

Petition for Review (filed after U.S. Supreme Court decision in
Cunningham)

- *Blakely* Issue: Imposition of Upper Term
 - Mixed Factors: (1) burglary involved a taking of “great monetary value”, (2) juvenile criminal history was serious, & (3) poor performance on probation.
 - *Blakely* claim raised in Court of Appeal, but not in superior court (post-*Black* sentencing)
 - Guilty Plea
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Posted: Feb. 17, 2007

People v. Corona, nos. A113511 and S150057

Author: Alan Siraco

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

<p>PEOPLE OF THE STATE OF CALIFORNIA,</p> <p>Plaintiff and Respondent,</p> <p>v.</p> <p>ABRAHAM R. CORONA,</p> <p>Defendant and Appellant.</p>	<p>No.</p> <p>Court of Appeal No. A113511</p> <p>Superior Court No. 06-6980504</p>
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APPELLANT'S PETITION FOR REVIEW

After a decision by the Court of Appeal for the State of California,
First Appellate District, Division Five

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**PEOPLE OF THE STATE
OF CALIFORNIA,**

Plaintiff and Respondent,

v.

ABRAHAM R. CORONA,

Defendant and Appellant.

No.

APPELLANT’S PETITION FOR REVIEW

Appellant, Abraham Corona, hereby petitions this court for review of the unpublished decision by Division Five of the First District Court of Appeal issued December 28, 2006. A copy of the slip opinion is attached. (Cal. Rules of Ct., rule 8.504(b).)

GROUND AND NECESSITY FOR REVIEW

Appellant Abraham Corona, who accompanied a friend into a jewelry store where that friend got into an altercation with another acquaintance, pled to one count of burglary and one count of participation in gang activity. He was sentenced to the upper term

for the burglary based on conduct-related “aggravating circumstances” and appellant’s juvenile offense history.

The Court of Appeal held there was no *Blakely* error under compulsion of stare decisis, *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 and *People v. Black* (2005) 35 Cal.4th 1238. (Opinion at p. 2.) Review is necessary to address the continued validity of *Black* in light of the United States Supreme Court decision in *Cunningham v. California* (Jan. 22, 2007; 05-6551) 549 U.S. ____ [2007 U.S. LEXIS 1324, 2007 WL 135687, 2007 Daily Journal D.A.R. 1003]. (Cal. Rules of Ct., rule 8.500(b)(1).)

ARGUMENT

I. BLACK IS NO LONGER VALID IN LIGHT OF CUNNINGHAM AND APPELLANT’S SENTENCE MUST BE VACATED BECAUSE IN CHOOSING THE UPPER TERM FOR THE BASE TERM, THE COURT RELIED ON AGGRAVATING FACTORS FOUND TRUE BY A PREPONDERANCE OF THE EVIDENCE IN THE ABSENCE OF A WAIVER OF JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT.

A. Factual Background

Without stating the standard of proof the court was

employing, it imposed the aggravated term on Count 2 (3 years), based its finding that the burglary involved a taking of “great monetary value” and was extraordinarily serious. The court also based the aggravated term on its finding that appellant’s juvenile criminal history was serious and he had a history of poor performance on probation. (RT III, pp. 53-54.) Though counsel did not object to the sentence on Sixth Amendment grounds, her omission was excused, because the law of this state currently does not recognize such an objection. (*People v. Black, supra*, 35 Cal.4th 1238.) In addition, counsel did argue for a low or middle term under California law, and only where a defendant stand silent in the face of the court’s exercise of sentencing discretion has he been held to implicitly waive or otherwise forfeit review of sentencing error. (*People v. Scott* (1994) 9 Cal.4th 331, 351 [“lack of a timely and meaningful objection forfeits or waives the claim” in a case where the defendant or his counsel failed to present any argument or sentencing request].)

B. The United States Supreme Court Has Disapproved *Black*.

The aggravated term in this case violated the Sixth and Fourteenth Amendments to the United States Constitution. (*Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531].)

As this Court is aware, the United States Supreme Court struck down California's Determinate Sentence Law ("DSL") on precisely the grounds urged in this appeal. (*Cunningham v. California*, *supra*, 2007 U.S. LEXIS 1324, 2007 WL 135687, 2007 Daily Journal D.A.R. 1003.)

Cunningham established that because a DSL upper term requires findings of additional aggravating circumstances beyond the minimum elements of the offense, "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum" for *Apprendi-Blakely* purposes. (*Cunningham*, *supra*, slip opn. at pp. 15-16, 2007 U.S. LEXIS 1324, *35.) "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL violates *Apprendi's* bright-line

rule.” (*Ibid.*)

Specifically rejecting the reasoning in *Black*, the Court held, “Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent. [Fn.]” (*Id.*, slip opn. at p. 21, 2007 U.S. LEXIS 1324, *44.) *Cunningham* confirms that the sentencing judge’s determination of aggravating factors and his reliance on those factors to impose the middle term violated appellant’s constitutional rights to a jury trial and due process.

Under *Cunningham*, *Blakely* and *Apprendi*, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Cunningham v. California*, *supra*, slip opn. at p. 1, 2007 U.S. LEXIS 1324, *11; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 120 S.Ct. 2348]; *Blakely v. Washington*, *supra*, 542 U.S. at p. 301.) The sentencing court here violated the Sixth and Fourteenth Amendments by imposing an upper term based on its own findings

of aggravating facts not admitted in the plea. Appellant's plea admitted only that he committed a commercial burglary for the benefit of a gang and that he participated in gang activity in committing the burglary. He did not admit that any property was taken, nor its value. Nor did he admit the burglary was particularly serious or that he had any juvenile criminal history. Further, though he waived his right to a jury on the underlying offenses as charged, he did not waive his right to fact finding of additional sentencing circumstances not charged in the complaint. Even if his trial waiver can be extended to the sentencing facts, he neither admitted those facts nor waived his right to their proof beyond a reasonable doubt.

Though the sentencing court did not expressly state what standard of proof it was applying in making the findings of aggravating circumstances, from its silence this court must presume that the judge found the aggravating factors true by a mere preponderance of the evidence in accordance with rule 4.420(b) of the California Rules of Court. (*People v. Scott, supra*, 9 Cal.4th at p. 349 [preponderance standard applies]; *People v. Mosley* (1997) 53

Cal.App.4th 489, 496 [presumption on a silent record is that the court followed settled law].) In view of the sentencing court's finding of aggravating factors by a lower standard of proof, the court's selection of the upper term was tainted by *Blakely* error and renders appellant's sentence unconstitutional. (See, *United States v. Velasco-Heredia* (9th Cir. 2003) 319 F.3d 1080, 1085 [*Apprendi* error occurred when trial court used the preponderance standard at sentencing to determine drug quantity].)

C. The "Aggravating Circumstances" Upon Which The Court Relied Do Not Come Within The *Almendarez-Torres* Exception.

It is true that some of the aggravating factors found present were arguably related to recidivism: that appellant's juvenile history was serious and that he had a record of poor performance on probation. The so-called "exception" to the right to a jury trial on the fact of a prior conviction (*Almendarez-Torres v. United States* (1998) 523 U.S. 224 [140 L.Ed.2d 350, 118 S.Ct. 1219]), however, does not apply to them. That exception is read very narrowly and applies only to the mere fact of a prior conviction. (*Shepard v. United States*

(2005) 544 U.S. 13, 25 [161 L.Ed.2d 205, 125 S.Ct. 1254], plur. opinion.)

The arguably recidivism-related factors present in this case fall outside of the *Almendarez-Torres* exception because they go beyond the mere fact of a prior conviction. First, they are among the enumerated “aggravating circumstances” in rule 4.421 “relating to the defendant.” Such factors consist entirely of conduct-related facts that go beyond the mere fact of status. The rule must be construed accordingly. (See, *People v. Gordon* (2001) 90 Cal.App.4th 109, 1412 [under the doctrine of *ejusdem generis*, specified terms limit the construction of the statute to other similar items]; *People ex rel. Mautner v. Quattrone* (1989) 211 Cal.App.3d 1389, 1395 [list of knives prohibited under section 653k, though not exhaustive, contemplates inclusion of other knives with similar characteristics].)

Further, one panel of the California Court of Appeal has recently held that “using a juvenile adjudication to enhance the sentence in a criminal case is a constitutionally impermissible use of a nonjury judgment to prove the fact of recidivism under *Apprendi*.” (*People v. Nguyen* (January 22, 2007, No. H028798) ___ Cal.App.4th ___

, slip opinion at p. 33, 2007 Cal. App. LEXIS 74, *59.) In any event, despite an indication that the Court is unlikely to take up the *Almendarez-Torres* issue soon in light of other issues on the Court's docket (see, *Rangel-Reyes v. United States* (2006) ___ U.S. ___, 165 L.Ed.2d 910, 126 S.Ct. 2873, Statement of Stevens, J. regarding denial of certiorari), there appear to be enough votes on the United States Supreme Court to overrule *Almendarez-Torres*. (See, *Id.*, dissent. opinion of Thomas, J.; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 520-521, concur. opinion of Thomas, J.; *Shepard v. United States*, *supra*, 161 L.Ed.2d at pp. 218-219, concur. opinion of Thomas, J.) Whether based on a recognition that a majority of the United States Supreme Court sees no distinction between the mere fact of a prior conviction or other conduct-related factors supporting the upper term sentence or on the recognition that such facts as the character of prior criminal history or performance on probation go beyond the mere fact of the prior conviction, such factors as were cited by the sentencing court here fall within the type of fact-finding disapproved in *Cunningham*.

D. Prejudice

The United States Supreme Court has held in a similar situation that the deprivation of a jury trial on a sentencing fact or proof of the truth of a sentencing fact beyond a reasonable is not structural error reversible per se. (*Washington v. Recuenco* (2006) ___ U.S. ___ [165 L.Ed.2d 466, 477, 126 S.Ct. 2546, 2553].) Rather, the error will require reversal unless the Attorney General can show it was harmless beyond a reasonable doubt. (*Id.*, 165 L.Ed.2d at p. 475; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].) Here, since the factors upon which the court relied were neither admitted by appellant, nor are they implicit in any fact necessarily found by the court based on appellant's plea, it will be impossible for the Attorney General to demonstrate the sentence was "surely unattributable" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 113 S.Ct. 2078]) to the erroneous factfinding. Nor is there any statutory or constitutional mechanism by which retrial can be had, because appellant's judgment of conviction based on a guilty plea cannot be set aside. Therefore, appellant's sentence based

on aggravating factors found true by a standard of proof less than beyond a reasonable doubt, must be reversed.

CONCLUSION

For the foregoing reasons, appellant submits review is warranted in this case.

DATED: February 5, 2007 Respectfully submitted,

By: _____
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CERTIFICATION OF WORD COUNT
(Cal. Rules of Ct., rule 8.504(d))

I, Alan Siraco, appellate counsel of record for Abraham Corona in this matter, do hereby certify that I used the word processing program WordPerfect to generate this petition, and according to that software program the word count of this brief is 1,599.

DATED: February 5, 2007 By: _____
ALAN SIRACO