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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 a 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. 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

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

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

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

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

1 could be used to impose an upper term sentence. Yes.

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

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

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

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

25 JUSTICE SOUTER: That depends on the

1 instructions.

2 MR. GOLD: Yes.

3 JUSTICE SOUTER: If the instructions said,
4 you know, you've got to find all of the things that are
5 set out in the information, and the jury returned a
6 verdict, then we would have found -- and that would
7 satisfy the requirement of an additional fact on an
8 element.

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

10 JUSTICE SCALIA: That would be an erroneous
11 instruction.

12 MR. GOLD: Yes, Justice Scalia.

13 JUSTICE SCALIA: You either have to have an
14 erroneous instruction or a special verdict.

15 MR. GOLD: Yes.

16 JUSTICE SOUTER: Only in the sense that it
17 would require the state to prove more than it had to
18 prove for the elements of the crime.

19 MR. GOLD: Yes, Justice Souter, and I agree
20 that it would be no different than submitting
21 aggravating factors as a separate allegation to the jury
22 as a separate instruction.

23 CHIEF JUSTICE ROBERTS: Counsel, the thing
24 that concerns me about your case is that California's
25 system looks a lot like the federal system after Booker.

1 We haven't addressed the issue or had a case involving
2 review of reasonableness for upward departure. But at
3 least at the circuit, it said, in a federal case, the
4 district judge imposes a maximum doesn't give any reason
5 for departing from what the guidelines might suggest is
6 a reasonable middle ground. He may be -- I think in
7 most circuits, that would be reversed.

8 Same here. If a California judge imposes
9 the upper tier but doesn't make any findings, that's
10 going to be reversed. But if a federal judge gives a
11 statement of his reasons, you know, a vulnerable victim,
12 or an offender likely to offend again, whatever, under
13 most circuit law, that's going to be upheld. Here, if
14 the California judge does that, that's going to be still
15 struck down under your view. You talked about Blakely
16 and Apprendi. But how does this system look to you
17 under Booker?

18 MR. GOLD: Well, Your Honor, this system
19 really is -- this is just like -- this case is just like
20 Blakely. What the California Supreme Court in People
21 against Black found, they used references to
22 reasonableness as a label and a characterization to
23 avoid the bright line rule of Blakely and Apprendi.
24 Instead they tried to fit the Determinate Sentencing Law
25 within the federal system this Court found

1 constitutional in Booker. But the California Supreme
2 Court seriously misread Booker. In Booker, in the
3 remedial portion of that decision, this Court found the
4 federal system to be constitutional by rendering the
5 guidelines -- the mandatory guidelines to be advisory.
6 Now --

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

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

14 THE COURT: My point is if he makes a
15 finding that justifies going up to the higher term, 16
16 years in this case, he doesn't have to impose that
17 higher term, he can go back to the middle term.

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

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

24 MR. GOLD: Yes.

25 JUSTICE BREYER: It does say that? As I

1 read the California opinion, they can go up above the
2 lower, the middle term for any reason, but it has to be
3 reasonable.

4 MR. GOLD: Your Honor, what this -- what the
5 California Supreme Court did, in this --

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

11 MR. GOLD: The answer to your question is
12 that Black has made no change whatsoever to the
13 mandatory nature of California's Determinate Sentencing
14 Law and it has always operated in a mandatory way.

15 JUSTICE BREYER: I think -- let me give
16 you --

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

21 JUSTICE BREYER: If that is your answer, my
22 example will be -- I'll give you a specific example.
23 One example is the question of consecutive versus
24 concurrent sentences, which may have very little to do
25 with facts.

1 A second example might that be a judge in a
2 particular community says there's been an unbelievable
3 rash of breaking and entering. I see how the writers of
4 this guideline, of the statute that embodies it, thought
5 that breaking and entering was X, occurred with X
6 frequency, but we have in this community a sudden rash
7 of crime, such that I think the reasonable thing to do
8 is to increase the sentence as a deterrent.

9 Now, suppose that's what he writes. Is
10 there anything in California law, as you understand
11 Black, that makes that unlawful?

12 MR. GOLD: Yes, Your Honor.

13 JUSTICE BREYER: What?

14 MR. GOLD: I believe that the statements in
15 Black --

16 JUSTICE BREYER: Which statements make that
17 unlawful?

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

1 There are a number of statements throughout
2 the Black opinion that indicate the system has never
3 changed from a mandatory one to an advisory one, so that
4 reasonableness is not the issue. Whether the system is
5 mandatory or advisory --

6 JUSTICE BREYER: So in other words, when
7 they say mandatory factor, they mean aggravating factor,
8 they mean to exclude the kind of aggravating factor I
9 just mentioned.

10 MR. GOLD: Well, a judge can consider those
11 aggravating factors.

12 JUSTICE BREYER: But I mean, could the judge
13 consider the fact that I just mentioned, that there's
14 been an extraordinary rash of breaking and entering in
15 the vicinity?

16 MR. GOLD: Well, Your Honor --

17 JUSTICE BREYER: Yes or no?

18 MR. GOLD: Well, under California's law,
19 they have -- in addition to factors relating to the
20 crime and factors relating to the defendant, the judge
21 can consider unenumerated factors.

22 JUSTICE BREYER: Unenumerated factors. So
23 mine would be an unenumerated factor?

24 MR. GOLD: Yes.

25 JUSTICE BREYER: All right. If he can

1 consider unenumerated factors -- now, I purposely picked
2 mine because I take it it is an example of a factor that
3 Apprendi would not require a jury to find.

4 It is a factor about community. It is not a
5 factor about this defendant. It is not a factor about
6 the manner in which this defendant committed the crime.
7 It is not a fact of that kind.

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

10 JUSTICE BREYER: But if it were reasonable,
11 it would be upheld, or not?

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

19 JUSTICE STEVENS: May I clarify one thing?
20 You mean that a rash of crimes committed by people other
21 than the defendant could be a aggravating factor?

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

25 JUSTICE STEVENS: But there's nothing in

1 California law suggesting that that would be upheld, is
2 there?

3 MR. GOLD: No, Justice Stevens, there is
4 not.

5 JUSTICE SOUTER: So you draw -- as I
6 understand it, your basic answer to Justice Breyer is,
7 it may well be that the situation in the community may
8 justify a judge in going to the -- to the high end of
9 the range that is possible, but that is not a factor
10 that determines what range is possible. And the fact
11 that determines what range is possible, is an
12 aggravating fact, and in that respect it is different
13 from the Federal system. Is that --

14 MR. GOLD: That's absolutely right, Justice
15 Souter.

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

20 (Laughter).

21 JUSTICE SCALIA: Somebody on that side
22 suggested it. That to talk about the fact that there's
23 a lot of crime in the community as an aggravating factor
24 doesn't make any sense. Aggravating factor means
25 something that makes the crime that this person

1 committed worse, not the need for punishment greater,
2 but makes the crime worse. Now if that is not your
3 answer, what is the answer that you gathered, from the
4 left of me?

5 MR. GOLD: Well, with all due respect to
6 Justice Breyer, I believe that that probably would not
7 be an aggravating factor that would be upheld under
8 California law. I was just trying to make the
9 distinction between whether an aggravating factor, no
10 matter what it is, whether it is considered reasonable,
11 whether that's enough to get the judge to go beyond the
12 statutory maximum. But --

13 JUSTICE KENNEDY: I thought your position
14 was that aggravation must be reasonable. What the court
15 in Black indicates is that it is not going to consider
16 anything reasonable unless there's a fact to support it,
17 unless there's a finding of fact to support it.

18 Is that the position you take?

19 MR. GOLD: The position as far as what Black
20 is saying?

21 JUSTICE STEVENS: Yes.

22 MR. GOLD: Yes. I think that Black, what
23 Black is saying is that an aggravating factor needs to
24 be reasonable; but I was trying to make the
25 distinction --

1 JUSTICE KENNEDY: But I think that there's
2 the further indication that it is not going to be deemed
3 reasonable unless it is supported by a finding of fact,
4 as indicated in order to support one of the specific
5 guideline aggravating.

6 MR. GOLD: Certainly if the aggravating
7 factor is not supported by the evidence, then it won't
8 be considered reasonable and the imposition of a upper
9 term won't be considered reasonable. But --

10 JUSTICE ALITO: I still don't understand the
11 distinction between the California system and a system
12 of advisory guidelines with reasonableness appellate
13 review. Let's take a hypothetical case where the
14 statutory range after a convictions on multiple counts
15 is zero to a hundred years. And let's say you have two
16 judges who have these cases. And one sentences the
17 defendant to zero, probation. The other sentences the
18 defendant to a hundred years. Without saying a word of
19 explanation for either sentence, isn't the appellate
20 court in that situation going to say you have to tell us
21 why you have chosen zero or why you have chosen 100?
22 And if the trial judge provides an explanation, isn't
23 the trial judge necessarily going to be reciting certain
24 facts that the judge believes to be true about the
25 offense and the offender?

1 MR. GOLD: Your Honor, if you're describing
2 the Federal system or just a hypothetical system, my
3 understanding in a indeterminate type of system, a judge
4 can impose whatever sentence he wants, and whether or
5 not in a particular system that will be reviewed for
6 reasonableness is a separate question as to what he --

7 JUSTICE ALITO: But isn't a review for
8 reasonableness -- isn't the reasonableness review
9 necessarily going to require what is in essence
10 fact-finding by the trial judge and a review of the
11 reasonableness of the sentence in light of those facts
12 by an appellate court?

13 MR. GOLD: Yes, Your Honor. But what in
14 Booker, what made the Federal system constitutional was
15 not the engraftment of the reasonableness review. It
16 was rendering the mandatory guidelines advisory. And
17 that's the aspect of California's Supreme Court Black
18 decision that they've misread the Booker decision.

19 JUSTICE GINSBURG: Why is that, why is that
20 so? Why isn't the middle sentence, just like what the
21 guideline -- what the guideline would indicate? And if
22 a Federal court would say if I sentence within the
23 guideline, that will be presumptively valid, as many
24 courts have held; not this Court yet. That would be
25 presumptively valid. And if I go outside, I have to

1 give a reason that will survive appellate review. Well,
2 why isn't the middle sentence identical in function to
3 the Federal sentencing guidelines advice?

4 MR. GOLD: Justice Ginsburg, I think it is
5 the mandatory nature in California of the middle term.
6 The judge cannot exceed the middle term unless he finds
7 at least one aggravating factor. And my understanding
8 of the Federal system is the judge can exceed the -- can
9 exceed these guideline ranges and that they're just
10 advisory.

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

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

1 CHIEF JUSTICE ROBERTS: So the only part of
2 the California system that creates a problem is this,
3 the one sentence in the statute that says the judge
4 shall impose the middle term unless he makes a finding.

5 MR. GOLD: That's absolutely right.

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

12 MR. Gold: But Mr. Chief Justice, it is not
13 clear that that would be the result in California. The
14 legislature could very well --

15 CHIEF JUSTICE ROBERTS: Doesn't the decision
16 in Black suggest the Supreme Court thinks that would be
17 the result? The California Supreme Court?

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

22 CHIEF JUSTICE ROBERTS: I thought that --
23 looked to me that's what they were trying to do in
24 Black. I mean, in a way, it is kind of the -- the Black
25 opinion, the day after, if this Court were to agree with

1 you, and the California Supreme Court issued a decision
2 looking a lot like its decision in Black, that would be
3 perfectly valid. In other words, saying that judges can
4 depart within this whole -- just like Booker, they can
5 depart within this whole range, and we're going to
6 review their determinations for reasonableness, they
7 don't have to impose the middle sentence. They can
8 impose a higher sentence and we will review it for
9 reasonableness. That would be perfectly all right.

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

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

22 MR. GOLD: But once again the reasonableness
23 aspect is not what makes the system constitutional. It
24 is the mandatory versus advisory aspect. And again
25 that's what made the Federal system constitutional based

1 on this Court's Booker decision. It wasn't this
2 engraftment of reason -- and reviewing these sentences
3 for reasonableness.

4 JUSTICE BREYER: Well, to be quite -- expose
5 my thinking on it, I found it rather ambiguous, pages
6 1260 and 1261. Is that what the -- the first part of
7 that is -- it says what you said. I have no doubt. It
8 says just what you said. But then you get over to the
9 part, the discussion of Booker, and when they start
10 talking about Booker, they seem to say, seemed to say,
11 that they're adopting what Booker says. Now if they are
12 adopting what Booker says, that means, and that's why I
13 used my example, that I guess a judge would have the
14 power if it is reasonable to just say the guideline,
15 though it thus and so, isn't right for my circumstance
16 and therefore, I don't adopt it. And that would be
17 reviewed for reasonableness, his decision not to follow
18 it. And similarly, we have cases, for example, where
19 they're trying to construct a sentence and they can't
20 get it right because of the consecutive/concurrent
21 nature, so he adds a few things on, you see, to the
22 sentence, in order, and then makes them concurrent. Or
23 you could have things where it is a very sophisticated
24 conspiracy and the jury found the conspiracy; it is a
25 characterization of a conspiracy, it is very

1 sophisticated.

2 And I thought well, maybe all three of those
3 are reasons for going up in California. And I read
4 those pages, 1260, 1261, and my honest opinion is I'm
5 not sure.

6 MR. GOLD: Well, Your Honor, I have no doubt
7 that the California Supreme Court was trying to fit the
8 determinate sentencing law within the constitutionality
9 of this Court's Booker system; but as far as 1261, I'm
10 looking -- every single time they talk about Booker or
11 reasonableness, they also make sure to give the -- to
12 make sure that they make clear that the way the
13 sentence -- the system works is that there's still this
14 requirement of finding a aggravating factor.

15 JUSTICE BREYER: An aggravating fact means
16 aggravating fact.

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

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

22 MR. GOLD: Justice Ginsburg, the court
23 could -- the COURT or the legislature could change
24 section 1170(b) to read something like: "A judge may
25 impose" instead of "shall impose" the middle term and

1 that would be valid to the extent that what they mean by
2 "may" is they can now impose the middle term based just
3 on the facts found by the jury.

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

7 MR. GOLD: They could and in effect they do
8 say --

9 JUSTICE SOUTER: Even though there is the
10 possibility that something above the middle term would
11 also be reasonable without necessarily finding a
12 discrete fact beyond the indictment to justify it.
13 Right?

14 MR. GOLD: Yes. There are --

15 CHIEF JUSTICE ROBERTS: The protection
16 criminal defendants now have they can not be sentenced
17 to a higher term unless the judge makes particular
18 findings will then be no longer applicable.

19 MR. GOLD: Yes, Your Honor. I, I -- and I
20 --

21 JUSTICE STEVENS: That's true unless the
22 California legislature does what most states have done
23 in response to Booker which is not that route at all.
24 They did maintain their determinate sentencing but they
25 just required the jury finding. That's what I think

1 seven out of nine states have done.

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

6 CHIEF JUSTICE ROBERTS: So that now the
7 defendant will have the protection of his jury
8 determining his guilt, will not only have to know the
9 evidence of his guilt of the crime, but also know why
10 he's likely to re-offend in the future, things like he
11 used a firearm, all the bad things that will increase
12 his sentence and might affect how the jury views the
13 issue of guilt in the first place.

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

21 CHIEF JUSTICE ROBERTS: And are there a half
22 a dozen jury trials in each, for each of those various
23 aggravating factors that now have to be tried to the
24 jury?

25 MR. GOLD: No, Your Honor, what I'm trying

1 to say is basically California does that anyway now.
2 Most of the factors that relate to the defendant have to
3 do with recidivism. And those are the same kind of
4 factors that alleged in the information and are tried in
5 a bifurcated proceeding to the jury or are waived and
6 then the trial court will consider them.

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

11 MR. GOLD: They don't have more than one
12 jury. They are tried to the same jury but they are
13 tried after the --

14 JUSTICE BREYER: In what percentage would
15 you say they have bifurcated or several jury trials? I
16 mean more than just one.

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

21 JUSTICE BREYER: No, no, but how many, how
22 many times do they -- let me call it empaneling the jury
23 twice, or two juries, or it could be the same one.

24 MR. GOLD: The same --

25 JUSTICE BREYER: Yes. What percentage would

1 you guess? Just make a rough -- roughest conceivable
2 guess.

3 MR. GOLD: Completely anecdotally, I would
4 say 20 percent.

5 I, if -- I would like to reserve the
6 remainder of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr. Gold.
8 Mr. Laurence.

9 ORAL ARGUMENT BY MR. JEFFREY M. LAURENCE,
10 ON BEHALF OF RESPONDENT

11 MR. LAURENCE: Mr. Chief Justice, and may it
12 please the Court:

13 The central lesson from Booker, from the
14 real portion of Booker, is that not every constraint
15 that's placed on a trial court's discretion in selecting
16 a term within a range that requires fact finding invokes
17 the Sixth Amendment requirement of a jury trial. A
18 reasonableness constraint that requires the court to
19 consider all the circumstances of the defendant and
20 select a reasonable sentence in relation to those facts
21 and those factors does not invoke the Sixth Amendment
22 jury trial right. California has consistently construed
23 its system as placing nothing more than a reasonableness
24 constraint on the trial court's discretion in
25 selecting among the --

1 JUSTICE SCALIA: That's not so at all.
2 California says if you go over the middle range, it is
3 unreasonable, period, unless you prove or you find one
4 of the aggravating factors. That's a constraint. You
5 cannot go above the middle range.

6 MR. LAURENCE: Yes, Your Honor, but that's
7 the same constraint that this Court found not above the
8 Constitution in Booker.

9 JUSTICE SCALIA: No, that's not what we
10 found in Booker. We found in Booker, or at least the
11 way the lower Federal courts have been interpreting
12 Booker, if you use the guideline range and you're within
13 the guideline range, that is automatically reasonable,
14 you don't have to worry about it. But we haven't held,
15 and I don't believe most of the Federal courts have held
16 that if you go beyond the guideline range, it is
17 automatically unreasonable. And that is the case with
18 the California system, if you go beyond the middle
19 range, it is automatically unreasonable unless you --
20 unless you find one of the aggravating facts.

21 MR. LAURENCE: Your Honor, I'd have to
22 respectfully disagree with that because we're not
23 talking about a middle range. What we are talking about
24 is an end point. If I can use the Booker example where
25 you have a term of 10 years to life, the court can

1 certainly make a selection within a reasonable range.
2 At some point as the court increases its sentence beyond
3 a certain point, it will become unreasonable. We don't
4 identify specifically what that point is, the guideline
5 range or something close to it. But when you get to the
6 end point, if there's no justification offered
7 whatsoever for a life term --

8 JUSTICE STEVENS: But the difference is, in
9 the Federal system the judge can go above and it can be
10 reasonable based on facts found by the jury. But in
11 California, to go beyond the middle range to the upper
12 range, it must be a fact not found by the jury.

13 MR. LAURENCE: Well, Your Honor --

14 JUSTICE STEVENS: Is that not correct?

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

17 JUSTICE STEVENS: Correct. But whatever the
18 reason, it is correct.

19 MR. LAURENCE: It is correct, Your Honor,
20 but the central point of both Booker and California is
21 that that upper term is being reversed not because it's
22 unauthorized, but because it's unreasonable.

23 JUSTICE STEVENS: On one hand, in one case,
24 the unreasonableness depends on a finding of fact not
25 made by the jury. But in the Federal system, it does

1 not require that finding by a jury.

2 MR. LAURENCE: Your Honor, if a Federal
3 judge wished to impose a life term, there would have to
4 be something to justify it, or it would be reversed on
5 appeal.

6 JUSTICE BREYER: It wouldn't necessarily be
7 a fact. It could be a fact. What it says in here is
8 that if the -- they speak of, in circumstance related to
9 the crime, or the offender. And in a case in which no
10 such aggravating factor can be found, the judge cannot
11 impose the upper term.

12 Now, I grant you there's some language that
13 I -- it seems to me on the next few paragraphs seems to
14 say something a little different, but that language, if
15 you just take that, seems to say unless, Judge, you find
16 a fact about the situation that would make it reasonable
17 to go above the middle range, you can't, under the law.

18 Now that's what it says. I have to admit, I
19 find it a little difficult to distinguish from Blakely
20 and other cases where I dissented, but the Court's law
21 is what the majority says. So that seems to me almost
22 like it, unless you can tell me that I'm wrong in that.

23 MR. LAURENCE: I would say you are wrong,
24 Your Honor, because California has construed its
25 sentencing law in 1170 as imposing nothing more than a

1 reasonableness.

2 JUSTICE SOUTER: No. As I understand it, it
3 has construed it by saying that if you go above the
4 middle term without the discrete finding of fact beyond
5 what has been proven to the jury, it is unreasonable as
6 a matter of law, and that unreasonableness as a matter
7 of law is what distinguishes it from the Federal system.

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

12 JUSTICE SCALIA: But the justification under
13 the Federal system could be, you know, this is what the
14 sentencing commission thought was a reasonable sentence
15 for this crime. I disagree with that. Now, there are
16 other authorities who think that that's a little too,
17 you know, below what it ought to be. He can simply
18 disagree with the sentencing guidelines.

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

25 MR. LAURENCE: I have two responses to that,

1 Your Honor. First of all, with regard to what the
2 ruling in Booker was, the court's discretion has to be
3 exercised in relation to the policy considerations set
4 out in 3593(a), which are the same policy considerations
5 that the court must look at, very similar in California,
6 that there are -- the court doesn't have unbridled
7 discretions, like any term based on whim, based on
8 whatever it feels would be -- whatever he decides to do
9 on Tuesday. The court has to do it with regard to the
10 policy considerations that are inherent in what the
11 guidelines decisions were and what the legislature
12 established should be appropriate sentencing
13 considerations.

14 JUSTICE SOUTER: But that does not
15 necessarily mean that he must make a discrete finding of
16 fact in order to do it. We come back to Justice
17 Scalia's hypo a moment ago. He can go, you know, in
18 theory under Booker. He can go above the guideline
19 range consistent with policy positions that may not be
20 precise, without necessarily making discrete findings of
21 fact. I mean, he'd have to judge it in each individual
22 case, but the possibility is there, and under the
23 California system, the possibility is not there.

24 MR. LAURENCE: Well, Your Honor, the systems
25 converge at the end point, and that is under the Federal

1 system, going to that right end point would be
2 unreasonable in every circumstance if there's no
3 justification offered other than he committed the
4 offense. In California, because we have three discrete
5 terms rather than a spectrum, you have the same effect
6 when you get to the end point. It would be unjustified,
7 it would be an unreasonable sentence if there's no
8 justification offered. But the fact that California has
9 three points rather than a range shouldn't be
10 constitutionally determined.

11 JUSTICE GINSBURG: And they can't be a fact,
12 in California, it can't be a fact found by the jury, as
13 Justice Stevens pointed out. That's a significant
14 difference.

15 MR. LAURENCE: Well, it can't be an element.
16 Obviously, there could be a circumstance where special
17 findings were made, in which case that might be beyond
18 the elements. But it can't be an element simply because
19 you shouldn't be double counting what's already
20 established. The range is set by the elements of the
21 offense, that all three terms are available from the
22 jury verdict based on those elements. If you are going
23 to make a selection within that range, it would have to
24 be more than simply the defendant committed the offense.
25 And that's the same with the Federal guidelines. Simply

1 saying --

2 JUSTICE SCALIA: It isn't the same in the
3 Federal guidelines. Under the Federal guidelines the
4 judge could say, you know, I think this offense is more
5 serious than what the sentencing commission thought, and
6 these are my reasons for it. There was a dissent, you
7 know -- the sentencing commission's determinations are
8 reasonable but they are surely not the only reasonable
9 disposition. And it is open to a Federal District Judge
10 to say, well, that's what they thought and I took it
11 into account, and I seriously considered it, and I think
12 they are wrong on this, I think this is more serious,
13 and that could be a perfectly reasonable determination.
14 That couldn't be done in California.

15 MR. LAURENCE: Yes, it could, Your Honor. I
16 would refer you to Rule 4.410 in our appendix, page 2
17 and 3, that the general policy considerations that
18 over -- that overlay our sentencing guidelines or our
19 sentencing system, include deterrence for this defendant
20 and deterring others from committing the same crime,
21 that you can't just look to the -- what is happening in
22 this particular neighborhood, as the examples brought
23 out.

24 JUSTICE SOUTER: Are you saying us to that
25 under the California system, if a California judge went

1 through exactly the thought process that Justice Scalia
2 just outlined and put that down on paper, without
3 finding any discrete fact beyond the elements the jury
4 found, that he could go to the third tier, I really
5 think deterrence requires the third tier, not the middle
6 tier? Can a California judge do that?

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

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

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

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

22 JUSTICE SCALIA: Where is that?

23 JUSTICE KENNEDY: It's appendix page 3 in
24 the brief.

25 MR. LAURENCE: Page 2 and 3.

1 JUSTICE BREYER: I'm not sure that that's
2 the way the Black Court interpreted it. The Black Court
3 talked about a requirement that the upper-term sentence
4 be imposed only if an aggravating factor exists.

5 MR. LAURENCE: Yes, Your Honor, that would
6 be considered an aggravating factor, to use deterrence
7 as --

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

19 Well, I assumed until this minute that the
20 first statement trumped the second. But now when I see
21 the court rule, certainly that court rule is possible,
22 given that to be read as permitting them, particularly
23 with the second statement, you would read the second
24 statement as saying yes, they can say that a particular
25 instance or a kind of sentence seemingly mandated at the

1 middle level is in this community so contrary to the
2 purposes of punishment that I'm giving a higher one.

3 To be honest, I don't know what Black means.

4 CHIEF JUSTICE ROBERTS: Before you respond,
5 tell me where the court rule you're talking about is set
6 out.

7 MR. LAURENCE: In our appendix, the appendix
8 to our brief, I'm sorry, the appendix to our brief, page
9 2 and 3.

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

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

21 MR. LAURENCE: Your Honor, that's to exceed
22 the base range, to go beyond the three terms. If you
23 want to impose an enhancement for a gun use, or for, an
24 enhancement as an Apprendi, not for selecting a term
25 within the base range.

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

6 That's not the way we refer to judges'
7 reasoning about policy. That's the way we refer to
8 proof of facts. I don't see how under subsection (b)
9 your answer to me can be correct.

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

15 JUSTICE SCALIA: Well, but they have to be
16 an aggravating factor.

17 MR. LAURENCE: Yes.

18 JUSTICE SCALIA: And to talk about the need
19 for more deterrence as an aggravating factor, it's not
20 an aggravating factor.

21 MR. LAURENCE: Well, Your Honor, I think
22 that the example that was given was in relation to the
23 community that was experiencing some uptick in crime.

24 JUSTICE SCALIA: That's not an aggravating
25 factor. It's a basis for imposing a harsher sentence,

1 but it doesn't aggravate this crime as opposed to the
2 same crime committed by other individuals. It's not an
3 aggravating factor.

4 MR. LAURENCE: Well, Your Honor, the
5 importance of our position, the central thrust of our
6 position is that the reasonableness constraint, the
7 constraint imposed under 1170(b) has been interpreted as
8 a reasonableness constraint. It does not matter if
9 factors are required --

10 JUSTICE SOUTER: Well, it can be a
11 reasonableness constraint and also be a reasonableness
12 restraint that requires a finding of discrete facts for
13 reasonableness. The two are not exclusive.

14 MR. LAURENCE: That's true, Your Honor.
15 That's true.

16 JUSTICE SOUTER: And the rule seems to
17 conflate -- seems very clearly to conflate the finding
18 of a discrete fact. It seems to me that we've got to
19 consider the rule in responding to the ambiguity that
20 Justice Breyer referred to a moment ago. The ambiguity
21 has got to be read in light of subsection (b) and
22 subsection (b) seems to answer the ambiguity by saying
23 preponderance of the evidence. That means a fact
24 finding.

25 MR. LAURENCE: Well, let me explain it this

1 way, Your Honor, that it doesn't matter from our
2 perspective whether or not there is a factor required in
3 order to say that something is -- that the end point is
4 reasonable is, or if you are taking deterrence into
5 account. It is not necessary for our argument because
6 our position is that even if a factor is required --

7 JUSTICE SOUTER: So, do you think under
8 subsection (b) of Rule 4.420, if a judge said, I just
9 think the policy of deterrence requires something
10 heavier, you think that statement by the judge would
11 satisfy the requirement that circumstances in
12 aggravation shall be established by a preponderance of
13 the evidence?

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

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

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

21 JUSTICE SOUTER: Is Black repealing the rule
22 of court? I mean, Black -- we go back to Black, we get
23 the ambiguity that Justice Breyer has raised. In order
24 to solve the ambiguity, we look to the court rule.

25 MR. LAURENCE: Yes.

1 JUSTICE SOUTER: Under the court rule, you
2 admit that a judge's policy consideration, however
3 sincerely held, could not satisfy the requirement to
4 prove aggravation and prior preponderance. Isn't that
5 the end of the issue? I mean, if California wants to
6 amend its rules or its statute, that's California's
7 business. But we can't do it.

8 MR. LAURENCE: Well, no, Your Honor, but
9 California has construed 1170(b) as not requiring a
10 fact-finding to move from the middle term to the upper
11 term. It's simply saying that when the court selects
12 between the three the decision must be reasonable.

13 JUSTICE SOUTER: Why didn't you give a
14 different answer to my question? Why didn't you say if
15 it is reasonable for the court to conclude that
16 deterrence really requires something tougher than the
17 middle term, that's enough? Why didn't you say that is
18 enough and (b) wouldn't preclude it?

19 MR. LAURENCE: Well, Your Honor, I think my
20 answer would have to be that, in relation to the
21 hypothetical given, I was answering it because with
22 regards to the circumstances of the community that the
23 defendant committed a crime in. If we take that away --

24 JUSTICE SOUTER: The judge, the judge is on
25 the bench. He says there's too much in our community.

1 Look at these statistics. Believe that deterrence
2 requires something heavier than the middle tier.
3 Nothing unusual about this particular crime. I'm making
4 a policy decision about what the law should require in
5 general.

6 Would that satisfy Part (b) of 4.420?

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

8 JUSTICE SOUTER: That would satisfy the
9 requirement of, as it puts it, establishing by a
10 preponderance of the evidence?

11 MR. LAURENCE: Uh-huh. Yes.

12 JUSTICE SOUTER: That was not what I
13 understood California law to be or your position to be
14 until this moment.

15 MR. LAURENCE: Well, Your Honor, I have not
16 been suggesting that that single factor is what makes
17 California's law constitutional. What makes
18 California's law constitutional is the fact that the
19 constraint imposed on the court's discretion in
20 selecting terms is a reasonableness requirement, just
21 like Booker.

22 JUSTICE SOUTER: Reasonably -- that does not
23 answer the problem.

24 JUSTICE SCALIA: I think the California
25 Supreme Court and the California legislature would be

1 astounded to think that this is what they have wrought.
2 They obviously intended to establish a scheme in which
3 the judge would apply the middle range, not using his
4 own perception as to whether more punishment is
5 justified or not, unless there's some circumstances
6 about this crime that make this person more guilty, and
7 that's what you usually mean by aggravating
8 circumstances, not the fact that you believe the crime
9 should bear, in general should bear, a higher penalty.
10 I think they would be astounded to find that this is
11 what they have created.

12 MR. LAURENCE: Your Honor, let me take a
13 step back then and say that, even with the requirement
14 that there be some factor, putting aside deterrence as a
15 possibility, California's system as structured, which
16 only requires a reasonableness constraint, does not
17 violate the Constitution, and the reason being because
18 all it's saying is that if you're going to the
19 absolute maximum, the farthest point on the spectrum
20 available, if there's no justification offered, it will
21 be reversed as unreasonable, not as unavailable.

22 JUSTICE KENNEDY: That's the whole problem
23 with your case.

24 MR. LAURENCE: Certainly.

25 JUSTICE KENNEDY: Incidentally, under the

1 rules, under 4.410, those are general objectives of
2 sentencing.

3 MR. LAURENCE: Yes, Your Honor.

4 JUSTICE KENNEDY: That is a term of art
5 that's different from circumstances.

6 MR. LAURENCE: Yes, Your Honor.

7 JUSTICE KENNEDY: So it's only the
8 circumstances that have to be found by a preponderance
9 of the evidence. The general objective can still be
10 considered.

11 MR. LAURENCE: Yes, Your Honor.

12 JUSTICE KENNEDY: But what we are involved
13 with in this case and with this criminal whose
14 conviction and sentence we're reviewing here are
15 circumstances that aggravate, and these do require
16 findings.

17 MR. LAURENCE: Yes, Your Honor.

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

20 MR. LAURENCE: That is correct, Your Honor.

21 Let's just take it a step back and say that what we're
22 talking about -- even if there are circumstances that
23 are required, even if there are some justifications that
24 the court must find aggravating factors, still the only
25 constraint is reasonableness. Let me quote from what

1 Black said about 1170(b), how it's been construed, not
2 from the facial language but how it's been construed.
3 And what Black says is on page 1255 that: "Although
4 subdivision (b) is worded in mandatory language, the
5 requirement that an aggravating factor exist is merely a
6 requirement that the decision to impose the upper term
7 be reasonable."

8 JUSTICE BREYER: What we have -- now this
9 has clarified it, but I don't know what to. I think if
10 I read the opinion the way you're saying I would say the
11 California court, which is a good court, conscientious,
12 managing a huge system of criminal law in the state,
13 probably bigger than the federal system, reads Blakely
14 and they see that those guidelines in California as
15 previously understood were violated, and they're
16 thinking, how do we maintain this system as
17 constitutional. And therefore they write 1261, which
18 can be read as saying we're Bookerizing it and we come
19 as close to Booker as necessary to make it
20 constitutional.

21 Now, that would be an understandable
22 judicial reaction, and I can read the opinion as saying
23 that, at which point I'm not certain what we're supposed
24 to say because I have no doubt that your unease reflects
25 the fact that prior to Black in California it would have

1 been pretty unheard of for a judge to depart upward on
2 grounds other than factual grounds related to the
3 circumstances of the crime or offender. But I also have
4 no doubt that this opinion is written to try to save the
5 California system.

6 All right, so now what do I do?

7 MR. LAURENCE: Well, Your Honor, I think the
8 one thing that seems to be giving you difficulty is the
9 fact that California didn't explicitly say in Black we
10 are now officially Bookerizing our system. The reason
11 for that is because California had already implicitly
12 construed the system as making all three terms legally
13 available based on the jury verdict alone and had simply
14 used a reasonableness requirement. That goes back to
15 Hernandez back in 1988, when California essentially
16 anticipated Apprendi and distinguished between making
17 enhancements available based on the jury verdict and the
18 elements alone versus the three, the three components of
19 the triad scheme.

20 JUSTICE KENNEDY: Well, it is the same old
21 record we've been playing. But the reasonableness
22 requirement has to be explained further. When you
23 explain it further, you find that there must be findings
24 by a preponderance of the evidence for any of the
25 aggravating or mitigating circumstances that are set

1 out. That's different from the objectives of
2 sentencing.

3 MR. LAURENCE: Yes, Your Honor.

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

6 MR. LAURENCE: Yes, Your Honor. Whether or
7 not the objectives of sentencing are involved is not the
8 critical point of the constitutionality of this system.
9 As far as California is concerned, what is important is
10 that first of all the fact that the preponderance of the
11 evidence requirement is essentially the same as what's
12 involved in making discretionary findings within a range
13 in the federal system. We're talking about the findings
14 within a range.

15 JUSTICE SCALIA: Would you want us to hold
16 that we uphold the system here in an opinion that says
17 what California's sentencing judges may do under
18 California law, as you've described it to us, is that
19 they -- they may exceed the middle range whenever they
20 think that that is a better result, whenever they think
21 that that's reasonable?

22 MR. LAURENCE: Yes.

23 JUSTICE SCALIA: And you think California
24 would be happy with that?

25 MR. LAURENCE: Yes. Reasonableness is the

1 touchstone of the constraint imposed upon the trial
2 court in selecting among the three terms, and that would
3 be a perfectly --

4 JUSTICE SCALIA: Well, including reasonable
5 disagreement with the level of severity that the
6 legislature has provided in the middle term. I mean
7 other legislatures may have provided higher severity and
8 the judge says: I simply disagree with the California
9 legislature. And it's a reasonable disagreement,
10 because some other legislature might have done what I
11 do.

12 MR. LAURENCE: No, Your Honor.

13 JUSTICE SCALIA: That isn't reasonable? Why
14 isn't it reasonable?

15 MR. LAURENCE: Reasonableness has to be tied
16 to the policy considerations that underlie the --

17 JUSTICE SCALIA: He ties it to that. He
18 says, I just disagree with the California legislature as
19 to whether this is enough to prevent the defendant from
20 committing this kind of a crime. Look, and he cites
21 another state which provides a much higher sentence for
22 the same crime. Can that possibly be unreasonable?

23 MR. LAURENCE: Yes, Your Honor. I believe
24 that under the California --

25 JUSTICE SCALIA: Then you don't mean

1 reasonably. You mean something else.

2 JUSTICE KENNEDY: May I ask you this
3 question? Excluding capital cases, in your view --
4 anecdotally, if it has to be that -- what percentage of
5 cases that go to juries, that go to jury trial, result
6 in bifurcated proceedings for sentencing purposes? 90
7 percent?

8 MR. LAURENCE: I would say probably a rough
9 guess would be around 10 percent. That's a very
10 rough --

11 JUSTICE STEVENS: On that question, may I
12 ask, on that subject, may I ask you this question: Have
13 you read the brief filed by the National Association,
14 the amicus brief filed by the National Association of
15 Defense Lawyers, which has a long discussion of the
16 practical consequences in other states and in
17 California?

18 MR. LAURENCE: Yes.

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

24 MR. LAURENCE: Well, Your Honor, it would
25 certainly be a big deal to California. But more

1 importantly, if this court were to say that a
2 reasonableness constraint reinvokes the Sixth Amendment,
3 you would be basically throwing into doubt the way
4 Booker has reformed the federal system as well, because
5 --

6 JUSTICE STEVENS: They say, if I remember it
7 correctly, the impact in a four day trial would normally
8 be an extra hour for the jury, that that's about the
9 burden on the system. Of course, 90 some percent of
10 your cases are pleaded out by guilty, so it's not the
11 major thing that we originally thought it might be. Do
12 you think, just across the board, are they fairly
13 accurate in their description of what happened in other
14 states as far as you're advised?

15 MR. LAURENCE: As far as the other states
16 go, yes, Your Honor. I believe the impact on California
17 would be a requirement of a secondary trial after the
18 main trial. It would also impose the burden of trying
19 to identify whatever aggravating circumstances or
20 whatever relevant considerations have to take place in a
21 particular case, which can be a multitude of things. In
22 California law essentially anything can, anything can
23 justify an upper term sentence. Only when there's
24 absolutely nothing, not a scintilla of justification,
25 that an upper term becomes unreasonable and therefore

1 reversed.

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

5 MR. LAURENCE: It's my understanding that
6 under -- currently in California about 20 percent of the
7 prison population has an upper term. So I don't know
8 how many cases there are on a year-by-year basis or
9 since Blakely or since Apprendi, but probably in the
10 thousands, possibly.

11 JUSTICE KENNEDY: Yes. You had 200,000
12 incarcerated when I last looked.

13 MR. LAURENCE: Yes, Your Honor.

14 And the -- once again the important aspect,
15 what's -- the key aspect is whether or not a term is
16 legally available and whether or not there's a
17 constraint that's imposed that takes away that legal
18 availability as a threshold matter rather than a
19 reasonableness review requirement. California has
20 consistently construed 1170(b) as imposing a
21 reasonableness requirement. This Court in Booker said
22 that a reasonableness requirement does not limit the
23 availability of those upper terms.

24 JUSTICE SCALIA: Do you know of any case in
25 which a California trial judge has gone beyond the

1 middle range not on the basis of a fact that that judge
2 has found, but rather on the basis of some general
3 policy he thinks that the punishment should be greater,
4 something along the lines of what Justice Breyer
5 suggested?

6 MR. LAURENCE: No, Your Honor, I'm not aware
7 of it.

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

11 MR. LAURENCE: Once again, Your Honor, that
12 is not the critical component of why this system is
13 constitutional. That's not what we are advancing in our
14 briefs. It's not the position I'm arguing here, that
15 that what would save California's system. What saves
16 California's system is that the only constraint imposed
17 is a reasonableness constraint, and that reasonableness
18 constraint, 1170(b), has been interpreted over time as
19 simply imposing the abuse of discretion standard on the
20 court and that has been applied to all three terms. The
21 middle term is also reviewed for an abuse of discretion,
22 as is the lower term. What is important to note is,
23 even though the middle term -- the only reason the
24 middle term has been given the label "presumptive" is
25 because the court doesn't have to expressly articulate

1 its reasons for selecting it. But it still has to do a
2 balancing to make a determination as to what's
3 reasonable, including in the middle term.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Laurence.

6 Mr. Gold, you have four minutes remaining.

7 REBUTTAL ARGUMENT OF PETER GOLD

8 ON BEHALF OF PETITIONER

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

13 The only information I have was what was
14 contained in Black, that only 13 to 17 percent of cases
15 are sentenced in the upper range. But what the Court
16 should also consider is that most -- in most cases the
17 difference between the middle term and upper term is
18 really only a year. In this case, it is four years,
19 which is somewhat unusual.

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

24 I also wanted to echo what Justice
25 Kennedy, I believe was saying. California Rules of

1 Court Rule 4.410 is just general objectives of
2 sentencing. These are not aggravating factors. You
3 can't take into account the uniformity of sentencing
4 securing restitution for the victims, these aren't
5 aggravating factors that the judge considers.

6 CHIEF JUSTICE ROBERTS: Rule 4.410(b) says
7 the sentencing judge should be guided by the criteria in
8 these rules.

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

13 JUSTICE KENNEDY: But a reading of the rule
14 indicates under (b) as the Chief Justice points out, the
15 judge could take into account these policy objectives.

16 MR. GOLD: All I can tell you is I've never
17 seen a judge take these into account as an aggravating
18 factor. I would be surprised under the case law if
19 these have ever been upheld as valid aggravating
20 factors.

21 JUSTICE KENNEDY: I think it is true it
22 doesn't seem to be involved in this case. In this case
23 we're under 4.420.

24 MR. GOLD: Certainly.

25 CHIEF JUSTICE ROBERTS: We have to conclude

1 the California Supreme Court has misread California law
2 to agree with you, don't we?

3 MR. GOLD: No, Your Honor.

4 CHIEF JUSTICE ROBERTS: I see 1170(b). I
5 understand your argument, but when I read the California
6 Supreme Court opinion in Black, it says this is what it
7 means. It doesn't seem to be what it means but they get
8 to interpret it, don't they?

9 MR. GOLD: They do get to interpret how
10 their statutes operate, but I believe they are
11 consistent in saying that this is a mandatory system.
12 In every one of their quotes they talk about how a judge
13 must impose the middle term unless there are aggravating
14 factors. I was going to mention Justice Breyer's quote
15 from Black and even in that one, they say because an
16 aggravating factor under California law may include any
17 factor the judge reasonably deems to be relevant, and
18 then say the determining sentencing law's requirement
19 that an upper-term sentence be imposed only if an
20 aggravating factor exists. They always talk about the
21 requirement that this aggravating factor must exist.

22 JUSTICE BREYER: So it is comparable to
23 Booker. And in the preceding four paragraphs, they
24 correctly describe Booker?

25 MR. GOLD: Yes. We have no doubt they are

1 trying to fit the determining sentence law within
2 Booker, but Booker is about making the magic word, as it
3 were, advisory versus mandatory, not reasonableness.

4 Yes, the California system is reasonable.
5 That's what the California Supreme Court is talking
6 about --

7 JUSTICE ALITO: Under any guideline system,
8 whether mandatory or advisory, once -- if you have a
9 mandatory system or an advisory system with appellate
10 review, once the appellate review function has been
11 performed, will it not be the case that trial judges
12 will not have unfettered discretion, will have very
13 limited discretion in choosing, making these sentencing
14 policy determinations?

15 That's the whole purpose of a guidelines
16 system. The judges don't get to decide how much
17 deterrence they think is necessary or how severe they
18 think an individual crime is. There has to be some kind
19 of uniformity.

20 MR. LAURENCE: Justice Alito, there is
21 discretion in our system. But it is the discretion to
22 impose an upper-term sentence after finding aggravating
23 factors. I think in an indeterminate system, as you
24 were discussing earlier, I think that that -- I'm not
25 sure. It depends what the system is, as far as what the

1 reasonableness constraints are.

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

3 The case is submitted.

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

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