

**AMAZING STORIES:**  
***Blakely v. Washington* and California Determinate Sentences**

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Last week, in a case which had not been “on the radar” for most of us, the U.S. Supreme Court significantly expanded [\*Apprendi v. New Jersey\*](#) (2000) 530 U.S. 466, in a way which casts serious doubt on the constitutionality of California’s Determinate Sentencing Law and, in particular, on the validity of most upper terms based on aggravating circumstances other than recidivism. ([\*Blakely v. Washington\*](#) (June 24, 2003; 02-1632) 542 U.S. \_\_\_, 2004 WL 1402697, 04 C.D.O.S. 5539, 2004 Daily Journal D.A.R. 7581 [slip opn. on Supreme Court’s web site].) This memorandum represents some **very preliminary** thoughts on the apparent implications of *Blakely* for California sentences. We expect to supplement or update these comments in the coming days and weeks and may also post sample “*Blakely* arguments” as they become available.

As outlined below, *Blakely* holds that, where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth Amendment entitles the defendant to jury determination of those additional facts by proof beyond a reasonable doubt. Because the middle term is the presumptive sentence under California’s Determinate Sentence Law and a defendant may only receive an upper term if “aggravating circumstances” are found, the sentencing scheme appears to violate *Blakely*. As with the Washington regime reviewed in *Blakely*, it is the judge, rather than the jury, who makes the findings of aggravating circumstances and the judge applies only a preponderance standard.

**THE WASHINGTON SENTENCING SCHEME AND THE REASONING OF *BLAKELY*.**

*Blakely* pled guilty to second-degree kidnaping and also admitted a firearm enhancement. As a “class B felony,” second-degree kidnaping was subject to an absolute maximum of 10 years. However, the “standard range” for second-degree kidnaping with a firearm was 49 to 53 months. Washington law provided that a court could impose a sentence greater than the “standard range” (but still within the 10-year cap) only if it found “substantial and compelling reasons justifying an exceptional sentence.” The statute provided a list of “aggravating factors” which could justify such a “departure” from the “standard range” and described the listed factors as “illustrative rather than exhaustive.” (*Blakely, supra*, slip opn., at pp. 2-3.) The trial court imposed an “exceptional sentence” of 90 months – 37 months above the standard range – based upon the judge’s finding that *Blakely* acted with “deliberate cruelty,” one of the enumerated aggravating factors.

The Supreme Court held that the trial court’s finding of that aggravating factor violated *Apprendi*’s rule entitling a defendant to jury determination of any fact exposing a defendant to greater punishment than the “maximum” otherwise allowable for the underlying offense. The

*Blakely* majority (led by Justice Scalia) rejected the state's assertion that the relevant "maximum" was the 10-year cap for a "class B felony." Instead, the majority treated the top end of the "standard range" (53 months) as the relevant "statutory maximum," because that was the greatest sentence Blakely could receive based solely on the facts admitted by his plea:

Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. 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, supra*, slip opn. at p. 7, emphasis in original.)

Drawing together the lessons of *Apprendi*, *Ring v. Arizona* (2002) 536 U.S. 584 (the case which applied *Apprendi* to death-penalty aggravating factors), and *Blakely* itself, the majority commented:

Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi* ), one of several specified facts (as in *Ring* ), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. [Fn.] (*Blakely, supra*, at p. 9, emphasis in original.)

In the course of responding to the dissenters, the *Blakely* majority spoke of "our commitment to *Apprendi* in this context" and "the need to give intelligible content to the right of jury trial." (*Ibid.*) The majority described *Apprendi* as a "bright-line rule" and rejected the notion that the jury trial right should depend on some assessment of the degree of judicial factfinding in the sentencing process, such as whether the statutory scheme went "too far" or allowed "the tail to wag the dog." (*Id.* at p. 12.) "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to the jury all facts legally essential to the punishment." (*Id.* at p. 17, emphasis in original.) While the majority rejected the notion that its holding would imperil the very concept of "determinate sentencing," the opinion implies that, to pass muster, a determinate sentencing scheme must rely upon *jury* fact-finding.

Determinate judicial-factfinding schemes entail less judicial power than indeterminate schemes, but more judicial power than determinate *jury*-factfinding schemes. Whether *Apprendi* increases judicial power overall depends on what States with determinate judicial-factfinding schemes would do, given the choice between the two alternatives. (*Id.* at p. 13, emphasis in original.)

Finally, the opinion makes clear that, as with the right to jury trial on the underlying offense itself, "nothing prevents a defendant from waiving his *Apprendi* rights" – either by "stipulat[ing] to the relevant facts or [by] consent[ing] to judicial factfinding. [Citations.]" (*Id.* at p. 14.)

## **BLAKELY’S IMPLICATIONS FOR CALIFORNIA’S DSL.**

**The structure of California determinate sentencing and the apparent applicability of *Blakely*.** The threshold question, of course, is whether *Blakely* has any potential application to California determinate sentencing. It’s true that, on its face, the Washington sentencing scheme, with its nomenclature of “standard ranges” and “departures” for “exceptional” circumstances, may bear greater resemblance to the *federal* sentencing guidelines than to choices among “lower,” “middle” and “upper” terms under California’s sentencing scheme. (In a footnote, the *Blakely* majority insisted that, “The Federal Guidelines are not before us, and we express no opinion on them.” (*Blakely, supra*, slip opn. at p. 9 fn. 9.) But (as reflected in the extensive discussion of *Blakely* over the past day) it’s widely assumed that *Blakely* will apply to “upward departures” under the federal guidelines.) But, in view of the breadth of the *Blakely* majority opinion and its characterization of *Apprendi* as a “bright-line rule” requiring *jury* fact-finding of any matters essential to imposition of a greater sentence, “commitment to *Apprendi* in this context” (*id.* at p. 9) should also require jury determination of “aggravating circumstances” for a California determinate sentence.

The state is likely to argue that, to the extent there is any analogy between the Washington and California sentencing schemes, the triad of lower, middle, and upper terms prescribed for an offense (e.g., 2-3-4) is the functional equivalent of the “standard range” (49 to 53 months) for the kidnaping offense in *Blakely*. Under that theory, an “exceptional sentence” finding justifying a “departure” from the “standard range” would be considered comparable to a California *enhancement* imposed on top of the base term. But a close examination of California sentencing law through the prism of *Blakely* reveals a different – and somewhat counter-intuitive – picture. In *Apprendi/Blakely* terms, *the middle term is the true “statutory maximum,”* because an upper term requires *additional findings* – i.e., “aggravating circumstances” – beyond those inherent in the offense itself.

California statutes, court rules, and case law unequivocally provide that, *unless there is a finding of at least one aggravating circumstances, a court cannot impose the upper-term:* “When a judgment of imprisonment is to be imposed, *the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.*” (Pen. Code § 1170(b), emphasis added; accord Cal. Rules of Court, rule 4.420(a) & (b);<sup>1</sup> cf., e.g., *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360.) As with the “standard range” in *Blakely*, the mid-term is the presumptive sentence. And, as with the “exceptional sentence” in *Blakely*, a California court lacks statutory authority to impose an upper term unless it finds “aggravating circumstances” beyond the elements inherent in the offense itself.

Like the Washington statutes, the California rules provide a list of enumerated aggravating circumstances (rule 4.421), but the list is “not exclusive” and a court may rely upon a non-enumerated circumstance “reasonably related” to the sentencing decision. (Rule 4.408(a); see e.g.,

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated. References to “rules” are to the California Rules of Court.

*People v. Garcia* (1989) 209 Cal.App.3d 790, 794-795 [rapist's knowledge of his herpes infection]; compare *Blakely, supra*, at p. 3 [listed aggravating factors "illustrative rather than exhaustive"].) As with the Washington scheme, the court must make explicit factual findings. (§ 1170(c); rule 4.420(e) ["a concise statement of the ultimate facts deemed to constitute circumstances in aggravation"]; compare *Blakely, supra*, at p. 3 [Washington judge "must set forth findings of facts and conclusions of law supporting" an "exceptional sentence"].)

California's "dual use" rule underscores the necessity of finding *additional* facts, for a court cannot base an upper term on a fact which is either an element of the underlying offense or is the basis for an enhancement. (§ 1170(b); rules 4.420(c) & (d).) Thus, the aggravating circumstances authorizing an upper term are almost necessarily *facts beyond those determined by the jury's offense verdicts and enhancement findings* (unless the court elects to strike an enhancement and instead use the enhancing facts to impose the upper term (rule 4.420(c))). Put another way, where the only aggravating circumstances are those which overlap either the offense or any enhancement, *the middle term is the "maximum" sentence a defendant may receive*. It is only a finding of some additional non-overlapping aggravating circumstance which can "expose" a defendant to an upper term. "The judge acquires that authority [to impose an upper term] only upon finding some additional fact. [Fn.]" (*Blakely, supra*, at p. 9.) Consequently, under the Sixth Amendment reasoning of *Blakely* and *Apprendi*, *a defendant is entitled to jury determination of any such aggravating circumstance used to impose an upper term*. Additionally, those findings must be subject to a reasonable doubt standard of proof (*id.* at pp. 5, 15), rather than a preponderance standard, as California law currently provides (rule 4.420(b)).

While the most obvious field for application of *Blakely* is the determination of aggravating circumstances used to impose an upper base term, *its reasoning should also apply to those enhancements which provide a triad of possible enhancement terms*. (E.g., §§ 12022.5(a) [3-, 4-, or 10-yr enhancement for firearm use], 12022.3(a) [3-, 4-, or 10-yr enhancement for deadly weapon use during sex offense], 12022.7(e) [3-, 4-, or 5-yr enhancement for infliction of GBI during domestic violence offense].) As with the selection of the base term for the offense itself (§ 1170(b)), the rules provide, "When the defendant is subject to an enhancement that was charged and found true for which three possible terms are specified by statute, *the middle term shall be imposed unless there are circumstances in aggravation or mitigation...*" (Rule 4.428(b).) As with the choice of an upper term for the underlying offense, the court must select the middle-term enhancement unless there are aggravating circumstances. Consequently, just as *Apprendi* requires jury determination of the facts necessary to establish the enhancement itself (e.g., weapon use, GBI), under *Blakely* the jury should also determine any *additional aggravating facts* which are used to support an upper-term on the enhancement, rather than the presumptive middle term.

**Limited to aggravating circumstances exposing defendant to an upper term.** Assuming that *Blakely* does have some applicability to California's Determinate Sentencing Law based on the structural considerations discussed above, what is the scope of the right to "determinate jury-factfinding" (*Blakely, supra*, at p. 13)? That is, which specific DSL determinations potentially come within *Blakely*? Those questions require considerations of some of the crucial limits the Supreme

Court has placed on the scope of *Apprendi* in other contexts.

First, the Supreme Court has limited the *Apprendi* rights (jury trial, proof beyond reasonable doubt, etc.) to factual findings necessary to expose a defendant to a sentence *greater than the maximum term otherwise provided for the underlying offense*. It has refused to extend those rights to facts which trigger “mandatory-minimums” or which otherwise fix the length of the sentence, *but which do not increase the maximum allowable sentence*. (*Harris v. United States* (2002) 536 U.S. 545.) “Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.” (*Id.* at p. 558.) Thus, for example, where the statute authorizes a range of potential prison terms for a particular offense, a finding which renders a defendant ineligible for probation or which somehow increases the *minimum* available term would not come within *Apprendi*. (See *McMillan v. Pennsylvania* (1986) 477 U.S. 89, which *Harris* re-affirmed.)

When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence.” (*Harris, supra*, 536 U.S. at p. 565.)

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The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury. The finding in *McMillan* restrained the judge's power, limiting his or her choices within the authorized range. It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be. (*Id.* at p. 565.)

While *Blakely* may alter our understanding of the “authorized range” permitted by the jury’s findings – i.e., in California, the *middle* term should be considered the “maximum” unless there have been findings of aggravating circumstances – it does not seem to affect the basic lessons of *Harris*. The focus of *Apprendi* and its progeny remains on findings which are necessary *to increase the sentence beyond the maximum otherwise allowed by the jury’s verdict*. Consequently, it is likely that *Blakely* applies only to determination of aggravating factors which expose a defendant to a potential upper term, but not to mitigating factors. If there is no right to jury determination of a fact which actually alters the available range of sentencing by increasing the lower term or by precluding probation, it is difficult to see how *Apprendi* could apply to criteria which operate less rigidly and simply guide the sentencing court’s discretion in choosing a term within the range already authorized by the jury’s verdict. Significantly, the presence of one or more mitigating circumstances simply allows a sentencing court to impose a middle term; they do not entitle a defendant to a lower term or preclude imposition of a middle or upper term.

This is a matter which may well be revisited in the future. If the initial *Blakely* challenges to findings of aggravating factors are successful, it may be possible to build upon those cases, especially if any courts describe *Blakely*’s principles in broad terms which could conceivably apply to mitigating factors. But, at least for the “first round” of *Blakely* appeals, it does not appear realistic to demand jury determination of mitigating factors.

**Factfinding not discretion.** Sentencing decisions typically involve two different kinds of determinations – findings of facts (e.g., weapon use) and *the exercise of discretion or judgment as to the most appropriate sentence*. *Apprendi* and *Blakely* appear to focus strictly on the right to *jury determination of facts*, which expose a defendant to the possibility of a sentence greater than the maximum allowed by the jury’s findings. The *Apprendi/Blakely* majority has no quarrel with *judicial sentencing discretion*, provided that jurors have made all the purely factual findings necessary to authorize a maximum sentence. As the *Blakely* opinion noted:

Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence. (*Blakely, supra*, at p. 9 fn. 8, emphasis in original.)

That footnote implies that “determinate *jury*-factfinding” (*id.* at p. 13) will bear greater resemblance to jury findings on conventional enhancements than to the jury’s role in the penalty phase of a California capital trial. That is, under the *Blakely*’s construction of the Sixth Amendment the *jury*, not the judge, must find the existence of any aggravating facts (such as those enumerated in rule 4.421(a)), which are used to support an upper term (subject to the recidivism limitation discussed below). But (in contrast to a capital jury’s role in choosing between death and LWOP) *Blakely* would not appear to entitle a defendant to jury determination of the choice between a middle and upper term. That normative or discretionary judgment – including the *weighing* of aggravating factors found by the jury and the balancing of those factors against mitigating circumstances – would likely remain with the sentencing judge.

Not applicable to recidivist aggravating factors. One glaring anomaly continues to plague all aspects of *Apprendi* practice. Two years before *Apprendi*, the Court ruled (5-4) that there was no right to jury trial (or proof beyond a reasonable doubt) on a prior conviction allegation *even where the prior conviction significantly increased the maximum allowable sentence*. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224.) The *Apprendi* majority opinion did not overrule *Almendarez-Torres*, but purported to distinguish it (even while acknowledging “it is arguable that *Almendarez-Torres* was incorrectly decided”). (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 489.) “Both the certainty that procedural safeguards attached to any ‘fact’ of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that ‘fact’ in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range. [Fn.]” (*Apprendi, supra*, at p. 488.) Consequently, as reiterated in *Blakely*, the core holding of *Apprendi* is: “*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Id.* at p. 490, emphasis added; *Blakely, supra*, at p. 5.)

Justice Thomas had been in the majority in *Almendarez-Torres*, but switched sides to provide

the crucial fifth vote in *Apprendi*. In his separate concurrence in *Apprendi*, Justice Thomas indicated that he regretted his *Almendarez-Torres* vote and made plain that he saw a right to jury trial on *any fact* increasing the maximum sentence, including a prior conviction. (*Apprendi, supra*, 530 U.S. at pp. 520-521 (Thomas, J., concur.)) Consequently, there should be 5 votes to overrule *Almendarez-Torres* – the 4 original dissenters plus Thomas (the same 5 who comprised the majority in both *Apprendi* and *Blakely*). Nonetheless, the Supreme Court did not actually do so in *Apprendi*, and, by its cert. denials over the intervening 4 years, it has passed up other opportunities to revisit *Almendarez-Torres*. Consequently, both California and federal courts have ruled that *Almendarez-Torres* remains the law and, pending any further word from the Supreme Court, there is no right to jury determination of a prior conviction or prior prison term enhancement. (E.g., *People v. Epps* (2001) 25 Cal.4th 19, 23; *United States v. Yanez-Saucedo* (9th Cir. 2002) 295 F.3d 991, 993.)

As with *Apprendi* challenges to lack of jury trial on “strikes” and other prior conviction enhancements, counsel may still want to raise a *Blakely/Apprendi* challenge to judicial determination of recidivist aggravating factors in order to ensure preservation of the claim in the event the U.S. Supreme Court grants cert. to resolve the issue sometime in the near future. But the remainder of this discussion will assume that *Almendarez-Torres* is still good law and that, as suggested by *Blakely*’s quotation of *Apprendi*, there is no right to jury determination of DSL aggravating circumstances which consist of “the fact of a prior conviction.” However, that still leaves considerable doubt as to *which precise aggravating circumstances* come within the *Apprendi/Blakely* right to jury trial and which within the *Almendarez-Torres* exception for prior convictions.

Even within the more traditional context of enhancements and “strikes,” there is uncertainty over whether there is a right to jury trial on some aspects of recidivist allegations. The California Supreme Court recently granted review to consider whether *Apprendi* requires determination of additional facts necessary to prove that an out-of-state prior conviction qualified as a “strike” (where the least adjudicated elements of the out-of-state robbery fell short of California’s definition of the offense). (*People v. McGee* (2004) 115 Cal.App.4th 819, review granted, Apr. 28, 2004 (S123474).) There is also continuing debate over whether a prior juvenile adjudication alleged as a “strike” properly comes within the *Almendarez-Torres* exception since (in contrast to an adult conviction) the defendant never had the right to jury trial in the juvenile case. (Compare maj. & dissenting opinions in *People v. Lee* (2003) 111 Cal.App.4th 1310; also compare *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187.)

Applying the elusive *Apprendi/Almendarez-Torres* distinction to California’s DSL aggravating factors may prove even more difficult than the similar questions surrounding enhancements and strikes. Assuming that *Blakely* applies to the California DSL structure in the first place, all the “facts relating to the crime” listed in rule 4.421(a) should come squarely within the *Apprendi* category of enhancing facts subject to the right to jury trial and proof beyond a reasonable doubt. But the converse is not true. The “facts relating to the defendant” listed in rule 4.421(b) do all arise from a defendant’s criminal record. But it would not be appropriate to withhold *Apprendi* protection from all rule 4.421(b) determinations on the theory that *Almendarez-Torres* broadly exempts all “redicivist” facts from these rights.

Rule 4.421(b)(3) (“prior prison term”) does probably come within the *Almendarez-Torres* exception, just as the comparable section 667.5(b) enhancement does. Rule 4.421(b)(2) findings (“prior convictions...numerous or of increasing seriousness”) will probably come within *Almendarez-Torres* rather than *Apprendi* in most cases where the court is relying only upon “the fact of a prior conviction,” such as the sheer number of priors or the “increasing seriousness” evident from the sequence of statutory offenses (e.g. petty theft, grand theft, robbery with gun use). But probation reports typically, though not always, provide brief blurbs on the facts of prior offenses (usually drawn from police reports). To the extent a court bases a finding of “increasing seriousness” upon details beyond the least adjudicated elements of prior offenses, that determination poses potential *Apprendi* problems similar to a court’s finding of extrinsic facts necessary to bring a prior within the “strike”/“serious felony” definition (an issue pending before the California Supreme Court in *People v. Mcgee, supra*, S123474). Similarly, to the extent a rule 4.421(b)(3) determination rests on juvenile adjudications, it raises the same issues as use of such adjudications as “strikes.” (Cf. *United States v. Tighe, supra*, 266 F.3d 1187.)

The probation- and parole-related factors also present a mixed picture. The bare fact of a defendant’s probation or parole status at the time of the current crime (rule 4.421(b)(4)) appears analogous to a prior prison term (and thus probably exempt from *Apprendi*) because it is a simple “objective” determination of legal status, shown by judicial and correctional records. But *unsatisfactory performance* on parole or probation is another matter, especially if it rests only upon the parole/probation officer’s characterization of a defendant’s compliance rather than on a record of formal violation findings and revocations. Moreover, even if there were formal revocations, those should not be given the same pass as prior convictions because they were not attended by similar procedural safeguards (a critical component of the *Almendarez-Torres* rationale) — neither a jury trial nor proof beyond a reasonable doubt.

Finally, “violent conduct which indicates a serious danger to society” (rule 4.421(b)(1)) may be the most problematic of all the rule 4.421(b), because it may not necessarily be tethered to any prior formal adjudication. It may rest upon unadjudicated aspects of the current case (which would bring it squarely within *Apprendi*), upon unadjudicated aspects of some prior case (which would arguably present an *Apprendi* problem), or even upon prior arrests or other matters which never resulted in a prior conviction.

In short, application of *Blakely* and *Apprendi* to rule 4.421(b) aggravators will likely require very close case-by-case dissection of the specific facts underlying an asserted factor. A recidivism-related aggravating factor falls cleanly into the *Almendarez-Torres* column only where the circumstance consisted of the bare “fact of a prior conviction” (or prison term), rather than any extrinsic facts. In all other instances, there is at least a potential issue.

**Distinguishing “facts reflected in the jury verdict or admitted by the defendant.”** As quoted earlier, the core holding of *Blakely* is “that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely, supra*, at p. 7, emphasis in original.) There will

no doubt be many case-by-case disputes over whether particular aggravating circumstances, beyond the minimum statutory elements of an offense, were somehow “reflected in the jury verdict or admitted by the defendant” in his plea.

It would be dangerous to conflate this standard with the “factual basis” for a plea or verdict. The focus of *Blakely* (and its precursors, *Apprendi* and *Ring*) is on the *jury’s findings or the defendant’s admissions*. In the case of a plea, that should be the plea waiver form or any other plea agreement executed by the defendant and the defendant’s own statements and responses during the plea colloquy. Those are the only facts truly “admitted by the defendant.” The court’s duty to ensure there is a “factual basis” for a negotiated plea (§ 1192.5) is a creature of legislative limitations on plea bargaining and should not be confused with the more limited scope of a defendant’s own admissions. Thus, for example, the attorneys’ stipulation that the court may look to the preliminary hearing transcript or a police report as a “factual basis” for section 1192.5 purposes is not tantamount to an admission by the defendant of everything asserted in those documents.

Similarly, in the case of jury verdicts, the focus must be on the jury’s actual findings. It is fair to look to the jury instructions, as well as the verdicts and any enhancement findings, to determine which facts the jurors necessarily found. But it would not be appropriate to look to additional matters seemingly apparent from the trial transcript *which were not the subject of instructions and verdicts*. It bears emphasis that, under the terms of the majority opinion, “*Blakely* error” is simply one form of *Apprendi* error. Consequently, we should subject an aggravating circumstance which was not the subject of a specific jury finding to the same scrutiny as imposition of an enhancement which was never submitted to the jury. No one would dispute that imposition of a weapon or GBI enhancement would represent *Apprendi* error if those enhancements were not submitted to the jury, even if the trial revolved entirely around identity issues and there was never any true dispute about weapon use or GBI. Similarly, at least for purposes of the “error” determination, the inquiry should focus strictly upon a comparison of the jury instructions and verdicts with the aggravating circumstances later cited by the court.

Upon analysis of “the facts reflected in the jury verdict or admitted by the defendant,” *some* upper terms will probably be secure from challenge because the aggravating circumstances rested upon facts either admitted or found elsewhere in the case. For example, many probation-disqualifying allegations are tried to a jury; a sentencing court’s reliance upon the “large quantity of contraband” as an aggravating circumstance (rule 4.421(a)(10)) would probably not offend *Blakely* if the jury had already returned a drug quantity finding in some other context. Similarly, if there were multiple convictions (either by plea or verdict) *and* the defendant received concurrent terms, a court could legitimately rely on those other counts as a basis for an upper term on the principal count. (Rule 4.421(a)(7).)

## **LITIGATING *BLAKELEY* CLAIMS.**

**Retroactivity.** As stated in another *Apprendi*-related opinion issued the same day as *Blakely* (and also authored by Justice Scalia): “When a decision of this Court results in a ‘new rule,’ the rule

applies to all criminal cases still pending on direct review. [Citation.]” (*Schiro v. Summerlin* (June 24, 2004; 03-526) 542 U.S. \_\_\_, 2004 WL 1402732 at p. \*3.) As with calculation of the “finality” date of a state conviction for purposes of the federal habeas statute of limitations, a case is considered non-final — and thus entitled to the benefit of any “new rule” — for the entire time it is actually pending on direct appeal in the state courts and up until the last day on which the defendant *could have filed a timely cert. petition in the U.S. Supreme Court* (90 days from the California Supreme Court’s denial of a petition for review in the direct appeal). (If there was no petition for review, the relevant finality date is the last day on which the defendant could have filed such a petition.)

Under those standards, *Blakely* unquestionably applies to: (a) all direct appeals currently pending in the appellate courts (at whatever stage), (b) all direct appeals in which petitions for review are currently pending, and (c) all direct appeals in which the California Supreme Court denied review on or after March 26, 2004.

Under the strict retroactivity limits of *Teague v. Lane* (1989) 489 U.S. 288, *Blakely* almost certainly does not apply to cases which became final prior to June 24, 2004. In *Schiro v. Summerlin supra*, 2004 WL 1402732, the majority found that *Ring v. Arizona* (extending the jury trial right to capital penalty findings) did not come within *Teague*’s exception for “‘watershed rules of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” *Ring* concerned similar *Apprendi* questions of judicial vs. jury factfinding — but in the life-or-death context of capital trials. If *Ring* did not qualify as a “watershed rule” for *Teague* purposes, then plainly *Blakely* won’t either.

Despite the apparent *Teague* bar to its retroactive application, Justice O’Connor’s dissent in *Blakely* raises the spectre that the decision may jeopardize thousands of already-final cases throughout the country: “[A]ll criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack.” (*Blakely, supra*, O’Connor, J., dissenting opn. at p. 11.) That seems unlikely. Since *Blakely* cannot be considered a “watershed rule” for purposes of *Teague*’s exception (*Schiro v. Summerlin*), a *Blakely* claim could only avoid the *Teague*-bar if *Blakely* were not viewed as a “new rule,” but simply as a straightforward application of *Apprendi*. As quoted in Justice O’Connor’s dissent, “a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” (*Teague v. Lane, supra*, 489 U.S. at p. 301.) Even assuming that *Blakely* is a logical application of *Apprendi*’s principles to a different sentencing scheme (as the majority opinion states), it is hard to say that *Apprendi* “dictated” this outcome. Indeed, as reflected in the astonished reaction among both the defense and prosecution bars, no one saw it coming. As noted elsewhere in Justice O’Connor’s dissent, every single federal circuit had rejected *Apprendi* challenges to the federal sentencing guidelines, and only a single court (the Kansas Supreme Court) had sustained such a challenge to a state guidelines regimen. (*Blakely, supra*, O’Connor, J., dissenting opn. at p. 7 fn. 1.)

In short, the putative threat to sentences which became final during the *Apprendi-Blakely*

window seems to be more a case of a dissent's exaggeration of the implications of a majority opinion, than a realistic possibility.

**Waiver.** A sentencing court's imposition of an upper term based on an aggravating circumstance not "reflected in the jury's verdict or admitted by the defendant" should *not* come within the usual *Scott* rule requiring a contemporaneous objection to preserve appellate review of defects in sentencing reasons. In several cases over the past decade, the California Supreme Court has held that a failure to object cannot waive "certain fundamental constitutional rights," such as double jeopardy *and the right to jury trial*, even though that omission may forfeit appellate review of related state statutory claims. In *People v. Saunders* (1993) 5 Cal.4th 580, the Court applied that distinction to a defendant's failure to object to the discharge of the jury, prior to the adjudication of charged priors. That omission forfeited the right to contest the premature discharge as a violation of the state statutory provisions requiring the same jury to determine both the currently charged crime and any alleged priors (§§ 1025, 1164) (see *id.* at pp. 589-592), *but not the right to raise the more fundamental claims of double jeopardy and jury trial*. "Defendant's failure to object also would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial. [Citations.]" (*id.* at p. 589 fn. 5; see also p. 592 [same holding re double jeopardy claim]; accord *People v. Valladoli* (1996) 13 Cal.4th 590, 606 [also refusing to find waiver of double jeopardy claim re post-verdict amendment of an information to add prior convictions].) As the Court summarized in a later opinion:

Not all claims of error are prohibited in the absence of a timely objection in the trial court. *A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights.* (See *Saunders, supra*, 5 Cal.4th at p. 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [*constitutional right to jury trial*]; cf. *People v. Walker* [(1991)] 54 Cal.3d [1013,] 1022-1023 [nonconstitutional nature of claim that trial court failed to advise of consequences of guilty plea subjects defendant's claim to rule that error is waived absent timely objection].) (*People v. Vera* (1997) 15 Cal.4th 269, 276 -277, emphasis added.)

Because a *Blakely* claims contests the denial of the Sixth Amendment right to a jury trial on the aggravating factors necessary to expose a defendant to an upper term, it should come within the *Saunders-Valladoli-Vera* rule: A lack of objection should not forfeit appellate review of a denial of this "fundamental constitutional right."

There are several other grounds for resisting waiver claims. The appellate courts generally will not insist upon an objection in a lower court where such an objection would have been *futile* at the time (such as where the court has already rebuffed similar objections. (E.g. *People v. Hill* (1998) 17 Cal.4th 800, 820 [prosecutorial misconduct]; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649 [judicial misconduct].) The futility exception should also apply where the statutory or case law binding the lower court at the time would have precluded the claim. (Cf. *People v. Birks* (1998) 19 Cal.4th 108, 116, fn.6 [no waiver where lower court was bound by higher court on

issue].) Until June 24, 2004, it would have been pointless to demand a jury trial or a reasonable doubt standard on DSL aggravating circumstances, since California statutory and case law unequivocally prescribed judicial factfinding under a preponderance standard. Even in the context of evidentiary claims (where the courts have generally enforced waiver rules most strictly), the California Supreme Court has allowed review of unraised claims based on a significant supervening change in the law: “Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]” (*People v. Turner* (1990) 50 Cal.3d 668, 703.)

Finally, in post-jury trial appeals a *Blakely* claim may also be cognizable, without the necessity of an objection below, on the ground that the underlying error was *the failure to instruct the jury on the aggravating factor*. Consequently, the claim could come within section 1259, allowing appellate review of any instruction which affects the defendant’s “substantial rights.”

**Harmless error.** The disposition in *Blakely* was a remand to the Washington appellate court “for proceedings not inconsistent with this opinion.” (*Blakely, supra*, at p. 18.) The opinion did not address whether the error necessarily required reversal of the sentence or was susceptible to harmless error review.

Ideally, of course, we would like to characterize *Blakely* error as a form of “structural defect,” not amenable to harmless error review, on the theory that the wrong entity, the judge rather than the jury, has adjudicated the aggravating factor *and* has applied the wrong standard of proof. (Cf. *Sullivan v Louisiana* (1993) 508 U.S. 275.) If the aggravator were viewed as comparable to a distinct charge (such as a separate count), the structural defect argument would carry some weight because there was a complete denial of jury trial as to that charge. But, in the contexts of more traditional enhancements, the courts have tended to view enhancing facts as comparable to extra “elements” of the underlying offense. Under that analogy, a failure to submit an enhancement to the jury is a non-structural error akin to omission of an element of the offense from the jury instructions and therefore subject to harmless error. (See *Neder v. United States* (1999) 527 U.S. 1.)

Both the California Supreme Court and the federal circuits have held that conventional *Apprendi* errors on enhancements are subject to the *Chapman* standard. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1209-1211; *United States v. Garcia-Guizar* (9<sup>th</sup> Cir. 2000) 234 F.3d 483, 488-489.) Although the California Supreme Court’s opinion in *Sengpadychith* involved an omission of a discrete element of an enhancement (the “primary activities” element of the gang enhancement, § 186.22(b)) rather than a complete failure to submit the enhancement to the jury, the Court’s characterization of *Apprendi* implies that it would analyze the latter, more grave error, under *Chapman* as well: “*Apprendi* treated the crime together with its sentence enhancement as the ‘functional equivalent’ of a single ‘greater’ crime.” (*Sengpadychith, supra*, at p. 324.)

Of course, even if *Blakely* errors are not considered “structural defects,” this only begs the

question of how exactly *Chapman* review should operate in this context. There has long been a tendency of California courts to view *Chapman* as merely altering the probability standard for prejudice and permitting a finding of harmless error whenever there is assertedly “overwhelming evidence” of guilt (or, in this case, aggravating circumstances). But, at least in context of instructional error affecting the elements of offenses and enhancements, the U.S. Supreme Court’s cases actually demand a far more rigorous form of *Chapman* analysis, focusing on what facts the jurors necessarily found in rendering their verdict. In particular, *Neder v. United States*, the very case which allowed harmless error review of omission of an element, made clear (or should have made clear) that *the error cannot be found harmless if the omitted element is susceptible to dispute:*

If, at the end of that examination, the [reviewing] court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless. (*Neder*, *supra*, 527 U.S. at p. 19, emphasis added.)

Even assuming that *Blakely* errors will be subject to *Chapman* (which appears likely in light of both state and federal treatment of *Apprendi*), it will be essential for appellate defense counsel to insist upon fidelity to the *Neder* formulation of *Chapman* review, rather upon the more generic “overwhelming evidence” version of *Chapman* to which California courts have been prone in the past.

*Blakely* error may also represent one form of appellate claim in which the post-plea defendant may well stand in a better position than a defendant who went to trial. The *Blakely* majority viewed the “extraordinary sentence” there as a *punishment greater than authorized by Blakely’s plea*. It was as if *Blakely* had received the sentence corresponding to a greater crime than the one to which he pled. There seems to be little room for *Chapman* analysis in that context. On the other hand, some plea situations could pose more difficult prejudice questions — such as where a court relies on multiple aggravating circumstances, some of which violate *Blakely* and some of which fall outside it (such as prior convictions within the *Almendarez-Torres* exception or current conduct circumstances adequately supported by pleas, admissions, or jury findings on other counts or allegations). Under one view of *Apprendi* prejudice analysis (which, sadly, may find support in some federal decisions) the presence of one valid aggravating circumstance might be viewed as sufficient to render *Apprendi* error on another circumstance harmless because one legitimately-determined aggravating circumstance is sufficient to increase a defendant’s maximum exposure to an upper term. Yet, if the *Chapman* analysis is to focus on the relationship between the error and the ultimate sentence, the inquiry should be whether there is a reasonable doubt the court would have imposed the same sentence if it had confined itself

## **MORE DISCLAIMERS.**

Have we mentioned that these are ***PRELIMINARY*** thoughts on *Blakely*? This posting represents one staff attorney’s over-the-weekend ruminations on the possible implications of *Blakely*

for California's DSL. There are several important topics which this preliminary outline either omits altogether or covers only superficially. Here are a few obvious candidates for further research and brainstorming:

- More about the Washington sentencing structure? One question of particular interest is the "standard range" for a sentence (which, in *Blakely* itself was 49 to 53 months). While *Blakely* explains the Washington procedures for "departing" from the "standard range" and imposing an "extraordinary sentence," it does not discuss the standards governing how a Washington court selects a specific term *within the "standard range."* Is that determination left to the judge's discretion, without any further specification of factual criteria? As discussed earlier, a *Blakely* challenge to California's DSL procedures depends on the notion that (due to the statutory presumption of a middle term, etc.) *imposition of a California upper term is comparable to an upward departure from the "standard range" in Washington,* rather than to selection of a term at the upper end of that range. That comparison may founder if it turns out that Washington courts are required to employ criteria similar to California's aggravating and mitigating circumstances in selecting a specific term within the "standard range."
- Any lessons from Kansas' experience? The *Blakely* majority noted that the Kansas Supreme Court "found *Apprendi* infirmities in that state's determinate-sentencing regime." (*Blakely, supra*, at p. 13, citing *State v. Gould* (Kan. 2001) 23 P.3d 801.) (The Kansas legislature apparently responded to the decision by adopting a form of determinate sentencing employing jury fact-finding.) It could be useful to examine whether the original Kansas system resembled California's DSL or instead followed a guidelines-and-departure model similar to the Washington statute or the federal sentencing guidelines.
- Consecutive sentencing? These materials have focused on the choice of an upper term. But could *Blakely* conceivably apply to findings used to justify consecutive terms? This is a more difficult question because there does not appear to be any statutory presumption of concurrent sentencing comparable to section 1170(b)'s mandate that a court "shall" impose a middle term unless it finds aggravating or mitigating circumstances.
- "Harvey waivers" and other problems posed by plea agreements? Even where a defendant does not explicitly "admit" additional facts as part of his plea, other common provisions in California negotiated pleas could pose problems for *Blakely* arguments. In particular, could a defendant's "Harvey waiver" be construed as consent to judicial factfinding regarding the alleged conduct underlying dismissed counts? For currently pending cases (i.e., pre-*Blakely* pleas) any such "waiver" or "consent" analysis would seem unfair because a defendant cannot knowingly and voluntarily waive a right which neither he nor his attorney knew he had in the first place.
- Much more research necessary on harmless error. Though the subject is plainly of critical importance, this memorandum's treatment of prejudice/harmless error questions is

superficial and speculative. It rests upon only a few applications of *Chapman* to *Apprendi* error “close to home” in California (and the Ninth Circuit). However, because California statutes and case law required jury trial and proof beyond a reasonable doubt of enhancement allegations, even before *Apprendi*, there are relatively few cases of outright *Apprendi* error in California — i.e., complete failure to submit an enhancement to the jury. (California cases on *Apprendi* have generally involved less grievous errors, such as the incomplete enhancement instructions in *Sengpadychith*.) There is much more case law “out there” assessing *Apprendi* errors which may be more comparable to those implicated by *Blakely*, but most of that case law is probably in the federal courts and other jurisdictions. However, in order to assess the likely prejudice/harmless error framework facing *Blakely* claims, it will be essential to develop a better-informed picture of how courts across the country have dealt with *Apprendi* errors.

- Means of raising *Blakely* claims. In any case which is still pending on direct review in the appellate court, this should pose no difficulty. Even if the case has already been briefed (or even argued), counsel can seek leave to file a supplemental brief. But what about cases farther along in the pipeline? As noted earlier, *Blakely* applies to all cases not yet final on direct review, and a case ordinarily is not deemed final until the time for petitioning for cert. has expired. But that still leaves the question of *how* a defendant is to raise the claim if the case is no longer in the Court of Appeal — such as where a petition for review is pending or the case is in the 90-day “cert. window” following a denial of review. Is the defendant’s only option to file a state habeas corpus petition (and, if so, in which court should he file it)?

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Again, this memo presents only the most preliminary and rudimentary analysis of *Blakely*’s implications for California. More will follow in the coming weeks and months. Good luck.