

**Brief: Petition for Rehearing**

**Blakely Issue(s):** Denial of Jury Trial on (1) **Aggravating Factors** Used to Imposed Upper Term (Non-Recidivist Aggravating Factors only); (2) facts used to impose **consecutive sentences**.

*Blakely* issue raised for first time in petition for rehearing in court of appeal

Proceeding Below: Guilty Plea

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Posted: 7/13/04

People v. Wilson, A102205, Div. 1

Panel Atty: Gordon Brownell

Defendant and appellant Darryeal Woodrow Wilson, respectfully requests that this court grant a new hearing in the above-entitled case for the reasons set forth in this petition. This court filed its opinion, not to be published in the official reports on June 22, 2004. Petitioner is submitting this petition within 15 days of that date, pursuant to rule 25, subdivision (b), of the California Rules of Court.

Appellant petitions this court for a rehearing because of the recent decision in *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_, Daily Journal .D.A.R. 7581, 2004 WL 1402697) which was decided on June 24, 2004, and which renders unconstitutional a significant portion of California's determinate sentencing law and the sentence appellant received in this case. For this reason, appellant asks this court to vacate the opinion filed on June 22, 2004 and permit supplemental briefing on this issue of fundamental constitutional significance.

#### **REASONS FOR GRANTING REHEARING**

**I. AFTER THIS COURT ISSUED ITS OPINION ON JUNE 22, 2004, THE UNITED STATES SUPREME COURT DECIDED *BLAKELY V. WASHINGTON* WHICH RENDERS UNCONSTITUTIONAL THE STATUTORY METHOD USED BY TRIAL JUDGES TO IMPOSE BOTH UPPER TERMS AND CONSECUTIVE SENTENCES. THIS DECISION CLEARLY DEMONSTRATES THAT APPELLANT WAS DENIED HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THIS ISSUE SHOULD BE ADDRESSED BY THIS COURT THROUGH A GRANT OF REHEARING.**

**A. The Blakely Decision.**

In *Blakely v. Washington*, 542 U.S. \_\_\_\_, 2004 WL 1402697, the defendant pleaded guilty to kidnaping his estranged wife. The facts admitted in his plea supported a maximum sentence of 53 months. After a separate

(nonjury) sentencing hearing on the aggravating factors, the trial judge found that the defendant acted with “deliberate cruelty.’ Based on that aggravating factor, the judge imposed a total sentence of 90-months. (*Blakely, supra*, 2004 WL 1402697 at \* 4.)

In a 5-4 decision rendered two days after this court issued its decision in the case at bar, the United States Supreme Court reversed the decision by the Washington Court of Appeals which had upheld the judgment in *Blakely*.. (*Blakely, supra*, 2004 WL 1402697 at \* 4, 10.) Relying upon its prior decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435], the high court held that the judge could not increase a sentence based upon his finding of “deliberate cruelty,” even though the sentence meted out did not exceed the statutory maximum for that type of offense. (*Blakely, supra*, 2004 WL 1402697 at \* 4-6.)

The *Blakely* court made clear that *Apprendi* and the Sixth Amendment of the United States Constitution require that any such sentence enhancement must be proved beyond a reasonable doubt and found to be true by a jury. “This case requires us to apply the rule we expressed in *Apprendi v. New Jersey* [*supra* 530 U.S. 466, 490]: ‘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.’” (*Blakely, supra*, 2004 WL 1402697 at \* 4.)

In order to clarify what it meant by the maximum sentence a judge could award, the court defined the "statutory maximum" as "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, supra*, 2004 WL 1402697 at \* 4; italics in original.) "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts [to support a sentence enhancement] , but the maximum he may impose

*without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid.*,. italics in original.)

The five-justice majority grounded its opinion squarely upon the Sixth Amendment right to jury trial. The majority observed that , "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust the government to mark out the role of the jury." The court described the Sixth Amendment "by its terms [as] not a limitation on judicial power, but a reservation of jury power." (*Blakely, supra*, 2004 WL 1402697 at \* 7.)

In essence therefore, if the judge is permitted to use aggravating factors to increase a sentence, those factors must be presented to the jury for its consideration. If the jury does not find unanimously and beyond a reasonable doubt that those factors exist, the judge may not use them to increase a sentence. (*Blakely, supra*, 2004 WL 1402697 at \*4-5.)

Upon application of these principles to the case before this court, appellant's sentence was imposed in violation of his Sixth Amendment right to have a jury decide that the factors relied upon by the trial judge in imposing consecutive upper terms sentences were not found true beyond a reasonable doubt.

## **B. California Determinate Sentencing Law.**

### **1. Upper Terms.**

Penal Code section 1170, subdivision (b), provides in pertinent part:

“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 ... 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 factors set forth in Penal Code section 1170 and the implementing rule 4.420 of the California Rules of Court<sup>1</sup> violate the *Apprendi* and *Blakely* mandates. The term of imprisonment that may be imposed based solely on the jury’s verdict is the middle term. The judge may not impose the upper term unless he finds that there are additional aggravating factors. By statute and regulation, however, these aggravating factors cannot be found true beyond a reasonable doubt by a unanimous jury. They are factors reserved solely to the trial judge based upon a preponderance of the evidence standard and gleaned

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<sup>1</sup> Rule 4.420 of the California Rules of Court provides in pertinent part, with italics added:

“(a) . . . 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 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. . . ¶.*

(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. [Emphasis added]”

from material that the jury never considered (e.g., probation reports). Indeed, by virtue of rule 4.420, subdivision (d), the judge is specifically *prohibited* from imposing the upper term based on an element of the underlying offense, which is one of the very things that the jury must unanimously find to be true beyond a reasonable doubt.

Significantly, the *Blakely* decision pointed to similar procedures under Washington state law as failing the *Apprendi* test. Specifically, the court noted that under Washington law “[a] judge may impose a sentence above the standard range [only] if he finds ‘substantial and compelling reasons justifying an exceptional sentence.’ §§ 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. §§ 9.94A.390. Nevertheless, ‘a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.’ *State v. Gore*, 143 Wash.2d 288, 315-316, 21 P.3d 262, 277 (2001). When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. §§ 9.94A.120(3).” (*Blakely* at 2004 WL 1402697 at \* 2, italics added.)

Thus in all pertinent respects, California’s determinate sentencing law suffers from the same defects as the Washington scheme that the United States Supreme Court declared unconstitutional in *Blakely*.

## **2. Consecutive Sentences.**

Similar to the Sixth Amendment flaws in the rules governing imposition of the upper term, the rules governing imposition of consecutive terms also violate the *Apprendi* and *Blakely* mandates.

Penal Code section 669 provides that in the absence of special findings by the trial judge, sentences for two or more felonies shall run concurrently.<sup>2</sup> The rule implementing that statute is California Rules of Court, rule 4.425.<sup>3</sup>

Based on these rules, in order to sentence consecutively rather than concurrently, the trial judge must find one or more of the factors listed in rule 4.425. None of these factors are presented to or found true beyond a reasonable doubt by the jury. Consecutive sentencing is an enhanced sentencing power reserved solely to the trial judge based upon factors beyond those authorized by the jury verdict alone. As such, the consecutive sentencing

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<sup>2</sup> Penal Code section 669 provides in pertinent part:

“ When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively . . . ¶ . . . Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently..”

<sup>3</sup> California Rules of Court, rule 4.425. states:

"Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

"(a) [Criteria relating to crimes] Facts relating to the crimes, including whether or not:

"(1) The crimes and their objectives were predominantly independent of each other.

"(2) The crimes involved separate acts of violence or threats of violence.

"(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior."

scheme in California fails the *Apprendi* test as explained in *Blakely* and thus violates the Sixth Amendment right to a jury trial.

**C. Application to Appellant's Case.**

Appellant's attorney argued at that the circumstances in mitigation outweighed those in aggravation and that the trial court should impose the low term of three years in state prison; further, because it was not proven that the acts found by the jury occurred on separate occasions, punishment on three of the four counts of conviction should be stayed pursuant to Penal Code section 654. (CT 333-343; RT [3-2803] 10-29.)<sup>4</sup> Because appellant was a first offender, his attorney argued that "he cannot be sent for an aggravated term, consecutive on all counts." (RT 29.) The prosecutor argued for imposition of the upper term of eight years in count one and for consecutive sentences of one-third the midterm on the remaining three counts, which would provide for a total term of imprisonment of 14 years in prison. (CT 327-332; RT 29-37.)

The trial court sentenced appellant to the upper term of eight years in prison for his conviction of violating Penal Code section 288, subdivision (a), in count one. (RT 42.) In imposing the upper term, the court stated that it considered the circumstances in mitigation and aggravation cited by counsel and found "those circumstances in aggravation to be very compelling and to outweigh the circumstances in mitigation." (RT 39-40.) Specifically, the court relied upon "two circumstances in aggravation . . . as the sole basis for my determination to impose the upper term as to each count if I was to analyze each count separately." (RT 40.)

The first factor relied upon by the trial court was rule 4.421(a)(11). The court found that "[w]ithout question the defendant took advantage of a position

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<sup>4</sup> All subsequent references to "RT" refer to the Reporter's Transcript of Proceedings on March 28, 2003, as contained in Volume 27 of the reporter's transcripts and record on appeal.

of trust and confidence to commit each of these offenses.” (RT 40-41.) The second “aggravating factor” relied upon by the court was rule 4.421(a)(8), which was “the manner in which each of the crimes was committed, was carried out in a fashion that would indicate planning, sophistication or professionalism.” (RT 41-42.)

Because each of the two aggravating factors relied upon by the court involved non-recidivist conduct, appellant was entitled under *Apprendi* and *Blakely* to a jury trial in which the People would be required to prove that each of those factors was true beyond a reasonable doubt. Appellant’s upper term sentence of eight years imprisonment does not meet constitutional muster under the controlling decisional law of the United States Supreme Court.

So, too, must the additional punishment imposed by imposition of consecutive sentences be reversed. The court found “four independent separate reasons for imposing consecutive sentences as to the counts in this case.” (RT 43.) The court cited the following factors: 1) rule 4.425(a)(1), “the crimes and their objectives were predominantly independent of one another”; 2) rule 4.425(a)(3), “the crimes were committed at different times and separate places . . . ”; 3) rule 4.425(b), “which pertains to other circumstances in aggravation not previously considered and not an element of the charges.” (RT 43.)

In regard to the third reason, the court cited rules 4.421(b), concerning facts relating to the defendant; rule 4.421(c), concerning any other facts statutorily declared to be circumstances in aggravation, and rule 4.408, concerning additional criteria reasonably related to the decision being made. (RT 44-45.) The court noted “as a fourth and separate reason for imposing consecutive sentences, that the defendant during an interim period which might be viewed as a period where he was not involved in criminal activity was involved [in other molestations]. “ (RT 45-46.)

Because the factors employed by the trial court to impose these enhanced sentences were not presented to or considered by a jury, the trial judge had no authority to impose either the upper term or consecutive sentences. Thus, the imposition of concurrent and consecutive sentences in this case violated appellant's Sixth Amendment right to a jury trial. (*Blakely, supra*, 2004 WL 1402697 at \*4-5.)

In *Blakely*, the United States Supreme Court rendered a decision of fundamental constitutional importance, impacting upon the Sixth Amendment right to a jury trial of countless defendants throughout the United States. Appellant is one of those defendants. Just as the *Blakely* decision invalidated a significant portion of the sentencing scheme utilized by the trial courts in the state of Washington, its rationale applies with equal force to a significant part of the determinate sentencing law in California and the sentencing laws of other states as well.<sup>5</sup>

Appellant therefore respectfully asks this court to grant rehearing so that he may have the opportunity to provide full briefing on this question of first impression, in order to provide this court with a thorough review of the decisional authority governing this issue, its application to the facts of his case, as well as the applicable standard of prejudice, which warrants reversal of the judgment in this matter.

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<sup>5</sup> Even the Wall Street Journal noted that the *Blakely* decision could be a "bombshell" affecting the federal sentencing guidelines and the sentencing schemes of at least eight states. ("Supreme Court Limits Scope of Judges' Sentencing Powers" *Wall Street Journal*, June 25, 2004, p. A3.) Quoting Frank O Bowman a sentencing expert at the University of Indiana law school, the *Journal* noted "This is the biggest opinion in American criminal law in 25 years because we could be invalidating significant components of most of the sentencing statutes in the union." (*Ibid*)

### CONCLUSION

Because of the magnitude of the issue in this case and the scope of its impact, appellant respectfully asks this court to grant rehearing and provide the parties with the opportunity to brief this entire issue at length. Should this court grant appellant's request for rehearing, appellant requests sufficient time for both parties to undertake the extensive research and writing necessary to fully explicate this novel and important sentencing matter.

Dated: July 7, 2004

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GORDON S. BROWNELL, ESQ.  
Attorney for Defendant and Appellant  
**DARRYEAL WOODROW WILSON**

### CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 33(b), I certify that pursuant to the word count conducted by my word-processing program (Word Perfect 10 for Windows) that this petition for review, excluding the Certificate of Compliance, consists of 2,814 words.

Dated: July 7, 2004

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GORDON S. BROWNELL, ESQ.  
Attorney for Defendant and Appellant  
**DARRYEAL WOODROW WILSON**

**PROOF OF SERVICE BY MAIL**

I declare that:

I am a member of the State Bar of California. I am over the age of 18 years and not a party to the within-entitled cause. My business address is 1241 Adams Street, # 1139, St. Helena, CA 94574.

On July 7, 2004, I served the attached **PETITION FOR REHEARING (A102205)** herein by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States Mail at St. Helena, CA addressed as follows:

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Darryeal Woodrow Wilson  
(Appellant has instructed appellate counsel in writing not to serve him with copies of the briefs filed in this matter.)

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 7, 2004, at St. Helena, California.

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GORDON S. BROWNELL