

January 23, 2007

Diana Herbert
Clerk Administrator
California Court of Appeal
350 McAllister St.
San Francisco, CA 94102

re: *People v. **, A*, Div. *
APPLICATION TO SUBMIT SUPPLEMENTAL LETTER BRIEF RE
CUNNINGHAM V. CALIFORNIA

Dear Ms. Herbert:

On behalf of appellant [appellant's name], I respectfully request leave to submit this short letter addressing a new U.S. Supreme Court opinion, which is dispositive of an issue presented in this appeal.

Pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Blakely v. Washington* (2004) 542 U.S. 296, appellant has argued that the sentencing court violated the Sixth and Fourteenth Amendments by imposing an upper term based on its own findings of aggravating facts, neither found true by a jury nor admitted by appellant. (See AOB *) As this Court is no doubt aware, the U.S. Supreme Court struck down California's Determinate Sentence Law (DSL) on precisely the grounds urged in this appeal. *Cunningham v. California* (Jan. 22, 2007; 05-6551) 549 U.S. ____ [2007 WL 135687].

As the *Cunningham* majority recognized, because a DSL upper term requires findings of additional aggravating circumstances beyond the minimum elements of the offense, "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum" for *Apprendi-Blakely* purposes. (*Cunningham, supra*, slip opn. at pp. 15-16, 2007 WL 135687 at p. *11.) "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL violates *Apprendi's* bright-line rule." (*Id.*, slip opn. at p. 16, WL 135687 at p. *11.) "Because the DSL authorizes the judge, not

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the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent. [Fn.]” (*Id.*, slip opn. at p. 21, 2007 WL 135687 at p. *14.)

Cunningham confirms that the sentencing judge’s determination of aggravating factors and his reliance on those factors to impose the middle term violated appellant’s constitutional rights to a jury trial and due process. For the reasons fully addressed in the previous briefing, the constitutional error was prejudicial under the circumstances of this case. Accordingly, appellant respectfully requests that this Court vacate the upper term sentence and remand the matter for resentencing.

Please submit this supplemental letter to the panel considering this appeal. Thank you for your consideration.

Respectfully submitted,

[attorney’s name]

State Bar. No. *

Attorney for Appellant

Proof of Service attached