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[Note: Since this memorandum was published, state legislation has been enacted and many appellate cases have been decided on *Blakely* issues. The reader should conduct further research. There is a helpful publication available on the Institute of Government website at <http://ncinfo.iog.unc.edu/programs/crimlaw/Blakely%20Update.pdf>.]

***Blakely v. Washington* and Its Impact on North Carolina's Sentencing Laws**

This memorandum discusses the United States Supreme Court ruling in *Blakely v. Washington*, 542 U.S. ____ (June 24, 2004), and its impact on North Carolina's sentencing laws. It offers suggestions on how to comply with the ruling until further guidance is provided by appellate courts or the North Carolina General Assembly.

I. *Apprendi v. New Jersey*

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant pled guilty to second-degree possession of a firearm for an unlawful purpose, which was punishable by imprisonment between 5 and 10 years. The state then requested the sentencing judge to make factual findings necessary to impose an extended term of imprisonment under New Jersey's hate crime enhancement law, which would authorize a punishment between 10 to 20 years. The judge conducted a hearing, heard evidence, found by a preponderance of evidence that the hate crime enhancement applied because the crime was motivated by racial bias, and sentenced the defendant to a 12-year term of imprisonment. Thus the judge's findings resulted in a sentence exceeding the maximum sentence for the offense to which the defendant had pled guilty. The New Jersey Supreme Court upheld the defendant's sentence.

The United States Supreme Court reversed. It ruled: "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 the jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. The defendant was entitled to a jury trial on the issue and the state had the duty to prove beyond a reasonable doubt the issue (that is, the crime was motivated by racial bias) that had resulted in a term of imprisonment greater than the maximum sentence for the offense to which he had pled guilty.

II. *Blakely v. Washington*

A. Ruling

In *Blakely v. Washington*, 542 U.S. ____ (June 24, 2004), the defendant in a Washington state court pled guilty to kidnapping, which was a Class B felony punishable by imprisonment up to 10 years. However, other provisions of state law limited the sentence to a “standard range” of 49 to 53 months. The judge conducted a hearing, heard evidence, found as an aggravating factor that the defendant had acted with “deliberate cruelty,” and imposed a sentence of 90 months, which exceeded the standard range maximum, but not the 10-year maximum for Class B felonies. A Washington appellate court upheld the defendant’s sentence.

The United States Supreme Court reversed. The Court stated that this case required it to apply the *Apprendi* ruling, which it quoted: “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 the jury, and proved beyond a reasonable doubt.” Slip opinion at 5. The Court noted that the defendant was sentenced to more than 3 years above the 53-month statutory maximum of the standard range because he had acted with “deliberate cruelty.” The facts supporting that finding were neither admitted by the defendant nor found by a jury beyond a reasonable doubt. The Court stated that its 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. 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. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” (emphasis in original opinion; citations and internal quotations omitted). Slip opinion at 7.

The Court stated that the sentencing judge in this case could not have imposed the 90-month sentence solely based on the facts admitted in the defendant’s guilty plea. The judge’s authority to impose the 90-month sentence came only from finding the additional fact that the defendant had acted with “deliberate cruelty.” The Court concluded that because this additional fact was not admitted by the defendant or submitted to a jury and proven beyond a reasonable doubt, the defendant’s sentence was constitutionally invalid.

The Court also discussed whether a defendant could waive the right to a jury trial concerning what it described as “sentence enhancements”:

When a defendant pleads guilty, the State is free to seek judicial enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which will be in his interest if relevant evidence would prejudice him at trial (citations omitted). Slip opinion at 14.

B. Cases Affected; Retroactivity

What cases are affected by this ruling? The ruling applies to all cases in which a conviction had not yet become final when *Blakely* was decided—June 24, 2004. A state conviction becomes final when the availability of direct appeal to state courts has been exhausted and the time for filing a petition for a writ of certiorari to the United States Supreme Court has elapsed or a timely filed petition has been finally denied. *See* Griffith v. Kentucky, 479 U.S. 314, 321, n. 6 (1987); Caspari v. Bohlen, 510 U.S. 236 (1994).

Is this ruling retroactive to cases that have become final? A defendant must satisfy the retroactivity test of *Teague v. Lane*, 489 U.S. 288 (1989). For recent *Teague* cases decided by the United States Supreme Court, see *Schriro v. Summerlin*, 542 U.S. ____, (June 24, 2004) (applying *Teague* test to *Ring v. Arizona*, 536 U.S. 584 (2002), and finding *Ring* was not retroactive); *Beard v. Banks*, 542 U.S. ____ (June 24, 2004) (applying *Teague* test to *Mills v. Maryland*, 486 U.S. 367 (1988), and finding *Mills* was not retroactive). See also *State v. Zuniga*, 336 N.C. 508 (1994) (applying *Teague* to determine whether *McKoy v. North Carolina*, 494 U.S. 433 (1990), applied retroactively in state postconviction proceeding and finding *McCoy* was retroactive). This memorandum will not analyze the retroactivity issue.

III. Relevant North Carolina Supreme Court cases after *Apprendi* and before *Blakely*

Two North Carolina Supreme Court cases decided after *Apprendi* and before *Blakely* may provide guidance in applying the *Blakely* ruling in North Carolina state courts. They are summarized below.

A. *State v. Lucas*

In *State v. Lucas*, 353 N.C. 568 (2001), the defendant was convicted of several offenses, including first-degree burglary and second-degree kidnapping. The trial judge found the necessary facts (essentially, the defendant's use of a firearm during the felonies) under the firearm enhancement statute, G.S. 15A-1340.16A, and increased the defendant's sentence by 60 months for both the burglary and kidnapping offenses. The defendant argued on appeal that the statute was unconstitutional on its face and as applied to him because it did not require the enhancing facts to be submitted to a jury and be proven beyond a reasonable doubt. The defendant also argued that the trial court lacked jurisdiction because the enhancing facts were not alleged in an indictment.

Quoting from *Apprendi*, the court noted that under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a 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—and the Fourteenth Amendment commanded the same answer involving a state statute. 353 N.C. at 595. Relying on these statements and the *Apprendi* ruling, the court ruled that in future cases when the state seeks a firearm enhancement, it must allege the enhancing facts in an indictment and prove those facts to a jury beyond a reasonable doubt. The court declined to declare the firearm enhancement statute unconstitutional on its face.

There are at least two significant outcomes of the North Carolina Supreme Court's *Lucas* ruling in light of *Blakely*.

1. The *Lucas* court determined that *Apprendi* required the state to allege non-conviction sentencing factors in an indictment or other criminal pleading, if the factors were subject to the *Apprendi* ruling. Thus, the state must allege non-conviction sentencing factors (assuming there is no short-form indictment or criminal pleading) for cases subject to the *Apprendi* and *Blakely* rulings.
2. The court authorized trial courts in future cases to follow constitutionally-mandated procedures permitting the imposition of an enhancement sentence without first requiring the revision of G.S. 15A-1340.16A by the North Carolina General Assembly. (The statute was later revised in 2003.) Thus trial courts are likely authorized to follow procedures mandated by *Blakely* without awaiting statutory revisions by the North Carolina General Assembly.

Concerning another matter, the court in *Lucas* had ruled that *Apprendi* applied only when the sentence for the firearm enhancement—when added to the sentence for the substantive offense—exceeded the maximum sentence, which the court calculated by assuming the offense was in aggravated range and the defendant had a prior record level VI. This ruling is no longer valid in light of *Blakely*. The facts supporting a firearm enhancement would not be reflected in the jury’s verdict concerning the substantive offense, and thus a sentence for a firearm enhancement under the version of G.S. 15A-1340.16A at issue in *Lucas* always would be subject to *Blakely*. (The 2003 revision of G.S. 15A-1340.16A appears to comply with *Blakely*’s requirements.)

B. *State v. Hunt*

In *State v. Hunt*, 357 N.C. 257 (2003), the North Carolina Supreme Court ruled that the United States Supreme Court’s ruling in *Ring v. Arizona*, 536 U.S. 584 (2002) (because Arizona law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of the factor to be proved to a jury instead of a judge), did not render North Carolina’s short-form murder indictment unconstitutional even though it did not allege the aggravating circumstances that the state would attempt to prove in seeking a death sentence. The court noted that while the United States Supreme Court has not imposed the Fifth Amendment’s indictment requirement on the states, the Sixth Amendment requires that defendants must be informed of the criminal charges against them. The court ruled that constructive statutory notice in G.S. 15A-2000(e)’s listing of the aggravating circumstances—which are exclusive, relatively short, and with no catchall circumstance—was sufficient. (The court’s ruling also relied on other factors set out in its opinion.) The court distinguished *State v. Lucas*, discussed above, on the ground that it did not involve a short-form indictment as the charging instrument.

The *Hunt* ruling may be relevant, as discussed below, in determining whether, because G.S. 20-138.1(c) authorizes a short-form criminal pleading, grossly aggravating or aggravating factors must be alleged in impaired driving prosecutions.

IV. Felony Sentencing in Superior Court under Structured Sentencing Act

A. Sentencing in Aggravated, Presumptive, or Mitigated Ranges

Sentencing a defendant in the aggravated range is clearly affected by *Blakely* and is discussed below. Sentencing a defendant in the presumptive range is not affected by *Blakely* because the sentence does not exceed the statutory maximum as defined in *Blakely* (once a defendant has been convicted by a jury or pleads guilty to a felony offense, no additional facts need to be found to sentence the defendant in the presumptive range). The presumptive range in North Carolina is similar to the “standard range” in Washington state courts, which was not an issue in *Blakely* and did not appear to be a constitutional problem. The mitigated range is less than the presumptive range and thus is not affected by *Blakely*.

Sentencing in the presumptive and mitigated ranges may, however, be subject to *Blakely* concerning calculating a defendant’s prior record level. See the discussion below.

B. Calculating Prior Record Level

Because the *Blakely* ruling does not apply to prior convictions (the Court’s opinion quoted from the *Apprendi* ruling, “Other than the fact of a prior conviction . . .” slip opinion at 5), the assignment of points for prior convictions and proof of prior convictions under G.S. 15A-1340.14(b), (d), (e) and (f) are not subject to the ruling.

G.S. 15A-1340.14(b)(7) assigns one point if the offense was committed while the defendant was on probation, parole, or post-release supervision, or while the defendant was on escape from a correctional institution while serving a sentence of imprisonment. Because this

factual information is neither a prior conviction nor reflected in the jury's verdict or a defendant's guilty plea to an offense, it appears *Blakely* applies to the findings necessary to assign these points. Thus, if the state seeks the assignment of one point under this statutory provision, it must (1) allege the factor in an indictment or bill of information (the defendant and his or her attorney must agree to sign a bill of information), and (2) prove the factor before a jury beyond a reasonable doubt. Or, after waiving the right to a jury trial on the issue, the defendant pleads guilty to or admits to the factor (or consents to judicial factfinding about this factor, but see the discussion below whether this procedure is permitted in North Carolina).

G.S. 15A-1340.14(b)(6) assigns one point if all the elements of the present offense are included in any prior offense for which the defendant was convicted, whether or not the prior offense or offenses were used in determining the prior record level. Because this provision requires a legal conclusion and not a finding of fact, it is unclear whether it is subject to *Blakely*. However, a conservative approach would be to assume it is subject to *Blakely* until the issue has been resolved by an appellate court.

When the assignment of the kind of points discussed above in the calculation of the prior record level would result in a higher prior record level than otherwise would have been determined, the state must satisfy *Blakely* even if the sentencing judge imposes a sentence in the presumptive or mitigated ranges because these points, reflecting facts not found by the jury, place the defendant in a greater sentencing range than would be authorized by the jury's verdict.

C. Sentencing in Aggravated Range

Sentencing in the aggravated range is clearly affected by *Blakely* because, under current statutory procedure, the facts supporting aggravating factors are not reflected in the jury verdict or a defendant's guilty plea to an offense. Thus, if the state seeks a sentence in the aggravated

range, it must (1) allege the aggravating factors, both statutory and nonstatutory, in an indictment or bill of information (the defendant and his or her attorney must agree to sign a bill of information), and (2) prove each aggravating factor before a jury beyond a reasonable doubt. Or, after waiving the right to a jury trial on the issue, the defendant pleads guilty to or admits to the aggravating factors (or consents to judicial factfinding about the factors—see the discussion below whether this procedure is permitted in North Carolina).

D. How to Allege Facts Subject to *Blakely*

Based on the North Carolina Supreme Court’s ruling in *State v. Lucas*, discussed above, and the current lack of any short-form indictment for alleging aggravating factors, to support a valid sentence under *Blakely* the state must allege in an indictment or a bill of information: (1) the statutory or nonstatutory aggravating factors that might be used in imposing a sentence in the aggravating range; and (2) the factors, other than prior convictions, that could be used in assigning points in calculating a defendant’s prior record level. These factors must be alleged even if the defendant plans to admit to the factors (or if the defendant consents to judicial factfinding, which is discussed below).

There are several ways to allege this information.

- The allegations could be added at the end of the charging language for an offense. For example, “The following aggravating factors exist for this offense: (1) The offense was especially heinous, atrocious, or cruel; and (2) The defendant does not support the defendant’s family. The following fact exists in calculating the defendant’s prior record level: the defendant committed this offense while on supervised probation.”

- The allegations could be asserted in the second count of a bill of indictment or bill of information: “The following aggravating factors exist for the offense alleged in count one: (1) The offense was especially heinous, atrocious, or cruel; and (2) The defendant does not support the defendant’s family. The following fact exists in calculating the defendant’s prior record level for the offense alleged in count one: the defendant committed this offense while on supervised probation.”
- If the indictment or information alleges three offenses and there are identical aggravating factors for all the offenses, then the allegations could be asserted in a fourth count: “The following aggravating factors exist for the offenses alleged in counts one, two, and three: (1) The offense was especially heinous, atrocious, or cruel; and (2) The defendant does not support the defendant’s family. The following fact exists in calculating the defendant’s prior record level for the offenses alleged in counts one, two, and three: the defendant committed this offense while on supervised probation.”
- If there are multiple offense in one indictment and the aggravating factors or facts in calculating the defendant’s prior record level are different for each offense, then the allegations need to be carefully referenced to the offenses to which they apply.

E. Trial Procedure

There are several scenarios in which a defendant has a constitutional right to a jury trial involving *Blakely*. (1) The defendant pleads not guilty to the offense and does not admit to any aggravating factors or points for calculating a prior record level. (2) The defendant pleads not guilty to the offense but admits to the aggravating factors or points for calculating a prior record

level. (3) The defendant pleads guilty to the offense but does not admit to the aggravating factors or points for calculating a prior record level. (4) With multiple offenses, any combination of the prior three examples.

There appears to be no federal or state constitutional bar if a judge decides to accept a defendant's admission to aggravating factors or points for calculating a prior record level, even though it leaves the offense for a jury trial. *Blakely*, slip opinion at 14; *State v. Smith*, 291 N.C. 438 (1976). However, because the defendant is waiving a federal constitutional right to a jury trial, the judge must conduct a colloquy with the defendant concerning the waiver of that right, just as if the defendant was pleading guilty to a substantive offense.

There appears to be no federal constitutional bar to a defendant's waiving his or her constitutional right to a jury trial and allowing a judge to determine the existence of aggravating factors and points for calculating a prior record level. *Blakely*, slip opinion at 14. However, it is unclear whether such a procedure is permitted under the North Carolina constitution. *See Smith*, 291 N.C. 438.

There are at least three options to try a case in which both the offense and "sentencing" factors are being contested. One option is a bifurcated trial in which the jury renders a verdict on the substantive offense and then, if there is a conviction, both the state and the defendant are given the opportunity to present evidence on the "sentencing" factors and the jury renders a verdict on the issue. A second option would be patterned after G.S. 15A-928, where the defendant is given an opportunity to admit or deny the "sentencing" factors outside the presence of the jury; the jury hears evidence and decides the issue only if the defendant denies their existence. A third option is conducting a trial before the same jury at a single trial proceeding on the issues of guilt or innocence of the substantive offense, whether aggravating factors exist, and

whether points for calculating a prior record level exist. *See Spencer v. Texas*, 385 U.S. 554 (1967) (no constitutional error in trial of habitual criminal offense in which prior convictions are introduced before the jury).

The standard of proof in proving the existence of “sentencing” factors subject to *Blakely* is beyond a reasonable doubt. Because the “sentencing” factors subject to *Blakely* essentially appear to be elements of an offense, it is likely that the rules of evidence apply to a jury trial on these factors.

F. Procedure Involving Guilty Pleas

Guilty pleas are subject to the criminal pleading requirements, discussed above, even when the state and defendant agree to recommend a sentence in the aggravated range (in such a case, a bill of information could be prepared to allege the aggravating factors if there was no indictment alleging them). Also, as discussed above, when the defendant is pleading guilty concerning issues for which *Blakely* provides a federal constitutional right to a jury trial, the plea colloquy must be conducted with the defendant concerning the aggravating factors and points for calculating a prior record level just as if the defendant was pleading guilty to a substantive offense.

V. Misdemeanor Sentencing in Superior Court under Structured Sentencing Act

Misdemeanor sentencing in superior court under the Structured Sentencing Act is not subject to *Blakely* because the sentencing determination only involves evidence of prior convictions, which are specifically excepted from the ruling.

VI. Misdemeanor Sentencing in Superior Court Not Subject to Structured Sentencing Act

The following misdemeanors are not subject to the Structured Sentencing Act:

1. Impaired driving under G.S. 20-138.1, punishable under G.S. 20-179.
2. Impaired driving in a commercial vehicle under G.S. 20-138.2, punishable under G.S. 20-179.
3. Second and subsequent violations of G.S. 20-138.2A (operating commercial vehicle after consuming alcohol) and G.S. 20-138.2B (operating school bus, school activity bus, or child care vehicle after consuming alcohol), both punishable under G.S. 20-179.
4. Certain health-related offenses set out in G.S. 130-25(b).

A. Sentencing under G.S. 20-179

Sentencing Subject to Blakely. Sentencing under Levels One, Two, and Three are clearly subject to *Blakely* because the grossly aggravating or aggravating factors used in sentencing have not been found by a jury. However, sentencing under one of these levels would not be subject to *Blakely* when all the factors used by the judge in sentencing involve prior convictions.

Sentencing under Level Four is subject to *Blakely* unless no aggravating factors are found.

Sentencing under Level Five is not subject to *Blakely* because it is effectively the presumptive or standard range.

Criminal Pleading. G.S. 20-138.1(c) (impaired driving) and G.S. 20-138.2(c) (impaired driving in commercial vehicle) both provide that a pleading is sufficient to charge the offenses if it uses the words set out in their respective subsections. G.S. 20-179(c) sets out the exclusive list of grossly aggravating factors. G.S. 20-179(d)(1) through (8) lists eight aggravating factors and then has a catchall aggravating factor (“[a]ny other factor that aggravates the seriousness of the offense”). Under the ruling in *State v. Hunt*, discussed above, it would appear that the short-form criminal pleading, along with the statutory listing, gives adequate notice to a defendant of the

grossly aggravating and aggravating factors, except the catchall aggravating factor, which must be specifically alleged in the pleading to give adequate notice.

One grossly aggravating factor [G.S. 20-179(c)(1)] and three aggravating factors [G.S. 20-179(d)(5), (d)(6), and (d)(7)] involve convictions and thus are not subject to *Blakely*'s requirements concerning a criminal pleading or a constitutional right to a jury trial in finding them.

Trial Procedure. The same discussion of trial and guilty plea procedure under felony sentencing in superior court applies equally here.

B. Sentencing for Certain Offenses under G.S. Chapter 130A

G.S. 130-25(b) provides that a person who is convicted of G.S. 130A-144(f) (failure to comply with control measures) or G.S. 130-145 (quarantine and isolation authority) shall not be sentenced under the Structured Sentencing Act but shall instead be sentenced to a term of imprisonment of no more than two years. It does not appear that there are any factors involved in sentencing a defendant for these offenses under *Blakely*.

VII. Misdemeanor Sentencing in District Court

Misdemeanor sentencing in district court under the Structured Sentencing Act is not subject to *Blakely* because the sentencing determination only involves evidence of prior convictions, which are specifically excepted from the ruling.

Sentencing for misdemeanors not subject to the Structured Sentencing Act, such as DWI, may be affected by *Blakely*. One view is that *Blakely* is not simply a ruling on the constitutional right to a jury trial, but also rests on rights (such as notice and proof beyond a reasonable doubt) that flow from a sentence that exceeds the statutory maximum as defined in the ruling. Therefore, requirements of a criminal pleading providing notice (either by specific allegations or

a statutory short-form pleading) and proof beyond a reasonable doubt apply to non-conviction grossly aggravating and aggravating factors in district court DWI cases just as they apply in superior court—except that a district court judge, not a jury, decides whether these factors have been proved beyond a reasonable doubt. (For a discussion of the criminal pleading, trial procedure, and sentencing in DWI cases, see “VI. Misdemeanor Sentencing in Superior Court Not Subject to Structured Sentencing Act.”)

Another view is that *Blakely* rests squarely on the constitutional right to a jury trial. The United States Supreme Court ruled in *Ludwig v. Massachusetts*, 427 U.S. 618 (1976), that there is no federal constitutional right to a jury trial at the first trial level of a state’s trial de novo system. If *Blakely* is based solely on the protection of that right, then it apparently does not apply to the first trial level of a system, such as North Carolina’s, where jury trials are provided only on *de novo* appeal.

VIII. Dispositions of Juveniles Adjudicated Delinquent in District Court

It is unclear whether the United States Supreme Court would apply *Blakely* to juvenile dispositions.

Assuming, *arguendo*, that *Blakely* applies, delinquency history levels are determined by points for prior adjudications, the functional equivalent of prior convictions that are not affected by *Blakely*. The one exception in G.S. 7B-2507 is the assignment of two points if the juvenile was on probation at the time of the offense—which *Blakely* would require to be pleaded and proved beyond a reasonable doubt before a district court judge.

IX. Felony Sentencing in District Court

A district court judge has jurisdiction under G.S. 7A-272(c) to accept a defendant’s plea of guilty or no contest to a Class H or I felony under the circumstances set out in the statute. The

same pleading requirements and judge's guilty plea colloquy with the defendant that have been discussed above apply here as well. Of course, if the defendant asserts the right to a jury trial on sentencing issues recognized by *Blakely*, the case must be tried in superior court.