

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff/Respondent,

v.

KEVIN MICHAEL BLACK,

Defendant/Appellant.

No. S126182

Court of Appeal No. F042592

Tulare County Sup. Ct. No. 79557

BRIEF OF AMICUS CURIAE
IN SUPPORT OF APPELLANT

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The Orange County Public Defender's Office, by and through counsel,
Martin F. Schwarz, hereby respectfully submits this Brief of Amicus Curiae
in Support of Appellant.

Introduction

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], the United States Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments and the Sixth Amendment's jury trial guarantee required that any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and be proved beyond a reasonable doubt. Four years later, in *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403] the Court explained that the statutory maximum, as envisioned by *Apprendi*, is the maximum sentence a judge may impose based solely on facts reflected in the jury verdict or admitted by a defendant. The Court reasoned that sentencing a defendant based on "aggravating factors" not found by the jury deprived the defendant of the right to trial by jury and the right to have every element of the crime proven beyond a reasonable doubt.

On the other hand, the Court has always distinguished between factors which increase a defendant's punishment and sentencing factors which a court may rightfully consider in selecting a sentence within a range provided by statute. In *Harris v. United States* (2002) 536 U.S. 545 [122 S.Ct. 2406, 153 L.Ed.2d 524], the Court held that a sentencing court may engage in judicial factfinding when it is choosing a sentence either at or below the maximum allowable by statute. However, the Court re-emphasized that a court may not increase the maximum allowable sentence with facts not found by the jury or admitted by the defendant.

Just what is the maximum allowable sentence under California's Determinate Sentencing Law, which, with a few exceptions, assigns a sentencing range of low term, middle term and upper term to most crimes? Both Penal Code section 1170, subdivision (b) and California Rules of

Court, rule 4.420(b), mandate that a sentencing court cannot impose an upper term sentence without finding factors in aggravation. In other words, a judge cannot impose a sentence harsher than the middle term, absent some judicial factfinding to justify the upper term. Since *Blakely* and *Apprendi* prohibit a court from engaging in factfinding to impose a sentence higher than what it could render without a specific finding by a jury, or an admission by a defendant, a sentencing court is limited to selecting the middle term as the maximum allowable sentence under the law. Therefore, the imposition of an upper term sentence, based on judicial factfinding of factors in aggravation, violates *Blakely*.

The same reasoning applies when sentencing courts engage in factfinding to justify consecutive sentences. When a defendant is convicted of more than one felony count for which the imposition of consecutives is not mandated by statute, the sentencing judge has discretion to impose concurrent or consecutive terms of imprisonment. (Pen. Code § 669.) Sentencing courts are required to state the reasons justifying the imposition of a consecutive term. (Penal Code § 1170, subd. (c); Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622; *People v. Kozel* (1982) 133 Cal.App.3d 507, 540.) Facts which justify consecutive sentences are outlined in California Rules of Court, rules 4.421 and 4.425. The overwhelming majority of the time, trial courts are called upon “to make factual determinations,” by a preponderance of the evidence, with regard to factors in aggravation to validly impose a consecutive sentence. (*People v. Wiley* (1995) 9 Cal.4th 580, 587.) Because the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose based solely on facts reflected in the jury verdict or admitted by a defendant, judicial factfinding of factors in aggravation to justify a consecutive sentence violates a defendant’s right to have all elements which

increase his sentence proven to a jury beyond a reasonable doubt. The imposition of consecutive sentences, based on factors not proven to a jury, therefore violates *Blakely*.

I.

Under California's determinate sentencing scheme, the imposition of an upper term sentence, absent an admission by the defendant or a finding by the jury of a factor in aggravation, violates *Blakely v. Washington*.

A.

***Apprendi* and *Blakely* guarantee that a defendant cannot be punished for facts not found by a jury beyond a reasonable doubt.**

In *Apprendi v. New Jersey, supra*, 530 U.S. 466, the Supreme Court struck down a New Jersey statute which allowed a sentencing court to double the maximum sentence for firearm possession from 10 to 20 years if a trial judge found by a preponderance of the evidence that the crime was racially motivated. The defendant in *Apprendi* fired two shots into the home of an African-American family that had recently moved into a previously all-white neighborhood. After his arrest, Apprendi told the police officers that the shooting was racially motivated, though he later retracted the statement. Apprendi ultimately pleaded guilty to two counts of second degree firearm possession and a count of third degree possession of an antipersonnel bomb. At the time, the New Jersey sentencing scheme provided a penalty range of 5 to 10 years for second degree offenses and 3 to 5 years for third degree offenses. Because the plea agreement called for the third degree charge to run concurrent, Apprendi faced a maximum sentence of 20 years if both second degree charges were imposed consecutively. However, at the sentencing hearing the prosecutor invoked a

state statute which permitted the court to double the potential sentence on one of the second degree counts to 20 years upon a finding that the crimes was racially motivated. The statute had the effect of increasing Apprendi's exposure to an aggregate sentence of up to 30 years. After holding a hearing, the sentencing court found that the crime was motivated by a racial bias and held that the statute providing for an enhanced sentence was applicable. Accordingly, the court sentenced Apprendi to 12 years on the second degree count to which the enhancement attached, rather than the 10 year maximum allowed by statute. The court imposed concurrent sentences on the remaining counts.

On review, the United States Supreme Court began by noting that at stake were "constitutional issues of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6." (*Apprendi v. New Jersey, supra*, 530 U.S. 466, 476-477.) The Court noted, "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.'" (*Id.* at p. 477, quoting *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444].) With these principles in mind, the court framed the issue as whether the statute's sentence enhancement for racial bias was an element of the offense and thereby triggered the protections of the Due Process Clause and the jury trial guarantee.

The Court recognized that a sentencing judge may exercise discretion based on judicial factfinding "in imposing a judgment *within the range* prescribed by statute." (*Apprendi v. New Jersey, supra*, 530 U.S. 466, 481, original italics.) However, "the judge's role in sentencing is

constrained at its outer limits by the facts alleged in the indictment and found by the jury.” (*Id.* at p. 485, fn. 12.) Therefore, “any facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] elements of a separate legal offense.”¹ (*Ibid.*) The New Jersey statute allowed the sentencing court by a preponderance of the evidence to make a factual finding of racial bias which increased Apprendi’s sentence above the maximum contained in the statute itself. Accordingly, the Supreme Court found that racial bias was an element and that the judicial factfinding deprived Apprendi of his right to have every element of the crime proven beyond a reasonable doubt to a jury. (*Id.* at pp. 491-496)

Four years later, the Court applied *Apprendi* to overturn a sentencing scheme from the state of Washington in *Blakely v. Washington, supra*, 124 S.Ct. 2531. Blakely pleaded guilty to kidnapping his estranged wife and faced a maximum sentence of 53 months.² At the sentencing hearing, the court relied upon a statute which allowed it to upwardly deviate from the maximum sentence if it found true certain aggravating factors. The court, after a hearing, found that Blakely had acted with “deliberate cruelty,” an aggravating factor enumerated in the statute, and sentenced Blakely to a term of 90 months.

The United Supreme Court began its review of the case by reiterating the rule of *Apprendi*: “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

¹ The Court noted that it had previously carved out an exception for prior convictions, because of the “substantial procedural safeguards” inherent to the disposition of criminal cases. (*Id.* at p. 488, citing *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350].)

² Based on other factors admitted by Blakely, the potential sentence ranged from 49-53 months. (*Id.* at p. 2535.)

reasonable doubt.” (*Blakely v. Washington, supra*, 124 S.Ct. 2531, 2536, citing *Apprendi v. New Jersey, supra*, 530 U.S. 466, 490.) For purposes of this rule, the statutory maximum “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.” (*Blakely*, at p. 2537.) The Washington law allowed the court to enhance a sentence beyond the statutory maximum based on findings made by a judge using a preponderance standard at a sentencing hearing. The Court reasoned that by disguising these elements as sentencing factors, *Blakely* was deprived of his right to a jury trial and to have every element proven beyond a reasonable doubt.

Taken together, *Apprendi* and *Blakely* stand for a single proposition: Any fact which exposes a defendant to a harsher sentence than would be permitted based on the jury’s verdict is an element of the crime and subject to the constitutional safeguards of trial by jury and proof beyond a reasonable doubt. Under California’s Determinate Sentencing Law, a judicial finding of factors in aggravation used to justify the imposition of an upper term sentence is not subject to jury findings or proof beyond a reasonable doubt. Therefore, if the jury’s verdict, by itself, does not permit the imposition of the upper term, a court may not impose the upper term without running afoul of *Blakely*. If however, a jury’s verdict by itself allows a sentencing court to impose the upper term, any facts used by the court in reaching the upper term are sentencing factors, not elements, and are not subject to constitutional safeguards. Therefore the issue hinges upon the distinction between elements of crimes and sentencing factors.

B.

***McMillan* and *Harris* permit a trial court to make findings affecting a defendant's sentence only within the range provided by statute.**

In *McMillan v. Pennsylvania* (1986) 477 U.S. 79 [106 S.Ct. 2411, 91 L.Ed.2d 67], the Supreme Court first distinguished the constitutional guarantees which attach to elements of crimes from those attaching to sentencing factors. Mr. McMillan was convicted of an aggravated assault for shooting someone in the buttocks during an argument over a debt. At sentencing, he was subject to a Pennsylvania statute which provided for a five year minimum sentence upon a finding by the sentencing judge that the defendant was in possession of a firearm during the commission of the offense. However, the sentencing court found the statute unconstitutional and imposed a lesser sentence than the five years required by statute.³

On review, the Supreme Court held that since the statute did not alter the maximum penalty, and operated solely to limit the court's discretion in imposing a minimum sentence, it did not add an additional element to the offense. (*McMillan v. Pennsylvania, supra*, 477 U.S. 79, 87-89.) It was therefore a permissible sentencing factor and not subject to the constitutional protections afforded to elements of crimes, such as proof beyond a reasonable doubt and the right to jury trial.

In *Harris v. United States* (2002) 536 U.S. 545 [122 S.Ct. 2406, 153 L.Ed.2d 524], the Court revisited the issue of permissible sentencing factors in light of *Apprendi*. In *Harris*, the defendant was convicted of committing a narcotics offense while armed with a firearm. The federal statute carried an indeterminate sentence and contained graduated minimum terms of 5 years for carrying the firearm, 7 years for brandishing the firearm and 10

³ McMillan was sentenced to a term of 3 to 10 years.

years for discharging the firearm. Harris was charged in an indictment which alleged only that a firearm was carried in the commission of a drug trafficking crime and made no mention of either the brandishing or discharging a firearm. After his conviction at trial, the sentencing court found that he had brandished a firearm and imposed a minimum term of seven years.

On review, the Supreme Court framed the issue as a consideration of “the distinction the law has drawn between the elements of a crime and factors that influence a criminal sentence.” (*Harris v. United States, supra*, 536 U.S. 545, 549.) Whereas elements of crimes are subject to the constitutional guarantees of proof beyond a reasonable doubt and trial by jury, sentencing factors, though they “may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution’s indictment, jury and proof requirements.” (*Ibid.*) While the Constitution recognizes a distinction between elements and sentencing factors, it does not permit the States to duck constitutional requirements by labeling elements as sentencing factors. (*Id.* at p. 550) The bright-line test distinguishing a sentencing factor from an essential element of a crime is whether the fact that gives rise to it increases the penalty for the crime beyond the statutory maximum.⁴ Since the trial court’s finding that Harris brandished a firearm merely affected his minimum sentence, and not his maximum, the Court found it to be a sentencing factor. The court explained:

The provisions before us now, however, have an effect on the defendant’s sentence that is more consistent with traditional understandings about

⁴ Two years later, in *Blakely*, the Supreme Court would clarify that the statutory maximum, “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.” (*Blakely v. Washington, supra*, 124 S.Ct. 2531, 2537.)

how sentencing factors operate; the required findings constrain, rather than extend the sentencing judge's discretion. [The statute] does not authorize the judge to impose "steeply higher penalties"—or higher penalties at all—once the facts in question are found. Since the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm. The incremental changes in the minimum—from 5 years, to 7, to 10—are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration.

(*Id.* at p. 554)

The court went on to explain that *McMillan* remains viable in light of *Apprendi* and harmonized the cases as follows:

...*McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding. As *McMillan* recognized, a statute may reserve this type of factual finding for the judge without violating the Constitution.

(*Harris v. United States, supra*, 536 U.S. 545, 557.)

C.

A legislature may not shroud elements as sentencing factors to dodge constitutional requirements.

McMillan recognized that there are constitutional limitations to a legislature's authority to delineate elements of crimes and sentencing factors. (*McMillan v. Pennsylvania, supra*, 477 U.S. 79, 86-88.) Although the *McMillan* court felt the fact giving rise to the mandatory minimum sentence at issue in the case was not an element, Justice Stevens warned of legislatures disguising elements as sentencing factors to avoid constitutional safeguards and facilitate convictions:

[A] state may not advance the objectives of its criminal laws at the expense of the accurate factfinding owed to the criminally accused who suffer the risk of nonpersuasion. [¶] It would demean the importance of the reasonable-doubt standard—indeed, it would demean the Constitution itself—if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct that is not an “element” of a crime.

(*McMillan v. Pennsylvania, supra*, 477 U.S. 79, 102 (dis. opn. of Stevens, J).)

This concern was reiterated by Justice Kennedy, writing for the majority in *Harris*:

Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt. [citations.] *McMillan* and *Apprendi* asked whether certain types of facts, though labeled sentencing factors by the legislature, were nevertheless ‘traditional elements’ to which these constitutional safeguards apply. [citation.]

(*Harris v. Pennsylvania, supra*, 536 U.S. 545, 557-558.)

So while the Supreme Court has recognized the right of legislatures to allow the trial courts to determine sentences based on factors not proven to the jury, the Constitution provides a clear limit on that authority. A legislature may not allow a sentencing judge to undermine the constitutional protections of trial by jury and proof beyond a reasonable doubt by considering facts not reflected in the jury's verdict to increase the defendant's sentence. As pointed out by the majority in *Blakely*, the failure to adhere to this limitation is an invitation to disaster:

Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. [citation] The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the state *actually* seeks to punish.

(*Blakely v. Washington, supra*, 124 S.Ct. 2531, 2539; fn. omitted; original italics.)

It is axiomatic that a legislature cannot shirk constitutional obligations by disguising elements as sentencing factors. In California, the legislature has empowered the trial courts to impose an upper term sentence based on judicial findings of the factors in aggravation found in California

Rules of Court, rule 4.421 and Penal Code sections 1170.7-1170.89. At issue here is whether the factors in aggravation used by the trial courts to justify the upper term are permissible sentencing factors or elements and therefore subject to constitutional safeguards not found in California's determinate sentencing scheme.

D.

Absent additional findings, a sentencing court must impose the middle term.

In light of *Apprendi*, *Blakely*, *McMillan* and *Harris*, the Supreme Court has clearly adopted a bright-line rule separating permissible sentencing factors from elements of crimes: Any fact that increases the penalty for a crime beyond the statutory maximum is an element, whereas a fact that allows the court to select a sentence within the range prescribed by statute is a sentencing factor and need not be proved to a jury beyond a reasonable doubt.

In California, an upper term sentence may only be imposed upon a judicial finding of factors in aggravation at sentencing. (Pen. Code § 1170, subd. (b); *In re Eric J* (1979) 25 Cal.3d 522, 530.) The issue squarely before this Court is whether the factors in aggravation used by sentencing courts to justify an upper term are elements of the offense which elevate the statutory maximum or sentencing factors a court can consider in selecting a term within the range allowed by statute.

The analysis must begin by ascertaining the statutory maximum in California, defined by *Blakely* 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 v. Washington, supra*, 124 S.Ct. 2531, 2537.)

The statutory provisions for trial court sentencing are found in part II, title XII, chapter 4.5, article 1 of the Penal Code, beginning at section 1170. Subdivision (b) of section 1170 outlines the procedure a trial court must follow in selecting a term when a statute provides a range of lower, middle or upper term. It begins by specifically stating a sentencing court must select the middle term in the absence of judicial findings in aggravation or mitigation:

When a judgment of imprisonment is imposed and the statute specifies three possible terms, the court **shall order the imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.**

(Emphasis added.)

The statute goes on specify that a deviation from the middle term requires the sentencing court to find factors in mitigation or aggravation at the sentencing hearing:⁵

In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term.

(*Ibid.*)

Penal Code section 1170, subd. (a)(3) provides, in part, "In sentencing the convicted person, the court **shall** apply the sentencing rules

⁵ Factors in aggravation and mitigation are outlined in California Rules of Court, rules 4.421 and 4.423.

of the Judicial Council.” (Emphasis added.) In other words, the sentencing court must apply the Determinate Sentencing Law set forth in title four, division IV of the California Rules of Court.⁶ In rule 4.420, the Judicial Council has made it clear that a trial court must impose the middle term unless the upper or lower terms are justified by factors in aggravation or mitigation:

(a) When a sentence of imprisonment is imposed or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. **The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.**

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. **Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation.** The relevant facts are included in the case record, the probation officer’s report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(Cal. Rules of Court, rule 4.420; emphasis added)

⁶ The sentencing rules found therein were promulgated by the Judicial Council “pursuant to Penal Code section 1170.3 and pursuant to the authority granted to the Judicial Council by the Constitution, article VI, section 6, to adopt rules for court administration, practice and procedure.” (Cal. Rules of Court, rule 4.401.)

Both Penal Code section 1170 and California Rules of Court, rule 4.420, mandate the imposition of the middle term unless the sentencing court makes additional findings in aggravation or mitigation. Also, both provisions use the word “shall” in directing trial courts to impose the middle term absent additional findings. Moreover, rule 4.420 specifically states that a trial court may impose an upper term “only if” it finds factors in aggravation which outweigh any factors in mitigation.

Recently Division One of the Court of Appeal for the Fourth Appellate District attempted an end-run around *Blakely* by holding that the mandatory language found in Penal Code section 1170 and Rules of Court, rule 4.420 is, in fact, discretionary or permissive. (*People v. Wagener* (Oct. 22, 2004, D042896) __ Cal.App.4th __ [2004 Cal.App. LEXIS 1760].) The court reasoned that since the Penal Code does not define “shall” it could not conclude that it signifies a mandate. Relying on *People v. Thornton* (1985) 167 Cal.App.3d 72 and *People v. Myers* (1983) 148 Cal.App.3d 699, the court reasoned that “shall” only becomes mandatory in the absence of a judicial finding of factors in aggravation or mitigation. In other words, the Penal Code and Rules of Court only mandate the imposition of the middle term as a default when the record is devoid of any findings. Therefore, the upper term is simply a discretionary sentencing option available to the court.⁷

The argument in *Wagener* runs contrary to the plain wording of both the Penal Code and Rules of Court, which both explicitly state that a trial court “shall” impose the middle term unless it finds factors in aggravation.⁸

⁷ This position has also been adopted by Respondent. (Answer Brief on the Merits, p. 28.)

⁸ The argument is also at odds with the Advisory Committee Comment to Cal. Rule of Court, rule 4.420, which specifies that “Section 1170(b) retains the requirement, however that the middle term be selected unless there are

(Penal Code § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).) There is no ambiguity as to the mandate created by the use of the word “shall”: Rule 4.407(a), which provides the rules of construction, specifically states, “‘Shall’ is mandatory.” (See also Cal. Rules of Court, rule 40 [“The word ‘shall’ is mandatory...”].) Furthermore, this Court has repeatedly explained that trial courts cannot deviate upward from the middle term unless the trial court finds factors in aggravation to justify an upper term sentence.⁹ (*People v. Wright* (1982) 30 Cal.3d 705, 709; *People v. Harvey* (1979) 25 Cal.3d 754, 758; *In re Eric J* (1979) 25 Cal.3d 522, 530; see also *People v. Jackson* (1987) 196 Cal.App.3d 380, 391; *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785; *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360.)

E.

The imposition of the upper term through judicial factfinding violates *Blakely*.

Since a sentencing court cannot impose the upper term without finding factors in aggravation, the next stage in the analysis asks whether the judicial factfinding involved in imposing the upper term violates *Blakely*.

Factors in aggravation are listed in California Rules of Court, rule 4.421. The list is not exhaustive and a sentencing judge may apply additional factors not enumerated in rule 4.421 if they are reasonably related to the court’s decision. (Cal. Rules of Court, rule 4.408; *People v.*

circumstances in aggravation or mitigation of the crime....”

⁹ The *Wagner* court appears to have committed the error of ipse dixit “as when Humpty Dumpty told Alice, ‘When I use a word... it means just what I choose it to mean—neither more nor less.’ [footnote omitted]” (See *People v. Hoard* (2002) 103 Cal.App.4th 599, 607, quoting Carroll, *Through the Looking-Glass and What Alice Found There* (1872).)

Tobia (1979) 98 Cal.App.3d 157, 165.) Additionally, the legislature has enacted specific statutory factors in aggravation codified in Penal Code sections 1170.7-1170.89.

In analyzing potential factors in aggravation, a sentencing court may not consider any facts which constitute an element of the crime. (Cal. Rules of Court, rule 4.420(d) [“A fact that is an element of the crime shall not be used to impose the upper term.”].) Also, the facts underlying an enhancement which has been found true may not be used to impose the upper term unless the sentencing court strikes the punishment for the enhancement. (Cal. Rules of Court, rule 4.420(c); Pen. Code § 1170, subd. (b).) Since a jury verdict represents a finding on every element of the charged crimes and enhancements, the verdict itself cannot be used to justify factors in aggravation; the sole exception being where the sentencing court strikes an enhancement and then uses those facts as an aggravating factor. This proscription against dual use prohibits a trial court from ever being able to use a fact proven beyond a reasonable doubt by a jury in finding factors in aggravation to justify the imposition of the upper term.

To justify an upper term sentence, the trial judge need only find that aggravating factors exist by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).) With regard to the standard of proof, the Advisory Committee Comment to rule 4.420 states:

Proof by a preponderance of the evidence is the standard in the absence of a statute or a decisional law to the contrary (Evid. Code, § 115), and appears appropriate here, since there is no requirement that sentencing decisions be based on the same quantum of proof as is required to establish guilt. See *Williams v. New York* (1949) 337 U.S. 241.

(Citations in original.)

In light of *Blakely*, the Advisory Committee's reliance on *Williams* now seems misplaced. In *Williams*, the defendant was convicted in New York of capital murder. However, in returning the guilty verdict, the jury also recommended a life sentence for Mr. Williams. At the sentencing hearing the trial court rejected the jury's recommendation and sentenced Williams to death based on evidence of other crimes and references to defendant's "morbid sexuality" contained in the probation report. On appeal, Williams argued that the death sentence violated the Due Process Clause because the trial court considered information in the probation report supplied by witnesses he had not confronted or cross-examined. The Supreme Court concluded that a defendant has no due process right to confront witnesses who provide statements to the court for purposes of sentencing. (*Williams v. New York* (1949) 337 U.S. 241, 250-251 [69 S.Ct. 1079, 93 L.Ed. 1337].) Implicit in the holding, though not discussed in the opinion, is that the evidence received by the court for purposes of sentencing is not subject to proof beyond a reasonable doubt. This was apparently what the advisory committee referred to by noting that the standard of preponderance "appears appropriate."

Blakely noted that the factors considered by the court in *Williams* were true sentencing factors because the sentencing judge could have sentenced Williams to death strictly as a result of the jury's verdict, without making any additional findings. (*Blakely v. Washington, supra*, 124 S.Ct. 2531, 2538.) Since a death sentence was authorized by the jury's verdict it fell within the range of sentencing options available to the trial court. Therefore, the facts offered in support of the sentence were not subject to the constitutional safeguards of proof beyond a reasonable doubt and trial by jury. (*Ibid.*)

By contrast, the imposition of the upper term in California is not authorized solely by the jury's verdict. Since a jury's verdict reflects a finding on each and every element of the charged crimes and enhancements, which in turn may not be used as factors in aggravation, the middle term is the maximum sentence which can be imposed absent additional judicial factfinding.¹⁰ Furthermore, Penal Code section 1170, subd. (b) and California Rules of Court, rule 4.420(a) and (b), explicitly prohibit the trial courts from imposing an upper term sentence without a *judicial* finding of factors in aggravation. By allowing judicial factfinding by a preponderance of the evidence to elevate a sentence to the upper term, California's determinate sentencing scheme violates the two fundamental due process safeguards *Blakely* seeks to protect.

Given the bright-line test of *Blakely*, any judicially found factors in aggravation used to impose the upper term are elements of the crime and subject to a jury finding of proof beyond a reasonable doubt. They are elements because they allow the court to impose a punishment greater than the statutory maximum of middle term. This is borne out by a simple test articulated in *Harris* to differentiate elements from sentencing factors. The *Harris* court noted that factors which limit the court's discretion in sentencing are permissible, whereas facts which extend the trial judge's authority to sentence beyond the statutory maximum needed to be proven beyond a reasonable doubt to a jury. The Court explained:

The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. The finding in *McMillan* restrained the judge's power, limiting his or her choices within the authorized range.

¹⁰ A jury's findings on elements and enhancements are the only facts found to be true beyond a reasonable doubt.

It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be.

(*Harris v. United States, supra*, 536 U.S. 545, 567.)

The use of judicially found factors in aggravation to impose an upper term sentence necessarily extends the power of the sentencing court. Absent finding factors in aggravation, it could not impose the upper term. It therefore violates *Apprendi* and *Blakely* by allowing the trial judge to impose a greater punishment than that authorized by the jury in finding by a preponderance of the evidence facts which increase a sentence beyond the statutory maximum to the upper term.

II.

The imposition of consecutive terms based on factors not found by the jury violates *Blakely v. Washington*.

When a defendant is convicted of more than one offense, Penal Code section 669 requires a sentencing court to determine whether the terms of imprisonment shall run consecutively or concurrently to one another, assuming the court's discretion is not limited by another statute. If a court fails to determine how the sentences shall run, the law requires the imposition of concurrent sentences. (Pen. Code § 669.)

In the event the court sentences a defendant to consecutive terms, Penal Code section 1170, subd. (c), requires a sentencing court to “state the reasons for its sentence choice on the record.” (See *People v. Walker, supra*, 83 Cal.App.3d 619, 622 [holding that the imposition of consecutive sentences is a “sentencing choice,” as used in Pen. Code § 1170(c), and therefore requires a statement of reasons].) The requirement is echoed in California Rules of Court, rule 4.406(a) and (b)(5), which require the court to state on the record “the primary factor or factors that support the exercise

of discretion” in “imposing consecutive sentences.” The failure of a trial court to state reasons for running a term consecutively invalidates the sentence. (*People v. Beaudrie* (1983) 147 Cal.App.3d 686, 694; *People v. Bejarano* (1981) 114 Cal.App.3d 693, 705-708; *People v. Walker, supra*, 83 Cal.App.3d 619, 622.)

California Rules of Court, rule 4.425, provides the trial courts with a list of reasons or “criteria affecting the decision to impose consecutive sentences.” (See also *People v. Bejarano, supra*, 114 Cal.App.3d 693, 704.) The rule incorporates rules 4.421 (circumstances in aggravation) and 4.423 (circumstances in mitigation) by allowing that “[a]ny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences....”¹¹ (Cal. Rules of Court, rule 4.425.) The rule, however, explicitly prohibits a sentencing court from using a fact to impose a consecutive sentence which has been used to impose an upper term, formed the basis of an enhancement or was an element of a crime the defendant for which the defendant was convicted. (*Ibid*; see also *People v. Callahan* (1983) 149 Cal.App.3d 1183, 1187 [dual use of facts rule bars a trial court from using the same facts to impose an upper term and a consecutive term], disapproved on another ground in *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 6; *People v. Kozel, supra*, 133 Cal.App.3d 507, 540 [same holding]; *People v. Bejarano, supra*, 114 Cal.App.3d 693, 704 [same holding].) It is precisely this prohibition against dual use of facts which requires the trial court to separately state its

¹¹ Presumably a sentencing court may also apply the statutory factors in aggravation found in Penal Code sections 1170.7-1170.89 and any non-enumerated factors so long as they are reasonably related to the court’s decision (Cal. Rules of Court, rule 4.408; *People v. Tobia* (1979) 98 Cal.App.3d 157, 165.)

reasons for imposing a consecutive sentence. (*People v. Kozel, supra*, 133 Cal.App.3d 507, 540.)

Any argument implying that a trial court need not make factual findings to impose a consecutive term is without merit. The criteria provided by the Rules of Court require the trial courts “to make factual determinations in their decision whether to impose consecutive sentences.”¹² (*People v. Wiley* (1995) 9 Cal.4th 580, 587.) The question is whether the factual findings violate *Blakely*. Because the dual use prohibition bars the imposition of a consecutive term based on the elements of the crime or any enhancement, the court must go outside the findings represented by the jury’s verdict to impose a consecutive sentence.

Since the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose based solely on facts reflected in the jury verdict or admitted by a defendant, judicial factfinding of factors in aggravation to justify a consecutive sentence violates a defendant’s right to have all elements which increase his sentence proven to a jury beyond a reasonable doubt. The only factor not reflected in the jury’s verdict which a trial may take into consideration in increasing a defendant’s sentence is the fact of a prior conviction, due to the procedural safeguards already afforded the defendant in the prior proceeding. (*Apprendi v. New Jersey, supra*, 530 U.S. 466, 488, citing *Almendarez-Torres v. United States, supra*, 523 U.S. 224.)

Counsel concedes that at first blush it seems counter-intuitive to consider facts used by the court in imposing a consecutive sentence as elements of crimes and therefore subject to a jury finding by proof beyond a

¹² As indicated, the court’s findings at sentencing are made by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b) [“Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence.”].)

reasonable doubt. However, since any fact which increases a defendant's punishment beyond that allowed by the jury's verdict is defined as an element by *Blakely*, any fact used to impose a consecutive sentence must be proven to a jury beyond a reasonable doubt. Because a sentencing court (1) cannot impose a consecutive sentence without stating the reasons justifying the sentence; (2) cannot rely on the findings reflected in the jury's verdict (i.e. proof beyond a reasonable doubt that the defendant satisfied all elements of the crimes and enhancements charged); and (3) must engage in judicial factfinding to reach those reasons, it is clear that under California's determinate sentencing scheme, consecutive sentences are not allowed solely by virtue of the jury's verdict. Judicial findings of factors in aggravation to support the consecutive sentence therefore fall within *Blakely*'s definition of elements.

This analysis has been lost on the Court of Appeal when analyzing whether *Blakely* applies to consecutive sentencing. For example, in *People v. Vaughn* (2004) 122 Cal.App.4th 1363, Division Four of the Second District held that consecutive sentencing does not increase the statutory maximum and therefore does not implicate *Blakely*. The Sixth District came to the same conclusion in *People v. Jaffe* (2004) 122 Cal.App.4th 1559. Both opinions ignore that *Blakely* defines the statutory maximum as the harshest possible sentence a court may impose based solely on facts reflected in the jury verdict or admitted by a defendant, *without any additional judicial factfinding*. (*Blakely v. Washington, supra*, 124 S.Ct. 2531, 2537.) Since a court cannot impose consecutive sentences without making additional factual determinations, consecutive sentencing under California's determinate sentencing scheme violates *Blakely*.¹³

¹³ This conclusion applies only to sentencing schemes where the court has discretion to impose concurrent or consecutive sentences and has no application where trial courts are mandated to impose consecutive terms.

Conclusion

As was the situation in *Blakely*, “This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.” (*Blakely v. Washington, supra*, 124 S.Ct. 2531, 2540.) In its current form, California’s determinate sentencing scheme allows trial courts to impose harsher sentences than would be allowed based solely on a jury’s verdict, by allowing the sentencing judge to engage in judicial factfinding. This allowance violates the Due Process Clause and the jury trial guarantee of the United States Constitution under the rationale of *Blakely v. Washington, supra*, and *Apprendi v. New Jersey, supra*, 530 U.S. 466.

Accordingly, for the reasons stated herein, the undersigned submits that the imposition of an upper term sentence and the imposition of consecutive sentences based on judicial factfinding by a preponderance of the evidence are unconstitutional under *Blakely v. Washington*.

Dated: November 8, 2004
Submitted,

Respectfully

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief has been prepared using 13 point Times New Roman typeface. The text of the Brief of Amicus Curiae consists of 7,665 words as counted by Microsoft Word version 2002 word processing program, up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance and correct and that this declaration was executed on November 8, 2004.

MARTIN F. SCHWARZ
Deputy Public Defender

DECLARATION OF SERVICE

People v. Kevin Michael Black— Supreme Court Case No. S126182:

STATE OF CALIFORNIA)

) ss

COUNTY OF ORANGE)

Martin F. Schwarz declares that he is a citizen of the United States, a resident of Orange County, over the age of 18 years, not a party to the above-entitled action and has a business address at 14 Civic Center Plaza, Santa Ana, California 92701.

That on the 8th day of November, 2004, I served a copy of the Brief of Amicus Curiae in the above-entitled action by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Santa Ana, California. Said envelopes were addressed as follows:

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