

From supplemental opening brief by panel attorney David Lampkin in *People v. Christopher Butler* (D041819)

## ARGUMENT

**I. THE COURT’S SELECTIONS OF THE UPPER TERM ON COUNT 6 AND CONSECUTIVE SENTENCING ON COUNTS 6, 11, AND 12 MUST BE REVERSED, BECAUSE THEY REST UPON FACTS FOUND BY THE COURT BY A PREPONDERANCE, NOT BY THE JURY BEYOND A REASONABLE DOUBT, AND THUS DEPRIVE APPELLANT OF HIS SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.**

**A. Introduction.**

In imposing a total prison term of three consecutive life terms plus 64 years, the court chose the upper term on Count 6 and chose to run the sentences on Counts 6, 11, and 12 consecutive to the indeterminate sentences and to each other. As required by California statutes and rules, these choices were based upon facts found by the court under a preponderance standard. As appellant will show below, under the recent decision of the United States Supreme Court in *Blakely v. Washington* (June 24, 2004) \_\_\_ U.S. \_\_\_ [124 S.Ct. 2531, \_\_\_ L.Ed.2d \_\_\_] (*Blakely*), these determinations denied appellant his right to trial by jury and require reversal of the sentence.

**B. Sentencing proceedings.**

The probation report suggested seven aggravating factors and one mitigating factor. The aggravating factors were, first, the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness (rule 4.421(a)(1));<sup>1</sup> second, the defendant was armed with or used a weapon at the time of the commission of the crime (rule 4.421(a)(2)); third, the manner in which the crime was carried out indicates planning, sophistication, or professionalism (rule 4.421(a)(8); fourth, the crime involved an attempted or actual taking or damage of great monetary value (rule 4.421(a)(9); fifth, the defendant's prior convictions are numerous or of increasing seriousness (rule 4.421(b)(2)); sixth, the defendant has served a prior prison term (rule 4.421(b)(3)); and, seventh, the defendant was on probation or parole when the crime was committed (rule 4.421(b)(4)). The mitigating factor was that the defendant's prior performance on misdemeanor probation was satisfactory (rule 4.423(b)(6)). Concerning consecutive or concurrent sentencing, the probation report suggested one factor in favor of consecutive sentencing, that the crimes involved separate acts of violence or threats of violence (rule 4.425(a)(2)). The report recommended the upper term on counts 6, 11, and 12 and consecutive sentencing on counts 1, 2, and 4. (CT 796-801).

Appellant submitted a sentencing brief, in which he disputed five of the factors in aggravation suggested by the probation report, suggested two additional factors in mitigation, and disputed that there was any factor in favor of consecutive sentencing. (CT 840-843.) The facts alleged in support of these contentions were primarily supported by appellant's trial testimony. (See CT 843.)

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<sup>1</sup> All citations to rules are to the California Rules of Court.

The court stated its general agreement with the recommendations in the probation report. The court stated further that appellant had “brutally victimized” Estey, Breea, and Oliver, appellant’s testimony was an “outrageous pack of lies,” “three distinct lives . . . were destroyed as a result of this crime,” and the factors in aggravation “strongly outweigh” those in mitigation. The court proceeded to pronounce sentence, including the upper term on Count 6 and consecutive sentences on Counts 6, 11, and 12. (RT 2376, 2393-2396.)

**C. *Blakely v. Washington.***

In *Blakely v. Washington, supra*, 124 S.Ct. 2531, the United States Supreme Court considered the constitutionality of a sentence imposed by a Washington state court after the defendant pleaded guilty to kidnapping with a firearm. The crime is a class B felony in Washington. A Washington statute provides that the maximum penalty for a class B felony is 10 years. However, other provisions of Washington law limit the range of sentence a judge may impose for kidnapping with a firearm to a "standard range" of 49 to 53 months, *unless* the judge finds "substantial and compelling reasons," other than those used in computing the standard-range sentence, for imposing a greater sentence. In *Blakely*, the judge imposed an exceptional sentence of 90 months on the ground that the defendant had acted with "deliberate cruelty," a statutorily enumerated ground for upward departure. (*Blakely v. Washington, supra*, 124 S.Ct. at 2534-2535.)

The Supreme Court reversed. It cited *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], which held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at 490.) It further cited *Ring v. Arizona* (2002) 536 U.S. 584, 592-593 and n.1 [122 S.Ct. 2428, 153

L.Ed.2d 556], in which the court applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. It stated: “In each case, we concluded that the defendant’s constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. (Citations.)” (*Blakely v. Washington, supra*, 124 S.Ct. 2531 at 2537.)

Applying *Apprendi* and *Ring* to the facts before it, the court explained as follows: “In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with ‘deliberate cruelty.’ The facts supporting that finding were neither admitted by petitioner nor found by a jury. Our precedents make clear, however, that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. (Citations.) In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment, (citation), and the judge exceeds his proper authority.” (*Blakely v. Washington, supra*, 124 S.Ct. at 2537, italics in original.) Citing its “commitment to *Apprendi*,” the high court reversed and remanded “for further proceedings not inconsistent with this opinion.” (*Id.* at 2538, 2543.)

**D. Choice of upper term on Count 6.**

In the instant case, appellant was convicted in Count 6 of first degree robbery in an inhabited dwelling house in concert with two or more other persons. (Pen. Code, §§ 211, 213, subd. (a)(1)(A).) After giving effect to the three strikes law, the possible sentences for that offense are 6, 12, and 18 years. (*Ibid.*) The court selected the upper term of 18 years. As appellant will show, the process by which the court selected the upper term is not materially distinguishable from the process held unconstitutional in *Blakely*.

The process by which a California court selects a determinate sentence is set forth in the Penal Code and the California Rules of Court. The Penal Code provides: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (Pen. Code, § 1170, subd. (b).) The Penal Code also provides that the sentencing court “shall apply the sentencing rules of the Judicial Council.” (Pen. Code, § 1170, subd. (a)(3).) Rule 4.420 provides: “When a sentence of imprisonment is imposed, . . . the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.”

The rules restrict the factors that the sentencing court may use as factors in aggravation. The court may not use an element of the crime as an aggravating factor. (Rule 4.420(d).) Nor may the court use the fact of any enhancement upon which sentence is imposed as an aggravating factor. (Pen. Code, § 1170, subd. (b); rule 4.420(c).)

These provisions bring California's system for imposing the upper term squarely within the holding of *Blakely*. As in *Blakely*, the mere fact of conviction does not allow the imposition of any sentence except the middle term. (Pen. Code, § 1170, subd. (b); rule 4.420.) Choice of the upper term is permissible only if factors in aggravation outweigh factors in mitigation. (*Ibid.*) Findings of factors in aggravation, factors in mitigation, and their relative weight are all made by the judge, not the jury. Indeed, the judge is prohibited from using the elements and enhancements found by the jury as aggravating factors. Thus, California's system explicitly contemplates that the upper term will be imposed on the basis of facts found by the court, not the jury. *Blakely* holds that this violates the defendant's right to trial by jury.

California's system is further objectionable in that findings of factors and their weight need only be made by a preponderance of the evidence. (Rule 4.420(b).) A fact that increases the penalty for a crime must be found beyond a reasonable doubt. (*Apprendi v. New Jersey, supra*, 530 U.S. at 476-492; *In re Winship* (1970) 397 U.S. 358, 361 [90 S.Ct. 1068, 25 L.Ed.2d 368].) For this reason, also, the imposition of the upper term in the instant case denies due process and the right to trial by jury.

**E. Choice of consecutive sentencing.**

Imposition of consecutive sentences similarly depends upon factors found by the judge, not the jury. Concurrent sentencing is the default, because Penal Code section 669 provides that, “[u]pon 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.” Consecutive sentencing is an enhancement and requires a statement of reasons. (*People v. Powell* (1980) 101 Cal.App.3d 513, 518; rule 4.406.) Rule 4.425 lists three factors to consider and further provides that “[a]ny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences.” (Rule 4.425(b).) The mere fact of conviction of two or more offenses does not automatically permit imposition of consecutive sentences. Consequently, California’s system for imposing consecutive determinate sentences is subject to the same constitutional infirmities as its system for imposing the upper term.

**F. Retroactivity.**

Sentence was imposed here before *Blakely* was decided, but *Blakely* is applicable. “[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . .” (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [107 S.Ct. 708, 93 L.Ed.2d 649]; accord, *Schriro v. Summerlin* (June 24, 2004) \_\_\_ U.S. \_\_\_ [124 S.Ct. 2519, \_\_\_ L.Ed.2d \_\_\_])*Blakely* states a new rule. (*Schriro v. Summerlin, supra*, 124 S.Ct. 2526 [*Ring v. Arizona* announced a new procedural rule].) Since the instant case is on direct review, appellant is entitled to the benefit of *Blakely*.

**G. No waiver.**

No objection is necessary to preserve this federal constitutional issue for review. “Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (Citations.)” (*People v. Vera* (1997) 15 Cal.4th 269,276; accord, *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5 [“Defendant’s failure to object . . . would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial. (Citations.)”]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [constitutional right to jury trial]; *People v. Belmares* (2003) 106 Cal.App.4th 19, 27.)

Furthermore, appellate courts will not insist upon an objection in a lower court where the objection would have been futile at the time. This exception is applicable where the statutory or case law binding the lower court at the time would have precluded the claim. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.) Until the holding in *Blakely*, it would have been pointless to demand a jury trial or a reasonable doubt standard on determinate sentencing decisions, because, as discussed above, California

statutory and case law unequivocally required judicial fact-finding under a preponderance of the doubt standard. (See *People v. Turner* (1990) 50 Cal.3d 668, 703 [trial objection not required when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.])

Finally, this claim is cognizable by this Court because it comes within Penal Code section 1259, allowing appellate review of any instruction affecting the defendant's "substantial rights". Here, the claim is premised on a complete failure to instruct the jury on the factors permitting selection of the upper term and consecutive sentencing.

#### **H. Prejudice.**

The applicable standard of prejudice is reversal per se. This follows from the Supreme Court's disposition of *Blakely*. There, without discussing prejudice, the high court simply reversed, stating, "Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid." (*Blakely v. Washington, supra*, 124 S.Ct. at 2538.)

The error is "structural" error, because the facts upon which the choice of the upper term and consecutive sentencing depend were found by the wrong entity. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *Rose v. Clark* (1986) 478 U.S. 570, 578 [106 S.Ct. 3101, 92 L.Ed.2d 460].) The structural significance of the difference between facts found by the judge and facts found by the jury is evident from *Blakely's* explanation that its holding reflects "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. . . . *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. at 2539, italics added.) Structural error is reversible per se. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

In the instant case, the structural error runs deeper than in *Blakely*, because the factual finding necessary to support the upper term and consecutive sentencing is more complex than in *Blakely*. In *Blakely*, under the Washington sentencing scheme, a finding of a single fact, for example, that the defendant acted with “deliberate cruelty,” was sufficient to support a term above the “standard range.” (*Blakely v. Washington, supra*, 124 S.Ct. at 2535.) In California, however, the sentencing court is required to make several findings: first, to identify the aggravating factors, second, to identify the mitigating factors, and, third, to determine whether aggravating factors outweigh mitigating factors. (Pen. Code, § 1170, subd. (b); rule 4.420.) It is evident that different finders of fact might identify different factors. Even if different finders of fact identified the same factors, they might make different determinations of their relative weight. Thus, under the California scheme, the denial of trial by jury runs not to just a single fact, but to an entire deliberative process.

Appellant is aware that the California Supreme Court has held that one form of *Apprendi* error is subject to harmless error analysis. In *People v. Sengpadychith* (2001) 26 Cal.4th 316, a criminal street gang enhancement was appended to a felony charge. The trial court instructed the jury on the gang enhancement but failed to instruct on the element that one of the gang’s primary activities must be the commission of one or more statutorily enumerated felonies. (*Id.* at 321; see Pen. Code, § 186.22, subds.

(e) & (f).) The Supreme Court held that failure to instruct on the primary-activity element was federal constitutional error under *Apprendi*. (*People v. Sengpadychith, supra*, 26 Cal.4th at 327.) The court then stated, without discussion or citation, that the error was reviewable under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], and it found the error harmless beyond a reasonable doubt. (*People v. Sengpadychith, supra*, 26 Cal.4th at 320, 327-328.)

*Sengpadychith* is distinguishable from the instant case, because, in *Sengpadychith*, the defendant received a jury trial on the gang enhancement, although the trial was flawed by failure to instruct on one element of the enhancement. Here, however, appellant received no jury trial on the factors relevant to choice of the upper term and consecutive sentencing.

When a court fails to instruct the jury on an element of the charged crime, the verdict is sometimes upheld on the basis that the missing element may be inferred from other elements necessarily found by the jury. (E.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1086.) No comparable inference may be made here, for several reasons. First, several of the aggravating factors suggested in the probation report were in no way put to the jury. For example, the jury had no information about appellant's prior conviction, prison term, or performance on probation or parole. Second, the sentencing court appeared to rely on its assessment that appellant lied when he testified. The assessment was based at least in part on the confessions of appellant's codefendants, which, as the court recognized, were not before the jury. Furthermore, the jury's inability to reach a verdict on the counts involving Estey indicates that at least some jurors did not entirely disbelieve appellant. Third, appellant's sentencing brief disputed most of the aggravating factors suggested in the probation report and suggested additional mitigating factors. For these reasons, it cannot be said how the

jury would have determined the sentencing issues if those issues had been put to the jury.

Even if the *Chapman* standard were applicable here, the failure to allow the jury to determine the sentencing factors could not be found to be harmless beyond a reasonable doubt. Preventing the jury from determining a fact cannot be found harmless under *Chapman* if the defendant contested the fact and raised evidence sufficient to support a contrary finding. (*Neder v. United States* (1999) 527 U.S. 1, 19 [119 S.Ct. 1827, 144 L.Ed.2d 35].) Here, appellant contested most of the aggravating factors suggested in the probation report and suggested additional mitigating factors. Appellant's allegations in support of his claims were based on his trial testimony, principally his allegation that it was Estey, not he, who orchestrated the bank robbery. The testimony of a single witness is sufficient to support such a claim. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884; *People v. Pringle* (1986) 177 Cal.App.3d 785, 788-790; CALJIC No. 2.27.) Furthermore, the jury's inability to reach a verdict on the counts involving Estey indicates that at least some jurors credited appellant's testimony to some extent. Thus, appellant presented evidence sufficient to support a finding in his favor on several of the alleged sentencing factors, and the failure to present those factors to the jury could not be found to be harmless beyond a reasonable doubt.

**I. Conclusion.**

For the reasons stated above, the sentence should be reversed and the cause remanded for resentencing.

DATED: July 15, 2004 Respectfully submitted,

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**CERTIFICATE OF WORD COUNT**

Pursuant to Rule 33(b)(1) of California Rules of Court, counsel on appeal certifies that, according to the word count of the word processing software with which this brief was produced, this brief contains 3,978 words.

DATED: July 15, 2004 \_\_\_\_\_  
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## PROOF OF SERVICE

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