

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,

v.

JOHN CUNNINGHAM,
Defendant and Appellant.

A103501

**(Contra Costa County
Super. Ct. No. 010396-0)**

**ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on April 18, 2005, be modified as follows:

At the end of the last paragraph on page 15, after the sentence ending “upper term was an abuse of the court’s discretion,” add the following sentence:

Remand for resentencing is unnecessary since it is not reasonably probable that the court would have imposed a lesser term had it know that some of its reasons were improper. (See *People v. Price* (1991) 1 Cal.4th 324, 492.)

There is no change in the judgment.

Respondent’s petition for rehearing is denied. Jones, P.J., would grant rehearing.

Dated: _____, P.J.