NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD DIAZ, Petitioner,

VS.

CALIFORNIA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

SIXTH DISTRICT APPELLATE PROGRAM

EDWARD DALLAS SACHER
Assistant Director
State Bar #100175
100 N. Winchester Blvd., Suite 310
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Counsel of Record for Petitioner,
RICHARD DIAZ

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Pursuant to Rule 39 of the Rules of the Supreme Court of the United States, petitioner, Richard Diaz, respectfully requests leave to file a petition for writ of certiorari in forma pauperis. In making this application, petitioner notes that he has proceeded in forma pauperis in state court and has been represented by appointed counsel in both the California Court of Appeal and the California Supreme Court. These facts are memorialized in the attached declaration of counsel.

The petitioner's declaration in support of this motion is attached hereto.

Dated: September __, 2005

Respectfully submitted,

EDWARD DALLAS SACHER
Attorney for Petitioner,
RICHARD DIAZ

DECLARATION OF EDWARD DALLAS SACHER

I am an attorney licensed to practice in California. I am a member of the bar of this court. I am the attorney of record for petitioner Richard Diaz.

The facts stated in this declaration are within my personal and firsthand knowledge. If called as a witness in this action, I could and would testify competently under oath to the following facts.

At present, petitioner is incarcerated in the California state penitentiary at Lancaster. Petitioner has been in custody since 2002.

On June 25, 2003, petitioner filed a notice of appeal. On March 2, 2004, I was appointed by the California Court of Appeal to represent petitioner . I have remained petitioner's counsel of record to this time. Petitioner has proceeded in forma pauperis in state court.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this ___ day of September, 2005, at Santa Clara, California.

_____
EDWARD DALLAS SACHER

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RICHARD DIAZ

QUESTION PRESENTED FOR REVIEW

DID THE CALIFORNIA SUPREME COURT ERR IN *PEOPLE V. BLACK,* 35 Cal.4th 1238 (2005) WHEN IT HELD THAT THE CALIFORNIA SENTENCING SCHEME IS SUFFICIENTLY DISTINGUISHABLE FROM THE SCHEME USED IN WASHINGTON STATE SUCH THAT THE RULE OF *BLAKELY V. WASHINGTON* 542 U.S. 296, 159 L.E. 2d 403 (2004) DOES NOT APPLY IN CALIFORNIA?[1]

1. Petitioner's counsel has contacted Mr. Black's attorney and been informed that Mr. Black will be filing a petition for writ of certiorari in this court.

OPINIONS BELOW

The unreported opinion of the California Court of Appeal, Sixth Appellate District, affirming the judgment on appeal appears as Appendix A. The unreported order of the California Court of Appeal denying a petition for rehearing appears as Appendix B. The unreported order of the California Supreme Court denying a petition for review appears as Appendix C.

JURISDICTIONAL STATEMENT

The judgment of the California Court of Appeal, Sixth Appellate District, was entered on April 21, 2005. A timely petition for review was denied on June 29, 2005. The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the

> right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

PROCEDURAL FACTS

On November 18, 2002, petitioner was charged in an amended information filed in the Superior Court for Monterey County. (CT 93-96.)[2] In count 1, petitioner was charged with second degree robbery (Penal Code section 211). (CT 93.) In count 2, petitioner was charged with grand theft from the person (Penal Code section 487, subd. (c)). (CT 94.) In count 3, petitioner was charged with using a badge to falsely impersonate a police

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2. "CT" refers to the clerk's transcript which was before the Court of Appeal. "RT" refers to the reporter's transcript which was before the Court of Appeal.

officer (Penal Code section 538d, subdivision (b)(2)). (CT 95.) It was also alleged that petitioner had previously suffered three prior serious felony convictions within the meaning of Penal Code section 1170.12. (CT 94.) Finally, it was alleged that petitioner had suffered a prior serious felony conviction within the meaning of Penal Code section 667, subd. (a). (CT 94-95.)

On December 2, 2002, a jury trial commenced. (CT 104.) On the government's motion, count 2 was dismissed. (CT 105.)

On December 9, 2002, the jury returned a guilty verdict on count 3 (Penal Code section 538d, subdivision (b)(2)). (CT 119.) A mistrial was declared as to count 1 (Penal Code section 211) since the jury was deadlocked. (CT 119.)

On April 7, 2003, a second jury trial commenced. (CT 139.) On April 10, 2003, the jury returned a guilty verdict on the robbery count. (CT 147.) After petitioner waived his right to a jury trial on the prior conviction allegations, the court returned true findings regarding the three Penal Code section 1170.12 prior convictions and the Penal Code section 667, subdivision (a) prior conviction. (CT 147.)

On June 20, 2003, petitioner filed a motion pursuant to *People v. Superior Court (Romero)*, 13 Cal.4th 497 (1996) and asked the court to

dismiss his three strike priors. (CT 179-188.) On June 23, 2003, the government filed an opposition to the motion. (CT 189-198.)

On June 25, 2003, the sentencing hearing was held. (CT 199.) The court dismissed two of petitioner's three strike priors. (CT 200.) The court imposed a sentence of 15 years which included a 10 year term for the robbery conviction and 5 years for the Penal Code section 667, subdivision (a) enhancement. (CT 203.) A concurrent one year jail term was imposed for the Penal Code section 538d, subdivision (b)(2) conviction. (CT 203.)

On his direct appeal to the California Court of Appeal, Sixth Appellate District, petitioner contended *inter alia* that the ten year sentence for his robbery conviction was imposed in violation of the rule of *Blakely v. Washington,* 542 U.S. 296, 159 L.E.2d 403. (ASOB 1-6.) In its opinion, the Court of Appeal rejected this contention on its merits. (Appendix A, pp. 23-26.)

Subsequently, petitioner filed a timely petition for review in the California Supreme Court. The *Blakely* claim was raised. (Petition for Review, pp. 2, 27-30.) On June 29, 2005, the California Supreme Court summarily denied the petition with a citation to *People v. Black,* 35 Cal.4th 1238. (Appendix C.)

STATEMENT OF FACTS

Arthur Peralta offered three distinct versions of the alleged robbery in this case. The versions were as follows.

At trial, Mr. Peralta testified that he traveled to the L'Amour adult bookstore at approximately 10 p.m. on the evening of September 3, 2002. (RT 267-268.) Mr. Peralta planned to visit with his friend, Alfonso Reyes, who worked at the store. (RT 267-268.) Mr. Peralta intended to set up an appointment to have Mr. Reyes cut his hair. (RT 509-510.) However, Mr. Peralta did not go inside L'Amour since he realized that Mr. Reyes had got off work at 5 p.m. (RT 268, 509-510.)

After abandoning his visit to L'Amour, Mr. Peralta drove to Long's Drugstore in order to buy some napkins. (RT 268.) When he saw that Long's was closed, Mr. Peralta parked on the street. (RT 269.)

At that point, a car populated with two women drove up to Mr. Peralta. (RT 269-270.) The woman in the passenger's seat asked Mr. Peralta if he wanted to have sex. (RT 271-272.) Although he was not interested in having sex, Mr. Peralta agreed to follow the women. (RT 272, 512.)

The two vehicles traveled to a school where they parked on the street. (RT 273.) At the school, four women alighted from the car. (RT 273.) A blond woman approached Mr. Peralta's vehicle and asked him if he had any

money. (RT 274.) After Mr. Peralta said that he had money, he followed the blond woman to the back of the building. (RT 274-277.) As he did so, the other three women drove away. (RT 276.)

When Mr. Peralta arrived at the back of the school, he saw petitioner and a second man. (RT 277.) Petitioner displayed a "policeman's badge" and said "I'm a policeman. I want your ID." (RT 279.) When Mr. Peralta took out his wallet, petitioner seized it. (RT 280.) When Mr. Peralta attempted to retrieve his wallet, petitioner hit him on the head with a "hard object." (RT 280.) Presumably, the "object" was a flashlight which Mr. Peralta saw in petitioner's hands. (RT 280-281.)

During the confrontation, the blond woman shot Mr. Peralta with a stun gun. (RT 282.) When Mr. Peralta fell to the ground, the three assailants fled. (RT 282.) During the fight, Mr. Peralta lost his dentures. (RT 288.)

As petitioner ran, he dropped a knife and Mr. Peralta's wallet. (RT 284.) Mr. Peralta picked up the knife and petitioner seized the wallet. (RT 285-286.) Petitioner tossed the wallet to the blond woman who was on the other side of a fence. (RT 286.) The three assailants then left the scene. (RT 287-288.)

Mr. Peralta went to his vehicle and drove to Alisal Street to obtain help. (RT 289.) On Alisal Street, Mr. Peralta flagged down Officer James Godwin.

(RT 290, 528.)

Officer Godwin testified that Mr. Peralta was suffering from a scraped right knee and a bump on his head. (RT 530.) Officer Godwin accompanied Mr. Peralta to the school where they found Mr. Peralta's dentures and ATM card on the ground. (RT 541-542.)

Officer Godwin issued a be-on-the-lookout bulletin (BOL) for the robber described by Mr. Peralta. (RT 531.) Mr. Peralta described his assailant as being "a Hispanic male, 30's to 40's with a thick mustache, wearing a black or gray long-sleeved shirt and blue jeans." (RT 531.)

Mr. Peralta told Officer Godwin a story which was distinctly different from the one which he offered at trial. In his version to Officer Godwin, Mr. Peralta made no mention of going to L'Amour or Long's. (RT 568-569.) Rather, Mr. Peralta indicated that he had been driving on Wood Street when a woman flagged him down. (RT 565.) After Mr. Peralta stopped, three women came up to his window. (RT 565-566.) While he was still sitting inside his vehicle, Mr. Peralta was approached by petitioner. (RT 566.) When petitioner displayed his badge and asked for Mr. Peralta's ID, Mr. Peralta took out his wallet and petitioner grabbed it. (RT 566.) Petitioner ran into the schoolyard and Mr. Peralta pursued him. (RT 569.) In reciting this version, Mr. Peralta inconsistently indicated that he seized a knife from petitioner's

waistband and petitioner hit him over the head with the knife. (RT 566-567.)

When he was subsequently interviewed on November 5, 2002 by District Attorney Investigator William Jenkins, Mr. Peralta offered yet a third version of the events. (RT 762.) In this version, Mr. Peralta indicated that he had gone to L'Amour where he met four women. (RT 763.) He then followed the women to Sherwood School. (RT 764-765.) From that point forward, Mr. Peralta's story to Mr. Jenkins matched that which he told at trial. (RT 765-766.)

While Officer Godwin was debriefing Mr. Peralta, Officer Ernesto Sanchez saw petitioner walking on South Wood Street. (RT 584.) Officer Sanchez believed that petitioner matched the description of the BOL sent by Officer Godwin. (RT 584.) Petitioner entered the Western Sky Lodge Motel. (RT 586.) Petitioner was wearing a security officer's badge around his neck. (RT 588.) When Officer Sanchez told him that another officer wanted to speak to him, petitioner agreed to go outside. (RT 587.) The two men walked toward the corner of East Alisal Street and South Wood Street. (RT 587.) As they walked, petitioner moved his badge under his sweatshirt. (RT 588-589.) When the duo arrived at the corner, they were joined by Officer Vance. (RT 610.)

While the men were waiting at the corner, Officer Sanchez asked

petitioner why he was sweating. (RT 590.) Petitioner indicated that he had just walked from his girlfriend's house in South Salinas. (RT 591.)

Officer Godwin brought Mr. Peralta to the corner where petitioner was standing. (RT 534-535.) Mr. Peralta identified petitioner as "the man who took my money." (RT 535.) After the identification was made, Officer Godwin told Officer Vance to arrest petitioner. (RT 536.)

While Officer Vance was placing petitioner under arrest, petitioner said "I only have my wallet." (RT 613-614.) Prior to petitioner's comment, no one had mentioned the fact that a wallet had been stolen. (RT 614.) When he was placed in the patrol car, petitioner admitted that he had witnessed the robbery and that "it was Freddy Moreno, . . . his brother and a blond girl that did the robbery." (RT 614.)

When petitioner arrived at the police station, he waived his *Miranda* rights. (RT 544-545.) Initially, petitioner told Officer Godwin that he had "seen the robbery, and that Freddy Moreno, his brother Juan, and a blond girl had committed it." (RT 545.) Petitioner said that he was in the vicinity of the school since he works at Western Sky Lodge which is 100 feet away from the school. (RT 546.)

Petitioner stated that he had been working at the motel for eight months. (RT 546-547.) For the first three months of this period, petitioner

said that he, "Freddy Moreno, and his brother Juan would 'jack jags.'" (RT 547.) "Jags" are Hispanics. (RT 547.) The methodology for "'jacking jags'" was that two men "would work together with a girl, and they would offer someone a date or a soda." (RT 547-548.) Once the victim was enticed by the girl, petitioner "would use a badge so as not to use force to take the property." (RT 548.)

Upon further questioning, petitioner admitted that he had struck Mr. Peralta. (RT 550.) Petitioner said that he saw Mr. Peralta behind the school with petitioner's retarded 18 year old daughter. (RT 550.) When Mr. Peralta reached for his daughter with a wallet in one hand and money in another, petitioner ran up and struck him with a flashlight. (RT 550.) During the assault, petitioner's knife fell out of his pocket. (RT 551-552.) While running away, petitioner may have thrown Mr. Peralta's wallet. (RT 552, 555.)

As the interrogation continued, petitioner offered a slightly different story. Petitioner said that he saw Mr. Peralta and his daughter drive up and walk behind the school. (RT 555.) Believing that Mr. Peralta was going to solicit his daughter for prostitution, petitioner flashed his badge at him. (RT 556.) Then, petitioner became upset and struck Mr. Peralta. (RT 557.)

Petitioner advised Officer Godwin that his daughter's name is Victoria Sandoval. (RT 557.) He indicated that Victoria lived with him at 6 South

Wood, number 2 and that her mother lived at 4 South Wood Street. (RT 557.)

Officer Godwin went to petitioner's residence and knocked on the door. (RT 559.) When no one answered, Officer Godwin went into the backyard and looked through a window. (RT 559-560.) Officer Godwin saw a stun gun lying on a bed. (RT 560.) Officer Godwin did not return with a search warrant to seize the gun. (RT 577-578.)

Officer Godwin spoke to Victoria Sandoval at her mother's apartment. (RT 561.) When he was given an opportunity to view Ms. Sandoval, Mr. Peralta was "unsure" as to whether she was the woman who had participated in the incident. (RT 564-565.)

The Defense Case

The defense presented the prior testimony of District Attorney Investigator William Jenkins. (See p. 8, *supra*.) During his closing argument, defense counsel presented a two prong theory.

First, counsel contended that the jury should disregard Mr. Peralta's testimony since it included numerous inconsistencies regarding what he had been doing prior to the incident and the manner in which the theft occurred. (RT 786-798.) Second, counsel argued that petitioner had told the truth when he said that he struck Mr. Peralta "because he was angry at [him] for his conduct toward his daughter." (RT 799.) Thus, counsel asked the jury to

return guilty verdicts on the lesser offenses of assault and theft. (RT 799.)

I.

THIS COURT SHOULD GRANT REVIEW SINCE THE CALIFORNIA SUPREME COURT ERRED BY FAILING TO APPLY THIS COURT'S DECISION IN *BLAKELY*.

Petitioner was sentenced under California's determinate sentencing law (DSL). Under DSL, the trial court has the authority to impose a specified sentence for either the lower, middle or upper term. Penal Code section 1170, subdivision (b). However, the middle term is the presumptive sentence absent evidence which supports the upper term. In this regard, Penal Code section 1170, subdivision (b) provides in material 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." (Emphasis added.)

In determining which of the three terms is to be imposed, the trial court is to be guided by numerous sentencing factors which are specified in various rules of court. California Rules of Court, rules 4.401-4.480. These rules specify both factors in aggravation and mitigation. California Rules of Court, rules 4.421 and 4.423.

In the case at bar, petitioner was convicted of second degree robbery. Pursuant to Penal Code section 213, subdivision (a)(2), the usual sentencing range for robbery is 2, 3 or 5 years. However, petitioner was sentenced under

the Three Strikes Law (Penal Code section 1170.12) as a second strike offender since he had a qualifying prior serious felony conviction. Thus, the applicable sentencing range was doubled to 4, 6 or 10 years. See Penal Code section 1170.12, subdivision (c)(1).

The trial court elected to impose the upper term of 10 years. In selecting the upper term, the court cited five factors in aggravation: (1) petitioner used great violence; (2) the crime was sophisticated and professional in nature; (3) petitioner has engaged in a pattern of violence; (4) petitioner has "numerous" prior convictions; and (5) petitioner has previously been on probation and parole. (RT 1008.)

In the California courts, petitioner contended that the trial court had erred in relying on the cited factors since the jury had not been asked to pass on the factors. In addition, petitioner argued that the trial court had erred since it employed the preponderance of the evidence standard rather than the standard of proof beyond a reasonable doubt. California Rules of Court, rule 4.420(b) ("[c]icumstances in aggravation and mitigation shall be established by a preponderance of the evidence."). Without doubt, petitioner's argument is well taken under this court's precedent.

In *Apprendi v. New Jersey,* 530 U.S. 466 (2000), this court held that a defendant has a federal constitutional right to a jury trial and application of the

proof beyond a reasonable doubt standard as to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . ." *Id*. at 490. The sole exception to the *Apprendi* rule is that "the fact of a prior conviction" need not be tried by a jury. *Ibid.*

In *Blakely v. Washington*, 159 L.E.2d 403, this court clarified that 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." *Id*. at 413-414, emphasis in original. Given this principle, there is no doubt that the California sentencing scheme requires a jury trial and application of the proof beyond a reasonable doubt standard before an upper term sentence may be imposed.

As was noted above, Penal Code section 1170, subdivision (b) provides that the middle term "shall" be imposed "unless there are circumstances in aggravation . . . ." Thus, as a matter of definition, the statute requires "additional findings" in order to justify imposition of the upper term. *Blakely*, 159 L.E.2d at 413-414.

Recently, the California Supreme Court held to the contrary in *People v. Black,* 35 Cal.4th 1238. At the outset of its analysis, the court acknowledged that the "mandatory language of section 1170, subdivision (b)" provided "some support" for the claim that California's scheme falls within

the *Blakely* rule. *Id.* at 1254. Nonetheless, the court reasoned that *Blakely* did not apply since "the provisions of the California determinate sentence law simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." *Ibid*. Based on this premise, the court concluded that "even though section 1170, subdivision (b) can be characterized as establishing the middle term sentence as a presumptive sentence, the upper term is the 'statutory maximum' for purposes of Sixth Amendment analysis." *Id*. at 1257.

With all due respect for the California Supreme Court, its analysis is completely at odds with the rule which was formulated in *Apprendi* and applied in *Blakely*. As this court made crystal clear in *Apprendi*, there is no constitutional distinction "between an 'element' of a felony offense and a 'sentencing factor'" insofar as the right to a jury trial is concerned. *Apprendi*, 530 U.S. at 478. Thus, a trial court's sentencing discretion is limited "to the facts reflected in the jury verdict alone." *Id*. at 483, n. omitted.

Under section 1170, subdivision (b), the trial court is presumptively required to impose the middle term based on the facts found by the jury (i.e. proof of the elements of the offense). In order to go beyond the jury's finding, the court must find additional facts on its own as identified in the sentencing

rules. California Rules of Court, rule 4.421 (specifying factors in aggravation.) Plainly, this system violates the defendant's right to a jury trial as explained in *Apprendi* and *Blakely*.

The Supreme Court of New Jersey agrees with petitioner's position. In the course of applying *Blakely* to the New Jersey sentencing scheme, the court expressly rejected "the California approach" stated in *Black* since "it appears to be in direct conflict with *Blakely* . . . ." *State v. Natale,* 184 N.J. 458, 482-483, 878 A.2d 724, 738 (2005).

Petitioner will not belabor his point. *Black* was wrongly decided. This court should grant review in order to rectify the erroneous analysis of the California Supreme Court.

One final point is worthy of discussion. Prior to the sentencing hearing, petitioner was facing a sentence of 25 years to life for his robbery conviction. This is so since the court had found that petitioner had three prior serious felony convictions. As a result, a life sentence was authorized under the Three Strikes law (Penal Code section 1170.12).

Pursuant to Penal Code section 1385, the trial court exercised its discretion to strike two of the prior convictions. See *People v. Superior Court (Romero)*, 13 Cal.4th 497. Having stricken two of the three prior convictions, the court was then authorized to sentence petitioner under DSL as a two strike

offender.

Given this record, the California Court of Appeal held that *Blakely* did not apply since the jury's findings allowed for a life sentence. (Appendix A, pp. 25-26.) Since the subsequently imposed sentence of 10 years was less than life, the Court of Appeal reasoned that the trial court did not impose a sentence beyond the "statutory maximum" allowed by the jury's verdict. *Ibid*. This analysis cannot be sustained.

The *ratio decidendi* of *Blakely* is that "[w]hen 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*, 159 L.E.2d at 414. Given this rationale, the proper lens for the examination of a *Blakely* claim is the defendant's maximum exposure at the time that sentence is imposed.

In this case, it is indisputable that the trial court imposed the upper term based on at least several facts which were never pled and proven to the jury. Thus, under *Blakely,* error occurred since it was the court, and not the jury, which made the requisite findings of fact.

In the Court of Appeal's view, this reality should be overlooked since petitioner was originally eligible for a life sentence prior to the granting of *Romero* relief. However, the court's position rests on a false foundation since

the granting of *Romero* relief removed petitioner's case from one statutory scheme (i.e. indeterminate sentencing) into a separate scheme (i.e. determinate sentencing). Since the latter scheme requires factual findings and the former does not, *Blakely* error clearly occurred when the trial court made factual findings which should have been made by the jury.

As has been shown above, the California Supreme Court has failed to follow binding precendent from this court. Review should be granted.

CONCLUSION

For the reasons expressed above, a writ of certiorari should issue to review the judgment of the California Court of Appeal, Sixth Appellate District.

Dated: September ____, 2005

Respectfully submitted,

_____
EDWARD DALLAS SACHER
Attorney for Petitioner,
Richard Diaz