

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 BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Did the trial court abuse its discretion and violate appellant’s Federal Constitutional rights under the Fifth, Sixth and Fourteenth Amendments to due process, a jury trial and against double jeopardy by sentencing him based upon factors necessarily rejected by the jury’s verdict acquitting him of all but one count charged?

2. Does *Blakely v. Washington* (2004) 540 U.S. ____ [124 S.Ct. 2531; 159 L.Ed.2d 403] preclude a trial court from making the required findings on aggravating factors for an upper term sentence?

3. If so, what standard of review applies, and was the error in this case prejudicial?

STATEMENT OF THE CASE

Appellant, Shawn Towne, appeals the judgment of conviction and sentence for one count of unlawful driving of a vehicle (Veh. Code, § 10851, subd. (a)), with findings of a prior violation of Vehicle Code section 10851 within the meaning of Penal Code section 666.5, and prior convictions qualifying as one “strike” and two prior prison term enhancements. (Pen. Code, §§ 667, 667.5, 1170.12.) (CT 185-187, 202-205)

On November 7, 2002, appellant was charged by amended information with the above offense and seven other counts alleging a series of crimes committed against Noe Arana on April 1, 2002. (Pen. Code, §§ 215, subd. (a); 207, subd. (a); 211; 487, subd. (d); 422; 209.5 subd. (a); 209, subd. (b)(1); Veh. Code, § 10851, subd. (a).) There were additional allegations that appellant had suffered a prior conviction for a serious or violent felony (1995 robbery) within the meaning of Penal Code sections 667 subdivisions (b)-(i) and 1170.12 subdivision (a)-(d), served two prior prison terms within the meaning of Penal Code section 667.5 subdivision (b)¹ and previously been convicted of a vehicle taking within the meaning of Penal Code section 666.5. (CT 71-77)

Appellant was tried by jury on the substantive offenses. (CT 100-111, 185-187) On December 11, 2002, appellant waived his trial rights as to the priors and

¹/ The information alleged four prior convictions, but the parties later agreed that they represented only two prior prison terms. (RT 2402)

admitted them. (CT 109-110; RT 1255-1260, 1640-1643) On December 13, 2002, the jury acquitted appellant of all counts except the unlawful driving count. (CT 178-187)

On February 19, 2003, appellant moved to strike the “strike” allegation pursuant to Penal Code section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 49 and to reduce the offense to a misdemeanor pursuant to Penal Code section 17 subdivision (b); he argued alternatively for imposition of the lower term doubled. (CT 193-203; RT 2408-2413) Both motions were denied, and the court imposed the upper term of four years, doubled to eight because of the strike prior. (CT 202-203) The court struck the Penal Code section 667.5 subdivision (b) priors based upon all of the circumstances, appellant’s personal history, the term he would be serving and the fact that his credits would be limited to 80%, and the fact that one of the priors was the same as the prior that was the basis for the strike. (RT 2418) Appellant was awarded credits pursuant to Penal Code sections 2900 and 4019 and ordered to pay restitution fines pursuant to Penal Code sections 1202.4 and 1202.45. (CT 202-203)

On April 4, 2003, appellant filed a timely notice of appeal. (CT 205) On appeal, appellant argued that the trial court abused its discretion in selecting the upper term and in denying a motion to strike his prior “strike” conviction pursuant to *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497. (AOB 6-16, ARB 2-12) The challenge to the imposition of the upper term was based upon the trial court’s improper use of the

facts underlying the offenses of which appellant was acquitted to select the upper term.

(AOB 12-16, ARB 7-12)

The Court of Appeal rejected appellant's arguments on both grounds, finding, in part, that any error in using the facts from the acquitted counts to impose the upper term was harmless. (Slip Opn. 5-6) Appellant petitioned for review, and filed a supplemental petition after the *Blakely* decision was issued. This Court granted review on the three issues listed above.

STATEMENT OF FACTS²

A. The Facts of the Offense

On March 31, 2002, Noe Arana went out to a bar. (RT 611) At around midnight, Arana left for home. (RT 612-613) On his way home, Arana was not feeling well and pulled off of the road, where he was approached by appellant, who was working as a prostitute. (RT 613-614) The two agreed to “hook up” for the evening, and appellant got into the passenger side of the car. (RT 614-615)

The two drove around to various locations. (RT 614-619) Appellant fell asleep during the ride. (RT 619) At some point, Arana stopped driving, and the two fought. (RT 620-622) Arana and appellant differed on who attacked whom, with Arana claiming appellant jumped him and appellant claiming that he awoke to find Arana strangling him, but they agreed that a fight ensued between them. (RT 621-622, 1023-1034) They also agreed that, in the end, appellant had prevailed, tied Arana’s hands in front of him, and taken over the driving. (RT 622, 628, 1038-1041)

At just before 6 a.m., appellant stopped at a store and entered it. (RT 636, 721) While appellant was in the store, Arana left the car. (RT 636) He went to the door

²/ Noe Arana and appellant were the only eyewitnesses to the charged offenses. The bulk of their testimony went to the seven counts of which appellant was acquitted. These were for carjacking, kidnaping, robbery, grand theft automobile, criminal threats, kidnaping for carjacking and kidnaping to commit robbery. (CT 177-183) Because appellant was acquitted of these crimes, their facts will not be detailed here.

of a nearby home and awoke the woman who lived there. (RT 636-637, 721-722) He appeared to be terrified and claimed to have just been carjacked. (RT 722-723) The woman called 911. (RT 723)

Officer Paul Lopez pulled over appellant as appellant drove Arana's car on the 110 Freeway. (RT 629, 902-904, 907) Although appellant sped up as the police car started to follow him, he pulled to the side of the road and stopped as soon as Lopez activated his overhead lights to signal him to do so. (RT 904-906) Lopez drew his gun, and before he could order appellant out of the car, appellant got out, put his hands in the air and stated, "This car is stolen. I had nothing to do with it, but my friend stole it." (RT 906) Shortly thereafter, appellant stated that he had been going to a police station to report being the victim of an assault and claimed that the car belonged to a friend. (RT 909)

Appellant testified that he had been attacked by Arana and subdued him. (RT 1023-1034) Thereafter, appellant tried to call 911 on a cellphone, but the call did not go through because he was in a mountain range. (RT 1034) He and Arana drove around for a time and finally stopped at a store. (RT 1041-1045, 1210) Appellant went inside; when he looked out, Arana was gone. (RT 1211) Appellant drove the car away and eventually went home. (RT 1211-1216) Thereafter, he telephoned the registered owner of the car at the owner's home and was going toward the owner's home with the car when

he was stopped by the police. (RT 1216-1217) He admitted lying to the police when they stopped him. (RT 1217)

B. The Court's Reasoning at Sentencing

The court began its pronouncement of sentence with a denial of a motion to reduce the crime to a misdemeanor pursuant to Penal Code 17 subdivision (b)³ because it would not be “appropriate to reduce it ... either under the facts of the case or on the lengthy history of the defendant.” (RT 2414-2415) It then turned to the *Romero* motion and, noting that appellant had had a number of encounters with law enforcement since his 1995 conviction for robbery, stated that it would not be appropriate to strike the strike. (RT 2415)

Immediately after denying the *Romero* motion, the court turned to selecting the term to impose. It noted that the case was not easy for the jury, but that the jury “sorted it out.” (RT 2415) The court stated that it was clear that both Arana and appellant had lied. (RT 2415-2416) It further noted that the jury was advised that even a liar like Arana had the right to be “free from the kind of treatment that the People alleged to have been inflicted on him” during these events. The court went on to conclude that Arana

³/ Although the court and both parties addressed the motion without questioning the applicability of Penal Code section 17 to this offense, it appears that, with the Penal Code section 666.5 allegation, the crime was no longer subject to treatment as a misdemeanor.

was terrified when he left his car and had been “afraid for his life.” (RT 2415-2416) The court stated:

“I do know with respect to the charge on which Mr. Towne stands convicted that the evidence that we have before the court that I believe is entirely believable is that when Mr. Arana got out of that car he was terrified. He was afraid for his life. He thought if he didn’t get out of there and hide he was dead. ¶ So I am believing that he left the car in that state of mind and that [appellant] had possession of the car against his will and for [appellant’s] own purposes.” (RT 2416)

Based upon these conclusions, the court determined that the crime here was an aggravated felony, not a simple violation of section 10851. (RT 2416) “I don’t believe it’s just a simple 10851(A) as I’ve just described to you, Mr. Towne. *I believe that it’s an aggravated situation based on what I have just described.*” (RT 2416, emphasis added)

Thereafter, the court again noted that appellant had a ten-year criminal history and commented that appellant was “an innocent of sorts,” who had not learned from his past punishments. (RT 2417) The court then imposed the high term doubled. It stated that it did so “*considering the trial as it took place before the court, the conviction on the 10851(a), [and] the fact that you have a lengthy history.*” (RT 2418 emphasis added.)

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A JURY TRIAL AND AGAINST DOUBLE JEOPARDY BY SENTENCING HIM UNDER CALIFORNIA'S UNCONSTITUTIONAL SENTENCING STATUTE TO AN UPPER TERM BASED UPON FACTORS THAT WERE NOT FOUND BY THE JURY AND WERE NECESSARILY REJECTED BY THE JURY'S VERDICT ACQUITTING HIM OF ALL BUT ONE COUNT CHARGED

A. Introduction

Appellant was acquitted of seven of eight counts against the same victim during a single incident. (CT 178-187) According to the victim, appellant violently assaulted him, kidnaped him, made criminal threats against him and took his car by use of force. (RT 612-637) The jury found none of this true beyond a reasonable doubt, acquitted appellant of all counts involving violence or threat of violence and convicted appellant of one count of unlawful driving of a motor vehicle, a charge appellant admitted committing. (CT 178-187; RT 1211-1217)

Despite this finding by the jury, the trial court departed from the presumed middle term and imposed the upper term for the sole count of unlawful driving based in part upon its conclusion that the victim, even though he was a liar, was "terrified" by appellant and "afraid for his life" when he left the car enabling appellant to take it. (RT 2415-2416) The jury, however, acquitted appellant of carjacking and all of the other

counts relating to the “kind of treatment that the People alleged” that infringed upon the victim’s “bodily integrity” and from which one could conclude that appellant had unlawfully caused the victim to be “terrified” or “afraid for his life.”

The trial court’s reliance on these counts of which appellant was acquitted was an improper exercise of discretion under California law. (See *People v. Takencareof* (1981) 119 Cal.App.3d 492; see also *People v. Richards* (1976) 17 Cal.3d 614, 624 [disapproved on other grds., *People v. Carbajal* (1995) 10 Cal.4th 1114, 1126]; cf., *People v. Coelho* (2001) 89 Cal.App.4th 861, 874-876; but see *People v. Lewis* (1991) 229 Cal.App.3d 259, 264-265; Cal. Const. Art.I, § 16.) Moreover, the court’s imposition of sentence under Penal Code section 1170 and based upon factors not found true beyond a reasonable doubt by the jury violated appellant’s federal constitutional rights to a jury, to proof of guilt beyond a reasonable doubt and to not be twice placed in jeopardy for an offense of which he has been acquitted. (See *Blakely v. Washington* (2004) 540 U.S. ____ [124 S.Ct. 2531; 159 L.Ed.2d 403]; *Green v. United States* (1957) 355 U.S. 184, 188.)

B. The Trial Court’s Use of Counts of Which the Defendant Was Acquitted to Impose the Upper Term Should Be Reversed Under California Law

Historically, the right to a jury trial was incorporated into the criminal justice system to insert the common people, in the form of a jury, as a buffer between the defendant and the State. (See *Blakely v. Washington, supra*, 540 U.S. at ____ [124 S.Ct. at 2538-2539; 159 L.Ed.2d at 415]; *Duncan v. Louisiana* (1968) 391 U.S. 145, 155-156;

Apprendi v. New Jersey (2000) 530 U.S. 466, 477.) To enable it to perform its important function, the jury was given the exclusive power to make factual determinations that set the limits of punishment. (See *Blakely v. Washington, supra*, 540 U.S. at ___ [124 S.Ct. at 2538-2540; 159 L.Ed.2d at 415-416]; *Ring v. Arizona* (2002) 536 U.S. 584, 610 [conc. opn. of Scalia, J.])

Allowing a trial court to impose sentence based upon its finding that the defendant has committed the very crimes of which the jury has acquitted him permits the judge to undermine the jury's power to determine the facts upon which the sentence depends.⁴ This is demonstrated by the way in which the authority of a court to make use of a finding conflicting with the jury verdict was characterized in *People v. Levitt* (1984) 156 Cal.App.3d 500, 519.

In *Levitt*, the court concluded that the trial court could properly take a view of the evidence as to malice in a homicide case that was contrary to the finding of the jury, which had acquitted the defendant of murder, and use it to impose an aggravated sentence. (*Id.*, at 515.) It further concluded, however, that the trial court had improperly relied on two other factors. (*Id.*, at 516-518.) In assessing whether the reliance of the trial court on

⁴/ Appellant's position, which will be more fully developed below, is that the federal constitution precludes the trial court from making any factual findings to enable it to impose more than the presumptive midterm for the crime (see Subpart C, *infra*) and that use of acquitted counts to impose a higher sentence violates double jeopardy. (See Subpart E, *infra*.) For purposes of this discussion only, it is assumed that the court had the discretion to impose an upper term based upon its own factfinding and that the use of acquitted counts did not violate double jeopardy.

the two improper factors in aggravation was prejudicial, the court noted that the trial court there felt that the crimes in that case had actually been murders, rather than the manslaughters found by the jury, and that there was substantial evidence to support a finding that they were murders beyond a reasonable doubt. (*Id.*, at 518-519.) The court then stated:

“Under these circumstances, the following conclusions appear inevitable. First, the court was trying to *partially ‘correct for’ the jury’s verdict in the one way it was entitled to do*, by giving defendant the maximum possible term for the lesser crime found by the jury based on substantial evidence that a higher crime was in fact committed; in effect the court relied on evidence of murder to make the sentence more commensurate to that prescribed for murderers.” (*Id.*, at 518-519, emphasis added, footnote omitted.)

Such “correction” of a jury verdict is contrary to the very purpose of the jury trial right. Justice Scalia in *Blakely* repeatedly emphasized the importance of the jury’s place in “our constitutional structure.” (*Blakely v. Washington, supra*, 540 U.S. at ___ [124 S.Ct. at 2538-2539; 159 L.Ed.2d at 415].) He further stated in *Blakely*:

“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.... *Apprendi* carries out this design by ensuring that *the judge’s authority to sentence derives wholly from the jury’s verdict*. Without that restriction, the jury would not exercise the control that the Framers intended.¶ ... The jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the state *actually* seeks to punish.” (*Id.*, at ___ [*Id.*, at 2538-2539; *Id.*, at 415-416] emphasis added.)

Justice Scalia further concluded that the Framers would not “have left the definition of the scope of jury power up to judges,” and that the jury trial guarantee was in the Constitution because the Framers were “unwilling to trust government to mark out the role of the jury.” (*Id.*, at ____ [*Id.*, at 2540; *Id.*, at 416].) Thus, allowing a sentencing court that disagrees with the jury’s finding as to guilt to “correct” that finding would be repugnant to the Framers’ desire to give the jury, as a representative of the “common people,” control over the judiciary. (See *Id.*, at ____ [*Id.*, at 2539; *Id.*, at 415] (quoting John Adams).)

The various courts of appeal in California have grappled with the propriety of the sentencing court making findings contrary to the jury’s verdict. In doing so, the courts have permitted different degrees of variance between the jury’s findings and those of the sentencing court.

In *People v. Takencareof* (1981) 119 Cal.App.3d 492, 498, the court had to determine whether the trial court could properly rely on the facts underlying two counts of which the defendant had been acquitted in deciding whether to deny probation. It assumed that the trial court had done so by employing a preponderance of the evidence standard in making its finding of aggravating factors contrary to the jury’s verdict. (*Id.*, at 497.) The question of whether the use of the lesser standard of proof under such circumstances was proper was a question of first impression at the time. (*Ibid.*)

The *Takencareof* court noted that, in *People v. Fulton* (1979) 92 Cal.App.3d 972, the court had held that facts underlying a count on which the jury had been unable to

reach a verdict could be properly used at sentencing because Penal Code section 1170 subdivision (b) permits the sentencing court to consider the entire record in the case, but had expressly declined to address whether the trial court could consider as aggravation a charge on which a jury had acquitted. (*Id.*, at p. 976, fn. 1.) The *Taken care of* court then, without explaining the statutory, constitutional or caselaw underpinnings for its conclusion, held that where “the trier of fact has found [the defendant] not guilty of a count in a multiple count prosecution, the same standard of proof of beyond a reasonable doubt should apply to both conviction and sentencing.” (*Id.*, at 498.)⁵

The court explained its conclusion:

“It would be anomalous to hold that if the jury finds the defendant not guilty of a count utilizing the constitutionally exacting standard of proof beyond a reasonable doubt, he should face the same alleged crime at sentencing under a preponderance of evidence standard. ¶ We are unprepared to hold that two standards operate simultaneously in a case where a defendant is acquitted. Such a holding would be ludicrous. A defendant who won a victory at the hands of the jury could nevertheless be subjected to a more harsh sentence if he was contemporaneously found guilty of another crime in the same case.” (*Ibid.*)

Thereafter, in permitting the sentencing court to use factors that were apparently contrary to a jury’s verdict, some appellate courts would attempt to demonstrate

⁵/ In so holding, the court distinguished the situation in which the sentencing court is choosing a term in a case on which probation had not been previously granted from the situation in which the court is deciding whether to continue someone on probation. (*Id.*, at 498-499.)

that the trial court's finding was not necessarily inconsistent with the jury's verdict. (See *People v. Reyes* (1987) 195 Cal.App.3d 957, 964 [a jury finding that the defendant had not inflicted great bodily injury on an elderly victim was not inconsistent with the court's reliance on the fact that the defendant had used gratuitous violence and injured the victim]; *People v. Lopez* (1982) 131 Cal.App.3d 565, 567 [a finding that the defendant did not use a gun was not inconsistent with a finding that he was armed with one]; see also *People v. Bermurdez* (1984) 157 Cal.App.3d 619, 626 [where the jury hung on a count, the lack of a jury finding did not preclude use of the evidence supporting it]; *People v. Fulton, supra*, 92 Cal.App.3d at 976 [same].)

Some courts stated that the sentencing court must not use the counts of which the defendant was acquitted, but, having heard the evidence supporting the acquitted counts, could use that evidence. (See *People v. Gragg* (1989) 216 Cal.App.3d 32, 42-45 [judge "correctly" stated that it would not "pay heed" to acquitted count and could use the evidence presented on that count as information for finding aggravation, but was prohibited from "the unwarranted practice of imposing extra punishment on a defendant convicted of one charge based on a conclusion by the judge that the jury erred in acquitting the defendant on any companion charges."].) Some courts declined to comment on whether a finding directly contrary to the jury's verdict would be permissible. (See *People v. Castorena, supra*, 51 Cal.App.4th at 562, fn. 9 [allowing that the court could use evidence of elements that would have made the crime a greater offense than that charged

and noting “we do not address the question of whether a court can aggravate a sentence based on a finding of malice in a case where a jury has acquitted the defendant of [the greater offense].”.)

In *People v. Lewis, supra*, 229 Cal.App.3d 259, the court held that, because the jury’s finding that the defendant had not used a weapon was made under a beyond a reasonable doubt standard, and the sentencing court could find factors in aggravation under a preponderance of the evidence standard, there was no problem with the court aggravating the defendant’s sentence based upon a finding that he used a weapon in the course of the offense. (*Id.*, at 264-265; see also *In re Gary B.* (1998) 61 Cal.App.4th 844, 850.) As noted above, the court in *People v. Levitt, supra*, 156 Cal.App.3d at 515 reached a similar conclusion and permitted the court to rely on malice as an aggravating factor despite the fact that it was contrary to the jury’s implied finding of no malice. “The jury’s verdict did not imply a rejection of the evidence of malice; it merely meant that the jury did not feel malice was proven beyond a reasonable doubt. The standard governing a sentencing court is far less stringent;...” (*Ibid.*)⁶

⁶/ The court in *Levitt* rejected the defendant’s interpretation of the *Levitt* court’s earlier decision in *People v. Wells* (1983) 149 Cal.App.3d 721, 730 as foreclosing the trial court’s reliance on substantial evidence that a higher crime was committed while imposing sentence on the lesser crime found. (*People v. Levitt, supra*, 156 Cal.App.3d at 519, fn. 5.) In *Wells*, in remanding for re-sentencing, the court noted that the trial court had stated at the initial sentencing that, although the jury had returned a verdict of manslaughter, it “should have returned a verdict of murder” and admonished the trial court that, while it could consider the severity of the crime in determining the ultimate

(continued...)

This created a conflict with *Takencareof*. (See *People v. Spencer* (1996) 51 Cal.App.4th 1208, 1223.) In *Spencer*, the court reversed the imposition of the upper term based upon the trial court's finding that the victims in a manslaughter case were particularly vulnerable. The jury had acquitted the defendant of the greater charged murder based on a theory of imperfect self-defense. (*Id.*, at 1222.) The appellate court concluded that the finding of vulnerability had to have been based upon a rejection of the imperfect self-defense found by the jury, and thus, could not be the proper basis for aggravating the manslaughter of which the defendant had been convicted. (*Id.*, at 1223.) The Attorney General posited the argument that the trial court was "at liberty to disregard the jury's finding and make its own under a lesser standard of proof." (*Ibid.*) The court noted the split between *Lewis* and *Takencareof* as to whether this assertion was legally sound and declined to resolve it because the trial court had not purported to make such a finding based upon the lesser standard. (*Ibid.*)

⁶(...continued)
disposition in the case, "the trial judge's personal belief" that the conviction should have been for murder instead of manslaughter "shall play no part in the process." (*People v. Wells, supra*, 149 Cal.App.3d at 730.) The *Levitt* court stated that it was permissible for the sentencing court to consider evidence of the greater offense to find aggravation, but that it could not "base a sentencing decision on its personal belief that a higher crime was committed, rather than on specific evidence that would support a sentencing decision under applicable rules and statutes." (*People v. Levitt, supra*, 156 Cal.App.3d at 519, fn.5.) It is difficult to see the distinction that the *Levitt* court was trying to make.

Of the views expressed by the various courts, the one that most carefully protects the jury's role as the ultimate factfinder and buffer between the State and the defendant, is the rule adopted in *Takencareof*. The Framers of the Constitution would surely have agreed that it would be anomalous to permit a defendant to face the same crime of which he had been acquitted by a jury at sentencing under a preponderance of evidence standard. (*People v. Takencareof, supra*, 119 Cal.App.3d at 498.) Moreover, the Framers would not quibble with the notion that it would be "ludicrous" to permit a "defendant who won a victory at the hands of the jury [to] nevertheless be subjected to a more harsh sentence if he was contemporaneously found guilty of another crime in the same case." (*Ibid*; see *Blakely v. Washington, supra*, 540 U.S. at ___ [124 S.Ct. at 2538-2539; 159 L.Ed 2d at 415-416]; *Duncan v. Louisiana, supra*, 391 U.S. at 155-156; cf., *People v. Coelho, supra*, 89 Cal.App.4th at p. 876 [to protect the jury trial right, among others, at sentencing, the court should confine its consideration of the circumstances of the offense to those facts it can conclude beyond a reasonable doubt were found by the jury beyond a reasonable doubt.] .) This Court should therefore adopt the rule of *Takencareof* to protect the right to a jury trial under the California Constitution, Article I, section 16, if not the Sixth Amendment of the Federal Constitution. (See *People v. Fields* (1996) 13 Cal.4th 289, 298 ["the California Constitution is a document of independent force and

effect that may be interpreted in a manner more protective of the defendant's rights than that extended by the federal Constitution."].)⁷

In doing so, this Court would be in keeping with its previous decision in *People v. Richards, supra*, 17 Cal.3d at 624 (disapproved on other grds., *People v. Carbajal, supra*, 10 Cal.4th at 1126) where this Court precluded the order of restitution based upon counts of which the defendant had been acquitted. In addressing the argument that the trial court was doing no more than a civil jury could do under the lesser standard applicable there, this Court stated, "It is entirely irrelevant that the burden of proof in a criminal case differs from the burden in a civil case. This is not a civil case. It is a criminal proceeding in which the defendant, protecting his liberty, will be acquitted if he raises a reasonable doubt of his guilt. In the course of convincing a jury to doubt his guilt on one charge, a defendant should not have the additional task of persuading the judge regarding the subsequent sentencing disposition on other charges." (*Ibid.*)

An application of the *Takencareof* rule to this case demonstrates that the trial court abused its discretion here. The trial court's determination that the terror experienced by Arana as he left the car could be used to aggravate appellant's subsequent crime of auto

⁷/ *Pre-Apprendi*, in *People v. Hernandez* (1998) 19 Cal.4th 835, 842-843, this Court held that neither state nor federal double jeopardy precluded reconsideration of the factual determinations on an enhancement and declined to extend state double jeopardy protections beyond those of federal double jeopardy. Whatever this Court may conclude about whether to adhere to this expansive statement in the context of double jeopardy protections, it should not extend it to undermine state protections under due process and the right to a jury trial.

taking runs afoul of the jury's necessary findings. The jury was not convinced beyond a reasonable doubt that appellant was not the victim of Arana's aggression or that any force used by appellant was not done in self-defense. It acquitted appellant of every count involving violence or threat of violence and did so even in the face of being told that "liars" like Arana are entitled to be free from crime. (RT 2415) The sentencing court's determination that appellant could be held to blame for Arana's terror demonstrated its conclusion that appellant had committed acts constituting unlawful force that had caused Arana to abandon his car, a finding rejected by the jury when it acquitted appellant of carjacking, robbery and making criminal threats. Moreover, there was no support in the record for a finding that appellant caused terror in the actual taking of the car; appellant was in the store when Arana left and took the car after Arana was gone. (RT 636, 1211)

Assuming that appellant did not unlawfully terrorize Arana, appellant only took an unoccupied car without permission. Thus, the circumstances of the offense as found by the jury were not aggravated. Had the court properly relied only on the facts that were consistent with the jury's verdicts, it likely would have imposed the standard, or even the mitigated, term.

As counsel argued, there were several mitigating factors that were supported by the record. One was that appellant admitted his commission of the auto taking early and throughout trial. (RT 2411-2412; Cal. Rules of Court, rule 4.423 (b)(3).) Another was that the crime arose because of odd circumstances, with Arana abandoning the car after

their conflict. (RT 2409-2410; Cal. Rules of Court, rule 4.423 (a)(2)(3)(4) [victim initiated or provoked the incident; the crime was the result of unusual circumstances, behavior partially excusable for a reason not amounting to a defense].) Counsel additionally noted that appellant was returning the car when caught. (RT 2409; see Cal. Rules of Court, rule 4.423 (a)(6) [efforts to avoid damage], (b)(5) [restitution made].)

In light of all of the available mitigation, it is likely that the court, after a proper exercise of discretion based upon a proper application of the law to all of the facts, would not impose the upper term doubled. Accordingly, the sentence must be reversed. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Under *Blakely v. Washington*, Penal Code section 1170 is Unconstitutional Insofar as it Permits the Imposition of the Upper Term Based on Required Findings of Aggravating Factors Found Only by the Judge by a Preponderance of the Evidence

“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*, *supra*, 530 U.S. at 490.) In *Blakely v. Washington*, *supra*, 540 U.S. ____ [124 S.Ct. 2531; 159 L.Ed.2d 403], the United States Supreme Court reiterated this rule and clarified that, “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without *any additional findings*.” (*Id.*, at ____ [*Id.*, at 413-414; *Id.*, at 2537] [Emphasis added].)

In California, the finding of guilt by jury verdict or admission alone permits only the imposition of the middle term set out by statute. (Pen. Code, § 1170 subd. (b).) The court may impose the upper term only in cases where it finds factors in aggravation, which cannot be based on elements of the offense or imposed enhancements, and further concludes that those factors outweigh any factors in mitigation. (See *Ibid.*; Cal. Rules of Court, rule 4.420.) Thus, California’s sentencing scheme contravenes the dictates of *Blakely*.

1. California’s Sentencing Scheme

The Penal Code sets out sentencing provisions in various locations. For most felony offenses, the code provides for a determinate sentence to be chosen from three terms: lower, middle and upper. (See e.g., Pen. Code, § 18.) Penal Code section 1170 outlines how the choice among the three terms is to be made. It provides in pertinent part:

“(a)(3) In any case in which the punishment . . . is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified . . . In sentencing . . ., the court shall apply the sentencing rules of the Judicial Council. . . .”(b) 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. . . .* In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the

family of the victim if the victim is deceased, and *any further evidence introduced at the sentencing hearing*. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” (Emphasis added.)

This section mandates the imposition of the middle term unless the court finds and states on the record circumstances in aggravation or mitigation. (See *People v. Wright* (1982) 30 Cal.3d 705, 709; “In the absence of aggravating or mitigating circumstances, the court is *required to impose the middle term*.” (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785 [emphasis added]; see also *People v. Langevin* (1984) 155 Cal.App.3d 520, 523-524; *People v. Arauz* (1992) 5 Cal.App.4th 663, 674 (conc. and diss. opn. Yegan, J. [quoting Pen. Code, § 1170 and concluding, “Thus, the midterm is the *presumptive* sentence selected by the Legislature.” (emphasis added)]).

“A fact that is an element of the crime shall not be used to impose the upper term.” (Cal. Rules of Court, rule 4.420 (d)⁸; *People v. Bowen* (1992) 11 Cal.App.4th 102, 105; *People v. Castorena* (1996) 51 Cal.App.4th 558, 562.) A fact charged and found true as an enhancement may not be used to impose the upper term unless the punishment for the enhancement has been lawfully stricken. (Cal. Rules of Court, rule 4.420 (c); Pen. Code, § 1170, subd. (b); *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775-1776.) Thus, no facts reflected by the jury’s verdict as to the offense may ever be used as

⁸/ Penal Code, section 1170, subdivision (a)(3) provides that the sentencing courts shall apply the rules imposed by the Judicial Counsel in sentencing a convicted person. (See also, Pen. Code, § 1170.3.) This delegation of authority is constitutional. (*People v. Wright, supra*, 30 Cal.3d at 711-714.)

aggravating circumstances and those establishing an enhancement may be used only if the enhancement is stricken. (See, *People v. Lobato* (2003) 109 Cal.App.4th 762, 767 [verdict reflects only the findings that the jury was compelled to make].)

The factors justifying the upper term need only be proved by a *preponderance of the evidence*. (Cal. Rules of Court rule 4.420 (b), (d); Pen. Code, § 1170, subd. (a)(3); see also *People v. Wright, supra*, 30 Cal.3d at 710; *People v. Levitt, supra*, 156 Cal.App.3d at 514-516; Evid. Code, § 115.)

Circumstances in aggravation, which are “facts which justify the imposition of the upper prison term referred to in section 1170 (b)” (Cal. Rules of Court, rule 4.405 (d)), include facts relating to the crime as well as facts relating to the defendant. (Cal. Rules of Court, rule 4.421; *People v. Cheatham* (1979) 23 Cal.3d 829, 834-836.) In addition, there are statutorily mandated circumstances in aggravation. (Pen. Code, §§ 1170.7, 1170.71, 1170.72; 1170.73, 1170.74, 1170.75, 1170.76, 1170.78, 1170.8, 1170.81, 1170.82, 1170.84, 1170.85, 1170.86, 1170.89.) The court may also consider “additional criteria reasonably related to the decision being made.” (Cal. Rules of Court, rule 4.408; *People v. Cheatham, supra*, 23 Cal.3d at 834-836; *People v. Hall* (1994) 8 Cal.4th 950 [the same rules apply for the choice of enhancement terms].)

The difference between the midterm and the upper term varies from crime to crime, but the increases are never less than one year. For example, the default sentence for any felony is 16 months, two years or three years; the jump from midterm to upper

term is fifty per cent. (See also e.g., Pen. Code, § 193 [penalty for voluntary manslaughter: midterm six years, upper term 11 years]; Pen. Code, § 264 [penalty for rape: midterm six years, upper term eight years].) Additionally, the difference between the midterm and the upper term for some enhancements can be even higher. (See, e.g., Pen. Code, § 12022.5 [penalty for gun use: midterm four years, upper term 10 years].)

Thus, upon conviction, without a finding of additional factors beyond those essential to the conviction itself, the sentencing court *must* impose the midterm designated for the particular offense. The court may, however, thereafter make a finding, by a preponderance of the evidence, of any of a wide range of factors, which cannot be any of those found by the jury in deciding guilt or admitted by the defendant in pleading guilty, and based on those factors, impose a sentence that is at least a year longer than that authorized by the guilty verdict alone.

2. ***Apprendi* and *Blakely* and the Federal Due Process Rights to a Jury Trial and Proof Beyond a Reasonable Doubt**

The due process clause of the Fourteenth Amendment and the jury trial right of the Sixth Amendment combine to “entitle a criminal defendant to ‘a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’ [Citations].” (*Apprendi v. New Jersey, supra*, 530 U.S. at 476-477, citing *In re Winship* (1970) 397 U.S. 358, 365.)

Thus, in *Apprendi*, the Court struck down a New Jersey statute that permitted the maximum sentence for a crime to increase from 10 years to 20 years based upon a judicial finding by a preponderance of the evidence that the crime was committed with a purpose to intimidate an individual or group because of race, color, gender, handicap, religion, sexual orientation or ethnicity. (*Apprendi v. New Jersey, supra*, 530 U.S., at 468-469, 491-492, 497.) In so doing, the Court rejected New Jersey's argument that the hate crime factor was not an element of a criminal offense but was, instead, a "sentencing factor." The Supreme Court held that, however the State chooses to denominate a given fact, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey, supra*, 530 U.S., at 490.)

In *Blakely v. Washington, supra*, 540 U.S. ____ [124 S.Ct. 2531; 159 L.Ed 2d 403], the Court held that Washington's sentencing scheme, which provided for one maximum sentence for the usual case, and a higher maximum sentence in cases in which the sentencing court found aggravating factors by a preponderance of the evidence, to be unconstitutional and a violation of the federal constitutional rights to trial by jury and proof of guilt beyond a reasonable doubt. (See *Id.*, at ____ [124 S.Ct. at 2536-2538].) The Court reached this conclusion by applying the rule from *Apprendi*.

In so doing, the Court explained in *Blakely*:

“the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ [Citation], and the judge exceeds his proper authority.” (*Blakely v. Washington, supra*, 540 U.S. at ___ [124 S.Ct. at 2537; 159 L.Ed.2d at 413-414].)

Under Washington law, the sentencing court could not impose the greater maximum sentence without finding facts other than the elements of the offense as committed with the firearm use that had been admitted by Blakely. Thus, the judge was necessarily finding facts beyond those established by the verdict of guilt, and such practice offended the Constitution. (*Ibid.*)

The holdings of *Apprendi* and *Blakely* did not change the rule that rights to a jury trial and proof beyond a reasonable doubt do not apply to “sentencing factors,” which are those factors that come into play only after the defendant has been found guilty of a crime beyond a reasonable doubt and that do not permit a sentence beyond the prescribed maximum established by the jury verdict. (*McMillan v. Pennsylvania* (1986) 477 U.S. 79, 85-90; *Apprendi v. New Jersey, supra*, 530 U.S. at 481, 485-486, 494 & fn. 19.) Statutory labels, however, are not controlling, and calling a circumstance a “sentencing factor” does not make it so. (*Ring v. Arizona* (2002) 536 U.S. 584, 602; *Apprendi v. New Jersey, supra*, 530 U.S. at 494 [“[T]he relevant inquiry is one not of

form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury’s verdict?”].) “It would demean the importance of the reasonable-doubt standard - indeed, it would demean the Constitution itself - if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an ‘element’ of a crime.” (*McMillan v. Pennsylvania, supra*, 477 U.S. at 102 [dis. opn. of Stevens, J].)

The question of which factors qualify as mere sentencing factors and which are instead elemental in nature has been addressed by the Supreme Court many times. In 1949, in *Williams v. New York* (1949) 337 U.S. 241, 246-252, the Court held that the defendant’s confrontation rights were not violated by permitting the sentencing court in a death case to use hearsay in making the decision as to whether to reduce a death sentence to a life term. The Court noted that the concerns in exercising sentencing discretion necessitated consideration of factors and evidence outside of that strictly relevant to the question of guilt. (*Id.*, at 246-247.) The discretion being exercised in *Williams*, however, was not whether to *increase* the defendant’s sentence to death or even to choose between equal options of life or death; the choice in *Williams* was whether to leave the sentence at death (a decision for which the court had to give no reason at all (*id.*, at 251-252)), or exercise the option that became available to it because of a jury recommendation to reduce the sentence to life imprisonment. (See *id.*, at 243, fn. 2.) *Blakely* distinguished *Williams* on this basis. (*Blakely v. Washington, supra*, 540 U.S. at ___ [124 S.Ct. at 2528]; see also

Apprendi v. New Jersey, supra, 530 U.S. at 482, fn. 9 [“Nothing in *Williams* implies that a judge may impose a more severe sentence than the maximum authorized *by the facts found by the jury.*” (Emphasis added)].)

In 1986, the Court upheld, against a due process and jury trial right challenge, the practice in Pennsylvania of permitting the trial court to find by a preponderance of the evidence facts that would dictate a statutory *minimum* sentence. (*McMillan v. Pennsylvania, supra*, 477 U.S. at 84-90.) In that case, the Court distinguished sentencing considerations that did not alter the maximum term for an offense from elements of the offense. (*Id.*, at 488.) As noted in *Apprendi*, however, the Court there did not “budge from the position that ... a state scheme that keeps from the jury facts that ‘expose defendants to greater or additional punishment may raise serious constitutional concern.’” (*Apprendi v. New Jersey, supra*, 530 U.S. at 486; see also *Blakely v. Washington, supra*, 540 U.S. at ___ [124 S.Ct. at p. 2538; 159 L.Ed. at p. 414] [distinguishing *McMillan* on the basis that the statute there did not authorize a sentence in excess of that otherwise authorized for the offense]; see also *Harris v. United States* (2002) 536 U.S. 545 [reaffirming the constitutionality of permitting the sentencing judge to find facts that the Legislature dictated would require a *minimum* sentence within the range permitted for the offense alone and noting that the minimum sentence mandated in such a case was “a sentence the judge could have imposed absent the finding.” (*Id.*, at 560.)].)

In *Jones v. United States* (1999) 526 U.S. 227, the Court construed a federal statute to require a jury finding of facts that would elevate the penalty for carjacking from 15 years to a potential life sentence. The Court did so, in part, to avoid having the statute be at odds with the federal Constitution. (*Id.*, at 239-252.)

Finally, following *Apprendi*, the Court struck down the Arizona death penalty statute because it permitted the trial court alone to determine the presence of aggravating factors necessary to impose the death penalty. (*Ring v. Arizona, supra*, 536 U.S. at 609.) “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.” (*Id.*, at 602.) Concurring in *Ring*, Justice Scalia clarified the basic rule underlying whether a jury finding is required, “I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt.” (*Id.*, at 610 [conc. opn. of Scalia, J.])

The recurring theme in these cases is the importance of the jury’s role in our system and that fact-finding authority left to the sentencing court is primarily that connected with the exercise of lenience, imposing less than the maximum permitted by the verdict alone. Thus, the Court in *Apprendi* quoted Blackstone to observe, “To guard

against a spirit of oppression and tyranny on the part of rulers,’ and ‘as the great bulwark of our civil and political liberties’ [Citation], trial by jury has been understood to require that ‘*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of the defendant’s equals and neighbours....’ [Citation]” (*Apprendi v. New Jersey*, *supra*, 530 U.S. at 477.) Additionally, in *Jones v. United States*, *supra*, 526 U.S. at 246, the Court also quoted Blackstone as having contended that “other liberties would remain secure only ‘so long as this palladium [trial by jury] remains sacred and inviolate,’”

In *Blakely*, the Court confirmed this:

Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. ... *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

(See also, *Apprendi v. New Jersey*, *supra*, 530 U.S. at 498, conc. opn. of Scalia, J. concurring [judges are a part of the State, and “[t]he founders of the American Republic were not prepared to leave [criminal justice] to the State,”].)

This exclusive control over factfinding as to all the essential prerequisites for the imposition of the maximum authorized sentence is entirely consistent with the Court’s

limitation of sentencing factors left to the judge to those facts relating to an imposition of a sentence equal to, or less than, the sentence permitted by the facts already found by the jury. (See *Williams v. New York*, *supra*, 337 U.S. 241 [court factfinding related to determining whether to follow the jury's recommendation to *reduce* the otherwise mandatory death sentence]; *McMillan v. Pennsylvania*, *supra*, 477 U.S. 79 [court factfinding limited to a determination of facts relating to a mandatory minimum sentence which was necessarily within the range to which the court could sentence the defendant *without any additional finding of fact*]; see also *Apprendi v. New Jersey*, *supra*, 530 U.S. at 482, fn. 9.)

As the Court explained in *Harris v. United States*, *supra*, 536 U.S. at 561-562:

“‘Within the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. Where the law permits the heaviest punishment, on a scale laid down, to be inflicted, and has merely committed to the judge the authority to interpose its mercy and inflict a punishment of a lighter grade, no rights of the accused are violated though in the indictment there is no mention of mitigating circumstances. The aggravating circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy. This is an entirely different thing from punishing one for what is not alleged against him.’ [Citation]”

(See also, *Apprendi v. New Jersey*, *supra*, 530 U.S. at 479 [the trial judge in England in the 18th century had little discretion and imposed a specified sentence unless he thought circumstances justified commuting it].)

3. ***Blakely* and Its Predecessors Applied to California’s Sentencing Scheme: Penal Code section 1170 is Unconstitutional As It Permits Imposition of a Sentence Greater than that Authorized by the Verdict Alone Based Solely on Facts Found by the Judge by a Mere Preponderance of the Evidence**

As set out by the Supreme Court in *Blakely v. Washington* the sentencing scheme in Washington as applicable to *Blakely* could be described as follows:

“In Washington, second-degree kidnaping is a class B felony. [Citation] State law provides that ‘no person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years.’ [Citation] Other provisions of state law, however, further limit the range of sentences a judge may impose. Washington’s Sentencing Reform Act specifies, for petitioner’s offense of second-degree kidnaping with a firearm, a “standard range” of 49 to 53 months. [Citations with explanation of calculation] A judge may impose a sentence above the standard range if he finds ‘substantial and compelling reasons justifying an exceptional sentence.’ [Citation] The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. [Citation] Nevertheless, ‘a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.’ [Citation] When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. [Citation] A reviewing court will reverse the sentence if it finds that ‘under a clearly erroneous standard there is insufficient evidence in the record to support the

reasons for imposing an exceptional sentence.’ [Citation]”
(*Blakely v. Washington, supra*, 540 U.S. at ____ [124 S.Ct. at
2535; 159 L.Ed. at 411].)

Thus, while Washington’s determinate sentencing scheme was divided into several different ranges, and the maximum sentence available for a given class of crimes was delineated by an outer aggravated range, the sentencing court was constrained to impose a sentence within that outer range by various legislative mandates. The court’s ability to depart from the standard range to a higher range up to the outermost limit turned, in part, on the court’s finding of facts in addition to, and different from, those found by the jury in convicting the defendant of the underlying crime. (*Ibid.*) So too is the case in California.

Under California’s parallel scheme, the determinate⁹ terms are divided into a single specified number of months or years; there is a middle term rather than a middle range¹⁰. (Pen. Code, § 1170, subd. (b).) While each crime with a determinate sentence could be punished by as much as a single specified upper term, the imposition of that upper term is limited by the requirement that the court first find circumstances in aggravation. (*Ibid.*) Those circumstances are outlined in illustrative lists as well as in mandatory statutes. (See Cal. Rules of Court 4.408 (a); 4.421(c); Pen. Code, §§ 1170,

⁹/ California’s indeterminate terms (see e.g. Pen. Code §§ 190, 209) are not at issue here.

¹⁰/ The “range” in *Blakely*’s case was quite limited, however. The applicable standard range for *Blakely* was from 49 months to 53 months, a variance of only four months.

subd. (b); 1170.7 *et. seq.*) They may not be based on elements of the offense or any enhancement imposed. (See Cal. Rules of Court, rule 4.420 (d); *People v. Bowen, supra*, 11 Cal.App.4th at 105; *People v. Castorena, supra*, 51 Cal.App.4th at 562; *People v. Garcia, supra*, 32 Cal.App.4th at 1775-1776; *People v. Quinones* (1988) 202 Cal.App.3d 1154; *People v. Hawk* (1979) 91 Cal.App.3d 938, 941.)

Thus, under Penal Code section 1170, the middle term represents the maximum sentence authorized by the jury's findings alone. It matters not that the statute also anticipates that the crime may be punished by the upper term if circumstances warrant. Those circumstances are by definition outside the elements of the crime itself that were presented to, and found by, the jury, and are found by the sentencing court by a mere preponderance based on evidence that need not have been presented to the jury.

Additionally, both California and Washington require that the sentencing court set forth on the record the facts and reasons for imposing the upper term. (Pen. Code, § 1170 subd. (b).) And, the appellate court in California, similar to the court in Washington, will reverse the determination only if there is insufficient evidence to support the finding by a preponderance, and applying a deferential abuse of discretion standard, the appellate court finds that the use of the factor was prejudicial under the reasonable probability test of *People v. Watson, supra*, 46 Cal.2d at 836. (See *People v. Levitt, supra*, 156 Cal.App.3d at 518-519.)

In this case, appellant was convicted of violating Vehicle Code section 10851 after having previously been convicted of a theft or taking of an automobile and having suffered a prior serious or violent felony under the Three Strikes Law. As a result, his sentence on the offense itself had to be two, three or four years doubled because of the prior conviction. (Pen. Code, §§ 666.5, 667, 1170.12.)¹¹ Accordingly, the sentence authorized by the jury's verdict, without more, was the midterm of three years, doubled to six. The upper limit of a term that could be imposed with a finding of additional aggravating factors was the upper term of four years, doubled to eight.

That eight-year term was the outer limit of the potential sentence on the count for which appellant was convicted and was comparable to the 10 years that was the absolute maximum available to the sentencing court in *Blakely*. In *Blakely*, the sentencing court did not sentence to the absolute maximum sentence of ten years, but it exceeded the maximum available sentence authorized by the verdict by more than three years. (*Blakely v. Washington, supra*, 540 U.S. at ___ [124 S.Ct. at 2543; 159 L.Ed. at 420].)¹²

¹¹/ The sentence was subject to further enhancement by two prior prison terms within the meaning of Penal Code section 667.5. These enhancements were stricken by the court in the interest of justice because of “[appellant’s] history, [appellant’s] own personal nature, the trial as it played out and the sentence to which you are to serve time, the fact that you will be doing 80% of that time” and the fact one of the priors was the same as the strike. (RT 2418)

¹²/ The standard range for *Blakely*'s offense was 49 to 53 months. The sentencing court found that *Blakely* had acted with deliberate cruelty, and on that basis, imposed a term of 90 months, a sentence that was less than the 10-year absolute maximum, but more than three years longer than the standard range. (*Blakely v. Washington, supra*, 540 U.S. (continued...))

The Court observed in *Blakely*, “The ‘maximum sentence’ is no more 10 years here than it was 20 years in *Apprendi* (because that was what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).” (*Id.*, at ___ [124 S.Ct. at 2538; 159 L.Ed.2d at 414].) Similarly, the upper term no more constitutes the maximum sentence for an underlying crime in California than did the 10 years in *Blakely*, the 20 years in *Apprendi* or death in *Ring*.

Here, the court imposed the absolute maximum sentence available for the substantive offense, which exceeded the maximum authorized by the jury’s verdict by two years. This sentence was based upon the disputed finding that appellant unlawfully terrified the victim (RT 2416), a finding that was contrary to the jury’s verdict acquitting appellant of carjacking and every other count alleging assaultive or threatening conduct toward the victim. Given these similarities between the situation in *Blakely* and the situation here, it is apparent that the United States Supreme Court would conclude that:

“The Framers would not have thought it too much to demand that, before depriving a man of [two] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to ‘the unanimous suffrage of twelve of his equals and neighbours,’ [citation], rather than a lone employee of the State.” (*Blakely v. Washington, supra*, 540 U.S. at ___ [124 S.Ct. at 2543; 159 L.Ed. at 420].)

¹²(...continued)
at ___ [124 S.Ct. at 2535; 159 L.Ed. at 411].)

As a result, the California scheme for imposition of the upper term in determinate term cases offends the federal constitution and violated appellant's rights to a jury trial and proof of guilt beyond a reasonable doubt.¹³

D. The Error of Imposing the Upper Term Based Upon Factors Not Found By the Jury Beyond a Reasonable Doubt Requires Reversal

“Because the State’s sentencing procedure did not comply with the *Sixth Amendment*, petitioner’s sentence is invalid.” (*Blakely v. Washington, supra*, 540 U.S. at ___ [159 L.Ed.2d at 415; 124 S.Ct. at 2538].) Without making further comment as to the standard of prejudice to be considered, the Court reversed the petitioner’s sentence and

^{13/} California appellate courts have previously rejected challenges to Penal Code section 1170 based upon the denial of a right to a jury trial and proof beyond a reasonable doubt. (See *People v. Betterton* (1979) 93 Cal.App.3d 406; *People v. Nelson* (1978) 85 Cal.App.3d 99.) These cases, however, relied on *Williams v. New York, supra*, 337 U.S. 241 to conclude that the sentencing procedures were not subject to the due process requirements of a criminal trial. (*People v. Betterton, supra*, 93 Cal.App.3d at 412-413; *People v. Nelson, supra*, 85 Cal.App.3d at 101-102.) This begs the question presented here, whether the sentencing determination being made was within the realm of mere sentencing factors or elemental facts. In *Blakely*, the Court distinguished *Williams* based upon the fact that the sentencing judge there was not using additional facts to impose “a sentence greater than what state law authorized on the basis of the verdict alone.” (*Blakely v. Washington, supra*, 540 U.S. at ___ [124 S.Ct. at 2528; 159 L.Ed. at 414]; see also *Apprendi v. New Jersey, supra*, 530 U.S. at 482, fn. 9 [“Nothing in *Williams* implies that a judge may impose a more severe sentence than the maximum authorized by the facts found by the jury.” (emphasis added)].) As noted above, the verdict in *Williams* required imposition of the death penalty unless the jury recommended a life sentence, at which point the court was given discretion to reduce the sentence. (See *Williams v. New York, supra*, 337 U.S. at 242-252.) The imposition of the upper term under Penal Code section 1170 subdivision (b) involves no such reduction.

remanded the case to Washington. It had done the same in *Apprendi*. (*Apprendi v. New Jersey, supra*, 530 U.S. at 497.)

1. The Court’s Finding that Appellant’s Crime Was Aggravated Because He Terrorized the Victim Must Be Reversed

a. The Error Is Structural and Requires *Per Se* Reversal

The California sentencing scheme violates a defendant’s right to a jury determination of elemental facts based upon proof beyond a reasonable doubt in multiple ways. By permitting the trial court alone to determine sentencing factors based upon any evidence from whatever source including the hearsay found in probation reports, evidence of dismissed counts, evidence otherwise excluded based upon the traditional rules of evidence and evidence rejected by the jury in finding guilt, the California scheme deprives the defendant of notice, a jury determination, proof beyond a reasonable doubt, and proof by competent evidence. Such a pervasive violation of Sixth Amendment rights makes a determination that the jury (or any trier of fact) would have found guilt beyond a reasonable doubt impossible. The error is structural and requires *per se* reversal. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *Chapman v. California* (1967) 386 U.S. 18, 23; *Neder v. United States* (1999) 527 U.S. 1, 7-9; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-281.)

Structural errors “deprive defendant of ‘basic protections’ without which ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or

innocence ... and no criminal punishment may be regarded as fundamentally fair.’
[Citation]” (*Neder v. United States, supra*, 527 U.S. at 8-9; see also *Rose v. Clark* (1986)
478 U.S. 570, 578, n. 6 [structural errors are those that “necessarily render a trial
fundamentally unfair”; they abort the trial process or deny it altogether]; *Arizona v.
Fulminante, supra*, 499 U.S. at 309-310 [structural defects in the trial mechanism defy
harmless error analysis; they affect the entire conduct of the trial from beginning to end].)
They “contain a ‘defect affecting the framework within which the trial proceeds, rather
than simply an error in the trial process itself.’ [Citing *Fulminante*]” (*Neder v. United
States, supra*, 527 U.S. at 8.)

Structural error is distinguished from “trial error” which can be subjected to
a harmless error analysis. Trial error is “error which occurred during the presentation of
the case to the jury, and which may therefore be quantitatively assessed in the context of
other evidence presented in order to determine whether its admission was harmless beyond
a reasonable doubt.” (*Arizona v. Fulminante, supra*, 499 U.S. at 307-308; see also *People
v. Flood* (1998) 18 Cal.4th 470, 492-504.)

The error created by California’s sentencing scheme “affect[s] the
framework” within which the trial on the aggravating circumstances proceeds. Under the
California plan, the sentencing hearing is an entirely separate proceeding at which new
allegations are considered. These allegations of aggravating factors are not formally made
and might appear in a probation report, in a prosecutor’s statement in aggravation, a third

party's statement, in the prosecutor's oral argument or in the judge's head. (See Pen. Code, § 1170 subd. (b) ["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."].) They are proved at a hearing before the judge alone, who determines their probable truth based upon a preponderance of the evidence standard. (See Cal. Rules of Court rule 4.420 (b), (d).) Moreover, additional evidence is presented that is unrestrained by traditional rules of evidence or the Confrontation Clause of the Sixth Amendment. (See Pen. Code, § 1170 subd. (b) ["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."].)

Thus, it permits the facts to be found under the wrong standard of proof by the wrong entity based up unreliable evidence and without notice. This renders the proceeding fundamentally unfair. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at 281.) It fits the description Justice Scalia presented of the scheme replaced in *Apprendi* in which, "a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment [citation], based not on facts proved to his peers beyond a reasonable doubt,

but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.” (*Blakely v. Washington, supra*, 540 U.S. at ___ [124 S.Ct. at 2542; 159 L.Ed. at 418-419].)

The situation is considerably different from those that have been found susceptible to a harmless error analysis. In *Neder*, the Court held that the harmless error analysis could be applied where the trial court had excluded an element of the crime from the jury’s consideration. In so doing, the Court noted that, “Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to Neder’s defense” The failure to charge the jury on one element did not render the trial “fundamentally unfair.” (*Neder v. United States, supra*, 527 U.S. at 9.) The Court additionally observed that the element was uncontested at trial and would not likely be contested on retrial; a retrial would be focused on the same issues that had already been properly tried. (*Id.*, at 15.) Other than having counsel and an impartial judge, appellant was afforded none of the other enumerated protections that made Neder’s trial fair.

Moreover, while the aggravating circumstances here require trial by jury and proof beyond a reasonable doubt because their ability to increase a defendant’s punishment renders them “elements” of a higher level of crime, they are not equivalent to the omitted “element” in *Neder* or the other cases on which *Neder* relied involving

misinstruction or use of a presumption on a single element of an offense. (See, e.g., *Yates v. Evatt* (1991) 500 U.S. 391; *Carella v. California* (1989) 491 U.S. 263; *Pope v. Illinois* (1987) 481 U.S. 497; *Rose v. Clark, supra*, 478 U.S. 570.) Unlike in cases involving an element that may have been omitted or the subject of presumptions, the trial on the basic elements of a crime will not necessarily involve the presentation of evidence relating to the specific aggravating factor, and the jury findings as to guilt will not necessarily shed light on the jury's determination as to facts relating to them. (Compare, e.g., *Rose v. Clark, supra*, 478 U.S. at 580 ["When a jury is instructed to presume malice from predicate facts, *it still must find the existence of those facts beyond a reasonable doubt* [fn. 8] "Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that *prevent* a jury from considering an issue' [Citation]" (emphasis added)].)

Moreover, as noted above, nobody involved in the process, neither the trier of fact nor the parties, conducts the "trial" on the aggravating circumstances with an awareness of the proper standard of proof or operated under the usual rules of evidence. Additionally, the defendant is given limited notice as to what factors he may have to defend, and thus, has less of an opportunity to do so. These factors alone undermine any confidence one might have in an appellate court's ability to predict what a jury may have found at a proper trial on the issue. As such, the error here is more akin to that in *Sullivan v. Louisiana, supra*, 508 U.S. at 281-282, where the Court concluded that the improper

reasonable doubt instruction infected every jury finding and was a structural defect in the constitution of the trial mechanism defying harmless error analysis.

This Court has previously held that *Apprendi* error was subject to a *Chapman* standard of harmless error (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326), but did so in a context that is inapposite here. In *Sengpadychith*, the error was the failure to instruct the jury properly as to the primary activities element of the criminal street gang enhancement. Prior to *Apprendi*, this Court had held that the failure to instruct on elements of sentencing enhancements was not federal constitutional error and thus was subject to the harmless error test of *People v. Watson, supra*, 46 Cal.2d 818. (See *People v. Wims* (1995) 10 Cal.4th 293, 315.) *Sengpadychith* acknowledged that, in light of *Apprendi*, this holding was wrong as to enhancements that increased the defendant's maximum punishment. (*People v. Sengpadychith, supra*, 26 Cal.4th at pp. 324-328.) Because there had been a jury trial on the enhancement, and the only error was the improper instruction on a single element of the enhancement, this Court, consistent with *Neder*, held that a *Chapman* harmless error analysis applied. (*Ibid.*; see also *People v. Breverman* (1998) 19 Cal.4th 142, 178-179.) Thus, it did not dispose of the issue presented here involving structural error in the proceedings surrounding the determination of factors that must be proved to the jury pursuant to the holdings of *Apprendi* and *Blakely*.

As the error here infected the structural underpinnings of the determination of the truth of the aggravating circumstances used to impose the upper term, the error requires *per se* reversal. (*Arizona v. Fulminante, supra*, 499 U.S. at 309-310; *Chapman v. California, supra*, 386 U.S. at 23; *Neder v. United States, supra*, 527 U.S. at 7-9; *Sullivan v. Louisiana, supra* 508 U.S. at 278-281.) Thus, the finding that appellant improperly terrorized the victim must be stricken.

b. Assuming a *Chapman* Standard of Prejudice Applies, the Error Requires Reversal

Under *Chapman v. California, supra*, 386 U.S. 18, the State must demonstrate beyond a reasonable doubt that the federal constitutional error did not contribute to the finding obtained. (*Id.*, at 24-26; *Neder v. United States, supra*, 527 U.S. at 15.) In *Neder*, the Court concluded that a reviewing court could assess whether the failure to have a jury make a finding of an element of the offense beyond a reasonable doubt was harmless. (*Ibid.*) In making this assessment, the reviewing court must “conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict 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.” (*Id.*, at 19 [emphasis added].)

In the situation where the trial court alone has made finding of an elemental factor by a mere preponderance of the evidence, based upon evidence not presented to the jury and possibly on unreliable evidence, and without notice as to the elemental factors being asserted, the reviewing court's task will be difficult. Its review of the record will have to be limited to only the evidence properly admitted before the jury during the determination of guilt. It will have to then determine what the jury did find, that is, what findings were encompassed by the jury's verdict, or those that would necessarily have been found given the necessary findings made by the jury, or those that were admitted by the defense, or those that were uncontested and supported by overwhelming evidence. (See *Id.*, at 15-19; *Carella v. California*, *supra*, at 270-273 (conc. opn. Scalia, J.); *Rose v. Clark*, *supra*, 478 U.S. at pp. 580-581; *Yates v. Evatt*, *supra*, 500 U.S. at 402-411; see also *People v. Flood*, *supra*, 18 Cal.4th at 504-507.)

In this case, it is clear that the error was not harmless beyond a reasonable doubt because the jury's verdict demonstrates that it *in fact did not find* the facts relied upon by the court beyond a reasonable doubt. The jury here acquitted appellant of carjacking, kidnaping, robbery, grand theft automobile, criminal threats, kidnaping for carjacking, and kidnaping to commit robbery. (CT 170-183) The jury convicted appellant of unlawful stealing, taking or driving of an automobile. (CT 184) Thus, the jury had a reasonable doubt that appellant committed any offense that required a finding that he committed it by means of force or fear, any offense that would require a finding that

appellant unlawfully “terrified” Arana or that Arana “left the car in that [terrified, afraid for his life] state of mind” leaving appellant in “possession of the car against [Arana’s] will” as the court described the crime, making it not “just a simple 10851 (a).” (RT 2416) Additionally, the case was presented to the jury as a straight credibility contest, with the prosecutor arguing exclusively that appellant was a liar and defense counsel arguing that Arana was the liar. (RT 1509-1582) The jury convicted appellant of the only count that he admitted by his own testimony as argued by both the prosecutor and defense counsel. (RT 1524, 1557, 1564) Thus, it resolved the credibility issue in appellant’s favor.

Accordingly, it cannot be said on this record that the jury either *did, or would have*, found the aggravating factor of appellant’s having unlawfully terrified Arana in committing his violation of Penal Code section 10851. Therefore, the error was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at 24-26; *Neder v. United States, supra*, 527 U.S. at 15-19.)

Accordingly, whether a standard of *per se* reversible error applies or the federal harmless error standard does, the trial court’s finding of the aggravating factor that appellant terrified Arana and made him fear for his life must be reversed.

2. The Imposition of the Upper Term Must Be Reversed

Because the use of this judicially found aggravating factor to impose the upper term was federal constitutional error, the harmless error standard of *Chapman* also

applies to the determination of whether the use of the factor to impose the upper term was harmless. (See *Chapman v. California*, *supra*, 386 U.S. at 21; *People v. Sengpadychith*, *supra*, 26 Cal.4th at 324-328; *People v. Breverman*, *supra*, 19 Cal.4th at 178-179.) Thus, the sentence must be reversed unless the prosecution can demonstrate beyond a reasonable doubt that the error did not contribute to the sentence chosen. (See *Chapman v. California*, *supra*, 386 U.S. at 24.)

Here, the court explained at length that the violation in this case was not “a simple [Penal Code section] 10851 (a)” (RT 2415-2417) “I believe that it is *an aggravated situation* based on what I have just described.”(RT 2416) Thus, the court relied on the infected finding in assessing the crime as aggravated. Moreover, it expressly relied on the finding in imposing the upper term: “the court is *considering the trial as it took place before the court, the conviction on the 10851(A)*, the fact that you have a lengthy history in choosing the high term of four years.” (RT 2417) Therefore, despite the fact that there was another potential factor in aggravation, at least half of the reason for choosing the upper term was the unconstitutional factor that must be stricken. Under the circumstances, this Court cannot conclude that the trial court’s reliance on it was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at 24.) It must therefore be reversed. (*Ibid.*)

E. The Sentence Must be Reversed Because the Use of the Facts of the Acquitted Counts Violated the Double Jeopardy Clause of the Fifth Amendment

The Double Jeopardy Clause of the Fifth Amendment bars retrial on the same charges after an acquittal and applies to the states through the Fourteenth Amendment. (See *Green v. United States* (1957) 355 U.S. 184, 188; *Benton v. Maryland* (1969) 395 U.S. 784, 794-795; see also *People v. Superior Court of Los Angeles (Marks)* (1991) 1 Cal.4th 56, 71, fn. 13.) California courts and the United States Supreme Court have held that a verdict of acquittal does not bar a sentencing court from considering conduct underlying that offense as a sentencing factor. (See *People v. Levitt, supra*, 156 Cal.App.3d at 515; *United States v. Watts* (1997) 519 U.S. 148, 157.) Both rules relied on the notion that sentencing factors are properly determined by the court alone under a preponderance of the evidence standard. (*People v. Levitt, supra*, 156 Cal.App.3d at 515; *United States v. Watts, supra*, 519 U.S. at 156.)

The rule, however, cannot apply to elemental aggravating factors, which are subject to the rights to a jury trial and proof beyond a reasonable doubt. Under *Blakely* and *Apprendi*, the aggravating factor becomes an “element” of the greater offense of the crime “simpliciter” plus some factor that makes it worse than in its basic form. (See *Apprendi v. New Jersey, supra*, 530 U.S. at 494; *Almendarez-Torres v. United States* (1988) 523 U.S. 224, 249 (dis. opn. of Scalia, J.)) Thus, a jury acquittal of those factors

does trigger double jeopardy protections. (See *Monge v. California* (1998) 524 U.S. 721,737-741 (dis. opn. of Scalia, J).)

In his dissent in *Monge*, Justice Scalia explained, based on the reasoning he later applied in *Blakely*, that the sentencing enhancements in California (including the one for recidivism at issue in *Monge*) were like new crimes because they caused a defendant's maximum sentence to increase. (*Ibid.*) He concluded, therefore, that an "acquittal" of the enhancement should bar retrial of it on double jeopardy grounds. (*Ibid.*)

In this case, appellant was acquitted of the elemental aggravating factors of having unlawfully terrified Arana and made him afraid for his life when the jury found him not guilty of any charged offense involving violence or threats. The trial court's comments at sentencing demonstrate that it ignored this key component of the jury's determination -- the fact that, by acquitting appellant of all of the serious and violent felonies charged against him in this case, the jury determined that the evidence did not show beyond a reasonable doubt that appellant was the aggressor or that the fear that he engendered in the victim was the result of appellant's having made *unlawful* threats or used *unlawful* force. (See CT 114-176 [instructions given]; *Richardson v. Marsh* (1987) 481 U.S. 200, 211[jury presumed to follow instructions]; *People v. Lawson* (1987) 189 Cal.App.3d 741, 748 [same].) The sentencing court's later conclusion to the contrary and imposition of punishment on the basis of them was therefore a violation of federal double jeopardy. (See *Green v. United States, supra*, 355 U.S. at 188; *Benton v. Maryland, supra*,

395 U.S. at 794-795; see also *United States v. Dixon* (1993) 509 U.S. 688, 705 [collateral estoppel effect attributed to the Double Jeopardy clause may bar later prosecution where the government lost in an earlier prosecution]; *Ashe v. Swenson* (1970) 397 U.S. 436, 445-446.)

For the reasons discussed in Subpart D, the impermissible use of a factor in violation of Double Jeopardy cannot be deemed harmless here.

CONCLUSION

Under Penal Code section 1170 subdivision (b), a California defendant, upon conviction, before the sentencing court has made findings in aggravation, *must* be sentenced to the middle term for the crime of which he was convicted. Therefore, the additional aggravating factors later found by the judge when imposing an upper term are essential to that increase in the sentence and are “elements” within the meaning of the holdings in *Apprendi* and *Blakely*. Accordingly, imposition of the upper term based on these judicially found factors violates federal due process and jury trial protections.

Additionally, when those factors are elements of offenses of which the defendant has been acquitted, federal double jeopardy protections are also violated. Furthermore, as a matter of policy, to protect state and federal jury trial rights, the facts of acquitted counts should not be used to aggravate a criminal sentence.

Appellant was sentenced to the upper term based upon facts that were not only not found by the jury, but were rejected by the jury in its verdicts of acquittal of all counts involving violence and behavior not admitted by appellant. Accordingly, his sentence must be reversed.

DATED: August 30, 2004

RESPECTFULLY SUBMITTED

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