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Cunningham v. California: The U.S. Supreme Court Painted Into a Corner

I. INTRODUCTION

The framers of the Constitution wished to avoid the judicial oppression resulting from “arbitrary punishments upon arbitrary convictions,”¹ and thus, resolved to protect the role of the jury in criminal cases.² Yet, today, the “land of the free” has the highest per capita incarceration rate in the world with over two million men and women filling America’s jails.³ Constitutional scholars have voiced concern that the recent “explosion in Supreme Court litigation” concerning the jury’s constitutional role in determining sentences⁴ has failed to remedy what seems to be a relentless incarceration epidemic.⁵ Indeed, at a time when clear and unequivocal solutions to the nation’s “imprisonment binge” are vital,⁶ the Supreme Court’s body of sentencing law remains “confusing, incoherent, [and] formalistic.”⁷

In *Cunningham v. California*, the United States Supreme Court had an opportunity to create a comprehensive rule which would “bring order out of chaos”⁸ and to formulate a coherent rule which would complement the relationships between “judicial fact-finding, judicial sentencing discretion, and appellate review.”⁹ While the *Cunningham* decision is relatively recent, it has already incited a wide span of reactions,¹⁰ and

1. United States v. Booker, 543 U.S. 220, 238–39 (2005) (quoting THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

2. See U.S. CONST. amend. VI.

3. Robert Batey, *The Costs of Judicial Restraint: Forgone Opportunities to Limit America’s Imprisonment Binge*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29, 29 (2007).

4. John Gleeson, *Seventeenth Annual Supreme Court Review: October 2004 Supreme Court Term: The Road to Booker and Beyond: Constitutional Limits on Sentence Enhancements*, 21 TOURO L. REV. 873, 873 (2006) (explaining the explosion in terms of the “limits placed by the Constitution . . . on legislatures’ power to direct sentencing outcomes”).

5. Batey, *supra* note 3, at 30 (arguing that the Court has missed important opportunities to limit the nation’s “imprisonment binge”); see also Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37 (2006).

6. Batey, *supra* note 3, at 29.

7. Berman & Bibas, *supra* note 5, at 37.

8. *Id.*

9. Frank O. Bowman, “*The Question Is Which Is To Be Master—That’s All*”: *Cunningham*, *Claiborne*, *Rita*, and *the Sixth Amendment Muddle*, 19 FED. SENTENCING REP. R. 155, *2 (2007).

10. *Id.* (noting the Court’s failure from *Apprendi* to *Cunningham* to formulate a coherent rule). *But see* United States v. Griffin, 494 F. Supp. 2d 15 (D. Mass. 2007) (arguing that

does not appear to provide the hoped for relief from the hopeless disorder of United States sentencing law.

The *Cunningham* Court held that California's Determinate Sentencing Law (DSL) violated the defendant's Fourteenth Amendment due process rights and the defendant's Sixth Amendment right to trial by jury because it allowed the trial judge to elevate Cunningham's sentence based on judge-found facts.¹¹ Some argue that the *Cunningham* Court reinforced the Sixth Amendment right to trial by jury by requiring that the maximum sentence a judge can impose be determined only by jury-found facts.¹² However, *Cunningham's* impact on the right to trial by jury is at best obscure and most likely damaging.¹³ Indeed, the Court's remedy to this constitutional violation was to allow the California legislature to choose whether to grant judges unregulated discretion in an indeterminate sentencing system or fully restrict them to the statutory range authorized by the jury verdict.¹⁴

The Court's invalidation of California's DSL was correct because each defendant's sentence should fall within the appropriate range defined by the legislature and as reflected in the jury verdict.¹⁵ Failing to maintain this standard would result in the erosion of the jury's role in the judicial system, effectively making juries "low-level gatekeep[ers]."¹⁶ However, *Cunningham's* inadequate remedial portion leads to inconsistencies and threatens to inflict substantial negative effects on determinate sentencing legislation and the Sixth Amendment right to trial by jury. To make matters worse, *Cunningham's* relationship to the Federal Sentencing Guidelines paints the Supreme Court into a corner where it will inevitably be forced in future decisions to either offend the Sixth Amendment or destroy the Federal Sentencing Guidelines.¹⁷

In Part II, this note will provide a brief historical background of the right to trial by jury, California's DSL, and the major decisions leading up to *Cunningham*. In Part III and IV, this note will discuss the background of *Cunningham* and its three separate opinions. In Part V, this note will conclude by analyzing (1) why the Court reached the correct conclusion, (2) the logical inconsistencies of *Cunningham* in relation to the Supreme Court's recent precedent and the possible

Cunningham clarifies the Sixth Amendment analysis).

11. *Cunningham v. California*, 127 S. Ct. 856, 860 (2007).

12. *Griffin*, 494 F. Supp. 2d at 20.

13. *See infra* accompanying text 18–20.

14. Bowman, *supra* note 9, at *15 (arguing that the rule is inadequate which grants "judges absolute sentencing discretion or none at all.").

15. *Jones v. United States*, 526 U.S. 227, 243–44 (1999).

16. *United States v. Booker*, 543 U.S. 220, 230 (2005) (citation omitted).

17. *See infra* Part V.C.

influence it will have on determinate sentencing, and (3) *Cunningham*'s relation to the Federal Sentencing Guidelines and reasonableness review.

II. HISTORICAL BACKGROUND

A. *Right to Trial by Jury*

The Magna Carta signed by King John in 1215 A.D. provided, "No Freeman shall be taken, or imprisoned, or be disseised [sic] . . . nor will we not pass upon him, nor condemn him, but by lawful *Judgment of his Peers*, or by *Law of the Land*."¹⁸ These phrases would later become essential components of American jurisprudence under the titles of "right to trial by jury" and "due process of law."¹⁹ The Sixth Amendment to the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."²⁰ The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."²¹ These words have been the center of major legal debates throughout the twentieth century.²²

The right to trial by jury has been described as the "spinal column of American democracy" and the "grand bulwark of [the Englishman's] liberties."²³ The Founders of the Constitution took great pains to vest the power to prosecute criminals in the people through the vehicle of the jury rather than the State²⁴ because "in the criminal arena, government power is at its zenith and poses the greatest threat to personal liberty."²⁵ In fact, "[o]ne of the indictments of the Declaration of Independence against King George III" was his deprivation "in many Cases, of the Benefits of Trial by Jury."²⁶ "Trial by jury" appears in the Constitution in two sections.²⁷ The right to trial by jury has been characterized as "one of the least controversial rights enshrined in the Bill of Rights" as evidenced by

18. *In re Winship*, 397 U.S. 358, 378–79 (1970) (Black, J., dissenting) (noting that King John signed a Magna Carta with substantially similar language) (citation omitted) (emphasis added).

19. *Id.* at 378 (explaining that "[d]ue process of law" was originally used as a shorthand expression for governmental proceedings according to the "law of the land.").

20. *See* U.S. CONST. amend. VI.

21. *See* U.S. CONST. amend. XIV, § 1.

22. *Winship*, 397 U.S. at 378 (Black, J., dissenting); *see* *Chambers v. Florida*, 309 U.S. 227, 235–36 (1940).

23. *Neder v. United States*, 527 U.S. 1, 30 (1999) (alteration in original) (citation omitted).

24. *See* *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

25. Berman & Bibas, *supra* note 5, at 42.

26. *Neder*, 527 U.S. at 42 (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

27. *Winship*, 397 U.S. at 377 (Black, J., dissenting).

its inclusion in the very organization of our government.²⁸ Proof of guilt beyond a reasonable doubt is “[e]qually well founded” in American jurisprudence.²⁹ However, United States courts have traditionally recognized that “the Sixth Amendment permits the court to base [a] sentence on its own factual findings.”³⁰

B. Indeterminate and Determinate Sentencing Laws

Indeterminate sentencing schemes, in which trial courts have unfettered discretion to select a proper sentence within a range restricted by the legislature, was the exclusive method of sentencing in the United States until the 1970s.³¹ For the past three decades, numerous states have enacted determinate sentencing schemes³² in an effort to promote greater uniformity in sentencing.³³ Some scholars have criticized the guidelines as “draconian sentencing regimes”³⁴ and have attributed the increase in the inmate population to such laws.³⁵ Each of these schemes are different, but there are three broad categories: (1) mandatory minimum sentences, (2) lengthening of a maximum sentence based on defendant’s prior convictions, and (3) lengthening of a maximum sentence based on facts other than prior convictions.³⁶ Under these sentencing laws, a judge will perform fact-finding, typically by a preponderance of the evidence, after the defendant has been convicted by the jury and use his or her judicial discretion in selecting the proper sentence based on those additional facts.

C. California’s Determinate Sentencing Law

California’s Determinate Sentencing Law (DSL) permitted trial courts to impose three terms of imprisonment: a lower, middle, or upper term. California Penal Code § 1170(b) declared “the court *shall* order

28. See U.S. CONST. art. III, § 2 cl. 3; *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

29. *Apprendi*, 530 U.S. at 478; see also *Winship*, 397 U.S. at 361.

30. *Cunningham v. California*, 127 S. Ct. 856, 874 (2007) (Alito, J., dissenting) (citing *United States v. Booker*, 543 U.S. 220, 233 (2005); *Blakely v. Washington*, 542 U.S. 296, 305 (2004); *Harris v. United States*, 536 U.S. 545, 558 (2002); *Apprendi*, 530 U.S. at 481).

31. *Batey*, *supra* note 3, at 37.

32. *Id.*; see *Gleeson*, *supra* note 4, at 873; see also Brief of Hawaii, Arkansas, Colorado, Illinois, Montana, Nevada, Oregon, Texas, and Utah as Amici Curiae in Support of Respondent, *Cunningham v. California*, 127 S. Ct. 856 (2007) (No. 05-6551), 2006 WL 1992876, at *12 (July 12, 2006) [hereinafter Brief of Hawaii et al.].

33. *Cunningham*, 127 S. Ct. at 861.

34. *Batey*, *supra* note 3, at 29.

35. *Id.*

36. *Gleeson*, *supra* note 4, at 874.

imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.”³⁷ In a separate post-trial sentencing hearing, circumstances in aggravation or mitigation were determined by a judge by a preponderance of the evidence.³⁸ Pursuant to their DSL statutory authority, the State Judicial Council defined “circumstances in aggravation” as “facts which justify the imposition of the upper prison term.”³⁹ The rules provided a non-exhaustive list of circumstances in aggravation and gave judges free reign in considering additional factors that were relevant to the sentencing decision.⁴⁰ Trial courts were permitted, though not obliged, to impose an upper or lower term.⁴¹

D. Significant Supreme Court Decisions

Beginning in 2000, the Supreme Court decided a line of cases on determinate sentencing that set an unfortunate stage for its *Cunningham* decision. *Apprendi v. New Jersey*, *Blakely v. Washington*⁴², and *United States v. Booker*⁴³ created a smorgasbord of isolated case law.⁴⁴ *Apprendi* stands for the proposition that any fact which raises the penalty above the statutory maximum must be found by a jury by a reasonable doubt standard in order to comport with the Sixth Amendment. In *Blakely*, the Court extended the *Apprendi* rule, indicating that the relevant statutory maximum that a trial court could impose without violating the Sixth Amendment was not the highest sentence within the entire statutory range, but rather, the highest sentence within the range which could be imposed based solely on the jury verdict.⁴⁵

In the lengthy two part opinion of *Booker*, the Court struggled to apply the formalistic rules it developed in *Apprendi* and *Blakely* to the Federal Sentencing Guidelines.⁴⁶ Adding to the confusion, Justice Stevens, the author of the majority opinion in the first half of *Booker* analyzing the constitutionality of the Guidelines, joined the dissent in the remedial portion of the opinion.⁴⁷ The Federal Sentencing Guidelines

37. CAL. PENAL CODE § 1170(b) (West Supp. 2006) (amended 2007) (emphasis added).

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

39. CAL. R. OF CT. 4.405(d) (2006) (amended May 23, 2007) (emphasis added).

40. *Cunningham*, 127 S. Ct. at 862.

41. *Id.* at 865.

42. *Blakely v. Washington*, 542 U.S. 296, (2004).

43. *United States v. Booker*, 543 U.S. 220 (2005).

44. Bowman, *supra* note 9, at 155.

45. *Blakely*, 542 U.S. 296.

46. *Booker*, 543 U.S. 220.

47. *Id.*; see Gleeson, *supra* note 4, at 886 (claiming “*Booker* has created many more

developed in the Sentencing Reform Act of 1984 required federal judges to impose the upper term if the court found certain sentencing factors which warranted the imposition of the upper term.⁴⁸ The Court found that this scheme violated the Sixth Amendment because it required a shift in the sentencing range based on judge-found facts.⁴⁹ The remedial portion of *Booker* attempted to remedy the violation of the Sixth Amendment by making the Guidelines “advisory,” granting judges discretion to deviate from the Guidelines subject to appellate review for “reasonableness.”⁵⁰

III. BACKGROUND OF *CUNNINGHAM V. CALIFORNIA*

A. Facts

Although *Cunningham* is the center of a raging legal debate in the area of criminal procedure, the facts of *Cunningham* are relatively straightforward. In January 2000,⁵¹ John Cunningham, a police officer,⁵² lived with his ten year old son, referred to as John Doe, who had a history of falsely reporting parental abuse and neglect.⁵³ Doe claimed that Cunningham perpetrated multiple acts of molestation, oral copulation, and sodomy against him and that these acts started shortly after he moved in with Cunningham.⁵⁴

Cunningham fervently denied Doe’s accusations,⁵⁵ although he admitted that on one occasion while they were in the shower together, Doe’s mouth had made contact with his penis for five seconds.⁵⁶ Cunningham claimed that Doe fabricated these lies because he wanted to return to his mother’s home and because he was also upset with Cunningham for disciplining him and expecting him do housework.⁵⁷ Cunningham also claimed that Doe was a manipulative liar and that Doe was a homosexual who was unable to stop his homosexual behavior.⁵⁸

questions than it answered”).

48. *Booker*, 543 U.S. at 256–57.

49. *Id.* at 267.

50. Bowman, *supra* note 9, at *5.

51. *People v. Cunningham*, No. A103501, 2005 WL 880983, at *1 (Cal. Ct. App. 2005).

52. *Id.* at *7.

53. *Id.* at *1 (explaining that Doe falsely reported that his step father abused him and that his mother Wanda did not have enough food in the house).

54. Brief for Petitioner at 7, *Cunningham v. California*, 127 S. Ct. 856 (2007) (No. 05-6551), 2006 WL 1307511, at *7.

55. *Id.*

56. *Cunningham*, 2005 WL 880983, at *2.

57. Brief for Petitioner at 7–8, *Cunningham v. California*, 127 S. Ct. 856 (2007) (No. 05-6551), 2006 WL 1307511, at *7–8.

58. *People v. Cunningham*, No. A103501, 2005 WL 880983, at *2 (Cal. Ct. App. 2005).

Cunningham was convicted by a jury of continuous sexual abuse of a child under fourteen.⁵⁹

B. Procedure

During sentencing, the trial court, bound by California's DSL, held that the only mitigating factor in Cunningham's favor was that he had no prior record. However, the Court found five aggravating facts: (1) that Cunningham had acted with great violence, viciousness, and callousness; (2) that he posed a danger to the community; (3) that he had abused his status as a police officer and his position of trust as Doe's caregiver; (4) that Cunningham posed a threat of great bodily harm to the victim; and (5) that the victim was particularly vulnerable due to his age and dependence on his father.⁶⁰ The Court held that the mitigating factors were outweighed by the aggravating factors and sentenced Cunningham to sixteen years in prison,⁶¹ which is the maximum term that can be imposed for such an offense under California's DSL.⁶²

The California Court of Appeal reviewed the trial court decision under the abuse of discretion standard⁶³ and upheld the verdict concluding that the aggravating factors contemplated by California's DSL did not implicate the Sixth Amendment right to trial by jury because a judge is authorized to impose the upper term based on "facts reflected in the jury verdict or admitted by the defendant."⁶⁴ "One dissenting Justice disagreed with the Court's understanding of the Penal Code arguing that section 1170 mandated the imposition of the middle term unless the judge made additional findings of fact not inherent in the jury verdict.⁶⁵ Consequently, the dissenting Justice found that the imposition of the sixteen-year term conflicted with *Blakely* and the Constitution.⁶⁶

The Supreme Court of California denied certiorari of Cunningham's appeal,⁶⁷ but the Court addressed the constitutionality of California's

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

60. *Cunningham*, 2005 WL 880983, at *7.

61. *Cunningham*, 127 S. Ct. at 861.

62. CAL. PENAL CODE § 288.5(a) (West 1999) (requiring that a person guilty under this provision "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years").

63. *Cunningham*, 2005 WL 880983, at *3; *see also* *State v. Schofield*, 895 A.2d 927, 935 (Me. 2005) (noting the lack of agreement among jurisdictions as to the proper standard of review and that the majority of courts have applied the "obvious or plain error" standard).

64. *Cunningham*, 2005 WL 880983, at *9 (quoting *Blakely v. Washington*, 542 US 296, 303 (2004)).

65. *Id.* at *10 (Jones, J., dissenting and concurring).

66. *Id.*

67. *Cunningham v. California*, 127 S. Ct. 856, 861 (2007).

DSL in *People v. Black*, a substantially similar case. In *Black* the Court recognized that the superficial language of the DSL appeared to lend support to the argument that the middle term was the statutory maximum a judge could impose without the finding of additional facts not inherent in the jury verdict. Nevertheless, the court held in a 6-1 majority that in “operation and effect,” the upper term was the relevant statutory maximum because the finding of additional facts by judges did not require the imposition of a higher term, but simply made the higher term reasonable.⁶⁸ Ultimately, the Court held that California’s DSL was in harmony with *Apprendi*,⁶⁹ *Blakely*,⁷⁰ and *Booker*⁷¹ and did not violate the defendant’s Sixth Amendment rights.⁷² While agreeing with the Court’s decision, a single dissenting Justice maintained that a jury, not a judge, should determine the existence of aggravating circumstances that would justify the imposition of the upper term.

The United States Supreme Court granted certiorari⁷³ to settle the split among various states⁷⁴ regarding whether fact-finding by a judge that increases a sentence beyond that inherent in the jury verdict violates a defendant’s trial by jury and due process rights protected by the Sixth and Fourteenth Amendments.⁷⁵

68. *Id.* at 868 (quoting *People v. Black*, 113 P.3d 534, 543 (Cal. 2005)).

69. *Black*, 113 P.3d at 543 (submitting to the language in *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000), which indicates, “the relevant inquiry is one not of form, but of effect . . .”).

70. *Id.* at 546 (arguing that California’s DSL is distinguishable from Washington’s sentencing scheme which the Supreme court invalidated in *Blakely* because California’s DSL grants a trial judge a greater level of discretion).

71. *Id.* at 548 (claiming that the level of discretion afforded to a California judge under the DSL is comparable to the post-*Booker* Federal Sentencing Guidelines).

72. *Id.* at 545; see *Cunningham*, 127 S. Ct. at 869.

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

74. Gleeson, *supra* note 4, at 888–89 (noting that in *State v. Schofield*, 895 A.2d 927 (Me. 2005), the Supreme Judicial Court of Maine reached the opposite result of the Supreme Court of California’s decision in *Cunningham*); see also Thomson/West, *Basing Upper Term of Sentence on Factor Not Found by Jury—Certiorari Granted*, 23 NO. 6 WEST’S CRIM. LAW NEWS 85, (Mar. 17, 2006) (noting that Arizona, Colorado, Minnesota, New Jersey, North Carolina, Indiana, and Oregon have held that fact-finding by a judge which imposes a sentence above the statutory maximum allowed by the jury verdict violates the Sixth and Fourteenth Amendments while California, Hawaii, and Tennessee have allowed such fact-finding as long as the sentencing scheme grants the judge broad discretion).

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

IV. THE DECISION

A. *The Majority*

Justice Ginsburg penned *Cunningham*'s 6-3 majority decision, holding that the trial court's sentence controlled by the California's DSL violated the defendant's Fourteenth Amendment due process rights and the defendant's Sixth Amendment right to trial by jury "by placing sentence-elevating fact finding within the judge's province."⁷⁶ The Court's analysis focused on the relationship between *Cunningham*, *Apprendi*, *Blakely*, and *Booker*, emphasizing that each of them involved statutes which allowed facts found by a judge to extend a defendant's sentence.⁷⁷ In conjunction with this analysis, the Court rebuked the *Black* Court for erroneously construing the *Apprendi*, *Blakely*, and *Booker* line of cases⁷⁸ and for failing to apply the United States Supreme Court's clear precedent.⁷⁹

The Court reemphasized the rules it announced in *Apprendi*, *Blakely*, and *Booker* as follows: first, other than the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."⁸⁰ Second, "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."⁸¹ Third, the Federal Sentencing Guidelines are unconstitutional to the extent that they mandate a court to increase a sentence based on facts found by a judge and not a jury.⁸²

In direct opposition to the construction of California's DSL given by the Supreme Court of California in *Black*, the United States Supreme Court construed the DSL as requiring a sentencing judge to begin with the middle term and to vary from that term only when the court finds

76. *Id.*

77. *Id.* at 863-69; *see also* *People v. Prince*, 57 Cal.Rptr. 3d 543, 642 (Cal. 2007) (the Supreme Court of California responded to the Supreme Court's decision in *Cunningham* stating that "[t]he *Cunningham* decision involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law . . .").

78. *Cunningham*, 127 S. Ct. at 871 ("The *Black* [C]ourt . . . construed this Court's decisions in an endeavor to render them consistent with California law.>").

79. *Id.* at 869 (noting that the *Black* Court "remarkably" stated that "[t]he high court precedents do not draw a bright line").

80. *Id.* at 864 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

81. *Id.* at 865 (quoting *Blakely v. Washington*, 542 US 296, 303-04 (2004)) (emphasis in original).

82. *Id.* at 857-58 (citing *United States v. Booker*, 543 U.S. 220, 226-27 (2005)).

facts “beyond the elements of the charged offense.”⁸³ The Court specifically discounted as irrelevant the *Black* Court’s argument that California’s DSL gave judges broader discretion than the Washington procedures invalidated in *Blakely*⁸⁴ and held that through the precedent established in *Blakely*, the “relevant statutory maximum” available to the sentencing judge was the middle term.⁸⁵ Consequently, the Court found that the trial court’s sentence in *Cunningham* violated *Apprendi*’s “bright-line” rule because “circumstances in aggravation” which increased Cunningham’s sentence to the sixteen-year term had been found by a judge by a preponderance of the evidence.⁸⁶ Finally, the U.S. Supreme Court rejected the *Black* Court’s determination that California’s DSL was substantially similar to the advisory post-*Booker* Federal Sentencing Guidelines because under the DSL, “judges are not free to exercise their ‘discretion to select a specific sentence within a defined range.’”⁸⁷

Thus, in spite of the California Legislature’s grant of power to the trial court to impose the upper limit upon the finding of aggravating facts,⁸⁸ the United States Supreme Court ruled that both California’s DSL and Cunningham’s sixteen-year sentence violated the Constitution of the United States. Specifically, the Court concluded that the DSL violated the Sixth and Fourteenth Amendments “because a precondition for a sentence above the middle term was a post-conviction judicial finding of fact.”⁸⁹ As a result, the Court overruled the decisions of the trial court and the appellate court in *Cunningham v. California*⁹⁰ and the decision of the Supreme Court of California in *People v. Black*.⁹¹

83. *Id.* at 863; *see also* Respondent’s Brief on the Merits, No. 05-6551, 2006 WL 1992877, at *19 (July 12, 2006) (failing to cite any case where a trial court imposed the upper term based on the jury verdict alone).

84. *Cunningham*, 127 S. Ct. at 869 (“[B]road discretion to decide what facts may support an enhanced sentence . . . does not shield a sentencing system from the force of this Court’s decisions.”).

85. *Id.* at 868.

86. *Id.*

87. *Id.* at 870 (citing *Booker*, 543 U.S. at 233).

88. *See United States v. Griffin*, 494 F. Supp. 2d 1 (D. Mass. 2007).

89. Bowman, *supra* note 9, at *1; *see also Cunningham*, 127 S. Ct. at 871.

90. *See People v. Cunningham*, No. A103501, 2005 WL 880983 at *1 (Cal. Ct. App. 2005).

91. *See Cunningham*, 127 S. Ct. at 871.

B. Dissent: Alito

Justice Alito filed a controversial⁹² dissenting opinion in which Justices Kennedy and Breyer joined.⁹³ Alito noted that *Booker* rendered the Federal Sentencing Guidelines advisory and did not force a return to the “pre-Guidelines federal sentencing system”;⁹⁴ instead, *Booker* instituted a “reasonableness” standard of appellate review. Alito fervently argued that this “reasonableness” standard would necessitate “sentencing judges to make factual findings and to base their sentences on those findings.”⁹⁵ Alito acknowledged the majority’s accusation that his analysis went beyond the contours of *Cunningham* to predict future cases; however, he contended, “We need not map all the murky contours of the post-*Booker* landscape in order to conclude that reasonableness review must mean something.”⁹⁶ He emphasized the “very real constraint on a judge’s ability to sentence across the full statutory range without finding some aggravating fact” despite the advisory nature of the Guidelines.⁹⁷

Alito then pointed to the similarities between California’s DSL and the Federal Sentencing Guidelines including the considerable level of discretion afforded to judges,⁹⁸ the subjection to appellate review for reasonableness,⁹⁹ and the requirement that sentencing judges find facts at sentencing not inherent in the jury verdict.¹⁰⁰ Alito argued that California’s DSL was “indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *United States v. Booker*.”¹⁰¹ Alito also urged the Court to defer to the “binding” construction of California’s DSL promulgated by the Supreme Court of California in *Black*.¹⁰²

Thus, Justice Alito focused on the logical inconsistencies in the majority’s reasoning and concluded that the majority could not hold

92. See *Griffin*, 494 F. Supp. 2d at 11 n.31 (D. Mass. 2007) (describing Justice Alito’s remarks as “paradoxical”); but see Bowman, *supra* note 9, at *6 (stating, “Justice Alito is right and Justice Ginsburg wrong . . .”).

93. *Cunningham*, 127 S. Ct. at 873 (Alito, J., dissenting).

94. *Id.* at 875.

95. *Id.*

96. *Id.* at 880 n.11.

97. *Id.* at 880; see also Bowman, *supra* note 9, at *4 (“[D]eclaring the Guidelines advisory does not alter the fundamental requirements of rational decision making.”).

98. *Id.* at 876 (Alito J., dissenting).

99. *Id.* at 878.

100. *Id.*

101. *Id.* at 873. (Alito J., dissenting).

102. *Id.* at 878 n.8 (citing *Ring v. Arizona*, 536 U.S. 584, 603 (2002), *Wainwright v. Goode*, 464 U.S. 78, 84 (1983), *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

California's DSL to be inconsistent with the Sixth Amendment unless it overruled the Court's decision in *Booker*.¹⁰³

C. Dissent: Kennedy

Though Justice Kennedy joined Justice Alito's dissent,¹⁰⁴ he filed a separate dissenting opinion in which Justice Breyer joined.¹⁰⁵ Kennedy iterated that certain sentencing factors are more appropriately determined by a judge rather than a jury because "[j]udges . . . have a broad view and long-term commitment to correctional systems."¹⁰⁶ He believed that *Apprendi* and its supportive cases remained incorrect and that the majority's decision extended *Apprendi* "far beyond its necessary boundaries."¹⁰⁷ Kennedy urged the Court to confine "the *Apprendi* rule to sentencing enhancements based on the nature of the offense"¹⁰⁸ and that the Constitution ought to be interpreted to allow legislatures to guide judges in their sentencing determinations.¹⁰⁹ He emphasized that the majority's decision would thwart reasonable efforts of state legislatures to develop favorable sentencing systems, which would provide greater uniformity in sentencing.¹¹⁰

V. ANALYSIS

The Supreme Court ruled correctly in *Cunningham* because the Court appropriately construed California's DSL¹¹¹ and because the right to trial by jury should be protected.¹¹² However, in the remedial portion of its opinion which requires states to choose between giving a judge unfettered discretionary sentencing power or no discretionary sentencing power, the Court strays onto a dark path that leads to an undesirable outcome.¹¹³ The Court's poor remedy will surely have negative repercussions for the determinate sentencing laws.¹¹⁴ Finally, *Cunningham*'s relationship with the Federal Sentencing Guidelines sets

103. *Id.* at 881.

104. *Id.* at 873 (Alito, J., dissenting).

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

106. *Id.* at 872–73.

107. *Id.* at 872.

108. *Id.* at 872–73.

109. *Id.*

110. *Id.*

111. *Id.* at 862–63.

112. *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

113. *See Gleeson, supra* note 4, at 890.

114. *See generally* Brief of Hawaii et al., *supra* note 32, at *12.

the Court on a collision course with *Booker*'s reasonableness¹¹⁵ review which will in all likelihood trap the Court into offending either the Sixth Amendment or destroying the Federal Sentencing Guidelines.¹¹⁶

A. *Getting It Right*

Considering the egregious precedent¹¹⁷ and the Court's logical inconsistencies, the Court should be applauded for reaching the correct decision. The correct outcome of *Cunningham* depends entirely on the correct construction of California's DSL.¹¹⁸ Satisfying both a functionalist and formalist approach to statutory interpretation, the Court properly analyzed the DSL in light of traditional Sixth Amendment requirements.

Here, the majority simply construed the DSL with greater expertise than the dissenting Justices by correctly emphasizing the statute's practical effects.¹¹⁹ By properly gauging the form and effect of the DSL, the U.S. Supreme Court discovered that judges rather than juries were finding facts leading to greater sentences. Under the Sixth Amendment, each defendant is entitled to a public trial by an impartial jury,¹²⁰ and one of the most essential functions of a jury is fact-finding. Stripping this prerogative from the jury's domain would transform the jury's role in the criminal justice system from that of an impartial participant to an impartial observer.¹²¹ Such a construction would bypass the purposes of the Sixth Amendment. The Court's decision to overturn the DSL is correct because the effect of the DSL threatens, to some degree, the right to trial by jury—a constitutional right which the Court is charged with preserving.

The Court also construed the DSL more impartially than the California Supreme Court.¹²² The Supreme Court of California argued that the DSL was constitutional in form and effect because it gave judges

115. Bowman, *supra* note 9, at *15 (stating that the "Supreme Court has plunged Sixth Amendment sentencing law deep down the rabbit hole").

116. *Id.* at *6.

117. United States v. Griffin, 494 F. Supp. 2d 1, 9 (noting that the Booker decisions were "internally irreconcilable").

118. See *Cunningham v. California*, 127 S. Ct. 856, 862 (2007) (holding that the DSL required the imposition of the middle term unless the court and not the jury found aggravating facts not inherent in the jury verdict); *but see id.* at 877 (Alito, J., dissenting) (arguing that the judge's discretion is "quite broad" under the DSL to select the upper term).

119. *Id.* (Alito, J., dissenting).

120. See U.S. CONST. amend. VI.

121. See *United States v. Booker*, 543 U.S. 220, 230 (2005).

122. *People v. Black*, 113 P.3d 534, 543 (Cal. 2005) (arguing that the relevant statutory maximum is the upper term).

broad discretion in selecting the upper term.¹²³ However, gauging the true effect of the DSL is easily done by reviewing its application in case law. The State's counsel in *Cunningham* was unable to point to a single case in which a trial judge increased the sentence beyond the middle term without finding additional facts not contained in the jury verdict.¹²⁴ In light of this reality, it is hard to believe that the California Supreme Court would claim the DSL is constitutional.¹²⁵

As outlined previously, Justice Kennedy's dissent argues that judges are in a better position to gauge the individual circumstances of each defendant that are not obvious to juries.¹²⁶ As Kennedy explained, some sentencing facts should be determined by judges because they have a more "broad view and long-term commitment to correctional systems."¹²⁷ But while juries are known to be inefficient, cumbersome, and sometimes inaccurate, "[t]he founders of the American Republic were not prepared to leave [criminal justice] to the State."¹²⁸ In his concurring opinion in *Apprendi*, Justice Scalia explains that the right to trial by jury "has never been efficient; but it has always been free."¹²⁹ Accordingly, the Court should not interpret the Constitution in conflict with this ideal.

Respecting the Sixth Amendment tradition requires the strict protection of the right to trial by jury. By allowing a judge to impose greater sentences based on judge-found facts, the right to trial by jury would be operatively bypassed and slowly eroded. As far as the *Cunningham* decision is concerned, the Court made the right choice in invalidating the DSL, but unfortunately left the States with the decision of whether to augment the province of the jury or the power of the bench.

B. Determinate Sentencing Legislation and the Bench's Rise, Fall, and Rise to Power

While lower courts—which are closer to local realities—struggle to decide exactly what to do in light of the "Supreme Court's crude doctrines,"¹³⁰ legislatures struggle to keep up with the Court's dynamic precedents. Essentially, *Cunningham* has created an extreme environment in sentencing schemes. Either judges retain unfettered

123. *Cunningham*, 127 S. Ct. at 868.

124. *Id.* at 863.

125. *Id.* at 868.

126. *See id.* at 872–73 (Kennedy, J., concurring).

127. *Id.* at 872.

128. *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

129. *Id.*

130. Berman & Bibas, *supra* note 5, at 38.

discretion in an indeterminate system, or they are utterly subject to the statutory range authorized by the jury verdict.¹³¹ Specifically, the Court suggested that states adopt a post-trial hearing where the jury would find facts to augment the sentence or grant judges broader discretion within a statutory range.¹³² Though the “ball now lies in [the State legislature’s] court,”¹³³ the Court has forced the states to choose which polar opposite is most attractive to their needs.

The California legislature chose an extreme route in its reaction to *Cunningham*. In response to the Court’s decision, California hurriedly passed a bill with a January 1, 2009, sunset provision, which allows judges to select the upper, middle, or lower term without any factual finding.¹³⁴ Thus, *Cunningham* induced California into a complete judicial U-turn. Before the DSL was passed, California judges had unfettered discretion to dispense sentences how they wished.¹³⁵ Subsequently, California enacted the DSL in order to promote uniformity and limit the bench’s power.¹³⁶ Ironically, *Cunningham* invalidated the DSL because it granted the judge too much power.¹³⁷ Even more ironically, one of the Supreme Court’s suggestions in the remedial portion of its opinion is to grant judges more power.¹³⁸

Given all of these conflicting messages, it is difficult to predict what direction the Court will go next. States will continue to struggle with the opposing objectives of sentencing uniformity and proper consideration of individual circumstances of each defendant. There was some evidence presented in *Cunningham* which suggested that more states have sentencing schemes similar to that invalidated in California than schemes giving broad discretion to judges. However, in light of the Court’s whirlwind of contradictory remedial suggestions,¹³⁹ more jurisdictions will likely move to liberate their judges from the confines of determinate sentencing and away from Sixth Amendment preservation.

131. Bowman, *supra* note 9, at *15 (arguing that the rule is inadequate which grants “judges absolute sentencing discretion or none at all”).

132. *Cunningham*, 127 S. Ct. at 856.

133. *Id.* at 868 (quoting *United States v. Booker*, 543 U.S. 220, 265 (2005)).

134. See Bill: S.B. 40, 2007–08 Sess. (Cal. 2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0001-0050/sb_40_bill_20070125_amended_sen_v98.html (amending CAL. PENAL CODE § 1170(b)) (visited Feb. 6, 2008). See generally *State Sentencing Law Does Not Need Drastic Changes—Lawyers*, METROPOLITAN NEWS-ENTERPRISE (May 30, 2007), available at <http://www.metnews.com/articles/2007/blac053007.htm>.

135. *Cunningham*, 127 S. Ct. at 861.

136. *Id.*

137. *Id.* at 868; see Gleeson, *supra* note 4, at 890.

138. *Cunningham*, 127 S. Ct. at 871; see Gleeson, *supra* note 4, at 890.

139. *Cunningham*, 127 S. Ct. at 871 (urging legislators to either grant more power to judges or to grant more power to juries).

Therefore, while the Court's constitutional analysis in *Cunningham* is correct, its remedial portion suggesting the re-endowment of power upon judges is logically inconsistent—adding to the disorder of the already confusing¹⁴⁰ sentencing restrictions of the Sixth Amendment. Indeed, Justice O'Connor lamented in an earlier opinion, “What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.”¹⁴¹ More disconcerting, is the likelihood that states will move away from preserving the jury's role in the criminal justice system. A wiser approach would be to require state courts to have a separate sentencing hearing where the jury could find facts that would augment the sentence.

C. Painted Into a Corner

Cunningham's relation to the Federal Sentencing Guidelines placed the Supreme Court on a collision course with defining a reasonableness standard of review that will either damage Sixth Amendment precedent or destroy what is left of the Federal Sentencing Guidelines. Neither of these options is inviting. To avoid stepping in wet paint in the future, the Court will need to fashion a standard of reasonableness review that gives viability to determinate sentencing laws, while at the same time, remaining completely arbitrary in order to avoid any Sixth Amendment problems—a nearly impossible task. Addressing this issue during oral arguments of *Rita v. United States*—the first federal sentencing decision since *Booker*—a frustrated Justice Scalia scolded the helpless advocate stating, “[Y]ou haven't solved the problem of the . . . apparent conflict”¹⁴²

In light of *Cunningham*, if a federal judge imposes a sentence at the upper end allowed by the Guidelines, he or she must do so for reasonable reasons that do not involve judge-found facts. The core problem with the *Cunningham* decision relates to the Court's “either or” approach. Under *Cunningham*, judges must have either unregulated discretion in an indeterminate system, or they are completely bound by a statutory range authorized by the jury verdict. However, this rule seems irreconcilable with *Booker*, which made the Federal Sentencing Guidelines advisory,

140. Bowman, *supra* note 9, at 2. *But see* United States v. Griffin, 494 F. Supp. 2d 1, 15 (D. Mass. 2007) (arguing that *Cunningham* clarifies the Sixth Amendment analysis).

141. Blakely v. Washington, 542 US 296, 336 (2004) (O'Connor, J., dissenting).

142. Oral Argument Transcript, *Rita v. United States*, Oral Transcript, available at 127 S. Ct. 2456 (2007) (No. 06-5754) http://www.oyez.org/cases/2000-2009/2006/2006_06_5754/argument/ (last visited Feb. 6, 2008).

allowing judges to deviate from them subject to appellate review for reasonableness. In light of *Cunningham*'s rule, what does "advisory" and "review for reasonableness" mean?

If these terms suggest that judges are constrained to some degree by the Guidelines, then *Cunningham* overrules *Booker* because it would effectively put district judges in an intermediate position of discretionary sentencing power. In the latest Federal sentencing case, *Gall v. United States*, Justice Alito's dissenting opinion suggests that "sentencing judges must still give the Guidelines' policy decisions some significant weight and that the courts of appeals must still police compliance."¹⁴³ Yet this is exactly what *Cunningham* prohibits. The moment a judge begins to follow the Guidelines, he or she necessarily engages in fact-finding.

If "advisory" and "review for reasonableness" carry little or no meaning, then the Federal Sentencing Guidelines are also meaningless. Without reasonableness review, the Federal Sentencing Guidelines will not be guidelines, but simple suggestions which the judge can vary from for any reason without explanation. In other words, the reasonableness review is the only doctrine supporting federal determinate sentencing and without it, sentencing power will revert back to the bench as in the pre-Federal Sentencing Guidelines era.¹⁴⁴ Thus, the reasonableness review is essential to the preservation of determinate sentencing in the post-*Booker* and post-*Cunningham* sentencing world.

Unfortunately, any attempt by the Court to strengthen the reasonableness review or give this doctrine any real weight will result in Sixth Amendment violations of judicial fact-finding. If reasonableness requires a judge to rely on specific factual bases,¹⁴⁵ the Sixth Amendment right to trial by jury is implicated. If reasonableness simply means that a judge did not dispense the sentencing in his sleep,¹⁴⁶ then the Federal Sentencing Guidelines become hollow. Thus, if reasonableness review is to "mean something,"¹⁴⁷ judges must be limited by it in some form—in violation of *Cunningham*.

143. *Gall v. United States*, 128 S. Ct. 586, 604 (2007) (Alito, J., dissenting).

144. *Bowman*, *supra* note 9, at *6.

145. *Id.* at *3.

146. *Id.* (considering a judge basing the decision on a lottery).

147. *Cunningham v. California*, 127 S. Ct. 856, 880 n.11 (2007) (Alito, J., dissenting) (emphasis omitted).

VI. CONCLUSION

In summary, while the *Cunningham* Court made the right decision for *Cunningham*, it jeopardized thousands of other criminal judgments.¹⁴⁸ The effect of its inconsistent remedial holding on the Sixth Amendment right to trial by jury will likely be negative. Finally, *Cunningham's* irresolvable conflict with *Booker* has created a situation where the Court will need to choose between offending the Sixth Amendment and destroying the Federal Sentencing Guidelines. "The only sure thing is that more change seems inevitable, and that it will be interesting to watch it happen."¹⁴⁹

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148. *Blakely v. Washington*, 542 US 296, 326 (2004)(O'Connor, J., dissenting).

149. Gleeson, *supra* note 4, at 890.

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