

June 28, 2004

To the Honorable Ronald George, Chief Justice
and the Honorable Associate Justices
Supreme Court of the State of California
Ronald Reagan Bldg.
300 S. Spring Street
2nd Floor
Los Angeles, CA 90013

RE: *People v. Shawn Towne*
Court of Appeal No. B166312

To the Honorable Chief Justice and Associate Justices:

Petitioner seeks leave to file this supplemental letter containing points and authorities relevant to the Petition for Review filed by petitioner on June 18, 2004. The request is based upon the June 24, 2004 filing by United States Supreme Court of *Blakely v. Washington* (2004) ___ U.S. ___ [No. 02-1632; 2004 Daily Journal D.A.R. 7581, June 25, 2004 Daily Journal Reports], a decision that is relevant to the issue presented for review.

In the Petition for Review, petitioner sought review based in part upon the trial court's having violated petitioner's Federal Constitutional right under the Sixth and Fourteenth Amendments to a trial by jury by imposing the upper term in this case based upon the facts of counts of which petitioner was acquitted by the jury. (Petition for Review, pgs. 3-8) The United States Supreme Court decision in *Blakely* demonstrates that petitioner's right to a jury under the federal constitution was indeed violated here.

In *Blakely*, the United States Supreme Court held that Washington's sentencing scheme, which provides for one maximum sentence for the usual case, and a higher maximum sentence in cases in which the sentence court finds aggravating factors by a preponderance of the evidence, to be unconstitutional and a violation of the right to trial by jury. (*Blakely v. Washington* (2004) ___ U.S. ___ [No. 02-1632; 2004 Daily Journal D.A.R. at 7582-7583]; see also *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) The court reached this conclusion by applying the rule from *Apprendi* that, "[o]ther 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." (*Id.*, at 490.)

The Court explained in *Blakely*:

“the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, 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.”
Blakely v. Washington (2004) ___ U.S. ___ [No. 02-1632; 2004 Daily Journal D.A.R. at 7582-7583]

Thus, because the Washington sentencing court could not impose the greater maximum sentence without finding facts beyond the mere elements of the offense, the judge was necessarily finding facts beyond those established by the jury's verdict of guilt. (*Ibid.*)

Similarly in California,

“[w]hen 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.” (Pen. Code, § 1170, subd. (b).)

The court must further state its reasons for imposing the upper term. Those reasons may be based upon the evidence at trial, evidence introduced at the sentencing hearing and the probation officer's reports among other things. (Pen. Code, § 1170, subd. (b).) They must be proved by a preponderance of the evidence and may not be based upon a fact that is an element of the crime. (Pen. Code, § 1170, subd. (a)(3) [the sentencing courts shall apply the rules imposed by the Judicial Counsel]; Cal. Rules of Court rule 4.420 (b), (d); see also *People v. Bowen* (1992) 11 Cal.App.4th 102, 105.)

In this case, applying these sentencing rules, the trial court sentenced petitioner to the upper term based, in part, on the court's finding that petitioner had committed the acts charged in the counts of which he had been acquitted by the jury. (RT 2415-2416) This was a clear violation of petitioner's right to a jury trial. (*Blakely v. Washington* (2004) ___ U.S. ___ [No. 02-1632; 2004 Daily Journal D.A.R. at 7582-7583]; see also *Apprendi v. New Jersey*, *supra*, 530 U.S., at 490.) The Court of Appeal found that any potential error in the trial court's having done so was harmless because the trial court could have based the upper term on the other sentencing factors relating to petitioner's prior performance on probation and parole that the court mentioned at the time of sentencing. (Slip Opn., at pg. 6.) Any court finding on these factors, however, would also violate the Supreme Court's holding in *Blakely*. (*Blakely v. Washington* (2004) ___ U.S. ___ [No. 02-1632; 2004 Daily Journal D.A.R. at 7582-7583].)

As noted in the Petition for Review, the California Courts of Appeal are split on whether a sentencing court may use the facts of counts of which the defendant was acquitted to impose the harshest sentence allowed for the crime of which the defendant was convicted. (See *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1223; compare *People v. Takencareof* (1981) 119 Cal.App.3d 492, 498 with *People v. Lewis* (1991) 229 Cal.App.3d 259.) The *Lewis* court took the position that, because the sentencing court uses a preponderance standard while the jury uses beyond a reasonable doubt, the inconsistency in the findings did not matter. (*Id.*, at 264.) This holding was clearly inconsistent with *Blakely* and cannot stand.

To bring California law into conformity with the requirements of the federal constitution, secure uniformity in decisions and vindicate petitioner's right to a jury trial, this Court should grant review and reverse petitioner's sentence to the upper term.

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

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