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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

REPLY BRIEF FOR PETITIONER

The bright-line rule animating this Court's recent Sixth and Fourteenth Amendment jurisprudence dictates that *any* judicial factfinding which increases a sentence beyond the maximum authorized by the jury's verdict or the defendant's admissions violates the defendant's constitutional rights to a jury trial and proof beyond a reasonable doubt. *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 232, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Apprendi v. New Jersey,* 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *accord Washington v. Recuenco*, ___ U.S. ___, 126 S.Ct. 2546, 2549, ___ L.Ed.2d ___ (2006). In his opening brief on the merits, petitioner explained that in allowing judges to impose enhanced sentences beyond the statutory maximum based on their finding of factors in aggravation, California's Determinate Sentencing Law operates just like the Washington state sentencing scheme invalidated in *Blakely*. Under the DSL, the jury's verdict by itself only authorizes a trial judge to impose a middle term sentence. In order to depart from the middle term and impose an upper term, the judge must first find one or more aggravating factors. Thus, the middle term constitutes the statutory maximum for purposes of *Blakely* and *Apprendi*, and any judicial factfinding used to justify an upper term runs afoul of the Sixth and Fourteenth Amendments.

The State of California and its *amicus* claim that under the DSL, the upper term is the statutory maximum for Sixth Amendment purposes because a judge may impose the upper term based on the jury's verdict alone. Therefore, they maintain, the imposition of an enhanced sentence based on the judge's own determination of factors in aggravation is constitutional. However, their position rests on tortured reasoning and the same arguments raised by the state of Washington in *Blakely*, but soundly rejected by this Court.

The state and its *amicus* further attempt to fit the square peg of the DSL into the round hole of constitutionality

carved out by this Court in *Booker*. To accept their convoluted logic is to accept the conclusion that *Booker* implicitly overruled *Blakely*. Although the DSL and the revised federal system may have some comparable features, they are different in at least one constitutionally-significant regard – the DSL allows for judicial factfinding in imposing sentence *beyond* the statutory maximum authorized by the jury's verdict, while the federal system does not. This distinction makes all the difference as to why California's DSL violates the Sixth and Fourteenth Amendments and the revised federal system does not.

I. UNDER CALIFORNIA'S DETERMINATE SENTENCING LAW, THE MIDDLE TERM CONSTITUTES THE STATUTORY MAXIMUM FOR PURPOSES OF THE SIXTH AND FOURTEENTH AMENDMENTS.

The state and petitioner agree on the constitutional principle controlling this case: Other than the fact of a prior conviction, any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Resp. Br. at 3; Pet. Br. at 10, 13-14; *see also Blakely,* 542 U.S. at 301, 124 S.Ct. 2531; *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348. However, the parties disagree as to what constitutes the prescribed statutory maximum sentence under California's DSL.

To justify its position that the upper term is the statutory maximum, the state relies on a series of faulty arguments. First, the state claims that a trial judge may impose an upper term sentence based on the jury's verdict alone. Resp. Br. at 4, 9, 24-25. Second, the state argues that a judge's choice from among the three sentences within the "base range" is constrained by a requirement of "reasonableness." Resp. Br. at 4, 6, 11-12, 31-32. Finally, the state maintains that the California Supreme Court has interpreted California law in a manner which resolves the constitutional question at issue here and is binding on

this Court. Resp. Br. at 18-19, 33. The state's analysis does not withstand scrutiny.

A. The Determinate Sentencing Law Does *Not* Permit Judges To Impose An Upper Term Sentence Based On The Jury's Verdict Alone.

Throughout its brief, the state represents that "the trial court *is* legally authorized under state law to impose the upper term based on the jury verdict alone." Resp. Br. at 24-25 (emphasis in original); *see also* Resp. Br. at 4, 9, 13, 19, 34, 46. The soundness of every one of the state's arguments rests on this frequently repeated claim. Unfortunately, it is patently false, as California's DSL, its case law, and even the state's brief demonstrate.

California Penal Code § 1170(b) provides that "[w]hen 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." (Emphasis supplied); *see also* Cal. Rules of Court, rule 4.420(a). Thus, judges may depart from the middle term and impose the upper term only where they first find one or more factors in aggravation; they are *prohibited* from imposing the upper term based solely on the jury's verdict. *Accord* Cal. Rules of Court, rule 4.420(d) ["A fact that is an element of the crime shall not be used to impose the upper term."].

California case law similarly holds that when a defendant is convicted of a felony offense specifying three possible prison terms, the sentencing judge must impose the middle term unless the judge finds aggravating or mitigating factors. *People v. Black*, 35 Cal.4th 1238, 1247, 113 P.3d 534, 538, 29 Cal.Rptr.3d 740, 744 (Cal. 2005); *People v. Lobaugh*, 188 Cal.App.3d 780, 785, 233 Cal.Rptr. 683, 686 (Cal.App. 1987). Cases abound in which judges properly imposed an upper term sentence after finding factors in aggravation. *See, e.g., People v. Osband*, 13 Cal.4th 622, 729-730, 919 P.2d 640, 709, 55 Cal.Rptr.2d 26, 95 (Cal. 1996); *People v. Burbine*, 106 Cal.App.4th 1250, 1263-1264, 131 Cal.Rptr.2d 628, 637 (Cal.App. 2003); *People v. Cruz*, 38 Cal.App.4th 427, 433-434,

45 Cal.Rptr.2d 148, 152 (Cal.App. 1995). However, the state fails to cite even a single case in which a California judge imposed the upper term without finding at least one aggravating factor or in which a California appellate court held that a judge may legally do so. That is because none exists. If a sentencing judge stated on the record, "I don't find any aggravating factors, but I'm still going to impose the upper term," a California appellate court would assuredly reverse that sentence as unlawful.

The state itself appears to recognize that if judges do in fact impose an upper term based on the jury's verdict alone, the resultant sentence cannot stand. Resp. Br. at 6 ["California Penal Code section 1170(b) recognizes that the upper term is unreasonable and an abuse of discretion absent aggravation of the crime."]; Resp. Br. at 12 [section 1170(b) "recognizes that the decision to impose [an upper] term in the absence of *any* factors in aggravation . . . is necessarily unreasonable."] (emphasis in original); Resp. Br. at 31-32 [same]. This implicit concession completely undermines the state's position that the upper term constitutes the prescribed statutory maximum. Since the imposition of an upper term sentence in the absence of aggravating factors would necessarily compel reversal, judges are precluded from imposing such sentences. *See Black*, 35 Cal.4th at 1260, 113 P.3d at 547, 29 Cal.Rptr.3d at 755 ["in a case in which no such aggravating factor can be found, the judge *cannot* impose the upper term."] (emphasis supplied). The middle term is therefore the maximum sentence judges may impose based on the jury's verdict alone. Pursuant to *Blakely* and *Apprendi*, then, the middle term – *not* the upper term – constitutes the "statutory maximum" for Sixth and Fourteenth Amendment purposes. *Blakely,* 542 U.S. at 303-304, 124 S.Ct. 2531.

Nevertheless, the state relies on two California Supreme Court decisions which it believes support its position: *People v. Hernandez*, 46 Cal.3d 194, 757 P.2d 1013, 249 Cal.Rptr. 850 (Cal. 1988), and *People v. Scott*, 9 Cal.4th 331, 885 P.2d 1040, 36 Cal.Rptr.2d 627 (Cal. 1994). Resp. Br. at 20-23. Neither of these cases further the claim that the DSL functions in a constitutional manner.

In *Hernandez*, the California Supreme Court held that as a matter of statutory construction, a judge could not add a three-year term to defendant's sentence based on a California Penal Code § 667.8 kidnapping for purposes of rape enhancement where the prosecution had failed to plead or prove a violation of that statute. *Hernandez*, 46 Cal.3d at 197, 757 P.2d at 1013, 249 Cal.Rptr. at 850. In *Scott*, the court held that a defendant waives his right to raise a sentencing error on appeal for "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." *Scott*, 9 Cal.4th at 353, 885 P.2d at 1053, 36 Cal.Rptr.2d at 640.[1] Thus, neither *Hernandez* nor *Scott* had anything to do with whether a sentencing judge could properly impose an upper term absent a factor in aggravation. Moreover, both cases were decided before *Blakely* and *Apprendi*. Therefore, as the state forthrightly concedes, any dictum in those cases has limited, if any value in assessing California's DSL since it was made "without an appreciation" for the post-*Blakely* and post-*Apprendi* world. Resp. Br. at 23, n.7.

B. The State's Labels For The Determinate Sentencing Law Cannot Change The Manner In Which The Law Authorizes The Imposition Of Upper Term Sentences.

The state characterizes the DSL as offering trial judges a choice of three sentences within a particular "base range." *See, e.g.,* Resp. Br. at 4-9, 11-13, 19, 21, 23-28. According to the state, judges can impose an upper term sentence within

[1] *Scott* specifically dealt with a judge's failure to state his reasons for imposing an upper term sentence, *not* with a judge's imposition of the upper term in the absence of aggravating factors – which the record in *Scott* reflected in abundance. *See Scott*, 9 Cal.4th at 339-340, 885 P.2d at 1043-1044, 36 Cal.Rptr.2d at 630-631. The state also discusses California habeas corpus law, but to the same effect; a defendant may not collaterally challenge the *manner* in which a judge in California imposed an otherwise lawful sentence. Resp. Br. at 23, citing *People v. Olken*, 125 Cal.App.3d 1064, 1067-1068, 178 Cal.Rptr. 497, 499 (Cal.App. 1981).

that "base range" in the absence of aggravating factors, although such a sentence would be "necessarily unreasonable." Resp. Br. at 12, 32; *see also* Resp. Br. at 6; Amicus Br. at 17.[2] Whatever labels or terminology the state applies to describe the DSL or a judge's actions thereunder, the manner in which the DSL authorizes the imposition of upper term sentences remains constant. *See Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348 ["[T]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"]. The DSL flat out prohibits its judges from imposing an upper term in the absence of aggravating factors, whether or not such a sentence is also labelled as "necessarily unreasonable." Moreover, even accepting the state's portrayal of such sentences as inherently unreasonable would not change the constitutionality

[2] Despite the state's frequent use of the terms "base range" and "base range triad" to cumulatively describe the lower, middle, and upper terms, no published case in California has ever used these terms to describe a judge's sentencing options under the DSL. Apparently, the state has invented this phrasing to suggest that the upper term constitutes the statutory maximum under this Court's precedents. *See, e.g.,* Resp. Br. at 15 ["In concrete terms, if the legislature establishes a base range for an offense, and creates departure statutes predicated on additional findings, the 'statutory maximum' for *Apprendi* purposes is the *maximum of the base range*, and any facts necessary for departing from that base range are subject to the Sixth Amendment's jury-trial requirement. . . ."] (emphasis in original); Resp. Br. at 16 ["Under *Apprendi* and *Blakely*, a fact that permits a judge to increase a defendant's sentence above the statutorily established *base range* for that offense is subject to the Sixth Amendment jury trial right."] (emphasis supplied); Resp. Br. at 18 ["Once state law establishes the *base range* legally available to the trial court from the verdict, the statutory maximum for constitutional purposes is fixed at the top of that *base range*."] (emphasis supplied). The state's use of "base range" to describe an aspect of the DSL is irrelevant to the constitutional question raised in this case. Just like the sentencing schemes invalidated in *Apprendi*, *Ring*, *Blakely*, and *Booker*, the DSL unconstitutionally permits judicial factfinding of aggravating factors to justify the imposition of a sentence greater than the maximum authorized by the jury's verdict. It matters not that the state for the first time labels the lower, middle, and upper term sentencing choices as the "base range."

of the DSL in permitting judges to impose them. *Accord Booker,* 543 U.S. at 311, 125 S.Ct. 738 (dis. opn. of Scalia, J.) ["any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional."].

Similarly, the state correctly observes that the sentencing decision in California to select the lower, middle, or upper term is reviewed under a deferential abuse of discretion standard, under which appellate courts assess whether the imposed sentence "'falls outside the bounds of reason.'" *People v. Williams*, 17 Cal.4th 148, 162, 948 P.2d 429, 438, 69 Cal.Rptr.2d 917, 926 (Cal. 1998), quoting *People v. DeSantis*, 2 Cal.4th 1198, 1226, 831 P.2d 1210, 9 Cal.Rptr.2d 628, 644 (Cal. 1992); *see* Resp. Br. at 5, 11, 33, 36. Yet, the fact that judges' sentencing choices are reviewed for an abuse of discretion by no means permits them to impose an upper term in the absence of aggravating factors; the DSL does not grant judges the discretion to impose such a sentence in the first place. Therefore, regardless of the labels used to characterize the DSL or the standard of review employed to assess judges' sentencing decisions, the DSL's procedure for authorizing the imposition of an upper term – requiring the finding of at least one aggravating factor – remains the same.

C. The California Supreme Court's Interpretation Of The Determinate Sentencing Law In *Black* Is Not Binding On This Court For Purposes Of The Constitutional Question At Issue Here.

The state and its *amicus* contend that the California Supreme Court's decision in *People v. Black*, which held that the DSL's procedure for imposing the upper term does not violate the federal constitution, is binding on this Court. Resp. Br. at 18-19, 33; Amicus Br. at 17. To the contrary, *Black* neither aids the state's position nor is it controlling here.

Petitioner has explained that in *Black*, the California Supreme Court misinterpreted this Court's Sixth and Fourteenth Amendment jurisprudence in finding that the DSL's procedure for imposing an upper term passes constitutional muster. Pet. Br. at 25-30. The state counters that the California Supreme Court's interpretation of the DSL is "'authoritative'" and "binding on this Court." Resp. Br. at 18, 33, citing *Ring v. Arizona,* 536 U.S. at 597-603, 122 S.Ct. 2428. However, the court's holding in *Black* does not limit this Court's review of the DSL's constitutionality.

Significantly, the parties do not dispute the California Supreme Court's interpretation in *Black* of California's statutes. There, the court construed California Penal Code § 1170(b) to mean that "only in a case in which a judge could not reasonably identify any relevant aggravating factor in either the circumstances of the crime or the defendant's prior or current criminal conduct would the judge be limited to imposing no more than a middle-term sentence." *Black*, 35 Cal.4th at 1258, 113 P.3d at 545-546, 29 Cal.Rptr.3d at 752-753; *see* Resp. Br. at 11. It is this very interpretation of state law which leads ineluctably to the conclusion that trial judges may not impose an upper term under the DSL without first finding at least one factor in aggravation, rendering the middle term the statutory maximum for purposes of the Sixth and Fourteenth Amendments.

After construing state law, however, the court in *Black* proceeded to interpret *federal constitutional law*, opining that the upper term under the DSL 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. *Black*, 35 Cal.4th at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750. What constitutes the statutory maximum and whether the DSL's procedure for imposing an upper term violates the Sixth and Fourteenth Amendments are questions of federal constitutional law on which the California Supreme Court's opinion is neither authoritative nor, in this instance, correct.

Moreover, the state's reliance on *Ring* is misplaced. There, the Arizona Supreme Court had found that its death penalty law did not authorize a sentence of death based solely on a jury's verdict of guilt, but also required a judicial finding of at least one aggravating circumstance. 536 U.S. at 595-596, 122 S.Ct. 2428. The Arizona Supreme Court's finding conflicted with this Court's own, earlier interpretation of Arizona's death penalty law in *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). This Court then found that the Arizona Supreme Court's subsequent construction of Arizona statutory law was "authoritative." *Ring*, 536 U.S. at 603, 122 S.Ct. 2428. The Court proceeded to hold that the state's death penalty law violated federal constitutional law pursuant to *Apprendi* by allowing judicial fact-finding to justify a sentence greater than that authorized by the jury's verdict standing alone. *Id.* at 604-609, 110 S.Ct. 3047. Thus, Arizona's description of its law did not resolve the constitutional question; this Court did.

Similarly, in *Blakely v. Washington,* this Court faced a federal constitutional challenge to Washington state's sentencing scheme previously rejected by the Washington Supreme Court. In *State v. Gore*, 143 Wash.2d 288, 21 P.3d 262 (Wash. 2001), the Washington Supreme Court had concluded that because the Washington legislature provided a maximum penalty for felonies greater than the sentence defendant received, that maximum penalty constituted the statutory maximum for *Apprendi* purposes. *Id*. at 314, 21 P.3d at 277 ["The state statutory scheme permits a judge to impose an exceptional sentence – still within the range determined by the Legislature and not exceeding the maximum – after considering the circumstances of an offense, and, as *McMillan*[3] and *Apprendi* indicate, it may do so without the factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt."]. In *Blakely*, this Court

[3] *McMillan v. Pennsylvania*, 477 U.S. 79, 93, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

rejected the Washington Supreme Court's earlier analysis in *Gore* of federal constitutional law as applied to Washington's sentencing scheme, holding that the statutory maximum was not the maximum term set out by the legislature, but the maximum sentence a judge may impose based solely on facts reflected in the jury's verdict or admitted by the defendant. *Blakely*, 542 U.S. at 303-304, 124 S.Ct. 2531;[4] *see also Washington v. Recuenco*, 126 S.Ct. at 2549 [rejecting contention that this Court was powerless to reverse Washington Supreme Court's determination that a *Blakely* violation constitutes structural error not amenable to harmless error analysis]. Accordingly, the California Supreme Court's determination in *Black* that the upper term constitutes the statutory maximum for purposes of the Sixth and Fourteenth

[4] The state's *amicus* observes that the Washington Supreme Court never ruled, as the California Supreme Court has, that the necessity for finding a factor in aggravation before departing upward from the presumptive middle term is merely a requirement that the departure be reasonable. Amicus Br. at 24. This distinction is not one of kind, but merely of degree. Prior to *Blakely*, a sentencing judge in Washington could depart upward from the presumptive sentence if he found "substantial and compelling reasons" to do so, *Blakely*, 542 U.S. at 299, 124 S.Ct. 253, while a California judge may depart upward from the middle term if the presence of aggravating factors makes it reasonable to do so, *see Black*, 35 Cal.4th at 1255, 113 P.3d at 544, 29 Cal.Rptr.3d at 751. Thus, it was merely harder to deviate from Washington's presumptive term than from California's. *Blakely* itself rejects this distinction as meaningless: "Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense." *Blakely*, 542 U.S. at 305, 124 S.Ct. 2531.

Moreover, as noted above, in *State v. Gore* the Washington Supreme Court had construed Washington law in a manner it believed complied with *Apprendi*, but in *Blakely* this Court easily disregarded that interpretation. *Blakely*, 542 U.S. at 299-300, 303-304, 124 S.Ct. 2531. That the Washington Supreme Court in *Gore* sought to avoid the bright-line rule of *Apprendi* on different grounds than the California Supreme Court did in *Black* is of no moment; neither may escape federal constitutional requirements merely through the use of creative state law interpretations.

Amendments is an interpretation of federal constitutional law which is not binding on this Court.

II. THE DETERMINATE SENTENCING LAW'S PROCEDURE FOR IMPOSING AN UPPER TERM OPERATES JUST LIKE THE PROCEDURE FOR IMPOSING AN EXCEPTIONAL SENTENCE UNDER WASHINGTON'S SENTENCING SCHEME INVALIDATED IN *BLAKELY*.

Petitioner explained in his opening brief that an upward deviation from the DSL's statutory maximum sentence, or middle term, operates exactly like an upward deviation under Washington state's sentencing scheme struck down in *Blakely*. Pet. Br. at 18-19. The state and its *amicus* maintain to the contrary that these sentencing systems operate in fundamentally different ways. Resp. Br. at 29; Amicus Br. at 23. However, to support this claim, they merely recycle the same arguments the state of Washington and its *amici* raised in *Blakely*, but which this Court discredited.

For instance, the state argues that unlike the sentencing scheme at issue in *Blakely*, the DSL authorizes judges to depart from the middle term and impose the upper term based solely on the jury's verdict:

> Under Washington law, the trial court was not legally authorized to depart from the standard range of forty-nine to fifty-three months without additional factual findings. . . . By contrast, California law makes the upper term a component of the "standard range," not a departure from it, and the trial court *is* legally authorized under state law to impose the upper term based on the jury verdict alone.

Resp. Br. at 24-25 (emphasis in original); *see also* Resp. Br. at 19. Yet, this is exactly the same argument Washington state made in *Blakely* to avoid the application of *Apprendi* and *Ring* to its sentencing scheme:

> The Washington guidelines are distinctly different from the statutes considered in *Apprendi* and

> *Ring*. *Apprendi* and *Ring* concerned statutes authorizing punishment in addition to that within the court's discretion on conviction and only on proof of one or more specific, enumerated facts. *Under the Washington guidelines, an exceptional sentence is within the court's discretion as a result of a guilty verdict*.

Resp. Br. in *Blakely* at 15 (emphasis supplied). In *Blakely*, this Court rejected Washington's position for the same reason the state's position here fails: "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.

The state and its *amicus* also contend that a distinguishing factor of the DSL is that it "authorizes judges to exercise broad discretion [to impose an upper term], constrained by a reasonableness requirement," Amicus Br. at 7; *see also* Resp. Br. at 29, whereas judges' discretion to impose an exceptional sentence under Washington's sentencing scheme was "tightly confined," Amicus Br. at 24. However, Washington state similarly argued in *Blakely* that its sentencing scheme operated in a constitutional manner since "'[t]he only restriction on discretion is a requirement to articulate a substantial and compelling reason for imposing an exceptional sentence.' (Citation omitted)." Resp. Br. in *Blakely* at 25; *see also* Resp. Br. in *Blakely* at 7 [characterizing Washington's sentencing law as granting judges "absolute discretion" within narrow ranges]; United States Amicus Br. in *Blakely* at 16, 21 [Under Washington law, judge may impose an exceptional sentence "based on a virtually unlimited set of facts," and after "exercis[ing] his own judgment that the case involves substantial and compelling reasons justifying an exceptional sentence."]. Nevertheless, the Court in *Blakely* exposed this contention as fallacious: "Nor does it matter that the judge must, after finding aggravating facts, make

a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense." *Blakely*, 542 U.S. at 305, 124 S.Ct. 2531.

The state posits the further distinction that unlike Washington's sentencing scheme, the DSL provides a defendant "full notice that he or she risks the upper term sentence for any given felony because the upper term is one of the three possible terms of the base range that appears either in the very code section or set of code sections that enumerate the elements of the offense. . . ." Resp. Br. at 27; *see also* Amicus Br. at 22. Once more, this is the precise argument Washington state made in *Blakely* to distinguish its sentencing system from *Apprendi's*:

> Mr. Blakely . . . cannot complain that he had no notice that the maximum penalty for his crimes was ten years. The maximum penalty was plain in the charging information. . . . The maximum penalty of ten years was plain in the plea statement. And it was plain in the statute.

Resp. Br. in *Blakely* at 35 (citations omitted); *see also* United States Amicus Br. in *Blakely* at 24 ["Even when a sentencing judge may make a factual finding that authorizes increased punishment, the law puts the defendant on notice that he will be exposed to the higher punishment if the judge makes the required finding. . . ."]. Once more, this Court in *Blakely* rejected the state's position, finding it unfair that "a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon" at sentencing "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. The very same reasoning applies to the DSL's procedure under which judges impose the upper term.

Finally, the state contends: "Petitioner cannot plausibly argue, as was the case in *Apprendi* and *Blakely*, that his sentence represents an upward departure from the

appropriate base range. California provides for jury trials for upward departures through enhancements or alternative sentencing schemes." Resp. Br. at 12-13; *see also* Resp. Br. at 26-27; Amicus Br. at 2-3. But Washington's sentencing system also incorporated sentence enhancements and required that a jury find them true beyond a reasonable doubt. *See* Wash. Rev. Code Ann. § 9.94A.125; Resp. Br. in *Blakely* at 8, n.4; Pet. Br. in *Blakely* at 19. In fact, the DSL's provision of jury trials for enhancement allegations shows only that California is also well equipped to provide such protections for findings on aggravating factors, which like enhancements, authorize punishment above the statutory maximum.

III. THE DETERMINATE SENTENCING LAW IS UNLIKE THE REVISED FEDERAL SENTENCING SCHEME UPHELD IN *BOOKER* BECAUSE IT ALLOWS FOR JUDICIAL FACTFINDING IN IMPOSING SENTENCE BEYOND THE STATUTORY MAXIMUM AUTHORIZED BY THE JURY'S VERDICT.

Even though the procedure for imposing an upper term sentence under the DSL contravenes the bright-line rule set forth in *Blakely* and *Apprendi*, the state and its *amicus* maintain that the DSL operates in a constitutional manner because it complies with *United States v. Booker*. Resp. Br. at 35-45; Amicus Br. at 8-25. However, their position suffers in a number of respects. Most importantly, it masks the critical difference between the DSL and the revised federal system – the DSL allows for judicial factfinding in imposing sentence *beyond* the statutory maximum authorized by the jury's verdict, while the revised federal system does not. In addition, their position makes much more of the notion of reasonableness review, and that concept's application to California's sentencing scheme, than *Booker* warrants. Indeed, if taken to its logical conclusion, the reasoning of the state and its *amicus* leads to the conclusion that *Booker* implicitly overruled *Blakely*.

The state and its *amicus* contend that the DSL "is consistent with the structure and scheme found constitutional in the remedial portion of *Booker*." Resp. Br. at 36; Amicus Br. at 17-21.[5] At base, the claim of equivalency rests upon their unfounded, but oft-repeated assertion that the DSL authorizes judges to impose an upper term sentence based on the jury's verdict alone. Resp. Br. at 36; Amicus Br. at 17. As detailed throughout this brief, the language of the relevant statutes, the California Supreme Court's decision in *Black*, and even the state's own brief acknowledge that the DSL does *not* permit a judge to impose an upper term absent a judicially-found factor in aggravation. § 1170(b); Cal. Rules of Court, rule 4.420(a) and (b); *Black*, 35 Cal.4th at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750; Resp. Br. at 44-45.

Nevertheless, the state seeks to save the DSL by claiming that the "nature and quality of discretion accorded a California sentencing judge is constitutionally equivalent to the discretion given a federal district court judge in selecting a term after consideration of the now-advisory Federal Sentencing Guidelines." Resp. Br. at 37; Amicus Br. at 18. This is merely a further twist on the state's basic dodge. The state now claims that section 1170(b) simply declares a "legislative preference for the midterm," much as the post-*Booker* advisory guidelines legitimately reflect Congress' sentencing preferences which federal judges must take into account. Resp. Br. at 37; Amicus Br. at 17. There is, however, a fundamental difference between California's system and that approved by *Booker*. In California, what the state calls a legislative "preference" for the middle term is in fact a *mandatory* requirement. § 1170(b) ["the court *shall* order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."] (emphasis supplied). In

[5] If the DSL were as similar to the post-*Booker* federal system as the state alleges, surely the United States Solicitor General's office would have participated as *amicus* in support of respondent and sought to take part during oral argument in this case. It has not.

Booker, by contrast, the Court *excised* that portion of the federal guidelines which made their application mandatory. *Booker*, 543 U.S. at 259, 125 S.Ct. 738. This distinction is critical; as *all* of the Justices in *Booker* agreed, the constitutional problem identified therein would not exist if the guidelines were merely advisory. *Id.* at 233, 259, 125 S.Ct. 738. Similarly, the constitutional problem with the DSL would cease to exist without its mandate for the middle term in the absence of aggravating or mitigating factors.

As a further similarity between the DSL and the post-*Booker* federal sentencing scheme, the state and its *amicus* submit that California's review of sentencing decisions for an abuse of discretion is akin to the reasonableness review appended to the advisory guideline system in *Booker*. Resp. Br. at 36; Amicus Br. at 17-18. Yet, their observations about how appellate courts review judges' sentencing decisions do nothing to salvage the constitutionality of the DSL. Because the DSL prohibits judges from imposing an upper term without finding facts beyond those included in the jury's verdict or the defendant's admissions, it violates the Sixth and Fourteenth Amendments just as surely as the Washington State and Federal Guideline systems did in *Blakely* and *Booker*. Were the standard of review of sentencing decisions constitutionally definitive, the *Booker* Court could have remedied the defect in the Guidelines merely by adding the reasonableness review. Instead, the Court determined that it also had to excise the portion of the Guidelines which made their application mandatory, a step which neither the state, its *amicus*, nor the California Supreme Court believes is necessary to rescue the DSL. *See* Resp. Br. at 36-38, 43-45; Amicus Br. at 29-30; *Black*, 35 Cal.4th at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750.[6]

[6] After nearly thirty pages of arguing that the DSL does not violate *Apprendi* or its progeny, the state's *amicus* finally posits that *Black* in fact *remedied* the *Apprendi* violation by implicitly "*Booker*-izing" California's system. Amicus Br. at 29. *Amicus* charges that it would be

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Moreover, the state reads far more into the concept of reasonableness review set forth in *Booker* than is warranted by that decision. According to the state:

> If the [federal district] court points to no facts justifying the deviation from the legislatively preferred sentencing choices, the reasonableness of the court's decision to sentence above the Guidelines range progressively diminishes as the deviation increases. A substantial deviation *without any justification*, would inevitably be unreasonable. Although under the reformed Guidelines system it is unnecessary to identify at what point an upward variance, without any facts in support, becomes unreasonable, that point necessarily occurs below the statutory maximum, or else the reasonableness review constraint becomes meaningless.

Resp. Br. at 39 (emphasis in original); *see also* Resp. Br. at 43 ["To impose the statutory maximum for a run-of-the-mill offender without *any* additional justification will always be unreasonable" and "such a sentence would not be *unauthorized*, but *unreasonable*."] (emphasis in original). The state claims that just as in the post-*Booker* federal system, under the DSL the imposition of an upper-term sentence in the

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"the height of formalism" to require the state to do so explicitly. Amicus Br. at 29. Petitioner is not as willing as *amicus* to deduce unstated reasoning from the California Supreme Court's opinion; if that court had perceived a constitutional problem with its sentencing system in the wake of *Blakely* and *Apprendi*, surely it would have simply said so. It did not. Instead, it reiterated, in accord with California's unambiguous statutes, that judges may depart upward from the middle term only if they find one or more aggravating facts beyond those inherent in the jury's verdict. *People v. Black*, 35 Cal.4th at 1247, 113 P.3d at 538, 29 Cal.Rptr.3d at 744. It found the system constitutional anyway because California judges retain discretion over *whether* to impose the upper term upon finding aggravating factors. *Black*, 35 Cal.4th at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750. As petitioner stated in his opening brief, this attribute does not save the DSL; the middle term is the statutory maximum before and *after Black*, and it is this undisputed aspect of the DSL which renders it unconstitutional. Pet. Br. at 27-28.

absence of any aggravating factors is authorized, although inherently unreasonable.

The principal flaw in the state's position, of course, is that *Booker* simply does not include the detailed analysis of reasonableness review upon which the state relies. Indeed, the dissents from the remedial opinion in *Booker* specifically noted the absence of such analysis. *Booker*, 543 U.S. at 301, 125 S.Ct. 738 (dis. opn. of Stevens, J.) ["How will a judge go about determining how much deference to give to the applicable Guidelines range? How will a court of appeals review for reasonableness a district court's decision that the need for 'just punishment' and 'adequate deterrence to criminal conduct' simply outweighs the considerations contemplated by the Sentencing Commission? (Citation omitted). What if a sentencing judge determines that a defendant's need for 'educational or vocational training, medical care, or other correctional treatment in the most effective manner,' (citation omitted), requires disregarding the stiff Guidelines range Congress presumably preferred?"]; *Id*. at 311, 125 S.Ct. 738 (dis. opn. of Scalia, J.) ["no one knows – and perhaps no one is meant to know – how advisory Guidelines and 'unreasonableness' review will function in practice."]. To the extent that the federal appellate courts have interpreted *Booker* in developing some of the particulars of reasonableness review – as the state discusses in some detail, Resp. Br. at 39-43 – *Booker* hardly mandated these developments, which have evolved without guidance from this Court.[7]

[7] Without supporting authority from this Court, the state claims that the post-*Booker* sentencing scheme "dictates a range of reasonable choices roughly proportionate to the Guidelines range," and that at some, unspecified point, as a judge deviates upward further from the range, the sentence becomes unreasonable, presumably requiring reversal. Resp. Br. at 38-39, 42-43. However, it is by no means clear that the state has correctly assessed the federal system. As noted, *Booker* did not "dictate" that courts must follow the Guidelines, roughly or exactly; it specified that the courts are "not bound to apply the Guidelines." *Booker*, 543 U.S. at 264, 125 S.Ct. 738. Indeed, as Justice Scalia noted in dissent, and without response from the majority, if the majority "thought the Guidelines not only had to be 'considered' (as the

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The state fails to offer any cogent reason why the Court should address these potentially far-reaching issues in this case, which concerns only the application of the Sixth and Fourteenth Amendments to California's sentencing law.

Furthermore, even if the post-*Booker* system operated as the state postulates, there still would be no significance to the state's assertion that, like the federal system, the DSL authorizes sentencing judges to impose an upper term absent any aggravating factors, but if they do so, the resulting sentence will be necessarily *unreasonable*, and therefore require reversal. Resp. Br. at 38, 44-45. As already discussed in detail, the DSL prohibits judges from imposing an upper term without supporting factors in aggravation, whether or not such a sentence is also labelled "necessarily unreasonable."

Nevertheless, the state argues that "[u]nder *Booker*, a threshold constraint on the court's sentencing authority triggers the Sixth Amendment jury-trial right. A reasonableness constraint on the court's ultimate sentencing decision does not." Resp. Br. at 35. Unfortunately, the state cites no authority for the distinction it has concocted, nor does any exist in this Court's well-developed jurisprudence. In fact, if *Booker* made this a constitutionally valid distinction, it would effectively overrule *Blakely*. In theory judges have the power to impose any sentence, subject to reversal on appeal. If a jurisdiction may simply characterize an invalid sentence as authorized, but just "necessarily unreasonable," this would render the statutory maximum test of *Blakely* and *Apprendi* meaningless. *Accord Booker*, 543 U.S. at 311, 125 S.Ct. 738 (dis. opn. of Scalia, J.) ["any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines

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amputated statute requires) but had generally to be followed – its opinion would surely say so" and "[i]f those policy decisions [reflected in the Guidelines] are no longer mandatory, the sentencing judge is free to disagree with them . . . as are appellate judges." *Id*. at 306, 125 S.Ct. 738 (dis. opn. of Scalia, J.).

system that the Court today holds unconstitutional."]. Of course, such facile use of terminology smacks of the form versus effect distinction this Court condemned in *Apprendi*. *Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348. Thus, however the state chooses to label it, in the end, judges in California may not impose an upper term in the absence of an aggravating factor. When judges do impose an enhanced sentence based on their determination of facts not found by the jury or admitted by the defendant – as the DSL authorizes them to do – they violate the defendant's rights under the Sixth and Fourteenth Amendments.

Upholding the constitutionality of California's DSL would effectively throw the state of this country's sentencing laws into disarray. No longer would the bright-line statutory maximum test have any meaning. Rather, jurisdictions would be free to subvert this Court's *Apprendi* and *Blakely* line of cases, as the California Supreme Court did in *Black*, by simply explaining that their sentencing schemes require their judges to exercise some measure of reasonable discretion. More should be, and is, required to fulfill the guarantees of the Sixth and Fourteenth Amendments.

CONCLUSION

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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