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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first in 05-6551, Cunningham versus California. Mr. Gold.

ORAL ARGUMENT OF PETER GOLD

ON BEHALF OF THE PETITIONER

MR. GOLD: Mr. Chief Justice, and may it please the Court:

The procedure for imposing aggravated sentences under California's Determinate Sentencing Law implicates the bright line rule this Court set forth in Blakely and Apprendi. Any fact other than the fact of a prior conviction which increases the penalty for a crime beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt.

The primary point of contention in this case is what constitutes the statutory maximum under California's Determinate Sentencing Law. Petitioner believes that it's the middle term, whereas Respondent maintains that it's the upper term.

In fact, this case really boils down to just one question in this dispute. Can a judge in California legally impose an upper term sentence based solely on the facts reflected in the jury's verdict or the defendant's admissions. The answer to this question is no. California's Determinate

1 Sentencing Law specifies three possible prison terms for
2 each -- for each felony conviction, a lower term, a
3 middle term, and an upper term, although it mandates that
4 judges shall impose the middle term unless there are
5 factors in aggravation or mitigation. California case
6 law confirms that judges must impose the middle term
7 where there are no aggravating factors, and even the
8 State appears to concede the point.

9 Because the middle term is the greatest
10 punishment a judge can impose based solely on the facts
11 reflected in the jury's verdict, it, and not the upper
12 term, constitutes the statutory maximum for --

13 JUSTICE STEVENS: Mr. Gold, I know you take that
14 position on the facts of this case, but is it not true
15 that there could be cases in which the verdict of the
16 jury would establish certain facts that would justify
17 going beyond the middle term? For example, the Black
18 case itself, as the Justice who dissented in this case
19 thought that the sentence was permissible in that case.

20 MR. GOLD: Your Honor, Justice Stevens, to the
21 extent that a fact is found by the jury which can be used
22 as an aggravating factor, but is not an element of the
23 crime or found by the jury as an enhancement, that could
24 be used to impose an upper term sentence. Yes.

25 JUSTICE SOUTER: Would it always, then, be

1 surplusage in the indictment when a fact is charged and
2 subsequently found by a jury, is it always a surplus
3 fact? Because otherwise -- I mean, what I'm getting at
4 is, otherwise, one assumes it would be a way of stating
5 an element of the offense, and as I understand it, under
6 California law, the element of the offense couldn't
7 satisfy the additional fact necessary to jump up to the
8 higher range.

9 MR. GOLD: Yes, Your Honor. I mean, typically
10 under California law, in the information, they allege the
11 crime, and on occasion, some of the elements. But
12 typically not all of the elements.

13 JUSTICE SOUTER: If in this case, the indictment
14 had charged -- had claimed that the defendant was the
15 father of the victim, would that have satisfied at least
16 the factfinding for the aggravator of being in a
17 position of trust?

18 MR. GOLD: Well, Your Honor, the fact that the
19 information would have alleged that does not mean that
20 the jury would have found that fact, because just because
21 -- what is alleged in the indictment or in the
22 information --

23 JUSTICE SOUTER: That depends on the instructions.

24 MR. GOLD: Yes.

25 JUSTICE SOUTER: If the instructions said, you

1 know, you've got to find all of the things that are set
2 out in the information, and the jury had returned a verdict,
3 then we would infer it had found -- and that would satisfy
4 the requirement of an additional fact on an element.

5 MR. GOLD: I believe so, Justice Souter.

6 JUSTICE SCALIA: That would be an erroneous
7 instruction, I assume.

8 MR. GOLD: Yes, Justice Scalia.

9 JUSTICE SCALIA: So, you either have to have an
10 erroneous instruction or a special verdict.

11 MR. GOLD: Yes.

12 JUSTICE SOUTER: Well, erroneous in the sense that
13 it would require the State to prove more than it had to
14 prove for the elements of the crime.

15 JUSTICE SCALIA: Right.

16 MR. GOLD: Yes, Justice Souter, and I believe that
17 it would be no different than submitting aggravating
18 factors as a separate allegation to the jury as a
19 separate instruction.

20 CHIEF JUSTICE ROBERTS: Counsel, the thing that
21 concerns me about your case is that California's system
22 looks a lot like the Federal system after Booker. And we
23 haven't addressed the issue or had a case involving
24 review of reasonableness for upward departures. But at
25 least as the circuits have said it, in a Federal case, if

1 a district judge imposes a maximum, doesn't give any
2 reason for departing from what the guidelines might
3 suggest is a reasonable middle ground, he may be -- I
4 think in most circuits, that would be reversed.

5 Same here. If a California judge imposes the
6 upper tier but doesn't make any findings, that's going to
7 be reversed. But if the Federal judge gives a statement of
8 his reasons, you know, a vulnerable victim, or -- an
9 offender likely to offend again, whatever, under most
10 circuit laws, that's going to be upheld.

11 Here, if the California judge does that, that's
12 going to be still struck down under your view. You
13 talked about Blakely and Apprendi. But how does this
14 system look to you under Booker?

15 MR. GOLD: Well, Your Honor, this system really is
16 -- this is just like -- this case is just like Blakely.
17 What the California Supreme Court in People against Black
18 found, they used references to reasonableness as a label
19 and a characterization to avoid the bright line rule of
20 Blakely and Apprendi.

21 Instead they tried to fit the Determinate
22 Sentencing Law within the Federal system this Court found
23 constitutional in Booker. But the California Supreme
24 Court seriously misread Booker. In Booker, in the
25 remedial portion of that decision, this Court found the

1 Federal system to be constitutional by rendering the
2 guidelines -- the mandatory guidelines to be advisory.

3 Now --

4 CHIEF JUSTICE ROBERTS: Under California, they're
5 advisory anyway. I mean, even if a judge makes the
6 necessary finding to get up into the higher tier, he
7 doesn't have to impose the higher sentence, he can impose
8 the lower one.

9 MR. GOLD: Mr. Chief Justice, no. He has to
10 impose the middle term. He can't deviate --

11 CHIEF JUSTICE ROBERTS: My point is if he makes a
12 finding that justifies going up to the higher term, 16
13 years in this case, he doesn't have to impose that higher
14 term, he can go back to the middle term.

15 MR. GOLD: No, no, you are absolutely right. He
16 has discretion not to do that.

17 JUSTICE BREYER: But does it say that the only
18 basis for a judge reasonably imposing the higher term is
19 that the judge has found a fact that the jury didn't
20 find.

21 MR. GOLD: Yes.

22 JUSTICE BREYER: It does say that? As I read the
23 California opinion, they can go up above the lower, the
24 middle term for any reason, but it has to be reasonable.

25 MR. GOLD: Your Honor, what this -- what the

1 California Supreme Court did, in this --

2 JUSTICE BREYER: Maybe that's hard to justify in
3 terms of California's statute, but we take the California
4 Supreme Court's interpretation of that statute as the law
5 of California. So what is the answer to my question as
6 you read Black?

7 MR. GOLD: The answer to your question is that
8 Black has made no change whatsoever to the mandatory
9 nature of California's Determinate Sentencing Law, and it
10 has always operated in a mandatory way.

11 JUSTICE BREYER: I think -- let me give
12 you --

13 JUSTICE SCALIA: I would think your answer would be
14 that how could it possibly be reasonable except for the
15 consideration of some additional fact? What makes it
16 reasonable other than facts? Atmosphere? I mean --

17 JUSTICE BREYER: But, if that is your answer, my
18 example will be -- I'll give you a specific example.
19 One example is the question of consecutive versus
20 concurrent sentences, which may have very little to do
21 with facts.

22 A second example might be that a judge in a
23 particular community says there's been an unbelievable
24 rash of breaking and entering. I see how the writers of
25 this guideline, of the statute that embodies it, thought

1 that breaking and entering was X, occurred with X
2 frequency, but we have in this community a sudden rash of
3 crime, such that I think the reasonable thing to do is to
4 increase the sentence as a deterrent.

5 Now, suppose that's what he writes. And does anything
6 in California law, as you understand Black, make that
7 unlawful?

8 MR. GOLD: Yes, Your Honor.

9 JUSTICE BREYER: What?

10 MR. GOLD: I believe that the statements in Black
11 --

12 JUSTICE BREYER: Which statements make that
13 unlawful?

14 MR. GOLD: Your Honor, in Black, the California
15 Supreme Court repeatedly stated that the way the system
16 works in California is that it is a mandatory system. So
17 as an example, at 35 Cal.4th 1254, the court stated, "the
18 court cannot impose the upper term unless there is at
19 least one aggravating factor." At 1260, the court said,
20 "in a case in which no aggravating factor can be found,
21 the judge cannot impose the upper term."

22 There are a number of statements throughout the
23 Black opinion that indicate the system has never changed
24 from a mandatory one to an advisory one, so that
25 reasonableness is not the issue. Whether the system is

1 mandatory or advisory --

2 JUSTICE BREYER: So in other words, when they say
3 mandatory factor, they mean aggravating factor, they mean
4 to exclude the kind of aggravating factor I just
5 mentioned.

6 MR. GOLD: Well, a judge can consider those
7 aggravating factors.

8 JUSTICE BREYER: Oh, could he? Could the judge
9 consider the fact that I just mentioned, that there's
10 been an extraordinary rash of breaking and entering in
11 the vicinity?

12 MR. GOLD: Well, Your Honor --

13 JUSTICE BREYER: Yes or no?

14 MR. GOLD: Well, under California's law, they have
15 -- in addition to factors relating to the crime and
16 factors relating to the defendant, the judge can consider
17 unenumerated factors.

18 JUSTICE BREYER: Unenumerated factors. So mine
19 would be an unenumerated factor.

20 MR. GOLD: Yes.

21 JUSTICE BREYER: All right. If he can consider
22 unenumerated factors -- now, I purposely picked mine
23 because I take it it is an example of a factor that
24 Apprendi would not require a jury to find.

25 It is a factor about the community. It is not a

1 factor about this defendant. It is not a factor about
2 the manner in which this defendant committed the crime.
3 It is not a fact of that kind.

4 MR. GOLD: Your Honor, I'm not sure whether that
5 sort of factor would be upheld as a --

6 JUSTICE BREYER: But if it were reasonable, it
7 would be upheld, or not?

8 MR. GOLD: If it was found to be a decision that
9 was reasonably related to the crime -- I'm sorry, to the
10 decision being made by the judge, then yes, it would be
11 upheld as a valid aggravating factor. But I believe that
12 it would still need to be then, if it would be considered
13 a valid aggravating factor, then it would need to be
14 tried by the jury.

15 JUSTICE STEVENS: May I make sure I clarify one thing?
16 You mean a rash of crimes committed by people other than
17 the defendant could be an aggravating factor?

18 MR. GOLD: Your Honor, under California law, I'm
19 not saying that that would be upheld as a valid reason.
20 I'm just --

21 JUSTICE STEVENS: But there's nothing in
22 California law suggesting that that would be upheld, is
23 there?

24 MR. GOLD: No, Justice Stevens, there is not.

25 JUSTICE SOUTER: So you draw -- as I understand

1 it, your basic answer to Justice Breyer is, it may well
2 be that the situation in the community may justify a
3 judge in going to the -- to the high end of the range
4 that is possible, but that is not a factor that
5 determines what range is possible. And the fact that
6 determines what range is possible is an aggravating fact,
7 and in that respect it's different from the Federal
8 system. Is that --

9 MR. GOLD: That's absolutely right, Justice
10 Souter.

11 JUSTICE SCALIA: I didn't understand it. If he
12 does -- tell me again, would you? I thought your
13 response was going to be what Justice -- who suggested
14 it?

15 (Laughter).

16 JUSTICE GINSBURG: Stevens.

17 JUSTICE SCALIA: Somebody on that side suggested
18 it. That to talk about the fact that there's a lot of
19 crime in the community as an aggravating factor doesn't
20 make any sense. Aggravating factor means something that
21 makes the crime that this person committed worse, not the
22 need for punishment greater, but makes the crime worse.
23 Now, if that is not your answer, what is the answer that
24 you gathered, from the left of me?

25 MR. GOLD: Well, with all due respect to Justice

1 Breyer, I believe that that probably would not be an
2 aggravating factor that would be upheld under California
3 law. I was just trying to make the distinction between
4 whether an aggravating factor, no matter what it is,
5 whether it is considered reasonable, whether that's
6 enough to get the judge to go beyond the statutory
7 maximum.

8 JUSTICE KENNEDY: I thought your position was that
9 the aggravation must be reasonable. But the court in
10 Black indicates that it's not going to consider
11 anything reasonable unless there's a fact to support it,
12 unless there's a finding of fact to support it. Is that
13 the position you take?

14 MR. GOLD: The position as far as what Black is
15 saying?

16 JUSTICE STEVENS: Yes.

17 MR. GOLD: Yes. I think Black -- what Black is
18 saying is that an aggravating factor needs to be
19 reasonable, but I was trying to make the distinction --

20 JUSTICE KENNEDY: But I think that there's the
21 further indication that it is not going to be deemed
22 reasonable unless it is supported by a finding of fact,
23 as indicated in order to support one of the specific
24 guideline aggravators.

25 MR. GOLD: Certainly if the aggravating factor is

1 not supported by the evidence, then it won't be
2 considered reasonable and the imposition of a upper term
3 won't be considered reasonable. But --

4 JUSTICE ALITO: I still don't understand the
5 distinction between the California system and a system of
6 advisory guidelines with reasonableness appellate review.
7 Let's take a hypothetical case where the statutory range
8 after convictions on multiple counts is zero to a hundred
9 years. And let's say you have two judges who have these
10 cases. And one sentences the defendant to zero,
11 probation. The other one sentences the defendant to a
12 hundred years.

13 Without saying a word of explanation for either
14 sentence, isn't the appellate court in that situation
15 going to say, you have to tell us why you've chosen
16 zero or why you've chosen 100? And if the trial judge
17 provides an explanation, isn't the trial judge
18 necessarily going to be reciting certain facts that the
19 judge believes to be true about the offense and the
20 offender?

21 MR. GOLD: Your Honor, if you're describing the
22 Federal system or just a hypothetical system, my
23 understanding in an indeterminate type of system, a judge
24 can impose whatever sentence he wants. And whether or
25 not in a particular system, that will be reviewed for

1 reasonableness is a separate question as to what he --

2 JUSTICE ALITO: But if it is reviewed for
3 reasonableness -- isn't the reasonableness review
4 necessarily going to require what is, in essence,
5 fact-finding by the trial judge, and a review of the
6 reasonableness of the sentence in light of those facts by
7 an appellate court?

8 MR. GOLD: Yes, Your Honor. But what -- in
9 Booker, what made the Federal system constitutional was
10 not the engraftment of the reasonableness review. It was
11 rendering the mandatory guidelines advisory. And that's
12 the aspect of California's Supreme Court Black decision
13 that they've misread the Booker decision.

14 JUSTICE GINSBURG: Why is that, why is that so?
15 Why isn't the middle sentence, just like what the
16 guideline -- what the guideline would indicate? And if a
17 Federal court would say, if I sentence within the
18 guideline, that will be presumptively valid, as many
19 courts have held. Not this Court yet. That would be
20 presumptively valid.

21 And if I go outside, I have to give a reason that
22 will survive appellate review. Well, why isn't the
23 middle sentence identical in function to the Federal
24 sentencing guidelines advice?

25 MR. GOLD: Justice Ginsburg, I think that it's the

1 mandatory nature in California of the middle term. The
2 judge cannot exceed the middle term unless he finds at
3 least one aggravating factor. And my understanding in
4 the Federal system is that the judge can exceed the --
5 can exceed these guideline ranges and that they're just
6 advisory.

7 JUSTICE SCALIA: To say that a sentence within the
8 guideline range is reasonable is not to say that a
9 sentence outside the guideline range is unreasonable. So
10 under the Federal system, it is perfectly possible --
11 unless, unless we hold otherwise -- for a judge to give a
12 sentence beyond the guideline range, and nonetheless to
13 be affirmed, because although the guideline range is
14 reasonable, there are other systems that would be
15 reasonable, right?

16 MR. GOLD: Yes, Your -- Justice Scalia. And I
17 think that to the extent that we are going to say that
18 any sentence outside this guideline range is going to be
19 unreasonable and necessarily require reversal is going to
20 be no different than the mandatory guideline system this
21 Court struck down in Booker itself.

22 CHIEF JUSTICE ROBERTS: So the only part of the
23 California system that creates a problem is this -- the
24 one sentence in the statute that says the judge shall
25 impose the middle term unless he makes a finding.

1 MR. GOLD: That's absolutely right.

2 CHIEF JUSTICE ROBERTS: So that if we rule in your
3 favor, the great benefit for criminal defendants in
4 California will be that judges can now depart without
5 making a particular finding, they can increase the
6 sentence even though they do not find an aggravator
7 within the limits of the California system.

8 MR. GOLD: But Mr. Chief Justice, it's not clear
9 that that would be the result in California. The
10 legislature could very well --

11 CHIEF JUSTICE ROBERTS: Doesn't the decision in
12 Black suggest the Supreme Court thinks that would be the
13 result? The California Supreme Court?

14 MR. GOLD: I'm not sure that they think that that
15 would be the result. They certainly did not make an
16 attempt to reform or rewrite the statute so that it was
17 now an advisory system.

18 CHIEF JUSTICE ROBERTS: I thought that -- it
19 looked to me that's what they were trying to do in Black.
20 I mean, in a way, it's kind of the -- the Black opinion,
21 the day after, if this Court were to agree with you, and
22 the California Supreme Court issued a decision looking a
23 lot like its decision in Black, that would be perfectly
24 valid.

25 In other words, saying that judges can depart

1 within this whole -- just like Booker, they can depart
2 within this whole range, and we're going to review their
3 determinations for reasonableness. They don't have to
4 impose the middle sentence, they can impose a higher
5 sentence, and we'll review it for reasonableness. That
6 would be perfectly all right.

7 MR. GOLD: Well, and that may very well be the
8 case, but that's not what the California Supreme Court
9 did in Black. They made no attempt. What they did was
10 described the Determinate Sentencing Law as it has always
11 operated. And at no time did they purport to change the
12 law in California, including the mandatory nature of the
13 Determinate Sentencing Law.

14 CHIEF JUSTICE ROBERTS: But what they said was
15 judges can impose a sentence in either of the three --
16 any one of the three tiers, and we are going to review it
17 for reasonableness. And if they don't make findings, it
18 is going to be unreasonable, right?

19 MR. GOLD: Yes, but once again, the reasonableness
20 aspect is not what makes the system constitutional. It's
21 the mandatory versus advisory aspect. And again,
22 that's what made the Federal system constitutional based
23 on this Court's Booker decision. It wasn't this
24 engraftment of reason -- reviewing these sentences for
25 reasonableness.

1 JUSTICE BREYER: Well, to be quite -- to expose my
2 thinking on it, I found it rather ambiguous, pages 1260
3 and 1261. Is that what -- the first part of that is --
4 it says what you said. I have no doubt. It says just
5 what you said.

6 But then you get over to the part, the discussion
7 of Booker, and when they start talking about Booker, they
8 seem to say, seem to say, that they're adopting what
9 Booker says. Now, if they are adopting what Booker says,
10 that means, and that's why I used my example, that I
11 guess a judge would have the power, if it is reasonable,
12 to just say the guideline, though it says thus and so,
13 isn't right for my circumstance. And therefore, I don't
14 adopt it. And that would be reviewed for reasonableness,
15 his decision not to follow it.

16 And similarly, we have cases, for example, where
17 they're trying to construct a sentence and they can't get
18 it right because of the consecutive/concurrent nature, so
19 he adds a few things on, you see, to the sentence, in
20 order -- and then makes them concurrent. Or you could
21 have things where it is a very sophisticated conspiracy,
22 and the jury found the conspiracy. It is a
23 characterization of a conspiracy, it is very
24 sophisticated.

25 And I thought, well, maybe all three of those are

1 reasons for going up in California. And I read those
2 pages, 1260, 1261, and my honest opinion is I'm not sure.

3 MR. GOLD: Well, Your Honor, I have no doubt that
4 the California Supreme Court was trying to fit the
5 Determinate Sentencing Law within the constitutionality
6 of this Court's Booker system. But as far as 1261, I'm
7 looking -- seemingly every single time they talk about
8 Booker or reasonableness, they also make sure to give the
9 -- to make sure that they make clear that the way the
10 sentence -- the system works is that there's still this
11 requirement of finding an aggravating factor.

12 JUSTICE BREYER: An aggravating factor to you means
13 aggravating fact.

14 MR. GOLD: Aggravating fact, uh -- yes.

15 JUSTICE GINSBURG: What would you think would be
16 necessary, what would be the least change California
17 would have to make to bring its system into compliance
18 with our decisions?

19 MR. GOLD: Justice Ginsburg, the court could --
20 the court or the legislature could change section 1170(b)
21 to read something like: "A judge may impose" instead of
22 "shall impose" the middle term. And that would be valid
23 to the extent that what they mean by "may" is they can
24 now impose the middle term based just on the facts found
25 by the jury.

1 JUSTICE SCALIA: Or they could say the middle term
2 will always be reasonable. Couldn't they say that?

3 MR. GOLD: They could, and in effect, they do say
4 that --

5 JUSTICE SOUTER: Which would leave open the
6 possibility that something above the middle term would
7 also be reasonable without necessarily finding a discrete
8 fact beyond the indictment to justify it. Right?

9 MR. GOLD: Yes. There are --

10 CHIEF JUSTICE ROBERTS: The protection that
11 criminal defendants now have, that they cannot be
12 sentenced to a higher term unless the judge makes
13 particular findings, will then be no longer applicable.

14 MR. GOLD: Yes, Your Honor. I -- and I --

15 JUSTICE STEVENS: That's true unless the
16 California legislature does what most states have done in
17 response to Booker, which is not that route at all. They
18 did maintain their determinate sentencing, but they just
19 required the jury finding. That's what I think seven out
20 of nine states have done.

21 MR. GOLD: Yes, Justice Stevens. And that was the
22 point I was going to make, that that is a very likely
23 outcome, given what the majority of other states have
24 done. And that, Mr. Chief Justice, would be a --

25 CHIEF JUSTICE ROBERTS: So that now the defendant

1 who will have the protection of his jury determining his
2 guilt, will not only have to know the evidence of his
3 guilt of the crime, but also know why he's likely to
4 re-offend in the future, things like he used a firearm,
5 all the bad things that will increase his sentence and
6 might affect how the jury views the issue of guilt in the
7 first place.

8 MR. GOLD: Not necessarily, Your Honor. Because
9 for those type of prejudicial factors, California is
10 well-positioned to handle those, because they do so
11 anyway in bifurcated proceedings. There are often
12 enhancement allegations that relate to recidivism or even
13 gang allegations, anything that's prejudicial are handled
14 at a separate proceeding after trial.

15 CHIEF JUSTICE ROBERTS: And are there a half a
16 dozen jury trials in each -- for each of those various
17 aggravating factors that now have to be tried to the
18 jury?

19 MR. GOLD: No, Your Honor, what I'm trying to say
20 is that basically California does that anyway now. Most
21 of the factors that relate to the defendant have to do
22 with recidivism. And those are the same kind of factors
23 that are alleged in the information, and are tried in a
24 bifurcated proceeding to the jury, or are waived and then
25 the trial court will consider them.

1 JUSTICE BREYER: That's interesting. Are there,
2 in fact -- what's your estimate, guess, as to how many
3 criminal jury-tried cases in California, what percent
4 have two juries? Have more than one jury?

5 MR. GOLD: They don't have more than one jury.
6 They are tried to the same jury, but they are tried after
7 the --

8 JUSTICE BREYER: In what percentage would you say
9 they have bifurcated or several jury trials? I mean,
10 more than just one.

11 MR. GOLD: Your Honor, I would say that there are
12 lots of cases where they're tried to a court. The
13 defendant will waive them if they're based on recidivism.

14 JUSTICE BREYER: No, no, but how many, how many
15 times do they -- let me call it impaneling the jury
16 twice, or two juries, or it could be the same one.

17 MR. GOLD: The same --

18 JUSTICE BREYER: Yes. What percentage would you
19 guess? Just make a rough -- roughest conceivable guess.

20 MR. GOLD: Completely anecdotally, I would say 20
21 percent. I -- if -- I would like to reserve the
22 remainder of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, Mr. Gold.

24 Mr. Laurence.

25 ORAL ARGUMENT BY JEFFREY M. LAURENCE

1 ON BEHALF OF RESPONDENT

2 MR. LAURENCE: Mr. Chief Justice, and may it
3 please the Court:

4 The central lesson from Booker, from the real
5 portion of Booker, is that not every constraint that's
6 placed on a trial court's discretion in selecting a term
7 within a range that requires fact-finding invokes the
8 Sixth Amendment requirement of a jury trial.

9 A reasonableness constraint that requires the
10 court to consider all the circumstances of the defendant
11 and select a reasonable sentence in relation to those
12 facts and those factors does not invoke the Sixth
13 Amendment jury trial right. California has consistently
14 construed its system as placing nothing more than a
15 reasonableness constraint on the trial court's discretion
16 in selecting among the --

17 JUSTICE SCALIA: That's not so at all. California
18 says if you go over the middle range, it is unreasonable,
19 period, unless you prove or you find one of the
20 aggravating factors. That's a constraint. You cannot go
21 above the middle range.

22 MR. LAURENCE: Yes, Your Honor, but that's the
23 same constraint that this Court found to not invoke the
24 Constitution in Booker.

25 JUSTICE SCALIA: No, that's not what we found in

1 Booker. We found in Booker, or at least the way the
2 lower Federal courts have been interpreting Booker, if
3 you use the guideline range, and you're within the
4 guideline range, that is automatically reasonable, you
5 don't have to worry about it.

6 But we haven't held, and I don't believe most of
7 the Federal courts have held, that if you go beyond the
8 guideline range, it is automatically unreasonable. And
9 that is the case with the California system, if you go
10 beyond the middle range, it is automatically unreasonable
11 unless you -- unless you find one of the aggravating
12 facts.

13 MR. LAURENCE: Your Honor, I'd have to
14 respectfully disagree with that because we're not talking
15 about a middle range. What we are talking about is an
16 end point. If I can use the Booker example, where you
17 have a term of 10 years to life, the court can certainly
18 make a selection within a reasonable range. At some
19 point, as the court increases its sentence beyond a
20 certain point, it will become unreasonable.

21 We don't need to identify specifically whether that
22 point is the guideline range or something close to it.
23 But when you get to the end point, if there's no
24 justification offered whatsoever for a life term --

25 JUSTICE STEVENS: Yes, but the difference is, in the

1 Federal system, the judge can go above and it can be
2 reasonable based on facts that were found by the jury.

3 But in California, to go beyond the middle range
4 up to the upper range, there must be a fact not found by the
5 jury.

6 MR. LAURENCE: Well, Your Honor --

7 JUSTICE STEVENS: Is that not correct?

8 MR. LAURENCE: That's only correct because
9 California has a discrete three-term sentence.

10 JUSTICE STEVENS: Correct. But whatever the
11 reason, it is correct.

12 MR. LAURENCE: It is correct, Your Honor, but the
13 central point of both Booker and California is that that
14 upper term is being reversed not because it's
15 unauthorized, but because it's unreasonable.

16 JUSTICE STEVENS: On one hand, in one case, the
17 unreasonableness depends on a finding of fact not made by
18 the jury. But in the Federal system, it does not require
19 that finding by a jury.

20 MR. LAURENCE: Your Honor, if a Federal judge
21 wished to impose a life term, there would have to be
22 something to justify it, or it would be reversed as
23 unreasonable.

24 JUSTICE BREYER: It wouldn't necessarily be a
25 fact. It could be a fact. What it says in here is that

1 if the -- they speak of, any circumstance related to the
2 crime, or the offender. And in a case in which no such
3 aggravating factor can be found, the judge cannot impose
4 the upper term.

5 Now, I grant you there's some language that I --
6 it seems to me on the next few paragraphs, seems to say
7 something a little different. But that language, if you
8 just take that, seems to say, unless, Judge, you find a
9 fact about the situation that would make it reasonable to
10 go above the middle range, you can't, under the law.

11 Now, if that's what it says, I have to admit, I
12 find it a little difficult to distinguish from Blakely
13 and other cases where I dissented, but the Court's law is
14 what the majority says. So that seems to me almost like
15 it, unless you can tell me that I'm wrong in that.

16 MR. LAURENCE: I would say you are wrong, Your
17 Honor, simply because California has construed its
18 sentencing law in 1170(b) as imposing nothing more than a
19 reasonableness requirement --

20 JUSTICE SOUTER: No, but if -- as I understand it,
21 it has construed it by saying that if you go above the
22 middle term without a discrete finding of fact beyond
23 what had to be proven to the jury, it is unreasonable as
24 a matter of law. And that unreasonableness as a matter
25 of law feature is what distinguishes it from the Federal

1 system post Booker.

2 MR. LAURENCE: Well, Your Honor, I would disagree,
3 because the upper term, the statutory maximum in Booker
4 would also be necessarily unreasonable if there was no
5 justification offered by the trial court --

6 JUSTICE SCALIA: But the justification under the
7 Federal system could be, you know, this is what the
8 sentencing commission thought was a reasonable sentence
9 for this crime. I disagree with that. And there are
10 other authorities who think that that's a little too, you
11 know, below what it ought to be. He can simply disagree
12 with the sentencing guidelines.

13 Or he could point out what Justice Breyer
14 suggests, well, the sentencing guidelines may be okay for
15 some jurisdictions, but in this jurisdiction, we have a
16 special problem with regard to this kind of a crime. He
17 can do that and doesn't have to find any special fact.
18 He cannot do that in California.

19 MR. LAURENCE: Well, I have two responses to that, Your
20 Honor. First of all, with regard to what the ruling in
21 Booker was, the court's discretion has to be exercised in
22 relation to the policy considerations set out in 3553(a),
23 which are the same policy considerations that the court
24 must look at, very similar in California, that there are
25 -- the court doesn't have unbridled discretion, to select

1 any term based on whim, based on whatever it feels would
2 be -- whatever it decides to do on Tuesday.

3 The court has to do it with regard to the policy
4 considerations that are inherent in what the guidelines
5 decisions were, and what the legislature has established
6 should be appropriate sentencing considerations.

7 JUSTICE SOUTER: But that does not necessarily
8 mean that he must make a discrete finding of fact in
9 order to do it. We come back to Justice Scalia's hypo a
10 moment ago. He can go, you know, in theory, under
11 Booker, he can go above the guideline range consistent
12 with policy positions that may not be precise, without
13 necessarily making discrete findings of fact.

14 I mean, you'd have to judge it in each individual
15 case, but the possibility is there. And under the
16 California system, the possibility is not there.

17 MR. LAURENCE: Well, Your Honor, the systems
18 converge at the end point. And that is, under the
19 Federal system, going to that right end point would be
20 unreasonable in every circumstance if there's no
21 justification offered, other than he committed the
22 offense.

23 In California, because we have three discrete
24 terms rather than a spectrum, you have the same effect
25 when you get to the end point. It would be

1 unjustified -- it would be an unreasonable sentence if
2 there's no justification offered. But the fact that
3 California has three points rather than a range shouldn't
4 be constitutionally determinative.

5 JUSTICE GINSBURG: And it can't be a fact -- in
6 California, it can't be a fact found by the jury, as
7 Justice Stevens pointed out, and that's a significant
8 difference.

9 MR. LAURENCE: Well, it can't be an element. And
10 that -- obviously, there could be a circumstance where
11 some special findings were made, in which case that might
12 be beyond the elements. But it can't be an element
13 simply because you shouldn't be double counting what's
14 already established.

15 The range is set by the elements of the offense,
16 that all three terms are available from the jury verdict
17 based on those elements. If you are going to make a
18 selection within that range, it has to be more than
19 simply the defendant committed the offense. And
20 that's the same with the Federal guidelines. Simply
21 saying --

22 JUSTICE SCALIA: But, it isn't the same in the Federal
23 guidelines. In the Federal guidelines, the district judge
24 could say, you know, I think this offense is more serious
25 than what the sentencing commission thought, and these

1 are my reasons for it. There was a dissent, you know --
2 the sentencing commission's determinations are
3 reasonable, but they are surely not the only reasonable
4 disposition.

5 And it is open to a Federal district judge to say,
6 well, that's what they thought, and I took it into
7 account, and I seriously considered it, but I think they
8 are wrong on this, I think this is more serious. And
9 that could be a perfectly reasonable determination. That
10 couldn't be done in California.

11 MR. LAURENCE: Yes, it could, Your Honor. And I
12 would refer you to Rule 4.410 in our appendix, page 2 and
13 3, that the general policy considerations that over --
14 that overlay our sentencing guidelines or our sentencing
15 system, include deterrence for this defendant and
16 deterring others from committing the same crime, that you
17 can just look to the -- what is happening in this
18 particular neighborhood, as the examples brought out.

19 JUSTICE SOUTER: Are you saying to us that under
20 the California system, if a California judge went through
21 exactly the thought process that Justice Scalia just
22 outlined and he put that down on paper, without finding any
23 discrete fact beyond the elements the jury found, that he
24 could go to the third tier? I really think deterrence
25 requires the third tier, not the middle tier? Can a

1 California judge do that?

2 MR. LAURENCE: Yes, Your Honor, deterrence is a
3 basis for going to the third tier.

4 JUSTICE BREYER: Well, that's critical, and that's
5 what I didn't understand about --

6 JUSTICE SCALIA: Well, it's just not true. You
7 certainly didn't argue that way in your papers up to now.
8 I thought that there has to be a finding of some
9 aggravating factor, not simply, I think deterrence is
10 more than what the statute says, or deterrence requires
11 more than what the statute says. Is that really your
12 position, that if a judge thinks deterrence requires more
13 than the middle range, for that reason alone, he can say
14 I ignore the middle range?

15 MR. LAURENCE: Well, that's part of the rules of
16 court under 4.410. Yes, Your Honor.

17 JUSTICE SCALIA: Where --

18 MR. LAURENCE: That would be --

19 JUSTICE BREYER: It's appendix page 3 in the
20 brief.

21 MR. LAURENCE: Appendix page 2 and 3.

22 JUSTICE KENNEDY: But I'm not sure that that's the way
23 the Black court interpreted it. The Black court talks
24 about a requirement that the upper-term sentence be
25 imposed only if an aggravating factor exists.

1 MR. LAURENCE: Yes, Your Honor, that would be
2 considered an aggravating factor, the need for deterrence
3 for this particular case --

4 JUSTICE BREYER: What do I do here? Because the
5 sentence I read to you seems to say the opposite. But
6 then, two sentences on, they list, the Federal judge is
7 not bound by the guidelines, he must consult the
8 guidelines. And after they say, an aggravating
9 California -- it says the discretion available -- the --
10 in California law, that may include any fact that the
11 judge reasonably determines to be relevant. The
12 Determinate Sentencing Law, about an upper term, is
13 comparable to Booker's requirement that a Federal judge's
14 sentencing decision not be unreasonable.

15 Well, I assumed until this minute that the first
16 statement trumped the second. But now when I see the
17 court rule, certainly that court rule is possible, given
18 that to be read as permitting them, particularly with the
19 second statement, you could read the second statement as
20 saying, yes, they can say a particular instance or a kind
21 of sentence seemingly mandated at the middle level is, in
22 this community, so contrary to the purposes of punishment
23 that I'm giving a higher one. To be honest, I don't know
24 what Black means.

25 CHIEF JUSTICE ROBERTS: I'm sorry. Before you --

1 could you tell me where the court rule you're talking
2 about is set out?

3 MR. LAURENCE: It's in our appendix, page -- the
4 appendix to our brief, I'm sorry, the appendix to our
5 brief, page 2 and 3.

6 JUSTICE SCALIA: What you say in your brief, which
7 doesn't seem to me to comport with what you are saying
8 here, for a judge to exceed the base range, for example,
9 by applying enhancement or an alternative sentencing
10 scheme, the predicate fact for the enhancement or
11 alternative scheme must be pleaded and proved to a jury
12 beyond a reasonable doubt.

13 There's no indication there that the judge could
14 just say, I think more deterrence is necessary and
15 therefore, I'm going to exceed the base range. That's
16 just totally incompatible with that.

17 MR. LAURENCE: Your Honor, that's to exceed the
18 base range, to go beyond the three terms. If you want to
19 impose an enhancement for gun use, or for an enhancement
20 such as in Apprendi, not for selecting a term within the
21 base range.

22 JUSTICE SOUTER: All right. But even for
23 selecting a term within the base range, I'm going to read
24 now from Rule 4.420. Part (b) says, "circumstances in
25 aggravation and mitigation shall be established by a

1 preponderance of the evidence."

2 That's not the way we refer to judges' reasoning
3 about policy. That's the way we refer to proof of fact,
4 and I don't see how under subsection (b) your answer to
5 me can be correct.

6 MR. LAURENCE: Well, Your Honor, I think the rules
7 of court are viewed as a whole with 4.408, which talks
8 about anything in addition to -- that the rules of -- the
9 examples set out are not exclusive and not determinative,
10 and anything can be a consideration.

11 JUSTICE SCALIA: Well, but they have to be an
12 aggravating factor.

13 MR. LAURENCE: Yes.

14 JUSTICE SCALIA: And to talk about the need for
15 more deterrence as an aggravating factor, that's not an
16 aggravating factor.

17 MR. LAURENCE: Well, Your Honor, I think that the
18 example that was given was in relation to the community
19 that was experiencing some uptick in crime.

20 JUSTICE SCALIA: That's not an aggravating factor.
21 It's a basis for imposing a harsher sentence, but it
22 doesn't aggravate this crime as opposed to the same crime
23 committed by other individuals. It's not an aggravating
24 factor.

25 MR. LAURENCE: Well, Your Honor, the importance of

1 our position, the central thrust of our position is that
2 the reasonableness constraint, or the constraint imposed
3 under 1170(b) has been interpreted as a reasonableness
4 constraint. It doesn't matter if factors are required --

5 JUSTICE SOUTER: Well, it can be a reasonableness
6 constraint and also be a reasonableness restraint that
7 requires a finding of discrete fact for reasonableness.
8 The two are not exclusive.

9 MR. LAURENCE: That's true, Your Honor. That's
10 true.

11 JUSTICE SOUTER: And the rule seems to contemplate --
12 seems very clearly to contemplate the finding of a discrete
13 fact, and it seems to me that we've got to consider the
14 rule in responding to the ambiguity that Justice Breyer
15 referred to a moment ago. The ambiguity has got to be
16 read in light of subsection (b), and subsection (b) seems
17 to answer the ambiguity by saying preponderance of the
18 evidence. That means a fact finding.

19 MR. LAURENCE: Well, let me explain it this way,
20 Your Honor, that it doesn't matter from our perspective
21 whether or not there is a factor required in order to say
22 that something is -- that the end point is reasonable, or
23 if you are taking deterrence into account, that that's
24 not -- it's not necessary for our argument because our
25 position is that even if a factor is required --

1 JUSTICE SOUTER: So do you think under subsection
2 (b) of Rule 4.420, if a judge said, I just think the
3 policy of deterrence requires something heavier, you
4 think that statement by the judge would satisfy the
5 requirement that circumstances in aggravation shall be
6 established by a preponderance of the evidence?

7 MR. LAURENCE: No, Your Honor. I don't.

8 JUSTICE SOUTER: All right. Then it seems to me
9 that you cannot hold your position consistently with the
10 state rule of court.

11 MR. LAURENCE: Well, Your Honor, I would refer
12 back to Black at 1255, which is the important part.

13 JUSTICE SOUTER: Is Black repealing the rule of
14 court? I mean, Black -- if we refer back to Black, we
15 get the ambiguity that Justice Breyer has raised. In
16 order to solve the ambiguity, we look to the court rule.

17 MR. LAURENCE: Yes.

18 JUSTICE SOUTER: Under the court rule, you admit
19 that a judge's policy consideration, however sincerely
20 held, could not satisfy the requirement to prove
21 aggravation by a preponderance. Isn't that the end of
22 the issue? I mean, if California wants to amend its
23 rules or its statutes, that's California's business. But
24 we can't do it.

25 MR. LAURENCE: Well, no, Your Honor, but

1 California has construed 1170(b) as not requiring a
2 fact-finding to move from the middle term to the upper
3 term. It's simply saying that when the court selects
4 between the three, the decision must be reasonable.

5 JUSTICE SOUTER: Then why didn't you give a
6 different answer to my question? Why didn't you say, if
7 it is reasonable for the court to conclude that
8 deterrence really requires something tougher than the
9 middle term, that's enough? Why didn't you say that is
10 enough and (b) wouldn't preclude it?

11 MR. LAURENCE: Well, Your Honor, I think that my
12 answer would have to be that in relation to the
13 hypothetical given, I was answering it because -- with
14 regards to the circumstances of the community that the
15 defendant committed the crime in. If we take that away
16 --

17 JUSTICE SOUTER: Okay. Let's make the hypothetical
18 clear. The judge, the judge is on the bench. He says,
19 there's too much crime in our community, look at these
20 statistics, I believe that deterrence requires something
21 heavier than the middle tier. Nothing unusual about this
22 particular crime. I'm making a policy decision about what
23 the law should require in general. Would that satisfy part
24 (b) of 4.420?

25 MR. LAURENCE: Yes, I believe it would.

1 JUSTICE SOUTER: That would satisfy the
2 requirement of, as it puts it, establishing by a
3 preponderance of the evidence?

4 MR. LAURENCE: Uh-huh. Yes.

5 JUSTICE SOUTER: That was not what I understood
6 California law to be or your position to be until this
7 moment, I have to admit.

8 MR. LAURENCE: Well, Your Honor, I have not been
9 suggesting that that single factor is what makes
10 California's law constitutional. What makes California's
11 law constitutional is the fact that the constraint
12 imposed on the court's discretion in selecting terms is a
13 reasonableness requirement, just like Booker.

14 JUSTICE SOUTER: No, but for reasons we've already
15 gotten into that does not answer the problem.

16 JUSTICE SCALIA: I think the California Supreme
17 Court and the California legislature would be astounded
18 to think that this is what they have wrought. They
19 obviously intended to establish a scheme in which the
20 judge would apply the middle range, not using his own
21 perception as to whether more punishment is justified or
22 not, unless there's some circumstances about this crime
23 that make this person more guilty, and that's what you
24 usually mean by aggravating circumstances, not the fact
25 that you believe the crime should bear -- in general,

1 should bear, a higher penalty. I think they would be
2 astounded to find that this is what they have created.

3 MR. LAURENCE: Your Honor, let me take a step back
4 then and say that, even with the requirement that there
5 be some factor, putting aside deterrence as a
6 possibility, California's system as structured, which
7 only requires a reasonableness constraint, does not
8 violate the Constitution. And the reason being because
9 all it's saying is that if you're going to the absolute
10 maximum, the farthest point on the spectrum available, if
11 there's no justification offered, it will be reversed as
12 unreasonable, not as unavailable.

13 JUSTICE KENNEDY: That's the whole problem with
14 your case.

15 MR. LAURENCE: Certainly.

16 JUSTICE KENNEDY: That there's -- and
17 incidentally, under the rules, under 4.410, those are
18 general objectives of sentencing.

19 MR. LAURENCE: Yes, Your Honor.

20 JUSTICE KENNEDY: And that is a term of art that's
21 different from circumstances.

22 MR. LAURENCE: Yes, Your Honor.

23 JUSTICE KENNEDY: So it's only the circumstances
24 that have to be found by a preponderance of the evidence.
25 The general objectives can still be considered.

1 MR. LAURENCE: Yes, Your Honor.

2 JUSTICE KENNEDY: But what we are involved with in
3 this case and with this criminal, whose conviction and
4 sentence we're reviewing here, are circumstances that
5 aggravate, and these do require findings.

6 MR. LAURENCE: Yes, Your Honor.

7 JUSTICE KENNEDY: If those findings aren't there,
8 it's not reasonable.

9 MR. LAURENCE: That is correct, Your Honor. Let's
10 just take it a step back and say that what we're talking
11 about is -- even if there are circumstances that are
12 required, even if there are some justifications that the
13 court must find aggravating factors, still the only
14 constraint is reasonableness.

15 And let me quote from what Black said about
16 1170(b), how it's been construed, not from the facial
17 language, but how it's been construed. And what Black
18 says is on page 1255 that: "Although subdivision (b) is
19 worded in mandatory language, the requirement that an
20 aggravating factor exist is merely a requirement that the
21 decision to impose the upper term be reasonable."
22 this has clarified it, but I don't know what to do. I
23 think if I read the opinion the way you're saying, I would
24 say the California court, which is a good court,
25 conscientious, managing a huge system of criminal law in

1 the state, probably bigger than the Federal system, reads
2 Blakely and they see that those guidelines in California
3 as previously understood were violated.

4 And they're thinking, how do we maintain this
5 system as constitutional. And therefore, they write
6 1261, which can be read as saying we're Bookerizing it,
7 and we come as close to Booker as necessary to make it
8 constitutional.

9 Now, that would be an understandable judicial
10 reaction, and I can read the opinion as saying that, at
11 which point I'm not certain what we're supposed to say,
12 because I have no doubt that your unease reflects the
13 fact that prior to Black, in California, it would have
14 been pretty unheard of for a judge to depart upward on
15 grounds other than factual grounds related to the
16 circumstances of the crime or offender. But I also have
17 no doubt that this opinion is written to try to save the
18 California system. All right, so now what do I do?

19 MR. LAURENCE: Well, Your Honor, I think that the
20 one thing that seems to be giving you some difficulty is
21 the fact that California didn't explicitly say in Black,
22 we are now officially Bookerizing our system, and I believe
23 the reason for that is because California had already
24 implicitly construed it's system as making all three terms
25 legally available based on the jury verdict alone, and

1 had simply used a reasonableness requirement.

2 And that goes back to Hernandez, back in 1988,
3 when California essentially anticipated Apprendi, and
4 distinguished between making enhancements available based
5 on the jury verdict on the elements alone, versus the
6 three, the three components of the triad scheme.

7 JUSTICE KENNEDY: Well, it's the same old record
8 we've been playing. But the reasonableness requirement
9 has to be explained further, and when you explain it
10 further, you find that there must be findings by a
11 preponderance of the evidence for any of the aggravating
12 or mitigating circumstances that are set out. That's
13 different from the objectives of sentencing.

14 MR. LAURENCE: Yes, Your Honor.

15 JUSTICE KENNEDY: But the objectives of sentencing
16 are not what's involved in this case.

17 MR. LAURENCE: Yes, Your Honor. And I -- whether
18 or not the objectives of sentencing are involved is not
19 the critical point of the constitutionality of this
20 system.

21 As far as California is concerned, what is
22 important is that, first of all, the fact that the
23 preponderance of the evidence requirement is essentially
24 the same as what's involved in making discretionary
25 findings within a range in the Federal system, and we're

1 talking about findings within a range.

2 JUSTICE SCALIA: Would you want us to hold that,
3 you know, that we uphold the system here in an opinion
4 that says what California's sentencing judges may do
5 under California law, as you've described it to us, is
6 that they -- they may exceed the middle range whenever
7 they think that that is a better result, whenever they
8 think that that's reasonable?

9 MR. LAURENCE: Yes.

10 JUSTICE SCALIA: And you think California would be
11 happy with that?

12 MR. LAURENCE: Yes. Reasonableness is the
13 touchstone of the constraint imposed upon the trial
14 courts in selecting among the three terms, and that would
15 be a perfectly --

16 JUSTICE SCALIA: Well, including reasonable
17 disagreement with the level of severity that the
18 legislature has provided in the middle term. I mean,
19 other legislatures may have provided higher severity and
20 the judge says, I simply disagree with the California
21 legislature. And it's a reasonable disagreement, because
22 some other legislature might have done what I do.

23 MR. LAURENCE: No, Your Honor.

24 JUSTICE SCALIA: That isn't reasonable? Why isn't
25 it reasonable?

1 MR. LAURENCE: Reasonableness has to be tied to
2 the policy considerations that underlie the --

3 JUSTICE SCALIA: He ties it to that. He says, I
4 just disagree with the California legislature as to
5 whether this is enough to prevent the defendant from
6 committing this kind of a crime. And look -- and he
7 cites another state which provides a much higher sentence
8 for the same crime. Can that possibly be unreasonable?

9 MR. LAURENCE: Yes, Your Honor. I believe that
10 under the California --

11 JUSTICE SCALIA: Then you don't mean
12 reasonableness. You mean something else.

13 JUSTICE KENNEDY: May I ask you this question?
14 Excluding capital cases, in your view -- anecdotally, if
15 it has to be that -- what percentage of cases that go to
16 juries, that go to jury trial, result in bifurcated
17 proceedings for sentencing purposes? 10 percent?

18 MR. LAURENCE: I would say probably a rough guess
19 would be around 10 percent, Your Honor. That your dealing
20 with --

21 JUSTICE STEVENS: On that question, may I ask --
22 on that subject, may I ask you this question: Have you
23 read the brief by the National Association -- the
24 amicus brief by the National Association of Defense
25 Lawyers, which has a long discussion of the practical

1 consequences in other states and in California?

2 MR. LAURENCE: Yes.

3 JUSTICE STEVENS: And which I find, to be honest
4 to you, rather persuasive on the fact it's not such a big
5 deal as we thought it might be. And I'd like to have you
6 have an opportunity to tell me whether there's something
7 in that brief that is not accurate.

8 MR. LAURENCE: Well, Your Honor, it would
9 certainly be a big deal to California. But more
10 importantly, if this Court were to say that a
11 reasonableness constraint reinvoles the Sixth Amendment,
12 you would be basically throwing into doubt the way Booker
13 has reformed the Federal system as well, because --

14 JUSTICE STEVENS: They say, if I remember the fact
15 correctly, that if the impact in a four day trial would
16 normally be an extra hour before the jury, that that's about
17 the burden on the system. And of course, 90 some percent
18 of your cases are pleaded out by guilty, so it's not the
19 major thing that we originally thought it might be. Do
20 you think, just across the board, are they fairly
21 accurate in their description of what happens in other
22 states as far as you're advised?

23 MR. LAURENCE: As far as the other states go, yes,
24 Your Honor. And I believe that the impact on California
25 would be a requirement of a secondary trial after the main

1 trial, but it would also impose a burden of trying to
2 identify whatever aggravating circumstances or whatever
3 relevant considerations have to take place in this
4 particular case, which can be a multitude of things. Under
5 California law, essentially anything can -- anything can
6 justify an upper term sentence. It's only when there's
7 absolutely nothing, not a scintilla of justification,
8 that an upper term becomes unreasonable and therefore
9 reversed.

10 CHIEF JUSTICE ROBERTS: How many cases would have
11 to be resentenced if we were to reverse in this case?

12 MR. LAURENCE: It's my understanding that under --
13 currently in California about 20 percent of the prison
14 population has an upper term. So I don't know how many
15 cases there are on a year-by-year basis, or since Blakely
16 or since Apprendi, but probably in the thousands,
17 possibly tens of thousands.

18 JUSTICE KENNEDY: Yes. You had 200,000
19 incarcerated when I last looked.

20 MR. LAURENCE: Yes, Your Honor.

21 And the -- once again, the important aspect,
22 what's -- the key aspect is whether or not a term is
23 legally available, and whether or not there's a
24 constraint that's imposed that takes away that legal
25 availability as a threshold matter, rather than a

1 reasonableness review requirement.

2 California has consistently construed 1170(b) as
3 imposing a reasonableness requirement. This Court in
4 Booker said that a reasonableness requirement does not
5 limit the availability of those upper terms.

6 JUSTICE SCALIA: Do you know of any case in which
7 a California trial judge has gone beyond the middle range
8 not on the basis of a fact that that judge has found, but
9 rather on the basis of some general policy he thinks that
10 the punishment should be greater, something along the
11 lines of what Justice Breyer suggested?

12 MR. LAURENCE: No, Your Honor, I'm not aware of
13 it.

14 JUSTICE SCALIA: I'm not either, and I would be
15 astounded if any trial judge would read these statutes
16 and court rules that way.

17 MR. LAURENCE: Once again, Your Honor, that is not
18 the critical component of why this system is
19 constitutional, and that's not what we are advancing in
20 our briefs. It's not the position that I'm arguing here,
21 that that is what would save California's system.

22 What saves California's system is that the only
23 constraint imposed is a reasonableness constraint, and
24 that reasonableness constraint, 1170(b), has been
25 interpreted over time as simply imposing the abuse of

1 discretion standard on the court, and that has been
2 applied to all three terms. The middle term is also
3 reviewed for an abuse of discretion, as is the lower
4 term.

5 And what is important to note is, even though the
6 middle term -- the only reason the middle term has been
7 given the label "presumptive" is because the court
8 doesn't have to expressly articulate its reasons for
9 selecting it. But it still has to do a balancing to make
10 a determination as to what's reasonable, including the
11 middle term.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr. Laurence.

13 MR. LAURENCE: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Gold, you have four
15 minutes remaining.

16 REBUTTAL ARGUMENT OF PETER GOLD

17 ON BEHALF OF THE PETITIONER

18 MR. GOLD: Thank you, Mr. Chief Justice. I want
19 to respond to three items. The first is, Mr. Chief
20 Justice, you were asking about what would be the effect
21 in California on those that have already been sentenced.

22 The only information I have was what was contained
23 in Black, that only 13 to 17 percent of cases are
24 sentenced in the upper range. But what the Court should
25 also consider is that most -- in most cases, the

1 difference between the middle term and the upper term is
2 really only a year. In this case, it is four years,
3 which is somewhat unusual.

4 So in those cases, a lot of the people will have
5 already served their prison sentences by the time that
6 they would be able to benefit from any result in this
7 case.

8 I also wanted to echo what Justice Kennedy, I
9 believe, was saying. California Rules of Court, Rule
10 4.410 is just general objectives of sentencing. These
11 are not aggravating factors. You can't take into account
12 achieving uniformity of sentencing, securing restitution
13 for the victims, these aren't aggravating factors that
14 the judge considers.

15 CHIEF JUSTICE ROBERTS: Well, Rule 4.410(b) says
16 that the sentencing judge should be guided by the
17 criteria in these rules.

18 MR. GOLD: In sentencing, but I don't believe as
19 far as finding them as aggravating factors, these are not
20 facts that judges in California use to impose upper-term
21 sentences.

22 JUSTICE KENNEDY: No, but a reading of the rule
23 indicates under (b), as the Chief Justice points out
24 that the judge could take into account these policy
25 objectives.

1 MR. GOLD: Your Honor, all I can tell you is that
2 I've never seen a judge take these into account as an
3 aggravating factor, and I would be surprised, under the
4 case law, if these have been ever upheld as valid
5 aggravating factors.

6 JUSTICE KENNEDY: Well, I think it is true that it
7 doesn't seem to be involved in this case. In this case,
8 we're under 4.420.

9 MR. GOLD: Certainly, yes. Certainly, not in this
10 case.

11 CHIEF JUSTICE ROBERTS: We have to conclude that
12 the California Supreme Court has misread California law
13 to agree with you, don't we?

14 MR. GOLD: No, Your Honor.

15 CHIEF JUSTICE ROBERTS: I mean, I see 1170(b),
16 a
17 nd I understand your argument, but when I read the
18 California Supreme Court opinion in Black, it says, well,
19 this is what it means. It doesn't seem to be what it
20 means, but they get to interpret it, don't they?

21 MR. GOLD: They do get to interpret how their
22 statutes operate, Your Honor, but I believe that they are
23 consistent in saying that this is a mandatory system.
24 In every one of their quotes, they talk about either a
25 judge must impose the middle term unless there are

1 aggravating factors, or they talk about the
2 requirement -- I was going to mention Justice Breyer's
3 quote from Black.

4 And even in that one, they say because an
5 aggravating factor under California law may include any
6 factor that the judge reasonably deems to be relevant,
7 and then say the Determinate Sentencing Law's requirement
8 that an upper-term sentence be imposed only if an
9 aggravating factor exists. They always talk about the
10 requirement that this aggravating factor must exist.

11 JUSTICE BREYER: -- they say it is comparable to
12 Booker. And then in the preceding four paragraphs, they
13 correctly describe Booker?

14 MR. GOLD: Yes, and we have no doubt that they
15 are trying to fit the Determinate Sentence Law within
16 Booker, but Booker is about making -- the magic word, if
17 it were, is advisory versus mandatory, not
18 reasonableness.

19 So yes, the California system is reasonable. And
20 that's what the California Supreme Court is talking about
21 --

22 JUSTICE ALITO: Under any guideline system,
23 whether it's mandatory or advisory, once -- if you have a
24 mandatory system or an advisory system with appellate
25 review, once the appellate review function has been

1 performed, will it not be the case that trial judges will
2 not have unfettered discretion, they will have very limited
3 discretion in choosing, in making these sentencing policy
4 determinations?

5 That's the whole purpose of a guideline system.
6 That the individual trial judges don't get to decide, you
7 know, how much deterrence they think is necessary, or how
8 severe they think an individual crime is that there is
9 supposed to be some kind of uniformity.

10 MR. GOLD: Well, Justice Alito, there is
11 discretion in our system. But it is the discretion to
12 impose an upper-term after finding aggravating factors,
13 and I think that in an indeterminate system, as you were
14 discussing earlier, I think that that -- I'm not sure.
15 It depends what the system is, as far as what the
16 reasonableness constraints are. Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr. Gold. The
18 case is submitted.

19 (Whereupon, at 11:02 a.m., the case in the
20 above-entitled matter was submitted.)

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