

Number S_____
(Court of Appeal No. C050785)

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF)
CALIFORNIA,)
Plaintiff/Respondent,)
v.)
WESLEY DAVID FRENCH,)
Defendant/Appellant.)

Appeal from the Superior Court of Sacramento County,
Number 02f07203

Hon. Maryanne G. Gilliard, Judge

APPELLANT'S PETITION FOR REVIEW
AFTER UNPUBLISHED OPINION OF THE COURT OF APPEAL,
THIRD APPELLATE DISTRICT,
AFFIRMING THE JUDGMENT OF CONVICTION

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* By appointment of the Court of Appeal under the
C.C.A.P. independent case system

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**APPELLANT'S PETITION FOR REVIEW
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AFFIRMING THE JUDGMENT OF CONVICTION**

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

Wesley David French petitions this court for review of the
decision of the Court of Appeal, Third Appellate District, filed
October 30, 2006, which affirmed the Superior Court's judgment.
A copy of the unpublished opinion is attached as Attachment A to
this petition.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

**THE SUPREME COURT SHOULD RECONSIDER WHETHER
IMPOSITION OF THE UPPER TERM VIOLATED
PETITIONER'S CONSTITUTIONAL RIGHTS UNDER
BLAKELY v. WASHINGTON**

RULE 28.1 CERTIFICATIONS

The undersigned counsel hereby certifies as follows,
pursuant to rule 28.1 of the California Rules of Court:

A petition for rehearing was not filed in this case.

The word count of this petition for review is: 1,147.

STATEMENT OF THE CASE

A complaint, deemed an information and filed as such on October 16, 2002, alleged against petitioner 12 counts of lewd and lascivious conduct with minors under the age of 14 (Pen. Code, § 288, subd. (a)), on dates on and between August of 2000 and September of 2001. Counts 1 through 5 involved the victim "Brandon B.," counts 6 through 10 involved the victim "Brittany P.," and counts 11 and 12 involved the victim "Zachary L." (C.T. 29-37.)

The case was assigned to a department for trial on June 1,

2004. On June 8, before jury selection began, the parties arrived at a negotiated disposition, according to which petitioner pled no contest to counts 1, 2, 9, 10, 11, and 12, with an 18-year "lid" on the prison sentence. Petitioner proceeded to plead no contest pursuant to the agreement. (C.T. 17, 18, 135; R.T. 25-36.)

On July 9 petitioner made an oral request for a continuance for the purpose of making a motion to withdraw the plea. The court did not grant the motion. (C.T. 157; R.T. 39-50, passim.) The court proceeded to pronounce judgment and sentence petitioner to 18 years in prison, a term which consisted of an upper, eight-year term on count one, and consecutive sentences of one-third the six-year middle term - i.e., two years, each - on the five other counts. The court granted credit for time served of 784 days. (C.T. 157-159, 189-190; R.T. 50-52.)

The Court of Appeal, Third Appellate District, affirmed the conviction. (Attachment A.)

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STATEMENT OF FACTS

At the time of the no contest pleas the prosecutor stated the factual bases as follows:

"On or about August, 2000, to July 27, 2001, . . . the defendant did . . . commit lewd and lascivious acts or act upon the body of Brandon B., who was . . . seven and eight at that time. * * * He did this by taking Brandon to a park bathroom and touching Brandon's penis on repeated occasions.

"[O]n or about and between April 1st, 2001, and September 7, 2001, . . . the defendant did . . . commit a lewd and lascivious act on the body and certain parts thereof of Brittany P., a child who was age seven at the time. * * * He did this by touching Brittany . . . skin-to-skin in her vaginal area as well as her breasts on . . . two separate occasions.

"[O]n or about April 1st, 2001, through September 7, 2001, . . . the defendant did . . . commit lewd and lascivious act upon the body and certain parts thereof of Zachary L., . . . who was five and six at the time. * * * He did this by - on two separate and distinct occasions touching Zachary on his penis skin-to-skin" (R.T. 26-27.)

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DISCUSSION

THE SUPREME COURT SHOULD RECONSIDER WHETHER IMPOSITION OF THE UPPER TERM VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER BLAKELY v. WASHINGTON

Petitioner has contended that in selecting the upper term for the base sentence in this case, the trial court violated the Sixth Amendment jury trial guarantee, and the Fourteenth Amendment due process guarantee, under Blakely v. Washington (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].)

This argument has been advanced in many cases, and in People v. Black (2005) 35 Cal.4th 1238, this court rejected it. There is currently no published federal opinion on whether Black can be reconciled with the Blakely opinion as the latter was written. However, the United States Supreme Court has granted certiorari in Cunningham v. California (case no. 05-6551) ___ U.S. ___ [126 S.Ct. 1329; 164 L.Ed.2d 47; 2006 U.S. LEXIS 1136], and it will in that case decide exactly this question.

Petitioner hereby preserves the argument that, for the reasons already argued before this court in Black, the court should reconsider this issue and overrule Black.¹

¹ The high courts of several other states having sentencing schemes similar to Washington's and California's have held, contrary to Black, that Blakely does apply to their statutory sentencing schemes. (See State v. Natale (N.J. 2005) 184 N.J. 458, 482 [878 A.2d 724]; State v. Smylie (Ind. 2005) 823 N.E.2d 679, 683; State v. Brown (2005) 209 Ariz. 200 [99 P.3d 15, 17-18]; State v. Shattuck (Minn. 2005) 704 N.W.2d 131, 141-142; State v. Dilts (2004) 337 Ore. 645, 652 [103 P.2d 95]; State v. Schofield (Me. 2005) 876 A.2d 43, 48-51.)

CONCLUSION

For the reasons noted above, it appears necessary that the Supreme Court should grant review, in order to secure uniformity of decision and/or to settle important questions of law. Accordingly, review should be granted.

Respectfully submitted,

DATE: December 13, 2006

GREGORY MARSHALL
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

CASE: People v. French, no. S _____
(Court of Appeal No. C050785)

DATE: December 13, 2006

I am a citizen of the United States and am employed in the County of Shasta, State of California. I am over 18 years of age and not a party to the within action. My business address is P.O. Box 996, Palo Cedro, California 96073.

On the date stated above I served the following document(s) on the parties indicated, by placing a true copy of each in an envelope, bearing first class postage prepaid, addressed as indicated below, and deposited the same in the U.S. mail at Palo Cedro, California.

DOCUMENT(S): Appellant's Petition for Review

ADDRESSEE(S):

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Wesley D. French

Executed December 13, 2006, at Palo Cedro, California.

I declare under penalty of perjury that the foregoing is true and correct.

GREGORY MARSHALL