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Cunningham: Why Federal Practitioners and Policy Makers Should Pay Attention



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On February 21, 2006, the United States Supreme Court granted certiorari in *Cunningham v. California*, which involves a challenge to the constitutionality of California's determinate sentencing system.¹ *Cunningham* offers the possibility of another important decision in the line of cases, beginning with *Apprendi v. New Jersey*,² that have expanded the right to a jury trial in the sentencing context. The case obviously warrants close attention from California practitioners, as well as those who work in other states with similar sentencing systems.³ This Article will discuss reasons why federal practitioners and policy makers should also pay attention to *Cunningham*.

I. Background: California's Determinate Sentencing System

For many crimes, California law specifies that one of three sentences may be imposed: an upper term, a middle term, or a lower term.⁴ For instance, the offense of "continuous sexual abuse of a child" is punishable by a term of six, twelve, or sixteen years' imprisonment. The sentencing judge must impose the middle term unless she finds that the aggravating circumstances in the case outweigh the mitigating, or the mitigating outweigh the aggravating. Rules of court provide a nonexhaustive list of aggravating and mitigating circumstances but otherwise offer little guidance. Judges are thus left with much freedom in determining what are aggravating circumstances, what are mitigating circumstances, and how much weight to give them. However, the basic elements of the offense itself may not be treated as aggravating.

The California Supreme Court has characterized the system as highly discretionary, indicating that the decision to sentence above or below the presumptive middle term is only constrained by a loose "reasonableness" requirement. While the California system bears many similarities to the Washington system the U.S. Supreme Court found to violate jury-trial rights in *Blakely v. Washington*,⁵ the California Supreme Court has distinguished the Washington system as less discretionary. Where Washington judges were bound by that state's presumptive sentences unless they found "substantial and compelling reasons" for a different sentence, California judges may potentially reject the presumptive middle term on the basis of any mitigating or aggravating circumstance.⁶ On that basis, the

California Supreme Court held in *People v. Black* that the California system does indeed comply with the requirements of *Blakely*.⁷

II. The *Cunningham* Litigation

Cunningham was convicted of continuous sexual abuse of a child and sentenced to the upper term (sixteen years). In reaching its decision, the sentencing court relied on six aggravating factors, none of which were found by a jury. Citing *Blakely*, *Cunningham* has argued on appeal—thus far unsuccessfully—that the California sentencing procedures violated his right to a jury trial.

In his Petition for Writ of Certiorari, *Cunningham* asserted that the California system cannot be distinguished from the Washington system that was overturned in *Blakely*, inasmuch as both systems require judicial fact-finding in order to increase sentences above a specified presumptive term.⁸ In its Brief in Opposition, the State argued that the California system is more discretionary than the Washington system because of the open-ended nature of the weighing of aggravating and mitigating circumstances.⁹ It also claimed that the California system is indistinguishable from the post-*Booker* federal system.

III. Points of Interest for Federal Practitioners and Policy Makers

A. The Intriguing Analogy to Federal Sentencing

While the Supreme Court *could* decide *Cunningham* without commenting in any way on the federal system, the State's attempt to analogize the California system to the federal system invites Supreme Court commentary on the federal system. The *Booker* remedy opinion, of course, offered only a bare-bones description of the new federal advisory guidelines system,¹⁰ so we don't really know much about the Court's views on such vital questions as whether within-range sentences should be treated in any sense as presumptively correct, what "reasonableness" review by the appellate courts really means, and whether district court judges are authorized to impose an outside-the-range sentence on the basis of a disagreement with a policy choice embodied in the Guidelines. If any of the Justices are interested in weighing in on such questions, *Cunningham* offers a convenient opportunity to do so.

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In particular, it will be interesting to see if the Court responds to the State's assertion that "under the reformed [i.e., post-*Booker*] Federal Sentencing Guidelines, a federal district court is not free to impose an aggravated term irrespective of the presence or absence of aggravating circumstances."¹¹ And what of the flip side of this proposition—a federal district court is not free to impose a *mitigated* term irrespective of the presence or absence of *mitigating* circumstances? Among other things, a discussion of this point might provide some insight into the Court's thinking on the crucial question of whether judges may impose a non-Guidelines sentence on the basis of a policy disagreement with the Guidelines (e.g., as to the notorious 100:1 crack/powder ratio), without regard to the presence of some unusual factual circumstance in the case.¹²

B. Counting Votes for Future Cases

There is real uncertainty now as to the Court's center of gravity on *Apprendi* issues. Not only have two new Justices joined the Court since *Booker* was decided, but Justice Ginsburg's views have also become a matter of considerable speculation. Ginsburg was the only Justice to join both the merits and remedy majority opinions in *Booker*, but she herself did not write an opinion in the case to explain her position. By joining the merits dissenters in their remedy opinion, was she indicating that she is having second thoughts about the *Apprendi* revolution? Justice Breyer's current views are also a matter of uncertainty. His concurrence in *Harris v. United States* was crucial to preserving mandatory minimums from *Apprendi*, yet he expressed misgivings about the logical inconsistencies between *Harris* and *Apprendi*.¹³ If he becomes willing to accept *Apprendi* on stare decisis grounds, then mandatory minimums are in serious jeopardy. Thus, any writing in *Cunningham* by Justices Ginsburg, Breyer, Roberts, or Alito might provide helpful insights into the future of mandatory minimums and a host of other *Apprendi*-related questions.

C. Future Legislative Reform

Cunningham may effectively impose new constraints on legislative responses to *Booker* or, alternatively, suggest new ways for Congress to reinstitute mandatory guidelines in a constitutional fashion. Most obviously, the central question posed by *Cunningham* is how discretionary a "discretionary" system needs to be in order to avoid *Apprendi* problems. In its discussion of this question, the Court may further delineate some of the constitutional parameters within which legislative reformers will have to operate.

I am also intrigued by the suggestion in *Black* (a case that is sure to be considered by the high court in *Cunningham*) that the history and intent of a sentencing system may have some bearing on its constitutionality: The real concern of *Apprendi* and its progeny, the California Supreme Court seemed to be saying, was with the legislature increasing punishment inappropriately by converting elements of crimes into sentencing factors.¹⁴ Thus, the court found it significant that "California's adoption of the determinate sentencing law reduced the length of potential sentences for most crimes, rather than increasing them."¹⁵ I, for one, think this is a misreading of the *Apprendi* line of cases, but, with two new members on the Court and the potential for malleability in Justice Ginsburg's views, perhaps the time is ripe for some revisionist history. And if the approach of the California Supreme Court were to be adopted, this might lead to the surprising conclusion that new mandatory guidelines could be imposed at the federal level if they were structured so as to *reduce* defendants' sentencing exposure.

Notes

This Article was originally presented as a talk at the annual meeting of the Eastern District of Wisconsin Bar Association in April 2006. I am grateful for the comments and questions of those in attendance.

- ¹ *People v. Cunningham*, 2005 WL 880983 (Cal. Ct. App.), cert. granted, 126 S.Ct. 1329 (2006).
- ² 530 U.S. 466 (2000).
- ³ For recent decisions from other states considering similar constitutional challenges to similar sentencing systems, see *State v. Brown*, 99 P.3d 15 (Ariz. 2004); *Lopez v. People*, 113 P.3d 713 (Colo. 2005); *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005); *State v. Natale*, 878 A.2d 724 (N.J. 2005).
- ⁴ The relevant California statutes are described and interpreted at length in *People v. Black*, 113 P.3d 534, 537-39, 543-46 (Cal. 2005), from which the material in this section is drawn.
- ⁵ 542 U.S. 296 (2004).
- ⁶ *Black*, 113 P.3d at 545-46.
- ⁷ *Id.* at 548.
- ⁸ *Cunningham v. California*, Brief in Support of Petition for Writ of Certiorari, 2005 WL 3785203.
- ⁹ *Cunningham v. California*, Brief in Opposition to Petition for Writ of Certiorari, 2005 WL 3783460.
- ¹⁰ See *United States v. Booker*, 125 S.Ct. 738, 767 (2005).
- ¹¹ *Cunningham*, Brief in Opposition to Petition for Writ of Certiorari, 2005 WL 3783460, at *6.
- ¹² See, e.g., *United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006) ("[S]entencing decisions must be done case by case and must be grounded in case-specific considerations, not in general disagreement with broad-based policies enunciated by Congress or the Commission, as its agent.").
- ¹³ *Harris v. United States*, 536 U.S. 545, 569-70 (2002) (Breyer, J., concurring).
- ¹⁴ See *Black*, 113 P.3d at 544-45.
- ¹⁵ *Id.* at 544.