requirement onto the Sentencing Reform Act, under which the Guidelines were adopted, the Court instead invalidated two of its provisions, one making application of the Guidelines mandatory, and, concomitantly, one requiring *de novo* review for appeals of departures from the mandatory Guidelines, and held that the remainder of the Act could remain intact.[106] As the Court explained, this remedy "makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." [107]

In *Cunningham v. California*,[108] the Court addressed whether California's determinate state sentencing law, yet another style of legislative effort intended to regularize criminal sentencing, survived the *Booker-Blakely* line of cases. That law, and its implementing rules, required that the trial judge in the case sentence the defendant to 12 years in prison unless the judge found one or more additional "circumstances in aggravation," in which case the sentence would be 16 years. Aggravating circumstances could include specific factual findings made by a judge under a "preponderance of the evidence" standard in apparent violation of *Booker* and *Blakely.* The court was also free to consider "additional criteria reasonably related to the decision being made." [109] The state argued that this latter provision conformed the California sentencing scheme to *Booker*, which contemplated that judges retain discretion to select a specific sentence within a statutory range, subject to appellate review to determine "reasonableness." The Court rejected this argument, finding that the scheme impermissibly allocated sole authority to judges to find the facts that permitted imposition of a higher alternative sentence.[110]

The Court, however, has refused to apply *Apprendi's* principles to judicial factfinding that supports the imposition of mandatory mini-

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find a Sixth Amendment violation; the other, authored by Justice Breyer, and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg (the *Blakely* dissenters joined by Justice Ginsburg), set forth the remedy.

[106] 543 U.S. at 259. Consistent with the role it envisioned for a sentencing judge, the Court substituted a "reasonableness" standard for the statutory *de novo* appellate review standard that it struck down. 543 U.S. at 262.

[107] 543 U.S. at 245–246 (statutory citations omitted). Although not addressed in the *Booker* ruling, a provision of the Sentencing Guidelines that limits district courts from departing from the Guidelines during resentencing (the previous sentence having been vacated) on grounds other than those considered during for the first sentencing, was subsequently struck down as conflicting with the now-advisory nature of the Guidelines. Pepper v. United States, 562 U.S. ___, No. 09–6822, slip op. (2011).

[108] 549 U.S. 270 (2007).

[109] 549 U.S. at 278–79, quoting California Rule 4.408(a).

[110] 549 U.S. at 279–80. "The reasonableness requirement that *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints." 549 U.S. at 292–93.