

**IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA**

THE PEOPLE OF THE STATE OF)	
)	
CALIFORNIA,)	No. S148974
)	
Plaintiff and Respondent,)	
v.)	
)	(Court of Appeal No.
)	D047682)
JOEL HERNANDEZ,)	(San Diego Superior
)	No. SCN195202)
)	
Defendant and Appellant)	
_____)	

**APPELLANT’S BRIEF ON THE MERITS
ORDER GRANTING REVIEW**

Pursuant to California Rules of Court, rule 8.520, subdivision (b)(2), appellant notes that the order of this Court, dated February 7, 2007, granting review did not specify the issues to be addressed in appellant’s brief on the merits. Appellant’s petition was filed as a Petition for Review To Exhaust State Remedies, pursuant to then California Rules of Court, rule 33.3. As such, it raised issues regarding appellant’s claim that the trial court had violated his Sixth and Fourteenth Amendment rights, as set forth in *Blakely v. Washington* (2004) 542 U.S 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], noting that at the time the petition for review was filed *Cunningham v. California* (Jan. 22, 2007) No. 05-6551, ___ U.S. ____ [127 S.Ct.

8561, 2007 U.S. LEXIS 1324, 75 U.S.L.W. 4078] was pending before the U.S. Supreme Court.

The judicial council notation on the website entry for this case identified the following issues for this case and the other four cases to which this Court granted review: (1) Did the trial court violate defendant's Sixth Amendment right to a jury trial, as interpreted in *Cunningham v. California, supra*, ___ U.S. ___ [127 S.Ct. 8561, 2007 U.S. LEXIS 1324, 75 U.S.L.W. 4078], by imposing an upper term sentence based on aggravating factors not found true by the jury? (2) If so, what is the proper remedy? However, that same notation stated: "The statement of the issues is intended simply to inform the public and the press of the general subject matter of the case. The description set out above does not necessarily reflect the view of the court, or define the specific issues that will be addressed by the court."

Therefore, appellant sets forth the following issues, pursuant to California Rules of Court, rule 8.520, subdivision (b) (2) and (3).

ISSUES PRESENTED

1. Did the trial court violate appellant's federal constitutional rights to a jury trial and to due process, under the Sixth and Fourteenth Amendment, as set forth in *Cunningham v. California* (Jan. 22, 2007) No. 05-6551, ___ U.S. ____ [127 S.Ct. 8561, 2007 U.S. LEXIS 1324, 75 U.S.L.W. 4078]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] and *United States v. Booker* (2005) 543 U.S. 220, [125 S.Ct. 738, 160 L.Ed.2d 621] by imposing the upper term and a consecutive sentence based upon factors that were not found true beyond a reasonable doubt by a jury or admitted by appellant?

2. Where the sentencing court relied on a number of aggravating factors not found by the jury beyond a reasonable doubt, does the court's recitation to a single factor within the *Almendarez-Torres* exception eliminate the violation of appellant's federal constitutional rights under the Sixth and Fourteenth Amendments, pursuant to *Cunningham v. California*?

3. If the sentencing court committed *Cunningham/Blakely* error in imposing the upper term and consecutive sentences, is the error in this case prejudicial under the *Chapman v. California* (1967) 386 U.S. 18 standard?

4. What remedy is appropriate for the violation of appellant's constitutional rights in sentencing?

STATEMENT OF THE CASE

Appellant, Joel Hernandez (hereafter "appellant"), appeals the judgment and sentence entered against him after conviction for one count of evading a peace officer with reckless driving (Veh. Code § 2800.2, subd. (a)) and one count of resisting an officer (Pen. Code § 148, subd. (a)(1)), with a finding, based upon appellant's admission, of a prison prior enhancement. (Pen. Code §§ 667.5, subd. (b).) (Reporter's Transcript ("R.T." pp. 189, 193; Clerk's Transcript ("C.T.") pp. 69-70, 132.)

On June 9, 2005, appellant was charged in a two-count information with the above offenses.¹ (C.T. pp. 1-2.) The information also contained allegations that appellant had suffered a prison prior within the meaning of Penal Code sections 667.5, subdivision (b) and 668, as well as a probation denial prior, within the meaning of Penal Code section 1203, subdivision (e)(4). On defense motion, the court bifurcated the prison prior for purposes of trial. (R.T.) p. 13, C.T. p. 128.)

Following a two-day jury trial, appellant was convicted on August 1, 2005, of the substantive offenses, as charged in the information. (R.T. p. 189; C.T. pp. 69-70.) Appellant, thereafter, waived jury and admitted the prison prior. (R.T. p. 193; C.T. p. 132.) He then filed a motion for new trial, pursuant to Penal Code section 1181, on grounds that prejudicial evidence of gang membership had prevented him from receiving a fair trial. (C.T. pp. 92-98.)

On October 7, 2005, the trial court denied appellant's motion for new trial and entered judgment against appellant for conviction after jury trial. (R.T. pp. 271, 278-282; C.T. p.134.) The court sentenced appellant to the upper term of three years on the Vehicle Code section 2800.2, subdivision (a) conviction, with a consecutive six-month sentence for the Penal Code section 148 conviction, and an additional one year for the prison prior. (R.T. pp. 278-282; C.T. pp.

¹ The original complaint filed against appellant on May 25, 2005 also charged appellant with violating Health & Safety Code section 11364 [possession of paraphernalia used for narcotics.] However, the court dismissed that count for insufficiency of evidence at the conclusion of the preliminary hearing. (Preliminary Hearing Transcript ("P.H.T.") p. 32; R.T. p. 13; C.T. p. 125.)

120, 134.) Thus, appellant received a total sentence of 4 years and 6 months. (*Ibid.*) Total credits of 210 days, made up of 140 time served credits plus 70 conduct credits, were applied to appellant's aggregate term. (*Ibid.*)

Appellant filed a timely notice of appeal on December 5, 2005. (C.T. p.121.) On appeal, appellant argued, among other issues, that the trial court abused its discretion in imposing the upper term and consecutive sentences without jury findings to support the facts found in aggravation beyond a reasonable doubt, in violation of appellant's right to a jury trial and due process rights under the Sixth and Fourteenth Amendments. (Appellant's Opening Brief ("AOB") pp. 16-24; Appellant's Reply Brief ("ARB") pp. 5-9.) The Fourth District Court of Appeal rejected appellant's arguments, challenging the sentencing choices of upper and consecutive terms, and affirmed the judgment entered against appellant in an unpublished decision, filed on November 16, 2006. (Slip Opinion D047682, hereafter "Slip Op.") The Court of Appeal found, in part, that the reasoning of *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] was inapplicable to California's determinate sentencing and did not implicate appellant's Sixth Amendment rights to jury trial, that appellant had waived any *Blakely* error by not raising it at sentencing, and that, even if a finding was made that the trial court erroneously relied upon aggravating factors, any *Blakely* error was harmless. (Slip Op. pp. 15-21.). Appellant petitioned for review to this Court to exhaust his state remedies, pending decision by the U.S. Supreme Court in *Cunningham v. California, supra*, ___ U.S. ___, [127 S.Ct. 8561, 2007 U.S. LEXIS 1324, 75 U.S.L.W. 4078]. After the decision in

Cunningham was issued on January 22, 2007, this Court granted review.

STATEMENT OF FACTS

The Facts of the Offense

On May 21, 2005, around 12:38 a.m., on-duty Escondido Police Detective Rudy Rudisell received a telephone call from someone at a 7-11 store, saying there was gang activity in the area of 9th Avenue and Quince Street in Escondido. (R.T. pp. 41-42, 56, 59.) He was told the suspects were driving two vehicles; one was described as a black Chevrolet Silverado truck and the second was described as a silver Honda Civic. (R.T. pp. 42, 60.)

Detective Rudisell, wearing his uniform, was traveling in a marked black and white Escondido police cruiser southbound on Quince Street when he saw a black Chevrolet Silverado truck turn north onto Quince Street. He observed a silver four-door automobile directly behind it. (R.T. pp. 42-43.)

As the truck turned onto Quince Street and directly in front of Detective Rudisell's cruiser, the officer used his vehicle's spotlight to illuminate the inside of the truck. He was able to look inside the vehicle for a period of approximately 5 seconds. (R.T. pp. 60, 94-95.) Based upon that observation, Detective Rudisell said he could identify appellant as the driver of the vehicle. (R.T. pp. 62, 82.) He recognized appellant's face when he saw it as he "spotlighted" the truck, but admitted that at that moment he was not able to connect to whom that face belonged and did not do so until he spoke with appellant at the scene of the arrest. (R.T. pp. 62, 83, 103-105.)

Detective Rudisell saw only one other person in the vehicle, but he was not able to identify that person. (R.T. p. 96.)

The Chevy truck sped up and turned east onto 5th Avenue, then south onto Pine Street, with the car turning north onto Quince Street. (R. T. p. 63.) Detective Rudisell fell in behind the truck and activated his lights and siren. (R.T. pp. 43, 63.) He observed the truck fail to stop at a stop sign on 9th Avenue and then drive through two red lights. (R.T. pp. 44, 46, 50, 65-70.) He also observed the truck driving at speeds of 65 mph and 70 mph, which exceeded the speed limit for the streets on which it was driving. (R.T. pp. 44, 47, 49, 70-71.) At Washington Avenue, another officer, Escondido Police Sergeant Eric Distel, who was in the area, took over the primary position in the pursuit. (R. T. pp. 42-44, 71.) Sergeant Distel also observed the truck run through red lights at speeds of between 60 and 70 mph. (R.T. pp. 44, 46.) He then observed the vehicle stop at a dead end on Beechwood Avenue, and saw five individuals run from the vehicle. (R.T. pp. 50-51, 96.)

The Escondido Police Department established a perimeter, with the assistance of approximately 8 officers, a canine team, and a helicopter, and began searching for the occupants of the Chevy truck. (R.T. pp. 52-53.) Appellant was found on the roof of a building on Rustic Road. (R.T. pp. 53, 73, 105.) The officers also located Noe Mendoza in a backyard on Rustic Place and found a 15-year-old female near the truck. (R.T. pp. 53, 74.) Detective Rudisell recognized appellant as a person he had had contact with before and had had prior contact with his family. (R.T. pp. 82-83.) When he first saw appellant, he called him “Ivan,” which is the name of appellant’s

brother, who had been arrested the week before. (R.T. p. 83.) He arrested appellant as the driver of the vehicle. (See R.T. pp. 82, 113, 123.) Noe Mendoza was arrested for being drunk in public. (R.T. p. 103.) Through Department of Motor Vehicle records, Detective Rudisell identified the truck as belonging to appellant. (R.T. pp. 90-91.) He also identified a cell phone that he said was on the driver's seat as belonging to appellant and a cell phone that he said was on the floor by the passenger seat as belong to Noe Mendoza. (R.T. pp. 91-92.)

On cross-examination, Detective Rudisell admitted that the two cell phones looked identical and one of the two phones did not turn on. He also admitted that he did not know how he had identified the phone on the driver's seat as appellant's phone. (R.T. pp. 91-94.) Officer Venable had secured the truck and retrieved the phones, which when given to Detective Rudisell were placed in a bag and not marked as to from which location which phone had been retrieved. (R.T. pp. 100-102, 108.)

The next day, on May 22, 2005, Noe Mendoza came to the Escondido Police Department to report that he had actually been the one driving the vehicle at the time of the pursuit. (R.T. pp. 102-103.) Escondido police officer Paige Woog contacted Detective Rudisell regarding Mr. Mendoza's statement. Detective Rudisell told her that the driver, i.e. appellant, had already been arrested and that Noe Mendoza was not to be detained. (R. T. pp. 102-103, 111-113, 123.) Officer Woog did not write a report regarding this incident until June 2005. (R.T. p. 114.)

Noe Mendoza appeared at the preliminary hearing and at trial, but on advice of counsel on both occasions, he invoked his rights under the Fifth Amendment of the United States Constitution and did not testify. (P.H.T. pp. 29-30; R. T. pp. 22-24; C. T. pp. 125, 128.) Mr. Mendoza's statements were introduced through Officer Woog, over the People's objection. (R.T. pp. 3, 26-27; C.T. pp. 8-10.)

Detective Rudisell testified in rebuttal that in his experience as the lead investigator with the gang unit in Escondido for five years, he found it common for one gang member to take the fall for another member's crime. (R.T. pp. 116-124 ; C.T. pp. 105-117.) He also testified that he believed that Noe Mendoza was in the same gang as appellant. (R.T. pp.119-122.)

The Court's Reasoning at Sentencing

The trial court began its pronouncement of sentence by stating that "probably the appropriate sentence was upper term on the evading and consecutive on the misdemeanor." (R.T. p. 272). In setting forth grounds for that conclusion, the court disregarded the probation officer's recommendation and analysis that this was a presumptive middle term case, stating: "The probation department recommended a midterm, but they also indicated in the probation report there are no mitigating circumstances under the California Rules of Court. There are none. And when there are none, *ipso facto*, the aggravating circumstances outweigh none, and you should get the upper term or at least presumably you should get the upper term." (R.T. pp. 278-279.)

Relying for the most part on California Rules of Court, rule 4.421, subdivisions (a) and (b), the court then listed several findings it made as circumstances in aggravation. First, the court observed that

appellant had no remorse. It then concluded that the crime involved “potential great violence for bodily harm to the members of the public, and the threat of violence or great bodily harm.” The court reasoned that “there’s no evidence of wrecks or near wrecks, but the defendant drove his truck through the red lights of the following major intersections in Escondido, all four-lane-in-each-direction roads, and that’s a bunch of intersections and a bunch of red lights and a bunch of people in great danger.” (R.T. p. 279.) The court then found “in my view it’s a high degree of callousness and lack of regard for the public.” (*Ibid.*)

In addition, the trial court found that “the victims are particularly vulnerable in that there’s a whole bunch of them and it was at night, so they would be unable to see the vehicle coming as well as they could in the day. There are multiple intersections and there’s a high speed of 70 miles per hour I believe the testimony was.” (R.T. p. 280.)

The court also made a finding that “the defendant induced others to participate in the crime and was the leader. He was older than the other people. It was his vehicle and he was driving. So I think that’s a fair conclusion.” (*Ibid.*) It further found that appellant “induced a minor to be involved in a crime.” The court noted that defense counsel had argued there was no evidence to support this finding, but said, “I think there is because the minors were in the car, and whether that’s a good one or not, the other ones -- or that may be the weakest one, but I think it still exists.” (*Ibid.*)

Further, the trial court said, “I think it’s very likely this defendant had something to do with Noe Mendoza’s false statement,”

and “I don’t think there’s much planning or sophistication to this crime, but there was gang professionalism all throughout the testimony.” (*Ibid.*)

Thereafter, the court noted that appellant has “numerous prior convictions,” was on parole at the time of the crime, had served a prison prior term, and that his prior performance on parole and probation was “very poor.” (R.T. p. 281.) The court then also noted, pursuant to California Rules of Court, rule 4.421, subdivision (c) that, for “other factors,” the court “would place all of this was done in furtherance of street gang activity.” (*Ibid.*) The court then imposed the upper term of three years, with an additional year added on for the prison prior. (*Ibid.*)

The court also imposed a consecutive 6 month sentence for the misdemeanor conviction under Penal Code section 148. It reasoned that there were two sets of victims, first the motorists, pedestrians, and police in danger during the vehicle pursuit and secondly, the people in the neighborhood where appellant got out of the vehicle to hide. (R.T. pp. 281-282.) The court further stated that to impose the consecutive sentence it could also “consider any circumstances in aggravation that I did not use to impose the upper term, so in imposing the upper term, I will indicate I have used all of rule 4.421 (b) and none of 4.421(a) and use 4.421 (a) in addition to the other factors I’ve cited to indicate that the misdemeanor term should be consecutive.” (R.T. p. 282.)

ARGUMENT

I.

THE TRIAL COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO TRIAL BY JURY AND DUE PROCESS BY SENTENCING HIM UNDER CALIFORNIA'S UNCONSTITUTIONAL SENTENCING STATUTE TO AN UPPER TERM AND CONSECUTIVE SENTENCE BASED UPON FACTORS THAT WERE NOT FOUND BY THE JURY

A. Introduction

The trial court departed from the presumed middle term and imposed the upper term for one count of evading a peace officer with reckless driving and a consecutive term for one count of resisting an officer, based on facts which were not found by the jury and facts which fall well outside the prior conviction exception of *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 239-247.

As set forth above, at the outset of sentencing, the trial court concluded that this was an upper term/consecutive sentence case, despite the probation report recommendation for a middle term sentence. (R.T. p. 272.) The court then listed a number of the factors in aggravation that were not based upon the jury findings, beyond a reasonable doubt, but instead were the court's own evaluation of the evidence and the information contained in the probation report.

For the upper term sentence, the trial court listed factors from California Rules of Court, rule 4.421, subdivision (b): that appellant had numerous convictions, was on parole at the time the crime was committed, and that his prior performance on parole and probation were "very poor." (R.T. p. 281.) These "factors" were found by the court based upon its review of the probation report and were not based

upon evidence presented at trial. The court also found, pursuant to California Rules of Court, rule 4.421, subdivision (c) that appellant's activities were "done in furtherance of gang activity."² (*Ibid.*) Since it was not an element of the crimes charge, that factor was necessarily not found by the jury beyond a reasonable doubt.

To impose the consecutive sentence for violation of Penal Code section 148, the trial court also made a number of conclusions that were not found by the jury beyond a reasonable doubt, including that appellant induced others to be involved in the crime, that he induced a minor to be involved in a crime, that he was involved in Noe Mendoza's "false statement," that there was "gang professionalism," that appellant had no remorse, and that the crime involved "potential great violence for bodily harm to members of the public, and the threat of violence or great bodily harm." In reaching this last conclusion, the court reasoned that there were a "bunch of intersections and a bunch of red lights and a bunch of people in great danger." (R.T. p. 279.) Because the evidence before the jury reflected that the incident occurred at night and the testimony of the officers was that traffic was light to moderate, it is clear that conclusion of the trial court was its interpretation of the evidence

² It is unclear from the court's comments whether its finding under California Rules of Court, rule 4.421, subdivision (c) was used to support the imposition of the upper term or the imposition of the consecutive sentence.

rather than facts found true by a jury beyond a reasonable doubt or admitted by appellant.³

B. Appellant’s Sentence Based upon the Trial Court’s Fact-Finding Is Unconstitutional and Must Be Reversed under *Cunningham v. California*

In *Cunningham v. California, supra*, ___ U.S. ___ [127 S.Ct. 8561, 2007 U.S. LEXIS 1324, 75 U.S.L.W. 4078], the U.S. Supreme Court made clear that California’s determinate sentencing scheme, which places sentence elevating fact-finding within the judge’s province, violates a defendant’s right to trial by jury as safeguarded by the Sixth and Fourteenth Amendments of the U.S. Constitution.

“This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.” (*Cunningham, supra*, ___ U.S. ___ [2007 U.S. LEXIS 1324 *22, 75 U.S.L.W. 4078]; see also, *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

As set forth above, in the instant case, the sentencing court imposed the upper term and a consecutive sentence based upon facts not admitted by the appellant and not found by the jury beyond a reasonable doubt. Doing so is a clear violation of the appellant’s Sixth and Fourteenth Amendment rights, as set forth in *Cunningham*. “Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the

³ The only factor in aggravation found by the court that appellant had admitted was that he had suffered a prison prior. (R.T. p. 193; C.T. p. 132.) That factor is discussed in Argument II, *infra*.

evidence, not beyond a reasonable doubt, ... the [determinate sentencing law] violates *Apprendi*'s bright line rule....” (*Cunningham v. California, supra*, ___ U.S. ___ [2007 U.S. LEXIS 1324 *34, 75 U.S.L.W. 4078].)

“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.” (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490 [120 S.Ct. at pp. 2362-2363, 147 L.Ed.2d at p. 455.]) The U.S. Supreme Court has since reaffirmed the rule of *Apprendi* in *Ring v. Arizona* (2002) 536 U.S. 584, 602, 609 [122 S.Ct. 2428, 153 L.Ed.2d 556 [applying rule to facts subjecting defendant to the death penalty]; *Blakely v. Washington, supra*, 542 U.S. 296, 304-305 [124 S.Ct. 2531, 159 L.Ed.2d 403] [applying rule to facts permitting a sentence in excess of the ‘standard range’ under Washington’s Sentencing Reform Act]; and *U.S. v Booker* (2005) 543 US 220, 243-244 [125 S.Ct. 738, 160 L.Ed.2d 621 [rule applied to facts triggering a sentence range elevation under the then-mandatory Federal Sentencing Guidelines]; see also, *Harris v. United States* (2002) 536 U.S. 545, 557 [122 S.Ct. 2406, 2414, 153 L.Ed.2d 524, 537-538] (plurality opinion) [“*Apprendi* said that any fact extending the defendant’s sentence beyond the maximum authorized by the jury’s verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.”]

“[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without any additional findings.*”

(*Cunningham v. California, supra*, ___ U.S. ___ [127 S.Ct. 856, 2007 U.S. LEXIS at 1324, * 11], citing *Blakely v. Washington, supra*, 542 U.S. at pp. 303-304 [124 S.Ct. at p. 2537, 159 L.Ed.2d at pp. 413-414] [emphasis added].) Penal Code section 1170, subdivision (b) makes clear that the “statutory maximum” under *Blakely*’s definition is the middle term, as it states, in pertinent part:

When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.*

(Pen. Code § 1170, subd. (b) [emphasis added].)

In accord with *Blakely*, therefore, the middle term prescribed in California’s statutes, not the upper term, is the relevant statutory maximum. (See, *Cunningham v. California, supra*, ___ U.S. ___ [127 S.Ct. 856, 2007 U.S. LEXIS at 1324, * 26].)

The trial court in the instant case thus violated appellant’s constitutional rights to have the findings that were applied to impose an upper term and consecutive sentence determined true by a jury beyond a reasonable doubt. Instead, the trial court applied California’s determinant sentencing law in deciding between a sentence for appellant of 16 months, two years, or three years for violation of Vehicle Code section 2800.2, subdivision (a), and exercised its discretion, citing the state judicial council adopted rules, as guiding the sentencing decision on both the upper term and consecutive sentences. (R.T. pp. 278-282.)

1. The Trial Court’s Imposition of the Upper Term Was Based Upon Factors That Do Not Fall Within the *Almendarez-Torres* Exception

In affirming the trial court sentence in this action, the Court of Appeal held that the trial court’s reliance upon factors included in California Rules of Court, rule 4.421, subdivision (b), regarding appellant’s prior convictions being numerous, his status on parole at the time of the charged offense, and his past performance on probation and parole as unsatisfactory, were sufficient to support imposition of the upper term, under the prior conviction exception, preserved by *Blakely*, *supra*, 542 U.S. 296, *Apprendi*, *supra*, 530 U.S. 466, and *Almendarez-Torres v. United States*, *supra*, 523 U.S. 224.

The Court of Appeal stated,

[T]he court relied on rule 4.421 (b), the defendant’s background, saying that it provided overwhelming evidence that he should get the upper term, due to repeated violent conduct dangerous to society. These factors included rule 4.421(b)(2), Hernandez’s prior convictions were numerous; (b)(4), he was on parole at the time he committed the charged offenses; and (b)(5), his past performance on probation and parole had been unsatisfactory.

These factors fall within the prior conviction exception preserved by *Blakely*, [citation omitted] and *Apprendi*, [citation omitted] ... Because any one of these proper factors in aggravation is sufficient to support imposition of an upper term (*People v. Osband*) (1996) 13 Cal.4th 622, 728), and the court expressly rejected an available leniency option when it imposed consecutive terms, the court’s reliance on other factors was harmless error.

(Slip Opn. p. 21.)

Of the facts identified by the trial court as factors in aggravation under California Rules of Court, rule 4.421, subdivision (b), the only fact admitted by appellant was that he had a prison prior, within the meaning of Penal Code sections 667.5, subdivision (b) and 668. (R.T. p. 193; C.T. p. 132.) There is no indication in the record that appellant admitted his “numerous” prior convictions, his probation priors or his lack of success on probation or parole. There is also no indication in the record that these finding were deemed true beyond a reasonable doubt.

Thus, the only fact that could arguably fall outside the Sixth Amendment violation for purposes of sentencing would be appellant’s prior conviction since he admitted to same. However, Penal Code section 1170, subdivision (b) makes clear that the trial court “may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” In this case, the sentencing court used the fact of the prison prior to add an additional one year to appellant’s sentence. (R.T. pp. 278-282; C.T. pp. 120, 134.) Thus, the recitation of that prison prior in setting forth the factors the court was relying upon to impose the upper term was either: (1) merely a point of notation, but not the basis for the trial court’s imposition of the upper term, or (2) a violation of Penal Code section 1170, subdivision (b)’s mandate that a fact used to impose an enhancement cannot be used to impose an aggravated term.

The facts of appellant’s prior record, found solely from a review of the probation report, is insufficient to uphold his aggravated sentence in light of *Cunningham v. California*, *supra*, ___ U.S. ____ [2007 U.S. LEXIS 1324, 75 U.S.L.W. 4078]. The appellate court

herein erred to the extent it found any factor, other than the fact of the admitted prior conviction itself, to fall within the “prior conviction exception” to the bright-line rule requiring a jury finding beyond a reasonable doubt. This exception has never been applied to facts, as presented by the instant case, where appellant’s only admitted prior conviction was used to enhance his sentence by a one year term.

It appears that the appellate court has read the reasoning of *Almendarez-Torres* or *Blakely* too broadly to include within the exception all aspects of a defendant’s prior record, rather than just the fact of a prior conviction alone. In *Almendarez-Torres*, *supra*, 523 U.S. 224, 239-247, the court considered a federal grand jury indictment, which charged Almendarez-Torres with “having been found in the United States ... after being deported,” in violation of 8 U.S.C. § 1326, subdivision (a). Almendarez-Torres thereafter pleaded guilty, and in doing so, admitted that his earlier deportation had taken place “pursuant to” three earlier “convictions” for aggravated felonies. The government filed a pre-sentence report indicating that his original deportation had been subsequent to an aggravated felony, such that Almendarez-Torres’ offense fell within the bounds of 8 U.S.C. § 1326, subdivision (b), which would subject him to a sentence of up to 20 years. He objected on grounds that his indictment “had not mentioned his earlier aggravated felony convictions” and that he should thus not be sentenced to more than two years. The U.S. Supreme Court rejected Almendarez-Torres’ objections, but did not reach the issue of whether the facts related to his prior convictions needed to be proved beyond a reasonable doubt.

Rejecting *Almendarez-Torres*' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of [*In re*] *Winship* [(1970) 397 U.S. 358, 25 L.Ed2d 368, 90 S.Ct. 1068] in that case. *Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies---* all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own -- no question concerning the right to jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.

(*Apprendi v. New Jersey, supra*, 530 U.S. at 488 [emphasis added].)

In other words, as this state's appellate courts have recognized, “[b]oth the certainty that procedural safeguards attached to any ‘fact’ of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that ‘fact’ in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range.” (See discussion in *People v. Thomas* (2001) 91 Cal.App.4th 212, 220.)

To the extent *Almendarez-Torres* creates an exception, that exception is only as to the fact of the prior conviction itself. All other factors, as enumerated by the sentencing court herein in imposing the upper term, involve an element of subjectivity that require fact-finding. For example, the findings of numerosity and characterization of seriousness of the offenses goes beyond the bare fact of a conviction, and requires some subjective analysis of the underlying convictions. There exists no absolute list from which it can be determined without delving into the basis of conviction whether a

particular crime is “more serious” than another. For example, in appellant’s case, the probation report set forth three prior convictions for Penal Code section 459 from 2000 through 2004. The underlying facts, as reported by the probation report, all involved stealing items from parked vehicles. The probation report also reported that appellant had been convicted of prior offenses under Penal Code section 148, subdivision (a)(1) [resisting an officer] and Penal Code section 12020, subdivision (a)(4) [possession of a concealed dagger]. (C.T. pp. 80-82.) The probation report identifies no injuries resulting from the activities of any of these offenses. How many offenses create a finding of “numerous” and which of the offenses is more increasingly serious are left to the opinion of a fact-finder.

In addition, unsatisfactory performance on probation and parole are findings of fact beyond the pure fact of a conviction, and in the instant case were based solely upon the probation report statements regarding same. (See, C.T. p. 82.) Finally, whether appellant was on parole at the time of the commission of the crime at issue is also a fluid factor that is subject to fact-finding, unlike the record of a prior conviction.

Moreover, even if arguably appellant’s prior history of convictions and success on parole and probation were properly classified as within the prior conviction exception set forth in *Almendarez-Torres*, such findings in appellant’s case were still not *Cunningham* and *Blakely* compliant since the findings were not made beyond a reasonable doubt. Instead, the evidence the sentencing court relied upon was based upon hearsay from the probation report. (See *Apprendi, supra*, 530 U.S. at p. 488 [“Both the certainty that

procedural safeguards attached to any ‘fact’ of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that ‘fact’ in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated...’].)

In *People v. Thomas* (2001) 91 Cal.App.4th 212, 223, the court found the evidence of Thomas’ prior convictions to “have the constitutional requisite level of reliability so as to meet any pertinent due process concerns.” (*Id.* at p. 223.) That “proof” included abstracts of judgment, fingerprint records, and Department of Corrections documents. (*Ibid.*) In the instant case, however, there was no such reliable proof of the factors the court relied upon to impose the aggravated term. Instead, the trial court found that appellant had “numerous” prior convictions, was on parole at the time of the charged offense, and had poor performance on probation and parole solely from information supplied in the probation report.

Under the California Determinate Sentencing law, applied by the sentencing judge in the instant action, facts aggravating an offense need be established only by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420, subd. (b); Pen. Code § 1170, subd. (b).) Such factors in aggravation are to be determined by the court after consideration of several items: the trial record; the probation officer’s report; statements in aggravation or mitigation submitted by the parties, the victim or the victim’s family; “and further evidence introduced at the sentencing hearing.” (Pen. Code § 1170(b).) The application of these rules led the trial court to make findings based upon the probation report rather than either a finding beyond a reasonable doubt or an admission of appellant.

As noted in *Apprendi, supra*, 530 U.S. at p. 496, “[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.” Since, in this case, the sole factor cited in aggravation that arguably meets Sixth and Fourteenth Amendment standards, was also used by the sentencing court to enhance appellant’s sentence by one year, the use of that factor alone could not alleviate the constitutional concerns raised in *Cunningham v. California*, for imposing the upper term on this appellant. Thus, imposition of the upper term based upon factors not admitted by appellant, and not found true by a jury based upon proof beyond a reasonable doubt, unconstitutionally infringed upon appellant’s rights and should be reversed.

2. The Trial Court’s Imposition of a Consecutive Term, Based upon Both Factors in Aggravation and Findings Pursuant to Penal Code section 654, Which Were Not Found True by a Jury Beyond a Reasonable Doubt Nor Admitted by Appellant Also Violate Appellant’s Sixth and Fourteenth Amendment Rights

Although *Cunningham* addressed the imposition of a term greater than the middle term pursuant to California’s determinate sentencing scheme under Penal Code section 1170, where three possible terms are identified for a felony conviction, the same reasoning should apply in finding that the trial court violated appellant’s constitutional rights by using factors not found by a jury or

admitted by appellant to impose a consecutive sentence of the misdemeanor conviction under Penal Code section 148.

Appellant had argued at sentencing that the trial court should stay the imposition of sentence for the misdemeanor conviction, pursuant to Penal Code section 654. The trial court, however, found that the Vehicle Code section 2800.2, subdivision (a) conviction and the Penal Code section 148 conviction were “separate acts of violence” involving “separate victims or threatened victims.” (R.T. p. 281.) The court then listed numerous factors it identified, under California Rules of Court, rule 4.421, subdivision (a), as factors in aggravation that were neither admitted by appellant nor found true by the jury beyond a reasonable doubt. It thereafter said these factors were the basis for imposition of the consecutive sentence. (R.T. pp. 281-282.)

The sentencing court thus relied upon both a finding it made that there was more than one criminal act with separate victims as well as findings of facts it found in aggravation -- none of which were found true by a jury beyond a reasonable doubt nor admitted by appellant --to increase appellant’s sentence in a manner which violated appellant’s constitutional rights.

While this Court had earlier concluded in *People v. Black* (2005) 35 Cal.4th 1238, 1262-1263, that a jury trial was not required on the aggravating factors used to justify imposition of consecutive sentences under Penal Code section 669, appellant requests this Court reconsider the issue in light of the analysis in *Cunningham*. On February 20, 2007, the U.S. Supreme Court vacated the *Black* opinion and remanded it to this Court for further consideration in light of

Cunningham v. California, supra, ___ U.S. ___ (2007). (*Black v. California*, 2007 U.S. LEXIS 1856 (U.S. Feb. 20, 2007).)

(a) Factors Found in Aggravation to Impose the Consecutive Term

As set forth above, none of the factors found in aggravation under California Rules of Court, rule 4.421, subdivision (a) even arguably fell within the prior conviction exception since none of them involved appellant's criminal history, status on parole or probation, prior record, etc. Instead, the factors the court listed in aggravation to support the consecutive sentence included that appellant was not remorseful; that appellant induced others, including a minor, to be involved in the crime; that he was involved in a witness' "false statement" that the witness had committed the crime; and that there was "gang professionalism." (R.T. p. 279.) None of these factors were admitted by appellant nor found true beyond a reasonable doubt by the jury.

Under Penal Code section 669, whenever a person is convicted of two or more crimes, the judge must direct whether the terms of imprisonment for those offenses shall run consecutively or concurrently. If the judge fails to direct how the terms will run, they are deemed to run concurrently. (Pen. Code § 669.) If the judge directs that a determinate sentence is to run consecutively to another term, the judge must state on the record "the primary factor or factors that support the exercise of discretion." (Cal. Rules of Court, rules 4.406, subd. (a); 4.406, subd. (b); Penal Code § 1170, subd. (c); and see *People v. Dixon* (1993) 201 Cal.App.4th 1029, 1036-1037 [judge

must give reasons for imposing a determinate term consecutively to an indeterminate term].)

In exercising discretion as to whether to impose a consecutive or concurrent sentence, under the California Determinate Sentencing Law, the judge may consider any circumstances in aggravation or mitigation, except an element of the crime or an aggravating fact that is used to impose the upper term or otherwise enhance the sentence. (Cal. Rules of Court, rule 4.425, subd. (b).) The judge also may consider whether the crimes and their objectives were independent of each other, involved separate acts of violence or threats of violence, and whether they were committed at different times or separate locations. (*Id.*, rule 4.425, subd. (a).)

For the same reasoning set forth in *Cunningham* and *Blakely* regarding the need for jury fact finding beyond a reasonable doubt to impose an upper term, the jury, not the judge, should determine the factors used to impose a consecutive sentence, using a reasonable doubt standard. Under the sentencing scheme, as it exists, concurrent terms are the “statutory maximum” absent findings of fact to support a consecutive sentence. (Pen. Code § 669.)

Cunningham, supra, ___ U.S. ____, [127 S.Ct. 856, 2007 U.S. LEXIS 1324, *11] makes clear that “the Federal Constitution’s jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.” (See also, *Apprendi v. New Jersey, supra*, 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and *Blakely v. Washington, supra*, 542 U.S. 296, [124 S.Ct. 2531, 159 L.Ed.2d 403.]

Since appellant had the constitutional right to a jury trial on his misdemeanor offense, he should also have the right to have a fact that increases the penalty by causing it to become consecutive, rather than concurrent, proved beyond a reasonable doubt. (See, e.g. *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 298-301 [rationale for *Boykin-Tahl* requirement of an explicit on-the-record waiver of a defendant's constitutional rights is applicable to misdemeanor guilty pleas as well as felonies.]

Instead, in the instant case, the sentencing court relied upon factors found in accordance with California Rules of Court, rule 4.421, subdivision (a). Those factors are “*facts* which [are used by the court to] justify the imposition of the upper term.” (*Cunningham, supra*, ___ U.S. ___ [127 S.Ct. 856, 2007 U.S. LEXIS 1324, *15] (emphasis in original).) Under California's determinate sentencing law-- found unconstitutional in *Cunningham*-- these facts need only be established by a preponderance of the evidence. (Cal. Rules of Ct., rule 4.420, subd. (b).)

However, the U.S. Supreme Court “has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.” (*Cunningham, supra*, ___ U.S. ___ [127 S.Ct. 856, 2007 U.S. LEXIS 1324, *21].) Since the sentencing court utilized these “aggravated factors” findings to support its determination to impose a consecutive sentence -- rather than merely relying upon them to determine the length of that sentence within the one year time prescribed by the statute -- such fact-finding did result in an increased

sentence for appellant and violated his Sixth and Fourteenth Amendment rights.

(b) Findings Made in Denying Appellant's Request to Stay the Penal Code Section 148 Sentence Were Also Judicial Fact-Finding in Violation of Appellant's Constitutional Rights

While not an issue specifically presented for briefing in this review, the court's determinations under Penal Code section 654 were the same type of judicial fact-finding *Cunningham* found violative of a defendant's constitutional rights.⁴ Appellant recognizes that this Court noted in *Black, supra*, 35 Cal.4th at p. 1264 that "[f]or purposes of the right to a jury trial, the decision whether section 654 requires that a term be stayed is analogous to the decision whether to sentence concurrently. Both are sentencing decisions made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense, and neither implicates the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense." However, in light of the U.S. Supreme Court's direction that *Black* be reviewed in

⁴ The specific findings set forth by the trial court to deny appellant's Penal Code section 654 request for a stay of the Penal Code section 148 sentence were not identified in appellant's briefing to the appellate court below or the Petition for Review as examples of the judicial fact-finding that resulted in the violation of appellant's Sixth and Fourteenth Amendment rights. However, the argument that the consecutive sentence was unauthorized based upon unconstitutional judicial fact-finding not found true beyond a reasonable doubt was raised. Thus, appellant raises the issue at this time as one which this Court may decide, pursuant to California Rules of Court, rule 8.516.

light of *Cunningham*, appellant requests the Court take this issue under consideration.

While *Cunningham* itself does not address the imposition of consecutive sentences, its reasoning, like *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, and the rationale it embodies, appears to require the jury rather than the trial judge to determine whether a defendant committed these offenses with multiple objectives and thus was susceptible to consecutive rather than concurrent sentences for this course of criminal conduct.

Penal Code section 654, subdivision (a) precludes multiple punishment for a criminal act that violates more than one Penal statute. Under *Neal v. California*, (1960) 55 Cal.2d 11, 19, the multiple punishment bar of Penal Code section 654 applies not only to a single act or omission, but to multiple acts and omissions that are part of one indivisible course of conduct. The *Neal* test for the indivisibility of a course of conduct focuses on the criminal objective of the defendant. “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses, but not for more than one.” (*Ibid.*)

A judge has no more discretion in determining the applicability of Penal Code section 654’s multiple punishment bar than a jury has in resolving a defendant’s guilt; they are both reviewed under the substantial evidence test. (See *People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) A judge’s

error in failing to apply the multiple punishment bar under Penal Code 654 is the functional equivalent of an unauthorized sentence. It cannot be waived. (See, *People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn.3 [“errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal”]; see also, *People v. Shelton* (2006) 37 Cal.4th 759 [after guilty plea, defendant needed a certificate of probable cause to appeal a trial court’s Penal Code section 654 determination because such an appeal challenged the trial court’s *legal authority* to impose a consecutive sentence].)

“A violation of [Penal Code] section 654 is conceptually distinct from an improper discretionary sentencing choice because it results in a legally unauthorized sentence.” (See, *People v. Latimer* (1993) 5 Cal.4th 1203, 1216; *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) This distinction makes clear why the standard under the *Cunningham/Blakely* rationale applies to Penal Code section 654 determinations because when a defendant receives a consecutive sentence on a transactionally related count, an adverse Penal Code 654 determination is “legally essential” to his sentence.

While the cases cited in *Black* that have addressed this issue have rejected it, they pre-date *Blakely* and *Cunningham*. (See, *People v. Cleveland*, (2001) 87 Cal.App.4th 263; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1021-1022.) In *Cleveland*, the defendant argued that the issue of whether he had more than one criminal objective for multiple offenses committed during a single course of criminal conduct was a factual question that *Apprendi* required the jury to decide beyond a reasonable doubt. In a 2-1 opinion, the appellate

court disagreed, reasoning that the question of whether Penal Code section 654 operates to “stay” a particular sentence does not involve the determination of any fact that could increase the penalty of the crime beyond the statutory maximum. (*Cleveland, supra*, 87 Cal.App.4th at p. 270.) The court classified Penal Code section 654 as a “sentencing ‘reduction’ statute,” rather than a sentencing enhancement. (*Ibid.*)

However, in a well-reasoned concurrence and dissent, Justice Johnson opined that “the United States Supreme Court opinion in *Apprendi v. New Jersey* -- and the rationale it embodies-- requires the jury rather than the trial judge to determine whether a defendant committed these offenses with multiple objectives and thus was susceptible to consecutive sentences rather than concurrent sentences for this course of criminal conduct.” (*Cleveland, supra*, 87 Cal.App.4th at pp. 272-273, Johnson J., concurring and dissenting.)

As *Apprendi* noted, “[T]he relevant inquiry is not one of form, but of effect -- does the required finding expose the defendant to a greater punishment than is authorized by the jury’s guilty verdict?” (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 494.) Further, as Justice Johnson noted in his dissent, the *Cleveland* majority’s characterization of Penal Code section 654 as a “sentencing reduction statute” is misplaced.

Penal Code section 654, subdivision (a) states:

An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.

In other words, Penal Code section 654 precludes additional punishment for additional crimes committed by a defendant that are part of the same “act” as the principle offense. Thus, classifying it as a “sentence reduction” statute is a misnomer.

Moreover, regardless of the label attached, a proper application of the *Cunningham/Blakely/Apprendi* rule makes clear that the question of whether the defendant had one criminal objective should go to the jury since only its adverse resolution allows the court to impose a sentence beyond that which would have been imposed had the Penal Code section 654 analysis been resolved the other way. Thus, the jury verdict itself did not “authorize” the consecutive term as additional punishment under Penal Code section 654.

“When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ and the judge exceeds his proper authority.” (*Blakely v. Washington, supra*, 542 U.S. at pp. 303-304 [124 S.Ct. at p. 2537, 159 L.Ed.2d at pp. 413-414].) Allowing the court to resolve the question of whether a defendant harbored a single criminal objective during his course of criminal conduct is one whose resolution, favorably or unfavorably to the defendant, will determine its legal effect on a defendant’s punishment. In the absence of findings by a jury based upon a reasonable doubt standard, the resolution of this question is violative of the standard enunciated in *Cunningham, Blakely and Apprendi*.

II.
**WHERE THE SENTENCING COURT RELIED ON A
NUMBER OF AGGRAVATING FACTORS NOT FOUND BY
THE JURY BEYOND A REASONABLE DOUBT, THE
COURT'S RECITATION TO A SINGLE FACTOR WITHIN
THE *ALMENDAREZ-TORRES* EXCEPTION DOES NOT
ELIMINATE THE VIOLATION OF APPELLANT'S FEDERAL
CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND
FOURTEENTH AMENDMENTS, PURSUANT TO
*CUNNINGHAM V. CALIFORNIA***

Since the sentencing court relied so significantly on factors in aggravation that were not found true by a jury beyond a reasonable doubt, its recitation to the single factor of appellant's prior conviction does not cure the violation of appellant's Sixth and Fourteenth Amendment rights in sentencing him to the upper term or a consecutive sentence. In addition, under Penal Code section 1170, subdivision (b), the prior conviction admitted by appellant could not be used by the sentencing court to impose the aggravated term since the court used it to enhance appellant's sentence by a one year term.

As set forth above, initially the sentencing court pronounced that it thought appellant should receive the upper term for the Vehicle Code section 2800.2, subdivision (a) conviction and a consecutive sentence for the Penal Code section 148 conviction. (R.T. p. 279.) It then set forth a number of factors under California Rules of Court, rule 4.421, subdivisions (a) and (b) which it deemed "in aggravation." (R.T. pp. 279-281.) After identifying all of these factors, the trial court indicated that it would use the rule 4.421 (b) factors to impose the upper term and the rule 4.421 (a) factors to impose the consecutive sentence.

To say the upper term can be held valid because the court identified a prior conviction belies the reality of the court's decision making process. To reach the point of exercising its discretion to impose the upper term, the court first made factual findings that there were factors in aggravation and then weighed those factors against those it found (or in this case did not find) in mitigation. It is only through the finding and then weighing of factors that the court rendered its decision to impose the upper term. This process involved, as the court stated on the record, a finding of numerous factors in aggravation, not simply a finding of a prior conviction. (R.T. pp. 281-282.)

Finding that there is no violation of appellant's Sixth Amendment rights under the Cunningham analysis if appellant is eligible for the upper term based upon a single aggravating factor that has been established by constitutional authority -- e.g., appellant's admission of a prior conviction -- would be to erroneously assume that the fact of a prior conviction automatically makes appellant eligible for the upper term. That is not the case. A court can find a single aggravating factor and then through the weighing process determine still not to impose the upper term.

Not every prior, for example, is considered aggravating. Very old priors for relatively minor offenses for which no prison term was served have frequently been rejected as sentence enhancers, and in some instances have been used as a factor in mitigation. (See, *People v. Humphrey* (1997) 58 Cal.App. 4th 809, 813 [describing when records may be so remote as to wash out in the context of *Romero*]; see also, Pen. Code § 667 [requiring felony convictions of a serious or

violent nature]; Pen. Code section 667.5 [requiring a prison term to have been served before the enhancement applies and precluding enhancement when a washout period is satisfied]; Pen. Code § 1210.1 [providing that serious prior felonies do not make a drug user ineligible for Prop. 36 probation if a washout period has been satisfied.] Thus, a mere finding of a prior conviction does not equate to a finding of a factor in aggravation.

Moreover, there is serious doubt that the finding of a prior alone as an aggravating factor to increase the maximum sentence can be constitutionally removed from a jury. *Almendarez-Torres, supra*, 523 U.S. at pp. 235, 239, 247, held that the fact of a prior conviction was no more than a “sentencing factor” that need not be treated as an element of the offense and need not be charged in the indictment or proved to the jury. While not overruled by either *Blakely* or *Apprendi*, the holding was questioned and had its underpinnings removed in *Apprendi* and numerous concurring and dissenting opinions in cases leading up to it.

Apprendi noted:

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that *a logical application of our reasoning today should apply if the recidivist issue were contested*, *Apprendi* did not contest the decision’s validity and we need not revisit it for purposes of our decision today *to treat the case as a narrow exception to the general rule* we recalled at the outset.”

(*Id.* at p. 490 [footnote omitted; emphasis added].)

“Since *Winship*, we have made clear beyond peradventure that *Winship*’s due process and associated jury protections extend, to some

degree, ‘to determinations that [go] not to the defendant’s guilt or innocence, but simply to the length of his sentence.’ [citations]” (*Apprendi, supra*, 530 U.S. at p. 484 [citing Justice Scalia’s dissent in *Almendarez-Torres*].)

Justice Scalia’s disapproval of *Almendarez-Torres* holding was articulated a number of times through concurring and dissenting opinions. (See e.g., *Apprendi, supra*, 530 U.S. at 498-499 [concurring]; *Jones v. United States* (1999) 526 U.S. 227, 253 [143 L.Ed. 2d 311, 119 S.Ct. 1215] concurring; majority limited *Almendarez-Torres* to recidivist issues and distinguished it as a pleading case (*Id.* at pp. 248-249.)

Justice Thomas’ concurring opinion in *Apprendi* also explained at length why the decision in *Almendarez-Torres* was wrong. (*Apprendi, supra*, 530 U.S. at pp. 501-523; see also, *Almendarez-Torres, supra*, 523 U.S. at pp. 256-257, 261 [Scalia, J., dissenting.]

Blakely, which also did not involve a recidivist statute, merely followed *Apprendi*, maintaining the exception for the finding of a prior without further analysis. (*Blakely, supra*, 542 U.S. at pp. 304-305 [159 L.Ed.2d at pp. 412-413; 124 S.Ct. at pp. 2536-2537].)

Almendarez-Torres was based on a distinction between “sentencing factors” and “elements of the crime,” a distinction that has since been rejected in both *Blakely* and *Apprendi*. (*Blakely, supra*, 542 U.S. at pp. 303-305; *Apprendi, supra*, 530 U.S. at pp. 478, 484, 494.) The rule now, as enunciated in *Cunningham*, is that any increase in a statutory maximum sentence -- other than that due to the fact of a prior conviction -- triggers a constitutional “elements” requirement. (See, *Cunningham, supra*, ___ U.S. ___, 2007 LEXIS

1324*35-36; *Apprendi, supra*, 530 U.S. at p. 490; *Blakely, supra*, 542 U.S. at pp. 303-304.) Thus, in the context of imposing an upper term, rather than the statutory maximum middle term, the fact of a prior conviction does not operate as a “sentencing factor” which may be constitutionally found but instead as an “elemental factor.” (See also, *Ring v. Arizona, supra*, 536 U.S. at p. 602.) As Justice Thomas explained, sentencing factors which may constitutionally be found by a judge were not those that could “swell the penalty.” (*Apprendi, supra*, 530 U.S. at p. 519, Thomas J. concurring.) “[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things.” (*Ibid.*)

Since *Almendarez-Torres* found support for its holding in *Walton v. Arizona* (1990) 497 U.S. 639, 647-649 [111 L.Ed.2d 511, 110 S.Ct. 3047], (*Almendarez-Torres, supra*, 523 U.S. at p. 2478) which has since been overruled in light of *Apprendi* (see, *Ring v. Arizona, supra*, 536 U.S. at pp. 588-589), arguably when squarely faced with the question, the U.S. Supreme Court will hold that *Almendarez-Torres* does not survive *Apprendi*, *Blakely*, and *Ring*. The U.S. Supreme Court in *Apprendi v. New Jersey, supra*, 530 U.S. 466, noted that *Almendarez-Torres v. United States, supra*, 523 U.S. 224, “represents at best an exceptional departure from the historic practice....”

In addition, in *Almendarez-Torres, supra*, 523 U.S. at p. 248, the court was not presented with the issue of what burden of proof need be applied and specifically expressed “no view as to whether some heightened standard of proof might apply to sentencing

determinations that bear significantly on the severity of the sentence.” Since, as set forth above, Almendarez-Torres admitted his prior, there was no argument raised in that case concerning a right to a jury determination of the issue. The only question presented was whether the allegation needed to be included in the indictment. (See *Apprendi, supra*, 530 U.S. at p. 488.)

In general, as a matter of law, a single aggravating factor does not mandate the imposition of an upper term. As set forth above, not every factor will be deemed equal. For example, a 20-year-old misdemeanor, found as a prior conviction, would most likely not result in an upper term. In accordance with California’s determinate sentencing statute, the court will undertake fact-finding of aggravating and mitigating factors and then weigh those factors to exercise its discretion. One factor alone will not necessarily cause a defendant to be eligible for the upper term.

In appellant’s case herein, that sole factor of the admitted prison prior was used to impose a one year enhancement and thus was not the basis for the court’s determination to impose the upper term. Thus, in appellant’s case, a recitation to one factor which may meet constitutional muster did not remedy the constitutional violations of his sentence to the upper and consecutive term. The sentencing court necessarily relied upon factors that it cited that were outside the *Almendarez-Torres* exception to impose the upper and consecutive terms. Thus, appellant’s sentence should be found illegal and reversed.

III.
THE ERROR IN THIS CASE IS PREJUDICIAL UNDER THE
CHAPMAN V. CALIFORNIA STANDARD

Assuming, *arguendo*, that the Court determines no structural error exists in light of the reasoning in *Washington v. Recuenco* (2006) __ U.S. __ [126 S.Ct. 2546, 165 L. Ed.2d 466], the error is subject to review and requires reversal under *Chapman v. California* (1967) 386 U.S. 18, 24-26 [state must demonstrate beyond a reasonable doubt that the federal constitutional error did not contribute to the finding obtained.]; see also, *Neder v. United States*, (1999) 527 U.S. 1, 15 [144 L.Ed.2d 35, 119 S.Ct. 1827].)

In *Neder*, the court concluded that a reviewing court could assess whether the failure to have a jury make a finding of an element of the offense beyond a reasonable doubt was harmless. (*Ibid.*) In making this assessment, the reviewing court must “conduct a thorough examination of the record. If, 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.)

In this case, where the trial court alone has made findings of facts in aggravation, by a preponderance of the evidence, based upon evidence not presented to the jury and based upon hearsay or potentially unreliable evidence, the error cannot be harmless beyond a reasonable doubt because the jury necessarily did not finding the facts relied upon by the sentencing court beyond a reasonable doubt.

Cunningham v. California, supra, ___ U.S. ____ [2007 U.S. LEXIS 1324, 75 U.S.L.W. 4078]. Appellant’s admission of his prior conviction could not be used to impose the upper term since it was used to impose a one year enhancement.

The record lacks information from which it can be determined with any certainty what the court would have done had it not relied on the findings that had not been rendered true beyond a reasonable doubt by a jury or admitted by the appellant. No proof of the “fact” of appellant’s prior convictions were provided to the court apart from the probation report. No abstracts of judgment or other records evidencing these “facts” were provided the court. In addition, the only “evidence” that there were no factors in mitigation to balance in the weighing of aggravating factors was the hearsay, conclusory statements of the probation officer, in his report. It is thus unclear whether, even if the court were permitted to consider appellant’s prior convictions, it would have sentenced appellant to the upper term solely on that basis.

The only option under Penal Code sections 1170 and 669 would have been to impose the statutory maximum, absent findings of factors in aggravation outweighing factors in mitigation, which in this case would have been the middle term with no consecutive sentence. Thus, under the *Chapman* standard, the error requires reversal.

A. Appellant Did Not Waive His Blakely Arguments by Failing to Raise Them in the Trial Court

The Court of Appeal ruled that appellant had waived his *Blakely* arguments by not raising them in the trial court. However, unlike the defendant in *People v. Hill* (2005) 131 Cal.App.4th 1089,

who waived a *Blakely* challenge by failing to raise it at his sentencing which occurred after *Blakely* but before *Black*, appellant Hernandez was sentenced in October 2005 after the June 2005 opinion issued in *Black* and well before the January 2007 opinion issued in *Cunningham*. At the time of appellant's sentencing, a *Blakely* objection would have been futile under controlling law that the trial court was compelled to follow. Any waiver should be excused because any objection would have been futile. (e.g. *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649; see also, *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver where lower court was bound by higher court on issue].)

B. Where Numerous Factors Beyond Prior Conviction Were Given Weight by the Trial Court, the Chapman Standard of Prejudice Is Met

Because the use of the judicially found aggravating factors to impose the upper and consecutive terms were federal constitutional error under *Cunningham*, the harmless error standard of *Chapman* also applies to the determination of whether the use of the factors to impose the upper and consecutive terms was harmless. (See *Chapman v. California, supra*, 386 U.S. at p. 21; *People v. Sengpadychith* (2001) 26 Cal. 4th 316, 324-328; *People v. Breverman* (1998) 19 Cal.4th 142, 178-179.) As set forth above, under this standard, the sentence must be reversed unless the prosecution can demonstrate beyond a reasonable doubt that the error did not contribute to the sentence chosen. (See, *Chapman v. California, supra*, 386 U.S. at p. 24.)

The Court of Appeal reasoned that the error was harmless under *Chapman* simply because the sentencing court found as factors in aggravation appellant's prior convictions were numerous, he was on parole at the time he committed the offense charged, and his past performance on probation and parole was unsatisfactory. (Slip Opn. p. 21.) The Court of Appeal held that reliance on one proper factor in aggravation was sufficient to support imposition of the upper term. (*Ibid.*) However, as set forth above, these findings do not fall within the *Almendarez-Torres* exception, and thus still necessitate a finding by a jury based on the proof beyond a reasonable doubt standard.

Moreover, the "proper factor," according to the Court of Appeal's opinion, that fell within the prior conviction exception preserved by *Blakely, supra*, 542 U.S. 296 and *Aprendi, supra*, 530 U.S. 466, was appellant's prior conviction. As also set forth above, this factor alone was improper since it was also used to impose a one-year additional prison prior sentence pursuant to Penal Code sections 667.5, subdivision (b) and 668. (See Pen. Code § 1170, subd. (b) [trial court "may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law"].)

The error could also not be found harmless even if the court finds that the reviewing court need only decide whether the jury would have found at least one aggravating factor, i.e., his prior convictions, beyond a reasonable doubt. As discussed above, appellant does not become automatically eligible for the upper term simply because one aggravating factor is found. The sentencing court would still need to find whether the factor is aggravating in the

context of the case and whether it is of sufficient weight to impose the upper term. (See Pen. Code § 1170.) Thus, the court’s error in sentencing cannot be found harmless beyond a reasonable doubt and requires reversal under the standard enunciated in *Chapman*.

**IV.
REMAND FOR IMPOSITION OF THE MIDDLE TERM WITH
NO CONSECUTIVE SENTENCE IS THE APPROPRIATE
REMEDY FOR THE VIOLATION OF APPELLANT’S
CONSTITUTIONAL RIGHTS IN SENTENCING**

Cunningham made clear that the “statutory maximum” is the middle term and that appellant’s Sixth Amendment jury trial guarantee “proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum” based upon a fact not admitted by appellant or found by a jury. (*Cunningham v. California, supra*, ___ U.S. ___ [127 S.Ct. 856; 2007 LEXIS 1324, * 11.) Thus, the appropriate remedy for violation of appellant’s constitutional rights in sentencing is to provide appellant the sentence he would have received based upon the jury verdict had his rights not been violated. In other words, appellant should be sentenced to the term he would have received if there had been no unconstitutional judicial fact-finding. In this case, that sentence would have been the middle term of two years for the Vehicle Code section 2800.2, subdivision (a) conviction with no consecutive sentence for the Penal Code section 148 conviction.

Notably, the Legislature has heeded the caution of this Court to promptly revise the existing California sentencing statutes in light of *Cunningham*, and is in the process, through Senate Bill No. 40’s amendment, to rest in the trial court’s discretion the term that “best

serves the interests of justice.” However, that statutory amendment does not affect the remedy for this appellant and cannot be applied to sentencing him for the crimes for which he was convicted and which are at issue in this appeal.

Appellant was entitled to be sentenced according to the procedure as it existed at the time the offense was committed, within the constraints of the Constitution. Any ruling to the contrary would violate Fourteenth Amendment due process principles against *ex post facto* laws.

Sentencing appellant under the terms of the amended statute which was not in effect at the time he committed the offense is an *ex post facto* violation. “A statute ‘which makes more burdensome the punishment for a crime, after its commission,’ violates ... the United States Constitution as an *ex post facto* determination of criminal liability ... as well as its California counterpart ... the state Constitution.” (*People v. Davis* (1994) 7 Cal.4th 797, 811, *citing Collins v. Youngblood* (1990) 497 U.S. 37 [111 L.Ed.2d 30, 110 S.Ct. 2715] and *Tapia v. Superior Court* (1991) 53 Cal.2d 282.)

Nor can the court, absent such legislation, create a remedy that would remove the mandate that appellant be given a sentence of the middle term with no consecutive sentence absent constitutionally appropriate fact finding. Federal due process prohibits the retroactive application of a judicial enlargement of a criminal statute in a manner that would operate like an *ex post facto* law. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 352-254 [12 L.Ed.2d 894, 87 S.Ct. 1697].) “An *ex post facto* law has been defined ... as one ... ‘that aggravates a crime, or makes it greater than it was when it was

committed’.” (*Id.* at pp. 353-354.) “If a state legislature is barred by the Ex Post Facto Clause from passing a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.” (*Ibid.*)

In other words, when appellant committed the crimes for which he was convicted, he was not subject to the upper term or a consecutive sentence unless the judge made specific findings under the California Rules of Court. Under *Blakely*’s reasoning, these findings were “elements” of an upper term and consecutive term crime and had to be proved beyond a reasonable doubt. The new sentencing scheme proposed by Senate Bill No. 40 would have the potential of allowing the court to impose the upper term upon appellant on a lesser showing -- i.e., the mere commission of the offense -- without additional findings. This, in turn, would have the effect of reducing the amount of evidence required and lessens the prosecutor’s burden of proof.

The appropriate remedy, therefore, for appellant is a determination that his sentence is illegal and a remand of his case for re-sentencing under California’s Determinate Sentencing Law, as it existed at the time of appellant’s conviction, but in a manner consistent with *Blakely* and *Cunningham*; i.e., without judicial fact finding, for an imposition of the middle term for the Vehicle Code section 2800.2, subdivision (a) conviction with no consecutive sentence for the Penal Code section 148 conviction.

V.
**IN AUGMENT HERETO, APPELLANT JOINS IN THE
BRIEFING OF APPELLANTS IN THE COMPANION
APPEALS ON ISSUES OF ARGUMENT REGARDING THE
STANDARDS AND APPLICABILITY OF *CUNNINGHAM*,
BLAKELY, AND *ALMENDAREZ-TORRES* AND THE ISSUE OF
REMEDY**

In addition to the instant matter, this Court has ordered supplemental briefing in *People v. Towne*, no. S125677 (rev. gr., July 14, 2004) and *People v. Black*, no. S126182. On February 7, 2007 granted review with briefing in four other cases: *People v. French*, no. S148845; *People v. Pardo*, no. S148914; *People v. Sandoval*, no. S148917; and *People v. Mvuemba*, no. S149247. All of these cases, to some degree, raise issues regarding the applicability of *Cunningham*, *Blakely* and *Almendarez-Torres* to judicial fact-finding in sentencing of either the upper term and/or consecutive sentence, including findings related to prior convictions and criminal history, and/or raise issues regarding the appropriate remedy for such *Cunningham* violations. California Rules of Court, rule 8.200, subdivision (a)(5) states:

Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal.

Thus, appellant herein augments its briefing and joins, to the extent they supplement and are beneficial to his arguments herein, the briefing of the appellants in each of the above-cited cases regarding the applicability of *Cunningham*, *Blakely* and *Almendarez-Torres* to judicial fact-finding in sentencing of either the upper term and/or consecutive sentence, including findings related to prior convictions

and criminal history, and/or raise issues regarding the appropriate remedy for such *Cunningham* violations.

CONCLUSION

Because the prior conviction admitted by appellant cannot be used for both a one year prison prior enhancement and a factor in aggravation to impose the upper term, the sentencing court in the instant case, as in *Cunningham*, actually cited only *Blakely* factors as aggravating circumstances. Thus, as in *Cunningham*, this Court should reverse the decision of the Court of Appeal, hold appellant's sentence unconstitutional, and remand this case for re-sentencing under California's Determinate Sentencing Law, as it existed at the time of appellant's conviction, but in a manner consistent with *Blakely* and *Cunningham*; i.e., without judicial fact finding, for an imposition of the middle term for the Vehicle Code section 2800.2, subdivision (a) conviction with no consecutive sentence for the Penal Code section 148 conviction.

Respectfully submitted,

Theresa Osterman Stevenson
Appointed Counsel for Appellant Joel
Hernandez

**CERTIFICATION OF COMPLIANCE TO
CALIFORNIA RULES OF COURT RULE 14(c)(1)**

Criminal No. S148974

Pursuant to California Rule of Court 14(c)(1), the foregoing Appellant's Brief On The Merits contains 12,247 words (including footnotes, but excluding tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2000.

Executed on February 27, 2007, at San Diego, California

Theresa Osterman Stevenson

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