


SPECIAL DIRECTIVE 05-04

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TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM:  CURT LIVESAY
Chief Deputy District Attorney

SUBJECT: ***People v. Black* (supersedes Special Directive #04-04
and Special Directive # 05-01)**

DATE: AUGUST 16, 2005

On June 20, 2005, the California Supreme Court issued its decision in *People v. Black* (2005) 35 Cal.4th 1238. In *Black*, the Supreme Court considered the effect of *Blakely v. Washington* (2004) 542 U.S. 296 [1245 S.Ct. 2531] and *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738] on California's determinate sentencing scheme. The issues before the Supreme Court were whether, after *Blakely* and *Booker*, a defendant is constitutionally entitled to a jury trial on the circumstances in aggravation that justify an upper term or a consecutive sentence. The Supreme Court held that a defendant is not entitled to a jury trial on the circumstances in aggravation before an upper term or a consecutive sentence can be imposed. According to our Supreme Court, "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Black, supra*, 35 Cal.4th at p. 1244.)

Since *Black* affirms that the sentencing scheme set forth in Penal Code § 1170 and in the Rules of Court is not constitutionally defective, it is no longer necessary to allege circumstances in aggravation in the complaint or to seek to prove them at trial. Nonetheless, in an abundance of caution, deputies shall continue to incorporate *Blakely* waivers when taking pleas where a defendant is pleading for the upper term or where the defendant is pleading open. However, deputies should be clear that seeking waivers in such cases is not a concession that jury findings are required before the upper term or consecutive sentences may be imposed. *Black* is the law in California and holds that such jury findings are not required.

Suggested *Blakely* waivers are attached.

Blakely Waiver

Whether the defendant is pleading for the upper term or pleading open, **in either case** advise defendant of the following:

A circumstance in aggravation may be used to increase your sentence on any count, sentencing enhancement or allegation to the upper or maximum term provided by law. The circumstance(s) in aggravation in your case is/are _____.*

Do you give up any right to a jury trial, any right to confront and cross-examine and any right against self-incrimination that you may have with respect to the circumstance(s) in aggravation?

Where the defendant is pleading for the **upper term**, add the following:

Do you admit the circumstance(s) in aggravation? Do you admit that the circumstance(s) in aggravation outweigh(s) the circumstance(s) in mitigation and agree to the imposition of the upper term?

Where the defendant is **pleading open**, add the following:

Do you agree that the judge may determine the existence of the circumstance(s) in aggravation as allowed by existing statutes and Rules of Court? Do you agree that this waiver shall apply to any future sentence imposed following the revocation of probation?

* Note that in order to take the suggested waivers, deputies must identify the circumstances in aggravation which apply in a particular case.