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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MEHDI DAGHIGHI ALAMOUTI,

Defendant and Appellant.

B188185

(Los Angeles County  
Super. Ct. No. LA044046)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin Herscovitz, Judge. Affirmed in part and reversed in part with directions.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General, and Thomas C. Hsieh, Deputy Attorney General, for Plaintiff and Respondent.

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Mehdi Alamouti appeals from a judgment entered on resentencing. He contends that imposition of the upper term on the principal offense (count 1) constituted reversible error under *Cunningham v. California* (2007) \_\_\_ U.S. \_\_\_ [127 S.Ct. 856] (*Cunningham*). We agree, reverse the judgment on count 1, remand the matter for resentencing, and affirm the judgment in all other respects.

### **FACTUAL BACKGROUND<sup>1</sup>**

Sam Shakib owned several business enterprises, including rental properties. Starting in 1997 or 1998, defendant became Shakib’s property manager and bookkeeper for the rental property enterprise. Defendant had full access to Shakib’s office and wrote out business checks for the signatures of Shakib and Shakib’s brother, who was also authorized to sign on the rental property account. Defendant received a monthly salary for his services, as well as an apartment in which to live.

Around March 2003, Shakib learned that defendant had moved out of the apartment and subleased it to someone else. In September 2003, defendant was in jail on an unrelated matter. Shakib wanted to withdraw money from the account to which defendant had access in order to buy a car for his daughter. Shakib was unable to do so by check because such a transaction would need to go through the office computer and defendant was the only one with the access code. Shakib therefore went to the bank to make the withdrawal. While there, Shakib determined that the balance on the account was substantially less than it should have been. In looking through account documents, Shakib identified a \$23,000 check to “cash” dated May 1, 2003, and a \$75,000 check to defendant dated August 4, 2003. Although Shakib had not signed or authorized either

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<sup>1</sup> The facts are taken from our opinion in *People v. Alamouti* (Jun. 22, 2005, B176867) [nonpub. opn.] pages 7–9 (*Alamouti I*), which was defendant’s appeal from the original judgment.

check, both had been endorsed by defendant and purported to bear Shakib's signature. Shakib demanded that the bank replace the funds. The bank refused to do so.

Shakib later identified three more checks made out to and endorsed by defendant, all of which purported to bear Shakib's signature and which Shakib had not signed or authorized. The checks were dated June 22, 2001, October 3, 2001, and April 9, 2002, respectively. All were in the amount of \$100,000. One of the checks bore the notation "loan," and another contained the notations "loan fee" and "loan/biz purchase." Shakib testified that he had never loaned any money to defendant or engaged in business dealings with him.

In defense, defendant presented witnesses who testified that Shakib was dishonest in his business dealings and had removed a computer from defendant's apartment. In argument to the jury, defendant conceded that the signatures on the five checks at issue were not in Shakib's normal handwriting but suggested different scenarios which would raise a reasonable doubt as to defendant's guilt. These included that payments to defendant were legitimate because the checks could have been signed by Shakib's brother, that the transfers were part of a scheme by Shakib to hide money from his wife, with whom Shakib had had disagreements, and that the transfers were part of a scheme by which Shakib could make fraudulent claims against the bank for reimbursement of his losses.

### **PROCEDURAL BACKGROUND**

Defendant was convicted by jury of five counts of forgery (Pen. Code, § 470, subd. (d)) and one count of grand theft of property valued at more than \$400 (*id.*, § 487, subd. (a)), with findings that he had committed two or more related felonies that resulted in a taking of over \$100,000 (*id.*, § 186.11, subd. (a)(3)) and that the victim's loss exceeded \$150,000 (*id.*, § 12022.6, subd. (a)(2)). Defendant was sentenced to the middle term of two years on the forgery alleged in count (1) and consecutive eight-month terms

on the remaining four forgery counts. In imposing the middle term on count 1, the court stated that it found “neither factors in aggravation or mitigation.” In addition, separate two-year enhancements were imposed under Penal Code sections 186.11, subdivision (a)(3), and 12022.6, subdivision (a)(2), for an aggregate term of eight years eight months. (Sentence on the conviction of grand theft was stayed under Penal Code section 654.)

Defendant appealed. In *Alamouti I* we rejected all but one of his arguments, finding merit in the contention that he should not have been sentenced to separate two-year enhancements. Accordingly, we ordered that one of the two-year terms be stricken and remanded the matter to permit the trial court to consider its sentencing choices. (*Alamouti I, supra*, B176867, at pp. 7–9.)

At the resentencing hearing, defendant argued that there had been no changes in circumstances to warrant imposition of an upper term. He further argued that, in mitigation, his conduct in custody had been exemplary. The court rejected defendant’s arguments and sentenced him to the upper term of three years on count 1, stating: “One, you took an advantage of a position of trust with Mr. Sam Shakib. [¶] Two, that he was particularly vulnerable, which is sort of a function of the first aggravating factor, too, in that he gave up control of his financial affairs to you, wrongfully. [¶] And the third factor in aggravation would be the planning, sophistication, and professionalism involved in the commission of these offenses. [¶] I can’t think of any factors in mitigation.” In accordance with the mandate of *Alamouti I*, the court struck one of the two-year enhancements, leaving the remainder of the sentence unchanged for an aggregate term of seven years eight months.<sup>2</sup>

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<sup>2</sup> In an apparent clerical error, the abstract of judgment characterizes the three-year term on count 1 as “M” for middle, rather than “U” for upper.

Defendant again appealed, arguing this time that judicial imposition of the upper term infringed his federal constitutional jury trial right under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] (*Blakely*). We rejected his argument, noting that although *Cunningham* was then pending in the United States Supreme Court, we were bound by the California Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), which had held that *Blakely* did not apply to imposition of an upper term. (*People v. Alamouti* (May 30, 2006, B188185) [nonpub. opn.] pp. 2–3 (*Alamouti II*).

Defendant next filed a petition for a writ of certiorari in the United States Supreme Court. While the petition was pending, that court decided *Cunningham*. On February 20, 2007, the United States Supreme Court granted defendant's certiorari petition, vacated our judgment in *Alamouti II*, and remanded the matter to us for further consideration in light of *Cunningham*.

Following the Supreme Court's remand, we recalled the remittitur we had issued in *Alamouti II* and invited further briefing from the parties, upon the filing of which the matter would stand submitted. The briefing has now been received.

## DISCUSSION

In *Cunningham*, the United States Supreme Court reaffirmed *Blakely*, overruled *Black*, and held that California's Determinate Sentencing Law violates a defendant's constitutional right to a jury trial to the extent it authorizes the trial judge to find facts that expose a defendant to an upper term sentence by a preponderance of the evidence.<sup>3</sup> (*Cunningham, supra*, 127 S.Ct. at pp. 863–864.) “Except for a prior conviction, ‘any fact

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<sup>3</sup> On February 20, 2007, the United States Supreme Court vacated the judgment in *Black* and remanded the case to the California Supreme Court for further consideration in light of *Cunningham*.

that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ [Citation.]” (*Id.* at p. 868.)

The Attorney General asserts that defendant forfeited his right to a *Cunningham* claim because he failed to raise the issue in the trial court. But unlike the defendant in *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103, on which the Attorney General relies, defendant here was sentenced after the California Supreme Court decided *People v. Black, supra*, 35 Cal.4th 1238.<sup>4</sup> Thus, objection under *Blakely* would have been futile and defendant’s *Cunningham* claim has not been forfeited. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5.)

The trial court’s imposition of the upper term for forgery alleged in count 1 was based on aggravating circumstances that were neither supported by jury findings nor involved recidivism. As such, imposition of the upper term violated defendant’s constitutional rights. The only remaining question is whether the error was harmless. (*Washington v. Recuenco* (2006) \_\_\_ U.S. \_\_\_, \_\_\_ [126 S.Ct. 2546, 2552–2553]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.)

The Attorney General argues that the error was harmless because, given evidence of the great degree of trust the victim placed in defendant and the multiple counts of which defendant was convicted, “the jury would have found every one of the aggravating circumstances relied upon [by] the trial court in selecting the upper term sentence to be true.” No doubt, evidence of these aggravating factors was presented to the jury. But California jurisprudence with respect to taking advantage of a position of trust, victim

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<sup>4</sup> *Black* was decided on June 20, 2005. Defendant was resentenced on December 6, 2005.

vulnerability, and criminal sophistication has thus far been limited to a trial court's assessment of these circumstances unconstrained by requirements of specific elements and under the preponderance-of-the-evidence standard of California Rules of Court, rule 4.420(b). (See, e.g., *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693–1695, overruled on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1576–1577.) We have no basis upon which to conclude that a jury would find these aggravating circumstances true in this case, especially under the now-required standard of beyond a reasonable doubt. Accordingly, the judgment must be reversed with respect to the sentence imposed on count 1.

#### **DISPOSITION**

The judgment is reversed with respect to the sentence imposed in count 1 and the matter is remanded for resentencing. In all other respects, the judgment is affirmed. The decision as to this court is final forthwith.

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MALLANO, J.

We concur:

SPENCER, P. J.

VOGEL, J.