POST-*BLACK BLAKELY* AOB

IMPOSITION OF AN UPPER TERM SENTENCE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND *BLAKELY V. WASHINGTON* (2004) 542 U.S. 296 [124 S.CT. 2531, 159 L.ED.2D 403], DESPITE THE CALIFORNIA SUPREME COURT'S DECISION IN *PEOPLE V. BLACK* (2005) 35 CAL.4TH 1238.

[Set forth facts relating to sentencing (and admission relating to guilty plea if applicable) on this issue -- e.g., "The court imposed the upper term of three years as to the second degree robbery conviction, finding the aggravating factors outweighed the mitigating factors. The court found, based on a preponderance of the evidence[1], that there were two aggravating factors, planning and victim vulnerability (C.T. p. 112; R.T. pp. 389-391.) However, these two factors were not found true by a jury beyond a reasonable doubt or admitted by appellant."]

The imposition of the aggravated term violated appellant's rights to jury trial and proof beyond a reasonable doubt under the federal constitution (6th, 14th Amends.) and United States Supreme Court precedent (*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*)). Where state law establishes a presumptive sentence for an offense and authorizes a greater term only where there is a finding of certain additional facts (beyond those inherent in the jury verdict or admitted in the guilty

[1]Although the court did not expressly state what standard of proof it relied upon, the standard applicable at the time was a preponderance of the evidence. (Cal. Rules of Ct., rule 4.420(b); *People v. Scott* (1994) 9 Cal.4th 331, 349.)

plea), any finding as to those additional facts must be determined by a jury on proof beyond a reasonable doubt. (542 U.S. at p. ___ [124 S.Ct. at p. 2537].)

Under California's Determinate Sentencing Law, of the three available terms, "the court shall order imposition of the middle term," unless aggravating or mitigating circumstances are found. (Pen. Code, § 1170, subd. (b) ; Cal. Rules of Court, rule 4.420(a); *People v. Leung* (1992) 5 Cal.App.4th 482, 508.) The only term of imprisonment that may be imposed based solely on the jury's verdict is the middle, or presumptive, term. The term longer than the presumptive term, the upper term, cannot be imposed without additional aggravating factors, which are determined solely by the court, based on unsworn reports and statements by probation officers, prosecutors, victims, and their families (§ 1170, subd. (b)), all material never presented to or considered by the jury. California's judicial fact-finding requires only proof based on a preponderance of the evidence. (Cal. Rules of Ct., rule 4.420(b); *People v. Scott, supra,* 9 Cal.4th 331, 349.)

Nonetheless, the California Supreme Court has held that there is no federal constitutional right to a jury trial on fact-finding relating to aggravating factors used to impose an upper term under California's Determinate Sentencing Law. (*People v. Black* (2005) 35 Cal.4th 1238 (*Black*).) Appellant acknowledges this court is bound by the Supreme Court's ruling in *Black*, based on *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 (*Auto Equity*).

However, this acknowledgment is not a concession as to the merits of appellant's

argument, which remains viable. The New Jersey Supreme Court has recently examined its sentencing scheme -- a scheme very much like California's -- to determine whether it violated the constitutional rights enunciated in *Blakely*. (*New Jersey v. Natale* (August 2, 2005) ___ N.J. ___, 2005 N.J. LEXIS 938, *44-46 [imprisonment choice is from a range of years with a statutorily prescribed presumptive term approximately half or three-quarters of the maximum; court shall impose the presumptive term unless aggravating or mitigating factors weigh in favor of higher or lower term within the statutory range].) The court held that a sentence above the presumptive statutory term, based solely on a judicial finding of aggravating factors, violates a defendant's jury trial guarantee. (*Id.* at * 12.) The New Jersey Supreme Court even noted that California's sentencing law appeared to be in direct conflict with the federal constitution. (*Id.* at *24.) Other state courts have also found jury trial guarantee violations in their sentencing schemes. (*Lopez v. People* (Colo. 2005) 113 P.3d 713, 728; *State v. Hughes* (2005) 154 Wn.2d 118 [110 P.3d 192] *Smylie v. State* (Ind. 2005) 823 N.E.2d 679, 681-685; *State v. Dilts* (2004) 337 Ore. 645, 654 [103 P.3d 95]; *State v. Shattuck* (Minn. 2004) 689 N.W.2d 785 *(per curiam* order); *State v. Brown* (2004) 209 Ariz. 200, 202-204 [99 P.3d 15]; but see *State v. Gomez* (Tenn. 2005) 163 S.W.3d 632, 658.)

Despite *Auto Equity*, this court should act to correct the constitutional violation in the present case. (See *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 844-845 [119 S.Ct. 1728, 144 L.Ed.2d 1] [state prisoner seeking federal habeas corpus relief must give state

court a fair opportunity to act on claims].)

The sentencing range for [robbery] is [two, three, or five years. (Pen. Code, § 213, subd. (a)(2).)] The presumptive term -- the term which must be imposed absent a jury finding aggravating factors -- is three years. Here, there was no fact-finding by the jury. Therefore, the maximum permissible sentence was the presumptive middle term of [three] years. Instead, the court imposed [five] years, a term longer than the presumptive term, based on [two] aggravating factors found by the court, not by the jury. This court should order appellant's sentence reduced to the presumptive middle term of [three] years.

[NOTE: If any sentencing factor involved a judicial finding of a prior criminal conviction, include: "[One] of the [four] aggravating factors the court found here was related to recividism. The exception to the right to jury trial set forth in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350] does not apply. That exception applies only to the mere *fact* of a prior conviction. (*Shepard v. United States* (2005) 125 S.Ct. 1254 (plurality opn.).) Here, the court found appellant's convictions (were of increasing seriousness. (cite to record.)) This type of recidivist factor goes beyond the mere fact of a prior conviction, requiring findings, and thus falls outside the *Almendarez-Torres* exception."]

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] (*Sullivan*); *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302].) Although most constitutional errors are subject to harmless error review, some errors, such as structural defects in the trial mechanism, would defy such analysis. (*Sullivan, supra,* 508 U.S. at pp. 279, 306-307.) As in the *Sullivan* case, where there was no jury verdict on the fact-finding at issue, here, the factual determination was completely removed from the jury and a lowered burden of proof was used by the court. Because there was no jury fact-finding and thus no finding to review, it is impossible to determine whether the error affected fact-finding. The entire mechanism of fact-finding was erroneous, rather than simply an error in an otherwise correct process overall. (See also *New Jersey v. Natale, supra,* 2005 N.J. LEXIS 938, *67 [reversal for resentencing without consideration of prejudice].)

Even if prejudice were to be evaluated under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], reversal is required because the government cannot show beyond a reasonable doubt that the error did not contribute to the result. (See also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Here it cannot be said that, without the error, the decision would have been the same. A jury considering the evidence of the aggravating factors in appellant's case is likely to have viewed them differently than the court did.

[Analyze the facts of your case for harmless error -- e.g., "Interestingly, as to the first factor -- threat of great bodily injury or a high degree of cruelty or viciousness -- that

factor is identical to the factor struck down in *Blakely*. As pointed out in *Blakely*, such a standard is obviously subjective and manipulable in the hands of the judiciary; the protection against such standards is the jury-trial guarantee. (124 S.Ct. at pp. 2539-2540.) Even under the prosecutrix's un-recanted version of events, she received three very minor injuries -- a punch in the chest which left a three-to-four-inch bruise, a hit on the shoulder blade area which left a red bruise, and a hit on the head, which left a quarter-sized bump. (R.T. pp. 384-387, 426.) The injuries were so minor she refused treatment from paramedics on the scene and subsequently never went to the hospital or even to a doctor on her own. (R.T. pp. 407-410, 429.) It is difficult to see how a reasonable jury would characterize this as involving a high degree of cruelty or viciousness, higher than that inherent in any other assaultive injury on a cohabitant."]

It cannot be said the error was harmless. Reversal is required.