

***BLAKELY AFTER BLACK***  
**GUIDANCE FOR ATTORNEYS ON FOURTH APPELLATE DISTRICT PANEL**  
**(SEPTEMBER 6, 2005)**

This discussion offers guidance on issues concerning the constitutionality of the California sentencing system, as raised by the United States Supreme Court decisions in *Blakely v. Washington* and *United States v. Booker*, and interpreted by the California Supreme Court's June 20, 2005, decision in *People v. Black*.<sup>1</sup> The guidance here is necessarily tentative and temporary: the legal picture is a "moving target," still evolving. Our advice for now, as explained further below, is:

*Cases on direct appeal:* For cases currently at some stage of the state appellate process, counsel should continue to preserve *Blakely* issues by raising them in the Court of Appeal (while acknowledging *Black* is, at least for the present, the law in California, binding on lower courts), then filing a petition for review.

*Post-appeal cases:* Post-appeal state remedies would be premature as long as *Black* is the law. Counsel should monitor the one-year statute of limitations for filing a federal habeas corpus petition and advise the client on invoking this remedy if it becomes needed.

*Real life:* Assuming that eventually *Black* is overturned and *Blakely* requires changes in California, it is far from clear what those changes will be and how they will affect criminal defendants as a whole or individual clients. Although for now attorneys should preserve *Blakely* issues, if *Black* is overturned they should give each further step careful thought (we will offer guidance as the law evolves) and should caution clients to keep expectations realistic.

### ***Legal Background***

*The three B's:* The current legal picture is framed by the *Blakely-Booker-Black* trilogy. *Blakely* held a state may impose a sentence on the basis of specified facts, other than prior convictions, only if they have been admitted by the defendant, or if a jury (or another trier, if the defendant has waived jury) has found them true beyond a reasonable

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<sup>1</sup>*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *United States v. Booker* (Jan. 12, 2005) \_\_\_ U.S. \_\_\_ [125 S.Ct. 738, 160 L.Ed.2d 621]; *People v. Black* (2005) 35 Cal.4th 1238; see also *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], the forerunner of *Blakely*.

doubt. *Booker* held the federal sentencing guidelines unconstitutional under *Blakely* to the extent they impose mandatory restrictions on sentencing judges and reformed the guidelines by making them advisory. *Black* held the *Blakely-Booker* decisions do not invalidate the California sentencing scheme as to the choice of an upper term or consecutive sentencing.<sup>2</sup>

*Next step:* A petition for certiorari is likely. The state courts so far are in conflict on *Blakely*'s applicability to sentencing systems similar to California's, although most have come down on the opposite side from *Black* and a decision by the New Jersey Supreme Court filed after *Black* expressly disagrees with it.<sup>3</sup> The divergence among states increases the likelihood certiorari will be granted in *Black*, although of course that is far from certain.

*Stare decisis framework:* This is tricky but critical as developments emerge. If certiorari is granted, *Black* would nevertheless remain binding California law until the United States Supreme Court resolves the case on the merits.<sup>4</sup> If certiorari is denied (or not sought), *Black* would be binding on all California courts unless and until (a) the California Supreme Court changes its mind or (b) the United States Supreme Court specifically strikes down the California system in some other case. Federal courts are not

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<sup>2</sup>Still open is the question whether *Blakely* requires a jury determination of other sentencing factors, such as whether different acts were committed on "the same" or "separate" occasions (Pen. Code, §§ 667, subd. (c)(6), 667.6, subd. (d)).

<sup>3</sup>*New Jersey v. Natale* (Aug. 2, 2005) \_\_\_ N.J. \_\_\_ [878 A.2d 724, 2005 N.J. Lexis 938, \*12, \*42-\*43] ("a sentence above the presumptive statutory term based solely on a judicial finding of aggravating factors, other than a prior criminal conviction, violates a defendant's Sixth Amendment jury trial guarantee"); accord *State v. Shattuck* (Minn., August 18, 2005, C6-03-362 ) \_\_\_N.W.2d\_\_\_[ 2005 Minn. LEXIS 476, \*26]; *State v. Allen* (2005) 359 N.C. 425, 433 [615 S.E.2d 256]; *State v. Schofield* (2005) 2005 ME 82 [876 A.2d 43, 49-50]; *Lopez v. People* (Colo. 2005) 113 P.3d 713, 728; *State v. Hughes* (2005) 154 Wn.2d 118 [110 P.3d 192]; *Smylie v. State* (Ind. 2005) 823 N.E.2d 679, 681-685; *State v. Dilts* (2004) 337 Ore. 645, 654 [103 P.3d 95]; *State v. Brown* (2004) 209 Ariz. 200, 202-204 [99 P.3d 15].

*State v. Gomez* (Tenn. 2005) 163 S.W.3d 632, 658, in contrast, held *Blakely* inapplicable because the Tennessee statute does not *require* an increased sentence upon finding the aggravating facts: "The Sixth Amendment is not implicated by a sentencing statute which permits judge fact-finding, but which does not *mandate* imposition of an increased sentence upon the judge's finding of a fact." (Italics added.) This rationale seems inconsistent with the theory underlying *Blakely* and with the court's specific rejection of a similar argument in that case: "Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." (*Blakely v. Washington, supra*, 542 U.S. 296 [124 S.Ct. 2531, 2538, fn. 8, 159 L.Ed.2d 403, 415, fn. 8], italics original.)

<sup>4</sup>*People v. Jaramillo* (1993) 20 Cal.App.4th 196, 197-198.

bound by *Black* and may grant federal habeas corpus relief in individual cases, but lower federal court decisions do not have binding stare decisis effect on state courts.<sup>5</sup>

### *Cases Coming into or Currently in the Appeal Pipeline*

Since *Black* is not necessarily the last word on *Blakely* in California, counsel should continue to preserve *Blakely* issues until the applicability of *Blakely* to the California sentencing scheme is resolved definitively. To preserve a *Blakely* issue involving the *Black* situation (*Blakely-Black*), counsel should follow carefully the steps outlined in ADI's article on exhaustion of state remedies for federal habeas corpus.<sup>6</sup> We suggest:

*Pre-AOB cases in Court of Appeal:* Counsel need not and generally should not argue *Blakely* issues extensively on the legal merits. We encourage a summary argument using recycled materials, such as those on the ADI's or other projects' websites.<sup>7</sup> The argument must acknowledge *Black* and the obligation of the Court of Appeal to follow it<sup>8</sup> and then should indicate the issue is being raised to preserve it for federal review. Of course, counsel must discuss any case-specific facts relevant to showing error and prejudice.

*Post-AOB cases:* If the opening brief in a pre-opinion appeal has already raised a *Blakely-Black* issue, counsel should consider a supplemental letter brief<sup>9</sup> acknowledging *Black* and stating that for federal purposes the appellant continues to adhere to the position taken in the brief. A reply brief or oral argument is unnecessary for exhaustion and would serve little purpose.

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<sup>5</sup>*Lockhart v. Fretwell* (1993) 506 U.S. 364, 375 [113 S.Ct. 838, 122 L.Ed.2d 180] (conc. opn. of Thomas, J.); *People v. Memro* (1995) 11 Cal.4th 786, 882.

<sup>6</sup>[http://www.adi-sandiego.com/newsletters/2005\\_january.pdf](http://www.adi-sandiego.com/newsletters/2005_january.pdf).

<sup>7</sup>ADI: <http://www.adi-sandiego.com/blakely.html>. Central California Appellate Program: <http://www.capcentral.org>. First District Appellate Project: <http://www.fdap.org/blakely.html>. These websites also have links to other *Blakely* resources. Materials are being updated and supplemented in light of *Black*.

<sup>8</sup>*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455: "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction."

<sup>9</sup>This requires a request for leave to file it. (Cal. Rules of Court, rule 13(a)(4).)

*Petition for review:* It is always necessary to file a petition for review in the California Supreme Court to preserve an issue for federal review, whether habeas corpus or certiorari.<sup>10</sup> If the only issue for review is *Blakely-Black*, an “exhaustion” petition may be used to conserve resources.<sup>11</sup>

*Pre-Black decisions already before California Supreme Court:* Numerous *Blakely* cases decided before *Black* currently are or recently have been pending before the Supreme Court, either on a petition for review or on grant and hold. If the Court of Appeal decision is completely in accord with *Black* and resolves all the issues in the case, the Supreme Court may simply deny review or dismiss a previous grant of review. Otherwise, after granting review (if not already granted), the Supreme Court may transfer the case to the Court of Appeal for reconsideration in light of *Black*.<sup>12</sup>

*Proceedings in Court of Appeal after transfer from Supreme Court:* When the Supreme Court transfers to the Court of Appeal for further proceedings, counsel may file a supplemental brief within 15 days of the transfer order, discussing the effect of *Black* on the case.<sup>13</sup> As above, to be safe counsel should reaffirm the client’s position in order to preserve it for federal purposes. Counsel are encouraged to consult with ADI and make use of sample arguments. When a new opinion is filed, counsel must file a new petition for review from that opinion to preserve the issue.

*Certiorari:* A certiorari petition to the United States Supreme Court is not necessary to preserve a *Blakely-Black* issue for later federal habeas corpus review.<sup>14</sup> Ordinary California court policy is that counsel will not be compensated for such a petition unless there is a substantial chance certiorari will be granted and the appellate

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<sup>10</sup>Habeas corpus: *O’Sullivan v. Boerckel* (1999) 526 U.S. 838 [119 S.Ct. 1728, 144 L.Ed.2d 1]; certiorari: 28 United States Code section 1257(a) (certiorari jurisdiction is over “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had”).

<sup>11</sup>Rule 33.3 of the California Rules of Court. See ADI website for guidance on the use of exhaustion petitions: <http://www.adi-sandiego.com/articles.html>.

<sup>12</sup>Rules 28(b)(4), 28.2(d)(2), 29.3(b) & (d).

<sup>13</sup>Rules 13(b)(1), 29.3(f). Unless otherwise ordered, such briefs are limited to matters arising after the previous Court of Appeal decision. (Rule 13(b)(2).)

<sup>14</sup>*Fay v. Noia* (1963) 372 U.S. 391, 435-437 [83 S.Ct. 822, 9 L. Ed. 2d 837], overruled on other grounds in *Wainwright v. Sykes* (1977) 433 U.S. 72, 84-85 [97 S.Ct. 2497, 53 L.Ed.2d 594].

project has pre-approved the petition.<sup>15</sup> That policy applies here, and thus we ask attorneys to check with ADI before filing one. If it is to be filed, it is due no later than 90 days after the last decision of the California Supreme Court becomes final; a California Supreme Court order denying or dismissing review is final immediately.<sup>16</sup> We will provide sample certiorari petitions for counsel and for pro per defendants if needed.

### ***Post-Appeal Cases***

*Blakely* applies to all cases not yet final on “direct review” (as defined above) when that case was decided, June 24, 2004. It is very unlikely *Blakely* applies to older cases already final on that date.<sup>17</sup> The following discussion is directed at cases that were not final on direct review on June 24, 2004, but are now past direct review.

*State post-appeal remedies:* Invoking state court post-appeal remedies such as habeas corpus or recall of the remittitur would be futile while *Black* is the law in California. Given the policy barring successive habeas corpus petitions on the same issue or on different issues that could have been raised at the same time,<sup>18</sup> counsel should advise clients to wait for a more favorable resolution of the underlying legal issue before filing an action in state court for *Blakely* relief. If such a change occurs, state remedies should be available;<sup>19</sup> ADI will then offer guidance.

*Federal habeas corpus:* Federal habeas corpus is available unless and until the federal courts uphold *Black*. Counsel should take care to advise the client accurately and

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<sup>15</sup>See the “certiorari” entry in ADI Compensation Claim Manual at [http://www.adi-sandiego.com/PDFs/claim\\_manual.pdf](http://www.adi-sandiego.com/PDFs/claim_manual.pdf)

<sup>16</sup>United States Supreme Court Rules, rule 13; California Rules of Court, rule 29.4(b)(2)(A) & (B).

<sup>17</sup>*In re Consiglio* (2005) 128 Cal.App.4th 511, 514-516; *People v. Amons* (2005) 125 Cal.App.4th 855, 863-868; *Schardt v. Payne* (9th Cir., July 8, 2005, No. 02-36164) \_\_\_F.3d \_\_\_ [2005 U.S. App. Lexis 13569, \*23-\*29]; see also *Schriro v. Summerlin* (2004) 542 U.S. 348 [124 S.Ct. 2519, 159 L.Ed.2d 442]; *Teague v. Lane* (1989) 489 U.S. 288 [109 S.Ct. 1060, 103 L.Ed.2d 334]; see generally “Retroactivity” appendix to memo on taking advantage of favorable changes in the law at <http://www.adi-sandiego.com/articles.html>.

<sup>18</sup>*In re Clark* (1993) 5 Cal.4th 750, 787-797; *In re Horowitz* (1949) 33 Cal.2d 534, 549; see also *In re Robbins* (1998) 18 Cal.4th 770, 788, fn. 9; see Pen. Code, § 1475.

<sup>19</sup>California courts will normally accept state habeas corpus jurisdiction if federal habeas corpus relief would be available. (*In re Spencer* (1965) 63 Cal.2d 400, 405-406; *In re Shipp* (1965) 62 Cal.2d 547, 553, fn. 2.)

thoroughly about this possibility and to watch the clock. ADI has extensive materials on federal habeas corpus. A few salient points:

- The one-year federal statute of limitations starts running when “direct review” is completed – when certiorari in the United States Supreme Court is denied, or when the time for petitioning for certiorari expires (in the most typical case, 90 days from the date the California Supreme Court denies or dismisses review).<sup>20</sup> The time limit is jurisdictional, and so counsel must count carefully.
- State remedies would be available if the United States Supreme Court overturns *Black*; and obviously no remedies, state or federal, would be available if the high court agrees with *Black*. Federal courts are unlikely to provide actual relief in California sentencing cases before *Black* completes the certiorari process. Thus the main use of federal habeas corpus will probably be to seek relief if the Supreme Court denies certiorari in *Black* or if no petition is filed in the allowed time. Filing before then would be necessary if the statute of limitations is about to expire or if immediate relief is needed, as when the defendant would be entitled to release from prison if the sentence were reduced to the middle term.
- Federal habeas corpus is not within the scope of a California appellate appointment, and so, unless prepared to handle it pro bono, appellate counsel should ask trial counsel to do it and/or provide sample pleadings for the client to file in pro per. We are providing samples on our website for appellate and trial counsel and pro per defendants and will be updating them as the law unfolds.

### ***Blakely in Real Life***

We emphasize that for now we are advising appellate counsel to preserve *Blakely* issues. However, we also think it’s important to consult a “crystal ball” here, so that attorneys can give clients realistic expectations and also so that, if *Black* is overturned, they will be on the alert to evaluate thoughtfully what further actions will work toward the ultimate best interests of the client. We of course will offer guidance at that time.

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<sup>20</sup>Statute of limitations: 28 United States Code section 2244(d)(1)(A); certiorari deadline: United States Supreme Court Rules, rule 13; finality for federal purposes: *Beard v. Banks* (2004) 542 U.S. 406 [124 S.Ct. 2504, 2510, 159 L.Ed.2d 494, 503]; finality of California Supreme Court decision: California Rules of Court, rule 29.4(b). See also discussion above under “Certiorari.”

Assume the California sentencing law is found to violate *Blakely* insofar as it mandates the middle term in the absence of further fact-finding by the trial court.<sup>21</sup> Such a decision would mean only that something has to change. The decision most likely to affect real clients in real life is the next one: remedy, or what the changed system will look like. This discussion analyzes the effect on upper-term cases that are at the post-sentencing stage when *Black*, hypothetically, is overturned.

The issue of remedy would initially be in the hands of the California Supreme Court and would depend heavily on its reading of the likely legislative intent. For example, the court could conceivably invalidate the entire system as unconstitutional on its face;<sup>22</sup> or engraft a jury requirement onto the current sentencing system;<sup>23</sup> or apply the current system consistently with *Blakely* (i.e., require no more than a middle term unless the aggravating factors in the case are *Blakely* compliant or exempt), leaving any systemic changes to the Legislature;<sup>24</sup> or “reform” Penal Code section 1170, subdivision (b)<sup>25</sup> and related rules to eliminate the presumptive middle term, so that a jury verdict would permit the upper term without further fact-finding.<sup>26</sup>

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<sup>21</sup>Penal Code section 1170, subdivision (b), as implemented by California Rules of Court, rule 4.420 and related provisions. Exceptions to invalidity would be facts that are *Blakely* exempt, such as the fact of a prior conviction, and those that are *Blakely* compliant, such as those admitted, included in the jury findings, or submitted to the court on a jury waiver and found true beyond a reasonable doubt.

<sup>22</sup>No court to our knowledge has adopted such an approach.

<sup>23</sup>Indiana and Maine have adopted something akin to this. (*Smylie v. State, supra*, 823 N.E.2d 679, 685-686; *State v. Schofield, supra*, 2005 ME 82 [876 A.2d 43, 54].) The Ohio Supreme Court, without determining whether that state’s sentencing system is constitutional, has rejected such an approach as inconsistent with statute and the state Constitution. (*State ex rel. Mason v. Griffin* (2004) 104 Ohio St. 3d 279, 281-282 [819 N.E.2d 644, 647].)

<sup>24</sup>This approach has been applied, with some variations, in Oregon (*State v. Dilts, supra*, 337 Ore. 645, 654), Colorado (*Lopez v. People, supra*, 113 P.3d 713, 728), and Washington (*State v. Hughes, supra*, 154 Wn.2d 118); Arizona has effectively done so on an interim basis by invalidating current sentences not compliant with *Blakely* and deferring systemic remedy to another day. (*State v. Brown, supra*, 209 Ariz. 200, 202-204.) Minnesota and North Carolina have severed provisions that required judicial fact findings not submitted to a jury or admitted – an approach that is functionally “apply the law as written constitutionally.” (*State v. Shattuck, supra*, \_\_\_ N.W.2d \_\_\_ [2005 Minn. LEXIS 476, \*34]; *State v. Allen, supra*, 359 N.C. 425, 433.)

<sup>25</sup>The court may construe a statute in non-literal ways if consistent with legislative intent and necessary to preserve its constitutionality. (*In re Howard N.* (2005) 35 Cal.4th 117, 133-136.)

<sup>26</sup>The United States Supreme Court used a variation of the “rewrite the statute” approach in *Booker*. Finding Congress’ intent would have been to preserve the basic system, the court recast the guidelines as non-mandatory. (*United States v. Booker, supra*, \_\_\_ U.S. \_\_\_ [125 S.Ct. 738, 756 et seq.,

In the absence of such complications as an unauthorized sentence or guilty plea, the defendant would not be able to get a greater sentence on remand. (*People v. Henderson* (1963) 60 Cal.2d 482, 495-497.) Beyond that, however, the result could vary under these different approaches. On the one hand, a remedy such as requiring a middle term be substituted in place of an upper one in all *Blakely* violative cases would obviously be beneficial. On the other hand, some of the remedies, such as jury involvement in sentencing proceedings and elimination of the mandatorily presumptive middle term, conceivably could result in resentencing and then reimposition of the upper term.

From a legal point of view it would be logical to think, “What would a defendant have to lose if the sentence can’t get worse and might get better?” And in many cases it may in fact get better. But real life doesn’t always follow legal logic. Sometimes it may not be to a defendant’s personal and practical benefit to seek a new sentencing proceeding – as when the same sentence is virtually foreordained, given the facts and the judge, and having to leave prison to go to court may cost the client a favored position within the institution. Appellate counsel should weigh these considerations, contact trial counsel when needed to get a feel for probable outcomes, and then consult the client about the desirability of resentencing.

Again, we advise counsel to preserve *Blakely* issues for now, since conceivably the remedy could be favorable for all or virtually all affected clients. Because of the many unknowns, it would be premature to offer concrete advice beyond that. Still, it is never too soon or too late to remind counsel always to keep the “real life” picture in mind, in order to help clients understand their situation and to achieve what is best for them in the long run.

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160 L.Ed.2d 621, 650 et seq.] [opn. of Breyer, J., for the court in part].) Similarly, *Natale* eliminated presumptive terms and made the upper end of the range the maximum for all offenses. (*New Jersey v. Natale, supra*, \_\_\_ N.J. \_\_\_ [2005 N.J. Lexis 938 at \*47 et seq.].)