STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

IT IS HEREBY ORDERED that a hearing be held before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on May 23, 2006 at 9:00 a.m., to consider the report of the Supreme Court Advisory Committee on Rules of Criminal Procedure, filed on March 7, 2006, recommending amendments to the Rules of Criminal Procedure. A copy of the report is annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Dr. Rev. Martin Luther King Jr. Boulevard, St. Paul, Minnesota 55155, on or before May 15, 2006, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the Clerk of the Appellate Courts together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before May 15, 2006.

Dated: March 9th, 2006

BY THE COURT:

Russell A. Anderson
Chief Justice

C1-84-2137
STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Supreme Court Advisory Committee
On Rules of Criminal Procedure

REPORT WITH PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

March 7, 2006

Hon. Robert Lynn, Chair

Carolyn Bell Beckman, Saint Paul
Leonardo Castro, Minneapolis
James W. Donehower, Detroit Lakes
James D. Fleming, Mankato
Theodora Gaitas, Minneapolis
Candice Hojan, Minneapolis
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Paul Scoggin, Minneapolis
Robert Stanich, Saint Paul
Hon. Heather L. Sweetland, Duluth

Hon. Paul H. Anderson
Supreme Court Liaison

Philip Marron, Minneapolis
Reporter

C. Paul Jones, Minneapolis
Counselor

Kelly Mitchell, Saint Paul
Staff Attorney

INTRODUCTION

On June 24, 2004, the United States Supreme Court held in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), that an upward departure in sentencing under the State of Washington's determinate sentencing system violated the defendant's Sixth Amendment right to a jury trial because the additional findings required to justify the departure must be made by a jury, and beyond a reasonable doubt. The Blakely decision called into question the legitimacy of upward sentencing departures under determinate sentencing systems similar to that of Washington.

The Minnesota Supreme Court considered the application of Blakely to the Minnesota Sentencing Guidelines in State v. Shattuck, 689 N.W.2d 785 (Minn. 2004). In an order issued on December 16, 2004, the Court held that upward departures under the Minnesota Sentencing Guidelines are subject to the Blakely holding, and requested further briefing from the parties on the applicable remedy. Id. On August 18, 2005, the Court issued a further opinion holding that Part II.D of the Minnesota Sentencing Guidelines, which allows for judicially determined upward departures, is unconstitutional under Blakely. The Court further held that Part II.D can be severed from the remaining guidelines provisions and that the other provisions remain in full effect. State v. Shattuck, 704 N.W.2d 131 (Minn. 2005).

The Minnesota Legislature enacted provisions relating to Blakely in the 2005 legislative session, which are set to expire February 1, 2007. See 2005 Minn. Laws ch. 136, art. 16, §§ 3-6, now codified at Minn. Stat. § 244.10, subds. 4-7. 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.

The Supreme Court Advisory Committee on Rules of Criminal Procedure has been monitoring cases and other developments following the issuance of Blakely to determine an appropriate point at which to recommend enactment of procedures to govern the process for seeking an aggravated departure. The issuance of Shattuck and other cases has resulted in a legal landscape in which it now appears that formal procedures should be enacted as part of the Rules of Criminal Procedure. The following report sets forth proposed procedures for seeking an aggravated sentence and summarizes the issues considered by the committee in developing this proposal. The report addresses the overall procedure by topic, and the proposed amendments follow.

DEFINITION OF AGGRAVATED SENTENCE

The committee settled upon the term "aggravated sentence" to describe the type of sentence governed by Blakely, and recommends defining the term in Rule 1.04. The committee recognizes that this definition may need to be amended over time to accommodate further developments in the case law.

NOTICE

Determining the point at which notice of intent to seek an aggravated sentence should be required generated the most discussion within the committee. At the core of the controversy is a question about the fundamental nature of the factors that support an aggravated sentence. On one side, an argument can be made that the factors are functionally equivalent to elements of the offense, and therefore must be included in the complaint or indictment. Alternatively, an argument can be made that the facts in support of an aggravated sentence are merely sentencing factors, and therefore due process considerations are paramount in setting an appropriate point at which notice of intent to seek an aggravating sentence must be given. In addition, there were

practical concerns to consider. Prosecutors were concerned that the notice not be required too early in the process because in some cases, aggravating factors are not known until much later in the case. Defense attorneys were concerned that notice be provided early enough in the process to allow for a proper defense, and that it be sufficiently detailed so as to be adequate.

Putting aside the question as to whether the facts in support of an aggravated sentence are functionally equivalent to elements of the offense, committee members agreed that at a minimum, notice should be provided by the point where plea negotiations are likely to occur. The committee acknowledged that this point varies across the state, but a majority of the committee members felt the Omnibus Hearing reflects the point of commonality among the varying procedures. The proposed procedure sets a deadline at seven days prior to the Omnibus Hearing, with some allowance for later notice. A minority of the committee asserts that this notice provision comes too early in the process, especially in light of the differing practices with regard to the timing and content of the Omnibus Hearing, and has offered an alternative proposal requiring that notice be given fourteen days before trial. See alternative language below. Under either alternative, the notice procedure is proposed in new Rule 7.03 for cases initiated by complaint, and in Rule 19.04 for cases initiated by indictment.

It should be noted, however, that some members of the committee are concerned that the procedure will not be constitutionally adequate if it is determined through case law that the facts in support of an aggravated sentence are functionally equivalent to elements of the offense. If such a determination is made, the committee will prepare and submit a substitute procedure requiring notice of the factors in or with the complaint or indictment.

Because the notice deadline resulted from a compromise position as to whether the facts in support of an aggravated sentence are functionally equivalent to elements of the offense, there

was also disagreement as to the standard that should be used to permit notice to be submitted later in the process. All committee members agreed that there should be a mechanism to support the prosecution's legitimate desire to seek an aggravated sentence when facts become known after the initial notice deadline. A majority also agreed that the decision to allow a later notice should be at the discretion of the court, and should be guided by the twin standards of good cause and prejudice to the defendant. There was, however, considerable debate as to whether the rule should be written so as to require the defendant to raise an objection if a later notice appeared to prejudice the defense's case or so as to require the prosecutor to show good cause to justify every notice provided later than seven days prior to the Omnibus Hearing.

A minority of members felt strongly that the standard should be no different than that used to guide the court's discretion in considering whether to allow the prosecution to amend the complaint. The minority argues that the "good cause shown" language is impractical and unreasonable, and that if it is adopted, exceptions will outnumber the rule. The minority states that because the prejudice rule has adequately protected defendants in the context of amendments to the complaint, a simple prejudice rule should suffice for sentencing notices as well.

The language recommended in this report at Rules 7.03 and 19.04, subd. 6(3), to address the timing of the notice and the standard by which a later notice is deemed permissible is as follows:

> At least seven days prior to the Omnibus Hearing, or at such later time if permitted by the court upon good cause shown and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

The alternative language suggested by the minority is as follows:

> At least fourteen days prior to trial, or as soon thereafter as grounds become known to the prosecuting attorney, if the substantial rights of the defendant are not prejudiced, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

DISCLOSURE

The committee recommends adding a provision to Rule 9.01 to state that the prosecutor has a duty to disclose evidence upon which the prosecutor intends to rely in seeking an aggravated sentence. This duty is also subject to the continuing duty to disclose for the duration of the proceedings that is already included in Rule 9.03, subd. 2.

EVIDENTIARY HEARING AND DECISION TO BIFURCATE

Committee members agreed that there should be an opportunity for the defense to raise an objection to the prosecutor's intent to seek an aggravated sentence based on an argument that the proffered grounds cannot legally support an aggravated sentence, insufficiency of evidence, or both. The committee has therefore recommended adding an opportunity for a hearing on the matter in Rule 11.04.

A second order of business at the hearing is the determination as to whether the issues will be presented to the jury in a unitary or bifurcated trial. This issue generated a great deal of discussion as to whether there should be a default trial type. Under the current legislative procedure, the default trial type is unitary unless the prosecutor requests a bifurcated trial and the evidence in support of an aggravated departure would be inadmissible during the trial on the offense elements and/or prejudicial to the defendant. The committee noted that a default unitary trial type could result in litigation by the defense in almost every case for at least a bifurcated final argument, if not trial. A bifurcated default trial type could result in wasted resources because a number of cases might appropriately be tried in a unitary manner. If no default trial type is established by rule, the trial type will have to be determined in every case, but will not necessarily be a contested issue in every case. Thus, the committee decided to offer amendments that would assist the court in determining the appropriate trial type, but that would not require a particular trial type in every case.

The committee's recommendation recognizes three potential trial types: 1) a fully unitary trial; 2) a bifurcated trial; and 3) a unitary trial with a bifurcated final argument. The criteria for determining the appropriate trial type are admissibility of the evidence in support of an aggravated sentence in the guilt phase of the trial and the prejudicial impact of that evidence. A unitary trial type is appropriate when the evidence in support of an aggravated sentence would be both admissible in the guilt phase of the trial and not prejudicial to the defendant on the issue of guilt. A bifurcated trial type would be appropriate when either the evidence is not admissible in the guilt phase of the trial or is unfairly prejudicial on the issue of guilt, or both. A unitary trial type with a bifurcated final argument would be appropriate in those situations in which the evidence is such that it would be admissible and not unfairly prejudicial in the guilt phase of the

trial, but would place the defense in the position of making an awkward final argument both against guilt, and alternatively, if the defendant *is* guilty, against the factors in support of an aggravated sentence.

The committee received some comment raising concern about the hearing provided for in this rule because there is no evidentiary standard or detail as to how much process should be afforded in the hearing. The committee deliberately chose not to elaborate on these issues, and anticipates that these matters will develop through case law.

RIGHTS ADVISORY, PLEA PETITION, AND WAIVER

Corollary to the right to a jury trial on the facts in support of an aggravated sentence is the ability to waive that right. The committee is concerned that this waiver be done separately from any waivers on the issue of guilt so that the distinction between the jury trial on the issue of guilt and the jury trial on the issue of the aggravated sentence will be clear, and the waiver will be understandable to the defendant. This waiver can occur in three distinct situations: 1) the defendant admits to all facts in support of an aggravated sentence; 2) the defendant waives the right to a jury as fact finder, and allows the judge to determine whether the facts in support of an aggravated sentence have been proven; or 3) the defendant waives the right to a jury as fact finder, stipulates to certain facts, and allows the court to determine whether the stipulated facts are sufficient to support an aggravated sentence. The committee has proposed procedures: 1) in Rule 15 to allow for admission of the facts in support of an aggravated sentence and waiver of a jury trial on those facts; 2) in Rule 26.01, subd. 1, to address waiver of the jury as fact finder; and 3) in Rule 26.01, subd. 3, to address waiver in the context of a stipulated facts trial.

MOTIONS FOR INSUFFICIENCY OF EVIDENCE

The committee recommends adding a procedure in Rule 26.03, subd. 17 allowing for a motion to withdraw the issue of the aggravated sentence from jury consideration if the evidence is deemed insufficient prior to submission of the case to the jury, or to overturn the verdict if the evidence is deemed insufficient after the return and discharge of the jury.

VERDICT

The committee recommends adding language to Rule 26.03, subd. 18 stating that issues relating to an aggravated sentence shall be submitted to the court by special interrogatory. The committee did not go into detail as to the form of the verdict, noting that there is already a sample verdict form in the Criminal Jury Instruction Guide. Additionally, the committee recommends amending Rule 26.03, subd. 19 to allow the parties to request that the jury be polled as to the special interrogatory.

MOTION FOR NEW TRIAL

The committee considered the possibility that the grounds for a new trial currently in Rule 26.04, subd. 1 could potentially be applicable to a trial on the facts in support of an aggravated sentence and has therefore amended the rule to accommodate that.

MITIGATED SENTENCE PROCEEDINGS

Prior to Blakely, the court had discretion to depart upward or downward from the presumptive sentence. That discretion was reflected in Rule 27.03, subd. 1, which required the court to inform the parties that it was considering a departure for sentencing. The committee recommends amending the rule to reflect the current state of the law, which continues to allow the court to exercise this discretion without findings by a jury for mitigated departures.

Dated: 3/7/06

Respectfully Submitted,

Judge Robert Lynn
Chair, Advisory Committee on Rules of Criminal Procedure

PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

Note: Throughout these proposals, unless otherwise indicated, deletions are indicated by a line drawn through the words, and additions are underlined.

1. Rule 1.04. Definitions

Amend Rule 1.04 by adding a new paragraph (d) as follows:

(d) Aggravated Sentence. As used in these rules, the term "aggravated sentence" refers to a sentence that is an upward durational or dispositional departure from the presumptive sentence provided for in the Minnesota Sentencing Guidelines based upon aggravating circumstances or a statutory sentencing enhancement.

2. Comments – Rule 1

Amend the comments to Rule 1 by adding a new paragraph at the end of the existing comments as follows:

Rule 1.04 (d) defines "aggravated sentence" for the purpose of the provisions in these rules governing the procedure that a sentencing court must follow to impose an upward sentencing departure in compliance with Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). On June 24, 2004, the United States Supreme Court decided in Blakely that an upward departure in sentencing under the State of Washington's determinate sentencing system violated the defendant's Sixth Amendment rights where the additional findings required to justify the departure were not made beyond a reasonable doubt by a jury. The definition is in accord with existing Minnesota case law holding that Blakely applies to upward departures under the Minnesota Sentencing Guidelines and under various sentencing enhancement statutes requiring additional factual findings. See, e.g., State v. Shattuck, 704 N.W.2d 131 (Minn. 2005) (durational departures); State v. Allen, 706 N.W.2d 40 (Minn. 2005) (dispositional departures); State v. Leake, 699 N.W.2d 312 (Minn. 2005) (life sentence without release under Minn. Stat. § 609.106); State v. Barker, 705 N.W.2d 768 (Minn. 2005) (firearm sentence enhancements under Minn. Stat. § 609.11); and State v. Henderson, 706 N.W.2d 758 (Minn. 2005) (career offender sentence enhancements under Minn. Stat. § 609.1095, subd. 4). However, these Blakely-related protections and procedures do not apply retroactively to sentences that were imposed and were no longer subject to direct appeal by the time that Blakely was decided on June 24, 2004. State v. Houston, 702 N.W.2d 268 (Minn. 2005). Also, the protections and procedures do not apply to sentencing departures and enhancements that are based solely on a defendant's criminal conviction history such as the assessment of a custody status point under the Minnesota Sentencing Guidelines. State v. Allen, 706 N.W.2d 40 (Minn. 2005). For aggravated sentence procedures related to Blakely, see Rule 7.03 (notice of prosecutor's intent to seek an aggravated sentence in proceedings prosecuted by complaint); Rule 9.01, subd. 1(7) (discovery of evidence relating to an aggravated sentence); Rule 11.04 (Omnibus Hearing decisions on

aggravated sentence issues); Rule 15.01, subd. 2 and Appendices E and F (required questioning and written petition provisions concerning defendant's admission of facts supporting an aggravated sentence and accompanying waiver of rights); Rule 19.04, subd. 6(3) (notice of prosecutor's intent to seek an aggravated sentence in proceedings prosecuted by indictment); Rule 26.01, subd. 1(2)(b) (waiver of right to a jury trial determination of facts supporting an aggravated sentence); Rule 26.01, subd. 3 (stipulation of facts to support an aggravated sentence and accompanying waiver of rights); Rules 26.03, subd. 17(1) and (3) (motion that evidence submitted to jury was insufficient to support an aggravated sentence); Rule 26.03, subd. 18(6) (verdict forms); Rule 26.03, subd. 19(5) (polling the jury); and Rule 26.04, subd. 1 (new trial on aggravated sentence issue). The procedures provided in these rules for the determination of aggravated sentence issues supersede the procedures concerning those issues in Minn. Stat. § 244.10 (see 2005 Minn. Laws, ch. 136, art. 16, §§ 3-6) or other statutes.

3. **Rule 7. Notice by Prosecuting Attorney of Evidence and Identification Procedures; Completion of Discovery**

Create a new Rule 7.03 as follows, and renumber existing Rule 7.03 as Rule 7.04:

Rule 7.03. Notice of Prosecutor's Intent to Seek an Aggravated Sentence

At least seven days prior to the Omnibus Hearing, or at such later time if permitted by the court upon good cause shown and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

4. **Comments – Rule 7**

Amend the comments to Rule 7 by substituting the words "Rule 7.04" for the words "Rule 7.03" in the existing fifth and sixth paragraphs of the comments and by adding the following new paragraph after the existing fourth paragraph of the comments:

Rule 7.03 establishes the notice requirements for a prosecutor to initiate proceedings seeking an aggravated sentence in compliance with Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). See Rule 1.04 (d) as to the definition of "aggravated sentence". Also, see the comments to that rule. The written notice required by Rule 7.03 must include not only the grounds or statute relied upon, but also a summary statement of the supporting factual basis. However, there is no requirement that the factual basis be given under oath. In developing this rule, the Advisory Committee was concerned that if prosecutors were required to provide notice too early in the proceedings, they may not yet have sufficient information to make that decision and therefore may be inclined to overcharge. On the other hand it is important that defendants and defense counsel have adequate advance notice of the aggravated sentence

allegations so that they can defend against them. Further, the earlier that accurate complete aggravated sentence notices are given, the more likely it is that cases can be settled, and at an earlier point in the proceedings. The requirement of the rule that notice be given at least seven days before the Omnibus Hearing balances these important, sometimes competing, policy considerations. However, the rule recognizes that it may not always be possible to give notice by that time and the court may permit a later notice for good cause shown so long as the later notice will not unfairly prejudice the defendant. In making that decision the court can consider whether a continuance of the proceedings or other conditions would cure any unfair prejudice to the defendant. Pretrial issues concerning a requested aggravated sentence will be considered and decided under the Omnibus Hearing provisions of Rule 11.04.

5. Rule 9.01. Disclosure by Prosecution

Amend Rule 9.01, subd. 1, as follows:

Subd. 1. **Disclosure by Prosecution Without Order of Court.** Without order of court and except as provided in Rule 9.01, subd. 3, the prosecuting attorney on request of defense counsel shall, before the date set for Omnibus Hearing provided for by Rule 11, allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate to the case and make the following disclosures:

(1) *Trial Witnesses; Grand Jury Witnesses; Other Persons.*

(a) The prosecuting attorney shall disclose to defense counsel the names and addresses of the persons intended to be called as witnesses at the trial together with their prior record of convictions, if any, within the prosecuting attorney's actual knowledge. The prosecuting attorney shall permit defense counsel to inspect and reproduce such witnesses' relevant written or recorded statements and any written summaries within the prosecuting attorney's knowledge of the substance of relevant oral statements made by such witnesses to prosecution agents.

(b) The fact that the prosecution has supplied the name of a trial witness to defense counsel shall not be commented on in the presence of the jury.

(c) If the defendant is charged by indictment, the prosecuting attorney shall disclose to defense counsel the names and addresses of the witnesses who testified before the grand jury in the case against the defendant.

(d) The prosecuting attorney shall disclose to defense counsel the names and the addresses of persons having information relating to the case.

(2) *Statements.* The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any relevant written or recorded statements which relate to the case within the possession or control of the prosecution, the existence of which is known by the prosecuting attorney, and shall provide defense counsel with the substance of any oral statements which relate to the case.

(3) *Documents and Tangible Objects.* The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce books, grand jury minutes or transcripts, law enforcement officer reports, reports on prospective jurors, papers, documents, photographs and tangible objects which relate to the case and the prosecuting attorney shall also permit defense counsel to inspect and photograph buildings or places

which relate to the case.

(4) *Reports of Examinations and Tests.* The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments or comparisons made in connection with the particular case. The prosecuting attorney shall allow the defendant to have reasonable tests made. If a scientific test or experiment of any matter, except those conducted under Minnesota Statutes, chapter 169, may preclude any further tests or experiments, the prosecuting attorney shall give the defendant reasonable notice and an opportunity to have a qualified expert observe the test or experiment.

(5) *Criminal Record of Defendant and Defense Witnesses.* The prosecuting attorney shall inform defense counsel of the records of prior convictions of the defendant and of any defense witnesses disclosed under Rule 9.02, subd. 1(3)(a) that are known to the prosecuting attorney provided the defense counsel informs the prosecuting attorney of any such records known to the defendant.

(6) *Exculpatory Information.* The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.

(7) *Evidence Relating to Aggravated Sentence.* The prosecuting attorney shall disclose to the defendant or defense counsel all evidence not otherwise disclosed upon which the prosecutor intends to rely in seeking an aggravated sentence.

(~~7~~8) *Scope of Prosecutor's Obligations.* The prosecuting attorney's obligations under this rule extend to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office.

6. Comments – Rule 9

Amend the comments to Rule 9 by substituting the words "Rule 9.01, subd. 1(8)" for the words "Rule 9.01, subd. 1(7)" in the existing nineteenth paragraph of the comments and by adding the following new paragraph after the existing eighteenth paragraph of the comments:

Rule 9.01, subd. 1(7) requires the prosecuting attorney to disclose to the defendant or defense counsel all evidence not otherwise disclosed upon which the prosecuting attorney intends to rely in seeking an aggravated sentence under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). The prosecuting attorney also has a continuing duty to disclose such evidence under Rule 9.03, subd. 2. See Rule 1.04 (d) for the definition of "aggravated sentence" and also see the comments to that rule.

7. Rule 11.04. Other Issues

Amend Rule 11.04 as follows:

Rule 11.04. Other Issues

The Omnibus Hearing may include a pretrial dispositional conference to determine whether the case can be resolved without scheduling it for trial. The court shall ascertain any other constitutional, evidentiary, procedural or other issues that may be heard or disposed of before trial and such other matters as will promote a fair and expeditious trial, and shall hear and determine them, or continue the hearing for that purpose as permitted by Rule 11.07.

If the prosecution has given notice under Rule 7.02 of intention to offer evidence of additional offenses, upon motion a hearing shall be held to determine their admissibility under Rule 404(b) of the Minnesota Rules of Evidence and whether there is clear and convincing evidence that defendant committed the offenses.

If the prosecutor has given notice under Rule 7.03 or 19.04, subd. 6(3) of intent to seek an aggravated sentence, a hearing shall be held to determine whether the law and proffered evidence support an aggravated sentence. If so, the court shall determine whether the issues will be presented to the jury in a unitary or bifurcated trial.

In deciding whether to bifurcate the trial, the court shall consider whether the evidence in support of an aggravated sentence is otherwise admissible in the guilt phase of the trial and whether unfair prejudice would result to the defendant in a unitary trial. A bifurcated trial shall be ordered where evidence in support of an aggravated sentence includes evidence that is inadmissible during the guilt phase of the trial or would result in unfair prejudice to the defendant. If the court orders a unitary trial the court may still order separate final arguments on the issues of guilt and the aggravated sentence.

If the defendant intends to offer evidence of a victim's previous sexual conduct in a prosecution for violation of Minn. Stat., §§ 609.342 to 609.346, a motion shall be made pursuant to the procedures prescribed by Rule 412 of the Minnesota Rules of Evidence.

8. Comments – Rule 11

Amend the comments to Rule 11 by substituting the words "Rule 7.04" for "Rule 7.03" in the fifth paragraph of the comments and by adding the following new paragraph after the existing thirteenth paragraph of the comments:

If the prosecuting attorney has given notice under Rule 7.03 or 19.04, subd. 6(3) of intent to seek an aggravated sentence, Rule 11.04 requires the court to have a hearing to determine any pretrial issues that need to be resolved in connection with that request. This could include issues as to the timeliness of the notice under Rule 7.03 or 19.04, subd. 6(3). The court must determine whether the proposed grounds legally support an

aggravated sentence and whether or not the proffered evidence is sufficient to proceed to trial. The rule does not provide a standard for determining insufficiency of the evidence claims and that is left to case law development. If the aggravated sentence claim will be presented to a jury, the court must also decide whether the evidence will be presented in a unitary or a bifurcated trial and the rule provides the standards for making that determination. Even if a unitary trial is ordered for the presentation of evidence, the rule recognizes that presentation of argument on an aggravated sentence during the guilt phase of the proceedings may unduly prejudice a defendant. The rule therefore allows the court to order separate final arguments on the aggravated sentence issue, if necessary, after the jury renders its verdict on the issue of guilt.

9. Rule 15. Procedure Upon Plea of Guilty; Plea Agreements; Plea Withdrawal; Plea to Lesser Offense

Amend the title to Rule 15 as follows:

Rule 15. Procedure Upon Plea of Guilty; Plea Agreements; Plea Withdrawal; Plea to Lesser Offense; Aggravated Sentence

Amend Rule 15.01 as follows:

Rule 15.01. Acceptance of Plea; Questioning Defendant on Plea or Aggravated Sentence; Felony and Gross Misdemeanor Cases

Subdivision 1. Guilty Plea.

Before the court accepts a plea of guilty, the defendant shall be sworn and questioned by the court with the assistance of counsel as to the following:

1. Name, age and date and place of birth and whether the defendant is handicapped in communication and, if so, whether a qualified interpreter has been provided for the defendant.

2. Whether the defendant understands the crime charged.

3. Specifically, whether the defendant understands that the crime charged is (name of offense) committed on or about (month) (day) (year) in _____ County, Minnesota (and that the defendant is tendering a plea of guilty to the crime of (name of offense) which is a lesser degree or lesser included offense of the crime charged).

4. a. Whether the defendant has had sufficient time to discuss the case with defense counsel.

b. Whether the defendant is satisfied that defense counsel is fully informed as to the facts of the case, and that defense counsel has represented the defendant's interests and fully advised the defendant.

5. Whether the defendant has been told by defense counsel and understands that upon a plea of not guilty, there is a right to a trial by jury and that a finding of guilty is not possible unless all jurors agree.

6. a. Whether the defendant has been told by defense counsel and understands that there will not be a trial by either a jury or by a judge without a jury if the defendant pleads guilty.

b. Whether the defendant waives the right to a trial on the issue of guilt.

7. Whether the defendant has been told by defense counsel, and understands that if the defendant wishes to plead not guilty and have a trial by jury or by a judge, the defendant will be presumed to be innocent until guilt is proved beyond a reasonable doubt.

8. a. Whether the defendant has been told by defense counsel, and understands that if the defendant wishes to plead not guilty and have a trial, the prosecutor will be required to have the prosecution witnesses testify in open court in the defendant's presence, and that the defendant will have the right, through defense counsel, to question these witnesses.

b. Whether the defendant waives the right to have these witnesses testify in the defendant's presence in court and be questioned by defense counsel.

9. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to plead not guilty and have a trial, the defendant will be entitled to require any defense witnesses to appear and testify.

b. Whether the defendant waives this right.

10. Whether defense counsel has told the defendant and the defendant understands:

a. That the maximum penalty that the court could impose for the crime charged (taking into consideration any prior conviction or convictions) is imprisonment for _____ years.

b. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than _____ months for the crime charged.

c. That for felony driving while impaired offenses and most sex offenses, a mandatory period of conditional release will be imposed to follow any executed prison sentence, and violating the terms of that conditional release may increase the time the defendant serves in prison.

d. That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

e. That the prosecutor is seeking an aggravated sentence.

11. Whether defense counsel has told the defendant that the defendant discussed the case with one of the prosecuting attorneys, and that the respective attorneys agreed that if the defendant entered a plea of guilty the prosecutor will do the following: (state the substance of the plea agreement.)

12. Whether defense counsel has told the defendant and the defendant understands that if the court does not approve the plea agreement, the defendant has an absolute right to withdraw the plea of guilty and have a trial.

13. Whether, except for the plea agreement, any policeman, prosecutor, judge, defense counsel, or any other person, made any promises or threats to the defendant or any member of the defendant's family, or any of the defendant's friends, or other persons in order to obtain a plea of guilty.

14. Whether defense counsel has told the defendant and the defendant understands that if the plea of guilty is for any reason not accepted by the court, or is withdrawn by the defendant with the court's approval, or is withdrawn by court order on appeal or other review, that the defendant will stand trial on the original charge (charges) namely, (state the offense) (which would include any charges that were dismissed as a result of the plea agreement) and that the prosecution could proceed just as if there had never been any agreement.

15. a. Whether the defendant has been told by defense counsel and understands, that if the defendant wishes to plead not guilty and have a jury trial, the defendant can testify if the defendant wishes, but that if the defendant decided not to testify, neither the prosecutor nor the judge could comment to the jury about the failure to testify.

b. Whether the defendant waives this right, and agrees to tell the court about the facts of the crime.

16. Whether with knowledge and understanding of these rights the defendant still wishes to enter a plea of guilty or instead wishes to plead not guilty.

17. Whether the defendant makes any claim of innocence.

18. Whether the defendant is under the influence of intoxicating liquor or drugs or under mental disability or under medical or psychiatric treatment.

19. Whether the defendant has any questions to ask or anything to say before stating the facts of the crime.

20. What is the factual basis for the plea.

(NOTE: It is desirable that the defendant also be asked to acknowledge signing

the Petition to Plead Guilty, suggested form of which is contained in the appendix A to these rules; that the defendant has read the questions set forth in the petition or that they have been read to the defendant, and that the defendant understands them; that the defendant gave the answers set forth in the petition; and that they are true. If an aggravated sentence is sought, refer to subdivision 2 of this rule.)

Subd. 2. Aggravated Sentence.

Before the court accepts an admission of facts in support of an aggravated sentence, the defendant shall be sworn and questioned by the court with the assistance of counsel, in addition to and separately from the inquiry that may be required by subdivision 1, as to the following:

1. Whether the defendant understands that the prosecution is seeking a sentence greater than the presumptive sentence called for in the sentencing guidelines.

2. a. Whether the defendant understands that the presumptive sentence for the crime to which the defendant has pled guilty or otherwise has been found guilty is _____, and that the defendant could not be given an aggravated sentence greater than the presumptive sentence unless the prosecutor proves facts in support of such aggravated sentence.

b. Whether the defendant understands that the sentence in this case will be an aggravated sentence of _____,or will be left to the judge to decide.

3. a. Whether the defendant has had sufficient time to discuss this aggravated sentence with defense counsel.

b. Whether the defendant is satisfied that defense counsel is fully informed as to the facts supporting an aggravated sentence and has represented defendant's interests and fully advised the defendant.

4. Whether the defendant has been told by defense counsel and understands that even though the defendant has pled guilty to or has otherwise been found guilty of the crime of _____, defendant may nonetheless deny the facts alleged by the prosecution which would support an aggravated sentence.

5. a. Whether the defendant has been told by defense counsel and understands that if defendant chooses to deny the facts alleged in support of an aggravated sentence, the defendant has a right to a trial by either a jury or a judge to determine whether those facts have been proven, and that a finding that the facts are proven is not possible unless all jurors agree.

b. Whether the defendant waives the right to a trial of the facts in support of an aggravated sentence to a jury or a judge.

6. Whether the defendant has been told by defense counsel and understands that at such trial before a jury or a judge, the defendant would be presumed not to be subject to an aggravated sentence and the court could not impose an aggravated sentence unless the facts in support of the aggravated sentence are proven beyond a reasonable doubt.

7. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts alleged in support of an aggravated sentence and have a trial to a jury or a judge, the prosecutor will be required to have the prosecution witnesses testify in open court in the defendant's presence, and that the defendant will have the right, through defense counsel, to question these witnesses.

b. Whether the defendant waives the right to have these witnesses testify in the defendant's presence and be questioned by defense counsel.

8. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts alleged in support of an aggravated sentence and have a trial to a jury or a judge, the defendant will be entitled to require any defense witnesses to appear and testify.

b. Whether the defendant waives this right.

9. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts in support of an aggravated sentence and have a trial to a jury or a judge, the defendant can testify if the defendant wishes, but that if the defendant decides not to testify, neither the prosecutor nor the judge could comment to the jury about the failure to testify.

b. Whether the defendant waives this right and agrees to tell the court about the facts in support of an aggravated sentence.

10. Whether, with knowledge and understanding of these rights, the defendant still wishes to admit the facts in support of an aggravated sentence or instead wishes to deny these facts and have a trial to a jury or a judge.

11. What is the factual basis for an aggravated sentence.

(Note: Where a represented defendant is pleading guilty without an aggravated sentence, use the plea petition form in Appendix A to these rules. Where a represented defendant's plea agreement includes an admission to facts to support an aggravated sentence, use both Appendix A and Appendix E.

Where an unrepresented defendant is pleading guilty without an aggravated sentence, use Appendix C to these rules. Where an unrepresented defendant's plea agreement includes an admission to facts to support an aggravated sentence, use both Appendix C and Appendix F.)

10. Appendices - Rule 15

Amend paragraphs 15 and 19 of Appendix A to Rule 15 as follows:

15. I have been told by my attorney and I understand:

a. That if I wish to plead not guilty I am entitled to a trial by a jury on the issue of guilt, and all jurors would have to agree I was guilty before the jury could find me guilty.

b. That if I plead guilty I will not have a trial by either a jury or by a judge without a jury.

c. That with knowledge of my right to a trial on the issue of guilt, I now waive my right to a trial.

19. I have been told by my attorney and I understand:

a. That a person who has prior convictions or a prior conviction can be given a longer prison term because of this.

b. That the maximum penalty that the court could impose for this crime (taking into consideration any prior conviction or convictions) is imprisonment for _____ years. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than _____ months for this crime.

c. That for felony driving while impaired offenses and most sex offenses, a mandatory period of conditional release will follow any executed prison sentence that is imposed. Violating the terms of this conditional release may increase the time I serve in prison. In this case, the period of conditional release is ___ years.

d. That a person who participates in a crime by intentionally aiding, advising, counseling and conspiring with another person or persons to commit a crime is just as guilty of that crime as the person or persons who are present and participating in the crime when it is actually committed.

e. That my present probation or parole could be revoked because of the plea of guilty to this crime.

f. That the prosecutor is seeking an aggravated sentence of _____.

Amend paragraphs 15 and 19 of Appendix C to Rule 15 as follows:

15. I understand:

a. That if I wish to plead not guilty I am entitled to a trial by a jury on the issue of guilt, and all jurors would have to agree I was guilty before the jury could find me guilty.

b. That if I plead guilty I will not have a trial by either a jury or by a judge without a jury.

c. That with knowledge of my right to a trial on the issue of guilt, I now waive my right to a trial.

19. I understand:

a. That a person who has prior convictions or a prior conviction can be given a longer prison term because of this.

b. That the maximum penalty that the court could impose for this crime (taking into consideration any prior conviction or convictions) is imprisonment for _____ years. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than _____ months for this crime.

c. That a person who participates in a crime by intentionally aiding, advising, counseling and conspiring with another person or persons to commit a crime is just as guilty of that crime as the person or persons who are present and participating in the crime when it is actually committed.

d. That my present probation or parole could be revoked because of the plea of guilty to this crime.

e. That if I am not a citizen of the United States, my plea of guilty to this crime may result in deportation, exclusion from admission to the United States or denial of naturalization as a United States citizen.

f. That the prosecutor is seeking an aggravated sentence of _____.

Add a new Appendix E to Rule 15 as follows:

APPENDIX E TO RULE 15

STATE OF MINNESOTA
COUNTY OF _____

IN DISTRICT COURT
_____ JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

PETITION REGARDING
AGGRAVATED SENTENCE

vs.

_____
Defendant.

TO: THE ABOVE NAMED COURT

I, _____, defendant in the above entitled action do respectfully represent and state as follows:

1. I have pled guilty to or have otherwise been found guilty of the crime of _____.

2. I understand the presumptive guideline sentence for this offense is _____, and I could not be given an aggravated sentence greater than the presumptive sentence unless the prosecution proves facts in support of such an aggravated sentence.

3. I understand the prosecution is seeking a sentence greater than that called for in the sentencing guidelines. Specifically, I understand the sentence in this case will be _____ or will be left to the judge to decide.

4. I am represented by attorney _____ and:

a) I feel I have had sufficient time to discuss the issue of an aggravated sentence with my attorney.

b) I am satisfied my attorney is fully informed as to the facts related to an aggravated sentence, and that my attorney has discussed possible defenses I have to an aggravated sentence.

c) I am satisfied that my attorney has represented my interests and has fully advised me about an aggravated sentence.

5. My attorney has told me and I understand that even though I have pled guilty to or been otherwise found guilty of the crime of _____, I have the right to deny the facts alleged by the prosecution in support of an aggravated sentence.

6. My attorney has told me and I understand that I am entitled to a trial to either a jury or a judge to determine whether an aggravated sentence may be imposed upon me.

7. My attorney has told me and I understand that at such trial I have the following rights:

a) I am presumed not to be subject to an aggravated sentence.

b) The prosecution must prove facts supporting an aggravated sentence to either a jury or a judge beyond a reasonable doubt.

c) That before a jury could find facts supporting an aggravated sentence, all jurors would have to agree. That means the jury's decision must be unanimous.

d) That at a trial before either a jury or a judge, the prosecution will be required to call witnesses in open court and in my presence, and I, through my attorney, will have the right to question the witnesses.

e) That I may require any witnesses I think are favorable to me to appear and testify on my behalf.

f) That I may testify at such a trial if I wish to, but that if I choose not to testify, neither the prosecution nor the judge could comment to the jury about the failure to testify.

g) That if I admit the facts in support of an aggravated sentence, I will not have a trial to either a jury or a judge.

8. That with knowledge of my right to a trial on the facts in support of an aggravated sentence, I now waive my right to a trial.

9. I now waive my right not to testify and I will tell the judge about the facts which support an aggravated sentence.

Dated: _____

_____
Signature of Defendant

Add a new Appendix F to Rule 15 as follows:

APPENDIX F TO RULE 15

STATE OF MINNESOTA — IN DISTRICT COURT
COUNTY OF _____ — _____ JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

_____
Defendant.

PETITION REGARDING AGGRAVATED SENTENCE BY PRO SE DEFENDANT

TO: THE ABOVE NAMED COURT

I, _____, defendant in the above entitled action do respectfully represent and state as follows:

1. I have pled guilty to or have otherwise been found guilty of the crime of _____.

2. I understand the presumptive guideline sentence for this offense is _____, and I could not be given an aggravated sentence greater than the presumptive sentence unless the prosecution proves facts in support of such an aggravated sentence.

3. I understand the prosecution is seeking a sentence greater than that called for in the sentencing guidelines. Specifically, I understand the sentence in this case will be _____ or will be left to the judge to decide.

4. I understand that although I have pled guilty to or have otherwise been found guilty of the crime of _____, I have the right to deny the facts alleged by the prosecution in support of an aggravated sentence.

5. I understand that I am entitled to a trial by either a jury or a judge to determine whether an aggravated sentence may be imposed upon me.

6. I understand that I have an absolute right to have an attorney represent me at such trial and knowing the consequences of giving up my right to counsel, I waive my right to be represented by an attorney.

7. I understand that at a trial to a jury or a judge to determine if an aggravated sentence may be imposed upon me, I have the following rights:

a) I am presumed not to be subject to an aggravated sentence.

b) The prosecution must prove facts supporting an aggravated sentence to either a jury or a judge beyond a reasonable doubt.

c) That before a jury could find facts supporting an aggravated sentence, all jurors would have to agree. That means the jury's decision would have to be unanimous.

d) That at a trial before either a jury or a judge, the prosecution will be required to call witnesses in open court and in my presence, and that I would have the right to question the witnesses.

e) That I may require any witnesses I think are favorable to me to appear and testify on my behalf.

f) That I may testify at such a trial if I wish to, but that if I choose not to testify, neither the prosecution nor the judge could comment to the jury about the failure to testify.

g) That if I admit the facts in support of an aggravated sentence, I will not have a trial to either a jury or a judge.

8. That with knowledge of my right to a trial on the facts in support of an aggravated sentence, I now waive my right to a trial.

9. I now waive my right not to testify and I will tell the judge about the facts which support an aggravated sentence.

Dated: _____

_____
Signature of Defendant

11. Rule 19.04. Appearance of Defendant Before Court

Amend Rule 19.04, subd. 6 as follows:

Subd. 6. Notice by Prosecuting Attorney.

(1) *Notice of Evidence and Identification Procedures.* When the prosecution has (1) any evidence against the defendant obtained as a result of a search, search and seizure, wiretapping, or any form of electronic or mechanical eavesdropping, (2) any confessions, admissions or statements in the nature of confessions made by the defendant, (3) any evidence against the defendant discovered as the result of confessions, admissions or statements in the nature of confessions made by the defendant, or (4) when in the investigation of the case against the defendant, any identification procedures were followed, including but not limited to lineups or other observations of the defendant and the exhibition of photographs of the defendant or of any other persons, the prosecuting attorney, on or before the date set for defendant's arraignment, shall notify the defendant or defense counsel in writing of such evidence and identification procedures.

(2) *Notice of Additional Offenses.* The prosecuting attorneys shall notify the defendant or defense counsel in writing of any additional offenses the evidence of which may be offered at the trial under any exceptions to the general exclusionary rule. The notice shall be given at the Omnibus Hearing under Rule 11 or as soon thereafter as the offense becomes known to the prosecuting attorney. Such additional offenses shall be described with sufficient particularity to enable the defendant to prepare for trial. The notice need not include offenses for which the defendant has been previously prosecuted, or those that may be offered in rebuttal of the defendant's character witnesses or as a part of the occurrence or episode out of which the offense charged in the indictment arose.

(3) *Notice of Intent to Seek Aggravated Sentence.* At least seven days prior to the Omnibus Hearing, or at such later time if permitted by the court and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

12. Comments – Rule 19

Amend the comments to Rule 19 by adding a new paragraph after the existing twelfth paragraph of those comments as follows:

Rule 19.04, subd. 6(3), which establishes the notice requirements for a prosecuting attorney seeking an aggravated sentence in proceedings prosecuted by indictment, parallels Rule 7.03 which establishes those requirements for proceedings prosecuted by complaint. See the comments to that other rule. Also see Rule 1.04 (d) which defines "aggravated sentence" and the comments to that rule.

13. Rule 26. Trial

Amend Rule 26.01, subd. 1 as follows:

Subd. 1. Trial by Jury.

(1) *Right to Jury Trial.*

(a) Offenses Punishable by Incarceration. A defendant shall be entitled to a jury trial in any prosecution for an offense punishable by incarceration. All trials shall be in the district court.

(b) Misdemeanors Not Punishable by Incarceration. In any prosecution for the violation of a misdemeanor not punishable by incarceration, trial shall be to the court.

(2) *Waiver of Trial by Jury.*

(a) Waiver ~~Generally~~ on the Issue of Guilt. The defendant, with the approval of the court may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

(b) Waiver on the Issue of an Aggravated Sentence. Where an aggravated sentence is sought by the prosecution, the defendant, with the approval of the court, may waive jury trial on the facts in support of an aggravated sentence provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel.

(~~b~~c) Waiver When Prejudicial Publicity. The defendant shall be permitted to waive jury trial whenever it is determined that (a) the waiver has been knowingly and voluntarily made, and (b) there is reason to believe that, as the result of the dissemination of potentially prejudicial material, the waiver is required to assure the likelihood of a fair trial.

(3) *Withdrawal of Waiver of Jury Trial.* Waiver of jury trial may be withdrawn by the defendant at any time before the commencement of trial.

(4) *Waiver of Number of Jurors Required by Law.* At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of a lesser number than that provided by law. The court shall not approve such a stipulation unless the defendant, after being advised by the court of the right to trial by a jury consisting of the number of jurors provided by law, personally in writing or orally on the record in open court agrees to trial by such reduced jury.

(5) *Number Required for Verdict.* A unanimous verdict shall be required in all cases.

(6) *Waiver of Unanimous Verdict.* At any time before verdict, the parties, with the approval of the court, may stipulate that the jury may render a verdict on the concurrence of a specified number of jurors less than that required by law or these rules. The court shall not approve such a stipulation unless the defendant, after being advised by the court of the right to a verdict on the concurrence of the number of jurors specified

by law, personally in writing or orally on the record waives the right to such a verdict.

Amend Rule 26.01, subd. 3 as follows:

Subd. 3. Trial on Stipulated Facts. By agreement of the defendant and the prosecuting attorney, a ~~case~~determination of defendant's guilt, or the existence of facts to support an aggravated sentence, or both, may be submitted to and tried by the court based on stipulated facts. Before proceeding in this manner, the defendant shall acknowledge and waive the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant's presence, to question those prosecution witnesses, and to require any favorable witnesses to testify for the defense in court. The agreement and the waiver shall be in writing or orally on the record. If this procedure is utilized for determination of defendant's guilt and the existence of facts to support an aggravated sentence, there shall be a separate waiver as to each issue. Upon submission of the case on stipulated facts, the court shall proceed as on any other trial to the court. If the defendant is found guilty based on the stipulated facts, the defendant may appeal from the judgment of conviction and raise issues on appeal the same as from any trial to the court.

Amend Rule 26.03, subd. 17 as follows:

Subd. 17. Motion for Judgment of Acquittal or Insufficiency of Evidence to Support an Aggravated Sentence.

(1) Motions Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. After the evidence on either side is closed, the court on motion of a defendant or on its initiative shall order the entry of a judgment of acquittal of one or more offenses charged in the tab charge, indictment or complaint if the evidence is insufficient to sustain a conviction of such offense or offenses. The court shall also, on motion of the defendant or on its initiative, order that any grounds for an aggravated sentence be withdrawn from consideration by the jury if the evidence is insufficient.

(2) Reservation of Decision on Motion. If the defendant's motion is made at the close of the evidence offered by the prosecution, the court may not reserve decision of the motion. If the defendant's motion is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict or is discharged without having returned a verdict. If the defendant's motion is granted after the jury returns a verdict of guilty, the court shall make written findings specifying its reasons for entering a judgment of acquittal.

(3) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal or insufficiency of evidence to support an aggravated sentence may be made or renewed within 15 days after the jury is discharged or within such further time as the court may fix during the 15-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal, in which case the court shall make written findings specifying its reasons for entering a judgment of acquittal. If no verdict

is returned, the court may enter judgment of acquittal. Such a motion is not barred by defendant's failure to make a similar motion prior to the submission of the case to the jury.

Amend Rule 26.03, subd. 18 as follows:

Subd. 18. Instructions.

(1) *Requests for Instructions.* At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to the arguments to the jury, and such action shall be made a part of the record.

(2) *Proposed Instructions.* The court may, and upon request of any party shall, before the arguments to the jury, inform counsel what instructions will be given and all such instructions may be stated to the jury by either party as a part of the party's argument.

(3) *Objections to Instructions.* No party may assign as error any portion of the charge or omission therefrom unless the party objects thereto before the jury retires to consider its verdict. The matter to which objection is made and the grounds of the objection shall be specifically stated. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. All objections to instructions and the rulings thereon shall be included in the record. All instructions, whether given or refused, shall be made a part of the record. An error in the instructions with respect to fundamental law or controlling principle may be assigned in a motion for a new trial though it was not otherwise called to the attention of the court.

(4) *Giving of Instructions.* The court in its discretion shall instruct the jury either before or after the arguments are completed except, at the discretion of the court, preliminary instructions need not be repeated. The instructions may be in writing and in the discretion of the court a copy may be taken to the jury room when the jury retires for deliberation.

(5) *Contents of Instructions.* In charging the jury the court shall state all matters of law which are necessary for the jury's information in rendering a verdict and shall inform the jury that it is the exclusive judge of all questions of fact. The court shall not comment on the evidence or the credibility of the witnesses, but may state the respective claims of the parties.

(6) *Verdict Forms.* The court shall submit appropriate forms of verdict to the jury for its consideration. Where an aggravated sentence is sought, the court shall submit the issue(s) to the jury by special interrogatory.

Amend Rule 26.03, subd. 19 as follows:

Subd. 19. Jury Deliberations and Verdict.

(1) *Materials to Jury Room.* The court shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits which have been received in evidence, or copies thereof, except depositions and may permit a copy of the instructions to be taken to the jury room.

(2) *Jury Requests to Review Evidence.*

1. If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to re-examine the requested materials admitted into evidence.

2. The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

(3) *Additional Instructions After Jury Retires.*

1. If the jury, after retiring for deliberation, desires to be informed on any point of law, the jurors, after notice to the prosecutor and defense counsel, shall be conducted to the courtroom. The court shall give appropriate additional instructions in response to the jury's request unless:

(a) the jury may be adequately informed by directing their attention to some portion of the original instructions;

(b) the request concerns matters not in evidence or questions which do not pertain to the law of the case;

or (c) the request would call upon the judge to express an opinion upon factual matters that the jury should determine.

2. The court need not give additional instructions beyond those specifically requested by the jury, but in its discretion the court may also give or repeat other instructions to avoid giving undue prominence to the requested instructions.

3. The court after notice to the prosecutor and defense counsel may recall the jury after it has retired and give any additional instructions as the court deems appropriate.

(4) *Deadlocked Jury.* The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

(5) *Polling the Jury.* When a verdict on the issue of guilt is rendered and before the jury has been discharged, the jury shall be polled at the request of any party or upon the court's initiative. When the jury has answered special interrogatories relating to an aggravated sentence, the jury shall be polled at the request of any party or upon the court's initiative as to their answers. The poll(s) shall be conducted by the court or clerk of court who shall ask each juror individually whether the verdict announced is the juror's verdict. If ~~the~~either poll does not conform to the verdict, the jury may be directed to retire for further deliberation or may be discharged.

(6) *Impeachment of Verdict.* Affidavits of jurors shall not be received in evidence to impeach their verdict. A defendant who has reason to believe that the verdict

is subject to impeachment, shall move the court for a summary hearing. If the motion is granted the jurors shall be interrogated under oath and their testimony recorded. The admissibility of evidence at the hearing shall be governed by Rule 606(b) of the Minnesota Rules of Evidence.

(7) *Partial Verdict.* The court may accept a partial verdict when the jury has agreed on a verdict on less than all of the charges submitted, but is unable to agree on the remainder.

Amend Rule 26.04, subd. 1 as follows:

Subd. 1. New Trial.

(1) *Grounds.* The court on written motion of the defendant may grant a new trial on the issue of guilt or the existence of facts to support an aggravated sentence, or both, on any of the following grounds:

1. If required in the interests of justice;

2. Irregularity in the proceedings of the court, jury, or on the part of the prosecution, or any order or abuse of discretion, whereby the defendant was deprived of a fair trial;

3. Misconduct of the jury or prosecution;

4. Accident or surprise which could not have been prevented by ordinary prudence;

5. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;

6. Errors of law occurring at the trial, and objected to at the time or, if no objection is required by these rules, assigned in the motion;

7. The verdict or finding of guilty is not justified by the evidence, or is contrary to law.

(2) *Basis of Motion.* A motion for new trial shall be made and heard on the files, exhibits and minutes of the court. Pertinent facts that would not be a part of the minutes may be shown by affidavit except as otherwise provided by these rules. A full or partial transcript of the court reporter's notes of the testimony taken at the trial or other verbatim recording thereof may be used on the hearing of the motion.

(3) *Time for Motion.* Notice of a motion for a new trial shall be served within 15 days after verdict or finding of guilty. The motion shall be heard within 30 days after the verdict or finding of guilty, unless the time for hearing be extended by the court within the 30-day period for good cause shown.

(4) *Time for Serving Affidavits.* When a motion for new trial is based on affidavits, they shall be served with the notice of motion. The opposing party shall have 10 days after such service in which to serve opposing affidavits, which period may be extended by the court upon an order extending the time for hearing under this rule. The court may permit reply affidavits.

14. Comments – Rule 26

Amend the ninth, tenth, and eleventh paragraphs of the comments to Rule 26 as follows:

Rule 26.01, subd. 1(2)(a) (Waiver of Trial by Jury ~~Generally~~ on the Issue of Guilt) is based upon F.R.Crim.P. 23(a), ABA Standards, Trial by Jury, 1.2(b) (Approved Draft, 1968) and continues substantially present Minnesota law (Minn. Stat. § 631.01 (1971)) except that waiver of jury trial by the defendant requires the approval of the court. Rule 26.01, subd. 1(2)(b) establishes the procedure for waiver of a jury on the issue of an aggravated sentence. See Blakely v. Washington, 542 U.S. 196, 124 S.Ct. 2531 (2004) and State v. Shattuck, 704 N.W.2d 131 (Minn. 2005) as to the constitutional limitations on imposing aggravated sentences based on findings of fact beyond the elements of the offense and the conviction history. Also, see Rules 1.04 (d), 7.03, and 11.04 and the comments to those rules. Whether a defendant has waived or demanded a jury on the issue of guilt, that defendant is still entitled to a jury trial on the issue of an aggravated sentence and a valid waiver under Rule 26.01, subd. 1(2)(b) is necessary before an aggravated sentence may be imposed based on findings not made by jury trial.

Rule 26.01, subd. 1(2)(~~b~~c) (Waiver When Prejudicial Publicity)

Under Rule 26.01, subd. 2(2)(~~b~~c), the defendant shall be permitted to waive jury trial if required to assure the likelihood of a fair trial when there has been a dissemination of potentially prejudicial material. (See ABA Standards, Fair Trial and Free Press, 3.3 (Approved Draft, 1968).)

Amend the sixty-eighth paragraph of the comments to Rule 26 as follows:

Rule 26.03, subd. 17 (Motion for Judgment of Acquittal or Insufficiency of Evidence to Support an Aggravated Sentence) abolishing motions for directed verdict, and providing for motions for judgment of acquittal is taken from F.R.Crim.P. 29(a)(b)(c) and ABA Standards, Trial by Jury, 4.5(a)(b)(c) (Approved Draft, 1968). Such a motion by the defendant, if not granted, should not be deemed to withdraw the case from the jury or to bar the defendant from offering evidence. (See F.R.Crim.P. 29(a), ABA Standards, Trial by Jury, 4.5(a) (Approved Draft, 1968).) A defendant is also entitled to a jury determination of any facts beyond the elements of the offense or conviction history that might be used to aggravate the sentence. Blakely v. Washington, 542 U.S. 196, 124 S.Ct. 2531 (2004), State v. Shattuck, 704 N.W.2d 131 (Minn. 2005). If such a trial is held, the rule also provides that the defendant may challenge the sufficiency of the evidence presented.

Amend the comments to Rule 26 by adding a new paragraph after the existing seventy-third paragraph of the comments (referring to Rule 26.03, subd. 18 (5)) as follows:

Rule 26.03, subd. 18(6) (Verdict Forms) requires that where aggravated sentence issues are presented to a jury, the court shall submit the issues to the jury by special

interrogatory. For a sample form for that purpose see CRIMJIG 8.01 of the Minnesota Criminal Jury Instruction Guide. When that is done, Rule 26.03, subd. 19(5) permits any of the parties to request that the jury be polled as to their answers.

15. Rule 27.03. Sentencing Proceedings

Amend Rule 27.03, subd. 1(A) as follows:

(A) At the time of, or within three days after a plea, finding or verdict of guilty of a felony, the court may order a presentence investigation and shall order that a sentencing worksheet be completed. As part of any presentence investigation and report, the court may order a mental or physical examination of the defendant. The court shall also then:

(1) Set a date for the return of the report of the presentence investigation.

(2) Set a date, time and place for the sentencing.

(3) Order the defendant to return at such date, time and place.

(4) If the facts ascertained at the time of a plea or through trial cause the judge to consider a mitigated departure from the sentencing guidelines appropriate, the court shall advise counsel of such consideration.

OFFICE OF THE HENNEPIN COUNTY ATTORNEY

AMY KLOBUCHAR COUNTY ATTORNEY

May 8, 2006

Mr. Frederick Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Boulevard
St. Paul, Minnesota 55155

Re: Comments of a Minority of the Advisory Committee on the Rules of Criminal Procedure and Request to Speak at the Public Hearing on Amendments to the Rules

Dear Mr. Grittner:

Attached please find a document entitled "Minority Report of the Supreme Court Advisory Committee on The Rules of Criminal Procedure on the Proposed *Blakely* Proceedings" on behalf of four members of the Advisory Committee on the Rules of Criminal Procedure.

Although labeled a "minority report," please accept this document as our comments on the proposed rule. We originally planned to file this as a minority report but the chair of the committee asked us to file this as a comment instead. In deference to the chair, we agreed.

Please also accept this as our (my) request to speak at the public hearing on the proposed *Blakely* changes.

Sincerely,

PAUL R. SCOGGIN
Managing Attorney
Violent Crimes Division
Telephone: (612) 348-5161

PRS:ks
Enc.

MINORITY REPORT OF THE SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE ON THE PROPOSED *BLAKELY* PROCEEDINGS

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT.

1. Introduction

The undersigned members of the Advisory Committee want to thank both this Court and our colleagues on the committee for the opportunity to report separately from the majority on the thorny procedural issues posed by *Blakely* and its progeny. We believe the committee has labored long, hard, and in good faith to arrive at a consensus on recommended changes. Nevertheless, because we believe the majority report creates a rule that is impractical and because the remedy it suggests is too harsh, we respectfully ask that this Court adopt a rule that parallels the pleadings rule for complaints and leaves the remedy for rule violations to the discretion of the trial courts.

2. Why the Committee Split on Some of the Proposed Rules

A. Differences over what *Blakely* means

We believe the split in opinion arises out of an underlying difference of opinion about what *Blakely* did.

At least some portion of the majority believes *Blakely* created a new element of the offense, i.e. that an aggravated sentence is simply an extra element added to the traditional definition of a crime.

For example, traditional assault in the third degree simply requires an assault and substantial bodily harm. In the majority view *Blakely* created a new crime; a defacto

"aggravated" assault in the third degree. This new crime requires an assault, substantial bodily harm, and some aggravating factor recognized by the guidelines. For the majority it follows that since the aggravating factor must be proven to a jury like an element, why not treat it like an element for every other purpose.

In this respect the minority acknowledges the majority did compromise its view in not insisting that aggravating factors be part of the complaint. In this view, taken to its extreme, there is no reason to amend the rules at all. If aggravating factors are elements, all of the pleadings and procedures that apply to existing elements apply to the new elements as well. The rules don't require amendment any more than when the Legislature adopts a new crime.

We believe that the United States Supreme Court created or discovered a wholly separate Sixth Amendment right that must be vindicated by a jury trial. For convenience, we've dubbed this the "parallel universe" approach. Put simply, we believe the procedures that vindicate this right must parallel but be separate from the pleadings and practice that relate to complaints.

In some respects we see the majority agrees with us. The committee has carefully crafted a set of waivers in Rule 15 and the plea petition form (Appendix A) (*see* also proposed Rule 26) that parallel but stand apart from the plea and waiver rules for elements of the offense.

We are puzzled however as to why this parallel approach is not satisfactory for initial pleadings. We believe that the rules that allow free amendment of the complaint ought to apply to *Blakely* pleadings as well.

3. We Propose a Parallel to Rule 3.04, Subd. 2

Minn. R. Crim. P. 3.04, subd. 2 contemplates the free amendment of the complaint at any time prior to trial. The rule tacitly recognizes that the charging decision is often made in haste and that new or later emerging circumstances may dictate new or different charges. *See State v. Alexander*, 290 N.W.2d 745 (Minn. 1980); *State v. Smith*, 313 N.W.2d 429 (Minn. 1981). The free amendment rule, without showing good cause applies up to the day of trial absent a showing of prejudice that cannot be remedied with a continuance or other measure. *Nelson v. State*, 407 N.W.2d 729 (Minn. Ct. App. 1987).

We propose a Rule 7.03 that incorporates the flexibility associated with amendments of complaints in Rule 3.04, subd. 2:

> At least fourteen days prior to trial or as soon thereafter as grounds become known to the prosecuting attorney, if the substantial rights of the defendant are not prejudiced, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

We also propose a parallel amendment to the Indictment Rule:

> 19.04, subd. 6(3)
> At least fourteen days prior to trial, or as soon thereafter as grounds become known to the prosecuting attorney, if the substantial rights of the defendant are not prejudiced, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

4. Other Practical Concerns Support a Broader Right to Add or Change the Aggravated Sentence Notice Rules.

Beyond the question of why it should be tougher to change the aggravated sentence notice than change the underlying crime, several practical concerns suggest that linking the sentence notice to trial rather than the Omnibus hearing is a good idea:

A. The "Omnibus" hearing is a moving target at best.

There is no general agreement from judicial district to judicial district of when an Omnibus hearing occurs. Some jurisdictions "stagger" the hearings with a first quick Omnibus hearing designed to triage cases and identify those requiring contested proceedings and scheduling second "real" contested hearings at a later date.

In other jurisdictions (most notably until recently in the Fourth Judicial District), the "real" Omnibus hearing takes place the day of trial. Still other jurisdictions strictly interpret the rule and force contested Omnibus hearings within twenty-eight days of first appearance.

We do not suggest that this non-uniformity of practice is a good thing. We suggest, however, that the majority is linking a very important notice to a hearing that is not uniformly observed across the state. We believe prosecutors will be left guessing at when the notice is really due. We believe the proposed rule, at best, will be honored more in the breach than in the observation.

B. As a practical matter, the Omnibus hearing is too soon to demand the State develop and deliver its sentencing claims.

As the comments presented by the Minnesota County Attorneys Association and Attorney General illustrate, the quick Omnibus hearings contemplated by the rules and granted in some jurisdictions would make it difficult to pursue aggravated sentences. For

example, in violent crime cases in Hennepin County the Omnibus hearings are scheduled in the third week after first appearance. Thus the State would have just ten to fourteen days to give notice and provide underlying grounds for a departure. In Ramsey County the Omnibus hearing (which is really an arraignment) takes place in fourteen days – leaving seven days from first appearance to notice.

A quick review of the sentencing enhancements adopted by the Legislature in the past few years suggests how difficult this can be. The criminal sexual conduct enhancements require some combination of criminal history, recognized guidelines aggravated factors, specific charged offenses, a finding of future dangerousness, amenability to treatment, and the need for long term supervision or the likelihood that such supervision may fail. *See* Minn. Stat. § 609.108-1095.

These statutes are hardly a model of clarity. They clearly contemplate the pre-*Blakely* world with an extended period between trial and sentencing when the court and counsel can sort these complicated issues. To presume, as the majority does, that the State can fairly determine whether to pursue these enhancements (even if the underlying data is available to the State) within two weeks of charging the offense is simply unreasonable.

We urge this Court to be mindful of the fact that aggravating factors and sentencing enhancements attach to the most serious of offenses. These offenders are the most likely to be held in custody and, in turn, are subject to the shortest timetable. In this necessarily compressed schedule, the State simply needs more breathing room to fully and fairly pursue appropriate sentences. We believe the better rule should track the more flexible approach that attaches to complaints.

C. The rules should not adopt a remedy.

We also strongly disagree with the remedy written into proposed Rules 7.03 and 19.04. The majority suggests that this Court shall disallow the notice unless good cause for the delay is shown and the defendant was not prejudiced by the violation.

We believe the rules purposefully shy away from suggesting specific remedies for this violation. The rules are not constitutional in nature and this Court has never imposed a blanket suppression rule as an enforcement mechanism.

As a matter of principle we believe the remedy for a violation should be left to the discretion of the trial courts. Remedies should be measured by a host of factors – the degree of prejudice, the equitable positions of the parties, the intentional nature of the omission, the history or pattern of conduct, and, most importantly, alternatives short of suppression to ameliorate the harm – that no rule can fully accommodate. We believe trial judges are in the best position to gauge an appropriate response to these factors and the rigid language suggested by the majority should not control.

D. The "good cause shown" standard is cumbersome and unnecessary.

Likewise, we believe the "good cause shown" language urged by the majority is impractical and unreasonable. If the majority language is adopted, exceptions will outnumber the rule. Unless a defendant is prejudiced, it seems unreasonable and wasteful to make the parties schedule a hearing to show good cause in every case. We believe the better rule reserves those hearings to cases where an actual harm occurs. Again, we cannot understand why a higher standard should apply to sentencing notices than attaches to the complaint in the first place. The prejudice rule has adequately protected

defendants in the context of a complaint, therefore we believe the simple prejudice rule should suffice for sentencing notices as well.

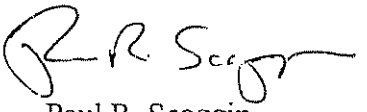
5. Conclusion

We believe *Blakely* can be reasonably and clearly accommodated by creating a set of rules that parallel the rules relating to complaints. We believe similar notice requirements will be easy to understand for practitioners and leave the State with sufficient time to make a fair determination whether to pursue an aggravated sentence.

We also urge this Court not to get into the business of writing rule violation remedies into the rules themselves. Trial courts have long experience in reaching remedies on a case-by-case basis. The majority "one size fits all" approach is unreasonably rigid. We suggest a more flexible approach that lets the remedy fit the harm.

Finally, we also suggest rejection of the "good cause shown" requirement above and beyond prejudice. Unless some harm attaches, there is no good reason to force the State to trot out the myriad reasons that may cause delay. Just as the simple prejudice standard regulates the amendment of complaints, the prejudice standard should regulate departure notices.

Respectfully submitted,



Paul R. Scoggin
Kathryn Keena
William Klumpp
James W. Donehower

Dated: March 1, 2006

COMMENTS ON PROPOSED AMENDMENTS TO
THE RULES OF CRIMINAL PROCEDURE DATED 7 MARCH 2006

I agree that the decisions in Blakely and Shattuck create a situation where this court needs to consider procedures for implementing the right to present evidence to the fact finder concerning reasons for sentencing departures. However, the court does not have to discard the entire history of criminal procedure in Minnesota to allow necessary changes.

This unfortunately is what the Rules Committee is proposing in their revisions to Rule 7, Sentencing decisions, both pre and post the adoption of the Minnesota Sentencing Guidelines, have occurred subsequent to the conviction of the individual charged with an offense. There has not been any rule that required the State to furnish advance notice of intent to move the court for a departure from the guidelines sentence, nor for that matter has the accused been required to do so. Currently Rule 27.03 provides the procedures for sentencing hearings, This process has successfully functioned for many years without challenge.

Now we find the Rules Committee has rather opportunistically seized upon the Blakely decision as an excuse to propose a major change in the procedure. The committee is suggesting that plea negotiation considerations should drive the timing of a decision by the state to ask for a departure from the guidelines and the procedures for presenting the facts supporting such a departure to the fact finder. But what does the committee say is wrong with the current practices, I see nothing to suggest that current plea negotiations were somehow circumscribed by the lack of a rule providing for notice prior to conviction. I certainly recognize that the argument exists, based on Justice Scalia's use of "element", that pleading and proving the aggravating factors would be part of the charging decision, but that is not resolved by the proposed notice timing. That is, if it is part of charging then it needs to be part of the complaint not notice occurring during the pendency of the proceeding.

Were this proposal simply a benign amendment to the rules making no substantial change in the rights of the state and victims of crimes it would perhaps be acceptable, but it isn't. The decision to propose a departure from the guidelines sentence may very well occur only after the elaboration of the facts of the crime during the trial, or as part of the presentence investigation subsequent to the conviction. This is recognized in the current Rule 27.03 Subd 1 (A) (4) (See also 631.20 Hearing on Punishment) "If the facts ascertained at the time of a plea or through trial cause the judge to consider departure from the sentencing guidelines appropriate, the court shall advise counsel of such consideration." The committee proposes amending this rule to retain such ability for mitigated departures; however, for an aggravated departure it would require the prosecution to have arrived at this conclusion far earlier in the proceeding, unless, it was able to convince the court that good cause for later notice is present and the defendant was not unfairly prejudiced. The proposal strips the court of it's authority to hold a sentencing hearing on its own motion, again the committee does not include it's rational for limiting the courts authority. I am not presenting arguments on behalf of the trial

bench but I would amaze me if they were not disturbed by this limitation on their right to sentence based on facts before them not with standing the position of the prosecution. The public has a right to be protected from offenders who are substantially more dangerous than the norm, if that is only disclosed during trial or in the PSI, how does the court explain, "that it cannot sentence based on the facts, but only if the state moved for such departure". The ability of the trial court to limit the states ability to present facts to a jury and then argue for departure, while it may appeal to the trail bench since then the decision not to depart is made on procedural grounds rather than evidentiary is not in the best interests of the criminal justice system. The singular responsibility of the court is to impose sentence, that decision should be made in the full light of public view after presentation of the arguments of the state and the defense, this proposal hides it in the fog of a pretrial order.

Also the recognized right of the victims of a crime to be heard in open court on the sentencing of the defendant is now limited by the ability and willingness of the court and prosecution to propose a departure. That is, if the state has limited its ability to propose departure by a plea agreement, the comments of the victim not supporting that decision are now meaningless, since the court would not have the ability to depart on its own motion.

The proposal to amend the rules in Section 19.04 (3), while consistent with the amendments to Rule 7.01 is inconsistent with the nature of a Grand Jury. In a proceeding instituted by complaint the probable cause decision is made by the court, in a proceeding instituted by indictment the probable cause is determined by the Grand Jury. In order to be consistent with the decisions holding that the court does not redetermine probable cause after an indictment it is logical that any decision concerning the existence of facts supportive of a aggravated departure should be made by the Grand Jury, either as part of the indictment or subsequent in a separate proceeding.

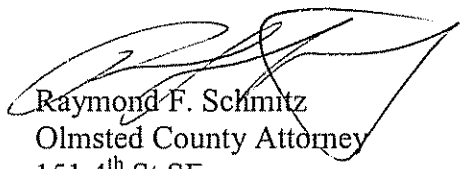
I will not unduly lengthen these comments by proposing specific language, suffice it to say that I encourage the court to not change the long standing ability of the prosecution or the court to argue (recognizing the need to obtain a fact determination) at any point prior to actual sentencing that departure is warranted. The necessary fact determination should be subject only to procedures for presentation and not limited to time; while interests of economy may argue for presentation during the initial guilt determination, the proposed modifications recognize that there will be cases where this is not possible, equally the state should have the right to cause the impaneling of a subsequent jury or recalling of the initial panel when it moves for departure.

If the court determines to create this discriminatory procedure recommended by the committee it needs to recognize the right of the state to obtain review of this decision of the trial court during the pendency of the case. I propose that the language of MRCP 28.04 be modified to specifically provide for such appeal right.

In summary this proposal is a substantial modification of the procedures that have existed in Minnesota for the entire history of the state, the committee has shown no good reason

for such modification in it's report, I encourage the court to limit the changes to those necessary to implement the requirements of the supreme court rulings procedurally.

Respectfully Submitted;



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13 May 2006

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THE MINNESOTA

COUNTY ATTORNEYS

ASSOCIATION

May 15, 2006

Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Dr. Rev. Martin Luther King Jr. Boulevard
St. Paul, Minnesota 55155

Dear Mr. Grittner:

I am writing to request an opportunity to make an oral presentation at the Minnesota Supreme Court hearing on May 23, 2006, to consider the report of the Supreme Court Advisory Committee on Rules of Criminal Procedure, filed March 7, 2006. I am requesting to address the Court on behalf of the Minnesota County Attorneys Association (MCAA).

The enclosed memorandum offers comments on behalf of the MCAA for consideration by the Supreme Court.

Thank you for the opportunity to address the Supreme Court regarding the proposed amendments to the Rules of Criminal Procedure.

Sincerely,

Susan Gaertner

Susan Gaertner
Ramsey County Attorney
President, Minnesota County Attorneys Association

Enclosures

C1-84-2137

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED AMENDMENTS
TO THE MINNESOTA RULES OF CRIMINAL PROCEDURE

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT

Thank you for the opportunity to address the Court at the May 23, 2006, hearing on the Proposed Amendments to the Rules of Criminal Procedure. The following written remarks are intended to summarize and supplement my oral presentation and to share with you the concerns and recommendations of the Minnesota County Attorneys Association (MCAA).

First, I would like to report that the MCAA Board of Directors, at a meeting on April 21, 2006, endorsed the Minority Report of the Supreme Court Advisory Committee on the Rules of Criminal Procedure on the Proposed Blakely Proceedings. The Minority Report, dated March 1, 2006, offers thoughtful analysis and recommendations on the proposed rules. We urge the Court to give serious consideration to the Minority Report.

Second, I would like to reiterate comments that were presented to the Supreme Court Advisory Committee on the Rules of Criminal Procedure by John Kingrey, executive director of the MCAA, in a memorandum dated February 17, 2006. These comments focused on the notice requirement when the prosecutor intends to seek an aggravated departure.

The MCAA believes that requiring notice of departure factors seven days before the Omnibus Hearing -- and the consequences of late notice -- are unreasonable, impractical, unnecessary, and not in line with other notice requirements. While everyone would agree that reasonable notice is appropriate, an arbitrary requirement of seven days prior to the Omnibus Hearing coupled with the severe consequences of failure to meet the timeline would not appear to serve the needs of justice. It is impractical to expect a prosecutor to give notice of intent to seek a departure until all evidence (including DNA) is in, disclosure is complete (including *Spreigl*), the defendant's full criminal history score is determined (which can often take months, especially if there is an out-of-state record), and the prosecutor has had the opportunity to interview the victim (where details

meriting departure often emerge). It is only at this point that the prosecutor is in a position to assess the strength of the evidence, whether aggravated departure should be sought, and, if so, what the factors are.

The time requirements of the current proposal for *Blakely* notice are also far more restrictive than for other criminal rules such as: discovery, amendment of a complaint, *Spreigl*, hearsay (under the catch-all exception), evidence of the victim's prior sexual conduct, etc. The proposed rule would appear to place more restrictions on seeking sentencing departures than on amending the charge itself.

The mandate of the last sentence of proposed Rule 7.03 that the court *shall* disallow notice given fewer than seven days prior to the Omnibus Hearing if the defendant establishes unfair prejudice is particularly onerous because it omits consideration of continuance as an alternative, starts with a presumption in favor of exclusion and links this ultimate bar not to a trial date but to a hearing that may be months from trial. It is unfair to bar the state from seeking upward departure merely because the Omnibus Hearing date has passed, especially when the trial date itself is repeatedly continued, because the passage of the Omnibus Hearing date has no legitimate bearing on lack of time to prepare a defense. Many of our concerns would be alleviated if the last sentence were deleted.

In addition, in some counties the arraignment that takes place two weeks after the initial appearance is called the Omnibus Hearing, and no trial attorney is even assigned to the case until after arraignment (let alone had the opportunity to assess departure factors in the case).

As written, in order to protect against the severe sanctions of this rule, prosecutors will have to file far more and overly broad *pro forma* departure notice checklists than a thoughtful, reasoned assessment at a later date would allow. In our view, allowing more time for both reasoned assessment and negotiations after evidence is in would result in fewer and better departure motions.

A more practical solution would be to reverse the presumption and allow a departure motion at any time *unless* the defendant can establish that notice is so late it will unfairly prejudice his ability to defend against it and continuance is not an adequate remedy. Alternatively, if some time limit is deemed necessary, it should be linked to trial date, not Omnibus Hearing date. This is not simply a question of prosecutor preference. The strong public interest in having the sentence fit the crime would be undermined by a system that forecloses that result due to arbitrary and unreasonable time limits.

The MCAA also would like to comment on the proposed change to Rule 11.04. Either the rule itself, or the comment to it, should make clear that the trial court is making a ruling of law, not a finding on sufficiency of the evidence. Under *Blakely*, any fact-finding on upward departure is entirely for the jury. This pretrial hearing should be based

on an offer of proof, not the taking of the testimony of witnesses. Construing this rule to authorize pretrial "mini-trials" on departure factors could place even greater and totally unnecessary stress on victims and their families before there is any finding of guilt that would make this testimony relevant. *State v Rud,* 359 N.W. 2d 573, 578-9 (Minn. 1984).

Probable cause for issuance of a complaint is routinely based on sworn facts in the complaint, supplemented, if needed, by additional reports. Probable cause for *Blakely* fact-findings by a jury should be treated no differently. Otherwise, the risk is that such a "mini-trial" could be used either to intimidate trial witnesses or as an opportunity for pretrial deposition. No legitimate defense purpose is served by such pretrial testimony since the jury is required to find such factors by proof beyond a reasonable doubt only if the state has first proved the defendant committed the crime charged. Even if so proved, the trial court is free to disregard the finding and impose no upward departure.

The MCAA appreciates the enormous challenges that the *Blakely* decision poses for all stakeholders in our system of justice. Thank you for considering our comments.

Respectfully Submitted,

Susan Gaertner

Susan Gaertner
Ramsey County Attorney
President, Minnesota County Attorneys Association

Dated: May 15, 2006

C1-84-2137

STATE OF MINNESOTA
IN SUPREME COURT

IN RE: REPORT OF THE SUPREME COURT ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE REGARDING *BLAKELY* ISSUES

SUBMISSION OF THE MACDL TO THE MINNESOTA SUPREME COURT REGARDING THE PROPOSED CHANGES TO THE MINNESOTA RULES OF CRIMINAL PROCEDURE

INTRODUCTION

The Minnesota Association of Criminal Defense Lawyer's (MACDL) is an organization of criminal defense lawyers consisting of public defenders and lawyers in private practice from around the state. The MACDL is the largest private organization of criminal defense lawyers in the state. As an organization, the MACDL provides criminal defense lawyers with educational seminars, provides opportunities for criminal defense attorneys to share work experiences and provide assistance to one another, coordinates lobbying efforts on behalf of the criminal defense bar, and acts as a vehicle through which the criminal defense bar can be heard.

The MACDL applauds the efforts of the Criminal Rules Advisory Committee in tackling the procedural issues raised by the United States Supreme Court's *Blakely* decision. The MACDL believes that the proposed rules changes reflect a well thought out compromise between various positions. As proposed, they are fair to the State, are fair to defendants, and can easily be implemented by the courts while retaining enough flexibility so that the district courts can deal with individual difficult cases as unusual circumstances require. In adopting the necessary rules changes required by *Blakely*, it should be remembered that these rules are going to be applied to thousands of cases each year. While most of these cases will not proceed to trial, the proposed rules changes need to be implemented so that the potential sentencing enhancement issues are squarely addressed up front by the State, the Defense, and the Court whether the case

is resolved by negotiated plea or ultimately at a trial. The MACDL believes that the proposed rules changes strike a fair balance: on the one hand they are fair to the defendants yet on the other hand are not overly burdensome to the State or the Court. Accordingly, the MACDL requests that the proposed rules changes be adopted by the Minnesota Supreme Court.

NOTICE

The MACDL believes that requiring that the State provide notice of its intent to seek an aggravated sentence seven days before the omnibus hearing is a sensible solution to the notice issue. Since the advisory committee was proceeding on the assumption that the aggravating sentencing factors are not akin to elements of the offense (or they would need to be set forth in the complaint or indictment), then providing notice seven days before the omnibus hearing makes practical sense. [1] In most jurisdictions, the so-called "omnibus hearing" is held a month or so after the defendant's initial appearance in court. By this time, the prosecutors should easily be able to identify the potential aggravating sentencing factors that may apply in a particular case and the State should have an idea whether they may seek a sentence outside the presumptive guideline range based on aggravating factors in the case.

The MACDL does not believe that the argument that the county attorneys need more time to determine the existence of potential aggravating sentencing factors has merit. In the most cases, the potential aggravating sentencing factors can easily be identified by the time the complaint is filed given the nature of the offense and the specific facts of the case. Most of the usual aggravating sentencing factors are victim related or deal with the unique circumstances of the case. Most of the usual aggravating factors, such as vulnerable victim, zone of privacy,

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1 As recognized by the advisory committee, there are divergent opinions whether *Blakely* ultimately will require that sentencing enhancements be treated as elements of the offense. That issue will likely be determined in the near future by decisions from the United States Supreme Court and/or this Court. For purposes of this submission, the MACDL assumes that sentencing enhancement factors are not elements of the offense, otherwise they would need to be set forth in the complaint or indictment.

unusual cruelty, major economic offense, repeated acts over a long period of time, etc., are easily identified at the time of charging. Accordingly, it is not a valid justification that the existence of these potential aggravating sentencing factors and an intent to seek a departure outside the guideline range cannot be determined a week before the omnibus hearing. As recognized by the Advisory Committee Report, the omnibus hearing is a logical time for such notice and is the time that plea negotiations are most likely to begin. Moreover, the rules, as proposed, do provide enough flexibility such that in unusual cases where the prosecution subsequently discovers a basis for departure unknown to it at the time of the omnibus hearing, the State can still subsequently request an aggravated sentence. In short, providing notice seven days before the omnibus hearing is a fair, workable and practical solution which should be adopted by the Minnesota Supreme Court.

The MACDL vigorously opposes the alternate proposal to provide notice fourteen days before trial. Before making a decision whether to proceed to trial, the defendant and defense counsel need to know what the potential sentence may be if the defendant proceeds to trial and is convicted. Defendants and their attorneys cannot make this decision in a vacuum and waiting two weeks before trial does not provide enough time to make this important decision. Moreover, in this post *Blakely* judicial landscape, once a defendant has made a decision to proceed to trial or negotiate a deal with sentencing factors unresolved, the defendant and his attorney now have some very difficult and problematic procedural decisions governing how the case will be handled. Decisions on the procedural issues which follow the state's notice to seek an aggravated sentence should not have to be rushed in the two weeks before trial. The decision whether to bifurcate, waive, stipulate, or try to the court the sentencing factors, the manner and method of contesting the aggravating sentencing factors during the trial or subsequent sentencing

proceedings, and how to deal with them in terms of structuring a plea agreement cannot and should not be left to the two weeks before trial. These need to be discussed, strategized, and agreed to by the defendant and the defense attorney. The proposal to provide notice fourteen days before trial is impractical and unworkable. Accordingly, the MACDL requests that the Minnesota Supreme Court reject that proposal.

The MACDL also supports the dual standards of "good cause shown" and lack of "prejudice to the defendant" to guide the district courts in determining under what circumstances the State will be allowed to provide notice of an intent to seek an aggravated sentence later in the process, i.e., after seven days before the omnibus hearing. Both of these standards are familiar to the district courts, and both are necessary to ensure that the notice provisions are adhered to while providing flexibility for the exceptional case. If a notice provision is enacted, it should be implemented with the expectation that it will be scrupulously followed. Otherwise, there is inherent risk that the state will routinely invoke the "no prejudice to the defendant" standard and thereby effectively eviscerate the timely notice requirements. The functional practicalities of any such notice requirement are that if it is easily discarded or ignored, it will be. This is an important enough issue that the exceptions need to be true exceptions. The district courts need clout to enforce the rule and the "for cause shown" standard is an effective tool to implement the rule and see that it is followed. The MACDL requests that the Minnesota Supreme Court adopt the dual standards of "good cause shown" and "prejudice" as set forth in the proposed rule.

EVIDENTIARY HEARING AND DECISION TO BIFURCATE

Providing for an evidentiary hearing to contest the potential of an aggravated sentence necessarily follows implementation of the notice rule. Defendants must have some procedural mechanism to raise challenges in those cases in which the basis for the enhanced sentence are

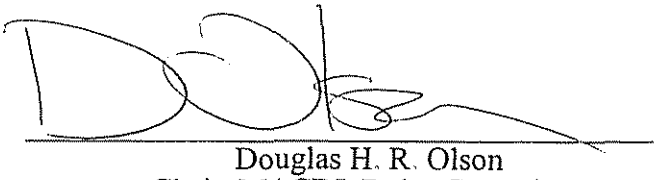
legally faulty or factually insufficient and where such determination can be made by the court in advance of trial.

Similarly, the determination as to whether the issues will be presented to the jury in a unitary or bifurcated trial should be disposed of at this hearing. The MACDL believes that the decision to proceed by way of unitary or bifurcated trial needs to be determined in every case and that there should not be a "default" provision. In addition to the unitary versus bifurcated trial decision, it is believed that the any issues of jury waiver, trial to the court, and stipulations, should also be determined at this hearing.

Finally, the MACDL concurs with the remaining suggested procedural rule changes which are functionally necessary in order to implement *Blakely* including: the revision of the rights advisory, the revisions of the plea petitions, the revision providing a challenge for insufficiency of the enhancement evidence, and the amendments to the verdict forms and motions for a new trial.

CONCLUSION

The MACDL feels strongly that the approach taken by the Advisory Committee on the Rules of Criminal Procedure was well thought out and provides a fair and workable solution to the issues raised by *Blakely*. The MACDL requests that the Minnesota Supreme Court adopt the proposed revisions to the Rules of Criminal Procedure as noted in this submission.



Douglas H. R. Olson
Chair, MACDL Rules Committee
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Minneapolis, MN 55402
(612) 340-8991

Dated: May 15, 2006

C1-84-2137

STATE OF MINNESOTA

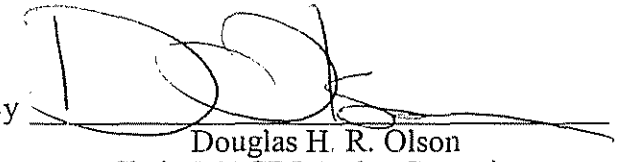
IN SUPREME COURT

IN RE: REPORT OF THE SUPREME COURT ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE REGARDING *BLAKELY* ISSUES

REQUEST TO MAKE AN ORAL PRESENTATION

The Minnesota Association of Criminal Defense Lawyers (MACDL) requests the opportunity to make an oral presentation to the Minnesota Supreme Court on the proposed *Blakely* amendments to the Minnesota Rules of Criminal Procedure. The MACDL requests an opportunity for two attorneys to present to the court the MACDL's position on the proposed *Blakely* amendments, as set forth in the MACDL's written submission. Each attorney requests a maximum of fifteen minutes to make their presentation.

The two attorneys will be Douglas Olson, Chair of the MACDL's Rules Committee, and another MACDL member to be determined. The MACDL appreciates the opportunity to be heard before the Minnesota Supreme Court on those important proposed procedural issues.

By 

Douglas H. R. Olson
Chair, MACDL Rules Committee
33 South Sixth Street, Suite 4900
Minneapolis, MN 55402
(612) 340-8991

Dated: May 15, 2006

C1-84-2137
STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Proposed Amendments to the Rules of Criminal Procedure

REQUEST TO MAKE ORAL PRESENTATION

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT.

David S. Voigt, Assistant Attorney General, hereby requests to make an oral presentation at the hearing to consider proposed amendments to the Rules of Criminal Procedure on May 23, 2006 at 9:00 a.m. at the Minnesota Judicial Center.

Dated: May 15, 2006

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota

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C1-84-2137
STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Proposed Amendments to the Rules of Criminal Procedure

WRITTEN STATEMENT REGARDING PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT.

I. INTRODUCTION

As a result of the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), aggravating sentencing factors under Minnesota's Sentencing Guidelines must now be submitted for determination by jury. The procedures adopted by this Court will be essential to ensuring fairness to the state and to defendants in submitting aggravating factors to juries. It is also important that the rules adopted reflect the intent of the legislature in its decision to continue to implement the Minnesota Sentencing Guidelines while accommodating *Blakely's* constitutional mandate that aggravating sentencing factors be determined by juries.

These comments will focus on the recommendation of the Supreme Court Advisory Committee on Rules of Criminal Procedure (the Committee) for the prosecution's notice of aggravating sentencing factors in a proposed Rule 7.03:

> **Rule 7.03. Notice of a Prosecutor's Intent to Seek an Aggravated Sentence**
>
> At least seven days prior to the omnibus hearing, or at such later time if permitted by the court upon good cause shown and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or

statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

The rule proposed by the Committee is impractical because it requires notice far too early in the process. Furthermore, the rule imposes a "good cause" standard for allowing notice at a later time, thus incorporating a remedy for missing the deadline which is much too harsh.

The Committee's report also contains alternative language suggested by a minority of the Committee which reads:

> At least fourteen days prior to trial, or as soon thereafter as grounds become known to the prosecuting attorney, if the substantial rights of the defendant are not prejudiced, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

The minority proposal is much more practical and consistent with other notice requirements in the rules. At the same time, the minority proposal fully protects a defendant's right to meet, prepare, and defend against allegations of aggravating sentencing factors.

II. THE COMMITTEE'S RULE IS IMPRACTICAL BECAUSE IT DOES NOT PROVIDE ADEQUATE TIME FOR PROSECUTORS TO FILE NOTICE OF AGGRAVATING SENTENCING FACTORS, OR TO MODIFY THE NOTICE.

As proposed by the Committee, Rule 7.03 would require that the prosecution notify defense counsel in writing of an intent to seek an aggravated sentence at least seven days prior to the omnibus hearing. The requirement that written notice come at least seven days before the omnibus hearing, however, is much too early in the process and may prove unduly burdensome. In many cases, the grounds for aggravating factors are not immediately known and many aspects of the investigation, such as laboratory analysis, are not immediately available. A more practical deadline for requiring notice of aggravating factors would occur later in the process, such as a pretrial conference scheduled at the discretion of the trial judge, or a deadline tied to the trial date rather than the omnibus hearing.

In most counties throughout the state, the omnibus hearing is scheduled very early in the process, much too early to expect the prosecutor to consistently have full knowledge of all facts in all cases. Where an arrest is made immediately, defendants often make their first appearance in court on the day of or the day after the offense. *See* Minn. R. Crim. P. 4.02, subd. 5(1) (requiring an appearance before a judge within 36 hours after the arrest). Pursuant to Rule 5.03, first appearances in court are often combined Rule 5 and Rule 8 hearings. Under Rule 8 the omnibus hearing must be held within 28 days, but scheduling practices in many counties put the omnibus hearing on the calendar much sooner. For a case in which an omnibus hearing is scheduled within fourteen days of a combined Rule 5 and Rule 8 hearing, a prosecutor could have as little as one week from the date of offense to file notice of aggravating factors under the Committee's rule.

The standard proposed by the Committee is not practical because in many cases it requires the prosecution to file notice of aggravating factors before all of the evidence is in. This is especially true in the most serious cases involving violent crime, such as assault with weapons, sexual assault, and murder. These are the types of cases most likely to involve aggravated sentencing factors. These cases often involve laboratory analysis for DNA and other evidence, which usually takes months before completion. Outside of Hennepin and Ramsey Counties, there are only two forensic crime laboratories, both operated by the Bureau of Criminal Apprehension (BCA), to serve the entire state. Because of the volume of requests from the counties, the BCA labs are often unable to complete all analysis until after a trial date has been set.

In many cases involving violent crime, factors justifying upward departure do not become known until the prosecutor has had an opportunity to meet with the victim. For a variety

of reasons, including hospitalization, debilitating injury, and emotional trauma to the victim, prosecutors do not and should not meet with the victim too soon.

Some departure factors, such as the statutory enhancements for sex offenders in Minn. Stat. §§ 609.108-1095, require evidence of not only the aggravating factors recognized in the guidelines, but also the offender's prior criminal history, future dangerousness, and need for treatment. If prior convictions come from a different state it can take months to determine a defendant's full criminal history.

All of these factors demonstrate how impractical a deadline tied to the omnibus hearing date would be. One danger in creating an unnecessarily early deadline is that in order to meet it, prosecutors may file boilerplate notices of aggravating factors in far more cases than would actually merit departure. It is much easier and safer to withdraw a prematurely filed notice than it is to wait and file notice after a deadline has passed. Of course, this practice would be counterproductive because it fails to give accurate notice to defendants of which factors the prosecution will actually pursue at trial. The better rule would allow enough time for an accurate and reasoned notice in the first place.

Another problem with tying the deadline for giving notice of aggravating factors to the omnibus hearing date is that the timing of omnibus hearing dates are not uniform from county to county, or even within the same county. Different scheduling practices among the various counties can be quite diverse. As a result, the difficulty in meeting the deadline will vary for different prosecutors across the state.

In some counties, there is often more than one omnibus hearing date scheduled. The first is scheduled rather quickly as a short hearing in which the defense merely advises the court and the prosecution whether they intend to raise any contested issues. If no issues are raised, the

court sets a trial date and possibly a date for a pretrial conference. If contested issues will be raised, the court sets a second omnibus hearing on a "contested" calendar, which may be months in the future. For prosecutors in these counties, the rule proposed by the Committee does not clarify which omnibus hearing the notice of aggravating factors is tied to. As a practical matter, prosecutors in these counties will probably have to file notice a week before the first omnibus hearing because if the defense shows up and waives omnibus issues, a second omnibus hearing will not be scheduled and it will be too late to meet the deadline.

In some counties, the 28-day requirement of Rule 8 is strictly followed and all omnibus hearings are held within that time frame. In many counties, the court will inquire at the Rule 8 hearing whether the defendant is willing to waive the 28-day requirement. If the defendant waives, the omnibus hearing could be scheduled months out. If not, the omnibus hearing could be scheduled on the earliest available court date within 28 days. Often, the decision turns on whether the defendant is in custody. Again, the result is that the deadline for filing notice of aggravating factors can come at drastically different times for different cases, which seems almost arbitrary.

The timing of the notice for aggravating factors in the rule proposed by the Committee is stricter than most other notice requirements within the Rules of Criminal Procedure and the Rules of Evidence. Notice of aggravating factors is certainly important, and defendants should have a full and fair opportunity to defend against such allegations, but the Committee's rule seems to elevate the importance of early notice above all else, including the charge itself.

Under Rules 3.04 and 11.05, the charges in the complaint can be amended at any time up until the day of trial. There is no valid reason why notice of aggravating sentencing factors should have to come a week before the omnibus hearing when the charges themselves may be

amended at any time. Likewise, virtually all other notice requirements under the rules allow notice to be made at a later point in the process than the Committee's rule on notice of aggravating factors. These include notice of all evidence, witnesses, and defenses under Rules 9.01 and 9.02, notice under Rule 7.02 of intent to introduce Spreigl evidence, notice of evidence of the victim's prior sexual conduct under Minn. R. Evid. 412, and notice of hearsay evidence under the catchall Rules 803 and 804.

The minority approach is much more rational because it ties the notice of aggravating factors to the trial date. This approach is more uniform in that it affects all defendants and prosecutors equally. It allows defendants a reasonable period of time to prepare a defense and it allows prosecutors the necessary time to consider all evidence and give a specific and rational notice.

III. THE RULE SHOULD NOT INCLUDE A REMEDY FOR FAILURE TO SERVE TIMELY NOTICE.

A rule for giving notice of aggravating factors should not include a remedy for violation of the rule. Aggravating sentencing factors are fact-based circumstances, and these circumstances come to light in a wide variety of ways. The timing of notice by the prosecutor will affect different cases in very different ways. For these reasons, the rule for giving notice of aggravating factors is not well suited to include a uniform remedy for its violation.

If a prosecutor gives notice of an aggravating factor after the rule's deadline, trial courts need to ensure that the delay in notice does not cause unfair prejudice to the defendant. This can be accomplished in a variety of ways, including granting a continuance, imposing limitations on evidence of the aggravating factor, or even disallowing the notice. Trial courts are in the best position to determine the appropriate remedy for violations of the notice rule, and the courts

should not be limited to disallowing the notice where an intermediate remedy would be more appropriate.

The Committee proposes a rule which requires the prosecutor to show "good cause" before a court can allow notice of an aggravating factor after the rule's deadline. If "good cause" is not shown, the trial court must disallow the notice and prevent the jury from making a determination on the aggravating factor. This requirement is cumbersome and unnecessary.

In many cases, notice after the deadline will have little or no effect on preparation of a defense. It would be unnecessary and wasteful to require the parties to schedule a hearing to establish "good cause" in these cases. Moreover, the Committee's proposed rule would encourage unnecessary litigation about what constitutes "good cause" in the context of this rule, when the real issue is whether the delay causes unfair prejudice.

The rules of criminal procedure allow trial courts the flexibility to impose appropriate remedies for rule violations. Remedies should be guided by judicial discretion and should be based upon the circumstances of the individual case. Remedies should not be uniformly imposed by a rigid rule.

IV. CONCLUSION

The *Blakely* decision added a whole new layer to Minnesota's sentencing guidelines by requiring submission of aggravating sentencing factors to juries. To accommodate this constitutional mandate, the legislature provided, "[w]hen the prosecutor provides reasonable notice [of aggravating factors], the district court shall allow the state to prove beyond a reasonable doubt to a jury of 12 members the factors in support of the state's request for an aggravated departure from the sentencing guidelines." Minn. Stat. § 244.10, subd. 5.

In fashioning rules of procedure for submission of aggravating factors, this Court should recognize the state's right to present these factors to the jury. Reasonable notice of the factors the state intends to submit is required, but it does not have to be at an arbitrary date very early in the process. Instead it should be given reasonably in advance of the trial date with enough time for the prosecutor to make a fair and thoughtful determination whether to pursue an aggravated sentence. In cases of late notice, trial courts should be allowed the flexibility to use their discretion and reach remedies on a case-by-case basis.

Dated: May 15, 2006

Respectfully submitted,

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C1-84-2137

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April 21, 2006

Frederick Grittner
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Re: The Report of the Supreme Court Advisory Committee on Rules of Criminal Procedure Relating to Blakely issues.

I am an out-state public defender and handle a variety of criminal cases. I have now been served with three notices of intent to seek upward departure following *Blakely*. I am concerned with the process utilized in these cases.

In particular, I am very concerned with the notices we actually receive. In many instances, the State merely cites some factor which may not even be a recognized Sentencing Guideline factor without explanation. For instance, I have a case where the departure factor is damage substantially more than a "normal" criminal damage to property amount. I have also heard of a laundry list of factors with no explanation being served.

In addition, I have also seen cases where the factor noted is particular cruelty but there is no designation of proof as to that element. Often times, the state notices no additional witnesses to support of this comparative finding. I believe the proposed rules would correctly require not only a recitation of a factor but also a factual basis for the factor to properly indicate the nature of the factor and the factual support. The factual basis requirement will eliminate the laundry list of potential factors.

I am also concerned with the timing of notice of intent to seek an upward departure. I have seen one prosecutor claim they can notice intent after a determination of guilt. I have also seen notices being served at pre-trial (ten to 14 days before trial) in the event a prior plea offer is not accepted. I believe the proposed amendments correctly place the requirement of notice at 7 days prior to omnibus unless some good cause exists for later notice.

This will allow meaningful settlement discussions early in the case. All the information will be shared within 40 to 50 days of the filing in many of the out-state counties in which I practice. This will also allow the defense to challenge those additional elements of the offense for probable cause at the original omnibus hearing rather than requiring additional hearings because of a late notice.

There is, of course, a concern with the way omnibus is conducted in some counties in that omnibus is within 30 days of trial. This is not enough time to prepare for the additional procedural challenges a *Blakely* trial may entail. There may actually be a need to modify the timing element to be 7 days prior to omnibus or within 60 days of the appearance pursuant to Rule 8, whichever is earlier for those counties.

As public defenders, we have been attempting to prepare ourselves for the new frontier that is a *Blakely* trial. To date, we have very little guidance on how to adequately represent our clients in a *Blakely* situation.

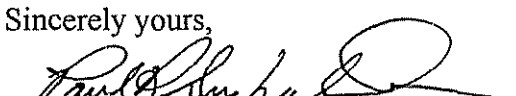
In looking at the overall trial, however, a number of issues become readily apparent. One is the challenge of voir dire. We have traditionally precluded discussion of punishment from voir dire, opening and closing so as not to sway the jury. A unitary panel with bifurcated argument or receipt of evidence, however, places that precise issue before that panel at some point in the trial. Thus, it may be necessary to revisit the issue of discussion of punishment before the jury, especially if unitary panels are to be used.

In addition, the limited experience in the State thus far raises some practical concerns. The preference appears to be unitary panels, even if bifurcated for argument or presentation of additional evidence. In those cases where either the State or the Defense will present additional evidence, those witnesses are essentially placed in standby even if the distances for some of these out-state trials can be substantial.

In a "normal" trial we can attempt to predict when a witness will be called. Because we are essentially waiting on the return of a jury that may take 2 hours or 3 days, we cannot adequately inform witnesses and have them take time off or stay in motels.

Finally, I am most concerned with the impact of *Blakely* trials on the jury process. While in law school, I was allowed to sit as a panel member on a criminal sexual conduct trial. I am sure that we all understand that the reaching of a consensus on guilt, especially in some of the more gut wrenching cases to which *Blakely* trials would normally be considered, involves a certain amount of finality for jury members. Thus, consideration should also be given to modifying the opening instructions to the *venire* for all cases so that expectation is reduced when we know that *Blakely* may require additional findings.

Sincerely yours,



Paul R. Spyhalski