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SPECIAL DIRECTIVE 07-01

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOHN K. SPILLANE 
Chief Deputy District Attorney

SUBJECT: **IMPLEMENTATION OF *CUNNINGHAM V. CALIFORNIA***

DATE: FEBRUARY 16, 2007

This Special Directive supplements, and in the event of a conflict, supersedes SD 04-04. In response to the United States Supreme Court decision in *Cunningham v. California*, (2007) ____ U.S. ____ [127 S.Ct. 856], our office has developed the following new policies and procedures. As legislation and court cases in this area develop, expect future policy adjustments to conform to legal developments.

Legal Analysis

On January 22, 2007, the United States Supreme Court decided *Cunningham v. California*, *supra*. The Supreme Court held that California's determinate sentencing scheme is unconstitutional to the extent it allows a judge to impose a high term sentence based upon a fact (other than a prior conviction) not found true by a jury beyond a reasonable doubt or admitted by a defendant. *Cunningham* did not address the issue of consecutive sentencing, and thus the California Supreme Court's holding that consecutive sentencing is not implicated by *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] still stands. (*People v. Black* (2005) 35 Cal.4th 1238, 1261-1264 [abrogated on other grounds in *Cunningham*].)

Complaint Filing Procedures

Effective immediately, all complaints will include the following notice:

NOTICE: The People of the State of California intend to present evidence and seek jury findings regarding all applicable circumstances in aggravation, pursuant to Penal Code §1170(b) and *Cunningham v. California* (2007) 127 S.Ct. 856.

Filing Deputies must complete the new *Circumstances in Aggravation Pleading Form* at the time of filing. [Attachment 1] This form should not be used to allege specific circumstances in aggravation on the complaint, but rather should be placed in the file for use by any deputy handling the case prior to the Information being filed. It is not necessary to prove any circumstances in aggravation at the preliminary hearing stage.

Information Filing Procedures

Following the preliminary hearing, the deputy who conducted the preliminary hearing should review the *Circumstances in Aggravation Pleading Form*. If no circumstances in aggravation

are known, the deputy should note on the form that the case has been reviewed and that no circumstances in aggravation apply.

If the deputy determines that one or more circumstances in aggravation have emerged since the time of filing or conversely learns that one or more of the circumstances no longer applies, the deputy should make the appropriate changes to the form. If there is no change, the deputy should indicate that there is no change. In offices with a paralegal or a priors assistant, deputies should consult with this individual to ensure that the circumstances in aggravation pertaining to recidivism are fully and accurately alleged.

The completed *Circumstances in Aggravation Pleading Form* should be given to clerical staff with the Information Pleading Instructions. PIMS has been updated to include U.C.C. form numbers for most circumstances in aggravation. [Attachment 2] Clerical staff shall use the *Circumstances in Aggravation Pleading Form* to prepare the Information and the circumstances in aggravation will be printed on the Information.

Head Deputies should review the alleged circumstances in aggravation to ensure that a high term state prison sentence might reasonably be justified and that the circumstances as alleged are accurate. Head Deputy authorization is required to allege circumstances in aggravation and all Head Deputies must sign the *Circumstances in Aggravation Pleading Form*.

Calendar deputies and trial deputies should periodically evaluate the circumstances in aggravation to ensure the continued applicability of the circumstances. Should additional circumstances in aggravation need to be alleged, or should circumstances which have been alleged no longer apply, the deputy should complete a new *Circumstances in Aggravation Pleading Form* following consultation with their Head Deputy. If changes are warranted, the Information should be amended accordingly.

In all currently pending cases in which an Information has been filed and circumstances in aggravation exist, the calendar or trial deputy should seek to amend the Information utilizing the procedures set forth above.

Challenges to Alleging Circumstances in Aggravation in the Information

If a court sustains a demurrer to the Information striking the circumstances in aggravation or refuses to permit amendment of the Information adding circumstances in aggravation, the deputy handling the case should file a formal notice of intent to prove the specified circumstances in aggravation to a jury. [Attachment 3] The deputy should immediately notify the Appellate Division so that the case may be evaluated for possible appellate action.

Trial

Some courts may hesitate to allow deputies to prove circumstances in aggravation and seek jury findings on them due to a lack of statutory authority. Should a deputy encounter this concern, he/she should submit Points and Authorities demonstrating that the court has the authority to allow proof to and findings by a jury. [Attachment 4]

Should a court rule that a deputy may not prove circumstances in aggravation to a jury, the trial deputy should notify the Appellate Division immediately so that the case may be evaluated for possible appellate action.

Note that CALCRIM includes jury instructions for circumstances in aggravation. (CALCRIM Nos. 3250 and 3251)

Exceptions to *Cunningham*

The California Supreme Court recently held that a circumstance in aggravation for multiple victims does not require explicit jury findings. (*People v. Calhoun* (Jan. 29, 2007) 2007 Cal. LEXIS 746, p. 15.) Applying the same analysis, explicit jury findings should not be required for the circumstance in aggravation that consecutive sentences could have been imposed but that concurrent sentences were imposed. (Cal. Rules of Court, Rule 4.421(a)(7).)

Additionally, the use of prior convictions for sentence enhancement is outside the purview of *Cunningham*. Prior to *Black, supra*, several (no longer citable) appellate cases interpreted the exception for prior convictions to include certain other recidivism-based circumstances in aggravation as well. While these cases are no longer authoritative, the arguments contained therein may nonetheless be persuasive. Note, however, that the pre-*Black* cases did not find all recidivism-based circumstances in aggravation to be outside of the purview of *Cunningham*.

A more detailed description of possible exceptions will be available in the near future.

Deputies should consider that in some cases, foregoing the imposition of sentence on an enhancement or a prior or foregoing consecutive sentences may yield a circumstance in aggravation that would permit imposition of the high term.

Written Materials

The Appellate Division has prepared and continues to draft written materials to address issues deputies may confront in the wake of the *Cunningham* decision. The following materials are included with this Special Directive:

- Notice of Circumstances in Aggravation [Attachment 3];
- Points and Authorities in Support of People's Request for Jury Findings on Circumstances in Aggravation [Attachment 4]; and an
- Opposition to Motion to Withdraw Plea/Re-Sentence Defendant [Attachment 5].

Two other documents, an Opposition to a 995 Motion and an Opposition to a Demurrer, are being completed and will soon be made available office-wide. Plea scripts incorporating *Cunningham* concerns are also included with this Special Directive in long form [Attachment 6] and in short form [Attachment 7].

A *Cunningham* database will be made available to all staff on Lotus Notes. This will be the repository for updated versions of the latest written materials on the issue. Prior to filing any of the above materials in court, deputies should check the *Cunningham* icon to ensure that their version is the most recent version available.

Pleas

Effective immediately, deputies must ensure that any felony pleas taken include language which addresses the issues raised in *Cunningham*. Plea scripts incorporating and addressing the issues raised by *Cunningham* are included with this Special Directive. A long plea script is included as Attachment 6, and an abbreviated version is included as Attachment 7. Deputies are encouraged to follow one of the two scripts in all felony plea bargains. If deputies wish to adapt their own

scripts, all language pertinent to circumstances in aggravation must be included. For ease of use, that language has been italicized in the attached plea scripts.

When a defendant pleads for a low or mid-term sentence, it is not necessary to take waivers and admissions of specified circumstances in aggravation. In those cases, it is sufficient merely to give the general admonition regarding circumstances in aggravation and establish that the defendant understands it. The general admonition appears as the first italicized language in the plea scripts.

Where the high term will be or may be imposed, waivers and admissions of the circumstances in aggravation should be sought. This includes cases in which a defendant initially receives probation but may ultimately receive high term. For cases in which probation is granted where no circumstances in aggravation exist to justify imposition of high term, deputies need only ensure the record reflects that the plea bargain is being entered into pursuant to an agreed-upon disposition.

Habeas Petitions and Motions to Withdraw Pleas

All habeas petitions requesting sentencing review should immediately be brought to the attention of Brentford Ferreira, the Deputy-in-Charge of HABLIT. HABLIT will assign a deputy to respond to and argue the habeas petition.

Motions to withdraw pleas within 120 days of sentencing are to be handled by calendar deputies. A sample opposition has been provided. [Attachment 5]

Pending Legislation and Court Decisions

In response to the *Cunningham* case, the California Supreme Court has accepted five cases for review. Also, the California Legislature has introduced urgency legislation, Senate Bill (SB) 40, which may quickly and prospectively remedy the current deficiency in our sentencing scheme as identified in *Cunningham*. It is uncertain, however, the extent to which this legislation will impact cases pending sentencing at the time it becomes law.

Contact Resources

Habeas Issues and Motions to Withdraw Guilty Pleas

Brentford Ferreira, DIC HABLIT (213) 974-5908

Issues Regarding Pending Cases (995 Motions, Demurrers, Sentencing, etc.)

Jessica Goulden, Appellate (213) 974-1615

Natasha Cooper, Appellate (213) 974-5911

Shirley Sun, Appellate (213) 893-0632

Cassandra Hart-Franklin, Appellate (213) 974-5918

Prop. 36 and Probation Violation Issues

Cassandra Hart-Franklin, Appellate (213) 974-5918

CIRCUMSTANCES IN AGGRAVATION PLEADING FORM

(Complete a separate form for each defendant)

DEFENDANT NAME: _____

California Rules of Court [CRC] Rule 4.421. Circumstances in Aggravation

(Check all that apply)

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements:

- ☐ (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness. (RC 4.421(a) F1)
- ☐ (2) The defendant was armed with or used a weapon at the time of the commission of the crime. (RC 4.421(a) F2)
- ☐ (3) The victim was particularly vulnerable. (RC 4.421(a) F3)
- ☐ (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission. (RC 4.421(a) F4)
- ☐ (5) The defendant induced a minor to commit or assist in the commission of the crime. (RC 4.421(a) F5)
- ☐ (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process. (RC 4.421(a) F6)
- ☐ (7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed. (RC 4.421(a) F7) *

Case No. Code/Statute Conviction Date County State Court Type

- ☐ (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism. (RC 4.421(a) F8)
- ☐ (9) The crime involved an attempted or actual taking or damage of great monetary value. (RC 4.421(a) F9)
- ☐ (10) The crime involved a large quantity of contraband. (RC 4.421(a) F10)
- ☐ (11) The defendant took advantage of a position of trust or confidence to commit the offense. (RC 4.421(a) F11)
- ☐ (12) The crime constitutes a hate crime under Penal Code § 422.55 and:
 - ☐ (A) No hate crime enhancements under Penal Code § 422.75 are imposed; and
 - ☐ (B) The crime is not subject to sentencing under Penal Code § 1170.8. (RC 4.421(a) F12)

*** NOTE: CRC 4.421(a)(7) and 4.421(b)(3) need not be found true by a jury, but may be admitted when a defendant enters a plea or used by a court to enhance a sentence.**

(b) Facts relating to the defendant:

- ☐ (1) The defendant has engaged in violent conduct that indicates a serious danger to society. (RC 4.421(b) F1)
- ☐ (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness. (RC 4.421(b) F2)

Case No. Code/Statute Conviction Date County State Court Type

- ☐ (3) The defendant has served a prior prison term. (RC 4.421(b) F3) *

Case No. Code/Statute Conviction Date County State Court Type

- ☐ (4) The defendant was on probation or parole when the crime was committed. (RC 4.421(b) F4)

Case No. Code/Statute Conviction Date County State Court Type

- ☐ (5) The defendant's prior performance on probation or parole was unsatisfactory. (RC 4.421(b) F5)

Case No.

☐ Probation

☐ Parole

**(c) Any other facts statutorily declared to be circumstances in aggravation.
(See also CRC Rule 4.408) (RC 4.408(a) F1)**

☐ Lack of remorse

☐ Other (List code section and U.C.C. form number. If not in the U.C.C., specify pleading language.)

☐ No circumstances in aggravation apply.

☐ I have reviewed the previously alleged circumstances in aggravation and find no changes.

Date

Filing DDA

Date

Calendar DDA

Date

Trial DDA

Date

Priors Verification (Name/Title)

Date

Head Deputy

CODE	STATUTE	FORM DESC	FORM NO	VARIABLE TEXT
RC	PC1170.78	SPEC ALLEG - ARSON AGAINST PROPERTY OWNER	1	It is further alleged pursuant to Penal Code section 1170.78 that <DCM> committed the violation of Penal Code section 451 in retaliation against the owner and occupant, to wit: <PRO=name of owner or occupant> of the property and structure burned, and against one believed to be the owner and occupant of the property burned, for an eviction and other legal action taken by the owner and occupant, and one believed to be the owner and occupant.
RC	PC278.6	SPEC ALLEG - CHILD ABDUCTION	1	It is further alleged pursuant to Penal Code section 278.6 that <DCM> committed a violation of Penal Code section 278 and 278.5 and <BCH><CHO=the victim was exposed to a substantial risk of physical injury and illness><CHO=defendant(s)/minor(s) inflicted and threatened to inflict physical harm on a parent and lawful custodian of the victim and on the victim at the time of and during the abduction><CHO=defendant(s)/minor(s) harmed and abandoned the victim during the abduction><CHO=defendant(s)/minor(s) took, enticed away, kept, withheld and concealed the victim outside the United States><CHO=the victim has not been returned to the lawful custodian><CHO=defendant(s)/minor(s) previously abducted and threatened to abduct the victim><CHO=defendant(s)/minor(s) substantially altered the appearance and the name of the victim><CHO=defendant(s)/minor(s) denied the victim appropriate education during the abduction><CHO=the abduction was lengthy><CHO=the victim was a young child at the time of the abduction><ECH>.
RC	PC515	SPEC ALLEG - EMBEZZLEMENT AGAINST ELDERLY OR DEPENDENT ADULT	1	It is further alleged pursuant to Penal Code section 515 that <VIC> was <BCH><CHO=an elder person><CHO=a dependent person><ECH> within the meaning of Penal Code section 288(f)(3) at the time <DCM> committed the offense of <PRO=list felony committed under Penal Code section 503 et seq. (all crimes in ch. 6)>
RC	PC525	SPEC ALLEG - EXTORTION AGAINST ELDERLY OR DEPENDENT ADULT	1	It is further alleged pursuant to Penal Code section 525 that <VIC> was <BCH><CHO=an elder person><CHO=a dependent person><ECH> within the meaning of Penal Code section 288(f)(3) at the time <DCM> committed the offense of <PRO=list felony committed under Penal Code section 518 et seq. (all crimes in ch. 7)>

RC	HS11373(B)	SPEC ALLEG - FAILURE TO COMPLETE COURT ORDERED DRUG PROGRAM	1	It is further alleged pursuant to Health & Safety Code Section 11373(b) that <DCM> willfully failed to complete a court ordered education and treatment program prior to a current conviction for violating Health and Safety Code section <BCH><CHO=11353><CHO=11354><CHO=11380><ECH>.
RC	4.421(A)	SPEC ALLEG - GREAT BODILY INJURY	1	It is further alleged that the crimes alleged in count(s) <PRO=list the count(s)> involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness within the meaning of California Rules of Court Rule 4.421(a)(1).
RC	PC1170.8	SPEC ALLEG - HATE CRIME ON RELIGIOUS PROPERTY	1	It is further alleged pursuant to Penal Code section 1170.8(a) that <DCM> committed the offense of Penal Code section <BCH><CHO=211><CHO=245(a)(1)><ECH> while <VIC> was in a church, synagogue, and building owned and occupied by a religious educational institution, and other place primarily used as a place of worship where religious services are regularly conducted.
RC	PC422.75(C)	SPEC ALLEG - HATE CRIME WITH WEAPON USE	1	It is further alleged that <DCM> personally used a firearm during the commission of the violation of Penal Code section 422.75, subdivision (a) and (b) within the meaning of Penal Code § 422.75(c).
RC	4.425(A)	SPEC ALLEG - INDEPENDENT CRIMES	1	It is further alleged pursuant to California Rules of Court Rule 4.425(a)(1) that the crimes and objectives as alleged in this <BCH><CHO=indictment><CHO=information><ECH> were predominantly independent of each other.
RC	PC1170.71	SPEC ALLEG - INDUCING MINOR WITH OBSCENE MATERIAL	1	It is further alleged pursuant to Penal Code Section 1170.71 that <DCM> used obscene and harmful matter to induce, persuade, and encourage <VIC>, a minor, to engage in a lewd and lascivious act in violation of Penal Code section <BCH><CHO=288(a)><CHO=288(b)(1)><CHO=288(b)(2)><CHO=288(c)(1)><CHO=288(c)(2)><ECH>.
RC	PC502.9	SPEC ALLEG - LARCENY AGAINST ELDERLY OR DEPENDENT ADULT	1	It is further alleged pursuant to Penal Code section 502.9 that <VIC> was <BCH><CHO=an elder person><CHO=a dependent person><ECH> within the meaning of Penal Code section 288(f)(3) at the time <DCM> committed the offense of <PRO=list felony committed under Penal Code section 484 et seq. (all crimes in ch. 5)>
RC	PC1170.73	SPEC ALLEG - LARGE QUANTITY OF CONTRABAND	1	It is further alleged pursuant to Penal Code section 1170.73, that the quantity of the controlled substance <DCM> possessed in a violation of Health and Safety Code section <BCH><CHO=11377><CHO=11378><CHO=11378.5><ECH> was large.

RC	PC1170.74	SPEC ALLEG - METHAMPHETAMINE IN CRYSTALLINE FORM	1	<p>It is further alleged pursuant to Penal Code section 1170.74, that the methamphetamine involved in a violation of Health and Safety Code section</p> <p><BCH><CHO=11377><CHO=11378><CHO=11379><CHO=11379.6><ECH> was in the crystalline form.</p> <p>It is further alleged pursuant to Health & Safety Code section 11379.6(b) that <DCM>'s violation of Health and Safety Code section 11379.6(a) involved methamphetamine and occurred in a structure where a person under 16 years of age resided.</p>
RC	HS11379.6	SPEC ALLEG - METHAMPHETAMINE OFFENSE WHERE MINOR 16 YEARS OF AGE OR YOUNGER WAS PRESENT IN THE STRUCTURE	1	
RC	PC1170.72	SPEC ALLEG - OFFENSE AGAINST MINOR 11 OR YOUNGER	1	<p>It is further alleged pursuant to Penal Code section 1170.72 that when <DCM> committed the violation of Health and Safety Code section(s)</p> <p><BCH><CHO=11353><CHO=11353.5.><CHO=11353.7><CHO=11354><CHO=11361><CHO=11380><ECH>, <VIC> was 11 years of age and younger at the time.</p> <p>It is further alleged pursuant to California Rules of Court Rule 4.408 that <DCM> <PRO=SPECIFY CONDUCT>.</p>
RC	4.408	SPEC ALLEG - OTHER CIRCUMSTANCES IN AGGRAVATION	1	
RC	4.421(C)/PC653J(C)	SPEC ALLEG - SOLICITATION OF MINOR ON SPECIFIED CRIMES	1	<p>It is further alleged that pursuant to Penal Code section 653j(c), when <DCM> solicited the minor, the person under the age of 18, to commit the underlying crime of <BCH><CHO=Penal Code section 136.1> <CHO=Penal Code section 187><CHO=Penal Code section 211><CHO=Penal Code section 215><CHO=Penal Code section 245><CHO=Penal Code Section 246><CHO=Penal Code Section 451><CHO=Penal Code section 459><CHO=Penal Code section 520><CHO=Vehicle Code section 10851><ECH>, the underlying crime was severe in that <PRO=describe the conduct that made the underlying crime severe> within the meaning of California Rules of Court Rule 4.421(c).</p>
RC	PC186.22(B)(2)	SPEC ALLEG - GANG RELATED CRIME IN SCHOOL ZONE	1	<p>It is further alleged that <DCM> committed the violation of Penal Code section 186.22(b)(1) on the grounds of, and within 1000 feet of, a public and private elementary, vocational, junior high, and high school, to wit: <PRO=name of academic facility> during hours in which the facility was open for classes and school-related programs and when minors were using the facility within the meaning of Penal Code, § 186.22(b)(2).</p>

RC	PC1170.7	SPEC ALLEG - ROBBERY OF PHARMACIST	1	It is further alleged that pursuant to Penal Code Section 1170.7 when <DCM> committed the violation of <BCH><CHO=Penal Code section 211><CHO=Penal Code section 664/211><ECH>, he did so with the purpose of obtaining a controlled substance and <VIC> was a <BCH><CHO=pharmacist><CHO=pharmacy employee><CHO=a person lawfully possessing controlled substances><ECH>.
RC	PC1170.86	SPEC ALLEG - SEXUAL ASSAULT IN SCHOOL ZONE	1	It is further alleged pursuant to Penal Code section 1170.86 <DCM> committed the offense of Penal Code sections <BCH><CHO=220><CHO=261><CHO=261.5><CHO=264.1><CHO=266j><CHO=269><ECH> within 100 feet of a designated school bus stop and within 1,000 feet of a school during regular school hours and within 60 minutes before and after the school day and 60 minutes before and after a school-sponsored activity at the school site, against <VIC>, a pupil currently attending school.
RC	PC1170.82	SPEC ALLEG - SALE OF NARCOTICS TO PREGNANT WOMAN OR PERSON CONVICTED OF SPECIFIED VIOLENT FELONY	1	It is further alleged pursuant to Penal Code section 1170.82 that <DCM> sold, furnished, administered or gave away a controlled substance in violation of Health and Safety Code section <BCH><CHO=11352><CHO=11360><CHO=11379><CHO=11379.5><ECH> to <BCH><CHO=a woman who was pregnant><CHO=someone previously convicted of a violent felony><CHO=someone who at the time was in psychological treatment for a mental disorder and for substance abuse><ECH>.
RC	PC243	SPEC ALLEG - SEXUAL BATTERY BY EMPLOYER	1	It is further alleged that <DCM> committed the violation of Penal Code section 243.4 while he/she was an employer and <VIC> was an employee within the meaning of Penal Code § 243.4(i).
RC	PC1170.76	SPEC ALLEG - SPECIFIED ASSAULT CRIME IN THE PRESENCE OF A MINOR	1	It is further alleged pursuant to Penal Code section 1170.76 that when <DCM> committed a violation of Penal Code section <BCH><CHO=243.4><CHO=245><CHO=273.5><ECH>, he/she did so in the presence of, and was witnessed by, a minor, to wit: <PRO=name of minor> and <DCM> <BCH><CHO=is and has been a member of the household of the minor and of victim><CHO=is a marital and blood relative of the minor and victim><CHO=is the natural parent, adoptive parent, stepparent, and foster parent of the minor><CHO=victim was the natural parent, adoptive parent, stepparent, and foster parent of the minor><ECH>.

RC	PC1170.84	SPEC ALLEG - TYING, BINDING OR CONFINING WITNESS IN SPECIFIED CRIMES	1	It is further alleged pursuant to Penal Code section 1170.84 that during the course of the commission of <PRO=specify the "serious felony" offense pursuant to Penal Code section 1192.7(c)>, <DCM> engaged in the tying, binding, and confining of <VIC>.
RC	4.421(B)	SPEC ALLEG - VIOLENT CONDUCT	1	It is further alleged that the <DCM> engaged in violent conduct, to wit: <PRO=describe conduct> that indicates a serious danger to society within the meaning of California Rules of Court Rule 4.421(b)(1).
RC	4.426(A)/PC667.61	SPEC ALLEG - VIOLENT SEX CRIMES	1	It is further alleged that the <DCM> committed violations of Penal Code sections <BCH><CHO=220><CHO=261(a)(2)><CHO=261(a)(3)><CHO=261(a)(6)><CHO=261(a)(7)><CHO=262(a)(1)><CHO=262(a)(4)><CHO=262(a)(5)><CHO=264.1><CHO=286(c)(2)><CHO=286(c)(3)><CHO=286(d)(2)><CHO=286(d)(3)><CHO=286(k)(2)><CHO=286(k)(3)><CHO=288(b)><CHO=288.5><CHO=288a><CHO=288a(c)(2)><CHO=288a(c)(3)><CHO=288a(d)(2)><CHO=288a(d)(3)><CHO=288a(k)(2)><CHO=288a(k)(3)><CHO=289(a)><CHO=289(g)><ECH> accomplished through force, violence, threat or duress, and: 1. The crimes as alleged in Count(s) <PRO=list count(s)> were committed against different victims, to wit: <VICT> and <VIC> within the meaning of California Rules of Court Rule 4.426(a)(1), and 2. The crimes as alleged in count(s) <PRO=list count(s)> were committed on separate occasions within the meaning of California Rules of Court Rule 4.426(b).
RC	PC136	SPEC ALLEG - WITNESS INTIMIDATION WITH USE OF FORCE	1	It is further alleged that <DCM> used force while violating Penal Code section 136.1, subdivision (c) within the meaning of Penal Code § 136.1(f).
RC	PC1170.85(A)	SPEC ALLEG - WITNESS INTIMIDATION IN ASSAULT AND BATTERY CASES WITH INTENT TO KEEP WITNESS FROM ATTENDING JUDICIAL PROCEEDING	1	It is further alleged pursuant to Penal Code section 1170.85 that <DCM> committed the felony assault and battery offense, to wit: <PRO=specify the offense> to prevent and dissuade a person, to wit: <PRO=specify the name of the person> who was, and who may have become, a witness from attending upon and testifying at a trial, proceeding, and inquiry authorized by law.
RC	PC1170.85(B)	SPEC ALLEG - WITNESS INTIMIDATION IN ASSAULT CASES INVOLVING ELDERLY OR DEPENDENT WITNESSES	1	It is further alleged pursuant to Penal Code section 1170.85(b), <VIC> was particularly vulnerable in that <PRO=describe why victim was particularly vulnerable>, and unable to defend himself or herself, due to: <PRO=specify victim's age or disability and describe disability>.

RC	4.421(A)	SPEC ALLEG - LARGE QUANTITY OF CONTRABAND	10	It is further alleged that the crime(s) alleged in count(s) <PRO=list the count(s)> involved a large quantity of contraband within the meaning of California Rules of Court Rule 4.421(a)(10).
RC	4.421(A)	SPEC ALLEG - POSITION OF TRUST	11	It is further alleged that, pursuant to California Rules of Court Rule 4.421(a)(11), the <DCM> took advantage of a position of trust, to wit <PRO=describe the position of trust> and confidence to commit the offense as alleged in count(s) <PRO=list the count(s)>.
RC	PC1170.8	SPEC ALLEG - ARSON OF RELIGIOUS BUILDING	2	It is further alleged pursuant to Penal Code section 1170.8(b) <DCM> intentionally burned, and intended to burn, a church, synagogue, and building owned and occupied by a religious educational institution, and other place primarily used as a place of worship where religious services are regularly conducted during the commission of violations of Penal Code section <BCH><CHO=451><CHO=453><ECH>.
RC	4.421(C)/PC1170.81	SPEC ALLEG - CRIMES AGAINST PEACE OFFICERS	2	It is further alleged pursuant to Penal Code Section 1170.81 that <DCM> knew and reasonably should have known that <VIC> was a peace officer, as described in Penal Code sections <BCH><CHO=830.1(a)> <CHO=830.1(b)><CHO=830.2><CHO=830.5><CHO=830.6><ECH> and <VIC> was engaged in the performance of his and her duties during the commission of <PRO=specify the attempted crime that has a life term>.
RC	PC1170.75	SPEC ALLEG - HATE CRIME	2	It is further alleged pursuant to Penal Code section 1170.75 that <DCM> committed the offense because of <VIC>'s <BCH><CHO=race><CHO=color><CHO=religion><CHO=nationality><CHO=country of origin><CHO=ancestry><CHO=disability><CHO=gender><CHO=sexual orientation><ECH> and because <DCM> perceived <VIC> had one or more of these characteristics and that <VIC> associated with person and a group with one and more of these actual and perceived characteristics.
RC	VC23578	SPEC ALLEG - REFUSAL TO TAKE CHEMICAL TEST	2	It is further alleged pursuant to Vehicle Code section 23578 that in the commission of a violation of Vehicle Code section <BCH><CHO=23152><CHO=23153><ECH>, <DCM> willfully refused to take a chemical test.
RC	4.421(B)	SPEC ALLEG - INCREASING SERIOUSNESS OF PRIORS/SUSTAINED PETITIONS	2	It is further alleged that pursuant to California Rules of Court Rule 4.421(b)(2) that the <DCM> has prior convictions as an adult and sustained petitions in juvenile delinquency proceedings that are numerous and of increasing seriousness, to wit: <PRP>.

RC	4.425(A)	SPEC ALLEG - SEPARATE ACTS OF VIOLENCE OR FORCE	2	It is further alleged pursuant to California Rules of Court Rule 4.425(a)(2) that the crimes alleged in this <BCH><CHO=indictment> <CHO=information><ECH> involved separate acts of violence and threats of violence.
RC	4.421(A)	SPEC ALLEG - USE OF WEAPON	2	It is further alleged as to count(s) <PRO=list the count(s)> that the <DCM> was armed with or used a weapon, to wit <PRO=type of weapon>, at the time of the commission of the crime within the meaning of California Rules of Court Rule 4.421(a)(2).
RC	PC1170.85(A)	SPEC ALLEG - WITNESS INTIMIDATION IN ASSAULT AND BATTERY CASES WHERE WITNESS PROVIDED ASSISTANCE IN JUDICIAL PROCEEDING	2	It is further alleged pursuant to Penal Code section 1170.85(a) that <DCM> committed the felony assault and battery offense, to wit: <PRO=specify the offense> because <VIC> provided assistance and information to a law enforcement officer, and to a public prosecutor in a criminal and juvenile court proceeding, to wit: <PRO=specify the proceedings>.
RC	VC23578	SPEC ALLEG - .20 OR MORE B/A	2	It is further alleged pursuant to Vehicle Code Section 23578 that in the commission of a violation of Vehicle Code section <BCH><CHO=23152><CHO=23153><ECH>, the concentration of alcohol in <DCM>'s blood was 0.15 percent and more, by weight.
RC	4.425(A)	SPEC ALLEG - DIFFERENT TIMES OR SEPARATE PLACES	3	It is further alleged pursuant to California Rules of Court Rule 4.425(a)(3) that the crimes were committed at different times and separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.
RC	4.421(B)	SPEC ALLEG - PRIOR PRISON TERM	3	It is further alleged that pursuant to California Rules of Court Rule 4.421(b)(3) the <DCM> served a prior prison term(s), to wit: <PRP>.
RC	4.421(C)/PC1170.89	SPEC ALLEG - STOLEN FIREARMS IN SPECIFIED CRIMES	3	It is further alleged pursuant to Penal Code section 1170.89 that in the commission of Penal Code section <BCH><CHO=12021.5><CHO=12022><CHO=12022.2><CHO=12022.3><CHO=12022.4><CHO=12022.5> <CHO=12022.55><ECH> <DCM> knew and had reason to believe that the firearm was stolen.
RC	4.421(A)	SPEC ALLEG - VULNERABLE VICTIM	3	It is further alleged as to count(s) <PRO=list the count(s)> that <VIC> was particularly vulnerable within the meaning of California Rules of Court Rule 4.421(a)(3).
RC	4.421(B)	SPEC ALLEG - PRIOR POOR PERFORMANCE ON PROBATION OR PAROLE	5	It is further alleged that pursuant to California Rules of Court Rule 4.421(b)(5) that the <DCM> unsatisfactorily performed on <BCH><CHO=probation><CHO=parole><ECH> in Case No. <PRO=court case number>.

RC	4.421(C)/PC1202.4	SPEC ALLEG - FAILURE TO DISCLOSE ASSETS	4	It is further alleged pursuant to Penal Code section 1202.4(f)(9)(a) that <DCM> unreasonably failed to make complete disclosure identifying all assets, income, and liabilities in which he/she held or controlled a present and future interest as of the date of <DCM>'s arrest for the crime for which restitution could be ordered.
RC	4.421(A)	SPEC ALLEG - INDUCING OTHERS TO PARTICIPATE IN CRIME	4	It is further alleged as to count(s) <PRO=list the count(s)> that the <DCM> induced others to participate in the commission of the crime and occupied a position of leadership and dominance of other participants in its commission within the meaning of California Rules of Court Rule 4.421(a)(4).
RC	4.421(B)	SPEC ALLEG - PROBATION OR PAROLE	4	It is further alleged that pursuant to California Rules of Court Rule 4.421(b)(4), that when the <DCM> committed the crime(s) alleged in Count(s) <PRO=list the count(s)>, the <DCM> was on probation and parole on the following offense(s), to wit: <PRP.>
RC	4.421(A)	SPEC ALLEG - INDUCING A MINOR TO PARTICIPATE IN CRIME	5	It is further alleged as to count(s) <PRO=list the count(s)> that the <DCM> induced a minor, to wit: <PRO=name of minor> to commit and assist in the commission of the crime within the meaning of California Rules of Court Rule 4.421(a)(5).
RC	4.421(A)	SPEC ALLEG - INTERFERENCE WITH JUDICIAL PROCESS	6	It is further alleged that the <DCM> threatened or unlawfully prevented and dissuaded witnesses, to wit, <PRO=name of witness or witnesses> from testifying, suborned perjury, and in another way illegally interfered with the judicial process by <PRO=describe the conduct that interfered with the judicial process> within the meaning of California Rules of Court Rule 4.421(a)(6).
RC	4.421(A)	SPEC ALLEG - PRIOR CONVICTIONS	7	It is further alleged that pursuant to California Rules of Court Rule 4.21(a)(7), the <DCM> has been convicted of other crimes for which consecutive sentences may be imposed but for which concurrent sentences may be imposed instead, to wit: <PRP.>
RC	4.421(A)	SPEC ALLEG - PLANNING, SOPHISTICATION, PROFESSIONALISM	8	It is further alleged that the manner in which the <DCM> carried out the crime(s) alleged in Counts <PRO=list the counts> indicate(s) planning, sophistication, and professionalism within the meaning of California Rules of Court Rule 4.421(a)(8).
RC	4.421(A)	SPEC ALLEG - GREAT MONETARY VALUE	9	It is further alleged that the crime alleged in count(s) <PRO=list the count(s)> involved an attempted or actual taking or damage of great monetary value within the meaning of California Rules of Court Rule 4.421(a)(9).

<PARNAMEDA>
District Attorney of Los Angeles County
By: <DDASelection>;State Bar No. <DDAStateBar>
Deputy District Attorney
<DAOAddress>

Attorney for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

<DefnNameFML>,

Defendant.

Case No. <CourtCaseNo>

**NOTICE OF CIRCUMSTANCES IN
AGGRAVATION JUSTIFYING IMPOSITION
OF UPPER OR MAXIMUM TERM OF
IMPRISONMENT**

**TO THE HONORABLE <Prompt:Name of Judge>, JUDGE OF THE
ABOVE ENTITLED COURT, <Prompt:Defense Counsel Name>, COUNSEL FOR THE
DEFENDANT, <DefnListFML>.**

THE PEOPLE OF THE STATE OF CALIFORNIA, hereby give notice that
they intend to present evidence to the jury, pursuant to *Blakely v. Washington* (2004) 524 U.S.
584, and *Cunningham v. California*, 2007 U.S. LEXIS 1324, in support of their request for
special jury findings of the truth of any of the following circumstances in aggravation which may
apply to justify imposition of the upper or maximum term of imprisonment under California
Rules of Court 4.421 and 4.408(a) and California Penal Code section 1170(b):

Fact relating to the crime, whether or not charged or chargeable as enhancements, e.g.:

- _____ 1. The crime involved great violence, great bodily harm, threat of great bodily harm, or
other acts disclosing a high degree of cruelty, viciousness, or callousness.
- _____ 2. The defendant was armed with or used a weapon at the time of the commission of the
crime.
- _____ 3. The victim was particularly vulnerable.

- 1 _____ 4. The defendant induced others to participate in the commission of the crime or occupied
2 a position of leadership or dominance of other participants in its commission.
- 3 _____ 5. The defendant induced a minor to commit or assist in the commission of the crime.
- 4 _____ 6. The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from
5 testifying, suborned perjury, or in other ways illegally interfered with the judicial
6 process.
- 7 _____ 7. The defendant was convicted of crimes against multiple victims or multiple crimes
8 against the same victim on separate occasions.
- 9 _____ 8. The manner in which the crime was carried out indicates planning, sophistication, or
10 professionalism.
- 11 _____ 9. The crime involved an attempted or actual taking or damage of great monetary value.
- 12 _____ 10. The crime involved a large quantity of contraband.
- 13 _____ 11. The defendant took advantage of a position of trust or confidence to commit the
14 offense.
- 15 _____ 12. The defendant in the commission of this crime has engaged in violent conduct which
16 indicates a serious danger to society.
- 17 _____ 13. The crime constitutes a hate crime under section 422.55.

18 Facts relating to the defendant, including the fact that:

- 19 _____ 14. The defendant's prior convictions as an adult or sustained petitions in juvenile
20 delinquency proceedings are numerous or of increasing seriousness.
- 21 _____ 15. The defendant has served a prior prison term.
- 22 _____ 16. The defendant was on probation or parole when the crime was committed.
- 23 _____ 17. The defendant's prior performance on probation or parole was unsatisfactory.
- 24 _____ 18. The defendant's prior violent conduct indicates a serious danger to society.

25 Pursuant to California Rule of Court 4.408(a), the People will ask the jury to find the following:

- 26 _____ 19. The defendant showed particular cruelty or callousness in the commission of the crime
27 or otherwise showed reckless disregard for the life, safety and welfare of others.
- 28 _____ 20. The defendant was deliberately false while testifying.
- _____ 21. (specify) _____

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_____ 22. (specify) _____

Dated <CurrentDated>

Respectfully submitted,

<DUP02PARNAMEDA>
District Attorney of Los Angeles County

By _____
<DUP02DDASelection>
Deputy District Attorney

Attorney for Plaintiff

STEVE COOLEY
DISTRICT ATTORNEY
(Name)(State Bar Number)
DEPUTY DISTRICT ATTORNEY
(Assignment)
(Address)
(Telephone Number)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,) No. _____
)
Plaintiff,) POINTS AND
) AUTHORITIES IN
v.) SUPPORT OF
) PEOPLE'S
_____) REQUEST FOR
) JURY FINDINGS ON
Defendant.) CIRCUMSTANCES
_____) IN AGGRAVATION
)

INTRODUCTION

In *Cunningham v. California* (Jan 22, 2007, No 05-6551) 549 U.S. ____ [2007
LEXIS 1324] (*Cunningham*), the United States Supreme Court held that California's
Determinate Sentencing Law is unconstitutional to the extent that it permits imposition of a high
term based on circumstances in aggravation found by the court rather than by a jury.

Consequently, the People seek to prove the circumstances in aggravation *to the jury*. Only submitting the circumstances in aggravation to the jury will preserve inviolate three tremendously important concerns -- the defendant's Sixth Amendment right to a jury trial, the People's rights to due process and to trial by jury under the California Constitution,¹ and the Legislature's mandate that the courts impose high term sentences where appropriate.

This court not only has the authority but the duty to allow the jury to make special findings regarding circumstances in aggravation. The California Supreme Court has upheld the use of *hybrid* verdicts, which combine general verdicts with special findings. This court also has

¹ Article I, section 29 of the California Constitution states: "In a criminal case, the people of the State of California have the right to due process of law and to a speedy and public trial."

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2 inherent authority to act, which is available since submitting circumstances in aggravation to a
3 jury is consistent with existing law. Further, courts should construe statutes so as to preserve
4 their constitutionality where possible. Allowing the jury to make the requested findings preserves
5 the constitutionality of Penal Code section 1170, subdivision (b) and helps ensure that a high
6 term sentence remains available.²
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I

**A JURY MAY BE ASKED TO SUPPLEMENT A GENERAL
VERDICT WITH SPECIAL FINDINGS**

Any view that California law does not permit juries to make findings as to circumstances in aggravation fails to take account of hybrid verdicts, which provide for precisely the kind of determination the People are seeking. The California Supreme Court has repeatedly approved the use of such verdicts, which ask the jury to supplement a general verdict of guilt on the charge with special findings (see, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 632), despite the fact that the California Constitution, statutes and rules of court do not expressly authorize such a procedure. (See, e.g., *People v. Davis* (1995) 10 Cal.4th 463, 511-512, and cases cited therein.)

The hybrid verdict is an appropriate vehicle for asking a jury to find the truth of circumstances in aggravation. Hybrid verdicts have been used to ask a jury to make special findings as to questions which do not correspond to any offense enumerated in the Penal Code, such as the theory on which they convicted a defendant of murder or whether they found the defendant personally killed the victim. (See, e.g., *People v. Gurule, supra*; *People v. Farmer* (1989) 47 Cal.3d 888, 920; *People v. Webster* (1991) 54 Cal.3d 411, 446-447; *People v. Neely* (1993) 6 Cal.4th 877, 898; *People v. Davis, supra*.) Similar verdicts have also been used to ensure that the jury unanimously agrees on acts which have been alleged in furtherance of a charged conspiracy. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1226-1227.)

The Supreme Court has upheld the hybrid verdict as a prophylactic measure to protect the judgment on appeal. (See, e.g., *People v. Farmer, supra*, 47 Cal.3d at p. 920; *People v. Webster, supra*, 54 Cal.3d at p. 447.) Their use in the instant case would also be prophylactic since the court's ability to impose the high term at sentencing would be protected from needless

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

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2 jeopardy, and that sentence -- were a high term imposed -- would be protected from needless
3 jeopardy on appeal. The Supreme Court in *Webster* rejected the defendant's claim that he was
4 prejudiced by this procedure. The court noted that the defendant does not have a right to a
5 verdict that is vulnerable on appeal, and that a defendant suffers no cognizable prejudice when
6 the trial court acts to protect the record by asking the jury to make special findings. (*Webster*,
7 *supra*, 54 Cal.3d at p. 447.)
8

9 II

10 THE COURT'S INHERENT AUTHORITY REQUIRES IT 11 TO DEVISE ITS OWN PROCEDURES IN THE FACE OF 12 STATUTORY SILENCE

13
14 The Supreme Court decisions upholding hybrid verdicts are examples of the trial
15 court's use of its inherent authority. This inherent authority permits the court to ask the jury to
16 make special findings as to the alleged circumstances in aggravation. No statutory scheme exists
17 in California for the jury to make findings regarding circumstances in aggravation; the
18 sentencing legislation preceded *Cunningham*. In the face of this statutory silence, the court is
19 empowered to act based upon its inherent powers:
20

21 [I]t is established that the inherent powers of the courts are derived from the
22 Constitution (art. VI, § 1 [reserving judicial power to courts]; see *Millholen [v.*
23 *Riley* (1930)] 211 Cal. [29] at p. 34; *Rice v. Superior Court* (1982) 136
24 Cal.App.3d 81, 89, and are not confined by or dependent on statute (see, e.g.,
25 *Bauguess [v. Paine]* (1978)] 22 Cal.3d [626] at pp. 635-636; *Peat, Marwick,*
26 *Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 287; cf. *James H.*
27 *v. Superior Court* (1978) 77 Cal.App.3d 169, 175 [court has inherent power to
hold competency hearing despite absence of express statutory authorization for
such hearing].)

28 (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 267.)
29

30 The Legislature has codified this inherent judicial power to establish appropriate
31 procedures in the face of statutory silence:

32 When jurisdiction is, by the constitution or this code, or by any other
33 statute, conferred on a court or judicial officer, all the means necessary to carry it
34 into effect are also given; and in the exercise of this jurisdiction, if the course of
35 proceeding be not specifically pointed out by this code or the statute, any suitable
36 process or mode of proceeding may be adopted which appear most conformable
with the spirit of this code.

1
2 (Code Civ. Proc., § 187.)
3

4 That principle is also set forth by the California Supreme Court, which instructs
5 that the courts not only have the power to devise necessary procedures, but they have a *duty* to
6 do so. Thus:

7 [W]hen a certain jurisdiction has been conferred on this or any court, it is the *duty*
8 of the court to exercise it; a *duty* of which it is not relieved by the failure of the
9 legislature to provide a mode for its exercise. *In the absence of any rules of*
10 *practice enacted by the legislative authority, it is competent for the courts of this*
11 *State to establish an entire Code of procedure in civil cases, and an entire system*
12 *of procedure in criminal cases. . . .*

13 (*People v. Jordan* (1884) 65 Cal. 644, 646, italics added.)

14 The Legislature has decreed a high term where appropriate and thereby conferred
15 jurisdiction upon the superior court to devise an appropriate procedure. *Jordan* states the
16 superior court has not only the power but the duty to devise appropriate procedures to enable it to
17 exercise jurisdiction granted by the Legislature. The Legislature itself has said: "The several
18 sections of this code which declare certain crimes to be punishable as therein mentioned, devolve
19 a *duty* upon the Court authorized to pass sentence, to determine and impose the punishment
20 prescribed." (§ 12, italics added.)

22 The method of exercising that jurisdiction proposed by the People is entirely
23 "conformable to the spirit" (Code Civ. Proc. § 187) of the determinate sentencing scheme, which
24 is set forth at section 1170 et seq. The Legislature enacted the determinate sentencing scheme to
25 ensure that sentences are both proportionate to the seriousness of the offense and uniform. (§
26 1170, subd. (a)(1).) That intent is frustrated if a high term is not available when warranted. (See
27 also pt. III.C, *post*.)

29 Of the three branches of government, only the court -- with its inherent authority
30 -- is capable of now preserving inviolate the defendant's Sixth Amendment jury right, the
31 People's rights to due process and to trial by jury, and the Legislature's mandate that a high term
32 be imposed where deserved. The court's use of its inherent authority also guards against
33 ineffective and unfair procedures, since it reduces the possibility of having to resentence or of
34 having to prove the circumstances in aggravation at a later time, with all of the attendant ills (i.e.,
35 waste of resources, hardship on witnesses, potential erosion of memory, lengthy appellate battles
36 about double jeopardy, etc.) that would accompany such a project. (See *Cottle*, *post*; see also

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2 *Milhollen v. Riley* (1930) 211 Cal. 29, 33 ["A court . . . has the power to remove all obstructions
3 to its successful and convenient operation."].)

4
5 Such concerns call into play the inherent powers of the court. Thus:

6 California courts have fashioned new forms of procedures when required
7 to deal with the rights of the parties and to manage the caseload of the court. For
8 example, in *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175, the Court
9 of Appeal held that the juvenile court had the inherent power to hold a required
10 competency hearing even though the juvenile court law failed to provide for such
11 a proceeding. The court based its holding on the principle that: "Courts have the
12 inherent power to create new forms of procedure in particular pending cases. 'The
13 . . . power arises from necessity where, in the absence of any previously
established procedural rule, rights would be lost or the court would be unable to
function.' " (*Ibid.*)

14 (*Cottle v. Superior Court (Oxnard Shores)*, *supra*, 3 Cal.App.4th 1367, 1377-1378.)

15 Here, the only way to avoid the loss of the People's constitutional right to due
16 process (see fn. 1, *ante*) is to allow jury findings on circumstances in aggravation.
17

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19 **III**
20 **A COURT MAY UTILIZE ITS INHERENT AUTHORITY**
21 **WHEN IT DOES NOT CONTRAVENE EXISTING LAW**

22 Permitting juries to make special findings regarding circumstances in aggravation
23 is consistent with section 1170, subdivision (b). While it is axiomatic that a court may not use its
24 inherent authority in conflict with existing law, there is no conflict here, as demonstrated at
25 points A and B, *post*. To the contrary, courts should construe statutes so as to avoid rendering
26 them unconstitutional where possible. Refusing to allow juries to make the required findings
27 runs afoul of this well-established principle, since it concludes that rendering the high term
28 unconstitutional is more appropriate than construing the statute to permit jury findings.
29

30 **A**
31 **Incorporating Jury Findings Does Not Contravene the**
32 **Sentencing Scheme**

33
34 Section 1170, subdivision (b) sets forth a skeletal procedure for factfinding at
35 sentencing. Even though the statute refers to circumstances in aggravation or mitigation, it
36 nowhere specifies who is to find them. Thus, it is not inconsistent with the statute to have the

1
2 jury find them. Instead of specifying that the judge is to find circumstances in aggravation or
3 mitigation, the statute requires the judge to determine “whether there are *circumstances that*
4 *justify the imposition of the upper or the lower term*,” (§ 1170, subd. (b), italics added). In
5 making that determination, the statute allows the judge to consider:
6

7 the record in the case, the probation officer’s report, other reports including
8 reports received pursuant to Section 1203.03 and statements in aggravation or
9 mitigation submitted by the prosecution or defendant, or the victim, or the family
10 of the victim if the victim is deceased, *and any further evidence introduced at the*
11 *sentencing hearing.*

12 (*Ibid*; italics added.)

13 Plainly, the statute is permissive as to what the judge may consider. It does not
14 purport to limit what may be considered. Nor does it address who must find the facts underlying
15 the circumstances in aggravation or how those facts must be found. The jury’s factual findings,
16 thus, can be “evidence introduced at the sentencing hearing.” (§ 1170, subd. (b).) The court’s
17 inherent authority includes “the power to obtain evidence upon which the judgment of the court
18 may rest.” (*Johnson v. Banducci* (1963) 212 Cal.App.2d 254, 260. See also *People v. Chew Lan*
19 *Ong* (1904) 141 Cal. 550, 552-553 [where statute requires court to determine degree of murder
20 but does not set forth procedure for obtaining evidence to make this determination, inherent
21 authority of court allows court to devise its own].) Similarly, seeking factual findings from the
22 jury would also be a means of “obtaining evidence upon which the judgment of the court may
23 rest.” (*Johnson, supra*, 212 Cal.App.2d at 260.) However, the ultimate determination as to
24 “whether there are circumstances which justify the imposition of the upper or lower term” (§
25 1170, subd. (b)) -- and hence the ultimate selection of the appropriate term -- remains with the
26 court.
27
28

30 B

31 A Court Can Use A Jury To Make Findings a Statute Requires 32 of a Court

33 It is well-established that courts should construe statutes -- where possible -- in a
34 manner which avoids rendering them unconstitutional. (See, e.g., *Kraus v. Trinity Management*
35 *Services, Inc.* (2000) 23 Cal.4th 116, 129.) Construing section 1170 to allow a jury to find
36 circumstances in aggravation saves the high term from being unconstitutional. Further, the

1
2 California Supreme Court has previously construed a similar statute in precisely the manner that
3 the People urge here. While the statute required a *court* finding of dangerousness before courts
4 could grant California Youth Authority petitions that wards be civilly committed, the California
5 Supreme Court construed the statute to permit a *jury* finding of dangerousness, in order to
6 preserve the statute's constitutionality. (*In re Gary W.* (1971) 5 Cal.3d 296, 302, 307-308.)
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10 **C**

11 **Allowing Juries to Find Circumstances in Aggravation Keeps**
12 **Faith With the Legislative Intent**

13 The legislative intent that sentences be both proportionate and uniform is
14 profoundly violated by the elimination of the upper term. Supplementing the sentencing
15 procedures described in section 1170, subdivision (b) with a hybrid verdict keeps faith with the
16 legislative intent. Clearly the identity of the fact finder and the burden of proof with respect to
17 circumstances in aggravation is less important to the Legislature than the high term. The
18 Legislature enacted determinate sentencing (§ 1170 et seq.) without working out those details,
19 leaving it up to the Judicial Council to promulgate those rules. (§ 1170.3.) It is inconceivable to
20 think that if the Legislature had to choose between the two, it would rather preserve inviolate the
21 identity of the fact finder and the lower burden of proof rather than retain the high term.
22

23 **IV**

24 **JURY FINDINGS, EVEN IF LATER HELD TO BE**
25 **UNAUTHORIZED, WOULD NOT RENDER THE**
26 **REMAINDER OF THE JUDGMENT VULNERABLE ON**
27 **APPEAL**

28 Proving circumstances in aggravation to a jury will not prejudice the defendant,
29 who may request bifurcation. However, failure to allow such proof could cause great prejudice
30 to the People, who might be deprived of the high term.

31 The Legislature has set forth this rule by statute:

32 Neither a departure from the form or mode prescribed by this Code in respect to
33 any pleading or proceeding, nor an error or mistake therein, renders it invalid,
34 unless it has actually prejudiced the defendant, or tended to his prejudice, in
35 respect to a substantial right.

36 (§ 1404.)

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3 The California Supreme Court has recognized the same principle, specifically in
4 the context of verdicts. (See *Webster, supra*, 54 Cal. 3d at p. 447.) As in other cases where a
5 jury's verdict contained unnecessary verbiage, the worst case scenario here is that special
6 findings which are later deemed not constitutionally required would be mere surplusage. (See,
7 e.g., *People v. Jochinsky* (1895) 106 Cal. 638, 642; *People v. Collins* (1925) 195 Cal. 325, 335.)
8

9
10 **CONCLUSION**

11 For the reasons set forth above, this court should permit the People to seek jury
12 findings as to the circumstances in aggravation at trial.

13 Respectfully submitted,

14 STEVE COOLEY
15 District Attorney of
16 Los Angeles County
17 By

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19 Deputy District Attorney
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STEVE COOLEY, District Attorney
For Los Angeles County
DEPUTY DISTRICT ATTORNEY
State Bar No. _____
Address _____
City and State and Zip Code _____
Telephone: _____
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff

v.

Defendant

Case No. _____

**OPPOSITION TO MOTION TO
WITHDRAW PLEA/RE-SENTENCE
DEFENDANT**

CDC#: _____

PRISON: _____

TO THE HONORABLE _____, JUDGE OF THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,
_____ JUDICIAL DISTRICT, DIVISION/DEPARTMENT __, AND TO
COUNSEL FOR DEFENDANT _____:

The People of the State of California, Plaintiff in the above entitled action, by their
counsel, Steve Cooley, District Attorney for Los Angeles County, make the following opposition to
defendant's motion to re-sentence the defendant:

I

Custody Status

Defendant, _____, is currently confined by the California
Department of Corrections, _____ State Prison. He/she was sentenced on _____.

*[If the sentence was imposed more than 120 days before the motion was filed, it is untimely and the
matter ends here; and use only the first argument set forth in the memorandum of Points and
Authorities. (Penal Code section 1170, subdivision (d).) If the motion's filed less than 120 days*

1 after it was imposed and the abstract of judgment or minute order was received by the Department
2 of Corrections, then continue on to the next paragraph.]
3

4 Although the defendant may move the court to recall his sentence and to withdraw
5 his plea, the defendant waived his right to a jury trial on the issue of the aggravating circumstances
6 used by the court to impose the high base. [See the second argument set forth in the Points and
7 Authorities. If no waivers were taken and the plea occurred less than 120 days from the filing of the
8 motion, we will most likely have to concede the withdrawal of the plea (or in the case of a sentence
9 imposed after jury trial without a waiver and without a jury finding, that the defendant may be re-
10 sentenced¹.) However, in the case of a plea, any counts that were dismissed as part of the plea
11 bargain would be reinstated. This fact may result in the defendant's withdrawal of the motion to
12 withdraw the plea. If so, use the paragraph below.]
13

14 Under *Cunningham v. California* (Jan. 22, 2007) 2007 U.S. LEXIS 1324, 75
15 U.S.L.W. 4078, the high court held that California's Determinate Sentencing Law violates a
16 defendant's Sixth and Fourteenth Amendment right to a jury trial to the extent it permits a trial
17 court to impose an upper term based on facts found by the court rather than by a jury beyond a
18 reasonable doubt. Assuming, arguendo, that the defendant is allowed to withdraw his/her plea,
19 then the dismissed counts (Count(s) _____), are reinstated by operation of law.
20
21

22 Date:

Respectfully submitted,

23 STEVE COOLEY
24 District Attorney of
25 Los Angeles County

26 By

27 xxxxxxxxxxxx
28 Deputy District Attorney
29 Los Angeles County

30 Attorneys for Real Party in Interest
31

32 ¹ This form applies only to pleas. If you have a high term sentence after a jury trial, other factors come into play. For
33 example, the California Supreme Court distinguished *Cunningham* finding: "This case does not implicate
34 *Cunningham* because in convicting Waller of two counts of gross vehicular manslaughter, and two counts of
35 reckless driving causing bodily injury, the jury necessarily found there were multiple victims." (*People v. Calhoun*
36 (Jan. 29, 2007) 2007 Cal. LEXIS 746 [the aggravating factor was multiple victims].) This can come into play with
pleas where the defendant admitted the crimes that were used as the aggravating factor but those crimes were
dismissed pursuant to the plea bargain. These, like a waiver, will not require re-sentencing. (*Id.* at p. 15.)

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POINTS AND AUTHORITIES

I

**THIS COURT IS WITHOUT JURISDICTION TO
ENTERTAIN A MOTION TO WITHDRAW A PLEA IN
ORDER TO RESENTENCE THE DEFENDANT**

The defendant was sentenced on _____. He has been in the custody of the California Department of Corrections since _____. For all practical purposes, defendant's commitment put the judgment beyond the court's power to alter. (See, e.g., *People v. Howard* (1997) 16 Cal.4th 1081, 1089-1090; *People v. Barriga* (1997) 54 Cal.App.4th 67, 69-70; *People v. Kirkpatrick* (1991) 1 Cal.App.4th 538, 542-543.) A trial court's statutory power to set aside a guilty plea is subject to two conditions-there must be an "application of the defendant" which is presented "at any time before judgment" (Penal Code §1018)². Neither of these conditions was present here. The trial court was therefore without jurisdiction to allow defendant to withdraw his plea. (*People v. Wade* (1959) 53 Cal.2d 322, 339, 1 Cal.Rptr. 683, disapproved on other grounds in *People v. Carpenter* (1997) 15 Cal.4th 312 [63 Cal.Rptr. 2d 1, 935 P.2d 708])

II

THIS COURT MAY NOT RECALL THE SENTENCE

Penal Code section 1170, subdivision (d) allows a court " 'within 120 days of the date of commitment on its own motion . . . [to] recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.' (§ 1170, subd. (d).) We recognized that this section is an exception to the common law rule that the court loses resentencing jurisdiction when execution of sentence begins. (*Karaman, supra*, 4 Cal.4th at pp. 351-352; see *Dix v. Superior Court* (1991) 53 Cal. 3d 442, 455-456 [279 Cal.Rptr. 834, 807 P.2d 1063].)" (*People v. Howard, supra*, 16 Cal.4th at pp. 1089-1090.)

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

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III
DEFENDANT WAIVED HIS/HER RIGHT TO A JURY TRIAL
ON THE CIRCUMSTANCES IN AGGRAVATION

Cunningham v. California, supra, 2007 U.S. LEXIS 1324, 75 U.S.L.W. 4078 does not apply where a defendant waives the right to a jury trial on aggravating factors, much less when he admits them. (*People v. Earley* (2004) 122 Cal.App.4th 542, 549-550.) Because defendant personally agreed to allow the trial court to rule on the truth of the special allegations and then admitted them, he is in no position to now argue he was denied his right to a jury trial.

IV
THE PEOPLE MAY REVIVE COUNTS PREVIOUSLY
DISMISSED PURSUANT TO A PLEA BARGAIN

The defendant requests permission to withdraw his plea of guilty in order to be re-sentenced. A long line of cases states that when a conviction by plea must be withdrawn based on a change in the law, counts that were dismissed may be reinstated. (*In re Sutherland* (1972) 6 Cal.3d 666, 671-672, *People v. Collins* (1978) 21 Cal.3d 208, 215, *People v. Wallace* (2003) 109 Cal.App.4th 1699.)

In re Sutherland, supra, 6 Cal.3d 666, the defendant's conviction, based on a guilty plea, was overturned for failure to properly advise the defendant of his constitutional rights. At the time of his plea, four remaining counts were dismissed at the request of the prosecutor. The Supreme Court stated:

Since by granting relief we are in effect permitting defendant to withdraw his guilty plea, the ends of justice require that the *status quo ante* be restored by reviving the four dismissed counts. We therefore order all five counts restored to the superior court calendar (see *People v. Daniels* (1969) 71 Cal.2d 1119, 1143), to be either tried or disposed of in some other appropriate manner.

(*Id.* at p. 672.) In the case relied upon in *Sutherland*, *People v. Daniels* (1969) 71 Cal.2d 1119, the Supreme Court reversed several convictions of kidnapping for the purpose of robbery on the ground that the asportation employed was no greater than that necessary for robbery. In doing so, the Supreme Court overruled *People v. Chessman* (1951) 38 Cal.2d.166, at 192 which held that any

1 forcible removal no matter what the distance constituted kidnapping. Prior to trial, the prosecution
2 had dismissed several counts of rape, robbery and burglary in favor of the kidnapping for purpose of
3 robbery prosecutions. The Supreme Court stated with regard to the dismissed counts:
4

5 For the guidance of the court on retrial, however, we observe that the three-year
6 statute of limitations (Pen. Code, §800) would not bar the prosecution of Daniels and
7 Simmons on a second amended indictment charging the crimes listed above. Such
8 indictment would, for this purpose, be deemed to relate back to the date of the
9 original indictment. (Citations omitted.) Although defendants may not be convicted
10 on this record of violating Penal Code section 209, they may be prosecuted to the
11 fullest extent of the law for the remaining crimes charged against them by the grand
12 jury.

12 (*People v. Daniels, supra*, at p. 1143.) This is the language referenced in *In re Sutherland, supra*, 6
13 Cal.3d at p. 672. Accordingly, the statement in *Sutherland* that the "status quo ante be restored by
14 reviving the four dismissed counts," includes the tolling of any statute of limitations.

15 In *People v. Collins* (1978) 21 Cal.3d 208, the defendant entered into a plea bargain
16 in which he admitted one count of oral copulation and had 14 counts of burglary, rape and assault
17 dismissed. The Legislature then repealed the statute that the defendant pled to and the Supreme
18 Court reversed his conviction. However, the Court following *Sutherland*, allowed the prosecution to
19 revive the dismissed counts:
20

21 The state, in entering a plea bargain, generally contemplates a certain ultimate
22 result; integral to its bargain is the defendant's vulnerability to a term of
23 punishment. We recognized this in the above quoted passage from *People v. Orin*
24 (1975) *supra*, 13 Cal.3d 937, 942, and in *People v. West* (1970) 3 Cal.3d 595, 604
25 [91 Cal.Rptr. 385, 477 P.2d 409], when we first gave explicit approval to the
26 process of plea bargaining: "Both the state and the defendant may profit from a
27 plea bargain. The benefit to the defendant from a *lessened punishment* does not
28 need elaboration" (Italics added.) When a defendant gains total relief from
29 his vulnerability to sentence, the state is substantially deprived of the benefits for
30 which it agreed to enter the bargain. Whether the defendant formally seeks to
31 withdraw his guilty plea or not is immaterial; it is his escape from vulnerability to
32 sentence that fundamentally alters the character of the bargain.

33 Defendant seeks to gain relief from the sentence imposed but otherwise leave the
34 plea bargain intact. This is bounty in excess of that to which he is entitled. The
35 intervening act of the Legislature in decriminalizing the conduct for which he was
36 convicted justifies a reversal of defendant's conviction and a direction that his
conduct may not support further criminal proceedings on that subject; but it also
destroys a fundamental assumption underlying the plea bargain - that defendant
would be vulnerable to a term of imprisonment. (See fn. 2.) The state may

1 therefore seek to reestablish defendant's vulnerability by reviving the counts
2 dismissed.

3
4 (*Id.* at p. 215.) In footnote 2, the Collins court reiterated that the statute of limitations was tolled
5 for the revived counts:

6 The statute of limitations will not bar prosecution on any of the dismissed counts,
7 as the indictment may be amended pursuant to section 1009 of the Penal Code to
8 reinstate those counts. (See *In re Crumpton* (1973) *supra*, 9 Cal.3d 463, 469;
9 *People v. Hill* (1974) *supra*, 12 Cal.3d 731, 769; *People v. Daniels* (1969) 71
10 Cal.2d 1119, 1143 [80 Cal.Rptr. 897, 459 P.2d 225, 43 A.L.R.3d 677].) As we
11 stated in our order to show cause in *In re Zurica* (Crim. 13973, June 28, 1971), the
12 court may "order the accusatory pleading amended to recharge any offenses that
13 were initially charged but the charges of which were subsequently dismissed."

14 (*Ibid.*) The only caveat regarding the reinstatement of dismissed counts is that the defendant may
15 not be given a sentence any greater than the one he received as a result of the former plea bargain.
16 (*Id.* at p. 216.)

17 In *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1704, the Court of Appeal also
18 held that the remedy to be applied " 'where fundamental jurisdiction is lacking'" in the context of a
19 criminal conviction, is that the judgement is reversed, the plea taken is vacated and the dismissed
20 counts are reinstated. The court noted that to reduce a sentence under these circumstances was an
21 incorrect remedy because it would "unfairly compromise the negotiated settlement upon which the
22 parties had agreed." (*Ibid.*) [Defendant pleaded to a sentencing section and not a criminal charge.]
23 The reinstatement of dismissed charges had become so ingrained in the law that in *Wallace* the
24 Court of Appeal stated that the dismissed charges would be reinstated without further analysis or
25 citation to authority. (*Ibid.*)
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1 If the court does not reinstate charges that were dismissed in the instant case, the
2 prosecution would be deprived of the benefit of their bargain. Thus, the court must reinstate the
3 charges that were dismissed and the People and defendant may proceed to trial if the defendant is
4 unwilling to waive his right to a jury trial on the aggravating factors previously used to impose the
5 high term.
6

7
8 Date:

Respectfully submitted,

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10 STEVE COOLEY
11 District Attorney of
12 Los Angeles County

13 By

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15 Deputy District Attorney

16 Attorneys for Real Party in Interest
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PLEA

Is your true name _____?

You are charged in Felony Complaint No./Information _____ with the crime of _____ in violation of (Statutory Section) _____. It is also alleged: **specify each enhancement, circumstance in aggravation, prior, and other special allegation.**

Do you understand the charge(s) against you?

The maximum possible sentence in this case as presently charged is _____ years in state prison.

A circumstance in aggravation may be used to increase your sentence on any count, sentencing enhancement or allegation to the maximum term provided by law. With a few exceptions, a circumstance in aggravation must be found true by a jury beyond a reasonable doubt or admitted by you before the maximum term can be imposed.

Do you understand?

Have you discussed with your attorney, the charges, your possible defenses, and the consequences of pleading?

[For Pro Per]

[You have the right to have an attorney represent you. Do you understand? Do you waive and give up that right in order that you may represent yourself?]

[TERMS OF AGREEMENT]

Your lawyer has stated that, in exchange for, a sentence of _____ [specify county jail term and term of probation or state prison sentence] you wish to plead guilty/plead no contest to count[s] _____, _____, and _____ and also **admit** the following **enhancements, circumstance in aggravation, priors, and other special allegations** :

Specify each Enhancement

Specify each Circumstance in Aggravation [see attachment for wording if omitted from complaint or information]

Specify each Prior

Specify other Special Allegations

If the defendant is not being sentenced immediately after the plea and is out of custody, the plea must explicitly provide what sentence the defendant will

receive upon a failure to appear at sentencing and you must take a PC 1192.5 (Cruz) waiver – waiving the right to withdraw plea

[Set forth agreed upon disposition, i.e. any charges or enhancements to be dismissed or to run concurrently. Specify, where applicable, that the defendant is agreeing to the upper term in order to take advantage of the agreed-upon disposition, even though no circumstances in aggravation exist or have been admitted.]

[You are also agreeing to make full restitution to the victim[s] on count[s] _____, even though the count[s] will be dismissed.]

Is that what you want to do?

The reason(s) for this plea agreement are as follows:

Serious Felony Cases: 1) Insufficiency of Evidence
 2) Cannot Obtain Testimony of Material Witness
 3) No substantial Change in Sentence

Other Felony Cases: State reasons for amended or dismissed and/or any punishment recommendation made by the prosecution

[If Sentencing Does Not Immediately Follow Plea]

[Do you agree that if the prosecution, at the time of sentencing, is made aware of *additional circumstances in aggravation* or of additional prior convictions that you have suffered, that the prosecution may withdraw from this plea bargain and that you may withdraw your plea?]

I
ADVISEMENT AND WAIVER OF RIGHTS

The rights that I am about to tell you apply to the charged offense(s), *circumstance(s) in aggravation*, prior(s) and other special allegation(s).

If Plea Is Taken Before Preliminary Hearing]

[You have a right to a continuous preliminary hearing within 10 court days of your arraignment. The purpose of a preliminary hearing is to determine whether the charge(s) filed against you has been committed, and whether there is sufficient cause to believe that you are guilty of the offenses charged. The decision would be made by a judge who would hear the evidence offered by both sides before making that decision.

Do you understand this right?

Do you give up this right?]

You have the right to a speedy and public trial by jury or, if you choose and the People agree, by a court. If you have a jury trial, 12 people would be selected from the county to hear the evidence against you as well as any evidence that you wanted to present. The judge would then instruct the jury and the lawyers would argue the case. The jury would then retire to deliberate and decide the case. In order for them to find you guilty, all 12 would have to agree that you were guilty beyond a reasonable doubt.

If you have a court trial, the judge alone would decide if you are guilty, beyond a reasonable doubt.

Do you understand both what a jury trial and a court trial are?

Do you give up your rights to both a jury trial and a court trial?

You also have a right to confront and cross-examine the witnesses against you. This means that the witnesses would be called to testify under oath and your lawyer would be able to ask them questions with you present in the courtroom.

Do you understand this right?

Do you give up this right?

You have the right to present evidence and to use the subpoena power of the court to require your witnesses to come to court, at no cost to you.

Do you understand your right to present evidence and to subpoena witnesses?

Do you give up that right?

You have a right against self-incrimination. This means that no one can make you say anything against yourself.

Do you understand this right?

Do you give up this right?

You have the right to appeal from the judgment and sentence of this court?

Do you understand this right?

Do you give up this right?

[In situations where defendant does not want to admit the circumstances in aggravation but wants the court to determine the truth of the circumstances in aggravation, after taking the preceding waiver of rights as to the circumstances in aggravation advise defendant of the following]:

Do you agree to have the court determine the truth of the circumstances in aggravation at a sentencing hearing?

CONSEQUENCES

There are other consequences of your plea that you must understand. If you are on probation in some other case, your plea of guilty in this case will probably be a violation of your probation. That violation could mean that you will be sentenced to some term of imprisonment in that case.

Do you understand?

Your conviction in this case can be used to enhance or increase your sentence in future cases.

Do you understand?

[Where Probationary Sentence is within Judge's Discretion]

It is possible that you could be placed on felony probation. As a condition of probation, you could be required to pay a fine and to make restitution. The judge could impose other conditions of probation including the condition that you serve up to one year in the county jail. If you are placed on probation and later violate any of the terms of probation, you could be brought back before the court and the judge could send you to state prison for a maximum of _____ years in state prison.

[Where State Prison Sentence Possible Or Certain]

If you are sent to state prison you will be placed on parole at the end of your sentence. If you violate the terms of your parole, you could be sent back to state prison for up to one year for each parole violation.

[Restitution]

You will be ordered to pay full restitution to the victim[s] in this case.

[Do you also agree that you will pay restitution to the victim[s] in count[s] _____, even though the count[s] will be dismissed as part of the plea agreement?]

Restitution Fine

The court will order you to pay a fine to the Victim's Restitution Fund in an amount between \$200 and \$10,000.

Other Consequences

[State Prison Cases] The court will also order you to pay a fine pursuant to PC 1202.45 that will remain suspended unless your parole is revoked.

If you are not a citizen of the United States, you are hereby advised that conviction of the offense(s) charged against you will have the consequence of deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States.

Do you understand?

Registration(e.g. narcotics offender, sex offender, arson offender, gang etc.)

Blood and saliva samples, thumb prints, and palm prints (PC 296)

AIDS Test (PC 1202.1 and 1202.6)

Revocation, suspension or restriction of driver's license (VC 13200-13202.7
And 13350-13376)

No contest plea has the same force and effect as a guilty plea (PC 1016(3))

[Conduct credit limitations

Two Strike Cases- 20% maximum (PC 667(c)(5)/PC 1170.12(a)(5)

3 Strike Cases-----No conduct credits for life term

20% maximum for any attached determinate term

Violent Felonies-15% maximum (PC 2933.1)

Life Sentences with no min. term- 7 min. calendar years,

No conduct credits (PC 3046)

Murder on or after June 3, 1998-No conduct credits (PC 2933.2)

Specified Felony with 2 prior brought and tried-separately felonies

for which def. served two separate prison terms

--no conduct credits]

PLEA - FREE AND VOLUNTARY

Are you pleading in this case freely and voluntarily because that is what you want to do?

Other than the promises regarding your sentence that I have just explained to you, have any promises been made to get you to plead guilty to this offense?

Have any threats been made to you or anyone close to you to get you plead guilty?

In order for you to plead guilty to this offense, it is necessary for you to withdraw your previous plea of not guilty.

Is that what you want to do?

[Arbuckle Waiver]

[Do you agree that you may be sentenced by any judge?]

PLEA

In Complaint/ Information No. _____ you are charged in count(s) _____ with (state factual basis) _____ in violation of (Statutory Section) _____.

How do you plead?

[If no contest plea – Are you pleading no contest because you believe it is in your best interests to do so?]

[If guilty plea – Are you pleading guilty because in truth and in fact on (charged date) you did commit (charged offense)? (Repeat for all counts being admitted)]

It is also alleged that you _____.
Specify allegation, enhancement, *circumstance in aggravation*

Do you admit or deny the allegation(s)[enhancement][circumstance in aggravation].

(For both no contest and guilty pleas) Does counsel stipulate a factual basis for the plea is contained in the [complaint][information][police reports][investigation] [any other facts known to you]?

Does counsel join in the waiver of rights and concur in the plea?

Does Your Honor wish to inquire further?

PLEA – Short Form

True name?

You are charged in Felony Complaint/Information No. _____ with (list crimes and statutory sections and specify each enhancement, circumstance in aggravation, prior, and other special allegation).

Maximum sentence:

Advise that a circumstance in aggravation:

- *may be used to increase sentence to maximum term*
- *must (w/a few exceptions) be found true by a jury beyond a reasonable doubt or admitted by defendant before the maximum term can be imposed*
Ask if understands.

[For Pro Per] - Waiver

TERMS OF AGREEMENT

- *state plea agreement and include admissions to enhancements, circumstance in aggravation, priors, and other special allegations and Harvey waiver*
- *specify, if applicable, that the defendant is agreeing to high term as part of the negotiated disposition even if no circumstances in aggravation exist or have been admitted*

[Note, the terms of the plea should explicitly provide what sentence the defendant will receive upon appearance and what sentence will be imposed upon a failure to appear at sentencing with a PC 1192.5 (*Cruz*) waiver – waiving the right to withdraw the plea.]

The reason(s) for this plea agreement are as follows (Serious Felony Cases - insufficiency of evidence or cannot obtain testimony of material wit. or no substantial change in sentence)

[If Sentencing Does Not Immediately Follow Plea] – if prosecutors determines *additional circumstances in aggravation* or priors exist, plea may be withdrawn.

ADVISEMENT AND WAIVER OF RIGHTS

(make clear that waiver of rights also applies to the specified circumstances in aggravation)

- *prelim waiver (if plea taken before prelim)*
- jury trial
- confront and cross-exam
- present evidence and subpoena witnesses
- privilege against self-incrimination

Understand and give up each of these rights?

[If defendant does not want to admit the circumstances in aggravation but wants the court to determine the truth of them] -- after taking the above waiver of rights as to the circumstances in aggravation, have the defendant agree that the court may determine truth of circumstances in aggravation at a sentencing hearing.]

CONSEQUENCES OF PLEA

Probation or parole violation; Immigration; Registration; Fines; Restitution; Conduct credit limitations; samples of blood, saliva, etc. pursuant to PC 296; AIDS test; driver's license revocation or restriction; and priorability.

[Where Probationary Sentence Is Within Judge's Discretion] - Explain possible consequences including maximum time in state prison upon a violation, etc.

[Where State Prison Sentence Possible or Certain] - Explain possible consequences, including return to state prison for up to 1 year for each violation of parole

Plea - Free and Voluntary: no promises, no threats

[Arbuckle Waiver] - [Do you agree that you may be sentenced by any judge?]

PLEA

In Complaint/ Information No. _____ you are charged in count(s) ____ with (state factual basis) _____ in violation of (Statutory Section) _____.

How do you plead?

[If no contest plea – Are you pleading no contest because you believe it is in your best interests to do so?]

Admission or denial of special allegation, enhancement, circumstances in aggravation

Stipulate to factual basis for the plea?

Does counsel join in the waiver of rights and concur in the plea?

Does Your Honor wish to inquire further?