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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
MICHAEL SPENCER,  
Defendant and Appellant.

A098944

(Alameda County  
Super. Ct. No. 140300)

ORDER MODIFYING OPINION AND  
DENYING REHEARING  
[NO CHANGE IN JUDGMENT]

BY THE COURT:

Defendant's petition for rehearing is denied.

The opinion filed on June 29, 2004, is modified as follows:

1. Insert new footnote 21 at the end of the first full paragraph on page 29:

<sup>21</sup> Defendant further argues that to the extent that the applicability of section 654 turns on a determination whether his possession preceded or followed the robbery, that question should have been determined by the jury under *Apprendi v. New Jersey* (2000) 530 U.S. 466. In his petition for rehearing he additionally cites *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_ 124 S.Ct. 2531 in support of this argument. Neither case extends the right of trial by jury to these types of factual determinations. If section 654 does not apply in a given case, permitting punishment for both crimes, the defendant is not sentenced to a greater term than the "statutory maximum," defined in *Blakely* as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict . . . ." The jury here found "all the facts 'which the law makes essential to

the punishment.’ ” (*Blakely v. Washington, supra*, 124 S.Ct. U.S. Ct. at p. 2537.)

2. Renumber the subsequent footnotes.

The above modification does not effect any change in the judgment.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Reardon, Acting P.J.