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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **MAURICIO PICADO,** **Defendant and Appellant.**	**A102251** **(Alameda County Super. Ct. No. H-30242)**

Mauricio Picado (Picado) appeals from a judgment of conviction and sentence imposed after a jury found him guilty of four counts of felony assault (Pen. Code, § 245, subd. (a)(1))[1] and certain misdemeanors, and found the offenses were gang-related for purposes of sentencing (§ 186.22, subd. (b)(1)). He contends: (1) the court erred in imposing consecutive sentences for each felony assault conviction and respective gang enhancement, since on each count he was convicted merely as an aider and abettor or co-conspirator based on a single underlying act and objective; (2) his presentence credits and the abstract of judgment should be corrected, because his offenses did not constitute violent felonies within the meaning of section 2933.1; and (3) the evidence was insufficient to prove his offenses were gang-related. In addition, Picado maintains, the imposition of the statutory upper term for felony assault and the imposition of consecutive sentences violated the Sixth Amendment under *Blakely v. Washington* (2004) 124 S.Ct. 2531 (*Blakely*).

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

1 Unless otherwise indicated, all further section references are to the Penal Code.

In the published portion of our opinion, we conclude the court properly imposed consecutive sentences even if Picado was convicted as an aider and abettor, and *Blakely* does not invalidate his sentence. In the unpublished portion of the opinion, we rule that the abstract of judgment and calculation of his credits are in error, and the evidence was sufficient to uphold the gang enhancement.

We will remand the matter to the trial court for correction of the abstract of judgment and recalculation of Picado's presentence credits. The judgment will be affirmed in all other respects.

I. FACTS AND PROCEDURAL HISTORY

After Picado's younger brother Walter had two brief fistfights with Danny C. (Danny), Picado engaged in two altercations with Danny, his friends, and family members. These two latter altercations—occurring on January 16, 2001, and April 24, 2001—are the subject of this appeal.

In count one of a second amended information,[2] Picado was charged with a January 16, 2001, assault with a deadly weapon on Danny's friend, Jesus Jesse Martinez (Jesse) (§ 245, subd. (a)(1)), with personal use of a knife (§ 1192.7, subd. (c)(23), § 12022, subd. (b)(1)). The remaining nine counts charged Picado and two codefendants, Jorge Lagunas (Lagunas) and Javier Meza (Meza), with assaults with a deadly weapon or by force likely to produce great bodily injury (§ 245, subd. (a)(1)), hereafter "felony assault") on April 24, 2001. Count two charged a felony assault on Danny's mother, Linda, with a stick, alleging that Lagunas personally used a weapon (the stick). Count three charged a felony assault upon Jesse with a screwdriver.[3] Count four alleged a felony assault upon Jesse with a metal club, and further alleged that Picado personally used a deadly weapon (§§ 1192.7, subd. (c)(23), 12022, subd. (b)(1)) and personally inflicted great bodily injury

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[2] Trial on the first amended information had resulted in the acquittal of Picado on the charge he assaulted Danny with a knife on January 16, 2001. A mistrial was declared as to the remaining counts of the first amended information.

[3] Counts three and seven did not allege that the named defendants personally used the screwdriver, because their companion, Rafael Navarette (Navarette), had admitted to stabbing two people in the incident. Navarette received his disposition in juvenile court.

(§ 12022.7, subd. (a)). Count five charged a felony assault on Jesse with a metal club (§ 245, subd. (a)(1)). Count six charged a felony assault on Danny's sister, Crystal, with a stick, alleging that Meza personally inflicted great bodily injury. Count seven charged a felony assault on Danny's friend, Damien, with a screwdriver. Count eight charged Picado with felony assault on Damien with a metal club, with personal use of a deadly weapon (§ 1192.7, subd. (c)(23), § 12022, subd. (b)(1)) and personal infliction of great bodily injury (§ 12022.7, subd. (a)). Count nine charged a felony assault upon Danny's younger brother, Jeremy, with a stick. Count ten charged felony assault upon Jesse with an automobile, with personal use of a deadly weapon (§ 1192.7, subd. (c)(23), § 12022, subd. (b)(1)). In addition, the information alleged with respect to counts two through nine that the offenses were gang-related for purposes of sentencing enhancements (§ 186.22, subd. (b)(1)). The matter proceeded to trial before a jury.

A. PROSECUTION EVIDENCE

Linda C. lived with her husband and four children, Danny (aged 13 at the time of the incident), Crystal (15), Jeremy (11), and Hannah (4), in San Leandro. Danny had been friends with Picado's brother Walter since the sixth grade. But one day in the summer of 2000, Walter said that Danny's friend Damien was Danny's "bitch," leading Walter and Danny to exchange a couple of punches. A few months later, Walter and Danny engaged in another fistfight for about 20 to 30 seconds, after Walter had purportedly chased Jeremy down the street.

Some time later, while Danny sat at a bus stop, Walter and Picado drove up in a blue truck. Picado warned Danny not to "mess with" his brother Walter. They taunted Danny to fight one-on-one, but Danny refused. As Picado drove away, he said "BB right here;" "BB" was a reference to the Border Brothers street gang.

1. <u>January 16, 2001, Events</u>

On January 16, 2001, Danny was walking with his girlfriend, when Picado drove up with Walter and challenged Danny to fight. Danny and his girlfriend fled until they met up with Damien and Jeremy, at which point Picado and Walter drove away.

At about 4:00 p.m. on January 16, Danny was outside his house with his friends Jesse and Anthony Darby (Anthony). Picado rode up on his bicycle and, essentially, pulled a knife and asked who was "messing with" his brother Walter.[4] Picado then lunged at Danny and Jesse with the knife, but they jumped out of the way. Picado rode off, and Danny and Jesse reported the matter to the police.

By around February 2001, Danny believed the animosity between him and Walter had ended. Danny suggested they should "let bygones be bygones," while Walter agreed the matter was "squashed," or done with. They shook hands. Indeed, Linda testified, about two weeks before the April 24 incident, Walter told Danny's parents that everything was "squashed." It wasn't.

2. April 24, 2001, Incident

On the afternoon of April 24, 2001, Danny's sister Crystal (aged 15), her boyfriend Jesse (aged 16), and their friend Damien (aged 17) were outside Danny's house doing yard work with rakes, brooms, and hand clippers. Picado, Walter, and Miguel Leos drove by in Picado's blue Blazer truck. Crystal heard Walter say to Picado, "There's Damien." (According to Jesse, the rumor at school was that Picado was after Damien.)

About an hour and a half later, Picado drove up again in his Blazer and parked. Picado, Walter, and a third man got out of the vehicle and approached Crystal, Jesse, and Damien. Picado said to Jesse, "What's up now, punk, I got my friends with me." The third man told Jesse and Damien they did not know who they were messing with. He promised to return with "his people," calling himself a Border Brother from 83rd. Picado and Walter added, "that's right," and nodded their heads in agreement. Walter then took a knife out of his pocket, and they surrounded Crystal, Jesse, and Damien. Crystal and Jesse picked up rocks and asked them to leave. Picado picked up rocks himself and asked

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[4] Danny recalled the incident a little differently than Jesse. According to Danny, Picado was wearing a black Raider beanie, pulled a knife out of his pocket, flicked open the blade, and said, "Anybody want to see me about something?" According to Jesse, Picado wore a hooded shirt, pulled his hood back, asked "Who whooped my brother" and who had been "messing" with his brother, and pulled out a knife that was 10 to 12 inches long with a six inch blade.

Crystal and Jesse, "What are you going to do with that?" Crystal threw a rock toward Picado's Blazer. According to Crystal, the third man threatened to bring back "Border bitches" to beat her up.

Jesse recalled additional details of this encounter. The third man said "Border Brother" and Picado said "straight BB," referring to the Border Brothers as well. When Damien said they did not "gang bang here," Picado walked up to him and said, "Oh, so you got a problem with my brother or something, let's me and you handle it one on one." When Damien declined, Picado turned to Jesse and asked if he wanted to fight. Jesse replied he just wanted to do his yard work. Picado's group drove off, promising to return, and someone in Picado's car flashed the Border Brothers street gang sign.

Around 7:00 or 8:00 p.m. that day, Crystal, Damien, and Jesse were finishing their yard work. Danny's brother Jeremy and four-year-old sister Hannah were also outside the house, while Danny and his mother Linda were inside. A group of people started running toward Crystal, Damien, and Jesse: Crystal estimated the group consisted of about "seven to eleven" guys, Jesse thought there were around 15 to 20 people, including three females, and Damien believed their number was between eight and eleven. Among those in the group were Picado, Walter, Lagunas, Meza, and Navarette. Picado made the Border Brothers' gang hand sign, while others repeatedly called out the gang numbers.

Crystal, Jesse, and Damien ran toward the back yard, with Jesse pulling Hannah along on her tricycle. Jesse opened the gate to let the others in, and Damien yelled for the people in the house to call the police. But Lagunas grabbed onto Hannah's tricycle, and Hannah fell. When Linda came out of the house to help Hannah, Lagunas hit her in the face with a broomstick, grabbed Jesse, and pulled him out of the backyard. Lagunas then struck Jesse with a stick, and Jesse fell to the ground. Jesse covered his head and face while about six people, including Picado, kicked and punched him for approximately 45 seconds. Picado took a piece of an automobile locking device known as the Club, and swung it at Jesse's head. Jesse deflected the blow with his arms. Picado then threw the piece of the Club at Jesse, striking him in the ribs.

From inside the gate, Crystal heard people outside screaming and yelling "BB." After about 20 to 30 seconds, she ventured out and saw the crowd moving back toward their cars. Lagunas still had his stick, someone else had a baseball bat, and Picado had a broom. As Crystal ran out, she stopped in front of Meza, who punched her in the face, and she fell to the ground. When she arose, she saw Picado hitting Danny continuously with his fists. Crystal's jaw was broken in three places, which required her jaw to be wired shut for about three months.[5]

Crystal ran around the corner and saw Picado grab Jesse and hit him with something. Jesse fell to the ground, and Picado and Walter continued to hit and kick him. While Picado held Jesse down, Navarette stabbed him. Picado and Walter let go of Jesse, kicked him one last time, and ran to their car. Lagunas then hit Jesse in the left arm with the other half of the Club.

Meanwhile, according to his testimony, Damien was hit with the Club and suffered two "fractured or cracked ribs." Within a minute later, he was stabbed in the right side with a screwdriver. Although Damien was unable to identify who stabbed him, Crystal saw it was Navarette.

Linda recalled the assault upon her. She was in the kitchen cooking dinner, when she heard a commotion outside. She went out to investigate and saw someone (Lagunas) trying to pull Jesse out of the back yard through the gate. Upon seeing that Hannah had been pushed off her tricycle, Linda went to her rescue, when Lagunas hit her in the face with a broken broomstick. Linda managed to grab onto Hannah, run back inside, and call 911. As a result of the assault, Linda's cheek and nose were swollen and bruised.

Danny was in the bathroom when the fight broke out. He heard his mother screaming to call the police, ran outside, and saw Walter, Picado and others, holding sticks

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[5] Jesse testified that he saw Crystal on the ground with her jaw hanging down. When she got up, it appeared Meza was going to do something to Crystal, but he backed off when Jesse pointed out Crystal was a girl. Then Lagunas hit Crystal with a yellow broomstick.

and parts of the Club. Picado ran up to Danny, and the two pushed each other. Picado threw a large rock at him, missed, and then pursued him down the street.

Jeremy recounted the incident as follows. After returning home from Little League practice, a group of at least six people approached the house. Two of them carried parts of the Club, and Picado grabbed a broken broomstick that was on the ground. Crystal, Hannah, Jesse, and Jeremy ran toward the gate to the backyard, but Jesse was attacked as he tried to pull Hannah into the yard. Jeremy ran into the garage for a minute or two, and when he came out Picado hit him with a broomstick handle in the left arm. Jeremy returned to the garage, retrieved his white baseball bat, and went back to the street. Picado was screaming "BB," and others in the crowd yelled "BB" for Border Brothers as they ran to their cars.[6]

Picado and Walter got into Picado's blue Blazer. The other assailants, including Navarette, got into a dark blue Buick. Picado made a U-turn and came back down the street, accelerating toward Jesse. Jesse dove away just in time.

3. Police Investigation and Detention of the Suspects

Officer Steve Kahncook arrived at the scene to collect evidence and obtain statements from the victims. He interviewed Anthony Darby and collected a baseball bat from Jeremy, as well as two steel pieces to the Club. Crystal told detectives that one of the assailants had previously said he and Picado were from the "83rd BB gang." She gave the police a description of the blue Buick as well.

Based on Crystal's report and description, the police found Picado, Lagunas, Meza, and Navarette at a laundromat in Border Brothers' gang territory in the vicinity of 83rd Street. Brought to the scene, Crystal identified them along with the blue Buick. Inside the Buick, the police found the Club used in the assault, as well as the screwdriver used to stab the victims and a baseball bat. Also in the car was a tire iron, two other screwdrivers, and a knife.

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[6] Crystal saw Lagunas hit Jeremy with Jeremy's purple baseball bat. Jesse said he saw Lagunas chase Jeremy with Jeremy's white bat.

4. Navarette's Preliminary Hearing Examination

Navarette's preliminary hearing testimony was read into the record at trial. He admitted being a tattooed member of the "81st Street" (or 81st Avenue) Border Brothers' gang for four years, including the time of the incident. He also identified Meza and Lagunas as members of the 27th Avenue and 81st Street Border Brothers gangs, with nicknames Sinaloia and Topo, respectively. When asked if Picado was a gang member, Navarette responded "I think so" and "I really don't know." He also noted that Picado was known as Malo, which is Spanish for "mean."

Navarette admitted stabbing two people on April 24, 2001, with a screwdriver. According to Navarette's account, on April 24 he was driving with Meza and Lagunas and, in the back seat, a girl named Dopey. They met up with Picado and Walter, who were in Picado's Blazer. By some point, there were at least five people in Navarette's vehicle, and Picado and Walter were following in the Blazer. They drove to Danny's house to fight. When they got out of their cars, the people in front of the house had bats and sticks. Navarette got a screwdriver from a toolbox inside a truck on the street and used it to stab a Hispanic and a Caucasian, both of whom were swinging bats. Navarette's group was proclaiming "BB" as it left the scene.

5. Gang Expert Officer Guerrero

Officer Eugene Guerrero, an expert on Hispanic gangs in general and the Border Brothers gang in particular, testified that the Border Brothers is an umbrella designation for several smaller gangs. The Border Brothers was started by individuals who wanted to take over the crack cocaine trade in Oakland, by combining all the Hispanic gangs in Oakland into one. The first Border Brothers gang was called Jingletown, formed around 1990 and named after the district of the same name. Other subsets of the Border Brothers gang developed with turfs such as 96th Avenue Locos, 94th Avenue Locos, 81st Avenue Locos, and others. The gang members claim black and brown as their colors and use their fingers to form the letter "B" as their gang symbol. Further, Officer Guerrero noted, the Border Brothers is an ongoing organization engaging in aggravated assault, robbery,

murder, narcotics sales, auto theft, burglary, intimidation of witnesses, and shooting at inhabited dwellings.

Officer Guerrero opined that Picado, Navarette, Lagunas, and Meza were members of the Border Brothers gang. In a letter Picado wrote to an avowed gang member while in jail, Guerrero explained, Picado expressed detailed information about the different subsets and turf of the Border Brothers. Picado also wrote in the letter that the jail contained a lot of "chepetes," which is the Border Brothers' derogatory term for Norteno gang members. Picado described how he had knocked out a "chepete" with a "one-hit quicker," which is something a Border Brother would boast about. Picado further asked in the letter that gang members tattooed from 96th Avenue Locos, 91st Avenue Locos, and 81st Locos to testify that he was not a gang member. He instructed they should not call him by his nickname, Malo.

From the information given to him regarding the incident of April 24, 2001, Officer Guerrero opined that the attack was committed by members of the Border Brothers gang to further, assist, and promote the gang. He opined that the fistfight would escalate, such that great bodily injury would be a natural and probable consequence. The officer added that the Border Brothers is "probably the most violent gang in the city of Oakland."

B. DEFENSE EVIDENCE

In his trial testimony, Picado presented a different version of the events. As to the January 16, 2001, incident, he claimed he was riding his bicycle past Danny's house on his way to work, when Danny got up and said, "What's up, mother fucker?" Picado stopped, and responded in kind. When he got off his bike, Jesse and two others surrounded him and Jesse pulled a knife. Picado pulled out his own knife, and Jesse ran. As Picado chased him three or four steps, Darby attempted to get on Picado's bicycle, but Picado retrieved it and used it as a shield against Danny, who had obtained a baseball bat. Jesse returned to stab Picado's bicycle tire. As Picado rode away with the three chasing him, Jesse was saying "VST" (the initials of "Varrio Sur Trece," a Sureno gang). Picado called 911 and later gave a taped statement to police, but decided not to press charges.

On April 24, 2001, Picado was driving with his brother Walter to a taco truck. On the way, he saw Jesse, Crystal, and Damien at Danny's residence and pulled over to discuss their problems with Walter. Picado challenged Jesse to a one-on-one fight. Jesse responded by picking up a rock the size of a football, which he held over his head, and Crystal threatened Walter with a stick. Picado and Walter left.

After visiting a taco truck and stopping by a friend's house, Walter waved to people in a blue Buick, which pulled over. Picado claimed the people in the Buick—including Navarette, Lagunas, and Meza—were Walter's friends and he did not know them. After Walter talked with them, both cars went to Danny's home with the intention of Walter fighting Danny, and Picado fighting Jesse, one-on-one. (Picado also admitted he had invited Danny to fight one-on-one previously.)

On arrival, the group got out of the Blazer and the Buick. The people at Danny's residence started running, but Picado caught Jesse, grabbed him by the shoulder, and punched him until Linda emerged from the house. He let Jesse go, and when he looked back Linda was holding her face and saying she was going to call the police. Picado warned his friends and started walking away at a fast pace.

Danny's group, however, gave pursuit. Seeing that Damien and Jeremy had bats, and Jesse and Danny had sticks, Picado started running. When he saw Jesse hit Walter with a broomstick, Picado engaged Jesse a second time. Picado admitted he also punched Danny. He denied ever seeing either part of the Club or any weapons held by members of his group.

Picado pulled Walter into the truck and made a U-turn to go home, but was blocked by Crystal chasing Meza with a stick. Walter jumped out of the truck, and Picado drove away. Picado was arrested the next day after dropping Walter off at his job.

Picado denied being a member of the Border Brothers gang and denied anyone in his group said anything about gangs or Border Brothers. He explained that the letter sent from jail was taken out of context and had a couple pages missing that were written in Spanish to his mother.

C. VERDICT AND SENTENCING

With respect to the January 16 incident charged in count one, the jury found Picado not guilty of felony assault, but guilty of misdemeanor brandishing (§ 417) and simple assault (§ 240). As to the April 24 incident, he was found not guilty on count four (assault with a club on Jesse), but guilty of lesser misdemeanor battery (§ 242) and assault (§ 240), and not guilty on count nine (assault with a stick on Jeremy), but guilty of the lesser misdemeanor of brandishing (§ 417). He was also found not guilty on count eight (assault with club on Damien) and count ten (assault with automobile on Jesse). None of the personal use of a deadly weapon or personal infliction of great bodily injury allegations was found true.

Nevertheless, the jury convicted Picado on five felony assault charges: count two (assault on Linda with a stick), count three (assault on Jesse with a screwdriver), count five (assault on Jesse with a metal club), count six (assault on Crystal with a stick), and count seven (assault on Damien with a screwdriver). The jury also found the gang enhancement allegations to be true.

Picado was sentenced to an aggregate term of 16 years in state prison. The court selected count three as the principle term, imposing the upper sentence of four years, plus the gang enhancement of four years (§ 186.22, subd. (b)(1)), for a total of eight years on count three. The court then found that "the crimes proven and their objectives were predominantly independent of one another, and they involved separate acts of violence," and ordered the terms for the additional offenses to be served consecutively to the sentence pronounced for count three. Thus, as to each of the other counts on which Picado was convicted—two, five, six, and seven—the court imposed consecutive one-year terms (one-third the midterm) for aggravated assault (§ 245, subd. (a)(1)), enhanced by four consecutive one-year gang enhancements (§ 186.22, subd. (b)(1)), for a total of eight years consecutive to the principle term. (§ 1170.1) The trial court calculated 796 days credit for local custody (§ 2933.1).

This appeal followed.

II. DISCUSSION

A. CONSECUTIVE SENTENCING FOR ASSAULTS AND ENHANCEMENTS (SECTION 654)

As mentioned, Picado was convicted of five felony assaults. Counts two, three, six, and seven involved different victims. Count five involved the same victim as count three, but was perpetrated with a different weapon. The trial court found the crimes were predominantly independent of one another, involved separate acts of violence, and could be punished consecutively.

Picado, however, urges us not to look merely at the convictions he sustained, but to the legal theory of liability—such as aiding and abetting—which underlie those convictions. In particular, he contends, section 654 bars consecutive sentences for his five assault convictions (or the consecutive sentences for all but one of the felony assault convictions should be stayed), because all of his convictions derived from a singular intent to merely bring the actual perpetrators—Meza, Lagunas, Navarette, and others—to the scene of the fight.

We begin by briefly reviewing section 654, and then address Picado's arguments.

1. Section 654

Section 654 reads: "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." Under this statute, conduct that violates more than one criminal provision is not subject to multiple punishments, unless the defendant's intent and objective was to perpetrate more than one crime. As our Supreme Court has explained: "The proscription against double punishment in section 654 is applicable where there is a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of section 654. The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one." (*People v. Bauer* (1969) 1 Cal.3d

368, 376 (*Bauer*); see *People v. Hicks* (1993) 6 Cal.4th 784, 789 ["'[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.' [Citation.]"] (*Hicks*).)

From Picado's appellate briefs we discern two slightly different but related approaches to the issue. We consider each in turn.

2. Picado's Purported Singular Intent and Objective

Seizing upon the language in *Bauer* and *Hicks* concerning the significance of the defendant's intent and objective, Picado insists that his purpose behind all of the crimes was merely to aid and abet the assaults perpetrated by his fellow gang members. His convictions were based on aider and abettor (or co-conspirator) liability, he argues, since it was Lagunas who actually struck Linda in count two and clubbed Jesse in count five (according to the prosecutor's argument), Navarette who stabbed Jesse with a screwdriver in count three and Damien in count seven, and Meza who struck Crystal in count six. Indeed, the jury was instructed on aider and abettor and co-conspirator liability, and the prosecutor described counts three, five, six, and seven as "aiding and abetting" counts as to Picado.[7]

Moreover, Picado points out, the prosecutor urged that he aided and abetted in these crimes merely by the single and preliminary act of bringing the actual perpetrators to Danny's residence. The prosecutor asserted in opening statement: "the act of setting in motion, bringing Javier Meza and Jorge Lagunas to that scene is what constitutes his

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[7] With respect to aiding and abetting, the jury was instructed: "One who aids and abets another in the commission of a crime or crimes is not only guilty of those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted." As to co-conspirator liability, the jury was instructed: "A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy, even though that crime or act was not intended as part of the agreed upon objective and even though he was not present at the time of the commission of that crime or act."

accountability as an aider and abettor." Because his convictions reflected only one single intent or objective in bringing others to the scene, Picado urges, he can be punished only once for all of the ensuing assaults.

We disagree. In the first place, although the prosecutor argued that Picado aided and abetted the assaults by bringing his fellow gang members to the scene, he also pointed out that his aider and abettor liability derived from "*fighting alongside* all of those guys." (Italics added.) Indeed, the *evidence* showed that Picado actually did much more to assist in the crimes, including beating a number of the victims and, at least generally, facilitating *each* assault.

For example, although it was Lagunas who struck Linda (count two), Picado was among the group accompanying Lagunas as they approached the house in force, with Picado wielding a broken broomstick. By Picado's own admission, he was punching Jesse when Linda came out of the house. When Navarette stabbed Jesse with a screwdriver (count three), it was Picado who was holding Jesse down. Only after this attack on Jesse and a continuing beating by Picado and Walter, did Lagunas hit Jesse in the left arm with the Club (count five). Although it is unclear from the record precisely where Picado was located when Meza struck Crystal (count six) and Navarette stabbed Damien (count seven), he was still very much engaged in the altercation. Crystal saw him with a broom and Danny saw him holding a stick or part of the Club, he hit Danny repeatedly with his fists and threw a rock at him, and he struck Jeremy with a broomstick handle. Further, Picado admitted attacking Jesse a second time and punching Danny. Thus, there was ample evidence from which the jury could conclude that Picado had a separate and independent intent to aid and abet each of the assaults for which he was convicted.

Even if Picado had only a single objective in perpetrating his criminal conduct, he could still be punished for multiple convictions if, during the course of his conduct, he committed *crimes of violence* against *different victims*. (*People v. Miller* (1977) 18 Cal.3d 873, 885 ["As the purpose of section 654 'is to insure that defendant's punishment will be commensurate with his criminal liability,' when he 'commits an act of violence with the intent to harm more than one person or by means likely to cause harm to several persons,'

his greater culpability precludes application of section 654."]; see *People v. Solis* (2001) 90 Cal.App.4th 1002; *People v. Prater* (1977) 71 Cal.App.3d 695, 699.)

The crimes for which Picado was convicted had multiple victims: Linda, Jesse, Crystal, and Damien. Picado nevertheless claims the multiple victim exception to section 654 does not apply, because his actions in aiding and abetting the assaults did not amount to an act of violence. In his view, while bringing the gang members to Danny's residence created a potential for violence, the act was not in itself sufficiently violent to trigger an exception to section 654. (See *People v. Hall* (2000) 83 Cal.App.4th 1084, 1092-1093 [brandishing is not an act of violence for purposes of the multiple victim exception to § 654] (*Hall*).)

Again, we must disagree. Although aiding and abetting does not *always* require proof of an act of violence, aiding and abetting *an assault* does. One who commits an assault—whether directly or by aiding and abetting—perpetrates an act of violence upon his victim and intends to accomplish harm. (See *Hall*, *supra*, 83 Cal.App.4th at p. 1089 [multiple-victim exception looks to the *crime* of which defendant was convicted].) Furthermore, from his prior challenges to Danny, Jesse, Damien, and Crystal, and his bringing other gang members to the scene, it is reasonable to infer that his intent was for several assaults to result. One who aids and abets a number of assaults is certainly more culpable than one who aids and abets just one assault. (See *People v. Williams* (1988) 201 Cal.App.3d 439, 445, quoting *People v. Cook* (1984) 151 Cal.App.3d 1142, 1147 ["'Although appellant did not actually commit an act of violence, he solicited the commission of four separate violent acts. Surely he is more culpable than would be a person who solicited only one such act. Accordingly, whether or not appellant engaged in an indivisible course of conduct, multiple punishment is appropriate and not prohibited by section 654.'"].) The multiple victim exception applies.

Picado has not established that section 654 bars consecutive sentences or requires any of his sentences to be stayed.[8]

3. Natural and Probable Consequences of Intended Lesser Assault

Picado's next argument, which the Attorney General does not really address, is a slight variation on the same theme. Essentially, Picado contends he was not actually convicted for the felony assaults because he aided and abetted *those* crimes (i.e., the assaults with dangerous weapons), but because he aided and abetted lesser simple assaults (intending only to fight with his fists) and the natural and probable consequence of those lesser assaults was the perpetration of the felony assaults by his companions. (See CALJIC Nos. 3.01, 3.02.) In this regard, Picado brings to our attention testimony that he intended only to fistfight Jesse one-on-one, while Walter fought Danny. He also cites to an excerpt from the prosecutor's closing argument, in which the prosecutor asked, "what if we believe [Picado], that the only thing that he really intended to do was to engage in fist fights[?]," and then argued that Picado could still be found guilty of the felony assaults because those crimes, perpetrated by his cohorts, were the "natural and probable consequences" of his intended simple assaults. Since he did not actually *intend* the felony assaults, Picado argues, he should not receive consecutive sentences for them.

For this proposition, Picado relies on *People v. Bradley* (2003) 111 Cal.App.4th 765 (*Bradley*). In *Bradley*, a female defendant acted as "bait" in a robbery scheme, luring a victim from a casino to a distant location where her two male accomplices were to accomplish the robbery. However, after the victim was ordered to open the trunk of his vehicle, and he failed to do so, Bradley's accomplices beat the victim and shot him eight times. Remarkably, the victim survived. Bradley was convicted of robbery *and* attempted murder as an aider and abettor, although her intent was to participate in the robbery only.

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8 Picado argues that, even if the multiple victim exception applied to this case, it would not apply to the consecutive sentence for count five, because count five involved the same victim (Jesse) as count three. We need not address this issue, in light of our conclusion there was sufficient evidence Picado aided and abetted each specific assault for which he was convicted.

The trial court imposed consecutive sentences for robbery and attempted murder. On appeal, the issue was whether a court may impose consecutive sentences as to the aider and abetter for two offenses arising out of a single criminal transaction where the aider and abetter only intended one of those offenses and her liability for the second depends upon it being a "natural and probable" consequence of the first. The court found that Bradley had but one objective and one intent—to aid and abet a *robbery*, and she was convicted of attempted murder only on the theory it was a "natural and probable" consequence of the robbery. The Court of Appeal ruled: "In our view, the trial court cannot countermand the jury and make the contrary finding appellant in fact personally had both objectives." (*Bradley, supra,* at p. 770, italics omitted.) The court concluded that Bradley "personally entertained only a single criminal objective and thus Penal Code section 654 prohibits consecutive sentencing for the two offenses." (*Bradley, supra,* at p. 767.)

In the matter before us, the jury did not find that Picado personally used the dangerous weapons charged in the felony assault counts. That does not mean the jury necessarily believed he intended only a simple assault, rather than each of the felony assaults which were accomplished with a weapon. As mentioned, there was ample evidence from which the jury could have inferred that Picado intended to aid and abet each of the violations of section 245, subdivision (a)(1), in counts two, three, five, six, and seven, even though he himself was not found to have personally wielded the weapons in the attacks. Substantial evidence supported the trial court's conclusion that Picado committed (by aiding and abetting) five separate felony assaults, and there is no showing that the jury *necessarily* based its verdicts on the natural and probable consequences theory.[9]

B. CALCULATION OF PRESENTENCE CUSTODY CREDITS

Section 2933.1 imposes a 15 percent limitation on the accrual of presentence and worktime credits for a defendant convicted of a violent felony, within the meaning of

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[9] For the same reasons, we reject Picado's claim that the gang enhancements should be stayed in regard to the aiding and abetting counts.

section 667.5. Because assault with a deadly weapon by means likely to produce great bodily injury (§ 245, subd. (a)(1)) is not among the crimes enumerated as violent felonies (§ 667.5, subd. (c)), Picado contends the abstract of judgment inaccurately classified his convictions as violent felonies and he was improperly subjected to the 15 percent credit limitation of section 2933.1.

The Attorney General does not contend the crimes of which Picado was convicted were violent felonies under section 667.5. Instead, he reminds us of section 1237.1, which provides: "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." (See *People v. Clavel* (2002) 103 Cal.App.4th 516, 518-519 [dismissing appeal where only issue was calculation of credits and defendant had not filed a motion in the trial court].)

Picado did not file a motion to correct the credit calculation, or the abstract of judgment, in the trial court. Nevertheless, since the credit issue is merely one of many issues Picado raises on appeal, the Attorney General does not dispute that his offenses were miscategorized, and classification of his crimes affects the calculation of both presentencing *and* other custody credits, we remand the matter to the trial court for correction of the abstract of judgment and recalculation of credits.

C. EVIDENCE SUPPORTING GANG ENHANCEMENT

Section 186.22, subdivision (b)(1), provides that "any person who is convicted of a felony committed for the benefit of, at the direction of, *or* in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" shall receive an additional term of imprisonment. (Italics added.) A gang enhancement may be based on circumstantial evidence provided by a gang expert's testimony. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

Substantial evidence supported the trial court's finding in this regard. In Officer Guerrero's expert opinion, Picado was a member of the Border Brothers gang. Picado was aware of information he would not have known if he were not a Border Brother, he used expressions Border Brothers used, his cohorts were admitted Border Brothers, and they were captured by police in Border Brother gang turf. Officer Guerrero also opined that the crimes were committed for the benefit of the Border Brothers gang, and other evidence tended to confirm his opinion. Before the April 24 incident, Picado and his companions warned Jesse, Damien, and Crystal that they were Border Brothers gang members and threatened to return. When Picado and his cohorts did return for the April 24 attack, they repeatedly announced they were Border Brothers members by yelling "BB" and flashing the Border Brothers' gang sign. From this, it may reasonably be inferred that the assaults were perpetrated in association with a criminal street gang, with the specific intent to promote, further, or assist in its gang members' criminal conduct.

Picado's only challenge to this point is that Officer Guerrero admitted "An incident like this could be personal *or* gang related, yes." (Italics added.) He also acknowledged that the disputes between Walter and Damien started out as a personal conflict, and the January 16, 2001, incident was probably personal in nature as well. Nevertheless, our role is not to reweigh the evidence. From the totality of the evidence presented, the trier of fact could conclude beyond a reasonable doubt that the elements of section 186.22, subdivision (b)(1), were met.

D. SIXTH AMENDMENT (*BLAKELY*)

During the pendency of this appeal, the United States Supreme Court issued its decision in *Blakely*, *supra*, 124 S.Ct. 2531. There, the court held that the imposition of a sentence exceeding the statutory maximum for the charged offense violated the defendant's Sixth Amendment right to trial by jury, if the sentence departed from the statutory maximum due to a factual finding not made by a jury or admitted by the defendant. We granted Picado's request to file a supplemental brief addressing *Blakely*, and the Attorney General submitted a response as well.

Picado argues that under *Blakely*, the trial court committed structural error by imposing the aggravated term as to count three, and by ordering the terms for his multiple convictions to run consecutively, based on facts neither found by the jury nor admitted by him. He therefore urges us to reverse the sentences on all counts. The Attorney General counters that Picado waived his challenge, *Blakely* does not apply to California's determinate sentencing law, *Blakely* does not apply to the choice between consecutive and concurrent terms, and any error was harmless beyond a reasonable doubt.[10]

1. Waiver/Forfeiture

As a threshold matter, we address respondent's contention that Picado waived his right to challenge his sentence under *Blakely*. Noting that the defendant in *Blakely* objected when the court imposed the sentence beyond the statutory maximum (*Blakely*, *supra*, 124 S.Ct. at p. 2535), the Attorney General argues that Picado's failure to object to the imposition of the aggravated term or consecutive terms on Sixth Amendment grounds forfeited his right to assert such a challenge now. (Cf. *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061 [defendant waives right to object on *Apprendi*[11] grounds by failing to specifically object on that ground below].)

We disagree. *Blakely* was not decided until after Picado was sentenced. As of that time, there was no reported decision holding that an upper term sentence violated the Sixth Amendment if premised on factors found by the trial court rather than a jury. California courts and numerous federal courts held there was *no* constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. (See, e.g., *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231.) To be sure, *Blakely* has been described as having "worked a sea change in the body of sentencing law." (*U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967, 973, & fn. 2.) Under these circumstances, the record does not

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10 On July 14, 2004, the California Supreme Court granted review in *People v. Towne* (S125677), requesting briefing on whether *Blakely* precludes a trial court from making the required findings on an aggravating factor for an upper term sentence, what standard of harmless error should be applied, and whether the error was prejudicial.

11 *Apprendi v. New Jersey* (2000) 530 U.S. 466.

establish that Picado knowingly and intelligently waived a right to a jury trial relating to the imposition of his sentence. (See *People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1565 , petn. for review pending, petn. filed Oct. 12, 2004 [defendant did not waive his right to challenge on Sixth Amendment grounds the trial court's imposition of consecutive sentences, where *Blakely* was decided after defendant's sentencing hearing] (*Ochoa*); *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2 [*Apprendi* claim as to section 654 sentence was not waived, where *Apprendi* was not issued until after sentencing and section 654 claims are usually nonwaivable].)

2. *Blakely*

Central to the United States Supreme Court's holding in *Blakely* was its earlier decision in *Apprendi, supra,* 530 U.S. 466. In *Apprendi*, the court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) The court in *Blakely* applied this rule to an "exceptional" sentence imposed under a Washington state sentencing scheme.

The defendant in *Blakely* had pleaded guilty to second degree kidnapping. Under Washington law, the "standard range" of sentence for his offense was 49 to 53 months. A separate statutory scheme, however, allowed for departures from this standard range upon a judicial finding of "'substantial and compelling reasons justifying an exceptional sentence,'" based on a finding of an aggravating circumstance such as "deliberate cruelty." (*Blakely*, *supra*, 124 S.Ct. at pp. 2535-2536.)[12] After the defendant had entered his plea,

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[12] The court in *Blakely* described the applicable Washington sentencing statutes as follows: "In Washington, second-degree kidnap[p]ing is a class B felony. [Wash. Rev. Code Ann.] § 9A.40.030(3). State law provides that '[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years.' § 9A.20.021(1)(b). Other provisions of state law, however, further limit the range of sentences a judge may impose. Washington's Sentencing Reform Act specifies, for petitioner's offense of second-degree kidnap[p]ing with a firearm, a 'standard range' of 49 to 53 months. See § 9.94A.320 (seriousness level V for second-degree kidnap[p]ing); App. 27 (offender score 2 based on § 9.94A.360); § 9.94A.310(1), box 2-V (standard range of 13-17 months); § 9.94A.310(3)(b) (36-month firearm enhancement). A judge

the trial court found he had acted with deliberate cruelty and imposed an "exceptional sentence" of *90* months—37 months beyond the statutory maximum. (*Blakely*, *supra*, at pp. 2535, 2537-2538.) Deliberate cruelty was not an element of the offense of kidnapping, and because the charges were resolved by the defendant's plea, there was necessarily no jury finding of exceptional cruelty either.

The United States Supreme Court held that the sentence violated the defendant's Sixth Amendment rights. (*Blakely*, *supra*, 124 S.Ct. at pp. 2535, 2537-2538.) First, the court determined that 53 months was the statutory maximum for *Apprendi* purposes, because it was "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, at p. 2537, italics in original.) Because no jury in *Blakely* found beyond a reasonable doubt the additional fact of "deliberate cruelty" on which the trial court's upward departure from the 53-month statutory maximum was based, the sentence violated the defendant's right to a jury trial. (*Id*. at pp. 2537-2538.)

3. Aggravated Term on Count Three and Corresponding Enhancement

Picado contends that under *Blakely* the trial court erred in imposing the upper term on count three (§ 245, subd. (a)(1)), felony assault with a screwdriver).[13] Noting that the crime was subject to two, three, or four years imprisonment, he reasons that the maximum

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may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence.' § 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. § 9.94A.390. Nevertheless, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.' *State v. Gore* [2001] 143 Wash. 2d 288, 315-316. When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. § 9.94A.120(3)." (*Blakely*, *supra*, 124 S.Ct. at p. 2535, fn. omitted.)

13 Picado also challenges imposition of the upper term of the gang enhancement on count three. The enhancement itself was imposed upon the jury's finding that the enhancement allegation was true beyond a reasonable doubt, and thus presents no *Blakely* issue. As to Picado's assertion there was error in the selection of the upper term, our conclusion that *Blakely* does not apply to count three disposes of this argument as well.

statutory term for *Blakely* purposes was the three-year midterm, since that is the term the trial court may impose without finding any aggravating factors. (See § 1170, subd. (b).) Because no aggravating factors warranting the upper term were admitted by Picado or found true by a jury beyond a reasonable doubt, Picado insists the imposition of the upper term deprived him of his Sixth Amendment rights.

As in *Blakely*, we begin by ascertaining the statutory maximum sentence for the relevant offense. Section 245, subdivision (a)(1), reads in pertinent part: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for *two, three, or four years* . . ." (Italics added.) On the face of the statute, the maximum statutory term for a violation of section 245, subdivision (a)(1), is four years. Because the trial court did not impose a base sentence on count three in excess of four years, we will conclude there was no *Blakely* error.

Picado urges us to ignore the sentencing range clearly prescribed by the Legislature, and to instead recast the statute in light of language taken from *Blakely*. In particular, he notes that the *Blakely* majority defined the "statutory maximum" for Sixth Amendment purposes 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*." (*Blakely*, *supra*, 124 S.Ct. at p. 2537, italics in original.) The court explained: "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid*., italics in original.) Based on this language, Picado argues that the three-year midterm in section 245, subdivision (a)(1), is the statutory maximum, because in choosing among the three possible prison terms "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).) We do not agree.

In the first place, the quoted language in *Blakely* must not be divorced from its context. In *Blakely*, the court dealt with a sentencing scheme that not only established a range of punishments for a given offense (as in § 245, subd. (a)), but also included an additional statute of general applicability that allowed for sentences beyond the statutory standard range. (*Blakely*, *supra*, 124 S.Ct. at p. 2535.) It was plainly this overarching enhancement statute with which the court was concerned: "Petitioner was sentenced to prison for more than three years *beyond what the law allowed for the crime to which he confessed*, on the basis of a disputed finding that he had acted with 'deliberate cruelty.'" (*Blakely*, *supra*, at p. 2543, italics added.) In essence, *Blakely* merely identified Washington's overarching statute as an enhancement provision, and thus subject to the *Apprendi* rule requiring proof to a jury beyond a reasonable doubt. Moreover, it dealt with a provision imposing punishment in excess of the term prescribed by the statute under which the defendant was convicted, not the selection among alternatives within the range authorized by that statute.

Next, we consider whether the principles underlying *Blakely* should nevertheless govern the matter before us. In this regard, we note that the majority in *Blakely* identified the statutory maximum for the relevant offense as the *upper term of the standard range specified for second degree kidnapping*: "The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months." (*Blakely*, *supra*, 124 S.Ct. at pp. 2534, 2537.) In *Blakely*, the identification of the statutory maximum was straightforward: 53 months was both the upper limit of the range identified in the charging statute, and what the court considered to be the longest sentence the trial court could impose without making additional findings of fact. As a practical matter, of course, a sentencing judge under the Washington scheme would have to exercise his or her discretion in arriving at a term somewhere within the 49-53 month range, and this discretion would be based not on whim, but upon facts pertaining to the crime and personal characteristics of the

defendant.[14] Notwithstanding this judicial determination of facts implicit in arriving at the 53-month term, the court considered the *upper limit of the charging statute* to be the statutory maximum.

Mindful of these points, we consider how the *Blakely* identification of the statutory maximum should be applied to section 245, subdivision (a)(1), in light of section 1170, subdivision (b). Or, to put it somewhat differently: Is the operation of section 245, subdivision (a)(1), and section 1170, subdivision (b), equivalent to the discretionary sentencing scheme of the Washington *charging* statute (53 month statutory maximum), or to the offending Washington *enhancement* statute (exceptional sentence)?

Looking first at section 245, subdivision (a)(1), the Legislature has prescribed an upper term of four years, and nothing in that statute requires the finding of an additional fact to impose this four-year term. *Blakely* is thus not invoked on the basis of the charging statute itself. As to section 1170, subdivision (b), the sentencing judge must find an aggravating factor and set forth reasons for imposing the upper term.[15]

That section 1170, subdivision (b), requires some additional fact for imposition of the upper term is not enough to trigger *Blakely*: even under the purely discretionary or indeterminate sentencing schemes the majority *accepted* in *Blakely*, a defendant may receive a higher sentence only if there is some additional factual circumstance warranting it. The question is the nature of the scheme in which the sentence is imposed, and whether it permits a term beyond what is authorized by the statute under which the defendant was convicted.

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14 Our Supreme Court has indicated that the circumstances of the offense and the offender must be considered in imposing sentence. (See, e.g., *In re Rodriguez* (1975) 14 Cal.3d 639, 655.)

15 We disagree with those courts that find section 1170 triggers *Blakely* and thus compels a jury trial on the aggravating factor(s) necessary for imposition of the elevated sentence. (See e.g., *People v. George* (2004) 122 Cal.App.4th 419, petn. for review pending, petn. filed Oct. 20, 2004; *People v. Lemus* (2004) 122 Cal.App.4th 614, petn. for review pending, petn. filed Oct. 27, 2004 (*Lemus*).)

In this regard, section 1170 is intended to do nothing more than guide the sentencing judge in exercising discretion authorized by the charging statute itself—such as section 245, subdivision (a)(1). Section 1170, subdivision (a)(1), declares that "the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense *as determined by the Legislature to be imposed by the court with specified discretion*." (Italics added.) Within this context, section 1170, subdivision (b), reads as follows: "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. . . ." (See also § 1170, subd. (c) [court shall state the reasons for its sentence choice on the record at the time of sentencing].)

Viewed in its context, the fact that section 1170, subdivision (b), dictates a midterm sentence in the absence of aggravating or mitigating factors is of no *Blakely* significance. There are several reasons section 1170, subdivision (b), confirms that our California sentencing scheme is the type of discretionary sentencing to which *Blakely* does not apply.

First, unlike an enhancement statute or the offending statute in *Blakely*, section 1170 does not *begin* the sentencing decision with a fixed term and then work its way up to

a higher sentence by piling on additional facts. Instead, the middle term is the *result* if the court, after exercising its discretion, finds *no* aggravating *or* mitigating factors. (*Lemus*, *supra*, 122 Cal.App.4th at p. 624, fn. 2 [Benke, J., dissenting]; see *People v. Thornton* (1985) 167 Cal.App.3d 72, 76-77.) By this and the accompanying procedure laid out in section 1170, it is clear the California Legislature intended a far different process than applies to the typical enhancement statutes found elsewhere in the code. (See, e.g., § 12022.53, subd. (b) ["Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years."]; see also Cal. Rules of Court, rule 4.405(c), (d) [distinguishing enhancement from upper prison term justified by aggravating circumstances]; § 1170.1, subd. (e) ["All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."].)

Second, the middle term provision on which Picado places such great reliance is quite unremarkable: common logic alone dictates that a perpetrator who is most culpable should receive a higher term, one who is less culpable should get a lower term, and one of average culpability—with no aggravating or mitigating factors—should obtain a term in the middle of the statutory range. How this codification of common sense could invoke a jury trial right escapes us. Similarly, the requirement that circumstances in aggravation and mitigation be established by a preponderance of the evidence suggests that the sentencing process was intended to reflect judicial discretion, rather than fact-finding subject to the Sixth Amendment. (See Cal. Rules of Court, rule 4.420, Advisory Committee Comment (2003) [proof by preponderance of the evidence "appears appropriate here, since there is no requirement that sentencing decisions be based on the same quantum of proof as is required to establish guilt. [Citation.]"].)

Third, most of the enumerated circumstances in aggravation that could lead to imposition of an upper term are not traditional elements of a crime, to which the Sixth Amendment jury trial right has extended historically, but rather circumstances that guide discretionary sentencing. (See, e.g., Cal. Rules of Court, rule 4.421 [including factors such

as whether the defendant was armed or used a gun, assumed a position of dominance in the offense, induced a minor to assist in the crime, or committed the offense while on probation or parole, as well as the vulnerability of the victim, the planning involved in carrying it out, the defendant's prior performance on probation or parole, and the defendant's prior convictions or prison terms]; see *Harris v. United States* (2002) 536 U.S. 545, 552-554 [brandishing and discharging of a firearm are traditionally federal sentencing factors rather than elements of a crime] (*Harris*).)

Fourth, and perhaps most importantly, the requirement in section 1170 for the judge to state reasons for the sentence is not the type of factual finding addressed in *Blakely*. Section 1170, subdivision (b), does not mandate a finding of each prescribed fact necessary for a particular sentence; rather, it merely requires a recitation of the main factor or factors supporting the ultimate sentencing choice. In giving reasons for the sentence, "the judge shall state in simple language the *primary* factor or factors that support the exercise of discretion or, if applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It shall be delivered *orally* on the record." (Cal. Rules of Court, rule 4.406(a), italics added; see Cal. Rules of Court, rule 4.420(e) [reasons shall be stated orally on the record and contain a concise statement of the "ultimate facts" justifying the sentence].) Furthermore, it matters not that the aggravating factors on which the sentencing judge may rely in imposing the upper term cannot be elements of the offense itself. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 350 (*Scott*).) The point is that section 1170, subdivision (b), is not a fact-finding statute, but a discretion-guiding statute.[16]

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16 It is not our place to attempt to justify the intriguing *Blakely* distinction between the treatment of sentences that are the result of judicial "fact-finding," and the treatment of sentences that emerge from unfettered judicial "discretion." It is enough for us to conclude, as we do, that the subject California statutes reflect the latter, and thus survive scrutiny under the *Blakely* majority opinion. Nor do we need to address the dissenting justices' predictions that *Blakely* spells the death knell for even purely discretionary or indeterminate sentencing schemes as well, since the majority in *Blakely* insisted otherwise.

Fifth, in actual practice the sentencing for violations of section 245, subdivision (a)(1), will bear instructive resemblance to the discretionary process the court in *Blakely* implicitly approved. Under both a purely discretionary process (e.g., selection of a sentence between 49 and 53 months) and section 245, subdivision (a)(1), the prosecutor would urge the higher sentence based on the nature of the defendant and the crime—such as the degree of violence imposed, the defendant's relative role in the crime, the planning and sophistication involved, and the vulnerable nature of the victims. Defense counsel would typically dispute these assertions, leaving the judge to resolve the factual disputes. For the benefit of the parties, counsel, victims, and appellate review, the court would justify its ultimate exercise of discretion by disclosing its conclusions as to the disputed factual circumstances of the crime and the defendant. There is no distinction, in logic or effect, between the elaboration of reasons in a discretionary system and the statement of reasons compelled by section 1170, subdivision (b). Consequently, there is no basis for concluding that the process embodied by section 245, subdivision (a)(1), and section 1170, subdivision (b), triggers the Sixth Amendment right to a jury trial on the factors that led the court to the sentence. (See *Apprendi*, *supra*, 530 U.S. at p. 494 [the dispositive question is "one not of form, but of effect"].)

Indeed, to hold to the contrary would lead to an incongruous result. If the legislative decision to require a judge to state reasons for the sentencing choice interjects a Sixth Amendment jury trial into the sentencing process, then the Legislature could simply preclude Sixth Amendment application by removing the salutary requirement of explaining a sentencing choice on the record. Surely our Sixth Amendment has not become so frail that its application hinges on *this* legislative prerogative. By the same token, the fact that California's determinate system provides greater guidance to judges and litigants—and greater protection for defendants against inappropriate sentences—cannot destroy either the propriety of the sentencing range deemed prudent by the Legislature *in the charging statute itself*, nor the discretionary process it expressly intended the judge to employ.

In the final analysis, the fact that section 1170, subdivision (b), mandates a middle term in the absence of aggravating or mitigating factors is immaterial to the concerns expressed in *Blakely*. Section 1170, subdivision (b), does not permit the trial court to exceed the maximum sentence prescribed for the crime in the charging statute. Nor does it require the finding of a particular fact in order to divert from the statutory maximum. Rather, it merely guides the trial court's discretionary selection of the proper term *from within the statutory range* for the subject offense. (See *Scott, supra,* 9 Cal.4th at pp. 349-350 [trial court has discretion to impose the lower, middle, or upper term].)[17] Even after *Apprendi*, factual findings that increase a sentence within the statutory maximum do not trigger Sixth Amendment protections. (*Harris, supra,* 536 U.S. at p. 558 ["Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments."].)

As Justice Benke observed in her dissent in *Lemus*: "The holdings of *Apprendi* and *Blakely* do not, I respectfully suggest, extend to the application of judicial discretion when that discretion is kept within a sentence range authorized by the statute for the crime of which the defendant was convicted. As the court notes in *Apprendi*, 'nothing . . . suggests that it is impermissible for judges to exercise discretion—taking into consideration various

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17 We recognize that the mere presence of judicial discretion in selecting the term, after the aggravating factors are found to exist, does not in itself immunize the sentencing process from Sixth Amendment scrutiny. The majority in *Blakely* stated: "Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." (*Blakely, supra*, 124 S.Ct. at p. 2538, fn. 8, italics in original.) That footnote, however, cannot mean that the presence of judicial discretion in selecting a sentence automatically compels application of *Blakely* to the ascertainment of the circumstances on which the sentence is based. For if it did, then the discretionary sentencing inherent in the 49-53 month range of the Washington charging statute—the very type of discretionary sentencing the *Blakely* majority accepted—was also impermissible, and the proclaimed statutory maximum of 53 months was not the statutory maximum at all.

factors relating both to offense and offender—in imposing a judgment *within the range* [italics in orig.] *prescribed by statute* [italics added].' (*Apprendi*, *supra*, 530 U.S. at p. 481.) Such factors are 'sentencing factors,' a term which 'appropriately describes 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.' (*Id*. at p. 494, fn. 19.)" (*Lemus*, *supra*, 122 Cal.App.4th at p. 623, italics in original [Benke, J., dissenting]; see also *Ibid.* [Benke, J., dissenting] ["The court in *Blakely* had no complaint with sentencing ranges for offenses, and it readily accepted the constitutional propriety of indeterminate sentencing schemes."].)

We agree that *Blakely* has not stripped trial courts of their discretion to fashion an appropriate sentence from among the alternative terms that have been expressly authorized for the subject offense. To the contrary, the court in *Blakely* distinguished between judicial fact-finding pertaining to the exercise of sentencing discretion within a statutory range, and judicial fact-finding that elevated a punishment beyond the sentence to which the defendant would otherwise have a right: "Of course indeterminate [sentencing] schemes involve judicial factfinding, in that a judge . . . may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts [properly subject to the court's discretion] do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely*, *supra*, 124 S.Ct. at p. 2540, italics in original.)

Upon conviction under section 245, subdivision (a)(1), the defendant has a "right" (in the absence of any pled and proven enhancement) to be sentenced to the term prescribed by that statute: two, three, or four years. (Cf. *Scott*, *supra*, 9 Cal.4th at pp. 353-354, 356-357, fn. 18 [if court chooses one of the terms set by statute, defendant cannot challenge the sentence as "unauthorized"—that is, unlawful "independent of any factual issues presented by the record at sentencing"—but only as an abuse of discretion in making the particular choice].) By imposing a four-year term, the court in this matter did not impose a sentence greater than the term to which Picado had a right.

Lastly, we point out that in distinguishing between permissible and impermissible schemes, the court in *Blakely* explained: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury." (*Blakely*, *supra*, 124 S.Ct. at p. 2540, italics in original.) We submit that section 245, subdivision (a)(1), as supplemented by section 1170, subdivision (b), is far closer in purpose and effect to the former discretionary system than to the latter enhancement system.

Section 245, subdivision (a)(1), simply does not present the constitutional problem with which the court was concerned in *Blakely*. Unlike the offending Washington statute, in California sentence enhancements that elevate a defendant's sentence beyond the range set forth in section 245 must be pled and proven to the jury beyond a reasonable doubt. (See § 1170.1, subd. (e).) Nothing in *Blakely* precludes the trial court from choosing the upper term from among the alternatives within the statutory range. Picado has failed to establish error.[18] (See *Lemus*, *supra*, 122 Cal.App.4th at p. 625 [Benke, J., dissenting] ["The constitutional defect found by *Blakely* in Washington's sentence scheme was that it allowed for the imposition of a term greater than the range authorized by law for the offense to which Blakely pled guilty based on a fact not found by a jury or admitted by the

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18 In convicting Picado under section 245, subdivision (a)(1), the jury necessarily found beyond a reasonable doubt that he committed an assault with a deadly weapon or by means of force likely to produce great bodily injury. We would conclude from this verdict, as well as the evidence in the case, that the jury would have found true beyond a reasonable doubt the following aggravating circumstances: the crime involved substantial violence, actual great bodily injury, and several acts reflecting a high degree of viciousness and callousness; and Picado induced others to participate in the crime and occupied a position of dominance and leadership over the other participants. Despite mitigating circumstances mentioned by the sentencing court, the Attorney General contends that any *Blakely* error was harmless. We need not resolve this issue, since *Blakely* does not apply.

defendant. California's law suffers no such defect and the sentencing in this case was proper."].)

4. Consecutive Terms

Next, Picado contends that under *Blakely* the court erred in ordering the terms for each of his convictions to run consecutively. In the absence of judicial action, he argues, sentences for two or more felonies are presumed to run concurrently under section 669, and they run consecutively only upon the finding of additional factors under California Rules of Court, rule 4.425. Picado is incorrect.[19]

In the first place, the imposition of consecutive sentences was not at issue in *Blakely*, and viewed in context there is no indication *Blakely* was intended to apply in that circumstance. *Blakely* (and *Apprendi*) were concerned with the finding of a fact "'that increases the penalty for *a* crime beyond the prescribed statutory maximum.'" (*Blakely*, *supra*, 124 S.Ct. at p. 2536, italics added; *Apprendi*, *supra*, 530 U.S. at p. 490.) Relatedly, *Apprendi* advised that the relevant issue was the sentence for a particular crime, not the aggregate effect of the defendant's multiple sentences. (*Apprendi*, *supra*, at p. 474.) As to each of Picado's convictions, a jury found him guilty beyond a reasonable doubt, and he received no more than the statutory maximum for each conviction; imposing those lawful sentences consecutively does not exceed the statutory maximum penalty for any one of his offenses. (See *Ochoa*, *supra*, 121 Cal.App.4th at pp. 1565-1567.)

In addition, contrary to Picado's assertion, there is no presumption of concurrent sentencing in California, in the sense that a concurrent term could possibly be construed to be a type of statutory maximum for *Blakely* purposes. When a defendant is convicted of multiple crimes, the trial court has discretion to impose sentence on the subordinate counts consecutively or concurrently. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1000.) We recognize, as Picado argues, that a sentence in section 669 reads: "Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment

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19 Whether *Blakely* applies to the imposition of consecutive sentences is pending before our Supreme Court in *People v. Black*, review granted, July 28, 2004, S126182.

shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." But this language merely mandates concurrent terms if the court has *failed to indicate* whether a sentence is to be consecutive or concurrent. It does not create a presumption favoring concurrent terms. (See *People v. Reeder* (1984) 152 Cal.App.3d 900, 923 ["trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing"].)[20]

There was no error in imposing consecutive sentences.

III. DISPOSITION

This matter is remanded to the trial court for correction of the abstract of judgment, and recalculation of presentence credits, consistent with this opinion. In all other respects, the judgment is affirmed. The trial court is further directed to forward a copy of the corrected abstract of judgment to the Department of Corrections.

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20 The Attorney General also argues there is no statutory requirement that the trial court make any findings of fact before imposing consecutive sentences. (§ 669.) Although section 1170, subdivision (c), requires the trial court to "state the *reasons* for its sentence choice on the record,"(italics added) this merely creates a record to facilitate appellate review of the sentencing choice for an abuse of discretion. (*People v. Stewart* (2001) 89 Cal.App.4th 1209, 1215.) It does not require a finding of additional facts. California Rules of Court, rule 4.425, does set forth "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences." Nonetheless, unlike the excessive sentence in *Blakely*, the imposition of consecutive sentences does not represent a penalty in excess of a statutory maximum, necessarily based on a fact neither found by the jury nor admitted by the defendant.

STEVENS, J.

I concur.

GEMELLO, J.

(A102251)

JONES, P.J., Concurring and Dissenting

I concur with all of the majority's reasoning and conclusions, including its analysis of Mauricio Picado's (Picado) constitutional challenge to imposition of consecutive terms, with the important exception of part II.D.3. I do not agree that *Blakely v. Washington* (2004) ____U.S.____ 124 S.Ct. 2531 (*Blakely*) does not compel reversal of the upper term imposed for Picado's conviction of count three, felony assault with a screwdriver.

To assess *Blakely's* impact on our review of Picado's sentence on count three, I believe *Blakely's* recitation of the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) bears repeating, for it defines our query: "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations omitted.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely*, *supra*, 124 S.Ct. at p. 2537; maj. opn. p. 25.)

In finding California's tripartite determinate sentencing scheme satisfies the constitutional requirements of *Blakely*, the majority accepts *Blakely's* characterization of the "statutory maximum" for purposes of determining the maximum punishment a judge may impose based on a jury's verdict or admissions by the defendant. (Maj. opn. pp. 23, 24.) Nevertheless, it concludes that California trial courts retain discretion to impose the upper term based on the court's, not the jury's, findings of aggravated factors because, the majority summarily declares, "[o]n the face of the statute, the maximum statutory term for a violation of [Penal Code] section 245, subdivision (a)(1), is four years." (Maj. opn. p. 24.) In short, the upper term specified in California's Penal Code is the statutory maximum for a given offense. The majority's conclusion relies on *Blakely's* statements

that the "facts admitted in [defendant Blakely's] plea [of second degree kidnapping], standing alone, supported a maximum sentence of 53 months," i.e., the upper end of the 49-53 month "standard range" specified for second degree kidnapping under Washington law, and "[Mr. Blakely] was sentenced to prison for more than three years beyond what the [Washington] law allowed for the crime to which he confessed. . . ." (*Blakely*, *supra*, 124 S.Ct. at pp. 2534, 2543; maj. opn. pp. 25-26.) The majority achieves its result by equating Washington's "standard range sentence" specified in Washington's charging statute with California's tripartite lower-mid-upper term determinate sentence scheme. (Maj. opn. p. 26.) The majority suggests that since the Washington sentencing judge's selection of a term at the upper limit of a four *month* range of 49 to 53 months is the statutory maximum in *Blakely*, the upper limit of the tripartite range in California must be California's statutory maximum. I cannot subscribe to this reasoning, which is in essence an assignment of desired labels to avoid the burden of extending *Apprendi* to California's determinate sentencing statutes.[1]

Indeed, a comparison of the Washington and California sentencing schemes shows that Washington's "standard sentence range" for a specific offense is more analogous to the midterm of California's tripartite sentencing provisions than to the full range of our tripartite scheme. Under the Washington Sentence Reform Act of 1981 (RCW § 9.94A et seq.), a sentence within the "standard sentence range" assigned to an offense is not appealable except to challenge the procedure by which a sentence within the standard

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1 That burden is previewed by Justice O'Connor in her *Blakely* dissent: "The consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. [Citations.] Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy [and sentences imposed under the guidelines since *Apprendi*] arguably remain open to collateral attack [via habeas review.] . . . [¶] The practical consequences for trial courts, starting today, will be equally unsettling. . . . The Court ignores the havoc it is about to wreak on trial courts across the country." (Dis. opn. of O'Connor, J., pp. 2548-2549.)

sentence range was imposed. (RCW §§ 9.94A.030(40); 9.94.585; *State v. Ammons* (1986) 713 P. 2d 719, 724 (*Ammons*).) The "standard range" sentence is presumed constitutional; thus, when a sentence is within the presumptive standard range, there is no abuse of discretion as a matter of law in imposing that sentence. (*Ammons, supra,* at p. 724.) As appears from *Blakely*, the "standard sentence range" for a particular offense under Washington law can be very narrow, e.g., four months for second degree kidnapping with a firearm. (*Blakely*, *supra*, 124 S.Ct. at p. 2535.)

Washington law authorizes imposition of an "exceptional sentence" longer than the "standard sentence range" if the court finds '"substantial and compelling reasons justifying an exceptional sentence'" (*Blakely, supra,* 124 S.Ct. at p. 2535; RCW § 9.94A.120(2),) and articulates aggravating factors to justify such a sentence. But the "exceptional sentence," which is subject to appeal, can be no longer than the maximum sentence prescribed by statute for the class of offenses to which the particular crime is assigned, e.g., 10 years for class B felonies, which includes second degree kidnapping. (*Blakely*, *supra*, at p. 2535; RCW § 9.94.585; *Ammons, supra*, 713 P.2d at p. 724.) Thus, an "exceptional sentence" is still within the statutory maximum applicable to crimes within a particular class of offenses, but it will be greater than the "standard sentence range" assigned to a specific crime within that class. As a consequence of *Blakely*, a defendant in Washington now has the right to have a jury find those disputed aggravating factors that justify an "exceptional sentence" greater than the "standard sentence range" and up to the maximum length of sentence statutorily assigned to the class of offense. (*Blakely*, *supra*, 124 S.Ct. at p. 2543.)

Like California's statutory scheme, Washington's Sentence Reform Act lists aggravating factors that justify a departure from the presumptively lawful standard range. (Cf. Cal. Rules of Court, rule 4.421.) As in California, the recited factors are "illustrative rather than exhaustive." (*Blakely, supra,* 124 S.Ct. at p. 2535; RCW § 9.94A.120(2); Cal. Rules of Court, rule 4.408(a); *People v. Brown* (2000) 83 Cal.App.4th 1037, 1044 & citations therein.) And where California precludes reliance on an aggravating fact to support imposition of the upper term, if the fact is an element of the offence (Cal. Rules

of Court, rule 4.420(d); *People v. Webber* (1991) 228 Cal.App.3d 1146, 1169), in Washington "'a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense,'" i.e., "beyond the bare elements of the offense." (*Blakely*, *supra*, at p. 2535, quoting *State v. Gore* (Wash. 2001) 21 P.3d 262, 277; *Blakely*, *supra*, at p. 2538, fn. 8.) For example, "planning" is a recognized factor justifying an "exceptional sentence" in Washington. However, it cannot be used to impose an "exceptional sentence" in an attempted first degree murder conviction because "planning" is included in the premeditated element of the offense, and thus has already been considered. (See *State v. Dunaway* (1987) 743 P.2d 1237, 1242.)

Under California's determinate sentencing law, the court "shall order" imposition of the midterm of the tripartite sentence assigned to an offense unless there are circumstances in aggravation (or mitigation), but the court is not required to state its reasons for imposing the midterm. (Pen. Code, § 1170, subd. (b); *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 786.) By contrast, to impose the upper term for an offense, i.e., its statutory maximum, the court is mandated to make factual findings of circumstances in aggravation that justify imposition of the upper term and to set forth those findings on the record. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rules 4.420(a), 4.421.) "Selection of the upper term is justified only if, after consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." (Cal. Rules of Court, rule 4.420(b).) In short, California's scheme for selection of a base term[2] for an offense is at its heart a fact-finding process assigned by our Legislature to the judiciary.

Although not identical, the California and Washington (as described in *Blakely*) sentencing schemes are far more alike than different. The default sentence, using facts found only by the jury or admitted by the defendant, is the midterm in California and the

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2 "'Base term' is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed." (Cal. Rules of Court, rule 4.405(b).)

de minimus "standard sentence range" in Washington. To impose a longer term, the sentencing courts of both states must find and identify specific factors or circumstances in aggravation, which are facts additional to those found by the jury in its verdict or admitted by the defendant in a plea.[3] California's "circumstances in aggravation" that permit an upper term are comparable to Washington's "aggravating factors" that permit an "exceptional sentence," e.g., victim vulnerability, sophisticated planning. (Cal. Rules of Court, rule 4.421(a); RCW § 9.94A.390.) Contrary to the majority's characterization of Washington's "exceptional sentence" as an enhancement statute (maj. opn. p. 25)--which under California law would have to be pled and proved (*People v. Hernandez* (1988) 46 Cal.3d 194, 208)--an "exceptional sentence" in Washington is analogous to an upper term in California, given the procedure by which, until *Blakely*, both states imposed them.

If, according to *Blakely*, the "relevant statutory maximum" sentence--the maximum sentence a court may impose without any additional factual findings--under Washington law is its nonappealable "standard range" sentence, by parity of reasoning, California's relevant statutory maximum sentence is the midterm. Any longer sentence in California, as in Washington, before the *Blakely* opinion, has required a court to make additional factual findings. (Pen. Code, § 1170, subd. (b).)

Unstated in the majority's rejection of *Blakely's* application to California's determinate sentencing scheme is its true concern, which I share: California courts face an enormous undertaking in converting what has been entirely a judicial responsibility to one shared with the jury. While translating statutorily endorsed circumstances in aggravation to jury instructions may be difficult, it is not impossible and does not preclude a judicial role as the ultimate sentencing authority, subject to the jury's need to

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[3] Of course, nothing precludes the defendant from admitting factors in aggravation as part of a negotiated plea, in which case the Sixth Amendment concern of *Blakely* is not implicated.

find whatever facts the Legislature chooses to label sentencing factors. (*Blakely*, *supra*, 124 S.Ct. at p. 2539.)[4]

In my view, the *Blakely* court's "commitment to *Apprendi*" (*Blakely*, *supra*, 124 S.Ct. at p. 2538) dictates that a term in excess of what I conclude is California's "statutory maximum," i.e., the midterm (here, three years on count three, violation of Penal Code section 245, subdivision (a)(1), cannot be imposed on Picado unless a jury finds the factual circumstances on which the court relies to be true beyond a reasonable doubt or the defendant admitted such facts. "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." (*Blakely*, *supra*, 124 S.Ct. at p. 2543, italics in original.)

Imposition of the upper term for Picado's aggravated assault conviction was error.

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Jones, P.J.

4 As *Blakely* notes, a defendant who stands trial by jury may well consent, with appropriate waivers, to judicial factfinding as to sentencing decisions. (*Blakely*, *supra*, 124 S.Ct. at p. 2541.)

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