

PEOPLE v. CUNNINGHAM, A103501, Div. 5

SUPPLEMENTAL OPENING BRIEF

Panel Attorney: Peter Gold

II. THE TRIAL COURT ERRONEOUSLY RELIED ON FIVE OF SIX AGGRAVATING FACTORS IN SENTENCING MR. CUNNINGHAM TO THE UPPER TERM FOR THE SECTION 288.5 CONVICTION.

In Appellant's Opening Brief, Mr. Cunningham has explained that five of the six aggravating factors which the trial court relied on to impose the upper term of 16 years for the Penal Code section 288.5 continuous sexual abuse conviction were inapplicable here. (Appellant's Opening Brief ("AOB") 44-53.) Of the five aggravating factors which the court erroneously found to exist, two were unsupported by the evidence: that Mr. Cunningham acted with great violence, great bodily harm, or a high degree of callousness or viciousness, and that he had engaged in violent conduct indicating a serious danger to society. (See AOB 47-51.)

In this regard, "[a] trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) An appellate court generally reviews findings of fact under the substantial evidence test. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.) However, in applying the substantial evidence test, a reviewing court must determine what burden of proof the prosecution had in the sentencing court. Under California Rules of Court, rule 4.420(b), "[c]ircumstances in aggravation and mitigation shall be established by a preponderance of the evidence." (See also *People v. Scott* (1994) 9 Cal.4th 331, 349.) Yet, recent United

States Supreme Court authority makes clear that the preponderance of the evidence standard no longer applies to the establishment of factors in aggravation under California's Determinate Sentencing Law.

In *Blakely v. Washington* (2004) 542 U.S. ___, 2004 WL 1402697 (decided June 24, 2004), and *Apprendi v. New Jersey* (2000) 530 U.S. 466, the Supreme Court determined that a criminal defendant has a constitutional right to a jury trial and to proof beyond a reasonable doubt with respect to the existence of non-recidivist aggravating factors. Accordingly, the traditional sufficiency of the evidence standard applies to non-recidivist aggravating factors, requiring the reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the" aggravating factors to exist "beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 (emphasis in original).) Applying this standard of proof, and for the reasons Mr. Cunningham discussed in his opening brief (AOB 47-51), the evidence was insufficient to establish that Mr. Cunningham acted with great violence, great bodily harm, or a high degree of callousness or viciousness, or that he had engaged in violent conduct indicating a serious danger to society. Consequently, as explained in Mr. Cunningham's opening brief, this court should reverse his sentence. (See AOB 54-55.)

III. MR. CUNNINGHAM WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND DUE PROCESS WHEN THE TRIAL COURT IMPOSED THE UPPER TERM OF 16 YEARS FOR THE SECTION 288.5 CONVICTION BY RELYING ON AGGRAVATING FACTORS FOUND TRUE NEITHER BY A JURY NOR BEYOND A REASONABLE DOUBT.

A. The Relevant Facts.

The indictment in this case alleged a violation of continuous sexual abuse in violation of Penal Code section 288.5, subdivision (a), as follows:

"On or about January, 2000 through December, 2000, at San Pablo, in Contra Costa County, the Defendant, JOHN E. CUNNINGHAM, who resided in the same home with and had recurring access to John Doe, who was a minor child under the age of 14 years, from January, 2000, to December, 2000, a period of not less than three months in duration, did unlawfully engage in three and more acts of lewd and lascivious conduct with the child." (CT 192.)

The trial court instructed the jury that in order to convict Mr. Cunningham of this offense, it had to find: "One, a person was a resident in the same house with a minor child; and [¶] Two, that person over a period of time, not less than three months in duration, engaged in three or more acts of lewd or lascivious conduct with the child under the age of 14 years at the time of the commission of the lewd conduct." (RT 638.) The jury convicted Mr. Cunningham as charged, stating in its verdict form that it found Mr. Cunningham guilty of "a violation of PC Sec. 288.5, (continuous sexual abuse), as set forth in the indictment." (CT 460.) Other than what was stated on its verdict form, the jury made no other factual findings regarding Mr. Cunningham or his guilt.

As Mr. Cunningham explained in his opening brief, prior to sentencing, the trial court appointed Dr. Richard Lundeen pursuant to Penal Code section 288.1 to examine Mr. Cunningham and submit a written report and recommendation. (CT 466; *see* AOB at 35-38.) Dr. Lundeen concluded that there would be no danger to John Doe or others if Mr. Cunningham were released. (CT 470.) He further concluded that "either Mr. Cunningham did not engage in inappropriate sexual behavior as charged, or else he has repressed those behaviors to a depth where he cannot deal with them at a conscious level at this time. In either case, he would be a poor candidate for rehabilitative therapy if he does not have a condition from which he is trying to rehabilitate." (CT 554.)

In addition, the defense hired Dr. John E. Kincaid, a psychologist, to interview Mr. Cunningham and administer psychological tests. (CT 506.) Dr. Kincaid submitted a report concluding that Mr. Cunningham would benefit from, and be amenable to treatment, which would be unavailable to him in prison. (CT 515-516.) He further concluded that Mr. Cunningham would be unlikely to pose a risk to John Doe if granted probation. (CT 515.) Based on Dr. Kincaid's report, defense counsel filed a Sentencing Memorandum requesting probation for Mr. Cunningham. (CT 473-481.) The defense also submitted numerous letters to the court attesting to Mr. Cunningham's good character, good works, and ties in the community. (CT 517-543.)

The prosecutor filed a Sentencing Brief asking that Mr. Cunningham be sentenced to the maximum term allowed by law. (CT

468-471.) As aggravating factors, the prosecutor cited threats of great bodily harm, a high degree of viciousness or callousness, a particularly vulnerable victim because of his age and relationship to Mr. Cunningham, Mr. Cunningham's use of his position as parent to commit the crimes, the violent conduct, and Mr. Cunningham's status as a police officer. (CT 469-470.) The prosecutor dismissed the conclusions of Dr. Lundeen out of hand. (CT 470.)

Finally, the probation officer believed that Mr. Cunningham was not a suitable candidate for probation, but failed to recommend a particular sentence. (CT 556.) The probation officer cited Mr. Cunningham's lack of a prior record as a mitigating factor. (CT 557.) As aggravating factors, she cited "great sexual violence and callousness toward an [sic] ten-year old child," a vulnerable victim who relied on his father for support, Mr. Cunningham's taking advantage of a position of parental trust, and that Mr. Cunningham "engaged in violent conduct which indicates a serious danger to children in society." (CT 557.)

At the sentencing hearing, four people spoke to Mr. Cunningham's good character and regard in the community, and twenty more people were present and willing to speak on his behalf. (RT 716-720.) Defense counsel argued that Mr. Cunningham's amenability to treatment and support from his family and community made him an excellent prospect for rehabilitation. (RT 722.) He also noted that John Doe did not want Mr. Cunningham to be imprisoned. (RT 726.) Further, counsel objected to the finding of factors in aggravation, including using John Doe's

vulnerability and Mr. Cunningham's position of trust as his parent as aggravating factors (as sought by the prosecution), since those were elements of the section 288.5 conviction. (RT 722.)

The trial court first denied Mr. Cunningham probation. (RT 728.) The court then sentenced him to the upper term of 16 years in state prison for the continuous sexual abuse conviction. (CT 544, 587.) In doing so, the court found the existence of six aggravating factors: (1) great violence, great bodily harm, and threat thereof disclosing a high degree of viciousness and callousness, (2) a vulnerable victim due to his age and dependence on Mr. Cunningham as his father and primary caretaker, (3) a threat of bodily injury to coerce the victim to recant, (4) Mr. Cunningham's taking advantage of a position of trust or confidence as John Doe's father and caregiver, (5) Mr. Cunningham's engaging in violent conduct which indicates a serious danger to society, and (6) Mr. Cunningham's employment as a police officer. (RT 728-729.) The court found one mitigating factor: Mr. Cunningham's lack of any prior record. (RT 728.)

As discussed more fully below, Mr. Cunningham was deprived of his state and federal constitutional rights to a jury trial and due process because the trial court imposed the upper term of 16 years by relying on aggravating factors found true neither by a jury nor beyond a reasonable doubt. Accordingly, Mr. Cunningham's sentence must be reversed.

- B. **Mr. Cunningham Was Deprived Of His Constitutional Right To Have A Jury Determine The Truth Of Aggravating Factors Beyond A Reasonable Doubt.**

The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property without due process of law" Similarly, the Fourteenth Amendment prohibits any state from depriving a person of liberty without "due process of law." In addition, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

Taken together, these amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510; *see also Mullaney v. Wilbur* (1975) 421 U.S. 684, 698; *In re Winship* (1970) 397 U.S. 358, 363-364.) Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Fifth and Sixth Amendments require to be proven to a jury beyond a reasonable doubt. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490; *Mullaney v. Wilbur, supra*, 421 U.S. at p. 698; *Specht v. Patterson* (1967) 386 U.S. 605, 607; *People v. Hernandez* (1988) 46 Cal.3d 194, 205.) Indeed, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.)

In *Apprendi*, defendant had been convicted of possession of a firearm for an unlawful purpose, a "second degree" offense punishable by imprisonment for between five and ten years. However, pursuant to New Jersey's hate crime statute, the trial court at sentencing found by a preponderance of the evidence that defendant had committed the crime with a purpose to intimidate individuals because of race. Under the hate crime statute, this finding increased defendant's sentence to imprisonment for between ten and twenty years. The United States Supreme Court held that although the New Jersey Supreme Court characterized the hate crime enhancement as a "sentencing factor," it was actually an element of the offense which should have been decided by the jury. (530 U.S. at p. 492.) The increase in the prescribed statutory maximum penalty to which defendant was exposed violated his Fifth and Sixth Amendment rights because the factual determination which served to elevate his maximum statutory exposure had not been submitted to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490-492.) Indeed, the Supreme Court concluded that *all* facts (other than the fact of a prior conviction) which increase the penalty beyond the prescribed statutory maximum must be found by a jury to exist beyond a reasonable doubt:

"[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" (*Id.* at p. 490, quoting *Jones v. United States* (1999) 526 U.S. 227, 252-253.)

Thereafter, in *Ring v. Arizona* (2002) 536 U.S. 584, the Supreme Court applied the holding of *Apprendi* to Arizona's death penalty law.

Under Arizona law, the maximum punishment for first-degree murder was life imprisonment unless the trial court found beyond a reasonable doubt that one of ten statutorily enumerated aggravating factors existed. The Court held that defendant's death sentence under this law violated his right to a jury determination of guilt on every element of the crime charged. (*Id.* at p. 589.) Thus, in line with *Apprendi*, the Court found that the Sixth Amendment mandates that the existence of an aggravating factor necessary for the imposition of the death penalty must be found by a jury rather than a sentencing judge. (*Id.* at p. 609.)

Most recently, the Court decided *Blakely v. Washington, supra*. In *Blakely*, defendant pleaded guilty to kidnaping his estranged wife while using a firearm. Under Washington law, the facts defendant admitted supported a prison sentence in the "standard range" of 49 to 53 months. However, Washington law also permitted the trial court to impose a sentence above the standard range if it found the existence of an aggravating factor demonstrating "substantial and compelling reasons justifying an exceptional sentence." (2004 WL 1402697 at p. 2.) Pursuant to this latter provision, the trial judge imposed an exceptional sentence of 90 months based on a finding that defendant had acted with "deliberate cruelty" in committing the kidnaping offense. (*Id.* at p. 3-4.)

Once again applying the holding of *Apprendi*, the Supreme Court reversed defendant's sentence. The Court first noted:

"[T]he '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*. 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 facts." (*Id.* at p. 4, emphasis in original.)

Applying this reasoning, the Court found that the statutory maximum sentence based solely on the facts defendant admitted in his guilty plea was the standard range of 49 to 53 months; the trial judge was prohibited from imposing the exceptional 90-month sentence on those facts alone. (*Id.* at p. 5.) Consequently, the judge's imposition of an additional three years beyond the statutory maximum was based on a factual finding to which defendant never confessed and which no jury had ever found true beyond a reasonable doubt. (*Ibid.*) The imposition of the 90-month exceptional sentence therefore violated defendant's Sixth Amendment right to trial by jury. (*Id.* at p. 5-6.)

California's Determinate Sentencing Law employs a system of sentencing choices much like Washington's sentencing scheme at issue in *Blakely*. Under Penal Code section 1170, subdivision (b), "[w]hen 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." (Emphasis supplied; *see also* Cal. Rules of Court, rule 4.420(a) ["The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation."].) Thus, under the Determinate Sentencing Law, the middle term is the presumptive sentence (*see, e.g., People v. Arauz* (1992) 5 Cal.App.4th 663, 666 (maj. opn.) and 674 (conc. & dis. opn. of Yegan, J.)), or as in

Blakely, the "statutory maximum" allowable for the particular offense. In fact, a trial court need not even state reasons for imposing the middle term. (*People v. Arceo* (1979) 95 Cal.App.3d 117, 121.)

Furthermore, as in *Blakely*, the upper term may only be imposed where "exceptional" circumstances in the form of aggravating factors exist justifying a departure from the middle term. (*See, e.g., People v. Jackson* (1987) 196 Cal.App.3d 380, 390-391; Cal. Rules of Court, rule 4.420(b) ["Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation."].) Yet, the rules of court require only that the trial court find circumstances in aggravation by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b); *see also People v. Levitt* (1984) 156 Cal.App.3d 500, 515.)

California Rules of Court, rule 4.421 sets forth a non-exhaustive list of circumstances which may constitute aggravating factors. In addition, rule 4.408(a) provides that for purposes of making discretionary sentencing decisions, the sentencing court may consider "additional criteria reasonably related to the decision being made." (*Cf. Blakely v. Washington, supra*, 2004 WL 1402697 at p. 2 [Washington law providing "illustrative" list of aggravating factors which justify imposition of exceptional sentence].) However, the rules of court make clear that in finding the existence of an aggravating factor, the court may *not* rely on a factor which is an element of the crime. (Cal. Rules of Court, rule 4.420(d) ["A fact that is an element of the crime shall not be used to

impose the upper term."]; *see also People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [trial court erroneously relied on vulnerability based on young age of victim as aggravating factor in sentencing resident child molester because age range was specified in underlying offense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159-1160 [trial court improperly aggravated sentence based on age of molest victim since age was an element of underlying offense]; *cf. People v. Young* (1983) 146 Cal.App.3d 729, 733-734 [finding prohibited dual use of facts in using firing of gun and threat of injury from gun as aggravating factors where gun use was basis of sentence enhancement].) Similarly, even where an aggravating factor technically is not an element of the underlying crime, the court may not rely on it where the factor is inherent in the crime. (*See, e.g., People v. Young, supra*, 146 Cal.App.3d at p. 734 [trial court improperly relied on "extreme serious nature of the offense" to aggravate defendant's sentence for assault with a deadly weapon since assault with a deadly weapon is "obvious[ly]" an extremely serious offense].) Consequently, under California's Determinate Sentencing Law, when a sentencing court finds the existence of factors in aggravation, it necessarily finds the existence of facts *beyond* which the jury found to exist in arriving at its verdict.

Penal Code section 288.5 provides that one convicted of continuous sexual abuse of a child "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." (Pen. Code § 288.5, subd. (a).) As *Apprendi* and *Blakely* make clear, the middle term of 12 years is the

"statutory maximum" sentence that a judge may impose for a section 288.5 conviction "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely v. Washington, supra*, 2004 WL 1402697 at p. 4.) Without the existence of additional aggravating factors, a departure from the middle term sentence of 12 years to the upper term of 16 years is unauthorized. (Pen. Code § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).) However, as *Apprendi* and *Blakely* also make clear, before any such aggravating factors can be used to impose the upper term, a jury must find them to exist beyond a reasonable doubt.¹ Here, the trial court usurped the jury's fact finding function when it found the existence of six aggravating factors for the purpose of imposing the upper term of 16 years. Moreover, by operation of rule 4.420(b), the court based its findings on a preponderance of the evidence standard. Consequently, the trial court's imposition of the upper term based on the aggravating factors it found to exist violated Mr. Cunningham's Sixth Amendment right to a jury trial on the truth of those aggravating factors and his Fifth and Fourteenth Amendment rights to due process requiring that they be found true beyond a reasonable doubt.²

¹ In order to effectuate Mr. Cunningham's constitutional right to have a jury determine the existence of aggravating factors beyond a reasonable doubt, Mr. Cunningham had a corollary federal due process right to have the jury properly instructed on this question. (*See, e.g., People v. Flood* (1998) 18 Cal.4th 470, 491-492; *People v. Hill* (1983) 141 Cal.App.3d 661, 669.)

² In *Blakely*, the Supreme Court suggested that although the trial court cannot make factual findings regarding the existence of aggravating factors without a waiver from the defendant, the court still retains
(continued...)

C. The Constitutional Violations Require Reversal Of Mr. Cunningham's Sentence.

Generally, the violation of a criminal defendant's constitutional rights warrants reversal unless the error is deemed harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24.) However, certain violations represent "structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards," and therefore require reversal per se. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-309.)

The denial of a jury trial is just such a structural defect. (*See, e.g., Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282; *Rose v. Clark* (1986) 478 U.S. 570, 578; *People v. Ernst* (1994) 8 Cal.4th 441, 449.) As the United States Supreme Court stated in *Rose*, because of the Sixth Amendment's clear command to afford jury trials in serious criminal cases, where that right is altogether denied, the error cannot be deemed harmless. (*Rose v. Clark, supra*, 478 U.S. at p. 578 ["the error in such a case is that the wrong entity judged the defendant guilty."].)

Significantly, the United States Supreme Court has also found an error to be structural, and therefore subject to automatic reversal, where the trial court permitted the jury to convict the defendant based on a standard less than proof beyond a reasonable doubt. (*Sullivan v.*

(...continued)
discretion to *weigh* such factors for purposes of departing from the statutory maximum after a jury finds them to exist. (*Blakely v. Washington, supra*, 2004 WL 1402697 at p. 5, n.8.)

Louisiana, supra, 508 U.S. at p. 281-282.)³ By finding the existence of aggravating factors based on a preponderance of the evidence, and not beyond a reasonable doubt, the trial court here subjected Mr. Cunningham to increased punishment on an unconstitutionally low standard of proof, requiring reversal per se.

Given the nature of the constitutional violations at issue here, it is impossible to assess with any precision the harm caused due to the lack of a jury trial on the aggravating factors or the failure to require that those factors be found to exist beyond a reasonable doubt. The constitutional violations in this case must therefore be deemed "structural defects" under the *Brecht* taxonomy. No appellate court can or should speculate as to how the resolution of Mr. Cunningham's sentencing would have differed had a jury been required to find the existence of aggravating factors beyond a reasonable doubt. Indeed, it is undoubtedly for these precise reasons that the Court in *Blakely* and *Apprendi* reversed the defendants' sentences without requiring a showing of prejudice. (*Blakely v. Washington, supra*, 2004 WL 1402697 at p. 10; *Apprendi v. New Jersey*,

³ The Court in *Sullivan* noted the close interplay between the Fifth and Sixth Amendment rights at issue in this case:

"It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 278.)

supra, 530 U.S. at p. 497.) Consequently, reversal of Mr. Cunningham's sentence is required.

Moreover, even applying the harmless error standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24, respondent is unable to prove the constitutional violations harmless beyond a reasonable doubt. (See, e.g., *United States v. Neder* (1999) 527 U.S. 1, 18 [applying *Chapman* standard to trial court's failure to instruct jury on an element of offense]; *People v. Flood, supra*, 18 Cal.4th at p. 504-505 [same].) In *Neder*, the United States Supreme Court held that in evaluating whether the failure to submit an element of an offense to the jury is harmless, a reviewing court must conduct a thorough evaluation of the evidence, and

"[i]f, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless." (*Id.* at p. 19.)

At the sentencing hearing in this case, defense counsel not only objected to, and contested the factors in aggravation, but he introduced evidence supporting a finding that probation was the appropriate sentence for Mr. Cunningham. Pursuant to *Neder*, reversal is therefore required.

Further, as Mr. Cunningham has explained in his opening brief, five of the six aggravating factors which the trial court found to exist were inapplicable here (*see* AOB 44-53), and as repeatedly noted above, the court based its findings relating to the aggravating factors on a preponderance of the evidence standard. Under these circumstances, there is no reason to believe that a jury applying the reasonable doubt

standard would find any, let alone all, of these aggravating factors to exist. Accordingly, this court must reverse Mr. Cunningham's sentence.

D. Mr. Cunningham Is Not Precluded From Contesting On Appeal The Constitutional Violations Relating To His Sentencing.

Although defense counsel objected to the court's finding of the factors in aggravation, he did not specifically allege a constitutional violation of Mr. Cunningham's right to a jury trial or to due process. In light of this fact, respondent may attempt to avoid the merits of the issue Mr. Cunningham has raised by claiming that any constitutional violation was waived due to defense counsel's failure to object to the aggravating factors on the grounds raised herein. However, any such claim of waiver would lack merit.

First, the California Supreme Court has repeatedly held that "[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain, fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276-277.) Such fundamental constitutional rights include the right to trial by jury. (*See, e.g., People v. Saunders* (1993) 5 Cal.4th 580, 589, n.5; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) Since Mr. Cunningham is claiming on appeal that he was denied his fundamental constitutional right to a jury trial and due process right to proof beyond a reasonable doubt, this issue is not waived.

Second, it is well-established that where an objection would have been futile, an attorney is not required to make it. (*People v. Chavez*

(1980) 26 Cal.3d 334, 350, n.5; *accord* Cal. Civ. Code § 3532 ["The law neither does nor requires idle acts."].) Because sentencing in this case occurred prior to the United States Supreme Court's decision in *Blakely*, it would have been futile for defense counsel to have demanded a jury trial or application of the proof beyond a reasonable standard on the existence of aggravating factors; as explained above, California's statutory and case law explicitly prescribed judicial factfinding on aggravating factors under a preponderance of the evidence standard. (See, e.g., *People v. Jackson, supra*, 196 Cal.App.3d at p. 390-391; *People v. Levitt, supra*, 156 Cal.App.3d at p. 515; Pen. Code § 1170, subd. (d); Cal. Rules of Court, rules 4.420 (a) and (b), and 4.421.) Similarly, the California Supreme Court has permitted the review of claims not raised during trial where there have been significant supervening changes in the law. (See, e.g., *People v. Turner* (1990) 50 Cal.3d 668, 703 [allowing claims for first time on appeal where "pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change."].) Thus, given the significant change *Blakely* has made in the law, Mr. Cunningham's claim is reviewable on appeal.

Finally, as noted above, in order to effectuate Mr. Cunningham's constitutional right to have a jury determine the existence of aggravating factors beyond a reasonable doubt, Mr. Cunningham had a corollary federal due process right to have the jury properly instructed on the existence of such factors. (See, e.g., *People v. Flood, supra*, 18 Cal.4th

at p. 491-492; *People v. Hill, supra*, 141 Cal.App.3d at p. 669.) To the extent the trial court violated Mr. Cunningham's constitutional right to due process because it failed to instruct the jury on aggravating factors, appellate review of the error is appropriate because the error affected Mr. Cunningham's "substantial rights." (Pen. Code § 1259 ["The appellate court may . . . review any instruction . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].) Thus, Mr. Cunningham is not precluded from raising this issue on appeal.⁴

⁴ Of course, as the California Supreme Court observed in *People v. Williams* (1998) 17 Cal.4th 148, appellate courts retain discretion to reach issues that have not been preserved for review by a party. (*Id.* at p. 161, n.6.)

CONCLUSION

For the foregoing reasons, and those contained in his opening brief, Mr. Cunningham respectfully requests this court to reverse his conviction, or in the alternative, to reverse his sentence.

DATED: July 9, 2004

Respectfully submitted,

By

Peter Gold
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 33(b)(1), I certify that this supplemental opening brief contains 4,777 words.

Peter Gold

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Fourteenth Amendment 8