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No. 05-6551

In The
Supreme Court of the United States

JOHN CUNNINGHAM,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District, Division Five

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

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The unpublished opinion of the California Court of Appeal is reprinted at Joint Appendix ("J.A.") 27-50. The order of the California Court of Appeal denying a rehearing and modifying its opinion is reproduced at J.A. 51. The order of the California Supreme Court denying discretionary review of the Court of Appeal's decision is reproduced at J.A. 51. The trial court's pertinent sentencing orders are reproduced at J.A. 5-26.

STATEMENT OF JURISDICTION

The California Supreme Court issued its order denying discretionary review on June 29, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

B. State Statutory Provisions

California Penal Code § 288.5(a) provides that any person who violates that section "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years."

California Penal Code § 1170(b) provides in pertinent part:

> When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.* . . . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.

(Emphasis supplied).

C. State Rules of Court

Rule 4.420 of the California Rules of Court provides in relevant part:

> (a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is

> ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. *The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation*.
>
> (b) *Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence*.

(Emphasis supplied).

All other relevant provisions of the California Rules of Court are reprinted in Appendix D to the petition.

STATEMENT OF THE CASE

A. California's Determinate Sentencing Law

The California Legislature enacted the Determinate Sentencing Law (the "DSL") in 1976, replacing an indeterminate sentencing scheme. Added by Stats. 1976, c. 1139, § 273, p. 5140, operative July 1, 1977, as amended by Stats. 1977, c. 165, § 15, p. 647. Under California's sentencing law, after a defendant suffers a conviction, a judge, not a jury, determines and imposes punishment. Cal. Pen. Code § 12.[1] For most felonies, the judge must sentence the defendant to either a lower, middle, or upper term of imprisonment. *See, e.g.*, § 18 [providing for state prison term of 16 months, two years, or three years for

[1] All statutory references are to the California Penal Code unless otherwise specified.

every felony offense not prescribing different punishment]. Judges have no authority to devise *ad hoc* sentences, or otherwise deviate from the DSL. § 12; *People v. Montano*, 6 Cal.App.4th 118, 123, 8 Cal.Rptr.2d 136, 139 (Cal.App. 1992).

Sentencing judges must impose the middle term unless they find the existence of additional facts which justify a mitigated or aggravated term: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime." § 1170(b) (emphasis supplied); *see also* Cal. Rules of Court, rule 4.420(a)[2] ["The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation."]; *People v. Lobaugh*, 188 Cal.App.3d 780, 785, 233 Cal.Rptr. 683, 686 (Cal.App. 1987). Thus, under the DSL, the middle term is the presumptive sentence. *People v. Black*, 35 Cal.4th 1238, 1257, 113 P.3d 543, 545, 29 Cal.Rptr.3d 740, 753 (Cal. 2005); Laurie L. Levenson & Alex Ricciardulli, California Criminal Law § 1:20, at 32 (2005).

Judges may depart from the presumptive middle term and impose the upper term only where they find exceptional circumstances in the form of aggravating factors.

[2] The DSL provides that "[i]n sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council." Cal. Pen. Code § 1170(a)(3); *see also* § 1170.3(a) [directing Judicial Council to promote uniformity in sentencing by adopting rules for consideration of sentencing judge]. In turn, the Judicial Council has promulgated rules of court "under express authority granted by the Legislature." Cal. Rules of Court, Introductory Statement. "All of the California Rules of Court have the force of law." *Ibid*.

§ 1170(b); Cal. Rules of Court, rule 4.420(b); *Black,* 35 Cal.4th at 1247, 113 P.3d at 538, 29 Cal.Rptr.3d at 744. The DSL allows judges to find such aggravating factors by only a preponderance of the evidence. Cal. Rules of Court, rule 4.420(b); *People v. Wright*, 30 Cal.3d 705, 710, 639 P.2d 267, 269, 180 Cal.Rptr. 196, 199 (Cal. 1982). In the absence of circumstances in aggravation, imposition of the upper term is unauthorized and requires a reversal of the defendant's sentence. § 1170(b); Cal. Rules of Court, rule 4.420(a) & (b); *Black,* 35 Cal.4th at 1260, 113 P.3d at 547, 29 Cal.Rptr.3d at 755, *People v. Simon*, 208 Cal.App.3d 841, 852, 256 Cal.Rptr. 373, 380 (Cal.App. 1989). Although judges need not state reasons for imposing the presumptive middle term, they must state orally on the record their "reasons for selecting the upper or lower term," including "a concise statement of the ultimate facts which the court deemed to constitute aggravation or mitigation justifying the term selected." Cal. Rules of Court, rule 4.420(e); *see also* § 1170(b); *Black,* 35 Cal.4th at 1248, 113 P.3d at 539, 29 Cal.Rptr.3d at 745.

Rule 4.421 sets forth a non-exhaustive list of circumstances which may constitute aggravating factors, including facts relating to the crime, facts relating to the defendant, and "[a]ny other facts statutorily declared to be circumstances in aggravation." Cal. Rules of Court, rule 4.421(a)-(c). Rule 4.408(a) further provides that when making discretionary sentencing decisions, judges may consider "additional criteria reasonably related to the decision being made."

However, judges may *not* use a fact which is an element of the crime as an aggravating factor. Cal. Rules of Court, rule 4.420(d); *People v. Fernandez,* 226 Cal.App.3d 669, 680, 276 Cal.Rptr. 631, 637 (Cal.App.

1990). Similarly, even where a fact is not technically an element of the underlying crime, judges still may not rely upon it as an aggravating factor where the fact is inherent in the crime. *See, e.g., People v. Young,* 146 Cal.App.3d 729, 734, 194 Cal.Rptr. 338, 341 (Cal.App. 1983) [judge improperly relied upon "extreme serious nature of the offense" to aggravate defendant's sentence for assault with a deadly weapon since this offense is "obvious[ly]" an extremely serious offense]. The DSL also prohibits judges from imposing the upper term based on a fact charged and found true as a sentence enhancement unless the judge first strikes the punishment associated with the enhancement. § 1170(b); Cal. Rules of Court, rule 4.420(c); *People v. Garcia,* 32 Cal.App.4th 1756, 1777, n.15, 39 Cal.Rptr.2d 73, 85, n.15 (Cal.App. 1995). Consequently, in finding the existence of factors in aggravation, sentencing judges necessarily rely on facts *beyond* those inherent in the jury's verdict or the defendant's guilty plea.

B. Petitioner's Case

On March 14, 2001, the State filed an indictment charging petitioner with one count of continuous sexual abuse of a child in violation of California Penal Code § 288.5. J.A. 2-3. Section 288.5 provides that anyone convicted of this offense "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." § 288.5(a).

Petitioner was a police officer. Reporter's Transcript ("R.T.") 243, 350. His son, John Doe, lived with his mother for the first ten years of his life. R.T. 45. Doe had a history of telling lies. R.T. 50, 90, 172, 183, 190, 271, 360-362, 402. When Doe was eight, he called a boys' home in Nebraska

and falsely reported that his mother did not return from work until 8:00 p.m. or 9:00 p.m. and the house had no food in it. R.T. 49-50, 83, 86, 90. This was his way of getting back at his mother. R.T. 271.

At age ten, Doe decided that he wanted to live with petitioner. R.T. 48. In order to accomplish this, he told petitioner and the police that his step-father beat him, causing injuries to his back. R.T. 49, 91, 93, 95, 152, 192. Investigation revealed that the scars on Doe's back were old and that he had lied. R.T. 49, 95, 141. Thereafter, Doe admitted fabricating the beatings in order to cause a move into petitioner's home. R.T. 49, 95.

Despite his lies, Doe moved in with petitioner in December of 1999. R.T. 49-50, 142. According to Doe, shortly thereafter petitioner began sexually abusing him. R.T. 50. Doe alleged that over the course of approximately ten months, petitioner committed numerous acts of molestation, sodomy, and oral copulation against him. R.T. 52-55, 58-61, 64. At some point, Doe wanted to move out of petitioner's home. R.T. 66, 102. He told various relatives that petitioner had abused him, and eventually returned to live with his mother and step-father. R.T. 67, 73, 143, 196, 205. Doe claimed that petitioner told him, "You come back I am going to F you up." R.T. 72.[3]

Petitioner denied Doe's accusations of sexual abuse. R.T. 506-507, 543, 548. Petitioner and other relatives of Doe suggested that Doe levelled these allegations because he was angry with petitioner for disciplining him and

[3] Petitioner's sister-in-law reported that according to Doe, petitioner told him, "In a week you better say you are lying or else I am going to fuck you up." R.T. 208.

requiring him to do chores, and because he wanted to return to his mother's home. R.T. 437-438, 451, 461, 463, 523-524, 528, 579.

On May 30, 2003, the jury convicted petitioner as charged, stating in its verdict form that it found petitioner guilty of "a violation of PC Sec. 288.5, (continuous sexual abuse), as set forth in the indictment." J.A. 4. The jury made no other factual findings.

The trial judge sentenced petitioner on August 1, 2003. J.A. 5-26. The judge found the existence of six aggravating factors pursuant to California's Rules of Court: (1) great violence, great bodily harm, and threat thereof disclosing a high degree of viciousness and callousness (rule 4.421(a)(1)); (2) a vulnerable victim due to his age and dependence on petitioner as his father and primary caretaker (rule 4.421(a)(3)); (3) a threat of bodily injury to coerce the victim to recant (rule 4.421(a)(6)); (4) taking advantage of a position of trust or confidence as the victim's father and caregiver (rule 4.421(a)(11)); (5) engaging in violent conduct which indicates a serious danger to society (rule 4.421(b)(1)); and (6) employment as a police officer (rule 4.408(a)). J.A. 22-23. The judge found one mitigating factor: petitioner's lack of any prior record (rule 4.423(b)(1)). J.A. 22.[4] Finding that the factors in aggravation outweighed the factor in mitigation,

[4] At the sentencing hearing, four people spoke to petitioner's good character and regard in the community, and twenty more people were present and willing to speak on his behalf. J.A. 10-14. Defense counsel argued that petitioner's amenability to treatment and support from his family and community made him an excellent prospect for rehabilitation. J.A. 15-16. Counsel also objected to the factors in aggravation, including John Doe's vulnerability and petitioner's position of trust as his parent since those factors were elements of the section 288.5 conviction. J.A. 16.

the judge departed from the presumptive middle term of 12 years and sentenced petitioner to the upper term of 16 years in state prison. J.A. 23.

In a split decision, the California Court of Appeal affirmed petitioner's conviction and sentence. J.A. 27-50. Specifically, the appellate court rejected petitioner's contention that he was deprived of his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process because the trial court imposed the upper term of 16 years by relying on aggravating factors neither found true by a jury nor beyond a reasonable doubt. J.A. 46-48. The court found that under California's DSL, "the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment." J.A. 47.[5] Presiding Justice Jones dissented from this portion of the majority's opinion, concluding that *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), compelled a remand for resentencing since "[u]nder California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term." J.A. 49.

[5] In a separate portion of its opinion, the Court of Appeal (1) found that the trial court had erred in finding petitioner took advantage of a position of trust or confidence; (2) assumed that the trial court "misplaced" its reliance on the crime involving great violence or great bodily harm; and (3) also assumed that the trial court improperly relied on petitioner's employment as a police officer as an aggravating factor. J.A. 43-46. The appellate court further determined that "the [trial] court properly found two aggravating factors and exercised its discretion in balancing them against a single mitigating factor." J.A. 46.

Petitioner sought discretionary review of this issue in the California Supreme Court. While his petition for review was pending, the California Supreme Court decided *People v. Black,* 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (Cal. 2005), ruling that criminal defendants have no federal constitutional right to a jury trial on aggravating factors used to impose an upper term sentence under the DSL. Thereafter, the California Supreme Court issued an order denying discretionary review in petitioner's case, "without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black*. . . ." J.A. 52. *Black* became final on August 31, 2005, with no change in the opinion. *See Black,* 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740.

On February 21, 2006, this Court granted certiorari in petitioner's case. J.A. 53.

SUMMARY OF ARGUMENT

In *Blakely v. Washington,* 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), this Court confirmed that any fact, other than the fact of a prior conviction, which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The Court has recently applied this constitutional mandate to invalidate the Federal Sentencing Guidelines, Washington state's sentencing scheme, and Arizona's Death Penalty Law to the extent they permitted judicial factfinding of aggravating factors to justify the imposition of a sentence greater than the maximum authorized by the

jury's verdict or the defendant's admissions. *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely,* 542 U.S. 296, 124 S.Ct. 2531; *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

The procedure for imposing an upper term sentence under California's DSL contravenes the bright-line rule set forth in *Blakely* and *Apprendi* in violation of the Sixth Amendment right to a jury trial and the Fourteenth Amendment due process right to proof beyond a reasonable doubt. When a criminal defendant in California suffers a conviction for a felony offense which specifies three possible prison terms – a lower, middle, and upper term – the DSL requires the sentencing judge to impose the middle term unless the judge finds circumstances in aggravation or mitigation. Accordingly, the middle term is the presumptive sentence, or "statutory maximum" allowable for the offense. Nevertheless, without additional jury findings, the DSL authorizes the judge to depart from this presumptive term to impose an upper term based on the judge's finding of aggravating factors by a preponderance of the evidence. This procedure for imposing upper term sentences is indistinguishable from the Washington state procedure for imposing exceptional sentences which this Court found unconstitutional in *Blakely*.

In petitioner's case, his conviction under California Penal Code § 288.5 subjected him to a presumptive middle term of 12 years in state prison. However, the sentencing judge subsequently found six factors in aggravation and one factor in mitigation by a preponderance of the evidence. Determining that the aggravating factors outweighed the mitigating factor, the judge sentenced petitioner to the upper term of 16 years. *Blakely* and

Apprendi explicitly condemn as a Sixth Amendment violation such judicial factfinding of aggravating factors to justify the imposition of a sentence greater than the statutory maximum authorized by the jury's verdict. Similarly, this Court's precedents reveal the judge's imposition of four additional years in state prison based on his finding of aggravating factors by a mere *preponderance of the evidence* as a clear violation of petitioner's due process right to proof of every element of the charged crime beyond a reasonable doubt. California afforded petitioner adequate procedural safeguards, including a trial by jury and proof beyond a reasonable doubt, with regard to the charged section 288.5 offense. Yet, it failed to furnish him those very same safeguards as to the existence of aggravating factors despite the increased loss of liberty attending a finding of such factors. California has no principled basis for depriving defendants of basic protections in the proof of these aggravating factors, and does so simply by labelling the factors "circumstances in aggravation."

In *People v. Black,* the California Supreme Court concluded that the DSL's procedure for imposing the upper term does not offend the Sixth or Fourteenth Amendments. 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740. However, in arriving at this conclusion, the court relied on grounds decisively rejected in *Blakely*. Citing this Court's recent decision in *United States v. Booker*, the California Supreme Court maintained that the upper term constitutes the statutory maximum for purposes of Sixth Amendment analysis because California judges retain discretion not to impose the upper term even after finding factors in aggravation. The Court in *Blakely* exposed the fallacy of this distinction. Any judicial factfinding which

forms the basis for increasing a sentence beyond the maximum authorized by the jury's verdict – whether the judicially determined facts *require* a sentence enhancement or merely *allow* it – is unconstitutional. The California Supreme Court also deemed it critical that the list of aggravating factors a sentencing judge may consider under the DSL is illustrative rather than exhaustive. *Blakely* rejected this distinction too as immaterial. Whether a sentencing scheme permits a judge to impose an enhanced sentence based on an enumerated factor or an unenumerated factor does not change the fact that the jury's verdict alone still fails to authorize the enhanced sentence.

ARGUMENT

I. CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. *Blakely* And *Apprendi* Require Any Fact, Other Than The Fact Of A Prior Conviction, That Increases The Penalty For A Crime Beyond The Statutory Maximum To Be Submitted To A Jury And Proved Beyond A Reasonable Doubt.

The Sixth and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United*

States v. Gaudin, 515 U.S. 506, 509-510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *see also Mullaney v. Wilbur,* 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship,* 397 U.S. 358, 363-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Sixth Amendment requires to be proven to a jury beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348; *Mullaney*, 421 U.S. at 698, 95 S.Ct. 1881; *Specht v. Patterson,* 386 U.S. 605, 607, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

The right to a jury trial reflects the historical intention to ensure the people's control in the judiciary. *Blakely,* 542 U.S. at 305-306, 124 S.Ct. 2531. "The very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Id*. at 308, 124 S.Ct. 2531. "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict." *Id*. at 306, 124 S.Ct. 2531. In particular, *Apprendi* requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348; *see also Booker,* 543 U.S. at 244, 125 S.Ct. 738. In *Apprendi*, a factual finding under New Jersey's hate crime statute that defendant committed the charged possession of a firearm offense with the purpose to intimidate individuals because of race increased the statutory maximum penalty from between five and ten years imprisonment to between ten and twenty years imprisonment. As a result, the Court determined

that this factual finding constituted an element of the offense to be submitted to a jury and proved beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490-492, 120 S.Ct. 2348.

Ring v. Arizona applied the holding of *Apprendi* to Arizona's death penalty law. Under that law, the maximum punishment for first-degree murder was life imprisonment unless the trial judge found beyond a reasonable doubt that one of ten statutorily enumerated aggravating factors existed. This Court held that a death sentence under Arizona law violated the defendant's right to a jury determination of guilt on every element of the crime charged. *Ring,* 536 U.S. at 589, 122 S.Ct. 2428. Thus, the Sixth Amendment mandates that a jury, rather than a sentencing judge, find the existence of an aggravating factor necessary for the imposition of the death penalty. *Id.* at 609; 122 S.Ct. 2428.

Blakely v. Washington further elaborated on a defendant's right to a jury determination of non-recidivist aggravating factors beyond a reasonable doubt. There, defendant pleaded guilty to kidnaping his estranged wife while using a firearm. Under Washington law, the facts defendant admitted through his plea supported a prison sentence in the "standard range" of 49 to 53 months. However, Washington law also permitted the judge to impose a sentence *above* the standard range if he found the existence of an aggravating factor demonstrating "substantial and compelling reasons justifying an exceptional sentence." *Blakely*, 542 U.S. at 299, 124 S.Ct. 2531. The judge could make such a finding by a mere preponderance of the evidence. *State v. Gore,* 143 Wash.2d 288, 21 P.3d 262 (Wash. 2001); Wash. Rev. Code Ann. § 9.94A.370(2). Furthermore, he could choose from a non-exhaustive list of

aggravating factors, although he could not rely on a factor already used to compute the standard range sentence for the offense. *Blakely,* 542 U.S. at 299, 124 S.Ct. 2531. Pursuant to these sentencing provisions, the judge imposed an exceptional sentence of 90 months based on his finding that defendant had acted with "deliberate cruelty" in committing the kidnaping offense. *Id.* at 300, 124 S.Ct. 2531.

In invalidating Mr. Blakely's exceptional sentence, this Court initially observed:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. (Citations omitted.) In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts.

Id. at 303-304, 124 S.Ct. 2531 (emphasis in original). Applying this principle, the Court found that the statutory maximum sentence based solely on the facts defendant admitted in his guilty plea was the standard range of 49 to 53 months; the judge was prohibited from imposing the exceptional 90-month sentence on those facts alone. *Id.* at 304, 124 S.Ct. 2531. Consequently, the judge necessarily based his imposition of an additional 37 months beyond the statutory maximum upon a factual finding unsupported by defendant's plea and never found true by a jury beyond a reasonable doubt. *Ibid.* The imposition of the 90-month exceptional sentence under Washington's sentencing scheme therefore violated defendant's Sixth Amendment right to trial by jury. *Id.* at 305, 124 S.Ct. 2531.

Most recently, in *United States v. Booker*, this Court reaffirmed the bright-line rule of *Blakely* and *Apprendi* while invalidating the Federal Sentencing Guidelines to the extent that they permitted judges, based on their own factfinding, to impose sentences greater than those authorized by the jury's verdict. *See* 543 U.S. at 243-244, 125 S.Ct. 738. There, a jury convicted defendant of possessing at least 50 grams of crack cocaine with intent to distribute it, an offense which, when coupled with defendant's criminal history, mandated a prison sentence of between 210 and 262 months in prison under the Guidelines. However, during a sentencing hearing, the judge found by a preponderance of the evidence that defendant possessed an additional 566 grams of crack and had obstructed justice. Under the Guidelines, these additional findings compelled the judge to sentence defendant to a term of between 360 months and life imprisonment. The judge chose a sentence of 360 months. In concluding that this sentencing procedure violated defendant's Sixth Amendment right to a jury trial, this Court found "no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines in [this] case[ ]." *Id.* at 235, 125 S.Ct. 738. "The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely*, 'the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.'" *Ibid*.[6]

[6] In a separate majority opinion, the Court in *Booker* addressed how to remedy the constitutional defects of the Guidelines in light of Congress' likely intent in enacting them. The Court achieved this result

(Continued on following page)

B. The Determinate Sentencing Law's Procedure For Imposing An Upper Term Violates Defendants' Sixth Amendment Right To A Jury Trial.

The procedure for imposing an upper term sentence under California's DSL infringes on defendants' Sixth Amendment right to a jury trial. Under the DSL, when a defendant is convicted of a felony offense which specifies three possible prison terms – a lower, middle, and upper term – the sentencing judge *must* impose the middle term unless the judge finds aggravating or mitigating factors. Cal. Pen. Code § 1170(b); Cal. Rules of Court, rule 4.420(a); *People v. Lobaugh*, 188 Cal.App.3d 780, 785, 233 Cal.Rptr. 683, 686 (Cal.App. 1987). Thus, the middle term is the presumptive sentence. *Black,* 35 Cal.4th at 1257, 113 P.3d at 545, 29 Cal.Rptr.3d at 753. Because the middle term is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury's verdict or admitted by the defendant, it also constitutes the "statutory maximum" for *Blakely* and *Apprendi* purposes. *Blakely,* 542 U.S. at 303-304, 124 S.Ct. 2531.

An upward deviation from the DSL's statutory maximum sentence operates exactly like an upward deviation under Washington's flawed sentencing law in *Blakely*. The DSL permits judges to impose an exceptional sentence only where they find aggravating circumstances justifying

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by rendering the Guidelines advisory, thereby making the statutory maximum the maximum stated in the statute of conviction. 543 U.S. at 245-246, 125 S.Ct. 738. Under the new advisory system, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing," and the federal appellate courts must "review sentencing decisions for unreasonableness." *Id.* at 264, 125 S.Ct. 738.

the upper term; the imposition of an upper term in the absence of such aggravators requires reversal. § 1170(b); Cal. Rules of Court, rule 4.420(a) & (b); *Black,* 35 Cal.4th at 1247, 113 P.3d at 538, 29 Cal.Rptr.3d at 744; *People v. Simon*, 208 Cal.App.3d 841, 852, 256 Cal.Rptr. 373, 380 (Cal.App. 1989). The DSL allows judges to find aggravating circumstances by a mere preponderance of the evidence. Cal. Rules of Court, rule 4.420(b); *People v. Wright*, 30 Cal.3d 705, 710, 639 P.2d 267, 269, 180 Cal.Rptr. 196, 199 (Cal. 1982). It provides judges with an illustrative list of aggravating factors from which to choose. Cal. Rules of Court, rules 4.408(a) & 4.421. Finally, it prohibits judges from imposing the upper term based on aggravating factors which are elements of the crime or facts found true and used to enhance the sentence. § 1170(b); Cal. Rules of Court, rule 4.420(c) & (d); *People v. Garcia,* 32 Cal.App.4th 1756, 1777, n.15, 39 Cal.Rptr.2d 73, 85, n.15 (Cal.App. 1995); *People v. Fernandez,* 226 Cal.App.3d 669, 680, 276 Cal.Rptr. 631, 637 (Cal.App. 1990); *People v. Young,* 146 Cal.App.3d 729, 734, 194 Cal.Rptr. 338, 341 (Cal.App. 1983).[7] As in *Blakely*, then, the DSL violates defendants' jury trial right by allowing judges to impose a sentence beyond the statutory maximum based on factual findings unsupported by the jury's verdict and never found true by a jury. *Blakely*, 542 U.S. at 304-305, 124 S.Ct. 2531.

[7] Also similar to Washington's sentencing procedure, the DSL requires judges to state orally on the record their reasons for selecting the upper term, including "a concise statement of the ultimate facts which the court deemed to constitute aggravation. . . ." Cal. Rules of Court, rule 4.420(e); *see also* § 1170(b); *Black,* 35 Cal.4th at 1248, 113 P.3d at 539, 29 Cal.Rptr.3d at 745; *cf. Blakely*, 542 U.S. at 299, 124 S.Ct. 2531 ["When a judge imposes an exceptional sentence [under Washington law], he must set forth findings of fact and conclusions of law supporting it."].

California Penal Code § 288.5 – the provision under which petitioner was convicted – provides that anyone who violates that section "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." Cal. Pen. Code § 288.5(a). In the absence of aggravating factors, a deviation from the middle term sentence of 12 years to the upper term of 16 years is unauthorized under the DSL. § 1170(b); Cal. Rules of Court, rule 4.420(a) & (b). Thus, pursuant to *Apprendi* and *Blakely*, the middle term of 12 years is the "statutory maximum" sentence that a judge may impose for a section 288.5 conviction "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely,* 542 U.S. at 303, 124 S.Ct. 2531 (emphasis in original).

Without the benefit of additional jury factfinding, the judge in this case found six aggravating factors based upon which he departed from the statutory maximum of 12 years and sentenced petitioner to the upper term of 16 years. In doing so, the judge necessarily found the existence of facts beyond those inherent in the jury's verdict. *See* Cal. Rules of Court, rule 4.420(d) [prohibiting judges from imposing upper term based on aggravating factors which are elements of crime]. Indeed, the judge here could no more impose an upper term of 16 years for petitioner's conviction without finding one or more factors in aggravation than the judge in *Blakely* could impose the additional 37-month sentence without finding that defendant acted with "deliberate cruelty," or than the judge in *Ring* could sentence defendant to the death penalty without finding one of ten aggravating factors, or than the judge in *Apprendi* could impose an additional ten-year sentence without finding that defendant acted with the purpose to intimidate individuals because of their race. Yet, as

Blakely, *Ring*, and *Apprendi* make crystal clear, such judicial factfinding of aggravating factors to justify the imposition of a sentence greater than the statutory maximum authorized by the jury's verdict runs afoul of the Sixth Amendment right to a jury trial. *Blakely*, 542 U.S. at 305, 124 S.Ct. 2531; *Ring*, 536 U.S. at 589, 122 S.Ct. 2428; *Apprendi*, 530 U.S. at 490-492, 120 S.Ct. 2348.

As this Court also explained in *Apprendi*, justice is not served when a state metes out punishment without providing adequate procedural safeguards, including the right to a jury trial:

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentencing enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

530 U.S. at 476, 120 S.Ct. 2348.

California threatened petitioner with certain pains if he committed the crime of continuous sexual assault on a child and certain additional pains if he committed other aggravating acts, such as threatening bodily injury to coerce the victim to recant. Cal. Rules of Court, rule 4.421(a)(6). Whereas California fulfilled its obligation to afford petitioner procedural safeguards to protect him against unwarranted pains attending a finding that he committed the charged offense, it failed in its duty to furnish him the very same safeguards relating to whether

he committed aggravating acts which subjected him to four additional years of punishment in state prison. California achieves this inconsistent treatment by merely describing these latter acts as "circumstances in aggravation" and enlisting its sentencing judges to determine their existence. Cal. Rules of Court, rule 4.421. Such labelling "surely does not provide a principled basis for treating them differently." *Apprendi*, 530 U.S. at 476, 120 S.Ct. 2348.[8]

In sum, as the Court concluded in *Blakely*:

> The Framers would not have thought it too much to demand that, before depriving a man of [four] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," (citation omitted), rather than a lone employee of the State.

542 U.S. at 313-314, 124 S.Ct. 2531. The judge's imposition of a 16-year upper term in this case violated petitioner's Sixth Amendment right to a jury determination of every fact which increases the defendant's penalty beyond the statutory maximum.

[8] Similarly, California's sentencing procedure frustrates "[t]he defendant's ability to predict with certainty the judgment from the face of the felony indictment." *Apprendi*, 530 U.S. at 478, 120 S.Ct. 2348. The prosecution here alleged facts in the indictment which subjected petitioner to a state prison term of only 12 years. J.A. 2-3. Nevertheless, the trial judge ultimately sentenced petitioner to a term of 16 years based on facts never alleged in the indictment or proved to a jury.

C. The Determinate Sentencing Law's Procedure For Imposing An Upper Term Violates Defendants' Due Process Right To Proof Beyond A Reasonable Doubt.

The DSL's procedure for imposing an upper term also violates defendants' right under the Due Process Clause to proof of every element of the charged crime *beyond a reasonable doubt*. *United States v. Gaudin,* 515 U.S. 506, 509-510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *Mullaney v. Wilbur,* 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." (Citation omitted.) . . . "[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." (Citation omitted).

In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *see also Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) ["the interests of the [criminal] defendant are of such magnitude that historically . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."]. Where proof of a particular fact exposes the defendant to greater punishment than that

available in the absence of such proof, that fact is an element of the crime which must be proven beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348.

California's DSL directs judges to determine the existence of aggravating factors for purposes of imposing punishment above and beyond the presumptive term authorized by the jury's verdict. Although the jury renders its verdict on the charged offenses beyond a reasonable doubt, the DSL allows judges to find aggravating circumstances by a mere preponderance of the evidence. Cal. Rules of Court, rule 4.420(b); *People v. Wright*, 30 Cal.3d 705, 710, 639 P.2d 267, 269, 180 Cal.Rptr. 196, 199 (Cal. 1982). Thus, the accused "routinely see[s] his maximum potential sentence balloon . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Blakely*, 542 U.S. at 311-312, 124 S.Ct. 2531. Indeed, in sentencing petitioner in this case, the judge imposed four additional years above the statutory maximum after finding factors in aggravation by only a preponderance of the evidence. This violated petitioner's due process right to proof beyond a reasonable doubt. *Accord* J.A. 48-50 [concurring and dissenting opinion of Presiding Justice Jones, who would have remanded petitioner's case for jury findings *beyond a reasonable doubt* on factors in aggravation].

D. The California Supreme Court Has Misinterpreted This Court's Precedents In Finding The DSL Constitutional.

Despite the similarities between Washington state's sentencing scheme in *Blakely* and California's DSL, the California Supreme Court has now concluded that the procedure for imposing an upper term under the DSL does not run afoul of the "bright-line rule" set forth in *Blakely* and *Apprendi*. *Blakely*, 542 U.S. at 308, 124 S.Ct. 2531; *Black,* 35 Cal.4th at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750; *see also* J.A. 46-48. The court in *Black* based this conclusion on the discretion sentencing judges have under the DSL to impose the lower, middle, or upper term after the jury has returned a guilty verdict. *Black*, 35 Cal.4th at 1257-1258, 113 P.3d at 545-546, 29 Cal.Rptr.3d at 752-753. However, this Court has repeatedly rejected the precise arguments the California Supreme Court set forth in *Black* in defense of the DSL's constitutionality.

In *Black*, the California Supreme Court conceded that the mandatory language of California Penal Code § 1170(b) – compelling judges to impose the middle term unless there are circumstances in aggravation or mitigation – "can be characterized as establishing the middle term sentence as a presumptive sentence. . . ." 35 Cal.4th at 1257, 113 P.3d at 545, 29 Cal.Rptr.3d at 753. Nevertheless, the court decided that the upper term constitutes the "statutory maximum" for purposes of Sixth Amendment analysis because California judges retain discretion over whether to impose the upper term even after finding factors in aggravation. *Id*. at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750. The court reasoned:

> The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of

> the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. The judicial factfinding that occurs during that selection process is the same type of judicial factfinding that traditionally has been a part of the sentencing process. Therefore, the upper term is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*."

Id. at 1257-1258, 113 P.3d at 545, 29 Cal.Rptr.3d at 753, quoting *Blakely*, 542 U.S. at 303, 124 S.Ct. 2531 (emphasis in original); *see also Black*, 35 Cal.4th at 1255, 113 P.3d at 544, 29 Cal.Rptr.3d at 751 ["the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable*."] (emphasis in original).

Similarly, the California Supreme Court drew support for its position from *United States v. Booker*, likening the DSL to the revised federal system approved in *Booker* which treats the Guidelines as advisory:

> The level of discretion available to a California judge in selecting which of the three available terms to impose appears comparable to the level of discretion that the high court has chosen to permit federal judges in post-*Booker* sentencing. Because an aggravating factor under California law may include any factor that the judge reasonably deems to be relevant, the determinate sentencing law's requirement that an upper term sentence be imposed only if an aggravating factor exists is comparable to *Booker's* requirement that

> a federal judge's sentencing decision not be unreasonable.

Id. at 1261, 113 P.3d at 548, 29 Cal.Rptr.3d at 756.

The California Supreme Court in *Black* has failed to adhere to this Court's oft-repeated bright-line rule that *any* judicial factfinding which increases a sentence beyond the maximum authorized by the jury's verdict or the defendant's admissions violates the Sixth Amendment. *See, e.g.*, *Booker,* 543 U.S. at 232, 125 S.Ct. 738; *Blakely*, 542 U.S. at 303, 308, 124 S.Ct. 2531 [referencing "*Apprendi's* bright-line rule"]; *Ring*, 536 U.S. at 602, 122 S.Ct. 2428; *Apprendi,* 530 U.S. at 483, 120 S.Ct. 2348.[9] This rule does not change simply because a sentencing scheme gives its judges discretion whether to impose an upper term upon the finding of one or more aggravators. Rather, the crucial inquiry is whether the scheme permits judges to impose an additional sentence based on circumstances that cause an "increase in the defendant's authorized punishment." *Ring*, 536 U.S. at 602, 122 S.Ct. 2428.

Indeed, in *Blakely* – which presented a sentencing scheme with judicial discretion all but indistinguishable from that provided under the DSL – this Court soundly rejected as fallacious the distinction the California Supreme Court has made in *Black*: "Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely,* 542 U.S. at 305, n.8, 124 S.Ct. 2531 (emphasis in original); *cf. Black,* 35 Cal.4th at 1271, 113

[9] The court in *Black* actually insisted that this "[C]ourt's precedents do *not* draw a bright line. . . ." *Black*, 35 Cal.4th at 1260, 113 P.3d at 547, 29 Cal.Rptr.3d at 755 (emphasis supplied).

P.3d at 555, 29 Cal.Rptr.3d at 764 (conc. & dis. opn. of Kennard, J.) [finding no difference between judicial discretion afforded California sentencing judges under DSL and discretion afforded judges under Washington scheme in *Blakely*].[10] Furthermore, contrary to the California Supreme Court's understanding, what made the federal system constitutionally acceptable after this Court rendered the Guidelines advisory in *Booker* was *not* the additional discretion afforded judges, but the fact that the federal system effectively became an indeterminate sentencing scheme in which the top of the range of the applicable statute constitutes the statutory maximum, *see Booker*, 543 U.S. at 245-246, 125 S.Ct. 738; California can enact a similar fix if it so chooses.

Also critical to the California Supreme Court's holding in *Black* was that the DSL does not restrict the aggravating

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[10] In her dissent from the majority's refusal to find a constitutional violation in the DSL's implementation, Justice Kennard correctly observed: "Hard as it tries, the majority here cannot point to any significant differences between California's sentencing law and the Washington sentencing scheme that the high court invalidated in *Blakely*. . . ." *Black,* 35 Cal.4th at 1271, 113 P.3d at 554, 29 Cal.Rptr.3d at 764 (conc. & dis. opn. of Kennard, J.). Justice Kennard concluded that under this Court's precedents, a California sentencing judge

> may use an aggravating fact to justify an upper term only if: (1) a jury has made a finding on the aggravating fact, (2) the defendant has admitted the aggravating fact, (3) the defendant has validly waived the right to a jury trial on the aggravating fact, or (4) the aggravating fact relates to the defendant's criminal record rather than to the circumstances of the conviction offense. Absent one of these situations, the trial court may not impose an upper term sentence.

Id. at 1265, 113 P.3d at 550, 29 Cal.Rptr.3d at 759 (conc. & dis. opn. of Kennard, J.).

factors a sentencing judge may consider in imposing the upper term:

> More significantly, the availability of upper term sentences under the determinate sentencing law does not represent a legislative effort to shift the proof of particular facts from elements of a crime (to be proved to a jury) to sentencing factors (to be decided by a judge). The Legislature did not identify all of the particular facts that could justify the upper term. Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence. Such a system does not diminish the traditional power of the jury.

35 Cal.4th at 1256, 113 P.3d at 544, 29 Cal.Rptr.3d at 752. Again, however, the *Blakely* majority repudiated this very rationale when the State of Washington raised it in that case:

> [T]he State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

Blakely, 542 U.S. at 305, 124 S.Ct. 2531 (emphasis in original).

Thus, merely because California's list of aggravating factors is illustrative does not somehow exempt the DSL

from the rule that, other than the fact of a prior conviction, *any fact* – whether enumerated or unenumerated – that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348. A sentencing judge will violate this constitutionally-based rule when it imposes a sentence beyond the statutory maximum authorized by the jury's verdict by finding one or more factors in aggravation, whether specifically listed in California Rules of Court, rule 4.421 or not.[11]

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the California Court of Appeal and hold that California's Determinate Sentencing Law is unconstitutional to the extent that it permits sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant.

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Respectfully submitted,

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[11] *Blakely* also found no support for the idea – advanced by the dissenters in *Blakely* and embraced by the California Supreme Court in *Black* – that judicial factfinding of the kind which occurs under the DSL "traditionally has been a part of the sentencing process," *Black*, 35 Cal.4th at 1258, 113 P.3d at 545, 29 Cal.Rptr.3d at 753. *Blakely*, 542 U.S. at 301-302 and n.6, 124 S.Ct. 2531.