OFFICE OF THE HENNEPIN COUNTY ATTORNEY

AMY KLOBUCHAR COUNTY ATTORNEY

OFFICE OF
APPELLATE COURTS

MAY 1 1 2006

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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.

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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. <u>Other Practical Concerns Support a Broader Right to Add or Change the Aggravated Sentence Notice Rules.</u>

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. <u>The "Omnibus" hearing is a moving target at best.</u>

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

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.

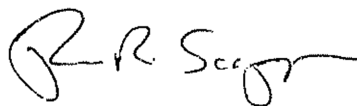
5. Conclusion

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