

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff and Respondent,) Crim. No. S125677
)
 v.) (Court of Appeal No. B166312)
) (Sup.Ct.No. PA040926)
)
 SHAWN TOWNE)
)
 Defendant and Appellant.)
 _____)

**APPELLANT’S SUPPLEMENTAL REPLY BRIEF
ON THE MERITS
RE: *CUNNINGHAM V. CALIFORNIA***

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Respondent agrees that *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856; 166 L.Ed.2d 856] held that California’s sentencing scheme violates the federal constitution by permitting judicial factfinding to increase the maximum sentence available. (Resp.’s Supp. Brief (re: *Cunningham*) [RSBC] 2, 4-8) Respondent further acknowledges that the statutory scheme must be reformed to make it comply with the federal constitutional requirements. (RSBC 2) Thereafter, respondent proposes reformation (RSBC 8-40), and also urges that either appellant’s sentence did not violate *Cunningham*, or that if it did, any error was harmless in this case. (RSBC 41-62) Throughout appellant’s previously filed briefing, appellant has addressed all of these arguments. Appellant will not herein repeat all of the prior arguments made, which he still asserts, but will address some points requiring additional comment to assist this Court in resolving the issues presented.

ARGUMENT

I.

THIS COURT SHOULD NOT REFORM CALIFORNIA'S SENTENCING STATUTES TO ELIMINATE THE PRESUMPTION OF THE MIDDLE TERM

Respondent asserts that this Court has the authority to reform the sentencing statutes, and notes that any such reformation must be consistent with the Legislature's intent in enacting the law. (RSBC 8-13) Respondent suggests that this Court should reform the statutory provisions to strike "the language of section 1170, subdivision (b), that the Supreme Court found unconstitutional." (RSBC 13) In respondent's view, the offending statutory language is "when a judgement 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." (RSBC 13)

While respondent is correct that this Court has the power to reform statutes in a manner consistent with the intent of the Legislature in enacting it, he is wrong in his assertions that removing the presumptive midterm would be consistent with that intent. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal. 4th 607, 660-661; *People v. Martin* (1986) 42 Cal.3d 437, 442-443; App.'s Reply Brief on the Merits [ARBM] 17-32; App.'s Supp. Letter Brief 11/16/04 [ASLB].) Also incorrect is his assertion that *Cunningham* declared the presumptive midterm unconstitutional and that removing it

would merely be striking “the language” that the “Supreme Court found unconstitutional.” (RSBC 13) It is the judicial finding of elemental facts necessary to permit sentence above the midterm that offends the federal constitution (see *Cunningham v. California, supra*, 549 U.S. ___ [127 S.Ct. 856, 873; 166 L.Ed.2d 856]), not the presumptive midterm itself. Thus, this Court’s reformation of the statute should limit itself to elimination of the unconstitutional aspects of the scheme in a manner that best promotes the concerns of the Legislature that enacted it.

A. The Legislature, Whose Primary Goals in Formulating the Determinate Sentencing Law [DSL] Were to Promote Uniformity of Sentencing and Limit Judicial Discretion in Imposing Sentence, Rejected the Option of Removing the Presumptive Midterm. Therefore, this Court Should Not Reform the Statute to Eliminate the Presumption

Respondent recognizes that elimination of disparity in sentencing was a goal of the Legislature in enacting DSL, but asserts that the Legislature intended to confer “broad discretion” on the sentencing court under DSL and that removing the presumption of the middle term would be consistent with this intent. (RSBC 15-20) Respondent’s analysis ignores the Legislature’s clear intent to severely limit the sentencing court’s discretion under DSL. (See *People v. Martin, supra*, 42 Cal.3d 437, 442-443; ARBM 31-31) Moreover, respondent’s proposed solution would undermine the Legislature’s main goal in DSL of eliminating disparity in sentencing.

The primary legislative goal behind section 1170's enactment was to promote

uniformity in sentencing of offenders committing the same offense. (Pen. Code, § 1170 subd. (a)(1); *People v. Simon* (1983) 144 Cal.App.3d 761, 765; Parnas & Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California* (1978) 11 U.C. Davis L.Rev. 29, 31-32, 39-40; App. Supp. Brief (re: *Booker*) filed 2/10/05 [ASBMB] 5-6) “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.*” (Pen. Code, § 1170, subd. (a)(1); emphasis added; see also Pen. Code, §§ 1170.3, 1170.4; *People v. Martin, supra*, 42 Cal. 3d 437, 442-443 [with § 1170, the Legislature sought to create a system of uniform sentencing that would give the sentencing court limited discretion to impose a sentence that fit the crime].)

Respondent recognizes this legislative intent to provide for uniform sentences, but urges that, because the Legislature provided for the court to make the factual findings to support aggravation, removal of the presumption for the middle term would best reflect the desires of the Legislature. (RSBC 15-20) This, however, ignores the fact that the Legislature, which was also very concerned about limiting judicial sentencing discretion, rejected this option.¹ “[T]he movement to promote uniformity in sentencing... was in no

^{1/} Respondent makes a pitch for elimination of the middle term as the solution to the problem because it would permit continued consideration of all relevant factors and permit the rules of court to play an illustrative role and provide guidance for the sentencing court in the exercise of its discretion. (RSBC 18-19) This is an argument to

small part a movement to *diminish* judicial discretion.” (*People v. Martin, supra*, 42 Cal. 3d 437, 443, emphasis added; ASBB 6.)

As initially drafted in Senate Bill 42, Penal Code section 1170 did not include current subdivision (b) with its requirement that the middle term be imposed unless the court found additional factors justifying departure from it. (See Sen. Bill No. 42 (1975-1976, Reg. Sess.) § 273.) Rather, it merely stated that the trial court shall sentence the defendant to one of the three terms absent a grant of new trial or probation. (*Ibid.*) In the August 7, 1975 version of the bill, subdivision (b) was added, providing for the mandatory imposition of the middle term absent additional findings and laying out various procedural rules for doing so. (See Assem. Amend to Sen. Bill No. 42 (1975-1976, Reg. Sess.) Aug. 7, 1975, pp. 111-113.) While those procedures were later amended by Assembly Bill 476 to permit finding of the factors at a single sentencing hearing and without a motion by the parties, the requirement that the court “shall” impose the middle term unless it made additional findings and stated the reasons for the departure on the record was never eliminated. (See Assem. Bill 476 (1977-1978, Reg. Sess.) § 15.)

Additionally, in 1977, when AB 476 was being drafted to amend the newly enacted determinate sentencing law as passed in SB 42, the San Diego District

present to the Legislature as it makes its determination of what to do next. It does not resolve the issue of what remedy the Legislature would ultimately prefer and enable this Court to determine whether such a solution best satisfies legislative concerns.

Attorney's Office urged the Legislature to give the sentencing court more discretion and reduce the emphasis on a "narrow uniformity." (See Exh. B in App. Req. for Jud. Not. filed 11/16/04 [ARJN], Suggested Modification of SB 42 - Tentative Draft, p. 4.)² It further argued to this end that, "[t]he middle term should be viewed as the norm, but not made mandatory; . . ." (*Id.* at p. 4.) The proposal went on to suggest that: (1) the requirement of a special hearing on aggravation or mitigation should be eliminated; (2) the choice of term should be left to the sound discretion of the court; (3) the Judicial Council's sentencing guidelines should be merely "taken into consideration" instead of mandatorily applied; and (4) the court should be able to use a wide range of information, including the probation report. (*Id.* at pp. 4-7.) The same office also wrote to the Chairman of the Assembly Committee for Criminal Justice, the Honorable Kenneth L. Maddy, to withdraw its support of the bill because its proposed amendments, which included those mentioned above, had not been adopted. (See ARJN Exh. A.)

Subsequently, the Legislature did follow some of these suggestions as they related to Penal Code section 1170, such as combining the hearing on aggravating or mitigating

^{2/} This was provided to Assemblyman Kenneth L. Maddy by Legislative Counsel in April 1977. In its opening paragraph, it explained that the San Diego District Attorney's Office believed that the determinate sentencing act needed modification and that this document was a tentative draft of suggested modifications. A copy of it was sent to appellant from the Legislative Archives. On November 16, 2004, appellant filed a request for this Court to take judicial notice of the archived materials that provide the legislative history for DSL. The letter to Assemblyman Maddy was attached to the request as Exhibit B. Appellant has not to date received an order from this Court ruling on the request and urges this Court to issue an order granting it.

factors with the sentencing hearing and permitting consideration of the probation officer's reports. (See Pen. Code, § 1170 as enacted in 1977; see also Exh. C, D, E.) But, despite the earlier request that the Legislature make the middle term "the norm," the Legislature retained the mandatory "shall." It further continued to mandate that the trial court follow the Judicial Council rules. This retention of the mandatory middle term demonstrates a clear legislative intent to require the sentencing court to impose the middle term unless additional facts were found. (Cf., *Kusior v. Silver* (1960) 54 Cal.2d 603, 618 ["failure to make changes in a given statute in a particular respect when the subject is before the Legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect."]; *Madrid v. Justice Court* (1975) 52 Cal.App.3d 819, 825-826.) The Legislature plainly rejected the suggestion of expanding the trial court's discretion to enable it to impose any of the three terms at will. Neither did it permit the trial court to ignore the rules of the Judicial Council in making its findings on aggravating or mitigating factors. The rejection of the suggestion in 1977 demonstrates clearly that such a solution was contrary to the intent of the Legislature. As a result, this Court should not now do what the Legislature has already opted against. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 661.)

Moreover, eliminating the restraint of the presumptive midterm and requirement of proof of additional facts to justify the aggravated term would actually lead to more disparity in sentences. Under such a system, so long as the sentencing court's decision

was not arbitrary, a sentence to any of the three terms would be permissible irrespective of whether there were aggravating facts. (Cf. *In re Cortez* (1971) 6 Cal. 3d 78, 85-86 [reasoned decision that is not arbitrary or capricious will not be found an abuse of discretion].) As respondent notes, in *People v. Black* (2005) 35 Cal. 4th 1255, 1260 [overruled in *Cunningham*], this Court recognized that the “broad discretion” afforded sentencing judges under section 1170 is “constrained, to some degree” by the mandated middle term. (RSBC 20)³ Of necessity, if this constraint is removed, the discretion will broaden. As respondent also notes, this Court concluded in *Black* that the presumptive middle term and requirement of aggravation was a means of assuring that the sentence was reasonable. (RSBC 20) This very specific control on what is reasonable served to promote uniformity in assessing which term to impose. With the broadening of the discretion, this degree of uniformity will necessarily be lost.⁴

^{3/} This discretion was further constrained by the Legislature’s designation of specific fixed terms rather than a sentencing range, as well as its requirements that certain factors be considered (see e.g. Pen. Code, §§ 1170.7 *et. seq.*), that the Judicial Council provide additional rules for the sentencing courts to follow, and that the sentencing court identify reasons on the record. (ASBMB 6)

^{4/} Respondent also relies on the fact that in *United States v. Booker* (2005) 543 U.S. 220 [160 L.Ed.2d 621; 125 S.Ct. 738], the High Court elected this type of reformation to the federal statutes as the best means to effectuate Congress’s intent in enacting the federal sentencing scheme. (RSBC 21-28) Respondent additionally relies on the choice of the courts in New Jersey and Ohio to reform their sentencing schemes similarly. (RSBC 28-33) These courts were all interpreting statutes within the applicable reformation rules in their jurisdictions and *based upon the legislative intent of their respective Legislatures*. (App. Supp. Rep. Brief (re: *Booker*) [ASRBB] 5-6) Whatever the merits of the decisions in those jurisdictions, in California, it is clear that the Legislature rejected the modification suggested by respondent because it was

B. Judicial Factfinding, Not the Presumptive Midterm, Is Unconstitutional; Thus, the Factfinding, Not the Presumptive Midterm, Should be Stricken

Respondent suggests that *Cunningham* held that the presumptive midterm was unconstitutional. (RSBC 13, 35) This is not so. The Court stated, “Because circumstances in aggravation *are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt*, [citation omitted], *the DSL violates Apprendi’s bright-line rule. . . .*” (*Cunningham v. California, supra*, 549 U.S. ____ [127 S.Ct. 856, 873] emphasis added.) Thus, it was judicial factfinding to make the upper term available that the High Court found problematic, not the requirement that additional facts beyond the identified elements of the crime and enhancements be found before the upper term can be imposed.

Based upon this faulty assumption, respondent urges excision of the presumptive midterm from section 1170, subdivision (b), addition of the middle term to Penal Code section 1170.3, and invalidation of rule 4.420 (a)’s provision that the middle term be selected unless the upper or lower term is justified by factors in aggravation or mitigation. (RBSC 15, 35-37) Respondent further urges that rule 4.420 (b)’s provisions that the upper term is justified only upon a finding that aggravating factors outweigh mitigating factors and the lower term is justified only upon a finding that mitigating factors outweigh aggravating factors, along with the definitions of aggravating and

inconsistent with its primary goals in enacting the statute. Thus, the models from these other jurisdictions should not be followed.

mitigating circumstances in rule 4.405 and the requirement of a statement of reasons in rule 4.406 (b), should also be invalidated. (RBSC 35-37) Yet, *none of these provisions violate the federal constitution or were invalidated by Cunningham*. Rather, only the provisions permitting the trial judge, instead of the jury, to make the required *factual* findings of aggravation based on a preponderance of the evidence, rather than proof beyond a reasonable doubt, were held to be constitutionally impermissible. (*Cunningham v. California, supra*, 549 U.S. ____ [127 S.Ct. 856, 873].) Only they need be removed.

Respondent also asserts that the Legislature demonstrated an intent that judges rather than juries identify and impose the appropriate sentences. (RSBC 16) This is true. Appellant does not dispute that the Legislature intended that the court select the sentence within the limited discretion outlined for it. Nothing in the *Apprendi* line of cases requires that the jury decide what sentence to impose. Rather, those cases merely hold that the federal constitution requires that all facts relied upon to set the maximum potential sentence be found by the jury. Thus, to satisfy the constitution, California's scheme need only eliminate the judge's authority to find the aggravating factors necessary to justify the upper term. It need not eliminate the presumptive middle term, or the court's authority to weigh the aggravating factors against mitigating factors, or the trial court's power to make the ultimate decision whether to impose the upper term once it is available.

To eliminate the unconstitutional imposition of the upper term based upon judicial

factfinding, this Court has several options. One would be to eliminate the upper term in all cases. This is the remedy appellant endorses. (ARBM 26-30, ASBMB 7-8) Another option would be simply to remove the provisions permitting the sentencing court to find facts to justify the aggravated term, and either permit the upper term only where those facts have already been established by constitutional means or to permit jury trials on the aggravating facts. (ARBM 17-18, 25-26)

Therefore, this Court could sever from Penal Code section 1170, subdivision (b) the provisions for interested parties to dispute facts or present evidence, as well as those permitting the consideration of additional evidence to determine whether the upper term is justified. This would leave subdivision (b) to read:

“(b) 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. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.”

The provision for the parties to submit statements in aggravation and the court’s consideration of such factors would have to be interpreted to be limited to facts found by the jury as proved beyond a reasonable doubt.

The Rules of Court would also have to be modified to eliminate the provisions for the sentencing court to find the aggravating factors by a mere preponderance of the evidence. Thus, rule 4.420 (b) would have to be reformed to delete the first and third sentences and read:

“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. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.”

With this reformation to these two sections, the scheme could operate constitutionally. It does not appear that any other statutes or rules would require modification.⁵

This Court would then have to decide whether it should further reform the system to read into it provisions for jury trials on any aggravating factors that would not be otherwise constitutionally available. As appellant has noted, this option is problematic because the procedural mechanisms for obtaining jury findings on these facts are not in place, and the determination of what procedures should be implemented to provide for pleading the allegations of aggravating facts and submitting them to the jury are largely legislative functions. (See *City of Carmel-by-the-Sea v. Young*(1970) 2 Cal.3d 259, 272; *Arp v. Workers’ Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 409-41; ARBM 24-26; Appellant’s Supplemental Brief on the Merits (re: *Cunningham*) [ASBMC 31-32].)

⁵/ As noted above, respondent’s proposal for eliminating the presumptive midterm would require substantial additional modification to the statutes and the court rules.

Moreover, as respondent noted, it appears that the Legislature preferred to keep the procedural aspects of the determination of the aggravating factors uncomplicated. Thus, it opted to have an even more informal hearing on factors in aggravation. (RSBC 16-17)⁶ Accordingly, it may be best to leave to the Legislature the decision as to how additional factors needed to justify the upper term may be constitutionally determined.

This Court's other option would be to hold that the upper term may be imposed only where there are aggravating factors that were found by constitutionally compliant means. Appellant has argued that this would improperly skew sentencing in a manner not anticipated by the Legislature and lead to disparate sentences. (See ARBM 18-19) Barring upper terms based on facts relating to the current offense, no matter how aggravating they may be, while permitting the upper term based upon a prior or an enhancement that was not imposed, will result in sentences in some more aggravated crimes being limited to the middle term while sentences in some more mitigated cases are allowed to increase to the upper term. Such a result would not promote any of the stated Legislative goals, but would be contrary to legislative intent. Thus, this Court should reject this option as well. (See *Metromedia v. San Diego* (1982) 32 Cal.3d 180, 190; *Kopp v. Fair Pol. Practices Com.*, *supra*, 11 Cal. 4th at pp. 643, 669-670; ASBMC 32-34; ARBM 17-26.)

^{6/} The Legislature's reluctance to complicate the proceedings is, of course, irrelevant if the Legislature seeks to maintain the requirement of a finding of aggravation to justify the upper term and the Constitution mandates that such facts be found by a jury. (See *Blakely v. Washington* (2004) 542 U.S. 296, 313-314 [159 L.Ed. 2d 403, 419-420; 124 S.Ct. 2531].)

No reformation will give the Legislature exactly what it wanted because part of what it wanted - judicial finding of facts necessary to aggravate the sentence - is unconstitutional. It is likely, however, that the Legislature would prefer to have its system operate to the extent that it can in a manner that would lead to the most uniform sentencing and result in a sentence considered appropriate by the Legislature in the majority of cases. (See *Gerkin v. Fair Political Practices Commission* (1993) 6 Cal. 4th 707, 714-716; *People v. Salazar-Merino* (2001) 89 Cal.App.4th 590, 600 [“If a part to be severed reflects a “substantial” portion of the [Legislature]’s purpose, that part can and should be severed and given operative effect.’ [Citing *Gerkin*].”].) This result can be constitutionally accomplished by eliminating the upper term until the Legislature has the opportunity to decide what final reforms should be made. By making the middle term presumptive, the Legislature indicated a determination that it was the sentence that would be expected in the usual case. It further anticipated that the lower term would be imposed some of the time. Thus, in the majority of cases, the upper term would not be implicated. Moreover, by eliminating the upper term across the board, the disparity caused by allowing imposition of the upper term in only some of the aggravated cases would be avoided. (ARBM 26-30, ASBMC 34)⁷ This Court has made similar

⁷/ Respondent expresses concern that making it harder for the imposition of the upper term than for the imposition of the lower term would put the parties on unequal footing and would create disparity by making lower terms easier to achieve. (RBSC 18) The fact that the prosecution would bear the burden of proving elemental aggravation beyond a reasonable doubt is no different from the added burden placed on the prosecution in every criminal case. Moreover, the fact that it will be harder to impose the upper term will result in no increase in the number of cases in which the lower term is

reforms limiting sentences where statutory provisions for higher sentences were found to be unconstitutional. (See *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 444-445 [this Court found the procedures for imposition of a death sentence to be unconstitutional, declined to rewrite the statute to correct the procedural defects, and instead severed the provisions for the death sentence, leaving a life sentence as the applicable punishment]; *Leaming v. Municipal Court* (1974) 12 Cal.3d 813, 816-817 [this Court severed the provision for a life term from a statute].)

C. Retroactive Application of a Reformed Version of section 1170, subdivision (b) that Eliminated the Presumptive Midterm and Requirement of Finding Aggravating Factors Would Violate Due Process

Finally, this Court's adoption of respondent's suggested reformation would trigger serious constitutional questions if it were applied to appellant and any defendant whose crimes were committed prior to the implementation of the reformation. As appellant argued in the supplemental reply brief addressing *Booker*, a new rule permitting the upper term to be imposed without findings of aggravation would violate appellant's federal due process rights. (See *Bowie v. City of Columbia* (1964) 378 U.S. 347, 352-354 [12 L.Ed.2d 894, 84 S.Ct. 1697] [federal due process prohibits the retroactive application of a judicial enlargement of a criminal statute in a manner that would operate like an *ex*

imposed. The option is not the upper term or the lower term. While there may be more middle terms as a result of it being more difficult to prove factors in aggravation, that fact will have no impact on the number of lower terms, which will still result as they always have from findings of factors in mitigation.

post facto law]; App.’s Supp. Reply Brief on the Merits (re: Booker) [ASRBMB] 10.)

Ex post facto prohibitions are violated by changes in the law that eliminate a beneficial presumption. (See *Miller v. Florida* (1987) 482 U.S. 423, 433 [107 S.Ct. 2446, 96 L.Ed.2d 351] [departure from the presumptive sentence under revised sentencing guideline violated *ex post facto* prohibitions].) Here, the presumption that the defendant would not get the aggravated term absent findings of factors in aggravation is such a beneficial presumption.

The critical question for *ex post facto* purposes is whether “the system itself [has] been altered to the prisoner’s detriment.” (*People v. Williams* (1987) 196 Cal.App.3d 1157, 1160.) Eliminating the presumptive middle term in the absence of aggravating factors changes “the standard by which punishment will be imposed to defendant’s disadvantage. Applying these laws to defendant thus runs afoul of the *ex post facto* clause.” (*Ibid.*)

Moreover, while procedural changes do not trigger *ex post facto* concerns, “it is the effect, not the form, of the law that determines whether it is *ex post facto*. [Citations].” (*Id.* at p. 1161, citing *People v. Smith* (1983) 34 Cal.3d 251, 260, citing *Weaver v. Graham* (1981) 450 U.S. 24 [67 L.Ed.2d 17, 23, 101 S.Ct. 960].) Thus, although seemingly procedural in nature, the proposed reformation actually alters a substantive right and so retrospective application of it would violate the *ex post facto* and due process clauses. (*Id.* at p. 1161, citing *Weaver v. Graham, supra*, 450 U.S. 24, 29 fn.

12.)

Furthermore, lowering of the burden of proof required by the law at the time appellant committed his crime would be another *ex post facto* violation. (*Calder v. Bull* (1798) 3 U.S. (3 Dall) 386, 390.) In *Carmell v. Texas* (2000) 529 U.S. 513 [120 S.Ct. 162, 146 L.Ed.2d 577], the Court stated:

“A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end.”(*Id.* at pp. 532-533.)

At the time of appellant’s crime, section 1170 and the rules of court required that aggravating factors be found by a preponderance of the evidence. Although this standard was unconstitutionally low, reforming section 1170 and the rules of court to remove the requirement of finding aggravating facts at all would improperly eliminate an element and reduce the quantum of evidence required to impose the higher term. Any reformation to section 1170, subdivision (b) that would eliminate elements required to impose the upper term, increase the maximum sentence for the bare offense from the middle to the upper term, eliminate a beneficial, statutorily prescribed presumption (the

middle term) of long standing, and reduce the burden of proving aggravating circumstances from an unconstitutionally low preponderance standard to nothing would violate *ex post facto* prohibitions or their due process equivalents.

The fact that the High Court in *Booker* altered the federal system and allowed the alteration to apply to cases pending on appeal does not mean otherwise. The Court took this action as a routine acknowledgment of the normal principles of retroactivity established in *Teague v. Lane* (1989) 489 U.S. 288 [109 S.Ct. 1060, 103 L.Ed.2d 334] and *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [93 L.Ed.2d 649, 107 S.Ct. 708]. (*United States v. Booker, supra*, 543 U.S. 220, 268.) Neither the majority nor the dissent discussed or gave any consideration to *ex post facto* or due process issues. Cases are not authority for propositions not considered. (*People v. Dillon* (1983) 34 Cal.3d 441, 473-474; *In re Tartar* (1959) 52 Cal.2d 250, 258.) Hence, it cannot be argued that a *Booker*-type reformation of the California system, as urged by respondent here, would not constitute a violation of due process and the *ex post facto* clauses if applied to appellant and others in his situation.⁸

⁸/ A further reason not to reform the statute to remove the presumptive midterm is the massive upheaval it would cause by necessitating new sentencing hearings for all defendants previously sentenced to the middle term when that was the presumptive sentence. If the courts will in fact be free to impose any term without findings in aggravation or mitigation, or if those factors are only required to insure reasonableness and not to overcome a presumption in favor of the middle term, any defendant sentenced to the presumptive middle term should be entitled to a remand to permit the sentencing court to exercise previously unrecognized discretion to impose the lower term without findings of factors in mitigation. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13 [providing for writ relief for defendants who had been sentenced

II.

APPELLANT’S SENTENCE TO THE UPPER TERM VIOLATED THE FEDERAL CONSTITUTION UNDER *CALIFORNIA v. CUNNINGHAM*, AND HIS SENTENCE MUST BE REVERSED

A. The Error Is Cognizable on Appeal

Respondent argues, as he did in the Answer Brief on the Merits (ABM 19-22) that appellant forfeited his Sixth Amendment claim by not asserting it in the trial court.

(RBSC 45-47)⁹ As this Court recognized in *People v. Vera* (1997) 15 Cal.4th 269, 276-277, however, the constitutional right to a jury trial cannot be forfeited by failure to assert it. (See also *People v. Belmares* (2003) 106 Cal.App.4th 19, 27 [declining to find forfeiture of a claim of a constitutional jury trial right on an enhancement for a prior pursuant to *Apprendi*]; but see *People v. Hill* (2005) 131 Cal.App. 4th 1089, 1103.)

More significantly, however, there is no requirement that the defendant make a futile objection to preserve an issue for appellate review. “[R]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations].” (*People v. Welch* (1993) 5 Cal. 4th 228, 237-238; see also *People v. Chavez* (1980) 26

by courts that did not recognize the scope of their discretion]; *Griffith v. Kentucky, supra*, 479 U.S. 314, 328.)

⁹/ Respondent also asserts that appellant did not object to his sentence. (RSBC 45) This is misleading. Appellant did not agree to the sentence, but rather argued that his wobblers crime should be sentenced as a misdemeanor, as well as that his strike prior be stricken along with the prison term priors and that the low term be imposed. (4RT 2410-2413)

Cal.3d 334, 350, fn. 5; *O'Connor v. Ohio* (1966) 385 U.S. 92, 92-93 [where the Court held that a defendant did not waive *Griffin* error by failing to object to a prosecutor's comments at a trial had before *Griffin* was decided].)

Respondent asserts that, although appellant was sentenced prior to *Blakely* being decided, because *Blakely* was based upon *Apprendi*, and *Apprendi* was decided before appellant was sentenced, an objection based on the deprivation of a jury trial would not have been futile. (RBSC 46) As appellant argued in the Reply Brief on the Merits, at the time of appellant's sentencing, no court had held that the defendant had a jury trial right as to factors in aggravation. (ARBM 7) Prior to *Cunningham*, decided in January of this year, no court had yet so held. In fact, this Court, in *Black* had expressly held to the contrary. An objection would have been futile; the error was not forfeited.

B. The Fact that the Court May Have Relied Upon a Constitutionally Found Factor in Addition to Unconstitutionally Found Factors Does Not Remove the Sentencing Proceedings from the Purview of *Cunningham*

Respondent asserts that the *Almendarez-Torres* exception to the *Apprendi* rule extends to all *recidivism* factors, and that the presence of any single recidivism factor or a factor found by constitutional means renders the defendant eligible for the upper term and takes the sentencing outside the purview of *Cunningham*. (RSBC 47-53) As appellant argued extensively in the supplemental brief addressing *Cunningham*, neither of these assertions is correct. (ASBMC 14-17)

A single factor might justify the imposition of the upper term if it is of sufficient weight to do so under the law, but it does not necessarily do so. (See *People v. Covino* (1980) 100 Cal. App. 3d 660, 670-672; *People v. Searle* (1989) 213 Cal. App. 3d 1091, 1100; *People v. Kellett* (1982) 134 Cal. App. 3d 949, 963; ASBMC 22) Thus, if the trial court uses impermissible factors to establish that aggravation outweighs mitigation and impose the upper term, the court has made a factual finding necessary to make the aggravated sentence available and violated the federal constitution. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, 494; ASBMC 23)

Here, the court used appellant's lengthy criminal history, the fact that he was a liar and the fact that he did things to terrorize the victim to decide that appellant should be sentenced to the upper term. (4 RT 2411-2417) There was no jury finding as to any of these things.

Respondent argues that the lengthy criminal history need not be found by the jury because it is a recidivist factor. (RSBC 48-50) As appellant argued in his last supplemental brief, the determination of a lengthy history goes beyond the parameters of the *Almendarez-Torres* exception. (ASBMC 4-13)

Respondent cites many cases from other jurisdictions that have interpreted "recidivism" to extend beyond the mere fact of the prior conviction. (RSBC 48-50) *Shepard v. United States* (2005) 544 U.S. 13 [161 L.Ed. 2d 205; 125 S.Ct. 1254] recently clarified that the High Court considers the *Almendarez-Torres* exception to the *Apprendi*

rule to be very narrow. (ASBMC 5-11) Because these cases, many of which pre-dated *Shepard*, do not read the exception narrowly, appellant submits they were wrongly decided. (ASBMC 4-11) Additionally, as noted by the court in *State v. Fagan* (Conn. 2006) 905 A.2d 1101, on its way to holding that the fact that the defendant was on controlled release at the time of the new offense fell within the recidivist exception, other courts “have refused to extend the prior conviction exception to apply to such facts.” (*Id.* at p. 1120-1121, see also *State v. Wissink* (N. C. 2005) 617 S.E.2d 319 [probationary status was outside the exception for priors]; *State v. Steele* (Ore. 2006) 134 P. 3d 1054 [similar prior convictions and probationary status were outside the exception for priors].)

Moreover, even if appellant’s recidivism was properly considered here based either upon *Almendarez-Torres* or appellant’s admissions regarding his prior convictions, the court still violated appellant’s constitutional rights by relying on the court’s own findings that appellant was a liar and that he had committed the acts alleged in the counts of which he was acquitted. (*Apprendi v. New Jersey, supra*, 530 U.S. 466, 490, 494; ASBMC 23)

C. The Maximum Term Available for the Substantive Offense Was the Middle Term, Not the Middle Term Plus the Enhancements for Prior Prison Terms

Respondent argues, as he did in the Answer Brief on the Merits (RABM 36-39), that because appellant admitted two prior prison term enhancements that could have

added two years to his total sentence, his maximum sentence for *Cunningham* purposes was eight years. (RBSC 54-56) In so doing, respondent acknowledges that Penal Code section 667.5, subdivision (b) enhancements do not attach to individual counts. (See *People v. Tassell* (1984) 36 Cal.3d 77, 90, RBSC 55, fn. 21.) Based upon this, he agrees that the enhancements could not be included to assess the maximum term as to any given count in a multiple count case, but asserts that, where only one count is charged, the enhancements may be used to assess the maximum term available for that count in doing the *Cunningham* analysis. (RBSC 55, fn. 21.)

As appellant noted in previous briefing, the Court in *Apprendi* rejected similar reasoning with respect to whether the identical term could have been achieved there by imposition of consecutive sentences. The Court concluded, “The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged *in that count*.” (*Apprendi v. New Jersey, supra*, 530 U.S. 466, 474 [147 L.Ed.2d 435; 120 S.Ct. 2348] emphasis added.) Similarly, the constitutional question here is what term was permissible for the sentence on the substantive count. (*Ibid.*)

Respondent further asserts that the ability to impose the upper term based upon the section 667.5 enhancements that had been stricken also made the upper term the maximum term available in this case. (RSBC 56) That would be so if the sentencing court here had decided that the 667.5 priors *alone* were sufficient to justify the upper

term and did not strike them for reasons independent of using them to impose the upper term. As this is far from clear from the record here, however, and the court relied on factors in addition to the priors for finding the upper term justified, appellant's constitutional rights were violated. (*Id.* at pp. 490, 494; ASBMC 23)

D. The Error Was Prejudicial

In addressing how to analyze prejudice, respondent repeats his assertion that a single constitutionally compliant reason for imposing the aggravated term takes the issue out of the purview of *Cunningham*. (RSBC 57-60) Respondent moves from this assertion to the conclusion that, after an appellate determination can be made that beyond a reasonable doubt a single constitutionally compliant factor existed or would have been found by the jury beyond a reasonable doubt, there is no longer any need to apply a federal constitutional standard of prejudice. He urges that the federal constitutional error will have been deemed harmless, and the most that will be left is state error. (RSBC 57-60) Respondent argues that, because *Apprendi* does not preclude the court from imposing sentence based upon jury-found facts, once the reviewing court determines under a *Neder v. United States* (1999) 527 U.S. 1, 8 [119 S. Ct. 1827, 144 L.Ed. 2d 35] analysis that the jury would have found an aggravating factor beyond a reasonable doubt if asked, any *Cunningham* error is harmless. (RSBC 59)

For the reasons previously stated, this is not so. DSL does not make the upper

term available upon the finding of a single potentially aggravating factor. Rather, it requires that the factor be sufficiently valued and determined to outweigh any mitigation and justify the imposition of the upper term. (See *People v. Covino, supra*, 100 Cal. App. 3d 660, 670-672; *People v. Searle, supra*, 213 Cal. App. 3d 1091, 1100; *People v. Kellett, supra*, 134 Cal. App. 3d 949, 963; ASBMC 18-25) Thus, contrary to respondent's assertion, a sentencing court would not automatically have authority to consider a factor that was not found constitutionally just because there was another constitutionally compliant factor to use as well. (ASBMC 18-25) So long as the sentencing court is using the non-compliant factor to establish that aggravation outweighs mitigation and justifies the upper term, it is using the factor as an "element" necessary to permit the imposition of the increased sentence and violating the constitution. (*Apprendi v. New Jersey, supra*, 530 U.S. 466, 490, 494.) Therefore, until the reviewing court can determine that the non-compliant factor did not contribute to the determination that aggravation justified the upper term, it will not be able to say the error was harmless beyond a reasonable doubt. Here, that cannot be done.

Contrary to respondent's argument, there is no way that the jury would have found that appellant caused the victim's fear by taking the car. (RSBC 60-61) First, as there is no mechanism in California for a jury trial on aggravating factors, there is no way that this jury would have made the findings of them in this case. (See *Washington v. Recuenco* (2006) 548 U.S. ____ [126 S.Ct. 2546, 2550, 165 L.Ed.2d 466, 474][noting that,

if the defendant was correct that there was no mechanism for a jury to find the missing factor under Washington law, he would be able to demonstrate that the error was not harmless].)

Moreover, the jury necessarily found that appellant took the car after the victim had left and without having unlawfully engendered the fear causing him to leave because it acquitted him of the carjacking, which had the element of force or fear. Appellant admitted that he took the car without permission after the victim had left, and the unlawful taking of the car, without force, was the only count that the jury found true beyond a reasonable doubt. (4RT 1211-1217, CT 178-187)

It matters not that the evidence of the victim's fear was uncontested. (RSBC 61) Thus, the jury did not believe beyond a reasonable doubt that appellant unlawfully caused the "uncontested" fear the victim felt. Thus, it cannot be said beyond a reasonable doubt that the jury would have found that aggravating factor.

Neither can it be said beyond a reasonable doubt that the jury would have found appellant was a liar, another factor mentioned by the trial court. (4RT 2416) As noted above, the jury convicted appellant of the only count that he admitted. This suggests that the jury did not agree beyond a reasonable doubt that appellant was a liar.

Respondent also asserts that the court found no mitigating circumstances. (RSBC 61) This is not so. The court noted that appellant was "an innocent of sorts." (4 RT 2417) This was after defense counsel had pointed out that appellant was unsophisticated

and a victim of sorts. (4RT 2411) Additionally, counsel noted that appellant had always acknowledged his guilt of the only count of which he was convicted (4RT 2411-2412), was vulnerable as a prostitute working in a dangerous job and taken to unfamiliar territory by the victim (4 RT 2411), and had a difficult personal history (a product of foster care, not raised by either birth parent, the child of a drug addict, and eventually adopted and moved to Utah where his sexual orientation caused him problems). (4RT 2412) Thus, it is not clear beyond a reasonable doubt that appellant's prior record alone would have been sufficient to justify the upper term in this case. Therefore, the court's reliance on the facts of the acquitted counts in violation of *Cunningham* was not harmless beyond a reasonable doubt, and remand is required. (See *Washington v. Recuenco* (2006) 548 U.S. ____ [126 S.Ct. 2546, 2552-2553, 165 L.Ed.2d 466, 475-477]; see also *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 490, 494; *Chapman v. California* (1967) 386 U.S. 18, 34 [87 S. Ct. 824, 17 L.Ed. 2d 705]; see also *People v. Covino*, *supra*, 100 Cal. App. 3d at pp. 670-672 [where the court reversed under a *Watson* standard based on the presence of only one valid aggravating factor and some potential mitigation].)

CONCLUSION

Because the trial court here relied on facts of crimes of which appellant had been acquitted to impose the upper term in violation of appellant's federal constitutional rights to a jury trial and proof beyond a reasonable doubt and of the Double Jeopardy Clause, his sentence must be reversed, and the case remanded to permit the imposition of a constitutional sentence.

Dated: March 8, 2007

RESPECTFULLY SUBMITTED

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