

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

Plaintiff and Respondent,

S148974

v.

**JOEL HERNANDEZ,**

Defendant and Appellant.

Appellate District, Division One, No. D047682  
San Diego County Superior Court No. SCN195202  
The Honorable Richard E. Mills, Judge

**RESPONDENT'S ANSWER BRIEF ON THE MERITS**

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**ISSUES PRESENTED<sup>1/</sup>**

(1) Did the trial court violate appellant's Sixth Amendment right to a jury trial, as interpreted in *Cunningham v. California* (2007) 549 U.S. \_\_\_ [127 S.Ct. 856, 166 L.Ed.2d 856], by imposing an upper term sentence based on aggravating factors not found true by the jury?

(2) If so, what is the proper remedy?

(3) Does *Cunningham* affect this court's conclusion in *People v. Black* (2005) 35 Cal.4th 1238, 1261-1264, that *Blakely v. Washington* (2004) 542 U.S. 296 does not apply to the imposition of consecutive sentences under Penal Code section 669?

**STATEMENT OF THE CASE**

A San Diego County jury convicted appellant of evading an officer with reckless driving (Veh. Code, § 2800.2, subd. (a)), and resisting an officer (Pen.

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1. The following abbreviations refer to the briefs in this case: Appellant's Brief On The Merits (ABM); Appellant's Petition For Review (PTN); Fourth District, Division One, Court Of Appeal Opinion in Case No. D047682 (OPN); Appellant's Opening Brief in Case No. D047682 (AOB).

Code, § 148, subd. (a)(1)).<sup>2/</sup> (CT 69-70, 132.) In a bifurcated proceeding, appellant admitted, and the trial court found true, an allegation that he had a prison prior offense (Pen. Code, §§ 677.5, subd. (b) & 688). (CT 132.) The trial court sentenced appellant to four years, six months in state prison: the upper term of three years for evading an officer, a consecutive six month term for resisting an officer, and a one year term for the prison enhancement. (CT 134, 120.)

Appellant appealed, claiming, *inter alia*, that the trial court's imposition of the upper term and consecutive sentences was unconstitutional under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*), because it was based upon facts the jury did not find true beyond a reasonable doubt. The Fourth District Court of Appeal, Division One, rejected appellant's claim under this Court's decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). Moreover, the court found that any error was harmless beyond a reasonable doubt.

Appellant petitioned this Court for review, arguing *Black* was wrongly decided. On February 7, 2007, this Court granted appellant's petition for review.

## STATEMENT OF FACTS

On May 21, 2005, around 12:45 a.m., Detective Luis Rudisell, lead investigator of the Escondido Police Department's gang investigations unit, responded to a citizen's report of a gang-related disturbance in the area of 9th Avenue and Pine Street in Escondido. (1 RT 41, 57, 59.) The report concerned two vehicles occupied by "gang types": a black, full-size pickup

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2. Further statutory references are to the Penal Code unless otherwise indicated.

truck and a silver compact car. (1 RT 41-42, 55, 60-61.) Traveling south on Quince Street, Detective Rudisell spotted a black pickup truck and a smaller compact car come out of an alley just south of Fifth Avenue. (1 RT 60.) The vehicles turned north onto Quince. (1 RT 60.) Detective Rudisell, who was stopped at the intersection of Fifth and Quince about 15 to 20 feet away, turned his spotlight on the truck. (1 RT 61-62, 93-94.) The truck immediately turned east on Fifth, running the stop sign at the intersection, while the car continued straight down Quince. (1 RT 61-63.) As the truck turned, Detective Rudisell followed it with his spotlight. (1 RT 61.) The spotlight shined on the inside of the truck for about five seconds. (1 RT 94-96.) Detective Rudisell had a very clear view of the driver (1 RT 62, 82, 96, 105), who was wearing a button-up shirt (1 RT 98). He had had numerous prior contacts with appellant, as well as with appellant's brother, Ivan. (1 RT 82-83, 103-104.) Though, at the time, Detective Rudisell did not recognize appellant from the prior contacts (1 RT 62, 103), he testified at trial that he was certain appellant was the person he saw driving the truck (1 RT 82).

After the truck turned onto Fifth, Detective Rudisell crossed the intersection and got behind it. (1 RT 62-63.) As soon as he did, the truck rapidly accelerated and turned south at the next block onto Pine Street, a narrow residential street with a speed limit of 25 miles per hour (mph). (1 RT 63-64.) The truck rapidly accelerated over the next two blocks, increasing its speed to between 30 and 40 mph. (1 RT 64.) At the intersection of Seventh Avenue and Pine, Detective Rudisell activated the cruiser's lights and siren. (1 RT 64-66.) In response, the truck accelerated and pulled away. (1 RT 65.) It sped for two more blocks before making a quick turn west onto Ninth Avenue. (1 RT 66.) The truck did not stop or slow down for the stop sign at that intersection (1 RT 66), and took a wide turn at about 35 mph, causing it to cross over onto the opposite side of the road (1 RT 66-68). It then made an immediate turn back onto Quince heading north. (1 RT 67.)

Detective Rudisell pursued the truck – his lights and sirens still on. (1 RT 68.) The truck sped up even more and, at the intersection of Fifth and Quince, drove through the stop sign at about 50 mph. (1 RT 68-69.) It continued to accelerate and ran a red light at the intersection of Second Avenue and Quince at about 65 mph -- an intersection where the speed limit was only 35 mph and the road crossed over two main city thoroughfares. (1 RT 69-70, 88.) Detective Rudisell opined that driving 65 mph in that area was very dangerous. (1 RT 70.) The truck continued to accelerate and ran another red light at the intersection of Valley Parkway and Quince at about 70 mph. (1 RT 70-71, 88.) Detective Rudisell struggled to keep up because he was stopping his cruiser at each intersection to check for cross traffic out of a concern for the safety of the general public. (1 RT 69, 72.) He briefly lost sight of the truck as it went around a curve at 70 mph. (1 RT 71-72, 90.)

As the truck approached Washington Avenue, Detective Rudisell broadcast its location. (1 RT 42.) Sergeant Eric Distel happened to be at the intersection of Washington and Quince. (1 RT 42.) When the truck turned east on Washington, Sergeant Distel took over the lead because Detective Rudisell had fallen a good distance behind. (1 RT 40, 42-44, 72-73.) Sergeant Distel, who was wearing a uniform, activated the red lights and siren on his police cruiser. (1 RT 43-44.) The truck accelerated to between 60 and 70 mph in 35 mph speed zone. (1 RT 45-46.) Without slowing down, it ran a red light at the intersection of Washington and Centre City Parkway – a heavily traveled intersection with light to moderate traffic conditions at the time. (1 RT 46-47.) Sergeant Distel had to make a full stop before crossing it because of cross traffic. (1 RT 47.) The truck continued speeding and ran a red light at the intersection of Escondido Boulevard and Washington at about 50 to 55 mph – also in a 35 mph speed zone. (1 RT 46-48.) This block of Washington is a commercial area with a convenience store, supermarket, and hotels that draw pedestrian traffic. (1 RT 47-48.)

The truck continued down Washington for about another half mile. (1 RT 50.) Sergeant Distel began to fall back because he was stopping for cross traffic along the pursuit. (1 RT 45, 48, 50.) At the intersection of Washington and Broadway Street, the truck went airborne and sparks flew out of the bottom as it crossed over a dip. (1 RT 89.) Sergeant Distel closed the gap slightly near the intersection of Washington and Fig Street. (1 RT 50.) The truck then turned north onto Beechwood, a residential street. (1 RT 50-51.) Sergeant Distel caught up with it at the cul-de-sac where the street ends. (1 RT 50-51.) The occupants fled from the truck. (1 RT 50-51.) Sergeant Distel was uncertain how many people fled from the truck, but believed it could have been as many as five. (1 RT 55.) He did not see the driver of the vehicle during the pursuit. (1 RT 54.) The vehicle chase lasted about 10 minutes and took place over about three-and-a-half to five miles. (1 RT 84-90, 99; Exh. No. 9.) Sergeant Distel explained such pursuits pose a danger to pedestrians, the pursuing officers, the suspect, and other cars. (1 RT 49-50.)

Police set up a perimeter, called in canines, and used a helicopter to search for the vehicle's occupants for 30 to 45 minutes. (1 RT 51-53, 101.) They located appellant hiding on the roof of a nearby residence. (1 RT 73.) He had removed his shirt. (1 RT 81.) Police also found Noe Mendoza hiding at a house nearby. He too had removed his shirt. (1 RT 74, 81, 84.) Detective Rudisell explained he had been involved in foot pursuits in the past where the suspects removed their shirts to make identification more difficult. (1 RT 81-82.) From the roof where appellant was hiding, police recovered a button-up shirt very similar to the one Detective Rudisell had seen the driver wearing. (1 RT 98-99.) Police also found a female juvenile, around the age of 15, who had been in the truck. (1 RT 53, 74.) Mendoza was arrested for being drunk in public. (1 RT 103.)

When Detective Rudisell contacted appellant on the scene, he realized he knew appellant from their prior contacts. (1 RT 62, 103.) At first, Detective

Rudisell mistakenly called appellant by appellant's brother's name, "Ivan." (1 RT 83-84, 104, 106.) Detective Rudisell knew it was appellant, but misspoke because he had had recent contacts with Ivan and Ivan's was the first name that came to mind. (1 RT 83-84, 104-105.)

After appellant was arrested, police searched the truck and found DMV forms, a vehicle title, and report of sale, which indicated appellant was the owner of the truck. (1 RT 90-91, 107-109; Exh. Nos. 4 and 5.) Police also found two cell phones in the cab of the truck; one on the driver's seat and one on the floorboard of the passenger seat. (1 RT 91-92, 100-102; Exh. No. 6.) Though he did not recall which method he used to make the determination, Detective Rudisell determined the phone in the driver's seat was appellant's by viewing its menu and record of calls or learning appellant's cell phone number. (1 RT 92-93.)

The next day, Officer Paige Woog called Detective Rudisell and told him Mendoza was at the police station to turn himself in as the driver of the truck. (1 RT 102-103.) Detective Rudisell told Officer Woog to let him go. (1 RT 103.)

### **Defense**

Officer Woog testified that on May 22, 2005, Mendoza came to the police station and told her he was the driver of the black pickup truck that evaded police the day before. (1 RT 111-112.) Mendoza said he did not want the "wrong guy" to go to jail. (1 RT 112.) He also said he was in the truck with two of his friends and there was no female occupant. (1 RT 112, 115.) When Officer Woog asked him why he ran from police, Mendoza said he had several traffic warrants and did not want to go to jail. (1 RT 112-113.) Officer Woog advised Detective Rudisell of Mendoza's statement. (1 RT 113.) The detective said Mendoza was the wrong guy and told her to let him go, which

she did. (1 RT 113.) Officer Woog did not prepare a report of the incident at that time. (1 RT 114.)

### **Rebuttal**

The prosecutor recalled Detective Rudisell as a gang expert. (1 RT 116-117.) He explained he was familiar with the gangs in Escondido. (1 RT 117.) Detective Rudisell testified it was very common for gang members to take responsibility for crimes of other gang members to improve their status in the gang. (1 RT 118-119.) He also opined Mendoza was member of the “Diablos” gang because Mendoza had a tattoo on his upper arm associated with that gang. (1 RT 119-121; Exh. No. 7.) Though Mendoza claimed the tattoo was unrelated to the gang (1 RT 120), Detective Rudisell explained gang members most often deny membership to police (1 RT 119). Before this incident, he did not know Mendoza was associated with Diablos. (1 RT 121.) He further testified appellant also belonged to the Diablos gang. (1 RT 121.)

Detective Rudisell explained that he told Officer Woog she need not write a report regarding Mendoza’s statement because he had seen appellant very clearly during the incident, had no doubt in his mind appellant was the driver of the truck, and Mendoza said nothing about being the driver the night before when Detective Rudisell interviewed him. (1 RT 123-124.) Detective Rudisell believed Mendoza made the statement to try to “hook up” his buddy, appellant. (1 RT 124.)

## ARGUMENT

### I.

#### **IN LIGHT OF *CUNNINGHAM*, THIS COURT SHOULD REFORM THE DETERMINATE SENTENCING LAW TO BEST COMPORT WITH LEGISLATIVE INTENT**

##### **A. Summary Of Argument**

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

In order to remedy the constitutional infirmity identified in *Cunningham*, this Court should reform Penal Code section 1170 by eliminating the requirement of an aggravating circumstance to impose an upper or lower term, leaving the selection of the lower, middle, or upper term to the trial court's broad discretion. This is one of the two remedies expressly suggested by the *Cunningham* Court itself, and it closely parallels the Supreme Court's reformation of the federal sentencing guidelines in order to preserve their

constitutionality in *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621] (*Booker*). The reformed statute should apply to all sentencings and resentencings. A case should not be remanded under *Cunningham*, however, until a reviewing court has considered three principal questions.

First, the court should determine whether the defendant preserved the constitutional objection to his sentence by objecting on that ground in the trial court. Traditional forfeiture rules apply to claims of constitutional violations in sentencing.

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

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

Applying these principles to this case, this Court should find that appellant forfeited his claims because he failed to raise any objection to his

sentence. In any event, there was no violation of *Cunningham*. Appellant admitted he had suffered a prison prior offense and the trial court relied on this and multiple other factors related to his criminal record, which fell under the recidivism exception to *Cunningham*. Moreover, the additional aggravating circumstances on which the trial court relied were either supported by overwhelming evidence or implicit in the jury's verdict. Thus, any Sixth Amendment violation in this case was harmless beyond a reasonable doubt.

Additionally, *Cunningham* has no effect on this Court's conclusion in *Black* that consecutive sentencing decisions do not implicate *Blakely*. Even so, in this particular case, the imposition of the consecutive sentences did not violate *Cunningham* because it was based on at least one factor implicit in the jury's verdict. Moreover, any error was harmless beyond a reasonable doubt because each finding was supported by substantial evidence.

## **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, and only one mitigating circumstance (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. (*Cunningham, supra*, 127 S.Ct. 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 section 1170, subdivision (b), “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,<sup>3/</sup> 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

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3. All further references to “rules” are to those of the California Rules of Court, unless otherwise indicated.

criteria reasonably related to the decision being made.’” (Cunningham, supra, 127 S.Ct. at p. 862, quoting *People v. Black*, supra, 35 Cal.4th at p. 1247, quoting rule 4.408(a).) “‘A fact that is an element of the crime,’ however, ‘shall not be used to impose the upper term.’” (Cunningham, supra, 127 S.Ct. at p. 862, quoting rule 4.420(d).) The Court found that under state law, there was no indication that an upper term could be authorized based not on facts, but on the “[g]eneral objectives of sentencing” in rule 4.410(a)), which include the protection of society, punishment, deterrence, and securing restitution for crime victims. (Cunningham, supra, 127 S.Ct. at p. 863.)

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

The Court then evaluated California’s sentencing procedure by applying the principle it distilled from its previous cases:

the Federal Constitution’s jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.

(Cunningham, supra, 127 S.Ct. at p. 861, citing, inter alia, *Apprendi v. New Jersey*, supra, 530 U.S. 466, *Blakely v. Washington*, supra, 542 U.S. 296, and *Booker*, supra, 543 U.S. 220.) 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 DSL, 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.’” (*Cunningham, supra*, 127 S.Ct. at p. 870., 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 DSL unconstitutional, the *Cunningham* Court stated that “[a]s to the adjustment of California’s sentencing system in light of our decision, ‘[t]he ball . . . lies in [California’s] court.’” (*Cunningham, supra*, 127 S.Ct. at p. 871.) But the Court also suggested two “paths” that California courts could follow in adjusting that system to comply with the Court’s Sixth Amendment precedent while still retaining determinate sentencing: (1) “calling upon the jury -- either at trial or in a separate sentencing proceeding -- to find any fact necessary to the imposition of an elevated sentence”; or (2) allowing sentencing courts “‘to exercise broad discretion . . . within a statutory range,’ which, ‘everyone agrees,’ encounters no Sixth Amendment shoal.” (*Ibid.*, fn. omitted, quoting *Booker, supra*, 543 U.S. at p. 233.)

### **C. Reformation**

Respondent respectfully submits that the proper remedy is for this Court to reform section 1170 to allow trial courts to exercise broad discretion in selecting a term of imprisonment. In order to accomplish this, the Court should interpret section 1170 to eliminate the requirement that trial courts must engage in factfinding before a term other than the middle term can be imposed. This

would allow trial courts to continue exercising their broad discretion in selecting one of three terms, including the consideration of all relevant circumstances relating to the offense and the offender.

This suggested statutory reformation best reflects the Legislature's intent in enacting the determinate sentencing scheme. 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 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 *Kopp v. Fair Political Practices Commission, supra*, 11 Cal.4th. 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 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].”

(*Kopp, supra*, 11 Cal.4th 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. (*People v.*

*Roder*, *supra*, 33 Cal.3d 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.) In *People v. Forrester* (1994) 30 Cal.App.4th 1697, the Court of Appeal expressly followed the approach in *Roder* to construe as permissible an unconstitutional mandatory presumption in section 1320, subdivision (b), so as to preserve its constitutionality. (*Id.* at pp. 1701-1703.)

Additionally, relying on *Kopp*, this Court recently reformed the juvenile extended detention scheme to add a provision necessary for the scheme to comply with due process. (*In re Howard N.* (2005) 35 Cal.4th 117, 132.) In doing so, this Court concluded the reformation was not inconsistent with the legislative intent and in fact “demonstrate[d] greater deference to the Legislature than simply invalidating, as the Court of Appeal did, the legislative scheme.” (*Id.* at pp. 132-133.)

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. This 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.)<sup>4/</sup>

In the same manner, this 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 . . . .”<sup>5/</sup> This change is necessary to remove the unconstitutional requirement that an upper or lower term must be justified by an aggravating or mitigating circumstance found by the court. Under the reformed system, a reason without a factual finding is sufficient to impose any term. For similar reasons, this 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 factfinding, and provides the same procedure for middle terms

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

5. The entire sentence currently reads:

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

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.)<sup>6/</sup>

This statutory reformation would be fully consistent with the Legislature's overall intent in enacting the tripartite sentencing scheme. Under the Determinate Sentencing Act of 1976, the Legislature intended to provide the trial courts the ability to impose any of the three possible terms in any particular case, with the trial court exercising its broad discretion to select the appropriate term on the basis of the circumstances relating to the crime and the defendant. (*Black*, *supra*, 35 Cal.4th at p. 1260;<sup>7/</sup> *People v. Hernandez* (1988)

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6. 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.

7. 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)

46 Cal.3d 194, 205; *People v. Wright* (1982) 30 Cal.3d 705, 713.) Thus, an interpretation of section 1170 in a manner that preserves its constitutionality under *Cunningham* would effectuate the Legislature's intent to give the trial courts the full flexibility to tailor an appropriate sentence under the circumstances of each individual case, and would preserve a system that has worked effectively for close to 30 years.

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

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

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26 Cal.3d 425 as vacated on other grounds].)

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.)<sup>8/</sup>

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

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8. 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.)

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.” (Pen. Code, § 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.

Further, 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.<sup>9/</sup> Finally, the trial court's statement of reasons for the imposition of a particular term would be taken into consideration by the appellate court in reviewing the decision.

The proposed reformation would also be far more consistent with the legislative intent behind the DSL than the alternative of removing the choice of an upper term and deeming the middle term the highest sentence that a trial court can lawfully impose. The Legislature provided that all three terms should be available, and it would plainly disserve the goals of punishment and uniformity in sentencing to grant defendants an unwarranted windfall based on a constitutional defect in the procedure for selecting upper terms.<sup>10/</sup>

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9. 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.)

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

This Court’s recent exposition of state law in *People v. Black*, *supra*, 35 Cal.4th 1238, also confirms that reforming the statute to reflect a “broad discretion” standard and to eliminate the judicial factfinding requirement is the appropriate remedy in this case. Although the *Cunningham* Court disagreed with this Court’s legal conclusions, it relied heavily on this Court’s statements in *Black* about California sentencing procedure in order to resolve the constitutional issue. (See *Cunningham*, *supra*, 127 S.Ct. at pp. 861-863, 868-871.) In discussing this procedure, this Court specifically stated that judges have “broad discretion” under current law to select an upper term, although that broad discretion is “constrained, to some degree” by the mandate in section 1170, subdivision (b), “that an aggravating factor exist . . . .” (*Black*, *supra*, 35 Cal.4th at pp. 1255, 1260.)<sup>11/</sup> 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*.” (*Black*, *supra*, 35 Cal.4th at pp. 1255.) 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

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of other litigable questions in such areas as notice, discovery, evidence, and jury instructions.

11. 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.

enhancements) to be used to impose any term.

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

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

In addition to its own decisions, this Court looks to United States Supreme Court cases as “authority” for this Court’s reformation power. (See *Kopp, supra*, 11 Cal.4th at pp. 627-641 [“much of the jurisprudence of our own cases rests on and flows from decisions of the United States Supreme Court addressing judicial authority to reform statutes to preserve them against constitutional infirmity”].) Because *Booker*, like *Cunningham*, identified a right to have a jury trial on any fact at sentencing used to increase a sentence, this Court should closely evaluate the manner in which the Supreme Court fashioned a remedy for the constitutional violation it found in the United States Sentencing Guidelines (“Guidelines”). Although the federal sentencing system is different and more complex than California’s, the remedy fashioned by the Supreme Court in *Booker* offers an apt and useful model for the reformation of DSL suggested by respondent. In *Booker*, the Supreme Court simply made the mandatory Guidelines advisory, and then held that federal sentences are to

be reviewed for reasonableness. A similarly direct, clear and practical solution to the Sixth Amendment problem in this case can and should be used to preserve the basic shape of California's DSL sentencing structure.

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. (*Booker, supra*, 543 U.S. 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 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 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 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’ 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 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. (*Booker, supra*, 543 U.S. at pp. 249-254.) *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 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. (*Booker, supra*, 543 U.S. 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 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 Pen. Code, § 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.” (Pen. Code, §

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**

In *State v. Natale* (N.J. 2005) 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.

(*State v. Natale, supra*, 878 A.2d 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.)<sup>12/</sup> 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 a viable solution.

(*Ibid.*)

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12. 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.)

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.” (*State v. Foster* (Ohio 2006) 845 N.E.2d 470, 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.’” (*State v. Foster, supra*, 845 N.E.2d. 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. (*Id.* 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." (Pen. Code, § 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, subsd. (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. (Pen. Code, § 1170, subsd. (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* (1994) 8 Cal.4th 950, 959 [declaring invalid a provision in former rule 428(b) because it conflicted with section 1170, subdivision (b)].)<sup>13/</sup> 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

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13. 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 . . . .” (Pen. Code, § 1170.3.) Thus, because most of the applicable provisions of the rules of court have no constitutional infirmity under the reformed scheme, they need not all be rendered advisory just because a few provisions must be deemed invalid.

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

**a. Provisions Requiring Invalidation**

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

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

This Court should also declare invalid the provisions in rule 4.420(b) that an upper term is justified only upon a finding that aggravating circumstances outweigh mitigating circumstances, and that a lower term is justified only upon finding mitigating circumstances outweigh aggravating circumstances.<sup>14/</sup> (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),<sup>15/</sup> 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

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14. 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.”

15. 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.” (Pen. Code, § 190.3, subd. (k).) Unlike the process of selecting upper or lower terms under the DSL, the capital weighing process is “not susceptible to a burden-of-proof quantification,” and is a “sentencing function [that] is inherently moral and normative,” thus complying with *Apprendi*. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 589.)

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

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

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

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

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

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

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

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

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

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

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

The following table summarizes the appropriate modifications to the California Rules of Court:

<b>Rule</b>	<b>Under Current Statute</b>	<b>Under Reformed Statute</b>
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; [¶] . . . .

<b>Rule</b>	<b>Under Current Statute</b>	<b>Under Reformed Statute</b>
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.

<b>Rule</b>	<b>Under Current Statute</b>	<b>Under Reformed Statute</b>
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.

<b>Rule</b>	<b>Under Current Statute</b>	<b>Under Reformed Statute</b>
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; . . . .

Rule	Under Current Statute	Under Reformed Statute
4.452(3)	<p>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.</p>	<p>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.</p>

**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].)

Appellant’s claim that ex post facto and due process principles would prevent applying section 1170 as reformed to sentencings and resentencings where the crime occurred before the date of this Court’s decision is unavailing.

(ABM 43-45.)<sup>16/</sup> 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* (2003) 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.

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16. Appellant speculates that if Senate Bill 40 becomes law, the ex post facto clause would prohibit the law’s application to resentencings. (ABM 44.) That issue is premature and is not before the Court.

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*. Indeed, the federal circuit courts have uniformly rejected similar ex post facto and due process arguments against the application of the *Booker* remedial opinion to pending cases.<sup>17/</sup> (See, e.g., *United States v. Portillo-Quezada* (10<sup>th</sup> Cir. 2006) 469 F.3d 1345, 1354-1356; *United States v. Barton* (6<sup>th</sup> Cir. 2006) 455 F.3d 649, 652-657; *United States v. Thomas* (11<sup>th</sup> Cir. 2006) 446 F.3d 1348, 1354-1355; *United States v. Pennavaria* (3<sup>rd</sup> Cir. 2006) 445 F.3d 720, 723-724; *United States v. Williams* (4<sup>th</sup> Cir. 2006) 444 F.3d 250, 253-254; *United States v. Wade* (8<sup>th</sup> Cir. 2006) 435 F.3d 829, 832; *United States v. Austin* (5<sup>th</sup> Cir. 2005) 432 F.3d 598, 599-600; *United States v. Vaughn* (2<sup>nd</sup> Cir. 2005) 430 F.3d 518, 524-525; *United States v. Dupas* (9<sup>th</sup> Cir. 2005) 419 F.3d 916, 918-921; *United States v. Jamison* (7<sup>th</sup> Cir. 2005) 416 F.3d 538, 539.) Accordingly, appellant's argument is without merit.

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17. 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.

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

## II.

### **APPELLANT IS NOT ENTITLED TO RELIEF UNDER *CUNNINGHAM***

#### **A. Relevant Proceedings**

Before the sentencing hearing, the parties submitted briefs outlining their respective positions regarding the appropriate sentence to be imposed. (CT 73-77, 89-91.) The probation officer filed a report and recommendation regarding the same. (CT 78-88.)

In its brief, the prosecution argued that the trial court should impose the upper term on evading an officer, and a consecutive one-year term for the prison prior enhancement. (CT 77.) The prosecution contended that, given the seriousness of the current offenses, this term was necessary to achieve California's sentencing objectives of protecting society, punishment, and

deterrence (rules 4.410 (a), (b), (c), (d), (e) & 4.421(b)(1)). (CT 74-75.)

The prosecution further argued that there were no mitigating circumstances and that numerous aggravating factors were present, including that appellant: showed a high level of violence, risk of harm, or degree of cruelty, viciousness, or callousness in the current offenses (rule 4.421(a)(1)); played a leadership role and threatened the safety of a minor (rule 4.421(a)(4), (5)); had prior convictions of numerous or increasing seriousness (rule 4.421(b)(2)); served a prior prison term (rule 4.421(b)(3)); was on probation or parole when the current offenses were committed (rule 4.421(b)(4)); and had performed unsatisfactorily on probation or parole (rule 4.421(b)(5)). (CT 75-77.)

In its brief, the defense argued that the court should impose the midterm for evading an officer. (CT 91.) It argued that the circumstances of the current offenses did not justify imposing an aggravated term because no pedestrians were injured and no accidents occurred. (CT 90-91.) It further contended that the court should impose a concurrent term on resisting an officer because the offenses were “part of one continuous stream.” (CT 91.)

In his report, the probation officer also found no circumstances in mitigation and cited the same circumstances in aggravation on which the prosecution relied in its brief. (CT 85-87.) He noted in the report that appellant had numerous prior convictions, performed poorly on multiple grants of probation, and had been released from prison on parole just over two months before the current offense. (CT 82, 84-85, 87.) The probation officer concluded that the midterm on Count One was sufficient. (CT 86, 88.)

At the sentencing hearing, the trial court noted it had read the parties’ briefs, as well as the probation officer’s report and recommendation. (2 RT 251.) The court then heard further argument of the parties. In reiterating the prosecution’s arguments regarding the appropriateness of the upper term for

evading an officer, the prosecutor highlighted the numerous aggravating factors and lack of mitigating factors. (2 RT 273-274.) The prosecutor also argued that the court should impose a consecutive sentence for resisting an officer because of appellant's further attempt to evade capture by fleeing on foot into a residential neighborhood after the vehicle chase ended. (2 RT 274-275.)

Defense counsel reiterated the defense's position, insisting that the upper term was inappropriate because no one was injured, no property was damaged, appellant's criminal record was not of a violent nature, the probation officer recommended the midterm, and appellant would endure unusual hardship in prison due to issues he had with rival gangs. (2 RT 275-277.) He argued that a concurrent sentence for resisting an officer was appropriate because the two crimes were part of one continuous course of conduct. (2 RT 277.)

At the conclusion of the arguments, the court stated, "this was not a difficult sentencing case at all." (2 RT 278.) It noted that, although the probation department had recommended the midterm, there were no mitigating circumstances and thus, the aggravating circumstances necessarily outweighed the mitigating circumstances, warranting, "*ipso facto*," imposition of the upper term. (2 RT 278-279.)

The court then explained the aggravating circumstances "which in [its] mind absolutely certainly exist in this case":

One, the defendant has no remorse at all. That's not a listed circumstance, but I think it's an important observation. These are under rule 4.421(a) circumstances of the crime. . . . This crime involved great violence, potential great violence for bodily harm to the members of the public, and the threat of violence or great bodily harm.

There's no evidence of wrecks or near wrecks, but the defendant drove his truck through red lights of the following major intersections [listing intersections], and that's a bunch of intersections and a bunch

of red lights and a bunch of people that were in great danger. [¶] Further under the same rule (a)(1), in my view it's a high degree of callousness and lack of regard for the public.

Rule (a)(3), the victims are particularly vulnerable in that there's a whole bunch of them and it was at night, so they would be unable to see the vehicle coming as well as they could in the day. There are multiple intersections and there's a high speed of 70 miles an hour I believe the testimony was.

[R]ule (a)(4). I believe that the defendant induced others to participate in the crime and was the leader. He was older than the other people. It was his vehicle and he was driving. So I think that's a fair conclusion. [¶] Rule (a)(5) is somewhat similar to (4), but he induced a minor to be involved in a crime. [The prosecutor] indicates there's no evidence of that. I think there is because the minors were in the car, and whether that's a good one or not, the other ones – or that may be the weakest one, but I think it still exists.

Under rule (a)(6), I think it's very likely this defendant had something to do with Noe Mendoza's false statement.

Rule (a)(8). I don't think there's much planning or sophistication to this crime, but there was gang professionalism all throughout the testimony.

Now, we go to rule 4.421(b), the defendant's background and the defendant, and that's where it just becomes absolutely overwhelming that he should get the upper term. It's violent conduct very dangerous to society.

He's on parole at the time of the crime. That's (b)(4). [¶] (B)(2). He has numerous prior convictions. [¶] (B)(3). He served a prior prison term. [¶] (B)(5). His prior performance on parole and probation was very poor or else he could deem it a total failure. [¶] You can also consider rule (c), other factors, and under other factors I would place all of this was done in furtherance of street gang activity.

So I selected the upper term which is three years. I'll add on a one-year prison term for four years.

(2 RT 279-281.)

The court went on to impose a six-month consecutive sentence on Count Two, finding there were multiple victims in this case:

As to the misdemeanor crime, the California Rules of Court rule 4.425 relating concurrent versus consecutive terms talks about whether the crimes were separate acts of violence or threatened violence and whether or not they had separate victims.

You could argue that the victims were the public in the whole case. On the other hand, you could argue, and I think this is appropriate, the first victims were the motorists and the pedestrian[s] and the police. The second victims were the people in the neighborhood where the defendant left the car in the middle of the road and then got on somebody's roof and was hiding. That certainly endangered the people in that house and the other houses, and it takes no experience to understand that at night in that situation the officers are out there with their guns. There's all kinds of dangerous situations created by hiding on people's roofs.

So I can consider any circumstances in aggravation that I did not use to impose the upper term. So in imposing the upper term, I will indicate I have used all of rule 4.421(b) and none of 4.421(a) and use 4.421(a) in addition to the other factors I've cited to indicate that the misdemeanor term should be consecutive.

(2 RT 279-282.)

The court imposed a total term of four years and six months in state prison. (2 RT 282.) Appellant appealed, claiming, *inter alia*, that the trial court's imposition of the upper term and consecutive sentences was unconstitutional under *Blakely* and *Apprendi* because it was based upon facts the jury did not find true beyond a reasonable doubt. The Court of Appeal disagreed. The court first concluded that appellant had forfeited his right to raise a claim under *Blakely* by specifically waiving his right to a jury trial on

the prior conviction allegations and failing to object to any aggravating factors not included in the verdict. (OPN 19.) The court went on to hold that, in any event, this Court's opinion in *Black* disposed of appellant's claims by holding that judicial factfinding was part of a trial court's traditional exercise of discretion in imposing consecutive sentences and upper terms and thus did not implicate a defendant's right to a jury trial. (OPN 19-20.)

The court recognized that the reasoning in *Black* might be "short-lived" given the United States Supreme Court's grant of certiorari in *Cunningham*. (OPN 20.) The court nonetheless went on to conclude that, even if *Black* was overturned and the trial court's reliance on the aggravating factors was erroneous, the error was harmless beyond a reasonable doubt. (OPN 20-21.) The court reasoned as follows:

The trial court imposed an upper term on count 1 after having found no mitigating factors, which were then presumptively outweighed by numerous aggravating factors. Chiefly, the court relied on rule 4.421(b), the defendant's background, saying that it provided overwhelming evidence that he should get the upper term, due to repeated violent conduct dangerous to society. These factors included rule 4.421(b)(2), Hernandez's prior convictions were numerous; (b)(4), he was on parole at the time he committed the charged offenses; and (b)(5), his past performance on probation and parole had been unsatisfactory.

These factors fall within the prior conviction exception preserved by *Blakely, supra*, 542 U.S. 296 and *Apprendi, supra*, 530 U.S. 466. (Cf. *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223 [prior prison term enhancements are within prior conviction exception of *Almendarez-Torres v. United States* (1998) 523 U.S. 224].) Because any one of these proper factors in aggravation is sufficient to support imposition of an upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728), and the court expressly rejected an available leniency option when it imposed consecutive terms, the court's reliance on other factors was harmless beyond a reasonable doubt. A reversal of the sentence is not required when there is no likelihood a more favorable term would have been imposed in the absence of the error. (*Ibid.*)

(OPN 21.)

## **B. Appellant Forfeited His Sixth Amendment Claims By Failing To Object**

Unlike appellant, the defendants in *Apprendi* and *Blakely* objected when the court imposed their sentences. (RT 951-952; *Blakely, supra*, 542 U.S. at p. 300; *Apprendi, supra*, 530 U.S. at pp. 470-471.)<sup>18/</sup> Respondent submits that appellant’s failure to object to his sentence forfeited his claims of error, where, as here, he was sentenced on October 7, 2005, after *Apprendi* was issued on June 26, 2000, and *Blakely* on June 24, 2004.<sup>19/</sup> 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.) The United States Supreme Court has invoked this principle to bar appellate review of constitutional claims,

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

19. After the trial court imposed the sentence, defense counsel stated, “Judge, if I didn’t state it already, I object formally to all the statements and points and aggravation not only used by the prosecution, but by Your Honor to perfect and preserve Mr. Hernandez’ issues on appeal.” (2 RT 282-283.) Defense counsel did not, however, specifically object under *Apprendi* or *Blakely*, or complain about a violation of his right to a jury trial at any time during the sentencing hearing. (2 RT 251-283.) Nor does appellant claim that defense counsel made such an objection. (See ABM 41.) It is well settled that a defendant must specifically raise a constitutional claim at the trial level to preserve it for appeal. (*People v. Gurule, supra*, 28 Cal.4th at p. 632 [defendant forfeited constitutional claim by failing to specifically state that his objection was based on that ground]; *People v. Boyette* (2002) 29 Cal.4th 381, 424 [same].)

including approving a state court's finding of forfeiture of a due process claim of failure to require a jury determination 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 [failure to object at sentencing forfeited *Blakely* claim]; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061 [failure to object at sentencing forfeited *Apprendi* claim]; 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].)

Moreover, while this Court in *Saunders* indicated in dicta that the constitutional right to a jury trial cannot be forfeited by the failure to object (*Saunders, supra*, 5 Cal.4th at p. 589, fn. 5, citing *People v. Holmes* (1960) 54 Cal.2d 442, 443-444), this Court has not so held in the context of *Apprendi* error. The latter context is a paradigmatic case of trial error, rather than structural error, for which the forfeiture rule should apply. (See *Washington v. Recuenco* (2006) 548 U.S. \_\_\_\_ [126 S.Ct. 2546, 2553, 165 L.Ed.2d 466] [*Blakely* error can be harmless]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error can be harmless].)

Appellant argues that because *Black* was decided before appellant's sentencing hearing, it would have been futile to object. (ABM 40-41.) But

*Black* has never been final and, in fact, has now been remanded to this Court for reconsideration in light of *Cunningham*. Further, after *Black*, many other defendants preserved the same *Blakely* claim in the California Court of Appeal, in this Court, and in the United States Supreme Court, and many of these defendants will now get review of this issue under *Cunningham*. Also, many other defendants continued to give *Blakely* guilty plea waivers or objected to their sentences under *Blakely* because the parties understood that the law in this area was still unsettled after *Black*. In between the decisions in *Black* and *Cunningham*, even appellant raised his *Blakely* claim in the Court of Appeal and then in this Court. There is no reason for him not to have also done so in the trial court.

Additionally, in support of his contention, appellant relies on *People v. Birks* (1998) 19 Cal.4th 108. (See ABM 41.) In *Birks*, this Court held that despite not raising the point in the Court of Appeal, the People had not forfeited a claim that *People v. Geiger* (1984) 35 Cal.3d 510, should be overruled, because the Court of Appeal would have had to follow this Court's *Geiger* decision. (*People v. Birks, supra*, 19 Cal.4th at p. 116, fn. 6.) Although Courts of Appeal were bound to follow *Black*, *Birks* nonetheless does not square with the present situation. Unlike this Court's 14-year-old state-law rule on lesser related offenses involved in *Birks*, the upper term question in *Black* was an important federal constitutional issue causing a conflict among state supreme courts, making it ripe for high court review. Defendants therefore had a strong chance of ultimately prevailing on this issue in federal court even after *Black*. (Cf. *Engle v. Isaac* (1982) 456 U.S. 107, 130 [102 S.Ct. 1558, 71 L.Ed.2d 783] [a forfeited federal constitutional claim is procedurally barred on federal habeas even where the state courts previously rejected the same claim in other cases, for "[i]f a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim"].)

This also illustrates why appellant's other cited cases of *People v. Hill* (1998) 17 Cal.4th 800, 820 and *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649 are inapposite. The circumstances in those cases rendered it virtually impossible that a defense objection would have provided any sort of relief. (*Hill, supra*, 17 Cal.4th at pp. 820-821 [prosecutor's repeated unethical conduct and demeaning comments to the defense, coupled with the trial court's "failure to rein in [these] excesses," created an atmosphere "so poisonous" that defense counsel could not object to the misconduct without risking prejudice to his client]; *Abbaszadeh, supra*, 106 Cal.App.4th at pp. 648-649 [finding defense objection would have been futile in part because trial court's previous adverse rulings made clear that it would have rejected any further objection on the same ground].) Nothing prevented appellant from raising his claim at the trial level. By failing to do so, he forfeited his Sixth Amendment claim.

### **C. *Cunningham* And *Almendarez-Torres* Permitted The Trial Court To Impose Appellant's Upper Term Based On The Finding Of A Recidivist Aggravating Circumstance**

#### **1. The *Almendarez-Torres* Exception**

Even though *Cunningham* generally precludes a trial court from finding facts to impose an upper term sentence, and even though *Cunningham* holds that the middle term is the statutory maximum, there was no *Cunningham* violation in this case. Under *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350], a defendant does not have a right to a jury trial for a sentence based on the fact of a prior conviction. The *Almendarez-Torres* Court explained that the "sentencing factor at issue here – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." (*Id.* at p. 243.) Citing *Almendarez-*

*Torres*, the *Apprendi* Court excluded “the fact of a prior conviction” from the general rule requiring any fact that increased the penalty beyond the prescribed statutory maximum to be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at pp. 489-490.) The Supreme Court retained the *Almendarez-Torres* exception in *Blakely*, *Booker*, and did so again in *Cunningham*. (*Cunningham*, *supra*, 127 S.Ct. at pp. 860, 864, 868; *Booker*, *supra*, 543 U.S. at p. 244; *Blakely*, *supra*, 542 U.S. at p. 301.)

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

Federal courts likewise have determined that the *Almendarez-Torres* exception encompasses recidivism findings, such as those based on facts relating to a defendant’s probationary status. For example, the Second Circuit Court of Appeals has held that the exception allows a trial court to find “not only the mere fact of previous convictions but other related issues as well. Judges frequently must make factual determinations for sentencing, so it is hardly anomalous to require that they also determine the ‘who, what, when, and where’ of a prior conviction.” (*United States v. Santiago* (2<sup>nd</sup> Cir. 2001) 268 F.3d 151, 156; see *United States v. Fagans* (2<sup>nd</sup> Cir. 2005) 406 F.3d 138, 142 [“the type and length of a sentence imposed seem logically to fall within this exception”].) The Eighth Circuit Court of Appeals has held that the prior

conviction exception applies to “sentencing-related circumstances of recidivism,” and has agreed with the Second Circuit’s opinion in *Santiago* “that it is entirely appropriate for judges to have ‘the task of finding not only the mere fact of previous convictions but other related issues as well.’” (*United States v. Kempis-Bonola* (8<sup>th</sup> Cir. 2002) 287 F.3d 699, 703.) The Tenth Circuit Court of Appeals has held that “the ‘prior conviction’ exception extends to ‘subsidiary findings’ such as whether a defendant was under court supervision when he or she committed a subsequent crime.” (*United States v. Corchado* (10<sup>th</sup> Cir. 2005) 427 F.3d 815, 820.)

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

The reasoning of courts from California and other jurisdictions shows that the jury trial right does not extend to an aggravating circumstance based on the defendant’s criminal record. A defendant’s prior prison terms, parole,

and probation are necessary components of his prior convictions. In turn, determinations of the defendant's prior prison terms, the defendant's status and performance on parole and probation, and the quantity and seriousness of the defendant's prior convictions, derive from the defendant's prior criminal convictions. As such, aggravating circumstances such as these, involving the defendant's recidivist status, fall within the *Almendarez-Torres* exception.

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

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;

(3) The defendant has served a prior prison term;

(4) The defendant was on probation or parole when the crime was committed; and

(5) The defendant's prior performance on probation or parole was unsatisfactory.

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

Additionally, despite appellant's contention to the contrary (ABM 21-22, 39-40), facts fitting under the *Almendarez-Torres* exception need not be found beyond a reasonable doubt. Rather, they may be found by a preponderance of the evidence. To hold otherwise would require interpreting the exception to remove the right of a jury trial as to a particular fact, but to require that fact to be found beyond a reasonable doubt. Such a result is nonsensical and unsupported.

First, the holding in *Almendarez-Torres* provides no support for such a proposition, because "the specific question decided [in *Almendarez-Torres*] concerned the sufficiency of the indictment," and "no question concerning the right to a jury trial or the standard of proof that would apply to a contested

issue of fact was before the Court.” (*Apprendi, supra*, 530 U.S. at p. 488.) Second, the United States Supreme Court has not held or otherwise indicated that the *Almendarez-Torres* exception only encompasses the jury trial component, but not the reasonable doubt component, of the constitutional rule set forth in the *Apprendi* line of cases.<sup>20/</sup> In *Apprendi* itself, the Supreme Court described the right to a jury trial and the right to proof beyond a reasonable doubt as “associated” and “companion” rights (*Apprendi, supra*, 530 U.S. at pp. 477-478, 484; see also *Booker, supra*, 543 U.S. at p. 230 [these two rights “provided the basis” for the *Apprendi* line of cases]), and it has never suggested that the jury-trial component could be severed from the reasonable doubt component for purposes of applying the *Apprendi-Blakely-Cunningham* constitutional rule or the *Almendarez-Torres* exception. Indeed, the federal circuit courts have consistently held that a judge can properly use the standard of preponderance of the evidence for any fact that falls within the *Almendarez-Torres* exception. (See, e.g., *United States v. Salazar* (9<sup>th</sup> Cir. 2006) 458 F.3d 851, 859; *United States v. Coleman* (3d Cir. 2006) 451 F.3d 154, 159; *United States v. Gibson* (11<sup>th</sup> Cir 2006) 434 F.3d 1234, 1244-1247; *United States v. Barrero* (2<sup>nd</sup> Cir. 2005) 425 F.3d 154, 157-158.)

## **2. *Cunningham* Is Satisfied If One Aggravating Circumstance Complies With The Sixth Amendment**

A single aggravating circumstance is sufficient under state law to render a defendant *eligible* for the upper term. (*People v. Osband* (1996) 13 Cal.4th

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20. Moreover, the particular manner in which the Supreme Court has phrased the applicable constitutional rule – “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt” (*Apprendi, supra*, 530 U.S. at p. 490) – lends no logical support to appellant’s conclusion that the *Almendarez-Torres* exception only applies to the jury trial component of the rule.

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

*Cunningham* is similarly satisfied whenever the court finds an aggravating circumstance that satisfies Sixth Amendment authorities, such as, for example, when established by the defendant’s admission or criminal history, or by a jury finding. (See *People v. Calhoun* (2007) 40 Cal.4th 398 [53 Cal.Rptr.3d 539, 546] [no *Cunningham* error from multiple-victim aggravating circumstance used to impose upper term where the jury necessarily found that there were multiple victims].) Such an aggravating circumstance satisfies the Sixth Amendment, and, standing alone, is sufficient to authorize the imposition of an upper term sentence. (See *Cunningham, supra*, 127 S.Ct. at p. 865, quoting *Blakely, supra*, 542 U.S. at p. 305 [the constitutional test focuses on the judge’s “*authority* to impose an enhanced sentence,” regardless of whether the “enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here),” first emphasis added].)

Moreover, once the federal constitutional requirement is satisfied, the state statutory scheme becomes the only controlling authority limiting the court’s ability to impose an appropriate sentence, including an upper term sentence. (*Apprendi, supra*, 530 U.S. at p. 481 [“[w]e should be clear that

nothing in this history suggests it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute”].) Accordingly, if one aggravating circumstance is supported by either a jury finding or the defendant’s admission, or if one aggravating circumstance is based on the defendant’s recidivism, the trial court may permissibly find any other aggravating circumstances in imposing the upper term without violating *Cunningham*.

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

Under California law, the existence of a single aggravating circumstance is sufficient to support imposition of an upper term. (§ 1170, subd. (b).) In this case, the jury’s findings pertaining to defendant’s probation eligibility, and the trial court’s findings pertaining to defendant’s criminal record, were each sufficient to satisfy this statutory requirement, thereby making the upper term the statutory maximum for the offense. (See *Blakely, supra*, 542 U.S. at pp. 303-304, 124 S.Ct. at p. 2537 [defining “statutory maximum” as the maximum sentence a trial court may impose without additional findings of offense-based facts].) Once the upper term became the statutory maximum in this manner, defendant’s right to jury trial under the federal Constitution’s Sixth Amendment was satisfied, and the trial court on its own properly could--and did--make additional findings of offense-based aggravating circumstances in support of its discretionary sentence choice to impose the upper term. Thus, under the high court’s decisions in *Apprendi, supra*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, *Blakely, supra*, 542 U.S. 296, 124 S.Ct. 2531, and *Booker, supra*, 543 U.S. 220, 125 S.Ct. 738, the trial court here did not violate defendant’s Sixth Amendment right to jury trial when it sentenced him to the upper term.

(*Black, supra*, 35 Cal.4th at p. 1270 (conc. & dis. opn. of Kennard, J.); see also

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

Appellant nonetheless contends that, even if there is a single aggravating circumstance that was established in compliance with the Sixth Amendment, a defendant’s Sixth Amendment rights are violated under *Cunningham* if the trial court relied on any aggravating circumstances that were not established by constitutional means. According to appellant, a single aggravating circumstance does not automatically authorize the upper term under California law because the upper term is not legally available until after the trial court has qualitatively weighed and balanced the various aggravating and mitigating circumstances and determined that the aggravating circumstances outweigh the mitigating circumstances. Thus, under appellant’s reasoning, the imposition of an upper term violates the defendant’s Sixth Amendment rights if the trial court relies on any aggravating circumstances that were not established in compliance with the Sixth Amendment because such circumstances were necessary to make the upper term the maximum available sentence. (ABM 33-35.) Appellant is incorrect.

Appellant’s interpretation of California’s sentencing procedures is contrary to the analysis in *People v. Osband*, *supra*, 13 Cal.4th 622, where this Court explained that “[o]nly a single aggravating circumstance is *required* to

impose the upper term [Citation].” (*Id.* at p. 728, emphasis added; see also *id.* at p. 730 [“a single factor in aggravation suffices to support an upper term”].) In *Osband*, the defendant claimed that the trial court impermissibly relied on a fact that constituted an element of the offense to impose an upper term. (*Id.* at p. 730.) This Court found that any error was not prejudicial because a single aggravating factor was sufficient to impose an upper term, and the trial “court therefore could still have relied on the aggravating factors it listed to impose such a term.” (*Ibid.*)

The reasoning in *Osband, supra*, demonstrates that a trial court acquires the legal authority to impose an upper term upon the initial finding of a single aggravating circumstance rather than upon any subsequent weighing process. Notably, in its prejudice analysis in *Osband*, this Court did not analyze or mention the qualitative weight of the remaining aggravating circumstances listed by the trial court, nor did it suggest that the invalidity of one of the aggravating circumstances rendered the upper term legally unauthorized. Instead, the analysis focused on the simple presence of the remaining aggravating circumstances to support the upper term. *Osband* therefore contradicts appellant’s assertions that the legal authorization for the upper term is dependent on the weighing process, and that the validity of each and every aggravating circumstance found by the court is legally necessary to make the upper term the maximum available sentence. Thus, contrary to appellant’s argument, a defendant’s eligibility or exposure to the upper term is established by the finding of a single aggravating circumstance.<sup>21/</sup>

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21. As explained above, the finding of a single aggravating circumstance establishes the defendant’s eligibility for the upper term, i.e., the trial court *could* impose the upper on the basis of the single circumstance. The subsequent weighing process, on the other hand, guides the trial court in its discretionary determination as to whether it *should* impose the upper term in any particular case.

In light of this settled state law, the presence of a single aggravating circumstance that has been established by constitutional means renders the upper term the statutory maximum under the Sixth Amendment because a trial court “*may* impose [the upper term] without any additional findings.” (*Cunningham, supra*, 127 S.Ct. at p. 865, internal quotations omitted, emphasis added; see also *id.* at p. 868 [“an upper term sentence may be imposed” upon the finding of an aggravating circumstance].) Since the upper term becomes the statutory maximum when a single aggravating circumstance has been established in compliance with the Sixth Amendment, the reliance on additional circumstances not established by such constitutional means does not violate the Sixth Amendment.

### **3. Application To This Case**

Here, in imposing the upper term on appellant’s conviction for evading an officer with reckless driving (Count One), the trial court expressly relied on multiple recidivism-related factors listed under rule 4.421(b) of the California Rules of Court. (2 RT 282.) It found appellant had numerous prior convictions, had served a prior prison term, was on parole at the time of the current offenses, and had performed poorly on past grants of parole and probation (rule 4.421(b)(2)-(5)). (2 RT 281.) Each of these factors fell within the recidivism exception and fully satisfied the jury trial requirement. (*Cunningham, supra*, 127 S.Ct. at pp. 860, 864, 868; *Almendarez-Torres v. United States, supra*, 523 U.S. at p. 246.)

Moreover, the factual basis for the trial court’s recidivism findings were fully established by appellant’s admissions alone. (*Cunningham, supra*, 127 S.Ct. at p. 861, quoting, inter alia, *Apprendi, supra*, 530 U.S. 466, emphasis added [“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*”].) Appellant admitted he served a prior prison term and had suffered the convictions underlying that term (burglary in February 2003; burglary in May 2003; carrying a concealed dagger in July 2004). (1 RT 193.)

Appellant argues that the trial court could not rely on the prior prison offense to impose the upper term because that same factor was the basis for the prior prison enhancement. (See ABM 18, 38, 42.) Appellant’s claim of “dual use” is a question of state law, however, and is thus irrelevant to this Court’s resolution of appellant’s rights under *Cunningham*. At any rate, appellant failed to raise this claim below and the failure to make a “dual use” objection at sentencing bars such a state-law claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [the forfeiture doctrine includes those “cases in which the court purportedly erred because it double-counted a particular sentencing factor”]; see also *People v. de Soto* (1997) 54 Cal.App.4th 1, 9.) In any event, the court cited multiple recidivist factors, each of which fell squarely within the *Almendarez-Torres* exception and independently permitted the trial court to impose the upper term without violating *Cunningham*.

Because the court’s recidivism findings authorized an upper term sentence, the trial court was free to consider any other aggravating circumstances found by a preponderance of the evidence in evaluating whether to impose the upper term. Thus, the trial court’s additional aggravating circumstance findings did not violate *Cunningham*. Accordingly, appellant’s sentence was constitutionally valid.

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

## 1. *Black*

For two independent reasons, this Court in *Black* held that *Blakely* did not implicate our system for determining whether sentences should run consecutively or concurrently. (*Black, supra*, 35 Cal.4th at p. 1264.) First, this Court rested its holding on the presence of discretion in California’s consecutive sentencing procedure. (*Id.* at p. 1262.) Because, under section 669, a court has discretion whether to impose consecutive or concurrent sentences, any judicial factfinding in exercising this discretion does not violate a defendant’s *Blakely* rights. (*Id.* at p. 1262, quoting *Harris v. United States* (2002) 536 U.S. 545, 558 [122 S.Ct. 2406, 153 L.Ed.2d 524].)

The second basis for this Court’s holding was more categorical. This Court reasoned that the *Apprendi* line of cases does not apply to consecutive sentencing generally because these cases “are intended to protect the defendant’s historical right to jury trial on all elements of the crime,” and “[n]o such danger is created by a statute that permits judges to decide whether to impose consecutive sentences without jury factfinding.” (*Id.* at p. 1263.) These cases do not prohibit “factual determinations that do not serve as the ‘functional equivalent’ of an element of a crime,” and *Apprendi* itself found the sentences on other counts “irrelevant” to the determination of the statutory maximum. (*Id.* at p. 1263 & fn. 18, citing *Apprendi, supra*, 530 U.S. at p. 474.) Comparing the consecutive/concurrent decision to the decision whether to stay one of two sentences under section 654, this Court held that these were “decisions made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense, and neither implicates the defendant’s right to a jury trial on facts that are the functional equivalent of elements of an offense.” (*Black, supra*, 35 Cal.4th at p. 1264.)

## **2. *Cunningham* Does Not Impact This Court’s Conclusion That Consecutive Sentencing Does Not Implicate The Right To Jury Trial**

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

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

Solely on this same ground, at least six other state supreme courts have also found that the *Apprendi* line of cases does not impact their consecutive sentencing laws. (*State v. Kahapea* (Haw. 2006) 141 P.3d 440, 452; *State v. Cubias* (Wash. 2005) 120 P.3d 929, 932-933; *State v. Higgins* (N.H. 2003) 821 A.2d 964, 975-976; *State v. Bramlett* (Kan. 2002) 41 P.3d 796, 797-798; *Hall v. State* (Fla. 2002) 823 So.2d 757, 764; *People v. Wagener* (Ill. 2001) 752 N.E.2d 430, 440-443.) All the federal circuits considering the issue have also

rejected *Apprendi* challenges to consecutive sentencing under this same reasoning. (*United States v. Hicks* (5<sup>th</sup> Cir. 2004) 389 F.3d 514, 532; *United States v. Pressley* (11<sup>th</sup> Cir. 2003) 345 F.3d 1205, 1213; *United States v. Harrison* (8<sup>th</sup> Cir. 2003) 340 F.3d 497, 500; *United States v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *United States v. Hernandez* (7<sup>th</sup> Cir. 2003) 330 F.3d 964, 982; *United States v. Chorin* (3<sup>rd</sup> Cir. 2003) 322 F.3d 274, 278-279; *United States v. Lott* (10<sup>th</sup> Cir. 2002) 310 F.3d 1231, 1242-1243; *United States v. Buckland* (9<sup>th</sup> Cir. 2002) 289 F.3d 558, 570-571 (en banc); *United States v. Campbell* (6<sup>th</sup> Cir. 2002) 279 F.3d 392, 401-402; *United States v. Feola* (2<sup>nd</sup> Cir. 2001) 275 F.3d 216, 220 & n. 1.)<sup>22/</sup> The California Court of Appeal also has reached the same conclusion for the same reason. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231.) *Cunningham* did not alter the analysis set out in *Black* and these other cases. Accordingly, appellant's constitutional challenge to the imposition of consecutive sentences is without merit.

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

Even if a consecutive sentencing procedure might conceivably implicate *Cunningham*, California's consecutive sentencing procedure does not. In *Black*, as indicated above, this Court compared its first basis for rejecting the

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

consecutive sentencing claim to its reasoning on the upper term issue, stating:

The same reasoning that leads us to conclude that a jury trial is not required on the aggravating factors that justify imposition of the upper term leads us to conclude that a jury trial is not required on the aggravating factors that justify imposition of consecutive sentences. Under section 669, the judge has discretion to determine whether to impose sentences consecutively or concurrently. “Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.” (*Harris v. United States*, *supra*, 536 U.S. at p. 558, 122 S.Ct. 2406.)

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

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

[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.] However, in the

absence of a clear showing that its sentencing decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate sentencing objectives and, accordingly, its discretionary determination to impose consecutive sentences ought not be set aside on review.

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

Turning to the Sixth Amendment analysis of these consecutive sentencing provisions, *Cunningham* applies only where a statutory sentencing scheme preconditions the court’s exercise of discretion on the existence of a fact beyond those reflected in either the jury’s verdict or the defendant’s admission. (See *Cunningham, supra*, 127 S.Ct. at pp. 868-871.) Appellant argues that like the middle term, the concurrent term is the “statutory maximum” under *Cunningham* because, like the upper term, a consecutive term may be imposed only upon the finding of some additional fact. (See ABM 24-26, 40.) These arguments are unpersuasive, however, for two independent reasons.

First, unlike middle terms, there is no such presumption favoring concurrent terms. The last sentence of section 669 states,

Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently.

But this language does not create a presumption favoring concurrent terms. Instead, it is a gap-filler for those rare instances where a court fails to properly indicate whether a sentence is to be consecutive or concurrent. Indeed, as the Court of Appeal explained, in *People v. Reeder*:

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

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

Second, there is no statutory requirement that the court make any findings of fact before imposing consecutive sentences. Section 669 provides that the court “shall direct whether the terms of imprisonment . . . shall run concurrently or consecutively.” It does not require any fact-finding whatsoever. Although a trial court must give a statement of reasons for imposing consecutive sentences on determinate terms (Pen. Code, § 1170, subd. (c); rule 4.406(b)(5)), this statement of reasons does not require a separate finding of facts beyond those reflected in the conviction. Rather, the essential function of the statement of reasons is to create a record to facilitate appellate review of the sentencing choice for an abuse of discretion. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450; *People v. Stewart* (2001) 89 Cal.App.4th 1209, 1215.)

As for the applicable Rules of Court, although section 1170, subdivision (a)(3), provides that the court “shall apply the sentencing rules of the Judicial Council,” those rules are merely “criteria” designed to aid the court in exercising its discretion (§ 1170.3). (See *Lepe, supra*, 195 Cal.App.3d at p. 1351 [where, in addressing the propriety of a decision whether to impose

consecutive or concurrent sentences, the Court of Appeal states, “The rules of court are merely guidelines to assist the court in making its sentencing choices and in exercising its discretion”].) Since the Legislature has not made consecutive sentencing conditional on the finding of any fact beyond those reflected in the conviction, the Judicial Council cannot impose such a requirement on its own. (Cal. Const., art. VI, § 6, subd. (d) [“[t]he rules adopted shall not be inconsistent with statute”].)

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

Thus, consecutive sentencing decisions do not demand a finding of any

fact. As a result, they are akin to the sentencing decisions involving broad discretion that the Court approved in *Cunningham*, *Booker*, *Blakely*, and *Apprendi*. (See *Cunningham*, *supra*, 127 S.Ct. at p. 871; *Booker*, *supra*, 543 U.S. at pp. 233, 264-265; *Blakely*, *supra*, 542 U.S. at pp 308-309; *Apprendi*, *supra*, 540 U.S. at pp. 481-482.)

The Ninth Circuit and three state supreme courts have also rejected Sixth Amendment challenges to their jurisdictions' discretionary consecutive sentencing decisions on the basis that no judicial factfinding was required, in addition to rejecting these challenges on the basis discussed above -- that *Apprendi* is satisfied as long as the statutory maximum for each crime is not exceeded. (*United States v. Fifield* (9<sup>th</sup> Cir. 2005) 432 F.3d 1056, 1066-67; *State v. Abdullah* (N.J. 2005) 878 A.2d 746, 756-757; *Smylie v. State* (Ind. 2005) 823 N.E.2d 679, 686; *State v. Jacobs* (Iowa 2001) 644 N.W.2d 695, 698-699; but see *In re Personal Restraint of VanDelft* (Wash. 2006) 147 P.3d 573, 578-579 [a non-serious, non-violent, consecutive sentence violates *Blakely* because it is an "exceptional sentence" requiring an aggravating factor to support it and because Washington law has a presumption of concurrent sentencing]; *Foster*, *supra*, 845 N.E.2d at pp. 490-491 [finding *Blakely* error because of Ohio's rule that sentences be run concurrently absent judicial factfinding].) This Court should find that both are correct, alternate rationales for rejecting the claim that California's consecutive sentencing system violates *Cunningham*.

#### **4. This Court Correctly Determined In *Black* That A Decision Whether To Stay A Sentence Under Section 654 Does Not Run Afoul Of The Sixth Amendment**

As discussed in Argument E.1, *ante*, this Court determined in *Black* that a trial court's decision whether to stay a sentence under section 654 does not

implicate the concerns in *Blakely*. In conjunction with its ruling on consecutive sentencing, this Court reasoned as to section 654:

Before *Blakely* was decided, numerous cases held that *Apprendi* does not apply to the decision to impose consecutive sentences. In addition, California cases held that *Apprendi* does not apply to the factual determinations made by the trial judge in connection with the decision whether to stay sentences on particular counts under the provisions of Penal Code section 654 prohibiting multiple punishment. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1021-1022, 109 Cal.Rptr.2d 464; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 270-271, 104 Cal.Rptr.2d 641.) Nothing in *Blakely* or *Booker* undermines the conclusions reached in these cases. For purposes of the right to a jury trial, the decision whether section 654 requires that a term be stayed is analogous to the decision whether to sentence concurrently. Both are sentencing decisions made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense, and neither implicates the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense.

(*Black, supra*, 35 Cal.4th at pp. 1263-1264, fn. omitted.)

Despite this Court's holding in *Black*, appellant claims that the trial court's findings under section 654 violated *Cunningham* because its finding that the two crimes involved separate criminal objectives was the impetus for the consecutive (and thus "greater") sentences and was therefore a determination the jury had to make. (ABM 28-32.) Preliminarily, respondent notes that appellant did not raise this claim at the trial level, in his opening before the Court of Appeal, or in his petition for review filed with this Court. Nor did this Court include that issue in its grant of review. As such, the claim is not properly before this Court.

In any event, as with consecutive sentencing, nothing in *Apprendi*, *Blakely*, or *Cunningham* speaks to the question of how sentences for multiple crimes are to be served. Because the trial court did not impose a sentence greater than that allowed for either of the convictions or the enhancement, any further analysis of the cumulative impact of these sentences is "irrelevant" to

a Sixth Amendment inquiry. (See *Black, supra*, 35 Cal.4th at p. 1263 & fn. 18, citing *Apprendi, supra*, 530 U.S. at p. 474; Arg. II.E.2, *ante*.)

Moreover, application of section 654 does not violate the right to jury trial because it does not impose an increase in punishment. Section 654 provides, in pertinent part:

An act or omission which is made punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case can it be punished under more than one provision.

(Pen. Code, § 654, subd. (a).) “Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.” (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) A defendant’s intent and objective determines whether the course of conduct is indivisible. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Thus, “[i]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The Court of Appeal has explained that section 654

is a sentencing “reduction” statute. . . . [I]t is a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes. Thus, when section 654 is found to apply, it effectively “reduces” the total sentence otherwise authorized by the jury's verdict. The rule of *Apprendi*, however, only applies where the nonjury factual determination increases the maximum penalty beyond the statutory range authorized by the jury's verdict.

(*People v. Cleveland, supra*, 87 Cal.App.4th at pp. 269-270, cited with approval in *Black, supra*, 35 Cal.4th at pp. 1263-1264; accord, *People v. Solis, supra*, 90 Cal.App.4th at pp. 1021-1022, cited with approval in *Black, supra*, 35 Cal.4th at pp. 1263-1264.) The reasoning in *Cleveland* and *Solis* applies to *Cunningham* just as it did to its forbear, *Apprendi*. Because a decision

whether to stay a sentence under section 654 does not increase a defendant's sentence, there is no *Cunningham* problem. (See *Cunningham, supra*, 127 S.Ct. at p. 868 [“any fact that *increases* the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,”] emphasis added, quoting *Apprendi, supra*, 530 U.S. at p. 490.) This Court should therefore reject appellant's *Cunningham* claim regarding section 654.

#### **5. In Any Event, One Aggravating Circumstance Inherent In The Jury's Verdict Supported The Consecutive Sentence**

Appellant's sentence should still be affirmed in this case even if this Court disagrees with its prior determination in *Black* that consecutive sentencing in California does not implicate the Sixth Amendment, because the trial court based its decision on at least one constitutionally valid aggravating circumstance. Under California law, a single aggravating circumstance can support a consecutive sentence. (*Osband, supra*, 13 Cal.4th at pp. 728-729; see also *Scott, supra*, 9 Cal.4th at p. 350, fn. 12 [“one relevant and sustainable fact may explain a series of consecutive sentences”]; *People v. Huber* (1986) 181 Cal.App.3d 601, 628 [same factor may be used to impose more than one consecutive sentence].) Assuming *arguendo* that an aggravating circumstance is *necessary* to support a consecutive sentence, that requirement was met here.

In imposing the consecutive sentence in this case, the trial court found, *inter alia*, that under rule 4.421(a)(1),<sup>23/</sup> appellant exhibited a “high degree of callousness and lack of regard for the public.” (2 RT 279.) To find appellant guilty of evading an officer with reckless driving, the jury had to find appellant

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23. Rule 4.421(a)(1) states: “The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.”

drove “with a conscious disregard for the safety of persons or property.” (CALJIC No. 12.85 [Flight From Pursuing Peace Officer – Reckless Driving]; 1 RT 143-145.) Accordingly, this finding by the trial court was inherent in the jury’s verdict of guilt on this count. Thus, the use of this aggravating fact to impose consecutive sentences did not violate the jury trial right enunciated in *Cunningham* because the jury found this fact beyond a reasonable doubt.

Additionally, because this finding, by itself, would permit the consecutive sentences, the trial court was free to consider any other aggravating circumstances in evaluating whether to impose the consecutive sentences. (See Arg. II.D, *ante*.) Under these circumstances, the trial court’s additional aggravating circumstance findings did not violate *Cunningham*. Accordingly, appellant’s consecutive sentences were constitutionally valid.

## **E. Any *Cunningham* Error Was Harmless In This Case**

### **1. Applicable Law**

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

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

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

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

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

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

(*Ring, supra*, 536 U.S. at pp. 612-613, original italics.) Thus, this concurring opinion clearly shows that the federal constitutional concerns in *Apprendi* only reach the issue of factfinding to authorize the increased sentence and do not

extend to a trial court's ultimate sentencing decision. Accordingly, once the reviewing court determines that the jury would have found at least one aggravating circumstance true, the reviewing court need not further examine under the *Chapman* standard whether the defendant would have received the same sentence in light of the *Cunningham* error. Instead, the proper *Cunningham* harmless error inquiry asks whether, if the jury had found one of these two aggravating circumstance beyond a reasonable doubt, the trial court have then had the authority to consider the other aggravating circumstance.

Thus, *Cunningham* error does not involve any state-law question of whether the trial court erred in its discretionary weighing of the aggravating and mitigating circumstances and resulting selection of the base term. But to the extent that this Court concludes that a reviewing court must examine whether the trial court would have nevertheless sentenced the defendant to the upper term sentence because there was some state-law error in the selection of the sentence, this inquiry should be conducted under the state-law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.

## **2. Upper Term**

Even if this Court were to conclude that the trial court's findings in imposing the upper term did not fall under the recidivism exception to *Cunningham*, it is clear that the jury would have reached the same conclusion as the trial court. As stated above, the trial court imposed the upper term on appellant's conviction for evading an officer with reckless driving (Count One) based on appellant's numerous prior convictions, prior prison term, parole status at the time of the current offenses, and poor performance on probation

and parole. (2 RT 279-281.)<sup>24/</sup>

First, not only did appellant admit his prison prior offense and that he had suffered the prior convictions underlying it (1 RT 193), at sentencing he did not dispute the validity of the facts in the probation regarding his criminal history (2 RT 251-283). These facts established that appellant had suffered numerous prior convictions. (CT 80-85.) Between March 2000 and the date of the current offense, May 21, 2005, appellant was convicted of burglary three times, resisting an officer, and carrying a concealed dagger burglary in 2002. (CT 80-85.) These convictions established a pattern of increasingly serious behavior and were more than sufficient to establish the numerosity requirement in this context. (See *People v. Searle* (1989) 213 Cal.App.3d 1091, 1098 [explaining three convictions are “numerous” within the meaning of rule 4.421(b)(2)].) The probation report also unequivocally established appellant had served a prior prison term, performed poorly on multiple grants of probation, and had been released on parole just over two months before the current offense. (CT 80-85.)

Additionally, the evidence at trial supported the trial court’s additional findings. In finding appellant was a “danger to society,” the trial court cited rule 4.421(b), which states “[t]he defendant has engaged in violent conduct that indicates a serious danger to society.” (2 RT 280.) The facts surrounding the incident made this clear. Late at night, appellant led police on a harrowing vehicle chase through city and residential streets, barreling down the road at

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24. As outlined in section II.A, *ante*, while the trial court initially discussed the aggravating circumstances listed in rule 4.421(a) in connection with its analysis regarding whether to impose the upper term (2 RT 279-281), it ultimately imposed the upper term based on the factors listed in rule 4.421(b) (2 RT 282). The aggravating circumstances listed in rule 4.421(a), along with additional factors, were ultimately the basis for the court’s decision to impose the consecutive sentences. (2 RT 282.)

speeds far in excess of the posted speed limits, running stop signs and red lights, and driving erratically. (1 RT 45-48, 50-51, 61-70, 88-89.) The pursuing officers struggled to keep up with appellant, as he recklessly plowed through intersections without stopping. (1 RT 40, 42-45, 48, 50, 69, 71-73.) One of the intersections was “heavily traveled” and had light to moderate traffic at the time. (1 RT 46-47.) Another was in a commercial area with a convenience store, supermarket, and hotels that draw pedestrian traffic. (1 RT 47-48.) Detective Rudisell, the first pursuing officer, described appellant’s speed as “very dangerous.” (1 RT 70.) Sergeant Distel, the second pursuing officer, explained that such pursuits pose a danger to pedestrians, police, the suspect, and other cars. (1 RT 49-50.) Ten minutes and three-and-a-half miles later, appellant pulled into a neighborhood cul-de-sac, bolted from his truck, and forced police to flush him out of his hiding spot – the roof of a home in the neighborhood – with canines and a helicopter. (1 RT 84-90, 99; Exh. No. 9.)

Such behavior can hardly be characterized as anything other than dangerous to society – a fact the jury surely appreciated. Indeed, as stated above, to convict appellant guilty of evading an officer with reckless driving, the jury had to find that appellant drove “with a conscious disregard for the safety of persons or property.” (CALJIC No. 12.85 [Flight From Pursuing Peace Officer – Reckless Driving]; 1 RT 143-145.) As such, in convicting appellant of this offense, the jury would have concluded appellant’s behavior posed a serious danger to society.

The evidence also fully supported the trial court’s findings that the incident involved gang activity.<sup>25/</sup> The jury learned that Detective Rudisell, who was the lead investigator of Escondido Police Department’s gang

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25. Though the trial court did not specifically state whether it relied on this factor to impose the upper term or the consecutive sentences, it cited this factor immediately after its discussion of the factors on which it relied to impose the upper term. (2 RT 281.)

investigations unit, was dispatched to appellant's location in response to a gang-related disturbance. (1 RT 41, 57, 59.) The report concerned two vehicles occupied by "gang types." (1 RT 41-42, 55, 60-61.) Moreover, the day after the incident, Mendoza went to the police station and unpersuasively claimed that he was the driver of the truck involved in the police chase. (1 RT 111-115.) Detective Rudisell testified as a gang expert and explained that it was very common for gang members to take responsibility for the crimes of other gang members to improve their status in the gang. (1 RT 118-119.) He further testified that Mendoza and appellant belonged to the same gang. (1 RT 119-121.) Indeed, Detective Rudisell believed Mendoza tried to take the blame for the incident to "hook up" appellant. (1 RT 124.) Because the evidence supported the trial court's finding in this regard, had the jury been tasked with deciding this factor, the result would have been the same.

In short, the jury would have found each of these aggravating circumstances true beyond a reasonable doubt had they been presented. Accordingly, any *Cunningham* error was harmless because the upper term sentence would have been authorized by any one of these aggravating circumstances found by the trial court in imposing the sentence.

### **3. Consecutive Sentences**

In imposing the consecutive sentence, the trial court relied on the following factors: appellant showed no remorse for his behavior;<sup>26/</sup> the incident involved "great violence, potential great violence for bodily harm to the members of the public, and the threat of violence or great bodily harm" (rule

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26. In imposing the consecutive sentences, the court indicated that its decision was based upon the factors listed in rule 4.421(a) and any other factor it cited. (2 RT 282.) Remorse was one of the factors the court cited that was not listed in rule 4.421(a). (2 RT 279.)

4.421(a)(1)); appellant exhibited a “high degree of callousness and lack of regard for the public” (rule 4.421(a)(1)); the victims were particularly vulnerable given the time of day and appellant’s excessive speeding through multiple intersections (rule 4.421(a)(3)); the incident involved separate acts and separate victims (rule 4.425); appellant induced others, including a minor, to participate and occupied a position of leadership (rule 4.421(a)(4) & (a)(5)); appellant was involved with Mendoza’s false statement to police (rule 4.421(a)(6)); and the incident involved gang professionalism (rule 4.421(a)(8)). (2 RT 279-282.)

The evidence strongly supported each of these findings. First, the potential for violence and great bodily harm, appellant’s callousness and lack of regard for the public, and the vulnerability of the victims were indisputable aspects of the offenses, given the extremely dangerous and reckless nature of appellant’s flight from police. It is also beyond dispute that the crimes involved separate acts and separate victims. As the trial court explained,

[T]he first victims were the motorists and the pedestrian[s] and the police. The second victims were the people in the neighborhood where the defendant left the car in the middle of the road and then got on somebody’s roof and was hiding. That certainly endangered the people in that house and the other houses, and it takes no experience to understand that at night in that situation the officers are out there with their guns. There’s all kinds of dangerous situations created by hiding on people’s roofs.

(2 RT 281-282.)

Additionally, appellant’s role as the leader in the incident was undeniable. He was the driver of the truck that evaded police. As the prosecutor pointed out, whether or not they wanted to be involved, the other occupants in the truck (who included the minor) were drawn into the situation when appellant decided to flee from the police. (2 RT 273.) Indeed, appellant’s actions posed a serious risk of injury to the occupants, along with

the risk he created for the police, motorists, and pedestrians in the area. The connection of the incident to gang activity was also well established. A gang investigator was dispatched to appellant's location in response to a gang-related disturbance, both appellant and Mendoza were members of the same gang, and Mendoza tried to take the blame for appellant – a common tactic among gang members seeking to earn status. (1 RT 41-42, 55, 57, 59-61, 118-119.)

Indeed, this also illustrates appellant's lack of remorse. He had an obvious interest in encouraging or allowing Mendoza to make these false statements to police and thus was very likely involved in that scheme. In fact, his fervent attempts to elude police during the incident make clear that he sought to avoid responsibility for his actions. He fled on foot, hid for 30 to 45 minutes until police flushed him out, and took off his shirt, which Detective Rudisell testified suspects fleeing on foot sometimes do to make identification difficult. (1 RT 50-53, 73, 81-82, 101.) Finally, according to the probation report, appellant claimed to have disassociated from the gang, but everyone apprehended in the current offense was a documented member of his gang. (CT 84-85.) Appellant did not dispute the truth of these facts at the sentencing hearing. (2 RT 251-283.)

The jury would have found each of these aggravating circumstances true beyond a reasonable doubt had they been presented for its consideration. The existence of any one of these factors would have allowed the imposition of consecutive sentences. (*Scott, supra*, 9 Cal.4th at p. 350, fn. 12; *Huber, supra*, 181 Cal.App.3d at p. 628.) Accordingly, any *Cunningham* error was harmless beyond a reasonable doubt because the consecutive sentences would have been authorized by any one of these aggravating circumstances found by the trial court in imposing the sentence.

Finally, even if it were assumed that this Court must examine whether the trial court would have imposed the upper term sentence and/or consecutive

sentences in light of the aggravating circumstances that were or would have been found true by the jury, it is not reasonably probable the trial court would have imposed a lesser sentence because, as explained above, it is beyond a reasonable doubt that the jury either found or would have found all, or at least most, of the aggravating circumstances true. Furthermore, the trial court's unwavering comments regarding the seriousness of appellant's offenses, and its failure to find any mitigating circumstances, demonstrates that even the omission of these circumstances that do not survive *Chapman* review would not have dissuaded the trial court from imposing the maximum sentence allowable in this case. Indeed, the trial court characterized this case as "not a difficult sentencing case at all." (2 RT 278.) It made clear that the case was devoid of any mitigating circumstances and instead found numerous aggravating circumstances that "absolutely certainly exist[ed] in this case." (2 RT 279.) Accordingly, any error was not prejudicial. (See, e.g., *People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Kelley* (1997) 52 Cal.App.4th 568, 581 & fn. 18.)

## CONCLUSION

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

Dated: March 20, 2007

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I certify that the attached Respondent's Answer Brief on the Merits uses a 13 point Times New Roman font and contains 29,502 words.

Dated: March 20, 2007

Respectfully submitted,

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