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 JOHN CUNNINGHAM, :  
                     Petitioner :  
                     v. : No. 05-6551  
 CALIFORNIA. :

Wednesday, October 11, 2006

APPEARANCES:

JEFFREY M. LAURENCE, ESQ., Deputy Attorney General,  
San Francisco, Cal.; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:01 a.m.)

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

5 ORAL ARGUMENT OF PETER GOLD

6 ON BEHALF OF THE PETITIONER

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

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

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

21 In fact, this case really boils down to just one  
22 question. Can a judge in California legally impose an  
23 upper term sentence based solely on the facts reflected  
24 in the jury's verdict or the defendant's admissions. The  
25 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 of 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 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 fact-finding 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 returned a verdict,  
3 then we would have found -- and that would satisfy the  
4 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: You either have to have an  
10 erroneous instruction or a special verdict.

11 MR. GOLD: Yes.

12 JUSTICE SOUTER: Only in the sense that it would  
13 require the state to prove more than it had to prove for  
14 the elements of the crime.

15 JUSTICE SCALIA: Right.

16 MR. GOLD: Yes, Justice Souter, and I agree 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. We  
23 haven't addressed the issue or had a case involving  
24 review of reasonableness for upward departure. But at  
25 least as the circuits have said it, in a federal case,

1 the 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 a 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 law, 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 the 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 think your answer would be that  
14 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: 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 is there  
6    anything in California law, as you understand Black, that  
7    makes that 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 clarify one thing? You  
16 mean that 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 is 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 SCALIA: Somebody on that side suggested  
17 it. That to talk about the fact that there's a lot of  
18 crime in the community as an aggravating factor doesn't  
19 make any sense. Aggravating factor means something that  
20 makes the crime that this person committed worse, not the  
21 need for punishment greater, but makes the crime worse.  
22 Now, if that is not your answer, what is the answer that  
23 you gathered, from the left of me?

24 MR. GOLD: Well, with all due respect to Justice  
25 Breyer, I believe that that probably would not be an

1     aggravating factor that would be upheld under California  
2     law. I was just trying to make the distinction between  
3     whether an aggravating factor, no matter what it is,  
4     whether it is considered reasonable, whether that's  
5     enough to get the judge to go beyond the statutory  
6     maximum. But --

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

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

15            JUSTICE STEVENS: Yes.

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

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

24            MR. GOLD: Certainly if the aggravating factor is  
25    not supported by the evidence, then it won't be

1 considered reasonable and the imposition of a upper term  
2 won't be considered reasonable. But --

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

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

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

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

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

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

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

24 MR. GOLD: Justice Ginsburg, I think that it's the  
25 mandatory nature in California of the middle term. The



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

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

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

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

25 MR. GOLD: That's absolutely right.

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

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

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

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

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

24 In other words, saying that judges can depart  
25 within this whole -- just like Booker, they can depart

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

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

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

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

25 JUSTICE BREYER: Well, to be quite -- to expose my

1 thinking on it, I found it rather ambiguous, pages 1260  
2 and 1261. Is that what -- the first part of that is --  
3 it says what you said. I have no doubt. It says just  
4 what you said.

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

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

24 And I thought, well, maybe all three of those are  
25 reasons for going up in California. And I read those

1 pages, 1260, 1261, and my honest opinion is I'm not sure.

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

11 JUSTICE BREYER: An aggravating factor means  
12 aggravating fact.

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

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

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

25 JUSTICE SCALIA: Or they could say the middle term

1 will always be reasonable. Couldn't they say that?

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

4 JUSTICE SOUTER: Even though there is the  
5 possibility that something above the middle term would  
6 also be reasonable without necessarily finding a discrete  
7 fact beyond the indictment to justify it. Right?

8 MR. GOLD: Yes. There are --

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

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

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

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

24 CHIEF JUSTICE ROBERTS: So that now the defendant  
25 will have the protection of his jury determining his

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

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

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

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

25            JUSTICE BREYER:  That's interesting.  Are there,

1 in fact -- what's your estimate, guess, as to how many  
2 criminal jury-tried cases in California, what percent  
3 have two juries? Have more than one jury?

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

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

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

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

16 MR. GOLD: The same --

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

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

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

23 Mr. Laurence.

24 ORAL ARGUMENT BY JEFFREY M. LAURENCE

25 ON BEHALF OF RESPONDENT



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

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

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

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

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

24          JUSTICE SCALIA: No, that's not what we found in  
25    Booker. We found in Booker, or at least the way the

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

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

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

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

24 JUSTICE STEVENS: But the difference is, in the  
25 Federal system, the judge can go above and it can be

1 reasonable based on facts that were found by the jury.

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

5 MR. LAURENCE: Well, Your Honor --

6 JUSTICE STEVENS: Is that not correct?

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

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

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

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

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

23 JUSTICE BREYER: It wouldn't necessarily be a  
24 fact. It could be a fact. What it says in here is that  
25 if the -- they speak of a circumstance related to the

1 crime, or the offender. And in a case in which no such  
2 aggravating factor can be found, the judge cannot impose  
3 the upper term.

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

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

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

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

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

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

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

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

1 be -- whatever he decides to do on Tuesday.

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

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

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

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

22 In California, because we have three discrete  
23 terms rather than a spectrum, you have the same effect  
24 when you get to the end point. It would be  
25 unjustified -- it would be an unreasonable sentence if

1   there's no justification offered. But the fact that  
2   California has three points rather than a range shouldn't  
3   be constitutionally determinative.

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

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

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

21           JUSTICE SCALIA: It isn't the same in the Federal  
22   guidelines. Under the Federal guidelines, the judge  
23   could say, you know, I think this offense is more serious  
24   than what the sentencing commission thought, and these  
25   are my reasons for it. There was a dissent, you know --

1 the sentencing commission's determinations are  
2 reasonable, but they are surely not the only reasonable  
3 disposition.

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

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

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



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

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

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

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

16          JUSTICE SCALIA: Where --

17          MR. LAURENCE: That would be --

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

20          MR. LAURENCE: Page 2 and 3.

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

25          MR. LAURENCE: Yes, Your Honor, that would be

1 considered an aggravating factor, to use deterrence for  
2 this particular case --

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

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

24 CHIEF JUSTICE ROBERTS: I'm sorry, before you --  
25 could you tell me where the court rule you're talking

1 about is set out?

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

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

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

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

21 JUSTICE SOUTER: All right. But even for  
22 selecting a term within the base range, I'm going to read  
23 now from Rule 4.20. Part (b) says, "circumstances in  
24 aggravation and mitigation shall be established by a  
25 preponderance of the evidence."

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

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

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

12          MR. LAURENCE: Yes.

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

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

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

24          MR. LAURENCE: Well, Your Honor, the importance of  
25   our position, the central thrust of our position is that

1 the reasonableness constraint, the constraint imposed  
2 under 1170(b) has been interpreted as a reasonableness  
3 constraint. It doesn't matter if factors are required --

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

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

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

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

25 JUSTICE SOUTER: So do you think under subsection

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

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

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

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

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

16 MR. LAURENCE: Yes.

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

24 MR. LAURENCE: Well, no, Your Honor, but  
25 California has construed 1170(b) as not requiring a

1 fact-finding to move from the middle term to the upper  
2 term. It's simply saying that when the court selects  
3 between the three, the decision must be reasonable.

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

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

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

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

25 JUSTICE SOUTER: That would satisfy the

1 requirement of, as it puts it, establishing by a  
2 preponderance of the evidence?

3 MR. LAURENCE: Uh-huh. Yes.

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

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

13 JUSTICE SOUTER: Reasonably -- that does not  
14 answer the problem.

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



1 astounded to find that this is what they have created.

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

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

14 MR. LAURENCE: Certainly.

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

18 MR. LAURENCE: Yes, Your Honor.

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

21 MR. LAURENCE: Yes, Your Honor.

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

25 MR. LAURENCE: Yes, Your Honor.

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

5 MR. LAURENCE: Yes, Your Honor.

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

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

14 And let me quote from what Black said about  
15 1170(b), how it's been construed, not from the facial  
16 language, but how it's been construed. And what Black  
17 says is on page 1255 that: "Although subdivision (b) is  
18 worded in mandatory language, the requirement that an  
19 aggravating factor exist is merely a requirement that the  
20 decision to impose the upper term be reasonable."

21 JUSTICE BREYER: So what we have -- now, this has  
22 clarified it, but I don't know what to do. I think if I  
23 read the opinion the way you're saying, I would say the  
24 California court, which is a good court, conscientious,  
25 managing a huge system of criminal law in the state,

1 probably bigger than the Federal system, reads Blakely  
2 and they see that those guidelines in California as  
3 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 the  
23 reason for that is because California had already  
24 implicitly construed the 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 is 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 the 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. That's -- we're dealing with  
20 --

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 filed 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 you to have  
6 an opportunity to tell me whether there's something in  
7 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 reinvokes 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 it  
15 correctly, that if the impact in a four day trial would  
16 normally be an extra hour for 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 the impact on California would  
25 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. In  
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.

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. Gold, you have four minutes remaining.

14 REBUTTAL ARGUMENT OF PETER GOLD  
15 ON BEHALF OF THE PETITIONER

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

20 The only information I have was what was contained  
21 in Black, that only 13 to 17 percent of cases are  
22 sentenced in the upper range. But what the Court should  
23 also consider is that most -- in most cases, the  
24 difference between the middle term and upper term is  
25 really only a year. In this case, it is four years,

1     which is somewhat unusual.

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

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

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

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

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

24            MR. GOLD: Your Honor, all I can tell you is that  
25    I've never seen a judge take these into account as an

1     aggravating factor. And I would be surprised, under the  
2     case law, if these have been ever upheld as valid  
3     aggravating factors.

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

7             MR. GOLD: Certainly, yes. Certainly, not in this  
8     case.

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

12            MR. GOLD: No, Your Honor.

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

18            MR. GOLD: They do get to interpret how their  
19    statutes operate, Your Honor, but I believe that they are  
20    consistent in saying that this is a mandatory system.  
21    In every one of their quotes, they talk about either a  
22    judge must impose the middle term unless there are  
23    aggravating factors, or they talk about the  
24    requirement -- I was going to mention Justice Breyer's  
25    quote from Black.

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

8           JUSTICE BREYER: So it is comparable to Booker.  
9   And then in the preceding four paragraphs, they correctly  
10   describe Booker?

11           MR. GOLD: Yes. And we have no doubt that they  
12   are trying to fit the Determinate Sentence Law within  
13   Booker, but Booker is about making -- the magic word, as  
14   it were, is advisory versus mandatory, not  
15   reasonableness.

16           So yes, the California system is reasonable. And  
17   that's what the California Supreme Court is talking about  
18   --

19           JUSTICE ALITO: Under any guideline system,  
20   whether it's mandatory or advisory, once -- if you have a  
21   mandatory system or an advisory system with appellate  
22   review, once the appellate review function has been  
23   performed, will it not be the case that trial judges will  
24   not have unfettered discretion, will have very limited  
25   discretion in choosing, making these sentencing policy

1 determinations?

2 That's the whole purpose of a guidelines system.

3 That the individual trial judges don't get to decide, you  
4 know, how much deterrence they think is necessary, or how  
5 severe they think an individual crime is, that there's  
6 supposed to be some kind of uniformity.

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

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Gold. The  
15 case is submitted.

16 (Whereupon, at 11:02 a.m., the case in the  
17 above-entitle matter was submitted.)

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