

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 REPLY BRIEF ON THE MERITS

INTRODUCTION

Respondent agrees that *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856; 166 L.Ed.2d 856] held that the California sentencing statute’s procedure for imposing an upper term violates the Sixth Amendment right to a jury trial by exposing a defendant to a sentence greater than the statutory maximum based on facts found by the trial court by a preponderance of the evidence rather than by the jury beyond a reasonable doubt. Yet respondent disagrees that *Cunningham* has also implicated California’s consecutive sentencing procedure under the same analysis. In its brief, respondent urges judicial reformation to remedy the constitutional infirmity identified by *Cunningham*, proposes a three-prong analysis for determining whether remand is warranted in pending cases, and, using that analysis, argues that appellant is not entitled to reversal of judgment in the instant case.

Appellant has addressed, in its previously filed brief on the merits, a number of the points raised by respondent's brief. These arguments, and those from the related cases incorporated by reference in appellant's opening brief, are not repeated, but are still asserted, herein. In addition, pursuant to California Rules of Court, rule 8.200, subdivision (a)(5), appellant specifically joins in and incorporates by reference the arguments made and positions taken in the *Towne* (S125677) and *Pardo* (S148914) opening briefs, supplemental brief, and reply briefs on the issue of remedy and the inappropriateness of respondent's suggested judicial reformation.

I.

CUNNINGHAM DOES IMPLICATE CALIFORNIA'S CONSECUTIVE SENTENCING

Respondent argues that *Cunningham v. California, supra*, 549 U.S. ____ ("*Cunningham*") does not implicate this Court's earlier reasoning in *People v. Black* (2005) 35 Cal.4th 1238 ("*Black*") on the issue of consecutive sentencing. Respondent argues that *Cunningham* did not involve multiple sentences and that none of the language in *Cunningham* suggests that the U.S. Supreme Court would apply its holding to a decision on how judges aggregate the punishment for multiple sentences. In respondent's view, *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham* are only relevant to issues regarding the sentence for a single particular crime, but not the aggregate effect of the defendant's multiple sentences. Respondent further argues that these cases do not prohibit a judicial factual determination that is not the "functional equivalent" of an element of the crime, that California's

consecutive sentencing scheme does not create a presumption for a concurrent sentence, and that no judicial fact-finding is required to impose the consecutive sentence. (Respondent’s Brief on the Merits (“RBM”) pp. 74-81.) Appellant disagrees with respondent’s contentions, and requests this Court reconsider its conclusion in *Black* regarding consecutive sentencing in light of *Cunningham*.

In *Black*, this Court had stated:

“The same reasoning that leads us to conclude that a jury trial is not required on the aggravating factors that justify imposition of the upper term leads us to conclude that a jury trial is not required on the aggravating factors that justify imposition of consecutive sentences.” (*Black, supra*, 35 Cal.4th at p. 1262.)

Just as *Cunningham* determined that *Black*’s reasoning was flawed with respect to upper term sentencing, this Court, revisiting *Black*, must also find its reasoning flawed as to consecutive sentencing. In other words, the same considerations set forth in *Cunningham*, that render Penal Code section 1170, subdivision (b) unconstitutional, apply to judicial fact-finding to impose consecutive sentencing as well.

Despite respondent’s contention to the contrary, and as discussed more fully in appellant’s opening brief and the *Black* (S126182), *Mvuemba* (S149247), and *Sandoval* (S148917) briefing incorporated herein, concurrent sentencing is the presumptive term in California. (See, *In re Walters* (1995) 39 Cal.App.4th 1546, 1552-1553 [Penal Code section 669 requires concurrent sentencing in absence of express statement of reasons otherwise]; see also *People v. Bruner* (1995) 9 Cal.4th 1178, 1181-1182 [where court failed to specify whether the new term would be concurrent

with, or consecutive to, the revocation term, it became a concurrent sentence by operation of law.]

The legislative history of Penal Code section 669 indicates a legislative preference for a concurrent term. A consecutive sentence is an enhancement that requires a statement of reasons. (*People v. Torres* (1987) 188 Cal.App.3d 723, 736; *People v. Lewis* (1991) 229 Cal.App.3d 259, 267.)¹ A concurrent sentence is the “statutory maximum” that a defendant may be sentenced for multiple counts as that term is defined in *Blakely* and its progeny since a trial court has no discretion to impose a consecutive term absent a finding of extrinsic facts. (Pen. Code § 1170, subd. (c); Cal. Rules of Court, rule 406 (a); *People v. Tran* (1996) 47 Cal.app.4th 759, 774.) Accordingly, *Cunningham* affects the imposition of consecutive sentencing as well as the imposition of the aggravated term.

The “relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Cunningham, supra*, ___ U.S. ___, 127 S.Ct. 856, 860, citing *Blakely, supra*, 542 U.S. at 303-304.) [emphasis in original.] There is conceptually no difference between a judge-found factor used to impose an aggravated term and a judge-found factor used to impose a consecutive sentence. In each instance, the reasoning of *Blakely* and *Cunningham* should prevail. “When a judge inflicts punishment that the jury’s verdict alone does not allow ... the judge

¹ While the advisory notes to California Rules of Court, rule 4.405 states that a consecutive sentence is not an enhancement, that note relies upon *People v. Tassell* (1984) 36 Cal.3d 77, 90, which did not consider or reach such a conclusion. In *Tassell*, this court concluded that the trial court could not add enhancements for prior convictions to each of defendant’s violent sexual assault counts of conviction.

exceeds his proper authority.” (*Blakely v. Washington, supra*, 542 U.S. at p. 304.)

While appellant acknowledges the Third District Court of Appeal recently analyzed this issue and reached a contrary result in *People v. Hernandez* 2007 Cal. App. LEXIS 257, filed February 26, 2007, appellant submits that the reasoning therein was faulty and should be disapproved by this Court. *Hernandez* held that *Blakely*, *Apprendi*, and *Cunningham* do not apply to consecutive sentencing because neither Penal Code section 669 nor the requirement that the trial court state reasons for imposing a consecutive sentence “create a presumption or other entitlement to concurrent sentencing.” (*People v. Hernandez, supra*, 2007 Cal.App. LEXIS 257, *5.) Respondent makes a similar argument in its RBM. The problem with respondent’s analysis and the *Hernandez* decision is that where the judge’s authority to impose an enhanced sentence depends upon the finding of some specified fact or facts, “it remains the case that the jury’s verdict alone does not authorize the sentence.” (*Blakely, supra*, 542 U.S. at p. 305.)

Respondent argues that *Apprendi* is satisfied as long as the statutory maximum for each crime is not exceeded. However, since it decided *Apprendi*, the U.S. Supreme Court has repeatedly held that the maximum term to which a criminal defendant may be sentenced is that authorized by the jury verdict alone. These decisions ensure “that the judge’s authority to sentence derives wholly from the jury’s verdict. Without that restriction, the jury would not exercise the control that the Framers intended.” (*Blakely, supra*, 124 S.Ct. 2531, 2539.) Following *Blakely*, *Apprendi*, and *Cunningham*, a criminal defendant in California knows that he or she risks an aggravated term or a consecutive sentence only where the jury finds

facts, extrinsic to its verdict, that subject him or her to these terms because the maximum term authorized by statute is only that supported solely by the jury verdict.

Following the reasoning of *Blakely*, the Supreme Courts of Ohio and Wisconsin have rendered the imposition of consecutive sentencing unconstitutional. (*In re Personal Restraint of VanDelft* (Wash. 2006) 147 P.3d 573 (“*VanDelft*”); *State v. Foster* (Ohio 2006) 845 N.E.2d 470; cert den. *Foster v. Ohio* 2006 U.S. LEXIS 7863 (U.S. Oct. 16, 2006).)²

In *VanDelft*, the defendant was convicted of 5 incidents of sexual misconduct. At sentencing, the trial court imposed a consecutive sentence, finding that the offenses involved “distinct criminal acts” and a “concurrent sentence on count one would result in a sentence that was ‘clearly too lenient.’” (*VanDelft, supra*, at p. 735.) *VanDelft* argued on appeal that *Blakely* prohibited imposition of consecutive sentences. The applicable Washington state statute³ mandated the concurrent term for offenses that were not serious and violent, as defined. To sentence a defendant to a

² The Ninth Circuit, New Jersey, Iowa, and Indiana, however, have held to the contrary on grounds no judicial fact-finding was required under their respective sentencing schemes. (See, *United States v. Fifield* (9th Cir. 2005) 432 F.3d 1056, 1066-1067; *State v. Abdullah* (N.J. 2005) 878 A.2d 746, 754-755, 512-514; *State v. Jacobs* (Iowa 2001) 644 N.W.2d 695, 698-699; and *Smylie v. State* (Ind. 2005) 823 N.E.2d 679, 686-687.)

³ Wash Rev Code § 9.94A.589(1)(a) states, in pertinent part: “Except as provided in (b) or (c) of this subsection (2007), whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, that if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535”.

consecutive term, a trial court was required to look to the “exceptional sentencing scheme” in Revised Code of Washington section 9.94A.535, which mandated the use of an aggravating factor before consecutive sentences could be imposed.

The Washington Supreme Court, citing *Blakely*, held that the trial court’s decision to order a consecutive sentence was based upon fact-finding that it was no longer empowered to make, and that because its sentence was predicated upon a finding that a concurrent sentence would be too lenient, the sentence violated *Apprendi* and *Blakely*. (*Id.* at pp. 742-743.)

Similarly, in *Foster*, the Ohio Supreme Court rejected a lower court decision that found *Blakely* did not apply to consecutive sentencing because “the facts found by the court do not increase the maximum penalty for an individual offense.” (*Foster, supra*, at p. 21, quoting *State v. Lett* (Ohio 2005) 829 N.E.3d 1281.) The Ohio Supreme Court found that the necessary judicial findings beyond those found by the jury to increase the defendant’s total punishment violated the principles announced in *Blakely*. (*Foster, supra*, at p. 21-22.)

Respondent attempts to distinguish *VanDelft* and *Foster*, as made under statutes mandating fact-finding. (RBM p. 81.) Respondent argues that California’s consecutive sentencing scheme does not mandate fact-finding, but simply requires the judge provide a statement of reasons to aid appellate review under the abuse of discretion standard. Respondent also argues that the factors identified in the rules of court are simply “advisory” and “nonexclusive.” (RBM pp. 79-80.) Respondent’s analysis is circular and flawed. Under California law, the trial court is required to give a statement of reasons for imposition of a consecutive sentence. (See, Pen.

Code § 1170, subd. (c).) Without a statement of reasons, the sentences are deemed to run concurrent. (See, Pen. Code § 669.) Thus, California’s scheme does require fact-finding since a requirement that the trial court state reasons means the trial court must have reasons or findings to support its discretionary decision to impose more than a concurrent term. Without findings or reasons, the sentence is deemed concurrent.

Moreover, in this case, the sentencing judge did make a number of findings, identified as factors under California Rules of Court, rule 4.421, subdivision (a), that were not implicit in the jury’s verdict nor admitted by appellant⁴ and specifically said those findings were the basis for imposition of the consecutive sentence. (R.T. pp. 281-182.)

Under the same rationale as *Cunningham* that California’s determinate sentencing law contravenes the Constitution in permitting the use of extra-judicial facts to sentence a defendant to the upper term, this Court should find the imposition of consecutive sentencing in this case

⁴ To impose the consecutive sentence for violation of Penal Code section 148, the trial court reached 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 rather than facts found true by a jury beyond a reasonable doubt or admitted by appellant. The trial court also found that the convictions for Vehicle Code section 2800.2, subdivision (a) and Penal Code section 148 were “separate acts of violence” involving “separate victims or threatened victims.” (R.T. p. 281.)

contravened appellant's rights under the Constitution by permitting the trial judge to impose a consecutive sentence based upon the use of facts neither admitted by appellant nor found true by the jury.

II.

THE REMEDY FOR THIS APPELLANT SHOULD BE IMPOSITION OF THE PRESUMED MIDDLE TERM, NOT A SENTENCE BASED UPON A JUDICIALLY REFORMED STATUTE THAT ELIMINATES THE MIDDLE TERM

As set forth in appellant's opening brief, the appropriate remedy is to remand this case for re-sentencing without judicial fact-finding, for an imposition of the middle term for the Vehicle Code section 2800.2, subdivision (a) conviction with imposition of a concurrent sentence for the Penal Code section 148 conviction. Alternatively, as noted in the *Pardo* (S148914) opening brief on the merits to this court, the modification of appellant's sentence to the middle term, concurrent, could be accomplished by a simple reviewing court order and would require no further proceedings. (Pen. Code § 1260.)

Respondent has argued that the Court should judicially reform Penal Code section 1170 by eliminating the requirement of an aggravating circumstance to impose an upper or lower term, which in essence would eliminate the presumption of a middle term and would leave the selection of the lower, middle, or upper term to the trial court's broad discretion.

Respondent also recommends modifying the California Rules of Court consistent with the proposed statutory reformation.⁵ (RBM pp. 8-51.)

Respondent argues that this approach would closely parallel the Supreme Court's reformation of the federal sentencing guidelines -- the so-called *Booker* approach. In *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed2d 621], the court severed from the Federal Sentencing Guidelines the provision for a mandatory base term absent aggravating or mitigating factors, rendering the guidelines advisory, and making the selection of the terms a matter of pure judicial discretion. Respondent argues that this approach would conform with the Legislature's intent to give trial courts full flexibility to tailor an appropriate sentence under the circumstances of each individual case.

However, as more fully set forth in the *Towne* (S125677) and *Pardo* (S148914) briefs incorporated herein, the legislative history of California's Determinate Sentencing Law demonstrates that the Legislature enacted the Determinate Sentencing Law to reduce, not increase, judicial discretion in

⁵ Respondent argues that should this Court declare invalid certain rules of court requiring mandatory judicial fact-finding to impose the upper or lower term, defining aggravating and mitigating circumstances, justifying the upper term only where aggravating circumstances outweigh mitigating circumstances, and that it should modify the rule requiring a statement of reasons for selecting a term to include the middle term as well as the upper and lower term. (RBM pp. 40-48.) Respondent contends that the rules of court requiring aggravating circumstances be established by a preponderance of the evidence need not be invalidated since the statute as respondent proposes it be reformed would not *require* the finding of an aggravated circumstance to impose the upper term. Respondent makes the same argument for not invalidating the "nonexhaustive list of aggravating circumstances." (RBM pp. 49-51.) Respondent's suggestion leaves potential for further confusion as to whether a sentencing court can impose the upper term, based upon its factual findings and a preponderance of evidence.

sentencing to promote uniformity of sentences. California's statute, thus, cannot be judicially reformed to create unrestrained discretion since it cannot be shown that doing so would be consistent with the Legislature's intent. (*Koop v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 626 [judicial reformation must "closely effectuate [] policy judgments clearly articulated by the enacting body..."].)

To the extent this Court determines reformation is appropriate, the approach suggested in *Pardo* and *Towne*'s briefing, which is adopted by appellant herein, would be more consistent with this objective than the one based upon the *Booker* model, as suggested by respondent. The *Booker* remedy would give state sentencing courts unduly broad leeway, requiring a statement of reasons reviewable only for an abuse of discretion, contrary to the mandatory, standardized options intended by the Legislature. Under the *Towne* suggestion, reformation would require severance only of that portion of the statute *Cunningham* found unconstitutional -- the authority of a sentencing court to impose the upper term, based upon its factual findings and a preponderance of evidence.

Moreover, even if this Court adopts respondent's suggestion of a *Booker*-type reformation or the Legislature amends the Determinate Sentencing Law, the change cannot constitutionally be applied to appellant, who committed his acts before the date of the reformation or amendment of statute, in light of the ban against *ex post facto* laws. (U.S. Const., art. I, § 9, cl. 3; Cal.Const., art. I, § 9.) Application of a reformed or amended statute would be unconstitutional because it would retroactively increase the punishment for the offense, eliminate elements needed to support an upper term, and lessen the burden of justifying an upper term and consecutive sentence.

Respondent argues that the principles of due process and *ex post facto* do not bar application of the judicially reformed law to appellant or those with appeals pending. Respondent argues that appellant had fair warning that he could be exposed to the maximum sentence he could receive under the proposed reformed version of Penal Code section 1170 since he was aware that he was exposed to the upper term as a possible punishment for his crime. (RBM pp. 52-53.) The Court's adoption of respondent's analysis, however, would trigger serious constitutional issues. As argued in *Towne* and adopted herein, a new rule permitting the upper term to be imposed without findings of aggravation would violate appellant's federal due process rights. (See *Bouie v. City of Columbia* (1964) 378 U.S. 347, 352-254 [84 S.Ct. 1697, 12 L.Ed.2d 894.] [federal due process prohibits retroactive application of a judicial enlargement of a criminal statute in a manner that would operate like an *ex post facto* law].)

The critical question for *ex post facto* analysis is whether "the system itself [has] been altered to the prisoner's detriment." (*People v. Williams* (1987) 196 Cal.App.3d 1157, 1160.) *Ex post facto* prohibitions are violated where the change to the law eliminates a beneficial presumption. (See *Miller v. Florida* (1987) 482 U.S. 423, 433 [107 S.Ct. 2446, 96 L.Ed.2d 351] [departure from the presumptive term under revised sentencing guidelines violated *ex post facto* prohibitions].) Eliminating the presumptive middle term and allowing imposition of an upper term without a finding of aggravating circumstances would be a change "by which punishment will be imposed to defendant's disadvantage." (*People v. Williams, supra*, 196 Cal.App.3d at p. 1160; see also, *Carmell v. Texas* (2000) 529 U.S. 513 [120 S.Ct. 162, 146 L.Ed.2d 577] ["A law reducing the quantum of evidence required to convict an offender is as grossly unfair

as ... retrospectively eliminating an element of an offense, increasing the punishment for an existing offense, or lowering the burden of proof...”].) As noted in *Towne* (S125677), while the rules of court in effect at the time of appellant’s crime required a standard of proof for aggravating factors that was unconstitutionally low, respondent’s proposed reformation would reduce the quantum of evidence to impose the upper term from low to none. This reduction would violate both the *ex post facto* prohibition and its due process counterpart.

For purposes of *ex post facto* determination, it is irrelevant that appellant could have received the same sentence under the statute prior to the reform proposed by respondent. As set forth above, any reformation that would eliminate elements required to impose the upper term, increase the maximum sentence for the bare offense from the presumed middle to potentially the upper term or reduce the burden of proving aggravating circumstances from the unconstitutionally low preponderance of the evidence to none, would violate *ex post facto* prohibitions and their due process principles.

Booker and the line of lower federal court cases following it that have rejected *ex post facto* arguments against retrospective application of the *Booker* remedy do not appear to have fully analyzed the range of issues implicated by respondent’s proposed reformation, such as the change in the burden of proof. In addition, unlike the federal sentencing guidelines, appellant herein has had the long standing statutory protection in Penal Code section 1170, subdivision (b) of a presumptive mandatory middle term as the statutory maximum. Thus, any judicial reformation, as proposed by respondent, raising the statutory maximum to the upper term is unforeseen and implicates *ex post facto* principles. For these reasons,

Booker and post-*Booker* federal cases do not reliably guide this Court with whether respondent's proposed judicial reformation can be applied to appellant's case without violating *ex post facto* prohibitions and due process principles.

III.

RESPONDENT'S THREE PRONG ANALYSIS IS FLAWED, AND TO THE EXTENT IT IS ADOPTED, IT DOES NOT MANDATE AFFIRMANCE OF APPELLANT'S JUDGMENT

Respondent argues that before a defendant's case is remanded under *Cunningham* to have the trial court exercise "broad discretion" in imposing a lower, middle, or upper term, the reviewing court should conduct a three-pronged analysis. Under that analysis, the reviewing court would only remand a defendant's case for re-sentencing if: (1) the defendant had preserved his/her constitutional objection to the sentence in the first instance; (2) there was not at least one constitutionally valid aggravating circumstance, which was either found or could have been found by the trial court; and (3) the reviewing court had conducted a harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] and determined that any Sixth Amendment violation was not harmless beyond a reasonable doubt. As set forth in appellant's opening brief and below, respondent's three-prong analysis is flawed, and even if adopted, would not permit affirmance of appellant's sentence under *Cunningham*.

A. Appellant Did Not Forfeit His *Cunningham* Challenge

Respondent argues that appellant's failure to object when the court imposed his sentence forfeits his right to bring a Sixth Amendment

challenge. This issue was addressed in appellant's opening brief. Appellant was sentenced in October 2005 after the June 2005 opinion issued in *Black* and well before the January 2007 opinion issued in *Cunningham*. Respondent's argument that *Black* has never been final and has now been remanded to this Court ignores the reality that at the time of appellant's sentence, this Court had issued its opinion in *Black* and the U.S. Supreme Court had not granted certiorari of that opinion. For all intents and purposes, the trial court was required at that time to follow this Court's opinion in *Black*. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn.6 [defendant cannot be said to have forfeited issue where the lower court has no authority to overrule higher court.]) Appellant did not waive or forfeit his *Cunningham* challenge.

B. Respondent's One Constitutionally Valid Aggravating Factor Test Is Not Sufficient to Affirm Appellant's Upper Term or Consecutive Sentence

Respondent argues that if the trial court finds just one aggravating circumstance, based upon a defendant's criminal history, a defendant's admission, or a fact inherent in the jury verdict, there is no *Cunningham* violation. In such a situation, according to respondent, once at least one aggravating circumstance is found, the trial court is free to find other aggravating circumstances to support its imposition of the upper term regardless of whether these additional factors would pass Constitutional muster. Under respondent's analysis of *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350], this one Constitutionally valid aggravating circumstance could include any fact that falls under the broad umbrella of evidence of "recidivism," rather than merely the fact of a prior conviction. It could also either be a factor found

by the jury or “implicit” in its verdict. (RBM pp. 9-10, 63-73.) As set forth in appellant’s opening brief and below, respondent’s three-pronged analysis is flawed and, even if applied, would not alleviate the *Cunningham* error suffered by appellant.

1. Respondent’s One Factor Approach Ignores The Weighing Requirement

Appellant’s admission of one prior conviction, or an “aggravating fact,” does not automatically expose him to the upper term or consecutive sentence nor does it then open the door for judicial fact-finding of further enhanced facts to support its sentencing choice. While the sentencing statutes and rules of court set forth factors the trial court can consider in exercising its sentencing discretion, none of them specify that any one particular factor is conclusive, in and of itself, to support imposition of aggravated term or consecutive sentence.

Under California’s determinate sentencing law, one fact in aggravation may be sufficient, but does not necessarily mandate that a defendant receive the upper term or consecutive sentence. (See, *People v. Osband* (1996) 13 Cal.4th 622.) Instead, determining a fact or facts in aggravation is just the first step. A trial court must thereafter balance the facts in aggravation with the facts in mitigation and impose the upper term or lower term only where the balance weighs against imposition of the middle term. (*People v. Scott* (1995) 9 Cal. 4th 331, 350, fn. 11, citing rules of court rule 420, subs. (a) and (b)); See also, *People v. Tatlis* (1991) 230 Cal.App.3d 1266; *People v. Corvino* (1980) 100 Cal.App.3d 660.) Under consecutive sentencing as well, the court abuses its discretion if it fails to consider mitigating factors or the effect of Penal Code section 654. (See

Cal. Rules of Court rule 4.424, 4.425, subd.(b) and *People v. Adams* (1993) 19 Cal.App.4th 412, 447.)

It is pure speculation for respondent to conclude that because one aggravating factor was *Blakely*-compliant, along with a number of non-*Blakely*-compliant factors, that the *Blakely*-compliant factor alone was the basis for the imposition of the upper term or consecutive sentence. In other words, where a number of factors that are not found by the jury or admitted by appellant are cited, along with an admitted prior conviction, there is no way for a reviewing court to determine with reasonable certainty what weight the trial judge court gave the one constitutionally valid factor. In the weighing of mitigating and aggravating circumstances required under California's determinate sentencing law, it is conceivable that a trial court could find a *Blakely*-compliant fact and still not impose the upper term or a consecutive sentence. It is also conceivable that a trial court, correctly applying the law, would not impose the upper term after finding one *Blakely*-compliant fact -- perhaps a conviction remote in time or of a misdemeanor -- even when weighed against no mitigating factors *per se*.⁶

In addition, under California's determinate sentencing law, if one *Blakely*-compliant fact were all that was necessary to override the necessity of a jury finding of all facts necessary to impose an "enhanced" term, then effectively all persons who had suffered a prior conviction would be barred from the Sixth and Fourteenth Amendment protections.

⁶ In appellant's case, however, the trial court incorrectly applied the law to find that the aggravating circumstance weighed against no mitigating circumstance required a *presumption* that appellant receive the upper term. (R.T. pp. 278-279.)

2. Respondent Reads *Almendarez-Torres* Too Broadly to Permit All Recidivism Proof to Constitutionally Support Imposition of an Upper Term Where Such Evidence Is Based Upon Hearsay from a Probation Report

Respondent argues that *Apprendi* excluded “the fact of a prior conviction” from the general rule requiring any fact that increased the penalty beyond the prescribed statutory maximum to be submitted to a jury and proved beyond a reasonable doubt. Respondent then contends that this “fact of prior conviction exception,” first discussed in *Almendarez-Torres*, “goes beyond the mere fact of a prior conviction to include matters such as the sentence imposed and the status and timing of the defendant’s incarceration in relation to subsequent offenses.” (RBM p. 64.)

Respondent erroneously reads *Apprendi* and *Almendarez-Torres* too broadly.

As set forth more fully in appellant’s opening brief and the briefing in *Towne* (S125677), *Black* (S126182), *French* (S148845), *Pardo* (S148917), and *Mvuemba* (S149247) incorporated herein, to the extent *Almendarez-Torres* creates an exception, that exception is only as to the fact of the prior conviction itself. In his guilty plea, *Almendarez-Torres* admitted that his earlier deportation had taken place pursuant to three earlier convictions for aggravated felonies. There was thus “no question concerning the right to jury trial or the standard of proof that would apply to a contested issue of fact...” (*Apprendi, supra*, 530 U.S. at p. 488.) Both the certainty that procedural safeguards attach to any “fact” of prior conviction and the reality that *Almendarez-Torres* did not challenge that “fact” in his case, mitigated the due process and Sixth Amendment concerns that would otherwise be implicated in allowing a judge to

determine a “fact” that would increase a defendant’s punishment beyond the maximum statutory range. (See, *Apprendi, supra*, 530 U.S. at p. 488 [120 S.Ct. at pp. 2361-2362].) In this case, as discussed below, no such procedural safeguards exist since all “recidivism” factors, other than the one prior conviction admitted by appellant, were proven solely by the probation report.

Moreover, subsequent Supreme Court decisions have questioned the continuing validity of *Almendarez-Torres*. *Apprendi, supra*, 530 U.S. at 487, 490 classified *Almendarez-Torres* as “at best an exceptional departure from the historic practice we have described” and noted that “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.” In a recent denial of certiorari of a case presenting challenges to *Almendarez-Torres*, Justice Stevens remarked, “While I continue to believe that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), was wrongly decided,” the risk of prejudice to a defendant was not great enough to warrant “revisiting the issue” in light of stare decisis. (*Rangel-Reyes v. United States* (2006) 574 U.S. ___ [126 S.Ct. 2873, 2874, 165 L.Ed.2d 910.]) In dissenting from that denial of certiorari, Justice Thomas reiterated his view that *Almendarez-Torres* was wrongly decided and noted that “a majority of this court now rejects that exception.” (*Id.* at pp. 2874-2875.)

Shepard v. United States (2005) 540 U.S. 13 [125 S.Ct. 1254, 161 L.Ed.2d 205] further emphasizes the narrowness with which *Almendarez-Torres* should be read. In considering what portions of the record of a prior guilty plea conviction could be considered by a sentencing court to determine whether that prior qualified as an enhancement, the Court rejected the prosecution’s argument that the sentencing court could consider

police reports and complaint applications to prove elements of the crime that would satisfy the enhancement requirements. Instead, it held the sentencing court's determination of the substance of the prior guilty plea was limited to "the charging document, the terms of a plea agreement, or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." (*Id.* at p. 26.)

Most recently in *Cunningham*, the Court emphasized that the prior conviction exception should not be applied broadly. Addressing Justice Kennedy's dissenting view that the right to jury trial under *Apprendi* should be limited to sentencing facts concerning the current offense and leave facts relating to the defendant to judicial determination, the majority said:

"Justice Kennedy urges a distinction between facts concerning the offense, where *Apprendi* would apply, and facts concerning the offender, where it would not. [] *Apprendi* itself, however, leaves no room for the bifurcated approach Justice Kennedy proposes.[] ("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." (emphasis added).")

(*Cunningham v California, supra*, 127 S.Ct. at p. 874, fn. 14.)

This Court also addressed the issue in *People v. McGee* (2006) 38 Cal.4th 682, which held that the trial court could consider the preliminary hearing testimony in the record of a defendant's Nevada convictions to determine whether his priors qualified as strikes under California's Three Strikes Law. (*Id.* at pp. 689-690, 693.) Relying upon *Almendarez-Torres*, this Court held that "*Apprendi* does not preclude a court from making sentencing determinations related to recidivism." (*Id.* at p. 707). The *McGee* decision, however, involved a judicial determination of a prior

conviction limited to the record of that conviction. Here, by contrast, the purported facts of appellant's "recidivism" were found by hearsay evidence from a probation report, not established solely by the record of his prior conviction.

The sentencing court here cited the following factors that respondent classifies as proof of "recidivism" within the "prior conviction" exception: (a) that appellant has numerous prior convictions, (b) was on parole at the time of the crime, (c) has served a prison prior, and (d) that appellant's performance on parole and probation was "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 nor admissions of appellant. As such, they do not have the reliability or certainty that procedural safeguards have attached to these "facts" as required by *Apprendi* and its progeny.

(a) Appellant's Admitted Prior Conviction Is Not Subject To Dual Use and thus the Sentencing Court Relied Solely on Non-*Blakely*-Compliant Factors to Impose the Upper Term and Consecutive Sentence

Of the "recidivism" factors, the only one admitted by appellant was the fact of his prior conviction. However, as set forth in appellant's opening brief, the sentencing court used that fact to impose an additional one year enhancement to appellant's term. (R.T. pp. 278-282; C.T. pp. 120, 134.) Penal Code section 1170, subdivision (b) makes clear that the sentencing court cannot "impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law."

Respondent argues that "dual use" is irrelevant to appellant's *Cunningham* argument since it is an issue of state law and was not raised

below. As set forth in Argument III. A., *infra*, appellant has not forfeited this issue, which is an implicit part of his *Cunningham* challenge.

Respondent's argument that it is otherwise "irrelevant" as a matter of state law ignores the reality that the sentencing court had no other *Blakely*-compliant factor to consider, and thus, since it was inherently not used by the sentencing court to impose the upper term, because the sentencing court used it to impose an enhanced sentence, the sentencing court necessarily imposed appellant's upper term and consecutive sentence based solely upon non-*Blakely*-compliant factors.

(b) The Factor of "Numerous" Convictions Does Not Fall Within the "Prior Conviction" Exception

The finding that appellant has suffered "numerous" convictions was not only based upon hearsay evidence found in a probation report, but is also subjective. California courts have held that two prior convictions are not numerous. (*People v. Fernandez* (1990) 226 Cal.App. 3d 669, 681; *People v. Berry* (1981) 17 Cal.App.3d 184, 191.) Beyond that threshold, however, no case authority has definitively established whether any particular amount of offenses are necessarily numerous, and it is left to the subjective determination of the judge. (Cf. *People v. Sears* (1989) 213 Cal.App.3d 1091, 1098 [opining that 3 convictions in 11 months were "numerous"].)

Numerousness of priors requires a fact-laden judgment dependent on circumstances not decided by a jury. For example, a given number of prior convictions of a relatively serious offense may be deemed numerous where the same number of offenses for misdemeanors may not be deemed numerous. A number of recent convictions may be deemed numerous whereas the same number of convictions from a remote time may not be

deemed numerous. The inherent subjectivity of this factor presents a factual question beyond the “fact” of a prior conviction, not answered purely by the record, but requiring an assessment of the number, nature, and timing of the priors. Thus, this factor does not fall within the *Almendarez-Torres* exception.

(c) The Factor of “On Parole” at the Time the Crime Was Committed Does Not Fall Within the “Prior Conviction” Exception

The finding that appellant was on parole at the time of the offense requires a factual determination not ascertainable from the record of appellant’s prior conviction and is not limited to the “fact” of prior conviction. (*Apprendi v. New Jersey supra*, 530 U.S. at p. 488.) In this case, the court made this finding solely from the hearsay evidence set forth in the probation officer’s report. A finding that appellant is on parole requires proof above and beyond the fact of a prior conviction and cannot be proven on the basis of official records alone. (See, *People v. Willis* (2002) 28 Cal.4th 22, 35-36, 44, 51 [false information obtained regarding parole status of defendant by police did not provide adequate basis for warrantless parole search.]) While the parole term may be set by statute (see e.g., Pen. Code § 3000, subd. (b)(2)), the calculation of the time period depends on a number of factors and may be deferred or revoked under certain circumstances. This factor presents a factual question beyond the “fact” of a prior conviction, not answered purely by the record of conviction, and thus does not fall within the *Almendarez-Torres* exception.

(d) Finding That Appellant’s Prior Performance on Parole and Probation Was “Poor” Does Not Fall Within The “Prior Conviction” Exception

The finding by the trial court that appellant’s prior performance on parole and probation was “very poor” is clearly subjective fact-finding, not answered purely by the record of conviction. As such, it also does not fall within the *Almendarez-Torres* exception. Such a determination of whether a defendant’s performance was “poor” goes beyond the fact of a bare conviction and necessitates the comparison and weighing of his conduct.

3. A Judicial Determination of the “Recidivism” Factors by a Preponderance Rather than Reasonable Doubt Standard Violates Appellant’s Sixth and Fourteenth Amendment Rights

Respondent argues that the sentencing court could properly use the preponderance of the evidence standard to find any fact that falls within the *Almendarez-Torres* exception. (RBM p. 67.) First, as set forth above, the factors found by the court do not fall within the *Almendarez-Torres* exception. Second, even if they did, this court should find that the standard required should be beyond a reasonable doubt.

While *Almendarez-Torres*, itself, did not decide the burden question, California law has long required that prior convictions charged as enhancements be proved to a jury beyond a reasonable doubt. (Pen. Code §§ 1025, 1158; *In re Yurko* (1974) 10 Cal.3d 857, 862; see also *People v. Barre* (1992) 11 Cal.App.4th 961, 965-966 [noting federal constitutional due process requires such proof].) *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368], the court invalidated a New York statute that had reduced the burden of proof in a juvenile delinquency proceeding

to a preponderance of the evidence. The “Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”

(*Ibid.*) The Court thereafter extended this rule to determinations that affect the length of a sentence. In *Mullaney v. Wilbur* (1975) 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508], the court invalidated a state homicide law under which all intentional murders were presumed committed with malice aforethought unless the defendant could rebut this presumption with proof he acted in the heat of passion. The court acknowledged that the absence of heat of passion was not an element of murder, but a fact that bore on punishment. However, it also rejected the purported distinction between crime elements and punishment, saying, “If *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.” (*Mullaney, supra*, 412 U.S. at pp. 697-698.)

To the extent a question exists as to the application of the “beyond a reasonable doubt” standard, appellant urges this court to adopt the approach suggested in Pardo’s (S148914) brief, pages. 28-29. As noted therein, this court can “avoid the cloud of constitutional doubt by interpreting section 1170” as requiring proof beyond a reasonable doubt of any factor necessary to impose the upper term or consecutive sentences.

C. The Error in This Case Is Not “Harmless Error” under the *Chapman v. California* Standard

Respondent argues that no prejudicial error can be found under *Chapman v. California, supra*, 386 U.S. 18, if the reviewing court determines that the jury would have found at least one of the aggravating circumstances true beyond a reasonable doubt. Then, according to respondent the trial court would have the authority to consider the other aggravating circumstances. (RBM pp. 87-88.)

Once again, respondent’s argument ignores the reality that if non-*Blakely*-compliant factors are taken into account in the weighing of aggravating versus mitigating factors, there is no way for the reviewing court to definitively determine that the trial court would have imposed the upper term solely upon the finding by the jury of one aggravating circumstance. Respondent further argues that to the extent the weighing factor is taken into consideration, the standard of prejudice should be reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836. Appellant does not concede respondent’s position and maintains, as set forth in his opening brief, that the *Cunningham* harmless error inquiry requires review under *Chapman*.

However, regardless of the standard, it cannot be said that any of the aggravating factors would have been found true by a jury beyond a reasonable doubt as required. The evidence of the “numerous prior convictions,” parole status, and poor performance on parole and probation, were all based upon hearsay evidence in the probation report. The probation report is a collection of hearsay compiled by the probation officer, with no guaranty of authenticity or accuracy. A collection of purported facts in a probation report cannot satisfy the evidentiary burden

of proof beyond a reasonable doubt. (See *People v. Reed* (1996) 13 Cal.4th 217, 230 [where a prior conviction must be proved beyond a reasonable doubt, a probation report is inadmissible proof]; *People v. Jones* (1995) 37 Cal.App.4th 1312, 1315 [to prove a prior conviction beyond a reasonable doubt, the prosecution must present credible, substantial evidence of the prior]; *People v. Hill* (1967) 67 Cal.2d 105, 121 [minute order listing conviction, together with fingerprint records, sufficient to prove prior beyond a reasonable doubt]; *People v. Castellanos* (1990) 219 Cal.App.3d 1163, 1175 [pleading and record of guilty plea sufficient].)

Further as set forth *infra*, 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. In addition, even if some factor fell within *Almendarez Torres*, the sentencing court's reliance on the remaining, invalid factors was prejudicial because it cannot be established beyond a reasonable doubt that the court would have chosen the upper term absent the invalid factors.

Respondent also argues that the court's findings that there was "gang professionalism," 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," were supported by the evidence at trial and could have been found true by a jury. However, simply because the arresting, testifying officer regularly was involved in gang investigations and had previous knowledge of appellant, did not prove beyond a reasonable doubt that the crime for which appellant was convicted involved "gang professionalism." Further, as set forth *infra*, in reaching the latter conclusion regarding threats to members of the public, 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 rather than facts found true by a jury beyond a reasonable doubt or admitted by appellant. Even assuming respondent’s view of the evidence was a permissible inference, it cannot be said beyond a reasonable doubt that a jury would have reached the same conclusion.

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 was 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 either the *Chapman* or *Watson* standard, the error requires reversal.

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. Alternatively, this court should declare appellant's sentence unconstitutional and modify judgment to the middle term with no consecutive sentence.

Respectfully submitted,

Theresa Osterman Stevenson
Appointed Counsel for
Joel Hernandez

CERTIFICATION

Criminal No. S148974

I certify that the foregoing Appellant's Reply Brief On The Merits contains 7,335 words (including footnotes, but excluding tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2000.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 29, 2007, at San Diego, California

Theresa Osterman Stevenson
Appointed Counsel

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