Opening brief by panel attorney Paul Ward in People v. Felix Rivera, E035262.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FELIX ANTHONY RIVERA Defendant and Appellant.	E035262

Appeal from the Judgment of the Superior Court
State of California, County of Riverside
Superior Court No. RIF102089 and RIF102391

Honorable Russell F. Schooling, Judge

APPELLANT'S OPENING BRIEF

Paul R. Ward
SBN: 161613
PMB 256
1764 E. Lugonia Ave., Ste. 104
Redlands, CA 92374-2764
Telephone: (909) 794-8006
Fax: (909) 794-8006
Attorney for Defendant-Appellant,

By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
independent case system

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THE PEOPLE, Plaintiff and Respondent, v. FELIX ANTHONY RIVERA Defendant and Appellant.	E035262

STATEMENT OF APPEALABILITY

This appeal is from a final judgment following a trial and is authorized by Penal Code[1] § 1237.

STATEMENT OF THE CASE

By an amended information filed November 3, 2003, and amended by interlineation on November 7, 2003, (RT 426) the District Attorney of Riverside County charged appellant Felix Rivera with kidnaping to commit robbery (§ 209, subd. (b)(1), count one), first degree robbery (§§ 211/212.5, subd. (a), counts two, three, four and five), second degree robbery (§ 211, count six), dissuading a witness (§ 136.1, subd. (c), count seven), and assault with a firearm (§ 245, subd. (a)(2), counts eight, nine, ten and eleven). (CT 128-132.)

In connection with count one, the information alleged that a principal

[1] The Penal Code will hereafter be implied.

was armed with a firearm for purposes of § 12022, subdivision (a). In connection with counts two, three, four, and five, the information alleged appellant personally used a firearm for purposes of § 12022.53, subdivision (b).

The information further alleged that appellant had served a prior prison term and not been free of custody for five years for purposes of § 667.5, subdivision (b). The information further alleged that appellant had been convicted of a serious felony for purposes of § 667, subdivision (a) and for purposes of § 667, subdivisions (c) and (e)(1), and § 1170.12, subdivision (c)(1). (CT 128-132.)

On November 3, 2003, a jury trial began[2]. Mr. Rivera testified in his own behalf. On November 11, 2003, the jury found appellant guilty of all counts and found true the allegations supporting sentencing enhancements. (RT 527-31.) On November 21, 2003, at a court trial, appellant admitted the allegations of prior convictions. (RT 540-42.)

On January 30, 2004, the court sentenced Mr. Rivera to a determinate term of fifty four years followed by an indeterminate term of life with the possibility of parole. (RT 553, CT 359-61.) The court selected count two, robbery, as the principal count for the determinate term. The court selected the upper term of six years, which the court doubled to twelve years because of the prior conviction. The court enhanced the term for count two by ten years for use of a firearm and by five years for the prior prison term (§ 667, subd. (a).) The court struck the allegation under § 667.5, subdivision (b). For the counts four, and five, first degree robbery, the court imposed consecutive terms of two years, eight months, one third the middle term of four years doubled. For count

[2] The abstract of judgment erroneously shows a court trial. (CT 359-61.)

six, second degree robbery, the court imposed a consecutive term of two years, one third the middle term of three years doubled. For count seven, dissuading a witness, the court selected the middle term of three years, which the court double to six years, and imposed a full consecutive term. For counts eight, nine, ten and eleven, assault, the court stayed the sentences pursuant to § 654. (RT 548-53.) The indeterminate term was imposed for count one, kidnaping for purposes of robbery. (RT 553.)

STATEMENT OF THE FACTS

Around 6:00 a.m. February 23, 2002, appellant and Lino Velasquez entered a room at Motel 6 in Corona armed with a handgun. In the room were four men, Oscar Rodriguez, Arturo Rodriguez, Galdino Hernandez and Rodolfo Trejo. (RT 94.) Appellant testified that he and Mr. Velasquez suspected that someone in the room had sold appellant's mother, Annette Salas, some bad dope the night before. (RT 334.) The two men intended to take property from the occupants of the room in retaliation for the sale. (RT 336.) They collected money, jewelry, a boom box, CDs, ATM cards and PIN numbers, and a cooler containing beer from the four men. (RT 73-74.) They also demanded drugs and searched the room for them. (RT 100, 139.)

Mr. Trejo's Chevrolet Suburban was parked outside the motel room. Mr. Rivera, Mr. Velasquez drove the Suburban with Mr. Trejo to the Lake Elsinore area. Mr. Trejo withdrew money from an automated teller machine and gave it to Mr. Rivera. The three men drove to the home of Jimmy Salas where the Suburban was stripped of its sound system. Mr Trejo then left with the Suburban. (RT 142-46, 158-172.)

ARGUMENT

I

APPELLANT'S SENTENCE FOR COUNT TWO SHOULD BE REDUCED TO THE MIDDLE TERM BECAUSE THE COURT IMPOSED THE UPPER TERM BASED ON FACTS NOT FOUND BY THE JURY

A. The Sixth and Fourteenth Amendments Require That All Facts Used To Impose A Criminal Sentence Be Submitted To The Jury

In *Jones v. United States* (1999) 526 U.S. 227 [143 L.Ed.2d 311, 119 S.Ct. 1215], (hereafter *Jones*) the United States Supreme Court held that

> "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."

(*Id*, at 243, n. 6.) A year later, the Court repeated this principle and held that it applies to the states:

> "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...The Fourteenth Amendment commands the same answer in this case involving a state statute."

(*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 [147 L.Ed.2d 435, 120 S.Ct. 2348]. Hereafter *Apprendi*.) The Court recently defined the term "statutory maximum" in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (hereafter *Blakely*): "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." (*Id.* at ___.)

In California, the statutory maximum that may be imposed solely on the

facts reflected in the jury verdict when three possible terms are specified is the middle term: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b).) "Circumstances in aggravation" specifically exclude facts that are elements of the crime. (Cal. Rules of Court, rule 4.420(d).) Because of this exclusion, the statutory maximum as defined by *Blakely* and *Apprendi* will be the middle term. In the case at bar, the statutory maximum term for count two, first degree robbery, is four years absent additional facts. (§ 213.)

The court made the following factual findings to support its selection of the upper term of six years: the crime involved

> "great violence, threat of great bodily harm, and high degree of cruelty, viciousness, and callousness, armed and planned violent conduct indicating a danger to society. And his prior convictions are numerous and of increasing seriousness. And his prior prison term had no effect on his recidivism and his ability and desire or willingness to rehabilitate himself."

(RT 550.)

The court also found that

> "it appears that the circumstances in aggravation here far outweigh – as a matter of fact, the factors in aggravation completely outreach and overbalance the only factor in mitigation, to wit, that he had a previous and continuing drug and alcohol abuse problem and that he had some hallucinations."

(RT 550.)

Of these facts, the jury found only that Mr. Rivera was armed. It found this fact true when it found him guilty of assault with a firearm and found true the allegation under §§ 12022, subdivision (a) and 12022.53, subdivision (b).

None of the other facts the court invoked to impose the upper term was found true as part of the jury's verdicts. Nor did a jury find that the combined circumstances in aggravation outweighed the circumstance in mitigation.

The fact that Mr. Rivera was armed, however, is not a fact the court was authorized to use to impose the upper term, because the sentence was enhanced under § 12022.53, subdivision (b) for personally using a firearm and such dual use of facts is prohibited by § 1170:

> "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime...The court shall set forth on the record the facts and reasons for imposing the upper or lower term. **The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.**"

(§ 1170, subd. (b).)

The court was, therefore, not authorized to use the fact that Mr. Rivera was armed to impose the upper term when Mr. Rivera's sentence was enhanced for using a firearm. (*People v. Dixon* (1993) 20 Cal.App.4th 1029, 1038.)

B. <u>If This Court Determines That The Fact Of Being Armed Can Be Used To Impose The Upper Term, Then It Must Strike The Enhancement</u>

Rule 4.420(c) elaborates on § 1170, subdivision (b)'s limitation on dual use of facts:

> "To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of

imprisonment, regardless of the effect on the total term."

(Cal. Rules of Court, rule 4.420(c).)

A straightforward application of rule 4.420(c) requires that the court strike the enhancement for using a firearm if the same fact is used to impose the upper term.

C. The Issue Was Not Waived

Jones, *Apprendi* and *Blakely* establish that a defendant has a sixth amendment right to a jury trial on facts used to impose an upper term. A defendant can waive that right, but any waiver must be knowing and intelligent and expressly appear in the record. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242 [23 L.Ed.2d 274, 89 S.Ct. 1709], *Brady v. United States* (1970) 397 U.S. 742, 748 [25 L.Ed.2d 747, 90 S.Ct. 1463].) Mr. Rivera did not waive his right to a jury trial on the facts used to impose the upper term.

D. The Error Requires Reversal

Although the Supreme Court did not address whether the failure to grant a defendant a jury trial on the facts used to increase his sentence beyond the statutory maximum is subject to harmless error analysis, the Court has held that the lack of a jury trial in a criminal case is a structural error:

> "The right to trial by jury reflects, we have said, 'a profound judgment about the way in which law should be enforced and justice administered.' *Duncan v. Louisiana*, 391 U.S. [145,] 155 [20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968)] . The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'"

(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-82 [124 L.Ed.2d 182, 113 S.Ct. 2078].)

II

NO UPPER TERM CAN BE IMPOSED FOR COUNT TWO BECAUSE THE SENTENCING RULES VIOLATE THE SEPARATION OF POWERS DOCTRINE

A. Penal Code Section 1170.3, Which Authorizes The Judicial Council To Define Circumstances In Aggravation, Violates Separation Of Powers, Because It Delegates To The Council A Fundamental Policy Decision Reserved To The Legislature

The doctrine of separation of powers is set forth in Article III, § 3 of the California Constitution: "the powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

One of the powers reserved to the Legislature is the power to create crimes:

> "Penal Code section 6 embodies a fundamental principle of our tripartite form of government, i.e., that subject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch."

(*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631. *People v. Cervantes* (2001) 26 Cal.4th 860, 867, fn. 10.) "[I]n the absence of legislative proscription of conduct, there is no crime." (*People v. Dillon* (1983) 34 Cal.3d 441, 461.) Even in their role as the interpreter of statutes, court must not expand the definition of a crime: "it is clear the courts cannot go so far as to create an offense by enlarging a statute, by inserting or deleting words, or by giving the terms used false or unusual meanings." (*Keeler, supra*, 2 Cal.3d at 632.)

The Legislature granted the Judicial Council authority to create rules that "seek to promote uniformity in sentencing" in § 1170.3, which reads:

> "The Judicial Council shall seek to promote uniformity in sentencing under Section 1170, by:
> (a) The adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing regarding the court's decision to:
> (1) Grant or deny probation.
> (2) Impose the lower or upper prison term.
> (3) Impose concurrent or consecutive sentences.
> (4) Determine whether or not to impose an enhancement where that determination is permitted by law.
> (b) The adoption of rules standardizing the minimum content and the sequential presentation of material in probation officer reports submitted to the court."

(§ 1170.3.)

The Judicial Council's authority, in turn, rests on Article VI, § 6(c) of the California Constitution:

> "To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute."

(Cal. Const. Art. VI, § 6(c).)

Pursuant to that authority the Judicial Council created the sentencing rules now found at California Rules of Court, rules 4.401 through 4.480. The rule governing the procedure for selecting sentencing choices is rule 4.420 and the rule enumerating some of circumstances in aggravation that justify a sentencing court's choice of the upper term is rule 4.421. Rule 4.421, however, does not necessarily list all criteria that can be used to impose an upper term:

> "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge."

(Cal. Rules of Court, rule 4.408(a).)

The Advisory Committee Comment to rule 4.408 states,

> "Enumerations of criteria in these rules are not exclusive. The variety of circumstances presented in felony cases is so great that no listing of criteria could claim to be all-inclusive. (Cf., Evid. Code, § 351.)
> "The relative significance of various criteria will vary from case to case. This, like the question of applicability of various criteria, will be decided by the sentencing judge."

(Advisory Com. Comment, Cal. Rules of Court, rule 4.408.)

The United States Supreme Court stated in *Apprendi*, "facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." (*Apprendi*, *supra*, 530 U.S. at 484, fn. 10.) The California Supreme Court applied that reasoning to facts supporting statutory enhancements:

> "Except for sentence enhancement provisions that are based on a defendant's prior conviction, the federal Constitution requires a jury to find, beyond a reasonable doubt, the existence of every element of a sentence enhancement that increases the penalty for a crime beyond the 'prescribed statutory maximum' punishment for that crime. (*Apprendi*, *supra*, 530 U.S. at p. 490 [120 S. Ct. at p. 2363].) Therefore, a trial court's failure to instruct the jury on an element of a sentence enhancement provision (other than one based on a prior conviction), is federal constitutional error if the provision 'increases the penalty for [the underlying] crime beyond the prescribed statutory maximum.' (*Ibid.*)"

(*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

It follows that facts used to increase the penalty for an offense from the middle term to the upper term are, for constitutional purposes, elements of crimes. The label, "circumstance in aggravation," does not alter the constitutional consequences of increasing a sentence beyond the statutory maximum based on acts not made illegal by the Legislature. As the Supreme

Court put it, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, at 494.) Further,

> "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense."

(*Id.* at 494, fn. 19.)

Before *Jones*, *Apprendi* and *Blakely*, selection of the upper term was viewed as the courts' traditional exercise of sentencing discretion. After those cases, however, selecting the upper term is seen to go beyond the exercise of sentencing discretion and actually to allow the judicial branch both to define crimes and to charge them–powers reserved to the legislative and executive branches. The judicial branch defines crimes when the Council adopts rules that declare what facts warrant selection of the upper term as in California Rules of Court, rule 4.421(a), because facts used to impose the upper term are elements of crimes, whether or not labeled as such:[3]

> "Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors – no matter how much they may increase the punishment – may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result."

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[3] The aggravating factors at issue in *Blakely* do not suffer this particular infirmity, because the Washington *Legislature* created the illustrative list of factors. (*Blakely, supra*, at ___.)

(*Blakely, supra,* at ___.)

Individual judges define new crimes ad hoc when they employ the catch-all provision of rule 4.408 to justify selection of the upper term.

The court employed rule 4.408 in the case at bar when it selected the upper term for Mr. Rivera's sentence based in part on a criterion not listed in rule 4.421: "And his prior prison term had no effect on his recidivism and his ability and desire or willingness to rehabilitate himself." (RT 550.)

But, the task of creating crimes is reserved to the Legislature and assigning it to the judicial branch violates the separation of powers doctrine.

The California Supreme Court rejected a claim that delegating to the Judicial Council the rules governing sentencing facts violated the separation of powers doctrine in *People v. Wright* (1982) 30 Cal.3d 705:

> "Defendant urges that adoption of rules 421 [4.421] and 423 [4.423] are contrary to powers granted the Judicial Council by article VI, section 6 of our Constitution and that the legislative direction to adopt such rules lacks proper standards and is an invalid delegation of legislative power."

(*Id.* at 709.)

In rejecting Wright's claim, the Court relied on an unstated assumption that has been exposed and entirely destroyed by the United States Supreme Court's decisions in *Jones*, *Apprendi*, and *Blakely*. That assumption is that rules governing sentencing choices do not touch on any constitutional guarantees and, therefore, that no fundamental policy is at stake.

The *Wright* court identified the following limits on the Legislature's ability to delegate power to another agency:

> "An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions...
> "This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It

> cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions...
> "The Legislature must make the fundamental policy determinations."

(*Id.* at 712-13. Citations and internal quotations omitted.)

The *Wright* court found only one fundamental policy at stake in § 1170.3: "the Legislature made the fundamental policy decision that terms were to be fixed by choosing one of the alternatives on the basis of circumstances relating to the crime and to the defendant." (*Wright, supra*, at 713.) To that end, "The Legislature directed the Judicial Council to adopt rules establishing criteria for imposing the upper or lower terms in order to promote uniformity." (*Ibid.*) Thus, the hidden assumption is that creating fixed, uniform sentences based on facts other than those found by the jury or admitted by the defendant does not amout to defining new crimes. As the United States Supreme Court has made clear, however, circumstances in aggravation that result in sentences longer than the statutory maximum ("the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant") do just that. (*Apprendi, supra*, 530 U.S. at 494, fn. 19.)

No policies are more fundamental than deciding for what acts the state can deprive a citizen of liberty. To protect the right to liberty California established long ago that the Legislature has the sole responsibility of defining what acts are criminal: "there are no common law crimes in California." (*Keeler, supra,* 2 Cal.3d at 631.) The Legislature fulfills its fundamental policy making responsibility when it defines the elements of a crime and established the sentence for violating that crime. The Judicial Council exercises that same fundamental policy making responsibility when it creates a greater crime based on additional elements. It does not matter that the increased sentence has been

limited by the Legislature to the upper term, because a fundamental policy is involved in deciding what acts can be punished.

In light of the constitutional rights that the United States Supreme Court says are at issue in increasing a defendant's sentence beyond the statutory maximum, it is now clear that the delegation of legislative power to the Judicial Council to define circumstances in aggravation is invalid. The *Wright* court's contrary conclusion must fall.

B. The Sentencing Rules Violate Separation Of Powers Because They Assign Prosecutorial Functions To Judges

The separation of powers doctrine not only prohibits courts from creating crimes, it also prohibits courts from charging defendants with crimes,

> "the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring...The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch."

(*People v. Birks* (1998) 19 Cal.4th 108, 134.)

The Rules violate the separation of powers doctrine because they allow courts to override the charging discretion of prosecutors: "Circumstances in aggravation include: (a) Facts relating to the crime, **whether or not charged or chargeable** as enhancements." (Cal. Rules of Court, rule 4.421(a). Emphasis added.) Under this broad claim of power, when judges select the upper term based on facts relating to the defendant's crime, they effectively charge the defendant with a greater offense than the one the prosecutor charged. (*Apprendi, supra*, 530 U.S. at 494, fn. 19. *Blakely, supra*, 534 U.S. at ___.)

At issue in *Birks* was whether defendants could require courts to

instruct on lesser related offenses as had been the rule since the court decided *People v. Geiger* (1984) 35 Cal.3d 510. The *Birks* court embraced the reasoning of the dissent in *Geiger* that the majority "holding may well result in a massive interference with, and erosion of, the prosecutor's discretionary function to select the offenses of which the defendant may be charged and convicted." (*Id*. at 533. *Birks, supra*, at 123.) The same reasoning perforce applies when judges decide to sentence a defendant for a related, albeit greater, offense than charged by the prosecutor.

The example of weapons is instructive. Among the criteria listed in the Rules is, "The defendant was armed with or used a weapon at the time of the commission of the crime." (Cal. Rules of Court, rule 4.421(a)(2).) Numerous statutes define enhancements relating to the use of firearms during the commission of felonies, including being armed with a firearm, § 12022, subdivision (a), personally using a dangerous or deadly weapon other than a firearm, § 12022, subdivision (b), and using a firearm, § 12022.5. The Legislature has provided prosecutors with a wide variety of carefully graduated enhancements that they can charge for a wide variety of acts involving weapons in a wide variety of circumstances. When a court, despite the fact the prosecutor did not charge a firearm enhancement, uses the fact the defendant was armed or used a firearm to increase a sentence–as the court did in the case at bar (RT 550)–the court overrides the prosecutor's discretion "to determine whom to charge with public offenses and what charges to bring." (*Birks, supra*, 19 Cal.4th at 134.)

Similarly, the court interfered with prosecutorial charging discretion when it invoked several facts included in rule 4.421(a)(1), "The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness" to

select the upper term for Mr. Rivera despite the fact the prosecutor elected not to charge enhancements or offenses covering the same acts. (RT 550.) For example, the prosecution did not allege an enhancement under § 12022.7, subdivision (a) for inflicting great bodily injury nor charge a violation of § 422, which prohibits threats of great bodily injury.

C. The Rules For Selecting Upper Terms Violate The Separation Of Powers Doctrine, Because They Are Inconsistent With Statute

Although rules developed by the Judicial Council must in general be consistent with statute (Cal. Const. Art. VI, § 6), the Legislature has the power to grant to the Judicial Council the authority to supersede statutes. (*In re Marriage of McKim* (1972) 6 Cal.3d 673, 678, footnote 4.) Relying on *McKim*, the *Wright* court found the Legislature had done that when it authorized the Judicial Council to adopt sentencing rules. (*Wright, supra*, 30 Cal.3d at 712.) In light of *Jones*, *Apprendi* and *Blakely*, however, it can now be seen that the Legislature granted to the Judicial Council the authority to supersede a far larger number of statutes than assumed by the court in *Wright*. It can also be seen that the Rules do far more than implement the Legislature's mandate of creating uniformity in sentencing.

The rules at issue in *McKim* were adopted by the Judicial Council pursuant to a broad grant of authority in the Family Law Act (Civ. Code §§ 4000-5138. Civil Code § 4001, which has since been repealed, read, "Notwithstanding any other provision of law, the Judicial Council may provide by rule for the practice and procedure in proceedings under this part." (Civ.Code § 4001 Repealed Stats 1992 ch 162 § 3 (AB 2650), operative January 1, 1994.) The extent of this grant of authority to create rules was unique:

> "The words 'Notwithstanding any other provision of law' in Civil Code section 4001, *supra*, make such rules 'sui generis' and controlling over both statutory and decisional law.[Citation omitted.] *We must thus look to these Family Law Rules of Court before looking to the laws applicable to civil actions generally to determine the appropriate practice and procedure*."

(*In re Marriage of Dover* (1971) 15 Cal.App.3d 675, 678, fn. 3. Italics in original.) The *McKim* court agreed: "The practical effect of section 4001, therefore, is to remove any restraints of statutory consistency on the Judicial Council's rules of practice and procedure under the Family Law Act." (*McKim, supra*, 6 Cal.3d at 678, fn. 4.) Despite such a broad grant of authority to the Judicial Council, the Court found that the Legislature intended the result: "The Family Law Rules of the California Rules of Court supersede contrary statutes because the rules were adopted pursuant to and are consistent with specific constitutional and statutory authorizations having this effect." (*Ibid*.)

The *Wright* court found that the Legislature similarly intended § 1170.3 to grant authority to the Judicial Council to adopt rules that supersede statutes: "in *In re Marriage of McKim* (1972) 6 Cal.3d 673, 678, footnote 4, the court recognized that the Legislature by adoption of statute had authorized the council to adopt rules superseding other statutes.[Citations omitted.]We conclude there is no violation of article VI, section 6." (*Wright, supra*, 30 Cal.3d at 712.) This conclusion can no longer stand.

In contrast to the sweeping grant of authority in Civ. Code § 4001, the Legislature's grant of authority in § 1170.3, was intended to be narrow: "The Judicial Council shall seek to promote uniformity in sentencing under Section 1170, by: (a) The adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing..." (§ 1170.3.) The Legislature manifestly did not express an intent "to remove any restraints of statutory

consistency on the Judicial Council's rules of practice and procedure under the" Penal Code. Yet, that is the result when circumstances in aggravation are seen to be elements of crimes.

The rules relating to circumstances in aggravation allow the circumstances to be presented for the first time at or near the sentencing hearing: "The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing." (Cal. Rules of Court, rule 4.420(b).) When it is recognized that these relevant facts are elements of new crimes, it is easy to see that allowing the facts to be introduced for the first time at a sentencing hearing is inconsistent with a host of statutes designed to protect defendants' state and federal constitutional rights. These statutes govern the entire range of criminal procedure in the California Penal Code and rules of evidence in the Evidence Code: pleading, preliminary hearings, double jeopardy, discovery, jury voir dire, admission of evidence, examination of witnesses, challenges to the sufficiency of the evidence, instructing the jury, standard of proof.

The Legislature could not reasonably be thought to have intended that the Judicial Council's rules would supersede so many statutes governing the prosecution of crimes and the conduct of trials. The underlying error in the Rules and the authority granted to the Judicial Council to create them is the belief that the Rules govern nothing more than sentencing procedures. *Jones*, *Apprendi* and *Blakely*, however, teach that the selection of an upper term is not merely a procedural matter, but concerns the substance of what constitutes a crime.

The Rules not only override an array of statutory procedural safeguards, they are also inconsistent with substantive statutes that establish punishments.

In the case at bar, the principal count was count two, first degree robbery. That offense is punishable by terms of three, four or six years. (§ 213.) Under the recidivist statutes, those terms are doubled to six, eight or twelve years. The court imposed the upper term based in part on the fact that Mr. Rivera was armed. (RT 550.) Thus, Mr. Rivera's punishment was increased by four years for being armed. This is inconsistent with the sentences provided for by statute.

The Legislature has provided for a range of punishments associated with the use of firearms in the commission of felonies: from one year to as much as five years, depending on the weapon and the offense, for being armed (§§ 12022, 12022.3), from three years to as much as life, depending on the weapon and the offense, for using a firearm (§§ 12022, 12022.3, 12022.5, 12022.53, 677.61), from five years to as much as life, depending on the offense, for discharging a firearm (§§ 12022.53, 12022.55, 667.61), and twenty five years to life for discharging a firearm and causing great bodily injury (§§ 12022.53, 667.61). In contrast, the punishment for being armed or using a firearm resulting from the selection of the upper term varies according to the difference between the middle term and the upper term and the defendant's prior criminal history. Further, in contrast to the enhancement statutes, the rules do not distinguish between being armed and using a firearm. (Cal. Rules of Court, rule 4.421(a)(2).) As a result, in some cases striking a firearm enhancement in favor of imposing the upper term will increase the punishment, while in other cases it will reduce the punishment the Legislature decided was appropriate.

In Mr. Rivera's case, the charged enhancements carry terms of one year for being armed, § 12022, subdivision (a), alleged in connection with count one, and ten years for personally using a firearm, § 12022.53, subdivision (b),

alleged in connection with count two. The upper term increased Mr. Rivera's sentence by four years. If the upper term is imposed based on the circumstance of being armed and the charged enhancement is stricken, the punishment for being armed will be either much greater or much less than the term the Legislature decided was proper.

Because the Legislature has so carefully crafted the punishment for firearms connected to felonies, the rule that allows courts to impose different punishment is inconsistent with statute.

III

THE SENTENCE MUST BE REDUCED TO THE MIDDLE TERM BECAUSE THE SENTENCING RULES DENY DEFENDANTS FUNDAMENTAL RIGHTS GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

A. The Rules Deny Defendants Notice Because They Permit Judges To Announce Circumstances In Aggravation For The First Time At The Sentencing Hearing

Mr. Rivera was entitled to notice in the charging document of what facts would be used to increase his sentence:

> "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."

(*Jones, supra*, 526 U.S. at 243, fn. 6.) In *Apprendi*, the Court applied this rule to state criminal proceedings: "The Fourteenth Amendment commands the same answer in this case involving a state statute." (*Apprendi, supra*, at 476. See also footnote 15 ["The indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted."]) The notice guarantee includes advanced notice of the issues: "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." (*Strickland v. Washington* (1984) 466 U.S. 668, 685 [80 L.Ed.2d 674, 104 S.Ct. 2052].)

In violation of *Jones*, *Apprendi* and *Blakely*, the Rules allow courts to select circumstances in aggravation announced for the first time at the sentencing hearing:

> "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the

> application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge."

(Cal. Rules of Court, rule 4.408(a).)

B. The Sentencing Rules Deny Defendants Notice Because They Are Unconstitutionally Vague

Due process demands that statutes be specific enough to give notice of what acts are prohibited:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

(*Connally v. General Construction Co.* (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 46 S.Ct. 126].) This principle has been restated often. (See e.g., *Lanzetta* v. *New Jersey* (1939) 306 U.S. 451, 453 [83 L.Ed. 888, 59 S.Ct. 618] ["No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."]; *Wright v. Georgia* (1962) 373 U.S. 284, 293 [10 L.Ed.2d 349, 83 S.Ct. 1240] ["It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process"]; *Shad v. Arizona* (1991) 501 U.S. 624, 633 [115 L.Ed.2d 555, 111 S.Ct. 2491] ["[N]o person may be punished criminally save upon proof of some specific illegal conduct."].)

The vagueness of the Rules for selecting the upper term is readily apparent, beginning with the catch-all provision of rule 4.408(a), which allows

a court to rely on criteria “reasonably related” to the offense.

Deciding what criteria are “reasonably related” to the sentencing decision is a task fraught with uncertainty. It presents the same difficulties as deciding what lesser crimes are related to a charged crime–a task the California Supreme Court removed from judges in part because it lacks discernable standards. In eliminating the requirement that courts instruct juries on lesser related offenses, the Supreme Court described the great difficulty of deciding what offenses are related:

> “Once the relative precision of necessary inclusion is left behind, the parties and the courts are cast adrift in a trackless sea. Because the evidence of uncharged and nonincluded offenses may develop only at trial, the difficulties of planning trial strategy are greatly enhanced. Moreover, there can be no clear standards for determining when a lesser offense, though not necessarily included in the charge, is nonetheless related for instructional purposes. This leaves an accused potentially infinite latitude to argue a sufficient link.”

(*Birks, supra*, 19 Cal.4th at 131.)

In the context of sentencing, it is the probation department, the prosecution and the court that are left “potentially infinite latitude to argue a sufficient link” between a circumstance and an offense to warrant the aggravated term. That the defendant is not the one attempting to establish the link does not lessen the need for “nuanced ‘ “questions of degree and judgment.” ’ ” (*Schmuck* [*v. U.S.* (1989)] 489 U.S. 705, 721[103 L.Ed.2d 734, 109 S.Ct. 1443].)” (*Birks, supra,* at 131.)

A leading jurist noted many years ago the vagueness of even the listed criteria:

> “The Rules of Court disturb me in a related regard. The standard of proof (preponderance) may be applied to factors so vague that no standard is readily perceived. Rules of Court (rules 421 and 423) appear to permit practically unbridled discretion in the trial

> judge to impose a maximum or minimum term. That cannot be. More predictability must be engrafted upon the sentencing process. The whole motivating concept behind recent legislative sentencing reforms has been to structure fairness and predictability in our sentencing scheme."

(*People v. Nelson* (1978) 85 Cal.App.3d 99, 104, conc. opn. of Reynoso, J.)

A year after *Nelson*, however, the Court of Appeal rejected a claim that circumstances in aggravation must meet the same criteria for specificity as criminal statutes: "Nor are we persuaded that the 'circumstances in aggravation' enumerated in rule 421 [4.421] [footnote omitted] must fall because they have not been drafted with the narrowness and precision we require in statutes defining criminal offenses." (*People v. Thomas* (1979) 87 Cal.App.3d 1014, 1023.) The court's reasoning rested on the perceived constitutional difference between circumstances in aggravation and elements of crimes, a difference that allowed the Court to embrace vagueness as a virtue:

> "The fundamental policy behind the constitutional prohibition of vaguely worded criminal statutes was stated in *Lanzetta* v. *New Jersey, supra*, 306 U.S. at page 453: 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. . . .' The primary function of rule 421, however, is quite different. The Legislature authorized the Judicial Council to adopt the guidelines contained in rule 421 (and the other rules setting forth sentencing guidelines) in order to '. . . promote uniformity in sentencing . . . by the adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing . . . .' (Pen. Code, § 1170.3.)...The functional difference between penal statutes and the rules of court on sentencing explain why the latter must necessarily be framed more broadly than the former. Obviously **the list of 'circumstances in aggravation' in rule 421 is not intended to give people advance warning of prohibited activities**; rather it is designed to provide guidance

to sentencing judges."

(*Ibid.* Emphasis added.)

After *Jones*, *Apprendi* and *Blakely*, this assumption cannot stand. In those cases the Court held that circumstances in aggravation and traditional elements of crimes are functionally equivalent. It follows that neither the intended purpose nor the origin (Legislature or agency) of aggravating circumstances exempts the sentencing rules from constitutional standards for providing notice of what acts will be punished.

In the case at bar, the court employed the catch-all provision of rule 4.408(a): "And his prior prison term had no effect on his recidivism and his ability and desire or willingness to rehabilitate himself." (RT 550.) This circumstance is listed neither in statutes nor in rule 4.421(a); it was not charged (CT 128-32); it did not appear in the probation report (CT 340-58). It was created by the sentencing court at the sentencing hearing.

Several of the criteria listed in rule 4.421(a) lack the required specificity. In particular: "(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness"; "(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism"; "(9) The crime involved an attempted or actual taking or damage of great monetary value"; "(10) The crime involved a large quantity of contraband." (Cal. Rules of Court, rule 4.421(a).) These criteria invite subjective evaluation of the circumstances of the crime on the order of "I know it when I see it."

In the case at bar, the court included items 1 and 3 among its reasons for selecting the upper term:

> "great violence, threat of great bodily harm, and high degree of cruelty, viciousness, and callousness, armed and planned violent conduct indicating a danger to society. And his prior convictions

are numerous and of increasing seriousness. And his prior prison term had no effect on his recidivism and his ability and desire or willingness to rehabilitate himself."

(RT 550.)

C. The Sentencing Rules Deny Defendants Due Process Because They Lower The Standard Of Proof To A Preponderance Of The Evidence

Rule 4.420(b) allowed the court in the case at bar to find circumstances in aggravation true by a preponderance of the evidence. This standard of proof was approved in *Nelson, supra*. In *Nelson*, the defendant pleaded guilty to multiple felonies and was sentenced to the upper term after the court found that the circumstances in aggravation outweighed those in mitigation "and that outweighing is by a preponderance of the evidence." On appeal the defendant claimed that he was denied due process when the sentencing court found the circumstances in aggravation by a standard of proof lower than beyond a reasonable doubt. (*Id.* at 100-101.) The reviewing court found no violation of due process:

> "Having committed an offense defendant is liable to punishment and loss of liberty, provided of course that evidence of his guilt satisfies the constitutionally exacting standard of proof beyond a reasonable doubt. Having waived the protection of this high standard by pleading guilty, we can perceive of no constitutional barrier to the court's weighing the mitigating and aggravating facts incident to the crime against a preponderance of the evidence standard in order to determine which of the terms provided by law are appropriate under the circumstances. In doing so defendant is in no way subjected to additional penalties beyond those already incurred by his conviction."

(*Id.* at 102-103.)

Jones, *Apprendi* and *Blakely* hold that imposing the upper term does in fact subject a defendant "to additional penalties beyond those already incurred

by his conviction" and that the facts supporting the additional penalties must therefore be proved beyond a reasonable doubt:

> "Any evaluation of *Apprendi*'s 'fairness' to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential 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."

(*Blakely, supra*, 542 U.S. at ___.)

D. The Sentencing Rules Deny Defendants Effective Assistance Of Counsel

Allowing a court to select or create circumstances in aggravation for the first time at the sentencing hearing denies the defendant the right to effective assistance of counsel guaranteed by the Sixth Amendment, because it denies counsel the opportunity to investigate and prepare a defense. (*Powell v. Alabama* (1932) 287 U.S. 45, 58, 71 [77 L.Ed. 158, 53 S.Ct. 55].)

E. The Sentencing Rules Violate The Confrontation Clause Because They Permit The Court To Rely On Hearsay

In *Crawford v. Washington* (2002) 541 U.S. ___ [158 L.Ed.2d 177, 124 S.Ct. 1354], the Supreme Court explained the constitutional limitation on the use of hearsay testimony in a criminal trial: "Where testimonial evidence is at issue...the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." This limitation stands in stark contrast to the rules for admitting evidence of circumstances in aggravation under the Rules.

The Rules permit the sentencing judge to consider evidence from a wide range of sources: "The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing." (Cal. Rules of Court, rule 4.420(b).) A probation officer's report may contain hearsay:

> "Superior courts consider and rely upon hearsay statements contained in a presentence report to determine whether to place a defendant on probation, and to evaluate his level of culpability when selecting an appropriate sentence. (Pen. Code, § 1203, subd. (b)(3); Cal. Rules of Court, rule 4.411(d).) This includes the court's assessment of aggravating and mitigating factors, such as whether the crime involved great bodily harm or other act disclosing a high degree of viciousness, cruelty, or callousness, whether the victim was particularly vulnerable, whether the crime was carried out with sophistication, whether the defendant took advantage of a position of trust or confidence, whether the defendant played a minor role in the crime, whether the victim participated in the incident and, if so, under what circumstances, and whether the defendant exercised caution to avoid harm or damage. (Rules 4.420(b), 4.421(a)(1), (3), (8), (11), 4.423(a)(1), (2), (6).)
>
> "Thus, courts routinely rely upon hearsay statements contained in probation reports to make factual findings concerning the details of the crime. These findings, in turn, guide the court's sentencing decision–a decision which has a great impact on the defendant's liberty interest."

(*People v. Otto* (2001) 26 Cal.4th 200, 212-13.)

In fact, hearsay is thought to be a necessity in a probation officer's report:

> "A probation officer could not make an investigation and report of the nature required by Penal Code, section 1203, if restricted to the rules of evidence. Much of the prior record and history of a defendant, as well as the circumstances surrounding the crime, are hearsay and can be investigated and reported upon only by

the use of hearsay information."

(*People v. Valdivia* (1960) 182 Cal.App.2d 145, 148. Cited with approval in *Otto, supra*, at 207-8.)

True to the statement in *Valdivia*, the probation officer's report in the case at bar is based entirely on inadmissible hearsay. (CT 340-58.) The report's rendition of the facts opens with this understated warning: "The Court, having heard testimony, is familiar with the circumstances of the offense. The following is a summary of the above listed [police] report and may not accurately reflect the evidence and testimony presented at the trial." (CT 343.)

The evidentiary flaws in probation officer's report are numerous and apparent. Only a few need be described: it does not identify the author(s) of the police report from which it quotes and it includes second or third hand statements by non-testifying witnesses, e.g. Rodolfo Trejo's father. (CT 343.)

The Rules' disregard for the rules of evidence in general and the Confrontation Clause in particular posed little constitutional concern before circumstances in aggravation were recognized to be elements of crimes. Post *Jones*, *Apprendi* and *Blakely*, however, it is obvious that the same rules of evidence that apply to elements of crimes must also apply to circumstances in aggravation, because circumstances in aggravation are elements of crimes for constitutional purposes. Thus, the limits on the use hearsay in criminal trials apply equally to sentencing hearings when the issue is whether to impose the upper term. Under *Crawford*, the hearsay laden probation officer's report is not admissible to establish any circumstance in aggravation used to increase Mr. Rivera's sentence beyond the statutory maximum of the middle term.

F. The Errors Require Reversal Of The Conviction For The Uncharged Greater Crime For Which The Court Imposed The Upper Term

The procedural and evidentiary rules established by the Judicial Council for finding a defendant guilty of the crime defined by the circumstances in aggravation deny defendants numerous fundamental constitutional rights in addition to the right to a jury trial. The errors discussed above, either individually or in combination, must be considered structural flaws, because "these errors deprive defendants of 'basic protections' without which '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.' " (*Neder v. Unites States* (1999) 527 U.S. 1, 8-9 [144 L.Ed.2d 35, 119 S.Ct. 1827]. Quoting *Rose v. Clark* (1986) 478 U.S. 570, 579 [92 L.Ed.2d 460, 106 S.Ct. 3101].) As a result, even if the facts supporting imposition of the upper term in the case at bar were found by the jury, this Court must strike the upper term.

CONCLUSION

For the reasons stated, Mr. Rivera's sentence for count two should be reduced to eight years.

Date: _September 1, 2004_

Respectfully Submitted,

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Paul R. Ward
Attorney for Appellant

CERTIFICATE OF WORD COUNT

The undesigned appellate counsel certifies that this brief contains 8,443 words.

Date: September 1, 2004

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Paul R. Ward
Attorney for Appellant