Cunningham: The Supreme Court's Next Sentencing Blockbluster?

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I. Background: California's Determinate Sentencing System[2]

For many crimes, California law specifies that one of three sentences may be imposed: an upper term, a middle term, or a lower term. 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 the judge 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 thus have considerable discretion 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 that was declared unconstitutional in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the California Supreme Court has distinguished the Washington system as one that was 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. On that basis, the California Supreme Court has rejected claims that the California system violates the *Blakely* principle.

II. The *Cunningham* Litigation

Cunningham was convicted of continuous sexual abuse of a child and sentenced to the upper term (sixteen years).[3] In reaching its decision, the sentencing court relied on six aggravating factors, none of which were found by a jury. Citing *Blakely*, Cunningham argued on appeal that the California sentencing procedures violated his Sixth Amendment right to a jury trial. The Court of Appeal affirmed, and the California Supreme Court denied discretionary review. The United States Supreme Court has agreed to hear the case, although oral argument will probably not be until October.

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[2] The relevant California statutes are described and interpreted at length in People v. Black, 113 P.3d 534 (Cal. 2005), from which the material in this section is drawn.

[3] People v. Cunningham, 2005 WL 880983 (Cal. Ct. App.).

In his Petition for Writ of Certiorari, Cunningham argues 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. [4] In its Brief in Opposition, the State argues 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.[5] Of particular interest for present purposes, the States argues that the California system is indistinguishable from the post-*Booker* federal system.

III. Why *Cunningham* Should Be of Interest to Federal Practitioners

A. The State's 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 barebones description of the new federal advisory guidelines system, so we don't really know much about the Court's views on such vital questions as how much presumptive weight the guidelines should be given and what "reasonableness" review by the appellate courts really means. If any of the Justices are interested in weighing in on such questions, *Cunningham* offers a convenient opportunity to do so.

In particular, I think 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." And what of the flipside of this proposition: a federal district court is not free to impose a *mitigated* term irrespective of 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 simple disagreement with the guidelines (e.g., as to the notorious 100:1 crack/powder ratio).

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*. If he becomes willing to accept

[4] 2005 WL 3785203.

[5] 2005 WL 3783460.

Apprendi on *stare decisis* grounds, then mandatory minimums are in serious jeopardy. Thus, any writing in *Cunningham* by Roberts, Alito, Ginsburg, or Breyer 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, point the way for Congress to reinstitute more 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* (the California Supreme Court decision --sure to be considered by the high court in *Cunningham* --upholding the California system) that the history and intent of a sentencing system should determine its constitutionality: the real concern of *Apprendi* and its progeny, the court seemed to be saying, was with the legislature increasing punishment inappropriately by converting elements of crimes into sentencing factors. 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." I myself think this is a complete misreading of the *Apprendi* line of cases, but, with two new members on the Court and Ginsburg potentially up in the air, who knows? And would this suggest that new mandatory guidelines could be adopted at the federal level if they self-consciously reduced severity?