

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

PEOPLE OF THE STATE OF CALIFORNIA,	)	<b>No. 126182</b>
	)	
Plaintiff and Respondent,	)	<b>Court of Appeal, Fifth Appellate District, No. F042592</b>
	)	
v.	)	<b>Tulare County Superior Court No. 79557</b>
	)	<b>(Hon. William Silveira, Jr., Judge)</b>
KEVIN MICHAEL BLACK,	)	
	)	
Defendant and Appellant.	)	
_____	)	

**MOTION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE FOR PERMISSION TO APPEAR AS *AMICUS CURIAE* ON BEHALF OF APPELLANT (RULE 29.1(f)) AND BRIEF IN SUPPORT OF APPELLANT BLACK**

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**TO: THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:**

California Attorneys for Criminal Justice (hereafter CACJ) moves this Court for permission to appear as an *amicus curiae* on behalf of Appellant Kevin Black within the meaning of California Rules of Court, Rule 29.1(f).

**I. MOTION OF CACJ TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF**  
**APPELLANT**

**A. Identification of CACJ**<sup>1</sup>

CACJ is a nonprofit California corporation. According to Article IV of its by-laws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." (Article IV, By-Laws of CACJ.) The organization has approximately 2,000 dues-paying members who are primarily criminal defense lawyers practicing before the state and federal courts located in California. These lawyers are employed both in the public and private sectors, and CACJ's membership is distributed around the state.

CACJ often appears as an *amicus curiae* before this Court on matters of importance to its membership and stated goals.

**B. Interest Of *Amicus Curiae* CACJ In This Litigation**

There is little doubt that the United States Supreme Court's ruling in *Blakely v. Washington* (2004) \_\_ U.S. \_\_; 124 S.Ct. 2531 (hereafter *Blakely*) has significantly changed the substantive and procedural laws related to the adjudication of criminal cases,

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<sup>1</sup>The undersigned, as chairs of the amicus committee of CACJ certify to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief, and additionally certify that no party to this litigation has contributed any monies, services, or other form of donation to assist in the production of this brief.

and especially the sentencing process.

Appellant Kevin Black argues that both the history of *Blakely*'s evolution as well as the substance of the ruling demonstrate that *Blakely* profoundly affects California sentencing procedure. (Black Opening Brief, hereafter Black AOB 17-24.) First, this is because after *Blakely*, "aggravating factors [must] be submitted to the jury and proven beyond a reasonable doubt." (Black AOB at p. 28.) Second, Black argues that *Blakely* also requires facts submitted to a jury verdict, and found beyond a reasonable doubt to trigger imposition of a consecutive sentence.

Appellant is correct on both points. He is supported by a recent succinct observation from the Court of Appeal for the Ninth Circuit in *U.S. v. Ameline*, (9th Cir. 2004) 376 F.3d 967, 973: "the *Blakely* court worked a seachange in the body of sentencing law." Whether or not *Ameline* survives upcoming rulings from the United States Supreme Court, the words just quoted must, at this point, be considered a legal truism.

CACJ has a great interest in this case for several reasons. First, CACJ members are involved in the practice of criminal defense throughout California, and must properly represent their clients by using their knowledge and awareness of all aspects and nuances of the law. *Blakely* has changed criminal procedure dramatically, but this Court has yet to define how the ruling is to be interpreted in our State. Second, CACJ is committed to defending those constitutional rights at issue whenever criminal cases are prosecuted and

adjudicated. *Blakely* represents the foundation for a change in the interpretation of those constitutional rights at issue in criminal cases in California.

CACJ respectfully urges the Court to grant its motion for permission to appear in this case. This brief is timely filed under the Court's current briefing order.

## II.

### CACJ'S BRIEF ON THE MERITS SUPPORTING APPELLANT BLACK

**THIS COURT SHOULD HOLD THAT PENAL CODE §1170, AND STATUTES AS WELL AS SENTENCING RULES LINKED TO IT BY THE DESIGN OF THE DETERMINATE SENTENCING LAW MUST BE SUITABLY AND APPROPRIATELY AMENDED TO ENSURE THE CONTINUED CONSTITUTIONAL VITALITY OF CALIFORNIA'S AIM TO ENSURE THE ELIMINATION OF DISPARITY AND THE EXISTENCE OF DETERMINATE SENTENCING**

#### 1. Introduction

CACJ supports Appellant Kevin Black's arguments, which, briefly stated, are as follows: *Blakely* applies in California (a) in such a way as to invalidate the way the trial court imposed the Upper Term sentence in Black's case; and (b) insofar as the trial court followed pre-*Blakely* procedure in imposing a concurrent sentence which Black argues is a matter that requires a jury verdict as a condition precedent.

Appellant's arguments are clear and complete, and stand without the need for further explanation. But the one matter Appellant Black leaves for this Court to resolve is a fundamental question: Can California's Determinate Sentencing Law survive in its

current form after *Blakely*? The question requires an assessment of whether the architecture of statutes and rules associated with the Determinate Sentencing Law, beginning with Penal Code §1170, can be saved through the rules of severability, or through some other method of reconciliation. They cannot. California's sentencing laws are not fully constitutional, as California's procedure is not *Blakely*-compliant. Parts of our system, discussed here, must be declared unconstitutional.

CACJ respectfully submits that this Court has an opportunity with Appellant Black's case, as well as with the other 'lead' case in the litigation into the implications of *Blakely*, to offer needed clarity and guidance for the necessary profound changes needed in California's substantive and procedural laws to bring us into compliance with their monumental ruling. While California clearly can continue to use a determinate sentencing structure, our rules of pleading, trial and sentencing must be changed so as to enable sentencing decisions to be made on the basis of facts adjudicated through the Sixth Amendment's jury trial requirements.

CACJ urges the Court to set forth its view of a post-*Blakely* statutory, and rule-related, architecture which can appropriately dignify a determinate sentencing scheme intended to ensure ". . . terms proportionate to the seriousness of the offense with provision for uniformity in the sentence of offenders committing the same offense under similar circumstances." (Penal Code §1170(a)(1).) CACJ has supported and continues to support the legislative finding and declaration set forth in Penal Code §1170(a)(1) which

states:

The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the courts with specified discretion.

CACJ recognizes that a possible outcome of urging this Court to find the current Determinate Sentencing Law unconstitutional as written, and implemented, may be, in effect, a return to the days of indeterminate sentencing. But that outcome is neither necessary, nor in keeping with California's adoption of determinate sentencing as a rule of criminal procedure, and as a means of determining just punishments for crimes.

CACJ does not support the 'enactment' of a sentencing scheme by default. However, it does support a ruling from this Court that will set the direction for the orderly resolution of the constitutional and legal issues presented to our State by the United States Supreme Court ruling in *Blakely*. It is clear that the letter of Penal Code §1170 is simply not compliant with *Blakely*, and that delay in invalidating the statute will prompt more questions than it will answer. Moreover, the current Rules of Court adopted under Penal Code §1170 (d) "so as to eliminate disparity of sentence and to promote uniformity of sentencing" are inconsistent with the constitutional requirement of a jury decision on factual findings that are now, by statute, defined as discretionary decisions to be made by

a sentencing court.<sup>2</sup>

*Blakely* and *Apprendi v. New Jersey*, (2000) 530 U.S. 466 have changed the requirements of a criminal case jury trial under the Sixth Amendment to the United States Constitution.<sup>3</sup> CACJ urges this Court to announce the implications of *Blakely* and the required changes now so that the Legislature, and rule making bodies, are appropriately and immediately guided.

## **2. The Situation is Such that This Court Must Step in Now**

In the aftermath of *Blakely*, California courts have actively addressed *Blakely* issues, without the benefit of guidance from this Court. One scholar who purports to be following the progress of *Blakely* litigation nationwide indicates that California courts more than any others throughout the United States (with the possible exception of the federal courts), have applied *Blakely* to current sentencing issues.<sup>4</sup> This state of affairs is creating problems. First, some of the current rulings are contradictory. Second, and more importantly, it is completely unclear that these rulings (which are multiplying weekly) will (a) be approved of by this Court, and (b) are themselves *Blakely* compliant. A review

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<sup>2</sup> See Penal Code §1170(a) providing for “specified discretion” and Penal Code §1170(b) noting that it is the sentencing court that is empowered to consider various sources of sentencing-related information and then impose a sentence other than the designated middle term.

<sup>3</sup> In *Apprendi v. New Jersey*, 530 U.S. 466, the Court held that the Sixth Amendment prohibited enhancement of a sentence based on a factor not submitted for decision by the jury. *Id.* at 744.

<sup>4</sup> See the writings of Professor Douglas Berman, College of Law, Ohio State University, at [www.sentencinglawandpolicy.com](http://www.sentencinglawandpolicy.com). Professor Berman is the author of *Sentencing Law and Policy* (Aspen Publishers, 2004). Professor Berman has noted the amount of activity from California.

of these rulings demonstrates on-going judicial speculation as to what views will pass muster in this Court.<sup>5</sup>

Commentators on the implications of *Blakely* have described this State's sentencing system as "fundamentally affected by *Blakely*".<sup>6</sup> Viewing sentencing issues from a national perspective, these commentators have compared and contrasted the impact of *Blakely* on two types of determinate sentencing. The first is characterized by presumptive sentencing pursuant to specific, formal, sentencing guidelines. 'Formal guidelines' means a scheme like the Federal Sentencing Guidelines. The second type of determinate sentencing system uses presumptive sentences but without mandatory sentencing guidelines. Our State has been described variably as falling in the second category, or fitting between two categories.

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<sup>5</sup> While the majority of the following cases are not yet final pending further rulings from this Court, CACJ notes the following rulings: People v. Earley, 4th App. Dist., Division Two, Case No. EO33600, filed August 31, 2004 dealing with recidivist-based sentencing factors as a basis for imposition of an Upper Term; People v. Ochoa, 4th App. Dist., Div. 1, Case No. DO42215 filed September 2, 2004 holding, among other things, that Blakely does not apply to consecutive sentences; People v. George, 4th App. Dist. Div 1, filed September 15, 2004, a case considering the basis for the imposition of an Upper Term, and the question of whether Appellant George had waived the issue by failing to challenge it below. The discussion in George is somewhat pertinent here, in part because it involves judicial consideration of whether the imposition of an Upper Term can survive without the finding of a violation of Blakely. (See slip op. at p. 21); People v. Lemus, 4th App. Dist., Div. 1, Case No. D042549, filed September 20, 2004, partially published on the question of the imposition of an Upper Term; People v. Barnes, 6th App. Dist., Case No. H026137, filed September 24, 2004, partially published analyzing imposition of the 'statutory maximum' authorized by a jury verdict and facts admitted by the defendant.

<sup>6</sup> See, for example, The Vera Institute of Justice, *State Sentencing and Corrections: Policy and Practice Review* (August 2004), p. 3.

In discussing systems that will pass muster under *Blakely* and *Apprendi*, the United States Supreme Court, and scholars have focused on the State of Kansas as having ‘adjusted’ in such a way as “. . . to retain presumptive guidelines by incorporating jury fact-finding as the basis of an enhanced sentence.” [footnote omitted]<sup>7</sup> The State of Kansas currently uses a system that defines a series of presumptive sentences for crimes, but also allows the presumed punishment to be enhanced. Thus, Kansas procedure requires specific forms of accusatory pleadings and proof where enhanced punishment is being sought. Kansas provides as follows where “an upward durational departure sentence” is at issue:

Upon motion of the county or district attorney to seek an upward durational departure sentence, the Court shall consider imposition of such upward durational sentence in the manner provided in subsection (b)(2). The county or district attorney shall file such motion to seek upward durational sentence not less than 30 days prior to the date of trial or if the trial date is to take place in less than 30 days then within 5 days from the date of arraignment.

(2) The court shall determine if the presentation of any evidence regarding the alleged factors may increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be presented to a jury and proved beyond a reasonable doubt during the trial of the matter or following the determination of the defendant’s innocence or guilt.

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<sup>7</sup> Vera Institute, *State Sentencing and Corrections*, *supra*, at p. 7, referring to Kansas Statutes Annotated §21-4718(b); see also *Blakely v. Washington*, *supra*, at 2541.

Kansas Statutes Annotated, §21-4718(b)(1)(2).<sup>8</sup>

Admittedly, the Kansas sentencing scheme as originally ‘revamped’ in the early 1990's did not completely mirror California’s Determinate Sentencing Law as embodied in Penal Code §1170 et seq. But there were both conceptual and legal similarities. In 1993, the Kansas Legislature enacted the Kansas Sentencing Guidelines Act which provided for sentencing according to two sentencing grids. One was for drug felonies, and the other for non-drug felonies. The sentencing range to be applied in a given case was based on two factors: First, the statutory definition of a ‘security level’ of the crime admitted, or found true through jury or court verdict; second, the offender’s prior history. A sentencing court would review a relatively narrow range of sentences at the intersection of the severity level and prior criminal history to determine the indicated authorized sentence for the given offense. The scheme also permitted aggravating or mitigating factors to be proven to depart from the indicated sentence.<sup>9</sup>

The two matters that caused reform of sentencing processes in the State of Kansas were the ruling in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 and the Kansas Supreme Court’s ruling in *State v. Gould*, (Kan., 2001) 23 P.3d 803. In *Gould*, which preceded the decision in *Blakely*, the Kansas Supreme Court expressed concern over *Apprendi*’s command as follows (quoting from *Apprendi*): “The relevant inquiry is not one of form,

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<sup>8</sup> See also *Kansas Criminal Law Handbook*, §14.8.

<sup>9</sup> See Kansas Statutes Annotated of 1993, and specifically §§21-4704, 4705, 4716.

but of effect . . . does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." Comparing the finding made by the trial court in its sentencing analysis to the punishment authorized by jury verdict, and relying on *Apprendi v. New Jersey, supra*, 530 U.S. at 494, the Kansas Supreme Court found the trial court's sentence in *Gould* to be illegal.

The Kansas Legislature reacted to the decision in *State v. Gould, supra*, by codifying the *Apprendi v. New Jersey, supra*, requirements. (See Kansas Statutes Annotated (2002 Supplement), 21-4718(b)(1), quoted above.) These requirements provide a procedure that incorporates notice pleading with the mandate of a court or jury adjudication, based on the reasonable doubt standard, of what are essentially 'sentencing facts'. At this juncture, because of its endorsement of the Sixth Amendment root for sentencing decisions, it is assumed that the Kansas sentencing scheme passes muster under *Blakely*. The United States Supreme Court's mention of the Kansas scheme in *Blakely* certainly provides a basis for the assumption. More significantly, for the purposes of the argument now offered to this Court, there is no indication that the decision by the State of Kansas to bring its determinate sentencing law into compliance with the *Apprendi/Blakely* line of cases has been significantly problematic to the administration of justice in Kansas.

3. **Appellant Black Correctly Argues that the Blakely/Apprendi Rules will Invalidate Sentences Beyond the Prescribed Statutory Maximum Based on Sentence-Significant Facts that have not been Submitted to a Jury, or Agreed Upon Trier of Fact, and Found beyond Reasonable Doubt**

\_\_\_\_\_The majority opinion by Judge Scalia in *Blakely v. Washington* is quite clear.

First: “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.” *Apprendi, supra*, 530 U.S. 466 at 744. Further, a court may not exceed the statutorily maximum sentence, or the so called “maximum sentence” without the findings of the jury. *Blakely, supra*, 124 S.Ct. 2531, 2537.

Prior to *Blakely*, the United States Supreme Court had also stated that: “[i]t is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury, we have resolved that general issue and have no intention of questioning its resolution.” *Jones v. United States*, (1999) 526 U.S. 227, 248. In litigating *Blakely*, the State of Washington relied on decisions like *Jones, Harris v. United States*, (2002) 536 U.S. 545 [where the court held that judges may find facts that compel a mandatory minimum sentence which would necessarily increase the sentence of some accuseds], and *McMillan v. Pennsylvania*, (1986) 477 U.S. 79, as supporting the view that legislatures have wide latitude in defining the elements of the crime that must be proved to a jury. See *McMillan*, 744 U.S. at 84 relying in part on *Patterson v. U.S.* (1977) 432 U.S. 197, 210. But in *Blakely* the Court answered those arguments by distancing itself from the alleged implications of its prior rulings. (*Id.* at 2531, 2537-38.)

The *Blakely* court found that the Sixth Amendment cannot support “. . . a sentence greater than what state law authorized on the basis of the verdict alone.” *Blakely*, 124 S.Ct. at 238. Indeed the analysis offered in *Blakely* demonstrates that reliance on Supreme Court precedent established prior to *Blakely* as the foundation for defending a sentencing scheme is risky business indeed. And, in passing, the Court dignified the current argument made to this Court by CACJ to the effect the Kansas Legislature’s response to *Apprendi* was the correct one. See *Blakely, supra*, at 2541.

The *Blakely* court specifically discussed the sort of results that will no longer be constitutionally valid absent a supporting jury establishing the facts that have sentencing significance. It provided examples of defective sentencing practices including:

1) enhancing a sentence based on a judicial finding of a specified fact not been found true by a jury; 2) the application of several specified facts by a sentencing court that were not found by the jury; and 3) the use of any aggravating fact that was not found by the jury.

In discussing the future of sentencing procedures, the *Blakely* majority referred to an ‘*Apprendi* bright-line’ that requires facts significant to judicial imposition of sentence to be determined by a jury. *Blakely* at 2538, 2540.

Because of the clarity of the statutes and rules that embody California’s Determinate Sentencing Law, it can be said that the DSL includes a number of features that cannot survive the ruling in *Blakely*. The statute central to the definitions of the DSL explains that wherever the law provides a determinate sentence defined by three

sentencing outcomes, “. . . the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” Penal Code §1170(b). Pursuant to its rule-making ability, the Judicial Council has published rules that describe how courts are to find the aggravating facts that justify the imposition of the upper term. See California Rules of Court (hereafter Rule) Rule 4.405(d). Significantly, however, there is no requirement of a triggering jury finding, or of proof beyond a reasonable doubt.

In addition, sentencing courts in California have discretion to decide whether an additional term of imprisonment for a charged “enhancement” can be applied.<sup>10</sup> These courts also decide whether probation is limited, or can be granted. (See Rule 4.413, 4.414.) They decide what criteria affect concurrent consecutive sentences. (Rule 4.425.) There is no requirement of a jury verdict to establish these sentencing acts. Unless a California sentencing judge is limited by operation of law in the exercise of discretion, a simple recitation on the record of factors that support the exercise of sentencing discretion will suffice to justify a sentence. (See Rule 4.406(a).) In sum, under our system, many of the crime and defendant characteristics that will trigger a given type of sentence are left to the court’s discretionary decision making<sup>11</sup> in violation of *Blakely* and *Apprendi*.

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<sup>10</sup> See Advisory Committee comment to Rule 4.405, describing the available enhancements.

<sup>11</sup> See, for example, the discussion of the operation of circumstances in aggravation in the Advisory Committee comment to Rule 4.421. (2004 revised edition, California Rules of Court.)

Further evidence of our State's investment in a sentencing scheme that places wide ranging discretion with the court at time of sentencing is the fact that much of the detail of the DSL is found in the Rules--not in statutes defining crimes and punishments. The California Legislature did not, by and large, define the circumstances that can trigger a judicial finding that the aggravated term is the correct, or at least legally permissible, term to be applied in a given case. Rule 4.421 which defines the circumstances in aggravation is a rule adopted pursuant to the legislative delegation of power. Indeed, none of the 11 factors in aggravation which are so called crime facts under Rule 4.421(a), and none of the 'defendant facts' found in Rule 4.421(b) or the discretionary 'other facts' determined to be aggravating in a particular case (Rule 4.421(c)) is: found in statutes; required to be found by the jury; or required to be established beyond a reasonable doubt.

In sum, while our state's sentencing scheme is constitutional in general terms--a state surely can enact and maintain a Determinate Sentencing Law, but the 'details' of our sentencing procedures must be replaced.

**4. The California Sentencing Scheme Cannot be Rescued Through 'Interlineation'**

Our Determinate Sentencing Law is broad, and its defining statutes cover a multitude of subjects and delegate rulemaking power in such a way as to require this Court to tender notice that Penal Code §§1170 et seq. and the associated Rules of Court as published and applied must be ruled invalid. Our current scheme must be replaced by

*Blakely*-compliant legislation.

Clearly, California can reiterate the decision to use determinate sentences for all but a few crimes. See Penal Code §1170(a)(1). However, CACJ respectfully submits that under the rules that apply to the analysis of severability, the Determinate Sentencing Law as it appears in Penal Code §1170 et seq. cannot be rescued through a surgical procedure. In *In re Blaney*, (1947) 30 Cal.2d 643, 655, this Court noted that while there is a general presumption of constitutionality of all statutes, the analysis of whether a statute is severable hinges not only on whether (1) the language of the statute is mechanically severable, but also (2) whether “. . . the language is so broad as to cover subjects within and without the legislative power, and the defect cannot be cured by excising any word or group of words . . .” *Id.* at 655. See also *Santa Barbara School District v. Superior Court*, (1975) 13 Cal.3d 315 at 330-331 discussing the rules of severability in analyzing the constitutional viability of the contents of a ballot initiative.<sup>12</sup>

It is axiomatic that a statute that is constitutionally valid is not rendered ineffective by language which is invalid but can be severed from the valid portion of the statute. See, generally, the discussion in *Hotel Employees and Restaurant Employees International Union v. Davis*, (1999) 21 Cal.4th 585, 613. But the invalid part of a statute can be severed only if it is ‘grammatically, functionally, and volitionally separable’. *Id.* at 613.

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<sup>12</sup> This Court has, on several occasions, discussed the implications of a severability clause contained in a ballot initiative, a drafting and ‘rescue’ mechanism recognized in California law for some period of time. See *McCafferty v. Board of Supervisors* (1969) 3 Cal.App.3d 190, 193 quoted with approval in *Santa Barbara School District, supra*, 13 Cal.3d at 331.

So much of our Determinate Sentencing Law draws force from an architecture that provides a wide range of judicial sentencing decisions absent pleadings, jury verdicts and burdens required by *Apprendi* and *Blakely* that in CACJ's estimation it is simply not possible to consider the Determinate Sentencing Law severable. While the backbone of the Determinate Sentencing Law certainly can remain in place, that bone is really provided by the statement of legislative intent, and preamble, contained in Penal Code §1170 (a)(1). Clearly, California can constitutionally, according to the California and United States Constitutions, both find and declare that the purpose of imprisonment is punishment, and provide a scheme to achieve uniformity in sentencing. But the inner workings of the scheme as it now exists, the interior and finish work of the Determinate Sentencing Law, as it were, cannot be rescued.

5. **In Order to Meet the Blakely/Apprendi Requirements, this Court Must Require Changes in: Rules of Pleading; Definition of Sentence-Triggering Elements where Necessary; Trial of Required Sentencing Facts; Jury Verdicts and Sentencing Processes**

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California can clearly retain determinate sentencing. The Supreme Court specifically so stated in *Blakely*, noting that the State of Washington's adoption of determinate sentencing, and attention to ". . . proportionality to the gravity of the offense and parity among defendants" were appropriate and "salutary objectives." *Id.* at 2540. However, in order to bring California into line with the combination of *Apprendi v. New Jersey, supra*, and *Blakely v. Washington, supra*, this Court should instruct the Legislature, and the pertinent rule making bodies, to be attentive to the following required

changes.

First, it is apparent that the *Blakely* majority views the Sixth Amendment as requiring that every fact legally essential to punishment must be charged in the Indictment. *Id.* at 2536, n.5. To the extent and degree that *Ring v. Arizona*, 536 U.S. 584, 592-602 (2002) is linked to the ruling in *Blakely v. Washington*, *supra*, 124 S.Ct. at 2537, the defendant must have notice of the fact and/or legally significant factors that are essential as a basis for a given punishment, particularly an enhanced or aggravated punishment.

Second, after *Blakely*, our State must establish the legal requirement that every fact that increases the penalty for a crime must be submitted to a jury, and proved beyond a reasonable doubt, or, that where the accused pleads guilty, no contest, or otherwise admits facts critical to the enhancement or aggravation of a sentence, the accused must either stipulate to the relevant facts, or knowingly, voluntarily, and intelligently must consent to judicial fact finding. See *Blakely* at 2541.

Third, the legal architecture that defines facts that increase a penalty for a crime must be changed so that these facts are subject to trial--either through a command that the definitions of individual crimes be changed according to the *Blakely* formula, or, through the expansion of the Penal Code to include such a requirement, perhaps in a restatement of Penal Code §1170.

Fourth, it appears to CACJ that the definition of a verdict may need to be changed

so as to provide judges with the confidence that, on occasion, and contrary to the current fabric of California law, special verdicts dealing with sentencing facts may be required, and will be authorized.

Finally, the statutory and associated rule-intensive framework of California's sentencing laws will need to be changed in order to incorporate the several *Blakely*-compliant elements just described. CACJ respectfully submits that the Kansas statutory scheme discussed above is instructive, and useful, as a guide.

6. **The Changes Urged by CACJ are Significant, but Clearly Manageable; the Pendency of Blakely-Related Cases Before the U.S. Supreme Court Makes It Imperative that California Reform its Laws Correctly at this Juncture**

Judge Marvin Frankel has been credited with providing the impetus for the Congress of the United States to move towards reforming the federal sentencing system which, according to Judge Frankel, allowed “almost wholly unchecked and sweeping” discretion of sentencing judges to create a situation that was “terrifying and intolerable for a society that professes devotion to the rule of law.”<sup>13</sup> Today, the United States Supreme Court is considering whether the product of the reform effort, the Federal Sentencing Reform Act of 1984 (which gave rise to the Federal Sentencing Guidelines),

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<sup>13</sup> Frankel, *Criminal Sentences: Law Without Order* (1972) at p. 5. Judge Frankel's influence on the creation of the Federal Sentencing Guidelines has been recognized. 121 Cong. Rec. 37, 562-37, 563 (1975).

is still constitutional in the aftermath of the ruling in *Blakely*.<sup>14</sup>

CACJ respectfully submits that if the United States Supreme Court invalidates the Federal Sentencing Guidelines, California's current sentencing scheme will be made further suspect by the extent to which the Legislature deferred important aspects of sentencing rule making to the Judicial Council.

CACJ makes the above point to note that this Court should provide the Legislature with a comprehensive analysis of the steps necessary to achieve valid law reform of California's sentencing process.

The importance of this Court's addressing the 'global' issues presented by this and similar cases is further emphasized by the sheer number of cases that are dealt with in California courts. That said, the available statistics clearly indicate that the pace of trial level case adjudications in California will allow *Blakely* compliant pleading, negotiation, and adjudication through trial, to take place after preliminary examinations--yet another reason to use the Kansas statute discussed above as a guide. The statistics indicate that needed reforms can occur without precipitating chaos in our court system.

According to the *Statewide Caseload Trends* reported in fiscal year 2002-2003, of a total of 188,311 cases disposed of in our courts, 120,011 resulted in felony

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<sup>14</sup> This issue is before the U.S. Supreme Court in two companion cases, *U.S. v. Booker* and *U.S. v. Fanfan*, U.S. Supreme Court Nos. 04-104; 04-105. Commentators too numerous to mention are speculating on the future of the Federal Sentencing Guidelines as this brief is written. It appears a certainty that the U.S. Supreme Court will announce the extent to which legislatures can delegate sentencing rule making ability to quasi-legislative, or quasi-judicial bodies.

convictions.<sup>15</sup> The vast majority of cases are disposed of prior to trial--61 percent. Of the overall dispositions of cases in the State of California (here, presumably, including both felonies and cases charged as felonies that were either reduced or ‘bargained’ down to misdemeanors), 123,198 were disposed of after the preliminary hearing.<sup>16</sup>

Thus, it appears that approximately two-thirds of the felony, or mixed felony/misdemeanor, cases charged in the State of California are resolved after the preliminary hearing.<sup>17</sup> Using a relatively ‘rough’ assessment of the information provided by case trends in the last fiscal year, it is clear that the majority of felony level cases are disposed of at a point at which the courts, and parties, have acquired an enhanced knowledge of case facts through the preliminary examination. Resolution after the preliminary hearing also means that the parties have been able to review available case discovery, and where necessary, both the prosecution and defense have also been able to conduct necessary further investigation. The ‘flow’ of cases indicates that the majority of felony filings can be brought into ‘Blakely shape’ after the preliminary hearing.

Review of the California system as it now stands indicates that a reform of the

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<sup>15</sup> *Statewide Caseload Trends* are reported at [www.courtinfo.ca.gov/reference/documents/csr2004](http://www.courtinfo.ca.gov/reference/documents/csr2004). The statistics just quoted from Table 8.

<sup>16</sup> See Table 8a of the *Statewide Caseload Trends* for fiscal year 2002-2003, reported in the 2004 court statistics report.

<sup>17</sup> The 2004 Court Statistics Report does not differentiate between cases that have been indicted and those which have proceeded via complaint. Thus, the analysis that is offered here does not purport to be ‘scientific’ or exact. Nonetheless, the numbers relied upon are those that are relied upon by the Judicial Council.

California system is not only legally necessary because of *Blakely*, but is also achievable without the need for reform that might ‘overwhelm’ current practices in our courts, familiar to both the prosecution and defense bars. The statistics support the notion that except where early negotiations require the filing of a *Blakely*-compliant charging document prior to the preliminary examination, in the vast majority of cases, it is the period of time between the preliminary examination, and the cutoff for pre-trial discovery compliance mandated under Penal Code §§1054 et seq. that provides the most fertile ground for the filing of *Blakely*-compliant charging documents in those cases headed to trial on the one hand, or likely to resolve through a negotiated disposition, on the other. While the necessary revision of statutes may be extensive, the practical changes can easily be accommodated given the way that cases tend to be handled in our State.

However, while the statistics relied upon here describe a window of opportunity, report of the sheer number of cases handled in California courts clearly provides emphasis for the need for this Court to act decisively now.

### **CONCLUSION**

CACJ supports Appellant Black in his arguments. The issues presented to this Court by *Apprendi v. New Jersey, supra*, and especially by *Blakely v. Washington, supra*, go well beyond those raised by Mr. Black. CACJ respectfully submits that this Court issue a ruling in this case that will enable California to redesign its sentencing scheme to

comply with the current interpretation of the United States Constitution discussed in

*Blakely*.

Dated: October \_\_, 2004

Respectfully submitted,  
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FOR CRIMINAL JUSTICE

**PROOF OF SERVICE BY MAIL**

I, Theresa Jacobson, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 250, San Francisco, California.

On October , 2004, I served the within

**MOTION OF CALIFORNIA ATTORNEYS FOR CRIMINAL  
JUSTICE FOR PERMISSION TO APPEAR AS *AMICUS*  
*CURIAE* ON BEHALF OF APPELLANTS (RULE 29.1(f) AND  
BRIEF IN SUPPORT OF APPELLANT BLACK**

on the parties in this action by placing a true and correct copy thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October , 2004 at San Francisco, California.

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Theresa Jacobson