

Briefing from opening brief by staff attorney Howard Cohen in *People v. Jose Achondo* (E035022)

THE COURT’S SENTENCING CHOICE TO IMPOSE AN UPPER TERM FOR THE BASE TERM AND THE FIREARM-USE ENHANCEMENT IMPROPERLY RELIED UPON FACTS NOT FOUND BY THE JURY. THE COURT ALSO IMPROPERLY IMPOSED AN UPPER TERM FOR FIREARM USE BASED UPON AN ELEMENT OF THE UNDERLYING OFFENSE AND/OR ANOTHER ENHANCEMENT (I.E., A CONSECUTIVE TERM). ALSO, THE CONSECUTIVE TERM FOR SHOOTING AT AN OCCUPIED BUILDING, WHEN THE SHOOTING WAS DURING THE SAME SHOOTING AS OCCURRED IN THE ATTEMPTED MANSLAUGHTER, WAS IMPROPER, SINCE THE COURT IMPOSED IT WITHOUT A STATEMENT OF REASONS, OR, IN THE ALTERNATIVE, CONSECUTIVE SENTENCING WAS AN ABUSE OF DISCRETION.

A. Introduction

The court selected the aggravated upper term for the attempted voluntary manslaughter, based on appellant’s past record, poor performance, gang association, and possession of a firearm prior to the occurrence of this incident occurring. (R.T. pp. 598-599).

This conclusion violates the recent pronouncement of the United States Supreme Court in *Blakely v. Washington* (June 24, 2004, No. 02-1632) __ U.S. __ [04 D.A.R. 7581] (*Blakely*).

Not only does the court’s reasoning violate *Blakely*, but the trial court appears to have been motivated by its express disbelief of appellant’s testimony in regard to (1) who had accompanied appellant as well as (2) appellant’s possession of the firearm before the confrontation and its (the court’s) disagreement with the verdict. (R.T. p. 599.) When the court’s comments – the court’s disbelief of appellant and its characterization of the verdict as an “extraordinarily early Christmas present” (*ibid.*) – are read in context with the

prosecutor's sentencing argument – which parroted the prosecution's theory presumably not accepted by the jury (R.T. pp. 593-594), the underlying tone is unmistakable – the court disagreed with the jury's acquittal on attempted murder. Hence, the court's maximizing appellant's sentence (upper term for substantive offense, upper term for enhancement, and consecutive sentencing) raises a question of the propriety of a sentence, especially in light of *Blakely*, discussed below.¹

B. Proceedings Below

In his sentencing argument, defense counsel made telling points. Here, unlike many cases, after the rendition of the verdicts, both counsel spoke to the jury. Defense counsel, without refutation from the prosecutor, informed the court:

I believe that also from talking to the jurors after the case – all 12 talked to us at length. Even though they found Mr. Anchondo guilty of the crimes that were indicated, they believed that the victim was equally responsible for this incident. They strongly voiced that they believed this whole incident would not have occurred if the victim would not have come out of the Jack in the Box and confronted Mr. Anchondo.

.....

..... I believe [the prosecutor] is vastly overstating what the jurors found. I

¹The California Supreme Court has recently granted review in a similar case. (*People v. Towne*, review granted July 16, 2004, S125677.)

think they – they told us that he was – he [apparently the prosecutor] was back there – they didn't believe the first two shots were unreasonable. Only the last two shots that – the shot that struck the glass they felt that's where they came back with the attempted [voluntary manslaughter]. If not for those two additional shots, they probably would not have convicted even of attempted voluntary manslaughter. That's what they said. Again, that was their finding.

(R.T. pp. 592, 596.)

Defense counsel also relied upon the fact that there were no injuries (R.T. pp. 592, 597) and, noting that the prosecutor could speculate all he wanted as to whether appellant was credible and had brought the firearm to the scene, emphasized that speculation was contrary to the apparent finding of the jury (R.T. pp. 596-597). Defense counsel also noted, in his recitation to section 654, that the attempted voluntary manslaughter and discharge of the

firearm into the restaurant “stemm[ed] from the same facts in this case.” (R.T. p. 597.)²

The court selected the aggravated upper term for the attempted voluntary manslaughter, based on appellant’s past record, poor performance, gang association, and possession of a firearm prior to the occurrence of this incident occurring. (R.T. pp. 598-599).

The court chose the upper term 10-year enhancement for firearm use, based primarily upon appellant’s trying to kill another human being as well as firing into a building where

²As noted below, case authority establishes that section 654 does not apply in this scenario. However, the discretionary decision of consecutive versus concurrent sentencing remains. Counsel’s argument would have placed the trial court on notice that the events were “committed so closely in time and place as to indicate a single period of aberrant behavior,” instead of being committed “at different times or separate places.” (Rule 4.425(a)(3).) In other words, counsel’s argument should suffice to prevent waiver on this score. However, if this court were to conclude that counsel must perforce utter the word “concurrent” and by not doing so an objection is waived, then the specter of ineffective assistance of counsel (U.S. Const., 6th and 14th amends; Cal. Const., art. I, § 15) is raised, for there could not be any reasonable tactical purpose in arguing for no sentence pursuant to section 654 and failing, in the alternative, to argue for the effective equivalent, i.e., concurrent sentencing.

Also, defense counsel did not specifically argue that the upper term for the discharge of the firearm was inappropriate based upon the intent to kill which is an element inherent in the underlying substantive offense. Again, though, he argued for less than the upper term based upon the facts of the case and the jury’s determination. The latter argument should obviate any waiver, but if waiver were otherwise present then ineffective assistance of counsel would be present as discussed in the preceding paragraph.

Counsel also argued that the discharge into the restaurant was part and parcel of the attempted murder which should suffice to negate the trial court’s reliance upon the discharge into the restaurant as a reason for imposing the upper term for the firearm. If counsel did not sufficiently pinpoint the impropriety of the fact for the upper term of firearm use, then again ineffective assistance of counsel, as described, would be present.

other people were present. (R.T. p. 599.) The court also concluded that Count Two (shooting into an occupied building) should not be stayed pursuant to section 654, since there were “multiple victims,” i.e., there were “separate incidents of violence.” (R.T. p. 600.)

C. *Blakely*

Blakely dealt with a Washington state sentencing where the defendant pleaded guilty to an offense, the elements of which would result in a sentence in the range of 49-53 months. (*Blakely, supra*, 04 D.A.R. at p. 7581.) Based upon his own finding of “deliberate cruelty,” the sentencing court tacked on an additional three years. (*Id.* at p. 7582.) The Supreme Court ruled that this increase of sentence violated the Sixth Amendment of the United States Constitution made applicable to the states by the Fourteenth Amendment. (*Id.* at p. 7583.) The high court’s reasoning is applicable to California’s sentencing scheme in general and appellant’s sentencing in particular.

Justice Scalia, writing for the majority, applying *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S. Ct. 2348, 147 L. Ed. 2d 435] (*Apprendi*), emphasized the following: (a) “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* (Citations.)[,],” (*Blakely, supra*, 04 D.A.R. at p. 7582, italics original, boldface added); and (b) “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. **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] . . . [,]

(*Ibid.*, italics original, boldface added.)

Under California’s Determinate Sentencing Law (DSL), section 1170, subdivision (b) provides, with emphasis added, that “[w]hen 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 other words, the middle term is the equivalent of the narrow range of 49-53 months which the trial court in *Blakely* had the discretion to apply absent some other finding to be made by a jury. Thus, the remainder of subdivision (b) [i.e., “[i]n determining whether there are circumstances that justify imposition of the upper or lower term, the *court* may consider the record of the case . . . ,” italics added], is unconstitutional under *Blakely*, at least as to the imposition of an upper term, unless the record includes applicable findings of fact by the *jury* within the meaning of *Blakely*.

Here, the trial court relied upon various findings to impose the upper term for the attempted manslaughter, specifically: “the defendant has a substantial criminal record consisting of three felony findings as a juvenile. He’s done poorly as a juvenile. He’s been given multiple opportunities to rehabilitate. He has not done that. He was in association with other gang members of the Dodd Street gang just weeks before this incident occurred. He was in possession of a firearm prior to this incident occurring.” (R.T. pp. 598-599.)

The last two factors are improper under *Blakely*. The jury made no such findings. The findings about doing poorly and not rehabilitating are ambiguous. To the extent the findings are meant to imply poor performance on probation or parole, again these are findings the jury did not make. To the extent, however, that the court's statements are an emphasis of the three juvenile true findings, then "doing poorly" and "not rehabilitating" are not additional findings beyond the recognition of the appellant's juvenile record.

Whether a juvenile record is a fact for a jury to find (and, hence, within *Apprendi*, *supra*, and *Blakely*, *supra*) is a question not without dispute. California case law to date – the Supreme Court has not ruled – has concluded that a juvenile true finding and disposition is a prior conviction within the meaning of *Apprendi*. (See, e.g., *People v. Superior Court (Andreas)* 113 Cal.App.4th 817, 831-834, but contrast, e.g., *People v. Lee* (2003) 111 Cal.App.4th 1310, 1319 (dis. opn. of Rushing, J.).)

Contrary to the California appellate opinions is *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1194 ["Juvenile adjudications that do not afford the right to a jury trial . . . do not fall within *Apprendi*'s 'prior conviction' exception"]; but see, e.g., *United States v. Smalley* (8th Cir. 2002) 294 F.3d 1030.) In other words, *Apprendi*'s exception to the requirement that any fact upon which the maximum sentence would be increased had to have been found by a jury and beyond a reasonable doubt – i.e., the exception being the fact of a prior conviction – was based on the circumstance that the prior conviction itself had to have been found by a jury and beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 496

[“There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof”].) In sum, the finding by a court of an aggravating factor based on a juvenile disposition where the defendant as a juvenile was denied a jury trial,³ denies the defendant his right to a jury on the aggravating factor in

³In *McKeiver et al. v. Pennsylvania* (1971) 403 U.S. 528 [91 S.Ct. 1976, 29 L.Ed.2d 647] (*McKeiver*), the Supreme Court concluded that federal Due Process (U.S. Const., 5th amend.) did not require the states to employ juries in juvenile adjudications. When examined critically, the reasoning of the various justices may be read to strengthen the position that juvenile adjudications/dispositions should not be considered as “prior convictions” within the meaning of *Apprendi/Blakely*.

Justice Blackmun wrote the plurality opinion of four justices. In his conclusion that Due Process did not require jury trial for juveniles, he extensively compared the differences in the objectives and realities between juvenile and adult proceedings. (*McKeiver, supra*, 403 U.S. at pp. 543-550.) Of particular note, though, the plurality opinion stated that “jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.” (*Id.* at p. 545.) “If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial.” (*Id.* at p. 550.) Also, the plurality essentially rejected that a juvenile proceeding was the equivalent of a criminal jury trial. (*Ibid.*)

Although Justice White was a member of the four-justice plurality, he also wrote separately. “[T]he consequences of criminal guilt are so severe that the Constitution mandates a jury to prevent abuses of official power by insuring, where demanded, community participation in imposing serious deprivations of liberty and to provide a hedge against corrupt, biased, or political justice. We have not, however, considered the juvenile

case a criminal proceeding within the meaning of the Sixth Amendment” (*McKeiver, supra*, 403 U.S. at p. 551.) Further, Justice White opined, “Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others.” (*Id.* at pp. 551-552.) He further wrote: “Not only are those risks that mandate juries in criminal cases of lesser magnitude in juvenile court adjudications, but the consequences of adjudication are less severe than those flowing from verdicts of criminal guilt.” (*Id.* at p. 553.) Today, however, the consequences of adjudication, for example, in a finding of Strike offenses, can *ultimately* be very severe indeed. Finally, perhaps prescient of society’s harsher reaction toward juvenile offenders, the justice concluded, “[The states] are also free, *if* they extend criminal court safeguards to juvenile court adjudications, frankly to embrace condemnation, punishment, and deterrence as permissible and desirable attributes of the juvenile justice system.” (*Id.* at p. 553, emphasis added.)

Justice Harlan concurred in the judgment but based solely on his idiosyncratic position that criminal jury trials are not constitutionally required of the states (*McKeiver, supra*, 403 U.S. at p. 553), a position at odds with *Apprendi/Blakely*.

Justice Brennan, concurred in part and dissented in part. He agreed with the plurality opinion’s conclusion that juvenile proceedings were “not ‘criminal proceedings’” (*McKeiver, supra*, 403 U.S. at p. 553.) The justice distinguished the procedures of the two states (Pennsylvania and North Carolina) before the court. Because the latter either permitted or required exclusion of the general public from juvenile trials, he concluded that the North Carolina judgment should have been reversed. (*Id.* at pp. 556-557.) The remaining three justices dissented. (*Id.* at pp. 557-572.)

When one considers that many offenses in California juvenile trials are not public (Welf. & Inst. Code, § 676), that Justice Harlan’s position would not be persuasive today, and that Justice White’s proviso as to what would be the case if the juvenile justice system became punitive, one cannot safely conclude the same holding would obtain today.

Regardless, however, whether or not non-jury juvenile proceedings are constitutional to adjudicate a minor’s case in the first instance, all of the concerns (save Justice Harlan’s) of the plurality, the concurrences, and the

violation of the Sixth Amendment and/or of federal and state due process (U.S. Const. 5th, 6th, & 14th amends.; Cal. Const, art. I, § 15). Whatever may be the countervailing policies which may constitutionally permit a non-jury juvenile finding with a juvenile disposition of lesser magnitude than a comparable adult criminal conviction in the first instance, one must seriously question the *ultimate* use of the juvenile record to aggravate a future adult criminal conviction without a jury finding in the latter. (See also Comment, *Prior “Convictions” Under Apprendi: Why Juvenile Adjudications May Not Be Used to Increase an Offender’s Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt* (2004) 87 Marq. L. Rev. 573, 601 [“juvenile adjudications, in which a juvenile was not afforded the right to a jury, should not be used to increase an offender's penalty beyond the statutory maximum or minimum without first being proven to a jury beyond a reasonable doubt”]; Murphy, *The Use of Prior Convictions After Apprendi* (2004) 37 U.C. Davis L. Rev. 973, 1023 [“[a] dispute over the existence of a prior conviction should trigger the same constitutional guarantees as a dispute over any other fact that would increase the penalty for an offense beyond the statutory maximum”]; Note, *Should Juvenile Adjudications Count as Prior Convictions for Apprendi Purposes?* (2004) 45 Wm and Mary L. Rev. 1159, 1191 [“Since juvenile adjudications are fundamentally different from adult prior convictions in

dissent, demonstrate a qualitative difference between a juvenile adjudication and an adult criminal conviction so as to question whether a juvenile finding falls within *Apprendi*’s “prior conviction” exception.

purpose and procedure, the Court should adopt the *Tighe* approach with its blanket ban on counting juvenile adjudications as prior convictions”]; Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts* (2003) 38 Wake Forest L. Rev. 1111, 1224 [“Providing delinquents with a constitutional or statutory right to a jury trial would mitigate the unfairness of using procedurally deficient, factually unreliable convictions to enhance subsequent sentences. States which deny delinquents jury trials in the contemporary punitive juvenile justice system compound that inequity when they use those nominally rehabilitative sentences to extend terms of adult imprisonment”]; Note, *Eighth Circuit Holds an Adjudication of Juvenile Delinquency To Be a “Prior Conviction” for the Purpose of Sentence Enhancement at a Subsequent Criminal Proceeding* (2002) 116 Harv. L. Rev. 705, 712 [“the relative reliability of larger factfinding bodies suggest that the *Tighe* court's understanding of juvenile adjudications is more constitutionally sound than that espoused by the *Smalley* court”].)

Even if one were to assume that juvenile dispositions come within the *Apprendi* “prior conviction” exception (and, hence, would likewise be excluded from the *Blakely* holding), still, in this case, the trial court’s stated reliance on appellant’s juvenile history cannot save the judgment from reversal and remand.

Appellant acknowledges the long-standing principle that a sentencing court may aggravate a sentence based on a single factor. (See, e.g., *People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) However, in the instant case, given the trial court's express disagreement with the jury's verdict, one cannot confidently conclude that a judge without such a prejudice toward the verdict would have chosen to aggravate the base term on the basis of that single factor. For example, while the court referred to the "felony" juvenile dispositions, none of the "felony" offenses were violent or serious felonies. (C.T. p. 250.) More to the point, because the record raises the distinct possibility the judge based his sentence choice on his subjective belief about the "truth" of facts contrary to the verdict, remand is appropriate. (Cf. *People v. Swanson* (1983) 140 Cal. App. 3d 571, 574.) Fairness and the appearance of fairness require that defendant be resentenced without consideration of a judge's subjective determination of the "truth" not found by the jury and, in fact, likely rejected by them. (Cf. *People v. Stanley* (1984) 161 Cal. App. 3d 144, 156.)

D. State Case Law

Moreover, California case law, prescient of *Blakely*, has established that, where "the trier of fact has found [the defendant] not guilty of a count in a multiple count prosecution, the same standard of proof of beyond a reasonable doubt should apply to both conviction and sentencing. [¶] It would be anomalous to hold that if the jury finds the defendant not guilty of a count utilizing the constitutionally exacting standard of proof beyond a reasonable doubt, he should face the same alleged crime at sentencing under a preponderance of evidence

standard.” (*People v. Takencareof*(1981) 119 Cal.App.3d 492, 498 (*Takencareof*);⁴ see also *People v. Richards* (1976) 17 Cal.3d 614, 624 [“[i]n the course of convincing a jury to doubt his guilt on one charge, a defendant should not have the additional task of persuading the judge regarding the subsequent sentencing disposition on other charges”], disapproved on another ground in *People v. Carbajal* (1995) 10 Cal.4th 1119, 1126; *People v. Gragg* (1989) 216 Cal.App.3d 32, 44-45 [“[w]hat is prohibited is the unwarranted practice of imposing extra punishment on a defendant convicted of one charge based on a conclusion by the judge the jury erred in acquitting the defendant on any companion charges”], citing to *Takencareof*, *supra*.)

⁴In *Takencareof*, the trial judge specifically referred to physical damage which could only have occurred in the acquitted count. (*Takencareof*, *supra*, 119 Cal.App.3d 497.) Here, the court expressly stated it disbelieved appellant’s testimony and implied its disagreement with the verdict.

E. Upper Term for Firearm Use and Sentencing Rules

The court's reasons for imposing the upper term on the enhancement are not appropriate pursuant to California Rules of Court (Rule(s)).⁵ The primary reason given by the trial court, because appellant tried to kill another human being, merely reinstates an essential element of attempted manslaughter.⁶ Rule 4.420(d), in reference to selection of the base term of an offense, prohibits the use of an element of the crime, to impose an upper term. For several reasons, the same prohibition should apply in choosing an enhancement, i.e., an element of the underlying offense should not suffice to impose an upper term on an enhancement. First, an enhancement has no independent vitality separate from its offense. (E.g., *People v. Wims* (1995) 10 Cal.4th 293, 322-323; *People v. Williams* (1996) 49 Cal.App.4th 1632, 1642.) Second, because intent to kill must always exist in a conviction for attempted manslaughter, then *if* intent to kill sufficed to impose an upper term for an attendant enhancement, then a fortiori, the upper term could always be imposed without any other reason.

A purported second reason for imposing the upper-term 10-year enhancement was because appellant fired into a building where other people were located. Reliance on this

⁵When a court must choose among three possible terms, the middle term must be imposed unless there are circumstances in aggravation or mitigation. (Rule 4.428(b).)

⁶As noted above, footnote 28, *ante*, appellant has contended that trial counsel preserved this issue, or, in the event he did not, he committed ineffective assistance of counsel.

factor is misplaced for two reasons.

First, such reliance violates the *Blakely* doctrine. (See generally, Argument IV-C, *ante*.) The court specifically relied on the fact that “other people,” i.e., other than Lopez, were present. There is no question but that other people were present. What *is* at issue is whether the *Blakely* error is “structural” or whether the *Chapman* harmless beyond a reasonable doubt standard applies. If it is the latter, appellant cannot prevail. However, the correct conclusion should be that the error was structural.

Blakely, supra, is, of course, premised on *Apprendi, supra*. Some courts – facing a *different* type of error – have applied the *Chapman* standard. For example, in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324, the Supreme Court applied *Chapman*. However, in *Sengpadychith*, the enhancement *was* tried to a jury. The error in *Sengpadychith* was the trial court's failure to instruct the jury on the primary activities element of the criminal street gang enhancement provision. (*Ibid.*) In other words, it was merely instructional error to the correct trier-of-fact. (See also *People v. Scott* (2001) 91 Cal.App.4th 1197, 1209 [*Chapman* applied to error in failing to provide jury instructions fully defining the elements of the enhancement]; *United States v. Garcia-Guizar* (9th Cir. 2000) 234 F.3d 483, 488-489 [*Chapman* applied without consideration of whether it was the proper standard].)

Here, in contrast to *Sengpadychith* and *Scott*, the issue is not incorrect instruction but the denial of the constitutionally mandated *jury* finding. One may posit the hypothetical where, because of extraordinary circumstances, no jury could be obtained and a court

proceeded with a court trial alone. Even assuming the evidence was so undescribably overwhelming, the judgment could not stand. Likewise here, where the *Apprendi-Blakley* majority has made abundantly clear that a *jury* determination is necessary, the failure to present the determining fact to the jury for a finding is structural error.

Justice Scalia wrote: “Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to *the right of jury trial*. That right is no mere procedural formality, but *a fundamental reservation of power in our constitutional structure*.” (*Blakely, supra*, 04 D.A.R. at p. 7583, emphasis added.)

Justice Scalia continued, “*Apprendi* carries out this design by ensuring that the judge’s authority to sentence derives *wholly* from the jury’s verdict.” (*Blakely, supra*, 04 D.A.R. at p. 7583, emphasis added.) Stated otherwise, the maximum sentence may only be imposed “*solely on the basis of the facts reflected in the jury verdict . . .*” (*Blakely, supra*, 04 D.A.R. at p. 7582, emphasis original.) Here, the jury’s verdict established that the building was occupied, which would be established by *Lopez’s presence alone*. The jury was *neither* asked *nor* did their verdict indicate whether there were multiple individuals within the occupied building.

Sullivan v. Louisiana, supra, 508 U.S. at page 281 emphasized, with internal citations omitted, that “‘structural defects in the constitution of the trial mechanism’ ‘defy analysis by ‘harmless-error’ standards,’” in contrast with “trial errors which occur ‘during the

presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented” “Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a ‘basic protection’ whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function [citation]. (*Ibid.*) “The deprivation of that right [to a jury trial], with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’” (*Id.* at pp. 281-282.)

Regardless of the applicability of *Blakely, supra*, the trial court *also* imposed a consecutive sentence, i.e., enhanced the sentence,⁷ with the imposition of a consecutive sentence for shooting at an occupied building. Thus, the trial court improperly enhanced the base term twice based on the same reason or fact, i.e., because rounds fired in the course of the attempted manslaughter hit the Jack in the Box, the court imposed both an upper term for the firearm use and a consecutive sentence for the offense of discharging a firearm at an occupied building.

F. Concurrent versus Consecutive Sentencing on Count Two

In the alternative, the trial court imposed the consecutive sentence for the offense of shooting at an occupied building without a sufficient statement of reasons. Appellant emphasizes he is *not* contending that the term for that offense should have been stayed pursuant to section 654. Several authorities belie such a contention. (E.g., *People v. Cruz* (1995) 38 Cal.App.4th 427, 434-435.)⁸ *However*, what is in contention is whether sufficient reason was given to impose consecutive rather than concurrent sentencing.

The only reason given by the trial court for imposing consecutive sentencing was the so-called “multiple-victim exception.” (R.T. p. 600.) Because the multiple victims principle

⁷E.g., *People v. Mitchell* (1988) 199 Cal.App.3d 300, 305, and *People v. Logsdon* (1998) 191 Cal.App.3d 338, 344. each citing to former rule 405(c), now rule 4.405(c).

⁸To the extent that consecutive sentencing was based solely on the factor of “multiple victims” but the *verdict* is insufficient to demonstrate multiple victims, then consecutive sentencing on this score would also run afoul of *Blakely, supra*. (See Argument IV-E, *ante*.)

is the sine qua non to avoid applicability of section 654 in the first instance, that reason should not suffice to impose (rather than stay) a punishment and *also* to impose the sentence consecutively to boot.

Reasons abound for imposing a concurrent, rather than consecutive, term. Here, one cannot reasonably conclude that the shots into the Jack in the Box were other than a continuation of the assaultive behavior toward Lopez. In other words, there was no showing of an independent intent to fire into the restaurant other than firing at Lopez. While persons present in the restaurant were placed in danger by the discharge of a firearm in the direction of the restaurant, there was no showing that appellant intended to harm anyone else within the restaurant other than Lopez. Appellant fired “in the direction” of the restaurant, striking the door, just moments after Lopez had entered the restaurant through that door. Further, as already noted above, the jury premised its conviction of attempted voluntary manslaughter on the shooting toward the Jack in the Box.

The specific criteria of rule 4.425(a) favor concurrent sentencing. The crimes and their objectives were *not* predominantly independent of each other. Most important, the crimes were “committed so closely in time and place as to indicate a single period of aberrant behavior,” instead of being committed “at different times or separate places.” (Rule 4.425(a)(3).)

Finally, the case of *People v. Coelho* (2001) 89 Cal.App.4th 861 (*Coelho*) presents a compelling analogy to all of the arguments made above. In *Coelho*, the issue was whether

concurrent sentencing was permitted or consecutive sentencing was mandated in a Strikes context, i.e., the court’s discretion is dependent upon the “factual basis of each conviction.” (*Id.* at pp. 864-865, 874.) “[T]o determine the scope of its discretion, a court must know the factual basis of each conviction. In this case, we hold that if the jury could have based its verdicts upon a number of unlawful acts and the court cannot determine beyond a reasonable doubt the particular acts the jury selected, the court should assume that the verdicts were based on those acts that would give it the *most discretion* to impose *concurrent terms*.” (*Id.* at p. 865, italics added.)

The *Coelho* court concluded that based on federal (5th, 6th, & 14th amends.) and state (art. I, § 16) constitutional guarantees, “*the jury will not only determine whether all elements of the offense have been proved beyond a reasonable doubt but also unanimously agree on the particular unlawful act that forms the basis of each conviction.*” (*Coelho, supra*, 89 Cal.App.4th at pp. 874-875, italics original.) In *Coelho*, the *People* (appellant’s emphasis) submitted and the appellate court agreed that “at sentencing, a trial court *must* accept and rely upon the same factual basis which the jury unanimously selected and relied upon to convict the defendant on a particular count.” (*Id.* at p. 876, italics original.)

In *Coelho*, both parties and the court agreed that the *Chapman, supra*, “beyond a reasonable doubt” standard was the standard to be applied for determining the factual basis of the jury’s verdict and that the standard of review was de novo. (*Coelho, supra*, 89 Cal.App.4th at pp. 876, 878.) Stated otherwise, “a defendant’s federal constitutional right

to a jury trial requires the trial court to accept the *jury's* determination concerning the factual bases for its verdicts. It follows that a court's failure to do so constitutes error of federal constitutional dimension, subject to review under the strict federal standard. Therefore, to prevent such error from occurring in the first place, we consider it appropriate and necessary for the court to use the federal standard when it attempts to discern the factual bases for multiple convictions." (*Id.* at p. 878, italics original.) Further, "[f]or this determination, the court may consider not only the evidence of unlawful acts but also the arguments of counsel and any relevant findings the jury might have made on other charges or enhancement allegations. On the other hand, the trial court's subjective views about the weight of the evidence and the credibility of the witnesses at trial are not relevant because those issues were matters for the jury to determine. (Citations.)" (*Id.* at p. 879.) Further still, "for the purpose of determining the scope of a trial court's sentencing discretion, we consider it appropriate to apply the rule of lenity to resolve ambiguity concerning the factual bases for convictions." (*Id.* at p. 885.)

Here, the trial court's actions were explicitly contrary to *Coelho*. Not only did the trial court not assume a rendition of acts which gave it the most discretion to impose a concurrent term or, if the factual bases were ambiguous, to apply a rule of lenity, but also the court expressly stated its disbelief as to the jury's verdict and gave no credence to appellant's testimony, which the jury had believed in large part. Further, the court gave no consideration to defense counsel's argument in which counsel stated the expressed basis for the jury's

verdict as stated by the jurors to both defense counsel and the prosecutor. The trial court's lack of respect for the jury's determination not only undermines the imposition of a consecutive sentence as to Count Two but also the imposition of the upper term for the firearm use as well.

Under a de novo standard, this court should order Count Two to be imposed concurrently to Count One, or, in the alternative, the cause should be remanded for resentencing. In any event, given the trial judge's express disbelief in the jury's verdict, which manifested itself in the imposition of an upper term for the firearm use, the cause should be remanded to a judge other than the trial court for resentencing on the firearm use enhancement. (See, e.g., Code Civ. Proc., § 170.1, subd. (c); *People v. Stanley*, supra, 161 Cal. App. 3d at p. 156; *People v. Swanson*, supra, 140 Cal. App. 3d at p. 574.) While disqualification is not appropriate where there is "mere" sentencing error, where the animus of the trial court is inconsistent with objectivity, then disqualification is appropriate. (*People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1562.)

G. Conclusion

The trial court erred in various respects in sentencing. The erroneous sentence requires remand. "When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms,

but one term made up of interdependent components.’ [Citations.]” (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258.) Therefore, if any error in sentencing occurred, the cause should be remanded in its entirety for an entirely new sentence.