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“CUNNINGHAM v. CALIFORNIA: THE CLASH BETWEEN JUDICIAL DISCRETION AND

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I. INTRODUCTION

A. Summary of Facts: Restatement of the Case

The State of California has a determinate sentencing law that allows a trial judge, not a jury, authority to find facts that expose a defendant to an enhanced “upper term” sentence.¹ The petitioner, John Cunningham, was tried and convicted of continuous sexual abuse of a child under the age of fourteen.² Under the California determinate sentencing law, that offense is punishable by imprisonment for a lower term sentence of six years, a middle term sentence of twelve years, or an upper term sentence of sixteen years.³ The determinate sentencing law allowed the trial judge to sentence the petitioner to the twelve-year middle term unless the judge found one or more additional “circumstances in aggravation.”⁴ According to the determinate sentencing law, “circumstances in aggravation” are those facts that justify the term and must be established by a preponderance of the evidence.⁵

Based on a post-trial sentencing hearing, the judge found, by a preponderance of the evidence, seven important factors including six aggravating facts and one mitigating factor.⁶ One of the six aggravating factors included the particular vulnerability of the victim. The mitigating factor was that Cunningham has no prior criminal record.⁷ Finding that the

² Id.
⁴ Cunningham, 127 S.Ct. at 856.
⁵ Id.
⁶ Id.
⁷ Id.
aggravating factors outweighed the sole mitigating factor, the judge sentenced Cunningham to
the upper term of sixteen years.\(^8\)

On appeal, the California Court of Appeal affirmed Cunningham’s conviction and
sentence; one judge dissented in part, urging that the Court’s precedent precluded the judge-
determined four-year increase in the petitioner’s sentence.\(^9\) During this appeal, Cunningham
argued that the California sentencing procedures violated his right to a jury trial.\(^10\) Cunningham
argued that the sentence violated the Sixth Amendment and he disputed the substance of five of
the six findings made by the trial judge.\(^11\) The appellate court affirmed the trial judge’s findings
that there was a vulnerable victim and violent conduct, but rejected the finding that Cunningham
abused a position of trust because that ruling overlapped the vulnerable victim finding.\(^12\)
According to the California Penal Code, the determinate sentencing scheme allows a sentence to
be increased above the range provided for the offense on the basis of statutory enhancements
reflecting the defendant’s criminal history or particular circumstances of the crime, such as the
particular vulnerability of the victim (that is, a victim who is young, elderly or disabled).\(^13\) After
the appellate court affirmed the trial court’s decision for the state, the California Supreme Court
denied review.\(^14\)

In his Petition for *petition for** writ of error**, Cunningham asserted that the California system cannot
be distinguished from the Washington system that was overturned in *Blakely v. Washington*,
inasmuch as both systems used judicial fact-finding in order to increase sentences above a

\(^8\) *Id.* at 857.
\(^9\) *Id.*
\(^10\) Michael M. O’Hear, Cunningham: Why Federal Practitioners and Policy Makers Should Pay
\(^11\) *Cunningham*, 127 S.Ct. at 857.
\(^12\) *Id.*
\(^13\) *CAL. PENAL CODE ANN.* § 1170.1, *subd.*(e).
\(^14\) *Cunningham v. California*, 127 S.Ct. at 861.
specified presumptive term.\textsuperscript{15} In its Brief in Opposition, the State argued that the California system is more discretionary than the Washington system because the California system weighs aggravating and mitigating circumstances in an open-ended manner.\textsuperscript{16} Cunningham appealed the appellate court decision on the grounds that the determinate sentencing law was unconstitutional and on February 21, 2006, the United States Supreme Court granted certiorari.\textsuperscript{17} The Supreme Court held that the California determinate sentencing law violated the Sixth Amendment right to trial by jury by allowing the judge to usurp the fact-finding authority of the jury and violated the Fourteenth Amendment right to due process by permitting the judge, rather than the jury, to perform the fact-finding role.\textsuperscript{18}

B. Statement of Case Significance: Finding Meaning Within Cunningham

The Supreme Court’s decision in \textit{Cunningham v. California}\textsuperscript{19} provides an example of how California’s sentencing law violates the right to trial by jury by involving judges in fact-finding.\textsuperscript{20} The lower courts used the determinate sentencing law as a strong foundation in their decision-making process believing the determinate sentencing law would promote uniform and proportionate punishment. The courts chose to focus not on factors exhibited by the defendant, but primarily on the nature of the defendant’s offense.

The Supreme Court determined that several states have modified their sentencing systems by calling upon the jury (either at trial or in a separate sentencing proceeding) to find any fact

\begin{footnotesize}
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\item \textsuperscript{15} Brief in Support of Petition for Writ of Certiorari, Cunningham v, California, 127 S.Ct. 856 (2007), 2005 WL 3785203.
\item \textsuperscript{16} Brief in Opposition to Petition for Writ of Certiorari, Cunningham v. California, 127 S.Ct. 856 (2007), 2005 WL 3783460.
\item \textsuperscript{17} Michael M. O’Hear, Cunningham: Why Federal Practitioners and Policy Makers Should Pay Attention, 18 FED. SENT. R. 260 (2006).
\item \textsuperscript{18} \textit{Cunningham}, 127 S.Ct. at 856.
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{United States v. Cunningham}, 429 F.3d 673 (7th Cir. 2005), \textit{cert. granted}, 74 U.S.L.W. 3559 (U.S. Apr. 3, 2006) (No. 05-6551).
\end{itemize}
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necessary for the imposition of an elevated sentence.\textsuperscript{21} In Cunningham, the United States Supreme Court differed from the California Supreme Court in People v. Black and relied on the Apprendi v. New Jersey and United States v. Booker decisions to justify the Court’s application of the middle term sentence of twelve years as the relevant statutory maximum.\textsuperscript{22} The Cunningham case provides the Supreme Court with an opportunity to examine the determinate sentencing law vis-à-vis the Sixth Amendment and the Fourteenth Amendment. The Court found the determinate sentencing law to be unconstitutional. Because of this finding, the Court has indirectly overruled the California Supreme Court decision in Black. The Black court held that the judicial fact-finding that occurs when a judge exercises discretion to impose an upper term sentence under Cal. Pen. Code, § 1170, subd. (b), does not implicate a defendant’s Sixth Amendment right to a jury trial.\textsuperscript{23}

C. Scope Statement: Roadmap of Casenote Analysis

The purpose of this note is to provide the reader with an understanding of the Sixth Amendment’s jury trial guarantee as it relates to the California determinate sentencing law, specifically the Cunningham case. This note also examines other relevant cases that have significantly impacted federal sentencing guidelines in light of the Sixth Amendment. Support for this note lies in case law, statutes, and the concurring and dissenting opinions of those who played a role in the Court’s reasoning and decision-making. This note will also provide and analyze the factors from which both the lower and higher courts made their decisions on federal sentencing issues and judicial discretion.

\begin{footnotes}
\textsuperscript{21} Cunningham, 127 S.Ct. at 871.
\textsuperscript{22} Id.
\textsuperscript{23} People v. Black, 35 Cal. 4th 1238 (2005).
\end{footnotes}
Section two of the note provides a snapshot of federal sentencing law in California. The snapshot will guide the reader through the purpose behind determinate sentencing law. Within the historical overview, key cases relating to sentencing and judicial discretion such as *Apprendi v. New Jersey*\(^{24}\), *Blakely v. Washington*\(^{25}\) and *United States v. Booker*\(^{26}\) will be discussed. In *Cunningham*, the Court relies on all three aforementioned cases in its reasoning; the dissenting justices also cite the cases in the dissenting opinion.\(^{27}\)

Section three will explore the Court’s analysis in *Cunningham*. The note will also explain the reasoning the Court used to hold the California determinate sentencing law unconstitutional. Also included in the note is the analysis of Justice Ginsburg’s opinion. The note will provide the Court’s view on the constitutionality of the determinate sentencing law and the historical foundations of the Sixth Amendment.

Section four solely contains the author’s critical analysis of the *Cunningham* opinion. The analysis will provide a review of the Court’s reasoning and holding. The analysis will also explore the decisions of the Court in prior cases involving issues closely related to *Cunningham*.

Section five summarizes the pertinent points in the casenote. It includes recommendations related to instituting future legislation on the constitutionality of sentencing guidelines. This section will review the United States Sentencing Commission, its role in past and future matters relating to federal sentencing issues, and its involvement in sentencing strategies.

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\(^{27}\) *Cunningham*, 127 S.Ct. at 856.
II. HISTORICAL OVERVIEW

A. History of Determinate Sentencing in California

California’s determinate sentencing law became operative on July 1, 1977, replacing the prior system under which most offenses carried an indeterminate sentence. In enacting the new sentencing scheme, the Legislature declared that the purpose of imprisonment is punishment, and that this purpose is “best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.” Under the prior regime, courts imposed open-ended prison terms (often one year to life), and the parole board determined the amount of time a felon would ultimately spend in prison. The determinate sentencing law replaced the indeterminate sentencing scheme that had been in force in California for some 60 years.

In contrast to the prior sentencing system, the determinate sentencing law fixed the terms of imprisonment for most offenses and eliminated the possibility of early release on parole. Three terms of imprisonments are specified by statute for most offenses. The judge’s discretion in selecting among these options is guided by California Penal Code section 1170, subd. (b), which states that “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” Under the applicable rules,
“selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation.”

Under the determinate sentencing law, the court may rely on aggravating facts that have not been found true by the jury. In Apprendi v. New Jersey, it was established that a defendant has a federal constitutional right to a jury trial on sentence enhancements, a right that already was accorded California defendants by statute. In California, all aspects of the crime charges are subject to determination by a jury. A judge is free to base an upper term sentence on any aggravating factor that the judge deems significant, subject to the specific prohibitions on double use of aggravating factors that constitute elements of the crime or enhancements. As a historical matter, California’s adoption of the determinate sentencing law reduced the length of potential sentences for most crimes, rather than increasing them.

B. Apprendi, Blakely & Booker: Three Building Blocks for Cunningham

The cases of Apprendi, Blakely and Booker all bear close resemblance to the questions presented in the Cunningham case. In Apprendi, the petitioner Apprendi was charged under New Jersey law with, inter alia, second-degree possession of a firearm for an unlawful purpose, which carried a prison term of five to ten years. The court found by a preponderance of the evidence that Apprendi’s use of the firearm was racially motivated and sentenced Apprendi to a 12-year term on the firearms count. In upholding the sentence, the appellate court rejected Apprendi’s

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36 CAL. R. CT. 4.420(b).
37 People, 35 Cal. 4th at 1248.
39 Id.
40 CAL. PENAL CODE ANN. § 422.55.
41 CAL. R. CT. 4.420(b).
42 Cassou & Taugher, 9 PAC. L.J. at 5, 13, 18.
43 Apprendi, 530 U.S. at 466.
44 Id.
claim that the Due Process clause requires that a finding of bias be proved to a jury beyond a reasonable doubt.\textsuperscript{45} The New Jersey Supreme Court affirmed.\textsuperscript{46} The United States Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.\textsuperscript{47} Just like in \textit{Cunningham}, the holding in \textit{Apprendi} relied upon the Sixth Amendment notice and jury trial guarantee which requires that any fact other than prior conviction that increases the maximum penalty for a crime be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt.\textsuperscript{48}

The Washington Sentencing Reform Act limited the range of sentences a judge may impose on a defendant.\textsuperscript{49} 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.”\textsuperscript{50} Blakely was convicted on a charge of kidnapping with a firearm in which a defendant could not receive a sentence above a “standard range” of forty-nine to fifty-three months imprisonment.\textsuperscript{51} The Washington state judge imposed a ninety-month prison sentence upon Blakely on the ground that he had committed the crime with “deliberate cruelty,” which was a statutorily enumerated ground for an enhanced sentence in a domestic-violence case.\textsuperscript{52} Again, the Supreme Court held that the Washington state judge’s imposed sentence, a

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\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Blakely}, 542 U.S. at 298.
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Blakely}, 542 U.S. at 296.
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significantly thirty-seven months higher than the standard maximum, was unconstitutional thus violating the Sixth Amendment right to jury trial.\footnote{Id.}

While the cases of \textit{Apprendi} and \textit{Blakely} involved state crimes in New Jersey and Washington, respectively, neither involved the Federal Sentencing Guidelines (Guidelines) as did the case of \textit{United States v. Booker}.\footnote{\textit{United States v. Booker}, 543 U.S. 220 (2005).} Under the Guidelines, the maximum prison sentence authorized by the findings of the jury, with respect to its guilty verdict at a particular defendant’s trial in a Federal District Court for violation of a federal statute prohibiting possession of cocaine, was 262 months.\footnote{Id.} At Booker’s sentencing hearing, the trial judge made some additional findings by a preponderance of the evidence; and because these findings mandated, under the Guidelines, a minimum sentence of 360 months, the judge imposed a 360-month sentence.\footnote{Id.} The United States Court of Appeals for the Seventh Circuit held that a trial judge’s application of the Guidelines conflicted with the Supreme Court’s holding in \textit{Apprendi}; relied on the Supreme Court’s holding in \textit{Blakely}; and concluded that Booker’s sentence violated the federal constitutional Sixth Amendment right to a jury trial.\footnote{United States v. Booker, 375 F.3d 508 (2004).} The United States filed a writ of certiorari with the Supreme Court which was granted but the Court eventually held that the Guidelines were unconstitutional under its two provisions, 18 USCS § 3553 (b)(1) and 18 USCS § 3742 (e).\footnote{Booker, 543 U.S. at 228.} All three of the aforementioned cases provide a basis and foundation for the building blocks used in the decision-making process that ultimately led to the Court’s holding in \textit{Cunningham}.\footnote{\textit{Id.}}
III. COURT’S ANALYSIS

A. Reasoning of the Supreme Court: Ruling in Favor of the Sixth Amendment Again

In *Cunningham v. California*, the Supreme Court analyzed whether the California determinate sentencing law violates a defendant’s Sixth Amendment right to trial by jury by allowing the judge to commandeer the jury’s fact-finding authority. The Court held that the determinate sentencing law does violate the Sixth Amendment. The Court has repeatedly held that, under the Sixth Amendment, a jury, not a judge, must find any fact that exposes a defendant to a greater potential sentence and establish guilt beyond a reasonable doubt, not merely a preponderance of the evidence. The Court has reaffirmed the *Apprendi* rule that held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt; applying it to facts subjecting a defendant to the death penalty, facts permitting a sentence in excess of the “standard range” under Washington’s Sentencing Reform Act, and facts triggering a sentence range elevation under the then-mandatory Federal Sentencing Guidelines. The relevant “statutory maximum” spelled out by the Court “is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” In Petitioner Cunningham’s case, the jury’s verdict alone limited the permissible sentence to twelve years. Additional fact-finding by the trial judge, however,

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59 *Cunningham*, 127 S.Ct. at 860.
60 *Id.*
61 *Id.* at 863, 864.
64 *Booker*, 543 U.S. at 228 (2005).
65 *Blakely*, 542 U.S. at 296.
66 *Cunningham*, 127 S.Ct. at 860.
yielded an upper term sentence of sixteen years. The Court reversed that disposition because the four-year elevation based on judicial fact-finding denied Cunningham his right to a jury trial.

The Supreme Court examined the Sixth Amendment’s historical and doctrinal foundations in reaching its holding. The Court recognized that the judge’s invasion of the jury’s province operated to increase a defendant’s otherwise maximum punishment and posed a grave constitutional question. Prior to Cunningham’s case, the State of Washington in Blakely endeavored to distinguish Apprendi on the ground that “under the Washington guidelines, an exceptional sentence is within the court’s discretion as a result of a guilty verdict.” The Apprendi court rejected that argument and found that the judge could not have sentenced Blakely above the standard range without finding the additional aggravating circumstance of deliberate cruelty. The Cunningham court found the same true where the judge could not have sentenced Cunningham to an elevated upper term sentence based on aggravating facts. The Court held that these facts were subject to the Sixth Amendment’s jury-trial guarantee.

The Supreme Court also looked to the actions of several other states such as Arizona, Kansas, Minnesota, North Carolina, and Oregon in deciding Cunningham. The Court noted that those aforementioned states, as well as a few others, had modified their systems in the wake

67 Id.
68 Id.
69 Id. at 864.
70 Id.
72 Blakely, 542 U.S. at 296.
73 Cunningham, 127 S.Ct. at 856.
74 Id. at 865.
75 Id. at 871.
of Apprendi and Blakely to retain determinate sentencing.\textsuperscript{76} Contrary to the court in People v. Black\textsuperscript{77}, the Court’s decision in the instant case resulted from the holdings from Apprendi and Booker.\textsuperscript{78} The decision points to the middle term specified in California’s statutes, not the upper term, as the relevant statutory maximum.\textsuperscript{79} In summary, the California determinate sentencing law authorized the judge, not the jury, to find the facts permitting an upper term sentence and the system could not withstand measurement against the court’s Sixth Amendment precedent.\textsuperscript{80} For the above stated reasons, the Supreme Court found that California’s determinate sentencing law violated the Sixth Amendment and reversed the judgment of the California Court of Appeals in part and remanded the case for further proceedings not inconsistent with its opinion.\textsuperscript{81}

B. \textit{Dissent: None Concurring, Two Dissenting}

Justice Kennedy dissented with the Court’s opinion that the California determinate sentencing law violated the Sixth Amendment.\textsuperscript{82} Justice Breyer joined this dissent.\textsuperscript{83} Kennedy viewed the Apprendi line of cases as incorrect.\textsuperscript{84} Kennedy believed that the rationale in those cases should have only been permitted to control other cases within the central sphere of their concern.\textsuperscript{85} His idea was that this would cause widespread harm to the criminal justice system and the corrections process now resulting from the Court’s unyielding insistence on expanding the Apprendi doctrine far beyond its necessary boundaries.\textsuperscript{86} Justice Kennedy asserted that the

\begin{footnotesize}
\textsuperscript{76} Id.
\textsuperscript{77} People v. Black, 35 Cal. 4th 1238 (2005).
\textsuperscript{78} Cunningham, 127 S.Ct. at 871.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\end{footnotesize}
Court could have distinguished between sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply, and sentencing enhancements based on the nature of the offender, where it would not. Kennedy suggested, as dissenting opinions have before, that the Constitution ought not to be interpreted to strike down all aspects of sentencing systems that grant judicial discretion with some legislative discretion and control. Kennedy had previously explained that “sentencing guidelines are a prime example of the collaborative process” between courts and legislatures. Justice Kennedy further thought that the line between offense and offender would not always be clear, but in most instances the nature of the offense is defined in a manner that ensures the problem of categories would not be difficult. In the opinion of Justice Kennedy, the Court’s decision should have considered the facts that must be considered by the jury and other considerations that a judge can take into account. He thought that his approach might develop sentencing systems of guided discretion within the general constraint that *Apprendi* imposes.

Justice Alito also dissented to the opinion of the Court in *Cunningham* with Justices Breyer and Kennedy joining. The Justices explained that the California sentencing law that the Court struck down was indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *Booker*. They compared both sentencing schemes in light of judicial discretion and appellate review for “reasonableness.”

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87 *Id.*  
88 *Id.*  
89 *Blakely*, 542 U.S. at 327 (opinion of KENNEDY, J.).  
90 *Cunningham*, 127 S.Ct. at 873.  
91 *Id.*  
92 *Id.*  
93 *Id.*  
94 *Id.*  
95 *Id.*
The Justices offered a reminder that the Court has held unequivocally that the post-*Booker* federal sentencing system satisfies the requirements of the Sixth Amendment and the same should be true with regard to the California system. The Justices pointed out that despite the similarities between the California system and the “advisory Guidelines” scheme approved in *Booker*, the California regime ran afoul of the Sixth Amendment. The Justices warned that unless the Court was prepared to overrule the remedial decision in *Booker*, the California sentencing scheme at issue should be held consistent with the Sixth Amendment.

IV. WRITER’S CRITICAL ANALYSIS

A. Commitment to a Sentence: Judges, Legislators and the Criminal Justice System

In *Cunningham*, the Supreme Court remained consistent with its decisions in *Apprendi* and *Booker* and held that the California determinate sentencing law violated the Sixth Amendment right to trial by jury. The Court held the California law unconstitutional because it allowed judges to invade the jury’s role by performing fact-finding that elevated sentences of guilty defendants to the upper term. The judge did correctly use aggravating and mitigating factors in elevating the sentences, but this was the jury’s duty. As Justice Kennedy pointed out in his dissent, judges and legislators also have a very important role in sentencing systems in the United States. Judges and legislators must have the capacity to develop consistent sentencing standards; standards that individual juries empanelled for only a short time cannot impact in a permanent way. Judges and sentencing officials have a broad view and long-term

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96 *Id.*
97 *Id.* at 878, 879.
98 *Id.* at 880.
99 *Id.* at 873.
100 *Blakely*, 542 U.S. at 327 (opinion of KENNEDY, J.).
commitment to correctional systems, whereas juries do not. Judicial officers and corrections professionals, under the guidance and control of the legislature, should be encouraged to participate in the improvement of various sentencing schemes in our country.

Both the *Blakely* and *Cunningham* decisions affected many different groups of people, including sentencing judges, prosecutors, criminal defense attorneys and both federal and state legislatures. After the *Blakely* decision, but before the one in the present case, many judges restricted their discretion in sentencing decisions to a jury’s finding only. Prosecutors and criminal defense attorneys had to adjust to life after the *Blakely* decision in their plea and trial dynamics. These adjustments will likely continue post-*Cunningham*. The massive uncertainty that was created in the criminal justice system after *Blakely* might be better controlled under the guided discretion of the legislature.

This system of guided discretion would be permitted to a large extent if the Supreme Court confined the *Apprendi* rule to sentencing enhancements based on the nature of the offense. These sentencing enhancements come in the form of aggravating and mitigating factors, for example, the fact that a weapon was used, violence was employed, or the crime involved misconduct with a minor child as it did in *Cunningham*. Juries could consider these matters without serious disruption because these factors often are part of the statutory definition

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101 *Cunningham*, 127 S.Ct. at 872. 
102 *Id.*
104 *Id.*
105 *Id.*
106 *Id.* at 230.
107 *Cunningham*, 127 S.Ct. at 872, 873. 
108 *Id.* at 873.
of an aggravated crime in any event and because the evidence to support these enhancements is likely to be a central part of the prosecution’s case.\textsuperscript{109}

On the other hand, the Court was correct in its holding that judicial discretion is appropriate when the judge is considering aggravating and migrating factors that bear on the defendant’s sentence.\textsuperscript{110} Such factors would include things like prior convictions and other aspects of the defendant’s history that would bear upon his background and contribution to the community.\textsuperscript{111} These are facts that should be taken into account at sentencing but have little, if any, significance in whether the defendant committed the crime.\textsuperscript{112} Again, under the guided discretion system, a judge’s subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria.\textsuperscript{113}

Justice Alito provided a great rationale regarding the flaws within the guided discretion system. Alito, along with Justices Breyer and Kennedy, asserted that there was no constitutionally significant difference in the California sentencing law struck down by the Supreme Court and the advisory Guideline scheme it approved in \textit{Booker}.\textsuperscript{114} Every court should pay attention to the similarities between the California system and the advisory Guidelines scheme. Alito’s dissent showed that the Court’s reasoning in \textit{Cunningham} was flawed for one very important reason.\textsuperscript{115} California required that some aggravating factor, apart from the

\begin{flushleft}
\textsuperscript{109} \textit{Id.} \\
\textsuperscript{110} \textit{Id.} \\
\textsuperscript{111} \textit{Id.} \\
\textsuperscript{113} \textit{People v. Stevens}, 253 Cal. Rptr. 173 (1988). \\
\textsuperscript{114} \textit{Cunningham}, 127 S.Ct. at 873. \\
\textsuperscript{115} \textit{Id.} at 879.
\end{flushleft}
elements of the crime found by the jury, must support an upper term sentence. In short, the Court missed the requirement that a California court finding some “circumstance in aggravation” before imposing an upper term sentence is not the same as a requirement that the court find an aggravating factor. These factors are similar to the federal sentencing policies set forth in 18 U.S.C. § 3553(a). The policy considerations have always been outside the province of the jury and do not implicate the Sixth Amendment. The Court should revisit this issue and define “circumstances in aggravation” and determine if it is the same as an aggravating fact for clarity.

B. Does the Majority Rule?

The conflict battled by the Supreme Court in Cunningham dealt with the constitutionality of California’s sentencing system. According to the majority, the first issue in determining the constitutionality of California’s sentencing scheme is “whether a trial judge’s decision to impose an upper term sentence under the California determinate sentence law involves the type of judicial fact-finding that traditionally has been performed by a judge in the context of exercising sentencing discretion or whether it instead involves the type of fact-finding that traditionally has been exercised by juries in the context of determining whether the elements of an offense have been proved.” What is the source for the majority’s test? The majority may have looked to Justice Ginsburg’s delivery of the Cunningham opinion where she pointed out that the federal Constitution’s jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact not found by a jury, or admitted by the

116 Id.
117 Id.
119 Cunningham, 127 S. Ct. at 879.
120 People v. Black, 35 Cal. 4th at 1270.
defendant; and that this denied that defendant his right to a jury trial. The point of the majority is slightly incompatible as it fails to rely on the difference between a maximum sentence and a sentence enhancement. The Court’s reasoning in Cunningham followed a very broad view of the California determinate sentencing law and the laws of the states in the precedent cases. It appears that the Supreme Court imposed the law but did not further challenge the intricate details that lie within the California sentencing system law.

C. Effects of Cunningham: What Happens Next?

The Supreme Court ruled on the constitutionality of the California determinate sentencing law in Cunningham. State and federal determinate sentencing schemes have been challenged since their advent but were still designed to minimize severe disparities in sentences. In past cases, the Court has defined the statutory maximum sentences judges may impose upon defendants after finding additional facts in their respective cases. This, without a doubt, has set an important precedent for lower courts, judges and legislators around the country. This decision provides the perfect opportunity for the United States Sentencing Commission to get involved on major issues concerning sentencing. Here, the Commission would be able to become the expert at developing and interpreting the sentencing laws of the nation.

The Commission, as an administrative body, would be able to study the system, and to implement and monitor the policies and issues that would affect the overall administration of sentencing systems. Those in favor of modern sentencing reform have fought against the legislature as the ideal institution for developing the intricacies of sentencing system structure. The very concept of a sentencing commission grew out of the realization that neither the judiciary nor legislature had been able to, nor could really be expected to, engender effective and

comprehensive sentencing reforms. A sentencing commission would be the best avenue for this assignment because the commission is comprised of knowledgeable experts who are insulated from short-term political pressures and have the time and opportunity to study sentencing. When all is said and done, the commission would be institutionally well-suited to take on this responsibility because of its access to adequate resources and data favorable to proposed sentencing reforms.

Historically, the United States Sentencing Commission has unduly concentrated its efforts on reducing system-wide sentencing disparity, has paid insufficient attention to case-specific sentencing fairness, and has shown a disconcerting tendency to subordinate its sentencing judgments to Congress’s more punitive tendencies rather than provide an independent voice and perspective on sentencing policy. To its credit, in the wake of Booker, the Commission has adjusted some of its practices and has been taking a somewhat more active role in the public dialogue over the current state and the future direction of federal sentencing guidelines and strategies. The Commission, however, must do more as it relates to those issues that divide the lower courts and encourages the Supreme Court to grant certiorari on cases concerning the various sentencing schemes and the constitutionality of those laws.

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123 Id.
124 Id.
125 Id. at 379.
V. CONCLUSION

For many crimes, California law specifies that one of three sentences may be imposed; an upper term, a middle term, or a lower term sentence.\(^{126}\) The Supreme Court has held that California’s determinate sentencing law violated a defendant’s right to trial by jury under the Sixth Amendment.\(^{127}\) Because of the role that judges and legislatures have in developing ongoing policy and legislation, the Court must suggest ways to institute 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 the problems found in cases such as Apprendi.\(^{128}\) The Court would be much more proficient if it allowed maximum employment of the federal sentencing system by incorporating the Sentencing Commission’s expertise, knowledge, and skill along with the jury’s fact-finding abilities into the federal sentencing process.\(^{129}\)


\(^{127}\) Cunningham, 127 S.Ct at 856.

\(^{128}\) O’Hear, 18 FED. SENT. R. at 260.

\(^{129}\) Symposium, 43 HOUS. L. REV. at 388.