

Briefing from opening brief by ADI staff attorney Cindi Mishkin in *People v. Melvin Moss* (D043567)

I. BECAUSE APPELLANT WAS NOT AFFORDED A JURY TRIAL ON THE AGGRAVATING FACT USED TO SUPPORT THE UPPER TERM, BECAUSE HE DID NOT ADMIT THE FACT USED BY THE COURT TO IMPOSE THE AGGRAVATED TERM, AND BECAUSE THE COURT USED THE WRONG BURDEN OF PROOF TO ASSESS THE FACT AT ISSUE, THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS. BASED ON THE RECENT DECISION OF *BLAKELY V. WASHINGTON*, APPELLANT'S SENTENCE MUST BE REVERSED AND THE CASE MUST BE REMANDED FOR RESENTENCING.

Based on its finding that it had given appellant a break by dismissing the strike prior convictions, the trial court selected the aggravated term in this case, thereby deviating from the maximum sentence which could have been imposed as a result of appellant's guilty plea (i.e., the middle term sentence). (12/10 R.T. p. 3.)¹ Under the recently decided case of *Blakely v. Washington* (June 24, 2004, 02-1632) ___ U.S. ___ [2004 D.A.R. 7581], the trial court's sentence violated appellant's right to a jury determination, beyond a reasonable doubt, of all facts necessary to support appellant's sentence under the Fifth, Sixth and Fourteenth Amendments.

In this new opinion, the high court reaffirmed the principle it had first stated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]:

¹ Although the government had submitted arguments that other factors existed to support the imposition of the upper term (12/10 R.T. p. 2; C.T. pp. 6-10), the court did not rely on these factors for its sentencing decision and made no indication as to their validity. (12/10 R.T. p. 3.) Accordingly, they are not relevant to the issue at hand.

that a defendant has the right, under the Sixth Amendment, to have a jury determine beyond a reasonable doubt all facts legally essential to the sentence.² (*Blakely, supra*, 2004 D.A.R. at p. 7582.) Thus, where a state law establishes the maximum sentence for a particular offense and authorizes a greater term only if additional facts are found true, the determination of such facts must comply with the Sixth Amendment. The court itself may find an aggravating factor true and use such factor to increase a defendant's sentence beyond the statutory maximum allowed under defendant's conviction, only where the defendant has admitted the facts underlying the aggravating factor or where he consented to judicial factfinding. (See *id.* at p. 7584.) Otherwise, it is the jury which must determine the truth of the aggravating fact which would be used to increase defendant's sentence above the statutory maximum. (*Id.* at p. 7582.) None of these events occurred in this case. Accordingly, the sentence must be reversed and the case must be remanded for resentencing.

A. THE *APPRENDI* DECISION.

In *Apprendi*, defendant's sentence for possession of a firearm for an unlawful purpose was increased above the 10-year statutory maximum [the court had imposed a 12-year sentence] after the trial court found, under the state's statutory hate crime enhancement scheme, by a preponderance of the evidence that defendant's crimes were committed to intimidate based upon race. (*Apprendi, supra*, 530 U.S. at pp. 470-471.)

² The exception to this rule is the fact of a prior conviction. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.)

On appeal, defendant argued his due process right was violated when his sentence was increased based upon a factual finding made by the trial court, and not the jury, and made based upon the preponderance of the evidence, and not based upon proof beyond a reasonable doubt. (*Id.* at p. 471.)

The high court agreed, finding the hate crime statutory scheme presented an additional element to the underlying offense rather than a mere sentencing factor, because the hate crime scheme increased the statutory maximum punishment. “If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.” (*Apprendi, supra*, 530 U.S. at p. 484.)

Thus, recognizing the Sixth Amendment right to jury trial and the Fourteenth Amendment right to due process “indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt’” (*id.* at p. 477, quoting *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444]), the court concluded “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490; see also *Ring v. Arizona* (2002)

536 U.S. 584, 592-595, 608 [122 S.Ct. 2428, 153 L.Ed.2d 556] [Arizona’s death penalty scheme, which allowed a court to impose a death sentence rather than the lesser sentence prescribed by the conviction of the crime itself, if it found at least one of ten aggravating factors true, created the functional equivalent of a greater offense and thereby violated the Sixth Amendment right to have a jury determine each element of that offense].)

B. THE *BLAKELY* DECISION.

In *Blakely*, the high court applied the rule enunciated in *Apprendi* to a sentence imposed under the Washington state sentencing scheme. Under that scheme, a defendant who had plead guilty to second-degree kidnaping and admitted allegations of domestic violence and firearm use, faced the standard range sentence of 49 to 53 months.

(*Blakely, supra*, 2004 D.A.R p. 7581.) Under the sentencing structure, however, the court was also permitted to impose a sentence above that standard range if it found an aggravating factor justified such an exceptional sentence. (*Id.* at p. 7582.) And, after hearing the victim’s statements about the offense, the court did just that. It found defendant had committed the crime with “deliberate cruelty” and imposed a 90-month sentence. (*Ibid.*) Defendant appealed, arguing the sentencing procedure violated his constitutional rights.

In resolving defendant’s claim, the *Blakely* majority first inquired whether the court had sentenced defendant in excess of the statutory maximum he could have received as a result of his plea.

Our precedents make clear, however, that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on*

the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.] In other words, 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] and the judge exceeds his proper authority.

(*Blakely, supra*, 2004 D.A.R. at p. 7582, italics in original.) Analyzing defendant’s case in light of this test, the Supreme Court concluded that the trial court had indeed imposed a sentence beyond the statutory maximum available based on defendant’s plea. This is so because, under Washington law, the exceptional sentence could be justified only if it were based on factors other than those which were used to compute the standard range.

(*Ibid.*) Because facts beyond those reflected in the plea were thus used to elevate defendant’s sentence beyond the maximum sentence possible as a result of the plea itself, and because defendant was denied the right to a jury determination of those additional facts, the Washington sentencing scheme violated defendant’s Sixth Amendment rights.

(*Id.* at p. 7583.)

The majority opinion emphasized the purpose of its ruling, to give “intelligible context to the right of jury trial . . . a fundamental reservation of power in our constitutional structure.” (*Blakely, supra*, 2004 D.A.R. at p. 7583.) The jury trial structure is meant to “ensure [the people’s] control in the judiciary.” (*Ibid.*) To this end, the *Apprendi* rule “ensur[es] that the judge’s authority to sentence derives wholly from the jury’s verdict. Without that restriction, the jury would not exercise the control that the Framers intended.” (*Ibid.*) The opinion was careful to emphasize that it did not

render all determinate sentencing schemes unconstitutional. (*Ibid.*) Rather, unconstitutional schemes are those determinate sentencing structures which include judicial-factfinding schemes that allow the court to impose a sentence

higher than the maximum possible resulting from the facts found by the jury, based solely on facts found true by the court. (*Ibid.*)

C. UNDER CALIFORNIA'S SENTENCING SCHEME, THE MIDDLE TERM IS THE STATUTORY MAXIMUM TERM THAT THE COURT CAN IMPOSE ABSENT ADDITIONAL FACTUAL FINDINGS.

California's determinate sentencing scheme, which allows the court to impose the upper term based on facts not found by the jury, suffers from the same constitutional infirmities exposed in the Washington state law by *Blakely*. Under our state's structure, section 1170, subdivision (b) provides: "[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." (See Cal. Rules of Court, rule 4.420(a); *People v. Leung* (1992) 5 Cal.App.4th 482, 508 ["The trial court must impose the middle term unless it finds circumstances mitigating or aggravating the offense."].)

As with the standard range considered for the Washington crime in *Blakely*, where the California statute allows for three possible terms, the middle term is the presumptive sentence. Under current California law, the court can impose the upper term only if it finds one or more aggravating factors, by a preponderance of the evidence (Cal. Rules of Court, rules 4.420(b); 4.421 [aggravating factors], 4.408 [enumerated factors are not exclusive]), and if the court makes explicit factual findings. (*People v. Scott* (1994) 9 Cal.4th 331, 349; § 1170, subs. (b) & (c); Cal. Rules of Court, rule 4.420(e).) Further, the aggravating factor must be over and above those facts which constitute the elements

of the crime (Cal. Rules of Court, rule 4.420(d)), and the court can use the same fact of an enhancement to justify the selection of the upper term only if it also strikes punishment of the enhancement. (Cal. Rules of Court, rule 4.420(c).) Thus, it is only a finding of some additional, non-overlapping aggravating circumstance which can expose a defendant to an upper term. These requirements are equivalent to those analyzed in *Blakely* – a court determination of facts above those admitted to by defendant which constituted the crime of conviction to support an exceptional sentence – that were found to be unconstitutional.

Under the rule enunciated in *Blakely*, it is the jury, and not the court, which must decide all facts – and decide them beyond a reasonable doubt – that can increase a defendant's sentence above the statutory maximum allowed for the conviction itself. To be sure, the defendant is able to stipulate to the facts relevant to support a sentence in excess of the statutory maximum and is able to waive his right to a jury determination of such facts. (*Blakely, supra*, 2004 D.A.R. at p. 7584.) But he must be given the choice.

D. THE TRIAL COURT ERRED IN THIS CASE BY IMPOSING A SENTENCE BEYOND THE STATUTORY MAXIMUM WHICH WAS ALLOWED UNDER APPELLANT'S PLEA.

In the instant case, the trial court's own determination, by a preponderance of the evidence,³ of a single aggravating factor to justify the selection of the upper five-year term for the robbery conviction violated appellant's rights. As mentioned, the factor relied upon by the court to select the aggravated term was the fact that the court had given appellant a break in its earlier sentencing determination by dismissing all the strike prior convictions. By finding and using this factor, the trial court erred.

First, the factor was found by a standard lower than that required by the federal Constitution and *Apprendi*. (See *United States v. Velasco-Heredia* (9th Cir. 2003) 319 F.3d 1080, 1085 [*Apprendi* error occurred where trial court used preponderance standard at sentencing to determine drug quantity to support sentence that exceeded statutory maximum].)

Second, it was the court and not a jury which made the factual finding. And, appellant was never given the opportunity to waive his right to a jury determination on this factual issue.

Third, appellant did not admit this factor as part of his plea.⁴ At that time, he

³ Under Evidence Code section 664, a court is presumed to perform its official duty. Under California law, as discussed *ante*, at the time of appellant's sentencing, a trial court needed to find aggravating factors only by a preponderance of the evidence to support its decision. (Cal. Rules of Court, rule 4.420(b).) Thus, under Evidence Code section 664, it is presumed the court applied this standard at the time of its decision.

⁴ A plea of guilt is dispositive of the least adjudicated elements of the admitted crime. (*People v. Thomas* (1986) 41 Cal.3d 837, 844, fn. 6.) It proves nothing more. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262.)

affirmed it was true “that on or about February 5th of this year [he] entered an Albertson’s store with the intent of taking some chicken and in the process of leaving the store [he] engaged in some physical conduct against a security person.” (2/22 R.T. p. 6.) No more facts were admitted, including no admission that the court had given appellant a break by earlier dismissing his strike prior convictions. Accordingly, the trial court violated appellant’s Sixth Amendment rights to a jury trial and proof beyond a reasonable doubt.

E. THE ISSUE IS PROPERLY RAISED IN THIS APPEAL.

Even though the *Blakely* decision occurred after the sentencing hearing in this case, the issue based on this decision is properly raised herein because appellant’s appeal was still pending at the time the decision was issued. (*Schriro v. Summerlin* (June 24, 2004, 03-526) ___ U.S. ___ [2004 D.A.R. 7569, 7570].)

Further, any application of the waiver doctrine enunciated in *Scott, supra*, 9 Cal.4th 331, is inapt. The question at hand is not whether the court abused its discretion in making a discretionary sentencing choice, it is whether the court violated appellant’s constitutional rights by failing to submit the factual question of the existence of the aggravating factor to a jury or to ask appellant to waive his right thereto, or by failing to have appellant admit the fact at issue.

And, it is well settled that the failure to object cannot forfeit review of certain fundamental constitutional rights, including the right to jury trial. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277 [“A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional right.”]);

People v. Saunders (1993) 5 Cal.4th 580, 589-592 [defendant's failure to object to jury's discharge before adjudication of alleged prior convictions forfeited right to contest error as a statutory one under sections 1025 and 1164, but did not forfeit right to raise fundamental claims of double jeopardy and jury trial]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444.)

Moreover, because any objection would have been futile at the time of sentencing, forfeiture principles should not apply. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 820 [prosecutorial misconduct]; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649 [judicial misconduct].) Because California law in effect at the time of appellant's objection did not support appellant's position, any objection would have been futile. (Cf. *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver where lower court bound by higher court on point of law].)

Finally, application of the forfeiture rule is not automatic and can be excused by the appellate court where a case presents an important legal issue. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) This case presents just such a question. Given the newness of the *Blakely* opinion and the apparently serious effect this decision has on California's Determinate Sentencing scheme, a scheme which is utilized many times each day by the many state courts throughout California, it is necessary for appellate courts to issue decisions which will guide the lower courts in their application of this law.

F. THE TRIAL COURT'S ERROR IS REVERSIBLE PER SE BECAUSE IT DEPRIVED APPELLANT OF HIS RIGHT TO A JURY TRIAL.

Because the error involves the fundamental right to a jury trial, as well as the

application of the appropriate burden of proof as to the factual determination, the error is a structural one and requires reversal per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182].)

In the case of *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302], a bare majority of the Supreme Court discussed the application of harmless error analysis to various types of constitutional error. It noted the common thread in those cases in which harmless error applied to assess whether reversal was required: “each involved ‘trial error’ -- error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” (*Fulminante, supra*, 499 U.S. at pp. 307-308.) Thus, this type of error is assessed with respect to its impact on the factfinding process at trial. (*Deleware v. Van Arsdall* (1986) 475 U.S. 673 [106 S.Ct. 1431, 89 L.Ed.2d 674].)

Those cases that involve structural error, however, i.e., where there are “structural defects in the constitution of the trial mechanism,” defy harmless-error standards.

(*Fulminante, supra*, 499 U.S. at p. 309.) In classifying these errors, the court stated:

Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."

(*Id.* at p. 310, quoting *Rose v. Clark* (1986) 478 U.S. 570, 577-578 [106 S.Ct. 3101, 92 L.Ed.2d 460].) This type of error necessarily renders the trial fundamentally unfair.

(*Rose, supra*, 478 U.S. at p. 577.)

Application of these rules was made in *Sullivan v. Louisiana*, where the high court considered whether to apply the harmless error standard where the trial court's instruction to the jury on the reasonable doubt standard was constitutionally deficient. The court answered the question in the negative. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 280-282.)

To arrive at this determination, the court recognized that the right to jury trial is "fundamental to the American scheme of justice." (*Sullivan, supra*, 508 U.S. at p. 277.) "The right includes, of course, as its most important element, the right to have a jury, rather than the judge reach the requisite finding of 'guilty.'" (*Ibid.*) In assessing guilt, the jury must use the beyond-a-reasonable-doubt standard. (*Id.* at pp. 277-278.) Although most constitutional errors are subject to harmless error review (*id.* at p. 279, referencing *Arizona v. Fulminante, supra*, 499 U.S. at pp. 306-307), the court noted that some errors would defy such analysis. (*Sullivan, supra*, 508 U.S. at p. 279.) To determine whether the instant case presented such an exception, the court reviewed the question that harmless error analysis asks. Such analysis does not examine the error in the abstract, but asks what effect the error had on the guilty verdict at hand. (*Ibid.*) Thus, the question is whether the guilty verdict in a particular trial was unattributable to the error. (*Ibid.*)

After assessing the reviewing court's appropriate role in the harmless error determination, the high court determined application of such a role would be illogical where the error at hand was the lack of a jury verdict. (*Sullivan, supra*, 508 U.S. at p. 280.) Because there was no jury verdict, the entire premise of harmless error review was absent.

There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

(*Sullivan, supra*, 508 U.S. at p. 280, internal citations omitted and italics original.)

Where there is no essential connection between the jury's verdict and the beyond a reasonable doubt factfinding mission of the jury, a reviewing court would engage only in speculation. The Sixth Amendment demands more. (*Ibid.*)

The error in the instant case is akin to that in *Sullivan*, because it affected the entire trial process. Appellant was denied his right to jury trial on the factor that would affect the court's aggravated sentencing consideration and the trial court determined these factors using the improper, lower burden of proof. As in the *Sullivan* case, where there is no jury verdict on the factfinding at issue, it would be illogical to determine whether the error affected the factfinding. There is simply no "object" or verdict to

review. The error cannot be assessed. It is not that some error in an otherwise overall correct trial process occurred, i.e., an improper or omitted jury instruction; it is that the entire process/mechanism of the factfinding procedure was erroneous. In such a situation, harmless error analysis is inappropriate. Consequently, reversal is required as a matter of course.

The California Supreme Court has applied the *Chapman*⁵ standard of review in analyzing an *Apprendi* error in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324. But in that case, the error at issue 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 and under the correct burden of proof – there was an error, but the overall factfinding mechanism was correct. (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].) Here, on the other hand, the error is the complete removal of the factual determination from the jury and the use of the wrong burden of proof in making that determination. Because the nature of the errors are different, *Sengpadychith* does not control the evaluation in this case.

G. EVEN UNDER *CHAPMAN*, REVERSAL IS REQUIRED.

⁵ *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. Under *Chapman*, the error is harmless if, beyond a reasonable doubt, “it did not contribute to the verdict obtained.” (*Id.* at p. 24.)

And even if *Chapman* does apply, reversal is required.⁶ The government cannot show beyond a reasonable doubt that the error did not contribute to the trial court's finding. If the error is considered a failure to instruct on the element of the crime, guidance from the high court's opinion in *Neder v. United States* (1999) 527 U.S. 1 [119 S.Ct. 1827, 144 L.Ed.2d 35] is helpful. In that case, the high court determined harmless error analysis applied to assess whether the failure to instruct on the element of a crime constituted reversible error. There, the court made clear, the error cannot be found harmless if the omitted element is susceptible to dispute.

If, at the end of that examination, the 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 p. 19.) Here, it cannot be said that, without the error, the decision would have been the same. Had a jury considered appellant's case instead of the court, it is likely to have characterized the trial court's actions in dismissing the strike differently. The court characterized it as giving a break to appellant. The jury, understanding the fairly minimal nature of the current crime (as *Estes*⁷ robbery), may well have characterized the court's actions as not giving a break to appellant, but rather doing its assigned job, making the hard choices, and appropriately dismissing the strikes given appellant's history, the

⁶ The difficulty of this analysis – trying to determine how a jury would have ruled if it, as opposed to the court, had considered appellant's case – shows how the error is a structural one requiring reversal per se.

⁷ *People v. Estes* (1983) 147 Cal.App.3d 23.

current crime, and appellant's motivation for the current crime. Thus, it cannot be said the error was harmless. Reversal is required.