

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

S149247

v.

LANDU MICHAEL MVUEMBA,

Defendant and Appellant.

Second Appellate District, No. B186622
Los Angeles County Superior Court No. SA056090
The Honorable Robert P. O'Neill, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Did the trial court violate appellant's Sixth Amendment right to a jury trial, as interpreted in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 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?
4. Did the trial court violate appellant's Sixth Amendment right to jury trial by imposing full, separate, and consecutive sentences under Penal Code section 667.6, subdivision (c)?

STATEMENT OF THE CASE

In a nine-count amended information, the Los Angeles County District Attorney charged appellant with kidnapping (Pen. Code,^{1/} § 207, subd. (a);

1. All further statutory references are to the Penal Code, unless otherwise stated.

count 1), kidnapping to commit another crime (§ 209, subd. (b)(1); count 2), forcible rape (§261, subd. (a)(2); count 3), sodomy by use of force (§ 286, subd. (c)(2); count 4), attempted forcible oral copulation (§§ 664/288a, subd. (c)(2); count 5), and four counts of lewd act upon a child (§ 288, subd. (c)(1); counts 6-9). The information further alleged as to all counts that appellant suffered a prior serious felony strike conviction and served a prior prison term (§§ 667, subd. (a)(1), 667.5, subd. (b), 1170.12, subds. (a)-(d) and 667, subds. (b)-(i)). (1CT 59-69.) Appellant pled not guilty to all counts, but he admitted the prior conviction and prior prison term allegations. (1CT 52-53, 59-71.) The trial court granted appellant's motion to represent himself. (1CT 52-53.)

Trial was by jury. (1CT 75-76.) A jury convicted appellant of forcible rape (count 3), sodomy by use of force (count 4), attempted forcible oral copulation (count 5), and one count of lewd act upon a child (count 6). It could not reach a verdict on the charges for kidnapping and kidnapping to commit another crime (counts 1-2) and acquitted appellant of three counts of lewd act upon a child (counts 7-9). (1CT 159-171.)

On August 22, 2005, the trial court denied probation and sentenced appellant to a total of 45 years and four months in state prison. Specifically, the trial court imposed the upper term of eight years for appellant's forcible rape conviction in count 3, the upper term of eight years in state prison for appellant's sodomy by use of force conviction in count 4, the midterm of three years in state prison for the attempted forcible oral copulation conviction in count 5, and one-third the midterm of 24 months (8 months) for appellant's lewd act upon a child conviction in count 6, doubled each of these sentences pursuant to sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i), and ordered each sentence to run consecutively to each other. The court further imposed a consecutive five year term pursuant to section 667, subdivision (a)(1), for the prior serious felony conviction and

a consecutive one year term pursuant to section 667.5, subdivision (b), for the prior prison term. (1CT 172-176.)

Appellant appealed from the judgment of conviction. (1CT 178.) Appellant argued that his upper term and consecutive sentences were unconstitutional. On November 20, 2006, the California Court of Appeal affirmed the judgment of conviction, citing *People v. Black* (2005) 35 Cal.4th 1238. Thereafter, appellant filed a petition for review in this Court. On February 7, 2007, the Court granted review.

STATEMENT OF FACTS

Angela R. was born on July 18, 1989. (3RT 345-346.) The last time she lived with her biological mother was when she was 14 months old. She lived with her grandmother until she was about 10 years old. After that, Angela had been in and out of placement homes. (3RT 396.) At the time of trial, Angela was in the 10th grade at the Citizen's Learning Academy, a "special" school. (3RT 397.) She had lived in the same placement home since October 2004. (3RT 345-347.)

On April 16, 2004, Angela was 15 years old. (3RT 345-346.) That day, she ran away from the placement home with her best friend Nicole Golden. (3RT 345-347; 6RT 1521.) They took the bus, walked around the city for a while, and slept under a tree. The next morning, April 17, 2005, they went to "Valentine's" house and hung out with him and his friends, and drank, ate, and smoked. (3RT 348-349.) Angela had consensual intercourse with Valentine and one of his friends. (3RT 349-350.) Later, Valentine dropped Angela and Nicole at a Baskin-Robbins. There was a Chuck E. Cheese restaurant nearby. (3RT 350.)

Angela and Nicole sat at the Baskin-Robbins for a while until they left to go to the store. When they returned, appellant was standing in front of the Chuck E. Cheese; he approached them and asked Angela if she had a pen.

(3RT 351.) Angela gave appellant a pen and appellant gave Angela his number. (3RT 351-352.) Then, appellant said, “Baby, do you smoke and drink?” Angela, who was depressed at the time and wanted to get drunk, said “Yes.” Appellant said, “Let’s go to my car,” and Angela crossed the street and walked with appellant to his car. (3RT 352, 354-356.)

Appellant asked Angela how old she was. Angela said, “I’m 15.” But appellant responded, “No, you’re 17.” Angela again told appellant that she was 15. And appellant said, “You’re 17 now.” (3RT 354, 425; 6RT 1523.) Angela never told appellant she was 17 years old. (3RT 355.)

Angela got into the front passenger seat of appellant’s car and appellant sat in the driver’s seat with the seat back reclined. Appellant gave Angela some marijuana and alcohol. Appellant took and pushed Angela’s head down hard to his exposed penis. (3RT 357-360; 6RT 1523.) Angela resisted and clenched her mouth closed. (3RT 361-362.) Appellant pushed her lips onto his exposed penis. (3RT 362-363.)

Angela tried to open the car door and get out, but appellant said, “Fuck that, you slut-ass bitch,” closed the door, and prevented her from leaving. (3RT 363-365; 6RT 1524.) Angela was scared that appellant was going to do something to her or hit her. Then, appellant moved his car into an alley, near the end of the alley, at the rear of an apartment complex. (3RT 363-365; 6RT 1524.) It was about sunset and she did not see anyone around. (3RT 366.)

After appellant parked the car, appellant reclined the back seat. He told Angela to get her “ass” in the back. (3RT 366-368; 6RT 1524.) Angela got in the back seat because she was afraid appellant was going to hit and chase her. (3RT 366-367.) Appellant told Angela to pull her pants down, but he pulled her pants down. (3RT 368-369.) Appellant touched and squeezed Angela’s breasts under her clothing on her skin with his hand, and then sucked on her breast with his mouth. (3RT 369-371.) Angela told appellant to stop and that he was hurting her, and she tried to push appellant’s hand and head away.

(3RT 371; 6RT 1525.)

Then, appellant put his bare penis in Angela's vagina. (3RT 371.) She felt pain, cried, and told appellant to stop. (3RT 372.) When appellant took his penis out of Angela's vagina, he said she was bleeding, but she did not see any blood. Appellant told her to turn her "ass" around. (3RT 372-373.) After Angela turned around, appellant put his penis in her butt. Angela cried and told him to stop. (3RT 373.) Appellant replied, "no, no, bullshit. I'm not stopping shit." (6RT 1525.) She did not want appellant to penetrate her and she was in pain. (3RT 373.) Appellant told Angela to get her "ass" in the front. Angela put her pants on. She was scared; she thought appellant was going to kill her; she got into the front seat. (3RT 374; 6RT 1526.) Appellant also got back into the front seat. (3RT 374.)

Angela was still crying and prayed that appellant would take her back to Nicole. She told appellant, "I want to go back to my friend, Nicole." Appellant said, "No. You're going home with me." Angela was scared that appellant was going to kill her and throw her out somewhere. (3RT 375.) Appellant drove in the opposite direction of where Angela had left Nicole. Angela was still crying. She did not know if appellant ejaculated or if he used a condom. (3RT 376.)

At about 7:40 p.m., Inglewood Police Officers Christopher Kearney and Jessie Guizar were on patrol in a black and white police car in the area of La Brea and Florence Boulevard, in Los Angeles County. They noticed a blue GMC Jimmy/Blazer make an improper left turn. (3RT 649-650; 5RT 1313.) Officer Guizar saw that the Blazer had no license plates; they initiated a traffic stop and approached on the driver's side. Officer Kearney approached on the passenger side. Officer Guizar tapped on the driver's side window, which was rolled up, and told the driver, appellant, several times to roll the window down. Appellant was leaning back in the driver's seat, and his pants were halfway down. Appellant tried to hide behind the pillar between the driver's side and

rear passenger's window and was playing with or trying to pull up his pants or zipper. (3RT 378-379, 391, 651-652, 662; 5RT 1314-1315.)

After appellant rolled down the window, Officer Guizar saw appellant was sweating and would not make eye contact. Officer Guizar asked appellant for his driver's license, registration, and proof of insurance. Appellant presented only an identification card. Appellant told Officer Guizar that he had some "weed" in the car. (3RT 653.) Officer Guizar had appellant walk over to Officer Kearney on the sidewalk on the passenger side. Appellant told Officer Kearney that he was on parole for burglary, and Officer Kearney conducted a cursory search of appellant's car and person. Officer Kearney found a small marijuana cigarette in appellant's right front pants pocket. (3RT 653-654; 5RT 1315-1317.)

Angela told Officer Guizar that she was 15 years old. (3RT 654, 657.) After speaking to her and asking her several questions and noticing that she appeared to be a little slow, Officer Guizar asked if she had any medical problems. She indicated she was mentally disabled. (3RT 655.)

Officer Guizar then walked over to his partner, who was with appellant in the back seat of the patrol car. Appellant stated Angela was his cousin. (3RT 655; 5RT 1317.) Officer Guizar went back to Angela and told her appellant said he was her cousin. She denied they were cousins and said that appellant had "begged" her to say, "You're my cousin. You're my cousin." (3RT 278-279, 291, 380-381, 656; 6RT 1509.)

The officers took her to the Inglewood Police Station where Angela told the police that appellant put his penis in her vagina and his mouth on her breast. (3RT 382-383.) Angela told Officer Guizar that she was with another girl when appellant approached her and asked her if she wanted to smoke and drink. While they were smoking and drinking, appellant asked her several times to touch his penis. Angela refused and stated she would not and did not touch his penis. (3RT 657-658.) Angela told Officer Guizar that appellant

asked Angela to lie down in the back of the Blazer and got on top of her, but did not give the officer any more details at that time. (3RT 658.)

Officers Ter Robinson and Alonzo Williams responded to the Inglewood Police Station. (5RT 1262; 6RT 1502.) When they arrived at about 9:54 p.m., Officer Williams interviewed Angela and could tell that she had either been smoking or drinking. (6RT 1502.) Although he did not have difficulty communicating with her, Officer Williams could tell that she was somewhat mentally challenged. (6RT 1502-1503.) Angela told Officer Williams that she had been raped and repeated to Officer Williams essentially what she had already told Officer Guizar. (6RT 1505-1508.)

At about 11:35 p.m., they brought Angela to the Santa Monica UCLA Medical Center for a sexual assault examination and waited while nurse practitioner Lizette Paniagua-Castro conducted the examination. (4RT 460, 955-957, 959-960; 5RT 1264; 6RT 1509.) Angela recounted the sexual assault to Nurse Paniagua-Castro. (4RT 958-968.) Nurse Paniagua-Castro found fissures, or breaking of the skin or tissue usually caused by stretching, along Angela's anal area, which was consistent with the history Angela gave. (4RT 969-970, 974-975.) Nurse Paniagua-Castro also found suction injury marks on Angela's left shoulder and right breast, which were also consistent with the sexual history Angela gave. (4RT 979.)

Vaginal lavage was collected from Angela in addition to swabs from her neck, breasts, vagina, and anus. (4RT 969-70, 972, 974-977.) Sperm was found on the external genital swab, vaginal swab, and in the vaginal lavage. (5RT 1294.) Nucleated epithelial cells (cells containing DNA from membrane linings such as the mouth and vagina) were found on the right breast and neck swabs. (5RT 1291, 1294-1297.)

The vaginal lavage sample collected from Angela contained Angela's DNA, and two other individuals, who might be males, but not appellant's, consistent with her statements that she had vaginal intercourse with two males

prior to being sexually assaulted. (4RT 917-918.) Angela could have been a secondary source of DNA on the swab from the right breast, but the primary source of the DNA profile matched appellant's DNA. (4RT 920.)

Appellant presented no evidence on his behalf. (6RT 1547-1548.)

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 Determinate Sentencing Law for Sixth Amendment purposes is the middle term, which is the longest sentence a trial court may impose exclusively on the basis of facts inherent in the jury's verdict or admitted by a defendant himself.

In this brief, respondent addresses three issues primarily relating to upper terms -- the remedy for the defect in California's upper term procedure, the approach for determining whether reversal is warranted in pending cases, and the application of this approach to this case. Respondent also explains why *Cunningham* does not call into question California's procedures for consecutive sentencing under sections 669 and 667.6, subdivision (c), and for determining whether to stay a sentence under section 654.

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

constitutionality in *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]. The remedied statute should be made applicable to all sentencings and resentencings.

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

Second, the reviewing court should affirm upper term sentences, including appellant's sentence in count 4, when the trial court finds at least one constitutionally valid aggravating circumstance. 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.

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 the aggravating circumstance to be true, had that aggravating circumstance been presented.

Applying these principles to this case, this Court should find that appellant forfeited his claims because he failed to raise any objection to his sentence, let alone an objection based on federal constitutional grounds. If appellant's upper term claim in this case is reviewable, there was no violation of *Cunningham* in count 4. The trial court's finding that appellant was on parole at the time of the offenses qualifies this case for the recidivism exception to *Cunningham*.

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

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

Further, *Cunningham* has no effect on this Court's conclusion in *Black* that consecutive sentencing decisions under section 669 do not implicate *Blakely*. Moreover, an additional basis for distinguishing California's consecutive sentencing procedure under section 669 and section 667.6, subdivision (c), is that there is no presumption of a concurrent sentence, or one-third-term sentence, respectively, and no requirement that a court find a fact to impose a consecutive sentence, or full-term consecutive sentence, respectively. Furthermore, a decision whether to stay a sentence under section 654 does not increase appellant's cumulative sentence, but merely allows for the possibility of a reduction in sentence, thus not implicating the Sixth Amendment.

ARGUMENT

I.

THIS COURT SHOULD REFORM THE DETERMINATE SENTENCING LAW TO BEST COMPORT WITH LEGISLATIVE INTENT

A. 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 particular vulnerability and Cunningham's violent conduct. (*Ibid.*) The trial court found one circumstance in mitigation: that Cunningham had no prior criminal record. (*Id.* at pp. 860-861.) The California state courts rejected Cunningham's claim that California's procedure for selecting his upper term violated his Sixth and Fourteenth Amendment rights to jury trial. (*Id.* at p. 861.)

The Supreme Court reversed, finding that California's sentencing procedure under the Determinate Sentencing Law (DSL) violates the Sixth Amendment by allocating to judges, not juries, the authority to find facts which would permit the imposition of an upper term sentence. The Supreme Court's analysis of this issue was based on a review of California's sentencing scheme.

Under Penal Code section 1170, subdivision (b),^{2/} “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,^{3/} rule 4.420(a)), define aggravating circumstances as “facts” justifying the upper term (rule 4.405(d)), mandate that these facts “shall be established by a preponderance of the evidence” (rule 4.420(b)), and require that these facts be “stated orally on the record” if imposing a lower or upper term (rules 4.406(b), 4.420(e)). (*Cunningham, supra*, 127 S.Ct. at p. 862 & fn. 6.)

The Court also noted that the rules indicate what facts are appropriate for a trial court to consider in selecting a term. The rules give “a nonexhaustive list of aggravating circumstances” for a court to consider, including facts pertaining to the crime and defendant, and any other statutorily declared aggravating circumstances. (*Cunningham, supra*, 127 S.Ct. at p. 862, citing rule 4.421(a), (b), (c).) A trial court also “is free to consider any “additional criteria reasonably related to the decision being made.”” (*Cunningham, supra*, 127 S.Ct. at p. 862, quoting *People v. Black* (2005) 35 Cal.4th 1238, 1247, quoting rule 4.408(a).) “A fact that is an element of the crime,’ however, ‘shall not be used to impose the upper term.” (*Cunningham, supra*, 127 S.Ct.

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

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

at p. 862, quoting rule 4.420(d).) The Court found that under state law, there was no indication that an upper term could be authorized based not on facts, but on the “[g]eneral objectives of sentencing” in rule 4.410(a)), which include the protection of society, punishment, deterrence, and securing restitution for crime victims. (*Cunningham, supra*, 127 S.Ct. at p. 863.)

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

The Court then evaluated California’s sentencing procedure by applying the principle it distilled from its previous cases: “the Federal Constitution’s jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.” (*Cunningham, supra*, 127 S.Ct. at p. 861, citing, inter alia, *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*), and *Booker, supra*, 543 U.S. 220 (*Booker*).) The Court found that *Blakely* and *Booker* bore “most closely on the question presented in this case.” (*Cunningham, supra*, 127 S.Ct. at p. 861.) The Court reiterated the definition of “statutory maximum” it had set forth in *Blakely*:

“Our precedents make clear . . . that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional

facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ . . . and the judge exceeds his proper authority.”

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

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

In reaching this decision, the high court rejected this Court’s conclusion, set forth in *People v. Black, supra*, 35 Cal.4th 1238, that California’s upper term procedure was constitutional under *Apprendi*, *Blakely*, and *Booker*. (*Cunningham, supra*, 127 S.Ct. at pp. 868-871.) In *Black*, this Court found that “‘the level of discretion available to a California judge in selecting which of three available terms to impose . . . appears comparable to the level of discretion that the high court has chosen to permit federal judges in post-*Booker* sentencing.’” (*Cunningham, supra*, 127 S.Ct. at pp. 869-870, quoting *Black, supra*, 35 Cal.4th at p. 1261.) The high court found this comparison “unavailing.” (*Cunningham, supra*, 127 S.Ct. at p. 870.) The Court explained that in California, unlike in the post-*Booker* federal system, “judges are not free to exercise their ‘discretion to select a specific sentence within a defined range.’” (*Id.*, quoting *Booker, supra*, 543 U.S. at p. 233.) Instead, the trial court in *Cunningham* “was to select 12 years, nothing less and nothing more, unless he found facts allowing the imposition of sentence of 6 or 16 years.” (*Id.* at p. 870.) The high court also rejected this Court’s conclusion that the

presumptive middle term was merely a reasonableness restraint akin to the reasonableness standard in the post-*Booker* federal scheme:

The reasonableness requirement *Booker* anticipated for the federal system operates within the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints. Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment.

(Ibid.)

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

B. Reformation

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

selecting one of three terms, including the consideration of all relevant circumstances relating to the offense and the offender.

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

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

This Court will reconstrue or rewrite a statute to preserve the statute's constitutionality when appropriate. In *Kopp v. Fair Political Practices Commission* (1995) 11 Cal.4th 607, 626-662, the Court affirmed the judiciary's critical role in reinterpreting and reforming legislative enactments consistent with legislative intent, in order to resolve constitutional infirmities when possible, rather than invalidating the enactment or subverting the intent of the Legislature. The issue in *Kopp* was whether certain provisions of Proposition 73, a campaign reform measure that the federal court had held unconstitutional, could be reformed to meet constitutional requirements, rather than simply be declared unenforceable. (*Id.* at p. 614.) The Court repudiated "the view that a court lacks authority to rewrite a statute in order to preserve its constitutionality or that the separation of powers doctrine . . . invariably precludes such judicial rewriting." (*Id.* at p. 615.) The Court explained that

“established decisions of this court and the United States Supreme Court” demonstrated that “a reviewing court may, in appropriate circumstances, and consistently with the separation of powers doctrine, reform a statute to conform to constitutional requirements in lieu of simply declaring it unconstitutional and unenforceable.” (*Ibid.*; see *id.* at pp. 627-653 [broadly surveying federal and California state cases applying reformation].) The Court also rejected any distinction between cases where the Court “simply placed a saving ‘construction’ on the statutory language, thereby constricting the reach of the statute,” and cases where a Court would have “to *disregard* language and to *substitute* reformed language[.]” (*Id.* at p. 646.) The Court explained that this distinction “suggests a difference of degree, not kind,” and that “in all of these cases, we ‘rewrote’ each statute in order to preserve its constitutionality.” (*Ibid.*)

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

The guiding principle is consistency with the Legislature’s [] intent: a court may reform a statute to satisfy constitutional requirements if it can conclude with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute.

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

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

courts may legitimately employ the power to reform in order to effectuate policy judgments clearly articulated by the Legislature or electorate, when invalidating a statute would be far more destructive of the electorate’s will. And, “of course . . . ultimate authority to recast or scrap the law in question remains with the political branches [and, as in this case, the electorate].”

(*Id.* at p. 661, quoting Ginsburg, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation (1979) 23 Clev. St. L.Rev. 301, 324.)

The *Kopp* Court ultimately determined that under this test, reformation of the unconstitutional provisions of the campaign reform measure was inappropriate. (*Kopp, supra*, 11 Cal.4th at p. 615.) As to the sections pertaining to the unconstitutional “intercandidate” ban, the federal court had found the section unconstitutional on First Amendment grounds that would remain unenforceable “whether or not we reform the latter two sections.” (*Id.* at p. 615.) And as to the sections pertaining to the unconstitutional statutes regulating contributions to individual candidates, political committees, or parties, reformation was impermissible because it would not “closely effectuate policy judgments clearly expressed by the electorate.” (*Id.* at pp. 615-616, 662-663.) More specifically, the proposed reformations would alter the amount of funding that the “electorate planned” in the proposition. (*Id.* at pp. 615-616, 664-670.)

Kopp’s express recognition of this Court’s role in reforming statutes was foreshadowed by *People v. Roder* (1983) 33 Cal.3d 491. In *Roder*, this Court held that the provisions of section 496 created an unconstitutional mandatory

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

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

This Court’s recent decision in *In re Howard N.* (2005) 35 Cal.4th 117, also demonstrates its willingness to reform a statute so as to preserve its constitutionality. (*Id.* at p. 132, citing generally to *Kopp, supra*, 11 Cal.4th at pp. 615, 641-661.) In *Howard N.*, this Court concluded that to comply with due process, the juvenile extended detention scheme needed to contain a provision requiring a finding that the person has “serious difficulty in controlling dangerous behavior.” (*Id.* at p. 132.) Although this provision was

not an explicit part of the statute, the Court nonetheless reformed the statute to add it on the ground that doing so “does not appear inconsistent with legislative intent” and “do[es] no violence to the words of the statute; rather, the words are susceptible of that interpretation.” (*Id.* at p. 133.) In making this addition, the Court found that “construing the statutory scheme to avoid constitutional infirmity demonstrates greater deference to the Legislature than simply invalidating, as the Court of Appeal did, the legislative scheme.” (*Ibid.*)

These principles are readily applicable to this case, and will permit the Court to reform California’s sentencing scheme to bring it into compliance with the federal Constitution. Respondent suggests the following specific revisions to the pertinent statutes and rules. First, the Court should strike the language of section 1170, subdivision (b), that the Supreme Court found unconstitutional: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (See *Cunningham, supra*, 127 S.Ct. at pp. 861, 868.) With this amendment, the subdivision would then give a trial court the broad discretion to impose a lower, middle, or upper term without the requirement of additional factfinding. (See *Cunningham, supra*, 127 S.Ct. at p. 871.) This “broad discretion” standard would permit, consistent with the elimination of the factfinding requirement, and subject to abuse of discretion review, the imposition of a term “solely on the basis of a policy judgment or subjective belief,” such as the “[g]eneralized objectives of sentencing” in rule 4.410(a), including, for example, the protection of society, punishment, deterrence, and securing restitution. (See *Cunningham, supra*, 127 S.Ct. at p. 863.)^{4/}

In the same manner, the Court should replace the phrase in section 1170,

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

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”^{5/} This change is necessary to remove the unconstitutional requirement that an upper or lower term must be justified by an aggravating or mitigating circumstance found by the court. Under the reformed system, a reason without a factual finding is sufficient to impose any term. For similar reasons, the Court should adjust the requirement that the trial court “set forth on the record the facts and reasons for imposing the upper or lower term,” to require that the trial court “set forth on the record the reasons for imposing the term selected.” This alteration also eliminates the need for further judicial factfinding, and provides the same procedure for middle terms as for upper or lower terms. Further, section 1170.3, authorizing the Judicial Council to adopt rules guiding the selection of the lower or upper terms, should be reformed to authorize the Judicial Council to adopt rules for the selection of the lower, *middle*, or upper term, so that the procedure for selecting middle terms will be no different than the procedure for selecting lower or upper terms. (See *Cunningham, supra*, 127 S.Ct. at p. 862.)^{6/}

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.”

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

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;²⁷ *People v. Hernandez* (1988) 46 Cal.3d 194, 205; *People v. Wright* (1982) 30 Cal.3d 705, 713.) Thus, an interpretation of section 1170 in a manner that preserves its constitutionality under *Cunningham* would effectuate the Legislature's intent to give the trial courts the full flexibility to tailor an appropriate sentence under the circumstances of each individual case, and would preserve a system that has worked effectively for close to 30 years.

Respondent's proposed construction would be far more consistent with legislative intent than the alternative of requiring a jury trial on aggravating circumstances in order to permit imposition of the upper term. In its declaration of purpose in section 1170, subdivision (a)(1), the Legislature expressed its intent to assign to the trial court, rather than a jury, the role of

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

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 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.)^{8/}

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

But in early 1977, prior to the effective date of S.B. 42, the Legislature enacted Assembly Bill 476 (A.B. 476) to resolve numerous concerns that had arisen in response to S.B. 42. (See Stats. 1977, ch. 165, pp. 639-680.) One of the Legislature's specific amendments in A.B. 476 involved rewriting section 1170, subdivision (b) to eliminate the cumbersome and formalistic motion practice and evidentiary factfinding requirements, and allow the court to rely on a broad array of relevant information, including probation reports, hearsay, and statements by the victim and family members. (Stats. 1977, ch. 165, § 15, pp. 647-649.) To ensure that the modified version of the Determinate Sentencing Act, rather than the original version, became effective on July 1, 1977, the Legislature enacted A.B. 476 as an urgency measure and made its effective date the same as S.B. 42. (Stats. 1977, ch. 165, § 100, p. 680.)

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

In addition, as enacted, section 1170 places an equal burden on the prosecution and the defendant – each must offer proof of facts to obtain a term other than the middle term, and each must make that proof by the

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.)

preponderance-of-the-evidence standard. This legislative mandate to place the parties on equal footing would be violated if the prosecution's burden was to prove aggravating facts to a jury beyond a reasonable doubt, but the defendant was required only to prove facts in mitigation to a judge by a preponderance of the evidence. That disparity, which would make mitigated terms much easier to achieve than aggravated terms, and would employ a dramatically less cumbersome and costly process for attaining lower terms than upper terms, would seriously erode the Legislature's stated goal of "attaining terms proportionate to the seriousness of the offense." (§ 1170, subd. (a)(1).)

Similarly, construing section 1170 to eliminate the requirement of factfinding would not grant the People a benefit at the expense of defendants. By eliminating any requirement that a trial court must find additional facts before imposing a term other than the middle term, defendants would be able to receive the low term without the need for any factual findings on mitigating circumstances.

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

discretionary sentencing decision.^{9/} 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.^{10/}

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-

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

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.)¹¹ The Court also pointed out that, except for using a fact twice to impose an upper term and an enhancement, or to impose an upper term and as an element of the crime, “a judge is free to base an upper term sentence on any aggravating factor the judge deems significant” (*Id.* at p. 1255.) And “[a]lthough subdivision (b) is worded in mandatory language, the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable*.” (*Ibid.*) Given this interpretation of the DSL in *Black*, the Legislature surely would have preferred the proposed reformation remedy because it retains the essential elements of the system within *Cunningham*’s constraints: retaining the broad discretion standard, i.e., a reasonableness requirement, but removing the requirement of judicial factfinding to impose an upper or lower term, while still allowing any fact (save facts also used as elements or enhancements) to be used to impose any term.

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

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.

constitutionally valid standard, as noted in *Cunningham*. And it is undoubtedly the remedy that would be preferred by the Legislature.

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

In addition to its own decisions, this Court looks to United States Supreme Court cases as “authority” for this Court’s reformation power. (See *Kopp, supra*, 11 Cal.4th at pp. 627-641 [“much of the jurisprudence of our own cases rests on and flows from decisions of the United States Supreme Court addressing judicial authority to reform statutes to preserve them against constitutional infirmity”].) Because *Booker*, like *Cunningham*, identified a right to have a jury trial on any fact at sentencing used to increase a sentence, this Court should closely evaluate the manner in which the Supreme Court fashioned a remedy for the constitutional violation it found in the United States Sentencing Guidelines (“Guidelines”). Although the federal sentencing system is different and more complex than California’s, the remedy fashioned by the Supreme Court in *Booker* offers an apt and useful model for the reformation of DSL suggested by respondent. In *Booker*, the Supreme Court simply made the mandatory Guidelines advisory, and then held that federal sentences are to be reviewed for reasonableness. A similarly direct, clear and practical solution to the Sixth Amendment problem in this case can be used to preserve the basic shape of California’s DSL sentencing structure. The *Booker* formula would also lead this Court to delete the mandatory factfinding requirement for imposing an upper or lower term and to leave the selection of a sentence within the trial court’s broad discretion.

In *Booker*, the United States Supreme Court held that, under its decisions in *Apprendi, supra*, 530 U.S. 466, and *Blakely, supra*, 542 U.S. 296, the Sixth Amendment right to a jury trial was violated by the imposition of an enhanced sentence under the Guidelines based on the sentencing judge’s

determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. (*Booker, supra*, 543 U.S. at pp. 226-237.) The jury found the defendant Booker guilty of possession with intent to distribute at least 50 grams of cocaine base (“crack”), based on evidence that he had 92.5 grams of crack in his bag. The statute under which he was convicted prescribed a minimum prison sentence of 10 years and a maximum sentence of life imprisonment, but based upon Booker’s criminal history and the quantity of drugs found by the jury, the Guidelines required the district court judge to impose a “base sentence” within the mandatory sentencing range of 210 months to 262 months in prison. The judge held a sentencing hearing and concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Under the Guidelines, these judicially-found facts prescribed a mandatory sentencing range of 360 months to life imprisonment, and the judge imposed a 360-month sentence. Thus, “instead of the sentence of 21 years and 10 months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt,” Booker received a 30-year sentence. (*Id.* at p. 227.)

The Supreme Court held that Booker’s sentence violated the Sixth Amendment. (*Booker, supra*, 543 U.S. at p. 229.) The *Booker* Court found that there was no distinction of constitutional significance between the Guidelines and the Washington sentencing procedures at issue in *Blakely* because the sentencing rules in both systems were mandatory and imposed binding requirements on all sentencing judges. (*Id.* at pp. 231-235.) The *Booker* Court explained that Booker’s actual sentence was almost 10 years longer than the mandatory Guidelines range authorized by the jury verdict alone, and that the higher Guidelines range was authorized only by facts beyond those found by the jury (i.e., possession of additional 566 grams of

crack). (*Id.* at p. 235.) The Supreme Court therefore concluded that the jury’s verdict alone in Booker’s case did not authorize the sentence and that the “judge acquired that authority only upon finding some additional fact.” (*Ibid.*) Accordingly, the Supreme Court held that the *Blakely* and *Apprendi* holdings applied to the Guidelines. (*Id.* at pp. 235-237.)

After concluding that the Sixth Amendment applied to the federal Sentencing Guidelines, the *Booker* Court then addressed the question of remedy, i.e., whether or to what extent the Guidelines were inapplicable. The Supreme Court answered this question “by looking to legislative intent” and “seek[ing] to determine what Congress would have intended in light of the Court constitutional holding.” In this regard, the Supreme Court was confronted with two alternative remedies: (1) “engraft onto the existing system” the jury-trial requirement and thereby change the Guidelines by preventing the sentencing court from imposing a sentence on the basis of a fact that the jury did not find or the defendant did not admit; or (2) make the Guidelines system advisory by severing and excising the invalid portions of the statute, while maintaining a strong connection between the sentence imposed and the offender’s real conduct, because such a connection was important to the legislative goal of sentence uniformity. (*Booker, supra*, 543 U.S. at p. 246.)

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

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

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

lever” would be contrary to Congress’ intent. (*Id.* at pp. 257-258.)

After concluding that the remedy of advisory Guidelines was more consistent with the legislative intent, the Supreme Court then severed and excised the statutory provisions that were inconsistent with the Sixth Amendment, such as the provision that required sentencing courts to impose a sentence within the applicable Guidelines range. The Supreme Court also adopted a new “reasonableness” standard as the appellate standard of review for sentences imposed under the remedied sentencing scheme. (*Booker, supra*, 543 U.S. at pp. 259-263.) The Supreme Court further applied the remedial interpretation of the federal sentencing statutes to all cases on direct review, and explained that reviewing courts should apply prudential doctrines, such as forfeiture and harmless error, to determine whether a particular case needed to be remanded for a new sentencing hearing. (*Id.* at p. 268.) The Supreme Court acknowledged that its remedy was not the “last word,” and that it would be left to Congress to devise a long-term sentencing system that was compatible with the Constitution. (*Id.* at p. 265.)

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

The second alternative remedy, as previously discussed, would be for

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

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

Second, superimposing the Sixth Amendment jury-trial requirement onto the determination of aggravating circumstances would undercut the express legislative goal of achieving sentence uniformity for “offenders committing the same offense under similar circumstances.” (§ 1170, subd. (a)(1).) For instance, under such a system, a trial court would be precluded from exercising its discretion to impose the upper term on the basis of the seriousness of the defendant’s actual conduct in committing the offense (e.g., high degree of cruelty, viciousness, or callousness) unless those particular aggravating facts were charged by the prosecutor and found by the jury. Thus,

as in *Booker*, a sentencing system with an engrafted jury-trial requirement would weaken the connection between the sentence and the defendant's actual conduct, and thereby undermine the legislative goal of "ensuring similar sentences for those who have committed similar crimes in similar ways." (*Booker, supra*, 543 U.S. at p. 252.)

Third, engrafting the jury-trial requirement onto the current system would create a far more complex sentencing scheme than the one contemplated by the Legislature. As explained above, the Legislature did not intend to precondition the trial court's authority to impose the upper term on a jury trial and jury findings as to aggravating circumstances, and the Legislature certainly did not intend that the intricate and time-consuming pleading, evidentiary, and instructional rules attendant to jury trials be applied to a determination of aggravating circumstances.

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

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

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

New Jersey and Ohio, like California, each had a sentencing system providing for a presumptive sentence within a statutory range and a requirement that a judge find a fact before increasing the sentence above the presumptive sentence. Before *Cunningham*, these states' supreme courts had found that this component of their systems violated *Blakely*. Analogizing to the high court's remedial model in *Booker*, each state supreme court then judicially deleted this presumption, thus eliminating the requirement of a fact to impose an increased sentence within the statutory range, and leaving for the trial court's discretion the selection of any sentence within this range. These state supreme courts' decisions are also instructive and persuasive for determining the proper remedy for the constitutional defect identified in *Cunningham*. (*State v. Foster* (Ohio 2006) 845 N.E.2d 470; *State v. Natale* (N.J. 2005) 878 A.2d 724.)

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

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

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

The New Jersey Supreme Court next determined that the proper remedy for this constitutional flaw was to eliminate the presumptive terms because this solution “best achieves the Legislature’s purpose in enacting the Code.” (*Id.* at pp. 741-742.)¹² 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

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.)

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.*)

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

The Ohio Supreme Court similarly found that Ohio’s system of minimum presumptive sentences within statutory ranges violated *Blakely* on the ground that judges are “statutorily *required* to make specific findings before imposing a sentence beyond that presumed solely by a jury verdict or admission of a defendant.” (*Foster, supra*, 845 N.E.2d at pp. 489-494.) The court also applied “the *Booker* remedy” to Ohio’s scheme by severing “[a]ll [statutory] references to mandatory judicial fact-finding,” so that “there is nothing to suggest a ‘presumptive term.’” (*Id.* at pp. 496-497.) This gives

Ohio judges “full discretion to impose a prison sentence within the statutory range” (*Id.* at p. 498.) In so doing, the court also rejected the solutions of “provid[ing] jury involvement in sentencing” and limiting the maximum sentence to the presumptive term as contrary to what Ohio’s legislature would have intended. (*Foster, supra*, 845 N.E.2d at pp. 495-496.)

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

in capital cases.

Just as in the other two states, the California Legislature clearly would not have intended to eliminate upper term sentences. Section 1170 states that the purpose of imprisonment is punishment, and that the court shall sentence a defendant to one of the three possible terms. (§ 1170, subd. (a)(1), (a)(3).) Removing the possibility of the upper term would result in “an unintended and undeserved windfall” for defendants and is not a “viable solution.”

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

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

4. Disposition Of The California Rules Of Court

As noted in section B., *ante*, the Court in *Cunningham* found that in

conjunction with certain provisions of sections 1170 and 1170.3, certain rules of court were unconstitutional to the extent that they permitted the imposition of the upper term only upon the judicial finding of a fact. If this Court adopts respondent's proposed reformation of the statutes, this Court should also declare invalid the provisions in any rules of court that could independently cause a *Cunningham* violation. Similarly, this Court should invalidate the parts of any rules that conflict with the statutes as reformed. (See *People v. Hall* (1995) 8 Cal.4th 950, 959 [declaring invalid a provision in former rule 428(b) because it conflicted with section 1170, subdivision (b)].)^{13/} 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

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

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 impose a sentence within the applicable Guidelines range,” which was why the *Booker* Court found the federal sentencing system unconstitutional. (*Booker, supra*, 543 U.S. at pp. 235, 259.) As a result, the Court made this provision advisory instead of mandatory. (*Id.* at p. 245.)

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

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

a. Provisions Requiring Invalidation

This Court should invalidate the second sentence of rule 4.420(a), essentially restating the statutory provision requiring mandatory judicial factfinding to impose the upper or lower term. This sentence of rule 4.420(a) states: “The middle term must be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.” (See *Cunningham, supra*, 127 S.Ct. at p. 862.) Because this provision of rule 4.420(a) is contrary to *Cunningham* and contrary to the elimination of the related provision in reformed section 1170, subdivision (b), it should be stricken.

This Court should also declare invalid the provisions in rule 4.420(b) that an upper term is justified only upon a finding that aggravating circumstances outweigh mitigating circumstances, and that a lower term is justified only upon finding mitigating circumstances outweigh aggravating circumstances.^{14/} (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),^{15/} this standard for determining the upper or lower term

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.” (§ 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.)

contradicts the reformed statute, which no longer requires the finding of *any* aggravating or mitigating circumstance to impose an upper or lower term. The actual standard under the reformed statute is that the trial court shall exercise its “broad discretion,” and this standard is different than a standard that the upper or lower term be imposed only upon finding that aggravating or mitigating circumstances outweigh the other. In addition, this standard conflicts with the reformed scheme because it treats the selection of upper and lower terms differently than that of middle terms. (See Section C.1, *ante*.) Thus, this provision should be invalidated as contrary to the statute as reformed.

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

This Court should also modify, in part, three rules requiring a statement

of reasons to impose an upper or lower term, so that they conform with *Cunningham* and the reformed statute to require a statement of reasons to impose *any* of the three terms. (See Section C.1, *ante*; see also *Cunningham, supra*, 127 S.Ct. at p. 862 & fn. 6.) To accomplish this, this Court should modify the provision in rule 4.406(b)(4) requiring a statement of reasons for “[s]electing a term other than the middle statutory term for either an offense or an enhancement,” to require a statement of reasons for “[s]electing the lower, middle, or upper statutory term” A like modification should be made to rule 4.420(e), to modify the provision requiring a statement of “reasons for selecting the upper or lower term” to require a statement of “reasons for selecting the upper, middle, or lower term” Similarly, as to rule 4.433(c)(1), this Court should delete the phrase “upper or lower” from the present provision requiring that a court “state on the record the facts and reasons for imposing the upper or lower term.”

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

Rule 4.437(c)(1) on statements in aggravation and mitigation should also be invalidated in part to conform with *Cunningham* and the reformed statute. Rule 4.437(c)(1) currently provides, “A statement in aggravation or mitigation must include: (1) A summary of facts that the party relies on as circumstances in aggravation or mitigation justifying imposition of the upper or lower term.” By implication, rule 4.437(c)(1) appears to require a fact to justify an upper or lower term. As a result, this rule appears to conflict with the statute as reformed, which no longer requires a fact to impose an upper or lower term, and prescribes the same procedure for selecting middle terms as for selecting upper or lower terms. (See Section C.1, *ante.*) Thus, the phrase in rule 4.437(c)(1), “justifying imposition of the upper or lower term,” should be stricken.

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

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

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

Rule 4.452, part (3), which provides that a court aggregating a sentence with a sentence in a previous case should not change the previous court’s discretionary decisions, should be modified in part because it references the previous presumption of a middle term no longer present in the reformed

statute. In this regard, it currently states, in pertinent part, “Such decisions include the decision that a term other than the middle term was justified by circumstances in mitigation or aggravation” To conform with the reformed statute and *Cunningham*, this phrase should be modified to state, “Such decisions include the decision to impose the upper, middle, or lower term”

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

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

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

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

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

b. Provisions Not Requiring Invalidation

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

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

as reformed.

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

Finally, the “nonexhaustive list of aggravating circumstances” in rule 4.421 should not be invalidated because it does not violate *Cunningham* under the statutes as reformed. (See also rule 4.408(a).) Although this rule gives examples of “facts” constituting aggravating circumstances, it does not by itself require the judge “to start with the middle term, and to move from that term only when the court itself finds and places on the record facts -- whether related to the offense or the offender -- beyond the elements of the charged offense.” (*Cunningham, supra*, 127 S.Ct. at p. 862.) Since, under the reformed statute,

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

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

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

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

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. Background

At sentencing, the trial court indicated it had “read and considered the report of the probation officer” and the “sentencing memorandum submitted by the People.”^{16/} (7RT 4101.) The probation report set forth appellant’s criminal history: a misdemeanor trespass conviction (§ 369I, subd. (b)) in 1995; convictions for misdemeanor burglary (§ 459), theft (§ 484, subd. (a)), and false identification to an officer (§ 148.9) in 1996; a felony conviction for attempted second degree robbery (§§ 664/211) in 1996; a littering infraction (§ 374.4, subd. (a)) in 1997; a misdemeanor conviction for driving while unlicensed (Veh. Code, § 12500, subd. (a)) in 1999; and a felony conviction for burglary (§ 459) in 2000. (1CT 38-39.) The probation officer noted that appellant’s criminal activity and anti-social behavior dated from the age of at least 18, appellant had been previously afforded the benefit of probation, and appellant performed poorly while on probation. Further, even after being imprisoned, appellant performed poorly upon his release on parole. (1CT 43.) The probation report listed no mitigating factors and the following aggravating factors:

- (1) 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;
- (2) the manner in which the crime was carried out indicates planning, sophistication, or professionalism;
- (3) [appellant] has engaged in violent conduct which indicates a serious danger of society;
- (4) [appellant’s] prior convictions as an adult or

16. The People’s sentencing memorandum was not included in the Clerk’s Transcript.

sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness; (5) [appellant] has served a prior prison term; (6) [appellant] was on probation or parole when the crime was committed; (7) [appellant's] prior performance on probation or parole was unsatisfactory.

(1CT 44.) Based on the aggravating factors, the probation officer recommended that appellant receive the high-base term, that any enhancements be served consecutively, and that all sentences be served consecutively. (1CT 44.)

The trial court stated, "The only point I would disagree with is that count 5 is a mandatory sentencing under 667.6[, subdivision] (b). It [is] an attempt, and as such I [do not] believe it falls under that section." (7RT 4102.)

The court gave appellant an opportunity to address sentencing. Appellant declined. (7RT 4102.)

The court sentenced appellant as follows:

In this matter, probation will be denied. I find [appellant] unsuitable and ineligible for probation. You'll be sent to state prison for the following term:

On counts 3 and 4, the court will sentence pursuant to Penal Code section 667.6, [subdivision] (c), because I find that the victim was particularly vulnerable.

She was developmentally disabled, and her condition was readily apparent to anyone, especially [appellant], and the crimes involved in counts 3 and 4 involved a high degree of callousness.

On count 3, a violation of 261, [subdivision] (a)(2) of the Penal Code, forcible rape, [appellant will] be sent to state prison. The high term for that charge is eight years.

I will impose the high term finding in aggravation that there is

evidence of planning by taking the victim to a more remote, secluded location to accomplish this sexual assault.

I [do not] find any factors in mitigation. The high term of eight years will be doubled pursuant to 1170.12[, subdivisions] (a) through (d) and 667 [, subdivisions] (b) through (i) for the prior terms in prison [appellant] admitted for a total term of 16 years.

That is to be served consecutive to all charges. On count 4, forcible sodomy in violation of 286[, subdivision] (c)(2), I will impose the upper term of eight years finding in aggravation at the time of this particular offense you were on parole.

I [am] finding no factors in mitigation. That as well will be doubled pursuant to 1170.12[, subdivisions] (a) through (d) and 667 [, subdivisions] (b) through (i), and that will be served consecutively to all other counts.

On counts 5 and 6, I will sentence pursuant to Penal Code section 1170.1[, subdivision] (a). On count 5, attempted forcible oral copulation in violation of 664 and 288[, subdivision] (a)(c)(2), I will impose the mid-term.

The mid-term is three years. That will be doubled pursuant to 1170.12[, subdivisions] (a) through (d) and 667 [, subdivisions] (b) through (i) for a total term of six years.

This will be ordered to be served consecutively to all counts because it was a separate act of violence towards the victim and in order to accomplish this act, [appellant] supplied the victim with alcohol and marijuana to accomplish [his] goals.

On count 6, a violation of 288[, subdivision] (c)(1), I will impose one-third the mid-term. That is eight months. That will be doubled pursuant to 1170.12[, subdivisions] (a) through (d) and 667 [, subdivisions] (b) through (i) for a total term of one year and four

months to be served consecutively to all other counts because, again, this is a separate act of violence against the victim.

(7RT 4102-4104.) Appellant questioned the court about doubling his sentence in count 6, given the People's sentencing memorandum did not indicate the sentence would be doubled. The court explained the sentencing memorandum was only what the prosecution was recommending, and that it was doubling appellant's sentence because of his separate acts against the victim and because of his prior convictions, including violations of section 148.9 and California Vehicle Code section 12500. (7RT 4105.) The court stated,

In addition and consecutive to all these terms, [appellant will] receive five years for the 667, [subdivision] (a)(1) prior which appellant admitted, and [appellant will] receive one year for the 667.5, [subdivision] (b)(1) prior for which [appellant] admitted for a total term of 45 years and four months in state prison. [¶] [Appellant will] get credits of 128 days of actual, 19 days good time/work time. [¶] [Appellant is to] provide DNA samples pursuant to Penal Code section 296.

(7RT 4105.) The court ordered appellant to provide AIDS samples pursuant to Penal Code section 1202.1, [subdivision] (d), and to register for the remainder of his life once released. (7RT 4105.) The court ordered appellant to pay various fines and fees. The court advised appellant of his right to appeal, which appellant indicated he understood. (7RT 4106.)

The Court of Appeal affirmed the judgment of conviction. It noted that *Black, supra*, 35 Cal.4th 1238, upheld the sentencing system used at appellant's trial, and that the United States Supreme Court was reviewing a constitutional challenge to that system in *Cunningham*. It stated, "Mvuemba recognizes that '*Black* is controlling at this time within the California courts[.]' So do we. As such, we reject his arguments." The court cited *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, and stated appellant's invocations

of out-of-state authorities were “unavailing.”

However, the court rejected respondent’s argument that appellant forfeited his *Blakely* arguments by not raising them in the trial court. The court explained that appellant’s case was unlike the defendant’s case in *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103, where the defendant waived a *Blakely* challenge by failing to raise it at sentencing, which occurred *after Blakely* but *before Black*. The court distinguished appellant’s case because he was sentenced *after Black*, making a *Blakely* objection futile. Thus, the court stated appellant had not waived the issue.

B. Appellant Forfeited The Instant Claims

Unlike appellant, the defendants in *Apprendi* and *Blakely* objected when the court imposed their sentences. (7RT 4102-4105; *Blakely, supra*, 542 U.S. at p. 300; *Apprendi, supra*, 530 U.S. at pp. 470-471.)^{17/} Respondent submits that appellant’s failure to object to his sentence, let alone raise an objection on federal constitutional grounds, forfeited his present claim of error.

No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, quoting *United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1770, 123 L.Ed.2d 508], internal quotation marks omitted.) Further, the United States Supreme Court has upheld a state court’s finding of forfeiture as to a due process claim asserting the failure to have a jury determine the truth of an element of a crime. (*Osborne v. Ohio* (1990) 495 U.S. 103, 122-123 [110 S.Ct. 1691, 109 L.Ed.2d

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

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

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

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 2546] [*Blakely* error can be harmless]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error can be harmless].)

The Court of Appeal ruled that because *Black* was decided before appellant's sentencing hearing, it would have been futile to object. (Opn. at pp. 3-4.) 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* claims 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 issues 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 upper term and consecutive sentencing *Blakely* claims 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.

In support of its ruling, the Court of Appeal cited *People v. Chavez* (1980) 26 Cal.3d 334. In *Chavez*, this Court held that despite not raising the point in the trial court, the defendant had not forfeited a claim that under the California Constitution, his right to confront witnesses was violated by the admission of a prior inconsistent statement. (*Id.* at p. 348, fn. 5.) The Court explained that an objection would have been futile because there were “a number of prior Court of Appeal decisions upholding the admissibility of such prior inconsistent statements in the face of similar state constitutional challenges,” and because appellant should not have to “anticipate unforeseen changes in the law” (*Ibid.*) But although Courts of Appeal were bound to follow *Black*, *Chavez* nonetheless does not square with the present situation. Unlike the state evidentiary rule unanimously decided by intermediate appellate courts and then by this Court in *Chavez*, 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 in federal court on this issue 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”].)

Similarly, although defendants across the nation have had little success arguing *Blakely* applies to consecutive sentencing (but see *Personal Restraint of VanDelft* (Wash. 2006) 147 P.3d 573, 578-579; *State v. Foster* (Ohio 2006) 845 N.E.2d 470, 490-491), the issue has been hotly debated, and the Supreme Court has previously asked for responses to petitions for writs of certiorari on this issue in at least two cases (*Swanson v. California* (06-6539) and *Smylie v. Indiana* (04-10472)), demonstrating a higher level of interest. (See http://sentencing.typepad.com/sentencing_law_and_policy/blakely_in_the_states (Aug. 26, 2005) (“Is SCOTUS interested in the consecutive sentencing *Blakely* issue”).] Thus, it cannot be fairly said that the change in the law wrought by *Cunningham* could not have been anticipated and was wholly unforeseen.

The other case cited by the Court of Appeal, *City of Long Beach v. Farmers and Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780, is also inapposite. There, the court excused the defendant’s failure to object to the trial court’s failure to rule on its written evidentiary objections to the summary judgment motion, because he had “twice orally requested the trial court rule on the written evidentiary objections.” (*Id.* at p. 784.) Under these circumstances, the court reasoned, “[i]t would have been a fruitless or idle act to have interposed a third oral request for rulings.” (*Ibid.*) Here, by contrast, appellant made *no* objection on Sixth Amendment or *Blakely* grounds to the court’s determination of the sentencing factors at issue. There was no indication that appellant could not have obtained a ruling by the trial court. Accordingly, this Court should hold that appellant’s claims are forfeited.

C. *Cunningham* And *Almendarez-Torres* Permitted The Trial Court To Impose Appellant’s Upper Term In Count 4 Solely Based On The Finding Of A Recidivist Aggravating Circumstance

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 as to count 4 in this case because the trial court imposed the upper term solely on the basis that he was on parole at the time of the offense. This finding fell under the recidivism exception to *Cunningham*, and therefore justified the upper term.

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

Further, this *Almendarez-Torres* exception goes beyond the mere fact of a prior conviction to include matters such as the sentence imposed and the status and timing of the defendant’s incarceration in relation to subsequent offenses. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222 [“[c]ourts have not described *Apprendi* as requiring jury trials on matters other than the precise ‘fact’ of a prior conviction. Rather, courts have held that no

jury trial right exists on matters involving the more broadly framed issue of ‘recidivism’”], cited with approval in *People v. McGee* (2006) 38 Cal.4th 682, 700-703; see also *People v. Epps* (2001) 25 Cal.4th 19, 26; *People v. Prather* (1990) 50 Cal.3d 428, 439-440.)

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

Several other state courts of last resort also have found that the prior conviction exception includes such facts relating to recidivism. The Maryland Court of Appeals has observed that the prior conviction exception “is not limited solely to prior convictions. The general rule is that there is no right to a jury trial on matters related to the broader issue of recidivism.” (*State v.*

Stewart (Md. 2002) 791 A.2d 143, 151-152.) The Supreme Courts of Washington, Connecticut, Indiana, and Minnesota have held that the exception includes the issue of whether the defendant was on probation at the time of the current offense. (See *State v. Jones* (Wash. 2006) 149 P.3d 636, 640-641; *State v. Fagan* (Conn. 2006) 905 A.2d 1101, 1121; *Ryle v. State* (Ind. 2005) 842 N.E.2d 320, 323-325; *State v. Allen* (Minn. 2005) 706 N.W.2d 40, 47-48.) As the Washington Supreme Court explained, “the prior conviction exception encompasses a determination of the defendant’s probation status because probation is a direct derivative of the defendant’s prior criminal conviction or convictions and the determination involves nothing more than a review of the defendant’s status as a repeat offender.” (*Jones, supra*, 149 P.3d at p. 640.)

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

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

- (2) The defendant’s prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;
- (3) The defendant has served a prior prison term;
- (4) The defendant was on probation or parole when the crime was committed; and
- (5) The defendant’s prior performance on probation or parole was

unsatisfactory.

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

Here, the trial court's aggravated circumstance finding that appellant was on parole at the time of the offense fell within the recidivism exception because it derived from his prior convictions. Therefore, the trial court's finding of this aggravating circumstance did not violate *Cunningham*.

Appellant argues that "the fact of being on parole" is not covered by the recidivism exception because it "requires proof above and beyond the fact of a prior conviction" and "cannot be proven on the basis of official records alone." (ABM 28.) But a defendant's parole status directly results from a prior conviction that was based upon a jury finding or the defendant's admission. And like the inquiry involving the bare fact of a prior conviction, the inquiry concerning parole status is inherently reliable because it is based upon a limited examination of judicial and correctional department records that are not generally subject to reliability challenges, and involves the type of inquiry about the defendant's status as a recidivist that is traditionally undertaken by judges at sentencing. (*Corchado, supra*, 427 F.3d at p. 820 [*Almendarez-Torres* exception includes fact that defendant was on probation at time of current offense]; *Fagans, supra*, 406 F.3d at p. 142 [same].)

Appellant further argues that the Supreme Court in *Almendarez-Torres* expressly declined to address the issue of the right to jury trial or the applicable burden of proof on prior convictions, and that the *Almendarez-Torres* exception applies "only to challenges to a pleading or charging document and not to issues concerning a defendant's right to jury trial." Appellant therefore contends that because the trial court found the recidivist circumstance by a preponderance standard, the exception did shield the upper term sentence in count 4 from *Cunningham*. (ABM 25-26.) Appellant is incorrect.

First, a plain reading of the Supreme Court's black letter law

unequivocally demonstrates that the *Almendarez-Torres* exception applies, not only to the notice component, but to the jury trial and burden of proof components, of the Fifth and Sixth Amendments. (See, e.g., *Cunningham, supra*, 127 S.Ct. at p. 860 [“[a]s this Court's decisions instruct, 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”]; *Apprendi, supra*, 530 U.S. at p. 490 [“[o]ther 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”], quoted in *Blakely, supra*, 542 U.S. at p. 301.) Appellant offers an unjustifiably narrow reading of *Almendarez-Torres* solely on the basis that the case arose in the context of the notice issue: “[T]he 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, emphasis added.) But the Supreme Court has never suggested that the notice 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 find any fact within the scope of the *Almendarez-Torres* exception using the standard of preponderance of the evidence. (See, e.g., *United States v. Salazar* (9th Cir. 2006) 458 F.3d 851, 859; *United States v. Coleman* (3d Cir. 2006) 451 F.3d 154, 159; *United States v. Gibson* (11th Cir. 2006) 434 F.3d 1234, 1244-1247; *United States v. Barrero* (2d Cir. 2005) 425 F.3d 154, 157-158.) Thus, in the instant case, the trial court properly found the recidivism-based circumstance under the appropriate burden of proof. Accordingly, appellant’s upper term sentence in count 4 was constitutionally valid.

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

Appellant contends that the trial court's imposition of consecutive sentences in count 6 violated *Cunningham* because the decision was based on a fact not found by a jury. (ABM 34-36.) Appellant is wrong because consecutive sentencing decisions do not implicate *Cunningham*, and, moreover, because there is no presumption of concurrent sentences, or for that matter, any requirement of judicial factfinding to consecutively sentence.

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.” (*Id.* 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 the Court would intend to apply its holding to a decision of how a judge aggregates the punishment for multiple offenses. This Court’s reasoning on this issue remains sound.

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

Solely on this same ground, at least six other state supreme courts have

also found that the *Apprendi* line of cases does not impact their consecutive sentencing laws. (*State v. Kahapea* (Haw. 2006) 141 P.3d 440, 452; *State v. Cubias* (Wash. 2005) 120 P.3d 929, 932-933; *State v. Higgins* (N.H. 2003) 821 A.2d 964, 975-976; *State v. Bramlett* (Kan. 2002) 41 P.3d 796, 797-798; *Hall v. State* (Fla. 2002) 823 So.2d 757, 764; *People v. Wagener* (Ill. 2001) 752 N.E.2d 430, 440-443.) All the federal circuits considering the issue have also rejected *Apprendi* challenges to consecutive sentencing under this same reasoning. (*United States v. Hicks* (5th Cir. 2004) 389 F.3d 514, 532; *United States v. Pressley* (11th Cir. 2003) 345 F.3d 1205, 1213; *United States v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *United States v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *United States v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *United States v. Chorin* (3rd Cir. 2003) 322 F.3d 274, 278-279; *United States v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *United States v. Buckland* (9th Cir. 2002) 289 F.3d 558, 570-571 (en banc); *United States v. Campbell* (6th Cir. 2002) 279 F.3d 392, 401-402; *United States v. Feola* (2d Cir.2001) 275 F.3d 216, 220 & n. 1.)^{18/} The California Court of Appeal also has reached the same conclusion for the same reason. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231.) *Cunningham* did not alter the analysis set out in *Black* and these other cases. Accordingly, appellant's constitutional challenge to the imposition of consecutive sentences is without merit.

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

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

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

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

In this case, the trial court imposed the sentence of one-third the middle term of eight months in count 6, lewd act upon a child, consecutively to the

middle term sentence of three years in count 5, attempted forcible oral copulation. (7RT 4103-4105; 1CT 174-177.) The application of California consecutive sentencing law to this sentencing choice did not implicate *Cunningham*.

To understand why *Cunningham* is not implicated, it is useful first to review consecutive sentencing law. A trial court at sentencing is empowered to “direct whether the terms of imprisonment or any of them . . . shall run concurrently or consecutively.” (§ 669; *Black, supra*, 35 Cal.4th at pp. 1261-1262.) Under section 1170, subdivision (c), a trial court must state reasons for the decision whether to impose consecutive sentences on a determinate term. (*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 under section 669, there is a presumption favoring concurrent terms and the court may deviate from that presumption only upon the finding of some additional fact. (ABM 35.) This argument is unpersuasive, however, for two independent reasons.

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

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

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

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

that the court “shall direct whether the terms of imprisonment . . . shall run concurrently or consecutively.” It does not require any fact-finding whatsoever. Although a trial court must give a statement of reasons for imposing consecutive sentences on determinate terms (§ 1170, subd. (c); rule 4.406(b)(5)), 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* (9th Cir. 2005) 432 F.3d 1056, 1066-1067; *State v. Abdullah* (N.J. 2005) 878 A.2d 746, 756-757; *Smylie v. State* (Ind. 2005) 823 N.E.2d 679, 686; *State v. Jacobs* (Iowa 2001) 644 N.W.2d 695, 698-699; but see *Personal Restraint of VanDelft* (Wash. 2006) 147 P.3d 573, 578-579 [a non-serious, non-violent, consecutive sentence violates *Blakely* because it is an “exceptional sentence” requiring an aggravating factor to support it and

because Washington law has a presumption of concurrent sentencing]; *Foster, supra*, 845 N.E.2d at pp. 490-491 [finding *Blakely* error because of Ohio's "unique" 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*.

E. Appellant's Full, Separate, And Consecutive Sentence In Count 4 Did Not Violate The Sixth Amendment

In count 4 (forcible sodomy), the trial court imposed a full, separate, and consecutive eight-year sentence to count 3 (forcible rape) under section 667.6, subdivision (c).^{19/} (7RT 4102-4104; 1CT 172-176.) Appellant contends that this full-strength consecutive sentence was necessarily based on factual determinations not found by a jury and thereby violated *Cunningham* because there is a presumption under section 1170.1 that a consecutive sentence is one-third the middle term rather than full-term, and because the trial court was required to state reasons for its sentencing choice. (AOB 29-34.) Respondent disagrees.

In count 4, the jury convicted appellant of sodomy by use of force, in violation of section 286, subdivision (c)(2). Under section 667.6, subdivision (c), "a full, separate, and consecutive term may be imposed" for forcible sodomy and other enumerated violent sex offenses, "whether or not the crimes were committed during a single transaction."^{20/} In making its discretionary

19. As previously explained, the upper term of eight years did not violate *Cunningham* in light of the aggravating circumstance that appellant was on parole at the time of the commission of the offense.

20. At the time of appellant's offense, section 667.6, subdivision (c), provided as follows:

In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each

sentencing choice under section 667.6, subdivision (c), the trial court must state a reason for imposing a consecutive sentence, and state a separate reason for imposing a full-strength consecutive sentence instead of one-third the midterm as provided in section 1170.1. (*People v. Osband* (1996) 13 Cal.4th 622, 729; Cal. Rules of Court, rule 4.426(b).) The trial court “is to be guided by the criteria listed in rule 4.425, which incorporates rule 4.421 and 4.423, as well as any other reasonably related criteria as provided in rule 4.408.” (Cal. Rules of Court, rule 4.426(b).) The “same reason,” however, may be used to impose a consecutive sentence and to impose a full-strength consecutive sentence. (Advisory Com. com., foll. rule 4.426.)

First of all, as explained in Argument D.2, *ante*, this Court correctly decided in *Black* that the Sixth Amendment does not impact consecutive sentencing decisions. Rather, 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.

violation of Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, Section 288.5 or subdivision (a) of Section 289, of committing sodomy in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of unlawful bodily injury on the victim of another person whether or not the crimes were committed during a single transaction. If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.

(Stats. 2002, ch. 787, § 16.)

Moreover, just as there is no presumption of a concurrent term under section 669, there is no presumption that a consecutive sentence must be set at one-third the middle term under section 1170.1 when a defendant is convicted of certain violent sex offenses. Section 667.6, subdivision (c), is a separate and *alternative* sentencing scheme to the standard formula scheme of section 1170.1, and the applicability of this alternative sentencing scheme is triggered by the defendant's conviction of one of the enumerated violent sex offenses. (*People v. Belmontes* (1983) 34 Cal.3d 335, 345-346; *People v. Farr* (1997) 54 Cal.App.4th 835, 843-844.) Thus, no additional facts beyond the conviction are necessary to impose a full-strength consecutive term, and the trial court's authority to impose such a full-strength consecutive term arises solely from the conviction itself. In other words, the defendant's eligibility for a full-strength consecutive sentence is not dependent on any additional judicial finding of fact.

In addition, the requirement of a statement of reasons does not run afoul of *Cunningham* because such a statement of reasons does not require any impermissible judicial factfinding under *Cunningham*. As previously explained in the context of consecutive sentencing, this statement of reasons does not require a separate finding of facts beyond those reflected in the conviction; instead, 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, supra*, 42 Cal.3d at pp. 449-450.) Also, just as there is no rule of court prohibiting a trial court from imposing a consecutive sentence absent the finding of any fact not reflected in the conviction, there is likewise no rule of court that prohibits a trial court from imposing a full-strength consecutive term absent the finding of a fact not reflected in the conviction. Moreover, the "same reason" can be used to impose a consecutive term and a full-strength consecutive term under section 667.6, subdivision (c). (Advisory Com. com., foll. rule 4.426). Thus, the discretionary decision to impose a consecutive sentence that is full strength

does not require any *additional* reasons, let alone any additional factfinding. Accordingly, there is no merit to appellant's claim that the trial court's imposition of a full-strength consecutive term violated *Cunningham*.

F. 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 D.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 contends that the trial

court's decision not to stay the sentence in count 6 violates *Cunningham*, incorporating by reference his arguments about consecutive sentencing under sections 669 and 667.6, subdivision (c). (ABM 36-38.) But 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 in counts 5 and 6, 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.D.1, II.D.2, *ante*.)

In any event, section 654 would 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.

(§ 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 forebear, *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.

G. 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”].)

2. Upper Term

Any error regarding appellant’s upper term sentence as to count 3 was harmless. The evidence supported the trial court’s finding of planning by taking the victim to a remote location to sexually assault her. The evidence was undisputed that appellant took Angela from the parking lot of the shopping center to a nearby alley, where no one was around, and then forcibly raped and sodomized her. Further, the evidence showed that afterwards, appellant drove a couple of miles away from the alley with Angela in the car until he was stopped by the police. Indeed, appellant was intent on taking Angela home with him. (3RT 363-366, 375-376, 649-650; 5RT 1313; 6RT 1524, 1526-

1527, 1531.)

Appellant argues that the trial court's finding of evidence of planning based on appellant taking the victim to a more remote secluded location to accomplish the sexual assault, was contrary to the jury's inability to reach a verdict on the kidnapping and kidnapping for the purposes of accomplishing a sex offense. (ABM 21-22.) Appellant is incorrect.

The prosecutor identified two movements as a basis for the kidnapping charges. The first movement was appellant's driving the victim in his car, which was parked in the 99 Cent Store parking lot, to the deserted alley. The second movement took place later, after appellant had committed the sexual acts, when he left the alley in order to take the victim to another location, until he was stopped by Inglewood police officers. (6RT 1807-1808.) The simple kidnapping in count 1 was charged as a lesser included offense to the aggravated kidnapping in count 2. (6RT 1812-1813.)

The circumstances of the trial suggest that any problems the jury had with regard to the kidnapping and aggravated kidnapping charges were related to the issue of whether the movement was without Angela's consent, not whether the movement was planned and for the purpose of a sexual assault. There was evidence suggesting that Angela voluntarily walked with appellant and got into his car to drink and smoke. (3RT 352, 354-356.) Moreover, in his opening statement, appellant appeared to assert that he did not "force" Angela to go anywhere with him. Rather, Angela willingly followed appellant to his car to smoke and drink. (3RT 316-342.)^{21/} And although appellant did not emphasize this point again in his closing argument, appellant said, "I state the same things I said from the beginning. . . ." (7RT 1828.) The jury apparently focused its attention on appellant's opening statement, as reflected by its request for readback of that opening statement. (1CT 91.) Moreover, the jury

21. Again, appellant was pro per at trial. (1CT 52.)

asked questions about: whether the victim's emotional state could be used as evidence of consent; whether a victim had to immediately state movement was against her will for a kidnapping; and whether "active consent" was required to find appellant was not guilty of the kidnapping charges. (1CT 102.)

Given the jury's apparent focus on the victim's purported willingness to get into the car with appellant, it is most likely that the jury hung on the kidnapping count because they could not agree on whether appellant moved Angela without her consent. Thus, there is no evidence to suggest that the jury would not have come to a conclusion that appellant planned to take the victim to a more secluded location to accomplish his sexual assault. On the contrary, there was overwhelming and undisputed evidence presented to the jury, which supported the trial court's finding.

Similarly, any error in imposing the upper term in count 4 was also harmless. As to count 4, the trial court's reason for imposing the upper term was drawn from uncontested evidence. There was no dispute that appellant was on parole at the time of the offense. (1CT 33, 38-39, 43-44.) In addition to appellant's admission that he had suffered a prior conviction, when Officers Guizar and Kearney stopped him, he told them that he was on parole for burglary. (3RT653-654; 5RT 1315.)

3. Consecutive Sentences

The trial court's reasons for imposing consecutive terms for counts 3 and 4 were also based on observations drawn from largely uncontested, overwhelming evidence. There is no dispute that the victim was particularly vulnerable. The victim, orphaned at 14 months, was actually and noticeably mentally disabled. (3RT 396-397, 655; 6RT 1502-1503.) In addition to being mentally disabled, the victim was in distress when appellant approached her. She acknowledged she wanted to get drunk because she was depressed, had run away from her group home, and slept on the street the night before appellant

victimized her. Further, the victim had already been “persuaded” to have consensual sex with “Valentine” and another friend, and drank alcohol and smoked before appellant approached her. Moreover, to make sure that the victim was in an even more vulnerable state, appellant gave her marijuana and alcohol. (3RT 345-349, 352, 354-360, 655; 6RT 1502-1503, 1523.) And the evidence undisputedly showed that the victim was 15 years old and that she told appellant she was 15 years old. Thus, her youth also made her more vulnerable. (3RT 354-355, 425; 6RT 1523.)

Similarly, the trial court’s finding that both counts involved a high degree of callousness was shown by overwhelming evidence. Appellant had no regard for the victim’s well-being when he gave her alcohol and marijuana, even though she told him repeatedly that she was only 15 years old. Appellant’s callousness was also shown when he attempted to force her to orally copulate him, and forcibly raped and sodomized her, tearing her anal tissue. (3RT 354, 357-376, 425; 4RT 969-970, 974-975; 6RT 1523-1524.) Appellant forced himself on the victim, even though she resisted and told appellant he was hurting her and begged him to stop. Appellant ignored the victim’s cries and pleas. (3RT 363-374; 4RT 968-970, 974-975; 6RT 1521-1525, 1530.) Thus, the evidence overwhelmingly demonstrated that the crimes involved a high degree of callousness and that the victim was particularly vulnerable.

Similarly, as to counts 5 and 6, the trial court’s reasons for imposing the consecutive terms were based on observations drawn from largely uncontested, overwhelming evidence. With respect to count 5, attempted forcible oral copulation, the court supplied two reasons for ordering appellant’s midterm sentence to be served consecutively: (1) the crime was a separate act of violence; and (2) appellant supplied the victim with alcohol and marijuana to accomplish his goals. The evidence overwhelmingly supported these findings. It was undisputed that appellant offered the victim marijuana and alcohol and

that the victim went with him to his car to smoke and drink. After supplying her with these intoxicants, appellant pushed her head down hard toward his exposed penis. This incident occurred while the victim and appellant were both seated in the front seat, while at the shopping center parking lot, where the victim initially got into the car. By contrast, the forcible rape and forcible sodomy took place later in the alleyway in the backseat, at some point in time after the forcible oral copulation failed. (3RT 352-368; 4RT 963-968; 6RT 1523-1524.) Thus, the evidence showed appellant supplied the victim with alcohol and marijuana in his attempt to force the victim to orally copulate him, a crime that was separate from the other offenses.

Similarly, with respect to the lewd act conviction in count 6, the court again found that the crime was a separate act of violence against the victim. (7RT 4104.) After appellant attempted to force the victim to orally copulate him while she sat in the front, passenger seat of his car in the shopping center parking lot, appellant moved and parked the car in an alleyway, and ordered the victim to get her “ass” in the back of the car. There, in the back of his car, appellant touched and squeezed the victim’s breasts under her clothing on her skin with his hand, and then sucked on her breast with his mouth. (3RT 363-371, 382-383; 6RT 1524-1525.) Appellant’s separate act of touching the victim’s breasts with his hands and his mouth was the basis for count 6. (3RT 369-371; 4RT 979; 5RT 1291, 1294-1297; 6RT 1822-1824.)^{22/} Additionally, appellant’s DNA was found on the victim’s right breast area. (4RT 920.) This was a separate act of violence, occurring after the attempted forcible oral copulation and before the forcible rape. In separately convicting appellant for lewd act upon a child, attempted forcible oral copulation, forcible rape, and

22. The three additional lewd act charges in counts 7 through 9, were alleged as lesser alternatives to the forcible rape, forcible sodomy, and attempted forcible oral copulation charges in counts 3 through 5, respectively. (1CT 64-66; 6RT 1822-1824.)

forcible sodomy, the jury necessarily would have found appellant committed separate acts of violence against the victim. Therefore, any error in relying on the factors used to impose consecutive sentences was harmless.

CONCLUSION

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

Dated: March 21, 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 26645 words.

Dated: March 21, 2007

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