

Supplemental reply brief by panel attorney Mark Christiansen in *People v. Anthony Kelly*, in 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 REPLY BRIEF

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PREFACE

In this reply to the Attorney General's supplemental respondent's letter brief, the appellant will attempt to avoid repetition of his supplemental opening brief and to focus on the Attorney General's position and its weakness. This effort in no manner should be seen as a concession of matters not discussed in this reply. The opening brief foresaw much of what the Attorney General has indeed said in his response.

The appellant recognizes that if his other briefing is successful, this case will go back or, if not, that even the term remaining is likely to exceed Mr. Kelly's life span. Nonetheless, Mr. Kelly was entitled to have a jury trial on the facts which were used to increase his punishment. As our Nation's High Court has explained, the protection of the jury determination requirement of the Sixth Amendment is central to our guarantee of freedom.

INTRODUCTION

The Attorney General correctly observes that the appellant has argued that the result of *Blakely v. Washington* (2004) 542 U.S. ____ [124

S.Ct.2531, 159 L.Ed.2d 403]^{1/} (*Blakely*) requires reversal of the upper term on count two and of the consecutive sentences. Respondent's submission is (1) any sentencing error has been forfeited by the lack of a timely objection, (2) California's sentencing scheme posits a "range" in which the upper term is the highest and that differs from the Washington scheme in *Blakely*, (3) *Blakely* also involved but a single count and did not discuss consecutive terms, and (4) any error was harmless.

The respondent's reading of *Blakely* is so narrow as to limit the case to its facts: a single count of conviction in the State of Washington where an objection was made to the imposition of a higher term than the normal sentence and in a range established identically to that of the Washington law. It is submitted that the United States Supreme Court was not reviewing that Washington case for such a limited purpose.

The terminology labeling the error as a "sentencing" error is clearly incorrect under *Blakely*. The appellant is not complaining of an error in the judge's proper sentencing discretion. He complains of the denial of his Sixth Amendment right to have a jury determine the factual elements of guilt necessary to the punishment actually imposed. Similarly, although not identical to the State of Washington, California law is within the holding of *Blakely* in its significant reasoning and declaration of how the Constitution was intended to be applied. Finally, the error was structural and in any event it cannot in this case be said to be harmless beyond a reasonable doubt.

1 Rehearing denied, August 23, 2004. (*Blakely v. Washington* (2004) 159 L. Ed. 2d 403, 124 S. Ct. 2531, 2004 U.S. LEXIS 4573.)

NOTE ON THE FORM OF THE ARGUMENT

The respondent has chosen a somewhat different format than the appellant for his briefing of the issues in his supplemental brief. He first argues forfeiture. (RLB 3.) Respondent next argues the “merits” of his position that the jury’s verdict found all the necessary facts to impose the “range” of terms which includes the upper term and that “the trial court’s *additional* finding of the aggravating circumstance that appellant engaged in violent conduct indicating a he poses a serious danger to society does not impermissibly raise the sentence beyond what already was authorized by the recidivism findings.” (RLB 6.) The latter argument is divided into sub-parts discussing respondent’s views on the *Blakely* case as not applicable in California (RLB 6-12), his belief that there is an “*Almendarez-Torres v. United States* exception for anything having to do with recidivist subject matter (RLB 12-15), and why he reasons that “no extension of *Blakely* could implicate California’s system for choosing consecutive sentences” (RLB 15-16). He closes with his harmless error argument. (RLB 16-17.)

The appellant in his opening supplemental brief felt that the more logical progression was first to understand what the *Blakely* case actually holds and why. Next appellant went on to examine the questions of the technical barriers of prejudice, retroactivity, and waiver or forfeiture in context, with an understanding of the entire subject matter. Finally, appellant explained his contention regarding the Due Process clauses application of the Sixth Amendment^{2/} law as set forth by *Blakely* to the

2 “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” (U.S. Const., Amend. VI.)

specifics of the present case.

Although appellant continues to believe the analysis in his supplemental brief is the more sensible and easy-to-follow, he will respond to the Respondent's Letter Brief on a point-by-point progression to ease the burden of switching around.

Nonetheless, appellant also respectfully is of the mind that respondent's "forfeiture" argument in particular shows its weaknesses most clearly when the nature of *Blakely* is fully understood. Appellant commends to the reader the discussion in parts A and B of appellant's Supplemental Brief as an incorporated basis of the following material on forfeiture, consecutive sentences, and prejudice. There is a fundamental difference between the parties in how *Blakely* is to be viewed.

I. THE APPELLANT DID NOT FORFEIT HIS CLAIM TO A JURY DETERMINATION AND THE DENIAL OF THAT JURY TRIAL IS A FUNDAMENTAL ERROR WHICH SHOULD BE REVIEWED.

The appellant and the respondent both appear to recognize that the principles underlying *Blakely* were a reasonable progression from *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). The parties differ on the matter of whether the specific application of those principles in *Blakely* were so foreseeable and compelling that an objection was required to avoid forfeiture of the valuable right to a jury trial.

Respondent correctly notes that in *Blakely*, the defendant objected to the unexpected increase in his sentence. The question presented in *Blakely* did not include forfeiture.^{3/}

3 By 2001 such an objection would have been foreclosed in Washington by that state's supreme court's ruling in *State v. Gore* (2001)

Appellant also does not dispute the fact that a right, even some constitutionally based rights, *may* be forfeited in criminal cases by a failure to timely assert it.

However, in terms of the particular rights involved in this case, the appellant has some disagreement as to whether they could be found forfeit in view of the utmost basis of the error here.

Appellant questions whether *Osborne v. Ohio* (1990) 495 U.S. 103, 123-125, assists respondent. While the *state* independent procedural bar was found to be a state ground which precluded consideration of Osborne's argument that he was convicted without the jury being instructed that there must be scienter, effectively the jurors were not expressly informed on the need for a union of act and intent. However, although the state courts also found a state waiver as to the definition of the necessary mental state, the federal story was different as to the defendant's protest that his conviction of lewd conduct was based on an overly broad statute. The defendant made his feelings known on a motion to dismiss, and the fact he did not object a second time specifically to the instruction at issue did not preclude the issue from being reached.

More importantly, respondent over-generalizes in implying that "this manner of forfeiture applies where the claim asserts a failure to have a jury determine the truth of some fact" and citing to *Osborne* which involved the rules of the State of Ohio and was in the procedural posture of certiorari review. It might be added that the *Osborne* case was reversed and remanded for a new trial in order to ensure that Osborne's conviction stemmed from a finding that the State had proved each of the elements of the statute. (*Osborne v. Ohio, supra*, 495 U.S. 103, 126.) The U.S. Supreme

143 Wn.2d 288, 21 P.2d 262, that *Apprendi* did not apply to factual determinations that support reasons for exceptional sentences upward.

Court wasn't directly making a holding of waiver but instead relied on an “independent state-law ground” for upholding the Ohio court's ruling on the scienter element.

Respondent’s citation for his over-generalized proposition to *Carella v. California* (1989) 491 U.S. 263, 264, is particularly puzzling. *Carella, supra*, at page 264, says nothing whatever about forfeiture—other than that it on the next page firmly rejected a California decision that a favorable result was foreclosed because the defense did not offer rebuttal evidence to the unconstitutional presumptions in question. (*Id.*, at p. 265.)

Nor does respondent’s final authority for this notion, *Sandstrom v. Montana* (1979) 442 U.S. 510, 513, stand for such a position. In *Sandstrom, supra*, the prosecution requested an instruction that “[the] law presumes that a person intends the ordinary consequences of his voluntary acts.’ Petitioner's counsel objected, arguing that ‘the instruction has the effect of shifting the burden of proof on the issue of” purpose or knowledge to the defense, and that ‘that is impermissible under the Federal Constitution, due process of law.’” (*Ibid.*) As in *Carella v. California, supra*, there was an argument that the defense must put on evidence challenging the effect of the instruction; however, the federal High Court again rejected that and reached the merits.

Therefore, none of the respondent’s cases will support his implication that forfeiture would apply to the right to have a jury determination or the protection of proof beyond a reasonable doubt. It might as well be added that in California the right to a jury determination can only be waived by the defendant in open court in a felony case and must be both express and personally done. (See *People v. Holmes* (1960) 54 Cal.2d 442, 443-444.)

As pointed out in the Appellant’s Supplemental Brief, at pages 7-8, the California Supreme Court has found that the failure to object to the

discharge of the jury, prior to the adjudication of charged prior conviction allegations, did not waive the right to raise fundamental claims, including that of the right to a jury trial. (*People v. Saunders* (1993) 5 Cal.4th 580,589, fn. 5; see also *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [appellate review of statutory claims versus fundamental constitutional rights]; *People v. Valladoli* (1996) 13 Cal.4th 590, 606 [double jeopardy not forfeited because fundamental].)

Respondent makes no mention of the status of the particular right or its constitutionally based status or California's especially zealous protection of the right to a jury determination, nor of the case law just cited and also cited in the Appellant's Supplemental Brief. Instead, the Attorney General has no more than over-generalized statements which are not supported by his cases in any significant manner in relation to the issues presented here.

The Attorney General next argues that the principles he found have been applied to restrict claims made under *Apprendi v. New Jersey, supra*, and "by logical extension" should be applied to *Blakely* error. His authority here also has problems.

He first cites *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061. In *Marchand* the Third District was faced with a situation in which the defendant was found to have to register as a sexual offender (see generally Pen. Code § 290) and protested that he had not been charged in the information with the predicate fact and it was not found beyond a reasonable doubt. The protest was founded in the Due Process Clause. There is no mention of a contention that he was denied a jury trial on the predicate facts. The defendant raised neither the notice or burden of proof problems in the trial court. The Third District pointed out that either of these might have been cured by the trial judge if the judge had been

informed of these concerns.^{4/}

However, in the present case, the trial judge could have done nothing even if he was so inclined. (See *People v. Martinez* (2003) 31 Cal.4th 673, 700 [*Apprendi v. New Jersey, supra*, does not require application of reasonable doubt standard to jury determination of truth of aggravating circumstances in capital case]; *People v. Marlow and Coffman* (2004) ___ Cal.4th ___ [2004 LEXIS 7590 (decided Aug. 19, 2004, S011960)] [“California's [capital] sentencing process remains constitutionally valid after *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584. (*People v. Valdez* (2004) 32 Cal.4th 73, 139.)”]; *People v. Nelson* (1978) 85 Cal.App.3d 99, 101 [no right to proof beyond a reasonable doubt on aggravating factors used to impose upper term].)^{5/}

4 “Had defendant raised this issue in the trial court, the court could have endeavored to correct the alleged errors. For example, if defendant had objected to imposition of the registration requirement on the ground the predicate fact was not alleged in the information, the court could have sought to cure any prejudice from the lack of notice by granting a new trial so defendant could offer evidence on the predicate fact, or by granting a continuance of the sentencing hearing to allow defendant time to address the issue of whether the evidence at trial already had proved the predicate fact beyond a reasonable doubt. Similarly, if defendant had objected that the court needed to find that the predicate fact had been proven beyond a reasonable doubt, the court could have made such a finding on the record. By failing to raise these issues in the trial court, defendant deprived the court of the opportunity to provide him with the due process safeguards he now contends he was denied.” (*People v. Merchand, supra*, 691-692.)

5 Although not binding in other cases, even this Division had expressed its opinion in a pre-*Blakely* unpublished case, *People v. Goodridge* (2001 unpublished) E016274 [2001 WL 1656604], that *Apprendi* did not apply to facts used to impose the upper term. Similarly, as mentioned in footnote 2 above, the Washington scheme was held by that State’s Supreme Court not to violate *Apprendi* in *State v. Gore, supra*. Although these cases are not binding precedent, they show the breadth of an

The line of reasoning was based in part on the cases holding there was no right to a determination beyond a reasonable doubt of the facts used to apply the increase in punishment. For example, in a pre-*Blakely* context Division Four of the First District has said regarding *Apprendi*:

“A criminal defendant has a federal constitutional due process right to have every fact necessary to conviction proven by proof beyond a reasonable doubt. (*McMillan v. Pennsylvania* (1986) 477 U.S. 79, 84-85, 91 L. Ed. 2d 67, 106 S. Ct. 2411; *In re Winship* (1970) 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068.) However, the United States Supreme Court has held that in a sentencing context, the state may link the severity of punishment to the presence or absence of a factor that the prosecution need not prove by proof beyond a reasonable doubt. (*McMillan v. Pennsylvania, supra*, 477 U.S. at p. 84; *Patterson v. New York* (1977) 432 U.S. 197, 214, 53 L. Ed. 2d 281, 97 S. Ct. 2319.) If the specific fact [fn.8] at issue is not an element of the crime but is a factor that comes into play only after the defendant had been found guilty of the charges beyond a reasonable doubt and no increase in sentence beyond the statutory maximum for the offense established by the jury is implicated, then the state may consider this factor based on a lesser standard of proof. (*Apprendi v. New Jersey, supra*, 530 U.S. 466 at p. 487, 147 L.Ed.2d 435, 120 S.Ct. 2348; *McMillan v. Pennsylvania, supra*, 477 U.S. at pp. 85-86.) The facts setting the maximum term of a sentence and the trial court's power to impose that sentence are not elements of the crime for purposes of federal constitutional law. Within the range of sentence authorized by the jury's verdict, a trial court may exercise its discretion and expertise to impose a sentence. (See *Harris v. United States* (2002) 536 U.S. 545, ___, ___ [122 S. Ct. 2406, 2410, 2419, 153 L. Ed. 2d 524.]

----- Footnotes -----

“Footnote 8 The fact of a prior conviction has been exempted from these requirements. (See *Apprendi v. New Jersey* (2000)

assumption that there was no “sea change” affected by *Apprendi* that reached into a sentencing range scheme itself.

530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348.)”

----- End Footnotes-----

(*People v. Groves* (2003) 107 Cal. App. 4th 1227, 1230-1231.)^{6/}

The case here does not present itself in the manner that *Marchand, supra*, found to present forfeiture or even a reason to apply forfeiture if it did apply. It would have been utterly futile to raise the objection, both because the trial court would not under the law to have made the correction (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and because there is probably not a superior court judge at that time in California who would have seriously considered revamping California law in that regard or would have had reason to believe he would be upheld had

6 The opinion in *People v. Groves, supra*, was pre-*Blakely* but also involved a mandatory consecutive term because the crimes were committed on separate occasions. *Groves* claimed that *Apprendi* required a jury determination of separate occasions. That claim was rejected because: “If due process requires a sentencing factor to be established by a burden of proof beyond a reasonable doubt, then the issue must be submitted to a jury. (See *Apprendi v. New Jersey, supra*, 530 U.S. at p. 490; see also *Harris v. United States, supra*, 536 U.S. at p. ____ [122 S. Ct. at p. 2410].) However, as we have concluded that the reasonable doubt standard is not implicated in this case, neither does this sentence factor require a jury's input.” (*People v. Groves, supra*, 107 Cal. App. 4th 1227, 1231-1232.) Thus, *Groves* recognized that consecutive terms were analogous to the situation in *Apprendi* but rejected a jury for the same reason it rejected proof beyond a reasonable doubt. The opinion’s reliance on *McMillan, supra*, for the proposition that “the state may link the severity of punishment to the presence or absence of a factor that the prosecution need not prove by proof beyond a reasonable doubt,” was a mistake as the U.S. Supreme Court pointed out in *Blakely, supra*, “*McMillan* involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact. 477 U.S., at 81, 91 L. Ed. 2d 67, 106 S. Ct. 2411. We specifically noted that the statute ‘does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense.’ *Id.*, at 82, 91 L. Ed. 2d 67, 106 S. Ct. 2411; [further citation omitted].” (*Blakely v. Washington, supra*, 159 L. Ed. 2d 403, 414.)

he done so.

Respondent correctly observes that the courts in *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2⁷, and *United States v. Ameline* (9th Cir. 2004) ___ F.3d ___ [2004 U.S. App. LEXIS 15031; 2004 WL 1635808] reached the *Apprendi* or *Blakely* errors on the basis that the errors were “clearly erroneous.”⁸

The “clear error” doctrine is one in which it is determined that an error indeed took place: “[D]eviation from a legal rule is “error” unless the rule has been waived.’ *United States v. Olano*, 507 U.S. 725, 732-33, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993).” (*United States v. Ameline*, *supra*, 2004 U.S. App. LEXIS 15031, 28-29.) A judge finding by a preponderance of the evidence a fact which must be found by a jury beyond a reasonable doubt is well within that definition. (*Ameline*, *supra*.) To paraphrase slightly, it is enough that an error be “plain” at the time of appellate consideration: “It is clear after *Blakely* that increasing [the defendant’s] punishment based on facts not admitted by him or determined by a jury beyond a reasonable doubt (or by the [trial] judge with a jury waived) was clearly contrary to his Sixth Amendment jury right.” (*Ibid.*) The error must

7 *Cleveland* argued that *Apprendi* required the jury to make the determination of “intent and objective” regarding the application of Penal Code section 654, but the opinion points out that section 654 does not set any maximum penalty above that set for the crimes that were involved there both of which had life maximum terms.

8 The “clearly erroneous” error which can escape forfeiture is a doctrine described as follows: “Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” (*United States v. Ameline*, *supra*, quoting *Blakely*.)

also have been prejudicial (*ibid*) and it must have affected the fairness^{9/} of the proceedings (*ibid*).

In *Ameline*, the *Blakely* error was found to have met both tests as applied to the federal sentencing guideline application in that case. Also, as the Ninth Circuit pointed out: “A jury finding beyond a reasonable doubt material sentencing facts that will increase the level of punishment, as opposed to a district judge making such findings by a preponderance of the evidence, will likely lead to more reliable information during the sentencing process.” (*United States v. Ameline, supra.*)

Neither *Cleveland* nor *Ameline* found a forfeiture in the sense that they did not review it. The Ninth Circuit simply applied the federal “plain error” doctrine set forth in the Federal Rules of Criminal Procedure. (FRCP, 52(b).)

In *United States v. Cotton* (2002) 535 U.S. 625, also cited by respondent, the Court found that the error in failing to charge the amount of drugs in the superceding indictment was not within the “plain error” doctrine because there was no controversy at the trial regarding the amount being well over that needed; hence, the error was on a point which was immaterial and would not be examined. In that sense, the error in failing to object to the failure to allege the quantity in the superceding indictment prior to the rendering of the *Apprendi* decision could be termed to have been forfeited.

9 “Any 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,[citation omitted], 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.” (*United States v. Ameline, supra.*)

The procedural posture of the *Cotton* decision was that the objection made in the Fourth Circuit was that the *Apprendi* error was two-fold: the failure to allege and also a failure to submit the issue to the jury; however, the Fourth Circuit found the failure to allege created a jurisdictional failure in the sense that there was no power to sentence based on a non-alleged quantity enhancement. It decided the case on that pleading question.

The Supreme Court found that the “jurisdictional failure” was not a failure of what California would call “fundamental jurisdiction” or an absence of power to act on the subject matter at all. It then found the failure to object “forfeited” the *right* to review. This finding raised the plain error test. In applying that doctrine, one of the questions was whether the error affected the “fairness, integrity, or public reputation of judicial proceedings.” The evidence of the drug amount was overwhelming and essentially uncontroverted, and the Court found the Grand Jury would have indicted had the issue been presented to it. The Congressional intent was clearly that persons dealing in larger quantities of drugs should be punished accordingly. To permit the defendants to escape that where there was overwhelming and uncontroverted evidence of the quantity simply because it was not found *as a charge* by the grand jury would not promote the interests involved. The Court refused to recognize the error on its own without a trial court objection, and it remanded to the Fourth Circuit for proceedings not inconsistent with its opinion.

In short, *Cotton* in the United States Supreme Court was a case involving “notice” rather than a jury trial right.

Cotton did not involve the question of the submission to the jury. The question of whether the Grand Jury would have indicted was involved only in determining whether the promotion of the judicial proceedings was to be found from recognizing the error. The trial jury aspect, although used as an analogy at one point, was not discussed as an issue in the Supreme

Court because the judgment it was reviewing had relied on the jurisdictional question.

It is also important that in the federal system appellate jurisdiction has various limitations on the scope of review. Among those are statutory (28 U.S.C., § 2111) and rule (Fed. Rule Crim. Proc. 52(b)) provisions that a failure to object ordinarily limits a court to review for plain error. After its adoption by Congress in 1944 incorporating the 1936 policy of the Court, rule 52(b) has acted as a specific statutory limit on the reviewing power of the federal courts. No such specified standards limit California courts. Rule 52(b) is not a rule of procedure to bind California courts.

However, *Cotton* and *Ameline* are distinguishable for reasons other than the trial jury not being the issue and the fact they were determined under a federal rule. Essentially, before they come into play there must *first* be a forfeiture for failure to make a timely objection. Within the federal system, apparently such an objection would have been available. In California an *Apprendi* objection was futile.

A fundamental problem with the “forfeiture” argument is that no objection on *Blakely* grounds could have been made in the present case. Those grounds had not been clearly set forth, *Blakely* had not been decided, and *Apprendi* dealt with what was understood by all to be something other than upper terms. “With its clarification of a defendant's Sixth Amendment rights, the *Blakely* court worked a sea change in the body of sentencing law.” (*United States v. Ameline, supra.*)

California procedure holds that a defendant need not make futile trial objections (see, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Hines* (1997) 15 Cal.4th 997, 1038, fn. 5), and indeed holds that a failure to object does not waive fundamental rights such as the constitutional right to a jury trial. (*People v. Saunders, supra*, 5 Cal.4th 580, 589, fn. 5; see also *People v. Vera, supra*; *People v. Valladoli, supra*; cf. *People v. Holmes*,

supra.)

Under California law at the time a trial objection could have been made, the objection would not only have been futile, it could not have resulted in a correction. (*People v. Martinez, supra; People v. Nelson, supra; People v. Valdez, supra; People v. Groves, supra; People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver where trial court bound by higher court]; *Auto Equity Sales, Inc. v. Superior Court, supra.*)

Thus, prior to the application of the “plain error” rules, even the federal courts require a “forfeiture,” and none appears here.

However, even where there is a forfeiture, the appellate court could in its discretion reach the issue. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, 36, p. 497; Pen. Code § 1259; see *People v. Cleveland, supra* [reaching in the interest of justice].) Given the fundamental nature of the right to a jury trial and to proof beyond a reasonable doubt, and considering the right to Equal Protection and Due Process (U.S. Const., Amend. XIV) in conjunction with the fact the issue is being reached in other cases on the merits, it would be unjust to rule *sub silentio* on the merits or not to consider them at all in this case.

Respondent finally turns to the statement in *People v. Scott* (1994) 9 Cal.4th 331, at 351-352, that “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.]” (AG Letter Brief p. 5.) Respondent argues from the premise that appellant’s argument is essentially the trial court erred under *Blakely* by considering flawed sentencing factors but that falls under *Scott* because the aggravating factors were set forth in the probation report. That is, as appellant understands it, respondent is urging the error was that the judge found erroneous factors to the extent they were not found by the jury or

admitted by the defendant, but under *Scott* such complaints are waived.

This effort by respondent is a sophistic argument at its best.

First, its premise is wrong. Appellant is *not* complaining of the use of improper sentencing factors in the sense that *Scott* means. Appellant is complaining about the denial of his right to a jury determination of facts.

Second, it flies in the very face of *Blakely*'s reasoning. Respondent simply will not acknowledge a hard fact: The United States Supreme Court plainly stated the very essence of its decision:

“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 omitted], and the judge exceeds his proper authority.” (*Blakely v. Washington, supra*, 124 S. Ct. 2531, 2537.)

The nature of the error is exceeding the maximum punishment allowed by the facts found by the jury verdict alone. It is the denial of a jury determination.

As for the probation report and the trial court's reliance thereon, that also received mention in *Blakely* as the court discussed the unfairness of fact-finding by a judge “extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.” (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2542.)

Third, this is not the sort of error that *People v. Scott, supra*, said was waived. The opinion in *Scott* explains its reasoning as being that “[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. (*People v. Scott, supra*, 9 Cal. 4th 331, 353.) The case clearly had nothing to do with waiving a jury trial or proof beyond a reasonable doubt.

Fourth, *Scott* itself reiterated the rule discussed earlier that futile objections are not necessary and also observed: “there must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived by today's decision.” (*People v. Scott*, 9 Cal. 4th at p. 356.)

Fifth, another good reason not to apply *Scott*'s waiver rationale too extensively may be found in another recent Supreme Court decision declining such an extension to HIV testing orders: “We note further that applying a forfeiture rule in this circumstance would likely have the effect of converting an appellate issue into a habeas corpus claim of ineffective assistance of counsel for failure to preserve the question by timely objection. Although habeas corpus proceedings might provide the prosecution with the opportunity to come forward with additional evidence and thus negate prejudice, we would be loath to invoke a rule that would proliferate rather than reduce the nature and scope of legal proceedings.” (*People v. Butler* (2003) 31 Cal. 4th 1119, 1128.)

The bottom line is that there is no forfeiture in this case because it would have been futile to object or to ask the trial judge to do that which he was precluded from doing at the time. There is no need to apply the “plain error” doctrine or to extend a discretionary exception of other sorts – although those are available and would be appropriate – because there is simply no forfeiture to begin that process.

The California Supreme Court appears to be signaling agreement because it has granted review on the merits in *People v. Black*, S126182 (review grtd. July 28, 2004) on what effect *Blakely* has on the validity of the defendant's upper term sentence and the imposition of consecutive sentences, after previously granting review on the merits in *People v. Towne*, S125677 (review gtd. July 14, 2004) on whether *Blakely* precludes a trial court from making the required factors for an upper term sentence and, assuming that to be the case, what standard of review applies and whether

the error in the case was prejudicial. (*Ibid.*) It has been denying review in further cases without prejudice to raising whatever result there is in *Black* and *Towne*. (E.g., *People v. Hicks*, S126163 (review den. July 28, 2004); *People v. Swangler*, S126105 (review den. Aug. 11, 2004); *People v. Brown*, S125619 (review den. August 11, 2004).) In the total of six cases in which review so far has been denied as of the date this is written, there must surely have been cases that would not have *Blakely* or *Apprendi* objections, yet they all are able to raise the merits – whatever the result of *Towne* and *Black* – one assumes on habeas corpus or a recall of the remittitur.

Sometimes major things happen, and this is one of those times, and it is respectfully submitted that “forfeiture” does not apply to preclude review on appeal.

II. MERITS

A. *Blakely v. Washington*

The appellant in his supplemental brief discussed the decision in *Blakely v. Washington, supra*, at some length and will try not to be overly repetitive. Instead, in this reply, he will again discuss some of the flaws in the respondent’s exposition of that case.

Respondent correctly has observed that the decision in *Blakely* extended the holding in *Apprendi*. Under the Sixth Amendment, all facts used to increase a defendant’s sentence beyond the statutory maximum must be charged and proven to a jury. (RLB 5.) As respondent also agrees, the United States Supreme Court in *Blakely* went on to explain that “the *relevant* ‘statutory maximum’ is *not* the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* [court’s emphasis] any additional findings.” (RLB 7, quoting *Blakely*, appellant’s emphasis added.) That is, the jury must find all factual predicates for the punishment to be imposed.

Respondent points out that *Blakely* was not removing all judicial discretion, and appellant agrees – indeed, the weighing of the facts found in terms of discretionary decision making does not seem to have been involved in the genesis of the *Blakely* findings. This requirement of jury fact finding may ultimately work to the disadvantage of many defendants; however, our High Court has explained that indeterminate terms to a maximum may have a discretionary determination of lesser terms and whether or not the judge finds facts in setting something less than a maximum allowed by the jury finding, this is proper because “the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence.” Respondent correctly perceives that situation is different when the penalty imposed is *greater* than what is authorized by the jury-found facts. (RLB 7-8.)

However, respondent begins to import labeling into his argument by using the term “offense-specific maximum.” The problem is that the *Blakely* opinion is not concerned with an “offense-specific maximum.” It is concerned with the right to have a jury find every single fact necessary for a particular punishment. By shifting his focus to “offense-specific”, respondent falls back once again into the trap of what *Blakely* has exposed in speaking of Justice O’Conner’s dissent:

“It bears repeating that the issue between us is not whether the Constitution limits States’ authority to reclassify elements as sentencing factors (we all agree that it does); it is only which line, ours or hers, the Constitution draws. Criticism of the quantity of evidence favoring our alternative would have some force if it were accompanied by any evidence favoring hers. JUSTICE O’CONNOR does not even provide a coherent alternative meaning for the jury-trial guarantee, unless one considers ‘whatever the legislature chooses to leave to the jury, so long as it does not go too far.’” (*Blakely v. Washington, supra*, 124 S. Ct. at p. 2537, fn. 6.)

The appellant agrees that the Legislature and courts and even administrative bodies have proper tasks in establishing sentence length.

These are not the problems that *Blakely* has focused upon. *Blakely* is focused upon the Constitution's protection of proof beyond a reasonable doubt and jury findings of all facts necessary to impose punishment.

Respondent uses his "offense-specific maximum" invention to argue overall that the Legislature established a triad of penalties of which the "upper term" is the maximum. He argues that a defendant only has a right to the upper term absent further facts. The Judicial Council rules are "regularization" of the judge's choices amongst the three terms. In respondent's view, the focus is upon whether the defendant has a "right" to a middle term, as opposed to the judge being allowed by the jury's verdict alone to impose some higher term. He then discusses the defendant's lack of a "right" to a middle term, as he sees it.

The appellant will discuss that theory on its own terms; however, it is essentially irrelevant. "[T]he relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi v. New Jersey, supra*, 530 U.S. 466 at p. 494.) Or, to put it another way,

"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.' This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason,' 1 J. Bishop, Criminal Procedure §§ 87, p. 55 (2d ed. 1872). [Footnote 5 omitted.]" (*Blakely v. Washington, supra*, 124 S. Ct. at p. 2536.)

The concept is not hard to grasp. If punishment depends on some

factual determination, that determination is for the jury. Thus, where the jury simply returns a verdict which by itself finds every fact necessary to impose a punishment, all the facts necessary to justify any lower punishment have been found but not those to impose a higher punishment.

The fact that a statutory scheme permits a judge to impose a higher punishment for an aggravated occurrence of that offense does not have any bearing on the Constitution's Sixth Amendment procedural protections requiring that the facts in aggravation—such as the fact in *Blakely* that the crime involved was committed with “deliberate cruelty”—be found beyond a reasonable doubt by a jury.

The California or any other state Legislature may establish appropriate punishments with no interference whatever with that function, the guidelines or “regularization” features incorporated by rule or otherwise also are not in any way banned. All of that is simply not relevant other than that the elements of which they are composed cannot raise a punishment to a higher level unless the jury finds those elements. In short, *Blakely* is a jury versus judge decision, a judicial branch matter of fundamental procedures regarding who is to find the facts in the courtroom.

When one understands what the nature of the constitutional problem is, it becomes obvious why the respondent's argument is flawed. For example, respondent agrees that the Legislature has mandated that “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (RLB 11; see Pen Code § 1170, subd. (b); see also Cal. Rules of Court, rule 4.420(a).) But, respondent then goes on to argue that “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, does not mean that it has effectively created separate, enhanced crimes containing the myriad, non-exclusive sentencing factors enumerated

in the Rules of Court.” (RLB 11.)

None of the foregoing addresses the issue that there must be some fact in addition to the bare elements found by the jury verdict in order to have an aggravated crime. California law is even explicit:

“It is established that a circumstance that is an element of the substantive offense cannot be used as a factor in aggravation. (*People v. Wilks* (1978) 21 Cal.3d 460, 470, 146 Cal. Rptr. 364, 578 P.2d 1369; *People v. Clark* (1992) 12 Cal.App.4th 663, 666, 15 Cal. Rptr. 2d 709.) A sentencing factor is only an element of the offense, however, if the crime as defined by statute cannot be accomplished without performance of the acts which constitute such factor. (*People v. Clark, supra*, at p. 666.)” (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1261-1262.)

This makes great sense because the additional punishment is in addition to the normal punishment for the acts and mens rea of the wrongful conduct. That is what the aggravating circumstances are, something in addition to the bare elements of the statutory crime. They are what justifies the additional punishment. “A circumstance which is an element of the substantive offense cannot be used as a factor in aggravation. [Citations.] A sentencing factor is an element of the offense if the crime as defined by statute cannot be accomplished without performance of the acts which constitute such factor.” (*People v. Clark* (1992) 12 Cal. App. 4th 663, 666.)

The Attorney General sums up his position in two ways. First, he points out that defendants have notice that there is an “offense-specific penalty” which is associated with the upper-, middle-, and lower-term and that the defendant will receive one of those terms. That is true, but it is also true that it is only if the crime is aggravated that the upper term will apply. That term cannot be applied absent aggravating factors.

Second, the Attorney General points out that in terms of “enhancements” and “alternative sentencing schemes” there is generally

provision for a jury trial and a burden of proof beyond a reasonable doubt. The appellant is not ready to say that this is entirely accurate and meets fully with *Blakely* or *Apprendi*, especially as to alternative sentencing schemes, but the fact is these statements by the Attorney General still do not address the problem. The problem is not in labels.

The problem is that the Sixth Amendment and Fourteenth Amendment require that a jury determine any fact that increases the punishment. It does not matter what label is used, unless found by a jury beyond a reasonable doubt any aggravating factor cannot be used to arrive at a higher term.^{10/}

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

Respondent states: “Even if this Court were to conclude *Blakely* applies to upper terms, under *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219; 140 L.Ed.2d 350] (*Almendarez-Torres*), appellant did not have a right to a 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. 48 [same].)” (RLB 13.)

Before proceeding further, it appears to appellant that *Apprendi*,

10 Respondent also goes into detail regarding the Washington sentence law and asserts that it and the federal guideline cases differ from California; the appellant agrees that our law and that of Washington are not both identical in all respects, and certainly California law differs from the structure of the federal guidelines significantly in many respects. However, the differences with Washington are not significant for the purposes of *Apprendi* or *Blakely*. The constitutional principles apply whether the statutes are all separate or incorporate aggravating factors in each one and whether the higher punishment is the result of guidelines, regulations, or rules. In this Constitution, a person is entitled to a jury determination beyond a reasonable doubt of every fact necessary to his punishment.

Blakely, and *Ring*, all are inconsistent in their reasoning with *Almendarez-Torres* being an exception¹¹, and the appellant also observes that the majority vote for the exception has now switched in terms of the expressions of the justices. Although the United States Supreme Court has not itself directly said so, it appears that *Almendarez-Torres* will not be the governing case. What the United States Supreme Court has said in *Apprendi-Blakely* context is:

“This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000): ‘*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.’” (*Blakely v. Washington, supra*, 124 S. Ct. 2531, 2536, emphasis added.)

Thus, *Blakely* was merely referring back to the holding in *Apprendi*. In *Apprendi*, as in *Blakely*, the Court merely said that the issue of prior convictions in *Almendarez-Torres* was not yet before it. The question of whether or not to take the major step of actually overruling *Almendarez-Torres* was not ripe.

11 The constitutionally required procedure is:
“Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. [Footnote 8.]

----- Footnotes -----
8 “Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence.”

----- End Footnotes-----
(*Blakely v. Washington, supra*, 124 S. Ct. 2531, 2538.)

More specifically, the majority opinion states: “*Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998), represents *at best* an exceptional departure from the historic practice that we have described.” (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 487, emphasis added.)

The opinion in *Apprendi* then goes on to explain that *Almendarez-Torres* was a case involving an objection that the indictment had not mentioned *Almendarez-Torres* earlier aggravated felony convictions (which he admitted suffering). He argued his sentence must be limited to two years rather than the twenty to which he was subject due to the prior convictions. The *Apprendi* majority continued by pointing out that the specific question in *Almendarez-Torres* was the sufficiency of the indictment, and “*no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.*” (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 488, emphasis added.)

Finally, *Apprendi* has this to say:

“Even though it is arguable that *Almendarez-Torres* was incorrectly decided, [footnote 15 omitted] and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.” (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 489-490.)

In sum, at the very least, *Almendarez-Torres* is not a barrier to the logical application of *Apprendi-Blakely* to prior convictions and recidivism facts, and it is to be treated as a very narrow exception. “[I]t surely does not warrant rejection” of the *Apprendi-Blakely* application of the Sixth Amendment. Indeed, “it is arguable that *Almendarez-Torres* was

incorrectly decided.”

There is not much question about the fact it would be overruled if it would impact on the *Apprendi-Blakely* rulings.

It is respectfully submitted that either in its narrowed form as an indictment sufficiency case or as a case which has been effectively overruled^{12/}, *Almendarez-Torres* has nothing to do with the *Apprendi-Blakely* problem and solution and is not a true limitation but merely a subset that is not being mentioned, *other than* to point out that logically it would not be an exception had it been challenged.

The Attorney General moves on from the position that prior convictions provide an exception to *Apprendi-Blakely* to a further extreme. “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.” (RLB 13, primarily citing *People v. Thomas* (2001) 91 Cal.App.4th 212, 215-223.)

As just pointed out, such an expansion of *Almendarez-Torres* now appears very out-of-place. Far from expanding, it has been at best narrowed to its own issue and facts in the regards the respondent seeks to invoke. The appellant respectfully contends that *Almendarez-Torres*, if not completely overruled, simply will not support the load respondent heaps upon it of exempting cases in which the defendant suffered any sort of prior criminal exposure in some other case.

12 Justice Thomas in a separate concurrence indicated he regretted his *Almendarez-Torres* vote and would now vote the other way in that 5 to 4 decision. Of the five justices in the majority in *Apprendi* and *Blakely* all but Thomas had dissented in *Almendarez-Torres*. Justice Thomas concurrence and the majority opinion demonstrate that he has effectively dissented from *Almendarez-Torres* and that holding is dead so far as the majority of the Supreme Court are concerned.

California cases also do not take an expansive view of *Almendarez-Torres* in the context of *Apprendi*. (E.g., *People v. Taylor* (2004) 118 Cal. App. 4th 11, 29 [decision of whether current offense was a serious felony depended on additional fact beyond conviction and court could not find contrary to jury verdict that great bodily injury was inflicted by using finding of battery with serious bodily injury^{13/}].)

It is true that in *People v. Thomas, supra*, the Second District, Division Five, stated that the language of *Apprendi* restricting the “exception” (or, as we have seen, the area not considered) to prior convictions did not limit the *Almendarez-Torres* applicability to the fact of prior convictions alone but rather *Almendarez-Torres* itself involved some determinations in addition to the simple fact of conviction.

In *Thomas* the issue in question was whether the absence of a personal waiver of a jury trial on the issue of the defendant’s having suffered two prior prison terms required reversal. As to the California statutory right, it was not a state constitutional right (*People v. Vera* (1997)

13 “The right to jury trial ‘includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding.’ (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277 [124 L. Ed. 2d 182, 113 S. Ct. 2078].) No matter how overwhelming the evidence, a judge in a criminal case may not direct a verdict for the prosecution. (*Ibid.*) The United States Constitution ‘requires an actual jury finding of guilty.’ (*Id.* at p. 280.) ‘[T]he jury’s determination of ultimate guilt is indispensable.’ (*United States v. Gaudin* (1995) 515 U.S. 506, 510, fn. 2 [132 L. Ed. 2d 444, 115 S. Ct. 2310].) Thus, the trial court violated Taylor’s constitutional right to jury trial by incorrectly treating the conviction for battery with serious bodily injury as equivalent to a finding of great bodily injury. ‘[T]he error in such a case is that the wrong entity judged the defendant guilty.’ (*Rose v. Clark* (1986) 478 U.S. 570, 578 [92 L. Ed. 2d 460, 106 S. Ct. 3101].)” (*People v. Taylor, supra*, 118 Cal. App. 4th 11, 30, reversing the enhancement.)

15 Cal.4th 269, 277) and there was no federal constitutional right perceived so far as a prior conviction was concerned (*People v. Epps* (2001) 25 Cal.4th 19, 23). However, a prior prison term involves more than simply a conviction—there is the additional fact that the person must have served a term in accordance with the requirements of Penal Code section 667.5. The appellant reasoned that he was entitled under *Apprendi* to a jury trial on that fact. Division Five felt otherwise. Where the additional fact enhances a sentence and is unrelated to an element of a crime, full due process treatment was not necessary in the Second District’s opinion.^{14/} *Thomas, supra*, assuming its reason was valid at the time – and for the reasons previously given the appellant submits that reasoning was incorrect – has been severely undercut by *Blakely*. That is, the emphasis in *Thomas* on the additional fact being “unrelated to an element of a crime” is not a tenable distinction after *Blakely* which points to the factors used as equivalent to elements.

It is respectfully submitted that the opinion in *People v. Thomas, supra*, read *Apprendi* in a more expansive manner than it should be read in this case. In addition to the “narrow” significance *Apprendi* ascribed to *Almendarez-Torres* and the subsequent developments in the *Blakely*

14 “The language relied upon by defendant in *Apprendi*, ‘other than the fact of a prior conviction,’ refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations. Notably, the recidivism enhancement in *Almendarez-Torres* had elements apart from the mere fact of a prior conviction. As noted previously, the prior conviction had to involve an ‘aggravated felony’ which occurred before the alien accused’s removal from this country. (See fn. 2, ante.) As has been noted, the term ‘aggravated felony’ in *Almendarez-Torres* involved the commission of specific enumerated felonies, not merely the ‘fact of a prior conviction’ as that term was utilized in *Apprendi*.” (*People v. Thomas, supra*, 91 Cal. App. 4th 212, 223.)

context, *Thomas* applies *Almendarez-Torres* in a manner which the opinion in *Apprendi* states is not logical in regard to the holding there. Finally, the situation in *Almendarez-Torres* specifically was not one dealing with the question of a jury trial but rather with a charging document and guilty plea and admissions.

With all due respect to the panel of Division Five of the Second District which decided *Thomas*, the appellant respectfully requests that this Court not follow that decision down the road of expanding “recidivism” in the sense of prior convictions to “recidivism” in the sense of anything having to do with the results of the conviction and beyond in regard to jury determinations.

The Attorney General imports at this point some of his harmless error aspects. That is, he wants to parley the expanded notions of *Apprendi* he sees as set forth in *Thomas* of factors which he labels as “recidivism” into being sufficient if there is but one such factor. His labeling knows no bounds.

Respondent argues that once a defendant has a “recidivistic” factor, that is now a basis for the upper term (presumably assuming it is not used as a factor for some other purpose as well). Since it is something which makes the defendant “eligible” for the upper term, no further determination by a jury is needed. A single aggravating factor is, in respondent’s view, sufficient to render a defendant eligible for the upper term. (RLB 13.)

In short, under respondent’s view, anyone with a criminal history has thereby forfeit his rights under the Sixth Amendment. On its face that is an unreasonable premise as a matter of common sense. However, for the present at least, that still would not solve respondent’s problems because the judge, as respondent admits (RLB 14), under California law uses a preponderance standard rather than the beyond a reasonable doubt standard to make the initial finding of a so-called recidivist sentencing factor other

than a prior conviction used for enhancement or the more punitive sentencing scales such as the Three Strikes Law. Respondent might argue that due to *Almendarez-Torres* a “recidivism” finding is not only exempt from the Sixth Amendment jury requirement but also thereby is exempt from the higher burden of proof. However, neither is accurate.

In *Jones v. United States* (1999) 526 U.S. 227, 249, the United States Supreme Court pointed out two things about *Almendarez-Torres*. First, it again observed the limited nature of the *Almendarez-Torres* decision (i.e., the rights to indictment and notice do not necessarily require charging prior convictions); and, second, it expressly distinguished that from questions under the Sixth Amendment.

After noting that the recidivist issues in *Almendarez-Torres* were partially resolved the way they were due to historical treatment as sentencing factors, the *Jones* opinion stated: “One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” (*Ibid.*)

In other words, in our present context, it is by no means clear that *Almendarez-Torres*, if still viable, would lend support to respondent on the scale he suggests. That case has been severely narrowed by *Apprendi* as already discussed, and previously *Jones* also said that it was limited in its holding to the rights of indictment and notice, and did not deal with the Sixth Amendment concerns of a jury trial and the right to proof beyond a reasonable doubt. The “fact” that was established was a prior conviction, a fact established by the due process guarantees, including a jury trial and proof beyond a reasonable doubt. It was not more remote items such as those used for sentencing factors, as for example those in this case, without

there having been a jury finding beyond a reasonable doubt.

The exposition of *Almendarez-Torres* in *Jones v. United States*, *supra*, is replete with language making it clear the *Jones* majority did not see *Almendarez-Torres* going beyond the notice questions and also making it clear that they felt that case on notice of recidivism was only a suggestion that the court felt recidivism otherwise was “potentially distinguishable” as a sentencing factor and having a “possible constitutional distinctiveness” in that role.

In short, *Almendarez-Torres* did *not* hold that recidivism *was* unique for purposes of the Sixth Amendment. As stated in *Jones*, one of the reasons *Almendarez-Torres* was not helpful to its problem was: “the case is not dispositive of the question here, . . . because we are concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by *Almendarez-Torres* . . . ^{15/} (*Jones v. United States*,

15 “*Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998), decided last Term, stands for the proposition that not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be so charged. But the case is not dispositive of the question here, not merely because we are concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by *Almendarez-Torres*, but because the holding last Term rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment. The Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing. [Citations omitted.] One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot,

supra.)

Although it cannot be said that *Blakely* has filled that gap by its application of the Sixth Amendment to every other factual finding needed, the express reservation of that issue has only one logical outcome, as *Blakely* itself stated. Thus, although not expressly stated and although expressly reserved, the state of the law in the United States Supreme Court is that all other factors must be proven to a jury beyond a reasonable doubt, there is no case expressly saying that recidivist factors and even prior convictions fall outside the Sixth Amendment, and the remaining conclusion is that they must also be within those protections.^{16/}

However, assuming *arguendo* that respondent is correct, it makes no difference to this case.

First, a prior offense is not per se an aggravating factor. Prior convictions as aggravating circumstances are “prior convictions as an adult or sustained petitions in juvenile delinquency proceedings [which] are numerous or of increasing seriousness. (Cal. Rules of Court, rule 4.42.1(b)(2).) *Almendarez-Torres* only applies to whether there is a prior conviction per se, not to whether they are numerous and of increasing seriousness.

Second, the respondent has seized upon *not* a prior conviction but rather upon the finding Mr. Kelly was on felony probation when the crime was committed and that his prior performance on probation was unsatisfactory. Although that is a listed factor in aggravation (Cal. Rules of

then, be read to resolve the due process and Sixth Amendment questions implicated by reading the carjacking statute as the Government urges. [Footnote 10 omitted.]” (*Jones v. United States, supra.*)

16 The concurring opinions of Stevens and Scalia, JJ, in this 1999 case clearly presage the *Apprendi* and *Blakely* opinions.

Court, rule 4.421), it is not a prior conviction factor. Respondent asserts these are components of appellant's prior convictions. (RLB 14.) However, respondent provides no support for that proposition.

Respondent's assertion is mistaken. The fact the person was on probation when he committed the crimes is not aggravating due to the prior conviction recidivism but rather is aggravating because the person breached the special custodial status of trust. (See *People v. Jerome* (1984) 160 Cal. App. 3d 1087, 1098 [explaining distinction avoids forbidden dual use of fact where on parole and prior conviction].) Especially in light of the highly limited view of the decision in *Almendarez-Torres* taken by the High Court in subsequent cases, the imaginative effort by respondent should be rejected.

Respondent appears to agree that the additional aggravating factors would require a jury finding beyond a reasonable doubt were it not for the "recidivist" label respondent mistakenly attached to the probation factors. However, due to that factor, respondent contends the trial court now had only to find the other aggravating factors by a preponderance since that now became discretionary considerations in that there was what respondent incorrectly determined was one proper factor which could aggravate the sentence to the higher term.

Respondent's argument that the other facts could now be found by a preponderance will not succeed in the face of what the *Apprendi-Blakely-Ring* cases have as their base. The single factor would have to be sufficient in the case to require the upper term as a matter of law in every case. If sufficient, and if relied upon by the trial judge exclusively, then there are no other factors. But, here the judge did not rely exclusively upon the probation factor. Rather, it was a combination that brought the judge to his decision. Each of those must be proven beyond a reasonable doubt to a jury.

A limited analogy might be drawn to the situation where there is an error in sentencing in which the trial court relied upon improper factors under state law. In such a situation, the error is not harmless unless it is not reasonably probable that the trial court would have chosen a lesser term had it been aware of its error. The reviewing court in such a situation “may not simply ask whether the imposed sentence would be wholly unsupported or arbitrary in the absence of the error but must also reverse where it cannot determine whether the improper [factors were] determinative *for the sentencing court.*” (*People v. Avalos* (1984) 37 Cal.3d 216, 233.)

The appellant recognizes that the analogy is not exact, but tenders it as illustrative of the fact that it is an over-generalization to say that simply because one factor is recognized as potentially aggravating it would (1) take the case out of *Blakely* and (2) negate in the particular case any decisive effect of the other factors on the mind of the trial judge. Thus, even assuming the respondent’s other arguments had some merit, they do not save the day because the other facts were found by a preponderance.

However, the greater problem may be that *Blakely* itself is clear: *any* fact that is used to increase the sentence must be found by a jury beyond a reasonable doubt, with the possible but uncertain exception of a prior *conviction*. That did not happen in this case.

C. Consecutive sentences.

Respondent starts off with *People v. Sykes* (2004) 120 Cal.App.4th 1331, a decision of the Second District’s Division Five, filed July 28, 2004, and not final as of this writing. The reasoning of *Sykes*, including its agreement that *Blakely* applies to the individual counts, is again offense focused.

“The consecutive sentencing decision does not involve the facts, in Justice Stevens’ words, ‘necessary to constitute a

statutory offense.’ (*Id.* at p. 483.) In fact, the consecutive sentencing decision can only be made once the accused has been found beyond a reasonable doubt to have committed two or more offenses--this fully complies with the Sixth Amendment jury trial and Fourteenth Amendment due process clause rights. Those facts which affect the appropriate sentence within the range of potential terms of incarceration for each offense are subject to *Blakely* and *Apprendi*; this constitutional principle does not extend to whether the sentences for charges which have been found to be true beyond a reasonable doubt shall be served consecutively.” (*People v. Sykes, supra*, 120 Cal. App. 4th 1331, 1345, as modified.)

The problem there is that the *Blakely* case focuses upon the nature of the decision (i.e., a factually dependent basis for a discretionary determination) and its effect (i.e., an increase in punishment above that which is the generally presumed punishment and can be imposed only if the factual basis is found to exist).

“This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000): ‘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.’ This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,’ 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769), and that ‘an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason,’ 1 J. Bishop, *Criminal Procedure* §§ 87, p. 55 (2d ed. 1872). [Footnote 5 omitted.]” (*Blakely v. Washington, supra*, 124 S. Ct. 2531, 2536.)

The focus of *Blakely* is on the right to a jury determination of “any fact that increases the penalty for a crime beyond he prescribed statutory

maximum” and upon the penalty actually imposed in relation to that maximum. The “statutory maximum” is also carefully defined as the term is used in *Blakely*:

“[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*. [Citations omitted.] 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 omitted] and the judge exceeds his proper authority.” (124 S. Ct. 2531, 2537.)

This definition was made in response to an argument by the State that the statutory maximum was that of the extended punishment statute. The *Blakely* opinion worked at trying to disabuse the State of any misunderstandings regarding *Apprendi* which appeared to have led to its narrow offense focused views:

“Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. [Footnote 8.]

----- Footnotes -----

“8 Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence.”

----- End Footnotes-----

(*Blakely v. Washington, supra*, 124 S. Ct. 2531, 2538 & fn. 8.)

The difference between a higher term and a consecutive sentence is no more the secret than the difference between a specific statutory fact and any other aggravating fact. The difference between a mandatory enhancement and one that is discretionary also makes no difference for *Blakely*'s purposes. What does make a difference is whether there is some fact necessary to the punishment imposed. In that regard, the appellant respectfully submits the *Sykes* opinion did not fully consider the import of *Blakely*:

“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. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. [Citations omitted.] *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.” (*Blakely v. Washington, supra*, 124 S. Ct. 2531, 2538-2539.)

The focus on punishment and the need for additional findings before that punishment may be imposed is also seen in California in the laws relating to imposition of consecutive terms.^{17/}

Sentencing choices which require a statement of reasons generally include determinate sentencing which impose consecutive terms. (Cal.

17 Respondent is correct that *Blakely* did not discuss consecutive terms; however, it may suggest that was only because the other count, a stipulated count of domestic violence carrying a fourteen month term, was run concurrently. “Petitioner further agreed to an additional charge of second-degree assault involving domestic violence, [citation omitted]. The 14-month sentence on that count ran concurrently and is not relevant here.” (*Id.*, at p. 2535, fn. 2.)

Rules of Court, rule 4.406(b)(5). Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently. (Pen Code § 669.) Although no particular reasons or none at all are required for indeterminate sentences, there still must be aggravating factors which permit the consecutive term. (See e.g. *People v. Valenzuela* (1995) 40 Cal.App.4th 358, 365 [adopting a “transactional relation” standard in order to justify a consecutive term].) Finally, in mixed determinate and indeterminate sentencing determinations, the reasons are required. (*People v. Dixon* (1993) 20 Cal. App. 4th 1029, 1037.)

These reasons are required in part because the trial court must make a discretionary decision to impose the terms consecutively, and the judgment declaring that the individual defendant before the court shall serve such terms is nevertheless an integral part of the judicial act of sentencing and committing him to prison (*In re Sandel* (1966) 64 Cal. 2d 412, 416.)

Clearly, the California statutes and law have been interpreted so the default on terms in California is that they shall run concurrently absent factual reasons to run them consecutively.

Respondent’s efforts to say that the increase is not fact-based is simply incorrect. The rationale of a jury determining facts which increase the punishment applies. And, again, the subject matter of the *Apprendi* decision itself was after all an “enhancement” or consecutive time.

Respondent also misunderstands the Three Strikes Law problem in regard to consecutive versus concurrent terms. The appellant has not protested that the facts necessary to bring that law into effect were not found by a jury or after waiver by a court or plea beyond a reasonable doubt.

Rather, the provisions of the law itself condition reliance on the

mandatory consecutive sentence upon the existence of certain facts, specifically that the crimes were not committed on the same occasion and did not arise from the same set of operative facts. While the judge otherwise retains discretion to impose consecutive terms—with the required ordinary fact-finding already discussed—reliance on the mandatory provision to remove the judge’s discretionary responsibility is still the equivalent of finding a factor to increase the overall term by running the sentences consecutively.

Respondent states that the provision relating to mandatory consecutive sentences is really analogous to mandatory minimum terms, which would take it outside of *Blakely*. However, that statement overlooks the language of the Three Strikes Law. The relevant provision creating a mandatory consecutive term is found in Penal Code section 1170.12, subdivision (a)(6), and Penal Code section 667, subdivision (c)(6), which are equivalent in effect (*People v. Hendrix* (1997) 16 Cal. 4th 508, 511).

In *People v. Casper* (2004) 33 Cal. 4th 38, 43-44, the Supreme Court construed the consecutive term provisions to require consecutive terms, if the predicates were present, to require that counts run consecutively even though the finding of prior convictions to increase the individual terms was stricken for those counts so long as at least one count qualified. It summed up that “there can be no doubt after examining the language of section 667, subdivision (c) but that consecutive sentences are required for all current felony convictions, regardless of whether a strike allegation attaches to them, *if the crimes did not arise on the same occasion or under the same set of operative facts.*” (*Ibid*, emphasis added; see *People v. Hendrix*, *supra*, at pp. 512-513; cf., e.g., *People v. Deloza* (1998) 18 Cal. 4th 585, 594 [“Making mandatory consecutive sentences for those current crimes committed on *different* occasions is consistent with the focus of the three strikes law, which is recidivism.”].) Thus, reliance on the mandatory terms

of the Three Strikes Law requires an initial factual inquiry which is not necessarily resolved by the jury's verdicts.

III. HARMLESS ERROR.

The appellant has explained that there was no forfeiture in this case, and thus the rules for reaching a forfeit issue, the "plain error" doctrine, which require finding that it would be unjust and thus that the error not be harmless beyond a reasonable doubt, do not apply.

Instead, as explained in the appellant's previous supplemental brief, the problem here is that the wrong fact-finder made the decision and did not do so beyond a reasonable doubt. The error was the denial of a jury trial, and that is a structural error requiring reversal without attempting the "harmless error" or "miscarriage of justice" analysis. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.) "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the state would be sustainable on appeal; it requires an actual jury finding of guilty." (*Ibid.*)

It is worth reflecting on the underlying purposes of *Blakely* and more importantly upon the underlying purposes of the Sixth Amendment which *Blakely* explains, and some of which are quoted above. It is a fundamental separation of the jury and the judiciary^{18/} that underlies the requirement, and

18 "Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has

one court simply could not substitute for another without destroying that structural protection.

The respondent would not prevail even under *Chapman v. California* (1967) 386 U.S. 18, 24, in regard to count two, the carjacking, being reduced to the middle term. Respondent suggests that “appellant assaulted one victim and drove away in the victim’s car.” (RLB 16.) Appellant continues to maintain that the evidence of carjacking was entirely insufficient; however, assuming *arguendo* that the defendant was found by the jury to have assaulted the owner of the car (there was no verdict covering that and appellant was acquitted of robbery of that person) and drove it off, it is the essence of a normal carjacking to take a car by threat or force or the like from possession of the driver. The trial judge quite properly did not rely on that as a factor for the upper term. The judge did rely on the defendant being engaged in violent conduct which indicated he was a serious danger to society. This was found by a preponderance. The question is whether a jury would have found these facts beyond a reasonable doubt. The acquittal of the robbery seems to indicate that they would not have done so, but that is not the question. Rather, the question is what is it about this crime that so indicated that a reviewing court could say it was convinced beyond a reasonable doubt that no juror would have dissented.

What respondent is doing is simply making his own findings. This is not what can be done under *Chapman*. The prosecution evidence showed that the car owner was exiting a party in no condition to drive and was prevented by being hit whereupon he fell to the street and either from the

the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” (*Blakely v. Washington, supra*, 124 S. Ct. 2531, 2543, original emphasis.)

blow or his drinking or both he passed out. At some later point, the defendant got Jennifer Hernandez, and the two of them used the car. Jennifer did not see Alexander Washington in the street, and Alexander was on a lawn when his father arrived. A jury could well-determine that there was not such violence involved in *this* crime as to indicate the defendant was a serious danger to society. It bears repetition that the jury unanimously did not find beyond a reasonable doubt that the defendant robbed Alexander.

The factor of being on probation and the prior performance being unsatisfactory might also not be found, but it was not even remotely submitted to the jury. In any event, as previously discussed, while it is true one factor might be sufficient, it is also true that the judge felt it necessary to use three factors.

As for the reasons given regarding consecutive terms, the prosecution theory was apparently that the defendant took the car and drove to where the murder victim's area was and ran him down and then while fleeing the area got involved in the other incidents. A jury could find that the crimes were not predominantly independent and that acts were not separate but were predominantly all a part of the same conduct.

The very difficulty of applying a "harmless error" test is a demonstration of why the error is reversible per se. The wrong factfinder is still making the decision, and that decision is made on a speculative basis related to how twelve people would likely decide, not on the basis of how they did decide.

Respondent cites *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327, as authority for applying *Chapman v. California, supra*, to the error here. However, *Sengpadychith* does not provide such support. In that case, the jury was instructed on a gang enhancement but the instructions omitted the element of the primary activities of the gang being unlawful. The

opinion stated the overall issue thusly:

“What harmless error standard governs a trial court's failure to instruct the jury on the primary activities element of the criminal street gang enhancement provision? Under the high court's recent decision in *Apprendi*, *supra*, 530 U.S. 466, the answer depends on whether the enhancement provision increases the maximum possible penalty for the underlying crime.” (*People v. Sengpadychith*, *supra*, 26 Cal. 4th 316, 324.)

The opinion continued by discussing how *Apprendi* had altered the California understanding of enhancements. On that point, it noted that the failure to instruct on an *element* of the enhancement must now be treated as federal constitutional error. The court found further that the enhancement in question *increased the statutory maximum* in two categories but in a third category did not increase the maximum punishment. It posited that in the two categories which resulted an increase in punishment, the *Chapman* rule would apply, but in the third category the lower state standard would continue to apply. Because one crime (attempted premeditated murder) in *Sengpadychith* to which the enhancement attached had a life top and because in that situation the gang enhancement statute expressly did not add to the maximum but by its terms raised the minimum term to fifteen years, the state standard applied. However, as to another crime (grossly negligent discharge of a firearm), the enhancement added to the determinate maximum, and as to that crime the federal standard applied.

(*Sengpadychith*, *supra*, at pp. 324-328.)

Once the situation in *Sengpadychith* is understood, it is clearly distinguishable from the current case. In *Sengpadychith*, the jury actually was asked to make the finding beyond a reasonable doubt and decided all of the other elements, there was only a failure to instruct on *one* element and not a total failure to submit the question of the enhancement to the jury at all. Here, the jury was never asked to make a finding, let alone one beyond

a reasonable doubt. That is, there is a complete denial of a jury trial on the enhancement factors. As in *Sullivan, supra*, there is nothing upon which the harmless error rule can operate and the very basis underlying *Blakely* is the separate functions of the citizenry and the governmental judiciary.

Respondent's discussion of his view of what a horrible situation this case presents is not relevant. Similarly, the judge's finding of no mitigating factors need not be examined because at best that would simply reduce the normal term to a mitigated term or would be part of a weighing process rather than a finding of facts which would increase the punishment available. The judge does retain discretion to weigh the facts after they have been found by the jury. However, to label it as "normative" is superfluous verbiage or even could be misleading. The fact not found in *Blakely* was "deliberate cruelty." Technically, that determination is also "normative" in that it deals with a standard, is a standard, and uses a standard. As the Court said in both *Apprendi* and *Ring*, the question is not one of form but of effect,

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.' *Duncan v. Louisiana*, 391 U.S. 145, 155-156, 20 L. Ed. 2d 491, 88 S. Ct. 1444, 45 Ohio Op. 2d 198 (1968)." (*Ring v. Arizona* (2002) 536 U.S. 584, 608 [after overruling another case and holding Arizona's death penalty unconstitutional].)

Respondent in a footnote states that the appropriate remedy would be to remand for resentencing with an opportunity for the prosecutor to decide whether to try aggravating circumstances before a jury on the upper term question. The appellant has expressed doubt of the appropriateness of such a disposition in view of double jeopardy and single jury considerations

since this issue was never presented to the trial jury, and respectfully contends that disposition is not constitutionally proper. However, the appellant also observes that aside from the principle of being entitled to a jury determination beyond a reasonable doubt, as a practical matter the other causes for reversal may moot the entire question, and should all else be affirmed it then would be an utter waste of time in view of the normal sentence of at least fifty years to life (25 years for first degree murder plus 25 years for discharge of a firearm with no conduct credits) or more.

CONCLUSION

Respondent's excellent effort is respectfully submitted not to be sufficient. For the foregoing reasons, and for those in the appellant's other briefing, it is respectfully requested that the judgment be reversed and that the upper term on count two and the consecutive sentences on the counts be reversed.

Dated: August 24, 2004.

Respectfully submitted,

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