

Appellant's Opening Brief

Blakely Issue: Imposition of Upper Term; Consecutive Sentences

Jury trial; recidivist & non-recidivist factors; addresses waiver, prejudice, and argues remand would violate double jeopardy

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People v. Hughes, [A104380](#) (1st Dist.; Div. 3)

Author: Irene Kiebert

V.

THE IMPOSITION OF AN UPPER TERM AND CONSECUTIVE SENTENCES WITHOUT JURY FINDINGS TO SUPPORT THEM VIOLATED APPELLANT'S RIGHTS TO JURY TRIAL AND DUE PROCESS UNDER THE FEDERAL CONSTITUTION

A. Appellant Was Entitled Under the Sixth and Fourteenth Amendments to Have a Jury Determine the Existence of Facts Used to Justify an Upper Term and Consecutive Sentences

The trial court sentenced appellant to the upper term of nine years for attempted murder and ordered the sentences on all counts to run consecutively. (RT 1208-1209, CT 622.)

Appellant submits that both the imposition of an upper term for the attempted murder count and the imposition of consecutive sentences for other counts, violated his federal constitutional rights because they were based on factual determinations made by the judge and appellant did not waive his right to have a jury determine the existence of those facts beyond a reasonable doubt.¹ (U.S. Const., Amends. VI, XIV; Cal. Const., Art. 1, § 16; *Blakely v. Washington* (2004) ___ U.S. ___, 124 S.Ct. 2531; 2004 Daily Journal D.A.R. 7581; 2004 WL 1402697]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Ernst* (1994) 8 Cal.4th 441, 448 [waiver of jury trial must be expressly made on the record].)

Further, the appellant's sentence violates the due process clause of the federal

¹Appellant assumes, arguendo, that this Court concludes that the imposition of consecutive sentences on appellant did not violate section 654 (see Argument IV, *supra*).

constitution under *Hicks v. Oklahoma, supra*, 447 U.S. 343, where the United States Supreme Court declared that where "a State has provided for the imposition of criminal punishment in the discretion of the trial jury . . . [t]he defendant . . . has a substantial and legitimate expectation that he will be deprived of liberty only to the extent determined by the jury in the exercise of its statutory discretion [citation], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the States." (*Id.*, at p. 346.)

1. Under *Apprendi* and *Blakely* the Federal Constitution Requires a Jury Determination of Any Facts Used to Impose a Sentence Greater than That Authorized by the Jury's Verdict Alone

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 the defendant was convicted in a New Jersey state court of second-degree possession of a firearm and third-degree unlawful possession of a bomb, which carried specified penalty ranges. (*Id.*, at pp. 469-470.) In addition, state law provided that a sentence higher than the specified range could be imposed if an offense had been committed for a "biased purpose;" i.e., if the offense qualified under a hate crime sentence enhancement statute. (*Ibid.*) The sentencing judge held an evidentiary hearing, determined that one of the firearm possession crimes qualified for the hate crime enhancement and sentenced Mr. Apprendi accordingly, which resulted in a sentence 10 years longer than could have been imposed in the absence of the "biased purpose" finding. (*Id.*, at pp. 470, 471.)

Mr. Apprendi challenged the constitutionality of the state law process for determining the existence of racial bias under this sentencing scheme, asserting that he

had a “constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt” (*Id.*, at pp. 475-476.) The United States Supreme Court agreed. (*Id.*, at p. 497.)

Justice Stevens, writing for the majority in *Apprendi*, observed that, “[t]he historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” (*Id.*, at pp. 482-483, footnote omitted, italics in original, underlining added.) Thus, “[i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.” (*Id.*, at p. 484.)

Citing its opinion in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 which in turn was grounded in the principles enunciated in *In re Winship, supra*, 397 U.S. 358, the high court specified that those protections include “due process and associated jury protections” in the context of sentencing. (*Apprendi, supra*, 530 U.S. at p. 484.)

The *Apprendi* majority concluded that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum

must be submitted to a jury, and proved beyond a reasonable doubt.” (*Id.*, at p. 491.)

Rejecting an analytical approach that parses the meaning of phrases such as “intent, “motive,” “element” and “sentencing factor,” the court emphasized that “the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” (*Id.*, at p. 494, footnote omitted.) The high court remanded Apprendi’s case for resentencing. (*Id.*, at p. 497.)

In its recent opinion in *Blakely v. Washington, supra*, ___ U.S. ___, 124 S.Ct. 2531; 2004 Daily Journal D.A.R. 7581; 2004 WL 1402697] the United States Supreme Court applied and further elucidated the constitutional principles explained in *Apprendi*.

In *Blakely* the defendant had pled guilty to kidnap, and the facts admitted in his plea supported a sentence within the range of 49 to 53 months. (*Id.*, ___ U.S. at p. ___ [124 S.Ct. at p. 2534].) The sentencing judge initially imposed a sentence of 90 months, which was higher than the standard range term recommended by the state, on the basis that the victim’s testimony had established that the crime was committed with deliberate cruelty, and such a factor was identified by state statute as a ground for imposing a higher sentence in a domestic violence case. (*Id.*,

___ U.S. at p. ___ [124 S.Ct. at p. 2535].) Mr. Blakely objected and the judge then held an evidentiary hearing, after which he issued factual findings, again determined that the crime was committed with deliberate cruelty. (*Id.*, ___ U.S. at p. ___ [124 S.Ct. at pp. 2535-2536].)

Justice Scalia, writing for the majority, applied the *Apprendi* rule that “. . . 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[.]” to Mr. Blakely’s case. (*Id.*, ____ U.S. at p. ____ [124 S.Ct. at p. 2536].)

The *Blakely* court explained that “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,’ [] and the judge exceeds his proper authority.” (*Id.*, ____ U.S. at p. ____ [124 S.Ct. at p. 2537], italics in original, citation to 1 J. Bishop, *Criminal Procedure* (2d ed. 1872) § 87, p. 55 omitted.)

The high court majority therefore held that in Mr. Blakely’s case, the judge could not constitutionally increase the sentence based on the finding of deliberate cruelty, even though such an increase was authorized by statute, because the enhanced sentence exceeded the maximum that the judge could impose without any additional findings. (*Id.*, ____ U.S. at p. ____ [124 S.Ct. at pp. 2537-2538].) The sentence imposed on Mr. Blakely violated his Sixth Amendment right to a jury trial and was invalid. (*Id.*, at p. 2538.)

2. The Imposition of Consecutive Sentences on All Counts in Appellant’s Case Violates the Federal Constitution Under *Apprendi* and *Blakely*

In the case at bar, the trial court ordered that the sentences imposed against appellant for attempted murder, kidnap, battery with serious bodily injury, terrorist

threats, false imprisonment, and dissuasion of a victim, must be served consecutively, amounting to a total of 16 years in state prison.² (CT 622; RT 1208-1209.)

Under *Apprendi*, the question with regard to consecutive sentencing is: Does the finding of separate and distinct purposes behind different crimes committed against a single victim expose appellant to a greater punishment than that authorized by the jury's verdicts? In appellant's case, the answer is clearly, yes. (Cf. *People v. Shaw* (Sept. 15, 2004, C043228) ___ Cal.App.4th ___ [2004 WL 2053260, p. 4] [consecutive sentences not barred under *Blakely/Apprendi* where jury verdicts reflected jury findings of separate crimes against different victims].) Here, the jury's verdict alone authorized a concurrent sentence, and a greater punishment could be imposed only after a required finding by the sentencing court of separate intents and objectives of each offense whose sentence was to be imposed consecutively. (Pen. Code §§ 654, 669; *Neal v. State of California, supra*, 55 Cal.2d at p. 19.)

a. California Law Creates a Presumption of Concurrent Sentencing and Consecutive Sentences May Be Imposed only after Additional Findings by the Sentencing Judge

Sections 654 and 669 create a presumption that sentences will be imposed concurrently, since a trial court may impose consecutive sentences only on the basis of specific findings which justify doing so. (*In re Walters* (1995) 39 Cal.App.4th 1546, 1552-1553 [rule 669 requires concurrent sentence in absence of express order

²Appellant assumes solely for this argument, without conceding, that there was sufficient evidence of each of the offenses and that appellant's convictions were otherwise valid.

otherwise].)

Section 654 prohibits the imposition of separate punishments for a single offense, and also provides that where the defendant has been convicted of multiple offenses, the offense carrying the longest prison term will be the sentence imposed.³ However, as discussed, *supra*, in Argument IV, the California Supreme Court has long held that, “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. State of California, supra*, 55 Cal.2d at p.19; see *People v. Latimer, supra*, 5 Cal.4th at pp.1216-1217.)

Section 669⁴ provides that, where there are multiple convictions, the sentencing court may order the sentences for those convictions to run concurrently or consecutively and must issue an order stating its sentencing choice. The statute explicitly states that, where the sentencing court fails to make this determination, “the term of imprisonment on the second or subsequent judgment shall run concurrently.” (Pen. Code § 669, underlining added.) In *People v. Caudillo* (1980) 101 Cal.App.3d 122, where the

³Section 654 provides as follows, in pertinent part: “(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.

⁴Section 669 provides as follows, in pertinent part: “When any person is convicted of two or more crimes . . . the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively.”

sentencing court had failed to make an explicit order for consecutive sentences, the reviewing court amended the abstract of judgment to indicate that the sentences were to run concurrently. (*Id.*, at pp. 125-127; see also *In re Walters, supra*, 39 Cal.App.4th at pp. 1552-1553.)

Further, it has long been held that, “[t]he sentencing court is required to state its reasons for imposing consecutive sentences and a remand for resentencing is proper when the court fails to state reasons for its sentencing choice.” (*People v. Calvert* (1993) 18 Cal.App.4th 1820, 1838 [citations omitted]; see also *People v. McLeod* (1989) 216 Cal.App.3d 585, 590.)

Rule 4.425⁵ sets out criteria to guide the sentencing courts’ “decision to impose consecutive rather than concurrent sentences,” and when sentencing a defendant under California’s determinate sentencing scheme, the court “shall apply the sentencing rules of the Judicial Council.” (Pen. Code § 1170, subd. (a)(3).)

Appellant submits that his convictions by the jury in his case, without more,

⁵Rule 4.425 provides as follow: “Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

“(a) [Criteria relating to crimes] Facts relating to the crimes, including whether or not:

“(1) The crimes and their objectives were predominantly independent of each other.

“(2) The crimes involved separate acts of violence or threats of violence.

“(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

“(b) [Other criteria and limitations] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except

“(i) a fact used to impose the upper term,

“(ii) a fact used to otherwise enhance the defendant’s prison sentence, and

“(iii) a fact that is an element of the crime shall not be used to impose consecutive sentences.” (www.courtinfo.ca.gov/rules/titlefour/title4-53.htm.)

mandated concurrent sentencing as the “default” choice under this state’s sentencing laws.

b. Consecutive Sentences Imposed on Appellant Were Based on Factors Found by the Sentencing Judge But Whose Existence Was Not Determined by the Jury

The trial judge in appellant’s case ordered that the sentences on all counts were to run consecutively. He explained:

“The court also finds that that [sic; there?] was a different period of criminality as to each of the crimes for which you were convicted. You had more than adequate time between each crime to reflect upon your conduct, to make a decision to proceed to the next step, if you will, and you chose every time then to go on to the next crime. So the Court imposes each and every one of these crimes [sic; sentences?] consecutively for those matters.” (RT 1209.)

As appellant has previously explained in Argument IV, *supra*, these factors were not a proper basis for the imposition of consecutive sentences, which could only be imposed in the circumstances of his case on a finding by the sentencing court that the offenses were independent of each other and committed with separate intents and objectives. In any case, however, appellant submits that he was entitled under the Sixth and Fourteenth Amendments to a jury determination of the existence of any facts used as a basis for increasing his sentence beyond the term that would result from concurrent sentencing.

Appellant’s analysis is consistent with that of the Third District Court of Appeal in

People v. Shaw, supra, ___ Cal.App.4th ___ [2004 WL 2053260], which held that the imposition of consecutive sentences passed constitutional muster because they were “based on the jury’s verdicts rather than the court’s independent findings of fact”

Appellant acknowledges that the Court of Appeal in the Second District, citing a line of lower federal court opinions which were decided before *Blakely*, held in *People v. Sykes* (2004) 120 Cal.App.4th 1331 that the imposition of consecutive sentences based on findings by the judge was constitutional because: (1) neither *Blakely* nor *Apprendi* involved consecutive sentences and (2) the defendant had been convicted of charges found to be true beyond a reasonable doubt. (*Sykes*, 120 Cal.App.4th at p. 1345.) The California Supreme Court has granted review in *Sykes* (___ Cal.4th ___) and in any case the *Sykes* opinion is not binding on this Court and its reasoning should not be followed.

First, in *Blakely* the high court specifically rejected the notion that *Apprendi*’s holding—or by implication, its own holding—was limited to statutes that aggravate offenses. (*Blakely v. Washington, supra*, 159 L. Ed. 2d at p. 413, fn. 5.)

Second, the *Sykes* court’s heavy reliance on one highlighted portion of one sentence taken out of context from *Apprendi* is not well-founded. The *Sykes* court pointed to the following passage: “[criminal trial] practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt.” (*Apprendi, supra*, 530 U.S. at pp. 483-484; see *Sykes, supra*, 120 Cal.App.4th at p. 1345.) The court then reasoned that, because the facts necessary to support Mr. Sykes’s

convictions had been found by a jury beyond a reasonable doubt, and because the consecutive sentencing decision was not based on those same facts, the consecutive sentences were constitutional. (*Sykes* at p. 1345.)

The *Sykes* court italicized the words “requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt” from *Apprendi* but apparently overlooked the critical words, “at least.” After stating that minimal and fundamental requirement, the United States Supreme Court in *Apprendi* went on to discuss further dimensions of the right to jury findings beyond a reasonable doubt. For example, the *Sykes* opinion ignores the following passage: “Since *Winship*, we have made clear beyond peradventure that *Winship's* due process and associated jury protections extend, to some degree, "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." (*Apprendi*, *supra*, 530 U.S. at p. 414.)

This portion of the *Sykes* opinion is mechanistic, simplistic, and utterly irreconcilable with the constitutional principles clearly and repeatedly enunciated in *Blakely* and *Apprendi* and on which appellant relies. Its reasoning should be rejected.

Appellant is also aware of the opinion of the Third District Court of Appeal in *People v. Sample* (Sept. 13, 2004, C044445) ___ Cal.App.4th ___ [2004 SL 2027285], which concluded in dictum that a consecutive sentence passed constitutional muster where the jury’s verdicts reflected findings that the relevant crimes “were committed against separate victims at different times and in different places.” (*Id.*, at p. 13.) There

were two victims in *Sample* and the crimes against one occurred nearly a month apart and in a different location from the other crimes. (*Id.*, at p. 4.) Thus, even assuming, arguendo, that *Sample*'s discussion in dicta of the federal case law is correct, it is factually distinguishable since in appellant's case only one victim was involved, the crimes were committed in an indivisible course of conduct, and most of the evidence of the factors used to increase the sentence was highly debatable and some was affirmatively controverted by the defense at trial.

3. The Imposition of Upper Terms on All Counts Violates the Federal Constitution under *Apprendi* and *Blakely*

The trial court imposed an "aggravated term" of nine years on appellant for the crime of attempted murder. (RT 1208; CT 622.) Under *Apprendi* and *Blakely* the question, again, is whether the trial judge imposed a higher sentence—i.e., a longer term—than the sentence that could lawfully have been imposed on the basis of the jury's verdict on the attempted murder count alone, without any additional findings.

In its very recent opinion in *People v. George* (September 15, 2004, D042980) ___ Cal.App.4th ___ <<http://www.courtinfo.ca.gov/opinions>>, the Court of Appeal in the Fourth District held that *Blakely* applies to the imposition of upper terms under California sentencing law. (*Id.*, at p. 21.) The opinion is well-reasoned and should be followed in appellant's case.

In *People v. Sample, supra*, ___ Cal.App.4th ___ [2004 SL 2027285] the upper term was based on only two factors: defendant's probationary status and the planning and sophistication of the crimes. (*Id.*, at p. 11.) The reviewing court thought that, since there

was overwhelming and uncontroverted evidence of one factor, and since one factor is sufficient to support an upper term sentence, that aspect of the sentence did not “seriously affect the fairness, integrity, and public reputation of the judicial proceedings” and therefore the *Blakely* issue with regard to it was forfeited under *United States v. Cotton* (2002) 535 U.S. 625. (*Id.*, at p. 11; see discussion of *Cotton* in section B, below.) The court also found beyond a reasonable doubt that the trial court would have imposed the upper term based on the prior convictions if it had anticipated the decision in *Blakely*. By implication, then, the *Sample* court took the view that “planning and sophistication” was a factor that required a jury determination under *Blakely* and *Apprendi*. Assuming, arguendo, that the *Sample* court’s substitution of its own discretion for that of the reviewing court was proper, its reasoning cannot be applied to appellant’s case, where appellant’s prior conviction was only one of six factors used to justify the upper term.

a. The Jury Verdict Alone Authorized a Maximum Sentence of Seven Years for Attempted Murder.

Since appellant’s jury found that the attempted murder was not committed deliberation and premeditation, his sentence on that count could only be a prison term of five, seven or nine years. (Section 664, subd. (a).)

Under the California determinate sentencing law, where the sentencing “statute specifies three possible terms, the court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation of the crime. . . .” (Pen. Code § 1170, subd. (b).) Further, “The court shall set forth on the record the facts and reasons for

imposing the upper or lower term.” (*Ibid.*) And, “The court shall state the reasons for its sentence choice on the record at the time of sentencing. . . .” (Pen. Code § 1170, subd.

(c).)

As a matter of black letter law, then, the jury’s verdict alone authorized a middle term sentence for attempted murder, which was seven years.

b. Appellant’s Sentence was Increased on the Basis of Factors Found by the Court and Whose Existence Was Never Determined by the Jury

The judge in appellant’s case sentenced him to the “aggravated term” of nine years in state prison on Count One, attempted murder. (RT 1208.) The court explained:

“The factors in aggravation being the fact that you displayed viciousness, cruelty or callousness; your violent conduct indicates that you’re a serious danger to society. You have numerous prior convictions. You were on a grant of conditional sentence when the crimes were committed. Your performance on probation generally has been unsatisfactory. You – in regards to serious felony counts, in counts – offenses, in Counts One, Two and Four, you bound, confined and gagged the victim within the meaning of Penal Code section 1170.84.

“Therefore, the Court selects the aggravated term and would impose also the aggravated term of all the other counts on which you were found guilty.”

(RT 1208.)

Thus, the facts used to increase appellant’s sentence from the middle term of seven years for attempted murder to the upper term of nine years were determined solely by the

court. None of them was directly or indirectly determined by the jury. This aspect of appellant's sentence therefore violates the federal constitution under *Blakely* and *Apprendi*. (See *People v. Sykes, supra*, 120 Cal.App.4th at p. 1345 [facts affecting appropriate sentence within the range of potential terms for each offense subject to *Blakely* and *Apprendi*].)

B. The Issue of the Constitutionality of Appellant's Sentence is Cognizable on Appeal

Appellant did not object at trial to the imposition of the upper term for attempted murder or of consecutive sentences on the federal constitutional grounds on which he now relies. Appellant was not required to enter an objection since his sentence violated his fundamental constitutional rights and in any case an objection would have been futile. (See authorities cited, below.)

The errors are also cognizable on appeal since this Court has the discretion to review errors of constitutional dimension even in the absence of an objection. (*People v. Shaw, supra*, ___ Cal.App.4th ___ [2004 SL 2053620]; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061; see also *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; see also *People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249.)

Appellant notes that in *United States v. Cotton, supra*, 535 U.S. 625 the United States Supreme Court invoked the federal courts' "plain error" doctrine to review *Apprendi* error in spite of the failure to object at trial to a faulty indictment. In *Cotton* the high court cited *Johnson v. United States* (1997) 520 U.S. 461 for the rule that *Apprendi* error requires an objection in the trial court. *Johnson*, however, explicitly distinguished

serious constitutional error arising in state criminal proceedings from “direct appeals from judgments of conviction in the federal system” which are subject to the Federal Rules of Criminal Procedure and therefore require an objection under those rules. Appellant submits that neither *Cotton* nor *Johnson*, therefore, preclude the review of the serious constitutional error in appellant’s case arising from a state court conviction.

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1. No Objection at Trial Was Necessary to Preserve an Issue Based on a Fundamental Constitutional Right

No objection at trial was necessary to preserve the instant issue since the sentencing errors violated appellant’s fundamental constitutional right to a jury trial. (*People v. Vera* (1997) 15 Cal.4th 269, 276 -277; see also *People v. Valladoli* (1996) 13 Cal.4th 590, 606 [no waiver of issue of double jeopardy for post-verdict amendment of an information to add prior convictions]; *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5 [no waiver of issue of right to jury trial where jury discharged before adjudication of prior convictions]; see also *People v. Williams, supra*, 17 Cal. 4th at pp. 161-162, fn. 6 [appellate court may review trial error in absence of objection]; *People v. Anderson, supra*, 26 Cal.App.4th at p. 1249 [same].)

Under *Blakely* and *Apprendi* and the statutes and rules cited in the instant argument, the questions of whether to impose an upper term for attempted murder and consecutive sentences should have been decided by the jury’s discretion. The trial court’s usurpation of the jury’s role violated appellant’s fundamental constitutional rights

to substantive due process and trial by jury and no objection at trial was required to preserve the issue for appeal. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280; see *Rose v. Clark* (1986) 478 U.S. 570, 578.)

In *People v. Vera*, *supra*, 15 Cal.4th 269 the California Supreme Court held that appellant had waived the issue of the constitutionality of his sentence enhancements based on prior convictions.⁶ (*Id.*, at p.281.) The *Vera* Court acknowledged that:

“Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (See *Saunders*, *supra*, 5 Cal.4th at p. 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [Cal.Rptr. 871, 353 P.2d 583] [constitutional right to jury trial]; cf. *People v. Walker*, *supra*, 54 Cal.3d at pp. 1022-1023 [nonconstitutional nature of claim that trial court failed to advise of consequences of guilty plea subjects defendant's claim to rule that error is waived absent timely objection].)

(*People v. Vera*, *supra*, 15 Cal.4th at pp. 276-277.) The court explained, however, that because the jury trial right at issue in *Vera* was derived only from a state statute and not

⁶The appellant in *Vera* argued on appeal that the trial court erred when it conducted a court trial on the truth of prior prison term allegations without first obtaining an express, personal waiver of appellant's right to a jury trial on that question under Penal Code sections 1025 and 1168. (*Vera*, 15 Cal.4th at p. 274.)

the state or federal constitutions, Mr. Vera could not “claim he was deprived of the *constitutional* right to jury trial on the prior prison term allegations.” (*Id.*, at p.277, italics in original.) Therefore, the failure to object at trial waived the issue. Since appellant’s claim is precisely that he was deprived of his constitutional right to jury trial on the factors used to impose an upper term and consecutive sentences, the holding in *Vera* is inapplicable to the case at bar.

Additionally, appellant was not obliged to object in order to invoke the constitutional protection against double jeopardy, which is one of the principles on which he relies, *post.* (*People v. Marks* (1991) 1 Cal.4th 56, 77, fn. 20.)

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2. An Objection Would Have Been Futile at the Time of Appellant’s Trial

An objection at trial is not necessary to preserve an issue for appeal where such an objection would have been futile at the time of trial. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [prosecutorial misconduct]; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649 [judicial misconduct].) This principle also applies where the statutory or case law binding the trial court at the time would have precluded the claim. (See *People v. George, supra*, <http://courtnfo.ca.gov/opinions> [pp. 18-19]; see also *People v. Birks* (1998) 19 Cal.4th 108, 116, fn.6 [no waiver where lower court was bound by higher court on issue]; *People v. Turner* (1990) 50 Cal.3d 668, 703 [no waiver where trial counsel could not have foreseen change in law of evidence].)

Appellant’s trial took place in August 2003 and the *Blakely* opinion came down in

June 2004. As the Fourth District Court of Appeal pointed out in *People v. George*, before *Blakely* both state and federal case law had held that the constitution did not require a jury trial for the imposition of consecutive sentences, and “[n]o published case in California held that a different rule applied in connection with the imposition of an upper term sentence.” (*People v. George, supra*, <http://courtinfo.ca.gov/opinions> [p. 19].) As in *George*, it would have been pointless at the time of appellant’s trial to demand a jury trial or a reasonable doubt standard on the determination of factors to support the imposition of an upper term or consecutive sentences. (*Ibid.*) These issues should therefore be reviewed by this Court. (*Contra, People v. Sample*(Sept.13, 2004, C044445) ___ Cal.App.4th ___ [2004 WL 2027285]⁷.)

3. If an Objection Was Required to Preserve the Issue Trial Counsel Rendered Ineffective Assistance

The constitutional principles on which *Blakely* relied were set out in *Apprendi* and other United States Supreme Court opinions pre-dating appellant’s 2003 trial. Thus, if

⁷In *Sample* the Third District Court of Appeal held two issues arising under *Blakely* forfeited for failure to enter an objection at trial. (*Id.*, at pp. 11, 13.) *Sample* purportedly followed the opinion of the United States Supreme Court in *United States v. Cotton* (2002) 535 U.S. 625 and reasoned, *inter alia*, that since the evidence of the facts on which the court relied to impose an upper term were overwhelming, the *Blakely/Apprendi* issues were barred. (*Sample* at p. 11.) In appellant’s case, by contrast, as discussed, *supra*, there was not overwhelming evidence of most of the factors on which the trial court relied to increase appellant’s sentence. In any case, the opinion of a court in another district is not binding on this court (cf. *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455), and appellant submits that *Sample* should not be followed on this point for all the reasons and under the authority set out, *supra*, in subsections 1 and 2 in the instant argument, including the opinion of the Fourth District Court of Appeal in *People v. George, supra*, <http://courtinfo.ca.gov/opinions>.

this Court declines to review the constitutionality of appellant's sentence for lack of objection at trial, then defense trial counsel's omission constituted ineffective assistance of counsel, since any reasonably competent criminal defense attorney should be familiar with basic constitutional protections and Supreme Court law explaining them, and there is no conceivable tactical reason that counsel would have deliberately failed to object to a greater sentence than that which could constitutionally have been imposed. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-692; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 343; *Harding v. Davis* (11th Cir. 1989) 878 F.2d 1341, 1344-1345; *People v. Ledesma* (1987) 43 Cal.3d 171, 215; *People v. Pope* (1979) 23 Cal.3d 412, 422; *People v. Borba* (1980) 110 Cal.App.3d 989, 997.)

C. Appellant's Sentence Should be Reduced

Appellant's sentences must be based on the jury's verdicts as mandated by the Sixth and Fourteenth Amendments of the United States Constitution. The greatest term of imprisonment for any of the crimes of which appellant was properly convicted by the jury would be five years, which is the middle term for kidnap. (Pen. Code § 208, subd. (a).) The judgment should therefore be modified to sentence appellant to five years in state prison as the principal term, with the sentences on all other counts to run concurrently. (Pen. Code § 1170.1, subd. (a).) Alternatively, if this Court finds that there is sufficient evidence to sustain appellant's conviction of attempted murder, then his sentence should be reduced to seven years, the middle term for attempted murder, as the principal term, with the sentences on all other counts to run concurrently.

1. Denial of the Right to a Jury Trial Is Structural Error That Is Not Susceptible to Harmless Error Review

To the extent that the imposition of an upper term on one count and consecutive sentences on other counts violated appellant's fundamental right to have a jury determine the facts used to increase his sentence beyond that authorized by the jury's verdicts and findings, appellant's sentence must be reversed under *Blakely* and *Apprendi*.

With regard to the imposition of the upper term for attempted murder, appellant acknowledges that the sentencing judge included appellant's prior convictions as one of six factors he found in aggravation of the sentence (RT 1208), and that under express language in *Apprendi* a jury determination is not required on that factor. (*Apprendi, supra*, 530 U.S. 466, 490.) Other factors, however, included such heavy considerations as the viciousness, cruelty or callousness of the crime, the court's conclusion that appellant was a danger to society, and that his performance on probation was "unsatisfactory." (RT 1208.) In these circumstances, this Court cannot be confident that the judge would have imposed the same sentence if he had known that he could not consider such other factors because they were not found by a jury to exist.

The upper term on the attempted murder count must therefore also be reversed. (See *People v. George, supra*, slip opn. at pp. 22-23 [remand where judge relied on five factors to impose upper term one of which was the equivalent of prior conviction finding]; see also *People v. Avalos* (1984) 37 Cal.3d 216, 233 [reversal required where reviewing court cannot determine whether improper factors were determinative]; see also *People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434 [sentence to be set aside where

reasonably probable lesser sentence would have been imposed if trial court had known some of its reasons for greater sentence were improper].)

The United States Supreme Court highlighted in *Blakely* the fundamental nature of the right at issue here: "Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. [Citations.] Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control the Framers intended." (*Blakely, supra*, ____ U.S. at p. ____ [124 S.Ct. at pp. 2538-2539], underlining added.) The high court emphasized additionally that, "[t]here is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As Apprendi held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, he has no such right. That should be the end of the matter." (*Id.*, ____ U.S. at p. ____ [124 S.Ct. at p. 2543], italics in original, underlining added.)

Thus, to the extent that appellant's sentence was based on facts other than prior convictions which were not determined by the jury, and not established beyond a

reasonable doubt, it was unauthorized and therefore unconstitutional. (*Blakely, supra*, ____ U.S. at p. ____ [124 S.Ct. at pp. 2538-2539]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

Moreover, the California Supreme Court explained in *People v. Ernst, supra*, 8 Cal.4th 441, a case that involved the right to a jury trial on the question of guilt, that “[i]t has long been established that the denial of the right to a jury trial constitutes a “structural defect[][sic]” in the judicial proceedings” (*Id.*, at p. 449, citing *People v. Cahill* (1993) 5 Cal.4th 478, 493, 501, and *People v. Holmes* (1960) 54 Cal.2d 442, 444.)

Such fundamental error is not susceptible to harmless error analysis under *Chapman*⁸ or any other standard: "Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of Chapman review is simply absent. There being no jury verdict of guilty beyond a reasonable doubt, the question whether the same verdict of guilty beyond a reasonable doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless error scrutiny can operate. . . ." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 280 [citation omitted]; see *Rose v. Clark* (1986) 478 U.S. 570, 578 [denial of right to jury not subject to harmless error analysis].)

In appellant’s case, there being no jury finding of most of the facts used to increase

⁸*Chapman v. California* (1967) 386 U.S. 18.

his sentence, the question whether the “same findings” would have been rendered absent the constitutional error is utterly meaningless.

Appellant notes that in *United States v. Cotton* (2002) 535 U.S. 625, the high court assumed, without deciding, that an *Apprendi* violation affects the defendant’s substantial rights, but found that the error in that case “did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.” (*Id.*, at pp. 632-633.) The *Cotton* court based that conclusion on the fact that there, the issue which had not been submitted to the jury – the quantity of drugs involved – had been established at trial by overwhelming and controverted evidence. (*Id.*, at p. 633.)

Under *Cotton*, then, reversal is required for *Apprendi* error which affects the fairness and integrity of the proceedings, i..e. at least where the record does not establish by overwhelming and uncontroverted evidence that the factors used to increase the sentence existed. The *Cotton* rule therefore requires reversal of appellant’s sentence.

This Court cannot speculate that a jury would have found any factors indicating greater culpability for attempted murder, especially in light of the actual jury finding that the allegation of premeditation and deliberation was not true. (CT 593.) Nor can this Court speculate that a jury would have found that the offenses of which appellant was convicted were independent of each other and committed with separate intents, especially in light of the circumstances of the case supporting defense counsel’s argument on the point and the failure of the prosecutor to argue it and of the trial judge to consider it. (RT 1182-1183, 1200.)

In *Apprendi* and *Blakely*, the judgments were reversed and the cases were remanded for further proceedings not inconsistent with the opinions. (*Blakely v. Washington, supra*, ___ U.S. ___, ___ [124 S.Ct. at p. 2543]; *Apprendi v. New Jersey, supra*, 530 U.S. at p. 497.) The high court did not apply any kind of harmless error analysis in either case.

Accordingly, the upper term and consecutive sentences must be reversed, and appellant's case should be remanded to the trial court for imposition of the sentence authorized by the jury's verdicts. Alternatively, in the interest of judicial economy, this Court should modify appellant's sentence so that the total term of imprisonment appellant will serve is five years if his conviction of attempted murder is reversed and seven years if it is not.

2. Remand for Re-sentencing Would Violate State and Federal Constitutional Protections Against Double Jeopardy

The California Supreme Court has long held that double jeopardy principles bar the imposition of consecutive sentences on retrial, where a defendant received a concurrent sentence initially. (*People v. Ali* (1967) 66 Cal.2d 277, 281, cited with approval in *People v. Hanson* (2000) 23 Cal.4th 355, 359.) Since the jury verdicts in appellant's case authorized only a concurrent sentence and at most a middle term for attempted murder, neither consecutive sentences nor an upper term may be imposed on remand. (See also *People v. Marks, supra*, 1 Cal.4th at pp. 71-79 [where jury failed to specify degree of murder and defendant deemed convicted of lesser degree by operation of law under Section 1157, double jeopardy bars retrial on greater degree].)