

FIRST DISTRICT APPELLATE PROJECT

730 Harrison Street, Suite 201 • San Francisco, California 94107 • (415) 495-3119 • Facsimile: (415) 495-0166

Blakely, Booker, and Black. Now What?

Jonathan D. Soglin
Staff Attorney
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Note: The electronic version of this document has hyperlinks (in blue).

On June 20, 2005, the California Supreme Court issued its opinion in [People v. Black](#) (no. S126182, filed June 20, 2005) --- Cal.Rptr.3d ----, 2005 WL 1421815, holding that there is no federal constitutional right to a jury trial on fact-finding relating to aggravating factors used to impose the upper term under California's Determinate Sentencing Law. The Court also held that there is no right to a jury trial on fact-finding used in the decision to impose sentences consecutively. This memorandum will provide quick suggestions as to how appellants can procedurally respond to *Black* in order to preserve *Blakely* claims. This memorandum will also provide some guidance for triage of cases in order to determine which cases may be best suited for certiorari petitions raising *Blakely* claims. In the coming weeks, sample certiorari petitions and post-*Black* opening briefs will be available.

Note: the most urgent category of cases noted below are those in which the California Supreme Court denied review and the 90-day window to file a certiorari petition is still open. If you have such a case, please review this material A.S.A.P. Filing a certiorari petition requires some ground work (e.g. IFP affidavits; admissions to the bar, etc.) that could cause delays. FDAP will soon be posting a sample certiorari petition, which should save you considerable time.

I.

Procedural Options for Post-*Black* *Blakely* Claims in the Court of Appeal

A. Pre-AOB: If a case is still pre-briefing in the Court of Appeal, the *Blakely* claim can be preserved with a very brief argument simply acknowledging that the Court of Appeal is bound by *Black* and noting that the issue is being raised to preserve it for federal court review. Such a brief need not explain why *Black* is

wrongly decided. (Save that for certiorari petitions and federal habeas petitions.) But be sure to adequately identify the error (denial of a jury, application of wrong burden of proof, etc.), identify the relevant facts and procedural history, address waiver if applicable, federalize the claim (citing the Sixth Amendment, *Apprendi*, and *Blakely*), note that *Black* is controlling, and explain that the claim is raised in order to preserve it for federal court review. FDAP has posted a [sample post-Black AOB](#).¹

B. Post-AOB: There is not much to do if you have already filed an opening brief, except to acknowledge in the reply brief that *Black* is controlling. (It may still be necessary in reply briefs to address such questions as the scope of the *Almendarez-Torres* exception or harmless error. Thus far, it appears that post-*Black* opinions tersely dispose of *Blakely* claims with citations to *Black*. It is too early to know whether the courts of appeal will, in other cases, also address other considerations as alternative grounds for affirmance.)

C. Post-Opinion: Given that the federal courts may have a different view of the DSL, it would be prudent in appropriate cases (see the triage discussion below) to preserve the issue with a [petition for review](#) in the California Supreme Court.²

II.

Procedural Options for Cases Post-Petition for Review

A. Review Granted Cases: In cases in which the appellant prevailed on a *Blakely* claim in the court of appeal and in which the California Supreme Court granted review (deferring briefing pending *Black* and *Towne*), there is nothing to do in the short term except wait for the California Supreme Court to transfer the case back to the court of appeal for reconsideration in light of *Black*. (This probably won't happen until the *Black* decision is final, i.e. 30 days after the decision, assuming no rehearing. In fact, even after *Black*, the Court is still granting review and deferring briefing pending the finality of *Black*. (See e.g. *People v. Castro*, no.

¹ <http://www.fdap.org/PostBlackSampleAOB.htm>

² [http://www.fdap.org/downloads/blakely/PostBlackPFRsample.p
df](http://www.fdap.org/downloads/blakely/PostBlackPFRsample.pdf)

[S134220](#).³) The court of appeal may or may not solicit additional briefing. After the court of appeal issues its new opinion – presumably rejecting the *Blakely* claim under *Black* – appellant can then petition for review, preserving the issue for federal court review. Only then will the case be “final” for purposes of a certiorari petition or a federal habeas petition.

In cases in which the appellant lost in the Court of Appeal and the California Supreme Court granted review and stayed briefing (this is probably limited to a few published decisions), the California Supreme Court will likely dismiss review without returning the cases to the Court of Appeal. The time to file certiorari in those cases would run from the date of the order dismissing review.

B. Review Denied Cases: Review-denied cases present more complex, and, in some cases, more urgent consideration. A typical order in such cases states that review is “denied without prejudice to any relief to which defendant might be entitled after this court determines in *People v. Black*, S126182, and *People v. Towne*, S125677, the effect of [*Blakely*] on California law.” The options available for such cases depend upon whether the 90-day window for a certiorari petition has run.

1. *90-Day Certiorari Window Still Open*. **[Note: Time Sensitive Considerations Follow and in Section III]**

In a case in which review was denied and there is still time to file a certiorari petition, counsel must decide whether the case warrants such a petition. Below, in section III, are some highlights of procedural aspects of filing a certiorari petition and, in section IV, a discussion of factors to consider in a triage of cases for certiorari petitions. As an alternative to counsel filing a certiorari petition, counsel could write to the client, advising him/her of the outcome of *Black* and providing forms for filing either a pro se certiorari petition or a pro se federal habeas corpus petition. The advantage of U.S. Supreme Court direct review over federal habeas review is that the U.S. Supreme Court, if it grants certiorari in *Black* or another case presenting the same issue, would decide the issue de novo.

In contrast, on federal habeas review, the federal courts accord deference to the state court's determination of the constitutional questions.

A certiorari petition should describe the ruling below, the ways in which *Black* conflicts with the entire *Apprendi* line of cases, the number of cases affected by *Black*, and how this analysis conflicts with (or compares to) the reasoning of *Blakely* decisions coming from states that have similar sentencing schemes. FDAP hopes to have sample certiorari petition along these lines available shortly.

2. 90-Day Window Is Closed:

If a petitioner received such a "review denied without prejudice" order and if more than 90 days have passed since the issuance of that order, the only avenue of relief still open would be a federal habeas petition. Because *Black* is controlling for all California courts, a state habeas petition would be to no avail. Because the 90 days have passed, both a certiorari petition and a request to extend the time for filing a certiorari petition would be untimely. Although the 90-day deadline is not jurisdictional in criminal cases, it is extremely unlikely that the Court would consider a late-filed certiorari petition. (*Schacht v. United States* (1970) 398 U.S. 58, 63-64; see also R. Stern & E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 350-353 (8th ed. 2002).)

An attempt to reopen the California Supreme Court proceedings in order to obtain a new order issued denying review, would likely be fruitless. Rehearing of an order denying review is not permitted. (Rules 25(a), 29.4(b)(2)(A), 29.5(a) (and adv. comm. note).) And it would be difficult to convince a court of appeal to recall its remittitur for the purpose of re-opening the certiorari window, and it's doubtful such a procedure would be effective. (See *Missouri v. Jenkins* (1990) 495 U.S. 33, 49.) It would, moreover, be difficult to show that extreme circumstances warrant any of these actions. While the orders denying review suffer from some vagueness and are, to the say the least, unusual, the meaning of the orders is still clear enough that it is a strain to argue that the denials were "without prejudice" to some procedural relief should the Court hold in *Black* that *Blakely* does not apply; the orders, instead, only implied that relief could be obtained if the Court held that *Blakely* **did** apply to the DSL.

Where review was denied more than 90 days ago, it appears that the only avenue left is a federal habeas petition. Should the U.S. Supreme Court ultimately

reverse *Black* or another case raising the issue, state habeas may again be available, but that is not a reason to let the federal habeas statute of limitations run.

Note: There is no compensation under a state court of appeal appointment for preparation of a federal habeas corpus petition. Counsel can either prepare the petition on a pro bono basis or send the appropriate forms, including an IFP application, to the appellant. Such forms can be found on the [federal court Web sites](#).⁴ Counsel could also instruct the petitioner to attach a copy of the court of appeal opinion and the relevant excerpts from model certiorari petitions showing why *Black* was wrongly decided. Unless there is tolling of the federal habeas statute of limitations, in the normal case the federal habeas petition must be filed within one year of the denial of review by the California Supreme Court.

III.

Background on Certiorari Procedures - Time Sensitive

While this memorandum cannot fully cover the procedural requirements of a certiorari petition, a couple of areas merit special attention given the short time line for some cases. As noted, FDAP will be posting a model certiorari petition for your use, but you must still follow proper procedures.

- 1. Timing:** The petition is due 90 days after the denial of review by the California Supreme Court. (The time runs from the filing date of the review denial order, *not* from the date of the remittitur.) “A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days.” (U.S.S.Ct. [Rule 29.2](#).)

⁴ <http://www.fdap.org/t-forms.html#habeas>

2. **Extensions of Time.** In cases in which the certiorari window closes in the coming weeks, consideration should be given to filing a request in the U.S. Supreme Court for an extension of time. The Supreme Court rules permit an extension of time of up to 60 days for a certiorari petition, but only if an application is filed “at least 10 days before the date the petition is due, except in extraordinary circumstances.” (U.S.S.Ct. Rules 13.5, 30.2.) Ideally, if at all possible, the certiorari petition should be filed by the original deadline; there is no guarantee that the U.S. Supreme Court will view the issuance of *Black* as good cause or extraordinary circumstances.
3. **IFP Applications.** Filing a certiorari petition without fees and in an 8 1/2 x 11 format (instead of booklet format) requires an application for leave to proceed in forma pauperis (IFP). Such an application must accompany the certiorari petition and no exception is made when the appellant had appointed counsel in the state court. Counsel anticipating filing a certiorari petition should forthwith obtain a signed financial affidavit from the client. (A [blank IFP application](#) and [financial affidavit](#) can be found in the Supreme Court’s [case handling guide for IFP cases](#).⁵) If it is logistically impossible to get the affidavit back from the client in time for filing with the petition before the 90 days run, file the petition and an application for IFP status stating that the appellant had court-appointed counsel in the state court and that a completed financial affidavit is forthcoming. If the IFP affidavit arrives shortly thereafter the Court will docket the petition. If the IFP affidavit doesn’t arrive shortly, the Court may return the petition with a letter stating that it can be resubmitted with the financial affidavit within a certain amount of time and will then be deemed timely. **Note: this should be a last resort approach. If at all possible, obtain the affidavit prior to filing. If time is short, use overnight delivery service to the prison or even seek permission to fax the blank affidavit to your client’s counselor.**
4. **Supreme Court Bar Membership.** Attorneys filing certiorari petitions must be members of the Supreme Court bar. Nevertheless, the Court will accept a certiorari petition for filing where counsel of record has an application for admission pending at the court. Upon receiving the certiorari petition, the clerk will confirm that the application is pending and complete. [Forms](#)

⁵ <http://www.supremecourtus.gov/casehand/guideforifpcases.pdf>

[and instructions](#) can be found on the U.S. Supreme Court Web site.⁶ Membership in the U.S. Supreme Court bar requires, among other things, a certificate of good standing from a state high court and the sponsorship of two members of the bar of the U.S. Supreme court. (Some FDAP attorneys are members of that bar and may be able to sponsor panel attorneys.) Because of the impending summer recess, applications received by the Supreme Court will not be acted upon until sometime in August, at the earliest. **If at all possible, submit the application for admission in sufficient time such that it can be acted upon prior to the filing of the certiorari petition. If you're unsure about whether you will be filing a certiorari petition, you might consider at least beginning the initial steps of obtaining the certificate of good standing⁷ and preparing the application for admission.**

- 5. Compensation.** Assuming a certiorari petition is warranted in your particular case, FDAP would recommend compensation. The general approach of the judiciary to certiorari petitions is that a petition should only be filed in a case with a strong, well-preserved federal issue that has important societal implications. Thus, just because there is a *Blakely* issue involved, that does not necessarily mean the case is cert-worthy. See below for discussion of what makes a particular case more or less cert-worthy. The First District traditionally has referenced the guideline for Petitions for Review (10 hours) as generally appropriate for certiorari petitions, though of course as with any guideline there may be specific reasons for exceeding or going below the guideline. Please note: Once a model petition is available, panel attorneys are expected not to re-invent the wheel with each new petition and considerable time should be saved by basing your petition on the model pleading.

⁶ <http://www.supremecourtus.gov/bar/baradmissions.html>

⁷ These may be obtained from the Court with a written request and a fee of \$1.00. Send your request, payment and self addressed envelope to: California Supreme Court, 350 McAllister St., Room 1295, San Francisco CA 94102. (Call 415-865-7000 for information.)

IV.

Triage of Cases Post-Black

In deciding whether to further pursue a *Blakely* claim, particularly when deciding whether to file a certiorari petition, several considerations are at play and some triage of cases should be done. Before discussing those factors, a couple of general points are in order. A grant of certiorari is far from certain for any of these cases, even *Black* itself. The Supreme Court may not be anxious to address this area again in the wake of *Blakely* and *Booker*, particularly because there are *Blakely* challenges coming up from a number of states. Also, because of impending 90-day deadlines, certiorari petitions in some cases would have to be filed before the certiorari petition in *Black* itself.

Characteristics of ideal *Blakely/Black* cases to bring to the supreme court:

- *Upper Term Issues Only.* Ideal cases would be those presenting the upper term issue, involving current case conduct factors (not covered by any separate jury finding or admission by the defendant), and in which the *Blakely* claim was rejected purely on the merits, without waiver or harmless error complexities. (The consecutive sentence issue is much less compelling, particularly because it is not nearly as directly controlled by *Blakely*.)
- *Avoid Recidivism Complication.* The case should not involve recidivist factors. (While it wouldn't be surprising to see a certiorari grant in a case presenting a challenge to *Almendarez-Torres*, cases presenting the complexity of combining both a challenge to *Black* and a challenge to *Almendarez-Torres* may not be a good vehicle for the court to resolve these issues).
- *Error Not Harmless.* The cases warranting a certiorari petition should not have prejudice problems, and especially avoid cases in which the court of appeal alternatively affirmed on the basis of a failure to show prejudice.
- *Low Priority for Short Sentence Cases.* The client should have enough time left on his or her sentence such that reversal by the U.S. Supreme Court would have a meaningful impact on the length of incarceration. If the Court actually granted review of a *Black-Blakely* case, the very earliest the

court would do so would be September and a decision on the merits would not realistically come before next Spring. Even then further state court proceedings could follow before an actual resentencing. While the issue is not moot for those who will be released before review by the U.S. Supreme Court, such cases are not as compelling vehicles for certiorari petitions.