

**1. IMPOSITION OF THE UPPER TERM VIOLATED APPELLANT’S FEDERAL CONSTITUTIONAL RIGHTS TO PROOF BEYOND A REASONABLE DOUBT AND A JURY TRIAL PURSUANT TO *BLAKELY* AND *BOOKER* BECAUSE THE AGGRAVATING FACTORS WERE NOT FOUND BY A JURY.<sup>1</sup>**

When the court sentenced appellant to the upper term of four years for his conviction of section 245 (a)(1), the judge said it was based upon several circumstances in aggravation, namely that the crime was a “vicious, cowardly act,” the victim was vulnerable, and the crime showed that planning was involved. (4RT 486.)

As noted in footnote 1, this court is presently bound by California Supreme Court precedent. However, given the recent grant of certiorari in *Cunningham v. California*, No. 05-6551, cert. granted, February 21, 2006, appellant presents the issue and shall request to file supplemental briefing if and when any favorable decision issues before finality of this appeal.

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<sup>1</sup> *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; and *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]. Appellant acknowledges that the California Supreme Court’s decision in *People v. Black* (2005) 35 Cal.4th 1238, -- holding that *Blakely* does not invalidate the California sentencing scheme as to the choice of an upper term or consecutive sentencing -- is binding authority in this Court. Appellant raises this claim here to preserve it for review.