

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, _____

DENNIS ABEYTA,

Petitioner

v.

THE STATE OF CALIFORNIA,

Respondent.

**On Petition For a Writ of Certiorari to the California Court of Appeal,
First Appellate District, Division Five**

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Question Presented

Whether, after this Court's decision *Booker v. United States* ___ U.S. ___, 160 L. Ed. 2d 621, 125 S.Ct. 738 (2005), the bright-line rule enunciated in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d, 124 S.Ct. 2531 (2004), continues to establish a right to a jury trial and proof beyond a reasonable doubt in a state sentencing scheme identical in all relevant respects to the Washington scheme at issue in *Blakely*.

Parties to the Proceedings

The parties to the proceedings in the California Court of Appeal included the State of California and petitioner Dennis Abeyta. There are no parties to the proceedings other than those named in the petition.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Dennis Abeyta, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, filed on February 10, 2005.

Opinions Below

The unpublished opinion of the California Court of Appeal, which is the subject of this petition, was filed on February 10, 2005, and is attached as Appendix (App.) A. The California Supreme Court's one-page order denying review is attached as Appendix B. The transcript of the sentencing

hearing is attached as Appendix C. For the convenience of the Court, the published opinion in *People v. Black*, 33 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (Cal. 2005) is attached as Appendix E.

Jurisdiction

The decision of the California Court of Appeal to be reviewed was filed on February 10, 2005. The California Supreme Court denied discretionary review on May 11, 2005. This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257(a).

Constitutional and Statutory Provisions Involved

A. Federal Constitutional Provisions

The Sixth Amendment of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed

The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law"

B. State Statutory Provisions

Subdivision (a) of section 288.5 of the California Penal Code provides (emphasis added):

(a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct under Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and **shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.**

Subdivision (b) of Section 1170, of the California Penal Code provides, in pertinent part (emphasis added):

When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, **the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime....** In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.

C. California Rules of Court

Relevant California Rules of Court are attached as appendix D, including:

Rule 4.401. Authority

Rule 4.405. Definitions
Rule 4.406. Reasons
Rule 4.408. Criteria not exclusive; sequence not significant
Rule 4.409. Consideration of criteria
Rule 4.420. Selection of base term of imprisonment
Rule 4.421. Circumstances in aggravation
Rule 4.423. Circumstances in mitigation

Statement of the Case

On June 20, 2001, the prosecutor filed in San Mateo County Superior Court a three-count¹ felony information charging petitioner, Dennis Abeyta, with two counts of continuous sexual abuse of a minor, a violation of California Penal Code section 288.5, against victims Sabina (count one) and Ernst (count two), and one count of committing a lewd or lascivious act with a fourteen or fifteen year-old, a violation of California Penal Code section 288(c)(1). Clerk's Transcript "CT"² 5-7.

On September 5, 2003, a jury returned verdicts of guilty on all counts. CT 396-397.

At the October 20, 2003, sentencing hearing, the superior court found true four aggravating factors relating to count one: (1) "the crime involved a high degree of cruelty, callousness to the victim, constituting, many, many

¹ A fourth count was dismissed at the request of the prosecution. CT 390.

² The "Clerk's Transcript" is a portion of the record on appeal filed in the California Court of Appeal.

instances of abuse over an extended period of time”; (2) “the victim was particularly vulnerable within the meaning of. . . rule [4.421]. The crime started when she was at a particularly young age”; and (3) “the defendant induced another minor, that is the victim in count 2, to commit or assist in the commission of the crimes to the victim in count 1”; and (4) “the manner in which the crime was carried out did indicate some planning and sophistication, and I think the trial evidence showed an extraordinary degree of manipulation of many people involved in order to commit the crime.” App. C 1373-1374. The court also found true one mitigating factor: petitioner had no prior criminal record. App. C 1374. Relying on these findings, the court sentenced petitioner to the upper term of sixteen years for count one. App. C 1373. (Pursuant to California Penal Code section 1170.1, which governs consecutive sentencing, the court sentenced petitioner to one-third of the presumptive (middle) term (four years) for count two. App. C 1374.) On October 16, 2003, petitioner filed a timely notice of appeal. CT 421.

In the state court of appeal, appellant, citing the Sixth and Fourteenth Amendments and this Court’s decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d, 124 S.Ct. 2531 (2004) argued that the judicial fact-

finding in sentencing for count one violated his federal constitutional rights to a jury trial and proof beyond a reasonable doubt.

In a majority opinion, two justices of the California Court of Appeal rejected petitioner's argument and affirmed his sentence. App. A 45. The majority agreed with the State that the California Determinate Sentencing Law ("DSL") is distinguishable from the sentencing scheme in Washington and the Federal Sentencing Guidelines and that there is no constitutional right to a jury trial on facts used to impose the upper term. App. A 32-45. The dissenting justice would have remanded for resentencing in light of *Blakely*. App. A, Jones, P.J., dissenting, 1-2.

Appellant petitioned for discretionary review by the California Supreme Court. On May 11, 2005, that court denied review in an order stating 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." App. B.

On June 20, 2005, the California Supreme Court issued its opinion in *People v. Black*, 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (Cal. 2005), holding that there is no federal constitutional right to a jury trial on aggravating factors used to impose the upper term under California's DSL.

The Court also held that there is no right to a jury trial on fact-finding used in the decision to impose sentences consecutively—a matter not at issue in this petition. (The *Towne* case has not been calendared for oral argument; the Court will likely either dismiss review in that case or return it to the state Court of Appeal for reconsideration in light of *Black*.)

* * * *

Reasons for Granting the Writ

Review Is Necessary to Resolve Whether there is Right to a Jury Trial and Proof Beyond a Reasonable Doubt on Aggravating Facts Necessary to Impose an Aggravated Sentence in a Sentencing Scheme Identical in Relevant Respects to the Washington Scheme at Issue in *Blakely*.

A. Introduction

Review is necessary so that this Court can reaffirm what it held in *Blakely*. In *Blakely*, this Court explicitly applied a “bright-line rule” to answer the question whether there is a right to a jury trial on facts necessary to impose a sentence higher than the statutory maximum. *Blakely*, 124 S.Ct. at 2540. The Court first reiterated that, “[o]ther 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,” and then declared that “the ‘statutory maximum’ . . . is the maximum sentence a judge may impose *solely on the*

basis of the facts reflected in the jury verdict or admitted by the defendant.”

Blakely, 124 S.Ct. at 2536 (emphasis in orig.), quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000).

United States v. Booker, ___ U.S. ___, 160 L. Ed. 2d 621, 125 S.Ct. 738 (2005), implemented the *Blakely* holding, yet some courts—the California and Tennessee high courts in particular—perceived a blurring of the bright line in *Booker*. This perception emboldened them to conclude that any judicial discretion may take a sentencing scheme outside of the ambit of *Blakely*. Other courts have applied the bright-line rule, including the New Jersey Supreme Court, which has recently expressly rejected the California Supreme Court’s interpretation of *Blakely* and *Booker* as directly contrary to this Court’s precedents. *State v. Natale*, ___ N.J. ___, ___ A.2d ___, 2005 WL 1802084, slip op. at 26-27 (N.J. Aug. 2, 2005)

Review is, therefore, also appropriate because California’s decision in *Black* is wrong. In fact, the approach taken by the California Supreme Court was one advocated by the State of Washington in *Blakely* and rejected by this Court. *Blakely*, 124 S.Ct. at 2538-2539; *Black*, 29 Cal.Rptr.3d at 751-753. California’s sentencing scheme unconstitutionally permits judicial fact-finding—upon proof by a preponderance of the evidence—of facts necessary to impose the aggravated (upper) term sentence. California’s

scheme is so identical to the scheme at issue in *Blakely*, and thus falls so clearly within the bright-line rule of *Apprendi*, that full briefing on the merits may not be required for this Court to review the *Black* decision.

Finally, the issue is of great significance for an enormous number of cases. The constitutionality of the core of California's determinate sentencing scheme is at issue. While some California defendants convicted of third strikes, murder, or some serious sex offenses receive presumptive indeterminate terms, the vast majority of felony defendants are sentenced under the determinate sentencing law at issue in *Black* and in this case.

This case provides an excellent opportunity for resolving the question presented. This case, unlike *Black* itself, involves only judicially-found aggravating factors related to the commission of the current offense, i.e., particular cruelty or callousness, particular vulnerability on the part of the victim (a particularly young age at the onset of the offense), sophistication and extraordinary manipulation by petitioner, and inducement of another to assist in the offense. App. C 1373-1374. This case is thus unencumbered by the complexity of recidivist-related aggravating factors possibly covered by the exception to the right to a jury trial identified in *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S.Ct. 1219 (1998). This case, also unlike *Black*, does not involve an aggravating factor that a jury

found true in returning a probation ineligibility finding. See *Black*, 29 Cal.Rptr.3d at 765 (Kennard, J., concurring & dissenting).

B. California’s Sentencing Scheme and the *Black* Decision

Before describing the evolving split among the state courts, petitioner will first describe California’s sentencing scheme and the *Black* decision.

1. *California’s Determinate Sentencing Law (DSL)*.

Under the DSL, judges may sentence felony defendants in California to one of three possible determinate terms—mitigated (lower), presumptive (middle), or aggravated (upper). The maximum sentence a judge may impose without additional fact-finding is the middle term: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, **the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation** of the crime.” Cal. Pen. Code § 1170(b) (emphasis added).

Each California statute defining an offense either states the applicable triad of terms expressly, or provides for a commitment “to state prison,” in which case the triad is 16 months, two years, or three years in state prison. Cal. Pen. Code § 18. The statute defining continuous sexual abuse of a minor—the offense involved in both this case and in *Black*—provides that a defendant guilty of the offense “shall be punished

by imprisonment in the state prison for a term of 6, 12, or 16 years.” Cal. Pen. Code § 288.5(a).

The California Rules of Court provide a non-exclusive list of enumerated aggravating circumstances. Cal.R.Ct. 4.421. A court may rely upon a non-enumerated aggravating circumstance “reasonably related” to the sentencing decision. Cal.R.Ct. 4.408(a); see e.g., *People v. Garcia*, 209 Cal.App.3d 790, 794-95, 257 Cal.Rptr. 495, 497-98 (1989). The court must make explicit factual findings. Cal. Pen. Code § 1170(c); Cal.R.Ct. 4.420(e). Facts in aggravation are established by a preponderance of the evidence. Cal.R.Ct. 4.420(b). A fact that is either an element of the underlying offense or an element of a statutory enhancement may not be used as a factor in aggravation. Cal. Pen. Code § 1170(b) (enhancements); Cal.R.Ct. 4.420(d) (elements); *People v. Scott*, 9 Cal.4th 331, 350, 885 P.2d 1040, 1051, 36 Cal.Rptr.2d 627, 638 (1994) (elements). For example, where, as in this case, the young age of the victim is an element of the offense, age and vulnerability may not be considered aggravating factors, unless the judge finds the victim was particularly young or vulnerable. *People v. Fernandez*, 226 Cal.App.3d 669, 680, 276 Cal.Rptr. 631, 637 (1990). Consequently, an upper term necessarily requires findings beyond the minimum elements of the conviction offense.

The judicial fact-finding involved in selecting between the lower, middle or upper term contrasts with the procedure used in California to apply sentencing “enhancements.” The California Penal Code provides for separate sentencing enhancements for both prior criminal conduct and certain current-offense-related conduct, such as being armed with a deadly weapon or firearm, personal use of a firearm, or infliction of great bodily injury. See e.g. Cal. Pen. Code §§ 667(a)-(i), 667.5, 12022.1, 12022, 12022.5, 12022.7. The penalties for such enhancements are sometimes fixed terms imposed consecutive to the base term (lower, middle or upper) selected for the underlying offense (e.g. § 12022.7), a higher triad to select from (§ 12022.5), or an indeterminate term for the underlying offense (three strikes law). Unlike the aggravating and mitigating circumstances, which are found by the judge under California law, there is a state statutory right to a jury trial on the just-described current-offense and status enhancements. See, e.g., Cal. Pen. Code § 1170.1(e).

2. *In Black, the California Supreme Court Found Judicial Fact-Finding on Aggravating Circumstances Constitutional.*

In its 6-1 decision in *People v. Black*, 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (2005), the California Supreme Court concluded, after reviewing *Apprendi*, *Blakely*, and *Booker*, that this Court’s “precedents do not draw a bright line” upon which to rely in determining whether the DSL

was constitutional. *Id.* at 755. This conclusion is apparently what motivated the court to find the California scheme constitutional, despite the statutory requirement that a judge find an aggravating factor by a preponderance of the evidence before an upper term sentence can be imposed.

The *Black* court repeatedly identified characteristics of the DSL that are identical to the scheme at issue in *Blakely*. It recognized that, under California Penal Code section 1170(b), an aggravated sentence cannot be imposed in the absence of aggravating factors. *Black*, 29 Cal.Rptr.3d at 750, 755. It further recognized that, under the applicable statutes and rules, an aggravating factor cannot constitute an element of an offense or an enhancement found true by the jury and separately imposed by the judge. *Id.* at 744. And the court conceded that “[t]he mandatory language of section 1170, subdivision (b), does provide some support for defendant’s position.” *Id.* at 750.

Such concessions would seem necessarily to lead to the conclusion that the middle term is the statutory maximum because it is “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 124 S.Ct. at 2537 (emphasis in orig.). But the California Supreme Court found the scheme constitutional by looking to factors other than whether the jury’s verdict or

defendant’s admissions themselves authorized the sentence. Under the California Supreme Court’s analysis, the core question is whether a judge has “traditionally” exercised discretion in making the sentencing choice at issue, and the determination of whether judicial discretion is “traditional” is resolved by considering such matters as the “context” of the discretion and whether the legislature intended to shorten sentences when it enacted the DSL. *Id.* at 749, 751, 752, & fn. 12.

In upholding the DSL, the court put particularly great weight on the fact that the list of possible aggravating factors is not exhaustive. *Id.* at 752, 755, 756. The court then acknowledged: “Some of the language used by the court in *Blakely* does suggest that the circumstance that the trial court has discretion to decide which factors are aggravating is not significant.” *Id.* at 752, n. 12. The *Black* court then turned to this Court’s “most recent clarification in *Booker* of the rationale underlying the *Apprendi* and *Blakely* decisions,” and concluded that *Booker* signaled that is not “inappropriate to consider this aspect of the California scheme” in determining whether the scheme is constitutional. *Ibid.*

C. The State Courts are Split on the Question Whether Judicial Discretion Distinguishes a State Sentencing Scheme from *Blakely* and whether *Booker* Erased the Bright Line Drawn in *Blakely*.

There is a split among the state courts interpreting this Court’s decisions in *Blakely* and *Booker*. The New Jersey Supreme Court, in invalidating portions of its sentencing scheme pursuant to *Blakely*, identified this split and expressly rejected the California Supreme Court’s reasoning that whether a jury trial right exists turns on whether the judge’s findings can be described as discretionary, because the California Supreme Court’s interpretation “appears to be in direct conflict with *Blakely*.” *Natale*, ____ A.2d at ____, slip op. at 26-27 (citations omitted).

Several states have applied the *Apprendi/Blakely* bright-line rule to invalidate sentencing schemes that authorize judicial sentencing longer than the maximum authorized by the jury’s verdicts or defendant’s admissions. (Arizona, Colorado, New Jersey, North Carolina, Indiana, Oregon.) Other states, however, find no such bright line and have concluded that such fact-finding is constitutional when conducted within schemes allowing for forms of judicial sentencing discretion. (California, Hawaii, Tennessee.) The latter group has found support in *Booker*—particularly the view of the Court that a sentencing scheme in which the Federal Sentencing Guidelines would be wholly advisory would be constitutional. *Booker*, 125 S.Ct. at 750. (Several

of the states discussed have enacted *Blakely*-fix legislation.³ The statutes and rules cited below and in the state cases are the versions in effect prior to any such amendments.)

The Supreme Courts of Arizona, Colorado, New Jersey, North Carolina, Indiana, Minnesota and Oregon have all invalidated (or limited the application of) sentencing schemes which were, in relevant respects, indistinguishable from California's and Washington's. Those states all had schemes in which there is a presumptive sentence or presumptive range for each offense. The judge was allowed to exceed the presumptive sentence only upon finding aggravating factors present. The statutory (or state sentencing guidelines) list of aggravating factors was not exclusive (with the exception of New Jersey). In each of these states, whether a judge imposed an aggravated term was discretionary, with the caveat that in Colorado some aggravating facts mandated a sentence in the aggravated range and some permitted a sentence in the aggravated range.⁴ Some of

³ See, e.g., 2005 Ariz. Sess. Laws, ch. 20, §§ 1-2 (amending Ariz.Rev.Stat. §§ 13-702 and 13-702.1); N.C. House Bill no. 822, § 1, 2005-145 N.C. Sess. Laws (effective June 30, 2005) (amending, *inter alia*, section 15A-1340.16); 2005 Tenn. Pub. Acts ch. 353, esp. § 6 (eff. June 7, 2005) (amending Tenn. Code Ann. § 40-35-210); Minnesota Sentencing Guidelines II.D. (eff. Aug. 1, 2005) (amended to provide jury trial right).

⁴ Again, several of the states have enacted *Blakely*-fix legislation. The statutes cited here and in the state cases addressing *Blakely* are the versions in effect prior to any such amendments. Ariz.Rev.Stat. §§ 13-

those schemes had even greater discretion than there is in California, as the extent of the departure from the presumptive sentence was also discretionary.⁵ (In California, if the sentence is to be aggravated there is only one choice: the upper term (e.g. 16 years in this case).)

The high courts of those states did not find that the discretionary aspects of their sentencing schemes rendered the schemes constitutional. Rather, they found sentencing statutes and rules unconstitutional in so far as they allowed judges to increase sentences based on judicially-found facts, or, as in Colorado, specified that only “*Blakely*-compliant” factors (admitted by defendant, found true by jury, or jury waived by defendant) and *Blakely*-exempt factors (i.e. recidivist-based) may be used to increase a sentence beyond the statutory maximum. *State v. Brown*, 209 Ariz. 200, 99 P.3d 15, 18 (Ariz. 2004); *Lopez v. State*, 113 P.3d at 729 (Colo.); *Smylie*, 823 N.E.2d

701, 13-702(A), 13-702(C)(21); *Smylie v. State*, 823 N.E.2d 679, 863 (Ind. 2005); Ind.Code Ann. §§ 35-38-1-7.1, 35-50-2-3 to 7; *Lopez v. State*, 113 P.3d 713, 723-725 (Colo. 2005); *State v. Natale*, ____ N.J. ____, ____ A.2d ____, 2005 WL 1802084, slip op. at 28-29 (N.J. Aug. 2, 2005); *State v. Dalziel*, 867 A.2d 1167, 1172-1173, 182 N.J. 494, 503-505 (N.J. 2005); N.J. Stat. Ann. §§ 2C:43-6(a), 2C:44-1(a) and (f)(1); *State v. Allen*, ____ N.C. ____, ____ S.E.2d ____, 2005 WL 1539186 (N.C.); N.C. Gen. Stat. §§ 15A-1340.13(c) and (e), 15A-1340.16(b), (d) and (e), 15A-1340.17(c)(4); *State v. Leja*, 684 N.W.2d 442, 448 (Minn. 2004) (citing Minnesota Sentencing Guidelines II.D.2(b)); Or. Rev. Stat. §§ 137.671, 138.222(2)(a); Or.Admin.R. §§ 213-008-0001, 213-008-0002(1).

⁵ See, e.g., Ariz.Rev.Stat. § 13-702(A); Colo. Rev. Stat. § 18-1.3-401(6).

at 684-85 (Ind.); *Natale*, ____ A.2d at ____, slip op. at 30 (N.J.); *Allen*, 2005 WL 1539186 at *6-*9 (N.C.); *State v. Dilts*, 337 Or. 645, 103 P.3d 95, 99 (Or. 2004); *State v. Shattuck*, 689 N.W.2d 785 (Minn. 2004) (*per curiam*).

In Arizona, North Carolina and Oregon, the state attorneys general even agreed that their respective sentencing schemes were constitutionally defective. *Brown*, 209 Ariz. at 203, 99 P.3d at 18; *State v. Allen*, 2005 WL 1539186, New Brief for the State, filed Nov. 24, 2004, at 7⁶; *Dilts*, 103 P.3d at 97. As the Colorado Supreme Court succinctly explained, “the *Blakely* Court effectively rejected any distinction, for the purpose of Sixth Amendment analysis, between mandatory or discretionary aggravated sentencing systems based on judicial fact-finding. Under either system, facts supporting increased sentences are subject to the rule.” *Lopez*, 113 P.3d at 723 (citing *Blakely*, 124 S.Ct. at 2538 n.8).

In contrast, the California, Hawaii and Tennessee Supreme Courts have relied heavily on *Booker* to conclude that discretionary aspects of their sentencing schemes take them outside the bounds of *Blakely*, despite the schemes’ requirements that the judge find an aggravating factor present before imposing an aggravated sentence.

⁶ Available at: <<http://www.ncappellatecourts.org/nclib/efile/1101316181832854219553158/4916.PDF>> (last visited August 2, 2005).

Prior to the enactment of *Blakely*-fix legislation, Tennessee, like the other states discussed, had a scheme in which there was a presumptive sentence, judicial fact-finding was required to impose an aggravated sentence, and judges were not required to impose the aggravated sentence.⁷ Tennessee, however, allowed for a bit less discretion than some other states because its statutory list of aggravating factors was exclusive.⁸ Despite the Tennessee Attorney General's concession that the Tennessee scheme was unconstitutional (*Gomez*, 163 S.W.3d at 654)⁹ and despite its own recognition that "*Blakely* itself includes language which can be broadly construed to require the result the defendants seek" (*Id.* at 658), the Tennessee Supreme Court found the Tennessee scheme constitutional in a 3-2 decision. The court emphasized that "*Blakely* must be read in light of *Booker*," noted *Booker*'s approval of a discretionary/advisory sentencing scheme, and concluded that the scheme was constitutional because "the

⁷ *State v. Gomez*, 163 S.W.3d 632, 648 (Tenn. 2005) (citing Tenn. Code Ann. §§ 40-35-105-114 (2003), former § 40-35-210(c) and (d)).

⁸ Former Tenn. Code Ann. § 40-35-114; *State v. Grissom*, 956 S.W.2d 514, 518 (Tenn. Crim. App. 1997).

⁹ The Tennessee Attorney General also joined the defendants in petitioning for rehearing in *Gomez*. *State v. Gomez*, 163 S.W.3d at 672 (Order Denying Petition for Rehearing, Tenn. S.Ct., Filed May 18, 2005).

finding of an enhancement factor does not mandate an increased sentence.”

Id. at 658, 661.

The Hawaii Supreme Court has similarly relied on *Booker* to permit judicial fact-finding in a discretionary scheme, even when the bright-line rule of *Blakely* would seem to apply. In Hawaii, the judge may impose an extended term (up to double the maximum for the non-extended term) upon finding any of six aggravating criteria present (some of which relate to prior convictions) and that the extended term “is necessary for protection of the public.”¹⁰ In a 3-2 post-*Booker* decision, the Hawaii Supreme Court recently reaffirmed an earlier decision (*State v. Rivera*, 106 Haw. 146, 102 P.3d 1044 (Haw. 2004)) holding that there is no right to a jury trial on the “necessary for protection of the public” element of an extended term sentence. *State v. Maugaotega*, 107 Haw. 399, 114 P.3d 905 (Haw. 2005). The Hawaii Supreme Court concluded that the reasoning in *Booker* “essentially erases *discretionary* extended term sentencing schemes such as Hawaii’s from the decision’s purview.” *Id.* at 914 (emphasis in orig.); see also *id.* at 915 (“[t]he factor that rendered the federal sentencing guidelines unconstitutional was its mandatory nature”).

¹⁰ *State v. Rivera*, 106 Haw. 146, 158-160, 102 P.3d 1044, 1056-1058 (Haw. 2004) (citing Haw.Rev.Stat. §§ 707-660, 706-669); Haw.Rev.Stat. § 706-662(1)-(6).

The decisions in California, Tennessee, and Hawaii, stand in stark contrast to the other states. In California and Tennessee the state high courts perceived, in *Booker*, an erasure of the bright line drawn in *Blakely*. The Hawaii Supreme Court had never seen that line, but was also emboldened by *Booker*. The California and Tennessee courts, while recognizing that fact-finding beyond the jury's verdict or defendant's admissions is mandatory before an aggravated sentence can be imposed, view their schemes as beyond the reach of *Apprendi* and its many progeny because within those schemes there lies judicial discretion in identifying aggravating factors and/or in deciding whether to impose the aggravated term.

Review by this Court is necessary to resolve the conflict among the state high courts' decisions and to reaffirm that (1) there is a bright-line test for determining whether there is a right to a jury trial and (2) a sentencing scheme is unconstitutional if it permits judicial fact-finding to increase a sentence beyond that authorized by the jury's verdict or the defendant's admissions.

D. Review is Necessary Because the Ruling Below is Wrong and Returns Sixth Amendment Jurisprudence to Reliance on a Manipulable, Indistinct Standard For Assessing the Applicability of the Jury Trial Right.

The state court of appeal's decision in this case and the California Supreme Court's decision in *Black* are patently contrary to *Apprendi*, *Blakely* and *Booker*. Because *Black* post-dates the court of appeal decision in this case and is now the controlling authority in California, petitioner below addresses the analysis in *Black*, rather than the court of appeal's decision.

The majority opinion in *Black* framed the critical question of whether the DSL violated the Sixth Amendment as a question of “whether a trial judge's decision to impose an upper term sentence under the California determinate sentencing law involves the type of judicial factfinding that traditionally has been performed by a judge in the context of exercising sentencing discretion or whether it instead involves the type of factfinding that traditionally has been exercised by juries in the context of determining whether the elements of an offense have been proved.” *Black*, 29 Cal.Rptr.3d at 749-750 & n. 8. The *Black* opinion, thus, reverts Sixth Amendment jury-trial-right jurisprudence into a state of confusion, in which there is no objectively discernible line between when the jury trial right applies and when it does not. As this Court stated in *Blakely*, the rule

demarcating when the jury trial right is triggered must not be “manipulable” or vulnerable to “subjectivity.” *Blakely*, 124 S.Ct. at 2539, 2540.

Specifically, the standard also must not be one that leaves “definition of the scope of jury power up to judges' intuitive sense of how far is *too far*” in allowing judicial fact-finding, or that declares “legislatures may establish legally essential sentencing factors *within limits*.” *Ibid.* (emphasis in orig.).

It appears that the *Black* majority justices (as well as the Hawaii and Tennessee supreme courts), were led astray by the discussion in the two *Booker* majority opinions about how the former federal scheme was unconstitutional because it was mandatory and how the reformed federal scheme, with *advisory* guidelines, was constitutional because it involved judicial discretion. *Black*, 29 Cal.Rptr.3d at 756; *Gomez*, 163 S.W.3d at 657-58; *Lopez*, 113 P.3d at 734 (Coats, J., concurring). But this Court has not devised a test based on the degree of judicial discretion in a sentencing scheme. The former federal scheme was unconstitutional, not just because federal judges were required to apply the Guidelines, but because those Guidelines permitted judicial fact-finding resulting in sentences longer than that authorized by a jury verdict or a defendant’s admission. *Gomez*, 163 S.W.3d at 665 (Anderson, J., concurring & dissenting). And the reformed federal scheme devised in Justice Breyer’s opinion for the Court was not

constitutional because it involved judicial discretion. Rather, it was constitutional because a jury verdict or an admission authorized a sentence higher than any that could result from a fact found only by a judge. *Ibid.*

As Justice Kennard observed in rejecting the majority approach in *Black, Booker* does not provide a source for the judicial-discretion- focused test devised by the *Black* majority, and the California DSL is unconstitutional because it is materially indistinguishable from the sentencing regime invalidated in *Blakely*. *Black*, 29 Cal.Rptr.3d at 762-764 (Kennard, J., concurring & dissenting). Justice Kennard noted that the judicial discretion found in the California scheme is no different from that which existed under the unconstitutional Washington scheme. *Black*, 29 Cal.Rptr.3d at 764 (Kennard, J., concurring & dissenting). Under both schemes, judicial discretion is guided by the requirement that aggravating factors be reasonably related to the decision being made. *Ibid.* And, upon enactment, both schemes appear to have reduced the length of potential sentences for most crimes. *Ibid.* (citing *Blakely*, 124 S. Ct. at 2544 (O'Connor, J., dissenting) and noting no disagreement from the *Blakely* majority).

The *Black* majority, in fact, conceded that the California DSL contains all of the essential elements of a scheme that runs afoul of *Blakely*. The

majority acknowledged that California Penal Code section 1170(b) “is worded in mandatory language,” that “in a case in which no ... aggravating factor can be found, the judge cannot impose the upper term,” and that, “[i]n imposing the upper term sentence, the court may not consider any fact that is an essential element of the crime itself and may not consider a fact charged and found true as an enhancement.” *Black*, 29 Cal.Rptr.3d at 744, 751, 755. To avoid the obvious result emanating from those aspects of the DSL, the majority in *Black* took the surprising position that “the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable*.” *Id.* at 751. (emphasis in orig.). In fact, the requirement that an aggravating factor exist and be found by a judge by a preponderance of the evidence violates the Sixth and Fourteenth Amendments in the same manner as the Washington statutes reviewed in *Blakely*.

This was “the emerging majority view” among the California Courts of Appeal prior to the *Black* decision. *People v. Harless*, 22 Cal.Rptr.3d 625, 645 (6th Dist. 2004), rev. granted by 109 P.3d 68, 26 Cal.Rptr.3d 568 (Cal. 2005). Legal scholars and commentators agree that California’s scheme is among those affected by *Blakely*. D. Berman, *The Roots and Realities of Blakely*, 19 Criminal Justice 5, 6 (ABA 2005); A. Skove,

National Center for State Courts, *Blakely v. Washington: Implications for State Courts* (2004); J. Wool and D. Stemen, Vera Institute of Justice State Sentencing and Corrections, *Aggravated Sentencing: Blakely v. Washington Practical Implications for State Sentencing Systems*, Policy and Practice Review (Aug. 2004) 2; K. Stith, *Crime and Punishment Under the Constitution*, 2004 Supreme Court Review 221, 269 n.17 (2005).

The Black majority's decision to determine the constitutionality of the DSL by inquiring into whether judicial discretion in California can be characterized as "traditional" represented an abandonment of the *Apprendi/Blakely* bright-line rule. This Court's precedents make clear that enforcing the right to a jury trial requires an inquiry into the role of the jury as guaranteed by the constitution. The *Apprendi/Blakely* bright-line rule arises from "a fundamental reservation of power in our constitutional structure," and that rule "ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 124 S. Ct. at 2538-39 (citations omitted). Review by this Court is necessary because the California Supreme Court has failed to recognize and apply the standards necessary to implement the Sixth Amendment jury trial guarantee.

E. The Question is of Great Importance and Wide Application, and this Case is An Excellent Vehicle for this Court to Resolve the Question Presented.

1. The Issue is of Great Importance and Wide Application.

The constitutionality of California's sentencing scheme affects countless cases. A Lexis search conducted on August 4, 2005, turned up 936 cases for published and unpublished California appellate decisions in which the word "Blakely" appeared in the same paragraph as the phrase "aggravated term" or "upper term." These numbers do not reflect the numerous cases still pending in the California courts of appeal and trial courts. Nor do they reflect the cases pending in states in which the state high court and state legislature are still grappling with their responses to *Blakely*.

2. This case is an ideal one for this Court to resolve the question presented.

The state court squarely rejected petitioner's claim on the merits, without finding a waiver and without finding any error harmless. App. A 32-45. This case involves only aggravating factors based upon current-offense conduct. App. C 1373-1374. Unlike other California *Blakely* cases, the sentencing court did not rely on recidivist factors, posing questions of the viability and the scope of the *Almendarez-Torres* exception for the fact of a prior conviction.

In contrast, *Black* itself presents the complexities of recidivist factors and harmless error. Even Justice Kennard, who dissented from the main holding, concurred in the result because “the trial court,” in *Black*, “relied in part on his prior criminal history and on facts found by the jury,” in a probation ineligibility finding. *Black*, 29 Cal.Rptr.3d at 765 (Kennard, J., concurring & dissenting).

This case is also a better candidate than the *Gomez* case from Tennessee, which was decided on plain error review and included recidivism among the aggravating factors. *Gomez*, 163 S.W.3d at 651 (plain error) and 671 (Anderson, J. dissenting) (prior criminal conduct). The defendant in the *Smylie* case from Indiana has petitioned for certiorari, but that petition presents a different issue: whether *Blakely* applies to fact-finding conducted in determining whether sentences should run consecutively. *Smylie*, 823 N.E.2d 679, *cert. pet. pending*, S. Ct. no. 04-10472.

Finally, the Court need not worry that by accepting review of this case it is embarking on a course of state-by-state review of sentencing schemes. For one thing, the questions presented in this case—about the types of judicial fact-findings that are constitutional—would apply beyond California and would be controlling in those other states. For another thing, the legislatures of many states—including several discussed above

(e.g. Arizona, North Carolina, Oregon, Tennessee, Minnesota) have enacted *Blakely*-fix legislation. But there is no fix in sight for California and every day, defendants are sentenced to aggravated terms based on facts neither found true by the jury nor admitted by the defendant.

CONCLUSION

For the foregoing reasons, petitioner requests that the Court grant the petition for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, First Appellate District, Division Five affirming his sentence.

Dated: _____

Respectfully submitted,

TARA MULAY
Attorney for Petitioner

California Rules of Court

Rule 4.401. Authority

The rules in this division are adopted pursuant to Penal Code section 1170.3 and pursuant to the authority granted to the Judicial Council by the Constitution, article VI, section 6, to adopt rules for court administration, practice and procedure.

Rule 4.405. Definitions

As used in this division, unless the context otherwise requires:

* * *

(b) "Base term" is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed.

(c) "Enhancement" means an additional term of imprisonment added to the base term.

(d) "Aggravation" or "circumstances in aggravation" means facts which justify the imposition of the upper prison term referred to in section 1170(b).

(e) "Mitigation" or "circumstances in mitigation" means facts which justify the imposition of the lower of three authorized prison terms or facts which justify the court in striking the additional punishment for an enhancement when the court has discretion to do so.

(f) "Sentence choice" means the selection of any disposition of the case which does not amount to a dismissal, acquittal, or grant of a new trial.

* * *

(h) "Imprisonment" means confinement in a state prison.

* * *

Rule 4.406. Reasons

(a) [How given] If the sentencing judge is required to give reasons for a sentence choice, the judge shall state in simple language the primary factor or factors that support the exercise of discretion or, if applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It shall be delivered orally on the record.

(b) [When reasons required] Sentence choices that generally require a statement of a reason include:

* * *

(2) Imposing a prison sentence and thereby denying probation.

* * *

(4) Selecting a term other than the middle statutory term for either an offense or an enhancement.

* * *

(7) Striking the punishment for an enhancement.

* * *

(10) Striking an enhancement or prior conviction allegation under section 1385(a).

Rule 4.408. Criteria not exclusive; sequence not significant

(a) The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.

(b) The order in which criteria are listed does not indicate their relative weight or importance.

Rule 4.409. Consideration of criteria

Relevant criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise.

Rule 4.420. Selection of base term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. 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. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.