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District Court of the United States
in and for Oklahoma

FILED

MAR 14 2007

WILLIAM B. GUTHRIE
Clerk, U.S. District Court

Deputy Clerk

UNITED STATES OF AMERICA)	
Plaintiff)	CR 05-0043-RAW By:
)	
v.)	Motion for release pending Appeal
)	for
Jimmy Clayton Chisum, en esse)	NEW AUTHORITY FROM SUPREME COURT
Pro Per accused/convicted)	of the United States
)	

Comes now the convicted felon, Jimmy Clayton Chisum, sui juris to move this honorable court for release pending appeal.

Appeal has been filed with the 10th Circuit and is in the process of being briefed.

New authority has come from the United States Supreme Court to clarify and emphasize their earlier rulings on the matter of sentence enhancements.

A part of their emphatic statement is that any fact to be used in sentencing must be alleged in the indictment and proven before the jury under the beyond a reasonable doubt standard.

No deficiency or tax loss was alleged in the indictment or proven for the jury.

No liability statute was alleged in the indictment or proven before the jury.

No liability or tax loss was considered by the jury, and no dollar quantity was entered in the verdict of the jury.

All of the enhancement points were added without benefit of any proof whatsoever before teh jury.

All the enhancement points were added by the judge under the satndard of proof called preponderence of the evidence, a now clearly unconstitutional act under the sixth amendment.

Plaintiff can not be harmed by the release.

JURISDICTION

As emphasized by the court in Cunningham v. California, U.S. No. 05-6551 decided and published 22 January, 2007, the concept of Sixth Amendment rights is common law doctrine. In the Common law any court maintains the jurisdiction and authority to correct its own error. The extraordinary Writ befor merging of the rules was called Writ of Error Corum Vobis. Thus this court can still decide to correct its own unconstitutional act.

ARGUMENT FOR THE CAUSE

On January 22, 2007, The Supreme Court of the United States carefully and definitely clarified and emphaized its decisions from 1999 to present stating that any fact that is used in sentencing must be proven before the jury and that judge finding of facts under preponderance of the evidence as in this case is in fact an unconstitutional act.

The consistent maxim of law is that an unconstitutional act does nothing and imposes no duty, or in this case penalty.

By the "bright line change" from Apprendi v New Jersey, 530 U.S. 466, 490 the judicial conduct of this court in sentencing was unconstitutional and unethical.

US v Magallanza, 408 F. 3d. 672 is in legal fact a void judgment made without jurisdiction or authority after Apprendi, supra, bright line change had been reported in Blakely v. Washington, S. Ct., 2003 542 U.S. 307-8, and Booker, S. Ct 2005; and this honorable court was acting unconstitutional when in sentencing it continued to use and emphasize the unconstitutional standard for fact finding called on the record preponderance of the evidence.

Apprendi is reemphasized and explained as a bright line change in the standard for judicial conduct during sentencing in the Cunningham v California decision so that there can be no doubt as to the doctrinal precedent of the Supreme Court and no room for any inferior interpretation to continue unconstitutional acts to enhance sentences. The full text is attached and incorporated herein by this reference. A few quotes follow for ease of understanding.

It sounds to this convicted man that the Supremes were yelling at their inferior courts and judges when they said; "This court has repeatedly held that, under the sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." This clear concise statement in decisional precedent is not subject to interpretation by inferior courts.

Then: "While this rule is rooted in longstanding common-law practice its explicit statement in our decision is recent. In Jones v United States, 526 U.S. 227 (1999), we explained the Sixth Amendment's historical and doctrinal foundation and recognized that judicial fact finding operating to increase a defendant's otherwise maximum punishment posed a grave constitutional question.

Apprendi held: "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." The Harris v United States, 536 U.S. 545, 557-566 (2002) "Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury verdict would have been considered an element of the aggravated crime- and thus the domain of the jury- by those

who framed the Bill of Rights.)

Blakely; "our precedents make clear ... that the maximum sentence for Apprendi purpose is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict. In other words ... without any additional factfinding.."

All of the enhancements and additions to sentence based on those judge found facts under the preponderance of the evidence are unconstitutional under Apprendi's Bright line rule as re-explained in Cunningham. It is a legal maxim created by the Supreme Court that an unconstitutional act does nothing and forms no duty; yet this truly innocent man remains a federal political prisoner because this court decided it was above the law, with the authority to interpret the Supreme Court rather than follow its precedent as repeatedly stated by the Supreme Court.

All authority not expressly delegated is reserved.

All delegation must come from the sovereign authority by a chain of authority. There is no Constitutional delegation of the people to the United States for inferiors to disobey and interpret the Supremes. There is no statutory delegation of interpretation from Congress to the inferior courts or their staff. Nancy Perryman openly stated " we interpret statutes and decisions all the time" an unconstitutional exertion and claim of authority.

The precedent also states that fraud destroys everything it touches; and in this case all the acts done to interpret and enhance are unconstitutional acts constituting fraud upon the court by an officer of the court in the persons of Nancy Perryman and Jeffrey Gallant, and perhaps the bench itself. It is plain that Nancy did not create the assumption of power she so enjoyed using.

"Fraud vitiates the most solemn contracts, documents, and even judgments" U.S. v. Throckmorton, 98 U.S. 61

"Courts are constituted by authority and they can not act beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal." Elliott v Peirsol, 1 Pet. 328, 340; Old Wayne Life Ass'n v. McDonough, 204 U.S.8.

Marbury v. Madison, 5 U.S. 137: "The Constitution of these United States is the supreme law of the land. Any law that is repugnant to the Constitution is null and void of law." The Court's unconstitutional actions to deprive this innocent man of liberty and livelihood are null and void; and now the court knows for certain that it acted unconstitutionally in convicting and sentencing this living soul to prison to aid the prosecutor in perpetrating his unconstitutional acts.

Boyd v. U.S., 116 U.S. 616: "The court is to protect against any encroachment of Constitutionally secured liberties." Among these rights are life liberty and the pursuit of happiness: this court by its unconstitutional actions breached two of the inalienable rights; and placed the third in jeopardy.

Miranda v. Arizona, 384 U.S. 436: "Where rights secured by the Constitution are involved, there can be no rulemaking or legislation, which would abrogate them." This court aided the perpetrators of the frauds above and covered up for the rampant violations of law; itself wholly rebelling to interpret instead of following precedent in direct contradistinction to its sworn duty. The court scoffed at any limitation, wrongly.

Actions by the court in contradistinction to its limited delegated authority extend to; getting out of business as a condition of probation before sentencing; denial of peaceful redress under First Amendment; no freedom of speech; abrogation of Second Amendment rights; and the entire jail term is based on judge found facts under preponderance of the evidence, a clearly unconstitutional action.

Cunningham continues the instruction: "determination by the judge, we have said, is the very inquiry Apprendi's 'bright line rule' was designed to exclude: and further "factfinding ... our decisions make plain, falls within the province of the jury employing a beyond a reasonable doubt standard." And once again: "calling upon a jury -- to find facts necessary to the imposition of an elevated sentence".

There is no tax loss alleged in the indictment or proved before the jury beyond a reasonable doubt and the courts use of such numbers is a clearly unconstitutional act.

There is no jurisdiction alleged in the indictment or proven before the jury beyond a reasonable doubt and all of the evidence presented was by the accused challenging jurisdiction so there was no time at which the court could have even reached the preponderance of the evidence. No! the court was simply convinced without any evidence by the plaintiff; and assumed powers not sustained by precedent or delegated by the Congress or Constitution to act in direct prideful rebellion against law and precedent to achieve its unconstitutional goal of an enhanced sentence of an innocent man.

The Court by its own unconstitutional acts tricked the jury into a guilty verdict, willingly supporting the lies of prosecutor.

The Court denied the Sixth Amendment right to trial by jury and beyond a reasonable doubt in the jury instruction that are directly in contradistinction to more than a century of holding precedent, in excess of the powers delegated to this inferior court by statute and by precedent.

A single unconstitutional act makes the whole process void on its fact.

The law, the precedent and their application are very important facts to which the defendant had a right to trial by jury and beyond a reasonable doubt standard of proof.

Apprendi's bright line rule requires that all facts related to sentencing must be ascribed in the jury verdict. None of the facts used by this court pass that precedent requirement.

At the first interview with Nancy Perryman, who by the court's own declaration was his mouthpiece to speak for him; she estimated the maximum sentencing range to be 24 to 36 months; and even that is questionable. One fraud destroys it all; one unconstitutional act makes it all willfully void. The judicial rebellion against the precedent is in contradistinction to its oath and office.

"When the words of a statute are unambiguous, the first cannon of statutory construction - that courts presume that a legislature says in a statute what it means and means in a statute what it says there - is also the last, and judicial inquiry is complete." Connecticut National Bank v. Germain, 503 U.S. 117; see also Zedner. This court is powerless to interpret statutes to assume powers and jurisdiction not clearly published by Congress in statute and the Supreme Court in doctrinal precedent.

Petitioner for release has proven repeatedly to this court

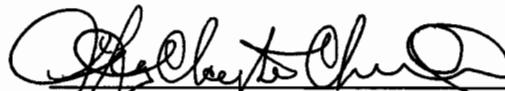
that he is trustworthy to appear and redress any action with or against government.

WHEREFORE: Convicted man Jimmy Clayton Chisum moves this court to its conscience before God and man for an order of release from federal incarceration during the pendency of the appeal process and for reasonable time for voluntary surrender should there be any conviction or sentence left to serve.

And for an order removing all the unconstitutional rebellion from the case.

And to restore or make whole this innocent man to the maximum extent available to the court.

Prepared and signed this 7th day of March, 2007 AD.

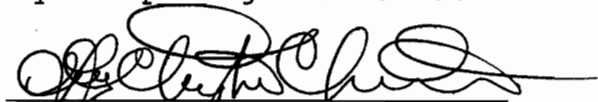


Jimmy Clayton Chisum, en esse
#84388008 in propria persona
Federal Prison Camp LaTuna
PO Box 8000
Anthony, Texas, 88021

CERTIFICATE OF SERVICE:

I certify that I have served a copy of this motion for release pending appeal upon US Attorney, 1200 W. Okmulgee, Muskogee, Oklahoma, 74401; Stephen Knorr, 4815 S. Harvard, Ste 523, Tulsa Oklahoma by first class mail with adequate postage attached.

7 March 2007


Jimmy Clayton Chisum sui juris

Text

OPINIONS OF THE UNITED STATES SUPREME COURT

SENTENCING

The Sixth Amendment right to a jury trial is violated by a state sentencing scheme that sets out three discrete alternative sentences and authorizes the most severe sentence only when the sentencing judge finds the existence of aggravating circumstances not found by the jury or admitted by the defendant. (*Cunningham v. California*, U.S., No. 05-6551, 1/22/07) Page 415

PRISONS AND JAILS

The Prison Litigation Reform Act's requirement that prisoners exhaust administrative grievance procedures before seeking redress in federal court does not require that inmates plead and demonstrate exhaustion in their complaints, but instead places the burden on defendants to raise a failure to exhaust as an affirmative defense; exhaustion is not per se inadequate simply because the person sued was not named in the initial grievance; a prisoner's failure to exhaust as to any single claim in the complaint does not require dismissal of the entire action; a court's imposition of such rules exceeds the proper limits on the judicial role. (*Jones v. Bock*, U.S., No. 05-7058, 1/22/07) Page 428

IMMIGRATION

A provision of the Immigration and Nationality Act subjecting certain aliens to removal for committing a "theft offense (including receipt of stolen property) . . . for which the term of imprisonment [is] at least one year," 8 U.S.C. §§ 1101(a)(43)(G), 1227(a)(2)(A), encompasses the crime of aiding and abetting a theft offense. (*Gonzales v. Duenas-Alvarez*, U.S., No. 05-1629, 1/17/07) Page 435

Full Text of Opinion

JOHN CUNNINGHAM, PETITIONER v. CALIFORNIA

No. 05-6551

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

NOTE: These opinions are subject to formal revision before publication in the preliminary report of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, DC 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

Syllabus

No. 05-6551. Argued October 11, 2006—Decided January 22, 2007

Petitioner Cunningham was tried and convicted of continuous sexual abuse of a child under 14. Under California's determinate sentencing law (DSL), that offense is punishable by one of three precise terms of imprisonment: a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years. The DSL obliged the trial judge to sentence Cunningham to the 12-year middle term unless the judge found one or more additional "circumstances in aggravation." Court Rules adopted to implement the DSL define "circumstances in aggravation" as facts that justify the upper term. Those facts, the Rules provide, must be established by a preponderance of the evidence. Based on a post-trial sentencing hearing, the judge found by a preponderance of the evidence six aggravating facts, including the particular vulnerability of the victim, and one mitigating fact, that Cunningham had no record of prior criminal conduct. Concluding that the aggravators outweighed the sole mitigator, the judge sentenced Cunningham to the upper term of 16 years. The California Court of Appeal affirmed. The State Supreme Court denied review, but in a decision published nine days earlier, *People v. Black*, 35 Cal 4th 1230, 113 P. 3d 534, that court held that the DSL survived Sixth Amendment inspection.

Held: The DSL, by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments.

(a) In *Apprendi v. New Jersey*, this Court held that, under the Sixth Amendment, any fact (other than a prior conviction) that exposes a defendant to a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. See 530 U. S. 466, 490. The Court has applied the rule of *Apprendi* to facts subjecting a defendant to the death penalty, *Ring v. Arizona*, 536 U. S. 584, 602, 609, facts permitting a sentence in excess of the "standard range" under Washington's Sentencing Reform Act (Reform Act), *Blakely v. Washington*, 542 U. S. 296, 304-305, and facts triggering a sentence range elevation under the then-mandatory Federal Sentencing Guidelines, *United States v. Booker*, 543 U. S. 220, 243-244. *Blakely* and *Booker* bear most closely on the question presented here.

The maximum penalty for *Blakely's* offense, under Washington's Reform Act, was ten years' imprisonment, but if no facts beyond those reflected in the jury's verdict were found by the trial judge, *Blakely* could not receive a sentence above a standard range of 49 to 53 months. *Blakely* was sentenced to 90 months, more than three years above the standard range, based on the judge's finding of deliberate cruelty. Applying *Apprendi*, this Court held the sentence unconstitutional. The State in *Blakely* endeavored to distinguish *Apprendi*, contending that *Blakely's* sentence was within the judge's discretion based solely on the guilty verdict. The Court dismissed that argument. *Blakely* could not have been sentenced above the standard range absent an additional fact. Consequently, that fact was subject to the Sixth Amendment's jury-trial guarantee. It did not matter that *Blakely's* sentence, though outside the standard range, was within the 10-year maximum. Because the judge could not have imposed a sentence outside the standard range without finding an additional fact, the top of that range—53 months, not 10 years—was the relevant statutory maximum. The Court also rejected the State's arguments that *Apprendi* was satisfied because the Reform Act did not specify an exclusive catalog of facts on which a judge might base a departure from the standard range, and because it ultimately left the decision whether or not to depart to the judge's discretion.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

Booker was sentenced under the Federal Sentencing Guidelines. The facts found by the jury yielded a base Guidelines range of 210 to 262 months' imprisonment, a range the judge could not exceed without undertaking additional factfinding. The judge did so, making a finding that boosted Booker into a higher Guidelines range. This Court held Booker's sentence impermissible under the Sixth Amendment. There was "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]." 543 U.S., at 233. Both were "mandatory and impose[d] binding requirements on all sentencing judges." *Ibid.* All Members of the Court agreed, however, that the Guidelines would not implicate the Sixth Amendment if they were advisory. *Ibid.* Facing the remedial question, the Court concluded that rendering the Guidelines advisory came closest to what Congress would have intended had it known that the Guidelines were vulnerable to a Sixth Amendment challenge. Under the advisory Guidelines system described in *Booker*, judges would no longer be confined to the sentencing range dictated by the Guidelines, but would be obliged to "take account" of that range along with the sentencing goals enumerated in the Sentencing Reform Act (SRA). *Id.*, at 259, 264. In place of the SRA provision governing appellate review of sentences under the mandatory Guidelines scheme, the Court installed a "reasonableness" standard of review. *Id.*, at 261.

(b) In all material respects, California's DSL resembles the sentencing systems invalidated in *Blakely* and *Booker*. Following the reasoning in those cases, the middle term prescribed under California law, not the upper term, is the relevant statutory maximum. Because aggravating facts that authorize the upper term are found by the judge, and need only be established by a preponderance of the evidence, the DSL violates the rule of *Apprendi*.

While "that should be the end of the matter," *Blakely*, 542 U.S., at 313, in *People v. Black*, the California Supreme Court insisted that the DSL survives inspection under our precedents. The *Black* court reasoned that, given the ample discretion afforded trial judges to identify aggravating facts warranting an upper term sentence, the DSL did "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)," 35 Cal. 4th, at 1255-1256, 113 P. 3d, at 543-544. This Court cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in a particular case, does not shield a sentencing system from the force of this Court's decisions. The *Black* court also urged that the DSL is not cause for concern because it reduced the penalties for most crimes over the prior indeterminate sentencing scheme; because the system is fair to defendants; and because the DSL requires statutory sentence enhancements (as distinguished from aggravators) to be charged in the indictment and proved to a jury beyond a reasonable doubt. The *Black* court's examination, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. This Court's decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, is the very inquiry *Apprendi*'s bright-line rule was designed to exclude.

Ultimately, the *Black* court relied on an equation of California's DSL to the post-*Booker* federal system. That attempted comparison is unavailing. The *Booker* Court held the Federal Guidelines incompatible with the Sixth Amendment because they were "mandatory and impose[d] binding requirements on all sentencing judges," 543 U.S., at 233. To remedy the constitutional infirmity, the Court excised provisions that rendered the system mandatory, leaving the Guidelines in place as advisory only. The DSL, however, does not resemble the advisory system the Court in *Booker* had in view. Under California's system, judges are not free to exercise their "discretion to select a specific sentence within a defined range." *Ibid.* California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years, but had to impose 12 years, nothing less and nothing more, unless the judge found facts allowing a sentence of 6 or 16 years. Factfinding to elevate a sentence from 12 to 16 years, this Court's decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies.

The *Black* court attempted to rescue the DSL's judicial factfinding authority by typing it a reasonableness constraint, equivalent to the constraint operative in the post-*Booker* federal system. Reasonableness, however, is not the touchstone of Sixth Amendment analysis. The reasonableness requirement *Booker* anticipated for the federal system operates within the constitutional constraints delineated in this Court's precedent, not as a substitute for those constraints. Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment. *Booker*'s remedy for the Federal Guidelines, in short, is not a recipe for rendering this Court's Sixth Amendment case law toothless. Further

elaboration here on the federal reasonableness standard is neither necessary nor proper. The Court has granted review in two cases—to be argued and decided later this Term—raising questions trained on that matter. *Claiborne v. United States*, No. 06-5618; *Rita v. United States*, No. 06-5754.

(c) As to the adjustment of California's sentencing system in light of the Court's ruling, "[t]he ball . . . lies in [California's] court." *Booker*, 543 U.S., at 265. Several States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing, by calling upon the jury to find any fact necessary to the imposition of an elevated sentence. Other States have chosen to permit judges genuinely "to exercise broad discretion . . . within a statutory range," which, "everyone agrees," encounters no Sixth Amendment shoal. *Id.*, at 233. California may follow the paths taken by its sister States or otherwise alter its system, so long as it observes Sixth Amendment limitations declared in this Court's decisions.

Reversed in part and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which BREYER, J., joined. ALITO, J., filed a dissenting opinion, in which KENNEDY and BREYER, JJ., joined.

JUSTICE GINSBURG delivered the opinion of the Court.

California's determinate sentencing law (DSL) assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated "upper term" sentence. The facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of the evidence, not beyond a reasonable doubt. The question presented is whether the DSL, by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. We hold that it does.

As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). "[T]he relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Blakely*, 542 U.S., at 303-304 (emphasis in original). In petitioner's case, the jury's verdict alone limited the permissible sentence to 12 years. Additional factfinding by the trial judge, however, yielded an upper term sentence of 16 years. The California Court of Appeal affirmed the harsher sentence. We reverse that disposition because the four-year elevation based on judicial factfinding denied petitioner his right to a jury trial.

I

A

Petitioner John Cunningham was tried and convicted of continuous sexual abuse of a child under the age of 14. Under the DSL, that offense is punishable by imprisonment for a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years. Cal. Penal Code Ann. § 288.5(a) (West 1999) (hereinafter Penal Code). As further explained below, see *infra*, at 4-7, the DSL obliged the trial judge to sen-

tence Cunningham to the 12-year middle term unless the judge found one or more additional facts in aggravation. Based on a post-trial sentencing hearing, the trial judge found by a preponderance of the evidence six aggravating circumstances, among them, the particular vulnerability of Cunningham's victim, and Cunningham's violent conduct, which indicated a serious danger to the community. *Tr. of Sentencing* (Aug. 1, 2003), App. 22.¹ In mitigation, the judge found one fact: Cunningham had no record of prior criminal conduct. *Ibid.* Concluding that the aggravators outweighed the sole mitigator, the judge sentenced Cunningham to the upper term of 16 years. *Id.*, at 23.

A panel of the California Court of Appeal affirmed the conviction and sentence; one judge dissented in part, urging that this Court's precedent precluded the judge-determined four-year increase in Cunningham's sentence. No. A103501 (Apr. 18, 2005), App. 43-48; *id.*, at 48-50 (Jones, J., concurring in part and dissenting in part).² The California Supreme Court denied review. No. S133971 (June 29, 2005) (en banc), *id.*, at 52. In a reasoned decision published nine days earlier, that court considered the question here presented and held that the DSL survived Sixth Amendment inspection. *People v. Black*, 35 Cal. 4th 1238, 113 P. 3d 534 (June 20, 2005).

B

Enacted in 1977, the DSL replaced an indeterminate sentencing regime in force in California for some 60 years. See *id.*, at 1246, 113 P. 3d, at 537; Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 Pac. L. J. 5, 6-22 (1978) (hereinafter Cassou & Taugher). Under the prior regime, courts imposed open-ended prison terms (often one year to life), and the parole board—the Adult Authority—determined the amount of time a felon would ultimately spend in prison. *Black*, 35 Cal. 4th, at 1246, 1256, 113 P. 3d, at 537, 544; *In re Roberts*, 36 Cal. 4th 575, 588, n. 6, 115 P. 3d 1121, 1129, n. 6 (2005); Cassou & Taugher 5-9. In contrast, the DSL fixed the terms of imprisonment for most offenses, and eliminated the possibility of early release on parole. See Penal Code § 3000 *et seq.* (West Supp. 2006); 3 B. Witkin & N. Epstein, *California Criminal Law* § 610, p. 809 (3d ed. 2000); Brief for Respondent 7.³ Through the DSL, California's lawmakers aimed to promote uniform and pro-

¹ The particular vulnerability of the victim is listed in Cal. Rule of Court 4.421(a)(3) (Criminal Cases) (West 2006) (hereinafter Rule), as a fact "relating to the crime." Violent conduct indicating a serious danger to society is listed in Rule 4.421(b)(1) as a fact "relating to the defendant."

² In addition to a Sixth Amendment challenge, Cunningham disputed the substance of five of the six findings made by the trial judge. The appellate panel affirmed the trial judge's vulnerable victim and violent conduct findings, but rejected the finding that Cunningham abused a position of trust (because that finding overlapped with the vulnerable victim finding). The panel did not decide whether the judge's other findings were warranted, concluding that he properly relied on at least two aggravating facts in imposing the upper term, and that it was not "reasonably probable" that a different sentence would have been imposed absent any improper findings. App. 43-46; *id.*, at 51 (May 4, 2005, order modifying opinion and denying rehearing).

³ Murder and certain other grave offenses still carry lengthy indeterminate terms with the possibility of early release on parole.

portionate punishment. Penal Code § 1170(a)(1); *Black*, 35 Cal. 4th, at 1246, 113 P. 3d, at 537.

For most offenses, including Cunningham's, the DSL regime is implemented in the following manner. The statute defining the offense prescribes three precise terms of imprisonment—a lower, middle, and upper term sentence. *E.g.*, Penal Code § 288.5(a) (West 1999) (a person convicted of continuous sexual abuse of a child "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years"). See also *Black*, 35 Cal. 4th, at 1247, 113 P. 3d, at 538. Penal Code § 1170(b) (West Supp. 2006) controls the trial judge's choice; it provides that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." "[C]ircumstances in aggravation or mitigation" are to be determined by the court after consideration of several items: the trial record; the probation officer's report; statements in aggravation or mitigation submitted by the parties, the victim, or the victim's family; "and any further evidence introduced at the sentencing hearing." *Ibid.*

The DSL directed the State's Judicial Council⁴ to adopt Rules guiding the sentencing judge's decision whether to "[i]mpose the lower or upper prison term." Penal Code § 1170.3(a)(2) (West 2004).⁵ Restating § 1170(b), the Council's Rules provide that "[t]he middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." Rule 4.420(a). "Circumstances in aggravation," as crisply defined by the Judicial Council, means "facts which justify the imposition of the upper prison term." Rule 4.405(d) (emphasis added). Facts aggravating an offense, the Rules instruct, "shall be established by a preponderance of the evidence." Rule 4.420(b),⁶ and must be "stated orally on the record." Rule 4.420(e).

The Rules provide a nonexhaustive list of aggravating circumstances, including "[f]acts relating to the crime," Rule 4.421(a),⁷ "[f]acts relating to the defendant," Rule 4.421(b),⁸ and "[a]ny other facts statutorily declared to be circumstances in aggravation," Rule 4.421(c). Beyond the enumerated circumstances, "the judge is free

Brief for Respondent 7, n. 2. See, *e.g.*, Penal Code § 190 (West Supp. 2006).

⁴ The Judicial Council includes the chief justice and another justice of the California Supreme Court, three judges sitting on the Courts of Appeal, ten judges from the Superior Courts, and other nonvoting members. Cal. Const., Art. 6, § 6(a) (West Supp. 2006). The California Constitution grants the Council authority, *inter alia*, "to adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute." Art. 6, § 6(d).

⁵ The Rules were amended on January 1, 2007. Those amendments made technical changes, none of them material to the constitutional question before us. We refer in this opinion to the prior text of the Rules, upon which the parties and principal authorities rely.

⁶ The judge must provide a statement of reasons for a sentence only when a lower or upper term sentence is imposed. Rules 4.406(b), 4.420(e).

⁷ *E.g.*, Rule 4.421(a)(1) ("[T]he fact that . . . [t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.")

⁸ *E.g.*, Rule 4.421(b)(1) ("[T]he fact that . . . [t]he defendant has engaged in violent conduct which indicates a serious danger to society.")

to consider any 'additional criteria reasonably related to the decision being made.'" *Black*, 35 Cal. 4th, at 1247, 113 P. 3d, at 538 (quoting Rule 4.408(a)). "A fact that is an element of the crime," however, "shall not be used to impose the upper term." Rule 4.420(d). In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts—whether related to the offense or the offender—beyond the elements of the charged offense.

JUSTICE ALTO maintains, however, that a circumstance in aggravation need not be a fact at all. In his view, a policy judgment, or even a judge's "subjective belief" regarding the appropriate sentence, qualifies as an aggravating circumstance. *Post*, at 11–12 (dissenting opinion). California's Rules, however, constantly refer to "facts." As just noted, the Rules define "circumstances in aggravation" as "facts which justify the imposition of the upper prison term." Rule 4.405(d) (emphasis added).⁹ And "circumstances in aggravation," the Rules unambiguously declare, "shall be established by a preponderance of the evidence," Rule 4.420(b), a clear factfinding directive to which there is no exception. See *People v. Hall*, 8 Cal. 4th 950, 957, 883 P. 2d 974, 978 (1994) ("Selection of the upper term is justified only if circumstances in aggravation are established by a preponderance of evidence . . ." (emphasis added)).

While the Rules list "[g]eneral objectives of sentencing," Rule 4.410(a), nowhere are these objectives cast as "circumstances in aggravation" that alone authorize an upper term sentence. The Rules also state that "[t]he enumeration . . . of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made." Rule 4.408(a). California courts have not read this language to unmoor "circumstances in aggravation" from any factfinding anchor.

In line with the Rules, the California Supreme Court has repeatedly referred to circumstances in aggravation as facts. See, e.g., *Black*, 35 Cal. 4th, at 1256, 113 P. 3d, at 544 ("The Legislature did not identify all of the particular facts that could justify the upper term." (emphasis added)); *People v. Wiley*, 9 Cal. 4th 580, 587, 889 P. 2d 541, 545 (1995) ("[T]rial courts are assigned the task of deciding whether to impose an upper or lower term of imprisonment based upon their determination whether there are circumstances in aggravation or mitigation of the crime, a determination that invariably requires numerous factual findings." (emphasis added and internal quotation marks omitted)).

It is unsurprising, then, that State's counsel, at oral argument, acknowledged that he knew of no case in which a California trial judge had gone beyond the middle term based not on any fact the judge found, but solely on the basis of a policy judgment or subjective belief. See Tr. of Oral Arg. 49–50.

⁹ See also, e.g., Rule 4.420(b) ("Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." (emphasis added)); Rule 4.420(e) (court must provide "a concise statement of the ultimate facts that the court deemed to constitute circumstances in aggravation or mitigation" (emphasis added)).

Notably, the Penal Code permits elevation of a sentence above the upper term based on specified statutory enhancements relating to the defendant's criminal history or circumstances of the crime. See, e.g., Penal Code § 667 *et seq.* (West Supp. 2006); § 12022 *et seq.* See also *Black*, 35 Cal. 4th, at 1257, 113 P. 3d, at 545. Unlike aggravating circumstances, statutory enhancements must be charged in the indictment, and the underlying facts must be proved to the jury beyond a reasonable doubt. Penal Code § 1170.1(e); *Black*, 35 Cal. 4th, at 1257, 113 P. 3d, at 545. A fact underlying an enhancement cannot do double duty; it cannot be used to impose an upper term sentence and, on top of that, an enhanced term. Penal Code § 1170(b). Where permitted by statute, however, a judge may use a fact qualifying as an enhancer to impose an upper term rather than an enhanced sentence. *Ibid.*; Rule 4.420(c).

II

— This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. While this rule is rooted in longstanding common-law practice, its explicit statement in our decisions is recent. In *Jones v. United States*, 526 U. S. 227 (1999), we examined the Sixth Amendment's historical and doctrinal foundations, and recognized that judicial factfinding operating to increase a defendant's otherwise maximum punishment posed a grave constitutional question. *Id.*, at 239–252. While the Court construed the statute at issue to avoid the question, the *Jones* opinion presaged our decision, some 15 months later, in *Apprendi v. New Jersey*, 530 U. S. 466 (2000).

Charles Apprendi was convicted of possession of a firearm for an unlawful purpose, a second-degree offense under New Jersey law punishable by five to ten years' imprisonment. *Id.*, at 468. A separate "hate crime" statute authorized an "extended term" of imprisonment: Ten to twenty years could be imposed if the trial judge found, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.*, at 468–469 (quoting N. J. Stat. Ann. § 2C:44–3(e) (West Supp. 1999–2000)). The judge in Apprendi's case so found, and therefore sentenced the defendant to 12 years' imprisonment. This Court held that the Sixth Amendment proscribed the enhanced sentence. 530 U. S., at 471. Other than a prior conviction, see *Almendarez-Torres v. United States*, 523 U. S. 224, 239–247 (1998), we held in *Apprendi*, "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." 530 U. S., at 490. — See also *Harris v. United States*, 536 U. S. 545, 557–566 (2002) (plurality opinion) ("*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights.").

We have since reaffirmed the rule of *Apprendi*, applying it to facts subjecting a defendant to the death penalty, *Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002), facts permitting a sentence in excess of the “standard range” under Washington’s Sentencing Reform Act, *Blakely v. Washington*, 542 U.S. 296, 304–305 (2004), and facts triggering a sentence range elevation under the then-mandatory Federal Sentencing Guidelines, *United States v. Booker*, 543 U.S. 220, 243–244 (2005). *Blakely* and *Booker* bear most closely on the question presented in this case.

Ralph Howard Blakely was convicted of second-degree kidnapping with a firearm, a class B felony under Washington law. *Blakely*, 542 U.S., at 298–299. While the overall statutory maximum for a class B felony was ten years, the State’s Sentencing Reform Act (Reform Act) added an important qualification: If no facts beyond those reflected in the jury’s verdict were found by the trial judge, a defendant could not receive a sentence above a “standard range” of 49 to 53 months. *Id.*, at 299–300. The Reform Act permitted but did not require a judge to exceed that standard range if she found “substantial and compelling reasons justifying an exceptional sentence.” *Ibid.* (quoting Wash. Rev. Code Ann. § 9.94A.120(2) (2000)). The Reform Act set out a nonexhaustive list of aggravating facts on which such a sentence elevation could be based. It also clarified that a fact taken into account in fixing the standard range—i.e., any fact found by the jury—could under no circumstances count in the determination whether to impose an exceptional sentence. 542 U.S., at 299–300. Blakely was sentenced to 90 months’ imprisonment, more than three years above the standard range, based on the trial judge’s finding that he had acted with deliberate cruelty. *Id.*, at 300.

Applying the rule of *Apprendi*, this Court held Blakely’s sentence unconstitutional. The State in *Blakely* had endeavored to distinguish *Apprendi* on the ground that “[u]nder the Washington guidelines, an exceptional sentence is within the court’s discretion as a result of a guilty verdict.” Brief for Respondent in *Blakely v. Washington*, O.T. 2003, No. 02–1632, p. 15. We rejected that argument. The judge could not have sentenced Blakely above the standard range without finding the additional fact of deliberate cruelty. Consequently, that fact was subject to the Sixth Amendment’s jury-trial guarantee. 542 U.S., at 304–314. It did not matter, we explained, that Blakely’s sentence, though outside the standard range, was within the 10-year maximum for class B felonies:

“Our precedents make clear . . . that the ‘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 . . . 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 findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ . . . and the judge exceeds his proper authority.” *Id.*, at 303 (emphasis in original) (quoting 1 J. Bishop, *Criminal Procedure* § 87, p. 55 (2d ed. 1872)).

Because the judge in Blakely’s case could not have imposed a sentence outside the standard range without

finding an additional fact, the top of that range—53 months, and not 10 years—was the relevant statutory maximum. 542 U.S., at 304.

The State had additionally argued in *Blakely* that *Apprendi*’s rule was satisfied because Washington’s Reform Act did not specify an exclusive catalog of potential facts on which a judge might base a departure from the standard range. This Court rejected that argument as well. “Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact . . . one of several specified facts . . . or any aggravating fact (as here),” we observed, “it remains the case that the jury’s verdict alone does not authorize the sentence.” 542 U.S., at 305 (emphasis in original). Further, we held it irrelevant that the Reform Act ultimately left the decision whether or not to depart to the judge’s discretion: “Whether the judicially determined facts require a sentence enhancement or merely allow it,” we noted, “the verdict alone does not authorize the sentence.” *Ibid.*, n. 8 (emphasis in original).

Freddie Booker was convicted of possession with intent to distribute crack cocaine and was sentenced under the Federal Sentencing Guidelines. The facts found by Booker’s jury yielded a base Guidelines range of 210 to 262 months’ imprisonment, a range the judge could not exceed without undertaking additional factfinding. *Booker*, 543 U.S., at 227, 233–234. The judge did so, finding by a preponderance of the evidence that Booker possessed an amount of drugs in excess of the amount determined by the jury’s verdict. That finding boosted Booker into a higher Guidelines range. Booker was sentenced at the bottom of the higher range, to 360 months in prison. *Id.*, at 227.

In an opinion written by JUSTICE STEVENS for a five-Member majority, the Court held Booker’s sentence impermissible under the Sixth Amendment. In the majority’s judgment, there was “no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*].” *Id.*, at 233. Both systems were “mandatory and impose[d] binding requirements on all sentencing judges.” *Ibid.*¹⁰ JUSTICE STEVENS’ opinion for the Court, it bears emphasis, next expressed a view on which there was no disagreement among the Justices. He acknowledged that the Federal Guidelines would not implicate the Sixth Amendment were they advisory:

“If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by [this case] would have

¹⁰ California’s DSL, we note in this context, resembles pre-*Booker* federal sentencing in the same ways Washington’s sentencing system did: The key California Penal Code provision states that the sentencing court “shall order imposition of the middle term” absent “circumstances in aggravation or mitigation of the crime,” § 1170(b) (emphasis added), and any move to the upper or lower term must be justified by “a concise statement of the ultimate facts” on which the departure rests, Rule 4.420(e) (emphasis added). But see post, at 7 (ALITO, J., dissenting) (characterizing California’s DSL as indistinguishable from post-*Booker* sentencing).

been avoided entirely if Congress had omitted from the [federal Sentencing Reform Act] the provisions that make the Guidelines binding on district judges . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

"The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges." *Ibid.* (citations omitted).

In an opinion written by JUSTICE BREYER, also garnering a five-Member majority, the Court faced the remedial question, which turned on an assessment of legislative intent: What alteration would Congress have intended had it known that the Guidelines were vulnerable to a Sixth Amendment challenge? Three choices were apparent: the Court could invalidate in its entirety the Sentencing Reform Act of 1984 (SRA), the law comprehensively delineating the federal sentencing system; or it could preserve the SRA, and the mandatory Guidelines regime the SRA established, by attaching a jury-trial requirement to any fact increasing a defendant's base Guidelines range; finally, the Court could render the Guidelines advisory by severing two provisions of the SRA, 18 U. S. C. § 3553(b)(1) and 3742(e) (2000 ed. and Supp. IV). 543 U. S., at 246-249.¹¹ Recognizing that "reasonable minds can, and do, differ" on the remedial question, the majority concluded that the advisory Guidelines solution came closest to the congressional mark. *Id.*, at 248-258.

Under the system described in JUSTICE BREYER's opinion for the Court in *Booker*, judges would no longer be tied to the sentencing range indicated in the Guidelines. But they would be obliged to "take account of" that range along with the sentencing goals Congress enumerated in the SRA at 18 U. S. C. § 3553(a). 543 U. S., at 259, 264.¹² Having severed § 3742(e), the provision of the SRA governing appellate review of sentences under the mandatory Guidelines scheme, see *supra*, at 13, and n. 11, the Court installed, as consistent with the Act and

¹¹ Title 18 U. S. C. § 3553(b)(1) mandated the imposition of a Guidelines sentence unless the district court found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Section 3742(e) directed the court of appeals to determine, *inter alia*, whether the district court correctly applied the Guidelines, § 3742(e)(2), and, if the sentence imposed fell outside the applicable Guidelines range, whether the sentencing judge had provided a written statement of reasons, whether § 3553(b) and the facts of the case warranted the departure, and whether the degree of departure was reasonable, § 3742(e)(3).

¹² Section 3553(a) instructs sentencing judges to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," "the kinds of sentences available," and the Guidelines and policy statements issued by the United States Sentencing Commission. § 3553(a)(1), (3)-(5). Avoidance of unwarranted sentencing disparities, and the need to provide restitution, are also listed as concerns to which the judge should respond. § 3553(a)(6)-(7).

In a further enumeration, § 3553(a) calls for the imposition of "a sentence sufficient, but not greater than necessary" to "reflect the seriousness of the offense," "promote respect for the law," "provide just punishment for the offense," "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." § 3553(a)(2).

the sound administration of justice, a "reasonableness" standard of review. 543 U. S., at 261. Without attempting an elaborate discussion of that standard, JUSTICE BREYER's remedial opinion for the Court observed: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is reasonable." *Ibid.*¹³ The Court emphasized the provisional character of the *Booker* remedy. Recognizing that authority to speak "the last word" resides in Congress, the Court said:

"The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." *Id.*, at 265.

We turn now to the instant case in light of both parts of the Court's *Booker* opinion, and our earlier decisions in point.

III

— Under California's DSL, an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. See *supra*, at 4-5. An element of the charged offense, essential to a jury's determination of guilt, or admitted in a defendant's guilty plea, does not qualify as such a circumstance. See *supra*, at 5-6. Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. 542 U. S., at 303 ("[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." (emphasis in original)). Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, see *supra*, at 5, the DSL violates *Apprendi*'s bright-line rule: Except for 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." 530 U. S., at 490.

While "[t]hat should be the end of the matter," *Blakely*, 542 U. S., at 313, in *People v. Black*, the California Supreme Court held otherwise. In that court's view, the DSL survived examination under our prece-

¹³ While this case does not call for elaboration of the reasonableness check on federal sentencing post-*Booker*, we note that the Court has granted review in two cases raising questions trained on that matter: *Claiborne v. United States*, No. 06-5618 (cert. granted, Nov. 3, 2006); and *Rita v. United States*, No. 06-5754 (cert. granted, Nov. 3, 2006). In *Claiborne*, the Court will consider whether it is consistent with the advisory cast of the Guidelines system post-*Booker* to require that extraordinary circumstances attend a sentence varying substantially from the Guidelines. *Rita* includes the question whether it is consistent with *Booker* to accord a presumption of reasonableness to a within-Guidelines sentence.

In this regard, we note JUSTICE ALTO's view that California's DSL is essentially the same as post-*Booker* federal sentencing. *Post*, at 1-10. To maintain that position, his dissent previews, without benefit of briefing or argument, how "reasonableness review," post-*Booker*, works. *Post*, at 13-15. It is neither necessary nor proper now to join issue with JUSTICE ALTO on this matter.

dent intact. See 35 Cal. 4th, at 1254–1261, 113 P. 3d, at 543–548. The *Black* court acknowledged that California's system appears on surface inspection to be in tension with the rule of *Apprendi*. But in "operation and effect," the court said, the DSL "simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." 35 Cal. 4th, at 1254, 113 P. 3d, at 543. Therefore, the court concluded, "the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*." *Ibid.* But see *id.*, at 1270, 113 P. 3d, at 554 (Kennard, J., concurring and dissenting) ("Nothing in the high court's majority opinions in *Apprendi*, *Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (quoting *id.*, at 1253, 113 P. 3d, at 542)).

The *Black* court's conclusion that the upper term, and not the middle term, qualifies as the relevant statutory maximum, rested on several considerations. First, the court reasoned that, given the ample discretion afforded trial judges to identify aggravating facts warranting an upper term sentence, the DSL

"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): . . . 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." *Id.*, at 1256, 113 P. 3d, at 544 (footnote omitted).

— We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. *Blakely*, 542 U. S., at 305, and n. 8.

The *Black* court also urged that the DSL is not cause for concern because it reduced the penalties for most crimes over the prior indeterminate sentencing regime. 35 Cal. 4th, at 1256–1258, 113 P. 3d, at 544–545. But see *id.*, at 1271–1272, 113 P. 3d, at 555 (Kennard, J., concurring and dissenting) ("This aspect of our sentencing law does not differ significantly from the Washington sentencing scheme [the high court invalidated in *Blakely*.]"); *supra*, at 10. Furthermore, California's system is not unfair to defendants, for they "cannot reasonably expect a guarantee that the upper term will not be imposed" given judges' broad discretion to impose an upper term sentence or to keep their punishment at the middle term. 35 Cal. 4th, at 1258–1259, 113 P. 3d, at 545–546. The *Black* court additionally noted that the DSL requires statutory enhancements (as distinguished from aggravators)—*e.g.*, the use of a firearm or other dangerous weapon, infliction of great bodily injury, Pe-

nal Code §§ 12022, 12022.7–8 (West 2000 and Supp. 2006)—to be charged in the indictment and proved to a jury beyond a reasonable doubt. 35 Cal. 4th, at 1257, 113 P. 3d, at 545.

The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s "bright-line rule" was designed to exclude. See *Blakely*, 542 U. S., at 307–308. But see *Black*, 35 Cal. 4th, at 1260, 113 P. 3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").¹⁴

Ultimately, the *Black* court relied on an equation of California's DSL system to the post-*Booker* federal system. "The level of discretion available to a California judge in selecting which of the three available terms to impose," the court said, "appears comparable to the level of discretion that the high court has chosen to permit federal judges in post-*Booker* sentencing." 35 Cal. 4th, at 1261, 113 P. 3d, at 548. The same equation drives JUSTICE ALITO's dissent. See *post*, at 1 ("The California sentencing law . . . is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in [*Booker*].").

The attempted comparison is unavailing. As earlier explained, see *supra*, at 12–13, this Court in *Booker* held the Federal Sentencing Guidelines incompatible with the Sixth Amendment because the Guidelines were "mandatory and imposed binding requirements on all sentencing judges." 543 U. S., at 233. "[M]erely advisory provisions," recommending but not requiring "the selection of particular sentences in response to differing sets of facts," all Members of the Court agreed, "would not implicate the Sixth Amendment." *Ibid.* To remedy the constitutional infirmity found in *Booker*, the Court's majority excised provisions that rendered the system mandatory, leaving the Guidelines in place as advisory only. *Id.*, at 245–246. See also *supra*, at 13–14.

California's DSL does not resemble the advisory system the *Booker* Court had in view. Under California's system, judges are not free to exercise their "discretion to select a specific sentence within a defined range." *Booker*, 543 U. S., at 233. California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. His instruction was to select 12 years, nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years. Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the prov-

¹⁴ JUSTICE KENNEDY urges a distinction between facts concerning the offense, where *Apprendi* would apply, and facts concerning the offender, where it would not. *Post*, at 1–2 (dissenting opinion). *Apprendi* itself, however, leaves no room for the bifurcated approach JUSTICE KENNEDY proposes. See 530 U. S., at 490 ("[A]ny 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." (emphasis added)).

ince of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies.

Nevertheless, the *Black* court attempted to rescue the DSL's judicial factfinding authority by typing it simply a reasonableness constraint, equivalent to the constraint operative in the federal system post-*Booker*. See 35 Cal. 4th, at 1261, 113 P. 3d, at 548 ("Because an aggravating factor under California law may include any factor that the judge reasonably deems relevant, the [DSL'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."). Reasonableness, however, is not, as the *Black* court would have it, the touchstone of Sixth Amendment analysis. The reasonableness requirement *Booker* anticipated for the federal system operates within the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints. Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment. It is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable. *Booker's* remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless.¹⁵

To summarize: Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.¹⁶

IV

As to the adjustment of California's sentencing system in light of our decision, "[t]he ball . . . lies in [California's] court." *Booker*, 543 U. S., at 265; cf. *supra*, at 15. We note that several States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury— either at trial or in a separate

¹⁵ JUSTICE ALTO, however, would do just that. His opinion reads the remedial portion of the Court's opinion in *Booker* to override *Blakely*, and to render academic the entire first part of *Booker* itself. *Post*, at 13–15. There would have been no majority in *Booker* for the revision of *Blakely* essayed in his dissent. Grounded in a notion of how federal reasonableness review operates in practice, JUSTICE ALTO "necessarily anticipates" a question that will be aired later this Term in *Rita* and *Claiborne*. See *supra*, at 14, n. 13. While we do not forecast the Court's responses in those cases, we affirm the continuing vitality of our prior decisions in point.

¹⁶ Respondent and its amici argue that whatever this Court makes of California's sentencing law, the *Black* court's "construction" of that law as consistent with the Sixth Amendment is authoritative. Brief for Respondent 6, 18, 33; Brief for Hawaii et al. as Amici Curiae 17, 29. We disagree. The *Black* court did not modify California law so as to align it with this Court's Sixth Amendment precedent. See 35 Cal. 4th, at 1273, 113 P. 3d, at 555–556 (Kennard, J., concurring and dissenting). Rather, it construed this Court's decisions in an endeavor to render them consistent with California law. The *Black* court's interpretation of federal constitutional law plainly does not qualify for this Court's deference.

sentencing proceeding—to find any fact necessary to the imposition of an elevated sentence.¹⁷ As earlier noted, California already employs juries in this manner to determine statutory sentencing enhancements. See *supra*, at 7, 18. Other States have chosen to permit judges genuinely "to exercise broad discretion . . . within a statutory range,"¹⁸ which, "everyone agrees," encounters no Sixth Amendment shoal. *Booker*, 543 U. S., at 233. California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions.

* * *

For the reasons stated, the judgment of the California Court of Appeal is reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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JUSTICE KENNEDY, with whom JUSTICE BREYER joins, dissenting.

The dissenting opinion by JUSTICE ALTO, which I join in full, well explains why the Court continues in a wrong and unfortunate direction in the cases following *Apprendi v. New Jersey*, 530 U. S. 466 (2000). See, e.g., *United States v. Booker*, 543 U. S. 220, 326–334 (2005) (BREYER, J., dissenting in part); *Blakely v. Washington*, 542 U. S. 296, 314–324 (2004) (O'Connor, J., dissenting); *id.*, at 326–328 (KENNEDY, J., dissenting); see also *Apprendi, supra*, at 523–554 (O'Connor, J., dissenting); *Jones v. United States*, 526 U. S. 227, 264–272 (1999) (KENNEDY, J., dissenting). The discussion in his dissenting opinion is fully sufficient to show why, in my respectful view, the Court's analysis and holding are mistaken. It does seem appropriate to add this brief, further comment.

In my view the *Apprendi* line of cases remains incorrect. Yet there may be a principled rationale permitting those cases to control within the central sphere of their concern, while reducing the collateral, widespread harm to the criminal justice system and the corrections process now resulting from the Court's wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries. The Court could distinguish between sentencing enhancements based on the nature of the offense, where the *Apprendi* prin-

¹⁷ States that have so altered their systems are Alaska, Arizona, Kansas, Minnesota, North Carolina, Oregon, and Washington. Alaska Stat. §§ 12.55.155(f), 12.55.125(c) (2004); Ariz. Rev. Stat. Ann. § 13–702.01 (West Supp. 2006); Kan. Stat. Ann. §§ 21–4716(b), 21–4718(b) (2005 Supp.); Minn. Stat. § 244.10, subd. 5 (2005 Supp.); N.C. Gen. Stat. Ann. § 15A–1340.16(a1) (Lexis 2005); 2005 Ore. Sess. Laws, ch. 463, §§ 3(1), 4(1); Wash. Rev. Code §§ 9.94A.535, 9.94A.537 (2006). The Colorado Supreme Court has adopted this approach as an interim solution. *Lopez v. People*, 113 P. 3d 713, 716 (Colo. 2005) (en banc). See also Stemen & Wilhelm, *Finding the Jury: State Legislative Responses to Blakely v. Washington*, 18 Fed. Sentencing Rptr. 7 (Oct. 2005) (majority of affected States have retained determinate sentencing systems).

¹⁸ See Ind. Code Ann. § 35–50–2–1.3(a) (West 2006); Tenn. Code Ann. § 40–35–210(c) (2005 Supp.).