

CASE NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF)
CALIFORNIA,)
)
Plaintiff and Respondent,) Case No. B186622
)
v.) Los Angeles Sup Ct.
) Case No. SA056090-01
)
LANDU MICHAEL MVUEMBA,)
)
Defendant and Petitioner.)
_____)

—
PETITION FOR REVIEW

**Petition from an Unpublished Decision of
the Second District Court of Appeal, First
Division, After a Judgment of Conviction from the
Los Angeles Superior Court**

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By appointment of the Court
of Appeal under the California
Appellate Project Independent
Case System

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

Petitioner LANDU MICHAEL MVUEMBA

("Petitioner") hereby petitions this honorable
Court for review pursuant to the California Rules
of Court, Rules 28 and 29.

STATEMENT OF THE CASE

Following a jury trial, Petitioner was
convicted of rape, sodomy, attempted forcible oral
copulation, and committing a lewd act on a child.
(Pen. Code, §§ 261, subdiv. (a)(2); 286, subdiv.
(c)(2); 664; 288a, subdiv. (c)(2); 288, subdiv.
(c)(1).) Petitioner admitted both a "strike"
prior and a prison prior.

He was sentenced to a total determinate term of 45 years, four months, as follows:

As to Counts 3 and 4, Petitioner was sentenced to two consecutive upper terms of 8 years, both doubled to 16 years, pursuant to sections 1170.12 and 667, subdivisions (b)-(i), for a total of 32 years. As to Count 5, the court sentenced Petitioner to a consecutive mid-term of 3 years, doubled to 6 years, pursuant to sections 1170.12 and 667, subdivisions (b)-(i). Finally, as to Count 6, the court sentenced Petitioner to one-third of the mid-term, or 8 months, doubled to 16 months, pursuant to sections 1170.12 and 667, subdivisions (b)-(i). The court ordered that this term, too, be served consecutively.

Petitioner was further sentenced to a consecutive 5 year term, pursuant to section 667, subdivision (a)(1) for the prior serious felony conviction, and a consecutive 1 year term, pursuant to section 667.5, subdivision (b), for the prior prison term.

Petitioner timely appealed. On or about November 30, 2006, the Second District Court of Appeal, Division One, issued an unpublished opinion in which it affirmed the judgment in all respects. (A copy of the court's opinion is

appended to this petition as Exhibit "A"
[hereafter Opinion at p.____.]

This Petition follows.

ISSUES PRESENTED

This case presents the related issues of whether the trial court erred by imposing the upper terms as to Counts 3 and 4, aggravating Petitioner's sentence as to Counts 3 and 4 pursuant to section 667.6, and imposing consecutive terms as to all counts, based upon judicial fact-finding as opposed to facts submitted to and found true by a jury. The Court of Appeal rejected Petitioner's arguments based upon *People v. Black* (2005) 35 Cal.4th 1238. (Opinion, at pp. 3-4.) In relation to this issue, Petitioner urges this Court to now grant review to reconsider its decision in *Black*. Petitioner also makes this argument in an effort to preserve it for subsequent federal review in light of the pending case of *People v. Cunningham* (Apr. 18, 2005, A103501) cert. granted sub. nom. *Cunningham v. California* (2006) ____ U.S. ____.

STATEMENT OF FACTS

The facts are generally set forth in the Opinion, at pp. 2-3. Additional facts necessary

for consideration of the case are set forth within
the argument below.

I.

**REVIEW SHOULD BE GRANTED TO RESOLVE
THE ISSUE OF WHETHER PETITIONER WAS
UNCONSTITUTIONALLY SENTENCED TO AGGRAVATED
TERMS AS TO COUNTS 3 AND 4.**

A. INTRODUCTION.

When the prosecution filed the Information in this case, listed therein were several allegations of "aggravating factors" pursuant to the California Rules of Court, Rules 4.421 and 4.425. During one of the initial pre-trial hearings, the prosecutor indicated these were alleged pursuant to the requirement of *Blakely* that if we proceed to trial and I have to prove circumstances in aggravation, I intend to argue that I want the high terms of the sentence." Judge O'Neill responded, "The *Black* decision seems to suggest that you don't need to do that." The prosecutor indicated she was not sure of that, so she put the allegations in the Information "in an abundance of caution." The court replied, "You can do that, but whether or not that gets addressed to the jury with the charges and the like, if it went to me, I would just inform them there are other issues."

Ultimately, the case was, in fact, assigned to Judge O'Neill for trial. When the case was submitted to the jury for deliberations, the

aforementioned allegations of aggravating circumstances were not mentioned in any of the jury instructions.

At the sentencing hearing in this case, the court sentenced Petitioner as follows:

On Counts 3 and 4, the court will sentence pursuant to Penal Code, Section 667.6(c) because I find that the victim was particularly vulnerable.

She was developmentally disabled, and her condition was readily apparent to anyone, especially Mr. Mvuemba, and the crimes involved a high degree of callousness.

On Count 3, a violation of 261(a)(2) of the Penal Code, forcible rape, you'll be sent to state prison. The high term for that charge is eight years.

I will impose the high term finding in aggravation that there is evidence of planning by taking the victim to a more remote, secluded location to accomplish this sexual assault.

I don't find any factors in mitigation. The high term of eight years will be doubled pursuant to 1170.12(a) through (d) and 667(b) through (i) for the prior terms in prison you admitted for a total term of 16 years.

That is to be served consecutive to all charges. On Count 4, forcible sodomy in violation of 286(c)(2), I will impose the upper term of eight years finding in aggravation at the time of this particular offense you were on parole.

I'm finding no factors in mitigation. That as well will be doubled pursuant to 1170.12(a) through (d) and 667(b) through (i), and that will be served consecutively to all other counts.

On Counts 5 and 6, I will sentence pursuant to Penal Code section 1170.1(a). On Count 5, attempted forcible oral copulation in violation of 664 and 288(a)(c)(2), I will impose the mid-term. The mid-term is three years. That will be doubled pursuant to 1170.12(a) through (d) and 667(b) through (i) for a total term of six years.

This will be ordered to be served consecutively to all counts because it was a separate act of violence towards the victim and in order to accomplish this act, you supplied the victim with alcohol and marijuana to accomplish your goals.

On Count 6, a violation of 288(c)(1), I will impose one-third the mid-term. That is eight months. That will be doubled pursuant to 1170.12(a) through (d) and 667(b) through (i) for a total term of one year and four months to be served consecutively to all other counts because, again, this is a separate act of violence against the victim.

.

In addition and consecutive to all these terms, you'll receive five years for the 667(a)(1) prior which you admitted, and you'll receive one year for the 667.5(b)(1) prior for which you admitted for a total term of 45 years and four months in prison.

The trial court's imposition of an aggravated sentence as to Counts 3 and 4, based upon its own judicial factfinding, violated Petitioner's constitutional rights to due process and a jury trial under the 5th, 6th and 14th Amendments to the United States Constitution, and parallel California constitutional provisions. (*Apprendi v. New Jersey, supra*, 530 U.S. at 490; *accord, United States v. Booker* (2005) 543 U.S. 220, ___ [125 S.Ct. 738]; *Blakely v. Washington* (2004) 542 U.S. 296.)

B. The Imposition of the Upper Terms as to Counts 3 and 4 Violated Petitioners Sixth Amendment Right to A Trial By Jury and his Fourteenth Amendment Right to Due Process of Law.

In *Blakely*, the United States Supreme Court made it abundantly clear, once and for all, that courts may not make upward departures in sentencing from statutorily enumerated mid-terms for criminal offenses based upon facts that are not both alleged in an Information, and found true by a jury beyond a reasonable doubt. This proposition stems from the rule expressed in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490: "[o]ther 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."

Petitioner acknowledges that, in *People v. Black* (2005) 35 Cal.4th 1238, the California Supreme Court recently upheld California's sentencing scheme after numerous challenges were brought under *Blakely*. While *Black* is controlling at this time within the California courts, there is currently no opinion from the United States Supreme Court¹ on whether *Black* can be reconciled with the *Blakely* opinion. Petitioner respectfully submits it cannot, and asks this Court to follow the plain language of *Blakely*, consistent with Justice Kennard's dissenting opinion, as well as a recent case published in New Jersey, by the name of *State v. Natale* (N.J. 2005) 184 N.J. 458, 482 [878 A.2d 724].)

In *Natale*, the New Jersey Supreme Court evaluated its own sentencing scheme, which is similar to that of California insofar as it provides for presumptive terms of imprisonment, while allowing for upward departures based upon additional judicial factfinding. The Court noted

¹ This issue is currently pending before the United States Supreme Court in *Cunningham v. California* (No. 05-6551), cert. grtd., U.S. (Feb. 21, 2006).

that "[c]ourts in states with sentencing schemes similar to our own have reached varying conclusions regarding the impact of *Blakely*, *supra*, and *Booker*, *supra*, on presumptive sentencing." (*State v. Natale*, *supra*, 184 N.J. 458, 482 [878 A.2d 724].)

Specifically with regard to *Black*, the New Jersey Supreme Court stated: "We reject the California approach because it appears to be in direct conflict with *Blakely*" (*Id.* (citing *Blakely v. Washington*, *supra*, 542 U.S. at , n.8; 124 S.Ct. at 2538, n.8 ("*Whether the judicially determined facts **require** a sentence enhancement or merely **allow** it, the verdict alone does not authorize the sentence.*")

Another state with a recent opinion in the area, Maine, is also in line with New Jersey and thus contrary to California. (*State v. Schofield* (Me. 2005) 876 A.2d 43, 48-51.) Thus, at least two other courts in the nation have recognized the reasoning set forth in *Black* was in error.

The sentencing scheme enacted by the California Legislature is clear: "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.” (Pen. Code, § 1170, subd. (b) (emphasis added).) Even the *Black* Court had to concede “[t]he mandatory language of section 1170, subdivision (b) does provide some support for defendant’s position.” (*People v. Black*, 35 Cal.4th at 1254.)

Consequently in California, a trial judge **must** impose no more than the midterm, unless circumstances in aggravation warrant an upward departure from the midterm. In other words, the presumptive maximum term of imprisonment that may be imposed based solely on a jury’s guilty verdict is the middle term. A judge may not impose an upper term unless he makes specific findings of the existence of additional aggravating factors. Thus, all by itself, with no circumstances in aggravation, a bare conviction for the offense alone in California permits no more than a midterm determinate sentence. The court in *Black* agreed: “[I]n a case in which no . . . aggravating factor can be found, the judge cannot impose the upper term.” (*Id.* at 1260 (emphasis added).)

Does this invoke the principles of *Apprendi*? Absolutely. And *Blakely* provides support for this proposition: “[T]he ‘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." (*Blakely v. Washington*, 542 U.S. at 303 [italics in original].) In California, as discussed above, "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (*Id.* (italics in original)) is the midterm.

The discussion should begin and end there: The presumptive midterm is the only sentence that conforms to *Blakely*, absent a charge and jury finding of whatever facts a sentencing judge wishes to use to impose a sentence greater than the midterm. The reasoning in *Black* is simply erroneous. The "mandatory" nature of section 1170, subdivision (b) invokes *Apprendi*. (See, *Booker, supra*, 543 U.S. at ____ [125 S.Ct. at p. 750].)

As a result, Petitioner asks that this case be remanded for resentencing, with directions that the base terms as to Counts 3 and 4 be reduced to the respective mid-terms for those offenses.

II.

REVIEW SHOULD BE GRANTED TO RESOLVE THE ISSUE OF WHETHER PETITIONER'S RIGHTS TO DUE PROCESS AND A JURY TRIAL WERE VIOLATED WHEN THE TRIAL COURT AGGRAVATED HIS SENTENCE PURSUANT TO SECTION 667.6 AFTER MAKING SPECIFIC FACTUAL FINDINGS, NONE OF WHICH WERE SUBMITTED TO, OR FOUND TRUE BY, THE JURY.

A. INTRODUCTION.

Petitioner incorporates here by reference the factual discussion contained in part I.A., above. He contends it was error for the court to sentence him pursuant to section 667.6 to full, separate and consecutive terms as to Counts 3 and 4, under the authority of *Apprendi v. New Jersey* (2000) 530 U.S. 466, and its progeny.

B. Utilization of Section 667.6 to Effect Upward Sentencing Departures from the Statutory Maximum Sentence Set forth Under Section 1170.1, Without Requisite Jury Findings of Fact, Violates a Criminal Defendant's Sixth Amendment Right to a Jury Trial.

Section 1170.1 provides where a criminal defendant is convicted if two or more felonies, and consecutive terms are imposed, the sentence shall generally consist of a principal term, one or more subordinate terms and any applicable enhancement terms. The section further provides that all subordinate terms are to be calculated as

one-third of the middle term for the underlying offense. (Pen. Code, § 1170.1, subd. (a).)

Section 667.6, on the other hand, provides for the imposition of full, separate and consecutive terms for each subordinate term for certain enumerated sex offenses, "in lieu of the term provided in section 1170.1." (Pen. Code, §§ 667.6, subdivs. (c) and (d).) Under subdivision (d), the imposition of full, separate and consecutive sentences is mandated where the crimes involve separate victims or the same victim on "separate occasions." (Pen. Code, § 667.6, subd. (d).) Imposition of full, separate and consecutive sentences under subdivision (c) rests within the court's discretion, but the court is required to first make specific factual findings justifying a departure from the sentencing scheme proscribed by section 1170.1. (*People v. Belmontes* (1983) 34 Cal.3d 335, 347-348.) In either case, the aggravated sentence depends upon a judge's factual findings, none of the allegations of which are submitted to a jury.

Petitioner incorporates by reference here his discussion above of *Blakely v. Washington, supra*, 542 U.S. 296, and the related authorities cited. The full, separate and consecutive terms imposed as to Counts 3 and 4 are unconstitutional for the

same reasons the imposition of upper terms as to these same two counts was unconstitutional, as detailed above. Under the rationale of *Apprendi* and *Blakely*, imposition of an aggravated sentence under 667.6 violated Petitioner's Sixth Amendment right to have a jury determine every fact essential to his sentence.

Consequently, Petitioner respectfully requests that his case be remanded to the trial court with directions that the terms imposed pursuant to section 667.6 be stricken, and that he be sentenced pursuant to section 1170.1.

III.

REVIEW SHOULD BE GRANTED TO RESOLVE THE ISSUE
OF WHETHER PETITIONER WAS UNCONSTITUTIONALLY
SENTENCED TO CONSECUTIVE TERMS OF IMPRISONMENT
AS TO COUNTS 3, 4, 5 and 6

A. Factual Background.

Petitioner was sentenced under section 669 to consecutive terms as to all Counts. The court utilized the aggravating factors set forth above, in part I.A., to impose this consecutive sentence, as opposed to a concurrent term. This too, was unconstitutional, under *Apprendi* and *Blakely*.

B. California's Sentencing Laws, Which Allow for the Imposition of a Consecutive, Rather than a Concurrent Term for Criminal Offenses, Upon a Judge's Factual Findings Which Are Not Reflected in the Jury's Verdict, Are Unconstitutional.

Penal Code section 669 provides that in the absence of special findings by the trial judge, sentences for two or more felonies shall run concurrently. (Pen. Code, § 669.) The rule implementing that statute is California Rules of Court, rule 4.425.

Based on these rules, in order to sentence consecutively rather than concurrently, the trial judge has to find one or more of the factors listed in rule 4.425. None of these factors are presented to or found true beyond a reasonable doubt by a unanimous jury. Consecutive sentencing is an enhanced sentencing power reserved solely for the trial judge based on factors beyond those authorized by the jury verdict alone. As such, the consecutive sentencing scheme in California fails the *Apprendi* test as explained in *Blakely* and thus violates the Sixth Amendment right to a jury trial. For these reasons, Petitioner's consecutive sentences imposed pursuant to section 669 and Rule 4.425 of the California Rule of Court are unconstitutional.

IV.

CONCLUSION

For all these reasons, Petitioner LANDU MVUEMBA respectfully requests this Court now grant review as to the aforementioned important issues of law.

DATED: _____ Respectfully submitted,

By: _____
Stephen Temko, Esq.
Attorney for Petitioner
LANDU MVUEMBA

RULE 33(B)(1) CERTIFICATION

Pursuant to the California Rules of Court,
Rule 33, subdivision (b)(1), I hereby certify that
the foregoing brief contains 2,992 words,
exclusive of tables, indices, covers and proof of
service.

DATED: _____

Stephen Temko