

Sample argument for use in a Post-*Black* petition for review raising a *Blakely* claim as to upper term aggravating factors.

Note 1: The sample is necessarily skeletal and will have to be tailored to each case. The sample identifies the legal error (denial of a jury, application of wrong burden of proof, etc.), but a filed petition will have to more completely identify (i.e. exhaust) the relevant facts, procedural history, and nuances of the case.

Note 2: In connection with the optional paragraph regarding recidivist factors, the memo on *Shepard v. U.S.* found here: <http://www.fdap.org/downloads/blakely/Shepard.pdf#page=6>, contains a more detailed analysis of the narrow interpretation of *Almendarez-Torres*.]

Note 3: Given the brevity of the sample, the distinct “necessity for review” and “argument” sections often used in petitions for review are consolidated. Whether this is appropriate in a particular case may depend on whether there are additional issues raised in the petition.

Note 4 (added Aug. 8, 2005): The sample assumes that the petition might present other issues. If not and if you intend to file the petition as an “exhaustion petition,” you must comply with the requirements of [rule 33.3](#), as described at in this January 2004 (updated March 2004) [article](#):

http://www.fdap.org/downloads/seminar-criminal/seminar_1_04_exhaustion_pet_materials.pdf

In the Supreme Court of the State of California

People of the State of California,

Plaintiff and Respondent,

v.

_____ ,

Defendant and Appellant.

S _____

Court of Appeal No. A _____

(_____ County Superior

Court no. _____)

Petition for Review

After Decision by the Court of Appeal
First Appellate District, Division _____
Filed _____, 2005

[attorney name]
(State Bar No. _____)
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Attorney for Appellant

In the Supreme Court of the State of California

People of the State of California,

Plaintiff and Respondent,

v.

_____,

Defendant and Appellant.

S_____

Court of Appeal No. A_____

(Alameda County Superior Court
No. _____)

Petition for Review

To: The Chief Justice, and to the Associate Justices of the California
Supreme Court:

Appellant respectfully petitions this Court to review the
_____, 2005, unpublished opinion of the Court of Appeal (First
Appellate District, Division _____) affirming appellant's convictions
and sentence. (Appendix ("App.") A).

* * * *

Questions Presented

Does imposition of an upper term sentence under California's Determinate Sentencing Law violate the rights to a jury trial and proof beyond a reasonable doubt when the sentence is based upon judicial fact-finding of aggravating factors which were neither admitted by the defendant nor found true by the jury?

Procedural Background

[state procedural history of case, including appellate proceeding on the the *Blakely* claim]

Factual Background

[state the relevant factual background, including sentencing facts/evidence relevant to the *Blakely* claim.]

Necessity for Review

I.

The Imposition of an Upper Term Sentence Violated *Blakely v. Washington* and Appellant's Federal Constitutional Rights to a Jury Trial (Sixth Amendment) and Due Process (Fourteenth Amendment).

Like many sentences now pending on appeal in California, the imposition of the aggravated term in this case violated the Sixth Amendment and due process. (*Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531.) *Blakely v. Washington* applies to fact finding on aggravating circumstances necessary for imposition of an upper term under California's Determinate Sentencing Law.

Appellant recognizes that on June 20, 2005, this Court held 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. (*People v. Black* (2005) 35 Cal.4th 1238, 29 Cal.Rptr.3d 740, 113 P.3d 534.) Appellant nevertheless makes this argument to preserve it for federal court review.

Because this Court is undoubtedly already familiar with the core argument, appellant will forego any extended explanation as to why *Black* was decided incorrectly. Appellant will only briefly summarize the rationale for *Blakely's* application to California upper terms.

In *Blakely v. Washington*, 124 S.Ct. 2531, the 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 Determinate Sentence Law 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*.

The sentencing court violated *Blakely* by imposing an upper term based on its own findings of aggravating facts not admitted in the plea. Under *Apprendi* and *Blakely*, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2536.) In this case, the court relied on [insert number of aggravating factors here] aggravating factors: [identify

aggravating factors here]. (RT Oct. 15, 2004 at 8.) Appellant’s plea did not admit any of these aggravating circumstances.

[Optional Paragraph: It is true that ___ of the ___ aggravating factors found present were related to recidivism. The *Almendarez-Torres v. United States* (1998) 523 US 224 exception to the right to a jury trial, however, does not apply. That exception is read very narrowly and applies only to the mere fact of a prior conviction. *Shepard v. United States* (2005) 125 S.Ct. 1254, 1262 (plurality opn.) The so-called “recidivist” factors present in this case fall outside of the *Almendarez-Torres* exception because they go beyond the mere fact of a prior conviction. In any event, there appear to be enough votes on the United States Supreme Court to overrule *Almendarez-Torres*. (*Apprendi*, 530 U.S. at 520-521 (Thomas, J., concur.); *Shepard*, 125 S.Ct. at 1264 (Thomas, J., concur.).)]

The court’s findings on the aggravating factors are exactly the kind of offense-related aggravating factors which *Apprendi* and *Blakely* entrust to a jury. In view of the sentencing court’s finding of aggravating factors, the court’s selection of the upper term was tainted by *Blakely* error and renders appellant’s sentence unconstitutional.

Conclusion

Appellant respectfully urges this Court to grant review.

Dated: _____, 2005

Respectfully submitted,

[attorney name]
Attorneys for Appellant

Certificate of Word Count

Counsel for appellant hereby certifies that this brief consists of _____ words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program.
(Cal. Rules of Court, rule 28.1.)

_____, 2005

[attorney name]