

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

WESLEY DAVID FRENCH,

Defendant and Appellant.

S148845

Third Appellate District, No. C050785
Sacramento County Superior Court No. 02F07203
Honorable Maryanne G. Gilliard, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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APPELLATE PROGRAM

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ISSUES PRESENTED

The Court has granted review of the following questions: (1) Did the trial court violate defendant's Sixth Amendment right to a jury trial, as interpreted in *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856], by imposing an upper term sentence based on aggravating factors not found true by the jury? (2) If so, what is the proper remedy?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A criminal complaint filed on August 16, 2002, in Sacramento County Superior Court (case no. 02F07203), charged defendant and appellant, Wesley David French (hereafter “appellant”), with twelve counts of lewd conduct on a child under the age of 14 (Pen. Code¹ § 288, subd. (a)). (See CT² 19-28.) The complaint stated that the charged offenses involved three victims – Brandon B. (counts 1-5), Brittany P. (counts 6-10), and Zachary L. (counts 11-12) – and thus came within the meaning of section 667.61, subdivisions (b) and (e). (*Ibid.*)³

On October 16, 2002, appellant waived his right to a preliminary hearing, and the complaint was deemed an information. Appellant was arraigned and pled not guilty to the charges. (CT 2, 29-37.)

After a number of continuances, the case was set for jury trial commencing on June 1, 2004. (CT 4-14, 17.) However, appellant, who was in custody and had undergone several brain surgeries (RT 6-7), was unable to appear in court until June 3, 2004, because he had been hospitalized after suffering a seizure, had just been prescribed anti-seizure medication, and the doctors did not think it would be wise to transport him. (CT 17, 90-91, 121, 134; RT

¹ Statutory references are to the California Penal Code unless otherwise indicated.

² “CT” refers to the Clerk’s Transcript on Appeal. “RT” will refer to the Reporter’s Transcript on Appeal. There is only one volume of each transcript.

³ Counts 1-5 were alleged to have occurred on or between August 2000 to July 27, 2001; counts 6-12 were alleged to have occurred on or between April 1, 2001, and September 7, 2001. (*Ibid.*)

6-7, 14-15.)

On June 8, 2004, appellant entered into a plea agreement with the prosecution, pursuant to which he pled no contest to six of the information's twelve counts (nos. 1, 2, 9-12), the remaining counts and allegations were to be dismissed, and appellant was told that he could receive a sentence of no more than 18 years in prison (which was the maximum allowed by law for the charges subject to the plea agreement). (CT 136; RT 22-37.) The factual basis for appellant's plea was provided by the prosecutor, as follows:

On or about August 2000 to July 27, 2001, in the County of Sacramento, the Defendant did violate Penal Code section 288(a) [as alleged in counts 1 and 2] in that he did willfully and unlawfully and lewdly commit lewd and lascivious acts or act upon the body of Brandon B., who was a child under the age of 14. He was seven and eight at the time. He did so with the intent of arousing, appealing to, and gratifying the lust, passions, and desires of himself. He did this by taking Brandon to a park bathroom and touching Brandon's penis on repeated occasions.

As to the counts involving Brittany P. [counts 9 and 10], on or about April 1st, 2001, and September 7, 2001, at and in the County of Sacramento, the Defendant did commit a felony, namely, a violation of 288 (a) of the Penal Code in that he did willfully and unlawfully and lewdly commit a lewd and lascivious act on the body and certain body parts thereof of Brittany P., a child who was age seven at the time. He did so with the intent of arousing, appealing to, and gratifying his lusts, passions, and desires. He did this by touching Brittany – skin-to-skin in her vaginal area as well as her breasts on separate – two separate occasions.

As to Zachary in Counts Eleven and Twelve, on or about April 1st, 2001, through September 7, 2001, at and in the County of Sacramento, the Defendant did commit a felony, namely, a violation of 288 (a) of the Penal Code, in that he did willfully and unlawfully and lewdly commit a lewd and lascivious act on the body and certain body parts thereof of Zachary L., a child under the age of 14, who was five and six at the time. He did – the Defendant did so with the intent of

arousing, appealing to and gratifying his lusts, passions, and desires. He did this by – on two separate and distinct occasions touching Zachary on his penis skin-to-skin while Zachary was in his daughter’s care at the daycare. (RT 26-28.)

Appellant’s no-contest plea was entered 16 days before the United States Supreme Court (on June 24, 2004) issued its opinion in *Blakely v. Washington* (2004) 542 U.S. 296. He was sentenced 16 days after *Blakely* was decided.

At his sentencing hearing on July 9, 2004, appellant asked for a continuance, so he could retain counsel to assist him with a motion to withdraw his plea. The trial court denied this request as untimely. (RT 39-40.) The court imposed the maximum sentence allowed by law – 18 years in state prison. (RT 50-51.) The court selected count one as the principal term and imposed the upper term of eight years on that count, finding the aggravated term to be supported by the fact that appellant “took advantage of a position of trust and confidence to commit the crime pursuant to [former] Rule 4.421(a)(11).” (RT 50.) The court imposed consecutive terms of two years each (one-third the middle term) for the remaining five counts, finding them to have been “committed at different times and/or different places pursuant to [former] Rule 4.425(a)(3).” (RT 50-51.) Pursuant to the plea agreement, the remaining charges were dismissed. (RT 53.)

Appellant submitted a notice of appeal and request for certificate of probable cause, with an accompanying request for relief from default and request for constructive filing, on or about September 16, 2004. (CT 198-212.) More than a year later, on September 30, 2005, the Court of Appeal granted appellant’s request for constructive filing and granted him until

October 20, 2005, to file a notice of appeal.⁴ (CT 215.) Appellant submitted a new notice of appeal and request for certificate of probable cause that were timely filed on October 20, 2005. (CT 213-214.) The notice of appeal stated that the appeal “is based on the sentence or other matters occurring after the plea.” (CT 213.) The request for a certificate of probable cause was never ruled on by the trial court. (CT 214.)

On appeal, appellant argued that the trial court’s imposition of the upper term on count one violated appellant’s rights to a jury trial and to due process, because, under the United States Supreme Court’s holding in *Blakely, supra*, the midterm sentence was the maximum sentence that could be imposed in this case for count one. (Appellant’s Opening Brief, dated May 8, 2006, pp. 5-11.) On October 30, 2006, the Court of Appeal rejected this argument and affirmed the judgment. The Court of Appeal rejected appellant’s argument for two reasons: (1) because it had been rejected by this court in *Black, supra*, which the Court of Appeal was bound to follow; and (2) because “*Blakely* does not apply where a defendant stipulates to relevant facts that support a particular term of imprisonment[,]” and appellant should be deemed by his no-contest plea to have admitted that his conduct allowed the trial court to impose the upper term. (Court of Appeal Opinion, pp. 2-3, citing *Blakely, supra*, 542 U.S. at p.310.)

Appellant filed a petition for review, which this court accepted for filing on December

⁴ In the meantime, this court had, on June 20, 2005, issued its opinion in *People v. Black* (2005) 35 Cal.4th 1238.

20, 2006, and granted on February 7, 2007.

DISCUSSION

I.

THE TRIAL COURT’S IMPOSITION OF THE UPPER TERM VIOLATED APPELLANT’S RIGHTS TO A JURY TRIAL AND TO DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE THAT TERM IS BASED ON A FACT, LEGALLY ESSENTIAL TO APPELLANT’S SENTENCE, THAT APPELLANT DID NOT ADMIT, THAT IS NOT THE FACT OF A PRIOR CONVICTION, AND AS TO WHICH APPELLANT WAS NOT AFFORDED NOTICE OR THE RIGHT TO A JURY TRIAL UNDER THE BEYOND-A-REASONABLE-DOUBT STANDARD

A. Under the United States Supreme Court’s Opinion in *Blakely*, All Facts (Other Than Prior Convictions) That Are Legally Essential to a Defendant’s Sentence Must Be Submitted to a Jury and Found True Beyond a Reasonable Doubt.

As noted earlier, the United States Supreme Court issued its opinion in *Blakely v. Washington, supra*, on June 24, 2004 – sixteen days after appellant entered his no-contest plea in this case.⁵ In *Blakely*, the High Court made a crucial clarification of its landmark decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, in which the Court had held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely* held that “the relevant ‘statutory maximum’ [referred to in

⁵ Although *Blakely* and *Cunningham* were decided after appellant entered his no-contest plea, they apply to this case, because they apply to all cases not yet final at the time they were decided. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [“a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final”]; *Schriro v. Summerlin* (2004) 542 U.S. 348, 351.)

Apprendi] 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*, 542 U.S. at pp. 303-304, emphasis in original.) “[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.*” (*Id.* at p. 303, emphasis in original; and see *id.* at p. 313 [“As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.”] Emphasis in original.)

B. *Blakely Applies to California’s DSL: The United States Supreme Court’s Opinion in Cunningham Overrules and Supersedes this Court’s Opinion in Black.*

The Court of Appeal’s first stated ground for rejecting appellant’s claim that the upper term here violates *Blakely* – viz., that the claim was rejected by this court in *Black, supra* – has been invalidated by the United States Supreme Court’s recent opinion in *Cunningham v. California, supra*. In *Cunningham*, the United State Supreme Court held that California’s determinate sentencing law (DSL) violates the Sixth Amendment jury-trial guarantee and the Fourteenth Amendment’s Due Process Clause insofar as it allows judges to impose an upper-term sentence on the basis of facts (other than prior convictions) that were not found by the jury beyond a reasonable doubt. (*Cunningham, supra*, 127 S.Ct. at pp. 864-873.) In doing so, the Court rejected this court’s opinion in *People v. Black, supra*, and held that “the middle term prescribed in California’s statutes, not the upper term, is the relevant ‘statutory maximum’” for purposes of *Apprendi* and *Blakely*. (*Cunningham, supra*, 127 S.Ct. at pp.

873-876.)⁶

This case is similar to *Cunningham* in that it involves an upper-term sentence imposed on the basis of an aggravating fact⁷ – violation of a position of trust (see RT 50) – that was not found true by a jury beyond a reasonable doubt and that is not a prior conviction.⁸ And, contrary to the Court of Appeal’s opinion below, the aggravating fact legally essential to the

⁶ See also *Black v. California* (Feb. 20, 2007), U.S. Sup. Ct. docket no. 05-6793 [2007 U.S. LEXIS 1856], vacating the judgment in *People v. Black, supra*, and remanding that case to this court for further consideration in light of *Cunningham, supra*.

⁷ *Cunningham* actually involved two aggravating facts – “the particular vulnerability of the victim, and Cunningham’s violent conduct, which indicated a serious danger to the community.” (*Id.*, 127 S.Ct. at p. 865.)

⁸ Appellant recognizes that some California courts have taken the view that the “prior conviction” exception to “*Apprendi*’s bright line rule” (*Cunningham, supra*, 127 S.Ct. at p. 873) is not strictly limited to prior convictions, but includes other facts that evidence the defendant’s recidivism. (See, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.) However broad it may be, the prior-conviction exception does not apply here, because the trial court did not rely on appellant’s criminal history as a basis for imposing the upper term, and any such reliance would have been factually unsupported and an abuse of discretion. (See CT 170 [probation officer’s report shows that appellant’s prior criminal history consists of a single misdemeanor conviction for resisting arrest, as to which he successfully completed probation, and lists, as a mitigating circumstance, the fact that appellant had “an insignificant record of criminal conduct”].) Appellant also notes that a broad and indefinite interpretation of the “prior conviction” exception is contrary to the express language and underlying reasoning of both the *Apprendi* rule and its exception. (See *Jones v. U.S.* (1999) 526 U.S. 227, 249 [“unlike virtually any other consideration used to enlarge the possible penalty for an offense ..., a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees”]; *Apprendi, supra*, 530 U.S. at pp. 488-496 [describing *Almendarez-Torres v. United States* (1998) 523 U.S. 224 as a “narrow exception” to the *Apprendi* rule]; *Blakely, supra*, 542 U.S. at pp. 303-306; *Shepard v. U.S.* (2005) 544 U.S. 13 [limiting the type of evidence that may be considered in determining the facts of a prior conviction]; *Cunningham, supra*, 127 S.Ct. at p. 874, fn. 14 [rejecting the approach suggested in Justice Kennedy’s dissenting opinion].)

trial court's imposition of the upper term was not charged and not admitted by appellant as part of his plea agreement. The impropriety of this aspect of the Court of Appeal's opinion is discussed in the next section.

C. The Court of Appeal Erred in Holding That, by Virtue of His Pre-*Blakely* Plea, Appellant Should Be Deemed to Have Admitted the Fact Upon Which the Trial Court Based the Upper Term; Appellant Can Be Deemed to Have Admitted Only the Elements of the Offense Charged, and Those Elements Did Not Include the Fact Used to Impose the Upper Term.

The Court of Appeal was correct in noting in its opinion below that a defendant may waive his "*Blakely*" rights as to a fact legally essential to his sentence, by stipulating to the fact. (Court of Appeal Opinion, p. 3, citing *Blakely, supra*, 542 U.S. at p.310.) However, the Court of Appeal erred in concluding (on the same page) that appellant here may be "deemed," by virtue of his no-contest plea, to have stipulated to the fact used to impose the upper term. The law has long been clear that, absent his consent, a defendant may not be convicted or sentenced for a crime for which he has not been charged. Under *Blakely* and *Cunningham*, that is what occurred in this case. Therefore, the upper-term sentence imposed on count one is unauthorized.

1. A Defendant May Only Be Sentenced for Crimes With Which He Has Been Charged or for Lesser Offenses Wholly Included Therein.

It is well established that, in the absence of his consent, a defendant may not be convicted of a crime that is neither charged nor necessarily included in a charged offense. (See *Cole v. Arkansas* (1948) 333 U.S. 196, 201 ["It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried

as it would be to convict him upon a charge that was never made.”]; *People v. Birks* (1998) 19 Cal. 4th 108, 128 [“Unless the defendant agrees, the prosecution cannot obtain a conviction for any uncharged, nonincluded offense.”]; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368.) Nor may a defendant be sentenced for such an offense. (*People v. Hernandez* (1988) 46 Cal.3d 194, 197.) Even before the United States Supreme Court decided *Apprendi*, California courts applied this due-process rule to enhancement allegations, as well as crimes. (*People v. Hernandez, supra*; *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.)

Hernandez, supra, and *Haskin, supra*, both of which were recently cited with approval (and summarized as set forth below) by this court in *People v. Mancebo* (2002) 27 Cal.4th 735, are noteworthy for purposes of this case.

In *Haskin*, the defendant admitted an allegation of a prior prison term under section 667.5, subdivision (b), for a prior 1979 burglary conviction. The information did not allege the burglary was of an inhabited dwelling. After the defendant admitted the enhancement allegation, the court made a factual finding, based on the People's exhibit containing proceedings of the 1979 burglary conviction, that the burglary was of a residence. At sentencing, the court imposed an enhancement term of five years for the prior 1979 burglary under section 667. It did so instead of imposing a one-year term as provided by section 667.5, subdivision (b), which was what the information had alleged and the defendant had admitted. (*Haskin*, 4 Cal.4th at pp. 1437-1438.) The Court of Appeal held that “[b]ecause appellant was neither statutorily nor factually charged with, nor consented to, a substituted section 667

enhancement in conjunction with the 1979 offense, the trial court was without authority to impose a sentence greater than that authorized by section 667.5, subdivision (b), the charging statute which appellant admitted." (*Id.* at p. 1440.)

In *Hernandez, supra*, 46 Cal.3d 194, criticized on other grounds in *People v. King* (1993) 5 Cal.4th 59, 78, fn. 5, this court addressed the issue of whether a judge could impose an additional three-year sentence under former section 667.8 (kidnapping for purpose of rape) when the defendant's violation of that section was neither pleaded nor proven, and was only mentioned for the first time in a probation report. (*Hernandez, supra*, 46 Cal.3d at p. 197.) This court concluded "such additional term may not be imposed, since a pleading and proof requirement should be implied as a matter of statutory interpretation and must be implied as a matter of due process." (*Ibid.*)

Here as in *Haskin* and *Hernandez*, the basic problem with the imposition of the upper term on count one is that, in the wake of *Blakely*, it punishes appellant for a sentence-aggravating fact that he neither was charged with violating nor admitted by virtue of his no-contest plea to the non-aggravated version of the offense with which he was charged. This is explained further in the next section (I.C.2, *post*).

2. Under *Blakely* and *Cunningham*, the Crime for Which Appellant Was Sentenced to the Upper Term on Count One Is Not the Crime with Which He Was Charged and to Which He Pled No Contest.

Under the United States Supreme Court's *Apprendi* jurisprudence, facts that are legally essential to a defendant's sentence are, for purposes of the United States Constitution,

indistinct from the elements of crime. (See *Apprendi, supra*, 530 U.S. at pp. 476-478, 483, fn. 10; *id.* at pp. 490-495 & fn. 19; *Washington v. Recuenco* (2006) 548 U.S. ___ [126 S.Ct. 2546, 2552]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; *People v. Betts* (2005) 34 Cal.4th 1039, 1054 [“A fact that increases the maximum permissible punishment for a crime is the functional equivalent of an element of the crime, regardless whether that fact is defined by state law as an element of the crime or as a sentencing factor.”])

Thus, the constitutional right to a jury trial, and all of the due-process rights that go with it, apply to such facts. (See *Apprendi, supra*, 530 U.S. at p. 476-477; *id.* at pp. 499-500, conc. opn. of Thomas, J.; and see *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111, plurality opn. of Scalia, J.; *People v. Seel* (2004) 34 Cal.4th 535, 540-548 [recognizing that *Apprendi* defines the parameters of the federal Double Jeopardy Clause].)

These rights include the right to pretrial notice. (*Jones v. U.S., supra*, 526 U.S. 227, 232 [“Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment ...”]; *Apprendi, supra*, 530 U.S. 466, 476-477; *id.* at pp. 499-500 (conc. opn. of Thomas, J.); *Blakely, supra*, 542 U.S. 296, 301-302 [“an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason”], quoting 1 J. Bishop, *Criminal Procedure* § 87, p 55 (2d ed. 1872); and see *Washington v. Recuenco* (2006) 548 U.S. ___ [126 S.Ct. 2546, 2553-2557 (dis. opns. of, Stevens, J., and Ginsburg, J.).)

For this reason, the United States Supreme Court and this court have described a sentencing factor legally essential to the defendant's sentence as "the functional equivalent of an element of a *greater* offense than the one covered by the jury's guilty verdict." (*Apprendi*, 530 U.S. at p. 495, fn. 19, emphasis added; *Ring v. Arizona* (2002) 536 U.S. 584, 605; *Cunningham v. California*, *supra*, 127 S.Ct. at p. 869; *People v. Seel*, *supra*, 34 Cal.4th at p. 548.)

In this case, the elements of the offense charged against appellant in count one did not include the fact used to impose the upper term, i.e., the fact that, in committing the offense, appellant took advantage of a position of trust. (See § 288, subd. (a); *People v. Martinez* (1995) 434, 444.) Indeed, if they did, under the DSL, that fact could *not* have been used to impose the upper term. (*Cunningham*, *supra*, 127 S.Ct. at pp. 866-868, 873; § 1170, subd. (b); Cal. Rules of Ct., rule 4.420(d); see discussion in section I.B, *ante*.) Thus, for purposes of the *Apprendi-Blakely* rule, the fact used to impose the upper term constituted an element of a greater version of section 288, subdivision (a), than described by the bare elements set forth in the statute. (*Apprendi*, *supra*, at p. 495, fn. 19; *Ring v. Arizona*, *supra*, 536 U.S. at p. 605.)

Under the authorities discussed in the preceding section (I.C.1, *ante*), appellant could not be convicted of or sentenced for this aggravated version of section 288(a) unless he was charged with it. So this begs the question: was appellant charged with an aggravated version of section 288(a) that included as a necessary element the fact that he took advantage of a

position of trust?

The answer to this question is no – he was not. The fact used to impose the upper term (i.e., that he took advantage of a position of a trust) was not pled in the complaint or information in this case. (See CT 19-37.) Nor was it proven up at a preliminary hearing (i.e., because there was no preliminary hearing in this case). (See CT 2.) The record does not show that appellant was given due process notice that this fact was something to which punitive consequences attached or that he would be deemed to be admitting for sentencing purposes as part of his no-contest plea. (See CT 19-37.) Nor was this fact cited by the prosecutor in setting forth the factual basis for appellant’s no-contest plea. (See RT 26-28.)⁹ Appellant’s attorney “discussed with [appellant] the elements of the charged offenses and the possible defenses which he may have[.]” (RT 26; and see *People v. Chadd* (1981) 28 Cal.3d

⁹ The prosecutor did state, in describing the factual basis of counts eleven and twelve, that those offenses occurred while the victim was in appellant’s “daughter’s care at the daycare.” (RT 27-28.) This was also described in an attachment to an arrest warrant. (See CT 39.) While a trier of fact could reasonably infer from this that appellant took advantage of a position of trust, it cannot be deemed to be a charge that appellant admitted as part of his plea agreement because it was never pled in a way that gave appellant notice of its punitive significance. (See *Shepard, supra*, 544 U.S. 13, 25-26; *People v. Mancebo, supra*, 27 Cal.4th 735; *People v. Holmes* (2004) 32 Cal.4th 432, 441-442 [showing a factual basis “does not require more than establishing a prima facie factual basis for the charges”]; *People v. Alfaro* (1986) 42 Cal.3d 627, 632-636 [noting the problem with attaching punitive significance to “superfluous” facts]; but see *People v. Guerrero* (1988) 44 Cal.3d 343, 355-356.) Nor, as discussed in section II.B, *post*, was there a statutory basis for charging this fact as an element of an aggravated version of Penal Code section 288, subdivision (a). Appellant cannot be deemed to have waived by his no-contest plea a right that was not recognized by this State at the time of that plea. (See *Halbert v. Michigan* (2005) 545 U.S. 605, 623.)

739, 748 [a guilty plea is “a judicial admission of every element of the offense charged”].) However, as previously explained, these elements did not include the fact used to impose the upper term. (See p. 13, *ante*.) In short, the offense charged against appellant in count one at the time of his no-contest plea was a non-aggravated version of section 288(a), not a greater offense that included the fact used to impose the upper term. Thus, appellant was not sentenced for the crime with which he was charged or a lesser offense wholly included therein.

3. Appellant Did Not Consent to a Modification of Count One to Include the Fact Used to Impose the Upper Term.

The lone exception to the “*Lohbauer*” rule that a defendant may only be sentenced for crimes charged or lesser-included offense is consent, i.e., “if the accused expressly or impliedly consents or acquiesces in having the trier of fact consider a substituted, uncharged offense.” (*People v. Haskin, supra*, at p. 1438; and see *Lohbauer, supra*, 29 Cal.3d at p. 367; *In re Robert G.* (1982) 31 Cal.3d 437, 444 [“consent was the one exception to the rule which we adopted in *Lohbauer*.”]) This exception is similar to the one recognized in *Blakely* for the *Apprendi-Blakely* rule.

[N]othing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. (*Blakely, supra*, 542 U.S. at p. 310.)

Thus, the question remaining is whether, for purposes of *Apprendi* and *Blakely*,

appellant stipulated to the fact used to impose the upper term or consented to the trial court's finding of that fact. In its opinion below, the Court of Appeal apparently held that appellant should be deemed to have consented to the judicial factfinding necessary to impose upper term, because, at the time he entered his plea, he acknowledged that the trial court was legally authorized, under the statutes applicable to the crimes to which he pled no contest, to impose an upper-term sentence. (Court of Appeal Opn., p. 3 ["Where, as here, a defendant agrees that the court has the authority to sentence that defendant to an upper term, he is deemed to have admitted that his conduct, as a matter of fact, can support that term."], citing generally *People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Hoffard* (1995) 10 Cal.4th 1170, 1181-1182; and *People v. Thomas* (1986) 41 Cal.3d 837, 842-843.) As explained below, this holding does not follow from the authorities it cites for support, and it is inconsistent with the procedural history of *Blakely* itself and with the express language of *Blakely* and *Cunningham*.

- a. The procedural history of *Blakely* makes clear that the Court of Appeal's analysis is incorrect.

Perhaps the clearest reason that the Court of Appeal erred in holding that a defendant may be deemed to have admitted a *Blakely*-violating fact used to impose the upper term, by pleading guilty or no contest under circumstances similar to those in this case, is that *Blakely* involved a guilty-plea situation that is essentially indistinguishable from this case.

The record before the Supreme Court in *Blakely* shows that, like appellant in this case, *Blakely* acknowledged his understanding of the maximum potential sentence for his offenses.

As part of his written plea agreement, Blakely acknowledged that the “maximum term” for his two offenses was 10 years. (*Blakely v. Washington*, U.S. Supreme Court No. 02-1632, Joint Appx., 2003 WL 23310880, p. *63, ¶ 6(a).)¹⁰ The plea agreement also recited Blakely’s understanding that, while the “standard range” was 49-53 months, Washington law would allow a sentence greater than the “standard range” if the judge found “substantial and compelling reasons.” (*Id.* at p. *66, ¶ 6(h).) Blakely’s sentence of 90 months (7 ½ years) was well within the 10-year maximum acknowledged in the plea agreement. The Supreme Court, nonetheless, found constitutional error because Blakely had never admitted *the specific aggravating facts* later cited by the sentencing court (acting with “deliberate cruelty”). (*Blakely, supra*, 542 U.S. at pp. 303-304.)

In this case, as in *Blakely*, appellant was advised when he entered his no-contest plea of the maximum sentence he could receive for all of the counts to which he pled no contest (i.e., 18 years). (RT 25-29.) And, as in *Blakely*, appellant’s acknowledgment of this maximum sentence was not an agreement to a sentence above the sentencing range to which he could otherwise be constitutionally sentenced. It was simply an acknowledgment of the maximum exposure he faced under the sentencing provisions applicable to the offenses to which he pled no contest. (See §§ 288, subd. (a), 1170.1, subd. (a).) This is the sort of acknowledgment that must be obtained in *every* case involving a guilty or no-contest plea.

¹⁰ A copy of the *Blakely* Joint Appendix cited herein is attached to appellant’s contemporaneously-filed Request for Judicial Notice.

“In all guilty plea and submission cases the defendant shall be advised of the direct consequences of conviction such as the permissible range of punishment provided by statute...” (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; see also *Brady v. United States* (1970) 397 U.S. 742, 755 [knowledge of “direct consequences” essential to voluntariness of plea].)¹¹

Thus, a court’s standard *Bunnell/Brady* advisement, which is required whenever a defendant pleads guilty or no contest, cannot be the sort of “stipulation” or admission envisioned in *Blakely*. And, if *Blakely* itself were not proof enough that this is so, any doubt is resolved by *Cunningham*, where the Court held that the facts legally essential to an upper-term sentence imposed under California’s DSL “are neither inherent in the jury’s verdict *nor embraced by the defendant’s plea*” (*Id.*, 127 S.Ct. at p. 864, emphasis added.)

¹¹ This case did not only not involve a plea to a specified or stipulated sentence, it did not even involve a plea to a true sentence “lid.” Notwithstanding the parties’ and court’s use of that term in describing appellant’s potential maximum sentence to him (RT 25, 28-29), the term was simply a shorthand way of describing appellant’s maximum exposure for *Bunnell* purposes (i.e., since his sentence could not have been higher than 18 years based solely on the charges to which he pled no contest). (See *People v. Shelton* (2006) 37 Cal.4th 759, 768 [“the specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term.”]; and see *People v. Bobbit* (2006) 138 Cal.App.4th 445 [dismissing appeal for lack of a certificate of probable cause where the defendant had pled to a “lid” eight months after the United States Supreme Court decided *Blakely*].) A potentially related question concerning when an appeal of a Penal Code section 654 determination requires a certificate of probable cause is presently pending in this court in *People v. Cuevas*, S147510 [B168269; 142 Cal.App.4th 1141], rev. granted Jan. 3, 2007.

- b. The record does not affirmatively demonstrate that appellant knowingly, intelligently and voluntarily waived his constitutional rights as to the fact used to impose the upper term.

The Supreme Court in *Blakely* made clear that, while judicial fact-finding may be allowed as to facts legally essential to a defendant's sentence where the defendant pleads guilty (see *Blakely*, *supra*, 542 U.S. at p. 310 ["nothing prevents a defendant from waiving his *Apprendi* rights"]), such fact-finding is allowed only "[i]f appropriate waivers are procured" (*Blakely*, at p. 310, emphasis added.) By "appropriate waivers," the Court was apparently referring to the waivers constitutionally required when a defendant pleads guilty or no contest.

A defendant who enters ... a [guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. (*McCarthy v. United States* (1969) 394 U.S. 459, 466.)

The defendant's waiver of his constitutional rights cannot be inferred from the mere fact that he has pled guilty and is represented by counsel. "Presuming waiver from a silent record is impermissible." (*Boykin v. Alabama* (1969) 395 U.S. 238, 243.) "[T]he record must contain *on its face* direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of

the charge and the consequences of his plea.” (*In re Tahl* (1969) 1 Cal.3d 122, 132, emphasis in original; and see *In re Yurko* (1974) 10 Cal.3d 857, 863-864 [“*Boykin* and *Tahl* require, before a court accepts an accused's admission that he has suffered prior felony convictions, express and specific admonitions as to the constitutional rights waived by an admission.”]; *People v. Howard* (1992) 1 Cal.4th 1132, 1175 [failure to advise defendant of *Boykin-Tahl* rights does not require reversal where the record affirmatively shows that the admission of a sentence-enhancement allegation was knowing, intelligent and voluntary under the totality of circumstances]; *People v. Mosby* (2004) 33 Cal.4th 353, 361-365 [same].)

As the above authorities make clear, the Court of Appeal erred in holding that, from the record in this case, appellant may be “deemed to have admitted” that his conduct in committing the offenses to which he pled no contest allowed the trial court to impose the upper term. To the contrary, the current record does not show that appellant was ever told he would be admitting, as part of his plea, that he took advantage of a position of trust. And it quite clearly does not affirmatively demonstrate that appellant was aware of and knowingly, intelligently and voluntarily waived his constitutional rights as to that fact. (See RT 22-37.)

Although appellant was advised of and waived (albeit somewhat reluctantly) his rights to a jury trial, to present a defense, to confront and cross-examine witnesses and against self-incrimination (RT 30-32), those advisements and waivers cannot be deemed to have included

appellant's constitutional rights as to the fact used to impose the upper term, for the simple reason that, under California law at that time, he *had* no such rights as to that fact.

As the United States Supreme Court explained in *Cunningham*, California's DSL assigns to the trial court the responsibility of finding aggravating facts legally essential to an upper term sentence. (*Id.*, 127 S.Ct. at pp. 866-868, 873; § 1170, subd. (b); Cal. Rules of Ct., rule 4.420(d).) Although *Blakely's* clarification of *Apprendi* gave notice that this aspect of the DSL might be unconstitutional, this court, in *People v. Black, supra*, did not interpret *Blakely* as giving California defendants the right to a jury trial and to acquittal in the absence of proof beyond a reasonable doubt as to aggravating facts used to impose an upper-term sentence. (See *Black, supra*, 35 Cal.4th at pp. 1255-1256.) Thus, it would be unreasonable to infer from the record of this case that appellant must have been advised by his attorney of his "*Blakely*" rights as to the facts legally essential to an upper-term sentence, at a time when *Blakely* had not yet been decided. (See *Halbert v. Michigan, supra*, 545 U.S. 605, 623 [disagreeing with state's contention that defendant had waived his right to appointed appellate counsel by entering a no-contest plea, because, at the time he entered that plea, the defendant "had no recognized right to appointed appellate counsel he could elect to forgo"].) And, again, waiver in this context may not be inferred from a silent record.¹²

¹² And it must be remembered that, at his sentencing hearing on July 9, 2004, appellant expressed the desire to withdraw his plea and go to trial, and he made a request for a continuance so he could obtain new counsel to help him with such a motion. Notwithstanding these statements by appellant, and the fact that *Blakely* had been decided following his change of plea, appellant's attorney made no mention of *Blakely* and

In sum, since appellant was not charged with an aggravated version of section 288, subdivision (a), that included the sentencing factor used to impose the upper term, he may not be deemed to have admitted it solely by virtue of having pleaded guilty to the *lesser*, charged version of that crime. (See *Cunningham, supra*, 127 S.Ct. at p. 864 [facts legally essential to an upper-term DSL sentence are *not* “embraced by the defendant’s plea”].) Thus, the record belies any contention that appellant admitted the fact used to impose the upper term, much less that he did so knowingly, intelligently and voluntarily, after “appropriate waivers [were] procured.” (*Blakely*, 542 U.S. at p. 310.)

c. The cases cited by the Court of Appeal are inapposite.

The Court of Appeal cited three opinions of this court in support of its holding that appellant should be deemed, by virtue of the “*Bunnell*” advisement he received prior to entering his no-contest plea, to have admitted facts sufficient to authorize the imposition of the upper term: *People v. Hester, supra*, 22 Cal.4th 290, 295; *People v. Hoffard, supra*, 10 Cal.4th 1170, 1181-1182; and *People v. Thomas, supra*, 41 Cal.3d 837, 842-843. These cases are fundamentally distinguishable from this case, and none supports the Court of Appeal’s conclusion that appellant may be deemed to have admitted the fact used to impose the upper term.

Hester concerned a defendant’s agreement to plead guilty in return for a specified prison sentence. This court held that, by agreeing to such a “stipulated” sentence, the

posited no grounds for moving to withdraw appellant’s plea. (RT 38-53.)

defendant abandoned his *statutory* right, under Penal Code section 654, not to be punished twice for the same act. (*Hester, supra*, 22 Cal.4th at pp. 294-296 [finding no conflict between Penal Code section 654 and rule [4.]412(b)].) This case is distinguishable from *Hester* for two reasons: (1) appellant did not stipulate to the upper-term sentence he received in this case – he merely acknowledged that that sentence was the maximum allowed under the sentencing provisions applicable to the crimes to which he pled no contest (see discussion at pp. 16-18, *ante*); and (2) the rights the Court of Appeal here deemed appellant to have abandoned by pleading no contest are fundamental constitutional rights, not merely the right to receive the benefit of a statutory provision whose application would (under court rules) be at odds with the express terms of his plea agreement. (See *People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023 [noting the distinction between “*Bunnell*” error, as to which it is incumbent upon the defendant to object and show prejudice, and “*Boykin-Tahl*” error, as to which no objection is required].)

People v. Hoffard, supra, also does not support the Court of Appeal’s holding in this case. In *Hoffard*, the issues were (1) whether a defendant who has obtained a certificate of probable cause on one ground may appeal a different issue that requires a certificate of probable cause and that was not identified in the defendant’s certificate-of-probable-cause request; and (2) whether Penal Code section 1192.5 requires a statement of the factual basis for a defendant’s guilty plea, when the defendant has pled guilty as charged, without any negotiated promise for a specified term of imprisonment. (*Hoffard, supra*, 10 Cal.4th 1170,

1173-1174.)¹³ In answering the second of these two questions in the negative, this court noted that one of the reasons a factual-basis statement need not be required in non-negotiated guilty-plea cases is that the defendant is already protected by the rule (discussed in section I.C.3.b, *ante*) that the record in such cases affirmatively demonstrate that the defendant's waiver of his constitutional rights in pleading guilty is made knowingly, intelligently and voluntarily. (*Id.* at pp. 1182-1183.) But, again, this did not occur here. (See section I.C.3.b, *ante*.) So *Hoffard* does not support the Court of Appeal's opinion in this case.

Nor does *People v. Thomas, supra*. In *Thomas*, the issues were: "(1) When the serious felony [charged under section 667] is 'residential burglary,' is an admission of conviction of a burglary 'within the meaning of section 667' -- without an express admission of its residential character -- sufficient to permit imposition of the serious felony enhancement? (2) Is such an admission sufficient when it is not the result of a plea bargain?" (*Id.*, 41 Cal. 3d at p. 839.) This court answered both of these questions affirmatively, explaining that it was reasonable to infer that a defendant who expressly admitted that he had suffered a prior conviction "within the meaning of section 667" and who had been advised of his constitutional rights as to that admission as required by *In re Yurko, supra*, understood the

¹³ This court answered both of these questions in the negative. (*Hoffard, supra*, 10 Cal.4th at p. 1174 ["Nothing in section 1237.5 indicates the defendant must specify, and the trial court certify as nonfrivolous, each issue to be raised on appeal. Such a rule is unnecessary to the purposes of the statute and would be inefficient in operation."]; *ibid.* ["Section 1192.5 ... imposes on trial courts the burden of inquiry into a factual basis for a guilty plea only for *negotiated* pleas specifying the punishment to be imposed"], emphasis in original.)

factual elements of a serious felony (e.g., that the burglary be residential) at the time of the admission, and that any claim that his attorney had not made those elements clear to him at the time of the admission would have to be raised in a petition for writ of habeas corpus. (*Thomas, supra*, 41 Ca.3d at pp. 839-844.)

This case is fundamentally distinguishable from *Thomas* for two reasons. First, unlike *Thomas*, appellant here was *not* advised of his constitutional rights as to the sentencing factor used to impose the upper term. (See discussion in section I.C.3.b, *ante*.) Second, appellant does not dispute the long-recognized rule (applied in *Thomas*) that a “plea of guilty admits every element of the crime charged.” (See *id.* at p. 844, fn. 7; *People v. Hoffard, supra*, at pp. 1177-1178; *People v. Chadd, supra*, 28 Cal.3d 739, 748.) But, as previously explained, he vigorously disputes the Court of Appeal’s conclusion that, by virtue of a guilty (or no-contest) plea, a defendant should be “deemed to admit” facts *beyond* those elements, i.e., a particular fact legally essential to impose a sentence greater than the middle term. (See *Cunningham, supra*, 127 S.Ct. at p. 864 [facts legally essential to an upper-term DSL sentence are *not* “embraced by the defendant’s plea”]; and see discussion at pp. 11-18, *ante*.) *Thomas* provides no support for this conclusion.

D. Conclusion.

Under *Cunningham*, the trial court’s finding that appellant took advantage of a position of trust was legally essential to the imposition of the upper term. Thus, under *Blakely*, that fact could not be used to impose the upper term, unless it was pled as a

sentence-enhancement allegation in the operative charging document and either found true by a jury beyond a reasonable doubt or admitted by appellant after knowingly, intelligently and voluntarily waiving his constitutional rights as to that fact, as affirmatively demonstrated on the record. Since none of these things occurred (or, as explained below, could have occurred) in this case, the upper term sentence imposed on count one is unconstitutional under the Sixth and Fourteenth Amendments.

II.

THE ERROR REQUIRES REVERSAL, AND THE APPROPRIATE REMEDY IS TO REDUCE THE UPPER TERM ON COUNT ONE TO THE MIDDLE TERM

The questions of prejudice and remedy are intertwined, for two reasons. First, if the error is structural (as appellant demonstrates, *post*), the issue of prejudice may be dispensed with, and the question of remedy is all that remains. Second, as the United States Supreme Court noted in *Washington v. Recuenco*, *supra*, 126 S.Ct. 2546, 2550, the lack of an adequate remedy can compel a finding that the error is not harmless.

A. The Error Requires Reversal of the Upper Term on Count One.

In *Recuenco*, the United States Supreme Court held that the failure to submit to a jury a fact that is legally essential to the defendant's sentence is subject to harmless-error analysis under the "*Chapman*" standard of reversibility (*Chapman v. California* (1967) 386 U.S. 18, 24, under which reversal is required unless it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Recuenco*, *supra*, 126 S.Ct. 2546, 2551-2553.)) The Court explained that, since an aggravating fact legally essential to

the defendant's sentence is constitutionally analogous to an element of a felony offense, and since, under the High Court's opinion in *Neder v. U.S.* (1999) 527 U.S. 1, 8, the removal of a single element of an offense from the jury is subject to harmless-error analysis under *Chapman*, that standard of reversibility should also apply to the failure to obtain a verdict from the jury on a sentencing factor that is legally essential to the defendant's sentence. (*Recuenco*, 126 S.Ct. at pp. 2551–2553.)

Of course, this case did not involve a jury trial. Unlike the jury-trial situations in *Neder* and *Recuenco*, there is no trial evidence here to subject to *Chapman* harmless-error analysis. Thus, although “[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error” (*Recuenco*, p. 2553), the same cannot be said for the failure to secure the defendant's admission to a sentencing factor, where the defendant has pled no contest, without constitutionally-required notice of the sentence-enhancing fact and its sentence-enhancing effect. Rather, in such cases, the error is structural and requires automatic reversal. (*People v. Hernandez, supra*, 46 Cal.3d at pp. 208-209; *People v. Mancebo, supra*, 27 Cal.4th 735, 747; *In re Robert G., supra*, 31 Cal.3d at pp. 442-445; and see *Recuenco, supra*, 126 S.Ct. at p. 2552, fn. 3 [declining to reach the issue of whether a charging error, as opposed to a judicial factfinding error, would be structural]; *id.* at pp. 2554, diss. opn. of Stevens, J. [finding this avoided argument the strongest one supporting *Recuenco*'s claim that the *Blakely* error in that case was structural].)

B. The Upper Term on Count One Must Be Reduced to the Midterm; the Error Cannot Be Remedied by Retroactive Modification of the DSL or By Trying Appellant on the Aggravating Fact Used to Impose the Upper Term.

Respondent may posit that there are two possible remedies that do not require (automatic) reduction of appellant's sentence on count one from the upper term to the middle term: (1) revising the DSL so as to render it compliant with *Blakely* and *Cunningham*, by granting trial courts broader discretion to impose an upper term sentence (see *United States v. Booker* (2005) 543 U.S. 220, 245); or (2) remanding the case to the trial court with directions that the fact used to impose the upper term be tried to a jury. Neither of these remedies is constitutionally viable.

The first (i.e., a retroactive "Bookerization" of the DSL) would violate the proscription of ex post facto laws (U.S. Const., Art. I, § 10, cl. 1), by removing the aggravating element of the greater offense on which the prosecution is seeking conviction. (See *Carmell v. Texas* (2000) 529 U.S. 513, 532 ["A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof."]; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 354 ["If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."]; *People v. Escobar* (1992) 3 Cal.4th 740, 752 ["a state Supreme Court, no less than a state Legislature, is barred from making conduct criminal which was innocent when it

occurred, through the process of judicial interpretation.”]; and see discussion in section I.C.2, *ante* [explaining that facts legally essential to a defendant’s sentence are constitutionally indistinct from the elements of crime].)

The second of these remedies (i.e., remand for a jury trial of the aggravating fact) is not viable for two reasons. First, such piecemeal litigation of count one would be contrary to the due-process and double-jeopardy concerns that underpin this court’s *Lohbauer* jurisprudence. (See *id.*, 29 Cal.3d at pp. 372-373; *People v. Haskin*, *supra*, 4 Cal.App.4th at p. 1441 [rejecting posited remedy of remand and rearraignment, where, as here, “the issue is whether appellant can be sentenced on a charge other than that with which he was charged, admitted and convicted”]; *People v. Esquibel* (1992) 3 Cal.App.4th 850, 859 [“fundamental fairness forbids [such] piecemeal jury litigation”]; and see *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111, plurality opn. of Scalia, J.; *People v. Seel*, *supra*, 34 Cal.4th 535, 540-548 [recognizing that *Apprendi* defines the parameters of the federal Double Jeopardy Clause].)

Second, there is no legislatively-created vehicle for trying appellant on the upper-term allegation, so there is no way that it could be tried to a jury and proven beyond a reasonable doubt, without violating the separation-of-powers doctrine. (Cal. Const., art. III, § 3.) Only the Legislature may create crimes and the elements on which a jury may be instructed. (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631 [“the power to define crimes and fix penalties is vested exclusively in the legislative branch”]; see also Pen. Code, § 6.) The Legislature cannot delegate to the judiciary power to manufacture such elements and submit

them to a jury. (*People v. Figueroa* (1999) 68 Cal.App.4th 1409, 1414 [“Although the Legislature may delegate rulemaking power to an administrative body, it may not allow the agency to declare the violation of its rules a crime. Only the Legislature, not an administrative body, may determine what conduct is unlawful and the penalty for the unlawful conduct”] [citations omitted]; see also *People v. Cervantes* (2001) 26 Cal.4th 860, 867, fn. 10 [a judicial rule or doctrine “does not itself define a crime, as that is a legislative function.”]; *People v. Dillon* (1983) 34 Cal.3d 441, 461 [absent “legislative proscription of conduct, there is no crime”].)

Since, as previously explained, facts legally essential to a defendant’s sentence are constitutionally indistinct from the elements of crime (see discussion in section I.C.2, *ante*), it is not possible for the Legislature to delegate to the courts the power to define those elements. (See *People v. Wright* (1982) 30 Cal.3d 705, 712 [“An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions.”]; *Keeler v. Superior Court*, *supra*; Cal. Const., art. III, § 3; Pen. Code, § 6.)

Thus, the appropriate remedy is to modify the sentence on count one from the upper term to the middle term (i.e., and reduce appellant’s aggregate sentence from 18 years to 16 years in state prison). (See Pen. Code § 1260; *People v. Schueren* (1973) 10 Cal.3d 553, 561-562.)

CONCLUSION

Wherefore, appellant respectfully requests that the opinion of the Court of Appeal be reversed, and that the upper-term sentence on count one be reduced to the midterm.

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Respectfully submitted,

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