

Petition for rehearing by panel attorney Martha McGill in *People v. Maynor Aceituno* (E033156)

PETITION FOR REHEARING

_____ TO THE HONORABLE MANUEL A. RAMIREZ, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Appellant MAYNOR GEOVANI ACEITUNO respectfully requests the Court grant a rehearing in the above-entitled matter, pursuant to Rule 25 of the California Rules of Court.

INTRODUCTION

A jury convicted Aceituno of twenty counts of lewd conduct with a child under the age of fourteen (Pen.Code, § 288, subd. (a)). (1 CT 181-203; 2 RT 467-472). The trial court sentenced him to prison for the upper term of eight years on one of the counts, and consecutive terms of two years on each of the remaining counts, for a total prison sentence of forty-six years. (2 CT 367-369, 374-375). When sentencing Aceituno, the court made factual findings, pursuant to Penal Code sections 669 and 1170, subdivision (b), and Rules 4.420, 4.421, 4.423, and 4.425 of the California Rules of Court, in

support of the selection of the upper term and the decision to impose consecutive sentences. (2 RT 492-493).

Aceituno appealed the judgment. (2 CT 370). The Court of Appeal issued its unpublished opinion affirming the judgment on June 21, 2004. On June 24, 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington* (No. 02-1632, June 24, 2004) ___U.S.___, 2004 D.J.D.A.R. 7581, 2004 WL 1402697, 2004 U.S. Lexis 4573) (*Blakely*). In light of the decision in *Blakely*, the procedures under which sentence was imposed in this case are not valid. Aceituno accordingly requests the Court grant a rehearing, permit the parties to submit additional briefing on these issues, and reverse the judgment with directions to the superior court to re-sentence Aceituno in accordance with *Blakely*.

ARGUMENT

I

A REHEARING SHOULD BE GRANTED TO CONSIDER THE VALIDITY OF ACEITUNO'S SENTENCE IN LIGHT OF BLAKELY v. WASHINGTON

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

In *Blakely v. Washington* (No. 02-1632, decided June 24, 2004) ___ U.S. ___, 2004 D.J.D.A.R. 7581, 2004 WL 1402697, 2004 U.S. Lexis 4573)

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

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

Washington's sentencing procedure did not comply with the Sixth Amendment, the court held Blakely's sentence is invalid. (*Blakely v. Washington, supra*, ___U.S.____, 2004 U.S. Lexis 4537 at p. 17).

The Court also addressed the circumstances in which a sentence exceeds the "statutory maximum," requiring factual findings by a jury and proof beyond a reasonable doubt. The court defined the "statutory maximum" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely v. Washington, supra*, ___U.S.____, 2004 U.S. Lexis 4573 at p.13-15, citing *Ring v. Arizona* (2002) 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556).

In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts [to support a sentence enhancement], but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [citation omitted], and the judge exceeds his proper authority. (*Blakely v. Washington, supra*, ___U.S. ____ ; 2004 U.S. Lexis at p. 14).

In summary, *Blakely* holds that aggravating factors which are to be used to increase a sentence must be presented to the jury for its consideration. "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." (*Blakely v. Washington,*

supra, ___ U.S. ___ ; 2004 U.S. Lexis 4573 at p. 31; emphasis in original). If the jury does not find unanimously and beyond a reasonable doubt that those facts exist, the judge may not use them to increase a sentence, and sentencing procedures which do not meet these requirements violate the Sixth Amendment.

B. The California Sentencing Scheme

1. Selection of Upper Term

As relevant here, California's determinate sentencing scheme, as set forth in Penal Code section 1170¹ and California Rules of Court rules 4.420, et seq.,² permits the sentencing judge to select from among the lower, middle,

¹ Penal Code section 1170, subdivision (b) provides in pertinent part:
(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation of the crime..... In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports ... and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. . .(Pen.Code, § 1170, subd. (b)).

² Rule 4.420 of the California Rules of Court provides in pertinent part:
(a) The middle term shall be selected *unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.*

and upper terms prescribed by statute for a particular offense. The term of imprisonment that may be imposed based solely on the jury's verdict is the middle term. The judge may not impose the upper term unless he finds, by a preponderance of the evidence, that there are additional aggravating factors, which outweigh any mitigating factors. (Pen.Code, § 1170, subd. (b); Cal.Rules of Court, rule 4.420(b)). The judge may base these findings on matters not presented to the jury (e.g., probation reports). (Pen.Code, § 1170, subd. (b); Cal.Rules of Court, rule 4.420(b)). In addition, a fact which is an element of the crime cannot be used to impose the upper term. (Cal.Rules of Court, rule 4.420(d)).

This statutory scheme does not require aggravating factors be found

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

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

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

true beyond a reasonable doubt by a unanimous jury. Rather, such findings are made solely by the trial judge based upon a preponderance of the evidence and may be based on material that the jury never considered (e.g., probation reports). Moreover, by virtue of rule 4.420, subdivision (d), the judge is specifically prohibited from imposing the upper term based on any elements of the underlying offense; the very things that the jury unanimously found to be true beyond a reasonable doubt.

California's sentencing scheme is highly similar to the sentencing procedures found invalid in *Blakely*. Under Washington's Sentencing Reform Act, a judge may impose a sentence above the standard range only if he finds "substantial and compelling reasons justifying an exceptional sentence." (Wash.Rev.Code, § 9.94A.535, formerly, § 9.94A.120(2)). Similarly, in California, the upper term of imprisonment may be imposed only if the judge finds one or more aggravating factors. (Pen.Code, § 1170, subd. (b), Cal.Rules of Court, rule 4.420 (b)). The Washington Act lists aggravating factors that justify such a departure, which are strikingly similar to the aggravating factors listed in rule 4.423 of the California Rules of Court. (Compare Wash.Rev.Code, § 9.94A.535, formerly, § 9.94A.390, with Cal.Rules of Court, rule 4.423). However, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which

are used in computing the standard range sentence for the offense.” (*State v. Gore* (2001) 143 Wash.2d 288, 315-316, 21 P.3d 262, 277). Similarly, in California, the upper term may not be imposed based on a fact which is also an element of the offense. (Cal. Rules of Court, rule 4.420(d)). Under the Washington Act, when a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it (Wash.Rev.Code, § 9.94A.535, formerly, § 9.94A.120(3)); in California, a judge who selects the upper term must state his reasons for doing so on the record. (Cal.Rules of Court, rule 4.420(e)).

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

2. Consecutive Sentences

California’s sentencing laws also permit the trial judge to impose increased punishment, in the form of consecutive sentences, based on facts not submitted to or found to be true by a jury. Penal Code section 669 provides that in the absence of special findings by the trial judge, sentences for two or more felonies shall run concurrently.³ The rule implementing this statute is

³ Penal Code section 669 provides in pertinent part:

(a) When any person is convicted of two or more crimes,

California Rules of Court, rule 4.425⁴, which specifies the criteria for determining whether to sentence consecutively or concurrently. Thus, in order to sentence consecutively rather than concurrently, the trial judge has to find one or more of the factors listed in rule 4.425. None of these factors is presented to or found true beyond a reasonable doubt by a unanimous jury. Consecutive sentencing under these provisions permits the trial judge, alone, to increase the defendant's punishment based on facts beyond those found by

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

⁴California Rules of Court, rule 4.425 states:

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

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

the jury verdict. For these reasons, the consecutive sentencing scheme in California also fails the *Apprendi* test as explained in *Blakely* and thus violates the Sixth Amendment right to a jury trial.

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

Here the trial court selected the upper term, based on findings the victim was vulnerable; the crime indicated planning, sophistication, and professionalism; Aceituno took advantage of a position of trust; and his prior record of a similar violation and danger to society. (2 RT 492). These factual findings were made by the judge alone, apparently based on the preponderance of the evidence standard (Cal.Rules of Court, rule 4.420(b)). It also appears from the record that the court's findings were based, at least in part, on the statements of Jessica H. and her mother at the sentencing hearing, as well as information in a psychological evaluations and the probation report, which were not part of the evidence presented to the jury. (2 RT 481, 486, 488-490). None of these factual issues was submitted to the jury, and the jury did not find any of the aggravating facts true beyond a reasonable doubt. Similarly, the court imposed consecutive sentences, based on its finding that each count involved a separate act of violence over a period of eighteen

months, committed at different times and places. (2 RT 492-493). These factual issues, too, were not submitted to the jury, and the jury did not find these facts to be true beyond a reasonable doubt. Because a defendant has the right to require that all facts essential to punishment be proved to a jury, beyond a reasonable doubt, the sentence imposed on Aceituno does not comply with the Sixth Amendment and is invalid. For these reasons, a rehearing is necessary to permit the court to consider the validity of Aceituno's sentence in light of *Blakely*.

CONCLUSION

For the reasons stated above, appellant MAYNOR GEOVANI ACEITUNO respectfully requests the court order a rehearing, permit the parties to submit briefing (Gov.Code, § 68081) on the validity of his sentence in light of *Blakely v. Washington, supra*, ___U.S.___, 2004 D.J.D.A.R. 7581, 2004 WL 1402697, 2004 U.S. Lexis 4573, and reverse the judgment with directions to re-sentence appellant in conformity with the procedures required by *Blakely v. Washington, supra*, ___U.S.___, 2004 D.J.D.A.R. 7581, 2004 WL 1402697, 2004 U.S. Lexis 4573.

Dated: July 1, 2004

Respectfully submitted,

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

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