

CUNNINGHAM v. CALIFORNIA

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I. INTRODUCTION

In *Cunningham v. California*,¹ the United States Supreme Court voted 6-3 to invalidate California's determinate sentencing law ("DSL") as violative of the Sixth and Fourteenth Amendments.² The Court held that, notwithstanding the California Supreme Court's determination to the contrary,³ the DSL conflicted with prior Supreme Court precedent "by placing sentence-elevating factfinding within the judge's province," thereby "violat[ing] a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments."⁴

II. BACKGROUND

Cunningham is the latest in a series of recent cases dealing with the constitutional implications of determinate sentencing schemes. The Court first squarely addressed the issue in *Apprendi v. New Jersey*,⁵ decided in 2000. *Apprendi* dealt with a New Jersey hate crime statute that permitted a judge to impose an additional ten to twenty years of imprisonment "if [he] 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'" because of membership in a protected class.⁶ The Court found the statute to be contrary to the Sixth Amendment, holding that "[o]ther than a prior conviction . . . any fact that increases the penalty for a crime beyond

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1. *Cunningham v. California*, 127 S. Ct. 856 (2007).

2. *Id.* at 860.

3. *People v. Black*, 113 P.3d 534 (Cal. 2005), *abrogated by* *Cunningham v. California*, 127 S. Ct. 856 (2007).

4. *Cunningham*, 127 S. Ct. at 860.

5. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

6. *Cunningham*, 127 S. Ct. at 864 (quoting *Apprendi*, 530 U.S. at 468-69).

the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁷

In the years since *Apprendi*, the Court has reaffirmed its holding three times, most recently in *Blakely v. Washington*⁸ and *United States v. Booker*.⁹ *Blakely* applied the holding of *Apprendi* to Washington’s Sentencing Reform Act.¹⁰ Defendant *Blakely* was convicted of second-degree kidnapping, a class B felony carrying a maximum sentence of 10 years.¹¹ The Reform Act provided:

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. 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.’¹²

As an aid, the Reform Act contained a nonexclusive list of aggravating factors that would justify augmenting the sentence.¹³ However, no factor that was used to “comput[e] the standard range sentence for the offense” (such as the facts relied upon by the jury to convict) could be used to increase the sentence.¹⁴

In *Blakely*’s case, the judge imposed an enhanced sentence of ninety months after finding that his crime was perpetrated with “deliberate cruelty,” one of the aggravating factors enumerated in the Washington statute.¹⁵ The Supreme Court applied the *Apprendi* rule, finding that Washington’s Sentencing Reform Act was unconstitutional.¹⁶ In doing so, the Court rejected Washington’s argument that the case differed from *Apprendi* because “[u]nder the Washington guidelines, an exceptional sentence [was] within the court’s discretion as a result of a guilty verdict.”¹⁷ Writing for the

7. *Id.* (citations and internal quotation marks omitted).

8. *Blakely v. Washington*, 542 U.S. 296, 304–05 (2004).

9. *United States v. Booker*, 543 U.S. 220, 243–44 (2005).

10. WASH. REV. CODE ANN. §§ 9.94A.010–9.94A.930 (2007).

11. *Blakely*, 542 U.S. at 299.

12. *Cunningham*, 127 S. Ct. at 864–65 (quoting *Blakely*, 542 U.S. at 299–300).

13. *Blakely*, 542 U.S. at 299.

14. *Id.*

15. *Id.* at 300.

16. *Cunningham*, 127 S. Ct. at 865.

17. *Id.* (quoting Brief for Respondent at 15, *Blakely v. Washington*, 542 U.S. 296 (2004) (No. 02-1632)).

Court, Justice Scalia pointed out that under the Reform Act, Blakely's enhanced sentence would not have been possible had the judge not found and articulated an aggravating factor to justify that enhancement.¹⁸ The fact that Blakely's sentence fell within the statutorily-prescribed ten-year range was irrelevant: "[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.*"¹⁹ Thus, the Reform Act fell afoul of the Sixth Amendment's jury-trial guarantee as articulated in *Apprendi*.²⁰

In *United States v. Booker*, the Court applied the *Apprendi* rule to the Federal Sentencing Guidelines.²¹ Like Washington's Reform Act, the federal Guidelines imposed a base sentencing range, one that a judge could not exceed without finding additional facts by a preponderance of the evidence.²² The Court held that there was "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]." Both systems were 'mandatory and impose[d] binding requirements on all sentencing judges.'²³ Accordingly, the Court found the Guidelines to be in violation of the Sixth Amendment.²⁴ Rather than invalidating the entire Sentencing Reform Act,²⁵ however, the Court excised the portion of the Act making the sentencing scheme mandatory.²⁶ "So modified, the federal sentencing statute ma[de] the Guidelines effectively advisory. It require[d] a sentencing court to consider Guidelines ranges, but it permit[ed] the court to tailor the sentence in light of other statutory concerns as well."²⁷

18. *Blakely*, 542 U.S. at 304.

19. *Id.* at 303 (emphasis in original).

20. *Cunningham*, 127 S. Ct. at 865.

21. *Booker*, 543 U.S. at 226–27.

22. *Id.*

23. *Cunningham*, 127 S. Ct. at 866 (quoting *Booker*, 543 U.S. at 233) (internal citations omitted).

24. *Booker*, 543 U.S. at 226–27.

25. The Sentencing Reform Act of 1984 is the law that "comprehensively delineat[es] the federal sentencing system." *Cunningham*, 127 S. Ct. at 866.

26. *Booker*, 543 U.S. at 245.

27. *Id.* at 245–46 (internal citations omitted).

III. CUNNINGHAM V. CALIFORNIA

This, then, was the state of the law when *Cunningham v. California* reached the Court. In 2003, Petitioner John Cunningham, a California police officer, “was tried and convicted of continuous sexual abuse of a child under the age of 14.”²⁸ Under California’s DSL, sentences of six, twelve, or sixteen years were the three possible ranges of incarceration for such an offense.²⁹ The middle term of twelve years was presumptive: “[T]he DSL obliged the trial judge to sentence Cunningham to the 12-year middle term unless the judge found one or more additional facts” by a preponderance of the evidence.³⁰ Facts found in mitigation would authorize the judge to reduce the sentence to six years; facts found in aggravation would permit him to raise the sentence to sixteen.³¹ In Cunningham’s case, the trial judge found six aggravating factors and one mitigating factor; because the aggravating factors outweighed those in mitigation, the judge sentenced Cunningham to sixteen years in prison.³²

Cunningham’s conviction and sentence were upheld by the California Court of Appeal.³³ The court disallowed four of the aggravating factors upon which the lower court had relied, but it nonetheless upheld the sentence, stating that “the court properly found two aggravating factors and exercised its discretion in

28. *Cunningham*, 127 S. Ct. at 860.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Cunningham v. California*, No. 010396-0, 2005 WL 880983, at *7 (Cal. App. 2005) [hereinafter *Appellate Decision*] (“At sentencing, the court acknowledged that it had considered the probation report, psychological evaluations, sentencing memoranda, letters from the community in mitigation and letters from Doe and his mother. After denying probation, it found the sole mitigating factor was appellant’s lack of prior criminal conduct. The court found the following aggravating factors: (1) The crime involved great violence and the threat of great bodily harm disclosing a high degree of viciousness and callousness. (2) The victim was particularly vulnerable due to his age and dependence on appellant as his father and primary caretaker. (3) Appellant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statements about the crime. (4) Appellant took advantage of a position of trust to commit the crime in that he is the victim’s father and sole caregiver for a substantial period of time. (5) Appellant engaged in violent conduct which indicates a serious danger to the community. (6) Appellant 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. After finding that the aggravating circumstances outweighed the sole mitigating factor, the court imposed the upper 16-year term.”) (internal citations omitted).

33. *Appellate Decision*, *supra* note 32, at *1.

balancing them against a single mitigating factor.”³⁴ The court also considered Cunningham’s argument that the DSL ran afoul of the Supreme Court’s decision in *Blakely v. Washington*.³⁵ In holding that it did not, the court stated that the statutory maximum for Sixth Amendment purposes was sixteen years,³⁶ thus, electing a sixteen-year sentence was a permissible exercise of judicial discretion.³⁷ The court also acknowledged the *United States v. Booker* decision, which was decided after Cunningham’s case had already been submitted for appeal; however, the court found that the DSL was permissive rather than mandatory, and thus was consistent with the *Booker* opinion.³⁸ One judge dissented, arguing that the sentence violated the Sixth Amendment, because “[u]nder California’s determinate sentencing scheme, the maximum sentence a court [could] impose without making additional factual findings [was] the middle term.”³⁹

Following the Court of Appeal’s decision, Cunningham filed for discretionary review with the California Supreme Court.⁴⁰ While his petition was pending, the California Supreme Court handed down its decision in *People v. Black*,⁴¹ holding that the DSL was not affected by the Supreme Court’s decisions in *Blakely* and *Booker*. The court’s main argument was as follows:

[T]he availability of upper term sentences under the determinate sentencing law [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). The Legislature did not identify all of the particular facts that could

34. *Id.* at *9.

35. *Id.*

36. *Id.* (“Under the California sentencing scheme the lower, middle and upper terms constitute a range of authorized punishments for a given crime; the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment.”).

37. *Id.*

38. *Id.* at *9 n.14 (“*Booker*, in our view, clarifies that *Blakely*’s Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit*, but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, [the DSL] permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors.”) (emphasis in original) (internal citations omitted).

39. *Id.* at *10.

40. Brief for Petitioner at 10, *Cunningham v. California*, 127 S. Ct. 856, (No. 05-6551) [hereinafter *Petitioner’s Brief*].

41. *People v. Black*, 113 P.3d 534 (Cal. 2005), *abrogated by* *Cunningham v. California*, 127 S. Ct. 856 (2007).

justify the upper term. Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence. Such a system does not diminish the traditional power of the jury.⁴²

Additionally, the *Black* court decided that the DSL passed constitutional muster because it was “comparable” to the advisory federal system upheld in *Booker*.⁴³

Shortly after its decision in *Black*, the California Supreme Court denied Cunningham’s petition for review.⁴⁴ After his motion for a rehearing was denied by the California Court of Appeal, Cunningham petitioned the Supreme Court for certiorari, which was granted. Justice Ginsburg delivered the Court’s opinion, writing for a majority of six justices. Justice Kennedy wrote a dissenting opinion, which was joined by Justice Breyer. Justice Alito also dissented, with Justices Kennedy and Breyer joining in his opinion.

The Court began by stating that the DSL was unconstitutional, because it “assign[ed] to the trial judge, not to the jury, authority to find the facts that expose[d] a defendant to an elevated ‘upper term’ sentence.”⁴⁵ The Court held that “by placing sentence-elevating factfinding within the judge’s province, [the DSL] violate[d] a defendant’s right to trial by jury safeguarded by the Sixth and Fourteenth Amendments.”⁴⁶ In so holding, the Court unambiguously rejected the *Black* court’s determination that the DSL had survived *Blakely* and *Booker*.

As laid out by the majority, the case appears a straightforward one. The Court marched through the *Apprendi*, *Blakely*, and *Booker* decisions, discussing in great detail the relevant facts and points of law raised by each.⁴⁷ The Court heavily emphasized the “statutory maximum” language found in *Blakely*: “[T]he relevant ‘statutory maximum,’ this Court has clarified, ‘is not the maximum sentence a

42. *Id.* at 544.

43. *Id.* at 548.

44. *Petitioner’s Brief*, *supra* note 40, at 10.

45. *Cunningham*, 127 S. Ct. at 860.

46. *Id.*

47. *Id.* at 863–68.

judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”⁴⁸

After thoroughly reviewing its sentencing guidelines precedents, the Court then applied those precedents to the DSL. The DSL involved sentencing increases based on judicial factfinding under a “preponderance of the evidence” standard.⁴⁹ Thus, the Court held that “the DSL violate[d] *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.”⁵⁰

The Court’s reasoning appears straightforward; thus, it was with a palpable sense of annoyance that Justice Ginsburg turned to a discussion of the California Supreme Court’s opinion in *Black*.⁵¹ Despite the seemingly self-evident nature of the Court’s precedent in this area, the *Black* court read it differently, concluding that because the DSL simply authorized a judge to engage in factfinding of a traditionally judicial nature, “the upper term [was] the “statutory maximum” and a trial court’s imposition of an upper term sentence [did] not violate a defendant’s right to a jury trial.”⁵² In support of its conclusion, the *Black* court argued that the broad discretion given to judges in finding aggravating factors distinguished the DSL from the *Apprendi* cases.⁵³ Unconvinced, the Supreme Court reminded the California jurists that as “[w]e cautioned in *Blakely* . . . broad discretion to decide what facts may support an enhanced sentence . . . does not shield a sentence from the force of our decisions.”⁵⁴ “If the jury’s verdict alone does not authorize the sentence,” the Court declared, “the Sixth Amendment requirement is not satisfied.”⁵⁵

Although the *Black* court enunciated several other rationales in support of its conclusion,⁵⁶ the Court did not deem it necessary to

48. *Id.* at 860 (quoting *Blakely*, 542 U.S. at 303–304 (emphasis in original) (internal quotations omitted)). The majority opinion quotes this sentence twice. *See also id.* at 865.

49. *Id.* at 868.

50. *Id.* (internal citations and quotations omitted).

51. *Id.* (“While that should be the end of the matter, in *People v. Black*, the California Supreme Court held otherwise.”) (internal citations and quotations omitted).

52. *Id.* at 868 (quoting *Black*, 113 P.3d at 543).

53. *Id.* at 868–69.

54. *Id.* at 869.

55. *Id.*

56. *See id.*

address them. Instead, after listing the *Black* court's additional arguments, the Court stated:

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.⁵⁷

If sentence-augmenting factfinding was performed by a judge, the Court asserted, it is irrelevant whether or not "Sixth Amendment concerns" were implicated.

The major disagreement between the majority opinion and Justice Alito's dissent concerned whether California's DSL resembled the post-*Booker* federal system. The majority argued that it did not, pointing out that unlike the advisory federal system, California judges were not free to exercise discretion in choosing the sentence to impose.⁵⁸ In *Cunningham*'s case, for example, the judge's obligation 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."⁵⁹ Because the judge's discretion was thus limited, the majority argued that the DSL did not resemble the advisory federal system.

Justice Alito disagreed, however, stating that "[t]he California sentencing law . . . is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *United States v. Booker*."⁶⁰ He argued that both schemes "grant[ed] trial judges considerable discretion in sentencing; both subject[ed] the exercise of that discretion to appellate review for reasonableness; and both—the California law explicitly, and the federal scheme implicitly—require[d] a sentencing judge to find some factor to justify a sentence above the minimum that could be imposed based solely on the jury's verdict."⁶¹

57. *Id.* (emphasis in original).

58. *Id.* at 870.

59. *Id.*

60. *Id.* at 873 (Alito, J., dissenting) (internal citations omitted).

61. *Id.*

Alito argued that California judges had at least as much discretion as federal judges because they “retain[ed] considerable discretion to identify aggravating factors.”⁶² He also emphasized the judges’ ability to “consider any ‘additional criteria reasonably related to the decision being made.’”⁶³ Furthermore, Alito pointed out that the federal system and the DSL both contained appellate “reasonableness” reviews to constrain unbridled judicial discretion.⁶⁴ His argument for an implicit federal “aggravating factor” requirement also stemmed from the reasonableness review: while no review is explicitly mandated, Alito argued that a sentence imposed without any rationale would be struck down as presumptively unreasonable.⁶⁵

Ultimately, however, Justice Alito’s argument is unpersuasive. Although parallels between the two systems did exist, they were neither as substantial nor as significant as he made them out to be. Under the federal sentencing law, judges are required to take certain factors into account when sentencing; however, the judge decides what weight to assign to any given factor and what sentence (within the overall statutory range) to impose as a result. Contrast that with the California system, where the only discretion that judges enjoyed was in finding mitigating or aggravating circumstances. Only three permissible sentences existed, and judges were bound to the middle one unless they made additional findings. Additionally, Alito’s argument regarding the implicit “aggravating factor” requirement seems weak. Even if extreme results would be struck down under the federal scheme, it does not follow that a judge must always find some factor to justify a sentence above the minimum. To use Justice Alito’s example,⁶⁶ in a mail fraud case with a minimum sentence of probation

62. *Id.* at 877 (internal quotations omitted).

63. *Id.* (quoting CAL. RULE OF COURT (Criminal Cases) 4.408(a) (West 2006)).

64. *Id.* at 878.

65. *Id.* at 875–76.

66. Justice Alito employed a hypothetical example to exemplify his concerns with the sentencing guidelines:

A simple example illustrates this point. Suppose that a defendant is found guilty of 10 counts of mail fraud in that the defendant made 10 mailings in furtherance of a scheme to defraud. Under the mail fraud statute, the district court would have discretion to sentence the defendant to any sentence ranging from probation up to 50 years of imprisonment (5 years on each count). Suppose that the sentencing judge imposes the maximum sentence allowed by statute—50 years of imprisonment—without identifying a single fact about the offense or the offender as a justification for this lengthy sentence. Surely that would be an unreasonable sentence that could not be sustained on appeal.

and a maximum sentence of fifty years, a sentence of five years would be unlikely to be overturned as unreasonable, even if no factors supporting it were provided by the judge.

All three dissenters joined in Justice Alito's opinion. Additionally, Justice Kennedy filed a separate dissent in which he was joined by Justice Breyer. In contrast with Alito's dissent, which focused on the case at hand, Kennedy's dissent was of broader scope. Rather than arguing simply that California's DSL should be upheld, Kennedy stated that "[i]n [his] view the *Apprendi* line of cases remain[ed] incorrect."⁶⁷ Instead of overturning them, however, he advocated an adjustment that could serve to rationalize the rule "while reducing the collateral, widespread harm to the criminal justice system and the corrections process" that he believed the cases were causing.⁶⁸ Kennedy suggested distinguishing between "sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply," and those "based on the nature of the offender, where it would not."⁶⁹ Thus, Sixth Amendment rights would be protected, but judges would be permitted to make rational determinations necessary to craft effective punishments.

Kennedy made a convincing point when he reminded the Court of why the DSL was passed in the first place. Prior to the DSL, California had an indeterminate sentencing scheme, where vast power and discretion resided in the hands of trial judges.⁷⁰ Such a system, he stated, would have been untouched by the *Apprendi* line of cases.⁷¹ It is ironic, then, that when the California legislature sought to make its sentencing system more consistent, to hold its judiciary to an

Suppose, alternatively, that the sentencing court finds that the mail fraud scheme caused a loss of \$1 million and that the victims were elderly people of limited means, and suppose that the court, based on these findings, imposes a sentence of 10 years of imprisonment. If the defendant challenges the sentence on appeal on the ground that these findings are erroneous, the question whether the defendant will be required to serve 10 years or some lesser sentence may well depend on the validity of the district court's findings of fact.

Id. at 876 (internal citations omitted).

67. *Id.* at 872 (Kennedy, J., dissenting).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

accountable standard, the Court struck down that system.⁷² Such a result, Kennedy argued, seems counterproductive.

Justice Kennedy's dissenting opinion is a powerful appeal for reason in the Court's Sixth Amendment jurisprudence. Given that only one other justice joined Justice Kennedy's dissent, however, it would appear that his plea had little effect. *Cunningham v. California* commanded a sizeable majority in favor of the *Apprendi* line of cases, and thus they are unlikely to be overturned or even substantially modified in the near future. For all practical purposes, *Cunningham* sounded the death-knell for state determinate sentencing laws, at least as they are currently written. Post-*Blakely* and *Booker*, a number of states had already altered their sentencing laws; now, the remainder will likely do so as well. One solution is to place all factfinding in the hands of a jury, "either at trial or in a separate sentencing proceeding," in order "to find any fact necessary to the imposition of an elevated sentence."⁷³ Another option is to mirror the federal scheme, giving judges genuinely "broad discretion within a statutory range."⁷⁴ Regardless of what course is taken, however, all states with DSLs now have an even greater incentive to change them. In light of *Cunningham*'s forcefully worded opinion, other states would do well not to challenge the *Apprendi* line of cases.

72. *Id.*

73. *Id.* at 871.

74. *Id.*