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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS JOHN MARTINEZ, JR.,

Defendant and Appellant.

A104728

(Lake County Super. Ct.

Nos. CR 5244 & CR032574)

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. Martinez* (Nov. 19, 2004, A104728) [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 aggravated term violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), because the aggravating facts were neither admitted by defendant in the course of entering his no contest plea nor decided by a jury beyond a reasonable doubt. We also held that the error cannot be harmless in this case, and remanded for resentencing.

Cunningham applies *Blakely* to California sentencing law, and only confirms the validity of our initial holding. “Because we deem it unnecessary to modify our prior opinion, we reiterate that opinion in its entirety.” (*City of Long Beach v. Bozek* (1983) 33 Cal.3d 727, 728.)¹

Let the remittitur issue forthwith and the case is hereby sent back for resentencing.

Marchiano, P.J.

We concur:

Stein, J.

Swager, J.

¹ We recognize that the Court of Appeal cases cited in our prior *Blakely* harmless error analysis have been the subject of grants of review since we filed our initial opinion. But the rationale of those cases has not changed.