

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff and Respondent,) Crim. No. S125677
)
 v.) (Court of Appeal No. B166312)
) (Sup.Ct.No. PA040926)
)
 SHAWN TOWNE)
)
 Defendant and Appellant.)
 _____)

**APPELLANT’S SUPPLEMENTAL
BRIEF ON THE MERITS RE: *CUNNINGHAM V. CALIFORNIA***

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ARGUMENT

INTRODUCTION

On February 7, 2007, this Court directed the parties to file supplemental briefing on the effect of *Cunningham v. California* on any issues presented in this case. This Court further requested briefing on two specific questions. Appellant will first address the general impact of *Cunningham* on the imposition of the upper term here, including the question of whether reliance on the facts of acquitted counts violated double jeopardy. Thereafter, appellant will address the two specific questions asked. Finally, appellant will address the more general questions of prejudice and remedy.

I.

THE DECISION IN *CUNNINGHAM V. CALIFORNIA* CONFIRMS THAT THE PROVISIONS FOR IMPOSING THE UPPER TERM IN CALIFORNIA VIOLATE THE FEDERAL CONSTITUTION AND THAT THE TRIAL COURT DID VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT AS WELL AS HIS RIGHT AGAINST DOUBLE JEOPARDY BY USING ACQUITTED COUNTS TO IMPOSE THE UPPER TERM

In *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856; 166 L.Ed.2d 856] the United States Supreme Court held that California's sentencing procedures that permit a trial court to impose an upper term after making its own findings of fact, which findings are made by a preponderance of the evidence, violate the Sixth and Fourteenth Amendments of the federal constitution. (*Id.* at p. ____ [127 S.Ct. at pp. 873-877.]) The trial court here imposed the upper term based in large part upon its findings that appellant had unlawfully terrified the victim by doing the things appellant was *alleged* to have done in this case. (4 RT 2415-2418) The jury, however, had acquitted appellant of doing any of the violent acts alleged and convicted him only of unlawfully taking the victim's car after the victim had left. (CT 178-187; 4 RT 1211-1217) Nothing in the taking of the car after the victim was no longer present could possibly have caused him to be terrified or could be deemed to be aggravating in any fashion. Thus, the trial court here was relying entirely on its own findings, which were contrary to the findings of the jury, that appellant had committed the violent acts alleged against him in the counts of which he had been acquitted. In so doing, the court violated appellants's federal constitutional rights.

(*Cunningham v. California*, *supra*, 549 U.S. at p. ____ [127 S.Ct. at pp. 873-877].)

Moreover, the trial court's reliance on the facts of the acquitted counts violated the state and federal proscription against double jeopardy. (See *People v. Seel* (2004) 34 Cal.4th 535, 550.) Under *Blakely* and *Apprendi*, any fact that increases a penalty for a crime above a statutory maximum must be found by a jury and proved beyond a reasonable doubt because it is in essence an "element" of the greater offense of the crime "simpliciter" plus the factor that aggravates it. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494 [147 L.Ed.2d 435; 120 S.Ct. 2348]; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 249 [140 L.Ed.2d 350, 118 S.Ct. 1219] (dis. opn. of Scalia, J.); see also *Washington v. Recuenco* (2006) 548 U.S. ____ [126 S.Ct. 2546, 2552, 165 L.Ed.2d 466, 475].) In *Seel*, this Court recognized that where the *Apprendi* rule applied, so did the Double Jeopardy Clause. (See *People v. Seel*, *supra*, 34 Cal.4th at p. 550.) In *Cunningham*, the United States Supreme Court held that the rule of *Apprendi* applies to the finding of aggravating factors in California. (*Cunningham v. California*, *supra*, 549 U.S. at p. ____ [127 S.Ct. at pp. 873-877].) Thus, a jury acquittal of those factors does trigger double jeopardy protections. (*People v. Seel*, *supra*, 34 Cal.4th at p. 550; see also *Monge v. California* (1998) 524 U.S. 721, 737-741 [141 L.Ed.2d 615, 118 S.Ct. 2246] (dis. opn. of Scalia, J.).)

II.

CUNNINGHAM V. CALIFORNIA AND ALMENDAREZ-TORRES V. UNITED STATES DO NOT PERMIT THE TRIAL JUDGE TO SENTENCE A DEFENDANT TO THE UPPER TERM BASED UPON THE NUMEROUS RECIDIVIST FACTORS LISTED IN CALIFORNIA RULES OF COURT, RULE 4.421, SUBDIVISION (B)(2) TO (B)(5)

The first question presented by this Court’s order of February 7, 2007 was:

“Do *Cunningham v. California, supra*, and *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 239-247 [140 L. Ed. 2d 350, 118 S.Ct. 1219], permit the trial judge to sentence defendant to the upper term based on any or all of the following aggravating factors, without submitting them to a jury: the defendant's prior convictions as an adult are numerous and of increasing seriousness; the defendant has served a prior prison term; the defendant was on parole when the crime was committed; the defendant's prior performance on probation or parole was unsatisfactory (California Rules of Court, Rule 4.421, subds. (b)(2)-(b)(5))?”

They do not. Although *Cunningham* reiterated the exception from the *Apprendi* rule for the “fact of a prior conviction” which was premised on *Almendarez-Torres*, it is clear from *Apprendi* and all post-*Apprendi* cases, that the exception of *Almendarez-Torres* may no longer be viable and is at the very least severely limited. The limitations on the exception operate to exclude from its purview the various recidivist factors outlined in rule 4.421 subdivision (b).

In *Apprendi*, the Court stated 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. . . .*” (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490 [emphasis added].) The Court declined to “revisit” the issue because the defendant

had not challenged its validity, but the Court did decide “to treat the case as a *narrow exception* to the general rule we recalled at the outset.” (*Id.* at 490 [emphasis added].)¹

In *Shepard v. United States* (2005) 544 U.S. 13 [161 L.Ed. 2d 205; 125 S.Ct. 1254], the Court further clarified that *Almendarez-Torres* was to be read very narrowly. There, the Court interpreted a federal statute that enhanced a sentence based upon the defendant having suffered prior violent felony convictions. Where the prior offenses were from other jurisdictions that defined their crimes more broadly than corresponding federal statutes, sentencing courts had to determine whether the convictions would qualify to enhance the sentence under the federal statute. The issue presented in *Shepard* was how far behind the statutory elements of the crime a sentencing court could look to establish that an earlier plea in another jurisdiction was to an offense that would qualify under the federal statute. The Court held that “a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual

¹In Appellant’s Reply Brief on the Merits, appellant set forth at length the various dissenting and concurring opinions authored by both Justice Scalia and Justice Thomas explaining the flaws in the *Almendarez-Torres* holding. (ARBM 20-23) Appellant additionally pointed out there that the holding of *Almendarez-Torres* relied on the distinction between “sentencing factors” and “elements of the crime” that has now been rejected by the United States Supreme Court. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 478, 484, 494; *Blakely v. Washington* (2004) 540 U.S. 296 [159 L.Ed. 403, 415-416; 124 S.Ct. 2531, 2538-2540]; see also *Washington v. Recuenco*, *supra*, 548 U.S. ____ [126 S.Ct. at p. 2552, 165 L.Ed.2d at p. 475].) (ARBM 22-23) Appellant also noted that *Almendarez-Torres* relied on *Walton v. Arizona* (1990) 497 U.S. 639, 647-649 [111 L. Ed.2d 511, 110 S. Ct. 3047] to support its reasoning, but *Walton* was overruled in light of *Apprendi* in *Ring v. Arizona* (2002) 536 U.S. 584, 588-589 [153 L.Ed.2d 556, 122 S.Ct. 2428]. (ARBM 23)

finding by the trial court to which the defendant assented.” (*Id.* at p. 16.)

As this list demonstrates, the Court limited the consideration to only that which the defendant *had necessarily admitted by his plea*. This limitation was imposed in part because of concerns about infringing the defendant’s jury trial rights by permitting a later sentencing judge to “make a disputed finding of fact about what the defendant and the state judge must have understood about the factual basis of the prior plea.” (*Id.* at p. 25) The Court concluded: “While the disputed fact here can be described as a fact about a prior conviction, it is *too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones and Apprendi, to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute.*” (*Id.* at p. 25 [emphasis added].) It thus invoked “the rule of reading statutes to avoid serious risks of unconstitutionality” and imposed the limitation. (*Id.* at pp. 25-26.)

In his concurring opinion, Justice Thomas noted that *Almendarez-Torres* “has been eroded by this Court’s subsequent Sixth Amendment jurisprudence.” (*Id.* at p. 27.) He therefore urged that the “flawed rule” of *Almendarez-Torres* should be reconsidered in the appropriate case. (*Id.* at pp. 27-28, [conc. opn. of Thomas, J].)

In *People v. McGee* (2006) 38 Cal. 4th 682, this Court recently decided that *Shepard* did not alter California’s rule permitting the sentencing court, not the jury, to review the record of a defendant’s out of state prior conviction to determine whether it was for a crime that would be a serious felony in California. (*Id.* at pp. 685-687.) In so

holding, this Court concluded that the *Almendarez-Torres* exception, retained by *Apprendi*, supported its view that “recidivist sentencing provisions” could be found by the court without a jury (*id.* at pp. 695-699) and that “*Apprendi* does not preclude a court from making sentencing determinations related to *recidivism*.” (*Id.* at p. 707 [emphasis added].) This Court went on to hold that, although *Shepard* may suggest that permitting the sentencing judge to look at the records of a prior plea proceeding to determine whether the prior would qualify to enhance a California sentence presented a “serious constitutional issue,” *Shepard* simply resolved a matter of statutory interpretation and did not decide the constitutional issue. (*Id.* at pp. 707-709.) In reaching this conclusion, this Court misread *Almendarez-Torres* and *Apprendi* to expand the *Almendarez-Torres* exception beyond both its original holding and the later limitations put on it.

Almendarez-Torres was a very limited holding addressing a very narrow issue. The issue presented there was whether the federal constitution required that a prior conviction that was used to impose an enhanced sentence for a new offense be *pleaded in the indictment*. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 488.)

In *Almendarez-Torres*, the defendant had been charged under a federal statute that provided that the punishment for violating the statute increased if the defendant had suffered certain prior convictions. The defendant, *who had in the **current** case waived his right to a jury trial, pleaded guilty and **admitted** that he had suffered the requisite prior convictions*, was challenging *only* the failure to allege the priors in the current indictment.

(*Almendarez-Torres v. United States*, *supra*, 523 U.S. at pp. 227, 248.) The defendant maintained that the statute under which he was convicted described two offenses, the lesser simple version of the offense and a greater offense that included the *element* of a prior conviction; invoking the rule that all elements had to be charged in the indictment, he argued that the failure to plead the priors in the indictment precluded his being sentenced on the greater offense. (*Id.* at p. 227.)

The High Court rejected this argument based upon statutory interpretation that demonstrated that Congress had not intended to make the prior an element of the offense, but rather only a “sentencing factor” that the court could consider in imposing punishment. (*Id.* at pp. 228-235.) It went on to address whether, despite legislative intent, the Constitution precluded the Congress from treating the prior conviction as a sentencing factor. (*Id.* at pp. 237-248.)² It then relied on the fact that recidivism was a traditional “sentencing factor” and did not “relate to the commission of the offense” to help it reach the conclusion that the prior need not be treated as an element of the offense. (*Id.* at pp. 243-248.) These reasons for exempting recidivism from being treated as an element, however, have now been soundly rejected by the High Court in connection with every other “sentencing factor” that has been since brought before it. (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 490, 494; *Ring v. Arizona*, *supra*, 536 U.S. 584, 602 & 610 [conc. opn. of Scalia, J.: “the fundamental meaning of the jury-trial guarantee of the

²Thus, *Almendarez-Torres*, like *Shepard*, was a statutory construction case.

Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt.”]; *Blakely v. Washington, supra*, 542 U.S. at pp. 303-304; *United States v. Booker* (2005) 543 U.S. 220, 243-244 [160 L.Ed. 2d 621, 125 S. Ct. 738]; *Cunningham v. California, supra*, 549 U.S. ____ [127 S. Ct. at p. 874] fn. 14 [where the majority declined to endorse a bifurcated approach urged by Justice Kennedy whereby facts concerning the offense would be submitted to the jury, but facts concerning the offender would not].)

Almendarez-Torres did not have before it the question of the right to a jury trial on the issue of the prior or what burden of proof should be applied to resolve it. As to the latter, the Court expressly declined to state a view on the standard of proof to be applied to such facts, because the defendant had admitted his recidivism at the time he pleaded guilty and had not raised the issue. (*Almendarez-Torres v. United States, supra*, 523 U.S. at pp. 247-248.)

In discussing *Almendarez-Torres*, the *Apprendi* majority clarified:

“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 a 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 p. 488 [emphasis original].)³

³In *McGee*, this Court in footnote six appears to have misread this quote from *Apprendi*. Footnote six directly follows the above quote from *Apprendi* and asserts that

The Court later concluded:

“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 allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range.” (*Id.* at p. 488.)

Thus, it was clear in *Apprendi*, that while the Court was not overruling *Almendarez-Torres* with respect to its narrow holding as to whether a prior was an element of the particular offense such that it had to be pleaded in an indictment, the Court intended that it be a very limited exception to the general rule that any fact increasing the maximum sentence must be treated as an element. (*Id.* at pp. 489-490; see also *Jones v. United States* (1999) 526 U.S. 227, 248-249 [143 L.Ed.2d 311,119 S.Ct. 1215] [limited *Almendarez-Torres* to recidivist issues and distinguished it as a pleading case].)

In this light, it is apparent that the only potential remnant of the *Almendarez-Torres* “recidivism” exception is that for the fact of the prior conviction itself, with

“like the petitioner in *Almendarez-Torres*, defendant here *admitted his involvement in the Nevada crimes pursuant to plea agreements entered into shortly after he committed those offenses*. The pleas were entered ‘pursuant to safeguards of their own.’ [citing *Apprendi*]” (*People v. McGee, supra*, 38 Cal. 4th at p. 698, fn. 6 [emphasis added]). This statement suggests that this Court considered the reference in *Apprendi* to Almendarez-Torres’ admissions to the priors to have related to his plea to them at the time they were committed. In fact, this refers to his admission to them *as priors* in the later proceeding. Thus, *unlike* the defendant in *McGee*, who demanded a jury trial on his priors (*id.* at p. 688), Almendarez-Torres raised neither his right to a jury trial nor proof beyond a reasonable doubt as to the priors *in the subsequent prosecution*.

“conviction” being limited to the “facts” necessarily established by the prior jury finding or defendant’s admissions at the time the prior conviction occurred. (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 488-489; *Shepard v. United States*, *supra*, 544 U.S. at pp. 15-16, 22-25; see also *Cunningham v. California*, *supra*, 549 U.S. ____ [127 S. Ct. at p. 874] fn. 14 [no exemption for facts relating to the defendant].) Moreover, the only remaining rationale for maintaining such an exception is the lack of dispute over the fact of the prior and the assurance that the “prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” (*Jones v. United States*, *supra*, 526 U.S. at p. 249; *Shepard v. United States*, *supra*, 544 U.S. at p. 25; see also *People v. McGee*, *supra*, 38 Cal 4th at pp. 713-714 [dis. opn. of Kennard, J.]

The recidivist factors listed in Rule 4.421 (b)(2)-(b)(5) go far beyond the bare fact of the conviction or its significance based upon the facts necessarily found by a jury or admitted by the defendant. Rather, they all require finding of *additional* potentially disputed facts.

A. Whether the Defendant’s Prior Convictions as an Adult that Are Numerous and of Increasing Seriousness Requires Additional Findings

Whether prior convictions are numerous and of increasing seriousness depends on findings, not only that *convictions* occurred, but also of additional facts establishing that they were “numerous” and of “increasing seriousness.” Whether priors are numerous turns not only on the number of convictions, but the length of time it took to accumulate

them. (See *People v. Simpson* (1979) 90 Cal. App. 3d 919, 926.) “The word ‘numerous’ must be interpreted in the context of the sentencing rules, and the provision in question should be contrasted with the wording that describes a good record for purposes of mitigation: ‘defendant has no prior record or an insignificant record of criminal conduct considering the recency and frequency of prior crimes.’ (Cal. Rules of Court, rule [4.423 (b)(1)]” (*Id.* at p. 926 [five priors committed before the age of 19 years made the finding that they were numerous “compelled”]; see also *People v. Searle* (1989) 213 Cal. App. 3d 1091, 1098 [three priors for driving while intoxicated occurring within 11 months of each other ten years prior to the current offense were “numerous”].) The questions of the length of time between priors and how long ago they occurred are factual determinations beyond the mere finding of the convictions themselves. Moreover, an additional relevant consideration may be how long the defendant was in custody during the period between convictions. (Cf., *People v. Humphrey* (1997) 58 Cal.App. 4th 809 [remoteness of a strike prior not mitigating if the defendant has been in custody on other crimes in the interim]; *People v. Nobelton* (1995) 38 Cal.App. 4th 76, 84-85 [Pen. Code, § 667.5 washout period runs from time of parole].)

Whether crimes are of increasing seriousness can involve even more extensive factual determinations. If seriousness is to be determined by length of potential sentence or the manner in which the offense is characterized in the Penal Code (e.g. “serious” or “violent”), many offenses are of the same level of seriousness. (See e.g. Pen. Code, §§

667.5 subd., (c) [listing multiple violent felonies]; 1192.7, subd. (c) [listing multiple serious felonies]; Pen. Code, § 18 [listing the sentence to be imposed for all felonies with punishment not otherwise prescribed]; Pen. Code, § 461, subd. (1) [first degree burglary] & § 451, subd. (c) [arson of a structure or forest land] [both punished by two, four or six years].) Thus, distinctions made among these crimes, as well as distinctions drawn between different violations of the same code sections, would have to turn on a determination of the facts underlying the compared crimes or perhaps the actual sentences imposed. Furthermore, the question of whether the defendant has numerous prior convictions of increasing seriousness is generally determined based upon the information presented in the probation officer's report, which may include information as to the facts underlying the priors as well as "factually supported" arrest data. (See *People v. Taylor* (1979) 92 Cal. App. 3d 831, 833; *People v. Ramos* (1980) 106 Cal. App. 3d 591, 609-610 [finding that the defendant had escalated from petty thefts to robbery was amply supported by his juvenile and adult arrest data].) None of these findings therefore is conclusively demonstrated by a judicial record and based upon the mere fact of the prior conviction alone or anything necessarily established by the verdict at the time of the prior conviction.

B. Whether the Defendant Has Served a Prior Prison Term Requires Additional Findings

The case law relating to what will establish adequate proof of an enhancement under Penal Code section 667.5 subdivision (b) demonstrates rather clearly that proof of

the service of a prior prison term involves more than a showing of the mere fact of a conviction itself. (See e.g. *People v. Tenner* (1993) 6 Cal.4th 559; *People v. Seals* (1993) 14 Cal. App. 4th 1379 [where defendant served a term in youth authority, the finding that he had a prior prison term depended on whether he had been directly committed to youth authority or merely housed there].) Additionally, defendants sometimes are initially placed on probation for a prior conviction and only go to prison after probation is revoked or sometimes receive “paper commitments” and are released directly from county jail because of having served the entire prison term pre-sentence. Finding the prior prison term in either of those situations would involve another layer of proof beyond the mere proof that a conviction was had.

C. Whether the Defendant Was On Parole When the Crime Was Committed Requires Additional Findings

This factor requires proof that the defendant not only had a prior conviction, but was sentenced to state prison as a result, served his term, paroled, and had not completed his time on parole. These facts are not readily apparent from the fact of a prior conviction alone. Moreover, the fact of being on parole is not something that can be proved by simple reference to official records, as those records are subject to challenge. (See, e.g., *People v. Willis* (2002) 28 Cal. 4th 22 [evidence found in a warrantless parole search had to be suppressed because the information obtained by the police as to the defendant’s parole status was erroneous].)

D. Whether the Defendant’s Prior Performance on Probation or Parole Was

Unsatisfactory Requires Additional Findings

This factor requires a determination of facts that demonstrate a poor prior performance on probation. Such facts may include drug use or addiction during probation. (See *People v. Regalado* (1980) 108 Cal. App. 3d 531, 540 [the sentencing judge’s reference to the defendant’s drug addiction while stating reasons for imposing the upper term was deemed to relate to a finding of poor performance on probation].) Most any demonstration of poor performance would likely be based upon the probation or parole officer’s comments as to whether the defendant had not been behaving properly on probation or parole. Even the use of the fact of commission of another offense while on probation can be an improper factor for finding a poor prior performance on probation if the violating offense was also the basis of an enhancement for a prior prison term, making the use of the “poor performance on probation” a dual use. (See *People v. Calhoun* (1981) 125 Cal. App. 3d 731, 733-734.)

E. Conclusion

Thus, all of the “recidivist factors” listed in rule 4.421 can involve findings as to “disputed facts.” *Apprendi* and its progeny hold that the Sixth and Fourteenth Amendments “guarantee a jury finding on any disputed fact essential to increase the ceiling of a potential sentence.” (*Shepard v. United States, supra*, 544 U.S. at p. 25.) That these “disputed facts” relate to recidivism does not change that. While these disputed facts might be described as facts about prior convictions, they are “too far removed from

the *conclusive significance of a prior judicial record*, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.” (*Ibid.* [emphasis added].)⁴

While some of these facts may be easily proved, the ease of proof is not the test. That the fact is more or less easy to prove does not alter its nature as an element that creates a question of fact for the jury rather than a question of law for the court. (See, e.g., *People v. Flood* (1998) 18 Cal. 4th 470, 482 [error to instruct that the officers defendant was evading were “peace officers” and thus direct a verdict on an element of a Pen. Code, § 830 violation].)

In *Cunningham*, the Court held that imposition of the upper term in California was a departure from the maximum sentence authorized by mere conviction of the crime itself. Thus, factors in aggravation act as “elements” of a greater offense, and imposition of the upper term is not constitutionally permissible unless those “elements” are found in a manner compliant with the rights to a jury trial and proof beyond a reasonable doubt.

⁴Even the fact of a prior conviction may be subject to dispute. (See *People v. Covino* (1980) 100 Cal. App. 3d 660, 671 [probation report had listed a prior conviction for a crime of which the defendant had been found not guilty on one count and all other counts were dismissed pursuant to a writ of habeas corpus]; *People v. Boyd* (1979) 24 Cal. 3d 285 [defendant could not be convicted of being an ex-felon in possession of a gun where prior felony had been decriminalized]; *People v. Jenkins* (1983) 142 Cal. App. 3d 222, 227, fn. 4 [sentencing court improperly relied on a conviction for an offense that had been decriminalized].) Thus, even the fact of the prior conviction could be characterized as a “disputed fact” that cannot be deemed to be conclusively proved by a judicial record. For this reason as well, the *Almendarez-Torres* exception appears dubious in light of *Apprendi* and its progeny.

Questions as to the continuing validity of the *Almendarez-Torres* exception to this rule that facts enhancing a sentence are elemental suggest that this Court should not rely on it to permit the imposition of the upper term based upon a sentencing judge having found the fact of a prior conviction. Whatever this Court determines as to the continuing validity of the exception for the finding of the prior conviction itself, however, it is very clear that expanding it to include the factors listed in Rule 4.421 (b)(2)-(b)(5) would run afoul of the federal Constitutional protections in the Sixth and Fourteenth Amendments.

III.

THE DEFENDANT’S SIXTH AMENDMENT RIGHTS UNDER CUNNINGHAM ARE VIOLATED, IF THE TRIAL JUDGE, IN EXERCISING DISCRETION TO IMPOSE THE UPPER TERM, RELIES ON AGGRAVATING FACTORS THAT HAVE NOT BEEN ESTABLISHED IN COMPLIANCE WITH THE SIXTH AMENDMENT, EVEN IF THERE IS AVAILABLE A SINGLE POTENTIALLY AGGRAVATING FACT THAT HAS BEEN ESTABLISHED BY MEANS SATISFYING THE CONSTITUTION

The second question presented by this Court’s order of February 7, 2007 was:

“Is there any violation of the defendant’s Sixth Amendment rights under *Cunningham v. California, supra*, if the defendant is eligible for the upper term based upon a single aggravating factor that has been established by means that satisfy the governing Sixth Amendment authorities - by, for example, a jury finding, the defendant’s criminal history, or the defendant’s admission - even if the trial judge relies on other aggravating factors (not established by such means) in exercising his or her discretion to select among the three sentences for which the defendant is eligible?”

California’s sentencing scheme creates a three-step process for imposition of the upper term. Whether factual findings by the judge violate the Constitution under *Cunningham* depends on when in the process those findings are made and how they are used. If the sentencing court relies on a mixture of constitutionally compliant factors and unconstitutional factors in deciding that aggravating factors justify the imposition of the upper term and the defendant is therefore eligible for the upper term, a constitutional violation occurs. If, after finding the defendant eligible for the upper term based on only constitutionally compliant factors, the court relies on its own factual findings in deciding whether to impose the midterm or the available upper term, that latter factfinding does not

violate the constitution.

“Factfinding to elevate a sentence from [the middle term to the upper term], our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies.” (*Cunningham v. California*, *supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 875].) Therefore, the Court in *Cunningham* held that California’s sentencing scheme permitting such factfinding was unconstitutional. “Because the DSL allocates to judges sole authority to find facts permitting the imposition of the upper term sentence, the system violates the Sixth Amendment.” (*Id.* at p. ___ [*Id.* at p. 876].)

In stating the basic rule requiring a jury finding of all facts necessary to permit the imposition of the upper term, however, the Court in *Cunningham* repeated the exception for “a prior conviction.” (*Id.* at p. ___ [*Id.* at p. 873].) Thus, there may be room for argument that the *Almendarez-Torres* exception would protect an upper term from constitutional challenge if it were based solely on the fact of a prior conviction.⁵ Furthermore, of course, the Constitution permits imposition of an increased sentence based upon facts found by the jury or knowingly admitted by the defendant who has

⁵Appellant has argued extensively in the Reply Brief on the Merits and above that this Court should not rely on the *Almendarez-Torres* exception as it is constitutionally suspect. Appellant continues to make that argument, but assumes the exception is viable for purposes of discussion here. Additionally, as argued above, the *Almendarez-Torres* exception is limited to the fact of the prior conviction alone and does not cover all aspects of the “defendant’s criminal history.”

waived a jury. (See *Blakely v. Washington*, *supra*, 542 U.S. at p. 303.) Thus, imposition of the upper term based upon factors found by the jury or admitted by the defendant would also pass constitutional muster. Whether a given sentence to the upper term imposed under the current system may be constitutionally compliant requires an examination of exactly how the California scheme operates.

Penal Code section 1170, subdivision (b) creates a three-step process for the imposition of an upper term sentence. The sentencing judge must: (1) find factors in aggravation and mitigation; then (2) assess the qualitative value of these factors and weigh them against each other to determine whether the aggravating factors outweigh mitigating factors; and (3) *if* the aggravating factors outweigh the mitigating factors, decide whether to impose the upper term. (See *People v. Hall* (1994) 8 Cal. 4th 950, 957-958; *People v. Wright* (1982) 30 Cal.3d 705, 709-710,720; *People v. Myers* (1983) 148 Cal. App.3d 699, 704; Pen. Code, § 1170; Cal. Rules of Court, rule 4.408 (a); 4.420.) Penal Code, section 1170, subdivision (a)(3) provides that the sentencing courts shall apply the rules imposed by the Judicial Council in making these determinations. (See also, Pen. Code, § 1170.3; *People v. Wright*, *supra*, 30 Cal.3d at pp. 711-714.)

The finding of a fact that could be aggravating is but the first step, and it alone does not make the upper term available. Rather, the upper term becomes available only after the sentencing court has completed the second step of assessing the value of the factor to aggravate and finding it of sufficient value to justify the imposition of the upper

term and to outweigh any factors in mitigation. (Cal. Rules of Court, rule 4.420.)

“The middle term must be imposed unless the imposition of the upper term . . . is justified by circumstances in aggravation” (Cal. Rules of Court, rule 4.420 (a).)

“The selection of the upper term is justified only if, after consideration of all of the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation.” (Cal. Rules of Court, rule 4.420 (b).) Moreover, this Court has recognized, “selection of the upper term is *justified only if circumstances in aggravation* are established by a preponderance of the evidence *and outweigh* circumstances in mitigation.” (*People v. Hall, supra*, 8 Cal. 4th at p. 957 [emphasis added].) Thus, the necessary “justification” that makes the upper term the available sentence does not occur until *after the court has weighted and balanced the various factors found*.

Accordingly, the identification of a single potential aggravating factor that has been determined by means that satisfy the Sixth Amendment does not automatically take the sentencing decision out of the purview of *Cunningham* or make any sentencing determination thereafter necessarily compliant with the Sixth and Fourteenth Amendments. This is so because a single potentially aggravating factor does not, upon simply being determined, automatically authorize the upper term. It can do so only after being found to be qualitatively sufficient to justify the upper term and to outweigh any mitigation.

It is true that a single factor in aggravation can be sufficient to justify the

imposition of the upper term. (See *People v. Osband* (1996) 13 Cal. 4th 622, 728.) This does not mean that any given factor in aggravation will necessarily justify the upper term in any given case. The determination of whether the upper term is justified depends on both a “qualitative and quantitative” analysis of the aggravating factors. (See *People v. Kellett* (1982) 134 Cal. App. 3d 949, 963; *People v. Searle*, *supra*, 213 Cal. App. 3d 1091, 1100.) On appeal, if this analysis suggests that the trial court could and did give adequate weight to sound aggravating factors such that the appellate court can conclude that the trial court could and would impose the upper term based upon only proper factors upon remand, an error in relying on one or more improper factors can be deemed harmless. (*Ibid.*) If on the other hand, it is not clear that the upper term could or would have been imposed based upon the single proper factor alone, the case must be remanded to the trial court for resentencing. (See *People v. Covino*, *supra*, 100 Cal. App. 3d at pp. 670-672.) But the availability of this harmless error analysis does not mean that, where the sentencing court relied on a mix of constitutionally sound factors and unconstitutional factors, the sentence was automatically constitutional.

“Individual criteria in the rules have no fixed mathematical value. . . .” (*People v. Regalado*, *supra*, 108 Cal. App. 3d at p. 539.) And, only after the value is set and established to be sufficient to outweigh countervailing factors, does the imposition of a term other than the middle term become legally available. (*People v. Hall*, *supra*, 8 Cal. 4th at p. 957; Cal. Rules of Court, rule 4.420.)

As appellant argued in his Reply Brief on the Merits, for this reason, the fact of a prior conviction alone does not even necessarily qualify as an aggravating factor. (ARBM 19-20) Aggravation or circumstances in aggravation are defined as “facts that *justify* the imposition of the upper term referred to in Penal Code section 1170 (b).” (Cal. Rules of Court, rule 4.405 (4).) As noted above, such facts “justify” the upper term only after they are determined to be of sufficient weight to do so.

Therefore, when a sentencing court has relied on both a constitutionally sound factor and a factor found by unconstitutional means to find sufficient aggravation to justify the upper term, it will have used the unconstitutional factor to make the upper term available. The unconstitutionally found factor has been used elementally as a fact necessary to make the upper term the maximum available. (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 490, 494.)

This is so even where no factor in mitigation is identified because the qualitative value of any particular potentially aggravating factor can be deemed to be too small to overcome the statutory presumption in favor of the middle term and to *justify* the imposition of the upper term. A prior conviction of a mitigated offense may be insufficient, even without countervailing mitigation. For example, a prior residential burglary committed by a cold, hungry defendant, who entered an empty vacation home to get out of the cold and find something to eat, may not be so aggravating. A misdemeanor trespass conviction under similar circumstances would be even less aggravating. This

would be especially so if that prior were the only crime the defendant had previously committed. Thus, a court may conclude that the single prior would not alone justify the upper term and would impose the upper term only if it found other factors surrounding the current offense that were also aggravating.

The only time within the California scheme that the sentencing court is in the position to make factual determinations that will not offend the constitution is in the third step of the process described above. That is when the court is deciding whether to impose the justified upper term or just impose the middle term. That is when the court has the type of sentencing discretion to choose a sentence within a maximum that permits judicial finding of “sentencing factors” of which the Court in *Apprendi* and the cases following it approved. (See *Apprendi v. New Jersey, supra*, 530 U.S. at p. 481; *Blakely v. Washington, supra*, 542 U.S. at pp. 308-309.)

The teaching of *Apprendi* and its progeny is that the jury must find all of the facts upon which the maximum potential sentence depends. The judge must then base the decision as to the maximum available sentence on these facts alone. If the court relies on facts not found by the jury to make the maximum available, the Sixth and Fourteenth Amendments are violated.

Thus, for the California system to operate constitutionally, the facts found in the first step of the California process must be found by constitutionally compliant means. In the second step, only those facts found in the first step may be used by the court in

making its determination of whether the upper term is “justified” and therefore available.

In the final step, when deciding whether to impose the upper term that has then become within the court’s discretion to impose, the court may make its own factual findings without running afoul of the constitution.

IV.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S SELECTION OF THE UPPER TERM IN THIS CASE

In this case, as in most cases, the trial court did not move from step to step in the three-part sentencing process described above. Rather, it made all of its comments in a single course of explaining the sentence being imposed.

Thus, the court commented on how terrified the victim had been, and that the victim was a liar, but even a liar did not deserve to be treated as appellant had allegedly treated him to make him so terrified. The court also commented that appellant was a liar. The court further noted that appellant had a lengthy prior record, but it also commented that he was an innocent of sorts who had not learned much from his past experiences. It then imposed the upper term on the offense. Thereafter, it struck the Penal Code section 667.5 enhancements based upon all of the circumstances before it, including appellant's personal nature and the sentence being imposed. (4 RT 2415-2418)

These comments, which focused in large part on the violence that had been alleged and the victim's fright and which also recognized mitigating facets of appellant's personality, demonstrate that the court used the facts of the counts of which appellant was acquitted to find sufficient aggravation to outweigh mitigation and justify the upper term. The court, which had no reason to believe that it could not use them for this purpose, was using those factors to determine whether the upper term was available.

The court's use of those facts to make aggravation outweigh mitigation and justify the upper term was elemental use of them; they were necessary to make the upper term available. (See *Apprendi v. New Jersey*, *supra*, 530 U.S., at pp. 491-497; *Ring v. Arizona*, *supra*, 536 U.S. at p. 602; *Blakely v. Washington*, *supra*, 542 U.S. at pp. 303-304.) Thus, the court violated appellant's rights to a jury trial and proof beyond a reasonable doubt in imposing the upper term. (*Cunningham v. California*, *supra*, 549 U.S. ____ [127 S. Ct. at pp. 876].)

V.

PREJUDICE FOR SENTENCING A DEFENDANT TO THE UPPER TERM IN VIOLATION OF THE SIXTH AND FOURTEEN AMENDMENT MUST BE ASSESSED UNDER *CHAPMAN* AND THE ERROR WAS PREJUDICIAL IN THIS CASE

In *Washington v. Recuenco*, *supra*, 548 U.S. ____ [126 S.Ct. 2546; 165 L.Ed. 2d 466], the Court held that *Apprendi/Blakely* error is not structural and may be subject to harmless error analysis under the *Chapman*⁶ standard. (*Id.* at p. ____ [126 S.Ct. at pp. 2551-2553; 165 L.Ed. 2d at pp. 474-477].) In so doing, the Court analogized to *Neder v. United States* (1999) 527 U.S. 1, 8 [119 S. Ct. 1827, 144 L.Ed. 2d 35], which applied harmless error analysis to the failure to obtain a jury finding on an element of the offense. Noting that after *Apprendi*, sentencing factors had been treated as elements that had to be tried to a jury and proved beyond a reasonable doubt, the Court concluded that the same rule of prejudice as was applied to the error in *Neder* should apply to failures to obtain a jury verdict on sentencing factors. (*Washington v. Recuenco*, *supra*, 548 U.S. ____ [126 S.Ct. at pp. 2552-2553; 165 L.Ed. 2d at pp. 475-477].)

Thus, the *Chapman* standard of prejudice must apply to this case as well. As appellant argued in his Opening Brief on the Merits, this standard must be applied in multiple contexts to determine prejudice from *Cunningham* error in California. First, it must be applied to determine whether it is clear beyond a reasonable doubt that the

⁶*Chapman v. California* (1967) 386 U.S. 18, 34 [87 S. Ct. 824, 17 L.Ed. 2d 705]

aggravating factor relied upon would have been found by the jury had it been asked to find it (the *Neder* analysis). If the court relied on some constitutionally compliant factors and some unconstitutionally found factors, the test will have to be applied in a second context to determine whether the court could have, and would have, imposed the upper term by relying only on factors that were constitutionally sound.⁷ (AOBM 45-48)

As to the first step, it is clear that the jury in this case, if asked, would not have found the aggravating factors related to the violence of the offense because it acquitted appellant of every count involving violence. (CT 178-187, 4 RT 1211-1217) Thus, the jury here was given the opportunity to find the factors and found them not true.

The trial court here, however, did have factors upon which it could constitutionally rely to impose the upper term. It could constitutionally rely on appellant's prior prison terms. They were alleged against him under Penal Code section 667.5 and admitted by him after he waived his trial rights. (4 RT 1255-1260, 1640-1643) Because the trial court did not impose the section 667.5 enhancements (4 RT 2418), the dual use prohibition of Penal Code section 1170, subdivision (b) did not preclude their consideration as factors in aggravation.

This fact, however, does not render the court's reliance on the facts of the acquitted counts harmless. Unless the trial court has made clear that the constitutionally

⁷If there were some factors that this Court could conclude the jury would have found under the *Neder* analysis, the second aspect of the prejudice assessment would include them in the calculus.

sound factors alone would support the upper term, it cannot be determined beyond a reasonable doubt that the unconstitutional factor played no role in the decision to make the upper term available. And, unless it played *no role* in that determination, the defendant's rights to a jury finding of the truth beyond a reasonable doubt of *all of the facts necessary* to make the upper term available will have been violated.

The sentencing court here imposed the upper term based largely on appellant's having terrified the victim by doing the things "alleged" against appellant here. (4 RT 2415-2418) As noted, however, appellant was acquitted of every violent crime charged. (CT 178-187; 4 RT 1211-1217) The court did also refer to appellant's prior record but also noted a mitigating aspect of his personality, that appellant was "an innocent of sorts." (4 RT 2417) As the violence of which appellant was acquitted was prominent the court's discussion and there was some mitigation that may have countered any aggravation from appellant's record, it cannot be said that the error in relying on the facts of which appellant had been acquitted was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24; see also *People v. Covino, supra*, 100 Cal. App. 3d at pp. 670-672 [where the court reversed under a *Watson* standard based on the presence of only one valid aggravating factor and some potential mitigation].) Accordingly, the sentence must be reversed, and the cause remanded for a new hearing.

VI.

TO REMEDY THE CONSTITUTIONAL INFIRMITY OF THE CALIFORNIA SENTENCING SCHEME, THIS COURT SHOULD NOT ATTEMPT TO REWRITE THE CODE AND SHOULD REFORM THE STATUTE TO PERMIT ONLY SENTENCES TO THE MIDDLE TERM, OR ALTERNATIVELY, TO LIMIT UPPER TERM SENTENCES TO THOSE CASES IN WHICH THE AGGRAVATING FACTORS WERE FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT

In *Cunningham*, the Court put “the ball” in “California’s court” to adjust California’s sentencing scheme in light of the High Court’s decision. (*Cunningham v. California, supra*, 549 U.S. ___ [127 S. Ct. at p. 876].) The Legislature has apparently begun work on doing so. (See Sen. Bill No. 40 (2007-2008 Reg. Sess.)) This Court, therefore, should not attempt to rewrite the statute, but should fashion a method by which trial courts can operate constitutionally until the Legislature has had time to act.

As appellant noted in his Reply Brief on the Merits, rewriting the statute to make it constitutional is predominately a legislative function that normally should not be undertaken by the courts. (See *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, 272; *Metromedia v. San Diego* (1982) 32 Cal.3d 180, 187; *Arp v. Workers’ Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 409-411; ARBM 17-26.) Any efforts this Court could undertake to reform the statute are limited by its ability to determine the Legislature’s intent in writing the statute and whether a proposed remedy would come closest to satisfying those legislative goals. (*Arp v. Workers’ Comp. Appeals Bd., supra*, 19 Cal.3d at pp. 407-408; *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661;

ARBM 17-26.)

As appellant additionally argued, this Court should not reform the statute to provide for jury trials. Determining the procedures to be implemented to provide for pleading the allegations and submitting them to the jury are largely legislative functions. (See *City of Carmel-by-the-Sea v. Young, supra*, 2 Cal.3d at p. 272, ARBM 24-26.)

Neither should this Court reform the system to permit upper terms whenever the defendant has a prior conviction that is exempt under *Almendarez-Torres*. (ARBM 17-26) This is so, not only because of the dubious validity of *Almendarez-Torres*, but because it would unfairly skew sentencing in a manner contrary to the Legislative goals behind the Determinate Sentencing Law [DSL].

As this Court noted in determining the validity of the Rules of Court governing factors in aggravation and mitigation, the intent of the Legislature in adopting DSL was to promote uniformity of sentencing. (See *People v. Hall, supra*, 8 Cal. 4th at p. 958; *People v. Cheatham* (1979) 23 Cal. 3d 829, 832-833.) This Court further concluded that the Legislature intended that the terms be fixed based upon circumstances relating to **both** the defendant and the crime. (*People v. Hall, supra*, 8 Cal. 4th at p. 961.) By permitting courts to continue to impose the upper term based upon facts relating to the defendant, such as his prior record, but not facts relating to the commission of the crime, this Court would create a scheme in which half of the traditional equation anticipated by the Legislature is missing and would, contrary to the purpose of the determinate sentencing

scheme in question, increase disparity in sentencing.

Moreover, it must be presumed that in fixing the available terms for the various offenses and enhancements outlined in the codes, the Legislature relied on the manner in which the system had been held to operate, and did not intend that only *some* people to whom aggravating factors applied would remain eligible for the upper term. (Cf. *People v. Hall, supra*, 8 Cal. 4th at pp. 962-963 [the Legislature is deemed to be aware of existing statutes and judicial decisions and to enact statutes in light thereof; and the Legislature did not want a “potentially inconsistent sentencing scheme”].)

For these same reasons, the solution of allowing upper terms to be imposed in only those cases in which the aggravating factor has been found by the jury or admitted by the defendant is also problematic. This solution, however, is fairer and would more closely match the Legislature’s intent than to remove the presumption of the midterm from the statute as respondent proposed. (RABM 50-53, RSB 8-14)

Appellant has addressed in prior briefing the reasons why this Court should not remove the presumption of the midterm from the statute. (See ARBM 31-32; Appellant’s Supplemental Reply Brief on the Merits 5-10.) The fact that the Legislature is deemed to have relied on existing law in enacting new laws is another reason not to adopt such a remedy. The Legislature, when fixing the statutory upper terms, would not have assumed that *everyone irrespective of whether aggravating factors preponderated* would be eligible for it. Rather, in choosing the three terms for any given crime, the Legislature

would have supposed that most defendants would get the middle term, which the Legislature had deemed the presumptively appropriate sentence for the crime. (Cf. *People v. Hall, supra*, 8 Cal. 4th at pp. 962-963.)

Rather than attempting to guess what the Legislature might ultimately decide is the best way to preserve the defendant's Sixth and Fourteenth Amendment rights in the sentencing process, this Court should simply require that all cases that were and are being resolved under the current law be limited to the middle term. As appellant argued in his Reply Brief on the Merits, this is the course taken by the Kansas Supreme Court while it waited for its Legislature to act. (ARBM 26-30) This solution would clearly be constitutional and would not run the risk of providing a remedy that will be subject to later constitutional challenge, and it would most closely comply with the Legislature's determination of what the usual sentence would be for the majority of cases and its desire to have uniformity of sentencing.

CONCLUSION

Because the trial court here relied on facts of crimes of which appellant had been acquitted to impose the upper term in violation of appellant's federal constitutional rights to a jury trial and proof beyond a reasonable doubt and of the Double Jeopardy Clause, his sentence must be reversed, and the case remanded to permit the imposition of a constitutional sentence.

Dated: February 27, 2007

RESPECTFULLY SUBMITTED

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