

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Court No. _____
Plaintiff and Respondent,	)
	) Court of Appeal
v.	) No. xxxxxx
	)
,	) Superior Court
Defendant and Appellant.	) No. xxxxxx
_____	)

APPEAL FROM THE SUPERIOR COURT OF xxxxxxxx COUNTY

The Honorable xxxxxxxx, Judge Presiding

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**PETITION FOR REVIEW TO EXHAUST  
STATE REMEDIES  
(CALIFORNIA RULES OF COURT, RULE 33.3)**

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

Pursuant to rules 28 and 33.3 of the California Rules of Court, XXXXXXXX, defendant and appellant, respectfully petitions this court for review of the [un/]published opinion by the Fourth District, Division XXX, [if published, provide citation], which affirms the judgment, filed xxxx. A copy of the opinion of the Court of Appeal is attached to this petition as Appendix A. (Cal. Rules of Court, rule 28.1(b)(4).)<sup>1</sup>

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<sup>1</sup> All further rule references are to the California Rules of Court.

## PETITION FOR REHEARING

Although a petition for rehearing could have been filed in the Court of Appeal, neither party filed such a petition. (Rule 28.1(b)(3).) [Or, if a petition was filed, so state and indicate how the court ruled.]

## STATEMENT UNDER RULE 33.3

This case presents no grounds for review under rule 28(b) and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838 [119 S.Ct. 1728, 144 L.Ed.2d 1].)

## STATEMENT OF THE UNDERLYING PROCEEDINGS

[Provide a brief statement of the case, including the nature of the conviction and the punishment imposed. (Rule 33.3(b)(3)(B).)]

## STATEMENT OF THE FACTUAL AND LEGAL BASES OF THE CLAIM

Appellant's claim is that the trial court violated appellant's Sixth and Fourteenth Amendment rights as set forth in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] and *United States v. Booker* (2005) \_\_\_ U.S. \_\_\_ [125 S.Ct. 738, 160 L.Ed.2d 621] by imposing the upper term [and/or consecutive sentences] based on factors that were not found true beyond a reasonable doubt by a jury [or admitted by appellant]. Appellant recognizes this court's recent holding in *People v. Black* (2005) 35 Cal.4th 1238, 1244: "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial," and asks this court to

revisit the issue.

Even though this case does not present a ground for relief under rule 28(b), it warrants review. Appellant requests this court exercise its discretion and grant review to reconsider its conclusion set forth in *Black*. (Advisory Com. com., West Ann. Codes, Rules (2005 ed.) foll. rule 33.3, p. 86.) Since *Black*, at least one state, with a sentencing scheme very much like California's, has called *Black* into question, by finding sentences above a presumptive statutory term based on judicial fact-finding violate the jury trial guarantee. (*New Jersey v. Natale* (N.J. 8/2/05) 2005 N.J. Lexis 938, \*12, \*44-46.) The court held that a sentence above the presumptive statutory term, based solely on a judicial finding of aggravating factors, violates a defendant's jury trial guarantee. (*Id.* at \*12.) The New Jersey Supreme Court even noted that California's determinate sentencing law appeared to be in direct conflict with the federal constitution. (*Id.* at \*24.)

And, almost all other state courts examining their sentencing statutes have reached similar conclusions, finding such schemes violate the jury trial guarantee. (*Lopez v. People* (Colo. 2005) 113 P.3d 713, 728; *State v. Hughes* (2005) 154 Wn.2d 118 [110 P.3d 192] *Smylie v. State* (Ind. 2005) 823 N.E.2d 679, 681-685; *State v. Dilts* (2004) 337 Ore. 645, 654 [103 P.3d 95]; *State v. Shattuck* (Minn. 2004) 689 N.W.2d 785 (*per curiam* order); *State v. Brown* (2004) 209 Ariz. 200, 202-204 [99 P.3d 15]; but see *State v. Gomez* (Tenn. 2005) 163 S.W.3d 632, 658.)

#### A. FACTUAL BACKGROUND

[Provide a brief statement of the facts underlying the claim and which entitle

appellant to relief. The facts set forth in the opening brief can be imported here or, for purposes of this petition only, the factual background set forth in the Court of Appeal opinion can be adopted. (Rule 33.3(b)(3)(C).)]

**B. LEGAL ERROR**

[Provide a brief statement of the legal arguments of the claim. The argument set forth in the opening brief can be imported here. Be sure to include a reference to the Sixth and Fourteenth Amendment rights and the discussions thereof in *Blakely* and *Booker* for federalization purposes. (Rule 33.3(b)(3)(C).)]

**C. CONCLUSION**

For the reasons set forth above, this court should exercise its discretion and grant review.

Date: XXXXXXXX

Respectfully Submitted,

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XXXXXXXXXX

**CERTIFICATION OF WORD COUNT**

I, XXXX, certify that, based on the word count of the computer program used to prepare this document, there are XXXX words in this opening brief, excluding the tables. (Cal. Rules of Court, rule 28.1(d)(1).)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at XXXX, California.

Dated: XXXXXXXXXXXX

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