

**THE APPLICATION OF *BLAKELY V. WASHINGTON* IN  
MINNESOTA: AN ANALYSIS OF *STATE V. SHATTUCK* AND  
*STATE V. HOUSTON***

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## I. INTRODUCTION

On June 24, 2004, the United States Supreme Court created uncertainty and confusion in the criminal justice system regarding sentencing at both the state and federal levels with the decision of *Blakely v. Washington*.<sup>1</sup> Suddenly, doubt was cast on the constitutionality and continued validity of sentencing guidelines in state and federal court systems that utilized guidelines.<sup>2</sup> However, the Supreme Court was clear on several issues. First, determinate sentencing structures themselves are not unconstitutional.<sup>3</sup> Second, sentencing guidelines are also not per se unconstitutional.<sup>4</sup> Third, enhanced sentences and plea agreements are constitutional when certain procedures are in place to ensure the defendants' constitutional rights.<sup>5</sup>

While the decision of *Blakely v. Washington* does not directly impact the constitutionality or the structure of the Minnesota Sentencing Guidelines, it does affect certain sentencing procedures pertaining to aggravated departures and specific sentence enhancements.<sup>6</sup> *State v. Shattuck* and *State v. Houston* are examples of decisions of the Minnesota Supreme Court that leave the door open for possible constitutional attacks on certain enhancing statutes while at the same time determining that the Minnesota Sentencing Guidelines are constitutional.<sup>7</sup>

After discussing the facts and decisions of *Shattuck* and *Houston*, this Article gives background information on the Minnesota Sentencing Guidelines.<sup>8</sup> It then gives background on the landmark cases of *Blakely v. Washington* and its predecessor, *Apprendi v. New Jersey*.<sup>9</sup> Next, it discusses the impact these decisions

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1. 542 U.S. 296 (2004).
  2. *See id.*
  3. *See* discussion *infra* Part III.C.
  4. *See* discussion *infra* Part III.C.
  5. *See* discussion *infra* Part III.C.
  6. *See* discussion *infra* Part III.A.
  7. *See* discussion *infra* Parts II, IV.
  8. *See* discussion *infra* Part III.A.
  9. *See* discussion *infra* Part III.B, III.C.

have had on other states with presumptive sentencing guidelines.<sup>10</sup> Finally, this Article addresses how the *Shattuck* and *Houston* decisions will impact the criminal justice system in Minnesota state courts.<sup>11</sup>

## II. STATEMENT OF THE CASES

### A. State v. Shattuck

#### 1. Facts

Robert Shattuck was arrested for the suspected rape of seventeen-year-old R.E. on January 30, 2001.<sup>12</sup> R.E. was walking home after getting off a bus in south Minneapolis, when a man pushing a bicycle approached her from behind, threatened her, and forced her to walk down an alley and then proceeded to sexually assault her.<sup>13</sup> Shattuck was quickly held to be the main suspect in the case.<sup>14</sup> Shattuck subsequently fled to Georgia after his picture was shown on television in connection with the crime; he was arrested there on an unrelated offense.<sup>15</sup> At trial, the State introduced substantial circumstantial evidence, as well as DNA evidence linking Shattuck to the crime.<sup>16</sup>

#### 2. The District Court

During the jury instruction conference, Shattuck argued that, under *Apprendi v. New Jersey*,<sup>17</sup> any aggravating factor that could render an enhanced sentence under the Minnesota repeat sex offender statute needed to be decided by the jury.<sup>18</sup> The court

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10. See discussion *infra* Part III.D.

11. See discussion *infra* Part IV.

12. State v. Shattuck, 704 N.W.2d 131, 134 (Minn. 2005).

13. *Id.* The man took twenty-five dollars from R.E.'s wallet before he penetrated R.E. vaginally with his fingers and penis causing her pain. *Id.* When R.E. asked him to stop, the man threatened her again and continued. *Id.* After the man was finished, he punched R.E. in the face, breaking her jaw. *Id.* The man told R.E. that if she told anybody he would kill her. *Id.*

14. *Id.* Shattuck worked at a nearby restaurant and had gotten off work shortly before the assault. *Id.*

15. *Id.*

16. *Id.*

17. 530 U.S. 466 (2000). *Apprendi* is discussed in detail *infra* Part III.B.

18. *Shattuck*, 704 N.W.2d at 134.

denied this request and Shattuck was subsequently found guilty of two counts of kidnapping, two counts of first-degree criminal sexual conduct, and one count of first-degree aggravated robbery.<sup>19</sup>

When Shattuck committed the offense, first-degree criminal sexual conduct and kidnapping with great bodily harm were both Severity Level Eight offenses under the Minnesota Sentencing Guidelines.<sup>20</sup> The presumptive guideline sentence was a range of 156 to 166 months with Shattuck's criminal history score of nine.<sup>21</sup> The trial court sentenced Shattuck to the presumptive 161-month sentence for the kidnapping as well as an enhanced sentence of a 360-month term for the first-degree criminal sexual conduct pursuant to Minnesota's repeat sex offender statute,<sup>22</sup> due to four aggravating factors being present in the crime.<sup>23</sup>

### 3. *The Minnesota Court of Appeals*

The Minnesota Court of Appeals affirmed Shattuck's sentence, stating that the trial court "acted within its discretion in finding that aggravating factors provided a sufficient basis for sentencing Shattuck under a mandatory-minimum-sentencing statute, and that decision did not violate the holding of *Apprendi*."<sup>24</sup> The court based its argument on *State v. McCoy*,<sup>25</sup> which held that *Apprendi* applies only to situations in which a court sentences a defendant to a term that exceeds the statutory maximum.<sup>26</sup> *Blakely* was then decided while Shattuck's petition for review was pending.<sup>27</sup>

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19. *Id.*

20. *Id.* See *infra* Part III.A. for a discussion of the Minnesota Sentencing Guidelines.

21. *Shattuck*, 704 N.W.2d at 134.

22. The repeat sex offender statute provides that for certain forms of first- and second-degree criminal sexual conduct, the district court shall commit the defendant for no less than thirty years if it finds that (1) an aggravating factor exists and (2) the defendant has a previous conviction for criminal sexual conduct in the first, second, or third degrees. MINN. STAT. § 609.109, subd. 4(a) (2004).

23. *Shattuck*, 704 N.W.2d at 134-35. The court found four aggravating factors: (1) the victim was particularly vulnerable, (2) the victim was treated with particular cruelty, (3) the victim suffered great emotional harm, and (4) the assault was planned. *Id.*

24. *Id.* (citing *State v. Shattuck*, No. 01011914, 2004 Minn. App. LEXIS 349, at \*19 (Minn. Ct. App. Apr. 13, 2004)).

25. 631 N.W.2d 446 (Minn. Ct. App. 2001).

26. *Shattuck*, 2004 Minn. App. LEXIS 349, at \*19.

27. *Shattuck*, 704 N.W.2d at 135.

#### 4. *The Minnesota Supreme Court*

The Minnesota Supreme Court held that, based on the jury verdict alone, Shattuck was only subject to a presumptive sentence of 161 months.<sup>28</sup> When the trial court found that aggravating factors existed in the crime, providing grounds to impose the mandatory minimum thirty-year sentence, it violated Shattuck's Sixth Amendment right to have a jury make that determination upon a reasonable-doubt standard.<sup>29</sup> The court's decision thereby rendered Minnesota Statutes section 609.109, subdivision 4 unconstitutional in its entirety,<sup>30</sup> while the unconstitutional section of Minnesota Sentencing Guideline II.D was severable from its constitutional sections.<sup>31</sup>

While the Minnesota Supreme Court was deciding *Shattuck*, the Minnesota Legislature acted to make sure various Minnesota statutes complied with *Apprendi* and *Blakely*.<sup>32</sup> The Minnesota Legislature amended Minnesota Statutes section 609.109, subdivision 4 to require the factfinder, rather than the court, to determine whether aggravating factors exist that would provide grounds for a mandatory thirty-year sentence as a repeat sex offender.<sup>33</sup> The *Shattuck* court took note of these amendments and stated that "we express no opinion about these recent changes."<sup>34</sup>

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28. *Id.* at 142.

29. *Id.*

30. *Id.* at 142-42. Without the unconstitutional provision, the statute is incomplete and incapable of being executed. *Id.*; see also MINN. STAT. § 645.20 (2004).

31. *Shattuck*, 704 N.W.2d at 144. The court determined that Minnesota Sentencing Guideline II.D is unconstitutional only insofar as it allows the district court to impose an upward departure based on judicial findings. *Id.* The court did not believe that the remaining provisions in the guidelines are "so essentially and inseparably connected with, and so dependant upon" the unconstitutional provision that without it, the remaining provisions would not have been enacted. *Id.* (quoting MINN. STAT. § 645.20). This is mainly based on the *Blakely* decision, which focuses on the procedure of judicial fact-finding for upward departures rather than the substance of determinate sentencing. *Id.*

32. S.F. No. 2273, 84th Leg. Sess. (Minn. 2005).

33. *Id.*

34. *Shattuck*, 704 N.W.2d at 148 n.16.

## B. State v. Houston

### 1. Facts

Gerald Houston was convicted of one count of an attempted first-degree controlled substance crime as well as one count of a fifth-degree controlled substance crime on October 10, 2001.<sup>35</sup> The presumptive guideline sentence for these crimes was eighty and one-half months.<sup>36</sup> The district court departed from the presumptive guidelines, based on the Minnesota Career Offender Statute, and sentenced Houston to 270 months.<sup>37</sup> After the Minnesota Court of Appeals affirmed Houston's upward departure from the presumptive sentence under the Minnesota Sentencing Guidelines, he attempted to collaterally challenge the sentence through the process of postconviction review.<sup>38</sup> The postconviction court upheld Houston's sentence; however, while his appeal of that decision was pending, the U.S. Supreme Court decided *Blakely*.<sup>39</sup>

### 2. The Minnesota Supreme Court

In *State v. Houston*, the Minnesota Supreme Court determined that *Blakely* could be applied retroactively to cases on direct review, but not to cases on collateral review.<sup>40</sup> The Minnesota Court of Appeals ruled that Houston was unable to utilize *Blakely* because the case announced a new rule of constitutional criminal procedure and Houston had exhausted all means of direct appeal at the time *Blakely* was decided.<sup>41</sup>

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35. *State v. Houston*, 702 N.W.2d 268, 269 (Minn. 2005). Houston possessed in his motor vehicle items necessary to manufacture methamphetamine. *Id.*; see MINN. STAT. §§ 152.021, subd. 2(a), 609.17, 152.025, subd. 2(1).

36. *Houston*, 702 N.W.2d at 270. Houston's sentence was based on a severity level of eight and a criminal history score of seven. For a discussion of the Minnesota Sentencing Guidelines, see *infra* Part III.A.

37. *Houston*, 702 N.W.2d at 269-70. The trial court found that (1) Houston had been convicted of at least five previous crimes, and (2) the current crime was committed as "part of a pattern of criminal behavior." *Id.* at 270; see MINN. STAT. § 609.1095, subd. 4.

38. *Houston*, 702 N.W.2d at 270.

39. *Id.*

40. *Id.* at 270-71. Once a defendant has exhausted all of his remedies in state courts, he is allowed to make constitutional challenges through the postconviction review process. MINN. STAT. § 590.01, subd. 1. *Houston* held that *Blakely* could be applied retroactively to a case that was pending on direct appeal, not on appeal from a denial of postconviction relief. *Houston*, 702 N.W.2d at 273.

41. *Houston*, 702 N.W.2d at 270. Houston was denied relief on direct review

Pursuant to the mandates of retroactivity jurisprudence,<sup>42</sup> a new rule does not apply once all direct appeals have been exhausted.<sup>43</sup> Furthermore, the court determined that *Blakely* does not announce a “watershed”<sup>44</sup> rule and is thus not subject to retroactive application on collateral review.<sup>45</sup> In order for a rule to be considered watershed, it must be one without which “the likelihood of an accurate conviction is seriously diminished,” and one that is essential to the fundamental fairness of the proceeding.<sup>46</sup> The court determined that a *Blakely* violation only requires a remand for resentencing rather than a new trial to determine the validity of the conviction.<sup>47</sup> When a *Blakely* violation is made, the likelihood of an accurate conviction is not seriously diminished, making the rule not one of watershed magnitude.<sup>48</sup>

Houston further claimed that the *Apprendi* line of cases requires that all sentencing factors that increase the penalty beyond the punishment available based solely on the jury verdict or guilty plea be treated as underlying elements of the offense.<sup>49</sup> Because elements of an offense must be placed in the charging instrument, submitted to a jury, and found beyond a reasonable doubt, treating sentencing factors as elements implicates “bedrock procedural

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by the Minnesota Court of Appeals, and denied review by the Minnesota Supreme Court. *Id.* The postconviction court also upheld Houston’s sentence. *Id.* This action was an appeal from the postconviction court decision. *Id.*

42. In Minnesota, *Teague v. Lane*, 489 U.S. 288 (1989), is used to determine the retroactivity of federal constitutional rules of criminal procedure. *O’Meara v. State*, 679 N.W.2d 334, 338 (Minn. 2004). Under *Teague*, the court first determines if the rule of federal constitutional criminal procedure is new. *Houston*, 702 N.W.2d at 270. If the rule is considered new, it will be applied to all cases pending on direct review. *Id.* If the defendant has exhausted all means of direct appeal, that defendant will not be able to petition for certiorari. *Id.*

*Teague* stated that a rule of constitutional criminal procedure is new if it is not “dictated” by precedent. 489 U.S. at 301. The test is whether “reasonable jurists hearing petitioner’s claim at the time his conviction became final ‘would have felt *compelled* by existing precedent’ to rule in his favor.” *Houston*, 702 N.W.2d at 271 (quoting *Graham v. Collins*, 506 U.S. 461, 467 (1993)).

43. *Houston*, 702 N.W.2d at 270.

44. A rule is considered “watershed” if it “requires the observance of those procedures that . . . are implicit in the concept of ordered liberty’ or ‘alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of any particular conviction.” *Houston*, 702 N.W.2d at 270-71 (quoting *Teague*, 489 U.S. at 311).

45. *Houston*, 702 N.W.2d at 273.

46. *Id.* (quoting *Teague*, 489 U.S. at 313).

47. *Id.* at 274.

48. *Id.*

49. *Id.*

elements,” which under *Teague* would require a new procedural rule to be construed as watershed.<sup>50</sup> The court, however, declined to address this issue as it has not been explicitly addressed by the U.S. Supreme Court.<sup>51</sup>

### III. BACKGROUND

#### A. *The Minnesota Sentencing Guidelines*

The Minnesota Sentencing Guidelines are used to establish rational and consistent sentencing standards, which reduce sentencing disparity and ensure that sanctions following a conviction of a felony are proportional to the severity of the offense and the criminal history of the defendant.<sup>52</sup> Minnesota utilizes a determinate sentencing model that now complies with the constitutional protections recognized in *Blakely*.<sup>53</sup> One axis of the sentencing grid lists the severity of the offense, while the other axis lists the criminal history score of the defendant.<sup>54</sup> The corresponding grid for these two points gives the sentencing judge a determinate range that must be used, absent any aggravating factors.<sup>55</sup> A departure from the guidelines is permitted if aggravating or mitigating factors are found.<sup>56</sup> As *Blakely* explained,

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50. *Id.*

51. *Id.*

52. MINN. SENTENCING GUIDELINES § I (2004).

53. MINN. SENTENCING GUIDELINES COMM'N, THE IMPACT OF BLAKELY V. WASHINGTON ON SENTENCING IN MINNESOTA §§ 3, 5 (2004).

54. MINN. SENTENCING GUIDELINES § II.A.-B. (2004).

55. *Id.* § II.C.-D.

56. *Id.* § II.D. A non-exclusive list of mitigating factors used for a departure include:

- (1) The victim was an aggressor in the incident.
- (2) The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.
- (3) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.
- (4) The offender's presumptive sentence is a commitment to the commissioner but not a mandatory minimum sentence, and either of the following exist:
  - (a) The current conviction offense is at severity level I or II and the offender received all of his or her prior felony sentences during less than three separate court appearances; or
  - (b) The current conviction offense is at severity level III or IV

it is not the aggravated departure from the guidelines that invokes a constitutional challenge, but the method by which the aggravated departure is given.<sup>57</sup> When *Blakely* was decided, the Minnesota Sentencing Guidelines left discretion to the sentencing judge, rather than the jury, to determine if an aggravated departure was appropriate.<sup>58</sup>

In Minnesota, aggravated departures accounted for

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and the offender received all of his or her prior felony sentences during one court appearance.

(5) Other substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense.

(6) Alternative placement for offender with serious and persistent mental illness . . . .

*Id.* § II.D.2.a.

A non-exclusive list of aggravating factors used in an upward departure includes

(1) The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender.

(2) The victim was treated with particular cruelty for which the individual offender should be held responsible.

(3) The current conviction is for a Criminal Sexual Conduct offense or an offense in which the victim was otherwise injured and there is a prior felony conviction for a Criminal Sexual Conduct offense or an offense in which the victim was otherwise injured.

(4) The offense was a major economic offense, identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage. . . .

(5) The offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. . . .

(6) The offender committed, for hire, a crime against the person.

(7) Offender is a "patterned sex offender" . . . .

(8) Offender is a "dangerous offender who commits a third violent crime" . . . .

(9) Offender is a "career offender" . . . .

(10) The offender committed the crime as part of a group of three or more persons who all actively participated in the crime.

(11) The offender intentionally selects the victim or the property against which the offense is committed, in whole or in part, because of the victim's, the property owner's or another's actual or perceived race, color, religion, sex, sexual orientation, disability, age, or national origin.

(12) The offender's use of another's identity without authorization to commit a crime. This aggravating factor may not be used when the use of another's identity is an element of the offense.

*Id.* § II.D.2.b.

57. See *Blakely v. Washington*, 542 U.S. 296, 308 (2004).

58. MINN. SENTENCING GUIDELINES COMM'N, *supra* note 53, §§ 3, 5.

approximately 7.7% of all felony sentences in 2002 (or 1002 of 12,978).<sup>59</sup> An aggravated departure in Minnesota can occur one of two ways.<sup>60</sup> The first is an aggravated dispositional departure,<sup>61</sup> while the second is an aggravated durational departure.<sup>62</sup> Out of the approximately 1000 cases per year that involved aggravated departures, and thus implicated *Blakely* issues, approximately 8% (seventy-nine) of the cases involved a trial.<sup>63</sup>

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

In *Apprendi v. New Jersey*, the defendant fired several shots into the home of an African-American family.<sup>64</sup> Apprendi pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose,<sup>65</sup> which carried a presumptive prison sentence of five to ten years.<sup>66</sup> Although the count did not initially refer to New Jersey's hate crime statute,<sup>67</sup> as part of the plea agreement the State of New Jersey reserved the right to impose an enhanced sentence on the ground that the crime was committed with a biased purpose.<sup>68</sup> In an evidentiary hearing, the trial court concluded by a preponderance of the evidence that Apprendi's actions were motivated by racial bias and "with a purpose to intimidate."<sup>69</sup> The

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59. *Id.* § 4.

60. *Id.*

61. *Id.* An aggravated dispositional departure occurs when the defendant should have received a presumptive stayed sentence under the guidelines, but instead the court imposed a prison sentence. *Id.*

62. *Id.* An aggravated duration departure occurs when the offender receives a sentence length that is longer than the sentence recommended by the sentencing grid, regardless of whether the sentence is a presumptive stay or a presumptive prison sentence. *Id.*

63. *Id.*

64. *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000).

65. *See* N.J. STAT. ANN. § 2C:39-4(a) (West 1995).

66. *Apprendi*, 530 U.S. at 470; *see* § N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995).

67. At the time New Jersey's hate crime statute "provide[d] for an 'extended term' of imprisonment if the trial judge [found], by a preponderance of the evidence, that 'the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Apprendi*, 530 U.S. at 468 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West 2000)). The extended term authorized for second-degree offenses is imprisonment for between ten and twenty years. *Id.*

68. *Id.* at 470. Apprendi reserved the right to challenge the sentence enhancement on the ground that it violated the U.S. Constitution. *Id.*

69. *Id.* at 471.

court sentenced Apprendi to an enhanced twelve-year term of imprisonment on the firearm charge.<sup>70</sup> On appeal, the New Jersey Supreme Court upheld Apprendi's sentence.<sup>71</sup>

The U.S. Supreme Court reversed the New Jersey Supreme Court in a five-to-four ruling, stating "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt."<sup>72</sup> The Court also stated that when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.<sup>73</sup> Therefore it fits as an element of the offense. The U.S. Supreme Court concluded that Apprendi's constitutional rights had been violated.<sup>74</sup> The trial court had imposed a sentence greater than the maximum prescribed under the state law without a jury determining additional facts beyond a reasonable doubt that would warrant an upward sentencing departure.<sup>75</sup>

### C. Blakely v. Washington

Four years after *Apprendi*, the U.S. Supreme Court handed down the decision of *Blakely v. Washington*.<sup>76</sup> In *Blakely*, the defendant abducted his ex-wife at knifepoint and forced her into a wooden box in the back of his pickup truck.<sup>77</sup> As soon as their thirteen-year-old son returned from school, Blakely ordered him to

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70. *Id.*

71. *Id.* at 472. The court explained that due process only requires the State to prove the "elements" of an offense beyond a reasonable doubt. *Id.* at 472. The fact that a state legislature "has placed a criminal component 'within the sentencing provisions' of the criminal code 'does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.'" *Id.* (quoting *State v. Apprendi*, 731 A.2d 485, 492 (N.J. 1999)).

72. *Id.* at 490. *Apprendi* did not render all presumptive sentences unconstitutional. *Id.* at 481. The Court stated that there is nothing unconstitutional about the trial court using various factors relating to the offense and offender to impose a sentence within the range prescribed by statute. *Id.* A Sixth Amendment problem occurs when the trial court makes a determination of a fact that leads to punishment exceeding the statutory maximum the defendant would have received based on facts reflected in the jury verdict alone. *Id.* at 483.

73. *Id.* at 494 n.19.

74. *Id.* at 491-92.

75. *Id.* at 491-97.

76. 542 U.S. 296 (2004).

77. *Id.* at 298.

follow in another car, threatening to do harm to his mother.<sup>78</sup> Blakely was eventually arrested in Montana.<sup>79</sup> In a plea agreement, Blakely was charged with second-degree kidnapping involving domestic violence and use of a firearm.<sup>80</sup> Blakely admitted no relevant facts other than the elements of the charges.<sup>81</sup>

At the sentencing hearing, the State recommended a sentence within the standard range of forty-nine to fifty-three months, pursuant to the Washington Sentencing Guidelines.<sup>82</sup> The trial court departed from the presumptive sentence, and imposed an “exceptional” sentence of ninety months.<sup>83</sup> The trial court justified this sentence on the ground that Blakely acted with “deliberate cruelty,” which is a statutorily enumerated ground for departure in the state of Washington.<sup>84</sup>

After all appeals were affirmed through the Washington Supreme Court, the U.S. Supreme Court granted certiorari.<sup>85</sup> While the U.S. Supreme Court applied the holding in *Apprendi*,<sup>86</sup> it further defined what was meant by the term “statutory maximum.”<sup>87</sup> The U.S. Supreme Court stated that “the ‘statutory maximum’ for

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78. *Id.*

79. *Id.*

80. *Id.*; see WASH. REV. CODE §§ 9A.40.030(1), 10.99.020(3)(p), 9.94A.125 (2000).

81. *Blakely*, 542 U.S. at 299.

82. *Id.* at 300. State law in Washington provided that “[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years.” *Id.* at 299 (quoting WASH. REV. CODE § 9A.20.021(1)(b) (2000)). Furthermore, other provisions limited the range of sentences a judge may impose. *Id.* The offense to which Blakely pled guilty carried a presumptive range of forty-nine to fifty-three months. *Id.* at 300.

83. *Id.* “A judge may impose a sentence above the standard range if he finds ‘substantial and compelling reasons justifying an exceptional sentence.’” *Id.* at 299 (quoting WASH. REV. CODE § 9.94A.120(2) (2000)). If a judge imposes an exceptional sentence, he must make specific findings of fact and conclusions of law supporting the departure. *Id.*

84. *Id.* at 299; see WASH. REV. CODE § 9.94A.390(2)(h)(iii) (2000). The trial court made the following findings of fact with regard to aggravating factors:

The defendant’s methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim’s isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order.

*Blakely*, 542 U.S. at 301.

85. *Blakely*, 542 U.S. at 301.

86. See *supra* Part III.B. (explaining *Apprendi*’s holding).

87. *Blakely*, 542 U.S. at 303-04.

*Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”<sup>88</sup> Therefore, the trial court could not have imposed a ninety-month sentence based only on the facts the defendant had admitted in the guilty plea.<sup>89</sup> The trial court imposed a ninety-month sentence based on substantial and compelling aggravating factors not admitted by Blakely.<sup>90</sup> Because these factors were not submitted to the jury and proven beyond a reasonable doubt, Blakely’s sentence was rendered unconstitutional by the Supreme Court.<sup>91</sup> The Court stressed that this ruling did not render determinate sentencing schemes unconstitutional; rather *Blakely* held that these sentencing schemes were unconstitutional in the way they were applied.<sup>92</sup>

*D. Reaction from Other States with Presumptive Sentencing Guidelines*

At the time the *Apprendi* and *Blakely* decisions were handed down, Kansas, Minnesota, North Carolina, Oregon, and Tennessee all employed a sentencing system based on presumptive guidelines that involved judicial fact-finding in some form.<sup>93</sup> This Part illustrates measures these states have taken in order to comply with *Apprendi* and *Blakely*’s Sixth Amendment interpretation.

*1. Kansas*

The Kansas Sentencing Guidelines provided a range for sentencing based on the severity level of the offense and the defendant’s criminal history score.<sup>94</sup> Before *Apprendi* and *Blakely*, the State was able to move for an upward departure sentence based

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88. *Id.* at 303. The Court further explained statutory maximum when it stated “[i]n other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” *Id.* at 303-04.

89. *Id.* at 304. Blakely did not admit any other relevant information besides the elements of the offenses in the guilty plea. *Id.* at 299.

90. *See id.* at 304.

91. *Id.*

92. *Id.* at 308.

93. *See infra* Parts III.D.1.-4.

94. KAN. STAT. ANN. § 21-4704 (2000). The vertical axis of the sentencing guidelines grid is the crime severity scale while the horizontal axis is based on the defendant’s criminal history score. § 21-4704(c). The presumptive guideline would be found at the meeting place of these two factors. § 21-4704(e)(1).

on a list of non-exclusive aggravating factors.<sup>95</sup> The statute provided that if a sentencing judge found substantial and compelling reasons based on aggravating factors present, the judge would be able to initiate an upward departure from the sentencing guidelines.<sup>96</sup>

In applying *Apprendi*, Kansas determined that having a judge, rather than a jury, make the findings of aggravating factors violated a defendant's Sixth Amendment rights.<sup>97</sup> The court in *State v. Gould* stated that the statute was silent on any burden of proof to be utilized by the district judge to establish a substantial and compelling reason to depart from the presumptive guidelines.<sup>98</sup> Because of this, an upward departure from the sentencing guidelines required less evidentiary weight than facts asserted for conviction.<sup>99</sup> The *Gould* court held that the Kansas sentencing scheme was unconstitutional on its face and therefore invalid.<sup>100</sup>

In 2002, the Kansas Legislature amended its sentencing procedures.<sup>101</sup> The new legislation required that any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.<sup>102</sup> If evidence presented warrants an increased penalty, the court will conduct a separate departure sentence proceeding before a trial jury.<sup>103</sup>

## 2. North Carolina

In 1993, North Carolina enacted the Structured Sentencing Act, which required sentencing judges to impose a minimum and maximum active, intermediate, or community punishment for felony convictions.<sup>104</sup> Ranges for possible minimum sentences were

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95. § 21-4716(c)(1).

96. § 21-4716(b)(2). An upward departure was limited by a "double-double rule" which prohibited a sentence to exceed twice the maximum presumptive imprisonment term of the departure sentence following aggravation. § 21-4720(c)(3).

97. *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001).

98. *Id.* at 812.

99. *Id.* (citing *State v. Spain*, 953 P.2d 1004 (Kan. 1998)).

100. *Id.* at 814.

101. 21 Kan. Reg. 869 (June 6, 2002).

102. *Id.*

103. *Id.*

104. N.C. GEN. STAT. § 15A-1340.13 (2003). The length of term imposed depended on the offense class, defendant's prior record, and whether aggravating or mitigating factors were present. *State v. Allen*, 615 S.E.2d 256, 261 (N.C. 2005);

set forth on every combination of offense class and prior-record level.<sup>105</sup> The sentencing judge would consider what aggravating or mitigating circumstances existed and select an appropriate punishment range.<sup>106</sup> Like Kansas, a non-exclusive list of aggravating and mitigating factors was statutorily enumerated.<sup>107</sup> The State was required to prove by a preponderance of the evidence that aggravating factors existed, while the defense was required to prove mitigating factors by the same standard.<sup>108</sup> Regardless, the decision to depart from the presumptive range was entirely in the trial judge's discretion.<sup>109</sup>

To meet *Apprendi*'s requirements, the North Carolina Supreme Court held that facts supporting an enhanced sentence must be submitted to a jury and proven beyond a reasonable doubt.<sup>110</sup> The court further stated that "in every instance where the state seeks an enhanced sentence pursuant to [North Carolina General Statutes section] 15A-1340.16A, it must allege statutory factors supporting the enhancement in an indictment."<sup>111</sup> Following the *State v. Lucas* decision, North Carolina amended its statute so that trial judges were no longer permitted to find facts supporting an enhanced sentence.<sup>112</sup>

After the *Blakely* decision further defined the term "statutory maximum," the North Carolina Supreme Court overruled its decision in *Lucas*.<sup>113</sup> In *State v. Allen*, the court held that the Sixth Amendment right to a jury trial only affected the portions of the North Carolina Structured Sentencing Act which permit a sentencing judge to impose an aggravated sentence based on the

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*see also* §§ 15A-1340.13, -1340.14, -1340.16, -1340.17. The minimum statutory punishment chart displayed a grid where offense classes and prior record level were the axes. *Allen*, 615 S.E.2d at 261; *see also* § 15A-1340.17(c). Maximum sentences corresponded to every minimum sentence and were listed on separate tables. *Allen*, 615 S.E.2d at 261; *see also* § 15A-1340.17(d)-(e1).

105. § 15A-1340.17(c). Ranges are presumptive, mitigated in less severe cases, or aggravated in the worst cases. *Id.*

106. § 15A-1340.16(a)-(c).

107. § 15A-1340.16(d)-(e). The prosecutor and defendant were entitled to present any evidence of other factors that were reasonably related to the purposes of sentencing. § 15A-1340.16(d)(20), (e)(21).

108. *Allen*, 615 S.E.2d at 261; *see also* § 15A-1340.16(a).

109. *Allen*, 615 S.E.2d at 261; *see also* § 15A-1340.16(a), (b).

110. *State v. Lucas*, 548 S.E.2d 712, 731 (N.C. 2001), *overruled by Allen*, 615 S.E.2d 256.

111. *Id.* (emphasis added).

112. *Allen*, 615 S.E.2d at 264 n.4.

113. *Id.* at 265.

existence of aggravating factors not admitted by a defendant or found by a jury.<sup>114</sup> *Allen* determined that *Blakely* is not implicated when a judge determines the presence of mitigating factors or when a judge balances aggravating and mitigating factors.<sup>115</sup> These determinations do not affect the statutorily defined maximum sentence as explained in *Blakely*.<sup>116</sup>

### 3. Oregon

Like North Carolina, “Oregon law provide[d] that ‘the sentencing judge shall impose the presumptive sentence . . . unless the judge finds substantial and compelling reasons to impose a departure.’”<sup>117</sup> Prior to *Apprendi* and *Blakely*, an erroneous sentence was one that exceeded the presumptive guidelines without the sentencing judge making the required additional findings.<sup>118</sup> Therefore, if a defendant was sentenced to thirty-six months when the presumptive guidelines called for eighteen months, that sentence was erroneous only if the sentencing judge did not make any findings explaining the departure.<sup>119</sup> The Oregon Supreme Court realized that this was the exact problem that *Blakely* was trying to remedy.<sup>120</sup> Instead of ruling the Oregon sentencing guidelines unconstitutional, the Oregon Supreme Court stated that the guidelines were applied in an unconstitutional way.<sup>121</sup> The court left it to the state legislature to determine what the best course of action would be.<sup>122</sup>

Oregon currently has legislation pending that will amend the unconstitutional portions of the sentencing statutes.<sup>123</sup> The pending amendments allow the court to impose a sentence outside the presumptive sentence or range if the court “determines, in the exercise of the court’s discretion, that a different sentence is more appropriate.”<sup>124</sup> Furthermore, the guidelines adopted under

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114. *Id.* at 266.

115. *Id.*

116. *See id.*

117. *State v. Dilts*, 103 P.3d 95, 99 (Or. 2004) (quoting OR. ADMIN. R. 213-008-0001 (1996)) (emphasis omitted). The presumptive guidelines were determined by Oregon Revised Statutes section 137.669 (2004).

118. *Dilts*, 103 P.3d at 99.

119. *Id.*

120. *Id.*

121. *Id.* at 100.

122. *See id.*

123. 2005 Oregon H.B. No. 2975, 73rd Leg. Ass. (Or. 2005).

124. *Id.*

section 137.667 are now advisory rather than mandatory.<sup>125</sup>

#### 4. *Tennessee*

In *State v. Gomez*,<sup>126</sup> the Tennessee Supreme Court determined that the *Apprendi* and *Blakely* decisions did not affect the state's sentencing scheme.<sup>127</sup> Under the Tennessee Sentencing Reform Act, the trial court has discretion to select an appropriate sentence within a predetermined statutory range.<sup>128</sup> The sentencing judge, however, has no authority to impose a sentence outside this statutory range.<sup>129</sup> There is no provision in the Tennessee Sentencing Reform Act that mandates an increase in a defendant's sentence upon the judicial finding of an enhancement factor.<sup>130</sup> If a trial court determines that there are aggravating factors present, the trial court "may set the sentence above the minimum but still within the appropriate range."<sup>131</sup>

The Tennessee Supreme Court stated that although the sentencing guidelines contain mandatory language, that language loses its mandatory effect because the statute directs the judge to enhance and mitigate within the range given.<sup>132</sup> Because the Tennessee Sentencing Reform Act authorizes a discretionary, non-mandatory sentencing procedure rather than a formula, grid, or other mechanical, mandatory procedure, it does not violate a defendant's Sixth Amendment rights.<sup>133</sup>

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125. *Id.*

126. 163 S.W.3d 632 (Tenn. 2005).

127. *Id.* at 661. The Tennessee Criminal Sentencing Reform Act of 1989 (1) divides felonies into five classifications according to the seriousness of the offense, (2) separates offenders into five classifications according to the number of prior convictions, (3) assigns a range of years for each class of crime committed by each class of offenders, and (4) uses the enhancement and mitigating factors to assess the definite sentence within each range. *Id.* at 658; *see also* TENN. CODE ANN. § 40-35-105 to -114 (2003).

128. *Gomez*, 163 S.W.3d at 659.

129. *Id.*

130. *Id.* Tennessee Code Annotated section 40-35-210 provides that the presumptive sentence for a Class B, C, D, and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors. *Id.* The presumptive sentence for a class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors. *Id.*

131. TENN. CODE ANN. § 40-35-210 Sentencing Commission Comments (2003). A sentencing judge must start at the minimum sentence in that range, enhance the sentence within that range as appropriate for the enhancement factors, then reduce the sentence within that range as appropriate for mitigating factors. *Id.*

132. *See Gomez*, 163 S.W.3d at 660.

133. *Id.* at 661.

## IV. ANALYSIS

A. *Will Shattuck Present an Ex Post Facto Problem?*

*Shattuck* rendered Minnesota Statutes section 609.109, subdivision 4 unconstitutional in its entirety, because it could not be applied without a sentencing provision.<sup>134</sup> While *Shattuck* was pending, the Minnesota Legislature amended the unconstitutional provisions in statutes that required judicial factfinding.<sup>135</sup> Because the *Shattuck* court did not express an opinion on how Shattuck could be sentenced upon remand,<sup>136</sup> it left open a possible defense for Shattuck: that the State is applying laws ex post facto to Shattuck and others similarly situated.

Article I, section 10 of the U.S. Constitution prohibits a State from passing any ex post facto law.<sup>137</sup> An ex post facto law is any statute which punishes as a crime an act that was innocent when done; makes a punishment more burdensome; or which deprives one charged with a crime of any defense available according to law when the act was committed.<sup>138</sup> The bar against ex post facto laws protects a citizen against a previously committed act being charged as a crime, when that act was considered innocent conduct at the time of commission.<sup>139</sup> The bar also prevents oppressive legislation, but at the same time does not handicap legislative control of remedies and procedural laws which do not affect citizens substantively.<sup>140</sup> A procedural change in the law is not ex post facto, regardless of the fact that it may be disadvantageous to the defendant.<sup>141</sup>

1. *Procedural Versus Substantive: Dobbert v. Florida*

In *Dobbert v. Florida*, the defendant was sentenced under a statute which provided that a person convicted of a capital felony

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134. See *supra* Part II.A.4.

135. See *supra* Part II.A.4.

136. See *State v. Shattuck*, 704 N.W.2d 131, 148 n.16 (Minn. 2005).

137. *Dobbert v. Florida*, 432 U.S. 282, 292 (1977). Article I, section 11 of the Minnesota Constitution also prohibits the passage of ex post facto laws.

138. *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925).

139. See *Dobbert*, 432 U.S. at 292-93.

140. *Id.* at 293.

141. *Id.*; see *Hopt v. Utah*, 110 U.S. 574 (1884) (change in statute was not ex post facto when it merely altered who could and could not be called as witnesses in trials, even though the change was disadvantageous to the defendant in the case).

was to be punished by death unless the jury verdict included a recommendation of mercy by a majority of the jury.<sup>142</sup> If mercy was found, the defendant would be sentenced to life imprisonment.<sup>143</sup> The Florida Supreme Court had previously ruled that the 1971 Florida death penalty statutes were unconstitutional based on the U.S. Supreme Court case of *Furman v. Georgia*.<sup>144</sup> Florida then enacted a new death penalty procedure in which a jury renders an advisory decision on punishment, not binding on the court, based upon aggravating and mitigating circumstances relevant to the case.<sup>145</sup> If the sentencing court imposes a sentence of death, a written finding must be made illustrating the aggravating and mitigating circumstances considered by the judge.<sup>146</sup> All death sentences are also subject to an automatic priority review by the Florida Supreme Court.<sup>147</sup>

Dobbert first argued that the change in the role of the judge and jury in the death penalty statute between the time of his crime and conviction deprived him of a substantive right to have a jury determine whether or not the death penalty should be imposed, thus constituting an ex post facto violation.<sup>148</sup> Dobbert's second claim was that because the 1971 death penalty statute was rendered unconstitutional, there was no death penalty in effect at the time he committed his crime.<sup>149</sup>

The Supreme Court denied Dobbert's first claim, stating that the change in the death penalty law was clearly procedural.<sup>150</sup> The Court reasoned that the new statute altered how the death penalty was going to be imposed, not the degree of proof necessary to establish his guilt.<sup>151</sup> Speculation that the jury would have recommended life was unpersuasive.<sup>152</sup> Furthermore, the Court reasoned that the new statute actually offers more protection for defendants, not less.<sup>153</sup> The death penalty was presumed under the

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142. *Dobbert*, 432 U.S. at 288 n.3.

143. *Id.*

144. *Id.* at 288 (citing *Furman v. Georgia*, 408 U.S. 238 (1972); *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972)).

145. *Id.* at 289.

146. *Id.*

147. *Id.*

148. *Id.* at 292.

149. *Id.* at 297.

150. *Id.* at 293.

151. *See id.* at 294.

152. *Id.*

153. *Id.*

old statute, only to be overruled by a majority of the jury recommending mercy.<sup>154</sup> The new Florida statute required a judge to impose the death penalty only after making a written finding indicating insufficient mitigating factors necessary to outweigh aggravating ones.<sup>155</sup> Even after findings are made, the decision is still subject to review by the Florida Supreme Court.<sup>156</sup> Viewing the statutory changes in their totality, the Court determined that the amendments were procedural, and also offered the defendant more significant safeguards, and therefore were not *ex post facto*.<sup>157</sup>

Dobbert's second claim was also denied by the Court.<sup>158</sup> The Court determined that "[t]he actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored."<sup>159</sup> The existence of a capital punishment statute served as an "operative fact" to warn the defendants of a penalty which will be imposed if a capital crime is committed.<sup>160</sup> This satisfies the *ex post facto* provision of the U.S. Constitution.<sup>161</sup>

## 2. Dobbert *Applied* to Shattuck

Shattuck, and others similarly situated, could make the same arguments that Dobbert presented to the U.S. Supreme Court by challenging that Minnesota is applying either a substantive change in law that makes his defense more burdensome, or that there was no constitutionally valid Career Sex Offender Statute. If a challenge is made, the Minnesota Supreme Court will have to determine whether requiring a jury, rather than a trial court, to make factual findings regarding aggravated departures is a procedural or substantive change. If the court finds the change procedural rather than substantive, no *ex post* argument can be made.

As displayed in *Dobbert*, a change in the sentencing process does not change the facts required to find guilt. The same amount of proof will be necessary to determine if a defendant is guilty of

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154. *Id.*

155. *Id.*

156. *Id.* at 295.

157. *Id.* at 294-97.

158. *Id.* at 298.

159. *Id.* (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940)).

160. *Id.*

161. *Id.*

the underlying crime. In Shattuck's case, the court found four aggravating factors: (1) the victim was particularly vulnerable, (2) the victim was treated with particular cruelty, (3) the victim suffered great emotional harm, and (4) the assault was planned.<sup>162</sup> These factors do not determine if Shattuck was guilty of either first-degree criminal sexual conduct or kidnapping with great bodily harm.<sup>163</sup> Furthermore, the change in the statute does not alter the aggravating factors required to impose Minnesota's Career Sex Offender Statute, the amendment just changes how the statute will be imposed.<sup>164</sup>

Much like the statute amendment in *Dobbert*, the amendment to the Minnesota Career Sex Offender statute will afford more protection to defendants rather than less.<sup>165</sup> Statutes are invalidated by the *Apprendi* and *Blakely* decisions because they do not offer sufficient protection under the Sixth Amendment of the U.S. Constitution. Before the Minnesota Legislature amended the Career Sex Offender Statute, the trial court had to find that aggravating factors were more likely than not.<sup>166</sup> Changes in violating statutes require that aggravating factors offered by the prosecution be submitted to a jury and proven beyond a reasonable doubt.<sup>167</sup> This stricter burden of proof offers more protection to defendants, not less.

The Minnesota Supreme Court will likely follow *Dobbert* and rule that the amendments made by the Minnesota Legislature, which now require a jury rather than a trial court to determine the presence of aggravating factors, are procedural. The amendments do not change the requirements needed to convict for the underlying offense, while providing the defendant more protection under the Sixth Amendment of the U.S. Constitution.

*B. Does Houston Change the Bedrock Procedural Elements of Criminal Procedure?*

Houston further claimed that the *Apprendi* line of cases requires that all sentencing factors that increase the penalty beyond the punishment available based solely on the jury verdict or guilty

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162. State v. Shattuck, 704 N.W.2d 131, 134-35 (Minn. 2005).

163. See MINN. STAT. §§ 609.342, .25 (2004).

164. See S.F. No. 2273, 84th Leg. Sess. (Minn. 2005).

165. See *id.*

166. See MINN. STAT. § 609.109.

167. See S.F. No. 2273, 84th Leg. Sess. (Minn. 2005).

plea must be treated as underlying elements of the offense.<sup>168</sup> Houston argued that because elements of an offense must be placed in the charging instrument, submitted to a jury, and found beyond a reasonable doubt, treating sentencing factors as elements implicates “bedrock procedural elements” required by *Teague* to construe a new procedural rule as watershed, mandating full retroactive effect.<sup>169</sup> The court, however, declined to address this issue as it has not been explicitly addressed by the U.S. Supreme Court.<sup>170</sup>

### 1. *Retroactivity and Bedrock Procedural Elements*

Recently, the Minnesota Court of Appeals determined the retroactivity of *State v. Modtland*<sup>171</sup> in *Erickson v. State*.<sup>172</sup> *Modtland* had changed the three-step probation revocation rule, known as the *Austin* factors.<sup>173</sup> In order to revoke probation the court had to (1) designate the specific condition that was violated, (2) find the violation was intentional or inexcusable, and (3) find that the need for confinement outweighs the policies favoring probation.<sup>174</sup> Erickson appealed his probation revocation because the trial court did not expressly make *Austin* findings.<sup>175</sup> Before *Modtland*, the courts applied a “sufficient evidence exception” when courts did not make express findings on the *Austin* factors.<sup>176</sup> If the court did not make *Austin* findings, it would not be considered an abuse of discretion if the record contained “sufficient evidence” to warrant the revocation.<sup>177</sup> *Modtland* eliminated the sufficient evidence exception, thus requiring the trial court to determine the three *Austin* factors on the record before probation can be revoked.<sup>178</sup> *Modtland* was not released at the time the trial court in *Erickson* revoked Erickson’s probation without making express *Austin* findings.<sup>179</sup>

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168. *State v. Houston*, 702 N.W.2d 268, 274 (Minn. 2005).

169. *Id.*

170. *Id.*

171. 695 N.W.2d 602 (Minn. 2005).

172. 702 N.W.2d 892 (Minn. Ct. App. 2005).

173. *Id.* at 895-96.

174. *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980).

175. *Erickson*, 702 N.W.2d at 895.

176. *Id.* at 895-896.

177. *State v. Theel*, 532 N.W.2d 265, 267 (Minn. Ct. App. 1995).

178. *Erickson*, 702 N.W.2d at 896.

179. *Id.*

The Minnesota Court of Appeals did not believe that the rule expressed in *Modtland* altered the bedrock procedural elements exception required by *Teague* to apply the case retroactively.<sup>180</sup> The court stated that “[t]he *Modtland* rule merely requires the district court to place the *Austin* findings on the record.”<sup>181</sup> This does not change the discretion allowed to the district court in weighing factors or making the ultimate decision of revoking or continuing the defendant’s probation.<sup>182</sup> Because it does not require procedures that implicate the fundamental fairness of a trial, the *Modtland* rule was not applied retroactively.<sup>183</sup>

## 2. *Applying Erickson to Houston*

In order for *Blakely* to apply to *Houston*, *Blakely* must change the bedrock procedural elements of criminal procedure. Because of *Apprendi* and *Blakely*, aggravating factors found in a crime must be placed in the charge if they are to be presented for an upward departure. Placing these factors as elements in the initial charge is dissimilar to the *Erickson* case requiring courts to place *Austin* findings on the record to determine probation revocation.

*Apprendi* stated that a sentence enhancement describes any increase beyond the maximum authorized statutory sentence for a given crime.<sup>184</sup> A sentence enhancement is the functional equivalent of an element of a greater offense because it gives a defendant notice that he or she may be given a greater punishment based on aggravating element(s). The court in *Erickson* stated that the *Austin* factors placed in the record do not alter the discretion courts have in determining that probation should or should not be revoked.<sup>185</sup> Conversely, placing aggravating factors in the initial charge as required by the *Apprendi* cases does change the determination of what offense a defendant may be charged with.

Depending on the aggravating factors in a case, a defendant may be charged as a career offender, resulting in a much longer sentence in the state of Minnesota.<sup>186</sup> If these elements are not presented in the charge, because of *Apprendi* and *Blakely*, a

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180. *Id.* at 897.

181. *Id.*

182. *Id.*

183. *Id.*

184. *See Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000).

185. *Erickson*, 702 N.W.2d at 897.

186. *See MINN. STAT. § 609.109* (2004).

defendant cannot be charged with the upward departure. This requirement could be viewed by Minnesota courts as a bedrock procedural change affecting the fundamental fairness of a trial, allowing defendants to use *Apprendi* and *Blakely* on collateral review.

Aggravating factors, however, are not necessary to alter the guilt or innocence of a defendant for the underlying offense. For example, elements required to convict a defendant for first-degree criminal sexual conduct are not based upon whether or not the victim of the offense was particularly vulnerable.<sup>187</sup> Furthermore, a career sex offender provision cannot be applied unless there is an underlying criminal sexual offense.<sup>188</sup> Thus, *Houston* is similar to *Erickson* if a court focuses solely on the underlying crime rather than a judge's ability to find aggravating factors that enhance a sentence. Aggravating factors do not alter the discretion a court has in making the ultimate decision of a defendant's guilt and therefore do not implicate the fundamental fairness of the trial.

#### V. CONCLUSION

It is very apparent that *Apprendi* and *Blakely* have changed criminal sentencing in this country. Each state that employs presumptive sentencing guidelines will eventually determine the magnitude of that change. The Minnesota courts have been a leader in combating sentencing confusion in defining what *Apprendi* and *Blakely* mean to their presumptive guidelines. The recent decisions of *Shattuck* and *Houston* may muddy the waters that the Minnesota Supreme Court has attempted to clear. These decisions raise issues of ex post facto legislation, which Minnesota Statutes section 609.109 likely is not, and retroactive application of *Apprendi* and *Blakely* to cases on collateral review, which is a much closer question.

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187. *See id.* § 609.342.

188. *See id.* § 609.109.