

**PETITION FOR REVIEW FOLLOWING THE UNPUBLISHED
DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE
DISTRICT, DIVISION ____, AFFIRMING THE JUDGMENT**

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

Pursuant to rule 28 of the California Rules of Court, defendant and petitioner NAME petitions this court for review of the unpublished decision of the Court of Appeal, Fourth Appellate District, Division ____, filed DATE, affirming the judgment. The Court of Appeal’s opinion is attached to this petition as Appendix “A.”

[A petition for rehearing was filed on DATE No petition for rehearing was filed.]

QUESTIONS PRESENTED

1. Whether imposition of the upper term and a consecutive term violated petitioner’s federal constitutional rights to jury trial and proof beyond a reasonable doubt.

NECESSITY FOR REVIEW

Pursuant to rule 28(b)(1) of the California Rules of Court, the issues presented herein merit Supreme Court review to settle important issues of law and to secure uniformity of decision among the appellate and trial courts.

As to whether the upper term and consecutive term sentencing violated petitioner's jury trial guarantee, this court should grant review to reconsider its decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). *Black* appears to be wrongly decided. 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 violates the jury trial guarantee. (*New Jersey v. Natale* (N.J. 8/2/05) 2005 N.J. Lexis 938, *12, *44-46.)

STATEMENT OF THE CASE

[Set forth proceedings.]

The Court of Appeal affirmed the judgment in its entirety in an opinion issued on DATE.

STATEMENT OF FACTS

[Set forth facts or adopt facts in Court of Appeal opinion for purposes of the petition for review only].

ARGUMENTS

I.

THIS COURT SHOULD GRANT REVIEW TO RECONSIDER ITS DECISION IN *PEOPLE V. BLACK* (2005) 35 CAL.4TH 1238.

Relying upon four aggravating factors, the court sentenced petitioner to the upper term of four years (doubled to eight years under the strikes law) as to the principal count, infliction of corporal injury on a cohabitant. (C.T. p. 148; R.T. pp. 679-680.) The court also imposed sentence as to the terrorist threat conviction, consecutive to the principal count, either giving no reasons or obliquely relying upon the same reasons as those used to impose the aggravated term. (C.T. pp. 145, 149; R.T. p. 680.) However, none of these factors were found true by the jury or admitted by petitioner.

On appeal, petitioner argued that the imposition of the aggravated term and the consecutive sentencing violated his rights to jury trial and proof beyond a reasonable doubt under the federal constitution (6th, 14th Amends.) and United States Supreme Court precedent (*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*)). (Appellant's Supplemental Opening Brief.) Where state law establishes a presumptive sentence for an offense and authorizes a greater term only where there is a finding of certain additional facts (beyond those inherent in the jury verdict or

admitted in the guilty plea), any finding as to those additional facts must be determined by a jury on proof beyond a reasonable doubt. (542 U.S. at p. ____ [124 S.Ct. at p. 2537].)

The Court of Appeal rejected petitioner's claims, finding that this court's recent decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) foreclosed his arguments. (Typed opn., p. 24.) In *Black*, this court held that there is no federal constitutional right to a jury trial on fact-finding relating to aggravating factors used to impose an upper term under California's Determinate Sentencing Law. (*Black, supra*, 35 Cal.4th at p. 1238.)

However, *Black* appears to be wrongly decided. Since *Black*, the New Jersey Supreme Court issued an opinion examining its sentencing scheme -- a scheme very much like California's -- in light of *Blakely*. (*New Jersey v. Natale* (August 2, 2005) 2005 N.J. LEXIS 938, *44-46 [imprisonment choice is from a range of years with a statutorily prescribed presumptive term approximately half or three-quarters of the maximum; court must impose the presumptive term unless aggravating or mitigating factors weigh in favor of higher or lower term within the statutory range].) 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.)

Like the sentencing scheme in New Jersey, the California sentencing range for each offense is a range of years. Specifically, for the offense at issue here (infliction of corporal injury on a cohabitant), the range is two, three, or five years (§ 273.5, subd. (a)). The presumptive term -- the term which must be imposed absent a jury finding of aggravating factors -- is three years. Here, there was no fact-finding by the jury as to any aggravating factors. Therefore, the maximum permissible sentence was the presumptive middle term of three years. Instead, the court imposed five years, a term longer than the presumptive term, based on aggravating factors it found by a preponderance of the evidence.

Thus, unlike in *Natale*, this court's decision in *Black* is in conflict with *Blakely* and the United States Constitution. 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.)

This court should grant review to reconsider its *Black* decision, acting now to correct the constitutional violation in the present case. (See *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 844-845 [119 S.Ct. 1728, 144 L.Ed.2d 1] [state prisoner seeking federal habeas corpus relief must give state court a fair opportunity to act on claims].)

Finally, although the Court of Appeal did not reach the issue of prejudice, petitioner argued that the error was structural, requiring reversal *per se*. (*Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] (*Sullivan*); *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302]; see also, *New Jersey v. Natale, supra*, 2005 N.J. Lexis 938 *67.) In the alternative, petitioner argued that reversal was required because the government could not show, beyond a reasonable doubt, under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], that the error did not contribute to the result. (See also, *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

Here, it cannot be said that, without the error, the decision would have been the same. None of the aggravating factors involved a prior conviction exception under *Almendarez-Torres v. United States* (1998) 523 U.S. 224,

226-227 [118 S.Ct. 1219, 140 L.Ed. 350]. Rather, all the aggravating factors were circumstances surrounding the current crime. All were the type of factors the United States Supreme Court disdained in *Blakely* (124 S.Ct. at pp. 2539-2540), obviously subjective and manipulable in the hands of the judiciary, requiring protection by the jury trial guarantee. All factors were subject to dispute during the trial, based on conflicting evidence (see e.g., as to factor involving threat of great bodily harm or viciousness/cruelty, R.T. pp. 378-379, 384-387, 407-410, 426, 429 [prosecutrix sustained only small bruises on chest, shoulder, and head, refused treatment from paramedics, and never went to doctor or hospital].)

This court should grant review to reconsider its decision in *Black* and to determine the appropriate standard of prejudice.

