

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)	No. S125677
)	
Plaintiff and Respondent,)	Court of Appeal No. B166312
)	
v.)	Superior Court. No. PA040926
)	
SHAWN TOWNE,)	
)	
Defendant and Appellant.)	
)	
)	
)	

MOTION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE FOR PERMISSION TO APPEAR AS *AMICUS CURIAE* ON BEHALF OF APPELLANT (RULE 29.1(f)) AND BRIEF IN SUPPORT OF APPELLANT TOWNE

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

California Attorneys for Criminal Justice (hereafter CACJ) moves this Court for permission to appear as an *amicus curiae* on behalf of Appellant Shawn Towne within the meaning of California Rules of Court, Rule 29.1(f).

I. MOTION OF CACJ TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

A. Identification of CACJ¹

CACJ is a nonprofit California corporation. According to Article IV of its by-laws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." (Article IV, By-Laws of CACJ.) The organization has approximately 2,000 dues-paying members who are primarily criminal defense lawyers practicing before the state and federal courts located in California. These lawyers are employed both in the public and private sectors, and CACJ's membership is distributed around the state.

CACJ often appears as an *amicus curiae* before this Court on matters of importance to its membership and stated goals.

B. Interest Of *Amicus Curiae* CACJ In This Litigation

The United States Supreme Court's ruling in *Blakely v. Washington* (2004) _

¹The undersigned, as chairs of the amicus committee of CACJ certify to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief, and additionally certify that no party to this litigation has contributed any monies, services, or other form of donation to assist in the production of this brief.

U.S. ___; 124 S.Ct. 2531 (hereafter *Blakely*) has significantly changed the substantive and procedural laws related to the adjudication of criminal cases, and especially the sentencing process.

Appellant Shawn Towne argues that the trial court abused its discretion, and violated both his state and federal constitutional rights by sentencing him to an upper term based on factors that were not found by the jury, and that in Towne's estimation were necessarily rejected by the jury's verdict acquitting him. (Towne's Opening Brief, hereafter AOB at 9.) Appellant has proffered several constitutionally rooted arguments to support his major premise. Of special significance to CACJ are Appellant's arguments (1) that Penal Code §§1170 *et seq.* are unconstitutional in that they do not comply with *Blakely* and its predecessors (AOB at 21 *et seq.*); and that (2) the error in imposing the upper term based on factors not found by the jury beyond a reasonable doubt require reversal of this case. (AOB at 38.) CACJ is also aware that Appellant will address the question of whether Penal Code §1170 can be 'rescued' through reformation or through severance of its invalid language in order to ensure some level of systemic stability as the Legislature addresses the issues presented by *Blakely*.²

² Counsel for Appellant Towne has been kind enough to review some of her arguments with Counsel for CACJ, a courtesy which allows CACJ to address issues that are likely to be before the Court in this case.

CACJ's interest in this case is underscored by the recent lodging of its motion for permission to appear, and brief, supporting Appellant in *People v. Black*, Supreme Court No. S126182, a case that raises similar issues. Though Appellant Towne's case presents different characteristics, and case specific issues, the main question presented by both cases appears to CACJ to be the same: Is California's current statutory sentencing scheme, with its attendant Rules of Court and rich fabric of case law interpretation, constitutional as written and as applied? If, as Appellant Towne argues (and CACJ agrees), the answer is 'no', that answer will have widespread ramifications.

CACJ has a great interest in this case for several reasons. First, CACJ members practice criminal defense throughout California. By definition, they must properly represent their clients. At this juncture, the lack of definitive pronouncement from this Court on the impact of *Blakely* in our State presents major questions for practitioners. Second, CACJ is committed to defending those constitutional rights at issue whenever criminal cases are prosecuted. As Appellant Towne argues, *Blakely* has changed the foundation in the interpretation of those constitutional rights at issue in criminal cases in California. CACJ has an interest in ensuring that the Sixth Amendment is properly applied in our state.

Third, it is likely that courts throughout California today are either imposing

sentences without measurably departing from California's existing sentencing statutes, and the related rules, or are attempting to anticipate this Court's upcoming rulings. If this is correct, there is little doubt that the unevenness of the responses to *Blakely* as the law is in flux will lead to unnecessary disarray and uncertainty.

CACJ has already expressed its interest in the subject matter of this litigation by lodging an amicus brief in the related *Black* case. CACJ respectfully requests permission to appear in support of Appellant Towne. This brief is timely filed under the Court's current briefing order.

II.

CACJ'S BRIEF ON THE MERITS SUPPORTING APPELLANT TOWNE

THIS COURT SHOULD HOLD THAT PENAL CODE §1170, AND STATUTES AS WELL AS SENTENCING RULES LINKED TO IT BY THE DESIGN OF THE DETERMINATE SENTENCING LAW ARE ALL CURRENTLY UNCONSTITUTIONAL AND THAT THE LAW MUST BE SUITABLY AND APPROPRIATELY AMENDED TO ENSURE THE CONTINUED CONSTITUTIONAL VITALITY OF CALIFORNIA'S AIM TO ENSURE THE ELIMINATION OF DISPARITY AND THE EXISTENCE OF DETERMINATE SENTENCING

1. Introduction

_____Appellant Towne is correct: He was sentenced under a statutory scheme that is unconstitutional; his sentence is illegal for several reasons; moreover, the body of law on which the court based its decisions is unconstitutional and must be reformed. *Blakely* and *Apprendi v. New Jersey*, (2000) 530 U.S. 466 have changed the requirements of a criminal case jury trial under the Sixth Amendment to the United States Constitution.³ CACJ urges this Court to announce the implications of *Blakely* in California and to specify the changes in our laws required by the ruling so that the Legislature, and rule making bodies, are

³ In *Apprendi v. New Jersey*, 530 U.S. 466, the court held that the Sixth Amendment prohibited enhancement of a sentence based on a factor not submitted for decision by the jury. *Id.* at 744.

appropriately and immediately guided.

CACJ urges the Court to set forth its view of a constitutionally valid post-*Blakely* statutory, and rule-related, architecture to support a determinate sentencing scheme intended to ensure “. . . terms proportionate to the seriousness of the offense with provision for uniformity in the sentence of offenders committing the same offense under similar circumstances.” (Penal Code §1170(a)(1).) CACJ has supported and continues to support the legislative finding and declaration set forth in Penal Code §1170(a)(1) which states:

. . . the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature . . .

CACJ recognizes that a possible outcome of urging this Court to find the current Determinate Sentencing Law unconstitutional as written, and implemented, may be a return to the days of indeterminate sentencing. But that outcome is neither necessary, nor in keeping with California’s adoption of determinate sentencing as a rule of criminal procedure, and as a means of determining just punishments for crimes.

Appellant Towne suggests that the way to ensure an orderly transition from our current system to an entirely *Blakely*-compliant one would be for this Court to

rule now that courts in this State should no longer impose an upper term within the meaning of Penal Code §1170 because the basis for upper terms is constitutionally suspect given the lack of a requirement for a triggering jury verdict fact finding, and the absence of the requirement of proof beyond a reasonable doubt.

Appellant Towne suggests that the Court may essentially sever the provisions that allow imposition of an upper term without jury verdict, and proof beyond reasonable doubt, from Penal Code §1170. This suggestion may temporarily help bridge the gap. But CACJ does not support a partial repair. Upper terms imposed through judicial discretion under the Rules of Court are not California's only sentencing problem. There are other issues that are all being litigated today. If this Court allows the reform of the DSL to proceed through piecemeal litigation, the result will be a series of *ad hoc* 'reforms' that will necessarily result from the Judiciary's attempt to fix the fabric of a legislative scheme that, at this juncture, needs wholesale revision. Our State needs a ruling from this Court that will set the direction for the orderly resolution of the constitutional and other legal issues presented by the United States Supreme Court ruling in *Blakely*. It is clear that the letter of Penal Code §1170 is not compliant with *Blakely*, and that delay in invalidating the statute will prompt more questions than it will answer. Moreover, the current Rules of Court adopted under Penal

Code §1170 (d) “so as to eliminate disparity of sentence and to promote uniformity of sentencing” are inconsistent with the constitutional requirement of a jury decision based on proof beyond a reasonable doubt on factual findings that are now, by statute, defined as discretionary decisions to be made by a sentencing court.⁴

In the aftermath of *Blakely* and *Apprendi*, The United States Supreme Court now has the question before it of whether sentencing ‘rules’ or ‘guidelines’ promulgated by non-legislative, or non-judicial, bodies are constitutional.⁵ CACJ respectfully submits that in the aftermath of *Blakely*, and given what are clearly new requirements for: criminal case accusatory pleading; trial procedures; jury verdicts; and sentencing procedures, this Court should encourage the Legislature to define most of our sentencing scheme in statutory form.

2. The Situation is Such that This Court Must Step in Now

In the aftermath of *Blakely*, California courts have actively addressed *Blakely* issues, without the benefit of guidance from this Court. One scholar who

⁴ See Penal Code §1170(a) providing for “specified discretion” and Penal Code §1170(b) noting that it is the sentencing court that is empowered to consider various sources of sentencing-related information and then impose a sentence other than the designated middle term.

⁵ *U.S. v. Booker*; *U.S. v. FanFan*; U.S. Supreme Court Nos. 04-104; 04-105, currently pending decision.

purports to be following the progress of *Blakely* litigation nationwide indicates that California courts more than any others throughout the United States (with the possible exception of the federal courts), have applied *Blakely* to current sentencing issues.⁶ This state of affairs is creating problems. First, some of the current rulings are contradictory. Second, and more importantly, it is completely unclear that these rulings (which are multiplying weekly) will (a) be approved of by this Court, and (b) are themselves *Blakely* compliant. A review of these rulings demonstrates on-going judicial speculation as to what views will pass muster in this Court.⁷

⁶ See the writings of Professor Douglas Berman, College of Law, Ohio State University, at www.sentencinglawandpolicy.com. Professor Berman is the author of *Sentencing Law and Policy* (Aspen Publishers, 2004). Professor Berman has noted the amount of activity from California.

⁷ While the majority of the following cases are not yet final pending further rulings from this Court, CACJ notes the following rulings: *People v. Earley*, 4th App. Dist., Division Two, Case No. EO33600, filed August 31, 2004 dealing with recidivist-based sentencing factors as a basis for imposition of an Upper Term; *People v. Ochoa*, 4th App. Dist., Div. 1, Case No. DO42215 filed September 2, 2004 holding, among other things, that *Blakely* does not apply to consecutive sentences; *People v. George*, 4th App. Dist. Div 1, filed September 15, 2004, a case considering the basis for the imposition of an Upper Term, and the question of whether Appellant George had waived the issue by failing to challenge it below. The discussion in *George* is somewhat pertinent here, in part because it involves judicial consideration of whether the imposition of an Upper Term can survive without the finding of a violation of *Blakely*. (See slip op. at p. 21); *People v. Lemus*, 4th App. Dist., Div. 1, Case No. D042549, filed September 20, 2004, partially published on the question of the imposition of an Upper Term; *People v.*

Commentators on the implications of *Blakely* have described this State's sentencing system as "fundamentally affected by *Blakely*".⁸ Viewing sentencing issues from a national perspective, these commentators have compared and contrasted the impact of *Blakely* on two types of determinate sentencing. The first is characterized by presumptive sentencing pursuant to specific, formal, sentencing guidelines. 'Formal guidelines' means a scheme like the Federal Sentencing Guidelines. The second type of determinate sentencing system uses presumptive sentences but without mandatory sentencing guidelines. Our State has been described variably as falling in the second category, or fitting between two categories.

In discussing systems that will pass muster under *Blakely* and *Apprendi*, the United States Supreme Court, and scholars, have focused on the State of Kansas as having 'adjusted' in such a way as ". . . to retain presumptive guidelines by incorporating jury fact-finding as the basis of an enhanced sentence." [footnote

Barnes, 6th App. Dist., Case No. H026137, filed September 24, 2004, partially published analyzing imposition of the 'statutory maximum' authorized by a jury verdict and facts admitted by the defendant.

⁸ See, for example, The Vera Institute of Justice, *State Sentencing and Corrections: Policy and Practice Review* (August 2004), p. 3.

omitted]⁹ The State of Kansas currently uses a system that defines a series of presumptive sentences for crimes, but also allows the presumed punishment to be enhanced. Thus, Kansas procedure requires specific forms of accusatory pleadings and proof where enhanced punishment is being sought. Kansas provides as follows where “an upward durational departure sentence” is at issue:

Upon motion of the county or district attorney to seek an upward durational departure sentence, the court shall consider imposition of such upward durational sentence in the manner provided in subsection (b)(2). The county or district attorney shall file such motion to seek upward durational sentence not less than 30 days prior to the date of trial or if the trial date is to take place in less than 30 days then within 5 days from the date of arraignment.

(2) The court shall determine if the presentation of any evidence regarding the alleged factors may increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be presented to a jury and proved beyond a reasonable doubt during the trial of the matter or following the determination of the defendant’s innocence or guilt.

Kansas Statutes Annotated, §21-4718(b)(1)(2).¹⁰

Admittedly, the Kansas sentencing scheme as originally ‘revamped’ in the

⁹ Vera Institute, *State Sentencing and Corrections*, *supra*, at p. 7, referring to Kansas Statutes Annotated §21-4718(b); see also *Blakely v. Washington*, *supra*, at 2541.

¹⁰ See also *Kansas Criminal Law Handbook*, §14.8.

early 1990's did not completely mirror California's Determinate Sentencing Law as embodied in Penal Code §1170 et seq. But there were both conceptual and legal similarities. In 1993, the Kansas Legislature enacted the Kansas Sentencing Guidelines Act which provided for sentencing according to two sentencing grids. One was for drug felonies, and the other for non-drug felonies. The sentencing range to be applied in a given case was based on two factors: First, the statutory definition of a 'severity level' of the crime admitted, or found true through jury or court verdict; second, the offender's prior history. A sentencing court would review a relatively narrow range of sentences at the intersection of the severity level and prior criminal history to determine the indicated authorized sentence for the given offense. The scheme also permitted aggravating or mitigating factors to be proven to depart from the indicated sentence.¹¹

The two matters that caused reform of sentencing processes in the State of Kansas were the ruling in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 and the Kansas Supreme Court's ruling in *State v. Gould*, (Kan., 2001) 23 P.3d 803. In *Gould*, which preceded the decision in *Blakely*, the Kansas Supreme Court expressed concern over Kansas courts' adherence to the *Apprendi*'s command as

¹¹ See Kansas Statutes Annotated of 1993, and specifically §§21-4704, 4705, 4716.

follows (quoting from *Apprendi*): ‘The relevant inquiry is not one of form, but of effect . . . does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict.’ *Gould* at 810. Comparing the finding made by the trial court in its sentencing analysis to the punishment authorized by jury verdict, and relying on *Apprendi v. New Jersey, supra*, 530 U.S. at 494, the Kansas Supreme Court found the trial court’s sentence in *Gould* to be illegal. *Id.* at 813-814.

The Kansas Legislature reacted to the decision in *State v. Gould, supra*, by codifying the *Apprendi v. New Jersey, supra*, requirements. (See Kansas Statutes Annotated (2002 Supplement), 21-4718(b)(1), quoted above.) These requirements provide a procedure that combines notice pleading of sentencing factors with the mandate of a court or jury adjudication of those factors, based on proof beyond a reasonable doubt standard. At this juncture, because of its endorsement of the Sixth Amendment root for sentencing decisions, it is assumed that the Kansas sentencing scheme passes muster under *Blakely*. The United States Supreme Court’s mention of the Kansas scheme in *Blakely* certainly provides a basis for the assumption. More significantly, for the purposes of the argument now offered to this Court, there is no indication that the decision by the State of Kansas to bring its determinate sentencing law into compliance with the *Apprendi/Blakely* line of

cases has been significantly problematic to the administration of justice in Kansas.

3. **Appellant Towne Correctly Argues that the Blakely/Apprendi Rules will Invalidate Sentences Beyond the Prescribed Statutory Maximum Based on Sentence-Significant Facts that have not been Submitted to a Jury, or Agreed Upon Trier of Fact, and Found Beyond Reasonable Doubt**

_____The majority opinion by Judge Scalia in *Blakely v. Washington* is quite clear. First: “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, supra*, 530 U.S. 466 at 744. Further, a court may not exceed the statutorily maximum sentence, or the so called “maximum sentence” without the findings of the jury. *Blakely, supra*, 124 S.Ct. 2531, 2537.

Prior to *Blakely*, the United States Supreme Court had also stated that: “[i]t is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury, we have resolved that general issue and have no intention of questioning its resolution.” *Jones v. United States*, (1999) 526 U.S. 227, 248. In litigating *Blakely*, the State of Washington relied on decisions like *Jones, Harris v. United States*, (2002) 536 U.S. 545 [where the court held that judges may find facts that compel a mandatory minimum sentence which would necessarily increase the sentence of some accuseds], and *McMillan v.*

Pennsylvania, (1986) 477 U.S. 79, as supporting the view that legislatures have wide latitude in defining the elements of the crime that must be proved to a jury. See *McMillan*, 744 U.S. at 84 relying in part on *Patterson v. U.S.*, (1977) 432 U.S. 197, 210. But in *Blakely* the court answered those arguments by distancing itself from the alleged implications of its prior rulings. (*Id.* at 2531, 2537-38.)

The *Blakely* court found that the Sixth Amendment cannot support “. . . a sentence greater than what state law authorized on the basis of the verdict alone.” *Blakely*, 124 S.Ct. at 238. Indeed the analysis offered in *Blakely* demonstrates that reliance on Supreme Court precedent established prior to *Blakely* as the foundation for defending a sentencing scheme is risky business indeed. And, in passing, the court dignified the current argument made to this Court by CACJ to the effect the Kansas Legislature’s response to *Apprendi* was the correct one. See *Blakely*, *supra*, at 2541.

The *Blakely* court specifically discussed the sort of results that will no longer be constitutionally valid absent a supporting jury establishing the facts that have sentencing significance. It provided examples of defective sentencing practices including: 1) enhancing a sentence based on a judicial finding of a specified fact not found true by a jury; 2) the application of several specified facts by a sentencing court that were not found by the jury; and 3) the use of any

aggravating fact that was not found by the jury. In discussing the future of sentencing procedures, the *Blakely* majority referred to an ‘*Apprendi* bright-line’ that requires facts significant to judicial imposition of sentence to be determined by a jury. *Blakely* at 2538, 2540.

Because of the clarity of the statutes and rules that embody California’s Determinate Sentencing Law, it can be said that the DSL includes a number of features that cannot survive the ruling in *Blakely*. The statute central to the definitions of the DSL explains that wherever the law provides a determinate sentence defined by three sentencing outcomes, “. . . the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” Penal Code §1170(b). Pursuant to its rule-making ability, the Judicial Council has published rules that describe how courts are to find the aggravating facts that justify the imposition of the upper term. See California Rules of Court (hereafter Rule) Rule 4.405(d). Significantly, however, there is no requirement of a triggering jury finding, or of proof beyond a reasonable doubt.

In addition, sentencing courts in California have discretion to decide whether an additional term of imprisonment for a charged “enhancement” can be

applied.¹² These courts also decide whether probation is limited, or can be granted. (See Rule 4.413, 4.414.) They decide what criteria affect concurrent consecutive sentences. (Rule 4.425.) There is no requirement of a jury verdict to establish these sentencing acts. Unless a California sentencing judge is limited by operation of law in the exercise of discretion, a simple recitation on the record of factors that support the exercise of sentencing discretion will suffice to justify a sentence. (See Rule 4.406(a).) In sum, under our system, many of the crime and defendant characteristics that will trigger a given type of sentence are left to the court's discretionary decision making¹³ in violation of *Blakely* and *Apprendi*.

Further evidence of our State's investment in a sentencing scheme that places wide-ranging discretion with the court at the time of sentencing is the fact that much of the detail of the DSL is found in the Rules--not in statutes defining crimes and punishments. The California Legislature did not, by and large, define the circumstances that can trigger a judicial finding that the aggravated term is the correct, or at least legally permissible, term to be applied in a given case. Rule

¹² See Advisory Committee comment to Rule 4.405, describing the available enhancements.

¹³ See, for example, the discussion of the operation of circumstances in aggravation in the Advisory Committee comment to Rule 4.421. (2004 revised edition, California Rules of Court.)

4.421 which defines the circumstances in aggravation is a rule adopted pursuant to the legislative delegation of power. Indeed, none of the 11 factors in aggravation which are so called crime facts under Rule 4.421(a), and none of the ‘defendant facts’ found in Rule 4.421(b), or the discretionary ‘other facts’ determined to be aggravating in a particular case (Rule 4.421(c)) is: found in statutes; required to be found by the jury; or required to be established beyond a reasonable doubt.

In sum, while our State’s sentencing scheme is constitutional in general terms given that a state can enact and maintain a determinate sentencing law, the ‘details’ of our sentencing procedures must be replaced.

4. While Appellant Towne is Correct that a Temporary ‘Fix’ is Available, the California Sentencing Scheme Cannot be Rescued Through Reformation or Severance

The parties have approached the question of the continuing validity of the DSL in different ways. Respondent seems focused on approaching the situation as though the DSL is essentially healthy, and that all that is needed now is some level of clarification from this Court. Appellant, on the other hand, is arguing that portions of California’s statutory scheme (Penal Code §§1170 et seq.) are unconstitutional. However, Appellant suggests that since one of the obvious ills, namely the imposition of an upper term without the benefit of jury verdict or proof beyond a reasonable doubt, can be cured by invalidating a portion of Penal Code

§1170, reformation, or severance, may be possible.¹⁴ Appellant's argument in this respect is practical, in that it provides a means through which our criminal courts can continue imposing sentences in certain types of cases while awaiting legislative action.

However, CACJ respectfully submits that Penal Code §§1170 et seq. can neither be reformed, nor severed, with faithful adherence to our State's constitutional principles on the one hand, and compliance with *Blakely/Apprendi* on the other.

On the question of reformation, while such reform may be curative in the narrow instance of cases like Appellant's, the problem is that an upper term is not the only sentencing law reformation that has to be dealt with under *Blakely*. Our statutes, and rules of court, provide for the imposition of enhancements; the denial of probation; the imposition of consecutive as opposed to concurrent punishments; and the recognition of the role of circumstances in aggravation in these varying sentencing choices. All of these matters must be dealt with if our sentencing scheme is to function according to *Blakely's* interpretation of the Sixth Amendment.

While it is true that reformation of statutes to avoid violation of state

¹⁴ See Appellant's Reply Brief.

constitutional provisions has been engaged in in a number of areas, the scope of the reformation project at issue here would be unprecedented. *See, generally*, the discussion of reformation in *Kopp v. Fair Political Practices Committee* (1995) 11 Cal.4th 607, 646-663. In *Kopp*, the Court engaged in a wide-ranging discussion of the concept of reformation, noting that reformation is not possible where a court would be supplying terms that run contrary to either the Legislature's, or electorate's, policy choices. *Id.* at 661. While one could argue that the policy choice here was described as the elimination of disparity in sentencing, it is equally true that the stated purpose of the DSL was to be implemented through a policy of primarily guided judicial sentencing discretion which can no longer be maintained in view of *Blakely*.

The pertinent statutes, and related rules, are constitutionally invalid. Clearly, California can reiterate the decision to use determinate sentencing for all but a few crimes for which either the death penalty, or indeterminate sentencing, are the legally approved sanctions. Reformation is not the answer.

Nor is severance of invalid language practical. As Appellant points out, at least part of the analysis of severability is guided by this Court's decisions, including the very useful discussion in *People v. Navarro* (1972) 7 Cal.3d 248, 260-265, and subsequent cases. As this Court stated in *Navarro*: "when part of a

statute is declared unconstitutional the remainder will stand if it is complete in itself and would have been adopted by the legislative bodies had the latter foreseen the partial invalidation. [citation omitted]” *Id.* at 260. The Court went on to explain: “Deletion of the challenged provision would leave a coherent amended statute complete in itself [in the case at issue], but the critical inquiry is whether the Legislature would have adopted the entire amendment had it foreseen the partial invalidity thereof? [citations omitted]” *Ibid.*

The Court’s analysis in *Navarro* would logically doom attempting to edit away the unconstitutional portions of Penal Code §§1170 et seq., and the associated Rules of Court. There is as much to pencil in to the DSL to make it *Blakely*-compliant as there is to pencil out. Moreover, in enacting the DSL, California was not seeking to create or implement a new interpretation of the Sixth Amendment’s jury trial right. A completely different issue was reached when California enacted the DSL, and not even the most imaginative interpretation of Penal Code §1170 could picture the Legislature’s shepherding of the DSL since the late 1970's being built around the *Blakely/Apprendi* rules. These rules have not been the design of California’s sentencing laws to date in very important particulars.

Penal Code §1170 et seq. cannot be rescued through a surgical procedure.

While this Court has repeatedly stated that there is a general presumption of constitutionality of all statutes, the analysis of whether a statute is severable hinges not only on whether (1) the language of the statute is mechanically severable, but also (2) whether “. . . the language is so broad as to cover subjects within and without the legislative power, and the defect cannot be cured by excising any word or groups of words . . .” *In re Blaney*, (1947) 30 Cal.2d 643, 655; *see also Santa Barbara School District v. Superior Court*, (1975) 13 Cal.3d 315, 330-331 discussing the rules of severability in analyzing the constitutional validity of a ballot initiative.¹⁵

It is axiomatic that a statute that is constitutionally valid is not rendered ineffective by language which is invalid but can be severed from the valid portion of the statute. *See, generally*, the discussion in *Hotel Employees and Restaurant Employees International Union v. Davis*, (1999) 21 Cal.4th 585, 613. But the invalid part of a statute can be severed only if it is ‘grammatically, functionally, and volitionally separable’. *Id* at 613.

Based on the discussion in *Navarro*, *supra*, ‘red penciling’ the upper term

¹⁵ This Court has, on several occasions, discussed the implications of a severability clause contained in a ballot initiative, a drafting and ‘rescue’ mechanism recognized in California law for some period of time. *See McCafferty v. Board of Supervisors* (1969) 3 Cal.App.3d 190, 193 quoted with approval in *Santa Barbara School District*, *supra*, 13 Cal.3d at 331.

calculus embodied in Penal Code §1170 would only provide a temporary fix that is very case specific. It would not, for example, address the issues raised in what is arguably the companion case to this one, *People v. Kevin Black*, Supreme Court No. S126182. Appellant Black has raised the question of whether *Blakely* invalidates the manner in which California allows the imposition of a consecutive sentence based on judicial fact finding after trial, which is just one of the myriad of questions concerning the constitutional validity of the DSL already in play in California.

Blakely requires revisions to our: rules of accusatory pleading; statutory definitions; jury trial processes; sentencing procedures. A partial, temporary, fix is not what is needed now. Clearly, California can continue to both find, and declare, that the purpose of imprisonment is punishment, and to provide a scheme to achieve uniformity in sentencing. It can do so through use of stated sentencing ranges for each defined offense. But in order to comply with *Blakely*, our State must retool much of the fabric of the Determinate Sentencing Law. That law as currently written cannot be rescued, and this Court should so state now.

5. **In Order to Meet the Blakely/Apprendi Requirements, this Court Must Require Changes in: Rules of Pleading; Definition of Sentence-Triggering Elements where Necessary; Trial of Required Sentencing Facts; Jury Verdicts and Sentencing Processes**

A state can clearly retain determinate sentencing. The Supreme Court specifically so stated in *Blakely*, noting that the State of Washington’s adoption of determinate sentencing, and attention to “. . . proportionality to the gravity of the offense and parity among defendants” were appropriate and “salutary objectives.” *Id.* at 2540. However, in order to bring California into line with the combination of *Apprendi v. New Jersey, supra*, and *Blakely v. Washington, supra*, this Court should instruct the Legislature, and the pertinent rule making bodies, to be attentive to the following required changes.

First, it is apparent that the *Blakely* majority views the Sixth Amendment as requiring that every fact legally essential to punishment must be charged in the Indictment. *Id.* at 2536, n.5. To the extent and degree that *Ring v. Arizona*, (2002) 536 U.S. 584, 592-602 is linked to the ruling in *Blakely v. Washington, supra*, 124 S.Ct. at 2537, the defendant must have notice of the fact and/or legally significant factors that are essential as a basis for a given punishment, particularly an enhanced or aggravated punishment.

Second, after *Blakely*, our State must establish the legal requirement that

every fact that increases the penalty for a crime must be submitted to a jury, and proved beyond a reasonable doubt, or, that where the accused pleads guilty, no contest, or otherwise admits facts critical to the enhancement or aggravation of a sentence, the accused must either stipulate to the relevant facts, or knowingly, voluntarily, and intelligently consent to judicial fact finding. See *Blakely* at 2541.

Third, the legal architecture that defines facts that increase a penalty for a crime must be changed so that these facts are subject to trial--either through a command that the definitions of individual crimes be changed according to the *Blakely* formula, or, through the expansion of the Penal Code to include such a requirement, perhaps in a restatement of Penal Code §1170.

Fourth, it appears to CACJ that the definition of a verdict may need to be changed so as to provide judges with the confidence that, on occasion, and contrary to the current fabric of California law, special verdicts dealing with sentencing facts may be required, and will be authorized.

Finally, the statutory and associated rule-intensive framework of California's sentencing laws will need to be changed in order to incorporate the several *Blakely*-compliant elements just described. CACJ respectfully submits that the Kansas statutory scheme discussed above is instructive, and useful, as a guide.

6. The Changes Urged by CACJ are Significant, but Clearly Manageable; the Pendency of Blakely-Related Cases Before the U.S. Supreme Court Makes It Imperative that California Reform its Laws Correctly at this Juncture

Judge Marvin Frankel has been credited with providing the impetus for the Congress of the United States to move towards reforming the federal sentencing system which, according to Judge Frankel, allowed “almost wholly unchecked and sweeping” discretion of sentencing judges to create a situation that was “terrifying and intolerable for a society that professes devotion to the rule of law.”¹⁶ Today, the United States Supreme Court is considering whether the product of the reform effort, the Federal Sentencing Reform Act of 1984 (which gave rise to the Federal Sentencing Guidelines), is still constitutional in the aftermath of the ruling in *Blakely*.¹⁷

CACJ respectfully submits that if the United States Supreme Court

¹⁶ Frankel, *Criminal Sentences: Law Without Order* (1972) at p. 5. Judge Frankel’s influence on the creation of the Federal Sentencing Guidelines has been recognized. 121 Cong. Rec. 37, 562-37, 563 (1975).

¹⁷ This issue is before the U.S. Supreme Court in two companion cases, *U.S. v. Booker* and *U.S. v. FanFan*, U.S. Supreme Court Nos. 04-104; 04-105. Commentators too numerous to mention are speculating on the future of the Federal Sentencing Guidelines as this brief is written. It appears a certainty that the U.S. Supreme Court will announce the extent to which legislatures can delegate sentencing rule making ability to quasi-legislative, or quasi-judicial bodies.

invalidates the Federal Sentencing Guidelines, California's current sentencing scheme will be made further suspect by the extent to which the Legislature deferred important aspects of sentencing rule making to the Judicial Council.

CACJ makes the above point to note that this Court should provide the Legislature with a comprehensive analysis of the steps necessary to achieve valid law reform of California's sentencing process.

The importance of this Court's addressing the 'global' issues presented by this and similar cases is further emphasized by the sheer number of cases that are dealt with in California courts. That said, the available statistics clearly indicate that the pace of trial level case adjudications in California will allow *Blakely* compliant pleadings, settlement negotiations, and adjudication through trial, to take place after preliminary examinations--yet another reason to use the Kansas statute discussed above as a guide. The statistics indicate that needed reforms can occur without precipitating chaos in our court system.

According to the *Statewide Caseload Trends* reported in fiscal year 2002-2003, of a total of 188,311 cases disposed of in our courts, 120,011 resulted in felony convictions.¹⁸ The vast majority of cases are disposed of prior to trial--61

¹⁸ *Statewide Caseload Trends* are reported at www.courtinfo.ca.gov/reference/documents/csr2004. The statistics just quoted from Table 8.

percent. Of the overall dispositions of cases in California (here, presumably, including both felonies and cases charged as felonies that were either reduced or ‘bargained’ down to misdemeanors), 123,198 were disposed of after the preliminary hearing.¹⁹

Thus, it appears that approximately two-thirds of the felony, or mixed felony/misdemeanor, cases charged in California are resolved after the preliminary hearing.²⁰ Using a relatively ‘rough’ assessment of the information provided by case trends in the last fiscal year, it is clear that the majority of felony level cases are disposed of at a point at which the courts, and parties, have acquired an enhanced knowledge of case facts through the preliminary examination. Resolution after the preliminary hearing also means that the parties have been able to review available case discovery, and where necessary, both the prosecution and defense have also been able to conduct necessary further investigation. The ‘flow’ of cases indicates that the majority of felony filings can be brought into ‘*Blakely* shape’ after the preliminary hearing.

¹⁹ See Table 8a of the *Statewide Caseload Trends* for fiscal year 2002-2003, reported in the 2004 Court Statistics Report.

²⁰ The 2004 Court Statistics Report does not differentiate between cases that have been indicted and those which have proceeded via Complaint. Thus, the analysis offered here does not purport to be ‘scientific’ or exact. Nonetheless, the numbers relied upon are those that are relied upon by the Judicial Council.

Review of the California system as it now stands indicates that a reform is not only legally necessary because of *Blakely*, but is also achievable without the need for reform that might ‘overwhelm’ current practices in our courts, familiar to both the prosecution and defense Bars. The statistics support the notion that except where early negotiations require the filing of a *Blakely*-compliant charging document prior to the preliminary examination, in the vast majority of cases, it is the period of time between the preliminary examination, and the cutoff for pre-trial discovery compliance mandated under Penal Code §§1054 et seq. that provides the most fertile ground for the filing of *Blakely*-compliant charging documents in those cases headed to trial on the one hand, or likely to resolve through a negotiated disposition, on the other. While the necessary revision of statutes may be extensive, the practical changes can easily be accommodated given the way that cases tend to be handled in our State.

However, while the statistics relied upon here describe a window of opportunity, report of the sheer number of cases handled in California courts clearly provides emphasis for the need for this Court to act decisively now.

CONCLUSION

With apology to this Court, and to the parties, for having partially reiterated several arguments that it has already made in the matter of *People v. Kevin Black*, CACJ urges this Court to find that trial court order here is violative of *Blakely*. In addition, and more importantly, the Court should use this opportunity to declare Penal Code §1170, and the rules related to it, unconstitutional insofar as they do not comply with *Blakely*, or *Apprendi v. New Jersey, supra*. The Court should also encourage the Legislature to deal with the impact of *Blakely* by enacting statutes that incorporate the key elements of the United States Supreme Court's interpretation of the Sixth Amendment.

Dated: October __, 2004

Respectfully submitted,
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FOR CRIMINAL JUSTICE

PROOF OF SERVICE BY MAIL

I, Theresa Jacobson, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 250, San Francisco, California.

On October , 2004, I served the within

**MOTION OF CALIFORNIA ATTORNEYS FOR CRIMINAL
JUSTICE FOR PERMISSION TO APPEAR AS *AMICUS CURIAE* ON
BEHALF OF APPELLANT (RULE 29.1(f) AND BRIEF IN SUPPORT
OF APPELLANT TOWNE**

on the parties in this action by placing a true and correct copy thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on October , 2004 at San Francisco, California.

Theresa Jacobson