

SPECIAL DIRECTIVE 05-01

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TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM:  CURT LIVESAY  
Chief Deputy District Attorney

SUBJECT: Update on *Blakely v. Washington*

DATE: FEBRUARY 17, 2005

Special Directive 04-04 set forth this Office's policy following *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531, 159 L.Ed.2d 403]. In order to protect our judgments to the greatest extent possible, deputies were directed to plead circumstances in aggravation (except for prior convictions) and either obtain *Blakely* waivers from defendants who plead or prove the circumstances in aggravation to a jury at trial. On January 12, 2005, the United States Supreme Court issued an opinion in *United States v. Booker & United States v. Fanfan* (Jan. 12, 2005, Nos. 04-104 & 04-105) \_\_\_\_ U.S. \_\_\_\_ [2005 LEXIS 628]. The opinion applied *Blakely* to the federal sentencing scheme and held that the scheme conflicts with the Sixth Amendment. As a remedy, the court excised those portions of the statutory scheme which make the Guidelines mandatory in the federal courts.

Because *Booker & Fanfan* only considered the federal sentencing scheme, the constitutionality of California's determinate sentencing scheme remains uncertain. Until that uncertainty is resolved by the California Supreme Court in the pending cases of *People v. Black* (S126182) and *People v. Towne* (S125677), the policy set forth in Special Directive 04-04 remains in effect. Except for prior convictions, circumstances in aggravation should continue to be alleged and proven to a jury in felony cases involving determinate sentences. If a defendant pleads, *Blakely* waivers should be obtained. (See Special Directive 04-04 for more detail.) This policy does not constitute a concession that California's determinate sentencing scheme runs afoul of *Blakely*. Instead, it is an effort to protect our judgments to the greatest extent possible in the light of continuing uncertainty, until the California Supreme Court decides the matter.

Deputies should consider submitting written points and authorities to the court demonstrating why the court should allow circumstances in aggravation to be proven to a jury, since proving circumstances in aggravation to a jury is an issue of first impression in California. In a case where the court struck the circumstances in aggravation from the information, the Appellate Division successfully argued in the Court of Appeal that, in light of the present uncertainty, the court not only has inherent authority but has a duty to

allow a jury determination of circumstances in aggravation. The Appellate Division brief also pointed out that the use of hybrid verdicts (general verdicts supplemented with specific findings by the jury) in order to protect the judgment on appeal has been upheld by the California Supreme Court. Hybrid verdicts are procedurally and analytically similar to verdicts incorporating jury findings regarding circumstances in aggravation. Deputies may obtain copies of the appellate brief from their head deputies or from the intranet and adapt it for submission to the court. DDA Jessica Goulden in the Appellate Division may also be contacted for assistance.

If the court refuses to allow the People to plead the circumstances in aggravation in the information and/or denies the People's request to prove the circumstances in aggravation to a jury, it is important that the record show that the People sought to do so but that the court denied that request. The record should reflect the reasons for the court's denial. If the defendant objects to the People's request to plead the circumstances in aggravation or to prove them to a jury, this should be clear on the record as well.

If the court denies the People's request and no written points and authorities have been submitted, deputies should submit them in a motion for reconsideration. If the trial court refuses to change its position, head deputies should consider whether to refer the matter to the Appellate Division. Any appellate relief, however, would have to be sought as early as possible in the proceedings.

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