

Supplemental opening brief by panel attorney Martha McGill in *People v. Robert Quintero* (D043269)

INTRODUCTION

Appellant ROBERT QUINTERO has appealed the judgment entered after a jury convicted him of willful, deliberate and premeditated attempted murder (Pen.Code, §§ 664, 187, subd.(a), 189), two counts of willful, deliberate and premeditated attempted murder of a peace officer (Pen.Code, §§ 664, subd. (e), (f), 187, subd. (a), 189), with firearm allegations (Pen.Code, §§ 12022.53, subd. (c), 12022.5, subd. (a)(1)); assault with a firearm on a police officer (Pen.Code, § 245, subd. (d)(1)), with firearm allegations (Pen.Code, §§ 12022.53, subd. (c), 12022.5, subd. (a)(1)); assault with a firearm (Pen.Code, § 245, subd. (a)(2)) with personal use of a firearm (Pen.Code, § 12022.5, subd. (a)(1)); shooting at an occupied motor vehicle (Pen.Code, § 246); shooting and causing the death of a police dog (Pen.Code, § 600, subd. (a), (c)); making a criminal threat (Pen.Code, § 422); assault by means likely to produce great bodily injury (Pen.Code, § 245, subd. (a)(1)); and battery with serious bodily injury (Pen.Code, § 243, subd. (d)).

In sentencing Quintero, the trial court selected upper determinate terms and imposed consecutive sentences based on factual findings made by the

court based on a preponderance of the evidence, pursuant to Penal Code sections 669 and 1170, subdivision (b), and rules 4.420, 4.421, 4.423, and 4.425 of the California Rules of Court. On June 24, 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington* (No. 02-1632, June 24, 2004) ___ U.S. ___, 2004 D.J.D.A.R. 7581, 2004 WL 1402697, 2004 U.S. Lexis 4573) (*Blakely*). In light of the decision in *Blakely*, the procedures under which sentence was imposed in this case are not valid. For this reasons, the judgment should be reversed with directions to the superior court to re-sentence Quintero in accordance with *Blakely*.

ARGUMENT

I

THE UPPER TERMS AND CONSECUTIVE SENTENCES IMPOSED IN THIS CASE, BASED ON FACTUAL FINDINGS BY THE TRIAL JUDGE AND THE PREPONDERANCE OF THE EVIDENCE STANDARD, VIOLATE QUINTERO'S RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. **The United States Supreme Court's Decision in *Blakely v. Washington***

In *Blakely v. Washington* (No. 02-1632, decided June 24, 2004) ___ U.S. ___, 2004 D.J.D.A.R. 7581, 2004 WL 1402697, 2004 U.S. Lexis 4573) (*Blakely*), the Court considered the validity of Washington's statutory

sentencing scheme, in which the judge is permitted to impose an “exceptional” sentence exceeding the statutory maximum, based on additional facts found by the judge, not the jury. In *Blakely*, the defendant pleaded guilty to kidnaping his estranged wife. The facts admitted in his plea supported a maximum sentence of 53 months. After a separate (non jury) sentencing hearing, the trial judge found that the defendant acted with “deliberate cruelty.” Based on that aggravating factor, the judge imposed a total sentence of 90 months.

In a 5-4 decision, the United States Supreme Court reversed. Relying in its prior decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (*Apprendi*), the Court held that the judge could not increase Blakely’s sentence based on his finding of “deliberate cruelty,” because the facts supporting that finding were not admitted by Blakely or found to be true by a jury. (*Blakely v. Washington, supra*, ___U.S.___, 2004 U.S. Lexis 4573 at pp.10-17, 31-32). In reaching this conclusion, the court reaffirmed its earlier decision in *Apprendi*, holding the Sixth Amendment requires any fact, other than a prior conviction, which increases a defendant’s punishment beyond the statutory maximum to be submitted to a jury and proved beyond a reasonable doubt. (*Blakely v. Washington, supra*, ___U.S.___, 2004 U.S. Lexis 4537 at pp.10-13, 16-17). Because Washington’s sentencing procedure did not comply with the Sixth

Amendment, the court held Blakely's sentence is invalid. (*Blakely v. Washington, supra*, ___U.S. ___, 2004 U.S. Lexis 4537 at p. 17).

The Court also addressed the circumstances in which a sentence exceeds the "statutory maximum," requiring factual findings by a jury and proof beyond a reasonable doubt. The court defined the "statutory maximum" as "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 v. Washington, supra*, ___U.S. ___, 2004 U.S. Lexis 4573 at p.13-15, citing *Ring v. Arizona* (2002) 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556).

In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts [to support a sentence enhancement], but the maximum he may impose without any additional findings. When 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 omitted], and the judge exceeds his proper authority. (*Blakely v. Washington, supra*, ___U.S. ___ ; 2004 U.S. Lexis at p. 14).

In summary, *Blakely* holds that aggravating factors which are to be used to increase a sentence must be presented to the jury for its consideration. "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." (*Blakely v. Washington, supra*, ___U.S. ___ ; 2004 U.S. Lexis 4573 at p. 31; emphasis in original). If

the jury does not find unanimously and beyond a reasonable doubt that those facts exist, the judge may not use them to increase a sentence, and sentencing procedures which do not meet these requirements violate the Sixth Amendment.

Blakely applies to all cases in which the direct appeal is still pending. (*Schriro v. Summerlin* (No. 03-526, decided June 24, 2004) __U.S.__, 2004 D.J. D.A.R. 7569, 2004 WL 1402732, 2004 Lexis U.S. 4574 at p. 7 [“When a decision of this Court results in a ‘new rule,’ the rule applies to all criminal cases still pending on direct review”]; *Griffith v. Kentucky* (1987) 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649).

B. The California Sentencing Scheme

1. Selection of Upper Term

As relevant here, California’s determinate sentencing scheme, as set forth in Penal Code section 1170¹ and California Rules of Court rules 4.420,

¹ Penal Code section 1170, subdivision (b) provides in pertinent part:
(b) 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..... In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports ... and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court

et seq.,² permits the sentencing judge to select from among the lower, middle, and upper terms prescribed by statute for a particular offense. The term of imprisonment that may be imposed based solely on the jury's verdict is the middle term. The judge may not impose the upper term unless he finds, by a preponderance of the evidence, that there are additional aggravating factors, which outweigh any mitigating factors. (Pen.Code, § 1170, subd. (b);

shall set forth on the record the facts and reasons for imposing the upper or lower term. . .(Pen.Code, § 1170, subd. (b)).

² Rule 4.420 of the California Rules of Court provides in pertinent part:

(a) The middle term shall be selected *unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.*

(b) Circumstances in aggravation shall be established by a *preponderance of the evidence* . Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. *The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. . .*

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected. (Cal.Rules of Court, rule 4.420 (a), (b), (d), (e); emphasis added).

Cal.Rules of Court, rule 4.420(b)). The judge may base these findings on matters not presented to the jury (e.g., probation reports). (Pen.Code, § 1170, subd. (b); Cal.Rules of Court, rule 4.420(b)). In addition, a fact which is an element of the crime cannot be used to impose the upper term. (Cal.Rules of Court, rule 4.420(d)).

This statutory scheme does not require aggravating factors be found true beyond a reasonable doubt by a unanimous jury. Rather, such findings are made solely by the trial judge based upon a preponderance of the evidence and may be based on material that the jury never considered (e.g., probation reports). Moreover, by virtue of rule 4.420, subdivision (d), the judge is specifically prohibited from imposing the upper term based on any elements of the underlying offense; the very things that the jury unanimously found to be true beyond a reasonable doubt.

California's sentencing scheme is highly similar to the sentencing procedures found invalid in *Blakely*. Under Washington's Sentencing Reform Act, a judge may impose a sentence above the standard range only if he finds "substantial and compelling reasons justifying an exceptional sentence." (Wash.Rev.Code, § 9.94A.535, formerly, § 9.94A.120(2)). Similarly, in California, the upper term of imprisonment may be imposed only if the judge finds one or more aggravating factors. (Pen.Code, § 1170, subd. (b), Cal.Rules

of Court, rule 4.420 (b)). The Washington Act lists aggravating factors that justify such a departure, which are strikingly similar to the aggravating factors listed in rule 4.423 of the California Rules of Court. (Compare Wash.Rev.Code, § 9.94A.535, formerly, § 9.94A.390, with Cal.Rules of Court, rule 4.423). However, “[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.” (*State v. Gore* (2001) 143 Wash.2d 288, 315-316, 21 P.3d 262, 277). Similarly, in California, the upper term may not be imposed based on a fact which is also an element of the offense. (Cal. Rules of Court, rule 4.420(d)). Under the Washington Act, when a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it (Wash.Rev.Code, § 9.94A.535, formerly, § 9.94A.120(3)); in California, a judge who selects the upper term must state his reasons for doing so on the record. (Cal.Rules of Court, rule 4.420(e)).

Thus in all pertinent respects, California’s sentencing scheme suffers from the same defects as the Washington scheme that the Court struck down in *Blakely*.

2. Consecutive Sentences

California’s sentencing laws also permit the trial judge to impose

increased punishment, in the form of consecutive sentences, based on facts not submitted to or found to be true by a jury. Penal Code section 669 provides that in the absence of special findings by the trial judge, sentences for two or more felonies shall run concurrently.³ The rule implementing this statute is California Rules of Court, rule 4.425⁴, which specifies the criteria for determining whether to sentence consecutively or concurrently. Thus, in order

³ Penal Code section 669 provides in pertinent part:

(a) When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. . . . Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently. . . (Pen.Code, § 669).

⁴California Rules of Court, rule 4.425 states:

Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

- (a) [Criteria relating to crimes] Facts relating to the crimes, including whether or not:
- (1) The crimes and their objectives were predominantly independent of each other.
 - (2) The crimes involved separate acts of violence or threats of violence.
 - (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

to sentence consecutively rather than concurrently, the trial judge has to find one or more of the factors listed in rule 4.425. None of these factors is presented to or found true beyond a reasonable doubt by a unanimous jury. Indeed, rule 4.425 expressly prohibits the use of facts found by the jury, such as elements of the offense and facts supporting enhancements, in the decision to impose consecutive sentences. (Cal.Rules of Court, rule 4.425(b)). Consecutive sentencing under these provisions permits the trial judge, alone, to increase the defendant's punishment based on facts beyond those found by the jury verdict. For these reasons, the consecutive sentencing scheme in California also fails the *Apprendi* test as explained in *Blakely* and thus violates the Sixth Amendment right to a jury trial.

C. The Upper Term and Consecutive Sentences Imposed in this Case Violate the Sixth Amendment and Are Invalid, Because They Are Based on Factual Findings Not Submitted to a Jury and Found True Beyond a Reasonable Doubt

Here the trial court sentenced Quintero to consecutive prison terms for counts one, two, and three, all of which arose from the events of January 18, 2003. (7 RT 1073-1075; CT 211-213, 245-246). The court also imposed a consecutive sentence on count ten, which arose from the events of June 18, 2001. (7 RT 1073-1075; CT 211-213, 245-246). In support of the selection of consecutive terms, the court found the crimes involved separate acts of

violence which were committed at different times or at separate places and were not committed so closely in time and place as to indicate a single period of aberrant behavior. (7 RT 1073; Cal.Rules of Court, rule 4.425(a)(2), (a)(3)). These factual findings were made by the judge alone. None of these factual issues was submitted to the jury, and the jury did not find any of the aggravating facts true beyond a reasonable doubt. Similarly, the court imposed the upper terms on counts four, five, six, seven, nine, and ten, based on its findings, by a preponderance of the evidence (Cal.Rules of Court, rule 4.420(b)), that the incident involved significant injury to third persons, the manner in which the crime was carried out demonstrated criminal sophistication or professionalism; Quintero had engaged in violent conduct indicating a serious danger to society; his prior convictions were of increasing seriousness; and he was on probation when he committed the charged offenses. (7 RT 1073-1074; Cal.Rules of Court, rule 4.421 (a)(1), (a)(8), (b)(1), (b)(2), (b)(4)).⁵ Other than injury to Quigley, these factual issues were not submitted to the jury, and the jury did not find these facts to be true

⁵ The sentences imposed on counts four, five, six, and nine were stayed pursuant to Penal Code section 654; the sentence on count seven was ordered to run concurrently with the sentence imposed on count one. (7 RT 1074-1075; CT 2110213, 245-246).

beyond a reasonable doubt.⁶ Because a defendant has the right to require that all facts essential to punishment be proved to a jury, beyond a reasonable doubt, the sentence imposed on Quintero does not comply with the Sixth Amendment and is invalid. For these reasons, the judgment should be reversed and the case remanded for re-sentencing in conformity with *Blakely*.

D. Quintero's Objections to the Non-jury Fact-finding Procedures Used in Sentencing Him Were Not Waived, Because No Objection is Required to Preserve Issues Relating to the Denial of the Constitutional Right to Jury Trial, and Any Objection Would Have Been Futile

At his sentencing, Quintero did not object to the non-jury fact-finding procedures used in imposing the upper terms and consecutive sentences. However, no objection is required to preserve for appeal issues relating to the denial of fundamental constitutional rights such as the right to jury trial. In addition, before *Blakely*, any objection on such grounds would have been futile.

A criminal defendant's failure to object at trial does not preclude him from raising, for the first time on appeal, the denial of certain fundamental constitutional rights, including the right to trial by jury. (*People v. Vera*

⁶ The fact of injury to third persons could not properly be used to aggravate the sentence on count ten, because it was an element of the offense. (Cal.Rules of Court, rule 4.420 (d)). Quintero was not charged with personally inflicting injury on Brenton Tracy, and the jury did not find he did so.

(1997) 15 Cal.4th 269, 276-277 [right to jury trial]; *People v. Saunders* (1993) 5 Cal.4th 580, 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [right to jury trial]. Because, pursuant to *Blakely*, Quintero's claims are based on the denial of his fundamental constitutional right to a jury determination of facts used to increase his sentence, the absence of an objection at sentencing does not preclude appellate review of the denial of this fundamental constitutional right.

Moreover, any objection at the time of Quintero's pre-*Blakely* sentencing would have been futile. The relevant California statutes and rules, approved by case law, expressly authorized the imposition of upper terms and consecutive sentences based judicial fact-finding and the preponderance of the evidence standard. (*People v. Betterton* (1979) 93 Cal.App.3d 406, 412-413; *People v. Nelson* (1978) 85 Cal.App.3d 99, 101; Pen.Code, §§ 669, 1170; Cal.Rules of Court, rules 4.420, 4.421, 4.423, 4.425). Indeed, before *Blakely*, the California Supreme Court had declined to extend the mandate of *Apprendi* to the sentencing process in capital cases, holding *Apprendi* did not require application of the reasonable-doubt standard to the jury determination of the truth of aggravating circumstances in such cases. (*People v. Martinez* (2003) 31 Cal.4th 673, 700-701). Under these circumstances, no objection was required. (*O'Connor v. Ohio* (1966) 385 U.S. 92, 93, 87 S.Ct. 252, 17

L.Ed.2d 189 [“failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court”]; *People v. Chavez* (1980) 26 Cal.3d 334, 349-350, fn. 5 (and cases cited); *People v. DeSantiago* (1969) 71 Cal.2d 18, 22-23, 27-28; cf. *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver where lower court was bound by decision of higher court on issue]).

II

**THE JUDGMENT SHOULD BE REVERSED,
BECAUSE DENIAL OF THE RIGHT TO
JURY TRIAL IS A STRUCTURAL ERROR,
REQUIRING REVERSAL;
ALTERNATIVELY, THE DENIAL OF THE
RIGHT TO JURY TRIAL ON THE FACTS
USED TO INCREASE QUINTERO’S
SENTENCE WAS NOT HARMLESS
BEYOND A REASONABLE DOUBT**

In *Blakely*, the Court remanded the case to the Washington courts “for proceedings not inconsistent with this opinion.” (*Blakely v. Washington, supra*, ___U.S.____, 2004 U.S. Lexis 4573 at p. 32). The opinion does not address whether the error required automatic reversal or was subject to harmless error analysis. Here, reversal is required under either standard.

Denial of the right to a jury trial is structural error requiring reversal without regard to prejudice, because the wrong entity, the judge rather than the jury, adjudicated the aggravating factors and the factors used in selecting

consecutive sentences and applied the wrong standard of proof. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182, 189). Here, Quintero was denied a jury trial on the facts used to increase his sentence, and the court applied the wrong standard of proof in determining those facts. Under these circumstances, the error is structural and automatically reversible.

This is not a case like *Neder v. United States* (1999) 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 and *People v. Flood* (1998) 18 Cal.4th 470, which concluded failure to instruct the jury on a single element is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 705 (*Chapman*). In those cases, only a single element was removed from the jury's consideration. Here, on the other hand, no jury at all was utilized in the sentencing process, and none of the facts used to sentence Quintero to the upper terms and consecutively was found to be true by a jury. Because the jury was wholly excluded from this fact-finding process, the error is structural, and reversal is required. (*Sullivan v. Louisiana, supra*, 508 U.S. at 280, 113 S.Ct. at 2082, 124 L.Ed.2d at 189-190 ["The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action"]).

Assuming *arguendo* the error is subject to harmless error analysis, the applicable standard is that set forth in *Chapman*. (*Neder v. United States*,

supra, 527 U.S. 1, 119 S.Ct. 1827, 133 L.Ed.2d 35; *People v. Sengpdychith* (2001) 26 Cal.4th 316, 324; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1209-1211). Where *Chapman* applies, reversal is required, unless the state proves the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705). In the context of errors affecting the right to a jury trial on elements or enhancements, the United States Supreme Court requires a rigorous form of *Chapman* analysis, focusing on the facts the jurors necessarily found in rendering their verdict. (*Neder v. United States, supra*, 527 U.S. 1, 119 S.Ct. 1827, 133 L.Ed.2d 35) (*Neder*). In *Neder*, for example, the Court applied harmless error analysis under *Chapman* where the jury was not instructed on an element, but made it clear that such error cannot be found harmless if the omitted element is susceptible to dispute:

If, at the end of that examination, the [reviewing] court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless. (*Id.* at 19, 119 S.Ct. 1827, 133 L.Ed.2d 35).

Here the trial court imposed consecutive sentences on counts one, two, and three, all of which arose from the events of January 18, 2003, based on the court's finding that each offense occurred at a different time and place and was

not part of a single episode of aberrant behavior. (7 RT 1073). Yet the conduct involved in each of these counts was part of a single incident, occurring in a brief time span, no more than five minutes. (1 RT 144-154, 156-157, 177-178; 2 RT 279-280, 284-285, 289-291; Aug. CT 13-15). In addition, the locations where each occurred were close to one another. Both counts one and three occurred in virtually the same place – next to Settle’s patrol car – and count two occurred nearby. (1 RT 144-154, 156-157, 177-178; 2 RT 279-280, 284-285, 289-291). Based on this evidence, it is questionable that a jury would have found these three counts occurred at different times and at different places and were not part of a single incident. Under these circumstances, the failure to submit these factual issues to a jury cannot be found harmless beyond a reasonable doubt.

The same is true for the factors used in the selection of the upper terms. For example, the trial court found Quintero’s prior convictions had been of increasing seriousness (7 RT 1073-1074), yet the probation report lists a number of non-violent offenses, which a jury could reasonably find were of approximately the same degree of seriousness. (CT 191-194). Similarly, the trial court concluded the current offenses showed planning and sophistication (7 RT 1073-1074), yet a jury could reasonably have found to the contrary, based on this record. While the jury did find infliction of serious bodily injury

on Quigley, that fact could not properly be used to justify imposition of the upper term on count ten, because it was an element of the charged offense, battery with serious bodily injury (Pen.Code, § 243, subd.(d)). (Cal.Rules of Court, rule 4.420(d)). Quintero was not charged with inflicting injury on Brenton Tracy, and the jury did not find he did so. For these reasons, the failure to submit the factual issues bearing on the selection of the upper term to a jury was not harmless beyond a reasonable doubt.

CONCLUSION

For the reasons stated above, appellant Robert Quintero requests the judgment be reversed and the matter remanded to the superior court for resentencing in accordance with *Blakely v. Washington* (No. 02-1632, June 24, 2004) ___U.S.___, 2004 D.J.D.A.R. 7581, 2004 WL 1402697, 2004 U.S. Lexis 4573).

Dated: July 9, 2004

Respectfully submitted,

Martha L. McGill
Attorney for Appellant
ROBERT QUINTERO
By appointment of the Court of
Appeal under the Appellate
Defenders, Inc. independent case
system

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