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***CHANGE IN JUDGMENT***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER SAMUEL GONZALEZ and  
JOSE LUIS MARTINEZ,

Defendants and Appellants.

B171456

(Los Angeles County  
Super. Ct. No. BA222996)

***ORDER MODIFYING OPINION  
AND DENYING REHEARING***

THE COURT:

It is ordered that the opinion filed herein on March 15, 2005, be modified as follows.

1. On page 14, the first full paragraph is deleted. In its place, the following paragraphs are added:

“With respect to the substantive count, the court sentenced Gonzalez to the high term because Gonzalez’s convictions were numerous, of increasing seriousness, and involved a large amount of contraband. The trial court correctly

considered the number and seriousness of Gonzalez’s prior convictions in exercising its discretion in applying a sentence because those factors involve the fact of Gonzalez’s prior convictions.

“The Attorney General points out that challenges to the finding of numerosity or increasing seriousness of the convictions should have been raised in the trial court, and we agree. Although Gonzalez did not forfeit the right to assert error based on the principles of *Blakely*, the reason is that *Blakely* extended the *Apprendi* rationale into a new area, and a defendant cannot have forfeited a legal argument that was not recognized at the time of his trial. Gonzalez, however, should have mounted any challenge to the trial court’s exercise of its sentencing discretion in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Imposition of the upper term was permissible based on Gonzalez’s prior convictions.”

2. On page 15, line five, the following sentence is deleted: “The case is remanded for resentencing.” In its place, the following sentence is added: “The case is remanded for resentencing on the gang enhancement.”

Plaintiff and Respondent’s petition for rehearing is denied.

This modification effects a change in the judgment.

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COOPER, P. J.

RUBIN, J.

FLIER, J.