

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

WESLEY DAVID FRENCH,

Defendant and Appellant.

S148845

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

APPELLANT'S REPLY BRIEF ON THE MERITS

CENTRAL CALIFORNIA
APPELLATE PROGRAM

GEORGE BOND
Executive Director

WILLIAM J. ARZBAECHER III
Staff Attorney
California Bar No. 137439
2407 J Street, Suite 301
Sacramento, CA 95816
(916) 441-3792

Attorneys for Appellant
WESLEY DAVID FRENCH

TABLE OF CONTENTS

| | Page |
|---|------|
| APPELLANT’S REPLY BRIEF ON THE MERITS | |
| I. INTRODUCTION | 1 |
| II. THE <i>BLAKELY</i> ISSUE RAISED IN THIS CASE DOES NOT REQUIRE A CERTIFICATE OF PROBABLE CAUSE; RESPONDENT’S CONTENTION THAT IT DOES SHOULD ALSO BE REJECTED ON THE GROUND THAT IT WAS NOT RAISED IN THE COURT OF APPEAL | 3 |
| A. Introduction | 3 |
| B. A Certificate of Probable Cause Is Not Required, Because Appellant Is Not Challenging the Validity of His No-Contest Plea | 4 |
| C. Resolving this Case on the Basis of Respondent’s Certificate-of-Probable-Cause Argument Would Be Inappropriate Since Respondent Did Not Raise That Issue Below | 11 |
| III RESPONDENT’S CONTENTIONS THAT APPELLANT FORFEITED HIS CONSTITUTIONAL RIGHTS BY FAILING TO OBJECT AND THAT HE ADMITTED THE AGGRAVATING FACT LEGALLY ESSENTIAL TO HIS UPPER TERM SENTENCE ARE INCORRECT AND INCONSISTENT WITH THE UNITED STATES SUPREME COURT’S OPINIONS IN <i>BLAKELY</i> AND <i>CUNNINGHAM</i> AND WITH THIS COURT’S JURISPRUDENCE IN SIMILAR CONTEXTS; RESPONDENT’S CLAIM OF FORFEITURE SHOULD ALSO BE REJECTED BECAUSE IT WAS NOT RAISED IN THE COURT OF APPEAL | 15 |
| A. Introduction | 15 |
| B. Respondent’s Claim of Forfeiture Should Be Rejected Because it Was Not Raised in the Court of Appeal | 17 |

TABLE OF CONTENTS

| | Page |
|--|------|
| C. <i>Blakely</i> Rights May Not Be Unknowingly Forfeited; They Are Fundamental Constitutional Rights That Can Be Relinquished Only via a Defendant’s Express, Knowing, Intelligent and Voluntary Waiver | 18 |
| D. Even If <i>Blakely</i> Rights May Be Forfeited by the Failure to Object in Some Situations, this Is Not a Case in Which Application of the Forfeiture Doctrine Would Be Appropriate . . . | 21 |
| E. The Factual-Basis Statement in this Case Does Not Support Respondent’s Contention That Appellant Admitted for Purposes of <i>Blakely</i> That He Could Be Sentenced to the Upper Term on Count One | 23 |
| IV THE ERROR IS NOT HARMLESS; REVERSAL AND IMPOSITION OF THE MIDDLE TERM ON COUNT ONE ARE REQUIRED | 26 |
| V. RESPONDENT’S SUGGESTED REFORMATION OF THE DSL WOULD RAISE A NUMBER OF CONSTITUTIONAL CONCERNS AND SHOULD THEREFORE BE REJECTED | 27 |
| CONCLUSION | 30 |
| CERTIFICATE OF WORD COUNT | |

TABLE OF AUTHORITIES

| | Page |
|---|---------|
| FEDERAL CASES | |
| Blakely v. Washington (2004) 542 U.S. 296 | Passim |
| Boykin v. Alabama (1969) 395 U.S. 238 | 18 |
| Cunningham v. California (2007) 549 U.S. __ [127 S.Ct. 856; 166 L.Ed.2d 856] | 1,9,16 |
| Duncan v. Louisiana (1968) 391 U.S. 145 | 20 |
| Estelle v. Smith (1981) 451 U.S. 444 | 24 |
| In re Winship (1970) 397 U.S. 358 | 20 |
| Halbert v. Michigan (2005) 545 U.S. 605 | 22 |
| Harris v. United States (2002) 536 U.S. 545 | 25 |
| Hicks v. Oklahoma (1980) 447 U.S. 343 | 8,11,28 |
| Johnson v. Zerbst (1938) 304 U.S. 458 | 24 |
| Monge v. California (1998) 524 U.S. 721 | 20 |
| Ring v. Arizona (2002) 536 U.S. 584 | 19,20 |
| Schriro v. Summerlin (2004) 542 U.S. 348 | 19,20 |
| Sullivan v. Louisiana (1993) 508 U.S. 275 | 20 |
| Taylor v. United States (1973) 414 U.S. 17 | 24 |
| United States v. Paulus (7th Cir. 2005) 419 F.3d 693 | 23 |
| Vitek v. Jones (1980) 445 U.S. 480 | 28 |

TABLE OF AUTHORITIES

Page

STATE CASES

Arp v. Workers' Compensation Appeal Board (1977) 19 Cal.3d 395 28

In re Brown (1973) 9 Cal.3d 612 29

In re Brown (1973) 9 Cal.3d 679 12

In re Chavez (2003) 30 Cal.4th 643 12

In re Tahl (1969) 1 Cal.3d 122 18

In re Yurko (1974) 10 Cal.3d 857 18

Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607 28

McGinity v. State (Ind. App. 2005) 824 N.E.2d 784 23,24,25

People v. Anderson (1987) 43 Cal.3d 1104 28

People v. Belmares (2003) 106 Cal.App.4th 19 19

People v. Black (2005) 35 Cal.4th 1238 21

People v. Bobbit (2006) 138 Cal.App.4th 445 4,10

People v. Buttram (2003) 30 Cal.4th 773 7,9

People v. Camacho (2000) 23 Cal.4th 824 18

People v. Cole (2001) 88 Cal.App.4th 850 Passim

People v. Hill (2005) 131 Cal.App.4th 1089 21

People v. Hoffard (1995) 10 Cal.4th 1170 13,14,16

People v. Holmes (2004) 32 Cal.4th 432 24

TABLE OF AUTHORITIES

| | Page |
|---|-------|
| STATE CASES | |
| People v. Lloyd (1998) 17 Cal.4th 658 | 5 |
| People v. Menchaca (1983) 146 Cal.App.3d 1019 | 19 |
| People v. Mendez (1999) 19 Cal.4th 1084 | 12 |
| People v. Panizzon (1996) 13 Cal.4th 68 | 5,6 |
| People v. Perez (2007)148, Cal.App.4th 353 | 11,12 |
| People v. Saunders (1993) 5 Cal.4th 580 | 18,19 |
| People v. Shelton (2006) 37 Cal.4th 759 | 4,7,8 |
| People v. Vera (1997) 15 Cal.4th 269 | 19 |
| People v. Ward (1967) 66 Cal.2d 571 | 5 |
| People v. Williams (1998) 17 Cal.4th 148 | 17 |
| People v. Young (2000) 77 Cal.App.4th 827 | 4,6 |
| Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal.App.3d 496 | 12 |
| Porter v. Superior Court (March 20, 2007) __ Cal.App.4th __ [2007 Cal.App. LEXIS 395, 37-41] | 27 |
| State v. Brown (Ariz. 2006) 129 P.3d 947, 952-953 | 23 |
| State v. Brown (Ariz. App. 2005) 115 P.3d 128, 132-138 | 23 |
| State v. Hagen (Minn. App. 2004) 690 N.W.2d 155 | 23 |

State v. Ward (Ariz. App. 2005) 118 P.3d 1122, 1126-1129 23

TABLE OF AUTHORITIES

Page

STATE CASES

Sturm, Ruger & Co. v. Superior Court (1985) 164 Cal.App.3d 579 12

STATE STATUTES

California Rules of Court, rule 8.304(b) 4

Penal Code sec. 6 29

Penal Code sec. 1237.5, subd. (a) 12

Penal Code sec 1237.5, subd. (b) 12

MISCELLANEOUS REFERENCES

5 Witkin, Cal. Procedure 12

California Const., art. III, sec. 3 28

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

WESLEY DAVID FRENCH,

Defendant and Appellant.

S148845

APPELLANT'S REPLY
BRIEF ON THE MERITS

I.

INTRODUCTION

In Respondent's Brief on the Merits ("RBOM"), respondent raises several arguments in opposition to appellant's claim that the trial court's imposition of the upper term as to count one violated his constitutional rights to due process and trial by jury, as recognized in *Blakely v. Washington* (2004) 542 U.S. 296 and *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856]. First, respondent argues that the appeal should be dismissed, because appellant's claim constitutes a challenge to his no-contest plea and therefore requires a certificate of probable cause, which appellant has not obtained. (RBOM, pp. 4-10.)

Respondent also argues that appellant forfeited the constitutional claims that are the subject of this appeal by failing to object on *Blakely* grounds at his sentencing and that

he admitted the fact used to impose the upper term by pleading no contest after having been advised that he could receive a sentence as long as the one imposed, and by stipulating to the prosecutor's statement of the factual basis for his no contest plea. (RBOM, pp. 64-71.)

Respondent also argues that any error in imposing the upper term in this case was harmless, because the evidence supporting the imposition of the upper term was "overwhelming" and "essentially uncontroverted." (RBOM, pp. 72-73.)

Finally (though not last), respondent argues that this court should retroactively eliminate all defendants' "*Blakely*" rights under California's Determinate Sentencing Law ("DSL") by reforming the DSL so as to make it easier for trial courts to impose upper-term sentences than it was under the DSL even prior to *Blakely*. (RBOM, pp. 17-60.)

For the reasons set forth in the arguments that follow and those in Appellant's Opening Brief on the Merits ("ABOM"), appellant disagrees with all of these arguments. And, as appellant will explain later, he objects to respondent's certificate-of-probable cause and forfeiture arguments for the additional reason that those arguments were not raised in the Court of Appeal.

II.

THE *BLAKELY* ISSUE RAISED IN THIS CASE DOES NOT REQUIRE A CERTIFICATE OF PROBABLE CAUSE; RESPONDENT'S CONTENTION THAT IT DOES SHOULD ALSO BE REJECTED ON THE GROUND THAT IT WAS NOT RAISED IN THE COURT OF APPEAL

A. Introduction.

Respondent argues, for the first time in this matter, that this appeal should be dismissed because appellant did not obtain a certificate of probable cause, as required by Penal Code section 1237.5. Respondent contends that, by challenging the imposition of the upper term on *Blakely* grounds, appellant is challenging his no-contest plea; thus, a certificate of probable cause is required. And, since appellant did not obtain one, the appeal should be dismissed. (RBOM, pp. 4-11.)

Respondent is incorrect. His argument is based on the same flawed premise that appellant refuted in his Opening Brief on the Merits (“ABOM”), viz.: that appellant’s plea included an admission of the fact the trial court used to impose the upper term. It did not. (See ABOM, pp. 9-26.) Since appellant’s plea did not involve an admission of the fact legally essential to the imposition of the upper term, his challenge of his sentence in this appeal on that ground does not constitute a challenge of the validity of his plea and so does not require a certificate of probable cause.

It would also be inappropriate to resolve this case on the basis of appellant’s failure to obtain a certificate of probable cause because respondent did not raise that issue in the Court of Appeal, and it is impossible to say with certainty that, had respondent done

so, a certificate of probable cause would not have been issued by the trial court on appellant's timely-filed certificate-of-probable-cause request.

B. A Certificate of Probable Cause Is Not Required, Because Appellant Is Not Challenging the Validity of His No-Contest Plea.

In support of his argument that the instant appeal requires a certificate of probable cause, respondent cites four cases: *People v. Shelton* (2006) 37 Cal.4th 759; *People v. Young* (2000) 77 Cal.App.4th 827; *People v. Cole* (2001) 88 Cal.App.4th 850; and *People v. Bobbit* (2006) 138 Cal.App.4th 445. (See RBOM, pp. 4-9.) These cases all discuss the interplay between the certificate-of-probable-cause requirement of section 1237.5 and the exception to that requirement (set forth in Cal. Rules of Court, rule 8.304(b)(4)(B)) for appeals based on grounds arising “after entry of the plea that do not affect the plea’s validity.”

None of the four cases cited in the RBOM provides persuasive support for respondent’s contention that this appeal challenges appellant’s plea and therefore requires a certificate of probable cause. The reasoning of the first three (*Shelton*, *Cole* and *Young*) supports appellant’s position that a certificate of probable cause is not required in this case. And the fourth case (*Bobbit*) is a very limited opinion in terms of its reasoning, and is factually distinguishable from this case, so as to be of limited usefulness in assessing the applicability of the certificate-of-probable-cause requirement in this case.

In *People v. Cole*, *supra*, the Second District Court of Appeal (Division Five) summarized this court’s jurisprudence on the certificate-of-probable-cause requirement in

guilty-plea cases in which the defendant challenged an aspect of his sentence on appeal. (*Id.*, 88 Cal.App.4th at pp. 861-866.) The court explained that, from this court’s opinion in *People v. Ward* (1967) 66 Cal.2d 571, the rule now embodied in rule 8.304(b)(4)(B) (formerly rule 31(d) and later rule 30(b)) emerged that a defendant need not obtain a certificate of probable cause where the appeal is based on grounds that arose after entry of the plea that do not affect its validity. (*Cole, supra*, at pp. 861-862.) However, this court’s subsequent jurisprudence (*People v. Panizzon* (1996) 13 Cal.4th 68; *People v. Lloyd* (1998) 17 Cal.4th 658) clarified that this exception to the certificate-of-probable-cause requirement is not as broad as it sounds, and that the certificate-of-probable-cause requirement is not simply a function of *when* the action challenged on appeal arose in relation to the plea, but whether the appeal, *in substance*, challenges the validity of the plea. Thus, when a defendant enters a plea to a specified sentence, he must obtain a certificate of probable cause in order to challenge the imposition of that sentence on appeal. (*Cole, supra*, at pp. 863-864, citing *Panizzon, supra*, 13 Cal.4th at pp. 76-79.)

Applying the substance-of-the-appeal reasoning of *Panizzon*, the court in *Cole* concluded that the defendant in that case (who pled guilty with the understanding that a sentence of 25 years to life would be imposed unless the trial court exercised its discretion under section 1385 to dismiss a “strike prior” allegation) needed a certificate of probable cause as to two issues that he had raised in the appeal (viz., (1) “that he must be allowed to withdraw his plea, because it was ‘manifestly influenced’ by the superior

court's promise to consider striking one or more of his prior serious or violent felony convictions;” and (2) that his sentence of 25 years to life constituted cruel and unusual punishment), but he did not need a certificate of probable cause to challenge the trial court’s refusal to dismiss a strike-prior allegation in furtherance of justice. (*Cole, supra*, 88 Cal.App.4th at pp. 867-872.)¹

In support of its holding that Cole needed a certificate of probable cause to argue on appeal that his sentence of 25 years to life constituted cruel and unusual punishment, the court relied in part on the holding of the Third District Court of Appeal in *People v. Young, supra*, which had reached the same conclusion in a similar case. (See *Cole, supra*, 88 Cal.App.4th at p. 866.) In *Young*, the court also applied *Panizzon*’s substance-of-the-appeal rule and explained that, by challenging his 25-to-life sentence as cruel and unusual punishment, the defendant sought “to void a term of the agreement to which both parties agreed to abide [citation], and [was] ‘in substance, attacking the validity of the plea.’” (*Young, supra*, 77 Cal.App.4th at p. 832, quoting *Panizzon, supra*, 13 Cal.4th at p. 78.)

In *People v. Shelton, supra*, this court recently held that a defendant needed a certificate of probable cause in order to challenge the trial court’s imposition of a sentence “lid” on the ground that it violated section 654. The court concluded that “inclusion of a sentence lid implies a mutual understanding and agreement that the trial

¹ The court also rejected Cole’s claim that the imposition of a concurrent sentence violated section 654, on the ground that that claim was barred by rule 4.412(b). (*Cole*, 88 Cal.App.4th at pp. 872-873.)

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.” (*People v. Shelton, supra*, 37 Cal. 4th at p. 763.)

The court emphasized that Shelton’s challenge of his “lid” sentence on section 654 grounds was problematic because it constituted a challenge of the trial court’s *authority* to impose that sentence, as opposed to a challenge of the court’s exercise of its sentencing discretion. (*Shelton, supra*, at pp. 763, 768-769.) The court also noted that it was not departing from its recent holding in *People v. Buttram* (2003) 30 Cal.4th 773, that the "issues [that] may be raised on appeal following a guilty or nolo plea without the need for a certificate [of probable cause include] issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed." (*Shelton, supra*, at p. 766, quoting *People v. Buttram, supra*, 30 Cal.4th at p. 780.)

The common theme in *Shelton, Young* and *Cole* is that, when the defendant’s appeal challenges the trial court’s authority to impose a sentence allowed by his plea, such that the trial could not lawfully impose that sentence, that contention is at odds with the plea and requires a certificate of probable cause. Such a challenge is, in substance, an attack on the plea, because the defendant is claiming that the trial court could not lawfully

reach a sentence that the parties expressly agreed was not necessarily foreclosed by the plea agreement.

Shelton, Cole and *Young* are all materially distinguishable from this case, because appellant here is not contending that the trial court had no authority, under any circumstances, to impose an upper-term, 18-year sentence.² Rather, he is challenging the trial court's use of a *particular fact* to impose that sentence. He is contending that that fact was *not* embraced by his plea, and that the trial court's use of that fact is therefore unconstitutional. This contention is expressly supported by the United States Supreme Court's holding in *Cunningham, supra*, in which the Court held that the facts legally essential to an upper-term sentence imposed under California's DSL are *not* "embraced by the defendant's plea" (*Id.*, 127 S.Ct. at p. 864, emphasis added; and see *id.* at pp. 869-870.)

Unlike the arguments raised in *Shelton, Cole* and *Young*, the argument that is the subject of this appeal would not have foreclosed the prosecutor from seeking the maximum sentence allowed by appellant's plea. Appellant is simply raising an "issue[] regarding proceedings held subsequent to the plea for the purpose of determining the

² As noted in the ABOM (p. 18, fn. 11), this case is also distinguishable from *Shelton* because it does not involve a true sentence "lid" as defined in *Shelton*. (See *id.*, 37 Cal.4th at p. 768 ["the 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."].)

degree of the crime and the penalty to be imposed." (*People v. Buttram, supra*, 30 Cal.4th at p. 780.) Appellant's claim is not that *Blakely* and *Cunningham* foreclose all upper-term sentences. They clearly do not. They simply foreclose upper-term sentences based on facts, other than prior convictions, that "are neither inherent in the jury's verdict nor embraced by the defendant's plea" (*Cunningham, supra*, 127 S.Ct. at p. 864.)

Respondent's claim that appellant is challenging his plea and therefore needs a certificate of probable cause is similar to the Court of Appeal's reasoning below that "[w]here, as here, a defendant agrees that the court has the authority to sentence that defendant to an upper term, he is deemed to have admitted that his conduct, as a matter of fact, can support that term." (Court of Appeal Opinion, p. 3.) As explained in the ABOM, this reasoning is flawed because it was expressly rejected by the United States Supreme Court in *Blakely*. (See ABOM, pp. 16-18.) Indeed, the brief of the State of Washington made this same argument in *Blakely*. (Brief for the State of Washington, Oct. Term 2003, No. 02-1632, pp. 35-36; http://www.abanet.org/publiced/preview/briefs/pdfs_3/1632Resp.pdf.)³

In *People v. Bobbit, supra*, the Third District Court of Appeal dismissed for lack of a certificate of probable cause an appeal in which the defendant claimed that the upper-

³ This brief can also be obtained by going to the United States Supreme Court's on-line docket (<http://www.supremecourtus.gov/docket/docket.html>) and then clicking sequentially on "Merits Briefs," the "Argument Date" menu, "2003-2004 Term," "Blakely, Jr. v. State of Washington," and "Respondent's brief."

term sentence he received, which was the maximum sentence he was told he could receive under his plea agreement, violated *Blakely*. (*Bobbit, supra*, 138 Cal.App.4th at pp. 447-448.) In support of this holding, the court quoted several passages from this court's opinion in *Shelton, supra*, and emphasized the fact that Bobbit's attorney raised no objection to the upper-term sentence on *Blakely* grounds, although both the entry of Bobbit's no-contest plea and his sentencing occurred more than seven months "after the highly publicized decision, which dispels any doubt that the issue was not preserved through the oversight of defense counsel." (*Bobbit, supra*, at pp. 447-448.)

Bobbit is materially distinguishable from this case because the timing of the two cases in relation to *Blakely* does not support similar interpretations of the defendants' respective plea agreements with respect to their *Blakely* rights. Appellant's no-contest plea was entered on June 8, 2004 (CT 136; RT 22-37), sixteen days before *Blakely* was decided (June 24, 2004). He was sentenced on July 9, 2004, sixteen days after *Blakely* was decided. (CT 17, 157-159; RT 38.) And his counsel made no mention of *Blakely* (nor did the court or prosecutor) even though appellant objected to the imposition of judgment and asked for a continuance so he could obtain alternate counsel to help him move to withdraw his plea. (RT 38-53.) Thus, here, unlike *Bobbit*, the record provides no basis for inferring that appellant must have understood that, by pleading no contest, he

was waiving his *Blakely* rights as to the imposition of an upper-term sentence.⁴

In sum, respondent's claim that the appeal should be dismissed for lack of a certificate of probable cause is based on a premise that is inconsistent with *Cunningham*, viz.: that appellant's plea admitted the fact that constitutionally authorized the trial court to impose the upper term. *Cunningham* holds just the opposite. (*Id.*, 127 S.Ct. at p. 864.) Since appellant's plea did not involve an admission of the fact legally essential to the imposition of the upper term, his challenge of his sentence in this appeal on that ground does not constitute a challenge of the validity of his plea and so does not require a certificate of probable cause.

C. Resolving this Case on the Basis of Respondent's Certificate-of-Probable-Cause Argument Would Be Inappropriate Since Respondent Did Not Raise That Issue Below.

It would be inappropriate to resolve this case on the basis of appellant's failure to obtain a certificate of probable cause for the additional reason that respondent did not raise that issue in the Court of Appeal, and it is impossible to say with certainty that, had respondent done so, a certificate of probable cause would not have been issued by the trial court on appellant's timely-filed request for a certificate of probable cause.

A defendant who needs a certificate of probable cause in order to appeal an issue

⁴ Appellant also notes that, in a recent, post-*Cunningham* case in which the Third District Court of Appeal discussed the law regarding certificates of probable cause at length, that court did not follow *Bobbit*, but addressed the merits of a defendant's *Blakely* claim even though he had not obtained a certificate of probable cause. (*People v. Perez* (2007)148 Cal.App.4th 353, 372-373.)

that constitutes an attack on his guilty or no-contest plea must timely apply for one by filing “a written statement, executed under oath or penalty of perjury showing reasonable, constitutional, jurisdictional, or other grounds going to the legality of the proceedings” (Pen. Code § 1237.5, subd. (a)) within 60 days after the rendition of judgment. (See rules 8.304(b)(1), 8.308(a); *People v. Perez*, *supra*, 148 Cal.App.4th at pp. 361-365.) If a timely statement of reasons under section 1237.5 (i.e., request for certificate of probable cause) is filed, the trial court must grant or deny the request within 20 days after its filing. (Rule 8.304(b)(2).)

The certificate-of-probable-cause requirement is not satisfied solely by the timely filing of a certificate request; the certificate must be issued in order for the requirement to be fulfilled. (Pen. Code § 1237.5, subd. (b); *People v. Mendez* (1999) 19 Cal.4th 1084, 1095.) However, only the failure to timely file a notice of appeal or request for a certificate of probable cause is irremediable. (*In re Chavez* (2003) 30 Cal.4th 643, 650-657; rule 8.60(d).) A trial court’s failure to issue a timely-requested certificate of probable cause may be remedied by the filing of a petition for writ of mandate, after the trial court’s 20-day deadline for ruling on the request has passed.⁵ (*In re Brown* (1973) 9

⁵ “As a general rule, in the absence of a specific statutory provision ‘an appellate court may consider a petition for extraordinary writ at any time,’ subject to its discretionary power to deny relief on the grounds of laches.” (*Sturm, Ruger & Co. v. Superior Court* (1985) 164 Cal.App.3d 579, 581, quoting *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 499; and citing 5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, § 118, pp. 3895-3896.)

Cal.3d 679, 683; *People v. Cole*, *supra*, 88 Cal.App.4th at p. 860, fn. 3.)⁶

Appellant timely filed a request for a certificate of probable cause in the trial court (i.e., after the Court of Appeal granted his request for constructive filing of a notice of appeal). (CT 213-215.)⁷ He was thereafter represented by appointed appellate counsel and would have been entitled to rely on that counsel to litigate the appeal and any requirement to pursue a ruling on his timely-filed request for a certificate of probable cause.⁸ Had respondent raised an issue in the Court of Appeal regarding the trial court's failure to rule on appellant's timely-filed request for a certificate of probable cause, appellant's appointed counsel might well have asked the Court of Appeal to expand his appointment to include the preparation and filing of a petition for a writ of mandate directing the trial court to rule on appellant's timely-filed request.

Appellant's certificate-of-probable-cause request (CT 214) stated grounds which, when viewed in the context of what occurred in the trial court, where appellant entered

⁶ A different rule, requiring a defendant to obtain a ruling from the trial court within the 20-day period of rule 8.304(b) would not make sense, because it is the trial court's duty to rule on a timely-filed request within that period, and a petition for writ of mandate directing the trial court to rule on a certificate request would be premature before that period has expired.

⁷ Although that certificate-of-probable-cause request did not list as a ground for the appeal the *Blakely* issue that is the subject of the appeal, it did not have to do so, as long as the request contained other reasonable grounds warranting the issuance of a certificate of probable cause. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1174.)

⁸ The procedural history of this matter in the Court of Appeal, as reflected in the Court of Appeal's on-line docket, is available at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=50765&doc_no=C050785.

his no-contest plea shortly after having brain surgeries and being placed on anti-seizure medication, and unsuccessfully attempted to continue his sentencing in order to retain counsel to assist him with a motion to withdraw his plea (see CT 17, 90-91, 121, 134; RT 6-7, 14-15, 39-40), were not “*clearly* frivolous and vexatious.” (*People v. Holland* (1978) 23 Cal.3d 77, 84 [italics in original].) Thus, it is quite possible that an appointment-expansion request by appellate counsel and subsequent petition for writ of mandate would have been granted, and that a certificate of probable cause on appellant’s timely-filed request also would have been granted.

The point is: this case might well not be in the same posture with respect to the lack of a ruling on appellant’s timely-filed request for a certificate of probable cause had respondent made an issue of that fact in the Court of Appeal. Therefore, it would be inappropriate to resolve this case on the basis of that issue. (See rule 8.500(c).)

III.

RESPONDENT’S CONTENTIONS THAT APPELLANT FORFEITED HIS CONSTITUTIONAL RIGHTS BY FAILING TO OBJECT AND THAT HE ADMITTED THE AGGRAVATING FACT LEGALLY ESSENTIAL TO HIS UPPER-TERM SENTENCE ARE INCORRECT AND INCONSISTENT WITH THE UNITED STATES SUPREME COURT OPINIONS IN *BLAKELY* AND *CUNNINGHAM* AND WITH THIS COURT’S JURISPRUDENCE IN SIMILAR CONTEXTS; RESPONDENT’S CLAIM OF FORFEITURE SHOULD ALSO BE REJECTED BECAUSE IT WAS NOT RAISED IN THE COURT OF APPEAL

A. Introduction.

At pages 60-71 of the RBOM, respondent claims that no cognizable *Blakely-Cunningham* error occurred in this case for two reasons: (1) appellant forfeited his constitutional rights under *Blakely* by failing to object on *Blakely* grounds to the imposition of the upper term on count one when he was sentenced (RBOM, pp. 60-62); and (2) appellant admitted for purposes of *Blakely* the fact used to impose the upper term (RBOM, pp. 62-70). This second argument has two aspects: (1) that appellant admitted the fact legally essential to the upper term by pleading no contest with notice that he could receive a sentence as long as the upper-term sentence imposed by the trial court (RBOM, pp. 68-69); and (2) that the factual-basis statement to which appellant’s attorney stipulated included a fact supporting the trial court’s imposition of the upper term. (RBOM, pp. 62-68.)

Respondent’s claim that appellant forfeited his constitutional rights under *Blakely* should be rejected for three reasons. First, it would be inappropriate to find appellant’s

claim of constitutional error forfeited when respondent did not raise that argument in the Court of Appeal. Second, respondent's forfeiture argument is not well-reasoned, because it undervalues the fundamental nature of the constitutional rights at issue in this case. These are rights that this court has held may not be forfeited by the mere failure to object; their relinquishment requires an express, knowing, intelligent and voluntary waiver. Third, even assuming that it would be reasonable to apply the forfeiture doctrine to claims of *Blakely* error on the record of some cases, this is not such a case.

Respondent's claim that appellant admitted, for purposes of *Blakely*, the fact used to impose the upper term on count one is incorrect as to both of its analytical aspects. The first – that appellant admitted the fact legally essential to the upper term by pleading no contest with notice that he could receive a sentence as long as the one imposed – is the same argument made by the Court of Appeal, which appellant addressed at length in the ABOM. (See *id.* at pp. 16-26.) Appellant will not repeat all the points he raised in the ABOM in response to this argument, except to remind the court that respondent's argument is the same one raised by the State of Washington and rejected by the United States Supreme Court in *Blakely*. (See discussion at p. 9, *ante*; ABOM, pp. 16-18.) Simply stated, a plea of guilty (or no contest) admits all elements of the charged offense (*People v. Hoffard, supra*, at pp. 1177-1178), but it does not admit the facts legally essential to the imposition of an upper-term sentence under the DSL. (*Cunningham, supra*, 127 S.Ct. at p. 864.)

The second aspect of respondent’s argument that appellant admitted (for *Blakely* purposes) the fact used to impose the upper term – i.e., because he stipulated to a factual-basis statement that included a fact that supported the aggravating fact cited by the trial court at sentencing – is not as easily brushed aside, because, as respondent correctly notes, there is a split of authority in other jurisdictions that have considered whether such facts may be used as admissions for purposes of *Blakely*. However, appellant submits that the authorities that hold that such statements may constitute “*Blakely*” admissions are not as persuasive as those that hold otherwise, because those statements do not provide a basis for concluding that the defendant has made a knowing, intelligent and voluntary waiver of the constitutional rights that are being relinquished in that process. And no such showing is demonstrated by the record of this case.

B. Respondent’s Claim of Forfeiture Should Be Rejected Because it Was Not Raised in the Court of Appeal.

Respondent’s claim that appellant forfeited his constitutional rights under *Blakely* is not properly before this court, because respondent did not raise that claim in the Court of Appeal, and the Court of Appeal did not rely on or discuss the forfeiture doctrine in its opinion below. (See rule 8.500(c) [“As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.”].)

Even if respondent’s forfeiture claim were correct, the Court of Appeal still would have had the discretion to address the merits of appellant’s *Blakely* claim. (See *People v.*

Williams (1998) 17 Cal.4th 148, 161, fn. 6.) It should not be supposed that the Court of Appeal would not have exercised this discretion (indeed, the Court of Appeal's failure to rely on forfeiture while resting its holding in part on grounds not raised by respondent suggests otherwise), or that appellant would not have been able to overcome a claim of forfeiture in the Court of Appeal, had respondent raised that claim in that court. It is not appropriate for respondent to raise that claim for the first time now. (See, e.g., *People v. Camacho* (2000) 23 Cal.4th 824, 837 fn. 4.)

C. *Blakely* Rights May Not Be Unknowingly Forfeited; They Are Fundamental Constitutional Rights That Can Be Relinquished Only via a Defendant's Express, Knowing, Intelligent and Voluntary Waiver.

As noted in the ABOM, the High Court in *Blakely* made it clear that a defendant may relinquish his *Apprendi* rights, “[i]f appropriate *waivers* procured ...” (*Blakely*, *supra*, 542 U.S. at p. 310.) By “appropriate waivers,” the Court was apparently referring to the waivers constitutionally required when a defendant pleads guilty or no contest, which must be knowing, intelligent and voluntary, and may not be inferred from a defendant's failure to object. (See ABOM, pp. 19-20, citing, inter alia, *Boykin v. Alabama* (1969) 395 U.S. 238, 243; *In re Tahl* (1969) 1 Cal.3d 122, 132; and *In re Yurko* (1974) 10 Cal.3d 857, 863-864 .)

This court also has recognized a distinction between fundamental constitutional rights whose relinquishment must be express, knowing, intelligent and voluntary, and lesser rights that may be forfeited by a defendant's failure to object. *People v. Saunders*

(1993) 5 Cal.4th 580 is illustrative. In *Saunders*, this court found that the defendant had forfeited his statutory right under section 1025 to a determination of alleged prior convictions by the same jury that determined his guilt (5 Cal.4th at pp. 589-592), but held that his “failure to object [did] not preclude his arguing on appeal that he was deprived of his constitutional right not to be placed twice in jeopardy.” (*Id.* at p. 592.)

In *People v. Vera* (1997) 15 Cal.4th 269, 276, this court reiterated that a “defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights.” (See also *People v. Belmares* (2003) 106 Cal.App.4th 19, 27; *People v. Menchaca* (1983) 146 Cal.App.3d 1019, 1025.)

Citing *Schriro v. Summerlin* (2004) 542 U.S. 348, 354, respondent attempts to downplay the importance of the fundamental constitutional rights to due process and trial by jury that are the subject of *Apprendi* and *Blakely*. (See RBOM, p. 67 [“*Blakely* ... simply altered the procedural rules attendant to any fact finding necessary to impose the upper term.”]) Appellant disagrees and submits that respondent is reading too much into *Schriro*.

The Supreme Court in *Schriro* held that the Court’s decision in *Ring v. Arizona* (2002) 536 U.S. 584 applies retroactively to cases that were not yet final on appeal at the time *Ring* was decided, but does not apply to cases already final. (*Schriro, supra*, 542 U.S. at p. 358.) In so holding, the Court described the rule in *Ring* as “procedural” rather than “substantive.” (*Schriro*, 542 U.S. at p. 354.) However, the Court did not hold that

the rights recognized in *Apprendi* and its progeny are not “fundamental.” To the contrary, the Court expressly stated that “[t]he right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them.” (*Schriro, supra*, 542 U.S. at p. 358.)

The Court made this just as clear in *Blakely*. “Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” (*Blakely, supra*, 542 U.S. 296, 305-306; see also *Duncan v. Louisiana* (1968) 391 U.S. 145, 149 [recognizing that the right to a jury trial in a criminal case is “fundamental to the American scheme of justice”]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [noting the fundamental nature of the rights to trial by jury and proof beyond a reasonable]; *In re Winship* (1970) 397 U.S. 358, 359, 364 [“proof beyond a reasonable doubt is among the ‘essentials of due process and fair treatment’”].)

Indeed, the *inalienability* of our constitutional rights to trial by jury and due process of law is at the core of *Apprendi* and its progeny, which arose from the High Court’s concern that legislatures and courts were eroding these rights by placing labels on facts essential to punishment in order to remove them from the Constitution’s reach. (See *id.*, 530 U.S. at pp. 476, 494; *Blakely, supra*, 542 U.S. at pp. 306-307; *Ring v. Arizona, supra*, 536 U.S. at p. 611-612, Scalia, J., concurring; and see *Monge v. California* (1998)

524 U.S. 721, 738-739, Scalia, J., dissenting.) It would be contrary to this core concern of the Supreme Court's *Apprendi* jurisprudence to hold that defendants' fundamental, constitutional rights under *Apprendi* may be forfeited silently and inadvertently.

D. Even If *Blakely* Rights May Be Forfeited by the Failure to Object in Some Situations, this Is Not a Case in Which Application of the Forfeiture Doctrine Would Be Appropriate.

Respondent argues that the forfeiture doctrine applies in this case, because appellant was sentenced after *Blakely* was decided, but before this court issued its opinion in *People v. Black* (2005) 35 Cal.4th 1238. (RBOM, p. 61.) Respondent also notes (on the same page) that there is a California appellate opinion (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1103) that applies the forfeiture doctrine to a case in which the defendant was sentenced eight days after *Blakely* was decided.

Hill is materially distinguishable from this case, because the court's forfeiture finding in that case (if not incorrect for the reasons discussed in the prior section) rested in large part on the fact that *Blakely*'s (non)applicability to that case was expressly discussed by the trial court at the defendant's sentencing, in spite of which the defendant's trial counsel raised no *Blakely* objection. (*Hill, supra*, 131 Cal.App.4th at p. 1103.)⁹

Here, it would not be reasonable to find that appellant forfeited his *Blakely* rights

⁹ Of course, the most obvious distinction between this case and *Hill* is that the Court of Appeal here, unlike the appellate court in *Hill*, did not find that appellant had forfeited his claim of *Blakely* error by failing to object. (See discussion in § III.B, *ante*.)

at sentencing, because here the record does not reasonably support the inference that appellant or his trial counsel were aware of appellant's *Blakely* rights as to the fact used to impose the upper term. If anything, the record here belies any such inference, because the trial court possessed no non-*Blakely*-violating facts with which to impose the upper term, and there was no reference to *Blakely* by the court or counsel. (RT 38-53.)

Moreover, as previously noted, appellant objected to the trial court's proceeding with sentencing, stating that he wanted a continuance to retain counsel to help him to move to withdraw his plea. (RT 39-40.)

On this record, the most reasonable and likely explanation for trial counsel's failure to raise a *Blakely* objection on appellant's behalf is that she was not aware of that decision's import in appellant's case. And it must be remembered that *Blakely* had not been decided at the time appellant entered his no-contest plea. (See *Halbert v. Michigan* (2005) 545 U.S. 605, 623 [disagreeing with state's contention that defendant had waived his right to appointed appellate counsel by entering a no-contest plea, because, at the time he entered that plea, the defendant "had no recognized right to appointed appellate counsel he could elect to forgo"].) Therefore, application of the forfeiture doctrine on this record would be unreasonable.

E. The Factual-Basis Statement in this Case Does Not Support Respondent's Contention That Appellant Admitted for Purposes of *Blakely* That He Could Be Sentenced to the Upper Term on Count One.

As respondent correctly notes (RBOM, p. 66), there is a split of authority among courts in other jurisdictions as to whether a defendant's admissions in a factual-basis statement taken in connection with a guilty plea constitute admissions for purposes of *Blakely*. Some courts have held that such statements do not satisfy *Blakely* unless the record shows that the defendant was aware of his constitutional rights as to the facts admitted and that he knowingly, intelligently and voluntarily waived those rights. (See *State v. Brown* (Ariz. 2006) 129 P.3d 947, 952-953; *State v. Brown* (Ariz. App. 2005) 115 P.3d 128, 132-138; *State v. Ward* (Ariz. App. 2005) 118 P.3d 1122, 1126-1129; *People v. Isaacks* (Col. 2006) 133 P.3d 1190, 1195; *State v. Hagen* (Minn. App. 2004) 690 N.W.2d 155, 158-160.) Others have found that such admissions satisfy *Blakely*, even in the absence of a showing that the defendant was aware that his admission constituted a waiver of his constitutional right to a jury trial as to an uncharged fact legally essential to the imposition of an enhanced sentence. (See *United States v. Paulus* (7th Cir. 2005) 419 F.3d 693, 699; *McGinity v. State* (Ind. App. 2005) 824 N.E.2d 784,788-789.)

A perusal of these conflicting cases demonstrates that the former are better reasoned than the latter. As previously explained, the constitutional right to trial by jury is one that may not be relinquished absent a knowing, intelligent and voluntary waiver. (See § III.C., *ante*; ABOM, pp. 19-22.) Waiver is the voluntary, intelligent and

intentional relinquishment of a known right or privilege. (*Estelle v. Smith* (1981) 451 U.S. 444, 471, fn. 16; *Taylor v. United States* (1973) 414 U.S. 17, 19; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) Waiver requires knowledge that the right exists. (*Taylor v. United States, supra*, 414 U.S. at p. 19.) Factual-basis statements are designed to ensure merely that the elements of the charged offense to which a defendant has pled guilty could be proven. (See *People v. Holmes* (2004) 32 Cal.4th 432, 441-442 [showing a factual basis "does not require more than establishing a prima facie factual basis for the charges"].) They do not serve the purpose of substituting for plea admonishments and waivers as to *uncharged* facts legally essential to punishment beyond that available solely on the basis of the charged offense's statutory elements.

Respondent attempts to distinguish *Yurko* and some of the other authorities discussed above, by arguing that appellant's stipulation to the factual basis for his plea is analogous to an evidentiary stipulation to a single element of an enhancement, not to an admission to an enhancement in its entirety. (RBOM, pp. 70-71, citing *People v. Adams* (1993) 6 Cal.4th 570, 579-582.) Respondent's argument is unavailing because *Adams* actually supports the conclusion that *Boykin-Tahl* waivers were required here.

In *Adams*, this court explained that "[a]n admission or stipulation of facts alleged in most enhancement allegations will lead to imposition of increased punishment on conviction of the underlying offense." (*Adams, supra*, 6 Cal.4th at p. 580.) The court also noted that, "when the stipulation admits every element of the enhancement that is

necessary to imposition of the additional penalty, for purposes of *Boykin-Tahl* analysis we see no meaningful distinction between an admission of the truth of an enhancement allegation and an admission of all of the elements necessary to imposition of the additional punishment authorized by the enhancement.” (*People v. Adams*, 6 Cal.4th at p. 580, fn. 7.) Since respondent is maintaining that appellant’s stipulation to the factual-basis statement (and that stipulation alone) rendered him eligible for enhanced punishment that otherwise would not be available under *Blakely*, respondent is necessarily conceding that, under this court’s reasoning in *Adams*, *Boykin-Tahl* waivers were required.¹⁰ In short, respondent cannot have it both ways.

Here, the record provides no basis for concluding that appellant understood that he had the right to a jury trial on the fact used to impose the upper term on count one or that his attorney’s stipulation to the prosecutor’s factual-basis statement would effect a relinquishment of that right. Again, appellant’s no contest plea was entered on June 8, 2004, sixteen days before *Blakely* was decided. Thus, it would be unreasonable to infer from the silent record in this case that appellant was aware of his “*Blakely*” rights at the time he entered his plea.¹¹ And the record does not affirmatively show that appellant’s

¹⁰ Respondent’s use of the term “necessary” in its argument (RBOM, p. 71) is misleading, because *Adams* is not concerned with whether *punishment is necessitated* by a defendant’s admissions, but by whether all of the facts legally *necessary to punishment* are available. (*Id.* at pp. 579-583.) This is also the concern of *Blakely*. (See *id.*, 542 U.S. at p. 313; and see *Harris v. United States* (2002) 536 U.S. 545.)

¹¹ Appellant also notes that the fact used to impose the upper term on count one (viz., taking advantage of a position of trust (RT 50)) was not a fact actually articulated in

stipulation to the prosecutor's statement of the factual basis for the plea was knowing, intelligent and voluntary under the totality of the circumstances. Therefore, the upper term sentence imposed on count one should be reversed.

IV.

THE ERROR IS NOT HARMLESS; REVERSAL AND IMPOSITION OF THE MIDDLE TERM ON COUNT ONE ARE REQUIRED

Respondent argues that, if the trial court erred in imposing an upper-term sentence on the basis of a fact not admitted by appellant, any error was harmless because that fact was supported by "overwhelming evidence" and was "essentially uncontroverted" in light of appellant's stipulation to the factual basis for his plea. (RBOM, p. 73.) This argument is illogical because it presupposes the fact it must assume (at least for purposes of argument) did not occur, i.e., that appellant did *not* admit the fact used to impose the upper term. If (as appellant argues) he did not admit that fact for purposes of *Blakely* when he entered his plea, it necessarily follows that the error was prejudicial and requires reversal of the upper-term sentence, because that was the only fact used by the trial court

the prosecutor's factual-basis statement. Rather, the only thing in that statement from which this fact may be inferred is the prosecutor's statement, in describing the factual basis for counts eleven and twelve, that those counts took place at appellant's daughter's daycare facility. (See RT 26-28.) Any suggestion that appellant was on notice of the punitive significance of his attorney's stipulation to the prosecutor's factual-basis statement might be more persuasive if that statement more closely accorded with the "position of trust" language later used by the trial court at sentencing. But, even if it did, that language alone would still not provide the necessary showing that appellant was aware of and waived his constitutional rights as to the fact used to impose the upper term.

to impose the upper term. There *are* no other constitutionally-permissible aggravating facts available to impose that term, and respondent has not suggested any.

And remand for rearraignment and retrial on this fact is not available, because this remedy would require constitutionally impermissible piecemeal litigation of a greater offense that includes the one on which appellant already stands convicted (see ABOM, p. 29; and see *Porter v. Superior Court* (March 20, 2007) __ Cal.App.4th __ [2007 Cal.App. LEXIS 395, * 37-*41]) and because there is no legislatively-created vehicle for trying appellant on the upper-term allegation, so there is no way that it could be tried to a jury and proven beyond a reasonable doubt, without violating the separation-of-powers doctrine. (ABOM, pp. 29-30.) Therefore, the appropriate remedy is an order vacating the upper-term sentence imposed on count one and remanding the case to the trial court with directions to impose the middle term on that count.

V.

RESPONDENT'S SUGGESTED REFORMATION OF THE DSL WOULD RAISE A NUMBER OF CONSTITUTIONAL CONCERNS AND SHOULD THEREFORE BE REJECTED

At pages 17-55 of the RBOM, respondent proposes that this court reform the DSL by making a number of substantial changes to the law, the effect of which is to retroactively eliminate all defendants' *Blakely* rights under the DSL and make it easier for trial courts to impose upper-term sentences than it was under the DSL even prior to *Blakely* and *Cunningham*. Appellant urges the court to reject this proposal. Such a

drastic reformation of the state's sentencing laws would be inconsistent with the judicial restraint that this court has traditionally exercised in reforming constitutionally infirm statutes. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 624 ["a judicial 'narrowing formation' of the invalidated statute is permissible."]; *Arp v. Workers' Comp. Appeal Bd.* (1977) 19 Cal.3d 395, 407 [such action is drastic and should be invoked sparingly].) And it would raise a number of constitutional issues that this court would be wise to avoid. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1146 [statutory construction should avoid raising grave and doubtful constitutional questions].)

Respondent's objections notwithstanding, appellant submits that amending the statute retroactively in the dramatic fashion respondent suggests would be analogous to criminalizing conduct retroactively, or at least making it easier for the state to obtain upper-term sentences for offenses than it is under the law as it has stood for thirty years. Thus, reforming the DSL as proposed by respondent would violate the separation of powers doctrine and defendants' constitutional rights to due process and against ex post facto laws. (See discussion and authorities cited in ABOM, pp. 28-30.)

Under the Fourteenth Amendment of the United States Constitution, a state may not deprive its citizens of a liberty interest that exists under the state's laws. (*Vitek v. Jones* (1980) 445 U.S. 480, 488; *Hicks v. Oklahoma* (1980) 447 U.S. 343.) Appellant (like all Californians) has a liberty interest under California law to be prosecuted only for offenses that have been created through the state's legislative process. (See Cal. Const.,

art. III, § 3; Pen. Code, § 6; *In re Brown* (1973) 9 Cal. 3d 612, 624 [“Only the Legislature and not the courts may make conduct criminal.”].)

Invading the province of the Legislature by substantially revising the DSL will also be unnecessary if the State Legislature has already done so by the time the court disposes of this matter, which appears likely. (See Sen. Bill 40 (2007-2008 Reg. Sess.).)

Finally, appellant understands that the Attorney General has filed a substantially identical proposed reformation of the DSL in many (if not all) of the respondent’s briefs or supplemental respondent’s briefs he has filed in the six other cases in which this court has granted review or requested supplemental briefing in the wake of *Cunningham* (i.e., *People v. Towne* (S125677), *People v. Black* (S126182), *People v. Mvuemba* (S149247), *People v. Pardo* (S148914), *People v. Sandoval* (S148917) and *People v. Hernandez* (S148974)). Appellant therefore respectfully requests to join in the arguments responsive to the Attorney General’s proposed reformation of the DSL filed by the defendants in these other cases. (See rule 8.200(a)(5).)

VI.

CONCLUSION

Wherefore, appellant respectfully requests that the opinion of the Court of Appeal be reversed, and that the upper-term sentence on count one be reduced to the middle term.

Dated: March 28, 2007

Respectfully submitted,

CENTRAL CALIFORNIA
APPELLATE PROGRAM

GEORGE BOND
Executive Director

WILLIAM J. ARZBAECHER III
Staff Attorney
California Bar No. 137439
2407 J Street, Suite 301
Sacramento, CA 95816
(916) 441-3792

Attorneys for Appellant
WESLEY DAVID FRENCH