

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff and Respondent,) Crim. No. S125677
)
 v.) (Court of Appeal No. B166312)
) (Sup.Ct.No. PA040926)
)
 SHAWN TOWNE)
)
 Defendant and Appellant.)
 -----)

APPELLANT’S REPLY BRIEF ON THE MERITS

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ARGUMENT

I.

THE TRIAL COURT’S USE OF COUNTS OF WHICH THE DEFENDANT WAS ACQUITTED TO IMPOSE THE UPPER TERM SHOULD BE REVERSED UNDER CALIFORNIA LAW

Appellant asserts that this Court should hold it improper under California law for a sentencing court to impose an upper term based upon counts of which the defendant had been acquitted. (ABM 10-21) This rule, which was posited in *People v. Takencareof* (1981) 119 Cal.App.3d 492, 498, most carefully protects the jury’s role as the factfinder and buffer between the state and the defendant. (See *Blakely v. Washington* (2004) 540 U.S. ____ [159 L.Ed.2d 403, 415-416; 124 S.Ct. 2531].)

Respondent urges this Court to reject this rule primarily because the sentencing court's determination of aggravating factors is based on a lesser burden of proof than the jury's finding on guilt. Therefore, a finding of aggravation based upon acquitted counts is not necessarily inconsistent with the jury's verdict and does not violate federal Double Jeopardy proscriptions. Respondent relies on *United States v. Watts* (1997) 519 U.S. 148 [136 L.Ed.2d 554, 117 S.Ct. 633]. (RBM 10-13) This argument misses the point.

The question as to this argument is not whether the federal constitution precludes reliance on acquitted counts in sentencing the defendant. It is whether this Court should disapprove such practice, as a matter of policy, to promote the state and federal jury trial right and the state due process right. In this context, the question is not whether the jury necessarily rejected the specific fact relied upon to impose sentence, but rather whether the jury *may* have done so. The vice to be avoided is a court's imposition of a sentence based on factual findings that were possibly contrary to those found by the jury and the unfairness that such a practice engenders.¹

^{1/} In this regard, respondent also misunderstands appellant's citation to *People v. Richards* (1976) 17 Cal.3d 614. As the court noted in *Taken care of*, this Court in *Richards* recognized that a defendant, in the course of raising a reasonable doubt as to guilt, should not also have to be concerned with persuading a sentencing court as to whether these facts should enhance a sentence on *different charges*. The restitution order in *Richards* was rejected for a number of reasons. This Court's comment about findings contrary to a verdict of acquittal pointed out only some of the problems, which also included the fact that the specific issue presented to the sentencing court was never litigated by the parties in the context of the sentencing consideration. (*Id.*, at 624.) This is a problem that also plagues the trial court's finding of aggravating factors under Penal

Respondent then goes on to argue that, even if this Court holds that the trial court may not use facts of counts of which the defendant was acquitted to increase a sentence on another count, there was no error here. (RBM 13-14) He argues that the court found that the victim's fear "resulted from the unlawful conduct of taking or driving the victim's vehicle." (RBM 14) He reaches this conclusion because the court focused on the victim's fear when he left the car, which he asserts was "conduct underlying the offense of conviction." (RBM 14)

Not so. The taking of the car that constituted the section 10851 violation occurred *after* the victim had left the car; carjacking was rejected by the jury. (CT 178-187; RT 1211-1217)

Finally, respondent argues that any error was harmless because the trial court mentioned appellant's record in choosing the upper term, and that factor alone *could* have justified that choice. However, the trial court's extensive discussion of the victim's fear demonstrates that it considered that fear a crucial factor in selecting the upper term. Moreover, while the court did not expressly find factors in mitigation, it did note the mitigating aspect of appellant's personality that he was "an innocent of sorts." (RT 2417) Thus, there is a reasonable probability that absent the consideration of the facts underlying the acquitted counts, the court would have imposed the middle or lower

Code section 1170 and makes an assessment of prejudice in permitting it impossible. (See ABM 40-44)

term. (ABM 20-21) Accordingly, the sentence must be reversed. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II.

THE COURT DID VIOLATE APPELLANT’S RIGHT AGAINST DOUBLE JEOPARDY BY USING ACQUITTED COUNTS TO IMPOSE THE UPPER TERM

Appellant urges that, because *Apprendi* and *Blakely* require that aggravating factors used to impose the upper term be proved to a jury beyond a reasonable doubt, the use of acquitted counts as aggravating factors violates the federal Double Jeopardy Clause. (ABM 49-51) Respondent argues against this claim because: the Double Jeopardy Clause does not apply to sentencing determinations; the trial court here did not rely on the acquitted counts; *United States v. Watts, supra*, 519 U.S. 148 held that acquitted counts could be used as sentencing factors; and *Blakely* did not resolve the double jeopardy question. (RABM 15)

Respondent’s arguments are primarily premised on the notion that aggravating factors are mere “sentencing factors” to which no jury trial right attaches. Assuming that appellant is correct that, after *Blakely*, aggravating factors are elemental and must be proved to a jury beyond a reasonable doubt, respondent’s reliance on *Monge v. California* (1998) 524 U.S. 721, 724 [141 L.Ed.2d 615, 118 S.Ct. 2246] and *Watts* is misplaced. And, while *Blakely* did not explicitly disapprove of *Watts* (RABM 15), it did undo its underpinnings by clarifying that some facts were elemental and must go to a jury. Respondent also repeats the argument that the trial court was not relying on the acquitted counts. As discussed above, the record belies this claim. (*Supra*, pg. 3.)

III.

APPELLANT WAS IMPROPERLY SENTENCED UNDER AN UNCONSTITUTIONAL STATUTE

A. The Issue is Cognizable on This Appeal

Relying on the general rule that the failure to assert a right may forfeit it, respondent argues that appellant has forfeited his *Blakely* claim by failing to assert it in the trial court. (RABM 19-22) Respondent is mistaken.

Where changes in the law are unforeseeable, it is unreasonable to expect that trial counsel would have anticipated the change, and the failure to object does not forfeit the issue on appeal. (See *People v. Turner* (1990) 50 Cal.3d 668, 703; *People v. Barnes* (2004) ___ Cal.App.4th ___ [2004 D.A.R. 12010].) Moreover, “reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations].” (*People v. Welch* (1993) 5 Cal.4th 228, 237-238; see also *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *O’Connor v. Ohio* (1966) 385 U.S. 92, 92-93 [where the Court held that a defendant did not waive *Griffin* error by failing to object to a prosecutor’s comments at a trial had before *Griffin* was decided].)

Here, at the time of trial, California law was clear that the trial court made the determination of whether there were factors in aggravation justifying the imposition of the upper term and did so based upon a preponderance of the evidence standard. (See Pen.

Code, § 1170; Cal. Rules of Court, rule 4.420.) No court had yet held that *Apprendi* undermined California's scheme with respect to the trial court's finding of sentencing factors. (See *Barnes, supra*, ___ Cal.App.4th at ___ [2004 D.A.R. at 12018]; *People v. George* (2004) 122 Cal.App.4th 419, 424; see also e.g., *People v. Groves* (2003) 107 Cal.App.4th 1227, 1231.) Prior to *Apprendi*, a jury trial right as to circumstances in aggravation to support the imposition of the upper term had been expressly rejected. (See *People v. Betterton* (1979) 93 Cal.App.3d 406, 410-413; *Barnes, supra*, ___ Cal.App.4th at ___ [2004 D.A.R. at 12018].) And, this Court has always assumed that the trial court could make such factual findings. (See e.g., *People v. Wiley* (1995) 9 Cal.4th 580, 587; *People v. Hernandez* (1988) 46 Cal.3d 194, 205.) Moreover, *Blakely's* clarification of the *Apprendi* rule worked a "sea change." (See *United States v. Ameline* (9th Cir. 2004) 376 F.3d 967, 973.) Thus, counsel could not have been expected to foresee that the court was committing federal constitutional error when it imposed the upper term according to the rules that had been in place in California for nearly 30 years.

Moreover, the forfeiture rules do not apply to certain fundamental constitutional rights. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *People v. Belmares* (2003) 106 Cal.App.4th 19, 27; *People v. Menchaca* (1983) 146 Cal.App.3d 1019, 1025.) The rights to a jury trial and proof beyond a reasonable doubt are recognized as essential. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [124 L.Ed.2d 182, 113 S.Ct. 2078]; *In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 90 S.Ct. 1068];

see also *United States v. Gaudin* (1995) 515 U.S. 506, 509-511 [132 L.Ed.2d 444, 115 S.Ct. 2310].)

Furthermore, nearly every published Court of Appeal decision to address the question has concluded that the issue is not forfeited. (See *People v. Butler* (2004) ___ Cal.App.4th ___ [2004 D.A.R. 12083, 12089]; *Barnes, supra*, ___ Cal.App.4th ___ [2004 D.A.R. at 12018]; *People v. Lemus* (2004) 122 Cal.App.4th 614, 620; *George, supra*, 122 Cal.App.4th at 424; *People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1565; but see *People v. Sample* (2004) 122 Cal.App.4th 206, 216-221.) The *Sample* court found forfeiture based upon an analogy to the “plain error” rule applicable in federal court. (*Ibid.*) *Sample* should be disapproved for the above reasons and because the federal analogy is not apt. (See *Barnes, supra*, ___ Cal.App.4th ___ [2004 D.A.R. at 12018, fn. 7].)

Accordingly, the asserted error is cognizable on this appeal.

B. Penal Code section 1170, subdivision (b) Is Unconstitutional in Allowing Judicial Factfinding to Support the Upper Term

Respondent asserts that California’s sentencing scheme does not offend *Blakely* because the upper term is within the range of sentences authorized by the jury’s verdict. (RABM 22-35) Respondent is mistaken.

Respondent asserts that, in California law, a jury verdict alone authorizes imposition of any one of the three terms provided for the particular offense. (RABM 22) A careful review of the entire scheme demonstrates that the verdict alone does not

authorize anything more than the midterm.

Even as respondent characterizes the California scheme, the middle term is “the default” without a court finding of additional circumstances; “it is in the absence of such circumstances that a court ‘shall’ then impose the middle term.” (RABM 33) Given that the court may not find as aggravation any of the facts established by the verdict (see Cal. Rules of Court, rule 4.420 (c)(d)), it becomes clear that this “default” sentence *shall* be imposed based upon the jury’s findings; the sentence authorized by the *verdict* is the middle term.

Respondent’s reliance on this Court’s decisions in *Hernandez, supra*, 46 Cal.3d 194 and *People v. Scott* (1994) 9 Cal.4th 331 is misplaced. Both decisions were reached before either *Blakely* or *Apprendi* was decided. Both were based upon an interpretation of the sentencing statute as written without consideration of whether the procedures outlined in it were constitutional. Thus, the statement that the upper term was authorized or that the judge had the power to choose the upper term was based only on the statute alone. The statute does “authorize” the court to impose the upper term, but *only after the court has found facts beyond those found by the jury in reaching its verdict*.

There was nothing “unauthorized” under New Jersey law with the court’s imposing the additional term based on racial bias in *Apprendi* and nothing “unauthorized” under Washington law with the sentence imposed in *Blakely*. Yet, the procedure used to authorize the sentence offended the federal constitution. Similarly, California’s upper

term is “authorized” only after an unconstitutional procedure has been followed.² By using *Hernandez* to establish that the factors in aggravation are mere sentencing factors or *Scott* to establish that the upper term is within the “authorized” range within the meaning of *Blakely* and *Apprendi*, respondent elevates “form” over “effect.” (See *Ring v. Arizona* (2002) 536 U.S. 584, 604 [153 L.Ed.2d 556, 122 S.Ct. 2428].)

In *Ring*, Arizona made almost the same argument. Under the Arizona statute, first degree murder was punishable by death or life imprisonment. The choice between the two was made after a separate hearing before the court alone at which it would make factual determinations and decide whether there were aggravating or mitigating factors. The court could then impose the death penalty only if it found at least one aggravating and no mitigating factors. (*Id.*, at 592-593.) Arizona argued that under this scheme a death sentence was “authorized” by the jury verdict, and the sentencing court’s findings did not therefore result in a sentence higher than was authorized by the verdict. (*Id.*, at 603-604.) The Court rejected this argument, finding that it elevated form over effect and that “[t]he Arizona first-degree murder statute ‘authorizes a maximum penalty of death only in a formal sense,’ [citation], . . .” (*Id.*, at 604.) California statutes authorize the upper term only in the same formal sense.

^{2/} Respondent also makes much of the distinctions between the details of California’s scheme and those involved in *Apprendi* and *Blakely*. These distinctions, created primarily because California judges are given fewer sentencing choices, do not differentiate the schemes in ways significant to the constitutional question posed. Under all three schemes, the sentencing court is required to make factual findings beyond those made by the jury in order to impose a higher sentence than that authorized by the jury’s verdict alone.

C. For Purposes of the *Apprendi/Blakely* Analysis, the Relevant Maximum is the Maximum Sentence the Jury Verdict Permits for the Individual Count Itself

Respondent asserts that, even if under *Blakely* the midterm is the prescribed statutory maximum for the substantive offense, the imposition of the upper term in this case was authorized because the maximum sentence available in this case was eight years. Respondent gets this total by adding two years for the two prior prison term enhancements admitted by appellant and stricken by the trial court to the middle term for the substantive offense. (RABM 36-39) Respondent is mistaken in his conclusion that the enhancements may be included in the calculation of the relevant maximum term.

In *Apprendi*, the State asserted that, even without the sentencing court's finding of racial motive, by imposing consecutive sentences, it could have achieved the same sentence as was imposed based upon that invalid finding. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 474 [147 L.Ed.2d 435; 120 S.Ct. 2348].) The Court rejected this argument stating, "The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count." (*Ibid.*) Similarly, the constitutional question here is what term was permissible for the sentence on the substantive count. (*Ibid.*)³

Assuming, however, that count-specific enhancements, such as gun use

³/ In making this argument, appellant recognizes that the *Barnes* court assumed that the maximum sentence constitutionally available is calculated by totaling the midterm with the enhancements found or admitted. (*Barnes, supra*, ___ Cal.App.4th ___ [2004 D.A.R. at 12019].) Appellant submits that the *Barnes* court erred in so calculating the relevant maximum.

(Pen. Code, § 12022.5) or infliction of great bodily injury (Pen. Code, § 12022.7) could be included in the total maximum term for a given count, the same would not be true for enhancements for priors that attach to an entire sentence. (See *People v. Tassell* (1984) 36 Cal.3d 77, 90 [disapproved on other grounds at 7 Cal.4th 380, 386-387; *People v. Smith* (1992) 10 Cal.App.4th 178, 182-183; see also Pen. Code, § 1170.1, subd. (a).) “[E]nhancements for prior convictions do not attach to particular counts but instead are added just once as the final step in computing the total sentence.” (*Tassell, supra*, 36 Cal.3d at 90.) Thus, such enhancements are independent of the individual counts and are of the same character as the separate offenses involved in *Apprendi*. Therefore, in this case, the additional two years available for appellant’s prior prison terms could not be properly included in the calculation of the maximum term authorized for violation of Penal Code section 10851.

IV.

**ASSUMING THAT PENAL CODE SECTION 1170
SUBDIVISION (B) CAN BE SAVED BY
REFORMATION, IT MUST BE REFORMED IN A
MANNER THAT WILL PRESERVE UNIFORMITY
OF SENTENCES; THE REFORMATION
SUGGESTED BY RESPONDENT DOES NOT
PRESERVE THIS LEGISLATIVE GOAL**

Respondent has posited two methods, one implicit and one explicit, by which section 1170 could be reformed to make it constitutional. The explicit suggestion is offered at the end of respondent's brief and is proposed for prospective application.

(RABM 50-53) The implicit is inherent in respondent's assertion that the statute can be constitutionally applied to any case in which the defendant has a prior conviction.

(RABM 39-44) Neither method can be used to salvage this unconstitutional statute.

The arguments fail because Penal Code section 1170 is unconstitutional on its face and must be stricken unless it can be reformed or severed in a manner that will satisfy as closely as possible the primary legislative goals behind the statute. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661.) As those goals are to promote uniformity in sentencing of offenders committing the same offense (Pen. Code, § 1170 subd. (a)(1); *People v. Simon* (1983) 144 Cal.App.3d 761, 765; Parnas & Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California* (1978) 11 U.C. Davis L.Rev. 29, 31-32, 39-40), the statute cannot be reformed to retain upper terms in only a fraction of cases based upon retention of only one of numerous aggravating factors or to remove altogether the preference for middle terms.

Rather, if the statute is reformed, it should be reformed in a manner that would retain the presumptive midterm and equally effectuate all aggravating factors. As such reformation would require judicial legislation, however, this Court may decide instead to sever the provisions permitting imposition of the upper term from the rest of the statute. Otherwise, the statute should be stricken entirely. (See *Kopp, supra*, 11 Cal.4th at 670-671.) In any case, appellant was improperly sentenced under the unconstitutional statute, and his sentence cannot stand.

A. Penal Code section 1170 Is Facially Unconstitutional

A statute is facially unconstitutional if “no set of circumstances exists under which the [statute] could be valid.” (*United States v. Salerno* (1987) 481 U.S. 739, 745.) “[A] facial challenge to a statutory provision that broadly impinges upon fundamental constitutional rights may not be defeated simply by showing that there may be some circumstances in which the statute constitutionally could be applied,” (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 343; *California Teachers Assn. v. California* (1999) 20 Cal.4th 327, 347.) While a law that in its general and ordinary application is clearly constitutional may not be held unconstitutional on its face simply because there may be some hypothetical application that is unconstitutional, where a statute broadly impinges upon fundamental constitutional rights, it does not become constitutional simply because there is a person covered by it to whom it may be constitutionally applied. (*Id.*, at 343-348.)

“[A]lthough we may not invalidate a statute simply because in some future hypothetical situation constitutional problems may arise [citation], neither may we ignore the actual standards contained in the procedural scheme and uphold the law simply because in some hypothetical situation it might lead to a permissible result.” (*California Teachers Assn.*, *supra*, 20 Cal.4th at 347; see also *County of Los Angeles v. Jessup* (1938) 11 Cal.2d 273, 278, disapproved on other grounds at 16 Cal.2d 276, 284 [“a statute which is not severable and which by its express terms permits an application the effect of which is unconstitutional, is invalid even though its provisions also permit and contemplate another and different application with a legal and proper effect.”]; *American Academy of Pediatrics v. Lungren*, *supra*, 16 Cal.4th at p., 345 [“Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.”]; *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, 272.)

Penal Code section 1170 provides that the trial court must impose the middle term absent an additional finding of fact. (Pen. Code, § 1170 subd. (a)(3); *People v. Wright* (1982) 30 Cal.3d 705, 709; *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785.) To impose the upper term, a court must find aggravating factors by a preponderance, and those factors must not be elements of the crime or enhancements charged and found by the jury. (See Pen. Code, § 1170; Cal. Rules of Court, rule 4.408 (a); 4.420 (c)(d); *People v. Bowen* (1992) 11 Cal.App.4th 102, 105; *People v. Castorena* (1996) 51 Cal.App.4th 558, 562; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775-1776.) Thus, Penal Code section 1170 is designed to operate in a manner that violates the

defendant's federal constitutional rights as stated in *Blakely, supra*, 540 U.S. ____ [159 L.Ed.2d at 413-414, 124 S.Ct. at 2537].) (AOBM 21-38)

The fact that in some instances the jury may have actually found the aggravating circumstances true, the defendant may have admitted an aggravating factor, or as respondent posits, an aggravating factor may be exempt from the jury finding requirement, does not render the statute facially valid. (See *California Teachers Assn., supra*, 20 Cal.4th at 345; *People v. Stevenson* (1962) 58 Cal.2d 794, 798.) “Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.’ [Citation]” (*California Teachers Assn., supra*, 20 Cal.4th at 345.) “Thus, for example, a statute authorizing a criminal conviction under a clear and convincing standard of proof would be invalid on its face, even though there would be some cases, decided under that standard, in which the proof would satisfy the proper standard of proof beyond a reasonable doubt. [Citation]” (*Ibid.*)

Accordingly, unless Penal Code section 1170 can be reformed to eliminate the judge's power to find aggravating factors and require a jury finding as to them or the judicial power to elevate a sentence can be severed from the rest of the statute, the entire statute should be declared invalid. (See *Blair v. Pitchess* (1971) 5 Cal.3d 258, 282; *Calfarm Insurance Company v. Deukmejian* (1989) 48 Cal.3d 805, 821; *American Academy of Pediatrics v. Lungren, supra*, 16 Cal.4th at 343; *Kopp, supra*, 11 Cal.4th at

670-671; *Santa Barbara School District v. Superior Court* (1975) 13 Cal.3d 315, 330; *People v. Navarro* (1972) 7 Cal.3d 248, 260.)

B. Penal Code section 1170 Cannot be Reformed to Permit Imposition of the Upper Term Only When the Defendant Has a Prior Conviction

“Although courts do not lack power to remedy a constitutional defect by literally rewriting statutory language, it is a comparatively drastic alternative, to be invoked sparingly, and only when the result achieved by such a course is more consistent with legislative intent than the result that would attend outright invalidation.” (*Arp v. Workers’ Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 407-408.) Such reformation is permissible to preserve a statute’s constitutionality when it is possible to “reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body,” and “the enacting body would have preferred the reformed construction to invalidation of the statute.” (*Kopp, supra*, 11 Cal.4th at 660-661; see also *In re Jorge G.* (2004) 117 Cal.App.4th 931, 940-941 [relying on *Kopp* to reform statute by limiting construction of its terms].)

Respondent argues that, because appellant has a prior record, his sentence did not violate *Blakely*. He reasons that a prior may be an aggravating factor, which may justify the imposition of the upper term and is exempt from the *Blakely* rule. (RABM 39) Implicit in this argument is the notion that section 1170 can be constitutionally reformed

by limiting the upper term to those defendants with prior convictions. Such reformation, however, would severely undermine the basic legislative purpose in enacting section 1170.

Penal Code section 1170 sets out its purpose and the Legislature's determination of how best to achieve that purpose:

“The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that *the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.*” (Pen. Code, § 1170, subd. (a)(1); emphasis added; see also Pen. Code, §§ 1170.3, 1170.4.)

To this end, the statute provides that the court would impose the middle term unless, employing the rules laid out by the Judicial Council, it finds factors in aggravation or mitigation and determines that one outweighs the other. Such factors are to be unlimited, except that the dual use of the elements of the offense or enhancements is precluded. (Cal. Rules of Court, rule 4.408 (a), 4.420 (c)(d); Pen. Code, § 1170, subd. (b).)

To restrict the imposition of the upper term to those cases in which the defendant has a prior conviction that the court found to be an aggravating factor and the use of which would not violate the dual use proscription would skew the sentences in a

manner unintended by the Legislature and do violence to the goal of uniformity of sentencing. Under such construction, two defendants could commit robberies. If one has a prior conviction that did not result in a prison term and the other has no prior conviction, the one with the prior could get the upper term, while the other could not. This would be true even if the one without the prior planned his crime, selected his victim on the basis of race and vulnerability and stole drugs from a pharmacy employee (Pen. Code, §§ 1170.7, 1170.75; Cal. Rules of Court, rule 4.421), while the other defendant who had the prior committed a robbery that was no more than a shop-lift gone bad.

Such sentencing that would limit the more aggravated case to a midterm sentence, while permitting the imposition of the upper term in the more mitigated case, would lead to absurd results and not promote any of the stated Legislative goals.

Accordingly, such reformation, which would do violence to the legislative intent, should not be adopted. (See *Metromedia v. San Diego* (1982) 32 Cal.3d 180, 190; *Kopp, supra*, 11 Cal.4th at 643, 669-670; see also *Barlow v. Davis* (1999) 72 Cal.App.4th 1258, 1267; *Gerkin v. Fair Political Practices Commission* (1993) 6 Cal.4th 707, 714; *California Teachers Assn., supra*, 20 Cal.4th at 345; cf., *People v. Barksdale* (1972) 8 Cal.3d 320, 333-334; *In re J.W.* (2002) 29 Cal.4th 200, 213.)

Additionally, respondent's suggestion that the mere fact of a prior conviction is sufficient to make any upper term constitutional is problematic in other ways. Respondent erroneously assumes that the fact of a prior automatically makes a

defendant eligible for the upper term. (RABM 41-44) Not every prior is considered aggravating; very old priors for relatively minor offenses for which no prison term was served have frequently been rejected as sentence enhancers. (See e.g., Pen. Code, §§ 667.5 [requiring a prison term to have been served before the enhancement applies and precluding enhancement when a washout period has been satisfied], 667 [requiring felony convictions of a serious or violent nature], 1210.1 [providing that serious prior felonies do not make a drug user ineligible for Prop. 36 probation if a washout period has been satisfied]; *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [describing when records may be so remote as to washout in the context of *Romero*].) Thus, a mere finding of a prior conviction, be it felony or misdemeanor, does not equate to a finding of a factor in aggravation.⁴

Furthermore, any prior that is used as an enhancement or element of a crime cannot be used to justify an upper term. (See Cal. Rules of Court, rule 4.420 (d); Pen. Code, § 1170, subd. (b).) Thus, not even all otherwise aggravating priors would make the upper term available.

Finally, there is serious doubt that the finding of a prior as an aggravating

⁴/ Accordingly, respondent's suggestion that such a "retrospective, case-by-case review" could save the statute is also misplaced. (See *California Teachers Assn.*, *supra*, 20 Cal.4th at 345.) There is no means of knowing when a particular prior might be found to be true and an aggravating factor. In cases such as this, where the court used aggravating factors that were the result of unconstitutional fact-finding to impose the upper term, the fact that there was a potential alternative constitutional basis for the court's action does not cure the constitutional violation that in fact occurred.

factor to increase the maximum sentence can be constitutionally removed from the jury. Respondent relies on *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [140 L.Ed.2d 350, 118 S.Ct. 1219], which held that the fact of a prior conviction was no more than a “sentencing factor” that need not be treated as an element of the offense and need not be charged in the indictment or proved to a jury. (*Id.*, at 235, 239, 247.)⁵ This holding, however, although not overruled by either *Blakely* or *Apprendi*, was questioned by *Apprendi* and had its underpinnings removed by *Blakely* and *Apprendi* as well as numerous concurring and dissenting opinions in cases leading up to them.

In *Apprendi*, the Court characterized the decision in *Almendarez-Torres* as “at best an exceptional departure from the historical practice that we have described” (*Apprendi, supra*, 530 U.S. at 486), and noted:

“Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that *a logical application of our reasoning today should apply if the recidivist issue were contested*, *Apprendi* did not contest the decision’s validity and we need not revisit it for purposes of our decision today to treat the case as a *narrow exception* to the general rule we recalled at the outset.” (*Id.*, at 490 [footnote omitted, emphasis added].)

⁵/ The Court was not there presented with the issue of what burden of proof need be applied, and interestingly, expressed “no view as to whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of the sentence.” (*Almendarez-Torres v. United States, supra*, 523 U.S., at 248.) Moreover, as *Almendarez-Torres* admitted his prior, there was no argument raised concerning a right to a jury determination of the issue; only the question of whether the allegation needed to be included in the indictment was at issue. (See *Apprendi, supra*, 530 U.S. at 488.)

Justice Thomas’s concurring opinion in *Apprendi* also explained at length why the decision in *Almendarez-Torres* was wrong. (*Apprendi, supra*, 530 U.S. at 501-523; see also *Almendarez-Torres, supra*, 523 U.S. at 256-257, 261 [Scalia, J. dissenting].)

Blakely, which also did not involve a recidivist statute, merely followed *Apprendi*, maintaining the exception for priors without further analysis. (*Blakely, supra*, 540 U.S. at ___ [159 L.Ed.2d at 412-413; 124 S.Ct. at 2536-2537].) Yet, the *Blakely* decision reflected the position that its author, Justice Scalia, had articulated several times in concurring and dissenting opinions which would disapprove of the *Almendarez-Torres* holding. (See e.g., *Almendarez-Torres, supra*, 523 U.S. at 248-271 [dissenting]; *Apprendi, supra*, 530 U.S. at 498-499 [concurring]; *Jones v. United States* (1999) 526 U.S. 227, 253 [143 L.Ed.2d 311, 119 S.Ct. 1215] [concurring; majority limited *Almendarez-Torres* to recidivist issues and distinguished it as a pleading case (*id.*, at 248-249)].) “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 the defendant’s guilt or innocence, but simply to the length of his sentence.’ [Citation]” (*Apprendi, supra*, 530 U.S. at 484 [citing Scalia’s dissent in *Almendarez-Torres*].)

Moreover, *Almendarez-Torres* was based on a distinction between “sentencing factors” and “elements of the crime,” that *Apprendi* and *Blakely* have now soundly rejected. (*Apprendi, supra*, 530 U.S. at 478, 484, 494; *Blakely, supra*, 540 U.S. at ___ [159 L.Ed. at 415-416; 124 S.Ct. at 2538-2540].) The simple rule now is that any

significant increase in a statutory maximum sentence (other than that due to a prior conviction) triggers a constitutional “elements” requirement. (*Apprendi, supra*, 530 U.S. at 490; *Blakely, supra*, 540 U.S. at ___ [159 L.Ed.2d at 413-414; 124 S.Ct. at 2537].)

In the context of making the upper term available to the sentencing court instead of the presumptive middle term, the fact of a prior conviction is not operating as a “sentencing factor,” but is instead operating as an elemental factor that is creating the discretion of the trial court to impose the higher sentence. (See, *Ring, supra*, 536 U.S. at 602.) As Justice Thomas stated, “establishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things.” (*Apprendi, supra*, 530 U.S. at 519, Thomas, J. concurring.) Justice Thomas further explained that sentencing factors which may constitutionally be found by a judge were not those that could “swell the penalty.” (*Id.*, at 519.)

Almendarez-Torres found support for its holding by reference to *Walton v. Arizona* (1990) 497 U.S. 639, 647-649 [111 L. Ed.2d 511, 110 S. Ct. 3047] (*Almendarez-Torres, supra*, 523 U.S. at 247), which has since been overruled in light of *Apprendi*. (*Ring, supra*, 536 U.S. at 588-589.) Thus, it is highly likely that when squarely faced with the question, the United States Supreme Court will hold that *Almendarez-Torres* does not survive *Apprendi, Blakely* and *Ring*. (See *Id.*, at 588-589, 602-604, 609.)

Accordingly, this Court should avoid an interpretation of Penal Code section 1170 that could make it violate the federal constitutional rights to a jury trial and

proof beyond a reasonable doubt. (See *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 827 [rejecting an interpretation of a statute that would render it in violation of the Equal Protection Clause]; see also *Metromedia, supra*, 32 Cal.3d at 186; *Graham v. Department of Public Welfare* (1971) 403 U.S. 365, 382-383 [29 L.Ed.2d 534; 91 S.Ct. 1848] [general rule of statutory construction not to interpret a statute in a manner that would render it unconstitutional.]

C. If this Court Reforms the Statute, It Must Require a Jury Determination of All Aggravating Factors, Including Prior Convictions

Respondent also suggests that the statute could be reformed to provide that the upper term may be imposed only on the basis of factors otherwise found by the jury or admitted by the defendant. (RABM 41-44) This solution also has problems because it requires reformation of the statute to provide for such findings or admissions.

Reformation of Penal Code section 1170 that would make it comport with the defendant's right to a jury determination of every fact essential to the imposition of the upper term would require wholesale rewriting of procedures that should be left to the Legislature. There is no statutory provision for a jury trial on aggravating factors. There is no statutory framework for how and when such factors would be pleaded or tried. The current statute provides for them to be found by the judge on the basis of all manner of evidence that would not be admissible in a normal jury trial. (See *United States v. Jackson* (1968) 390 U.S. 570, 580 [20 L.Ed.2d 138; 88 S.Ct.1209] [where the Court

declined to restructure procedures for implementing a federal death penalty for kidnaping that would be constitutional].)

This Court could read into the statute a requirement that all aggravating factors, including priors, be presented to and found by the jury. Whether the Legislature would opt to impose this procedural framework on a criminal trial instead of restructuring its sentencing scheme is not clear. What is clear is that the determination of whether to change the sentencing scheme or the procedures at a criminal trial is “properly a legislative function” and likely should not be taken on by this Court. (See *Arp, supra*, 19 Cal.3d at 409-411; *American Academy of Pediatrics v. Lungren, supra*, 16 Cal.4th at 344.) “The only way in which the statute now at issue could be limited to a proper scope with respect to the [defendant’s rights to a jury trial and proof beyond a reasonable doubt] would be by reading into it numerous qualifications and exceptions [and rights and procedures], thereby performing a wholesale rewriting of the statute which the courts cannot reasonably be expected to undertake.” (*City of Carmel-by-the-Sea v. Young, supra*, 2 Cal.3d at 272; see also *Metromedia, supra*, 32 Cal.3d at 187 [if the court were to insert all of the qualifying provisions needed to render the statute constitutional, it would be serving a “legislative” rather than a “judicial function”]; see also *Jackson, supra*, 390 U.S. at 580.)

On the other hand, the Legislature has provided a jury trial right as to enhancements, including those involving priors. (Pen. Code, §§ 666.5, 1025, 1170.1,

subd. (e).) This demonstration of legislative intent to have those factors it recognized as giving rise to an increased sentence be submitted to the jury suggests that reformation of section 1170 to include a jury trial right for elemental aggravating factors would conform with the Legislature's intent and purpose.

Additionally, reformation of the statute to add a requirement of a jury finding of beyond a reasonable doubt as to all aggravating factors would also preserve the legislative purpose of giving the sentencing court the option of imposing an upper term when the crime merits it. Thus, it may be an appropriate means of implementing the Legislature's intent in a constitutional manner. (See *Kopp, supra*, 11 Cal.4th at 660-661.)

D. The Statute Can be Severed to Eliminate the Imposition of the Upper Term

This Court may also be able to save part of Penal Code section 1170 by severing the unconstitutional scheme for elevating the sentence from the rest of the statute. "Generally, unconstitutional provisions do not vitiate the whole act unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it without such obnoxious provisions. [Citation]." (*Navarro, supra*, 7 Cal.3d at 260; see also *Leaming v. Municipal Court* (1974) 12 Cal.3d 813.)

Three criteria must be met for an unconstitutional portion of a statute to be severable from the rest of the statute: (1) the invalid provision must be mechanically and grammatically severable; (2) it must be functionally severable; and (3) the remainder of

the statute likely would have been adopted had the invalidity of the severed portion been foreseen. (*Calfarm Insurance Company v. Deukmejian* (1989) 48 Cal.3d 805, 822; *Gerkin, supra*, 6 Cal.4th at 714; *People v. Salazar-Merino* (2001) 89 Cal.App.4th 590, 600.) “The test of severability is whether the invalid parts of a statute can be severed from the otherwise valid parts without destroying the statutory scheme or utility of the remaining provisions.” (*Manning v. Municipal Court* (1982) 132 Cal.App.3d 825, 828-831.)

The upper term provisions can be mechanically severed by removing them from the statute. For example, the first provision of subdivision (b) would read in pertinent part, “the court shall order imposition of the middle term, unless there are circumstances in mitigation of the crime.” And, the option of imposing the upper term found later in the statute could be deleted. Functionally, a sentencing court could easily impose a middle term in most cases or the lower term where it is warranted. The elimination of the upper term would not hinder these other functions. (Compare *People v. Library One* (1991) 229 Cal.App.3d 973, 989.)

In deciding the third criterion, volitional severability, the court must look to whether those who favored the statute would be happy to achieve at least the portion of their purpose that the remaining statute reflects. (*Gerkin, supra*, 6 Cal.4th at 714-716; *Salazar-Merino, supra*, 89 Cal.App.4th at 600.) “If a part to be severed reflects a “substantial” portion of the [Legislature]’s purpose, that part can and should be severed

and given operative effect.’ [Citation].” (*Ibid.*, citing *Gerkin*.)

In enacting Penal Code section 1170, the Legislature sought to create a system of uniform sentencing that would give the sentencing court limited discretion to impose a sentence that fit the crime. (See *People v. Martin* (1986) 42 Cal.3d 437, 442-443.) It thus gave the court sentencing authority, but mandated that the sentence to be imposed be the middle term absent additional factual findings. It then impermissibly sought to give the court the power to make those factual findings to increase the sentence. (See *Blakely, supra*, 540 U.S. ____ [159 L.Ed.2d at 413-414; 124 S.Ct. at 2537].)

If the constitutionally invalid authority to impose an upper term based upon judicial fact-finding were severed from the statute, the statute would still perform much of the intended function. The Legislature would undoubtedly have wanted the court to retain the power to sentence convicted persons, the presumptive sentence to be the midterm the Legislature had chosen, and to have the court retain the power to mitigate that term if circumstances demanded. The fact that the court could not also have the power to increase the sentence for aggravated crimes, while it was not what the Legislature had envisioned, would not lessen the Legislature’s desire to have the statute otherwise perform its function. (See *Salazar-Merino, supra*, 89 Cal.App.4th at 600.) Accordingly, this Court could sever the unconstitutional provision for imposing the upper term from Penal Code section 1170.

This was the choice apparently made by the Kansas Supreme Court when

faced with a similar problem. In Kansas, as here, the challenged statute required the imposition of a presumptive sentence unless the trial court found factors in aggravation or mitigation that justified an upward or downward departure. (See K.S.A. 1999 Supp. 21-4716; *State v. Murphy* (2001) 270 Kan. 804.) The Kansas Supreme Court found this judicial fact-finding unconstitutional under *Apprendi*. (*State v. Gould* (2001) 271 Kan. 394.) In the interim between the Kansas Legislature's enactment of a new scheme that provided for jury findings of aggravating factors (K.S.A. 2002 Supp. 21-4716 (b) & 4718 (b)) and the time of the *Gould* decision, one trial court attempted to remedy the constitutional flaw in the statutory sentencing scheme by asking the jury to make the factual findings needed for an upward departure in sentencing. The Kansas Supreme Court rejected this solution and announced a rule precluding an upward sentencing departure in any case. (See *State v. Kessler* (2003) 276 Kan. 202, 215-217.) The court stated: “[W]e deny the State’s invitation to work around a flawed sentencing scheme. A district court’s authority to impose sentence is controlled by statute. Thus, where the statutory procedure for imposing upward durational departure sentences has been found unconstitutional, the district court has no authority to impose such a sentence.” (*Id.*, at 217; see also *State v. Cody* (2001) 272 Kan. 564, 565-566 [guilty plea admission of factors used to increase sentence was not sufficient to permit upward departure because the legislature’s grant of authority to depart from a presumptive sentence had been declared unconstitutional].) It then, as it had previously in *Gould* and *Cody*, remanded for

re-sentencing, presumably to a sentence in the presumptive range or lower. (*Kessler, supra*, 276 Kan. at 217.)

This Court has taken similar steps in other situations in which the imposition of a higher sentence was unconstitutional. Thus, in *Leaming, supra*, 12 Cal.3d 813, this Court held that the provision in former Penal Code section 314 for a term with a life top for a second conviction of indecent exposure, which had been previously declared unconstitutional, could be severed from the rest of the statute that declared a second conviction to be a felony. This Court further concluded that reading the felony provision with the statute providing that a felony sentence not otherwise specified had a maximum of five years resulted in the remainder of the statute being “complete in itself” without the unconstitutional life-maximum term. (*Id.*, at 816-817.) In *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, this Court found the procedures for imposition of a death sentence for first degree murder to be unconstitutional and declined to rewrite the statute to correct the procedural defects. (*Id.*, at 444-445.) This Court concluded instead that the provisions requiring a death sentence were severable from the provision of a life sentence where death was not imposed and left a life term as the applicable punishment. (*Ibid.*) Similarly here, the upper term, which requires unconstitutional judicial fact-finding to impose, could be eliminated as a sentencing option, leaving the trial court authority to impose the presumptive middle term or the lower term if mitigating factors support it.

E. This Court Should Not Read the Presumptive Midterm Out of the Statute

Respondent suggests that this Court could correct the constitutional defect in section 1170 by construing it to permit the imposition of the upper term without the finding of additional aggravating circumstances. (RABM 50-53) This Court should not adopt such construction because it would be inconsistent with Legislative intent. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 621 [must effectuate legislative intent in construing a statute].)

The Legislature provided that the court shall impose the middle term unless additional facts are found. This demonstrates the legislative conclusion that a conviction alone warrants punishment no greater than the middle term. And, while the Legislature did intend that a greater term might be imposed if additional factors were present, it did not intend to give the trial court unfettered discretion to impose the upper term without them. In stating that the purpose behind section 1170 was to promote uniformity in sentencing, this Court, in *Martin, supra*, 42 Cal.3d at 443, noted that “the movement to promote uniformity in sentencing... was in no small part a movement to *diminish* judicial discretion.” (Emphasis added.)

Thus, the Legislature very carefully circumscribed the discretion it granted to the trial court under section 1170. This Court must not just write out the limitations imposed. The Legislature may ultimately decide to give sentencing courts broader discretion in sentencing, but that is a determination that should be left to the Legislature.

(See *Kopp, supra*, 11 Cal.4th at 660-661; *Arp, supra*, 19 Cal.3d at 407-408.)

Respondent's reliance on *People v. Roder* (1983) 33 Cal.3d 491 is misplaced. In *Roder*, the constitutional defect in the statute was the creation of an unconstitutional presumption as to an element of the offense. (*Id.*, at 504.) To remedy it, this Court read out the presumption, and changed it to a constitutional inference. (*Id.*, at 505-506.) It did not cure the problem by taking the *element* out of the crime. That is what respondent is asking the court to do here. The only unconstitutional portion of 1170 is that enabling the trial court to make factual findings by a preponderance that will increase a sentence. Making the midterm the presumptive sentence is *not unconstitutional*; neither is requiring a finding of additional "elements" to impose the upper term. Applying *Roder* here, this Court should rid the statute of the unconstitutional procedure for finding the additional elements, not the elements themselves.

V.

**RESPONDENT'S FORMULATION OF THE
CHAPMAN ANALYSIS IN THIS CASE IS WRONG**

Respondent argues that to apply *Chapman to Blakely* error, the reviewing court need only decide whether the jury would have found at least one aggravating factor beyond a reasonable doubt. If it so finds, then it must find the error harmless because, upon the finding of one factor, the defendant became eligible for the upper term. (RABM 44-46) As discussed above, this argument fails because a defendant does not become automatically eligible for the upper term upon a finding of one factor in aggravation. The necessary factual finding is only the first step. The sentencing court must also decide whether the factor is in fact aggravating in the context of the case and then whether it is of sufficient weight to impose the upper term. All of these considerations go into whether the defendant is eligible for the upper term, not just whether the upper term should be chosen. (See *Wright, supra*, 30 Cal.3d at 720.) Thus, the *Chapman* analysis cannot end with a determination that a fact that could potentially have supported the finding of an aggravating factor would have been found by the jury.

CONCLUSION

As the provisions in Penal Code section 1170 for judicial fact-finding to impose the upper term are unconstitutional, this Court must either invalidate the entire statute or rid it of its unconstitutional provisions. (See *Santa Barbara School District, supra*, 13 Cal.3d at 330.) The latter may be accomplished by either reformation of the statute to add the right to a jury finding of the factors beyond a reasonable doubt or by severing the unconstitutional provisions for imposition of the upper term from the rest of the statute. (See *Ibid; Kopp, supra*, 11 Cal.4th at 670-671.) It cannot be accomplished by reforming the statute to permit imposition of the upper term in only the limited situation in which the defendant has a prior conviction which the trial court finds to be both true and aggravating as this would lead to disparity in sentencing, contrary to the primary purpose of the Legislature. (*Ibid.; Simon, supra*, 144 Cal.App.3d at 765.)

Under either the reformed or severed statute, appellant's sentence cannot stand. If this Court reforms the statute to require a jury finding of the aggravating factors beyond a reasonable doubt, the trial court's reliance here on the counts that the jury rejected violated appellant's right to such a jury finding. Assuming that appellant's admissions of the priors could have enabled the court to impose the upper term, the sentence must still be reversed because it is not clear beyond a reasonable doubt that the court would have found the priors to be aggravating and chosen the upper term based upon the priors alone. (See *Neder v. United States* (1999) 527 U.S. 1, 7-9.) If the upper

term provisions are severed from the statutory scheme, appellant's sentence to the upper term is illegal and must be reversed. Alternatively, this Court should reverse the sentence under the California Constitution because of the trial court's reliance on the facts of the counts of which appellant was acquitted. (See *Takencareof*, *supra*, 119 Cal.App.3d at 498.)

Dated: October 20, 2004

Respectfully Submitted,

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