

**STATE V. DETTMAN: THE END OF THE SENTENCING  
REVOLUTION OR JUST THE BEGINNING?**

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I. THE *APPRENDI/BLAKELY* “REVOLUTION”

The word revolution in the law is frequently overused. Seven years ago, the United States Supreme Court launched what many commentators have described as a sentencing revolution with its ruling in *Apprendi v. New Jersey*.<sup>1</sup> In *Apprendi*, the Supreme Court held that a defendant’s Sixth Amendment right to a jury trial is violated when a judge uses facts not found by a jury beyond a reasonable doubt to enhance a sentence beyond the statutory maximum.<sup>2</sup>

Next came *Blakely v. Washington*.<sup>3</sup> Blakely pled guilty to a second-degree kidnapping offense involving a firearm.<sup>4</sup> The State of Washington’s sentencing scheme provided that Blakely should have received a presumptive sentence between forty-nine and fifty-three months for this offense.<sup>5</sup> In addition, Blakely had a plea negotiation, which purportedly limited his potential sentence.<sup>6</sup> The judge, however, sentenced Blakely to ninety months, citing a Washington statute that allows a sentence of up to ten years if the

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1. 530 U.S. 466 (2000).

2. *Id.* at 476.

3. 542 U.S. 296 (2004).

4. *Id.* at 299.

5. *Id.* (citing WASH. REV. CODE § 9.94A.320 (2000)).

6. *Id.* at 300.

judge finds justification for the imposition of an “exceptional” sentence.<sup>7</sup> The judge “found” that Blakely committed the offense with deliberate cruelty.<sup>8</sup>

The facts that led to his sentence were horrific. In October 1998, Blakely bound his wife with duct tape and forced her at knifepoint into a wooden box in his pickup truck.<sup>9</sup> Threatening his wife with a shotgun, Blakely told their thirteen-year-old son that his mother would be shot if he did not follow them in another car.<sup>10</sup> Although the boy eventually escaped, Blakely drove his wife all the way from Grant County, Washington to Montana before he was arrested.<sup>11</sup>

The United States Supreme Court reversed Blakely’s sentence and held that all facts, other than prior criminal convictions, that increase a defendant’s sentence beyond what it had been absent those facts must be presented to a jury and proven beyond a reasonable doubt.<sup>12</sup> In the majority’s view, the right to a jury trial means not only that the defendant has a right to present a case to the jury on the issue of guilt, but it also means that a defendant has the right to have a jury, not a judge, make all the factual findings required to impose a sentence longer than the recommended sentence under the sentencing guidelines.<sup>13</sup> Writing for the majority, Justice Scalia stated that Blakely was, in effect, sentenced for first-degree kidnapping after being convicted of second-degree kidnapping.<sup>14</sup> For this reason, the majority said the defendant was denied the fundamental constitutional right to a jury trial.<sup>15</sup> The Court did not consider whether the punishment was too harsh; it only considered whether the decision-making process was constitutional.<sup>16</sup>

[N]othing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or

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7. *Id.* at 299–300.

8. *Id.* at 300.

9. *Id.* at 298.

10. *Id.*

11. *State v. Blakely*, 47 P.3d 149, 152 (Wash. Ct. App. 2002).

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

13. *See id.* at 304.

14. *Id.* at 307.

15. *Id.*

16. *See generally Blakely*, 542 U.S. 296.

consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.<sup>17</sup>

For many, the decision in *Blakely* crystallized the fears that they had when *Apprendi* was decided. From the bench, Justice O'Connor read from her dissenting opinion, a practice that was, for her, an unusual display of disagreement with the majority: "[T]he practical consequences of today's decision may be disastrous . . . ." <sup>18</sup> Predictably, shortly after *Blakely*, the United States Supreme Court "remedied" the Federal Sentencing Guidelines' Sixth Amendment problem by making the Federal Sentencing Guidelines effectively advisory.<sup>19</sup>

Just this term, the Supreme Court found California's sentencing law unconstitutional.<sup>20</sup> California had a three-tier determinate sentencing scheme that set each term of imprisonment—lower, middle, and upper—at an exact number of years.<sup>21</sup> The Supreme Court found that this ran afoul of *Apprendi*'s "bright-line rule."<sup>22</sup> Because the sentencing law mandated that judges impose the middle term unless they found additional aggravating facts by a preponderance of the evidence, the Court held that the middle term, and not the upper term, was the relevant statutory maximum.<sup>23</sup> In order to impose the upper term, the sentencing judge necessarily had to engage in fact-finding that was in contravention of the holding in *Apprendi*.<sup>24</sup>

## II. BLAKELY IN MINNESOTA

An awful lot has been written about the *Apprendi/Blakely* sentencing "revolution," almost all of which has focused on the right to a jury trial. *Blakely*, however, stands for much more than

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17. *Id.* at 310 (citations omitted).

18. *Id.* at 314 (O'Connor, J., dissenting).

19. *United States v. Booker*, 543 U.S. 220, 245 (2005).

20. *Cunningham v. California*, 127 S. Ct. 856, 870 (2007).

21. *Id.* at 861–62 (citing CAL. PENAL CODE § 288.5 (West 1999)).

22. *Id.* at 868.

23. *Id.* at 871.

24. *Id.* at 868; *see also Apprendi*, 530 U.S. at 476.

giving the relatively few defendants who have committed egregious crimes an opportunity to argue against enhanced sentences before a jury. It may be that the most important aspect of the revolution is not the right to a jury trial, but the obligation of those who seek enhanced sentences to establish their justification beyond a reasonable doubt.

Although it certainly unnerved a number of people, the *Apprendi/Blakely* revolution did not cause earth-shattering change in Minnesota. In their article, *Why Minnesota Will Weather Blakely's Blast*, Richard Frase and Dale Parent noted:

The [Minnesota Sentencing Guidelines] Commission's policy choices—in particular, its decision to approach guideline development as a policy-making process rather than an effort to codify past sentencing practices, and its rejection of “real-offense” sentencing—resulted in proposed guidelines that lacked several features that made the federal guidelines highly vulnerable to Blakely attack.<sup>25</sup>

Frase and Parent also noted that the impact of *Blakely* was minimized in Minnesota because Minnesota judges never had the authority to “enhance a sentence based on offenses for which the defendant had not been charged or for which charges had been dropped.”<sup>26</sup> Likewise, Minnesota prohibits departures based on a prediction that a defendant might commit an offense in the future.<sup>27</sup>

In the twenty-seven years since the Minnesota Sentencing Guidelines' implementation, the percentage of upward departures has been relatively small. The Minnesota Supreme Court adopted “a very deferential standard of review” when considering a judge's decision to depart from the sentencing guidelines.<sup>28</sup> It appears that there is not a single case in which a reviewing court has overturned a trial court's imposition of the presumptive guideline sentence in

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25. Dale G. Parent & Richard S. Frase, *Why Minnesota Will Weather Blakely's Blast*, 18 FED. SENT. R. 12, 12 (2005).

26. *Id.* at 14 (citing *State v. Brusven*, 327 N.W.2d 591, 593 (Minn. 1982); *State v. Peterson*, 329 N.W.2d 58, 60 (Minn. 1981)).

27. Parent & Frase, *supra* note 25, at 14 (citing *State v. Hagen*, 317 N.W.2d 701, 703 (Minn. 1982); *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981)).

28. See Parent & Frase, *supra* note 25, at 15 (citing *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981)). “[W]e do not intend entirely to close the door on appeals from refusals to depart. However, we believe that it would be a rare case which would warrant reversal of the refusal to depart.” *Kindem*, 313 N.W.2d at 7.

favor of an enhanced sentence.<sup>29</sup> While there are certain types of cases, such as drug cases, that have had unusually high departure rates, the deferential standard of review has “reinforced the presumption in favor of imposing the recommended guidelines sentence and made clear that when unusual circumstances are present, judges are authorized but not required to depart.”<sup>30</sup>

Although the federal circuits and many states have struggled with post-*Blakely* litigation, Minnesota has seen most of the fundamental issues of the post-*Blakely* sentencing framework resolved in four decisions by the Minnesota Supreme Court. In *State v. Shattuck*,<sup>31</sup> the court held that upward durational departures under the Minnesota Sentencing Guidelines were subject to *Blakely* requirements.<sup>32</sup> The court thus rejected all three of the options considered by Justice Breyer in *United States v. Booker*:<sup>33</sup> (1) totally invalidating the sentencing guidelines, (2) excision of all provisions that made the guidelines mandatory, or (3) grafting onto the guidelines a set of judge-made procedures for a jury trial of aggravating facts.<sup>34</sup>

In *State v. Houston*,<sup>35</sup> the court addressed retroactivity issues, holding that *Blakely* is a new rule but not a “watershed” rule requiring full retroactivity.<sup>36</sup> *Blakely*, therefore, applies to all cases still pending on direct review at the time *Blakely* was decided, which was the case in *Shattuck*. But, *Blakely* does not apply to defendants like Houston whose convictions had already become final.

In *State v. Osborne*,<sup>37</sup> Osborne was convicted on twenty-three counts of drug-related offenses.<sup>38</sup> He appealed, and the Court of Appeals affirmed.<sup>39</sup> The Minnesota Supreme Court denied review.<sup>40</sup> Soon after, *Blakely* was decided, and Osborne moved to

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29. There are only a small handful of cases where a reviewing court has rejected a trial court’s downward departure in favor of a guideline sentence. *See, e.g., State v. Warren*, 592 N.W.2d 440, 451–52 (Minn. 1999); *State v. Law*, 620 N.W.2d 562, 565–66 (Minn. Ct. App. 2000).

30. Parent & Frase, *supra* note 25, at 15.

31. 704 N.W.2d 131 (Minn. 2005).

32. *Id.* at 144.

33. 543 U.S. 220 (2005).

34. *Shattuck*, 704 N.W.2d at 146–47 (citing *Booker*, 543 U.S. at 246–67).

35. 702 N.W.2d 268 (Minn. 2005).

36. *Id.* at 273.

37. 715 N.W.2d 436 (Minn. 2006).

38. *Id.* at 438.

39. *Id.*

40. *Id.*

reopen the appeal of his sentence for review of an alleged *Blakely* error.<sup>41</sup> The Minnesota Supreme Court found that *Shattuck* applied and granted Osborne's motion to reopen the appeal.<sup>42</sup> In the appeal, the State argued that "Osborne [had] forfeited his *Blakely* claim for purposes of appeal by failing to raise the claim in the district court."<sup>43</sup> The majority wrote that the jurisprudence in Minnesota has "consistently rejected any *Blakely*-type claim, holding that an upward departure from a presumptive sentence does not present any Sixth Amendment issues under *Apprendi*, so long as the sentence does not exceed the maximum sentence authorized by the legislature in the statute."<sup>44</sup> The court noted that it was reasonable that Osborne would not foresee this new rule of law, especially since it had been consistently rejected by the Minnesota courts.<sup>45</sup> For reasons of judicial economy, it was also reasonable for Osborne not to object on grounds that the courts had definitively rejected.<sup>46</sup> The court held that "Osborne did not forfeit consideration of *Blakely* errors for purposes of . . . appeal"<sup>47</sup> because the law is clear that a right to a jury trial cannot be waived by silence.<sup>48</sup> Rather, the court "require[d] that the waiver be affirmatively made, after a full advisory and a searching inquiry to be certain that it is knowing, intelligent, and voluntary."<sup>49</sup> The court also found that just as a defendant cannot be convicted of both a charged offense and a lesser-included offense for the same criminal act, "the elements of lesser-included offenses under [the pertinent statute] cannot support upward sentencing departures."<sup>50</sup> The court further found that "because the factors on which the upward departures were based were neither found by the jury nor admitted to by Osborne, Osborne's sentence was imposed in violation of *Blakely*."<sup>51</sup>

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 442 (footnote and internal citation omitted).

45. *See id.*

46. *Id.*

47. *Id.* at 446.

48. *Id.* at 442.

49. *Id.* at 444.

50. *Id.* at 447 (referring to MINN. STAT. § 609.04, subdiv. 1(4) (2006)). But the court clarified, in a footnote, that they "do not render a decision on whether guilty verdicts on lesser-included offenses defined by other provisions of Minn. Stat. § 609.04, subd. 1, can be used to support upward departures." *Id.* at 447 n.7.

51. *Id.* at 447. Having concluded that Osborne had not waived his right to a

Finally, in *State v. Dettman*,<sup>52</sup> the Minnesota Supreme Court held that an upward departure based on the trial court's findings of aggravated factors, without the express, knowing, voluntary, and intelligent waiver by a defendant of his right to have a jury make those findings, violated the defendant's Sixth Amendment right to a jury trial.<sup>53</sup> The court held that the defendant's statements to the police were not admissions on which the trial court could base an upward departure.<sup>54</sup>

The facts in *Dettman*, although not as egregious as *Blakely*, certainly tested the outer limits. The defendant called the victim, asking her to "come to his apartment to assist her boyfriend" because he "was in trouble."<sup>55</sup> After she arrived, the defendant "told her that her boyfriend had gone to purchase cigarettes," so she entered the apartment to wait for her boyfriend's return.<sup>56</sup> The defendant then tried to cover the victim's mouth with duct tape.<sup>57</sup> "When [the victim] fought back, [the defendant] restrained her and told her to be quiet or he would cut her throat."<sup>58</sup> The defendant then made the victim "get undressed and get on his bed where he penetrated her vaginally with his fingers and put his mouth on her vagina."<sup>59</sup> The defendant also "ordered [the victim] to sit on his face and urinate into his mouth."<sup>60</sup> At some point the attack was interrupted by the Rochester police, who found the victim "naked on Dettman's bed with blood around her mouth."<sup>61</sup> The police found the defendant with a knife in his pants pocket.<sup>62</sup>

The trial court inquired as to Dettman's waiver of his rights when he entered his plea.<sup>63</sup> The judge asked Dettman if he "knew that there was no agreement regarding what his sentence would be, and . . . that 'the actual sentence will be up to the judge'" after

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jury trial during the sentencing phase, the court engaged in a harmless error analysis. *Id.* It found that "the *Blakely* error was necessarily prejudicial, not harmless." *Id.* (footnote omitted).

52. 719 N.W.2d 644 (Minn. 2006).

53. *Id.* at 651, 655.

54. *Id.* at 655.

55. *Id.* at 646.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 646–47.

60. *Id.* at 647.

61. *Id.*

62. *Id.*

63. *Id.* at 656 (Gildea, J., dissenting).

hearing the arguments of both attorneys.<sup>64</sup> The judge informed Dettman that the defense was free to make a motion for a departure downward from the sentencing guidelines and that the prosecution could do the same for an upward departure.<sup>65</sup> The judge asked Dettman if he understood that “there are no guarantees about whether either of these motions would be granted and it’s possible that you could be sentenced to longer than 144 months.”<sup>66</sup> Dettman indicated that he understood and that he wanted to proceed with his guilty plea.<sup>67</sup>

The judge sentenced Dettman to 216 months in prison. The presumptive sentence was 144 months.<sup>68</sup> The judge based the 72-month upward departure on the particular cruelty with which the offense was committed and the lasting psychological impact on the victim.<sup>69</sup> With respect to the particular cruelty factor, the judge “determined” that Dettman: (1) exploited his knowledge of the victim’s relationship with her boyfriend to lure her to Dettman’s apartment; (2) subjected the victim to multiple forms of penetration; (3) planned and prepared for the assault by precutting the duct tape that he tried to use to silence her; and (4) ordered the victim to engage in especially repulsive acts.<sup>70</sup>

In fairness to the trial judge, it was not until Dettman’s appeal was pending before the Minnesota Court of Appeals that the United States Supreme Court decided *Blakely v. Washington*.<sup>71</sup> The trial judge was therefore not in a position to know that an express waiver of a jury determination was necessary. The principal issue decided in *Dettman* was whether the defendant admitted to certain facts used in sentencing as part of his guilty plea and therefore had waived his right to claim that only a jury, not a judge, could determine the existence of aggravating factors.<sup>72</sup>

The prosecution contended that *Blakely* does not require an express waiver of the right to a jury determination of aggravating sentencing factors before a defendant’s admission may be used to

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64. *Id.* at 656–57.

65. *Id.* at 657.

66. *Id.*

67. *Id.*

68. *Id.* at 647 (majority opinion).

69. *Id.*

70. *Id.*

71. *Id.*; see also *Blakely*, 542 U.S. 296 (2004).

72. See *Dettman*, 719 N.W.2d at 647–48.

enhance his sentence.<sup>73</sup> The majority opinion written by Chief Justice Anderson noted that “several federal courts of appeals have upheld upward sentencing departures based on facts admitted at a sentencing hearing, a plea hearing, or in a plea agreement, without requiring an express waiver of the right to a jury determination of aggravating sentencing factors.”<sup>74</sup> Nevertheless, the Minnesota Supreme Court held that an explicit waiver of *Blakely* is required.<sup>75</sup> Chief Justice Anderson stated:

We believe our approach is preferable to that of the federal circuits because our approach more appropriately takes into account long-standing principles regarding a defendant’s waiver of his jury-trial rights. We agree with the Colorado Supreme Court that a waiver requirement “furthers the central goal of *Blakely*, which was to correct a system ‘in which the defendant, with no warning in either his indictment or plea, would routinely see his maximum sentence balloon from as little as five years to as much as life imprisonment.’”<sup>76</sup>

Justice Laurie Gildea and Justice Alan Page dissented.<sup>77</sup> In her dissent, Justice Gildea stated, “Every federal circuit court of appeals has indicated that sentencing courts do not run afoul of *Blakely* or the Sixth Amendment when they rely on a defendant’s admissions of fact in sentencing.”<sup>78</sup> Curiously, she wrote, “Even though Dettman is arguing that a ‘right’ based on the U.S. Constitution has been violated, the majority dismisses the federal cases without discussion, and relies instead on certain state cases.”<sup>79</sup>

While reasonable minds might differ as to how explicit a waiver of *Blakely* rights should be, the fact is that Minnesota has also not followed federal law with regard to waivers in other areas. For example, in *State v. Spann*,<sup>80</sup> the Minnesota Supreme Court held that any agreement between the prosecution and a defendant that

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73. *Id.* at 649.

74. *Id.* at 653 (citing *United States v. Pittman*, 418 F.3d 704, 709 (7th Cir. 2005); *United States v. Monsalve*, 388 F.3d 71, 73 (2d Cir. 2004); *United States v. Saldivar-Trujillo*, 380 F.3d 274, 279 (6th Cir. 2004); *United States v. Lucca*, 377 F.3d 927, 934 (8th Cir. 2004)).

75. *Dettman*, 719 N.W.2d at 655.

76. *Id.* at 653 (quoting *People v. Isaacks*, 133 P.3d 1190, 1195 (Colo. 2006)).

77. *Id.* at 656.

78. *Id.* at 659 (Gildea, J., dissenting) (referencing *United States v. Saldivar-Trujillo*, 380 F.3d 274, 279 (6th Cir. 2004)).

79. *Id.* at 659.

80. 704 N.W.2d 486 (2005).

requires the defendant to waive all rights to appellate review in exchange for a reduced sentence was invalid as a matter of public policy and violated the defendant's right to due process.<sup>81</sup> Justice Page, who wrote the opinion in *Spann*, said, "We recognize that a majority of other jurisdictions have held that allowing a defendant to waive his right to appeal is not inherently illegal or unfair."<sup>82</sup> Justice Russell Anderson, the author of the opinion in *Dettman*, dissented in *Spann*, stating that he would have sent "the matter to the district court for a more comprehensive inquiry as to the validity of Spann's waiver of those rights."<sup>83</sup>

Historically, Minnesota courts have strictly construed the requirements for allowing a defendant to waive his or her right to a jury trial.<sup>84</sup> The Minnesota Rules of Criminal Procedure state that:

The defendant, with the approval of the court may waive jury trial 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.<sup>85</sup>

Approval of waiver by the trial court is discretionary and can only be made where the court finds that the defendant was informed of his or her rights and that the waiver was, in fact, voluntary.<sup>86</sup> Finally, Minnesota courts are adamant that a defendant personally waive his or her right to a trial and disallow waiver by the defendant's attorney.<sup>87</sup>

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81. *Id.* at 494–95.

82. *Id.* at 491 (referencing *State v. Perkins*, 737 P.2d 250, 251 (Wash. 1987); *United States v. Nave*, 302 F.3d 719, 720 (7th Cir. 2002)).

83. *Id.* at 495 (Anderson, J., dissenting).

84. *See State v. Ulland*, 357 N.W.2d 346, 347 (Minn. Ct. App. 1984) (citing MINN. R. CRIM. P. 26.01, subdiv. 1(2)(a)–(b)).

85. MINN. R. CRIM. P. 26.01, subdiv. 1(2)(a); *see State v. Neumann*, 392 N.W.2d 706, 707–09 (Minn. Ct. App. 1986) (rejecting a defendant's waiver even though the defendant received a group advisory at his first hearing and a mailed advance notice of a non-jury trial).

86. *See State v. Pietraszewski*, 283 N.W.2d 887, 889–90 (Minn. 1979); *Gaulke v. State*, 184 N.W.2d 599, 602–03 (Minn. 1979).

87. *See State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. Ct. App. 2002); *State v. Sandmoen*, 390 N.W.2d 419, 424–25 (Minn. Ct. App. 1986). *But see State v. Ford*, 276 N.W.2d 178, 183 (Minn. 1979) ("While we intended to make it clear that the waiver should be by defendant, not by his counsel, in this case defendant was present [in court] when his counsel made the waiver and defendant may well be said to have ratified the waiver and made it his personal act.").

### III. *BLAKELY* AND *DETTMAN*: MOVING FORWARD

If *State v. Dettman*<sup>88</sup> represents the culmination of the structural sentencing framework in Minnesota created by *Blakely*,<sup>89</sup> where does the revolution go now? Certain issues seem obvious. First, how will appellate courts in Minnesota review *Blakely* departures? Second, how will lawyers present arguments and evidence in departure cases when the issues are less well-defined, such as those factors cited by the trial judge in *Dettman*? Third, although Minnesota does not, as a matter of law, consider evidence of diminished capacity as relevant in the guilty phase of a trial, would that same standard be true if the evidence was offered to negate a departure fought by the prosecution on grounds similar to those advanced in *Dettman*?

Before *Blakely*, the question in Minnesota on appellate review was whether the trial court was justified in departing from a presumptive sentence.<sup>90</sup> In the post-*Blakely* era of jury determination of the facts for sentence enhancement, appellate courts will face new issues. For example, one appellate issue is whether the jury's finding of an enhancement factor had a sufficient factual basis—akin to sufficiency of evidence for guilt. A second appellate issue is whether, even if the jury verdict is supported by the evidence, the discretion of the judge is still an issue in determining whether the district court properly applied its discretion in deciding to depart based on the jury's findings. A third issue is whether appellate courts will, for the first time, begin to examine the justifications for sentencing to the presumptive sentence but count the ends of the allowable range.

The essence of the justification for the departure in *Dettman* was cruelty. But what is “cruelty” under Minnesota sentencing law? When judges alone were determining cruelty, Minnesota courts made little attempt to define the term, and a variety of appellate court opinions held that there really was no standard for making this determination.<sup>91</sup> In *Holmes v. State*,<sup>92</sup> the court concluded that the departure for cruelty was unjustified because the conduct was

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88. 719 N.W.2d 644 (Minn. 2006).

89. 542 U.S. 296 (2004).

90. See, e.g., *Ture v. State*, 353 N.W.2d 518, 525 (Minn. 1984); *State v. Blue* 327 N.W.2d 7, 12 (Minn. 1982).

91. See, e.g., *State v. Smith*, 541 N.W.2d 584, 589–90 (Minn. 1996).

92. 437 N.W.2d 58 (Minn. 1989).

not significantly different from that typically involved in the commission of that particular crime.<sup>93</sup> The court held in *State v. Hanson*<sup>94</sup> that a departure for cruelty was not warranted because the defendant did not commit manslaughter in a manner significantly more serious than a typical manslaughter.<sup>95</sup> In *State v. Bicek*,<sup>96</sup> the defendant's wife and child died in an explosion.<sup>97</sup> He was charged with first-degree murder but convicted of second-degree culpable negligence manslaughter.<sup>98</sup> At the State's request, the trial court departed upward, but the appellate court reversed, holding that particular cruelty was not applicable to a reckless offense that is not intended to harm.<sup>99</sup>

When determining whether a departure is warranted, the "core issue" for a trial court is "whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime."<sup>100</sup> In a system where the jury determines the existence of aggravating factors, a whole range of fundamental issues are brought to the fore. For example, "the void-for-vagueness doctrine requires that a . . . statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."<sup>101</sup> Due process requires that criminal statutes provide explicit standards for those who apply them in order to prevent arbitrary enforcement.<sup>102</sup> A statute is unconstitutional when it "delegates basic policy matters to . . . juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."<sup>103</sup> Definitions of aggravating factors that are left entirely to the imagination of the jury will create a significant issue for appellate review of the Minnesota Sentencing Guidelines' applications.

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93. *Id.* at 59–60.

94. 405 N.W.2d 467 (Minn. 1987).

95. *Id.* at 469.

96. 429 N.W.2d 289 (Minn. Ct. App. 1988).

97. *Id.* at 290.

98. *Id.* at 290–91.

99. *Id.* at 291–92.

100. *State v. Thao*, 649 N.W.2d 414, 421 (Minn. 2002) (citing *State v. Back*, 341 N.W.2d 273, 276 (Minn. 1983)).

101. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

102. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

103. *Id.* at 108–09.

“Cruelty” is a term that can be defined differently from one juror to the next. “When a jury is the final sentencer [sic],” the United States Supreme Court requires juries to be “properly instructed regarding all facets of the sentencing process.”<sup>104</sup> In *Maynard v. Cartwright*,<sup>105</sup> the United States Supreme Court determined that the “especially heinous, atrocious, or cruel” aggravating factor is unconstitutionally vague when given to a sentencing jury without further definition.<sup>106</sup> Similarly, the Supreme Court in *Godfrey v. Georgia*<sup>107</sup> overturned a defendant’s sentence because the aggravating factor at issue—whether the crime committed was “outrageously or wantonly vile, horrible and inhuman”—did not give the jury guidance concerning the statute’s meaning.<sup>108</sup> In *Walton v. Arizona*,<sup>109</sup> the Supreme Court reaffirmed the *Maynard* Court’s holding that the bare terms of the aggravating factor were facially vague and further stated that in the context of sentencing by a jury, the vagueness problem could be fixed by applying a constitutional limiting instruction.<sup>110</sup> In *Walton*, the Court ruled that the use of the aggravating factor was constitutional because a judge, rather than a jury, was determining whether the factor existed.<sup>111</sup> The Court reasoned that “[t]rial judges are presumed to know the law and apply it in making their decisions.”<sup>112</sup>

To date, there have been relatively few *Blakely* sentencing jury trials. If there is a norm, it is that defendants are far more likely to waive a jury trial for purposes of sentencing than they are to waive a jury trial for purposes of determining guilt. The fear is that issues such as particular cruelty or that the offense is more serious than is typical require context. Presenting context to a jury is not easy. Will the parties be able to call expert witnesses? And if so, who would they be? Would the parties be able to introduce departure reports of other similar cases?

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104. *Walton v. Arizona*, 497 U.S. 639, 653 (1990); *see also* *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 427–28 (1980).

105. 486 U.S. 356 (1988).

106. *Id.* at 363–64; *see also* *Walton*, 497 U.S. at 652–53.

107. 446 U.S. 420 (1980).

108. *Id.* at 428–29.

109. 497 U.S. 639 (1990).

110. *Id.* at 653.

111. *Id.*

112. *Id.*

Another potential question is raised when juries are responsible for determining aggravating factors beyond a reasonable doubt. The court must determine the permissibility of evidence that is not directly related to particular cruelty, but might mitigate a jury determination in favor of departures such as the defendant's diminished capacity. On the issue of guilt, Minnesota does not recognize the doctrine of diminished capacity.<sup>113</sup> The court in *State v. Bouwman*<sup>114</sup> stated that allowing the use of this doctrine would "inevitably open[] the door to variable or sliding scales of criminal responsibility"<sup>115</sup> where the law "requires a final decisive moral judgment of the culpability of the accused."<sup>116</sup> In *State v. Provost*,<sup>117</sup> the court, in a pre-*Blakely* world, criticized the doctrine because it "seeks to make the punishment fit the crime by, in effect, changing the crime (or at least by transferring the sentencing function from the judge to the jury)."<sup>118</sup>

At the sentencing phase, however, Minnesota juries might consider a defendant's diminished capacity in determining whether an upward departure is justified. The Minnesota Sentencing Guidelines provide that if a defendant "lacked substantial capacity for judgment" because of a "mental impairment," then such impairment may be used as a mitigating factor.<sup>119</sup> In addition, the Minnesota Supreme Court held in *State v. Wall*<sup>120</sup> that while the existence of a mitigating factor does not require a downward departure, it "[cannot] properly be ignored" when departing upward.<sup>121</sup> In that case, the defendant strangled his wife while she was apparently sleeping.<sup>122</sup> The trial court viewed these circumstances as an aggravating factor because the defendant "preyed upon the reduced physical capacity of the victim."<sup>123</sup> The

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113. *State v. Bouwman*, 328 N.W.2d 703, 706 (Minn. 1982).

114. *Id.*

115. *Id.* (citing *Betha v. United States*, 365 A.2d 64, 88 (D.C. 1976)).

116. *Id.* at 706 (citing *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945)).

117. 490 N.W.2d 93 (Minn. 1992).

118. *Id.* at 100.

119. MINNESOTA SENTENCING GUIDELINES COMMISSION, MINNESOTA SENTENCING GUIDELINES & COMMENTARY II.D.103(a)(3), available at <http://www.msgc.state.mn.us> (follow "Guidelines" hyperlink; then follow "Sentencing Guidelines and Commentary (Revised August 01, 2006)" hyperlink).

120. 343 N.W.2d 22 (Minn. 1984).

121. *Id.* at 25.

122. *Id.*

123. *Id.*

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Minnesota Supreme Court, however, rejected the trial court's finding because the defendant clearly "lacked substantial capacity for judgment."<sup>124</sup>

Alexis de Tocqueville once said, "In a revolution, as in a novel, the most difficult part to invent is the end."<sup>125</sup> *State v. Dettman* may, at least for Minnesota, be the end of the structural debate of how to implement the *Apprendi/Blakely* sentencing revolution. Minnesota will require explicit waiver of a jury, just as it does with jury waivers on issues of guilt. Where the rest of the sentencing revolution ends is unclear. Among the things we do not know is how the attorneys' sentencing presentations will unfold before juries, nor do we know how appellate courts will review them. That part of the sentencing revolution is yet to be invented.

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124. *Id.*; see also *State v. Sanford*, 450 N.W.2d 580, 587–88 (Minn. Ct. App. 1990), *petition for rev. granted*, (Minn. Feb. 28, 1990), *order granting rev. vacated* (Minn. Mar. 22, 1990) (stating that aggravating factors justify upward departure, even if defendant's mental illness was mitigating factor); *State v. Stephani*, 369 N.W. 2d 540, 550 (Minn. Ct. App. 1985) (affirming upward departure where court specifically found the defendant did not "lack substantial capacity" for judgment).

125. STEPHEN M. WALT, *REVOLUTION AND WAR* 331 (1996).