S151022

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SCOTT JONES,

Plaintiff and Appellant,

v.

LODGE AT TORREY PINES and JEAN WEISS,

Defendants and Respondents

Appeal from Court of Appeal, District No. 4, Div. No. 1
Case No. DO46600
San Diego Superior Court Case No. GIC811515
Hon. Richard E. L. Strauss, Judge

CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION'S REQUEST TO FILE AMICUS BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT; AMICUS BRIEF

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REQUEST FOR PERMISSION TO FILE AMICUS BRIEF:

TO THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

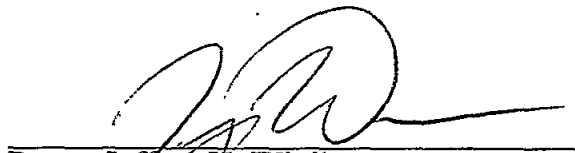
The California Employment Lawyers Association (CELA) requests permission to file a brief as amicus curiae in support of Plaintiff and Appellant. CELA is a statewide organization of attorneys primarily representing plaintiffs in employment termination and discrimination cases.

CELA, through its undersigned attorney, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument on the following point:

- Whether an individual may be held personally liable for retaliation under the Fair Employment and Housing Act?

If this request is granted, the following brief in support of plaintiff and appellant is respectfully submitted.

Date: October 10, 2007 LAW OFFICES OF JEFFREY K. WINIKOW



By: Jeffrey K. Winikow
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Case No. DO46600
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Hon. Ernest Williams, Judge

CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION'S AMICUS BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT

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SUMMARY OF ARGUMENT:

While the Fair Employment and Housing Act ("FEHA" or "the Act") may be a comprehensive scheme to address civil rights in employment, FEHA has many different provisions. The defense seems to suggest that Government Code Section 12940(a) is the yardstick by which all other FEHA provisions should be measured – ignoring that several provisions adopt language which differs substantially from Section 12940(a). By imposing liability on any "person" in Section 12940(h), the Legislature contemplated personal liability for retaliation.

When this Court was called upon to construe FEHA's former age discrimination provision in Esberg v. Union Oil Co., 28 Cal.4th 262 (2002) the Court was confronted with a situation where the plain language of a specific provision (former Section 12941) differed dramatically from the language used in Section 12940(a). This case is no different. Like the situation in Esberg, Government Code Section 12949(h) needs to be construed according to its own unique plain language. And like the situation in Esberg, if the current Legislature seeks to question the consequences of unambiguous statutory language, it can revise FEHA.

If the Court is going to entertain policy arguments, however, CELA wishes to stress two points. One, despite the defense's Henny-Penny like predictions, for the past decade the courts and the FEHC have consistently interpreted FEHA as allowing for personal liability for retaliation ***without having the sky fall.*** And two, personal accountability for intentional and tortious misconduct has long been a cornerstone of California law. The policy issues related to personal accountability do not disappear simply because the tortious conduct arises in a workplace.

THE NATURE OF CELA'S INTEREST IN THIS MATTER:

The California Employment Lawyers Association ("CELA") is an organization composed of attorneys who represent primarily plaintiffs in employment discrimination and related cases. Through its undersigned attorney, CELA is familiar with the questions involved in this case and the scope of their presentation. CELA has sought leave of Court to submit this brief.

ARGUMENT

A. The Court Should Construe Unique FEHA Provisions in Light of Their Unique Language: Policy Issues Are Addressed By the Legislature

FEHA does not use the term "retaliation." Instead, the statute merely refers to "discrimination" against anyone opposing unlawful practices or anyone filing a complaint of discrimination. Gov't Code Section 12940(h). The California Legislature could have easily prohibited retaliation-based discrimination in the same paragraph as other forms of prohibited "discrimination." (Gov't Code Section 12940(a)). The Legislature chose not to.

When prohibiting workplace discrimination in general, the Legislature chose to impose duties upon "employers." Yet, when crafting FEHA's anti-retaliation provision, the Legislature sought to impose a broader duty on "any person." Govt' Code Section 12940(h). Once again, the Legislature could have used identical language to that adopted in other FEHA provisions, but chose not to.

The defense suggests that the Court harmonize FEHA's anti-retaliation provision with FEHA's discrimination provision as if the statutory differences between the two paragraphs were nothing more than legislative oversight. Bunk. The fact that the two provisions are somewhat related, but contain different language, shows that the Legislature intended for there to be a difference in terms of scope of liability. Indeed, the very case upon which the defense relies, Reno v. Baird, 18 Cal.4th 640, 658 (1998), articulates this very point: "It is a maxim of statutory construction that Courts should give meaning to ***every word possible***, and should avoid any construction making any word surplusage." (Emphasis added; quotation omitted). And the Reno court emphasized this point in the context of legislative attempts to define the scope of liability. Id. The word "person," as used in Section 12940(h), is simply not surplusage.

The present question before this Court is strikingly similar issue in Esberg v. Union Oil Co., 28 Cal.4th 262 (2002). In Esberg, the Court had to construe former Government Code Section 12941, which prohibited age discrimination. Unlike Government Code Section 12940(a), the former statute only prohibited age discrimination in hiring and firing, but did not otherwise prohibit age discrimination in other terms, conditions or privileges of employment. Id. In holding that former Section 12941 failed to prohibit age-based discrimination in employee benefits, this Court recognized:

> ...We do not review the wisdom of the Legislature's decision not to include allocation of employee benefits among the employer decisions to which the age discrimination prohibition of section 12941 applies. Our role in construing a statute is simply to ascertain and to declare what is in terms or

in substance contained in the statute, not to insert what has been omitted...Esberg v. Union Oil Co., 28 Cal.4th at 270.

In this case, the Court should not be making any types of assessment about the relative wisdom of the Legislative decision to prohibit "persons" from engaging in unlawful retaliation under Section 12940(h). While CELA believes that this was a wise decision for a host reasons, it also recognizes that there are others who may disagree. But policy debates over the wisdom of personal liability have nothing to do with how one construes the unambiguous language of Section 12940(h), just as policy debates over the wisdom of condoning age-based distinctions in employee benefits did not factor into the Esberg decision.

B. Policy Favors Imposing Personal Liability on Individuals Guilty of Unlawful Retalation

Individuals are not held personally liable for discrimination because the statutory language does not allow for personal liability. Reno v. Baird, 18 Cal.4th 640 (1998) . This has nothing to do with policy.

If one is to entertain a policy debate about the wisdom of holding individuals liable for their intentional torts, then this just begs the question as to why the law should recognize workplace immunities that the law does not recognize anywhere else. Take, for example, this mini-play:

Scene A: Mike Manager says to his friend: "I have to promote one of my subordinates into a lead position. I just can't stand that Polly Plaintiff, however. Last month, she actually accused me

of sex harassment because I told a dirty joke at a staff meeting. There is no way that I'm going to promote her." The friend then responds, "Well, aren't you afraid of getting sued for retaliation?" The reply, "Nah. The courts have said that only the company has to pay, not me personally."

Scene B: After this initial discussion, Mike Manager then says to his friend: "Having to make this decision is making my head spin, let's go out for some drinks at Happy Hour. We'll take the Company car." The friend then says, "Are you crazy, Don Drunkard crashed his company car last week on the way back from Happy Hour, and now he and the Company have to pay mega bucks." The reply, "You're right. There's no way that I'm going to drink and drive; that could cost me big time."

It is one thing to exempt individuals from personal liability for their own intentional torts when it is a creature of statutory language, i.e., Reno, it is quite another to do so as a matter of policy. Civil Code Section 1714 clearly contemplates personal liability for one's *negligence*, yet the defense suggests that public policy somehow favors immunizing individuals from liability for *intentional* misconduct simply because that misconduct arises in a workplace. Why? The public policy of the State has always favored joint and several liability for torts. American Motorcycle Ass'n v. Superior Court, 20 Cal.3d 528 (1978).

There are no bright-line rules about immunizing individuals from personal liability for torts occurring in the workplace. Personal

liability attaches to both harassment claims under FEHA, and to fraud claims under Labor Code Section 970. Retaliation claims are nothing more than another subset of statutory claims which involve personal liability.

From a policy perspective, however, there should not be any distinction between liability issues relating to statutory claims and common law torts. Either the law seeks to immunize agents acting within the course and scope of their agency from personal liability, or the law seeks to mandate personal accountability for wrongful conduct. The law has always chosen the latter. See, e.g., Vacco Industries v. Van Den Berg, 5 Cal.App.4th 34 (1992) (individuals held personally liable for misappropriating trade secrets on behalf of their new employer); Hanson v. California Bank, 17 Cal.App.2d 80 (1936) (personal liability for fraud)

The policy arguments advanced by the defense are simply no different from those arising in any type of agency relationship. Indeed, Civil Code Section 2343 specifically contemplates an agent's personal liability when the agent acts within the course and scope of the agency ***when the agent's acts are "wrongful."*** See also Agarwal v. Johnson, 25 Cal.3d 932 (1979) (individual and company both liable for defamation). Any policy which favors supervisory immunity has to apply across the board to all agents committing torts on behalf of their principle – and such a policy would have to be created out of thin air.

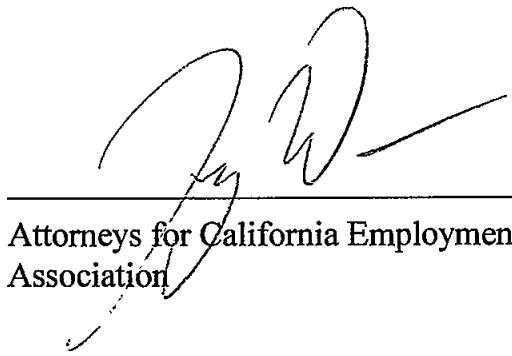
Moreover, the parade of horribles that the defense describes regarding personal liability are pure fantasy. As Appellant has shown, the lower courts have been interpreting FEHA as allowing for personal liability

on retaliation claims for over a decade[1]. The sky hasn't fallen. The world hasn't come to an end. Managers have not fled California for greener pastures. The system works.

CONCLUSION

Unlike garden variety discrimination claims, the statutory language regarding retaliation claims applies to "persons," which can only mean individuals. This case is not about policy, or legislative intent. It is about clear and unambiguous language. The Court should interpret FEHA as allowing for personal liability against individuals who unlawfully retaliate against workers.

October 10, 2007 LAW OFFICES OF JEFFREY K. WINIKOW



Attorneys for California Employment Lawyers Association

[1] The defense seems to suggest that the Court should consider the fact that the Legislature has not modified the language of Section 12940(h) as somehow favoring its own position. Wrong. Legislative silence needs to be considered in the context of a statutory scheme that has consistently interpreted FEHA as allowing for personal liability for retaliation. Had the Legislature sought to afford immunity to individuals, it could have – and would have - acted to change the statute in light of this steady stream of authority. Legislative silence supports the Appellant's position, not the defense's position.

CERTIFICATE RE: WORD COUNT

I, Jeffrey K. Winikow, hereby certify that pursuant to Rule 14 of the California Rules of Court, that the Amicus Curiae brief submitted by the California Employment Lawyers Association contains 1860 words (including caption sheets and the request to file this brief). I make this representation in reliance upon the word count program accompanying the WordPerfect software that was used to create this brief.

August 8, 2006

Jeffrey K. Winikow
Attorney for Amicus Curiae
California Employment Lawyers Assoc.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1801 Century Park East, Suite 1520, Los Angeles, CA 90067.

On October 11, 2007, I served the following document described as:

REQUEST TO FILE AMICUS BRIEF; AMICUS BRIEF

which was enclosed in sealed envelopes addressed as follows:

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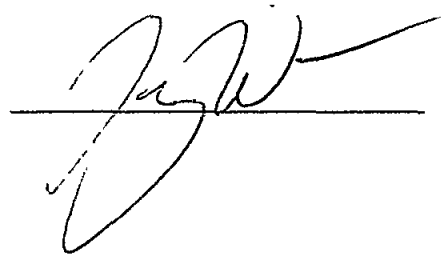
X (By Mail)

I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 11, 2007 at Los Angeles, California.



IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SAMUEL F. TEWOLDE, Defendant and Appellant.	S157434 Court of Appeal No. A106273 (Sonoma County Superior Court no. MCR-426478)

PETITION FOR REVIEW

After Decision by the Court of Appeal
First Appellate District, Division One
Filed September 12, 2007

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SAMUEL F. TEWOLDE, Defendant and Appellant.	S_____ Court of Appeal No. A106273 (Sonoma County Superior Court no. MCR-426478)

PETITION FOR REVIEW

To: The Chief Justice, and to the Associate Justices of the California Supreme Court:

Appellant respectfully petitions this Court to review the September 12, 2007, unpublished opinion of the Court of Appeal (First Appellate District, Division One) affirming appellant's sentence. (Appendix ("App.") A).

* * * *

Questions Presented

1. Whether juvenile adjudications fall within the *Almendarez-Torres* prior-conviction exception to the right to a jury trial. (The same question is pending in *People v. Nguyen*, no. S154847, thus supporting, at least, a grant and hold order under rule 8.512(d)(2).)

* * * *

The following additional questions are presented to preserve for federal court review should the Court not hold this case pending *Nguyen*:

2. Whether, in *Black II*, this Court incorrectly found—contrary to the Sixth and Fourteenth Amendments—that the presence of a single valid aggravating factor authorizes an upper term sentence by itself such that there is no right to a jury trial on other aggravating factors.

3. Whether the sentencing court violated appellant's federal constitutional rights to a jury trial and to proof beyond a reasonable doubt by imposing an upper term sentence based on facts neither proven to the jury nor admitted appellant.

Procedural Background

1. Superior Court Proceedings

On September 2, 2003, the Sonoma County District Attorney filed a one-count complaint charging appellant Samuel F. Tewolde with assaulting Ryan Nelson with force likely to cause great bodily injury. (Clerk's Transcript (CT) 1; Pen. Code § 245(a)(1).) The complaint also alleged that appellant personally inflicted great bodily injury on Nelson and committed the offense for the benefit of a criminal street gang. (CT 1; Pen. Code § 186.22(b)(1) (gang enh.); 12022.7(a) (gbi).)

On January 29, 2004, appellant pleaded no contest to the aggravated assault charge and admitted the allegation that he personally inflicted great bodily injury. In exchange for this plea and admission, the prosecutor dismissed the gang enhancement allegation. No promise was made as to appellant's sentence. (CT 13.)

On April 16, 2004, the superior court sentenced appellant. The court found one factor in mitigation: "the defendant managed to make a positive adjustment at the end of his wardship." (RT 22.) The court found present three aggravating factors: (1) "the crime involved a high degree of cruelty, viciousness, and callousness in that the defendant and his companions stomped on the victim's

head after Mr. Tewolde knocked him to the ground," (2) "[t]he victim was particularly vulnerable in that Mr. Nelson was apparently intoxicated and vastly outnumbered by the defendant and his companions"; and (3) "his prior sustained petitions as a juvenile were numerous." (RT 22.) The court sentenced appellant to a total of seven years in state prison, consisting of the four-year upper on the assault count and three years for the great bodily injury enhancement. (RT 21; CT 24.) On April 20, 2004, appellant filed a timely notice of appeal. (CT 27.)

2. *First Court of Appeal Decision (Prior to Black I)*

In its first opinion in this case, the Court of Appeal found that *Blakely v. Washington* (2004) 542 U.S. 296 applied to facts used to impose an upper-term sentence and agreed appellant's sentence was unconstitutional. The court did not reach the other sentencing issues and rejected his challenge to DNA testing. (App. D.)

On the state's petition, this Court granted review. (*People v. Tewolde*, no. S133325, Order filed June 8, 2005.) On September 7, 2005, this Court transferred the case back to the court of appeal for reconsideration in light of *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*).

3. *Second Court of Appeal Opinion and Subsequent Reversal By U.S. Supreme Court.*

On September 29, 2005, the court of appeal issued its second opinion in the case, vacating its prior decision and reconsidering the case. (App. C.) The court incorporated by reference portions of its first opinion. (App. C at 2.) The court then followed *Black* to reject appellant's *Blakely* claim. (App. C at 3.) On October 18, 2005, the Court of Appeal denied rehearing. On December 14, 2005, this Court denied review in case no. S138702. On February 20, 2007, the United States Supreme Court's granted certiorari, vacated the judgment, and remanded to the Court of Appeal for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856. (*Tewolde v. California* (2007) ____ U.S. ____, 127 S.Ct. 1216.)

4. *Third and Fourth Court of Appeal Opinions (Following Reversal by U.S. Supreme Court).*

On June 26, 2007, the Court of Appeal issued an amended opinion vacating appellant's sentence based on *Cunningham* error. (App. B.) On July 24, 2007, the Court of Appeal granted the state's petition for rehearing in light of *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825.

Finally, on September 12, 2007, the Court of Appeal issued its most recent opinion in this case, holding that there was no sentencing error. The Court of Appeal noted that there were three aggravating factors in this case, only one of which was based on recidivism: that appellant had numerous prior juvenile adjudications. (App. A, at 2.) The Court of Appeal rejected the reasoning of *People v. Nguyen* (2007) 152 Cal.App.4th 1205 (rev. gr. Oct. 10, 2007, in no. S154847) and held that "despite the lack of a jury trial, juvenile adjudications can qualify as prior convictions and thus be used as sentencing factors in adult criminal proceedings." (App. A at 3-4.) Because the Court found present an aggravating factor for which appellant had no right to a jury trial, the court concluded that under the authority of the single-valid factor rule of *Black II*, 41 Cal.4th at 806, there was no constitutional error.

NECESSITY FOR REVIEW

I

REVIEW IS NECESSARY BECAUSE THIS CASE PRESENTS THE SAME QUESTION PENDING BEFORE THIS CASE IN THE REVIEW-GRANTED CASE OF *PEOPLE V. NGUYEN*, NO. S154847: WHETHER THE *ALMENDAREZ-TORRES* EXCEPTION TO THE RIGHT TO A JURY TRIAL FOR PRIOR CONVICTIONS APPLIES TO PRIOR JUVENILE ADJUDICATIONS.

On October 10, 2007, this Court granted review in *People v. Nguyen*, no. S154847. In *Nguyen*, a panel of the Sixth Appellate District had held that "a juvenile adjudication is not a prior conviction within the meaning of *Apprendi [v. New Jersey* (2000) 530 U.S. 466] because the juvenile offender does not have the right to a jury trial." *(People v. Nguyen* (2007) 152 Cal.App.4th 1205, 1239 [rev. gr. Oct. 10, 2007, in no. S154847].) Accordingly, *Nguyen* presents the question of whether the *Almendarez-Torres v. United States* (1998) 523 US 224 prior-conviction exception to the right to a jury trial applies to juvenile adjudications. The holding of *Nguyen* will control appellant's case.

The Court of Appeal, in finding no constitutional error, noted that there were three aggravating factors in this case, only one of which was based on recidivism: that appellant had numerous prior juvenile adjudications. (App. A, at 2.) The Court of Appeal rejected

the Sixth District's reasoning in *Nguyen* and held that "despite the lack of a jury trial, juvenile adjudications can qualify as prior convictions and thus be used as sentencing factors in adult criminal proceedings." (App. A at 3-4.) The finding of numerous juvenile prior conviction at issue in this petition was the only aggravating factor the Court of Appeal held was properly found without a jury trial. Indeed, the other two aggravating factors—(1) "the crime involved a high degree of cruelty, viciousness, and callousness" and (2) "[t]he victim was particularly vulnerable" (RT 22)—were based on current offense conduct, which appellant did not admit. Accordingly, if this Court finds that the *Almendarez-Torres* exception does not apply to juvenile prior convictions, then there are no properly-found aggravating factors in this case, the *Black II* single-valid-factor holding does not apply to appellant, the *Cunningham*-related issues raised below (argument II and III) are moot, and a remand is required.

II

REVIEW IS NECESSARY BECAUSE IN *BLACK II* THIS COURT INCORRECTLY FOUND—CONTRARY TO THE SIXTH AND FOURTEENTH AMENDMENTS—THAT THE PRESENCE OF A SINGLE VALID AGGRAVATING FACTOR (I.E. EITHER FOUND BY THE JURY, ADMITTED BY THE DEFENDANT OR FOR WHICH THERE WAS NO RIGHT TO A JURY TRIAL) AUTHORIZED AN UPPER TERM SENTENCE BY ITSELF SUCH THAT THERE IS NO RIGHT TO A JURY TRIAL ON OTHER AGGRAVATING FACTORS.

In *Cunningham*, the United State Supreme Court held that there is a federal constitutional right to a jury trial and proof beyond a reasonable doubt for aggravating facts, other than the mere fact of a prior conviction, used to impose an upper-term sentence under California's Determinate Sentencing Law (DSL). (*Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856, 860, 871.) In the wake of *Cunningham*, in *Black II*, this Court held that "imposition of an upper term sentence did not violate defendant's right to a jury trial, because at least one aggravating circumstance was established by means that satisfy Sixth Amendment requirements and thus made him eligible for the upper term." (*People v. Black* (2007) 41 Cal.4th 799, 806.)

Assuming, contrary to argument I, that the *Almendarez-Torres* exception to the right to a jury trial applies to prior juvenile

adjudications, then the *Black II* single-valid-factor holding applies to appellant. Appellant recognizes that the Court is now unlikely to reconsider that holding and he raises this claim to preserve it for federal court review because *Black II* was decided incorrectly.

This Court reasoned in *Black II* that judicial fact-finding is unconstitutional only when it raises the sentence above that which may have been lawfully imposed. (*Black II*, 41 Cal.4th at 814-815.) Because one factor may be legally sufficient to impose an upper term under state law, this Court concluded that any *Blakely* compliant fact is adequate to permit the remaining facts to be found by the trial court. But under state law, "[s]election of the upper term is justified only if, after consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." (*Id.*, 41 Cal. 4th 799, 814, supra, citing Cal. Rules of Court, former rule 4.420 (b); see also former Pen. Code § 1170.) Although a single factor may potentially subject a defendant to an aggravated term if the factor is serious enough and if there are no countervailing mitigating factors, a trial court would not be authorized to impose an aggravated term until it had considered all relevant facts and determined that the circumstances in aggravation outweighed those

in mitigation. (*Id., see also People v. Scott* (1994) 9 Cal. 4th 331, 350.) Accordingly, the presence of a single *Blakely* -factor does not by itself raise the statutory maximum above the middle term and characterizing the upper term as the maximum after a finding of just one *Blakely*-compliant fact suffers from the same infirmities that the United States Supreme Court found objectionable in *Cunningham.*

Review is necessary because the single-valid-factor exception is contrary to the holdings of *Apprendi, Blakely,* and *Cunningham,* and denies a criminal defendant his Sixth and Fourteenth Amendment rights.

III.

THE SENTENCING COURT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND TO PROOF BEYOND A REASONABLE DOUBT BY IMPOSING AN UPPER TERM SENTENCE BASED ON FACTS NEITHER PROVEN TO THE JURY NOR ADMITTED APPELLANT.

At the time of appellant's offense, plea, and sentencing, the middle term was the presumptive sentence under the DSL and a defendant could only receive an upper term if the sentencing judge found "aggravating circumstances" true by a preponderance of the evidence. (Former Pen. Code § 1170(b); Cal.R.Ct. 4.420(b)). In the wake of *Cunningham,* the Legislature recently amended section

1170(b) to eliminate the presumption of a middle-term sentence (Stats.2007, c. 3 (S.B.40), § 2, eff. Mar. 30, 2007), but appellant was sentenced under the former version of section 1170(b) and it is the former version that is relevant to this appeal.

Because the middle term was the maximum possible sentence that could be imposed without aggravating factors, appellant had a right to a jury trial on all facts—except prior adult convictions—that were used to raise the maximum sentence to the upper term. (*Cunningham*, 127 S.Ct. at 860, 871.) Appellant had a right to a jury trial and proof beyond a reasonable doubt on all of the facts underlying the aggravating factors.

It is undisputed that under *Cunningham* appellant had a right jury trial on the two factors based on current-offense conduct: (1) cruelty/viciousness/callousness and (2) victim vulnerability. As noted in argument I, appellant also had a right to a jury trial on the finding of numerous juvenile adjudications. The exception for prior convictions applies specifically to "prior convictions," not generally to "recidivism." In a California juvenile proceeding, there is no judgment of conviction and no right to a jury trial. While the proof beyond a reasonable doubt standard applied in appellant's prior

juvenile proceedings, he had no right to a jury trial in those proceedings. The rights accorded appellant are not sufficient to ensure the reliability that *Apprendi* requires in a criminal case.

Other California courts have found California juvenile adjudications to fall within the *Almendarez-Torres* exception for prior convictions for three main reasons: (1) recidivism is different; (2) juries add nothing to the reliability of the proceedings; and (3) juries are not indispensable to due process. (*People v. Bowden* (2002) 102 Cal.App.4th 387, *People v. Lee* (2003) 111 Cal.App.4th 1310, 1315-1316, *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 832-833.) These arguments do not support applying the exception to juvenile adjudications.

The first point—that recidivism is different—is not persuasive because the *Almendarez-Torres* exception is not for recidivism, it is for prior convictions. (*Apprendi*, 530 U.S. at 489.) In California, juvenile adjudications are not convictions. (Welf. & Inst. Code § 203) Appellant, thus, has no prior "convictions" and the exception to the right to a jury trial for prior convictions does not apply to him.

The second point—that juries adds nothing to the reliability of a trial—is unfounded. This notion stems from the Supreme Court's

dictum "that a jury is not a necessary part even of every criminal process that is fair and equitable" and "[t]he imposition of the jury trial on the juvenile system would not strengthen greatly, if at all, the fact-finding function." (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 547 [finding no right to a jury trial in juvenile court proceedings].) There are two reasons not to read *McKeiver* as definitive on whether juries add to the reliability of the criminal justice system. The Court, in *McKeiver*, gave 13 reasons for not imposing the jury trial right in juvenile proceedings, most of which related to the *parens partriae* nature of such proceedings. Accordingly, the conclusion that due process does not require a jury in a juvenile proceeding did not turn on a notion of a limited value of a jury in adding reliability.

In addition, more recent developments in the law show that a jury, indeed, is a necessary component of accurate fact-finding. In 1978, the Court, citing empirical studies, found that fact-finding was impaired when juries were composed of fewer than six people. (*Ballew v. Georgia* (1978) 435 U.S. 223, 232-233.) While court trials may be reliable enough for juvenile dispositions, they are not reliable enough for imprisonment.

The third point—that juries are not indispensable to due process in the context of sentencing above the statutory maximum—also is not supportable. The jury, not only enhances the reliability of the fact-finding, but also serves other purposes of importance in criminal cases. As the Supreme Court has explained, "trial by jury ... is fundamental to the American scheme of justice." (*Ballew*, 435 U.S. at 229.) More recently, the Court has called the right "'of surpassing importance'" and "'indispensable.'" (*Apprendi*, 530 U.S. at 476-477, 497.) In *Blakely*, 542 U.S. at 306, the Court described the jury as a "circuitbraker in the State's machinery of justice" and in *Duncan v. Louisiana* (1968) 391 U.S. 145, 155, the Court similarly noted that the jury prevents oppression by the government.

For all the above reasons, cases finding there is no right to a jury trial on prior juvenile adjudications (1) fail to recognize that the prior-conviction exception does not apply across the board to recidivism, (2) denigrate the jury's role in enhancing the reliability of fact-finding, and (3) fail to recognize how indispensable the jury is to American justice. Accordingly, appellant had a right to a jury trial and proof beyond a reasonable doubt on all of the aggravating factors in this case, including the finding regarding his juvenile

adjudications. Appellant was denied those rights in violation of the Sixth and Fourteenth Amendments.

CONCLUSION

Appellant respectfully urges this Court to grant review.

Dated: October 22, 2007

Respectfully submitted,

MATTHEW ZWERLING
Executive Director

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Staff Attorney
Attorneys for Appellant

Certificate of Word Count

Counsel for appellant hereby certifies that this brief consists of **2,889** words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program. (Cal. Rules of Court, 8.504(d)(1).)

October 22, 2007

Jonathan D. Soglin

Appendix A

Filed 9/12/07 P. v. Tewolde CA1/1
Opinion on remand

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL F. TEWOLDE, Defendant and Appellant.	A106273 (Sonoma County Super. Ct. No. MCR-426478) **MEMORANDUM OPINION**

On February 20, 2007, the United States Supreme Court issued an order in this case granting certiorari, vacating the judgment, and remanding to this court for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*).

Pursuant to this mandate, we recalled the remittitur. We re-examined our initial opinion in this case (*People v. Tewolde* (Mar. 21, 2005, A106273) [nonpub. opn.]), which remains on file with this court, and which we hereby incorporate by reference into this order.

In our prior opinion, we held that the imposition of the upper term violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We noted that the sentencing court found three aggravating factors:

(1) The crime involved a high degree of cruelty, viciousness, and callousness;

(2) The victim was particularly vulnerable; and

(3) Defendant had suffered numerous prior juvenile adjudications.

We noted that factor (3) is based on recidivism, and thus was not invalid under *Blakely*. But factors (1) and (2) involved issues of fact which were not admitted by defendant or determined by a jury. Thus, we held that it was error under *Blakely* for the court to rely on factors (1) and (2) to impose the upper term.

We further held that, under the circumstances of this case, the error was not harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18.) We acknowledged that one valid aggravating factor is generally sufficient to expose a defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) But even in the context of general, nonconstitutional sentencing error, a reviewing court will set aside a sentence "if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

We concluded that it was not clear beyond a reasonable doubt that the trial court would have imposed the upper term had it known factors (1) and (2) were invalid—i.e., if the court was faced only with one valid aggravating factor, factor (3). Factors (1) and (2) were by far the more severe of the three. Factor (1) involved cruelty, viciousness, and callousness, based on the kicking of the victim when he was lying unconscious. Factor (2) involved the victim's vulnerability. In contrast, factor (3) involved a relatively brief juvenile history of less than serious offenses. Given the factor in mitigation found by the trial court, as well as the numerous letters in defendant's favor, we could not conclude beyond a reasonable doubt that the trial court would have imposed the upper term based solely on factor (3).

On June 26, 2007, we filed a memorandum opinion in which we stated that we had reconsidered our prior opinion in light of *Cunningham*, which simply applies *Blakely* to California sentencing law. We concluded that *Cunningham* only confirmed the validity of our initial holding. We reiterated our prior opinion in its entirety. (See *City of Long Beach v. Bozek* (1983) 33 Cal.3d 727, 728.)

On July 19, 2007, the California Supreme Court decided *People v. Black* (July 19, 2007, S126182) ___ Cal.4th ___ [2007 D.A.R. 11041]; [2007 Cal. Lexis 7604] (*Black II*). In *Black II*, the court held: "Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term. [Citation.] Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.' " (*Black II, supra,* 2007 D.A.R. at p. 11045 [fn. omitted].)

In other words, if there is a single aggravating circumstance which satisfies *Blakely*, "any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to [a] jury trial." (*Black II, supra,* 2007 D.A.R. at pp. 11044-11045.)

The *Black II* court further held, consistent with existing authorities, that a defendant's criminal history—such as the increasing seriousness of prior convictions—qualifies under the recidivism exception to *Blakely*. (*Black II, supra,* 2007 D.A.R. at pp. 11047-11049.)

On July 20, 2007, the Attorney General petitioned for rehearing under *Black II*, arguing that defendant's single, recidivist-based aggravating factor justifies the upper term imposed by the trial court.

On July 24, 2007, we granted rehearing and asked defendant to file opposition. On August 1, 2007, defendant filed opposition, in which he primarily argues that juvenile adjudications cannot be used as an aggravating factor to justify an upper term because those adjudications are made without benefit of a trial by jury.

The issue of juvenile adjudications vs. adult convictions was raised in passing in the original opening brief and has not been a central issue in this case. Despite the recent decision of the Sixth District in *People v. Nguyen* (2007) 152 Cal.App.4th 1205 (*Nguyen*), we agree with the majority view that despite the lack of a jury trial, juvenile

adjudications can qualify as prior convictions and thus be used as sentencing factors in adult criminal proceedings. (See cases collected in *Nguyen*, *supra,* at p. 1225.)

Accordingly, aggravating factor (3) is valid under *Blakely* and is sufficient under *Black II* to justify the upper term.

The judgment and sentence are affirmed.

Marchiano, P.J.

We concur:

Swager, J.

Margulies, J.

Appendix B

Filed 6/26/07 P. v. Tewolde CA1/1
Opinion on remand from U.S. Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL F. TEWOLDE, Defendant and Appellant.	A106273 (Sonoma County Super. Ct. No. MCR-426478) **MEMORANDUM OPINION**

On February 20, 2007, the United States Supreme Court issued an order in this case granting certiorari, vacating the judgment, and remanding to this court for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*).

Pursuant to this mandate, we have recalled the remittitur. We have re-examined our initial opinion in this case (*People v. Tewolde* (Mar. 21, 2005, A106273) [nonpub. opn.]), which remains on file with this court, and which we hereby incorporate by reference into this order.

In our prior opinion, we held that the imposition of the upper term violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We noted that the sentencing court found three aggravating factors:

(1) The crime involved a high degree of cruelty, viciousness, and callousness;

(2) The victim was particularly vulnerable; and

(3) Defendant had suffered numerous prior juvenile adjudications.

We noted that factor (3) is based on recidivism, and thus was not invalid under *Blakely*. But factors (1) and (2) involved issues of fact which were not admitted by defendant or determined by a jury. Thus, we held that it was error under *Blakely* for the court to rely on factors (1) and (2) to impose the upper term.

We further held that, under the circumstances of this case, the error was not harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).)[1] We acknowledged that one valid aggravating factor is generally sufficient to expose a defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) But even in the context of general, nonconstitutional sentencing error, a reviewing court will set aside a sentence "if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

We concluded that it was not clear beyond a reasonable doubt that the trial court would have imposed the upper term had it known factors (1) and (2) were invalid—i.e., if the court was faced only with one valid aggravating factor, factor (3). Factors (1) and (2) were by far the more severe of the three. Factor (1) involved cruelty, viciousness, and callousness, based on the kicking of the victim when he was lying unconscious. Factor (2) involved the victim's vulnerability. In contrast, factor (3) involved a relatively brief juvenile history of less than serious offenses. Given the factor in mitigation found by the trial court, as well as the numerous letters in defendant's favor, we could not conclude beyond a reasonable doubt that the trial court would have imposed the upper term based solely on factor (3).

We have reconsidered our prior opinion in light of *Cunningham*, which simply applies *Blakely* to California sentencing law. *Cunningham* only confirms the validity of our initial holding. "Because we deem it unnecessary to modify our prior opinion, we

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[1] It is clear from recent decisions that the *Chapman* standard applies to *Cunningham/Blakely* error. (*Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 2550-2553]; *People v. Govan* (2007) 150 Cal.App.4th 1015, 1034-1035 (*Govan*).)

reiterate that opinion in its entirety." (*City of Long Beach v. Bozek* (1983) 33 Cal.3d 727, 728.)[2]

We briefly address the arguments made by the Attorney General in his postremand supplemental brief.

The Attorney General contends that there is no *Cunningham* error here, because the recidivist-based aggravating factor operated to make the upper term the statutory maximum—which the trial court is empowered to impose without the defendant's admissions or a jury's findings of fact. The Attorney General relies on a passage from Justice Kennard's separate opinion in *People v. Black* (2005) 35 Cal.4th 1238, 1264, 1270 (conc. & dis. opn. of Kennard, J.). That reasoning, however, has not survived the subsequent *Cunningham* decision. Under California sentencing law, the middle term is *always* the statutory maximum. (*Cunningham, supra,* 127 S.Ct. at p. 868; *Govan, supra,* 150 Cal.App.4th at pp. 1033-1034.)

The Attorney General also contends that any *Cunningham* error is harmless beyond a reasonable doubt because a jury would have found true either factor (1) or factor (2). But this is not a case where evidence was presented to a jury, subjected to cross-examination, and preserved in a record for judicial review. Defendant pleaded no contest before the case proceeded to a preliminary hearing and the only facts are found in the probation report. We cannot indulge in speculation as to what a hypothetical jury may or may not have found if the probation officer's factual essay was transmuted into actual, admissible evidence. Rather, we must focus on the sentencing calculus of the trial judge.[3]

This matter is hereby remanded to the trial court for resentencing.[4]

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[2] We recognize that a Court of Appeal decision cited in our prior *Blakely* harmless error analysis has been the subject of a grant of review since we filed our initial opinion. That does not change the disposition of the present case.

[3] Virtually all of the authorities cited by the Attorney General in support of this argument involve jury trials, but not guilty or nolo pleas, and are thus inapposite.

[4] We are not suggesting what sentence the trial court in its discretion should impose in this case.

Marchiano, P.J.

We concur:

Swager, J.

Margulies, J.

Appendix C

Filed 9/29/05 P. v. Tewolde CA1/1
Opinion on remand

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL F. TEWOLDE, Defendant and Appellant.	A106273 (Sonoma County Super. Ct. No. MCR-426478

This matter comes before us after a grant of Supreme Court review and a subsequent retransfer to this court for reconsideration.

Defendant Samuel F. Tewolde pleaded no contest to one count of assault with force likely to produce great bodily injury (GBI) (Pen. Code, § 245, subd. (a)(1)) and admitted an enhancement that he personally inflicted GBI upon the victim (Pen. Code, § 12022.7, subd. (a)). The trial court denied probation and imposed the upper (or aggravated) term of four years in state prison for the assault, plus three years for the GBI enhancement for a total of seven years.

We discussed two issues on appeal. One was the contention that under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), defendant was entitled to proof before a jury beyond a reasonable doubt of the factors in aggravation used to increase his assault sentence beyond the middle term.

We held that the imposition of the aggravated term violated *Blakely* because the aggravating factors were not admitted by defendant in the course of entering his plea, and were not determined by a jury beyond a reasonable doubt. Accordingly, we reversed and remanded for resentencing or to allow the prosecution to seek a jury trial on the aggravating factors. (*People v. Tewolde* (Mar. 21, 2005, A106273) [nonpub. opn.].)

The California Supreme Court granted review, and then retransferred this matter to us with directions to vacate our decision and reconsider the cause in light of *People v. Black* (2005) 35 Cal.4th 1238 (*Black*).

We hereby vacate our prior decision and reconsider the matter.

I. PROCEDURAL AND FACTUAL BACKGROUND

We need not restate the facts set forth in our previous opinion. The statement of facts in our slip opinion in *People v. Tewolde* (Mar. 21, 2005, A106273) [nonpub. opn.], which remains on file with this court, is hereby incorporated by reference into this opinion.

We also need not restate the analysis of the other issue discussed in our previous opinion. That issue is distinct from defendant's *Blakely* claim and is outside the scope of the retransfer order. We readopt and affirm our discussion and our resolution of that issue in favor of the People. The discussion and resolution of that issue in our slip opinion in *People v. Tewolde* (Mar. 21, 2005, A106273) [nonpub. opn.], which remains on file with this court, are hereby incorporated by reference into this opinion.

The trial court imposed the aggravated term based on three circumstances in aggravation: (1) the crime involved a high degree of cruelty, viciousness, and callousness; (2) the victim was particularly vulnerable; and (3) defendant's prior sustained petitions as a juvenile were numerous. Defendant did not admit these aggravating circumstances when he entered his plea. Neither were they found to be true beyond a reasonable doubt by a jury.

In our prior opinion we concluded that factor (3) is based on recidivism, and thus is not invalid under *Blakely*—because a sentencing court retained the power to determine the fact of a prior conviction. But we concluded that factors (1) and (2) involve issues of

fact which were not admitted by defendant or determined by a jury. We held it was error for the court to rely on factors (1) and (2) to impose the upper term—and under the circumstances of the case we could not find the error harmless.

II. DISCUSSION

Defendant challenges the imposition of the aggravated term. He contends that under *Blakely* he was entitled to proof before a jury beyond a reasonable doubt of the circumstances in aggravation used to increase his punishment beyond the middle term. Our Supreme Court has recently rejected this argument in *Black*.

In *Black*, the California Supreme Court held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term . . . under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Black, supra,* 35 Cal.4th at p. 1244.) The court reasoned that the California determinate sentencing law "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466], *Blakely* and *Booker*." (*Black, supra,* 35 Cal.4th at p. 1254, referring to *United States v. Booker* (2005) ___ U.S. ___ [160 L.Ed.2d 621].)

As an intermediate appellate court we are bound to follow *Black*, unless and until the United States Supreme Court reaches a contrary conclusion. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

The trial court properly found the three aggravating factors, in accordance with the rules of court and based on the evidence in the case.

Because we reversed and remanded on *Blakely* grounds in our prior opinion, we did not reach other sentencing issues which defendant raised on appeal. We resolve those issues now.

Defendant contends the trial court erred by failing to find two additional circumstances in mitigation: that defendant admitted wrongdoing at an early stage, and

that the victim provoked the assault with a racial epithet. But defendant at first denied wrongdoing when he spoke to police; the officer who spoke to him concluded he was lying; and defendant only admitted he was involved in the assault when he learned the victim was going to survive. Even so, defendant only admitted to police that he punched the victim once, and denied kicking or stomping on his head. And the only suggestion of the victim's use of a racial epithet was a remark that falls short of a provocative use of an unambiguously racist term.

We must conclude the trial court considered all relevant matters in mitigation. (See *People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637.) The trial court was entitled to conclude that the two mitigating factors urged by defendant were insignificant, and the court did not have to state its reasons for not finding the factors to be present. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583 (*Avalos*); *People v. Thompson* (1982) 138 Cal.App.3d 123, 127.) We see no abuse of discretion. (See *Avalos, supra,* at p. 1582.)

Defendant also contends there is insufficient evidence to support aggravating factor (1) – that the crime involved a high degree of cruelty, viciousness, and callousness. This factor is based on the fact that defendant stomped the victim in the head as he lay on the ground. Defendant contends there is insufficient evidence of this. From our review of the record, we disagree. And in any case one valid aggravating factor is sufficient to justify the aggravated term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.)

Defendant's sentence was proper and was not an abuse of discretion.

III. DISPOSITION

The judgment is affirmed.

Marchiano, P.J.

We concur:

Swager, J.

Margulies, J.

Appendix D

Filed 3/21/05 P. v. Tewolde CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL F. TEWOLDE, Defendant and Appellant.	A106273 (Sonoma County Super. Ct. No. MCR-426478)

Defendant Samuel F. Tewolde pleaded no contest to one count of assault with force likely to produce great bodily injury (GBI) (Pen. Code, § 245, subd. (a)(1)) and admitted an enhancement that he personally inflicted GBI upon the victim (Pen. Code, § 12022.7, subd. (a)). The trial court denied probation and imposed the upper (or aggravated) term of four years in state prison for the assault, plus three years for the GBI enhancement for a total of seven years.

Defendant contends that Penal Code section 296, which requires the submission of blood and saliva samples from defendants convicted of certain listed felonies, violates the Fourth Amendment of the United States Constitution. We disagree and affirm our ruling in *People v. King* (2000) 82 Cal.App.4th 1363, 1372 (*King*).

Defendant also contends that under *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403] (*Blakely*), he was entitled to proof before a jury beyond a reasonable doubt of the factors in aggravation used to increase his assault sentence beyond the middle term. We agree. The imposition of the aggravated term violated *Blakely* because

the aggravating factors were not admitted by defendant in the course of entering his plea, and were not determined by a jury beyond a reasonable doubt. Accordingly, we reverse and remand for resentencing or to allow the prosecution to seek a jury trial on the aggravating factors.

I. FACTS

Defendant pleaded no contest before the case proceeded to a preliminary hearing. Accordingly, we take the facts from the probation report.

This case arises from a vicious attack on Ryan Nelson by a group of men after the group was asked to leave a party. Nelson had gone to a party at the Santa Rosa home of a minor female whose mother was absent. Some time during the evening some uninvited guests arrived, including "a large group of Hispanic and African American males whom the host did not want to admit . . . ." The host "did admit [the group] after they began causing a disturbance outside." The group included defendant, who is apparently an African American of Eritrean descent.

The group was soon asked to leave the party. They left, but loitered outside the house and were loud. Nelson, who is Caucasian, went outside to try to get the group to leave. One of the men hit Nelson over the head with a bottle. Defendant punched Nelson in the head, and Nelson fell to the ground. Six to 10 men circled Nelson and began jumping up and down on his head " 'like a trampoline' " and kicking him. As they kicked Nelson the group chanted "gang-related statements." Eventually, the group stopped beating Nelson and ran off.

"Witnesses indicated that the defendant participated in the assault . . . ." "One witness positively identified the defendant as having punched the victim after Nelson was hit over the head with the bottle. The victim fell to the ground, and [defendant] proceeded to stomp on the victim's head while chanting, 'go to sleep.' " According to witnesses, Nelson was not armed and "nothing took place which indicated there was trouble between [Nelson] and the assailants."

Eighteen-year-old Nelson suffered serious injuries. He continues to have problems with his vision, and suffered from migraines for three months after the assault.

He suffers from depression and is afraid to go out. At defendant's sentencing Nelson described the assault as "terrible" and "definitely . . . the most traumatic thing that I [have] experienced. . . ."

When defendant first spoke to police, apparently soon after the incident, he was wearing "a red and white shirt with a number indicating Norteno gang affiliation on it . . . ." He admitted going to the party with "a friend," but denied there were Nortenos there. As he was leaving the party he saw "a commotion outside," but avoided it.

When confronted with witness accounts, defendant admitted he saw Nelson being assaulted. He said Nelson "got 'cracked,' and that he saw the suspects 'stomping on the dude.' " He thought the attackers might have been Nortenos. Defendant became angry and said, " 'I care less about some fucking little dude, white dude, that got knocked out or whatever . . . .' " The detective speaking to defendant noted he made several inconsistent statements. The detective concluded defendant was "clearly lying."

When he learned Nelson's condition had improved and that he was expected to survive, defendant admitted his participation in the assault. "[D]efendant admitted he punched the victim in the head. He denied using a bottle, and denied kicking or stomping the victim's head. The defendant stated, 'I hit him . . . I was the first one to hit him.' He indicated he punched the victim because[] 'he was talking shit.'. . . [Defendant] claimed he tried to dissuade the other men from further attacking the victim."

Defendant was arrested and jailed. The jail staff monitored his telephone conversations for two months after his arrest. "In conversations, the defendant referred to being with his 'homies,' mentioning monikers police identified as belonging to Norteno gang members." He also discussed the assault on Nelson. In a conversation two days after he was arrested, defendant "stated he punched the victim one time, 'hella hard,' that the victim was 'out cold,' and that [defendant] was 'hella happy.' When everyone began stomping on the victim's head, 'I was like oh well.' "

The probation report listed several indications that defendant was affiliated with the Norteno gang. According to the probation report, "Gang-related clothing and newspaper articles regarding Norteno gang crimes and assaults—including the present

offense—were found in the defendant's home after [defendant] was arrested. The [investigating] detective detailed several local law enforcement contacts which occurred from 1998 through 2003 which pointed to gang involvement by the defendant. [Defendant] had been contacted with known Norteno gang members, had admitted being an affiliate, had participated in a Norteno-Sureno fracas at the County Fair in 2001, and had perpetrated an attempted robbery (adjudicated as false imprisonment) with a known Norteno member at Santa Rosa Middle School in 1998. The detective noted at least one Norteno member was present with the defendant when the assault on Nelson took place in the present case. . . ."

Defendant was originally charged with assault with force likely to produce GBI, the enhancement for personal infliction of GBI, and a criminal street gang enhancement (Pen. Code, § 186.22, subd. (b)(1)). He entered an open plea of no contest to the assault and the GBI enhancement, in exchange for the dismissal of the gang enhancement. He was specifically admonished that his open plea meant there were no guarantees as to sentence, and he faced anything from the minimum of probation to the maximum of the upper term of four years for the assault, plus three years for the GBI enhancement, for a total of seven years. Defense counsel stipulated there was a factual basis for the plea, but defendant did not specifically admit any aggravating circumstances.

When interviewed for the probation report, defendant said he had been drinking on the night of the assault—although he had previously told police he had not been drinking. He said Nelson and his friends were " 'talking shit,' making statements which the defendant felt were racially derogatory, such as, 'it's dark in here.' " This angered defendant, who admitted he punched Nelson once when he saw him outside. Again, defendant said he only hit Nelson once and did not participate in kicking or stomping him. He expressed remorse for Nelson. He hoped he would be placed on probation.

Defendant, who was 20 at the time of the incident, has suffered three juvenile adjudications: one each for false imprisonment, receiving stolen property, and escape from Probation Camp, a juvenile facility. The earliest, the false imprisonment referred to by the investigating detective as evidence of gang involvement, was a robbery attempt—

the 15-year-old defendant pulled a jacket over a boy's head while two associates rifled his pockets looking for money. During juvenile probation for this offense, defendant violated probation several times. After the latest adjudication for escape, he returned to Probation Camp where he earned a high school diploma and received vocational training and counseling. He showed "some difficulty with authority figures," but did graduate from the camp.

The probation report recommended against probation, and recommended the court impose the upper term of four years for the assault. The report listed five circumstances in aggravation (California Rules of Court, rule 4.421 (Rule)):[1]

• "The crime involved a high degree of cruelty, viciousness, and callousness, in that the defendant and his companions stomped on the victim's head after [defendant] knocked him to the ground while the defendant chanted, 'go to sleep.' " (Rule 4.421(a)(1));

• "The victim was particularly vulnerable, in that Nelson was apparently somewhat intoxicated and vastly outnumbered by the defendant and his companions." (Rule 4.421(a)(3));[2]

• "The present offense coupled with his first adjudication as a juvenile indicates the defendant has engaged in violent conduct which indicates a serious danger to society." (Rule 4.421(b)(1));

• "His prior sustained petitions as a juvenile were numerous." (Rule 4.421(b)(3)); and;

• "His prior performance on probation as a juvenile was mostly unsatisfactory." (Rule 4.421(b)(5)). The report also noted that defendant "just got off Juvenile Probation six months prior to this offense."

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[1] Subsequent rule references are to the California Rules of Court.

[2] Other than this reference to intoxication, the probation report does not make it clear that drinking occurred at the party and, if it did, whether drinking was light, moderate or heavy. In a letter to the court Nelson said he was hit by a wine bottle.

The report listed only one circumstance in mitigation (rule 4.423), presumably a reference to defendant's successful completion of Probation Camp: "The defendant managed to make a positive adjustment at the end of wardship." (Rule 4.423(b)(6).)

Attached to the report was a letter from Nelson in which he asked that defendant receive "the maximum punishment . . . for his crimes." Also attached was a letter from defendant, in which he expressed remorse, and several letters from defendant's family and friends, attesting to his good character.

Defendant filed a Statement in Mitigation in which he set forth "facts," purportedly from witness statements, which defendant claimed showed that he only punched Nelson, and did not participate in the kicking and stomping. This was apparently done in an attempt to mitigate, or refute, the aggravating circumstance of cruelty, viciousness, and callousness. But these purported "facts" are not properly before us.[3]

Defendant's Statement in Mitigation disputed other circumstances in aggravation listed in the probation report, and proposed five factors in mitigation: the victim allegedly provoked the attack with a racial slur; defendant was 21 with no adult criminal record and a juvenile record of minimal violence; defendant has substance abuse problems; defendant supposedly acknowledged wrongdoing at an early stage in the proceedings; and defendant successfully completed Probation Camp. Defendant also argued that he was a deserving candidate for probation.

At sentencing, the court indicated it had read and considered the probation report, including the attached letters. Nelson was present and made a statement. Defendant also made a statement, saying he was "sorry for what happened that night." After oral argument of counsel, the court denied probation and imposed a state prison sentence of seven years.

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[3] Evidence in support of aggravation or mitigation must generally be presented in the form of testimony. (Pen. Code, § 1204.) The purported "facts" are not evidentiary ones, and are not supported by the probation report—they have simply been set forth in an unsworn statement of counsel. As such, they will be disregarded.

The court noted: "As I read this probation report and I look at the letters and other information that's attached to it, I see this huge disconnect" between defendant's loving family and friends, and "what [defendant] did and who [he was] hanging out with." The court found three aggravating factors:

(1) "[T]he crime involved a high degree of cruelty, viciousness, and callousness in that the defendant and his companions stomped on the victim's head after [defendant] knocked him to the ground."

(2) "The victim was particularly vulnerable in that Mr. Nelson was apparently intoxicated and vastly outnumbered by the defendant and his companions."

(3) "And his prior sustained petitions as a juvenile were numerous."

The court found a single circumstance in mitigation, that defendant "managed to make a positive adjustment at the end of wardship."

The court found that the circumstances in aggravation "prevail," and sentenced defendant to the upper term of four years for the assault. The court sentenced defendant to an additional three years for the GBI enhancement, for a total sentence of seven years.

II. DISCUSSION

Defendant contends that Penal Code section 296, which requires the submission of blood and saliva samples from defendants convicted of certain listed felonies, violates the Fourth Amendment of the United States Constitution.[4] He also contends that under *Blakely, supra,* 159 L.Ed.2d 403, he was entitled to proof before a jury beyond a reasonable doubt of the factors in aggravation used to increase his assault sentence beyond the middle term. We disagree with the former contention because of *King* and cognate cases, but we agree with the latter and conclude that defendant's sentence violated *Blakely.* Accordingly, we reverse and remand for resentencing.

A. Section 296

Section 296 requires defendants convicted of certain listed felonies to "provide buccal swab samples, right thumbprints, and a full palm print impression of each hand,

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[4] Henceforth we refer to Penal Code section 296 as section 296 and cite it as § 296. Other statutory references are to the Penal Code.

and any blood specimens or other biological samples required . . . for law enforcement identification analysis[.]" (§ 296, subd. (a)(1).) The statute is part of the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (§ 295 et seq.) in which the Legislature found and declared that felons convicted of certain listed offenses must provide "DNA and forensic identification data bank samples" because DNA and forensic identification analysis "is a useful law enforcement tool for identifying and prosecuting criminal offenders and exonerating the innocent." (§ 295, subd. (b)(1), (2).)

At the time defendant entered his plea, assault with force likely to produce GBI was an offense listed under section 296. (Former Pen. Code, § 296, subd. (a)(1)(F).)[5] Accordingly, the sentencing court ordered defendant to provide samples of his blood and saliva. Defendant argues this statutory requirement of submission of blood and saliva violates the Fourth Amendment. He presents lengthy argument which we need not discuss in detail.

"DNA data base and date bank acts have been enacted in all 50 states as well as by the federal government. [Citations.] Various constitutional challenges to these acts have been rejected consistently. [Citations.]" (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505 (*Alfaro*); see Annot., Validity, Construction, and Operation of State DNA Database Statutes (2000) 76 A.L.R.5th 239.)[6] As our colleagues stated in *Alfaro*, "In view of the thoroughness with which constitutional challenges to DNA data base and data bank acts have been discussed, there is little we would venture to add." (*Alfaro, supra,* at p. 505.)

In *King* we held that the typical Fourth Amendment requirement of a warrant, based on probable cause, did not apply to the taking of blood from a convicted felon pursuant to the statutory predecessor of section 296. (*King, supra,* 82 Cal.App.4th at

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[5] Section 296 was subsequently amended to include convictions of all felonies. (§ 296, subd. (a)(1) [post-amendment].)

[6] Recently, an en banc panel of the Ninth Circuit upheld blood sample collection for DNA databasing against a Fourth Amendment challenge. (*U.S. v. Kincade* (9th Cir. 2004) 379 F.3d 813.)

pp. 1369-1374.) Rather, we held that under a balancing test such a minimal search could be conducted without individualized suspicion if requiring such suspicion would thwart an important government interest. (*King, supra,* at pp. 1373-1378.)

Balancing the reduced privacy interest of a convicted felon, especially when incarcerated, with the "undeniable interest" of the government in crime prevention and solution, we held the predecessor of section 296 did not violate the Fourth Amendment. (*King, supra,* 82 Cal.App.4th at pp. 1373-1378.) In light of the balancing test approach, we did not feel it necessary to decide whether drawing blood for DNA testing satisfied the "special needs" doctrine as set forth in several well-known decisions of the United States Supreme Court. (*King, supra,* at pp. 1376-1377.)

We reaffirm our decision in *King*. We note that two subsequent California decisions have also upheld the taking of blood and saliva for DNA testing under section 296. (*Alfaro, supra,* 98 Cal.App.4th at pp. 505-509; *People v. Adams* (2004) 115 Cal.App.4th 243, 255-259 (*Adams*).)

Defendant argues that section 296 is not justified by a "special need," which is defined in the case law as a special need over and above the normal needs of law enforcement. Our answer to this is twofold: (1) in *King* we held a special needs analysis is not necessary to uphold the statute (*King, supra,* 82 Cal.App.4th at pp. 1376-1377); and (2) the court in *Adams* held that the special needs doctrine does not apply because "the class of persons subject to [section 296] is convicted criminals, not the general population. . . . [C]onvicted criminals do not enjoy the same expectation of privacy that nonconvicts do. The [special needs] cases . . . involved different populations of test subjects[,]" such as motorists and state hospital patients. (*Adams, supra,* 115 Cal.App.4th at p. 258.)

Section 296 does not violate the Fourth Amendment. The trial court's order for blood and saliva samples does not offend the Constitution.[7]

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[7] In light of this conclusion we need not address the Attorney General's contention that defendant waived this issue by failing to object below.

B. *Blakely* Error

Defendant contends that *Blakely* requires that we set aside his sentence because the aggravating factors used to impose the upper term for the assault were neither admitted by defendant nor proved beyond a reasonable doubt to a jury.[8] We conclude there is *Blakely* error in this case, and that error is not harmless. We must therefore reverse and remand for resentencing.

We need not discourse at length on the much discussed issue of *Blakely* and its impact on the California sentencing scheme. *Blakely* held that " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.' " (*Blakely, supra,* 159 L.Ed.2d at p. 412, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) The phrase "statutory maximum" for *Blakely* and *Apprendi* purposes "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.]" (*Blakely, supra,* 159 L.Ed.2d at p. 413.) Thus, *Blakely* prohibits the use of any judicially determined fact, other than recidivism, to increase a sentence beyond the statutory maximum.

Numerous California Court of Appeal decisions involving aspects of *Blakely* are pending before the California Supreme Court. We are familiar with those decisions, none of which are citable because of the grants of review. But we agree with those decisions which held that *Blakely* applies to the California determinate sentencing scheme, and prohibits the imposition of an upper term based on nonrecidivist aggravating factors which have neither been admitted by the defendant, nor determined by a jury. We also

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[8] We reject the Attorney General's argument that defendant has waived his *Blakely* claim. (See *People v. White* (2004) 124 Cal.App.4th 1417, 1433 (*White*); see also *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.) We also note that defendant entered his no contest plea on January 29, 2004 and was sentenced April 16, 2004. *Blakely* was not decided until June 24, 2004.

agree with the recent case of *White, supra,* 124 Cal.App.4th at p. 1439, decided December 15, 2004, which so held.[9]

In sentencing defendant to the upper term, the trial judge made factual findings that three aggravating factors were present:

(1) The crime involved a high degree of cruelty, viciousness, and callousness;

(2) The victim was particularly vulnerable; and

(3) Defendant had suffered numerous prior juvenile adjudications.

Factor (3) is based on recidivism, and thus is not invalid under *Blakely*; a sentencing court retains the power to determine the fact of a prior conviction. But factors (1) and (2) involve issues of fact which were not admitted by defendant or determined by a jury. Thus, it was error for the court to rely on factors (1) and (2) to impose the upper term.

We must decide whether, under the circumstances of this case, the error is harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).) A finding of *Blakely* error signifies the infringement of the defendant's Sixth Amendment right to trial by jury. (*Blakely, supra,* 159 L.Ed.2d at pp. 410, 415.) We conclude, as did numerous post-*Blakely* California decisions we can no longer cite because of grants of review, that the *Chapman* standard of harmless error applies to *Blakely* error. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320, 324-327 (*Sengpadychith*) [error under *Apprendi* on which *Blakely* is based, governed by *Chapman* standard]; *U.S. v. Sanchez* (11th Cir. 2001) 269 F.3d 1250, 1271-1273 (*Sanchez*) [same]; cf. *White, supra,* 124 Cal.App.4th at p. 1437 & fn. 6 [court agrees with now uncitable decision that *Blakely* error subject to harmless error analysis].)

In *Sengpadychith*, our Supreme Court held that the trial court's failure to instruct the jury on certain aspects of a gang enhancement, which when found true increased the penalty for the charged offenses, was (1) similar to failing to instruct on an element of the

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[9] On January 12, 2005, the United States Supreme Court reaffirmed *Blakely* in a decision involving the federal sentencing guidelines. (*United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738].)

offense, and (2) error under *Apprendi* because it removed from the jury's consideration facts which lengthened punishment. Thus, reasoned the Supreme Court, the error amounted to federal constitutional error governed by the *Chapman* test for harmless error. (*Sengpadychith, supra,* 26 Cal.4th at pp. 320, 324-327.) In *Sanchez*, the court explained that *Apprendi* error—in that case, the failure to submit the issue of drug quantity to the jury—was not structural error because the error did not necessarily render the trial unreliable or unfair. The error was merely one of trial process, albeit of constitutional dimension, and was thus governed by *Chapman.* (*Sanchez, supra,* 269 F.3d at pp. 1272-1273.)

The harmless error analysis in the present case focuses on the presence of one persuasive valid factor despite the invalidity of the other two. As noted, factor (3) is based on recidivism and is untouched by the *Blakely* error. It is generally true that one valid factor is sufficient to expose a defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) But even in the context of general, nonconstitutional sentencing error, a reviewing court will set aside a sentence "if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

We must decide whether it is clear beyond a reasonable doubt that the trial court would have imposed the upper term had it known factors (1) and (2) were invalid—i.e., if the court was faced only with one aggravating factor, factor (3). We will not automatically assume the trial court would have imposed the upper term simply because one valid factor remains in the sentencing calculus. "The relevant question is not whether we can conceive of a legitimate way for the trial court to have arrived at the [upper term]. . . . The question is whether the trial court would have exercised its discretion to impose the upper term . . . if it knew that one or more of the factors relied on were invalid. This is a question that can only be answered on a case-by-case basis. [Citations.]" (*White, supra,* 124 Cal.App.4th at pp. 1439-1440.)

Here factors (1) and (2) were by far the more severe of the three. Factor (1) involved cruelty, viciousness, and callousness, based on the kicking of the victim when

he was lying unconscious. Factor (2) involved the victim's vulnerability. In contrast, factor (3) involved a relatively brief juvenile history of less than serious offenses. When he was 15 defendant pulled a jacket over a boy's head so others could rifle his pockets. There is no indication defendant struck the victim or used a weapon. His other two juvenile adjudications were bereft of violence. And at the conclusion of his juvenile wardship, defendant successfully completed Probation Camp, where he earned a high school diploma and completed vocational education. Defendant did not admit the aggravating factors, strongly contested factors (1) and (2), and disputed the characterization of his involvement that led to the court's conclusions. He also urged his admission of guilt at an early stage before a preliminary hearing as a mitigating factor.

When we consider the factor in mitigation discussed by the trial court, as well as the numerous letters in defendant's favor, we cannot conclude beyond a reasonable doubt that the trial court would have imposed the upper term based solely on factor (3). This is a serious crime, but we cannot find the sentencing error harmless under these circumstances. The trial court must reconsider the appropriate sentence.

III. DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for further proceedings consistent with *Blakely*.[10] This reversal is solely for resentencing or to allow the prosecution to seek a jury trial on the aggravating factors and does not affect the order for blood and saliva samples under section 296, or any other provision of the judgment other than the aggravated term for the assault.

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[10] We are not suggesting what the sentence should be or limiting the various options open to the court on remand. Also, in light of our remand, we need not address defendant's remaining challenges to his sentence—including claims that the court erred by not finding more mitigating circumstances and that the aggravating factor of cruelty, viciousness and callousness was not supported by the evidence.

Marchiano, P.J.

We concur:

Swager, J.

Margulies, J.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 730 Harrison Street, Suite 201, San Francisco, CA 94107. On October 22, 2007, I have caused to be served a true copy of the attached APPELLANT'S PETITION FOR REVIEW on each of the following, by placing same in an envelope(s) addressed as follows:

Office of the Attorney General
Bill Lockyer, Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664
(Respondent)

Sonoma County Superior Court
Attn: Raima Ballinger, Judge
Hall of Justice
600 Administration Drive
Santa Rosa, CA 95403

Sonoma County District Attorney
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Steve Fabian
Deputy Public Defender
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Santa Rosa, CA 95403

Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102
(Hand delivery)

Samuel F. Tewolde
(Appellant)

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in San Francisco, California, on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 22, 2007, at San Francisco, California.

Sean Keane

Declarant