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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CLAYTON TREVOR MACK, Defendant and Appellant.	D048084 (Super. Ct. No. SCD189468)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed in part and reversed in part.

A jury convicted Clayton Mack of three counts of forcible rape (Pen. Code, § 261, subd. (a)(2)),[1] three counts of forcible oral copulation (§ 288a, subd. (c)(2)), kidnapping for purposes of rape (§ 209, subd. (b)(1)), residential burglary (§ 459), making a criminal threat (§ 422), inflicting corporal injury on a cohabitant (§ 273.5, subd. (a)), attempting to dissuade a witness from testifying (§ 136.1, subd. (a)(2)) and disobeying a court order

1 All further statutory references are to the Penal Code unless otherwise specified.

(§ 166, subd. (a)(4)). The jury also found true a series of associated special allegations. The trial court sentenced Mack to an indeterminate prison term of 25 years to life, plus a consecutive determinate prison term of 38 years 8 months.

On appeal, Mack argues the court erroneously denied his motions to change retained counsel and his motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806. He also argues that, under *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), the court's imposition of the upper term for one component of his determinate sentence (count 9) was error.[2]

I

FACTS

A. Prosecution Case

Jaime J. dated Mack for over two years and lived with him for some period of time. However, they broke up in late January 2005. Jaime moved into her mother's apartment, but Mack continued to telephone her. He came to her mother's apartment on

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2 Mack also asserts on appeal execution of the term of life with the possibility of parole imposed for the conviction for kidnapping for purposes of rape (count 1), stayed under section 667.61, subdivision (f), and execution of the concurrent term imposed for the conviction for inflicting corporal injury on a cohabitant (count 9) should have been stayed under section 654. The People concede, and we agree, the court should have stayed execution of those terms under section 654. Mack also contends, and the People agree, that the abstract of judgment incorrectly lists his conviction on count 10 as a violation of section 281, subdivision (a)(2); instead it should have shown a conviction for violation of section 261, subdivision (a)(2). On remand, the trial court shall stay execution of the sentences on counts 1 and 9 pursuant to section 654 and amend the abstract of judgment to reflect the proper Penal Code section for count 10.

February 6, 2005, ostensibly just to "talk," but raped her. However, she did not immediately report the assault to police.

The following morning, while Jaime was in the shower, Mack entered her apartment and came into the bathroom. He was carrying a knife and glass pipe. He forcibly raped her twice and forced her to orally copulate him. After he left, Jaime called 911 and obtained a restraining order.

Jaime did not see Mack again until March 4, 2005. Mack continued to try to contact Jaime, and left several voice mails for her, claiming he was living in Alaska. Jaime was working with police trying to locate Mack.

On the morning of March 4, Mack came to Jaime's apartment and kicked in the door. She fled out the front door, wearing only jeans and a bra, but Mack caught her and forced her into her car while a neighbor who witnessed the abduction called police. Mack told her he had a weapon, and would hurt her if she tried to escape. He drove her to an unfamiliar neighborhood, where he parked. He twice forcibly raped her and twice forced her to orally copulate him.

Mack drove to a different location, where he got out of the car and allowed Jaime to leave. She drove to a telephone and called 911. Police found Mack a short time later trying to hide. At the police station, Mack expressed regret for what he had done, asked for a deal, and said Jaime would never testify against him.

B. The Defense

Mack testified the sexual encounter on February 6 was consensual. When he returned the following morning, he entered using a key Jaime had given to him and again

had consensual sex. Jaime was angry with Mack because he had slept with her sister. Jaime had threatened to file a false police report asserting he had raped her. He returned her key to her and left.

When he returned on March 4, he accidentally broke a window while entering. He forced her into the car so they could talk. They ended up having consensual sex in the car. He denied making one of the statements to police attributed to him, but instead only stated he had "----ed up" and that Jaime would not testify against him because she loved him.

II

THE *ORTIZ*[3] AND *FARETTA* ISSUES

Because Mack's claims on appeal arise out of the court's rulings on his last-minute motions to change counsel, we set forth the facts from the hearing on these motions before addressing Mack's claims.

A. The Motions

The Ortiz Motion

On November 10, 2005, the day set for trial, Mack asked for a *Marsden*[4] hearing, asserting he had a conflict of interest with his retained attorney allegedly because Mack was "physically attracted to him." Mack wanted to discharge the attorney and "go pro per." The court advised Mack that *Marsden* was not the appropriate framework for his

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3 *People v. Ortiz* (1990) 51 Cal.3d 975 (*Ortiz*).

4 *People v. Marsden* (1970) 2 Cal.3d 118.

request because his present attorney was retained rather than appointed, and advised Mack he had the right under limited circumstances to fire his retained counsel and replace him either with another retained counsel or potentially to represent himself in propria persona (pro. per.). When the court asked if Mack's motion was to fire his retained attorney and proceed in pro. per., Mack responded, "That, and I . . . have another attorney lined up, hopefully, [who's] going to take on the case."

The court immediately asked, "before we go too much further into this . . . , if you either represent yourself or have another attorney, are you ready to proceed to trial today?" Mack responded that, "I'm going to hire Roland Haddad; and I know . . . he's going to need time to review the case," and Mack confirmed he was seeking to continue the trial. The court stated the request was untimely because the matter was scheduled for trial that day, and asked whether Haddad had agreed to represent Mack. Mack replied that Haddad would take over "[a]s long as I can get payment to him, but it's going to take [until] the end of this week," and that Haddad would need time to meet with Mack, obtain the files, and prepare for trial. The court then confirmed that on October 24, it had advised Mack's current attorney to discuss with him that, if he wished to change counsel, the new counsel would need to be ready to proceed on November 10 with trial; Mack's current counsel confirmed he had relayed that proviso to him. The court denied Mack's motion to continue the trial to obtain new counsel. The court specifically informed Mack that it would have granted his motion to replace counsel "if counsel was ready to go; but since we don't have that, it's uncertain" because "[y]ou haven't retained him. In fact, we

don't know when that retention would occur, if it could occur. All of those variables make it very uncertain and do not constitute good cause for a continuance."

The Faretta Motion

Mack then stated he was "ready to represent myself then, pro per." However, when the court again asked if he was ready to proceed, Mack stated he was not ready and would "need at least another two weeks." The court reiterated that, although it would hear his request to represent himself in pro. per., it would not grant a continuance.

The court then asked about Mack's "physical attraction" to his retained attorney, and cautioned that, although it would not force him to keep his retained attorney, if Mack wished to represent himself he would need to start trial without a continuance because the request for the continuance was untimely. The court noted Mack's retained attorney was "extremely capable" and, considering the fact no continuance would be granted, the court asked whether Mack wished to proceed to trial with his retained attorney or instead to seek to represent himself. Mack stated he wished to represent himself, and the court then took a recess to have Mack fill out a *Lopez*[5] waiver form before it would rule on his *Faretta* motion.

The court subsequently conducted a hearing to consider Mack's *Faretta* motion. It probed various inconsistencies between Mack's factual representations to the court (and to a probation officer) and the actual facts, the bizarre statement Mack made to a mental

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5 *People v. Lopez* (1977) 71 Cal.App.3d 568.

health professional, and an apparent threat made by Mack to spit in the prosecutor's face. The court denied the *Faretta* motion for the reasons we detail below.

B. Analysis of Ruling on the *Ortiz* Motion

Mack argues the trial court erroneously denied the *Ortiz* motion because it incorrectly applied the standards used to evaluate a request to replace *appointed* counsel under *Marsden*, and the error is reversible per se. Mack alternatively appears to argue that, to the extent the court applied the correct standard but denied the motion as untimely, the ruling was error.

Legal Framework

"[D]ue process of law, as it is expressed through the right-to-counsel provisions of the state and federal Constitutions, comprehends a right to appear and defend with retained counsel of one's own choice." (*People v. Byoune* (1966) 65 Cal.2d 345, 346.) Unlike a request to replace *appointed* counsel under *Marsden*, where the inquiry is focused on the adequacy of the representation being provided or the presence of an irreconcilable conflict likely to harm adequate representation (*Ortiz, supra,* 51 Cal.3d at p. 984), a defendant may replace *retained* counsel with or without cause. (*Id*. at p. 983.)

The right to replace retained counsel, however, "is not absolute" and must be balanced against countervailing interests, including the government's " 'interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time." ' " (*Ortiz, supra,* 51 Cal.3d at pp. 983-984.) Although the trial court should accommodate a defendant's request to obtain private counsel of his or her choice,

it is not required to do so where an accommodation will result " 'in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' " (*People v. Courts* (1985) 37 Cal.3d 784, 790 (*Courts*).) When deciding whether the denial of a continuance to obtain private counsel "was so arbitrary as to violate due process," we evaluate "the circumstances of [the] case" and " ' "particularly . . . the reasons presented to the trial judge at the time the request [was] denied." ' " (*Id*. at p. 791.)

Analysis

Mack's primary assertion is that the trial court applied the *Marsden* framework to assess his motion to replace retained counsel rather than applying the *Ortiz* framework, and this error is per se reversible. However, we have carefully reviewed the proceedings, and are convinced the trial court understood the standards of *Ortiz* rather than *Marsden* applied, and applied the correct framework. The court (1) specifically advised Mack that his reference to *Marsden* was inaccurate because his present attorney was retained rather than appointed and therefore *Marsden* was not the appropriate framework for his request, (2) explained Mack had the right to change counsel under limited circumstances, and (3) advised Mack that it would have granted his motion to replace counsel had new retained counsel been ready to go to trial. Although Mack cites passages in the record where the court noted Mack's current counsel was competent, the court's comments were made not in connection with the ruling on Mack's *Ortiz* motion, but were instead made *after* the court had already denied his *Ortiz* motion as untimely (a proper consideration under the *Ortiz* framework) and were made in connection with assessing his *Faretta* motion.

The court denied Mack's *Ortiz* motion because, although Mack had been forewarned that any substitution should be made (and counsel be ready to proceed) by the scheduled trial date, Mack nevertheless waited until the day of trial to seek a trial continuance (to allow new counsel to prepare for trial) as an essential adjunct of his *Ortiz* motion, and therefore the motion was untimely. Moreover, the court noted there was uncertainty when (or even if) new counsel would take over the case, which further militated against granting the continuance. The courts have recognized that requests for continuances that are made on the date of trial, as Mack's request was here,[6] jeopardize the orderly administration of justice (*Ortiz, supra*, 51 Cal.3d at pp. 983-984), and trial courts have latitude to deny such requests. (*People v. Molina* (1977) 74 Cal.App.3d 544, 548 ["while generally a defendant is entitled to be represented by counsel of his own choosing, the right must be asserted in a timely fashion"]; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 850 ["Where a continuance is requested on the day of trial, the lateness of the request may be a significant factor justifying denial absent compelling circumstances to the contrary."]; cf. *Courts, supra*, 37 Cal.3d at pp. 791-792 & fn. 4

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6 Mack asserts the motion was not untimely because it was made on October 24, 2005, several weeks before the scheduled trial date, and was only continued to November 10 because the court suspended proceedings to conduct competency proceedings under section 1368. However, the proceedings on October 24 contain no reference to a request to substitute retained counsel. Instead, the only discussion of acrimony was that, when Mack demanded that his attorney enter a guilty plea to all charges and ask for a maximum sentence, Mack's counsel resisted the demand to "[commit] legal suicide." At that hearing, Mack stated "[l]et's just do what I want to do, then. I want to go pro per today. I feel that I need to let go [of] my attorney." Although this statement may at best have been a nebulous suggestion that he was pursuing *Faretta*, it contains no mention of substituting counsel within the ambit of *Ortiz*.

[distinguishing request for continuance of trial in case made "a week before trial" from "eve-of-trial, day-of-trial, and second-day-of-trial requests" found to have been properly denied in other cases].) Additionally, at the time of Mack's request for a continuance, the trial court was informed there was only a *possibility* Mack would retain new counsel.

A trial court has greater latitude to deny a request for a continuance for purposes of substituting private counsel when the prospect that a defendant will retain such counsel is "still quite speculative at the time the motion for continuance [i]s made." (*Courts, supra*, 37 Cal.3d at p. 791, fn. 3 [emphasizing the request in that case, which was accompanied by testimony establishing that "a lawyer-client relationship had been established" with prospective retained counsel, was distinguishable from requests in "cases which have upheld the denial of a continuance on the ground that participation by a particular private attorney was still quite speculative at the time the motion for continuance was made"].) Here, the proffer before the trial court regarding Mack's continuance request was that Mack had called Haddad the previous evening and was "going to hire" Haddad, who would take over "as long as I can get payment to him," suggesting on its face a new lawyer had not yet been retained and Haddad's purported agreement to represent Mack was conditional. Indeed, Mack's request was unaccompanied by any suggestion of when Haddad would be available or why Haddad had not yet been in contact with either the court or Mack's current counsel. (See *People v. Johnson* (1970) 5 Cal.App.3d 851, 858-859 [upholding trial court's denial of day-of-trial request for continuance to obtain private counsel where private counsel had not

contacted court, and witnesses were ready, because "[t]o continue the trial at such a date on such nebulous grounds would adversely affect the orderly administration of justice"].)

We conclude the trial court applied the correct standard for Mack's request for a continuance to substitute new retained counsel, and did not abuse its discretion in denying the motion.

C. Analysis of Ruling on the *Faretta* Motion

Mack contends the trial court abused its discretion when it denied his alternative *Faretta* motion to represent himself.

Legal Framework

A defendant has a federal constitutional right to self-representation in a criminal proceeding (*Faretta, supra*, 422 U.S. at p. 819), and *Faretta* applies to California criminal proceedings (*People v. Windham* (1977) 19 Cal.3d 121, 128 [a trial court must grant a defendant's *Faretta* motion "upon ascertaining that he [or she] has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be"]). Generally, "[a] trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make [the] request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, [the defendant] must make [the] request unequivocally. [Citations.] Third, [the defendant] must make [the] request within a reasonable time before trial. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 729.)

Although a defendant has the right to self-representation, to invoke an unconditional right he or she must assert it within a reasonable time prior to the

commencement of trial. (*People v. Welch, supra,* 20 Cal.4th at p. 729.) A motion not made within a reasonable time prior to trial is addressed to the sound discretion of the trial court. (*People v. Marshall* (1996) 13 Cal.4th 799, 827.) In exercising its discretion the trial court should consider the quality of counsel's representation, the defendant's prior proclivity to substitute counsel, the reason for the request, the stage of the proceedings, and the disruption or delay that might reasonably be expected to follow granting the motion. (*Ibid*.) Additionally, a trial court may deny the motion if it finds it is made for the purpose of frustrating the orderly administration of justice. (*People v. Marshall* (1997) 15 Cal.4th 1, 23.) Finally, when ruling on a motion made in close proximity to trial, the court may also consider whether the defendant's prior conduct has demonstrated a likelihood the proceedings would be disrupted in the event the motion for self-representation is granted. (*People v. Jenkins* (2000) 22 Cal.4th 900, 962-963.) This includes a consideration of defendant's manner and demeanor, any previous disruptive behavior, and any lack of control over his or her emotions that would demonstrate a risk of disruption of future court proceedings. (*Ibid.*) In exercising its discretion, the court may rely on a defendant's previous conduct and need not credit assurances made by the defendant at the time of the motion that he or she would not cause further disruption of the proceedings. (*Ibid*.)

When considering a *Faretta* motion made on the eve of trial, the court's discretion is "broad." (*People v. Hardy* (1992) 2 Cal.4th 86, 196.) On appeal, we "must give 'considerable weight' to the court's exercise of discretion and must examine the total

circumstances confronting the court when the decision is made." (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398.)

Analysis

The court concluded Mack's motion was untimely because it was made on the day trial was scheduled to begin.[7] Moreover, it was accompanied by a request for a continuance that the trial court had already rejected.[8] Although there is no bright line test for determining the timeliness of a *Faretta* motion (*People v. Clark* (1992) 3 Cal.4th 41, 99), the courts have noted a motion made within three calendar days of the commencement of trial does not give rise to an unqualified right to self-representation,

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7 Mack argues his *Faretta* motion was timely because he first made the motion on October 24. However, there was substantial doubt at that hearing about Mack's competence, and the garbled request by Mack was apparently focused on allowing him to discharge his attorney so he could plead guilty to all charges and request the maximum sentence, not to take over trial of the case. A *Faretta* motion must be unequivocal "to protect the courts against clever defendants who attempt to build reversible error into the record by making an equivocal request for self representation." (*People v. Marshall, supra,* 15 Cal.4th at p. 22.) The demand for self-representation must be both articulate and unmistakable (*id.* at p. 21), and where "it is clear from the record that defendant never made an unequivocal assertion of his [or her] right to self-representation . . . [a] trial court [does] not err in declining to consider such a request." (*People v. Valdez* (2004) 32 Cal.4th 73, 99.) We are not persuaded by Mack's claim that the timeliness of the motion must be assessed based on his October 24 statements.

8 Mack argues the request was timely because, although he asked to continue the trial to allow him to prepare, he agreed to start trial without a continuance were his motion granted. However, a court could well conclude his offer to go to trial without preparation cast doubt on whether his *Faretta* request was "knowing[] and intelligent[], having been apprised of the dangers of self-representation" (*People v. Welch, supra,* 20 Cal.4th at p. 729), and was attempting to set up the record for appeal by "playing 'the *Faretta* game' " (*People v. Williams* (1990) 220 Cal.App.3d 1165, 1170) for a subsequent appeal asserting his trial was unfair because he was denied time to prepare.

and a court has discretion to deny the motion as untimely. (*People v. Rudd* (1998) 63 Cal.App.4th 620, 626.) Indeed, even a motion made six calendar days prior to trial was made in such "close proximity" to trial that the decision whether to deny it as untimely was within the discretion of the trial court. (*People v. Ruiz* (1983) 142 Cal.App.3d 780, 789-791).

The court below carefully considered each of the factors relevant to a *Faretta* motion made on the eve of trial. It considered the quality of counsel's representation (*People v. Marshall, supra,* 13 Cal.4th at p. 827), and noted Mack's attorney was competent and prepared for trial. It assessed Mack's stated reason for the request, and concluded the purported conflict arising from his alleged physical attraction to counsel was "not credible to me [but instead] seem[s] to me to be patently false and manipulative."[9] The court also evaluated whether Mack had a proclivity to substitute counsel, and concluded Mack did manifest a proclivity to try to manipulate the proceedings to delay trial (by apparently feigning mental illness and then refusing to cooperate with the doctor in the section 1368 proceedings and by seeking a continuance on the day of trial), which is a permissible consideration. (See *People v. Marshall, supra,* 15 Cal.4th at p. 23 [court may deny a motion if it finds it is made for the purpose of frustrating the orderly administration of justice].) The court also considered whether Mack's prior conduct raised a likelihood the proceedings would be disrupted were his

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9 The court noted this "problem" arose only on the day of trial, was inconsistent with Mack's heterosexual history, and that Mack made the claim with "a little grin on his face."

motion for self-representation granted. (*People v. Jenkins, supra,* 22 Cal.4th at pp. 962-963.) The court noted he had delayed the proceedings by feigning mental illness and there was "reason to believe that that behavior could occur again," had shown a mercurial temperament and sullenly obstreperous behavior, and had threatened to spit on the prosecutor. These behaviors raised concerns that Mack would be unable to comport with appropriate courtroom behavior but would instead be disruptive were he representing himself. The court concluded Mack's course of conduct showed he was "playing a game with the court" and seeking to "delay these proceedings because the options are not great," which are proper considerations supporting denial of a *Faretta* motion. (*People v. Williams, supra,* 220 Cal.App.3d at p. 1170.)

We conclude, considering all the circumstances, the denial of Mack's *Faretta* motion was not an abuse of discretion.

III

THE *BLAKELY*[10]*/CUNNINGHAM* ISSUES

Mack contends the trial court erred by imposing the six-year upper term for his burglary conviction because the sentence was based on facts not found by a jury beyond a reasonable doubt or admitted by him in violation of *Blakely* and *Cunningham.* The People contend the claim is not preserved for appeal, and in any event there was no sentencing error.

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10 *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

A. The Sentencing Hearing

At the sentencing hearing, the court imposed the upper term for his burglary conviction (count 7), stating:

> "I am imposing the upper term of six years on the burglary count. The reason for that--the additional circumstances in aggravation that I find that support that are the defendant does have a substantial criminal record. He's been committing crimes for years, despite his youth, against numerous types of victims. The crimes are increasing in seriousness and increasing in violence, and his pattern and history does indicate that the defendant is a serious danger to the community. For that reason, I'm imposing the upper term . . . ."

B. *Blakely/Cunningham*

In *Blakely, supra*, 542 U.S. 296, the United States Supreme Court held Washington's sentencing procedure, by permitting the trial court to add three years to the defendant's sentence based on an aggravating factor of deliberate cruelty that was neither found true by a jury nor admitted by the defendant as part of his guilty plea, violated the defendant's Sixth Amendment right to a jury trial. (*Blakely,* at pp. 301-305.) In so doing, the court applied its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490, quoted in *Blakely, supra,* at p. 301.) *Blakely* concluded " the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant." (*Blakely,* at p. 303.)

Subsequently, in *People v. Black* (2005) 35 Cal.4th 1238, 1258, the California Supreme Court concluded a trial court's imposition of an upper term under California's determinate sentencing scheme based on facts not found by a jury or admitted by a defendant does *not* violate either *Blakely* or the United States Constitution. However, on January 22, 2007, in *Cunningham, supra*, 127 S.Ct. 856, the United States Supreme Court rejected *Black*.

In *Cunningham*, the court noted California's determinate sentencing law (DSL) and relevant sentencing rules "direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts--whether related to the offense or the offender--beyond the elements of the charged offense." (*Cunningham, supra*, 127 S.Ct. at p. 862.) Furthermore, "an upper term . . . may be imposed only when the trial judge finds an aggravating circumstance." (*Id*. at p. 868.) *Cunningham* held imposition of an upper term under California's determinate sentencing law, based on neither a prior conviction nor facts found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments of the United States Constitution, stating:

> "California's determinate sentencing law (DSL) assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence. The facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of the evidence, not beyond a reasonable doubt. The question presented is whether the DSL, by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. We hold that it does." (*Cunningham, supra*, 127 S.Ct. at p. 860.)

The *Cunningham* court reasoned:

> "As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. [*Apprendi*], 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Blakely* [, *supra*,] 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). '[T]he relevant "statutory maximum," ' this Court has clarified, 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.' *Blakely*, 542 U.S., at 303-304, 124 S.Ct. 2531 (emphasis in original)." (*Cunningham*, *supra*, 127 S.Ct. at p. 860.)

The *Cunningham* court reversed the defendant's upper term because "the four-year elevation based on judicial factfinding denied petitioner his right to a jury trial." (*Cunningham*, *supra*, 127 S.Ct. at p. 860.) *Cunningham* concluded: "In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Id*. at p. 868.) Accordingly, *Cunningham* held:

> "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact 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.]" (*Ibid*.)

C. Waiver

The People first argue Mack waived any claim that the court improperly relied on his criminal history because Mack did not object at the sentencing hearing. (See *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.) However, Mack's sentencing occurred on

January 13, 2006, in the interregnum between *Black* and *Cunningham*. Accordingly, at the time of sentencing, the controlling law was *Black*, which concluded imposition of an upper term under California's determinate sentencing scheme based on facts not found by a jury or admitted by a defendant did *not* violate *Blakely*.

In *People v. Scott* (1994) 9 Cal.4th 331, the California Supreme Court held a defendant's failure to challenge in the trial court the imposition of an aggravated sentence based on erroneous or flawed information waived that issue for purposes of appeal. However, *Scott's* reason for its waiver rule--it was necessary to facilitate the prompt detection and correction of error in the trial court, thus reducing the number of appellate claims and preserving judicial resources (*id.* at pp. 351-353)--is a pragmatic rationale that does not support the application of the waiver rule here. Prior to *Cunningham*, the controlling law in California was that there was no constitutional right to a jury trial in connection with a court's imposition of the upper term. Because of this state of the law, an assertion of a constitutional challenge to the imposition of an upper term would not have achieved the purpose of prompt detection and correction of error in the trial court. To the contrary, an objection would have been futile in light of *Black*, and we will not require interposition of futile objections at trial to preserve issues for appeal. (Cf. *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5.)

Moreover, the essence of an allegation of *Blakely* error is that the defendant was deprived of his or her constitutional right to a jury trial on the factors on which the trial court relied in imposing an upper term. A defendant is not precluded from asserting on appeal that he was denied his constitutional right to a jury trial, despite a failure to raise

the issue in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5.) Because a claim of *Blakely* error involves a partial deprivation of the right to a jury trial--a jury trial on aggravating factors--Mack's challenge to his upper term is cognizable on appeal even though he did not raise the issue in the trial court.

D. Analysis of *Cunningham* Issue

Mack argues the trial court's rationale for imposing the upper term shows it engaged in both a quantitative and qualitative analysis of his criminal history, as well as a predictive analysis of his danger to the community, and these considerations violate *Cunningham* and exceed the limited exception recognized by *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 257 for sentence decisions based on his prior convictions. The People argue the *Almendarez-Torres* exception, recognized in *Apprendi*, *supra*, 530 U.S. at p. 490 [in imposing an aggravated sentence, "the fact of a prior conviction" need not be proved to a jury beyond a reasonable doubt]) and reaffirmed in *Blakely* and *Cunningham*, apply broadly to all sentence decisions based broadly on the defendant's recidivist behavior, and therefore the trial court's selection of the upper term based on Mack's recidivism is not barred by *Blakely* and *Cunningham*.[11] (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222.)

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11 The People make no effort to argue that, if we conclude the factual basis relied on by the trial court was impermissible under *Cunningham*, the error was harmless and the sentence may be affirmed.

The Trial Court Relied on Impermissible Factors

The People argue it was permissible for the trial court to rely on its findings that Mack's prior convictions were numerous and of increasing seriousness, and that he posed a danger to the community based on his history. The People note that under *Almendarez-Torres v. United States, supra,* 523 U.S. 224, a court may impose a sentence that exceeds the statutory maximum on the basis of a defendant's prior conviction, and contend that courts have construed the "*Almendarez-Torres* exception" to apply broadly, encompassing more than the mere fact of a prior conviction. The People maintain *Almendarez-Torres* applies to the "recidivism factors" on which the trial court relied in imposing an upper term in this case.

Prior to *Cunningham*, courts, including the California Supreme Court, had construed the *Almendarez-Torres* exception to apply to more than the mere the fact of a prior conviction. (See e.g. *People v. Thomas, supra,* 91 Cal.App.4th at p. 221 [agreeing with "courts [that] have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism' "]; *People v. McGee* (2006) 38 Cal.4th 682, 708-709 [concluding Court of Appeal erred in "narrowly constru[ing] the *Almendarez-Torres* exception for recidivist conduct as preserved by *Apprendi"*]; accord *People v. Black, supra,* 35 Cal.4th at p. 1269 [construing *Apprendi* and its progeny only to apply to "offense-based facts"] (conc. & dis. opn of Kennard, J.).)

However, in *Cunningham*, the United States Supreme Court clarified the narrow scope of the *Almendarez-Torres* exception, and rejected the notion that recidivism-related

factors pertaining to a defendant need not be proven to a jury. In his dissent in *Cunningham*, Justice Kennedy wrote:

> "The Court could distinguish between sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply, and sentencing enhancements based on the nature of the offender, where it would not. California attempted to make this initial distinction. Compare Cal. Rule of Court 4.421(a) (Criminal Cases) (West 2006) (listing aggravating '[f]acts relating to the crime'), with Rule 4.421(b) (listing aggravating '[f]acts relating to the defendant'). The Court should not foreclose its efforts." (*Cunningham, supra*, 127 S.Ct. at p. 872 (dis. opn. of Kennedy, J).)

Nearly all of the "facts relating to the defendant" Justice Kennedy mentions, to which rule 4.421 (b) refers, are recidivism related factors. Rule 4.421 (b) provides:

> "Facts relating to the defendant include the fact that:
>
> "(1) The defendant has engaged in violent conduct that indicates a serious danger to society;
>
> "(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;
>
> "(3) The defendant has served a prior prison term;
>
> "(4) The defendant was on probation or parole when the crime was committed; and
>
> "(5) The defendant's prior performance on probation or parole was unsatisfactory."

The *Cunningham* majority concluded that, pursuant to *Apprendi*'s " 'bright-line rule' " (*Cunningham, supra*, 127 S.Ct. at p. 869, quoting *Blakely, supra*, 542 U.S. at p. 308), those factors *are* subject to *Apprendi*'s jury trial requirement:

> "Justice KENNEDY urges a distinction between facts concerning the offense, where *Apprendi* would apply, and facts concerning the

> offender, where it would not. *Post,* at 872 (dissenting opinion). *Apprendi* itself, however, leaves no room for the bifurcated approach Justice KENNEDY proposes. See 530 U.S., at 490, 120 S.Ct. 2348 ('*[A]ny* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' (emphasis added.))."
> (*Cunningham, supra*, 127 S.Ct. at p. 869, fn. 14, quoting *Apprendi*.)

Prior to *Cunningham*, the United States Supreme Court had repeatedly described the "narrow exception" (*Apprendi*, *supra*, 530 U.S. at p. 490) provided in *Almendarez-Torres* in a manner to exclude recidivism-*related* factors from its scope. (*United States v. Booker*, *supra*, 543 U.S. at p. 244 ["[W]e reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"]; *Blakely*, *supra*, 542 U.S. at p. 301 [stating that case requires court to "apply the rule we expressed in [*Apprendi*]: 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt' "]; *Ring v. Arizona*, *supra*, 536 U.S. at p. 597, fn. 4 [describing *Almendarez-Torres* as holding "that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"].)

We find nothing in *Booker*, *Blakely*, or *Ring* that warrants expanding the "exceptional departure" (*Apprendi*, *supra*, 530 U.S. at p. 487) established in *Almendarez-Torres* from the "historic practice" outlined in *Apprendi*, which prohibits the imposition of a term of punishment greater than that authorized by the jury's verdict. (*Apprendi*, at p. 487.) Accordingly, we conclude that the United States Supreme Court's statement that,

"[e]xcept for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt' " (*Cunningham*, *supra*, 127 S.Ct. at p. 868), means that courts may consider *only* the *fact* of the defendant having incurred a prior conviction, and not other factors related to the defendant's prior convictions.

Although " 'that should be the end of the matter' " (*Cunningham*, *supra*, 127 S.Ct. at p. 858), lest we be charged with adopting a "wooden" interpretation of the *Almendarez-Torres* exception (*Cunningham*, *supra*, 127 S.Ct. at p. 872 (dis. opn. of Kennedy, J.)), we note that many of the reasons the Supreme Court offered in *Apprendi* for distinguishing *Almendarez-Torres* apply with equal force to the recidivism related factors present in this case. (See *Apprendi*, *supra*, 530 U.S. at p. 488, fn. omitted ["Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range."].)

Unlike the bare, and admitted, prior convictions at issue in *Almendarez-Torres*, Mack did not admit the recidivism-*related* aggravating facts in this case, and a jury has not determined any of those facts to be true beyond a reasonable doubt. Because none of the recidivism-*related* aggravating factors on which the trial court in this case relied is the mere fact of a prior conviction, we conclude the trial court improperly relied on these factors in imposing an upper term.

The error requires reversal

The People do not contend the *Cunningham* error in this case was harmless. Because we cannot determine what sentence selection the trial court would have made had it limited itself to the facts of Mack's prior convictions, we reverse and remand for resentencing.

DISPOSITION

The convictions are affirmed. The judgment is reversed as to the term imposed on count 7 pursuant to *Cunningham*, and on counts 1and 9 pursuant to section 654, and the matter is remanded for resentencing and for correction of the abstract of judgment.

McDONALD, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.