No. 05-6551

IN THE SUPREME COURT OF THE UNITED STATES

JOHN CUNNINGHAM,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does California's determinate sentencing law comply with *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 125 S. Ct. 738 (2005), given *People v. Black*, 35 Cal. 4th 1238, 1257-58, 113 P.3d 534, 545, 29 Cal. Rptr. 3d 740, 753 (2005), which held the requirement that the trial court find at least one aggravating factor before imposing an upper term was only a requirement that the sentence be reasonable based on factfinding validly part of the sentencing process?

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STATEMENT OF THE CASE

1. On May 30, 2003, a jury found petitioner John Cunningham guilty of continuous sexual abuse of a child under the age of 14. Pet. App. A. at 1; Cal. Penal Code § 288.5. The offense is punishable by a term of imprisonment of six, twelve, or sixteen years, and the trial court selected the upper term of sixteen years. Pet. App. A. at 13.

The trial court identified six aggravating factors, of which the following five were affirmed by the California Court of Appeal: (1) The crime involved great violence and a threat of great bodily harm, disclosing a high degree of viciousness and callousness; (2) the victim was particularly vulnerable due to dependence on petitioner as his father and primary caretaker; (3) petitioner threatened to inflict bodily injury upon the victim in an attempt to coerce the victim to recant

his statements about the crime; (4) petitioner's violent conduct indicated a serious danger to the community; and (5) petitioner was a peace officer at the time he committed the criminal acts, violating his duty to serve the community of which the victim was a member. Pet. App. A at 12. The trial court found one mitigating factor, petitioner's lack of prior criminal conduct. Pet. App. A at 12-13.

2. On appeal, petitioner claimed his upper-term sentence violated the Sixth Amendment as construed in *Blakely v. Washington*, 542 U.S. 296 (2004). The California Court of Appeal rejected petitioner's claim, finding that California's determinate sentencing law does not violate *Blakely*. Pet. App. A. The California Supreme Court denied review "without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black*[, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740 (2005)] regarding the effect of *Blakely v. Washington* (2004) 542 U.S. [296], and *United States v. Booker* (2005)[125 S. Ct. 738], on California law." Pet. App. C.

ARGUMENT

1. Petitioner contends that, because California's determinate sentencing law identifies the midterm as the presumptive sentence and allows the trial court to impose an upper-term sentence based on aggravating circumstances not found true by a jury, the law violates the Sixth Amendment as construed in *Blakely*. Petitioner ignores the California Supreme Court's construction of California's determinate sentencing law in *Black*, which demonstrated that our statute conforms to *Blakely*'s constitutional requirements. Because California's determinate sentencing law, as elucidated by the California Supreme Court, complies with *Blakely*'s constitutional requirements, certiorari is not appropriate. *See* Sup. Ct. R. 10.

a. *Blakely* explained "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." *Blakely*, 542 U.S. at 303-04 (citations omitted); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000). Consequently, this Court held that any factual finding that permits a judge to increase a defendant's sentence above the statutory maximum

is subject to *Apprendi*'s Sixth Amendment jury trial right. *Blakely*, 542 U.S. at 303-04. Any sentencing scheme that permits the trial court to make factual findings that increase a sentence beyond the statutory maximum is necessarily unconstitutional. *See id.* at 304 ("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.").

However, this Court also recognized a legitimate role for judicial factfinding in discretionary sentencing schemes. In response to the dissent's criticism that *Blakely* validated unbridled exercises of judicial discretion under an indeterminate sentencing regime, while invalidating determinate sentencing regimes that limit such discretion, the majority explained that the salient Sixth Amendment concern is not the existence or extent of sentencing discretion, but whether the judicial factfinding increases the penalty above the offense-specific maximum set by the legislature.

> Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.

Blakely, 542 U.S. at 309. *Apprendi* similarly observed that,

when sentencing offenders, it is permissible "for judges to exercise discretion-taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Apprendi,* 530 U.S. at 481.

b. In *Booker*, this Court reaffirmed *Blakely* and applied its holding to the Federal Sentencing Guidelines, finding the Guidelines unconstitutional. However, *Booker* also reaffirmed that trial courts may make discretionary determinations based on various sentencing factors in selecting an appropriate term within a prescribed range. *Booker*, 125 S. Ct. at 750 ("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."); *see also id.* ("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.").

Furthermore, in reforming the Federal Sentencing Guidelines, *Booker* set out an exemplar of a sentencing scheme under which the trial court, rather than the jury, makes the

factual determinations of aggravating and mitigating circumstances without violating the Sixth Amendment. Under the reconstituted Federal Sentencing Guidelines, the sentencing court is required to consider the Guidelines but is not bound by them. *Id.* at 764-65, 767. Moreover, while the sentencing court's discretion is not formally bound by the Guidelines, its discretion is not unfettered either. Instead, *Booker* imposes a tempered constraint on the sentencing court's discretion in selecting a sentence within the applicable range. *Booker* requires that the sentence imposed must be "reasonable" in relation to all of the applicable factors, or else it will not survive appellate review. *Id.* at 765-66. Accordingly, under the reformed Federal Sentencing Guidelines, a federal district court is not free to impose an aggravated term irrespective of the presence or absence of aggravating circumstances. Rather, any aggravated sentence imposed must be reasonable in relation to the presence of aggravating factors set out in the Federal Sentencing Guidelines and in consideration of other statutory concerns. *Id.* at 757.

c. It was with the reformed Guidelines in mind that the California Supreme Court analyzed California's determinate sentencing law in *Black*, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740. Critically, the *Black* court articulated a construction of California's sentencing scheme that parallels the reformed Federal Sentencing Guidelines in function, and

that construction fully comports with *Blakely*.

Under California's system for determinate sentencing, the relevant sentencing range for most felonies and numerous enhancements consists of three possible terms of imprisonment (lower, middle, and upper term) that are specified typically by the same code section or set of code sections that enumerate the elements of the felony or enhancement. *See, e.g.*, Cal. Penal Code § 288.5 (setting out terms of six, twelve, or sixteen years for the offense of continuous sexual abuse of a minor). The sentencing judge's discretion in selecting among these three terms is guided by California Penal Code section 1170(b), which provides that the court shall impose the middle term unless there are circumstances in aggravation or mitigation of the crime. *Black*, 35 Cal. 4th at 1247, 113 P.3d at 538, 29 Cal. Rptr. 3d at 744.

California Penal Code section 1170.3 directs the California Judicial Counsel to promulgate rules of court to promote uniformity in the implementation of California's determinate sentencing law. These rules of court provide in relevant part that circumstances in aggravation and mitigation must be established by a preponderance of the evidence, and the upper term is "justified only if, after a consideration of all relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." Cal. R. Ct. 4.420(b). The "relevant facts" are included in the trial record, the

probation report, other properly received reports and statements, statements in aggravation or mitigation, and any additional evidence presented at a sentencing hearing. Cal. Penal Code § 1170(b); Cal. R. Ct. 4.420(b). A fact that is an element of the crime cannot be used to impose the upper term, nor can a fact charged and found as an enhancement unless the court exercises its discretion to strike the enhancement. *See* Cal. Penal Code § 1170(b); Cal. R. Ct. 4.420(c)-(d). In addition, the sentencing court must state its reasons for imposing an upper or lower term, including the circumstances the court considered to be aggravating or mitigating, to facilitate appellate review. *Black*, 35 Cal. 4th at 1248, 113 P.3d at 539, 29 Cal. Rptr. 3d at 745; Cal. R. Ct. 4.420(e).

The California Supreme Court explained that "[t]he sentencing judge retains considerable discretion to identify aggravating factors. Examples of aggravating factors are listed in the rules of court, but the judge is free to consider any 'additional criteria reasonably related to the decision being made.'" *Black*, 35 Cal. 4th at 1247, 113 P.3d at 538, 29 Cal. Rptr. 3d at 744-45(footnote omitted).

d. Under California's determinate sentencing law, the midterm sentence is not the statutory maximum for *Blakely* purposes. The midterm is the "presumptive" term and the court cannot impose the upper term in the absence of any aggravating circumstances. But the California Supreme Court held in *Black*

that, as a matter of state law, the "presumption" does nothing more than establish a "reasonableness" constraint on an otherwise wholly discretionary sentencing choice akin to that deemed constitutional in *Booker*. *Black* answered in the negative the question of whether California's determinate sentencing statute actually requires the judge before imposing an upper term to engage in "the type of factfinding that traditionally has been exercised by juries in the context of determining whether the elements of an offense have been proved." *See Black*, 35 Cal. 4th at 1254, 113 P.3d at 542, 29 Cal. Rptr. 3d at 749-50(footnote omitted). Instead, "in operation and effect, the provisions of the California determinate sentence law simply authorize 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." *Black*, 35 Cal. 4th at 1254, 113 P.3d at 543, 29 Cal. Rptr. 3d at 751.

Under the California law, the choice among the three legislatively-prescribed sentences is entirely discretionary and may be based on *any* circumstances in aggravation or mitigation, regardless of whether they are specifically enumerated in the rules of court, so long as they are "reasonably related to the [sentencing] decision being made." *Black*, 35 Cal. 4th at 1255, 113 P.3d at 544, 29 Cal. Rptr. 3d at 751;

Cal. R. Ct. 4.408(a). Moreover, while the sentencing court should take the enumerated factors listed in the rules of court into account in deciding upon the sentence, it is not bound to impose an upper or lower term merely because one or more factors in aggravation or mitigation exist. Thus, the amount of discretion for a California sentencing court is equivalent to that for a federal district court in selecting a term after due consideration of the now-advisory Federal Sentencing Guidelines.

Black also makes clear that the constraints placed on the sentencing court's discretion under California's system are functionally equivalent to the "reasonableness" constraint placed on federal courts. The statutory presumption in favor of the midterm merely is a recognition that to assign to the defendant an upper term in the absence of *any* aggravating circumstances would be patently unreasonable. As the California Supreme Court explained, "Although [section 1170(b)] is worded in mandatory language, the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable*." *Black*, 35 Cal. 4th at 1255; 113 P.3d at 544, 29 Cal. Rptr. 3d at 751. The California Supreme Court's interpretation of California statutory law is binding on this Court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961).

It follows that, "even though [section 1170(b)] can be characterized as establishing the middle term sentence as a presumptive sentence, the upper term is the 'statutory maximum' for purposes of Sixth Amendment analysis. The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. The judicial fact-finding that occurs during that selection process is the same type of judicial factfinding that traditionally has been a part of the sentencing process. Therefore, the upper term is the 'maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict* . . . .'" *Black*, 35 Cal. 4th at 1257-58; 113 P.3d at 545, 29 Cal. Rptr. 3d at 753.

e. In the instant case, the state court of appeal anticipated the decision in *Black* and concluded that the upper term is the statutory maximum under *Blakely*. The California Supreme Court denied review based on its decision in *Black*. Consequently, certiorari is not warranted because this case represents nothing more than an application of this Court's decisions in *Blakely* and *Booker*. Petitioner's allegation that the rule of *Blakely* was misapplied is not a compelling reason

to grant certiorari. Sup. Ct. R. 10.

2. Petitioner also contends that a "split of authority has developed in the state courts regarding the application of *Blakely* and *Booker*" to determinate sentencing systems. Pet. at 18 (comparing cases from Arizona, Colorado, Minnesota, New Jersey, North Carolina, Indiana, and Oregon, which held that certain forms of judicial factfinding under their determinate sentencing systems violated *Blakely*, with decisions from California, Hawaii, and Tennessee, which held that their determinate sentencing laws, as construed by the state courts, satisfied *Blakely*'s requirements); *see also State v. Lopez*, 2005-NMSC-036, ¶ 55, 2005 WL 3046661, at *17, __ P.3d __, (N.M. 2005) (holding New Mexico's determinate sentencing scheme comports with *Blakely* and *Booker*). Petitioner contends that granting certiorari is necessary to resolve this split.

Petitioner's contention is flawed. The present case does not represent an instance of courts of last resort in different states dividing on a federal question. *Cf.* Sup. Ct. R. 10(b). Far from reflecting a divergence in the interpretation of *Blakely*, the decisions cited by petitioner merely analyze how *Blakely* and *Booker* apply to particular sentence systems. The sentencing systems of the cited states vary—sometimes quite widely—in their structure, language, and application. Even where different states appear to have facially similar sentencing systems, those systems can differ

significantly in operation after the state courts construe the relevant statutes and rules applying to a particular case.

The decisions cited by petitioner do not conflict in their understanding and interpretation of *Blakely* and *Booker*. Rather, each decision cited by petitioner reflects an individual state supreme court's understanding of its own state's sentencing law and an analysis as to how, if at all, *Blakely* and *Booker* impact the state's sentencing system. These variations in the application of *Blakely* and *Booker*, which derive from state law constructions of different statutory sentencing schemes, do not constitute a conflict about the requirements of the Sixth Amendment. Consequently, a grant of certiorari is not warranted.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: December 12, 2005

Respectfully submitted,

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