

From supplemental briefing filed by panel attorney Lewis Wenzell in *People v. Rojas* (E034599)

## ARGUMENT

**1. Imposition of the upper terms was unlawful and violated Appellant's federal constitutional rights to a jury trial and proof beyond a reasonable doubt (U.S. Const., amends. V, VI, XIV) because the aggravating factors were not found by a jury.**

On June 24, 2004, the United States Supreme Court decided *Blakely v. Washington* (2004) 124 S.Ct. 2531 ("*Blakely*"). The court's decision in *Blakely* renders unconstitutional portions of California's Determinate Sentencing Law ("DSL")<sup>1/</sup> including the provision of section 1170(b) which authorizes judges, not juries to make factual findings in connection with aggravating factors used to impose the upper term. The sentencing court in this case imposed the upper term based upon factual findings which were neither admitted by appellant nor found by a jury. The sentencing court also erred in failing to apply the proof beyond a reasonable doubt standard to its factual findings.<sup>2/</sup>

---

1. Chapter 4.5 of Title 7 of Part 2 of the Penal Code, consisting of sections 1170 through 1170.89, is what is commonly referred to as the DSL.

2. As stated in another *Apprendi*-related opinion issued the same day as *Blakely*, "When a decision of this Court results in a "new rule," the rule applies to all criminal cases still pending on direct review. [Citation.]" (*Schiro v. Summerlin* (2004) 124 S.Ct. 2519, 2522.)

**A. Appellant had a federal constitutional right to a jury trial, and proof beyond a reasonable doubt, with respect to facts underlying the aggravating factors used to impose the upper terms.**

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 ("*Apprendi*"), the supreme court held 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, supra*, 530 U.S. at p. 476 quoting *Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6.) 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 factors used to impose the upper term under the DSL.

**B. The right to a jury trial applies to facts used to impose a sentence above the statutory maximum.**

In *Apprendi*, the court held the defendant had a constitutional right to a jury trial on the factual findings underlying the New Jersey hate-crime enhancement applied to his sentence. This enhancement raised the maximum possible sentence from 10 years to 20 years upon a finding that the offense was committed with the intent to intimidate because of the victim's race, color, gender, handicap, and various other statuses. (*Apprendi, supra*, 530 U.S. at pp. 468-469.) Two years later, in *Ring v. Arizona* (2002) 536 U.S. 584, the

supreme court "applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors." (*Blakely, supra*, 124 S.Ct. at p. 2537.) The same term, the supreme court held there is no constitutional right to a jury trial on a fact used to establish a minimum mandatory sentence. (*Harris v. United States* (2002) 536 U.S. 545, 563.)

In *Apprendi* and in *Ring*, the Court "concluded that the defendant's constitutional rights have been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." (*Blakely, supra*, 124 S.Ct. at p. 2537.)

In applying these precedents to the state sentencing guidelines at issue in *Blakely*, the court clarified "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, supra*, 124 S.Ct. at p. 2537, emphasis in original.) Stated another way, "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.*" (*Ibid.*, emphasis in original.)

**C. Under the DSL, the "statutory maximum" is the middle term.**

Under California's determinate sentencing law, the maximum sentence a judge may impose without any additional findings is the middle term: "When

a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation* of the crime."

(§ 1170(b), emphasis added; accord Cal. Rules of Court ("Rule"), rule 4.420(a).) Because the maximum term without the findings is the middle term, the upper term may not be imposed where, as in this case, the aggravating factors were neither admitted by the defendant nor found by a jury.

California's "dual use" rule underscores the necessity of finding additional facts. A court cannot base an upper term on a fact which is either an element of the underlying offense or is the basis for an enhancement. (§ 1170(b); Rule 4.420(c) & (d).) The aggravating circumstances authorizing an upper term, thus, are necessarily facts beyond those determined by appellant's guilty plea or a jury verdict. Put another way, where the only aggravating circumstances are those which overlap either the offense or any enhancement, the middle term is the "maximum" sentence a defendant may receive. It is only a finding of some additional non-overlapping aggravating circumstance which can expose a defendant to an upper term. As the court said in *Blakely*, under the DSL "[t]he judge acquires that authority [to impose an upper term] only upon finding some additional fact." (*Blakely, supra*, 124 S.Ct. at p. 2538.) 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. Additionally, those findings must be subject to a reasonable doubt standard of proof (*id.* at p. 2542), rather than a preponderance standard, as California law currently provides (Rule 4.420(b)).

**D. The fact-finding used to impose the upper term is analogous to the fact-finding used to apply the exceptional sentence in *Blakely*.**

In *Blakely*, the defendant had pled guilty to second-degree kidnaping and also admitted a firearm enhancement. (*Blakely, supra*, 124 S.Ct. at p. 2535.) As a "class B felony," second-degree kidnaping was subject to an absolute maximum of 10 years. (*Ibid.*) But the "standard range" for second-degree kidnaping with a firearm was 49 to 53 months. (*Ibid.*) Washington statutory law provided that a court could impose a sentence greater than the "standard range" (but still within the ten-year cap) only if it found "substantial and compelling reasons justifying an exceptional sentence." (*Ibid.*) The statute provided a non-exhaustive list of "aggravating factors" which could justify such a "departure" from the "standard range." (*Ibid.*) The trial court imposed an "exceptional sentence" of 90 months -- 37 months above the standard range -- based upon the judge's finding that Blakely acted with "deliberate cruelty," one of the enumerated aggravating factors. (*Ibid.*)

The supreme court held the trial court's finding of the deliberate cruelty aggravating factor violated *Apprendi*'s rule entitling a defendant to jury

determination of any fact exposing a defendant to greater punishment than the "maximum" otherwise allowable for the underlying offense. (*Blakely, supra*, 124 S.Ct. at p. 2538.) The court rejected the state's assertion the relevant "maximum" was the ten-year cap for a class B felony. (*Ibid.*) Instead, the court treated the top end of the "standard range" (53 months) as the relevant "statutory maximum," because that was the greatest sentence Blakely could receive based solely on the facts admitted by his plea. (*Blakely, supra*, 124 S.Ct. at p. 2537.)

As with the "standard range" in *Blakely*, the mid-term under the DSL is the presumptive sentence. And, as with the "exceptional sentence" in *Blakely*, a California court lacks statutory authority to impose an upper term unless it finds "aggravating circumstances" beyond the elements inherent in the offense itself. (Rule 4.420(d).) Like the Washington statutes, the California rules provide a list of enumerated aggravating circumstances (Rule 4.421), but the list is "not exclusive" and a court may rely upon a non-enumerated circumstance "reasonably related" to the sentencing decision (Rule 4.408(a)). As with the Washington scheme, the court must make explicit factual findings. (§ 1170(c); Rule 4.420(e).)

These striking parallels between the DSL and *Blakely* affirm the *Apprendi/Blakely* doctrine applies to California's determinate sentencing scheme.

**E. Recidivism factors are not different.**

The United States Supreme Court has yet to apply *Apprendi* to recidivist-based sentencing factors, even when the fact of such prior convictions is used to increase the statutory maximum sentence for an offense. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224 ("*Almendarez-Torres*").) This exception is arguably applicable to recidivist-related aggravating factors, such as used in this case: numerous or increasingly serious prior convictions (Rule 4.421(b)(2)),<sup>3/</sup> the defendant was on probation at the time of current offense (Rule 4.421(b)(4)), unsatisfactory prior performance on probation (Rule 4.421(b)(5)). (See RT 207; pp. 15-16, *post.*)

*Almendarez-Torres*, however, can no longer be deemed controlling because a majority of the United States Supreme Court Justices now agree that *Almendarez-Torres* was incorrectly decided. Justice Thomas had been in the majority in *Almendarez-Torres*, but switched his position to provide a fifth vote in *Apprendi*. In his separate concurrence in *Apprendi*, Justice Thomas indicated that he regretted his *Almendarez-Torres* vote and made plain that he saw a right to jury trial to any fact increasing the maximum sentence, including

---

3. In light of *Blakely*, Appellant's juvenile delinquency adjudication does not fall within the *Almendarez-Torres* exception because (in contrast to an adult conviction) the defendant never had the right to jury trial in the juvenile case. (See *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1194-1195; see also *People v. Lee* (2003) 111 Cal.App.4th 1310, 1319 (diss. op. of Rushing, P.J.).)

a prior conviction. (*Apprendi, supra*, 530 U.S. at pp. 520-521 (conc. op. of Thomas, J.)) Consequently, there are five votes to overrule *Almendarez-Torres* -- the four original dissenters in it plus Justice Thomas (the same five justices who comprised the majority in both *Apprendi* and *Blakely*).

## **2. The errors require reversal.**

The disposition in *Blakely* was a remand to the Washington appellate court "for proceedings not inconsistent with this opinion." (*Blakely*, 124 S.Ct. at p. 2543.) The opinion did not address whether the error automatically required reversal of the sentence or was susceptible to harmless error review. Under either view, reversal is required in this case.

The error is a "structural defect," not amenable to harmless error review, because the wrong entity, the judge rather than the jury, has adjudicated the aggravating factor and has applied the wrong standard of proof. (Cf. *Sullivan v. Louisiana* (1993) 508 U.S. 275.) In *Sullivan*, Justice Scalia explained the error in that case -- as to the definition of proof beyond a reasonable -- was structural error because there was a jury verdict ostensibly based upon proof beyond a reasonable doubt. Harmless error analysis, under *Chapman v. California* (1967) 386 U.S. 18 ("*Chapman*"), examines, "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) Because the error

with respect to the reasonable doubt instruction meant, "there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent." (*Id.* at 280.) In this case, as in *Sullivan*, there is no verdict based upon reasonable doubt. "There is no object, so to speak, upon which harmless-error scrutiny can operate" and reversal is mandatory. (*Ibid.*)

It is true the failure to instruct a jury on a single element is subject to *Chapman* harmless error analysis and is not per se reversible. (*Neder v. United States* (1999) 527 U.S. 1, 10; *People v. Flood* (1998) 18 Cal. 4th 470, 504.) But in *Neder* and in *Flood*, a jury was seated and reached verdicts, and only one element was not decided by the jury because of the misinstruction. (*Neder v. United States, supra*, 527 U.S. at p. 4; *People v. Flood, supra*, 18 Cal.4th at p. 475.) In this case in stark contrast, no jury at all was seated for Appellant's sentencing and none of the aggravating facts were decided by his jury. Because appellant was denied a jury verdict on multiple aggravating facts, the error is structural and automatically reversible.

Even if the error is not structural, reversal is required because the error was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The California Supreme Court and federal courts have said conventional *Apprendi* errors on enhancements are subject to the *Chapman* standard. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v.*

*Scott* (2001) 91 Cal.App.4th 1197, 1209-1211; *United States v. Garcia-Guizar* (9th Cir. 2000) 234 F.3d 483, 488-489.) However, the harmless error analysis in these cases is not useful here because, unlike in those cases, the jury's verdict here has absolutely nothing to do with, and provides no insight into, the aggravating factors used to enhance Appellant's sentence.

In the context of a error affecting the right to a jury trial on all elements of an offense, a court "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." (*Neder v. United States, supra*, 527 U.S. at p. 10.) Even assuming, a similar test should be applied in Appellant's case, the error still requires reversal.

In this case, the trial court used four factors to justify the upper term:

As to circumstances in aggravation pursuant to Rule 421, the manner in which the crime was carried out indicated planning, sophistication, and professionalism. [Rule 4.421(a)(8).] ...

Defendant's prior convictions as an adult and sustained petitions as a juvenile delinquent proceedings are numerous and of increasing seriousness. [Rule 4.421(b)(2).]

The defendant was on a grant of probation when the crime was committed. [Rule 4.421(b)(4).]

The defendant's prior performance on probation was clearly unsatisfactory. [Rule 4.421(b)(5).]

(RT 206-207.) However, a jury might well have disagreed with the court as to

two of these four factors.

The facts in this case could well have been seen by a jury as simply the spur of the moment acts of a down and out alcoholic. (See Pages 4 - 6, *ante*; Presentence Report, p. 2.) Even assuming Appellant's prior juvenile adjudication could be considered (see footnote 6, *ante*), his convictions in order were for burglary in 1995, misdemeanor presentation of a false identification in 1999, attempted theft from the person in 2000, misdemeanor resisting or presenting a false identification in 2001, and the current case in 2003 (Presentence Report, p. 1). Here again, a jury might well have found this sequence of convictions presented neither a set of numerous convictions nor ones of increasing seriousness. Further, it simply cannot be found beyond a reasonable (as required by *Chapman*) that the court would have aggravated Appellant's sentence if only the two remaining aggravating factors were present.

**3. The claim is not waived by lack of objection.**

Appellant's failure to object in the superior court did not waive his constitutional claims. Certain fundamental constitutional rights, such as double jeopardy and the right to jury trial, are not forfeited by a failure to object. For instance, a defendant's failure to object to the discharge of the jury, prior to the adjudication of charged priors, might waive a state statutory error, but it does

not waive fundamental claims of double jeopardy and the right to a jury trial. (*People v. Vera* (1997) 15 Cal.4th 269, 276 -277; *People v. Saunders* (1993) 5 Cal.4th 580, 589, 592; *People v. Valladoli* (1996) 13 Cal.4th 590, 606; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) Because Appellant contests the denial of his Sixth and Fourteenth Amendment rights to a jury trial and proof beyond a reasonable doubt on the aggravating factors, his lack of an objection in the superior court does not preclude appellate review.

In any event, any waiver is excused because any objection would have been futile. (E.g., *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649; *see also People v. Birks* (1998) 19 Cal.4th 108, 116, fn.6 [no waiver where lower court was bound by higher court on issue].) At the time of appellant's sentencing, i.e., prior to *Blakely*, it would have been futile to object to request a jury at sentencing in a noncapital sentencing in a California court. It would have been equally futile to request application of the reasonable doubt standard. California case law, statutes, and rules, even after *Apprendi*, remained a barrier to such a claim. The claim being futile prior to *Blakely*, there is no waiver.

Of course, section 1259 provides in pertinent part:

Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior

to or after judgment, . . . and which affected the substantial rights of the defendant.

Violation of the federal constitutional right to a jury trial and proof beyond a reasonable doubt substantially effects Appellant's rights.