

BLAKELY: ALERT TO PANEL

The recent decision of the United States Supreme Court decision in *Blakely v. Washington* (June 24, 2004, No. 02-1632) ___ 542 U.S. ___ [124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573], creates responsibilities for appointed appellate counsel. *Blakely* held a state may impose an increased sentence on the basis of specified facts (such as California's circumstances in aggravation) only if the defendant has been afforded, or has waived, a jury trial on those facts, and they have been proved beyond a reasonable doubt. We stress some essential points at the outset:

Prompt action vital: To ensure a *Blakely* issue is preserved and to avoid possible procedural default, *Blakely* should be raised at the earliest stage possible. Thus it is important that all of our present and past clients affected by the ruling receive the benefit of our prompt attention. The procedures vary according to the stage of the case, as outlined below.

Be alert for adverse consequences: The usual caution should be exercised in examining each case for potential risks of pursuing relief. Risks include upsetting an advantageous plea bargain and spotting and correcting unauthorized sentencing errors favoring the client. ADI can help identify and sort out these risks.

Cases involving a guilty plea: These cases can be complicated. They may raise factual and procedural issues and a risk of adverse consequences. Consultation with ADI and with trial counsel is very important. ADI is preparing a separate memo on this subject.

Probation cases: ADI is preparing a memo on this subject. Consult the "hotline" in the interim.

I. REVIEW OF CASES

Attorneys should review all of their cases, open or closed and trial or guilty plea, to identify all cases to which *Blakely* is factually applicable. If you have any doubts, ADI would be happy to consult with you. It is preferable to be over-inclusive at this point.

II. PROCEDURES FOR PRE-REMITTITUR CASES

Blakely should be raised at the earliest possible stage. Even if procedures specifically permitted as a matter of right under the Rules of Court are

unavailable,¹ counsel should submit the issue to the court, along with a request for leave to file the particular pleading, addressed to the presiding justice in the Court of Appeal or the Chief Justice in the Supreme Court.² If the court rejects the filing, the very fact it was submitted at the earliest possible stage will help avoid future claims of procedural default, failure to seek appellate remedies before resorting to habeas corpus, etc.

- A. Pre-AOB. If you haven't yet filed the AOB (**ADI and FDAP website samples available), the procedure should be straightforward: include *Blakely* in the brief.
- B. Post-AOB, pre-opinion: File a supplemental opening brief (**ADI and FDAP website samples available). Include with the brief a request to the presiding justice for leave to file it. (Cal. Rules of Court, rule 13(a)(4).) If the original filing was a *Wende* brief, ask for leave to withdraw it and file a new opening brief.
- C. Post-opinion, but fewer than 30 days since the opinion was filed:³ Petition for rehearing (**ADI and FDAP website samples available). If it has been more than 15 days since the opinion, ask the presiding justice for leave to file a late petition under rule 25(b)(4).⁴ Argue, on the ground of *Blakely*'s recency, for an exception to the usual rule that issues may not be raised for the first time in a petition for rehearing. (See *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 120-121; *People v. Payne* (1977) 75

¹Filings of right include, among others, the appellant's opening brief, respondent's brief, reply brief, petition for rehearing, and petition for review. The Judicial Council is considering an amendment to rule 13 to permit as a matter of right a letter brief on new authorities not available to be included in previous pleadings.

²Examples of pleadings that would require leave to file are a supplemental opening brief (rule 13(a)(4)) and a late petition for rehearing or review (rules 25(b)(4), 28(e)(2)), as well as those not mentioned in the rules but not precluded by them, such as a letter supplementing an already-filed petition for rehearing or review, a request to expand the scope of review, and a request for the remedy of transfer or remand.

³A modification of the opinion that changes the judgment or an order for publication restarts the 30-day clock between the filing of the opinion and its finality. (Rule 24(b)(5), (c)(2).)

⁴The court may also grant rehearing on its own motion under rule 25(a) up to 30 days from the filing of the opinion.

Cal.App.3d 601, 605.) If you have already filed a petition for rehearing on other grounds, file a letter (along with a request for leave to file it) asking the court to consider the *Blakely* issue in connection with the petition.

- D. More than 30 days since opinion filed, pre-remittitur: These cases must be taken to the California Supreme Court; the Court of Appeal has lost jurisdiction. In doing so, ask the Supreme Court to excuse failure to have raised the *Blakely* issue in the Court of Appeal (as normally required by rule 28(c)) on the ground *Blakely* was decided too recently.
1. 31-40 days since opinion filed, no petition for review yet filed: On or before the 40th day file a petition for review (**ADI and FDAP website samples available) raising the *Blakely* issue, even if it was not raised below.
 2. 41-60 days since opinion filed, no petition for review yet filed: File a petition for review (**ADI and FDAP website samples available) raising *Blakely*, along with a request to the Chief Justice for relief from late filing under rule 28(e)(2). The excuse for late filing would be *Blakely*'s recency.⁵
 3. Petition for review already pending, but *Blakely* not raised: File a letter (along with a request for leave to file it) asking the Supreme Court to consider the *Blakely* issue in connection with the petition for review. (**ADI and FDAP website sample available. **Note: The sample supplemental letter was successful, and review was granted. *People v. Towne*, S125677.)**)
- E. Cases already in the California Supreme Court on grant of review, but *Blakely* not raised: It is possible to ask the Supreme Court to expand the scope of review (rule 29(b)(2)) or to remand the case to the Court of Appeal after resolution of the issue on which review was granted (if the *Blakely* question is not mooted by the Supreme Court decision), with instructions to permit briefing on *Blakely* (rule 29.3(c), (f)). If the Supreme Court opinion has already been filed and is not yet final,⁶ the request should be made by petition for rehearing (rule 29.5).

⁵The court may also grant review on its own motion under rule 28.2(c).

⁶The usual time of finality is 30 days after filing. (Rule 29.4(b)(1); see exceptions listed in rule 29.4.)

III. PROCEDURES FOR POST-REMITTITUR CASES

IMPORTANT – Coordination with trial counsel: Consultation with trial counsel is especially important in post-remittitur situations, since neither the trial nor appellate court has active jurisdiction and both have potential writ jurisdiction. Consultation between counsel will help identify adverse consequences, make sure *someone* is doing *something* if necessary, prevent duplicative proceedings or conflicting positions in the trial and appellate courts, provide a chance to strategize about the most advantageous forum, etc. ADI will offer guidance to the panel as to these issues and as to any preferences expressed by our courts concerning the forum or procedure.

- A. Retroactivity: Under *Teague v. Lane* (1989) 489 U.S. 288, cases for which direct review is not yet concluded when a new rule of law is decided are covered by that new rule, for purposes of federal habeas corpus relief. Cases for which no further appellate remedies are available are not covered, unless the new rule comes within certain unusual exceptions. A decision that does not change the law but merely applies existing law can be used in federal collateral proceedings. Direct review for federal purposes concludes when no further state appellate remedies are available and the time for petitioning for certiorari to the United States Supreme Court has expired.⁷ (See *Beard v. Banks* (June 24, 2004, No. 02-1603) ___ U.S. ___ [124 S.Ct. 2504; 159 L.Ed.2d 494; 2004 U.S. LEXIS 4572]; *Caspari v. Bohlen* (1994) 510 U.S. 383, 390.)
- B. Cases to be flagged but not requiring action at this point, because they are no longer on “direct review” for retroactivity purposes: A state case is no longer on direct review for federal retroactivity purposes if further state appellate remedies are not available and the time for filing a petition for certiorari has expired. These cases include those in which: (a) no petition for review was filed; **OR** (b) more than 90 days elapsed between the time review was denied (or the case was otherwise concluded by the California

⁷Certiorari requires a previous petition for review. The certiorari petition must be filed within 90 days from the entry of the decision by the California Supreme Court. (U.S. Supreme Ct. Rules, rule 13.) That decision may be the denial of review, the filing of an opinion, the denial of a petition for rehearing following a decision on a grant of review, or other order concluding state appellate proceedings (e.g., Cal. Rules of Court, rule 29.3(b) [dismissal of review]).

Supreme Court) and the time *Blakely* was decided:⁸ *Blakely* does not apply to them unless that decision is found to be a mere application of existing law or to come within the unusual *Teague* exceptions. (*Teague v. Lane, supra*, 489 U.S. 288, 305-310.) We suggest counsel flag them but not take any action unless *Blakely* is found to be fully or partially retroactive to cases no longer on direct review.

C. Cases needing prompt attention because they are still on “direct review”: These include cases in which (a) a petition for review was filed **AND** (b) fewer than 90 days elapsed between the time review was denied (or the case was otherwise concluded by the California Supreme Court) and the time *Blakely* was decided.⁹ *Blakely* applies to these cases, and so prompt consideration is essential. (*Teague v. Lane, supra*, 489 U.S. at pp. 303-305.)

D. Remedies for post-remittitur cases still on direct review

1. Recall of remittitur: A fundamental change in the law is a ground for recalling the remittitur. A party may make a motion for recall under rule 26(c)(2). (See *People v. Mutch* (1971) 4 Cal.3d 389, 396-397; *People v. Ketchel* (1966) 63 Cal.2d 859, 868; *People v. Curtis* (1971) 21 Cal.App.3d 704, 705, 708, overruled on other grounds in *In re Earley* (1975) 14 Cal.3d 122, 130, fn. 11.)
2. State habeas corpus: The 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.) These points may be helpful in considering state habeas relief:
 - a. Availability: A recent change in fundamental applicable law can allow an exception to the usual rule that habeas corpus

⁸*Blakely* was decided June 24, 2004. Thus a case in which the California Supreme Court denied a petition for review before March 26, 2004, would be considered final and no longer on “direct review” at the time *Blakely* was decided, for retroactivity purposes.

⁹The flip side of the preceding footnote is that a case in which the California Supreme Court denied a petition for review on or after March 26, 2004, would be considered not final on direct review at the time *Blakely* was decided, for retroactivity purposes.

may not be used to raise an issue that theoretically could have been raised on appeal or that was raised and rejected. (*In re Harris* (1993) 5 Cal.4th 813, 841.)

- b. Choice of forum: Both the superior court and the Court of Appeal would have jurisdiction. The trial court is normally the preferred forum for a petition filed for the first time on a particular ground, but because of the substantial legal questions *Blakely* raises, the trial courts may be looking to the appellate courts for guidance. Strategic considerations may be important here; consult with trial counsel. Some cases, such as those involving guilty pleas, may involve factual issues that would better be presented to the trial court. Appellate counsel should be aware that compensation for proceedings in the superior court normally comes from that court, not the Court of Appeal.
 - c. Relief to be sought: A habeas corpus petition filed in any court can ask for direct relief on *Blakely* grounds. (**[FDAP website sample of Court of Appeal habeas petition seeking direct relief is available.](#)) If filed in the Court of Appeal, it may also seek recall of the remittitur. (See *In re Smith* (1970) 3 Cal.3d 192, 203-204.) This process would reopen the appeal and permit briefing on *Blakely*.
3. Choice of remedy: Although both habeas corpus and recall of the remittitur would appear to be appropriate, we think that a simple motion to recall the remittitur under rule 26(c)(2), to grant rehearing, and to permit briefing on *Blakely*, accompanied by a supplemental opening brief on *Blakely*, has a good deal to recommend it:
 - It is more efficient and much less cumbersome procedurally than habeas corpus.
 - It avoids successive petitions problems that might require investigating and adding other issues to the habeas petition. (*In re Clark* (1993) 5 Cal.4th 750, 797;¹⁰ Pen. Code, § 1475.)

¹⁰“[A]bsent justification for the failure to present all known claims in a single, timely petition for writ of habeas corpus, successive and/or untimely petitions will be summarily denied.” (*In re Clark* at p. 797.)

- It reinstates direct review and so would allow the federal habeas statute of limitations to restart from day one, rather than simply tolling it from the original starting date. (28 U.S.C. § 2244(d)(1)(A), (d)(2).)
- It reflects the normal policy preference for legal/appellate remedies over equitable/writ remedies. (*In re Harris, supra*, 5 Cal.4th 813, 825-829.)

The Court of Appeal may express a preference for one procedure over another, and ADI will inform counsel if that is so. Meanwhile, we suggest a motion to recall the remittitur be filed, unless there are strategic or other advantages to habeas corpus (e.g., the need to rely on facts outside the record). If the motion to recall is denied as an improper remedy, there would be no obstacle to filing a later habeas petition.

- E. Cases involving a guilty plea: As mentioned at the beginning, these can be more complicated than cases that were tried. ADI is preparing a memo on this subject. Consultation with ADI and trial counsel is very important.

III. RESOURCES

- A. Blakely “hotline” committee: ADI has a “hotline” committee of staff attorneys to act as consultants on *Blakely* issues. They are:

Howard Cohen	ext. 24	hcc@adi-sandiego.com
Patrick DuNah	ext. 31	ped@adi-sandiego.com
Diane Nichols	ext. 57	dln@adi-sandiego.com
Cindi Mishkin	ext. 55	cbm@adi-sandiego.com
Art Martin	ext. 61	abm@adi-sandiego.com

The assigned staff attorney of course is available, too.

- B. Websites:

1. ADI: ADI’s website has a *Blakely* resources corner: <http://www.adi-sandiego.com/Resources/Blakely%20Resources/Blakely.htm>

It includes links to articles, news, and online resources, as well as a number of sample pleadings and opinions. We ask panel attorneys to help provide samples as they are produced.

Attorney Cindi Mishkin is acting as the “clearinghouse” for model briefs, motions, petitions, opinions, etc., to put on our website. Please route to her materials you think might be useful. (Again, you can reach her at ext. 55, e-mail cbm@adi-sandiego.com .) This includes *Blakely*-specific arguments, as well as sample pleadings such as motions to file a supplemental brief, request for relief from filing late petition for rehearing or review, or request to recall the remittitur. Cindi can also provide sample arguments and pleadings not yet on the website.

2. FDAP: The First District Appellate Project has a collection of memos, links, and a number of sample pleadings and opinions: <http://www.fdap.org/blakely.html>
3. Appellate projects: All of the appellate projects will be screening *Blakely* filings and forwarding sample materials to ADI . We will organize the samples chosen, and when they are reasonably complete the projects will post them in unified form on their websites, so that attorneys do not have to visit multiple sites to find what they need.