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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ALLAN JOY, Defendant and Appellant.	E034071 (Super.Ct.No. FMB004474) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Bert L. Swift and John M. Pacheco, Judges. Affirmed.

Jean F. Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Michael T. Murphy, Scott C. Taylor, and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.A and II.B.1.

Defendant pled no contest to assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1), hereafter, 245(a)(1)) and received probation. After finding defendant had violated the terms of probation, the court revoked probation and imposed four years. Defendant contends the revocation was invalid because the attorney who represented him at the revocation hearing had an impermissible conflict of interest. He also contends the prison sentence violated *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*), because the trial court imposed the upper term without jury findings of aggravating circumstances. We affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *First Case*

In April 2001, defendant was charged in case No. FMB 004474 (hereafter, first case) with three counts of committing a lewd or lascivious act on a child. (Pen. Code, § 288, subd. (a).) Later, the prosecution added a charge of assault by means of force likely to produce great bodily injury. (Pen. Code, § 245(a)(1).)

In June 2001, the public defender's office declared a conflict, and the court appointed alternate defense panel attorney Richard Crouter to represent defendant. The record does not indicate the reason for the conflict.

On August 10, 2001, defendant pled no contest to the assault charge, pursuant to a plea bargain with the prosecution. On September 7, 2001, the court placed him on probation for five years. One of the conditions of his probation was that he violate no law.

B. *Second Case*

On September 10, 2002, defendant was living in Hesperia at the home of his grandparents, Billie and Velma Abner. Defendant's mother, Deborah Sequeira, also was living there. Mr. Abner was 74 years old. He had broken his heel, which was in a cast, and had to use a walker.

On the morning of September 10, 2002, Mr. Abner overheard defendant in the kitchen of the house, calling Mrs. Abner a whore and a bitch. Mr. Abner started toward the kitchen, and defendant went out the back door. Mr. Abner locked the front door. Defendant came to the door, knocked, and said he wanted his cigarettes.

Ms. Sequeira tossed defendant's cigarettes out to him. Defendant began to call Mr. Abner names. Defendant said he was going to "kick [Mr. Abner's] butt," or something similar. Mr. Abner went out the front door. Defendant said he was not going to "kick [Mr. Abner's] butt" in the yard and wanted Mr. Abner to follow him out to the street.

Mr. Abner started down the driveway toward defendant. Ms. Sequeira came out, passed Mr. Abner, and went down by the curb. Defendant pushed her down and made a motion as if he were going to kick her. Defendant was "ranting and raving and screaming" about what he was going to do to Mr. Abner. He called Mr. Abner a "[f]'in old man."

When Mr. Abner reached the street, defendant made a motion as if he were going to charge Mr. Abner. Mr. Abner picked up his walker to defend himself. A neighbor, James Christian, looked out his window and saw the altercation. Defendant swung at Mr. Abner about 10 or 15 times, hitting the walker with his hands. Mr. Christian came

out of his house and went over to the area of the altercation. He positioned himself between defendant and Mr. Abner to try to keep them from fighting.

Defendant said something about taking out Mr. Abner. He also said he was going to kill Mr. Christian and take him out. He circled around Mr. Christian like a boxer, telling him "[L]et's do it." Eventually, defendant backed off and went down the street.

Based on these events, the prosecution filed a second criminal proceeding against defendant, case No. FVI 015771 (hereafter, second case), charging him with two counts of criminal threats (Pen. Code, § 422) and one count of attempted elder abuse (Pen. Code, §§ 21a, 368, 664). The prosecution also filed a petition in the first case to revoke defendant's probation on the ground he had failed to comply with the condition that he violate no law. The public defender's office represented defendant in the second case. Mr. Crouter continued to represent him in the first case and was appointed to represent defendant at the probation revocation hearing in that case.

On February 26, 2003, the court found defendant incompetent within the meaning of Penal Code section 1368, in that he was not able to understand the proceedings against him and assist his attorney in his defense. The court therefore suspended the proceedings against defendant.

C. *Revocation Hearing*

On June 4, 2003, the deputy public defender representing defendant in the second case, William Sasnett, appeared and advised the court defendant's competency had been restored, and proceedings were reinstated. At the same time, a revocation hearing in the first case was set for June 10, 2003. On that date, the prosecutor requested that the court hold the revocation hearing together with the preliminary hearing in the second case, so

as to minimize the inconvenience to Mr. Abner, due to his age. Mr. Crouter objected to holding the revocation hearing the following day, contending one day was not adequate notice and that he had a scheduling conflict.[1]

The court asked Mr. Sasnett if he was prepared to represent defendant in the revocation hearing if Mr. Crouter were not available. Mr. Sasnett responded: "With respect to the violation of probation, I am somewhat uncomfortable . . . . I am not prepared specifically to defend the violation of probation, but I am prepared to proceed on those facts in the preliminary hearing."

After a recess, the court said it had reviewed the file and had noted that on September 25, 2002, the revocation hearing had been set for October 1, 2002.[2] The court then stated it was going to hear the matters together, but after the prosecutor had said he had no objection to a continuance, the court stated: "I don't know if you guys want to continue this. Otherwise, we will go tomorrow, tomorrow at 10:00."

Mr. Crouter and Mr. Sasnett then conferred with defendant, and Mr. Sasnett stated: " . . . I have consulted with Mr. Crouter and conferred with Mr. Joy, and I am

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[1] The record indicates Mr. Crouter was present in court on June 4, 2003, when the revocation hearing was set for June 10, 2003, and defendant was ordered to appear on that date. It is not clear why he believed he had received only one day's notice of the hearing.

[2] The September 25, 2002, minute order of defendant's arraignment on the petition for revocation of probation states: "Court appoints conflict panel attorney. [¶] . . . [¶] Hearing on petition revoking probation set for 10/01/2002 at 9:30 in Dept. M2. [¶] Special setting with FVI015771." (Capitalization altered.) The minute order further states: "Clerk's office to notify atty. R. Crouter (CP)." (Capitalization omitted.) The record shows that thereafter, the hearing was continued to November 12, 2002, January 14, 2003, and February 11, 2003. The record further shows that defendant and Mr. Crouter were both present when each of these continuances was ordered.

prepared to do both the preliminary hearing and the Vickers hearing, which are on identical facts tomorrow. [¶] I would be appearing for Mr. Crouter on the revocation of probation hearing. I want to make sure that Mr. Joy understood that." This colloquy then occurred:

"[MR. SASNETT]: Do you understand that, Mr. Joy?

"THE DEFENDANT: Yes.

"[MR. SASNETT]: And do you agree to that?

"THE DEFENDANT: Yes."

The next day, the court heard the preliminary hearing and revocation hearing together. The court found the evidence sufficient to hold defendant to answer on the three counts charged, plus an additional count of battery against Ms. Sequeira. The court also found the allegations of the revocation petition were true based on a preponderance of the evidence, in that defendant had violated the term of his probation requiring that he violate no law.

On July 16, 2003, the court revoked defendant's probation and imposed the aggravated term of four years for the first case, for violation of Penal Code section 245(a)(1). In the second case, defendant pled no contest to a violation of Penal Code section 368, subdivision (b)(1), elder abuse. The court sentenced defendant in the second case to the aggravated term of four years, to be served concurrently with the sentence in the first case.

II

DISCUSSION

A. *Conflict of Interest*

Defendant contends that, the public defender having declared a conflict of interest in the first case, it was improper for Mr. Sasnett to represent him at the revocation hearing in that case. He contends he was prejudiced because Mr. Sasnett failed to present evidence and assert arguments that might have persuaded the court not to revoke probation.

1. *Applicable legal principles*

A criminal defendant's right to representation by an attorney who is free from conflicts of interest is guaranteed by the federal and California Constitutions. (*People v. Frye* (1998) 18 Cal.4th 894, 998.) "To establish a federal constitutional violation, a defendant who fails to object at trial must show that an actual conflict of interest 'adversely affected his lawyer's performance.' [Citations.] To show a violation of the corresponding right under our state Constitution, a defendant need only demonstrate a *potential* conflict, so long as the record supports an 'informed speculation' that the asserted conflict adversely affected counsel's performance. [Citations.]" (*Ibid*.) Even under the state standard, therefore, "a showing that the alleged conflict prejudicially affected counsel's representation of the defendant is also required." (*People v. Clark* (1993) 5 Cal.4th 950, 995.)

As the state standard is the less demanding of the two, we will in the interest of economy direct our attention to whether defendant satisfied that standard, since if he did not it follows a fortiori that he did not satisfy the federal standard. We therefore will

consider, first, whether defendant demonstrated at least a potential conflict in Mr. Sasnett's representation of him at the revocation hearing, and second, whether the record supports an informed speculation that the asserted conflict adversely affected Mr. Sasnett's performance.

2. *Analysis*

a. *Existence of a conflict*

We find no basis in the record for inferring that a potential conflict of interest existed in Mr. Sasnett's representation of defendant at the revocation hearing. The only indication of a conflict to which defendant can point is the fact that the public defender declared a conflict at the outset of the first case in June 2001. But that fact does nothing to suggest that the conflict still existed two years later in June 2003 when Mr. Sasnett appeared for defendant at the revocation hearing, or that the conflict, even if it still existed, was such that it might have affected Mr. Sasnett's performance.

When the public defender declared a conflict, the first case had just begun, and the events which led to the petition to revoke defendant's probation would not occur for more than another year. There is no suggestion in the record that the facts that underlay the charges in the first case -- the only facts that were known when the conflict was declared -- had any connection with the facts on which the revocation was based.

The charges in the first case arose from defendant's alleged molestation of three minor victims in October 1997 in the City of 29 Palms. The prosecution witnesses at the preliminary hearing were Michael DiMatteo and Nancy Anne Avalos. Something about the events, the victims, or the witnesses evidently led the public defender to perceive a conflict of interest if that office represented defendant.

The evidence at the revocation hearing in June 2003 concerned events that occurred five years later, in September 2002, in the City of Hesperia. The victims were Mr. Abner and Ms. Sequeira, and perhaps Mr. Christian. The prosecution witnesses at the preliminary hearing were Mr. Abner and Mr. Christian. There is no reason whatever to suspect that the conflict that existed in the first case had anything to do with the facts, victims, or witnesses in the second case. If it had, the court would not have ordered, and the public defender would not have accepted, the appointment of that office to represent defendant in the second case.[3] Moreover, defendant and Mr. Crouter would not have agreed to have Mr. Sasnett appear at the revocation hearing. Both defendant and Mr. Crouter were well aware of the previous declaration of a conflict, as both were present in court in June 2001 when the conflict was declared.

In light of these considerations, we conclude the record did not suggest the potential for a conflict of interest in Mr. Sasnett's representation of defendant at the revocation hearing.

b. *Adverse effect on counsel's performance*

Even if the record had disclosed a potential conflict, there was no basis for an informed speculation that Mr. Sasnett's representation of defendant at the revocation hearing was adversely affected. Defendant contends Mr. Sasnett provided no more than the minimal defenses available at a preliminary hearing. He asserts this approach

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[3] Defendant argues the orders of the trial court relieving the public defender and appointing conflict counsel in the first case are presumed correct for purposes of this appeal. By parity of reasoning, the subsequent order *appointing* the public defender to represent defendant in the second case must also be presumed correct.

deprived him of his due process right to present evidence at the revocation hearing. He also asserts Mr. Sasnett failed to pursue a mental health defense to the charges on which the revocation was based, depriving defendant of the ability to raise a mental health defense as to the revocation itself and leaving him with only the option of raising the mental health issue at sentencing.

Both of the probation reports in the first case noted defendant's history of mental health problems. Presumably, documentary evidence or testimony to show defendant's mental health history could have been presented at the revocation hearing. However, where a defendant claims his or her counsel failed to pursue an argument or defense due to an asserted conflict, the court must "examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission. [Citation.]" (*People v. Cox* (2003) 30 Cal.4th 916, 949.)

There was an obvious tactical reason for Mr. Sasnett not to assert a mental health defense at the revocation hearing. Insanity is *not a defense* to a violation of probation, even when the violation consists of the commission of a new criminal offense. (*People v. Breaux* (1990) 101 Cal.App.3d 468, 474.)[4] A defendant's counsel is not ineffective for

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[4] The *Breaux* court reached that conclusion under California law and further noted: "Other jurisdictions have considered the question and have uniformly held that insanity is not a defense. [Citations]." (*People v. Breaux*, *supra*, 101 Cal.App.3d at p. 472.)

failing to pursue nonmeritorious arguments. (*People v. Maury* (2003) 30 Cal.4th 342, 419.)

Defendant points out that even though insanity is not a defense, "[a] person's sanity or the fact that he suffers from a mental disease or defect is relevant for the court to consider in determining whether a probationer's probation should be revoked or modified." (*People v. Breaux*, *supra*, 101 Cal.App.3d at p. 474, fn. omitted.) However, even if Mr. Sasnett should have presented evidence of defendant's mental state at the revocation hearing as a ground for not revoking probation, defendant was not prejudiced. The court made *no decision* on the issue of whether to revoke probation at the June 11, 2003, revocation hearing, the only hearing at which Mr. Sasnett represented defendant in the first case. The court only determined at that hearing that defendant had violated his probation, a determination that would not have been affected by evidence of defendant's mental condition since insanity is not a defense.

The appropriate time to present evidence of defendant's mental condition was when the court actually decided to revoke probation, at the July 16, 2003, sentencing hearing. Mr. Crouter, not Mr. Sasnett, represented defendant at that hearing. Although Mr. Sasnett also appeared, he made clear he was only representing defendant in the second case. Any failure to assert mental health evidence as a reason for not revoking probation should more appropriately be attributed to Mr. Crouter than to Mr. Sasnett. Moreover, even assuming Mr. Sasnett should have presented mental health evidence, there is no reason whatever to believe he failed to do so because of a conflict of interest.

Defendant notes that a probationer's testimony at a revocation hearing cannot be used to prove his guilt in the new criminal case arising from the same facts, apparently

suggesting Mr. Sasnett should have called him to testify at the June 13, 2003, hearing since he had nothing to lose by doing so. However, there is no indication defendant wanted to testify or had anything to say that would have helped him avoid revocation.

To the extent defendant may be claiming he was prejudiced by the consolidation of the preliminary hearing and the revocation hearing, that situation was created by the court, not Mr. Sasnett, and therefore cannot serve as evidence of any adverse effect on Mr. Sasnett's performance due to a conflict. Moreover, the Supreme Court has expressly recognized the validity of combining a preliminary hearing and probation revocation hearing where the evidence overlaps. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1159.)

In sum, we find nothing to support an informed speculation that the asserted conflict in this case adversely affected Mr. Sasnett's performance at the revocation hearing. Accordingly, defendant has failed to make the showing of prejudice that is required for reversal.

B. *Validity of Upper Term*

Penal Code section 245(a)(1), under which defendant was sentenced in this case, provides that assault by means of force likely to produce great bodily injury shall be punished by imprisonment for two, three, or four years. The court selected the upper term of four years based on its findings that the victim was particularly vulnerable and defendant took advantage of a position of trust in committing the offense.

In *Blakely*, *supra*, 124 S.Ct. 2531, the United States Supreme Court reaffirmed the conclusion it had reached in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*): "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*, at p. 490; *Blakely*, at p. 2536.) In *Blakely*, the court further stated 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.]" (*Blakely*, at p. 2537.) It went on to explain: "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." (*Ibid*.)

Penal Code section 1170, subdivision (b) (hereafter, section 1170(b)) provides in relevant part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Defendant contends that, under *Blakely*, the maximum statutory punishment in this case was the middle term of three years, because that was the most the court could impose pursuant to section 1170(b) based solely on the facts admitted in defendant's no contest plea, without additional findings of aggravating circumstances. Since the aggravating circumstances on which the court relied to exceed the middle term were not found by a jury or admitted by defendant, defendant concludes the imposition of the upper term violated *Blakely*.

1. *Certificate of probable cause*

The People contend defendant cannot raise the *Blakely* issue on appeal because he did not obtain a certificate of probable cause pursuant to Penal Code section 1237.5. Section 1237.5 provides that no appeal shall be taken by the defendant from a judgment of conviction on a plea of guilty or nolo contendere, except where the trial court has executed and filed a certificate of probable cause for the appeal. The People argue that

since defendant was convicted of and sentenced for assault based on his no contest plea, he was required to obtain a certificate of probable cause in order to challenge the sentence on appeal.

Penal Code section 1237.5 is subject to exceptions. In *People v. Buttram* (2003) 30 Cal.4th 773, the Supreme Court noted that one of those exceptions applies to "issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. [Citations.]" (*Id*. at p. 780.) Rule 30(b)(4)(B) of the California Rules of Court similarly provides that a defendant need not obtain a certificate of probable cause if the notice of appeal states the appeal is based on "grounds that arose after entry of the plea and do not affect the plea's validity." Thus, when the defendant seeks to attack only the validity of his sentence, not the validity of the plea itself, no certificate is necessary. (*Buttram*, at pp. 784-785.)

Where a guilty or no contest plea is made pursuant to a plea bargain, whether a certificate of probable cause is required to challenge the sentence on appeal depends on what the defendant is really challenging. "'[T]he critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]' [Citation.]" (*People v. Buttram*, *supra*, 30 Cal.4th at p. 782.) A challenge to a sentence is deemed to challenge the validity of the plea "'if the sentence was part of a plea bargain. [Citation.] It does not if it was not . . . .'" (*Id*. at p. 785.)

Here, the four-year sentence defendant received was not part of the plea bargain. When defendant pled no contest, the parties executed and filed with the court a change of plea form setting forth the terms of the bargain. The form stated defendant was pleading

no contest because the district attorney and court had agreed to "[p]robation w/ max 120 days to be deemed completed at sentencing." At the bottom of the form was an order that the form be filed and that defendant's plea be accepted and entered. The court signed the order. Nowhere did the form state defendant was agreeing to any particular prison sentence or sentencing range if he violated probation.

When defendant entered his plea in open court, the prosecutor gave him the usual advisements describing the rights he was giving up by entering the plea. In the course of doing so, the prosecutor asked defendant, "[D]o you understand that your sentence will be solely and completely up to the sentencing court, and that the probation department will investigate your background and circumstances of your case, and such will be reviewed by the sentencing court prior to sentencing you in this matter?" Defendant answered yes.

The prosecutor then asked defendant, "[D]o you understand that the maximum penalty which you could receive under the law for the offense that you are pleading to today is four years in state prison?" Again, defendant answered yes. Defendant also agreed that the court could consider dismissed counts -- i.e., the counts for committing a lewd or lascivious act on a child -- in determining the appropriate sentence.

The prosecutor then summed up the terms of the plea bargain as follows: "Mr. Joy, it is our understanding that you are changing your plea today because the district attorney and the court have agreed to the following in your case: That you will be pleading to an added Count 3 of a violation of Penal Code section 254 sub (a) sub (1), assault by means of force likely to produce great bodily injury as a felony, that your case will be referred to the probation department with an initial custody time to not exceed

120 days in the county jail, and that those 120 days will be deemed to be completed at the time of your sentencing in this case?" Defendant answered yes. Throughout the plea proceedings, there was no reference to the sentence defendant would receive, other than the facts that (1) defendant's initial custody time would be deemed to be completed when he was sentenced, and (2) defendant understood he could receive a maximum sentence of four years "under the law."

The change of plea form and the oral proceedings demonstrate conclusively that the plea bargain did not contain as one of its terms any agreement by defendant to any particular sentence or range of sentences, other than the 120 days jail time to be deemed completed at the time of sentencing. Rather, the terms of the bargain were that defendant would plead no contest to the assault charge and would receive probation conditioned on the 120 days of jail time. In consideration of the plea, the prosecution would dismiss the lewd act charges and agree to the probation.

While defendant *understood* he could be sentenced to a maximum of four years "under the law," he did not *agree* to such a sentence, nor did he agree that a four-year sentence or any other sentence would be lawful. He simply acknowledged his understanding that the usual sentence range provided for in section 245(a)(1) -- two, three, or four years -- would apply. Moreover, the prosecutor expressly stated that defendant's sentence would be "solely and completely up to the sentencing court," plainly negating any implication that any particular sentence or range of sentences was a part of the plea bargain.

For that reason, the decisions on which the People rely are inapplicable. In *People v. Cole* (2001) 88 Cal.App.4th 850, the plea bargain provided that the defendant would

plead no contest with the assurance that his maximum sentence would be 25 years to life instead of more than 75 years to life, as it would have been without the bargain. (*Id*. at p. 859.) The court imposed the 25-year sentence, and the defendant sought to argue on appeal that the sentence was cruel and unusual punishment.

The Court of Appeal held the defendant could not make that argument without a certificate of probable cause. The court noted that although the argument was styled as a challenge to the sentence, it really was a challenge to the validity of the plea, because the plea bargain expressly authorized a sentence of up to 25 years to life, the sentence the defendant received. That term was a negotiated term of the bargain, given in consideration for the reduction in exposure. Having agreed to the bargain, the defendant could not challenge the sentence given pursuant to it. (*People v. Cole*, *supra*, 88 Cal.App.4th at p. 873.)

In *People v. Young* (2000) 77 Cal.App.4th 827, the defendant agreed to a maximum sentence of 25 years to life in return for the prosecution's agreement not to seek consecutive sentences, which would have increased the maximum punishment to 52 years to life. (*Id*. at p. 830.) As in *Cole*, the defendant sought to argue on appeal that the sentence was cruel and unusual punishment. Holding that the defendant could not do so without a certificate of probable cause, the court stated: "The prosecution agreed to a maximum sentence of 25 years to life in return for defendant's plea. Yet, defendant now attacks that maximum sentence on the ground that it is cruel and unusual punishment. By arguing that the maximum sentence is unconstitutional, he is arguing that part of his plea bargain is illegal and is thus attacking the validity of the plea." (*Young*, at p. 832.)

Here, in contrast to *Cole* and *Young*, defendant is not arguing that any part of his plea bargain is illegal. The plea bargain itself did not include an agreement to the four-year sentence or any other prison sentence. Instead, defendant is arguing that the sentence imposed by the court, *independently* of the plea bargain, is illegal under *Blakely*. This is a challenge to the sentence, not the plea. No certificate of probable cause is required.

2. *Waiver*

The People next argue that defendant waived the right to object to his sentence based on *Blakely*, because he did not object on that basis in the trial court. The right under *Blakely* to have a jury determine any fact used to increase the statutory maximum penalty derives from the Sixth Amendment guarantee of a jury trial in criminal cases. (*Blakely*, *supra*, 124 S.Ct. at p. 2538.) The right to a jury trial is a constitutional protection "of surpassing importance . . . ." (*Apprendi*, *supra*, 530 U.S. at p. 476.)

California courts generally are reluctant to find that a fundamental constitutional right has been forfeited[5] based on the defendant's failure to assert the right in the trial court. In *People v. Vera* (1997) 15 Cal.4th 269, the California Supreme Court said: "Not all claims of error are prohibited in the absence of a timely objection in the trial court. A

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[5] "[T]he terms 'waiver' and 'forfeiture' long have been used interchangeably. As the United States Supreme Court has explained, however, '[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." [Citations.]' [Citation.]" (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.) Though captioned as a claim of waiver, the People's argument in this case is more accurately seen as a claim of forfeiture. However, as some decisions refer to similar arguments as claims of waiver, we will sometimes use that term in our discussion of the relevant decisions.

defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. [Citations.]" (*Id*. at p. 276.) The court referred to the "constitutional right to jury trial" as such a right. (*Id.* at p. 277.)

In *People v. Saunders* (1993) 5 Cal.4th 580, the defendant claimed that discharge of the jury that convicted him and empanelment of a new jury to decide prior conviction allegations violated the constitutional guarantee against double jeopardy. The California Supreme Court held the defendant did not forfeit that claim by failing to object on that basis in the trial court. The court went on to state: "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.)

At least one California Court of Appeal has held that a failure to object at trial does *not* forfeit a claim of a right to a jury trial under *Apprendi*. In *People v. Belmares* (2003) 106 Cal.App.4th 19, the court, citing *People v. Vera*, *supra*, 15 Cal.4th 269, held the defendant could argue on appeal that he had a right under *Apprendi* to a jury determination of whether he was the person referred to in documents offered to prove prior convictions. The court *rejected* the People's contention that the defendant had waived his *Apprendi* claim by failing to object when the trial court instructed the jury that defendant was the person named in the documents: "Since Belmares's jury trial argument has, in part, a legitimate constitutional basis, we reject as to that argument the Attorney General's waiver argument." (*Belmares*, at p. 27.)

The People cite *People v. Marchand* (2002) 98 Cal.App.4th 1056 for the proposition that a defendant waives his right to object on *Apprendi* grounds by failing to object specifically on that ground in the trial court. In *Marchand*, the trial court required

the defendant to register as a sex offender under Penal Code section 290, subdivision (a)(2)(E). The court made the necessary predicate findings by a preponderance of the evidence. The defendant claimed his right of due process had been violated because, under *Apprendi*, the predicate facts should have been alleged in the information and found true beyond a reasonable doubt. The Court of Appeal held the defendant waived these claims by not asserting them in the trial court, but it decided to address them anyway because they presented important questions of constitutional law. (*Marchand*, at p. 1061.)

Notably, the defendant in *Marchand* had *expressly* waived his right to a jury trial, so he did *not* assert the trial court had violated that right. (*People v. Marchand*, *supra*, 98 Cal.App.4th at p. 1059.) The Court of Appeal thus had no occasion to consider whether the defendant could have waived that right by failing to assert it in the trial court. Accordingly, *Marchand* is not particularly helpful in deciding whether a *Blakely* claim -- i.e., a claim that facts used to increase the maximum penalty must be found by a jury -- can be waived by a failure to object on that basis at sentencing.

The People also cite a number of federal court decisions for the proposition that a constitutional claim may be forfeited. We believe these cases are inapposite. " . . . California courts have followed the general rule that when a federal claim is brought in state court the law of the state controls on matters of practice and procedure but federal law controls on matters of substance. [Citations.]" (*County of Los Angeles v. Superior Court* (2000) 78 Cal.App.4th 212, 230.) The United States Supreme Court likewise has recognized that "it is normally 'within the power of the State to regulate procedures under which its laws are carried out . . . .'" (*Patterson v. New York* (1977)

432 U.S. 197, 201 [97 S.Ct. 2319, 53 L.Ed.2d 281].) The issue of whether a federal claim has been adequately preserved for appeal in a state court is a procedural matter and therefore should be governed by state law.

In any event, the federal decisions the People cite fail to persuade us that defendant's *Blakely* claim should be deemed to be forfeited in this case. *Daniels v. U.S.* (2001) 532 U.S. 374 [121 S.Ct. 1578, 149 L.Ed.2d 590] and *U. S. v. Olano* (1993) 507 U.S. 725 [113 S.Ct. 1770, 123 L.Ed.2d 508] did not concern the constitutional right to a jury trial. *Daniels* held the defendant could not collaterally challenge the constitutionality of a prior state court conviction in a federal habeas corpus proceeding where he did not assert the challenge when the conviction was still open to attack in its own right. (*Daniels*, at p. 382.) *Olano* held the defendant had forfeited a claim that it was error to let alternate jurors attend deliberations by not objecting when the deliberations took place. Significantly for our purposes, the Supreme Court expressly recognized that some constitutional rights may not be subject to waiver: "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. [Citations.]" (*Olano*, at p. 733.)

The court in *U.S. v. Cotton* (2002) 535 U.S. 625 [122 S.Ct. 1781] concluded that an *Apprendi* claim can be forfeited, but the case did not concern the right under *Apprendi* to a jury determination of facts used to increase the maximum punishment. In *Cotton*, the federal district court made drug quantity findings that exposed the defendants to greater punishment, which the court then imposed. On appeal, the defendants argued their

sentences were invalid under *Apprendi* because the issue of drug quantity was neither alleged in the indictment nor submitted to the jury.

In holding that the claim had been forfeited, the United States Supreme Court limited its discussion of *Apprendi* to the adequacy of the indictment. It did not discuss whether the defendants waived their *additional* claim that the issue of quantity should have been submitted to the jury. In fact, the court described the question to be addressed as "whether the *omission from a federal indictment* of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court." (*U.S. v. Cotton*, *supra*, 535 U.S. at p. 627, italics added.)

In *U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967, the defendant claimed the district court violated *Blakely* by determining, without a jury, that his offense involved a sufficient quantity of drugs for an enhanced sentence. The Court of Appeals reviewed the claim under the plain error doctrine, the standard applicable in federal court to the review of a claim not raised in the trial court. However, the court did not actually say the claim had been forfeited, nor did it indicate the government had argued forfeiture. Instead, the court simply stated it would consider the claim sua sponte, because *Blakely* had "worked a sea change in the body of sentencing law," and because of "the Sixth Amendment implications of *Blakely* . . . ." (*Ameline*, at pp. 973-974, fn. omitted; see also *id.* at pp. 978-979.)

Given the importance of the constitutional right to a jury trial, "California law has long required that waiver of a jury trial be express. [Citation.]" (*In re Tahl* (1969) 1 Cal.3d 122, 129, fn. 4.) A reviewing court therefore should not find that a claim based on

the right to a jury trial has been *implicitly* forfeited by mere inaction unless there is no substantial doubt about the matter. In view of the decisions discussed *ante*, we cannot conclude, at least without further guidance, that the California Supreme Court would hold a *Blakely* claim is forfeited by failure to object on that basis in the trial court. Accordingly, we reject the People's claim of waiver.

3. *Application of Blakely*

We turn now to the merits of defendant's *Blakely* claim. The question presented by that claim is this: Under California's Determinate Sentencing Act (DSA; Pen. Code, § 1170 et seq.) should the "statutory maximum," which under *Blakely* cannot be exceeded without jury findings, be deemed to be the upper term stated in the statute prescribing the punishment for the crime, or the statutory middle term, which section 1170(b) says shall be given unless the court finds aggravating or mitigating circumstances? Put another way, should 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*, 124 S.Ct. at p. 2537, italics omitted) be deemed to be the upper term, on the theory that once a defendant is convicted, he becomes eligible for any of the three terms stated in the penalty statute, or the middle term, on the theory that a conviction alone does not allow the court to find the aggravating circumstances that are necessary to impose the upper term?

Blakely does not provide a direct answer to this question. *Blakely* dealt not with an upper term -- i.e., a term at the high end of the statutory range -- but with an "exceptional sentence" (90 months) that *exceeded* the upper term of the statutory range (49 to 53 months). Thus, the sentencing provision declared unconstitutional in *Blakely* operated like an enhancement, not an upper term, under the DSA. Unlike an

enhancement in California, the exceptional sentence in *Blakely* could be imposed based on the judge's unilateral findings of facts, with no jury determination or admission by the defendant of those facts.

Accordingly, to determine how *Blakely* affects the validity of an upper term under the DSA, we must consider the Washington sentencing scheme under which *Blakely* arose. We will then consider, interpreting *Blakely* in that context, how its holding should be applied to the DSA.[6]

a. *Washington sentencing law*[7]

In Washington, the penalty for a crime that is to be punished with a determinate sentence is determined by computing a "standard range" based on the seriousness of the crime (seriousness level) and the defendant's prior criminal record (offender score). The seriousness level is determined from a table assigning a number to each crime, which may vary from a low of I for offenses such as forgery to a high of XVI for aggravated

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[6] The California Supreme Court is currently considering whether an upper term imposed without a jury finding of aggravating circumstances is unconstitutional under *Blakely*. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.) In the interim, California Court of Appeal decisions have gone both ways on the issue. To date, all of those decisions either have been accepted for review by the Supreme Court or are still subject to being reviewed. In view of the Supreme Court's pending consideration of the issue, it would not be profitable to address the Court of Appeal decisions specifically.

[7] For ease of reference, we use the current versions of the Washington statutes. The Supreme Court in *Blakely* used the versions that were in effect when the defendant in that case was sentenced, October 2000. (*Blakely*, *supra*, 124 S.Ct. at p. 2534, fn. 1; see *State v. Blakely* (2002) 111 Wash.App. 851, 860 [47 P.3d 149, 154].) The current versions are not different from the versions considered in *Blakely* in any way that would affect our analysis.

first degree murder. (Wash. Rev. Code § 9.94A.515.) The offender score is determined by assigning a point value to each of the defendant's prior convictions based on its seriousness and then totaling the points for all of the prior convictions. (Wash. Rev. Code § 9.94A.525.)

The seriousness level and offender score are then applied to the horizontal and vertical axes of a sentencing grid. The intersection of the two numbers on the grid yields a standard range extending from the lowest to the highest term that may be imposed for the offense and a sentencing midpoint between the lowest and highest terms. (Wash. Rev. Code § 9.94A.510, § 9.94A.530.)[8]

Normally, the court is to impose a sentence within the standard range. (Wash. Rev. Code § 9A.04.505(2)(a)(i).) However, the court may impose a sentence outside the range if it finds there are substantial and compelling reasons justifying an "exceptional sentence." (Wash. Rev. Code § 9.94A.535.) It was this provision, allowing the court to exceed the standard range based on findings it had made independently of the jury, that *Blakely* held violated the Sixth Amendment.

In choosing a sentence within the standard range, a Washington court "shall consider the risk assessment report and presentence reports, if any, including any victim

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[8] *Blakely* stated that the defendant in that case had a seriousness level of V and an offender score of two, which made the standard range 13 to 17 months. This was increased to 49 to 53 months, because the defendant also was subject to a firearm enhancement of 36 months. (*Blakely*, *supra*, 124 S.Ct. at p. 2535.) Although the court did not say so, the midpoint for a 13- to 17-month standard range was 15 months, which would have yielded a midpoint of 51 months for the 49- to 53-month range. (See Notes foll. Wash. Rev. Code § 9.94A.510.)

impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." (Wash. Rev. Code § 9.94A.500(1).) Furthermore, the court may rely on information "admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports." (Wash. Rev. Code § 9.94A.530(2).)

At the sentencing hearing, which the court must conduct before imposing sentence (Wash. Rev. Code § 9.94A.500(1)), each party may argue factual matters in support of a sentence at one or the other end of the standard range. (See, e.g., *State v. Williams* (2000) 103 Wash.App. 231, 238 [11 P.2d 878] [prosecutor argued that protection of the community required a sentence of at least the high end of the standard range].) Thus, "a prosecutor may reference a defendant's prior bad acts in support of an argument that the sentencing judge should impose the maximum standard range sentence." (*Ibid.*; accord, *State v. Van Buren* (2000) 101 Wash.App. 206, 216 [2 P.3d 991].)

b. *Interpretation of Blakely in the context of Washington sentencing law*

It is apparent from the foregoing discussion that a Washington judge in selecting a sentence within a 49- to 53-month standard range would *not* literally be imposing a sentence "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) Instead, the judge would be imposing a sentence on the basis of the jury verdict or the defendant's admissions *plus* the information presented in the presentence reports; the statements of counsel, the

defendant, the victim, and the law enforcement officer at the sentencing hearing; and any other information proved at the trial or sentencing hearing. (Wash. Rev. Code §§ 9.94A.500(1), 9.94A.530(2).)

Requiring a court to consider these sources of information necessarily means the court must be authorized to make factual determinations based on the information. Otherwise, the court could not determine whether the information it is bound by statute to consider is credible or relevant, or whether it supports a sentence at one or the other end of the standard range. We must presume the Washington legislature would not require a court to hold a hearing, consider the evidence presented at the hearing, and then make no meaningful use of the information obtained because it could not make the factual determinations necessary to do so.

Notably, the Washington legislature in enacting the state's determinate sentencing law expressly disclaimed any intent to eliminate judicial discretion from the sentencing process. The legislature stated it wanted to create a sentencing system "which structures, but does not eliminate, discretionary decisions affecting sentences . . . ." (Wash. Rev. Code § 9.94A.110.) A grant of judicial discretion implies the authority to make factual determinations to the degree necessary to reach an informed decision. "'To exercise the power of judicial discretion all the material facts in evidence must be both known and considered . . . .'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, quoting *People v. Surplice* (1952) 203 Cal.App.2d 784, 791.)

A fair reading of the Washington sentencing law therefore supports the conclusion that a judge in choosing a sentence from a range of 49 to 53 months must have authority to determine facts in addition to those "reflected in the jury verdict or admitted by the

defendant." (*Blakely*, *supra*, 124 S.Ct. at p. 2537, italics omitted.) A typical jury verdict or guilty plea does no more than establish the defendant's guilt of the specified offense. That finding would *establish* the range of, say, 49 to 53 months, but it would provide no guidance in *choosing* within the range. Precluding the judge from making any further factual determinations would result in a choice of sentence that would be no more than arbitrary, a result antithetical to the proper exercise of discretion. (*In re Cortez*, *supra*, 6 Cal.3d at p. 85 ["'[t]he term [judicial discretion] implies absence of arbitrary determination, capricious disposition or whimsical thinking'"].)

The Supreme Court in *Blakely* did not suggest there was any constitutional infirmity in allowing the judge to select a sentence within the 49- to 53-month range. The constitutional problem arose when the judge went beyond that range. The *Blakely* court demonstrated its familiarity with the Washington sentencing statutes by citing them extensively. (*Blakely*, *supra*, 124 S.Ct. at p. 2535.) It presumably knew those statutes required a court in selecting a sentence within the standard range to consider information *besides* the facts found by the jury or admitted by the defendant. (Wash. Rev. Code §§ 9.94A.500(1), 9.94A.530(2).) It presumably also recognized that a court could not effectively consider that information if it was precluded from making any further factual determinations.

We also presume the *Blakely* court knew that in many cases the statutory range available to the sentencing judge would be far greater than the 49- to-53-month range in *Blakely*. For example, in the case of an offender with a seriousness level of XV and an offender score of nine or more, the range would be 411 to 548 months, i.e., 34 years 3 months to 45 years 8 months. (Wash. Rev. Code § 9.94A.510.) Yet, if there is no

constitutional infirmity in a judge choosing a sentence within a range of 49 and 53 months without jury findings, consistency would require that there be no infirmity in choosing a sentence within a broader statutory range without jury findings. If that is true, the conclusion that the judge must be authorized to make factual findings in choosing a sentence within the range becomes virtually inescapable. It cannot reasonably be suggested that a judge could meaningfully choose between 34 years 3 months and 45 years 8 months -- a difference of more than 11 years -- but make no factual findings on which to base the choice. *Blakely*'s statements 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*" and 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" (*Blakely*, *supra*, 124 S. Ct. at p. 2537) must be interpreted in this context. That context must include the fact that the court identified no Sixth Amendment violation in the fact a Washington judge could give a sentence of 53 months without jury findings. Viewing the statements in that manner, we derive these principles of law from *Blakely*:

1. Judicial factfinding in the determination of an appropriate sentence is not per se unconstitutional.

2. Under a determinate sentencing system that provides for a range of sentences rather than a single sentence for a given offense, it is not unconstitutional for the legislature to authorize the judge to make factual determinations that are used to select a sentence within the range, including the highest term in the range.

3. It *is* unconstitutional for the legislature to authorize the judge to make factual determinations that are used to impose a sentence *exceeding* the highest term of the statutory range. Facts that are used for that purpose must be found by the jury or admitted by the defendant.

We discuss next how these principles should be applied to sentencing in California.

c. *Application of Blakely to California sentencing law*

As we have noted, section 1170(b) provides: "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." Section 1170(b) goes on to provide: "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."

Section 1170(b)'s description of the materials a judge may consider in deciding whether to impose an upper or lower term is notably similar to the description in Washington's sentencing law of the materials a judge is to consider in selecting a term within the standard range. As shown *ante*, the Washington law provides that the court shall consider presentence reports; victim impact statements; arguments from counsel, the defendant, the victim or his or her representative, and an investigative law enforcement

officer; and any information proved at trial or at the time of sentencing. (Wash. Rev. Code §§ 9.94A.500(1), 9.94A.530(2).)

We have seen *ante* that the Washington system implicitly contemplates a sentencing court may make factual determinations based on its consideration of the materials referred to in the statute. Based on those factual determinations, the court can select any term within the standard sentencing range, including the high term.

California merely makes explicit what is implicit in Washington. Section 1170(b) says the judge can give the upper term by finding aggravating circumstances, and in finding such circumstances can consider the factual materials referred to in the statute. Washington's law implicitly says the same thing -- the judge may sentence within the standard range after considering the factual materials referred to in the Washington statute and, by necessary implication, making fact findings to support a higher or lower sentence within that range. If a 53-month sentence in *Blakely* would not offend the Sixth Amendment, neither should an upper term under the DSA.

The only overt difference between the California and Washington systems is that section 1170(b) contains an explicit directive that the middle term be given unless the judge makes additional findings to justify a departure from it. Defendant seizes upon that directive to argue that under *Blakely*'s statement that the "statutory maximum" for *Apprendi* purposes is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings" (*Blakely*, *supra*, 124 S.Ct. at p. 2537), the statutory maximum in California must be deemed to be the middle term, not the upper term.

We believe, however, that *Blakely*'s statement should be understood according to the context in which it was stated -- a case in which the court did not give what would be the equivalent of an upper term under the DSA, but exceeded that term to impose almost double the upper term. We do not for that reason believe that, if it were to consider California's sentencing system, the *Blakely* court would apply its definition literally to find unconstitutional the statutory authority of a court to give the upper term if it finds aggravating circumstances. Rather, we believe, the court would find unconstitutional only a term *exceeding* the upper term without supporting jury findings.

Accordingly, as we read *Blakely*, "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*, 124 S.Ct. at p. 2537) should be taken to mean the maximum term of the sentencing range the legislature has chosen for that offense. Otherwise, there would have been no basis in *Blakely* for giving any sentence other than 49 months, because the judge would have been precluded from making any factual determination that would justify giving 53 months or any other sentence exceeding 49.

Even if we are wrong, and the *Blakely* court would say that section 1170(b)'s directive renders unconstitutional an upper term imposed without jury findings, the constitutional problem could be instantly eliminated by the simple expedient of deleting the middle term directive from the statute. Then, a sentencing range under the DSA would become an exact analog of the 49- to 53-month range in *Blakely*, with which, we again emphasize, *Blakely* found no constitutional problem.

Taking that simple expedient would serve no salutary objective that should, in right or in law, justify conferring the imprimatur of constitutionality on a sentence that

previously lacked it. The potential for arbitrariness in sentencing would increase, not decrease, because the court could now give an upper or lower term without any factual findings at all. Such a result would in no way advance any Sixth Amendment goal. We cannot believe the *Blakely* court would intend that result.

The only part of the sentence in *Blakely* that the court held presented a constitutional problem was the judge's imposition of an "exceptional" sentence of 90 months. *Blakely* held the judge could not exceed the 49- to 53-month range imposed by the statute that specified the range of punishment for the offense based on his own finding that the defendant acted with deliberate cruelty. The exceptional sentence was based on a separate statute providing for a higher sentence if the court made the cruelty finding.

In this case, the four-year term defendant received for the assault was within the two- to four-year range imposed by the statute that specified the standard range of punishment for the offense, Penal Code section 245(a)(1). The court did not exceed that range by imposing more time under a separate statute, as the judge in *Blakely* did. The four-year term therefore is not analogous to the 90-month term that the court found unconstitutional in *Blakely*. Rather, it is analogous to the 53-month high end of the standard range in *Blakely*, which the court never suggested might pose any constitutional problem.

The appropriate California analog for the additional 37 months by which the 90-month exceptional sentence in *Blakely* exceeded the 53-month high end of the standard range is a sentence enhancement. An enhancement, like the exceptional sentence in *Blakely*, increases the sentence *beyond* the standard range of lower, middle, and upper

terms set forth in the statute specifying the punishment for the offense. Under *Blakely*, a fact used to impose an exceptional sentence must admitted by the defendant or found to be true by a jury. The same is true of an enhancement in California. (Pen. Code, § 1170.1, subd. (e).)

Blakely itself referred to the type of sentence term it determined to be unconstitutional -- one that causes the overall sentence to exceed the statutory maximum -- as an "enhancement." The court said that a judge in Washington cannot impose an exceptional sentence "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*, 124 S.Ct. at p. 2538, fn. 8, second italics added.)

The court again referred to the excessive portion of an unconstitutional sentence as an "enhancement" when it discussed the appropriate procedure when a defendant pleads guilty: "When a defendant pleads guilty, the State is free to seek judicial *sentence enhancements* so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. . . . Even a defendant who stands trial may consent to judicial factfinding as to *sentence enhancements*, which may well be in his interest if relevant evidence would prejudice him at trial." (*Blakely*, *supra*, 124 S.Ct. at p. 2541, italics added.)

Though it did not use the term "enhancement," the *Blakely* court's comparison of determinate and indeterminate sentencing systems also supports the conclusion that the type of sentence term *Blakely* found unconstitutional is analogous to a California sentence enhancement rather than an upper term. *Blakely* acknowledged that

indeterminate sentencing systems "involve judicial factfinding," since a judge "may implicitly rule on those facts he deems important to the exercise of his sentencing discretion." (*Blakely*, *supra*, 124 S.Ct. at p. 2540.) However, the court explained why that kind of judicial factfinding is permissible, but factfinding that yields a penalty exceeding the statutory maximum is not: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence -- and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury." (*Ibid.*)

An upper term under the DSA operates like the 40-year term referred to in the first system described in *Blakely*'s example. An offender, like defendant in this case, who commits an assault by means of force likely to produce great bodily injury "knows he is risking" four years in prison, because Penal Code section 245(a)(1), the statute prescribing the punishment for the offense, says four years is the maximum sentence for that crime. By the same token, a defendant who commits that offense while unarmed is "entitled" to a sentence of no more than four years, since he is not subject to a firearm enhancement. (See Pen. Code, §§ 12022, 12022.5.)

Why, then, are indeterminate sentencing systems constitutional under *Blakely* even though the court acknowledged that they "involve judicial factfinding"? (*Blakely*, *supra*, 124 S.Ct. at p. 2540.) *Blakely*'s answer is that the judicial factfinding under such a system only permits a judge to "implicitly rule on those facts he deems important to the exercise of his sentencing discretion." (*Ibid*.) If that is the relevant criterion, an upper

term under the DSA should be constitutional too. Findings of aggravating circumstances also consist of a judge ruling "on those facts he deems important to the exercise of his sentencing discretion" within the range set forth in the statute prescribing the punishment. They do not operate to remove the upper term limit and make available a much greater sentence, as the finding of deliberate cruelty did in *Blakely*. That function is served by enhancements, not upper terms.

Decisions of our own Supreme Court also support the conclusion that the type of sentence *Blakely* found unconstitutional is analogous to an enhancement, not an upper term, under the DSA. Although our Supreme Court has not yet addressed the application of *Blakely* to sentencing under the DSA, it has on several occasions considered the application of *Apprendi*. The court has consistently read *Apprendi* to apply to enhancements, not to upper terms.

In one recent decision, the court said: "This is what *Apprendi* teaches us: [T]he federal Constitution requires a jury to find, beyond a reasonable doubt, the existence of every element of a *sentence enhancement* that increases the penalty for a crime beyond the 'prescribed statutory maximum' punishment for that crime. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326, italics added.)

Two years later, the court made explicit that it considered the "statutory maximum" sentence for *Apprendi* purposes -- the sentence a court cannot exceed without a jury finding -- to be the upper term. The defendant in *In re Varnell* (2003) 30 Cal.4th 1132 received 16 months for violating Health and Safety Code section 11377, subdivision (a), a crime punishable by 16 months, two years, or three years. (Health & Saf. Code, § 11377, subd. (a); Pen. Code, § 18.) The defendant argued the court

improperly relied on a prior conviction to find him ineligible for alternative drug offender treatment. Rejecting the argument, the Supreme Court stated: " . . . *Apprendi*, *supra*, 530 U.S. 466, holds that any fact that increases the penalty for a crime beyond the statutory maximum prescribed for that crime must be submitted to a jury and proved beyond a reasonable doubt. [Citations.] Here, since *the statutory maximum for petitioner's crime is three years* in prison [citation], no finding by the trial court *increased* the penalty beyond the statutory maximum. [Citation.]" (*Varnell*, at pp. 1141-1142, second italics added.)

If the "statutory maximum" for *Apprendi* purposes is the upper term, the same should be true for purposes of *Blakely*. *Blakely* did not purport to alter any principles expressed in *Apprendi*. The *Blakely* court, in fact, began its legal discussion by saying, "This case requires us to *apply the rule* we expressed in *Apprendi* . . . ." (*Blakely*, *supra*, 124 S.Ct. at p. 2536, first italics added.) Here, then, the "statutory maximum" for purposes of *Blakely* should be deemed to be the upper term of four years, not the middle term of three years, just as the statutory maximum in *In re Varnell* was the upper term of three years and not the middle term of two years. That being the case, imposition of the upper term does not violate *Blakely*.

d. *Conclusion*

For these reasons, we conclude *Blakely* does not prohibit a California court from imposing an upper term under the DSA based on facts not found by a jury or admitted by the defendant. Accordingly, sentencing defendant to four years was not unconstitutional under *Blakely*.

III

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
Acting P.J.

I concur:

KING
J.

GAUT, J., Concurring and Dissenting:

I concur with the majority's decisions except for its conclusion that the four-year aggravated term imposed upon defendant by the trial court did not violate the decision in *Blakely v. Washington* (2004) 542 U.S.___, 124 S.Ct., 2531. I dissent from that conclusion.

The trial court sentenced defendant to an aggravated term of four years upon the revocation of his probation for violation of Penal Code section 245, subdivision (a)(1) and to a concurrent aggravated term of four years for his plea of no contest to a violation of Penal Code section 368, subdivision (b)(1), elder abuse. In each case the statutes provide for sentences of two, three, or four years. The trial court sentenced defendant to the aggravated term under section 245, subdivision (a)(1) based upon its finding that the victim was particularly vulnerable and defendant took advantage of a position of trust in committing the offense.

The majority opinion is based upon its interpretation of the meaning of "prescribed statutory maximum term." The Supreme Court refers to that concept in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348. There the court said that "[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*, *supra*, at p. 490, italics added.) For the following reasons I believe that the majority has erred in its conclusion as to the meaning

of the term "statutory maximum." As a result the majority erroneously affirms the trial court decision to aggravate the defendant's sentence without submitting the issue to a jury.

Penal Code section 1170, subdivision (b) provides that "[w]hen 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." California Rules of Court, rule 4.420 directs the trial judge to select the middle term of imprisonment unless imposition of the upper term is justified by circumstances in aggravation, established by a preponderance of the evidence. In this case Penal Code section 245, subdivision (a)(1) provided for sentences of two, three, or four years. Based upon section 1170, subdivision (b) the majority finds, without apparent authority, that the "statutory maximum" in this case is four years and that the trial court could impose the aggravated four-year sentence without submitting the issue to a jury.

In *Blakely v. Washington*, *supra*, Justice Scalia referred to the admonition of *Apprendi v. New Jersey*, *supra*, that ". . . 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." As Justice Scalia noted "[t]his rule reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) . . . ." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2536.)

In *Harris v. U.S.* (2002) 536 U.S. 545, 122 S.Ct. 2406, the Supreme Court concluded that the legislature "may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt." (*Id.* at p. 557.) Those constitutional safeguards apply to facts that were "traditional elements" of a crime even though the Legislature may label those elements as mere sentencing factors. An element of the crime, which requires submission to a jury, is a fact "legally essential to the punishment to be inflicted." (*United States v. Reese* (1875) 92 U.S. 214, 232, 23 L.E. 563.)

In this case the trial court sentenced defendant to the aggravated term based upon its finding by a preponderance of the evidence. The majority nevertheless affirms that decision because it defines the statutory maximum to be the upper term of the three terms authorized by Penal Code section 1170, subdivision (b). That definition, however, ignores Justice Scalia's caveat 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. 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,' Bishop, supra, § 87, at 55, and the judge exceeds his proper authority." (*Blakely v. Washington*, *supra*, 542 U.S. at p. ___, 124 S.Ct at p. 2537.)

In this case the trial court increased the penalty for the charged crime by considering factors never submitted to a jury. As Justice Scalia noted in his concurring opinion in *Apprendi* the right to trial by jury guarantees "the right to have a jury determine those facts that determine the maximum sentence the law allows." (*Apprendi v. New Jersey*, *supra,* 530 U.S. at p. 499, 120 S.Ct. 2348.)

Here the trial court considered by a mere preponderance of the evidence factors that increased defendant's penalty. Those factors were not charged in the information and were not found by a jury. Nor can the People contend that those factors were mere sentencing factors and not elements of the crime on which the penalty was based. In *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 243, 118 S.Ct. 1219, Justice Breyer found that recidivism is a traditional sentencing factor not requiring inclusion in the information nor submittal to a jury. That is not the situation here. Vulnerability of the victim and taking advantage of a position of trust are factors that go beyond mere sentencing factors. The trial judge must impose "'a specific sentence *within the* range authorized by the jury's finding that the defendant [was] guilty.'" (*Harris v. U.S.* (2002) 536 U.S. at p. 564, 122 S.Ct. 2406, quoting from *Apprendi v. New Jersey, supra,* at p. 494, n. 19, 120 S.Ct. 2348, original italics.) In this case the trial court, not the jury, found that the victim was vulnerable and that defendant took advantage of a position of trust in committing the offense.

The factors found by the trial court to support the aggravated sentence were elements of the crime, not mere sentencing factors. Those factors were not determined

by the jury and hence they violate the Supreme Court's admonition "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 v. Washington, supra,* 124 S.Ct at p. 2537, italics added.) In effect, the majority's decision reduces the elements of defendant's crime to mere sentencing factors, thereby allowing imposition of a substantial increase in the defendant's sentence. A defendant's right to a jury decision on the facts relied upon to aggravate his sentence is too significant to relegate to a mere "sentencing" decision by a trial court relying upon its own finding by a preponderance of the evidence.

I would remand the case for resentencing.

s/Gaut
J.