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When May a Judge, Instead of a Jury, Find the Facts on Which a Criminal Sentence Is Based?

by Michael O'Hear

PREVIEW of United States Supreme Court Cases, pages 16-20 © 2006 American Bar Association

Case at a Glance

For most felonies, California law provides three possible sentences. The sentencing judge may impose the most severe of the three sentences if the judge finds there are circumstances in aggravation of the crime. This case asks whether defendants have a constitutional right to have the facts found by a jury, instead of the judge.

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ISSUE

Does California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violate the constitutional right to jury fact-finding beyond a reasonable doubt in criminal cases?

FACTS

When California adopted its Determinate Sentencing Law (DSL) in the mid-1970s, it was foreshadowing a broad national movement against judicial discretion in sentencing. Under the DSL, the sentencing judge must usually impose one of three specified terms of imprisonment following a felony conviction. The law further states that the judge must impose the middle term, unless there are circumstances in aggravation or mitigation of the crime. Cal. Pen. Code § 1170(b). Rules of court identify a

nonexhaustive list of aggravating and mitigating circumstances. These factors may be found by the judge using the "preponderance of the evidence" standard, as opposed to a jury using the higher "beyond a reasonable doubt" standard. Cal. Rules of Court, Rule 4.420(b).

Thus, in 2003, when a jury found John Cunningham guilty of continuous sexual abuse of a child, the judge was left with a choice between three possible sentences: 6, 12, or 16 years in prison. The judge found the existence of six aggravating factors: (1) great violence, great bodily harm, and threat thereof disclosing a high degree of viciousness and callousness; (2) a vulnerable victim; (3) a threat of bodily injury to coerce the victim to recant; (4) taking advantage of a position of trust or confidence; (5) engaging in violent conduct which indicates a serious danger to society; and (6) Cunningham's employment as a police officer. The judge found just one mitigating factor: the defendant's lack of any prior record. Finding that the aggravating circum-

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stances outweighed the mitigating circumstances, the judge bypassed the middle term of 12 years and sentenced Cunningham to 16 years.

As other states followed California's lead in replacing broad, unguided judicial discretion with sentencing rules that specified particular consequences for particular findings of fact, defendants began to argue that fact-finding at sentencing should be subject to all of the basic procedural protections that are constitutionally required of criminal trials. These constitutional protections include, most notably, a right to jury fact-finding beyond a reasonable doubt. The Supreme Court rejected an argument of this sort in 1986. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). However, an unusual coalition of some of the Court's most liberal Justices (Stevens, Souter, and Ginsburg) and most conservative Justices (Scalia and Thomas) signaled a reversal of course in 2000. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* held that, with just a couple of exceptions, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The *Apprendi* revolution in sentencing procedure reached its zenith in *Blakely v. Washington*, 542 U.S. 296 (2004), which has been characterized by some experts as the Court's most important criminal procedure decision in a generation. In *Blakely*, the Court overturned Washington's sentencing guidelines system. The Washington guidelines specified a narrow, presumptive sentencing range based on the jury's findings, but then permitted the judge to impose a sentence in excess of that range if the judge found "substantial and compelling reasons justifying an exceptional

sentence." The Court held that this process violated *Apprendi*, refining the *Apprendi* rule as follows: "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."

Blakely thus cast doubt on the constitutionality of the "presumptive" sentencing systems used in California and about a dozen other states. Most of these states responded by changing their sentencing systems, either creating a fact-finding role for the jury or switching back to discretionary sentencing. California, however, did nothing. Sentenced a few months before *Blakely*, John Cunningham was able to raise the sentencing procedure issue on appeal. He argued that the judge in his case unconstitutionally found the aggravating facts on which his upper-term sentence was based. However, in an unpublished decision, the California Court of Appeal rejected Cunningham's *Blakely* challenge. The court reasoned that the upper term of imprisonment imposed on Cunningham was within the authorized range of punishment based on Cunningham's conviction. In other words, to use *Apprendi*'s terminology, the judge's findings of fact did not increase the penalty for Cunningham's crime "beyond the prescribed statutory maximum." Because an upper-term punishment under the DSL is within the "statutory maximum," the fact-finding necessary to impose the upper term need not be made by a jury beyond a reasonable doubt.

Cunningham then sought discretionary review in the California Supreme Court. However, while his petition was pending, the higher court also upheld the constitutionality of the DSL scheme against a *Blakely* challenge. *People v. Black*,

113 P.3d 534 (Cal. 2005). Thereafter, the California Supreme Court denied Cunningham's petition. He then successfully sought review in the United States Supreme Court.

CASE ANALYSIS

Cunningham argues this case is simply a repeat of *Blakely*. Just like the sentencing scheme overturned in *Blakely*, the DSL scheme establishes a standard, middle-of-the-road sentence and requires that the judge find at least one aggravating circumstance before selecting a term above the standard sentence. As Cunningham characterizes the California system, the jury's verdict alone does not authorize an upper-term sentence. That sentence can only be reached through some additional fact-finding. Under *Apprendi* and *Blakely*, Cunningham argues, such additional fact-finding must be performed by a jury using the beyond a reasonable doubt standard.

The State of California presents a more complicated argument, which proceeds along two lines. The state attempts first to distinguish *Blakely* and then second to analogize the California system to the federal sentencing scheme adopted by the Court in *Booker v. United States*, 543 U.S. 220 (2005). In a sense, then, the state's arguments really turn on the question of whether the DSL scheme is closer to the pre-*Blakely* Washington system or the post-*Booker* federal system.

The state contends that Cunningham mischaracterizes the California system. The jury verdict actually does authorize all three terms of imprisonment (upper, middle, and lower), and the judge's selection of any of these three is a discretionary decision subject to differential appellate review. The "standard" sentencing range for a crime

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thus includes all three terms. The requirement that there be an aggravating circumstance to justify the upper term is really just another way of saying that the sentence must be reasonable. However, a reasonability requirement does not convert an otherwise discretionary sentencing system into an impermissibly presumptive one. The broad discretion enjoyed by California judges in selecting the upper term ought to be distinguished from the more rigorous standards that had to be satisfied for Washington judges to impose a sentence above that state's standard range.

In arguing that the jury's verdict alone authorizes an upper-term sentence, the state relies on the California Supreme Court's opinion in *Black*, which upheld the DSL system against a *Blakely* challenge. According to the state, the United States Supreme Court must defer to California's highest court when it comes to interpreting California law. Cunningham counters that *Black* itself acknowledged the key requirement of an aggravating circumstance before an upper-term sentence can be imposed; any characterization of the significance of this requirement for purposes of federal constitutional analysis is ultimately a matter for the United States Supreme Court, and not a state court, to decide.

The state also relies on earlier California decisions that raised barriers to post-conviction review of a judge's decision to impose an upper-term sentence. Cunningham responds that these decisions were pre-*Apprendi* and, in any event, addressed different legal questions than the jury-right question.

Building on its efforts to distinguish *Blakely*, the state argues that its DSL scheme avoids the "policy concerns" that animated *Blakely*. For

instance, the DSL does not represent "judicial usurpation of the jury's role" because the law preserves a role for the jury in finding facts that are necessary to enhance a sentence above the upper term. Nor does the DSL deny defendants fair notice of their sentencing exposure; the upper term is clearly indicated in the criminal statutes.

The state analogizes the California system to the post-*Booker* federal system. Prior to *Booker*, federal sentencing was governed by mandatory guidelines. The guidelines set forth a host of sentence enhancements. Judges, not juries, did the fact-finding in order to determine which enhancements applied. *Booker* held that this scheme violated *Apprendi* and *Blakely*. By way of a remedy, *Booker* declared that the guidelines would henceforth be merely "advisory," not binding. Appellate courts would review sentences, not for strict compliance with the guidelines, but for "reasonableness." The Court made clear that the modified federal system, despite its use of guidelines and appellate review and its lack of a role for the jury, nonetheless complied with *Apprendi* and *Blakely*.

The state argues that its system, as construed by *Black*, closely parallels the new federal regime. The state's middle term establishes a norm that operates like the recommended sentencing range under the federal guidelines. California judges, like their federal counterparts, have broad, but not quite unlimited, discretion to sentence above the norm. In both settings, a sentence above the norm must be reasonable, but reasonability review does not mean the sentencing scheme is the sort of mandatory scheme that must be accompanied by jury fact-finding. The state finds support for its analogy in the growing body of post-*Booker* decisions in the lower federal

courts that treat the guidelines range as "presumptively reasonable."

Cunningham counters that the post-*Booker* system still provides for more discretion than the DSL. *Booker* did not contemplate that federal judges would necessarily be required to find an aggravating circumstance in order to impose a sentence above the recommended guidelines range. To the extent that post-*Booker* decisions do indeed suggest such a requirement, Cunningham points out that they are merely *lower-court* decisions. The Supreme Court itself has never endorsed this view of *Booker*.

SIGNIFICANCE

Cunningham is an extremely important case—arguably the most important criminal procedure case yet confronted by the Roberts Court. To be sure, the basic question presented by the entire line of *Apprendi* cases seems at first to be a rather arcane matter of procedure: under what circumstances can fact-finding for sentencing purposes be performed by a judge, as opposed to a jury? Yet, this procedural issue turns out to have profound consequences for substantive outcomes. For one thing, both the folk wisdom of lawyers and the research of social scientists indicate that judges and juries often assess evidence differently. It is not clear whether judges are, on the whole, tougher on criminal defendants than juries, or vice versa. But there is little doubt that in many cases judges and juries will reach different outcomes. Even more significant, though, is the extra time and effort that is required by lawyers and court personnel when an issue is tried to a jury. In a criminal justice system that is already spread thin, recognizing a broader jury-trial right is apt to reduce the number of cases that prosecutors can take, cause prosecutors to be more generous in

plea bargaining, and/or result in fewer sentence enhancements being imposed. Moreover, in order to deal with the resource problems, a state may feel obliged to reinstitute the sort of highly discretionary sentencing regime that fell out of favor three decades ago. It is a matter of intense debate whether these sorts of changes are desirable, but they are surely momentous.

Within the broader context of the *Apprendi* revolution, *Cunningham* may prove significant in at least four respects. First and most obviously, *Cunningham* may result in a determination that the nation's largest state-level criminal justice system is operating day-in and day-out in violation of the Constitution. This would cause considerable short-term instability and confusion, as the state courts try to sort out the scope of the ruling, decide which defendants were entitled to a resentencing, and establish new procedures to bring the state into compliance with the constitutional mandate. Over the long term, the state legislature would need to decide how to respond, which might entail either scrapping the DSL or modifying the law so as to incorporate jury fact-finding.

Second, and more subtly, *Cunningham* may have important ramifications for the federal sentencing system. This is because the state is arguing that its system falls within the constitutional safe harbor recognized by *Booker* for discretionary sentencing regimes. The state's argument is an invitation for the Court to clarify its holding in *Booker* and, in particular, to address the post-*Booker* lower-court decisions (relied on by the state in its brief) that accord presumptive validity to sentences within the recommended guidelines range. In the eyes of some commentators, the federal courts of appeals have evis-

cerated *Booker* by requiring compliance with the guidelines in all routine cases. For instance, the courts of appeals have largely squelched a post-*Booker* movement by district court judges to soften the notoriously harsh federal guidelines for crack offenses. It is arguable that such decisions have moved the federal system outside the safe harbor for truly discretionary sentencing regimes. *Cunningham* requires the Court to define the safe harbor's parameters with greater clarity. In doing so, the Court may try to signal the federal courts of appeals that they cannot demand as rigorous compliance with the guidelines as they have been doing.

Third, if the DSL regime is upheld, then other states that are looking for ways to implement some form of presumptive sentencing without jury fact-finding will have a clear model to follow. A number of states, including Ohio and New Jersey, are still trying to deal with the fallout from *Blakely*. Courts have declared their sentencing systems unconstitutional, but their legislatures have yet to respond. The California system, if constitutional, might prove to be an attractive model for reform.

Finally, *Cunningham* offers the first good opportunity to take the temperature of the new Roberts Court on *Apprendi* issues. It is not yet known whether Chief Justice Roberts and Justice Alito will follow the lead of fellow conservative Justices Scalia and Thomas (supporters of the *Apprendi* revolution) or of their predecessors Chief Justice Rehnquist and Justice O'Connor (opponents of the revolution). There is also some uncertainty over the views of Justices Breyer and Ginsburg. Before he became a Justice, Breyer played a key role in drafting the federal sentencing guidelines, which gives him a unique personal stake in anything the Court

has to say about presumptive sentencing. He has opposed the *Apprendi* revolution from the start. With *Booker*, the federal guidelines case, now behind the Court, some commentators have speculated that Breyer might be willing to make peace with *Apprendi* and collaborate with some of the pro-*Apprendi* Justices in pushing the revolution in new directions. On the other hand, some commentators have wondered whether Ginsburg, a supporter of the revolution, is having second thoughts. She surprised many observers by joining Breyer's "remedy" opinion in *Booker* but did not explain her vote. Judges and sentencing policy-makers will be reading with particular interest anything she writes in *Cunningham*, just as they will be anxious for any hints about the views of Roberts, Alito, and Breyer. The opinions of these four Justices will determine whether we are entering a period of retrenchment in the Court's sentencing jurisprudence or whether the Court will continue to reshape the criminal justice landscape as dramatically as it has done over the past six years.

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