

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, No. 126182
Court of Appeal No.
F042592
Tulare County
No. 79557

Plaintiff and Respondent,

vs.

KEVIN MICHAEL BLACK,

Defendant and Appellant.

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APPELLANT’S OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

1. What effect does *Blakely v. Washington* (2004) 124 S.Ct. 2531 [“Blakely”] have on the validity of the defendant’s upper term sentence?
2. What effect does *Blakely* have on the trial court’s imposition of consecutive sentences?

STATEMENT OF THE CASE

On February 7, 2002, the district attorney filed an amended information charging appellant in count one with continuous sexual abuse. (Pen. Code § 288.5) and in counts two and three with lewd and lascivious conduct (Pen. Code §288, subd. (a).)

It was alleged as to count one that appellant committed the offense by use of force, duress or menace within the meaning of Penal Code section 1203.066, subdivision (a)(1) and that appellant had substantial sexual conduct with a victim under the age of 14. (Pen. Code §1203.066, subd. (a)(8).) It was alleged to all counts that appellant committed specified sexual acts with more than one victim within the meaning of Penal Code section 667.61, subdivision (b) and 1203.066, subdivision (a)(7). (CT 102 – 107.)

Appellant was arraigned on February 8, 2002, pleaded not guilty and denied the special allegations. (CT 108.)

Appellant's jury trial was called on November 4, 2002 but ultimately trailed until November 12, 2002. (CT 220 – 223, 262.)

On November 22, 2002, the jury found appellant guilty of all counts and special allegations. (CT 372-374.)

On January 9, 2003, the court granted the district attorney's motion to dismiss the Penal Code section 667.61 allegation as to count one. Appellant was sentenced to the aggravated term of 16 years on count one (continuous sexual conduct). The court imposed consecutive 15-year to life terms on counts two and three (lewd and lascivious conduct.) (CT 436 – 437.) The total term was 46 years to life.

Notice of appeal was timely filed on March 6, 2003. (CT 820.)

A petition for Rehearing was filed on June 17, 2004.

On June 28, 2004, the court modified the opinion without changing the judgment and denied the petition.

This Court granted review on July 28, 2004.

STATEMENT OF FACTS

T., the daughter of Ricky Richardson and Melanie Black was born on February 9, 1992 and was 10 years old at the time of trial. (RT 213.) Her parents divorced in 1994. (RT 433 – 434.) Melanie lived with Gilbert Zayas from 1993 through 1998. (RT 761.) Their relationship was volatile and physically violent and T. witnessed many of the fights. (RT 492, 762 – 763.) T. accused Zayas of molesting her, but later recanted. (RT 284-285, 299-300, 492, 764-765.) T. told Melanie that she dreamed that a ghost was in her room, and the ghost touched her. (RT 548 – 549.) Soon after T. made her allegations, Zayas and Melanie separated. (RT 286.) Melanie began to live with appellant in May 1999 and they married in January 2000. (RT 432.)

Melanie and appellant lived at 432 Park View in Tulare with T. and two younger children. (RT 231, 233.) Each child had his/her own bedroom. (RT 233.) Richardson and his wife April lived nearby. (RT 357 – 358.) During the 2000 – 2001 school year, when T. was in the third grade, T. spent every other week with each couple. (RT 222, 354.)

Like the situation with Zayas, Melanie and appellant fought frequently – sometimes in front of T.. (RT 274 – 276, 279.) At times, the

police came. (RT 284.) It was one of the things that she liked the least about living with appellant. (RT 279.)

When she was midway through third grade, T. awoke one night around 2:30 a.m. (RT 224 – 225.) Melanie was at work. T. was undressed, lying supine on the bed. Appellant was lying on top of her and holding her arms by her sides. (RT 226 – 227, 230 - 231.) His private was inside her private. (RT 228.)¹ It hurt. (RT 230.) As soon as T. awoke, appellant moved off of her. He told T. not to tell anyone. (RT 230.)

Another time, during the summer following third grade, T. went into her bedroom to change for bed before joining the others in the living room to watch a video. (RT 233- 235.) Appellant walked into T.'s bedroom while she was changing and pushed her on the bed. (RT 236.) Appellant took his clothes off and tried to touch her, but T. said, "No" and hit him. She went into her sister's room to finish changing. (RT 238.)

During the summer between third and fourth grade, when T. was in Melanie's bedroom and lying on the bed, appellant undressed T., climbed on top of her and touched her private with his private and moved up and down. (RT 244.) T. tried to struggle and asked him to stop. (RT 240 – 241.) Appellant held T.'s hands with one hand and covered her mouth with the other. (RT 242 – 243.)

¹ By using pictures, T. indicated that a man's private is his penis. She circled the female's genital area to indicate a woman's private. (Peo. Exh. 1 & 2; RT 229; See CT 949 – 950.)

After he stopped, T. waited in her bedroom for Melanie to come home and told her about the incident, but Melanie didn't believe her. (RT 244 – 245.)

T. stated that when she was in her room when she was eight or nine, she saw stuff coming out of appellant's private and go on her Hello Kitty purple blanket. Appellant washed the blanket a few days later. (RT 246 – 247, 609, 611.)

Around July 4, 2001, T. fell asleep on the living room sofa while watching a movie. (RT 249.) When she woke up, she was on Melanie's bed. (RT 249.) T.'s clothes were on the floor by the bed. (RT 250.) Appellant was on the bed beside her. (RT 250.) It was like a dream, but she thought that he had been on top of her and put his private in her private. (RT 251 - 252.) Something came out of appellant's private and went onto the green, tie dyed blanket. (RT 252 – 253, 304.)

In February, T. experienced a little bit of vaginal bleeding. (RT 253, 444.) Melanie thought that she might have started her menses or that she may have fallen on a toy. (RT 445-446.) Earlier Melanie told police that it might have been from a bike accident. (RT 601.)

In June 2001, T. first told Melanie that appellant had been molesting her, but Melanie did not believe her. (RT 258, 439.) Melanie confronted appellant with the accusation, but he denied it. (RT 441 - 442.) Appellant and Melanie were having marital problems and Melanie told T. that she

would make sure that she was not around appellant. Appellant moved out for two to three weeks. (RT 442 – 443.) Because appellant was the third person that T. claimed had molested her, Melanie wanted time to consider how to handle the situation. (RT 442.)

When appellant returned, Melanie contacted Richardson and alerted him to the allegations. They agreed to meet the next day. (RT 443.)

In August 2001, T. was at Richardson and April's house. T. was upset because although she had chosen to stay with Melanie during the school year and Richardson during the summer, now she wanted to resume the 50/50 custody split. (RT 343, 524, 557.) She discussed problems, other than the molestation that she was having with appellant. (RT 522.) Richardson called Melanie and in the course of that conversation learned about T.'s allegations. (RT 522 – 523.) T. went into Richardson's bedroom and began to cry and Richardson asked April to talk with Melanie. (RT 261, 525 - 526.)

April asked Melanie if appellant had touched her in inappropriate ways. T. screamed, kicked her legs and said that she was going to get into trouble, but told April that appellant had touched her with his private, (RT 536.) She explained that she had a hole between her legs and that had appellant put his private in part way. (RT 527.) T. told April that when she informed Melanie of the incident, Melanie and appellant told her that she must have been dreaming. (RT 529.) Appellant warned T. that if she told

anyone, he would go to prison and be beaten to death. (RT 349, 529.)
Richardson called the police. (RT 346.)

Over the next few weeks, T. told April that appellant had raped her while she was in the shower. (RT 530.) T. also related that appellant had touched her girlfriends at a party. (RT 347, 530.)

Approximately 6 months earlier, twice T. told April that she was hurting “down there.” (RT 531.) Once April noted that the area was red and asked Melanie if T. had used an irritant such as bubble bath. The second time T. exhibited a rash on the inside of her legs and was referred to an allergist. (RT 531 – 532.)

T. said once that appellant picked her up when she was in the garage, took her into the house and raped her. Sometimes appellant came into her bedroom, picked her up and put her on her mom’s bed. (RT 532.) She said that these incidents occurred during the year that she was in third grade. (RT 533.)

After the telephone call, Richardson went to work. T. was upset and wanted her grandma and Papa. (RT 534.) T.’s Aunt Christy, and her babysitter Baldamer Sanchez, to whom T. referred as Papa, came to the house. (RT 534.)

Even before the police were called, April noticed changes in T.. T. lost weight and her grades dropped. She cried easily, had difficulty sleeping and appeared agitated. T.’s pediatrician gave her anti-anxiety medication

and she began to see a counselor. (RT 351, 537 – 540, 552.) Richardson could not recall changes in T.'s behavior. (RT 351.)

Ten-year-old twins, A. and H. were classmates of T. when they were in the 3rd or 4th grade. (RT 379, 382-383, 401.) Both girls went to a birthday slumber party at T.'s house and then returned to the house a few days later for another sleep over. (RT 383, 404, 406, 424.) At first they played outside, but after Melanie left T. and another friend, Lisa undressed and encouraged the twins to strip. (RT 384 – 386, 391, 393, 405.) Appellant told the girls that they could undress, or say bad words in his presence. (RT 393-394, 405.)

The kids ran through the house and appellant tried to pick them up to stop them from running. (RT 407, 416, 593.) They went into the living room and appellant asked the girls to sit on his lap as they watched TV. (RT 407.) He was dressed. (RT 396.) He rubbed their legs, but did not touch their "privates." (RT 387 – 390, 409.) After a few minutes the girls went into T.'s room and dressed. (RT 390, 411.)

A. and H. first said that appellant told them not to tell. (RT 391, 411) However, H. then corrected her testimony and said that it was Lisa who told the kids not to tell. (RT 418, 420.)

After appellant was arrested, the police contacted A. and H.'s mom, Larae Tallon and told her that her kids may have witnessed a molestation. (RT 424 – 426.) Tallon talked to the kids. (RT 431.)

In August 2001, T., A. and H. were interviewed by the Mrs. Anthony of the Child Abuse Response Team. (CART.) (RT 584 - 585.) Mrs. Anthony works for the District Attorney's Office. (RT 581.) Detective Gale Watson watched those interviews through a two way mirror and interviewed the children himself. (RT 579 - 580.) A. told the interviewer that appellant didn't touch her private spot, but he was getting kind of close. (RT 588.) When H. was asked why she didn't tell her mom, replied, "I think he said don't tell anybody. I think Lisa, Lisa and T. said don't tell anybody. So, that's why I didn't tell anybody. (RT 591.)

Initially Watson stated that he knew Baldemar Sanchez because both were members of the same veteran's organization. (RT 604, 629.) Watson did not talk to Sanchez about the Black investigation. (RT 604.) Watson knew that the police were investigating Sanchez, but was not involved in that. (RT 629 - 630.) Watson was unaware that T. had previously accused Sanchez and Zayas of molesting her. (RT 621-623.)²

The next day, Watson testified that although there was a person in the veteran's organization named Baldemar Sanchez who was nicknamed Blondie, it was not the same person who was being investigated by the police. (RT 668.)

² Baldemar Sanchez (Blondie) asserted his right to remain silent under the Fifth Amendment outside of the presence of the jury and declined to testify. (RT 632.)

Appellant's cousin Jessica Mayfield related that when she was 13 years old, she went swimming with appellant. (RT 316 – 318.) Appellant threw her around and touched her “by places that he shouldn't have touched [her].” (RT 318.) She didn't think anything of it at the time. (RT 318.)

When they returned to appellant's apartment, appellant asked her to try on a dress that appellant's wife planned to give to Mayfield. (RT 318.) Appellant came into the room as Mayfield was changing and touched her breast. (RT 320.) Mayfield told appellant to leave. (RT 320 – 321.) When Mayfield returned to the living room, appellant told her to take a shower to wash the chlorine out of her hair, but she refused. (RT 321.) Later, appellant followed Mayfield into the garage and grabbed her breast. (RT 321.)

Appellant told Mayfield not to tell and promised to buy her clothes for high school or give her a car. (RT 322-323.) Mayfield told her parents what had happened. (RT 323.) Her dad spoke with appellant and appellant apologized. (RT 323.)

Appellant had been drinking on the day of that incident. (RT 326.)

Defense Case

Sandra Knudson, a nurse practitioner was employed for 15 years as coordinator of the University Medical Center's Child Sexual Abuse Evaluation Program. (RT 679 – 680.) She examined the photographs provided by the District Attorney's Office and T.'s medical reports from Hanford and did not see any evidence of old or new trauma to T.'s genital

or anal areas. (RT 682, 685, 687.) She observed no indication that T. had been penetrated. (RT 685.) She did not find an absence of hymeneal tissue. (RT 704.)

Knudson admitted that there are clear signs of abuse in only 9% of the cases and the pictures did not prove that T. had not been molested. (RT 703.)

Baldemar Sanchez, a friend of the family's and T.'s babysitter, drove T. to school and cared for T. at times when Melanie or Richardson were at work. (RT 356, 470.) He had been T.'s babysitter for years and had also been Melanie's babysitter when she was a child. (RT 469.)

In 1994, T. observed Melanie urinating and asked her why pee pee came out of her pussy. (RT 467.) When Melanie questioned T., T. said that Sanchez had taught her the word. (RT 467.) She also related that Sanchez touched her private and butt. Melanie went to the police. (RT 468.) For a while, Melanie stopped Sanchez from seeing T., but Sanchez resumed babysitting after the police told Melanie that there was no evidence that Sanchez had done anything improper. (RT 468 – 469.)

Sanchez bought T. jewelry and clothes. When Melanie did laundry at Sanchez' home, she found different children's clothing there. (RT 473 – 474.) Although Sanchez didn't have Melanie's permission to change T.'s clothes or underwear, T. returned home in different underwear at times. (RT 474.)

Sanchez had daily access to T.. Sanchez bought T. presents including clothes and candy and gave her money. (RT 290.) Occasionally, T. spent the night at Sanchez' home. (RT 291.) Sanchez bought bathing suits for T. and the other kids and had them try on the suits. (RT 291.)

Sanchez keeps a blanket in his car. (RT 294.)

Christina S. was 29 years old at the time of trial. (RT 708.) Sanchez began to molest her when she was 8 or 9. (RT 710 – 711.) Sanchez would let Christina and her friends Melanie Black and Tara M. drive his car while seated on his lap. (RT 712.) When Christina drove, Sanchez grabbed her vaginal area. (RT 712.) He took the girls to the store, bought them candy and gave them money to go the fair. (RT 714.) When the police came to the house to investigate Sanchez, Christina denied that Sanchez fondled her because she didn't want to get him into trouble and because the other kids would be angry if Christina's actions caused the flow of gifts to stop. (RT 715 – 717.)

Sanchez babysat Tara M's young daughter Tiffany. (RT 725.) At times, Sanchez picked up Tiffany and took her for ice cream. Often, T. accompanied Sanchez. (RT 725.) When her daughter was 3, Tara was bathing her. The little girl rubbed a crayon between her legs and said, "Papa does this with a screwdriver." (RT 727 – 728.) Around the same time, when the child returned from Sanchez' house she had talcum powder around her vagina. (RT 727.) Tara terminated contact with Sanchez and told

him that he could not help himself to her daughter. (RT 727 – 728.) Tara reported Sanchez' actions to the police. (RT 725.)

When Lisa S. was young, Blondie was her neighbor. (RT 734.) Blondie took her bowling and golfing and bought her candy. (RT 735 – 736.) When they were alone, Blondie fondled her breasts and vagina. (RT 736.) This occurred when he placed her on the washing machine, or in his car or on the bed. (RT 737.) After speaking with the defense investigator, Lisa S. contacted the police.

During that time that they lived together, Zayas and Melanie were physically abusive to each other. (RT 755.) After he and Melanie had a confrontation, T. accused him of molesting her. (RT 776.) T. watched porn channels on the cable television and appeared to be engrossed. (RT 766 – 767.) Those channels showed depictions of sexual intercourse. (RT 767.)

Zayas thought that Sanchez spent too much time with T.. When T. returned home, she always had a gift or money. (RT 769.)

The defense argued that T. lacked credibility. (RT 843.) T. lived in a home in which the men beat Melanie and T. fabricated incidents of molest to protect her mom. (RT 844.) T.'s accounts of the incidents to the CART interview and her trial testimony were inconsistent. (RT 851.) She didn't know what intercourse entailed. (RT 844.) She described ejaculate as green. (RT 844.) She described that she and appellant were lying face to face

during their encounters, which would have been physically impossible given their size difference. (RT 845.)

The defense contended that April disliked Melanie and April influenced T. by repeatedly discussing the events with her. (RT 847.) T. claimed that appellant raped her without touching her. In actuality, it was Sanchez who was touching her. (RT 852.)

There was no physical evidence of rape. (RT 854.) If an adult rapes an 8 year old, it would be likely that her hymen would be torn, but that was not the case. (RT 855.)

A. and H.'s stories differed. It was T. and Lisa who told the kids to undress. Patting the kids' legs was nothing more than affection. (RT 856 – 857, 859 - 860.)

It was Sanchez' pattern of behavior that connected him to T.. (RT 864.) He molested her in 1994 and had a sexual interest in her. (RT 865.) He showered her with gifts. Sanchez was there on the night that T. reported the rape and on the morning before the sleepover. T. couldn't risk accusing Sanchez of molestation but blamed it on appellant. (RT 865.)

INTRODUCTION

It is axiomatic that the Sixth Amendment right to a trial by jury and the Due Process Clause of the Fourteenth Amendment entitle a criminal defendant to a jury determination of every element of the offense with which he is charged on the basis of proof beyond a reasonable doubt. (*United States v. Gaudin* (1995) 515 U.S. 506, 510; *In re Winship* (1970) 397 U.S. 358, 364.)

Historically, there was no differentiation between elements of a crime and factors that a trial court could consider when sentencing a defendant. Crimes were sanction specific and left the judge little sentencing discretion, other than a pardon. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 479 [*“Apprendi”*].) However since the 1800’s, there has been a shift from statutes providing fixed-term sentences to those granting judges discretion to sentence an offender within fixed statutory or constitutional limits. (*Id.* at pp. 481 – 482.) The court’s exercise of discretion was commonly based on facts determined by the court by a preponderance of the evidence.

However, since the United States Supreme Court has issued opinions in *Apprendi* and *Blakely v. Washington* (2004) 124 S.Ct. 2531[*“Blakely”*], the sentencing landscape has changed because these cases make clear that, “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.” (*Apprendi, supra*, 530 U.S. 466, 477.) The statutory maximum is defined as the maximum a court may impose *without* any additional findings. (*Blakely, supra*, 124 S.Ct. 2531, 2537.)

Mr. Black maintains that *Blakely* and *Apprendi* affect California’s sentencing scheme in two significant ways. First, because the midterm is the presumptive choice when sentencing a defendant pursuant to California’s Determinate Sentencing Law, all facts on which the prosecution or court relies to impose the aggravated term must be tried to the jury and proven beyond a reasonable doubt. (Pen. Code §1170, subd. (a)(3); *People v. Jackson* (1987) 196 Cal.App.3d 380, 391; *People v. Leung* (1992) 5 Cal.App.4th 482, 508; Cal. Rules of Court, rule 4.420, subd. (a).)

Second, because concurrent sentences are the presumptive term pursuant to Penal Code section 669, and the court is required to make findings extrinsic to those found by the jury in order to impose a consecutive sentence, all sentencing schemes that grant discretion to the court to impose terms consecutively fall within the *Apprendi/Blakely* restrictions as well.

Accordingly, these sentencing schemes must “be implemented in a way that respects the Sixth Amendment.” (*Blakely, supra*, at p. 2540.)³

³ The United States Supreme Court is considering *Blakely’s* effect on both federal and state sentencing schemes. (*United States v. Booker* (7th Cir. 2004) 375F.3d 508 cert. granted, 73 U.S.L.W. 3074 (U.S. Aug. 2, 2004) (No. 04-104), and *United States v. Fanfan* (D. Me. June 28, 2004) No. 03-47, 2004 WL

ARGUMENT

THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE JURY TO FIND BEYOND A REASONABLE DOUBT FACTS THAT ARE USED EITHER TO AGGRAVATE A DEFENDANT’S SENTENCE OR IMPOSE CONSECUTIVE SENTENCES

A. Evolution Of The *Blakely* Rule

For the past two decades, the United States Supreme Court has struggled to create a consistent rule that considered both the legislative prerogative to define the elements of crimes and a criminal defendant’s constitutional rights.

In *McMillan v. Pennsylvania* (1986) 477 U.S. 79, [*McMillan*], the Supreme Court coined the term “sentencing factor.” *McMillan* involved a challenge to a Pennsylvania law that mandated a minimum of 5 years imprisonment for enumerated felonies if a judge found by a preponderance of the evidence that the defendant visibly possessed a firearm during the commission of a specified offense.

In consolidated cases, petitioners argued that statute was unconstitutional under the 6th and 14th Amendments because “visible possession” was an element of offense requiring proof beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. 358.) Petitioners also argued that

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even if visible possession was not an element, due process required proof beyond a reasonable doubt.

The Supreme Court disagreed and held that a trial court could find a sentencing factor to be true by a preponderance of the evidence without offending the Constitution when the finding did not subject a defendant to a greater punishment than that permitted by law. (*Id.* at pp. 88, 91 – 93.)

The Supreme Court revisited the issue in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [“*Almendarez-Torres*”] and appeared to extend *McMillan’s* holding. In *Almendarez-Torres*, the defendant pleaded guilty to a violation of re-entering the United States after having been previously deported. (18 U.S.C § 1326, subd. (a).) He also admitted that he had suffered three prior convictions for aggravated felonies. (*Id.* at p. 227.) Subdivision (a) provides for a sentence of no more than two years imprisonment. However, 18 U.S.C section 1326 subdivision (b)(2) specified that a defendant could be subject to imprisonment for a term of up to 20 years if he was previously deported “subsequent to a conviction for commission of an aggravated felony.” (*Almendarez-Torres, supra*, at p. 226.)

At sentencing, *Almendarez-Torres* asserted he could not be sentenced to the aggravated term because the indictment mentioned neither the code section providing for the aggravated term nor his earlier aggravated felony convictions.

The United States Supreme Court recognized that the deportation statute changed the maximum penalty for the crime. Nonetheless, the Court concluded that Congress has power to treat a prior conviction as a sentencing factor. (*Id.*, at p. 247.)

Apprendi v. New Jersey (2000) 530 U.S. 466 and subsequent cases appeared to limit the holdings in *McMillan* and *Almandarez-Torres* by holding that there were constitutional limits to State's authority to define away facts that were necessary to constitute criminal offense. (*Apprendi, supra.*, at pp. 486 – 487.)

Apprendi fired shots into the home of an African American family. Initially, he claimed that he fired the shots because he did not want a black family in his previously all white neighborhood but then retracted the statement. He pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose (N. J. Stat. Ann. § 2C:39-4a), and one count of the third-degree offense of unlawful possession of an antipersonnel bomb. (N. J. Stat. Ann § 2C:39-3a.) Under New Jersey law, a second-degree offense carries a penalty range of 5 to 10 years. (N. J. Stat. Ann § 2C:43-6(a)(2).) Following a hearing on the purpose of the shooting, the court found by a preponderance of the evidence that Apprendi had committed a hate crime and enhanced Apprendi's sentence. Apprendi asserted that the Due Process Clause of the Fourteenth Amendment required the jury to make factual determinations based on proof beyond a reasonable

doubt before an increase in the maximum prison sentence could be imposed.

The United States Supreme Court agreed and held that the Due Process Clause of the Fourteenth Amendment and a defendant's right to a jury trial as guaranteed by the Sixth Amendment required that, "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." (*Id.*, at p. 477.)

Two years later in *Ring v. Arizona* (2002) 536 U.S. 584 ["*Ring*"], the High Court relied on *Apprendi* and struck down an Arizona statute that permitted the trial court to find certain enumerated factors in a capital case and sentence a defendant to death. Ring argued that Arizona's capital sentencing scheme violated the Sixth Amendment's jury trial guarantee because it permitted the court to find facts that raised the defendant's maximum penalty from life imprisonment to death.

The United States Supreme Court refused to distinguish the capital sentencing scheme from other situations and instead, quoting *Apprendi*, recognized that all facts that increase a defendant's authorized sentence must be proven to a jury beyond a reasonable doubt.

The dispositive question, we said, "is one not of form, but of effect." *Id.*, at 494. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt. See *id.*, at 482-

483. A defendant may not be "exposed . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483; see also *id.*, at 499 (SCALIA, J., concurring) ("All the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.") (*Ring, supra*, 536 U.S. 584, 602.)

Ring found *Walton v. Arizona* (1990) 497 U.S. 639 to be irreconcilable with *Apprendi* and overruled *Walton* to the extent that *Walton* allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. (*Ring* at p. 608.)

Later that year in *Harris v. United States* (2002) 536 U.S. 545, the Court was given an opportunity to overrule *McMillan*, but declined to do so. The *Harris* court found that the defendant could be sentenced to a mandatory-minimum of 7 years based on the trial court's finding that he brandished a weapon in relation to a drug trafficking offense. Nonetheless, the Court limited the holding in *McMillan* "to cases that do not involve the imposition of a sentence more severe than the statutory maximum..." (*Harris, supra*, at p. 563.)

Finally, this year the United States Supreme Court decided *Blakely v. Washington, supra*, 124 S.Ct. 2531, applied the *Apprendi* rule to a state sentencing scheme similar to California's Determinate Sentencing Law and clarified the meaning of statutory maximum.

In *Blakely*, the defendant pleaded guilty to second-degree kidnapping involving domestic violence and admitted a firearm enhancement. Under the law of the State of Washington, second-degree kidnapping is a class B felony that carries a maximum sentence of ten years. (Wash. Rev. Code § 9A.20.021(1)(b).) However, Washington’s Sentencing Reform Act [“Act”] limits the sentence for kidnapping with a firearm to a "standard range" of 49 to 53 months. (Wash. Rev. Code § 9.94A.320.) The Act permits a trial court to impose a sentence in excess of that range if it finds “substantial and compelling reasons to justify an exceptional sentence.” (Wash. Rev. Code § 9.94A.210(2).) To impose an “exceptional sentence” a trial court must consider factors other than those that are used in computing the standard range sentence for the offense. *Blakely* was sentenced to a term of 90 months because the trial court determined that he used “deliberate cruelty” in carrying out the offense. (*Blakely, supra*, 124 S. Ct. 2531, 2535, citing *State v. Gore* (2001) 143 Wn. 2d 288, 315-316, 21 P. 3d 262, 277.) He appealed and argued that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

No matter how aggravating facts are labeled, facts that increase a defendant’s sentence beyond the statutory maximum must be tried to a jury. The State argued that the relevant "statutory maximum" was not 53 months, but the 10-year maximum for class B felonies in section 9A.20.021(1)(b).

The Court disagreed and relying on *Apprendi*, *Harris* and *Ring* defined the maximum term as that which a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant. “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.” (*Blakely*, *supra*, 124 S. Ct. 2531, 2537.)

The majority opinion emphasized that it’s ruling was more than a procedural formality. Instead the Court’s commitment to *Apprendi* gives “intelligible content to the right of jury trial.” (*Id.*, at p. 2538.)

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. (*Id.*, at pp. 2538 – 2539.)

The rule set forth in *Apprendi* and *Blakely* ensures “that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.” (*Id.* at p. 2539.)

The High Court did not make determinate sentencing schemes unconstitutional, but mandated that such schemes “be implemented in a way that respects the Sixth Amendment.” (*Blakely*, *supra*, at p. 2540.)

B. The Limited Scope Of The Exception To the *Blakely* Rule

Apprendi and *Blakely* exempted the fact of a prior conviction from those facts, which require a jury finding. By doing so, *Apprendi* left in tact, for now, the holding of *Almendarez-Torres v. United States, supra*, 523 U.S. 224, which permitted the court to increase the maximum sentence based upon prior convictions which were not charged, but were admitted by the defendant at the time of his plea. Unlike the issues of *Apprendi* and *Blakely*, *Almendarez-Torres* was based on the defendant's lack of notice of the charge because the Government failed to allege the prior convictions in the indictment

In *Almendarez-Torres* the Supreme Court left unanswered the question of when a prior conviction might be subjected to a higher standard of proof:

We mention one final point. Petitioner makes no separate, subsidiary, standard of proof claims with respect to his sentencing, perhaps because he admitted his recidivism at the time he pleaded guilty and would therefore find it difficult to show that the standard of proof could have made a difference to his case. Accordingly, we express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence. (*Almendarez-Torres, supra*, 523 U.S. at p. 247-248.)

Given the Supreme Court's subsequent holdings in *Apprendi* and *Blakely*, it appears that the application of *Almendarez-Torres* has been limited, especially when a prior conviction substantially increases a defendant's sentence.

Furthermore, *Almendarez-Torres* relies on the Supreme Court's conclusion in *McMillan* and *McMillan's* holding has been curtailed, if not eliminated by subsequent cases.

C. Blakely's Effect on California's Upper Term Sentence

Mr. Black was sentenced to the aggravated term of sixteen years on count one for the continuous sexual abuse of a child. (RT 950 – 951.) He maintains that the facts on which the court relied to impose this term were neither tried to the jury nor found beyond a reasonable doubt.

California's Determinate Sentencing Law permits a triad of sentencing choices. (Pen. Code §1170, subd. (a)(3).) Penal Code section 1170, subdivision (b) mandates the court to select the middle term unless there are mitigating or aggravating circumstances. (see *People v. Jackson* (1987) 196 Cal.App.3d 380, 391; *People v. Leung* (1992) 5 Cal.App.4th 482, 508; Cal. Rules of Court, rule 4.420, subd. (a)), and provides in pertinent part:

When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, **the court shall order imposition of the middle term**, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. 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.... (*Ibid*; Emphasis added.)

The implementing provision, California Rules of Court, rule 4.420 specifies that circumstances in aggravation shall be established by the preponderance of the evidence and states in part:

(a) 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 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.**

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected. [Emphasis added]”

Because California expressly forbids the dual use of facts included in the element of the offense to impose the aggravated term (Cal. Rules of Court, rule 4.420, subd. (d)), the Determinate Sentencing Law necessarily requires facts beyond those determined by the jury. In this regard,

California's sentencing scheme mirrors the Washington law discussed in *Blakely*. The Washington Act gives a standard range to which a court may sentence a defendant without the use of additional facts, while California's law presumes a midterm sentence without the use of additional facts. Washington's exceptional sentence (i.e., a sentence based on extrinsic, aggravating facts) is tantamount to California's aggravated sentence. This is important because in *Apprendi*, the United States Supreme Court held that the jury must determine any fact that increases the penalty for a crime beyond the prescribed statutory maximum. As previously noted, in *Blakely*, the court defined the statutory maximum as the maximum sentence that the court may impose *without* any additional findings. (*Blakely, supra*, at p. 2537.) Therefore, the maximum sentence that may be imposed in Washington is the standard range, while the statutory maximum in California is the midterm. The *Blakely* court made this clear when it rejected the State's position that the maximum term to which *Blakely* could be sentenced was the 10-year "exceptional" term that Washington law specifies for class B felonies. (Wash. Rev. Code § 9A.20.021(1)(b).)

The constitutional limitation on judicial discretion applies even if the court is required to impose the upper term after finding a specified fact. As the *Blakely* opinion noted:

Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that

judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence. (*Blakely, supra*, at p. 9 fn. 8; emphasis in original.)

Accordingly, *Blakely* requires that aggravating factors be submitted to the jury and proven beyond a reasonable doubt.

D. The Effect of *Blakely* On California's Consecutive Sentencing Scheme

The principals gleaned from *Blakely* and its predecessors are equally applicable to the imposition of consecutive terms. Like sentencing enhancements, the imposition of consecutive terms increase the punishment to which an offender is subject and implicate *Apprendi's* and *Blakely's* concern with the heightened loss of liberty and stigma attached to an offense when a defendant is subjected to increased punishment. All of Mr. Black's terms were imposed consecutively. The court ordered that counts 2 and 3 (indeterminate terms imposed pursuant to Penal Code section 667.61, subdivision (b)) run consecutive to the determinate term imposed in count one and to each other. (RT 950 – 952.)

In California, the imposition of concurrent terms is the presumptive sentence. (Pen. Code § 669.) Additionally, consecutive terms may not be imposed by facts that were neither presented to a jury nor found true beyond a reasonable doubt. Accordingly, pursuant to *Blakely* and *Apprendi*,

California's consecutive sentencing scheme violates a defendant's right to a jury trial and proof beyond a reasonable doubt under the Sixth and Fourteenth Amendments.

1. The Concurrent Sentence Is the Presumptive Term

Penal Code section 669 governs the imposition of consecutive sentences. A review of the early history of section 669 reveals a legislative preference for concurrent terms.

First enacted in 1872, Penal Code section 669 provided for consecutive terms when a defendant was sentenced together on two or more offenses:

When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term or imprisonment as the case may be. (*People v. Radovich* (1943) 61 Cal.App.2d 177, 179.)

In all other cases, the sentences were to run concurrently. (*Ibid.*)

The 1927 amendment continued to reveal a statutory preference for consecutive sentences but granted increased judicial discretion by adding the proviso, "*provided*, that in exceptional cases the judgment, in the discretion of the court, may direct that such terms of imprisonment, or any of them, shall run concurrently." (*People v. Radovich, supra*, 61 Cal.App.2d 177, 179 – 180.)

The 1931 amendment indicated a diminishing preference for consecutive sentencing by omitting the exceptional case language. As amended, Penal Code section 669 stated:

When any person is convicted of two or more crimes, the judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced as the case may be. (*Id.* at p. 180.)⁴

If the courts failed to state how the sentences should be imposed, they were presumed to run concurrently. “No presumption will be indulged in favor of sustaining a sentence as cumulative.” (*Id.*, at p. 183.)

Although later amendments also addressed the relationship of enhancement and life sentences to determinate terms, no amendment again expressed a preference for consecutive sentencing.

Today, Penal Code section 669 provides in pertinent part:

(a)When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, 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.....**Upon the failure of the court to determine how the terms of imprisonment on the**

⁴ The 1943 Amendment: added "whether with or without possibility of parole" in the proviso in the first sentence.

second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently. . (Emphasis added.)

Accordingly, under California law, a concurrent sentence is the presumptive term.⁵

Concurrent sentencing is also the presumptive term under the definition set forth in *Blakely*. As previously noted, the *Blakely* Court defined the maximum term as that which the judge may impose *without* any additional findings.” (*Blakely, supra*, 124 S. Ct. 2531, 2537.) However, in California the imposition of consecutive terms is a sentencing choice (Pen. Code § 1170, subd. (c)) that requires the court to find extrinsic facts. California Rules of Court, rule 4.425 sets out the criteria affecting the decision to impose consecutive rather than concurrent terms and provides:

(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

⁵ See also Penal Code section 1203.2a which was enacted to prevent inadvertent consecutive sentences that would deprive a defendant of the benefit of Penal Code section 669, providing that sentences shall be concurrent unless a judge orders otherwise. (*People v. Ruster* (1974) 40 Cal.App.3d 865, 870; overruled on other grounds in *In re Hoddinott* (1996) 12 Cal.4th 992, 1005.)

time and place as to indicate a single period of aberrant behavior. (Subd (a) as amended effective January 1, 1991.)

(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. (Subd (b) as amended effective January 1, 1991.)

This rule incorporates factors in aggravation on which a court may rule in support of the imposition of a consecutive term. (See Cal. Rules of Court, rule 4.421.) ⁶ Like the imposition of the upper term, a court may not

⁶ California Rules of Court, rule 4.421 list the following factors in aggravation:

(a) (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; (2) The defendant was armed with or used a weapon at the time of the commission of the crime; (3) The victim was particularly vulnerable; (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission; (5) The defendant induced a minor to commit or assist in the commission of the crime; (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process; (7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed; (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism; (9) The crime involved an attempted or actual taking or damage of great monetary value; (10) The crime involved a large quantity of contraband; (11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

use a fact that is an element of the offense or inherent in the offense to impose consecutive sentences. (*People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159-1160; see also *People v. Smith* (1984) 155 Cal.App.3d 539.)

Therefore, in order to sentence a defendant to consecutive terms, a court must necessarily determine facts that were neither presented to, nor found true beyond a reasonable doubt by a unanimous jury. Accordingly, pursuant to *Blakely* and *Apprendi*, the imposition of a consecutive based on facts that were neither presented to the jury nor found true beyond a reasonable doubt violates a defendant's right to a jury trial and proof beyond a reasonable doubt under the Sixth and Fourteenth Amendments.

Two recent California cases hold otherwise. Their reasoning, however, does not stand up to scrutiny. In *People v. Sykes* (2004) 120 Cal.App.4th 1331, the Second District Court of Appeal held that because *Apprendi* and *Blakely* were single counts cases, they did not "purport to create a jury trial right to the determination as to whether to impose consecutive sentences." (*Id.*, at p. 1344.) In fact, in both *Blakely* and *Apprendi* the defendants were convicted of multiple counts. (*Blakely, supra*, 124 S.Ct. at p. 2535, fn. 2; *Apprendi, supra*, 530 U.S. at p. 474.) However, the United States Supreme Court did not consider whether the *Apprendi* rationale extended to consecutive sentences.

Next, the *Sykes* court reasons that *Apprendi* and *Blakely* are inapplicable to consecutive terms because the defendant has already been convicted of the substantive offense beyond a reasonable doubt. (*People v. Sykes, supra*, 120 Cal.App.4th 1331, 1345.) However, in *Apprendi* and *Blakely*, the relevant consideration was not whether all of the elements of a crime have been presented to the jury, but rather whether the facts that increase a defendant's punishment have been tried to the jury beyond a reasonable doubt. Both *Apprendi* and *Blakely* had been properly convicted of offenses before the improper enhancing facts were found by the court.

In *People v. Vonner*, 2004 Cal. App. LEXIS 1334, filed August 16, 2004, the Second District Court of Appeal, Division 6 held that the *Blakely* rule did not apply because the sentence was imposed pursuant to Penal Code section 667.6, subdivision (c), an alternative sentencing scheme,

(1) The defendant has engaged in violent conduct which indicates a serious danger to society; (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness; (3) The defendant has served a prior prison term; (4) The defendant was on probation or parole when the crime was committed; (5) The defendant's prior performance on probation or parole was unsatisfactory. (Subd (b) as amended effective January 1, 1991.)

(c) Any other facts statutorily declared to be circumstances in aggravation.

which expressly authorizes full consecutive sentences whether or not the crimes were committed during a single transaction (*People v. Vonner, supra*, at pp. *13 – 14, 17.) However, this reasoning fails to consider that consecutive sentencing, pursuant to Penal Code section 667.6, subdivision (c), is a discretionary sentencing choice as defined by Penal Code section 669, and the court is required both to state reasons for sentencing the defendant pursuant to 667.6, subdivision (c) and for running the terms consecutively. (*People v. Ramirez* (1985) 165 Cal. App. 3d 214, 219 – 220.) Furthermore, factors in aggravation set forth in California Rules of Court, rule 4.425 (formerly 425) are applicable to sentencing under 667.6 subdivision (c). (*People v. Belmontes* (1983) 34 Cal. 3d 335, 347.)

The *Vonner* Court also contended that *Blakely* didn't apply because Vonner could have been sentenced to a term of 16 years. Because he was sentenced to 12 years, his sentence fell within the statutory range and therefore, *Blakely* didn't apply. This was the same argument proffered by the State of Washington and soundly rejected by the *Blakely* Court. (*Blakely, supra*, 124 S.Ct. 2531, 2537.)

Vonner was convicted of one count of forcible lewd conduct on a child under the age of 14 (Pen. Code §288, subd. (b)(1)), and committing a lewd act on a child under the age of 14 (Pen. Code § 288, subd. (a).) Each offense was punished by a term of three, six or eight years. Accordingly, Vonner could only be subjected to a maximum term of 16 years if the court imposed full consecutive, aggravated sentences. The problem with the *Vonner* Court's reasoning is that the highest presumptive concurrent term to which Vonner could be sentenced was only eight years (assuming the imposition of the aggravated term was correct.) Therefore, his sentence of 16 years fell outside of the range to which he was subjected without a finding of additional facts and violated the mandates of *Apprendi* and *Blakely*.

2. *Blakely* and *Apprendi* Apply to Consecutive Sentencing For Both Determinate and Indeterminate Terms

The fact that Mr. Black was sentenced to consecutive terms pursuant to Penal Code section 667.61, subdivision (b), does not change the analysis. (CT 436.) Penal Code section 667.61, subdivision (b) subjects a defendant to a term of 15 years to life when he commits a specified sexual offense, including Penal Code section 288, subdivision (a). (Pen. Code § 667.61, subd. (c)), under one of the circumstances specified in subdivision (e). Here, Mr. Black was convicted of committing the offense against more than one victim. (Pen. Code § 667.61, subd. (e)(5).) The statute specifies neither concurrent nor consecutive sentencing. In contrast, other statutes not

applicable here, mandate consecutive sentencing. (See e.g. Penal Code § 667.6, subd. (d).)

Because the court has the discretion to impose consecutive or concurrent terms pursuant to Penal Code section 667.61, subdivision (b), section 669 applies and states in part:

Life sentences, whether with or without the possibility of parole, **may** be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction. (Emphasis added.)

Accordingly, sentencing a defendant to a consecutive term pursuant to Penal Code section 667.61 without a jury finding of the facts on which the consecutive sentencing is based violates *Apprendi* and *Blakely*, as well.

When determinate and indeterminate terms are imposed consecutively to each other and there still must be aggravating factors, which permit imposition of a consecutive term. (See e.g. *People v. Valenzuela* (1995) 40 Cal.App.4th 358, 365 [adopting a “transactional relation” standard in order to justify a consecutive term]) and the court must state reasons for its sentencing choice. (*People v. Dixon* (1993) 20 Cal. App. 4th 1029, 1037.)

Likewise, indeterminate terms may run concurrently or consecutively to each other. (Pen. Code §669; *People v. Morris* (1971) 20 Cal.App.3d 659, 667 overruled on other grounds in *People v. Duran* (1976) 16 Cal.3d 282, 292.) Mr. Black acknowledges that traditionally a court was not required to state sentencing reasons for imposing consecutive indeterminate terms because those terms are not imposed pursuant to Penal Code section 1170, subd. (c), which relates to determinate terms and requires a statement of reasons. (See Cal. Rules of Court, rule 4.403; *People v. Arviso* (1988) 201 Cal.App.3d 1055.) Rather, indeterminate terms are imposed pursuant to Penal Code section 1168, subdivision (b), which is silent as to the requirement of a statement of reasons. Nonetheless, there still must be aggravating factors, which permit the imposition of a consecutive term. (See e.g. *People v. Valenzuela* (1995) 40 Cal.App.4th 358, 365 [adopting a “transactional relation” standard in order to justify a consecutive term].) Accordingly, it is the jury that must decide whether the aggravating factors were proven beyond a reasonable doubt.

Because in California, concurrent sentencing is the presumptive term, a holding that vests the trial court with the unfettered discretion to impose consecutive indeterminate terms and increase a defendant’s punishment without the necessary jury findings, would violate the both the spirit and law of *Apprendi* and *Blakely*.

3. Stacking Indeterminate Terms Vastly Increases A

Defendant's Punishment

Mr. Black recognizes that *Blakely* holds that the trial court has the discretion to sentence a defendant within the statutory range. Practically, a life term is the outer edge of range. However, the imposition of consecutive life terms greatly increases a defendant's punishment by extending his earliest possible date of parole eligibility by 15 or more years for each count for which an indeterminate sentence is imposed. (See e.g. Pen. Code § 667.61, subd. (b).) It is easily conceivable that consecutive sentencing will transmute a potentially parole eligible defendant into a defendant who has no possibility of ever securing his release. Therefore, the statutory maximum is altered when two or more life terms are imposed. Like enhanced determinate sentencing, the imposition of multiple life terms heightens a defendant's loss of liberty and deserves constitutional protection.

Blakely appears to suggest that the statutory maximum of each count is considered individually. (*Blakely, supra*, 124 S.Ct. 2531, 2537, fn.2.) Therefore, the aggregate punishment or sentencing range for two life terms is necessarily greater than for one. Accordingly, the *Blakely* rules must apply to indeterminate as well as determinate terms.

E. Application of These Principles To Mr. Black's Case

The trial court sentenced appellant to the upper term of 16 years on count one - continuous sexual abuse. (Pen. Code § 288.5) Imposing the aggravated term, the court stated:

The Court is selecting the upper term of 16 years, because of the nature, seriousness, and circumstances of the crime. The Defendant forced the victim, T., to have sexual intercourse with him on numerous occasions. She – the victim was particularly vulnerable to him. He was her stepfather. He baby-sat these children when the mother was away. She was only eight when this happened. He threatened her. He inflicted emotional and physical injury on her. She has described physical pain and bleeding. She, in the Court’s opinion, undoubtedly has suffered serious emotional injury. And the injury is magnified by her own mother’s reaction to this whole situation. The – so – the – those factors and the others – the Defendant took advantage of a position of trust and confidence to commit this offense – those and the other factors cited in aggravation in the people’s brief, the Court adopts and sets the term of 16 years. (RT 950 – 951.)

In her sentencing brief, the district attorney cited 4 aggravating factor relating to the crime: 1) The crimes involved great violence⁷; 2) The victims were particularly vulnerable; 3) The manner in which the crime was carried out indicated planning and; 4) The defendant took advantage of a position of trust and confidence to commit the offense. (CT 385 – 386.)

In addition, she listed 3 factors in aggravation that related to petitioner: 1) The defendant is a danger to society; 2) The defendant’s prior convictions of increasing seriousness; 3) The defendant was unremorseful.

The elements of the offense of the continuous abuse of a child mirror the statutory language:

...[a]ny person who either resides in the same home with the minor child *or has recurring access to the child*, who over a period of time, not less than three months in duration, engages

⁷ The jury did find that the defendant committed the continuous sexual abuse by force, duress and violence, however, there was no finding of **great** violence of required by California Rules of Court, rule 4.421 (a). (CT 373.)

in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct under Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years. (Italics added.) (*People v. Rodriguez* (2002) 28 Cal. 4th 543, 546.)

The jury was so instructed. (RT 909 – 910.)

However, no factor listed by the court or the district attorney was one that the jury necessarily found in arriving at a verdict. Furthermore, *Almendarez-Torres*' prior conviction exception, if any, is inapplicable to the present case because Mr. Black's prior convictions did not involve the fact of the conviction itself, but rather necessitated a jury finding of whether the convictions were of increasing seriousness and therefore, could be used to enhance his sentence.

The same is true of the factors that the court used in imposing the terms consecutively. Mr. Black notes that mixed determinate and indeterminate sentencing choices requires a statement of reasons. (*People v. Dixon* (1993) 20 Cal. App. 4th 1029, 1037.)

Regarding Count 2, the court stated:

This involved a separate victim. It occurred at -- separately from many of the offenses committed against T. in Count 1. It involved a breach of confidence. These children were allowed to attend a slumber party at his home, and it was expected that they would be safe and cared for by the mother of these children, and obviously it was used as an opportunity to

initiate them into all sorts of inappropriate sexual and perhaps better sexualized conduct. (RT 951.)

Regarding Count 3, the court stated:

And this involved a different victim and a different offense against a different victim. Again, in light of the Defendant's total conduct in this case, with respect to not only T., but her friends, the Court believes that the seriousness and nature of the offense of a predatory nature, of not only selecting the stepdaughter, but her friends to engage in his conduct, makes these sentences appropriate. (RT 951 – 952.)

The only factor that the jury found upon which the court relied was that petitioner sexually abused more than one victim. For each count, it was alleged that defendant committed the offense on more than one victim within the meaning of Penal Code section 1203.066, subdivision (a)(7). (CT 104, 105, 106.)

Petitioner was sentenced to consecutive terms of 15 years to life pursuant to Penal Code section 667.61, subdivision (b), because of the multiple victim allegation. However, once that factor was used to bring petitioner within the One-Strike Law, it was unavailable for use to support a consecutive term. (*People v. Mancebo* (2002) 27 Cal.4th 735, 742; *People v Fernandez* (1990) 226 Cal.App.3d 669; Pen. Code § 667.61, subd. (f).) Accordingly, petitioner was sentenced consecutively without the necessary jury findings in violation of the United States Supreme Court's holdings in *Blakely* and *Apprendi*.

F. The Error Was Prejudicial Under A Per Se Or *Chapman* Standard

The *Blakely* Court remanded the action to the Washington appellate court “for proceedings not inconsistent with this opinion.” (*Blakely, supra*, 124 S.Ct. 2531, 2543.) The opinion did not address whether the error automatically required reversal of the sentence or was susceptible to harmless error review. Under either view, reversal is required in this case.

The error is a “structural defect,” not amenable to harmless error review, because the wrong entity, the judge rather than the jury, adjudicated both the aggravating factor and the factors used to sentence petitioner consecutively and applied the wrong standard of proof. (Cf. *Sullivan v. Louisiana* (1993) 508 U.S. 275.) It’s true that the failure to instruct a jury on a single element is subject to *Chapman* harmless error analysis and is not per se reversible. (*Neder v. United States* (1999) 527 U.S. 1; *People v. Flood* (1998) 18 Cal.4th 470.) But in *Neder* and *Flood*, juries were seated and reached verdicts, and only one element/fact was not decided by the jury because of instructional error. (*Neder v. United States, supra*, 527 U.S. at 4; *People v. Flood, supra*, 18 Cal.4th at 475.)

In this case, no jury at all was seated for petitioner’s sentencing and none of the facts used to sentence petitioner to the aggravated term or consecutively were decided by a jury. Because petitioner was denied a jury

verdict on these facts, and the court applied the wrong standard of proof, the error is structural and automatically reversible.⁸

But even if the error is not structural, reversal is required because it was not harmless. This Court and federal courts have held that conventional *Apprendi* errors on enhancements are subject to the *Chapman* standard. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1209-1211; *United States v. Garcia-Guizar* (9th Cir. 2000) 234 F.3d 483, 488-489.) Under *Chapman*, the state must prove that the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) But, in the context of an error affecting the right to a jury trial on elements or enhancements, a reviewing court cannot simply ask whether there was “overwhelming evidence” supporting the finding in question. A far more rigorous form of *Chapman* analysis, focusing on what facts the fact-finder necessarily found in reaching a decision is required in this context. The error, in this context, is not harmless if the omitted element is susceptible to dispute:

If, at the end of that examination, the [reviewing] court cannot conclude beyond a reasonable doubt that the jury verdict

⁸ Support for this approach is found by analogizing to the ineffective assistance of counsel context, where a defendant complaining about erroneous advice in connection with his or her acceptance of a plea offer need show only that he or she would have gone to trial but for the bad advice, not that he or she would have prevailed at such trial. (*Hill v. Lockhart* (1985) 474 U.S. 52, 59.) The right to a jury trial is so inviolable that usual notions of harmless error analysis do not apply to it.

would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless. (*Neder v. United States*, *supra*, 527 U.S. at 19.)

In the present case, it is questionable whether a jury would have found the factors cited by the court to be true. Some of the factors cited by the trial court, such as the seriousness of the offense and the vulnerability of the victim were inherent in the crime itself. The fact that petitioner was unremorseful is questionable and was most likely based on petitioner's denial that he committed the offense. The prosecution asserted that petitioner was convicted of two felony convictions in 1996 – one for grand theft and the other for commercial burglary. (CT 387.) The underlying facts of these felonies were not presented. A jury may have found that petitioner did not engage in a pattern of criminal behavior that was numerous and of increasing seriousness.

Under these circumstances, the prosecution cannot demonstrate that the denial of petitioner's right to a jury trial and proof beyond a reasonable doubt was harmless.

G. The Claim Is Not Waived by Any Failure to Object

Petitioner's failure to object in the superior court to judicial fact-finding does not waive his constitutional claims. Certain fundamental constitutional rights, such as double jeopardy and the right to jury trial, are not forfeited by a failure to object. For instance, a defendant's failure to object to the discharge of the jury, prior to the adjudication of charged priors, might waive a state statutory error, but it does not waive fundamental claims of double jeopardy and the right to a jury trial. A defendant's failure to object also would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial. [Citations.] (*People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5; see also 592 [same holding re double jeopardy claim]; accord *People v. Valladoli* (1996) 13 Cal.4th 590, 606 [double jeopardy].) More recently, this Court has reaffirmed that [a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (*People v. Vera* (1997) 15 Cal.4th 269, 276 -277 [citing *Saunders*, 5 Cal.4th at 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [constitutional right to jury trial].)

Because Mr. Black contests the denial of his Sixth Amendment right to a jury trial and proof beyond a reasonable doubt on the aggravating factors,

his lack of an objection in the superior court does not forfeit appellate review.

In any event, any waiver is excused because any objection would have been futile. (E.g. *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649; 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].) At the time of petitioner's sentencing, i.e. prior to *Blakely*, it would have been futile to object to request a jury at sentencing in a non-capital sentencing in a California court. And it would have been equally futile to request application of the reasonable doubt standard. California caselaw, statutes, and rules, even after *Apprendi*, remained a barrier to such a claim.⁹ The claim being futile prior to *Blakely*, there is no waiver.

Even without an objection, this Court has discretionary power to review the issue. The fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an appellate court is precluded from considering the issue. (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, 36, p. 497 [original emphasis].) An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party . . . Whether or not it should do so is entrusted to its discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.)

Statutory bases to review the issue also exist under section 1259, which, in relevant part, provides: "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction,

⁹See *People v. Martinez* (2003) 31 Cal.4th 673, 700 (*Apprendi* does not require application of reasonable doubt standard to jury determination of truth of aggravating circumstance in capital case); *People v. Goodridge* (2001) 2001 WL 1656604 at 7-8 (*Apprendi* does not apply to facts used to impose upper term under the DSL); *People v. Nelson* (1978) 85 Cal.App.3d 99, 101-101 (no right to proof beyond a reasonable doubt on aggravating factors used to impose upper term). (Appellant cites the unpublished decision in *Goodridge*, not as controlling authority, but to demonstrate that prior to *Blakely* the legal landscape made *Apprendi* challenges to California's DSL futile.)

or thing whatsoever said or done at the trial or prior to or after judgment, . . . and which affected the substantial rights of the defendant.” Violation of the federal constitutional right to a jury trial and proof beyond a reasonable doubt constitutes an egregious violation of petitioner’s rights under the Sixth and Fourteenth Amendments to the United States Constitution, and thus affects his substantial rights. Furthermore, it constitutes a pure question of law.

Accordingly, waiver does not apply in this situation.

In sum, petitioner was subjected to an aggravated term and consecutive sentences by the use of facts that were neither submitted to the jury nor proven beyond a reasonable doubt as required by *Blakely*, *Apprendi* and the United States Constitution. Accordingly, this matter must be remanded to the Superior Court so that Mr. Black may be properly sentenced.

CONCLUSION

For the reasons stated herein, Mr. Black respectfully requests that this court vacate his sentence, and remand the matter to the Superior Court so that he may be sentenced consistent with this Court's decision.

Dated: September 1, 2004

Respectfully submitted,
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CERTIFICATION OF WORD COUNT

I certify that the foregoing petition contains 11,605 words as counted by the program in Microsoft Word.

EILEEN S. KOTLER