October 1, 2006

Dear Fall Moot Court Competition Participants:

Thank you for participating in the Fall Competition. We have worked hard to create a problem that is challenging and interesting. For this problem, you and your partner represent either Petitioner or Respondent, and your case is before the United States Supreme Court on Writ of Certiorari.

A copy of the Rules for the 2006 Fall Competition is available on the Moot Court website at **http://www.law.ucla.edu/moot/rules.htm**. ALL COMPETITORS ARE EXPECTED TO READ AND ABIDE BY THESE RULES. Questions about the rules should be addressed to **Sage Fahimi (Fahimi2007@lawnet.ucla.edu)** or **Tony Ryan (Ryan2007@lawnet.ucla.edu)**.

For the Fall Competition, you need only this packet and the sources referred to in the list of authorities (which can be downloaded from Westlaw, Lexis-Nexis, or the Moot Court website). We have provided you with the opinions below, the certified questions, the pertinent statutes, a list of cases, and other research materials. Please DO NOT Shepardize or KeyCite any of the materials on the list of authorities or include extraneous sources in your arguments. NO ADDITIONAL RESEARCH IS ALLOWED. Please inform the Moot Court board promptly if you are aware of any advocates conducting outside research or violating the rules in any fashion. In your brief, please address only the issue presented to you. Competitors should read the opinions below for both issue 1 and issue 2 regardless of which issue he or she is arguing. When citing to the record, please use the following form: (R. at <page number>).

We have tried to present an equal amount of authority for each of the positions you may argue. While the relevance of some cases will be obvious to you, others will not, so use creativity in thinking about how each case can apply to your facts. Remember that you should not only find law that supports your position, but you should distinguish any cases that refute your position. Also, keep in mind that you are arguing to the Supreme Court, so all non-Supreme Court cases are *persuasive*.

In order to keep the playing field level, we will not answer any questions about the substantive law of the problem. However, clarification questions may be asked, and if you think there is a problem or mistake with any of the cases or issues presented, you should feel free to voice your concerns. The Moot Court Board reserves the right not to answer questions it feels should not be answered. Questions regarding issue 1 should be sent to Chaz Nanji (**nanji2007@lawnet.ucla.edu**) and questions regarding issue 2 should be sent to David Weinberg (**weinberg2007@lawnet.ucla.edu**). General questions regarding both issues can be directed to Damion Robinson (**robinsond2007@lawnet.ucla.edu**). As we receive questions, we will periodically post responses on the Moot Court website at **http://www.law.ucla.edu/moot/QNA/QNA_F2006.htm** for all competitors to see. Please check that page before sending an email in order to see if your question has already been answered.

Remember: briefs are due on **October 20, 2006**, between the hours of **9:00 a.m. and 5:00 p.m.** and Oral Argument rounds take place on **Friday, November 3rd, 2006 and Saturday, November 4th, 2006**.

Best of luck,

The 2006-2007 Moot Court Executive Board
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http://www.law.ucla.edu/moot

IN THE SUPREME COURT
OF THE UNITED STATES

The United States of America and The State of Patron,	)	
	)	
Plaintiffs- Respondents,	)	ORDER GRANTING
	)	WRIT OF CERTIORARI
v.	)	
	)	
El Guapo,	)	
	)	
Defendant- Petitioner	)	
	)	
----------	)	

NOTICE IS HEREBY GIVEN THAT the petition for writ of certiorari by petitioner in the above named action is granted; the questions being limited to:

1) Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error?

2) Whether the State of Patron's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments?

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
999 F.9th 999 (9th Cir. 2005)
No. 09-9999
Filed Nov. 10, 2005

The United States of America,	)	
	)	
Plaintiff-Respondent,	)	JUDGMENT ON APPEAL
	)	
v.	)	
	)	
El Guapo,	)	
	)	
Defendant-Petitioner.	)	
	)	
----------	)	

Before MORGAN, Chief Judge, BEAM and WALKER, Circuit Judges.

MORGAN, Chief Judge:

I. Introduction

El Guapo appeals a decision by the District Court[1] in a criminal action brought against him by the United States of America. El Guapo, a native and citizen of Mexico, challenges his conviction for attempting to reenter the United States after having been previously deported, pursuant to 8 U.S.C. § 1326(a). At trial, El Guapo moved to dismiss the indictment because it did not allege an essential element of the offense he was being charged with. The district court denied the motion reasoning that, in this case, omission of an element of the offense from the indictment was harmless error. Thereafter, defendant was convicted and sentenced. This appeal followed. We affirm.

II. Facts and Procedural History

Petitioner El Guapo entered the United States illegally in 1988 and was ordered deported on March 12, 1997. He reentered the United States illegally again in July, 2000.

On December 29, 2002, the State of Patron filed an indictment charging petitioner with one count of continuous sexual abuse of a child in violation of California Penal Code § 288.5.[2] Section 288.5 provides that anyone convicted of this offense "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." Cal. Pen. Code § 288.5(a). On June 5, 2004, the jury convicted petitioner as charged and the judge sentenced petitioner to the upper term of

[1] The District Court is located in the State of Patron. The state of Patron is a newly formed state encompassing the territory formerly known as "SoCal" (a.k.a. "Southern California"). Like California, it is part of the Ninth Circuit.
[2] Patron applies California law pursuant to Pat. Penal Code § 10

16 years in state prison. On September 7, 2004, while still in state prison, petitioner El Guapo was questioned by an Immigration and Naturalization Service ("INS") agent where El Guapo admitted that he was an alien, that he was previously deported, and that he had not sought permission to re-enter from the Attorney General. INS, in their infinite wisdom, chose to deport El Guapo, a convicted child molester, that same week on the condition that El Guapo's sentence for child molestation would be reinstated if El Guapo ever attempted to reenter the United States or was found within its borders.

In January 2005, El Guapo approached Beefeater, a port of entry at the U.S./Mexican border, on foot. El Guapo presented a permanent residence card ("Green Card") and driver's license to the border agent claiming to be a legal resident. Both forms of identification belonged to Pepe Lopez, El Guapo's cousin. Petitioner claimed that he was a legal resident and was going to Calvados, Patron. Because El Guapo did not look like the tendered photo, the agent directed him to a secondary inspection area, where he was questioned by Agent Jack Daniels. When Agent Daniels asked petitioner about his intended destination, he said he was going to Phoenix, Arizona. Petitioner was thereafter detained. Eventually, El Guapo stated that he was reentering the United States to briefly take care of some business and then he planned to return to Mexico. While detained, INS officers discovered El Guapo's real identity and successfully had his sentence for child molestation reinstated.

In due course, INS sought and obtained an indictment against El Guapo for attempting to reenter the United States in violation of 8 U.S.C. § 1326(a). The indictment reads as follows:

> "On or about January 1, 2005, El Guapo, an alien, knowingly and intentionally attempted to enter the United States of America at or near Beefeater in the District of Patron, after having been previously denied admission, excluded, deported, and removed from the United States at or near Agavero, Patron, on or about September 7, 2004, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission in violation of Title 8, United States Code, Sections 1326(a)."

Before trial, petitioner moved to dismiss the indictment. Petitioner argued that under Ninth Circuit law, one element of the offense of attempted unlawful entry is that the defendant committed an overt act that was a substantial step towards reentering without the consent of the Attorney General. In his motion to dismiss, the petitioner contended that the indictment failed to allege an essential element, an overt act, or to state the essential facts of such overt act. After a hearing, the district court denied this motion.

At trial, the government introduced testimony from the border patrol agents, together with other evidence, demonstrating that respondent had presented false identification at the border and made contradictory statements concerning his intended destination. After the district court denied the defense's motion for an acquittal, the defense rested without presenting any witnesses. At the close of the evidence, the district court instructed the jury that the government was required to prove beyond a reasonable doubt, *inter alia*, that respondent had attempted to enter the United States by intentionally committing an overt act that was a substantial step towards reentering the United States. In closing arguments, the government contended that respondent met that requirement by presenting false identification at the border and making contradictory statements concerning his intended destination. The defense contended that petitioner had made no further attempt to enter after he had presented the identification and made the relevant statements.

Subsequently, the jury returned a guilty verdict. At El Guapo's sentencing hearing, pursuant to § 5G1.3(c) of the Federal Sentencing Guidelines ("U.S.S.G. § 5G1.3(c)"), the district court ruled that El Guapo's undischarged term of imprisonment of 16 years would run consecutively to the 2 year sentence for violating 8 U.S.C. § 1326(a). Consequently, his sentence was increased from 2 years to 18 years. This appeal followed.[3]

III. Standard of Review

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This court has jurisdiction pursuant to 28 U.S.C. § 1291. We review the sufficiency of an indictment *de novo*.

IV. Discussion

The Grand Jury Clause of the Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Supreme Court has held that the Grand Jury clause requires that every element of a criminal offense be charged in a federal indictment. *See, e.g., Almendarez-Torres v. United States,* 523 U.S. 224, 228 (1998). This requirement ensures that the grand jury has considered all of the elements of the offense before deciding to indict. The issue before us is whether omission of an element from El Guapo's grand jury indictment was harmless error. We find that it was.

The crime of attempted unlawful entry into the United States, as defined by 8 U.S.C. § 1326, includes as an essential element that "the defendant committed an overt act that was a substantial step toward reentering ..." *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (*en banc*). Unlike the separate offense of "being found in" the United States, where failure to allege the overt act of crossing the border (or other overt act) is not a fatal defect, because not an "essential element," the other two § 1326 offenses for which deported aliens may be prosecuted require an overt act to be alleged in the indictment.

First, the government argues that the indictment in this case was sufficient. We agree. An indictment is constitutionally sufficient if it clearly informs the defendant of the precise offense of which he is accused so that he may prepare his defense and so that a judgment thereon will safeguard him from a subsequent prosecution for the same offense. 1 CHARLES ALAN WRIGHT & ARUTHER MILLER, FEDERAL PRACTICE & PROCEDURE CRIMINAL § 125 (3d ed. 2000). This indictment does that.

The indictment informs us when and where defendant intentionally tried to enter the country without consent. The indictment was sufficiently clear to enable El Guapo to prepare his defense. El Guapo raises no contention that he received inadequate notice of the crime charged, nor does he contend that he did not present false identification nor make inaccurate statements at the border, as government agents testified. His contention is only that the indictment failed to charge him with attempting to enter illegally because it does not contain a laundry list of the actions he took in doing so. It is inconceivable, however, that El Guapo would have presented a different defense if the indictment had been more detailed.

[3] In separate state court proceedings, El Guapo has also appealed the state trial court's imposition of the upper term, contending that the judge based the upper term on aggravating factors not found by the jury in violation of his right to jury trial.

As Professor Wright observed, and numerous courts have echoed, "[t]he test for sufficiency ought to be whether it is *fair* to defendant to require him to defend on the basis of the charge as stated in the particular indictment or information. The requirement that every ingredient or essential element of the offense should be alleged must be read in the light of the fairness test just suggested." (emphasis added). Wright & Miller § 125. The indictment charged El Guapo with "knowingly and intentionally" attempting to enter the country in violation of § 1326 and thus fairly implied that he committed an overt act in doing so. The judge directed the jury to convict El Guapo under § 1326 only if it found beyond a reasonable doubt that he "intentionally committed an overt act that was a substantial step towards re-entering the United States." El Guapo was adequately informed of his offense. He knew what the government would be required to prove at trial, and therefore, no unfairness resulted from requiring him to defend on the basis of the charge as stated. The indictment, as a result, passes muster and similar indictments have passed muster in cases before the Supreme Court as well. *See, e.g., Hagner v. United States*, 285 U.S. 427 (1932).

Secondly, we agree with the government that like most constitutional errors, a failure to allege an essential element of the offense is not a fatal flaw. Such a failure is, therefore, subject to mere harmless error analysis. (Cite omitted). We find that the dissent is misguided in reasoning that an indictment's failure to recite an essential element constitutes a structural error and not harmless error.

As described recently by the Supreme Court, an error is denominated structural if the harmless error inquiry is irrelevant to remedying the constitutional error. (Cite Omitted). These errors defy analysis by 'harmless error' standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself. (Cite Omitted). The dissent reasons that only such a rule would secure the basic institutional purpose of the grand jury and safeguard a defendant's Fifth and Sixth Amendment rights. Fashioning the absolute rule of automatic reversal that the dissent recommends would waste judicial resources and would also be inapposite to the Supreme Court's decision in *Neder v. United States,* 527 U.S. 1 (1999).

In *Neder*, the Supreme Court held that the omission of an offense element from the petit jury's instructions does not constitute structural error. The situation in *Neder* presents a close parallel to the omission of an element from an indictment and, if we adopt petitioner's argument, leaves us with an incongruity: Omission of an element from an indictment is subject to automatic reversal, but omission of the same element from a jury instruction is not. The right to a grand jury finding of probable cause as to each element of the offense is no more important than the right to a petit jury's finding that each element was proved beyond a reasonable doubt.

Further, we reject the dissent's proposition that there is no way to evaluate or to cure any prejudice caused by the omission of an element from an indictment. On the contrary, it is possible to review the omission of an element from a grand jury's indictment for harmless error. Under Supreme Court precedent, other errors in grand jury proceedings are subject to harmless-error analysis. *See, e.g., United States v. Mechanik*, 475 U.S. 66. We also take note of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that the omission of a sentence-enhancing fact from a federal indictment did not constitute harmless error. The Court's decision in *Cotton* rebuts the idea that omission of an element from an indictment always renders a criminal proceeding unfair.

We hold that the omission of an offense element from a federal indictment is subject to harmless-error analysis. Such an error should be found harmless when a reviewing court concludes that it is clear beyond a reasonable doubt that the grand jury would have determined that there was probable cause to believe that the omitted element had been satisfied. Here, the jury was instructed to convict if it found beyond a reasonable doubt that petitioner had committed an overt act in attempt to unlawfully reenter the United States after having been previously deported. The jury so found beyond a reasonable doubt.

V. Conclusion

For the foregoing reasons, we affirm the judgment against petitioner El Guapo.

WALKER, Circuit Judge, dissenting:

Today this court has taken a considerable step towards eviscerating the protections afforded to defendants by the Fifth and Sixth Amendments of the United States Constitution by ruling that the omission of an offense element from a federal indictment is subject to harmless error analysis. In doing so, this court has ignored Supreme Court precedent as well as English common-law tradition, in which the requirement for a grand jury is rooted.

The failure of an indictment to charge an essential element cannot be cured at the trial by amendment or through jury instruction. Further, it cannot be reviewed under a harmless-error analysis. The Supreme Court has stated: "The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offense charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Russell v. United States,* 369 U.S. 749, 771 (1962). To allow a prosecutor or court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection that the grand jury was designed to secure, because a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him. *Id.* at 770; *see, also, Bank of Nova Scotia v. The United States*, 487 U.S. 250, 257 (1988) (stating that the "nature of the violation allowed a presumption that the defendant was prejudiced, and any inquiry into harmless error would have required un-guided speculation"). A rule that would characterize a grand jury error such as one in the present case as structural would secure the basic institutional purpose of the grand jury, by ensuring that a defendant is not convicted on the basis of facts not found by or presented to the grand jury. As the Supreme Court has explained, this purpose has its constitutional roots in the Fifth and Sixth Amendments and historical roots in the English common-law tradition. *Id.* at 770.

In calling for the application of the harmless error rule to the omission of an element of the offense sought to be charged from a grand jury indictment, the panel ignores the constitutional role and function of a grand jury. Although grand juries are subject to certain judicial constraints, grand juries cannot be viewed as performing a judicial function. Rather, they stand between the executive branch and criminal proceedings in the federal courts, and actually perform what is tantamount to an executive branch function: deciding who will be charged, when they will be charged and what they will be charged with. *See, e.g., United States v. Calandra*, 414 U.S. 338, 343 (1974). Put rather bluntly, this court misses the point completely in its holding for the blanket application of a standard of judicial review to that function of the grand jury that is best understood as an executive branch decision-making process.

Mechanik and *Cotton*, the cases the majority relies on, address questions raised by the administration of a grand jury; in such cases, harmless error analysis may be appropriate. However, the present case deals with an error affecting the core function of the grand jury: the exercise of it executive branch powers. Where the error was correctly preserved with a timely objection before trial, as in petitioner El Guapo's case, prejudice needs to be presumed because the structural protections provided by the grand jury have been compromised. There is no way to evaluate or to cure any prejudice caused by the omission of the "overt act" element from an indictment.

Accordingly, the omission of an element of an offense from an indictment is not analogous to the omission of an element of an offense in instructions to a petit jury. The former scenario involves an error by the executive branch, which is not subject to harmless error review, whereas the latter case involves a judicial error in judicial proceedings.

Further, as in this case, where the elements of an offense are missing from an indictment, judicial review is impossible to conduct, because the impact of the error on the subsequent proceedings at trial can never be known. *See, e.g., Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (stating that grand jury's determination of probable cause cannot be confirmed in hindsight by a conviction on the indicted offense because the conviction in no way suggests that the indictment itself was not impermissibly tainted.)

Finally, I respectfully disagree with the panel that the indictment in this particular case is sufficient. The indictment does not explicitly allege an overt act. It charges neither the physical crossing of the border, nor the tendering of the bogus identification card, nor any other fact, as a substantial step toward reentry. Either or both of those acts could have been stated in the indictment. The panel espouses the view that the indictment fairly implied that El Guapo committed an overt act in attempting to enter the country. However, there is an essential logical distinction between what is implied by the "language" of the indictment and what is implied by "facts" outside the four corners of the indictment. Neither common knowledge nor appraisal of probabilities should take the place of an omitted but essential allegation.

The defendant has a right to be apprised of what overt act the government will try to prove at trial, and he has a right to have a grand jury consider whether to charge that specific overt act. Physical crossing into a government inspection area is but one of a number of other acts that the government might have alleged as a substantial step toward entry into the United States. Instead the indictment merely alleged that El Guapo "attempted to enter" the United States, which simply repeats the ultimate charge against him. A grand jury never passed on a specific overt act, and El Guapo was never given notice of what specific overt act would be proved at trial.

For the foregoing reasons, I respectfully dissent.

IN THE COURT OF APPEAL, FIRST DISTRICT,
OF THE STATE OF PATRON
1 Pat. App. 151 (Pat. App. 1st. Dist. 2005)
No. A1111
Nov. 15, 2005

The People of the State of Patron,	)	
	)	
Plaintiff-Respondent,	)	JUDGMENT ON APPEAL
	)	
v.	)	
	)	
El Guapo	)	
	)	
Defendant-Appellant	)	
	)	
----------	)	

CRISTAL, CJ, delivered the opinion of The Court, in which Justice Courvoisier joins:

I. Introduction

Appellant, El Guapo, appeals his conviction by jury trial of continuous sexual abuse of a child under age 14. (Cal. Pen. Code § 288.5). On appeal he contends that the trial court erroneously imposed the upper term sentence and based the upper term on aggravating factors not found by jury in violation of his right to jury trial under *Blakely v. Washington*, 542 U.S. 296 (2004). We find that criminal defendants have no federal constitutional right to a jury trial on aggravating factors used to impose an upper term sentence under Patron's Determinate Sentencing Law (the "DSL"). We reject appellant's contentions. Accordingly, we affirm.

II. Applicable Law

Patron State court jurisdiction is appropriate where the act was committed within the current territorial authority of the State of Patron. We apply California law where two requirements are satisfied: 1) the act was committed prior to January 1, 2006; 2) the act was committed in territory that was within the jurisdiction of California authorities at the time the act was committed. Pat. Pen. Code §1, et. seq.

III. Standard of Review

We review on a modified *de novo* basis. (cite omitted).

IV. Facts and Procedural History

On December 29, 2002, the State of Patron filed an indictment charging appellant with one count of continuous sexual abuse of a child in violation of California Penal Code § 288.5.

The victim referred to at trial and herein as Jon Doe is the appellant's son. Doe testified that he lived with his mother, Momma, for the first ten years of his life. Doe has a history of making up stories. Doe admitted that prior to moving in with appellant, Doe falsely accused his stepfather of beating him because he wanted to live with appellant and did not like his new stepfather. Doe also admitted that when he was eight years old he falsely reported that his mother did not feed him and that she often left him home alone over night. The Department of Child and Family Services later confirmed that Doe was well fed and attended to.

Doe testified that in November, 2001, shortly after he moved in with the appellant, appellant began forcibly sodomizing him and forcing him to orally copulate appellant. Sometimes while being sodomized by appellant, Doe screamed for help because it hurt "very bad" and appellant put his hand over Doe's mouth to stop Doe from screaming. Sometimes appellant molested Doe when he was angry with Doe. Because appellant threatened to kill Doe if he told anyone about the abuse, Doe was afraid of appellant and did not tell anyone while living with him.

In March, 2002, Doe first told his younger cousin, Shirley Temple, about appellant's abuse in a note while visiting her when appellant was out of town. Before giving her the note Doe said "I have to tell you," but did not want to say it aloud. The note said, "my dad is boinking me." Thereafter, Shirley showed the note to her mother Antedoe who then questioned Doe as to what it meant. Doe told Antedoe about appellant's repeated abuse. After Antedoe told her husband, Caesar, about Doe's allegations, Caesar talked to Doe, then took him to appellant's house for a family meeting. While there, as Doe was packing his clothes, appellant confronted Doe while they were alone and said, "In a week you better say you are lying or else I am going to f*ck you up!"

After Doe reported appellant's abuse to Momma and his stepfather, Momma took him to the hospital. Dr. Corona, the pediatrician who performed a sexual assault examination on Doe, testified that the examination revealed no trauma to Doe's anus, consistent with most post-sodomy examinations. However, the doctor added that Doe's accounts of how he felt physically during and after being sodomized and orally copulating appellant were consistent with how children report such incidents.

On June 4, 2002, Doe was interviewed by Police Officer Dean Martini. Doe told Martini that appellant sexually abused him numerous times beginning shortly after he moved in with appellant. On June 8, Mia Mayo, of the Children's Interview Center (CIC), conducted a videotaped sexual assault interview of Doe. Doe's statements during the CIC interview were consistent with his earlier statements to Officer Martini and Dr. Corona. A videotape of the CIC interview was played for the jury and admitted into evidence.

On June 5, 2002, appellant agreed to a videotaped interview by Officer Martini. At the beginning of the interview appellant adamantly denied any type of sexual touching of Doe. As the questioning ensued, appellant became more forthcoming in his responses. After two or three hours, appellant admitted that Doe's mouth accidentally made contact with appellant's penis briefly while in the shower on one occasion. Appellant also said that Doe was a liar and was manipulative and later said Doe was a homosexual and "can't quit the queer behavior." A videotape of the interview was played for the jury.

Testifying in his own defense, appellant denied ever molesting Doe or any child. He also denied ever threatening to kill Doe or "f*ck him up." Appellant testified that prior to coming to live with him, Doe had been expelled from school due to behavior problems, lying to school administrators and was not doing his homework. Other defense witnesses testified that Doe had a history of lying and his allegations against appellant were fabricated because he was unhappy about appellant's requirements regarding chores and homework.

On June 5, 2004, the jury convicted appellant as charged, stating in its verdict form that it found appellant guilty of a violation of Penal Code Section § 288.5 as set forth in the indictment. The jury made no other factual findings.

Prior to sentencing, court appointed psychologist, Dr. Chivas Regal, examined appellant and opined that appellant would not be a danger to Doe or other children in the community if released. Appellant's retained psychologist, Dr. Gloria Greygoose, reported that if granted probation, appellant would be unlikely to pose a risk to Doe, but it would be prudent to restrict him from direct contact with minors without another adult present.

The judge sentenced appellant finding the existence of five aggravating factors pursuant to Patron's Rules of Court:[1] (1) The crime involved great violence and the threat of great bodily harm disclosing a high degree of viciousness and callousness. (2) The victim was particularly vulnerable due to his age and dependence on appellant as his father and primary caretaker. (3) Appellant took advantage of a position of trust to commit the crime in that he is the victim's father and was the sole caregiver for a substantial period of time. (4) Appellant engaged in violent conduct which indicates a serious danger to the community. (5) Appellant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statements about the crime. The sole mitigating factor found by the trial judge was appellant's minimal prior criminal record – his unlawful presence in the United States. After finding that the aggravating factors outweighed the sole mitigating factor, the court imposed the upper term of 16 years.

Appellant contends that the district court erroneously relied on four of five aggravating factors in sentencing him to the upper term. We agree with the appellant, in part, that (1) the trial court erred in finding appellant took advantage of a position of trust or confidence; and (2) that the trial court misplaced its reliance on the crime involving great violence or great bodily harm. However, the trial judge properly relied on at least two aggravating factors and exercised his discretion in balancing them against a single mitigating factor. Accordingly, remand for resentencing is unnecessary on this ground because the trial judge could rely on merely one factor in aggravation in imposing the maximum sentence. (Cite Omitted).

Appellant also contends that his sentence must be reversed because in imposing the upper term the trial court, and not the jury, made factual findings on aggravating factors in violation of his rights to jury trial and due process. We now turn our attention to this issue.

V. Discussion

[1] The aggravating factors and sole mitigating factor found by the court are identical to the factors noted in an independent probation report delivered to the Judge prior to sentencing. The jury made no factual findings with regard to the probation report's contents.

This case addresses the effect of the decisions of the United States Supreme Court in *Blakely v. Washington,* 542 U.S. 296 (2004) and *United States v. Booker,* 543 U.S. 220 (2005) on Patron's determinate sentencing law ("DSL"). It presents the specific question whether a defendant is constitutionally entitled to a jury trial on the aggravating factors that justify an upper term sentence. For the reasons discussed below, we conclude that the judicial fact finding that occurs when a judge exercises discretion to impose an upper term sentence under Patron law does not implicate a defendant's Sixth Amendment right to a jury trial.

Patron's DSL is inherited from California's DSL replacing the prior system under which most offenses carried an indeterminate sentence. The determinate sentencing scheme seeks to achieve greater uniformity in sentencing by providing a limited range of sentencing options for each offense. (Cite Omitted). The sentence may be increased or decreased within the range provided for the offense on the basis of statutory enhancements reflecting the defendant's criminal history or particular circumstances of the crime. Cal. Penal Code § 1170(b).

In appellant's supplemental brief, filed pursuant to *Blakely*, appellant contends his sentence must be reversed because in imposing the upper term, the trial court, and not the jury, made the findings on aggravating factors thereby violating of appellant's rights to jury trial and due process.

Under the Patron sentencing scheme, the lower, middle and upper terms constitute a range of authorized punishments for a given crime. The exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is *within the authorized range of punishment.* (Cite Omitted).

Here, appellant, upon conviction of continuous sexual abuse of a child under the age of 14, faced a maximum prison term of 16 years that may be imposed "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely,* 542 U.S. at 303. The 'statutory maximum' is the maximum a judge may impose *without* any additional findings and not the maximum sentence he or she may impose after finding additional facts. *Id.* at 303-304. The relevant section of Patron's penal code (adopting California's Penal Code) permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors. Cal. Penal Code § 1170. The 16 year upper term is the maximum term authorized by the statute, and the trial judge imposed that term. The judge did not go beyond the statutory term upon the finding of the aggravating factors discussed above. Had the judge done so, we would be faced with a different issue.

Appellant's claims must also fail, because we must determine whether a trial judge's decision to impose an upper term sentence under the California determinate sentencing law involves the type of judicial fact finding that traditionally has been performed by a judge in the context of exercising sentencing discretion or whether it instead involves the type of fact finding that traditionally has been exercised by juries in the context of determining whether the elements of an offense have been proved. *See Williams v. New York,* 337 U.S. 241, 249-51 (1949).

Appellant's argument goes as follows: A jury trial is required on the aggravating factors on which an upper term sentence is based, because the middle term is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict* ...." *Blakely,* 542 U.S. at 303. State law dictates that trial court "shall order imposition of the middle term, unless

there are circumstances in aggravation or mitigation." Cal. Penal Code § 1170(b); *see also* Cal Rules of Court, rule 4.420(b). The court cannot impose the upper term unless there is at least one aggravating factor. *Id.* An aggravating factor cannot be an element of the offense, and therefore the jury's guilty verdict on the charged offense itself does not establish an aggravating factor. Thus, defendant argues, the middle term is the "statutory maximum" as that phrase is used in *Blakely,* unless an aggravating factor has been established by the jury's findings or the defendant's admission.

The mandatory language of § 1170(b), does provide some support for defendant's position. But, as the high court has emphasized, in analyzing the Sixth Amendment right to a jury trial, "the relevant inquiry is one not of form, but of effect." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). In operation and effect, the provisions of the California determinate sentence law simply authorize a sentencing court to engage in the type of fact finding that *traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range.* Therefore, the upper term is the "statutory maximum" and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi, Blakely*, and *Booker.*

We conclude appellant's constitutional right to a jury trial was not violated by the trial court's imposition of the upper term sentence. Appellant's conviction is therefore Affirmed.

PERIGNON, J, dissenting:

The majority misreads and misapplies the precedent and statutory laws in reaching its holding. The majority is incorrect in its conclusion that the imposition of the 16-year upper term was constitutional. It was not constitutional and can't be constitutional. I adamantly dissent.

Under three high court decisions, *Apprendi*, *Blakely,* and *Booker*, the Sixth Amendment to the federal Constitution guarantees a defendant a right to a jury trial on any aggravating fact (other than a fact concerning the defendant's criminal history) that the trial court uses to impose an upper term. This means that under Patron's sentencing scheme a trial court may use an aggravating fact to justify an upper term only if: (1) a jury has made a finding on the aggravating fact, (2) the defendant has admitted the aggravating fact, (3) the defendant has validly waived the right to a jury trial on the aggravating fact, or (4) the aggravating fact relates to the defendant's criminal record rather than to the circumstances of the conviction offense. Absent one of these situations, the trial court may not impose an upper term sentence under Patron's DSL.

Here, the trial court relied on certain aggravating facts not found by the jury to justify sentencing appellant to an upper term. The trial court imposed the upper term of 16 years for the violation of section 288.5 (continuous sexual abuse of a child), basing its decision on the aggravating factors enumerated and discussed in the majority's opinion. The trial judge did not state, nor does the majority explain, whether these findings are to be made on clear and convincing evidence, a preponderance of the evidence, beyond a reasonable doubt, or on a mere whim. Further, the aggravating factors cited by the judge were copied verbatim from the sentencing report – indicating the judge's blind reliance on a report generated outside the evidence introduced at trial.

Appellant argues that under the Sixth Amendment to the federal Constitution he was entitled to have a jury determine beyond a reasonable doubt the existence of each of the aggravating factors justifying imposition of the upper term. I agree.

Blakely held 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." *Blakely*, 542 U.S. at 301. Under Patron's DSL, the statutory maximum sentence a court can impose without making additional factual findings is the *middle* term. (Cal. Pen. Code. § 1170(b); Cal Rules of Court, rule 4.420(a)). Therefore, the trial court erred when it imposed the upper term by finding aggravating facts on its own without a jury finding beyond a reasonable doubt.

The jury did not make a finding of any of the aggravating factors, the defendant did not admit any of the aggravating factors, nor did appellant waive his right to a jury trial. Furthermore, appellant's criminal history is minimal, and therefore, serves as a mitigating factor, suggesting that a reduced sentence under the statute might be most appropriate.

The majority also bases its holding on its determination that a trial judge's decision to impose an upper term sentence under the California determinate sentencing law involves fact finding that traditionally has been performed by a judge in the context of exercising sentencing discretion. That, in my view, is not the question at all.

As the Court stated in *Blakely*, the determinative question is whether the sentencing scheme allows the trial court, relying on offense-based facts found by the court, to impose a punishment greater than that permitted under the facts found by the jury. Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of fact finding that traditionally has been performed by a judge.

The line the Supreme Court has drawn is bright and clear: A sentencing law is invalid when it allows a trial judge to impose a sentence beyond the "statutory maximum," which the high court defined 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* " unless that sentence is based at least in part on the defendant's prior criminal history. *See Blakley, supra.* Patron's DSL allows the trial judge to impose sentences above the statutory maximum, and is therefore unconstitutional.

Our criminal justice system cannot survive if judges are allowed to subjectively impose sentences based on facts not found by the jury. Doing so removes the protective function of a jury to separate the accused from the wrath of the government. Furthermore, when judges supplant the jury, as was done here, the citizens lose faith in the integrity of our system of justice. In short – the system is no longer legitimate. The majority would argue otherwise. They are wrong. The trial court was wrong. Therefore, I would reverse and remand for resentencing.

LIST OF AUTHORITIES FOR ISSUE 1

Constitutional Provisions

U.S. CONST. amend. V
U.S. CONST. amend. VI

Federal Statutes (attached)*

8 U.S.C. § 1326(a)
Chapter 5, part G of the 2004 Federal Sentencing Guidelines

* Relevant portions of Title 8, ALIENS AND NATIONALITY, and Chapter 5, part G of the 2004 Federal Sentencing Guidelines, are attached. Advocates SHOULD NOT print out the entire text of either, and should instead refer to the attached excerpts only.

Cases

- Almendarez-Torres v. United States, 523 U.S. 224 (1998)
- Apprendi v. New Jersey, 530 U.S. 466 (2000)
- Bank of Nova Scotia v. The United States, 487 U.S. 250 (1988)
- Chapman v. California, 386 U.S. 18 (1967)
- Hagner v. United States, 285 U.S. 427 (1932)
- United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006)
- Russell v. United States, 369 U.S. 749 (1962)
- Neder v. United States, 527 U.S. 1 (1999)
- United States v. Calandra, 414 U.S. 338 (1974)
- United States v. Cotton, 535 U.S. 625 (2002)
- United States v. Gracidas-Ulibarry, 231 F.3d 1188 (9th Cir. 2000)
- Sullivan v. Louisiana, 508 U.S. 275 (1993)
- United States v. Mechanik, 475 U.S. 66 (1986)
- Vasquez v. Hillery, 474 U.S. 254 (1986).
- United States v. Yakobowicz, 427 F.3d 144 (2d Cir. 2005)

ADDITIONAL AUTHORITIES (Download from Moot Court website)

1 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure Criminal § 125 (3d ed. 2000)

- cite on Westlaw as: **1 FPP s 125**
- also available on the Moot Court Web page at: http://www.law.ucla.edu/moot/problems/Charles_Alan_Wright_1_FPP_125.doc

Title 8 – ALIENS AND NATIONALITY
(Relevant Excerpt)
8 USCS § 1326 (2005)

§ 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who -

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

2004 FEDERAL SENTENCING GUIDELINES

Chapter 5 - PART G - IMPLEMENTING THE TOTAL SENTENCE OF IMPRISONMENT

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially

concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Commentary

Application Notes:

1. Consecutive Sentence - Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.

2. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgement in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) Example.—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of level 16 for sale of 55 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment.

Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. Application of Subsection (c).—

(A) In General.—Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));

(ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(iii)the time served on the undischarged sentence and the time likely to be served before release;

(iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) Partially Concurrent Sentence.—In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length

and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) Downward Departure.—Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(c), rather than as a credit for time served.

4. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).

Background: In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a). Exercise of that authority, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

LIST OF AUTHORITIES FOR ISSUE 2

Constitutional Provisions

U.S. CONST. amend. VI
U.S. CONST. amend. XIV

State Statutes and Rules of Court excerpts (attached)*

Patron Penal Code §§ 1, 9, 10
California Penal Code § 12
California Penal Code § 13
California Penal Code § 288.5
California Penal Code § 1170(b)

California Rules of Court 4.408
California Rules of Court 4.420
California Rules of Court 4.421
California Rules of Court 4.423

* Relevant portions of the Penal Codes and Rules of Court are attached. Advocates SHOULD NOT print out the entire text of either, and should instead refer to the attached excerpts only.

Cases

- Apprendi v. New Jersey, 530 U.S. 466 (2000)
- Blakely v. Washington, 542 U.S. 296 (2004)
- People v. Sengpadychit, 26 Cal.4th 316, 325 (2002).
- People v. Wims,10 Cal.4th 293 (1995)
- United States v. Booker, 543 U.S. 220 (2005)
- Ring v. Arizona, 536 U.S. 584 (2002)
- People v. Lobaugh, 188 Cal. App. 3d 780 (Cal. App. 3d. Dist. 1987)
- People v. Wright, 30 Cal. 3d 705 (1982)
- State v. Natale, 184 N.J. 458 (2005)
- People v. Scott, 9 Cal. 4th 331 (1994)
- State v. Lopez, 138 N.M. 521 (2005)

Relevent Excerpts of the Pat. Penal Code

§ 1. Statement of Purpose

The Legislature finds and declares that the admission into Statehood of Patron on January 1, 2006, territory acceded exclusively from within the State of California, presents several challenges to the maintenance of the public safety. Accordingly, it is the intent of the Legislature to establish clear guidelines in conjunction with the Legislature of the State of California on matters relating to jurisdiction....***

§9. Jurisdiction
The State of Patron, its courts and authorities, shall exercise jurisdiction over all criminal matters arising from acts committed within its current territory, whether the act in question was committed before or after the State of Patron was admitted into Statehood on January 1, 2006.

§10. Choice of Law
State courts shall apply California law where the act:

(a) was committed prior to January 1, 2006;
(b) was committed in territory then controlled by the State of California but which is now the current territory of the State of Patron; and
(c) California State court jurisdiction would have been appropriate but for the accession of land by the State of Patron.

Applicable Sections of California Penal Code adopted by the State of Patron
(Relevant Excerpts)
Penal Code Sections 12, 13, 288.5 and 1170(b) (2006)

§ 12. The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the Court authorized to pass sentence, to determine and impose the punishment prescribed.

§ 13. Whenever in this Code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the Court authorized to pass sentence, within such limits as may be prescribed by this Code.

§ 288.5. (a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct under Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or
16 years.

(b) To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number.

(c) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim.

§ 1170(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

California State Rules of Court
(Relevant Excerpts)
Rule 4.408, et. seq. (2006)

Rule 4.408. Criteria not exclusive; sequence not significant

(a) The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.

(b) The order in which criteria are listed does not indicate their relative weight or importance.

Rule 4.420. Selection of base term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced

at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.