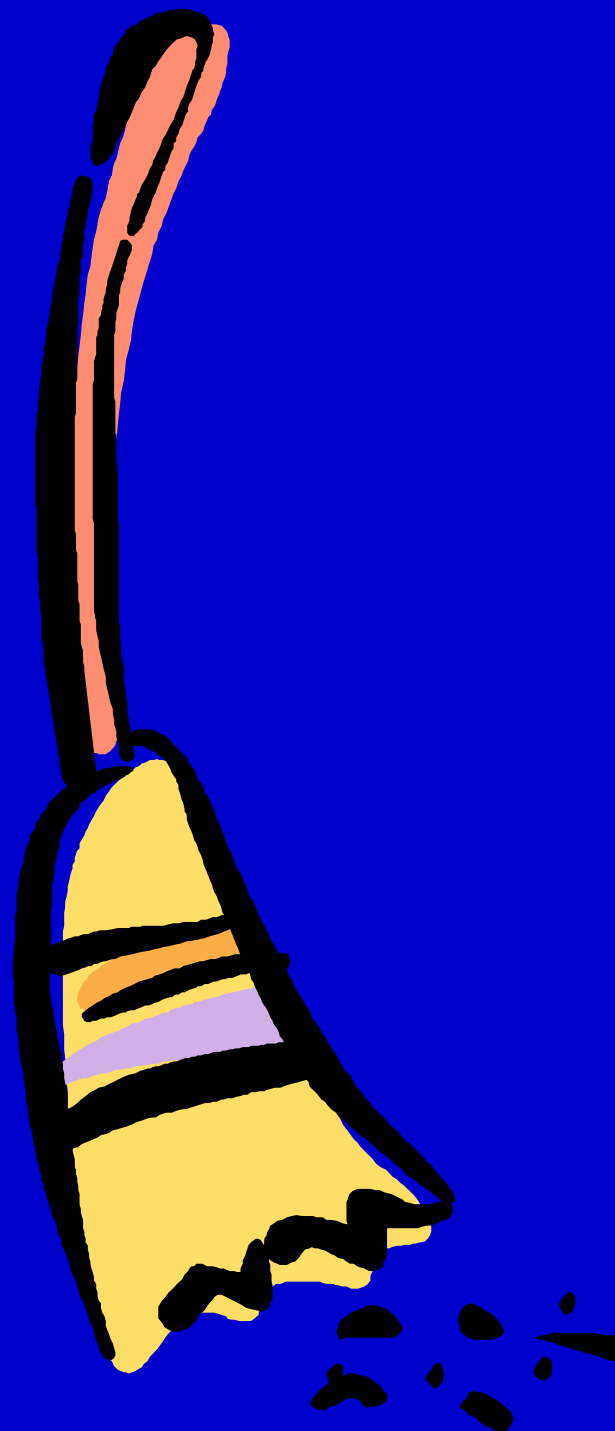
Decided

6/24/2004

Pre-bill

proApplicability?

Retroactivity?



Pre-Blakely Cases

Blakely
Decided
6/24/2004

***Blakely* Bill**
SSA
Felonies
Committed
on or After
6/30/2005

Retroactivity?



Pre-Blakely Cases

- Motions for appropriate relief
- Raises issue of retroactivity

***Post-Blakely* Felonies To
Which the *Blakely* Bill Doesn't
Apply**

Blakely
Decided
6/24/2004

Blakely Bill
SSA
Felonies
Committed
on or After
6/30/2005

**SSA felonies before
effective date**



***Post-Blakely* Felonies To Which the *Blakely* Bill Doesn't Apply**

- Aggravating factors need to be submitted to jury & proved beyond a reasonable doubt

Post-Blakely Felonies To Which the Blakely Bill Doesn't Apply

- Prior record points
 - Point under 15A-1340.14(b)(6) (all elements included in prior offense): *Blakely does not apply*
 - Point under 15A-1340.14(b)(7) (offense committed while on probation, etc): *NC App. held Blakely applies –decision stayed*

Post-Blakely Felonies To Which the Blakely Bill Doesn't Apply

- Trial Procedure
 - Allen* remanded for “resentencing”; Presumptive range sentencing only? Jury trial?
 - Norris* remand instructed trial judge to submit aggs to jury; *Norris* has been stayed

***Post-Blakely* Felonies To Which the *Blakely* Bill Doesn't Apply**

- Mitigating factors
Judge determines

***Post-Blakely* Felonies To Which the *Blakely* Bill Doesn't Apply**

- Factor balancing
Judge does

***Post-Blakely* Felonies To Which the *Blakely* Bill Doesn't Apply**

- Presumptive range sentencing—safe harbor?

Allen said prescribed statutory max. was presumptive range

NC App. has reversed a presumptive sentence when judge found an aggravator – stay has been issued

***Post-Blakely* Felonies To Which the *Blakely* Bill Doesn't Apply**

- Pleading

Post-*Blakely* NC cases hold that aggs. & prior record points need not be alleged

But what of NC law saying elements must be in indictment?

***Post-Blakely* Felonies To Which the *Blakely* Bill Doesn't Apply**

- Notice

Still some question as to scope
of notice requirement

***Post-Blakely* Felonies To Which the *Blakely* Bill Doesn't Apply**

- Admissions

Generally, waivers of constitutional rights, must be knowing & voluntary

Best to use same protections as plea/*Blakely* Bill

Effect of a “stipulation”?

Post-Blakely Felonies To Which the Blakely Bill Doesn't Apply

- Structural error
 - Structural errors require automatic reversal
 - Allen & Speight* held *Blakely* errors are structural
 - US Supreme Court has granted cert. on the issue in another state's case; NC AG has petitioned for cert. in *Speight*

Blakely Bill Cases

- Applicability

SSA felonies only

Offenses committed on or after
June 30, 2005

***Blakely* Bill Cases**

- Aggravating factors
 - Proved beyond reasonable doubt
 - With 1 exception, need to go to jury
 - Exception for GS 15A-1340.16(d)(18a) (adjudicated delinquent)
 - Status of exception in question

***Blakely* Bill Cases**

- Mitigating factors
Judge still determines
- Factor balancing
Judge still does

***Blakely* Bill Cases**

- Prior Record Points

G.S. 15A-1340.14(b)(7) (offense committed while on probation etc.) must be submitted to the jury & proved beyond a reasonable doubt

Blakely Bill Cases

- Trial procedure

If D doesn't admit the factor or point under 1340.14(b)(7), judge can

(1) Have 1 trial

(2) Bifurcate "if interests of justice require"

Blakely Bill Cases

- Admissions

Under new 15A-1022.1 you must determine whether the state:

(1) seeks an agg. sentence & which factors are at issue;

(2) seeks a PRL point under (b)(7) &

(3) provided the required notice or whether the right to notice was waived

***Blakely* Bill Cases**

- Admissions

Incorporates 15A-1022(a)

Blakely Bill Cases

Additional protections: you must

(1) Personally advise D that he/she is entitled to have a jury determine the factors/points & has the right to prove mitigating factors before a judge

(2) Determine that there is a factual basis & that the admission is the result of informed choice

***Blakely* Bill Cases**

- Pleading

Statutory aggs in 1340.16(d)(1)-(19) & 1340.14(b)(7) point need not be charged

1340.16(d)(20) “catch-all” must be charged

Blakely Bill Cases

- Notice

30 days before trial

***Blakely* Bill
Cases**

**The
Rest**

Blakely Bill **Cases**

- All aggs go to jury except 15A-1340.16(d)(18a) (adjud. delinquent)

Status of exception unclear in light of *Yarrell*

The **Rest**

- All aggs. go to jury

Again, keep an eye on *Yarrell*

***Blakely* Bill Cases**

- 15A-1340.14(b)(7) point (committed while on probation, etc.) must go to the jury

The Rest

- NC App. has said *Blakely* doesn't apply to the (b)(7) point but decision has been stayed

***Blakely* Bill Cases**

- Mitigators & factor balancing:
you do it

The Rest

- Same

***Blakely* Bill Cases**

- Trial procedure:
can have jury
trial on
factors/(b)(7)
point

The Rest

- Trial procedure:
some uncertainty
about “judicial
fix”

Remember
Norris case
remanding for
jury trial has
been stayed

***Blakely* Bill Cases**

- Admissions:
detailed statutory
procedure

The Rest

- Admissions: best
to do it like a
guilty plea or
follow *Blakely*
Bill procedure

***Blakely* Bill Cases**

- Notice: 30 days

The Rest

- Notice: need to comply with *Hunt* but not clear what that means; could comply with *Blakely* Bill

***Blakely* Bill Cases**

- Pleading: only catch-all agg. needs to be pleaded

The Rest

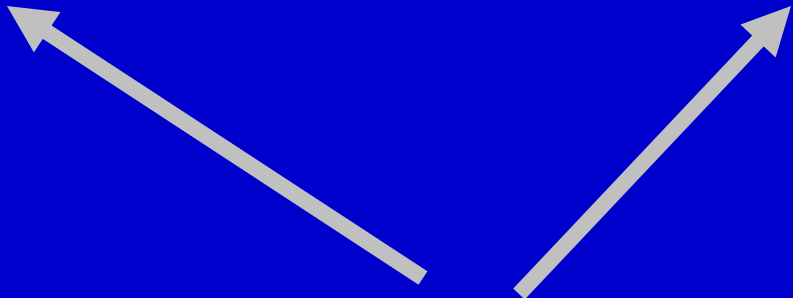
- Pleading: under *Allen* and *Speight*, factors need not be pleaded

***Post-Blakely* Misdemeanors**

- Impaired driving related offenses punishable under GS 20-179

Blakely
Decided
6/24/2004

***Blakely* Bill**
SSA
Felonies
Committed
on or After
6/30/2005



**Offenses not
covered by the
Bill?**

***Post-Blakely* Misdemeanors**

- 20-179 sentencing
 - Only 2 grossly agg. factors involve prior convictions & thus are excepted from *Blakely*
 - Of 8 regular agg. factors, only 3 pertain to prior convictions; plus, there is the catch-all agg.

***Post-Blakely* Misdemeanors**

- Levels 1-3: *Blakely* applies unless all grossly agg. or agg. factors pertain to prior convictions
- Level 4: *Blakely* probably applies—possible exception if no aggs are found
- Level 5: presumptive range ?

***Post-Blakely* Misdemeanors Sentenced Under G.S. 20-179**

- Pleading

Need not allege in indictment.

See Speight.

***Post-Blakely* Misdemeanors Sentenced Under G.S. 20-179**

- Notice

Requirements aren't clear