

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

S148914

v.

GARY MITCHELL PARDO,

Defendant and Appellant.

Fourth Appellate District, Division Two, No. E039420
San Bernardino County Superior Court No. FMB006545
The Honorable Marsha G. Slough, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

(1) Did the trial court violate defendant's Sixth Amendment right to a jury trial, as interpreted in *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 549 U.S. __ [2007 WL 135687], by imposing an upper term sentence based on aggravating factors not found true by the jury? (2) If so, what is the proper remedy?

INTRODUCTION

In *Cunningham*, the United States 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 Supreme 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 order to remedy the constitutional infirmity identified in *Cunningham*, this Court should reform Penal Code section 1170. This Court

should eliminate 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, and does not raise ex post facto concerns.

In any event, a reviewing court should not remand a case under *Cunningham*, until the 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 when the trial court has found at least one constitutionally valid aggravating circumstance. *Cunningham* did not grant criminal defendants the right to a jury trial and proof beyond a reasonable doubt on all sentencing factors, or a right to have a jury decide the appropriate sentence. It simply recognized a Sixth Amendment right to a jury determination of any fact that exposes the defendant to a sentence exceeding the statutory maximum. Once that determination is made, the defendant's Sixth Amendment rights are satisfied and the appropriate sentence is solely a matter of state law. The *Cunningham* Court recognized that under California law, only one aggravating circumstance is necessary to support an upper term. This means that if the trial court finds one aggravating circumstance based on the defendant's criminal history, on the defendant's admission, or on a fact inherent in the jury's verdict, there is no *Cunningham* violation. By the same reasoning, the trial court in such a situation is permitted to find any other aggravating circumstance supporting the upper term,

regardless of whether that finding would independently satisfy *Cunningham*.

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

Applying these principles here, 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 appellant's case. The trial court's findings that appellant had a prior conviction and was on probation at the time of the offense, facts also admitted by appellant during his testimony, qualifies this case for the recidivism exception to *Cunningham*. Appellant's recidivism was sufficient to authorize the imposition of an upper term sentence.

Further, there was no prejudice from any *Cunningham* error. Any of 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.

STATEMENT OF THE CASE

On November 5, 2004, the San Bernardino County District Attorney filed a first amended information charging appellant with five criminal offenses: 1) embezzlement (Pen. Code, § 506); 2) diversion of construction funds (Pen. Code, § 484, subd. (b)); 3) grand theft of personal property (Pen. Code, § 487, subd. (a)); 4) fraudulent use of a contractor's license (Bus. & Prof. Code, § 7027.3); and 5) contracting without a license (Bus. & Prof. Code, § 7028, subd. (a)). (1 CT 55-57.)

On September 28, 2005, a jury found appellant guilty of counts 1, 2, 3, and 5, as charged. The jury found appellant not guilty of count 4. (2 RT 363-371; 2 CT 189-193.)

On October 26, 2005, appellant was sentenced to state prison for a total of three years. Appellant received the upper term of three years for count 1 (embezzlement). Three-year terms for counts 2 and 3 were stayed. The court imposed 85 days of county jail custody for count 5. Appellant was given credit for time served. (2 CT 204-206.)

Appellant appealed from the judgment. (2 RT 392-393; 2 CT 208.) On appeal, appellant contended, *inter alia*, that the trial court violated his Sixth Amendment right to a jury trial and proof beyond a reasonable doubt by sentencing him to the upper term. Appellant relied on *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] for support. Appellant stated in his opening brief that he was preserving his claim for federal review. Respondent argued that appellant forfeited his claim by failing to request a jury trial on sentencing in the court below and that the claim was without merit.

In an unpublished opinion filed on November 16, 2006, the Fourth Appellate District, Division Two, summarily rejected appellant's argument, citing *People v. Black* (2005) 35 Cal.4th 1238. (Slip opn. at 8-9.) The Court of Appeal stated that until the United States Supreme Court resolved the issue,

it was “required to follow the holding in *Black* by affirming the trial court’s decision to impose the upper term. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)” (Slip opn. at 9.)

Appellant filed a “Petition for Review to Exhaust State Remedies,” raising the *Blakely* claim. On February 7, 2007, this Court granted review.

STATEMENT OF FACTS

Mark Tiffany, the owner of a transmission repair shop in Yucca Valley, met appellant on August 3, 2003, when appellant took his truck to Tiffany’s shop for replacement of the clutch. (1 RT 101.) During the encounter, Tiffany mentioned that he needed some grading and excavating done, and appellant said, “That’s what I do for a living.” (1 RT 102.) Appellant handed Tiffany a business card with “LKB Contracting” and a license number on it, and informed Tiffany that he was the general manager for the company. (1 RT 102.) Tiffany pointed to the side of a mountain where he lived and said that was where he needed the work done. (1 RT 102.)

Tiffany contacted appellant the following day, and on August 16, 2003, he wrote a check to appellant for a partial down payment of \$3,500 so appellant could have an engineer prepare plans for the project. (1 RT 104.) Appellant later returned to Tiffany and told him the engineer said it was approximately an “\$8,600 job.” (1 RT 105.) Tiffany then gave appellant another check for \$3500, as well as Tiffany’s 1989 Camaro, valued at \$3500. (1 RT 105.) Appellant asked Tiffany to list the car’s value as \$500 so appellant could avoid full tax liability. (1 RT 108, 113-114.)

Appellant provided Tiffany with a handwritten contract/receipt that stated it was between Tiffany and “Jim McBrian,” described the construction project, and specified appellant as the project’s coordinator. (1 RT 108; 2 CT 217.) Appellant told Tiffany that Jim McBrian was the person he had hired to

do the grading plan on Tiffany's property. (1 RT 109.)

Approximately a month later, appellant returned to Tiffany and demanded more money. Appellant said Jim McBrian quit and it was necessary to hire another engineer. (1 RT 109.) Tiffany initially declined to provide appellant with the money because nothing had happened on the project. However, when appellant made a phone call in Tiffany's presence which appellant said was to this other engineer, Tiffany provided appellant with additional funds. (1 RT 109 110.) Appellant prepared a new contract/receipt, typed, which specified that it was between Tiffany and "James McBride," doing business as "McBride Design," again with appellant as project coordinator. (1 RT 112; 2 CT 218.) Appellant told Tiffany that McBride was a certified engineer with an engineering stamp that could write up the plans for Tiffany's job. (1 RT 112.) Instead, appellant hired Coachella Valley Engineering to do the work. Appellant paid them with a check which was returned for insufficient funds and consequently, they did not complete grading plans for Tiffany's property. (1 RT 111, 115, 118-119.)

Tiffany telephoned appellant, who asked for more money and ensured Tiffany that "everything would be okay." (1 RT 119-120.) During that call, appellant admitted that Tiffany already paid him over \$12,000. (1 RT 170.) Appellant nonetheless demanded more money from Tiffany, assuring Tiffany that he was working on Tiffany's project. (1 RT 120-121.) Tiffany refused. Tiffany placed a second call to appellant a couple of days later, which met with a similar demand for money by appellant. When Tiffany refused to pay appellant any more money until appellant completed written plans for the project, appellant promised to have the plans by a specified date. When that date came and went, Tiffany went to appellant's house and complained. Appellant's excuse was that he entrusted everything to "James McBride," whose phone had been disconnected and who appellant could not reach. (1 RT 123.) Tiffany contacted the sheriff's department. (1 RT 121-122.)

Law enforcement did an extensive search for “James McBride” and “McBride Associates” but could not locate any such individual or entity. (1 RT 213.)

Appellant deposited the checks he received from Tiffany in his own personal bank account. (1 RT 203-204.) Over the next two months, appellant conducted his personal banking from the account and made numerous personal payments with checks and ATM withdrawals which included casino ATM withdrawals. (1 RT 203-215.)

Appellant was not a licensed contractor. (1 RT 92.)

Defense

Appellant testified on his own behalf. Appellant’s defense was that the contract was between Tiffany and McBride, his only role was to refer “one friend to another.” (1 RT 234.) Appellant testified that he did what he could to help Tiffany when the project ran into problems but refused to provide any more assistance when Tiffany threatened to kill him. (1 RT 234-245.)

ARGUMENT

I.

SECTION 1170 SHOULD BE JUDICIALLY REFORMED TO ALLOW BROAD DISCRETION IN SENTENCING TO THE LOWER, MIDDLE OR UPPER TERM FOR AN OFFENSE

Appellant contends that this Court cannot constitutionally reform the DSL. (ABOM 42-48.) Appellant further contends if reformation is available to this Court as an option, this Court should sever the portions of the DSL and excise the Rules of Court which allow sentencing courts to base upper terms on factual findings made by a preponderance of the evidence. (ABOM 48-52.) Finally, appellant contends that any reformation could not apply to his case without violating ex post facto principles. (ABOM 52-62.) Respondent disagrees. Respondent respectfully submits that the proper remedy is for this Court to reform section 1170 to allow trial courts to exercise broad discretion in selecting a term of imprisonment. In order to accomplish this, the Court should interpret section 1170 to eliminate the requirement that trial courts must engage in fact finding before a term other than the middle term can be imposed. This would allow trial courts to continue to exercise their broad discretion in selecting one of three terms, including the consideration of all relevant circumstances relating to the offense and the offender.

This statutory reformation best reflects the Legislature's intent in enacting the determinate sentencing scheme. It is consistent with this Court's prior interpretation of the DSL. Further, it closely resembles the Supreme Court's own method for preserving the federal sentencing system by excising its unconstitutional features. Additionally, it is consistent with the statutory reformations undertaken by the Supreme Courts of New Jersey and Ohio, states which had sentencing schemes similar to California's. Most importantly, this is the remedy which would preserve the essential policies and procedures of a

system that has dispensed fair and effective justice in California for close to 30 years.

A. The *Cunningham* Decision

In *Cunningham v. California*, *supra*, 127 S.Ct. 856, (*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." (*Id.* 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),^{1/} "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

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

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,^{2/} 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, supra*, 35 Cal.4th at p. 1247, quoting rule 4.408(a).) “‘A fact that is an element of the crime,’ however, ‘shall not be used to impose the upper term.’” (*Cunningham, supra*, 127 S.Ct. at p. 862, quoting rule 4.420(d).) The Court found that under state law, there was no indication that an upper term could be authorized based not on facts, but on the “[g]eneral objectives of sentencing” in rule 4.410(a)), which include the protection of society, punishment, deterrence, and securing restitution for crime victims. (*Cunningham, supra*, 127 S.Ct. at p. 863.)

The *Cunningham* Court also observed that this Court had “repeatedly

2. All rule references are to the California Rules of Court.

referred to circumstances in aggravation as facts.” (*Cunningham, supra*, 127 S.Ct. at p. 863, citing *People v. 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, supra*, 542 U.S. 296 (*Blakely*), and *United States v. 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, supra*, 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 Supreme 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 Supreme 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 Supreme 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 Supreme 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.
(*Cunningham, supra*, 127 S.Ct. at p. 870.)

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

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

When appropriate, this Court will reconstrue or rewrite a statute to preserve its constitutionality. (*Kopp v. Fair Political Practices Commission* (1995) 11 Cal.4th 607, 626-662.) Statutory reformation may be undertaken regardless of whether the Court “simply place[s] a saving ‘construction’ on the statutory language, thereby constricting the reach of the statute,” or has “to *disregard* language and to *substitute* reformed language[.]” (*Id.* at p. 646.)

In *Kopp*, this Court 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 v. Fair Political Practices Commission, supra*, 11 Cal.4th 607 at p. 615.)

This 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.) This Court also cautioned that “in all cases, reformation should be tested objectively against the standard set out herein.” (*Id.* at p. 663.)

Eleven years before *Kopp*, in *People v. Roder* (1983) 33 Cal.3d 491, 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.) The *Roder* court stated that although the People’s request required “some creative statutory construction,” it was 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 statute. (*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.)

Similarly, in *People v. Forrester* (1994) 30 Cal.App.4th 1697, the Court of Appeal 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 this statute, its provisions should be construed as containing a permissive inference in order to preserve its 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 to preserve its constitutionality. 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 juvenile had "serious difficulty in controlling dangerous behavior." (*Id.* at p. 132.) Although this provision was not an explicit part of the statute, this Court nonetheless reformed the statute to add it because 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, this 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 permit the Court to reform California's sentencing scheme to bring it into compliance with the federal Constitution. Specifically, this Court should strike the language of section 1170, subdivision (b), that the Supreme Court found unconstitutional: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (See *Cunningham, supra*, 127 S.Ct. at pp. 861, 868.) With this amendment, the subdivision would then give a trial court the broad discretion to impose a lower, middle, or upper term without the requirement of additional factfinding. (See *Cunningham, supra*, 127 S.Ct. at p. 871.) This "broad discretion" standard would permit, consistent with the elimination of the factfinding requirement, and subject to abuse of discretion review, the imposition of a term "solely on the basis of a policy judgment or subjective belief," such as the "[g]eneralized objectives of sentencing" in rule 4.410(a), including, for

example, the protection of society, punishment, deterrence, and securing restitution. (See *Cunningham, supra*, 127 S.Ct. at p. 863.)^{3/}

In the same manner, this Court should replace the phrase in section 1170, subdivision (b), that begins, “In determining whether there are circumstances that justify imposition of the upper or lower term . . . ,” with “In determining the appropriate term” This change is necessary to remove the unconstitutional requirement that an upper or lower term must be justified by an aggravating or mitigating circumstance found by the court. Under the reformed system, a reason without a factual finding is sufficient to impose any term. For similar reasons, this Court should adjust the requirement that the trial court “set forth on the record the facts and reasons for imposing the upper or lower term,” to require that the trial court “set forth on the record the reasons for imposing the term selected.” This alteration also eliminates the need for further judicial factfinding, and provides the same procedure for middle terms 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.)^{4/}

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

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

4. 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>.)

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;^{5/} *People v. Hernandez* (1988) 46 Cal.3d 194, 205; *People v. Wright* (1982) 30 Cal.3d 705, 713.) Thus, an interpretation of section 1170 in a manner that preserves its constitutionality under *Cunningham* would effectuate the Legislature’s intent to give the trial courts the full flexibility to tailor an appropriate sentence under the circumstances of each individual case, and would preserve a system that has worked effectively for close to 30 years.

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

5. Although the Supreme Court vacated this Court’s *Black* opinion on February 20, 2007, and remanded the case for reconsideration in light of *Cunningham*, it retains its precedential value on any point not rejected in *Cunningham*. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 598 [citing *People v. Bacigalupo* (1991) 1 Cal.4th 103 as vacated on other grounds]; *People v. Thomas* (1992) 2 Cal.4th 489, 518 [citing *People v. Velasquez* (1980) 26 Cal.3d 425 as vacated on other grounds].)

In 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 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.)

In early 1977, before 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 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. 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.^{6/} 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.^{7/}

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

6. 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.)

7. 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.

in *Black* about California sentencing procedure in order to resolve the constitutional issue. (See *Cunningham, supra*, 127 S.Ct. at pp. 861-863, 868-871.) In discussing this procedure, this Court specifically stated that judges have “broad discretion” under current law to select an upper term, although that broad discretion is “constrained, to some degree” by the mandate in section 1170, subdivision (b), “that an aggravating factor exist . . .” (*Black, supra*, 35 Cal.4th at pp. 1255, 1260.)^{8/} This Court also noted 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 Supreme 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

8. This phrase “constrained, to some degree” suggests that this Court considered this requirement of section 1170, subdivision (b), to have a relatively minor effect on the “broad discretion” standard in California.

should exercise its sound discretion to choose any of the three legislatively mandated terms. Indeed, as previously noted, this is in practical terms very close to the current standard, as explained in *Black*. It is also undoubtedly a constitutionally valid standard, as noted in *Cunningham*. And it is undoubtedly the remedy that would be preferred by the Legislature.

C. 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 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 by a preponderance of the evidence that the defendant had an additional 566 grams of crack and that he was guilty of obstructing justice. (*Booker*, 543 U.S. at p. 229.) 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’s constitutional holding.” The Court stated that it had 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 *Booker* Court recognized that either approach would significantly alter the system that Congress designed, but explained that the judicial

factfinding inherent in the mandatory Guidelines system was no longer possible in light of the Court's constitutional holding. (*Booker, supra*, 543 U.S. at p. 246.) The 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 many 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, i.e., mandatory maximum sentences based on facts other than recidivism, and made those Guidelines advisory. 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. (*Booker, supra*, 543 U.S. at p. 265.)

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 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. As explained in Argument I(B), *supra*, in enacting sections 1170 and 1170.3, the Legislature rejected more formalized, rigid sentencing hearings in favor of procedures which would allow sentencing judges to consider a wide array of pertinent information, including information which is gathered between trial and sentencing. Further, 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.)

Additionally, 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.

Additionally, 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.

D. 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*. Applying the Supreme Court's remedial model in *Booker*, each state supreme court then judicially deleted this presumption, 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 the statutory 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. 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.*)

After finding its own scheme unconstitutional, the New Jersey Supreme Court next determined that the proper remedy was to eliminate the presumptive terms, because this solution "best achieves the Legislature's purpose in enacting the Code." (*State v. Natale, supra*, 878 A.2d at pp. 741-742.)⁹ In reaching this conclusion, 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

9. 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.)

quotation marks omitted.)

The court then explained why it had alternative remedies. First, the court found that it had the power to do “judicial surgery,” and further 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 concluded that the Legislature would not have preferred “to substitute jurors for judges as the factfinders” for sentencing facts. (*Id.* at p. 740.) The court cited four reasons for this conclusion: (a) the Legislature delegated to *judges* the function of considering aggravating factors in order to impose “fair and uniform sentences”; (b) the statutorily enumerated aggravating factors generally “represent the traditional factors that judges historically have weighed in sentencing a defendant within the statutory range”; (c) the Legislature intended that “trial court consider all relevant information, including hearsay, unrestrained by the rules of evidence”; and (d) requiring jury trials on aggravating factors “would lead to separate, costly, unwieldy, and perhaps protracted penalty trials at the conclusion of guilt-phase trials.” (*Ibid.*) Third, the New Jersey Supreme Court quickly rejected the remedy of prohibiting all sentences above the presumptive term, explaining:

To do so would gut the sentencing ranges, cutting them in half and presenting to convicted felons an unintended and undeserved windfall. We do not believe that the Legislature would have contemplated that as a viable solution.

(*Natale, supra*, 878 A.2d at p. 740)

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 adopted “the *Booker* remedy” to its own invalidated 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.) The supreme court found that this remedy gave 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” or 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. The same considerations which motivated the New Jersey and Ohio Supreme Courts to reform their statutes apply with equal force here, and the alternatives are equally undesirable and at odds with the will of the Legislature. Eliminating the presumptive middle term in section 1170, subdivision (b), most faithfully achieves the Legislature’s intent in enacting the DSL, comports with the Legislature’s desire that the sentencing court hear all relevant information, whether or not admissible under the rules of evidence and including material gathered after trial, avoids expensive and time-consuming jury trials which will generate a whole new slew of litigation in the trial and appellate courts, and

avoids giving undeserving defendants a windfall by simply eliminating the upper term altogether.

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.

E. Disposition Of The California Rules Of Court

As noted in Argument I(B), *supra*, 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)].)¹⁰

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

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 Argument I (C)(1), *supra*.)

Another possible disposition to conform the rules to the reformed system, besides invalidating particular provisions, would be to render all the rules of court advisory, as the Supreme Court did with the Guidelines in *Booker*. (See *Booker*, *supra*, 543 U.S. at pp. 246-247.) But, applying the *Booker* remedial test, this disposition appears less appropriate than declaring invalid a few provisions in the rules but keeping the large majority of them intact. In this regard, the *Booker* Court found that it “must retain those portions of the Act that are (1) constitutionally valid [citation] (2) capable of functioning independently [citation] and (3) consistent with Congress’ basic objectives in enacting the statute [citation].” (*Booker*, *supra*, 543 U.S. 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*.

1. 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.^{11/} (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),^{12/} this standard for determining the upper or lower term contradicts the reformed statute, which no longer requires the finding of *any* aggravating or mitigating circumstance to impose an upper or lower term. The actual standard under the reformed statute is that the trial court shall exercise its “broad discretion,” and this standard is different than a standard that the upper or lower term be imposed only upon finding that aggravating or mitigating circumstances outweigh the other. In addition, this standard conflicts with the reformed scheme because it treats the selection of upper and lower terms differently than that of middle terms. (See Argument I(C)(1), *supra*.) 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

11. 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.”

12. 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.)

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 Argument I(C)(1), *supra*; 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 Argument I(C)(1), *infra*.) 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).

Rule	Under Current Statute	Under Reformed Statute
4.405(5)	<p>“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.</p>	<p>“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.</p>
4.406(b)(4)	<p>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; [¶] . . .</p>	<p>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; [¶] . . .</p>
4.420(a)	<p>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.</p>	<p>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.</p>

Rule	Under Current Statute	Under Reformed Statute
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.
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.

Rule	Under Current Statute	Under Reformed Statute
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.
4.437(c)(1)	A statement in aggravation or mitigation must include: (1) A summary of facts that the party relies on as circumstances in aggravation or mitigation justifying imposition of the upper or lower term;	A statement in aggravation or mitigation must include: (1) A summary of facts that the party relies on as circumstances in aggravation or mitigation;

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

2. 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 Argument I(C)(1), *supra*.) 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*.

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.

F. 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 p. 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*, 543 U.S. at p. 268.) This Court should follow the United States Supreme Court’s sensible lead on this point.

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

Appellant argues that ex post facto and due process principles would prevent applying section 1170 as reformed to sentencings and resentencings where the crime occurred before the date of this Court's decision. (ABOM 52-62.) Appellant's argument is meritless.^{13/}

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

13. Appellant speculates that if Senate Bill 40 becomes law, the ex post facto clause would prohibit the law's application to resentencings. (ABOM 62.) That issue is premature and is not properly before the Court.

20 Cal.4th 403, 431, internal quotation marks omitted.)

Here, the application of a judicially reformed version of section 1170 to the instant case would not violate ex post facto or due process principles. Appellant was fully aware that his conduct was criminal at the time he committed the offense, and a new judicial interpretation of section 1170 would not make appellant criminally liable for conduct that had previously been considered innocent at the time of the offense. Appellant also had fair warning at the time of the offense that he was potentially subject to the imposition of an upper term because the upper term was expressly specified in the Penal Code as a possible punishment for his conduct. Appellant therefore had sufficient notice of the possible consequences of his actions, and the imposition of a sentence under the reformed version of 1170 would not violate any of the core due process or ex post facto principles discussed by the United States Supreme Court in *Rogers, supra*. Indeed, the federal circuit courts have uniformly rejected similar ex post facto and due process arguments against the application of the *Booker* remedial opinion to pending cases.^{14/} (See, e.g., *United States v. Portillo-Quezada* (10th Cir. 2006) 469 F.3d 1345, 1354-1356; *United States v. Barton* (6th Cir. 2006) 455 F.3d 649, 652-657; *United States v. Thomas* (11th Cir. 2006) 446 F.3d 1348, 1354-1355; *United States v. Pennavaria* (3d Cir. 2006) 445 F.3d 720, 723-724; *United States v. Williams* (4th Cir. 2006) 444 F.3d 250, 253-254; *United States v. Wade* (8th Cir. 2006) 435 F.3d 829, 832; *United States v. Austin* (5th Cir. 2005) 432 F.3d 598, 599-600; *United States v. Vaughn* (2d Cir. 2005) 430 F.3d 518, 524-525; *United States v. Dupas*

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

(9th Cir. 2005) 419 F.3d 916, 918-921; *United States v. Jamison* (7th Cir. 2005) 416 F.3d 538, 539.) Accordingly, appellant's argument is without merit.

To summarize respondent's proposed remedy of the constitutional infirmity identified in *Cunningham*, this Court should reform the relevant statutory provisions to eliminate the requirement of a fact to impose an upper or lower term. This Court should also invalidate only those provisions in the California Rules of Court that conflict with this reformation or *Cunningham*. This Court should further direct that a court reviewing a pre-*Cunningham* upper term should determine whether the particular sentence needs to be reversed, under doctrines such as forfeiture, the recidivism exception, and 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.

THE UPPER TERM WAS PROPER BECAUSE THE SENTENCING COURT PERMISSIBLY RELIED ON APPELLANT'S PRIOR CONVICTION AND PROBATION IN IMPOSING THE SENTENCE

There was no violation of *Cunningham* in appellant's case because the trial court properly relied on his prior conviction and status as a probationer to impose the upper term. Each of these factors fell within the well-recognized recidivism exception to the jury trial requirement. Because there was at least one valid aggravating factor, the upper term became the statutory maximum, and the Sixth Amendment right set forth in *Cunningham* was satisfied. The trial court was then free to exercise its discretion, within the confines of California state law, to consider all factors in selecting the appropriate sentence.

Assuming, arguendo, that a prejudice analysis is required, there was no prejudice in appellant's case. All of the four aggravating factors cited by the trial court were based on appellant's admissions, and/or on evidence which was uncontradicted or undisputed. Thus, any *Cunningham* error was harmless beyond a reasonable doubt.

Accordingly, appellant's upper term sentence on count 1 should be affirmed.

A. Sentencing Proceedings In Appellant's Case

In the presentence report, the probation officer listed five factors in aggravation: (1) the manner in which the crime was carried out indicated planning, sophistication or professionalism (Rule 4.421(a)(8)); (2) the crime involved an attempted or actual taking or damage of great monetary value (Rule 4.421(a)(9)); (3) appellant's prior convictions as an adult were numerous

and of increasing seriousness (Rule 4.421(b)(2)); (4) appellant was on a grant of summary probation when the crime was committed (Rule 4.421(b)(4)); and (5) appellant's prior performance on probation was unsatisfactory (Rule 4.421(b)(5)). (Probation Officer's Report ["P.O. Rept."] at 7-8.) The probation officer concluded that "[t]here do not appear to be any circumstances in mitigation that are fully applicable." (P.O. Rept. at 8.)

At sentencing, the trial court stated it had read and considered the probation officer's report. Defense counsel told the court that he read the report to appellant over the lunch hour. (2 RT 383.) Tiffany (the victim) addressed the court. Tiffany noted that even during the sentencing proceedings, appellant was studying documents and plans from Coachella Valley Engineering, indicating that appellant was involved in "more than one scam[.]" Tiffany said appellant's conduct indicated he still had no remorse for the harm he had caused; appellant was only concerned about money. Tiffany asked the court to give appellant five years in state prison. (2 RT 386.)

The prosecutor argued that the upper term was appropriate. The prosecutor stated he found it surprising that appellant had never been to prison, given the fact that appellant had several prior convictions, three of which were felonies, and one of which was for the exact same crime - diversion of funds - charged here. The prosecutor added that appellant's own statements to the probation officer supported Tiffany's opinion that appellant had no remorse; appellant continued to insist he did nothing wrong. (2 RT 387-388.)

The court sentenced appellant to the upper term of three years on count 1. (2 RT 392.) The court stated it had read and considered its notes from the trial and the probation officer's report. (2 RT 390.) The court noted that appellant continued to blame "James McBride" for everything that happened, but there was no evidence presented at trial any such person existed. The court told appellant his trial testimony was "not credible" and "bordered on perjury."

(2 RT 390-391.)

The court found appellant ineligible for probation, because appellant had “numerous prior convictions,” including three felonies, and appellant was on summary probation at the time of the offenses in this case. (2 RT 391.) The court then selected the aggravated term on count 1. The court stated:

The Court finds that the factors in aggravation clearly outweigh the factors in mitigation. Factors in aggravation including the fact that you have the prior felony conviction. The manner in which this crime was carried out demonstrates to this Court planning, criminal sophistication and/or professionalism on your part.

Also, as it relates to factors in aggravation, as indicated, you were on summary probation at the time that you committed this offense. And indeed, you have shown no remorse, at least that I can tell, to this point.

There are no circumstances in mitigation that this Court could review in looking at those mitigating circumstance[s] which are outlined in Rule of Court 4.423.

As indicated, the Court’s sentence is going to be the aggravated term of three years state prison. I am finding that that’s on Count 1, three years.

(2 RT 390-392.)

B. Appellant Forfeited His Claim By Failing To Object

Unlike appellant, the defendants in *Apprendi* and *Blakely* objected when the court imposed their sentences. (*Blakely, supra*, 542 U.S. at p. 300; *Apprendi, supra*, 530 U.S. at pp. 470-471.)^{15/} Respondent submits that appellant’s failure to object to his sentence forfeited his claims of error.

No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of

15. 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.)

the right before a tribunal having jurisdiction to determine it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, quoting *United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1770, 123 L.Ed.2d 508], internal quotation marks omitted.) Further, the United States Supreme Court has upheld a state court's finding of forfeiture as to a due process claim asserting the failure to have a jury determine the truth of an element of a crime. (*Osborne v. Ohio* (1990) 495 U.S. 103, 122-123 [110 S.Ct. 1691, 109 L.Ed.2d 98].) Additionally, the Court in *Booker* indicated that forfeiture is a doctrine that a federal appellate court should apply in resolving a claim that a federal guidelines sentence violates the Sixth Amendment. (*Booker, supra*, 543 U.S. at p. 268.)

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

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

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

Appellant argues that because *Black* was decided before his sentencing hearing, it would have been futile to object. (ABOM 39-40.) But *Black* has never been final and, in fact, has now been remanded to this Court for reconsideration in light of *Cunningham*. Further, after *Black*, many other defendants preserved the same *Blakely* claim in the California Courts of Appeal, in this Court, and in the United States Supreme Court, and many of these defendants will now get review of this issue under *Cunningham*. Also, many other defendants continued to give *Blakely* guilty plea waivers or objected to their sentences under *Blakely* because the parties understood that the law in this area was still unsettled after *Black*. (C.f. *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”].)

In between the decisions in *Black* and *Cunningham*, even appellant raised his *Blakely* claim in the Court of Appeal and then in this Court. There is no reason for him not to have also done so in the trial court. Appellant’s counsel certainly raised numerous other issues there. For example, counsel asked for a chance to discuss the probation officer’s report with appellant over the lunch hour before proceeding to sentencing. (2 RT 383.) When the court recalled the matter in the afternoon, counsel told the court appellant had complaints about the recommended restitution amount, and detailed the specific complaints. (2 RT 383-384.) Appellant did not complain, however, about a single aggravating factor cited by the probation officer or

anything else in the probation report; counsel simply asked the court to “consider” imposing a midterm sentence. (2 RT 385.) Additionally, appellant admitted he was a repeat offender during his trial testimony. (1 RT 280.) Furthermore, when the court informed appellant that he had a right to a hearing on restitution, appellant expressly waived that right. (2 RT 389-390.) There is nothing in the record to indicate that appellant had any interest in a jury trial on any aggravating circumstance.

In support of his contention that the forfeiture doctrine does not apply to his case, appellant relies on *People v. Birks* (1998) 19 Cal.4th 108 (ABOM 39). In *Birks*, this Court held that despite not raising the point in the Court of Appeal, the People had not forfeited a claim that *People v. Geiger* (1984) 35 Cal.3d 510, should be overruled, because the Court of Appeal would have had to follow this Court’s *Geiger* decision. (*People v. Birks, supra*, 19 Cal.4th at p. 116, fn. 6.) But although Courts of Appeal were bound to follow *Black, Birks* nonetheless does not square with the present situation. Unlike this Court’s 14-year-old state-law rule on lesser related offenses involved in *Birks*, the upper term question in *Black* was an important federal constitutional issue causing a conflict among state supreme courts, making it ripe for Supreme Court review. Defendants therefore had a strong chance of ultimately prevailing on this issue even after *Black*. Because appellant failed to object on the ground that the trial court was prohibited from finding an aggravating circumstance used to impose his upper term sentence, his Sixth Amendment claim is forfeited.

C. The Trial Court’s Findings That Appellant Had A Prior Felony Conviction, And That Appellant Was On Probation When He Committed The Offense, Fell Within A Recognized Exception To The Rule Requiring A Jury Trial And Proof Beyond A Reasonable Doubt And Rendered Appellant Eligible For The Upper Term

Two of the aggravating circumstances cited by the trial court were appellant’s prior felony conviction and the fact appellant was on probation at the time he committed the current offenses. (2 RT 391.) Even though *Cunningham* generally precludes a trial court from finding a fact necessary to impose an upper term sentence, and holds that the middle term is the statutory maximum, there was no *Cunningham* violation in this case because the upper term was authorized by these two findings. Each finding fell under the recidivism exception to *Cunningham* and was independently sufficient to allow imposition of the upper term, since a single aggravating circumstance is sufficient to authorize an upper term sentence. Accordingly, the upper term became the statutory maximum. Any additional judicial fact finding was constitutionally permissible because such fact finding did not increase appellant’s actual sentence beyond the statutory maximum.

1. Recidivism Exception

The United States Supreme Court first announced an exception for judicial determination of sentencing factors relating to prior convictions in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350] (*Almendarez-Torres*). There, the defendant was charged with illegal re-entry into the United States after having once been deported, in violation of 8 U.S.C. § 1326, subd. (a)). The penalty prescribed in the statute was two years. (8 U.S.C. § 1326.) However, subdivision (b) of the same

section provided:

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection --

(1) whose deportation was subsequent to a conviction for commission of [certain misdemeanors], or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.

The Supreme Court held that while subdivision (a) defined a crime, subdivision (b) related solely to sentencing factors. Thus, the Supreme Court held, the Government did not need to allege in the indictment that the defendant had three prior aggravated felonies in order to render him eligible for the increased penalty provisions. (*Almendarez-Torres*, *supra*, 523 U.S. at pp. 228-248.) The Supreme Court explained, “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 [citation].” (*Id.* at p. 243.) The Supreme Court also noted that the increased penalty provision did not change the definition of a crime, restructure elements of the crime, or create a presumption of guilt. (*Id.* at p. 246.) Further, “recidivism ‘does not relate to the commission of the offense, *but goes to the punishment only*, and therefore. . . may be subsequently decided’ [citation].” (*Id.* at p. 244, omission and emphasis in original.)

Although the question posed in *Almendarez-Torres* was what needed to be included in an accusatory pleading, *Apprendi* subsequently made clear that the holding was not so limited. In *Apprendi*, the Supreme Court held that the Sixth and Fourteenth Amendments prohibited the state from imposing an enhanced sentence for a hate crime when the facts supporting the enhancement were found by the trial judge by a preponderance of the evidence.

(*Apprendi*, 530 U.S. at pp. 491-492.) After an extensive discussion of prior case law, including *Almendarez-Torres*, the Supreme Court held, “*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Id.* at p. 490, emphasis added.) Contrary to appellant’s assertion that *Almendarez-Torres* is now “questionable authority” (ABOM 17), the court has repeatedly reaffirmed the prior conviction exception, 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.)

Because the focus of the *Almendarez-Torres* exception is the defendant’s status as a recidivist, the 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.)

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.” (*State v. Jones, supra*, 149 P.3d at p. 640.)

Appellant argues that to the extent the exception for prior convictions encompasses matters beyond the bare fact of a prior conviction, the exception must be narrowly interpreted to include only those facts which can be determined by the record of conviction. (ABOM 19-20.) Accordingly, appellant claims, the trial court could not use as aggravating factors his “numerous” prior convictions or his status as a person on probation at the time of the current offense, because these determinations involved factual findings subject to dispute which therefore had to be presented to a jury. (ABOM 21-23.) Respondent notes that in appellant’s case, the argument is academic. The trial court cited appellant’s numerous prior convictions as a reason to deny probation, not to impose the upper term. In using the word “numerous,” the court referenced appellant’s entire criminal record, noting that he had a long history of criminal offenses, the “vast majority of which were misdemeanors.” (2 RT 391-392.) The court had just found appellant ineligible for probation, in part, because he had two or more prior felony convictions. (2 RT 392.) As a basis for the upper term, on the other hand, the court specifically relied upon, in the singular, “the prior felony conviction.” (*Ibid.*)^{16/} Whether a prior conviction was for a felony or misdemeanor offense can be determined from the record of conviction and falls squarely within the exception set forth in *Almendarez-Torres* and *Apprendi*.^{17/}

Likewise, one need not go beyond the record of conviction to determine whether the defendant is on probation and if so, whether the

16. The trial court was free to find this aggravating circumstance even though not specifically enumerated in the Rules of Court or by statute. (Rule 4.408(a).)

17. In any event, whether appellant’s prior felony convictions were numerous would present no factual dispute for a jury but rather, a legal determination made from a review of certified court documents and other properly authenticated records.

probation has been terminated or revoked.^{18/} Additionally, during his testimony, appellant admitted he had a prior felony conviction for possession of controlled substances and was on probation for misdemeanor diversion of funds (1 RT 250), thereby exempting those factors from any jury trial requirement. (See *Cunningham, supra*, 127 S.Ct. at p. 868 [defining statutory maximum as “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict *or admitted by the defendant*”].) Since appellant admitted these two aggravating factors and made clear at sentencing that his only quarrel with the probation officer’s report centered on the amount of recommended restitution, it was unnecessary for the prosecutor to present additional documentation to prove matters which were not in dispute.

Appellant further contends that even if the *Almendarez-Torres* exception applied to one or more of the aggravating factors, the judicial findings on those factors were nevertheless improper because they were found by a preponderance of the evidence rather than beyond a reasonable doubt. (ABOM 24-28.) According to appellant, the Supreme Court in *Almendarez-Torres* expressly declined to address the issue of the applicable burden of proof on prior convictions, and therefore *Almendarez-Torres* should be limited to its “narrow holding that the right to *jury trial* does not extend to prior convictions.” (ABOM 25, original emphasis.) Appellant is incorrect.

First, appellant has misconstrued the specific holding in *Almendarez-Torres*. “[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,

18. That the probation officer’s report in appellant’s case may be unclear (ABOM 22), a point respondent does not concede, has no bearing on whether appellant’s probationary status *could* be established by a certified record of conviction.

emphasis added.) Second, the United States Supreme Court has not held or otherwise indicated that the *Almendarez-Torres* exception only encompasses the jury trial component, but not the reasonable doubt component, of the constitutional rule set forth in the *Apprendi* line of cases.^{19/} In *Apprendi* itself, the Supreme Court described the right to a jury trial and the right to proof beyond a reasonable doubt as “associated” and “companion” rights (*Apprendi, supra*, 530 U.S. at pp. 477-478, 484; see also *Booker, supra*, 543 U.S. at p. 230 [these two rights “provided the basis” for the *Apprendi* line of cases]), and the Supreme Court has never suggested that the jury-trial component could be severed from the reasonable doubt component for purposes of applying the *Apprendi-Blakely-Cunningham* constitutional rule or the *Almendarez-Torres* exception. Indeed, the federal circuit courts have consistently held that a judge can properly use the standard of preponderance of the evidence for any fact that falls within the scope of the *Almendarez-Torres* exception. (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.) Moreover, appellant’s argument wrongly assumes that the Sixth Amendment mandates a jury trial on sentencing when in fact, it does not. Thus, in the instant case, the trial court properly found all of the recidivism-based circumstances under the appropriate burden of proof.

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

2. The Recidivism Circumstances Authorized The Upper Term

In a separate section of his opening brief contending that the alleged *Cunningham* errors were prejudicial,^{20/} appellant argues that one aggravating factor is not enough to support an upper term because the Rules of Court require a weighing of aggravating and mitigating factors. Accordingly, appellant claims, “[t]he prosecution has the burden of establishing beyond a reasonable doubt that the unconstitutionally determined sentencing factors did not contribute to the court’s selection of the upper term.” (ABOM 36.) Appellant’s inclusion of this assertion only in the section on “harmless error” highlights the flaw in his reasoning. The issue here is not what the court would have done; it is whether a sentence exceeds the statutory maximum requiring *any* fact finding by a jury. A single aggravating circumstance is sufficient under state law to render a defendant *eligible* for the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729; *People v. Earley* (2004) 122 Cal.App.4th 542, 550; see also *Cunningham, supra*, 127 S.Ct. at pp. 860 [the middle term was required “unless the judge found one or more additional facts in aggravation], 868 [“an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance”]; *Black, supra*, 35 Cal.4th at p. 1255 [section 1170, subdivision (b), mandates “that the middle term be imposed unless an aggravating factor is found”].) Thus, the presence of a single circumstance in aggravation renders a defendant *eligible* for the upper term and provides the trial court with the statutory *authority* to impose the upper term, irrespective of the particular term the court ultimately imposes after conducting the requisite balancing.

Cunningham is similarly satisfied whenever the court finds an

20. Lack of prejudice to appellant is addressed in Argument II(D), *infra*.

aggravating circumstance that satisfies Sixth Amendment authorities, such as, for example, when established by the defendant’s admission or criminal history, or by a jury finding. (See *People v. Calhoun* (2007) 40 Cal.4th 398, 402 [no *Cunningham* error from multiple-victim aggravating circumstance used to impose upper term where the jury necessarily found that there were multiple victims].) Such an aggravating circumstance satisfies the Sixth Amendment, and, standing alone, is sufficient to authorize the imposition of an upper term sentence. (See *Cunningham, supra*, 127 S.Ct. at p. 865, quoting *Blakely, supra*, 542 U.S. at p. 305 [the constitutional test focuses on the judge’s “authority to impose an enhanced sentence,” regardless of whether the “enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*^{21/}), or any aggravating fact (as here),” first emphasis added].) When any fact supporting an upper term sentence has been properly found, the aggravated term has become the sentence that the court is authorized to impose “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” (*Blakely, supra*, 542 U.S. at p. 303.)

Once the federal constitutional requirement is satisfied, the state statutory scheme becomes the only controlling authority limiting the court’s ability to impose an appropriate sentence, including an upper term sentence. (*Apprendi, supra*, 530 U.S. at p. 481 [“[w]e should be clear that nothing in this history suggests it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute”].) Accordingly, if one aggravating circumstance is supported by either a jury finding or the defendant’s admission, or if one aggravating circumstance is based on the defendant’s recidivism, the trial court may permissibly find any other

21. *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556].

aggravating circumstances in imposing the upper term without violating *Cunningham*.

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

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

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

Other state courts considering statutes similar to Section 1170 have reached the same conclusion. (E.g., *State v. Martinez* (2005) 210 Ariz.

578, 585-586 [115 P.3d 618] [“once a jury finds or a defendant admits a single aggravating factor, the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute”]; *Lopez v. People* (Colo. 2005) 113 P.3d 713, 731 [because “[o]ne *Blakely*-compliant or *Blakely*-exempt factor is sufficient to support an aggravated sentence” under Colorado state law and the Sixth Amendment, imposing an aggravated sentence is “both constitutionally and statutorily sound even if the sentencing judge also considered factors that were not *Blakely*-compliant or *Blakely*-exempt”). In *Cleveland v. State* (Alaska Ct. App. 2006) 143 P.2d 977, 988, the Alaska court of appeal explained:

Under our pre-2005 sentencing scheme, *Blakely* governed the proof of the aggravating factor that altered the sentencing judge’s authority. But once one or more *Blakely*-compliant aggravating factors were proved, the sentencing judge was empowered to impose any sentence up to the statutory maximum. At that point, the existence of other aggravating factors might well influence the judge’s selection of a particular sentence within this authorized range -- but *Blakely* does not affect this type of judicial fact-finding.

Appellant’s interpretation of California’s sentencing procedures as requiring every sentencing fact to be decided by the jury is contrary to the analysis in *People v. Osband, supra*, 13 Cal.4th 622, where this Court explained that “[o]nly a single aggravating circumstance is *required* to impose the upper term [Citation].” (*Id.* at p. 728, emphasis added; see also *id.* at p. 730 [“a single factor in aggravation suffices to support an upper term”].) In *Osband*, the defendant claimed that the trial court impermissibly relied on a fact that constituted an element of the offense to impose an upper term. (*Id.* at p. 730.) This Court found that any error was not prejudicial because a single aggravating factor was sufficient to impose an upper term, and the trial “court

therefore could still have relied on the aggravating factors it listed to impose such a term.” (*Ibid.*)

The reasoning in *Osband, supra*, demonstrates that a trial court acquires the legal authority to impose an upper term upon the initial finding of a single aggravating circumstance rather than upon any subsequent weighing process. Notably, in its prejudice analysis in *Osband*, this Court did not analyze or mention the qualitative weight of the remaining aggravating circumstances listed by the trial court, nor did it suggest that the invalidity of one of the aggravating circumstances rendered the upper term legally unauthorized. Instead, the analysis focused on the simple presence of the remaining aggravating circumstances to support the upper term. *Osband* therefore contradicts appellant’s assertions that the legal authorization for the upper term is dependent on the weighing process, and that the validity of each and every aggravating circumstance found by the court is legally necessary to make the upper term the maximum available sentence. Thus, contrary to appellant’s argument, a defendant’s eligibility or exposure to the upper term is established by the finding of a single aggravating circumstance.^{22/}

In light of this settled state law, the presence of a single aggravating circumstance that has been established by constitutional means renders the upper term the statutory maximum under the Sixth Amendment because a trial court “*may* impose [the upper term] without any additional findings.” (*Cunningham, supra*, 127 S.Ct. at p. 865, internal quotations omitted, emphasis added; see also *id.* at p. 868 [“an upper term sentence may

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

be imposed” upon the finding of an aggravating circumstance].) Since the upper term becomes the statutory maximum when a single aggravating circumstance has been established in compliance with the Sixth Amendment, the reliance on additional circumstances not established by such constitutional means does not violate the Sixth Amendment.

Here, the trial court’s aggravated circumstance findings that appellant had a prior conviction for a felony, and that he was on probation at the time of the offense, were within the recidivism exception because they derived from his prior convictions. Therefore, these findings did not violate *Cunningham*. Since each of these recidivism findings, by itself, authorized an upper term sentence, the upper term became the statutory maximum. The trial court was therefore free to consider any other aggravating factors found by a preponderance of the evidence in evaluating whether to impose the upper term. Under these circumstances, the trial court’s additional aggravating circumstance findings did not violate *Cunningham*. Accordingly, appellant’s upper-term sentence on count 1 was constitutionally valid and should be upheld.

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

1. Applicable Law

As appellant concedes, *Cunningham* error is subject to *Chapman* harmless error review. (ABOM 30, citing *Washington v. Recuenco*, *supra*, 548 U.S. ___ [applying *Chapman* to *Blakely* error]); see *People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 327 [applying *Chapman* to *Apprendi* error].) Under *Chapman*, to determine whether *Cunningham* error was prejudicial, the reviewing court must ascertain whether the jury would have found an aggravating circumstance true beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) If the evidence at trial or at

sentencing consisted of was overwhelming or uncontradicted, *Chapman* is satisfied. (*Washington v. Recuenco*, *supra*, 126 S.Ct. at p. 2552; see *People v. Cleveland*, *supra*, 87 Cal.App.4th at p. 271 [any *Apprendi* error in a judge’s section 654 finding was 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. Piler* (C.D. Cal. 2004) 307 F.Supp.2d 1128, 1142-1143 [any *Apprendi* error from failure to submit personal-use finding to the jury was harmless because “[p]etitioner has adduced no evidence to contradict the evidence considered by the trial court, which included the victim’s testimony that petitioner had pulled out a knife and struck the victim in the head with a shiny object cutting him and leaving a scar”].)

If the reviewing court determines that the jury would have found at least one of the aggravating circumstances true beyond a reasonable doubt, the prejudice inquiry ends, and the reviewing court must deem the *Cunningham* error not prejudicial. This is because, as stated in Argument II(C), *supra*, *Cunningham* error only occurs if there are no factors in aggravation which are either recidivism-related, found by a jury, or admitted by the defendant, and which authorize the imposition of the increased sentence. Since under California state law a single aggravating circumstance can validate the imposition of an upper term (*People v. Osband*, *supra*, 13 Cal.4th at pp. 728-729), a determination that the jury would have found at least one aggravating circumstance true beyond a reasonable doubt satisfies Sixth Amendment concerns, thereby rendering any *Cunningham* error harmless.

Once this determination is made, the prosecution does not need to prove beyond a reasonable doubt, as appellant claims (ABOM 36), that the trial court would have sentenced the defendant to the same upper term without the *Cunningham* error. Such an inquiry is not required because the jury trial

right in *Cunningham* focuses on the issue of whether the jury made the necessary finding to expose the defendant to a higher sentence, not on the question of whether the trial court made the proper discretionary sentencing choice. (See *Cunningham, supra*, 127 S.Ct. at p. 860 [“sentence-elevating factfinding” which “expose[s] a defendant” to an upper term violates the right to jury trial].)

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

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

(*Ring, supra*, 536 U.S. at pp. 612-613, original italics.)

Thus, this concurring opinion clearly shows that the federal constitutional concerns in *Apprendi* only reach the issue of factfinding to authorize the increased sentence and do not extend to a trial court’s ultimate sentencing decision. Once the reviewing court determines that the jury would have found at least one aggravating circumstance true, the reviewing court need not further examine under the *Chapman* standard whether the defendant would have received the same sentence in light of the *Cunningham* error. Instead, the proper *Cunningham* harmless error inquiry asks whether, *if* the jury had found one of these two aggravating circumstance beyond a reasonable doubt, the trial court would have then had the authority to consider the other aggravating

circumstance.

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

2. Analysis

Here, all of the trial court's reasons for imposing the upper term were observations drawn from largely uncontested or overwhelming evidence. To begin with, the evidence that appellant had a prior felony conviction and was on probation was undisputed. Indeed, appellant admitted during his testimony that he had a 1995 prior conviction for felony possession of marijuana for sale, a 2001 prior conviction for misdemeanor diversion of construction funds, and a 2001 arrest for domestic violence. Appellant also admitted he was on probation. (1 RT 250.)^{23/} As previously stated, appellant never offered contrary evidence or indicated any disagreement with this portion of the probation officer's report. Further, even assuming, *arguendo*, that the court relied on appellant's "numerous" prior convictions, it cannot be seriously disputed that this factor would apply to appellant, who had a total of 11 prior convictions, 4 failures to appear, and 3 instances in which his probation was

23. Although it was not necessary to do so here because there was no dispute, respondent that in appellant's case as in others, recidivism factors like prior convictions and probationary status are a matter of public record and can be proven by documentary evidence. (§ 969b.)

revoked. (P.O. Rept. at 2-3; see *People v. Searle* (1989) 213 Cal.App.3d 1091, 1098 [describing three prior convictions as “numerous”].)

Appellant’s lack of remorse was unambiguously demonstrated by his repeated attempts to shift blame to the victims of his crimes. Appellant testified that he did not sell marijuana in 1995, that he was living with the Palm Beach City Attorney, and that the marijuana belonged to the City Attorney’s son. Appellant testified he was arrested because he was “at the wrong place at the wrong time.” (1 RT 249.) Appellant testified that he did not divert construction funds in 2001; he was simply helping a friend’s mother who, “drunk and belligerent,” made accusations against him which led to his arrest. (1 RT 250.) Appellant testified that he pled guilty to that charge to make sure the victims got their money back. (1 RT 251.) Appellant’s entire defense in this case was that the actual perpetrator was a person named James McBride. (1 RT 231-247.) Defense counsel argued to the jury that the crimes were committed by McBride and that all of the prosecution witnesses were liars. (2 RT 330-348.) During rebuttal argument, the prosecutor noted that appellant was always blaming someone else for his misconduct, instead of accepting responsibility as he should. (2 RT 350-351.) In imposing sentence, the court stated that appellant’s testimony was not only incredible, it bordered on perjury. (2 RT 390-391.) The jury apparently came to a similar conclusion by finding appellant guilty. In addition, appellant overtly expressed his disdain in front of the jury. During a recess, the court noted that appellant was indicating his disagreement with Tiffany’s testimony by “shaking [his] head, and not very subtly.” The court told appellant to discontinue this behavior. (1 RT 116.)

The evidence also amply showed appellant’s planning, professionalism and sophistication. Appellant came to Tiffany’s shop wearing a shirt with a logo indicating he was in the grading and excavating business.

(1 RT 101-102.) Appellant told Tiffany he did construction work for a living, and handed Tiffany a business card. (1 RT 102.) The card, which was introduced as People's Exhibit 6, was from appellant's former employer, LKB Contracting, Inc., bore the license number for LKB and represented that the company was bonded. (1 RT 102; 2 CT 232.) Appellant followed up on his conversation with Tiffany by leaving a note at Tiffany's home the following day. (1 RT 103-105.) Beverly Buck, the secretary of LKB, testified that appellant was fired on June 26, 2003, and was never authorized to enter into contracts using their license number. (1 RT 184-186.) Tiffany testified that appellant asked him to falsify the bill of sale for the Camaro so appellant could minimize his tax liability. (1 RT 114.) Appellant convinced Tiffany to make a series of payments by coming up with plausible reasons why more money was needed, even though the work had not been done. (1 RT 104-107, 110, 113.) Appellant invented two phantom individuals, James McBrian and James McBride, who he said were responsible for the job. (1 RT 105, 111, 112, 123, 174, 213, 216-217.) The prosecutor argued to the jury that McBride was appellant's "shell game" - someone who appears to exist but can never be found. (2 RT 349-350.) Tiffany pointed out that while waiting for sentencing, appellant was studying documents which suggested he was planning his next scam. (2 RT 386.)

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

Finally, even if it were assumed that this Court must examine whether the trial court would have imposed the upper term sentence in light of the aggravating circumstances that would have been found true by the jury, it

is not reasonably probable the trial court would have imposed a lesser sentence because, as explained above, it is beyond a reasonable doubt that the jury either found or would have found all, or at least most, of the aggravating circumstances true. Furthermore, the trial court's opinion that appellant's testimony "bordered on perjury," that there were no mitigating circumstances, and that the aggravating circumstances "clearly outweigh[ed]" the mitigating circumstances, demonstrates that even the omission of these circumstances that do not survive *Chapman* review would not have dissuaded the trial court from imposing the maximum sentence allowable in this case. Accordingly, any error was not prejudicial. (See, e.g., *People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Kelley* (1997) 52 Cal.App.4th 568, 581 & fn. 18.)

CONCLUSION

Based on the foregoing, respondent respectfully requests that the judgment in appellant's case be affirmed.

Dated: March 20, 2007

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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 22099 words.

Dated: March 20, 2007

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