

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

S148845

v.

WESLEY DAVID FRENCH,

Respondent and Appellant.

Third Appellate District, No. C050785
Sacramento County Superior Court No. 02F07203
The Honorable Maryanne G. Gillard, Judge

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

On October 16, 2002, information number 02F07203 was filed in the Sacramento County Superior Court against appellant Wesley French alleging as follows: counts I through V alleged violations of Penal Code section 288, subdivision (a), lewd and lascivious conduct with a child under the age of 14, committed against Brandon B.; counts VI through X alleged commission of the same offense against Brittany P.; and counts XI and XII alleged commission of the same offense against Zachary L. (CT 29-37.)

On June 8, 2004, pursuant to a negotiated disposition, appellant pled no contest to counts I, II, IX, X, XI and XII on condition that he receive no more than 18 years in prison. The remaining counts were dismissed as part of the plea bargain. (CT 18.)

Appellant was sentenced on July 9, 2004, to the upper term of eight years on count I. On each of the remaining counts, appellant received one-third of the midterm, two years, to be served consecutively. The total term imposed was 18 years. (CT 157-159.)

Appellant filed a notice of appeal on September 21, 2004. On September 30, 2005, this Court granted appellant's request for constructive filing of a second notice of appeal. Appellant did so on October 20, 2005. (CT

198, 213, 215.)

On October 30, 2006, the Court of Appeal, Third Appellate District, issued an unpublished opinion affirming the judgment.

On December 13, 2006, appellant filed a Petition for Review in the California Supreme Court. On February 7, 2007, the California Supreme Court granted review.^{1/}

STATEMENT OF FACTS

Appellant Wesley French's daughter, Lisa, ran an in-home daycare center. Sometimes appellant would work at the daycare center when Lisa ran errands or otherwise needed help. On at least five or six occasions, appellant took eight-year-old Brandon B., one of the children, into a nearby restroom. There, he would shove Brandon into one of the stalls, forcibly pull down Brandon's pants despite his protests, and hold Brandon against the wall while he fondled his penis. (CT 161-162.)

On at least three occasions, appellant also fondled five-year-old Zachary L., reaching inside of Zachary's pants and touching Zachary's penis skin-to-skin. (CT 163.) Appellant also molested another child at the daycare center, seven-year-old Brittany P. On one occasion, appellant began by tucking in her shirt, but then reached into her pants and touched skin-to-skin both inside and outside of her vagina. She tried to get away, but appellant held on and pulled her back. On five other occasions, appellant rubbed her breasts. On at least one

1. This Court granted review in five cases to address the impact of *Cunningham*. (See *People v. Sandoval* (S148917), *People v. Mvuemba* (S149247), *People v. French* (S148845), *People v. Hernandez* (S148974), and *People v. Pardo* (S148914).) The Court also requested supplemental briefing in *People v. Towne* (S125677), review granted July 14, 2004, and in *People v. Black* (2006) 35 Cal.4th 1238, on remand from a grant of writ of certiorari in *Black v. California* (Feb. 20, 2007) ___ U.S. ___ [2007 WL 505809], on the effect of *Cunningham*.

other occasion, appellant reached inside of her pants and rubbed her "butt," including sliding his finger in and out of her rectum. (CT 163-164.)

Other children at the daycare center also reported being touched inappropriately by appellant. (CT 164.)

ARGUMENT

I.

THIS APPEAL MUST BE DISMISSED BECAUSE APPELLANT DID NOT OBTAIN A CERTIFICATE OF PROBABLE CAUSE TO CHALLENGE THE CONSTITUTIONALITY OF HIS SENTENCE

Appellant challenges the constitutionality of the sentence imposed, asserting that it violated his Sixth Amendment rights as set out in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*). (AOB 6.) Appellant is precluded from raising this claim because he received a sentence within the range to which he agreed, yet failed to obtain a certificate of probable cause to challenge the constitutionality of his sentence.^{2/} When a defendant agrees to a sentencing range or maximum sentence as part of a plea bargain, and receives a sentence within that range or maximum, the defendant must obtain a certificate of probable cause before he can challenge the constitutionality of any sentence imposed within that agreed-upon range or maximum.

Under section 1237.5 and rule 31(d) of the California Rules of Court, no appeal may be taken by a defendant from a judgment of conviction upon a plea of guilty or nolo contendere except where a certificate of probable cause is filed -- unless the appeal deals with search and seizure issues, or is based on grounds "occurring after entry of the plea which do not challenge its validity." (Rule 31(d).) (*People v. Young* (2000) 77 Cal.App.4th 827, 829, footnote omitted.)^{3/}

2. Appellant applied for a certificate of probable cause, but no certificate was issued. (CT 199-212.) To the extent that the trial court did not rule on the request, respondent submits that this would constitute a denial. (See *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1650-1651; *Weisenburg v. Molina* (1976) 58 Cal.App.3d 478, 486, citing Code Civ. Proc., § 660.)

3. Former rule 31(d) of the California Rules of Court is now rule 8.304(b).

People v. Shelton (2006) 37 Cal.4th 759, 763, explained "that inclusion of a sentence lid implies a mutual understanding and agreement that the trial court has authority to impose the specified maximum sentence and preserves only the defendant's right to urge that the trial court should or must exercise its discretion in favor of a shorter term. Accordingly, a challenge to the trial court's authority to impose the lid sentence is a challenge to the validity of the plea requiring a certificate of probable cause." (*Ibid.*)

Shelton made clear that, absent an express reservation by the defendant to challenge the legal validity of imposing the maximum of the specified range, the agreement should be viewed as precluding the defendant from challenging the legality of that maximum sentence imposed. (*Id.* at pp. 768-769.) Moreover, *Shelton* endorsed the analysis of *People v. Young, supra*, 77 Cal.App.4th at pages 829 to 832, which had reached the same conclusion with respect to challenges to the constitutionality of imposing the maximum term.

Young explained that, when a defendant agreed to be sentenced within a range or with a specified maximum as part of a plea bargain, the defendant's plea bargain necessarily included an agreement that any sentence within that range or not exceeding the maximum was constitutional. (*Ibid.*) Thus, any challenge to the constitutionality of such a sentence was in fact a challenge to the validity of the plea itself which required a certificate of probable cause. (*People v. Young, supra*, 77 Cal.App.4th at p. 832; see also *People v. Cole* (2001) 88 Cal.App.4th 850, 868 [same].)

In *People v. Bobbit* (2006) 138 Cal.App.4th 445, 447-448, the Court of Appeal observed that *Shelton's* certificate of probable cause requirement applied equally to *Blakely* claims such as the one raised by appellant in this case, and concluded that the defendant's *Blakely* claim was not cognizable in the absence of a certificate of probable cause. (*Ibid.*)

The holdings in *Shelton, Young, Cole*, and *Bobbit* apply with equal force here. As part of the plea bargain, appellant agreed the court had the authority

to impose a sentence within maximum sentence of 18 years. (CT 136; RT 22-37.) Appellant's constitutional challenge under *Cunningham* to the trial court's imposition of the upper term within the agreed-upon maximum sentence is not a challenge to the discretionary sentence imposed. Rather, it is a direct challenge to the constitutionality of the maximum sentence agreed upon in the plea bargain, which is an attack on the validity of the plea itself. (*People v. Bobbit, supra*, 138 Cal.App.4th at pp. 447-448.) As such, appellant was required to obtain a certificate of probable cause in order to raise this issue on appeal. Because he did not obtain a certificate of probable cause, "this court cannot entertain defendant's claim" that the sentence imposed violated the Constitution. (*People v. Cole, supra*, 88 Cal.App.4th at p. 868; see also *People v. Shelton, supra*, 37 Cal.4th at p. 771 ["[W]e here conclude that defendant's challenge to the trial court's sentencing authority is in substance a challenge to the validity of the negotiated plea. Therefore, defendant's failure to secure a certificate of probable cause bars consideration of this challenge and requires dismissal of his appeal."].) Accordingly, this Court should dismiss appellant's appeal.

Appellant counters that the plea agreement in this case did not involve "a true sentence 'lid'." (AOB 18, fn. 11.) Appellant points out that in *Shelton*, this Court distinguished between an identified lid which was *at* the maximum sentence the court could impose under the plea agreement and an identified lid that was *below* the maximum authorized term. (*People v. Shelton, supra*, 37 Cal.4th at p. 768.) The Court noted that, as a general matter,

a sentence lid provision in a plea agreement necessarily implies the defendant's understanding and belief that in its absence the trial court might lawfully have imposed a greater sentence. If the maximum sentence authorized by law were at or below the specified sentence lid, the lid provision would be superfluous and of no benefit to the defendant.

(*Ibid.*) Appellant points out that, in this case, the identified lid discussed by the

parties was an 18-year lid, which corresponded to the maximum sentence the court could impose for the six counts to which appellant pleaded guilty. (RT 25-26; AOB 18, fn. 11.) Appellant's argument, however, ignores the context in which *Shelton* suggested that only a lid below the maximum was a "true lid" for purposes of applying the certificate of probable cause requirement.

Shelton made the above-quoted comment as simply a general application of its broader discussion on the contract principles governing plea bargains, rather than as an independent rule. (*People v. Shelton, supra*, 37 Cal.4th at pp. 767-769.) The Court made clear that it is the parties intent and understanding in entering into the plea bargain which informs the nature of the agreement, which in turn gives rise to the certificate of probable cause requirement. (*Ibid.*) Consequently, when the parties are bargaining over the number and identity of the counts to which the defendant will plead guilty, the additional designation of a maximum sentence or lid will only have independent significance if that lid is below the maximum sentence available to the court based on the charges agreed upon by the parties. (*Id.* at p. 768.) However, when the parties are bargaining exclusively over the defendant's total exposure, without specific regard to the number or identity of the counts to which the defendant pleads guilty, that bargained-for lid is the heart of the agreement, irrespective of whether it also corresponds to the maximum for the charges ultimately selected as the basis for the guilty plea. (*Id.* at pp. 767-769.) Under this latter circumstance, *Shelton's* rationale concerning a true lid applies with equal force to the bargained-for maximum.

[T]he specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term.

(*Id.* at p. 768.)

The record in this case amply demonstrates that the parties were bargaining exclusively over the total available exposure, rather than the number and nature of counts, as the fundamental core of the bargain. The prosecutor explained the history of the plea offers and negotiations as tied to a particular exposure. The plea offer initially began as an offer for a 26-year maximum. (RT 22-23 [noting offer originally made to public defender's office of 26 years].) Once appellant's health deteriorated, the prosecution reduced the offer to a 12-year maximum. (RT 22.) That offer remained open for eight months, but was rejected by appellant. (RT 22.) As the case proceeded to trial, the prosecution increased the offer to an 18-year maximum. (RT 22-23.) The prosecution also explained that the offer was only open until the start of jury selection, which was scheduled to begin the following day. (RT 23-24.)

After appellant and defense counsel discussed the offer again, the court explained to appellant that the offer was for an 18-year lid. (RT 24-25.) Appellant then specifically inquired of the court, "It won't go any higher than 18 years under any circumstances?" (RT 25.) The court confirmed it would not. Defense counsel reiterated to appellant that the lid meant the judge could "go below 18" but not above it. (RT 25.) After further discussions off the record between appellant and defense counsel, appellant informed the court, "I'll take the 18." (RT 25.) The court and the prosecutor confirmed that, without the offer, appellant was facing a sentence of 180 years to life. (RT 22, 25.) The prosecutor then explained to the court why he was seeking a plea bargain for an "18-year lid." (RT 25.)

Notably, throughout the course of the discussions, the offer was always presented in terms of the maximum exposure, without specific reference to the number or identity of the charged counts to which the defendant would plead. (RT 22-26.) Only at the close of the discussions and recitation of the factual basis for the plea did the parties indicate that the means of achieving this 18-year exposure was by having appellant plead guilty to six of the charges.

Specifically, the court noted, "What you've agreed to do, Mr. French, is to enter pleas of no contest to six of the charges for a State Prison lid of no more than 18 years." (RT 28; see also CT 18 ["Prom[ise] - SP Lid of 18 yrs".])

Thus, the parties viewed the 18-year lid as having independent significance in limiting the trial court's sentencing authority, and it was precisely to effectuate this lid that the parties agreed to have appellant plead guilty to six counts and have the prosecution dismiss the other six counts and the section 667.61 allegation. Consequently, the holding in *Shelton* is equally applicable to appellant's bargain:

In this case, it is reasonable to conclude that both the prosecutor and the trial court believed, when the plea bargain was made and accepted by the court, that defendant understood it in the same manner, as reserving to him a right to argue for a sentence less than the specified maximum of [18 years] only on the ground that the trial court should impose a lesser sentence in the exercise of its sentencing discretion, and not on the ground that the trial court lacked authority to impose the specified maximum sentence.

(*Shelton, supra*, 37 Cal.4th at p. 768.)

Moreover, as in *Shelton*, appellant "did not reserve, either expressly or impliedly, a right to challenge the trial court's authority to impose the lid sentence." (*Id.* at p. 769.) Because the agreement in this case was based on a mutual understanding that the trial court had the legal authority to impose the 18-year sentence, and that the 18-year maximum was the fundamental purpose of the bargain, appellant's contention that the 18-year sentence is unconstitutional is a challenge to the validity of the plea bargain itself, which requires a certificate of probable cause. (*Id.* at pp. 769, 771; *People v. Young, supra*, 77 Cal.App.4th at p. 832.) Appellant's failure to obtain a certificate of probable cause requires dismissal of this appeal.^{4/}

4. Respondent did not raise the certificate of probable cause issue in the Court of Appeal. However, because appellant's failure to obtain this certificate was a jurisdictional bar to considering this appeal, the issue may be raised at

II.

APPELLANT'S CLAIM OF CONSTITUTIONAL ERROR IS UNAVAILING

Assuming appellant may bring the instant appeal without a certificate of probable cause, his claim of constitutional error still fails.

A. Overview Of The Arguments

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 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.

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

any time.

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, a fact inherent in the jury's verdict, or as in this case on a fact determined by the defendant's admission, there is no *Cunningham* violation.

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 upper term 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*. Appellant's stipulation to a factual basis was sufficient to authorize the imposition of an upper term sentence on the basis of

those facts.

In any event, there was no prejudice from any *Cunningham* error. The factual findings upon which the trial court relied would have been found by a jury beyond a reasonable doubt in light of appellant's stipulation to those facts as part of the factual basis for his guilty plea. Thus, any Sixth Amendment violation in this case was harmless beyond a reasonable doubt.

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),^{5/} "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,^{6/} 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 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

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

6. All further references to "rules" are to those of the California Rules of Court.

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 fact finding 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 reformations 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 reconstruing 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.)^{7/}

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" ^{8/} This change is necessary to remove the

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

8. 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

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 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 fact finding, 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.)^{9/}

This statutory reformation would be fully consistent with the Legislature's overall intent in enacting the tripartite sentencing scheme. Under

victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing."

9. 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.

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 defendant. (*Black, supra*, 35 Cal.4th at p. 1260;^{10/} *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

10. 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].)

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 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.)^{11/}

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

11. 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.)

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, 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.^{12/} 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

12. 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.)

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 a constitutional defect in the procedure for selecting upper terms.^{13/}

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*,

13. 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; 2 Witkin, Cal. Proc. 4th (1997) Courts, § 190, p. 254; 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.

Appellant counters that this Court lacks the authority even to create a jury trial mechanism for aggravating factors, asserting only the Legislature may create "crimes" and the "elements" of crimes. (AOB 30-31.) Appellant's claim is premised on a faulty foundation. As discussed in detail below, *Blakely & Cunningham* only mandated new *procedural* requirements, they did not create any new substantive crimes or identify new elements.

supra, 35 Cal.4th at pp. 1255, 1260.)^{14/} 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 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.

14. 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.

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.)^{15/} 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

15. 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)].)^{16/} 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 U.S.C.A. § 3553(b)(1), however, it was mandatory for "sentencing courts to

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

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. Respondent then explains why this Court does not need to invalidate 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.^{17/} (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),^{18/} 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 lower terms differently than that of middle terms. (See Section C.1, *ante.*)

17. 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.”

18. 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.)

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 rule 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].).

6. Reformation Does Not Violate Ex Post Facto Or Due Process Principles

Appellant counters that reforming the statute retrospectively to all cases not final on appeal, as the United States Supreme Court did in *Booker*, would violate the ex post facto clause and due process principles. (AOB 29-30.) Appellant's argument is without merit.

The ex post facto clause "prohibits any legislative act that criminalizes conduct innocent when done, makes a crime greater than when done, increases or changes the punishment, or alters the rules of evidence to permit conviction on lesser or different evidence than when the crime was committed." (*People v. Brown* (2004) 33 Cal.4th 382, 391.) But "[t]he due process clause, not the ex post facto clause, bars retroactive application of a judicial construction of a criminal statute that is unexpected and indefensible by reference to the law expressed before the conduct in issue." (*People v. Crew* (2004) 31 Cal.4th 822, 853; see *Rogers v. Tennessee* (2001) 532 U.S. 451, 458-462 [121 S. Ct. 1693, 149 L. Ed. 2d 697].) This limitation is based on "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." (*Rogers, supra*, 532 U.S. at p. 459.) "Courts violate constitutional due process guarantees when they impose unexpected criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct." (*People v. Rathert* (2000) 24 Cal.4th 200, 209, internal quotation marks omitted.) "Holding a defendant criminally liable for conduct that he or she could not reasonably anticipate would be proscribed, violates due process because the law must give sufficient warning so that individuals may conduct themselves so as to avoid that which is forbidden." (*People v. Morante* (1999) 20 Cal.4th 403, 431, internal quotation marks omitted.)

Here, the application of a judicially reformed version of section 1170 to

the instant case would not violate ex post facto or due process principles. Appellant was fully aware that his conduct was criminal at the time he committed the offense, and a new judicial interpretation of section 1170 would not make appellant criminally liable for conduct that had previously been considered innocent at the time of the offense. Appellant also had fair warning at the time of the offense that he was potentially subject to the imposition of an upper term because the upper term was expressly specified in the Penal Code as a possible punishment for his conduct. Appellant therefore had sufficient warning of the possible consequences of his actions, and the imposition of a sentence under the reformed version of 1170 would not violate any of the core due process or ex post facto principles discussed by the United States Supreme Court in *Rogers, supra*.

Appellant argues that *Blakely* and *Cunningham* created new offenses by separating out the aggravated forms of all determinate sentencing crimes in the Penal Code as independent crimes. Appellant contends that the reformation of the statute would effectively eliminate an element from each of these new crimes. (AOB 29.) Appellant's argument rests on a flawed premise. California never created a new class of aggravated crimes, and *Blakely* and *Cunningham* did not purport to create any new offenses or define new elements in existing crimes. What those cases held was that when a state premises an increase in sentencing on the finding of a fact, that finding may be accorded the same procedural protections as an element, namely the protections set out in the Sixth Amendment. However, providing procedural protections equivalent to those given to elements is not the same as transforming such findings into legal elements of a new crime.

The Supreme Court made this point clear in *Schriro v. Summerlin* (2004) 542 U.S. 348 [124 S.Ct. 2519, 159 L.Ed.2d 442]. In *Schriro*, the Court explained that its application of *Apprendi* to Arizona's capital sentencing system in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d

556], was a procedural change rather than a substantive change in the law. *Schriro* described the difference between procedural protections mandated by the constitution and new substantive rules. *Schriro* explained that "a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes," whereas "rules that regulate only the *manner of determining* the defendant's culpability are procedural." (*Schriro v. Summerlin, supra*, 542 U.S. at p. 353.) The court then concluded, based on this formulation, that the holding in *Ring* that a jury rather than the trial court must find a fact necessary to render a defendant eligible for the death penalty, was a quintessential procedural rule.

This holding [in *Ring*] did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules

(*Id.* at p. 353.)

Schriro went on to reject the defendant's claim, premised on the statement in *Ring* that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" that *Ring* had in fact modified the elements for Arizona's capital murder offense. (*Id.* at p. 354.) *Schriro* explained:

A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. [Citation.] But that is not what *Ring* did; the range of conduct punished by death in Arizona was the same before *Ring* as after. *Ring* held that, *because* Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the

Constitution attaches to trial of elements. 536 U.S., at 609, 122 S.Ct. 2428. This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

(*Id.* at p. 354, emphasis in original.)

Appellant's argument is premised on the same flawed view rejected in *Schriro*. *Blakely*, like *Ring*, did not modify the elements of any offense, nor did it alter the range of conduct punished by a state statute.^{19/} Rather, *Blakely* provided that, when the state establishes a sentencing system in which a factual finding increases a defendant's sentence above what the jury verdict alone permits, that finding is subject to the same procedural requirements that are applicable to elements. Just because *Blakely* and *Cunningham* identified such facts used for sentencing as warranting the same procedural protections as elements does not mean those cases redefined such facts *as* elements under state law.

Similarly, reformation of a sentencing system to eliminate the factfinding requirement that triggers the Sixth Amendment's procedural protections does not alter any substantive elements of any offense. When a state identifies a range of conduct punishable by statute, the factfinding mechanism selected by the state for punishing that range of conduct may trigger additional constitutional procedural requirements not anticipated by the state. Under such circumstances, it is up to the state to either alter the factfinding requirements to avoid triggering these constitutional requirements or provide a means of incorporating these constitutional protections into the existing sentencing procedure. Reformation follows the former path. It avoids triggering the procedural requirements without altering the substantive

19. Notably, the opinion in *Blakely* was issued the same day as the opinion in *Schriro*.

elements of an offense or the range of conduct punishable by the statute.

For this reason, the federal circuit courts have uniformly rejected similar ex post facto and due process arguments raised against the application of the *Booker* remedial opinion to all non-final cases federal applying the reformed federal sentencing guidelines.^{20/} (See, e.g., *United States v. Portillo-Quezada* (10th Cir. 2006) 469 F.3d 1345, 1354-1356; *United States v. Barton* (6th Cir. 2006) 455 F.3d 649, 652-657; *United States v. Thomas* (11th Cir. 2006) 446 F.3d 1348, 1354-1355; *United States v. Pennavaria* (3d Cir. 2006) 445 F.3d 720, 723-724; *United States v. Williams* (4th Cir. 2006) 444 F.3d 250, 253-254; *United States v. Wade* (8th Cir. 2006) 435 F.3d 829, 832; *United States v. Austin* (5th Cir. 2005) 432 F.3d 598, 599-600; *United States v. Vaughn* (2d Cir. 2005) 430 F.3d 518, 524-525; *United States v. Dupas* (9th Cir. 2005) 419 F.3d 916, 918-921; *United States v. Jamison* (7th Cir. 2005) 416 F.3d 538, 539.) Accordingly, appellant's ex post facto and due process challenge to reformation is without merit.

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

20. The reasoning of this federal circuit authority is readily applicable to the reformation of section 1170 because the remedied federal sentencing scheme and the proposed reformation of section 1170 share common features, i.e., the federal remedy and the proposed California remedy cure the constitutional infirmities of the respective systems by eliminating mandatory judicial factfinding and by granting the trial courts the broad discretionary authority to impose the maximum sentence set forth in the statutes.

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* Because He 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.) 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 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 *Cunningham* was not decided until well after appellant's sentencing hearing does not preclude a finding of forfeiture based on an argument that objecting would have been futile. *Blakely* was decided on June 24, 2004, fifteen days before appellant's sentencing hearing. (See *Hill, supra*, 131 Cal.App.4th at p. 1103 [finding forfeiture where sentencing hearing occurred seven days after *Blakely* was issued].) Yet, appellant raised no constitutional objection under *Blakely* to the court's imposition of the upper term. (RT 38-55.) After *Blakely* was issued to immediate and wide publicity, hundreds of defendants raised *Blakely* upper term challenges at sentencing and on appeal. The result in *Cunningham* ultimately derived from an eminently foreseeable, albeit debatable, application of the rule in *Blakely* 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.) Appellant's sentencing also occurred well before this Court's decision in *Black*, foreclosing any suggestion of futility in raising an objection under state law.

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. (*Id.* at pp.

628-629, 631.)^{21/} Here, both *Apprendi* and *Blakely* were decided *before* appellant's sentencing, and yet he did not object to his sentence on the basis of either case 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/Blakely* 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].)^{22/} 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.

E. *Cunningham* Permitted The Trial Court To Impose The Upper Term Based On The Facts Admitted By Appellant

Even if this Court were to conclude that appellant's claim was not forfeited, his claim is still unavailing. The trial court properly relied on appellant's admissions as the basis for finding the single aggravating factor that the court used to impose the upper term.

21. 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.)

22. This distinction arises from the fundamental difference between the trial error of failure to provide a jury trial on an element as compared to the complete failure to provide a jury trial on all elements of an offense.

1. Factual Background

At the time appellant entered his guilty plea, the court asked the prosecution to state the factual basis for the plea. The prosecutor set out the factual basis as follows:

On or about August 2000 to July 27, 2001, in the County of Sacramento, the Defendant did violate Penal Code Section 288(a) in that he did willfully and unlawfully and lewdly commit lewd and lascivious acts or act upon the body of Brandon B., who was a child under the age of 14. He was seven and eight at that time. He did so with the intent of arousing, appealing to, and gratifying the lusts, passions and desires of himself. He did this by taking Brandon to a park bathroom and touching Brandon's penis on repeated occasions.

As to the counts involving Brittany P., on or about and between April 1st, 2001, and September 7, 2001, at and in the County of Sacramento, the Defendant did commit a felony, namely, a violation of 288(a) of the Penal Code in that the Defendant did willfully and unlawfully and lewdly commit a lewd and lascivious act on the body and certain parts thereof of Brittany P., a child who was age seven at the time. He did so with the intent of arousing, appealing to and gratifying his lusts, passions, and desires. He did this by touching Brittany on her – skin-to-skin in her vaginal area as well as her breasts on separate – two separate occasions.

As to Zachary in Counts Eleven and Twelve, on or about April 1st, 2001, through September 7, 2001, at and in the County of Sacramento, the Defendant did commit a felony, a violation of 288(a) of the Penal Code, in that he did willfully and unlawfully and lewdly commit a lewd and lascivious act on the body and certain parts thereof of Zachary L., a child under the age of 14, who was five and six at the time. He did so – the Defendant did so with the intent of arousing, appealing to and gratifying his lusts, passions, and desires. He did this by – on two separate and distinct occasions touching Zachary on his penis skin-to-skin while Zachary was in his daughter's care at the daycare.

(RT 26-28.)

The defense accepted this factual basis, observing, "I believe the People have witnesses lined up for this trial that will support what the D.A. read in

terms of the factual basis, and that's what they'll testify to." (RT 28.) At sentencing, the court imposed the upper term of eight years for count one. (RT 50.) The court explained, "The high term is selected because the Defendant took advantage of a position of trust and confidence to commit the crime pursuant to Rule 4.421(a)(11)."^{23/}

2. Appellant's Agreement To The Factual Basis Was An Admission Of Facts That Satisfied *Cunningham*

As explained above, *Cunningham* provides that the "statutory maximum" under *Blakely* "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.*" (*Cunningham, supra*, 127 S.Ct. at p. 865, original italics, underline added, quoting *Blakely*, 542 U.S. at p. 303.) In *Blakely*, the court pointed out that the defendant had not admitted the facts underlying the factor that was used to impose an exceptional sentence, namely exceptional cruelty. (*Blakely*, 542 U.S. at p. 303.) By contrast, in the present case, appellant stipulated to the facts upon which the court relied in concluding that appellant took advantage of a position of trust or confidence in committing the molestations of the three victims. (RT 26-28.) Specifically, appellant acknowledged that one of his victims was in his daughter's care at her daycare center when appellant molested him, and he took another one of the victims to a park bathroom where he molested the victim. (RT 27-28.) These admitted facts served as a proper basis for the court to find that appellant took advantage of a position of trust and confidence to commit the crime. The trial court's reliance on appellant's admission of these facts as the foundation for the aggravating factor that served

23. The court then imposed consecutive sentences of one-third the midterm for the other five counts based on the fact that the crimes were committed at different times or separate places pursuant to Rule 4.425(a)(3). (RT 50-51.) That decision is not at issue in this appeal.

as the basis for imposing the upper term did not violate the Sixth Amendment protections set out in *Cunningham*.

Appellant challenges the court's use of his admission of a factual basis for the offense as constituting an admission for purposes of *Blakely* and *Cunningham*. Appellant's challenges are unavailing.

As this Court noted in *People v. Holmes* (2004) 32 Cal.4th 432, 440-442, when taking a felony guilty plea, the trial court is statutorily required to determine that there is a factual basis for the plea. This factual basis can be established by either a direct admission of specific facts by the defendant or a stipulation by defense counsel on the record to a document, such as a police report, admitting the facts contained therein for purposes of the plea. (*Ibid.*) A defense attorney's stipulation is just as binding an admission as a defendant's direct admission of particular facts. (*Ibid.*; see generally 1 Witkin, Cal. Evidence (4th ed., 2000) Hearsay, §100, p.802 ["A stipulation is an agreement between attorneys for adverse parties relating to a matter involved in a judicial proceeding. It may relate to evidence or facts, and, if it is not in excess of the attorney's authority, and conforms to procedural requirements, it results in a judicial admission removing issues from the case."]; cf. *People v. Mickens* (1995) 38 Cal.App.4th 1557, 1564-1565 [noting counsel may stipulate to documents as reflecting factual basis]; *People v. Adams* (1993) 6 Cal.4th 570, 578 ["Evidentiary stipulations have long been recognized as tactical trial decisions which counsel has discretion to make without the express authority of the client. "]; *People v. Enright* (1982) 132 Cal.App.3d 631, 635-636; *People v. Hammond* (1938) 26 Cal.App.2d 145, 149-151.)

The factual basis need not prove the crime. However, a defendant may not subsequently contest the facts admitted in the factual basis. Indeed, in *People v. Wallace* (2004) 33 Cal.4th 738, 749-750, this Court reaffirmed that a stipulation as to the factual basis for a guilty plea is a binding admission as to the nature of the offense to which the defendant has pleaded guilty. The

defendant may not subsequently challenge the nature of the offense to which he pleaded guilty by attempting to contradict the factual basis to which he stipulated. (*Id.* at pp. 750-753.) As such, the stipulated factual basis for a guilty plea constitutes an admission of the facts by the defendant within the meaning of *Blakely* and *Cunningham* that may be used by the court to impose an aggravated sentence. (Accord *United States v. Paulus* (7th Cir. 2005) 419 F.3d 693, 699 [factual basis for plea agreement was an admission of facts for *Blakely* purposes]; *United States v. Quackenbush* (W.D. Tenn. 2005) 369 F.Supp.2d 958, 968-969 [defendant's acknowledgment of facts in factual basis for plea satisfied *Blakely*]; *McGinity v. State* (Ind. Ct. App. 2005) 824 N.E.2d 784, 788, fn. 8 [same]; cf. *United States v. Smith* (9th Cir. 2004) 390 F.3d 661, 663-666 [stipulation to factual basis is binding admission and conclusively establishes facts of defendant's prior offense which may be relied on by court]; but see *State v. Brown* (Ariz. 2006) 129 P.3d 947, 952-953 [taking contrary view]; *State v. Hagen* (Minn. Ct. App. 2004) 690 N.W.2d 155 [same].)

In the present case, the requirement of a factual basis was satisfied by defense counsel's agreement that the prosecutor's recitation of facts set out the factual basis for the offense. (RT 28.) As the Court of Appeal recognized below, that agreement is a valid admission by the defendant as to the facts of the offense he committed and the nature and scope of the guilty plea. (See *People v. Wallace, supra*, 33 Cal.4th at pp. 750-753.) The trial court was entitled to rely on that factual basis in making sentencing determinations. More importantly, with respect to the constitutional challenge raised by appellant, under *Blakely* and *Cunningham*, the agreement to the factual basis for the plea constituted "*facts admitted by the defendant*" upon which the court could rely in reaching the upper term without the need for a jury determination as to the factual basis for the aggravating factors found by the court. (*Cunningham, supra*, 127 S.Ct. at p. 865; *Blakely*, 542 U.S. at p. 303.) Appellant's admission of the specified factual basis underlying the offense

means that the question of proof beyond a reasonable doubt are simply not an issue in this case.

Appellant contends that his admission to the factual basis cannot serve as an admission of a fact for *Blakely* and *Cunningham* purposes because he cannot be deemed to have admitted an element of a crime with which he was never charged. (AOB 9-10.) The thrust of appellant's claim is, once again, that *Blakely* created a new class of offenses with additional elements, namely a new aggravated form of every determinate sentence offense in the Penal Code. Appellant asserts that he had to have been charged with this new class of offense—i.e., "aggravated-sentence" child molestation—before his admissions could be used to impose the upper term. (AOB 10-15.) This argument, however, is based on the same flawed premise noted above. *Blakely* did not alter how states define crimes, nor did it create new aggravated offenses with new elements. It merely required that additional procedures attach to the factfinding already required by state law. *Blakely* did not alter the range of conduct punishable by section 288, nor did it render "formerly unlawful conduct lawful or vice versa." (*Schriro v. Summerlin*, *supra*, 542 U.S. at p. 354.) It simply altered the procedural rules attendant to any fact finding necessary to impose the upper term.

In the present case, when appellant was charged with violating section 288, subdivision (a), he was charged with the applicable state crime that encompassed all three punishment levels identified in the statute. Moreover, at the time he pleaded guilty and admitted the factual basis for the offense, appellant was well aware that he faced a possible upper term for count one. (RT 28.) *Blakely* did not change his criminal exposure for his guilty plea, it merely established additional procedural requirements before the court could impose the upper term. *Blakely*'s procedural protections could be satisfied in one of two ways, either with a jury trial by proof beyond a reasonable doubt or with an admission by the defendant. (*Blakely*, 542 U.S. at p. 303; see also

Cunningham, supra, 127 S.Ct. at p. 865.) Here, appellant's admission satisfied *Blakely*'s procedural protections, and permitted the court to rely on the admitted facts in identifying a factor in aggravation and imposing the upper term.

Appellant argues that his admission should not be binding on him because he lacked sufficient awareness that his admission would have potential punitive consequences for sentencing. (AOB 14.) This claim is specious. Prior to *Blakely*, a defendant's admission to a factual basis indicating he committed an aggravated offense could and would be taken into account by the trial court in its decision to select an upper term. Indeed, for the entire 30-year history of the DSL, defendants were well aware that admissions as to aggravating facts regarding the nature of their offenses would play a direct role in the trial courts' selection between the three levels of punishment for the offenses. *Blakely* did not alter that aspect of California's sentencing system, namely that an admission of aggravating facts could be considered by the trial court in selecting a upper term. *Blakely* only requires that, in the absence of an admission, any aggravating facts must be found by a jury beyond a reasonable doubt, rather than by the trial court by a preponderance. Here, appellant's admission of the factual basis has the same legally operative effect after *Blakely* as it did before *Blakely*; it permitted the trial court to take those facts into account as aggravating circumstances authorizing an upper term.

Appellant also contends that he was not given adequate due process notice of the facts laid out in the factual basis for the plea that also served as factual basis for the aggravating circumstance identified by the court. Appellant asserts that these specific facts were never specifically charged, and he points out that they were not proved up at a preliminary hearing because he waived preliminary hearing in this case. (AOB 14; CT 2.) Appellant's argument is unavailing precisely because he waived preliminary hearing.

First, appellant had adequate legal notice that he faced all three levels

of punishment for committing a lewd act on a minor in count one because the information charged appellant with violating section 288, subdivision (a), which expressly sets out the three applicable levels of punishment. Under Penal Code sections 951 and 952, simply charging a defendant with the generally applicable Penal Code section is sufficient to put a defendant on notice that he faces possible conviction for all degrees of the offense. A charging document need not specify the degree of the offense to provide the defendant with sufficient notice of any and all degrees of the offense. (See *People v. Ortega* (1998) 19 Cal.4th 686, 696 ["In charging a crime divided into degrees . . . , it is not necessary to allege the particular degree, or the facts establishing the degree. The general pleading of the offense will support proof of the higher or lower degree."]; 4 Witkin, Cal. Crim. Law 3d (2000) Pretrial, § 200, p. 406 [listing cases].) Additionally, when an offense can be supported by alternative theories, the accusatory pleading need not specify which theory is the basis for the charge. (See, e.g., *People v. Silva* (2001) 25 Cal.4th 345, 367 [charging murder under section 187 is sufficient to provide notice of first degree felony murder as an alternate theory of liability]; see generally *United States v. Agurs* (1976) 427 U.S. 97, 112, fn. 20 ["it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge."].)

Here, appellant was on notice that he faced all three punishment levels specified in section 288, subdivision (a). Moreover, the general charge of violating section 288, subdivision (a), not only encompassed the upper term, it also encompassed all theories by which the upper term can be imposed. Appellant is correct in noting the general rule that the preliminary hearing is designed to serve the narrowing function of limiting the factual and legal bases for liability at trial, thereby giving a defendant notice of the actual charges and bases for liability he is confronting. (See generally, *People v. Jones* (1990) 51 Cal.3d 294, 317-320.) However, when a defendant waives preliminary

hearing, he concomitantly forfeits any claim that the charging document was vague or overbroad, or that it failed to provide sufficient notice as to what theory of liability he faced under the charged count. (*People v. Butte* (2004) 117 Cal.App.4th 956, 959 ["We conclude that, having foregone the use of a preliminary hearing—'the touchstone of due process notice to a defendant' [citation]—defendant has forfeited his right to complain on appeal that he was provided with insufficient notice of the charges against him."].) Here, by waiving preliminary hearing, appellant forfeited any claim that he lacked notice as to what factual basis could serve to impose the aggravated term for the offense.

Appellant also contends that his admission of the factual basis could not be used to satisfy *Blakely*'s procedural requirements for imposing the upper term in the absence of a formal *Boykin-Tahl* waiver. (AOB 20.) However, *Boykin-Tahl* advice and waiver requirements generally are not extended to such evidentiary stipulations or admissions. (*People v. Newman* (1999) 21 Cal.4th 413, 415 ["[A] defendant validly may 'stipulate to one or more, but not all, of the evidentiary facts necessary to a conviction of an offense or . . . an enhancement,' without first having received such advisements"], quoting *People v. Adams, supra*, 6 Cal.4th at p. 581.)

In *Adams*, this Court made clear that *Boykin-Tahl* waivers apply to an evidentiary stipulation pertaining to an increase in sentencing only when that stipulation automatically leads to the imposition of a higher penalty, such as stipulating to the last remaining element of an enhancement. (*People v. Adams, supra*, 6 Cal.4th at pp. 579-582.) Such is not the case for an admission of facts underlying an aggravating factor.

While an admission to such facts renders an upper term available (because a single aggravating circumstance is sufficient to authorize the imposition of the upper term sentence under state law (*People v. Osband* (1996) 13 Cal.4th 622, 728-729)), it is not equivalent to a stipulation that the

court shall impose the upper term. Even after finding the existence of an aggravating circumstance, the trial court must still consider all other circumstances as well and exercise its discretion in selecting the appropriate term. Consequently, because a stipulation to a factual basis which includes facts that will render the upper term legally available does not make imposition of the upper term necessary, no *Boykin-Tahl* admonition and waiver is necessary. (*People v. Adams, supra*, 6 Cal.4th at pp. 579-582.)

Appellant's evidentiary admission of a factual basis was an admission within the meaning *Blakely* and *Cunningham* and was properly used to impose the upper term. (Accord, *United States v. Paulus, supra*, 419 F.3d at p. 699 ["[Defendant] asks us to decide whether the facts to which he stipulated in his Factual Basis for Plea constitute 'admissions' sufficient to increase his sentence beyond what the Guidelines dictate for the offenses of using the mail and interstate facilities to promote bribery and filing a false tax return. Paulus says that he 'did not intend to admit any facts for purposes of sentence enhancement under *Blakely/ Booker*.' . . . Paulus admitted having taken 22 bribes and \$48,050 for purposes of a conviction and certain benefits from the government. He is stuck with the consequences of admitting those facts for purposes of sentencing as well."].) Accordingly, the court's imposition of the upper term based on appellant's admitted facts did not violate the constitutional protections set out in *Cunningham* and *Blakely*.

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

Apprendi or *Blakely* error is subject to review under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*). (*Washington v. Recuenco, supra*, 126 S.Ct. at p. 2553; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) Likewise, since *Cunningham* is an application of *Apprendi* and *Blakely*, it should be subject to *Chapman* harmless error review.

Thus, under *Chapman*, to determine whether *Cunningham* error was prejudicial, the reviewing court must determine whether a 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. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 327; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 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"]; see also *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 *Washington v. 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"].)

In the instant case, the evidence of the aggravating circumstance found by the trial court, was overwhelming in light of appellant's admission to the factual basis. In the statement of the factual basis for the plea, the prosecutor specifically noted that the molestations of one of the victims occurred at the defendant's daughter's in-home daycare. (RT 26-28.) Defense counsel acknowledged that "the People have witnesses lined up for this trial that will

support what the D.A. read in terms of the factual basis, and that's what they'll testify to." (RT 28) Accordingly, the determination that the defendant "took advantage of a position of trust and confidence to commit the crime" was essentially uncontroverted.

Therefore, had the issue been presented to a jury, it would have found this aggravating circumstance true beyond a reasonable doubt. Accordingly, any *Cunningham* error was harmless because the upper term sentence would have been authorized by this aggravating circumstance found by the trial court in imposing the sentence.

CONCLUSION

Accordingly, for the foregoing reasons, respondent respectfully asks that the appeal be dismissed, or alternatively, that the judgment be affirmed.

Dated: March 22, 2007

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 22982 words.

Dated: March 22, 2007

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