An Approach to Understanding and Applying
Blakely v. Washington
to Sentencing Determinations in California

by
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The purpose of this article is to provide an understanding of the holdings and reasoning of the United States Supreme Court’s recent opinion in Blakely v. Washington\(^1\) and the cases leading up to it, together with some suggestions on how to approach sentencing determinations in California with an eye towards challenging their constitutionality under Blakely. This article will not attempt to identify and discuss all the myriad ways Blakely might affect sentencing determinations in California’s state courts. Rather, the article’s aim is to provide a historical overview of the momentous debate that has recently raged in the High Court on what facts constitute the all-important “elements” of crime, and an analytical framework for criminal defense attorneys to use in identifying and articulating how Blakely might apply to a particular sentencing determination, whatever it might be.

I. Historical Overview.

A. The Elementary Debate on the “Elements” of Crime.

It would be an understatement to say that Blakely is having a tumultuous effect on sentencing in the state and federal courts. The decision’s impact on sentencing laws and judgments throughout the country, though still not entirely clear, is (as Justice O’Connor observed in her dissent) potentially “staggering.”\(^2\) By explaining that our Sixth Amendment right to a jury trial includes our right to have a jury determine beyond a reasonable doubt all facts legally essential to our sentence, the Supreme Court has potentially rendered sentencing laws of the federal courts and numerous state courts, including California—and tens (if not hundreds) of thousands of sentences that have been imposed under them—unconstitutional.\(^3\)

\(^1\) (June 24, 2004) ___ U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403].
\(^2\) See id., 124 S.Ct. at pp. 2548-2550, and fn. 2, O’Connor, J., dissenting.
\(^3\) For example, several courts have held that the Federal Sentencing Guidelines, as applied, are unconstitutional under Blakely; and the United States Supreme Court has taken up two such cases (United States v. Booker, 04-104, (7th Cir. 7/9/04) 375 F.3d 50, cert. granted 8/2/04; United States v. Fanfan, 04-105, (D. Maine 6/28/04), cert. granted 8/2/04) which are scheduled for argument on October 4, 2004. And at least two published California Court of Appeal opinions have recognized that upper-term sentences in California can be unconstitutional under Blakely. (People v. George (9/15/04) ___ Cal.App.4th ___ [2004 Cal.App. LEXIS 1532;
Yet as big as this impact may be, it would be an even greater understatement of Blakely’s significance to consider it as merely a sentencing case. Although it may turn out to be one of the most important sentencing cases the Supreme Court has ever decided, Blakely is clearly much more. The opinion is the culmination of an ongoing historic debate among the Justices of the Supreme Court about the extent to which many if not most of our core constitutional rights protect us from governmental deprivations of life, liberty and property.4

This debate’s importance is a function of its primacy. It involves a semantic and elementary quest by the Court to define the “elements” of “crime” to which many of our most basic constitutional rights attach. This quest is still a work in progress. Blakely illustrates that, as old as our right to trial by jury is, the parameters of its inalienability remain unclear. Although the opinion clarifies the definition of an element of crime in a way that significantly strengthens and protects our right to a jury trial, it raises many questions as well. The precise meaning of “element,” and the coterminous extent to which our jury-trial right may or may not be legislatively subverted, remain to be seen.

However the Supreme Court ultimately defines the “elements” of crime, it is clear that that definition will delimit not only the right to trial by a jury, but also many of the core constitutional rights that go with it, including our right to notice of the crimes with which we have been charged, our right to be presumed innocent and to be acquitted in the absence of a jury finding that we are guilty beyond a reasonable doubt, our right not to be placed twice in jeopardy for the same offense, and our rights to confront the witnesses against us, to present a defense and to subpoena witnesses and evidence. A brief overview of the recent Supreme Court cases leading up to Blakely helps illustrate this.

4 See Apprendi v. New Jersey (2000) 530 U.S. 466, 476-477 (“At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without “due process of law,” Amdt. 14, and the guarantee that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,” Amdt. 6.”); and see id. at pp. 499-500, Thomas, J., concurring (enumerating constitutional protections and noting that “all of [them] turn on determining which facts constitute the ‘crime’— that is, which facts are the ‘elements’ or ‘ingredients’ of a crime. ... Thus, it is critical to know which facts are elements.”).
B. **Blakely’s Recent Ancestry.**

The importance of establishing the precise “elements” of crime to our Fifth and Fourteenth Amendment rights to due process of law and our Sixth Amendment right to trial by jury has been clear for some time. In 1970, the Supreme Court held that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”

In 1993, the Court explained that the due-process, “Winship” right to the presumption of innocence and acquittal in the absence of “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged” is related to the Sixth Amendment right to a jury trial.

It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have the jury determine that the defendant is probably guilty, and then leave it up the judge to determine (as Winship requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Two years later, the Court succinctly explained that the federal Constitution (viz., its due-process and jury-trial guarantees) “gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.”

Although the constitutional significance attached to the “elements” of an offense was becoming clearer through the late 1980's and early 1990's, the inalienability of the constitutional rights attached to elements was becoming less certain. During this period, states were drafting determinate sentencing provisions in such a way as to remove facts essential to a defendant’s sentence from the jury’s consideration and to give them to a

8 See, e.g., *Sullivan, supra; Yates v. Evatt* (1991) 500 U.S. 391 (reversing as prejudicial due-process violation a jury instruction that shifted burden of proof on element of offense to defense).
And the Supreme Court was (and to some extent still is) sanctioning the constitutionality of this practice, holding that the question of whether a fact affecting a defendant’s sentence was an element or a mere “sentencing factor” was largely a matter of legislative draftsmanship and intent.

In two cases decided in 1998 (Almendarez-Torres v. U.S. and Monge v. California), the Court relied on the significance of the distinction between the “elements” of crime and mere “sentencing considerations” to limit the parameters of our right to notice of the crime(s) with which we have been charged and our Fifth Amendment right not to be placed twice in jeopardy for the same offense. Discouragingly, these two cases established that prior convictions used to increase a defendant’s sentence are not “elements” of the crimes whose punishment they increase; thus, according to these opinions, a defendant’s jury-trial, notice and double-jeopardy

In his concurring opinion in Ring v. Arizona (2002) 536 U.S. 584, Justice Scalia cited this trend as a significant factor in the “new wisdom” he had acquired in changing his mind about the constitutionality of Arizona’s capital sentencing laws since he had sanctioned them 12 years earlier in his opinion in Walton v. Arizona (1990) 497 U.S. 639. “[M]y observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt ‘sentencing factors’ determined by judges that increase punishment beyond what is authorized by the jury’s verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK, cause me to believe that our people’s traditional belief in the right of trial by jury is in perilous decline.” (Ring v. Arizona, supra, 536 U.S. at p. 611-612, Scalia, J., concurring [citation omitted].)


In Almendarez-Torres, supra, the Court held that prior convictions may constitutionally be treated as sentencing factors, which may be decided by judges and need not be set forth in an indictment, rather than elements of the offenses whose punishment they increase. The court reasoned that, since recidivism has traditionally been treated as a sentencing factor rather than an element of an offense (i.e., except in cases where the conduct proscribed is not independently unlawful in the absence of a prior conviction), prior convictions may constitutionally be deemed sentencing factors rather than elements even if they have a substantial impact on a defendant’s sentence. (Id., 523 U.S. at pp. 238-247.)

rights do not attach to prior convictions used to increase punishment.  

The inalienability of some of our most basic constitutional rights was looking pretty shaky in the wake of Monge v. California and Almandrez-Torres. Justice Scalia made this observation in his dissenting opinion in Monge v. California, supra, while examining the constitutional distinction between facts that compose a “crime” and facts that are merely “sentencing considerations”:

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15 See notes 13 and 14, ante. Although the Court in Almendarez-Torres held that prior convictions may constitutionally be treated as sentencing factors (which may be decided by judges and need not be set forth in an indictment) rather than elements of the offenses whose punishment they increase, it “express[ed] no view on whether some heightened standard of proof might apply to sentencing determinations which bear significantly on the severity of sentence.” (Id., 523 U.S. at p. 247-248.)

16 And the contemporary opinions of the California Supreme Court were equally discouraging. (See, e.g., People v. Wims (1995) 10 Cal.4th 293; People v. Monge (1997) 16 Cal.4th 826.) In People v. Monge, supra, the State Supreme Court held (as later affirmed by the United States Supreme Court in Monge v. California, supra) that the Double Jeopardy clause does not apply to prior convictions used to increase a defendant’s sentence. (Id., 16 Cal.4th at pp. 831-843.) In People v. Wims, supra, the court held that there is no federal right to a jury trial on “sentencing factors.” (Id., 10 Cal.4th at pp. 303-309.) Wims was seemingly validated (at least in part) by Almendarez-Torres, supra, and Monge v. California, supra, albeit temporarily (i.e., until Jones v. U.S. and Apprendi v. New Jersey came down). (See People v. Sengpadychith (2001) 26 Cal.4th 316, 324-326.)
I do not believe that [the] distinction is (as the Court seems to assume) simply a matter of the label affixed to each fact by the legislature. Suppose that a State repealed all of the violent crimes in its criminal code and replaced them with only one offense, “knowingly causing injury to another,” bearing a penalty of 30 days in prison, but subject to a series of “sentencing enhancements” authorizing additional punishment up to life imprisonment or death on the basis of various levels of mens rea, severity of injury, and other surrounding circumstances. Could the State then grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question of whether he “knowingly cause[d] injury to another,” but leave it for the judge to determine by a preponderance of the evidence whether the defendant acted intentionally or accidentally, whether he used a weapon, and whether the victim ultimately died from the injury the defendant inflicted? If the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be, to borrow a phrase from Justice Field, “vain and idle enactment[s], which accomplished nothing, and most unnecessarily excited Congress and the people on [their] passage.”\textsuperscript{17}

At the time Justice Scalia made this observation, it looked as though he might have been accurately predicting the eventual evisceration of our federal constitutional rights to due process and a jury trial. However, within the span of a couple years, the future of these rights had brightened considerably, in light of the Court’s momentous opinions in Jones v. U.S.\textsuperscript{supra} and Apprendi v. New Jersey\textsuperscript{supra}. In a historic turn of the tide, and victory of substance over form, the Court in these two cases breathed new life into the Constitution, and made it clear that our governments cannot vitiate our most basic constitutional rights simply by re-labeling the facts that constitute a “crime.”

\textsuperscript{17} Id., 524 U.S. at pp. 738-739, Scalia, J., dissenting, quoting Slaughter-House Cases (1873) 16 Wall 36 [21 L.Ed. 394].
In Jones, supra, the Court first articulated and relied on the principle that, “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” However, this principle had merely been “suggested rather than established” by prior United States Supreme Court cases. It was therefore relegated to a footnote. Also, for this reason, the Court could not say that it was “certain” that the government’s interpretation of a federal carjacking statute would render the statute unconstitutional. However, the Court rejected the government’s contention that the fact used to increase the defendant’s sentence (viz., that he had inflicted serious bodily injury in the course of the carjacking for which he was convicted) was merely a “sentencing factor.” The Court held that this fact was an element of the offense, which required notice to the defendant in the indictment, trial by jury, and a true finding by the jury beyond a reasonable doubt. Otherwise, the statute would be “open to constitutional doubt.”

The following year, in Apprendi, the fateful footnote in Jones graduated to a full-fledged holding, and became a cornerstone of our criminal constitutional jurisprudence: “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.”

In Apprendi, the Supreme Court made it clear that whether a fact constitutes an element of a crime depends not on the label legislatively attached to it, but on the substantive, liberty-depriving impact the fact has on a defendant’s sentence. Thus, the Court invalidated New Jersey’s hate-crime statute, which increased a defendant’s sentence for a crime by 10-20 years if the judge found by a preponderance of the evidence that it was committed for the purpose of intimidating its victims because of their race, notwithstanding the fact that the state’s intent in drafting the law was that it be

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18 Id., 526 U.S. at pp. 242-243, fn. 6.
21 Ibid.
22 Id., 526 U.S. 239-252.
23 Id., 530 U.S. at p. 490.
24 “[T]he relevant inquiry is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than is authorized by the jury's guilty verdict?” (Apprendi, supra, 530 U.S. at p. 494.)
treated as creating a “sentencing factor” rather than an “element.”

While emphasizing substance over form, and punitive effect over statutory labels, in holding that a judge may not increase a defendant’s sentence above the “statutory maximum” sentence otherwise allowed by the jury’s verdict, *Apprendi* also explained that it was not suggesting an end of judicial sentencing discretion within a range below the “maximum” sentence otherwise available.

We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case.

Two simultaneous but very different opinions followed *Apprendi* in 2002: *Ring v. Arizona*, supra, and *Harris v. U.S.*, supra, one of which (*Harris*) interprets *Apprendi* narrowly, and the other of which (*Ring*) interprets it more broadly. Both of these cases stemmed from *Apprendi*’s ostensible incompatibility with two prior cases the Court had decided in the not-too-distant past: *McMillan v. Pennsylvania*, supra, and *Walton v. Arizona*, supra.

In *Harris*, the Court seemingly retreated from *Apprendi*’s emphasis on substance over form. The Court held that *Apprendi* did not require the Court to overrule its 16-year-old opinion in *McMillan*, which had sanctioned the government’s right to establish mandatory minimum sentences on the basis of facts not found true by the jury. However, *Harris* is a strange opinion, because aside from the bare holding “reaffirming *McMillan* and employing the [statutory construction] approach outlined in that case,” no substantive part of the opinion represents the opinion of the Court. This is because the opinion of the Court is a plurality opinion by Justice Kennedy, in which three other Justices (Rehnquist, O’Connor and Scalia) join all parts of his opinion, while the fifth Justice (Breyer) joins only the very narrow holding of the opinion.

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25 530 U.S. at pp. 492-494.
26 *Apprendi*, supra, 530 U.S. at p. 481.
27 *Id.*, 536 U.S. at p. 568. Although *McMillan* had not been overruled by *Apprendi*, the Court had “limit[ed] its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury’s verdict.” (*Apprendi, supra*, 530 U.S. at p. 487, fn. 13.)
The major part of Justice Kennedy’s opinion (part III) does not represent the opinion of the Court because it is not joined by Justice Breyer. However, it is this part of Justice Kennedy’s opinion that expresses the only real rationale for the Court’s holding. And this part of the opinion suggests that *Apprendi* should be viewed narrowly, viz.: that *Apprendi* places no limit on a judge’s discretion to sentence anywhere within a statutorily prescribed range; it only precludes judges from exceeding the “maximum” sentence otherwise allowed by the jury’s verdict.29

[I]t is beyond dispute that the judge's choice of sentences within the authorized range may be influenced by facts not considered by the jury, a factual finding's practical effect cannot by itself control the constitutional analysis. The Fifth and Sixth Amendments ensure that the defendant "will never get more punishment than he bargained for when he did the crime," but they do not promise that he will receive "anything less” than that. [Citation.] If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury -- even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.30

This opinion would seemingly preclude a defendant from ever challenging his sentence on *Apprendi* grounds if his sentence is not more than the theoretical “statutory maximum” available to punish the most culpable of offenders. However, it must be remembered that this opinion (part III of Justice Kennedy’s opinion) is not the opinion of the Court. Justice Breyer, because of his disagreement with *Apprendi* itself, joined only the narrow opinion of the Court, which merely reaffirmed *McMillan* and sanctioned the mandatory-minimum sentencing provision at issue in *Harris* on statutory-construction grounds. But, because he agreed with the dissent that *McMillan* could not be squared with the reasoning of *Apprendi*, Justice Breyer did not join part III of Justice Kennedy’s opinion.31

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29 *Harris*, supra, 536 U.S. at pp. 556-568.
30 *Harris*, supra, 536 U.S. at p. 566, emphasis in original.
31 See *id.*, 536 U.S. at pp. 548-556, 569-572. When read together with the Justices’ opinions in *Blakey*, it appears that Part III of *Harris* is an intentionally vague compromise between Justice Kennedy — who believes that *Harris* should not stand as precedent for the Court’s later opinion in *Blakely*, from which he dissented — and Justice Scalia, who (in his
And the four-member opinion authored by Justice Kennedy in part III of Harris was roundly criticized by an equal number of dissenting Justices. These four dissenters (Justices Stevens, Souter, Thomas and Ginsburg, in an opinion written by Justice Thomas) opined that McMillan could not stand in the wake of Apprendi, and that the reasoning in part III of Justice Kennedy’s opinion was contrary to the reasoning in Apprendi, in that it elevated form over substance and would allow “Apprendi [to] easily be avoided by clever statutory drafting.”32 (This concern would soon prove prophetic when the Court was asked to review the sentencing scheme at issue in Blakely.)

Like the dissenting opinion in Harris, the Court’s simultaneous opinion in Ring v. Arizona, supra, was a harbinger of Blakely. In that case, the Court overruled its 12-year-old opinion in Walton v. Arizona, supra, in which the Court had found Arizona’s death penalty statute constitutional. In Ring, a 6-3 majority of the Court (Ginsburg (the author), Stevens, Scalia, Souter and Thomas) found Arizona’s death-penalty statute unconstitutional under Apprendi, because it required judge-imposed death sentences to rest “on aggravating facts [which] operate[d] as ‘the functional equivalent of an element of a greater offense’ [; thus,] the Sixth Amendment required that they be found by a jury.”33

What’s interesting about Ring is how the Court’s opinion is so much more reverential of both the holding and rationale of Apprendi than is the Court’s simultaneous, plurality opinion in Harris, and how Ring rejected an argument espousing a superficial understanding of what the Court meant in Apprendi by the phrase “maximum penalty for the crime.” The statute at issue in Ring provided that a defendant convicted of first-degree murder would receive a sentence of “death or life imprisonment.” However, Arizona’s related sentencing rules required the judge to hold a separate, post-conviction trial during which the judge (without a jury) had to determine the existence of aggravating and mitigating circumstances, with the judge required to find at least one aggravating circumstance and no mitigating circumstances warranting

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32 Id., 536 U.S. at pp. 572-579, Thomas, J., dissenting.
33 Ring v. Arizona, supra, 536 U.S. at p. 609, quoting Apprendi, supra, 530 U.S. at p. 494, n. 19. Justice Breyer concurred in the judgment (i.e., while continuing to disagree with Apprendi), opining that the Eighth Amendment’s proscription of cruel and unusual punishment requires jury sentencing in capital cases. (Ring, supra, 536 U.S. at pp. 614-619, Breyer, J., concurring.) It is also worth noting that Justice Kennedy, who dissented in Apprendi, joined the majority opinion in Ring, while writing a concurring opinion explaining that, although he still believed Apprendi was wrongly decided, it “is now the law,” and its principled implementation required that Ring be overruled. (Id. at p. 613, Kennedy, J., concurring.)
leniency in order to impose death. The judge in *Ring* imposed a death sentence upon finding two aggravating factors not included within the jury’s verdict. The state argued that this set of facts did not violate *Apprendi* because the state’s death-penalty statute gave notice that the maximum penalty for first-degree murder was death; thus, the death judgment was not greater than the maximum penalty authorized by the jury’s verdict. The Supreme Court rejected this argument, finding that it overlooked “*Apprendi*’s instruction that ‘the relevant inquiry is one not of form, but of effect.’”

This re-emphasis of form over effect, and rejection of a superficial understanding of *Apprendi*’s reference to the “maximum penalty for the crime,” were echoed and made much clearer in *Blakely*. In *Blakely*, the defendant kidnapped his estranged wife at knifepoint, bound her with duct tape, placed her in a wooden box in his pickup truck, told the couple’s 13-year-old son to follow him or he would shoot his mother with a shotgun, and drove to a friend’s house in Montana. He was charged with first-degree kidnapping, but entered a plea to a lesser, “class B” felony charge of second-degree kidnapping involving domestic-violence and the use of a firearm. The state’s sentencing laws provided that the theoretical maximum sentence available to punish a class B felony was ten years. However, other sentencing laws of the state limited the sentence range available for the offense to which Blakely pled guilty to 49-53 months, in the absence of “factors other than those which are used in computing the standard range sentence for the offense.” After Blakely entered his plea, the judge conducted sentencing proceedings (without a jury), during which the above facts about the offense were adduced, and after which the judge imposed the “exceptional” sentence of 90 months based on its finding that Blakely had acted with deliberate cruelty, a fact that was not among the statutory elements of the offense to which he had pled guilty.

On appeal, Blakely argued that the procedure pursuant to which he was sentenced “deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally necessary to his sentence.” The state argued that Blakely’s sentence was still within the maximum range allowed by the law, because that range was up to 10 years (i.e., the maximum for class B felonies), not the 53-month maximum allowed by the bare facts encompassed within Blakely’s guilty plea. In an opinion authored by Justice Scalia, the Court rejected this argument, holding that, under the rule of *Apprendi* (viz., that the elements of a crime—the facts that must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt—include any

34 Id., 536 U.S. at pp. 592-593.
35 Id., 536 U.S. at pp. 594-595.
36 Id. at p. 604.
37 *Blakely*, supra, 124 S.Ct. at pp. 2534-2536.
fact, other than a prior conviction, that increases the prescribed statutory maximum penalty for the crime), “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” 38 The Court went on to explain that the 90-month sentence Blakely received was unconstitutional because Washington’s sentencing rules required that such a sentence be based on facts additional to those that Blakely admitted as part of his plea. 39

As noted at the outset of this article, this holding of Blakely is important and may have an immense impact on federal and state sentencing laws and the judgments rendered under them. The reason for this, as explained in the sections that follow, are two key clarifications by the Court as to how the Constitution defines the “elements” of crime. The first of these clarifications (the most obvious, and the one generating the most litigation) is Blakely’s explanation of how to assess what Apprendi meant by the phrase “the prescribed statutory maximum” penalty for a crime. By explaining that that maximum is the maximum available in the absence of findings additional to those made by the jury, the Court has clarified that the “prescribed statutory maximum” sentence is not the maximum sentence theoretically available for a particular crime (i.e., the maximum prescribed by law for the worst offender) but the maximum legally available in the specific case at hand.

The second of these clarifications is related to the first, but more subtle. By clarifying what the “elements” of crime are, the Court also delimits what a “conviction” is. Under Blakely, it is clear that, by “additional facts,” the Court means facts other than those found by the jury or admitted by the defendant:

Our precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring, supra, at 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone" (quoting Apprendi, supra, at 483, 147 L. Ed. 2d 435, 120 S. Ct. 2348)); Harris v. United States, 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (plurality opinion) (same); cf. Apprendi, supra, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not

38 Blakely, supra, 124 S.Ct. at pp. 2536-2537, emphasis in original.
39 Id. at p. 2537-2538.
the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” [1 J.] Bishop, [Criminal Procedure] § 87, [p.] 55 [(2d ed. 1872)], and the judge exceeds his proper authority.\(^{40}\)

This clarification of \textit{Apprendi} means that, in the absence of a special verdict reflecting a jury’s findings on additional facts, or in the absence of a defendant’s admission to additional facts as part of a guilty plea, \textit{a conviction is limited to the least adjudicated elements of the offense}. This clarification is important, not only because it delimits the facts of the defendant’s current offense that may constitutionally be punished, but also because (as explained later in this article)\(^{41}\) it should delimit what constitutes “the fact of a \textit{prior} conviction” within the meaning of \textit{Apprendi}.

Together, these two important clarifications should open up new avenues for defendants in California to challenge the constitutionality of their sentences. The second part of this article will discuss how these important clarifications of \textit{Apprendi} by \textit{Blakely} might do that.

\section*{II. Applying \textit{Blakely} to Sentencing in California:}
\begin{itemize}
  \item \textbf{A. Remember the \textit{Apprendi} Mantra: Substance Over Form; Effect Over Label; Inalienability Over All Else.}
\end{itemize}

This article does not intend to suggest that there is only one approach or a single best approach to identifying and analyzing potential \textit{Blakely} issues. More important than any particular step-by-step methodology for identifying these types of issues is keeping in mind the overarching concerns regarding the legislative \textit{erosion} of our constitutional jury-trial rights that led to the Court’s opinions in \textit{Jones, Apprendi, Ring}, and \textit{Blakely}. The basic theme defense attorneys should bear in mind while assessing sentencing determinations for possible \textit{Blakely} error is that the \textit{labels} used in establishing the rules for sentencing are insignificant in relation to a particular sentencing determination’s \textit{effect} on our client’s sentence, and sentencing rules must be interpreted in a way that does not jeopardize the \textit{inalienability} of our constitutional right to a jury trial.\(^{42}\)

\hspace{1cm} \footnote{\textit{Blakely, supra}, 124 S.Ct. at p. 2537, emphasis in original.}
\hspace{1cm} \footnote{See pp. 27-28, 30-31, \textit{post}.}
\hspace{1cm} \footnote{See \textit{Jones, supra}, 526 U.S. at pp. 247-248 (“It is beyond question that Americans of [the 18\textsuperscript{th} Century] perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion.”); and see \textit{Blakely, supra}, 124 S.Ct. 2540 (“the very reason the}
In short: don’t be fooled by labels. We have already seen two big labels initially relied upon by the Supreme Court in sanctioning sentencing laws—“sentencing factor” and “statutory maximum”—shot down, the first in Apprendi, and the second in Blakely. Before Apprendi and Blakely came down, the criminal defense bar was (at least in large part) incorrectly assuming that these labels were unassailable and more important than their erosive effect on our jury-trial rights. We should not assume that other labels given importance by the courts in the elements-of-crime debate (e.g., “discretion,” “mitigating fact,” “aggravating fact,” “sentence-reducing,” “sentence-increasing”) are any more unassailable than the two already shot down. The harsh reality is that all of these labels can be manipulated in a way that alienates us from our right to a jury trial. So, none should be presumed to present an insurmountable hurdle to raising a Blakely issue.

B. Don’t Be Sidetracked by the Label “Judicial Discretion.”

Perhaps the most important sentencing label that must be scrutinized in assessing a sentencing determination for Blakely error is “judicial discretion.” As noted previously, the Supreme Court stated in Apprendi that it was not eliminating “judicial discretion” over sentencing. However, the Court has also held (in Blakely) that the exercise of judicial discretion is unconstitutional if it relies on a fact not found true by the jury, in whose absence the state’s sentencing laws would require a lower sentence. So, just because a state’s sentencing laws say that they are giving a judge “discretion” – even “broad discretion” – to make a particular determination affecting the defendant’s sentence does not mean that the exercise of that discretion is immune from a Blakely challenge. Indeed, unless the state has given the sentencing court unfettered discretion to do whatever it wants to in making a particular determination that affects the defendant’s sentence, the exercise of that discretion will potentially be susceptible to a Blakely challenge.

This is so for two reasons. First, sentencing discretion that is not unfettered will

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Framers put a jury trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.”).

43 See Apprendi, supra, 530 U.S. at p. 482.
44 124 S.Ct. at pp. 2537-2538.
45 See Blakely, supra, 124 S.Ct. at p. 2538, distinguishing the Court’s opinion in Williams v. New York (1949) 337 U.S. 241, 252, in which the state’s “indeterminate-sentencing regime allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death[,]” on the ground that “[t]he judge [under that regime] could have ‘sentenced [the defendant] to death giving no reason at all.’” (Emphasis added.)
be limited by rules – rules that will have been identified in the state’s laws, be they statutory provisions, court sentencing rules, or decisional authority. Second, the facts that these rules are most likely to require the sentencing judge to rely on in exercising discretion will be facts other than those found true by the jury. Why? Because, in the absence of special verdicts and corresponding instructions, the facts “found true” by the jury will do little if anything to distinguish one defendant’s level of culpability from another’s. In fact, in the absence of special verdicts and instructions, the bare facts of conviction should be irrelevant to the defendant’s level of culpability. The bare facts of conviction are not sentencing variables, but a constant that exists in all cases.

Thus, while these “facts of conviction” will be highly relevant to state legislatures in creating a statutory sentencing range for a particular crime, they will be irrelevant to the rules the state creates to guide judges in their exercise of sentencing discretion within that range on a case-by-case basis. And, unless the state’s rules governing the exercise of sentencing discretion are themselves irrational (an adjective that defines discretion’s abuse), they will be concerned with ensuring that the judge has relied on facts that fairly focus on the defendant’s culpability relative to the culpability of other defendants convicted of the same offense. Thus, whenever a defendant can at least theoretically argue that a judge has abused his or her sentencing discretion under the state’s rules, he will be able to argue that those rules limit the “maximum sentence” available within the meaning of Blakely.

And it must be remembered that there are relatively few sentencing provisions in California that remove a judge’s sentencing discretion altogether. And there are fewer still (if any) that give judges unfettered sentencing discretion. Rather, to the extent there is any discretion over a particular aspect of sentencing in California, it is likely to be broad but not unlimited. And it will have to be supported by at least some evidence.

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46 See People v. Gimenez (1975) 14 Cal.3d 68, 72 (“discretion is abused whenever the court exceeds the bounds of reason, all the circumstances being considered.”).

47 Of course, McMillan v. Pennsylvania, supra, still allows states to totally remove a judge’s discretion to impose a lower sentence as to any defendant (i.e., by creating a mandatory minimum sentence). However, a state legislature’s creation of a mandatory minimum does not constitute the delegation of sentencing discretion to a judge, but the removal of such discretion. And it must be remembered that this “mandatory minimum” exception to Apprendi/Blakely is hanging by the thin reed of the Court’s 5-4 plurality opinion in Harris v. U.S., supra.

48 “[T]he courts have never ascribed to judicial discretion a potential without restraint.” (People v. Superior Court (Alvarez) (1997) 14 Cal.4th 968, 977, quoting People v. Russell (1968) 69 Cal.2d 187, 194-195.) “[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.” (Ibid., emphasis added.)
This may be a slim reed on which to hang a Blakely claim in most cases, but it might provide ample room to maneuver in others.  

C. Identify All Facts Used by the Court in Imposing Sentence, Including Mitigating Facts.

In order to determine whether a particular sentencing decision might be the subject of a viable Blakely claim, an attorney must first identify all the facts that figure in that decision. This is no easy task, as trial judges are not always required to state their reasons for a particular sentencing determination. But it should be a task that we are already accustomed to: for it is the same one we must perform in assessing whether the sentencing determination was (at least arguably) an abuse of the trial judge’s discretion. And it is an essential task in the Blakely context as well, because you don’t have a Blakely issue unless you have an arguable “element,” and you don’t have an arguable “element” unless you have a fact. So identify all sentencing facts.

1. Aggravating facts.

The importance of identifying aggravating facts to spotting and analyzing Blakely issues is fairly obvious: all have an increasing effect on the sentence that may be lawfully imposed under California sentencing rules; thus, they all have the potential to cause the sentence to exceed the maximum sentence otherwise authorized by the jury’s verdict (or the defendant’s plea). The importance of identifying aggravating facts is especially obvious in cases where the defendant has received an upper-term sentence. In such cases, the sentencing rules that limit a court’s exercise of discretion can make it easy to argue that an upper-term sentence violates Blakely. And these arguments are having some success.

49 See In re Cortez (1971) 6 Cal.3d 78, 85-86 [“To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision.”]; People v. Williams (1997) 17 Cal.4th 148, 162 [the abuse-of-discretion standard “asks in substance whether the ruling in question ‘falls outside the bounds of reason’ under applicable law and the relevant facts”].

50 For example, in People v. George, supra, the court held that the imposition of a “discretionary” upper-term sentence based on facts not found true by the jury violated Blakely (see George, supra, 2004 Cal.App. LEXIS 1532 at pp. 1, 29-35).

51 See Pen. Code § 1170, subd. (b); Cal. Rules of Court, rules 4.420, 4.421, 4.425(b), 4.428(b).

52 See People v. George, supra; People v. Lemus, supra. As previously noted, this issue is pending in the California Supreme Court. (See footnote 3, ante.)
People v. George, supra, illustrates the simplicity of challenging upper-term sentences in California in most cases (at least in cases where the aggravating facts have not been found true by the jury and do not constitute prior convictions). As the court succinctly explained, the winning syllogism goes like this: Apprendi holds that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Blakely holds that “the relevant ‘statutory maximum’ [referred to in Apprendi] is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” In California, an upper term sentence cannot be imposed in the absence of facts additional to those found true by the jury as part of the offense of conviction. Thus, unless the upper term is based on (a) a fact that is not an element of the crime, but which the jury has found true beyond a reasonable doubt (e.g., in a special verdict) or (b) the fact of a prior conviction, it cannot be used to support the imposition of an upper-term sentence.

Finding that the trial court had relied on five aggravating facts, none of which had been found by the jury and only one of which (the fact that George was on probation at the time of the current offense) was “essentially analogous to the fact of a prior

53 Id., 530 U.S. at p. 490.
54 Blakely, supra, 124 S.Ct. at p. 2537, emphasis in original.
55 See Pen. Code § 1170, subd. (b); Cal. Rules of Court, rule 4.420(d). Penal Code section 1170, subdivision (b), requires that the middle term be imposed, “unless there are circumstances in aggravation or mitigation of the crime.” And rule 4.420(d) states that “[a] fact that is an element of the crime shall not be used to impose the upper term.”
56 Blakely did not eliminate the prior-conviction exception to Apprendi, but (as discussed later) it did clarify what constitutes a “conviction” for Apprendi purposes in a way that should help limit the types of sentencing facts that courts are able to place within the prior-conviction exception to Apprendi. (See pp. 26-33, post.)
57 See People v. George, supra, 2004 Cal.App. LEXIS 1532 at pp. 29-32. Before addressing the merits of the issue, the court addressed and rejected the Attorney General’s argument that the issue had been “waived” by the defendant’s failure to object in the trial court at sentencing. The court noted that, as of the time of George’s sentencing, Blakely had not yet been decided, and no published case in California supported a constitutional challenge to the imposition of an upper term. Therefore, George’s assertion of the argument in the trial court “would not have achieved the purpose of prompt detection and correction in the trial court” (see People v. Scott (1994) 9 Cal.4th 331), and George could not be said to have knowingly and voluntarily waived his right to a jury trial.” (People v. George, supra, 2004 Cal.App. LEXIS 1532 at p. 28, citing Blakely, supra, 124 S.Ct. at p. 2541 [noting that state is free to use judicial factfinding, “if appropriate waivers are procured”].) The Fourth District applied essentially the same reasoning and reached the same conclusion again in People v. Lemus, supra.
conviction,” the court concluded that the error was prejudicial under the “Watson” standard of reversibility, which the court assumed, without deciding, applied.59


To the author’s knowledge, the Supreme Court has never held that a defendant has the right to a jury trial on “mitigating” facts that, under a state’s sentencing laws, support a trial court’s imposition of a more lenient term than the statutorily-prescribed norm. Blakely does not support such a right’s existence, and the Court’s opinion in Apprendi supports precisely the opposite premise, viz., that there is no constitutional right to a jury trial on “mitigating” facts.60 Be that as it may, “mitigating” facts are important and must also be identified when analyzing sentencing determinations for potential “Blakely” issues (or closely related constitutional issues). Why? At least four reasons (discussed below) come to mind.

a. A mitigating fact may have been mislabeled.

Remember the Apprendi mantra: beware of labels. “Mitigating fact” is, of course, a label. But, despite the label it has been given by the state, a “mitigating” fact may in truth be more analogous to an “element” of a greater offense that has not, but (in order to warrant a higher level of punishment) should have been, charged. In other words, it may really be nothing more than the absence of an aggravating fact without which a lower sentence would be required by law, and the burden of establishing which the state has unfairly and unconstitutionally shifted to the defense.61

58 The flaw in the court’s analysis in concluding that this fact could constitutionally be used as an aggravating fact is discussed at p. 29-31, post.
59 Id. at pp. 31-34, citing People v. Osband (1996) 13 Cal.4th 622, 728, but recognizing that the California Supreme Court has held, in People v. Collins (2001) 26 Cal.4th 297, 311-313; and People v. Ernst (1994) 8 Cal.4th 441, 448-449297, 311-313, that the denial of a right to a jury trial is “structural defect” that results in a miscarriage of justice.
60 See Apprendi, supra, 530 U.S. at pp. 481, 490-491, fn. 16 [explaining “the distinction the court has often recognized between facts in aggravation of punishment and facts in mitigation” (e.g., a defendant’s military service), citation omitted], and 494, fn. 19 [describing the proper meaning of “sentencing factor” as “as a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence, within the range authorized by the jury’s finding that the defendant is guilty of a particular offense.”] Emphasis in original.
61 See Mullaney v. Wilbur (1975) 421 U.S. 684 [invalidating as a violation of “Winship” due process a Maine statute presuming malice from intent to kill, thereby shifting to the defendant the burden of proving that he acted with the mens rea required for the less punishable
This possibility was considered by Justice Stevens in his majority opinion in
*Apprendi*, in response to Justice O’Connor’s dissent in that case. In her dissenting
opinion, Justice O’Connor criticized the constitutional rule established in *Apprendi* as
being “meaningless formalism that accords, at best, marginal protection for the
constitutional rights that it seeks to effectuate.” She explained by suggesting that a state
could easily sidestep *Apprendi* by inverting its sentencing laws so that the sentencing
range starts at the top, and the defendant has to prove he deserves a “mitigated” sentence
because his crime does not involve facts that would make it more aggravated. Justice
O’Connor posited that the Court’s opinion in *Patterson v. New York, supra*, would allow
New Jersey to revise its statute in such a way as to require judges to impose the highest
term, unless the defendant could establish by a preponderance of the evidence that he did
not act with the intent to intimidate a person on the basis of race.

The majority of Justices who joined Justice Stevens’ opinion obviously hold a
different view of *Patterson*’s significance than does Justice O’Connor, because they
responded to her dissent by intimating that her supposition was incorrect, because
*Patterson, supra*, and *Mullaney v. Wilbur, supra*, would preclude such burden shifting.

As criminal defense attorneys across the country wonder how state legislatures
and Congress might respond to court judgments holding that *Blakely* and *Apprendi*
invalidate sentencing laws, they would be wise to keep *Patterson* and *Mullaney*, and the
*Apprendi* majority opinion’s interpretation of their continuing significance, in mind. This

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62 530 U.S. at p. 539, O’Connor, J., dissenting.
63 *Id.* at pp. 541-542, O’Connor, J., dissenting. (In his dissenting opinion in *Blakely*,
Justice Breyer also wonders if legislatures might not try this idea in response to *Blakely*. *(Id.,
124 S.Ct. at p. 2558.)*)
64 530 U.S. at pp. 490-491, fn. 16; and see *id.* at pp. 484-485 and fn. 12. It is perhaps
also worth noting that Justice Ginsburg, in her majority opinion in *Ring, supra*, noted that the
defendant did not raise a claim regarding the mitigating circumstances in that case. (536 U.S. at
p. 597, fn. 4.) Query whether this otherwise superfluous comment is a reflection of Justice
Ginsburg’s belief that such a claim might have been made in that case (or at least is one that is
not infrequently raised).
will obviously be one of the first lines of defense to any legislative attempt to re-label an element (viz., aggravating fact) as mitigating facts, and to shift the burden of proof as to the fact from the prosecution to the defense.

And there are probably ways of arguing that a mitigating fact should really be treated as an element under “Blakely” even before the California Legislature (if ever) begins revamping its sentencing laws in response to Blakely. A recent opinion of the California Supreme Court regarding the mens rea required for a violation of Penal Code section 290, People v. Barker,65 arguably presents such an example. In Barker, the court held that, if an individual has a duty to register as a sex offender, it is illegal for him to forget to do so.66 Justice Kennard makes a number of interesting points in her dissenting opinion, one of which is relevant here:

[M]any violators of section 290 face sentences of 25 years to life under the Three Strikes law. To impose such a sentence on defendants who inadvertently fail to timely update their registrations, a degree of culpability below that of criminal negligence, may violate the state Constitution's prohibition of cruel or unusual punishment (Cal. Const., art. I, § 17) or the federal Constitution's prohibition of cruel and unusual punishment (U.S. Const., 8th Amend.).67

What is interesting about Barker, for Blakely purposes, is that a defendant who truly has forgotten to register, and whose failure to do so is truly a function of inadvertence (imagine the offender who registers a few minutes late), will have a mitigating factor that is extremely important at his sentencing. If a judge credits his explanation that he forgot, the judge might be compelled by the California Constitution, or by the limits of her judicial discretion under Penal Code section 1385 (broad as it might be),68 to strike one or more of the defendant’s prior “strike” convictions, and to impose a sentence that is dramatically lower than that which would be required if the judge did not give credence to the defendant’s “I forgot” defense. Under Blakely, the significance of this fact to the defendant’s sentence—which is not really a mitigating fact, so much as the absence of a more aggravated state of mind—is one that would (at least

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66 Id., 34 Cal.4th at p.348 [“just forgetting” does not negate the “willful” mens rea required to violate the statute].
67 Id. at p. 364, Kennard, J., dissenting; emphasis in original.
68 See People v. Carmony (2004) 33 Cal.4th 367 [defining abuse-of-discretion standard of review applicable to a court’s refusal to strike a prior conviction alleged under the Three Strikes law].
very arguably) be an element that must be tried by the jury and proved beyond a reasonable doubt. Query whether the State Supreme Court Justices ascribing to Barker have “forgotten” that the reason forgetfulness is not an affirmative defense to section 290 is that it is something even greater: an element whose absence the People have the burden of proving to a jury beyond a reasonable doubt.\(^{69}\)

And this problem with mislabeling elements as mitigating factors is closely-related to the second reason mitigating facts must be considered in reviewing a sentence for Apprendi/Blakely error: many facts affecting a court’s proper exercise of sentencing discretion are neither inherently mitigating or aggravating; they must be litigated before their relative aggravating or mitigating significance can be determined. This problem with “pre-labeling” facts before they have been subjected to fact-finding (i.e., “truth-finding”) litigation is discussed next.

b. The pre-labeling problem.

Many aggravating and mitigating circumstances are just flip-sides of each other. For example, whether the defendant has a prior criminal record or not, whether the defendant was a relatively major or minor participant in the crime, whether the crime was relatively sophisticated or not, and whether multiple crimes occurred at the same time or not,\(^ {70}\) are all factual questions whose resolution will determine whether they are mitigating or aggravating. These facts should arguably be treated as analogous to aggravating facts, for Blakely purposes, since the label the factfinder (i.e., truth-finder) ascribes to them (which could very well be “aggravating”) will determine the punitive effect they will have in the normative process that takes place at sentencing.\(^ {71}\) Lest our rights to a jury trial and to be presumed innocent be subverted, these types of facts should be presumed “guilty”—i.e., “aggravating,” i.e., “elements” under Blakely—because they very well could have that effect at sentencing.

\(^{69}\) Cf. Mullaney v. Wilbur, supra.


\(^{71}\) Apprendi and Blakely strongly suggest that our constitutional rights attach to the “fact-finding” process, but not to the “normative” process, used to determine punishment. However, the labels “normative” and “fact-finding” should be subjected to the same scrutiny and distrust that all sentencing labels should be subjected to. It would be unwise to attach excessive significance to these labels at this point, because the fact-finding process involved in determining the “truth” or “existence” of “aggravating” and “mitigating” “sentencing factors” is itself a normative or weighing process, more often than not. And this often-blurry line between finding and weighing a fact can render the line between whether the fact is “aggravating” or “mitigating” blurry as well. So, again, beware of labels.
This problem with pre-labeling (i.e., prejudging) certain facts as “aggravating” or “mitigating” to determine whether they should go to the jury or to the judge, when the labeling process itself requires litigation, is illustrated by the Blakely problem presented by Penal Code section 654. Section 654, subdivision (a), precludes multiple punishment for a criminal act that violates more than one penal statute. Under Neal v. California (1960) 55 Cal.2d 11, 19, the multiple-punishment bar of section 654 applies not only to a single act or omission, but to multiple acts and omissions that are part of one indivisible course of conduct. The “Neal test” for the indivisibility of a course of conduct focuses on the criminal objective(s) of the defendant. “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.”

A judge has no more discretion in determining the applicability of section 654's multiple-punishment bar than a jury has in resolving a defendant’s guilt: they are both reviewed under the substantial-evidence test. Finally, a judge’s error in failing to apply the multiple-punishment bar of section 654 is the functional equivalent of an unauthorized sentence: it cannot be waived.

In light of all these rules regarding section 654's application, and the enormous impact the statute can have on a defendant’s sentence, it would seem that section 654 would lend itself well to claims of Apprendi/Blakely error. The cases that have addressed the issue have rejected it. However, the analysis used in these cases is highly questionable. The lead case is People v. Cleveland (2001) 87 Cal.App.4th 263, a post-Apprendi, pre-Blakely case. In Cleveland, the defendant argued that the issue of whether he had more than one criminal objective for multiple offenses committed during a single course of criminal conduct was a factual question that Apprendi required the jury to decide, using the beyond-a-reasonable-doubt standard. In a 2-1 decision, the appellate court disagreed, holding that section 654's application in that case did not violate Apprendi because the question of whether section 654 operates to “stay” a particular sentence does not involve the determination of any fact that could increase the penalty for a crime beyond the statutory maximum. The court reasoned that there is no federal right to a jury trial on section 654 determinations, because section 654 is a “sentencing ‘reduction’ statute”-- not a sentencing “enhancement.”

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72 Ibid.
74 See People v. Perez (1979) 23 Cal.3d 545, 549-550, fn. 3: “Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.”
75 Cleveland, supra, 87 Cal.App.4th at p. 270.
Justice Johnson dissented, opining that “the United States Supreme Court opinion in Apprendi v. New Jersey—and the rationale it embodies—requires the jury rather than the trial judge to determine whether a defendant committed these offenses with multiple objectives and thus was susceptible to consecutive sentences rather than concurrent sentences for this course of criminal conduct.” 76 Justice Johnson disagreed with the majority’s characterization of a section-654 determination as one effecting a sentence “reduction” rather than a sentence “enhancement.” 77

Justice Johnson’s opinion is clearly the better reasoned one. “[T]he relevant inquiry is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than is authorized by the jury's guilty verdict?” 78 Thus, the Cleveland majority’s reliance on labels (viz., “sentencing reduction statute” and “sentencing enhancement”) is misplaced. And, as Justice Johnson noted in his dissent, the majority’s characterization of section 654 as a “sentencing reduction statute” rather than a “sentencing enhancement” is also inaccurate. 79 Section 654 is not a statute, like Penal Code section 1385, that gives a judge discretion to reduce a defendant’s sentence by striking a sentence-enhancing fact found true by a jury beyond a reasonable doubt. To the contrary, section 654 precludes additional punishment for additional crimes committed by a defendant that are part of the same “act” (viz., done with the same criminal intent and during the same course of conduct) as the principle offense. 80 So, “sentencing reduction statute,” if anything, is a misnomer for section 654.

And, again, the label is irrelevant. A proper application of the Apprendi/Blakely rule discloses that the question of whether or not a defendant had only one criminal objective should go to the jury, because only its adverse resolution allows the judge to exceed the punishment that otherwise would have been authorized by section 654 had the issue been resolved the other way. The very fact that the Court of Appeal in Cleveland had to resolve whether the “Neal” question should have been given to the jury shows that it was not. Thus, the jury’s verdict obviously did not “authorize” the imposition of additional punishment under section 654. 81 Rather, the defendant was “entitled” to a

76 Cleveland, supra, 87 Cal.App.4th at pp. 272-273, Johnson, J., dissenting.
77 Id. at pp. 280-281, Johnson, J., dissenting.
78 Apprendi, supra, 530 U.S. at p. 494.
79 Cleveland, supra, 87 Cal.App.4th at p. 280, Johnson, J., dissenting.
80 “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (Pen. Code § 654, subd. (a), emphasis added; and see Neal, supra, at p. 19.)
81 See Blakely, supra, 124 S.Ct. at p. 2537 (“When a judge inflicts punishment that the
lower sentence in the absence of the fact which had to be found in order to avoid section 654’s multiple-punishment ban.\textsuperscript{82} Blakely makes this quite clear.

Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in Apprendi), one of several specified facts (as in Ring), or any aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence. \textit{The judge acquires that authority only upon finding some additional fact.}\textsuperscript{83}

\textit{Cleveland} illustrates the problem with attempting to place labels (i.e., mitigating vs. aggravating, sentencing-reducing vs. sentence-enhancing, sentencing factor vs. element) on certain facts to determine whether they can be taken away from the jury. Some facts must be litigated and found true (or untrue), before they can be labeled “mitigating” as opposed to “aggravating.” It is the factfinder’s resolution of the “Neal” test that determines whether section 654 is a “sentence-enhancement” statute or a “sentence-reduction” statute. Under Neal, the question of whether or not a defendant harbored a single criminal objective during his course of criminal conduct is one whose resolution, favorably or unfavorably to the defendant, will determine its legal effect on the defendant’s punishment. Thus, it is nonsensical to try to brand this unresolved factual question with a sentencing label that prejudges its resolution. This places the sentencing cart before the factfinding horse. And it violates \textit{Apprendi} and \textit{Blakely}.

c. \textbf{Mitigating facts can help demonstrate prejudice.}

The third reason that mitigating facts must be included in a proper analysis of a potential \textit{Blakely} issue is that they might be useful in arguing prejudice as to a \textit{Blakely} claim. Although it is possible that courts will agree with defendants’ claims that \textit{Blakely} error is “structural” because the wrong standard of proof has been used (viz., preponderance of the evidence\textsuperscript{84} rather than beyond-a-reasonable-doubt),\textsuperscript{85} it is more

\textsuperscript{82} See \textit{Blakely}, supra, 124 S.Ct. at p. 2540.

\textsuperscript{83} Id., 124 S.Ct. at p. 2538, emphasis added. See also id. at p. 2539 [“Apprendi ... ensur[es] that the judge’s authority to sentence derives wholly from the jury’s verdict.”] Emphasis added.

\textsuperscript{84} See Cal. Rules of Court, rule 4.420(b).

likely that these types of error will be evaluated (at least in the state appellate courts) for
harmlessness under *Chapman* \(^{86}\) or some lesser standard of reversibility. \(^{87}\) The presence
of mitigating facts can help bolster a claim of prejudice in this context.

d. **Blakely** arguments compliment rather than
supplant abuse-of-discretion arguments.

A fourth obvious reason for inventorying all mitigating facts in a case is that this
should be done in all cases anyway, in order to see if the defendant can raise a standard,
abuse-of-discretion argument based (at least in part) on the court’s failure to give due
correspondence to the fact(s) in mitigation.

**D. Determine Which Facts Used in the Sentencing
Decision Were Not Found True by the Jury or Admitted
by the Defendant as Part of a Guilty Plea.**

1. **The findings of the jury.**

Once you have identified the facts used in sentencing, you need to cross-check
them against the jury’s findings to see which of them were not found true by the jury. As
previously noted, **Blakely** makes clear that a conviction is limited to a jury’s findings (or
to the facts the defendant admitted as part of a guilty plea). And the sentence must not
rely on facts not found by the jury. \(^{88}\) Thus, the proper inquiry is not what evidence was
presented at trial (or the preliminary hearing, or contained in the probation report). This
will only give us an idea of what the jury could have found; it won’t reveal what the jury
actually found. Evidence is evidence. A finding is a finding. They have distinctly

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\(^{86}\) *Chapman v. California* (1967) 386 U.S. 18, 24 (reversal is required unless it appears
“beyond a reasonable doubt that the error complained of did not contribute to the verdict
obtained”).

\(^{87}\) See, e.g., *People v. Lemus*, supra, 2004 Cal.App. LEXIS 1580 at pp. 15-16 (applying
*Chapman*); *People v. George*, supra (applying Watson-type standard).

\(^{88}\) *Blakely*, supra, 124 S.Ct. at p. 2537.
different meanings in both the law and the dictionary. Only the findings count. And they must be the jury’s.\textsuperscript{89}

So, how do we know what the jury found? The verdict? Yes, it is certainly important. But it will usually only say that the defendant is “guilty” or “not guilty” with reference to a particular charged count as set forth in the operative pleading. Thus, unless the verdict includes special additional finding(s), it will only support a finding of the least adjudicated elements of the offense (i.e., assuming the jury was given the proper instructions as to the elements of the offense). Which leads us to the instructions. Yes, these should be consulted too. By framing the questions that the jury was asked to decide, they elucidate what the jury did, in fact, find (i.e., by giving meaning to the limited answers reflected in a jury’s usually general verdict). By looking at the operative pleading (usually the information), the verdict, and the instructions, we should be able to determine the facts that the jury was asked to find and actually found. Consultation of other parts of the record to determine the jury’s findings would be stepping into the jury’s shoes and making findings for them.\textsuperscript{90}

In this way, analyzing the record for Blakely error is close kin to reviewing the record for instructional error. Both processes involve essentially the same review and essentially the same basic concerns: Was my client convicted of the right crime? And has she been punished for the right crime?

2. The facts admitted by the defendant pursuant to a guilty plea.

Identifying “the facts admitted by the defendant” in a guilty plea is a trickier task than identifying the findings of the jury. This is so, because a defendant arguably “admits” more facts when pleading guilty than a jury usually finds in convicting. The defendant’s oral admission of the offense during his change of plea will usually be limited to the facts averred in the operative pleading. Thus (like a general jury verdict), the oral admission will usually support only the least adjudicated elements of the admitted offense(s). However, there are (at least) two reasons that guilty pleas can be messier than jury verdicts: (1) change-of-plea rules require a statement of the factual basis of the defendant’s plea,\textsuperscript{91} and (2) guilty pleas can involve “Harvey” waivers in which the defendant agrees that the facts of counts dismissed pursuant to a plea bargain can be considered at sentencing.\textsuperscript{92}

\textsuperscript{89} Id., 124 S.Ct. at pp. 2537-2538

\textsuperscript{90} See Blakely, supra, 124 S.Ct. at p. 2537 (precluding judge from making “additional findings”).

\textsuperscript{91} See Pen. Code § 1192.5; People v. Holmes (2004) 32 Cal.4th 432.

\textsuperscript{92} People v. Harvey (1979) 25 Cal.3d 754.
The precise impact that *Blakely* will have on the extent to which facts subsumed within a *Harvey* waiver and/or the factual basis for a guilty plea can be used at sentencing is likely to be a very complicated and hotly contested area, with prosecutors arguing that the defendant has given up all constitutional rights as to the facts included in “*Harvey*-waived” counts and factual-basis statements, and the defendant arguing that his plea and *Boykin-Tahl* waivers\(^{93}\) did not cover all these additional facts. Suffice it to say that the defendant should proceed with extreme caution in agreeing to *Harvey* waivers and in choosing how to frame or stipulate to the factual basis for a plea. For not only can the facts the defendant is deemed to have admitted as part of his plea affect the sentence he receives for his current offenses of conviction, they can also have a huge impact on the extent to which his plea will expose him to greater punishment in the future, when (if he re-offends) his current conviction will become “the fact of a prior conviction” within the meaning of *Apprendi* and *Blakely*. The significance of *Blakely*’s clarification of what a conviction is (and, ergo, what a prior conviction is) are discussed in the next section.

**E. Determine Whether the Fact Used in the Sentencing Decision That Was Not Found True by the Jury (Or Pled to by the Defendant) Is “The Fact of a Prior Conviction.”**

Perhaps the most underrated aspect of *Blakely* is its clarification of what a “conviction” is. As previously noted, *Blakely* makes clear that a conviction is limited to a jury’s findings or to the facts the defendant admitted as part of a guilty plea. Thus, the defendant’s sentence must not rely on “any additional facts.”\(^{94}\) The inescapable question this gives rise to is: Is there any principled basis for defining “the fact of a prior conviction” within the meaning of the “*Almendarez-Torres*” exception to the *Apprendi/Blakely* rule differently than how the rule defines a current conviction? None that the author can think of. If anything, since prior convictions are necessarily older than current offenses, the current factfinder’s ability to review the evidence supporting the prior conviction and to gauge the extent to which it was considered and credited (beyond a reasonable doubt) by the defendant’s jury is a lot more difficult than it is with respect to the current case. Moreover, the basic purpose of limiting the facts of a current conviction to those reflected in the jury’s findings should also apply when defining “the fact of a prior conviction”: to protect the defendant’s due-process and jury-trial rights and ensure that the defendant is not being punished for facts not found true by the jury beyond a reasonable doubt. So, the constitutional demarcation of the facts that compose “convictions” and “prior convictions” should be the same.


\(^{94}\) *Blakely*, supra, 124 S.Ct.at p. 2537, emphasis added.
Assuming this conclusion is correct (and I believe it is), what does it mean for California sentencing? A lot. As explained below, it should dramatically limit the number of aggravating facts used at sentencing that can fairly be found to come within the fact-of-a-prior-conviction exception to the Apprendi/Blakely rule. And, perhaps even more important, it should dramatically limit the quality and quantity of evidence that can be used to prove prior convictions in California.

1. Few aggravating facts should fall within the prior-conviction exception to the Apprendi/Blakely rule.

The Second Appellate District’s recent opinion in People v. George, supra, illustrates how Blakely places limitations on the sorts of aggravating facts that can be viewed as “the fact of a prior conviction” within the Almendarez-Torres’ exception to the Apprendi/Blakely rule. In George, the trial court found five aggravating factors as the basis for its decision to impose the upper term: (1) the crime was serious and involved threats of great bodily injury to the victims; (2) the crime involved planning, sophistication and professionalism; (3) the current offense was more serious than the offense underlying George's prior conviction; (4) at the time George committed the current offenses, he was on felony probation; and (5) George's prior performance on probation was poor. The Court of Appeal concluded that the trial court was “constitutionally entitled to rely only on the fact that George was on probation at the time of the charged offense as a basis for imposing an upper term sentence.” The court went on to explain its rationale as follows:

Because this fact arises out of the fact of a prior conviction and is so essentially analogous to the fact of a prior conviction, we conclude that constitutional considerations do not require that matter to be tried to a jury and found beyond a reasonable doubt. As with a prior conviction, the fact of the defendant's status as a probationer arises out of a prior conviction in which a trier of fact found (or the defendant admitted) the defendant's guilt as to the prior offense. (Apprendi, supra, 530 U.S. at p. 488; see also Jones v. United States (1999) 526 U.S. 227, 233 [143 L. Ed. 2d 311, 119 S. Ct. 1215].) As with a prior conviction, a probationer's status can be established by a review of the court records relating to the prior offense. Further, like a prior conviction, the defendant's status as a probationer "does not

95 George, supra, 2004 Cal.App. LEXIS 1532 at pp. 31-32.
[in any way] relate to the commission of the offense, but goes to the punishment only ....” (Almendarez-Torres v. U.S. (1998) 523 U.S. 224, 244 [140 L. Ed. 2d 350, 118 S. Ct. 1219], italics in original.) Thus, in accordance with the analysis of Blakely, the trial court was not required to afford George the right to a jury trial before relying on his status as a probationer at the time of the current offense as an aggravating factor supporting the imposition of the upper term.96

The implicit reason for the court’s conclusion that the trial court was not entitled to rely on the other four aggravating factors is fairly obvious: they are neither “the fact of a prior conviction” nor “essentially analogous” to such a fact. The court’s express reasons for finding that the remaining factor – the fact that George was on probation at the time of the current offense – was a fact to which the “Almendarez-Torres” exception to the Apprendi rule applied, is, to say the least, questionable. The “Almendarez-Torres” exception to the Apprendi rule is that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”97 The Supreme Court has re-asserted this “Apprendi” rule several times,98 but not once has it intimated that the exception includes not only “the fact of a prior conviction,” but a “fact that arises out of the fact of a prior conviction,” or a fact that “is essentially analogous to the fact of a prior conviction.” Although both of these characterizations of the fact that George was on probation at the time of his current offense may well be fair, they are irrelevant, because the indisputable fact remains that his probation status at the time of his current offense is not “the fact of a prior conviction.” Why? Because it is not a fact that was “reflected in the jury verdict or admitted by the defendant” at the time he was convicted of the prior.99

Defense attorneys should take a firm stance against any lower court’s effort to change the language and holdings of the Supreme Court in Jones, Apprendi, Ring, and Blakely. Those holdings were created to protect our federal constitutional rights to due process and trial by jury and to prevent their piecemeal erosion by the government. And lower courts have no authority to change them.100 While the result in George is good, the opinion’s improper and expansive interpretation of the prior-conviction exception to the Apprendi rule is troubling.

97 Id., 530 U.S. at p. 490, emphasis added.
98 See Jones, supra, 526 U.S. at pp. 242-243, fn. 6; Apprendi, supra, 530 U.S. at p. 490; Ring, supra, 536 U.S. at p. 602; Blakely, supra, 124 S.Ct. at p. 2536.
99 Blakely, supra, 124 S.Ct. at p. 2537, and see discussion at pp. 24-25, ante.
100 See People v. Bradley (1969) 1 Cal.3d 80, 86 (California courts “are bound by decisions of the United States Supreme Court interpreting the federal Constitution”).
Defense attorneys should also take a very narrow view of what constitutes “the fact of a prior conviction” for Apprendi/Blakely purposes. Such a fact must be a prior "conviction" – no more, no less. In other words, it must be a fact all of whose parts were found true by the jury or admitted by the defendant at the time of conviction. Can a jury constitutionally return a verdict: “We find the defendant essentially analogous to guilty”? This rhetorical question illustrates both the flaw in George’s reasoning and the approach defense attorneys should take in challenging similar efforts to water down the Apprendi/Blakely rule and to expand the scope of facts that fall within its narrow Almendarez-Torres exception.101

2. Good-bye, Guerrero: the facts used to prove prior convictions must be limited to those found true by the jury or admitted by the defendant in a guilty plea.

Under current California Supreme Court jurisprudence, the “entire record of conviction” can be used to prove the fact of a prior conviction. This evidence must be admissible under the rules of evidence, and it must be limited to “the record of conviction.” But it includes the entire record of conviction, including such things as preliminary-hearing transcripts and probation reports.102 This authority, quite obviously, allows for a much broader characterization of the facts that constitute a prior conviction (i.e., “the fact of a prior conviction”) than does the definition provided by Blakely.

As previously explained (except in cases where there is insufficient evidence to support conviction, in which case the defendant should not have been convicted in the first place), the evidence supporting a conviction (i.e., the facts a jury could have found true under the deferential substantial-evidence test for the sufficiency of the evidence) will usually be a much bigger set of facts than the facts that may be considered under Blakely, that is, the jury’s actual findings (i.e., as reflected in the verdict, the operative

101 It is worth noting that prior prison sentences (Cal. Rules of Court, rule 4.421(b)(3); and see Pen. Code § 667.5) are among the more common types of aggravating facts that are likely to be mislabeled by courts as “the fact of a prior conviction.” Although the “prior conviction” aspects of these facts should fall within the prior-conviction exception to the Apprendi/Blakely rule (i.e., the least adjudicated elements of the prior), the prison term itself should not. Why? Because, again, it is not a “conviction,” so it has not been found true by a jury or admitted by the defendant as part of a guilty plea. (Blakely, supra, 124 S.Ct. at p. 2537.)

102 See People v. Guerrero (1988) 44 Cal.3d 343, 352 (“the court may look to the entire record of the conviction to determine the substance of [a] prior foreign conviction”); People v. Reed (1996) 13 Cal.4th 217 (“the record of the conviction” includes preliminary-hearing transcripts and probation reports from the record of the prior conviction).
pleading, and the instructions). And the types of evidence that the California Supreme Court says may be used to define prior convictions can include evidence that the original jury never even heard, much less that it believed and found true beyond a reasonable doubt. In short, according to the California Supreme Court, a prior conviction can be something very different than what the jury who rendered it decided it was.

A simple hypothetical helps illustrate the “revisionist-history” nature and potential unfairness of the California Supreme Court’s approach to the evidence admissible to prove a prior conviction. Suppose a jailhouse snitch testifies that he heard you confess to shooting a gun at someone while jaywalking. The jury probably did not believe this testimony, because the snitch was, well, a snitch. But the jury did convict you of jaywalking, the only crime with which you were charged. Years later when you are convicted of felony jaywalking with a prior, should the jury or judge reviewing the evidence of your prior jaywalking conviction be allowed to find that it is a serious-felony conviction of “jaywalking while discharging a firearm”? On what basis – the snitch’s testimony? Are you serious? “Yes, yes, yes,” says the California Supreme Court (in Guerrero). “No, no, no,” says the United States Supreme Court (in Blakely). Fortunately, the latter Court’s opinion on this question of federal constitutional law is the only one that should matter.103

In fairness to the California Supreme Court, the above hypothetical is probably a slight exaggeration. And the court may soon be re-examining the continuing validity of Guerrero while considering the closely-related question of whether a defendant is entitled to a jury trial on facts other than the least adjudicated elements of an out-of-state prior, when such additional facts are necessary to render the prior a “serious felony” under California’s Three Strikes law.104 So stay tuned. But, the point here can’t be made too clear: Guerrero is dead! Long live Blakely!

3. Scrutinize and challenge those priors!

As previously noted, all types of priors and the way we used to think about them

103 See People v. Bradley, supra.
104 This question is pending People v. McGee (2004) 115 Cal.App.4th 819, rev. granted Apr. 28, 2004 (S123474). As framed on the court’s website, the question that that case presents is: “Under Apprendi v. New Jersey (2000) 530 U.S. 466, was defendant entitled to a jury trial on the question whether his prior conviction for robbery in Nevada constituted a serious felony for purposes of sentencing under the three strikes law when the elements of the Nevada offense differed from the elements of robbery under California law and the sentencing issue thus depended upon whether the record of the prior conviction established that defendant’s prior conduct amounted to robbery under California law?”

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should be re-examined in light of Blakely. The decision opens up a whole number of possible issues whose full treatment the author does not have time to include in this article. A few ideas are briefly listed below. Please keep in mind that the list is not exhaustive and that there may be many other issues that should be considered (or reconsidered) in light of Blakely.

- Challenge all prior-conviction allegations and findings that rest on evidence additional to the least adjudicated facts reflected the jury’s verdict (or defendant’s guilty plea) in the prior case.

- And challenge the admission of that “additional” evidence, too.

- Pay special attention to those out-of-state priors and other priors whose “least adjudicated” elements do not constitute a strike (e.g., aggravated assault, grossly negligent discharge of a firearm, etc.).

- Challenge all juvenile priors alleged as strikes or “recidivist” priors. Blakely strongly bolsters all Tighe claims, because the “facts found true by the jury” requirement of Blakely obviously cannot be met when the defendant had no right to a jury, and so there are no jury findings to consult.

- Challenge the continuing validity of People v. Wiley (1995) 9 Cal.4th 580, 583-585. Its holding that there is no right to a jury trial on whether prior serious felonies were brought and tried separately should wither in Blakely’s wake. (This is a factual issue that a jury obviously never resolved.)

- Remember that Wims, supra, is dead. Instructional error on facts used to increase the defendant’s sentence (i.e., other than the fact of a prior conviction) is federal constitutional error.

- If your client did not waive his right to a jury trial on the prior convictions increasing his sentence, challenge Penal Code section 1025 and the Almendarez-Torres prior-conviction exception to the Apprendi/Blakely rule on the ground that they violate the constitutional rights that Apprendi and

105 United States v. Tighe (9th Cir. 2001) 266 F.3d 1187.
106 See footnote 16, ante.
Blakely are supposed to protect.\textsuperscript{107}

- And, while you are at it, challenge Monge v. California, supra. If Almendarez-Torres ever falls, so should Monge.

- But also see the “good” in Monge v. California, supra. Remember that, as that opinion illustrates, our double-jeopardy rights and jury-trial rights are joined at the hip. So Monge increases our right to double-jeopardy protection to the same extent that Apprendi and Blakely have increased the number of facts that are subject to our right to a jury trial.

- Finally, remember that not all prior-conviction-based enhancements are just “prior” convictions. Some require that the current conviction be a qualifying offense as well. (See, e.g., Pen. Code §§ 667, subd. (a), 667.5-667.75.) Blakely and Apprendi unquestionably require that all facts establishing the sentence-enhancing qualifications of the current offense be proved to a jury beyond a reasonable doubt.\textsuperscript{108}

\textsuperscript{107} Of course, you won’t win in the state or lower federal courts unless the Supreme Court issues another great opinion—likely Blakely—agreeing with you. But, who knows? They just might, especially if we keep bugging them. Since Apprendi, we’ve had five Justices who believe Almendarez-Torres was wrongly decided. So mustering the four votes necessary for a grant of certiorari should just be a matter of time. And the argument should be easy to write, if you use sample briefing or just plagiarize from Justice Thomas’s concurring opinion in Apprendi (530 U.S. 498-518).

\textsuperscript{108} See Dillard v. Roe (9th Cir. 2001) 244 F.3d 758.
III. Conclusion.

Blakely has been described as creating a “sea change in the body of sentencing law.” But, as great a change in sentencing law as it may effect, it must also be acknowledged that the decision did not come out of the blue. The ongoing debate among the Supreme Court Justices that gave rise to Blakely also portended it. Like all properly-written court opinions, Blakely follows from its precedents. And like Blakely, its precedents reflect a continuing and lively dialogue on a topic of primal constitutional concern: what is a lawfully punishable crime? This is a historic debate, and we as criminal defense attorneys are obliged by our callings to follow it very closely, to anticipate where it is or could be headed, and to participate in it. And wherever we think this debate might or should be headed, our obligations to our clients and to our professions require us to be involved. Not just as followers, but proactively. If Blakely teaches us anything, it is that this debate is still very much open. The decision’s holdings afford us an incredible opportunity to advance on behalf of our clients novel (yet elementary) arguments on a broad range of legal topics involving crime and punishment. And, because the very meaning and inalienability of our constitutional rights is at issue, this debate gives us a unique chance make arguments that can have an enduring impact on the Constitution’s future. So, be educated. Be informed. And be involved!

109 U.S. v. Ameline (9th Cir. 2004) 376 U.S. F.3d 967, 973, fn. 2.
110 See Apprendi, 530 U.S. at pp. 499-500, Thomas, J., concurring.