No. 05 -

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2005

JOHN CUNNINGHAM,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

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QUESTION PRESENTED

Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

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FIRST APPELLATE DISTRICT, DIVISION FIVE

Petitioner John Cunningham respectfully prays that a Writ of Certiorari issue to review the decision of the California Court of Appeal entered on April 18, 2005.

OPINIONS BELOW

The California Court of Appeal issued its unpublished opinion in this case on April 18, 2005, with Presiding Justice Jones both concurring and dissenting. A copy of that opinion is attached as Appendix A. On May 4, 2005, the Court of Appeal issued a one-page order denying a rehearing and modifying its opinion. A copy of that order is attached as Appendix B. The California Supreme Court issued a one-page order denying discretionary review of the Court of Appeal's decision on June 29, 2005. A copy of that order is attached as Appendix C.

JURISDICTION

The California Supreme Court denied discretionary review on June 29, 2005. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

B. State Statutory Provisions

California Penal Code section 288.5, subdivision (a) provides in relevant part:

> "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense . . . or three or more acts of lewd or lascivious conduct . . . with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and *shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years*." (Emphasis supplied.)

California Penal Code section 1170, subdivision (b) provides in relevant 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 including reports received pursuant to Section 1203.03 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 court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. (Emphasis supplied.)

C. State Rules of Court

Relevant California Rules of Court, which are attached as Appendix D, include the following:

> Rule 4.401. Authority
> Rule 4.405. Definitions

Rule 4.406. Reasons
Rule 4.408. Criteria not exclusive; sequence not significant
Rule 4.409. Consideration of criteria
Rule 4.420. Selection of base term of imprisonment
Rule 4.421. Circumstances in aggravation
Rule 4.423. Circumstances in mitigation

STATEMENT OF THE CASE

In an indictment filed on March 14, 2001, the state charged petitioner John Cunningham in Contra Costa County Superior Court with one count of continuous sexual abuse in violation of California Penal Code section 288.5, as follows:

> "On or about January, 2000 through December, 2000, at San Pablo, in Contra Costa County, the Defendant, JOHN E. CUNNINGHAM, who resided in the same home with and had recurring access to John Doe, who was a minor child under the age of 14 years, from January, 2000, to December, 2000, a period of not less than three months in duration, did unlawfully engage in three and more acts of lewd and lascivious conduct with the child." CT 192.[1]

On May 30, 2003, the jury convicted Mr. Cunningham as charged, stating in its verdict form that it found Mr. Cunningham guilty of "a violation of PC Sec. 288.5, (continuous sexual abuse), as set forth in the indictment." CT 460. Other than what was stated on its verdict form, the jury made no other factual findings regarding Mr. Cunningham or his guilt.

At the August 1, 2003 sentencing hearing, the trial court first denied Mr. Cunningham probation. RT 728. The court then found the

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[1] Citations to "CT" denote the Clerk's Transcript filed in the California Court of Appeal, followed by the page reference. Citations to the Reporter's Transcript on Appeal are denoted "RT."

existence of six aggravating factors pursuant to the California Rules of Court: (1) great violence, great bodily harm, and threat thereof disclosing a high degree of viciousness and callousness (rule 4.421(a)(1)), (2) a vulnerable victim due to his age and dependence on Mr. Cunningham as his father and primary caretaker (rule 4.421(a)(3)), (3) a threat of bodily injury to coerce the victim to recant (rule 4.421(a)(6)), (4) taking advantage of a position of trust or confidence as the victim's father and caregiver (rule 4.421(a)(11)), (5) engaging in violent conduct which indicates a serious danger to society (rule 4.421(b)(1)), and (6) employment as a police officer (rule 4.408(a)). RT 728-729. The court found one mitigating factor: Mr. Cunningham's lack of any prior record (rule 4.423(b)(1)). RT 728. The court then determined that the factors in aggravation outweighed the factor in mitigation, and sentenced Mr. Cunningham to the upper term of 16 years in state prison for the continuous sexual abuse conviction. RT 729-730. That same day, Mr. Cunningham filed a timely notice of appeal. CT 589.

Relying on this Court's decision in *Blakely v. Washington*, 542 U.S. 296, 125 S.Ct. 2531 (2004), Mr. Cunningham contended on appeal that he was deprived of his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process because the trial court imposed the upper term of 16 years by relying on aggravating factors found true neither by a jury nor beyond a reasonable doubt. The state Court of Appeal rejected this claim, finding that under California's

Determinate Sentencing Law (the "DSL"), which provides for the imposition of a lower, middle, or upper term, "the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment." Opinion at 16. Presiding Justice Jones dissented from this portion of the majority's opinion, concluding that *Blakely* compelled a remand for resentencing since "[u]nder California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term." Conc. & dis. opn. of Jones, P.J. at 1-2. On May 4, 2005, the Court of Appeal issued a one-page order denying Mr. Cunningham's petition for rehearing[2] and modifying its opinion. Appendix B.

On May 19, 2005, Mr. Cunningham petitioned the California Supreme Court for discretionary review of this issue. On June 20, 2005, while Mr. Cunningham's petition was pending, the California Supreme Court decided *People v. Black*, 35 Cal.4th 1238 (Cal. 2005), holding that criminal defendants have no federal constitutional right to a jury trial on aggravating factors used to impose an upper term sentence under the DSL. On June 29, 2005, that court issued an order denying Mr. Cunningham's Petition for Review "without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black* (June

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[2] The Court of Appeal's order erroneously states that it denied Respondent's petition for rehearing; Mr. Cunningham, the appellant, was the only party to have filed a petition for rehearing.

20, 2005, S126182) ___ Cal.4th ___, 2005 WL 1421815 . . . regarding the effect of *Blakely v. Washington* (2004) 542 U.S. ___, 124 S.Ct. 2531, and *United States v. Booker* (2005) 543 U.S. ___, 125 S.Ct. 738, on California law." Appendix C. *Black* has since become final, with no change in the opinion. *See People v. Black, supra,* 35 Cal.4th 1238. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

As this Court has repeatedly made clear, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *See, e.g., Blakely v. Washington, supra,* 124 S.Ct. at p. 2536; *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000). Most recently, the Court has applied this constitutional mandate to invalidate Washington state's sentencing scheme and the Federal Sentencing Guidelines to the extent they permitted judicial fact-finding of aggravating factors to justify the imposition of a sentence greater than the maximum authorized by the jury's verdict or defendant's admissions. *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005) [Federal Sentencing Guidelines]; *Blakely v. Washington, supra,* 124 S.Ct. 2531 [Washington state's sentencing scheme].

Despite the Court's authorities in this area, California has now decided that its determinate sentencing scheme, the DSL, does not offend the Sixth or Fourteenth Amendments even to the extent that it permits a trial judge to impose an upper term sentence based on factors in aggravation found true neither by a jury nor beyond a reasonable doubt.

People v. Black, supra, 35 Cal.4th 1238; *see also* Opinion at 16-17. In light of California's position, certiorari is appropriate in this case for two reasons. First, this recently-settled California law directly contravenes *Blakely* and *Apprendi*. Certiorari is therefore necessary to forestall California from continuing to violate the constitutional rights of thousands of criminal defendants during sentencing. Second, a split of authority compelling resolution has now arisen in the state courts in the aftermath of *Blakely* and *Booker* regarding the application of these cases to sentencing schemes just like California's DSL. Because this case is an ideal one for resolving the important question presented, this Court should grant certiorari and hold that California's DSL, as is being applied to permit the imposition of enhanced sentences based on judicial fact-finding, violates the Sixth and Fourteenth Amendments.

B. California Law Directly Contravenes This Court's Precedents And Must Be Corrected To Avoid Further Constitutional Encroachments.

The Sixth and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin,* 515 U.S. 506, 509-510 (1995); *see also Mullaney v. Wilbur,* 421 U.S. 684, 698 (1975); *In re Winship,* 397 U.S. 358, 363-364 (1970). Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Sixth Amendment requires to be proven to a jury beyond a reasonable

doubt. *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490; *Mullaney v. Wilbur, supra*, 421 U.S. at p. 698; *Specht v. Patterson,* 386 U.S. 605, 607 (1967). In *Apprendi*, this Court held 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." *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490; *see also Ring v. Arizona,* 536 U.S. 584, 609 (2002) [Sixth Amendment mandates that existence of an aggravating factor necessary for imposition of death penalty must be found by a jury rather than a sentencing judge].

Blakely v. Washington, supra, further elaborated on the right to a jury determination of non-recidivist aggravating factors beyond a reasonable doubt. There, the Court held that Washington state's sentencing procedure violated the Sixth Amendment because it permitted the trial court to impose a sentence above the "standard range" or statutory maximum if it found the existence of an aggravating factor demonstrating substantial and compelling reasons for an exceptional sentence. 124 S.Ct. at p. 2538. As the Court explained:

> "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, 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 facts." *Id.* at p. 2537 (emphasis in original).

California's DSL employs a system of sentencing choices much like Washington's sentencing scheme at issue in *Blakely*. Under

California Penal Code section 1170, subdivision (b), "[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." (Emphasis supplied.) *See also* Cal. Rules of Court, rule 4.420(a) ["The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation."]. Thus, under the DSL, the middle term is the presumptive sentence, *see, e.g.*, *People v. Arauz,* 5 Cal.App.4th 663, 666 (Cal.App. 1992) (maj. opn.) and 674 (conc. & dis. opn. of Yegan, J.)), or as in *Blakely*, the "statutory maximum" allowable for the particular offense. In fact, a sentencing judge in California need not even state reasons for imposing the middle term. *People v. Arceo,* 95 Cal.App.3d 117, 121 (Cal.App. 1979).

Furthermore, as with Washington's sentencing procedure, in California, the upper term may only be imposed where "exceptional" circumstances in the form of aggravating factors exist justifying a departure from the middle term. *See, e.g., People v. Jackson,* 196 Cal.App.3d 380, 390-391 (Cal.App. 1987); Cal. Rules of Court, rule 4.420(b) ["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."]. California's Rules of Court also only require that the sentencing judge find circumstances in aggravation by a preponderance of the evidence. Cal. Rules of Court,

rule 4.420(b); *see also People v. Levitt,* 156 Cal.App.3d 500, 515 (Cal.App. 1984).

California Rules of Court, rule 4.421 sets forth a non-exhaustive list of circumstances which may constitute aggravating factors. Rule 4.408(a) provides that for purposes of making discretionary sentencing decisions, the sentencing court may consider "additional criteria reasonably related to the decision being made." *Cf. Blakely v. Washington, supra,* 124 S.Ct. at p. 2535 [Washington sentencing scheme providing "illustrative" list of aggravating factors which justify imposition of exceptional sentence]. However, California's Rules of Court make clear that in finding the existence of an aggravating factor, the court may *not* rely on a factor which is an element of the crime. Cal. Rules of Court, rule 4.420(d) ["A fact that is an element of the crime shall not be used to impose the upper term."]; *see also People v. Fernandez,* 226 Cal.App.3d 669, 680 (Cal.App. 1990) [trial court erroneously relied on vulnerability based on young age of victim as aggravating factor in sentencing resident child molester because age range was specified in underlying offense]. Similarly, even where an aggravating factor technically is not an element of the underlying crime, California courts may not rely on it where the factor is inherent in the crime. *See, e.g., People v. Young,* 146 Cal.App.3d 729, 734 (Cal.App. 1983) [trial court improperly relied on "extreme serious nature of the offense" to aggravate defendant's sentence for assault with a deadly weapon since this offense is "obvious[ly]" an extremely serious offense].

Consequently, under California's DSL, when a sentencing court finds the existence of factors in aggravation, it necessarily finds the existence of facts *beyond* which the jury found to exist in arriving at its verdict.

California Penal Code section 288.5 -- the provision under which Mr. Cunningham was convicted -- provides that one who commits continuous sexual abuse of a child "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." Cal. Pen. Code § 288.5, subd. (a). In the absence of aggravating factors, a departure from the middle term sentence of 12 years to the upper term of 16 years is unauthorized under the DSL. Pen. Code § 1170, subd. (b); *see also* Cal. Rules of Court, rule 4.420(a). Thus, pursuant to *Apprendi* and *Blakely*, the middle term of 12 years is the "statutory maximum" sentence that a judge may impose for a section 288.5 conviction "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington, supra,* 124 S.Ct. at p. 2537. Nevertheless, without the benefit of additional jury fact-finding, the trial court in this case found the existence of six aggravating factors based on which it departed from the statutory maximum of 12 years, and sentenced Mr. Cunningham to the upper term of 16 years. Moreover, by operation of California Rules of Court, rule 4.420(b), the court necessarily based its factual findings on a preponderance of the evidence standard. The California Court of Appeal held that the trial court's imposition of the upper term under these circumstances did not

contravene *Blakely* or violate Mr. Cunningham's constitutional rights to a jury trial and due process. Opinion at 16-17.[3]

Despite the similarity between Washington state's sentencing scheme and California's DSL, the California Supreme Court has now concluded -- as the Court of Appeal did here -- that the DSL does not violate the dictates of *Apprendi* and *Blakely*. *People v. Black, supra,* 35 Cal.4th at p. 1254. In *Black*, the court conceded that "[t]he mandatory language of [California Penal Code] section 1170, subdivision (b), does provide some support for defendant's position," *ibid.*, and that "section 1170, subdivision (b) can be characterized as establishing the middle term sentence as a presumptive sentence . . ." *id.* at p. 1257. However, relying on *United States v. Booker, supra,* and the discretion sentencing judges have under the DSL to impose the lower, middle, or upper term after the jury has returned a guilty verdict, the court concluded that a judge's imposition of "the upper term is the 'statutory maximum' for purposes of Sixth Amendment analysis." *Id.* at p. 1257-1258. Indeed, the court found that the DSL "preserves, rather than undermines, the traditional power of the jury." *Id.* at p. 1257.

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[3] According to the Court of Appeal, *United States v. Booker, supra,* 125 S.Ct. 738,

> "clarifies that *Blakely's* Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit*, but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, Penal Code section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors." Opinion at 17, n.14 (emphasis in original).

In dissent, Justice Kennard observed: "Hard as it tries, the majority here cannot point to any significant differences between California's sentencing law and the Washington sentencing scheme that the high court invalidated in *Blakely* . . . ." *People v. Black, supra,* 35 Cal.4th at p. 1271 (conc. & dis. opn. of Kennard, J.). Moreover, as Justice Kennard explained, the judicial discretion afforded California sentencing judges under the DSL is in fact no different from the discretion afforded judges under the Washington scheme. *Ibid*.[4]

In light of California's position regarding the constitutionality of its DSL, certiorari is necessary to make California and its sentencing scheme adhere to constitutionally acceptable standards. More importantly, this Court should grant certiorari on the issue presented to prevent California from continuing every day to violate the constitutional rights of countless criminal defendants facing sentencing in its courts.

C. A Split Of Authority Has Developed In The State Courts Regarding The Application Of *Blakely* and *Booker* To Sentencing Schemes Like California's Determinate Sentencing Law.

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[4] Justice Kennard concluded that pursuant to this Court's precedents,

> "under California's sentencing scheme a trial court may use an aggravating fact to justify an upper term only if: (1) a jury has made a finding on the aggravating fact, (2) the defendant has admitted the aggravating fact, (3) the defendant has validly waived the right to a jury trial on the aggravating fact, or (4) the aggravating fact relates to the defendant's criminal record rather than to the circumstances of the conviction offense. Absent one of these situations, the trial court may not impose an upper term sentence." *People v. Black, supra*, 35 Cal.4th at p. 1265 (conc. & dis. opn. of Kennard, J.).

Certiorari is also appropriate to resolve the stark split of authority which has developed in the state courts regarding the application of *Blakely* to sentencing schemes similar to California's DSL. Decisions from Arizona, Colorado, Minnesota, New Jersey, North Carolina, Indiana, and Oregon have applied a bright-line rule, holding that the Sixth and Fourteenth Amendments are necessarily violated when a sentencing judge finds facts in imposing a sentence longer than the maximum authorized by the jury's verdicts or the defendant's admissions. *See, e.g. State v. Brown*, 209 Ariz. 200, 203, 99 P.3d 15, 18 (Ariz. 2004); *Lopez v. State,* 113 P.3d 713, 723-725 (Colo. 2005); *Smylie v. State*, 823 N.E.2d 679, 863 (Ind. 2005); *State v. Shattuck*, 689 N.W.2d 785, 786 (Minn. 2004); *State v. Natale*, 184 N.J. 458, 466, 878 A.2d 724, 728 (N.J. 2005); *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 264-265 (N.C. 2005); *State v. Dilts*, 337 Or. 645, 649, 103 P.3d 95, 99 (Or. 2004). On the other hand, state courts in California, Hawaii, and Tennessee, finding no bright-line rule, have concluded that such fact-finding by judges is constitutional when conducted within a sentencing scheme characterized by broad judicial discretion. *See, e.g., People v. Black, supra,* 35 Cal.4th at p. 1254 (Cal.); *State v. Maugaotega,* 107 Haw. 399, 114 P.3d 905, 914-915 (Haw. 2005); *State v. Gomez,* 163 S.W.3d 632, 661 (Tenn. 2005). As discussed in the previous section, this is precisely the approach taken by the Court of Appeal in this case. *See* Opinion at 16-17.

Since this sharp split of authority has arisen among the state's highest courts, it cannot be resolved without this Court's intervention.

Thus, in order to correct the constitutional analysis in those jurisdictions which, contrary to *Blakely*, uphold sentencing schemes permitting the imposition of enhanced sentences based on judicial fact-finding -- not jury findings or defendants' admissions -- the Court should grant this Petition for Writ of Certiorari.

D. This Case Presents An Excellent Vehicle For Considering The Question Presented.

At least three aspects of this case make it an excellent vehicle for deciding whether California's DSL, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments. First, the case is on direct review and Petitioner unambiguously presented the federal constitutional claim to the California Court of Appeal, which denied the claim on its merits. Petitioner similarly presented the claim to the California Supreme Court, which declined to review it. Consequently, there is no procedural impediment to this Court's considering the question presented.

Second, this case only involves the finding of aggravating factors based on conduct relating to the charged offense, and is therefore unencumbered by the complexity of the recidivist-related aggravating factors exception to the jury trial right identified in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In contrast, the California Supreme Court's decision in *People v. Black, supra,* involves this very issue.

Indeed, although Justice Kennard dissented from the majority's reasoning in *Black* which upheld the constitutionality of California's DSL, she concurred in the result because "in sentencing defendant to the upper term, the trial court relied in part on [defendant's] prior criminal history and on facts found by the jury . . . ." *People v. Black, supra,* 35 Cal.4th at p. 1273 (conc. & dis. opn. of Kennard, J.). Also unlike *Black*, this case does not involve the trial court's use of an aggravating factor that the jury found true in returning its verdict. *Ibid*. [probation ineligibility finding by jury].

Third, there is every reason to believe that the constitutional violation was not harmless. The trial court imposed the upper term of 16 years based on its finding of six factors in aggravation. At the sentencing hearing, defense counsel not only objected to, and contested the factors in aggravation, but he introduced substantial evidence supporting a finding that probation was the appropriate sentence for Mr. Cunningham. RT 716-722; *cf. United States v. Neder,* 527 U.S. 1, 19 (1999) [failure to submit an element of an offense to jury will not be harmless where defendant contested omitted element and raised evidence sufficient to support a contrary finding]. Further, the state court squarely rejected Petitioner's claim on the merits, without any finding of harmless error. Opinion at 16-17. Presiding Justice Jones, who in dissent concluded that the imposition of the upper term violated Petitioner's constitutional rights under *Blakely*, would have found the constitutional violation prejudicial and remanded for a resentencing. Conc. & dis. opn. of Jones, P.J. at 1-2.

This Court should grant Mr. Cunningham's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

DATED: February 22, 2006.

Respectfully submitted,

By: ________________
Peter Gold
Attorney for petitioner
John Cunningham

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Rule 4.401. Authority

The rules in this division are adopted pursuant to Penal Code section 1170.3 and pursuant to the authority granted to the Judicial Council by the Constitution, article VI, section 6, to adopt rules for court administration, practice and procedure.

Rule 4.405. Definitions

As used in this division, unless the context otherwise requires:

* * *

(b) "Base term" is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed.

(c) "Enhancement" means an additional term of imprisonment added to the base term.

(d) "Aggravation" or "circumstances in aggravation" means facts which justify the imposition of the upper prison term referred to in section 1170(b).

(e) "Mitigation" or "circumstances in mitigation" means facts which justify the imposition of the lower of three authorized prison terms or facts which justify the court in striking the additional punishment for an enhancement when the court has discretion to do so.

(f) "Sentence choice" means the selection of any disposition of the case which does not amount to a dismissal, acquittal, or grant of a new trial.

* * *

(h) "Imprisonment" means confinement in a state prison.

* * *

Rule 4.406. Reasons

(a) [How given] If the sentencing judge is required to give reasons for a sentence choice, the judge shall state in simple language the primary factor or factors that support the exercise of discretion or, if

applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It shall be delivered orally on the record.

(b) [When reasons required] Sentence choices that generally require a statement of a reason include:

> * * *
>
> (2) Imposing a prison sentence and thereby denying probation.
>
> * * *
>
> (4) Selecting a term other than the middle statutory term for either an offense or an enhancement.
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> * * *
>
> (7) Striking the punishment for an enhancement.
>
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>
> (10) Striking an enhancement or prior conviction allegation under section 1385(a).

Rule 4.408. Criteria not exclusive; sequence not significant

(a) The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.

(b) The order in which criteria are listed does not indicate their relative weight or importance.

Rule 4.409. Consideration of criteria

Relevant criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise.

Rule 4.420. Selection of base term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these

rules. 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 and mitigation 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. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(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.

Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.