

Petition for rehearing by ADI staff attorney Lynelle Hee in *People v. Jose Bello* (G032665)

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION THREE**

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSE VALENTIN BELLO,

Defendant and Appellant.

Court of Appeal  
No. G032665

Superior Court  
No. 01CF1912

Appeal from the Superior Court of Orange County

Honorable Frank F. Fasel, Judge

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**PETITION FOR REHEARING**

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TO THE HONORABLE DAVID G. SILLS, PRESIDING JUSTICE,  
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE FOURTH  
DISTRICT COURT OF APPEAL, DIVISION THREE:

Appellant respectfully petitions this court for rehearing after the issuance of its unpublished opinion in *People v. Jose Valentin Bello*, filed on June 21, 2004 (per Rylaarsdam, J.), pursuant to Rule 25 of the California Rules of Court. Rehearing is necessary because a new issue has arisen based upon the recent United States Supreme Court decision in *Blakely v. Washington* (June 24, 2004, No. 02-1632) 542 U.S. \_\_\_\_ [2004 U.S.Lexis 4573]. Specifically, appellant was denied his constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

In 2000, the United States Supreme Court issued its landmark decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] and held that “[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.” On June 24, 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington, supra*, 542 U.S. \_\_\_\_ [2004 U.S.Lexis 4573], further explaining its decision in *Apprendi*. The court stated, “Our precedents make clear, . . . , 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.” (*Blakely v. Washington, supra*, at pp. \*13-14.)

In *Blakely*, the defendant was sentenced to three years more than the statutory maximum of the standard range because the trial court found that the offense was committed with deliberate cruelty. (*Blakely v. Washington, supra*, at p. \*13.) The defendant had not admitted this fact, nor had it been found true by a jury. (*Ibid.*) The United States Supreme Court reversed, rejecting the government’s argument that *Apprendi* had not been violated because the statutory maximum was 10 years, and finding that the defendant’s Sixth Amendment rights had been violated when the trial court exceeded the statutory maximum of the standard range. (*Id.* at pp. \*13-15, 17.) Here, the court stated, “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 facts ‘which the law makes essential to the punishment,’ [citation omitted], and the judge exceeds his proper authority.” (*Id.* at p. \*14.) In *Blakely*, imposition of a sentence greater than the statutory maximum of the standard range required additional findings beyond those admitted in the guilty plea. (*Ibid.*) Thus, the United States Supreme Court concluded that the statutory maximum of the standard range under Washington law was the “statutory maximum” for *Apprendi* purposes. (*Id.* at pp. \*14-15.)

In the present case, appellant was sentenced to a total term of 10 years, 8 months plus an indeterminate term of 25 years to life. (2 C.T. pp. 411-412.) The determinate sentence was based, in part, upon the trial court's imposition of the upper term of 9 years for his conviction of Penal Code<sup>1</sup> section 288a, subdivision (d)(1) (count 7, oral copulation with force or bodily injury while acting in concert).

The punishment for a violation of section 288a, subdivision (d)(1) is five, seven, or nine years. (§ 288a, subd. (d)(1).) Under California law, a court is required to impose the presumptive middle term unless the circumstances in aggravation preponderate. (§ 1170, subd. (b).) Further, the court is required to set forth reasons on the record for imposing a mitigated or aggravated term. (§ 1170, subd. (c); California Rules of Court, rule 4.420(e).)

Here, the trial court imposed the upper term on count 7, finding that the victim was vulnerable. Because this finding resulted in imposition of a sentence greater than the statutory maximum the court could have imposed based solely upon the jury verdict, the presumptive middle term, the trial court violated appellant's Sixth Amendment right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

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<sup>1</sup> All future references are to the Penal Code unless otherwise specified.



## ARGUMENT

### I.

**REHEARING IS REQUIRED BECAUSE OF  
THE UNITED STATES SUPREME  
COURT’S RECENTLY ISSUED OPINION IN  
*BLAKELY V. WASHINGTON, SUPRA*, 542  
U.S. \_\_\_\_ [2004 U.S.LEXIS 4573].**

#### A. Introduction

Appellant was sentenced to a determinate term of 10 years, 8 months plus an indeterminate term of 25 years to life. (2 C.T. pp. 411-412.) The sentence was imposed in the following manner:

Count 1:	25 years to life;
Count 2:	Life with parole stayed pursuant to section 654;
Count 3:	Life with parole stayed pursuant to section 654;
Count 7:	9 years ( <b>upper term</b> );
Count 8:	3 years (middle term), concurrent;
Count 9:	5 years (middle term), concurrent;
Count 10:	2 years (middle term), concurrent;
Count 11:	8 months (one-third the middle term), consecutive;
Count 12:	3 years (middle term), concurrent, stayed pursuant to section 654.

(2 C.T. pp. 411-412.)

In sentencing appellant to the upper term on count 7, the court stated, “The court does select [the] aggravated term because of the vulnerability of the victim. So it is nine years aggravated on count VII.” (II R.T. p. 479.) Because this factual finding was not determined by a jury and proved beyond a reasonable doubt, and because it resulted in a sentence greater than the

statutory maximum under *Apprendi*, appellant's Sixth Amendment right to have a jury determine all the facts which are essential to his punishment was violated. (U.S. Const., 6<sup>th</sup> & 14<sup>th</sup> Amends.; Cal. Const., Art. I, §§ 7 & 16; *Blakely v. Washington, supra*, 542 U.S. \_\_\_\_ [2004 U.S.Lexis 4573]; *Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.)

**B. Apprendi and its progeny**

An accused is entitled to have a jury determine whether he or she is guilty of every element of the crime within which he or she is charged, beyond a reasonable doubt. (*Dillard v. Roe* (9<sup>th</sup> Cir. 2001) 2001 U.S. App. LEXIS 9730; *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) Consequently, if the trial judge, rather than the jury, makes the finding as to one of the elements of the charged crime, the defendant's constitutional rights have been violated. (*Dillard v. Roe, supra*, 2001 U.S.App.LEXIS at p. 35.)

“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.” (*Apprendi v. New Jersey, supra*, 530 U.S. 466.) *Apprendi* involved a New Jersey hate-

crime statute which authorized the court to impose a 10 to 20 year sentence, rather than a five to 10 year sentence, if the judge found by a preponderance of the evidence that the crime was committed “with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.” (*Id.* at pp. 468-469 quoting N. J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000).) Apprendi pled guilty to three separate counts (counts 3, 18, and 22), and it was agreed that the third count (count 22) would run concurrent to the sentence on the first two counts. (*Id.* at p. 471.) Thus, Apprendi’s plea subjected him to a maximum of 10 years on each of the first two counts (counts 3 and 18), for a total aggregate sentence of 20 years. (*Ibid.*) If, however, the court enhanced the sentence on count 18 under the hate-crime statute, then the maximum on that count would be 20 years, and the maximum for the two counts in aggregate would be 30 years. (*Ibid.*) At the sentencing hearing, the court found that Apprendi’s actions fell within the hate-crime statute and applied the enhancement to count 18. (*Id.* at p. 471.) Apprendi was sentenced to 12 years imprisonment on count 18, and to shorter concurrent sentences on the remaining counts. (*Ibid.*) The United States Supreme Court reversed, finding that imposition of a sentence greater than the 10 year term based upon facts not proven to a jury beyond a reasonable doubt violated

Apprendi's constitutional right to have a jury determine every element of the offense. (*Id.* at pp. 476-479, 491-492,497.)

That same year, the United States Supreme Court overruled *Watson v. Arizona* (1990) 497 U.S. 639, 649, a previous United States Supreme Court case in which the court held that a defendant was not entitled to a jury trial on the issue of whether certain enumerated aggravating circumstances existed justifying a death sentence, as opposed to a life sentence. (*Ring v. Arizona* (2002) 536 U.S. 584, 588-589, 591-593 [122 S.Ct. 2428, 153 L.Ed.2d 556].) The court held in *Ring* that a defendant is entitled to have a jury determine whether the aggravating factor exists because it operates as “the functional equivalent of an element of a greater offense.” (*Id.* at p. 609.) The court confirmed that the defendant is entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. (*Ibid.*)

On June 24, 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington, supra*, further explaining the application of *Apprendi* to our traditional determinate sentencing laws. The court summarized its ruling in the following manner,

By reversing the judgment below, we are not, as the State would have it, “finding determinate sentencing schemes unconstitutional.” . . . This case is not about whether

determinate sentencing is constitutional, only about how it can be implemented in a way that respects the *Sixth Amendment*.

(*Blakely v. Washington, supra*, at p. \*22.)

In *Blakely*, the defendant pled guilty to second degree kidnaping, as well as the domestic violence and firearm allegations. (*Blakely v. Washington, supra*, 542 U.S. \_\_\_\_ [2004 U.S.Lexis 4573, \*5]. Under Washington law, the statutory maximum sentence for second degree kidnaping is 10 years imprisonment. (Wash. Rev. Code Ann.<sup>2</sup> §§ 9A.40.030, subd. (3), & 9A.20.021, subd. (1)(b); *Blakely v. Washington, supra*, at p. \*6.) However, the Washington Sentencing Reform Act specified a standard range of 49 to 53 months for second degree kidnaping with a firearm. (Wash. Rev. Code Ann. §§ 9.94A.320, 9.94A.360, 9.94A.310, subd. (1), 9.94A.310, subd. (3)(b); *Blakely v. Washington, supra*, at p. \*6.) A judge is only authorized to impose a sentence greater than the standard range if it finds “substantial and compelling reasons for justifying the exceptional sentence.” (Wash. Rev. Code Ann. § 9.94A.20, subd. (2); *Blakely v. Washington, supra*, at p. \*6.) The act lists numerous aggravating factors which are illustrative, not exhaustive factors. (Wash. Rev. Code Ann. § 9.94A.390; *Blakely v. Washington, supra*,

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<sup>2</sup> Parts of Washington’s criminal code have been recodified and amended. Citations to the Washington’s criminal code are to provisions in effect at the time of sentencing.

at p. \*6.) “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.” (*Id.* at pp. \*6-7 quoting *State v. Gore* (2001) 143 Wn.2d 288, 315-316; 2 P.3d 262, 277, internal quotation marks omitted.) Further, when a trial court imposes a sentence greater than the standard range, it must set forth findings of fact and conclusions of law. (*Id.* at p. \*7.) An appellate court will reverse if it finds under a “clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence.” (*Ibid.*)

In *Blakely*, the trial court imposed a sentence of 90 months, three years more than the statutory maximum of the standard range, based upon its finding that the defendant had acted with “deliberate cruelty.” (*Blakely v. Washington, supra*, 542 U.S. \_\_\_\_ [2004 U.S.Lexis at p. \*7].) Facts supporting this finding were not admitted by the defendant, nor found true by a jury. (*Id.* at p. \*13.) The United States Supreme Court reversed the sentence, finding that sentence violated the defendant’s Sixth Amendment right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. (*Id.* at p. \*17.) Rejecting the government’s argument that the sentence did not violate the rule announced in *Apprendi* because the sentence did not exceed the statutory maximum of 10 years, the high court stated,

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*.

(*Id.* at p. \*13, italics original.)

Under Washington law, the trial court had no authority to impose the 90 month sentence solely on the basis of the facts admitted in the guilty plea.

(*Blakely v. Washington, supra*, 542 U.S. \_\_\_\_ [2004 U.S.Lexis at p. \*14].)

Rather, imposition of a sentence greater than the standard sentencing range required additional reasons outside of those used in computing the standard range sentence for the offense. (*Id.* at pp. \*14-15.) The court concluded,

The “maximum sentence” is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

(*Id.* at p. \*15.)

**C. *Apprendi* and *Blakely*'s application to California Determinate Sentencing Law.**

A court imposing sentence under a statute specifying three possible terms is required to impose the middle term “unless there are circumstances in aggravation or mitigation of the crime.” (§ 1170, subd. (b); *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785; California Rules of Court, rule 4.420(a).)

The court is required to set forth reasons on the record for imposing a

mitigated or aggravated term. (§ 1170, subd. (c); California Rules of Court, rule 4.420(e).) “[T]he court may not impose an upper term by using any fact of any enhancement upon which sentence is imposed under any provision of law.” (§ 1170, subd. (c).) Further, “[a] fact that is an element of the offense cannot be used to impose the upper term.” (California Rules of Court, rule 4.420(d).) Circumstances in aggravation and in mitigation must be established by a preponderance of the evidence. (California Rules of Court, rule 4.420(b).) A trial court’s sentence will not be overturned absent a clear showing the sentencing choice was arbitrary or irrational. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.)

California’s determinate sentencing law is analogous to the Washington sentencing statutes utilized in *Blakely*. Under California law, the presumption is in favor of the middle term, and a trial court need not state reasons for imposing the middle term. (*People v. Lobaugh, supra*, 188 Cal.App.3d at p. 786.) Thus, the middle term under California sentencing law is similar to the statutory standard range specified in the Washington statute. Similarly, the upper term in California’s sentencing scheme is like the 10 year maximum for class B felonies under Washington law. Both cannot be imposed unless the trial court makes *additional* findings of fact. These findings must go *beyond*

those admitted in the plea because they cannot involve elements of the admitted offense or admitted enhancements.

**D. The trial court violated appellant's constitutional right to a jury trial under *Apprendi* and *Blakely* when it imposed two years more than the maximum sentence based upon a finding which was not proven beyond a reasonable doubt and not found to be true by the jury.**

Under *Apprendi*, the “statutory maximum” for a violation of section 288a, subdivision (d)(1) is the presumptive middle term of seven years, a term which could have been imposed by the trial court based solely upon the jury verdict. (*Blakely v. Washington, supra*, 542 U.S. \_\_\_ [2004 U.S.Lexis at pp. \*13-14].) Here, the court sentenced appellant to the upper term of 9 years, two years more than the presumptive middle term, based upon its finding that the victim was vulnerable. (II R.T. p. 479.) This fact was not found true by the jury and was not proved beyond a reasonable doubt. Because this fact was used to increase appellant’s sentence beyond the “statutory maximum,” i.e. the presumptive middle term, appellant’s sentence violated appellant’s Sixth Amendment rights to have a jury determine beyond a reasonable doubt all elements of the offense.

**CONCLUSION**

Rehearing is necessary in order to determine the effect of the United States Supreme Court's recently issued opinion in *Blakely v. Washington*, *supra*, 542 U.S. \_\_\_\_ [2004 U.S.Lexis 4573] on appellant's sentence.

Respectfully submitted,

Dated: July 1, 2004

APPELLATE DEFENDERS, INC.

Lynelle K. Hee  
Attorney at Law  
Attorney for Appellant

## **CERTIFICATION OF WORD COUNT**

I, Lynelle K. Hee, hereby certify that, according to the computer program used to prepare this document there are 2,844 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 1, 2004, in San Diego, California.

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Lynelle K. Hee  
Staff Attorney

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**FOURTH APPELLATE DISTRICT**  
**DIVISION THREE**

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**PETITION FOR REHEARING**

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**DECLARATION OF SERVICE**

Case Name: JOSE VALENTIN BELLO

No. G032665

I declare:

I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is 555 West Beech Street, Suite 300, San Diego, California 92101-2939.

On July 23, 2004, I served the attached

**PETITION FOR REHEARING**

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego, California on July 23, 2004.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on July 23, 2004.

DOROTHY JIMENEZ  
(Typed Name)

\_\_\_\_\_  
(Signature)