SINGLE VALID FACTOR TEST: A CRITIQUE

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In *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), the California Supreme Court held *Blakely*[1] is satisfied as long as the trial court relied on at least one fact in aggravation that meets *Blakely*'s criteria – either the jury found that fact beyond a reasonable doubt, or the defendant admitted it, or the defendant waived a jury trial on that point, or the fact relates to a prior criminal record. The court reasoned one such fact makes the defendant legally *eligible* for the upper term, and thereafter the defendant is no longer *entitled* to the middle term sentence. From that point the judge may rely on factors not compliant with *Blakely* in choosing among the three terms.

The ruling that a single valid factor in aggravation is sufficient to shield an upper term sentence from *Blakely* error, regardless of other factors entering into the trial court's decision, involves a thoroughly revisionist reading of Determinate Sentencing Law jurisprudence that defies both the realities of the past and logic.

Nowhere in the long history of case law interpreting the DSL, including the California Supreme Court's own precedents, is there support for *Black II*'s retrospective reading of the law.[2] Under the provisions of the pre-reformation DSL, to impose the

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[1]*Blakely v. Washington* (2004) 542 U.S. 296.

[2]*Black II* purports to find support for the single valid factor test in *People v. Osband* (1996) 13 Cal.4th 622, 728-729. (*People v. Black*, *supra*, 41 Cal.4th at p. 813.) That support is a partial sentence (dictum at that), taken out of context. The error in that case was dual use, and the passage dealt with prejudice:

> Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error." Only a single aggravating factor is required to impose the upper term (*People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615[] . . . . In this case, the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term, and on this record we discern no reasonable probability that it would not have done so.

Osband does say a single valid factor can be sufficient, but does not say it would always be sufficient; it properly engages in the conventional analysis of whether the court would

upper term the trial court was legally required to find that factors in aggravation outweighed those in mitigation. California Rules of Court, former rule 4.420,[3] provided in relevant part:

> (a) . . . The middle term must be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation. . . .
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> (b) . . . Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. . . .

(See also *People v. Scott* (1994) 9 Cal.4th 331, 350 ["the court may impose the upper or lower term of imprisonment only where the balance of aggravating or mitigating factors cited in support of that choice 'weighs' against imposition of the middle term"]; *People v. Austin* (1981) 30 Cal.3d 155, 159-160 ["the upper term is justified only if facts in aggravation outweigh those in mitigation"].) Finding there is at least a single factor in aggravation is not the same thing at all as finding aggravating factors outweigh mitigating ones.

Under the former DSL, the weighing process was not merely a means of guiding the sentencing court's discretion as to whether it *should* impose the upper term, but rather was an essential component in determining whether it *might lawfully* impose it. The trial court did not have "authority" to impose an upper term solely upon finding a valid aggravating factor, nor did the defendant become "eligible" for it. The court gained that authority, and the defendant that eligibility, only after the court made the additional finding that circumstances in aggravation outweighed circumstances in mitigation. Since that finding was an eligibility determination, not a mere choice among lawful sentences, it could be based only on constitutionally valid sentencing factors.

Although a single factor *might* support the court's act of discretion in imposing the upper term, it did not *necessarily* do so. (*People v. Thornton* (1985) 167 Cal.App.3d 72 ["weighing of factors involves a flexible quantitative and qualitative analysis, not a rigid numerical approach"].) It goes without saying that in many cases the trial court might easily have exercised its discretion differently if it had not had the invalid factors to rely

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have imposed the same sentence without the error. In both *Osband* and *Castellano*, the statement was dictum because the trial court had relied on multiple valid factors in sentencing.

[3]After *Cunningham*, rule 4.420 was amended, effective May 23, 2007, to eliminate these provisions.

on. (E.g., *People v. Goldberg* (1983) 148 Cal.App.3d 1160, 1163 [reversing: "it is at least questionable whether aggravating circumstances outweighed mitigating circumstances]"; *People v. Berry* (1981) 117 Cal.App.3d 184, 193-198 [remanding for resentencing after finding some aggravating factors unsupported]; *People v. Burney* (1981) 115 Cal.App.3d 497, 505 [reversing: "Although we find that the trial judge cited proper aggravating factors in imposing the upper base term, we nevertheless find that the trial judge erred when he stated 'The Court finds no circumstances in mitigation'"].)[4]

Even further, an appellate court might find that, without the invalid aggravating factors, the trial court would have abused its discretion by imposing the upper term. (E.g., *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360 [single valid factor, juvenile record, was insufficient as matter of law, to support sentence].) That means, as a matter of law, no reasonable judge could find the factors in aggravation outweighed those in mitigation. It simply does not make sense to conclude, as *Black II* seems to, that the defendant in such a situation was not *legally entitled* to the middle term (or lower), when in fact, *as a matter of law* no higher one was available.[5]

Let us take a hypothetical case. A trial court finds six factors in aggravation and six in mitigation. Although declaring it to be a close case, the court concludes the aggravating factors outweigh the mitigating ones. On appeal, after *Cunningham*, the reviewing court finds five of the six aggravating factors invalid but finds one, say a remote prior prison term, valid. The remaining valid one is weak and the factors in mitigation are strong. The appellate court would certainly say the trial court might exercise its discretion differently after excising the invalid factors and probably would find that as a matter of law *no* reasonable judge could have chosen the upper term on the basis of the one remaining aggravating factor. Under *pre-Black II* law, resentencing unquestionably would have been required, either to weigh the proper factors or to impose the middle term; it would have been impossible to conclude there was no prejudicial error.

If one weak valid factor in aggravation would not outweigh six strong ones in mitigation, the finding of such an aggravating factor would not make the defendant legally eligible for the upper term. The upper term could not lawfully be imposed until

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[4]Although unpublished California cases may not be cited to California courts (Cal. Rules of Court, rule 8.1115(a)), there is no comparable federal rule prohibiting citation of those cases to federal courts. Counsel thus may expand on the examples by reference to unpublished cases.

[5]Justice Scalia discusses aspects of this problem in his concurring opinion in *Rita v. United States* (2007) 551 U.S. ___ [127 S.Ct. 2456, 2475-2479].

the judge reasonably found sufficient aggravating factors to outweigh mitigating ones. In our hypothetical, the judge would have to rely on one or more *Blakely*-violative factors to reach that point. Thus those would be *legally necessary* to the upper term. But *Black II* would apparently conclude otherwise.

Booker v. United States (2005) 534 U.S. 220 made clear it is insufficient that a judge has theoretical power in *some* cases to exceed a given sentence. An increased sentence must in fact have been available in the particular case:

> The availability of a departure in specified circumstances does not avoid the constitutional issue . . . . [D]epartures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, . . . no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. It was for this reason that we rejected a similar argument in *Blakely*, holding that although the Washington statute allowed the judge to impose a sentence outside the sentencing range for "'substantial and compelling reasons,'" that exception was not available for Blakely himself. . . . The sentencing judge would have been reversed had he invoked the departure section to justify the sentence.

(*Id*. at pp. 234-235.)

Black II's single valid factor test does not accommodate the question whether a judge would or could lawfully have imposed the upper term on the basis of one factor in aggravation in a particular case, after taking account of the weight of the aggravating and mitigating factors. Instead, *Black II*'s query ends when one valid factor is found.

Normally a state Supreme Court's interpretation of state law is conclusive and binding on the United States Supreme Court. However, as the United States Supreme Court said in *Mullaney v. Wilbur* (1975) 421 U.S. 684, 691: "On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.'"[6] Indeed, in *Cunningham* the court declined to accept *Black I*'s interpretation of the DSL as making the upper term the statutory maximum in all cases. (*Cunningham v. California*, *supra*, 127 S.Ct. 856, 871,

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[6]See also *Bush v. Gore* (2000) 531 U.S. 98, 112-115 (conc. opinion. of Rehnquist, C.J.); *NAACP v. Alabama ex rel. Patterson* (1953) 357 U.S. 449; *Radio Station WOW, Inc. v. Johnson* (1945) 326 U.S. 120, 129; *Ward v. Love County* (1920) 253 U.S. 17; *Terre Haute & I.R. Co. v. Indiana ex rel. Ketcham* (1904) 194 U.S. 579.

fn. 16; see also *NAACP v. Alabama ex rel. Patterson* (1953) 357 U.S. 449, 456 ["We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings"].)

The United States Supreme Court has already rejected a state court's effort to recast a clearly established "weighing" process for sentencing into a "single-factor" system, in which the only function of an aggravating factor is to create threshold eligibility for an enhanced sentence. In *Clemons v. Mississippi* (1990) 494 U.S. 738, the jury in a capital case found one constitutionally invalid and one valid aggravating factor. The Mississippi death penalty system was a "weighing" one – that is, the jury was told to weigh factors in aggravation against those in mitigation. On appeal, the state court had upheld the verdict, saying:

> [W]hen one aggravating circumstance is found to be invalid or unsupported by the evidence, a remaining valid aggravating circumstance will nonetheless support the death penalty verdict.

This language suggested the appellate court might be authorized or required to affirm if there remained at least one valid factor, without reweighing on the basis of valid factors alone or engaging in a harmless error analysis. The United States Supreme Court held such appellate rule would be an inadequate remedy for a constitutionally invalid factor in a "weighing" state. (*Id.* at pp. 751-754; see also *Parker v. Dugger* (1991) 498 U.S. 308, 318-320 [reversing because Florida court did not reweigh sentencing factors or remand for resentencing after striking two aggravating factors]; *Barclay v. Florida* (1983) 463 U.S. 939 [trial judge relied on invalid aggravating factor; affirmed because it was clear Florida court had determined sentence would have been the same had the sentencing judge given no weight to that factor]; see *People v. Bacigalupo* (1993) 6 Cal.4th 457, 472-473 [discussing *Clemons* and *Stringer v. Black* (1992) 503 U.S. 222, which held *Clemons* could be asserted on habeas corpus in a case that was final before *Clemons* was decided[7]].)

Black II applies *Cunningham*, not to a DSL that actually existed, but rather to a retrospective invention of the DSL that conflicts with rule language and the court's own precedents, as well as those of the Courts of Appeal, for almost 30 years. Further, *Black II*'s interpretation is inherently incoherent: it seems to say that a defendant is legally eligible for the upper term and not entitled to the middle term or less, even if as matter of

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[7] *Stringer*'s application of *Clemons* is analyzed in detail in the separately posted ADI amicus curiae letter supporting a petition for review in *In re Gomez*, S155425, Court of Appeal opinion at 153 Cal.App.4th 1516, review granted October 24, 2007.

law the upper term is unavailable. For these reasons it is worthwhile arguing to the United States Supreme Court that the single valid factor test announced in *Black II* need not be given authoritative weight.

The weaknesses in the *Black II* analyses would make this argument a strong one on a petition for certiorari in the United States Supreme Court. A good test case would be one in which only a weak factor or factors in aggravation remain after *Blakely*-violative ones are excised, and there are countervailing, stronger factors in mitigation. In such a situation no appellate court could properly find, beyond a reasonable doubt, that the trial court would have exercised its discretion in the same way without the invalid factors. The best test case would be one in which a finding by the trial court that the remaining valid aggravating factor outweighed mitigating factors would have been inappropriate as a matter of law – i.e., imposition of the upper term would have been an abuse of discretion.