

Respondent's brief in People v. Ricardo Gonzales, G033272.

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,

G033272

v.

**RICARDO MENDOZA GONZALEZ**

Defendant and Appellant

**THE IMPOSITION OF THE UPPER TERM WAS CONSTITUTIONAL**

Relying on *Blakely v. Washington* (2004) \_U.S.\_[124 S. Ct. 2531, 2004 WL 1402697, 2004 Daily Journal D.A.R. 7581], appellant claims his upper term sentence was imposed in violation of his Sixth Amendment right to a jury trial and his Fifth Amendment right to due process (Supp. AOB 1-12.) However, *Blakely* does not affect the judicial imposition of upper term sentences under California's determinate sentencing law. Therefore, appellant's sentence is constitutional. Moreover, appellant has waived any *Blakely* claim.

**A. Blakely v. Washington**

\_\_\_\_\_ In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348; 147 L.Ed.2d 435]

(“*Apprendi*”) the United States Supreme Court held,

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. at p. 490.) In *Blakely v. Washington* (2004) \_U.S.\_ [124 S.Ct. 2531, 2536-2542, 2004 WL 1402697, 2004 Daily Journal D.A.R. 7581], the Court extended *Apprendi* to apply to the imposition of an “exceptional” sentence under Washington state law. The Court held that the trial court violated the defendant’s Sixth Amendment right to a jury trial when it sentenced him to a 90-month “exceptional” sentence, which was 37 months beyond the crime’s “standard range” of 49 to 53 months. (*Id.* At pp. 2535, 2537-2538.) The trial court imposed the exceptional sentence because it found the defendant had acted with deliberate cruelty, a statutorily-enumerated ground for imposing a sentence exceeding the standard range. (*Id.* at p. 2535.) The Supreme Court reasoned that 53 months was the statutory maximum for *Apprendi* purposes because it was “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*, 124 S.Ct. At p. 2537, original italics.) Because the jury in *Blakely* did not find beyond a reasonable doubt the fact supporting the trial court’s upward departure from the 53-month statutory maximum, the Court concluded that the defendant was denied his right to a jury trial. (*Id.* at pp. 2537-2538.)

## **B. Forfeiture**

Unlike appellant, the defendant in *Blakely* objected when the court imposed the “unexpected increase” to his sentence. (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2535.) We submit that the lack of such an objection forfeited appellant’s present claims of error.

“[T]he right to challenge a criminal sentence on appeal is not unrestricted.” (*People v. Scott* (1994) 9 Cal.4th 331, 351.) “No procedural principle is more familiar to this Court than

that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” (*People v. Saunders* (1993) 5 Cal.4th 580, 590, quoting *United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 11770; 123 L.Ed.2d 508], internal quotation marks omitted.) Similarly, “a criminal defendant cannot argue for the first time on appeal that the court . . . aggravated a sentence based on items contained in a probation report that were erroneous or otherwise flawed. [Citation.]” (*People v. Scott, supra* 9 Cal.4th at pp. 351-352.) Assuming for the sake of argument that *Blakely* applies to California’s determinate sentencing law, a court could still consider any circumstance that was either found by the jury or admitted by the defendant. Accordingly, appellant’s argument that the court erred under *Blakely* is essentially a claim that the court considered flawed sentencing factors when it based its sentencing choices on factors he did not admit and that the jury did not find. Since the probation report sufficiently described the aggravating sentencing factors, and since appellant did not request a jury determination or otherwise object to the reasons the court gave for the sentence, his claim falls within those subject to forfeiture. (See CT 175; RT 640.)

The fact that *Blakely* was not decided until after appellant’s sentencing hearing should not preclude a finding of forfeiture. In *United States v. Cotton* (2002) 535 U.S. 625 [122 S.Ct. 1781; 152 L.Ed.2d 860], the Court found that the federal defendants had forfeited their *Apprendi* claims by not objecting at trial that *Apprendi* was decided while the defendants’ case was on appeal.<sup>1</sup>

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<sup>1</sup> Having found the claim forfeited, the Court considered the “plain error” forfeiture exception found in Federal Rule of Criminal Procedure 52(b). (*United States v. Cotton, supra*, 535 U.S. at pp. 631-634.) Since the “plain error” standard is a product of the federal appellate procedure, it does not apply to the state appeal here. Nonetheless, we note that the Court found the defendants in *Cotton* unentitled to relief even under the relaxed forfeiture exception for “plain errors” because the error did not “seriously affect the fairness, integrity, or public reputation of judicial proceedings.” (*Id.* at p. 633-634.) The evidence supporting the challenged enhancement

(*Id.* at pp. 628-629, 631.)

### C. Upper Terms

*Blakely v. Washington* 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.” (*Blakely v. Washington, supra*, 124 S.Ct., at p. 2536.) Driving the *Blakely* Court’s constitutional ruling was the premise that a defendant charged with a specific offense must not only have notice of the sentencing range legislatively mandated for that particular offense, but must also have the right to a jury determination of the facts subjecting him to that sentencing range:

Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with “deliberate cruelty.” The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to “the unanimous suffrage of twelve of his equals and neighbors,” 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

(*Blakely v. Washington, supra*, 124 S.Ct. at p. 2543; see also *id.* at p. 2542 [“[a]ny 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,

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was “overwhelming” and “essentially uncontroverted.” (*Id.* at p. 633.) “Indeed, the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments. The real threat then to the ‘fairness, integrity, and public reputation of judicial proceedings’ would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial. [Citation.]” (*Id.* at p. 634.)

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”], citation and footnote omitted.)

It was in that context that the *Blakely* majority defined the “statutory maximum” for Sixth Amendment purposes 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*, 124 S.Ct. at p. 2537, italics in original.)

In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” [citation], and the judge exceeds his proper authority.

(*Ibid.*, italics in original.)

It is important to understand, however, that the *Blakely* majority took pains to deny that its holding eliminated all discretionary fact-finding in sentencing. In responding to Justice O’Connor’s criticism that *Blakely*’s holding ironically served to validate full-blown exercises of judicial discretion under an indeterminate sentencing regime, while invalidating determinate sentencing regimes that limit such discretion, the majority explained that the salient Sixth Amendment concern was not the existence or extent of sentencing discretion, but whether the judicial fact-finding increased the penalty above the offense-specific maximum set by the legislature:

Of course indeterminate schemes involve judicial fact-finding, in that a judge . . . may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.

(*Blakely v. Washington, supra*, 124 S.Ct. At p. 2540, italics in original.)

As the Court’s illustrative hypothetical makes clear, a judicial finding as to a particular fact to increase the term of punishment is constitutional when the ultimate sentence is within the offense-specific sentencing range. However, that very same judicial finding violates the Sixth Amendment when it empowers a judge to increase the sentence above the offense-specific maximum:

In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence – and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

(*Blakely v. Washington, supra*, 124 S.Ct. At p. 2540, italics in original.) That is, the *Blakely* holding means that the Legislature, not the courts, must set the sentencing range for each offense.<sup>2</sup>

In other words, the *Blakely* Court sought to identify statutory enhancements that are masquerading as factors left to the sentencing judge’s discretion. To assert that *Blakely* eliminated “the sentencing court’s historic discretion to choose a sentence within the broad range established by the crime’s statutory . . . minimum and maximum” requires an unnecessarily

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<sup>2</sup> Writing in dissent, Judge Easterbrook of the Seventh Circuit made this same point in the context of a *Blakely* challenge to the federal Sentencing Guidelines:

The [*Blakely*] Court considered whether there would be a constitutional problem with open-ended sentencing, such as a statute allowing any person convicted of burglary to be sentenced to any term of years up to 40. [Citation.] If the law left that decision to the judiciary, the court said, there would be no problem even if the sentencing judge applied (as a matter of common law) the rule “10 years unless the burglar uses a gun; if a gun, then 40 years.” Put that algorithm in a statute and the sixth amendment commits to the jury the question whether the burglar was armed; put the same algorithm in a judicial opinion and the sixth amendment allows the judge to make the decision. The Court saw this not as an “evasion” but as a natural application of the Constitution.

(*United States v. Booker* (7<sup>th</sup> Cir., July 9, 2004, No. 03-4225) \_\_F.3d\_\_, 2004 WL 1535858, at p. \*9 (dis. opn. of Easterbrook, J.).)

expansive reading of its holding. (*United States v. Pineiro* (5<sup>th</sup> Cir. July 12, 2004, No. 03-30437) \_\_F.3d\_\_, 2004 WL 1543170 at \*5; compare *United States v. Ameline* (9<sup>th</sup> Cir., July 21, 2004, No. 02-30326) \_\_F.3d\_\_, 2004 WL 1635808 at p. \*4 [describing *Blakely* as having effected a “sea change” in sentencing law].) As Judge Easterbrook explained, it remains true after *Blakely* that “[o]nce the jury has determined the degree (and the statutory consequences) of the offense, both judges and executive officials constitutionally may take part in determining how much of the statutory maximum the defendant serves in prison.” (*United States v. Booker* (7<sup>th</sup> Cir., July 9, 2004, No. 03-4225) \_\_F.3d\_\_, 2004 WL 1535858, at p. \*10 (dis. opn. of Easterbrook, J.).) Indeed, as Judge Posner’s majority opinion conceded, nothing in *Blakely* undercut the Supreme Court’s prior recognition that the legislature may properly delegate to the judiciary (or even an administrative agency) the task of regularizing judges’ discretion in picking a sentence within a statutory range.<sup>3</sup> (*United States v. Booker, supra*, 2004 WL 1535858 at p. \*2, citing *Mistretta v. United States* (1989) 488 U.S. 361, 395 [109 S.Ct. 647; 102 L.Ed.2d 714].)

A comparison of appellant’s upper-term sentence under California’s determinate sentencing laws with *Blakely*’s “exceptional sentence” under Washington law (not to mention Justice Scalia’s burglary hypothetical) shows that the former amounts to a legitimate exercise of

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<sup>3</sup> In *United States v. Penaranda* (2d Cir., July 12, 2004, Nos. 03-1044, 03-1062) \_\_F.3d\_\_ 2004 WL 1551369 (en banc), the Second Circuit set forth the competing interpretations as to *Blakely*’s application to the Sentencing Guidelines, and certified the issue to the Supreme Court. Of course, this Court is not bound by the decisions of the lower federal courts (e.g., *People v. Cleveland* (2001) 25 Cal.4th 466, 480), and respondent does not contend that the constitutionality of California’s upper-term sentences depends on the constitutionality of the federal Guidelines. In fact, the Guidelines bear more than a passing resemblance to sentence enhancements: A federal sentencing court’s factual findings entail prescribed increases (or decreases) in a defendant’s base term. In contrast, under California law, a defendant’s base term does not change: “Base term” is defined as “the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed.” (Cal. Rules of Court, rule 4.405.)

sentencing discretion – not the effective punishment for a separate offense. Under Washington’s sentencing scheme, the legislature enacted a standard guideline range of sentences for each offense, but superimposed a separate statutory regime of general applicability that allowed for departures from the standard guideline range. (*Blakely v. Washington, supra*, 124 S.Ct. At p. 2535.) In effect, the Washington state legislature empowered sentencing courts to turn any felony into an aggravated offense at their discretion. (*United States v. Pineiro, supra*, 2004 WL 1543170 at p. \*9 [“t]he sentencing scheme at issue in *Blakely*, like that involved in *Apprendi*, essentially established two distinct statutory maximum sentences, with the choice between them turning on judge-made findings of fact. In such a circumstance, it makes sense to say that the legislature has effectively created distinct offenses. [fn.]”].)

*Blakely* requires this Court to determine whether the jury’s verdict, standing alone, either *allowed* the trial court to impose an upper term or gave appellant the *right* to a mid-term sentence. (See *Blakely v. Washington, supra*, 124 S.Ct. at pp. 2537-2540.) California Supreme Court precedent answers the first question affirmatively and the second negatively. Under our state’s Determinate Sentencing Act, “[w]here imprisonment is imposed, the court typically selects a lower, middle, or upper tem as the base term for the underlying offense.” (*People v. Scott, supra* 9 Cal.4th at p. 349.) Pursuant to California Penal Code section 1170, subdivision (a)(3), upon conviction, the courts shall impose a sentence of *any* one of the three specified terms of imprisonment prescribed for the offense of conviction.

The choices of whether to impose “the lower or upper tem instead of the middle term of imprisonment” and to impose “consecutive rather than concurrent sentences” are committed to the sentencing court’s “broad discretion to tailor the sentence to the particular case.” (*People v. Scott, supra* 9 Cal.4th at p. 349.) As directed by the Legislature, the Judicial Council has

promulgated rules to guide those choices. (*Ibid*; see Pen. Code §§ 1170, subd. (a)(2), 1170.3; Cal.Rules of Court, rules 4.401, 4.403, 4.406; *People v. Wright* (1982) 30 Cal.3d 705, 709-713.) Again, there is nothing constitutionally suspect about the legislature's delegating to the judiciary or subservient agency the task of regularizing judges' discretion in picking a sentence within a statutory range. (*Mistretta v. United States*, *supra*, 488 U.S. at p. 395; *United States v. Booker*, *supra*, 2004 WL 1535858 at p. \*2; cf. *United States v. Pineiro*, *supra*, 2004 WL 1543170 at p. \*9 [finding that "the better view," consistent with Supreme Court and federal circuit court precedent, "is that the relevant 'offenses' and the 'maximum punishments' are those defined and authorized by Congress in the United States Code. Judicial findings under the Guidelines that set sentences within that authorized range therefore do not offend the Constitution."].)

The Supreme Court's holding in *People v. Scott*, belies the notion that appellant had a legal "right" to the mid-term sentence upon conviction. The *Scott* court held that a defendant waived all claims of sentencing error by failing to interpose a timely objection, save claims as to "unauthorized" sentences. (*People v. Scott*, *supra*, 9 Cal.4th at pp. 353-354.) Consistent with longstanding precedent, sentences that violate "mandatory provisions governing the length of confinement" are considered unauthorized. Such sentences occur when the court selects a term other than the lower, middle, or upper term. (*People v. Scott*, *supra*, 9 Cal.4th at p. 356.) However, a court's erroneous choice as to one of the three prescribed terms is not considered to be unauthorized. (*Id.* at p. 356, fn. 18 ["defects in the court's discretionary sentencing choices and statement of reasons do not result in an 'unauthorized sentence'"].) That is, upon conviction, a defendant does not have a legal right to anything other than one of the three specified terms. If one of those terms is imposed, a defendant can merely seek review on the ground that the court abused its discretion in making a particular choice. (See *id.* at p. 354 ["[i]n essence, claims

deemed waived on appeal involve sentences which, though *otherwise permitted by law*, were imposed in a procedurally or factually flawed manner”], italics added.)

Appellant attempts to rely on the legislative directive that when three possible prison terms are predicated on conviction for a given offense, “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (See Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).) However, the mere fact that the Legislature has imposed a presumptive mid-term sentence, designed to promote the policy goals of eliminating sentencing disparity and promoting uniformity of sentences,<sup>4</sup> does not mean that it has effectively created separate, enhanced crimes containing the myriad, non-exclusive sentencing factors enumerated in the Rules of Court. (See Cal. Rules of Court, rules 4.408, 4.421, 4.423.)

More fundamentally, section 1170, subdivision (b), must be read in context. The judicial fact-finding predicated under that provision is intended to be a discretionary determination of the proper term within the sentencing range for the particular offenses. (*People v. Scott, supra*, 9 Cal.4th at 349.) Indeed, the Legislature expressly found that its sentencing policy goals “can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.”<sup>5</sup>

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<sup>4</sup> The *Blakely* court expressly recognized those policies as “salutary objectives.” (*Blakely v. Washington, supra*, 124 S.Ct. At p. 2540.)

<sup>5</sup> While California Rule of Court, rule 4.420(b), refers to the establishing of aggravating and mitigating facts by a preponderance of the evidence, the ultimate sentencing determination is not meant to be the analogue, much less the equivalent, of jury fact-finding. As the Advisory Committee Comment states: “Determining whether circumstances in aggravation or mitigation preponderate is a qualitative, rather than a quantitative, process. It cannot be determined by simply counting identified circumstances of each kind.” The sentencing factors, thus, merely inform and circumscribe the sentencing court’s discretion within the statutory range.

(Pen. Code, § 1170, subd. (a).)

In sum, determinate sentencing schemes comply with *Blakely* where, as in California, the legislature sets a maximum, offense-specific penalty, so long as the defendant receives a sentence that is not greater than that maximum. California's system does not suffer from the same constitutional flaws as Washington's. California's legislature created a triad system in which every offense has an associated lower, middle, and upper term, of which a defendant necessarily has notice and a full understanding that he has a legal right to receive no more than one of those three terms, absent an additional jury finding. Nor does California have a generalized departure statute allowing for a greater sentence to be imposed above the statutorily-mandated triad associated with every offense.

Instead, California has a system of enhancements and alternate sentencing schemes, by which a sentence can be extended beyond the standard range imposed by the Legislature. Critically, under California law, sentence enhancements and alternate sentencing schemes that have the potential to elevate a defendant's sentence beyond the standard range statutorily assigned to a given offense must be pled and proven to the jury beyond a reasonable doubt. (See, e.g., Pen. Code, § 1170.1, subd. (e) [enhancements], and Pen. Code, §§ 1025, 1158 [prior conviction allegations].) Accordingly, California satisfies *Blakely's* requirement that, before a defendant can be sentenced outside the standard range identified by the Legislature as appropriate for a particular offense, a jury must find beyond a reasonable doubt that the defendant is eligible for an enhancement or alternative scheme that exposes the defendant to a higher sentence. As appellant received one of the three legislatively authorized terms for his offense of conviction, no Sixth Amendment violation occurred.

#### **D. Harmless Error**

Since *Blakely* is an extension of *Apprendi*, it should be subject to the same standard of reversible error. *Apprendi* error does not warrant relief if it is harmless beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327; *Campbell v. United States* (6<sup>th</sup> Cir. 2004) 364 F.3d 727, 737; *United States v. Sanchez* (11<sup>th</sup> Cir. 2001) 269 F.3d 1250, 1272-1273; *Chamberlain v. Pliler* (C.D.Cal. 2004) 307 F.Supp. 2d 1128, 1143; see also *Neder v. United States* (1999) 527 U.S. 1, 19 [119 S.Ct. 1827; 144 L.Ed.2d 35] [failure to instruct on all elements of offense is subject to harmless-error analysis].)

There is, however, a wrinkle under California law. “A single factor in aggravation will support imposition of an upper term. [Citation.]” (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) In addition, a court’s consideration of improper sentencing factors under state law is reviewed only for a miscarriage of justice. “When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.” (*People v. Price* (1991) 1 Cal.4th 324, 492.) “[H]ad [the court] been aware of its reliance on improper considerations, it is reasonable to conclude that it would simply have realigned its statement of factors in order to use the proper circumstance to support its selection of the upper term on the enhancement.” (*People v. Edwards* (1993) 13 Cal.App.4th 75, 80, overruled on other grounds in *People v. Hall* (1994) 8 Cal.4th 75, 80, overruled on other grounds in *People v. Hall* (1994) 8 Cal.4th 950, 964, fn. 9.) The same miscarriage of justice standard applies when the trial court fails to state the reasons for its sentencing choices. (*People v. Coelho* (2001) 90 Cal.App. 4<sup>th</sup> 861, 889; *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1300-1301.)

Assuming *Blakely* applies to the imposition of upper terms under California's determinate sentencing law, the jury's finding of a single factor in aggravation would support the imposition of an upper term. What *Blakely* makes clear is that the federal constitutional requirement identified in that case looks solely to whether the fact or facts which render the defendant *eligible* for an enhanced or aggravated sentence have been proved to the jury. The *Blakely* Court explained that the Constitution defines the "statutory maximum" as the maximum sentence the trial court *may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* (*Blakely v. Washington, supra*, at p. 2537, first italics added.) The constitutional test set out in *Blakely* focuses on the judge's *authority* to impose an enhanced sentence" and the Court drew no distinction between systems in which the defendant's eligibility for "an enhanced sentence depends on a finding of a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* facts (as here)." (*Id.* At p. 2538, italics added.)<sup>6</sup>

Critical to the instant inquiry, under California law, a single factor is sufficient to support the imposition of an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) What this means is that the presence of a single factor in aggravation renders a defendant *eligible* for the upper term and provides the trial court with the statutory *authority* to impose the upper term, irrespective of what term the court ultimately imposes after conducting the requisite balancing. Thus, a jury verdict as to *one* aggravated factor beyond a reasonable doubt before a defendant can be exposed to the enhanced sentence. Once this constitutional requirement is satisfied, the state statutory scheme becomes the only controlling authority limiting the court's ability to impose an appropriate sentence, including an upper term, and under the state statutory scheme, the court can

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<sup>6</sup> Indeed, the Court expressly pointed out that under Washington's scheme, "the judge acquires that authority [to impose an exceptional sentence] only upon finding some additional fact." (*Blakely v. Washington, supra*, at p. 2538, fn. 7.)

consider any other factors found by a preponderance, as well as mitigating factors found by a preponderance.

In such a case, the upper term would become the “maximum sentence” for constitutional purposes under *Blakely* because the court *may impose* the upper term without making any other findings of fact. (See *Blakely v. Washington, supra*, 124 S.Ct. At p. 2537.) Although *Blakely* would continue to restrict the factors that the court could consider in imposing a sentence above and beyond the top of the triad associated with an offense, it would not restrict the factors that the court could consider in deciding whether to impose the upper term of the triad itself. (See *Apprendi v. New Jersey, supra*, 530 U.S. at p. 481 [“We should be clear that nothing in this history suggests it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute.”].) Rather, the court’s exercise of sentencing discretion within the range permitted by the jury’s finding is guided and restrained only by state law. Under state law, the court may consider any factor that the court itself finds by a preponderance of the evidence. (See Cal. Rules of Court, rule 4.420(b).) As a result, once the jury finds a single factor in aggravation to exist beyond a reasonable doubt, the upper term becomes the statutory maximum for constitutional purposes, and the sentencing returns to purely state statutory considerations. Thus, the court may consider any additional circumstances it finds by a preponderance of the evidence when deciding whether to impose the upper term.

This same analysis applies for evaluating harmless error. Any constitutional error stemming from the failure to have a jury finding as required under *Blakely* is rendered harmless if the reviewing court finds beyond a reasonable doubt that a *single factor* would have been found true by a jury, had the jury been presented with that factor. For the reasons stated above, once the

reviewing court finds that a *single factor* rendered the constitutional error harmless, the only question remaining is whether the sentence actually imposed satisfied state law requirements, even if the court ultimately relied on additional factors found only by a preponderance.

As a result, a reviewing court considering a *Blakely* error should first determine whether the constitutional error is harmless beyond a reasonable doubt, i.e., whether it is beyond a reasonable doubt that the jury would have found any factor to be true. If any such circumstance exists beyond a reasonable doubt, then the constitutional error is rendered harmless, and the sentencing court may consider any additional circumstance if found by a preponderance of the evidence. Accordingly, if it is beyond a reasonable doubt that the jury would have found at least one factor, then the reviewing court should affirm the sentence unless it is reasonably probable that the court would have imposed the middle term despite the combined weight of the beyond-a-reasonable-doubt circumstance and any additional preponderance-of-the-evidence circumstances.

Here, it is beyond a reasonable doubt that the jury would have found, not just one, but several factors to be true. The probation report found five factors in aggravation (appellant's gang membership, his prior adult and juvenile record, his service of a prior prison term, the fact that he was on parole at the time of the current offense, and his prior poor performance on parole) and no mitigating factors. (CT 175.) Although the trial court did not state its reasons for imposing the upper term at the time sentence was pronounced (RT 640), the court previously indicated that it had read the probation report (RT 628) and implicitly accepted the probation report's statement of factors. None of these factors involve contested issues. As a result, even if *Blakely* applied here, it is beyond a reasonable doubt that the jury would have found at least one sufficient circumstance for the court to act on its unambiguous intent to impose the maximum sentence available.

Alternatively, even if this Court determines that, under *Blakely*, one factor is not sufficient by itself to satisfy the constitutional inquiry, and if this Court concludes that it can consider *only* those factors which would have been found true beyond a reasonable doubt by a jury, the alleged error in this case is still harmless because the trial court would have reached the same sentence based solely on those factors which survive this *Blakely* inquiry. As noted above, several of the factors identified in the probation report would necessarily have been found true beyond a reasonable doubt. Thus, even if this Court concludes *Blakely* requires the reviewing court to reject any factors not found harmless beyond a reasonable doubt, the factors identified above which do survive the *Chapman* harmless error test are more than sufficient to justify the sentencing selections made by the court.

Specifically, once the reviewing court has identified those factors which survive the *Blakely* inquiry because they would have been found true by a jury beyond a reasonable doubt, the reviewing court then turns to the traditional state law inquiry as to whether there is a reasonable likelihood that this narrower group of remaining factors would have resulted in the same sentence. (See *People v. Avalos* (1984) 37 Cal.3d 216, 223 [noting generally that when some factors are invalidated, the court applies state harmless error test to determine if trial court would have imposed the same sentence based on the remaining valid factors]; *People v. Steele* (2000) 83 Cal.App.4th 212, 226-227; see generally *People v. Dance* (1996) 45 Cal.App.4th 1677, 1695 [noting sentencing error is harmless if remand for resentencing would serve no purpose].) Of course, this analysis applies even if only a single factor survives the *Blakely* inquiry, because even a single factor may justify imposing the upper term. (*People v. Osband*, *supra* 13 Cal.4th at p. 728.)

Applying this standard in the present case, the alleged error is harmless. For the reasons

explained above, the factors that remain are sufficiently weighty by themselves that it is not reasonably probable that the court would have reached a different result absent the *Blakely*-invalidated factors.

**E. The *Almendarez-Torres v. United States* Exception**

Even if this Court were to conclude *Blakely* applies to upper terms, under *Almendarez-Torres v. United States* (1988) 532 U.S. 224 [118 S.Ct. 1219; 140 L.Ed.2d 350] (*Almendarez-Torres*), appellant did not have a right to jury trial for aggravating circumstances based on the facts of his prior convictions. (*Id.* At p. 246; see *Blakely, supra*, 124 S.Ct. At p. 2536 [retaining *Almendarez-Torres*'s exception for prior convictions]; *Apprendi* 530 U.S. at p. 488 [same].) Further, the *Almendarez-Torres* exception goes beyond the mere fact of a prior conviction to include matters such as the sentence imposed and the status and timing of the defendant's incarceration in relation to when he committed subsequent offenses. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 215-223; see also *People v. Epps* (2001) 25 Cal.4th 19, 26 [the determination whether a defendant was sentenced to prison is "largely legal"]; *People v. Prather* (1990) 50 Cal.3d 428, 439-440 [considering prior prison terms to be a "subset" of prior convictions for purposes of the "double-the-base-term limitation"].) Under *Almendarez-Torres*, the judicial finding on priors at sentencing does not violate the Constitution. *Blakely*'s jury trial right thus does not extend to an aggravating factor based on appellant's criminal record.

Furthermore, what *Blakely* makes clear is that the federal constitutional requirement identified in that case looks solely to whether the fact or facts which render the defendant *eligible* for an enhanced or aggravated sentence have been proved to the jury. The *Blakely* Court explained that the Constitution defines the "statutory maximum" as the maximum sentence the trial court *may impose solely on the basis of the facts reflected in the jury verdict or admitted by*

*the defendant.* (*Blakely v. Washington, supra*, at p. 2537 first italics added.) The constitutional test set out in *Blakely* focuses on the judge’s “*authority to impose an enhanced sentence*” and the Court drew no distinction between systems in which the defendant’s eligibility for “an enhanced sentence depends on a finding of a specified fact (as in *Apprendi*), one of the several specified facts (as in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428; 153 L.Ed.2d 556]), or *any* aggravating facts (as here).” (*Blakely v. Washington, supra*, at p. 2538, italics added.)<sup>7</sup>

Under California law, a single aggravating factor is sufficient to render a defendant *eligible* for the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Castellano* (1983) 140 Cal.App.3d 608, 615.) What this means is that the presence of a single factor in aggravation renders a defendant *eligible* for the upper term and provides the trial court with the statutory *authority* to impose the upper term, irrespective of what term the court ultimately imposes after conducting the requisite balancing. Thus, a jury verdict as to *one* aggravating circumstances beyond a reasonable doubt satisfies the constitutional requirement set out in *Blakely* that a jury make the necessary finding beyond a reasonable doubt before a defendant can be exposed to the higher sentence.

The same holds true for a single recidivism factor that falls within the *Almendarez-Torres* exception to the jury verdict requirement, which would also satisfy *Blakely*’s constitutional requirement. Once the constitutional requirement is satisfied, the state statutory scheme becomes the only controlling authority limiting the court’s ability to impose an appropriate sentence, including an upper term, and under the state statutory scheme, the court can consider any other aggravating factors it finds by a preponderance, as well as mitigating factors found by a

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<sup>7</sup> Indeed, the Court expressly pointed out that under Washington’s scheme, “the judge acquires that authority [to impose an exceptional sentence] only upon finding some additional fact.” (*Blakely v. Washington, supra*, at p. 2538, fn. 7.)

preponderance. (See *Apprendi, supra*, 530 U.S. at p. 481 [“[w]e should be clear that nothing in this history suggests it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute.”].)

Is such a case, the upper term would necessarily become the “maximum sentence” for constitutional purposes under *Blakely* because the court *may impose* the upper term without making any other findings of fact. (See *Blakely v. Washington, supra*, 124 S.Ct. At pp. 2531, 2537.) Although *Blakely* would continue to restrict the factors that the court could consider in imposing a sentence above and beyond the top of the triad associated with an offense, it would not restrict the factors that the court could consider in deciding whether to impose the upper term of the triad itself. Rather, the court’s exercise of sentencing discretion within the range permitted by the jury’s finding is guided and restrained only by state law. Under state law, the court may consider any factor that the court itself finds by a preponderance of the evidence. (See Cal. Rules of Court, rule 4.420(b).) As a result, when the court finds a valid recidivism factor that falls within the *Almendarez-Torres* exception to the jury verdict requirement, the upper term would become the statutory maximum for Sixth Amendment purposes, and the sentencing returns to purely state statutory considerations. In such a case, the court may consider any additional circumstances it finds by a preponderance of the evidence when deciding whether to impose the upper term.

In the present case, the recidivism factors that appellant’s prior convictions were of increasing seriousness (which is based on the nature of the prior convictions) and that he was on parole at the time, which is a component of his most recent prior conviction, fell within the *Almendarez-Torres* exception and fully satisfied the constitutional requirement in *Blakely*.

Consequently, having satisfied *Blakely*, the court was free to consider any other aggravating factors found by a preponderance in evaluating whether to impose the upper-term enhancement. Under these circumstances, the trial court's additional aggravating circumstance finding that appellant attempted to suborn perjury also did not violate *Blakely*.

**F. Remedy**

Appellant asserts that the appropriate remedy for any reversible error is to reduce sentence to the middle term doubled for his prior "strike." (Supp. AOB 12.) Since the court imposed the maximum aggregate term available, there are no sentencing choices in appellant's favor that the court could reconsider to reach the same or similar term. (See *People v. Shakvaladyan* (2004) 117 Cal.App.4th 232, 238; *People v. Burns* (1984) 158 Cal.App.3d 1178, 1184.) Accordingly, we submit that the appropriate remedy would be to remand the case to allow the prosecution to decide whether to seek a jury determination of the circumstances necessary to reinstate any reversed portions of the sentence. (Cf. *United States v. Ameline, supra*, 2004 WL 1635808 at p. \*13 [remanding to allow jury to determine facts increasing the federal defendant's "base level offense and his two level firearm enhancement"].)