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Case Note: Minnesota's Fact-Factor Bifurcation in Criminal Sentencing Departures: Splitting Blakely's Hairs or a Legitimate Procedure?—State V. Rourke

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CASE NOTE: MINNESOTA'S FACT-FACTOR BIFURCATION IN CRIMINAL SENTENCING DEPARTURES: SPLITTING *BLAKELY*'S HAIRS OR A LEGITIMATE PROCEDURE?—*STATE V. ROURKE*

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I. INTRODUCTION

Since 1980, Minnesota has employed a guidelines-based system that delineates presumptive sentences for all felony offenses.[1] Despite the presumptive penalties, judges have statutory authority to depart from the guidelines when longer sentences are warranted due to substantial and compelling circumstances.[2]

The constitutionality of sentencing departures under guidelines-based sentencing schemes, now utilized by many states, was called into question in 2004 when the U.S. Supreme Court reviewed an enhanced sentence out of Washington State in *Blakely v. Washington*.[3] The Supreme Court found that the enhanced sentence was unconstitutional as violative of the Sixth Amendment because a sentencing judge, not a jury, found that the defendant acted with particular cruelty.[4] *Blakely* is a landmark case holding that any fact, other than the fact of prior conviction, that increases the penalty for a crime beyond the statutorily-defined guidelines maximum must be found by a jury, not a sentencing judge.[5]

Recently, the Minnesota Supreme Court issued a controversial opinion interpreting the scope of *Blakely* with respect to durational upward sentencing departures in Minnesota. The court relied on a self-created distinction between "facts" and "factors" to issue a rule actually *prohibiting* juries from making final aggravating factor determinations for sentencing purposes.[6] Effectively, *Rourke*

1. *See* 1978 Minn. Laws 761 (codified as amended at MINN. STAT. § 244 (2008) (creating sentencing commission and guidelines enabling statute)); Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 4 (1993) [hereinafter Frase: *Future*] (describing the Minnesota Sentencing Guidelines).

2. *See* MINN. STAT. § 244.10, subdiv. 2 (2008); MINN. SENTENCING GUIDELINES COMM'N, MINN. SENTENCING GUIDELINES AND COMMENTARY, 28–35 (2010) [hereinafter MINN. SENTENCING GUIDELINES 2010], *available at* http://www.msgc.state.mn.us/guidelines/guide10.pdf. The guidelines provide a list of aggravating factors that can serve as a basis for departing from presumptive guideline sentencing. *See* MINN. SENTENCING GUIDELINES 2010, *supra*, at 32–34.

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

4. *Id.* at 301, 305.

5. *Id.* at 301.

6. *See* State v. Rourke, 773 N.W.2d 913, 921 (Minn. 2009). In its most simple

declared that aggravating sentencing factors are legal—not factual—determinations and, therefore, can be decided by a judge.[7] This reasoning, however, appears to "split the hairs" of *Blakely* in order to circumvent submitting aggravating factors for jury determination—an outcome arguably not intended by the U.S. Supreme Court.

This note endeavors to make sense of the *Rourke* opinion—how and why the court decided the case the way it did and its implications—in light of *Blakely*. To that end, this note begins by outlining criminal sentencing in Minnesota, the function of presumptive sentencing guidelines, and the statutory authority for sentencing departures.[8] Next the author discusses the landmark case *Blakely v. Washington*, which prohibits states with determinate sentencing schemes from imposing enhanced sentences on criminal defendants without jury determinations,[9] and addresses the initial impact of *Blakely* on Minnesota sentencing procedure.[10]

Part III covers the recent Minnesota Supreme Court decision *State v. Rourke* by detailing the procedural history,[11] holding, and reasoning[12] that fostered this controversial opinion.[13] In Part IV, the author shares some initial reactions to *Rourke*,[14] outlines the bifurcated fact-factor sentencing procedure the case commands,[15] and argues that such procedure does not square with *Blakely* and thereby impedes on the jury right in the criminal context.[16] Despite inconsistency between *Rourke* and *Blakely*, the author nonetheless discusses sound policy interests that the new *Rourke*

iteration, the court ruled that sentencing-related "facts" are to be found by juries, but that the determination as to whether there exists an aggravating "factor" that serves as a reason to depart based on those facts rests with the judge. *Id.* at 921–22. While *Rourke* does not explicitly *prohibit* submitting aggravating factors to a jury, a subsequent Minnesota case has interpreted *Rourke* as prohibiting the practice of allowing jurors to decide aggravating factors. *See* Carse v. State, 778 N.W.2d 361, 373 (Minn. Ct. App. 2010) (holding a sentencing procedure in which the jury was instructed as to aggravating factors was barred under *Rourke*).

7. *Rourke*, 773 N.W.2d at 920.
8. *See infra* Part II.A.
9. *See infra* Part II.B.
10. *See infra* Part II.C.
11. *See infra* Part III.A, B.
12. *See infra* Part III.C, D.
13. *See infra* Part III.D.
14. *See infra* Part IV.A.
15. *See infra* Part IV.B.
16. *See infra* Part IV.C.

procedure serves.[17]

The note concludes that, while *Rourke*'s fact-factor distinction may promote prudential policy interests, the decision ultimately flies in the face of precedent by creating an "end run" around *Blakely*. As such, the fact-factor distinction prescribed in *Rourke*, while perhaps desirable, is impermissible.[18]

II. HISTORY

A. *Criminal Sentencing in Minnesota*

1. Minnesota Sentencing Guidelines

Minnesota has been recognized as a "pioneer" in modern sentencing reform.[19] In 1978, it became the first state to create a sentencing guidelines commission to reform its sentencing system.[20] The Minnesota Sentencing Guidelines, implemented in 1980 and replacing indeterminate sentencing, have been in effect longer than any other state and have prompted other states to implement reform as well.[21] Much of sentencing reform in the 1980s and beyond was motivated by concerns that indeterminate sentencing systems promoted unfairness and disparity in criminal sentences.[22]

17. *See infra* Part IV.D.

18. *See infra* Part V.

19. Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL'Y 279, 279 (1993) [hereinafter Frase: *Lessons*] (analyzing whether the Minnesota Sentencing Guidelines achieved their stated goals).

20. *See* 1978 Minn. Laws 761–62, 765–67 (codified as amended at MINN. STAT. §§ 244.01, 244.09 (1980)); Frase: *Lessons*, *supra* note 19, at 279 ("Minnesota was the first state to use an independent state sentencing commission to draft and implement presumptive guidelines, and it was also the first jurisdiction to enact state-wide controls over both prison duration and prison commitment decisions.").

21. Frase: *Lessons*, *supra* note 19, at 279.

22. Under an indeterminate system, judges have immense leeway in choosing what sentence they impose. "[J]udges could impose any sentence from probation to the maximum prison term authorized by law." Frase: *Future*, *supra* note 1, at 7. Additionally, under such a system, parole boards were empowered with broad discretion in ultimately deciding how much of a sentence each offender will actually serve. *Id.* Given the potential for great disparity in sentences, often divided along racial lines, many states moved away from indeterminate sentencing toward a guideline-driven system. *See id.* at 8–9.

In Minnesota, the guidelines were enacted to "establish rational and consistent sentencing standards which reduce sentencing disparity and ensure the sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history."[23] To this end, the Minnesota Sentencing Guidelines Commission created presumptive sentences for each felony based on consideration of two factors—the offense severity and the offender's criminal history score[24]—and devised an easy-to-use grid[25] to identify the presumptive sentence for any felony.[26]

Under this "determinate" system, the maximum sentence a judge may impose based on a guilty plea or guilty verdict is the top of the presumptive sentencing range found in the grid cell.[27] The rationale supporting this limitation is that the sentence ranges provided in the grid are "presumed to be appropriate for the crimes to which they apply."[28]

2. Authority to Depart from the Guidelines' Presumptive Sentences

Despite the protective function Minnesota's guidelines play in curbing inconsistent and, thereby, unfair results, a district court judge nonetheless has discretion to impose a sentence outside of the presumptive sentence range.[29] However, the power to do so is triggered *only* if there exists a "substantial and compelling circumstance" warranting a longer sentence.[30] Departures must be

23. MINN. SENTENCING GUIDELINES 2010, *supra* note 2, at 1.

24. *Id.* § II.

25. *Id.* § IV.

26. *Id.* § II, subdiv. C. The offenses (and corresponding severity level) are charted on the vertical axis of the grid, with the criminal history index along the horizontal axis. *See id.* § IV. The grid is also split diagonally along the chart into less-severe felonies for which there is a presumptive stayed sentence, and more severe crimes for which there is a presumptive commitment to state prison. *Id.* For each offense and criminal history score combination, a number is given in the middle of the corresponding grid cell—this is the presumptive sentence in months for the particular offense. *Id.* Just below that is an italicized range of numbers that represents a presumptive "range within which a judge may sentence without the sentence being deemed a departure." *Id.* at 57.

27. *See id.* § II, subdiv. C cmt. II.C.09.a (discussing the maximum sentence rule in Apprendi v. New Jersey, 530 U.S. 466 (2000)).

28. MINN. SENTENCING GUIDELINES 2010, *supra* note 2, at § II, subdiv. D.

29. *See id.*

30. *Id.* *See, e.g.*, State v. Shattuck, 704 N.W.2d 131, 140 (Minn. 2005) (explaining the district court has power to depart from presumptive sentences *only* if aggravating or mitigating factors are present).

based on identifiable aggravating or mitigating factors.[31]

The Minnesota Sentencing Guidelines Commission provides a non-exhaustive list of aggravating and mitigating factors that can serve as valid reasons for durational departure.[32] Some of the approved aggravating factors include particular vulnerability (due to age, infirmity, or reduced capacity), particular cruelty, a current criminal sexual conduct offense, a major economic offense, commission of crime in the presence of a child, and commission of crime in a location in which the victim expected privacy.[33] It should be noted that while some of these factors involve rather clear-cut inquiries (e.g., whether a child was present), others necessitate complex, often non-binary, circumstance-contingent determinations, such as particular cruelty and vulnerability.[34]

As discussed, the components of Minnesota's determinate sentencing system, like most sentencing reform, sought to limit disparity in sentences across offenders of the same or similar crimes and to ensure sentences fit the severity of the offense.[35] As we have seen, however, even under a determinate sentencing scheme like Minnesota's, district court judges still enjoy great latitude in deciding whether to depart on the basis of substantial and compelling circumstances.[36] For over thirty years, this practice went largely unquestioned and was the norm in most of the country.

B. Blakely v. Washington—*The "Earthquake" that Shook-up Sentencing Departures*

In 2004, the U.S. Supreme Court called into question the constitutionality of these discretionary acts and determinate sentencing systems as a whole.[37] In *Blakely v. Washington*,[38] the Court reviewed a sentencing departure, imposed under Washington State's guidelines scheme.[39] Justice Sandra Day O'Connor famously described this decision as a "Number 10

31. *See* MINN. SENTENCING GUIDELINES 2010, *supra* note 2, at § II, subdiv. D.
32. *Id.* § D.2.
33. *Id.* § D.2.b.
34. *See infra* notes 194–197 and accompanying text for explication of why these sentencing determinations are particularly difficult for juries.
35. *See supra* notes 22–23 and accompanying text.
36. *See* MINN. SENTENCING GUIDELINES 2010, *supra* note 2, § II, subdiv. D.
37. *See infra* Part II.B.3
38. 542 U.S. 296 (2004).
39. *See infra* Part II.B.3

earthquake."[40]

In this matter, the court held that the Sixth Amendment right to a jury is violated when facts supporting an exceptional sentence[41] are neither admitted by the defendant nor found by a jury.[42] Because of this decision, "the jury—rather than the judge—becomes increasingly empowered to determine enhancement facts that dramatically increase a defendant's sentence."[43] To understand the import of this decision and its impact upon the role of the jury in criminal sentencing enhancements, it is imperative to first appreciate the case background, both factually and procedurally.

1. Background

Ralph and Yolanda Blakely married in 1973.[44] In 1995, Yolanda filed for divorce, obtained a restraining order against her husband, and moved to Spokane, Washington, where the couple owned property.[45] During the ensuing years, Yolanda initiated trust

40. Charles Lane, *Supreme Court to Consider Federal Sentencing Guidelines*, WASH. POST, Oct. 3, 2004, at A10, *available at* http://www.washingtonpost.com/wp-dyn/articles/A2962-2004Oct2.html (quoting Justice O'Connor's unfavorable description of *Blakely* while at a conference with federal judges). At the time this case note was written, there were seventy-two published law review articles that use Justice O'Connor's metaphor when discussing *Blakely*. Justice O'Connor has also criticized the *Apprendi* decision, upon which *Blakely* rests, as an unwarranted "watershed change in constitutional law." Apprendi v. New Jersey, 530 U.S. 466, 524 (2000) (O'Connor, J., dissenting). See *infra* Part II.B.4 for explication of Justice O'Connor's dissenting view that the *Apprendi-Blakely* line of case law would undermine years of modern sentencing reform. Justice Breyer, also in an impassioned dissent, enumerated several ways in which *Blakely* threatened fairness and the "jury trial right the majority purports to strengthen." *See infra* Part II.B.4.

41. The Blakely Court employs the term "exceptional sentence." It refers to a sentence that is outside the range provided in determinate statutory or guidelines sentencing schemes. It is synonymous with "departing sentence" and a sentence "enhancement." The author uses all of these terms interchangeably.

42. *Blakely*, 542 U.S. at 301 (affirming the rule in *Apprendi v. New Jersey* that "[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 proved beyond a reasonable doubt" and citing the right to a jury as a long-standing principle on which criminal jurisprudence is based).

43. Steven G. Kalar et al., *A* Blakely *Primer: An End to the Federal Sentencing Guidelines?*, CHAMPION MAG. (Nat'l Ass'n of Criminal Def. Lawyers (NACDL), Washington, D.C.), Aug. 2004, at 10, *available at* http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/3a2725450c91fe2785256efb004d4b8f?OpenDocument&Highlight=0,blakely.

44. *Blakely*, 542 U.S. at 298.

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

proceedings against Ralph and moved the couple's son, Ralphy, to Washington to live with her.[46]

In 1998, Ralph Blakely attacked his estranged wife as she was walking from her mailbox back to the house.[47] Ralph bound Yolanda's wrists, covered her mouth with duct tape, and forced her at knifepoint into a coffin-like wooden box in the bed of his pick-up truck.[48] He ordered Ralphy, now thirteen, to follow in another car and threatened to shoot his mother if Ralphy did not do what Ralph instructed.[49] Ralphy drove the truck, with Yolanda locked in the back, to a friend's house in Montana.[50] The friend managed to call the police and Ralph was arrested.[51]

2. Procedural History

Washington State charged Ralph Blakely with first-degree kidnapping.[52] Subsequently, the state offered to reduce the charge to second-degree kidnapping with a deadly weapon enhancement and second-degree domestic violence assault.[53] In exchange for a guilty plea, the state further agreed to recommend a sentence within the standard statutory range.[54] Ralph Blakely pleaded guilty admitting the elements of each of the amended charges, but admitted *no other facts*.[55] Pursuant to the plea bargain, the state recommended a sentence within the standard range: forty-nine to

46. *Id.* During the course of their marriage, the couple acquired considerable real estate and they created a family trust to insulate the properties from creditors and tax liability. *Id.* In 1997, Yolanda moved onto one of these properties, an orchard home in Grant County, per a divorce court directive. *Id.*

47. *Id.*

48. *Blakely*, 542 U.S. at 298. While attacking Yolanda, Ralph told her that he wanted her to dismiss the marriage dissolution and trust proceedings against him. *Id.* Ralph threatened to kill Yolanda and their son if she did not comply with his demands. *Id.* He told her he had many knives, guns, and ammunition. *Id.* The box in which Yolanda was kidnapped was constructed by Ralph, and was not much wider or longer than the victim. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 298–99.

54. *Id.* at 300.

55. *Id.* at 299. That the petitioner only admitted the facts necessary to establish each of the charged crimes, and *no additional facts*, is a critical aspect of the Washington State trial that the U.S. Supreme Court deemed problematic. *Id.* *See infra* Part II.B.3 for an overview of the Court's holding and analysis of why this was unconstitutional.

fifty-three months.[56] However, the trial judge did not follow the State's recommendation.[57] Instead, he imposed an exceptional sentence of ninety months because the offender "acted with 'deliberate cruelty,' a statutorily enumerated ground for departure in domestic-violence cases."[58] Blakely appealed the decision to the Washington Court of Appeals, arguing that his sentence violated the rule in *Apprendi v. New Jersey*[59] requiring that the jury find facts necessary to support an exceptional sentence.[60] The court of appeals affirmed.[61] The Washington Supreme Court denied review.[62] Blakely petitioned the U.S. Supreme Court for a writ of certiorari, again arguing that the aggravating factor necessary to impose an exceptional sentence had to be found by a jury consistent with the rule in *Apprendi v. New Jersey*.[63] The U.S. Supreme Court granted review.

56. *Blakely*, 542 U.S. at 300. The State carefully parsed Washington's sentencing laws to identify the standard presumptive range for Blakely's crimes. *See* Brief for Respondent at *7–8, Blakely v. Washington, 542 U.S. 296 (2004) (No. 02-1632), 2004 WL 199237. Under Washington law, sentences for multiple offenses are served concurrently. WASH. REV. CODE § 9.94A.400(1)(a) (2010). Of all his offenses, Blakely's kidnapping offense, a "class B felony," called for the longest sentence. WASH. REV. CODE § 9A.40.030(3) (2000). The statutory maximum for a class B felony is ten years imprisonment. WASH. REV. CODE § 9A.20.021(1)(b) (2010). However, other provisions of Washington's Sentencing Reform Act further limit sentences based on the seriousness level of the crime and the offender's criminal history score. Second-degree kidnapping is a level V crime and Blakely had a criminal history score of II. Brief for Respondent, *supra*, at *7. The standard range for a level V crime by a level II offender is thirteen to seventeen months. *See* WASH. REV. CODE §§ 9.94A.310, .320, .360 (2000). With the additional, mandatory thirty-six month firearm enhancement, the standard range for Blakely's offense was accurately identified as forty-nine to fifty-three months. *Blakely*, 542 U.S. at 299.

57. *Blakely*, 542 U.S. at 300.

58. *Id.* (citing the Washington Sentencing Reform Act, WASH. REV. CODE § 9.94A.010 (2000)).

59. 530 U.S. 466 (2000).

60. State v. Blakely, 47 P.3d 149, 157 (Wash. Ct. App. 2002). The Court in *Apprendi* held that "[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 proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

61. *Blakely*, 47 P.3d at 161. The court of appeals concluded that *Apprendi* does not apply to factual determinations supporting upward sentencing departures, thus holding that facts supporting the sentence did not have to be submitted to a jury or proved beyond a reasonable doubt. *Id.* at 159.

62. State v. Blakely, 62 P.3d 889 (Wash. 2003).

63. Brief for Petitioner at *9, Blakely v. Washington, 542 U.S. 296 (2004) (No. 02-1632), 2003 WL 22970606.

3. The Blakely *Majority*

In writing for the majority, Justice Scalia began the Court's analysis of the constitutionality of the petitioner's sentence by immediately identifying *Apprendi* as the controlling rule of law.[64] The Court unequivocally stated "[t]his case requires us to apply the rule we expressed in *Apprendi* . . . : '[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 proved beyond a reasonable doubt.'"[65]

The Court went on to circumscribe the jurisprudential principle implicated in the case: "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours [sic].'"[66] As amicus curiae in support of the petitioner-Washington State, the American Civil Liberties Union arrived at the same conclusion as the majority: the "case falls squarely within the rule of *Apprendi* . . ." and accordingly argued the state sidestepped "constitutional protections of surpassing importance."[67]

The Court concluded that the trial judge could not have validly arrived at a ninety month sentence under Washington's sentencing rules, based solely on the facts admitted in the defendant's guilty plea.[68] The Court explained that the statutory maximum in this case was not the ten-year ceiling for Class B felonies, but fifty-three months.[69] Justice Scalia clarified that the statutory maximum "for *Apprendi* purposes" is *not* the outer limit of what the "judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[70]

64. *See infra* note 65 and accompanying text.

65. Blakely v. Washington, 542 U.S. 296, 301 (2004) (citing *Apprendi*, 530 U.S. at 490).

66. *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)). This principle to which Justice Scalia refers is, of course, the right to a jury enshrined in the Sixth Amendment of the U.S. Constitution. *See* U.S. CONST. amend. VI.

67. Brief Amici Curiae of the American Civil Liberties Union et al. in Support of Petitioner at *6–7, Blakely v. Washington, 542 U.S. 296 (2004) (No. 02-1632), 2003 WL 22970599 (quoting *Apprendi*, 530 U.S. at 476).

68. *Blakely*, 542 U.S. at 304. *See also supra* note 55 and accompanying text (explaining that the petitioner, in his plea, admitted *only* the facts necessary to establish the elements of each of the charged crimes and *no additional facts*).

69. *Blakely*, 542 U.S. at 303–04.

70. *Id.*

Applying this standard to the Washington sentencing rules, the Court differentiated the ten-year limit on imprisonment terms for Class B felonies and the fifty-three month maximum sentence the judge could impose based on the facts proven in establishing the elements of the crime in Blakely's case.[71] Hence, only upon a finding of *additional facts* would the trial judge have had the statutorily enumerated power to impose a sentence up to ten years.[72] Accordingly, the majority found that "[t]he judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea."[73]

This case flatly failed the *Apprendi* standard because the facts necessary to support petitioner's exceptional sentence were neither admitted to by him nor found by a jury. Thus, the Court held that the sentence deprived Ralph Blakely of his Sixth Amendment right to a jury and, therefore, was invalid.[74]

4. The Blakely *Dissents*

Blakely was decided in a sharply divided five-four opinion.[75] Echoing her dissent in *Apprendi*,[76] Justice O'Connor registered several criticisms against the Court's reasoning and predicted grave effects flowing from this ruling.[77] Chief among her concerns was the threat to the modern sentencing reform this ruling posed.[78]

71. *See id.* at 304–05 (explaining the statutory maximum, because it is not the maximum a judge may ever impose, is only that which can be imposed *based solely on the facts reflected in the jury verdict or admitted by the defendant* and thus, under Washington law, that is fifty-three months).

72. *See id.* at 303 (noting that ten years, under Washington law, is the limit for enhanced sentences, and further explaining that enhancements require finding facts beyond the verdict or plea).

73. *Id.* at 304.

74. *Id.* at 305.

75. Justices O'Connor, Brennan, Kennedy, and Chief Justice Rehnquist all dissented. All four joined O'Connor's dissent in part, while Justices Breyer and Kennedy issued their own dissents as well.

76. Apprendi v. New Jersey, 530 U.S. 466, 549–59 (2000) (O'Connor, J., dissenting).

77. *Blakely*, 542 U.S. at 318 (O'Connor, J., dissenting) (characterizing the majority decision as a "substantial constitutional tax" for taking those facts historically belonging to the province of sentencing judges and requiring them to be included in indictments and explicating why this is an unreasonable burden).

78. *Id.* at 326 ("What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.").

Justice Breyer in a separate dissent predicted that the new *Blakely* requirement would likely induce states to supplant guidelines systems with either "pure charge" offense systems, statutorily mandated sentencing, or the indeterminate sentencing they previously left behind.[79] In his view, each of these consequences "risks either impracticality, unfairness, or harm to the jury trial right the majority purports to strengthen."[80]

*C. Sentencing Departures in Post-*Blakely *Minnesota*

After *Blakely*, there was a rash of activity across the nation amongst legislatures, prosecutors, members of the criminal defense bar, and criminal justice organizations in an effort to adjust to the ruling and to understand the impact it would have on various sentencing schemes.[81] At the federal level, the Department of Justice took preventative measures in anticipation that *Blakely* would eventually be extended to the Federal Sentencing Guidelines.[82] All federal prosecutors were given new "protective procedures" to follow in charging and trial practices.[83] The National Association of Criminal Defense Lawyers, who supported

79. *Id.* at 330–32 (Breyer, J., dissenting).

80. *Id.* at 330.

81. *See infra* notes 82–87 and accompanying text.

82. Less than two weeks after *Blakely* was decided, the Deputy Attorney General for the Department of Justice sent a memorandum to all federal prosecutors noting that *Blakely* did not reach the federal guidelines, but recognized the specter of such a future ruling. Memorandum from James Comey, Deputy Attorney Gen., U.S. Dep't of Justice, to All Federal Prosecutors, U.S. Dep't of Justice (July 2, 2004), *available at* http://www.justice.gov/dag/readingroom/blakely.htm. In deciding *Blakely*, the Court declined to address the constitutionality of the Federal Sentencing Guidelines. *Blakely*, 542 U.S. at 305 n.9 ("The Federal Guidelines are not before us, and we express no opinion on them."). However, since any differences between Washington's state guidelines and the Federal Guidelines are arguably constitutionally insignificant, some have interpreted *Blakely* as a serious threat to the Federal ones. *See, e.g.*, *Blakely*, 542 U.S. at 324–25 (O'Connor, J., dissenting) (explaining that the Federal Guidelines are vulnerable to a constitutional attack on account of the *Blakely* ruling). The United States, as amicus curiae for Washington State, noted some differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questioned whether those differences were of "constitutional magnitude." Brief for the United States as Amicus Curiae Supporting Respondent at *29–30, Blakely v. Washington, 542 U.S. 296 (2004) (No. 02-1632), 2004 WL 177025.

83. *See* Memorandum from James Comey, *supra* note 82 (directing prosecutors to include upward departure factors in all indictments and to seek waivers to all rights under *Blakely* when seeking plea agreements).

the petitioner as amicus curiae,[84] posted numerous articles and hosted discussions to promote understanding of this ruling for criminal defense attorneys.[85]

The Minnesota Legislature also responded to *Blakely* by enacting numerous provisions prescribing procedures for aggravating factors in sentencing departures.[86] Yet, perhaps the most notable change was made to the guidelines themselves by the Minnesota Sentencing Guidelines Commission—a change that would not have surprised Justices O'Connor and Breyer. After *Blakely*, Minnesota opened up its presumptive sentence ranges to provide a wider range of sentences that a judge could impose without having to employ *Blakely* procedures for a departure.[87]

By far the most important Minnesota case grappling with the precise requirements of *Blakely*, and further demarcating the roles for both judge and jury in sentencing departure procedure, was decided in October 2009 by the Minnesota Supreme Court—*State v. Rourke*.[88]

84. Brief Amici Curiae of the Nat'l Ass'n of Criminal Def. Lawyers et al. in Support of Petitioner, Blakely v. Washington, 542 U.S. 296 (2004) (No. 02-1632), 2003 WL 22925106.

85. *See Blakely v. Washington*, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, http://www.nacdl.org/booker (last visited March 3, 2011) (listing various resources on *Blakely* and its progeny including case materials, articles, and links to audio recordings on panel discussions).

86. 9 HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE: CRIMINAL LAW & PROCEDURE § 36.30 (3d ed. 2009). The changes provide for "unitary and bifurcated trials, order of presentation of evidence, waiver of jury trial on aggravating facts, and allowing aggravating factors not specified in guidelines upon proper notice." *Id.* (footnotes omitted).

87. The presumptive range for first-degree assault, for example, for an offender with a criminal history score of one was between ninety-three and 103 months in 2004. In 2005, after *Blakely*, the range for the same offense was expanded to encompass sentences between eighty-four and 117 months. *Compare* MINN. SENTENCING GUIDELINES COMM'N, MINN. SENTENCING GUIDELINES AND COMMENTARY, § IV (2004), *available at* http://www.msgc.state.mn.us/guidelines/guide04.DOC, *with* MINN. SENTENCING GUIDELINES COMM'N, MINN. SENTENCING GUIDELINES AND COMMENTARY, § IV (2005), *available at* http://www.msgc.state.mn.us/guidelines/guide05.DOC. The 2005 changes gave judges more latitude in choosing sentences without having to employ departure procedures.

88. State v. Rourke, 773 N.W.2d 913 (Minn. 2009).

III. THE *ROURKE* DECISION

A. Background

The circumstances prompting the criminal conviction of Chad Rourke are similar to those underlying *Blakely* and, unfortunately, all too familiar to many women in this country.[89] Appellant Chad Rourke and Erica Boettcher had an on-again-off-again relationship in which Rourke physically abused Boettcher.[90] Despite separating in 2003, Rourke and Boettcher continued to live together in Morris, Minnesota.[91]

On January 28, 2003, Boettcher drove to a friend's house to pick up Rourke.[92] Upon getting into the vehicle, "Rourke ordered [Boettcher] into the passenger's seat, took the keys, and drove around Morris while threatening to kill her."[93] Rourke was speeding and drove into a pole.[94] Rourke fled the scene after unsuccessfully attempting to move Boettcher to create the appearance she was driving.[95]

To better understand the sentencing issues at stake in *Rourke*, it is imperative to first revisit the procedural history of the case and appreciate *how* and *why* the case ended up addressing the issues it did.

89. *See Domestic Violence Facts*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf (last visited March 3, 2011) ("An estimated 1.3 million women are victims of physical assault by an intimate partner each year." (emphasis omitted)).

90. *Rourke*, 773 N.W.2d at 915. The extent of the abuse was noted in great detail by the court of appeals in its opinion. *See* State v. Rourke, 681 N.W.2d 35, 37 (Minn. Ct. App. 2004).

91. *Rourke*, 773 N.W.2d at 915.

92. *Id.*

93. *Id.*

94. *Id.* Rourke was driving approximately sixty miles-per-hour in a thirty mile-per-hour zone. *Rourke*, 681 N.W.2d at 37.

95. *Rourke*, 773 N.W.2d at 915. Boettcher's legs were pinned in the vehicle. She shattered bones in her ankle, requiring placement of seventeen screws and a metal plate in her leg. *Rourke*, 681 N.W.2d at 37.

B. Procedural History

Rourke was charged in connection with the car crash[96] and he pleaded guilty to first-degree assault.[97] Pursuant to a plea agreement with the state, Rourke admitted to driving Boettcher's vehicle in a reckless manner, that he did so with the intent of intimidating her, and that the collision caused her great bodily harm.[98] Rourke further agreed to a maximum sentence of 128 months,[99] which constituted an upward departure from the presumptive ninety-eight month sentence under the Minnesota Sentencing Guidelines.[100] In return for Rourke's plea, the state dismissed the five other charges and agreed not to seek a sentence greater than the 128-month sentence upon which they agreed.[101]

Consistent with the parties' agreement, Rourke was sentenced to 128 months,[102] an upward departure from the presumptive sentence of ninety-eight months for first-degree assault.[103] The district court relied on four grounds for imposing the longer sentence: Rourke's two prior misdemeanor convictions against Boettcher;[104] Rourke's abuse of a position of power; the particular cruelty of the offense; and the plea agreement with the state.[105]

96. *Rourke*, 681 N.W.2d at 37. In its complaint, Stevens County charged Rourke with seven crimes: assault in the first degree, assault in the second degree, assault in the third degree, criminal damage to property in the first degree, domestic assault, reckless driving, and careless driving. *Id.*

97. *Rourke*, 773 N.W.2d at 916; Appellant's Brief at 6, State v. Rourke, 773 N.W.2d 913 (Minn. 2009) (No. A07-0937), 2007 WL 6942369. The basis for the first degree charge was that Rourke inflicted great bodily harm on the victim. *See* MINN. STAT. § 609.221, subdiv. 1 (2002) (prohibiting a person from inflicting great bodily harm while assaulting another person).

98. *Rourke*, 773 N.W.2d at 916.

99. *Id.*

100. *Id.* One hundred twenty-eight months is outside the presumptive range prescribed in the guidelines. The presumptive sentence for first-degree assault for Rourke, who had a criminal history score of one, was ninety-eight months. The permissible sentence range a judge could have imposed without it being deemed a "departure" was between ninety-three and 103 months. *See* MINN. SENTENCING GUIDELINES COMM'N, MINN. SENTENCING GUIDELINES AND COMMENTARY, § IV (2004), *available at* http://www.msgc.state.mn.us/guidelines/guide04.DOC.

101. *Rourke*, 773 N.W.2d at 916; *Rourke*, 681 N.W.2d at 37.

102. *Rourke*, 681 N.W.2d at 38.

103. *See supra* note 100 for an explanation of the presumptive sentence for first-degree-assault by an offender with a criminal history score of one.

104. Rourke was convicted of fifth-degree assault against Boettcher in both 1999 and 2000. *Rourke*, 681 N.W.2d at 37 n.1.

105. *Rourke*, 773 N.W.2d at 916; Appellant's Brief, *supra* note 97, at 8.

1. Rourke I*: The First Appeal*

In Rourke's first appeal,[106] he challenged the sentencing departure.[107] The court of appeals concluded that the district court properly found a substantial and compelling reason—particular cruelty—for imposing the departure.[108] Rourke appealed this decision to the Minnesota Supreme Court.[109] However, while Rourke's appeal was pending, the U.S. Supreme Court decided *Blakely v. Washington*,[110] a decision striking at the heart of the departure issues germane to *Rourke*. Thus, the Minnesota Supreme Court vacated the decision of the court of appeals and remanded the case in light of *Blakely*.[111]

2. Rourke II*: The First Remand*

On remand, and in deference to the newly minted *Blakely* rule, the court of appeals concluded that the sentencing departure (from the statutory ninety-eight months to 128 months) "violated [Rourke's] right to a jury trial under *Blakely*" and was, therefore, invalid.[112] Accordingly, the case was remanded for resentencing

106. *Rourke*, 681 N.W.2d 35.

107. *Id.* at 36. Among other things, Rourke argued that a plea agreement cannot serve as the sole basis for a sentencing departure and that the district court erred in imposing an upward departure on the basis of "particular cruelty" of the offense. He contended that his actions were "stupid" but not atypical of assaultive behavior. *Id.* at 38–39.

108. *Id.* at 39. The court also found that the sentence was justified on the grounds that Rourke had abused his "position of power" and that the victim was in a "position of particular vulnerability." *Id.* at 40–41.

109. *See Rourke*, 773 N.W.2d at 916 (implying the supreme court granted review of *Rourke*).

110. Blakely v. Washington, 542 U.S. 296, 301 (2004) (holding that any fact, other than a prior conviction, which is necessary to support a sentence exceeding the statutory maximum must be admitted by the defendant or proved to a jury beyond a reasonable doubt); *see supra* Part II.B for explication of this landmark case.

111. *Rourke*, 773 N.W.2d at 916. Pursuant to *Blakely*, this meant that any *facts* necessary to support a sentencing departure from the statutory maximum would have to be proven to a jury beyond a reasonable doubt. *See Blakely*, 542 U.S. at 301. Under *Blakely*, a sentencing judge no longer had the power to make factual determinations as to whether a departure was warranted. This new requirement was deemed necessary by the U.S. Supreme Court to satisfy a defendant's Sixth Amendment right to a jury. *See id.* (citing a longstanding tenet of criminal jurisprudence: "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours [sic].'").

112. State v. Rourke, No. A03-1254, 2005 WL 525522, at *2–3 (Minn. Ct. App.

consistent with the *Blakely* constitutional requirement—that a *jury*, not a judge, would have to find facts supporting a departure.[113]

*3. The First "*Blakely*" Trial*

On the second remand, the district court empanelled a jury for a *Blakely* trial, wherein the court submitted two aggravating sentencing factors to the jury[114]: particular cruelty and vulnerability of victim.[115] The jury found that Boettcher was treated with particular cruelty, but that she had not been particularly vulnerable on the day of the assault.[116]

The district court entered an order ruling the term "particular cruelty" was unconstitutionally vague. As such, the court had no power to provide jury instructions as to that term.[117] The court sentenced Rourke to 103 months in prison—the top of the presumptive sentencing range under the guidelines.[118]

Mar. 8, 2005).

113. *Rourke*, 773 N.W.2d at 916.

114. The State had requested the court submit two additional aggravating sentencing factors: plea agreement and abuse of position of power. However, "[f]ollowing a pre-trial hearing, the district court concluded that only the factors of particular cruelty and vulnerability of the victim would be submitted to the jury because the sentencing guidelines' list of aggravating sentencing factors did not include plea agreements or abuse of a position of power." *Rourke*, 773 N.W.2d at 916.

115. *Id.*; Appellant's Brief, *supra* note 97, at 8–9. The jury was presented the following two interrogatories: "(1) Was [the victim] treated with particular cruelty on January 28, 2003? and (2) Was [the victim] particularly vulnerable on January 28, 2003, due to age, infirmity, reduced physical capacity, or reduced mental capacity?" *Rourke*, 773 N.W.2d at 916. Although "[t]he district court denied the State's request for a jury instruction defining 'particular vulnerability' as including repeated attacks and intimidation by Rourke and a level of extreme and escalating ongoing violence, threats to kill, and efforts to control and intimidate [Boettcher]," the state was permitted to argue to the jury that the victim was physically "infirm" by reason of years of abuse inflicted upon her by the offender. *Id.* at 916, 916 n.1.

116. *Rourke*, 773 N.W.2d at 916–17.

117. *Id.* at 917.

118. *Id.*; *see also* MINN. SENTENCING GUIDELINES COMM'N, MINN. SENTENCING GUIDELINES AND COMMENTARY, § IV (2004), *available at* http://www.msgc.state.mn.us/guidelines/guide04.DOC (providing a grid with the presumptive sentence lengths). This sentence is significant. It was not a departure, because it fell within the statutory range prescribed in the guidelines (between ninety-three and 103 months). *Id.* In deciding the jury could not be instructed as to particular cruelty, the court effectively nullified any opportunity before the *Blakely* jury to find a valid basis for an enhanced sentence.

4. Rourke III*: The Court of Appeals Vacates*

The State appealed this 103-month sentence.[119] The court of appeals reversed the district court ruling that particular cruelty was unconstitutionally vague.[120] Accordingly, the case was sent back down to the lower court on remand for another *Blakely* trial in which particular cruelty *would* be defined for the jury consistent with *State v. Weaver*.[121] With the prospect of a new *Blakely* trial, the state was given another opportunity to obtain the sentencing departure it sought.

119. State v. Rourke, No. A07-0937, 2008 WL 2105445, at *1 (Minn. Ct. App. May 20, 2008). The state argued that the district court erred when it: (1) ruled that the aggravating factor of "particular cruelty" is unconstitutionally vague; (2) refused to submit to the jury the aggravating factor of "abuse of a position of power" on the grounds that it is not enumerated in the sentencing guidelines; and (3) refused to define the aggravating factor of "particular vulnerability" to include vulnerability created by repeated attacks and intimidation, and extreme, escalating, and ongoing violence. *Id.*

120. *Id.*

121. *Id.* at *6. In *State v. Weaver*, the court defined the standard for particular cruelty as conduct "significantly more cruel than that usually associated with the offense [for] which [the offender] was convicted." 733 N.W.2d 793, 803 (Minn. Ct. App. 2007). This is the controlling standard. Yet there has been much litigation in Minnesota over what constitutes particular cruelty for the purposes of sentencing departures. *Compare* Holmes v. State, 437 N.W.2d 58, 59–60 (Minn. 1989) (departure overturned where conduct not significantly different from that typically associated with the crime), *and* State v. Hanson, 405 N.W.2d 467, 469 (Minn. Ct. App. 1987) (departure overturned where manslaughter committed in a manner not "significantly more serious" than typical manslaughter), *with* State v. Campbell, 367 N.W.2d 454, 460–61 (Minn. 1985) (departure upheld in brutal murder of mentally disabled women by seventeen stab wounds and ear-to-ear throat splitting where position of trust was used to gain entry to victim's home), State v. Vogelpohl, 326 N.W.2d 635, 636 (Minn. 1982) (departure upheld for murder where defendant stuffed victim's mouth to keep her quiet while he hit her head with two hammers at least eight times), State v. Gurske, 424 N.W.2d 300, 305 (Minn. Ct. App. 1988) (departure upheld where defendant burned victim alive), State v. Dircks, 412 N.W.2d 765, 768 (Minn. Ct. App. 1987) (departure upheld where defendant slashed victim's throat, hit her with baseball bat, and then set fire to her while she still may have been alive), State v. Ming Sen Shiue, 326 N.W.2d 648, 654–55 (Minn. 1982) (departure upheld where defendant concealed the victim's body for reasons of trauma suffered by victim's family and other policy reasons), *and* State v. Rathbun, 347 N.W.2d 548, 548–49 (Minn. Ct. App. 1984) (departure upheld for particular cruelty in commission of the offense where defendant stabbed victim twenty-three times). Before *Blakely*, the sentencing judge often made these determinations as to whether particular cruelty was used in the commission of a crime.

However, the Minnesota Supreme Court granted Rourke's petition for review.[122] At this stage—over five years from Rourke's guilty plea—the case was again going before the Minnesota Supreme Court. The state's highest court was positioned to make sense of the role that particular cruelty is to play in sentencing[123] and to define the precise scope of *Blakely* trials under Minnesota's system.[124]

C. Minnesota Supreme Court—The Majority Decision

The court first addressed the question of whether the Minnesota Sentencing Guidelines' aggravating factor of particular cruelty was unconstitutionally vague, explaining that a statute providing judicial discretion in sentence determinations is not unconstitutional unless it violates the prohibition against cruel and unusual punishment.[125] The court relied on Minnesota case law, *State v. Givens*,[126] and an Eighth Circuit decision, *United States v.*

122. *Rourke*, 773 N.W.2d 913.

123. The court granted the appellant review of two issues: whether the aggravating factor of particular cruelty was unconstitutionally vague under the Minnesota Sentencing Guidelines and whether the state had a right to seek post-trial appellate review of the *Blakely* trial determinations at the district court level. *Id.* at 917. The court also granted the state's petition for cross-review of a double-jeopardy issue decided by the court of appeals. *Id.* The author of this case note will address only the first of these issues, as it is beyond the scope of this article to address the other procedural matters.

124. *Rourke* remains authoritative. At that time this article was written, the decision in *Rourke* constitutes controlling law on sentencing departures in Minnesota, has received no negative treatment by the courts, and has been directly applied by the Minnesota Court of Appeals in three cases involving durational sentencing departures. *See* State v. Ahmed, 782 N.W.2d 253, 256 (Minn. Ct. App. 2010) (reversed and remanded for sentencing in light of *Rourke* due to jury having been instructed on particular cruelty); Carse v. State, 778 N.W.2d 361, 371–73 (Minn. Ct. App. 2010) (holding trial court's instruction to the jury to determine whether aggravating factors were present was improper and violated the rule in *Rourke*); State v. Belter, No. A07-1059, 2010 WL 1189774, at *1 (Minn. Ct. App. Mar. 30, 2010) (remanded because trial court erred in instructing jury to determine whether particular vulnerability was established).

125. *Rourke*, 773 N.W.2d at 918 (citing State v. Christie, 506 N.W.2d 293, 301 (Minn. 1993)).

126. 332 N.W.2d 187, 190 (Minn. 1983) (explaining that non-capital sentence decisions fall outside the purview of *Godfrey*—the authority for applying vagueness principles to sentencing decisions). *See* Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (explaining how the prohibition against cruel and unusual punishment is triggered when a judge imposes a death sentence under a statute that provides "standardless sentencing discretion").

Wivell,[127] to prove that "more routine sentencing decisions—those not including the death sentence" are not subject to vagueness challenges.[128]

Appellant argued that *Givens* and *Wivell* were not controlling because *Blakely* had since been decided and required any aggravating factors that could serve as substantial and compelling reasons to depart from a presumptive sentence be submitted to a jury.[129] The court did not disagree that *Blakely* was controlling, but asserted that Minnesota's Sentencing Guidelines were consistent with that ruling.[130]

The court then detailed the requirements under the Minnesota Sentencing Guidelines.[131] It characterized these rules as prescribing "two distinct requirements" for a departure: "(1) a factual finding that there exist one or more circumstances not reflected in the guilty verdict or guilty plea, and (2) an explanation by the district court as to why those circumstances create a substantial and compelling reason to impose a sentence outside the range on the grid."[132] The court concluded that the secondary explanations of why the court is departing from the presumptive sentence "do not involve finding facts" and that such "discretionary acts . . . are not subject to the rule announced in *Blakely*."[133]

127. 893 F.2d 156, 160 (8th Cir. 1990) (clarifying that aggravating factors in the federal sentencing guidelines are not subject to vagueness challenges—they cannot violate a defendant's due process by reason of being vague—because those guidelines do not outline illegal conduct but instead provide directives for judges to use as guidance).

128. *Rourke*, 773 N.W.2d at 918.

129. *Id.*

130. *Id.* at 919. At this point, the court's inquiry into the factor of particular cruelty turned into a *Blakely* analysis. The central issue, as the court framed it, was whether particular cruelty (or any aggravating factor) is a *fact* requiring jury determination per *Blakely*, or a mere *factor* which could serve as judge's "reason" to depart from a presumptive sentence. *Id.* at 920.

131. *Id.* at 919–20 (quoting MINN. SENTENCING GUIDELINES COMM'N, MINN. SENTENCING GUIDELINES AND COMMENTARY, § II, subdiv. D. (2009)). The court conceded "that a district court 'must afford the accused an opportunity to have a jury trial on the *additional facts* that support the departure and to have the facts proved beyond a reasonable doubt.'" *Id.* Yet, if the State manages to reach this threshold in proving *additional facts*, then a district court "may exercise [its] discretion to depart from the presumptive sentence." *Id.* In exercising this discretion, the district court must explain on the record what aggravating factors compelled the court to depart from the statutory presumptive sentences. *Id.* at 920.

132. *Id.* at 919.

133. *Id.* at 920. *But see infra* Part III.D (detailing the dissent's stark disagreement with this reading of both the guidelines and of *Blakely*).

The question hanging in the balance, as understood by the majority, was whether the aggravating circumstance of particular cruelty is an "additional fact" or a "reason" that can serve as a legal reason to depart.[134] Under the majority's interpretation of the Guidelines and of *Blakely*,[135] the court further concluded that an "additional fact" must be submitted to jurors, but a "'reason' which explains why the additional facts provide the district court a substantial and compelling reason or basis to impose a sentence outside the range on the grid" falls "outside the purview of a *Blakely* jury" and within the province of judicial discretion.[136]

The court held that the aggravating factor "particular cruelty" was a reason, not a fact.[137] As such, this "reason" explains why the additional facts as found by the jury create the proper basis for imposing a sentence that is longer than the usual one.[138] In its opinion, the court articulated this holding several times, reiterating its newly codified fact-reason distinction: aggravating facts are to be found by the jury, yet aggravating factors are legal determinations for a judge.[139]

134. *Rourke*, 773 N.W.2d at 920–21.

135. See *supra* note 133 and accompanying text explaining the court's interpretation of the guidelines' fact-reason distinction and of how "reasons" are not subject to *Blakely*.

136. *Rourke*, 773 N.W.2d at 920. This interpretation that "particular cruelty" is non-factual is one with which the dissent and the author of this article disagree. *But see infra* Parts III.D, IV.

137. *Rourke*, 773 N.W.2d at 920. ("[W]e conclude that the particular cruelty aggravating factor is a reason that explains why the additional facts found by the jury provide the district court a substantial and compelling basis for imposition of a sentence outside the range on the grid.").

138. *Id.*

139. *Id.* at 920–21 ("*Blakely* . . . does not require us to abandon our view that the particular cruelty aggravating factor is a reason explaining why the *facts* of the case provide the district court a substantial and compelling basis for imposition of a sentence outside the range on the grid."); *id.* at 921 ("We hold that a district court must submit to a jury the question . . . of additional facts . . . which support reasons for departure. But the question of whether those additional facts provide the district court a *reason* to depart does not involve a factual determination and, therefore, need not be submitted to a jury." (emphasis added)); *id.* at 921 n.8 ("To be clear, the question of whether the defendant inflicted . . . pain alleged by the State is one for the jury. But the *explanation* as to *why* the facts found by the jury made the defendant's offense more serious than that typically involved in the commission of the crime . . . is given by the court." (emphasis added)); *id.* at 922 ("*Blakely* does not require that a jury determine whether a crime was particularly cruel."); *id.* ("*Blakely* requires that the jury determine 'additional facts' . . . which a judge may rely on to support his or her explanation as to why those additional facts support a substantial and compelling reason . . . to impose a sentence outside the presumptive sentencing range.").

In support of its decision, the court offered two lines of reasoning. First, the court pointed to past cases in which aggravating factors were merely cast as *reasons* for departures.[140] Second, the court pointed to a comment in the Guidelines that actually cut against its ruling.[141] This comment states that if an aggravated departure is considered, "[a] defendant has the right to a jury trial to determine whether or not aggravating factors are proved beyond a reasonable doubt."[142] The court "[acknowledged] that this comment is inconsistent with [its] holding[,]"[143] but overcame this roadblock by explaining that the Guidelines are "advisory rather than controlling."[144] The court cited no other authority to buttress its arguments.

Ultimately, the court affirmed the court of appeals' decision that particular cruelty was not unconstitutionally vague, but reversed the court of appeals' order to submit the factor to the jury with a definition.[145] With respect to sentencing, the court left that issue in the hands of the lower courts.[146]

D. The Dissent

In his dissenting opinion, Justice Paul Anderson[147] unequivocally disagreed with the majority's conclusion that particular cruelty does not involve fact-finding.[148] Consequently, he

140. *Id.* at 920 (citing State v. Leja, 684 N.W.2d 442, 450 (Minn. 2004); State v. Schantzen, 308 N.W.2d 484, 485–87 (Minn. 1981)).

141. *See Rourke*, 773 N.W.2d at 921 n.9 (citing MINN. SENTENCING GUIDELINES COMM'N, MINN. SENTENCING GUIDELINES AND COMMENTARY, cmt. II.D.01 (2009)).

142. MINN. SENTENCING GUIDELINES COMM'N, MINN. SENTENCING GUIDELINES AND COMMENTARY, cmt. II.D.01 (2009), *available at* http://www.msgc.state.mn.us/guidelines/guide09.pdf.

143. *Rourke*, 773 N.W.2d at 921 n.9.

144. *Id.* (citing Asfaha v. State, 665 N.W.2d 523, 526 (Minn. 2003)).

145. *Id.* at 922–23.

146. *See id.* at 923 (instructing that *if* another *Blakely* trial were held on remand, the district court should submit interrogatories to a *Blakely* jury inquiring only as to whether the state has proven the alleged *factual circumstances* that provide "a substantial and compelling reason . . . to depart from the presumptive guideline sentence[,]" but not inquiring as to the ultimate question of whether aggravating *factors* exist).

147. Justice Paul H. Anderson is not to be confused with Justice G. Barry Anderson, who wrote for the majority. All references to Justice Anderson in the course of this case note refer to the former, Justice Paul Anderson, the sole dissenting justice in *Rourke*.

148. *See Rourke*, 773 N.W.2d at 925–27 (Anderson, J., dissenting) (discussing post-*Blakely* changes to sentencing guidelines and pattern jury instructions requiring that aggravating sentencing factors be submitted to a jury as facts, and

disagreed that particular cruelty need not be submitted to a jury.[149]

In stark contrast to the majority, Justice Anderson held that Minnesota case law, the state's sentencing guidelines, and Minnesota pattern jury instructions all unambiguously "recognize that aggravating factors, including particular cruelty, are facts that must be found by a jury."[150] According to the dissent, "[f]undamentally, aggravating factors are facts" and Minnesota case law supports this understanding.[151] The dissent also looked to the text of *Apprendi* and *Blakely* as unambiguous and dispositive on this point.[152] Justice Anderson highlighted that "[t]he United States Supreme Court has said that '[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 proved beyond a reasonable doubt.'"[153] The dissent also articulated why "particular cruelty" is factual in nature.[154]

In sum, the dissent rested on an entirely different interpretation of *Blakely*'s scope, meaning, and requirements with respect to whether particular cruelty needs to be found by a jury for

explaining how post-*Blakely* case law shows the court's understanding that aggravating factors are factual in nature); *see, e.g.*, State v. Thompson, 720 N.W.2d 820, 827 (Minn. 2006) (explaining that after defendant waived right to jury, the district court performed the fact-finding function of jury and found several aggravating factors); State v. Chauvin, 723 N.W.2d 20, 24 (Minn. 2006) (concluding that impaneling a jury was necessary to vindicate defendant of his Sixth Amendment right to a jury determination of aggravating sentencing factors); State v. Allen, 706 N.W.2d 40, 46 (Minn. 2005) (stating the use of an offender-related aggravating factor did not insulate the departure from the *Apprendi-Blakely* rule).

149. *Rourke*, 773 N.W.2d at 925 (Anderson, J., dissenting) ("[A] finding of particular cruelty exposes the defendant to a sentence exceeding the maximum authorized by the jury's verdict of guilty and therefore *must be found by a jury*." (emphasis added)).

150. *Id.*

151. *Id.* at 926. Justice Anderson cited several Minnesota cases wherein the court recognized that the Sixth Amendment required that a jury determine whether aggravating factors were present for sentencing purposes. *See id.* at 925.

152. *See id.* at 927 (citing the requirement of *Blakely* and *Apprendi*—that juries must decide aggravating sentencing factors—that have subsequently been enshrined in Cunningham v. California, 549 U.S. 270 (2007) and United States v. Booker, 543 U.S. 220 (2005)).

153. *Id.* (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

154. *Id.* at 926–27 (explicating that the behavior which comprises particular cruelty necessarily "goes beyond what is inherent in the statutory elements of the crime at issue" and a factual determination is required). Justice Anderson concluded that this factual inquiry "involves a comparison of defendant's conduct with conduct usually associated with the offense . . . and therefore must be made by a jury." *Id.* at 927.

states like Minnesota with determinate sentencing schemes. The dissent would have remanded the case for a new *Blakely* trial.[155]

IV. ANALYSIS

A. *Reacting to* Rourke

Many things may not be clear when wading through the numerous decisions and appeals in *Rourke*. What is indisputable, however, is that the case turns on the interpretation of *Blakely*—its precise contours and reach.[156] How the majority arrived at its ultimate conclusion—that *Blakely* does not reach particular cruelty as a judicial *reason* for departing, but only the *facts* that would constitute particular cruelty—is no doubt confusing. More importantly, it is a conclusion likely not warranted by the *Apprendi-Blakely* line of cases.

At first blush, *Rourke* appears at odds with the rather bright-line *Blakely* standard: juries must determine facts upon which culpability and enhanced sentencing are based. The majority seems to center its whole argument on its theoretical, and rather abstruse, fact-reason distinction—one that cannot be traced to the *Blakely* opinion itself.[157] The *Rourke* court even concedes inconsistency between its holding and the state guidelines.[158] In sum, *Rourke* can be viewed as an act of "splitting hairs" to arrive at a new rule that was simply a desirable result for the court.[159]

Yet some believe the court "got it right" and that *Rourke* "was a long time coming."[160] This sentiment is driven by important practical concerns with respect to the capacity of jurors to make determinations as to difficult and often vague criminal law concepts like the existence of aggravating circumstances, and is less concerned with strict adherence to the principle of *stare decisis*.[161]

155. *Id.* at 929.
156. *See supra* Part III.C.
157. *See* Blakely v. Washington, 542 U.S. 296 (2004). The opinion does not recognize a distinction between aggravating facts and factors.
158. *See supra* note 143 and accompanying text.
159. *See infra* Part IV.C, D.
160. Interview with Bradford Colbert, Appellate Pub. Defender, Office of the Minn. State Pub. Defender, in St. Paul, Minn. (Oct. 25, 2010).
161. See *infra* Part IV.D for analysis of some unspoken policy interests *Rourke* serves.

In this section, the author first explicates what procedure *Rourke* requires of Minnesota courts for aggravated sentencing inquiries.[162] The author argues that the *Rourke* decision effectuates a bifurcated fact-factor fiction[163] that is inconsistent with the longstanding right to a jury in criminal proceedings as understood and affirmed by the Supreme Court in *Apprendi-Blakely*.[164] Notwithstanding the tension between *Rourke* and the right to a jury, the author next recognizes sound policy interests served by the *Rourke* sentencing procedure.[165] In conclusion, the author posits that, while there may be exigent policy reasons for this new fact-factor procedure, it defies U.S. Supreme Court case law and our tradition of empowering juries to determine criminal culpability.[166]

B. Rourke *Fact-Factor Procedure for Sentencing Departures*

The Minnesota Supreme Court used *Rourke* as a vehicle to shift certain factual determinations from the province of the jury to the judge.[167] It ruled that aggravating factors are not factual determinations, but rather legal conclusions that may compel a judge to impose a sentence outside of the guideline ranges.[168] While the court did not explicitly lay out how district courts were to proceed with its directive, subsequent cases upholding *Rourke* did.

In *Carse v. State*,[169] decided in February 2010, the Minnesota Court of Appeals upheld *Rourke* and fleshed out the bifurcated sentencing fact-finding required from its ruling in *Rourke*.[170] *Carse* involved a matter in which the defendant was found guilty of first-degree assault.[171] At his sentencing trial, the district court judge instructed the jury to determine whether the victim was "particularly vulnerable" and whether the defendant used "particular cruelty" in the commission of the assault.[172] On petition

162. *See infra* Part IV.B.
163. *See infra* Part IV.B.
164. *See infra* Part IV.C.
165. *See infra* Part IV.D.
166. *See infra* Part V.
167. *Rourke*, 773 N.W.2d 913, 920 (Minn. 2009) (holding that the aggravating factor of particular cruelty is a "reason" explaining why additional facts provided the court a basis to depart from the guidelines—not an "additional fact" that had to be submitted to the jury).
168. *See id.*
169. 778 N.W.2d 361 (Minn. Ct. App. 2010).
170. *Id.* at 372–73.
171. *Id.* at 367.
172. *Id.*

for post-conviction relief, the court of appeals ruled that the district court's sentencing procedure violated *Rourke*.[173] The court made clear that an upward durational departure based upon aggravating factors found by the jury was improper, because that is a determination entrusted to the judge.[174]

The *Carse* court explained that Minnesota must handle sentencing departures "[u]nder the procedure described in *Rourke,* [wherein] a jury should *not* be asked to determine whether or not an enumerated aggravating factor exists—that determination must be made by the sentencing judge."[175] The court detailed the process that *Rourke* commands:

> The jury should have been asked to determine the existence of the particular facts that the state alleged in support of its argument that substantial and compelling circumstances justified a departure based on the particular-cruelty factor. After which, the sentencing judge should have determined whether a departure was warranted based on the facts found by the jury.[176]

This procedure splits aggravating factor determinations into a two-part inquiry, relying on a fact-factor "fiction."[177] *Rourke* requires the judge to extricate aggravating facts from the aggravating circumstance. The factual constituent parts go to the jury, after which the overarching factor determination goes to the judge.

173. *Id.* at 372–73 ("*Rourke* is the law in Minnesota, and [the court is] obligated to follow it even though the parties did not cite or argue it on appeal.").

174. *Id.* at 373. Note that this is the converse of the *Blakely* procedural posture and holding. *See supra* Part II.B.2–3.

175. *Carse*, 778 N.W.2d at 373 (emphasis added). While this procedure follows *Rourke*, the author argues it is inconsistent with the procedure required by *Blakely*. *See infra* Part IV.C; *see also supra* Part II.B (explaining the U.S. Supreme Court's analysis and holding in *Blakely* that an exceptional sentence violates the Sixth Amendment right to a jury when aggravating factors necessary to support the sentencing departure are neither admitted by the defendant nor proven to a jury beyond a reasonable doubt).

176. *Carse*, 778 N.W.2d at 373.

177. The author describes the *Rourke* fact-factor distinction as a "fiction" primarily because it incorrectly presupposes that aggravating circumstances can distill into discreet fact-based component parts, each of which can then be subjected to a binary inquiry. See *infra* note 196 and accompanying text for related discussion. The fact-factor distinction is furthermore a "fiction" to the extent it undermines the right to have juries find each element of the charged offenses. Many criminal law scholars hold that *all* sentencing factors that can increase a penalty are additional "elements" of an offense, and, therefore, must be proven to a jury. *See infra* notes 184–186 and accompanying text.

C. Why the Fact-Factor Fiction Impedes on the Jury Right

As in *Carse*, *Rourke* directs juries to decide only sentencing "facts," while it commands judges to determine sentencing "factors" that could comprise a reason to impose an enhanced sentence.[178] One is left wondering whether, and to what extent, placing aggravating factor determinations in the province of the judge impedes on the jury right.

The right to a criminal jury trial is a deep-rooted principle in American jurisprudence, enshrined in the U.S. Constitution.[179] This right provides what one commentator describes as a "critical check on state power" fundamental to the U.S. operation of government.[180] The jury right prohibits the court from substituting itself for the jury without consent of the parties.[181]

Chiefly, this right requires juries to find the elements of a charged crime and to determine guilt.[182] Dividing up this inquiry into two parts—where juries find facts but judges find elements—violates this long-standing principle. For example, in a culpable negligence manslaughter case, the jury must find whether the defendant acted with culpable negligence. A judge cannot decide this question. It would also be constitutionally impermissible to distort this inquiry by breaking it down into singular components for the jury to find something such as, "did the defendant drive seventy miles per hour?," and then have the judge decide whether driving at that speed constitutes culpable negligence. This violates the jury right.

178. *See supra* note 167.

179. *See* U.S. CONST. amend. VI. The jury right actually predates the U.S. Constitution. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994). The right to a jury was the only individual right enumerated in every constitution of the first twelve states, and, in 1774, the First Continental Congress's *Declaration of Rights* announced the right to jury trial. *Id.*

180. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 46 (2003) (describing the critical check on state power and how a criminal jury fulfills that purpose).

181. 50A C.J.S. *Juries* § 246 (2008).

182.

> The right to criminal jury trial includes, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." [ ] The accused has the right to a jury determination on every element of the crime charged, and every material factual matter presented by the evidence. None of the elements of the crime may be withheld from the jury and decided by the judge as a matter of law.

Id. § 242.

Apprendi-Blakely case law affirmed that sentencing factors, to the extent that they increase a penalty above the statutory maximum, *must be treated just like elements*. To hand over any of these elements or guilt determinations to the judge is an invalid procedure under the law.[183]

This theory—that sentencing factors are "elements"—has been termed the "elements rule" by University of Pennsylvania Law Professor Stephanos Bibas[184] and garners support from many legal scholars.[185] "The elements rule holds that any fact that increases a defendant's statutory maximum sentence must be an element of the offense. These facts must therefore be charged in an indictment and proved to a jury beyond a reasonable doubt."[186]

Apprendi and its progeny add authoritative punch to scholarly arguments favoring treating of sentencing factors as elements. The U.S. Supreme Court overtly adopted the "elements rule" when it held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum,' *whether the statute calls it an element or a sentencing factor*,

183. *See id.*

184. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1099 (2001) (proposing the "elements rule"). Professor Bibas's extensive bibliography on criminal sentencing and criminal justice is available online. *Penn Law Faculty: Stephanos Bibas*, PENN LAW, http://www.law.upenn.edu/cf/faculty/sbibas/ (last visited June 1, 2011). Incidentally, Professor Bibas testified to the U. S. Sentencing Commission on the future of the *Federal Sentencing Guidelines* after *Blakely*. *Id.*

185. *See, e.g.*, Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1469 (2001) (supporting *Apprendi* elements rule); Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057, 1112, 1118 (1999) (supporting the elements rule and critical of *McMillan*); Colleen P. Murphy, *Jury Factfinding of Offense-Related Sentencing Factors*, 5 FED. SENT'G REP. 41 (1992) (proposing juries find all enhancement facts regardless of whether they are named sentencing factors in statute); Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249, 297 (1998) (promoting the elements rule); Benjamin J. Preister, *Structuring Sentencing:* Apprendi, *the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 875–76 (2004) (supporting *Apprendi*'s requirement that factors be proven by jury); Richard G. Singer & Mark D. Knoll, *Elements and Sentencing Factors: A Reassessment of the Alleged Distinction*, 12 FED. SENT'G REP. 203, 206 (2000) (supporting the elements rule). *Contra, e.g.*, Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors Into Offense Elements: The Apprendi Debate*, 12 FED. SENT'G REP. 197, 198–202 (2000) (arguing the elements rule will produce negative effects for criminal justice system).

186. Bibas, *supra* note 184, at 1099.

'must be submitted to a jury, and proved beyond a reasonable doubt.'"[187] The Court did so by reason of preserving constitutional protections for the criminal defendant.[188]

"[Sir] William Blackstone warned that we must protect the criminal jury not from 'open attacks,' but from 'secret machinations' that on their face seem convenient and benign."[189] *Rourke* creates a convenient end-run around the basic constitutional and judicial provisions dictating that sentencing factors, to the extent they increase penalties beyond the statutory maximum, are elements that juries should determine. It may be that *Rourke* comprises the quiet, perhaps unintended, attack on the jury's central role in the administration of criminal justice against which Blackstone cautioned.[190]

D. Counter-Argument: A Policy Argument for Fact-Factor Bifurcation

Notwithstanding the incompatibility of *Rourke* and the "elements rule," sound policy arguments favor the *Rourke* fact-factor procedure.[191] However, in the end, the author maintains that policy cannot trump precedent. It is impermissible to advance a desired result at the cost of the constitutional right to have juries determine criminal elements.[192]

Nonetheless, many rightly believe that judges are simply better at addressing sentencing questions than juries.[193] A major criticism of *Apprendi-Blakely*, and one shared by Justice Breyer,[194] "has been

187. Harris v. United States, 536 U.S. 545, 550 (2002) (emphasis added) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

188. *Apprendi*, 530 U.S. at 477.

189. Barkow, *supra* note 180, at 34 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 350 (1769)).

190. *Id.* at 84.

191. Interestingly, the *Rourke* court did not posit any policy rationale motivating its decision. Rather, the court, as the author has argued, devised a fact-factor distinction and insisted that *Blakely* allows for it. However, it must be noted that *Blakely* is silent as to such a practice, and *Apprendi* expressly prohibits the procedure. *See supra* note 186 and accompanying text. It is this author's position, however, that the *Rourke* court was likely motivated by unspoken policy interests. The rest of this section explicates those potential motivating factors. *See infra* notes 195–207.

192. *See Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) ("[I]t is not arguable that, just because one thinks it is a better system [to have a judge decide facts that determine the length of sentence], it must be, or is even more likely to be, the system envisioned by a Constitution that guarantees trial by jury.").

193. *See infra* notes 194–197 and accompanying text.

194. *Cf.* United States v. Booker, 543 U.S. 220, 254–55 (2005) (discussing in

that juries are just not very good at the kinds of complex inquires that sentencing under modern guidelines schemes requires."[195] Some commentators express concern that jurors do not have the capacity to analyze the often open-ended, simultaneously qualitative and quantitative, non-binary questions that are typical at the sentencing stage.[196] Others recognize the critical function of the jury as a "check" on prosecutorial allegations during trial, but posit that judges are better suited to bring the "reasoned" judgment that is needed at the sentencing stage.[197]

Take particular cruelty, for example. One need only begin to contemplate how a juror is to determine whether a given violent crime was committed in a particularly cruel way—one that sufficiently exceeds the threshold of how others typically commit it—to see how complicated this question might be.[198] Arguably, for average citizens, much assaultive or violent conduct may be deemed *a priori* particularly cruel.[199] Perhaps it is more prudent to allow a judge to decide as a matter of experience, *a posteriori*, the point at which a harsher sentence is warranted.[200]

dictum a hypothetical securities fraud situation in which related sentencing statute is so complex it would be very difficult for a jury to be instructed on the "loss" element).

195. J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the* Blakely *Revolution*, 2006 U. ILL. L. REV. 301, 303 (2006) (assessing the performance of juries in finding sentencing facts).

196. *Id.* at 301–03 (noting that entrusting jurors with such difficult sentencing-related fact questions can lead to cognitive overload, frustration, loss of motivation, difficulties in evaluating evidence, and deliberation-related biases).

197. *See* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 41, 55 (2006) (arguing that juries are effective at trial, but lack the judgment, flexibility, and experience that sentencing demands).

198. However, we often ask jurors to take on complex, non-binary inquires. Culpable negligence, intent, and pre-meditation are common examples of vague, difficult concepts that, nonetheless, must be determined by a jury to comport with our constitutional standards.

199. *See* Interview with Bradford Colbert, *supra* note 160 (pointing out that most jurors in a murder trial are likely to find the murder "particularly cruel" and explaining that, for that reason, a judge is better positioned to make the final determination as to whether aggravating factors are present).

200. Particular cruelty very well may be a decision that *should* be made by a judge because a judge is an experienced "repeat player" in sentencing, and jurors simply are not. Accordingly, a judge over his or her time on the bench will see many first-degree assaults. A jury only sees one. *See* Berman & Bibas, *supra* note 197, at 37, 55 (characterizing judges as "repeat players" and detailing why sentencing requires their "expert" decisionmaking).

The "elements rule" has also come under attack as harmful to defendants for undermining, rather than bolstering, the right to a jury.[201] Because the "elements rule" requires that any fact that could trigger an enhanced sentence must be charged in the complaint or indictment,[202] defendants are forced to give up important sentencing issues if they plead guilty—they effectively waive them.[203] Conversely, in going to trial, defendants are subjected to an increased potential for prejudice when aggravating-factor issues are raised and corresponding evidence is presented before a jury.[204]

The foregoing policy arguments cut against *Apprendi-Blakely* and favor *Rourke*-like fact-factor bifurcation, in which sentencing "facts" are decided by a jury, yet the determination of whether those facts comprise an aggravating "factor" lies with the judge. *Rourke* seems to offer a sensible approach that inherently recognizes limitations of jury capacity and other fairness concerns. Yet, while there are compelling reasons to take aggravating sentencing factor inquires out of the realm of the jury and entrust them to the judge, as is prescribed in *Rourke*, our law[205] has made it clear this practice is simply impermissible.[206]

V. CONCLUSION

There are legitimate arguments that *Blakely* may undermine modern sentencing reform's goals of uniformity and fairness in criminal penalties. And while the *Rourke* court did not posit any policy rationale for its decision, it is clear there are compelling

201. *See* Bibas, *supra* note 184, at 1100 (arguing several ways in which treating sentencing factors as elements—ones that must be charged in the indictment—undermines the right to a jury); *see also* Blakely v. Washington, 542 U.S. 296, 329 (2004) (Breyer, J., dissenting) (foreshadowing that the jury right, which *Blakely* purports to support, will actually be threatened by the rule).

202. *See supra* note 186 and accompanying text.

203. *See* Bibas, *supra* note 184, at 1100 ("[T]he elements rule in effect deprives many defendants of sentencing hearings, the only hearings they were likely to have. By making important factual disputes elements of crimes, it forces defendants to surrender sentencing issues . . . when they plead guilty.").

204. *See id.* at 1143.

205. *Blakely*, 542 U.S. at 310 (reaffirming Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

206. See *supra* Part IV.C. for a discussion of the constitutional jury right as encompassing the right to have a jury decide all elements of an offense and related aggravating sentencing factors to the extent that they may trigger an enhanced sentence.

interests advanced by *Rourke*'s bifurcated fact-factor procedure, which implicitly rules that aggravating sentencing factors are not elements of an offense for jury determination.[207] Whether *Rourke* is "right" or "wrong" is unanswered, and may not be the most important question to ask of the case. More significantly, *Rourke* is emblematic of the very real, inescapable tension between constitutional precedent and prudential policy with respect to the role of criminal juries. *Rourke* should be understood as a signal that guidelines-sentencing states are experiencing undesirable limitations, perhaps both procedural and substantive, flowing from *Blakely*'s requirements.

However, it is not the role of state courts, like Minnesota's, to bend the rule announced in *Blakely* through "secret machinations" to promote desirable policies. It is emphatically the duty of the U.S. Supreme Court to say what the law is with respect to the U.S. Constitution.[208] Accordingly, the Supreme Court decides what the constitutional jury right does and does not entail.[209] Thus, it is up to the Supreme Court alone to overturn or modify its *Apprendi-Blakely* "elements doctrine" to make way for *Rourke*.

From a practical point of view, this change cannot happen until the purported damaging effects of *Blakely* are shown to be systematic and the rule too rigid. This will not just take time, but will also require a Supreme Court that is willing to allow contemporary considerations of policy and justice to inform its understanding of the parameters of the jury function. If this happens, the element/sentencing factor pendulum may swing away from the formalism of *Blakely* and toward a practical *Rourke*-like sentencing procedure. However, as it stands now, Minnesota's new fact-factor bifurcation in aggravated sentencing deliberations creates an impermissible end-run around the law.

207. State v. Rourke, 773 N.W.2d 913, 920–21 (2009).

208. Marbury v. Madison, 5 U.S. 137, 177 (1803).

209. *See id.* ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").