

Pleading: Model Habeas Corpus Petition Filed in California State Courts

Procedural Posture: For filing after denial of petition for review, in case which was not final on direct review on June 24, 2004, when the Supreme Court issued the *Blakely* opinion.

Blakely Issue: Denial of Jury Trial & Proof Beyond a Reasonable Doubt on Aggravating Factors Used to Imposed Upper Term for Substantive Offense and for Enhancement.

Important Note: This is a **generic** habeas petition you can directly use (just fill in the blanks regarding facts etc, as noted in the instructions.) **This model petition is only for cases which were not final on direct review when *Blakely* was decided on June 24th.** Whether a case was still pending on direct appeal depends upon whether a petition for review was filed. (1) If a petition for review was filed and denied [review petition doesn't need to have raised *Blakely* issue], the case is not final on direct review until the time for filing a certiorari petition runs, i.e. 90 days from the Cal. Supreme Court denial of review. For cases in which a petition for review was filed, *Blakely* thus applies and this model petition may be used if those 90 days had not run when *Blakely* was decided. (2) If no petition for review was filed, the case is not final on direct review until 40 days after the filing of the court of appeal opinion. For case with no petition for review, *Blakely* applies and this model petition may be used if those 40 days had not run when *Blakely* was decided

Under well-established law, such cases are considered to have been "pending on direct appeal" at the time *Blakely* was decided, and therefore they are covered by *Blakely* and there is no issue as to retroactivity. Further, you can file the habeas after the 90-day window, as long as the appeal was in the 90-day window at the time *Blakely* was decided. NOTE: This is very different from cases which were already beyond the 90-day period when *Blakely* was filed. Those cases are not directly covered by *Blakely*, and their viability will depend on whether the courts rule *Blakely* to be retroactive. We hope in the near future to have a generic habeas dealing with those kinds of cases, but this model habeas does not deal with true retroactivity and is just for cases that were in the certiorari window when *Blakely* was decided.

Posted: 7/21/04

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

* _____ APPELLATE DISTRICT, DIVISION * _____

In re * _____,

Petitioner,

On Habeas Corpus.

No. * _____

Related Appeal, No. * _____

* _____ County

Sup. Court No. * _____)

PETITION FOR WRIT OF HABEAS CORPUS

TO: THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, * _____ APPELLATE DISTRICT, DIVISION * _____ :

Petitioner * _____ respectfully petitions this Court for a writ of habeas corpus on the ground that in violation of the Fifth and Sixth Amendments to the United States Constitution, the trial court illegally imposed the aggravated terms in petitioner's case under the U.S. Supreme Court's opinion in *Blakely v. Washington* (June 24, 2004, 02-1632) 542 U.S. ___, 124 S.Ct. 2531; 04 C.D.O.S. 5539, 5540; 2004 WL 1402697. By this verified petition, petitioner sets forth the following facts and causes for the issuance of the writ:

1. Petitioner is unlawfully held in custody at * _____ State Prison by the Warden, and by the Director of the Department of Corrections.
2. Petitioner is confined pursuant to a judgment of imprisonment of * _____ years rendered on * _____ in * _____ County Superior Court, No. * _____, Hon. _____, Judge.

3. In that proceeding, petitioner was charged with *_____, in an information filed *_____. [On *_____, petitioner entered a plea to Counts *___ (CT ___)] **OR** [a jury returned verdicts of guilty on Counts *_____. (CT ___)]
4. On *_____, the trial court sentenced petitioner to a term of *___ years: calculated as follows: ***[include here description of aggravated term]**. (CT ___)
5. Petitioner is entitled to issuance of a writ of habeas corpus vacating his sentence because the trial court illegally imposed the aggravated term(s) in petitioner’s case in violation of the Fifth and Sixth Amendments to the United States Constitution:
6. On June 24, 2004, the United States Supreme Court held in *Blakely v. Washington* that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth Amendment entitles the defendant to jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely v. Washington* (June 24, 2004, 02-1632) 542 U.S. ___, 124 S.Ct. 2531; 04 C.D.O.S. 5539, 5540; 2004 WL 1402697.)
7. Under *Blakely*, in California, the middle term is the “statutory maximum,” because an upper term requires additional findings (i.e., “aggravating circumstances”) beyond those inherent in the offense itself.
8. Under the Sixth Amendment reasoning of *Blakely*, petitioner is entitled to jury determination of any such aggravating circumstance used to impose an upper term and those findings must be subject to a reasonable doubt standard of proof, rather than a preponderance

standard, as California law currently provides (Cal. Rules of Court, rule 4.420(b)).

9. Here, *[petitioner pled guilty to] **OR** [a jury found petitioner guilty of]:
***list offenses and enhancement allegations.**
10. In violation of *Blakely*, however, the court's imposition of aggravated terms for ***[list offenses or enhancement allegations for which the aggravated term was imposed]** was unauthorized and in violation of the Sixth Amendment, because none of the judicial findings used to aggravate were admitted by petitioner or found true by a jury. As such, petitioner was entitled to, but denied, a jury determination of those additional facts exposing him to the possibility of a sentence greater than the maximum allowed by a jury's findings and by proof beyond a reasonable doubt.
11. *Blakely* is applicable to petitioner's case because it was not yet final on direct review at the time *Blakely* was decided on June 24, 2004. Petitioner's case was not yet final because *[his/her petition for review was still pending on June 24, 2004] **OR** [on June 24, 2004, less than 90 days had elapsed from the date of the California Supreme Court's denial of his/her petition for review on * _____ (i.e., on or after March 26, 2004)] **OR** [although he/she had not yet filed a petition for review on June 24, 2004, less than 40 days had passed since the issuance of this Court's opinion on * _____].
12. Moreover, as *Blakely* indisputably constitutes a change in the law, habeas corpus is the proper vehicle for addressing petitioner's *Blakely* claims.

13. Petitioner refers to and incorporates herein by reference the attached Memorandum of Points and Authorities.
14. Petitioner has no plain, speedy, or adequate remedy at law to raise the above claim. He has not presented the grounds for relief raised here in any other petition, motion, or application to any court except insofar as the claims are implicated on his direct appeal.
15. Petitioner has filed no other petition for writ of habeas corpus relating to this confinement and restraint.
16. WHEREFORE, petitioner respectfully requests that this Court:
 - a. Take judicial notice of the record in petitioner's direct appeal, No. * _____;
 - b. Issue an order to show cause before this Court why it should not vacate petitioner's sentence;
 - c. Upon review of the petition and response, vacate petitioner's sentence in * _____ County Superior Court No. * _____ and remand this matter for further proceedings;
 - d. Grant petitioner such other and further relief as the Court determines appropriate.

For all the foregoing reasons, petitioner respectfully requests this Court to grant the petition for writ of habeas corpus.

Dated: * _____, 2004

Respectfully submitted,

* _____
Attorney for Petitioner

VERIFICATION

I, * _____, declare:

I am a member of the Bar of the State of California. I am the attorney for petitioner * _____, who is confined and restrained of his liberty at * _____ State Prison, in * _____, California.

I am authorized to file this petition for writ of habeas corpus on his behalf. I make this verification because petitioner is incarcerated in a county different from that of my law office and because these matters are more within my knowledge than his.

I have read the foregoing petition for writ of habeas corpus. I declare that all the matters alleged here are true of my own personal knowledge or are supported by the record in petitioner's direct appeal, No. * _____, or by the attached exhibits.

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

Executed on * _____, 2004, at * _____, California.

* _____
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

I. IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *BLAKELY V. WASHINGTON*, THE TRIAL COURT ILLEGALLY IMPOSED THE AGGRAVATED TERM IN PETITIONER’S CASE

A. Introduction and Background

On June 24, 2004, the United States Supreme Court held in *Blakely v. Washington* that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth Amendment entitles the defendant to jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely v. Washington* (June 24, 2004, 02-1632) 542 U.S. ___, 124 S.Ct. 2531; 04 C.D.O.S. 5539, 5540; 2004 WL 1402697.) On *_____, [petitioner pled guilty to] **OR** [a jury found petitioner guilty of]: ***list offenses and enhancement allegations.** (CT ___.)

On *_____, the trial court sentenced petitioner to a term of *___ years: calculated as follows: [include here description of aggravated term]. (CT ___)

In choosing the aggravated term, the court stated *_____. (EXHIBIT A: RT ___.) **[NOTE: Attach copy of sentencing transcript and designate as “EXHIBIT A.” Also attach copy of probation report, if necessary to claim (e.g., when the court expressly relies upon probation**

recommendation or where probation report otherwise helps to establish *Blakely* error and prejudice; see “ANALYSIS” at p. 11).]

As discussed below, the court’s imposition of the aggravated term was unauthorized under *Blakely* and in violation of the Sixth Amendment, because petitioner was entitled to a jury determination of those additional facts exposing him to the possibility of a sentence greater than the maximum allowed by a jury’s findings (in California: the middle term) by proof beyond a reasonable doubt.¹

B. *Blakely v. Washington*

In *Blakely*, the defendant pled guilty admitting the elements of second-degree kidnaping and a domestic-violence and firearm allegations, but no other relevant facts. In Washington, second-degree kidnaping is a class B felony, subject to an absolute maximum of 10 years in state prison. Washington law specifies a “standard range” for second-degree kidnaping with a firearm of 49 to 53 months. Washington law further provided that a court could impose a sentence greater than the “standard range” (but still within the 10-year cap) only if it found “substantial and compelling reasons justifying an exceptional sentence.” The statute provided a list of “aggravating factors” which could

¹ In recognition of the importance of the implications of *Blakely* to the Determinate Sentencing Law in California, on July 14, 2004, the California Supreme Court granted review of a *Blakely* claim in *People v. Towne* (S125677) only three weeks after the *Blakely* decision: The issue, as stated on the court’s electronic docket, is: “In addition to the issue raised in the petition for review, the parties shall address the following issues: (1) Does *Blakely v. Washington* (June 24, 2004) ___ U.S. ___ [2004 WL 1402697] preclude a trial court from making the required findings on aggravating factors for an upper term sentence? (2) If so, what standard of review applies, and was the error in this case prejudicial?”

justify such a “departure” from the “standard range” and described the listed factors as “illustrative rather than exhaustive.” However, the trial court imposed an “exceptional sentence” of 90 months – 37 months above the standard range – based upon the judge’s finding that Blakely acted with “deliberate cruelty,” one of the enumerated aggravating factors. (*Blakely v. Washington, supra*, 04 C.D.O.S. at p. 5539.)

The United States Supreme Court held that this was error under *Apprendi v. New Jersey* (2000) 530 U. S. 466, 490, which only four years earlier had held: “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.” Considering *Apprendi* and *Ring v. Arizona* (2002) 536 U. S. 584, a subsequent cases in which the high court applied the *Apprendi* rule, *Blakely* observed:

Apprendi involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed ““with a purpose to intimidate ... because of race, color, gender, handicap, religion, sexual orientation or ethnicity.”” *Id.*, at 468-469 (quoting N. J. Stat. Ann. §2C:44-3(e) (West Supp. 1999-2000)). In *Ring v. Arizona*, 536 U. S. 584, 592-593, and n. 1 (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, we concluded that the defendant’s constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra*, at 491-497; *Ring, supra*, at 603-609.

(*Blakely*, at p. 5540.)

The Court observed that although *Blakely* “was sentenced to more than three years above the 53-month statutory maximum of the standard range

because he had acted with ‘deliberate cruelty,’” “[t]he facts supporting that finding were neither admitted by petitioner nor found by a jury.” The Supreme Court held that the trial court’s finding of that aggravating factor violated *Apprendi*’s rule entitling a defendant to jury determination of any fact exposing a defendant to greater punishment than the “maximum” otherwise allowable for the underlying offense.

In doing so, it rejected the state’s argument that the relevant “maximum” was the 10-year cap for a “class B felony.” Instead, the court treated the top end of the “standard range” (53 months) as the relevant “statutory maximum,” because that was the greatest sentence *Blakely* could receive based solely on the facts admitted by his plea:

Our precedents make clear, however, that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely* on the basis of the facts reflected in the jury verdict or admitted by the defendant. *See Ring, supra*, at 602 (“the maximum he would receive if punished according to the facts reflected in the jury verdict alone” (quoting *Apprendi, supra*, at 483)); *Harris v. United States*, 536 U. S. 545, 563 (2002) (plurality opinion) (same); cf. *Apprendi, supra*, at 488 (facts admitted by the defendant). In other words, 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*, at p. 5540 [italics in the original].)

Rejecting the state’s attempt to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive, the *Blakely* court determined: “This

distinction is immaterial. Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.”

Accordingly, *Blakely* reversed, holding: “Because the State’s sentencing procedure did not comply with the Sixth Amendment, petitioner’s sentence is invalid.” (*Blakely*, at p. 5540.)

Blakely applies to petitioner’s case and requires the same result.

C. *Blakely* Applies to Petitioner’s Case

Under *Blakely*, in California, the middle term is the “statutory maximum,” because an upper term requires additional findings (i.e., “aggravating circumstances”) beyond those inherent in the offense itself.

California statutes, court rules, and case law make clear that, unless there is a finding of at least one aggravating circumstance, a court cannot impose the upper-term: “When a judgment of imprisonment is to be imposed, **the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.**” (§ 1170(b), emphasis added; Cal. Rules of Court, rule 4.420(a) & (b); cf., e.g., *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360.) As with the “standard range” in *Blakely*, the mid-term is the presumptive sentence.

Similar to the “exceptional sentence” in *Blakely*, a California court lacks statutory authority to impose an upper term unless it finds “aggravating circumstances” beyond the elements inherent in the offense itself.

Like the Washington statutes, the California rules provide a list of enumerated aggravating circumstances (Cal. Rules of Court, rule 4.421), but

the list is “not exclusive” and a court may rely upon an non-enumerated circumstance “reasonably related” to the sentencing decision. (Cal. Rules of Court, rule 4.408(a)²; see e.g., *People v. Garcia* (1989) 209 Cal.App.3d 790, 794-795 [rapist’s knowledge of his herpes infection]; compare *Blakely*, at p. 5539 [listed aggravating factors “illustrative rather than exhaustive”].) As with the Washington scheme, the court must make explicit factual findings. (§ 1170(c); Cal. Rules of Court, rule 4.420(e) [“a concise statement of the ultimate facts deemed to constitute circumstances in aggravation”]; *Blakely*, at p. 5539 [Washington judge “must set forth findings of facts and conclusions of law supporting” an “exceptional sentence”].)

Moreover, California’s “dual use” rule underscores the necessity of finding additional facts, for a court cannot base an upper term on a fact which is either an element of the underlying offense or is the basis for an enhancement. (§ 1170(b); Cal. Rules of Court, rules 4.420(c) & (d).) Thus, the aggravating circumstances authorizing an upper term are almost necessarily facts beyond those determined by the jury’s offense verdicts and enhancement findings (unless the court elects to strike an enhancement and instead use the enhancing facts to impose the upper term (Cal. Rules of Court, rule 4.420(c))). Put another way, where the only aggravating circumstances are those which overlap either the offense or any enhancement, the middle term is the “maximum” sentence a defendant may receive. It is only a finding of some additional non-overlapping aggravating circumstance which can

² Rule 4.408(a) provides “The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.”

“expose” a defendant to an upper term. “The judge acquires that authority [to impose an upper term] only upon finding some additional fact.” (*Blakely*, at p. 5540.)

Accordingly, under the Sixth Amendment reasoning of *Blakely* and *Apprendi*, petitioner is entitled to jury determination of any such aggravating circumstance used to impose an upper term and those findings must be subject to a reasonable doubt standard of proof (*Blakely*, at p. 5540), rather than a preponderance standard, as California law currently provides (Cal. Rules of Court, rule 4.420(b)).³

***[ANALYSIS: discuss here each aggravating factor mentioned by court and show how it violates *Blakely* (e.g., court’s recitation of Cal. Rules of Court, rule 4.421(a)(1) [crime involved great violence and the threat of great bodily harm] is precisely the kind of judicial finding of historical facts of the offense proscribed by *Blakely*; or invoking Cal. Rules of Court, rule 4.421(b)(5), [performance on probation unsatisfactory] constitutes a**

³ That a jury was not instructed to find the aggravating circumstance **beyond a reasonable doubt** also constitutes a violation of petitioner’s rights under the Fifth Amendment. As the Supreme Court observed in *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278:

It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

judge-made finding used to impose an upper term beyond those determined by the jury’s verdict or plea).]

D. The *Blakely* Error Requires Reversal

While the disposition in *Blakely* did not specify whether the error requires a reversal of the sentence or was susceptible to a harmless error analysis, petitioner asserts that this error is structural requiring reversal without employing a prejudice analysis.

In *Sullivan v. Louisiana* (1993) 508 U.S. 275, the Supreme Court held that a constitutionally deficient reasonable-doubt instruction required reversal of conviction, without a harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18 . Justice Scalia, writing for the court, observed that

Chapman itself suggests the answer. Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. See *Chapman, supra*, 386 U.S., at 24 (analyzing effect of error on “verdict obtained”). Harmless-error review looks, we have said, to the basis on which “the jury *actually rested* its verdict.” *Yates v. Evatt*, 500 U.S. 391, 404 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee. See *Rose v. Clark*, 478 U.S. 570, 578 (1986); *id.*, at 593 (BLACKMUN, J., dissenting); *Pope v. Illinois*, 481 U.S. 497, 509- 510 (1987) (STEVENS, J., dissenting).

Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error

review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury’s actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. See *Yates, supra*, 500 U.S., at 413-414 (SCALIA, J., concurring in part and concurring in judgment). The Sixth Amendment requires more than appellate speculation about a hypothetical jury’s action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See *Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

(*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 279-280 [original italics].)

Sullivan’s logic applies with equal force to *Blakely* error. Here, as in *Sullivan*, there being no jury finding of the aggravating circumstance beyond-a-reasonable-doubt, the question whether the same finding beyond-a-reasonable-doubt “would have been rendered absent the constitutional error is utterly meaningless.”

It is true that the California Supreme Court in *People v. Sengpadychith* (2001) 26 Cal.4th 316, considering *Apprendi*-type error, applied a *Chapman* analysis. But *Sengpadychith* and other cases considering *Apprendi*-type error (e.g., *People v. Scott* (2001) 91 Cal.App.4th 1197) are distinguishable in ways that do not render them vulnerable to *Sullivan*.

Sengpadychith involved an omission of a discrete element of an enhancement (the “primary activities” element of the gang enhancement, § 186.22(b)) rather than a complete failure to submit the entire matter to the jury. Thus, the error in *Sengpadychith* was “trial error,” lending itself to a circumstance governed by *Neder v. United States* (1999) 527 U.S. 1, 8-15 (instructional error in omitting an element of the offense), in which *Chapman* applies. Moreover, in *Sengpadychith*—unlike here—there was no violation of petitioner’s right to have the jury make the relevant finding “beyond a reasonable doubt,” as in *Sullivan*.

For the foregoing reasons, the error requires reversal without a harmless error analysis.

However, in the event this Court determines that *Chapman* does apply, a *Neder* must also apply. This inquiry “asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” (*Neder*, 527 U.S. at p. 19.) *Neder* held that “where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested **and** supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.” (*Id.*, at pp. 18-19 [emphasis added].)

***[ANALYSIS: show here how trial court’s finding was contested and not supported by overwhelming evidence.]** Harmless error analysis, therefore, does not withstand *Neder* scrutiny. (*Neder*, 527 U.S. at p. 18-19.) *Blakely* error here was not harmless beyond a reasonable doubt. Accordingly, even under *Chapman*, the error nevertheless requires reversal.

E. Petitioner's *Blakely* Claims Are Cognizable and Reviewable on State Habeas Because Petitioner's Case Was Still Pending on Direct Review at the Time *Blakely* Was Decided

This Court affirmed petitioner's conviction on *_____. *Blakely* is applicable to petitioner's case because it was not yet final on direct review at the time *Blakely* was decided on June 24, 2004. Petitioner's case was not yet final because *[his/her petition for review was still pending on June 24, 2004] **OR** [on June 24, 2004, less than 90 days had elapsed from the date of the California Supreme Court's denial of his/her petition for review on *_____ (i.e., on or after March 26, 2004)] **OR** [although he/she had not yet filed a petition for review on June 24, 2004, less than 40 days had passed since the issuance of this Court's opinion on *_____].

As a preliminary matter, habeas corpus is available to petitioner as a vehicle for addressing petitioner's *Blakely* claims. It is well-established that a defendant may use habeas corpus to obtain relief based on a change in the law. (*In re Harris* (1993) 5 Cal.4th 813, 841.) As *Blakely* indisputably constitutes a change in the law, habeas is available to petitioner.

As petitioner's case was still pending on direct appeal at the time *Blakely* was decided, the claim is cognizable and reviewable by this Court. Consistent with *In re Spencer* (1965) 63 Cal.2d 400, habeas corpus in this Court is proper for adjudication of petitioner's claims because (1) petitioner had no opportunity to raise the constitutional issue of *Blakely v. Washington* at trial and on appeal and (2) his case had not yet become final as to the U.S. Supreme court prior to the time it rendered its decision in *Blakely*.

In *Spencer*, the California Supreme Court held that the defendant could pursue a habeas corpus in a collateral attack on the validity of his conviction on *Escobedo v. Illinois* (1964) 378 U.S. 478 grounds (i.e., that he suffered an

unconstitutional deprivation of his right to counsel during his interrogations by the police) where his conviction had not yet become final as to the U.S. Supreme court when the high court rendered its decision in *Escobedo*.

Spencer reasoned:

Under the United States Supreme Court's view of finality, federal habeas corpus will therefore be available to review petitioner's judgment. (See *Fay v. Noia* (1963) 372 U.S. 391, 438.) Whether or not we are compelled to afford defendants a comparable state collateral remedy (*Case v. Nebraska* (1965) 381 U.S. 336; *Henry v. Mississippi*, 379 U.S. 443; *In re Shipp* (1965) 62 Cal.2d 547, 553 fn. 2; 76 Harv.L.Rev. (1963) 1253, 1269), the availability of the federal remedy makes its pointless for us to refuse to do so, when, as in this case, defendant is entitled to a new trial on the issue of penalty. Moreover, the grant of state collateral relief in these circumstances accords with our traditional habeas corpus rules. This court normally affords collateral relief on constitutional grounds if the petitioner had no opportunity to raise the constitutional issue at trial and on appeal. (See *In re Dixon* (1953) 41 Cal.2d 756, 760-761; *In re Shipp, supra*, 62 Cal.2d 547, 551-553. Petitioner had no such opportunity when, as in this case, the new constitutional right had not been declared at those times. (See *People v. Hillery* (1965) 62 Cal.2d 692, 711-712; *People v. Kitchens* (1956) 46 Cal.2d 260, 262-263.)

(*In re Spencer, supra*, 63 Cal.2d at pp. 405-406.)

Petitioner's procedural posture is like that of the defendant in *Spencer*. Here, as in *Spencer*, petitioner had no opportunity to raise the constitutional issue (in this case, *Blakely* error) at trial and on appeal, and his case had not yet become final as to the U.S. Supreme Court prior to the time the high court rendered its decision (*Blakely*).

Since *[the petition for review in this case was still pending on June 24, 2004 (the date *Blakely* was filed),] **OR** [on June 24, 2004, the California

Supreme Court had already denied of his/her petition for review on * _____
__ (NOTE: on or after March 26, 2004),] OR [(NOTE: where petition for
review not yet filed on June 24, 2004) less than 40 days had elapsed since
the issuance of this Court’s opinion on * _____,] petitioner had no
“realistic opportunity” to raise the claim on direct appeal because a claim
under *Blakely* was not available “at the time the appeal was briefed and
argued.” (*People v. Treloar* (1966) 64 Cal.2d 141, 143, *In re Varnum* (1966)
63 Cal.2d 629, 631.)

For the foregoing reasons, petitioner’s *Blakely* claims are cognizable
and reviewable on state habeas and are presented to this Court in the first
instance.

**F. There Was No Waiver or Forfeiture of the Issue for Lack of
Objection to the *Blakely* Error**

Lest it is argued otherwise, the *Blakely* error here is not waived for lack
of objection under *People v. Scott* (1994) 9 Cal.4th 331, 352- 353, for several
reasons.

First, it is well-established that *Scott* does not apply where, as here, the
error affects the substantial rights of the defendant. The California Supreme
Court has held that a claim, such as petitioner’s here, asserting a denial of the
constitutional right to jury trial, is an error affecting the substantial rights of
the defendant and is, therefore, not waived for lack of objection. (*People v.*
Saunders (1993) 5 Cal.4th 580, 589, fn. 5 [“Defendant’s failure to object also
would not preclude his asserting on appeal that he was denied his
constitutional right to a jury trial. [Citations.]”]; accord *People v. Valladoli*
(1996) 13 Cal.4th 590, 606; *People v. Vera* (1997) 15 Cal.4th 269, 276 -277.)

Statutory bases to review the issue also exist under section 1259, which, in relevant part, provides: “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 . . . and which affected the substantial rights of the defendant.”

Under decisional and statutory authority, then, the denial of petitioner’s Sixth Amendment right to a jury trial on aggravating factors necessary to expose him to an upper term affected his substantial rights, and therefore preclude application of *Scott* to petitioner’s case.

Second, as general matter, since the error constitutes an unauthorized sentence—an exception to the waiver doctrine as discussed in *People v. Scott*, *supra*, 9 Cal.4th 331—no waiver of the issue results from an omission to object. As already discussed, the trial court had no authority to impose the upper term under these circumstances. *Blakely*, itself, expressly holds such a sentence is unauthorized: “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,’ [citations] and the judge exceeds his proper authority.”

Third, where, as here, the claim is based on a significant supervening change in the law, the California Supreme Court has allowed review of the unraised claim: “Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]” (*People v. Turner* (1990) 50 Cal.3d 668, 703; *Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, 20

[barring point on appeal would have “unfairly penalize[d]” petitioner for a “lack of extrasensory perception”].)

Until June 24, 2004, California decisional and statutory authority plainly provided only judicial factfinding for all aggravating factors under a preponderance standard. (See Cal. Rules of Court, rule 4.420(b).) Before that time, defendants had no right to a jury trial employing a standard of proof beyond a reasonable doubt of aggravating circumstances. *Blakely* plainly represents a sea change; it would be entirely unreasonable to expect trial counsel to have anticipated it. (*Turner, supra*, 50 Cal.3d at p. 703; *Clemens v. Regents of University of California, supra*, 8 Cal.App.3d at p. 20.)

Accordingly, the *Scott* waiver doctrine does not apply to this case.

CONCLUSION

The facts alleged in this petition—as supported by the trial record—establish, if taken as true, a prima facie case for relief. Consequently, this court should issue a show cause order and direct the People to file a return. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

Ultimately, moreover, the constitutional lapses described in this petition, alone or together with the impact of the errors challenged in the direct appeal (see, generally, *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, & fn. 15), entitle petitioner to the issuance of the writ of habeas corpus and the reversal of petitioner’s sentence. At a minimum, however, the California Supreme Court’s expeditious grant of review in *People v. Towne* (S125677) (see fn. 1 at p. 7, *ante*)—less than three weeks after the *Blakely* decision—demonstrates the importance of *Blakely* to this case, compelling not merely the ordering of informal briefing, but briefing on the merits.

Dated: * _____, 2004

Respectfully submitted,

* _____
Attorney for Petitioner