

Post-Black Sample AOB Argument

Sample argument for use in a Post-Black AOB raising a Blakely claim as to upper term aggravating factors. In connection with the optional paragraph regarding recidivist factors, the memo on Shepard v. U.S. found here:

<http://www.fdap.org/downloads/blakely/Shepard.pdf#page=6>, contains a more detailed analysis of the narrow interpretation of Almendarez-Torres.]

I.

The Imposition of an Upper Term Sentence Violated *Blakely v. Washington* and Appellant's Federal Constitutional Rights to a Jury Trial (Sixth Amendment) and Due Process (Fourteenth Amendment).

Like many sentences now pending on appeal in California, the imposition of the aggravated term in this case violated the Sixth Amendment and due process. (*Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531.) *Blakely v. Washington* applies to fact finding on aggravating circumstances necessary for imposition of an upper term under California's Determinate Sentencing Law.

Appellant recognizes that on June 20, 2005, the California Supreme Court held that there is no federal constitutional right to a jury trial on fact-finding relating to aggravating factors used to impose the upper term under California's Determinate Sentencing Law. (*People v. Black* (2005) 35 Cal.4th 1238, 29 Cal.Rptr.3d 740, 113 P.3d 534.) Appellant recognizes that this Court is bound to follow the decisions of the California Supreme Court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and makes this argument to preserve it for federal court review.

Because this Court is bound by *Black* and because this Court is undoubtedly already familiar with the core argument, appellant will forego any extended explanation as to why

Black was decided incorrectly. Appellant will only briefly summarize the rationale for *Blakely*'s application to California upper terms.

In *Blakely v. Washington*, 124 S.Ct. 2531, the Court held that, where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely*, 124 S.Ct. at 2537.)

Because the middle term is the presumptive sentence under California's Determinate Sentence Law and a defendant may only receive an upper term if "aggravating circumstances" are found (Pen. Code § 1170(b)), the California sentencing scheme for judicial determination of those facts under a preponderance standard suffers from the same constitutional defects as the Washington regime reviewed in *Blakely*.

The sentencing court violated *Blakely* by imposing an upper term based on its own findings of aggravating facts not admitted in the plea. Under *Apprendi* and *Blakely*, "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 v. New Jersey*, 530 U.S. at p. 490; *Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2536.) In this case, the court relied on **[insert number of aggravating factors here]** aggravating factors: **[identify aggravating factors here]**. (RT

Oct. 15, 2004 at 8.) Appellant's plea did not admit any of these aggravating circumstances.

[Optional Paragraph: It is true that ___ of the ___ aggravating factors found present were related to recidivism. The *Almendarez-Torres v. United States* (1998) 523 US 224 exception to the right to a jury trial, however, does not apply. That exception is read very narrowly and applies only to the mere fact of a prior conviction. *Shepard v. United States* (2005) 125 S.Ct. 1254, 1262 (plurality opn.).) The so-called "recidivist" factors present in this case fall outside of the *Almendarez-Torres* exception because they go beyond the mere fact of a prior conviction. In any event, there appear to be enough votes on the United States Supreme Court to overrule *Almendarez-Torres*. (*Apprendi*, 530 U.S. at 520-521 (Thomas, J., concur.); *Shepard*, 125 S.Ct. at 1264 (Thomas, J., concur.).)]

The court's findings on the aggravating factors are exactly the kind of offense-related aggravating factors which *Apprendi* and *Blakely* entrust to a jury. In view of the sentencing court's finding of aggravating factors, the court's selection of the upper term was tainted by *Blakely* error and reversal of appellant's sentence is required.