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## Digest: *People v. French*

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*Digest: People v. French*

*Brian S. Thomley*

Opinion by George, C.J., expressing the unanimous view of the Court.

Issue

Does a trial court's imposition of the upper term sentence on a criminal defendant based on aggravating circumstances violate his Sixth Amendment right to a jury trial under *Cunningham v. California*<sup>1</sup> when the defendant had pleaded guilty or no contest?

Facts

On June 8, 2004, defendant, Wesley David French pleaded no contest to six counts of lewd and lascivious conduct with a child pursuant to a plea agreement.<sup>2</sup> The trial court sentenced him to the maximum term available under the agreement, eighteen years, by finding aggravated circumstances.<sup>3</sup> On appeal of his conviction, defendant claimed that the trial judge violated his Sixth Amendment right to a jury trial under *Blakely v. Washington*<sup>4</sup> by imposing an upper term based on facts neither proved to a jury nor admitted by him.<sup>5</sup> The court of appeal rejected this argument under *People v. Black*<sup>6</sup> and concluded that the plea agreement constituted an admission that his conduct supported the upper term.<sup>7</sup>

While defendant's case was on a petition for review before the California Supreme Court, the U.S. Supreme Court decided *Cunningham v. California*,<sup>8</sup> overruling *Black* and holding that California's determinate sentencing law violated the Sixth Amendment.<sup>9</sup> Defendant then argued that his Sixth Amendment rights were violated under *Cunningham*.<sup>10</sup> The

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<sup>1</sup> 549 U.S. 270 (2007).

<sup>2</sup> *People v. French*, 178 P.3d 1100, 1103–04 (Cal. 2008).

<sup>3</sup> *Id.* at 1104.

<sup>4</sup> 542 U.S. 296, 303–04 (2004) (holding that a criminal defendant's Sixth Amendment right to a jury was violated when a trial judge, rather than a jury, imposed an exceptional sentence based on facts neither proved to a jury beyond a reasonable doubt nor admitted by the defendant.).

<sup>5</sup> *French*, 178 P.3d at 1103.

<sup>6</sup> 113 P.3d 534, 548–50 (Cal. 2005) (holding that *Blakely* did not apply to California's determinate sentencing law).

<sup>7</sup> *French*, 178 P.3d at 1103.

<sup>8</sup> 549 U.S. 270 (2007). After remand, the Supreme Court of California applied the *Cunningham* decision in *People v. Black*, 161 P.3d 1130 (Cal. 2007).

<sup>9</sup> *French*, 178 P.3d at 1103.

<sup>10</sup> *Id.*

California Supreme Court granted review.<sup>11</sup>

## Analysis

### 1. Certificate of Probable Cause

The Attorney General argued that the appeal must be dismissed because the trial court did not issue a certificate of probable cause for appeal under section 1237.5 of the Penal Code.<sup>12</sup> The Court said, however, that this requirement does not apply if the appeal challenges grounds that arose after the entry of the plea and that did not affect the plea's validity.<sup>13</sup> Defendant's appeal challenged whether aggravating circumstances were established in the sentencing hearing and not the validity of the plea.<sup>14</sup> Thus, the Court said, a certificate of probable cause was not required.<sup>15</sup>

### 2. Forfeiture of Claim by Failure to Object

The Attorney General also argued that defendant forfeited his Sixth Amendment claim by failing to raise it at the sentencing hearing.<sup>16</sup> The Court recognized that an appellate court will not ordinarily consider a claim of error if an objection was not made in the court below.<sup>17</sup> However, the Court distinguished this case because a defendant's failure to object does not preclude his asserting on appeal that he was denied his constitutional right to a jury trial.<sup>18</sup> The Court reasoned that an express waiver is required to waive the right to a jury trial under the state or federal constitutions.<sup>19</sup> The Court stated that the defendant's waiver encompassed his substantive offenses but not any aggravating circumstances.<sup>20</sup> Thus, the Court said, defendant's failure to request a jury trial on the aggravating circumstances did not forfeit his Sixth Amendment claim on appeal.<sup>21</sup>

### 3. Establishment of Aggravating Circumstances by Defendant's Admissions

The Court also rejected the court of appeal's conclusion that the defendant, by entering into the plea agreement and by stipulating to the factual basis of the plea as stated by the prosecutor, admitted that his conduct supported the upper term.<sup>22</sup> The Court reasoned that defendant's plea constituted an admission to the elements of the charged offenses and

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1104–05.

<sup>13</sup> *Id.* at 1105.

<sup>14</sup> *Id.* at 1106.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1107.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1108.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

not to any aggravating circumstance.<sup>23</sup> The Court also said that the factual basis as stated by the prosecutor did not establish an aggravating circumstance.<sup>24</sup> Further, the Court said, defendant did not stipulate to those facts but only stipulated that witnesses would testify as to those facts.<sup>25</sup>

### Holding

The Court held that, since the aggravating circumstance upon which the maximum sentence was imposed on defendant was neither admitted by him nor decided by a jury, his Sixth Amendment right to a jury trial was violated under *Cunningham*.<sup>26</sup> The Court concluded that this error was not harmless because there was a reasonable doubt whether a jury would have found an aggravating circumstance sufficient to authorize the upper term.<sup>27</sup>

### Legal Significance

This decision extends *Cunningham*'s Sixth Amendment protection to criminal defendants who plead guilty or no contest and waive a jury trial on the elements of the offenses. This decision requires that a jury find the aggravating circumstances that are sufficient to impose the maximum term under the plea agreement unless the defendant has admitted to the aggravating circumstances or waived a jury as to those circumstances. The Court did not decide whether *Cunningham* error can ever be found harmless in a case in which the defendant pleads guilty or no contest.

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<sup>23</sup> *Id.* at 1109.

<sup>24</sup> *Id.* at 1110.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1111.

<sup>27</sup> *Id.* at 1111–12.