Supplemental briefing from panel attorney Solomon Wollack in *People v. Joel Henderson* (D043082)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	]	NO. D043082
	]	
Plaintiff and Respondent,	]	Superior Court No.
	]	SCD169260
v.	]	(San Diego County)
	]	
JOEL B. HENDERSON,	]	
	]	
Defendant and Appellant.	]	
	]	

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

Honorable Gale E. Kaneshiro, Judge Presiding

APPELLANT'S SUPPLEMENTAL OPENING BRIEF.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

SENTENCING HEARING 3

ARGUMENT 3

I. **Under the Supreme Court's recent decision in *Blakely v. Washington*, California's Determinate Sentencing Act violates the Sixth and Fourteenth Amendments by allowing a defendant to be sentenced to the aggravated term based upon factors found true by the judge under a preponderance standard** 3

A. **The relevant caselaw** 3

B. **The California Determinate Sentencing Act** 7

C. **California's Determinate Sentencing Act violates the rule set forth in *Blakely*** 8

II. **This Court must remand Mr. Henderson's case for a new sentencing hearing** 12

A. **That the offense involved planning was a "fact[] relating to the crime" which should have been submitted to the jury under *Blakely*** 13

B. **Under *Blakely*, the remaining three aggravating factors should also have been submitted to the jury** 14

1. Recidivism as an aggravating factor 14

2. Because the holdings in *Blakely* and *Almendarez-Torres* cannot be reconciled, issues involving recidivism must now be submitted to the jury or encompassed in the guilty plea 15

3. Even if *Almendarez-Torres* survives *Blakely*, its holding applies only to the fact of the prior conviction and not to any factual inferences or determinations which arise from that prior conviction 17

4. Of the aggravating factors relied on by the trial court, only appellant's prior prison term was properly submitted to the jury or admitted by appellant 17

a. The trial court violated *Blakely* by imposing the upper term based on its finding that Mr. Henderson's crimes were numerous and of increasing seriousness 18

b. The trial court violated *Blakely* by imposing the upper term based on its finding that Mr. Henderson had engaged in violent conduct constituting a serious danger to society 20

C. Because the court's *Blakely* errors were not harmless beyond a reasonable doubt, this Court should remand Mr. Henderson's case for a new sentencing hearing 22

1. Of the three aggravating factors that were neither admitted nor submitted to the jury, it does not appear beyond a reasonable doubt that the jury would have found these factors present 22

2. It does not appear beyond a reasonable doubt that the sentencing court would have imposed the upper term absent the three aggravating factors which were the subject of the *Blakely* violation 24

3. The combined effect of the trial court's *Blakely* errors, as well as its errors of state law, cannot be said to be harmless beyond a reasonable doubt 26

CONCLUSION 28

CERTIFICATE OF COMPLIANCE 29

TABLE OF AUTHORITIES

CASES

Almendarez-Torres v. United States (1998)
523 U.S. 224 13-17

Apprendi v. New Jersey (2000)
530 U.S. 436 . . . . 4-6, 10, 14-15, 17, 22

Blakely v. Washington (June 24, 2004)
___ U.S. ___, 2004 WL 1402697 . . . . 2-3, 5-20, 22, 24, 26-28

Harris v. United States (2002)
536 U.S. 545 5

Hoffman v. Arave (9th Cir. 2001)
236 F.3d 523 24-26

In re Winship (1970)
397 U.S. 358 3

McMillan v. Pennsylvania (1986)
477 U.S. 179 . . . . 4, 8

Neder v. United States (1999)
527 U.S. 1 22-23

People v. Epps (2001)
25 Cal.4th 19 15

People v. Estes (1983)
147 Cal.App.3d 23. 20

People v. Felix (2000)
22 Cal.4th 651 7

People v. Garcia (1989)
209 Cal.App.3d 790 9

People v. Harvey (1984)
163 Cal.App.3d 90 14

People v. Jefferson (1999)
21 Cal.4th 86 7

People v. Moreno (1982)
128 Cal.App.3d 103 14

People v. Sengpadychith (2001)
26 Cal.4th 316 22

State v. Ammons (1986)
105 Wash.2d 175 11

State v. Garcia-Martinez (1997)
88 Wash.App. 322 11

State v. Mail (1993)
121 Wash.2d 707 11

Sullivan v. Louisiana (1993)
508 U.S. 275 3

United States v. Yanez-Saucedo (9th Cir. 2002)
295 F.3d 991 15

Williams v. Calderon (9th Cir. 1995)
52 F.3d 1465 24

STATUTES

Penal Code

Section 1170 7-8

Section 1170, subd. (b) 8

Washington Statutes Annotated

Section 9.94A.535 . . . . 10, 12

Section 9.94A.585(a) 11

CONSTITUTIONS

United States Constitution

Fifth Amendment 5

Sixth Amendment 2-3, 5, 7-9, 12-14, 16-17, 22

Fourteenth Amendment 2-3, 5, 9, 12, 16, 22

OTHER AUTHORITIES

California Rules of Court

Rule 4.408(a) 9

Rule 4.420(a) 8

Rule 4.420(b) 8-9, 24

Rule 4.420(c) 10, 18

Rule 4.420(d) 10

Rule 4.420(e) 12

Rule 4.421 . . . . 9, 12

Rule 4.421(a) 13

Rule 4.421(a)(1) 21-22

Rule 4.421(a)(8) 3

Rule 4.421(b) 13

Rule 4.421(b)(1) 3, 20-21

Rule 4.421(b)(2) 3, 20

Rule 4.421(b)(3) 3

Rule 4.423(a)(6) 27

Rule 4.423(a)(8) 27

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	]	NO. D043082
	]	
Plaintiff and Respondent,	]	Superior Court No.
	]	SCD169260
v.	]	(San Diego County)
	]	
JOEL B. HENDERSON,	]	
	]	
Defendant and Appellant.	]	
	]	

INTRODUCTION

Appellant Joel Henderson was convicted of robbery, based on an incident in which he was accused of stealing a $19.95 gauge kit from Wal-Mart, then pushing a security guard and threatening another employee as they tried to retake the stolen property in the store's front parking lot. At sentencing, the trial judge imposed the upper term, based on its finding of various circumstances in aggravation.

On March 8, 2004, appellant filed his opening brief on appeal. In that brief, he argued, among other things, that the trial court abused its sentencing discretion and relied on inapplicable aggravating factors in sentencing him to

the upper term. (AOB, pp. 50-59.) Appellant did not argue that the sentencing error was of federal constitutional dimension.

On June 24, 2004, the United States Supreme Court decided *Blakely v. Washington* (June 24, 2004) __ U.S. __, 2004 WL 1402697. In that decision, the Court held that a Washington sentencing procedure violated the Sixth Amendment right to jury trial because it permitted the court to impose a sentence in excess of the statutory maximum based on judicially-determined facts that were neither admitted by the defendant nor found true by the jury. (*Id.*, at *4-5.)

In light of *Blakely*, appellant now contends that the trial court violated both his Sixth Amendment right to jury trial and his Fourteenth Amendment right to a verdict based on proof beyond a reasonable doubt, by sentencing him to the upper term based on "circumstances in aggravation" which were not encompassed in the jury's verdict and which were found true only by the court, applying a preponderance of the evidence standard.

STATEMENT OF THE CASE AND FACTS

For convenience, appellant incorporates by reference the Statement of the Case and Statement of Facts contained in his original opening brief.

\\

\\

SENTENCING HEARING

At the October 3, 2003 sentencing hearing, the trial court imposed the upper term. In doing so, it found four factors in aggravation: (1) that the manner of the crime's commission demonstrated planning (Cal. Rules of Court, rule 4.421(a)(8)[1]); (2) that appellant had engaged in violent conduct indicating a serious danger to society (Rule 4.421(b)(1)); (3) that appellant's prior convictions were numerous and of increasing seriousness (Rule 4.421(b)(2)); and (4) that the defendant had served a prior prison term. (Rule 4.421(b)(3).) (RT 681-682.)

ARGUMENT

I. Under the Supreme Court's recent decision in *Blakely v. Washington*, California's Determinate Sentencing Act violates the Sixth and Fourteenth Amendments by allowing a defendant to be sentenced to the aggravated term based upon factors found true by the judge under a preponderance standard.

A. The relevant caselaw

The Fourteenth Amendment's due process clause requires that the prosecution prove a defendant's guilt beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) The Sixth Amendment requires that the jury, not the trial court, find the defendant guilty beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.)

---

[1] All citations of "rules" refer to the California Rules of Court.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court considered the extent to which these constitutional guarantees extend "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." (*Id.*, at p. 484.) In so doing, the Court held that, "Other 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." (*Id.*, at p. 490.)

In reaching this conclusion, the Court took pains to distinguish its earlier ruling in *McMillan v. Pennsylvania* (1986) 477 U.S. 179. There, the Court upheld a Pennsylvania "mandatory minimum" statute which applied whenever the judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the course of certain crimes. As *Apprendi* pointed out, however, the statute in *McMillan* did not increase the maximum penalty for the crime, but "operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." (*Id.*, at pp. 87-88, quoting *McMillan v. Pennsylvania*, *supra*, 477 U.S. at p. 88.) Thus, the combined effect of *Apprendi* and *McMillan* was to nullify only those sentencing schemes which permitted a sentence in excess of the "statutory maximum" based on a judicial determination of fact. (*Apprendi v. New Jersey*,

supra, 530 U.S. at p. 489.) Conversely, "Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth [and Fourteenth] Amendments." (*Harris v. United States* (2002) 536 U.S. 545, 558.)

The Court's recent decision in *Blakely v. Washington*, *supra*, __U.S. __, 2004 WL 1402697, adds a new and important wrinkle to *Apprendi*. For, *Blakely* makes clear that the term "statutory maximum" refers not to "the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.*, at *4, original italics.) Differently put, "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.*" (*Ibid.*, original italics.)

In *Blakely*, the defendant pled guilty to second-degree kidnaping with a firearm – a class B felony under Washington law. By state statute, all class B felonies carried a maximum term of ten years imprisonment. However, a more specific statute set forth a "standard range" of 49 to 53 months in prison for the offense of which Blakely was convicted. That same statute then permitted sentences in excess of this standard range where the judge found "substantial

and compelling reasons justifying an exceptional sentence." (*Id.*, at * 2.) It then listed, by way of illustration, some of the aggravating factors which might warrant a sentence beyond the standard range. (*Ibid.*)

At the sentencing hearing in *Blakely*, the court found that defendant had acted with "deliberate cruelty" – one of the enumerated aggravating factors under the Washington statute. It therefore imposed a sentence of 90 months.

The Supreme Court struck down the sentence as a violation of the *Apprendi* rule. In this regard, it held that the statutory maximum was not the ten-year term for class B felonies, but the 53 month-term – that is, the outer limit of the "standard range" for second degree kidnaping. As the Court explained:

> The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because [under Washington law] . . . an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range for the offense.

(*Id.*, at *5, internal quotations omitted.)

In the course of its discussion, *Blakely* also made clear that the rule established in *Apprendi* is a "bright-line rule" which "ensur[es] that the judge's authority to sentence derives wholly rom the jury's verdict." (*Id.*, at *7) The Court thus rejected the notion that *Apprendi* rights turned on such arbitrary and

inherently subjective standards as whether a particular fact constitutes an element or a sentencing factor, or whether a particular scheme goes "too far" in allowing judicial fact-finding to drive sentencing decisions. (*Id.*, at *6-7.) Under such scenarios, the Court pointed out, a defendant could plausibly be sentenced to death for committing murder, though the jury convicted him "of making an illegal lane change while fleeing the death scene." (*Id.*, at *7.) To avoid such an outcome, the Court held, quite simply, that the Sixth Amendment entitles every accused "the *right* to insist that the prosecutor prove to the jury all facts legally essential to the punishment." (*Id.*, at *9, original emphasis.)

B. The California Determinate Sentencing Act

In California, felony sentencing is governed by the Determinate Sentencing Act. (Pen. Code, § 1170; *People v. Felix* (2000) 22 Cal.4th 651, 654.) Under this scheme, most felony statutes set forth three possible terms of imprisonment, known as the upper, middle, and lower terms. (*People v. Felix*, *supra*, 22 Cal.4th at p. 654.) The trial court must then select the most appropriate of the three sentences, based on a weighing of any aggravating or mitigating evidence or circumstances. (*People v. Jefferson* (1999) 21 Cal.4th 86, 95.)

Under *Blakely*, the constitutionality of California's Determinate Sentencing Act turns on whether the low, middle, and high ranges are seen as three different choices within an authorized range (*McMillan v. Pennsylvania*, *supra*, 477 U.S. at p. 88), or whether the middle term is the functional equivalent of Washington's "standard range." As will be seen, both the structure and language of the statute make it far more similar to the Washington scheme than to the Pennsylvania procedure upheld in *McMillan*.

C. California's Determinate Sentencing Act violates the rule set forth in *Blakely*.

In *Blakely*, the Court held that 53 months (the high end of the 49 to 53 month standard range) constituted the statutory maximum punishment, since any punishment beyond that could only be based on additional factual findings not encompassed in the guilty plea or jury verdict. Because these additional findings were made by the judge, the scheme violated the Sixth Amendment right to jury trial.

The California sentencing scheme has a similar structure to the Washington one. In this regard, Penal Code section 1170 specifically provides: "When a judgment of imprisonment is imposed . . . the court **shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.**" (Pen. Code, § 1170, subd. (b), emphasis added; accord, Rule 4.420(a) & (b).) Such circumstances in

aggravation need not be adjudicated by the jury, but are determined by the court under a preponderance of the evidence standard. (Rule 4.420(b).) "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." (*Ibid.*)

Like the Washington statute, the California rules provide a list of enumerated aggravating circumstances. (Rule 4.421.) As in *Blakely*, however, the list is not exhaustive and the court may rely upon additional aggravating factors which it finds "reasonably related" to the sentencing decision. (Rule 4.408(a); see, e.g., *People v. Garcia* (1989) 209 Cal.App.3d 790, 794-795 [rapist's knowledge of his herpes infection].)

The California sentencing scheme suffers from the same defect as the one in *Blakely*. For, both statutes not only set up a strong presumption in favor of a particular sentencing range, but both require at least one additional factual finding in order to overcome that presumption. Because that additional finding is made by the judge, and is not reflected in either the jury verdict or the guilty plea, the statutes violate the Sixth Amendment right to jury trial. Furthermore, because the finding must be made under a mere preponderance standard, it also violates the Fourteenth Amendment right to proof beyond a reasonable doubt of every fact which "increases the penalty for a crime beyond the prescribed

statutory maximum" – that is, beyond the sentence permitted by the facts contained in the jury's verdict. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 489; *Blakely v. Washington*, *supra*, at *4.)

Indeed, California law actually prohibits the use of a particular fact as a circumstance in aggravation when that same fact also constitutes either an element of the offense or the basis of a charged sentencing enhancement. (Rule 4.420(c) & (d).) Thus, almost by definition, a fact which constitutes a circumstance in aggravation must necessarily be a fact beyond the jury's verdict.[2] For, it is only by finding some additional fact beyond those encompassed in the jury's verdict (namely, the elements and enhancements) that the judge acquires the authority to impose a sentence other than the middle term.

Finally, although it is not directly discussed in *Blakely*, it is noteworthy that, whereas the Washington sentencing statute sets forth stringent guidelines regarding the procedures and criteria which may be used in imposing an "exceptional sentence" (Wash. Stat. Ann., § 9.94A.535), it establishes no similar criteria for directing a judge's discretion within the applicable standard

---

[2] An exception to this rule occurs when the sentencing court chooses to strike the enhancement and instead use its underlying facts as a reason for imposing the upper term. (Rule 4.420(c).)

range. (*State v. Mail* (1993) 121 Wash.2d 707, 711.) To the contrary, provided the judge does not rely upon unconstitutional factors (such as race or gender), she has essentially unfettered discretion to choose the appropriate sentence within the given range. (*Ibid.*; *State v. Garcia-Martinez* (1997) 88 Wash.App. 322, 329.) Washington law places no limits on the information a judge may consider in imposing a standard range sentence, and the judge need not state any reasons for choosing a particular sentence within the range. (*State v. Mail*, *supra*, 121 Wash.2d at p. 714.) By statute, the sentencing court's decision is not appealable (Wash. Stat. Ann., § 9.94A.585(a)), and "as a matter of law there can be no abuse of discretion" provided "defendant has not alleged that any mitigating factors exist." (*State v. Garcia-Martinez*, *supra*, 88 Wash.App. at p.329, citing *State v. Ammons* (1986) 105 Wash.2d 175, 183.)

Unlike Washington, California does not set forth a presumptive **range** of sentences; rather, it sets forth a specific presumptive sentence – namely, the middle term. Under *Blakely*, however, what matters is not whether the statute calls for a range or a term certain. What matters is whether judicial fact-finding is a prerequisite to imposition of a middle term. In this regard, the two state statutes are identical since, under both the Washington and California schemes, the judge may impose the presumptive sentence without making any

findings, without weighing or considering any specific or enumerated criteria, and without stating her reasons for choosing the particular sentence. It is only when the court decides to impose a sentence outside the standard range or middle term that it must weigh specific circumstances in aggravation, make findings with regard to those circumstances, and state its reasons on the record for imposing this harsher sentence. (Rule 4.420(e); Wash. Stat. Ann., § 9.94A.535.)

In short, the California Determinate Sentencing Act has the same flaws as the one in *Blakely*. Accordingly, the statute violates the Sixth and Fourteenth Amendments of the United States Constitution by allowing the court to sentence a defendant to an upper term, based on factual findings not reflected in the jury verdict.

II. <u>This Court must remand Mr. Henderson's case for a new sentencing hearing</u>.

Should this Court agree that the Determinate Sentencing Act is subject to *Blakely*, it must next evaluate the specific facts of Mr. Henderson's case to determine the extent of any Sixth Amendment error.

As a threshold matter, rule 4.421 sets forth the various circumstances in aggravation which a sentencing court may consider in imposing the upper term. In this regard, the rule distinguishes between "facts relating to the crime" and "facts relating to the defendant." The former category

encompasses offense-specific considerations, such as the degree of violence involved, the vulnerability of the victim, and the amount or quantity of contraband involved. (Rule 4.421(a).) The latter category, on the other hand, involves facts related to the defendant's criminal history, such as the number of his prior convictions, whether those convictions are of increasing seriousness, and whether the defendant was on parole or probation at the time of the offense. (Rule 4.421(b).) The two categories warrant separate discussion for, while facts relating to the crime would appear to fall squarely within *Blakely*, the Court has historically treated recidivist factors as an exception to the Sixth Amendment jury trial guarantee. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224.)

A. That the offense involved planning was a "fact[] relating to the crime" which should have been submitted to the jury under *Blakely*.

Like all factors enumerated in rule 4.421(a), a finding that a case involved planning is the very type of factual, case specific determination which, after *Blakely*, must be submitted to the jury and proved beyond a reasonable doubt.

That the jury found appellant guilty of robbery says nothing about whether his case involved planning sufficient to warrant an aggravated sentence. After all, "The essence of 'aggravation' relates to the effect of a

particular fact in making the offense distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110.) All robberies involve a degree of planning. What triggers a finding of aggravating circumstances is that the particular robbery in question involves more planning than the average, run-of-the-mill robbery. (See *People v. Harvey* (1984) 163 Cal.App.3d 90, 117.) This issue was precisely the type that needed to be submitted to the jury. As such, the trial court violated appellant's Sixth Amendment right to jury trial by imposing an aggravated sentence based on its finding that the case involved planning.

B. Under *Blakely*, the remaining three aggravating factors should also have been submitted to the jury.

1. Recidivism as an aggravating factor

Two years before *Apprendi*, the Supreme Court held, in *Almendarez-Torres v. United States*, *supra*, 523 U.S. at p. 247, that there is no constitutional right to jury trial on a prior conviction, even when that prior conviction significantly increases the statutory maximum sentence. Justice Breyer authored the lead opinion in *Almendarez-Torres*, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy and Thomas. Justice Scalia filed a dissenting opinion, joined by the Court's remaining three members.

These same four dissenters later carried the day in *Apprendi*, joined by Justice Thomas. In holding that the right to jury trial encompasses any fact which increases an offense's punishment beyond the statutory maximum, *Apprendi* acknowledged that *Almendarez-Torres* may have been wrongly decided and might no longer be tenable. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 489.) However, the Court stopped short of overruling *Almendarez-Torres*, instead making prior convictions an exception to the jury trial rule. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 489.) Notably, Justice Thomas filed a separate concurring opinion, in which he acknowledged "succumb[ing]" to the erroneous reasoning of *Almendarez-Torres*'s majority. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 520-521 [conc. opn. of Thomas, J].)

2. Because the holdings in *Blakely* and *Almendarez-Torres* cannot be reconciled, issues involving recidivism must now be submitted to the jury or encompassed in the guilty plea.

Despite Justice Thomas's subsequent retreat from his stance in *Almendare-Torres*, both the California Supreme Court and the Ninth Circuit have held that the *Almendarez-Torres* holding survived *Apprendi* and remains good law. (*People v. Epps* (2001) 25 Cal.4th 19, 29; *United States v. Yanez-Saucedo* (9th Cir. 2002) 295 F.3d 991, 993.) These decisions, however, pre-dated *Blakely*.

The core holding of *Blakely* was that "[T]he judge's authority to sentence derives wholly from the jury's verdict" or guilty plea. (*Blakely v. Washington*, *supra*, at *6.) Moreover, *Blakely* made clear that this is a "bright-line" rule which replaced a regime:

> in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum sentence balloon from as little as five years to as much as life imprisonment, based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. (*Id.*, at *8.)

While *Blakely* did not arise in the context of prior offenses, it might as well have – for the above-quoted language describes exactly how a defendant's prior offenses are "proved" in the typical criminal case. For this reason, it is appellant's position that *Almendarez-Torres* cannot be reconciled with *Blakely* and that even recidivist factors must now be submitted to the jury and proved beyond a reasonable doubt. Accordingly, appellant's sentence violates the Sixth and Fourteenth Amendments to the extent it relied on aggravating recidivist factors which were never presented to the jury or admitted by Mr. Henderson.

\\

\\

3. Even if *Almendarez-Torres* survives *Blakely*, its holding applies only to the fact of the prior conviction and not to any factual inferences or determinations which arise from that prior conviction.

Even if *Almendarez-Torres* remains good law, its holding was a limited one – especially when viewed through the prism of both *Apprendi* and *Blakely*. *Almendarez-Torres* holds simply that there is no Sixth Amendment right to jury trial on the fact of a prior conviction. (*Almendarez-Torres v. United States*, *supra*, 523 U.S. at pp. 246-247.) It does not follow, however, that all sentencing factors which contain a component of recidivism are therefore exempt from the Sixth Amendment's jury trial guarantee. It is one thing for a court to increase a defendant's sentence based on the bare fact of his prior convictions; it is quite another for the court to do so based on factual findings or inferences about those convictions. The latter category of findings go beyond the admitted elements of the prior convictions and therefore cannot form the basis for an aggravated sentence unless first submitted to the jury or admitted by the defendant.

4. Of the aggravating factors relied on by the trial court, only appellant's prior prison term was properly submitted to the jury or admitted by appellant.

Regardless of whether recidivist factors must be entirely submitted to the jury, or whether the court may make findings related to the fact of the prior convictions, the outcome in Mr. Henderson's case is the same. After trial, Mr.

Henderson waived his right to jury trial on the priors and admitted suffering a 1992 conviction for assault with a deadly weapon – a crime which he admitted constituted both a "strike" and a prior serious felony. (RT 636-639.) In addition, he also admitted to two "prison priors." The first "prison prior" was based on 1987, 1988 and 1990 convictions for grand theft, possession of a controlled substance for sale, and unlawful transport of a controlled substance. (RT 635-636.) The second was based, again, on the 1992 conviction for assault with a deadly weapon. (RT 636.) At sentencing, the court struck both the prison priors. (RT 683.)

In light of these admissions, the court was constitutionally permitted to rely on Mr. Henderson's prior prison terms as a basis for imposing a sentence in excess of the middle term. (Rule 4.420(c).) By contrast, however, appellant did not admit that his prior crimes were "numerous" or "of increasing seriousness" and he did not admit that they evidenced a "serious danger to society." Because these findings went beyond the mere fact of the prior convictions, these facts should have been submitted to the jury under *Blakely*.

a. The trial court violated *Blakely* by imposing the upper term based on its finding that Mr. Henderson's crimes were numerous and of increasing seriousness.

In imposing the aggravated term, the court relied in part on its finding that Mr. Henderson's "prior convictions as an adult are numerous and of

increasing seriousness." (RT 682.) This finding violated *Blakely*, as it increased Mr. Henderson's sentence beyond the middle term, based on a factor which should have been submitted to the jury.

It is true, of course, that Mr. Henderson admitted to suffering prior convictions in 1987, 1988, 1990, and 1992. And while the trial court could perhaps look to the bare elements of these past convictions in determining whether Mr. Henderson's crimes were "numerous" or "of increasing seriousness," the point is that it was not the court's job to do so. Determining whether a defendant's past convictions are "numerous" or of "increasing seriousness" is an inherently subjective exercise. How many crimes must one commit in order to meet the criterion of "numerous?" Does it matter that these past crimes all occurred more than a decade ago and that the defendant remained free of felony convictions during the intervening time period? How is one to gauge whether Mr. Henderson's 1988 and 1990 narcotics convictions were more serious than his 1992 conviction for assault with a deadly weapon? How many consecutive crimes of escalating seriousness must a defendant commit in order for his criminal history to be of "increasing seriousness?" Does the instant robbery, which started out as a theft of a $19.95 gauge kit, constitute a crime of increasing seriousness, as compared to Mr. Henderson's past conviction for narcotics dealing and assault with a deadly weapon?

Appellant raises these questions not to challenge the trial court's factual finding that his convictions were "numerous and of increasing seriousness,"[3] but simply to point out that this finding is a subjective one which does not necessarily follow from the bare elements of his prior convictions. Thus, while it may be true that Mr. Henderson admitted the fact of his prior convictions in 1987, 1988, 1990, and 1992, he did not admit – and the jury did not find – the aggravating factor set forth in rule 4.421(b)(2). As such, his right to jury trial was violated under *Blakely*.

b. The trial court violated *Blakely* by imposing the upper term based on its finding that Mr. Henderson had engaged in violent conduct constituting a serious danger to society.

Mr. Henderson did not admit – and the jury did not find – that he had engaged in violent conduct constituting a serious danger to society. Rather, the court made this finding, relying, it seems, solely upon the facts of this case. Specifically, the court stated:

> Rule 4.421(b)(1), defendant has engaged in violent conduct which indicates a serious danger to society.
>
> This may have been an Estes[4] robbery. It is nevertheless robbery, because force or fear was used to take the property. I have no doubt in my

---

[3] Appellant has already made this challenge in section IV(A)(3) of his opening brief. (See AOB, pp. 57-58.)

[4] *People v. Estes* (1983) 147 Cal.App.3d 23.

> mind that a robbery took place in this case, and that Mr. Henderson was the perpetrator of that robbery, together with Ms. Pulliam. (RT 681.)

While the court couched its finding as one based on rule 4.421(b)(1), its analysis shows otherwise. Under rule 4.421(b)(1), "violent conduct [involving] a serious danger to society" constitutes a "fact relating to the defendant," not a fact relating to the offense. In other words, this factor is a recidivist factor, which requires analysis not of the offense itself, but of the defendant's past crimes and conduct. In this case, the court relied solely on the offense of conviction in determining whether Mr. Henderson had engaged in violent conduct indicating a serious danger to society.

Because the court looked only to the offense of conviction, its finding cannot be characterized as one related to recidivism, but is better seen as a "fact[] relating to the crime." For instance, under rule 4.421(a)(1), the court may impose the upper term when it finds that the crime of conviction "involved great violence . . . threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." This is, in essence, what the court found with regard to Mr. Henderson.

Of course, it is nowhere evident from either the jury's verdict, or from Mr. Henderson's post-trial admissions, that this robbery "involved great violence" or "a high degree of cruelty, viciousness, or callousness." As

discussed in appellant's opening brief, all robberies are violent crimes which create a serious danger to society. (AOB, pp. 55-57.) Therefore, section 4.421(a)(1) contemplates something more than just the fact of a robbery conviction. It requires that, "compared to other ways in which [a robbery] could be committed, the manner of this crime's commission indicated viciousness and callousness." (*People v. Harvey*, *supra*, 163 Cal.App.3d at p. 117.) As this finding is not encompassed in the jury's verdict or in Mr. Henderson's admission of the prior offenses, the trial court violated the Sixth and Fourteenth Amendments by relying on it in imposing an aggravated term.

C. Because the court's *Blakely* errors were not harmless beyond a reasonable doubt, this Court should remand Mr. Henderson's case for a new sentencing hearing.

1. Of the three aggravating factors that were neither admitted nor submitted to the jury, it does not appear beyond a reasonable doubt that the jury would have found these factors present.

Under *Apprendi*, where a sentencing factor increases the defendant's sentence beyond the statutory maximum, the failure to submit that factor to the jury is equivalent to the omission of an element of the offense. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 475-476; see also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Such errors require reversal unless they appear harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 15.)

In gauging whether the omission of an element is harmless, the appellate court must not "become in effect a second jury" to determine if the element was present. (*Neder v. United States*, *supra*, 527 U.S. at p. 19.) Rather, it must "ask[] whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." (*Ibid.*)

Here, the court relied on four aggravating factors – one of which was admitted by the defendant. However, the jury could easily have found that none of the remaining three factors was present. Indeed, not only **could** the jury have so found, but they almost certainly would have. As appellant argued in his original opening brief, the trial court exceeded all bounds of reason in finding that the three aggravating sentencing factors were present in this case. (See AOB, pp. 50-57.) Without spilling needless ink, the arguments that appellant advanced in support of this contention are equally relevant for the present harmless error analysis. Because the jury could easily have found three of the four aggravating factors to be absent, it was not harmless beyond a reasonable doubt to withdraw those three factors from the jury's consideration.

\\

\\

\\

2. It does not appear beyond a reasonable doubt that the sentencing court would have imposed the upper term absent the three aggravating factors which were the subject of the *Blakely* violation.

Where the omitted element is a sentencing enhancement, the harmless error analysis takes on an additional layer, for the reviewing court must also ask whether there is a reasonable doubt that the sentencing court would have imposed the same sentence absent its findings on the unconstitutional aggravating factors. (*Hoffman v. Arave* (9th Cir. 2001) 236 F.3d 523, 541.) In doing so, the Court's analysis differs depending upon "whether the state statute is a weighing or non-weighing statute." (*Ibid.*) "[I]n states with non-weighing schemes, reviewing courts may affirm the sentence if other valid aggravating factors remain." (*Ibid.*) Conversely, in states which employ a weighing scheme – that is, a scheme which weighs both aggravating and mitigating factors – the appellate Court must determine whether the invalid factors "had a 'substantial and injurious effect or influence' on the court's [sentencing] determination." (*Id.*, at pp. 541-542, quoting *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476.)

California employs a weighing scheme, which requires the sentencing court to balance the aggravating and mitigating circumstances in selecting the appropriate sentence. (Rule 4.420(b).) Thus, in evaluating the prejudicial effect of the error, it is not enough that there was a single valid aggravating

factor (in this case, the prior prison term). What matters is whether the remaining improper factors had a "substantial and injurious effect or influence" on the court's sentencing decision. (*Hoffman v. Arave*, *supra*, 236 F.3d at pp. 541-542.)

In *Hoffman*, the Ninth Circuit found harmless error where the trial court relied on two aggravating factors, only one of which was constitutionally invalid. Significant to its holding, however, was that the trial court had specifically determined "that each aggravating circumstance, standing alone, outweighed the mitigating evidence." (*Id.*, at p. 542.)

Here, the trial court made no such finding. Rather, it simply set forth the four aggravating factors, without stating which of these factors it found most significant and without stating whether it was relying on each factor individually or only in combination. Therefore, unlike *Hoffman*, the record affords no basis for believing that the trial court would have imposed the upper term absent the three improper aggravating factors.

Without the three improper sentencing factors, the sole permissible circumstance in aggravation was Mr. Henderson's service of two prior prison terms. Both of those prison terms, however, arose from conduct that had occurred more than ten years before the offense in this case. Moreover, one of those prior prison terms was based on Mr. Henderson's 1992 conviction for

assault with a deadly weapon – a conviction which was already the subject of both a strike and a prior serious felony enhancement. Thus, even if the court had selected the middle three-year term on the robbery count, the 1992 conviction would still have added eight additional years to Mr. Henderson's sentence. In a case involving only a theft of a $19.95 item from Wal-Mart, it is doubtful that the trial court would have chosen to increase appellant's sentence by an additional four years based solely upon two decade-old prison terms, one of which had already added eight years to his sentence. Accordingly, it cannot be said beyond a reasonable doubt that the court's error did not substantially and injuriously affect its sentencing decision.

3. The combined effect of the trial court's *Blakely* errors, as well as its errors of state law, cannot be said to be harmless beyond a reasonable doubt.

A possibility, of course, exists that this Court could find *Blakely* error with regard to some of the aggravating factors, but no such error on others. However, assuming the Court finds even a single constitutionally improper aggravating factor, the test for prejudice is whether the invalid factor(s) "had a substantial and injurious effect or influence" on the court's sentencing decision. (*Hoffman v. Arave*, *supra*, 236 F.3d at pp. 541-542.)

Furthermore, in gauging the substantial and injurious effect of any *Blakely* error, this Court must also take into account any state law errors which

the sentencing court committed. For, in his original opening brief, appellant argued that three of the four aggravating factors were factually unsupported and that the trial court abused its discretion in relying on these factors.

This Court could, for example, find that appellant had a right to jury trial on the issue of planning, but no right to jury trial on whether his prior convictions were "numerous and of increasing seriousness." (RT 682.) Should the Court so find, it must next determine whether the court properly applied and understood the latter factor under California law. If the answer to this question is no, then the Court may not point to that factor in finding that the *Blakely* error was harmless. An aggravating factor which was improperly applied under state law cannot form the basis for upholding an otherwise unconstitutional sentence.

Likewise, appellant's opening brief also argues that the trial court erroneously failed to consider, as a circumstance in mitigation, the fact that the stolen gauge kit was of little value (Rule 4.423(a)(6)) and that, at the time of the offense, Mr. Henderson was homeless and needing to support his family. (Rule 4.423(a)(8).) Should this Court agree that the trial court erred in this regard, then its harmless error analysis must take these additional mitigating factors into consideration.

Simply put, for this Court to accurately gauge whether the *Blakely* error had a substantial and injurious effect on his sentencing hearing, it must first correct any additional state court errors which infected that hearing. Once it is has done so, it must find that the *Blakely* error – either alone or in combination with the state court errors – had a substantial and injurious effect on the trial court's sentencing decision. As such, a new sentencing hearing is warranted.

CONCLUSION

For all of the foregoing reasons, appellant Joel Henderson respectfully requests that this Court reverse the judgment below and remand this case to the San Diego County Superior Court for a new sentencing hearing.

DATED: July 9, 2004

Respectfully submitted,

SOLOMON WOLLACK
Attorney for Appellant
Joel B. Henderson

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 33(b)

Pursuant to rule 33(b)(1) of the California Rules of Court, I certify that Joel B. Henderson's Appellant's Supplemental Opening Brief contains 6,117 words according to the word count produced by my Wordperfect program.

Dated this 9th day of July, 2004

By: ____________________________
Solomon Wollack

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is P.O. Box 23316, Pleasant Hill, California, 94523. On the date shown below, I served the within:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

to the parties on the attached service list by:

____ Causing a true copy thereof to be delivered to the office of each party shown below at the address indicated by leaving the same with a person apparently in charge and over the age of 18 years.

_X_ Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pleasant Hill, California, addressed as follows:

I declare under penalty of perjury the foregoing is true and correct. Executed this 9th day of July, 2004 at Pleasant Hill, California.

____

Solomon Wollack

SERVICE LIST

Mr. Gil P. Gonzalez — Respondent: People of the State of California
Supervising Deputy Attorney General
110 West A Street
Suite 1100
San Diego, CA 92101-3702

Mr. Keith Lollis — Respondent: People of the State of California
Deputy District Attorney
San Diego County
P.O. Box 121011
San Diego, CA 92112-1011

Mr. Arthur Martin — Appellant: Joel B. Henderson
Appellate Defenders, Inc.
555 West Beech Street,
Suite 300
San Diego, CA 92101-2939

Ms. Olivia J. Gilliam — Trial Counsel for Appellant
Deputy Alternate Public Defender
110 West C Street, Suite 1100
San Diego, CA 92101

Clerk of the Superior Court
San Diego County
County Courthouse
220 West Broadway
San Diego, CA 92101

Mr. Joel Henderson — Appellant