

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**PEOPLE OF THE STATE OF CALIFORNIA,** No. 126182  
Court of Appeal No.  
F042592  
Tulare County  
No. 79557

Plaintiff and Respondent,

vs.

**KEVIN MICHAEL BLACK,**  
Defendant and Appellant.

---

**REPLY BRIEF ON THE MERITS**

**ARGUMENT**

**I.**

**THE SIXTH AND FOURTEENTH AMENDMENTS  
TO THE UNITED STATES CONSTITUTION  
REQUIRE THE JURY TO FIND BEYOND A  
REASONABLE DOUBT FACTS THAT ARE  
USED EITHER TO AGGRAVATE A  
DEFENDANT’S SENTENCE OR IMPOSE  
CONSECUTIVE SENTENCES**

**A. Mr. Black Has Not Forfeited Or Waived His Claims**

Without citing any California case that holds otherwise (see e.g. *People v. Vaughn* (2004) \_\_\_ Cal.App.4<sup>th</sup> \_\_\_, 2004 Cal.App.LEXIS 1673, filed October 5, 2004; *People v. Butler* (2004) \_\_\_ Cal.App.4<sup>th</sup> \_\_\_, 2004 Cal. App. LEXIS 1610, filed September 27, 2004; *People v. Barnes* (2004) \_\_\_ Cal.App.4<sup>th</sup> \_\_\_, 2004 Cal. App. LEXIS 1601, filed September 24, 2004; *People v. George* (2004) 122 Cal. App. 4th 419; *People v. Ochoa*

(2004) 121 Cal. App. 4th 1551; but see *People v. Sample* (2004) 122 Cal. App. 4th 206, contra), respondent claims that Mr. Black has forfeited his claims pursuant to *Blakely v. Washington* (2004) 124 S.Ct. 2531[“Blakely”] by failing to raise them below. (RB 11 – 16.) In fact, the cases cited by respondent are inapposite and forfeiture does not apply in this situation.

Analogizing to *People v. Scott* (1994) 9 Cal.4<sup>th</sup> 331 in which the defendant failed to object to a flawed statement of reasons and *People v. Marchland* (2002) 98 Cal.App.4<sup>th</sup> 1056, 1060 – 1061 in which the defendant failed to object to an *Apprendi* error (*Apprendi v. New Jersey* (2000) 530 U.S. 466 [“*Apprendi*”]), respondent argues that *Blakely* errors are forfeited as well absent a timely objection. These arguments have been raised and soundly rejected. (See e.g. *People v. Ochoa* (2004) 121 Cal. App. 4th 1551. [“*Ochoa*”].)

The object of the waiver rule set forth in *People v. Scott, supra*, 9 Cal.4<sup>th</sup> 331 is the prompt detection and correction of the error in the trial court. (*Id.*, at p. 351.) In *Ochoa, Blakely* was decided after the appellate case was fully briefed. (*Ochoa, supra*, at p. 1564.) The Attorney General raised the *Scott* waiver rule and argued that *Ochoa* waived the *Blakely* issue on appeal by failing to raise it in the trial court. (*Id.*, at pp. 1564 – 1565.) The *Ochoa* court recognized that prior to *Blakely*, both California and federal Courts had consistently held that there was no constitutional right to a jury trial on consecutive sentences. (See *Id.*, at p. 1565 and the cases cited

therein.) Therefore, the court reasoned that a challenge to the imposition of consecutive sentences would not have achieved the rationale of the waiver rules set forth in *People v. Scott, supra*, 9 Cal.4<sup>th</sup> 331 and held that waiver doctrine did not apply. (*People v. Ochoa, supra*, at p. 1565.)

Likewise, in *People v. Barnes, supra*, \_\_\_ Cal.App.4<sup>th</sup> \_\_\_, 2004 Cal. App. LEXIS 1601 [*“Barnes”*], the Attorney General cried forfeiture and waiver when a *Blakely* claim was first raised during the appellate proceeding. (*Id.*, at pp. \*34 – 35.) Nonetheless, the *Barnes* court held, “The holding of *Blakely* was sufficiently unforeseeable that we find no forfeiture due to defendant's failure to object at sentencing.” (*Barnes* at p. \*41.) Furthermore, in rejecting a forfeiture challenge, the *Barnes* court distinguished *People v. Marchland, supra*, 98 Cal.App.4<sup>th</sup> 1056. In *Marchland*, the defendant first asserted on appeal that requiring him to register as a sex offender under Penal Code section 290, subdivision (a)(2)(E) violated his right to due process under *Apprendi* because the predicate fact was not alleged in the information or found to have been proven beyond a reasonable doubt. Although the *Marchland* court concluded that the waiver doctrine applied, it exercised its discretion to address the claims on the merits because they presented important questions of constitutional law. (*Marchland* at p. 1061; see *People v. Brown* (1996) 42 Cal. App. 4th 461, 471.) It did not address the argument asserted both in *Barnes* and in the present case, that it would have been futile to object

under *Apprendi*. (*People v. Barnes, supra*, 2004 Cal. App. LEXIS 1601 at p. \*37, n.8.)

The Ninth Circuit has also permitted a *Blakely* challenge that was first raised on appeal. (*United States v. Adeline* (9<sup>th</sup> Cir. 2004) 376 F.3d 967, 974.) Noting that *Blakely*'s clarification of a defendant's Sixth Amendment rights worked a "sea of change" in the body of sentencing law, the *Adeline* court concluded that precedent provided ample support for their authority to consider the claim sua sponte. (*Ibid.*)

Mr. Black recognizes that the Third District Court of Appeal held otherwise in *People v. Sample, supra*, 122 Cal. App. 4th 206. The *Sample* court relied upon *United States v. Cotton* (2002) 535 U.S. 625 and held that a claim of *Blakely* error was forfeited due to the defendant's failure to object to the erroneous sentence in the trial court. (*People v. Sample, supra*, 122 Cal. App. 4th 206, 217 – 218.) In *United States v. Cotton*, the defendant argued for the first time on appeal that their sentences were invalid under *Apprendi*, because the issue of drug quantity was neither alleged in the indictment nor submitted to the petit jury. (*Id.* at pp. 628 – 629.) The United States Supreme Court reviewed the omission under the Federal Rules of Criminal Procedure 52 (b), (18 U.S.C. §52(b)), which requires the appellant to show in part that the forfeited error seriously affects the fairness, integrity or public reputation of judicial proceedings. (*Id.*, at p. 631.) The court concluded that the *Apprendi* error did not seriously affect

the judicial proceeding and denied relief. (*Id.*, at pp. 632 – 634.) The holding in *Cotton* is inapplicable to the present case. First, as respondent acknowledges, the Federal Rules of Criminal Procedure do not govern State claims. (RB at p. 13,fn2.) In *Cotton*, the court relied on *Johnson v. United States* (1997) 520 U.S. 461 and *United States v. Loan* (1993) 507 U.S. 725, 731, for the proposition that that the defendant had to meet the requirements of Rule 52(b) because the error was not raised in the trial court. However, *Johnson* explicitly distinguished cases arising from direct appeals of judgments of conviction in the federal system to which Rule 52(b) applied from State cases that consider the waiver or forfeiture under their own rules. (*Johnson, supra*, at p. 466.) Accordingly, the *Sample* court’s reliance on *United States v. Cotton* is misplaced.

In California Penal Code section 1259 controls and states in pertinent part:

Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant...

In *People v. Saunders* (1993) 5 Cal.4<sup>th</sup> 580, this Court held that the waiver doctrine applied when a defendant’s right to a jury trial was conferred by statute, but not when it was guaranteed by constitution. (*Id.*, at

p. 589 n.5.)<sup>1</sup> Similarly, in *People v. Holmes* (1960) 54 Cal.2d 442, this Court concluded that a defendant's waiver of his right to a jury trial could not be implied from his conduct. In *Blakely*, the United States Supreme Court confirmed that a defendant's right to a jury trial was the Sixth Amendment.

Finally, neither *United States v. Cotton*, *supra*, 535 U.S. 625 nor *People v. Sample*, *supra*, 122 Cal. App. 4th 206 considered Mr. Black's claim that under the circumstances, an objection would have been futile.

In sum, the vast majority of California cases decided after *Blakely*, have rebuffed the arguments proffered by the Attorney General on waiver and forfeiture and have decided the cases on the merits. This Court should decline to follow *People v. Sample* because it relied on the plain error standard, which does not apply to California cases. Because the denial of a jury trial affected Mr. Black's substantial (and constitutional) rights, this Court should decide this issue on the merits.

#### **B. Blakely Applies To Aggravated Sentences Because The Jury Verdict Alone Only Permits The Court To Impose The Midterm**

In his Opening Brief, Mr. Black asserted that he could not be sentenced to the aggravated term on the basis of factors that he did not admit and that were not submitted to the jury and found true beyond a reasonable doubt.

---

<sup>1</sup> To the extent that *People v. Saunders* holds that a defendant has no constitutional right that there is no Sixth Amendment right to jury sentencing, Mr. Black asserts that such a conclusion is questionable following the United States Supreme Court's decision in *Blakely*.

In response, respondent claims that in California the upper term is the legislatively mandated maximum range permitted by the jury verdict alone and therefore, the court had the discretion to use extrinsic factors to sentence appellant to the upper term which “merely inform and guide the court’s discretion within the statutory range.” (Ans. at pp. 28 – 29.) Respondent contends that 1) unlike *Apprendi*, in which the hate crime sentence was set forth in a separate statute, in California the “relevant sentencing range for most felonies and numerous enhancements consists of three possible terms of imprisonment...that are specified by the same code section or set of code sections that enumerate the offense (Ans. at pp. 17 – 18); 2) that in California, a defendant charged with a specific offense has notice of the sentencing range for the particular offense and has a right to a jury determination of facts subjecting him to that sentencing range (Ans. at p. 21; 3) that in California the facts on which a trial court relies in imposing the aggravated term are sentencing factors rather than elements of the offense. (Ans. at p. 21.)

These arguments were advanced in *Walton v. Arizona* (1990) 497 U.S. 639 and later rejected when *Walton* was overruled by *Ring v. Arizona* (2002) 536 U.S. 584. In *Ring*, the defendant was convicted of first-degree felony murder that occurred in the commission of a robbery. Arizona Revised Statutes section 13-1105, subdivision (A)(2) defines first-degree murder as one that occurs in the commission of a robbery, while subdivision (C) declares, “First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by 703 and 13-703.01.” This statute, like the California criminal statutes that specify punishment, gives a defendant notice of the maximum punishment to which he is potentially subjected, in that case, death.

The United States Supreme Court attempted to reconcile its holding in *Apprendi* with that of *Walton*. It stated, as respondent argues here, “once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.” (*Apprendi, supra*, 530 U.S. 466, 497 citing *Allendale-Torres*, 523 U.S. at 257, n. 2 (SCALIA J., dissenting; emphasis deleted). The *Apprendi* dissent countered that this statement was untrue because without a finding of the statutory factors that permit the imposition of the death penalty, the maximum penalty to which the defendant could be subjected was life imprisonment. (*Id.* at p. 537 [opinion of O’CONNOR, J.]

In *Ring*, the Court held that *Walton* could no longer be reconciled with *Apprendi*. “[O]ur Sixth Amendment jurisprudence cannot be home to both.” (*Ring, supra*, 536 U.S. 584, 609.) The High Court overruled *Walton* “to the extent that it allows a sentencing judge, sitting without a jury, to find

an aggravating circumstance necessary for imposition of the death penalty.”  
(*Ibid.*)

The *Blakely* Court cited their ruling in *Ring* with approval as they reaffirmed that:

the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.

(*Blakely, supra*, 124 S. Ct. 2531, 2537.)

Respondent's attempts to distinguish the sentencing scheme in *Blakely* from California's Determinate Sentencing Scheme must fail. As *Ring* and *Blakely* teach us, it is simply irrelevant whether the sentencing provisions are set out in one statute or two.

Respondent argues that the aggravating factors used to impose the aggravated term are not the functional equivalent of a greater offense and therefore, the jury verdict alone authorizes the imposition of the upper term. (Ans. at p. 29.) Mr. Black recognizes that prior to its decision in *Blakely*, the United States Supreme Court had made this distinction. (See e.g. *McMillan v. Pennsylvania* (1986) 477 U.S. 79 [visible possession of a firearm was a sentencing factor]; *Jones v. United States* (1999) 526 US 227 [serious bodily injury provision of the federal carjacking statute was an element of the offense and subject to the Fifth and Sixth Amendments].) Nonetheless, following *Blakely's* determination that the maximum term is defined as that which a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant, this distinction is much less important.

Moreover, in many situations California law does not distinguish between sentencing factors and elements of offenses. For example, although Penal Code section 288.5, the statute that defines the continuous abuse of a child, does not specifically include in its provisions an increased term based upon a factor that could also be used to impose the aggravated term, other statutes do. Several statutes relating to sex crimes subject a defendant to an increased term if the criminal offenses are accomplished by violence or the threat of bodily injury. (See e.g. Pen. Code § 276, subd. (c)(2) [sodomy]; § 288a, subd. (c)(3) [oral copulation].) Yet, violence and the threat of great bodily harm are aggravating factors within the meaning of California Rules of Court, rule 4.421, subdivision (a)(1). In California, any distinction

between aggravating circumstances and the factors that are the functional element of a greater offense have been blurred if not eliminated. To determine the statutory maximum, it is necessary to follow *Blakely's* mandates rather than attempting to make meaningless distinctions between elements and sentencing factors.

Respondent also suggests that the imposition of the mid-term is not the presumptive term, but rather the default term if the court finds no aggravating or mitigating factors. (Ans. at p. 28.) Both the express language of the statute - “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime” (Pen. Code §1170, subd. (b)) - and the Legislative history to Penal Code section 1170 refute this contention. The rules of statutory construction are well established. When the language of the statute is clear, this Court need go no further to ascertain legislative intent. (*Nolan v. City of Anaheim* (2004) 933 Cal. 4th 335, 340.) The statute uses the word “shall.” The Merriam-Webster Online Dictionary defines “shall” as: “b -- used in laws, regulations, or directives to express what is mandatory <it *shall* be unlawful to carry firearms>” (www.m-w.com.) Accordingly, it is reasonable to infer from the express language of the statute that the Legislature intended the midterm to be the presumptive sentence.

If there is any ambiguity in the statute, the Legislative history may properly shed light on the legislative intent. (*Nolan v. City of Anaheim, supra*, 933 Cal. 4th 335, 340.) Penal Code section 1170 became operative on July 1, 1977. (Pen. Code § 1170, Matthew Bender 1978 Ed.) On April 18, 1977, the district attorney submitted draft amendments to Assemblyman Kenneth L. Maddy and suggested modifications to the language of Senate Bill 42, the precursor to Penal Code section 1170. The district attorney noted that the language of Penal Code section 1170 provided both that “the court ‘**shall**’ impose the middle term of imprisonment” and ‘**shall apply**’ the sentencing rules of the Judicial Council. (Letter to Kenneth L. Maddy dated 4/18/77 at p. 4; emphasis added.) They explained:

The middle term should be viewed as the norm, but not made mandatory...The court should take into consideration (rather than “shall apply”) the sentencing rules of the Judicial Council as guidelines for the exercise of such discretion.

(*Id.* at pp. 4 – 5.)

This correspondence reveals that both the district attorney and the Legislature understood at the time that Penal Code section 1170 was enacted that the midterm was the mandatory sentence without a finding of additional factors. Yet, the Legislature declined to follow the district

attorney's suggestions and enacted the law using the mandatory language. (Pen. Code § 1170, Matthew Bender 1978 Ed.)<sup>2</sup>

Neither *People v. Thornton* (1985) 167 Cal.App.3d 72 nor *People v. Myers* (1983) 148 Cal.App.3d 699, on which respondent relies support respondent's position. In *Thornton*, the question was whether a trial court could impose a term other than those set forth by statute by staying a portion of the base term and the appellate court held that it could not. In *Myers*, the court held that the trial court had mistakenly determined that it was required to impose an aggravated term if it found that the factors in aggravation outweighed the factors in mitigation. In fact, the court was authorized to impose the mid-term even if the factors in aggravation predominated. (*Id.*, at p. 704.)

Contrary to respondent's claim that the midterm is one set by default in the absence of aggravating or mitigating circumstances, both *Myers* and *Thornton* recognize that the court has the discretion to sentence a defendant to the midterm even if aggravating factors are present. As the language of Penal Code section 1170, subdivision (b) states: "...the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (*Ibid.*)

Mr. Black notes that all but one Court of Appeal case that has considered the *Blakely* problem on the merits as it relates to aggravated terms has held that the midterm was the greatest sentence authorized by jury findings alone. (See e.g. *People v. Jones* (2004) 2004 Cal. App. LEXIS 1731 at \*4, filed Oct. 18, 2004; *People v. Butler*, *supra*, \_\_\_ Cal.App.4<sup>th</sup> \_\_\_, 2004 Cal. App. LEXIS 1610 at \*13-14; *People v. Lemus* (2004) 122 Cal. App. 4th 614, 619 – 620; *People v. George* (2004) 122 Cal.App.4th 419.) In the split decision, the Fourth District Court of Appeal, Division One held that the midterm is not the presumptive term. (*People v. Wagener* (2004) 2004 Cal. App. LEXIS 1760 at p. \*15.) However, the majority relied on *People v. Ledesma* (1997) 16 Cal.4th 90, 95 for the proposition that "shall" does not mean something that is mandatory. In *Ledesma*, however, this Court decided that "may" was mandatory rather than permissive in the context of the firearm enhancement statute; it did not define "shall." (See *People v. Municipal Court (Lozano)* (1956) 145 Cal.App.2d 767, 775 [in most cases shall is mandatory ].) As appellant has explained, both the clear meaning of Penal Code section 1170 and its legislative history reveal that the Legislature intended "shall" to be a mandatory act.

---

<sup>2</sup> As enacted in 1977, Penal Code section 1170, subdivision (a)(2) stated in pertinent part, "...the court shall apply the sentencing rules of the Judicial Council..." Subdivision (b) states in part, "...the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.

Like the sentencing scheme at issue in *Blakely*, California's Determinate Sentencing Scheme improperly permits the imposition of an aggravated term based on factors that were never submitted to the jury or found true beyond a reasonable doubt in violation of a criminal defendant's rights to due process and trial by jury.

### **C. Blakely Applies To Consecutive Sentences**

Respondent contends that consecutive sentences do not implicate *Blakely*. (Ans. at p. 30.) Respondent notes that neither *Apprendi* nor *Blakely* explicitly discussed consecutive sentencing. Mr. Black agrees. In *Blakely*, the defendant stipulated to a count of domestic violence that was run concurrently and accordingly, the Court found that the concurrent count was not relevant to its analysis. (*Id.*, at p. 2535, fn. 2.) In *Apprendi*, the defendant pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose, (N. J. Stat. Ann. § 2C:39-4a), and one count of the third-degree offense of unlawful possession of an antipersonnel bomb, (§ 2C:39-3a) and the prosecutor dismissed the remaining 20 counts. The court sentenced the defendant to 12 years on count 18 and imposed concurrent terms on the other two counts of conviction. (*Id.*, at p. 469 – 470.) Likewise, the concurrent counts were not relevant to the Court's holding. Nonetheless, the principles gleaned from *Blakely*, *Apprendi* and *Jones v. United States*, *supra*, 526 U.S. 227, lead to the inescapable conclusion that the jury must find factors that permit consecutive terms beyond a reasonable doubt.

Furthermore, *Apprendi* did apply to a sentence enhancement. In California, consecutive sentencing is **an enhancement** and the imposition of consecutive terms is a sentence choice that requires a statement of reasons. (*People v. Powell* (1980) 10 Cal.App.3d 513, 518; *People v. Reeder*, 152 Cal. App. 3d 900, 918; *People v. Hetherington* (1984) 154 Cal. App. 3d 1132, 1143; Cal. Rules of Court, rule 4.406, subd. (b)(5).) Like the enhancement discussed in *Apprendi*, the imposition of consecutive terms subjects a criminal defendant to increased prison time.

#### **1. Penal Code section 669 Presumes Concurrent Sentencing**

First, the presumptive term in California is concurrent sentencing. (Pen. Code § 669.) *People v. Reeder*, *supra*, 152 Cal.App.3d 900, *People v. Lepe* (1987) 195 Cal.App.3d 1347 and *People v. Sample*, *supra*, 122 Cal. App. 4th 206 on which respondent relies, do not consider the legislative history of Penal Code section 669 as evidence of a Legislative intent to choose concurrent sentencing as the presumptive term. (See *People v. Radovich* (1943) 61 Cal.App.2d 177.) Respondent has not addressed the issue either.

Furthermore, the language of Penal Code section 669, **which presumes concurrent sentencing absent a determination by the court to the contrary indicates that the Legislature intended a statutory presumption for**

**concurrent sentences. If this Court finds that the statute is silent or ambiguous as to the Legislative intent than it must apply the rule of lenity, which** provides that "ambiguity concerning the ambit of **criminal statutes** should be resolved in the favor of **lenity**." (*Rewis v. United States* 401 U.S. 808, 812.) In *People v. Overstreet* (1986) 42 Cal. 3d 891, this Court explained:

When language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute. (Cites omitted.)

(*Id.*, at p. 896.)

The rule has been extended to encompass the penalties imposed by **criminal statutes**. (See *Hughey v. United States* (1990) 495 U.S. 411; *Bifulco v. United States* (1980) 447 U.S. 381, 387.) Mr. Black asserts that the statute clearly evidences the legislative intent for concurrent sentences. Should this Court disagree and find the statute to be silent or ambiguous, it must apply the rule of lenity and construe the statute in favor of Mr. Black.

## **2. A Court May Not Impose Consecutive Sentences Without A Finding of Additional Facts**

Contrary to respondent's claim, the imposition of consecutive sentences pursuant Penal Code section 669 requires fact-finding separate from those facts found by the jury. (Ans. at p. 34 – 35.) Penal Code section 1170, subdivision (c) requires the court to state reasons for imposing a consecutive term in determinate sentencing. (See also *People v. Jackson* (1987) 196 Cal.App.3d 380, 388; Cal. Rules of Court, rule 406(b)(5).) Indeed, the failure of the trial court to do so is reversible error. (*People v. Peters* (1982) 128 Cal.App.3d 75, 82.) Furthermore, an element of a crime may not be used to impose consecutive sentences. (*Ibid*; Cal. Rules of Court, rule 4.425 (b).)

Respondent suggests that the Rules of Court are "merely guidelines" and that the trial courts need not state any fact in support of its decision to impose consecutive sentences. (Ans. at p. 35.) In fact, the Legislature directed the Judicial Council to seek to promote uniformity under Section 1170 by establishing criteria for trial courts to consider when deciding to impose concurrent or consecutive sentences. (Pen. Code § 1170.3.) If trial courts were permitted to completely ignore the Rules of Court relating to these criteria, it would undermine the Legislative purpose in establishing

determinate sentencing. Although respondent argues that since the Legislature has not made consecutive sentencing conditional on the finding of any fact beyond those reflected in the conviction, and therefore the Judicial Council cannot make such a requirement on its own, in fact, by establishing criteria as the Legislature directed, the Rules of Court promote and are consistent with the Legislative intent of conformity in sentencing. In *People v. Wright* (1982) 30 Cal.3d 705, this court held that there was no unconstitutional delegation of power in the Legislature's decision to assign the Judicial Council the task of establishing criteria for imposing the upper and lower prison terms system of determinate sentencing. (*Id.* at pp. 713 – 714.) As this court stated, “standards for administrative application of a statute need not be expressly set forth; they may be implied by the statutory purpose.” (*Id.*, at p. 713.)

Mr. Black agrees that even with the limitations of rule 4.425 (b), a trial court has wide discretion on the factors that it can use to justify the imposition of consecutive terms. Penal Code section 1170, subdivision (a)(3) mandates that the court apply the sentencing rules of the Judicial Council and those rules permit the court to use specified factors relating the crimes and any factor in aggravation or mitigation set forth in statutes or in the Rules of Court. (Cal. Rules of Court, rules 4.421 & 4.425(a).) Nonetheless, to adopt the position suggested by respondent that a court might exercise its discretion and impose consecutive sentencing without a finding of fact (Ans. at p. 34) would vest trial courts with the unfettered discretion to enhance a defendant’s term by sentencing him consecutively for an improper reason or for no reason at all and the defendant would have no recourse. It has long been held that a trial court’s discretion must be exercised “in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.” (*Cohen v. Herbert* (1960) 186 Cal.App.2d 488, 493 quoting *Gossman v. Gossman* (1942) 52 Cal.App.2d 184, 195.)

In sum, the dictates of *Blakely* and *Apprendi* apply to consecutive sentencing. Concurrent sentencing is presumed in California as evidenced by the language and legislative history of Penal Code section 669. The Legislature properly delegated the task of determining criteria for courts to consider when making the decision of whether to sentence a defendant to consecutive or concurrent terms. Because an element of a crime may not be used to impose consecutive sentences, the court must look to facts other than those determined by the jury beyond a reasonable doubt in order to impose a consecutive sentence. As such, consecutive sentencing in California violates Due Process and a defendant’s right to a jury trial as set forth in *Apprendi* and *Blakely*.

#### **D. *Blakely* Applies to The Stacking of Indeterminate Terms**

Respondent argues that *Blakely* does not apply to consecutive sentencing of indeterminate terms because when a defendant is sentenced to a life term on one count, consecutive sentencing on any other count will necessarily fall within the maximum term of life. (Ans. at p. 37.) Respondent continues that as practical matter, aggregation of life terms only increases the parole ineligibility date for the defendant and is therefore analogous to the permissible use of sentencing factors to raise the mandatory minimum sentence. (*Harris v. United States* (2002) 536 U.S. 545, 566 (plurality opinion); *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 82.) Mr. Black has discussed both *Harris* and *McMillan* in his Opening Brief at pages 17 – 18 and 21 and won't repeat that discussion. However, Mr. Black notes that *Harris* limited *McMillan* to "to cases that do not involve the imposition of a sentence more severe than the statutory maximum..." (*Harris, supra*, at p. 563.) In *Blakely*, the court clarified its definition of statutory maximum as the maximum a court may impose *without* any additional findings of fact. (*Blakely, supra*, 124 S. Ct. 2531, 2537.) As explained in the Opening Brief, under *Blakely's* definition the aggregate punishment or sentencing range for two life terms is necessarily greater than for one; consecutive sentencing is an enhancement. (*People v. Powell, supra*, 10 Cal.App.3d 513, 518.) Moreover, those sentenced to life terms should not have to forfeit their 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendment protections. Accordingly, the *Blakely* rules must apply to indeterminate as well as determinate terms.

**E. Neither Federal Recidivism Exception Nor Multiple Victim Exception of The Aggravated Term And Consecutive Sentencing In Mr. Black Case**

Should this Court hold that *Blakely* applies to the imposition of aggravated or consecutive terms, respondent claims that the trial court could properly rely on the fact that Mr. Black's prior convictions were numerous or of increasing seriousness to impose the aggravated term. Respondent claims that this factor falls within the recidivism exception of *Almendarez-Torres v. United States* (1998) 523 U.S. 224. Respondent also argues that the multiple victim exception was sufficient to impose consecutive sentences. (Ans. at p. 40.) As explained below, Mr. Black disagrees.

**1. It Is Doubtful Whether The Holding in *Almendarez-Torres* Applies To A *Blakely* Matter**

Contrary to respondent's position, it is doubtful that the holding in *Almendarez-Torres* applies in the *Blakely* or *Apprendi* context. In his Opening Brief, Mr. Black noted that in *Almendarez-Torres*, the Court had no reason to decide whether or not a prior conviction was subject to a jury trial or proof beyond a reasonable doubt because the defendant pleaded guilty to three prior convictions for aggravated felonies. (*Id.* at p. 227.) The Court expressly left for another day whether a heightened standard of proof applied to prior convictions when it increased the length of a defendant's sentence. (*Id.* at pp. 247-248.)

Given the court's subsequent holdings in *Apprendi's* and *Blakely*, neither of which dealt with the recidivism problem, it appears that the problem of the standard of proof of a prior conviction has not yet reached the United States Supreme Court. Accordingly, this Court is not bound by the holding in *Almendarez-Torres* and may properly find that recidivist factors must be found by a jury behind a reasonable doubt.

Furthermore, appellant questions whether the United States Supreme Court will overrule *Almendarez-Torres* when they have an opportunity to do so because its holding appears to be inconsistent with that of *Blakely* and *Apprendi*. Mr. Black notes that in *Apprendi*, the court recognized that

*Almendarez-Torres* was “an **exceptional departure** from the historic practice that we have described.” (*Id.* at p. 487; emphasis added.) The Court went on to say:

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, n15 and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi*’s does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

(*Apprendi, supra*, 530 U.S. 466, 489 – 490.)

Furthermore, Mr. Black notes that other than Justice Thomas, the justices writing for the majority in *Almendarez-Torres* were the dissenters in *Apprendi* and *Blakely*. If *Almendarez-Torres* was decided today, it is doubtful whether it would stand. Because of its questionable viability and because the Supreme Court never decided if and when proof of a prior conviction must be must by a jury under a heightened burden of proof, *Almendarez-Torres* should have little impact on the issues before this Court and should be given a narrow reading.

**2. Whether Prior Convictions Are Numerous Or Of  
Increasing Seriousness Is Purely A Matter That  
*Almendarez-Torres* Does Not Address**

Rather than acknowledging the death knell of *Almendarez-Torres*, respondent seeks to broaden its scope to include not only the fact of the prior conviction but also other facts involving recidivism. (Ans. at p. 41.) This is contrary to the holding of *Almendarez-Torres* and subsequent cases that refer only to “the fact of a prior conviction.”

In support of his argument, respondent cites *People v. Thomas* (2001) 91 Cal.App.4<sup>th</sup> 212. The *Thomas* court considered the effect of the defendant’s failure to personally waive a jury trial on the prior prison term allegations. *Thomas* argued that Penal Code section 667.5, subdivision (b) required not only the fact of the prison conviction, but also the additional element of whether he had served a prison term and therefore, *Apprendi* required a jury trial on the additional elements.

The Second-District Court of Appeal, Division Five disagreed and concluded that *Apprendi* “other than the fact of a prior conviction,” language refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations. (*People v. Thomas, supra*, 91 Cal.App.4<sup>th</sup> 212, 223.) The *Thomas* Court (and respondent) relied, in part, on the fact that in *Almendarez-Torres*, the prior convictions had elements apart from the mere fact of a prior conviction; they had to be aggravated felonies. (*Ibid.*; Ans. at p. 41.) The problem with this reasoning is that in

*Almendarez-Torres* the defendant admitted that his priors were aggravated felonies and therefore, there was nothing for the jury to decide. (*Almendarez-Torres, supra*, 523 U.S. 224, 227.)

This broad reading of *Almendarez-Torres* is not warranted. First, *Almendarez-Torres* was not a Sixth Amendment case. Rather, it dealt with the indictment and notice. In *United States v. Jones, supra*, 526 U.S. 227, the United States Supreme Court was asked to decide whether the subsections of federal car-jacking statute, which provided for increased penalties if the crime resulted in great bodily injury or death, were elements of the offense or sentencing factors. In deciding that the statute encompassed elements of the offense that must be submitted to the jury and proven beyond a reasonable doubt, the Court noted that the holding of *Almendarez-Torres* was not dispositive in part “because we are concerned with the right to jury trial and not alone the rights to indictment and notice...” (*Jones, supra*, 526 U.S. 227, 248 – 249.) Furthermore, the *Jones* Court recognized that two reasons that a prior conviction was constitutionally distinguishable from other facts that increased sentencing ranges was that it had been traditionally used as a sentencing factor and because, “...a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” (*Id.*, at p. 249.) While these factors apply to the fact of a prior

conviction, they are not present in regard to the wide range of “recidivistic factors” as the *Thomas* Court and respondent suggest.

Recently, in *People v. Jaffe* (2004) \_\_\_ Cal.App.4<sup>th</sup> \_\_\_, 2004 Cal.App.4<sup>th</sup> LEXIS 1711, filed October 13, 2004, the Sixth District Court of Appeal refused to extend the scope of the fact of a prior conviction. The *Jaffe* Court stated that it did not “perceive the phrase ‘the fact of a prior conviction’ to have a broad meaning including all recidivist circumstances.” (*Id.* at p. \*51.) Although the *Jaffe* court stated that evidence of a prior conviction together with an abstract of judgment showing a prior prison term was sufficient proof, it did not consider whether the jury had the responsibility of making that determination on proof beyond a reasonable doubt. (*Id.* at p. \*52.)

In Mr. Black’s situation, the potential aggravating factor that his convictions were numerous or of increasing seriousness was a factual rather than a legal determination that a jury was perfectly capable of undertaking. In contrast, respondent relies on cases that require a judicial determination of whether a state conviction satisfies the federal definition of a “crime of violence.” (*United States v. Venegas-Ornelas* (10<sup>th</sup> Cir. 2003) 348 F.3d 1273, 1274; *United States v. Trinidad Aquino* (9<sup>th</sup> Cir. 2001) 259 F.3d 1140; 1144 – 1145.)

Respondent contends that the court must use a similar analysis in determining whether the prior convictions are numerous or of increasing

seriousness. (Ans. at pp. 44 – 45.) Mr. Black assumes the jurors can count and are capable of determining whether or not his convictions are of increasing seriousness. Mr. Black’s prior criminal history is fairly insignificant. It appears that in 1992 he was convicted of three theft- related misdemeanors and in 1996, he was convicted of two theft-related felonies – commercial burglary and grand theft in a single case. (CT 387; 401.) The record does not indicate whether Mr. Black committed burglary for the purpose of the theft.<sup>3</sup> Between 1996 and 2002, Mr. Black remained crime-free outside of a few traffic violations. (CT 401.)

Respondent cites *People v. Searle* (1989) 213 Cal.App.3d 1091 and *People v. Fernandez* (1990) 226 Cal.App.3d 669, 681 for the proposition that three convictions are “numerous” while two convictions are not. (Ans. at p. 45.) The *Seale* Court’s sole “legal analysis” of whether three convictions were numerous was the statement, “...we believe that three convictions are "numerous" within the meaning of rule 421 (b)(2).” (*Id.*, at p. 1098.) In the present case, it is likely that several of Mr. Black’s convictions were part of a single transaction and should not be treated separately in order to qualify under this criterion. Had evidence regarding these convictions been properly presented to the jury, it is likely that they would have found that Mr. Black’s prior record was not numerous.

---

<sup>3</sup> The same is true of the misdemeanor convictions, which included burglary and theft in a single case. (CT 401.)

Mr. Black questions the propriety of the “increasingly seriousness” allegation, which punishes him for having a minimal prior record. For example, if Mr. Black had been convicted in the past of two counts of murder, he would not be subject to an enhanced sentence under California Rules of Court, rule 4.421, subdivision (b)(2). Nonetheless, contrary to respondent’s assertion, nothing in *Almendarez-Torres* encompassed this factor within the “fact of a prior conviction” language. This is a fact that *Blakely* requires to be submitted to the jury and proven beyond a reasonable doubt.

**2. A Jury Finding On Multiple Victims Did Not Diminish The Sixth Amendment Problem**

The jury found that for each count appellant had committed a violation of lewd and lascivious acts against more than one victim within the meaning of Penal Code section 667.61, subdivision (b)(7) and 1203.66, subdivision (a)(7). As respondent notes, the court later struck the section 667. 61 allegation as to count one. (Ans. at p. 45, fn. 10; CT 436.)

Nonetheless, respondent claims that the jury finding alone permitted the court to impose consecutive sentences on count two and three and the recidivist factor on count one authorized the court to impose the aggravated term on count one. (Ans. at pp. 47 – 48.)

Mr. Black disagrees. As he previously explained the “recidivist factor” fell outside the scope of the prior conviction exception, if one exists,

and therefore the court was not authorized to use it. Furthermore, as set forth in the Opening Brief, the court was not authorized to use the multiple victim exception on counts two and three because it utilized it for another purpose. In the present case, the court had the opportunity to either use the multiple victim factor to sentence appellant to consecutive sentences **or** to sentence appellant as a one-strike offender. Because the trial court chose to sentence Mr. Black pursuant to the One-Strike Law, it was not authorized to use that factor to impose consecutive sentences. (*People v. Mancebo* (2002) 27 Cal.4<sup>th</sup> 735, 742; *People v. Fernandez* (1990) 226 Cal.App.3d 669.) Accordingly, respondent's argument must fail.

#### **F. The Error Is Reversible Per Se**

Respondent gives Mr. Black's argument that the error is prejudicial per se short shrift. Relying on *People v. Sengpadychith* (2001) 26 Cal.4<sup>th</sup> 316 and *United States v. Sanchez-Cervantes* (9<sup>th</sup> Cir. 2002) 282 F.3d 664, 668 – 671, respondent argues that *Apprendi* error is tested under a *Chapman* standard, and because *Blakely* error is an application of *Apprendi*'s, *Blakely* error is similarly subject to a *Chapman* analysis. (Ans. at p. 50.) Respondent's argument is unavailing.

Unlike the situation at bar, in *People v. Sengpadychith, supra*, the error was the trial court's failure to instruct the jury on the primary activities element of the criminal street gang enhancement. (Pen. Code §186.22, subd. (b).) Prior to *Apprendi*, this Court held that the California

Constitution, rather than the federal Constitution, required the prosecution to prove all elements of sentence enhancement beyond a reasonable doubt and therefore, any instructional failure had to be evaluated under the “reasonably probable” test of *People v. Watson* (1954) 46 Cal.2d 818, 836. (*Id.*, at p. 325; *People v. Wims* (1995) 10 Cal.4<sup>th</sup> 818.) Following *Apprendi*, this Court disapproved *Wims* and held that the federal harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 was the proper standard.

While *Sengpadychith* had a jury trial on all but one element of the gang enhancement, in the present case Mr. Black did not have a jury trial, with the concomitant rights of confrontation, the presentation of evidence under the normal rules and proof beyond a reasonable doubt on any usable factor that increased his sentence beyond the statutory maximum.

A criminal defendant’s right to a jury trial is fundamental under both the federal and California Constitutions and the denial of that right is recognized as “structural error” and a miscarriage of justice within the meaning of California Constitution, article VI, section 13. (*People v. Collins* (2001) 26 Cal.4<sup>th</sup> 297, 311.) In *Collins*, when the defendant was improperly induced to waive his right to a jury trial for an unspecified benefit, this Court that the error was reversible per se and explained:

Additionally, where a case improperly is tried to the court rather than to a jury, there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of

the error. (See *Sullivan, supra*, 508 U.S. 275, 278-282 [113 S. Ct. 2078, 2081-2083, 124 L. Ed. 2d 182].) n5 The trial court's error thus compels reversal of the judgment.

(*People v. Collins, supra*, 26 Cal.4<sup>th</sup> 297, 313.)

Even in the context of jury instructions, this Court has recognized that there are some situations in which so many elements of an offense are removed from the jury's consideration that the error is reversible per se. (*People v. Flood* (1998) 18 Cal.4<sup>th</sup> 470, *People v. Cummings* (1993) 4 Cal.4<sup>th</sup> 1233, 1315.) In *Flood*, this Court stated:

We have no occasion in this case to decide whether there may be some instances when a trial court's instruction removing an issue from the jury's consideration will be the equivalent of failing to submit the entire case to the jury - an error that clearly would be "structural" rather than a "trial" error.

(*People v. Flood, supra*, 18 Cal.4<sup>th</sup> 470, 503 citing *Rose v. Clark* (1986) 478 U.S. 570, 577 - 578 [106 S.Ct. 3101, 3105 - 3106].)

A few years earlier, this Court held that a trial's court's failure to instruct on four of the five elements of robbery was prejudicial per se even though the People argued that the defendant did not dispute the existence of the predicate facts and that the evidence overwhelmingly established all of the elements of robbery, attempted robbery, and conspiracy to commit robbery. (*People v. Cummings* (1993) 4 Cal.4<sup>th</sup> 1233, 1315.)

In the present case, the appellant was denied his constitutional right to a jury trial on all of the facts on which his upper and consecutive sentences were based. Here, the error was structural and necessitates reversal per se.

**G. Even Under A Chapman Standard, Mr. Black's Sentence Cannot Stand**

Respondent argues that any error was harmless because the jury would have reached the same conclusion as the trial court. (Ans. at p. 53.) There are two fallacies in respondent's argument. First, respondent assumes facts that were not necessarily found by the jury. Second, in order to use a factor in aggravation, it must not be inherent in the crime itself. Rather, it must make "the **offense** distinctively **worse** than the ordinary." (*People v. Young* (1983) 146 Cal. App. 3d 729, 734 quoting *People v. Moreno* (1982) 128 Cal.App.3d 103, 110.) The offense contemplates factors cited by respondent including a young and vulnerable victim and that the offender resided in the victim's household. (Pen. Code §288, subd. (a); Ans. at p. 55.)

Although it is true that the prosecution presented evidence that Mr. Black raped T. on several occasions (RT 530, 532 – 533), the defense presented evidence to support its claim that T. showed no signs of physical penetration. Nurse practitioner Sandra Knudson testified that she examined the T's photographs and medical reports but did not see any evidence of old or new trauma to T.'s genital or anal areas. (RT 682, 685, 687.) She did not find an absence of hymenal tissue. (RT 704.)

It was not necessary for the jury to find rape in order to convict Mr. Black of the continuous sexual abuse of a child. Penal Code section 288.5 states in part:

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.

(Pen. Code §288.5, subd. (a).)

Accordingly, it was not necessary for the jury to find anything more than a lewd and lascivious touching in order to convict Mr. Black pursuant to this section. It was not necessary for the jury to believe all the details of T.'s testimony, on which respondent relies, in order to convict appellant. (Ans. at p. 56.) Contrary to respondent's claim, nothing in the jury verdict or special allegations supports an implicit conclusion that T.'s account was true. (Ans. at p. 54.)

T.'s testimony was suspect. She disliked living with appellant. (RT 279.) She had accused both her babysitter and her former stepfather of molesting her. (RT 468, 776.) She, rather than Mr. Black, encouraged the other kids to strip at the party. (RT 384 – 386, 392, 393, 405.) Given the problems with T's credibility, it is unlikely that the jury believed her testimony in its entirety.

Furthermore, contrary to respondent's claims, some of T.'s testimony was contradicted by other witnesses. T. denied that Mr. Black touched her or her friends at the party. (RT 267.) Her friends' testimony regarding the party was inconsistent; one testified that Mr. Black told the kids not to tell and the other testified that it was another child and T., not Mr. Black who said not to tell. (RT 391, 411, 418, 420, 591.)

Because jury support for the aggravating factors cannot be presumed, respondent cannot show that the error was harmless beyond a reasonable doubt.

The same is true of the factors used to support the consecutive sentencing.

First, if the jury believed that Mr. Black inappropriately touched T. at the party, then an element used to support count one occurred on the same occasion as that in counts 2 and 3. (Ans. at p. 58.) Even taking **reasonable** inferences from the evidence presented, there is no evidence that Mr. Black used the party in which T. prevailed upon the other kids to undress and run around that Mr. Black used the occasion as an opportunity to initiate the kids into sexualized conduct. (Ans. at p. 59.)

Respondent argues that any error was harmless because the trial court would have imposed the maximum sentence in any event. (Ans. at p. 59.) In *People v. George, supra*, 122 Cal. App. 4th 419, the People made a similar argument. Yet, the *George* court concluded that because *Blakely*

invalidated four factors used by the trial court to impose the upper term, it could not conclude that the trial court would impose the same sentence on remand when only one aggravating fact remained. (*Id.*, at pp. 426 – 227.) The same is true in the present case. Here, the jury failed to find factors that were properly used to impose the aggravated term or consecutive sentences. This Court cannot properly conclude that the trial court would impose the upper or consecutive terms if the improper factors were eliminated. If this Court declines to adopt a per se standard of prejudice, then it must remand the matter for resentencing.

## II.

### PERMITTING A COURT TO IMPOSE AN AGGRAVATED TERM WITHOUT ADDITIONAL FACT-FINDING WOULD CONTRADICT THE INTENT OF THE LEGISLATURE AND VIOLATE THE SEPARATION OF POWERS DOCTRINE

#### A. Introduction

Respondent suggests that this Court may preserve the constitutionality of Penal Code section 1170 by using “creative” statutory construction and permitting the court to impose the upper term without a finding of additional facts. This solution is untenable because it contravenes the express statutory language. It fails to distinguish between the middle term and aggravated term, and it gives the trial court unrestrained discretion to impose sentences without any mechanism for appellate review. As explained below, the cases on which respondent rely are simply inapplicable to the present situation.

#### **B. Construing the Statute In the Manner In Which Respondent Suggests Would Violate the Separation of Powers Doctrine**

Courts must be vigilant in respecting the separation of powers doctrine and guard against intruding upon fundamental legislative

functions. (Cal. Const., art. III, § 3.)<sup>4</sup> The primary purpose of the separation of powers doctrine “is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government.” (*Parker v. Riley* (1941) 18 Cal. 2d 83, 89.) “[T]he power to define crimes and fix penalties is vested exclusively in the legislative branch.” (*People v. Superior Court, (Romero)* 13 Cal.4<sup>th</sup> 497, 516 quoting *Keeler v. Superior Court* (1970) 2 Cal. 3d 619, 631.) Therefore, a court may rewrite a statute in order to preserve it against invalidation under the Constitution, only when:

- (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and
- (ii) the enacting body would have preferred the reformed construction to invalidation of the statute.

(*In re Jorge G.* (2004) 117 Cal. App. 4th 931, 941 quoting (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661.)

In the present case, respondent does not request that this court make discrete changes to the statutory language of Penal Code section 1170 in order to effectuate the intent of the legislature while eliminating the statute’s constitutional infirmities. Respondent’s suggestion to eliminate fact-finding as a prerequisite to the imposition of the upper term contradicts the policy judgments set forth by the Legislature.

---

<sup>4</sup> “The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.” (Cal. Const., art. III, § 3.)

First, by enacting the Determinate Sentencing Law, the Legislature sought to promote uniformity in sentencing by limiting the discretion of the court to impose different sentences for similar crimes. (Pen. Code § 1170, subd. (a)(1).) Contrary to this express legislative intent, respondent seeks to vastly increase the court’s discretion to apply the upper term without a finding of any aggravating factors. Respondent contends that the Legislative purpose in enacting the Determinate Sentencing Law was to “provide the trial courts with the ability to impose any of the three possible terms in any particular case, with the discretion to select the appropriate term on the basis of circumstances relating to the crime and the defendant.” (Ans. at p. 62.) Mr. Black asserts that the requirement of additional fact-finding was the method chosen by the Legislature to limit the court’s discretion. However, following the United States Supreme Court’s decision in *Blakely*, it is the jury rather than the trial court that must determine the existence of additional facts beyond a reasonable doubt.

Second, contrary to the express legislative intent, respondent asks this court to invalidate the legislative language that mandates a finding of additional facts and the balancing of aggravating and mitigating terms before the court may impose the upper term. Penal Code section 1170, subdivision (b), which provides in pertinent part:

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.

Here, the Legislature never intended the imposition of the upper term without the finding of additional facts and respondent seeks to frustrate rather than effectuate the policy of the Legislature.

Third, respondent suggests that this Court implement the statute in a way that blurs any distinction between the imposition of the upper and midterm sentences. As it now stands, a trial court must impose the midterm “unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.” (Cal. Rules of Court, rule 4.420, subd. (a).) Imposition of the aggravated term is “justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation.” (Cal. Rules of Court, rule 4.420, subd. (b).) The court must state reasons for selecting the upper or lower terms. (Cal. Rules of Court, rule 4.420, subd. (e).)

If, as respondent suggests, the court may impose the upper term without additional fact-finding, then there is no objective standard to distinguish the imposition of the midterm from that of the aggravated term.

Fourth, although respondent insists that the trial court’s decision to impose an aggravated term would be reviewable on appeal for an abuse of discretion just like any other sentencing decision, respondent’s statutory revisions would leave the higher court without any evidence or factual finding to review. A defendant has a constitutional right to a record that permits meaningful appellate review. In the context of the grant or denial of bail applications, this Court has held that a trial court’s statement of ultimate fact was insufficient. Rather, a court must “articulate its evaluative process and show how it weighed the evidence presented in light of the applicable standards.” (*In re Pipinos* (1982) 33 Cal. 3d 189, 198.) Anything less deprives a defendant of meaningful review. (*Id.*, at p. 199.) In the present case, respondent’s suggestion is clearly inadequate.

**C. The Reasons Of The Statute That Respondent Relies On As Justification Are Distinguishable From the Present Situation.**

Respondent relies on *People v. Roder* (1983) 33 Cal.3d 491 and *People v. Forrester* (1994) 30 Cal.App.3d 1697 in support of its position. (Ans. at pp. 60 – 61.) In both cases, the courts protected the constitutionality of a statute by changing a mandatory presumption contained in each statute into a permissive inference by “paring down the existing statutory intent to constitutionally permissible limits.” (*People v. Roder, supra*, 33 Cal.3d 491, 506.) The *Roder* court reasoned that in this way the jury would still be informed of a presumption and the presumption

would continue to regulate the conduct of the group to which it applied. (*Ibid.*)<sup>5</sup>

In both cases, the courts made a minor adjustment to the statutes in to avoid their abrogation. In contrast, in the present case, respondent asks this Court to obliterate the underpinnings of the Determinate Sentencing Law and to expand the trial court's discretion in sentencing while denying a criminal defendant any meaningful review.

This "solution" does not effectuate the Legislative policy judgment articulated in Penal Code section 1170, and there is no indication that the Legislature would have preferred the reformed construction to invalidation of the statute.

#### **D. Following *Blakely*, California's Determinate Sentencing Law Is Unconstitutional and Should Be Invalidated**

*Blakely* calls into question the constitutionality of California's Determinate Sentencing Scheme, which permits the consecutive sentencing and imposition of the aggravated term by the use of facts found by a judge by a preponderance of the evidence. Mr. Black asserts that even after *Blakely*, California may retain its Determinate Sentencing Law, however, the Law must be restructured to include pleading and proof of facts used to impose aggravated and consecutive terms. This is a job for the Legislature. Appellant recognizes that a court may properly sever the offending portions of a statute unless those provisions "enter so entirely into the scope and design of the law, that it would be impossible to maintain it without such obnoxious provisions." (*In re King* (1970) 3 Cal.3d 226, 237 quoting *Danskin v. San Diego Unified School Dist.* (1946) 28 Cal.2d 536, 555.) This is such a case.

Amicus California Attorneys for Criminal Justice set forth the problems with the present version of the California's Determinate Sentencing Scheme and ask this Court to invalidate the Law to permit the Legislature to bring the Sentencing Scheme within the constitutional dictates of *Apprendi* and *Blakely*. Mr. Black adopts and joins the arguments raised in that brief.

According, California's Determinate Sentencing Law is unconstitutional and Mr. Black asks this Court to so hold.

---

<sup>5</sup> In *Roder*, a second-hand dealer was presumed to have known property was stolen when he purchased it if he failed to make a reasonable inquiry regarding the origin of the property when circumstances demanded that he did so.

**CONCLUSION**

For the reasons stated herein and in Mr. Black's Opening Brief Mr. Black respectfully requests that this court declare that the Determinate Sentencing Law is unconstitutional as presently written, vacate his sentence, and remand the matter to the Superior Court so that he may be sentenced consistent with this Court's decision.

Dated: November 3, 2004

Respectfully submitted,  
BALIN & KOTLER, LLP

\_\_\_\_\_  
EILEEN S. KOTLER  
Attorneys for Petitioner,  
KEVIN MICHAEL BLACK

**CERTIFICATION OF WORD COUNT**

I certify that the foregoing petition contains 9935 words as counted by the program in Microsoft Word.

\_\_\_\_\_  
EILEEN S. KOTLER