

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, [leave blank, clerk will fill in]

[appellant's name],

Petitioner

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For a Writ of Certiorari to the California Court of
Appeal, First Appellate District, Division **XXXXX**

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the Court, in *Booker v. United States*, ___ U.S. ___, 160 L. Ed. 2d 621, 125 S.Ct. 738 (2005), retreated from the bright-line rule established in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d, 124 S.Ct. 2531 (2004), such that there is no constitutional right to a jury trial for fact-finding necessary to impose an aggravated sentence in a state sentencing scheme identical in relevant respects to the Washington scheme at issue in *Blakely*?

Parties to the Proceedings

The parties to the proceedings in the California Court of Appeal included the State of California and petitioner _____. There are no parties to the proceedings other than those named in the petition.

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On Petition For a Writ of Certiorari to the California Court of
Appeal, First Appellate District, Division [_____]

PETITION FOR WRIT OF CERTIORARI

The petitioner, [appellant's name here], respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, filed on [date].

Opinions Below

The unpublished opinion of the California Court of Appeal, which is the subject of this petition, was filed on [date], and is

attached as Appendix (App.) A. The California Supreme Court's one-page order denying review is attached as Appendix B. The transcript of the sentencing hearing is attached as Appendix C.

Jurisdiction

The decision of the California Court of Appeal to be reviewed was filed on [date]. The California Supreme Court denied discretionary review on [date]. This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257(a).

Constitutional and Statutory Provisions Involved

A. Federal Constitutional Provisions

The Sixth Amendment of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed

The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law"

B. State Statutory Provisions

Subdivision [____] of section [_____] of the California Penal Code provides:

[insert relevant text of statute defining offense, including penalty]

[If the offense statute merely states that the punishment is “state prison,” add the following optional paragraph:

Section 19 of the California Penal Code provides, in pertinent part:

Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years

Subdivision (b) of Section 1170, of the California Penal Code provides, in pertinent part (emphasis added):

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. ...** In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not

impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.

C. California Rules of Court

Relevant California Rules of Court are attached as appendix D, including:

- Rule 4.401. Authority
- Rule 4.405. Definitions
- Rule 4.406. Reasons
- Rule 4.408. Criteria not exclusive; sequence not significant
- Rule 4.409. Consideration of criteria
- Rule 4.420. Selection of base term of imprisonment
- Rule 4.421. Circumstances in aggravation
- Rule 4.423. Circumstances in mitigation

Statement of the Case

On [date], the prosecutor filed in [insert name of county] County Superior Court an information charging petitioner, [appellant's name], with [identify offense(s) here], a violation of California Penal Code section [____]. Clerk's Transcript ("CT") ____.¹

On [date], appellant pleaded guilty to the violation of section [____]. CT xxxxx.

¹ The "Clerk's Transcript" is the record on appeal filed in the California Court of Appeal.

At the [date], sentencing hearing, the superior court found true [insert number of aggravating factors here] aggravating factors: [list aggravating factors here]. The court also found true [insert number of mitigating factors here] mitigating factor: [list mitigating factors here]. The Court then sentenced appellant to the upper term of [length of sentence] years. App. C. On [date], appellant filed a timely notice of appeal.

In the state court of appeal, appellant, citing the Fifth and Sixth Amendments and this Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004) argued that the judicial fact-finding at sentencing violated his federal constitutional rights to a jury trial and proof beyond a reasonable doubt.

The California Court of Appeal, rejected petitioner's argument and affirmed his sentence. App. A _____. The court agreed with the state that the California Determinate Sentencing Law ("DSL") is distinguishable from the sentencing schemes in Washington and the federal sentencing guidelines and that there is no constitutional right to a jury trial on facts used to impose the upper term. App. A _____.

Appellant petitioned for discretionary review by the California Supreme Court. On [date], that court denied review in an order stating [insert text of order denying review, such as “denied without prejudice to any relief to which defendant might be entitled after this court determines in *People v. Black*, S126182, and *People v. Towne*, S125677, the effect of [*Blakely*] on California law”]. App. B.

On June 20, 2005, the California Supreme Court issued its opinion in *People v. Black*, 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (Cal. 2005), holding that there is no federal constitutional right to a jury trial on fact-finding relating to aggravating factors used to impose the upper term under California's Determinate Sentencing Law. The Court also held that there is no right to a jury trial on fact-finding used in the decision to impose sentences consecutively – a matter not at issue in this case. (The *Towne* case has not been calendared for oral argument; the Court will likely either dismiss review in that case or return it to the state Court of Appeal for reconsideration in light of *Black*.)

* * * *

Reasons for Granting the Writ

Review Is Necessary to Resolve Whether there is a Right to a Jury Trial and Proof Beyond a Reasonable Doubt on Aggravating Facts Necessary to Impose an Aggravated Sentence in a Sentencing Scheme Identical in Relevant Respects to the Washington Scheme at Issue in *Blakely*.

A. Introduction

Review is necessary so that this Court can reaffirm what it said in *Blakely*. In *Blakely*, this Court explicitly applied a “bright-line rule” to answer the question whether there is a right to a jury trial on facts necessary to impose a sentence higher than the statutory maximum. *Blakely*, 124 S.Ct. at 2540. Some courts – the California and Tennessee high courts in particular – perceived a retreat from that bright line in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), emboldening them to conclude that any judicial discretion may take a sentencing scheme outside of the ambit of *Blakely*. Other courts have applied the bright line rule, including the New Jersey Supreme Court which has recently expressly rejected the California interpretation of *Blakely* and *Booker*. *State v. Natale*, ___ N.J. ___, ___ A.2d ___, 2005 WL 1802084, slip op. at 26-27 (N.J. Aug. 2, 2005). Review by this Court is necessary to resolve this split.

Review is also appropriate because California's decision in *Black* is simply wrong on the law. In fact, the approach taken by the California Supreme Court was one advocated by the State of Washington in *Blakely* and rejected by this Court. California's sentencing scheme unconstitutionally permits judicial fact-finding – upon proof by a preponderance of the evidence – of facts necessary to impose the aggravated (upper) term sentence. California's scheme so clearly falls within the rule of *Apprendi v. New Jersey*, 530 US 466 (2000) and *Blakely* that full briefing on the merits may not be required for this Court to review the *Black* decision.

Finally, the issue is of great significance for an enormous number of cases. The constitutionality of the core of California's determinate sentencing scheme is at issue. While some defendants convicted of third strikes, murder, or some serious sex offenses receive indeterminate terms, the vast majority of California felony defendants are sentenced under the determinate sentencing law at issue in *Black*.

This case provides an excellent opportunity for resolving the question presented. This case, unlike the *Black* case itself, involves

only aggravating factors related to the commission of the current offense: _____ and _____. This case is thus unencumbered by the complexity of recidivist-related aggravating factors that might be covered by the exception to the right to a jury trial identified in *Almendarez-Torres v. United States*, 523 US 224 (1998). This case, also unlike *Black*, does not involve aggravating factors which were actually found true by the jury.

B. California’s Sentencing Scheme and the *Black* Decision

Before describing the evolving split among the state courts, petitioner will first describe California’s sentencing scheme and the *Black* decision.

1. *California’s Determinate Sentencing Law (DSL)*.

Under the DSL, judges may sentence defendants in California to one of three possible determinate terms – mitigated (lower), presumptive (middle), or aggravated (upper). Each statute defining an offense either states the applicable triad of terms expressly, or provides for a commitment “to state prison,” in which case the applicable triad is 16 months, two years, or three years in state prison. Cal.Pen.Code § 18. The statute defining [name offense(s) of conviction] – the offense involved in both this case – provides that a

defendant guilty of the offense [quote statutes penalty here, e.g. “shall be punished by imprisonment in the state prison for a term of __, ____, or ____ years.” Cal.Pen.Code § ____.

The maximum sentence a judge may impose without additional fact-finding is the middle term: “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.” Cal. Pen. Code § 1170(b) (emphasis added).

The California Rules of Court provide a list of enumerated aggravating circumstances (rule 4.421), but the list is not exclusive and a court may rely upon a non-enumerated circumstance “reasonably related” to the sentencing decision. Cal.R.Ct. 4.408(a); see e.g., *People v. Garcia*, 209 Cal.App.3d 790, 794-95, 257 Cal.Rptr. 495, 497-98 (1989). The court must make explicit factual findings. Cal.Pen.Code § 1170(c); rule 4.420(e). Facts in aggravation are established by a preponderance of the evidence. Cal.R.Ct. 4.420(b). A fact which is either an element of the underlying offense or an element of a statutory enhancement may not be used as a factor in aggravation. Cal.Pen.Code § 1170(b) (enhancements); Rule 4.420(d)

(elements); *People v. Scott*, 9 Cal.4th 331, 350, 885 P.2d 1040, 1051, 36 Cal.Rptr.2d 627, 638 (1994) (elements). Consequently, an upper term necessarily requires findings beyond the minimum elements of the conviction offense.

California's Penal Code also contains statutory sentencing enhancements for certain current offense related conduct, such as being armed with a deadly weapon or firearm, personal use of a firearm, or infliction of great bodily injury. See e.g. Cal.Pen.Code §§ 12022, 12022.5, 12022.7. Other statutes provide for enhancements based on the defendant's status, such as having prior "strike" convictions, having served a prior prison term, or being on bail at the time of the offense. Cal.Pen.Code §§ 667(a)-(i), 667.5, 12022.1. The terms for such enhancements can be fixed terms imposed consecutive to the base term (lower, middle or upper) selected for the underlying offense (e.g. § 12022.7), may have its own triad to select from (§ 12022.5), or may require an indeterminate term for the underlying offense (three strikes law). Unlike the aggravating and mitigating circumstances which are found by the judge under California law, there is a state statutory right to a jury trial on the

just-described current-offense and status enhancements. See e.g. Cal. Pen. Code § 1170.1(e).

2. *In Black, the California Supreme Court Found the DSL Constitutional.*

In its 6-1 decision in *People v. Black*, 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (2005), the California Supreme Court repeatedly acknowledged that, under section 1170(b), an aggravated sentence cannot be imposed in the absence of aggravating factors. *Black*, 29 Cal.Rptr.3d at 750, 755. And the court conceded that “[t]he mandatory language of section 1170, subdivision (b), does provide some support for defendant’s position.” *Id.* at 750.

Such concessions would seem to necessarily lead to the conclusion that the middle term 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*, 124 S.Ct. at 2537 (emphasis in orig.). But the California Supreme Court found otherwise, deeming the DSL to be outside of *Blakely*. The California Supreme Court found the scheme constitutional by looking to factors other than whether the jury’s verdict or defendant’s admissions themselves authorized the sentence. Under the California Supreme Court’s

analysis, the core question is whether a judge has “traditionally” exercised discretion in making the sentencing choice at issue, and the determination of whether judicial discretion is “traditional” is resolved by considering such matters as the “context” of the discretion and whether the legislature intended to shorten sentences when it enacted the DSL. *Id.* at 749, 751, 752, & fn. 12.

The court put great weight on the degree of judicial discretion in the California sentencing scheme, emphasizing that the list of possible aggravating factors is not exhaustive and that the judge has considerable discretion in deciding whether the upper term is warranted. *Id.* at 752, 755, 756. The *Black* court also turned to this Court’s “most recent clarification in *Booker* of the rationale underlying the *Apprendi* and *Blakely* decisions” to justify its departure from *Blakely*’s clear statement that the use of an illustrative, rather than an exhaustive, list of aggravating factors does not determine whether there is a right to a jury trial. *Id.* at 752, n.12. The court, in *Black*, also emphasized that the fact-finding involved was traditionally judicial. *Id.* at 750; see also 751 and 753.

Perhaps most illuminating, the court in *Black* concluded this court's "precedents do not draw a bright line." *Id.* at 755. This, perhaps, is what emboldened the state supreme court to find the scheme constitutional, despite the requirement of an aggravating factor before an upper term sentence can be imposed.

C. The State Courts are Split on the Question of Whether Judicial Discretion Distinguishes a State Sentencing Scheme from *Blakely* and whether *Booker* Represented a Retreat from the Bright Line Drawn in *Blakely*.

There is a split among the state courts interpreting this Court's decisions in *Blakely* and *Booker*. Not only has the New Jersey Supreme Court expressly rejected the reasoning of *Black*, but several other states have perceived and applied a bright-line rule under which the Sixth and Fourteenth Amendments are necessarily violated when a judge finds facts which authorize a sentence longer than the maximum authorized by the jury's verdicts or defendant's admissions. (Arizona, Colorado, Minnesota, New Jersey, North Carolina, Indiana, Oregon.) Other states, however, find no such bright line and have concluded that such fact-finding is constitutional when conducted within a scheme characterized by broad judicial sentencing discretion. (California, Hawaii, Tennessee.)

The latter group tends to find support in *Booker* – particularly the unanimous view of the Court that a sentencing scheme in which the federal sentencing guidelines would be wholly advisory would be constitutional. (Several of the states discussed have enacted *Blakely*-fix legislation. The statutes cited below and cited in the state cases cited are the versions in effect prior to the amendments.²)

The Supreme Courts of Arizona, Colorado, Minnesota, New Jersey, North Carolina, Indiana, and Oregon have all invalidated (or limited the application of) sentencing schemes which are, in relevant respects, indistinguishable from California's and Washington's.

Those states all have schemes in which there is a presumptive sentence (or presumptive range) for each offense. The judge may

² Again, several of the states have enacted *Blakely*-fix legislation. The statutes cited here and in the state cases addressing *Blakely* are the versions in effect prior to any such amendments. Ariz.Rev.Stat. §§ 13-701, 13-702(A), 13-702(C)(21); *Smylie v. State*, 823 N.E.2d 679, 863 (Ind. 2005); Ind.Code Ann. §§ 35-38-1-7.1, 35-50-2-3 to 7; *Lopez v. State*, 113 P.3d 713, 723-725 (Colo. 2005); *State v. Natale*, ___ N.J. ___, ___ A.2d ___, 2005 WL 1802084, slip op. at 28-29 (N.J. Aug. 2, 2005); *State v. Dalziel*, 867 A.2d 1167, 1172-1173, 182 N.J. 494, 503-505 (N.J. 2005); N. J. Stat. Ann. §§ 2C:43-6(a), 2C:44-1(a) and (f)(1); *State v. Allen*, ___ N.C. ___, ___ S.E.2d ___, 2005 WL 1539186 (N.C.); N.C. Gen. Stat. §§ 15A-1340.13(c) and (e), 15A-1340.16(b), (d) and (e), 15A-1340.17(c)(4); *State v. Leja*, 684 N.W.2d 442, 448 (Minn. 2004) (citing Minnesota Sentencing Guidelines II.D.2(b)); Or. Rev. Stat. §§ 137.671, 138.222(2)(a); Or.Admin.R. §§ 213-008-0001, 213-008-0002(1).

exceed the presumptive sentence only upon finding aggravating factors present. The statutory list of aggravating factors is not exclusive (with the exception of New Jersey). In each of these states, whether a judge imposes an aggravated term is discretionary, with the caveat that in Colorado some aggravating facts mandate a sentence in the aggravated range and some permit a sentence in the aggravated range.³ Some of those schemes have even greater discretion than there is in California, as the extent of the departure from the presumptive sentence is also discretionary.⁴ (In California, if the sentence is to be aggravated there is only one choice: the upper term (e.g. _____ years in this case).

Despite such discretion, those state courts all found their schemes unconstitutional or, as in the case of Colorado, limited the

³ Ariz.Rev.Stat. §§ 13-701, 13-702(A), 13-702(C)(21); *Smylie v. State*, 823 N.E.2d 679, 863 (Ind.2005); Ind.Code Ann. §§ 35-38-1-7.1, 35-50-2-3 to 7; *Lopez v. State*, 113 P.3d 713, 723-725 (Colo. 2005); *State v. Natale*, ____ N.J. ____, ____ A.2d ____, 2005 WL 1802084, slip op. at 28-29 (N.J. Aug. 2, 2005); N. J. Stat. Ann. §§ 2C:43-6(a), 2C:44-1(a) and (f)(1); *State v. Allen*, ____ N.C. ____, ____ S.E.2d ____, 2005 WL 1539186 (N.C.); N.C.Gen.Stat. § 15A-1340.13(c) and (e), 15A-1340.16(b), (d) and (e); 15A-1340.17(c)(4); Or. Rev. Stat. 137.671; Or. Rev. Stat. 138.222(2)(a); Or.Admin.R. §§ 213-008-0001, 213-008-0002(1).

⁴ See e.g. Ariz.Rev.Stat. § 13-702(A); Colo. Rev. Stat. § 18-1.3-401(6).

application of the aggravated-sentence statutes to *Blakely*-compliant factors (admitted by defendant, found true by jury, or jury waived by defendant) and *Blakely*-exempt factors (i.e. recidivist-based). *State v. Brown*, 209 Ariz. 200, 99 P.3d 15, 18 (2004); *Lopez v. State* 113 P.3d at 729, *Smylie*, 823 N.E.2d at 684-85 (Ind.); *State v. Shattuck*, 689 N.W.2d 785 (Minn. 2004) (*per curiam*); *Natale*, ____ A.2d at ____, slip op. at 30; *Allen*, 2005 WL 1539186 at *6-*9; *State v. Dilts*, 337 Or. 645, 103 P.3d 95, 99 (2004). In Arizona, North Carolina and Oregon, the state attorneys general even agreed that their respective sentencing schemes were constitutionally defective. *Brown*, 209 Ariz. at 203, 99 P.3d at 18; *State v. Allen*, 2005 WL 1539186, New Brief for the State, filed Nov. 24, 2004, at 7⁵; *Dilts*, 103 P.3d at 97. As the Colorado Supreme Court succinctly explained, “the *Blakely* Court effectively rejected any distinction, for the purpose of Sixth Amendment analysis, between mandatory or discretionary aggravated sentencing systems based on judicial fact-finding. Under either system, facts

⁵ Available at <<http://www.ncappellatecourts.org/nclib/efile/1101316181832854219553158/4916.PDF>> (last visited August 2, 2005).

supporting increased sentences are subject to the rule.” *Lopez*, 113 P.3d at 723 (citing *Blakely*, 124 S.Ct. at 2538 n.8).

In contrast, the California, Hawaii and Tennessee Supreme Courts have relied heavily on *Booker* to conclude that judicial discretion takes a sentencing scheme outside of *Blakely*, despite the scheme’s requirement that the judge find an aggravating factor present before imposing an aggravated sentence.

Prior to *Blakely*-fix legislation, Tennessee, like the other states discussed, had a scheme in which there was a presumptive sentence, judicial fact-finding was required to impose an aggravated sentence, and judges were not required to impose the aggravated sentence.⁶ Tennessee, however, allowed for a bit less discretion than the other states because its statutory list of aggravating factors was exclusive.⁷ Despite the Tennessee Attorney General’s concession that the Tennessee scheme was unconstitutional (*Gomez*, 163 S.W.3d at 654) and despite its own recognition that “*Blakely* itself includes language

⁶ *Gomez*, 163 S.W.3d at 648 (citing Tenn. Code Ann. §§ 40-35-105-114 (2003), former § 40-35-210(c) and (d)).

⁷ Former Tenn. Code Ann. § 40-35-114; *State v. Grissom*, 956 S.W.2d 514, 518 (Tenn. Crim. App. 1997).

which can be broadly construed to require the result the defendants seek” (*Id.* at 658), the Tennessee Supreme Court found the Tennessee scheme constitutional in a 3-2 decision. The court emphasized that “*Blakely* must be read in light of *Booker*,” noted *Booker’s* approval of a discretionary/advisory sentencing scheme, and concluded that the scheme was constitutional because “the finding of an enhancement factor does not mandate an increased sentence.” *Id.* at 658, 661; see also *State v. Gomez*, 163 S.W.3d at 672 (Order Denying Petition for Rehearing, Tenn. S.Ct., Filed May 18, 2005) (reiterating that “*Blakely* must be read in light of *Booker*”).⁸

The Hawaii Supreme Court has similarly relied on *Booker* to permit judicial fact-finding in a discretionary scheme, even when the bright-line rule of *Blakely* would seem to apply. In Hawaii, the judge may impose an extended term (up to double the maximum for the non-extended term) upon finding any of six aggravating criteria present and that the extended term “is necessary for protection of

⁸ The Tennessee Attorney General had joined the defendants in petitioning for rehearing in *Gomez*. *Id.*

the public.”⁹ In a 3-2 post-*Booker* decision, the Hawaii Supreme Court recently reaffirmed an earlier decision holding that there is no right to a jury trial on the “necessary for protection of the public” element of an extended term sentence. *State v. Maugaotega*, 107 Haw. 399, 114 P.3d 905 (2005). The Hawaii Supreme Court concluded that the reasoning in *Booker* “essentially erases *discretionary* extended term sentencing schemes such as Hawaii’s from the decision’s purview.” *Id.*, 114 P.3d at 914 (emphasis in orig.); see also *id.* at 915 (“[t]he factor that rendered the federal sentencing guidelines unconstitutional was its mandatory nature”).

The decisions in California, Tennessee, and Hawaii, stand in stark contrast to the other states. In California and Tennessee the state high courts perceived, in *Booker*, some sort of blurring of the bright line drawn in *Blakely*. The Hawaii Supreme Court had never seen that line, but was also emboldened by *Booker*. The California and Tennessee courts, while recognizing that fact-finding beyond the jury’s verdict or defendant’s admission is mandatory before an

⁹ *State v. Rivera*, 106 Haw. 146, 158-160, 102 P.3d 1044, 1056-1058 (Haw. 2004) (citing Haw.Rev.Stat. §§ 707-660, 706-669); Haw.Rev.Stat. § 706-662(1)-(6).

aggravated sentence can be imposed, view their schemes as outside of *Apprendi* and its many progeny because within those schemes there lies judicial discretion in identifying aggravating factors and/or in deciding whether to impose the aggravated term.

In contrast, the Arizona, Colorado, Indiana, Minnesota, New Jersey, North Carolina and Oregon courts, without hesitation, found that similar schemes – involving both discretion in the identifying of aggravating factors and in selecting the ultimate sentence – were unconstitutional. The New Jersey Supreme Court did so while noting the split among the states and expressly rejecting California’s approach, “because it appears to be in direct conflict with *Blakely*.” *Natale*, ____ A.2d at ____, slip op. at 26-27 (*citations omitted*).

Review by this Court is necessary to resolve this split and re-affirm that (1) there is a bright-line test for determining whether there is a right to a jury trial and (2) a sentencing scheme is unconstitutional if it permits judicial fact-finding to increase a sentence beyond that authorized by the jury’s verdict or the defendant’s admissions.

D. Review is Necessary Because the Ruling Below is Wrong.

The state court of appeal's decision in this case and the California Supreme Court's decision in *Black* are contrary to *Apprendi*, *Blakely*, and *Booker*. Because *Black* post-dates the court of appeal decision in this case and is now the controlling authority in California, petitioner below addresses the analysis in *Black*, rather than the court of appeal's decision.

The majority opinion in *Black* framed the critical question of whether the DSL violated the Sixth Amendment as a question of "whether a trial judge's decision to impose an upper term sentence under the California determinate sentencing law involves the type of judicial factfinding that traditionally has been performed by a judge in the context of exercising sentencing discretion or whether it instead involves the type of factfinding that traditionally has been exercised by juries in the context of determining whether the elements of an offense have been proved." *Black*, 29 Cal.Rptr.3d at 749-750 & n. 8. The *Black* opinion, thus, reverts Sixth Amendment jury-trial-right jurisprudence into a state of confusion, in which there is no objectively discernible line between when the jury trial right applies and when it does not. As this Court stated in *Blakely*, the rule

demarcating when the jury trial right is triggered must not be “manipulable” or vulnerable to “subjectivity.” *Blakely*, 124 S.Ct. at 2539, 2540. Specifically, the standard also must not be one that leaves “definition of the scope of jury power up to judges' intuitive sense of how far is *too far*” in allowing judicial fact-finding, or that declares “legislatures may establish legally essential sentencing factors *within limits*.” *Ibid.* (emphasis in orig.).

Even the majority in *Black*, acknowledged that section 1170(b) “is worded in mandatory language.” To avoid the obvious result emanating from that language, the majority in *Black* took the surprising position that “the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable*.” *Black*, 29 Cal.Rptr.3d at 751 (emphasis in orig.). That slim reed cannot support the majority’s weighty conclusion that there is no constitutional right to a jury trial on aggravating factors.

In *Blakely*, this Court held 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 and Fourteenth

Amendments entitle the defendant to jury determination of those additional facts by proof beyond a reasonable doubt. *Blakely*, 124 S.Ct. at 2537. Because the middle term is the presumptive sentence under California's DSL and a defendant may only receive an upper term if "aggravating circumstances" are found (Pen. Code § 1170(b)), the California sentencing scheme for judicial determination of those facts under a preponderance standard suffers from the same constitutional defects as the Washington regime reviewed in *Blakely*. This, in fact, was "the emerging majority view" among the California Courts of Appeal prior to the *Black* decision. *People v. Harless*, 22 Cal.Rptr.3d 625, 645 (6th Dist., 2004), rev. granted by 109 P.3d 68, 26 Cal.Rptr.3d 568 (Cal. 2005). Legal scholars and commentators agree that California's scheme is among those affected by *Blakely*.

D. Berman, *The Roots and Realities of Blakely*, 19 Criminal Justice 5, 6 (ABA 2005); A. Skove, National Center for State Courts, *Blakely v. Washington: Implications for State Courts* (2004); J. Wool and D. Stemen, Vera Institute of Justice State Sentencing and Corrections, *Aggravated Sentencing: Blakely v. Washington Practical Implications for State Sentencing Systems*, Policy and Practice Review (Aug. 2004) 2;

K. Stith, *Crime and Punishment Under the Constitution*, 2004 Supreme Court Review 221, 269 n.17 (2005).

The standard of *Blakely* and *Apprendi* is, in the Court's words, a "bright-line rule". *Blakely*, 124 S.Ct. at 2540. And the Court did not retreat from that standard in *Booker*. As explained in Justice Stevens's majority opinion in *Booker*, the federal sentencing guidelines were mandatory, requiring a sentence in the range established by the application of the guidelines to the case. *Booker*, 125 S.Ct. at 750 (citing 18 U.S.S.C. § 3553(b)). Because the guidelines were mandatory, the maximum sentence authorized by the jury verdict alone would be the upper end of the guideline range that applied without any additional calculations or adjustments based on judicial fact-finding (e.g. the drug quantity calculation at issue in *Booker*). *Id.* at 750-751. The remedial *Booker* opinion (authored by Justice Breyer), created a constitutional scheme by severing the statutory provisions that make the Guidelines mandatory. *Id.* at 756. Once the Guidelines were rendered advisory, the maximum sentence authorized by a jury verdict would be that stated in the statute for the offense, rather

than the Guidelines. *Id.* at 756-57 (Breyer, J., opinion of the Court); see also *id.* at 790 (Scalia, J., dissenting).

It appears that the California, Hawaii and Tennessee courts (and the Colorado dissenters too), were led astray by the discussion in the two *Booker* majority opinions about how the former federal scheme was unconstitutional because it was mandatory and how the reformed federal scheme, with *advisory* guidelines, was constitutional because it involved judicial discretion. *Black*, 29 Cal.Rptr.3d at 756; *Gomez*, 163 S.W.3d at 657-58; *Lopez*, 113 P.3d at 734 (Coats, J., concurring). But this Court has in no way devised a test based on the degree of judicial discretion in a sentencing scheme. The former federal scheme was unconstitutional, not just because federal judges were required to apply the Guidelines, but because those Guidelines permitted judicial fact-finding resulting in sentences longer than that authorized by a jury verdict or a defendant's admission. *Gomez*, 163 S.W.3d at 665 (Anderson, J., concurring & dissenting). And the re-formed federal scheme devised in Justice Breyer's opinion for the Court was not constitutional because it involved broad judicial discretion. Rather, it was

constitutional because a jury verdict or an admission authorized a sentence higher than any that resulted from judicial fact-finding. The broad judicial discretion to select a sentence within a range was the byproduct of creating a scheme under which a jury verdict or an admission authorized a sentence up to the maximum stated in the statute. As this Court very clearly explained in *Blakely*, “[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.” *Blakely*, 124 S.Ct. at 2538 (emphasis in orig.).

As Justice Kennard explained in rejecting the majority approach in *Black*, the judicial discretion found in the California scheme is no different from that found in the Washington scheme deemed unconstitutional in *Blakely*. *Black*, 29 Cal.Rptr.3d at 764 (Kennard, J. (concurring & dissenting)). (California’s scheme, in fact, is so similar to Washington’s in the relevant respects that further briefing may not be required for this Court to conclude that *Blakely* mandates reversal.)

Under both schemes, the list of aggravating factors is not exclusive. Cal. R. Ct. 4.408; *Blakely*, 124 S.Ct. at 2535 (citing Wash.

Rev. Code Ann. § 9.94A.390). The California Supreme acknowledged that this Court, in *Blakely*, explained that this factor is not constitutionally significant. *Black*, 29 Cal.Rptr.3d at 752 and ns. 11 and 12. This Court, indeed, expressly rejected such line-drawing suggested by the State of Washington. *Blakely*, 124 S.Ct. at 2538. Under both schemes, an aggravated sentence is not required, even after the judge finds aggravating factors present. *Black*, 29 Cal.Rptr.3d at 755 (“the judge has considerable discretion to select among the upper, middle, and lower terms”); Wash. Rev. Code Ann. § 9.94A.120(2) (“The court **may** impose a sentence outside the standard sentence range for that offense if it finds ... that there are substantial and compelling reasons justifying an exceptional sentence”) (emphasis added). Under both schemes, judicial discretion is guided by the requirement that aggravating factors be reasonably related to the decision being made. *Black*, 29 Cal.Rptr.3d at 764 (Kennard, J., concurring & dissenting).

The *Black* majority also relied on the fact that, “as a historical matter California’s adoption of the [DSL] reduced the length of potential sentences for most crimes, rather than increasing them.”

Black, 29 Cal.Rptr.3d at 751. As Justice Kennard pointed out in dissent, this Court appears to agree that the same was true of Washington's new sentencing law. *Black*, 29 Cal.Rptr. at 764 (citing *Blakely*, 124 S. Ct. at 2544 (O'Connor, J., dissenting) and noting no disagreement from the *Blakely* majority).

The *Black* majority also supported its holding with the conclusion that the DSL involves the type of judicial factfinding that traditionally has been performed by a judge. *Black*, 29 Cal.Rptr.3d at 749-50. This inquiry misses the mark. Enforcing the right to a jury trial requires an inquiry into, not whether a particular fact is a traditional sentencing factor, but the scope of the role of the jury as guaranteed by the constitution. The bright line rule of *Apprendi* and *Blakely* arises from "a fundamental reservation of power in our constitutional structure," and that rule "ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 124 S. Ct. at 2538-39 (citations omitted).

Under the California DSL and under the Washington and federal schemes at issue in *Blakely* and *Booker*, judicial fact-finding can

increase the sentence beyond that permitted based upon just the jury's verdict or the defendant's admission. As the California Supreme Court acknowledged, "in a case in which no ... aggravating factor can be found, the judge cannot impose the upper term." *Black*, 29 Cal.Rptr.3d at 755. That is why the California DSL, like the former Washington and federal schemes, is unconstitutional.

This Court's decisions in *Apprendi*, *Blakely*, and *Booker* do, indeed, draw a bright line. Review by this Court is necessary because the California Supreme Court has failed to adhere to that line.

E. The Question is of Great Importance and Wide Application and this Case is An Excellent Vehicle for this Court to Resolve the Question Presented.

1. The Issue is of Great Importance and Wide Application.

At issue in this case is the scope of due process and jury trial protections under the federal constitution. But the issues presented are important for reasons that go beyond their connection to the fairness and reliability of sentencing proceedings.

The constitutionality of California's sentencing scheme affects countless cases. A Westlaw search conducted on July 28, 2005, turned up 893 cases for published and unpublished California appellate decisions in which the word "Blakley" appeared in the

same paragraph as the phrase “upper term.” These numbers, moreover, do not reflect the numerous cases still pending in the California courts of appeal and trial courts. Nor do they reflect the cases pending in states in which the state high court and state legislature are still grappling with their responses to *Blakely*.

2. *This case is an ideal one for this Court to resolve the question presented.*

The state courts squarely rejected appellant’s claim on the merits, without finding a waiver and without finding any error harmless. This case involves only aggravating factors based upon current-offense conduct. Unlike other California *Blakely* cases, the sentencing court did not rely on recidivist factors, posing questions of the viability and the scope of the *Almendarez-Torres* exception for the fact of a prior conviction. This is a far better candidate for review than *Black* itself because, in this case, there were no other defendant admissions or jury findings (such as the “substantial sexual conduct” finding in *Black*) touching on any of the aggravating factors. In contrast, *Black* itself presents the complexities of recidivist factors and harmless error. Even Justice Kennard, who dissented from the main holding, concurred in the result because “the trial court,” in

Black, “relied in part on his prior criminal history and on facts found by the jury.” *Black*, 28 Cal.Rptr.3d at 765 (Kennard, J., concurring & dissenting).) This case is also a better candidate than the *Gomez* case from Tennessee, which was decided on plain error review and included recidivism among the aggravating factors. *Gomez*, 163 S.W.3d at 651 (plain error) and 671 (Anderson, J. dissenting) (prior criminal conduct). The defendant in the *Smylie* case from Indiana has petitioned for certiorari, but that petition presents a different issue: whether *Blakely* applies to fact-finding conducted in determining whether sentences should run consecutively. *Smylie*, 823 N.E.2d 679, *cert. pet. pending*, S. Ct. no. 04-10472.

Finally, the Court need not worry that by accepting review of this case it is embarking on a course of state-by-state review of sentencing scheme. For one thing, the questions presented in this case – about the affect of broad judicial discretion and about whether this Court has drawn a bright line – would apply beyond California and would be controlling in those other states. For another thing, the legislatures of many states – including several discussed above (e.g. Arizona, Minnesota, North Carolina, Oregon, Tennessee) have

enacted *Blakely*-fix legislation. But there is no fix in sight for California and every day, defendants are sentenced to aggravated terms based on facts neither found true by the jury nor admitted by the defendant.

CONCLUSION

For the foregoing reasons, petitioner requests that the Court grant the petition for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, First Appellate District, affirming his sentence.

Dated: _____

Respectfully submitted,

[attorney's name]
Attorney for Petitioner

California Rules of Court

Rule 4.401. Authority

The rules in this division are adopted pursuant to Penal Code section 1170.3 and pursuant to the authority granted to the Judicial Council by the Constitution, article VI, section 6, to adopt rules for court administration, practice and procedure.

Rule 4.405. Definitions

As used in this division, unless the context otherwise requires:

* * *

(b) "Base term" is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed.

(c) "Enhancement" means an additional term of imprisonment added to the base term.

(d) "Aggravation" or "circumstances in aggravation" means facts which justify the imposition of the upper prison term referred to in section 1170(b).

(e) "Mitigation" or "circumstances in mitigation" means facts which justify the imposition of the lower of three authorized prison terms or facts which justify the court in striking the additional punishment for an enhancement when the court has discretion to do so.

(f) "Sentence choice" means the selection of any disposition of the case which does not amount to a dismissal, acquittal, or grant of a new trial.

* * *

(h) "Imprisonment" means confinement in a state prison.

* * *

Rule 4.406. Reasons

(a) [How given] If the sentencing judge is required to give reasons for a sentence choice, the judge shall state in simple language the primary factor or factors that support the exercise of discretion or, if applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It shall be delivered orally on the record.

(b) [When reasons required] Sentence choices that generally require a statement of a reason include:

* * *

(2) Imposing a prison sentence and thereby denying probation.

* * *

(4) Selecting a term other than the middle statutory term for either an offense or an enhancement.

* * *

(7) Striking the punishment for an enhancement.

* * *

(10) Striking an enhancement or prior conviction allegation under section 1385(a).

Rule 4.408. Criteria not exclusive; sequence not significant

(a) 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.

(b) The order in which criteria are listed does not indicate their relative weight or importance.

Rule 4.409. Consideration of criteria

Relevant criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise.

Rule 4.420. Selection of base term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for

striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.