

Supplemental opening brief by panel attorney Mark Christiansen in *People v. Anthony Kelly* (E034058)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANTHONY KELLY,

Defendant and Appellant.

Appeal No. E034058

Appeal from the Superior Court of the State of California  
San Bernardino County No. FSB30008  
Hon. Ronald Christianson, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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Independent system.

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

ARGUMENT

**IMPOSITION OF A TERM ABOVE THE STANDARD TERM  
VIOLATED APPELLANTS FEDERAL CONSTITUTIONAL  
RIGHTS TO PROOF BEYOND A REASONABLE DOUBT AND A  
JURY TRIAL**

**Introduction.**

This supplemental brief addresses the very new United States Supreme Court case of *Blakely v. Washington* (No. 02-1632, June 24, 2004) 542 U.S. \_\_\_\_ [2004 LEXIS 4573, 2004 WL 1402697,2004 DJDAR 7581] and why it makes clear the necessity of amending or reversing the sentencing in this case.

Parts A through D will explain the general aspects of the law and its recent developments, and Part E will apply these principles specifically to

the case at hand.

**A. The Fifth, Sixth, and Fourteenth Amendments Required a Jury Trial and that the Jury Make It's Findings Beyond A Reasonable Doubt.**

In *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*, 530 U.S. at 476 (quoting *Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6.) Two years later, in *Ring v. Arizona* (2002) 536 U.S. 584, 592-593 and n.1, the Court applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. Both cases were indicators that the Sixth Amendment (U.S. Const., Amend. VI) required jury findings beyond a reasonable doubt if the factor involved an increase in the defendant's sentence. *Apprendi* held that 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. *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment.

On June 24, 2004, the Supreme Court of the United States decided *Blakely v. Washington* (No. 02-1632, June 24, 2004) 542 U.S. \_\_\_\_ [2004 LEXIS 4573, 2004 WL 1402697, 2004 DJDAR 7581] (Blakely). *Blakely* held that, whether termed an element or as a sentencing factor, the jury must make the finding of anything which would serve to increase the normal term and must do so beyond a reasonable doubt.

Under the California Determinate Sentencing Law, most crimes have a standard or middle term, a mitigated term (not directly affected by *Blakely*), and an aggravated or upper term. The maximum sentence a judge may impose without any additional findings is the middle term. (Pen. Code 1170, subd. (b) [emphasis added]; see also Cal. Rules of Court, rule 4.420, subds. (a) & (b); cf., e.g., *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360.) A fact which is an element of an offense or inherent in the offense cannot be an aggravating factor (*People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159-1160; see also *People v. Smith* (1984) 155 Cal.App.3d 539; *People v. Young* (1983) 146 Cal.App.3d 729; *People v. Fernandez* (1990) 226 Cal.App.3d 669).

California determinate sentencing law also provides under Penal Code section 669 that in the absence of special findings by the court, multiple terms should be imposed concurrently, not consecutively. Various factors justifying consecutive terms are stated in the Rules of Court. The judge is to determine whether or not to add the terms (with various rules to be applied) together, and in the absence of such a declaration supported by reasons the terms by law run concurrently, with a few specific exceptions.

Under the Sixth Amendment, the determining question is whether the jury's verdict alone supported the sentence imposed, in the absence of any additional fact. (*Blakely, supra.*) The imposition of the consecutive terms is a discretionary sentencing act which must be supported by facts found by the jury beyond a reasonable doubt. (*Ibid.*) "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 *Apprendi*, the sentence increase was by means of a consecutive

time for the enhancement. The United States Supreme Court held that although the New Jersey Supreme Court characterized the hate crime enhancement as a “sentencing factor,” it was actually an element of the offense which should have been decided by the jury. (*Id.*, at p. 492.)

Thus, *Blakely, supra*, and *Apprendi, supra*, make it clear that consecutive terms in California are also exposed to the Fifth and Sixth Amendment requirements imposed on the States through the Fourteenth Amendment. (U.S. Const., Amends. V, VI, XIV.)

“[T]he ‘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. 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 facts.” (*Blakely, supra*, )

The judge is therefore the wrong fact-finder for factors which would increase the term above the middle range and also for factors which cause imposition of consecutive terms.

The second part of the line of *Apprendi-Ring-Blakely* cases is that the finding must not only be by a jury but also must be a finding beyond a reasonable doubt. This follows from the Fifth, Sixth, and Fourteenth Amendments being the origin. However, sentencing decisions in California have not had this requirement for matters increasing the standard term. The trial judges are required to find circumstances in aggravation by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b); see also *People v. Levitt* (1984) 156 Cal.App.3d 500, 515.)

California law in these regards necessarily is unconstitutional under

the Fifth, Sixth, and Fourteenth Amendments, and by virtue of that is unconstitutional under the Eighth Amendment as well, to the extent that it permits a judge to find factors justifying the upper term and to impose a consecutive term not mandated by law and also to the extent it permits any such decision to be made by a standard of less than beyond a reasonable doubt.

**B. Discussion of the Standard of Prejudice.**

Generally, the violation of a criminal defendant's constitutional rights warrants reversal unless the error is deemed harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) However, certain violations represent ““structural defects in the constitution of the trial mechanism, which defy analysis by “harmless-error” standards,”” and therefore require reversal per se. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-309.)

The denial of a jury trial is just such a structural defect. (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282; *Rose v. Clark* (1986) 478 U.S. 570, 578 [“the error in such a case is that the wrong entity judged the defendant guilty.”]; *People v. Ernst* (1994) 8 Cal.4th 441, 449.)

Where the jury is permitted to convict on a standard of less than beyond a reasonable doubt, the error is again structural. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp 278, 281-282.)

Other factors also require reversal per se as a standard. Given the nature of the constitutional violations at issue here, it is impossible to assess with any precision the harm caused due to the lack of a jury trial on the

aggravating factors or the failure to require that those factors be found to exist beyond a reasonable doubt. The constitutional violations in this case must therefore be deemed “structural defects.” (*Brecht, supra.*) The Court in *Blakely* and *Apprendi* reversed the defendants' sentences without requiring a showing of prejudice. (*Blakely v. Washington, supra*, 2004 WL 1402697 at p. 10; *Apprendi v. New Jersey, supra*, 530 U.S. at p. 497.)

Moreover, even applying the harmless error standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24, respondent would be unable to prove the constitutional violations harmless beyond a reasonable doubt. (See, e.g., *United States v. Neder* (1999) 527 U.S. 1, 18 [applying Chapman standard to trial court's failure to instruct jury on an element of offense].) In *Neder*, the United States Supreme Court held that in evaluating whether the failure to submit an element of an offense to the jury is harmless, a reviewing court must conduct a thorough evaluation of the evidence, and

“[i]f, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless.” (*Id.* at p. 19.)

Harmless error analysis, under *Chapman v. California, supra*, examines, not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had in fact in the case. The entire premise of *Chapman* review is simply absent. (*Id.*, at 280.) In this case, as in *Sullivan*, there is no verdict by judge or jury based upon reasonable doubt. There is no object, so to speak, upon which harmless-error scrutiny can operate and reversal is mandatory. (*Ibid.*; see

also *People v. Orellano* (2000) 79 Cal.App.4th 179, 186 [Since we have no way of knowing whether the jury applied the correct burden of proof, the convictions must be reversed ... so that appellant can be retried before a properly instructed jury].) It is extremely difficult to apply a *Chapman* analysis without again having the wrong entity make the decision.

**C. Retroactivity.**

When a decision of the United States Supreme Court results in a “new rule,” that rule applies to all criminal cases still pending on direct review. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328; see *Schriro v. Summerlin* (2004) 2004 U.S. LEXIS 4574 [discussing retroactivity of *Ring*, *supra*].) That Court, and the Ninth Circuit, both are remanding cases for application of *Blakely*. (See, e.g., *Schriro, supra*; *Dilts v. Oregon* (2004) 2004 U.S. LEXIS 4584; 72 U.S.L.W. 3767; *United States v. Epis* (9th Cir. 2004) 2004 U.S. App. LEXIS 14237; *United States v. Deitzen* (9th Cir. 2004) 2004 U.S. App. LEXIS 14169.)

This case is pending on appeal. *Blakely, supra*, therefore, is applicable.

**D. There has been No Waiver of the Issues and They Should Be Reached.**

A failure to object cannot waive certain fundamental constitutional rights, such as double jeopardy and the right to jury trial, even though that omission may forfeit appellate review of related state statutory claims. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277.) In *People v. Saunders*

(1993) 5 Cal.4th 580, the Court applied that distinction to a defendant's failure to object to the discharge of the jury, prior to the adjudication of charged priors. That omission did not waive the right to raise fundamental claims of double jeopardy and jury trial. Defendant's failure to object also would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial. [Citations.] (*Id.* at 589 n. 5; see also 592 [same holding re double jeopardy claim]; accord *People v. Valladolid* (1996) 13 Cal.4th 590, 606 [refusing to find waiver of double jeopardy claim].)

Also, it is well-established that where an objection would have been futile, an attorney is not required to make it. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, n.5; accord Cal. Civ. Code § 3532 [“The law neither does nor requires idle acts.”].) Because sentencing in this case occurred prior to the United States Supreme Court's decision in *Blakely*, it would have been futile for defense counsel to have demanded a jury trial or application of the proof beyond a reasonable standard on the existence of aggravating factors; as explained above, California's statutory and case law explicitly prescribed judicial factfinding on aggravating factors under a preponderance of the evidence standard. (See, e.g., *People v. Jackson* (1987) 196 Cal.App.3d 380, at p. 390-391, fn. 8; *People v. Ramos* (1980) 106 Cal.App.3d 591, 602-604; *People v. Levitt* (1984) 156 Cal. App. 3d 500, 515; Pen. Code § 1170, subd. (d); Cal. Rules of Court, rules 4.420 (a) and (b), and 4.421.) Similarly, the California Supreme Court has permitted the review of claims not raised during trial where there have been significant supervening changes in the law. (See, e.g., *People v. Turner* (1990) 50 Cal.3d 668, 703 [allowing claims for first time on appeal where “pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.”].)

Further, since there was a right to a jury trial, there was also a right to have the jury instructed. Appellate review of the error is appropriate because the error affected appellant's "substantial rights." (Pen. Code § 1259 ["The appellate court may . . . review any instruction . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].) And, of course, appellate courts retain discretion to reach issues that have not been preserved for review by a party. (*People v. Williams* (1998) 17 Cal.4th 148, 161 fn. 6.)

The California Supreme Court is itself apparently prepared to apply the case retroactively because it granted review and specified as issues "(1) Does *Blakely v. Washington* (June 24, 2004) U.S. [2004 WL 1402697] preclude a trial court from making the required findings on aggravating factors for an upper term sentence? (2) If so, what standard of review applies, and was the error in this case prejudicial." (*People v. Towne* (2004) S125677, 2004 Cal. LEXIS 6290.)

#### **E. Application to this Case.**

The sentence length selection in this case is at pages 1368 to 1372 of the Reporter's Transcript. (9 RT 1368-1372.)

The judge found the following factors in aggravation: (1) the defendant engaged in violent conduct which indicated he was a serious danger to society, (2) he was on formal felony probation when the crimes in this case were committed, (3) his prior performance on probation was unsatisfactory, and (4) there were no offsetting factors in mitigation; and, as to aggravating factors related to concurrent versus consecutive sentencing, (5) the crimes and their objectives were predominantly independent of each

other, (6) the crimes of carjacking, attempted murder, and murder involved separate acts of violence or threats of violence,<sup>1/</sup> and (7) at the request of the prosecuting attorney the court also found that – although there had been some modification of the case law that he found was inapplicable to this case – pursuant to “1170.12(a), six and seven,” (Pen. Code § 1170.12, subd. (a), subhds. (6) & (7)) the sentences must run consecutively. (RT 1369, 1372.)

Thus, in this particular case, all of the sentence elevating factors pertaining to aggravation of the term relate to personal characteristics of the defendant. As to those factors, as previously explained by rule and law they cannot be elements of the crime; and the comment to Rule 4.421 itself is clear, “The phrase ‘circumstances in aggravation or mitigation of the crime’ necessarily alludes to extrinsic facts.” (Comment, Cal.Rules of Court, rule 4.421.) The jury, therefore, could not and did not find on any of these, nor did the judge find them beyond a reasonable doubt.

The upper term of nine years was imposed on count 2 [carjacking]. It must be reversed. (*Blakely, supra.*)

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1 These are factors listed by Rule 4.421, subdivision (a) relating to the particular crime and (b) relating to characteristics of the defendant. (Cal. Rules of Court, rule 4.421.) By respective designation: (b)(1) [“The defendant has engaged in violent conduct which indicates a serious danger to society.”], (b)(4) [“The defendant was on probation or parole when the crime was committed.”], (b)(5) [“The defendant’s prior performance on probation or parole was unsatisfactory.”], no designation [court found no “mitigating” factors (see Cal. Rules of Court, rule 4.423 [mitigating factors], Cal. Rules of Court, rule 4.433(c) [judge to determine]). Or they are factors listed by Rule 4.425, relating to consecutive sentences. By respective designation, (a)(1) [“The crimes and their objectives were predominantly independent of each other.”], (a)(2) [“The crimes involved separate acts of violence or threats of violence.”].

As for the consecutive terms, leaving aside for the moment the provisions of the Three Strike Law, whether or not the crimes were “predominantly independent” of each other appears to be a factual question for the jurors, as does whether they were “separate” acts of violence. This has long been an ill-defined factor; however, the separation of the acts is not all that clear in terms of, for example, the carjacking being a cause of the murder or attempted murder or the murder being a cause of the attempted murder; or for another example, the carjacking in this case was not proven (see other briefing) to have been “violently” done. Reasonable minds could obviously differ as to whether the crimes were "predominately independent of each other." Casually or as a developing course of culpability, the jury was the proper fact finder.

In *Blakely, supra*, the factor was that the defendant acted with "deliberate cruelty" in the commission of the crime to which he had pleaded guilty. It is submitted respectfully that the United States Supreme Court has made it abundantly clear that all factors bearing on sentencing beyond the presumed standard sentence for the crime or crimes are to be decided by the jury and by proof beyond a reasonable doubt.

The question of the Three Strikes Law's effect on consecutive sentencing is also raised by *Blakely, supra*, because there is a question as to its effect on a standard sentence. As the prosecutor correctly cited, the parts of that law which are of interest are the "mandatory" terms regarding consecutive sentencing in the same case:

"(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the

following:

....

(6) *If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts*, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) *If there is a current conviction for more than one serious or violent felony as described in paragraph (6)*, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law. (Pen. Code § 667, subd. (c)(6)&(7), italics added; accord Pen. Code § 1170.12, subd. (a)(6)&(7) [identical provisions].)

Therefore, the default on the Three Strikes Law is not simply a question of whether there have been "strikes" but rather includes an assumption of normal sentencing discretion absent the italicized conditions quoted above. The trial judge in this case was knowledgeable enough to recognize there were further findings which had to be made before he employed the mandate of those sections. Therefore, *Blakely* applies to the consecutive terms even though the sentencing was pursuant to the Three Strikes Law.

On the other hand, as to the enhancements within the counts for firearm use or discharge (Pen. Code § 12022.53), once the jury has found the provisions of section 12022.53 apply, a question to be submitted to them for resolution beyond a reasonable doubt, the provisions each state the punishment shall be imposed in addition and consecutive to the punishment

for the underlying crime (subds. (b)-(d)). The facts of these enhancements already must be charged and found by the jury (subd. (i)).

In that the sentencing facts were found by no more than a preponderance of the evidence, reversal or reduction is also required for that reason as well.

"It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 278.)

Based on the foregoing, it is respectfully submitted that count two must be reduced as to the substantive count or must be reversed as to sentence entirely and that all of the consecutive terms, possibly excluding the firearm terms under section 12022.53 as to their substantive underlying counts, must all be vacated or the entire sentence must be reversed as to its consecutive nature. It is further respectfully suggested that trial would be impossible due to double jeopardy principles. (See *Green v. United States* (1957) 355 U.S. 184; *Gomez v. Superior Court* (1958) 50 Cal.2d 640.)

**CONCLUSION**

For the foregoing reasons, it is respectfully requested that the upper term on count two and the order the sentences be served consecutively be reversed, and for the reasons in the appellant's other briefing and above it is respectfully requested that the judgment be reversed.

Dated: July \_\_\_\_, 2004.

Respectfully submitted,

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**CERTIFICATION**

This brief does not exceed 25,500 words (Cal. Rules of Court, rule 33(b)). It has 3578 words excluding covers, tables, certification, and proof of service, by computer count.

-----  
Mark Christiansen

DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury as follows: I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is: PMB 513, Suite D, 44489 Town Center Way, Palm Desert, CA 92260. On **July \_\_\_\_\_, 2004**. I served the attached in a sealed envelope addressed as shown below, postage fully prepaid, deposited in the United States Mail at Palm Desert, California, from which there is regular communication by mail to each place sent.

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I declare under penalty of perjury that the foregoing is true and correct.  
Executed on **July \_\_\_\_, 2004**, at Palm Desert, California.

---

Mark Christiansen