

The Impact of  
*Blakely v. Washington*  
on  
Sentencing in Minnesota

Short Term Recommendations

Presented to:  
**Governor Tim Pawlenty**

Submitted by:  
**Minnesota Sentencing Guidelines Commission**

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# Minnesota Sentencing Guidelines Commission

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## Introduction

Almost immediately after the *Blakely v. Washington* decision was handed down by the U.S. Supreme Court on June 24, 2004, those in the world of sentencing and the courts began to speculate as to what the decision really meant and who would be impacted by it. The potential effects of the decision were compared to the “equivalent of a forty car pile up” or “the end of decades of sentencing reform.” Now, weeks after *Blakely* was released, many of the answers to an endless string of questions still remain unclear. However, it is very apparent that *Blakely* has changed criminal sentencing in this country and the magnitude of that change is something each individual state and the federal government will need to decipher based on their own sentencing structure.

Although the *Blakely* decision created a lot uncertainty and confusion surrounding numerous aspects of sentencing, the Court was clear on several issues. First, determinate sentencing itself is not unconstitutional. Second, sentencing guidelines are not unconstitutional in and of themselves. Finally, enhanced sentences and plea bargains are permissible when certain procedures are in place to ensure the constitutional rights of the defendant.

The recent *Blakely v. Washington* decision directly impacts neither the constitutionality nor the structure of the Minnesota Sentencing Guidelines. However, the decision does affect certain sentencing procedures pertaining to aggravated departures and specific sentence enhancements that will need to be modified to meet the constitutionality issues identified under *Blakely*. Those procedures can be corrected, as demonstrated by the state of Kansas, who addressed this very issue in 2001, with limited impact on the criminal justice system as a whole. The impact of *Blakely* on sentencing in Minnesota, while temporarily disruptive, is limited in scope and can be addressed within the current sentencing guidelines scheme.

This report outlines the sentencing procedures within the sentencing guidelines that are impacted by the *Blakely* decision; sentencing procedures that are not impacted; and several specific aspects of sentencing where the impact remains unclear at this time and may require action by the courts before a final resolution is reached. The report also set forth specific issues that will need to be addressed to ensure that aggravated departures sentences can continue to be imposed, whether through a jury trial or a plea process.

The *Blakely* ruling will result in some change in the way specific types of criminal sentencing is done. Change is not always welcomed but sometimes necessary. The sentencing guidelines has served as the sentencing model in Minnesota for over twenty years, focusing on uniformity, proportionality and certainty in sentencing, while ensuring fair and equitable sentences for all offenders regardless of gender, race or geographic location. Public safety still remains the primary goal of the guidelines and will not be compromised by the *Blakely* decision.

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

## **I. Recent Supreme Court Decisions Impacting Sentencing**

### ***Apprendi v. New Jersey***

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant pled guilty to second degree possession of a firearm for an unlawful purpose, which carried a prison sentence of between five and ten years. The state then requested that the court make the factual findings necessary under the New Jersey hate crime law to impose an enhanced prison sentence of 10 to 20 years. The judge held the requested hearing, listened to the evidence presented and determined by a preponderance of the evidence that the hate crime enhancement was applicable because the crime was committed with the purpose to intimidate because of race, color, gender, handicap, religion, sexual orientation or ethnicity, and subsequently sentenced the defendant to prison for twelve years. The judge's finding resulted in a sentence that exceeded the statutory maximum sentence for the offense to which the defendant pled guilty. On appeal, the New Jersey Supreme Court upheld the defendant's sentence.

The United States Supreme Court reversed that decision, in a 5 to 4 ruling stating, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466. Because the hate crime law resulted in a sentence greater than the maximum sentence for the underlying offense, the court ruled the defendant had the right to have a jury determine, beyond a reasonable doubt, that the crime was committed to intimidate based on racial bias.

### ***Blakely v. Washington***

In the case of *Blakely v. Washington*, 542 U.S. \_\_\_ (June 24, 2004), the defendant pled guilty in a Washington state court to kidnapping, a Class B felony punishable by a prison sentence of up to ten years. Provisions of the Washington Sentencing Guidelines prescribe a "standard range" of sentences for this offense of 49 to 53 months, well below the statutory maximum sentence of ten years (120 months). The judge conducted a departure hearing, listened to evidence presented and determined that the "defendant acted with deliberate cruelty." Based on this aggravating factor, the judge imposed a sentence of 90 months, exceeding the guidelines "standard range" but 30 months below the statutory maximum for that offense. The appellate court in Washington upheld the defendant's sentence.

The United States Supreme Court reversed the Washington court's ruling in a 5-4 decision, applying its prior ruling in *Apprendi v. New Jersey* by stating, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proven beyond a reasonable doubt." Slip opinion at 5.

The Court further stated 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's verdict or admitted to by the defendant. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts that the law makes essential to the punishment. Slip opinion at 7.

The Supreme Court ruled that the sentencing judge in this case could not have imposed the 90-month sentence based only on the facts the defendant admitted in the guilty plea. The judge's authority to impose the 90-month sentence came from the determination that an aggravating factor was present and an upward departure from the standard sentencing range was warranted. Since the aggravating factor was not admitted to by the defendant nor submitted to a jury and proven beyond a reasonable doubt, the sentence imposed was unconstitutional and thus invalid.

Both Supreme Court decisions focus on the Sixth Amendment right of a defendant to a jury trial when the sentence imposed exceeds the statutory maximum sentence. The Court interprets *Apprendi* very broadly in the *Blakely* decision by ruling that the statutory maximum sentence is not the maximum sentence a judge may impose after finding additional factors, but rather the maximum sentence a judge may impose without any additional findings. The majority argues that the ruling is important to delineate the scope of the Sixth Amendment right to a jury trial and protect it against legislative and judicial encroachment.

## **II. Comparison of Federal Sentencing Guidelines and Minnesota Sentencing Guidelines**

Much of the coverage of the impact of the recent *Blakely v. Washington* decision on sentencing has been focused on the U.S. Sentencing Guidelines. The numerous federal court decisions that often appear to be in conflict with each other only further demonstrate the uncertainty and chaos that *Blakely* has created in the federal courts. The Department of Justice has taken the official position that the *Blakely* decision does not have an impact on the federal sentencing guidelines. However, various Federal Circuit Courts have viewed the impact quite differently, with a range of responses, from ruling the federal guidelines unconstitutional to imposing dual sentences or drastically reduced sentences to ensure compliance with the issues raised in *Blakely*. In an attempt to gain clarity as to the Court's intent, the Department of Justice asked the U.S. Supreme Court to hear expedited appeals from two *Blakely* related cases. On August 2, 2004, the Court agreed to hear *United States v. Booker* and *United States v. Fanfan* on the first day of the new court term in October. The Supreme Court's willingness to hear the *Blakely* related appeals so quickly is an indication the Court is aware of the level of confusion and uncertainty stemming from its earlier ruling.

State sentencing systems are also being forced to deal with the constitutional issues raised in *Blakely*, but the impact at the state level appears to be more contained in nature and limited to specific aspects of the guidelines, rather than entire guideline structures. State systems are examining their current sentencing practices and trying to identify the

specific areas or statutes that need to be modified to address the constitutional issues raised in *Blakely*. The more reserved response of the states is due to several factors that set the state sentencing guideline systems apart from the federal guideline system.

State sentencing structures exist in numerous forms, including both determinate and indeterminate sentences, as well as guidelines being statutory, presumptive, advisory or voluntary in nature. States with indeterminate sentencing appear to be exempt from the impact of *Blakely* since there is only a minimum and maximum range imposed and not a standard range of sentence to be considered. Pure advisory or voluntary sentencing guidelines also appear to be exempt because the recommended sentence is simply a reference for the court to consider, and the court is not required to make any findings to depart from the recommendation.

For presumptive sentencing guidelines states, such as Washington, Minnesota, North Carolina and Kansas, there is somewhat of a more direct impact on specific sentencing procedures since the judge is required to sentence within the prescribed guideline range or note on the record reasons for imposing sentences outside of the prescribed range. When a sentence is imposed outside of the prescribed range (commonly referred to as a departure), there must be aggravating or mitigating factors found by the court. Thus, if aggravating factors are determined to be present, the sentence can be increased above the standard or prescribed sentencing range. It is this aspect of sentencing guideline systems that is subject to the *Blakely* ruling.

Even though the federal guidelines and presumptive guideline states, including Minnesota, are both directly impacted by *Blakely*, the impact is very different in scope due to the differences in the structure of the two guideline systems. Both systems allow for the finding of aggravating factors in determining departures or enhanced sentences from the standard sentence range. What differs, however, is that enhancement factors are built into the structure of the federal guidelines through a complicated point system that results in the assignment of a point value for the finding of aggravating factors (relative criminal history does not reflect the seriousness, the on-going nature of the criminal activity, physical injury occurred, or extreme psychological injury, etc). The point value for the aggravating factor(s) is added to the points assigned for the offense itself and the defendant's total points determine the level from which the sentence is pronounced. The manner in which the enhanced sentence is determined is built into the very structure of the federal sentencing guidelines and the judge is required to impose a sentence from a range within a specific level that is determined by the total number of points assigned.

Aggravated departures resulting in enhanced sentences under the Minnesota Sentencing Guidelines are outside the structure of the guidelines. Unlike the federal guidelines, there are no points assigned for aggravating factors, nor are judges mandated by the guidelines to impose an aggravated departure or enhanced sentence. The sentencing guidelines determine presumptive sentences for offenses on the sentencing grid. Departures are viewed as sentences outside or apart from presumptive sentences set forth on the sentencing grid and are available for judges to use when deciding a case that is atypical or

when the factors surrounding a specific case sets it apart from the norm. A departure/enhanced sentence is not controlled by the guidelines regarding the length of the enhancement other than not exceeding the statutory maximum for a specific offense.

Thus, when comparing the U.S. Sentencing Guidelines with the Minnesota Sentencing Guidelines, it is the manner in which the guidelines are constructed that limits the impact of the *Blakely v. Washington* decision on the Minnesota guidelines system. The recent decision does impact the manner in which aggravated departures are imposed but does not impact the sentencing grid or the guideline system as a whole.

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

Minnesota Sentencing Guidelines utilizes a determinate sentencing model that, in the *Blakely* decision, is noted as being a constitutional sentencing scheme. Since the structure of the state's sentencing guidelines sets apart presumptive sentences identified on the sentencing grid from aggravated departures resulting in enhanced sentences above the presumptive sentences, the structure of the sentencing guidelines also remains constitutional.

An aggravated departure resulting in an enhanced sentence length above the presumptive sentencing range on the sentencing grid is not deemed unconstitutional in itself by the *Blakely v. Washington* decision. The issue raised by the Court was the defendant's Sixth Amendment right to have the aggravating factor(s) that may result in a departure determined beyond a reasonable doubt by a jury. Thus, it is the procedure that the Court calls into question and not the enhanced sentence itself.

Under Sentencing Guidelines, the current procedure for imposing aggravated departures and certain statutory sentencing enhancements that require a finding of additional factors appear to be unconstitutional under *Blakely* because the court and not the jury make the findings. The state will need to modify those procedures to comply with the criteria set forth in the Supreme Court's recent decision. Those modifications can be achieved in several ways that will enable aggravated departures to continue, while simultaneously ensuring a defendant's constitutional rights.

The Sentencing Guidelines Commission strongly believes that preserving aggravated departures is necessary to ensure public safety and provide for appropriate sentencing when aggravating factors related to an offense are present and an enhanced sentence is in the interest of justice. As stated previously, aggravated departures are outside the structure of the sentencing guideline grid and can be modified, as demonstrated by Kansas, without the need to reconstruct the entire current guideline system.

### *IV. The Nature and Extent of Aggravated Departures in Minnesota*

In Minnesota, aggravated departures accounted for approximately 7.7% (1,002) of a total of 12,978 felony sentences in 2002. Aggravated departures can occur in two ways under sentencing guidelines. The first type of aggravated departure is an aggravated

dispositional departure in which the defendant should have received a presumptive stayed sentence under the guidelines but the court instead imposes a prison sentence. The second type of aggravated departure is an aggravated durational departure that occurs when the offender receives a sentence length that is longer than the sentence recommended by the sentencing grid, regardless of whether the sentence is a presumptive stay or a presumptive prison sentence. Listed below is the distribution of aggravated departures for 2002.

**Total Aggravated Departures For 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%
<b>Total</b>	<b>1,002</b>	<b>7.7% (of 12,978)</b>

From the data available, approximately 1,000 cases per year involve aggravated departures and would be subject to the constitutional issues raised in Blakely. When this data is further examined by method of conviction, approximately 92% (923) of the cases involved a guilty plea and only 8 % (79) of the cases involved a trial. The data would indicate that a very small number of cases resulting in aggravated departures actually involve a criminal trial. Presented below is a summary of aggravated departures by conviction type.

**Type of Aggravated Departure by Method of Conviction for 2002**

Type of Departure	Trial	Guilty Plea	Total
All Aggravated Dispositions	20 (4%)	511 (96%)	531
Aggravated Duration - Prison	46 (21%)	178 (79%)	224
Aggravated Duration - Probation	13 (5%)	234 (95%)	247
<b>Total</b>	<b>79 (8%)</b>	<b>923 (92%)</b>	<b>1,002</b>

It would be reasonable to assume that there will be a slight increase in the number of trials in the future since a certain percentage of offenders who currently plead guilty may request a jury trial in the future to have the aggravating factors determined by a jury. There would be corresponding costs to the courts for these additional trials. However, it should be noted that 67% of the offenders who pled guilty in 2002, either agreed to the departure in the guilty plea or the defendant requested the aggravated dispositional departure.

What the data demonstrates is that aggravated departures represent a very small percentage of the total number of felony sentences imposed each year in Minnesota. When the percentage of aggravated departures are further subdivided by type of

conviction, a very small number of cases actually involve a criminal trial. The state of Kansas implemented the bifurcated jury trial system in 2001 in response to the *Apprendi* ruling and to date has not experienced a significant growth in the number of trials related to aggravated departures. Although there may be a slight increase in the number of jury trials involving aggravated departures, there is no basis to believe at this time that the number of jury trials would reach the hundreds or thousands as some have predicted.

## **V. Sentencing Guidelines Provisions Impacted by *Blakely v. Washington***

### **Aggravated Durational and Dispositional Departures**

The *Blakely* ruling directly affects aggravated departures because under the current sentencing structure the facts supporting the aggravating factors are not reflected on the jury verdict form or in a defendant's guilty plea to an offense. The prosecution will most often notify the court of its intent to seek an aggravated departure, but it is the judge, not the jury, that determines whether the aggravating factors exist to impose the aggravated departure. In addition, the judge presently may use the "preponderance of the evidence" standard and not the "beyond a reasonable doubt" standard set forth in *Blakely*.

There are four potential situations that could result when pursuing aggravated departures:

- (1) the defendant pleads not guilty to the offense and does not admit to any of the aggravating factors;
- (2) the defendant pleads not guilty to the offense but admits to the aggravating factors;
- (3) the defendant pleads guilty to the offense but does not admit the aggravating factors; and
- (4) multiple offenses involve any combination of the above.

The issue of whether a defendant can waive a jury trial on guilt or innocence but request a jury to determine the presence of aggravating factors is an issue that will have to be addressed. The Kansas statute relevant to bifurcated trials states that if a defendant waives the right to a jury trial he also waives the right to have a jury determine the presence of aggravating factors. This is an issue that will need further legislative or judicial consideration to ensure that any procedures enacted comply with all constitutional issues at both the federal and state levels.

At the current time the commission believes that the *Blakely* ruling will be applicable to both aggravated durational and dispositional departures. However, there is case law in a Kansas case *State v. Carr* that ruled that the *Apprendi* principle only applied to aggravated durational departures and not aggravated dispositional departures. Although there has been speculation as to whether the Kansas Court's argument will be adopted by other states in the wake of *Blakely*, it is widely believed that *Blakely* will be applied to both aggravated durational and dispositional departures. Minnesota Courts will have the final say regarding the interpretation.

The Court in *Blakely* discussed whether a defendant could waive the right to a jury trial when it related to sentencing enhancements. The court stated, “When a defendant pleads guilty, the state is free to seek judicial enhancements so long as the defendant either stipulates to the relevant factors or consents to judicial fact finding.” If appropriate waivers are procured, states may continue to offer judicial fact finding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial fact finding as to sentence enhancements, which will be in his interest if relevant evidence would prejudice him at trial (citations omitted) Slip opinion at 14.

Although the plea bargaining process is permitted when aggravated departures are involved, the defendant must stipulate to the aggravating factors or consent to judicial fact finding. Neither of these options is currently being required in pleas involving aggravated departures, thus, our current plea process would need to be modified to bring the state into compliance with the *Blakely v. Washington* ruling.

***Recommendations:***

- (1) Notice Procedures should be modified when there is an intent to seek an aggravated departure
- (2) Rule 15 Petition should be modified to include language to allow for the waiver of jury trial to determine aggravating factors
- (3) Procedures will need to be developed to permit juries to determine aggravating factors
  - a. Develop bifurcated trial policies and procedures
  - b. Consider Minn. R. Crim. P. 20.02 Subd. 6(2) relating to mental illness as a model
  - c. Consider K.S.A. 21-4718 on departure procedures and procedures for jury requirements as a model
  - d. Develop special jury verdict forms to be used in bifurcated jury trial situations – See Kansas Chapter 71.00
  - e. Incorporate Special Interrogatories on the jury verdict form

**Aggravated Departures Resulting from Specific Statutory Enhancements**

In Minnesota, there are several specific statutory enhancements for certain offenses that result in an aggravated departure or an enhanced sentence above the presumptive sentence for the offense due to the determination of one or more aggravating factors, other than prior convictions. Currently, the court makes the determination of additional factors that increase the length of sentence for a conviction under these statutes. They include sentencing enhancements for heinous crimes; certain pattern and predatory sex offenders; mandatory sentences for repeat sex offenders; dangerous offenders; career offenders; and depriving of custodial or parental rights. A complete list of these statutes is listed in Appendix A.

A very small number of offenders are sentenced under these statutes per year. The number averages 50 to 60 offenders per year, with only a total of 420 offenders sentenced since 1991

***Recommendations:***

- (1) Due to the public safety issues and seriousness of the offenses in this category, bifurcated trials should be used when sentencing under these specific statutes.

**M.S. § 609.11 Dangerous Weapons**

In addition to the specific statutory enhancements listed above, the Commission has determined that the imposition of this specific mandatory minimum sentences under M.S. § 609.11 Subd. 4 and 609.11 Subd. 5 (offenses committed with a dangerous weapon or a firearm) also require an additional finding that is currently being determined by the court and would be subject to the Blakely ruling.

***Recommendations:***

- (1) Either bifurcated trials or stipulated pleas should be used when sentencing under this specific statute.

**Consecutive Sentencing Provisions**

Concerns have been raised as to whether presumptive or permissive consecutive sentencing policies are impacted by the Blakely ruling. This issue has yet to come before the Minnesota courts, but in the commission's initial analysis of the consecutive sentencing provisions under the sentencing guidelines, it does not appear to be directly impacted by the *Blakely* decision since the court is not required to find any additional factors other than the offender had been convicted of a prior "person offense."

However, in reviewing current statutory definitions, a definition of a "person offense" could not be located. Under current procedures, the judge makes a finding of whether the defendant's prior convictions qualified as a "person offense." This specific issue has the potential to make the consecutive sentencing statutes subject to *Blakely*.

***Recommendation:***

- (1) The Sentencing Guidelines Commission should review all felony offenses and designate each offense as either a person or non-person offense to be used in consecutive sentencing procedures.

**VI. Sentencing Guidelines Provisions Not Impacted by *Blakely v. Washington***

**Mitigated Departures**

Mitigated departures mirror aggravated departures in every aspect except rather than enhancing a defendant's sentence they reduce the duration of the sentence or provide for a stayed sentence when the guidelines recommend a presumptive commit to prison.

*Blakely* only addresses sentencing enhancements, which would increase or lengthen a defendant's sentence, thus mitigated departures are not covered in the *Blakely* ruling.

### **Mandatory Minimum Sentences**

Mandatory minimum sentences represent baseline sentences that are dependent on specific facts and *Blakely* very clearly distinguishes such cases in its decision. The Supreme Court decision *Harris v. U.S.*, 536 U.S. 545(2002), upheld the use of mandatory minimum enhancements based on judicial fact finding at sentencing against the claim that *Apprendi* renders such arrangements unconstitutional. The Court has also upheld mandatory sentences in two prior California "three-strikes" cases. Mandatory sentences imposed at trial or sentences that do not require any additional fact finding are viewed as constitutional and not subject to *Blakely*.

### **Truth-in-Sentencing**

It does not appear that the truth-in-sentencing (two-thirds of the sentence in prison and one-third of the sentence on supervised release) aspect of the sentencing guidelines will be affected by *Blakely*. The two-thirds portion of the defendant's sentence that is served in prison does not require finding of any additional facts but rather just reflects a real time period of incarceration

### **Periods of Supervised and Conditional Release**

Under the Minnesota Sentencing Guidelines the period of supervised release is part of the pronounced sentence for a conviction of a specific felony offense. It is not enhanced by any special findings of the court. Periods of conditional release can be increased if the offender has a conviction for a specific offense, such as a prior sex offense. Thus, the enhancement is the result of a prior conviction and not a finding of fact or an aggravated factor. In addition, revocations of supervised release and conditional release are not subject to *Blakely* issues since revocation decisions and procedures are governed by the Department of Corrections and not the courts since they are administrative in nature and do not increase the length of a defendant's sentence.

## **VII. Sentencing Guidelines Provisions Where Uncertainty Exists as to the Impact of *Blakely v. Washington***

### **Custody Status Point in the Calculation of Criminal History**

The *Blakely* decision does not apply to sentencing enhancements that are the result of prior convictions (the Court's opinion quoted from the *Apprendi* ruling, "other than the fact of a prior conviction..." Slip opinion at 5). Under the Minnesota Sentencing Guidelines, a defendant is assigned one criminal history point if the current offense was committed while the defendant was on probation, parole or post-release supervision, supervised release, released pending sentencing or while the defendant was on escape status from a correctional institution while serving a sentence of imprisonment. Because

this factual information is neither a prior conviction, nor reflected in a jury's verdict or stipulated to in a defendant's guilty plea, it is possible that *Blakely* applies to the findings necessary to apply the custody status point.

Since the assignment of a custody status point could result in a higher prior criminal history than may have been determined otherwise, it is possible that the state must satisfy *Blakely* even if the judge imposes a sentence within the presumptive sentence range because the custody status point that reflects facts not found by a jury could place the defendant in a higher sentencing range than would be authorized by a jury.

There is ambiguity at the current time whether *Blakely* would in fact apply to the assignment of custody status points and it may be necessary to wait until the courts provide clarification on this specific issue.

### **Probation Revocations**

Probation revocations may be subject to *Blakely* provisions under certain circumstances. The issue raised is whether the factors that are considered by the court in the revocation of a defendant's probation are considered elements of the offense and are required to be proven before a sentence of imprisonment can be imposed for an offense, which is considered a presumptive non-prison sentence. Whether the fact-finding process in probation revocations is similar enough to a presumptive sentence to fall under the purview of *Blakely* is unclear at this time and subject to varying interpretations. It may be necessary to wait until the Minnesota courts address this issue before clarification is available.

## **VIII. Specific Sentencing Issues Raised by *Blakely v. Washington***

### **Retroactivity**

The *Blakely* ruling will apply to all cases in which there has not been a final conviction as of June 24, 2004, the date when *Blakely* was decided. A conviction becomes final when the availability of direct appeals to state courts has been exhausted and the time period for filing a petition for a writ of certiorari to the United States Supreme Court has expired or a timely petition was filed and has been denied. Thus, any cases on direct appeal would be subject to *Blakely* and may be remanded for re-sentencing, as numerous federal cases have.

The majority in *Blakely* did not indicate when its rule would be effective. Justice O'Connor's dissent stated that "despite the fact we hold in *Schriro 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. \_\_\_.)

In *O'Meara v. State*, 679 N.W. 2d 334 (Minn, 2004), the Minnesota Supreme Court addressed the issue of *Apprendi v. New Jersey*. Because *Apprendi* announced a new rule of federal constitutional procedure, the Minnesota Supreme Court applied federal precedent. Under that precedent, when a “new rule<sup>1</sup>” for criminal prosecution is announced, it is to be applied retroactively to all cases pending on direct review and all cases not final.

If *Blakely* announced a “new rule,” then the *O'Meara* retroactivity rule means *Blakely* applies to currently pending direct appeals and current cases that are not final. However, if *Blakely* was dictated by the *Apprendi* precedent, or broke no new ground or imposed no new obligation on Minnesota, then *Blakely* would extend back to the date *Apprendi* was decided. Based on *O'Meara*, the issue could be raised through a post-conviction proceeding and appeal.

The argument can be made that *Blakely* does create a “new rule” in that it provides a new definition of the maximum statutory sentence by equating it to the presumptive sentence. In addition, the decision creates a new obligation for the state of Minnesota by requiring bifurcated jury trials for aggravated departures and statutory sentencing enhancements. It is reasonable to conclude that *Blakely* is a “new rule” and *O'Meara* would control retroactivity. Future court action will be required to clarify the retroactivity issue under *Blakely*.

### **Post-Conviction Relief Motions**

Concern has been raised over an anticipated increase in the number of post-conviction relief motions that will be filed as the result of *Blakely*. There will be a certain number of post-conviction relief motions that will be filed as the direct result of this recent court decision. They will primarily be limited to pre-*O'Meara* and pre-*Blakely* cases or to cases where the direct appeal time has expired.

The validity of these motions will, in part, be dependent on how the retroactivity issue related to *Blakely* is ultimately decided. The retroactivity decision will also impact the number of potential hearings that may be required. For cases in which the motions are unwarranted, the court can summarily dismiss the motion without holding an evidentiary hearing. There is the potential for some impact on the courts from these motions but the extent of that impact cannot to be determined at this time. In addition, public defenders appoint counsel in a limited number of post-conviction relief motion cases and also face the potential for an increase in demand for services.

### **Sensitivity to Victims**

With the likelihood that bifurcated jury trials will be required in some cases to comply with *Blakely* issues regarding aggravated departures and sentencing enhancements, the

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<sup>1</sup> A “new rule” is one not dictated by precedent existing when the conviction became final or breaks new ground or that imposes a new obligation on the states or federal government.

commission strongly recommends that every attempt should be made to accommodate the concerns and interests of crime victims regarding both opportunities and requirements to appear personally or testify on sentencing issues.

### **Interim Policy and Procedures**

It has been approximately six weeks since the U.S. Supreme Court handed down the *Blakely v. Washington* decision. It is a very complex decision and analysis is still unfolding as to what it really means and how it will affect sentencing in Minnesota and throughout the United States. Legal experts, academics, criminologists, judges and countless other criminal justice professionals are grappling with the impact of this one court decision that has left numerous areas of sentencing in a state of uncertainty.

The commission recommends that the state move cautiously and thoughtfully as it explores potential changes to the current sentencing system. It may be counter productive to begin developing solutions before the nature of the problem is fully understood. Before embarking on a series of statutory responses to the *Blakely* decision, it may be more prudent for the judiciary, prosecutors and defense attorneys to develop temporary interim policies and procedures that are advisory in nature for conducting bifurcated jury trials, plea negotiations, and sentencing procedures that impact the areas of sentencing that have previously been identified as most likely be affected by this decision. The U.S. Supreme Court has already agreed to hear two *Blakely* related appeals the first week in October. The Court's ruling in those two cases may provide some clarity on the numerous issues surrounding the *Blakely* ruling. In addition, several *Blakely* related cases are currently before the Minnesota Court of Appeals.

Although advisory policies and procedures will carry no legal force, they will provide for some consistency in sentencing throughout the state as the legal issues work their way through the courts at both the state and federal levels. In addition, they will help to limit the number of future of appeals that could result from every judicial district interpreting and responding to *Blakely* in a different manner. During this transition period following the *Blakely* decision, flexibility combined with rational and thoughtful responses will be crucial to minimizing the confusion surrounding this ruling and maximizing the effectiveness of the criminal justice system.

### **IX. Future Actions of Sentencing Guidelines Commission**

This report presents an overview of the initial impact of the *Blakely v. Washington* on sentencing in Minnesota. Also identified in the report are specific guideline provisions that are impacted by the decision and sentencing procedures that will need to be modified, including some specific actions that should be taken at this time. In addition, the report outlines several areas of sentencing where there is a lack of clarity as to the potential impact of *Blakely* that will have to be further researched and studied.

The Sentencing Guidelines in Minnesota are constitutional, and aggravated departures and statutory sentencing enhancements will continue to occur with procedural

modifications that address the constitutional issues identified in *Blakely*. The recent Supreme Court decision does impact our sentencing guidelines, but in a limited manner. There will be a period of transition that may result in a certain level of confusion and frustration, but trials will continue and sentencing will occur and protecting public safety will remain a priority in the state. Although presently there may be a certain level of apprehension, sentencing in Minnesota is not in a state of chaos.

The Minnesota Sentencing Guidelines Commission will submit its long-term recommendations in response to the *Blakely* decision on September 30, 2004. Those recommendations will identify any statutory changes that may be required, suggest specific policy changes that may be necessary, propose changes to the guidelines or sentencing grid that are warranted and outline any procedural issues that may result from pending court decisions.

## Attachment A

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

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**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>

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

**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>

**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