

Dear Mr. Kelly:

In accordance with this Court's order granting supplemental briefing, respondent submits this letter brief. Appellant claims that the imposition of the upper term for count 1 (which was thereafter doubled pursuant to Penal Code section 667, subdivisions (d) and (e)(1)) in this case violated his Sixth Amendment right to a jury trial under the recent case of *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_, 124 S.Ct. 2531, 2536-2542 [ WL 1402697, 2004 Daily Journal D.A.R, 7581]. For the reasons set forth, this claim should be rejected.<sup>1</sup>

Appellant was convicted of two counts of carjacking (Pen. Code, § 215, subd. (a)). Additionally, in a bifurcated court trial, the court found the allegation that appellant had a prior strike (Pen. Code, § 667, subds, (d)(e)(1)) to be true. (CT 25 8-261, 266, 302, 307; RT 464.) The trial court sentenced appellant to 21 years 4 months in state prison, consisting of a term of 18 years on count 1 (the upper term of 9 years, doubled), plus a consecutive term of 3 years, 4 months (one-third the mid-term) on count 2. (CT 307-308, 311-312, 317.) Appellant claims that the factors relied upon by the trial court in imposing the upper term for count 1 should have been determined by a jury.

On June 24, 2004, the United States Supreme Court, in *Blakely*, held that the trial court violated the defendant's Sixth Amendment right to trial by jury by imposing a 90-month "exceptional" sentence for second-degree kidnaping with a firearm, which was 37 months beyond the "standard range" for the crime, by finding that the defendant acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range of 49 to 53 months. In doing so, the Court extended *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435, which 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." (*Blakely, supra*, 124 S.Ct. at p. 2536.) The United States Supreme Court reasoned that 53 months was the statutory maximum, i.e., "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Ibid.*) Because the jury in *Blakely* did not find beyond a reasonable doubt the fact supporting the trial court's upward departure from the statutory

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<sup>1</sup> The California Supreme Court has recently granted review in two cases dealing with *Blakely*. In *People v. Towne* (S125677), the following issues are being addressed: 1) Does *Blakely* preclude a trial court from making the required findings on an aggravating factor for an upper term sentence?; and 2) If so, what standard applies, and was the error prejudicial? In *People v. Black* (S126182), the following issues are being addressed: 1) What effect does *Blakely* have on the validity of the defendant's upper term sentence? 2) What effect does *Blakely* have on the trial court's imposition of consecutive sentences?

maximum, the Court concluded that the defendant was denied his right to a jury trial. (*Id.* at pp. 2537-2538.)

Appellant argues that the imposition of the upper term in his case is invalid because it goes beyond the statutory maximum for the offense and required that a jury make the findings for which the trial court imposed the upper term.

As a procedural matter, the claim of error made by appellant is waived. The California Supreme Court has held that unless a trial court lacks jurisdiction to impose a sentence, the defendant's failure to timely object to the trial court's sentencing choices waives such claims. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354.) Additionally, the United States Supreme Court has held that all manner of constitutional errors must be preserved by proper objection in the trial court. (*Daniels v. United States* (2001) 532 U.S. 374, 381, 121 S. Ct. 1578, 149 L. Ed. 2d 590; *United States v. Olano* (1993) 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508.)

Courts have applied these principles to *Apprendi* claims, and by logical extension, should apply them to *Blakely* claims, since they arise from an application of *Apprendi*. The Court of Appeal has held that a defendant waives his right to object on *Apprendi* grounds by failing to specifically object on that ground below. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061; but see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2 [because section 654 claims are ordinarily nonwaivable, and because *Apprendi* was not issued until after sentencing, *Apprendi* claim as to section 654 sentence not waived and subject to "plain error" review].)

In *United States v. Cotton* (2002) 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860, the United States Supreme Court found an *Apprendi* claim on direct federal appeal to be "forfeited" by the federal defendant's failure to object in the district court, holding that there was no plain error. (*Id.* at 634 ["[t]he real threat then to the 'fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial"].) Indeed, in *Cotton*, the high court made this finding even though *Apprendi* did not issue until the defendant's appeal was pending and the defendant raised his *Apprendi* claim in the circuit court. (*Id.* at 628-629; see also *United States v. Ameline* (9th Cir. July 21, 2004) \_\_\_ F.3d \_\_\_ [2004 Daily Journal, D.A.R. 8857, 8860] [even though *Blakely* was not issued until the defendant's federal appeal was pending, the standard of review for a *Blakely* claim on direct federal appeal is plain error, because the defendant did not object at the time of sentencing under *Apprendi*].)

Notably, the defendant in *Blakely* objected to an aggravated sentence at the time of sentencing under *Apprendi*. (*Blakely, supra*, 124 S.Ct. at p. 2535.) Appellant made no such objection, and should therefore be barred from raising this issue on appeal.

On the merits, *Blakely* does not invalidate the imposition of the upper term in this case. Appellant's reading of *Blakely* is too broad. There has been no judicial determination on California's scheme, and the United States Supreme Court limited its holding to the Washington scheme at issue by noting that the federal guidelines for upward departures were "not before us, and we express no opinion on them." (*Blakely, supra*, 124 S.Ct. at p. 2538, fn. 9.) Likewise, California's scheme was not before the Supreme Court, and that scheme is structured differently than Washington's sentencing scheme. Further, *Blakely* emphasized that it was "not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." (*Id.*, at p. 2540.) In addition, the *Blakely* Court was concerned with judicial findings raising a sentence above the "standard range" for crimes (*Id.*, at pp. 2537-2538), a concern not present with regard to California's standard range of lower, middle, and upper terms for crimes.

A review of California's basic determinate sentencing scheme is useful to understand the arguments on the applicability of *Blakely*. Where a criminal statute provides for three possible prison terms (a tripartite sentencing scheme), a court shall impose the middle term unless it finds, by a preponderance of the evidence, that aggravating circumstances outweigh mitigating circumstances. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a) (b).) In imposing the upper or lower term, the court must consider "all relevant facts," including evidence both inside and outside the record. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(b).) The court may not use a fact that is an element of a crime or an enhancement to impose the upper term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(c), (d).) The court must state its reasons on the record for its sentencing choice, and for an upper or lower term, must include a statement of the facts it used to constitute aggravating or mitigating circumstances. (Pen. Code, § 1170, subd. (c); Cal. Rules of Court, rule 4.420(e).)

Appellant argues that imposition of the upper term for an offense is the same as the imposition of the term beyond the standard range for the crime imposed in *Blakely*. Appellant's belief is that the upper term can only be imposed by findings of factors in aggravation and thus, is akin to the findings made by the trial court in *Blakely* which took the sentence out of the normal range. However, in *Blakely*, the Supreme Court confronted a sentencing scheme substantially different from California's scheme. For Washington's scheme at issue in *Blakely*, the facts in the defendant's guilty plea did not reflect the option of an exceptional sentence of 90 months because the crime of second degree kidnaping with a firearm had a "standard" sentencing "range" of 49 to 53 months for this "class B felony." Thus, the guilty plea to kidnaping in *Blakely* did not by itself reflect a possible 90-month sentence. In California, by contrast, the facts in a guilty plea or jury verdict reflect the option of an upper term because each tripartite statute

authorizing the crime or enhancement in the plea or verdict includes an upper term. Consequently, the upper term is the statutory maximum in California. Under these circumstances, any facts found by the trial court to reach the upper term do not raise the sentence above this statutory maximum.

Under Washington's sentencing scheme, each criminal offense has an associated 'sentencing range' that is specific for that class of offense. In *Blakely*, for the crime of second degree kidnaping with a firearm, the associated range was 49 to 53 months. Washington also has a separate statute of general applicability that allowed the sentencing court to depart from the range for that offense and find additional factors to impose an "exceptional" sentence not exceeding 10 years. In *Blakely*, the Washington court utilized this exceptional sentence statute to elevate Blakely's sentence well beyond the maximum allowed under the "standard range" of 49 to 53 months and imposed a 90-month sentence. (*Blakely, supra*, 124 S.Ct. at pp. 2534-2535.) The United States Supreme Court found Washington's exceptional sentence provision unconstitutional because the facts that allowed the trial court to deviate from the sentence range associated with the crime were not found by a jury based on proof beyond a reasonable doubt. (*Id.*, at pp. 2536-2543.)

The Supreme Court ultimately held in *Blakely* that "the 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." (*Blakely, supra*, 124 S.Ct. at p. 2537.) However, the Court placed its holding in context. It specifically noted that its ruling was not finding determinate sentencing schemes unconstitutional. (*Id.*, at p. 2540.) Moreover, the Court made clear that it was not addressing schemes outside of Washington's approach. (*Id.*, at p. 2538, fn. 9 [expressing no opinion on the validity of the federal sentencing guidelines in light of *Blakely*].)

California's sentencing scheme is fundamentally different from Washington's sentencing scheme. Washington's scheme identifies a range of sentences associated with each offense, but then has a separate statutory structure of general applicability that allows for departures from the standard range. The United States Supreme Court made clear that one of the primary concerns underpinning its constitutional rule is the fact that a defendant charged with an offense has notice of and a legal right to, receive a sentence within the range legislatively identified as available for the particular offense. Yet the general Washington statute permitting departures from that mandated sentence violated that legal expectation, effectively allowing the defendant to be punished for an offense greater than he committed and was convicted of. The Court explained:

Of course indeterminate schemes involve judicial fact finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence--and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.

In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence--and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

(*Blakely, supra*, 124 S.Ct. at p. 2540; see also *id.* at p. 2535 [at sentencing, “[f]aced with an *unexpected increase* in his sentence, petitioner objected,” italics added].)

California’s system does not suffer from the same flaw as Washington’s sentencing scheme. California’s legislature created a triad system in which every offense has an associated lower, middle, and upper term, of which a defendant necessarily has notice and a full understanding that he has a legal right to receive no more than one of those three terms. California does not have a generalized departure statute allowing for a greater sentence to be imposed above the statutorily-mandated sentence range associated with every offense. Instead, California has a system of enhancements and alternate sentencing schemes, by which a sentence can be extended beyond the standard range imposed by the Legislature. Critically, under California law, sentence enhancements and alternate sentencing schemes that have the potential to elevate a defendant’s sentence beyond the triad statutorily assigned to a given offense must be pled and proven to the jury beyond a reasonable doubt. Accordingly, California satisfies *Blakely’s* requirement that, before a defendant can be sentenced outside the standard range identified by the Legislature as appropriate for a particular offense, a jury must find beyond a reasonable doubt that the defendant is eligible for that enhancement or alternative scheme that exposes the defendant to the higher sentence.

Notably, Justice O’Connor’s dissent considered Washington’s system to be a “guidelines system,” listing the federal and nine states’s guidelines systems as examples threatened by the decision, and omitting California as an example. (*Blakely, supra*, 124 S.Ct. at pp. 2549-2550 (O’Connor, J., dissenting).) This omission may be because California is unlike Washington’s system, and others, where an upward departure from a crime’s punishment is appropriate by factual findings. There is no upward departure in California from a crime’s punishment. Rather, the plea or verdict of the crime or enhancement itself reflects the upper term via the criminal statute listing the upper term as an optional penalty for that crime or enhancement. Thus, the upper term is the statutory maximum under *Blakely*. Although the decision whether to ultimately impose an upper term is governed by aggravating and mitigating factors, these findings do not raise the sentence above this statutory maximum.

In sum, although California sentencing procedure requires finding an aggravating circumstance to impose the upper term in a criminal statute, such a sentence complies with *Blakely* because it does not “increase the penalty for a crime beyond the prescribed statutory maximum. . . .” (*Blakely, supra*, 124 S.Ct. at p. 2536.)

Additionally, should this Court find an unwaived *Blakely* error, the error did not prejudice appellant. The California Supreme Court has found that *Apprendi* error does not warrant relief if it is harmless beyond a reasonable doubt, and the same should apply to *Blakely* error. (*People v. Sengpadychith* (2001)26 Cal.4th 316, 327; see *Summerlin v. Stewart* (9th Cir. 2003), reversed on other grounds in *Schriro v. Summerlin* (2004) \_\_\_ U.S. \_\_\_, 124 S.Ct. 2519 [ WL 1402732, 2004 Daily Journal D.A.R. 7569] *Apprendi* errors are not structural and therefore are subject to harmless error analysis]; see also *United States v. Cotton*, *supra*, 535 U.S. at p. 634 [plain error analysis to *Apprendi* claim where the defendant did not object on that ground at trial]; see also *Neder v. United States* (1999) 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L. Ed. 2d 35 [trial court’s failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis].) In other words, the prosecution must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error. (See *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L. Ed. 2d 705; *People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 327.)

Applying the usual *Chapman* analysis, any error here was harmless beyond a reasonable doubt where the evidence at trial or sentencing constituted overwhelming or uncontradicted evidence of that aggravating circumstance or other factual finding. (See *People v. Cleveland*, *supra*, 87 Cal.App.4th at p. 271 [finding any *Apprendi* error for a judge’s section 654 finding to be harmless beyond a reasonable doubt because “[w]e have no doubt a jury would have reached the same conclusion [as the trial court] under the reasonable doubt standard”]; *Chamberlain v. Filler* (C.D. Cal. 2004) 307 F. Supp.2d 1128, 1143 [holding that any *Apprendi* error from the failure to submit a personal-use finding to the jury was harmless because “[p]etitioner has adduced no evidence to contradict the evidence considered by the trial court, which included the victim’s testimony that petitioner had pulled out a knife and struck the victim in the head with a shiny object cutting him and leaving a scar”].) In a similar context, the United States Supreme Court has found no plain error from an *Apprendi* violation involving a drug quantity enhancement reasoning that the evidence was “‘overwhelming’” and “‘essentially uncontroverted.’” (*United States v. Cotton*, *supra*, 535 U.S. at p. 634 [“[t]he real threat then to the ‘fairness, integrity, and public reputation of judicial proceedings’ would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial”].)

The trial court here imposed the upper term finding appellant had engaged in violent conduct which indicated a serious danger to society, the crime involved a threat of bodily harm, and the manner in which the crime was carried out indicated planning, sophistication, or professionalism. (RT 466-467; Cal. Rules of Court, rules 4.421(b) and 4.421(a) [factors 1 and 8].) Here, with respect to count 1, the jury heard evidence that appellant and an accomplice carjacked Joon Kang in a parking lot at night. As Kang was

getting out of his car, appellant opened the car door and put a gun to Kang's side.<sup>2</sup> Appellant threatened to shoot Kang if he did not give him the car. (RT 323-327; see also RT 220-227.) This evidence clearly showed that appellant engaged in violent conduct which indicated a serious danger to society, the crime involved a threat of bodily harm, and the manner in which the crime was carried out indicated planning, sophistication, or professionalism. (See also CT 284-285 [report].) Moreover, there was evidence of three aggravating factors and there was no evidence of any mitigating factors. (See CT 285.) Thus, even if this Court were to find there was not abundant evidence of one of the aggravating factors, the remaining aggravating factors outweighed the lack of any mitigating factors. Consequently, there was ample evidence to support the imposition of the upper term, and any error would be harmless.

Finally, in the event that an upper-term sentence for count 1 is reversed on *Blakely* grounds, the appropriate remedy is to remand for resentencing for the prosecutor to decide whether to try aggravating circumstances before a jury. (*United States v. Ameline, supra*, 2004 D.A.R. at pp. 8862-8863 [to allow jury to determine facts increasing the federal defendant's "base level offense and his two level firearm enhancement"].)

Based on the above, this Court should find that the imposition of the upper term complies with United States Supreme Court precedent; this issue has been waived by a lack of any objection; any error was harmless; and remand for resentencing would be the appropriate remedy should this Court find unwaived, prejudicial error.

Sincerely,

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For BILL LOCKYER  
Attorney General

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<sup>2</sup> Apparently, the gun was subsequently determined to be a replica. (See RT 36 1-364, 366-368, 370-371; see also CT 260.)