IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

S148974

Court of Appeal No. D047682

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JOEL HERNANDEZ,

Defendant and Appellant,

On review from the decision of the Court of Appeal, Fourth Appellate District, Division One, affirming the judgment of the San Diego County Superior Court, The Honorable Richard E. Mills, Judge

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S148917

Court of Appeal No. B187977

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

AIDA SANDOVAL,

Defendant and Appellant.

On review from the decision of the Court of Appeal, Second Appellate District, Division Four, modifying and affirming the judgment of the Los Angeles County Superior Court, The Honorable Lance A. Ito, Judge

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JOEL HERNANDEZ,

Defendant and Appellant,

THE PEOPLE OF THE STATE OF CALIFORNIA,

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AIDA SANDOVAL,

Defendant and Appellant.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

To the Honorable Chief Justice of the Supreme Court of the State of California

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of Respondent, the People of the State of California, pursuant to rule 8.520(f) of the California Rules of Court and this court's order of February 7, 2007.

Applicant's Interest

CJLF is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the procedures necssary to comply with the decision of the United States Supreme Court in *Cunningham v. California* (2007) 549 U.S. __, 127 S.Ct. 856, 166 L.Ed.2d 856. The argument of defendants that this procedural issue should completely exempt them from their deserved punishment is contrary to the interests CJLF was formed to protect.

Need for Further Argument

CJLF is familiar with the arguments presented on both sides of this issue and believes that further argument is necessary.

CJLF will argue that *Cunningham* imports into noncapital sentencing the distinction between eligibility circumstances and selection circumstances long recognized in capital sentencing. Only one eligibility circumstance needs to be validly found to satisfy the Sixth Amendment. The trial court may find any additional facts needed to determine if the defendant should receive the upper term.

Our brief is submitted with this application and ready for immediate filing.

March 21, 2007

Respectfully Submitted,

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

Appellant Joel Hernandez was convicted of evading an officer with reckless driving and resisting an officer's performance of duty. He was sentenced to the upper term of three years on the first count, a consecutive term of six months for the second, and an enhancement term of one year for a prison prior. (*People v. Hernandez* (Nov.16, 2006, D047682) 2006 Cal.App. Unpub. Lexis 10435, *1-*2.) The incident involved pursuit of appellant in his truck, in the course of which he ran red lights and stop signs, followed by abandonment of the truck and a foot pursuit in a residential area. (*Id*. pp. at *3-*5.)

At sentencing, the trial court rejected the probation officer's recommendation for a middle term:

> "The court generally referred to the nature of his past offenses, his continued association with gang members, and the reckless driving giving rise to these offenses. The court also noted the existence of aggravating factors under rule 4.421(a), by mentioning the lack of regard for public safety, the leadership of the defendant as the driver of his own car, his lack of remorse, and the likelihood that he had something to do with Mendoza's false statement seeking to take responsibility for the offense. (Rule 4.421(a)(1), (4) & (6).)
>
> "To impose the upper term, the court relied on the factors identified in rule 4.421(b)(2), Hernandez's prior convictions were numerous; (b)(3), his prior prison term; (b)(4), he was on parole at the time he committed the charged offenses; and (b)(5), his past performance on probation and parole had been unsatisfactory." (*Id*. at pp. *21-*22.)

In choosing a consecutive term for the second count, the court noted that two different sets of victims had been endangered by the vehicle chase in count 1 and the foot pursuit in count 2. (*Id*. at pp. *22-*23.)

Appellant Aida Sandoval was convicted of the voluntary manslaughter of Rolando Rojas and Belen Dercio and the attempted voluntary manslaughter of Salvador Ramirez. (*People v. Sandoval* (Nov. 14, 2006, B187977) 2006 Cal.App. Unpub. Lexis 10258, *1.) Appellant describes the trial court's reasons for imposing the upper term of 11 years for manslaughter:

> "The court found that the crime involved a great amount of violence and incredibly callous behavior, that petitioner had no concern about the consequences of her actions and that the victims were particularly vulnerable because they were unarmed, inebriated and ambushed from behind. The court also found that

> petitioner's actions showed planning [and] premeditation." (Appellant's Opening Brief in *People v. Sandoval*, S148917 ("Sandoval AOB") at p. 3.)

The trial court also imposed consecutive terms of two years for count 2 and 16 months for count 3. (*People v. Sandoval*, *supra*, at p. *2.) On appeal, the Court of Appeal rejected appellant's Sixth Amendment claims as to both the upper term and consecutive sentences under *People v. Black* (2005) 35 Cal.4th 1238. (See *Sandoval*, *supra*, at p. *14.)

Subsequently, on January 22, 2007, the United States Supreme Court disapproved *Black* as to upper-term sentencing in *Cunningham v. California* (2007) 549 U.S. __, 127 S.Ct. 856, 166 L.Ed.2d 856. On February 7, 2007, this court granted review in the above two cases and three others, noting that they "present the following issues in different factual contexts: (1) Did the trial court violate defendant's Sixth Amendment right to a jury trial, as interpreted in *Cunningham* . . . , by imposing an upper-term sentence based on aggravating factors not found true by the jury? (2) If so, what is the proper remedy?" Although not within the questions stated, both Hernandez and Sandoval contend that their consecutive sentences also are contrary to *Cunningham*.

SUMMARY OF ARGUMENT

Only one aggravating circumstance is required by California law to make a defendant eligible for the upper term, and *Cunningham* therefore requires only one to be found by a jury, admitted by defendant, or be a prior conviction. Once one circumstance qualifies, the court may find all other aggravating and mitigating circumstances needed to inform its decision on the upper, middle, or lower term. *Cunningham* has effectively imported into noncapital sentencing the

distinction between "eligibility" circumstances and "selection" circumstances long recognized in capital cases. Because any prior conviction can be an aggravating circumstance, there is no *Cunningham* error if the defendant has priors not used for enhancement.

Consecutive sentencing in California is not affected by *Blakely v. Washington* and *Cunningham*. *Blakely* and *Cunningham* are based on upper-term sentencing and how the required aggravating factor is found. When imposing a consecutive sentence, since there is no need to find any additional element or aggravating factor, there is no need to include the jury on the decision. The decision to impose a consecutive sentence is left to the judge's discretion. The only requirements to impose a consecutive sentence are that the decision cannot be based on any fact that was used to impose the upper term, to otherwise enhance the defendant's sentence, or that is an element to the crime (Cal. Rules of Court, rule 4.425)[1], and in a determinate sentence, the judge must include on the record his reasoning in imposing the upper term. None of these requirements is related to the finding of an aggravating fact, the key element behind the *Blakely* and *Cunningham* reasoning.

If the court decides to reform the statute along the lines suggested by the Attorney General, no remedy is required. If not, a case with no priors and no aggravating circumstances admitted by the defendant requires a jury determination of an aggravating circumstance to impose the upper term. The jury need only find one. This court has ample authority to make this minor change by judicial decision to preserve the operation of the statute as close to the Legislature's intent as possible.

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1. All rule citations are to the California Rules of Court.

ARGUMENT

I. A single properly found or admitted aggravating fact is sufficient to satisfy *Cunningham* for the upper term, and the judge may find additional supporting facts.

"Under California's DSL, an upper-term sentence may be imposed only when the trial judge finds *an* aggravating circumstance." (*Cunningham v. California* (2007) 549 U.S. __, 127 S.Ct. 856, 868, 166 L.Ed.2d 856, 873, italics added). The singular is significant here. Applicability of the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 turns on the distinction between eligibility factors and selection factors that California law has long recognized in capital cases.

A defendant convicted of first-degree murder is eligible for the death penalty only if at least one "special circumstance" is found. (Pen. Code, § 190.2, subd. (a); *People v. Bacigalupo* (1993) 6 Cal.4th 457, 467.) Once a defendant has been found eligible for the death penalty, the sentencer considers a broader range of aggravating circumstances, weighed against mitigating circumstances, to decide whether to actually impose that penalty. (*Bacigalupo*, *supra*, at pp. 467-469; *Tuilaepa v. California* (1994) 512 U.S. 967, 975-976.) The Sixth Amendment as construed in *Apprendi* requires that the eligibility circumstances must be found by the jury and proved beyond a reasonable doubt. (*Ring v. Arizona* (2002) 536 U.S. 584, 609.) California's statute provides that both kinds of factors be found by the jury, but there is no burden of proof for selection factors, and this court has consistently rejected the argument that any burden of proof instruction is required for them. (See, e.g., *People v. Ochoa* (2001) 26 Cal.4th 398, 453-454.)

A finding of more than one eligibility circumstance is superfluous for the purpose of eligibility, but those additional circumstances

may properly be considered for the purpose of selection. This is illustrated by *People v. Sanders* (1990) 51 Cal. 3d 471 and *Brown v. Sanders* (2006) 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723.[2] The jury found four special circumstances, but this court found that two of them had to be set aside. (See 51 Cal. 3d at p. 520.) However, Sanders remained eligible for the death penalty under the two remaining special circumstances, and the facts underlying the two stricken circumstances were properly considered as selection factors under the broad "circumstances of the crime" factor. (See *id*. at pp. 520-521; *Brown v. Sanders*, *supra*, 126 S.Ct. at p. 894, 163 L.Ed.2d at p. 735.)

Cunningham effectively makes aggravating circumstances under Penal Code section 1170, subdivision (b) the same as special circumstances under section 190.2 in the sense that at least one is required for eligibility, all may be considered for selection, but the one that makes the defendant eligible for the higher sentence must constitutionally be found by the jury beyond a reasonable doubt, unless it is the fact of a prior conviction or the defendant admits it.[3] The critical line under *Cunningham* is between legal availability of the sentence and the sentencer's discretion to impose that sentence. The upper term is legally out of reach of the sentencer until, and only until, one aggravating circumstance is validly found. "The court cannot impose the upper term unless there is *at least one* aggravating

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2. *Brown v. Sanders* is an indirect affirmance of *People v. Sanders*, reversing a grant of federal habeas relief. (See 126 S.Ct. at p. 894, 163 L.Ed.2d at p. 736.)

3. Death is still different in that the requirement of specificity under *Godfrey v. Georgia* (1980) 446 U.S. 420, 428, has not been held to apply to noncapital eligibility circumstances.

factor." (*People v. Black* (2005) 35 Cal.4th 1238, 1254, italics added; cf. *Ring*, *supra*, 536 U.S. at p. 597.)

Apprendi did not overrule the holding of *Almendarez-Torres v. United States* (1998) 523 U.S. 224, that the fact of a prior conviction may be found by the trial court, and the Supreme Court has acknowledged that exception in every case in the line since then. (See, e.g., *Cunningham v. California*, *supra*, 127 S.Ct. at p. 864, 166 L.Ed.2d at p. 869.) Appellant Hernandez acknowledges that his prior convictions include three convictions of burglary, one of resisting an officer, and one of possession of a concealed dagger. (See Appellant's Opening Brief in *People v. Hernandez*, S148974 ("Hernandez AOB") at p. 21.) Yet he protests that the finding that these convictions are numerous and serious is a finding of fact that does not come within the *Almendarez-Torres* exception. (See *ibid*.) It does not matter. Although Rule 4.421(b)(2) refers to numerous and serious prior convictions, the aggravating circumstances in the rule are only examples. (See *Black*, *supra*, 35 Cal.4th at p. 1247; Rule 4.408(a).) Any prior conviction at all can be an aggravating circumstance.

Cunningham cited the decision of the Colorado Supreme Court in *Lopez v. People* (2000) 113 P.3d 713, 716 as an example of a state that had complied with *Apprendi* and *Blakely* "by calling upon the jury . . . to find any fact necessary to the imposition of an elevated sentence." (*Cunningham*, *supra*, 166 L.Ed.2d at p. 876 & fn. 17.) The *Lopez* decision is therefore worth a close look.

The Colorado sentencing system divides offenses into classes and provides a presumptive range for each class. (*Lopez v. People*, *supra*, 113 P.3d at pp. 723-724.) The trial court can depart from the presumptive range on several grounds. The one relevant to the *Lopez* case was "departure from the presumptive range based on the presence of extraordinary aggravating or mitigating circumstances

. . . ." (*Id*. at p. 724.) Such circumstances expand the available range down to half the presumptive minimum and up to double the presumptive maximum. (*Ibid*.) This system differs from California's in that our system does not require that the circumstances be "extraordinary" and ours has discrete sentences rather than ranges, but the systems are otherwise analogous. A Colorado sentence greater than the presumptive maximum up to double that maximum is analogous to a California upper term. These "aggravated sentences can be imposed constitutionally if based on *Blakely*-compliant or *Blakely*-exempt facts." (*Id*. at p. 729.)[4]

As the Colorado Supreme Court recognized, "One *Blakely*-compliant or *Blakely*-exempt factor is sufficient to support an aggravated sentence." (*Id*. at p. 731.) Further,

> "the existence of a constitutionally-permissible aggravating or mitigating fact widens the sentencing range on both the minimum and maximum ends, to a floor of one-half the presumptive minimum up to a ceiling of double the presumptive maximum. The sentencing judge then has full discretion to sentence within this widened range according to traditional sentencing considerations. [Citation.] Sentencing within this widened range under section 18-1.3-401(6), based on *Blakely*-compliant or *Blakely*-exempt factors, is both constitutionally and statutorily sound *even if the sentencing judge also considered factors that were not Blakely-compliant or Blakely-exempt*." (*Ibid*., italics added.)

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4. "We adopt a useful shorthand from the Arizona Court of Appeals; facts admitted by the defendant, found by the jury, or found by a judge when the defendant has consented to judicial fact-finding for sentencing purposes we call '*Blakely*-compliant,' and prior conviction facts we call '*Blakely*-exempt.' " (*Id*. at p. 723, citing *State v. Aleman* (Ariz.App. 2005) 109 P.3d 571, 580.)

The italicized phrase recognizes the critical distinction between eligibility factors which are subject to *Blakely* and selection factors which are not. There is no constitutional requirement that all the factors considered by the sentencing judge be *Blakely*-compliant or *Blakely*-exempt. The "statutory maximum" is defined not by the facts that inform the judge's decision but only by the facts legally necessary to authorize the judge's decision. If *any* aggravating fact is legally sufficient under state law to authorize an aggravated term, then a *Blakely*-compliant or *Blakely*-exempt finding of *any* aggravating fact is sufficient to satisfy the *Blakely* requirement. (See *Blakely v. Washington* (2004) 542 U.S. 296, 305.) Upon that finding, in *Blakely*'s words, the judge has acquired the authority to impose the sentence (see *ibid.*), and there is no constitutional requirement that he blind himself to other available facts in deciding whether to exercise that authority. (See *ibid.*, distinguishing *Williams v. New York* (1949) 337 U.S. 241.)

The Colorado Supreme Court's application of these principles to Lopez's case illustrates the point. The trial court considered Lopez's prior convictions along with numerous other facts in deciding to impose a sentence above the presumptive maximum. (See *Lopez v. People*, *supra*, 113 P.3d at pp. 719, 730-731.) The prior conviction factor was sufficient for *Blakely*, and the judge's consideration of other factors did not alter that conclusion. (See *id.* at p. 731.)

The present case (*Hernandez*) is similar. The facts of appellant's priors were validly found by the judge under the *Almendarez-Torres* exception to the *Apprendi* rule. Any one of them is sufficient by itself to clear the very low fact-finding hurdle for eligibility for the upper term set by Penal Code section 1170, subdivision (b). Once that hurdle is cleared, the mandatory aspect of the statute is satisfied and the sentence choice enters the discretion-

ary realm where the Sixth Amendment does not apply. "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." (*United States v. Booker* (2005) 543 U.S. 220, 233.) The judge may validly find any additional facts needed to inform the sentence choice, which in this case included the parole status of the defendant, lack of remorse, dangerousness of defendant's conduct, leadership role in the crime, use of a minor in the crime, and the numerosity and seriousness of appellant's priors. (See *Hernandez* AOB at pp. 9-11.) There is no *Blakely*/*Cunningham* error in this case.

II. *Blakely* and *Cunningham* have no effect on consecutive sentencing in California.

Appellant Hernandez contends that the imposition of consecutive sentences is *Blakely*/*Cunningham* error. (See *Hernandez* AOB at pp. 23-28.) Because this argument was rejected in *People v. Black* (2005) 35 Cal.4th 1238, 1262-1263, the only question is whether *Cunningham v. California* (2007) 549 U.S. __, 127 S.Ct. 856, 166 L.Ed.2d 856 requires reconsideration on this point.

California law allows the sentencing judge a wide range of discretion when deciding whether a defendant should serve his sentences concurrently or consecutively. California Penal Code section 669 requires only that the judge direct whether the terms of imprisonment shall run concurrently or consecutively and establishes a default rule on concurrent sentencing in the absence of a specification.

California has no statutory requirement that the sentencing judge find any element aggravating fact in choosing consecutive sentencing rather than concurrent. "The trial court is required to

determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923, citing Pen. Code, §§ 669, 1170.1, subd. (a); former Rule 433(c)(3).) With no presumption that the court need sentence consecutively or concurrently, and no necessity to find any fact or element to impose consecutive sentencing, there is no *Blakely* problem when a judge imposes a consecutive sentence.

The court in *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 found that the defendant's Sixth Amendment rights were violated when the judge imposed a sentence above the maximum authorized by facts either admitted by defendant or found by a jury. There is no such rule or requirement when a sentencing judge imposes a consecutive sentence. A consecutive sentence is not considered an increased or an enhanced penalty. Penal Code section 669 merely says that whether the subsequent judgment is rendered by the same judge or different judges, the court imposing the second judgment shall direct whether the terms shall run concurrently or consecutively.

To be sure, there are some restrictions on imposing a consecutive sentence provided for in Rule 4.425. The limitations allow *any* circumstance in aggravation or mitigation to be considered by the court when deciding whether to impose consecutive rather than concurrent sentences, *except*: (1) a fact used to impose the upper term, (2) a fact used to otherwise enhance the defendant's prison sentence, and (3) a fact that is an element of the crime. (Rule 4.425(b).) A limitation on facts that may be considered in exercising discretion is not the same as a fact needed to make the defendant legally eligible for the sentence, as in *Cunningham*. So long as the sentencing court does not violate Rule 4.425(b), the court is free to exercise discretion in imposing a consecutive sentence. Although the

sentencing court may find the criteria listed in Rule 4.425(a)[5] helpful, the list of criteria is not exclusive and does not bind the court to any necessary findings.

When the court imposes a consecutive sentence, some circumstances require that the judge provide a statement of reasons. The requirement depends on whether the sentence is determinate or indeterminate. California Penal Code, section 1170, subdivision (c) provides that for determinate sentencing, "The court shall state the reasons for its sentence choice on the record at the time of sentencing." The court does not need to state reasons for imposing consecutive sentencing for two indeterminate sentences. (See *People v. Arviso* (1988) 201 Cal.App.3d 1055, 1058.) In cases where there is both a determinate and indeterminate sentence, case law has established that the court shall state its reasons for imposing a consecutive sentence. (*People v. Dixon* (1993) 20 Cal.App.4th 1029, 1037.)

When a sentencing judge is required to include a statement of reasons on the record for imposing a consecutive sentence, he is not required to find any aggravating fact as the judge was in *Blakely*. Instead, he is only required to state a primary factor or factors that helped him make his decision. (*People v. Black*, *supra*, 35 Cal.4th at p. 1262.) The required statement of reasons is not in place to set limitations on the sentencing judge. The interests served in the requirement include and are not limited to: (1) assisting in meaningful review; (2) acting as an inherent guard against careless decisions;

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5. Rule 4.425(a) says that criteria affecting the decision to impose consecutive sentences include: (1) the crimes and their objectives were independent of each other, (2) the crimes involved separate acts of violence or threats of violence, (3) the crimes were committed at different times or separate places.

(3) insuring that the judge analyzed the problem and recognizes the grounds for his decision; (4) and aiding in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) The statement of reasons provided on the record is not related to an additional fact or element that must be found and recorded, only that a record is made of the judge's reasoning behind the sentence. "Under Penal Code section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result." (*People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1271).

In contrast, the rule *Blakely v. Washington*, *supra*, 542 U.S. at page 309 depends on the defendant's *entitlement* to the lesser sentence in the absence of a finding of some additional fact. *Blakely* does not apply to the imposition of consecutive instead of concurrent sentencing because the judge is not required to find any additional fact in order to choose a consecutive sentence.

The court in *Black*, *supra*, 35 Cal.4th at pages 1262-1263, held that the *Blakely* rule is inapplicable to the court's decision whether to require that two or more offenses be served consecutively or concurrently because *Blakely*'s concern is that the defendant's right to a jury trial on all elements of the crime be protected. The court, in deciding that the defendant will serve his offenses consecutively rather than concurrently, is not required by statute or case law to find any additional fact or element to the crimes. Instead it is left solely to the judge's discretion, so long as he does not violate the criteria limiting the decision provided in Rule 4.425.

Cunningham overruled *Black* on the point that when the court is sentencing the defendant to an upper term, those facts that expose

the defendant to such a term must be found by the jury and not the judge alone. However, *Cunningham* "did not mention, let alone expressly overrule, the California Supreme Court's decision that 'Blakely's underlying rationale is inapplicable to a trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently.' " (*People v. Hernandez*, 147 Cal.App.4th at p. 1271, quoting *Black*, *supra*, 35 Cal.4th at p. 1262, vacated in *Black v. California* (Feb. 20, 2007) __ U.S. __ [2007 WL 505809].)

"In this state, every person who commits multiple crimes knows he or she is risking consecutive sentencing. While such a person has the right to the exercise of the court's discretion, the person does not have a legal right to concurrent sentencing." (*Ibid*.). The court that imposes a consecutive sentence rather than concurrent is exercising its discretion among available sentence choices, not finding a fact needed for legal eligibility for the sentence. While the court must not overstep the boundaries provided in Rule 4.425 and must provide on the record its reasoning, these requirements do not imply that the rules established in *Cunningham*, *Blakely*, and *Apprendi* apply to consecutive and concurrent sentencing. *Black* is still good law on consecutive sentencing.

III. In any case where jury determination of an aggravating fact is constitutionally required, this court has ample authority to promulgate the necessary procedures.

Appellants Hernandez and Sandoval both take the remarkable position that if there is *Cunningham* error in their cases, they are entitled to the middle term and concurrent sentencing regardless of how clearly true the aggravating circumstances are or how weighty they may be. (See *Hernandez* AOB at pp. 43-45; *Sandoval* AOB at pp. 40-48.) If accepted, this argument would mean that *every*

criminal convicted of one or more three-tier felonies whose case is pending on direct appeal[6] would receive no more than the middle term for the most serious of his crimes, regardless of their number or heinousness. The criminals previously determined to be the very worst of those who have committed determinate-sentence crimes would have to be released on the same schedule as the average felon, to prey once again on the innocent and defenseless. On its face, it is inconceivable that the law would require a miscarriage of justice on such a massive scale. Fortunately, the law requires no such thing.

The Attorney General has proposed a judicial reformation of the statute to eliminate the fact-finding requirement that was found to be problematic in *Cunningham*. (See Brief for Respondent in *People v. Towne*, No. S125677, at pp. 8-40.) As of this writing, a bill to take that step legislatively appears to be headed for overwhelming, bipartisan approval. (See Furillo, *Sentencing bill advances*, Sacramento Bee (March 14, 2007) p. A3, col. 2.) Even if a bill applies only to new cases, the Legislature's decision has strong persuasive weight in judicial determinations of how to deal with cases already tried. (See *In re Hawthorne* (2005) 35 Cal.4th 40, 44-47.) However, in the event that this court determines that the fact-finding requirement cannot be eliminated as to pending cases, the court has ample

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6. All new rules of federal constitutional criminal procedure are retroactive to cases pending on direct appeal at the time they are announced. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328.) The high court granted certiorari in *Burton v. Stewart* (2007) 549 U.S. __, 127 S.Ct. 793, 163 L.Ed.2d 628 to clarify the retroactivity of *Blakely* on habeas corpus, but the case had to be dismissed for lack of jurisdiction. (See *id*. 163 L.Ed.2d at p. 632.) The damage from *Cunningham* may extend back to the date of *Blakely* in 2004, and conceivably it could go as far back as *Apprendi* in 2000.

authority to judicially authorize the jury fact-finding that *Cunningham* requires.

This is not the first time that the high court has revised its interpretation of constitutional requirements to overturn long-settled understandings of what process is due. Undoubtedly, it will not be the last. In the past, however, this court has regularly created the necessary procedures to deal with the new requirement by decision, rather than render portions of the criminal law ineffective merely for the lack of a statutory procedure to implement them. The only exception has been where the required procedure would be a complete rewrite of the statute, contradicting a major legislative decision.

In *Gerstein v. Pugh* (1975) 420 U.S. 103, 125, the Supreme Court required a judicial determination of probable cause promptly after arrest in cases where there had been no pre-arrest determination. This court quickly determined that California's pretrial procedures in misdemeanor cases did not comply. (*In re Walters* (1975) 15 Cal.3d 738, 747.) The court did not take the view that the judiciary is helpless in the absence of statutory authorization for a proceeding. (Cf. *Sandoval* AOB at p. 41.) Instead, *Walters* directed that a determination of probable cause be added to the arraignment or bail setting proceeding, even though the statute did not provide for such a hearing. (See 15 Cal.3d at pp. 748, 750.)

Hawthorne, *supra*, is similar. This court had routinely rejected claims of a categorical exclusion from capital punishment for mental retardation based on a United States Supreme Court precedent on point. (See 35 Cal.4th at p. 43, citing *Penry v. Lynaugh* (1989) 492 U.S. 302.) When that precedent was overruled in *Atkins v. Virginia* (2002) 536 U.S. 304, this court and many others around the nation had to find ways to deal with the new fact-finding requirement. "The

new legislation makes no provision for cases in which the death penalty has already been imposed. *The task thus falls to this court* to formulate appropriate procedures for resolving postconviction claims." (*Hawthorne*, *supra*, 35 Cal.4th at p. 45, italics added.)

A contrasting example is provided by the mandatory death penalty case, *Rockwell v. Superior Court* (1976) 18 Cal.3d 420. In 1973, the Legislature enacted a mandatory capital sentencing law in the well-founded but ultimately mistaken belief that this was the kind of law required by *Furman v. Georgia* (1972) 408 U.S. 238. (See *Rockwell*, *supra*, at pp. 446-448 (conc. opn. of Clark, J.).) The court declined the People's invitation to transform this mandatory statute into one of the guided discretion type approved in *Gregg v. Georgia* (1976) 428 U.S. 153 and its companion cases. The statute was plainly a mandatory one, and the People's proposal was "to rewrite the law in a manner which we have shown would be contrary to the manifest legislative intent . . . ." (*Rockwell*, *supra*, at p. 445; *id*. at pp. 448-449 (conc. opn. of Clark, J.).)

The identity of the fact finder under section 1170, subdivision (b) is not nearly so central to the character of the statute. The substantive rule in the first sentence requires the middle term "unless there are circumstances . . ." without specifying who finds them. The statute does assume judicial fact-finding in its later reference to what "the court may consider . . . ," but this is not central to the operation of the law. Having a jury make a finding of a single aggravating circumstance in cases where the Constitution does not permit the judge to make that finding is only a minor departure that otherwise enables the statute to operate as written. Failure to do so would collapse California's three-tier sentencing system to two, and *that* is the result that would be "contrary to the manifest legislative intent."

Appropriate judicially declared procedures track legislatively declared procedures "as closely as logic and practicality permit . . . ." (*Hawthorne*, *supra*, 35 Cal.4th at p. 47.) If SB 40 is enacted and provides workable guidance, that is the first place to look. If not, the next place to look is the sentence-increasing circumstances that are presently tried to juries—sentence enhancements and death penalty special circumstances. These are the kinds of circumstances that were at issue in *Apprendi* and *Ring*, respectively, and *Cunningham* holds that aggravating circumstances under Penal Code section 1170 are equivalent to them for Sixth Amendment purposes, to the extent that they are required for eligibility for a sentence.

The Legislature has provided for jury trial of sentencing factors in a number of contexts. (See 5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial § 438, p. 626.) The people by initiative required jury trial of the special circumstances in capital cases long before it was considered constitutionally required. (See Pen. Code, § 190.4, enacted 1978.) Adding one more type of circumstance to the long list already tried to juries is not antithetical to the operation of California criminal procedure. There are practical problems, to be sure, in asking jurors to decide issues outside their experience, such as whether one crime of a particular type is worse than the typical crime of that type, but given that only one jury-found circumstance is required to comply with *Cunningham*, such difficulties are unlikely to determine the outcome in many cases.

Several objections to resentencing to the upper term can be dealt with readily. The Ex Post Facto Clause presents no barrier to the application of an ameliorative procedural change, even when it is enacted legislatively. (See *Dobbert v. Florida* (1977) 432 U.S. 282, 293-294.) The analogous due process limitation on changes made through case law is even less restrictive. (See *Rogers v. Tennessee* (2001) 532 U.S. 451, 461-462.)

The essence of due process, as applicable to this case, is fair notice. (See *id*. at pp. 459-460; *People v. Mancebo* (2002) 27 Cal.4th 735, 748.) All of the defendants in the five post-*Cunningham* cases before this court had fair notice that they could receive the upper term at the time they committed their offenses and at the time of trial.

Appellant Sandoval claims that double jeopardy prevents retrial of an eligibility circumstance originally tried to the court but subsequently found to be subject to the jury trial requirement of the Sixth Amendment. If that were true, it would have precluded resentencing in all of the cases overturned by *Ring v. Arizona*, *supra*. That argument has been uniformly rejected. (See *State v. Ring* (Ariz. 2003) 65 P.3d 915, 929-932; *State v. Lovelace* (Idaho 2004) 90 P.3d 298, 299-302; *Capano v. State* (Del. 2006) 889 A.2d 968, 980-985.) Where the fact required for the sentence was found by the fact finder assigned that task at the time of trial, a subsequent change in the law assigning this task to a different fact finder should not give the defendant the additional windfall of escaping his or her deserved punishment altogether. The principles of fairness underlying due process and double jeopardy do not require such a patently unjust and unfair result.

CONCLUSION

The judgment of the Court of Appeal in *People v. Hernandez*, No. S148974, should be affirmed. In *People v. Sandoval*, No. S148917, the judgment should be affirmed to the extent it imposes consecutive sentences. Whether the judgment can be affirmed or must be vacated and the case remanded as to the upper term on count 1 depends on the court's resolution of issues not considered in this brief. If the case must be remanded, the remedy is a jury trial of aggravating circumstances for the purpose of Penal Code § 1170, subdivision (b). If the jury finds or the defendant admits a single

aggravating circumstance, the court may reimpose the original sentence.

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Respectfully Submitted,

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