

The Impact of
Blakely v. Washington
on
Sentencing in Minnesota

Long Term Recommendations

Presented to:
Governor Tim Pawlenty

Submitted by:
Minnesota Sentencing Guidelines Commission

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Introduction

This report is the second submission by the Sentencing Guidelines Commission outlining proposed long-term recommendations in response to *Blakely v. Washington's* impact on criminal sentencing practices in Minnesota. Although it has been three months since the Supreme Court handed down its ruling, there are still more questions than answers being raised regarding the implications of *Blakely* to sentencing procedures at both the state and federal level. *United States v. Booker* and *United States v. Fanfan*, pending cases before the Court, are scheduled to be heard on October 4, 2004, and may provide clarification on some of these issues.

As stated in the Commission's initial report, Minnesota's Sentencing Guidelines remain constitutional, as do aggravated departures under *Blakely*. Given the structure of the state's sentencing guidelines, the impact of *Blakely* is limited to the procedures by which aggravated departures or enhanced sentences are currently imposed and can be addressed with modifications to those procedures.

From the data available, aggravated departure sentences that would be subject to *Blakely* provisions would account for approximately 358 felony cases out of the 14,492 felony cases sentenced in 2003. The number of affected cases is limited and will not constitute a crisis within the state. However, it should be noted that any additional impact, no matter how limited, placed on a court system that is already operating at or above capacity will have ramifications.

The Commission has identified specific sentencing provisions that will require modification in response to *Blakely*. Those provisions include aggravated departures, specific sentencing enhancement statutes, consecutive sentencing provisions and M.S. § 609.11, mandatory minimum statute for dangerous weapons. This report contains recommendations that outline procedures to be implemented that will address the constitutional issues raised in *Blakely* and still permit sentencing to continue under the state's current sentencing scheme.

In addition, the Commission has identified several additional sentencing provisions that have the potential to be impacted by *Blakely*. Given the uncertainty that surrounds the *Blakely* ruling, future court action will be needed to address these provisions and they are not included in the Commission's recommendations.

The Sentencing Guidelines Commission brings forth these recommendations that are advisory in nature, but are meant to serve as a road map until the full implications of *Blakely* work their way through the courts. The Commission strongly believes that aggravated departures are an important sentencing option that needs to be preserved to ensure public safety in certain types of cases. The recommendations set forth in this report enable enhanced sentences to continue while ensuring that the constitutional rights of the defendant are protected.

The Sentencing Guidelines Commission respectfully submits the following recommendations for your review and consideration.

I. Summary of *Blakely v. Washington*

On June 24, 2004, the United States Supreme Court issued its decision in *Blakely v. Washington*, 1264 S.Ct.2531 (2004) holding that it violated the defendant's right to a jury trial under the Sixth Amendment of United States Constitution. In *Blakely*, a Washington State defendant pled guilty to a second degree kidnapping offense involving a firearm. Under Washington's sentencing statute, the defendant would have received a sentence of between 49 and 53 months for this offense.

However, the sentencing judge sentenced the defendant to 90 months, citing a Washington statute that allows a sentence of up to ten years if the judge finds justification for the imposition of an "exceptional sentence." The judge stated that justification for the sentence imposed was that the defendant committed the offense with deliberate cruelty. The defendant appealed his sentence and the Court ruled that the sentence was a Sixth Amendment violation.

Under the Sixth Amendment, the Court held that all facts, other than prior criminal convictions, that increase a criminal defendant's sentence beyond what it would have been absent those facts, must be presented to a jury and proven beyond a reasonable doubt. In the Court's view, the jury trial right does not just mean that a person has the right to present a case to the jury; it also means that a person has a right to have a jury, not a judge, make all the factual findings required to impose a sentence longer than recommended by the guidelines, unless the defendant formally admits some or all of the facts.

In *Blakely*, the Supreme Court reaffirmed and clarified its prior holding in *Apprendi v. New Jersey* 530 U.S. 466 (2000), and held that the Sixth Amendment right to a jury trial can be violated even when the sentence is below what has historically been considered the statutory maximum sentence. Under *Blakely*, the definition of "statutory maximum" is the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Had the Washington trial court made no factual findings in *Blakely*, the maximum sentence authorized under the guidelines would have been 53 months. The Court held that facts necessary to impose, any sentence higher than 53 months would have to be forwarded to a jury.

II. Pending United States Supreme Court Action

The Supreme Court's ruling in *Blakely v. Washington* at the end of its 2003-2004 term created an enormous amount of confusion and uncertainty in sentencing practices and policies at both the state and federal level. Academics, courts, legal experts and sentencing professionals have struggled to decipher what the Court's decision really means and to determine to what extent current sentencing policies and practices are affected. Not surprisingly, there are numerous interpretations with many conflicting opinions, ranging from rendering entire sentencing systems unconstitutional to limited, if any, impact on sentencing systems. To some degree, the structure of a given sentencing system dictates the nature of the impact. However, even within similar sentencing

structures there appears to be disagreement as to the extent of the impact, especially in relation to a number of specific sentencing provisions, such as consecutive sentencing, various types of sentencing enhancements and revocations.

On August 2, 2004, less than six weeks after rendering the *Blakely v. Washington* decision, the Supreme Court, aware of the level of chaos surrounding its recent decision, granted certiorari on two *Blakely* related cases. On October 4, 2004, the first day of its new term, the Court will hear arguments in a pre-*Blakely* case *United States v. Booker* 375 F.3d 508 (7th Cir.2004), *cert granted*, 2004 U.S. LEXIS 4788(U.S. Aug. 2, 2004) (No.04-104) and a post-*Blakely* case *United States v. Fanfan* 542 U.S. ___, *cert granted*, 2004 W.L. 1713655 (Aug 2, 2004)(No. 04-105), in an attempt to address some of the uncertainty surrounding its earlier decision.

The facts in *United States v. Booker*, a decision from the United States Court of Appeals, are that Booker was found guilty by a federal jury of possession of at least 50 grams of cocaine base with intent to distribute, in addition to several other offenses. At sentencing, the district court sentenced the defendant to 360 months (30 years) based on several factual findings. The findings included that Booker possessed at least 658.5 grams of cocaine base and had perjured himself at trial.

After Booker was sentenced, *Blakely* was decided. Booker argues that in light of *Blakely*, his sentence violates his Sixth Amendment rights because his sentence was based on judicial fact-finding and not jury fact-finding. Without the drug quantity and perjury findings by the judge, his federal guideline sentence would have been much lower. It should be noted that these findings did not lengthen his sentence beyond the statutory maximum sentence of life for this offense, thus complying with the original *Apprendi* principle.

In *United States v. Fanfan*, from the United States District Court for the District of Maine decision, a jury found Fanfan guilty of conspiracy to possess with the intent to distribute and distribution of at least 500 grams of cocaine. Under the federal sentencing guidelines, a guilty verdict for that specific offense with no additional findings would result in a sentence between 53-78 months. At sentencing, the judge found Fanfan possessed 2.5 kilos of cocaine and 281.6 grams of cocaine base and that the defendant was an organizer, leader, manager, or supervisor in the criminal activity. Given these findings, the federal sentencing guidelines designated a sentence of between 188 to 235 months.

However, the judge imposed a 78-month sentence indicating that under *Blakely*, a longer sentence based on findings of the judge alone might be held unconstitutional. Federal prosecutors requested a sentence correction arguing if the federal sentencing guidelines were unconstitutional under *Blakely*, the remedy should not be to sentence in the lower 53-78 month guideline range according to the prosecutor. The appropriate action would be to disregard the sentencing guidelines altogether and have the judge choose any sentence up to the 40-year statutory maximum. The defendant has a great deal at stake in this ruling since his current sentence is about six and a half years and if the federal

government's argument is upheld, he could be sentenced to 40 years at the discretion of the judge.

Although both of the cases before the Supreme Court relate to the federal sentencing guidelines, and there are significant differences between federal and state sentencing guidelines, the Court's rulings may address broader issues, such as exactly what is the maximum sentence that a judge can impose without additional findings, or which facts can be decided by the court and which facts need to be presented to a jury. In addition, the issue of retroactivity may be addressed since the two cases before the Court include both pre- and post-*Blakely* cases. However, it is likely that other questions involving state specific sentencing guideline issues will be left to rulings at the state court level.

At the current time, there is only speculation on which issues will be addressed by the Supreme Court with regards to these two cases or exactly when those decisions will be handed down, although the consensus among many in the legal field is that a ruling will be forthcoming by the end of this year.

The significance to Minnesota of the two cases currently before Supreme Court is ensuring that our state sentencing guideline system complies with any constitutional issues identified in these two decisions. In addition, the ruling of the Court in these cases will hopefully clarify what aspects of our current sentencing structure need to be modified. Finally, there is still a level of uncertainty and confusion at the time of this report and that future modifications to sentencing practices may be necessary or required as the result of future federal or state court rulings.

III. Impact of *Blakely v. Washington* on the Minnesota Sentencing Guidelines

In its previous report, the Sentencing Guidelines Commission outlined aspects of the current sentencing guidelines that appear to be impacted by *Blakely* decision. The state utilizes a determinate sentencing model and employs a sentencing structure that designates presumptive sentences on a grid format that incorporates the severity of the offense on the vertical axis with the defendant's criminal history on the horizontal axis. The intersection point of the two axes designates the presumptive sentence to be imposed. Departures, both aggravated and mitigated, are separate from the presumptive sentences designated by the sentencing grid. Since the structure of the state's sentencing guidelines sets apart presumptive grid sentences from aggravated departures that result in enhanced sentences, the structure of the state's sentencing guidelines remains constitutional under *Blakely*.

Aggravated departures resulting in enhanced sentences are not unconstitutional under *Blakely*. Rather the current procedure used for imposing departures is unconstitutional. The issue decided by the Supreme Court in *Blakely* was the defendant's Sixth Amendment right to have the aggravating factor(s) that may result in a departure or an

enhanced sentence determined beyond a reasonable doubt by a jury. The Court calls into question the procedure, not the enhanced sentence itself.

After a thorough review of the Minnesota Sentencing Guidelines and given the information that is available to the Commission at this time, the following provisions of the sentencing guidelines have been identified as directly impacted by the *Blakely v. Washington* decision:

- a) aggravated departures –durational and disposition
- b) specific statutorily enhanced sentencing provisions (Attachment A)
- c) permissive consecutive sentencing provisions
- d) M.S. § 609.11 dangerous weapons mandatory sentencing provision

In addition to the provisions listed above, several other aspects of the sentencing guidelines may be impacted. Without additional guidance from either the state or federal courts, it is impossible to assess the impact of these areas. Accordingly, this report does not address those provisions. Those provisions include:

- a) use of custody status points in the calculation of criminal history scores¹
- b) use of juvenile adjudications in the calculation of criminal history scores
- c) potential *Blakely* issues surrounding probation revocations
- d) restitution amounts ordered by the court

The recommendations contained in this are intended to provide guidance and some level of consistency in sentencing practices while awaiting future court action. Since sentencing enhancements are appropriate and necessary in certain cases, the commission believes it is important for the protection of public safety that interim procedures be in place to enable criminal sentencing to continue while acknowledging and complying with the constitutional issues identified in *Blakely*.

IV. Aggravated Departures in Minnesota

The primary impact on sentencing as the result of *Blakely* focuses on aggravated departures under the sentencing guidelines. Aggravated departures are important to the state's sentencing structure as they were developed as a means to provide enhanced sentences for the "exceptional" cases in which the presumptive sentence does not appropriately address either the dangerousness of the offender or the extreme factors surrounding the commission of a criminal offense. They are an important public safety tool and need to be available and utilized when appropriate.

¹ The issue has been raised whether the custody status point defendants receive for committing a new offense while under some form of custody such as probation, community corrections, release pending sentencing are subject to *Blakely* provisions and because it can increase a defendant's criminal history scores and has the potential to increase the length of a defendant's sentence.

It should be noted, however, that the number of aggravated departures sentences in Minnesota impacted by *Blakely* is limited. In 2002 there were a total of 1,002 aggravated departures representing, 7.7% of the total 12,978 felony cases sentenced in that year.

Total Aggravated Departures Cases in 2002

Type of Departure	# Cases	% Overall Cases
Aggravated Disposition	481	3.7%
Agg. Disposition and Agg. Duration	50	0.4%
Aggravated Duration-Prison	224	1.7%
Aggravated Duration-Probation	247	1.9%
Total	1,002	7.7%(of 12,978)

In 2003, a very similar pattern is indicated with a total of 1,064 aggravated departures sentences. This total represents only 7.3% of the total 14,492 felony sentences for that year.

Total Aggravated Departures Cases in 2003

Type of Departure	# Cases	% Overall Cases
Aggravated Disposition	522	3.6%
Agg. Disposition and Agg. Duration	60	0.4%
Aggravated Duration-Prison	247	1.7%
Aggravated Duration-Probation	235	1.6%
Total	1,064	7.3% (of 14,492)

When comparing the data between 2002 and 2003, there are minimal differences in the number of aggravated departures by type of aggravated departure. The data indicates that the use of aggravated departures is fairly stable and account for a little over 7% of all felony sentences.

When aggravated departures are analyzed further by whether the departure was contested or not contested, the number of departures that would be impacted by *Blakely* is reduced further. In many situations, aggravated departures are part of a plea to a lesser charge with an agreement between the prosecution and defense that the defendant will serve a longer sentence than the presumptive sentence set forth on the sentencing grid. Aggravated dispositional departures are often the result of a request by the defendant to have the sentence executed in order to serve the time concurrently with another sentence or revocation.

In 2002, of the total 1,002 aggravated departures only 286 cases (29% of the total number of aggravated departures) involved contested aggravated departures, which would represent the target group of cases that would probably be affected by *Blakely*.

Analysis of 2002 Departures

	Method of Conviction and Agreement on Departure	All Aggravated Dispositions*	Aggravated Durations	Total
Total # Departures		531	471	1,002
Non-Contested	Guilty Plea – Departure by Plea Agreement or Request	435	231	666
	Guilty Plea – Departure Result of Criminal History Error		42	42
	Trial - Departure by Request	8		8
	Total	443 (83%)	273 (58%)	716 (71%)
Contested	Trial	12	59	71
	Guilty Plea - No Agreement for Departure	76	139	215
	Total	88 (17%)	198 (42%)	286 (29%)

* All Aggravated Dispositions includes the 50 cases that are both aggravated dispositional and aggravated durational departures

When the same analysis is completed for aggravated departures in 2003, a total of 358 cases or 34% of the total number of aggravated departures are identified as contested departures that would be subject to the provisions set forth in *Blakely*.

Analysis of 2003 Departures

	Method of Conviction and Agreement on Departure	All Aggravated Dispositions*	Aggravated Durations	Total
Total # Departures		582	482	1,064
Non-Contested	Guilty Plea – Departure by Plea Agreement or Request	461	212	673
	Guilty Plea – Departure Result of Criminal History Error		27	27
	Trial - Departure by Request	6		6
	Total	467 (80%)	239 (50%)	706 (66%)
Contested	Trial	9	55	64
	Guilty Plea - No Agreement for Departure	106	188	294
	Total	115 (20%)	243 (50%)	358 (34%)

* All Aggravated Dispositions includes the 60 cases that are both aggravated dispositional and aggravated durational departures

From the data provided, about one third of the total number of aggravated departures in a given year are likely to be subject to *Blakely* provisions. The importance of the ability to impose an enhanced sentence in these cases should not be diminished in any manner, but it is also important to note that there are a limited number of aggravated departures cases per year, approximately 300 to 400 cases, that would be impacted. It is inevitable that there will be some impact on the courts, prosecutors and public defenders, but the data indicates that the impact should not create a severe crisis within the state's criminal justice system.

V. Assumptions Used in the Formulation of Recommendations

In order for the Commission to formulate recommendations with regard to sentencing in light of the *Blakely v. Washington* ruling, certain assumptions had to be incorporated into the recommendations. It was necessary for the Commission “to assume without deciding” a number of issues surrounding *Blakely*, which include retroactivity, applicability of post-conviction relief, and types of aggravated departures subject to *Blakely*. The Commission is fully aware that pending and future court action at both the federal and state level or modifications to the Minnesota Rules of Criminal Procedure will be the final and permanent basis for changes in the state’s current sentencing structure. The assumptions used to formulate the recommendations included in this report are based on the Commission’s interpretation of the impact of *Blakely* on the state’s sentencing guidelines at the current time.

A. Retroactivity Cases involving aggravated departures sentenced after June 25, 2000 (date of the *Apprendi v. New Jersey* decision) in which all direct appeals have been exhausted are not impacted by the *Blakely v. Washington* decision.

In the U.S. Supreme Court Decision, *Schirro v. Summerlin*, 124 S.Ct. 2519 (2004), the court states that a defendant does not have the retroactive application of a right to a jury trial. It should be noted that this case does not address the question about the application of proof beyond the reasonable doubt standard, which may still leave some limited potential for the retroactive application of *Blakely*.

The issue of retroactivity was not addressed directly in the *Blakely* decision. Justice O’Connor’s dissent stated that “despite the fact we hold in *Schirro v. Summerlin*, ___ U.S. ___ (2004), that *Ring* (and a *fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack. See *Teague v. Lane* 489 U.S. 288, 301 (1989) (plurality opinion) (‘[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final’).” (*Blakely v. Washington*, supra. ___U.S. at p.___.)

State v. O’Meara, 679 N.W. 2d 334 (Minn, 2004), addresses the issue of retroactivity by applying federal precedent related to the creation of a “new rule” of constitutional criminal procedure in *Apprendi v. New Jersey*. A new rule is one that is (a) not dictated by precedent existing when the conviction became final, or (b) breaks new ground, or (c) imposes a new obligation on the states or federal government. The Minnesota Supreme Court ruled that when a new rule for criminal prosecution is announced, it is to be applied retroactively to all cases pending on direct appeal and all cases not yet final.

Arguments have been raised that the *Blakely* ruling is dictated to some degree by precedent set in *Apprendi v. New Jersey* and that the case does not break new ground. However, the Commission believes that the *Blakely* decision does impose a new obligation on the state, and thus qualifies as a new rule and would not be retroactive back to the date of *Apprendi*. If the courts decides that it is a new rule, than all cases final at the time of *Blakely* would not be affected by the decision.

B. Types of Departures Impacted by Blakely It is assumed that both aggravated dispositional and durational departures under Minnesota Sentencing Guidelines are subject to the provisions of *Blakely*. Mitigated departures are not impacted by the *Blakely* ruling and do not violate a defendant’s Sixth Amendment rights.

Kansas case law addressed the application of the *Apprendi* ruling to dispositional departures in a Kansas decision *State v. Carr* 274 Kan. 447, 53 P.3d 843 (2002). The Kansas Supreme Court ruled in *State v. Gould* 271 Kan. 394, 23 P.3d 801(2001) that aggravated departures were unconstitutional under the *Apprendi* decision. However, in *State v. Gould*, the Kansas Supreme Court was silent as to whether or not *Gould* applied to aggravated dispositional departures or was limited to aggravated durational departures.

In *State v. Carr*, the Court stated in part: “although the Supreme Court stated that the upward departure provision of K.S.A. 2000 Supp. 21-4716 was unconstitutional on its face, it is difficult to see how a dispositional departure such as Carr’s fits under the rationale of *Apprendi*.” The court found in *State v. Carr* that the dispositional departure merely altered the mode of service of Carr’s sentence; it did not lengthen it.

Although the Court in *State v. Carr* ruled that aggravated dispositional departures are not subject to *Apprendi* and subsequently *Blakely* provisions, the Sentencing Guidelines Commission believes that aggravated dispositional departures will be subject to the *Blakely* in Minnesota. Given that position, recommendations included in this report should be applied to cases involving both aggravated durational and dispositional departures.

C. Post-Conviction Relief In the aftermath of such a significant decision as *Blakely v. Washington*, it is reasonable to expect that defendants whose sentences involve aggravated departures under the sentencing guidelines will file a number of post-conviction relief motions. The validity of these motions will in part be dependant on the retroactivity issue related to *Blakely*. The assumption regarding retroactivity utilized by the commission in drafting recommendations assumes that motions would be limited to pre-*O’Meara* and pre-*Blakely* cases in which direct appeals are still open.

For cases in which the motions are unwarranted or outside the assumed retroactivity period, the court may summarily dismiss the motion without the need to hold an evidentiary hearing. However, for cases that fall within the retroactivity period, it will be necessary for the court to hold a hearing, resulting in additional workloads for both the courts and public defenders.

VI. Proposed Long-Term Recommendations in Response to *Blakely v. Washington*

The *Blakely v. Washington* decision created both a level of confusion and anxiety within the criminal justice system with regards to what exactly the ruling means and what aspects of individual sentencing systems are affected. In addition, the task of developing responses that address the constitutional issues raised in *Blakely*, while simultaneously maintaining and supporting the underlying punishment and sentencing philosophy of a given state, has been challenging. Although numerous “easy or simple fixes” have been identified as potential responses to *Blakely*, the commission spent a considerable amount of time examining options and crafting recommendations that were both constitutionally sound and reflective of the sentencing guideline principles of equity, proportionality and truth in sentencing.

The recommendations presented below are meant to be advisory in nature and incorporate the assumptions noted previously in this report. They are intended to serve as a guide to criminal justice practitioners to enable the state’s current sentencing structure to continue to operate in a manner in which public safety is paramount and defendant’s constitutional rights are protected. The commission prefaces all recommendations with the understanding that pending and future court action at both the federal and state level could substantially affect these recommendations and future modifications may be necessary.

Recommendations contained in this report are divided into three categories: (1) aggravated departure cases prior to *Blakely*; (2) aggravated departure cases after *Blakely*; and (3) other *Blakely* related sentencing issues.

Recommendation One: Aggravated Departure Cases Prior to *Blakely*

A. Aggravated departure sentences prior to June 24, 2004, for which all direct appeals have been exhausted, are not impacted by the *Blakely*.

B. Aggravated departures sentenced prior to June 24, 2004, for which direct appeals are still pending will need to be re-sentenced to address the constitutional issues raised in *Blakely*. The verdict from the original conviction will stand, regardless of whether the verdict was the result of a trial or a guilty plea. Although a defendant can be re-sentenced, the facts of the case cannot be re-tried under the Double Jeopardy principle.

If a case is remanded for re-sentencing because the current sentence is ruled unconstitutional under *Blakely*, then there is no sentence. The court is initiating sentencing from the point of conviction and is only bound by the standard rules of sentencing at that time. It is not required that the re-sentencing involve the same judge or the same jury that participated in the original sentencing. The re-sentencing can be accomplished through various means, which may include one or more of the following options:

1. Use of the trial transcript from the original trial to identify or determine the presence of aggravating factors;
2. Defendant can stipulate to the aggravating factors, even if there was not a plea agreement in the original trial;
3. Defendant can waive the right to a jury trial and request the court determine the presence of aggravating factors; and
4. A jury can be impaneled to determine the presence of aggravating factor(s) employing the beyond a reasonable doubt standard.

It is recommended that the Criminal Rules Committee establish a procedure or determine the criteria necessary for proving aggravating factors in cases remanded for re-sentencing. Victims should also be notified of the re-sentencing and provided the opportunity to give input if so desired.

The court retains the authority to impose the length of sentence upon the determination of the presence of aggravating factors in a case. In addition, the court can accept the jury's finding of aggravating factors in a case but determine that a departure is not warranted and impose the presumptive guideline sentence.

C. Aggravated departure cases where the date of conviction was prior to June 24, 2004, but sentencing has not yet occurred will have to comply with *Blakely*. Listed below are suggested procedures to incorporate during the sentencing process:

1. The state should provide written notice of intent to seek an aggravated departure as soon as reasonably possible.
2. The court should schedule a hearing to inform the defendant of the right to a jury trial to determine the presence of aggravating departure factors utilizing the beyond a reasonable doubt standard.
3. The defendant should be provided the opportunity to indicate whether he/she chooses a jury trial, chooses to waive the right to a jury trial and have the court make the determination or to stipulate to the aggravating factors.

4. If a bench trial is held, the state will present evidence to the court regarding the presence of aggravating factors. The court will utilize the beyond the reasonable doubt standard in determining the presence of aggravating factors. Upon a finding of aggravating factors, the court retains the authority to determine the length of sentence imposed.
5. If a jury trial is held, the jury should be instructed that the purpose of the sentencing trial is not to determine guilt or innocence but only to determine the presence of aggravating factors.
6. The jury should be informed that a finding of aggravating factors might result in an enhanced sentence.
7. If a jury is convened for the sentencing portion of a trial, the aggravating factors should be submitted to the jury by means of a Special Interrogatory or comparable instrument.
8. Victims should be notified of the sentencing hearing and provided the opportunity to give input if so desired to either the court or the jury.

In cases where a jury is impaneled to determine aggravating factors for the purpose of sentencing, a unanimous decision must be reached by the jury for an aggravated departure to be imposed. If the jury cannot reach a unanimous decision, then a sentence no greater than the presumptive guideline sentence should be imposed.

If the court chooses to seek an aggravating factor on its own volition, without a motion from the state or the defendant, the court must notify all parties of its intent and allow reasonable time for either party to respond. The notice should state the type of departure sought by the court and the reasons or factors supporting the departure.

There is the potential for a constitutional separation of powers argument if the court chooses to seek an aggravated departure on its own volition over the objection of the state. It may be necessary for the court to seek separate counsel in the form of representation from the state's Attorney General's office in these situations.

Recommendation Two: Aggravated Departure Cases Post-*Blakely*

A. All cases involving aggravated departures for convictions or pleas occurring after June 24, 2004 are subject to *Blakely*. These cases will need to incorporate modifications to pre-plea and pre-trial proceedings, as well as, modifications to the plea process and trial proceedings. Outlined below are suggested modifications to be incorporated into the various proceedings.

1. Pre-Plea and Pre-Trial Modifications

When an aggravated departure is sought, the defendant should receive notice of his/her constitutional right to have a jury trial at sentencing and the use of the beyond a reasonable doubt standard to determine the presence of aggravated factors for the purpose of imposing an aggravated departure sentence under *Blakely*.

A notice to seek a departure by the state should be added to the probable cause section of the complaint. The notice can be achieved by amending the complaint, through a pleading, or in the form of a formal letter. The notice to seek an aggravated departure should be served upon the defense and filed with the court at the earliest time possible.

An “offer of proof” for aggravating factors should be provided by the state at an appropriate time within the discretion of the court. Preferably an “offer of proof” should be presented prior to the commencement of the trial or at the earliest point that is reasonable.

The court should hold a hearing to inform the defendant of the right to a jury trial to determine the presence of aggravating departure factors beyond a reasonable doubt. At that time, the defendant should indicate whether he/she chooses a jury trial, chooses to waive the right to a jury trial and desires the court to make the determination or chooses to stipulate to the aggravating factors.

2. Modifications to the Plea Process Involving Aggravated Departures

Modifications should be made to Rule 15 and the Rule 15 Petition of the Minnesota Rules of Criminal Procedure. It is recommended that the Minnesota State Bar Association draft appropriate modifications and present those modifications to the Minnesota Supreme Court for consideration.

The court, state and defense counsel should participate in designing an expansion of the defendant’s portion of admissions to allow for both the admission of criminal fact and admission of aggravating factors. In addition, the record should be expanded to allow for the admission of aggravating departure factors.

It is suggested that the Criminal Rules Committee review and make a recommendation on the following issues. If a defendant waives a jury trial in the conviction phase of a trial should that also constitute a waiver of a jury at the sentencing phase of a trial? Is a defendant permitted to waive a

jury in the conviction phase of a trial but be permitted to request a jury at the sentencing phase of a trial?

3. Modifications to Trial Proceeding Involving Aggravated Departures

If a defendant chooses to have a jury determine the presence of aggravating factors at the sentencing phase of the trial, the court should make a determination if presenting the aggravating factors during the conviction phase of the trial would be prejudicial to the defendant. If the court determines that presentation of aggravating factors would, in fact, be prejudicial to the defendant, then a bifurcated trial process should be used.

In a bifurcated trial proceeding, upon finding the defendant guilty of the crime(s) charged, the alleged aggravating factors would then be presented by the prosecution to the jury for determination. The presentation of the aggravating factors could be done in any of the following ways:

- a. Evidence could be presented to the jury and witnesses called to testify to establish or support the aggravating factors. It is recommended that the Criminal Rules Committee determine if evidence inadmissible at the guilt phase of the trial can be presented to the jury during the sentencing phase of the trial.
- b. Both the state and defense counsel could present arguments relating to significance of aggravating factors presented during guilt phase of the trial.
- c. The defendant could stipulate to one or more of the aggravating factors.
- d. The defendant could choose to waive his *Blakely* right to jury determination of aggravating factors after a verdict of guilty and have the court make the determination.
- e. Rule 20 (Mental Illness Bifurcated Process) could be used as a model for bifurcated sentencing in aggravated departure cases.
- f. Victims should be notified of the sentencing hearing and provided the opportunity to give input if so desired.

A special verdict form listing the aggravated factors should be used for jury determination during the sentencing phase of the trial. A jury must reach a unanimous decision on the presence of aggravating factors for an aggravated departure sentence to be imposed. Upon a unanimous decision of the jury that aggravating factors are present, the court, not the jury, retains the authority to determine the length of the aggravated departure

sentence. If a unanimous decision is not reached on a specific aggravating factor, a sentence no greater than the presumptive guideline sentences should be imposed with regard to that specific aggravating factor.

If the court chooses to seek an aggravating factor on its own volition, without a motion from the state or the defendant, the court must notify all parties of its intent and allow reasonable time for either party to respond. The notice should state the type of departure sought by the court and the reasons or factors supporting the departure.

There is the potential for a constitutional separation of powers argument if the court chooses to seek an aggravated departure on its own volition over the objection of the state. It may be necessary for the court to seek separate counsel in the form of representation from the state's Attorney Generals office in these situations.

Recommendation Three: *Blakely* Related Sentencing Issues

In addition to the various modifications to trial procedures and various forms related to sentencing in cases involving aggravated departures, there are a few sentencing procedures that will need to be modified to be in compliance with the *Blakely*. They include changes to several sentencing enhancement statutes, permissive consecutive sentencing procedures and modification to M.S. §609.11, the mandatory minimum sentencing statute for possession or use of a dangerous weapon. Outlined below are the recommended modifications:

A. Specific Statutory Sentence Enhancements

Minnesota has several specific statutory enhancements for certain offenses that result in an aggravated departure or enhanced sentence above the presumptive sentence for the offense due to the determination of one or more aggravating factors, other than prior convictions (See Attachment A). Currently, the court makes the determination of the additional factors that result in an enhanced sentence.

It is recommended that those statutes be modified by replacing the current section of each statute in which "the court" makes the additional finding to "a jury" makes the additional finding(s). Due to the seriousness of the offenses contained in these statutory enhancements, it is recommended that absent a defendant stipulation to the additional finding, a bifurcated trial proceeding be used in these specific cases. These offenses account for a minimal number of cases, averaging only 50 to 60 offenders sentenced yearly and this change should not pose an unmanageable burden on the court system.

B. Consecutive Sentencing Provisions

The Commission has determined that *Blakely* impacts consecutive sentencing provisions under the guidelines and require modification. Currently, the court is not required to make any additional findings to impose consecutive sentences other than that there are multiple current convictions for a “person offense” or a prior conviction for a “person offense.” On the surface it would appear that the *Blakely* ruling does not directly impact the state’s consecutive sentencing provision. However, in reviewing current statutory definitions, a definition of a “person offense” could not be located. Currently the court makes the determination whether an offense is classified as a person offense, which may raise a *Blakely* issue.

The Sentencing Guidelines Commission recommends that all felony offenses be reviewed and classified as eligible or ineligible for consecutive sentencing. The commission adopted this approach because of the difficulty and complexity in designating an offense “a person” crime since the term has varying meanings in various situations. The designation as eligible or ineligible for consecutive sentencing would remove the need for the court to make that finding and adequately address any potential *Blakely* issues. The commission is currently in the process of reviewing all felony offenses and assigning a designation of eligible or ineligible for consecutive sentencing.

C. M.S. § 609.11 Dangerous Weapon

M.S. § 609.11 is a mandatory minimum sentencing statute for offense committed while possessing or using a dangerous weapon (See Attachment B). While the commission determined that mandatory minimum sentences were not impacted by the *Blakely* decision, this specific statute requires a finding by the court in some situations, which creates a *Blakely* issue.

If the use of the weapon is an element of the offense, for example armed robbery, then there would not be a *Blakely* issue since the court is not required to make any additional finding that a weapon was used to impose the mandatory minimum sentence. However, in situations where the dangerous weapon is not an element of the crime, for example possession of a firearm during a drug transaction, the court is required to make a finding that the defendant was in possession of a dangerous weapon to impose the mandatory minimum sentence. The Commission recommends that M.S. § 609.11, subd. 7 be modified to indicate that a jury must make a finding or the defendant must stipulate to the use or possession of a dangerous weapon if it is not an element of the crime.

D. Modifications to the Sentencing Guidelines and Guidelines Commentary

The Commission proposes to modify the language in section 11.D and comment

11.D.01 of the sentencing guidelines to conform to *Blakely* (See Attachment C). This section of the guidelines and corresponding commentary deals with departures and should indicate the defendant's right to have a jury trial to determine the aggravating factors beyond a reasonable doubt for a departure sentence.

Modification to the guidelines language pertaining to departures has been drafted and tentatively approved by the commission. Following a public hearing on the proposed language modification and final approval from the Commission, it is anticipated that the modified language and commentary will be presented to the Minnesota Legislature.

Conclusion

The Minnesota Sentencing Guidelines Commission has spent the past three months analyzing the potential impact of the United States Supreme Court's ruling in *Blakely v. Washington* on sentencing in Minnesota. A single court decision has created a level of confusion and uncertainty that has never previously been experienced in the area of criminal sentencing. The level of chaos surrounding the *Blakely* decision is determined in part on the structure of an individual state's sentencing system. When sentencing enhancements are an integral part of the sentencing structure, such as with the Federal Sentencing Guidelines, the impact is much more significant and difficult to remedy. To add to the confusion of the last three months, the two cases pending before the U.S. Supreme Court, *Booker* and *Fanfan* create even more apprehension as to what the outcome of those decisions may have on sentencing policies.

The Commission's analysis of the *Blakely* decision on sentencing in Minnesota indicates that there is limited impact. The sentencing guidelines remain constitutional, as do aggravated departures. The current procedure for imposing aggravated departures requires some modification to address the constitutional issues raised in *Blakely*, but the modifications are not extensive or far reaching, especially given the limited number of cases each year that receive aggravated departure sentences. In addition, there are a limited number of sentencing provisions or procedures that need to be modified or amended, but the majority of the modifications focus on language changes, amending forms or modifying trial procedures. The basic structure of the state's sentencing system remains intact and continues to provide for sentences that promote public safety and hold the defendant accountable, while ensuring the constitutional rights of the defendant are protected.

This report contains several long-term recommendations addressing the constitutional issues related to sentencing that were identified in *Blakely*. The Commission based these recommendations on assumptions that are subject to future court action or modifications to rules of criminal procedure and could require modification at a future time. In this report, the Commission "assumed without deciding" issues relating to retroactivity, types of departures affected and the impact of post-relief motions. Based on those assumptions, the recommendations contained in this report were developed. In addition, the

Commission is considering modifications to the guidelines themselves in response to *Blakely*. Among modifications being considered are expansion of the sentencing ranges within the grid cells and sentencing provisions for sex offenders. A subcommittee has been appointed to analyze and develop proposals to be reviewed by the full Commission later this year.

Although the recommendations presented in this report carry no legal force, they do provide a road map for the state with regard to sentencing policies and practices as both the state and federal courts work through the numerous issues surrounding the *Blakely* decision. If the state approaches the issues raised in the recent decision in a rational and methodical manner, the disruption and impact to the criminal justice system will be held to a tolerable level. Flexibility will be crucial in the upcoming months as the state awaits rulings from both the state and federal courts. The Sentencing Guidelines Commission hopes the recommendations set forth in this report will assist in sentencing during this period of transition.

Minnesota's Sentencing Enhancements Statutes*
(Based on factors other than a prior conviction)

609.106. Heinous crimes: This statute defines heinous crimes and included is a violation of section [609.342](#), [609.343](#), or [609.344](#), if the offense was committed with force or violence. The statute further provides that a person convicted of first degree murder must be committed to prison for life without possibility of release if the court determines that the person has a prior conviction for a heinous crime.

<http://www.revisor.leg.state.mn.us/stats/609/106.html>

609.108. Mandatory increased sentences for certain patterned and predatory sex offenders: This statute provides for enhanced sentences if the court determines that the offender is a danger to public safety and in need of long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release.

<http://www.revisor.leg.state.mn.us/stats/609/108.html>

Note: It was determined that this statute violates due process under *Apprendi* when the sentence is greater than the statutory maximum (*State v. Grossman*, 622 N.W.2d 394, 396 (Minn. App. 2001). In *State v. Whitley*, ___ N.W.2d ___ (Minn App. 2004), the 40-year enhanced sentence was reversed and remanded for sentencing consistent with Blakely because “appellant did not make a knowing and intelligent waiver of his right to have a jury determine whether his sentence could be enhanced....”

609.109, subd. 4. Presumptive and mandatory sentences for repeat sex offenders--

Mandatory 30 year sentence: This provision mandates a 30 year sentence, notwithstanding the statutory maximum, for certain sex offenders if the court determines that the crime involved an aggravating factor and the offender has a previous sex offense conviction.

<http://www.revisor.leg.state.mn.us/stats/609/109.html>

609.1095, subd. 2. Dangerous Offender Sentencing Provision: Provides that a judge may impose an aggravated durational departure if the person is convicted of a violent crime, has two or more prior convictions for violent crimes, and the court finds that the offender is a danger to public safety.

<http://www.revisor.leg.state.mn.us/stats/609/1095.html>

609.1095, subd. 4. Career Offender Sentencing Provision: Provides that a judge may impose an aggravated durational departure if the court finds that the offender has five or more felony convictions and that the present offense is an offense that was committed as part of a pattern of criminal conduct.

<http://www.revisor.leg.state.mn.us/stats/609/1095.html>

609.26 (a)(2). Depriving another of custodial or parental rights: This statute provides enhanced penalties if the court finds that the crime was committed under various listed conditions.

<http://www.revisor.leg.state.mn.us/stats/609/26.html>

* Based on review by MSGC staff of MN Statutes, Chapter 609, 152, and various other statutes. This list of sentencing enhancements may be incomplete.

Mandatory Minimums for Offenses Committed while Using or Possessing a Dangerous Weapon – 609.11: This statute requires that the Court determine whether the defendant used or possessed a dangerous weapon

[Minnesota Statutes 2003, Table of Chapters](#)

[Table of contents for Chapter 609](#)

609.11 Minimum sentences of imprisonment.

Subdivision 1. **Commitments without minimums.** All commitments to the commissioner of corrections for imprisonment of the defendant are without minimum terms except when the sentence is to life imprisonment as required by law and except as otherwise provided in this chapter.

Subd. 2. Repealed, 1978 c 723 art 2 s 5

Subd. 3. Repealed, 1981 c 227 s 13

Subd. 4. **Dangerous weapon.** Any defendant convicted of an offense listed in subdivision 9 in which the defendant or an accomplice, at the time of the offense, used, whether by brandishing, displaying, threatening with, or otherwise employing, a dangerous weapon other than a firearm, shall be committed to the commissioner of corrections for not less than one year plus one day, nor more than the maximum sentence provided by law. Any defendant convicted of a second or subsequent offense in which the defendant or an accomplice, at the time of the offense, used a dangerous weapon other than a firearm, shall be committed to the commissioner of corrections for not less than three years nor more than the maximum sentence provided by law.

Subd. 5. **Firearm.** (a) Except as otherwise provided in paragraph (b), any defendant convicted of an offense listed in subdivision 9 in which the defendant or an accomplice, at the time of the offense, had in possession or used, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm, shall be committed to the commissioner of corrections for not less than three years, nor more than the maximum sentence provided by law. Any defendant convicted of a second or subsequent offense in which the defendant or an accomplice, at the time of the offense, had in possession or used a firearm shall be committed to the commissioner of corrections for not less than five years, nor more than the maximum sentence provided by law.

(b) Any defendant convicted of violating section [609.165](#) or [624.713](#), subdivision 1, clause (b), shall be committed to the commissioner of corrections for not less than five years, nor more than the maximum sentence provided by law.

Subd. 5a. **Drug offenses.** Notwithstanding section [609.035](#), whenever a defendant is subject to a mandatory minimum sentence for a felony violation of chapter 152 and is also subject to this section, the minimum sentence imposed under this section shall be consecutive to that imposed under chapter 152.

Subd. 6. **No early release.** Any defendant convicted and sentenced as required by this section is not eligible for probation, parole, discharge, or supervised release until that person has served the full term of imprisonment as provided by law, notwithstanding the provisions of sections [242.19](#), [243.05](#), [244.04](#), [609.12](#) and [609.135](#).

Subd. 7. **Prosecutor shall establish.** Whenever reasonable grounds exist to believe that the defendant or an accomplice used a firearm or other dangerous weapon or had in possession a firearm, at the time of commission of an offense listed in subdivision 9, the prosecutor shall, at the time of trial or at the plea of guilty, present on the record all evidence tending to establish that fact unless it is otherwise admitted on the record. The question of whether the defendant or an accomplice, at the time of commission of an offense listed in subdivision 9, used a firearm or other dangerous weapon or had in possession a firearm shall be determined by the court on the record at the time of a verdict or finding of guilt at trial or the entry of a plea of guilty based upon the record of the trial or the plea of guilty. The court shall determine on the record at the time of sentencing whether the defendant has been convicted of a second or subsequent offense in which the defendant or an accomplice, at the time of commission of an offense listed in subdivision 9, used a firearm or other dangerous weapon or had in possession a firearm.

Subd. 8. **Motion by prosecutor.** (a) Except as otherwise provided in paragraph (b), prior to the time of sentencing, the prosecutor may file a motion to have the defendant sentenced without regard to the mandatory minimum sentences established by this section. The motion shall be accompanied by a statement on the record of the reasons for it. When presented with the motion, or on its own motion, the court may sentence the defendant without regard to the mandatory minimum sentences established by this section if the court finds substantial and compelling reasons to do so. A sentence imposed under this subdivision is a departure from the sentencing guidelines.

(b) The court may not, on its own motion or the prosecutor's motion, sentence a defendant without regard to the mandatory minimum sentences established by this section if the defendant previously has been convicted of an offense listed in subdivision 9 in which the defendant used or possessed a firearm or other dangerous weapon.

Subd. 9. **Applicable offenses.** The crimes for which mandatory minimum sentences shall be served as provided in this section are: murder in the first, second, or third degree;

assault in the first, second, or third degree; burglary; kidnapping; false imprisonment; manslaughter in the first or second degree; aggravated robbery; simple robbery; first-degree or aggravated first-degree witness tampering; criminal sexual conduct under the circumstances described in sections [609.342](#), subdivision 1, clauses (a) to (f); [609.343](#), subdivision 1, clauses (a) to (f); and [609.344](#), subdivision 1, clauses (a) to (e) and (h) to (j); escape from custody; arson in the first, second, or third degree; drive-by shooting under section [609.66](#), subdivision 1e; harassment and stalking under section [609.749](#), subdivision 3, clause (3); possession or other unlawful use of a firearm in violation of section [609.165](#), subdivision 1b, or [624.713](#), subdivision 1, clause (b), a felony violation of chapter 152; or any attempt to commit any of these offenses.

Subd. 10. **Report on criminal cases involving a firearm.**

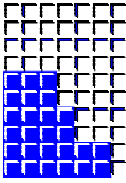
Beginning on July 1, 1994, every county attorney shall collect and maintain the following information on criminal complaints and prosecutions within the county attorney's office in which the defendant is alleged to have committed an offense listed in subdivision 9 while possessing or using a firearm:

- (1) whether the case was charged or dismissed;
- (2) whether the defendant was convicted of the offense or a lesser offense; and
- (3) whether the mandatory minimum sentence required under this section was imposed and executed or was waived by the prosecutor or court.

No later than July 1 of each year, beginning on July 1, 1995, the county attorney shall forward this information to the sentencing guidelines commission upon forms prescribed by the commission.

HIST: 1963 c 753 art 1 s 609.11; 1969 c 743 s 1; 1971 c 845 s 15; 1974 c 32 s 1; 1975 c 378 s 8; 1977 c 130 s 2; 1978 c 723 art 2 s 2; 1979 c 258 s 1; 1981 c 227 s 1-7; 1983 c 274 s 15; 1986 c 351 s 5; 1989 c 290 art 3 s 27,28; 1991 c 279 s 25; 1993 c 326 art 13 s 23; 1994 c 576 s 46; 1994 c 636 art 3 s 5-8; 1996 c 408 art 4 s 4,5; 1997 c 96 s 4; 1998 c 367 art 2 s 4,5

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**Minnesota Sentencing Guidelines Commission
Proposed Modifications to the Sentencing Guidelines
September 16, 2004**

I. Proposed Modifications Related to Blakely Decision

A. Departure Language

The commission proposes to modify the language in section II.D and comment II.D.01 of the sentencing guidelines to conform to the *State of Washington v. Blakely* decision.

Proposed Language

D. Departures from the Guidelines: The sentences ranges provided in the Sentencing Guidelines Grid are presumed to be appropriate for every case the crimes to which they apply. Thus, the judge shall utilize the presumptive sentence provided in the sentencing guidelines pronounce a sentence within the applicable range unless the individual case involves there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grid. A sentence outside the applicable range on the grid is a departure from the sentencing guidelines and is not controlled by the guidelines, but rather, is within the judge's sound discretion. However, in exercising the discretion to depart from a presumptive sentence, the judge must disclose in writing or on the record the particular When such circumstances are present, the judge may depart from the presumptive sentence and stay or impose any sentence authorized by law. When departing from the presumptive sentence, the court should pronounce a sentence which is proportional to the severity of the offense of conviction and the extent of the offender's prior criminal history, and should take into substantial consideration the statement of purpose and principles in Section I, above. When departing from the presumptive sentence, a judge must provide written reasons which specify the substantial and compelling nature of the circumstances that, and which demonstrate why the sentence selected in the departure is make the departure more appropriate, reasonable, or equitable than the presumptive sentence.

Furthermore, if an aggravated departure is based upon or supported by facts that are not established in proving the elements of the crime being sentenced, the judge must afford the accused an opportunity to have a jury trial on those additional facts and to have the facts proved beyond a reasonable doubt. If the departure facts are proved beyond a reasonable doubt, the judge may exercise the discretion to depart from the presumptive sentence. In exercising that discretion, it is recommended that the judge pronounce a sentence that is proportional to the severity of the crime for which the sentence is imposed and the offender's criminal history, and take into consideration the purposes and underlying principles of the sentencing guidelines. Because departures are not within the sentencing guidelines, the departure factors set forth in II.D are advisory only, except as otherwise established by settled case law.

Comment

II.D.01. *The guideline sentences are presumed to be appropriate for every case. However, there will be a small number of cases where substantial and compelling aggravating or mitigating factors are present. When such factors are present, the judge may depart from the presumptive disposition or duration provided in the guidelines, and stay or impose a sentence that is deemed to be more appropriate, reasonable, or*

equitable than the presumptive sentence. A defendant has the right to a jury trial to determine whether or not aggravating factors are proved beyond a reasonable doubt.

II.D.02. *Decisions with respect to disposition and duration are logically separate. Departures with respect to disposition and duration also are logically separate decisions. A judge may depart from the presumptive disposition without departing from the presumptive duration, and vice-versa. A judge who departs from the presumptive disposition as well as the presumptive duration has made two separate departure decisions, each requiring written reasons.*

II.D.03. *The aggravating or mitigating factors and the written reasons supporting the departure must be substantial and compelling to overcome the presumption in favor of the guideline sentence. The purposes of the sentencing guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity. Sentencing disparity cannot be reduced if judges depart from the guidelines frequently. Certainty in sentencing cannot be attained if departure rates are high. Prison populations will exceed capacity if departures increase imprisonment rates significantly above past practice.*

II.D.04. *Plea agreements are important to our criminal justice system because it is not possible to support a system where all cases go to trial. However, it is important to have balance in the criminal justice system where plea agreements are recognized as legitimate and necessary and the goals of the sentencing guidelines are supported. If a plea agreement involves a sentence departure and no other reasons are provided, there is little information available to provide for informed policy making or to ensure consistency, proportionality, and rationality in sentencing.*

Departures and their reasons highlight both the success and problems of the existing sentencing guidelines. When a plea agreement is made that involves a departure from the presumptive sentence, the court should cite the reasons that underlie the plea agreement or explain the reasons the negotiation was accepted.