

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

S126182

v.

KEVIN MICHAEL BLACK,

Defendant and Appellant.

Fifth Appellate District, No. F042592
Tulare County Superior Court No. 79557
The Honorable William Silveira, Jr., Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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Respondent respectfully submits this supplemental brief in response to this Court's Order regarding the effect of the recent decision in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856], on the instant case. In the Order, the Court also requested that the parties address two specific issues: "(1) Is there any violation of the defendant's Sixth Amendment rights under *Cunningham* if the defendant is eligible for the upper term based upon a single aggravating factor that has been established by means that satisfy the governing Sixth Amendment authorities -- in the present case, for example, by the defendant's prior convictions or by the jury's finding that the offense involved force or fear -- even if the trial judge relies on other aggravating factors (not established by such means) in exercising his or her discretion to select among the three sentences for which the defendant is eligible?" and "(2) Does *Cunningham* affect this court's conclusion in *People v. Black* (2005) 35 Cal.4th 1238, 1261-1264, that *Blakely v. Washington* (2004) 542 U.S. 296 does not apply to the imposition of consecutive sentences under Penal Code section 669?"

A. Summary

In *Cunningham*, the Supreme Court held that California's procedure for imposing an upper term violates the Sixth Amendment right to a jury trial

because it exposes a defendant to a sentence greater than the statutory maximum based on facts found by the trial court by a preponderance of the evidence rather than by the jury beyond a reasonable doubt. The Court found that the statutory maximum term under the Determinate Sentencing Law for Sixth Amendment purposes is the middle term, which is the longest sentence a trial court may impose exclusively on the basis of facts inherent in the jury's verdict or admitted by a defendant himself.

In this supplemental brief, respondent addresses three issues primarily relating to upper terms -- the remedy for the defect in California's upper term procedure, the approach for determining whether reversal is warranted in pending cases, and the application of this approach to this case. Respondent also explains why *Cunningham* does not call California's consecutive sentencing procedure into question.

In order to remedy the constitutional infirmity identified in *Cunningham*, this Court should reform Penal Code section 1170 by eliminating the requirement of an aggravating circumstance to impose an upper or lower term, leaving the selection of the lower, middle, or upper term to the trial court's broad discretion. This is one of the two remedies expressly suggested by the *Cunningham* court itself, and it closely parallels the Supreme Court's reformation of the federal sentencing guidelines in order to preserve their constitutionality in *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]. The remedied statute should be made applicable to all sentencings and resentencings.

A case should not be remanded under *Cunningham*, however, until a reviewing court has considered three principal questions. First, the court should determine whether the defendant preserved the constitutional objection to his sentence by objecting on that ground in the trial court. Traditional forfeiture rules apply to claims of constitutional violations in sentencing.

Second, the reviewing court should affirm upper term sentences,

including appellant's, when the trial court finds at least one constitutionally valid aggravating circumstance. The Supreme Court recognized in *Cunningham* that under California law, only one aggravating circumstance is necessary to support an upper term. This means that if the trial court finds one aggravating circumstance based on the defendant's criminal history, on the defendant's admission, or on a fact inherent in the jury's verdict, there is no *Cunningham* violation. By the same reasoning, the trial court in such a situation is permitted to find any other aggravating circumstance supporting the upper term, regardless of whether that finding would independently satisfy *Cunningham*.

Third, the reviewing court should conduct a harmless error analysis. A violation of the Sixth Amendment of the kind identified in *Cunningham* is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. *Cunningham* error is harmless where a reviewing court determines that it is beyond a reasonable doubt that a jury would have found at least one aggravating circumstance to be true, had that aggravating circumstance been presented.

Applying these principles to this case, this Court should find that appellant forfeited his claims because he failed to raise any objection to his sentence, let alone an objection based on federal constitutional grounds. If appellant's upper term claim in this case is reviewable, there was no violation of *Cunningham*. First, the trial court's finding that appellant had prior convictions of increasing seriousness or numerousness qualifies this case for the recidivism exception to *Cunningham*. Second, the jury's special allegation findings that appellant used force or fear in committing his offense and that he engaged in substantial sexual conduct were inherent in several of the trial court's aggravating circumstance findings. The recidivism and jury findings were sufficient to authorize the imposition of an upper term sentence.

In any event, there was no prejudice from any *Cunningham* error. Any

of the trial court's findings would have been found by a jury beyond a reasonable doubt, as they were based on overwhelming or undisputed evidence. Thus, any Sixth Amendment violation in this case was harmless beyond a reasonable doubt.

In answer to the second question posed by this Court, *Cunningham* has no effect on this Court's conclusion in *Black* that consecutive sentencing decisions do not implicate *Blakely*. Moreover, an additional basis for distinguishing California's consecutive sentencing procedure is that there is no presumption of concurrent sentencing and no requirement that a court find a fact to impose a consecutive sentence. In any event, in this particular case, appellant's sentence would still be permissible under *Cunningham* because the trial court's multiple-victim finding in imposing consecutive sentences was a fact actually found by the jury. Furthermore, consecutive sentencing in this case would not raise any aggregated statutory maximum for the crimes because appellant was sentenced to at least one indeterminate life term, and the combined consecutive sentences did not exceed this statutory maximum of life.

B. The *Cunningham* Decision

In *Cunningham*, the United States Supreme Court held that California's procedure for selecting upper terms violates the defendant's Sixth and Fourteenth Amendment right to jury trial because it "assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham, supra*, 127 S.Ct. at p. 860.) *Cunningham* was convicted of continuous sexual abuse of a child under the age of 14, which was punishable by a lower, middle, or upper term of 6, 12, or 16 years, respectively. (*Ibid.*) At sentencing, the trial court imposed the upper term after finding six aggravating circumstances, including the victim's particularly vulnerability and *Cunningham's* violent conduct. (*Ibid.*) The trial court found one circumstance in mitigation: that *Cunningham* had no prior

criminal record. (*Id.* at pp. 860-861.) The California state courts rejected Cunningham’s claim that California’s procedure for selecting his upper term violated his Sixth and Fourteenth Amendment rights to jury trial. (*Id.* at p. 861.)

The Supreme Court reversed, finding that California’s sentencing procedure under the Determinate Sentencing Law (DSL) violates the Sixth Amendment by allocating to judges, not juries, the authority to find facts which would permit the imposition of an upper term sentence. The Supreme Court’s analysis of this issue was based on a review of California’s sentencing scheme. Under Penal Code section 1170, subdivision (b),^{1/} “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (*Cunningham, supra*, 127 S.Ct. at p. 861.) The Penal Code also “directed the State’s Judicial Council to adopt Rules guiding the sentencing judge’s decision whether to ‘impose the lower or upper prison term.’” (*Cunningham, supra*, 127 S.Ct. at p. 862, fn. omitted, quoting § 1170.3, subd. (a)(2).) The Court explained that the rules serve other significant functions. The rules restate the standard in section 1170, subdivision (b), for selecting a term (Cal. Rules of Court,^{2/} rule 4.420(a)), define aggravating circumstances as “facts” justifying the upper term (rule 4.405(d)), mandate that these facts “shall be established by a preponderance of the evidence” (rule 4.420(b)), and require that these facts be “stated orally on the record” if imposing a lower or upper term (rules 4.406(b), 4.420(e)). (*Cunningham, supra*, 127 S.Ct. at p. 862 & fn. 6.)

The Court also noted that the rules indicate what facts are appropriate

1. Unless otherwise indicated, all further statutory references are to the Penal Code.

2. All further references to “rules” are to those of the California Rules of Court.

for a trial court to consider in selecting a term. The rules give “a nonexhaustive list of aggravating circumstances” for a court to consider, including facts pertaining to the crime and defendant, and any other statutorily declared aggravating circumstances. (*Cunningham, supra*, 127 S.Ct. at p. 862, citing rule 4.421(a), (b), (c).) A trial court also “is free to consider any “additional criteria reasonably related to the decision being made.”” (*Cunningham, supra*, 127 S.Ct. at p. 862, quoting *People v. Black* (2005) 35 Cal.4th 1238, 1247, quoting rule 4.408(a).) “A fact that is an element of the crime,’ however, ‘shall not be used to impose the upper term.’” (*Cunningham, supra*, 127 S.Ct. at p. 862, quoting rule 4.420(d).) The Court found that under state law, there was no indication that an upper term could be authorized based not on facts, but on the “[g]eneral objectives of sentencing” in rule 4.410(a)), which include the protection of society, punishment, deterrence, and securing restitution for crime victims. (*Cunningham, supra*, 127 S.Ct. at p. 863.)

The *Cunningham* Court also observed that this Court had “repeatedly referred to circumstances in aggravation as facts.” (*Cunningham, supra*, 127 S.Ct. at p. 863, citing *Black, supra*, 35 Cal.4th at p. 1256 and *People v. Wiley* (1995) 9 Cal.4th 580, 587.) The Court noted that there had no been no citation to any California case where a trial court imposed the upper term based not on a fact, “but solely on the basis of a policy judgment or subjective belief.” (*Cunningham, supra*, 127 S.Ct. at p. 863.)

The Court then evaluated California’s sentencing procedure by applying the principle it distilled from its previous cases: “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.” (*Cunningham, supra*, 127 S.Ct. at p. 861, citing, inter alia, *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]

(*Blakely*), and *Booker*, *supra*, 543 U.S. 220 (*Booker*).) The Court found that *Blakely* and *Booker* bore “most closely on the question presented in this case.” (*Cunningham*, *supra*, 127 S.Ct. at p. 861.) The Court reiterated the definition of “statutory maximum” it had set forth in *Blakely*:

“Our precedents make clear . . . 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* 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. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ . . . and the judge exceeds his proper authority.”

(*Cunningham*, *supra*, 127 S.Ct. at p. 865, quoting *Blakely*, 542 U.S. at p. 303.)

Applying the *Blakely* test to California’s Determinate Sentencing Law, the Court determined that “the middle term, not the upper term, is the relevant statutory maximum.” (*Cunningham*, *supra*, 127 S.Ct. at p. 868.) The Court found that because the Penal Code and the implementing California Rules of Court allow for imposing an upper term on the basis of a fact that a judge finds by a preponderance of the evidence, the jury trial and reasonable doubt requirements of due process are missing in the DSL. (*Ibid.*)

In reaching this decision, the high court rejected this Court’s conclusion, set forth in *People v. Black*, *supra*, 35 Cal.4th 1238, that California’s upper term procedure was constitutional under *Apprendi*, *Blakely*, and *Booker*. (*Cunningham*, *supra*, 127 S.Ct. at pp. 868-871.) In *Black*, this Court found that “the level of discretion available to a California judge in selecting which of three available terms to impose . . . appears comparable to the level of discretion that the high court has chosen to permit federal judges in post-

Booker sentencing.” (Cunningham, supra, 127 S.Ct. at pp. 869-870, quoting Black, supra, 35 Cal.4th at p. 1261.) The high court found this comparison “unavailing.” (Cunningham, supra, 127 S.Ct. at p. 870.) The Court explained that in California, unlike in the post-Booker federal system, “judges are not free to exercise their ‘discretion to select a specific sentence within a defined range.’” (Id., quoting Booker, supra, 543 U.S. at p. 233.) Instead, the trial court in Cunningham “was to select 12 years, nothing less and nothing more, unless he found facts allowing the imposition of sentence of 6 or 16 years.” (Id. at p. 870.) The high court also rejected this Court’s conclusion that the presumptive middle term was merely a reasonableness restraint akin to the reasonableness standard in the post-Booker federal scheme:

The reasonableness requirement *Booker* anticipated for the federal system operates within the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints. 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.

(Ibid.)

After holding the Determinate Sentencing Law unconstitutional, the *Cunningham* Court stated that “[a]s to the adjustment of California’s sentencing system in light of our decision, ‘[t]he ball . . . lies in [California’s] court.’” (Cunningham, supra, 127 S.Ct. at p. 871.) But the Court also suggested two “paths” that California courts could follow in adjusting that system to comply with the Court’s Sixth Amendment precedent while still retaining determinate sentencing: (1) “calling upon the jury -- either at trial or in a separate sentencing proceeding -- to find any fact necessary to the imposition of an elevated sentence”; or (2) allowing sentencing courts “‘to exercise broad discretion . . . within a statutory range,’ which, ‘everyone agrees,’ encounters no Sixth Amendment shoal.” (Ibid., fn. omitted, quoting

Booker, supra, 543 U.S. at p. 233.)

C. Reformation

Respondent respectfully submits that the proper remedy is for this Court to reform section 1170 to allow trial courts to exercise broad discretion in selecting a term of imprisonment. In order to accomplish this, the Court should interpret section 1170 to eliminate the requirement that trial courts must engage in factfinding before a term other than the middle term can be imposed. This would allow trial courts to continue exercising their broad discretion in selecting one of three terms, including the consideration of all relevant circumstances relating to the offense and the offender.

Respondent will demonstrate that this suggested statutory reformation best reflects the Legislature's intent in enacting the determinate sentencing scheme. This is shown in three major ways. First, the proposed reformation is consistent with this Court's prior interpretation of the DSL. Second, this remedy closely resembles the high court's own method for preserving the federal sentencing system by excising its unconstitutional features. Third, this option is consistent with the statutory reformations undertaken by the Supreme Courts of both New Jersey and Ohio, both of which had sentencing schemes similar to California's. Not least of all, this remedy would preserve the essential policies and procedures of a system that has dispensed fair and effective justice in California for close to 30 years.

1. This Court Should Reform The Unconstitutional Statutory Provisions To Conform With The Legislature's Intent In Enacting The DSL

This Court will reconstrue or rewrite a statute to preserve the statute's constitutionality when appropriate. In *Kopp v. Fair Political Practices Commission* (1995) 11 Cal.4th 607, 626-662, the Court affirmed the judiciary's

critical role in reinterpreting and reforming legislative enactments consistent with legislative intent, in order to resolve constitutional infirmities when possible, rather than invalidating the enactment or subverting the intent of the Legislature. The issue in *Kopp* was whether certain provisions of Proposition 73, a campaign reform measure that the federal court had held unconstitutional, could be reformed to meet constitutional requirements, rather than simply be declared unenforceable. (*Id.* at p. 614.) The Court repudiated “the view that a court lacks authority to rewrite a statute in order to preserve its constitutionality or that the separation of powers doctrine . . . invariably precludes such judicial rewriting.” (*Id.* at p. 615.) The Court explained that “established decisions of this court and the United States Supreme Court” demonstrated that “a reviewing court may, in appropriate circumstances, and consistently with the separation of powers doctrine, reform a statute to conform to constitutional requirements in lieu of simply declaring it unconstitutional and unenforceable.” (*Ibid.*; see *id.* at pp. 627-653 [broadly surveying federal and California state cases applying reformation].) The Court also rejected any distinction between cases where the Court “simply placed a saving ‘construction’ on the statutory language, thereby constricting the reach of the statute,” and cases where a Court would have “to *disregard* language and to *substitute* reformed language[.]” (*Id.* at p. 646.) The Court explained that this distinction “suggests a difference of degree, not kind,” and that “in all of these cases, we ‘rewrote’ each statute in order to preserve its constitutionality.” (*Ibid.*)

The Court then set out the test for whether to reform or simply invalidate a statute:

The guiding principle is consistency with the Legislature’s [] intent: a court may reform a statute to satisfy constitutional requirements if it can conclude with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by

the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute. (*Kopp, supra*, 11 Cal.4th at p. 615.) Under this test, the Court equated reforming a statute with rewriting a statute. (*Id.* at pp. 660-661.) The Court found that the application of this test will avoid “‘judicial policymaking’ in the guise of statutory reformation, and thereby avoid encroaching on the legislative function in violation of the separation of powers doctrine.” (*Id.* at p. 661.)

The Court in *Kopp* also cautioned that “in all cases, reformation should be tested objectively against the standard set out herein.” (*Kopp, supra*, 11 Cal.4th at p. 663.) Citing a 1979 law review article by Justice Ginsburg, a member of the *Booker* remedial majority and the author of *Cunningham*, this Court determined that

courts may legitimately employ the power to reform in order to effectuate policy judgments clearly articulated by the Legislature or electorate, when invalidating a statute would be far more destructive of the electorate’s will. And, “of course . . . ultimate authority to recast or scrap the law in question remains with the political branches [and, as in this case, the electorate].” (*Id.* at p. 661, quoting Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation* (1979) 23 *Clev.St.L.Rev.* 301, 324.)

The *Kopp* Court ultimately determined that under this test, reformation of the unconstitutional provisions of the campaign reform measure was inappropriate. (*Kopp, supra*, 11 Cal.4th at p. 615.) As to the sections pertaining to the unconstitutional “‘intercandidate’” ban, the federal court had found the section unconstitutional on First Amendment grounds that would remain unenforceable “whether or not we reform the latter two sections.” (*Id.* at p. 615.) And as to the sections pertaining to the unconstitutional statutes regulating contributions to individual candidates, political committees, or parties, reformation was impermissible because it would not “closely effectuate

policy judgments clearly expressed by the electorate.” (*Id.* at pp. 615-616, 662-663.) More specifically, the proposed reforms would alter the amount of funding that the “electorate planned” in the proposition. (*Id.* at pp. 615-616, 664-670.)

Kopp’s express recognition of this Court’s role in reforming statutes was foreshadowed by *People v. Roder* (1983) 33 Cal.3d 491. In *Roder*, this Court held that the provisions of section 496 created an unconstitutional mandatory presumption. (*Id.* at p. 504.) In order to save the statute’s constitutionality and prevent it from being struck down in its entirety, the People requested that this Court construe the statute as a legislatively-prescribed permissive inference. (*Id.* at p. 507.) Although the People’s request required “some creative statutory construction,” the *Roder* Court found the transformation of the statutory presumption into a permissive inference reasonable and feasible. (*Id.* at pp. 505-506.) This Court explained that preserving the statutory provisions in a restrained form still enabled the trial courts to inform the jury of an inference that the Legislature had concluded could be reasonably drawn from proof of the basic facts, and that the permissive inference served an important substantive function in regulating the conduct addressed in the section. (*Id.* at pp. 506-507.) This Court ordered that on retrial, the trial court should apply this reinterpretation of the statute. (*Id.* at p. 507.)

This approach of reconstructing a statute to permit a constitutional interpretation was followed by the Court of Appeal in *People v. Forrester* (1994) 30 Cal.App.4th 1697. In *Forrester*, the Court of Appeal first held that section 1320, subdivision (b), contained an unconstitutional mandatory presumption. (*Id.* at pp. 1701-1703.) Expressly following the approach taken in *Roder*, the *Forrester* court further held that in future prosecutions for violations of section 1320, subdivision (b), the section should be construed as containing a permissive inference in order to preserve the statute's constitutionality. (*Id.* at p. 1703.)

This Court's recent decision in *In re Howard N.* (2005) 35 Cal.4th 117 also demonstrates its willingness to reform a statute so as to preserve its constitutionality. (*Id.* at p. 132, citing generally to *Kopp, supra*, 11 Cal.4th at pp. 615, 641-661.) In *Howard N.*, this Court concluded that to comply with due process, the juvenile extended detention scheme needed to contain a provision requiring a finding that the person has "serious difficulty in controlling dangerous behavior." (*Id.* at p. 132.) Although this provision was not an explicit part of the statute, the Court nonetheless reformed the statute to add it on the ground that doing so "does not appear inconsistent with legislative intent" and "do[es] no violence to the words of the statute; rather, the words are susceptible of that interpretation." (*Id.* at p. 133.) In making this addition, the Court found that "construing the statutory scheme to avoid constitutional infirmity demonstrates greater deference to the Legislature than simply invalidating, as the Court of Appeal did, the legislative scheme." (*Ibid.*)

These principles are readily applicable to this case, and will permit the Court to reform California's sentencing scheme to bring it into compliance with the federal Constitution. Respondent suggests the following specific revisions to the pertinent statutes and rules. First, the Court should strike the language of section 1170, subdivision (b), that the Supreme Court found unconstitutional: "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.” (See *Cunningham, supra*, 127 S.Ct. at pp. 861, 868.) With this amendment, the subdivision would then give a trial court the broad discretion to impose a lower, middle, or upper term without the requirement of additional factfinding. (See *Cunningham, supra*, 127 S.Ct. at p. 871.) This “broad discretion” standard would permit, consistent with the elimination of the factfinding requirement, and subject to abuse of discretion review, the imposition of a term “solely on the basis of a policy judgment or subjective belief,” such as the “[g]eneralized objectives of sentencing” in rule 4.410(a), including, for example, the protection of society, punishment, deterrence, and securing restitution. (See *Cunningham, supra*, 127 S.Ct. at p. 863.)^{3/}

In the same manner, the Court should replace the phrase in section 1170, subdivision (b), that begins, “In determining whether there are circumstances that justify imposition of the upper or lower term . . . ,” with “In determining the appropriate term”^{4/} This change is necessary to remove the unconstitutional requirement that an upper or lower term must be justified by an aggravating or mitigating circumstance found by the court. Under the reformed system, a reason without a factual finding is sufficient to impose any term. For similar reasons, the Court should adjust the requirement that the trial

3. This same construction would apply to section 1170.1, subdivision (d), which addresses the procedure for punishing sentence enhancements with three possible punishments.

4. The entire sentence currently reads: “In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer’s report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing.”

court “set forth on the record the facts and reasons for imposing the upper or lower term,” to require that the trial court “set forth on the record the reasons for imposing the term selected.” This alteration also eliminates the need for further judicial factfinding, and provides the same procedure for middle terms as for upper or lower terms. Further, section 1170.3, authorizing the Judicial Council to adopt rules guiding the selection of the lower or upper terms, should be reformed to authorize the Judicial Council to adopt rules for the selection of the lower, *middle*, or upper term, so that the procedure for selecting middle terms will be no different than the procedure for selecting lower or upper terms. (See *Cunningham, supra*, 127 S.Ct. at p. 862.)^{5/}

This statutory reformation would be fully consistent with the Legislature’s overall intent in enacting the tripartite sentencing scheme. Under the Determinate Sentencing Act of 1976, the Legislature intended to provide the trial courts the ability to impose any of the three possible terms in any particular case, with the trial court exercising its broad discretion to select the appropriate term on the basis of the circumstances relating to the crime and the

5. At the time of this writing, there is a bill pending in the Legislature which would amend section 1170, subdivision (b), in a manner similar to respondent’s proposed reformation. (See S.B. 40 (2007-2008 Reg. Sess.), as amended Mar. 8, 2007, available at <http://www.leginfo.ca.gov/bilinfo.html>.) At present, one difference between respondent’s proposed reformation and the bill is that the reformation employs *Cunningham*’s “broad discretion” standard for selecting a sentence, whereas the bill reaches the same end by naming the standard “sound discretion.” “Broad discretion” is defined by the three available terms. The review for reasonableness will insure that the exercise of discretion will be “sound.” Also, the bill, but not respondent’s proposed reformation, deletes the following phrase regarding the purpose of the statement of aggravation or mitigation that the parties may submit: “to dispute facts in the record or the probation officer’s report, or to present additional facts.” Respondent has not suggested this deletion in the proposed reform because it does not appear necessary to render section 1170 constitutional.

defendant. (*Black, supra*, 35 Cal.4th at p. 1260;^{6/} *People v. Hernandez* (1988) 46 Cal.3d 194, 205; *People v. Wright* (1982) 30 Cal.3d 705, 713.) Thus, an interpretation of section 1170 in a manner that preserves its constitutionality under *Cunningham* would effectuate the Legislature’s intent to give the trial courts the full flexibility to tailor an appropriate sentence under the circumstances of each individual case, and would preserve a system that has worked effectively for close to 30 years.

Respondent’s proposed construction would be far more consistent with legislative intent than the alternative of requiring a jury trial on aggravating circumstances in order to permit imposition of the upper term. In its declaration of purpose in section 1170, subdivision (a)(1), the Legislature expressed its intent to assign to the trial court, rather than a jury, the role of identifying and imposing the appropriate sentence. (*Ibid.* [“The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion”].) The Legislature then formulated a system which assigned to the trial court the responsibility to identify and evaluate the applicable circumstances in each case in order to best achieve the goals of determinate sentencing.

In enacting the Determinate Sentencing Act, the Legislature also expressly rejected a more rigid and formalized trial-like approach to sentencing determinations, opting instead for the current system. California’s Determinate

6. Although the Supreme Court vacated this Court’s *Black* opinion on February 20, 2007, and remanded the case for reconsideration in light of *Cunningham*, it retains its precedential value on any point not rejected in *Cunningham*. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 598 [citing *People v. Bacigalupo* (1991) 1 Cal.4th 103 as vacated on other grounds]; *People v. Thomas* (1992) 2 Cal.4th 489, 518 [citing *People v. Velasquez* (1980) 26 Cal.3d 425 as vacated on other grounds].)

Sentencing Act was first created in 1976 by Senate Bill 42 (S.B. 42) and had an effective date of July 1, 1977. (Stats. 1976, ch. 1139, § 273, p. 5140.) Under this original version of the Determinate Sentencing Act, section 1170, subdivision (b), provided that the trial court could consider only those aggravating or mitigating circumstances set forth in formal motions by the parties, and the court had to conduct an evidentiary hearing and make formal findings of fact and statements of reasons as to those circumstances in order to impose an upper or lower term. (Stats. 1976, ch. 1139, § 273, p. 5140.)^{7/}

But in early 1977, prior to the effective date of S.B. 42, the Legislature enacted Assembly Bill 476 (A.B. 476) to resolve numerous concerns that had arisen in response to S.B. 42. (See Stats. 1977, ch. 165, pp. 639-680.) One of the Legislature's specific amendments in A.B. 476 involved rewriting section 1170, subdivision (b) to eliminate the cumbersome and formalistic motion practice and evidentiary factfinding requirements, and allow the court to rely on a broad array of relevant information, including probation reports, hearsay, and statements by the victim and family members. (Stats. 1977, ch. 165, § 15,

7. The original version of section 1170, subdivision (b) provided in relevant part:

Such circumstances shall only be considered if set forth in a motion made prior to or at the time set for sentencing. The upper term may be imposed only when the circumstances alleged to be in aggravation of the crime are found to be true by the trial judge upon the evidence introduced at the hearing on the motion and any evidence previously heard by the judge at the trial, and factual findings and reasons in support thereof are set forth on the record at the time of sentencing. . . . The lower term may be imposed only when the circumstances alleged to be in mitigation of the crime are found to be true by the trial judge upon the evidence introduced at the hearing on the motion and any evidence previously heard by the judge at the trial, and factual findings and reasons in support thereof are set forth on the record at the time of sentencing.

(Stats. 1976, ch. 1139, § 273, p. 5140.)

pp. 647-649.) To ensure that the modified version of the Determinate Sentencing Act, rather than the original version, became effective on July 1, 1977, the Legislature enacted A.B. 476 as an urgency measure and made its effective date the same as S.B. 42. (Stats. 1977, ch. 165, § 100, p. 680.)

This legislative history of section 1170, subdivision (b), shows that the Legislature expressly considered and rejected requiring a more trial-like approach to sentencing determinations of aggravating and mitigating circumstances, and this legislative intent runs directly counter to requiring a formal jury trial and proof beyond a reasonable doubt on aggravating circumstances before a court could impose an upper term. Thus, construing the statute in a way that retains the role of the trial court and the current broad and informal nature of sentencing determinations is the only way to preserve the legislative objectives expressed in section 1170, subdivision (b), and the entire determinate sentencing scheme.

In addition, as enacted, section 1170 places an equal burden on the prosecution and the defendant – each must offer proof of facts to obtain a term other than the middle term, and each must make that proof by the preponderance-of-the-evidence standard. This legislative mandate to place the parties on equal footing would be violated if the prosecution’s burden was to prove aggravating facts to a jury beyond a reasonable doubt, but the defendant was required only to prove facts in mitigation to a judge by a preponderance of the evidence. That disparity, which would make mitigated terms much easier to achieve than aggravated terms, and would employ a dramatically less cumbersome and costly process for attaining lower terms than upper terms, would seriously erode the Legislature’s stated goal of “attaining terms proportionate to the seriousness of the offense.” (§ 1170, subd. (a)(1).)

Similarly, construing section 1170 to eliminate the requirement of factfinding would not grant the People a benefit at the expense of defendants. By eliminating any requirement that a trial court must find additional facts

before imposing a term other than the middle term, defendants would be able to receive the low term without the need for any factual findings on mitigating circumstances.

Furthermore, such a statutory construction would not prevent the trial court from taking into account all relevant considerations in selecting the appropriate term, nor would it make the selection of the appropriate term unbounded or arbitrary. The parties would still be permitted to present evidence and argue that there are aggravating and mitigating circumstances, the trial court would still be required to consider whatever evidence and argument the parties submitted, and the trial court would continue to exercise its broad discretion in selecting a term. As explained in Section C.4, *post*, the enumerated aggravating and mitigating circumstances currently identified in the rules of court would continue to play an illustrative role in providing guidance for the court in its exercise of discretion. Additionally, the trial court's decision to impose all terms, including the middle term, would continue to be reviewable on appeal for abuse of discretion, much like any other discretionary sentencing decision.^{8/} Finally, the trial court's statement of reasons for the imposition of a particular term would be taken into consideration by the appellate court in reviewing the decision.

The proposed reformation would also be far more consistent with the legislative intent behind the DSL than the alternative of removing the choice of an upper term and deeming the middle term the highest sentence that a trial court can lawfully impose. The Legislature provided that all three terms should be available, and it would plainly disserve the goals of punishment and uniformity in sentencing to grant defendants an unwarranted windfall based on

8. Even under the current system, a trial court's imposition of a middle term can still be reviewed for abuse of discretion. (See, e.g., *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1587-1588; *People v. Knowlden* (1985) 171 Cal.App.3d 1052, 1058-1059.)

a constitutional defect in the procedure for selecting upper terms.^{9/}

This Court's recent exposition of state law in *People v. Black, supra*, 35 Cal.4th 1238, also confirms that reforming the statute to reflect a "broad discretion" standard and to eliminate the judicial factfinding requirement is the appropriate remedy in this case. Although the *Cunningham* Court disagreed with this Court's legal conclusions, it relied heavily on this Court's statements in *Black* about California sentencing procedure in order to resolve the constitutional issue. (See *Cunningham, supra*, 127 S.Ct. at pp. 861-863, 868-871.) In discussing this procedure, this Court specifically stated that judges have "broad discretion" under current law to select an upper term, although that broad discretion is "constrained, to some degree" by the mandate in section 1170, subdivision (b), "that an aggravating factor exist" (*Black, supra*, 35 Cal.4th at pp. 1255, 1260.)^{10/} The Court also pointed out that, except for using a fact twice to impose an upper term and an enhancement, or to impose an upper term and as an element of the crime, "a judge is free to base an upper term sentence on any aggravating factor the judge deems significant" (*Id.* at p. 1255.) And "[a]lthough subdivision (b) is worded in mandatory language, the requirement that an aggravating factor exist is merely a requirement that the

9. For this reason, cutting off available sentences at the middle term in many cases would even be less consistent with legislative intent than allowing jury trials on aggravating circumstances. Thus, if this Court concludes that reformation is not the appropriate remedy, respondent respectfully requests that this Court recognize that trial courts have the legal authority to convene jury trials on aggravating circumstances. (See Code Civ. Proc., § 187; *People v. Chew Lang Ong* (1904) 141 Cal. 550, 552-553; see also *People v. Gurule* (2002) 28 Cal.4th 557, 632.) Respondent nonetheless acknowledges that jury trials on aggravating circumstances would raise a host of other litigable questions in such areas as notice, discovery, evidence, and jury instructions.

10. This phrase "constrained, to some degree" appears to imply that this Court considered this requirement of section 1170, subdivision (b), to have a relatively minor effect on the "broad discretion" standard in California.

decision to impose the upper term be *reasonable*.” (*Ibid.*) Given this interpretation of the DSL in *Black*, the Legislature surely would have preferred the proposed reformation remedy because it retains the essential elements of the system within *Cunningham*’s constraints: retaining the broad discretion standard, i.e., a reasonableness requirement, but removing the requirement of judicial factfinding to impose an upper or lower term, while still allowing any fact (save facts also used as elements or enhancements) to be used to impose any term.

In short, this Court should replace the “mandatory presumption” of the middle term with the constitutionally sound option of “broad discretion” defined by the high court in *Cunningham*. In place of the requirement in the statute and rules of court that a trial court find a fact in order to impose a lower or upper term, the Court should insert a provision that the trial court should exercise its sound discretion to choose any of the three legislatively mandated terms. Indeed, as previously noted, this is in practical terms very close to the current standard, as explained in *Black*. It is also undoubtedly a constitutionally valid standard, as noted in *Cunningham*. And it is undoubtedly the remedy that would be preferred by the Legislature.

2. The *Booker* Remedial Opinion Provides Further Support For This Court To Reinterpret And Reform The DSL In The Manner Suggested By Respondent

In addition to its own decisions, this Court looks to United States Supreme Court cases as “authority” for this Court’s reformation power. (See *Kopp, supra*, 11 Cal.4th at pp. 627-641 [“much of the jurisprudence of our own cases rests on and flows from decisions of the United States Supreme Court addressing judicial authority to reform statutes to preserve them against constitutional infirmity”].) Because *Booker*, like *Cunningham*, identified a right to have a jury trial on any fact at sentencing used to increase a sentence, this Court should closely evaluate the manner in which the Supreme Court

fashioned a remedy for the constitutional violation it found in the United States Sentencing Guidelines (“Guidelines”). Although the federal sentencing system is different and more complex than California’s, the remedy fashioned by the Supreme Court in *Booker* offers an apt and useful model for the reformation of DSL suggested by respondent. In *Booker*, the Supreme Court simply made the mandatory Guidelines advisory, and then held that federal sentences are to be reviewed for reasonableness. A similarly direct, clear and practical solution to the Sixth Amendment problem in this case can be used to preserve the basic shape of California’s DSL sentencing structure. The *Booker* formula would also lead this Court to delete the mandatory factfinding requirement for imposing an upper or lower term and to leave the selection of a sentence within the trial court’s broad discretion.

In *Booker*, the United States Supreme Court held that, under its decisions in *Apprendi, supra*, 530 U.S. 466, and *Blakely, supra*, 542 U.S. 296, the Sixth Amendment right to a jury trial was violated by the imposition of an enhanced sentence under the Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. (*Booker, supra*, 543 U.S. at pp. 226-237.) The jury found the defendant Booker guilty of possession with intent to distribute at least 50 grams of cocaine base (“crack”), based on evidence that he had 92.5 grams of crack in his bag. The statute under which he was convicted prescribed a minimum prison sentence of 10 years and a maximum sentence of life imprisonment, but based upon Booker’s criminal history and the quantity of drugs found by the jury, the Guidelines required the district court judge to impose a “base sentence” within the mandatory sentencing range of 210 months to 262 months in prison. The judge held a sentencing hearing and concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Under the Guidelines, these judicially-found facts prescribed a mandatory

sentencing range of 360 months to life imprisonment, and the judge imposed a 360-month sentence. Thus, “instead of the sentence of 21 years and 10 months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt,” Booker received a 30-year sentence. (*Id.* at p. 227.)

The Supreme Court held that Booker’s sentence violated the Sixth Amendment. (*Booker, supra*, 543 U.S. at p. 229.) The *Booker* Court found that there was no distinction of constitutional significance between the Guidelines and the Washington sentencing procedures at issue in *Blakely* because the sentencing rules in both systems were mandatory and imposed binding requirements on all sentencing judges. (*Id.* at pp. 231-235.) The *Booker* Court explained that Booker’s actual sentence was almost 10 years longer than the mandatory Guidelines range authorized by the jury verdict alone, and that the higher Guidelines range was authorized only by facts beyond those found by the jury (i.e., possession of additional 566 grams of crack). (*Id.* at p. 235.) The Supreme Court therefore concluded that the jury’s verdict alone in Booker’s case did not authorize the sentence and that the “judge acquired that authority only upon finding some additional fact.” (*Ibid.*) Accordingly, the Supreme Court held that the *Blakely* and *Apprendi* holdings applied to the Guidelines. (*Id.* at pp. 235-237.)

After concluding that the Sixth Amendment applied to the federal Sentencing Guidelines, the *Booker* Court then addressed the question of remedy, i.e., whether or to what extent the Guidelines were inapplicable. The Supreme Court answered this question “by looking to legislative intent” and “seek[ing] to determine what Congress would have intended in light of the Court constitutional holding.” In this regard, the Supreme Court was confronted with two alternative remedies: (1) “engraft onto the existing system” the jury-trial requirement and thereby change the Guidelines by preventing the sentencing court from imposing a sentence on the basis of a fact

that the jury did not find or the defendant did not admit; or (2) make the Guidelines system advisory by severing and excising the invalid portions of the statute, while maintaining a strong connection between the sentence imposed and the offender's real conduct, because such a connection was important to the legislative goal of sentence uniformity. (*Booker, supra*, 543 U.S. at p. 246.)

The Supreme Court recognized that either approach would significantly alter the system that Congress designed, but the *Booker* Court explained that the judicial factfinding inherent in the mandatory Guidelines system was no longer possible in light of the Court's constitutional holding. (*Booker, supra*, 543 U.S. at p. 246.) The Supreme Court therefore adopted the advisory approach and rejected the jury-trial approach because the remedy of making the Guidelines advisory was "more compatible" with the legislative intent and "deviate[d] less radically" from Congress' intended system. (*Id.* at pp. 246-247.)

Booker explained that there were multiple reasons why the rejected remedy of engrafting or superimposing the jury-trial requirement onto the existing sentencing scheme was inconsistent with Congress's intent in enacting the Guidelines. The Supreme Court first noted that the statute expressly provided that "the court" would consider the nature and circumstances of the offense and the history and characteristics of the defendant in sentencing, and that this reference to "the court" meant, in context, the judge working without the jury. The Supreme Court also noted that another statutory provision removed typical "jury trial" evidentiary limitations, such as the limitations on information concerning the defendant's background, character, and conduct. (*Booker, supra*, 543 U.S. at pp. 249-250.)

The Supreme Court next found that the basic statutory goal of diminishing sentencing disparity and increasing sentence uniformity depended on judicial efforts to base the punishment on the real conduct that formed the

basis for the crime of conviction. (*Booker, supra*, 543 U.S. at pp. 249-254.) The Court explained that the same offense could be committed in a host of different ways, but that, under a system with the jury trial requirement, the sentencing judge would be precluded from taking into account the actual manner in which the offense was committed unless the prosecutor charged more than the elements of the crime. (*Ibid.*) *Booker* then provided several examples to illustrate how the goal of “ensuring similar sentences for those who have committed similar crimes in similar ways” would be undermined by such a system. (*Id.* at p. 252.) The Supreme Court also found that engrafting a Sixth Amendment requirement onto the sentencing scheme would create a system more complex than Congress intended, and that plea bargaining under such a system would lead to diminished uniformity in sentencing. (*Id.* at pp. 253-257.) The Supreme Court further determined that the rejected remedy would create an asymmetrical system by making it more difficult to adjust sentences upward than to adjust them downward, and that such a “one-way lever” would be contrary to Congress’ intent. (*Id.* at pp. 257-258.)

After concluding that the remedy of advisory Guidelines was more consistent with the legislative intent, the Supreme Court then severed and excised the statutory provisions that were inconsistent with the Sixth Amendment, such as the provision that required sentencing courts to impose a sentence within the applicable Guidelines range. The Supreme Court also adopted a new “reasonableness” standard as the appellate standard of review for sentences imposed under the remedied sentencing scheme. (*Booker, supra*, 543 U.S. at pp. 259-263.) The Supreme Court further applied the remedial interpretation of the federal sentencing statutes to all cases on direct review, and explained that reviewing courts should apply prudential doctrines, such as forfeiture and harmless error, to determine whether a particular case needed to be remanded for a new sentencing hearing. (*Id.* at p. 268.) The Supreme Court acknowledged that its remedy was not the “last word,” and that it would be left

to Congress to devise a long-term sentencing system that was compatible with the Constitution. (*Id.* at p. 265.)

Now that the high court in *Cunningham* has found that the Sixth Amendment jury-trial right implicates the imposition of the upper term in California’s sentencing scheme, the *Booker* analysis provides strong and clear guidance for this Court on the issue of remedy. The alternatives in this case closely resemble the options the Supreme Court considered in *Booker*. The most radical option would be for this Court to decline to reinterpret section 1170, subdivision (b), in a constitutional manner. Such an approach would result in engrafting a jury-trial requirement onto the current system to prohibit the trial court from imposing the upper term on the basis of aggravating circumstances that were not found by the jury or admitted by the defendant. It is a considerable understatement to suggest that this alternative would drastically change the system designed by the Legislature.

The second alternative remedy, as previously discussed, would be for this Court to reinterpret section 1170, subdivision (b), so that the reformed statute would allow the trial court the broad discretion to impose the upper or lower term without any requirement of additional factfinding. Like the remedy adopted in *Booker*, this proposed interpretation of the statute would be far more consistent with the legislative policies and objectives behind the DSL, and “deviate less radically” from the Legislature’s intended system than the alternative of engrafting a jury-trial requirement onto the current statutory scheme.

The legislative intent has been expressed in several different ways. First, like the federal sentencing scheme, the express references to “the court” in section 1170 demonstrate that the Legislature contemplated that the sentencing judge, without the assistance of the jury, determine whether there were aggravating circumstances to justify the imposition of the upper term. (See also § 1170.3 [Rules of Court provide “criteria for the trial judge at the time of sentencing”].) In enacting section 1170, the Legislature also rejected evidentiary limitations typical to jury trials, and instead allowed the sentencing court to rely on a broad array of relevant information, including probation reports, hearsay, and statements by the victim and family members. (Compare Stats. 1977, ch. 165, § 15, pp. 647-649 with Stats. 1976, ch. 1139, § 273, p. 5140.)

Second, superimposing the Sixth Amendment jury-trial requirement onto the determination of aggravating circumstances would undercut the express legislative goal of achieving sentence uniformity for “offenders committing the same offense under similar circumstances.” (§ 1170, subd. (a)(1).) For instance, under such a system, a trial court would be precluded from exercising its discretion to impose the upper term on the basis of the seriousness of the defendant’s actual conduct in committing the offense (e.g., high degree of cruelty, viciousness, or callousness) unless those particular aggravating facts were charged by the prosecutor and found by the jury. Thus, as in *Booker*, a sentencing system with an engrafted jury-trial requirement would weaken the connection between the sentence and the defendant’s actual conduct, and thereby undermine the legislative goal of “ensuring similar sentences for those who have committed similar crimes in similar ways.” (*Booker, supra*, 543 U.S. at p. 252.)

Third, engrafting the jury-trial requirement onto the current system would create a far more complex sentencing scheme than the one contemplated by the Legislature. As explained above, the Legislature did not intend to

precondition the trial court's authority to impose the upper term on a jury trial and jury findings as to aggravating circumstances, and the Legislature certainly did not intend that the intricate and time-consuming pleading, evidentiary, and instructional rules attendant to jury trials be applied to a determination of aggravating circumstances.

Fourth, it is highly unlikely that the Legislature intended an asymmetrical sentencing scheme where the trial court could consider facts that were not found by a jury or proved beyond a reasonable doubt only for the purpose of imposing the discretionary low term but not the discretionary upper term. As in *Booker*, such a "one-way lever" is clearly not compatible with the legislative intent. By contrast, respondent's proposed reformation of the statute would preserve the balanced system intended by the Legislature.

The Supreme Court's approach to the remedy question in *Booker* thus fully supports respondent's proposed reformation of section 1170, subdivision (b). This Court should use the *Booker* formula to conform the DSL to the Supreme Court's interpretation of the Constitution. The statute should be reformed to eliminate the requirement of a fact to impose the lower or upper term, and otherwise to retain the trial court's broad discretion in selecting any term.

3. The Remedies That The New Jersey And Ohio Supreme Courts Applied To Their States' Systems After *Booker* Also Support Reformation Of California's System

New Jersey and Ohio, like California, each had a sentencing system providing for a presumptive sentence within a statutory range and a requirement that a judge find a fact before increasing the sentence above the presumptive sentence. Before *Cunningham*, these states' supreme courts had found that this component of their systems violated *Blakely*. Analogizing to the high court's remedial model in *Booker*, each state supreme court then judicially deleted this presumption, thus eliminating the requirement of a fact

to impose an increased sentence within the statutory range, and leaving for the trial court's discretion the selection of any sentence within this range. These state supreme courts' decisions are also instructive and persuasive for determining the proper remedy for the constitutional defect identified in *Cunningham*. (*State v. Foster* (Ohio 2006) 845 N.E.2d 470; *State v. Natale* (N.J. 2005) 878 A.2d 724.)

In *State v. Natale, supra*, 878 A.2d 724, the New Jersey Supreme Court confronted a *Blakely* challenge to a system with crimes punishable by ranges of imprisonment with presumptive terms within these ranges. For example, ranges for certain crimes consisted of five to ten years, with a presumptive term of seven years, or ten to twenty years, with a presumptive term of fifteen years. (*Id.* at p. 738.) The New Jersey statutory scheme stated that “the court ‘shall impose’ the presumptive term ‘unless the preponderance of aggravating or mitigating factors, as set forth in [N.J.S.A. 2C:44-1] a and b., weighs in favor of a higher or lower term’ within the statutory range.” (*Ibid.*) The court found that under this statute:

before any judicial factfinding, the maximum sentence that can be imposed based on a jury verdict or guilty plea is the presumptive term. Accordingly, the “statutory maximum” for *Blakely* and *Booker* purposes is the presumptive sentence.

(*Id.* at p. 739.) The court therefore held “that the Code’s system of presumptive term sentencing violates the Sixth Amendment right to trial by jury.” (*Ibid.*)

The New Jersey Supreme Court next determined that the proper remedy for this constitutional flaw was to eliminate the presumptive terms because this solution “best achieves the Legislature’s purpose in enacting the Code.” (*Id.*

at pp. 741-742.)^{11/} In reaching this determination, the court noted that the Code was intended “to guide judicial discretion in imposing sentences to ensure that similarly situated defendants did not receive dissimilar sentences.” (*Id.* at p. 739, internal quotation marks omitted.)

The court then explained why it was rejecting alternative remedies. First, the court stated that it had the power to do “judicial surgery,” and found that the Legislature would prefer to have the court “sever the offending portion” of the Code rather than invalidate the entire Code. (*Natale, supra*, 878 A.2d at pp. 739-740.) Second, the court found that the Legislature would not have preferred “to substitute jurors for judges as the factfinders” for sentencing facts. (*Id.* at p. 740.) The court cited four reasons for this conclusion: (a) the Legislature delegated to *judges* the function of considering aggravating factors in order to impose “fair and uniform sentences”; (b) the statutorily enumerated aggravating factors generally “represent the traditional factors that judges historically have weighed in sentencing a defendant within the statutory range”; (c) the Legislature intended that “trial court consider all relevant information, including hearsay, unrestrained by the rules of evidence”; and (d) requiring jury trials on aggravating factors “would lead to separate, costly, unwieldy, and perhaps protracted penalty trials at the conclusion of guilt-phase trials.” (*Ibid.*) Third, the New Jersey Supreme Court quickly rejected the remedy of prohibiting all sentences above the presumptive term, explaining:

To do so would gut the sentencing ranges, cutting them in half and presenting to convicted felons an unintended and undeserved windfall.

We do not believe that the Legislature would have contemplated that as

11. By eliminating the presumptive terms, the court did not eliminate the possibility that courts could impose these particular terms within the statutory ranges; rather, these terms were no longer points from which sentences could only increase or decrease based on the finding of a fact. (See *Natale, supra*, 878 A.2d at p. 741.)

a viable solution.

(*Ibid.*)

Accordingly, the New Jersey Supreme Court chose as its remedy “eliminating the presumptive terms.” (*Natale, supra*, 878 A.2d at p. 741.) The court reasoned that this remedy would “best preserve the major elements of our sentencing code and cause the least disruption to our criminal justice system” (*Ibid.*) The court explained that “[i]n all other respects, the sentencing process will remain essentially unchanged.” (*Ibid.*) In this regard, courts will continue to determine aggravating and mitigating factors and whether these factors preponderate, and to give a statement of reasons for arriving at a particular sentence. (*Ibid.*) Further, appellate courts will continue to review these sentencing decisions for abuse of discretion. (*Id.* at pp. 741-742.) The court found that the “touchstone is that the sentence must be a reasonable one in light of all the relevant factors considered by the court.” (*Id.* at p. 741.)

The Ohio Supreme Court similarly found that Ohio’s system of minimum presumptive sentences within statutory ranges violated *Blakely* on the ground that judges are “statutorily *required* to make specific findings before imposing a sentence beyond that presumed solely by a jury verdict or admission of a defendant.” (*Foster, supra*, 845 N.E.2d at pp. 489-494.) The court also applied “the *Booker* remedy” to Ohio’s scheme by severing “[a]ll [statutory] references to mandatory judicial fact-finding,” so that “there is nothing to suggest a ‘presumptive term.’” (*Id.* at pp. 496-497.) This gives Ohio judges “full discretion to impose a prison sentence within the statutory range” (*Id.* at p. 498.) In so doing, the court also rejected the solutions of “provid[ing] jury involvement in sentencing” and limiting the maximum sentence to the presumptive term as contrary to what Ohio’s legislature would have intended. (*Foster, supra*, 845 N.E.2d at pp. 495-496.)

The remedies fashioned by New Jersey and Ohio, which are closely modeled on the *Booker* remedy, offer additional substantial support for respondent's suggested cure for the presumptive-term problem in California. Eliminating the presumptive middle term in section 1170, subdivision (b), most faithfully achieves the Legislature's intent in enacting the DSL. The DSL's purpose was to have terms "proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." (§ 1170, subd. (a)(1).) Like the legislatures in New Jersey and Ohio, California's Legislature would not have wanted to substitute jurors for judges to make factual findings at sentencing. In this regard, the Legislature delegated to judges, not juries, the function of considering aggravating circumstances. (See § 1170, subds. (b), (c).) In addition, these aggravating circumstances reflect a traditional part of the sentencing process. (See *Black, supra*, 35 Cal.4th at p. 1257.) Also, the Legislature intended that the trial court hear all relevant information, whether or not admissible under the rules of evidence. Section 1170 contemplates that information based on hearsay reports from probation officers and others, including the victim and the victim's family, be introduced at the sentencing hearing. (See § 1170, subd. (b); see also *People v. Hove* (1999) 76 Cal.App.4th 1266, 1275 ["sentencing judges are given virtually unlimited discretion as to the kind of information they can consider and the source from whence it comes"].) Furthermore, jury trials on aggravating circumstances would be expensive and time-consuming, would lead to confusion and litigation, and would potentially require the sort of elaborate separate penalty phases required in capital cases.

Just as in the other two states, the California Legislature clearly would not have intended to eliminate upper term sentences. Section 1170 states that the purpose of imprisonment is punishment, and that the court shall sentence a defendant to one of the three possible terms. (§ 1170, subd. (a)(1), (a)(3).)

Removing the possibility of the upper term would result in “an unintended and undeserved windfall” for defendants and is not a “viable solution.”

The appropriate remedy is also the simplest one. Eliminating the presumptive term language best preserves the essential elements of California’s sentencing system. Under this reformed process, courts can still find and consider aggravating and mitigating circumstances in their broad discretion, and still must give a statement of reasons. As in New Jersey, a sentence must still be “*reasonable*,” which is how this Court has already characterized our system in *Black*. (See *Black, supra*, 35 Cal.4th at p. 1255 [stating that section 1170, subdivision (b), requires that the decision to impose an upper term be reasonable]; *Cunningham, supra*, 127 S.Ct. at p. 869 & fn. 14 [acknowledging California’s requirement that a sentence be reasonable but rejecting this standard as sufficing to validate California’s law basing an upper term upon a judge’s finding of fact].) Further, reviewing courts will continue to review these decisions for abuse of discretion.

This Court should adopt the effective and expeditious approach to the Sixth Amendment problem identified in *Booker* and employed by the New Jersey and Ohio Supreme Courts. California’s sentencing system can be brought into compliance with *Cunningham* by eliminating the presumptive terms, thus doing away with the requirement that a judge must find a fact in order to impose an upper term.

4. Disposition Of The California Rules Of Court

As noted in section B., *ante*, the Court in *Cunningham* found that in conjunction with certain provisions of sections 1170 and 1170.3, certain rules of court were unconstitutional to the extent that they permitted the imposition of the upper term only upon the judicial finding of a fact. If this Court adopts respondent’s proposed reformation of the statutes, this Court should also declare invalid the provisions in any rules of court that could independently

cause a *Cunningham* violation. Similarly, this Court should invalidate the parts of any rules that conflict with the statutes as reformed. (See *People v. Hall* (1995) 8 Cal.4th 950, 959 [declaring invalid a provision in former rule 428(b) because it conflicted with section 1170, subdivision (b)].)^{12/} To reiterate, this reformation: (1) replaces the statutory language requiring an aggravating or mitigating circumstance to impose an upper term or lower term, with language instructing the sentencing court to exercise its broad discretion in selecting any of three terms; (2) eliminates the provision stating that a court must determine whether there are circumstances justifying an upper or lower term with language simply stating that a court must determine the choice of the appropriate term; (3) makes the middle term a term requiring a statement of reasons; (4) eliminates the requirement that a court give a statement of “facts” for imposing a term; and (5) authorizes the Judicial Council to adopt rules for selecting the middle term as well as for the upper or lower term. (See Section C.1, *ante.*)

Another possible disposition to conform the rules to the reformed system, besides invalidating particular provisions, would be to render all the rules of court advisory, as the Supreme Court did with the Guidelines in *Booker*. (See *Booker, supra*, 543 U.S. at pp. 246-247.) But, applying the *Booker* remedial test, this disposition appears less appropriate than declaring invalid a few provisions in the rules but keeping the large majority of them intact. In this regard, the *Booker* Court found that it “must retain those portions of the Act that are (1) constitutionally valid [citation] (2) capable of functioning independently [citation] and (3) consistent with Congress’ basic objectives in enacting the statute [citation].” (*Id.* at pp. 258-259.) The *Booker* Court further found that “[m]ost of the statute is perfectly valid.” (*Id.* at p. 258.) Under 18

12. After invalidating these provisions, this Court could also direct the Judicial Council to promulgate new rules conforming to this Court’s opinion.

U.S.C.A. § 3553(b)(1), however, it was mandatory for “sentencing courts to impose a sentence within the applicable Guidelines range,” which was why the *Booker* Court found the federal sentencing system unconstitutional. (*Booker*, *supra*, 543 U.S. at pp. 235, 259.) As a result, the Court made this provision advisory instead of mandatory. (*Id.* at p. 245.)

Unlike the Guidelines, most of the California Rules of Court are constitutionally valid, capable of functioning independently, and consistent with the Legislature’s basic objectives in enacting section 1170. These rules also “have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions.” (*In re Richard S.* (1991) 54 Cal.3d 857, 863; see also Cal. Rules of Court, Intro. Statement (adopted Jan. 1, 1992) [“All the California Rules of Court have the force of law”].) Also, the Legislature intended for these rules to be adopted to “promote uniformity in sentencing under Section 1170” (§ 1170.3.) Thus, because most of the applicable provisions of the rules of court have no constitutional infirmity under the reformed scheme, they need not all be rendered advisory just because a few provisions must be deemed invalid.

Respondent therefore suggests the following alterations to certain provisions in the rules of court in order to comply with *Cunningham* and the statute as reformed, and provides a table reflecting these changes. Respondent then explains why this Court does not need to invalidate certain other provisions that the Supreme Court cited in *Cunningham*.

a. Provisions Requiring Invalidation

This Court should invalidate the second sentence of rule 4.420(a), essentially restating the statutory provision requiring mandatory judicial factfinding to impose the upper or lower term. This sentence of rule 4.420(a) states: “The middle term must be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.” (See

Cunningham, *supra*, 127 S.Ct. at p. 862.) Because this provision of rule 4.420(a) is contrary to *Cunningham* and contrary to the elimination of the related provision in reformed section 1170, subdivision (b), it should be stricken.

This Court should also declare invalid the provisions in rule 4.420(b) that an upper term is justified only upon a finding that aggravating circumstances outweigh mitigating circumstances, and that a lower term is justified only upon finding mitigating circumstances outweigh aggravating circumstances.^{13/} (See *Cunningham*, *supra*, 127 S.Ct. at p. 863, fn. 9.) Because aggravating circumstances are elsewhere defined as “facts” (see rules 4.405, ¶ (4), 4.420(b), 4.421),^{14/} this standard for determining the upper or lower term contradicts the reformed statute, which no longer requires the finding of *any* aggravating or mitigating circumstance to impose an upper or lower term. The actual standard under the reformed statute is that the trial court shall exercise its “broad discretion,” and this standard is different than a standard that the upper or lower term be imposed only upon finding that aggravating or mitigating circumstances outweigh the other. In addition, this standard conflicts with the reformed scheme because it treats the selection of upper and

13. The second sentence in rule 4.420(b) provides: “Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation.” In the same vein, the last sentence in rule 4.420(b) states: “Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.”

14. In this way as well as others, the DSL reviewed in *Cunningham* is distinguishable from the statutory standard for imposing a death sentence “if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.” (§ 190.3, subd. (k).) Unlike the process of selecting upper or lower terms under the DSL, the capital weighing process is “not susceptible to a burden-of-proof quantification,” and is a “sentencing function [that] is inherently moral and normative,” thus complying with *Apprendi*. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 589.)

lower terms differently than that of middle terms. (See Section C.1, *ante*.) Thus, this provision should be invalidated as contrary to the statute as reformed.

The definitions of aggravating and mitigating circumstances in rule 4.405, parts (4) and (5) should also be invalidated in part. (See *Cunningham*, *supra*, 127 S.Ct. at p. 862.) These provisions provide in relevant part, “‘Aggravation’ or ‘circumstances in aggravation’ means facts that justify the imposition of the upper prison term referred to in Penal Code section 1170(b)” and “‘Mitigation’ or ‘circumstances in mitigation’ means facts that justify the imposition of the lower of three authorized prison terms” There is no impediment under *Cunningham* and the reformed scheme that prevents the trial court from considering aggravating circumstances in selecting a term, nor is there a problem with these circumstances being considered “facts,” so long as there is no *requirement* that any such factfinding be made to impose the upper or lower term. Thus, this Court should invalidate the clauses in these provisions requiring aggravating or mitigating circumstances to “justify” the upper or lower term, and replace them with clauses defining these terms as facts that the court may consider in its broad discretion in imposing one of the three authorized terms under section 1170, subdivision (b). These definitions would therefore coincide rather than conflict with the *Cunningham*-approved standard of the reformed statute.

This Court should also modify, in part, three rules requiring a statement of reasons to impose an upper or lower term, so that they conform with *Cunningham* and the reformed statute to require a statement of reasons to impose *any* of the three terms. (See Section C.1, *ante*; see also *Cunningham*, *supra*, 127 S.Ct. at p. 862 & fn. 6.) To accomplish this, this Court should modify the provision in rule 4.406(b)(4) requiring a statement of reasons for “[s]electing a term other than the middle statutory term for either an offense or an enhancement,” to require a statement of reasons for “[s]electing the lower,

middle, or upper statutory term” A like modification should be made to rule 4.420(e), to modify the provision requiring a statement of “reasons for selecting the upper or lower term” to require a statement of “reasons for selecting the upper, middle, or lower term” Similarly, as to rule 4.433(c)(1), this Court should delete the phrase “upper or lower” from the present provision requiring that a court “state on the record the facts and reasons for imposing the upper or lower term.”

Rule 4.420(e) and rule 4.443(c)(1) should also be invalidated in part because they require not only a statement of reasons, but the recitation of *facts* used to justify an upper term, which conflicts with *Cunningham* and the reformed statute. (See *Cunningham, supra*, 127 S.Ct. at p. 862.) Under rule 4.420(e), this statement of reasons “must include a concise statement of the ultimate facts that the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.” (See *Cunningham, supra*, 127 S.Ct. at p. 862.) As explained above, in order to comply with *Cunningham*, the reformed scheme would no longer require a fact to justify an upper term. Thus, this second clause of rule 4.420(e) should be invalidated. In the same vein, rule 4.433(c)(1) presently requires in part that a court “state on the record the facts and reasons for imposing the upper or lower term.” This Court therefore should delete the words “facts and” (in addition to the words “upper or lower” as discussed above) from this subsection in order to comply with *Cunningham* and the statute as reformed.

Rule 4.437(c)(1) on statements in aggravation and mitigation should also be invalidated in part to conform with *Cunningham* and the reformed statute. Rule 4.437(c)(1) currently provides, “A statement in aggravation or mitigation must include: (1) A summary of facts that the party relies on as circumstances in aggravation or mitigation justifying imposition of the upper or lower term.” By implication, rule 4.437(c)(1) appears to require a fact to justify an upper or lower term. As a result, this rule appears to conflict with the

statute as reformed, which no longer requires a fact to impose an upper or lower term, and prescribes the same procedure for selecting middle terms as for selecting upper or lower terms. (See Section C.1, *ante.*) Thus, the phrase in rule 4.437(c)(1), “justifying imposition of the upper or lower term,” should be stricken.

Rule 4.433(b), which governs the procedure for suspending imposition of sentence during a period of probation, should be modified in part because it suggests that an additional finding of fact is required to justify an upper or lower term in this situation. This provision provides:

If the imposition of sentence is to be suspended during a period of probation after a conviction by trial, the trial judge must make factual findings as to circumstances that would justify imposition of the upper or lower term if probation is later revoked, based on evidence admitted at the trial.

To comply with the reformed statute and *Cunningham*, the phrase “the trial judge must make factual findings” should be changed to “the trial judge may make factual findings,” and the phrase “upper or lower term” should be changed to “upper, middle, or lower term”

Rule 4.452, part (3), which provides that a court aggregating a sentence with a sentence in a previous case should not change the previous court’s discretionary decisions, should be modified in part because it references the previous presumption of a middle term no longer present in the reformed statute. In this regard, it currently states, in pertinent part, “Such decisions include the decision that a term other than the middle term was justified by circumstances in mitigation or aggravation” To conform with the reformed statute and *Cunningham*, this phrase should be modified to state, “Such decisions include the decision to impose the upper, middle, or lower term”

The following table summarizes the appropriate modifications to the

California Rules of Court:

Rule	Under Current Statute	Under Reformed Statute
4.405(4)	“Aggravation” or “circumstances in aggravation” means facts that justify the imposition of the upper prison term referred to in Penal Code section 1170(b).	“Aggravation” or “circumstances in aggravation” means facts that the court may consider in its broad discretion in imposing the base term as referred to in Penal Code section 1170(b).
4.405(5)	“Mitigation” or “circumstances in mitigation” means facts that justify the imposition of the lower of three authorized prison terms or facts that justify the court in striking the additional punishment for an enhancement when the court has discretion to do so.	“Mitigation” or “circumstances in mitigation” means facts that the court may consider in its broad discretion in imposing one of three authorized prison terms or facts that justify the court in striking the additional punishment for an enhancement when the court has discretion to do so.
4.406(b)(4)	Sentence choices that generally require a statement of a reason include: [¶] . . . [¶] (4) Selecting a term other than the middle statutory term for either an offense or an enhancement; [¶]	Sentence choices that generally require a statement of a reason include: [¶] . . . [¶] (4) Selecting the lower, middle, or upper statutory term for either an offense or an enhancement; [¶]

Rule	Under Current Statute	Under Reformed Statute
4.420(a)	When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge must select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term must be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.	When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge must select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules.
4.420(b)	Circumstances in aggravation and mitigation must be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.	Circumstances in aggravation and mitigation must be established by a preponderance of the evidence. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing.

Rule	Under Current Statute	Under Reformed Statute
4.420(e)	The reasons for selecting the upper or lower term must be stated orally on the record, and must include a concise statement of the ultimate facts that the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.	The reasons for selecting the upper, middle, or lower term must be stated orally on the record.
4.433(b)	If the imposition of sentence is to be suspended during a period of probation after a conviction by trial, the trial judge must make factual findings as to circumstances that would justify imposition of the upper or lower term if probation is later revoked, based on evidence admitted at the trial.	If the imposition of sentence is to be suspended during a period of probation after a conviction by trial, the trial judge may make factual findings as to circumstances that would justify imposition of the upper, middle, or lower term if probation is later revoked, based on evidence admitted at the trial.
4.433(c)(1)	If a sentence of imprisonment is to be imposed, or if the execution of a sentence of imprisonment is to be suspended during a period of probation, the sentencing judge must: (1) Hear evidence in aggravation and mitigation, and determine, under section 1170(b), whether to impose the upper, middle, or lower term; and state on the record the facts and reasons for imposing the upper or lower term.	If a sentence of imprisonment is to be imposed, or if the execution of a sentence of imprisonment is to be suspended during a period of probation, the sentencing judge must: (1) Hear evidence in aggravation and mitigation, and determine, under section 1170(b), whether to impose the upper, middle, or lower term; and state on the record the reasons for imposing the term.

Rule	Under Current Statute	Under Reformed Statute
4.437(c)(1)	A statement in aggravation or mitigation must include: (1) A summary of facts that the party relies on as circumstances in aggravation or mitigation justifying imposition of the upper or lower term;	A statement in aggravation or mitigation must include: (1) A summary of facts that the party relies on as circumstances in aggravation or mitigation;
4.452(3)	If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, the court in the current case must pronounce a single aggregate term, as defined in section 1170.1(a), stating the result of combining the previous and current sentences. In those situations: [¶] . . . [¶] (3) Discretionary decisions of the judges in the previous cases may not be changed by the judge in the current case. Such decisions include the decision that a term other than the middle term was justified by circumstances in mitigation or aggravation, making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation or in the furtherance of justice justified striking the punishment for an enhancement.	If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, the court in the current case must pronounce a single aggregate term, as defined in section 1170.1(a), stating the result of combining the previous and current sentences. In those situations: [¶] . . . [¶] (3) Discretionary decisions of the judges in the previous cases may not be changed by the judge in the current case. Such decisions include the decision to impose the upper, middle, or lower term, making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation or in the furtherance of justice justified striking the punishment for an enhancement.

b. Provisions Not Requiring Invalidation

This Court should not invalidate the provision of rule 4.420(b) requiring aggravating circumstances to be established by a preponderance of the evidence. It is true that this provision is unconstitutional in conjunction with the requirement of an aggravating circumstance to impose an upper term. (See *Cunningham, supra*, 127 S.Ct. at p. 862, 868.) But under the reformed system, an upper term no longer needs to be based on an aggravating circumstance; instead, it may be based on reasons that do not include facts, such as policy judgments based on an assessment of the sentencing objectives enunciated in rule 4.410. (See section C.1, *ante*.) Thus, since the statutes as reformed do not *require* the finding of an aggravating circumstance to impose an upper term, there is neither an impediment under *Cunningham* nor a conflict with the reformed statutes to require that a factual finding, if made, be established by a preponderance of the evidence.

This Court also should not invalidate the provision in rule 4.420(d) specifying, “A fact that is an element of the crime may not be used to impose the upper term.” In *Cunningham*, the Court found that because an aggravating circumstance was a fact that had to be judicially found in order to impose an upper term, and because this fact could not be an element of the offense under state law, a judge had to find a fact not found by the jury in order to impose an upper term. (See *Cunningham, supra*, 127 S.Ct. at pp. 862, 868; see also *Blakely, supra*, 542 U.S. at pp. 303, 305, fn. 8.) But under the reformed statute, there is no concern under *Cunningham* about this rule, because there is no longer a requirement of an aggravating circumstance/fact to impose the upper term. Rather, aggravating circumstances can simply be found and considered by trial courts in the exercise of their broad discretion. Therefore, the rule limiting aggravating circumstances for consideration to those that are not elements of a crime poses no constitutional problem or conflict with the statute

as reformed.

There is no need for this Court to strike the provision in rule 4.406(a) stating that in giving a statement of reasons, “the judge must state in simple language the primary factor or factors that support the exercise of discretion.” Instead, under this rule, this Court should interpret a “factor” as being a “reason” rather than a “fact.” It appears that neither this Court nor a lower appellate court has defined the term “factor or factors” in this rule as being akin to reasons, to facts, or to a combination of the two. However, the term is in the rule under the subject heading “Reasons.” Furthermore, the rule is a general one meant to provide for statements of reasons in a wide variety of contexts, many or most of which do not contain any factfinding requirement. The rule also provides that this “statement need not be in the language of these rules,” also indicating that the statement of reasons need not recite circumstances in aggravation or mitigation, i.e., facts. Thus, this Court should construe the term in this rule as referring solely to reasons, not facts. With such a construction, there is no conflict with *Cunningham* or the reformed statutory scheme in that there is no requirement that a court state a fact to impose the upper term. With a construction that “factor or factors” means or necessarily includes “fact or facts,” on the other hand, this provision of rule 4.406(a) would have to be invalidated as contradicting the elimination of the statutory requirement that a court state on the record the facts supporting an upper term.

Finally, the “nonexhaustive list of aggravating circumstances” in rule 4.421 should not be invalidated because it does not violate *Cunningham* under the statutes as reformed. (See also rule 4.408(a).) Although this rule gives examples of “facts” constituting aggravating circumstances, it does not by itself require the judge “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.) Since, under the reformed statute,

it is no longer true that “an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance” (*id.* at p. 868), these illustrative rules on aggravating circumstances do not violate *Cunningham*.

5. As In *Booker*, This Reformation Should Apply To Any Sentencing And Resentencing Hearing Occurring After This Court’s Decision

This reformation should apply to all appeals on direct review where the reviewing court concludes that there is unforfeited, prejudicial *Cunningham* error. *Booker* applied its reformation remedy to all cases currently on appeal as well as future sentencings. (*Booker, supra*, 543 U.S. at 268, citing *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [107 S.Ct. 708, 93 L.Ed.2d 649].) Further, the *Booker* Court admonished that the federal appellate court, before ordering a new sentencing hearing, should apply “ordinary prudential doctrines” such as forfeiture and harmless error. (*Booker, supra*, 125 S.Ct. at p. 769.) This Court should follow the United States Supreme Court’s sensible lead on this point.

Thus, this Court should declare that before ordering a remand for resentencing under the reformed system, the reviewing court should determine whether any ground exists to affirm the sentence by applying such doctrines as forfeiture, the recidivism exception, and harmless error. This resentencing hearing should be “based on the original sentencing record,” as nothing in the system as reformed warrants the introduction of new evidence or additional factual findings. (See *Natale, supra*, 878 A.2d at p. 745; but see *Foster, supra*, 845 N.E.2d at p. 499 [under the judicially modified system, “the defendants are entitled to a new sentencing hearing, although the parties *may* stipulate to the sentencing court’s acting on the record before it,” italics added].)^{15/}

15. Respondent in its pre-*Cunningham* briefing argued that an appellate court should determine whether the sentencing court would have imposed a different sentence under a reformed system. (Supp. RB at 15-16.) It appears,

To summarize respondent’s proposed remedy of the constitutional infirmity identified in *Cunningham*, this Court should reform the relevant statutory provisions to eliminate the requirement of a fact to impose an upper or lower term. This Court should also invalidate only those provisions in the California Rules of Court that conflict with this reformation or *Cunningham*. This Court should further direct that a court reviewing a pre-*Cunningham* upper term should determine whether the particular sentence needs to be reversed, under doctrines such as forfeiture, the recidivism exception, and harmless error. If the reviewing court decides that there is unforfeited, prejudicial *Cunningham* error, it should remand for resentencing under the reformed system. This reformation remedy is responsive to the Supreme Court’s mandate and faithful to the Legislature’s intent.

D. Appellant Is Not Entitled To Relief Under *Cunningham*

1. Background

Appellant was charged in a three-count information with one count of continuous sexual abuse (§ 288.5; count 1) and two counts of lewd or lascivious acts on a child under 14 years of age (§ 288, subd. (a); counts 2 and 3). As to count 1, the prosecution alleged within the meaning of section 1203.066, subdivision (a)(1), that appellant committed the offense with force, violence, duress, menace, and fear of immediate and unlawful bodily injury on the victim, T.R., and another person. Also as to count 1, the prosecution alleged within the meaning of section 1203.066, subdivision (a)(8), that in

however, that given the different sentencing standard afforded defendants under a reformed system, this determination would be more appropriately left for the trial courts on remand. (See, e.g., *United States v. Oliver* (6th Cir. 2005) 397 F.3d 369, 380, fn. 3 [“[w]e would be usurping the discretionary power granted to the district courts by *Booker* if we were to assume that the district court would have given [defendant] the same sentence post-*Booker*”]; accord, *United States v. Davis* (3rd Cir. 2005) 407 F.3d 162, 165.)

violating section 288 or 288.5, appellant had substantial sexual conduct with T.R., to wit, sexual intercourse. As to all counts, the prosecution alleged within the meaning of section 1203.066, subdivision (a)(7) that appellant committed a violation of section 288 against more than one victim. Also as to all counts, the prosecution alleged within the meaning of section 667.61, subdivisions (b)(7), and (e)(5) that appellant in the present case committed lewd or lascivious acts against more than one victim. (CT 102-107.) Appellant pleaded not guilty and denied the allegations. (CT 108.)

The evidence at trial showed that T.R. (the victim in count 1) was born on February 9, 1992. (RT 213.) Appellant married T.R.'s mother in January 2000. (RT 218-219, 432.) In 2001 and 2002, during T.R.'s third-grade term, and during the summer that followed, appellant molested T.R. repeatedly, including multiple occasions during which appellant had sexual intercourse with her. (RT 224-227, 230-232, 239-265, 280-281, 297-298, 301-308, 313-314.) More than once, appellant used physical force while raping or attempting to rape T.R. or immediately afterward, and at least once he threatened T.R. would get "in trouble" if she disclosed the sexual abuse. (RT 230-231, 236-237, 241-243, 256, 259, 264, 281.)

One night during February 2001, a few days after T.R.'s ninth birthday, two of T.R.'s friends, nine-year-old twin sisters A.T. (the victim in count 2) and H.T. (the victim in count 3) were sleeping over at T.R.'s home. (RT 266, 379-384, 388, 401-402, 404, 406, 423-424, 586-587.) While T.R.'s mother was away grocery shopping, appellant convinced the minors to remove their clothing and he sexually molested each of them (RT 267, 346-347, 384-400, 405-411, 414-415, 587-589, 592, 595-597; see RT 426-429), admonishing each of them afterward not to disclose the molestation (RT 391, 412, 591).

The jury found appellant guilty of all counts and found all the allegations to be true. (CT 362-374.) After the jury returned its guilty verdicts, appellant argued at sentencing that T.R.'s babysitter, not appellant, was the perpetrator in this case. (RT 940-941.) Appellant further argued that his factual innocence in this case should be considered a mitigating circumstance. (RT 941.) Appellant also argued that the People's and Probation Department's sentencing recommendations were unjust because violent felons receive less prison time than 30 years to life. (RT 941-942.) Appellant cited a case before the same trial court where a molestation convict received only a 16-year sentence. (RT 941-942.) Appellant argued that as a result, the trial court should sentence him to "15 years to life, in light of the record, the atmosphere of hysteria, the Court's view and sentencing of a similarly situated [molestation convict] and of [appellant]." (RT 942.)

The prosecution cited eight factors in aggravation in its sentencing memorandum: (1) the crimes involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness and callousness; (2) the victims were particularly vulnerable; (3) the manner in which the crime was carried out indicated planning; (4) appellant took advantage of a position of trust and confidence to commit the offense; (5) appellant has engaged in violent conduct which indicates a serious danger to society; (6) appellant's prior convictions as an adult were numerous or of increasing seriousness; (7) appellant showed no remorse; and (8) appellant represented a danger to society. (CT 385-387.)

The trial court imposed the upper term of 16 years in count 1, stating, The Court is selecting the upper term of 16 years, because of the nature, seriousness, and circumstances of the crime. [Appellant] forced the victim, [T.R.], to have sexual intercourse with him on numerous occasions. She -- the victim was particularly vulnerable to him. He was her stepfather. He baby-sat these children when the mother was away.

She was only eight when this happened. He threatened her. He inflicted emotional and physical injury on her. She has described physical pain and bleeding. She, in the Court's opinion, undoubtedly has suffered serious emotional injury. And the injury is magnified by her own mother's reaction to this whole situation. The -- so -- the -- those factors and the others -- [appellant] took advantage of a position of trust and confidence to commit this offense -- those and the other factors cited in aggravation in the People's brief, the Court adopts and sets the term of 16 years.

(RT 951.)

The trial court imposed consecutive sentences in counts 2 and 3 of 15 years to life each. The trial court stated its reasons for its consecutive sentencing choice in count 2 as follows:

The Court is imposing a term of 15 years to life to be served consecutively to Count 1. This involved a different victim. It occurred at -- separately from many of the offenses committed against [T.R.] in Count 1. It again involved a breach of confidence. These children were allowed to attend a slumber party at this home, and it was expected that they would be safe and cared for by the mother of these children, and obviously, it was used as an opportunity to initiate them into all sorts of inappropriate and perhaps better sexualized conduct.

(RT 951.)

The trial court then set forth its reasons for imposing sentencing consecutively on count 3:

With respect to Count 3, involving a separate victim, the Court -- the term is 15 years to life to be served consecutively to Count 1. And this involved a different victim and a different offense against a different victim. Again, in light of Defendant's total conduct in this case, with respect to not only [T.R.], but her friends, the Court believes that the

seriousness and nature of the offense of a predatory nature, of not only selecting the stepdaughter, but her friends to engage in this conduct, makes these sentences appropriate.

(RT 952.) Appellant did not object to the sentence.

On appeal, appellant raised two claims unrelated to the issues presented in this case, prosecutorial misconduct and improper failure to recuse the district attorney's office. The Court of Appeal rejected these claims in an unpublished opinion.

2. Appellant Forfeited His Sixth Amendment Claims By Failing To Object

Unlike appellant, the defendants in *Apprendi* and *Blakely* objected when the court imposed their sentences. (RT 951-952; *Blakely, supra*, 542 U.S. at p. 300; *Apprendi, supra*, 530 U.S. at pp. 470-471.)^{16/} Respondent submits that appellant's failure to object to his sentence, let alone raise an objection on federal constitutional grounds, forfeited his present claims of error.

No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

(*People v. Saunders* (1993) 5 Cal.4th 580, 590, quoting *United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1770, 123 L.Ed.2d 508], internal quotation marks omitted.) Further, the United States Supreme Court has upheld a state court's finding of forfeiture as to a due process claim asserting the failure to have a jury determine the truth of an element of a crime. (*Osborne v. Ohio* (1990) 495 U.S. 103, 122-123 [110 S.Ct. 1691, 109 L.Ed.2d

16. The *Booker* and *Cunningham* opinions do not reveal whether there was an objection on Sixth Amendment grounds at sentencing. (*Cunningham, supra*, 127 S.Ct. at pp. 860-861; *Booker, supra*, 543 U.S. at pp. 227-229.)

98].) Additionally, the Court in *Booker* indicated that forfeiture is a doctrine that a federal appellate court should apply in resolving a claim that a federal guidelines sentence violates the Sixth Amendment. (*Booker, supra*, 543 U.S. at p. 268.)

Courts of appeal have applied this doctrine to a *Blakely* challenge to an upper term sentence, and to an *Apprendi* challenge to a sex offender registration requirement. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1103 [*Blakely* claim forfeited by failure to object at sentencing]; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061 [*Apprendi* claim forfeited by failure to object at sentencing]; but see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2 [rejecting argument that *Apprendi* challenge to section 654 sentence was barred by failure to object because *Apprendi* was decided after the sentencing hearing and section 654 claims are generally reviewable absent a failure to object].) Thus, appellant forfeited his claims by failing to object to his sentence on the federal constitutional ground that he now presents on appeal.

Furthermore, the fact that *Blakely* was not decided until after appellant's sentencing hearing does not preclude a finding of forfeiture based on an argument that objecting would have been futile. *Blakely*, like *Cunningham*, applied the rule in *Apprendi* that, under the Sixth Amendment, a fact used to increase a defendant's sentence beyond the statutory maximum must be charged and proven to a jury. (*Blakely, supra*, 542 U.S. at p. 301; see *Cunningham, supra*, 127 S.Ct. at pp. 864-865.) Further, the defendant in *Blakely* objected to an aggravated sentence at the time of sentencing under *Apprendi*. Since the defendant in *Blakely* ultimately prevailed on his Sixth Amendment claim, appellant should also have raised an objection under *Apprendi* to preserve his instant claims. (But see *Hill, supra*, 131 Cal.App.4th at p. 1103 [holding *Blakely* claim forfeited where the court was "attuned to the recent decision in *Blakely*, as evidenced by her reference to *Blakely* at the

sentencing hearing and obvious grasp of the potential issues involved”].)

Instructively, in *United States v. Cotton* (2002) 535 U.S. 625 [122 S.Ct. 1781, 152 L.Ed.2d 860], the Supreme Court found that the federal defendants had forfeited their *Apprendi* claims by not objecting at trial despite the fact that *Apprendi* was decided while the defendants’ case was on appeal.^{17/} (*Id.* at pp. 628-629, 631.) Here, *Apprendi* was decided *before* appellant’s sentencing, and yet he did not object to his sentence on the basis of *Apprendi* or the constitutional right to a jury trial.

While this Court in *Saunders* indicated in dicta that the constitutional right to a jury trial cannot be forfeited by the failure to object (*Saunders, supra*, 5 Cal.4th at p. 589, fn. 5, citing *People v. Holmes* (1960) 54 Cal.2d 442, 443-444), this Court has not so held in the context of *Apprendi* error. The latter context is a paradigmatic case of trial error, rather than structural error, for which the forfeiture rule should apply. (See *Washington v. Recuenco* (2006) 548 U.S. ____ [126 S.Ct. 2546, 2553, 165 L.Ed.2d 466] [*Blakely* error can be harmless]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error can be harmless].) Because appellant failed to object on the ground that the trial court was prohibited from finding an aggravating circumstance used to impose his upper term and consecutive sentences, his Sixth Amendment claims are forfeited.

3. *Cunningham* And *Almendarez-Torres* Permitted The Trial Court To Impose Appellant’s Upper Term Based On The Finding Of A Recidivist Aggravating Circumstance, And, Alternatively, Based On A Fact Found By The Jury

Even though *Cunningham* generally precludes a trial court from finding

17. Having found the claim forfeited, the Court considered the “plain error” forfeiture exception found in Federal Rule of Criminal Procedure 52(b) and found no plain error. (*Cotton, supra*, 535 U.S. at pp. 631-634.) Since the “plain error” exception is a product of federal appellate procedure, it does not apply to this state appeal. (See *People v. Benevites* (2005) 35 Cal.4th 69, 115.)

facts to impose an upper term sentence, and even though *Cunningham* holds that the middle term is the statutory maximum, there was no *Cunningham* violation in this case because the upper term was authorized by the trial court's finding that appellant's prior convictions were numerous or of increasing seriousness. This finding fell under the recidivism exception to *Cunningham*, and it was sufficient to authorize the imposition of the upper term, since a single aggravating circumstance is sufficient to authorize an upper term sentence. Similarly, the jury's special findings beyond a reasonable doubt that appellant used force or fear and had engaged in substantial sexual conduct with the victim were inherent in several of the trial court's aggravating circumstances in imposing the upper term. Any of these aggravating circumstances was also sufficient by itself to support the upper term. Accordingly, the upper term became the statutory maximum and any additional judicial factfinding was constitutionally permissible because such factfinding did not increase appellant's actual sentence beyond the statutory maximum.

Under *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350], a defendant does not have a right to a jury trial for a sentence based on the fact of a prior conviction. The *Almendarez-Torres* Court explained that the "sentencing factor at issue here – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." (*Id.* at p. 243.) Citing *Almendarez-Torres*, the *Apprendi* Court excluded "the fact of a prior conviction" from the general rule requiring any fact that increased the penalty beyond the prescribed statutory maximum to be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at pp. 489-490.) The Supreme Court retained the *Almendarez-Torres* exception in *Blakely*, *Booker*, and did so again in *Cunningham*. (*Cunningham, supra*, 127 S.Ct. at pp. 860, 864, 868; *Booker, supra*, 543 U.S. at p. 244; *Blakely, supra*, 542 U.S. at p. 301.)

Further, this *Almendarez-Torres* exception goes beyond the mere fact

of a prior conviction to include matters such as the sentence imposed and the status and timing of the defendant's incarceration in relation to subsequent offenses. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222 [“[c]ourts have not described *Apprendi* as requiring jury trials on matters other than the precise ‘fact’ of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of ‘recidivism’”], cited with approval in *People v. McGee* (2006) 38 Cal.4th 682, 700-703; see also *People v. Epps* (2001) 25 Cal.4th 19, 26; *People v. Prather* (1990) 50 Cal.3d 428, 439-440.)

Federal courts likewise have determined that the *Almendarez-Torres* exception encompasses recidivism findings, such as those based on facts relating to a defendant's probationary status. For example, the Second Circuit Court of Appeals has held that the exception allows a trial court to find “not only the mere fact of previous convictions but other related issues as well. Judges frequently must make factual determinations for sentencing, so it is hardly anomalous to require that they also determine the ‘who, what, when, and where’ of a prior conviction.” (*United States v. Santiago* (2nd Cir. 2001) 268 F.3d 151, 156; see *United States v. Fagans* (2nd Cir. 2005) 406 F.3d 138, 142 [“the type and length of a sentence imposed seem logically to fall within this exception”].) The Eighth Circuit Court of Appeals has held that the prior conviction exception applies to “sentencing-related circumstances of recidivism,” and has agreed with the Second Circuit's opinion in *Santiago* “that it is entirely appropriate for judges to have ‘the task of finding not only the mere fact of previous convictions but other related issues as well.’” (*United States v. Kempis-Bonola* (8th Cir. 2002) 287 F.3d 699, 703.) The Tenth Circuit Court of Appeals has held that “the ‘prior conviction’ exception extends to ‘subsidiary findings’ such as whether a defendant was under court supervision when he or she committed a subsequent crime.” (*United States v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820.)

Several other state courts of last resort also have found that the prior conviction exception includes such facts relating to recidivism. The Maryland Court of Appeals has observed that the prior conviction exception “is not limited solely to prior convictions. The general rule is that there is no right to a jury trial on matters related to the broader issue of recidivism.” (*State v. Stewart* (Md. 2002) 791 A.2d 143, 151-152.) The Supreme Courts of Washington, Connecticut, Indiana, and Minnesota have held that the exception includes the issue of whether the defendant was on probation at the time of the current offense. (See *State v. Jones* (Wash. 2006) 149 P.3d 636, 640-641; *State v. Fagan* (Conn. 2006) 905 A.2d 1101, 1121; *Ryle v. State* (Ind. 2005) 842 N.E.2d 320, 323-325; *State v. Allen* (Minn. 2005) 706 N.W.2d 40, 47-48.) As the Washington Supreme Court explained, “the prior conviction exception encompasses a determination of the defendant’s probation status because probation is a direct derivative of the defendant’s prior criminal conviction or convictions and the determination involves nothing more than a review of the defendant’s status as a repeat offender.” (*Jones, supra*, 149 P.3d at p. 640.)

The reasoning of courts from California and other jurisdictions shows that the jury trial right does not extend to an aggravating circumstance based on the defendant’s criminal record. A defendant’s prior prison terms, parole, and probation are necessary components of his prior convictions. In turn, determinations of the defendant’s prior prison terms, the defendant’s status and performance on parole and probation, and the quantity and seriousness of the defendant’s prior convictions, derive from the defendant’s prior criminal convictions. As such, aggravating circumstances such as these, involving the defendant’s recidivist status, fall within the *Almendarez-Torres* exception.

Rule 4.421(b) lists four specific aggravating circumstances based on a defendant’s recidivism:

- (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.

Since these four aggravating circumstances arise from a defendant's prior convictions, they fall within the exception reiterated in *Cunningham*.

In addition, a single aggravating circumstance is sufficient under state law to render a defendant *eligible* for the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729; *People v. Earley* (2004) 122 Cal.App.4th 542, 550; see also *Cunningham, supra*, 127 S.Ct. at pp. 860 [the middle term was required "unless the judge found one or more additional facts in aggravation], 868 ["an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance"]; *Black, supra*, 35 Cal.4th at p. 1255 [section 1170, subdivision (b), mandates "that the middle term be imposed unless an aggravating factor is found"].) Thus, the presence of a single circumstance in aggravation renders a defendant *eligible* for the upper term and provides the trial court with the statutory *authority* to impose the upper term, irrespective of the particular term the court ultimately imposes after conducting the requisite balancing.

Cunningham is similarly satisfied whenever the court finds an aggravating circumstance that satisfies Sixth Amendment authorities, such as, for example, when established by the defendant's admission or criminal history, or by a jury finding. (See *People v. Calhoun* (2007) 40 Cal.4th 398 [53 Cal.Rptr.3d 539, 546] [no *Cunningham* error from multiple-victim aggravating circumstance used to impose upper term where the jury necessarily found that there were multiple victims].) Such an aggravating circumstance satisfies the Sixth Amendment, and, standing alone, is sufficient to authorize

the imposition of an upper term sentence. (See *Cunningham, supra*, 127 S.Ct. at p. 865, quoting *Blakely, supra*, 542 U.S. at p. 305 [the constitutional test focuses on the judge’s “*authority* to impose an enhanced sentence,” regardless of whether the “enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here),” first emphasis added].)

Moreover, once the federal constitutional requirement is satisfied, the state statutory scheme becomes the only controlling authority limiting the court’s ability to impose an appropriate sentence, including an upper term sentence. (*Apprendi, supra*, 530 U.S. at p. 481 [“[w]e should be clear that nothing in this history suggests it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute”].) Accordingly, if one aggravating circumstance is supported by either a jury finding or the defendant’s admission, or if one aggravating circumstance is based on the defendant’s recidivism, the trial court may permissibly find any other aggravating circumstances in imposing the upper term without violating *Cunningham*.

Justice Kennard articulated and applied this principle in *Black*. After disagreeing with the *Black* majority’s opinion that California’s upper term procedure was categorically constitutional, Justice Kennard nonetheless wrote to affirm the defendant’s sentence on the ground that at least one aggravating circumstance complying with the Sixth Amendment supported the upper term.

Under California law, the existence of a single aggravating circumstance is sufficient to support imposition of an upper term. (§ 1170, subd. (b).) In this case, the jury’s findings pertaining to defendant’s probation eligibility, and the trial court’s findings pertaining to defendant’s criminal record, were each sufficient to satisfy this statutory requirement, thereby making the upper term the statutory

maximum for the offense. (See *Blakely, supra*, 542 U.S. at pp. 303-304, 124 S.Ct. at p. 2537 [defining “statutory maximum” as the maximum sentence a trial court may impose without additional findings of offense-based facts].) Once the upper term became the statutory maximum in this manner, defendant’s right to jury trial under the federal Constitution’s Sixth Amendment was satisfied, and the trial court on its own properly could--and did--make additional findings of offense-based aggravating circumstances in support of its discretionary sentence choice to impose the upper term. Thus, under the high court’s decisions in *Apprendi, supra*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, *Blakely, supra*, 542 U.S. 296, 124 S.Ct. 2531, and *Booker, supra*, 543 U.S. 220, 125 S.Ct. 738, the trial court here did not violate defendant’s Sixth Amendment right to jury trial when it sentenced him to the upper term.

(*Black, supra*, 35 Cal.4th at p. 1270 (conc. & dis. opn. of Kennard, J.); see also *State v. Martinez* (Ariz. 2005) 115 P.3d 618, 625 [“once a jury finds or a defendant admits a single aggravating factor, the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute”]; *Lopez v. People* (Colo. 2005) 113 P.3d 713, 731 [because “[o]ne *Blakely*-compliant or *Blakely*-exempt factor is sufficient to support an aggravated sentence” under Colorado state law and the Sixth Amendment, imposing an aggravated sentence is “both constitutionally and statutorily sound even if the sentencing judge also considered factors that were not *Blakely*-complaint or *Blakely*-exempt”].)

Here, the trial court’s aggravated circumstance finding that appellant had prior convictions that were numerous or of increasing seriousness fell within the recidivism exception because it derived from his prior convictions. Therefore, the trial court’s finding of this aggravating circumstance did not

violate *Cunningham*. Moreover, the jury’s probation ineligibility findings that appellant committed the offense with force, violence, duress, menace, and fear of immediate and unlawful bodily injury on T.R. and another person (§ 1203.066, subd. (a)(1)) and that he had substantial sexual conduct with T.R., to wit, sexual intercourse (§ 1203.066, subd. (a)(8)) were inherent in several of the trial court’s justifications for the upper term. (See *Black, supra*, 35 Cal.4th at pp. 1269, 1273 (conc. & dis. opn. of Kennard, J.); see, e.g., CT 385-387; RT 951 [where the trial court finds as aggravating factors that appellant has engaged in violent conduct indicating a serious danger to society, that appellant “forced the victim, [T.R.], to have sexual intercourse with him on numerous occasions,” that appellant “threatened her,” and that appellant “inflicted emotional and physical injury on her”].) Since the recidivism finding, by itself, and either special jury finding, by itself, authorized an upper term sentence, the upper term became the statutory maximum and the trial court was free to consider any other aggravating circumstances found by a preponderance in evaluating whether to impose the upper term. Under these circumstances, the trial court’s additional aggravating circumstance findings did not violate *Cunningham*. Accordingly, appellant’s sentence was constitutionally valid.

4. This Court Correctly Determined In *Black* That California’s Consecutive Sentencing System Does Not Violate The Sixth Amendment

a. *Black*

For two independent reasons, this Court in *Black* held that *Blakely* did not implicate our system for determining whether sentences should run consecutively or concurrently. (*Black, supra*, 35 Cal.4th at p. 1264.) First, this Court rested its holding on the presence of discretion in California’s consecutive sentencing procedure. (*Id.* at p. 1262.) Because, under section 669, a court has discretion whether to impose consecutive or concurrent

sentences, any judicial factfinding in exercising this discretion does not violate a defendant's *Blakely* rights. (*Id.* at p. 1262, quoting *Harris v. United States* (2002) 536 U.S. 545, 558 [122 S.Ct. 2406, 153 L.Ed.2d 524].)

The second basis for this Court's holding was more categorical. This Court reasoned that the *Apprendi* line of cases does not apply to consecutive sentencing generally because these cases "are intended to protect the defendant's historical right to jury trial on all elements of the crime," and "[n]o such danger is created by a statute that permits judges to decide whether to impose consecutive sentences without jury factfinding." (*Id.* at p. 1263.) These cases do not prohibit "factual determinations that do not serve as the 'functional equivalent' of an element of a crime," and *Apprendi* itself found the sentences on other counts "irrelevant" to the determination of the statutory maximum. (*Id.* at p. 1263 & fn. 18, citing *Apprendi, supra*, 530 U.S. at p. 474.) Comparing the consecutive/concurrent decision to the decision whether to stay one of two sentences under section 654, this Court held that these were "decisions made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense, and neither implicates the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense." (*Id.* at p. 1264.)

b. *Cunningham* Does Not Impact This Court's Conclusion That Consecutive Sentencing Does Not Implicate The Right To Jury Trial

Cunningham rejected the California Supreme Court's opinion in *Black* only on the issue of upper term sentencing. No consecutive sentencing issue was raised in *Cunningham* – nor did the case even involve multiple sentences. Nor does any language in *Cunningham* suggest the Court would intend to apply its holding to a decision of how a judge aggregates the punishment for multiple offenses. This Court's reasoning on this issue remains sound.

Apprendi, Blakely, and Cunningham do not apply to the imposition of

consecutive sentences. These cases were concerned with the finding of a fact “that increases the penalty for *a* crime beyond the prescribed statutory maximum.” (*Cunningham, supra*, 127 S.Ct. at p. 864, italics added; *Blakely, supra*, 542 U.S. at p. 301, italics added; *Apprendi, supra*, 530 U.S. at p. 490, italics added.) *Apprendi* itself explained that the only relevant issue is the sentence for a single particular crime, not the aggregate effect of the defendant’s multiple sentences. (*Apprendi, supra*, 530 U.S. at p. 474, cited in *Black, supra*, 35 Cal.4th at p. 1263, fn. 18.) Thus, as long as the sentence for each count is within the statutory maximum for that conviction, *Apprendi*, *Blakely*, and *Cunningham* do not forbid consecutively sentencing on multiple counts.

Solely on this same ground, at least six other state supreme courts have also found that the *Apprendi* line of cases does not impact their consecutive sentencing laws. (*State v. Kahapea* (Haw. 2006) 141 P.3d 440, 452; *State v. Cubias* (Wash. 2005) 120 P.3d 929, 932-933; *State v. Higgins* (N.H. 2003) 821 A.2d 964, 975-976; *State v. Bramlett* (Kan. 2002) 41 P.3d 796, 797-798; *Hall v. State* (Fla. 2002) 823 So.2d 757, 764; *People v. Wagener* (Ill. 2001) 752 N.E.2d 430, 440-443.) All the federal circuits considering the issue have also rejected *Apprendi* challenges to consecutive sentencing under this same reasoning. (*United States v. Hicks* (5th Cir. 2004) 389 F.3d 514, 532; *United States v. Pressley* (11th Cir. 2003) 345 F.3d 1205, 1213; *United States v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *United States v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *United States v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *United States v. Chorin* (3rd Cir. 2003) 322 F.3d 274, 278-279; *United States v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *United States v. Buckland* (9th Cir. 2002) 289 F.3d 558, 570-571 (en banc); *United States v. Campbell* (6th Cir. 2002) 279 F.3d 392, 401-402;

United States v. Feola (2d Cir. 2001) 275 F.3d 216, 220 & fn. 1.)^{18/} The California Court of Appeal also has reached the same conclusion for the same reason. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231.) *Cunningham* did not alter the analysis set out in *Black* and these other cases. Accordingly, appellant's constitutional challenge to the imposition of consecutive sentences is without merit.

c. *Cunningham* Is Also Satisfied Because There Is No Presumption Of Concurrent Sentencing And No Requirement That A Court Find An Additional Fact Before Choosing A Consecutive Sentence

Even if a consecutive sentencing procedure could implicate *Cunningham*, California's consecutive sentencing procedure does not. In *Black*, as indicated above, this Court compared its first basis for rejecting the consecutive sentencing claim to its reasoning on the upper term issue, stating:

The same reasoning that leads us to conclude that a jury trial is not required on the aggravating factors that justify imposition of the upper term leads us to conclude that a jury trial is not required on the aggravating factors that justify imposition of consecutive sentences. Under section 669, the judge has discretion to determine whether to impose sentences consecutively or concurrently. "Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." (*Harris v. United*

18. The Fourth Circuit, although not squarely addressing the issue, has implicitly approved this reasoning by analogizing to the Second Circuit's resolution in *United States v. White* (2nd Cir. 2001) 240 F.3d 127, 135. (*United States v. Angle* (4th Cir. 2001) 254 F.3d 514, 518-519 [reasoning that under *Apprendi*, the sentence on another count does not affect whether the sentence on this count is error, but it can affect whether the error is harmless].) The First Circuit has not published a case on this issue.

States, supra, 536 U.S. at p. 558, 122 S.Ct. 2406.) (*Black, supra*, 35 Cal.4th at p. 1262.) Although the *Cunningham* Court disagreed with this Court’s reasoning on the upper term issue because a fact is required to impose an upper term sentence, that disagreement could not be applicable to consecutive sentencing law in California, because this law carries no presumption of concurrent sentencing and requires no additional factual finding to impose a consecutive sentence. (See § 669; *People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) Thus, a court’s discretionary decision to impose a consecutive sentence under section 669 does not implicate the Sixth Amendment concerns in *Cunningham*.

In this case, the trial court imposed the indeterminate sentence of 15 years to life on count 2 consecutively to the determinate sentence of 16 years on count 1. The trial court also imposed the indeterminate sentence of 15 years to life on count 3 to run consecutively to the sentences on counts 1 and 2. (RT 951-952; CT 436.) The application of California consecutive sentencing law to this sentencing choice did not implicate *Cunningham*.

To understand why *Cunningham* is not implicated, it is useful first to review consecutive sentencing law. A trial court at sentencing is empowered to “direct whether the terms of imprisonment or any of them . . . shall run concurrently or consecutively.” (§ 669; *Black, supra*, 35 Cal.4th at pp. 1261-1262.) Under section 1170, subdivision (c), a trial court must state reasons for the decision whether to impose consecutive sentences on a determinate term, even if that decision is in regard to whether to run a determinate term consecutively with an indeterminate term (e.g., the decision to impose consecutive sentences in counts 1 and 2 in this case). (*Black, supra*, 35 Cal.4th at p. 1262 & fn. 17.) The trial court’s decision will be overturned on appeal only if there was a clear abuse of discretion. (*People v. Giminez* (1975) 14 Cal.3d 68, 71.) As this Court has explained in this context,

[D]iscretion is abused whenever the court exceeds the bounds of reason,

all of the circumstances being considered. [Citation.] However, in the absence of a clear showing that its sentencing decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate sentencing objectives and, accordingly, its discretionary determination to impose consecutive sentences ought not be set aside on review.

(*Id.* at p. 72.) To guide this decision, rule 4.425 sets forth some nonexclusive “criteria affecting concurrent or consecutive sentences,” including that the crimes were predominantly independent of each other, involved separate acts of violence or threats of violence, or were committed at different times or separate places. (See *Black, supra*, 35 Cal.4th at p. 1262.)

The decision whether to impose two *indeterminate* terms consecutively or concurrently (e.g., the decision to impose consecutive sentences on counts 2 and 3 in this case), on the other hand, is not governed by the determinate sentencing provisions of section 1170, et al. (§ 1168.) Further, the sentencing rules in the California Rules of Court do not apply to indeterminate sentencing decisions, including the decision whether to run them consecutively or concurrently. (*People v. Murray* (1991) 225 Cal.App.3d 734, 750; rule 4.403.) Also, “[n]o reason need be stated on the record for directing that indeterminate terms run consecutively to one another.” (*Black, supra*, 35 Cal.4th at p. 1262, fn. 17.) But as with determinate sentences, in making a consecutive sentencing decision on indeterminate sentences, “a trial court has ‘full discretion’ in deciding whether to impose consecutive sentences.” (*People v. Arviso* (1988) 201 Cal.App.3d 1055, 1059, quoting *People v. Morris* (1971) 20 Cal.App.3d 659, 667; accord, *Murray, supra*, 225 Cal.App.3d at p. 750.)

Turning to the Sixth Amendment analysis of these consecutive sentencing provisions, *Cunningham* applies only where a statutory sentencing scheme preconditions the court’s exercise of discretion on the existence of a fact beyond those reflected in either the jury’s verdict or the defendant’s

admission. (See *Cunningham, supra*, 127 S.Ct. at pp. 868-871.) Appellant will likely continue to claim that *Cunningham* applies to the court's imposition of consecutive terms in this case, and argue that under section 669, there is a presumption favoring concurrent terms and the court may deviate from that presumption only upon the finding of some additional fact. (See ABM 29-36.) These arguments are unpersuasive, however, for two independent reasons.

First, there is no such presumption favoring concurrent terms. The last sentence of section 669 states, "Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." But this language does not create a presumption favoring concurrent terms. Instead, it is a gap-filler for those rare instances where a court fails to properly indicate whether a sentence is to be consecutive or concurrent. Indeed, as the Court of Appeal explained, in *People v. Reeder*:

While there is a statutory presumption in favor of the middle term as the sentence for the offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing.

(*Reeder, supra*, 152 Cal.App.3d at p. 923; see also *People v. Lepe* (1987) 195 Cal.App.3d 1347, 1351 ["the sentencing court's decision to impose concurrent or consecutive terms is discretionary and not mandatory. (§ 669)"].) Because there is no presumption in favor of concurrent terms, a defendant has no legal right to concurrent sentencing, and *Cunningham* cannot be implicated by consecutive sentencing.

Second, there is no statutory requirement that the court make any findings of fact before imposing consecutive sentences. Section 669 provides

that the court “shall direct whether the terms of imprisonment . . . shall run concurrently or consecutively.” It does not require any fact-finding whatsoever. Although a trial court must give a statement of reasons for imposing consecutive sentences on determinate terms (§ 1170, subd. (c); rule 4.406(b)(5)),^{19/} this statement of reasons does not require a separate finding of facts beyond those reflected in the conviction. Rather, the essential function of the statement of reasons is to create a record to facilitate appellate review of the sentencing choice for an abuse of discretion. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450; *People v. Stewart* (2001) 89 Cal.App.4th 1209, 1215.)

As for the applicable Rules of Court, although section 1170, subdivision (a)(3), provides that the court “shall apply the sentencing rules of the Judicial Council,” those rules are merely “criteria” designed to aid the court in exercising its discretion (§ 1170.3). (See *Lepe, supra*, 195 Cal.App.3d at p. 1351 [where, in addressing the propriety of a decision whether to impose consecutive or concurrent sentences, the Court of Appeal states, “The rules of court are merely guidelines to assist the court in making its sentencing choices and in exercising its discretion”].)^{20/} Since the Legislature has not made consecutive sentencing conditional on the finding of any fact beyond those reflected in the conviction, the Judicial Council cannot impose such a requirement on its own. (Cal. Const., art. VI, § 6, subd. (d) [“[t]he rules adopted shall not be inconsistent with statute”].)

Nonetheless, there is no rule prohibiting a trial court from imposing a

19. As noted, the decision to impose consecutive sentences on the indeterminate terms in counts 2 and 3 did not require a statement of reasons. (*People v. Arviso, supra*, 201 Cal.App.3d at p. 1058.)

20. Again, the Rules of Court do not apply to the decision to impose consecutive sentences on the indeterminate terms in counts 2 and 3. These rules apply only to the trial court’s decision whether to run the indeterminate term in count 2 consecutively to the determinate term in count 1. (*Murray, supra*, 225 Cal.App.3d at p. 750; rule 4.403.)

consecutive sentence absent the finding of any fact not reflected in the conviction. Rule 4.425(a) merely provides nonexclusive “[c]riteria affecting the decision to impose consecutive rather than concurrent sentences,” but does not prohibit the court from considering the facts reflected in the conviction itself. Rule 4.425(b) provides that “[a]ny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except . . . (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences.” The rule merely limits the court’s consideration of aggravating circumstances for consecutive sentencing purposes, and does not prohibit consecutive sentences absent the finding of some fact not reflected in the conviction. Furthermore, rule 4.433(c) demonstrates that consecutive sentences require no additional factfinding whatsoever. Specifically, rule 4.433(c)(1) provides that in deciding the length of the term, the court shall “[h]ear evidence in aggravation and mitigation, and determine, pursuant to section 1170(b), whether to impose the upper, middle or lower term; and set forth on the record the facts and reasons for imposing the upper or lower term.” By contrast, rule 4.433(c)(2) merely provides that the court shall “[d]etermine whether the sentences shall be consecutive or concurrent.”

Thus, consecutive sentencing decisions do not demand a finding of any fact. As a result, they are akin to the sentencing decisions involving broad discretion that the Court approved in *Cunningham*, *Booker*, *Blakely*, and *Apprendi*. (See *Cunningham*, *supra*, 127 S.Ct. at p. 871; *Booker*, *supra*, 543 U.S. at pp. 233, 264-265; *Blakely*, *supra*, 542 U.S. at pp 308-309; *Apprendi*, *supra*, 540 U.S. at pp. 481-482.)

The Ninth Circuit and three state supreme courts have also rejected Sixth Amendment challenges to their jurisdictions’ discretionary consecutive sentencing decisions on the basis that no judicial factfinding was required, in addition to rejecting these challenges on the basis discussed above -- that

Apprendi is satisfied as long as the statutory maximum for each crime is not exceeded. (*United States v. Fifield* (9th Cir. 2005) 432 F.3d 1056, 1066-1067; *State v. Abdullah* (N.J. 2005) 878 A.2d 746, 756-757; *Smylie v. State* (Ind. 2005) 823 N.E.2d 679, 686; *State v. Jacobs* (Iowa 2001) 644 N.W.2d 695, 698-699; but see *Personal Restraint of VanDelft* (Wash. 2006) 147 P.3d 573, 578-579 [a non-serious, non-violent, consecutive sentence violates *Blakely* because it is an “exceptional sentence” requiring an aggravating factor to support it and because Washington law has a presumption of concurrent sentencing]; *Foster, supra*, 845 N.E.2d at pp. 490-491 [finding *Blakely* error because of Ohio’s rule that sentences be run concurrently absent judicial factfinding].) This Court should find that both are correct, alternate rationales for rejecting the claim that California’s consecutive sentencing system violates *Cunningham*.

5. In Any Event, The Jury’s Explicit Multiple-Victim Findings Would Allow Appellant’s Consecutive Sentences

Appellant’s sentence should still be affirmed in this case even if this Court disagrees with its prior determination in *Black* that consecutive sentencing in California does not implicate the Sixth Amendment, because the trial court based its decision on one constitutionally valid aggravating circumstance. As to all three counts, the jury found true the special allegations that appellant committed a violation of section 288, lewd and lascivious acts against more than one victim, within the meaning of sections 667.61, subdivision (b)(7) and (e)(5) and 1203.066, subdivision (a)(7). (CT 364, 367-368, 370-371, 373-374.)^{21/} In imposing consecutive sentences in counts 2 and 3, the trial court expressly relied on the fact that these section 288 counts involved “different” and “separate” victims. (RT 951-952.) Thus, the use of this aggravating fact to impose consecutive sentences did not violate the jury

21. On the prosecution’s motion, the trial court later struck the section 667.61 allegation as to count 1 only. (CT 436.)

trial right enunciated in *Cunningham* because the jury did find this aggravating fact beyond a reasonable doubt.

Further, under California law, a single aggravating circumstance can support a consecutive sentence. (*Osband, supra*, 13 Cal.4th at pp. 728-729; see also *People v. Scott* (1994) 9 Cal.4th 331, 350, fn. 12 [“one relevant and sustainable fact may explain a series of consecutive sentences”]; *People v. Huber* (1986) 181 Cal.App.3d 601, 628 [same factor may be used to impose more than one consecutive sentence].) Thus, assuming arguendo an aggravating circumstance is *necessary* to support a consecutive sentence, that requirement was met here. The trial court’s use of multiple-victim findings in imposing consecutive sentences would be justified by the jury’s multiple-victim findings. Since this jury finding, by itself, would permit the consecutive sentences, the trial court would be free to consider any other aggravating circumstances in evaluating whether to impose the consecutive sentences. (See Arg. D.3, *ante*.) Under these circumstances, the trial court’s additional aggravating circumstance findings did not violate *Cunningham*. Accordingly, appellant’s consecutive sentences were constitutionally valid.

Appellant has acknowledged that the jury found this factor that the trial court relied on but argues that this finding did not satisfy *Blakely* because “once that factor was used to bring [appellant] within the One-Strike Law [section 667.61], it was unavailable for use to support a consecutive term.” (ABM 42.) Respondent disagrees. Section 667.61, subdivision (f), provides that a sole circumstance used to impose a One Strike Law sentence may not also be “used to impose the punishment authorized under any other law, unless that other law provides for a greater penalty.” But nothing in this provision suggests that it implicates the decision whether to impose consecutive sentences on different counts, which actually leads to a “greater penalty.” (See, e.g., *People v. Acosta* (2002) 29 Cal.4th 105, 118-128 [section 667.61, subdivision (f) does not preclude the same fact from being used under the One

Strikes Law and the Three Strikes Law].) Instead, it is concerned with the question of whether the alternate sentencing scheme of the One Strike Law should be used instead of another “penalty,” such as an enhancement, for a particular count. (See, e.g., *People v. Mancebo* (2002) 27 Cal.4th 735, 742 [section 667.61, subdivision (f) precludes the same fact from being used under the One Strikes Law and the section 12022.5, subdivision (a) gun-use enhancement].) There was no improper “dual use” of the multiple victim finding. (See *Scott, supra*, 9 Cal.4th at p. 350, fn. 12 [“[t]he statutes and rules impose few explicit bans on the dual use of sentencing factors”].)

In any event, this Court need not resolve this issue since it is irrelevant whether there is any state law violation from the dual use of facts in this situation.^{22/} All that matters for Sixth Amendment purposes is that the jury found this fact beyond a reasonable doubt, and thus the trial court’s use of this fact would permit the consecutive sentence.

6. *Cunningham* Is Not Implicated By The Imposition Of Consecutive Sentences When One Of The Consecutive Terms Is An Indeterminate Term

Again, even if this Court were to conclude that, as a general matter, *Cunningham* does indeed apply to the aggregation of consecutive sentences under California’s system for consecutive sentencing, appellant’s claim would nonetheless be unavailing in this case for an additional reason: the Sixth Amendment is not implicated by an aggregation of sentences involving one or more indeterminate life terms. As explained above, *Cunningham* requires a jury finding only when the sentence *exceeds* the statutory maximum. When a

22. This Court has found that the failure to make a “dual use” objection at sentencing bars such a state-law claim on appeal. (*People v. Scott, supra*, 9 Cal.4th at p. 353 [the forfeiture doctrine includes those “cases in which the court purportedly erred because it double-counted a particular sentencing factor”]; see also *People v. de Soto* (1997) 54 Cal.App.4th 1, 9.)

defendant is sentenced to an indeterminate term, the statutory maximum for that offense for *Blakely* and *Cunningham* purposes is life in prison. Additional consecutive sentences for determinate or indeterminate terms do not result in aggregate statutory maximum greater than the life term that would otherwise be imposed for any individual indeterminate term. Rather, the only effect of the aggregation is to increase the minimum parole ineligibility date for the defendant. (§ 669.)

The United States Supreme Court has made clear that, unlike using facts to impose a sentence above the statutory maximum, a sentencing court's reliance on sentencing facts to impose a greater *mandatory minimum* sentence which a defendant must serve does not implicate the Sixth Amendment. (See *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 82 [106 S.Ct. 2411, 91 L.Ed.2d 67] [trial court may consider sentencing factors in finding a mandatory minimum applies to the defendant's sentence]; see also *Blakely, supra*, 542 U.S. at pp. 304-305 [distinguishing *McMillan*]; *Harris, supra*, 536 U.S. at p. 566 (plurality opinion) [following *McMillan*]; *Apprendi, supra*, 530 U.S. at p. 487, fn. 13 [reaffirming *McMillan*, and explaining that it does not conflict with the principle announced in *Apprendi*].) Increasing the parole ineligibility date through imposition of consecutive sentences involving at least one indeterminate term is nothing more than imposing a greater mandatory minimum sentence which the defendant must serve as compared to that for concurrent sentencing. As such, it is not subject to *Blakely*'s requirements.

There is no persuasive argument that imposing an indeterminate term consecutively to a determinate term results in a higher "statutory maximum" than a life term on a single indeterminate term alone. While the case law on this question appears sparse, the courts have concluded in other contexts that such hybrid sentences are still aggregated as having a maximum top of life in prison. *People v. Superior Court (Bell)* (2002) 99 Cal.App.4th 1334 (*Bell*), is informative on this point.

In *Bell*, the defendant was sentenced to a determinate term followed by a consecutive indeterminate term. While still serving the determinate portion of his sentence, the defendant committed an assault in prison, and was charged with the crime of assault by a life prisoner. (*Id.* at pp. 1336-1337.) The defendant sought writ review, contending that he was not “undergoing a life sentence” at the time he committed the prison assault because he was still serving the determinate portion of his aggregate sentence. (*Id.* at p. 1338.) The *Bell* court surveyed the history of indeterminate sentencing and rejected this claim.

Bell quoted this Court’s holding in *In re Cowen* (1946) 27 Cal.2d 637, 648, for the general proposition that

consecutive sentences, even if regarded as separate and distinct for some purposes, necessarily coalesce into one aggregate term of confinement during which the prisoner is continually restrained of his liberty.

(*Bell, supra*, 99 Cal.App.4th at p. 1343.) The *Bell* Court recognized that *Cowen* was predicated on an earlier version of section 669 and predated California’s move away from indeterminate sentencing to the current Determinate Sentencing Law, but it concluded that the holding of *Cowen* was still applicable. *Bell* explained that even under the current version of section 669,

the mandate that a determinate sentence be served before a consecutive life sentence is for the purpose of calculating parole eligibility, and not for the purpose of determining whether the prisoner is undergoing a life sentence within the meaning of section 4500.

(*Bell, supra*, at p. 1343.)

The reasoning of *Bell* and *Cowen* is equally applicable for purposes of the instant Sixth Amendment analysis. Running an indeterminate term consecutively to a determinate or another indeterminate term does not impact the actual statutory maximum sentence to which the defendant is subject. The defendant is always subject to a life term. The legal effect of running an indeterminate term consecutively to a determinate or indeterminate term is simply to extend the parole ineligibility date and thereby to increase the mandatory minimum sentence a defendant must serve. This result does not implicate *Blakely*’s and *Cunningham*’s constitutional requirements.

Appellant has previously countered that imposing consecutive sentences “greatly increases a defendant’s punishment by extending his earliest possible date of parole eligibility by 15 or more years for each count” (ABM 38-39) and

that “the aggregate punishment or sentencing range for two life terms is necessarily greater than one” (ARB 21). Appellant’s claim does not set out a valid *Blakely/Cunningham* challenge. Even assuming this authority impacts the aggregation of sentences, it is not concerned with the length of incarceration the defendant must actually serve, when the total sentence is still *within* the statutory maximum. *Cunningham* and *Blakely* only apply to sentences that exceed the statutory maximum. Where the aggregate sentence includes an indeterminate life term, the statutory maximum is necessarily life, which cannot be exceeded by any increase in the minimum parole ineligibility period. Accordingly, aggregating an indeterminate term with a determinate term or another indeterminate term or both simply does not implicate the Sixth Amendment under *Blakely* and *Cunningham*.

7. Any *Cunningham* Error Was Harmless In This Case

a. Applicable Law

Apprendi or *Blakely* error is subject to review under *Chapman v. California*. (*Recuenco, supra*, 126 S.Ct. at p. 2553; *Sengpadychith, supra*, 26 Cal.4th at p. 327.) Likewise, since *Cunningham* is an application of *Apprendi* and *Blakely*, it is subject to *Chapman* harmless error review. Under *Chapman*, to determine whether *Cunningham* error was prejudicial, the reviewing court must determine whether the jury would have found an aggravating circumstance true beyond a reasonable doubt. (See *Chapman, supra*, 386 U.S. at p. 24.) Any error as to an aggravating circumstance is harmless under this standard if the evidence at trial and sentencing consisted of overwhelming or uncontradicted evidence as to that circumstance. (See *Neder v. United States* (1999) 527 U.S. 1, 17 [119 S.Ct. 1827, 144 L.Ed.2d 135] [finding erroneous instruction omitting element of the offense harmless “where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence”], cited with approval in *Recuenco*,

supra, 126 S.Ct. at p. 2552 [describing *Neder* inquiry as “asking whether the jury would have returned the same verdict absent the error”]; see also *Cleveland, supra*, 87 Cal.App.4th at p. 271 [finding any *Apprendi* error for a judge’s section 654 finding to be harmless beyond a reasonable doubt because “[w]e have no doubt a jury would have reached the same conclusion [as the trial court] under the reasonable doubt standard”]; *Chamberlain v. Pliler* (C.D. Cal. 2004) 307 F.Supp.2d 1128, 1142-1143 [holding that any *Apprendi* error from the failure to submit a personal-use finding to the jury was harmless because “[p]etitioner has adduced no evidence to contradict the evidence considered by the trial court, which included the victim’s testimony that petitioner had pulled out a knife and struck the victim in the head with a shiny object cutting him and leaving a scar”].)

If the reviewing court determines that the jury would have found at least one of the aggravating circumstances true beyond a reasonable doubt, the prejudice inquiry ends and the reviewing court must deem the *Cunningham* error not prejudicial. This is because *Cunningham* error only occurs if the jury did not find the necessary fact that authorizes the imposition of, or makes the defendant eligible for, the increased sentence. Since a single aggravating circumstance can validate the imposition of an upper term or consecutive sentence under state law (*Osband, supra*, 13 Cal.4th at pp. 728-729), a determination that the jury would have found at least one aggravating circumstance true beyond a reasonable doubt necessarily renders the *Cunningham* error harmless because that single aggravating circumstance would have permitted the upper term or consecutive sentence. The reviewing court would therefore affirm the defendant’s sentence under such circumstances.

Once the reviewing court determines that any *Cunningham* error was harmless because the jury would have found at least one aggravating circumstance true, the reviewing court does not need to further determine

whether the trial court would have sentenced the defendant to the same upper term or consecutive sentence in light of the *Cunningham* error. Such an inquiry is not required because the jury trial right in *Cunningham* focuses on the issue of whether the jury made the necessary finding to expose the defendant to a higher sentence, rather than the issue of whether the trial court made the proper discretionary sentencing choice. (See *Cunningham, supra*, 127 S.Ct. at p. 860 [“sentence-elevating factfinding” which “expose[s] a defendant” to an upper term violates the right to jury trial].) Thus, the *Chapman* inquiry required to vindicate that right is limited to the question of whether the jury would have found at least one aggravating circumstance true, exposing the defendant to the upper term or consecutive sentence.

This conclusion that the ultimate sentencing decision does not implicate the Sixth Amendment right to a jury trial is demonstrated by the concurring opinion in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], by Justice Scalia, the author of the *Blakely* opinion. In this concurring opinion, Justice Scalia explained that *Ring*, and implicitly *Apprendi*, had “nothing to do with jury sentencing.” (*Ring, supra*, 536 U.S. at p. 612 (conc. opn. of Scalia, J.)) Instead, the *Ring* decision meant that

the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so – by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

(*Id.* at pp. 612-613, original italics.) Thus, this concurring opinion clearly shows that the federal constitutional concerns in *Apprendi* only reach the issue of factfinding to authorize the increased sentence and do not extend to a trial court’s ultimate sentencing decision. Accordingly, once the reviewing court determines that the jury would have found at least one aggravating

circumstance true, the reviewing court need not further examine under the *Chapman* standard whether the defendant would have received the same sentence in light of the *Cunningham* error.

For example, suppose the prosecution submits evidence at trial that a defendant committed a sexual offense by pretending he was a doctor for a severely mentally retarded person. The defense seeks to impeach the victim and ultimately argues to the jury that her severe mental retardation makes her testimony unreliable. The jury convicts the defendant. At sentencing, the trial court imposes the upper term, after finding two aggravating circumstances and one mitigating circumstance. One of these two aggravating circumstances is that the victim was particularly vulnerable. (See rule 4.421(a)(3).) In resolving a *Cunningham* claim on appeal, the reviewing court determines that beyond a reasonable doubt, the jury would have found true the aggravating circumstance that the victim was particularly vulnerable based on her undisputed severe mental retardation. As to the other aggravating circumstance, however, the reviewing court does not find it harmless beyond a reasonable doubt. In this situation, appellate rebalancing or reweighing of the one remaining aggravating circumstance with the one mitigating circumstance is inappropriate. Instead, the proper *Cunningham* harmless error inquiry asks, *if* the jury had found one of these two aggravating circumstance beyond a reasonable doubt, would the trial court have then had the authority to consider the other aggravating circumstance? The answer is yes, since the *Chapman*-surviving aggravating circumstance by itself would have authorized the upper term. As a result, the trial court's additional aggravating circumstance finding would also have been permissible under *Cunningham*. Given this, the trial court's weighing of the same circumstances necessarily would have been the same as well.

Thus, *Cunningham* error does not involve any state-law question of whether the trial court erred in its discretionary weighing of the aggravating and mitigating circumstances and resulting selection of the base term. But to

the extent that this Court concludes that a reviewing court must examine whether the trial court would have nevertheless sentenced the defendant to the upper term sentence because there was some state-law error in the selection of the sentence, this inquiry should be conducted under the state-law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.

b. Upper Term

Even if this Court were to conclude that the trial court's finding in imposing the upper term that appellant's prior convictions as an adult were numerous or of increasing seriousness did not fall under the recidivism exception to *Cunningham*, it is clear that the jury would have reached the same conclusion as the trial court. First, it is undisputed that before committing the instant three sex offenses, appellant was convicted of three misdemeanors and two felonies. (CT 401.) That these crimes, together, were "numerous," can hardly be disputed, as they were well above the three prior convictions that the California Court of Appeal has ruled constitute numerousness in this context. (See *People v. Searle* (1989) 213 Cal.App.3d 1091, 1098 [explaining three convictions are "numerous" within the meaning of rule 4.421(b)(2)].) Moreover, their progression unequivocally demonstrates that they were of increasing seriousness. In 1992, appellant was convicted of three misdemeanors, namely burglary, fraudulent use of access cards, and receiving stolen property, for which he received 36 months of summary probation. Then in 1996, appellant committed more serious crimes, felony burglary and grand theft, for which he received a more serious sentence, 120 days of jail along with his three years of probation. Then, other than several intervening traffic citations, appellant proceeded to commit the instant molestation felonies on three young girls, for which he was exposed to a determinate prison sentence

plus two life terms.^{23/} Since the jury would have found this recidivism aggravating circumstance true beyond a reasonable doubt, the upper term sentence would have been authorized by this circumstance. Accordingly, any *Cunningham* error was harmless and appellant's upper term sentence should be affirmed.

Further, appellant's upper term sentence also should be affirmed because the jury would have reached the same conclusion as to any one of the other aggravating circumstances found by the trial court. (RT 951; CT 385-386.) All of these other factors related to the nature, seriousness, and circumstances of the appellant's continuous sexual abuse T.R. (RT 950.) Appellant never disputed these particular facts. Instead, his defense rested on a theory that (1) T.R.'s medical record did not sufficiently show sexual abuse (RT 679, 682-683, 685, 687, 689-690); (2) T.R.'s babysitter, Baldemar Sanchez, molested other children (RT 708-714, 724, 726-727, 733-737, 740, 770-773, 782, 784); and (3) T.R. had falsely accused a former boyfriend of T.R.'s mother (RT 761-765, 773-777). As the trial court correctly noted at sentencing, appellant's defense regarding Sanchez's molestation "was not a defense at all to the charges against this defendant." (RT 948.) Inherent in the jury's verdict and special allegations in count 1 was the implicit finding that T.R.'s account was true.^{24/}

23. See *People v. Clark* (1993) 12 Cal.App.4th 663, 666 ["[t]he offense for which a defendant is being sentenced may be considered in determining that his or her convictions are of increasing seriousness"].

24. C.f. *People v. Jones* (1990) 51 Cal.3d 294, 321-322 [explaining in the context of unanimity instruction, that when the victim testifies as to an extensive series of molestations, and the defendant presents an all or nothing defense, the jury's guilty verdict on the few counts charged indicates it believed the victim's testimony as to all acts].

Thus, the jury would also have found beyond a reasonable doubt the aggravating circumstance that appellant forced the victim to have sexual intercourse with him on numerous occasions. (RT 950.) In this regard, there was testimony about at least three separate occasions of sexual intercourse with appellant. (RT 249-252, 256, 281, 297-298, 302-303 [on about July 4, 2001, T.R. awoke on her mother's bed with appellant on top of her having intercourse]; RT 240-243, 249, 255-256, 302-303, 439, 443-444 [in June, appellant had intercourse with T.R. on her mother's bed]; RT 259-260, 271 [about a week later, appellant again touched T.R.'s vagina with his penis].) Furthermore, the jury made a special finding that appellant had substantial sexual conduct with T.R., to wit, sexual intercourse. (CT 365.)

For similar reasons, the jury also would have found beyond a reasonable doubt the aggravating circumstances that the victim was particularly vulnerable to him and that appellant took advantage of a position of trust and confidence. In making these findings, the trial court found the subordinate facts that appellant was T.R.'s stepfather, that he babysat the children when the mother was away, and that the victim was only eight when this happened. (RT 950-951; CT 385-386.) The uncontradicted testimony at trial supporting these findings was that the molestations occurred in 2000-2001, when T.R. was eight and nine years old and in the third grade. (RT 213, 219, 249, 255-257, 280-281, 308, 311-312, 343.) The jury also made the special finding that T.R. was under the age of 14 during the offense, implicitly accepting the uncontradicted account of her age. (CT 365.) Further, the evidence was uncontested that appellant was married to T.R.'s mother, and lived in a house with T.R.'s mother, who had joint custody of T.R. (RT 217-221, 223-224, 231, 257, 270, 343-344, 432-433, 438-439.) In addition, the evidence was that appellant often watched T.R. while her mother was out. (RT 223, 438.)

There was also evidence of three separate incidents of threats, unrefuted by appellant at trial or sentencing, supporting the trial court's aggravating circumstance finding that appellant threatened T.R. (RT 951.) After one molestation, appellant told the girls not to tell their parents or anybody. (RT 391, 412, 591.) After another molestation, appellant held T.R. by her arms and warned her not to tell anyone. (RT 230-231.) After a third incident, appellant told T.R. he did not want her mother to know. (RT 253, 264, 281.) The jury also made a special finding that appellant committed the offense against T.R. by, inter alia, duress, menace, and fear of immediate and unlawful bodily injury on T.R. (CT 363.) This finding further demonstrated, under the evidence presented at trial, that the jury would have found that appellant threatened T.R.

There was also overwhelming support for the aggravating circumstance that appellant inflicted emotional and physical injury on T.R. and that T.R. suffered serious emotional injury, which was magnified by her mother's reaction to the situation. As to physical injury, the evidence showed that during one incident of sexual intercourse, appellant held T.R. by the arm and covered her mouth as she struggled. (RT 242-243, 256.) The intercourse hurt her, and her vagina bled. (RT 244, 253-254, 263, 281, 297-298.) T.R. also complained to her stepmother about vaginal pain, and her vaginal area was red. (RT 531.) The jury also made a special finding that appellant committed the offense with force and violence, a virtual finding under the evidence presented that he physically injured T.R. (CT 363.) As to emotional injury, beginning around December 2000, T.R. lost weight, her grades declined, she stayed in her room and cried more often, she was agitated and anxious, and she slept during the day but not at night. (RT 536-540.) Furthermore, a jury naturally would have found that T.R.'s mother's actions aggravated the situation, inasmuch as she told T.R. not to tell anyone and to say it was just a dream if anyone asked her about it, told police she did not believe T.R., and supported appellant's defense at trial. (RT 448-451, 509-510, 600-601.) Again, the jury's verdicts

and findings were an implicit acceptance of T.R.'s testimony and corroborating evidence of these events.

There were three other aggravating circumstances also inherent in the verdicts and findings and overwhelmingly shown by the trial evidence: (1) the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness and callousness; (2) appellant engaged in violent conduct indicating a serious danger to society; and (3) appellant was dangerous to society. (RT 951; CT 385-387.) As previously discussed, the evidence was undisputed that T.R. was only eight to nine at the time of the continuous sexual conduct. Furthermore, appellant pinned T.R. down by holding her hands above her head during one episode of intercourse. (RT 347.) T.R.'s testimony, which the jury necessarily believed given its verdicts and findings, was that T.R. experienced pain from the sexual abuse, that appellant threatened her, and that appellant molested other young girls (counts 2 and 3). All these facts would also have led the jury to reach the unavoidable conclusion reached by the trial court that appellant was a sexual predator who has molested not only T.R. but other girls as well. (RT 951; CT 387.) And again, the jury's special finding that appellant committed the offense by use of force, violence, duress, menace, and fear of immediate and unlawful bodily injury on T.R. and another, also meant beyond a reasonable doubt that it would have explicitly found the above three aggravating circumstances.

The two remaining circumstances were also unassailable at sentencing, given the jury's verdicts and findings. The first of these was that the manner in which the crime was carried out indicated planning. (RT 951; CT 386.) Given that T.R. was appellant's stepdaughter and that she lived with him and T.R.'s mother, appellant necessarily had to win T.R.'s trust and then had to lure her away from other adults. Furthermore, beyond a reasonable doubt a jury would have concurred with the trial court and found beyond a reasonable doubt

that there was a complete absence of remorse on appellant's part, as he continued to deny responsibility. (RT 951; CT 386.) After T.R. told her mother about the molestation, appellant denied the accusation. (RT 244, 254-255, 257-259, 263, 439-445, 489.) Then, before sentencing, appellant told his probation officer "that he believed T.R. had made up the story because she was angry at him." (CT 400.)

Accordingly, any *Cunningham* error was harmless because the upper term sentence would have been authorized by any one of these aggravating circumstances found by the trial court in imposing the upper term on count 1.

c. Consecutive Sentences

Similarly, even if this Court found that a "dual use" rendered constitutionally invalid the jury's multiple-victim finding supporting the trial court's multiple-victim aggravating circumstance, the essentially uncontradicted evidence shows beyond a reasonable doubt that, had the issues been specifically presented to them, a jury would have found at least one of these other bases for imposing consecutive sentences on counts 2 and 3: (1) counts 2 and 3 occurred separately from many of the offenses committed against T.R. in count 1; (2) counts 2 and 3 involved a breach of confidence, in that these children were allowed to attend a slumber party at this home, it was expected that T.R.'s mother would care for them and that they would be safe, and this situation was used as an opportunity to initiate them into inappropriate and sexualized conduct; and (3) the offenses were serious and predatory in that appellant not only selected his stepdaughter but her friends to engage in this conduct. (RT 952-953.) Thus, the existence of any one of these factors would also have allowed the imposition of consecutive sentences on counts 2 and 3. (*Scott, supra*, 9 Cal.4th at p. 350, fn. 12; *Huber, supra*, 181 Cal.App.3d at p. 628.)

Finally, even if it were assumed that this Court must examine whether the trial court would have imposed the upper term sentence and/or consecutive sentences in light of the aggravating circumstances that were or would have been found true by the jury, it is not reasonably probable the trial court would have imposed a lesser sentence because, as explained above, it is beyond a reasonable doubt that the jury either found or would have found all, or at least most, of the aggravating circumstances true. Furthermore, the trial court's unwavering comments regarding the seriousness of appellant's offenses, and its failure to find any mitigating circumstances, demonstrates that even the omission of these circumstances that do not survive *Chapman* review would not have dissuaded the trial court from imposing the maximum sentence allowable in this case. Accordingly, any error was not prejudicial. (See, e.g., *People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Kelley* (1997) 52 Cal.App.4th 568, 581 & fn. 18.)

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the judgment be affirmed.

Dated: March 15, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 26,491 words.

Dated: March 15, 2007

Respectfully submitted,

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