

No. \_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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KEVIN MICHAEL BLACK,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

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On Petition For Writ of Certiorari  
To The California Supreme Court

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**PETITION FOR WRIT OF CERTIORARI**

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## Questions Presented

1. Whether a broad reading of this Court's holding in *Almendarez-Torres v. United States* 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) ("*Almendarez-Torres*") to encompass not only "the fact of a prior conviction" but also other related recidivist facts violates the Sixth and Fourteenth Amendment guarantees as set forth in *Apprendi v. New Jersey* 530 U.S. 466, 479 (2000) ("*Apprendi*"), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004) ("*Blakely*"), *United States v. Booker*, 543 U.S. 220 [160 L. Ed. 2d 621, 125 S. Ct. 738] (2005) ("*Booker*"), and *Cunningham v. California* \_\_\_U.S.\_\_\_, 127 S. Ct. 856; 166 L. Ed. 2d 856 (2007) ("*Cunningham*")?
2. When one aggravating fact is either found by the jury beyond a reasonable doubt or admitted by the defendant, is the prosecution relieved of its obligation, pursuant to the dictates of *Apprendi*, *Blakely*, *Booker* and *Cunningham*, to prove to a jury beyond a reasonable doubt other aggravating facts used to support the imposition of the upper term or consecutive sentences?
3. Whether the Sixth and Fourteenth Amendments guarantees, as set forth in *Apprendi*, *Blakely*, *Booker* and *Cunningham*, that other 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 applies to consecutive sentences?
4. Does the retroactive application of a reformed statute, which deprives a criminal defendant of his right to the imposition of the midterm absent aggravating facts and a jury finding of aggravating facts by proof beyond a reasonable doubt deprive a criminal defendant of his right to due process of law under the Fourteenth Amendment to the United States Constitution?

### **Parties to the Proceedings**

The parties to the proceedings in the California Supreme Court included the State of California and petitioner Kevin Michael Black. There are no parties to the proceedings other than those named in the petition.

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**PETITION FOR WRIT OF CERTIORARI**

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The petitioner, Kevin Michael Black, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the California Supreme Court filed on July 19, 2007.

## OPINIONS BELOW

The opinion of the California Supreme Court to which this petition relates was filed on July 19, 2007, and is attached as Appendix A. It is reported at *People v. Black*, 41 Cal. 4th 799, 2007 Cal. Lexis 7604 (2007) (*Black II*.) This is the second time that this case comes before this Court. 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 (2005) (*Black I*), attached hereto as Appendix B. This Court granted Mr. Black's petition for certiorari and petition to proceed in forma pauperis in Case No. 05-6793 on February 20, 2007, vacated the judgment and remanded to the California Supreme Court for further consideration in light of *Cunningham v. California*, 549 U. S. \_\_\_\_ , 127 S. Ct. 856 (2007). The opinion of the Fifth District Court of Appeal of the State of California is attached hereto as Appendix C and is unpublished. The transcript of the sentencing hearing is attached hereto as Appendix D. A companion case, *People v. Sandoval*, 41 Cal. 4th 825, 2007 Cal. LEXIS 7606 (2007) is attached hereto as Appendix E.

## JURISDICTION

The decision of the California Supreme Court to be reviewed was filed on July 19, 2007. 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, STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The constitutional provisions involved are:

**U.S.C.A. Const: Amend. VI**

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**U.S.C.A. Const. Amend. XIV:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The California Statutes and Rules of Court involved are set forth in Appendix F.

infra as follows:

**A. Statutes**

Penal Code section 3  
Penal Code section 288  
Penal Code section 288.5  
Penal Code section 667.61  
Penal Code section 669  
Penal Code section 1170 prior to March 30, 2007  
Penal Code section 1170, as amended March 30, 2007  
Penal Code section 1203.066

**B. Former Rules of Court**

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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  
Rule 4.425 Criteria affecting concurrent or consecutive sentences

**STATEMENT OF THE CASE**

On February 7, 2002, the district attorney of Tulare County filed an amended information in Superior Court charging petitioner Kevin Michael Black in count one with

the continuous sexual abuse of a child. Pen. Code § 288.5<sup>1</sup> and in counts two and three with lewd and lascivious conduct. Pen. Code §288, subd. (a).

It was alleged as to count one that petitioner committed the offense by use of force, duress or menace within the meaning of Penal Code section 1203.066, subdivision (a)(1) and that petitioner had substantial sexual conduct with a victim under the age of 14. Pen. Code §1203.066, subd. (a)(8). It was alleged as to all counts that petitioner committed specified sexual acts with more than one victim within the meaning of Penal Code sections 667.61, subdivision (b) and 1203.066, subdivision (a)(7). CT 102 – 107.

On November 22, 2002, the jury found appellant guilty of all counts and special allegations. CT 372-374.

On January 9, 2003, the Superior Court granted the district attorney's motion to dismiss the Penal Code section 667.61 allegation as to count one. Petitioner was sentenced to the aggravated term of 16 years on count one (continuous sexual conduct).

The Court found that the seriousness and circumstances of the offense merited the aggravated term. These circumstances included the infliction of emotional and physical injury to the victim, the vulnerability of the victim, the fact that petitioner took advantage of a position of trust and the additional factors cited by the district attorney. In addition, the sentencing court relied on factors cited by the prosecutor. In her sentencing brief, the district attorney listed 4 aggravating factors relating to the crime: 1) The crimes involved great violence<sup>2</sup>; 2) The victims were particularly vulnerable; 3) The manner in which the crime was carried out indicated planning and; 4) The defendant took advantage of a position of trust and confidence to commit the offense. CT 385 – 386.

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<sup>1</sup> All references to the Penal Code refer to the code of the State of California unless otherwise specified.

The jury did find that the defendant committed the continuous sexual abuse by force, duress and violence, however, there was no finding of **great** violence as required by California Rules of Court, rule 4.421 (a). CT 373. In *Black II*, the California Supreme Court found that this distinction was irrelevant. *Id.* at 817. The only other factor found by the jury upon which the court relied was that petitioner sexually abused more than one victim. For each count, it was alleged that defendant committed the offense on more than one victim within the meaning of Penal Code section 1203.066, subdivision (a)(7). CT 104, 105, 106.

Petitioner was sentenced to consecutive terms of 15 years to life pursuant to Penal Code section 667.61, subdivision (b) (the One-Strike Law), because of the multiple victim allegation. However, once that factor was used to bring petitioner within the One-Strike Law, it was unavailable for use to support a consecutive term. *People v. Mancebo* 27 Cal.4<sup>th</sup> 735, 742 (2002); *People v. Fernandez* 226 Cal.App.3d 669 (1990); Pen. Code § 667.61, subd. (f).

In addition, the district attorney set forth 3 factors in aggravation that related to petitioner: 1) The defendant is a danger to society; 2) The defendant's prior convictions were of increasing seriousness; and 3) The defendant was unremorseful.

Sentencing petitioner consecutively on counts 2 and 3, the trial court gave the following reasons:

Regarding Count 2, the court stated:

This involved a separate victim. It occurred at -- separately from many of the offenses committed against T. in Count 1. It involved a breach of confidence. These children were allowed to attend a slumber party at his home, and it was expected that they would be safe and cared for by the mother of these children, and obviously it was used as an opportunity to initiate them into all sorts of inappropriate sexual and perhaps better sexualized conduct. RT 951.

Regarding Count 3, the court stated:

And this involved a different victim and a different offense against a different victim. Again, in light of the Defendant's total conduct in this case, with respect to not only T., but her friends, the Court believes that the seriousness and nature of the offense of a predatory nature, of not only selecting the stepdaughter, but her friends to engage in his conduct, makes these sentences appropriate. RT 951 – 952.

The court imposed consecutive 15-year to life terms on counts two and three (lewd and lascivious conduct.) The total term was 46 years to life. CT 436 – 437.

Notice of appeal was timely filed on March 6, 2003. CT 820. Petitioner did not raise a sentencing issue before the California Court of Appeal.

On June 1, 2004, the Court of Appeal affirmed appellant's conviction.

A Petition for Rehearing was filed on June 17, 2004 and denied on June 28, 2004. The Court of Appeal issued a modification that did not affect the judgment.

On July 8, 2004, petitioner filed for review in the California Supreme Court first questioning the propriety of petitioner's sentence given this Court's decision in *Blakely, supra*. Petitioner argued that judicial fact-finding at sentencing violated his federal constitutional rights to a jury trial and proof beyond a reasonable doubt. On July 28, 2004, the California Supreme Court granted review and asked the parties to brief the following issues: 1) What effect does *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_, 124

S.Ct. 2531 have on the validity of defendant's upper term sentence? (2) What effect does *Blakely* have on the trial court's imposition of consecutive sentences? No other issue was raised in Mr. Black's petition before the California Supreme Court.

On June 20, 2005, the California Supreme Court issued its decision in *Black I*, 35 Cal.4<sup>th</sup> 1238, *supra*, and held that there was no federal constitutional right to a jury trial on fact-finding relating to the aggravating factors used to impose the upper term under California's Determinate Sentencing Law. The Court also held that there was no right to a jury trial on fact-finding used in the decision to impose consecutive sentences. *Id.* at 1262.

On July 5, 2005, petitioner filed a timely Petition for Rehearing in the California Supreme Court.

On August 31, 2005, the California Supreme Court denied rehearing.

On September 28, 2005, Mr. Black filed a petition for certiorari in this Court, No. 05-6793, and motion for leave to proceed in forma pauperis. The questions raised in the petition were:

1. Whether the Court, in *United States v. Booker*, \_\_\_ U.S. \_\_\_, 160 L. Ed. 2d 621, 125 S.Ct. 738 (2005), retreated from the bright-line rule established 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), such that there is no constitutional right to a jury trial for fact-finding necessary to impose an aggravated sentence in a state sentencing scheme identical in relevant respects to the Washington scheme at issue in *Blakely*?
2. Whether the Sixth Amendment's guarantee, as set forth in *Apprendi v. New Jersey*, *supra*, and *Blakely v. Washington*, *supra*, that other 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 applies to consecutive sentences where state law has specifically held that consecutive sentences cannot be applied in the absence of additional facts or aggravating circumstances?

On February 20, 2007, this Court granted Mr. Black's motion to proceed in forma pauperis and petition for a writ of certiorari. The Court vacated the judgment and remanded the case for further consideration in light of *Cunningham v. California*, 549 U. S. \_\_\_, 127 S.Ct. 856, *supra*.

Mandate issued on March 26, 2007.

On February 21, 2007, the California Supreme Court requested supplemental briefing as follows:

The parties are directed to serve and file simultaneous supplemental briefs addressing the effect of *Cunningham v. California* (2007) 549 U.S. \_\_\_, 127 S.Ct. 856 on any of the issues presented in this case. The court specifically requests that the supplemental briefs address the following issues:

(1) Is there any violation of the defendant's Sixth Amendment rights under *Cunningham* if the defendant is eligible for the upper term based upon a single aggravating factor that has been established by means that satisfy the governing Sixth Amendment authorities - in the present case, for example, by the defendant's prior convictions or by the jury's finding that the offense involved force or fear - even if the trial judge relies on other aggravating factors (not established by such means) in exercising his or her discretion to select among the three sentences for which the defendant is eligible?

(2) Does *Cunningham* affect this court's conclusion in *People v. Black* (2005) 35 Cal.4th 1238, 1261-1264, that *Blakely v. Washington* (2004) 542 U.S.296 does not apply to the imposition of consecutive sentences under Penal Code section 669?

On July 19, 2007, the California Supreme Court issued its opinion in *Black II*.

Appendix A.

## REASONS TO GRANT THE PETITION

**Review Is Necessary to Give Import To This Court's Holdings That A Criminal Defendant Has A Sixth Amendment Right To A Trial By Jury and Proof Beyond A Reasonable Doubt On Facts Used To Impose A Sentence Higher Than The Statutory Maximum and to Settle The Differing Interpretations That State Courts of Last Resort Have Given To This Court's Holding In *Apprendi* And Its Progeny.**

### A. Introduction

With a stroke of the pen, the California Supreme Court has interpreted this Court's holdings in *Apprendi v. New Jersey*, *Blakely v. Washington*; *United States v. Booker*, 543 U.S. 220; 125 S. Ct. 738; 160 L. Ed. 2d 621 (2005) ("*Booker*") and

*Cunningham*, 549 U. S. \_\_\_, 127 S. Ct. 856, *supra*, to deny relief to most of California criminal defendants. Read together, the California Supreme Court's holdings in *Black II*, 41 Cal. 4th 799, *supra*, and a companion case, *People v. Sandoval*, 41 Cal. 4th 825, 2007 Cal. LEXIS 7606 (2007) ("*Sandoval*"), exclude most criminal defendants from the ambit of *Apprendi*, *Blakely*, *Booker* and *Cunningham* by holding that 1) *Almendarez-Torres* must be read broadly to include not only the "fact of a prior conviction," but also related recidivist findings. *Black II*, 41 Cal. 4th 799, 819-820, *supra*; 2) a single factor, including a prior conviction or recidivist findings, is sufficient to expose a defendant to the aggravated term and therefore, the sentencing court may find additional aggravating factors by a preponderance standard *Black II*, 41 Cal. 4th 799, 815-816, *supra*; 3) a criminal defendant has no right to a jury trial and proof beyond a reasonable doubt on facts used to impose consecutive sentences *Id.* at 819-820; and 4) California's sentencing statutes could be reformed to give sentencing judges broad discretion to impose the mitigated, mid or aggravated term without stating facts to support its decision to impose the upper to lower terms as previously required. *Sandoval*, 41 Cal. 4th 825, 847, 849, *supra*. In addition, the California Supreme Court held that sentencing under this discretionary scheme, which excludes a defendant's Sixth and Fourteenth Amendment guarantees of a jury trial and proof beyond a reasonable doubt could apply retroactively to criminal defendants without violating their due process or ex post facto rights. *Id.* at 855.

The issues presented have great significance for an enormous number of cases. The constitutionality of California's former determinate sentencing scheme and the remedy to be applied following *Cunningham* remains at issue. While some defendants

convicted of third strikes, murder, or some serious sex offenses received indeterminate terms, the vast majority of California felony defendants were sentenced under California's former the determinate sentencing law at issue in *Black II*.

**B. California's Sentencing Scheme Prior to *Cunningham, supra*, Included A Mandatory Presumption of Midterm Sentencing And Required Trial Courts to Find Aggravating Facts And Balance Aggravating and Mitigating Facts Before Imposing The Upper Term**

Between 1977 and this Court's decision in *Cunningham*, 549 U. S. \_\_\_\_ , 127 S. Ct. 856 *supra*, California's Determinate Sentencing Scheme (DSL; Pen. Code § 1170)<sup>3</sup> was implemented as follows: Criminal statutes prescribed three terms of imprisonment, a mitigated term, a midterm and an aggravated term. In Mr. Black's case, the sentence for continuous abuse of a child (Pen. Code § 288.5 (a)) carried potential terms of 6, 12 or 16 years. Penal Code section 1170(b) and the implementing Rule of Court, rule 4.420(a) mandated that the midterm be imposed unless there were circumstances in aggravation or mitigation. The Judicial Counsel defined circumstances in aggravation as facts that justified imposition of the upper term. Cal. Rules of Court, rule 4.405(d). The list of aggravating facts was nonexclusive and included facts relating to the defendant and the offense (Cal. Rules of Court, rule 4.421), statutorily enumerated factors in aggravation (Cal. Rules of Court, rule 4.421 (c)) and other reasonably related criteria. Cal. Rules of Court, rule 4.408(a). The trial court was directed to find these aggravating and mitigating by a preponderance of the evidence. Cal. Rules of Court, rule 4.420(b); *Cunningham* at 862-863, *supra*,.

In *Cunningham*, 549 U. S. \_\_\_\_ , 127 S. Ct. 856, *supra*, this Court held that California's DSL was unconstitutional. Relying on *Blakely's* definition of statutory

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<sup>3</sup> California's Determinate Sentencing Law, as previously codified at section 1170, subdivision (b) was amended by Stats. 1998, ch. 926, § 1. Unless otherwise noted, all references are to the former DSL.

maximum i.e. the maximum sentence that the court may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, this Court found that the midterm was the relevant statutory maximum. *Cunningham*, 549 U. S. \_\_\_, 127 S. Ct. 856, 871, *supra*. California's DSL implicated the Sixth Amendment because it permitted the trial judge rather than a jury to find aggravating facts by a preponderance standard to permit the imposition of the upper term. *Ibid*. Thus, this Court ordered California to bring its sentencing scheme in compliance with constitutional standards. *Id.* at 871. This court also noted that under the former sentencing scheme, California law did not mirror the discretionary scheme imposed in *Booker*:

California's DSL does not resemble the advisory system the *Booker* Court had in view. Under California's system, judges are not free to exercise their "discretion to select a specific sentence within a defined range." *Booker*, 543 U.S., at 233, 125 S. Ct. 738, 160 L. Ed. 2d 621. California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. *Cunningham's* sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. His instruction was to select 12 years, nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years. Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies.

*Cunningham*, 549 U. S. \_\_\_, 127 S. Ct. 856, 870, *supra*.

## **C. California Supreme Court's Decision in *Black II*, *Booker*, *Blakely*, *Wolfe*, and *Cunningham***

### **1. The Single Factor Exception**

In *Black II*, 41 Cal. 4th 799, *supra*, the California Supreme Court failed to abide by this Court's ruling in *Cunningham*. *Cunningham* reiterated, "under the Sixth Amendment, **any** fact that exposes a defendant to a greater potential sentence must be

found by a jury, not a judge, and established beyond a reasonable doubt not merely by a preponderance of the evidence.” *Id.* at 863-864. Yet, in *Black II*, the California Supreme Court held that merely one fact that exposes a defendant to an aggravated term is sufficient to authorize the upper term and therefore, the judge may find the remaining facts by a preponderance of the evidence to support an upper term sentence. *Id.* at 812-814. The *Black* Court reasoned that judicial fact-finding is unconstitutional only when it raises the sentence above that which may have been lawfully imposed. *Id.* at 814-815, citing *Booker*, 543 U.S. at 278, *supra*, (dis. opn. of Stevens, J.) Because one factor may be legally sufficient to impose an upper term under state law, the California Supreme Court concludes that any Blakely compliant fact is adequate to permit the remaining facts to be found by the trial court. The California Supreme Court’s holding is curious because under state law, “[s]election of the upper term is justified only if, after consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation.” *Black II*, 41 Cal. 4th 799, 814, *supra*, citing *Cal. Rules of Court*, former rule 4.420 (b); see also former Pen. Code § 1170. Therefore, although a single factor may potentially subject a defendant to an aggravated term if the factor is serious enough and if there are no countervailing mitigating factors, a trial court would not be authorized to impose an aggravated term until it had considered all relevant facts and determined that the circumstances in aggravation outweighed those in mitigation. *Ibid*; see also *People v. Scott* (1994) 9 Cal. 4th 331, 350.

In *Black II*, the California Supreme Court attempts to avoid this problem. The Court characterizes the weighing process as an exercise of discretion to choose among any of the three terms and any judicial fact-finding done during this “exercise of

discretion” as merely making the imposition of the already available upper term more likely. *Id.*, at 815, *supra*. In reaching this conclusion, the California Supreme Court employs the same faulty reasoning that it used in *Black I* when it held:

[I]n operation and effect, the provisions of the California determinate sentence law simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the “statutory maximum” and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*.

*Black I*, 35 Cal.4<sup>th</sup> 1238, 1254 *supra*.

In *Cunningham*, this Court rejected that reasoning:

Asking whether a defendant’s basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the *very* inquiry *Apprendi*'s "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S. Ct. 2531, 159 L. Ed. 2d 403. But see *Black*, 35 Cal. 4<sup>th</sup>, at 1260, 113 P. 3d, at 547 (stating, remarkably, that "the high court precedents do not draw a bright line")

*Cunningham*, 549 U. S. \_\_\_, 127 S. Ct. 856, 869, *supra*.

Under California law, a trial court has no discretion to impose the upper term until it balances the aggravating and mitigating factors *People v. Scott*, 9 Cal. 4<sup>th</sup> 331, 350, *People v. Scott*, 9 Cal. 4<sup>th</sup> 331, 350, *supra*; Cal. Rules of Court, rule 4.420 (a) (b). To characterize the upper term as the maximum after a finding of just one *Blakely*-compliant fact suffers from the same infirmities that this Court found objectionable in *Cunningham*. Permitting a trial court to find relevant facts to support its sentencing choice by a preponderance of the evidence when one *Blakely* compliant factor exists is nothing more than a run around the Sixth Amendment.

An examination of California’s former statutory scheme illustrates this problem. California Rules of Court, rule 4.421 sets forth a nonexclusive list of the circumstances in aggravation. One of the circumstances is “The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.” Rule 4.421(a)(7). Assuming that the court could properly use this factor in any multiple count case, it could ignore the jury fact-finding requirement by sentencing the defendant concurrently to any term.

Other aggravating circumstances relate to recidivism. California Rules of Court, rule 4.421(b) states in pertinent part that aggravating facts include:

- (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

Cal. Rules of Court, rule 4.421(b)

As explained in subsection 2, *infra*, the California Supreme Court held in *Black II* that the prior conviction exception first enunciated in *Almendarez-Torres v. United States*, 523 U.S. 224 118 S. Ct. 1219; 140 L. Ed. 2d 350 (1998) (“*Almendarez-Torres*”) must be read broadly to include whether a defendant’s convictions are numerous or of increasing seriousness. *Black II*, 41 Cal. 4th 799, 819-820, *supra*. If a trial court may properly “expose a defendant” to the upper term based on the fact of any prior conviction – even a misdemeanor or a remote offense- or related recidivist factors, then a defendant who has suffered any conviction at any time in his life has lost his Sixth Amendment

guarantee of a jury trial and proof beyond a reasonable doubt for facts on which the trial court relies in imposing the upper term.

Here, the exceptions set forth in *Black II*, 41 Cal. 4th 799, *supra*, subsume this Court's holdings in *Apprendi* and its progeny.

In sum, review is necessary because the single factor exception undercuts this Court's holdings in *Apprendi*, *Blakely*, *Booker*, and *Cunningham* and denies a criminal defendant his constitutional Sixth and Fourteenth Amendment guarantees.

## **2. The *Almendarez-Torres* Exception**

By holding that one *Blakely* complaint factor is sufficient to define the statutory maximum as the aggravated term and by continuing to interpret the *Almendarez-Torres* prior conviction exception broadly, the California Supreme Court ensures that *Cunningham's* holding will not apply to recidivists. In *Black II*, the California Supreme Court held that the number and increasing seriousness of a defendant's prior convictions fell within the prior conviction exception first set forth in *Almendarez-Torres*. *Black II*, at 818-821, *supra*. The Court reasoned that these determinations required only consideration of the number, dates, and prior convictions alleged. "The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense... and is [a determination] more typically and appropriately undertaken by the court." *Id.* at 820. The California Supreme Court also rejected Mr. Black's position that the fact of a prior conviction had to be found beyond a reasonable doubt and found the preponderance standard used in the present case to be sufficient. *Ibid*, fn. 9.

This holding follows the state Supreme Court's holding in *People v. McGee*, 38 Cal. 4th 682 (2006). In *McGee*, the California Supreme Court considered whether *Apprendi* required a jury to determine if the defendant's two prior convictions for robbery in Nevada qualified as a strike under California's "Three Strikes" law. *Id.* at 711. The Court noted that under California law, the trial court had only to determine the nature of the prior conviction itself i.e. whether it was a serious felony and such a finding was limited to the record of conviction.

The need for such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct (see *id.* at p. 460), but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law. This is an inquiry that is quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court.

*Id.* at 706.

Thus, the California Court held that the prior conviction exception of *Almendarez-Torres* encompassed the both the fact and nature of a prior conviction. *Id.* at 708 – 709; but see *People v. McGee*, 38 Cal.4th at pp. 709-716 (dis. opn. of Kennard, J.), *supra*; *Shepard v. U.S.* 544 U.S. 13, 28, 161 L. Ed. 2d 205 (2005) (conc. opn. of Thomas, J.)

This broad reading is unwarranted given the history and criticism of the *Almendarez-Torres* exception. Furthermore, this broad interpretation conflicts both with other state Supreme Courts and federal Courts of Appeal.

**a. The Prior Exception Holding of *Almendarez-Torres* Should Not Be Expanded.**

In *Almendarez-Torres*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219. *supra*, the defendant pleaded guilty to a violation of re-entering the United States after having been previously deported. 18 U.S.C § 1326, subd. (a). He also admitted that he had suffered three prior convictions for aggravated felonies. *Id.* at p. 227. Subdivision (a) provides for a sentence of no more than two years imprisonment. However, 18 U.S.C section 1326 subdivision (b)(2) specified that a defendant could be subject to imprisonment for a term of up to 20 years if he was previously deported “subsequent to a

conviction for commission of an aggravated felony.” (*Almendarez-Torres*, at 226, *supra*.)

At sentencing, *Almendarez-Torres* asserted he could not be sentenced to the aggravated term because the indictment mentioned neither the code section providing for the aggravated term nor his earlier aggravated felony convictions.

This Court recognized that the deportation statute changed the maximum penalty for the crime. Nonetheless, this Court concluded that Congress has power to treat a prior conviction as a sentencing factor. *Id.*, at p. 247.

*Apprendi v. New Jersey* 530 U.S. 466, *supra*, and subsequent cases appeared to limit the holdings in *Almendarez-Torres* by holding that there were constitutional limits to a State’s authority to define away facts that were necessary to constitute criminal offense. *Apprendi*, at pp. 486 – 487, *supra*. In fact, this Court’s holding in *Almendarez-Torres* has been soundly criticized.

In *Shepard v. United States* 544 U.S. 13, 125 S. Ct. 1254 (2005), this Court considered whether the defendant’s guilty plea to a generic burglary in state court qualified as a “violent felony” for the purposes of the Armed Career Criminal Act [“ACCA”]. 18 U.S.C. §924(e). Although Shepard’s guilty plea did not conclusively establish that he had entered a dwelling, the First Circuit Court of Appeals held that the sentence-enhancing fact could be established by other documents in the state court file including the police reports. This Court reversed the judgment and held, as a matter of statutory construction, that the only documents that the district court could consider to prove the sentencing-enhancing fact were the plea agreement and the admissions made during the plea colloquy.

A plurality of the Court expressly limited the breadth of the recidivism exception without a jury finding explaining that:

[T]he Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury’s finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones*<sup>4</sup> and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.

*Shepard* at p. 25, *supra*.

In a concurring opinion, Justice Thomas questioned the continuing validity of *Almendarez-Torres*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219, *supra*:

*Almendarez-Torres*, like *Taylor*, has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. See 523

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<sup>4</sup> *Jones v. United States* 526 U.S. 227, (1999)

U.S., at 248-249, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); *Appendi*, *supra*, at 520-521, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (THOMAS, J., concurring). The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements." *Harris v. United States*, 536 U.S. 545, 581-582, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (THOMAS, J., dissenting).

(*Shepard* at p. 27-28, *supra*, THOMAS, J. concurring.)

More recently, in *Rangel-Reyes v. United States* 574 U.S. \_\_\_, 126 S. Ct. 2873 (2006), this Court continued to question the *Almendarez-Torres* holding. Although certiorari was denied in *Rangel-Reyes*, Justice Stevens wrote, "While I continue to believe that *Almendarez-Torres v. United States*, 523 U. S. 224 (1998), was wrongly decided, that is not a sufficient reason for revisiting the issue." (*Rangel-Reyes* at 2374; but see opinion of Justice Thomas (dissenting from denial of certiorari).

Given this Court's doubts about the continuing validity of the prior conviction exception of *Almendarez-Torres* and its impact on this Court's subsequent decisions in *Appendi*, *Blakely*, *Booker* and *Cunningham*, California should not be permitted to expand *Almendarez-Torres*' holding in order to limit *Cunningham*'s reach.

#### **b. Federal And State Courts Disagree On The Scope Of The Prior Conviction Exception**

Certiorari should also be granted because both state and federal Courts disagree on the scope of the *Almendarez-Torres* exception.

In *State v. Jones*, 159 Wn.2d 231 [149 P.2d 636] (2006), the Washington Supreme Court determined that whether the defendant was on community placement fell within the recidivist exception. Jones was convicted of one count of unlawful possession of cocaine. At sentencing, the trial court calculated his Jones' offender score based upon his prior adult and juvenile prior convictions and before Jones was on community placement when he committed the current offense. *Id.* at 234. Jones contended that his

Sixth Amendment right to a jury trial was violated when the judge found that he was on community placement. In a split decision, the Washington Supreme Court disagreed. The court reasoned that in *Apprendi* and *Jones v. United States* 526 U.S. 227, 299 (1999), one of the reasons that this Court excluded a prior conviction from jury determination was that the conviction had already been established by procedures that satisfied Due Process and Sixth Amendment guarantees. *State v. Jones*, 159 Wn.2d 231, 243, *supra*,. Since a sentencing court could now determine the defendant’s probation status “merely by reviewing court records related to that conviction” (*id.* at 244), there was no necessity for the independent judgment of a fact-finder, and the defendant’s Due Process and jury right concerns had been satisfied. (*Id.* at 247; see also *Gurley v. State*, 906 So.2d 1264 (Florida 2005) [A court’s determination of whether the defendant’s current conviction fell within three years of his release from prison did not implicate *Apprendi*.].)

Minnesota’s Supreme Court reached a contrary result in *State v. Henderson*, 706 N.W.2d 758 (Minn 2005) and held that a determination that Henderson’s prior convictions formed a pattern of criminal conduct as required for enhanced sentencing pursuant to the state’s career offender statute involved more than the fact of a prior conviction and implicated the defendant’s Sixth Amendment right to trial by jury. *Id.* at 762. The Minnesota Court differentiated its career offender statute from that at issue in *Almendarez-Torres*. It recognized that the enhanced sentencing statute at issue in *Almendarez – Torres*, “based purely on the existence of a previous felony conviction, without consideration of any relationship of the relationship of the previous felony to the deportation violation” (*id.* at 762), contrasted with its career offender statute, which

required the trial court to “look at a variety of prior conduct, ... and decide their relationship to each other” and to the present conviction. *Ibid.*

The Minnesota Court held that the comparison and weighing of prior conduct “go beyond the acceptable parameters of the recidivism exception because they involved more than the fact of a prior conviction” and therefore such factors had to be tried to a jury. *Ibid.*

The federal District Courts interpretations the prior conviction exception vary as well. In *United States v. Santiago*, 268 F.3d 151 (2d Cir. 2001) the defendant was convicted of one count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922 (g)(1). The district court found that the defendant had suffered three serious prior convictions, each arising from offenses committed on different occasions and enhanced his sentence pursuant to 18 U.S.C. §922 (e). On appeal the defendant claimed that *Apprendi* precluded the district court from making this finding. The Second District Court of Appeal held that *Apprendi* left “to the judge, consistent with due process, the task of finding not only the mere fact of previous convictions but other related issues as well.” *Id.* at 156.

Relying on *Santiago, supra*, the Eighth Circuit Court of Appeals held that the district court could properly find that a felony was aggravated without violating the Sixth Amendment because the fact of a prior conviction included other related issues. *United States v. Kempis-Bonola*, 287 F.3d 699, 703 (8<sup>th</sup> Cir. 2002). Likewise, in *United States v. Corchado*, 427 F.3d 815, 820 (10<sup>th</sup> Cir. 2005)<sup>5</sup>, the Tenth Circuit Court of Appeals held

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<sup>5</sup>This Court denied certiorari in *Corchado v. United States*, 2006 U.S. LEXIS 3004 (U.S., Apr. 17, 2006)

that the prior conviction exception encompassed "subsidiary findings" such as a finding by the trial court that the defendant was on probation when he committed the current offenses. *Id.* at 820.

The Fourth and Ninth Circuit Courts of Appeals have reached contrary conclusions. In *United States v. Kortgaard*, 425 F.3d 602 (9<sup>th</sup> Cir. 2005), the district court departed upward after it found that “the applicable guideline range inadequately represented the seriousness of Kortgaard's criminal history and his likelihood of recidivism.” *Id.* at 604. The court “considered Kortgaard's two drug convictions and eight convictions for various other offenses, which occurred in the United States many years ago, and Kortgaard's six foreign drug convictions and seven foreign convictions for property offenses, which occurred in Canada.” *Ibid.*

The Ninth Circuit held that the mere fact that the sentencing court considered Kortgaard’s prior convictions did not bring the matter within *Almendarez-Torres* prior conviction exception. Rather, the seriousness of a defendant's past misconduct and a defendant's likelihood of recidivism were factual, rather than legal matters that had to be found by a jury. *Id.* at 608 – 609, 611.

Relying on *Kortgaard*, in *United States v. Guyon*, 474 F.3d 114 (4<sup>th</sup> Cir. 2006), the Fourth Circuit Court of Appeals held that an upward departure based on a judicial finding that the Sentencing Guidelines were inadequate to address the extent of the defendant’s prior criminal history, current offenses and likelihood of recidivism violated the Sixth Amendment. *Id.* at 116 – 118.

*Thus, a grant of certiorari is necessary to resolve these conflicting holdings.*

**3. *Cunningham Applies To California’s Consecutive Sentencing Scheme*** *In Black*  
*II*, 41 Cal. 4th 799, *supra*, the California Supreme Court held that the holding in *Cunningham* did not apply to consecutive sentencing in California. *Id.* at 823. The Court reasoned that both

Apprendi and Blakely treated the crime and its sentence enhancement or aggravating fact “as the ‘functional equivalent’ of a single ‘greater crime.’” *Ibid*, citing *People v. Sengpadychith*, 26 Cal.4th 316, 326 (2001) and concluded that judicially determined facts that subject a defendant to consecutive terms do not serve as the functional equivalent of a greater crime, and therefore *Apprendi*, *Blakely* and *Booker* did not apply. *Black II*, at 821, citing *Black I*, 35 Cal.4th at 1262-1263, *supra*.

The state Supreme Court reasoned that although a trial court must consider aggravating and mitigating circumstances before it imposes consecutive terms, the court need not rely on facts or aggravating circumstances. *Black II*, at 822-823, *supra*. The *Black* Court compares the wording of Penal Code section 1170 (b) which requires the trial court to state “facts and reasons” for imposing the aggravated term with Penal Code section 1170 (c) which requires the trial court to state only its reasons for making its sentencing choice. *Black II*, at 822, *supra*. California Rules of Court, rule 4.406 (b)(5) mandates that the court state its reasons for imposing consecutive sentences. Subdivision (a) states in pertinent part: “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...” *Ibid*. Whether couched in the terminology of facts or factors, the end result is the same. Under California’s consecutive sentencing scheme, a court may not impose consecutive sentences without making a factual finding and it is this judicially determined finding that violates the Sixth Amendment.

#### **a. California’s Consecutive Sentencing Scheme**

California Penal Code section 669 governs the imposition of most consecutive sentences. It provides in pertinent part:

(a) When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively.....Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently.

*Ibid.*

Concurrent sentencing is the presumptive term under the definition set forth in *Blakely*. In *Blakely*, this Court defined the maximum term as that which the judge may impose *without* any additional findings.” *Blakely*, 124 S. Ct. 2531, 2537, *supra.*. In California, the imposition of consecutive terms is a sentencing choice that requires the court to find extrinsic facts in order to impose a consecutive term. Pen. Code § 1170, subd. (c); Cal. Rules of Court, rule 406 (a); *People v. Tran*, 47 Cal.App.4<sup>th</sup> 759, 774 (1996). California Rules of Court, rule 4.425 sets forth a non-exclusive list of facts for the sentencing court to consider when deciding whether to impose consecutive or concurrent terms.

Like the imposition of the upper term, a court may not use a fact that is an element of the offense or inherent in the offense to impose consecutive sentences. *People v. Quinones*, 202 Cal.App.3d 1154, 1159-1160 (1988); see also *People v. Smith*, 155 Cal.App.3d 539 (1984) .

The fact that Mr. Black was sentenced to consecutive terms pursuant to Penal Code section 667.61, subdivision (b), does not change the analysis. CT 436. Penal Code section 667.61, subdivision (b) subjects a defendant to a term of 15 years to life when he

commits a specified sexual offense, including Penal Code section 288, subdivision (a) (Pen. Code § 667.61, subd. (c)), under one of the circumstances specified in subdivision (e). Here, Mr. Black was convicted of committing the offense against more than one victim. Pen. Code § 667.61, subd. (e)(5). That statute specifies neither concurrent nor consecutive sentencing. Because the court retains the discretion to impose consecutive or concurrent terms pursuant to Penal Code section 667.61, subdivision (b), section 669 applies and states in part:

Life sentences, whether with or without the possibility of parole, **may** be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction. (Emphasis added.)

Therefore, in order to sentence a defendant to consecutive terms, a court must necessarily determine facts that were neither presented to, nor found true beyond a reasonable doubt by a unanimous jury.

**b. Sister States Have Split Over Whether *Blakely* Applies To Consecutive Sentencing**

Sister states have reached varying results in applying *Blakely* to their consecutive sentencing schemes. Those which hold that *Blakely's* mandate do not implicate consecutive sentencing discount this Court's definition of statutory maximum as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Cunningham, supra*, at 868 quoting *Blakely*, 542 U.S., at 303, 124 S. Ct. 253, *supra*; emphasis in the original.

Thus, in *Smylie v. State* 823 N.E.2d 679 (Ind. 2005), the Indiana Supreme Court held that there was no Sixth Amendment violation if the trial court did not exceed the combined statutory maximums. *Id.* at 686; see also *State v. Abdullah* 184 N.J. 497, 878 A.2d 746, 756 (2005) (same.) The Wisconsin Supreme Court held that consecutive

sentencing does not offend *Blakely* “so long as the sentence for *any single offense* does not exceed the statutory maximum for that offense...” *State v. Cubias*, 155 Wn.2d 549, 120 P.3d 929, 931-932 (2005).

More recently, in *State v. Keene*, 2007 ME 84, 2007 Me. LEXIS 86 (filed July 10, 2007), in a split decision the Maine Supreme Court held that the principals of *Apprendi* did not apply to its sentencing scheme because consecutive sentences are separate punishments for different offenses, and two sentences do not become a single sentence by virtue of their running consecutively. *Id* at \*\*23. Relying on this Court’s definition of “statutory maximum,” the dissenting justice opined that concurrent sentencing was required unless the jury found by the requisite proof one of the factual elements set forth in M.R.S.A. section 1256 (2). *Id.* at \*P30, Calkins, J., dissenting.

Two states have concluded that *Apprendi* and its progeny apply to consecutive sentencing. *In re VanDelft* 158 Wn.2d 731, 147 P.3d 573 (2006) (“*VanDelft*”); *Ohio v. Foster et al* 109 Ohio CT.3d 1, 845 N.E.2d 470 (2006) ; cert den. *Foster v. Ohio* 2006 U.S. LEXIS 7863 (U.S. Oct. 16, 2006) (“*Foster*”).

The sentencing scheme of the State of Washington mandated concurrent sentencing for nonserious violent felonies absent a finding of aggravating factors. *In re VanDelft*, 158 Wn.2d 731, 742, *supra*. Because *Blakely* held that a criminal defendant was entitled to expect a sentencing limits based upon the jury verdict alone and the Washington Legislature defined consecutive sentencing as an exceptional sentence, the Washington Supreme Court held that a consecutive sentence based on facts found by the trial judge, and not reflected in the jury verdict violated *Blakely*’s mandates. *In re VanDelft* 158 Wn.2d at 742-743, *supra*.

Ohio's Supreme Court reached a similar conclusion in *Ohio v. Foster et al*, 109 Ohio CT.3d 1, 845 N.E.2d 470, *supra*; cert den. *Foster v. Ohio* 2006 U.S. LEXIS 7863 (U.S. Oct. 16, 2006). Ohio's criminal sentencing statutes were similar in many respects to the way California's sentencing laws operated prior to this Court's decision in *Cunningham*. Ohio had a hybrid-sentencing scheme prior to *Blakely*; some offenses carried indeterminate terms, however, most offenses had determinate sentences. See Revised Code ["R.C."] 2929.14, which sets out penalties for crimes in Ohio. Although consecutive sentencing was mandatory for several crimes, usually the trial court had the discretion to sentence a defendant to consecutive sentences pursuant to R.C. 2929.14, subdivision (E)(4) only if it made several distinct findings by clear and convincing evidence. R.C. 2929.14, subdivision (E)(4) states:

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(*Ibid.*)

As in California, the Ohio sentencing court must state its reasons for imposing a consecutive term. R.C. 2929.19 (B)(2)(c); *State v. Comer*, 99 Ohio St.3d 463 (2003). R.C. 2929.41 (A) mandated concurrent terms absent the judicial findings set forth in 2929.14:

Except as provided in division (B) of this section, division (E) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B) (3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.

R.C. 2929.41 (A).

The Ohio Supreme Court also rejected the decision of a lower court that found that *Blakely* did not apply to consecutive sentencing because “the facts found by the court do not increase the maximum penalty for an individual offense.” *Id.* at 21 quoting *State v. Lett*, 161 Ohio3d 274, 274, 829 N.E. 3d 1281 (2005). The *Foster* Court recognized that this was true, but held that the necessary judicial findings beyond those found by the jury to increase the defendant’s total punishment violated the principles announced in *Blakely*. *Ohio v. Foster, et al*, 109 Ohio St. 3d 1, 21-22, *supra*,.

In sum, if *Blakely*’s definition of statutory maximum is applied to consecutive sentencing, California’s consecutive sentencing scheme fails constitutional muster because it permits the court to impose consecutive sentencing based on facts (or factors) neither found by the jury nor proved beyond a reasonable doubt. Review should be

granted on this issue because California's sentencing scheme violates the Sixth and Fourth Amendments and because different States had reached varying conclusions when applying this Court's Sixth Amendment guarantee to consecutive sentencing.

**4. Reformation Of California's Sentencing Scheme To Deny A Criminal Defendant His Or Her Right To A Jury Trial And Proof Beyond A Reasonable Doubt On Aggravating Facts May Not Apply Retroactively Without Violating The Due Process Clause of the Federal Constitution**

Following this Court's opinion in *Cunningham*, 549 U. S. \_\_\_\_ , 127 S. Ct. 856, *supra*, on March 30, 2007 the California Legislature enacted Senate Bill 40 as urgency legislation, effective immediately, to amend Penal Code section 1170 to make the trial court's sentencing choice discretionary and simply require the court to state its reason for selecting the aggravated term. This temporary measure is set to expire on January 1, 2009. As amended, Penal Code section 1170(b) states:

When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate 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 select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and 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.** A term of imprisonment shall not be specified if imposition of sentence is suspended.

Pen. Code sec. 1170(b); Stats 2007 ch 3 § 2 (SB 40), effective March 30, 2007, repealed January 1, 2009; emphasis added.

The Legislature included no language regarding retroactivity. *Sandoval*, 41 Cal. 4th 825,845, *supra*. Under California law, no part of a statute is retroactive unless expressly so declared. Pen. Code § 3; see *Myers v. Philip Morris Companies, Inc.*, 28 Cal.4th 828, 839 (2002). Penal Code section 1170(b) continues to require the court to choose the mitigated term, midterm or aggravated term as set forth in the statutes defining the offenses, however, the statute has eliminated the presumption of midterm sentencing absent a finding of aggravators and mitigations and instead leaves it to the court's discretion to chose the term that best serves the interests of justice. *Ibid*.

In Mr. Black's case, the trial court imposed the upper term and consecutive terms based not only on a jury finding of dangerousness and appellant's recidivistic behavior, but also on many facts that were neither found by the jury nor determined beyond a reasonable doubt. CT 385 – 386; RT 951 – 952.

In *Sandoval*, the California Supreme Court reformed the statute to mirror the amended legislative statute. Relying on *Booker* and *Cunningham*, the California Supreme Court determined that “when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.” *Sandoval*, 41 Cal. 4th 825, 844-845, *supra*.<sup>6</sup> The California Supreme Court application of the reformed scheme to cases on remand, however, allows the imposition of the aggravated term under circumstances not currently permitted. Therefore, retroactive application of the reformed scheme is an unforeseen judicial enlargement of a criminal states and violates the due process guarantees.

A statute " 'which makes more burdensome the punishment for a crime, after its commission' " violates article I, section 9, clause 3, of the United States Constitution as an ex post facto determination of criminal liability (*Collins v. Youngblood* (1990) 497 U.S. 37, 42 [111 L.Ed.2d 30, 38-39, 110 S.Ct. 2715], quoting *Beazell v. Ohio* (1925) 269 U.S. 167, 169-170 [70 L.Ed. 216, 217,218, 46 S.Ct. 68]), as well as its California counterpart, article I, section 9 of the state Constitution (*Tapia v. Superior Court* (1991) 53 Cal.3d 282 [279 Cal.Rptr. 592, 807 P.2d 434]). Correspondingly, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 354 [12 L.Ed.2d 894, 900, 84 S.Ct. 1697]; see also *People v. Escobar* (1992) 3

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Although Mr. Black questions the constitutionality of the Legislative fix to California's DSL, he has not raised that issue or the constitutionality of the Supreme Court's reformation in this petition. He notes, however, that recently in *Rita v. United States*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007), the Court held that on review, an appellate court may apply a presumption of reasonableness to a district court sentence. In a pending case, *Clairborne v. United States* 127 S.Ct. 551, 166 L.Ed.2d 406 (cert. granted Nov. 3, 2006), this Court will consider “whether it is consistent with the advisory case of the guidelines system post-*Booker* to require that extraordinary circumstances attend a sentence varying substantially from the Guidelines.” (*Cunningham*, at p. 868, *supra*.)

Cal.4th 740, 752 [837 P.2d 1100]; *People v. Wharton* (1991) 53 Cal.3d 522, 586 [280 Cal.Rptr. 631, 809 P.2d 290].)

(*People v. Davis* (1994) 7 Cal.4<sup>th</sup> 797, 811.)

It is a violation of due process guarantees under the Fifth and Fourteenth Amendments to the United States Constitution for courts to interpret existing laws and impose unexpected criminal penalties in a manner that the defendant could not have foreseen at the time of his or her criminal conduct. *United States v. Lanier* (1997) 520 U.S. 259, 266 – 267.

In analogous situations, this Court has recognized that statutory revisions that give a court greater flexibility to impose a higher term than the presumptive sentence at the time of the offense or reduces the “quantum of evidence” necessary to convict violates the ex post facto clause. *Miller v. Florida* (1987) 482 U.S. 423; *Carmell v. Texas* (2000) 529 U.S. 513; see U.S. Const. Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.

Since this Court’s holding in *Apprendi*, which mandated a jury finding on facts proven beyond a reasonable doubt to be used to impose an enhanced sentence, defendant could not have foreseen either the Legislature’s reformation of the sentencing statute or that the California Supreme Court would enlarge the statute to eliminate such a requirement. Accordingly, the California Supreme Court’s holding in *Sandoval* must be applied prospectively.

The California Supreme Court answers this concern by contending that a defendant receives adequate notice that he or she may be sentenced to the upper term because the statute defining punishment specifies that the punishment for the offense carries a minimum, midterm or aggravated term. *Sandoval*, 41 Cal. 4th 825, 857, *supra*. Following *Apprendi*, however, a criminal defendant was put on notice that he or she could be sentenced to an enhanced sentence only when the jury found beyond a reasonable doubt the aggravating facts that subjected him or her to that term. Furthermore, under California’s former law, the trial court had to weigh aggravating and mitigating facts and determine that the aggravating facts outweighed those in mitigation before it could impose the upper term. *People v. Scott*, 9 Cal. 4th 331, 350 fn 11 (1995); [“[T]he 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**. (Rule 420(a) & (b)).]; *People v. Tatlis* 230 Cal.App.3d 1266 (1991); *People v. Corvino*, 100 Cal.App.3d 660 (1980). All of those protections are now gone.

Thus, a California criminal defendant did not get fair warning of the judicial enlargement of the Penal Code section 1170.

In *Black II*, 41 Cal. 4th 799, *supra*, the California Supreme Court did not reach the issue of a remedy because the Court upheld Mr. Black’s sentence based upon the findings that one *Blakely*-compliant fact was sufficient to impose the upper term and found that *Cunningham* did not apply to consecutive sentences. *Id.* at 815-816, 819. Nonetheless, Mr. Black raised the issue in the Supplemental Brief on the Merits that he filed following this Court’s opinion in *Booker* on the California Supreme Court’s request.

Because he raised the issue before California's highest court, he may properly raise it here. *Smith v. Digmon* 434 U.S. 332, 333 (1978); *Dye v. Hofbauer*, 546 U.S. 1, 3. (2005).

**D. The Questions Presented in this Case and Their Application to the Issues Presented.**

**1. The Issues Are of Great Importance and Wide Application.**

At issue in this case is the scope of due process and jury trial protections under the federal constitution. But the issues presented are important for reasons that go beyond their connection to the fairness and reliability of sentencing proceedings. The interpretation of this Court's holding in *Cunningham* affects thousands of cases in California.

**2. This Case Is an Ideal One for This Court to Resolve the Questions Presented**

Taken together, the California Supreme Court's decisions in *Black II* and *Sandoval* ensured that this Court's holding in *Cunningham* applied to few of California's criminal defendants. Its holding in *Black II*, 41 Cal. 4th 799, *supra*, impermissibly expanded the prior conviction exception of *Almendarez-Torres* even though that decision has been criticized and this Court has questioned the validity of the holding. By accepting review of this case, this Court will have the opportunity both to clarify its prior holdings and to speak to

*Apprendi*, *Blakely*, *Booker* and *Cunningham's* relationship to consecutive sentences when imposition of such terms require a judicial determination of "aggravating facts."

Although Mr. Black's sentencing was factually complex, each question that he poses relates only to a discrete portion of California's sentencing laws. Accordingly, Mr. Black's case is ideal for resolution of the issues presented.

**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 Supreme Court, affirming his sentence.

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Respectfully submitted,

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