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Opinion following remand from U.S. Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LOUIS MUNOZ SOTO, Defendant and Appellant.	H027820 (Santa Clara County Super. Ct. No. C9540785)

Defendant Louis Munoz Soto pleaded no contest to four counts of forcible lewd and lascivious acts on a child under the age of 14 (Pen. Code, § 288, subd. (b)(1), hereafter, § 288(b)(1)).[1] The court sentenced defendant to a total prison term of 32 years, based upon consecutive upper term sentences of eight years for each count.

Defendant challenged the conviction, claiming that the court committed sentencing error: (1) under the United States Supreme Court's decision in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), which was decided after judgment was entered on defendant's conviction; and (2) by imposing an ex post facto parole revocation restitution fine under section 1202.45.

[1] All further statutory references are to the Penal Code unless otherwise stated.

In our decision filed July 8, 2005, we held, inter alia, that there was no *Blakely* error. Thereafter, the United States Supreme Court granted certiorari, vacated the prior judgment, and remanded the case to us for further consideration in light of the Supreme Court's decision in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*). After such reconsideration, we conclude that there was *Blakely* error. We hold further that imposition of the fine was improper. We therefore reverse and remand for resentencing with instructions that any new sentence not include a parole revocation restitution fine.

FACTS

This appeal concerns principally the legal question of whether the sentence imposed by the court violated *Blakely*, *supra*, 542 U.S. 296. We therefore present a short summary of the facts as taken from the probation report.

In March 1995, the San Jose Police Department responded to a report of child molestation. The police conducted an investigation by interviewing the two minor victims and their respective mothers.

Victim 1 reported that in approximately 1993 (when he was seven or eight years old), he would visit his aunt, who was married to defendant. During these visits, defendant would take victim 1 to the basement and molest him. The four incidents described by victim 1 involved defendant fondling and placing his mouth over victim 1's penis, defendant forcing victim 1 to rub defendant's penis, and one instance in which defendant attempted to place his penis into victim 1's buttocks.

Victim 2 reported to the police that he and his mother had lived with defendant in San Jose from 1992 to 1993, when victim 2 was nine years old. He told the police that defendant had molested him on five occasions in victim 2's bedroom. Defendant forced victim 2 to orally copulate him. On two occasions, defendant went to victim 2's room at night, pushed him on the bed, and placed his

penis in victim 2's anus. In addition, there were three occasions in which defendant rubbed victim 2's " 'privates.' "

PROCEDURAL BACKGROUND

Defendant was charged by complaint with four violations of section 288(b)(1) (forcible lewd and lascivious acts on a child under the age of 14).[2] As later amended, the complaint alleged that defendant committed two forcible lewd acts each on an eight-year-old boy, victim 1, and on a nine-year-old boy, victim 2. Two of the incidents occurred in 1993; the other two violations were alleged to have occurred between September 1993 and January 1994.[3]

Following a partial preliminary examination during which the two victims provided testimony, defendant pleaded no contest to the four counts. On June 14, 2004,[4] the court sentenced defendant to a total prison term of 32 years; defendant received an upper term sentence of eight years for each offense, and the court ordered that each eight-year prison term be served consecutively. Defendant filed a timely notice of appeal from the judgment on August 16, 2004.

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[2] "Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years." (§ 288(b)(1).) Subdivision (a) of section 288 provides: "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

[3] The complaint was filed April 26, 1995. After the molestation was reported in 1995, defendant apparently moved out of the area and was not arrested until 2003.

[4] Significantly, *Blakely*, *supra*, 542 U.S. 296, was decided on June 24, 2004.

On July 8, 2005, we filed our opinion in which we struck the parole revocation restitution fine and affirmed the judgment as modified. The California Supreme Court denied review. Thereafter, defendant filed a petition for certiorari, which was granted on February 20, 2007; at that time the United States Supreme Court vacated the judgment and remanded the case to us for further consideration in light of *Cunningham*, *supra*, 549 U.S. __ [127 S.Ct. 856]. (*Soto v. California* (2007) __ U.S. __ [127 S.Ct. 1211].)

Thereafter, we recalled the remittitur. Having received no supplemental briefing, we ordered the cause submitted on April 16, 2007.

DISCUSSION

I. *Contentions On Appeal*

Defendant asserts two challenges to the judgment. These claims of error are as follows:

1. The court imposed upper term sentences for each of the four convictions based upon circumstances in aggravation that were neither part of the jury's factual findings nor admitted by defendant. Under *Blakely*, *supra*, 542 U.S. 296, this sentence violated defendant's right to a jury trial guaranteed under the United States and California Constitutions.

2. The court's imposition of a parole revocation restitution fine under section 1202.45 violated ex post facto principles because the underlying crimes of which defendant was convicted preceded the enactment of the statute authorizing such fine.

As a preliminary matter, the Attorney General challenges defendant's right to assert a *Blakely* challenge from the judgment entered following defendant's no

contest plea because he did not obtain a certificate of probable cause.[5] After first addressing this procedural challenge, we discuss defendant's two claims of error, *post*.

II. *Whether Appeal Without Probable Cause Certificate Was Cognizable*

The Attorney General argues that defendant is precluded from challenging the judgment because he did not obtain a certificate of probable cause under section 1237.5.[6] He argues in essence that defendant's appeal constitutes a challenge of his no contest plea, thus triggering the requirement of a certificate of probable cause.

Defendant responds that he was not required to obtain such a certificate. He argues that his appeal is not a challenge to the validity of the no contest plea, and, as such, is excepted under California Rules of Court, former rule 30(b) (now rule 8.304(b)), from the requirement that an appeal from a judgment entered after a guilty or no contest plea be accompanied by a certificate of probable cause.[7] We agree with defendant's position.

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[5] The trial judge denied defendant's request for issuance of a certificate of probable cause on August 17, 2004.

[6] "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, . . . , except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." (§ 1237.5.)

[7] California Rules of Court, former rule 30(b) (now rule 8.304(b)), provides in relevant part: "(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere, . . . , the defendant must file in that superior court--in addition to the notice of appeal required by (a)--the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] . . . [¶] (4) The defendant need not comply with (1) if the (continued)

Generally speaking, under section 1237.5, a defendant may not bring an appeal from a judgment of conviction entered after a guilty or no contest plea,[8] including an appeal challenging the validity of the plea. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1095.) As the Supreme Court has held, however: "Notwithstanding the broad language of section 1237.5, it is settled that two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: (1) search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. [Citations.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 74-75 (*Panizzon*).) The issue that is crucial in determining the necessity of a probable cause certificate is not the time the challenge is made or its facial nature; rather, it is the substance of the challenge. (*Id.* at p. 76.)

Thus, in *Panizzon*, the Supreme Court pierced the surface of the defendant's challenge to the sentence imposed after his no contest plea in determining that a probable cause certificate was required. The defendant--after pleading no contest as part of a plea under which he agreed to a sentence of life with the possibility of parole plus 12 years--appealed, claiming that the agreed-upon sentence was disproportionate to the sentence his codefendant received and was thus unconstitutional. (*Panizzon*, *supra*, 13 Cal.4th at pp. 73-74.) The court

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notice of appeal states that the appeal is based on: [¶] (A) the denial of a motion to suppress evidence under Penal Code section 1538.5, or [¶] (B) grounds that arose after entry of the plea and do not affect the plea's validity. [¶] (5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1)."

[8] A no contest plea has the same legal effect as a guilty plea. (*People v. Robinson* (1997) 56 Cal.App.4th 363, 368; § 1016, subd. 3.)

agreed that the defendant did not on the surface appear to be attacking the validity of the plea; nonetheless, it held that he was required to obtain a probable cause certificate because the "challenge to a negotiated sentence imposed as part of the plea bargain is properly viewed as a challenge to the validity of the plea itself." (*Id.* at p. 79; see also *id.* at p. 89 [defendant, in reality, "seeks to challenge the very sentence he negotiated as part of the plea"].)

In *People v. Buttram* (2003) 30 Cal.4th 773 (*Buttram*), the Supreme Court declined to extend the principle of *Panizzon* to a sentencing challenge where the defendant's prior guilty plea only specified a *maximum* sentence (or "lid"), as opposed to a stipulated term. In *Buttram*, the defendant pleaded guilty pursuant to a plea agreement under which there would be a maximum six-year sentence. (*Id.* at p. 777.) The defendant argued on appeal that the trial court had abused its sentencing discretion by denying the defendant's request for diversion to a drug treatment program. (*Id.* at pp. 776, 779.) In evaluating the substance of the defendant's challenge to ascertain whether it was, in fact, a challenge to the plea's validity, the court stated: "[W]here the terms of the plea agreement leave issues open for resolution by litigation, appellate claims arising within the scope of that litigation do not attack the validity of the plea, and thus do not require a certificate of probable cause." (*Id.* at p. 783.)

The court in *Buttram* held that under a plea agreement that stipulates only a "*maximum* sentence," as opposed to "a *specific* or *recommended* sentence," "the parties leave unresolved between themselves the appropriate sentence within the maximum. That issue is left to the normal sentencing discretion of the trial court, to be exercised in a separate proceeding." (*Buttram*, *supra*, 30 Cal.4th at p. 785.) Accordingly, the court held that no probable cause certificate was required to challenge the court's exercise of sentencing discretion because "the bargain contemplated separate sentencing proceedings in which the appropriate sentencing

choice, within the agreed maximum term, would stem from adversarial debate between the parties and the exercise of sentencing discretion by the trial court." (*Id.* at p. 787; see also *People v. Lloyd* (1998) 17 Cal.4th 658, 665 [appeal asserting *Romero*[9] sentencing error did not attack validity of plea].)

Buttram is controlling. Here, the record is clear that the plea agreement involved an agreed *maximum* sentence only, not a stipulated sentence. The prosecution made this point clear at the time the no contest plea was entered, indicating that was "an open plea . . . . No promises. [¶] And the mitigated [sentence defendant] can receive is 12 years in the state prison. The aggravated he can receive is 32 years in the state prison." The plea clearly left "open for resolution by litigation" (*Buttram*, *supra*, 30 Cal.4th at p. 783) the issue of *precisely what sentence* between that 12- to 32-year range would be imposed by the court in the exercise of its sentencing discretion. We conclude that defendant here was not required under section 1237.5 and California Rules of Court, former rule 30(b) (now rule 8.304(b)) to obtain a certificate of probable cause in order to assert his challenge on appeal that there was *Blakely* sentencing error.[10] Accordingly, we proceed with our review on the merits of that claimed error.

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[9] See *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

[10] *People v. Young* (2000) 77 Cal.App.4th 827, cited by the Attorney General, does not support the requirement here for a probable cause certificate. In *Young*, the defendant, after pleading guilty and agreeing to a maximum prison term of 25 years to life, and after receiving the maximum sentence, claimed that the sentence constituted cruel and unusual punishment. (*Id.* at p. 830.) The appellate court dismissed the appeal because the defendant did not obtain a probable cause certificate, concluding that by arguing that the maximum sentence to which he agreed in the plea was unconstitutional, he was, in effect, attacking the validity of the plea. (*Id.* at pp. 832-833.) Likewise, *People v. Cole* (2001) 88 Cal.App.4th 850, 854, 867-869 (*Cole*)--cited by the Attorney General and involving the same issue as in *Young*, where the defendant stipulated to a maximum sentence and later challenged it as being unconstitutional--is inapposite. (continued)

III. *Claimed Blakely Violation*

A. *Contentions of the Parties*

The trial court imposed the upper term of eight years in state prison for each of the four counts charging violations of section 288(b)(1). The court's reasons for imposing the upper term sentences as to each of the four counts--recited largely from the probation report--were that (1) the crimes "involved great violence, bodily harm, threat of bodily harm expressing high degree of cruelty, viciousness or callousness"; (2) the victims were "particularly vulnerable"; (3) the crimes were carried out in a manner indicating "planning, sophistication or professionalism"; (4) defendant "took advantage of a position of trust, confidence"; (5) defendant "engaged in violent conduct including serious danger to society"; (6) there were "repeat molestations, multiple victims, multiple times, by multiple times this easily could have reached toward the hundreds"; (7) defendant "used force, forcibly held [the victims] down, turned them over, forced them to have oral copulation on him"; and (8) defendant showed "no remorse."[11]

Defendant claims that, under *Blakely*, *supra*, 542 U.S. 296, he was deprived of his constitutional right to a jury trial when the trial court imposed upper term sentences for each of the four counts to which he pleaded no contest. He argues

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(The *Cole* court, however, decided--in a holding that was discussed and cited with approval by the Supreme Court in *Buttram* (*Buttram*, *supra*, 30 Cal.4th at pp. 777, 786-787)--that the defendant's challenge that the trial court abused its discretion in failing to strike a prior conviction did not require a probable cause certificate. (*Cole*, *supra*, at pp. 869-872.)) In our case--unlike *Young* or *Cole*--defendant does *not* assert that the statutory maximum itself is unconstitutional; instead, he claims that the process by which the court arrived at defendant's sentence was flawed. This does not amount to an attack upon the validity of the plea.

[11] The trial court's comments often refer to the crime in the singular. It is clear from a review of the entire record, however, that the trial court's description of factors in aggravation are to the multiple offenses to which defendant pleaded no contest.

that *Blakely* applies to the imposition of upper term sentences under California's determinate sentencing statute. Defendant asserts that there was *Blakely* sentencing error here because: (1) he did not admit any of the factors in aggravation on which the court's sentence was based; (2) none of the exceptions to *Blakely* are applicable; and (3) none of the factors cited by the sentencing court was proved beyond a reasonable doubt.

The Attorney General responds that defendant forfeited any claim of error under *Blakely* by failing to raise the issue below. Further, even if defendant did not forfeit his appellate challenge, *Blakely* does not apply to California's determinate sentencing law (hereafter, sometimes DSL). Alternatively, the Attorney General argues that any *Blakely* error was harmless because the jury *would have found* one or more of the factors in aggravation utilized by the judge in its upper term sentence.

We conclude below that defendant did not forfeit his contention that there was *Blakely* error. We hold further that, under *Cunningham*, *supra*, 549 U.S. __ [127 S.Ct. 856], the trial court's imposition of upper term sentences for each of the four convictions implicated defendant's Sixth Amendment right to a jury trial and thus there was *Blakely* error.

B. *Discussion of Blakely Challenge*

1. *Forfeiture*

The Attorney General contends that defendant forfeited his objection to the upper term sentence by failing to specifically object at the time of the sentencing hearing under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*). The term "waiver" has been applied both to the intentional relinquishment of a known right and the forfeiture of a claim by failing to timely assert it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) " 'The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial

court, so that they may be corrected or avoided and a fair trial had. . . .' " (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

The holding in *Apprendi* (discussed *post*) had been understood to apply to sentence enhancements; before *Blakely* was decided, it was not commonly understood that it had application to factors in aggravation. Thus, we believe it reasonable that a defense attorney--of course, being unable to foresee the Supreme Court's decision in *Blakely* decided after defendant's sentencing--would not object to the court's reliance upon factors not decided by a jury beyond a reasonable doubt in imposing an upper term sentence. Furthermore, even had defendant here objected to the imposition of the upper term sentences, he would not have achieved the purpose of the prompt detection and correction of trial court error. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237.) We therefore find no forfeiture due to defendant's failure to object at sentencing.

2. *Merits of Blakely challenge*

In *Apprendi*, *supra*, 530 U.S. 466, the United States Supreme Court held unconstitutional a New Jersey law permitting an enhancement that could result in potentially double the maximum sentence for possession of a firearm in the event that the judge determined by a preponderance of the evidence that a hate crime had been committed; it concluded that "[o]ther 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.) This principle, the court explained, derives from two constitutional rights, namely, the right to trial by jury, and the prohibition against depriving a person of liberty without due process of law. (*Id.* at pp. 476-477; see also *Ring v. Arizona* (2002) 536 U.S. 584, 603-609.)

In *Blakely, supra*, 542 U.S. 296, the court considered Washington determinate sentencing laws under which the trial court--after the defendant had pleaded guilty to a class B felony--determined that he "had acted with 'deliberate cruelty' " (*id.* at p. 298), and accordingly "imposed an exceptional sentence of 90 months--37 months beyond the standard maximum." (*Id.* at p. 300.) The defendant contended that the Washington sentencing procedure deprived him of his federal constitutional right to a jury trial to determine beyond a reasonable doubt all of the facts required for the sentence imposed. (*Id.* at p. 301.) The Supreme Court agreed, holding "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at pp. 303-304.) The judge had relied on a fact not found by the jury or admitted by the defendant; accordingly the Supreme Court concluded that the sentence in *Blakely* was invalid. (*Id.* at p. 304; see also *United States v. Booker* (2005) 543 U.S. 220 [*Blakely* holding found applicable to Federal Sentencing Guidelines] (*Booker*).)

In *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), the California Supreme Court considered the effect of *Blakely* and *Booker* on upper term sentencing under California's determinate sentencing law. The court noted that under California's DSL, "[t]hree terms of imprisonment are specified by statute for most offenses." (*Id.* at p. 1247.) The judge's sentencing discretion is guided as follows: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b).) The court may select the upper term "only if, after a consideration of all the relevant

facts, the circumstances in aggravation outweigh the circumstances in mitigation." (Cal. Rules of Court, rule 4.420(b).) The California Supreme Court acknowledged under this scheme, "[t]he sentencing judge retains considerable discretion to identify aggravating factors" (*Black*, *supra*, at p. 1247), and that he or she may base that decision "on aggravating facts that have not been found true by the jury." (*Id*. at p. 1248.)[12] Circumstances in aggravation or mitigation need be proved to the sentencing judge only by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).)

The *Black* court held that the imposition of an upper term sentence under California's determinate sentencing statute was not unconstitutional under *Blakely*. It reasoned: "[E]ven though section 1170, subdivision (b) can be characterized as establishing the middle term sentence as a presumptive sentence, the upper term is the 'statutory maximum' for purposes of Sixth Amendment analysis. The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. . . . [T]he upper term is the 'maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*. . . .' " (*Black*, *supra*, 35 Cal.4th at pp. 1257-1258, quoting *Blakely*, *supra*, 542 U.S. at p. 303.)

The defendant in *Cunningham*, *supra*, 549 U.S. __ [127 S.Ct. 856]--like the defendant in *Black*--received an upper term sentence of 16 years after his conviction under section 288.5, the sentencing judge having found six aggravating

[12] Rule 4.421 of the California Rules of Court provides a nonexclusive list of 17 factors in aggravation that the sentencing judge may consider. The sentencing judge, however, may consider any "additional criteria reasonably related to the decision being made." (Cal. Rules of Court, rule 4.408(a).)

factors warranting the sentence. (*Cunningham*, *supra*, at pp. __ [at pp. 860-861].) The California Court of Appeal (First District) rejected the defendant's *Blakely* challenge, and the California Supreme Court denied review, having decided *Black* nine days earlier. (*Id.* at p. __ [at p. 861].)

As a starting point for the court's analysis, Justice Ginsburg, writing for the majority in *Cunningham*, noted: "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham*, *supra*, 549 U.S. at pp. __ [127 S.Ct. 856 at pp. 863-864].) Accordingly, after discussing California's determinate sentencing law, and the court's decisions in *Apprendi*, *Blakely*, and *Booker*, the court concluded that "aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation.] 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.' " (*Id.* at p. __ [at p. 868].) After discussing *Black* at some length, the *Cunningham* court concluded that the California Supreme Court's reasoning was at odds with the principles of *Apprendi* and *Blakely*: "Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment. It is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* at p. __ [at p. 870].)

There was sentencing error here. The sentencing provision with which we are concerned here specifies that each count of forcible lewd acts upon a minor is punishable "by imprisonment in the state prison for three, six, or eight years." (§ 288(b)(1).) Thus, under *Cunningham*, the middle term of six years was the "statutory maximum" for Sixth Amendment purposes under *Blakely*. (*Cunningham*, *supra*, 549 U.S. at p. __ [127 S.Ct. 856 at p. 868].) And none of the factors in aggravation identified by the sentencing judge concerned prior crimes of which defendant was convicted--an exception to the requirement that circumstances in aggravation supporting an upper term sentence must be found by a jury beyond a reasonable doubt. (*Ibid.*) Accordingly, we conclude that there was *Blakely* error here with respect to the court's imposition of (upper term) eight-year sentences for each of the four counts to which defendant pleaded no contest, and that this error requires a remand for resentencing.

IV. *Parole Revocation Restitution Fine*

Defendant challenges the court's imposition of a parole revocation restitution fine in the amount of $9,600 under section 1202.45.[13] He contends that this fine violated ex post facto principles because the statute authorizing such fine was enacted in 1995, *after* the offenses were alleged in the complaint to have been committed (i.e., between 1993 and 1994). Defendant cites *People v. Callejas* (2000) 85 Cal.App.4th 667, 669, in support of his position.

[13] Section 1202.45 originally read as follows: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked." (Stats. 1995, ch. 313, § 6, p. 1758, eff. Aug. 3, 1995.)

The Attorney General concedes the point. Indeed, he admits that the imposition of an unauthorized sentence as is the case here is a recognized exception to the waiver rule. (See *People v. Andrade* (2002) 100 Cal.App.4th 351, 354.)

We agree that the imposition of the fine here violated ex post facto principles under *Callejas*. Accordingly, we order that the fine be stricken.

DISPOSITION

The judgment is reversed and remanded to the trial court for the limited purpose of resentencing in a manner that is consistent with (1) this opinion, (2) *Blakely*, *supra*, 542 U.S. 296, and (3) *Cunningham*, *supra*, 549 U.S. __ [127 S.Ct. 856]. The new sentence shall not include a parole revocation restitution fine.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.