

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff and Respondent,

vs.

JOSHUA EDWARD LOPEZ ,
Defendant and Appellant.

Court of Appeal
No. G032405

Superior Court
No. 02WF1601

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

Honorable Gary S. Paer, Judge

APPELLANT’S SUPPLEMENTAL OPENING BRIEF

Reversal of the judgment and remand for resentencing are also necessary because the court’s imposition of the upper term for counts 1, 2, and 4, and imposition of a consecutive term for count 6, were based on factual findings that violated appellant’s Fifth and Sixth and Fourteenth Amendment rights under the newly decided case of *Blakely v. Washington* (2004) 524 U.S. ____ [124 S.Ct. 2531, 159 L.Ed.2d 403], because they were made by the court

and not by the jury and because the facts were found true only by a preponderance of the evidence and not beyond a reasonable doubt.¹

In this new opinion, the high court reaffirmed the principle it had first stated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]: that a defendant has the right, under the Sixth Amendment, to have a jury determine beyond a reasonable doubt all facts legally essential to the sentence.² (*Blakely, supra*, 2004 D.A.R. at p. 7582.) Thus, where a state law establishes the maximum sentence for a particular offense and authorizes a greater term only if additional facts are found true, the determination of such facts must comply with the Fifth and Sixth Amendments. The court itself may find an aggravating factor true and use such factor to increase a defendant's sentence beyond the statutory maximum allowed under defendant's conviction, only where the defendant has admitted

¹ Sentence was imposed here before *Blakely* was decided, but *Blakely* is nevertheless 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* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] announced a new procedural rule].) Since the instant case is on direct review, appellant is entitled to the benefit of *Blakely*.

² The exception to this rule is the fact of a prior conviction. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.)

the facts underlying the aggravating factor or where he consented to judicial factfinding. (See *id.* at p. 7584.) Otherwise, it is the jury which must determine the truth of the aggravating fact which would be used to increase defendant's sentence above the statutory maximum. (*Id.* at p. 7582.) And it must determine the aggravating facts 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].) None of these events occurred in this case. Accordingly, the sentence must be reversed and the case must be remanded for resentencing.

A. THE SENTENCING BELOW

Prior to sentencing, appellant (C.T. pp. 514-515), his mother (C.T. pp. 511-512), and his step-mother (C.T. pp. 509-510) all sent letters to the court asking it to consider appellant's drug problem when determining what sentence to impose. The court considered these letters as well as the probation report (R.T. p. 743), but stressed to the family that it could not order appellant to attend a drug rehabilitation program as a term of probation because the true finding of the gun-use allegation precluded probation (R.T. pp. 743-744). In addition, at the sentencing hearing, the court heard argument from the government, which concluded the court should select the aggravated terms and impose the sentences consecutively to each other, thereby imposing the

maximum term (R.T. pp. 745-746), and from defense counsel. Defense counsel argued the choice of the middle term was appropriate for the smoke shop robberies (R.T. pp. 746-749) and the choice of a concurrent term for the 7-11 robbery was appropriate because it occurred within a single period of aberrant behavior (R.T. p. 750). Appellant's step-mother (R.T. pp. 754-755), mother (R.T. p. 755-760), and father (R.T. pp. 761-763), and appellant (R.T. pp. 765-766) also addressed the court.

The court chose to impose an aggravated sentence on each count except count 6, justifying the selection by reasoning that there really were no factors in mitigation (R.T. p. 770) and the following factors in aggravation: (1) "the great deal of violence, the threat of bodily harm, and the fact that he robbed three people in two separate transactions" (R.T. p. 770); (2) planning (R.T. p. 771); (3) prior violent conduct (R.T. p. 771); (4) the fact he has been in and out of the system since he was 14 (R.T. p. 772); and (5) the occurrence of the robberies while appellant was on probation and his poor performance on probation while in juvenile court (R.T. p. 772). And the court chose to impose sentence for count 6 consecutive to the principal term, based on the reasoning that the crime occurred to a different victim, occurred at a different time and location, and involved a separate threat of violence. (R.T. p. 773.)

B. BECAUSE THE COURT'S SENTENCING PROCEDURE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS SET FORTH IN THE NEW *BLAKELY* CASE, A REMAND FOR RESENTENCING IS REQUIRED.

1. THE *APPRENDI* DECISION.

In *Apprendi*, defendant's sentence for possession of a firearm for an unlawful purpose was increased above the 10-year statutory maximum [the court had imposed a 12-year sentence] after the trial court found, under the state's statutory hate crime enhancement scheme, by a preponderance of the evidence that defendant's crimes were committed to intimidate based upon race. (*Apprendi, supra*, 530 U.S. at pp. 470-471.) On appeal, defendant argued his due process right was violated when his sentence was increased based upon a factual finding made by the trial court, and not the jury, and made based upon the preponderance of the evidence, and not based upon proof beyond a reasonable doubt. (*Id.* at p. 471.)

The high court agreed, finding the hate crime statutory scheme presented an additional element to the underlying offense rather than a mere sentencing factor, because the hate crime scheme increased the statutory maximum punishment. "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the

defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.” (*Apprendi, supra*, 530 U.S. at p. 484.)

Thus, recognizing the Sixth Amendment right to jury trial and the Fourteenth Amendment right to due process “indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt’” (*id.* at p. 477, quoting *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444]), the court concluded “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt” (*Apprendi, supra*, 530 U.S. at p. 490; see also *Ring v. Arizona, supra*, 536 U.S. at pp. 592-595, 608 [Arizona’s death penalty scheme, which allowed a court to impose a death sentence rather than the lesser sentence prescribed by the conviction of the crime itself, if it found at least one of ten aggravating factors true, created the functional equivalent of a greater offense and thereby violated the Sixth Amendment right to have a jury determine each element of that offense]).

2. THE *BLAKELY* DECISION.

In *Blakely*, the high court applied the rule enunciated in *Apprendi* to a sentence imposed under the Washington state sentencing scheme. Under that scheme, a defendant who had plead guilty to second-degree kidnaping and admitted allegations of domestic violence and firearm use, faced the standard range sentence of 49 to 53 months. (*Blakely, supra*, 2004 D.A.R p. 7581.) Under the sentencing structure, however, the court was also permitted to impose a sentence above that standard range if it found an aggravating factor justified such an exceptional sentence. (*Id.* at p. 7582.) And, after hearing the victim's statements about the offense, the court did just that. It found defendant had committed the crime with "deliberate cruelty" and imposed a 90-month sentence. (*Ibid.*) Defendant appealed, arguing the sentencing procedure violated his constitutional rights.

In resolving defendant's claim, the *Blakely* majority first inquired whether the court had sentenced defendant in excess of the statutory maximum he could have received as a result of his plea.

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, supra*, 2004 D.A.R. at p. 7582, italics in original.) Analyzing defendant’s case in light of this test, the Supreme Court concluded that the trial court had indeed imposed a sentence beyond the statutory maximum available based on defendant’s plea. This is so because, under Washington law, the exceptional sentence could be justified only if it were based on factors other than those which were used to compute the standard range. (*Ibid.*) Because facts beyond those reflected in the plea were thus used to elevate defendant’s sentence beyond the maximum sentence possible as a result of the plea itself, and because defendant was denied the right to a jury determination of those additional facts, the Washington sentencing scheme violated defendant’s Sixth Amendment rights. (*Id.* at p. 7583.)

The majority opinion emphasized the purpose of its ruling, to give “intelligible context to the right of jury trial . . . a fundamental reservation of power in our constitutional structure.” (*Blakely, supra*, 2004 D.A.R. at p. 7583.) The jury trial structure is meant to “ensure [the people’s] control in the judiciary.” (*Ibid.*) To this end, the *Apprendi* rule “ensur[es] 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.”

(*Ibid.*) The opinion was careful to emphasize that it did not render all determinate sentencing schemes unconstitutional. (*Ibid.*) Rather, unconstitutional schemes are those determinate sentencing structures which include judicial-factfinding schemes that allow the court to impose a sentence higher than the maximum possible resulting from the facts found by the jury, based solely on facts found true by the court. (*Ibid.*)

3. UNDER CALIFORNIA'S SENTENCING SCHEME, THE MIDDLE TERM IS THE STATUTORY MAXIMUM TERM THAT THE COURT CAN IMPOSE ABSENT ADDITIONAL FACTUAL FINDINGS.

California's determinate sentencing scheme, which allows the court to impose the upper term based on facts not found by the jury, suffers from the same constitutional infirmities exposed in the Washington state law by *Blakely*. Under our state's structure, Penal Code section 1170, subdivision (b) provides: "[w]hen 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." (See Cal. Rules of Court, rule 4.420(a); *People v. Leung* (1992) 5 Cal.App.4th 482, 508 ["The trial court must impose the middle term unless it finds circumstances mitigating or aggravating the offense."].) As with the standard range considered for the Washington crime in *Blakely*, where the

California statute allows for three possible terms, the middle term is the presumptive sentence. Under current California law, the court can impose the upper term only if it finds one or more aggravating factors, by a preponderance of the evidence (Cal. Rules of Court, rules 4.420(b); 4.421 [aggravating factors], 4.408 [enumerated factors are not exclusive]), and if the court makes explicit factual findings (*People v. Scott* (1994) 9 Cal.4th 331, 349; § 1170, subs. (b) & (c); Cal. Rules of Court, rule 4.420(e)). Further, the aggravating factor must be over and above those facts which constitute the elements of the crime (Cal. Rules of Court, rule 4.420(d)), and the court can use the same fact of an enhancement to justify the selection of the upper term only if it also strikes punishment of the enhancement (Cal. Rules of Court, rule 4.420(c)). Thus, it is only a finding of some additional, non-overlapping aggravating circumstance which can expose a defendant to an upper term. These requirements are equivalent to those analyzed in *Blakely* – a court determination of facts above those admitted to by defendant which constituted the crime of conviction to support an exceptional sentence – that were found to be unconstitutional.

Under the rule enunciated in *Blakely*, it is the jury, and not the court, which must decide all facts – and decide them beyond a reasonable doubt – that can increase a defendant’s sentence above the statutory maximum allowed

for the conviction itself. To be sure, the defendant is able to stipulate to the facts relevant to support a sentence in excess of the statutory maximum and is able to waive his right to a jury determination of such facts. (*Blakely, supra*, 2004 D.A.R. at p. 7584.) But he must be given the choice.³

4. ALSO UNDER CALIFORNIA'S SENTENCING SCHEME, CONCURRENT SENTENCING IS THE MAXIMUM TERM WHICH CAN BE IMPOSED ABSENT FINDINGS IN EXCESS OF THOSE RENDERED BY THE JURY'S VERDICT.

Under California's current sentencing structure, 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

³ This issue is currently on review in the California Supreme Court in the case of *People v. Towne*, review granted July 14, 2004, S125677. The court requested briefing on the question, inter alia: "Does *Blakely* ... preclude a trial court from making the required findings on aggravating factors for an upper term sentence?"

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.⁴

One California case has determined that consecutive sentences present no constitutional problem under *Blakely, People v. Sykes* (July 28, 2004, B168042) ___ Cal.App.4th ___ [04 D.A.R. 9238]; however, that case is not correctly decided and should not be followed by this court. In *Sykes*, the trial court imposed consecutive sentences for three of defendant’s crimes (violations of Penal Code section 422) under Penal Code section 667, subdivisions (c)(6) and (c)(7) [Three strikes law]. (*Id.* at pp. 9240-9241.) On appeal, defendant asserted the court’s factual determination to be made under Penal Code section 667, subdivision (c)(6) – whether the crimes were

⁴ This question is currently on review in the California Supreme Court in *People v. Black*, review granted July 28, 2004, S126182. The court asked for briefing on two issues, one of which is “What effect does *Blakely* have on the trial court’s imposition of consecutive sentences?”

“committed on the same occasion” or “ar[ose] from the same set of operative facts” – which would dictate whether sentence for the crimes had to be served consecutively, was required under *Blakely* to be made by the jury based on the beyond a reasonable doubt standard. (*Id.* at p. 9241.)

Rejecting the argument, the reviewing court found that “[n]either *Blakely* nor *Apprendi* purport to create a jury trial right to the determination as to whether to impose consecutive sentences.” (*Sykes, supra*, 04 D.A.R. at p. 9242.) In addition, it reasoned both cases involved only single counts and their historical bases did not involve consecutive sentencing. Further, the court declared the consecutive sentencing decision, made after the guilt finding, did not involve the facts necessary to prove the statutory offense. (*Ibid.*)

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.

(*Ibid.*) But the logic of the court conflicts with the reasoning of both *Apprendi* and *Blakely*.

Notably, neither case discussed the application of the principles cited therein to a consecutive sentencing choice because neither case dealt with such a question. Accordingly, their silence on the matter cannot be

understood as an affirmative expression that the principles expressed therein did not apply in this context. Further, the *Sykes* court falls into the same intellectual error, describing the consecutive sentencing determination as a “sentencing factor,” that the Supreme Court counseled against in *Apprendi*, where the government tried to characterize the increase in sentence as based on a sentencing factor and not an element of the offense.

The question is whether the factual determination would expose defendant to punishment that would exceed the maximum punishment allowed based on the jury’s verdict alone. (*Apprendi, supra*, 530 U.S. at pp. 482-483.) “Despite what appears to us the clear ‘elemental’ nature of the factor here [at issue in *Apprendi*], the 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?” (*Id.* at p. 494.) Clearly, the factual determination at issue did just that.⁵

Without such a factual determination, for the three violations of Penal Code section 422, defendant Sykes was facing a maximum term of three years.

⁵ Additionally, the Court of Appeal’s focus on the timing of the factual determination made whether to impose consecutive sentences – made after the jury’s guilt determination – is not relevant to the analysis. The question at hand is the effect of the factual finding, not when it is made. Use of such reasoning by the Court of Appeal places form over function, an analysis specifically decried in *Apprendi*.

However, once the court made the factual findings it did, defendant faced a maximum term of 4-years, 4-months (3-years for the first count, and 8-months each for the remaining two counts). (Pen. Code, §§ 18, 422, and 1170.1.) Clearly, a term of 4-years, 4-months is greater than a term of 3-years. Accordingly, the reviewing court's analysis is incorrect and this court should not follow the *Sykes* opinion.

5. THE ERROR IS NOT WAIVED FOR FAILURE TO OBJECT AT THE TIME OF SENTENCING.

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 – which are "elements" of the crimes.

C. THE TRIAL COURT'S ERROR IS REVERSIBLE PER SE BECAUSE IT DEPRIVED APPELLANT OF HIS RIGHT TO A JURY TRIAL.

Because the error involves the fundamental right to a jury trial, as well as the application of the appropriate burden of proof as to the factual determination, the error is a structural one and requires reversal per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182].)

In the case of *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302], a bare majority of the Supreme Court discussed the application of harmless error analysis to various types of constitutional error. It noted the common thread in those cases in which harmless error applied to assess whether reversal was required: "each involved 'trial error' -- error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Fulminante, supra*, 499 U.S. at pp. 307-308.) Thus, this type of error is assessed with respect to its impact on the factfinding process at trial. (*Deleware v. Van Arsdall* (1986) 475 U.S. 673 [106 S.Ct. 1431, 89 L.Ed.2d 674].)

Those cases that involve structural error, however, i.e., where there are "structural defects in the constitution of the trial mechanism," defy harmless-error standards. (*Fulminante, supra*, 499 U.S. at p. 309.) In classifying these errors, the court stated:

Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."

(*Id.* at p. 310, quoting *Rose v. Clark* (1986) 478 U.S. 570, 577-578 [106 S.Ct. 3101, 92 L.Ed.2d 460].) This type of error necessarily renders the trial fundamentally unfair. (*Rose, supra*, 478 U.S. at p. 577.)

Application of these rules was made in *Sullivan v. Louisiana*, where the high court considered whether to apply the harmless error standard where the trial court's instruction to the jury on the reasonable doubt standard was constitutionally deficient. The court answered the question in the negative. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 280-282.)

To arrive at this determination, the court recognized that the right to jury trial is "fundamental to the American scheme of justice." (*Sullivan, supra*, 508 U.S. at p. 277.) "The right includes, of course, as its most important element, the right to have a jury, rather than the judge reach the requisite finding of 'guilty.'" (*Ibid.*) In assessing guilt, the jury must use the beyond-a-reasonable-doubt standard. (*Id.* at pp. 277-278.) Although most constitutional errors are subject to harmless error review (*id.* at p. 279, referencing *Arizona v. Fulminante, supra*, 499 U.S. at pp. 306-307), the court noted that some errors would defy such analysis. (*Sullivan, supra*, 508 U.S. at p. 279.) To determine whether the instant case presented such an exception, the court reviewed the question that harmless error analysis asks. Such analysis does not examine the error in the abstract, but asks what effect the

error had on the guilty verdict at hand. (*Ibid.*) Thus, the question is whether the guilty verdict in a particular trial was unattributable to the error. (*Ibid.*)

After assessing the reviewing court's appropriate role in the harmless error determination, the high court determined application of such a role would be illogical where the error at hand was the lack of a jury verdict. (*Sullivan, supra*, 508 U.S. at p. 280.) Because there was no jury verdict, the entire premise of harmless error review was absent.

There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. 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.

(*Sullivan, supra*, 508 U.S. at p. 280, internal citations omitted and italics original.) Where there is no essential connection between the jury's verdict and the beyond a reasonable doubt factfinding mission of the jury, a reviewing court would engage only in speculation. The Sixth Amendment demands more. (*Ibid.*)

The error in the instant case is akin to that in *Sullivan*, because it affected the entire trial process. Appellant was denied his right to jury trial on the factor that would affect the court's aggravated sentencing consideration and the trial court determined these factors using the improper, lower burden of proof. As in the *Sullivan* case, where there is no jury verdict on the factfinding at issue, it would be illogical to determine whether the error affected the factfinding. There is simply no "object" or verdict to review. The error cannot be assessed. It is not that some error in an otherwise overall correct trial process occurred, i.e., an improper or omitted jury instruction; it is that the entire process/mechanism of the factfinding procedure was erroneous. In such a situation, harmless error analysis is inappropriate. Consequently, reversal is required as a matter of course.

The California Supreme Court has applied the *Chapman*⁶ standard of review in analyzing an *Apprendi* error in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324. But in that case, the error at issue was the trial court's failure to instruct the jury on the primary activities element of the criminal street gang enhancement provision. (*Ibid.*) In other words, it was merely

⁶ *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. Under *Chapman*, the error is harmless if, beyond a reasonable doubt, "it did not contribute to the verdict obtained." (*Id.* at p. 24.)

instructional error to the correct trier-of-fact and under the correct burden of proof – there was an error, but the overall factfinding mechanism was correct. (See also *People v. Scott* (2001) 91 Cal.App.4th 1197, 1209 [*Chapman* applied to error in failing to provide jury instructions fully defining the elements of the enhancement].) Here, on the other hand, the error is the complete removal of the factual determination from the jury and the use of the wrong burden of proof in making that determination. Because the nature of the errors are different, *Sengpadychith* does not control the evaluation in this case.

D. EVEN UNDER *CHAPMAN*, REVERSAL IS REQUIRED.

And even if *Chapman* does apply, reversal is required.⁷ The government cannot show beyond a reasonable doubt that the error did not contribute to the trial court's finding. If the error is considered a failure to instruct on the element of the crime, guidance from the high court's opinion in *Neder v. United States* (1999) 527 U.S. 1 [119 S.Ct. 1827, 144 L.Ed.2d 35] is helpful. In that case, the high court determined harmless error analysis applied to assess whether the failure to instruct on the element of a crime

⁷ The difficulty of this analysis – trying to determine how a jury would have ruled if it, as opposed to the court, had considered appellant's case – shows how the error is a structural one requiring reversal per se.

constituted reversible error. There, the court made clear, the error cannot be found harmless if the omitted element is susceptible to dispute.

If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless.

(*Id.* at p. 19.) Here, it cannot be said that, without the error, the decision would have been the same. Had a jury considered appellant's case instead of the court, it is possible the jury might have characterized appellant's actions differently. While there was some fighting involved during the smoke shop incident, the jury may not have characterized the incident the same. Rather, the jury might have considered the incident a typical robbery. Further, the jury could have considered both incidents (the smoke shop and the 7-11) as one period of aberrant behavior, not separate incidents, as defense counsel argued. (R.T. p. 750.) Moreover, the jury may not have considered appellant's prior conduct to be violent and may not have characterized his performance on probation as poor. Simply, the jury may have viewed the crime differently than the court. And certainly, the jury did have some reservations about the case as it rendered a not true finding on the most serious enhancement – intentional discharge of a firearm under Penal Code

section 12022.53, subdivision (c). (C.T. pp. 441-442.) Thus, it cannot be said the error was harmless. Reversal is required.

CONCLUSION

For the reasons outlined above, appellant's case must be remanded for resentencing proceedings that comply with the United States Constitution.

Dated: August 3, 2004

Respectfully submitted,

APPELLATE DEFENDERS, INC.

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CERTIFICATION

I, Cindi Mishkin, certify that, based on the word count of the computer program used to prepare this document, there are 5177 words in this supplemental opening brief, excluding the tables. (Cal. Rules of Court, rule 33(b)(1).)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Diego, California.

Dated: August 3, 2004

Cindi B. Mishkin

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TOPICAL INDEX

PAGE

APPELLANT’S SUPPLEMENTAL OPENING BRIEF 1

A. THE SENTENCING BELOW 3

B. BECAUSE THE COURT’S SENTENCING PROCEDURE VIOLATED APPELLANT’S CONSTITUTIONAL RIGHTS AS SET FORTH IN THE NEW *BLAKELY* CASE, A REMAND FOR RESENTENCING IS REQUIRED. 5

1. THE *APPRENDI* DECISION. 5

2. THE *BLAKELY* DECISION. 7

3. UNDER CALIFORNIA’S SENTENCING SCHEME, THE MIDDLE TERM IS THE STATUTORY MAXIMUM TERM THAT THE COURT CAN IMPOSE ABSENT ADDITIONAL FACTUAL FINDINGS. 9

4. ALSO UNDER CALIFORNIA’S SENTENCING SCHEME, CONCURRENT SENTENCING IS THE MAXIMUM TERM WHICH CAN BE IMPOSED ABSENT FINDINGS IN EXCESS OF THOSE RENDERED BY THE JURY’S VERDICT. 11

5. THE ERROR IS NOT WAIVED FOR FAILURE TO OBJECT AT THE TIME OF SENTENCING. 15

C. THE TRIAL COURT’S ERROR IS REVERSIBLE PER SE BECAUSE IT DEPRIVED APPELLANT OF HIS RIGHT TO A JURY TRIAL. 16

D. EVEN UNDER *CHAPMAN*, REVERSAL IS REQUIRED. 21

CONCLUSION 24
CERTIFICATION 25

TABLE OF AUTHORITIES

PAGE(S)

CASES

Apprendi v. New Jersey (2000) 530 U.S. 466
[120 S.Ct. 2348, 147 L.Ed.2d 435] 2, 3, 5-8, 13, 14, 20

Arizona v. Fulminante (1991) 499 U.S. 279
[111 S.Ct. 1246, 113 L.Ed.2d 302] 17, 18

Blakely v. Washington (2004) 524 U.S. ____
[124 S.Ct. 2531, 159 L.Ed.2d 403] 1, 2, 5, 7-13, 16

Chapman v. California (1967) 386 U.S. 18
[87 S.Ct. 824, 17 L.Ed.2d 705] 20, 21

Deleware v. Van Arsdall (1986) 475 U.S. 673
[106 S.Ct. 1431, 89 L.Ed.2d 674] 17

Griffith v. Kentucky (1987) 479 U.S. 314
[107 S.Ct. 708, 93 L.Ed.2d 649] 2

Neder v. United States (1999) 527 U.S. 1
[119 S.Ct. 1827, 144 L.Ed.2d 35] 21

People v. Belmares (2003) 106 Cal.App.4th 19 15

People v. Birks (1998) 19 Cal.4th 108 16

People v. Black,
review granted July 28, 2004, S126182 12

People v. Holmes (1960) 54 Cal.2d 442 15

People v. Leung (1992) 5 Cal.App.4th 482 9

People v. Powell (1980) 101 Cal.App.3d 513 11

<i>People v. Saunders</i> (1993) 5 Cal.4th 580	15
<i>People v. Scott</i> (1994) 9 Cal.4th 331	10
<i>People v. Scott</i> (2001) 91 Cal.App.4th 1197	21
<i>People v. Sengpadychith</i> (2001) 26 Cal.4th 316	20, 21
<i>People v. Sykes</i> (July 28, 2004, B168042) ___ Cal.App.4th ___ [04 D.A.R. 9238]	12-15
<i>People v. Towne</i> , review granted July 14, 2004, S125677	11
<i>People v. Turner</i> (1990) 50 Cal.3d 668	16
<i>People v. Vera</i> (1997) 15 Cal.4th 269	15
<i>Ring v. Arizona</i> (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]	2, 6
<i>Rose v. Clark</i> (1986) 478 U.S. 570 [106 S.Ct. 3101, 92 L.Ed.2d 460]	18
<i>Schriro v. Summerlin</i> (June 24, 2004) ___ U.S. ___ [124 S.Ct. 2519, ___ L.Ed.2d ___]	2
<i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182]	16, 18-20
<i>United States v. Gaudin</i> (1995) 515 U.S. 506 [115 S.Ct. 2310, 132 L.Ed.2d 444]	6

CONSTITUTIONS

United States Constitution	
Fifth Amendment	1, 2
Sixth Amendment	1, 2, 6, 8, 19
Fourteenth Amendment	1, 6

STATUTES

Penal Code

section 18 15
section 422 12, 14, 15
section 667, subdivision (c)(6) 12
section 667, subdivision(c)(7) 12
section 1170.1 15
section 1170, subdivision (b) 9
section 1170, subds. (b) & (c) 10
section 1259 16
section 12022.53, subdivision (c) 23

RULES

California Rules of Court

rule 4.406 11
rule 4.408 10
rule 4.420(a) 9
rule 4.420(b) 10
rule 4.420(c) 10
rule 4.420(d) 10
rule 4.420(e) 10
rule 4.421 10
rule 4.425 11
rule 4.425(b) 12