

## California's Determinate Sentencing Law: How California Got it Wrong . . . Twice

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### INTRODUCTION

Imagine that California's Determinate Sentencing Law ("DSL") has been found unconstitutional by the United States Supreme Court. And, suppose the Supreme Court found California was violating a defendant's Sixth Amendment right to trial by jury. But, after receiving instruction on how the sentencing procedures could be made constitutional, California decides to implement a quick fix—an amendment of the sentencing statute. Instead of following the guidance of the Supreme Court, California adopts an alternate remedy—not used by any other state—that still violates the Constitution. Unfortunately, this is the current reality in California.

“[E]limination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.”<sup>1</sup> This passage comes from California's DSL, which was enacted in 1977. Determinate sentencing statutes provide statutorily defined terms of imprisonment that must be imposed if a defendant is found guilty. In California, for most crimes, the statutes provide lower, middle, and upper terms.<sup>2</sup> Prior to the enactment of California's DSL, most crimes carried an indeterminate sentence range, within which judges could choose a sentence of any length.<sup>3</sup> Since 1977, however, determinate sentencing laws have not gone unchallenged. The United States Supreme Court addressed

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<sup>1</sup> Uniform Determinate Sentencing Act, ch. 1139, § 273, 1976 Cal. Stat. (1977) (codified at CAL. PENAL CODE § 1170(a)(1) (West 2008)).

<sup>2</sup> For example, the California Penal Code states:

Any person who commits an assault upon the person of a peace officer or firefighter with a semiautomatic firearm and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for five, seven, or nine years.

CAL. PENAL CODE § 245(d)(2).

<sup>3</sup> See Nicole Eiland, *Sentence Structure: The Supreme Court's Decision in Cunningham Closely Follows the Jurisprudence Set Forth in Apprendi and Blakely*, LOS ANGELES LAWYER, July–Aug. 2007, at 31, 36.

determinate sentencing laws in *Apprendi v. New Jersey*,<sup>4</sup> *Blakely v. Washington*,<sup>5</sup> *United States v. Booker*,<sup>6</sup> and, finally, in *Cunningham v. California*, which declared California's sentencing procedures unconstitutional.<sup>7</sup>

*Cunningham* gave California three ways to amend the DSL: (1) employ a jury to find facts used to impose the upper term; (2) give judges broad discretion to choose a term from within a statutory range; or (3) find another solution consistent with the Court's Sixth Amendment jurisprudence.<sup>8</sup> The California Supreme Court reacted to *Cunningham* by finding the sentencing law unconstitutional in *People v. Sandoval*,<sup>9</sup> and by amending its sentencing laws<sup>10</sup> and Rules of Court.<sup>11</sup> But these reforms did not comply with the recommendations in *Cunningham*. California did not include a jury in the sentencing process and did not give its judges broad discretion to choose a sentence of any length within a set range. Instead, California granted its judges "sound discretion" to choose any of the three statutorily specified terms.<sup>12</sup> This Note explains why California's previous DSL was unconstitutional, and why, even as amended, California's current DSL still runs afoul of the Sixth Amendment.

Part I of this Note describes the history of California's DSL, including relevant case law from *Almendarez-Torres*<sup>13</sup> to *Cunningham*. This part briefly explains *People v. Black*,<sup>14</sup> the California Supreme Court's pre-*Cunningham* attempt to save California's DSL. This part then explains the California Legislature's post-*Cunningham* amendment of the DSL. These lines of cases are crucial to understanding *People v. Sandoval*,<sup>15</sup> California's latest ruling on determinate sentencing.

Part II of this Note analyzes California's attempt to make its DSL constitutional through legislative amendment,<sup>16</sup> amendment of its Rules of Court, and the California Supreme Court's opinion in *Sandoval*. This part suggests that California's legislative and judicial branches failed to reform California's DSL in a manner consistent with *Cunningham*. California's remedy, while coming close to the Supreme Court's recommendations and

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4 *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

5 *Blakely v. Washington*, 542 U.S. 296 (2004).

6 *United States v. Booker*, 543 U.S. 220 (2005).

7 *Cunningham v. California*, 127 S. Ct. 856 (2007).

8 *Id.* at 871.

9 *People v. Sandoval*, 161 P.3d 1146 (Cal. 2007).

10 Act of March 30, 2007, 2007 Cal. Legis. Serv. 4 (West) (codified as amended at CAL. PENAL CODE § 1170 (West 2008)).

11 Cal. Order No. 07-83, 2007 Cal. Legis. Serv. R-40-47 (West).

12 Act of March 30, 2007, 2007 Cal. Legis. Serv. 4, 5 (West) (codified at CAL. PENAL CODE § 1170 (West 2008)); *see infra* Parts I, II.

13 *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

14 *People v. Black*, 113 P.3d 534 (Cal. 2005).

15 *People v. Sandoval*, 161 P.3d 1146 (Cal. 2007).

16 Act of March 30, 2007, 2007 Cal. Legis. Serv. 4 (West) (codified as amended at CAL. PENAL CODE § 1170 (West 2008)).

what other states employ, still falls short of the constitutional threshold.

Part III discusses how California can make its DSL constitutional after *Sandoval*. This part describes the remedies recommended by the Supreme Court.<sup>17</sup> This part also describes the constitutionally valid method used by most states affected by *Apprendi*, *Blakely*, and *Booker* to sentence convicted defendants—the use of a jury as the finder of facts needed to impose a sentence above the statutory maximum.<sup>18</sup>

Finally, Part IV of this Note recommends that California amend its DSL to make the upper, middle, and lower sentences advisory. California's actions demonstrate a desire to retain this sentencing triad, even though adding a jury to the sentencing process would burden the system.<sup>19</sup> Still, if California made its guidelines advisory, California's DSL would be constitutional by its 2009 sunset date. This remedy would be less burdensome than grafting a jury onto the sentencing process, and would comply with the Sixth Amendment by giving judges broad discretion in sentencing.

I. DETERMINATE SENTENCING LAW FROM *APPRENDI* TO  
*CUNNINGHAM*, INCLUDING THE CALIFORNIA LEGISLATURE'S  
ATTEMPTED PATCH

A. An Explanation of California's DSL Prior to the 2007 Amendment

California's DSL was enacted in 1977 to eliminate disparity and to promote uniformity in sentencing.<sup>20</sup> Prior to the 2007 amendment, section 1170(b) of the California Penal Code provided a different sentencing procedure. Under the previous version of the statute, the court was to impose the middle term of imprisonment specified in the statute unless there were aggravating or mitigating circumstances.<sup>21</sup> If aggravating circumstances were found, the higher sentence was justified.<sup>22</sup> A judge could justify a higher term based on a preponderance of the evidence.<sup>23</sup> In *Cunningham*, the Supreme Court found California's DSL unconstitutional, because this determination should be made by a jury under a beyond-a-reasonable-doubt standard.<sup>24</sup>

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17 *Cunningham v. California*, 127 S. Ct. 856, 871 (2007).

18 Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to Blakely v. Washington*, 18 FED. SENT'G REP. 7, 8 (2005).

19 *Sandoval*, 161 P.3d at 1161.

20 *See supra* note 1 and accompanying text.

21 CAL. PENAL CODE § 1170(b) (West 2004) (amended 2007).

22 *See id.*

23 *See Cunningham v. California*, 127 S. Ct. 856, 870 (2007).

24 *See id.*

B. *Almendarez-Torres v. United States*: The Beginning of the Supreme Court's Focus on Sentencing Law

The line of cases leading up to *Cunningham* and *Sandoval* began with *Almendarez-Torres v. United States*.<sup>25</sup> In 1998, Hugo Almendarez-Torres pled guilty to reentry into the United States as a deported alien, a violation of 8 U.S.C. section 1326.<sup>26</sup> Despite that the offense carried a maximum punishment of two years in prison, the sentencing court imposed a term of eighty-five months based on Almendarez-Torres' past commission of an aggravated felony that he admitted before entering his plea.<sup>27</sup> This longer sentence was based upon Section 1326(b)(2), which authorized up to twenty years imprisonment for an alien who had previously committed an aggravated felony, had subsequently been deported, and then reentered the country again illegally.<sup>28</sup>

At the sentencing hearing, and again on appeal, Almendarez-Torres claimed that the indictment failed to allege the prior conviction.<sup>29</sup> Because the indictment did not allege the prior conviction, Almendarez-Torres claimed that any sentence beyond the ordinary two years for a Section 1326 violation was constitutionally invalid.<sup>30</sup> The district court, Fifth Circuit, and the Supreme Court all rejected his argument.<sup>31</sup> The Supreme Court concluded that Section 1326(b)(2) was a penalty provision that authorized the sentencing court to increase the sentence for a repeat offender and did not define a separate crime.<sup>32</sup> Thus, the Supreme Court stated, "neither the statute nor the Constitution requires the Government to charge the factor that it mentions, an earlier conviction, in the indictment."<sup>33</sup> Therefore, prior convictions were considered sentencing factors and not elements of a separate crime.

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<sup>25</sup> 523 U.S. 224 (1998). For a more detailed explanation of *Almendarez-Torres*, see Mohammed Saif-Alden Wattad, *The Meaning of Guilt: Rethinking Apprendi*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 501, 514–15 (2007).

<sup>26</sup> *Almendarez-Torres*, 523 U.S. at 227. Under this section, any alien who:

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1326(a) (2000).

<sup>27</sup> *Almendarez-Torres*, 523 U.S. at 227.

<sup>28</sup> 8 U.S.C. § 1326(b)(2) (2000).

<sup>29</sup> *Almendarez-Torres*, 523 U.S. at 227.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.* at 227, 247.

<sup>32</sup> *Id.* at 226.

<sup>33</sup> *Id.* at 226–27.

C. *Jones v. United States*: Facts are Elements of an Offense and Need to be Proven to a Jury

One year later, the Supreme Court decided *Jones v. United States*.<sup>34</sup> Jones was charged with carjacking under 18 U.S.C. section 2119, which carried a maximum sentence of fifteen years.<sup>35</sup> He was also charged with “using or aiding and abetting the use of a firearm during . . . a crime of violence, in violation of 18 U.S.C. § 924(c).”<sup>36</sup> The indictment made no mention of the latter two sections of the statute, which authorize an increased sentence if serious bodily injury or death results from the carjacking.<sup>37</sup> The jury found Jones guilty as charged.<sup>38</sup>

The case took a surprising turn when the presentence report recommended that Jones be sentenced to twenty five years for the carjacking because one of the victims was seriously injured.<sup>39</sup> Even though the serious bodily injury was not mentioned in the indictment or proven to a jury, the district court found, by a preponderance of the evidence, that the victim had suffered serious bodily injury, and sentenced Jones to twenty-five years for the subdivision (2) violation.<sup>40</sup> The Ninth Circuit affirmed the sentence, and did not read Section 2119(2) as setting out an element of an independent offense.<sup>41</sup> The Supreme Court reversed, concluding that the serious injury subdivision was a separate offense.<sup>42</sup> As a separate offense, the serious injury must be “charged in the indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.”<sup>43</sup> The Court clarified that the factual elements of an offense must be independently proved, and not merely used for sentencing consideration.<sup>44</sup>

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<sup>34</sup> *Jones v. United States*, 526 U.S. 227 (1999). See generally Kathleen H. Morkes, *Where Are We Going, Where Did We Come From: Why the Federal Sentencing Guidelines Were Invalidated and the Consequences for State Sentencing Schemes*, 4 AVE MARIA L. REV. 249, 258–61 (2006).

<sup>35</sup> *Jones*, 526 U.S. at 230.

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—(1) be fined under this title or imprisoned not more than 15 years, or both . . . .

18 U.S.C. § 2119 (2000).

<sup>36</sup> *Jones*, 526 U.S. at 230; 18 U.S.C. § 924(c) (1998).

<sup>37</sup> *Jones*, 526 U.S. at 230; 18 U.S.C. § 2119(2)–(3) (1998) (“if serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both . . .” if death results, be fined under this title or imprisoned for any number of years up to life, or both . . .”).

<sup>38</sup> *Jones*, 526 U.S. at 231.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 231–32.

<sup>42</sup> *Id.* at 251–52.

<sup>43</sup> *Jones*, 526 U.S. at 252.

<sup>44</sup> *Id.* at 232 (citing *Hamling v. United States*, 418 U.S. 87 (1974); *United States v. Gaudin*, 515 U.S. 506 (1995)).

D. *Apprendi v. New Jersey*: The Right of Defendants to Have a Jury Find Facts that Will Enhance a Sentence Beyond the Statutory Maximum

*Jones* set the stage for *Apprendi* by categorizing what appeared to be a sentencing enhancement as an aggravating fact, and requiring that fact to be proven beyond a reasonable doubt.<sup>45</sup> By invalidating New Jersey's sentencing law, *Apprendi* required juries to find, beyond a reasonable doubt, any fact that will increase a sentence beyond the statutory maximum.<sup>46</sup> The defendant in *Apprendi* pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree unlawful possession of an antipersonnel bomb.<sup>47</sup> The firearm offense carried a maximum sentence of ten years.<sup>48</sup> His sentence, however, was enhanced based upon a finding by a preponderance of the evidence that he acted "with a purpose to intimidate an individual or group of individuals because of race,"<sup>49</sup> and the trial court imposed a twelve year prison term.<sup>50</sup> Defendant appealed, arguing "the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt."<sup>51</sup> The Appellate Division of the Superior Court of New Jersey affirmed, and a divided New Jersey Supreme Court reached the same outcome.<sup>52</sup>

The case eventually reached the Supreme Court, which relied heavily on the holdings in *Jones v. United States*,<sup>53</sup> but criticized *Almandarez-Torres v. United States* as an "exceptional departure from the historic practice[.]"<sup>54</sup> The *Apprendi* court held, "[o]ther than the fact of a prior conviction, 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."<sup>55</sup> This case marked the beginning of the end for the Court's previous "hands-off approach" to non-capital sentencing procedure.<sup>56</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see generally Ann Marie Tracey, *Has the Fat Lady Sung on Sentencing Guidelines? The Impact of Booker, Blakely, Apprendi, and Foster on Ohio's Sentencing Protocol*, 34 N. KY. L. REV. 71, 78-82 (2007).

<sup>47</sup> *Apprendi*, 530 U.S. at 469-70.

<sup>48</sup> *Id.* at 468.

<sup>49</sup> *Id.* at 468-69.

<sup>50</sup> *Id.* at 471.

<sup>51</sup> *Id.* (internal citation omitted).

<sup>52</sup> *Id.* at 471-72.

<sup>53</sup> See, e.g., *id.* at 472-73, 476, 479 n.5, 480 n.7, 483 n.11, 487-88. Regarding federal law, the *Jones* Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

<sup>54</sup> *Apprendi*, 530 U.S. at 487. See supra Part I.B for a discussion of *Almandarez-Torres*.

<sup>55</sup> *Id.* at 490.

<sup>56</sup> See Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 46-52 (2006) (discussing the Supreme Court's history regarding non-capital sentencing prior to

E. *Blakely v. Washington*: The “Statutory Maximum” is Clarified for *Apprendi* Purposes

*Blakely v. Washington* clarified *Apprendi*'s holding by defining the term “statutory maximum” as the maximum sentence that a judge could impose based solely on the facts reflected in the jury verdict or what the defendant admitted.<sup>57</sup> The *Blakely* defendant pled guilty to kidnapping, and was sentenced to ninety months in prison after the trial court determined that he acted with deliberate cruelty.<sup>58</sup> The statutory maximum for his crime was fifty-three months, which the trial judge could enhance only if he found facts and conclusions of law that reflected “substantial and compelling reasons justifying an exceptional sentence.”<sup>59</sup> But the facts contained in the plea were insufficient to support the “exceptional” sentence,<sup>60</sup> nor were facts supporting this “exceptional” sentence found by a jury under the beyond a reasonable doubt standard.<sup>61</sup> Defendant appealed, arguing that the sentencing procedure violated his Sixth Amendment right to have a jury find, beyond a reasonable doubt, “all facts legally essential to his sentence.”<sup>62</sup> The Supreme Court agreed, and “clarified that the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, and not the maximum sentence a judge may impose after finding additional facts.”<sup>63</sup>

F. *United States v. Booker*: The Supreme Court finds the Federal Sentencing Guidelines Unconstitutional and finds that “Advisory” Provisions Would not Implicate the Sixth Amendment

*Apprendi* made it clear that any fact used to increase a sentence beyond the statutory maximum needed to be found by a jury.<sup>64</sup> *Blakely* defined the statutory maximum as the maximum term that could be imposed based solely on the facts reflected in the jury verdict or admitted by the defendant.<sup>65</sup> *Booker*, taking this line of reasoning one step further, found the federal sentencing guidelines unconstitutional because they established mandatory sentences, without any fact-finding by a jury.<sup>66</sup>

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*Apprendi*, and the drastic turn towards regulation around the turn of the century).

<sup>57</sup> *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

<sup>58</sup> *Id.* at 298.

<sup>59</sup> *Id.* at 299.

<sup>60</sup> *Id.* at 303–04.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 301.

<sup>63</sup> Fern L. Kletter, Annotation, *Application of Apprendi v. New Jersey and Blakely v. Washington to State Controlled Substance Proceedings*, 26 A.L.R. 6TH 511, 511 (2007).

<sup>64</sup> *Apprendi*, 530 U.S. at 490.

<sup>65</sup> *Blakely*, 542 U.S. at 303.

<sup>66</sup> *United States v. Booker*, 543 U.S. 220, 233–34 (2005).

In two separate cases, defendants were convicted of charges relating to the distribution of cocaine.<sup>67</sup> The first defendant's sentence was increased by more than eight years based on the trial judge's—and not the jury's—finding that the defendant possessed additional quantities of drugs.<sup>68</sup> In the second case, the judge found facts that would have added ten years to the defendant's sentence, but the judge declined to apply the enhancements.<sup>69</sup>

The Supreme Court held that the Federal Sentencing Guidelines are incompatible with the Sixth Amendment because the Guidelines are “mandatory and impose binding requirements on all sentencing judges.”<sup>70</sup> “Merely advisory provisions, recommending but not requiring the selection of particular sentences in response to differing sets of facts, all Members of the Court agreed, would not implicate the Sixth Amendment.”<sup>71</sup> The Supreme Court went on to say that, “when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”<sup>72</sup>

G. *People v. Black I*: The California Supreme Court's First Attempt to Avoid the United States Supreme Court's Holdings and Find the California DSL Constitutional

Black was charged with continuous sexual abuse of a minor, and two counts of lewd and lascivious conduct with a child.<sup>73</sup> He was found guilty, and the judge imposed a sixteen year sentence—the upper term under the sentencing guidelines.<sup>74</sup> The trial court listed several aggravating factors as reasons for imposing the upper term.<sup>75</sup> Defendant appealed, arguing that under the Sixth Amendment, he has a right to have a jury find, beyond a reasonable doubt, the existence of aggravating factors used to justify the imposition of the upper term.<sup>76</sup>

The California Supreme Court, in a 6-1 decision, ruled that California's DSL was constitutional and outside of the *Apprendi* rule.<sup>77</sup>

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<sup>67</sup> *Id.* at 220. For more analysis, see generally M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533 (2005).

<sup>68</sup> *Booker*, 543 U.S. at 227.

<sup>69</sup> *Id.* at 228–29.

<sup>70</sup> *Id.* at 233.

<sup>71</sup> *Cunningham v. California*, 127 S. Ct. 856, 860 (2007) (quoting *Booker*, 543 U.S. 223) (internal quotations omitted).

<sup>72</sup> *Booker*, 543 U.S. at 233.

<sup>73</sup> *People v. Black*, 113 P.3d 534, 536 (Cal. 2004) (hereinafter “*Black I*”).

<sup>74</sup> *Id.* at 536–37.

<sup>75</sup> *Id.* at 551. The court gave the following reasons for imposing the upper term: “Defendant forced his stepdaughter to have intercourse with him on numerous occasions, defendant's stepdaughter was particularly vulnerable, defendant abused a position of trust and confidence, and defendant inflicted emotional and physical injury on his stepdaughter.” *Id.*

<sup>76</sup> *Id.*



The court reasoned that the United States Supreme Court's prior decisions "[did] not draw a bright line."<sup>78</sup> Ultimately, the California Supreme Court found that the "defendant's constitutional right to a jury trial was not violated by the trial court's imposition of the upper term sentence for his conviction of continuous sexual abuse or by its imposition of consecutive sentences on all three counts."<sup>79</sup> This was California's first attempt to save its DSL post-*Apprendi*, *Blakely*, and *Booker*. Despite California's DSL being a clear example of what the Justices in *Apprendi*, *Blakely*, and *Booker* found unconstitutional, California disregarded the Supreme Court's rulings in an attempt to preserve the 1977 sentencing law.

#### H. *Cunningham v. California*: The Supreme Court Finds California's DSL Unconstitutional

The California Supreme Court found that California's DSL was constitutional in *Black*, but the United States Supreme Court disagreed when it decided *Cunningham*. The Supreme Court invalidated California's DSL because judges, not juries, had the power to find facts and enhance sentences based upon facts that were not admitted by the defendant or found within the jury's verdict.<sup>80</sup> *Cunningham* was tried and convicted of continuous sexual abuse of a minor under the age of fourteen.<sup>81</sup>

Under the California Determinate Sentencing Law, the offense was punishable by one of three precise terms of imprisonment: a low-term sentence of 6 years, a middle-term sentence of 12 years, or an upper-term sentence of 16 years. The judge could impose either the lower-, middle-, or upper-term sentence based on his findings on various aggravating and mitigating factors.<sup>82</sup>

"The trial judge found by a preponderance of the evidence six aggravating circumstances, among them, the particular vulnerability of *Cunningham*'s victim, and *Cunningham*'s violent conduct, which indicated a serious danger to the community."<sup>83</sup> "In mitigation, the judge found one fact: *Cunningham* had no record or prior criminal conduct. Concluding that the aggravators outweighed the sole mitigator, the judge sentenced *Cunningham* to the upper term of 16 years."<sup>84</sup> *Cunningham* appealed, arguing that his Sixth Amendment right to a jury trial had been violated because the facts that elevated his sentence were found by a judge using the preponderance of the evidence standard, instead of a jury of his peers

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<sup>77</sup> See Jonathan D. Soglin et al., *Blakely, Booker, & Black: Beyond the Bright Line*, 18 FED. SENT'G. REP. 46 (2006) for a closer look at *People v. Black*, and an explanation of how *Black* departs from the *Apprendi*, *Blakely*, and *Booker* line of cases.

<sup>78</sup> *Black*, 113 P.3d at 547.

<sup>79</sup> *Id.* at 550.

<sup>80</sup> *Cunningham v. California*, 127 S. Ct. 856, 870 (2007).

<sup>81</sup> *Id.* at 860. The minor was his ten-year-old son. See 2005 Cal. LEXIS 7128.

<sup>82</sup> *Eiland*, *supra* note 3, at 31.

<sup>83</sup> *Cunningham*, 127 S. Ct. at 860.

<sup>84</sup> *Id.* at 860-61.

employing the beyond-a-reasonable-doubt standard.<sup>85</sup>

The Supreme Court stated California's DSL does not resemble the advisory system that the *Booker* court had in mind.<sup>86</sup> Instead, under California's system, "judges are not free to exercise their discretion to select a specific sentence within a defined range."<sup>87</sup> The judge in *Cunningham* did not have an option to choose a sentence between six and sixteen years. He was required to impose a sentence of "12 years, nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years."<sup>88</sup> The Supreme Court made its view crystal clear when it reiterated that, "[f]actfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies."<sup>89</sup>

According to the Supreme Court, either the judge needs to be given broad discretion to choose a sentence within a set range, or a jury needs to be used as the finder of any fact that could enhance a defendant's sentence. California's DSL "allocate[d] to judges sole authority to find facts permitting the imposition of an upper term sentence,"<sup>90</sup> and thus the system violated the Sixth Amendment. The Court concluded by stating that "[t]he ball . . . lies in [California's] court" as to how to fix its DSL.<sup>91</sup>

#### I. California's Legislature Reacts Quickly in Response to the Supreme Courts Holding in *Cunningham*

*Cunningham* was decided on January 22, 2007.<sup>92</sup> Within a week, the California Legislature was already analyzing the rules laid down in *Cunningham* and attempting to remedy the defect found by the Supreme Court.<sup>93</sup> The California Senate held an urgent meeting on January 30, 2007 to discuss *Cunningham*, and how the sentencing law could be made constitutional.<sup>94</sup> In an attempt to address the *Cunningham* ruling, the Legislature decided that the key issue was whether it should amend the Penal Code to provide that if a crime is punishable by a lower, middle, or upper term of imprisonment, the "choice of appropriate term would rest

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<sup>85</sup> *Id.* at 860.

<sup>86</sup> *Id.* at 870. In *Booker*, the Supreme Court held that the Federal Sentencing Guidelines were unconstitutional because they were mandatory, and not merely advisory. See *supra* Part I.F. California's DSL, like the Federal Sentencing Guidelines, creates a mandatory procedure.

<sup>87</sup> *Cunningham*, 127 S. Ct. at 870 (internal quotations omitted).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 871 (quoting *United States v. Booker*, 543 U.S. 220, 265 (2004)).

<sup>92</sup> *Cunningham*, 127 S. Ct. at 856.

<sup>93</sup> 2007 Cal Legis. Serv. page no. 4 (West).

<sup>94</sup> *Id.* In the comments of Senate Bill 40, the Senate explained, "[i]t is the intent of the Legislature in enacting this provision to respond to the decision of the United States Supreme Court in *Cunningham v. California*." *Id.*

within the sound discretion of the court.”<sup>95</sup>

The California Senate answered the question in the affirmative and amended Penal Code section 1170 to give judges the discretion to impose the lower, middle, or upper term authorized by statute.<sup>96</sup> The Bill further stated that the legislative intent was to address the Supreme Court's decision in *Cunningham*, and to “maintain stability in California's criminal justice system while the criminal justice and sentencing structures in California sentencing are being reviewed.”<sup>97</sup> The Legislation was set to become effective March 30, 2007, and was scheduled to sunset in 2009.<sup>98</sup>

## II. CALIFORNIA'S POST-*CUNNINGHAM* ATTEMPTS TO REPAIR THE DETERMINATE SENTENCING LAW

### A. The Legislative Amendment Does Not Meet the Requirements of the Supreme Court and the Constitution

As mentioned above, the sole reason for Senate Bill 40 was to remedy the defect found in California's DSL by the United States Supreme Court.<sup>99</sup> The changes made, however, still failed to adequately address the problem. According to *Cunningham*, judges needed to be given broad discretion to choose a sentence from a specified range, or juries needed to be used to find facts that justify the imposition of upper term sentences.<sup>100</sup> The Legislature, however, chose to implement a different solution.<sup>101</sup>

The California Legislature gave judges discretion to choose one of the sentences from the already established sentencing triad, not discretion to choose a sentence somewhere between a determined range.<sup>102</sup> The amended law allowed judges to impose the lower, middle, or upper term at their discretion.<sup>103</sup> This limited discretion was not what the Supreme Court had in mind when it used the term, “broad discretion” in *Booker*.<sup>104</sup> Nor was the statute amended to include any fact-finding role for the jury in relation to sentencing, as required by *Cunningham*.<sup>105</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 5. Prior to the amendment, the statute read, “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” *People v. Sandoval*, 161 P.3d 1146, 1152 (Cal. 2007).

<sup>97</sup> 2007 Cal Legis. Serv. page no. 4 (West).

<sup>98</sup> *Id.* at 4, 6. This means that, if no further legislative action is taken, the provisions of the bill will be repealed on January 1, 2009.

<sup>99</sup> *Id.* at 4.

<sup>100</sup> *Cunningham v. California*, 127 S. Ct. 856, 871 (2007).

<sup>101</sup> 2007 Cal Legis. Serv. page no. 5 (West). The Senate decided that “when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the . . . choice of the appropriate term shall rest within the sound discretion of the court.” *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *United States v. Booker*, 543 U.S. 220, 233 (2005) (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”).

<sup>105</sup> CAL. PENAL CODE § 1170 (West 2007).

B. Judicial: Both the Rules of Court and the California Supreme Court's Holding in *Sandoval* Fail to Render the DSL Constitutional

1. The California Judicial Council Amends the Rules of Court in Response to the Legislatures Amendment of Penal Code Section 1170

On May 18, 2007, the California Judicial Council amended the California Rules of Court, to become effective on May 23, 2007.<sup>106</sup> The Judicial Council changed the definition of circumstances in aggravation from “facts that justify the imposition of the upper prison term” to “factors that the court may consider in its broad discretion in imposing of the three authorized prison terms referred to in Section 1170(b).”<sup>107</sup> The Judicial Council also changed the meaning of circumstances in mitigation to resemble that of circumstances in aggravation—that is, simply factors to be considered by the court.<sup>108</sup> The Judicial Council made it mandatory for a judge to give reasons for whichever sentence he chooses, whether it be the lower, middle, or upper term.<sup>109</sup>

The Judicial Council amended the Rules of Court so that they complied with the Senate's amendments of Section 1170(b). The Judicial Council reiterated that judges are given broad discretion to choose between one of the three statutorily defined sentences, and no longer need to find an aggravating fact in order to impose the upper term; the judge simply needs to give his reasons for imposing any sentence.<sup>110</sup>

2. The California Supreme Court Grants Review of *People v. Sandoval* and Upholds the Amendments made by the California Legislature

After *Cunningham*, Senate Bill 40, and the amendments by the Judicial Council, the stage was set for the California Supreme Court to rule on a case involving DSL issues. It did not take long. The California Supreme Court granted review in *People v. Sandoval* to “determine whether [the] defendant's Sixth Amendment rights as defined in *Cunningham v. California* were violated by the imposition of an upper term sentence and, if so, the remedy to which she is entitled.”<sup>111</sup> In July 2007, the California Supreme Court issued the opinion for *Sandoval*, which attempted to reconcile California's DSL—as amended by Senate Bill 40—with the requirements of the Sixth Amendment.

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<sup>106</sup> Cal. Jud. Council, List of Amendments to the California Rules of Court: Adopted on May 18, 2007, effective May 23, 2007, <http://www.courtinfo.ca.gov/rules/amendments/may2007.pdf> (last visited June 25, 2008).

<sup>107</sup> *Id.* at 1.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 2.

<sup>110</sup> *Id.* at 3.

<sup>111</sup> *People v. Sandoval*, 161 P.3d 1146, 1150 (Cal. 2007) (citations omitted).

The defendant was charged with the premeditated murders of two men and with the attempted premeditated murder of a third man.<sup>112</sup> She was convicted and sentenced to fourteen years, including an eleven-year upper term for the premeditated murder of the first man.<sup>113</sup> On appeal, the defendant argued that the imposition of the upper term violated her federal constitutional right to a jury trial.<sup>114</sup> The court of appeal made a minor change to the sentence for attempted premeditated murder and affirmed the judgment, rejecting the defendant's Sixth Amendment claim.<sup>115</sup>

The California Supreme Court stated that the aggravating circumstances found were based upon the evidence presented at trial, but not directly at issue in the trial.<sup>116</sup> Therefore, the court said, the defendant did not have the incentive or opportunity to challenge the evidence supporting these aggravating circumstances during the trial.<sup>117</sup> After reviewing the evidence and all of the aggravating circumstances found by the trial court, the California Supreme Court found that the imposition of the upper term violated the defendant's Sixth Amendment right, the error was not harmless, and that the imposition of the upper term on the first count needed to be reversed and remanded for resentencing consistent with *Cunningham*.<sup>118</sup> The court could not conclude beyond a reasonable doubt that, if instructed on the aggravating circumstances, the jury would have reached the same conclusion that the trial court reached.<sup>119</sup>

The Attorney General urged the court to amend the statute to give judges broad discretion to choose between the three sentences.<sup>120</sup> Incidentally, while the case was pending, the California Legislature amended the statute through SB40 as recommended by the Attorney General.<sup>121</sup> Therefore, the court found that the only issue remaining was "what type of resentencing proceedings must be conducted in those cases," in which a Sixth Amendment error is found, requiring a reversal and remand in order to cure the defect.<sup>122</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* The trial court gave the following aggravating factors as reasons for imposing the upper term:

[C]rime involving a great amount of violence . . . incredibly callous behavior. [Defendant] had no concern about the consequences of her action. The victims were particularly vulnerable . . . [and] were inebriated. Clearly, [Defendant] was the motivating force behind these actions. Her actions showed planning and premeditation.

*Id.* at 1153–54.

<sup>114</sup> *Id.* at 1150.

<sup>115</sup> *Id.* The Court of Appeal modified the sentence for attempted premeditated murder from eighteen months down to one year.

<sup>116</sup> *Id.* at 1155.

<sup>117</sup> *Sandoval*, 161 P.3d at 1155.

<sup>118</sup> *Id.* at 1150.

<sup>119</sup> *Id.* at 1156.

<sup>120</sup> *Id.* at 1158.

<sup>121</sup> *Id.* at 1159.

<sup>122</sup> *Id.*

The court instructed the lower courts to conduct sentencing in a manner consistent with the amendments to the DSL, as modified by the legislature.<sup>123</sup> Trial judges now have to give reasons, not facts, for imposing any of the three statutorily defined sentences.<sup>124</sup> Previously, the middle term required no justification, because the middle term was presumed unless mitigating or aggravating circumstances were found.<sup>125</sup> Regarding the use of juries to find aggravating circumstances, the court claimed that “engrafting a jury trial onto the sentencing process established in the former DSL would significantly complicate and distort the sentencing scheme.”<sup>126</sup>

The court justified the judicial reformation of the sentencing rules, and decided that applying retroactive changes would not violate the *ex post facto* clause because the changes did not alter “substantial personal rights,” but simply changed the “mode of procedure.”<sup>127</sup> “In summary, the felony sentencing process continues much as it existed before except that selection of the appropriate prison term is now entirely discretionary and the middle term is no longer the presumptive term.”<sup>128</sup> Aggravating factors need not be found by a jury or trial court, facts need not be proven beyond a reasonable doubt, and factors need not be mentioned in the pleadings.<sup>129</sup> Judges do, however, need to give reasons for imposing a particular term, including the middle term.<sup>130</sup>

This is the second time that the California Supreme Court has gotten it wrong. The same court found in *Black* that California’s DSL was not unconstitutional, despite that it obviously was.<sup>131</sup> *Cunningham* was decided shortly after *Black*, and found the law unconstitutional.<sup>132</sup> The California Supreme Court has been wrong on this subject before, and they got it wrong again by backing the California Legislature and Senate Bill 40.

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<sup>123</sup> *Id.* at 1160.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1160–61.

<sup>126</sup> *Id.* at 1161. The court also mentioned that neither the DSL or the Judicial Council’s sentencing rules “were drafted in contemplation of a jury trial on aggravating circumstances.” *Id.* Further, it would be difficult for prosecutors to select which aggravators should be tried to a jury, because no absolute list of aggravating circumstances exists. Prosecutors would also be exercising discretion that was meant for the judge.

<sup>127</sup> *Id.* at 1165.

<sup>128</sup> J. Richard Couzens & Tricia Ann Bigelow, *Lifting the Fog of Cunningham: Black II, Sandoval, and Senate Bill 40*, at 30, CAL. CTS. REV. (Summer 2007).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Black*, 113 P.3d 534, 550 (Cal. 2005).

<sup>132</sup> *Cunningham v. California*, 127 S. Ct. 856 (2007).

III. POTENTIAL REMEDIES: EMPLOY A JURY IN THE SENTENCING  
PROCESS, LEGITIMATELY GIVE JUDGES BROAD DISCRETION, OR  
RETURN TO INDETERMINATE SENTENCING

This legislative and judicial reformation of the sentencing procedures in California falls short of passing constitutional muster. The Supreme Court emphasized—through *Apprendi*, *Blakely*, *Booker*, and then, again, in *Cunningham*—that in order to make California's DSL constitutional, judges need to be given "broad discretion"<sup>133</sup> to choose a sentence from within a specified range, or aggravating facts need to be found by a jury beyond a reasonable doubt.<sup>134</sup> It seems unlikely that the Supreme Court intended a mandatory sentencing triad to fall under the rubric of "broad discretion." In fact, the term, "broad discretion" is used in conjunction with the word "range,"<sup>135</sup> and not with a set of statutorily determined mandatory sentences.

*Sandoval* essentially leaves defendants in their previous position. The upper term may still be imposed without a jury finding any facts beyond a reasonable doubt, and the sentence options are still limited to the three statutorily defined terms. In fact, judges are not required to find any facts, and only need to give reasons for imposing whichever sentence they choose.<sup>136</sup> Judges have been given more discretionary power, but it is still limited, which is neither acceptable nor comparable to "broad discretion." The initial home-run for defendants in *Cunningham* turned out to be a bunt when the California Supreme Court handed down *Sandoval*. The positive news is the amendment to Section 1170 will sunset in 2009, which means there will be a chance to amend the law for the better.

The Supreme Court left it up to California as to what the state wanted to do in order to render its DSL constitutional.<sup>137</sup> The Supreme Court gave three options: Follow the lead of other states that employ a jury in the sentencing process, permit judges to "genuinely . . . exercise broad discretion within a statutory range," or "otherwise alter its system, so long as the State observes Sixth Amendment limitations declared" by the Supreme Court.<sup>138</sup> The Court listed specific states that modified their

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<sup>133</sup> *Id.* at 871.

<sup>134</sup> *Id.*

<sup>135</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) ("As in *Williams*, our periodic recognition of judges' broad discretion in sentencing—since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range . . ."); *Blakely v. Washington*, 542 U.S. 296, 342 (2004) (Bryer, J., dissenting) ("The modern history of preguidelines sentencing likewise indicates that judges had broad discretion to set sentences within a statutory range based on uncharged conduct."); *United States v. Booker*, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.") (internal citations omitted).

<sup>136</sup> See CAL. PENAL CODE § 1170(b) (West 2008).

<sup>137</sup> *Cunningham*, 127 S. Ct. at 871.

<sup>138</sup> *Id.*

sentencing laws as examples of the first two options.<sup>139</sup> California chose the last option, which gave no guidance. California clearly has not been capable of rendering its own DSL constitutional on several occasions.

#### A. The Use of Juries to Find Facts for Sentencing Purposes

The Supreme Court's first recommended option—keeping the triad system while installing a jury component into the sentencing procedure—is partially in use by California.<sup>140</sup> Full use of this option can be easily achieved because, as the Supreme Court pointed out, California already employs a jury to determine statutory sentencing enhancements.<sup>141</sup> Further, seven out of the nine states confronted with this problem have decided that requiring the aggravating facts to be proven to a jury is a good solution.<sup>142</sup>

Kansas was the first state to invalidate and reform its own sentencing procedures based on *Apprendi*.<sup>143</sup> After the Kansas Supreme Court found its sentencing law unconstitutional, the Kansas Legislature amended the invalidated law to include a jury in the process.<sup>144</sup> Kansas now requires any factor that could increase a defendant's sentence to be found beyond a reasonable doubt by a unanimous jury of no less than six jurors.<sup>145</sup> By altering their sentencing procedure this way, Kansas was able to keep using the same statutorily defined sentences and bring its sentencing procedure within the bounds of the Constitution.

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<sup>139</sup> *Id.* at 871, nn.17–18 (listing Alaska, Arizona, Kansas, Minnesota, North Carolina, Oregon, and Washington as states that have retained determinate sentencing, but which have amended their statutes to incorporate the use of a jury within the sentencing procedures, and listing Indiana and Tennessee as states that have amended their sentencing procedures to permit judges to genuinely exercise broad discretion in choosing a sentence).

<sup>140</sup> *Cunningham*, 127 S. Ct. at 871.

<sup>141</sup> *Id.*; see also CAL. PENAL CODE § 1170.1(e) (West 2008) (using juries to find facts needed to enhance sentences); *People v. Black*, 113 P.3d 534, 545 (Cal. 2005) (noting that, unlike aggravating circumstances, statutory enhancements must be charged in the indictment, and the underlying facts must be proved to the jury beyond a reasonable doubt) (internal citations omitted).

<sup>142</sup> *Cunningham*, 127 S. Ct. at 871, n.17.

<sup>143</sup> *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001). The district court made findings as to certain aggravating factors that increased Gould's sentence beyond the statutory maximum. The district court, rather than the jury, made these findings as required by K.S.A. 21-4716(a). *Apprendi* requires that such findings be made by the jury beyond a reasonable doubt. Because Kansas law authorizing upward departure sentences directly contravenes this requirement, the law is unconstitutional. See also Michael M. O'Hear, *The End of Bordenkircher: Extending the Logic of Apprendi to Plea Bargaining*, 84 WASH. U. L. REV. 835, 869 (2006) (noting that Kansas was the first state to modify its sentencing procedure to include jury fact-finding).

<sup>144</sup> See KAN. STAT. ANN. § 21-4718(b) (2007). Under Kansas law, the district attorney must move to seek an upward durational departure sentence. The court then determines if the evidence supporting the alleged fact or factors that may increase the penalty for a crime shall be presented to a jury during the trial or after determination of innocence or guilt. If it is in the interest of justice, the court shall hold a separate departure sentence proceeding before the trial jury, as soon as practicable. If a trial juror is unavailable, an alternate can be used, but at no time can the sentencing proceeding be conducted before less than six jurors. In order for the upper term to be given, the jury must find unanimously beyond a reasonable doubt that the fact or factor exists.

<sup>145</sup> *Id.*; see also Stemen & Wilhelm, *supra* note 18, at 8.



The California Supreme court expressed the opinion that engrafting a jury onto the sentencing procedure would burden the system and complicate the proceedings.<sup>146</sup> The court further stated that many of the aggravating circumstances were drafted to guide judges' discretion, not "for the purpose of requiring factual findings by a jury."<sup>147</sup> But, inevitably, "[s]ome facts are more conducive to jury fact-finding than others."<sup>148</sup> Clearly, the use of a jury during sentencing is feasible, as seven other states already employ a jury to find facts used for the sentencing of defendants.<sup>149</sup>

In his *Blakely* dissent, Justice Breyer argued that the use of a jury for sentencing would raise the time and financial costs of trial.<sup>150</sup> This may be a valid point, but sentencing hearings always have to take place, and the information has to be presented to a judge. Jury deliberations may take longer than a judge's deliberation, but a simple form—much like a special verdict form—could be drafted by the attorneys and be given to the jurors to expedite the process. Further, rendering the law constitutional may be well worth the slight increase in judicial resources.

B. Give Judges Broad Discretion by Amending the DSL to Follow Tennessee and Indiana in Making the Three Specified Terms "Advisory"

A second option is to keep the sentencing triad in place, but designate the statutorily defined sentences "advisory." In *Booker*, the Supreme Court decided that advisory guidelines would not violate the constitution.<sup>151</sup> This would mean judges would not have to use the suggested terms, but instead would have the freedom to impose a sentence anywhere between the upper and lower term. Several states, including Tennessee and Indiana, have gone this route to keep their statutorily defined sentences on the books.

In the wake of *Booker*, the Tennessee Legislature amended the state sentencing guidelines, making the predetermined statutorily defined sentences advisory.<sup>152</sup> The statute now reads, "[i]n imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines."<sup>153</sup> Prior to the amendment, the statute had not included the word "advisory," and instead called for the imposition of specific terms based upon specific scenarios.<sup>154</sup>

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<sup>146</sup> *People v. Sandoval*, 161 P.3d 1146, 1161 (Cal. 2007).

<sup>147</sup> *Id.*

<sup>148</sup> Darmer, *supra* note 67, at 571.

<sup>149</sup> *Cunningham v. California*, 127 S. Ct. 856, 871 n.17 (2007).

<sup>150</sup> *Blakely v. Washington*, 542 U.S. 296, 340 (2004) (Breyer, J., dissenting).

<sup>151</sup> *United States v. Booker*, 543 U.S. 220, 233 (2005). See *supra* part II.F for discussion of *Booker*.

<sup>152</sup> TENN. CODE ANN. § 40-35-210 (2006).

<sup>153</sup> *Id.*

<sup>154</sup>

(c) The presumptive sentence for a Class B, C, D and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors. The presumptive

Indiana also employs an advisory system.<sup>155</sup> According to the Indiana statute, an “advisory sentence means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.”<sup>156</sup> Essentially, there is a range set by the minimum and maximum sentence, because the middle term is advisory. The judge is not required to use the advisory sentence, except in certain circumstances.<sup>157</sup> In all other circumstances where the statute gives a minimum, an advisory, and a maximum sentence, the sentencing judge can choose any sentence length between the minimum and maximum term.<sup>158</sup>

If the California Legislature changes the mandatory sentences to advisory, judges would have broad discretion to choose a sentence between the lower and upper term, bringing California’s DSL within the requirements of the Constitution. Essentially, California would fall in line with the Supreme Court’s ruling in *Booker*,<sup>159</sup> and join Indiana and Tennessee as states that preserved their determinate sentencing laws by switching to advisory sentences.

### C. Do Away with Sentencing Triad Completely and Return to Indeterminate Sentencing

The third option is to amend the sentencing law to do away with the sentencing triad all together. Judges would be given the authority to use broad discretion in imposing a sentence of any length within a statutory range. This is how sentencing was done in California prior to 1977. Although this relatively simple remedy would cure the constitutional defect, California is not likely to choose this option.

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sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors.

(d) Should there be enhancement but no mitigating factors for a Class B, C, D or E felony, then the court may set the sentence above the minimum in that range but still within the range. Should there be enhancement but no mitigating factors for a Class A felony, then the court shall set the sentence at or above the midpoint of the range. Should there be mitigating but no enhancement factors for a Class A felony, then the court shall set the sentence at or below the midpoint of the range.

(e) Should there be enhancement and mitigating factors for a Class B, C, D or E felony, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. Should there be enhancement and mitigating factors for a Class A felony, the court must start at the midpoint of the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors.

TENN. CODE ANN. § 40-35-210 (2001).

<sup>155</sup> IND. CODE ANN. § 35-50-2-1.3(a) (2007).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* Under the Indiana law, the sentencing judge is only required to use the advisory sentence when imposing consecutive sentences in accordance with Indiana Code section 35-50-1-2, when imposing an additional fixed term to an habitual offender, or when imposing an additional fixed term to a repeat sexual offender.

<sup>158</sup> *Id.*

<sup>159</sup> *United States v. Booker*, 543 U.S. 220, 233 (2005).

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*California's Determinate Sentencing Law*

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## CONCLUSION AND RECOMMENDATION

California's DSL is still unconstitutional. Judges are no longer required to find facts by a preponderance of the evidence. Instead, judges simply need to give reasons for imposing whichever term they choose. The California Legislature and California Supreme Court call this, "broad discretion." Unfortunately, California's current scheme would not fall under the United States Supreme Court's understanding of "broad discretion." California judges are still required to impose one of three terms, and are not free to impose a sentence anywhere between the lower and upper term. I recommend that California alter its system so as to make the defined sentences advisory. By doing this, California could keep its determinate sentencing mostly intact, avoiding the burden of grafting a jury onto the sentencing process while bringing the determinate sentencing law within the bounds of the Sixth Amendment. Until an acceptable change is made, California will continue to sentence defendants in a way that violates their constitutional rights.