

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER ESQUIBEL,

Defendant and Appellant.

B165767

(Los Angeles County
Super. Ct. No. TA065805)

ORDER MODIYING OPINION

THE COURT:

It is ordered that the opinion filed in this matter on August 29, 2008, be modified as follows:

In the **PRODECURAL BACKGROUND** section, second paragraph, “With respect to counts 2 through 4” is deleted and replaced with “With respect to counts 2 through 5”.

In the **PRODECURAL BACKGROUND** section, sixth paragraph, “On September 9, 2005, the California Supreme Court remanded the case to this court for further consideration in light of *United States v. Booker* (2005) 543 U.S. 220 (*Booker*) and *People v. Black* (2005) 35 Cal.4th 1238, 1257-1261 (*Black I*),” is deleted and replaced with “On September 9, 2005, the California Supreme Court remanded the case to this court for further consideration in light of *People v. Black* (2005) 35 Cal.4th 1238, 1257-1261 (*Black I*).”

In the **PRODECURAL BACKGROUND** section, seventh paragraph, the following is deleted: “Pursuant to the direction of the California Supreme Court, we recalled the remittitur issued in *Esquibel* I and received further briefing from the parties. Appellant maintained his original contentions and added the contention that his Sixth Amendment right to a fair and impartial jury was violated by the trial court’s imposition of the upper term because the term was based on facts not determined to be true by a jury. Respondent argued waiver.”

In the **PRODECURAL BACKGROUND** section, seventh paragraph, the following is deleted: “(*People v. Esquibel* (September 30, 2006, B165767 [nonpub. opn.] (*Esquibel* II).)” and replaced with “(*People v. Esquibel* (2006) 143 Cal.App.4th 645 (*Esquibel* II).)”

In the **PRODECURAL BACKGROUND** section, ninth paragraph, “June 5, 2007” is deleted and replaced with “March 20, 2007”.

In the **PRODECURAL BACKGROUND** section, ninth paragraph, “vacated our judgment in *Esquibel* I, and on July 10, 2007” is deleted and replaced with “vacated our judgment in *Esquibel* II, and on May 29, 2007”.

In the **PRODECURAL BACKGROUND** section, paragraphs ten and eleven are deleted in their entirety.

In the **STATEMENT OF FACTUAL HISTORY** section, seventh paragraph, “The trial judge called counsel to side bar and, after some discussion,” is deleted and replaced with “The trial judge called counsel to side bar and”.

In the **DISCUSSION** section, *Constitutional Right to a Public Trial* subsection, second paragraph, “*People v. Woodward* (1992) 4 Cal.4th 376, 385” is replaced with *People v. Woodward* (1992) 4 Cal.4th 376, 381”.

In the **DISCUSSION** section, *Waiver or Forfeiture of Blakely Error* subsection, second paragraph, “upper term on both convictions” is deleted and replaced with “upper term on count 4”.

These modifications effect no change in the judgment

COOPER, P. J.

RUBIN, J.

FLIER, J.