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Richard Frase

University of Minnesota Law School, frase001@umn.edu

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***Blakely* in Minnesota, Two Years Out: Guidelines Sentencing Is Alive And Well**

Richard S. Frase*

I. INTRODUCTION

The Supreme Court's decision in *Blakely v. Washington*¹ has produced some changes in sentencing law and practice in Minnesota, but after two years the basic structure of the state's pioneering sentencing guidelines system remains intact. *Blakely* caused much initial concern and uncertainty, but the dire predictions² of catastrophic change or major retreat from progressive sentencing policy have not been borne out. This article examines the ways in which critical policy choices made before and after *Blakely* helped to preserve the most important features of the Guidelines. Part I shows how the design, implementation, and pre-*Blakely* evolution of the Guidelines served to limit *Blakely*'s impact. Parts II and III then tell the story of successive responses to *Blakely* by the Sentencing Guidelines Commission, appellate courts, the Legislature, and the Criminal Rules advisory committee.

II. PRE-BLAKELY EVENTS, CUSHIONING BLAKELY'S IMPACT

A. *The Design of the Guidelines*

In drafting the initial version of the Guidelines which became effective on May 1, 1980, the Minnesota Sentencing Guidelines Commission made several critical policy decisions which, a quarter century later, served to limit the number of sentencing decisions subject to *Blakely* attack.³

The Commission's proposed guidelines were prescriptive, not descriptive; the Commission viewed guidelines drafting as an opportunity to develop and improve sentencing policy rather than an occasion to codify past sentencing practices. One of

* Benjamin N. Berger Professor of Criminal Law, University of Minnesota.

¹ 542 U.S. 296 (2004).

² Justice O'Connor opined that "over 20 years of sentencing reform are all but lost" *Blakely*, 542 U.S. at 326 (O'Connor, J., dissenting). Although I no longer take such a pessimistic view, I expressed similar concerns shortly after *Blakely* was handed down, fearing that *Blakely* could have the perverse effect of encouraging good state systems to go bad and bad systems to stay bad. See Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross Purposes*, 105 COLUM. L. REV. 1082, 1101 (2005).

³ For further discussion of the Commission's critical early policy decisions and other significant pre-*Blakely* events, see Dale G. Parent & Richard S. Frase, *Why Minnesota Will Weather Blakely's Blast*, 18 FED. SENT'G REP. 12 (2005). See generally DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988).

the Commission's most important policy decisions was to reject "real-offense" sentencing and develop guidelines with recommended sentences based almost entirely on factors which were already elements of the defendant's conviction offense(s) and prior conviction(s). The nature of Minnesota's criminal statutes at the time facilitated this decision. The criminal code had been recodified in the early 1960s, and was still relatively coherent and accepted by practitioners at the time the Commission began its work in 1978. Thus, unlike the federal criminal code (which has been in serious need of recodification for decades⁴) the Minnesota code provided a satisfactory basis for classification and ranking of offenses under the Guidelines. The Commission needed only to fine-tune certain statutory offense definitions, for instance, by dividing some forgery and theft-related crimes into several sub-groups, based on dollar amounts involved, using the dollar-loss modifiers found in the general theft statute.⁵

Another early policy choice which later served to lessen *Blakely's* impact in Minnesota was the Commission's decision to discourage high departure rates. The Commission believed that departure rates needed to be low not only to reduce sentencing disparity but also to achieve the Commission's goal of avoiding prison overcrowding. The Commission sought to coordinate sentencing policy with available correctional resources, but this requires accurate predictions of future resource impacts which are difficult to make if departure rates are high. Accordingly, the Commission set a high threshold for departures, stating that the recommended Guideline sentence is presumed to be appropriate for all cases in that category, and that judges must cite "substantial and compelling" circumstances to overcome the presumption and impose a departure. The Commission's illustrative list of departure criteria were intended to describe exceptional, infrequently-occurring circumstances; the list also reflected the Commission's policy decisions to base sentencing on conviction offenses, not alleged or "real" facts, and to prohibit departures for facts not consistent with the conviction offense(s).

B. *Interpretive Case Law*

Early case law strongly supported the Commission's key policy choices described above and further limited *Blakely's* impact. The Supreme Court ruled that upward departures could not be based on contested offenses for which the defendant had not been charged or for which charges had been dropped,⁶ nor on predictions of

⁴ See Richard S. Frase, *The Warren Court's Missed Opportunities in Substantive Criminal Law*, 3 OHIO ST. J. CRIM. L. 75, 98 (2005) (by 1970 federal criminal law was described as a "hodge-podge" and "chaos").

⁵ MINN. STAT. § 609.52, subdiv. 3 (1980); Parent & Frase, *supra* note 3, at 13.

⁶ See, e.g., *State v. Peterson*, 329 N.W.2d 58, 60 (Minn. 1983); *State v. Brusven*, 327 N.W.2d 591, 593 (Minn. 1982). The Court ruled that judges could not depart on the basis of alleged crimes to which the defendant maintained his or her innocence. *State v. Womack*, 319 N.W.2d 17, 19–20 (Minn. 1982), but could depart on the basis of uncharged offenses if the defendant admitted them on the record. *State v. Rott*, 313 N.W.2d 574, 575 (Minn. 1981); *State v. Garcia*, 302 N.W.2d 643 (Minn. 1981).

future dangerousness, a special need for deterrence, or the defendant's need for treatment available only in prison.⁷ On the other hand, in reviewing trial court decisions refusing to depart, the Court's standard of review was highly deferential,⁸ emphasizing the strong presumption in favor of imposing the recommended Guidelines sentence and suggesting that, even where departure would be authorized, trial judges have discretion not to depart.⁹

In one very important line of cases the Supreme Court recognized several new bases for departure which had not been approved and may actually have been opposed by the Commission; however, the *Blakely* impact of these cases was quite limited. Under the Guidelines courts may depart as to the duration of the recommended prison sentence and/or as to "disposition"—whether the prison term will be stayed or executed. A downward or mitigated dispositional departure occurs when an offender with a presumptive executed-prison sentence is given a stayed prison term and placed on probation; an upward or aggravated dispositional departure occurs when an offender with a presumptive stayed-prison sentence is given an executed prison term.

The Commission's initial list of permissible departure grounds, as well as its adoption of a "modified just deserts" model giving increased emphasis to retributive punishment goals, implied that all departures should be based on a finding of increased or decreased offender desert, but the Supreme Court soon recognized non-desert grounds for dispositional (but not durational) departures.¹⁰ Offenders who are particularly amenable to probation and/or unamenable to prison may receive downward dispositional departures; offenders who are particularly unamenable to probation (e.g., because they have failed on probation in the past) can receive an upward dispositional departure. In practice downward amenability departures are quite common but upward, unamenable-to-probation departures (the ones now subject to *Blakely* requirements) are rare, and are often agreed to by the defendant in return for charging leniency and/or concurrent rather than consecutive sentencing.¹¹

⁷ See, e.g., *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981) (dangerousness); *State v. Schmit*, 329 N.W.2d 56, 58 n.1 (Minn. 1983) (deterrence); *State v. Barnes*, 313 N.W.2d 1, 2 (Minn. 1981) (need for in-prison treatment).

⁸ *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) ("[Although] we do not intend to entirely close the door . . . it would be a rare case which would warrant reversal of the refusal to depart.").

⁹ This discretion was later made explicit by language added to the Guidelines, in the Commission's initial response to *Blakely*. See *infra* text accompanying note 24.

¹⁰ For discussions of this line of cases, see Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, in 32 CRIME & JUST.: A REVIEW OF RESEARCH 131, 155 (Michael Tonry ed., 2005) [hereinafter Frase, *Sentencing Guidelines*]; Richard S. Frase, *Sentencing Principles in Theory and Practice*, in 22 CRIME & JUST.: A REVIEW OF RESEARCH 363, 399–403 (1997) [hereinafter Frase, *Sentencing Principles*].

¹¹ See Frase, *Sentencing Guidelines*, *supra* note 10, at 173, 179, 184–85; Frase, *Sentencing Principles*, *supra* note 10, at 402 n.21, 416. Similarly, in plea negotiations defendants sometimes agree to an upward durational departure in order to limit the extent of the departure, or in exchange for a downward dispositional departure and/or dismissal of other charges. See also *infra* text accompanying note 17 (discussing Guidelines Commission data showing the infrequency of contested upward departures that would raise *Blakely* issues).

C. Post-Implementation Statutory and Guidelines Modifications

Political and sentencing policy developments in Minnesota in recent years, driven by nearly continuous political and media attention to issues of crime and sentencing,¹² have both increased and decreased the number of cases raising potential *Apprendi-Blakely* issues. Statutory drug penalties and recommended Guidelines sentence durations began to rise in the mid-1980s, and from the late 1980s through 2002 penalties for violent and repeat offending were substantially increased. Statutory and Guidelines penalties for rape were raised again in 2005 and 2006.¹³ Many of the statutory penalty enhancements are subject to *Apprendi-Blakely* requirements. But other statutory enhancements, as well as most of the increases in the severity of presumptive guidelines dispositions and durations, have been applied to groups of offenders defined by conviction offense and prior record. Such enhancements raise no *Apprendi-Blakely* issues, and increases in recommended Guidelines severity provide a higher “starting point” which tends to reduce the need for and frequency of upward durational departures.

III. INITIAL RESPONSES TO *BLAKELY*

A. The Guidelines Commission’s Reports and Recommendations

Shortly after the *Blakely* decision was handed down Minnesota Governor Tim Pawlenty requested the Sentencing Guidelines Commission to study the impact of the case in Minnesota and submit short-term and long-term recommendations. The accomplishment of these tasks was greatly facilitated by the fact that the Commission Director at the time, Barbara Tombs, had previously held a similar position on the Kansas Sentencing Commission when that body addressed changes required by a Kansas decision which anticipated *Blakely* by over three years.¹⁴ The Commission’s August 6 and September 30, 2004 reports¹⁵ concluded that upward departures and

¹² See generally Frase, *Sentencing Guidelines*, *supra* note 10.

¹³ See 2006 Minn. Sess. Law. Serv. 551 (West) (enacting minimum extended terms for certain sex offenders); Omnibus Public Safety Bill of 2005, ch. 136, art. 2, §§ 20, 21, 2005 Minn. Sess. Law Serv. 658, 658–59 (West) (enacting extended terms and mandatory life and life without parole sentences for certain sex offenses); Minn. Sentencing Guidelines Comm’n, *Report to the Legislature* 3, 17–21 (Jan. 2006) [hereinafter *2006 Report to the Legislature*] (proposing, as directed by the 2005 legislation, a separate grid for sex crimes which is designed to raise penalties for offenders not subject to the enhanced statutory penalties summarized above).

¹⁴ *State v. Gould*, 23 P.3d 801 (Kan. 2001). The Kansas statutory changes made in response to *Gould* are posted at <http://www.ussc.gov/STATES/blakely/> (follow Kansas Statute Post hyperlink) [hereinafter Kansas statutory changes].

¹⁵ Minn. Sentencing Guidelines Comm’n, *The Impact of Blakely v. Washington on Sentencing in Minnesota: Long Term Recommendations* (Sept. 30, 2004) [hereinafter *Long Term Report*]; Minn. Sentencing Guidelines Comm’n, *The Impact of Blakely v. Washington on Sentencing in Minnesota:*

certain other decisions under the Minnesota Guidelines would be subject to *Blakely* requirements, but that *Blakely* would have a limited and easily-managed impact on the state's sentencing system. Although *Blakely* itself involved an upward departure from the recommended prison duration under the Washington guidelines, and Kansas courts had previously rejected the extension of *Apprendi* to upward departures as to disposition (prison, in lieu of the guidelines recommendation of probation), the Commission assumed (correctly, as it turned out) that Minnesota courts would find *Blakely* to be applicable to dispositional as well as durational departures.¹⁶ But the Commission reported that only 358 (2.4 percent) of the 14,492 cases sentenced in 2003 involved contested upward dispositional and/or durational departures.¹⁷

The Commission's proposed response to *Blakely* was a mixture of avoidance and compliance¹⁸—it recommended Guidelines changes to further limit the number of cases raising *Blakely* issues, and new procedures to comply with *Blakely* when necessary. The Commission also concluded that only upward departures would be affected, thereby assuming (again, correctly) that these decisions are “severable” from other aspects of Guidelines sentencing.¹⁹

The Commission's *Blakely*-avoidance strategies sought to insulate discretionary (“permissive”) consecutive sentencing from *Blakely* and to reduce the number of upward durational departures. The Commission provided a list of crimes eligible for permissive consecutive²⁰ sentencing, in lieu of the former rule requiring the court to find that the crimes were “person” offenses.²¹ As for departures, the Commission

Short Term Recommendations (Aug. 6, 2004) [hereinafter *Short Term Report*].

¹⁶ *Long Term Report*, *supra* note 15, at 11. See *infra* text accompanying notes 27, 44 and 82 (discussing cases addressing whether upward durational and upward dispositional departures are subject to *Blakely*).

¹⁷ *Long Term Report*, *supra* note 15, at 7–9. Of the 12,978 cases sentenced in 2002, 286 (2.2 percent) involved contested upward departures. *Id.* In 2002 and 2003 the total upward departure rates were 7.7% and 7.3% respectively. *2006 Report to the Legislature*, *supra* note 13, at 12. See also Minn. Sentencing Guidelines Comm'n, *Sentencing Practices Annual Summary of Statistics for Felony Offenders Sentenced in 2004* 29 (Oct. 2005) (7% of offenders sentenced in 2004 had upward dispositional and/or durational departures; plea agreements were involved in 35% of these cases); Minn. Sentencing Guidelines Comm'n, *Sentencing Practices Annual Summary of Statistics for Felony Offenders Sentenced in 2003* 29 (Dec. 2004) (total upward departure rate of 7%, of which 37% involved a plea agreement).

¹⁸ Cf. Reitz, *supra* note 2, at 1108–18 (discussing *Blakely* “approach” and “avoidance” strategies).

¹⁹ The Minnesota Supreme Court ruled in favor of severability in *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005). For further discussion of *Shattuck*, see *infra* text accompanying notes 27 and 44.

²⁰ Consecutive sentences are either discouraged, presumptive, or permissive. MINN. SENTENCING GUIDELINES § II.F. (2006). Most multiple-count offenders fall into the first category—concurrent sentencing is recommended and consecutive sentencing constitutes an upward departure (and thus is subject to *Blakely* requirements). Sentences for crimes committed while in prison, on release, or on escape status are presumptively consecutive to the existing sentence. Multiple crimes of violence and certain other multiple crimes are subject to permissive consecutive sentencing—they may be sentenced concurrently or consecutively, in the court's discretion.

²¹ *Long Term Report*, *supra* note 15, at 18. See also Minn. Sentencing Guidelines Comm'n, *Report to the Legislature* 6, 13–17 (2005) [hereinafter *2005 Report to the Legislature*]. But see *State v.*

proposed to substantially broaden the cell ranges on the Guidelines grid, taking full advantage of the enabling statute provision authorizing ranges as broad as 15 percent above and below the midpoint.²²

The Commission's compliance recommendations were based on procedures similar to those which had already been implemented in Kansas, to permit upward departure under that state's guidelines consistent with constitutional requirements; the Commission's proposed changes in pretrial and trial rules provided for jury trials of sentence-enhancing facts unless such facts were admitted by the defendant or the defendant requested the court to make the findings.²³ The Commission also added language to the Guidelines stating that sentencing outside of the guidelines range "is an exercise of judicial discretion constrained by case law and appellate review," and that if aggravated facts are proved beyond a reasonable doubt "the judge may exercise the discretion to depart."²⁴ This language confirms that even where a jury has found that aggravated circumstances are present the judge retains discretion not to depart, or to depart by less than the full extent allowed.

B. *Early Blakely Case Law*

Most courts and practitioners in Minnesota never seriously doubted that at least some sentencing decisions under the Minnesota Guidelines would be subject to *Blakely* requirements. This was the conclusion reached by the Commission in its August and September 2004 reports,²⁵ and in decisions of the state's intermediate court of appeals during the first six months following *Blakely*.²⁶

In December 2004 (one month before *Booker*), the Minnesota Supreme Court issued its initial opinion in *State v. Shattuck (Shattuck I)*,²⁷ holding that the upward durational departure in that case violated the defendant's rights under *Blakely*. The court requested supplemental briefing on the following issues: 1) severability of the

Sense, 692 N.W.2d 743, 746–49 (Minn. Ct. App. 2005) (declining to extend *Blakely* to permissive consecutive sentencing invoked by a judicial finding that both crimes were "crimes against persons").

²² 2005 Report to the Legislature, *supra* note 21, at 6, 17–18. The Legislature further broadened the cell ranges, see *infra* text accompanying note 36.

²³ Long Term Report, *supra* note 15, at 12–19; Kansas statutory changes, *supra* note 14. See also *infra* text accompanying notes 31–36 and 83–99, discussing procedures enacted by the Legislature and proposed by the Criminal Rules Advisory Committee.

²⁴ Report to the Legislature, *supra* note 21, at 11. But see *infra* text accompanying notes 45–46, discussing a rare example of a mandated upward departure.

²⁵ Short Term Report, *supra* note 15, at 1, 3–5; Long Term Report, *supra* note 15, at 3, 6–9.

²⁶ See, e.g., *State v. Saue*, 688 N.W.2d 337 (Minn. Ct. App. 2004); *State v. Fairbanks*, 688 N.W.2d 333 (Minn. Ct. App. 2004), *rev. denied*, 2005 Minn. LEXIS 777 (Minn. 2005); *State v. Hanf*, 687 N.W.2d 659 (Minn. Ct. App. 2004); *State v. Conger*, 687 N.W.2d 639 (Minn. Ct. App. 2004); *State v. Mitchell*, 687 N.W.2d 393 (Minn. Ct. App. 2004); *State v. Whitley*, 682 N.W.2d 691 (Minn. Ct. App. 2004).

²⁷ *State v. Shattuck (Shattuck I)*, 689 N.W.2d 785 (Minn. 2004), *modified on reh'g*, 704 N.W.2d 131 (Minn. 2005).

invalid upward departure procedures from the remainder of the Guidelines; 2) the inherent authority of the Court to authorize the use of sentencing juries and a bifurcated trial process; 3) double jeopardy problems with bifurcated trials; and 4) the specific remedy to be applied in Shattuck's case.²⁸

Of course, if the invalid portions of the Guidelines were not severable the entire Guidelines system would be invalid, and so would thousands of non-departure and downward-departure felony sentences pronounced after *Blakely* (and even before, given standard retroactivity rules).²⁹ Courts and practitioners before and after *Shattuck I* seemed to assume severability and, as noted previously, this was also the conclusion reached by the Guidelines Commission. Thus, when the Court finally issued its "full opinion" the following August (*Shattuck II*)³⁰ it was no surprise that the Court ruled in favor of severability. But the probable resolution of the other issues deferred in *Shattuck I* was less clear, particularly the inherent authority of appellate and trial courts to empanel sentencing juries and order bifurcated trials. As discussed below, lower courts and the Legislature struggled with these and other issues in the months following *Shattuck I*.

IV. SUBSEQUENT LEGISLATIVE AND JUDICIAL RESPONSES

A. *The Legislative Response*

In May 2005 the Minnesota Legislature adopted the Commission's proposals in slightly modified form.³¹ The Commission had recommended that its proposed pretrial and trial rule changes be considered by the Supreme Court's Criminal Rules Committee. Pending changes in the Rules to comply with *Blakely*,³² the Legislature enacted the following interim rules which apply to all departures and sentencing or resentencing hearings on and after June 3, 2005, and which were supposed to expire on February 1, 2007.³³

²⁸ *Id.* at 786. The Court's subsequent opinion on substantive and remedy issues, issued in August 2005 [*State v. Shattuck (Shattuck II)*, 704 N.W.2d 131 (Minn. 2005)], is discussed *infra* notes 44–54.

²⁹ Retroactivity is discussed *infra* text accompanying note 38.

³⁰ 704 N.W.2d 131 (Minn. 2005).

³¹ See Omnibus Public Safety Bill of 2005, ch. 136, art. 16, 2005 Minn. Sess. Law Serv. 785, 785–90 (West).

³² The rules enabling statute authorizes the Supreme Court to promulgate rules of criminal procedure that do not abridge, enlarge, or modify substantive rights, MINN. STAT. § 480.059(1) (2005). The Supreme Court usually upholds inconsistent statutory provisions as a matter of comity, but occasionally invalidates them. See, e.g., *State v. Lindsey*, 632 N.W.2d 652, 659 (Minn. 2001) (statute excluding certain minors from attending trials unconstitutionally encroached on the judiciary and should not be upheld as a matter of comity). See also *infra* text accompanying notes 92, 112–13.

³³ Omnibus Public Safety Bill of 2005, ch. 136, art. 16, §§ 3–6, 2005 Minn. Sess. Law Serv. 786, 786–87 (West) (amending MINN. STAT. § 244.10). The 2007 sunset provision was later repealed. See *infra* text accompanying notes 112–13.

1. The prosecution must provide the court and the defendant “reasonable notice” prior to sentencing of the intent to seek an upward departure and the factors to be relied upon;³⁴
2. A unitary jury trial (combined evidence-taking, final argument, and deliberation on all issues) will be used unless a) bifurcated trial is requested by the prosecutor, or b) some the evidence supporting an upward departure is inadmissible on the elements of the charged offense(s) and would result in unfair prejudice to the defendant;
3. In either a unitary or bifurcated trial the defendant may present evidence and argument to the fact finder as to an upward durational³⁵ departure, but may only present evidence and argument supporting a mitigating departure in the sentencing hearing, not during the trial;
4. Defendants may waive jury and request the court to determine whether facts supporting an upward departure have been proven beyond a reasonable doubt.

The Legislature’s response to the Commission’s proposal to widen recommended sentencing ranges went further, specifying that grid cell durations should extend 20 percent above the midpoint, not 15 percent.³⁶ The result is substantially broader cell ranges, especially for high-criminal-history offenders. For example, at offense severity level IX (first degree criminal sexual conduct; first degree assault) the revised cell width for zero-criminal-history offenders is 29 months (74 to 103); for criminal histories of 6 or more, the revised level IX cell width is 54 months (135 to 189). Previously, all cells at level IX had a width of ten months. These changes will allow sentences to be enhanced substantially without exceeding the top of the cell range and triggering *Blakely* rights. (The Legislature did not change the Commission’s proposal to extend grid cell durations 15 percent below the midpoint, giving courts more discretion to mitigate sentence duration without departing.)

Finally, the 2005 Legislature amended several statutory enhancement provisions to authorize jury determinations of facts permitting upward durational departure

³⁴ The legislation speaks only of departures on the prosecutor’s motion. *Id.* at §§ 3, 4. The Commission’s report implied that courts could also initiate such departures unless this would violate separation of powers. *Long Term Report, supra* note 15, at 15.

³⁵ Other provisions in this legislation refer more broadly to “aggravated departure” or “aggravated sentence,” thus covering both dispositional and durational departures (the difference is explained *supra* text accompanying notes 9–10). The limitation to durational departures in this provisions appears to be an oversight. For discussion of cases dealing with the application of *Blakely* to upward dispositional departures, see *infra* text accompanying notes 81–84.

³⁶ Omnibus Public Safety Bill of 2005, ch. 136, art. 16, § 1, 2005 Minn. Sess. Laws Serv. 785, 785–86 (West) (amending the Guidelines enabling statute, MINN. STAT. Sec. 244.09, subd. 5(2)) (“The guidelines shall provide for an increase of 20 percent and a decrease of 15 percent in the presumptive, fixed sentence.”). See also <http://www.msgc.state.mn.us/Guidelines/grid05.doc> (revised Guidelines grid, eff. Aug. 1, 2005).

(substituting “if the fact finder determines” for “if the court finds”).³⁷ However, these amendments apply only to crimes committed on and after August 1, 2005.

B. Case Law

Even before the Minnesota Supreme Court confirmed in *Shattuck I*, *supra*, that aspects of the Guidelines were subject to *Blakely* attack, lower courts had begun to apply *Blakely* and resolve some of the many interpretative issues confronting courts around the country. Accordingly, the following summary of Minnesota *Blakely* case law is organized by issue, combining cases before and after *Shattuck I*. It begins with the threshold issues of retroactivity, claim forfeiture, severability, and inherent judicial power to craft *Blakely*ized trial procedures. The summary then examines various rulings defining *Blakely*'s substantive scope and exceptions.

1. Retroactivity

In *State v. Houston*,³⁸ the Minnesota Supreme Court held that *Blakely* is a “new rule” but not a “watershed” new rule; it therefore applies to all cases that were still pending on direct review at the time *Blakely* was decided but does not apply to defendants like Houston whose convictions had already become final.

2. Claim Forfeiture

Transitional cases like *Shattuck* raise difficult claim-forfeiture issues when the “new rule” being retroactively applied had previously been clearly rejected by controlling authority in the jurisdiction. *Shattuck*'s attorney had specifically objected to the court's finding of upward departure facts, arguing, as the Supreme Court subsequently ruled in *Blakely*, that this procedure was in violation of *Apprendi v. New Jersey*.³⁹ But many defendants in cases decided before *Blakely* did not anticipate that ruling and did not challenge their upward departures on *Apprendi* grounds.

In *State v. Osborne*,⁴⁰ a majority of the Minnesota Supreme Court rejected the

³⁷ See, e.g., MINN. STAT. § 609.1095(2) (2005) (enhancement based on finding that violent repeat offender is “a danger to public safety”). This statute had been found to violate *Blakely* in *Fairbanks*, 688 N.W.2d at 333. But some enhancement provisions were not changed, leading some courts to rule that jury fact finding lacked a legal basis. See *infra* text accompanying note 54.

³⁸ 702 N.W.2d 268 (Minn. 2005). In a later case the court ruled that “pending on direct review” includes cases in which the time to petition for certiorari in the U.S. Supreme Court had not yet expired, even if the defendant never perfected his petition (preferring to request reopening of his direct appeal). *State v. Osborne*, 715 N.W.2d 436, 441 (Minn. 2006).

³⁹ 530 U.S. 466 (2000).

⁴⁰ 715 N.W.2d 436, 441–46 (Minn. 2006). In an earlier case the Court reached the same conclusion, rejecting the state's forfeiture argument in a footnote without extended discussion. See *State v. Leake*, 699 N.W.2d 312, 324 n.7 (Minn. 2005); see also *State v. Henderson*, 706 N.W.2d 758, 759–60 (Minn. 2005) (noting forfeiture doctrine but exercising Court's discretion to consider a forfeited claim

State's argument that the defendant, whose direct appeal was pending when *Blakely* was decided, had forfeited his *Apprendi* claim by failing to object in the trial court. The majority recognized that most trial court errors, even those affecting constitutional rights, are forfeited by failure to make timely objection, but the majority declined to apply that rule in Osborne's case. The majority reasoned that forfeiture is essentially a form of waiver by silence; but waiver of important rights such as the right to counsel and trial by jury requires an affirmative act, after advice of rights and "searching questions" by the trial court, to ensure that the waiver is knowing, intelligent, and voluntary.⁴¹ The majority also felt that applying the forfeiture rule in Osborne's case would be unfair and would not promote judicial economy; defendants cannot be expected to raise arguments contrary to well-established precedent (prior Minnesota cases had rejected *Apprendi* attacks on upward departures), and should not be encouraged to do so.

Two concurring justices in *Osborne* agreed that the defendant should be allowed to raise his *Blakely* claim, but preferred to base this conclusion on state criminal procedure rules, which give appellate courts discretion to consider forfeited claims in cases of "plain error . . . affecting substantial rights."⁴² These justices further concluded that the constitutional error in Osborne's case (upward departure based on judicial findings) "was plain [error] at the time of this appeal."⁴³

3. Remedies

In *Shattuck II*,⁴⁴ the Minnesota Supreme Court re-affirmed and explained its decision in *Shattuck I*, holding that *Blakely* applies to upward departures based on judicial fact-finding. The Court rejected the State's argument that the Minnesota Guidelines are only advisory, and thus exempt from *Blakely* under *United States v. Booker*.⁴⁵ *Shattuck*'s case involved a repeat sex offender statute which mandated upward departure to the statutory maximum once certain aggravating circumstances were found, whereas most upward departures under the Guidelines are discretionary—the sentencing court is authorized but not required to sentence above the presumptive

when required by "the interests of justice" and where there is no "unfair surprise" to any party); *State v. Fairbanks*, 688 N.W.2d at 336–37 (Minn. Ct. App. 2004) (pre-*Blakely* waiver of jury trial and failure to object on *Apprendi* grounds in trial court did not waive jury right under *Blakely*).

⁴¹ *Osborne*, 715 N.W.2d at 442–44.

⁴² *Id.* at 448 (citing MINN. R. CRIM. P. 31.02). These justices also cited federal plain error cases, and noted that Rule 31.02 is substantially similar to, and based on the federal rule.

⁴³ *Id.* at 452 (Special Concurrence of Justice Paul Anderson, joined by Justice G. Barry Anderson). Chief Justice Russell Anderson joined the majority opinion, along with three other justices not named Anderson; Justice Gildea took no part in the decision.

⁴⁴ 704 N.W.2d 131 (Minn. 2005).

⁴⁵ *Id.* at 142; *see also* *United States v. Booker*, 543 U.S. 220, 233 (2005) ("merits" opinion by Justice Stevens); 543 U.S. at 259 ("remedy" opinion by Justice Breyer).

range, when a legal basis for departure exists.⁴⁶ However, the Minnesota Supreme Court left little doubt that it considered such discretionary upward departures based on judicially found facts to be equally invalid, under *Blakely*.⁴⁷

The Court in *Shattuck II* also confirmed what most practitioners and lower courts had already assumed—that the invalid departure provisions are severable from the remainder of the Guidelines. The Court cited its earlier cases in favor of severability, as well as a state statute⁴⁸ calling for severability absent findings that this would not effectuate legislative intent, and reasoned that the Legislature would have preferred severability in this case if it had known that some provisions of the Guidelines would be struck down.⁴⁹ The Court also rejected the State’s argument that the Court should follow the U.S. Supreme Court’s lead in *Booker* and make the Minnesota Guidelines advisory, noting that *Booker* was decided on federal grounds and that Minnesota and federal severability analysis are not the same.⁵⁰

Finally, the Court in *Shattuck II* turned to the question of remedy in Mr. Shattuck’s case—in particular, whether the Court had inherent authority to order the trial court on remand to use a sentencing jury and/or a bifurcated trial procedure. The Court concluded that it did have the authority to establish procedures necessary to comply with federal constitutional requirements; but it declined to exercise that authority, preferring in the first instance to leave to the Legislature the task of deciding how to revise the Guidelines system in light of *Apprendi* and *Blakely* (and noting that the Legislature had done so in the 2005 legislation).⁵¹ The Court noted that because its “inherent authority extends only to its unique judicial functions,” it would exercise that authority cautiously “in order to respect the equally unique authority of the executive and legislative branches” in the exercise of their respective

⁴⁶ See *supra* text accompanying notes 9, 24.

⁴⁷ *Shattuck II*, 704 N.W.2d at 141–42. The Court also rejected the state’s argument that the presumptive sentencing ranges in Minnesota were promulgated by the Guidelines Commission, and were never formally adopted as statutes, unlike the Washington state guidelines ranges at issue in *Blakely*. The Court noted that a similar argument had been rejected in *Booker*. *Id.* at 142; *Booker*, 543 U.S. at 237–39.

⁴⁸ MINN. STAT. § 645.20 (2005).

⁴⁹ *Shattuck II*, 704 N.W.2d at 143–46.

⁵⁰ *Id.* at 146–47.

⁵¹ *Id.* at 147–48; see also *supra* text accompanying notes 31–37. The Court’s initial *Shattuck II* opinion, issued on August 18th, remanded the case with directions to impose a sentence within the presumptive range. But on October 6th the Court amended its earlier opinion, deleting mention of the presumptive range and adding language, after the Court’s reference to the 2005 laws, stating that “we . . . do not foreclose the district court from considering any constitutionally applicable and/or available laws on remand.” *Id.* at 148 n.17. See also *State v. Henderson*, 706 N.W.2d 758, 763 (Minn. 2005) (declining to order a sentencing jury, bifurcated trial, or other specific procedures, but remanding “for resentencing consistent with *Shattuck II*”).

Because the Court in *Shattuck II* chose to “express no opinion” about the sentencing jury and bifurcated trial procedures adopted in the 2005 legislation, 704 N.W.2d at 148 n.17, it did not address the double jeopardy issue it had previously identified in *Shattuck I*, 689 N.W.2d at 786.

functions;⁵² the Court further observed that the legislature has constitutional power “to fix the limits of punishment,” while “the imposition of a sentence in a particular case within those limits is a [constitutionally-recognized] judicial function.”⁵³ Finally, the Court stated that for it to “engraft sentencing-jury or bifurcated-trial requirements onto the Sentencing Guidelines and sentencing statutes would require rewriting them, something our severance jurisprudence does not permit.”⁵⁴

Later in 2005, the Minnesota Supreme Court took a similar, cautious view of its inherent remedy-crafting powers. In *State v. Barker*,⁵⁵ a case involving a dangerous-weapon enhancement statute, the Court refused to order remand and re-sentencing with *Blakely*-compliant procedures, citing *Shattuck II*. The state argued that sentencing juries and bifurcated trials had received legislative endorsement in the 2005 legislation.⁵⁶ However, the Court noted that the weapons statute itself had not been amended and continued to provide that enhancement facts were to be determined by the court, whereas several other enhancement statutes had been changed, substituting “the fact finder” for “the court.”⁵⁷ Accordingly, the court in *Barker* remanded with directions to impose a sentence within the presumptive Guidelines range.⁵⁸

However, in light of the 2005 legislation the Supreme Court directed its advisory committee to consider changes to the Rules of Criminal Procedure needed to accommodate *Blakely*; the committee made its recommendations in March of 2006.⁵⁹

A somewhat different remedy issue arises at the trial court level. Even if the Supreme Court has declined, in the absence of legislative direction, to draft rules governing all cases, or even to order particular procedures on remand in specific cases, do trial courts have inherent authority to employ sentencing juries and bifurcated trials, in an effort to retain upward departure power while complying with *Blakely*? Prior to the 2005 legislation some trial courts in Minnesota were, in fact, employing such procedures. In two cases these decisions were upheld on appeal, but in several other cases different panels of the Minnesota Court of Appeals invalidated

⁵² *Shattuck II*, 704 N.W.2d at 147–48.

⁵³ *Id.* at 148.

⁵⁴ *Id.*

⁵⁵ 705 N.W.2d 768, 775–76 (Minn. 2005).

⁵⁶ *Id.* at 776.

⁵⁷ *Id.*

⁵⁸ *Id.* But see *State v. Moore*, No. A05-1278, 2006 WL 2255726 (Minn. Ct. App. Aug. 8, 2006) (finding a violation under the same enhancement statute at issue in *Shattuck* but not precluding the trial court on remand from imposing an enhanced sentence, presumably by empanelling a sentencing jury pursuant to the 2005 laws) Neither the majority nor the dissent considered that Moore’s offense was committed prior to the effective date of the 2005 amendment to this enhancement statute. See *supra*, text accompanying note 37; see also *infra*, note 60, citing cases applying this limitation.

⁵⁹ See *infra* text accompanying notes 92–104.

such *ad hoc* procedures, citing the Supreme Court's cautious remedy decisions in *Shattuck II* and *Barker* as well as limiting language in the 2005 legislation.⁶⁰

4. "The Fact of a Prior Conviction" (The *Almendarez-Torres* Exception)

A number of Minnesota appellate decisions have addressed the scope of the so-called *Almendarez-Torres* exception, recognized in *Apprendi* and carried over in *Blakely*,⁶¹ excluding findings as to "the fact of a prior conviction" from jury trial and reasonable doubt standards. In *State v. Leake*,⁶² the Supreme Court held that this exception did not apply to the determination of whether a prior rape conviction was for a "heinous crime." The statutory definition of "heinous crime," when applied to a prior rape conviction, required the rape to have been committed "with force or violence,"⁶³ whereas defendant's prior rape charge required proof of "force or coercion."⁶⁴ The use of "or" in the rape statute meant that the jury might have found coercion rather than force, and the Court appeared to assume that coercion does not qualify as "violence;" thus, enhancement in Leake's case required a separate finding

⁶⁰ Compare *State v. Lushenko*, 714 N.W.2d 729, 733–36 (Minn. Ct. App. 2006) (upholding trial court's use of bifurcated jury procedure despite absence of statutory authority, viewing *Shattuck II* as addressed only to the Supreme Court's issuance of general on-remand *Blakely* compliance procedures, and not restricting the trial court's inherent power) and *State v. Chauvin*, No. A05-726, 2005 WL 2979382 (Minn. Ct. App. Nov. 8, 2005), review granted 2006 Minn. LEXIS 19 (Minn. Jan 17, 2006) (finding similarly as *Lushenko*) with *State v. Greer*, No. A05-552, 2006 WL 1704059 (Minn. Ct. App. June 20, 2006) (The defendant's crime was committed prior to the effective date of the 2005 amendments to the enhancement statute, so the trial court lacked statutory authority to submit sentencing factors to the jury); *State v. Maddox*, No. A05-339, 2006 WL 1460441 (Minn. Ct. App. May 30, 2006) (Trial courts lacked statutory authority to order a bifurcated trial prior to the 2005 legislation substituting "fact finder" for "the court" in this sentence-enhancement statute; in addition, the defendant's crime was committed prior to the August 1, 2005 effective date of that legislation); and *State v. Hobbs*, 713 N.W.2d 884 (Minn. Ct. App. 2006) (Prior to 2005 legislation trial courts lacked statutory authority to submit sentence-enhancement issues to the jury). See also *State v. Moore*, No. A05-1278, 2006 WL 2255726 (Minn. Ct. App. Aug. 8, 2006), dealing with sentencing on remand rather than procedures already employed by the trial court, and appearing to approve the empanelling of a sentencing jury while disregarding the date-of-the-offense limitation in the 2005 amendments to the enhancement statutes.

⁶¹ *Apprendi*, 530 U.S. at 490; *Blakely*, 542 U.S. at 301; *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998). However, if a prior conviction is deemed to be a formal element of the charged offense, then full-trial procedure standards applied even before *Blakely*. See, e.g., *State v. Hinton*, 702 N.W.2d 278, 281–82 (Minn. Ct. App. 2005) (noting that the defendant's prior convictions for domestic violence were each "a necessary element of proving that his violation of the order for protection is a felony-level offense" and finding that the defendant did not validly waive his right to a jury determination of these prior convictions).

⁶² 699 N.W.2d 312, 323–24 (Minn. 2005), cert. denied, 126 S. Ct. 745 (2005).

⁶³ See MINN. STAT. § 609.106, subdiv. 1(3).

⁶⁴ *Leake*, 699 N.W.2d at 323–24 (explaining that a person could be convicted of rape under MINN. STAT. § 609.344, subdiv. (1)(c) and not have committed a heinous crime under MINN. STAT. § 609.106, subdiv. 1).

that the rape in question was committed with force or violence, and the Court ruled that this determination is subject to *Blakely* requirements.⁶⁵

Similarly, in *State v. Henderson*,⁶⁶ the Court viewed the *Almendarez-Torres* exception as a narrow one and declined to apply it to the determination of whether an offender with five prior felony convictions committed the current (sixth) felony “as part of a pattern of criminal conduct.”⁶⁷ Prior case law had defined the latter standard to require that the current and prior crimes be similar in “motive, purpose, results, participants, victims, or other shared characteristics.”⁶⁸ The Supreme Court, quoting language from an earlier Court of Appeals case, concluded that such a finding “involves a comparison of different criminal acts, weighing the degree to which those acts are sufficiently similar. . . . This determination goes beyond a mere determination as to the fact, or number, of the offender’s prior convictions.”⁶⁹

But in *State v. Brooks*, the Minnesota Court of Appeals applied the *Almendarez-Torres* exception and upheld a three-month sentence enhancement based on the trial court’s finding that the defendant’s criminal history score included a “custody status point.”⁷⁰ Under the Guidelines, a custody status point is assigned if the offender commits the current offense while in custody or on probation or other supervised release.⁷¹ The Court reasoned that custody status points, like prior convictions, are established by the court’s own records, and assume that a person has one or more convictions.⁷²

5. Facts Triggering a Mandatory Minimum Term (The *Harris* Exception)

In *Harris v. United States*,⁷³ a case decided in the interim between *Apprendi* and *Blakely*, the Supreme Court excluded from *Apprendi*’s coverage factual determinations which invoke or raise the minimum sentence but do not change the maximum. Although *Harris* was a 5–4 decision, and there is reason to believe that

⁶⁵ *Id.*

⁶⁶ 706 N.W.2d 758, 762 (Minn. 2005).

⁶⁷ *Id.* See also MINN. STAT. § 609.1095, subdiv. 4.

⁶⁸ *Henderson*, 706 N.W.2d at 761 (quoting *State v. Gorman*, 546 N.W.2d 5, 9 (Minn. 1996)).

⁶⁹ *Henderson*, 706 N.W.2d at 762 (quoting *State v. Mitchell*, 687 N.W.2d 393, 399–400 (Minn. Ct. App. 2004)).

⁷⁰ 690 N.W.2d 160, 163–64 (Minn. Ct. App. 2004), *review granted* (Mar. 15, 2005), *review denied* (Dec. 13, 2005). See also *State v. Maurstad*, 706 N.W.2d 545, 551 (Minn. Ct. App. 2005), *review granted* (Feb. 22, 2006) (citing *Brooks* and holding custody status point determination not subject to *Blakely*).

⁷¹ MINN. SENTENCING GUIDELINES § II.B.2 (2006). In most cases the custody status point adds one point to the defendant’s criminal history score, but a three-month add-on is applied when the offender is already (i.e., without including the custody status point) in the far-right (most severe) column of the guidelines grid. *Id.*

⁷² *Brooks*, 690 N.W.2d at 163–64.

⁷³ 536 U.S. 545, 547 (2002).

Justice Breyer regrets his decision to join the majority,⁷⁴ it remains the law. Moreover, since *Blakely* merely extended *Apprendi* to the guidelines context, some version of the *Harris* exception presumably applies to guidelines sentencing—the determination of a fact which raises the minimum but does not change the applicable guidelines recommended maximum would be exempt from *Blakely* coverage. On the other hand, facts which trigger a mandatory minimum that is higher than the applicable guidelines maximum *do* raise *Blakely* issues, and the Minnesota Supreme Court so held (without citing *Harris*) in *State v. Barker*.⁷⁵

But in another case, *State v. Leake*, the Court distinguished and declined to follow *Harris*.⁷⁶ The defendant in *Leake* was found guilty at trial of first degree murder, which in most cases carries a mandatory sentence of life in prison, with eligibility for release after 30 years. But if the defendant has a prior conviction for a “heinous crime,” the mandatory sentence is life without parole (LWOP). As previously discussed, the Court ruled that the heinous-crime determination is not within the *Almendarez-Torres* prior-record exception;⁷⁷ however, the state also argued that facts which invoke a LWOP sentence, in place of a life-with-parole sentence, fall within the *Harris* exception. The Court had previously accepted this argument, relying in part on *Harris*.⁷⁸ But in *Leake*, the Court overruled its earlier decision, concluding that, in light of *Blakely*, the LWOP-invoking facts at issue here “affect[] the statutory maximum . . . Based on the jury verdict alone, the ‘statutory maximum’ sentence . . . is life *with* the possibility of release” (emphasis in original).⁷⁹

Clearly, a sentence of LWOP is “more severe” than a sentence to life with parole, but the maximum (i.e., the longest) sentence the defendant could end up serving is the same—life in prison. The Court thus appeared to view “the maximum sentence” after *Blakely* as meaning “the most severe sentence the judge can impose” without finding additional facts, rather than the “longest-possible” sentence the defendant will serve without such a finding. This is a broad reading of *Blakely*, particularly considering that *Leake*, unlike *Blakely*, was not even a guidelines case—in Minnesota, first degree murder cases and life sentences are not subject to the Guidelines. Under the Court’s reading, it would seem that *Blakely* overruled *Harris*. A narrower rationale for the Court’s holding in *Leake* would be that LWOP is constitutionally different from life

⁷⁴ See Reitz, *supra* note 2, at 1097.

⁷⁵ 705 N.W.2d 768, 771–73 (Minn. 2005) (36-month mandatory minimum sentence, based on trial court’s finding of gun possession and that such possession “increased the risk of violence,” violated *Blakely*; although the dangerous-weapon enhancement statute does not refer to the Guidelines or expressly authorize upward departure, application of the statute in Barker’s case produced an upward departure from the presumptive Guidelines sentence of 12 months (a year and day) with execution of sentence stayed).

⁷⁶ 699 N.W.2d 312, 322–23 (Minn.), *cert. denied*, 126 S.Ct. 745 (2005).

⁷⁷ See *supra* text accompanying note 61.

⁷⁸ *State v. Smith*, 669 N.W.2d 19, 33 (Minn. 2003).

⁷⁹ *Leake*, 699 N.W.2d at 323.

with parole for *Apprendi-Blakely* purposes, just as these sentences are different for purposes of constitutional proportionality limits under the Eighth Amendment.⁸⁰

6. Dispositional Departures

As noted previously, the Minnesota Sentencing Guidelines Commission's Long-Term Report assumed that *Blakely* would be extended to cover dispositional as well as durational departures, and the Minnesota Supreme Court so held in *State v. Allen*.⁸¹ Although the facts in *Blakely* only involved an upward durational departure, the court in *Allen* quoted language in *Blakely* stating that the "maximum" sentence for *Apprendi* purposes is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"⁸² (i.e., without finding additional facts). The court therefore invalidated the upward dispositional departure and prison sentence which had been based on the trial court's finding that defendant Allen was unamenable to probation.

Although the *Allen* court did not cite its previous opinion in *Leake, supra*, both cases seem to be based on a theory that the defendant- or jury-authorized "maximum sentence" after *Blakely* means the "most severe" sentence (in a broad sense) that the trial judge can impose without finding additional facts, as opposed to the most severe sentence the defendant could end up serving. The latter (narrower) reading of *Blakely* would have caused the court to rule the other way in these two cases—finding, in *Leake*, that the LWOP-triggering fact is not subject to *Blakely* because, even without LWOP, the parole board could refuse to ever grant parole; and finding, in *Allen*, that the upward-dispositional-departure-triggering fact is not subject to *Blakely* because, even without the departure, the presumptive stayed-prison sentence for the offense to which Mr. Allen pled guilty authorized later revocation and execution of that prison sentence. In both cases the alternative, "less severe" sentence available to the trial court without enhancement can become more severe based on adverse findings made in later proceedings. But parole-denial and probation-revocation decisions have never been covered by jury trial and reasonable doubt standards, and it appears unlikely that *Blakely* will be extended that far; at least in the absence of legally-binding rules, such highly discretionary "correctional" decisions are akin to traditional indeterminate sentencing (or advisory guidelines, under *Booker II*).

Allen overruled several earlier decisions of the Minnesota Court of Appeals, holding that *Blakely* did not apply to upward dispositional departures. In *State v*

⁸⁰ Compare *Solem v. Helm*, 463 U.S. 277 (1983) (finding LWOP sentence given to recidivist property offender violated Eighth Amendment), with *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding sentence of life with possibility of parole for recidivist property offender). These and other Eighth Amendment cases are discussed in Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative To What?*, 89 MINN. L. REV. 571 (2005).

⁸¹ 706 N.W.2d 40, 42 (Minn. 2005).

⁸² *Id.* at 45 (quoting *Blakely*, 542 U.S. at 303).

Hanf,⁸³ the court reasoned that dispositional departures are based on offender characteristics, which makes these decisions unlike the aggravated offense factors at issue in *Apprendi* and *Blakely* and more akin to *Blakely*-exempt indeterminate sentencing (and/or more akin to prior record, which relates only to punishment and which is also exempt from *Apprendi-Blakely* requirements). The court also noted that modern juries have not been involved in choosing sentence dispositions. The Court of Appeals may have further assumed that while jurors are equipped to distinguish atypical offense conduct and to determine whether such conduct should increase the deserved sentence duration, they would have difficulty assessing atypical offender characteristics and matching them with the appropriate sentence disposition. Exclusion of upward dispositional departures also serves to insulate probation revocations from *Blakely*, although as noted above, there are historical and *Blakely*-based grounds for declining to extend *Blakely* that far. The Guidelines Commission nevertheless has expressed concern about whether *Blakely* might cover revocation decisions,⁸⁴ but this issue has not yet been addressed in appellate decisions.

7. Other Issues

The Court in *Blakely* stated that its ruling does not apply to sentence enhancements based on facts “reflected in the jury verdict or admitted by the defendant.”⁸⁵ Several Minnesota cases have considered what kinds of facts are included in these two exceptions. In *State v. Osborne*,⁸⁶ the Minnesota Supreme Court examined the elements and jury instructions underlying the multiple counts of drug crime for which the jury returned guilty verdicts, and concluded that the trial court’s grounds for upward departure—crime committed by three or more persons who all actively participate, and “major controlled substance offense”⁸⁷—were not implicit or inferable from the jury’s verdicts.

Similarly, the exception for facts “admitted by the defendant” has been narrowly

⁸³ 687 N.W.2d 659, 661–66 (Minn. Ct. App. 2004). See also *State v. Saue*, 688 N.W.2d 337, 345–46 (Minn. Ct. App. 2004). In *State v. Carr*, 53 P.3d 843, 846–50 (Kan. 2002), the Kansas Supreme Court held, on somewhat different grounds, that upward dispositional departures are not subject to *Apprendi* (and now, *Blakely*) requirements. For an argument in favor of distinguishing between offense and offender factors, under *Blakely*, see Douglas A. Berman, *Conceptualizing Blakely*, 17 FED. SENT’G. REP. 89 (2004).

⁸⁴ See *Long Term Report*, *supra* note 15, at 7.

⁸⁵ *Blakely*, 542 US. at 303.

⁸⁶ *State v. Osborne*, 715 N.W.2d 436, 447 (Minn. 2006).

⁸⁷ The Guidelines definition of a major controlled substance offense requires that at least two of numerous listed factors be present, MINN. SENTENCING GUIDELINES, Sec. II.D.2.b.(5). In *Osborne* the trial court cited the following factors: “at least three separate transactions,” “manufacture . . . for use by others,” “sale . . . in quantities substantially larger than for personal use,” “high position in the drug distribution hierarchy,” “high degree of sophistication,” “offense . . . occurred over a lengthy period of time,” and use of defendant’s “position or status to facilitate the commission of the offense, including positions of trust [or] confidence.” *State v. Osborne*, 715 N.W.2d at 440.

construed. In *State v. Dettman*,⁸⁸ the Minnesota Supreme Court held that the defendant's admissions to the police and at a guilty plea hearing did not comply with *Blakely* because these admissions were not accompanied by advice of the right to a sentencing jury determination of the admitted facts and other procedural safeguards necessary to establish an express, knowing, intelligent, and voluntary waiver of the jury right. The Court, citing *Apprendi*, viewed the sentence-enhancement fact in this case ("deliberate cruelty" to the victim, a recognized basis for upward departure under the Guidelines) as the "functional equivalent of an element of a greater offense," and thus concluded that strict waiver standards must be applied.⁸⁹

However, defendant-admission standards applied in the context of evaluating the nature of a prior conviction are looser. In *State v. Leake*,⁹⁰ the Minnesota Supreme Court found that the element of "force" required to make a prior rape conviction a "heinous crime" was established by defendant's admissions made at the plea hearing in the earlier case. The Court cited language in *Shepard v. United States*,⁹¹ stating that the prior record exception of *Almendarez-Torres*, permits courts to determine the nature of a prior conviction by examination of the "transcript of plea colloquy."

C. Criminal Rules Changes and Additional Legislative Developments

1. Amendments to the Rules of Criminal Procedure

After the Legislature took the lead by enacting interim *Blakely* compliance procedures, the Minnesota Supreme Court directed its advisory committee to consider necessary changes in the Rules of Criminal Procedure. The committee issued its report and recommendations in March 2006, and in August the Supreme Court issued an order adopting the committee's recommendations.⁹² The report notes the 2005

⁸⁸ 719 N.W. 2d 694, 652–655 (Minn. 2006). See also *State v. Barker*, 705 N.W.2d 768, 774 (Minn. 2005) (holding that the defendant's admissions at his sentencing hearing, after denial of his request for jury determination of those facts, could not be counted as admissions for *Blakely* purposes); *State v. Senske*, 692 N.W.2d 743, 746 (Minn. Ct. App. 2005) (finding that defendant's statements at his sentencing hearing did not establish a valid waiver of his jury rights under *Blakely*); *State v. Hagen*, 690 N.W.2d 155, 158–60 (Minn. Ct. App. 2004) (finding similarly as *Senske*). See also *infra* notes 105–08 and accompanying text (discussing warning and waiver procedures in *Blakely* amendments to the Minnesota Rules of Criminal Procedure).

⁸⁹ *Dettman*, 719 N.W.2d at 651, (quoting *Apprendi*, 530 U.S. at 494 n.19). The court noted the lower standards applied in *State v. Leake*, 699 N.W.2d 312 (Minn. 2005), but distinguished that case on two grounds: 1) *Leake*'s prior admissions were part of a valid guilty plea; and 2) "*Leake* involved *Blakely*'s prior record exception 'which appears to incorporate its own admission exception'." *Dettman* at 653–54 (quoting *Barker*, 705 N.W.2d. at 774 (Minn. 2005)).

⁹⁰ 699 N.W.2d 312, 324–25 (Minn.), cert. denied, 126 S.Ct. 745 (2005).

⁹¹ 544 U.S. 13, 16 (2005). The Court also cited several federal court of appeals decisions finding admissions in guilty plea colloquies and plea agreements (in the *same*, not a prior case) to fall within the *Blakely* admissions exception. *Leake*, 699 N.W.2d at 325. See also *Almendarez-Torres*, 523 U.S. 224 (1998).

⁹² Minnesota Supreme Court Advisory Committee on Rules of Criminal Procedure, *Report with*

interim legislation but also states: “This is a procedural matter that is within the province of the court, and it is appropriate that procedural rules governing this matter be included in the Rules of Criminal Procedure.”⁹³ Although the introduction to the report and some of the proposed new Rules commentary imply that the proposals are only in response to *Blakely* and the upward departure issues addressed in *Shattuck I* and *II*, the actual rule changes are broader, governing any “aggravated sentence.” The definition of that term in new Rule 1.04(d) includes not only upward durational and dispositional departures but also any “statutory sentence enhancement.” The following is a summary of the most important issues addressed by the committee.

Required notice. The prosecution is required to give advance notice of intent to seek an aggravated sentence, and state the “grounds or statutes relied upon and a summary statement of the factual basis,” at least seven days before the Omnibus Hearing (where most pretrial motions are made); later notice is permitted in the discretion of the court for “good cause” and “upon such conditions as will not unfairly prejudice the defendant.”⁹⁴ There was disagreement within the committee as to the timing of such notice. All agreed that it should be no later than “the point where plea negotiations are likely to occur;” the minority view was that notice need only be given at least 14 days before trial, with the possibility of later notice subject only to the prejudice standard.⁹⁵ There was agreement on the committee that if later cases find enhancement-triggering facts to be “functionally equivalent to elements of the offense,” then notice would have to be given much earlier, in the formal charging document (complaint or indictment).⁹⁶

Pretrial discovery rules. The Minnesota Rules of Criminal Procedure require substantial pretrial disclosure to the defense of the prosecution’s trial evidence. Accordingly, the committee recommended that, in addition to the “summary statement of factual basis” in the required notice discussed above, the prosecution’s pretrial disclosures should include “all evidence not otherwise disclosed upon which the prosecution intends to rely in seeking an aggravated sentence,” with a continuing duty to disclose any later-acquired enhancement evidence to be relied upon.⁹⁷

Preliminary hearing on enhancement issues. At the omnibus pretrial hearing the defense can argue that the proposed grounds are not legally adequate to support enhancement, and/or that the proffered evidence is insufficient.⁹⁸ This hearing will

Proposed Amendments to the Rules of Criminal Procedure C1-84-2137(Mar. 7, 2006) [hereinafter Rules Advisory Committee Report]. The Court held a hearing on May 23, 2006 and issued its order, adopting the proposed changes, on August 17, 2006, to take effect as of October 1, 2006.

⁹³ *Id.* at 1.

⁹⁴ MINN. R. CRIM. P. 7.03, 19.04, subdiv. 6 (eff. Oct. 1, 2006).

⁹⁵ Rules Advisory Committee Report, *supra* note 92, at 3.

⁹⁶ *Id.* at 2–3.

⁹⁷ *Id.* at 5. *See also* MINN. R. CRIM. P. 9.01 subdiv. 1(7), 9.03, subdiv. 2 (eff. Oct. 1, 2006).

⁹⁸ MINN. R. CRIM. P. 11.04 (eff. Oct. 1, 2006). The Comments to this rule indicate that at these hearings the defense could also raise objections as to the timeliness of the prosecution’s notice of intent to seek enhancement.

also determine which of the trial options discussed below will be used.

Trial options. The Committee defined three jury trial staging options: 1) a fully unitary trial; 2) a fully bifurcated trial; and 3) a unitary trial as to evidence-taking, with bifurcated argument and deliberation on guilt and enhancement issues – in the event of a guilty verdict there would then be arguments and jury deliberation on enhancement.⁹⁹ The factors determining the choice among these three types are: a) whether the enhancement evidence is otherwise admissible in the guilt phase, and b) the prejudicial impact of such evidence. A bifurcated trial should be held if the evidence, or some of it, would be inadmissible in the guilt phase, or if such evidence is unfairly prejudicial on the issue of guilt. The third, unitary-bifurcated option is deemed appropriate when a fully unitary trial would put the defense in the awkward position of having to argue against guilt and, in the alternative, against enhancement assuming the defendant is guilty.¹⁰⁰ Whichever trial option is used, the determination of enhancement facts will be submitted to juries by special interrogatories.¹⁰¹

Applicable procedural rights and waiver standards in enhancement trials. The proposal appears to assume that some additional trial rights, besides jury and reasonable doubt, will apply in enhancement trials. Based on the proposed rights advisory and waiver procedures for receiving the defendant's admissions of enhancement facts,¹⁰² the following trial rights apply: confrontation, compulsory process, the Fifth Amendment Privilege, and the right not to have the court or prosecutor comment on the defendant's failure to testify. The committee left the applicability and scope of other trial rights to be resolved through case law.¹⁰³

Waiver options. The proposed advice-of-rights and waiver procedures contemplate three waiver/admission options for a given enhancement fact.¹⁰⁴ The defendant may: 1) admit the fact and its legal sufficiency;¹⁰⁵ 2) waive jury and request the court to determine the existence and sufficiency of that fact;¹⁰⁶ or 3) waive jury and stipulate the existence of the fact, but request the court to determine its sufficiency.¹⁰⁷ The committee comments also state that the defendant may waive the right to jury trial for purposes of guilt determination but still demand a jury on the enhancement issue(s).¹⁰⁸ Presumably, that rule applies regardless of whether the

⁹⁹ MINN. R. CRIM. P. 11.04 (eff. Oct. 1, 2006) and Comments; Rules Advisory Committee Report, *supra* note 92, at 6.

¹⁰⁰ Rules Advisory Committee Report, *supra* note 92, at 6–7.

¹⁰¹ MINN. R. CRIM. P. 26.03, subdiv. 18(6). *See also* MINN. R. CRIM. P. 26.03, subdiv. 19(5) (jury may be polled on its answers to enhancement interrogatories).

¹⁰² MINN. R. CRIM. P. 15.01(2).

¹⁰³ Rules Advisory Committee Report, *supra* note 92, at 7.

¹⁰⁴ *Id.* at 7.

¹⁰⁵ MINN. R. CRIM. P. 15.01(2).

¹⁰⁶ MINN. R. CRIM. P. 26.01, subdiv. 1(2)(b).

¹⁰⁷ MINN. R. CRIM. P. 26.01, subdiv. 3.

¹⁰⁸ MINN. R. CRIM. P. 26.01, subdiv. 1(2)(b), cmts.

defendant pled guilty or had a court trial on the issue of guilt; defendants would also seem entitled to the option of demanding a court trial as to enhancement, regardless of the method by which guilt was determined (by plea, court trial, or jury trial).

2. 2006 Legislation

In May 2006 the Legislature amended its 2005 legislation to clarify several points. First, the Legislature expanded its interim *Blakely* compliance procedures so that they expressly apply not only to upward departures under the Guidelines, but also to “the state’s request for an aggravated sentence under any sentencing enhancement statute or the state’s request for a mandatory minimum under section 609.11” (the dangerous weapon statute).¹⁰⁹ Second, the problem with the language of the dangerous weapon statute, which prevented remand for a sentencing jury in *State v. Barker*,¹¹⁰ was fixed by specifying that the “fact finder” (not “the court”) would make any additional findings required for enhancement under that statute.¹¹¹ However, the 2006 legislation may have complicated rather than clarified some issues by removing the February 1, 2007 sunset provisions in the 2005 legislation creating interim bifurcated trial procedures.¹¹² The statutory and Rules provisions conflict in several areas, and it is not clear which version will control.¹¹³ For example, the statute requires only “reasonable notice” of the prosecutor’s intent to seek an enhanced sentence, whereas the Rules specify notice seven days before the Omnibus hearing, absent good cause and a showing of no prejudice to the defendant. And standards for bifurcation are more defense-friendly under the Rules than in the 2005 legislation; the latter provides that bifurcated trial will be held only if some enhancement evidence would be inadmissible as to guilt *and* would cause unfair prejudice in an unitary trial, whereas the Rules use a disjunctive standard—bifurcation is required if the evidence is inadmissible *or* prejudicial.

V. CONCLUSION

At the two year mark, *Blakely*’s impact on Minnesota sentencing law and practice appears to be modest and manageable. The number of cases in which *Blakely* rights might apply is limited due to the design of the Guidelines, pre-*Blakely* interpretative case law, and decisions of the Sentencing Guidelines Commission and

¹⁰⁹ Act of June 1, 2006, ch. 260, art. 1, § 1, 2006 Minn. Sess. Law Serv. 541, 541–42 (West) (amending MINN. STAT. § 244.10, subdvs. 5–7).

¹¹⁰ This aspect of *Barker* is discussed *supra* text accompanying note 55.

¹¹¹ Act of June 1, 2006, ch. 260, art. 1, § 13, 2006 Minn. Sess. Law Serv. 541, 548 (West) (amending MINN. STAT. § 609.11, subd. 7).

¹¹² Act of June 1, 2006, ch. 260, art. 1, §§ 41–44, 2006 Minn. Sess. Law Serv. 541, 558 (West) (amending effective dates in 2005 Minn. Laws, ch. 136, art. 16, §§ 3–6).

¹¹³ See *supra* note 32 and accompanying text.

the Legislature, both before and after *Blakely*, increasing or broadening sentencing ranges so that fewer upward departures are needed.¹¹⁴

Where *Blakely* applies, courts and practitioners have not found it difficult to comply—using procedures recommended by the Commission three months after *Blakely* (based on the approach already being used in Kansas),¹¹⁵ statutory interim procedures adopted the following spring, and a steady stream of Minnesota appellate case law interpreting *Blakely* and the *ad hoc* procedures initially crafted by trial courts. The more detailed compliance procedures proposed by the Criminal Rules advisory committee should resolve many of the uncertainties in *Blakely*'s scope and logistics, and ensure that statutory and Guidelines enhancements will continue to be available when deemed necessary.

Minnesota was the first jurisdiction to implement sentencing guidelines written and monitored by a permanent sentencing commission, and its positive experience with guidelines sentencing has guided and helped to inspire the adoption of similar sentencing reforms in other states.¹¹⁶ Many of those states made similar policy decisions that limit the number of cases raising *Blakely* issues—in particular, the decision to reject “real offense” sentencing, basing recommended sentences and departure grounds on conviction offenses, and the decision to keep guidelines rules fairly simple to apply. The very different approach taken by the U.S. Sentencing Commission not only made the federal guidelines more severe and more controversial, but also would (in the absence of the *Booker II* remedy) have made *Blakely* compliance much more difficult—many more determinations would have had to be made by juries, and under the guidelines as currently written those determinations would often be highly complex.

For states considering the adoption of sentencing guidelines, or the modification of existing guidelines, Minnesota's experience continues to be instructive. That experience shows that, post-*Blakely*, guidelines need not be purely advisory. Minnesota's smooth transition demonstrates that a legally-binding guidelines system can accommodate the *Blakely* challenge, provided those guidelines are well-designed, well-supported by interpretative case law and sentencing statutes, and carefully monitored by a respected and properly financed guidelines commission.

¹¹⁴ However, *Blakely*'s long-term impacts on sentencing disparity and predictability are still unknown. The most recent available sentencing data is for calendar 2004, *see supra* note 17, and the broader sentencing ranges implemented by the Commission and the Legislature did not take effect until August 1, 2005. *See supra* note 36 and accompanying text; *see also* Barbara L. Jones, ‘*Blakely*’ Still Major Source of Issues in Minnesota Criminal Cases, MINNESOTA LAWYER, Jan. 16, 2006, at 21 (Reporting that state public defenders had a 45 percent increase in the file openings from fiscal 2004 to 2005, mainly attributable to *Blakely*).

¹¹⁵ *See supra* notes 14 and 23 and accompanying text.

¹¹⁶ *See generally* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005); Frase, *Sentencing Guidelines*, *supra* note 10.