5

SPECIAL DIRECTIVE 04-04

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: CURT LIVESAY
Chief Deputy District Attorney

SUBJECT: *Blakely v. Washington*

DATE: JULY 21, 2004

SUMMARY

On June 24, 2004, the United States Supreme Court decided the case of *Blakely v. Washington* (2004) 542 U.S. _____; 124 S.Ct. 2531; 2004 DJDAR 7581; 72 U.S.L.W. 4546; 2004 LEXIS 4573. This case radically transforms sentencing, holding that the United States Constitution requires that any fact which increases the penalty beyond the "statutory maximum" must be proven to a jury. Many questions remain unanswered, and will likely remain so until the United States Supreme Court provides further clarification. In order to protect our convictions in the face of this uncertainty, not only our sentencing practices but our case filing, pleas, pre-trial and trial practices must all be revised -- effective immediately -- as outlined in the body of this special directive in order to ensure compliance with *Blakely*.

ANALYSIS

In *Blakely*, the Supreme Court reversed a sentence imposed in Washington state because the judge selected what Washington state called an "exceptional" sentence in reliance upon aggravating factors which had not been submitted to and found true by a jury. The Court -- applying its earlier decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 -- held that this was a violation of the Sixth Amendment right to trial by jury, and that the judge may not increase punishment beyond that which is authorized based on the facts found by the jury in its verdict. Thus: "'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.'" (*Blakely, supra*, 2004 DJDAR at p. 7582, citing *Apprendi, supra* at p. 490.)

This holding probably applies to California's determinate sentencing schema. We have identified three ways in which *Blakely* could apply – first, in the imposition of the high term based on circumstances in aggravation; second, in the standard of

proof required for finding a fact that could justify a high term or a consecutive sentence; third, in the decision to impose consecutive sentences in certain cases.

If we are correct, then judges may no longer impose high term for either substantive offenses or enhancements in reliance upon circumstances in aggravation -- enumerated at California Rules of Court, rule 4.421 -- which have not been found to be true by a jury.[1] The midterm will henceforth be what *Blakely* calls the "statutory maximum," unless supported by factual findings of the jury or the defendant's waivers, as to all offenses and enhancements for which a low, middle and high term are set forth.

The standard of proof has also been changed. Previously, factors in aggravation justifying selection of high term only had to be found true by a judge by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420, subd. (b).)[2] Now, they must be found true beyond a reasonable doubt.

A more difficult question is the effect of *Blakely* on certain types of consecutive sentencing. Nothing in *Blakely* nor in the precedents on which it relies explicitly addresses consecutive sentencing. While it is clear that *Blakely* will not apply to consecutive sentencing which relies solely upon prior convictions or upon facts found by the jury, such as the 10-20-life statute set forth at Penal Code section 12022.53, subdivision (b)-(d), it is not clear if *Blakely* will be held to apply to consecutive sentencing based upon facts found by the judge. However, given that consecutive sentencing increases the penalty, requires a statement of reasons and does -- in many cases -- rely upon factual findings by the judge for its imposition,[3] it is possible that consecutive sentencing based upon such judicial factfinding will ultimately be deemed to come within *Blakely* as well. Accordingly, in order to protect our judgments to the greatest extent possible in the light of this uncertainty, this Office -- while not conceding that *Blakely* applies – will nonetheless proceed as if consecutive sentencing is covered by *Blakely* until the Supreme Court provides further clarification.[4] Proceeding in this manner is not expected to be especially burdensome, since -- with the exception of a few additional factors -- the same list of factors which will support aggravation under rule 4.421will also support imposition of consecutive sentences under rules 4.425 and 4.426.

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[1]Ironically, the sole aggravating factor which need not be found by a jury is a prior conviction.

[2] All subsequent references to "rules" are to the California Rules of Court.

[3] See, i.e., rules 4.425, 4.426.

[4] If the verdicts are clear on their face that the crimes involve different victims and/or different times or places within the meaning of rules 4.425 and 4.426 and other applicable authority, an additional finding by the jury to support consecutive sentences may not be required.

(However, note that the same individual factor may not be used for both purposes. See, i.e., rules 4.425, subd. (b)(i) & (ii).)

Compliance with *Blakely* will require changes not only in our pleas and sentencing but also in our charging, pre-trial and trial practices, effective immediately. The guiding principle is that aggravating factors used to support imposition of high term or certain consecutive sentences should now be treated as a type of enhancement, which must -- unless appropriate waivers are procured -- be charged and proven to a jury beyond a reasonable doubt. Thus, prosecutors should not request a high term sentence or certain consecutive terms unless aggravating factors supporting the selection of high term or supporting consecutive sentencing have been found true beyond a reasonable doubt by a jury in a written finding, or unless the defendant has provided appropriate admissions and/or waivers, or unless one of the exceptions set forth below at section III(A) applies.

Guidance for more specific situations is provided below:

I. Filing/Pre-trial:

- The filing deputy should review reports in light of possible aggravating factors (e.g., rules 4.421, 4.425, 4.426) and allege applicable aggravating factors in the complaint in order to preserve the option of seeking high or consecutive terms.[5] Bear in mind that the lists of possible aggravating factors set forth in the rules are not exclusive, and a court may rely upon a non-enumerated circumstance reasonably related to the sentencing decision. (Rule 4.408, subd. (a); *People v. Garcia* (1989) 209 Cal.App.3d 790, 794-795 [rapist's knowledge of his herpes infection].) However, aggravating factors may not be elements of the offense or the basis for an enhancement. (Rules 4.420, subd. (c),(d); 4.425, subd. (b)(i)-(iii).)

- Facts about the defendant which would normally be learned through the probation report (set forth at rule 4.421(b)(1)-(5)) may now have to be proven to the jury if high term or certain consecutive terms will be sought. Like proving priors, necessary records in admissible form and subpoenaed witnesses (including possibly probation and parole personnel) will be needed.

- If the case has already been filed, the calendar deputy or the trial deputy should review the charging document to ensure that all known aggravating factors have been filed. Calendar deputies and trial deputies should also remain alert for other information that might be learned during the pre-trial phase which would

[5] Note that "aggravating factors" as used throughout this special directive refers not only to factors supporting the high term (set forth at rule 4.421), but also to factors supporting consecutive terms (set forth at rules 4.425 and 4.426).

warrant charging additional factors in aggravation. (See also discussion of cases in or awaiting jury trial, *post*.)

II. Pleas:

A plea bargain specifying the high term and/or consecutive terms:

The defendant should waive his rights and admit not only the charge itself but also the aggravating factors supporting the selection of any high terms and/or consecutive terms. The waivers and admissions should mirror those which would be obtained when the defendant is admitting an enhancement.

An open plea:

A defendant must provide an *Apprendi* waiver, meaning that the defendant admits and waives his right to have a jury decide the truth of the aggravating factors. If no other waiver is obtained, the result will be a court trial on the aggravating factors.

If the goal is to conduct a pre-*Blakely*-style sentencing hearing where the judge may rule based upon reviewing a probation report, police reports, preliminary hearing transcripts, etc., then an agreement by the defendant that the judge may find the truth of the aggravating factors based on such documents is required. Alternatively, a defendant might be willing to admit certain aggravating factors for purposes of an open plea.

III. Jury trial:

A. If the trial is already completed and defendant is awaiting sentencing:

- If the jury found an enhancement true but the judge chooses not to impose it, then that enhancement could potentially be used as an aggravating factor to support high term or consecutive terms. However, the rule remains that if sentence is imposed on the enhancement, it cannot also be used as an aggravating factor. (Pen. Code, § 1170, subd. (b); rule 4.420, subd. (c) [high term]; rule 4.425, subd. (b)(iii) [consecutive terms].)

- If the defendant has been convicted of other crimes for which consecutive sentences could be but are not imposed, this factor will support imposition of the high term. (Rule 4.421, subd. (a)(7).)

- Prior convictions – which under *Blakely* need not be proven to a jury -- may be considered as aggravating factors, subject to applicable restrictions on dual use. (Rules 4.421, subd. (b) (2),(3).)

B. If the jury trial is upcoming or ongoing:

- Some aggravating factors may be known ahead of trial, such as a vulnerable victim or that the defendant took advantage of a position of trust or confidence to commit the offense. (Rules 4.421 (a)(3), (a)(11).) If such factors have not been alleged in the charging documents, they should be alleged immediately. Other factors may not be known until trial is underway, when more detail about the case emerges. A motion to amend the information should then be made. Be aware that if the defendant takes the witness stand and lies, even this is something the jury must find to be true beyond a reasonable doubt before it can be used as an aggravating factor.

- Special verdict forms should be drafted for the jury to find an aggravating factor. (Cf. Pen. Code, § 1150 *et seq.*) Together with opposing counsel and the court, develop jury instructions to accompany the special finding.

- The defense may request bifurcation with respect to some aggravating factors, or offer to admit certain aggravating factors in order to prevent them from coming before the jury. Such requests should not be opposed unless the circumstances would be material to the underlying offense.

IV. Post-conviction:

If a petition for habeas corpus relief is received, contact HABLIT.[6]

CONCLUSION

Obviously, this seismic shift in the criminal law leaves many questions unanswered at this point. As matters are clarified, we will provide further direction. The Training Division is in the process of developing sample pleadings and forms to be used at various stages of the proceedings. They will be made available shortly.

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[6] Note that while the majority opinion in *Blakely* does not address retroactivity, Justice O'Connor states in her dissent that *Blakely* would at most be retroactive to 2000, when *Apprendi* was decided. (*Blakely, supra*, 2004 DJDAR at p. 7588 (dis. opn. of O'Connor, J.).)