

## APPLICATION OF *BLAKELY* vs. *WASHINGTON* TO CALIFORNIA COURTS

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### I. *Introduction*

The United States Supreme Court, in *Apprendi v. New Jersey* (2000) 530 U.S.466, determined “[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.” (*Id.* at p. 490.) *Apprendi* concerned the ability of the trial court to increase the defendant’s sentence because the crime was racially motivated. In *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_, [124 S.Ct. 2531, 2004 Daily Journal D.A.R. 7581, 2004 WL 1402697], the Supreme Court extended *Apprendi* to circumstances where a defendant’s punishment is increased by the use of facts other than those based solely on a jury verdict or plea. The decision calls into question the ability of California courts to impose aggravated prison terms under our current sentencing rules and procedures.

Whether, and to what extent, *Blakely* will apply to California sentencing proceedings has yet to be determined. As discussed in this analysis, however, it is reasonably probable the decision prohibits imposition of an aggravated term of imprisonment if based on facts (other than prior convictions) found by a judge and not a jury. The purpose of this analysis is to advise courts of potential sentencing issues raised by *Blakely*, and to suggest a reasonable course of action to address the potential effect of the decision pending further analysis by our appellate courts.

### II. *The facts of Blakely*

Defendant pled guilty to kidnapping his estranged wife. Under Washington State law defendant could be sentenced to a “standard” sentencing range of 49 to 53 months. After receiving evidence taken at a three day bench hearing, the court found the defendant had acted with “deliberate cruelty” and, because of that fact, imposed an “exceptional” sentence of 90 months. “Deliberate cruelty” is one of the statutorily enumerated reasons for departure from the “standard” sentence in domestic violence cases. The facts relied upon by the court in making the finding were neither admitted by defendant, nor found true by a jury. Defendant argued

the Washington sentencing process violated his Sixth Amendment right to trial by jury.

Blakely was convicted of a “Class B” felony that carries a maximum term of 10 years. However, further restrictions are placed on the court’s sentencing discretion. As previously indicated, the “standard” sentence for defendant’s crime is 49 to 53 months. A sentence above the standard range can be imposed if the judge finds “substantial and compelling reasons justifying an exceptional sentence.” (Wash. Rev. Code Ann. § 9.94A.120(2)(2000).) The statutes provide a list of factors that can be used to increase the sentence; the factors are not exclusive, but are illustrative of aggravating circumstances. (§ 9.94A.390.) The justification for the enhanced sentence must take into account factors other than those used to compute the standard sentence. If an enhanced sentence is imposed, the court must set forth findings of fact and conclusions of law in support of the factors relied upon.

### III. *The decision*

The Supreme Court applied the rule expressed in *Apprendi*: “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 proved beyond a reasonable doubt.” (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.) *Blakely* defined “statutory maximum” for purposes of *Apprendi* to be “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” (*Blakely v. Washington, supra*, \_\_\_ U.S. at p. \_\_\_.)

The state argued the 90-month sentence was within the 10-year maximum for Class B felonies, thus was within the “statutory maximum” contemplated by *Apprendi*. The Supreme Court rejected the argument. “[T]he 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,’ [citation omitted] and the judge exceeds his proper authority.” (*Id.* at p. \_\_\_; emphasis in original.)

The court also found no significance in the fact that the sentencing factors are illustrative rather than exhaustive. “This distinction is immaterial. Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in [*Ring v. Arizona* (2002) 536 U.S. 584]), or *any* aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.” (*Id.* at p. \_\_\_; emphasis in original.)

The court said determinate sentencing schemes are constitutional, provided they do not allow judicial action to infringe on the province of the jury.

Finally, the court found a defendant may waive his *Apprendi* rights. “When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding. [Citations omitted.] If appropriate waivers are procured, States may continue to offer judicial fact finding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial fact finding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.” (*Id.* at p. \_\_\_\_.)

In responding to the dissent’s contention that the extension of *Apprendi* is unfair to defendants, the majority observed: “Any evaluation of *Apprendi*’s ‘fairness’ to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, [citation omitted], based not on facts proved by his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.” (*Id.* at p. \_\_\_\_.)

The court reversed the defendant’s sentence because he was sentenced to a prison term of three years more than what the law provided for the crime *as admitted by the defendant*, based on a disputed factual finding made by the judge rather than by a jury.

#### IV. *Application to California*

*Blakely* may be applicable to the California Determinate Sentencing Law for two reasons. First, the Washington sentencing scheme seems remarkably similar to that used in California. Washington utilizes a determinate sentencing system that requires the imposition of a “standard” sentence when no aggravating factors are found. The “standard” sentence is the functional equivalent of California’s middle term of the sentencing triad, the “presumptive” term. (P.C. § 1170(b); *People v. Avalos* (1984) 37 Cal.3d 216, 233; Cal. Rules of Court, Rule 4.420(a).) As in Washington, California courts are not permitted to impose an enhanced term absent a finding of aggravating circumstances. Like Washington, the California courts may not use the essential facts of the base term (the elements of the crime) to impose the upper term. In other words, the court may not impose an enhanced sentence without finding the existence of facts beyond what would be included in a jury verdict on the underlying charge or admitted by the defendant in a guilty plea. Both systems require the court to state on the record the reasons or facts relied upon in imposing the aggravated punishment. Finally, and most importantly, both sentencing systems allow the court, not a jury, to find the truth of the aggravating sentencing factors.

Second, even disregarding the apparent similarities in the two sentencing systems, *Blakely* is broad enough to apply to the California triad sentencing system. *Blakely* is based on the Supreme Court's decision in *Apprendi* that secured the defendant's Sixth Amendment right to a jury trial on any fact used to increase punishment above the statutory maximum. As noted above, the Supreme Court observed "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in [*Ring v. Arizona* (2002) 536 U.S. 584]), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Blakely v. Washington*, *supra*, \_\_\_ U.S. at p. \_\_\_; emphasis in original.) The California requirement that the court find specific aggravating factors prior to imposing the aggravated term appears in direct conflict with the rule as stated in *Apprendi* and as applied by *Blakely*.

## V. *Practical application of Blakely*

Undoubtedly the full implications of *Blakely* will not be known for many months, at least for the period of time necessary for cases to work through the appellate process. It is possible appellate courts may disagree on the extent of *Blakely*'s application in California, even as to whether it applies at all.

There are a number of things courts can do, however, to minimize the potential impact of the decision if ultimately it is applied in California. The following observations and suggestions are offered as possible options in dealing with felony cases during this unsettled period.

### A. *Blakely's effective date*

The majority in *Blakely* did not indicate when its rule would be effective. Justice O'Connor's dissent, however, said "despite the fact that we hold in *Schriro v. Summerlin*, \_\_\_ U.S. \_\_\_ (2004), that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack. See *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion) ('[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final')." (*Blakely v. Washington*, *supra*, \_\_\_ U.S. at p. \_\_\_\_.)

Certainly *Blakely* will apply to all cases not yet final as of the filing of the decision on June 24, 2004. It seems unlikely that it will be effective as to sentencing proceedings held prior to *Apprendi*. Based on Justice O'Connor's comments, however, a strong argument could be made for the application of *Blakely* as of the filing date of *Apprendi* on June 22, 2000.

B. *Application to indeterminate terms and misdemeanors*

By its own terms *Blakely* does not challenge the procedure used for the pronouncement of an indeterminate sentence. “[Indeterminate sentencing] increases judicial discretion, to be sure, but not at the expense of the jury’s traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial fact finding in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of a sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement on the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail.” (*Blakely v. Washington, supra*, \_\_\_ U.S. at p. \_\_\_\_; emphasis in original.)

Although *Blakely* does not apply to indeterminate sentences, the decision will apply to any determinate enhancement added to the indeterminate term if the enhancement has a triad. The handling of the enhancement under these circumstances should be the same as a determinate sentence for a crime, discussed below. *Blakely* also will apply to any determinate term that runs either consecutively to or concurrently with an indeterminate term.

Since misdemeanor sentences are expressed in terms of a sentencing range of 0 to 6 months or 0 to 12 months, a misdemeanant is on notice of the maximum term for the violation. The sentencing range for misdemeanors is similar to the 10 to 40-year sentencing range discussed in *Blakely*. Applying *Blakely*’s logic, therefore, there is no right to a jury determination of the sentencing factors considered by the court in imposing a misdemeanor sentence.

C. *Application to determinate felony sentences*

*Blakely*’s impact may be divided into two broad categories: those cases resolved by plea and those cases resolved by jury trial.

1. Cases resolved by guilty plea

As noted above, the Supreme Court indicated the defendant may waive the requirement that the jury determine the existence of aggravating sentencing factors. It is suggested courts obtain a personal waiver of defendant’s *Apprendi/Blakely* rights as part of the normal *Boykin/Tahl* advisement and waiver of rights. **Because the circumstances where such a waiver is required remains**

**subject to further appellate determination, prudence suggests the waiver be obtained in all cases as a matter of routine.**

Beyond stating defendants have a right to a jury trial on aggravating sentencing factors, *Blakely* does not fully define the nature of the right being protected. Accordingly, it is not clear how broad the waiver must be. For example, is the Supreme Court saying the simple waiver of the right to a trial by jury will allow trial courts to conduct a sentencing hearing in the traditional manner under pre-*Blakely* rules and procedures? Or is the court saying sentencing factors are now to be considered the same as elements of the crime, and as such must be proved beyond a reasonable doubt, with competent evidence, in a trial by the court if the jury is waived? (See, e.g., *Blakely v. Washington, supra*, \_\_\_ U.S. at pp. \_\_\_, \_\_\_, fn. 12.) If the answer is the latter, then a simple waiver of a jury trial will not eliminate the need for a full evidentiary hearing by the court, with the proof of each factor beyond a reasonable doubt.

*Blakely* found no need for a jury trial when the defendant stipulates to the aggravating factors. A general waiver of the right to a jury trial ultimately may be held sufficient when there is a stipulated prison term, even when it is the upper term. On the other hand, courts must directly address the issue if the terms of the plea contemplate the exercise of judicial discretion that could include the imposition of the upper term of the triad. The waiver will be necessary where the court contemplates probation, but potentially may impose an upper term suspended state prison sentence. Because of the uncertainty of the application of *Blakely*, it is far safer to take a waiver in all cases. Not only will a routine procedure assure that the waiver is obtained in all required situations, it will totally eliminate potential writ challenge later by a defendant who contends he would not have plead had he known of the right to a jury trial on any aggravating sentencing factors.

In view of the uncertainties associated with *Blakely*, the following comprehensive waiver is suggested for all felony pleas. The exact language can be adjusted to suit local legal culture.

**APPENDI-BLAKELY WAIVER\***

**I understand I have the right to a jury or court trial as to any sentencing factors that may be used to increase my sentence on any count, sentencing enhancement, or allegation to the upper or maximum term provided by law.**

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\* If an oral waiver is taken, the written advisement and waiver can easily be adapted for such use.

**I hereby give up the right to a jury or court trial on any sentencing factors and consent to the judge determining the existence of any sentencing factors within the judge's discretion as allowed by existing statutes and Rules of Court. I also agree this waiver shall apply to any future sentence imposed following the revocation of probation.**

**Dated:** \_\_\_\_\_ **Defendant:** \_\_\_\_\_  
**Dated:** \_\_\_\_\_ **Attorney:** \_\_\_\_\_

While the above waiver should be sufficient to vest the court with all necessary decision making authority, a court, in taking a felony plea where there is the potential for the imposition of the upper term, may wish to have the statement of the factual basis of the plea include reference to any relevant aggravating sentencing factors. The court also may wish to have the parties stipulate to any applicable aggravating factors, whether or not the defendant later will have the opportunity to offer mitigating factors.

One final word on waivers. Judges must be cautious and sensitive to the potential ethical issues attendant the process of securing waivers. Each judge must determine the extent to which he or she will actively participate in a process that demands *Apprendi/Blakely* waivers in exchange for approval of a plea bargain.

2. Cases resolved by jury trial

*Blakely* raises a number of issues if the defendant does not waive jury on aggravating sentencing factors. Most likely these concerns will arise when the defendant is being tried on the merits of the underlying criminal charges. It is important to emphasize that *Apprendi* and *Blakely* do not require a jury trial on the *fact* of a prior conviction, even if the fact of the prior conviction is being used to aggravate a sentence. In most other situations, however, the determination of the factors in aggravation listed in California Rules of Court, Rule 4.421, other statutory aggravating factors (see e.g. P.C. § 136.1(f)), and any other relevant factors authorized by Rule 4.408(a), must be submitted to a jury. The factors must be found beyond a reasonable doubt, not by a preponderance of the evidence as now authorized by Rule 4.420(b).

Even where the defendant does not waive the right to a jury trial on aggravating factors, there may be limited circumstances where the court could impose an aggravated term after plea or verdict without

a separate finding by a jury. Utilizing Rule 4.408(a), for example, the court may be able to impose an aggravated term simply because the defendant has a certain number of felony and/or misdemeanor convictions. An upper term could be based on the fact of prior convictions since *Apprendi* and *Blakely* exclude the need for a jury finding on that issue. The court, however, should avoid characterizing the nature of defendant's record with such expressions as "the record is of increasing seriousness," or "defendant has numerous convictions;" such assessments probably must be made by a jury.

The court also may be able to impose an upper term if the aggravating factor is included in the nature of the plea or verdict, but is other than an element. An upper term may be imposed, for example, if the defendant is convicted of other crimes that could be consecutive, but are not (Rule 4.421(a)(7)), or the defendant has a prior prison term (Rule 4.421(b)(3))\* . Care must be taken, however, to avoid aggravating a sentence for the more subjective findings such as "the victim was particularly vulnerable," or "the defendant induced others to participate."

a. *Authority/jurisdiction to submit sentencing factors to a jury*

*Blakely* requires aggravating sentencing factors be submitted for determination by the jury. It is unclear, however, whether existing California law permits the submission of such factors to the jury. The scope of jury trials and permissible verdicts are matters governed by the California Constitution, statute and rules of court. Nowhere do these authorities authorize juries to determine factors in aggravation. In most circumstances, for example, the jury is permitted only to render a general verdict. (P.C. § 1150.)

Indeed, existing statutes and rules require *the court* to determine the existence of sentencing factors. (See, e.g., P.C. § 1170(b): "*In determining whether there are circumstances that justify imposition of the upper or lower term, the court* may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the

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\* Use of a prior prison term under these circumstances only will be permissible if the court does not impose a prior prison term enhancement under P.C. § 667.5(b); to use the prison prior for both purposes would be an impermissible dual use of facts.

victim is deceased, and any further evidence introduced at the sentencing hearing.” (Emphasis added.)

There may be a temptation to find appropriate jurisdiction in the court’s “inherent powers” to conduct business. It must be remembered, however, that courts only have inherent power when it is not inconsistent with statute. (*Ferguson v. Keays* (1971) 4 Cal.3d 649, 654.)

Notwithstanding *Blakely’s* direction that factors in aggravation be submitted to a jury, current California law may prevent trial courts from submitting these issues to the jury. If there is no authority to submit factors in aggravation to the jury, it may mean that until such time as proper authority exists, courts will be limited to imposing only the lower or middle terms of imprisonment.

b. *Notice to the defendant*

Assuming California courts have jurisdiction to submit sentencing factors to the jury, the first issue is what notice a defendant should receive that the prosecution or the court may impose an upper term. The majority in *Blakely* does not address the issue. The minority, however, suggests sentencing factors may need to be included in the charging documents. Certainly the defendant is entitled to some notice of aggravating factors if an upper term may be imposed. Putting the factors in the pleadings may be impractical or impossible. (See dissenting opinions of Justices O’Connor and Breyer.) At least one California district attorney is considering the filing of a statement in aggravation, similar to the notice of evidence in aggravation of sentence required in death penalty cases under Penal Code §190.3. What will be considered reasonable notice may depend on the nature of the aggravating factors. If the factors are based on the manner in which the crime was committed, i.e., evidence that is already before the jury, probably minimal notice is required. On the other hand, if additional witnesses or evidence must be presented to the jury to prove or disprove an aggravating factor, more notice may be required.

c. *Scope of trial*

*Blakely* suggests the defendant only is entitled to a jury trial on the proof of any *aggravating* factor, other than prior

convictions. Presumably this means the defendant does not have an independent right to a jury trial on *mitigating* factors. So, for example, if the sole aggravating factor is that the crime “involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness” (Rule 4.421(a)(1)), it would seem unlikely the defendant is entitled to present evidence that he has an insignificant criminal record. On the other hand, the defendant undoubtedly would be entitled to present evidence that tends to show the aggravating factor is not true, even if such evidence otherwise might be considered mitigating.

The scope of the trial also may depend on *Blakely*'s application to Rule 4.420(b) which provides, in relevant part: “Selection of the upper term is justified only if, after consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation.” If the fact that the aggravating factors outweigh the mitigating factors is an *aggravating sentencing factor* as contemplated by *Blakely*, the jury may be required to determine not only aggravating factors, but also mitigating factors and their relative weight to aggravating factors.

d. *Bifurcated proceedings*

*Blakely* did not address the issue of bifurcation of the sentencing proceedings. Both the majority and dissenting opinions suggest unitary and bifurcated proceedings are possible. Although it is not entirely clear from *Blakely*, defendants likely retain the due process right to separately try allegations not relevant to the determination of guilt of the charged crimes. (*People v. Bracamonte* (1981) 119 Cal.App.3d 644.) Evidence extraneous to the determination of guilt of the crime likely will be presented in a separate proceeding unless some exception applies. (See, e.g., *People v. Calderon* (1994) 9 Cal.4<sup>th</sup> 69.)

e. *Jury instructions*

The court must instruct the jury relative to the sentencing factors to be determined. The court should consider instructions similar to the proof of a prior conviction in a bifurcated proceeding, adapted to the specific aggravating factors at issue. (See, e.g., CALJIC 17.26 and 17.24.1.) The meaning of most aggravating sentencing factors is self-

evident; occasionally the court may need to define terms less commonly understood or used.

f. *Verdict form*

The court should provide a verdict form wherein the jury may find the aggravating factors “true” or “not true.”

g. *Sentencing hearing after trial*

The jury by its verdict will determine the existence of any aggravating factors. Nothing in *Blakely* suggests the court, in selecting the final sentence, is not free to balance the aggravating factors as found by the jury with any mitigating factors developed in the probation report or by the defendant at the sentencing hearing.\* Furthermore, the defendant will have an opportunity to present a statement in mitigation, and both parties may present evidence at a P.C. § 1204 hearing. Presumably the prosecution will be limited to arguing the factors in aggravation as found by the jury and presenting only such evidence that tends to disprove the existence of a factor in mitigation.

It does not appear *Blakely* will apply to the decision to impose consecutive sentences, at least when consecutive sentencing is mandatory. (See, e.g., P.C. 667.6.) A closer question arises when the decision is discretionary. The defense may argue the court must find to be true certain facts in order to impose a consecutive sentence, facts, accordingly to *Blakely*, that must be found by a jury. On the other hand, the prosecution may contend *Blakely* has no application because, unlike the middle term of the sentencing triad for a crime, there is no presumption that a concurrent term will be imposed. “[W]hile there is a statutory presumption in favor of the middle term as the sentence for the offense (§ 1170(b)), there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required.” (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923; See also Rule 4.425.) While the sentence relationship between multiple counts does effect the overall length of custody, and even though the court in making the decision can consider factors in aggravation, the decision to impose a consecutive

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\* Cf. discussion of the scope of the trial in Section V(C)(2)(c), *supra*.

sentence does not depend on the determination of the maximum term of confinement for each crime.

D. *Application to cases pending sentencing after verdict or plea, or upon violation of probation*

Even though a defendant has been convicted following a verdict or plea prior to *Blakely*, or the defendant is facing a potential state prison sentence after a violation of probation, there are a number of things that can be done to avoid future problems with the sentencing.

1. Where plea entered or pending violation of probation

The court should ask for an *Apprendi/Blakely* waiver prior to sentencing. In many situations the defendant may want to cooperate with the sentencing process and may be willing to waive these rights. If there is a stipulated sentence or probation is contemplated, it is unlikely the defendant will refuse the waiver. Even in situations where the court has discretion to impose the upper term, defendants may wish to appear in a favorable light with the court and prosecution and may be willing to allow traditional sentencing.

If the defendant does not waive his *Apprendi/Blakely* rights, the court's response may depend on the circumstances:

- a. If it is a plea with a stipulated sentence: proceed anyway. Under these circumstances, there likely is no *Blakely* error because implicit in the defendant's acceptance of the plea agreement is the waiver of the right to a jury trial on the aggravating sentencing factors.
- b. If the terms of the plea contemplate the possible imposition of only the middle or low term in prison: proceed anyway; *Blakely* likely is irrelevant to the sentencing determination.
- c. If the terms of the plea allow the court to impose the upper term, but the defendant refuses to waive the *Apprendi/Blakely* rights, the court should:
  - try to find sentencing factors that the court may impose without a jury finding (see discussion in Section V(C)(2), *supra*) if the court intends to impose the upper term.
  - consider the need to set aside the plea since the prosecution is not receiving the full benefit of the bargain.

-the court may wish to impose “alternative” sentences, one if *Blakely* applies, one if it does not.

2. Where case has gone to trial

Cases already in trial or those that are between verdict and sentencing, are the most problematic. As with pleas, the court should ask for the *Apprendi/Blakely* waiver. If it is refused, the court should consider the following alternatives:

- a. Determine if there are sentencing factors that are present in the nature of the verdict without the need for further findings by a jury. (See discussion at Section V(C)(2), *supra*.)
- b. If the court is uncertain about the jurisdiction of the court to impose the upper term without jury findings and determines the court is without jurisdiction to submit the issues to the jury, impose only the lower or middle terms of imprisonment.
- c. If the court is comfortable with the jurisdictional issues, submit the sentencing factors to the jury (if the jury has not been discharged), following the procedures outlined above. Such an approach may be the most practical when the aggravating sentencing factors are relatively simple and the “penalty phase” will be relatively short. If the appellate courts determine the court has jurisdiction to submit these issues to the jury, there is no error. If there is no jurisdiction, the court is no worse off than under the previous two choices.
- d. The court may wish to impose “alternative” sentences, one if *Blakely* applies, one if it does not.

E. *Application to death penalty cases*

In determining whether to impose the death penalty or life without parole, the jury is to consider a number of mitigating and aggravating factors. (See P.C. § 190.3.) There is no particular burden of proof for most of the factors because the “determination of penalty is essentially moral and normative.” (*People v. Hayes* (1990) 52 Cal.3d 577, 643.) *Blakely*, particularly with its partial reliance on *Ring v. Arizona* (2002) 536 U.S. 584, may now require any factors in aggravation be proved beyond a reasonable doubt. On July 12, 2004 (post-*Blakely*), in *People v. Brown*,

however, the California Supreme Court stated *Apprendi* and *Ring* are not applicable to the California death penalty sentencing scheme and that weighing aggravating and mitigating factors are normative sentencing functions, not factual determinations. These post-*Blakely* statements may provide support for the claim that *Blakely* does not impact capital sentencing.

## VI. *Other interesting issues*

There are a number of other interesting issues which will be left to appellate review, but which emphasize the desirability of obtaining proper *Apprendi/Blakely* waivers.

1. Must the prosecutor allege in the pleadings the existence of specific prior convictions that may be used by the court to aggravate a sentence? If the prior convictions are alleged in the pleadings, does the defendant have a right to a jury trial on the priors under P.C. § 1025?
2. Must the factors in aggravation be submitted at the preliminary hearing or included in a grand jury indictment?
3. Does *Blakely*, absent a waiver, abrogate all of the sentencing processes outlined in P.C. § 1170(b)?
4. Are the aggravating sentencing factors too vague for jury determination? (See, e.g., P.C. § 1170.73 [“the court shall consider the quantity of controlled substance involved in determining whether to impose an aggravated term . . . .”].)
5. What happens in a multi-case sentencing when a prior court has imposed an aggravated term without having obtained an *Apprendi/Blakely* waiver?

## VII. *California Supreme Court has granted review of case*

The California Supreme Court has taken prompt action to address *Blakely*'s application to California sentencing proceedings. The court granted review in the Los Angeles case of *People v. Towne*, B166312. Additional briefing was requested on the following issues: “Does *Blakely v. Washington* . . . preclude a trial court from making the required findings on aggravating factors for an upper term sentence? (2) If so, what standard of review applies, and was the error in this case prejudicial?”