

# U.S. High Court Strikes Down State's Determinate Sentencing Law

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California's determinate sentencing system is unconstitutional to the extent it permits a judge to impose an upper term sentence based on facts that have neither been admitted to by the defendant nor found true by the jury, the U.S. Supreme Court ruled yesterday.

The decision could cut the sentences of thousands of prison inmates, and will limit judges' sentencing options going forward. But the district attorney of Los Angeles County said it will have only a limited impact here, and Gov. Arnold Schwarzenegger, in a vaguely worded statement, said he would "work to ensure that this decision will not be a threat to public safety."

The 6-3 ruling in *Cunningham v. California* effectively shaves four years off the 16-year sentence of former police officer John Cunningham, who was convicted of sexually abusing his son.

It's the latest in a series of high court rulings over the past seven years that limit judges' discretion in sentencing defendants.

"This court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by the jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence," Justice Ruth Bader Ginsburg wrote for the court.

## First District Ruling

The ruling overturns a 2005 First District Court of Appeal ruling that upheld Cunningham's sentence. The California Supreme Court denied review, nine days after upholding the DSL in another case.

In that decision, *People v. Black* 35 Cal. 4th 1230, the high court held that the DSL, under which the trial judge chooses from among three possible sentences for a given crime, and must choose the middle term unless aggravating or mitigating circumstances support a different choice, passes muster under *United States v. Booker* (2005) 543 U. S. 220.

*Booker* held that judicial factfinding in the federal sentencing process does not render that scheme unconstitutional as long as the Sentencing Guidelines are treated as discretionary rather than mandatory and the sentences are not unreasonable. Chief Justice Ronald M. George, writing in *Black*, said that the DSL gives California judges essentially the same level of discretion that federal judges have under *Booker*.

## Former Police Officer

Ginsburg disagreed, noting that California judges cannot choose from within a wide range of permissible sentences, as federal judges can post-*Booker*, and that they are locked into the middle term in the absence of aggravating or mitigating circumstances, which require written findings on the record.

Cunningham, a former Richmond, Calif., police officer, was convicted of sexually abusing his 10-year-old son after the boy moved in with Cunningham and his girlfriend.

In Cunningham's case, the judge was required to impose a six-year, 12-year, or 16-year term, and found that the upper term was appropriate because the vulnerability of the victim and the degree of violence, among other factors, outweighed the only mitigating circumstance, the lack of a prior criminal record.

"The ball lies in California's court" has to how to fix the law, Ginsburg said. She was joined by Chief Justice John Roberts and Justices David Souter, John Paul Stevens, Antonin Scalia and Clarence Thomas.

Justice Samuel Alito said in dissent that California's law "is indistinguishable in any constitutionally significant respect" from the federal guidelines. He was joined by Justices Anthony Kennedy and Stephen Breyer.

In a separate dissent joined by Breyer, Kennedy suggested a middle ground, under which jury findings would be necessary with respect to aggravating factors regarding the crime itself, but not as to those dealing with the defendant's background.

When the case was argued last fall, the state warned that its criminal justice system would be burdened by having to re-sentence thousands of inmates. But Peter Gold, Cunningham's lawyer, told the court that in many cases the standard term and longer option differ by just a year. In practical terms, many of those who might be affected by the ruling might already have finished serving their time in prison.

Several states have changed their sentencing laws to require prosecutors to prove to a jury aggravating factors that could lead to longer sentences; another option would be to adopt advisory guidelines like those used in federal courts.

Two bills now pending in the Legislature, AB 160 by Assemblywoman Salley Lieber, D-Mountain View, and SB 110 by Sen. Gloria Romero, would create a commission to study revisions of California's system.

District Attorney Steve Cooley said in a statement that the ruling was anticipated, and that its effect in the county will be minimized because 96 percent of the cases are resolved by plea bargains, and his office has incorporated waivers of the Sixth Amendment issue into its plea agreements since the issue arose in a pre-Booker case, *Blakely v. Washington*, (2004) 542 U. S. 296. *Blakely* held that use of judicial factfinding to justify a sentence in excess of that which would otherwise have been imposed under state guidelines was unconstitutional.

A Cooley spokesperson also noted that *Blakely* has never been held retroactive, so that relief under yesterday's ruling will likely be limited to those defendants who received upper term sentences since *Blakely* was decided and after a jury trial.

There were just under a quarter-million felony convictions in the state in 2005. Data from the 1980s cited by the California Supreme Court suggests that roughly 15 percent of cases involving just one felony count result in sentences in which a judge, not a jury, finds an aggravating factor to justify the additional punishment.