Probation Revocations as Delayed Dispositional Departures: Why *Blakely v. Washington* Requires Jury Trials at Probation Violation Hearings

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Introduction

Imagine being convicted of a crime that carries a presumptive sentence of probation; later you are found in violation of the terms by intentionally contacting the victim. You dispute the grounds of the revocation arguing that you never contacted the victim. However, under your state's sentencing scheme, a judge determines whether the conditions of probation are violated by a preponderance of the evidence and, therefore, may send individuals to prison. Despite vehement objections to the judge that he or she cannot send you to prison without a jury finding beyond a reasonable doubt that you contacted the victim, the judge finds that the conditions of your probation have been violated and executes your sentence.

Criminal defendants have the right, at trial, to have a jury determine beyond a reasonable doubt facts necessary to convict them.[1] After *Blakely v. Washington*,[2] it is now known that the Sixth Amendment right to a jury trial extends to sentencing proceedings. This requirement notably extends to situations where a judge wants to depart from the sentence set forth in that state's sentencing guidelines, including extending the length of time a defendant serves. However, the requirement does not appear to apply to a determination of how the defendant serves his

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1. United States v. Howard, 420 F.2d 142, 144 (1969) (declaring that this right is "[i]mplicit in the right to trial by jury afforded criminal defendants under the [S]ixth [A]mendment").

2. 124 S. Ct. 2531 (2004).

or her time. Yet in probation revocations, where the defendant is initially placed on probation rather than imprisoned, judges are given unilateral discretion to execute a stayed sentence and commit a criminal defendant to incarceration.[3] This Article argues that probation revocations are the functional equivalent of delayed dispositional departures. This Article will refer to an extension of the time a defendant is required to serve as a durational departure. An increase in duration will be referred to as an upward durational departure, and a decrease in duration will be referred to as a downward durational departure. A modification of how a defendant serves his or her sentence will be referred to as a dispositional departure. Instances where a judge requires a defendant to serve a sentence in prison when the guidelines called for probation will be referred to as an upward dispositional departure. The opposite, where a judge places the defendant on probation when that defendant should have been imprisoned, will be referred to as a downward dispositional departure.

Because probation revocations are essentially dispositional departures that occur at a different time, the probation revocation scheme is untenable in light of *Blakely* because juries should be required to find facts beyond a reasonable doubt to ensure the accuracy of the revocation. This Article begins by discussing the procedural requirements in probation revocation cases. It will then discuss cases that preceded and, in certain instances, foreshadowed *Blakely*. Following the pre-*Blakely* Supreme Court jurisprudence discussion, this Article will examine how states with determinate schemes incorrectly followed these Supreme Court holdings. This Article will then describe the holding in *Blakely* and how states with determinate sentencing schemes have addressed the *Blakely* decision. Finally, this Article will explore the impact of *Blakely* on dispositional departures and argue that *Blakely* applies to dispositional departures and, as the next logical step, to probation revocation hearings.

I. Sentencing Before *Blakely*

Before *Blakely*, judges could impose sentences that departed from the presumptive sentence under that state's guidelines if there were "substantial and compelling" factors present to justify the departure,[4] such as prior convictions. In Kansas, at least, that

3. *See infra* notes 9-20 and accompanying text.

4. *See, e.g.*, State v. Geller, 665 N.W.2d 514, 516 (Minn. 2003) (holding that a court must specify on the record the substantial and compelling reasons for

radically changed in 2000 with the United States Supreme Court decision, *Apprendi v. New Jersey*.[5] *Apprendi* allowed judges to consider defendants' prior convictions only to pronounce a sentence in excess of the statutory maximum.[6] Any further fact for departure must be found by a jury beyond a reasonable doubt.[7] The following section examines the pre-*Blakely* decisions of the United States Supreme Court and state courts of jurisdictions with determinate sentencing schemes.[8]

*A. Probation Revocations in a Pre-*Blakely *World*

One of the most important cases related to a defendant's rights at probation revocation hearings, and the appropriate starting point of this Article, is *Morrissey v. Brewer*.[9] *Morrissey* explained the minimum due process requirements necessary at probation revocation hearings.[10] The minimum due process requirements set forth by *Morrissey* are

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[11]

In the term following *Morrissey*, the United States Supreme Court decided *Gagnon v. Scarpelli*.[12] *Gagnon* further explained the Court's holding in *Morrissey* and addressed a defendant's right to counsel at a probation revocation hearing.[13] In *Gagnon*, the Court

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departure).

5. 530 U.S. 466 (2000).

6. *Id.* at 490.

7. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 476 (citing Jones v. United States, 526 U.S. 227, 243 n.6 (1999)).

8. *See infra* notes 9-20.

9. 408 U.S. 471 (1972).

10. *Id.* at 488-89.

11. *Id.* at 489.

12. 411 U.S. 778 (1973).

13. *Id.* at 790 ("We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.").

held that defendants are not entitled to counsel as a *per se* rule but that trial courts must determine the need for counsel on a case-by-case basis.[14] Importantly, the Court distinguished between a criminal prosecution and a probation revocation hearing, thus justifying the different levels of due process protection in each hearing.[15] Probation revocations, the Court observed, are not a part of the criminal prosecution because the defendant has already been found guilty and is granted only conditional liberty, and, as such, defendants in probation revocations are not entitled to all of the due process rights afforded to criminal defendants.[16]

In *Morrissey* and *Gagnon*, the Court limited the scope of procedural requirements in probation revocations, but in 2002, the Court decided *Alabama v. Shelton*,[17] which dealt with procedural rights in probation revocations that may impact the due process limitations set forth in *Morrissey* and *Gagnon*. *Shelton* involved a defendant's right to counsel.[18] The Court held that a defendant cannot be imprisoned if the defendant was unrepresented at trial, even if the defendant faced a stayed sentence.[19] Defendants, then, are at least entitled to the Sixth Amendment right to counsel under due process when facing probation and a stayed incarceration sentence.[20]

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14. *Id.*

15. *Id.* at 781 (citing Morrissey v. Brewer, 408 U.S. 471, 480 (1972)) (holding "that the revocation of parole is not a part of a criminal prosecution"). Note also that the Court does not distinguish between probation revocation and parole revocation hearings. *Id.* at 782. As such, any reference to "probation revocations" in this Article shall also include "parole revocations."

16. *Id.* at 781. The Court, however, did observe that the revocation of probation does entail the loss of liberty and, therefore, some due process must be afforded. *Id.*

> Specifically, we held that a parolee is entitled to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.

Id. at 781-82.

17. 535 U.S. 654 (2002).

18. *Id.* at 657.

19. *Id.* at 674. The Court rejected the state's argument that this would unduly hamper its ability to "impose effective probationary punishment," and sought to appoint counsel only at the probation revocation stage. *Id.* at 666-68.

20. In *Shelton*, the defendant represented himself at a bench trial and "was convicted of third-degree assault, a class A misdemeanor carrying a maximum punishment of one year imprisonment and a $2000 fine," *id.* at 658, pursuant to sections 13A-6-22, 13A-5-7(a)(1), 13A-5-12(a)(1) of the Alabama Code. *Id.* The circuit court then sentenced Shelton to thirty days in the county jail, but suspended the sentence and placed Shelton on two years of unsupervised probation. *Id.* at 658-59. The Alabama Court of Criminal Appeals held that a suspended sentence "does

B. *"Other Than the Fact of a Prior Conviction . . ."*

In 2000, the United States Supreme Court decided *Apprendi v. New Jersey*.[21] In *Apprendi*, the Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt."[22] States with sentencing guidelines, with the exception of Kansas, believed that this language meant that judges could continue to make durational departures from sentencing guidelines as long as the resultant sentence did not exceed the statutory maximum set forth by the legislature.[23]

In 2002, the United States Supreme Court decided two cases implicated by *Apprendi*: *Ring v. Arizona*[24] and *Harris v. United*

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not trigger the Sixth Amendment right to appointed counsel unless there is 'evidence in the record that the [defendant] has actually been deprived of liberty.'" *Id.* at 659 (alteration in original). The Alabama Supreme Court reversed and held that "a suspended sentence constitute[d] a 'term of imprisonment' within the meaning of *Argersinger* and *Scott* even though incarceration is not immediate or inevitable." *Id. Shelton* makes clear that a defendant is entitled to due process, at least as it relates to representation by counsel before being incarcerated. *Id.*

21. 530 U.S. 466 (2000). *Apprendi* involved a sentencing enhancement statute where the defendant could receive twenty years imprisonment if his crime was motivated by racial bias. *See* N.J. STAT. ANN. § 2C:44-3(e) (2001); *id.* at 468. The defendant pled guilty to two offenses: second-degree possession of a firearm for an unlawful purpose in violation of section 2C:39-4a of the New Jersey statutes and third-degree unlawful possession of an antipersonnel bomb, in violation of section 2C:39-3a. *Apprendi*, 530 U.S. at 469-70. The remaining twenty counts were dismissed. *Id.* at 470. The prosecutor reserved the right to argue for enhancement of Apprendi's sentence under section 2C:44-3(e), namely, that Apprendi's offense was committed with a biased purpose. *Id.* Apprendi reserved the right to challenge the enhancement's constitutionality. *Id.* The trial judge rejected Apprendi's unconstitutionality argument and sentenced Apprendi to twelve years on one count, a penalty that was two years greater than the maximum for the offense to which he admitted. *Id.* at 470-71. Apprendi appealed, arguing that the trial court's finding of bias must be proven to a jury beyond a reasonable doubt in order to enhance his sentence. *Id.* (citing State v. Apprendi, 698 A.2d 1265 (N.J. Super. Ct. App. Div. 1997)). The New Jersey Supreme Court affirmed Apprendi's conviction and sentence. State v. Apprendi, 731 A.2d 485, 486 (N.J. 1999).

22. 530 U.S. at 489.

23. *See, e.g.*, State v. Grossman, 636 N.W.2d 545, 551 (Minn. 2001) (reducing the defendant's forty year sentence as a patterned sex offender to thirty years, the statutory maximum for first-degree criminal sexual conduct). *But see* State v. Gould, 23 P.3d 801, 804 (Kan. 2001) (holding that upward departures under the Kansas Sentencing Guidelines Act are unconstitutional if the facts necessary to depart durationally are not found by a jury beyond a reasonable doubt). The Kansas courts, however, found that *Apprendi* did not apply to dispositional departures. State v. Carr, 53 P.3d 843, 845 (Kan. 2002) (holding that *Apprendi* does not require jury findings when the court is executing a presumptively stayed sentence).

24. 536 U.S. 584 (2002).

States.[25] *Ring*, applying the rule announced in *Apprendi*, required that capital defendants receive jury determination of facts necessary to impose the death penalty where the statute prescribed life imprisonment.[26] Under the Arizona statute, "[b]ased solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment."[27] *Ring* was the first United States Supreme Court case that hinted that *Apprendi*'s definition of "statutory maximum" may not be the maximum penalty set forth in the statute, but may be the sentence that must be imposed absent additional findings.[28]

In *Harris v. United States*,[29] a case that upheld judicial findings of fact to impose mandatory minimum sentences, the Court held that the imposition of a mandatory minimum sentence did not violate *Apprendi* because its imposition was below the statutory maximum and, therefore, authorized by the jury's verdict.[30] Unlike the rule announced in *Ring* that initially hinted at the interpretation of *Apprendi* announced by *Blakely*, *Harris* indicated that the meaning of statutory maximum is not what is allowed under the guidelines, but is instead the maximum sentence set forth in the statute.[31]

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25. 536 U.S. 545 (2002).

26. 536 U.S. at 588. Ring was initially charged with premeditated murder and felony murder. *Id.* at 591. The jury was split evenly on the premeditated murder charge, six to six, and convicted on the felony murder charge. *Id.* Ring was found guilty of felony murder, but not premeditated murder. *Id.* at 592. "Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made." *Id.* The prosecution presents evidence of aggravating factors, and the defendant presents evidence of mitigating factors. *Id.* (citing ARIZ. REV. STAT. ANN. § 13-703C (West. Supp. 2001)). Those aggravating factors, the Court held, must be found by a jury in order to comply with the Sixth Amendment. *Id.* at 608-09.

27. *Id.* at 597.

28. *See id.*

29. 536 U.S. 545 (2002).

30. *Id.* at 565.

31. This appeared to be the correct predictive reading of *Ring* and *Harris*. *Ring* dealt with a sentencing statute that allowed life imprisonment unless other facts were found. 536 U.S. at 592. But in *Harris*, even if the minimum sentence exceeded the top-of-the-box presumptive sentence under the federal guidelines, the sentence still appeared to be appropriate because the judge could impose any sentence up to the statutory maximum. 536 U.S. at 554 ("Since the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm."). These holdings appear inconsistent with *Blakely*'s interpretation of the *Apprendi* rule, that the statutory maximum meant the top of the box presumptive sentence.

C. *"Other Than the Fact of a Prior Conviction . . ." Incorrectly Interpreted*

Following *Apprendi* many state courts failed to interpret correctly the holding in *Apprendi* that any fact that increases the penalty for a crime, besides a prior conviction, must be submitted to a jury.[32] Minnesota, a state with sentencing guidelines, held post-*Apprendi* that a jury's guilty verdict allowed a judge to sentence a defendant up to the statutory maximum despite the presence of sentencing guidelines that place the presumptive sentence lower than the statutory maximum.[33]

Kansas, on the other hand, interpreted *Apprendi*'s holding correctly in light of *Blakely*. In *State v. Gould*,[34] the state supreme court held that *Apprendi* applied in cases where the statutory maximum was not exceeded, but only the presumptive sentence under the sentencing guidelines was exceeded.[35] The Kansas

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32. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *see, e.g.*, State v. Grossman, 636 N.W.2d 545, 551 (Minn. 2001) (holding that the imposition of a forty year sentence for first-degree criminal sexual conduct violates *Apprendi* because it exceeds the statutory maximum by ten years without a jury finding that Grossman was a patterned sex offender). In *Grossman*, the Minnesota Supreme Court noted that the jury's verdict exposed the defendant to a sentence of thirty years under subdivision two of section 609.342 of Minnesota's criminal sexual conduct statute. *Id.* at 550. That interpretation, however, is inconsistent with *Blakely* because the maximum penalty authorized by law is the maximum the judge may impose without additional factual findings. Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004) ("In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."). Grossman's maximum sentence was not the thirty years under the statute, but was the maximum sentence in the grid of the Minnesota Sentencing Guidelines because that was the most that the judge could sentence Grossman to without additional aggravating factor findings. *See* MINN. SENTENCING GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § IV, 47-48 (2002), *available at* http://www.msgc.state.mn.us/guidelines/guide02.pdf; Eric C. Hallstrom, *Recent Decisions of the Minnesota Supreme Court:* State v. Grossman*: The Minnesota Supreme Court Applies* Apprendi *to Minnesota's Patterned Sex Offender Statute, But What Lies Ahead?*, 29 WM. MITCHELL L. REV. 411, 418 (2002) (observing that due process requires findings by a jury beyond a reasonable doubt to impose a sentence that exceeds the *statutory maximum* set forth in the criminal sexual conduct statute and not the sentencing guidelines); *see also* People v. Chanthaloth, 743 N.E.2d 1043, 1050 (Ill. App. Ct. 2001) (limiting the *Apprendi* holding to instances where the statutory maximum for that particular crime is exceeded).

33. *See supra* note 32 and accompanying text.

34. 23 P.3d 801 (Kan. 2001).

35. *Id.* at 812-13. The court in *Gould* observed:

> Under *Apprendi*, it does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment that that

Supreme Court thus presciently decided *Gould* in compliance with one of *Blakely*'s central holdings, that the statutory maximum for *Apprendi* purposes was the top-of-the-box of the sentencing grid.[36]

II. *Blakely*: What the Court Really Meant by "Statutory Maximum"

A. Blakely*: We Really Meant the Top of the Range Under the Guidelines*

In 1998, Washington State charged Ralph Howard Blakely with first-degree kidnapping under section 9A.40.020(1) of the Washington Statutes.[37] Blakely kidnapped his wife, bound her with duct tape, and placed her into a wooden box at knifepoint while asking her to dismiss pending divorce and trust proceedings.[38]

Pursuant to a plea agreement reached with the state, Blakely pled guilty to second-degree kidnapping involving domestic violence and use of a firearm.[39] On the record, Blakely "admitt[ed] the elements of second-degree kidnapping and the domestic-violence and firearm allegations, but no other relevant facts."[40] The statutory maximum sentence in Washington for second-degree kidnapping, a class B felony, was ten years of imprisonment.[41] The Washington Sentencing Reform Act established statutory

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> authorized by the jury's verdict. Gould's jury verdict "authorized" a sentence of 31-34 months for each child abuse conviction. By imposing two 68-month sentences, the district court went beyond the maximum sentence in the applicable grid box and exposed Gould to punishment greater than that authorized by the jury's verdict.

Id. (internal citations omitted). *See generally* Steven J. Crossland, *Durational and Dispositional Departures Under the Kansas Sentencing Guidelines Act: The Kansas Supreme Court's Uneasy Passage Through* Apprendi-*land*, 42 WASHBURN L.J. 687 (2003) (explaining the *Gould* decision); *Kansas Sentencing Commission Report to the 2002 Kansas Legislature*, 15 FED. SENT'G. REP. 32 (Oct. 2002) (explaining the *Gould* holding that departures exceeding the prescribed grid sentence violated *Apprendi* and suggesting possible legislative solutions).

36. *Gould*, 23 P.3d at 812-13; *see* Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004) (holding that the maximum sentence for *Apprendi* purposes is the maximum a judge may impose absent additional fact finding).

37. *Blakely*, 124 S. Ct. at 2534.

38. *Id.*

39. *Id.* at 2534. Blakely pled guilty to those charges in violation of sections 9A.40.030(1), 10.99.0202(e)(p), and 9.94A.125 of the Washington statutes. *Blakely*, 124 S. Ct. at 2534.

40. *Id.* at 2535.

41. *Id.*; WASH. REV. STAT. ANN. § 9A.40.030(3) (2000) (classifying second-degree kidnapping as a class B felony); WASH REV. STAT. ANN. § 9A.20.021(1)(b) (2000) (establishing the maximum term for a class B felony at ten years of imprisonment).

guidelines that must be followed when sentencing a criminal defendant.[42] The presumptive sentence for Blakely under the Act was between forty-nine and fifty-three months.[43]

In accordance with the plea agreement, the state asked the trial court to impose a sentence within the statutory guideline range of forty-nine to fifty-three months.[44] Following the victim's testimony, the court, on its own, imposed an exceptional sentence[45] of ninety months, thirty-seven months beyond the maximum set forth under the sentencing guidelines.[46] The trial court based its departure on several factors, including "deliberate cruelty," a statutorily enumerated departure factor in domestic violence cases.[47] Facing an additional thirty-seven months, Blakely appealed on grounds that his Sixth Amendment right to a jury determination beyond a reasonable doubt of all facts necessary to give him a departure was violated.[48] The sentence was affirmed by the Washington Court of Appeals.[49] The Washington Supreme Court denied review.[50] The United States Supreme Court granted a *writ of certiorari*.[51]

The Court began its analysis by noting that it was simply

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42. *See Blakely*, 124 S. Ct. at 2535.

43. *Id.* Second-degree kidnapping is a seriousness level V crime. WASH. REV. STAT. ANN. § 9.94A.320 (2003) (recodified as WASH. REV. STAT. ANN. § 9.94A.515). Based on the Washington statute, Blakely had an offender score of two, placing him in box 2-V, which produced the sentencing range of thirteen to seventeen months. *Blakely*, 124 S. Ct. at 2535 (citing WASH. REV. STAT. ANN. §§ 9.94A.360, 9.94A.310(1) (2003) (recodified as WASH. REV. STAT. ANN. §§ 9.94A.520, 9.94.510(1) respectively)). Having also pled guilty to use of a firearm, Blakely's sentence was subject to a thirty-six month firearm enhancement under the Washington statute. *Blakely*, 124 S. Ct. at 2535 (citing WASH. REV. STAT. ANN. § 9.94A.310(3)(b) (2003)) (recodified as § 9.94A.510(3)(b)). Adding the thirteen to seventeen month range to the thirty-six month firearm enhancement results in a presumptive sentence under Washington's Sentencing Reform Act of forty-nine to fifty-three months. The domestic violence conviction did not subject Blakely to additional time. *Blakely*, 124 S. Ct. at 2535 n.3 ("The domestic-violence stipulation subjected [Blakely] to such measures as a 'no contact' order, see § 10.99.040, but did not increase the standard range of his sentence.").

44. *Blakely*, 124 S. Ct. at 2535.

45. Washington state refers to "exceptional sentences." In this Article, I refer to "exceptional sentences" as "departures."

46. *Blakely*, 124 S. Ct. at 2535.

47. *Id.*; WASH. REV. STAT. ANN. § 9.94A.390(2)(h)(iii) (2003) (re-codified as § 9.94A.535(2)(h)(iii)). The trial court initially listed other departure factors, but the only factor affirmed on appeal was deliberate cruelty. Blakely v. Washington, 47 P.3d 149, 158-59, 159 n.3 (2002).

48. *Blakely*, 124 S. Ct. at 2536.

49. *Id.* (citing Blakely v. Washington, 47 P.3d 149, 161 (Wash. Ct. App. 2002)).

50. *Id.* (citing Blakely v. Washington, 62 P.3d 889 (Wash. 2003)).

51. Blakely v. Washington, 540 U.S. 965 (2003).

applying the rule it announced in *Apprendi*,[52] 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."[53] The Court believed that requirement was based on two tenets of common law criminal jurisprudence: first, the truth of an accusation should be confirmed unanimously by twelve peers and second, the law requires as essential the facts necessary to punish.[54]

The meaning of "statutory maximum" for *Apprendi* purposes was a matter of dispute before *Blakely*.[55] In *Blakely*, the state argued that the "statutory maximum" was a ten year maximum for class B felonies.[56] The Court, however, corrected that mistake by stating, "[o]ur precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[57] Here, the judge could not have imposed a ninety month sentence based solely on Blakely's guilty plea, but could reach only the top-of-the-box sentence of fifty-three months.[58]

The Court then explained that its "commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial."[59] The Court further explained that there are only two alternatives for those who reject *Apprendi*.[60] The first alternative is that rejecting *Blakely*'s interpretation of *Apprendi* would allow the state to label elements of the crime for the jury to decide and

52. *Blakely*, 124 S. Ct. at 2536 ("This case requires us to apply the rule we expressed in *Apprendi v. New Jersey* . . . .").

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

54. *Blakely*, 124 S. Ct. at 2536.

55. *See supra* notes 32-36 and accompanying text.

56. *Blakely*, 124 S. Ct. at 2537.

57. *Id.* ("In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.") (emphasis in original); *see also* Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT'G REP. 316, 317 (2004) ("After *Blakely*, however, the relevant 'statutory maximum' that the judge 'may impose *without* any additional findings' is the top of the range designated for the offense of conviction alone, 0-6 months. Any additional finding triggering a higher range . . . must be either admitted or proven beyond a reasonable doubt.") (citation omitted).

58. *Blakely*, 124 S. Ct. at 2537-38.

59. *Id.* at 2538.

60. *Id.* at 2539.

sentencing factors for the judge based on legislative labels.[61] The second alternative is that the "legislature may establish legally essential sentencing factors" that could result in a sentencing factor becoming the "tail which wags the dog of the substantive offense."[62] The Court concluded that neither alternative was feasible because the Framers did not intend for judges and the legislature to have this much discretion.[63]

The Court then explained that it was not invalidating determinate sentencing schemes.[64] Indeterminate sentencing schemes do not infringe on the province of the jury, unlike determinate sentencing schemes.[65] Determinate schemes implicate a defendant's *right* to a specific sentence absent additional facts, and this fact-finding is precisely what is protected by the Sixth Amendment.[66]

The dissent charged that *Blakely* would benefit judges and deprive defendants of the ability to argue sentencing factors to a judge.[67] The majority characterized the first charge as mere speculation and the second as incorrect.[68] The Court noted that the Kansas cases indicate that the opposite of the dissent's charges may be true.[69] The Court observed that defendants are not deprived of the ability to argue sentencing factors to a judge,

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61. *Id.* The Court held that this alternative is unpalatable because "[t]he jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.*

62. *Id.* (citing McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)). The problem with this alternative is that it is too subjective, according to the Court. *Blakely*, 124 S. Ct. at 2539.

63. *Blakely*, 124 S. Ct. at 2540 ("We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.").

64. *Id.* ("By reversing the judgment below, we are not, as the State would have it, 'find[ing] determinate sentencing schemes unconstitutional.' This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.") (alteration in original) (citation omitted).

65. *Id.* The Sixth Amendment, according to the Court, "is not a limitation on judicial power, but a reservation of jury power." *Id.*

66. *Id.*

67. *Id.* at 2541 ("Justice O'C[onnor] simply assumes that the net effect will favor judges, but she has no empirical basis for that prediction.").

68. *Id.*

69. *Id.* The Court observed that when Kansas courts determined that *Apprendi* threatened its determinate sentencing scheme, the legislature did not abandon determinate sentencing, but merely amended its policies to comply with *Apprendi*. *Id.* (citing KAN. STAT. ANN. § 21-4718 (Cum. Supp.) (2003)).

because they can waive their *Apprendi* rights.[70]

The Court concluded its opinion by addressing Justice Breyer's dissent.[71] Justice Breyer asserted that the majority's holding would give prosecutors more elements to bargain with and "undermin[e] alternatives to adversarial fact finding."[72] The majority rejected the first criticism as speculative[73] and the second as an attack on the jury trial system itself.[74]

The Court determined that fairness or efficiency of a jury trial need not be considered.[75] According to the Court, the fact that a judge may discover facts better than a jury is not a value judgment that could or need be made in this case.[76] The Court easily discarded the dissenters' position, noting, "as *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, [the defendant] has no such right. That should be the end of the matter."[77]

In the end, the Court held that Blakely was entitled to relief because his sentence was thirty-seven months longer than the top-of-the-box sentence he could have received under Washington's Sentencing Reform Act.[78] Blakely received a ninety month sentence based on a judicial finding that he perpetrated his crime with deliberate cruelty.[79] That fact, however, was not found by a jury and was not admitted in his plea.[80] Further, Blakely did not waive his right to have a jury determine aggravating factors.[81] Because Blakely was denied a jury finding of aggravating factors, and because he did not waive his right to do so, the Court reversed Blakely's conviction and remanded for further proceedings

70. *Blakely*, 124 S. Ct. at 2541.

71. *Id.* at 2541-43. Justice Breyer's first argument was that defendants would be deprived of the ability to argue sentencing factors to a judge. *Id.* at 2541. This Article addressed that criticism above. *See supra* note 70 and accompanying text.

72. *Id.* at 2541-42.

73. *Id.*

74. *Id.* at 2542-43.

75. *Id.* at 2543 ("Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice.").

76. *Id.* ("Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.").

77. *Id.*

78. *See supra* note 43 and accompanying text.

79. *Blakely*, 124 S. Ct. at 2535; *see supra* note 47.

80. *Blakely*, 124 S. Ct. at 2534-36.

81. *Id.* at 2536.

consistent with the Court's application of the Sixth Amendment.[82]

B. *Post*-Blakely *Correction*

The *Blakely* decision forced jurisdictions that used determinate sentencing schemes to deal with its implications.[83] Kansas was the only state in the nation that anticipated correctly the Court's interpretation of *Apprendi*.[84] Other states, including Minnesota, rushed to deal with its implications.[85] It appears that Minnesota, in light of *Blakely*, has abandoned its jurisprudence that limited *Apprendi* to cases where the defendant's sentence exceeded the statutory maximum.[86]

Blakely's applicability to dispositional departures appears tenuous. The Kansas Supreme Court determined that *Apprendi* did not apply to dispositional departures because a dispositional departure does not increase the defendant's sentence.[87]

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82. *Id.* at 2543.

83. *See* King & Klein, *supra* note 57. *Blakely* threatens the presumptive sentencing guidelines of no fewer than fourteen states. *Id.*

84. *See* State v. Gould, 23 P.3d 801, 809-14; *see also Kansas Sentencing Commission Report to the 2002 Kansas Legislature*, *supra* note 35, at 33-34 (proposing legislation that would require a jury determination of aggravating circumstances based on proof beyond a reasonable doubt, a unanimous jury verdict, and that "the sentencing court's decision would be based upon the jury's determinations regarding aggravating circumstances").

85. In *State v. Whitley*, the Minnesota Court of Appeals addressed *Blakely* and remanded for resentencing not inconsistent with *Blakely* where the defendant's sentence was based on a judicial finding that he was a patterned sex offender. 682 N.W.2d 691 (Minn. Ct. App. 2004). *Whitley* was the first case in Minnesota to be remanded on *Blakely/Apprendi* grounds because the defendant received a sentence that exceeded the presumptive sentence under the Minnesota Sentencing Guidelines. *See* MINN. SENTENCING GUIDELINES COMM'N, *supra* note 32, at § IV. Subsequent cases have provided further elaboration. *See, e.g.*, State v. Mitchell, 687 N.W.2d 393 (Minn. Ct. App. 2004) (holding that to comply with *Blakely*, the factual finding that defendant is a career offender must be found by a jury beyond a reasonable doubt); *see also* Benjamin J. Butler, Blakely v. Washington *and Sentencing in Minnesota* (October 13, 2004) (unpublished materials for presentation, on file with Minnesota State Public Defender's Office) ("Maybe the best way to think about sentencing in the post-*Blakely* world is this: the top-of-the-box presumptive sentence is the absolute maximum sentence the judge can impose.") (emphasis removed). The Minnesota Sentencing Guidelines Commission has also issued long-term recommendations to the governor in light of *Blakely*. Minn. Sentencing Guidelines Comm'n, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota: Long Term Recommendations*, 17 FED. SENT'G REP. 146 (Dec. 2004).

86. *See supra* note 85 and accompanying text.

87. In *State v. Carr*, the court restricted *Apprendi*'s holding to durational departures. 53 P.3d 843 (Kan. 2002). Specifically, the court held that "*Apprendi*, and likewise *Gould*, only involved the imposition of an upward durational departure sentence and did not encompass dispositional departures." *Id.* at 848. It is when the duration of the sentence, according to the *Carr* court, exceeds the

Minnesota, a late-comer to applying *Apprendi* to durational departures, initially agreed with Kansas' determination and held that *Blakely* did not apply to dispositional departures.[88]

Blakely's applicability to the federal sentencing guidelines appears more doubtful following *United States v. Booker*.[89] In *Booker*, the Court held that *Blakely* applied to the federal sentencing guidelines despite the statutory basis of Washington's guidelines and the commission based guideline scheme in the federal system.[90] The Court's remedy, however, excised language in the federal guidelines that made their application mandatory.[91] Federal judges were now free to disregard the guidelines when sentencing a defendant because the guidelines were now merely advisory.[92] The Court based this remedy on legislative intent.[93] Thus, the remedy in *Booker* does not automatically extend to state

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statutory maximum that *Apprendi*'s protections are triggered. *Id.* Departing dispositionally, the court held, does not extend the time served, but merely "determines where an individual's sentence will be supervised." *Id.* at 849.

88. State v. Hanf, 687 N.W.2d 659 (Minn. Ct. App. 2004). The court found that dispositional departures did not require a *Blakely* sentencing jury determination because decisions on a defendant's disposition were traditionally made by judges. *Id.* at 664 ("The traditional role of the jury has never extended to determining which offenders go to prison and which do not."). As to unamenability to probation, the determinative factor in sentencing a defendant to probation or prison, the court observed, "this tradition establishes that an offender's amenability or unamenability to probation is not a 'fact,' within the meaning of *Apprendi*, that increases the offender's penalty . . . . But an offender's unamenability to probation is a judgment reached after consideration of a series of facts." *Id.* at 665. On November 16, 2004, however, the Minnesota Supreme Court granted a petition for review in State v. Allen, (No. A04-127), 2004 WL 1925881 (Minn. Ct. App. 2004) (unpublished). *Allen*, like *Hanf*, deals with *Blakely*'s impact on dispositional departures. *Allen*, 2004 WL 1925881, at *1. It appears, then, that Minnesota's highest court is prepared to decide definitively the issue of *Blakely*'s impact on dispositional departures. *See* State v. Hanf, 2004 MN. LEXIS 758, *1 (Minn. 2005) (unpublished) (granting review of Minnesota Court of Appeals decision and staying the appeal pending review of *Allen*).

89. United States v. Booker, 125 S. Ct. 738 (2005) (interim ed.).

90. *Id.* at 749 ("As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case.").

91. *Id.* at 758-59 (requiring excision of two statutory provisions). One of the provision is the statutory provision that "requires sentencing courts to impose a sentence within the applicable Guidelines range." *Id.* at 744.

92. *See supra* note 91 and accompanying text. *See also* Debra Barayuga, *Child Porn Nets Jail Term*, HONOLULU STAR-BULLETIN, Jan. 19, 2005, *at* http://starbulletin.com/2005/01/19/news/story7.html ("Zerfoss is believed to be the first person in Hawaii to benefit from the High Court ruling that made federal sentencing guidelines in place for nearly two decades advisory but no longer mandatory, said his attorney, Victor Bakke.").

93. *Booker*, 125 S. Ct. at 768 ("[W]e believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would create.").

sentencing guideline schemes because it is not clear that each state legislature shared the same intent as Congress.

III. Probation Revocations, Dispositional Departures, and *Blakely*'s Applicability

This section argues that dispositional departures are impacted by *Blakely*. Dispositional decisions are presumptively set forth by sentencing guidelines. This section also argues that probation revocations are the functional equivalent of dispositional departures. "Delayed dispositional departures" is offered as a term of art to describe the probation revocation function. It follows, then, that probation revocations are implicated by the *Blakely* decision because they are dispositional departures that occur at a different time.

A. Blakely *Impacts Dispositional Departures*

Dispositional departures are impacted by the *Blakely* holding because they are as much a part of sentencing guidelines as durational departures.[94] Dispositional departures are written into sentencing guidelines and are inseparable from the guidelines themselves.[95] Facts must be found in order to depart dispositionally.[96] As such, those facts must be found by a jury beyond a reasonable doubt in order to comply with *Blakely*.

Under state sentencing guidelines, a grid typically includes information such as duration and disposition.[97] The inclusion of disposition indicates that the way a criminal defendant serves his or her sentence is as important as the duration of the sentence served.[98] There appears to be no distinction, at least in the

94. *See* Minn. Sentencing Guidelines Comm'n, *supra* note 85, at 150 ("Although the Court in *State v. Carr* ruled that aggravated dispositional departures are not subject to *Apprendi* and subsequently *Blakely* provisions, the Sentencing Guidelines Commission believes that aggravated dispositional departures will be subject to the [sic] *Blakely* in Minnesota.").

95. *See supra* note 94 and accompanying text; Crossland, *supra* note 35, at 711-12.

96. *See* State v. Carr, 53 P.3d 843, 853 (Kan. 2002) (Six, J., dissenting) ("The fact that Carr was not amenable to rehabilitation was a court-made finding by a preponderance of the evidence. This court-made finding sends Carr to prison.").

97. *See, e.g.*, KAN. STAT. ANN. §§ 21-4701-4705 (1995); MINN. SENTENCING GUIDELINES COMM'N, *supra* note 32, at 47-48, § IV (sentencing grid of Minnesota Sentencing Guidelines Commission).

98. *See Carr*, 53 P.3d at 853 (Six, J., dissenting) ("The provisions of the KSGA read together make clear that the presumptive sentence for a crime is not only defined by the numbers in the grid box alone, but also by whether the box lies above or below the dispositional line."); MINN. SENTENCING GUIDELINES COMM'N,

sentencing grid, of the import of duration over disposition.[99]

1. *Hanf*'s Historical Justification Cannot Be Sustained

Minnesota and Kansas attempted to distinguish dispositional departures from the *Blakely* holding by conducting a tortured comparison of factors used to depart durationally versus dispositionally.[100] Both *Hanf*, in Minnesota, and *Carr*, in Kansas, cannot withstand scrutiny.

Hanf attempted to distinguish dispositional determination by finding that the decision as to disposition is more like an indeterminate sentencing scheme than a determinate sentencing scheme.[101] This meant that a criminal defendant was not entitled to a particular disposition, and, as a result, *Blakely* was not implicated.[102] *Hanf* set forth three responses to the defendant's argument that he had a right to a stayed sentence because it was presumptive under the guidelines:[103]

> First, the presumptive disposition is determined in large degree by the defendant's criminal history score . . . . Second, the "right" referred to in *Blakely* must arise from the jury's verdict, and that verdict historically has never determined sentence dispositions, at least since courts acquired the authority to stay sentences. Third, while the elements of the offense found by the jury help determine what is a "typical" offense warranting the presumptive duration, Minnesota courts have not attempted to define what is a "typical" offender to serve as a baseline for the proper disposition of any

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supra note 32, at 19-20, § II.C ("The offenses within the Sentencing Guidelines Grid are presumptive with respect to the duration of the sentence *and* whether imposition or execution of the felony sentence should be stayed.") (emphasis added). *But see Carr*, 53 P.3d at 850 ("Probation and parole are dispositions alternate to the serving of a sentence, and neither probation nor parole increase or decrease the sentence required to be imposed by statute.").

99. *See supra* note 98 and accompanying text. Nowhere in the Minnesota Sentencing Guidelines is there any statement that duration is more important than disposition. In fact, it appears that they are to be treated with equal weight. MINN. SENTENCING GUIDELINES COMM'N, *supra* note 32, at 19-21, § II.C; *see also id.* at 21-22, §§ II.C.01-02.

100. *See* State v. Hanf, 687 N.W.2d 659 (Minn. Ct. App. 2004); *Carr*, 53 P.3d at 843.

101. *Hanf*, 687 N.W.2d at 664 ("The relevance of this history to the *Blakely* issue is plain. Dispositional departures based on individual offender characteristics are like the traditional sentencing judgments made by judges in indeterminate sentencing schemes."). Dispositional departures survive *Blakely* analysis when judges make fact determinations because *Blakely* upheld indeterminate sentencing schemes. *Id.* (citing Blakely v. Washington, 124 S.Ct. 2531, 2540 (2004)).

102. *See Hanf*, 687 N.W.2d at 664.

103. *Id.*

type of offense.[104]

Even if the Minnesota Court of Appeals was correct when it stated that "the presumptive disposition is determined in large degree by the defendant's criminal history score,"[105] the court itself admitted that there are other factors that historically played a significant role in determining disposition.[106] The court instead chose to rely on an unsupported, conclusory statement: "We conclude that the determination of amenability or unamenability to probation is not the determinate, structured fact-finding that *Blakely* holds the jury must perform."[107] As to the second, historical factor, the court did not account for a change in case law, namely *Blakely*, that had the possibility of fundamentally altering the dispositional determination.[108] Instead, it merely recited the history of dispositional determinations and held that *Blakely* did not apply because, historically, juries never determined disposition.[109] Finally, the court determined that dispositional decisions are not implicated by *Blakely* because there is no "typical" offender baseline to guide juries. The court failed to note that juries generally are not told what "typical" offenses may look like, yet they apparently are given the power to find aggravating factors based on a departure factor such as "deliberate cruelty" that would increase a sentence duration.[110]

Not only did *Hanf* fail to distinguish adequately dispositional departures from durational departures that it admitted were impacted by the rules announced in *Apprendi* and *Blakely*, but the Minnesota Sentencing Guidelines Commission believed that

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104. *Id.*

105. *Id.*

106. *Id.* at 665 ("But an offender's unamenability to probation is a judgment reached after consideration of a *series of facts*.").

107. *Id.*

108. *Id.* at 664.

109. *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 363 (1989)) ("The traditional role of the jury has never extended to determining which offenders go to prison and which do not. Traditionally, courts and parole officials made 'their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation.'").

110. *See id.* at 665. The Minnesota Sentencing Guidelines also provide a non-exhaustive list of proper departure factors. MINN. SENTENCING GUIDELINES COMM'N, *supra* note 32, at 25-29, § 11.D. Despite these offense-based comparisons that must be done by the jury, the Minnesota Court of Appeals still does not have a problem with durational departures. *See Hanf*, 687 N.W.2d at 665; *see also* Butler, *supra* note 85, at 2 ("Dispositional departures require additional fact-finding (of aggravating factors) just like durational departures. These too are unconstitutional under *Blakely*.").

dispositional departures were implicated by *Blakely*.[111] The commission spent several paragraphs explaining Kansas' treatment of dispositional departures through an examination of *Carr* but held in conclusion, "although the Court in *State v. Carr* ruled that aggravated dispositional departures are not subject to *Apprendi* and subsequently *Blakely* provisions, the Sentencing Guidelines Commission believes that aggravated dispositional departures will be subject to the [sic] *Blakely* in Minnesota."[112]

2. *Carr*'s "Act of Grace" Justification Cannot Be Sustained

In *Carr*, the Kansas Supreme Court held that upward dispositional departures were not implicated by *Apprendi* because probation was an "act of grace," distinct from the sentence given to a defendant.[113] That argument fails under scrutiny for two reasons. First, sentencing guidelines specifically include presumptive dispositions. Second, a prison term is indeed a more serious disposition than a probation term, thus implicating *Apprendi* and *Blakely*.

Whether a state's guideline system is promulgated by statute or commission, the distinction between stayed and imposed sentences remains.[114] Dispositional sentences are presumptive in the same way that durational sentences are presumptive.[115] No

111. Minn. Sentencing Guidelines Comm'n, *supra* note 85, at 150; *see infra* note 116.

112. Minn. Sentencing Guidelines Comm'n, *supra* note 85, at 150. While the report of the commission admittedly does not have binding effect, it has persuasive authority. *Id.* at 146 ("The Sentencing Guidelines Commission brings forth these recommendations that are advisory in nature, but are meant to serve as a road map until the full implications of *Blakely* work their way through the courts.").

113. State v. Carr, 53 P.3d 843, 850 (Kan. 2002); Crossland, *supra* note 35, at 708-09.

114. *See supra* note 97 and accompanying text. The Kansas system is set forth by the legislature through statutes, while the Minnesota scheme is commission-based. *See supra* note 97. In both Kansas and Minnesota, there exists a separation of presumptive incarceration sentences from presumptive probation sentences. Crossland, *supra* note 35, at 713 ("The mere existence of the dispositional line is a strong indication that the Kansas legislature intended the district courts to adhere to the distinction that the dispositional line represents."); *see* MINN. SENTENCING GUIDELINES COMM'N, *supra* note 32, at 47, § IV. In Minnesota, the grid uses shaded and non-shaded boxes that represent presumptive incarceration or presumptive stayed sentences. *Id.* Non-shaded boxes represent presumptive commitment to state imprisonment. *Id.* Shaded boxes represent presumptive stayed sentences. *Id.*

115. *See* MINN. SENTENCING GUIDELINES COMM'N, *supra* note 32, at 19-21, § II.C (noting that sentences are presumptive as to both duration and disposition); Crossland, *supra* note 35, at 711 ("[I]t is sensible to consider that a grant of presumptive probation for a felony offense subject to the KSGA constitutes a sentence, and that the Kansas legislature intended this result in creating the

basis exists for courts to distinguish between a durational and dispositional departure when none is set forth in the guidelines.[116] Because dispositional sentences have the same presumptive weight in a sentencing guidelines grid, *Blakely* and *Apprendi* must also impact dispositional departures and require a jury to find facts beyond a reasonable doubt in order to depart.

Second, upward dispositional departures enhance the severity of a defendant's sentence, again implicating *Blakely* and *Apprendi*. It is undeniable that sentences of commitment to state prison are more serious than stayed sentences of probation.[117] The restrictions placed on individuals on probation versus those incarcerated are significant.[118]

The United States Supreme Court in *Blakely* was not only concerned about duration specifically but also appeared to be concerned with severity in general.[119] Both Minnesota and Kansas

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KSGA.").

116. It is important to note first that the Minnesota Sentencing Guidelines Commission believed that dispositional departures were affected by *Blakely*. MINN. SENTENCING GUIDELINES COMM'N, *supra* note 32, at § IV; *see also* Butler, *supra* note 85, at 2. The Kansas Sentencing Commission also believed that probation was presumptive. *See* Crossland, *supra* note 35, at 712 ("Notably, the Sentencing Commission embraces probation as a sentence in its annual report to the legislature.").

117. *See Carr*, 53 P.3d at 851 (Six, J., dissenting) ("The qualitative difference between prison and probation is obvious and striking."). Justice Six's dissent continued: "while the demands of probation place certain restrictions on a person's movements, these are very different from the restrictions of confinement in prison." *Id.* (citing Hudson v. State, 42 P.3d 150 (2002)).

118. *See* Crossland, *supra* note 35, at 715. In his article, Crossland articulates the differences between probation and prison:

> The Kansas Supreme Court has acknowledged that there is a significant difference between probation and prison. For example, an offender placed on probation must accept certain limitations upon personal freedom, but the offender may still move about freely in the community. The probationer may generally work in the employment or career of his or her choice, travel, vote, and engage in any lawful social activity to the extent that court restrictions allow. In contrast, a person confined in prison cannot participate in any of these basic societal activities.

Id. These differences, Crossland argues, are the bases against which it is impossible to argue that a prison sentence is not an increased penalty beyond the presumptive sentence where the presumptive sentence is a stayed sentence to probation. *Id.*

119. *See generally* Blakely v. Washington, 124 S.Ct. 2531 (2004). No mention is made in *Blakely* of being limited to duration only. Relevant to this discussion is *Blakely*'s clear definition that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 124 S.Ct. at 2537. The Court continued, "when a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts . . . and the judge exceeds his proper authority." *Id.* Whether a defendant is amenable to probation appears to be the fact question that must be answered in order to determine

now appear to be making the same mistake that most states made in interpreting *Apprendi* too narrowly, given their recent *Hanf* and *Carr* decisions.[120] Just as *Apprendi*'s holding was not limited solely to instances where the statutory maximum for that particular crime was exceeded, *Blakely* should not be read so narrowly as to avoid application to dispositional departures.[121] In *Blakely*, the Court made clear that when it said "statutory maximum" penalty, it meant the most severe sentence authorized by the guidelines grid.[122]

Whether a defendant is incarcerated or placed on probation is a weighty decision that impacts the seriousness of the penalty. The dissent in *Carr* was correct in observing that this decision is "obvious and striking."[123] Sentencing guidelines are written with presumptive durations and dispositions.[124] Because incarceration is more serious than probation and increases the penalty of the offense, the dispositional decision, like the durational decision, is implicated by the *Blakely* explanation of the rule announced in *Apprendi*.[125]

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disposition. *See* State v. Carr, 53 P.3d 843, 853 (Kan. 2002) (Six, J., dissenting); State v. Hanf, 687 N.W.2d 659, 665 (Minn. Ct. App. 2004) ("We conclude that the determination of amenability or unamenability to probation is not the determinate, structured fact-finding that *Blakely* holds the jury must perform.").

120. An example of Minnesota's incorrect application of *Apprendi* is the *Grossman* case. *See supra* note 32 and accompanying text. In *Grossman*, the Minnesota Supreme Court invalidated the defendant's sentence because it exceeded the thirty year statutory maximum set forth in the criminal sexual conduct statute and instead imposed the statutory maximum of thirty years, despite the defendant's presumptive sentence under the guidelines being less than that. *See* State v. Grossman, 636 N.W.2d, 545, 549-51 (Minn. 2001). We know now that this interpretation was incorrect in light of *Blakely*. *See supra* note 119 and accompanying text (discussing *Blakely*'s definition of "statutory maximum"); *see also* State v. Gould, 23 P.3d 801, 814 (Kan. 2001) ("*Apprendi* dictates our conclusion that Kansas' scheme for imposing upward departure sentences, embodied in K.S.A. 2000 Supp. 21-4716, violates the due process and jury trial rights contained in the Sixth and Fourteenth Amendments to the United States Constitution."). For a discussion of *Hanf*, see *supra* notes 100-111 and accompanying text. For a more complete discussion of *Carr*, see *supra* notes 113-118 and accompanying text.

121. This Article is not assuming that simply because *Blakely* gave a more expansive reading to *Apprendi* that it necessarily follows that a more expansive reading should be given to the dispositional departure problem. Instead, this Article argues that *in light of Blakely*'s more expansive reading of the term "statutory maximum," it should be even clearer that the presumptive disposition is a part of the "statutory maximum" and cannot be increased absent jury findings beyond a reasonable doubt. *See supra* note 119 and accompanying text.

122. *See supra* note 119 and accompanying text.

123. *Carr*, 53 P.3d at 851 (Six, J., dissenting).

124. *See supra* notes 97-98 and accompanying text.

125. *See supra* notes 117-118 and accompanying text.

B. Probation Revocations Are Delayed Dispositional Departures

The functional effect of probation revocations is incarceration.[126] In an upward dispositional departure, a criminal defendant is incarcerated instead of placed on probation. Thus, the result of a probation revocation is the same as the result of an upward dispositional departure. The temporal difference—that probation revocations occur at some point after sentencing—is insufficient to distinguish *Blakely*'s requirements.[127] Probation revocations thus are essentially delayed dispositional departures.

The result of a probation revocation is incarceration.[128] Generally, those placed on probation are given terms and conditions to follow that, if violated, are grounds for the stay of sentence to be revoked.[129] Whether one has followed the terms and conditions is essentially a determination of amenability.[130] The amenability versus unamenability determination is the hallmark of the dispositional departure.[131]

Probation revocations occur after a defendant has been sentenced. Dispositional departures from the presumptive disposition, under sentencing guidelines, occur at the conclusion of the guilt phase of trial.[132] The temporal difference, thus, appears to be the only distinguishing characteristic between probation revocations and dispositional departures.[133]

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126. *See, e.g.*, KAN. STAT. ANN. § 22-3716 (2004) (stayed sentence and probation revocation statute); MINN. STAT. § 609.14 (2003) (revocation of stay statute). A probation revocation revokes the stay that was granted at sentencing. *Id.*

127. *See infra* note 134 and accompanying text.

128. *See supra* note 126 and accompanying text.

129. *See, e.g.*, MINN. STAT. § 609.14, subd. 1 (explaining that the grounds for revocation include whether a defendant violated the terms and conditions of the stayed sentence of probation). *See generally* Gagnon v. Scarpelli, 411 U.S. 778, 779-80 (1973) (discussing probation revocation hearings and the grounds for revocation); Morrissey v. Brewer, 408 U.S. 471, 472 (1972) (illustrating revocation on grounds of another committed crime).

130. *See* State v. Hanf, 687 N.W.2d 659, 665-66 (Minn. Ct. App. 2004) (citing amenability as the factor used for dispositional decisions, which is not a "fact" that increases the defendant's penalty thus implicating *Apprendi* and *Blakely*).

131. *See supra* note 130 and accompanying text.

132. *See generally* Alabama v. Shelton, 535 U.S. 654 (2002) (discussing the procedural process of sentencing and revocation generally throughout).

133. A countervailing argument that probation revocations do not deprive the defendant of liberty because a sentence has already been pronounced is unpersuasive. *See* Adam D. Young, Comment, *An Analysis of the Sixth Amendment Right to Counsel as It Applies to Suspended Sentences and Probation: Do* Argersinger *and* Scott *Blow a Flat Note on* Gideon's *Trumpet?*, 107 DICK. L. REV. 699, 714-16 (2003). Defendants are, in fact, being deprived of something to which they were entitled. In this context, they are entitled to remain unincarcerated as

Difference in time cannot adequately distinguish a probation revocation from a dispositional departure done at sentencing and, as a result, remove it from protection under *Blakely* and *Apprendi*.[134] Time is simply not enough to defeat the argument that probation revocations are not impacted by *Blakely* and *Apprendi*. The fact that the dispositional departure occurs later does not alter the substance of the decision.[135] Because a difference in the temporal point at which a criminal defendant with a presumptive stayed sentence is incarcerated is not sufficient to remove probation revocations from *Blakely* and *Apprendi*'s reach, probation revocations require juries to decide facts necessary to revoke probation beyond a reasonable doubt.[136]

C. Blakely *Implicates Probation Revocations*

Having accepted the first two premises as true, it becomes inescapable that probation revocations are impacted by *Blakely* and *Apprendi*.[137] Of course, one problem still exists. Probation revocation case law has clearly delineated the procedural rights of defendants at probation revocation hearings. In *Morrissey*, the Court set forth the minimum due process requirements in probation revocation hearings.[138] Following *Morrissey*, the Court held that counsel was not required as a rule in probation revocation hearings, but that the need would be determined on a case-by-case basis.[139] Thirty years later, in 2002, the Court found that counsel was required at both the revocation stage and at the underlying offense stage.[140]

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long as they do not violate the terms and conditions of their probation. However that determination is made by a judge using a constitutionally permissible lower standard of proof. Brian G. Bieluch, *Thirty-First Annual Review of Criminal Procedure: IV. Sentencing: Probation*, 90 GEO. L.J. 1813, 1826 (2002) ("Although the government has the burden of persuasion at probation revocation hearings, the government is not require[d] to prove probation violations beyond a reasonable doubt.").

134. Young, *supra* note 133, at 716 ("Simply removing in time the implementation of the prison sentence does not give it constitutional validity.").

135. *See supra* note 134 and accompanying text.

136. In order for this conclusion to follow, one must assume that dispositional departures are impacted by *Blakely* and require jury findings beyond a reasonable doubt to depart upwardly.

137. *See supra* notes 94-136 and accompanying text.

138. *See supra* note 10 and accompanying text. Of the six requirements set forth in *Morrissey*, the right to a jury determination was not included. *Id.*

139. *See supra* note 13 and accompanying text. The Court did not want to establish a bright line rule, but wanted to give judges discretion to decide whether counsel was necessary and appropriate. *Id.*

140. *See supra* notes 17-19 and accompanying text. *Shelton* required counsel at

This historical overview highlights the fluid nature of probation revocation hearing jurisprudence.[141] The fact that jury trials were not afforded to criminal defendants at probation revocations under *Morrissey* and *Gagnon* does not justify the failure to extend the right in light of *Blakely* and *Apprendi* because the right to counsel at the underlying offense stage was not guaranteed until as recently as 2002 in *Shelton*.

The law in this area is ripe for change. *Apprendi* gave criminal defendants the right to a jury trial where none existed before.[142] *Ring* applied that rule in the context of the death penalty, essentially finding that a shift from execution to life imprisonment without parole is an upward departure and required jury findings if the conviction alone does not support the departure.[143] *Shelton* then expanded due process protections to criminal defendants facing probation revocation by requiring counsel at every stage of the process.[144] And finally, *Blakely* held that the statutory maximum that cannot be exceeded under *Apprendi* meant the top of the range in determinate sentencing schemes without a jury finding the facts necessary to depart beyond a reasonable doubt.[145]

This progression leads to the conclusion that the rule in *Apprendi* can and will be further expanded to the area of probation revocations. *Blakely* and *Ring* hinted at the Court's willingness to expand the rule in *Apprendi*.[146] *Shelton* indicated the Court's willingness to expand due process protections in probation revocation hearings.[147] The argument, then, that jury trials are required under *Blakely*, *Apprendi*, and *Shelton* is both reasonable and probable.

Conclusion

The *Blakely* and *Apprendi* cases demonstrate how patterns emerge in the United States Supreme Court's jurisprudence. At first glance, it appears that *Apprendi* is limited to situations where

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the underlying offense stage, where the defendant was initially placed on probation because the sentence could never be executed and be in accord with a defendant's right to counsel. *See supra* note 19 and accompanying text.

141. *See supra* notes 138-140 and accompanying text.

142. *See supra* notes 21-23 and accompanying text.

143. *See supra* notes 24-27 and accompanying text.

144. *See supra* notes 17-20 and accompanying text.

145. *See supra* notes 37-82 and accompanying text.

146. *See supra* notes 143, 145 and accompanying text.

147. *See supra* note 144 and accompanying text.

the statutory maximum is exceeded.[148] *Ring*, and later *Blakely*, gave new meaning to the *Apprendi* holding by expanding its reach.[149] Part of a guidelines' sentence is disposition; how one serves his or her sentence *is* important after all. Dispositional departures, then, should be regarded as implicated by *Blakely*'s more expansive language.[150] Once dispositional departures are included, the question of probation revocations becomes much easier. Probation revocations are essentially dispositional departures that occur at a later time; they can be thought of as delayed dispositional departures. Temporal difference simply cannot distinguish substance here.[151] As such, probation revocations should be implicated by *Blakely* and *Apprendi*.

Imagine the accused, standing before the judge emphatically arguing that he or she never violated the terms of his or her probation. Pre-*Blakely*, *Apprendi*, and *Shelton*, it appeared that the accused would be subject to execution of sentence unilaterally by a judge, without counsel, and with the fact-finder using a standard of proof lower than beyond a reasonable doubt. *Shelton* held that those facing probation revocations were entitled to counsel at the underlying offense hearing, even if that offense did not expose them to a loss of liberty. *Apprendi* and *Blakely* give the accused the right to have a jury determine the facts necessary to revoke beyond a reasonable doubt.

Taken together, under *Blakely*, *Apprendi*, and *Shelton*, it is reasonable to believe that the next logical step is to allow jury determinations of facts necessary to revoke probation in probation revocation hearings. Under this new rule, criminal defendants will no longer be at the mercy of judges. Those facing probation revocations, like all criminal defendants facing prison time, should now have the procedural protections of twelve peers determining whether aggravating factors exist beyond a reasonable doubt when facing revocation of a stayed sentence.

148. *See supra* notes 21-23 and accompanying text.
149. *See supra* notes 24-28, 37-82 and accompanying text.
150. *See supra* notes 94-125 and accompanying text.
151. *See supra* notes 134-136 and accompanying text.