

Petition for review by ADI staff attorney Lynelle Hee in *People v. Jeffrey Roe* (E034157)

SUPREME COURT NO. _____

__IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JEFFREY ROE,

Defendant and Appellant.

Court of Appeal
No. E034157

Superior Court
No. FBV3410

Appeal from the Superior Court of San Bernardino County

Honorable John P. Vander Feer, Judge

**APPELLANT'S PETITION FOR REVIEW AFTER THE
UNPUBLISHED DECISION OF THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO,
AFFIRMING THE JUDGMENT OF CONVICTION**

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE STATE OF CALIFORNIA:

Defendant and Appellant Jeffrey Roe, petitions for review following the unpublished decision of the Court of Appeal, Fourth Appellate District, Division Two (per Richli, J.), filed on May 19, 2004. A copy of the opinion is attached to this petition as Appendix "A."

ISSUES PRESENTED

1. Was appellant's federal constitutional right to have a jury determine beyond a reasonable doubt any fact, other than the fact of a prior conviction, which increases his sentence beyond the statutory maximum violated when he was sentenced to the upper term based upon facts the court found true by a preponderance of the evidence?

2. Was appellant's federal constitutional right to have a jury determine beyond a reasonable doubt any fact, other than the fact of a prior conviction, which increases his sentence beyond the statutory maximum violated when he was sentenced to consecutive terms on counts 5 and 6 based upon facts the court found true by a preponderance of the evidence?

NECESSITY FOR REVIEW

Review of the issue presented is necessary for the purpose of transferring the matter to the Court of Appeal to determine impact of the United States Supreme Court's recent decision in *Blakely v. Washington* (June 24, 2004, No. 02-1632) 542 U.S. ____ [2004 U.S.Lexis 4573] on the present case. (California Rules of Court, rule 28(b)(4).) Here, the trial court sentenced appellant to the upper term in count 2, the upper term for the firearm use enhancement, and consecutive terms on the remaining counts based upon facts the *court* determined were true by a *preponderance of the evidence* standard. This issue was not heard before the Court of Appeal because it predated the issuance of the court's decision in *Blakely*.

Appellant respectfully requests this court grant review and transfer the case back to the Court of Appeal under California Rules of Court, rule 29.3(d).

STATEMENT OF THE CASE

On March 10, 2003, a six count amended information was filed against Jeffrey Roe, appellant. (C.T. pp. 114-120.) Appellant was charged with attempted premeditated murder (count 1, Pen. Code,¹ §§ 187, 664), assault by a machine gun or assault rifle (count 2, § 245, subd. (a)(3)), making criminal threats (count 3, § 422), kidnapping (count 4, § 207, subd. (a)), discharge of a weapon with gross negligence (count 5, § 246.3), and maliciously cutting a utility line (count 6, § 591.) (C.T. pp. 114-119.) The information further alleged as to counts 1 through 5 that appellant personally used an assault rifle. (§ 12022.5, subd. (b)(2).) (C.T. pp. 114-119.) As to counts 1, 2, and 4, the information alleged that appellant personally used a firearm (§§ 12022.5, subd. (a)(1) [counts 1, 2 & 4], 12022.53, subd. (b) [counts 1 & 4]). (C.T. pp. 114-118.)

On May 14, 2002, appellant entered dual pleas of not guilty and not guilty by reason of insanity. (C.T. p. 72; AUG R.T. pp. 1-5.) In addition, criminal proceedings were suspended. (C.T. p. 72.) A section 1368 court trial was held; appellant was found competent to stand trial. (C.T. p. 89.)

¹ All future references are to the Penal Code unless otherwise specified.

On March 11, 2003, appellant withdrew his plea of not guilty by reason of insanity. (C.T. p. 124.) The jury trial began on March 11, 2003. (C.T. p. 124.) On March 20, 2003, the court dismissed the personal use allegations attached to count 4 (§ 1118.1). (C.T. p. 145.) On March 26, 2003, the jury returned verdicts finding appellant guilty of counts 2, 5, and 6, and the personal use allegations attached to count 2. (C.T. pp. 276-278, 280-281, 309.) The jury acquitted appellant on count 4 and deadlocked on counts 1 and 3. (C.T. pp. 279, 309.) The court ordered the personal use allegations attached to count 5 stricken and declared a mistrial on counts 1 and 3. (C.T. p. 309.)

Appellant was sentenced to a total term of 23 years, 4 months in state prison.² (C.T. p. 316.) The prosecution's motion to dismiss counts 1 and 3 was granted. (C.T. p. 317.)

Appellant filed a notice of appeal. (C.T. p. 319.) On May 19, 2004, the Court of Appeal affirmed the judgment and sentence.

² Appellant was sentenced as follows: count 2: 12 years (upper term); count 5: 8 months (one-third the mid term), consecutive; count 6: 8 months (one-third the mid term), consecutive. The court imposed an additional 10 years in state prison for the section 12022.5, subdivision (b), enhancement. The sentence on the section 12022.5, subdivision (a), enhancement was stayed pursuant to section 654. (C.T. p. 316.)

STATEMENT OF THE FACTS

Appellant was sentenced to a total term of 23 years, 4 months in state prison. (III R.T. p. 792.) The sentence was imposed in the following manner:

Count 2: 12 years, upper term;
Count 5: 8 months, consecutive;
Count 6: 8 months, consecutive;
Section 12022.5, subdivision (b) enhancement: 10 years, upper term, consecutive.

(C.T. p. 316.)

The trial court imposed the upper term for count 2 finding that the crime involved great violence and appellant engaged in violent conduct which indicates a serious danger to society. (III R.T. pp. 787, 789.) The court imposed the upper term for the firearm enhancement, finding that the manner in which the crime was carried out indicated planning and appellant was on a grant of summary probation while the violence was committed. (III R.T. pp. 788-789.)

In choosing to sentence appellant to consecutive terms on counts 5 and 6, the court found that the objectives of the crimes were predominantly independent of each other, the crimes were committed at different times and places, and the crimes involved separate acts of threats or violence. (III R.T. p. 791.)

ARGUMENT

I.

PURSUANT TO THE UNITED STATES SUPREME COURT'S RECENTLY ISSUED OPINION IN *BLAKELY V. WASHINGTON* (JUNE 24, 2004, NO. 02-1632) 542 U.S. ____ [2004 U.S.LEXIS 4573], APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO HAVE A JURY DETERMINE BEYOND A REASONABLE DOUBT ALL FACTS LEGALLY ESSENTIAL TO SENTENCE WHEN THE TRIAL COURT SENTENCED HIM TO A TOTAL OF 9 YEARS, 4 MONTHS MORE THAN THE STATUTORY MAXIMUM SENTENCE.

A. Introduction

On June 24, 2004, the Supreme Court of the United States decided *Blakely v. Washington* (June 24, 2004, No. 02-1632) 542 U.S. ____, [2004 U.S.LEXIS 4573]. The court's decision in *Blakely* renders unconstitutional portions of California's determinate sentencing scheme, including (1) the provision of section 1170, subdivision (b) which authorizes judges, not juries to make factual findings in connection with aggravating factors used to impose the upper term, (2) California Rules of Court, rule 4.420(b) providing that circumstances in aggravation be proved by a preponderance of the evidence, and (3) section 669 and California Rules of Court, rule 4.425 permitting

judges, not juries to make factual findings in connection with aggravating factors to impose consecutive sentences.

In the present case, appellant was sentenced to the upper term of 12 years in state prison on count 2, and the upper term of 10 years for the firearm enhancement based upon factors not found true by a jury or admitted by appellant. (C.T. pp. 74-75; R.T. p. 16.) The trial court imposed the upper term for count 2 finding that the crime involved great violence and appellant engaged in violent conduct which indicates a serious danger to society. (III R.T. pp. 787, 789.) The court imposed the upper term for the firearm enhancement, finding that the manner in which the crime was carried out indicated planning and that appellant was on a grant of summary probation while the violence was committed. (III R.T. pp. 788-789.) The court further imposed consecutive sentences on counts 5 and 6, finding that the objectives of the crimes were predominantly independent of each other, the crimes were committed at different times and places, and the crimes involved separate acts of threats or violence. (III R.T. p. 791.) None of these facts were found true by the jury.

The sentencing court further erred in applying the incorrect standard of proof to determine the truth of the aggravating factors. Here, the court applied the preponderance standard rather than requiring proof beyond a reasonable

doubt. (See Evid. Code, § 664 ["[i]t is presumed that official duty has been regularly performed"]; California Rules of Court, rule 4.420 ["[c]ircumstances in aggravation and mitigation shall be established by a preponderance of the evidence".]) Because these factual findings were not determined by a jury and proved beyond a reasonable doubt, and because they resulted in a sentence greater than the statutory maximum under *Apprendi*, appellant's Fifth, Sixth Amendment right to have a jury determine beyond a reasonable doubt all the facts which are essential to his punishment was violated. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., Art. I, §§ 7 & 16; *Blakely v. Washington, supra*, 542 U.S. ____ [2004 U.S.Lexis 4573]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

B. Appellant had a federal constitutional right to have a jury determine beyond a reasonable doubt any aggravating factors used to impose the upper term or a consecutive sentence.

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. (*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]; *Dillard v. Roe* (9th Cir. 2001) 2001 U.S. App. LEXIS 9730.) In the seminal case of *Apprendi v. New Jersey*

(2000) 530 U.S. 466, the Supreme Court of the United States held that there is a federal constitutional right to a jury trial and proof beyond a reasonable doubt "for any fact (other than prior conviction) that increases the maximum penalty for a crime." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 476 quoting *Jones v. United States* (1999) 526 U.S. 227, 243 fn. 6., internal quotation marks omitted.) In light of *Blakely*, it is now apparent that there is a federal constitutional right to a jury trial and proof beyond a reasonable doubt, on non-recidivist aggravating factors used to impose the upper term under the Determinate Sentencing Law.

1. *The right to a jury trial and proof beyond a reasonable doubt applies to facts used to impose a sentence above the statutory maximum.*

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." (*Apprendi v. New Jersey, supra*, 530 U.S. 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 maximum sentence for second degree kidnaping is 10 years imprisonment. (Wash. Rev. Code Ann.³ §§ 9A.40.030, subd. (3), & 9A.20.021, subd. (1)(b);

³ 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.

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*, 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.)

2. *Under California's Determinate Sentencing Law, the statutory maximum under Apprendi is the middle term with concurrent sentences because imposition of a sentence greater than the middle term or consecutive sentences requires that the court find additional aggravating facts.*

Under California’s Determinate Sentencing Law (DSL), section 1170, subdivision (b) provides, with emphasis added, that “[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall* order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (§ 1170, subd. (b); *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785; California Rules of Court, rule 4.420(a).) Section 669 provides, “When any person is convicted of two or more crimes, . . . the second or other subsequent judgment upon which sentence is order to be executed shall direct whether the terms of imprisonment . . . shall run concurrently or consecutively.” Where no such order is made, the term of imprisonment on the second or any subsequent judgment **shall** run concurrently. (§ 669.) In determining whether to impose concurrent or consecutive sentences, California Rules of Court, rule 4.425 sets

out three criteria to be considered in addition to any other aggravating or mitigating factors.

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).) The court may not impose an upper term or consecutive sentence by using any fact of any enhancement upon which sentence is imposed under any provision of law. (§ 1170, subd. (c); California Rules of Court, rule 4.425(b).) Further, “[a] fact that is an element of the offense cannot be used to impose the upper term” or impose a consecutive sentence. (California Rules of Court, rules 4.420(d) & 4.425(b).) Finally, circumstances in aggravation and in mitigation must be established by a preponderance of the evidence. (California Rules of Court, rule 4.420(b).)

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 or ordering a concurrent sentence. (*People v. Lepe* (1987) 195 Cal.App.3d 1347, 1350; *People v. Lobaugh, supra*, 188 Cal.App.3d at p. 786.) The middle term and concurrent sentencing under California sentencing law is the equivalent of the statutory standard range specified in the Washington statute. Similarly, the upper term and consecutive sentencing in

California's sentencing scheme is like the 10 year maximum for class B felonies under Washington law. They cannot be imposed unless the trial court makes *additional* findings of fact which must go *beyond* those admitted in the plea because they cannot involve elements of the admitted offense or admitted enhancements. Consequently, under the Sixth Amendment reasoning of *Blakely* and *Apprendi*, a defendant is entitled to jury determination of any such aggravating circumstance used to impose an upper term or a consecutive sentence. Further, *Blakely* and *Apprendi* make clear that these additional facts must be proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 476; *Blakely v. Washington, supra*, at p. *17.)

3. *The trial court violated appellant's constitutional rights under Apprendi and Blakely when it imposed a total of 9 years, 4 months more than the statutory maximum sentence based upon findings which were not found true by a jury or admitted by appellant and not proven beyond a reasonable doubt.*

A violation of section 245, subdivision (a)(3) is punishable by 4, 8, or 12 years in state prison. (§ 245, subd. (a)(3).) Any person who personally uses an assault weapon in the commission of a felony shall be punished by a consecutive term of 5, 6, or 10 years in state prison. (§ 12022.5, subd. (b).) Under *Apprendi*, the "statutory maximum" for a violation of section 245, subdivision (a)(3) is the presumptive middle term of 8 years, the 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].) Similarly, the statutory maximum for the section 12022.5, subdivision (b) enhancement is 6 years, a term which could have been imposed based solely upon the jury verdict. Here, the court sentenced appellant to the upper term of 12 years on count 2 and 10 years on the firearm enhancement, a total of 8 years more than the presumptive middle term, based upon its additional findings. (III R.T. pp. 787-792.) The court further sentenced appellant to a consecutive sentence of 8 months on counts 5 and 6, a total of 16 months more than the statutory maximum, based upon its additional findings. (III R.T. p. 791.) Reliance on these facts was improper as they were not found true by the jury or admitted by appellant and were not proved beyond a reasonable doubt.

Further, the trial court erred in applying the wrong burden of proof. Under California law at the time the sentencing hearing was conducted, factors in aggravation and mitigation had to be proven by a preponderance of the evidence. (*People v. Scott* (1994) 9 Cal.4th 331,349; California Rules of Court, rule 4.420(b).) Although the sentencing court did not expressly state what standard of proof it was applying, from its silence this court must presume that it applied the standard in effect at the time the sentencing hearing occurred. (Evid. Code, § 664.) The trial court's application of the preponderance standard to factors used to enhance appellant's sentence beyond

the statutory maximum under *Apprendi* violated appellant's constitutional right to have each fact essential to his punishment proved beyond a reasonable doubt.

C. **Sentencing appellant to the upper term based upon facts not found true by a jury beyond a reasonable doubt resulted in structural error.**

The error resulted in a “structural defect,” not amenable to harmless error review, because the appellant was denied his right to have a jury determine the truth of the aggravating facts and because the incorrect standard of proof was applied. (Cf. *Sullivan v Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182].) In *Sullivan*, the United States Supreme Court concluded that the trial court’s erroneous reasonable doubt instruction, which resulted in application of a lower standard of proof, was structural error because the jury verdict was not based upon proof beyond a reasonable doubt. (*Id.* at p. 280.) Similarly, in the present case, there is no verdict—by judge or jury— based upon proof beyond a reasonable doubt.

Further, the *Apprendi-Blakley* majority has made abundantly clear that a *jury* determination is necessary, and that the failure to present the determining fact to the jury for a finding is structural error. Justice Scalia wrote: “Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to *the right*

of jury trial. That right is no mere procedural formality, but *a fundamental reservation of power in our constitutional structure*.” (*Blakely, supra*, at p. *18, emphasis added.) Justice Scalia continued, “*Apprendi* carries out this design by ensuring that the judge’s authority to sentence derives *wholly* from the jury’s verdict.” (*Blakely, supra*, at p. *19, emphasis added.)

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

However, in this case, no jury was seated for appellant’s sentencing—which, under *Blakely*, is now better described as a penalty trial—and none of the aggravating facts were decided by a jury. Further, the

trial court applied an incorrect standard of proof, preponderance of the evidence as opposed to proof beyond a reasonable doubt. Because appellant was denied a jury verdict on multiple aggravating facts, and because the incorrect standard of proof was applied, the error is structural and automatically reversible.

CONCLUSION

Review is necessary to transfer the cause to the Fourth District Court of Appeal, Division Two, to determine the impact of the United States Supreme Court's recent decision in *Blakely v. Washington* upon the present case.

Respectfully submitted,

Dated:

APPELLATE DEFENDERS, INC.

Lynelle K. Hee
Staff Attorney
Attorney for Petitioner

CERTIFICATION OF WORD COUNT

I, Lynelle K. Hee, hereby certify that, according to the computer program used to prepare this document, defendant's Petition For Review contains 4,379 words.

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

Lynelle K. Hee
Staff Attorney

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APPENDIX “A”
COURT OF APPEAL OPINION

DECLARATION OF SERVICE

Case Name: JEFFREY ROE

No. E034157

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 REVIEW

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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Superior Court
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Division Two
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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)

