

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

S125677

v.

SHAWN TOWNE,

Defendant and Appellant.

Second Appellate District, Division Four, No. B166312
Los Angeles County Superior Court No. PA040926
The Honorable Meredith C. Taylor, Judge

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

1. May a trial court use facts relating to counts on which the defendant was found not guilty as aggravating factors in determining the appropriate sentence?

2. Does *Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct 2531, 159 L.Ed.2d 403] preclude a trial court from making the required findings on aggravating factors for an upper term sentence?

3. If so, what standard of review applies, and was the error prejudicial in this case?

STATEMENT OF THE CASE

Appellant was charged in an eight-count information with carjacking (Pen. Code, § 215, subd. (a))^{1/}, kidnapping (§ 207, subd. (a)), second-degree robbery (§ 211), grand theft auto (§ 487, subd. (d)), making a criminal threat (§ 422), kidnapping for carjacking (§ 209.5), kidnapping to commit robbery (§ 209, subd. (b)(1)), and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)). As to the counts involving grand theft auto and unlawful

1. All further statutory references are to the Penal Code unless otherwise indicated.

driving or taking of a vehicle, it was alleged that appellant had suffered one prior theft conviction involving a vehicle (§ 666.5). As to all counts, appellant was alleged to have served four prior prison terms (§ 667.5, subd. (b)), and suffered one prior felony “strike” conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and one prior serious felony conviction (§ 667, subd. (a)(1)). (CT 71-76.) Appellant pled not guilty and denied the allegations. (CT 78-79.)

At trial, the victim testified that he met appellant while driving home and they agreed to go to a motel room together. After several unsuccessful attempts to find a motel room, the victim stopped his car and attempted to wake appellant, who was sleeping. Appellant became angry and initiated a physical altercation with the victim. Appellant managed to grab the car keys and tie the victim’s hands together. Appellant then drove the car for about an hour with the victim as a passenger. When appellant stopped the car at a convenience store, the victim untied himself, exited the car, and ran to an apartment building to obtain help. (RT 611-637.)

During trial, appellant waived his rights and admitted the truth of all of the charged prior-conviction and prison-term allegations. (RT 1252-1260; CT 109-110, 112.) The jury found appellant guilty of unlawful driving or taking of a vehicle, and acquitted him of the remaining charges. (CT 185-187.)

At sentencing, the trial court denied appellant’s motions to reduce the offense to a misdemeanor and to dismiss the prior “strike” conviction. The court imposed a total sentence of eight years: the upper term of four years, doubled under the second-strike provisions of the Three Strikes law. The court struck the prior prison term enhancements.^{2/} (CT 202-204.)

The court explained its reasoning for the imposition of the upper term

2. Although appellant had admitted the truth of four prior prison term allegations, the People acknowledged at the sentencing hearing that appellant had served only two separate prior prison terms because the other prison terms had been served concurrently. (RT 2402.)

as follows:

With regard to sentencing, I did hear the testimony. I do believe that the jury sorted it out. [¶] It wasn't an easy case I don't think for the jury. I think you should be pleased they were able to weigh it all out and return verdicts and not to return hung.

I do know that [the victim] was a liar. I think it was clear. [¶] [The prosecutor] knows his witness was a liar. The victim was a liar; and the jury was advised that even a liar is entitled to his bodily integrity and be free from the kind of treatment that the People alleged to have been inflicted on him during the course of the contact between the defendant and [the victim]. [¶] I know that the defendant is a liar also. That came out in his testimony when he was before the court.

I do know with respect to the charge on which [appellant] stands convicted that the evidence that we have before the Court that I believe is entirely believable is that when [the victim] got out of that car he was terrified. He was afraid for his life. He thought if he didn't get out of there and hide he was dead. [¶] So I am believing that he left the car in that state of mind and that you had possession of the car against his will and for your own purposes. [¶] I believe that you were convicted appropriately of the 10851(a), as do you. [¶] You have admitted it, that you believe that it was as set forth as well.

I don't believe it's just a simple 10851(a) as I've just described to you, [appellant]. I believe that it's an aggravated situation based on what I have just described. [¶] There was a woman who testified -- I think two people from the apartment where [the victim] finally landed testified; and their testimony was very credible. [¶] From that woman I understand that he was significantly terrified and afraid for his own physical well being.

I don't believe it's appropriate to give you low term, [appellant], or

mid term. You've got a ten year history before you got this case. Low term and mid term are not appropriate.

I believe, [appellant], that you are an innocent of sorts; that you don't seem despite all of this contact with law enforcement and the court system to learn what punishment is and what it means. [¶] Here you are. You're back again.

So the Court is considering the trial as it took place before the Court, the conviction on the 10581(a), the fact that you have a lengthy history in choosing the high term of four years; and the high term is because the 10851(a) is alleged pursuant to I believe it's Penal Code [section] 666.5. (RT 2415-2417.) Appellant did not object to the sentence.

On appeal, appellant raised two claims of sentencing error: (1) the trial court abused its discretion in failing to strike the prior "strike" conviction; and (2) the court abused its discretion in imposing the upper term. As to the second claim, appellant specifically asserted that, in light of the jury's acquittal on seven of the eight counts, the jury necessarily found that appellant did not use any "unlawful force" on the victim; thus, according to appellant, the trial court improperly relied on the fact of the victim's fear to impose the upper term.

The Court of Appeal concluded that the trial court did not abuse its discretion in either declining to strike the prior conviction or in imposing the upper term. As to the imposition of the upper term, the Court of Appeal concluded that the trial court's findings did not conflict with the jury's necessary findings on the acquitted counts. The Court of Appeal further determined that, even if there had been error, it was harmless since the court could have cited appellant's prior prison terms, his unsatisfactory prior performance on probation or parole, and his parole status at the time of the current offense as further reasons in support of the upper term. (Opn., at p. 6.)

Appellant petitioned for review on the issue of whether a trial court could use facts relating to counts on which the defendant was found not guilty

as aggravating factors in determining the appropriate sentence. In a subsequent letter, appellant cited the decision in *Blakely* in support of his petition for review.

On July 14, 2004, this Court granted the petition for review, and ordered the parties to address the issue raised in the petition for review and two additional issues: whether *Blakely* precludes a trial court from making the required findings on aggravating factors for an upper term sentence; and, if so, what standard of review applies, and was the error in this case prejudicial?

SUMMARY OF ARGUMENT

Under California law, a trial court may properly use facts relating to counts on which the defendant was found not guilty as aggravating factors in determining the appropriate sentence. A trial court may properly use such facts because the court is allowed to consider a wide range of information concerning the defendant and the crime for sentencing purposes, and because the preponderance-of-the-evidence standard rather than the reasonable-doubt standard may apply at sentencing. Moreover, it cannot be reasonably inferred from a general not-guilty verdict that the jury necessarily rejected all of the prosecution's evidence in returning such a verdict, and the United States Supreme Court has held that the Double Jeopardy Clause does not prohibit the use of facts related to acquitted counts in imposing a sentence for the offense of conviction.

Appellant forfeited his *Blakely* claim because he failed to raise any objection to his sentence, let alone an objection based on federal constitutional grounds. Since *Blakely* involves an application of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], appellant could have raised an objection to his sentence on the basis of *Apprendi*.

Further, the *Blakely* decision does not preclude the trial court from making the requisite determinations on aggravating circumstances to support

an upper-term sentence. In California, judicial factfinding on aggravating circumstances merely determines a sentence within the legislatively prescribed sentencing range for the offense, and this type of judicial factfinding has been upheld in United States Supreme Court precedent. Because the jury's verdict that the defendant is guilty of an offense reflects the standard range of lower, middle, and upper terms for that offense, the upper term is the statutory maximum. Accordingly, judicially-found aggravating circumstances that are used to impose an upper-term sentence do not violate the defendant's constitutional right to a jury trial under the Sixth Amendment because these findings do not increase the sentence beyond the statutory maximum.

Even if this Court concludes that *Blakely* generally precludes a trial court from making the required findings to impose an upper-term sentence, and that the middle term is therefore the statutory maximum of the three-tiered sentencing range, there was no violation of *Blakely* in the instant case for two reasons. First, appellant's admissions on the prior prison term allegations raised the statutory maximum to at least eight years, i.e., the actual sentence he received. Second, the trial court's finding that appellant had a lengthy criminal history fell under the recidivism exception to *Blakely* and was also established by appellant's admissions regarding his prior convictions. Since this finding, by itself, was sufficient to authorize the imposition of an upper term sentence, the upper term became the statutory maximum.

Moreover, if this Court concludes that *Blakely* applies to the imposition of the upper term, the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] is appropriate for determining whether the *Blakely* error was prejudicial. Under the *Chapman* test, the reviewing court must determine whether the jury would have found any aggravating circumstances true beyond a reasonable doubt. If the reviewing court determines that the jury would have found at least one aggravating circumstance true beyond a reasonable doubt, the *Blakely* error was harmless

because one aggravating circumstance is enough to authorize an upper term sentence under California law.

Under this standard of review, any *Blakely* error in this case was not prejudicial. The trial court's findings that appellant had a lengthy criminal history and that the victim feared for his life would have been found by a jury beyond a reasonable doubt. Because only one aggravating circumstance was needed to authorize the upper term sentence, any error was harmless.

Finally, if this Court were to conclude that section 1170 is unconstitutional under *Blakely*, respondent would request that this Court interpret section 1170 to eliminate any requirement that trial courts must engage in factfinding before a term other than the middle term could be imposed. Such an interpretation, applied prospectively, would be consistent with the Legislature's intent in enacting the determinate sentencing scheme and would preserve a system that has dispensed fair and effective justice for more than a quarter of a century.

ARGUMENT

I.

A TRIAL COURT MAY PROPERLY USE FACTS RELATING TO COUNTS ON WHICH THE DEFENDANT WAS FOUND NOT GUILTY AS AGGRAVATING FACTORS IN DETERMINING THE APPROPRIATE SENTENCE

Contrary to appellant's position (ABM 10-21), a trial court may properly use facts relating to counts on which the defendant was found not guilty as aggravating factors in determining the appropriate sentence. A trial court may properly use such facts because section 1170 and the applicable Rules of Court allow the court to consider a wide range of information concerning the defendant and the crime for sentencing purposes, and the preponderance-of-the-evidence standard rather than the reasonable-doubt standard applies at sentencing. Moreover, no reasonable inference can be drawn from a general not-guilty verdict that the jury necessarily rejected any facts in returning such a verdict, and the Double Jeopardy Clause does not prohibit the use of acquitted conduct in imposing a sentence for the offense of conviction.

A. Upper Term Sentencing

When a statute provides for three possible terms of imprisonment, the court shall impose the middle term unless there are circumstances in aggravation or mitigation of the crime. (§ 1170, subd. (b).) Circumstances in aggravation and mitigation must be established by a preponderance of the evidence, and the upper term is "justified only if, after a consideration of all relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." (Cal. Rules of Court, rule 4.420(b).)^{3/} The "relevant facts" are included in the trial record, the probation report, other properly received reports

3. All further references to rules are to the California Rules of Court unless otherwise indicated.

and statements, statements in aggravation or mitigation, and any additional evidence presented at a sentencing hearing. (§ 1170, subd. (b); rule 4.420(b).) A fact charged and found as an enhancement may be used as a reason to impose the upper term only if the court exercised its discretion to strike the enhancement. (§ 1170, subd. (b); rule 4.420(c).) A fact that is an element of the crime cannot be used to impose the upper term. (Rule 4.420(d).)

B. Conflicting Court Of Appeal Decisions

Two Courts of Appeal have reached conflicting conclusions as to the issue of whether a trial court may use facts relating to counts in which the defendant was acquitted in determining the appropriate sentence. In *People v. Takencareof* (1981) 119 Cal.App.3d 492, 497-500, the Court of Appeal concluded that the trial court erred in using evidence of an arson as a basis for denying probation because the defendant had been acquitted at trial of the arson charge. The *Takencareof* Court acknowledged that the preponderance of the evidence standard was generally applicable at sentencing, but held that the standard of proof beyond a reasonable doubt should apply to both conviction and sentencing in those cases where the trier of fact has found the defendant not guilty of a count in a multiple count prosecution. (*Id.* at p. 498.) The Court of Appeal reasoned that it would be “anomalous” to hold that if the jury found the defendant not guilty of a crime under the reasonable doubt standard, the defendant should face the same alleged crime at sentencing under a preponderance standard. (*Ibid.*) The *Takencareof* Court said that it was unprepared to hold that the two standards operated simultaneously in a case where a defendant was acquitted because such a holding would be “ludicrous.” (*Ibid.*)

By contrast, in *People v. Lewis* (1991) 229 Cal.App.3d 259, 264-265, the Court of Appeal held that the jury’s not-true finding on a weapon use

enhancement did not preclude the trial court from finding that the defendant was armed with or used a weapon in the commission of the crime for the purpose of imposing a consecutive sentence. The Court of Appeal based its holding on the differing standards of proof that are applicable at trial and sentencing. (*Ibid.*)

C. A Jury Verdict Of Acquittal Does Not Prevent A Sentencing Court From Considering Facts Related To Counts On Which The Defendant Was Acquitted Because Sentencing Facts Can Be Properly Based On A Standard Of Preponderance Of The Evidence

The decision in *United States v. Watts* (1997) 519 U.S. 148 [117 S.Ct. 633, 136 L.Ed.2d 554] is instructive on the question of whether a trial court may properly use facts related to counts on which the defendant was acquitted for sentencing purposes. In *Watts*, the United States Supreme Court summarily reversed two decisions by the Ninth Circuit Court of Appeals that had held that the sentencing courts could not increase the defendants' sentences on the basis of conduct underlying charges of which they had been acquitted. The *Watts* Court first explained that the federal Sentencing Guidelines, as well as the longstanding principle that sentencing courts had broad discretion to consider various types of information, allowed a sentencing court to "consider conduct of which a defendant has been acquitted." (*Id.* at p. 154.) The *Watts* Court further explained that the constitutional prohibition against double jeopardy was not implicated when a sentencing court considered facts underlying a charge on which the jury returned a not-guilty verdict because "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime

of conviction." (*Ibid.*) Citing its earlier decision in *Witte v. United States* (1995) 515 U.S. 389 [115 S.Ct. 2199, 132 L.Ed.2d 351], the Supreme Court

noted that considering information about the defendant's character and conduct at sentencing resulted only in punishment for the offense of conviction. (*Id.* at pp. 154-155.)

The Supreme Court also concluded that the Ninth Circuit had misunderstood the preclusive effect of an acquittal, especially in light of the "different standards of proof that govern at trial and sentencing." (*Watts, supra*, 519 U.S. at p. 155.) The Supreme Court noted that an acquittal on a criminal charge did not indicate the defendant was innocent, but merely indicated the existence of reasonable doubt as to his guilt. (*Ibid.*) Because "it is impossible to know why a jury found a defendant not guilty on a certain charge," the "jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty." (*Ibid.*) The Supreme Court further explained that the federal Sentencing Guidelines provided that facts relevant to sentencing were to be proved on a standard of preponderance of the evidence, and that the application of the preponderance standard generally satisfied due process. (*Id.* at p. 156.) Thus, the *Watts* Court held,

a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

(*Id.* at p. 157.)

The reasoning of *Watts* is highly persuasive and should be applied to California's sentencing scheme. Although the federal Sentencing Guidelines and California's sentencing scheme differ in many respects, there are similarities with respect to the criteria discussed in *Watts*. Like the federal system, section 1170, subdivision (b), and rule 4.420(b) allow the sentencing court to consider a wide range of information and "relevant facts" in determining the appropriate sentence. (*People v. Hall* (1994) 8 Cal.4th 950, 962 [section 1170, subdivision (b), "demonstrates the Legislature's intent that aggravating circumstances, relating to the defendant and the offense, constitute

proper matters by a court in sentencing”].) Moreover, there is nothing in section 1170, subdivision (b), or the applicable Rules of Court, that prohibits the consideration of facts relating to an acquitted charge. Also, as in the federal system, sentencing facts, such as aggravating circumstances, are established by a preponderance standard. Furthermore, as the *Watts* Court explained, it cannot be reasonably inferred from a general verdict of not guilty that the jury necessarily rejected any facts in rendering its verdict, and the Double Jeopardy Clause does not prohibit a sentencing court from considering facts underlying an acquitted charge because the defendant is being punished only for the fact that his present offense was committed in a manner that warrants increased punishment. Accordingly, a trial court may properly use facts relating to counts on which the defendant was found not guilty as aggravating factors in determining the appropriate sentence.

The contrary holding in *Takencareof* is highly unpersuasive in light of the reasoning of the *Watts* decision, especially since the United States Supreme Court readily approved of a sentencing procedure that the *Takencareof* Court had deemed “anomalous” and “ludicrous.” Moreover, the Supreme Court considered its rationale in *Watts* so obvious that it summarily reversed the lower federal court in a per curiam opinion. This Court should adopt the reasoning in *Watts* and *Lewis* rather than the reasoning in *Takencareof*.

Appellant’s citation of *People v. Richards* (1976) 17 Cal.3d 614, fails to support his contention. (ABM 19.) In *Richards*, this Court held that the trial court erred in ordering the defendant to pay restitution for conduct relating to charges in which the defendant was acquitted because the trial court imposed the restitution order to resolve the civil liability of the defendant. (*Id.* at p. 620.) This Court explained that the resolution of civil liability was not a proper issue in a criminal case or a proper basis for the restitution order. (*Id.* at pp. 620-622.) *Richards* is entirely inapposite to the instant issue because the use of facts relating to acquitted counts at sentencing is for the proper purpose of

punishing the defendant for the manner in which he committed the offense of conviction, and does not implicate any issue of resolving civil liability. Thus, as explained above, this Court should adopt the reasoning in *Watts* and *Lewis*, and hold that a trial court may properly use facts relating to counts on which the defendant was found not guilty as aggravating factors in determining the appropriate sentence.

When this rule is applied to the instant case, it becomes clear that the trial court clearly committed no error in using the fact of the victim's fear for his life in imposing an upper term sentence. Even if it were assumed this finding was based on facts relating to the acquitted charges, no reasonable inference could be drawn that the jury necessarily rejected the fact that the victim was in fear for his life with its general verdict of not guilty. Thus, the trial court, applying a preponderance standard, properly considered the victim's fear as an aggravating circumstance.

D. Even If It Were Assumed That A Trial Court May Not Consider Facts From Acquitted Counts For Sentencing Purposes, No Prejudicial Error Occurred In The Instant Case

Contrary to appellant's contention (ABM 19-20), the trial court did not consider facts relating to the acquitted counts in finding that the victim's fear constituted an aggravating circumstance. Instead, the record demonstrates that the trial court found that the victim's fear resulted from the unlawful conduct of taking or driving the victim's vehicle, i.e., the offense of which appellant was convicted, rather than from the alleged conduct underlying the acquitted counts. For instance, the trial court's statement – "I do know with respect to the charge on which [appellant] stands convicted that the evidence that we have before the Court that I believe is entirely believable is that when Mr. Arana got out of that car he was terrified" – shows that the trial court was focusing on the evidence of the count on which appellant was convicted. (RT 2416.) The trial

court's further references to appellant's possession of the car against the victim's will and for his own purposes, and to the victim's fear *at the time he left his car*, also show that the court was basing its findings on the conduct underlying the offense of conviction. (RT 2416.) In addition, the trial court's comments that both the victim and appellant were liars and that the jury had properly "weighed it all out" and "sorted it out" in its verdicts further indicated that the trial court was not basing its findings on the evidence underlying the acquitted counts. (RT 2415.) Accordingly, even if a trial court is prohibited from considering facts relating to acquitted counts, no error occurred in the instant case.

Moreover, even if it were assumed that the trial court erred, there was no possible prejudice. The trial court found that appellant's lengthy criminal history was an aggravating circumstance and as the Court of Appeal noted, appellant's recidivist history could have supported three separate aggravating circumstances under the Rules of Court. (Opn., at p. 6. fn. 3.) Further, the trial court found no mitigating circumstances. (RT 2415-2417.) Accordingly, even if the trial court erred, it was not reasonably probable that the court would have sentenced appellant to any term other than the upper term. Thus, any error was not prejudicial. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434 [“When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper”].)

E. Appellant's Sentence Did Not Violate The Double Jeopardy Clause

There is also no merit to appellant's claim that the trial court violated the Double Jeopardy Clause by considering facts from acquitted counts during sentencing. (ABM 49-51.) First, the Double Jeopardy Clause has no application to noncapital sentencing determinations. (*Monge v. California*

(1998) 524 U.S. 721, 724 [118 S.Ct. 2246, 141 L.Ed.2d 615]; *People v. Hernandez* (1998) 19 Cal.3d 835, 838.) Second, as explained above, appellant's claim is based on the faulty premise that the trial court's finding as to the victim's fear was based on facts from an acquitted count. Further, even if the trial court considered facts from an acquitted count to impose an enhanced sentence, the *Watts* decision conclusively established that appellant's Double Jeopardy rights were not violated. (*Watts, supra*, 519 U.S. at pp. 154-155; see also *Witte v. United States, supra*, 515 U.S. at pp. 401-403 [sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged offense in imposing a sentence on offense of conviction without precluding subsequent prosecution for uncharged offense].)

In addition, there is no merit to appellant's attempt to distinguish *Watts* on the ground that, under *Blakely*, the aggravating facts in California must be determined by a jury on a standard of beyond a reasonable doubt. First, as explained in Argument II, *Blakely* does not apply to the sentencing scheme in California. Furthermore, *Blakely* only involved the Sixth Amendment right to a jury trial rather than the Double Jeopardy Clause, and *Blakely* did not disapprove of *Watts*. Since the Supreme Court did not address the issue of Double Jeopardy in *Blakely*, the *Blakely* decision did not change the Supreme Court's Double Jeopardy precedent. Since the *Watts* decision is still valid in light of *Blakely*, appellant's Double Jeopardy claim must fail.

II.

APPELLANT'S SENTENCE DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL

Under the Sixth and Fourteenth Amendments, a defendant has a right to a jury finding, based on proof beyond a reasonable doubt, on any fact that increases his or her punishment beyond the statutory maximum sentence set by the legislature. (*Blakely, supra*, 124 S.Ct. 2531; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Apprendi v. New Jersey, supra*, 530 U.S. 466.) In *Blakely, supra*, the United States Supreme Court recently applied this constitutional rule to an “exceptional sentence” imposed under the sentencing scheme in the State of Washington, and held that the defendant’s sentence violated the federal Constitution.

Appellant contends that section 1170 is unconstitutional under *Blakely* insofar that it permits the imposition of the upper term based on required findings of aggravated factors found only by a judge on a standard of preponderance of the evidence. He asserts that, under section 1170, the middle term is the statutory maximum because the middle term is the maximum sentence that is authorized by the jury’s verdict alone, and the upper term cannot be imposed without additional factfinding by the judge. Appellant therefore argues that *Blakely* is violated by the imposition of the upper term based on factors that were not found by the jury beyond a reasonable doubt. (ABM 21-38.) Respondent first submits that appellant forfeited this claim by failing to object to his sentence on the federal constitutional grounds he now raises on appeal. Respondent further submits that *Blakely* does not preclude the trial court from making the requisite findings on aggravating circumstances to support an upper term sentence under California law, that appellant’s sentence did not violate *Blakely*, and that any error was harmless.

A. Blakely v. Washington

As noted above, *Blakely* involved a constitutional challenge to a sentence imposed under the laws of the State of Washington. In Washington, all felonies are legislatively classified as Class A, B, or C felonies: Class A felonies have a maximum sentence of life imprisonment, Class B felonies have a maximum sentence of 10 years, and Class C felonies have a maximum sentence of 5 years. (Wash. Rev. Code, §§ 9A.20.010(b), 9A.20.021(1).)

In addition to the maximum penalties set forth in the felony classification statutes, the Washington State Sentencing Reform Act of 1981 (“Sentencing Reform Act”) created a second level of sentencing. Under this system, each criminal offense is characterized according to its seriousness level, and every criminal defendant is assigned an offender score based largely on the defendant’s prior criminal history. (Wash. Rev. Code, §§ 9.94A.515, 9.94A.525.) The Sentencing Reform Act also set forth a two-factor sentencing grid that prescribes a standard sentencing range based on the offense seriousness level and the offender score. (Wash. Rev. Code, § 9.94A.510.) The trial court must sentence the defendant within this standard range unless there are substantial and compelling reasons justifying an “exceptional” sentence that departs from the standard range set forth in the grid. (Wash. Rev. Code, § 9.94A.5.) Factual findings in support of an exceptional sentence are made by the court on a standard of preponderance of the evidence. (Wash. Rev. Code, § 9.94A.530(2).)

In *Blakely*, the defendant pled guilty to second-degree kidnapping involving domestic violence and use of a firearm. Under the felony classification system, second-degree kidnapping was a Class B felony with a maximum sentence of 10 years. Under the sentencing grid of the Sentencing Reform Act, the defendant’s offense of second-degree kidnapping with a firearm, coupled with his offender score, resulted in a standard range of 49 to 53 months. (*Blakely, supra*, 124 S.Ct. at pp. 2534-2535.)

Pursuant to the plea agreement, the prosecution recommended a sentence within the standard range. But, after hearing the victim’s description of the offense, the trial court imposed an exceptional sentence of 90 months, which was 37 months beyond the top of the standard range. The court justified the sentence on the ground that the defendant had acted with deliberate cruelty, a statutorily-enumerated ground for departure in domestic violence cases. “Faced with an unexpected increase of more than three years in his sentence,” the defendant objected. The court then held a bench hearing with witness testimony, but the court ultimately adhered to its prior finding of deliberate cruelty. After the defendant unsuccessfully appealed his sentence in state court, the United States Supreme Court granted certiorari. (*Blakely, supra*, 124 S.Ct. at pp. 2535-2536.)

The Supreme Court explained that the case required the application of the Sixth Amendment rule set forth in *Apprendi v. New Jersey, supra*, 530 U.S. 466, 490: “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.” The Court then found that the defendant’s exceptional sentence violated the Sixth Amendment because the sentence exceeded the 53-month statutory maximum of the standard range and was based on a fact (deliberate cruelty) that was not admitted by the defendant or found by a jury. (*Blakely, supra*, 124 S.Ct. at pp. 1537-2538.)

The *Blakely* Court rejected the state’s claim that there was no constitutional violation because the relevant statutory maximum was the 10-year maximum sentence for Class B felonies rather than the 53-month maximum of the standard range. (*Blakely, supra*, 124 S.Ct. at pp. 2537-2538.) The Court explained 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. (*Id.* at p. 2537, italics in original.) The Court found that the statutory maximum was 53 months because the sentencing judge acquired the authority to exceed that maximum only by finding some additional fact. (*Id.* at pp. 2537-2538.)

B. Appellant Forfeited The Instant Claim

Unlike appellant, the defendant in *Blakely* objected when the court imposed his sentence. (RT 2414-2421; *Blakely*, *supra*, 124 S.Ct. at p. 2535.) Respondent submits that appellant’s failure to object to his sentence, let alone base on an objection on federal constitutional grounds, forfeited his present claim of error.

No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, quoting *United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1770, 123 L.Ed.2d 508], internal quotation marks omitted.) Further, the United States Supreme Court has explained that this forfeiture applies where the claim asserts a failure to have a jury determine the truth of some fact. (See, e.g., *Osborne v. Ohio* (1990) 495 U.S. 103, 122-123 [110 S.Ct. 1691, 109 L.Ed.2d 98].)

Courts have applied these principles to *Apprendi* claims, and by logical extension, should apply them to *Blakely* claims, since they arise from an

application of *Apprendi*. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061 [defendant forfeited *Apprendi* claim by failing to specifically object on that ground below]; but see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2.) Thus, appellant forfeited the instant claim by failing to object to his sentence on the federal constitutional grounds that he now presents on appeal.

Moreover, this Court's holding in *People v. Scott* (1994) 9 Cal.4th 331 lends further analogous support for the conclusion that appellant forfeited his claim. In *Scott*, this Court explained that the "right to challenge a criminal sentence on appeal is not unrestricted," and 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.]" (*Id.* at pp. 351-352.) Like a defendant who asserts the trial court erred by basing its sentencing choice on flawed facts from a probation report, a defendant raising a *Blakely* claim also essentially asserts that the trial court considered flawed sentencing factors in imposing the sentence. Thus, it logically follows that both defendants forfeit their claims by failing to object to the sentence.

Furthermore, the fact that *Blakely* was not decided until after appellant's sentencing hearing does not preclude a finding of forfeiture. *Blakely* involves an application of the holding in *Apprendi* that, 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. (*Blakely, supra*, 124 S.Ct. at p. 2536.) Thus, appellant, like the defendant in *Blakely*, could have raised a challenge to his sentence on the basis of *Apprendi*. Moreover, in *United States v. Cotton* (2002) 535 U.S. 625 [122 S.Ct. 1781, 152 L.Ed.2d 860], the United States Supreme Court found that the federal defendants had forfeited their *Apprendi* claims by not objecting at trial despite the fact that *Apprendi* was decided while

the defendants' case was on appeal.^{4/} (*Id.* at pp. 628-629, 631.) Consequently, because appellant did not object to his sentence on the basis of *Apprendi* or the constitutional right to a jury trial, his claim is forfeited.

While this Court in *Saunders* indicated in dicta that the constitutional right to a jury trial cannot be forfeited by the failure to object (*Saunders, supra*, 5 Cal.4th 580, 589, fn. 5, citing *People v. Holmes* (1960) 54 Cal.2d 442, 443-444), this Court has not so held in the context of *Apprendi* error. The latter context is a paradigmatic case of trial, rather than structural, error for which the forfeiture rule will generally apply. Indeed, this Court in *Holmes* and *People v. Vera* (1997) 15 Cal.4th 269, 276-277, dealt with a different constitutional jury-trial right — the California Constitution's specific recognition under Article I, section 16, that a jury-trial waiver can be effected only by a defendant's and counsel's express waiver. (*Vera, supra*, 15 Cal.4th at pp. 277-278; *Holmes, supra*, 54 Cal.2d at pp. 443-444.) There is no such right in the federal Constitution's Sixth Amendment. Accordingly, the general forfeiture rule for constitutional error should apply.

In addition, appellant's failure to object should not be excused on the basis that such an objection would have been futile. First, appellant raised no objection on any grounds to his sentence. Further, as previously noted, *Blakely* involves an application of *Apprendi*, and the defendant in *Blakely* objected to an aggravated sentence at the time of sentencing under *Apprendi*. Since the defendant in *Blakely* ultimately prevailed on his *Apprendi* claim, appellant should have also raised an objection under *Apprendi* to preserve his instant claim. Moreover, in order to preserve a claim, a party must advance it, even if all precedent is contrary. (See *Bousley v. United States* (1998) 523 U.S. 614,

4. Having found the claim forfeited, the Court considered the "plain error" forfeiture exception found in Federal Rule of Criminal Procedure 52(b) and found no plain error. (*Cotton, supra*, 535 U.S. at pp. 631-634.) Since the "plain error" exception is a product of federal appellate procedure, it does not apply to this state appeal.

622-23 [118 S.Ct. 1604, 140 L.Ed.2d 828]; *Monsanto Co. v. Spray-Rite Service Corp.* (1984) 465 U.S. 752, 761-62, fn. 7 [104 S.Ct. 1464, 79 L.Ed.2d 775]; *Engel v. Isaac* (1982) 456 U.S. 107, 130, fn. 35 [102 S.Ct. 1558, 71 L.Ed.2d 783].) Therefore, appellant's possible belief at sentencing that his claim would not prevail does not justify a failure to raise an objection. Accordingly, appellant's claim is forfeited.

C. Judicial Factfinding On Aggravating Circumstances To Support An Upper Term Sentence Does Not Violate *Blakely*

The decision in *Blakely v. Washington* does not preclude a trial court from making the required findings on aggravating circumstances for the imposition of an upper term sentence under California law. The United States Supreme Court has consistently held that the federal Constitution does not prohibit judicial factfinding on aggravating circumstances that support a specific sentence *within* the standard sentencing range authorized by the jury's finding that the defendant is guilty of a particular offense. In California, the relevant sentencing range for most felonies and numerous enhancements consists of three possible terms of imprisonment (lower, middle, and upper term) that are specified by the same code section or set of code sections that enumerate the elements of the offense. Because California law provides that the jury verdict authorizes the trial court to impose any of the three terms within this range, the upper term of the triad is the relevant statutory maximum. Accordingly, the use of judicially found aggravating circumstances to impose the upper term does not infringe upon the province of the jury, but instead limits judicial discretion in imposing a sentence within the statutory maximum.

A proper reading of *Blakely* requires an examination of the legal and factual context in which *Blakely* was decided. The *Blakely* court first explained that it was "applying" the Sixth Amendment rule originally set forth in *Apprendi, supra*, 530 U.S. at page 490: "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.”

In *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, the defendant pled guilty to a charge of possession of a firearm for an unlawful purpose, a “second-degree” offense which was punishable with a maximum sentence of 10 years. Subsequent to the defendant’s guilty plea, and over the defendant’s objections, the trial court found, on a preponderance of the evidence, that the defendant had committed the offense with a racially-biased purpose. Based on this factual finding, the trial court determined that a hate crime sentence enhancement -- which was set forth in a separate statute and which increased the maximum sentence for a second-degree offense to 20 years -- was applicable. The trial court then imposed a 12-year sentence for the offense. (*Id.* at pp. 469-471.)

The *Apprendi* Court explained that the imposition of the New Jersey hate-crime enhancement based upon judicial findings conflicted with (1) the historic linkage between punishment and the statutory definition of the crime of which the defendant was convicted and (2) the consistent limitation on judges’ discretion to operate within the limits of the prescribed legal penalties. (*Apprendi*, *supra*, 530 U.S. at pp. 482-483.) The *Apprendi* Court explained that a judge’s traditional exercise of sentencing discretion “was bound by the range of sentencing options prescribed by the legislature” and that the judge’s role in sentencing was “constrained at its outer limits by the facts alleged in the indictment and found by the jury.” (*Id.* at pp. 481, 483, fn. 10.) A defendant was able to “discern from the statute of indictment what maximum punishment conviction under that statute could bring” since “punishment was, by law, tied to the offense” and judges only “exercised sentencing discretion within a legally prescribed range.” (*Id.* at p. 483, fn. 10; see also *id.* at p. 478.) The New Jersey hate-crime enhancement provision conflicted with these principles

and therefore violated the defendant's Sixth Amendment right to a jury trial because it allowed the jury to be removed from the determination of a fact that exposed the defendant to a penalty exceeding the "prescribed range of penalties" beyond the statutory maximum for the offense established by the jury's verdict. (*Id.* at pp. 482-483, 490.)

The *Apprendi* Court explained, however, that a different constitutional outcome would result when judicial factfinding occurred *within* the statutory range authorized by the jury's verdict. The *Apprendi* Court noted there was nothing in the common-law history to suggest that it was "impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute," and that "judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." (*Apprendi, supra*, 530 U.S. at p. 481, original italics.)

The *Apprendi* Court also noted that the term "sentencing factor" was still viable in light of *Apprendi's* holding. The Court explained,

the term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense.

(*Apprendi, supra*, 530 U.S. at p. 494, fn. 19, original italics.) By contrast, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

(*Ibid.*) Thus, in *Apprendi*, the New Jersey hate crime provision clearly involved an enhancement or functional element of an offense rather than a sentencing factor since it allowed the judge to impose punishment identical to

a first-degree offense even though the jury convicted the defendant only of a second-degree offense. (*Id.* at pp. 491-492, 494.)

Two years after its decision in *Apprendi*, the Supreme Court held in *Harris v. United States* (2002) 536 U.S. 545 [122 S.Ct. 2406, 153 L.Ed.2d 524] that *Apprendi* did not apply to a fact increasing the defendant's minimum sentence. In reaching its holding, the *Harris* Court first noted,

Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable doubt components of the Fifth and Sixth Amendments. (*Harris, supra*, 536 U.S. at p. 558.)

The *Harris* Court also stated, Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. . . . when the judge chooses a sentence within the range, the grand and petit juries already have found all of the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries – and without contradicting *Apprendi*.

(*Harris, supra*, 536 U.S. at p. 565.)

The Court further explained, The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury -- even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.

(*Id.* at p. 566.)

Indeed, three years before *Harris*, the same five justices as in the *Blakely* majority explained that facts that *raise* the “sentencing range” or “penalty range” for a crime are ordinarily subject to jury determinations, but explicitly rejected the position that “every finding underlying a sentencing determination must be made by a jury.” (*United States v. Jones* (1999) 526 U.S. 227, 242, 248, 251 [119 S.Ct. 1215, 143 L.Ed.2d 311].)

Thus, when viewed within the legal context of the above precedent, *Blakely* means that a defendant charged with a specific offense must not only have notice of the sentencing range legislatively mandated for that particular offense, but must also have the right to a jury determination of the facts subjecting him to that sentencing range. (*Blakely, supra*, 124 S.Ct. at p. 2543.) In other words, the *Apprendi/Blakely* inquiry seeks to identify functional elements of an offense that are masquerading as factors left to the sentencing judge’s discretion. Indeed, an expansive reading of *Blakely* and its definition of the “statutory maximum” to mean that *all* facts increasing a sentence must be found by a jury, regardless of whether those facts merely increase the sentence within the legislatively prescribed range for a crime, is inconsistent with the United States Supreme Court’s pronouncements in *Harris* and *Apprendi* that judicial factfinding within the authorized range is constitutionally permissible. (*United States v. Koch* (6th Cir. 2004) ___ F.3d ___ [2004 U.S. App. LEXIS 18138, *20] (en banc) [a broad reading of *Blakely* “would create tension with the Court’s other decisions giving legislatures wide berth in distinguishing between sentencing facts and elements-of-the-crime facts”].)

In California, a defendant charged with a specific offense has notice of the sentencing range legislatively mandated for that particular offense, and has the right to a jury determination of the facts subjecting him to that sentencing range. Under California’s determinate sentencing scheme, the three possible

terms of imprisonment specified in the statute of conviction^{5/} constitute the prescribed “range” of punishment authorized by the jury’s verdict that the defendant is guilty of a particular offense. (§ 1170, subd. (a)(3) [upon conviction, the court shall sentence the defendant to *any* one of the three specified terms of imprisonment prescribed for the offense of conviction]; *Hall, supra*, 8 Cal.4th at p. 957 [Determinative Sentencing Act of 1976 “replaced indeterminate sentences for substantive offenses with a range of three possible sentences (lower, middle, and upper terms)”].) Thus, it is the jury’s determination that the elements of the offense have been proved beyond a reasonable doubt, as reflected by the jury’s guilty verdict, that exposes the defendant to the entire range of punishment that is specified for that offense in the statute of conviction. (*Apprendi, supra*, 530 U.S. at p. 491, fn. 16 [“If the facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute”].)

Because the elements of a particular offense, as reflected by the jury’s verdict that the defendant committed that offense, are the facts that authorize the imposition of any of the three possible sentences within the three-tiered range of punishment, the upper term sentence is therefore “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely, supra*, 124 S.Ct. at p. 2537, original italics.) Any additional post-verdict factfinding by a judge under section 1170, subdivision (b), merely sets the appropriate punishment within the range authorized by the jury’s verdict. In other words, these judicially-found facts are merely “facts guiding judicial discretion below the statutory

5. By referring to the “statute of conviction,” respondent refers to the code section or set of code sections that defines the criminal offense and prescribes the penalties for the offense. (See, e.g., §§ 211 [defining robbery], 212.5 [setting degrees of robbery], 213 [prescribing penalties for robbery].)

maximum,” and therefore “need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.” (*Harris, supra*, 536 U.S. at p. 565.) Because the Supreme Court explained in *Apprendi* and *Harris* that this type of judicial factfinding is constitutionally permissible under *Apprendi*, the upper term sentence is the statutory maximum, as defined by *Apprendi* and *Blakely*.

In addition, this Court has previously explained that the aggravating circumstances necessary to impose the upper term are simply the type of sentencing factors that support a specific sentence *within the range* authorized by the jury’s finding that the defendant is guilty of a particular offense:

[The Court of Appeal] fails to distinguish a trial court’s decision in fashioning appropriate punishment from the need to establish before the trier of fact the wrongful criminal conduct for which punishment is being imposed. “Sentencing facts” such as aggravating and mitigating circumstances assist a judge in selecting *from among the options of punishment the trier of fact’s verdict has made available*. They help the court select, for example, the higher, middle, or lower term and whether terms should be consecutive or concurrent. Such factors are largely the articulation of considerations sentencing judges have always used in making these decisions.

(*People v. Hernandez* (1988) 46 Cal.3d 194, 205, italics added, abrogated on another ground in *People v. King* (1993) 5 Cal.4th 59, 78, fn. 5; see also *People v. Wright* (1982) 30 Cal.3d 705, 713 [“terms were to be fixed by choosing one of the alternatives on the basis of circumstances relating to the crime and to the defendant”].) Given this Court’s description of the role of aggravating circumstances in imposing the upper term -- a description that closely mirrors the United States Supreme Court’s description of constitutionally permissible sentencing factors in *Apprendi* and *Harris* -- judicial factfinding on aggravating circumstances does not violate a defendant’s Sixth Amendment rights.

Moreover, *Blakely* is inapplicable to the imposition of the upper term sentence because there are critical and constitutionally significant differences between California’s sentencing scheme and the Washington sentencing scheme at issue in *Blakely*. In Washington, it is the sentencing grid rather than the general felony classification statute that specifically links the actual elements of the offense committed by the defendant with a particular range of penalties.⁶ Washington, however, also has a statute of general applicability that allows departure from the standard range of penalties set forth in the sentencing grid. Thus, it was in that context that the *Blakely* Court described the relevant statutory maximum as the maximum a judge “may impose *without* additional findings.” (*Blakely, supra*, 124 S.Ct. at p. 2537.) As the federal Fifth Circuit Court of Appeals explained, the Washington sentencing scheme “essentially established two distinct statutory maximum sentences,” and in such a circumstance, “it makes sense to say that the legislature has effectively created two distinct offenses.” (*United States v. Pineiro* (5th Cir. 2004) 377 F.3d 464, 473.)

By contrast, it makes no sense to say that the California Legislature has essentially created two distinct offenses just because the statute of conviction provides that a middle term and an upper term are potential penalties for the same offense. Unlike the Washington scheme, where the link between the specific elements of the offense and the corresponding prescribed punishment for those elements (as manifested in the sentencing grid) can be superseded by a departure statute of general applicability, the California scheme specifically ties a particular triad of prison terms with the elements of the offense of conviction in the same statute. The Legislature has thus determined that a jury

6. For instance, second-degree kidnapping is punishable by a range of 13 to 17 months, and second-degree kidnapping with a firearm is punishable by a range of 49 to 53 months. (Wash. Rev. Code, §§ 9.94A.310(1), 9.94A.310(3)(b).)

finding on those elements authorizes any of the three possible terms, and has therefore effectively set the lower and upper terms as the outer parameters of a single range of penalties for a single criminal offense. Thus, the elements of a particular offense are the “legally essential facts” that expose the defendant to the lower, middle, and upper terms that the Legislature has prescribed for that offense. Accordingly, the core constitutional principles underlying the *Apprendi* doctrine -- the necessary link between verdict and punishment, and the constraint on judicial sentencing discretion to operate within the penalties prescribed by the legislature -- are not offended by judicial factfinding on aggravating circumstances to impose the upper term because the upper term is the maximum sentence authorized by the jury verdict and provided by the statute of conviction. (*Apprendi, supra*, 530 U.S. at p. 491, fn. 16 [“If the facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute”].)

This Court’s decisions concerning the inapplicability of *Apprendi* and *Ring v. Arizona, supra*, 536 U.S. 584 (which applied *Apprendi* to Arizona’s capital sentencing scheme) to the penalty determination in a capital case under California law are also instructive. For instance, in a case decided after *Blakely*, this Court explained that once the jury has found one special circumstance true beyond a reasonable doubt, no further facts need to be proved in order to increase the punishment for first degree murder to either death or life without the possibility of parole because both were “prescribed as potential penalties” in section 190.2. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) This Court further explained that, even though the ultimate penalty decision depends on determinations as to which of the two penalties is appropriate and whether the evidence in aggravation outweighed the evidence in mitigation, “those determinations do not entail the findings of facts that can increase the

punishment for murder of the first degree beyond the maximum otherwise provided by law.” (*Ibid.*)

Similarly, once the jury has found the defendant guilty of a particular offense, no further facts need to be proved to the jury in order to impose the upper term because the upper term is specifically prescribed as a potential penalty in the statute of conviction. Thus, any factfinding on aggravating circumstances does not entail the findings of facts that can increase the punishment for the offense beyond the maximum otherwise provided by the full range of penalties prescribed for the offense.

Moreover, it cannot be said that a defendant in California has a “legal right” or is “entitled” to the middle term upon conviction. (*Blakely, supra*, 124 S.Ct. at p. 2540.) In *Blakely*, the Court explained that a burglar knows he is risking a 40-year sentence in a system that punishes burglary with a range of 10 to 40 years, whereas, in a system that punishes burglary with a 10-year sentence and the use of a gun with an additional 30-year sentence, the unarmed burglar is entitled to no more than a 10-year sentence. (*Ibid.*) Applying this hypothetical to the imposition of the upper term demonstrates that California’s sentencing scheme is far more analogous to the former system rather than the latter.

In California, a defendant is on full notice that he or she risks an upper term sentence when he commits a particular offense because the upper term is identified as a potential penalty in the code section or set of code sections that enumerates the elements of the offense that the defendant has committed. Thus, the defendant in California, unlike the defendant in Washington, is able “to discern from the statute of indictment what maximum punishment conviction under that statute could bring.” (*Apprendi, supra*, 530 U.S. at p. 483, fn. 10.) Further, the charging information, like the information in the instant case (CT 71-77), will often set forth the full sentencing range for the charged offense. Thus, unlike the imposition of an exceptional sentence in

Washington, or the sentencing scheme mentioned in *Blakely* where a defendant has no warning that his maximum potential sentence could balloon from five years to life imprisonment (*Blakely, supra*, 124 S.Ct. at p. 2542), the imposition of the upper term does not result in an unexpected increase in the defendant's sentence.

This Court's holding in *People v. Scott, supra*, also belies the notion that a defendant had a legal "right" to the middle term upon conviction. In *Scott*, this Court explained that the choice of whether to impose "the lower or upper term instead of the middle term of imprisonment" is committed to the sentencing court's "broad discretion to tailor the sentence to the particular case." (*Scott, supra*, 9 Cal.4th at p. 349.) Because the imposition of any of the three terms is considered an "authorized" sentence, this Court held that a defendant forfeits all claims of sentencing error if he or she fails to interpose a timely objection to such an authorized sentence. (*Scott, supra*, 9 Cal.4th at pp. 353-354.) Thus, upon conviction, a defendant does not have a legal right to anything other than one of the three specified terms. If one of those terms is imposed, a defendant can merely seek review on the ground that the court abused its discretion in making a particular choice. (See *id.* at p. 354 ["[i]n essence, claims deemed waived on appeal involve sentences which, though *otherwise permitted by law*, were imposed in a procedurally or factually flawed manner"], italics added.)

Further, a defendant does not obtain a legal right or entitlement to the middle term from the legislative directive in section 1170, subdivision (b), that when three possible prison terms are predicated on conviction for a given offense, "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." The mere fact that the Legislature has indicated a statutory preference for the middle term in order to promote the policy goals of eliminating sentencing disparity and promoting uniformity of sentences does not mean that it has essentially created separate,

enhanced crimes containing the myriad, non-exclusive sentencing factors enumerated in the Rules of Court. (See rules 4.408, 4.421, 4.423.) Indeed, given that the legislative intent was to simply make the middle term the “average or usual term” (Advisory Comm. com., foll. Cal. Rules of Court, rule 4.420), it cannot be said that a defendant has a legal right or entitlement to the to the most-common or the statistical mean of the three possible terms imposed for a particular offense.

More fundamentally, section 1170, subdivision (b), must be read in proper context. The application of the middle term is not the first step in the determination of the appropriate base term; rather, it is the default *conclusion* if the trial court finds no “circumstances in aggravation or mitigation of the crime.” (§ 1170, subd. (b).) Thus, it is in the absence of such circumstances that a court “shall” then impose the middle term. (*People v. Thornton* (1985) 167 Cal.App.3d 72, 76-77; *People v. Myers* (1983) 148 Cal.App.3d 699, 703.) Because the application of the middle term is not the first step in the determination of the base term, an upper term cannot be viewed as a graduated step above the middle term that can be reached and authorized only by additional factfinding from a judge. Instead, the upper term is simply the top tier of the range authorized by the jury’s verdict, with the trial court having the discretionary authority to impose any of the three terms in the range.

Thus, any judicial factfinding predicated under section 1170, subdivision (b), is simply intended to be a discretionary determination of the proper term within the sentencing range for the particular offense. (*Scott, supra*, 9 Cal.4th at p. 349.) Indeed, the Legislature expressly found that its sentencing policy goals “can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.”^{7/} (§ 1170, subd. (a).) Thus,

7. While rule 4.420(b) refers to the establishing of aggravating and mitigating facts by a preponderance of the evidence, the ultimate sentencing

section 1170, subdivision (b), and the related Rules of Court merely channel and guide judicial discretion within the legislatively- authorized limits, and do not set the middle term as the “statutory maximum,” as defined by *Blakely*.

In sum, determinate sentencing schemes comply with *Blakely* where, as in California, the legislature sets a maximum, offense-specific penalty, so long as the defendant receives a sentence that is not greater than that maximum. California’s system does not suffer from the constitutional flaws identified by *Blakely*. California’s Legislature created a system in which most offenses have an associated lower, middle, and upper term, of which defendants necessarily have notice and a full understanding of their legal right to receive one of the three terms, absent an additional jury finding. Thus, an aggravating circumstance used to impose the upper term is not a functional element of a greater offense; rather, it is simply the type of sentencing factor that judges have historically used in their broad discretion to impose the appropriate sentence within the range of penalties that is authorized by the jury’s verdict.

Nor does California have a generalized departure statute allowing for a greater sentence to be imposed above the statutorily-mandated triad associated with every offense. As explained earlier, Washington’s departure statute violated the constitutional concerns of *Apprendi* and *Blakely* because it broke the necessary link between the jury’s findings and the corresponding punishment. Unlike Washington, California has a system of enhancements and alternate sentencing schemes, by which a sentence can be extended beyond the standard range imposed by the Legislature. Critically, under California statutes,

determination is not meant to be the analogue, much less the equivalent, of jury fact-finding. As the Advisory Committee Comment states:

Determining whether circumstances in aggravation or mitigation preponderate is a qualitative, rather than a quantitative, process. It cannot be determined by simply counting identified circumstances of each kind.

The sentencing factors, thus, merely inform and guide the sentencing court’s discretion within the statutory range.

sentence enhancements and alternate sentencing schemes that have the potential to elevate a defendant's sentence beyond the standard range statutorily assigned to a given offense must be pled and proven to the jury beyond a reasonable doubt. (See, e.g., § 1170.1, subd. (e) [enhancements], and §§ 1025, 1158 [prior conviction allegations].) Accordingly, California satisfies *Blakely*'s requirement that, before a defendant can be sentenced outside the standard range identified by the Legislature as appropriate for a particular offense, a jury must find beyond a reasonable doubt that the defendant is eligible for an enhancement or alternative scheme that exposes the defendant to a higher sentence. As appellant received one of the three legislatively authorized terms for his offense of conviction, no Sixth Amendment violation occurred.

D. Even If This Court Concludes That *Blakely* Applies To Upper Term Sentences, There Was No *Blakely* Error In The Instant Case

Even if this Court should conclude that *Blakely* generally precludes a trial court from making the required findings to impose an upper term sentence, and the middle term is therefore the statutory maximum of the triad, there was no violation of *Blakely* in the instant case for two independent reasons. First, appellant's admissions on the prior prison term enhancements raised the statutory maximum to at least eight years, and appellant's eight-year sentence did not exceed that maximum. Secondly, the trial court's finding that appellant had a lengthy criminal history fell under the recidivism exception to *Blakely* and was also established by appellant's admissions regarding his prior convictions, and this finding was sufficient to authorize the imposition of the upper term.

1. Because Appellant’s Admissions On The Prior Prison Term Enhancements Increased The Statutory Maximum To Eight Years, The Judicial Factfinding Did Not Increase Appellant’s Sentence Beyond The Statutory Maximum

Blakely defined the statutory maximum as “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely, supra*, 124 S.Ct. at p. 2537, original italics.) Here, even the middle term of the prescribed statutory range for the substantive offense, combined with appellant’s admissions on the charged prior conviction and prison term allegations, resulted in an authorized sentence of eight years, i.e., the same sentence the trial court actually imposed.

This sentence is calculated as follows. Appellant’s felony conviction of unlawful taking or driving of a vehicle carried the standard range of sixteen months, two years, or three years. (Veh. Code, § 10851, subd. (a); § 18.) Because appellant admitted that he had suffered a prior felony conviction of unlawful taking or driving of a vehicle, the standard range was increased to two, three, or four years under section 666.5. (§ 666.5, subd. (a); Veh. Code, § 10851, subd. (e).) This standard range was then doubled to a range of four, six, or eight years by appellant’s admission that he had suffered a prior “strike” conviction. Appellant was further exposed to an additional two years of imprisonment because of his admissions that he had served two valid prior prison terms. (§ 667.5, subd. (b)).^{8/} Thus, even the middle term of six years, coupled with the two one-year prior prison term enhancements, yielded an exposure to a prison term of at least eight years. In other words, the trial court could have imposed a maximum sentence of at least eight years “*without any additional findings.*” (*Blakely, supra*, 124 S.Ct. at p. 2537, original italics.)

8. As previously noted, appellant admitted that he had served four prior prison terms, but the prosecution later acknowledged that only two of the prison terms qualified as *separate* prior prison terms under section 667.5, subdivision (b).

In light of this eight-year exposure, the trial court’s sentencing decision could rely on factual findings that were not reflected in the jury verdict or admitted by appellant to sentence him to eight years. Accordingly, appellant’s eight-year sentence is valid. (*Blakely, supra*, 124 S.Ct. at p. 2538 [a sentence based in part on judicially found facts does not violate a defendant’s right to jury where the sentence is not “in excess of that otherwise allowed for [the underlying] offense”]; *id.* at p. 2537 [a constitutional violation occurred if the judge “imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding”].)

Appellant, however, contends that the statutory maximum was only six years, the middle term of the substantive offense. He concedes that his sentence was subject to further enhancement by the prior prison terms, but he omits the two prior prison terms from his computation of the statutory maximum on the apparent basis that these two enhancements were ultimately stricken by the trial court. (ABM 36.) Appellant is incorrect.

Contrary to appellant’s apparent suggestion, the trial court’s ultimate striking of the two prior prison term enhancements had no effect on the computation of the statutory maximum, as defined by *Blakely*. In *Apprendi*, the Supreme Court instructed that the statutory maximum involves the maximum penalty “to which a criminal defendant is exposed” on a particular count. (*Apprendi, supra*, 530 U.S. at p. 490.) Similarly, *Blakely*’s definition of the statutory maximum involves the maximum *potential* sentence to which a defendant is exposed *at the time of the guilty verdict or plea*. (*Blakely, supra*, 124 S.Ct. at p. 2537.) The Supreme Court explained in *Blakely* that the statutory maximum is the maximum sentence a judge “may” impose based on facts from the jury verdict or admitted by the defendant, and without additional findings. (*Ibid.*) The Court also explained that the Washington trial judge “could” not have imposed the exceptional sentence without additional factfinding. (*Ibid.*) Thus, the statutory maximum is the defendant’s maximum

sentence exposure *prior* to the trial court’s actual exercise of its discretionary choices in imposing a sentence.^{9/}

Moreover, striking a prior does not invalidate the underlying true finding or admission of the prior. (*People v. Garcia* (1999) 20 Cal.4th 490, 496 [“the striking or dismissal of a charge of prior conviction . . . is not the equivalent of a determination that defendant did not in fact suffer the conviction [citations]; such judicial action is taken . . . for the purpose of sentencing only,” internal quotation marks omitted].) Therefore, under *Blakely*, a trial court’s discretionary sentencing decision to dismiss a prior is simply a downward departure from, and does not change, the statutory maximum that was already established by the facts found by the jury or admitted by the defendant.

Thus, in the instant case, the trial court’s discretionary sentencing decision to ultimately strike the two prior prison term enhancements did not affect appellant’s exposure to an eight-year prison sentence. As explained above, at the time of the guilty verdict and appellant’s admissions, the court *could* have imposed a sentence of at least eight years without any additional factfinding. Accordingly, *Blakely* was not violated because the trial court imposed a sentence that did not exceed the statutory maximum.

9. Using the trial court’s discretionary sentencing decisions to calculate the statutory maximum involves circuitous reasoning. To determine whether a judicially-found fact was used to increase the punishment beyond the statutory maximum, it is necessary to compare two benchmarks that have been established at different times, i.e., the trial court’s actual sentencing decisions (the “punishment”) must be compared with the maximum potential sentence at the time of the guilty verdict or plea (the “statutory maximum”). Here, by failing to include the two prior prison terms in the statutory maximum calculation, appellant erroneously conflates the two benchmarks. For instance, under this erroneous analysis, a trial court’s ultimate discretionary decision to impose the low term rather than the middle term would illogically convert the low term into the statutory maximum. Nothing in *Blakely* suggests such a result.

2. The Trial Court’s Aggravated Circumstance Finding That Appellant Had A Lengthy Criminal History Provided The Trial Court With The Authority To Impose The Upper Term

In addition, *Blakely* was not violated because the trial court’s aggravated-circumstance finding that appellant had a lengthy criminal history fell under the recidivism exception to *Blakely*, and because the factual basis of the finding was fully established by appellant’s admissions on his prior convictions and prison terms. Since a single aggravating circumstance is sufficient to authorize an upper term sentence, the trial court’s recidivism finding authorized the imposition of the upper term sentence. Accordingly, even under appellant’s expansive reading of *Blakely*, the upper term sentence became the statutory maximum and any additional judicial factfinding was constitutionally permissible because such factfinding did not increase appellant’s actual sentence beyond the statutory maximum.

a. The *Almendarez-Torres v. United States* Recidivism Exception

In *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 226 [118 S.Ct. 1219, 140 L.Ed.2d 350], the Supreme Court held that the fact of a defendant’s recidivism did not need to be included in the indictment or proved to a jury beyond a reasonable doubt because it was not an “element” of the offense, even though the fact could increase the defendant’s punishment. (*Id.* at pp. 226, 223-249.) The *Almendarez-Torres* Court explained that the “sentencing factor at issue here – recidivism -- is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence.” (*Id.* at p. 243.) Citing *Almendarez-Torres*, the *Apprendi* Court excluded “the fact of a prior conviction” from the general rule requiring any fact that

increased the penalty beyond the prescribed statutory maximum to be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at pp. 489-490.) The Supreme Court retained the *Almendarez-Torres* exception in *Blakely*. (*Blakely, supra*, 124 S.Ct. at p. 2536.)

Moreover, the *Almendarez-Torres* exception is not limited to the mere fact of a prior conviction. Rather, the exception includes facts involving recidivism, such as matters involving the sentence imposed and the status and timing of the defendant's incarceration in relation to when he committed subsequent offenses. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 215-223; see also *People v. Epps* (2001) 25 Cal.4th 19, 26 [the determination whether a defendant was sentenced to prison is "largely legal"]; *People v. Prather* (1990) 50 Cal.3d 428, 439-440 [considering prior prison terms to be a "subset" of prior convictions for purposes of the "double-the-base-term limitation"].)

Thus, even if *Blakely* applies to the imposition of upper terms, a defendant has no right to a jury trial on any aggravating circumstance based on his or her recidivism, and a court can properly make sentencing findings regarding the defendant's recidivism without violating the federal Constitution.

b. A Single Aggravating Circumstance Provides The Trial Court With Authority To Impose The Upper Term

Furthermore, what *Blakely* makes clear is that the federal constitutional inquiry looks solely to whether the fact or facts that render the defendant *eligible* for an enhanced or aggravated sentence have been proved to the jury. The *Blakely* Court explained that the Constitution defines the "statutory maximum" as "the maximum sentence the trial court *may* impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely, supra*, 124 S.Ct. at p. 2537, first italics added.) The constitutional test set forth in *Blakely* focuses on the judge's "*authority* to impose an enhanced

sentence,” and the Court drew no distinction between systems in which the defendant’s eligibility for “an enhanced sentence depends on a finding of a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating facts (as here).” (*Blakely, supra*, 124 S.Ct. at p. 2538, italics added.)^{10/}

Under California law, a single aggravating circumstance is sufficient to render a defendant *eligible* for the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Castellano* (1983) 140 Cal.App.3d 608, 615.) Thus, the presence of a single circumstance in aggravation renders a defendant *eligible* for the upper term and provides the trial court with the statutory *authority* to impose the upper term, irrespective of the particular term the court ultimately imposes after conducting the requisite balancing. Accordingly, a jury verdict as to *one* aggravating circumstance beyond a reasonable doubt or the defendant’s admission as to one aggravating circumstance satisfies the constitutional requirement set forth in *Blakely* that a jury make the necessary finding beyond a reasonable doubt before a defendant can be exposed to a higher sentence.

Blakely is similarly satisfied if the trial court finds a single aggravating circumstance based on the defendant’s recidivism. Because such a recidivism finding falls within the *Almendarez-Torres* exception to the jury verdict requirement, and because the recidivism circumstance, standing alone, is sufficient to authorize the imposition of an upper term sentence, the Sixth Amendment does not prohibit the trial court from imposing an upper term sentence. In such a case, the upper term would necessarily become the statutory maximum under *Blakely*, even under appellant’s expansive reading

10. Indeed, the Court expressly pointed out that under Washington’s scheme, “the judge acquires that authority [to impose an exceptional sentence] only upon finding some additional fact.” (*Blakely, supra*, 124 S.Ct. at p. 2538, fn. 7.)

of *Blakely*, because the court *may impose* the upper term without making any other findings of fact. (*Blakely, supra*, 124 S.Ct. at pp. 2531, 2537.)

Moreover, once the federal constitutional requirement is satisfied, the state statutory scheme becomes the only controlling authority limiting the court's ability to impose an appropriate sentence, including an upper term. (*Apprendi, supra*, 530 U.S. at p. 481 [“We should be clear that nothing in this history suggests it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute”].) Under California's statutory scheme, the court can consider any other aggravating factors it finds by a preponderance of the evidence, as well as mitigating factors found by a preponderance standard.

Although *Blakely* would continue to restrict the factors that the court could consider in imposing a sentence above and beyond the top of the triad associated with an offense or an enhancement, it would not restrict the factors that the court could consider in deciding whether to impose the upper term of the triad itself. Rather, the court's exercise of sentencing discretion within the range permitted by the jury's finding is guided and restrained only by state law. Under state law, the court may consider any factor that the court itself finds by a preponderance of the evidence. (Rule 4.420(b).) As a result, when the court finds a valid recidivism factor that falls within the *Almendarez-Torres* recidivism exception to the jury verdict requirement, the upper term would become the statutory maximum for Sixth Amendment purposes, and the sentencing returns to purely state statutory considerations. In such a case, the court may consider any additional circumstances it finds by a preponderance of the evidence when deciding whether to impose the upper term.

Accordingly, if one aggravating circumstance is supported by either a jury finding or the defendant's admission, or one aggravating circumstance is

based on the defendant's recidivism, *Blakely* is not violated and the defendant's upper-term sentence is constitutionally valid.

Here, the trial court's aggravated circumstance finding that appellant had a "lengthy [criminal] history" did not violate *Blakely*. First, this finding as to appellant's recidivism clearly fell within the *Almendarez-Torres* exception to *Blakely*.^{11/} Moreover, the factual basis for the trial court's recidivism finding was fully established by appellant's admissions that he had suffered four prior convictions (robbery in 1995, unlawful taking of a vehicle in 1996, grand theft in 1995, and obstructing or resisting an officer in 2000) and that he had served prison terms for those convictions. (RT 1257-1259.)

Since this recidivism finding, by itself, authorized an upper-term sentence, the upper term became the statutory maximum and the trial court was free to consider any other aggravating factors found by a preponderance in evaluating whether to impose the upper term. Under these circumstances, the trial court's additional aggravating circumstance finding that the victim was in fear for his life, and the use of that finding to support an upper term sentence, did not violate *Blakely*. Accordingly, appellant's sentence was constitutionally valid.

E. *Blakely* Error Is Reviewed Under The *Chapman* Standard, And Under This Standard Of Review, Any *Blakely* Error Was Harmless In The Instant Case

11. Even if the *Almendarez-Torres* exception is strictly limited to the mere fact of a prior conviction, the trial court's finding nevertheless fell under the exception since the finding simply involved aggregating appellant's four prior convictions.

1. *Blakely* error Is Not Prejudicial Under The *Chapman* Standard If The Jury Would Have Found At Least One Of The Aggravating Circumstances True Beyond A Reasonable Doubt

Even if the sentencing procedures in this case violated *Blakely*, appellant's sentence was nevertheless valid because any *Blakely* error was harmless. Contrary to appellant's contention (ABM 39-45), *Blakely* error is not structural error that is reversible per se. In *People v. Sengpadychith* (2001) 26 Cal.4th 316, this Court found that *Apprendi* error does not warrant relief if it is harmless beyond a reasonable doubt and, since *Blakely* is an application of *Apprendi*, the same standard should apply to *Blakely* error. (*Id.* at p. 327; see also *Cotton, supra*, 535 U.S. at pp. 627, 631, 634 [applying plain error analysis to *Apprendi* claim where the defendant did not object on that ground at trial]; *United States v. Sanchez-Cervantes* (9th Cir. 2002) 282 F.3d 664, 668-671 [*Apprendi* error not structural error].)

In determining whether *Blakely* error was prejudicial, the reviewing court must apply the standard of review set forth in *Chapman, supra*, 386 U.S. at page 24, to determine whether the jury would have found any of the aggravating circumstances true beyond a reasonable doubt. Any error as to a particular aggravating circumstance would be harmless under this standard if the evidence at trial and sentencing consisted of overwhelming or uncontradicted evidence as that circumstance. (*Sengpadychith, supra*, 26 Cal.4th at p. 327; *Cleveland, supra*, 87 Cal.App.4th at p. 271 [finding any *Apprendi* error for a judge's section 654 finding to be harmless beyond a reasonable doubt because "[w]e have no doubt a jury would have reached the same conclusion [as the trial court] under the reasonable doubt standard"]; *Chamberlain v. Pliler* (C.D.Cal. 2004) 307 F. Supp. 2d 1128, 1142-1143 [holding that any *Apprendi* error from the failure to submit a personal-use finding to the jury was harmless because "[p]etitioner has adduced no evidence to contradict the evidence considered by the trial court, which included the

victim’s testimony that petitioner had pulled out a knife and struck the victim in the head with a shiny object cutting him and leaving a scar”].) In a similar context, the United States Supreme Court has found no plain errors from an *Apprendi* violation involving a drug quantity enhancement reasoning that the evidence was ““overwhelming”” and ““essentially uncontroverted.”” (*Cotton, supra*, 535 U.S. at pp. 633-634.)

If the reviewing court determines that the jury would have found at least one of the aggravating circumstances true beyond a reasonable doubt, the prejudice inquiry ends and the reviewing court must deem the *Blakely* error not prejudicial. As explained, *ante*, in Argument II(D)(2), *Blakely* error occurs if the jury did not find the necessary fact that *authorizes* the imposition of, or makes the defendant *eligible* for, the increased sentence. Since a single aggravating circumstance is sufficient to authorize the imposition of the upper term under state law (*Osband, supra*, 13 Cal.4th at p. 728), a determination that the jury would have found at least one aggravating circumstance true beyond a reasonable doubt necessarily renders the *Blakely* error harmless because that single aggravating circumstance would have authorized the upper-term sentence. The reviewing court would therefore affirm the defendant’s sentence under such circumstances.

Once the reviewing court determines that any *Blakely* error was harmless because the jury would have found at least one aggravating circumstance true, the reviewing court does not need to further determine whether the trial court would have sentenced the defendant to the same upper-term sentence in light of the *Blakely* error. Such an inquiry is not required because *Blakely* focuses on the issue of whether the jury made the necessary finding to expose the defendant to a higher sentence, rather than the issue of whether the trial court made the proper discretionary sentencing choice. In other words, the defendant’s federal constitutional right to a jury trial is implicated in the former issue, but not the latter issue. Thus, the *Chapman*

inquiry required to vindicate that federal constitutional right is limited to the question of whether the jury would have found at least one aggravating circumstance true.

This conclusion that the ultimate sentencing decision does not implicate the Sixth Amendment right to a jury trial is demonstrated by the concurring opinion in *Ring v. Arizona*, *supra*, by Justice Scalia, the author of the *Blakely* opinion. In this concurring opinion, Justice Scalia explained that *Ring*, and implicitly *Apprendi*, had “nothing to do with jury sentencing.” (*Ring*, *supra*, 536 U.S. at p. 612 (conc. opn. of Scalia, J.)) Instead, the *Ring* decision meant that:

the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so – by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

(*Id.* at pp. 612-613, original italics.) Thus, this concurring opinion clearly shows that the federal constitutional concerns in *Apprendi* and *Blakely* only reach the issue of factfinding to authorize the increased sentence and do not extend to a trial court’s ultimate sentencing decision. Accordingly, once the reviewing court determines that the jury would have found at least one aggravating circumstance true, the reviewing court does not need to further examine under the *Chapman* standard whether the defendant would have received the same sentence in light of the *Blakely* error.

Finally, any *Blakely* error does not involve any state-law question of whether the trial court erred in its discretionary weighing of the aggravating and mitigating circumstances and resulting selection of the base term. But to the extent that this Court concludes that a reviewing court must examine whether the trial court would have nevertheless sentenced the defendant to the upper-

term sentence because there was some state-law error in the selection of the sentence, this inquiry should be conducted under the state-law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.

2. Any *Blakely* Error Was Harmless In The Instant Case

An application of the standard of review in the instant case demonstrates that any *Blakely* error was harmless. Even if this Court were to conclude that the trial court's finding as to appellant's lengthy criminal history did not fall under the recidivism exception to *Blakely* or was unsupported by appellant's admissions, it is clear the jury would have reached the same conclusion as the trial court because appellant testified at trial that he had suffered four felony convictions over a five-year period. (RT 1221-1222.) Since the jury would have found this aggravating circumstance true beyond a reasonable doubt, the upper-term sentence would have been authorized by this circumstance. Accordingly, any *Blakely* error was harmless and appellant's sentence should be affirmed.

Further, appellant's sentence should be affirmed because the jury would have reached the same conclusion as the trial court that the victim feared for his life. Even though most of the factual issues at trial involved a credibility contest between appellant and the victim, the specific factual issue of the victim's fear at the time he left his car was firmly established by an independent witness who described the victim as "frantic, very scared and very nervous," and "pretty terrified." (RT 722-724.) In addition, as explained, *ante*, in Argument I(D), the trial court based its finding on the conduct underlying the offense of conviction, i.e., that the victim's fear resulted from appellant's commission of the offense of taking or driving a vehicle rather than from any conduct underlying the acquitted counts. Thus, if the issue of the victim's fear had been presented to the jury, the jury would have made the same finding as the trial court. Accordingly, any *Blakely* error was harmless because the upper-

term sentence would have been authorized by this aggravating circumstance.

Finally, even assuming this Court must examine whether the trial court would have imposed the upper-term sentence in light of the aggravating circumstances that would have been found true by the jury, it is not reasonably probable the trial court would have imposed a lesser sentence since, as explained above, the jury would have found both of the aggravating circumstances true. Moreover, even if the aggravating circumstance based on appellant's recidivism was the only viable aggravating circumstance, it is still not reasonably probable that the trial court would have imposed a lesser sentence. As previously explained, and as noted by the Court of Appeal, appellant's recidivism could have supported three separate aggravating circumstances under the Rules of Court. The importance of appellant's recidivism in the determination of his sentence is further demonstrated by the trial court's comments that appellant had a "lengthy history" and "ten year history," and that, despite all of this previous experience, appellant was again before the criminal justice system awaiting sentencing. (RT 2416-2417.) In addition, the trial court found no mitigating circumstances. (RT 2415-2417.) Accordingly, any error was not prejudicial.

III.

IF THIS COURT CONCLUDES THAT SECTION 1170 IS UNCONSTITUTIONAL UNDER *BLAKELY*, THIS COURT SHOULD INTERPRET SECTION 1170, FOR PROSPECTIVE APPLICATION, IN A CONSTITUTIONAL MANNER

If this Court should conclude that section 1170 is unconstitutional because *Blakely* precludes the trial court from making the necessary findings to impose an upper term sentence, respondent respectfully requests that this Court construe section 1170, for prospective application, as allowing the trial court the discretion to impose the upper term without the requirement of any additional factfinding. This construction of the statute would preserve a tripartite sentencing scheme that has worked effectively for more than a quarter-century, and would be fully consistent with the Legislature's intent to provide trial courts the discretion to impose an upper term sentence in the appropriate circumstances.

This Court has, on a prior occasion, prospectively construed a statute to preserve the statute's constitutionality. In *People v. Roder* (1983) 33 Cal.3d 491, 499-502, this Court held that the provisions of section 496 created an unconstitutional mandatory presumption. In order to save the statute's constitutionality and prevent it from being struck down in its entirety, the People requested that this Court prospectively construe the statute as a legislatively-prescribed permissive inference. Although the People's request required "some creative statutory construction," the *Roder* Court found the transformation of the statutory presumption into a permissive inference reasonable and feasible. This Court explained that preserving the statutory provisions in a restrained form still enabled the trial courts to inform the jury of an inference that the Legislature had concluded could be reasonably drawn from proof of the basic facts, and that the permissive inference served an

important substantive function in regulating the conduct addressed in the section. (*Id.* at pp. 505-507.)

This approach of construing a statute for prospective application was followed by the Court of Appeal in *People v. Forrester* (1994) 30 Cal.App.4th 1697. In *Forrester*, the Court of Appeal first held that section 1320, subdivision (b), contained an unconstitutional mandatory presumption. (*Id.* at pp. 1701-1703.) Expressly following the approach taken in *Roder*, the *Forrester* Court further held that, in future prosecutions for violations of section 1320, subdivision (b), the section should be construed as containing a permissive inference in order to preserve the statute's constitutionality. (*Id.* at p. 1703.)

Here, if this Court concludes that section 1170 is unconstitutional under *Blakely*, this Court should construe section 1170, for prospective application,^{12/} in a constitutional manner. Thus, section 1170 should be construed to allow a trial court the discretion to impose an upper term without additional factfinding. In other words, the section should be construed to eliminate any requirement that a trial court must find facts before it could impose any term other than the middle term. Furthermore, such an interpretation could still preserve a statutory preference for the middle term,^{13/} in accordance with the Legislature's intent to have the middle term be the "average or usual term." (Advisory Comm. com., foll. rule 4.420.)

12. By "prospective application," respondent means that this suggested interpretation of section 1170 should apply to any sentencing hearings occurring after this Court issues its decision in this case.

13. Section 1170, subdivision (b), by itself, merely creates a "statutory preference" for the middle term, but a "presumption" for the middle term is created when the statute is coupled with the requirement in rule 4.420(b) that an upper term is justified only if the aggravating circumstances outweigh the mitigating circumstances. (See *People v. Avalos* (1984) 37 Cal.3d 216, 233.)

This interpretation of section 1170 would be fully consistent with the Legislature’s overall intent in enacting the tripartite sentencing scheme. Under the Determinate Sentencing Act of 1976, the Legislature intended to provide the trial courts the ability to impose any of the three possible terms in any particular case, with the trial court exercising its discretion to select the appropriate term on the basis of the circumstances relating to the crime and the defendant. (*Hernandez, supra*, 46 Cal.3d at p. 205; *Wright, supra*, 30 Cal.3d at p. 713 [in enacting the Determinate Sentencing Act of 1976, “the Legislature made the fundamental policy decision that terms were to be fixed by choosing one of the alternatives on the basis of circumstances relating to the crime and to the defendant”].) Thus, an interpretation of section 1170 in a manner that preserves its constitutionality under *Blakely* would effectuate the Legislature’s intent to give the trial courts the full flexibility to tailor an appropriate sentence under the circumstances of each individual case, and would preserve a system that has worked effectively for more than a quarter of a century.^{14/} Certainly, in enacting section 1170, the Legislature never intended that any requirement of additional factfinding would preclude the trial court from imposing the upper term unless the aggravating circumstances were found by the jury beyond a reasonable doubt.

Moreover, construing section 1170 in a balanced manner to eliminate the requirement of factfinding would not inure only to the benefit of the People. For instance, by eliminating any requirement that a trial court must find additional facts before imposing a term other than the middle term, defendants would be able to receive the low term without the need for any requisite findings on mitigating circumstances.

14. Although certain aspects of state sentencing law have generated some controversy (e.g., the Three Strikes law), there has been no controversy about the fairness or efficacy of a trial court’s ability to impose a sentence from a three-tiered range of prison terms.

In addition, such a statutory construction would not eliminate the balancing undertaken by the trial court in selecting the appropriate term, nor would it make the selection of the appropriate term unbounded or arbitrary. The trial court would still need to consider and balance the relevant circumstances in their totality to determine the appropriate sentence, and the court would also need to take into account the legislative preference that the typical case should receive the middle term.^{15/} Finally, the trial court's decision to impose a term other than the middle term would still be reviewable on appeal for abuse of discretion, much like any other discretionary sentencing decision (see, e.g., *People v. Carmony* (2004) 33 Cal.4th 367, 373-376), and the trial court's statement of reasons for the imposition of a particular term would be taken into consideration by the appellate court in reviewing the decision.

In sum, if this Court concludes that section 1170 is unconstitutional under *Blakely*, respondent requests that this Court interpret section 1170 to eliminate the requirement that trial courts must engage in factfinding before a term other than the middle term could be imposed because such an interpretation would preserve a sentencing scheme that has dispensed fair and effective justice since 1977.

15. Such a normative balancing approach has already been endorsed in the capital sentencing context and satisfies the requirements set out in *Apprendi* and *Blakely*. (See *Griffin, supra*, 33 Cal.4th at p. 595.)

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the judgment be affirmed.

Dated: October 4, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 16,030 words.

Dated: October 4, 2004

Respectfully submitted,

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