

# CJA PANEL TRAINING

January 2008

## FEDERAL SENTENCING IN LIGHT OF *Gall and Kimbrough*

Sacramento

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Wednesday, January 16, 2007 at 5:30 p.m.

Bruce Locke and David M. Porter

## OUTLINE

- I. The long and winding road
  - A. *Jones v. U.S.*
  - B. *Apprendi v. New Jersey*
  - C. *Ring v. Arizona*
  - D. *Blakely v. Washington*
  - E. *Booker v. United States*
  - F. *Cunningham v. California*
  - G. *Rita v. United States*
  - H. *Gall v. United States*
  - I. *Kimbrough v. United States*
  
- II. When to do plea agreements
  - A. Judge Young's opinion in *United States v. Griffin*, 494 F. Supp.2d 1 (D. Mass. June 6, 2007)
  - B. Under the Guidelines, a tax case with loss is level 6
  - C. Under the Guidelines, a fraud case with no loss is level 6 or 7
  - D. Drug cases
  
- III. Sentencing, step-by-step
  - A. In the district court
    - 1. Calculate the appropriate guideline range
    - 2. Apply § 3553(a) factors
      - (a) the nature and circumstances of the offense and the history and characteristics of the defendant;
      - (b) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
      - (c) the kinds of sentences available;
      - (d) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines or, in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;
      - (e) any pertinent policy statement;
      - (f) the need to avoid unwarranted sentence disparities; and
      - (g) the need to provide restitution to any victims of the offense.

3. If the judge will sentence outside the applicable guideline range, she must consider the extent of the variance or departure, and the justification must be appropriate to the degree of variance.
  4. Finally, after settling on the appropriate sentence, the judge must explain the sentence adequately to permit for meaningful appellate review and “to promote the *perception* of fair sentencing.” *Gall*, 128 S. Ct. at 597 (emphasis added).
- B. Review of the sentence by the court of appeals
1. Abuse of discretion standard, whether sentence was inside or outside the guideline range (“[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.” *Ibid.*
  2. Review of procedural requirements (to “ensure that the district court committed no *significant* procedural error.” *Ibid.*
    - a. failure to calculate (or improperly calculating) the Guidelines range;
    - b. treating the Guidelines as mandatory;
    - c. failing to consider the § 3553(a) factors;
    - d. selecting a sentence based on clearly erroneous facts; or
    - e. failing to adequately explain the chosen sentence;
    - f. This list from *Gall* is NOT exhaustive; there are many other procedural errors that could affect sentencing, such as failing to allow allocution or failing to give adequate time to file objections to the PSR. The issue of whether the court must give advance notice that it is considering imposing a non-Guideline sentence, see F.R.Crim.P. 32(h), is pending before the U.S. Supreme Court in *Irizarry v. United States*, No. 06-7517 (cert. granted Jan. 4, 2008).
  3. Review for substantive reasonableness  
Taking into account “the totality of the circumstances, including the extent of any variance from the Guidelines range,” is the sentence “unreasonable” under an abuse of discretion standard. *Gall*, 128 S. Ct. at 597. The court may (but is not required to) apply a presumption of reasonableness to *within* Guideline sentences, but it may *not* apply a presumption of *unreasonableness* to sentences outside the Guideline range.

**Booker, Cunningham, Rita, Gall, and Kimbrough:  
When To Do Plea Agreements**

**By Bruce Locke**

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

Defendant fired shots into the home of African-American family and made a statement that the defendant did not want the family in the neighborhood because of their race. The defendant entered into a plea agreement that required him to plead to two counts of possession of a firearm for an unlawful purpose in the second degree and one count of unlawful possession of an antipersonnel bomb in the third degree. Both sides reserved the issue of "hate crime" which provided for an enhanced prison sentence of 10 to 20 years if the judge finds from a preponderance of the evidence that the defendant committed the crime to intimidate a person because of that person's race. A second degree offense carried a penalty range of 5 to 10 years. The trial judge applied the "hate crime" enhancement and sentenced the defendant to 12 years.

The Supreme Court reversed and remanded. Justice Stevens wrote the majority opinion with Scalia, Thomas, Souter and Ginsburg joining. Stevens held that the due process clause of the Fourteenth Amendment required that any fact that increased the penalty for a state crime beyond the prescribed statutory maximum - other than the fact of conviction - had to be submitted to the jury and proved beyond a reasonable doubt.

**2. *Ring v. Arizona*, 536 U.S. 584 (2002)**

Defendant was tried on charges arising out of participation in an armored car robbery in which the driver was shot. The jury convicted the defendant of felony murder but not premeditated murder. At the sentencing hearing, an accomplice changed his previous testimony and testified that the defendant was the leader and had shot the driver. The trial judge found that defendant had committed the offense in expectation of receiving something of pecuniary value and in an especially heinous manner because the defendant had expressed pride in his marksmanship. The judge then found that these factors rendered the defendant's minimal criminal record insufficient to call for leniency and sentenced the defendant to death.

The Supreme Court reversed and remanded. Justice Ginsburg wrote the opinion with Scalia, Thomas, Souter, Stevens, and

Kennedy joining. Ginsburg held that the Sixth Amendment required that defendants were entitled to a jury determination of any fact on which the legislature conditioned an increase in the defendant's maximum punishment.

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

The facts admitted by the defendant in pleading guilty to kidnapping his estranged wife supported a maximum sentence under state law of 53 months. The trial judge, after hearing the wife's description of the kidnapping, found that the defendant acted with deliberate cruelty and imposed a sentence of 90 months.

The Supreme Court reversed and remanded. Justice Scalia wrote the opinion with Stevens, Souter, Thomas, and Ginsburg joining. Scalia held that the judge's imposition of the 90 month sentence violated the defendant's right to a jury trial because the finding of "deliberate cruelty" had not been admitted by the defendant or found by a jury.

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

The defendant's maximum sentence under the guidelines based upon the jury's findings would have been 262 months. Based upon the judge's findings by a preponderance of the evidence at the sentencing hearing, the defendant was sentenced to 360 months.

The Seventh Circuit held that this sentence violated the defendant's right to a jury trial citing *Blakely*. A second defendant was convicted by a jury whose findings authorized a sentence under the guidelines of 78 months. At the sentencing hearing, the judge found facts by a preponderance of the evidence that would have authorized a range of 188 to 235 months, but relying on *Blakely*, sentenced the defendant to 78 months. The Government appealed both of these cases to the Supreme Court.

The Supreme Court affirmed and remanded on the first case, and vacated and remanded on the second case. In the first opinion (Constitutional *Booker*), Justice Stevens joined by Scalia, Thomas, Souter and Ginsburg held that the Sentencing Guidelines were unconstitutional because the Guidelines allowed the judge to find facts by a preponderance of the evidence that increased the defendant's sentence above that which the jury's verdict allowed. In a second opinion of five justices, Justice Breyer, who was joined by Rehnquist, O'Connor, Kennedy and

Ginsburg, held (*Remedial Booker*) that the constitutional problem could be cured by eliminating those parts of the Guidelines that made them mandatory. Breyer wrote that the Guidelines would henceforth be advisory and sentencing judges would no longer be bound by the Guideline range, but would be obliged to "take account" of the Guideline range along with the sentencing goals enumerated in the Sentencing Reform Act and in place of de novo review, the Breyer installed a "reasonableness" standard of review. Note that Ginsburg's switch to Breyer's side is the only event that allowed Breyer to try to save the Guidelines.

**5. *Cunningham v. California*, 127 S. Ct. 856 (January 22, 2007)**

Defendant was tried and convicted of continuous sexual abuse of a child under 14. Under California's determinate sentencing law (DSL), that offense is punishable by one of three precise terms of imprisonment: 6, 12, or 16 years. The trial judge was obligated to use the middle term unless the judge found one or more additional "circumstances in aggravation." Court Rules adopted to implement the DSL define "circumstances in aggravation" as facts that justify the upper term. Those facts, the Rules provide, must be established by a preponderance of the evidence. Based upon a post-trial sentencing hearing, the trial judge sentenced defendant to 16 years.

The Supreme Court held that California's DSL was unconstitutional because the law violated the defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. The opinion was written by Ginsburg and joined by Stevens, Scalia, Souter, Thomas, and Roberts. Alito filed a dissent in which he wrote that the California DSL was no different in any constitutional sense from the federal system after *Booker*. (Breyer and Kennedy joined in this dissent.) Alito's position was that reasonableness review in the federal system automatically means that there is a "reasonable sentence" for what the defendant was convicted of (the middle term in the California system) and in order for the judge to go over that sentence, the judge would have to find facts that would make a greater sentence "reasonable," and those facts would be found in violation of the defendant's right to trial by jury.

**6. *Rita v. United States*, 127 S. Ct. 2456 (June 21, 2007)**

Defendant was charged with making false statements to a federal grand jury. The jury was investigating a gun company

because prosecutors believed the company was selling a kit that could be made into machine guns. The defendant was convicted after a jury trial. The Guideline range was 33 to 41 months. The defendant sought a below Guideline sentence but the trial judge sentenced him to 33 months. The defendant appealed and the Fourth Circuit held that a sentence within the properly calculated Guideline range is presumptively reasonable and upheld the sentence. The Supreme Court held that a court of appeals may apply a presumption of reasonableness to a district court sentence within the Guidelines, but the presumption is not binding because it is not a trial-related evidentiary presumption that requires one side or the other to shoulder the burden of persuasion. The opinion was written by Breyer with Roberts, Kennedy, Alito, and with Stevens (with Ginsburg) and Scalia (with Thomas) concurring (but it sounds like a dissent). Souter dissented. This case is a low-end Guidelines sentence with the defendant trying to go lower.

**7. *Gall v. United States*, 128 S. Ct. 586 (Dec. 10, 2007), and *Kimbrough v. United States*, 128 S. Ct. 558 (Dec. 10, 2007)**

In *Gall*, the defendant joined an on-going conspiracy and later withdrew from the conspiracy after seven months. The defendant pleaded guilty to conspiracy. The presentence report recommended a sentence of 30 to 37 months. The trial judge sentenced the defendant to three years probation because the defendant voluntarily withdrew from the conspiracy and his post-offense conduct showed that he would not offend again and he was not a danger to the community. The Eighth Circuit reversed because a sentence that was outside the Guidelines range must be supported by extraordinary circumstances. The Supreme Court reversed the Eighth Circuit, and did not remand. The opinion was written by Stevens and joined by Roberts, Scalia, Kennedy, Souter, Ginsburg and Breyer. Alito and Thomas dissented. Justice Stevens wrote that the standard of review is abuse of discretion and a district judge must consider the extent of the departure from the Guidelines and explain the appropriateness of an unusually lenient or harsh sentence with sufficient justifications based upon the Section 3553(a) factors.

Note that this is a below-guidelines case.

In *Kimbrough*, the defendant pleaded guilty four crack cocaine offenses. The advisory Guidelines range was 228 to 270 months. The district judge found that a sentence in this range would be more than necessary because the crack cocaine/powder cocaine disparity was not justified and sentenced the defendant

to the statutory mandatory minimum of 15 years. The Fourth Circuit vacated the sentence as per se unreasonable because it was based upon a policy judgment that differed with Congress (the crack disparity). The Supreme Court reversed and remanded. The opinion was written by Ginsburg and joined by Roberts, Stevens, Scalia, Kennedy, Souter and Breyer. Thomas and Alioto dissented. Justice Ginsburg wrote that normally the Sentencing Guidelines will achieve a rough approximation of the Section 3553(a) objectives. But here the Sentencing Commission has recognized the problems with the crack disparity and so it is not unreasonable for the district court to go to the mandatory minimum rather than the Guideline range.

Note that this is a below-guidelines case.

The above cases leave unanswered the question, what happens where the Judge finds a fact that increases the sentence beyond the sentence that would be imposed based on the defendant's guilty plea alone? In other words, what happens if a defendant pleads to tax evasion without admitting the amount of the tax loss or to a fraud case without the loss or a drug case and only admits to more than 500 grams of meth?

Under the Guidelines a tax case with no loss is level 6.

Under the Guidelines a fraud case with no loss is 6 or 7.

What does a judge do?

See *United States v. Griffin*, 494 F. Supp. 2d 1 (D. Mass. June 6, 2007). The district judge is William Young, former Chief Judge of the district court and a former state prosecutor and graduate of Harvard Law School appointed by Reagan. (Not a Ted Kennedy liberal.) And Justice Scalia cited to the *Griffin* case in his *Rita* concurrence as a case showing how a district judge is trying to do sentencing the correct way.

In *Griffin*, the defendant went to trial in a tax case and was convicted on the second count but the jury hung on the first count. The jury determined (by special interrogatory) the tax loss on Count Two as more than \$30,000 and less than \$80,000, and the jury also determined that sophisticated means (a two level enhancement) applied. At sentencing, the Judge added the tax loss on Count Two as determined by the jury to the tax loss that the judge determined by a preponderance of the evidence on Count One, and came up with a total tax loss of more than \$200,000. This made the Guideline range 27 to 33 months and the Judge

sentenced the defendant to 27 months.

After reading *Cunningham*, however, the Judge vacated the 27 month sentence and ordered a new sentencing hearing.

At the new sentencing, the Judge found that his sentencing practice prior to *Cunningham* was essentially the same as the California DSL. That is, in Ms. Griffin's initial sentencing, the Judge found the Guideline range based upon what the defendant was convicted of and then increased the range based upon facts that the Judge, and not the jury, had found based on a preponderance of the evidence. Stated another way, the range determined based upon the jury's findings, would have been based on \$30,000 tax loss and sophisticated means, which is a level 14 and a range of 15 to 21 months. The Judge determined that 21 months was the maximum sentence that he could impose based upon the record and he imposed a high end sentence of 21 months because he believed that the defendant should be punished at the high end because she also did not report the correct income in the second year.

Judge Young reasoned that a reasonable sentence must start with the Guidelines based upon the guilty plea or the jury verdict because the sentence has to be reasonable and it just stands to reason that the Sentencing Commission has put a lot of work into the Guidelines and, therefore, the Commission's determination would be reasonable. It would be unreasonable to sentence a defendant in a tax fraud to the statutory maximum of five years for someone who only evaded \$30,000 of tax. So Judge Young reasoned that it would be reasonable to use the Guidelines to determine the maximum sentence based upon the tax loss and any other factors that were admitted by the defendant or found by the jury sophistication, for instance. If 21 months is reasonable for a \$30,000 tax loss with "sophisticated means," by definition 27 months would be unreasonable because the only way that 27 months could be justified is to say that the Judge really knows that the tax loss was \$200,000. And if the Judge increased the sentence to 27 months and justified the sentence due to the higher tax loss, the Judge would be increasing the sentence based upon Judge found facts. How can a 27 month sentence be reasonable unless it is based upon some fact other than the facts that justify the 21 month sentence?

It is noteworthy that the Supreme Court has not accepted a case that presents this issue. Since *Booker*, the Court has taken only below the Guidelines cases.

If you have a tax case or a fraud case or any case where you can plead to a Count that limits the Guideline calculation, why enter into a plea agreement?

For example, a drug case where the defendant is charged with conspiracy to distribute more than 500 grams of meth. That is mandatory minimum 10 years. But the actual amount was more than 5 kilos, which is level 36 and there was a gun in the car so you add two levels to 38. Subtract three levels to 35 and you have 168 to 210. The low end is 14 years. You get a recommendation from the Government for low end, which is 14 years. Why not plead to the charge that the Government wants without a plea agreement?

You can argue that based upon what you admitted in your plea the Guideline range is computed on the 500 grams, not the 5 kilos and that the Judge cannot increase the range by finding more facts. That would be level 32 in this case. 32 plus minus 3 would be 29, which is 87 to 108. But your client has to do the 10 mandatory minimum. But you may be able to convince the judge that your client qualifies for the safety valve. § 5C1.2.

You can argue that below 10 is the reasonable sentence for your client based upon other factors like age, family matters, etc.

You can fight the gun enhancement on an evidentiary basis and constitutional basis. Even if you lose the gun enhancement, you are level 31, which is 108 to 135. You have not lost your right to appeal the constitutional issue or the evidentiary issues or the safety valve and the reasonableness of the sentence. And worst case, you are back where the Government offered, but you don't have a recommendation for low end.

LEXSEE 2007 U.S. DIST. LEXIS 40856

**UNITED STATES OF AMERICA, Plaintiff, v. NADINE GRIFFIN,  
Defendant.**

**CRIMINAL ACTION NO. 05-10175-WGY**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF  
MASSACHUSETTS**

*494 F. Supp. 2d 1; 2007 U.S. Dist. LEXIS 40856; 99 A.F.T.R.2d (RIA)  
3184*

**June 6, 2007, Decided**

**COUNSEL:** **[\*\*1]** For USA, (Plaintiff):  
Christopher Maietta, LEAD ATTORNEY, U.S.  
Dept. of Justice, Tax Division, Washington,  
DC.

**JUDGES:** WILLIAM G. YOUNG, DISTRICT  
JUDGE.

**OPINION BY:** WILLIAM G. YOUNG

**OPINION**  
**[\*2]**

SENTENCING MEMORANDUM

YOUNG, D.J.

June 6, 2007

One of the most striking aspects of the United States Constitution is its aspirational goal. The Framers of the Constitution, and the public who ratified it, sought not only to create a novel structure to govern democratically and justly, but to do so humbly with a vision of evolving towards a "more perfect Union."<sup>1</sup> The Constitution, as a document, may thus be viewed as the scaffolding of our Nation, undergirding our progress toward embodying the many intangible and amorphous but universally understood ideals that bind us

together as Americans.

1 For a full discussion on the intricacies of the Preamble to the United States Constitution, including a detailed discussion of the issues and placement of sovereignty, see Akhil Reed Amar, *America's Constitution - A Biography* 21-39 (2005). Alexander Hamilton also provides a pithy but well-reasoned explanation on the desire to "form" a new Nation in his "Conjectures About the New Constitution, September 1787," *in* *The Debate on the Constitution: Part One 9-11* (Bernard Bailyn, ed., The Library of America 1993).

**[\*\*2]** Yet the Constitution is not purely aspirational; in fact, it is not largely so. Its purpose is not simply to enshrine the symbolic and lofty goals of our country -- a position rightly ascribed to the Declaration of Independence<sup>2</sup> -- instead, it serves a practical function cognizant that change does not always equal progress.<sup>3</sup> It is this purpose as a Great Contract that ought resonate most strongly within our society because it reminds us and binds us to a time when we feared losing the very liberties we call "rights" today. This compact presents not only a magnetic north for society's navigation but the rudder for stable

travel.<sup>4</sup>

2 This point is perhaps best made by President Abraham Lincoln in the Gettysburg Address. Abraham Lincoln: His Speeches and Writings 734 (photo. Reprint 1999) (Roy P. Basler ed., The World Pub. Co. 1946). President Lincoln gave that memorable speech on November 19, 1863, and he began with a reminder that the Founders began this Nation with a dedication to liberty and to the proposition that "all men are created equal." *Id.* President Lincoln dates the birth of these aspirational goals not to the Constitution, but "[f]our score and seven years ago" to the writing of the Declaration of Independence. See *id.* Such thoughts by President Lincoln were not the result of the passion of that one solemn day. See *id.* at 709 ("Response to a Serenade"). On July 7, 1863, this same thought came casually to President Lincoln in a short address just after the Battle of Gettysburg where he asks: "How long ago is it - eighty odd years - since on the Fourth of July for the first time in the history of the world a nation by its representatives, assembled and declared as a self-evident truth that 'all men are created equal.' That was the birthday of the United States of America." See *id.* Thus, it is the Declaration of Independence that captures the spirit and goals of the United States that were enshrined in the Constitution - the latter document practically and pragmatically pursuing those goals, while understandably falling short of their full actualization.

[\*\*3]

3 Erwin Chemerinsky highlights the oft-cited analogy of a written constitution to the rope that Ulysses used to bind himself to his ship's mast to avoid the temptation of the songs from Siren. Erwin Chemerinsky, *A Grand Theory of*

*Constitutional Law?*, 100 *Mich. L. Rev.* 1249, 1258 (2002).

4 In perhaps his greatest speech, President Lincoln appealed to the Constitution and to the Nation's laws as the "solid quarry of sober reason" that will defeat the future enemy of passion. Basler, *supra* note 2 at 84-85 ("The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois, January 27, 1838"). In an eloquent analogy to Peter as the rock of the Christian Church in Matthew 16:18, Lincoln saw reverence to calculated and debated law as the necessary foundation upon which a Nation hopeful of perpetuation must rely. See *id.* This appeal to reason over passion is reminiscent of Madison/Publius' similar warning that "passion never fails to wrest the scepter from reason." *The Federalist* No. 55, at 336 (James Madison) (Isaac Kramnick, ed., Penguin Books 1987).

[\*\*4] [\*3] Contract theory views the Constitution and its amendments as an exchange by the American people of their individual sovereignty in consideration of a federal union where the people's liberties are redrawn as rights and memorialized in a written compact. No right in the Constitution more fully expresses this perspective than the right to trial by jury. Indeed, only the United States of America -- out of all the states and empires over the long course of the world's history -- considers its jurors full constitutional officers in the discharge of their fact-finding function.<sup>5</sup>

5 The United States Constitution expressly so provides in erecting our fundamental structure of government.

UNITED STATES  
CONSTITUTION

Article I

*Section 1.* All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a **Senate** and **House of Representatives**.

...

## Article II

Section 1. The executive power shall be vested in a **President** of the United States of America.

...

## Article III

*Section 1.* The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The **judges**, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. . . . The trial of all crimes, except in cases of impeachment, shall be by **jury**. . . .

U.S. Const. (emphasis added). So it is that jurors in criminal cases are co-equal constitutional officers with the judges who preside. Together they exercise the judicial power of the United States. As Professor Amar writes, "[t]rial juries, widely viewed as the lower half of a bicameral judiciary, likewise had the

power (and perhaps even the right and duty) to acquit with finality in such cases, even if the bench had already adjudged the law to be constitutionally sound." Amar, *supra* note 1, at 61.

[\*\*5] The compact theory extends to *Sixth Amendment* jurisprudence as well. <sup>6</sup> Indeed, the impulse behind the adoption of the *Sixth Amendment* is found in its historical roots where the jury trial was viewed as the people's administrative safeguard against the government. <sup>7</sup> Thus, [**\*4**] concerns about the dilution of the role of the jury in criminal proceedings is real, <sup>8</sup> for it is this right that prevents the strong penological hand of governmental power from descending on an individual *but for* the collective agreement of his or her peers.

6 The historical importance of the right to a trial by jury in criminal cases ought not be underestimated. The need to flesh out this right was a major argument by the Anti-Federalists in opposition to the written Constitution. See *The Anti-Federalist: Writings by the Opponents of the Constitution* 39-40 (Herbert J. Storing, ed., University of Chicago Press 1985) (including in its collection a letter from the Federal Farmer who was not only concerned with the right to a trial by jury itself, but also of a trial by jury in the vicinage of where the crime occurred).

[\*\*6]

7 See Herbert J. Storing, *What the Anti-Federalists Were for: The Political Thought of the Opponents of the Constitution* 19 (University of Chicago Press, 1981). "Juries are constantly and frequently drawn from the body of the people, and freemen of the country; and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful control in the judicial department." *Id.* (quoting Federal Farmer

XV, 2.8.190 and explaining in an accompanying footnote that "[a] general verdict is one in which the jury finds either for the plaintiff or for the defendant in general terms, judging both law and fact, as opposed to a special verdict, in which a particular finding of fact is made by the jury, leaving to the court the application of the law to the facts thus found.") Much of the emphasis on the right to a jury trial at the Founding was attributable to colonial experience with Britain's abuse of the criminal process. Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 22-23 (Harvard Univ. Press 2001). For instance, in the Stamp Act Crisis of 1765-66, Britain often tried violators without juries in admiralty courts, a procedure they attempted - to no avail due to his countersuit for trespass - with John Hancock. *Id.* at 23-24.

[\*\*7]

8 In the civil context, *Seventh Amendment* jurisprudence "freezes" the scope of this right to that which existed under English common law at the time of the amendment's adoption in 1791. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996).

Lawrence M. Friedman states that "[i]n American legal theory, jury power was enormous, and subject to few controls. There was a maxim of law that the jury was judge both of law and fact in criminal cases." Lawrence M. Friedman, *A History of American Law* 251 (Simon and Schuster, 1973). He goes on to state that this maxim was strongest during the first generation of the Revolutionary period, but that it slowly eroded as memories of British practices were forgotten. *Id.*

Yet, sadly, this right is not one of daily, expressive quality. Its scope may be reshaped

and restricted without boisterous objection from Americans distanced from judicial action. Further, this reshaping may be done by the one person who stands to gain the power taken from the collective will of the people -- the judge.<sup>9</sup>

9 In fact, Lawrence Friedman makes this point by stating that the maxim of jury as judge of both law and fact cited above was eroded through attacks by judges who saw it as a threat to their power and to their belief in the prioritization of uniformity of adjudication. Friedman, *supra* note 8, at 251. These judges were wrong. A stronger jury trial right in fact empowers the judge. See William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 *Suffolk U. L. Rev.* 67, 72-73 (2007) (arguing that strong juries in fact guarantee judicial independence); cf. Emily Bazelon, *Diagramming Sentences: The Supreme Court's War on Sentencing Guidelines*, *Slate* (Jan. 23, 2007), <http://www.sentencing.nj.gov/downloads/pdf/articles/2007/Feb2007/news20.pdf>.

[\*\*8] The modern struggle over the shaping of the right to trial by jury is waged over federal criminal sentencing.<sup>10</sup> It is one that began with the passage by Congress of mandatory sentencing guidelines that stripped from the individual the right to have, as the foundation for every day in prison, facts found by the uniform judgment of his peers beyond a reasonable doubt. See *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 [\*\*5] L. Ed. 2d 435 (2000); *Mullaney v. Wilbur*, 421 U.S. 684, 704, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); *In re Winship*, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). From the passage of these guidelines to the present day, sentencing law has been in flux<sup>11</sup> as the federal district courts have struggled to give the Congressional mandate the greatest deference allowed under the Constitution, ever

mindful that its restraints severely undermine the vitality of that legislation. The current struggle is not one between the power of Congress and the power of Federal Judges, but one between Congress and the people, with the judge the interested referee. The result of this struggle has been confusion and seismic shifts from year to year of the interpretation of the constitutional mandates. **[\*\*9]** <sup>12</sup> Lost in this confusion is the faith, albeit a reluctant one, of the criminal defendant that she has received the punishment that the community of her peers adjudged befitted the transgression. <sup>13</sup>

10 Professor Stephanos Bibas makes a strong argument that sentencing law must address the modern reality that the majority of criminal cases end with a plea bargain and not a jury trial. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Please*, 110 *Yale L.J.* 1097, 1100, 1150 (2001) (including data that shows 91 percent of adjudicated felons pleaded guilty). While Professor Bibas highlights the potential adverse consequences of "jury focused" sentencing law, his desire to "translate the Constitution into the real world of guilty pleas" is incompatible with the guarantees of the United States Constitution. See *id.* at 1150. Such a view is incompatible with the Constitution because even though few defendants choose to (or, more cynically, believe they will benefit from) exercising their right to a jury, that right must remain a solid, defensive bulwark that the defendant must knowingly forego. Though a sentencing hearing has become more fact-driven and trial-like as a result of the growth of adjudication through guilty pleas, see Douglas A. Berman, *Symposium: Sentencing and Punishment: Conceptualizing Booker*, 38 *Ariz. St. L.J.* 387, 404-05 (2006), the Constitution requires this Court to view

sentencing law through the prism of the right to a jury.

**[\*\*10]**

11 See Douglas A. Berman, *Now What? The Post-Booker Challenge for Congress and the Sentencing Commission*, 18 *Fed. Sent. R.* 157, 2006 WL 1895175, at \*3-\*4 (Feb. 2006) (commenting on the turmoil in federal sentencing law since 2003).

12 See Douglas A. Berman, *Perspective and Principles for the Post-Booker World*, 17 *Fed. Sent. R.* 231, 2005 WL 292197, at \*1-\*3 (2005).

13 This Court stated its concern about the human cost of the unconstitutional nature of the sentencing guidelines in *United States v. Kandirakis*, 441 *F. Supp. 2d* 282, 282 (*D. Mass.* 2006).

But just as it has been said that "the arc of the moral universe is long but it bends toward justice," <sup>14</sup> so too has the jurisprudence of the right to trial by jury recently arced toward more complete actualization. In the recent decision in *Cunningham v. California*, -- *U.S.* --, 127 *S. Ct.* 856, 166 *L. Ed. 2d* 856 (2007), Justice Ginsburg, while speaking for a six justice majority of our United States Supreme Court, issued this ringing reminder:

This Court has repeatedly held **[\*\*11]** that, under the *Sixth Amendment*, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely a preponderance of the evidence.

*Id.* at 864. <sup>15</sup>

14 Martin Luther King, Jr., "The Southern Christian Leadership

Conference Presidential Address" (Aug. 16, 1967), available at <http://www.hartford-hwp.com/archives/45a/628.html>.

15 Justice Thomas likewise, in a concurring opinion in *Apprendi v. New Jersey*, demonstrates the historical roots of this right by extensively citing to a 1872 authoritative treatise. *530 U.S. at 510* (Thomas, J., concurring). This treatise stated that an indictment was required to allege all facts legally significant to a punishment. *Id.* A crime, therefore, consisted of all facts necessary to punishment. *Id.* The law required these facts to be found by a jury. *Id.*

Michael R. Dreeben, Deputy Solicitor General of the United States, appeared to agree with this statement when arguing in the Supreme Court in *United States v. Rita*. He stated:

As I understand this Court's sequence of opinions from *Apprendi* leading up to the most recent decision in *Cunningham*, if the law establishes a level of punishment that may be imposed based on the facts found by the jury and says to the judge, judge, you may not go above it unless you find a particular fact, that fact is subject to the *Sixth Amendment* rule that the Court has announced and must be found by a jury.

Oral Argument Trial Tr. 33:23-34:5, *Rita v. United States*, -- U.S.--, 127 S. Ct. 855, 166 L. Ed. 2d 681 (No. 065754), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/06-](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-)

5754.pdf.

[\*\*12] Here this Court endeavors to apply the recent Supreme Court decision in *Cunningham* [\*6] in light of all controlling law from that Court and this Circuit that may possibly survive its holding, and to do so grounded in the specific facts found and procedures followed in this specific case.

### I. Statement of Facts

On July 13, 2005, the government indicted Nadine Griffin ("Griffin") on two counts of filing false income tax returns in violation of *26 U.S.C. § 7206(1)*. The government alleged that Griffin failed to report on her taxes the gross receipts she earned as a salesperson for Global Prosperity -- a multi-level marketing company that sold materials and held seminars for offshore customers. Griffin Indictment [Doc. No. 1] PP 2-5. Count 1 concerned tax returns filed in 1998, and Count 2 addressed the 1999 tax returns. *Id.* PP 6-7.

On August 11, 2005, the Court entered a plea of not guilty on Griffin's behalf. Trial by jury commenced on July 11, 2006. After eight days of trial, this Court charged the jury. Trial Tr. Vol. VIII at 61:14-95:24. The Court instructed the jury on the law and provided a jury verdict form in compliance with this session's [\*\*13] standing procedures as described in *United States v. Kandirakis*. *441 F. Supp. 2d 282, 319-329 (D. Mass. 2006)*.<sup>16</sup> In accordance with those procedures, this Court charged the jury concerning the relevant sentencing enhancements under the now advisory guidelines at sentencing. See Trial Tr. Vol. VIII at 84:5-86:3. The jury verdict form reflected this Court's use of the jury in both the traditional, mandatory manner as to guilt and in its advisory role as to sentencing. See Jury Verdict [Doc. No. 124].

16 This Court has employed such verdict forms to elicit advisory determinations of Guidelines enhancement questions since the Spring

of 2004. *Kandirakis*, 441 F. Supp. 2d at 330-31 (collecting cases).

Question One of the verdict form asked for a determination of "not guilty" or "guilty" for each of the two tax years at issue. *Id.* at 1. The second question asked for a determination whether the government had proved beyond a reasonable doubt that "sophisticated means [\*\*14] of concealment" were employed. *Id.* at 2. Finally, the third question asked the jury to specify the amount of the aggregate tax loss that the government had proved beyond a reasonable doubt. *Id.* If the jury could not provide an exact number, the jury could check one of seven ranges of tax loss -- each of which corresponded to a sentencing guideline range. See *id.* The Court further instructed the jury that if it could not determine that the government proved a range of tax loss beyond a reasonable doubt, it could return question three blank. Trial Tr. Vol. VIII at 85:22-86:3.

The jury took two and a half days to deliberate before returning a verdict. The jury could not reach a unanimous verdict on Count 1. See Jury Verdict at 1 (showing that the jury left both the "not guilty" and "guilty" box unchecked). The jury found Griffin guilty as to Count 2. *Id.* In its advisory role, the jury determined that the government proved beyond a reasonable doubt that sophisticated means of concealment were used and that Griffin's actions resulted in "more than \$ 30,000, but less than \$ 80,000" of tax loss. <sup>17</sup> *Id.* at 2. The [\*\*7] Court declared a mistrial on Count 1. Trial Tr. Vol. [\*\*15] X at 19:7-8. On September 5, 2006, the government dismissed that count in light of the partial guilty verdict.

17 It bears noting that this advisory jury's handling of the sophisticated concealment enhancement demonstrates a jury's ability to handle complex sentencing factors and the ability for a sentencing court to effectuate Congressional policy and purpose through this process. See Trial Tr. Vol. X

at 9:19-10:23. During deliberations, the jury requested further clarification of the term "sophisticated." *Id.* This Court answered that question by using the explanations in the Sentencing Guidelines Manual. *Id.* at 6:11-15. Moreover, the jury's ultimate verdict as to tax loss corresponds exactly to evidence for the 1999 tax year. The smooth operation of this process ought put to rest Justice Breyer's concerns that a jury of twelve could not possibly apply Guideline definitions as well as a judge of one. See *United States v. Booker*, 543 U.S. 220, 254-55, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) ("How could a judge expect a jury to work with the Guidelines' definitions of, say, 'relevant conduct . . . .'"). In addition, it demonstrates how the policies expressed in the Sentencing Guidelines may still be effectuated in an environment where full Constitutional rights are realized and properly allocated.

## [\*\*16] II. Griffin's Initial Sentencing

On January 16, 2007, the Court convened to conduct the sentencing of Griffin. As a result of requiring the government to try the enhancement issues of sophisticated concealment and the amount of tax loss to the advisory jury, the Court benefitted in its preparation for the hearing from a record well-developed by the evidentiary presentations of the government and the testing of that evidence by the defense.

This Court conducted the sentencing pursuant to 18 U.S.C. § 3553(a). The Sentencing Guidelines, though pronounced advisory by the Supreme Court, *United States v. Booker*, 543 U.S. 220, 245, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), are still required to be calculated, considered, and given substantial weight when fashioning an individualized sentence, see *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc);

*United States v. Vazquez-Rivera*, 470 F.3d 443, 449 (1st Cir. 2006).

To assist the Court in understanding how much deference to give the Sentencing Guidelines, it began its sentencing colloquy as it customarily does with a collection and recital of the various [\*\*17] data points relative to Griffin's tax offense crime. Sentencing Tr. at 4:6-5:8. The nationwide average sentence was 20 months. *Id.* at 4:20-21. The First Circuit average was 18 months. *Id.* at 4:21-22. The average sentence in the District of Massachusetts was 15 months. *Id.* at 4:22-23. Finally, the average sentence in this Session was 11 months. <sup>18</sup> *Id.* at 4:25-5:2. Once the Court determined these averages; it turned to the data contained in the Presentence Investigation Report ("PSR").

18 This session's distinguished court reporter, Don Womack, retains, populates, and provides a public database searchable by offense for every sentence this Court levies at <http://www.donwomack.com/>.

The data in the PSR was used to calculate the advisory guideline range. The Court determined that Griffin was properly classified in Criminal History Category I. *Id.* at 5:9-14. In addition, the Court found, as did the advisory jury beyond a reasonable doubt, that Griffin was guilty of sophisticated concealment and, [\*\*18] therefore, was subject to a two-level Base Offense Level enhancement. *Id.*

The problem relative to Griffin's sentencing, however, lay with the calculation of the Base Offense Level itself because it required and turned on a finding of tax loss. *Id.* at 5:9-11. If the Court followed the advisory jury's calculation of tax loss as between \$ 30,000 and \$ 80,000, then the Base Offense Level would have been either 13 or 14. See *id.* at 13:17-21. This calculation would consider only the tax loss for Count 2 -- the count upon which the jury found Griffin guilty. In the alternative, the Court could conduct its own

fact-finding on tax loss and consider as well the tax loss stemming from Count 1 -- the hung jury count. Were the Court to follow the [\*\*8] latter route, the Court would be warranted in finding that the tax loss exceeded \$ 200,000, which would raise the Base Offense Level to 16. See *id.* at 13:23-14:5.

The Court faced this issue cognizant that controlling law commanded one particular outcome. See *United States v. Watts*, 519 U.S. 148, 157, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997). First, on the issue of whether the Court could consider the tax loss that stemmed from the hung jury Count 1, [\*\*19] the Court recognized and followed *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997), that allowed a sentencing court to consider conduct as to which a defendant has been acquitted. *Id.* at 157. Second, the Court also faithfully applied First Circuit precedent that provided that the tax loss only be proved by a preponderance of the evidence. See *United States v. Antonakopoulos*, 399 F.3d 68, 75 (1st Cir. 2005). This required the Court to consider facts that exceeded the advisory jury's mandate.

The Court thus applied a preponderance of the evidence standard to the alleged 1998 tax loss contained in the hung jury count. Sentencing Tr. at 17:5-8. It did so believing that the jury likely hung on the issue of intent and not on the evidence of the tax loss. *Id.* at 17:9-19; Trial Tr. Vol. X at 12:20-13:3. The Court then found that, by a preponderance of the evidence, the tax loss for 1998 and 1999 likely exceeded \$ 200,000. Sentencing Tr. at 17:5-9. It did so noting that it could not find beyond a reasonable doubt the tax loss for 1998. *Id.* at 25:8-14. The Court harbors a reasonable doubt that Griffin had the requisite criminal intent [\*\*20] with respect to her 1998 tax filing. As a result, the Base Offense Level was calculated at 16 and then raised by the two level enhancement for sophisticated concealment to 18. *Id.* at 17:20-24. This provided an advisory guideline range of 27 to 33 months. *Id.* The Court then sentenced

Griffin to 27 months. *Id.* at 40:9-14.

### **Booker**

The story of sentencing law after the promulgation of the Sentencing Guidelines has two conflicting themes, one or the other predominating at various [\*\*22] times.

### **III. Reconsideration of Griffin's Sentence**

On January 22, 2007, six days after Griffin's sentencing, the Supreme Court decided *Cunningham*. As discussed below, this Court read that decision as affecting the legal framework applicable to Griffin's sentence. In light of the new controlling law, Griffin's sentence appeared to constitute "clear error." See *United States v. Morillo*, 8 F.3d 864, 868-69 (1st Cir. 1993) (addressing former *Federal Rule of Criminal Procedure 35(c)*, which, after the 2002 Amendments, is now *Rule 35(a)*).

Accordingly, pursuant to *Federal Rule of Criminal Procedure 35(a)* and within the statutory time period computed in accordance with *Federal Rule of Criminal Procedure 45(a)*, this Court found it necessary and proper to [\*\*21] vacate the judgment and commitment order and to convene another sentencing hearing to correct the sentence earlier imposed.

The Court convened on February 22, 2007 to resentence Griffin in accordance with the new Supreme Court authority. Before explaining the reasoning behind the new sentence imposed, a brief survey of the legal framework and the implications of *Cunningham* is required.

### **IV. The Legal Framework for Sentencing**

In *Kandirakis*, this Court told the sentencing law story up to and including the Supreme Court's split decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). *Kandirakis*, 441 F. Supp. 2d at 285-288. It also provided a survey of the First Circuit's application of the law in the Post-Booker environment. *Id.* at 289-299. In [\*\*9] light of that expansive treatment, only a brief explanation of the applicable law is required to frame the key issues and explain the effect of *Cunningham*.

#### **A. "Supreme" Law up to and Including**

#### **1. The Apprendi/Blakely/Constitutional Booker Theme**

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the Supreme Court did not address the Federal Sentencing Guidelines, but instead faced an analogous judge-based, determinate sentencing scheme under a New Jersey hate crime statute.<sup>19</sup> *Id.* at 469. The Court invalidated the New Jersey statute and stated:

[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. . . . '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'<sup>20</sup>

*Id.* at 490 (emphasis added) (quoting *Jones v. United States*, 526 U.S. 227, 252, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) (Stevens, J. concurring)).

19 The New Jersey statute at issue extended the imprisonment of a defendant convicted for "possession of a firearm for an unlawful purpose" if a trial judge found by a preponderance of the evidence that the firearm was used to commit a "hate crime" as described by New Jersey state law. *Apprendi*, 530 U.S. at 468-69. If a Judge did so find, the range of punishment would be increased from five to 10 years to 10 to 20 years.

Id.  
[\*\*23]

20 Justice Stevens's reasoning for the Court in *Apprendi* is perhaps even more strongly voiced in the preemptive strike against the dissenters, which states

[w]hat ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee, if, as they assert, it does not guarantee - what it has been assumed to guarantee throughout our history - the right to have a jury determine those facts that determine the maximum sentence the law allows.

530 *U.S. at 498-99* (Scalia, J., concurring).

This holding in *Apprendi* launched the first theme, which seeks to reinvigorate a defendant's *Sixth Amendment* rights in light of the judge-based sentencing scheme of the Sentencing Guidelines. See *id.*

The Supreme Court built upon and strengthened *Apprendi* through two major decisions. In *Blakely v. Washington*, 542 *U.S.* 296, 124 *S. Ct.* 2531, 159 *L. Ed.* 2d 403 (2004), the Supreme Court applied *Apprendi* and invalidated the state of Washington's sentencing scheme. *Id. at 313-14*. In *Blakely*, the defendant pled [\*\*24] guilty to second-degree kidnaping involving domestic violence and use of a firearm. *Id. at 298-99*. The state law provided a maximum punishment of ten years for that crime. *Id.* Washington's sentencing scheme, however, provided a standard range of 49 to 53 months, but allowed a judge to impose a sentence above this range if he found "substantial and compelling reasons justifying an exceptional sentence." *Id. at 299*

(quoting *Wash. Rev. Code Ann. § 9.94A.120(2)*). The judge in *Blakely* found that the defendant had acted with "deliberate cruelty" -- a conclusion dependent upon facts neither admitted nor found by a jury -- and imposed a 90 month sentence. *Id. at 300, 303*.

[\*10] The Supreme Court applied *Apprendi* and invalidated the sentence. *Id. at 305*. The Court held that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id. at 303-04*. Since the facts admitted by *Blakely* would only have supported a maximum punishment of 53 months, the imposition [\*\*25] of the 90 month sentence violated his *Sixth Amendment* rights. *Id. at 305*. The limits of *Blakely* were, of course, that it applied its reasoning to a state sentencing scheme and not to the federal Sentencing Guidelines.

The natural extension of *Blakely* to the federal Sentencing Guidelines appeared imminent in *Booker*. A detailed discussion of that fractured opinion and its separate Constitutional and Remedial holdings need not be repeated.<sup>21</sup> It suffices to say that Constitutional *Booker* extended the *Apprendi/Blakely* theme by holding the federal Sentencing Guidelines unconstitutional under the same rationale as applied in *Apprendi*. *Id. at 244 (Stevens, J.)*.

21 For a full discussion, see *Kandirakis*, 441 *F. Supp. 2d at 286-288*.

## 2. The Counter-Theme

The parallel but antipodal theme of the sentencing story is not as cohesively linear as the reinvigoration line of *Apprendi/Blakely/Constitutional Booker*. It is best discerned through [\*\*26] a patchwork of cases that accord significant deference to the legislative scheme and none to the judges' partner in adjudication -- the American jury. After *Apprendi*, these cases seek to retain as

much of the Sentencing Guidelines as possible, narrowly cabinng in the burgeoning *Sixth Amendment* jurisprudence.

Before the enactment of the federal Sentencing Guidelines scheme, in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), the Supreme Court introduced the concept of "sentencing factors" and held that facts relevant solely to sentencing need only be proven by a preponderance of the evidence standard. *Id.* at 92. The Sentencing Commission adopted this standard of proof for the Sentencing Guidelines, see, e.g., *United States v. Whiting*, 28 F.3d 1296, 1304 (1st Cir. 1994), although no real "evidence" has ever been required to prove guideline "facts." See *United States v. Green*, 346 F. Supp. 2d 259, 281 (D. Mass. 2004) *rev'd on other grounds by United States v. Yeje-Cabrera*, 430 F.3d 1 (1st Cir. 2005) and *United States v. Pacheco*, 434 F.3d 106 (1st Cir. 2006).

[\*\*27] In *Watts*, the Supreme Court addressed the issue of whether a sentencing court could consider conduct of a defendant alleged in an underlying charge but as to which he or she had been acquitted. 519 U.S. at 149. The Court answered in the affirmative, holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 228, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the Court reaffirmed the distinction between elements of crimes and sentencing factors suggested by *McMillan*. *Id.* at 228. In addition, *Almendarez-Torres* stands for an often-recited<sup>22</sup> proposition that a prior [\*11] conviction is a sentencing factor that need not be proven beyond a reasonable doubt. *Id.* at 246-47.

22 This exception is even cited in *Apprendi's* general rule requiring facts that increase the statutory maximum to

be proved to a jury beyond a reasonable doubt. 530 U.S. at 490. It is, of course, not difficult to harmonize *Apprendi* and *Almendarez-Torres*. Prior convictions do not run afoul of *Apprendi* in increasing an offender's sentence because the offender either admitted to the facts upon which the prior conviction rests (through a guilty plea) or was accorded his right to trial by jury. Moreover, prior convictions usually do not involve "proof" at all since they are matters usually appropriate for judicial notice. See *Fed. R. Evid.* 201.

[\*\*28] Finally, it is sufficient for this brief survey to conclude with mention of the Remedial Booker opinion. 543 U.S. at 245 (*Breyer, J.*). Remedial Booker sought to remedy the *Sixth Amendment* violation relative to the federal Sentencing Guidelines by severing and excising the provision making the Guidelines mandatory. *Id.* This rendered the Guidelines advisory, at least in name. *Id.* Despite the advisory nature of the Guidelines, the Remedial Booker holding also discussed the appropriate standard of review. *Id.* at 260-61. The Supreme Court held that the proper standard of review is whether the district court's sentence "is unreasonable" with regard to the factors enumerated in 18 U.S.C. § 3553(a). *Id.* at 261.

### **B. The First Circuit Explains and Applies Booker**

The Supreme Court's decision in Remedial Booker highlighted, in one tortured opinion, the incompatible collision of the two disparate approaches to the application of the *Sixth Amendment* to the law of sentencing. After Remedial Booker, district courts, including this Court, looked to the circuit courts for controlling guidance [\*\*29] on how to resolve the incompatible nature of Booker's dual opinions and awaited further clarification by the Supreme Court.

The First Circuit wrestled with sentencing law post-Booker in a few, key decisions. It

quickly became apparent that the incompatible approaches of the two Booker decisions would be resolved in the First Circuit (just as in every other circuit) in favor of Justice Breyer's remedial holding, which sought to preserve the Sentencing Guidelines as far as possible without directly confronting Constitutional Booker.

In *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006), the First Circuit recognized the advisory nature of the sentencing guidelines, but also held that a district court is not free categorically to dispense with their advised penalty range. See *id.* at 61-62. The defendant in Pho pled guilty to a one-count information that charged him with possession with intent to distribute cocaine base. *Id.* at 57. At disposition, the district court calculated the guideline range but stated that it was no longer mandatory and that the sentence must only meet a standard of reasonableness. *Id.* at 58. **[\*\*30]** The district court then concluded that the guideline ratio that treated crack cocaine as 100 times more serious than cocaine powder was unfair and recalculated Pho's sentence according to a 20 to 1 ratio. *Id.*

The First Circuit reversed and stated that a district court's discretion "is subject to the limitations imposed by Congress," and that "the guidelines remain part and parcel of the sentencing algorithm." *Id.* at 61. The First Circuit went on to classify the crack-to-powder ratio as a "policy judgment" reserved to Congress. *Id.* at 62. Since the district court's departure from the guidelines derogated Congressional policy, it erred as matter of law. *Id.* at 64. The effect of Pho, of course, is to render every aspect of the entire Sentencing Guidelines matter of law since every aspect expresses a "policy judgment," see **[\*12]** *Kandirakis*, 441 F. Supp. 2d at 291-93, even though the sentencing range that results is, and must be, purely advisory, subject to being trumped by a reasoned articulation of the other section 3553(a) factors, see, e.g., *United States v. Goodhue*, -- F.3d --, 486 F.3d 52, 2007 U.S.

*App. LEXIS 11421, 2007 WL 1430183, \*4-7 (1st Cir. May 16, 2007) **[\*\*31]*** (providing a lengthy discussion of extremely complex drug weight calculation even though the result is advisory).

In *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006) (en banc), the First Circuit sat *en banc* to address the question of "what role the advisory guidelines should play in a post-Booker sentence." *Id.* at 518. The panel began by reasserting that appellate review of sentences for reasonableness may occur regardless of whether they fell within or without the sentencing guidelines. *Id.* at 517. A sentence within the guidelines is reviewable and thus not presumptively or *per se* reasonable. *Id.* at 517-18. The guidelines are, however, generalizations that integrate and address all of the 18 U.S.C. § 3553(a) factors and must be considered. *Id.* at 518. "In most cases, this will mean that the district court will have to calculate the applicable guidelines range including the resolution of any factual or legal disputes necessary to that calculation . . . ." <sup>23</sup> *Id.*

23 See, e.g., *United States v. Garcia-Carrasguillo*, where the First Circuit criticized the sentence of the district court for failing to explain her guidelines calculation, to include any reasoned analysis, or to reference any evidence that influenced her decision. 483 F.3d 124, 132-33 (1st Cir. 2007).

**[\*\*32]** Jimenez-Beltre went to great lengths to clarify the scope and degree of a sentencing judge's discretion after Booker. It did not, however, examine the issue of greater import, i.e., who would find, and by what evidentiary standard, the facts necessary to apply an enhancement to a defendant's sentence. See *Jimenez-Beltre*, 440 F.3d at 520. Jimenez-Beltre raised that issue through a *Sixth Amendment* attack on his sentence based upon an enhancement due to a prior conviction. *Id.* In light of *Almendarez-Torres*, however, that

claim was a non-starter. The First Circuit had no need, therefore, to reach the more profound merits of that argument, but simply could, and did, rely on *stare decisis*, stating that Almendarez-Torres remained good law until expressly overruled. *Jimenez-Beltre*, 440 F.3d at 520; see *United States v. Washington*, No. 06-1970, 220 Fed. Appx. 1, 2007 U.S. App. LEXIS 7099, 2007 WL 901653, slip op., at \*1 (1st Cir. Mar. 27, 2007) (collecting cases); *United States v. Miller*, 478 F.3d 48, 52 (1st Cir. 2007).

Regrettably, like the other circuits, the First Circuit has not chosen to explore the *Sixth Amendment* repercussions [\*\*33] in the post-Booker atmosphere with anything other than a reflexive recital of the constitutionally incompatible principals espoused in Remedial Booker. See *United States v. O'Brien*, 435 F.3d 36, 41 (1st Cir. 2006); *United States v. Tejada*, 481 F.3d 44, 57 (1st Cir. 2007) ("[A]s long as the statutory maximum is not affected, a sentencing judge is permitted to determine by a preponderance of the evidence the factual basis for a sentencing enhancement.") In *United States v. O'Brien*, 435 F.3d 36 (1st Cir. 2006), the court stated, without any analysis or clarification, that "it remains (as before Booker) for the judge to determine the factual basis for an enhancement, so long as the statutory ceiling is not raised." *Id.* at 41 (internal citations omitted). It is, however, just this issue -- what constitutes the statutory maximum -- that is so critical to *Sixth Amendment* analysis.

In sum, although Constitutional Booker was all about juries, circuit decisions in the wake of Remedial Booker have been all about judges -- what they can do, and why [\*13] and how they need explain themselves. Even though [\*\*34] Remedial Booker was intended to be evanescent, see 543 U.S. at 265 ("The ball now lies in Congress' court."), it seems at times as though the Constitutional Booker opinion had never been written.<sup>24</sup>

24 Divorcing sentencing from evidentiary facts found by a jury beyond a reasonable doubt strikingly dilutes the moral authority of the sentencing judge - and most judges appear agreeable to this development. See Judge Nancy Gertner, From Omnipotence to Impotence: American Judges and Sentencing, 4 *Ohio St. J. Crim. L.* 523, 536, 538 (2007) ("[A]nnouncing that the Guidelines were advisory did not make them so. . . . Rigid, numerical categories still anchored sentencing. . . . [After Booker,] when the Commission issued a report on the judges, which districts were acting 'in conformance' with the Guidelines, which were not, there was, nary a whisper from the federal court. . . . The belief that judges [are] not competent to sentence without code-like diktats from a Sentencing Commission represents an extraordinary attitudinal shift in less than two decades.") (reordered from original).

Absent jury fact-finding distilled upon a transparent record and bereft of moral authority, the reasoning behind each individual sentence is cloaked in a secrecy that thwarts the true development of a common law of sentencing and prevents public ratification, criticism, and weighing of its central assumptions, detriments, and benefits. See *Kandirakis*, 441 F. Supp. 2d at 332-33 n.76. In light of this shadowed sentencing scheme, the legitimacy of any particular sentence is adjudged by the public not on the facts evidenced by their twelve constitutional representatives but through their pre-conceived and generalized notions. One result is a sophomoric cry that "[sentencing] [j]udges should engage in disobedience - they should refuse to enforce unjust laws." Recent Case, Civil Disobedience - The Role of Judges - Ninth Circuit Affirms Mandatory Sentence, 120 *Harv. L. Rev.* 1988, 1992 (2007). Where such lumpen proposals

appear in reputable legal publications, one might "wish more judges treated the jurors as a treasure rather than a nuisance." Letter from John W. Kecker, Esq., May 23, 2007 (on file in Chambers).

**[\*\*35] C. *Cunningham* and its Effect**

And so came *Cunningham*.

The defendant in *Cunningham* was tried and convicted of sexual abuse of a child under 14. *127 S.Ct at 860*. He was sentenced under California's determinate sentencing law ("DSL"), which created a lower term, middle term, and upper term sentence for that offense. *Id.* Under the DSL, a judge, and not a jury, could find facts by only a preponderance of the evidence that would expose a defendant to the upper term. *Id.* Absent facts that would support an enhancement, a judge would be required to sentence the defendant to the middle term. *Id.*

The Supreme Court held California's DSL unconstitutional as violating the *Sixth Amendment*. *Id. at 871*. The Court did so by reiterating the *Apprendi/Blakely* command that any fact that increases a defendant's sentence must be found by a jury beyond a reasonable doubt.<sup>25</sup> See *id. at 863-64*. In so doing, the Supreme Court focused squarely on the important question of what constitutes a "statutory maximum" for *Sixth Amendment* purposes. *Id. at 868*. The Court held that the statutory maximum in this **[\*\*36]** case was the middle term of the DSL because if only the elements of the charged offense necessary for a guilty verdict were proven, a punishment at that level would result. See *id.* In contrast, a sentence to the upper term would require the judge to find facts that constituted an aggravating circumstance. *Id.*

25 As is quoted in the Introduction and attributed to Justice Ginsburg, the language the Supreme Court used in *Cunningham* tracks almost verbatim the language from *Apprendi*. Compare

*Cunningham, 127 S. Ct at 863-64* with *Apprendi, 530 U.S. at 489*.

**[\*14]** In defining the statutory maximum, the Supreme Court rejected the argument that the applicable statutory maximum was, instead, the upper term because the DSL afforded discretion to the judge to decide whether the upper sentence was justified. *Id. at 869*. Again referencing *Blakely*, the Supreme Court responded by stating, "broad discretion to decide what facts may support an enhanced sentence . . . does not shield **[\*\*37]** a sentencing system . . . . If the jury's verdict alone does not authorize the sentence . . . the *Sixth Amendment* requirement is not satisfied." *Id.*

The Supreme Court in *Cunningham* does, in all fairness, take pains in dicta to distinguish the California DSL from the post-*Booker* advisory federal sentencing guidelines.<sup>26</sup> See *id. at 870*. The Supreme Court highlights the critical distinction as being the discretion under the federal system for the judge freely to sentence within a defined range in contrast to the DSL, which fixed the sentence to a sentencing triad without any ranges for discretion. *Id.* It ought be noted, however, that this distinction merely affirms the constitutionality of the federal sentencing guidelines when used in an advisory role, *it does not speak* to the constitutionality of current federal sentencing practice that requires deriving guideline ranges from "facts" found by a judge on a non-evidentiary record only by a preponderance of the evidence.<sup>27</sup>

26 Though this Court must apply the decision in *Cunningham* faithfully and accept the Supreme Court's characterization of its own holding, it ought be noted that Justice Alito, in his dissent, ascribes an even greater importance to the decision when he states: "The California sentencing law that the Court strikes down today is indistinguishable in any constitutionally

significant respect from the advisory Guidelines scheme that the Court approved in *United States v. Booker*." *Cunningham*, 127 S. Ct. at 873 (Alito, J., dissenting) (internal citation omitted). If Justice Alito's dissent correctly characterizes *Cunningham*, it is hard to see how any of Remedial Booker survives.

**[\*\*38]**

27 As Frank Bowman writes in a very thoughtful, careful, and persuasive discussion of the *Sixth Amendment* framework after *Cunningham*:

declaring the Guideline advisory does not alter the fundamental requirement of rational decision making. After *Booker*, a sentencing judge is still presented with a statutorily created range of sentencing choices. . . . A sentence at the upper end of such a range cannot be rationally justified unless the judge find some fact in addition to the elements of the crime.

Frank O. Bowman III, "The Question is Which is to Be Master - That's All": *Cunningham*, Claiborne, Rita and the Sixth Amendment Muddle, 19 Fed. Sent. R. 155 (Feb. 2007).

In short, the importance of *Cunningham* is two-fold. First, much as a codicil is to a revoked will, *Cunningham*'s timing -- after the internally irreconcilable *Booker* decisions -- *r e p u b l i s h e s* t h e *Appendi/Blakely/Constitutional Booker* theme over Remedial Booker's minimization of the *Sixth Amendment*. Thus, the epicenter of *Sixth Amendment* jurisprudence for sentencing **[\*\*39]** purposes is located on the facts found by a jury beyond a reasonable doubt. See

*Cunningham*, 127 S. Ct. at 863-64. Second, the analysis in *Cunningham* reiterates and clarifies that the "statutory maximum" for *Sixth Amendment* analysis must be determined, in first instance, by jury-found facts. See *id.* at 868. For these two purposes, it makes no difference that *Cunningham* focuses on a state sentencing law instead of the federal advisory sentencing guidelines.

### V. Federal Sentencing Guidelines after *Cunningham*

As a result of *Cunningham*, this Court felt compelled to change its sentencing **[\*15]** practice to comport with a defendant's *Sixth Amendment* rights. See 127 S.Ct. at 868. The impetus for the change came from a reevaluation after *Cunningham* as to what constitutes the statutory maximum sentence that may be levied from facts found by a jury beyond a reasonable doubt. <sup>28</sup> See *id.*

28 To be clear, once this statutory maximum is determined, this Court sees no constitutional problem with a sentencing judge exercising the discretion to sentence within any range below that maximum based upon facts found by the sentencing judge by only a preponderance of the evidence. This principle has never been the subject of a *Sixth Amendment* challenge. See *Appendi*, 530 U.S. at 476. The coherence of a *Sixth Amendment* jurisprudence that extends a jury trial right to facts that increase a defendant's punishment and not to mitigating facts is, however, the subject of recent scholarship. See Jonathan F. Mitchell, *Appendi's Domain*, Supreme Court Review (forthcoming 2007), available at <http://ssrn.com/abstract=978971>.

**[\*\*40]** The possible options for what constitutes the statutory maximum for *Sixth Amendment* purposes must be examined, but a point about the advisory guidelines is first required. Much has been made -- stemming

from Remedial Booker -- that rendering the federal sentencing guidelines advisory remedied any *Sixth Amendment* violation. See *Booker*, 543 U.S. at 245; *Pho*, 433 F.3d at 61; *United States v. Pesaturo*, 476 F.3d 60, 73 (1st Cir. 2007). As defined in Remedial Booker, applied by the First Circuit, and conducted by actual district courts, the contours and substance of this remedy demonstrate that the term "advisory" is a misnomer. See, e.g., *Jimenez-Beltre*, 440 F.3d at 517-18 (holding that the Sentencing Guidelines deserve substantial weight). It is a misnomer first because the sentencing guidelines were never fully "mandatory." See *Watts*, 519 U.S. at 162 (Stevens, J., dissenting) (pointing out, in a pre-Booker environment, what information a judge may use to depart from a Sentencing Guideline determination); *United States v. Derbes*, 369 F.3d 579, 580 (1st Cir. 2004) (reviewing **[\*\*41]** a district court's four-level downward departure). A sentencing judge could depart from the calculated range, but was required to justify that departure in a manner that would satisfy *de novo* appellate review. *Derbes*, 369 F.3d at 581. The pre-Booker federal sentencing guidelines were, more accurately, mandatory unless a district court found an aggravating or mitigating factor not included in *section 3553*. *Booker*, 543 U.S. at 234. This exception made the Sentencing Guidelines function, in the aggregate, along lines more accurately described as a heavy presumption of correctness.

In the Post-Booker environment, circuits that have interpreted the remedial holding as providing that a sentence within the advisory range is *per se*, presumptively, or rebuttably reasonable, merely reinstate the pre-existing presumption by insulating such a sentence from appellate review.<sup>29</sup> See, e.g., *United States v. Mykytiuk*, 415 F.3d 606, 607-08 (7th Cir. 2005); *United States v. Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005). The First Circuit has linguistically avoided adopting that position. See *Jimenez-Beltre*, 440 F.3d at 517-18 **[\*\*42]** (refusing to label the guidelines *per*

*se* or presumptively reasonable). In the same breath, however, this Circuit has held that a district court must give the guidelines "substantial weight" as the amalgamation and integration of the *section 3553(a)* factors and the voice of Congressional policy. **[\*16]** *Id.* at 518. It is difficult, if not impossible, to understand how "substantial weight" does not result in a presumption of correctness, even if that presumption is weaker than the "mandatory, but" iteration of pre-Booker appellate review.<sup>30</sup> See, e.g., *United States v. Gilman*, 478 F.3d 440, (1st Cir. 2007) ("Because [the defendant] seeks here to attack an in-guideline-range sentence as excessive, he must 'adduce fairly powerful mitigating reasons and persuade us that the district judge was unreasonable in balancing pros and cons despite the latitude implicit in saying that a sentence must be 'reasonable.'"") (quoting *United States v. Navedo-Concepcion*, 450 F.3d 54, 59 (1st Cir. 2006)).

29 See Stephen R. Sady, Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt, 18 Fed. Sent. R. 170, 2006 WL 1895179, \*1-\*2 (Feb. 2006), for a discussion on the problematic nature of a presumption of reasonableness after Booker.

**[\*\*43]**

30 Does Booker provide merely an academic remedy to *Sixth Amendment* violations through its dual misperception of beginning with a fully mandatory system and ending with a completely discretionary one? This issue is important, but it is ancillary to the issue faced by this Court after Cunningham.

The larger and more important point is not the weight that a district court must give the advisory guidelines, but the appellate review that remains after Remedial Booker. After Booker, an appellate court will review a district court's sentence for "reasonableness." 543 U.S. at 261. Though "[t]he reasonableness requirement [of] Booker . . . operates *within* the

*Sixth Amendment* constraints," it highlights the remaining constitutional problem with sentencing practice -- how to determine the statutory maximum. See *Cunningham*, 127 S. Ct. at 870-71.

When considering what constitutes a statutory maximum for *Sixth Amendment* purposes, the existence of appellate review based on reasonableness defines the issue. It is clear that what must be reasonable about [\*\*44] a district court's sentence is not merely procedural, but also substantive. See *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006) (explaining the difference between procedural and substantive appellate review). More precisely, a reasonable sentence requires a correlation between the factual record and the district court's reasoning in imposing a sentence. See *United States v. Ossai*, 485 F.3d 25, 32, 485 F.3d 25, 2007 U.S. App. LEXIS 9293 (1st Cir. 2007) (reviewing the reasonableness of the "fact-intensive" determination of "physical restraint" by analyzing the factual record). As a result, Booker did not create a pure, discretionary sentencing system, but, because of the appellate review that remains, simply traded one determinate scheme directed by the sentencing guidelines for a determinate scheme based on reasonable, reviewable, factual judgments. See, e.g., *Cunningham*, 127 S. Ct. at 880 (Alito, J., dissenting) ("Booker's reasonableness review necessarily supposes that some sentences will be unreasonable in the absence of additional facts justifying them."); *Ossai*, 485 F.3d at 32, 2007 U.S. App. LEXIS 9293.

For example, consider a case where a defendant [\*\*45] is charged under a statute with a penalty range from five years to life imprisonment. Consider also that a jury finds facts that are properly viewed as only supporting the elements of the offense. If a judge sentenced such a defendant to life, would not such a sentence require the judge to find some additional, aggravating facts? And would not a review of that sentence for reasonableness

depend upon a judgment regarding the correlation between those judge-found facts and the sentence imposed? The answer to both questions is in the affirmative.<sup>31</sup> See *United States v. Doe*, 128 Fed. Appx. 179, 181 [\*17] (2d Cir. 2005) (vacating a district court's sentence at the maximum allowed by the applicable statute in light of undue weight placed on the perceived threat of the defendant). As a result of such appellate review, the facts of each case limit the sentence that a judge may reasonably impose.<sup>32</sup> See *Cunningham*, 127 S. Ct. at 876 (Alito, J., dissenting). This, in turn, and in light of *Cunningham*, implicates the *Sixth Amendment*. See *id.* at 869 ("If . . . the judge must find an additional fact to impose the longer term, the *Sixth Amendment* [\*\*46] requirement is not satisfied.")

31 In a largely paradoxical dissent, Justice Alito agrees with this premise. *Cunningham*, 127 S. Ct. at 875-76 (Alito, J., dissenting). Justice Alito presents a hypothetical similar to the one posed above and argues, "[s]uppose that the sentencing judge imposes the maximum sentence allowed by statute -- 50 years of imprisonment -- without identifying a single fact about the offense or the offender as a justification for this lengthy sentence. Surely that would be an unreasonable sentence that could not be sustained on appeal." *Id.* at 876.

32 "[I]n every existing sentencing system in which conviction presents the judge a choice of more and less severe punishments for the same crime, a rational sentencing judge must find the existence of aggravating non-element factors in order to justify imposition of some subset of the legally available sentences." Bowman, *supra* note 27.

One of the barriers that prevents courts from reaching this logical [\*\*47] conclusion is a misunderstanding of the *Sixth Amendment*

rights implicated by sentencing law. For instance, even though the holding in *Pho* is properly limited to cabining a sentencing judge's discretion categorically to dispense with a clear congressional policy, the reasoning that leads to the holding highlights a common error in post-Booker jurisprudence. See *Pho*, 433 F.3d at 61. The panel concludes that Constitutional Booker "held that mandatory sentencing enhancements triggered by judge-found facts were in derogation of the constitutionally assured right to trial by jury." *Id.* (citing *Booker*, 543 U.S. at 244-45). The panel then characterizes Remedial Booker as curing "that infirmity" by rendering the sentencing guidelines advisory. *Id.* The confusion that the split Booker opinion created is captured in this reasoning, which implies that the "mandatory" nature of the guidelines and not the issue of "judge-found facts" was the infirmity at stake in Booker. See *id.* This perspective views the constitutional right at stake as one held by the sentencing judge to exercise discretion and not, as ought be the case, as one held [\*\*48] by the defendant to have sentencing enhancing facts proved to a jury beyond a reasonable doubt. See *Cunningham*, 127 S. Ct. at 860 (reversing the disposition below "because the four-year elevation based on judicial factfinding denied petitioner his right to a jury trial.") (emphasis added).

As illustrated by consideration of rational, fact-based appellate review, and in light of a proper understanding of who holds the *Sixth Amendment* right at stake, the dispositive issue becomes what constitutes the statutory maximum for *Sixth Amendment* purposes. See *id.* at 868. There are three possible options: (1) the maximum term allowable by statute; (2) the minimum term required by statute;<sup>33</sup> or (3) a judicially [\*18] determined range based on jury-found or defendant-admitted facts.

33 There is an argument that this second option could also include a possible fourth option that defines the

statutory maximum as the greater of the minimum required by the statute or 24 months. The rationale for this argument stems from the provision in 18 U.S.C. § 3553(c)(1) that requires a statement of reasons to support a sentence only when the penalty exceeds 24 months. While this argument does recognize the close correlation between appellate review of the sufficiency of the district court's reasoning, it fails to recognize that reasonableness is not the touchstone of *Sixth Amendment* analysis. See *Cunningham*, 127 S. Ct. at 870. Instead, even a reasonable sentence that relies on facts not proven to a jury beyond a reasonable doubt will violate the *Sixth Amendment* if it increases the penalty beyond the statutory maximum. To this end, not requiring a statement of reasons when the sentence is under 24 months speaks only to the ability to divine the district court's justification when levying a shorter sentence and does not address what maximum penalty is supported by the proven facts.

[\*\*49] The first option is easily set aside. The discussion of reasonableness review, in addition to explicit Supreme Court precedent, demonstrate that the statutory maximum for *Sixth Amendment* purposes cannot be viewed as the maximum term allowed under the applicable statute.<sup>34</sup> See *Blakely*, 542 U.S. at 303-04 ("In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings."); *Ring v. Arizona*, 536 U.S. 584, 586, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) ("A defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.") (citing *Apprendi*, 530 U.S. at 483). First, as the hypothetical above demonstrates, logic alone counsels that a sentence at the maximum term allowed under a statute would not be

reasonable if only the elements of the offense were proven and no aggravating facts were considered.<sup>35</sup> Second, Cunningham made this logic its very holding. See *127 S.Ct. at 868*. In Cunningham, the Supreme Court held that the applicable **[\*\*50]** statutory maximum was the middle term of the triad structure because the judge was required to sentence at that level if only the elements of the offense were proven. See *id.* Despite the fact that the judge was legislatively empowered under the limits of the statute -- upon finding additional, aggravating facts -- to sentence above the middle term, such an upward movement pierced the "statutory maximum."<sup>36</sup> See *id.* Finally, to recognize this first option as the constitutionally applicable statutory maximum would contradict the parsimony provision in the Sentencing Reform Act that states that a sentencing court, "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." *18 U.S.C. § 3553(a)*. Even a narrow reading of the parsimony provision requires a court to find some non-element facts to impose upper-term sentences. See *id.*

34 On February 12, 2007, the Sentencing Fairness and Equity Restoration Act of 2007 was introduced into the United States House of Representative. This bill proposes to set the lower range of the advisory sentencing guidelines as a mandatory minimum and establish the statutory maximum as the maximum sentence provided in the statute establishing the offense. H.R. 993, 110th Cong. § 2 (2007).

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35 Justice Alito, in his dissent in Cunningham, reaches the same conclusion. *127 S. Ct. at 876*.

36 The failure to recognize that the "statutory maximum" is not the maximum allowed under a statute will be

the cause for much of the post-Booker and now post-Cunningham disagreement with this Court's holding in this case. See, e.g., *United States v. Belskis*, *477 F. Supp. 2d. 237, 240-41 (D. Me. 2007)* (rejecting an argument as to Cunningham's applicability after defining the statutory maximum as the maximum allowed under the statute).

The next consideration is whether the minimum penalty required by a statute constitutes the statutory maximum. There is some logic to this conclusion when viewed through the lens of a defendant convicted solely based on conduct sufficient to satisfy the elements of the offense. In addition, Cunningham appears to support an approach whereby the district court first identifies what penalty would be levied if only the base elements were proven **[\*19]** to a jury. See *127 S. Ct. at 868*. The Supreme Court in **[\*\*52]** Cunningham, however, applied this approach and held that the middle term, not the lowest term, was the statutory maximum. See *id.* By not returning the lowest term required by statute, the Supreme Court foreclosed this option. See *id.* In addition, such an option would explicitly contravene the remedial structure pronounced in Booker whereby a sentencing judge must apply the *section 3553(a)* factors to impose a reasonable sentence. *Booker*, *543 U.S. at 261*. Booker's remedial structure necessitates at least some range within which a sentencing judge may exercise the discretion necessary to effectuate Congressional purposes and policies. See *id.*

This leads to the third option -- that the statutory maximum constitutes the upper term of a judicially determined range. After Booker, this range cannot be imposed on the sentencing judge by the Sentencing Guidelines. *543 U.S. at 245*. The Sentencing Guidelines may, however, advise a sentencing judge as to a reasonable range of penalties. *Id.* The key to this calculation is that such a range must be determined solely by the facts found by a jury

beyond a reasonable doubt and reflected **[\*\*53]** in its verdict.<sup>37</sup> *Cunningham*, 127 S. Ct. at 863-64; *Blakely*, 542 U.S. at 303 ("Our precedents make clear, however, 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.*") The upper term of this range constitutes the statutory maximum. *Cunningham*, 127 S. Ct. at 863-64; *Blakely*, 542 U.S. at 303.

37 In an old, but interesting case from the Commonwealth of Massachusetts, the Supreme Judicial Court addressed a case where a single larceny statute involved grades of crimes depending on the value of property allegedly stolen. *Hope v. Commonwealth*, 50 Mass. 134, 9 Metc. 134, 9 Metcalf 134, 139 (Mass. 1845). The Supreme Judicial Court held that the value of the property was thus an integral element of the crime and was required to be asserted in the indictment. See *id.* The parallel between this old state case and the situation faced by Griffin in this Court is notable and instructive.

**[\*\*54]** In practice, a sentencing judge would first consider the jury verdict and the facts underlying such a verdict. See *Blakely*, 542 U.S. at 303. The judge would calculate the Base Offense Level in the Sentencing Guidelines from these facts for an advisory range. Guided by the advisory range and an ever-developing body of common law,<sup>38</sup> the sentencing judge would determine the statutory maximum supported by the jury-found facts and the minimum sentence that ought be imposed as a result of those facts.<sup>39</sup> The sentencing judge would then normally sentence within that range based upon the *section 3553(a)* factors and aided by any **[\*20]** facts found by a preponderance of the evidence.<sup>40</sup> The district judge could not enhance the sentence beyond this range without putting the facts of that enhancement before a jury. See *Cunningham*, 127 S. Ct. at 863-64. On

appellate review, the reasonableness of the sentence would be adjudged, first, as to the calculation of the statutory maximum and minimum and then, second, as to the weighing of the *section 3553(a)* factors.

38 David J. D'Addio, in an influential law review article on this topic, suggests that reasonable ranges will remain abstract, but will be significantly aided by the development of careful appellate review and the rise of a "common law of 'reasonable sentences.'" David J. D'Addio, *Sentencing After Booker: The Impact of Appellate Review on Defendants' Rights*, 24 *Yale L. & Pol'y Rev.* 173, 194 (2006).

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39 The Sentencing Initiative Committee has gone so far as to propose a simplified sentencing guideline system that would empower juries to find the facts that would determine the theoretical statutory maximums in such a case. See generally *The Constitution Project Sentencing Initiative: Recommendations for Federal Criminal Sentencing in a Post-Booker World*, 18 *Fed. Sent. R.* 310 (2002) (suggesting the assignment of a defendant's offense to a sentencing range in a simplified grid based on the jury's fact-finding or the particulars of his plea). In addition, David D'Addio argues that reasonable range must be determined solely by the facts of the conviction. D'Addio, *supra* note 38, at 192.

40 It is here that a sentencing judge remains faithful to the Supreme Court requirements in *McMillan*, 477 U.S. at 92. Factors relevant only to sentencing may be found by a preponderance of the evidence. *Id.* This Court simply makes clear that factors relevant only to sentencing must not pierce the statutory maximum.

After *Cunningham*, this Court holds that the

[\*\*56] latter approach is now required by controlling law. See *id.* Such a conclusion is a natural outgrowth of the Apprendi/Blakely/Constitutional Booker *Sixth Amendment* jurisprudence that requires facts found by a jury beyond a reasonable doubt to determine the applicable statutory maximum. *Id.* This conclusion was called into doubt by Remedial Booker, which, though promoting the appellate review that serves as its hemlock, left the resonance of Constitutional Booker unclear on this issue. See *id. at 875* (Alito, J., dissenting) (stating that Remedial Booker required sentencing judges to make factual findings). Cunningham removed this doubt by applying a definition of a statutory maximum that accommodates both the Constitutional holding of Booker and its Remedial decision. See *id. at 868* (reaching its decision "in light of both parts of the Court's Booker opinion.").

## VI. The Resentence of Nadine Griffin

In light of Cunningham's guidance as to what constitutes the statutory maximum for *Sixth Amendment* purposes, this Court resentenced Griffin. First, the Base Offense Level of the advisory Sentencing Guidelines was calculated [\*\*57] from the facts reflected in the jury's verdict.<sup>41</sup> Resentencing Tr. at 4:23-10:11. The jury found only tax loss for Count 2 beyond a reasonable doubt. The jury also indicated that it found the range of tax loss as more than \$ 30,000, but less than \$ 80,000. As a result, this Court was required to consider only the tax loss from Count 2. In addition, since the jury could not find a definite amount of tax loss beyond a reasonable doubt, this Court was required to consider the amount of tax loss as \$ 30,000 or else risk applying a fact not found by the jury to the calculation of the initial sentencing range. Thus, under the 1998 Sentencing Guidelines, a tax loss of \$ 30,000 returned a Base Offense Level of 12. Since there was no dispute that Griffin belonged in a Criminal History Category I, the advisory sentencing range was 10-16 months.

41 One issue that this Court faced on resentencing was that the jury verdict form reflected the use of the 2004 Sentencing Guidelines rather than the 1998 version. On resentencing, this Court, aided by counsel and the probation officer, employed the 1998 version to calculate the applicable advisory Base Offense Level from the tax loss and the jury-found enhancements.

[\*\*58] In this case, however, this Court also put to the jury an enhancement for sophisticated concealment. The jury found Griffin guilty beyond a reasonable doubt of this enhancement. As a result, it was proper for this Court to include this two-level enhancement in the initial calculation of the advisory Base Offense Level. The Base Offense Level, adjusted for this enhancement, thus became a level 14, which advised a sentencing range of 15-21 months.

[\*21] Griffin's case presented a straightforward tax evasion scheme. There were no circumstances related to this case that counseled this Court not to adopt the advisory Guideline range. As a result, this Court held that, after Cunningham, the applicable statutory maximum sentence was 21 months. See *127 S.Ct. at 868*.

With that statutory maximum in mind, this Court then considered the *section 3553(a)* factors in light of all facts found by a preponderance of the evidence and all relevant conduct. This consideration included this Court's finding by a preponderance of the evidence but not beyond a reasonable doubt that Griffin ought be accountable for the tax loss alleged under Count 1. This Court subsequently resentenced Griffin [\*\*59] up to, but not exceeding, the statutory maximum of 21 months. Resentencing Tr. at 20:2-8.

## VII. Conclusion

The right of a criminal defendant to the

defined elements of a trial by jury was one of the least controversial rights enshrined in the *Bill of Rights* as evidenced by its inclusion in the very organization of our government. U.S. Const. art. III, § 2.; see *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). This was the case because the Founders shared a mutual vision derived from common experience that the locus of power for criminal prosecution must reside not in the State, but in the people through a jury. See *id.*

In *Cunningham*, the United States Supreme Court took a long stride to reinvigorate this original application of the *Sixth Amendment*. See 127 S.Ct. at 863-64. In so doing, the Supreme Court affirmed and clarified the jurisprudence expressed in *Apprendi*, *Blakely*, and *Constitutional Booker*. Here, the concrete result of this decision was a need to reevaluate what constitutes a statutory maximum for purposes of the *Sixth Amendment*. After much

thought on this question, this Court reached the only conclusion compatible [\*\*60] with *Cunningham* and the existing body of controlling law. The statutory maximum must be judicially-determined from the facts either admitted by a defendant or reflected in a jury verdict and found upon evidence beyond a reasonable doubt. See *Cunningham*, 127 S. Ct. at 863-64. This statutory maximum range must first be determined during sentencing before a judge may exercise discretion to sentence within the advisory guideline range or depart therefrom for any appropriate reason.

Since this conclusion affected Griffin's sentence, and thus her constitutional rights, the recalculation of her sentence was proper and now conforms to the *Sixth Amendment*.

/s/ William G. Young

DISTRICT JUDGE

**Sacramento County Sheriff Department  
Center for Corrections Alternative Programs**

**Programs and Services**

The Sacramento Sheriff Department's (SSD) Center for Corrections Alternative Programs (CCAP) is a collaboration of agencies providing services for those in the judicial system in Sacramento County. Initially there are three organizations incorporated into CCAP; SSD re-entry program for sentenced inmates, Mentally Ill Offenders Crime Reduction Act (MIOCR) treatment program (MIOT), and Federal Probation's Sanction program.

Currently these programs are housed at 4343 Williamsborough, Sacramento, CA as a part of the SSD's Work Release Division. A SSD sergeant will be directing and overseeing all of the programs at the facility. Offenders or probationers at the facility are under the authority of law enforcement or probation at all times. Offenders will participate in community restoration projects and are supervised by SSD. All offenders are assigned rehabilitation specialists who will work with them to determine the level of individual programming based on his/her needs. All offenders will be integrated into all programs offered through the CCAP consortium.

The groups and classes available for individuals include job development/readiness, life skills, alcohol and other drugs education, accountability and re-education, parent education, family reunification, basic math and English, GED, conflict management, relapse prevention and process groups. A brief synopsis of each component follows.

**Component Descriptions**

**Job development/readiness/retention:**

Sacramento Employment Training Agency (SETA) will provide in-kind services of one job developer for 8 hours weekly. The job developer will provide an overview of what is available to ex-offenders and the services offered by SETA's One Stop Career Centers. He or she will assist the offender in job search and job placement. He or she will also assist the offender in determining vocational training available and support services offered ex-offenders. The offender will be issued SMARTWARE cards that give him/her access to receive services that assist in job search and placement in any of the One Stop Career Centers in the Sacramento County area. In addition, Elk Grove Adult and Community Education (EGACE) will provide classes in Job Readiness/Retention for the offender that provides him/her with interpersonal, job seeking and pre-employment strategies and skills to assist in job placement or job enhancement.

**Life skills for offenders in alternative programs**

The offender addresses behaviors upon release from incarceration. The emphasis is on the difference in living skills for an offender while in a correctional facility verse while at home with the family and community. The offender is given direction on how to complete probation successfully and to develop healthy lifestyle choices and practices upon reentering the community.

### **Alcohol and Other Drugs education**

The offender is provided with the bio/psycho/social ramifications of chemical dependency and addiction. The Framework for Recovery program is also incorporated into the curriculum to enable the offender to re-program his/her thinking from jail house and drug abuse mentality to one of sobriety and a mainstream lifestyle. Group participation and group processing supports the offender in awareness of his/her self image and thought processes, and how these relate to consequences in his/her life. The offender is given tools and strategies to assist in his/her chemical dependency recovery

### **Accountability reeducation**

The program's objective is to reeducate the offender to utilize equality and non-violence in their communication styles in the home, workplace, and social situations. The offender is provided with information to learn to become accountable for his/her actions and behaviors. The offender continually practices changing communication in a cycle of destruction exercise to a cycle of assertion in his/her everyday life.

### **Parent education**

This course presents valuable information on effective parenting. The offender receives instruction and tools for a variety of disciplining skills. The students are given instruction and exercises for improving his/her self-esteem and his/her children's self-esteem. Offenders practice behaviors that improve communication with his/her children.

### **Family reunification**

This component reeducates the offender on the importance of the entire family unit and how the absence of a parent can cause significant harm to a child. It explains the intricate dynamics of a family and how to successfully reunify with his/her family after incarceration. A model of family group decision making will be incorporated into this component.

### **Vocational training**

Currently, Sacramento City Unified District offers a variety of vocational training courses and programs. CCAP offender's who are qualified to participate in these programs will be offered training to assist them in creating a career path for their future. SETA will also provide training to qualifying offenders in other fields e.g. Truck Driving School, Construction Apprenticeship Program, Cosmetology and On the Job Training (OJT) programs.

### **Relapse prevention**

This class provides the offender with the process of relapse for alcohol and drug dependency so that he/she can prevent relapse when integrated back into society. The offender is given the opportunity to address their deep rooted emotional and behavioral issues that inevitably lead them back to a path of destruction that they find familiar. The purpose of this class is to change that behavior and use new tools to keep from relapsing.

### **Community restoration projects**

Offenders will participate in the Sheriff's Department's community restoration project. This project is intended to serve as restitution to the community by the offender and aides in the revitalization of the community. The Sheriff's Department will coordinate with the local faith-based and non-profit organizations to identify individuals and groups e.g. seniors and disabled persons who need labor intensive services. The offenders will be supervised by a Sheriff's deputy.

**GED/English and math skills**

This course provides the offender assistance in remedial math and English skills. The offender who needs to obtain a GED will be offered instruction and testing with possible distance learning models for video- and/or on-line-based instruction.

**Survivor impact**

This component provides a forum to offenders to listen to victims and survivors of alcohol and other drugs abuse and violent offenses. After hearing the presentation, the offenders process what he/she heard and how it relates to the consequences of his/her destructive behavior and how that behavior impacts his/her family, friends and the community as a whole.

## Center For Corrections Alternative Programs

### **Purpose of Program:**

CCAP is an intensive, highly-structured, 90 day out-of-custody remedial correctional program. The program combines elements of personal accountability, treatment intervention, job skills development, education, and community service. While placed in the CCAP program, the offenders will be on home detention (electronic monitoring mandatory). CCAP will serve as a mid-level intermediate sanction alternative for offenders who have violated conditions of community supervision.

### **Federal Offender Eligibility:**

- \* Has committed repeated technical violations of supervision, such as violations of reporting or substance abuse treatment requirements, or minor new law violations and prior interventions have been ineffective.
- \* Does not pose an immediate risk of harm to himself/herself or any other person.
- \* Is not a registered sex offender (290 PC) or arsonist (457.1PC).
  - \* *Is not an active validated gang member*
- \* Has some combination of family, employment, residential, business, or other ties to the community that should be strengthened and would be adversely impacted by incarceration, or placement in an RRC/CCC outside the area.
- \* Is somewhat responsive to probation officer directions and willing to abide by the rules and requirements of the CCAP.
- \* Resides in the greater Sacramento area.
- \* Must sign a Release of Information form that conforms to the requirements of HPPA and authorizes the probation office, the CCAP program and service providers to exchange information relevant to the offender's participation.

### **Offender's Schedule/Participation:**

CCAP is open Monday through Thursday 9am to 9pm. Friday schedule is from 9am to 6pm. Saturday is from 9am to 1pm. Each offender will have an individualized schedule developed for them based on their work schedule as well as their treatment and education and structure needs.

### **Condition For CCAP**

The defendant shall participate in and complete the Center for Corrections Alternative Programs (CCAP) for ninety (90) days, to commence as directed by the probation officer, including up to 100 hours of community service, and shall pay costs as determined by the program administrator up to a maximum of \$25 per day. The defendant shall follow the rules and regulations of the CCAP.

While placed in the CCAP program, the defendant shall comply with the conditions of home detention. The defendant will remain at his/her place of residence except for employment, CCAP programs and other activities approved in advance by the defendant's probation officer. The defendant will maintain telephone service at his/her place of residence without an answering device, call forwarding, a modem, caller ID, call waiting, or a cordless telephone for the above period. The defendant shall wear an electronic monitoring device and follow electronic monitoring procedures as specified by the probation officer. The defendant shall pay the cost of electronic monitoring as determined by the probation officer.