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*Opinion on remand from Supreme Court

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL WILKERSON, Defendant and Appellant.	D042017 (Super. Ct. Nos. SCD159400 and SCD160878)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed in part, reversed in part.

Michael Wilkerson was convicted of 25 counts of lewd and lascivious conduct upon a child 14 or 15 years of age by a perpetrator at least 10 years older (Pen. Code,[1] § 288, subd. (c)(1)); one count of corporal injury to a cohabitant (§ 273.5, subd. (a)); one count of forcible rape (§ 261, subd. (a)(2)); one count of forcible oral copulation (§ 288a, subd. (c)(2)); one count of assault by means of force likely to produce great bodily injury

1 Subsequent statutory references are to the Penal Code unless otherwise specified.

(§ 245, subd. (a)(1)); three counts of employment of a minor to sell or carry marijuana (Health & Saf. Code, § 11361, subd. (a)); and one count of employment of a minor to sell or carry a narcotic (Health & Saf. Code, § 11353, subd. (b)). In a bifurcated proceeding, the trial court found that he had suffered a prior serious felony conviction under section 667, subdivision (a)(1), arising from a juvenile adjudication for armed robbery. The court sentenced him to 57 years 6 months in prison, which sentence included a five-year enhancement for the prior serious felony conviction.

Wilkerson appealed, raising various contentions, which issues we resolved adversely to him in an opinion filed May 17, 2004. Wilkerson petitioned for review to the California Supreme Court. The Supreme Court granted review and transferred the case back to this court for consideration of an issue not previously briefed by the parties: i.e., whether a juvenile adjudication may be used to impose a prior serious felony conviction enhancement. We have received supplemental briefing by the parties on this issue. The People concede that Wilkerson's prior juvenile adjudication was improperly used to enhance his sentence under section 667, subdivision (a)(1), and that the case must be remanded for resentencing.

In this opinion, we restate our previous holdings finding no merit in Wilkerson's constitutional challenges to the trial court's rulings which (1) precluded a mistake of age defense to the section 288, subdivision (c)(1) charges, and (2) admitted prior sexual offense and domestic violence evidence pursuant to Evidence Code sections 1108 and 1109. As to the sentence, we reverse based on the conceded error. We also reiterate our previous holding rejecting Wilkerson's argument that there was insufficient evidence to

support the trial court's finding that he had committed the prior offense of armed robbery. For guidance at resentencing, and having received supplemental briefing on the issues, we also hold the imposition of upper terms violated the principles set forth in the United States Supreme Court's recent decision in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531], but the imposition of consecutive sentences did not.

FACTUAL BACKGROUND

The issues raised on appeal do not require a lengthy recitation of the facts. The facts underlying the convictions include Wilkerson's ongoing, and at times physically abusive, sexual relationship with a 15-year-old girl when he was 45 years old. Additionally, Wilkerson raped and engaged in forcible sexual conduct with a 14-year-old girl, and physically assaulted a woman with whom he had a sexual encounter. To the extent further factual details are relevant to the issues on appeal, we will present them in our discussion which follows.

DISCUSSION

I. CONVICTIONS

A. *Mistake of Age Defense*

The 15-year-old victim of the lewd conduct charges testified that she told Wilkerson she was 19 years old. Based on this testimony, Wilkerson challenges the constitutionally of the trial court's pretrial ruling that mistake of age was not a defense to section 288, subdivision (c)(1)[2] charges of lewd or lascivious conduct upon a child age

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2 Hereafter referred to for convenience as section 288(c)(1).

14 or 15 years old by a perpetrator at least 10 years older than the victim. Wilkerson recognizes that in *People v. Olsen* (1984) 36 Cal.3d 638, 649 (Olsen), the California Supreme Court held that a good faith belief the victim was 14 years or older is not a defense to a section 288, subdivision (a)[3] charge of lewd or lascivious conduct with a child under the age of 14. *Olsen* was decided before the 1988 enactment of section 288(c)(1), which made the lewd conduct offense applicable to children slightly older than those covered by section 288(a). (Historical and Statutory Notes, 48 West's Ann. Penal Code (1999 ed.) foll. § 288, p. 445.) Pointing to the analysis in *Olsen* which characterizes children under age 14 as being of tender years and in need of special protection (*Olsen, supra,* at p. 647), Wilkerson argues these policy concerns do not apply when the victim is 14 or 15 years old.

The court in *People v. Paz* (2000) 80 Cal.App.4th 293 (*Paz*) addressed this precise argument, and extended *Olsen*'s rejection of the mistake of age defense to the lewd conduct offense defined in section 288(c)(1). Based on a review of legislative history, the court in *Paz* concluded that to allow the mistake of age defense would undermine the legislative purpose underlying the enactment of section 288(c)(1). (*Paz, supra,* at pp. 295-296.) The statute was enacted to allow for imposition of felony culpability on offenders whose victims were 14 or 15 years old if the offender was at least 10 years older than the victim. (*Id.* at pp. 296-297.) In order to prevent prosecution of a minor for sexual conduct short of intercourse between consenting teenagers, section 288(c)(1) was

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3 Hereafter referred to for convenience as section 288(a).

consciously crafted to apply only when there is a 10-year age differential between the victim and the perpetrator. (*Paz, supra*, at pp. 296-297.) Premised on the recognition that a 14- or 15-year-old minor can be "'sexually naïve'" and fall victim to a more experienced adult, *Paz* ascertained that the statutory background showed a "legislative desire to protect 14- and 15-year-olds *from predatory older adults* to the same extent children under 14 are protected by subdivision (a) of section 288." (*Id.* at p. 297, italics added.) That is, "section 288 offenses set out a hierarchy of victims, from the most vulnerable—infants and children under subdivision (a)—to those perceived as less vulnerable—young teenagers under subdivision (c)(1). The age distinctions help define the gravity of, and the range of punishment for, the offense." (*Ibid.*, italics omitted.)

To support its conclusion, the court in *Paz* observed that section 288(c)(1) allows for a lower range of prison terms than section 288(a), as well as the option of misdemeanor punishment not available under section 288(a).[4] Thus, the sentencing structure of section 288, as well as the absence of any reference to lack of consent as an element of the offense, indicates that the Legislature did not intend to permit defenses based on mistake of age, but rather intended any such good faith mistake to be accommodated at sentencing. (*Paz, supra*, 80 Cal.App.4th at pp. 297-298.)

The *Paz* court also reasoned that because the *Olsen* decision predated the enactment of section 288(c)(1), the Legislature was aware of its holding and could have

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4 The sentence choices for section 288(a) are three, six, or eight years in prison, whereas for section 288(c)(1) they are one, two, or three years in prison or not more than one year in jail.

included language allowing the mistake of age defense had it intended *Olsen*'s holding not to apply to this newly-defined crime. (*Paz, supra,* 80 Cal.App.4th at p. 298.) Further, the Legislature's awareness of the mistake of age issue is shown by the fact that in 1981 it enacted section 1203.066, subdivision (a)(3) which provides that a defendant convicted under section 288 is not eligible for probation unless he or she had an honest and reasonable belief the victim was 14 years or older. (*Paz, supra*, at p. 298; accord *People v. Olsen, supra*, 36 Cal.3d at p. 647.)

Wilkerson argues that *Paz* was wrongly decided. Pointing to the fact that mistake of age has long been a defense to unlawful sexual intercourse with a minor under age 18 (§ 261.5, subd. (a); *People v. Hernandez* (1964) 61 Cal.2d 529, 535-536), he asserts that the Legislature has not indicated any intent to reject the defense in the context of section 288(c)(1). We are not persuaded. We agree with *Paz*'s analysis and holding—i.e., section 288(c)(1) was enacted to protect 14- and 15-year-old children from lewd conduct committed by adults who are substantially older than the children, and the section should be interpreted to extend the same protections to these children as to those covered by section 288(a). Accordingly, absent an express statement by the Legislature to the contrary, the mistake of age defense is not available for section 288(c)(1) violations.

Attempting to remove his case from the ambit of *Paz*, Wilkerson contends *Paz* is factually distinguishable because the victim in that case told the defendant she was 16 years old (*Paz, supra*, 80 Cal.App.4th at pp. 295, 300), whereas the victim here told Wilkerson she was 19 years old. The court in *Paz* reasoned that because the evidence at most could support a reasonable belief that the victim was age 16, the defendant's

conduct could not be characterized as "'morally innocent'" comparable to the conduct of the defendant in *Hernandez* who thought he was having consensual intercourse with another adult. (*Paz, supra,* at p. 300.) We do not find this factual distinction to be pivotal and it does not alter our conclusion. As noted, we are persuaded by the portion of the *Paz* opinion addressing Legislative intent. Because section 288(c)(1) presents a clear mandate to protect sexually vulnerable 14- and 15-year-old children from predatory older adults with no reference to a mistake of age defense, the defense is unavailable regardless of what age the victim pretended to be.

Finally, Wilkerson argues that preclusion of the mistake of age defense results in imposition of culpability without requiring knowledge of the facts that make the act a crime, in violation of his federal constitutional rights. The California Supreme Court's holding in *Olsen* implicitly rejects the notion that the mistake of age defense is constitutionally required. Courts in other jurisdictions have expressly rejected the argument that the federal Constitution mandates allowance of a mistake of age defense for sex offenses committed against minors, and we agree with this conclusion. (See, e.g., *Nelson v. Moriarty* (1st Cir. 1973) 484 F.2d 1034, 1035-1036 [mistake of age not constitutionally required defense to statutory rape]; accord *People v. Cash* (Mich. 1984) 351 N.W.2d 822, 828.)

B. *Prior Sex Offense and Domestic Violence Evidence*

As an exception to the general rule against use of propensity evidence, Evidence Code sections 1108 and 1109 allow admission of prior sexual offense or domestic violence evidence when a defendant is charged with a sexual or domestic violence

offense, as long as the evidence is not more prejudicial than probative under Evidence Code section 352. Pursuant to these exceptions and over defense objection, evidence was presented regarding Wilkerson's prior sexual, physically abusive relationship with a 16-year-old girl when he was 32 years old.

Wilkerson argues admission of the evidence under Evidence Code sections 1108 and 1109, as well as the instructions permitting the jury to use the evidence to infer criminal disposition, violated his federal constitutional rights. Assuming Wilkerson did not waive this constitutional challenge by failing to raise it below, the argument has already been fully addressed by the courts. As to Evidence Code section 1108, the constitutional challenge has been rejected by the California Supreme Court (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-922 (*Falsetta*); see also *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013), and by federal courts evaluating a comparable federal statute (see *Falsetta, supra*, at pp. 920-921, and cases there cited). We must defer to the rulings of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

As to Evidence Code section 1109, lower appellate courts have repeatedly applied *Falsetta* to reject constitutional challenges to domestic violence propensity evidence. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1029; *People v. Johnson* (2000) 77 Cal.App.4th 410, 420; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1313; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096, and cases there cited.) We agree with these appellate court holdings.

II. SENTENCE

Wilkerson was sentenced to a total of 57 years 6 months in prison. He received upper term sentences for three of the counts and one enhancement. Sentences on two of the counts were imposed as full consecutive sentences. For the remaining counts, the court imposed one-third-the-midterm, consecutive sentences. As to enhancements, the court struck a "Three Strikes" prior conviction allegation based on Wilkerson's 1973 juvenile adjudication of armed robbery, and used the juvenile adjudication to impose a five-year sentence enhancement for a prior serious felony conviction under section 667, subdivision (a)(1). The court also imposed a one-year sentence for a prior prison term enhancement.

A. *Improper Use of Prior Juvenile Adjudication for Prior Serious Felony Enhancement*

A juvenile adjudication cannot be used to impose a prior serious felony conviction enhancement under section 667, subdivision (a)(1). (*People v. Smith* (2003) 110 Cal.App.4th 1072, 1080, fn. 10; *People v. West* (1984) 154 Cal.App.3d 100, 107-108.) The People concede that Wilkerson's prior juvenile adjudication was improperly used for this purpose and that the error requires reversal of the sentence.

B. *Substantial Evidence of Prior Armed Robbery Adjudication*

We reject Wilkerson's argument that the record does not support a finding that he committed a prior armed robbery offense.[5]

The prosecution must prove all the elements of an enhancement beyond a reasonable doubt, including that the defendant was convicted and that the conviction was for an offense within the definition of the enhancement. (*People v. Haney* (1994) 26 Cal.App.4th 472, 475.) On appeal, we must ascertain whether there is evidence which is "'reasonable, credible and of solid value—such that a reasonable trier of fact could find'" the allegation to be true beyond a reasonable doubt. (*People v. Williams* (1996) 50 Cal.App.4th 1405, 1413.) We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) A trier of fact is entitled to draw reasonable inferences from certified records offered to prove a prior conviction. (*People v. Williams, supra,* 50 Cal.App.4th at p. 1413.) Certified prison records are an acceptable means of proving a prior conviction. (§ 969b; see *People v. Prieto* (2003) 30 Cal.4th 226, 259; *People v. Lizarraga* (1974) 43 Cal.App.3d 815, 820.)

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5 In reiterating our holding that there is substantial evidence to support the court's finding of a prior armed robbery adjudication, we do not suggest or imply that we disagree with the court's original determination that Wilkerson's 1973 juvenile adjudication was too remote to warrant its use as a strike. Likewise, in reiterating this holding, we express no opinion on the issue of whether the use of juvenile adjudications as strikes under the Three Strikes law (§ 667, subd. (d)(3)) survives *Blakely. (See People v. Smith, supra,* 110 Cal.App.4th at pp. 1100-1102, diss. op. J. Johnson.) That issue has not been raised and will be of no consequence if the court again strikes the juvenile adjudication.

To prove the prior juvenile adjudication, the prosecution presented a certified copy of a booking card from the California Youth Authority (CYA) for Wilkerson. The booking card contains Wilkerson's fingerprints and states that he was "arrested or received" on February 14, 1973, and that the "charge or offense" was armed robbery and possession of a sawed-off shotgun. The portion of the booking card addressing the final "disposition or sentence" states "Kern County Juvenile Court."

Wilkerson argues there is insufficient evidence to prove he was adjudged guilty of armed robbery because the CYA booking card proves only that he was arrested and charged with armed robbery but does not prove the offense was found true by the juvenile court. The People assert that Wilkerson would not have been sent to the CYA facility unless the allegations against him were found to be true by the juvenile court.

The trial court could reasonably infer from the booking card that the juvenile court made a true finding regarding the armed robbery offense referenced on that card. The fact that Wilkerson was booked at CYA indicates that he was adjudicated to be a delinquent in need of the highest level of treatment in the juvenile system. (See 1 Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 7th ed. 2004) § 53.45, p. 1579 [CYA commitment for juvenile is akin to adult prison].) At the point of CYA booking, the juvenile court has rendered its disposition and the juvenile is committed to the institution. (See *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 577-578.) CYA is not an institution which books a juvenile *before* a true finding for an offense; rather, CYA booking only comes into operation once a juvenile has incurred the true finding and is sent for detention at the facility. Thus, contrary to Wilkerson's suggestion, the CYA

booking card does not refer to pre-adjudication arrest and charges, but rather refers to post-adjudication placement at a detention facility. Because CYA does not handle detention of juveniles prior to court adjudication of the charged offense, there would be no reason for a CYA booking card to reference any offense other than the one forming the basis for the CYA commitment. In short, given the nature of CYA, the "charge or offense" notation on the booking card necessarily refers to the adjudicated disposition by the juvenile court.

We emphasize there is no contention here that the booking card might be an inaccurate recordation of the juvenile court's ruling. Absent such evidence, and based on the presumption that official duty is properly performed, the trial court could reasonably infer that the officials filling out the booking card accurately set forth the offense found true by the juvenile court. (Evid. Code, § 664; *People v. Martinez* (2000) 22 Cal.4th 106, 115-116; *People v. Haney, supra,* 26 Cal.App.4th at pp. 475-476, compare *People v. Williams, supra,* 50 Cal.App.4th at p. 1413 [fingerprint card did not provide substantial evidence of conviction because it differed from abstract of judgment]; see also *People v. Ruiz* (1999) 69 Cal.App.4th 1085, 1091 [fingerprint card properly used to interpret illegible abstract of judgment].)

We note there is language in the above-cited *Ruiz* and *Williams* cases that could be interpreted to suggest that a fingerprint card might not be sufficient on its own to establish a prior conviction without an abstract of judgment or other comparable document. (*People v. Ruiz, supra,* 69 Cal.App.4th at p. 1091; *People v. Williams, supra,* 50 Cal.App.4th at p. 1413.) However, the factual posture of those cases involved the use

of a fingerprint card to contradict (*Williams*) or interpret (*Ruiz*) an abstract of judgment. In contrast, here, there is no such ambiguity in the presented evidence. Upon a close reading of *Ruiz* and *Williams*, we do not view these decisions as fashioning a broad rule forestalling use of a prison fingerprint card to independently prove a prior conviction. Although the preferred practice would be to present a document comparable to an abstract of judgment, under the circumstances of this case the CYA booking card provided substantial evidence of Wilkerson's prior robbery adjudication.

C. Blakely*'s Applicability to California's Sentencing Scheme*

Our court recently considered the impact of *Blakely v. Washington, supra,* 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) on California's sentencing scheme. In *People v. George* (2004) 122 Cal.App.4th 419 and *People v. Lemus* (2004) 122 Cal.App.4th 614, we concluded that *Blakely* is applicable to upper terms. As we shall explain, we adhere to this holding here.[6] We also hold *Blakely* is not applicable to consecutive sentences.

The Blakely *Decision*

In *Blakely,* the United States Supreme Court held the defendant's Sixth Amendment right to trial by jury was violated when a Washington sentencing court imposed an "exceptional" sentence that was three years beyond the state's "standard range" maximum for the crime. (*Blakely, supra,* 124 S.Ct. at pp. 2535-2538.) The

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6 A split exists in this court on the applicability of *Blakely*. In *People v. Wagener* (2004) 123 Cal.App.4th 424, this court held *Blakely* was inapplicable to California's middle/upper term sentencing scheme. We decline to follow *Wagener*. The issue of *Blakely*'s application to California's sentencing scheme is currently pending before the

exceptional sentence was based on the sentencing court's factual finding of an aggravated circumstance of deliberate cruelty. (*Ibid*.) *Blakely* applied the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, which provides: "'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.'" (*Blakely, supra*, 124 S.Ct. at p. 2536.) The *Blakely* court defined the "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Id.* at p. 2537.) That is, the test to determine the unconstitutionality of a sentence derived from factual findings by a court rather than a jury is whether the sentence is "*greater than what state law authorize[s] on the basis of the verdict alone*." (*Id*. at p. 2538, italics added.) The *Blakely* court did not, however, limit all fact-finding by a sentencing judge—rather, distinguishing determinate from indeterminate sentencing schemes, the court explained that a judge may impose a sentence based on additional facts as long as the sentence does not exceed the sentence to which the defendant has a *legal right* under the state's statutory scheme. (*Id*. at p. 2540 [facts ruled upon by court under indeterminate scheme do not violate jury trial right because the facts "do not pertain to whether the defendant has a legal *right* to a lesser sentence"].)

California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

Applicability of Blakely *to Upper-Term Sentences*

Under California's determinate sentencing law, where a penal statute provides for three possible terms for a particular offense, the sentencing court is required to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); Cal. Rules of Court,[7] rule 4.420.) Because this sentencing scheme *requires* selection of the middle term unless the court finds aggravating or mitigating circumstances, the middle term is viewed as the sentence to which the defendant is presumptively entitled. (*People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Reeder* (1984) 152 Cal.App.3d 900, 923; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583 ["midterm is statutorily presumed to be the appropriate term"].) Further, in order to avoid punishing the defendant twice based on the same fact, a fact that is an element of the crime or the basis of an imposed enhancement may not be used to impose the upper term. (§ 1170, subd. (b); rule 4.420(c), (d); *People v. Scott* (1994) 9 Cal.4th 331, 350.)[8] Thus, the upper term cannot be based on matters included in the jury verdict—that is, the elements of the crime and imposed enhancements.

Although there are some differences between the Washington and California sentencing schemes, we conclude that for purposes of the core concerns set forth in *Blakely*, California's upper term sentencing scheme is comparable to the scheme

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7 Subsequent references to rules are to the California Rules of Court.

evaluated in *Blakely*. The Washington sentencing court was authorized to impose an exceptional sentence based on a court finding of aggravating factors, which factors must be distinct from the elements of the crime used to compute the standard range sentence, and thus distinct from the matters encompassed within the jury verdict or guilty plea. (*Blakely, supra*, 124 S.Ct. at pp. 2535, 2537-2538.) Similarly, California courts are authorized to impose an upper term sentence based on a court finding of aggravating factors, which factors must be distinct from the elements of the crime and imposed enhancements encompassed within the jury verdict. In *Blakely*, the United States Supreme Court rejected the contention that the maximum term set forth in the exceptional sentence statute should be viewed as the statutory maximum, and instead concluded that the statutory maximum was the term set forth in the standard range statute, because the latter is the only sentence which may be imposed "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. 2537, italics omitted.)

Absent direction from the California Supreme Court or Legislature, we are compelled to apply *Blakely*'s holding here—i.e., the statutory maximum for an offense is not the upper term but rather is the middle term, because the latter is the presumptively correct term and is the only term that does not require findings beyond the jury verdict to justify its imposition. Accordingly, because the upper term increases the penalty beyond

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8 A court may utilize an enhancement to impose the upper term if it can, and does, strike the enhancement. (Rule 4.420(c).)

the statutory maximum, it cannot be imposed unless it is based on the fact of a prior conviction or facts found by the jury beyond a reasonable doubt.

In sum, based on the middle/upper term sentencing scheme, we conclude that, except to the extent a sentencing court relies on the fact of a prior conviction or matters included in the jury verdict, a court's selection of the upper term is proscribed by *Blakely* because (1) it exceeds the sentence to which the defendant has a legal right under the statutory scheme, and (2) it requires fact-finding by the court beyond the facts reflected in the jury verdict. (*People v. George, supra,* 122 Cal.App.4th at p. 425; *People v. Lemus, supra*, 122 Cal.App.4th at pp. 620-621.)

Inapplicability of Blakely *to Consecutive Sentences*

However, contrary to Wilkerson's argument, the same conclusion does not apply to the sentencing court's selection of consecutive sentences. What is markedly different from an upper/middle term option for purposes of *Blakely* analysis is that there is nothing in California's sentencing scheme which suggests the defendant is *entitled* to a concurrent rather than a consecutive sentence. As explained in *People v. Reeder, supra,* 152 Cal.App.3d at p. 923: "While there is a statutory presumption in favor of the middle term . . . , there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent

sentencing."[9] Absent a statutory presumption in favor of a concurrent sentence, a jury verdict finding the defendant guilty of more than one offense implicitly authorizes a consecutive sentence for each of those offenses. The lack of statutory entitlement to a particular sentence "makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra,* 124 S.Ct. at p. 2540.)

Moreover, neither *Blakely* nor *Apprendi* arose in the context of sentencing for multiple offenses. *Blakely* circumscribed the court's imposition of punishment beyond the prescribed statutory maximum for a single offense, based on an underlying concern that a state not circumvent the right to trial by jury by in effect reclassifying elements of an offense as sentencing factors, or by converting a separate crime into a sentence enhancement. (*Blakely, supra,* 124 S.Ct. at pp. 2537, fn. 6, 2539-2540 & fn. 11.) When a sentencing court selects a consecutive sentence, it is simply deciding that the defendant shall separately serve the sentence authorized by the jury verdict for the particular offense, rather than exercising leniency to allow the prescribed punishment for two separate offenses to be served at the same time. This sentencing choice does not implicate *Blakely.* (Accord *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1589; *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1372.)

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9 The distinct language used in the penal statutes regarding these sentencing choices reflects the qualitative difference between a middle term and a concurrent sentence. Section 1170, subdivision (b) states: "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." In contrast, section 669 merely states that when there are multiple convictions the court shall "direct whether the terms of imprisonment . . . shall run concurrently or consecutively."

Blakely *Constraints on Remand*

Under *Blakely,* the Constitution requires a jury trial on facts (other than the fact of a prior conviction) which determine whether the defendant will be given a sentence greater than the statutory maximum. Based on our conclusion that the statutory maximum is the middle term, the trial court can only impose the upper term if it utilizes the fact of a prior conviction or matters included in the jury verdict.[10]

Here, the trial court selected upper terms based on findings that the crime involved significant planning, sophistication, or professionalism; the victims were vulnerable; defendant was on parole; defendant's prior performance on parole was unsatisfactory; defendant's prior convictions were of increasing seriousness; and defendant was a danger to society. Because we are reversing the sentence for the improper use of the juvenile adjudication and we do not know how the court will configure Wilkerson's sentence upon remand, we need not decide the extent to which utilization of these aggravating factors violated Wilkerson's jury trial rights under *Blakely*. However, to assist the court at resentencing, we offer the following observations regarding the evolving post-*Blakely* sentencing standards. Of the aggravating factors listed by the court, it is clear that planning/sophistication/professionalism, victim vulnerability, and danger to society are proscribed by *Blakely* because they require the court to determine facts not included in the jury verdict nor within the prior conviction exception. (*People v. Lemus, supra,* 122

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10 For example, if a court strikes an enhancement found by the jury and then uses the enhancement to impose the upper term (rule 4.420(c)), this procedure would comply with *Blakely'*s jury-determination requirement.

Cal.App.4th at p. 621.) In contrast, parole status is available as a permissible aggravating factor because it falls squarely within the prior conviction exception. (*People v. George, supra,* 122 Cal.App.4th at p. 426 [probationer status is encompassed within prior conviction exception].) Finally, the factors of unsatisfactory performance on parole and increasingly serious prior convictions fall into a gray area of recidivism-related factors, and their availability as aggravating factors is, to date, unsettled. (Compare *People v. George, supra,* 122 Cal.App.4th at pp. 425-427 [suggesting that poor probation performance and increasing seriousness are excluded from prior conviction exception] with *People v. Sample* (2004) 122 Cal.App.4th 206, 222, 224-225 [increasing seriousness included within prior conviction exception].)

DISPOSITION

The judgment is affirmed as to the convictions. The judgment is reversed as to the sentence and remanded for resentencing in a manner consistent with the views expressed in this opinion.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.