BLAKELY-CUNNINGHAM AFTER *BLACK II-SANDOVAL*

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This memo, prepared after consultation among the appellate projects and adapted in parts from a draft by the First District Appellate Project, analyzes the California Supreme Court's July 19, 2007, decisions in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), and *People v. Sandoval* (2007) 41 Cal.4th 825. It surveys *Apprendi-Blakely-Cunningham*[1] issues after those decisions and discusses procedures available at various stages of the process.

I. ISSUES – RESOLVED AND UNRESOLVED

We identify here the issues that are decided by *Black II* and *Sandoval* and also some of those left open for purposes of the California courts after those decisions. We also discuss the possibility of federal relief on various grounds.

A. FORFEITURE/WAIVER

In *Black II-Sandoval*, the California Supreme Court squarely rejects the Attorney General's forfeiture/waiver arguments based on defense counsel's failure to assert the claims at sentencing, if at that time the applicable law was unforeseeable or in doubt. (*People v. Black*, *supra*, 41 Cal.4th 799, 810-812; *People v. Sandoval*, *supra*, 41 Cal.4th 825, 837, fn. 4.) In *Black II* sentencing occurred before *Blakely*, and in *Sandoval* it was in the interval between *Black I*[2] and *Cunningham*. In each instance, raising an *Apprendi*-type claim would have been futile in light of California law at the time. The court has not yet addressed whether forfeiture/waiver might apply to sentencing hearings in the window between *Blakely* and *Black I*. See section II-A, *post*, on procedures available to assert the *Black II-Sandoval* forfeiture rulings in pending cases.

B. SINGLE VALID FACTOR

An extremely consequential aspect of these decisions is the holding that there is no constitutional violation so long as the sentencing court relied on at least one "valid"

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[1] *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Blakely v. Washington* (2004) 542 U.S. 296; *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856].

[2] *People v. Black* (2005) 35 Cal.4th 1238 (finding California DSL conforms with *Blakely*; later disapproved in *Cunningham*).

aggravating factor – one that was either *Blakely*-compliant (jury finding or waiver, or admission) or *Blakely*-exempt (recidivist exception). A single "valid" factor makes the defendant eligible for an upper term and therefore satisfies *Blakely*, even if the judge also cited "invalid" factors that were neither compliant nor exempt. (*People v. Black*, *supra*, 41 Cal.4th 799, 810-816.) *Black II* does not treat this as a question of harmless error: it concludes that there is no constitutional error at all if there is at least one "valid" factor. In such a situation the reviewing court's inquiry ends, and it does not reach the question whether the sentencing court would have imposed the same term if it had considered only "valid" factors.

It is disputable whether *Black II* reads *Blakely-Cunningham* correctly, and we expect that a certiorari petition will be filed in *Black II*, challenging the "single factor" rationale. Until that is resolved, counsel should preserve the issue in cases where the court relied on mixed "valid" and "invalid" factors, by arguing there was constitutional error and applying a prejudice analysis. Since *Black II* is binding on California courts, that argument should be made succinctly in both the Court of Appeal and a petition for review.

C. SCOPE OF THE PRIOR CONVICTION EXCEPTION

Black II addresses aspects of the "prior conviction" exception to *Apprendi-Blakely-Cunningham*, based on *Almendarez-Torres v. United States* (1998) 523 U.S. 224. *Almendarez-Torres* held a statute imposing an enhanced term for returning to the United States without permission after a deportation "subsequent to a conviction for commission of an aggravated felony" is a penalty provision, not a separate crime, and thus does not have to be charged in the indictment. It found the statute is not unconstitutional for treating such a provision as a penalty rather than an element, subject to indictment and jury trial: recidivism has long been a traditional sentencing consideration.[3] While expressing reservations about that decision, *Apprendi* did not renounce *Almendarez-Torres* and concluded that, "*Other 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." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, emphasis added.) The court has reiterated that exception in its later holdings.

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[3]The court did caution: "Petitioner makes no separate, subsidiary, standard of proof claims with respect to his sentencing, perhaps because he admitted his recidivism . . . . Accordingly, we express no view on whether some heightened standard of proof might apply to sentencing determinations which bear significantly on the severity of sentence." (*Almendarez-Torres v. United States*, *supra*, 523 U.S. at pp. 247-248.) *Black II* finds preponderance to be an appropriate standard. (*People v. Black*, *supra*, 41 Cal.4th 799, 820, fn. 9.)

1. NUMEROUS OR INCREASINGLY SERIOUS PRIORS

Black II holds that *Apprendi-Blakely-Cunningham* rights do not apply to the aggravating factor of "numerous" or "increasingly serious" prior convictions (Cal. Rules of Court, rule 4.421(b)(2)). (*People v. Black*, *supra*, 41 Cal.4th 799, 818-820.) It gives a broad reading to the *Almendarez-Torres* exception: "As we recognized in *McGee*,[4] numerous decisions from other jurisdictions have interpreted the *Almendarez-Torres* exception to include not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Black II*, at p. 819.)

Although *Black II* will preclude a lower court from reconsidering the numerous/increasingly seriousness convictions exception, there are prospects for federal relief. (See section 3, below.) The issue can be briefed summarily and then raised again in a petition for review, for federal exhaustion purposes.

2. OTHER RECIDIVIST FACTORS

Other recidivist factors – including parole/probation status or performance and prior prison term[5] – remain an open question. They are at issue in several briefed lead cases[6] and in numerous grant and hold cases. The Courts of Appeal have split on the question whether these factors come within the *Almendarez-Torres* exception. Some courts have found they do not, because they require the determination of additional facts beyond the bare fact of a prior conviction. (E.g., *People v. Govan* (2007) 150 Cal.App.4th 1015, review granted July 18, 2007 (S153330) [probation status and performance], and *People v. Guess* (2007) 150 Cal.App.4th 148, review granted June 27, 2007 (S152877); **caution**: **these cases are not citable** [rules 8.1110(e)(1), 8.1115(a)].) Other courts have held to the contrary. (E.g., *People v. Velasquez* 152 Cal.App.4th 1503, 1515, and *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223 [prior prison term];

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[4]*People v. McGee* (2006) 38 Cal.4th 682 (defendant not entitled to jury determination of whether an out-of-state prior qualifies as a serious felony for purposes of sentence enhancement).

[5]Rule 4.421(b)(4): "The defendant was on probation or parole when the crime was committed." Rule 4.421(b)(5): "The defendant's prior performance on probation or parole was unsatisfactory." Rule 4.421(b)(3): "The defendant has served a prior prison term."

[6]*People v. Hernandez*, S148974, *People v. Pardo*, S148914, and *People v. Towne*, S125677. The briefs in those cases are available on the FDAP website at http://www.fdap.org/blakely4.shtml.

People v. Yim (2007) 152 Cal.App.4th 366, 369 [parole status and performance]; *People v. Morton* (2007) 152 Cal.App.4th 323, 336-337 [various].)

Counsel should brief in full the recidivist factors not resolved by *Black II*. There are prospects for a favorable state holding, as well as federal relief (see following section). A petition for review is necessary to preserve the issue for federal review.

3. FEDERALIZING RECIDIVIST ISSUES

The factors of numerous/increasingly seriousness convictions, parole/probation status or performance, and prior prison term remain potentially viable federal issues and should be preserved. The United States Supreme Court has read the prior conviction exception as a "narrow" one. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490; see *Shepard v. United States* (2005) 544 U.S. 13, 16 [to avoid *Apprendi-Jones*[7] problems arising from judicial fact-finding, under Armed Career Criminal Act, which imposes penalties for firearm possession if defendant has specified priors, determination of nature of priors is "generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"].) *Cunningham* itself declined to draw a distinction between offense-related aggravating circumstances (rule 4.421(a)) and offender-related ones, such as recidivism (rule 4.421(b)). (*Cunningham v. California*, *supra*, 127 S.Ct. 856, 869, fn. 14.)

D. CONSECUTIVE SENTENCES

As it had in *Black I*, the California Supreme Court in *Black II* holds the determination of any facts surrounding the discretionary decision to impose consecutive rather than concurrent terms is not subject to *Blakely-Cunningham*. It concludes that *Cunningham* did not undermine *Black I*'s analysis of the consecutive sentencing issue. (*People v. Black*, *supra*, 41 Cal.4th 799, 820-823.) There is no statutory presumption in favor of concurrent sentencing, nor is there a requirement that the court make particular factual findings as a precondition to a consecutive term. (*Id.* at p. 822.)

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[7] *Jones v. United States* (2000) 526 U.S. 227 (to avoid serious questions of constitutionality, federal car jacking statute read as defining three distinct offenses requiring charges in indictment and jury findings, rather than a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from those requirements).

E. PREJUDICE ANALYSIS UNDER *SANDOVAL*

Counsel should pay close attention to *Sandoval*'s prejudice test, which is different from and less favorable than that which most appellate courts have employed. As noted above, under *Black II* an appellate court will reach the question of prejudice only if all of the sentencing factors were "invalid." In such cases, the reviewing court must apply the *Chapman*[8] standard to each of the cited aggravating factors and remand only if the error was prejudicial as to every cited factor. (*People v. Sandoval*, *supra*, 41 Cal.4th 825, 838-839.) Thus, "if a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable- doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless," even if the error was prejudicial as to every other factor. (*Id*. at p. 839.)

Whether *Sandoval* correctly reads *Blakely-Cunningham* is subject to question, and at this point counsel may preserve the issue, arguing the correct test is whether the appellate court can say beyond a reasonable doubt the same sentence would have been imposed in the absence of the constitutional error.

Sandoval itself finds prejudicial error as to each factor the trial court cited. (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 841-843.) Its reasoning can be used in other contexts. For example, it applies the analysis of *Neder v. United States* (1999) 527 U.S. 1, 17, which held that omitted instruction on an element of the crime was harmless "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error" (*Sandoval*, at p. 838); this is a high standard for the state to meet and leaves it open to argue prejudice in cases with a lesser showing of harmlessness. *Sandoval* also recognizes that doubt may arise because the parties did not view aggravating facts as a matter for trial adjudication: "[A] reviewing court cannot always be confident that the factual record would have been the same had aggravating circumstances been charged and tried to the jury." (*Id.* at p. 840.) Finally, *Sandoval* notes many sentencing factors tend to employ imprecise or subjective criteria (e.g., "particularly vulnerable," "large" quantity of contraband, "great monetary value," etc.); this may leave room for doubt whether jurors would necessarily have found the factor true. (*Ibid.*)

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[8] *Chapman v. California* (1967) 386 U.S. 18, 24 (if reviewing court finds federal constitutional error, it must reverse unless convinced beyond a reasonable doubt the error did not contribute to the outcome).

F. *SANDOVAL* REMEDY

For the cases that require remand, *Sandoval* follows the example of *Booker v. United States* (2005) 543 U.S. 220 and adopts a system making sentencing factors discretionary rather mandatory. The *Sandoval* remedy is modeled on the amendments to the Determinate Sentencing Law enacted in SB 40 and related amendments to the Rules of Court on sentencing.[9] (*People v. Sandoval*, *supra*, 41 Cal.4th 825, 846-847.) Under that system, the trial court may in its discretion impose the lower, middle, or upper term upon a finding of guilty. "The trial court will be required to specify reasons for its sentencing decision, but will not be required to cite 'facts' that support its decision or to weigh aggravating and mitigating circumstances." (*Ibid*.) A statement of reasons is now required even if the middle term is selected. The reasons, however, no longer must "include a concise statement of the ultimate facts that the trial court deemed to constitute circumstances in aggravation or mitigation." The trial court's sentencing decision will be subject to review for abuse of discretion. (*Id*. at p. 847.)

1. *CUNNINGHAM* CHALLENGE TO *SANDOVAL* REMEDY AND SB 40

It is possible to argue that the *Sandoval* remedy and SB 40 fail to cure the constitutional defect found in *Cunningham* and that the reformed/amended sentencing regimen still allows sentencing on the basis of impermissible fact-finding by the court under a preponderance standard rather than by a jury beyond a reasonable doubt. The argument should distinguish the *Sandoval* remedy or SB 40 from the system imposed by the United States Supreme Court in *Booker*, *supra*, for the federal sentencing guidelines.

The issue may be raised in pending appeals requiring resentencing and also in cases where the defendant was sentenced for the first time under one or the other of those revisions to the DSL. If resentencing is required, federal review would be premature until that occurs and the subsequent state appellate process is over, because the case is not yet final.

2. DUE PROCESS/EX POST FACTO CHALLENGE TO RETROACTIVE APPLICATION OF THE REVISED SENTENCING STANDARDS

Sandoval rejects the argument that applying the reformed DSL to cases in which the criminal act occurred before the date of reformation (ultimately, July 19, 2007) would

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[9]Senate Bill 40, Stats. 2007, ch. 3, amending Penal Code section 1170, subdivisions (b) and (c), among other things. It became effective March 30, 2007. Related sentencing rules 4.405 through 4.452 were amended effective May 23, 2007.

violate the principles of due process akin to the prohibition against ex post facto laws.[10] The argument was that, in comparison with the law at the time of the crime, the revised scheme would impermissibly make it easier for the court to impose an upper term, by eliminating the presumptive middle term and the need to find factors in aggravation and reducing the burden of proof for imposing the upper term from an unconstitutionally low preponderance standard to nothing, and would increase the potential punishment for the bare offense alone from the middle to the upper term.[11] *Sandoval* finds the revised system does not substantially disadvantage a defendant in comparison with the former one. It also notes the due process principles governing retroactive application of judicial decisions are different from ex post facto prohibitions, which apply to legislative enactments. (*People v. Sandoval*, *supra*, 41 Cal.4th 825, 853-857.)

If a trial court imposes sentence on a defendant under SB 40 for acts occurring before the effective date of the statute (March 30, 2007), ex post facto issues based on the same grounds as the due process objections to *Sandoval* would arise.[12]

The United States Supreme Court did not mention due process/ex post facto considerations when it changed the sentencing guidelines in *Booker*. The issue appears open for federal review, although as noted in *Sandoval* some lower federal courts have rejected a due process/ex post facto argument. (See *People v. Sandoval*, *supra*, 41 Cal.4th at pp. 856-857.) Ideally, from a practical and psychological perspective, such an argument should distinguish *Booker* from *Sandoval*, so that the federal court would not need to find the decision in *Booker* violative of due process in order to accept the argument.

A challenge to application of the revised DSL to a criminal act occurring before the revision – *Sandoval* on due process grounds and/or SB 40 on ex post facto grounds – can be raised in appeals requiring resentencing and also in cases where the defendant was sentenced for the <u>first</u> time under one or the other revision. As with the preceding

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[10]E.g., *Miller v. Florida* (1987) 482 U.S. 423; *Marks v. United States* (1977) 430 U.S. 188, 191; *Bouie v. Columbia* (1964) 378 U.S. 347; *People v. Morante* (1999) 20 Cal.4th 403, 431-432; *People v. King* (1993) 5 Cal. 4th 59, 80.

[11]ADI addressed this issue extensively in the opening and reply briefs in *People v. Pardo*, S148914, which at this point remains in the Supreme Court; those briefs and others are available on the FDAP website at http://www.fdap.org/blakely4.shtml.

[12]A statute is presumptively prospective only. (Pen. Code, § 3: "No part of [the Penal Code] is retroactive, unless expressly so declared.") *Sandoval* notes some doubt on the retroactivity of SB 40 but finds it unnecessary to decide the question. (*People v. Sandoval*, *supra*, 41 Cal.4th at pp. 845-846.)

Cunningham-based argument, if resentencing is required, federal review would be premature until that occurs and the subsequent state appellate process is over, because the case is not yet final.

G. OTHER POSSIBLE ISSUES RAISED BY *BLACK II* AND *SANDOVAL*

Black II does not address Penal Code section 654 issues. Section 654 requires specific factual determinations as to the relationship between offenses and arguably is subject to *Blakely-Cunningham*. (Cf. pre-*Blakely* cases of *People v. Solis* (2001) 90 Cal. App. 4th 1002, 1021-1022 [*Apprendi* does not apply]; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 269-271 [same], 272-282, dis. opinion. of Johnson, J. [disagreeing].)

Similar arguments may be made in such fact-dependent situations as the imposition of full consecutive sentences for certain sex offenses under Penal Code section 667.6 (see briefing in *People v. Mvuemba*, S149247[13]) and consecutive sentences under the Three Strikes Law (Pen. Code, §§ 667, subd. (c)(6) & (7), 1170.12, subd. (a)(6) & (7)). In appropriate cases counsel should consider raising these issues.

Another argument might be, if a court imposed the middle term under Penal Code section 1170, subdivision (b) before *Sandoval* or SB 40, that the court would not have been aware it had discretion to impose a lower term in the absence of mitigating factors that outweighed aggravating factors and the case should be remanded to allow the trial court to exercise this discretion.

The projects will keep panel attorneys informed of any developments on these or other issues and provide sample arguments as they are briefed.

II. PROCEDURES

A. CASES IN COURT OF APPEAL

If a *Blakely-Cunningham* issue is not foreclosed for state purposes under *Black II-Sandoval*, it should be briefed fully. If it is foreclosed in state court, but is still potentially viable in federal court, it should be briefed in summary form – normally by short boilerplate arguments, which we expect to be available on the project websites, supplemented by analysis relevant to the particular case; it should acknowledge the binding effect of *Black II-Sandoval* and explicitly state the intent is to preserve the issue for federal purposes. If an issue controlled by *Black II-Sandoval* has little prospect of being viewed differently by the federal courts, counsel might consider not pursuing it.

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[13]See briefs at http://www.fdap.org/blakely4.shtml.

Whether full or summary, the briefing must be sufficient to satisfy the needs of exhaustion. (This topic is explored in detail in the ADI Criminal Appellate Practice Manual,[14] chapter 5, "Effective Written Advocacy: Briefing," at §5.42 et seq., and chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," §9.66 et seq.) As always, *a petition for review is required* to preserve a federal issue; an abbreviated exhaustion petition (rule 8.508) may be used if that is the only purpose for the petition.

To the extent *Black II-Sandoval* is favorable on a given point, such as forfeiture, it may be asserted preemptively or responsively, in an opening or supplemental opening brief or in a reply or supplemental reply brief, depending on the issue and stage of the case. (Some courts may permit supplemental briefing to be in letter form; check with us if you have questions about content or form.) If the Court of Appeal has resolved such an issue unfavorably and the decision is not yet final as to that court,[15] a petition for rehearing would be in order.[16] If the case is final as to the Court of Appeal but the Supreme Court still has jurisdiction to grant review,[17] a petition for review would be possible.[18]

B. CASES CURRENTLY PENDING IN CALIFORNIA SUPREME COURT

After *Cunningham* the California Supreme Court granted review in numerous cases involving related issues, most on a grant and hold basis (rule 8.512(d)(2)). *Black II* and *Sandoval* became final 30 days after their filing on July 19, 2007. (Rule 8.532(b)(1).) If it follows its usual practice, the court will soon begin disposing of the grant and hold cases resolved by *Black II-Sandoval.*[19]

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[14]http://www.adi-sandiego.com/manual.html.

[15]Finality is governed by rule 8.264(b)(1). Most decisions are final in 30 days.

[16]Petitions for rehearing are due in 15 days. (Rule 8.268(b)(1).) For good cause, before the decision is final, the presiding justice may relieve a party from failure to file a timely petition. (Rule 8.268(b)(4).)

[17]The Supreme Court's authority to grant review is governed by rule 8.512(b)(1) (petition for review) and (c)(1) (court's own motion).

[18]The time for filing a petition for review is specified in rule 8.500(e)(1). For good cause, the Chief Justice may relieve a party from failure to file a timely petition if the court still has jurisdiction to grant review on its own motion. (Rule 8.500(e)(2).)

[19]Unless the court so orders, there does not seem to be any reason for counsel to submit additional pleadings to the Supreme Court discussing *Black II-Sandoval*. Check with ADI if your case poses a special situation.

If the Court of Appeal reached a disposition consistent with *Black II-Sandoval,* the Supreme Court may simply dismiss review under rule 8.528(b), thereby letting the Court of Appeal decision stand. In such a case, the Court of Appeal decision is final immediately upon that court's receipt of the dismissal order (rules 8.528(b)(2), 8.532(b)(2)(B)).

If further Court of Appeal proceedings are needed to conform the decision to *Black II-Sandoval*, the Supreme Court may remand or transfer the case with instructions. (Rule 8.528(c) or (d).) In such a situation, supplemental briefing, limited to matters arising after the previous Court of Appeal decision, is possible.[20] *Once the Court of Appeal has reached a decision, counsel must again seek review in the California Supreme Court from that decision, in order to ensure federal remedies are preserved.* An abbreviated exhaustion petition under rule 8.508 may be used if that is the sole purpose of review.

If other briefed lead cases or grant and hold cases present issues not resolved by *Black II-Sandoval*,[21] the Supreme Court may order briefing and/or argument in some or all of them or in a later review-granted case and continue to hold other cases that pose those issues.

C. POST-APPEAL CASES

The handling of cases that are already final for purposes of direct appeal[22] will depend on what case is considered the governing precedent and when the current case became final, as well as what specific issues the case presents. *Counsel should consult the assigned ADI staff attorney before taking any post-appeal steps.*

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[20]Any party may file a supplemental brief within 15 days of the Supreme Court's order; the opposing party's response is due within 15 days of the initial supplemental brief. (Rule 8.200(b)(1).) The Court of Appeal may order a different schedule.

[21]E.g., parole/probation status or performance – *People v. Hernandez*, S148974, *People v. Pardo*, S148914, and *People v. Towne*, S125677; Penal Code section 654 and full strength consecutive sentences under Penal Code section 667.6 – *People v. Mvuemba*, S149247; guilty plea – *People v. French*, S148845. The briefing in these cases is available on the FDAP website at http://www.fdap.org/blakely4.shtml.

[22]Direct review concludes when a certiorari petition to the United States Supreme Court is denied or the time for filing such a petition expires. A certiorari petition in the United States Supreme Court is due within 90 days after the day the California Supreme Court denies or dismisses review, or decides the case, or denies rehearing after a decision. (U.S. Supreme Ct. Rules, rule 13.)

In general, *Teague v. Lane* (1989) 489 U.S. 288 and *Griffith v. Kentucky* (1987) 479 U.S. 314, 322, provide that a decision changing or announcing for the first time a procedural rule of law is applicable to cases not yet final for purposes of appellate review when the new decision was filed. Collateral relief (habeas corpus) is not available in cases already final at that time. Exceptions to that bar include substantive changes and "watershed" procedural rules, fundamental to the integrity of the fact-finding process; these are fully retroactive and may be the basis for collateral relief. (See *Bousley v. United* States (1998) 523 U.S. 614; *Michigan v. Payne* (1973) 412 U.S. 47, 53, fn. 6; *Ashe v. Swenson* (1970) 397 U.S. 436, 437, fn. 1.) Cases merely applying pre-existing authority do not involve "new law" at all and are retroactive to the date of the earlier decision that announced the rule. (E.g., *Yates v. Aiken* (1988) 484 U.S. 211; see *Saffle v. Parks* (1990) 494 U.S. 484, 489-491.)

For further discussion of the general rules regarding retroactivity, see ADI's article on taking advantage of changes in the law[23] and FDAP's memo on challenges to upper term sentences after *Cunningham* (Jan. 23, 2007).[24]

1. GOVERNING PRECEDENT

Identifying the governing precedent is somewhat tricky in this context. It would seem *Cunningham* is a straightforward application of prior Supreme Court precedents; it would be difficult to identify any "new rule of law" announced in it. Nevertheless, *In re Gomez* (Aug. 7, 2007, B197980) ___Cal.App.4th___ holds *Cunningham* announced new law, because there had been "doubt" about *Blakely*'s applicability to the California DSL, and denies habeas corpus on the ground the case was final before that decision. If *Cunningham* is the operative precedent, collateral relief would be available only for cases final on or after January 22, 2007, the date of that decision. (See following section for procedures to avoid any preclusive effect from *Gomez*.)

Assuming *Cunningham* is merely an application of *Blakely* and *Blakely* announced a "new" law, the rule of *Blakely* and *Cunningham* would apply to any case not yet final on direct appeal on June 24, 2004, the date *Blakely* was decided.

An argument can be made that *Blakely* itself was merely a straightforward application of *Apprendi* – a position bolstered by *Cunningham*'s repeated references to *Apprendi*. If *Apprendi* is the governing precedent, its rule (and those of *Blakely-Cunningham*) would apply to cases that became final after *Apprendi* was decided on June 26, 2000.

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[23] http://www.adi-sandiego.com/articles.html

[24] http://www.fdap.org/CunninghamDecided1-23-07.shtml#retro

An argument might be made that the rule of *Apprendi* or *Blakely* is a "watershed" one that is fully retroactive, without regard to date of finality. Such an argument would have to deal with *Schriro v. Summerlin* (2004) 542 U.S. 348, finding *Ring v. Arizona* (2002) 536 U.S. 584 (a kin of *Apprendi* in the capital sentencing context) not to be a watershed decision, and with lower federal court decisions, as well as *In re Consiglio* (2005) 128 Cal.App.4th 511 and *People v. Amons* (2005) 125 Cal.App.4th 855, rejecting such a position as to *Blakely*.

2. PROCEDURES IN STATE COURT

If the case is one in which relief is directly barred under *Black II* or *Sandoval*, it would seem pointless to seek habeas corpus relief in the lower state courts. For purposes of preserving the issue for federal court review, appellate counsel should consider filing a habeas corpus petition in the California Supreme Court, asking it to revisit those decisions.

If the issues are not barred by *Black II-Sandoval*, the remedy of choice would normally appear to be a habeas corpus petition in the state superior court. Unless and until *Gomez*, *supra*, is depublished, however, or a contrary Court of Appeal case is published, a superior court habeas corpus petition based on *Cunningham* may be futile if the case was final before *Cunningham* was decided on January 22, 2007. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[25] In such a situation, appellate counsel could file a habeas corpus petition or motion to recall the remittitur under rule 8.272(c)(2) in the Court of Appeal, which unlike the superior court has the power to disagree with *Gomez* and find *Blakely* or *Apprendi* to be the governing precedent.

In general, ADI takes the position it is the primary responsibility of trial counsel to handle filings in the superior court. If that is the appropriate remedy, appellate counsel should communicate with trial counsel and monitor the case to make sure something is happening and also may supply available sample arguments. If for some reason trial counsel cannot, will not, or does not take appropriate action, appellate counsel may step in. Compensation to appellate counsel will be recommended for filing a habeas corpus petition in the superior court if required, but counsel must request appointment by that court for further proceedings, such as an evidentiary hearing.

If the initial remedy is in the appellate court, such as a motion to recall the remittitur or habeas corpus in Court of Appeal or Supreme Court, appellate counsel has the presumptive responsibility.

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[25]The doctrine of stare decisis as it applies in California is examined in the ADI Criminal Appellate Practice Manual, *supra*, chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision," §7.5 et seq.

Once again, counsel should consult the assigned ADI staff attorney before acting in a case that is already final.

D. FEDERAL REVIEW

To preserve an issue for federal review – certiorari or habeas corpus – it is necessary to raise it properly in the Court of Appeal and then give the California Supreme Court a chance to resolve it. Federalizing is treated in depth in the ADI Criminal Appellate Practice Manual, *supra*.[26] (Chapter 5, "Effective Written Advocacy: Briefing," at §5.42 et seq., and chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," §9.66 et seq.)

Once a case is final as to the California courts, consideration may be given to seeking a federal remedy. As relevant here, finality usually occurs when the state Supreme Court denies review or dismisses review, or if the court has granted review and decided the case, 30 days after the opinion is filed.[27] (Rule 8.532(b)(1), (2)(A) & (B).) If resentencing is required in any given case, federal review would normally be premature until that occurs and the subsequent state appellate process is over, because the case is not yet final. (See ADI manual, *supra*, chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision," §7.111.)

As discussed above, potential federal issues under *Blakely-Cunningham* include, among other matters, the scope of the *Almendarez-Torres* exception for recidivism-based factors (whether or not resolved in *Black II-Sandoval*), the single valid factor analysis, the test for harmless error, the adequacy of the *Sandoval* remedy under *Blakey-Cunningham*, the propriety of applying the reformed or amended sentencing law retroactively to acts committed before the revisions, and issues not addressed in *Black II-Sandoval*, such as Penal Code section 654 or 667.6 or other fact-related sentencing decisions, or mid-term sentences.

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[26] http://www.adi-sandiego.com/manual.html.

[27] Finality can occur also in other ways, as when the time for filing a petition for review or granting review expires (rules 8.500(e), 8.512(b) & (c)), but in that situation the federal issue will likely be procedurally defaulted for failure to present it to the California Supreme Court. (See 28 U.S.C. § 1257(a) [certiorari jurisdiction]; *O'Sullivan v. Boerckel* (1999) 526 U.S. 838 [federal habeas corpus].)

1. CERTIORARI

The topic of certiorari in the United States Supreme Court is treated in the ADI Criminal Appellate Practice Manual, *supra*, in chapter 7, §7.100 et seq.[28] As stated above, a certiorari petition in the United States Supreme Court is due within 90 days after the California Supreme Court denies or dismisses review, or decides the case,[29] or denies rehearing after a decision. (U.S. Supreme Ct. Rules, rule 13.)

As always, counsel should discuss a certiorari petition with ADI and get the approval of the executive director before filing one. (See ADI manual, *supra*, chapter 1, "The ABC's of Panel Membership: Basic Information for Appointed Counsel," §1.22.) Relevant considerations would be the importance of the federal issue, the suitability of the case as a vehicle for resolving it, the adequacy of federalization in the state court, prejudice, the existence of conflicting lower court decisions, the pendency of other petitions raising the same issue, etc. To conserve resources, whenever appropriate boilerplate arguments should be used.

2. FEDERAL HABEAS CORPUS

Federal habeas corpus review of *Blakely-Cunningham* claims may offer prospects for relief in some cases after *Black II-Sandoval*. Appellate counsel should assess those prospects and advise clients. Any assistance counsel renders in the preparation of federal habeas corpus petitions raising *Blakely-Cunningham* claims must be pro bono, since the state appointment does not extend that far.

A federal habeas corpus petition based on *Blakely-Cunningham* would need to satisfy AEDPA[30] standards. Normally, the petition must be filed within one year of the time the state court decision became final on direct appeal. (28 U.S.C. § 2244(d)(1).) The federal statute of limitations is discussed extensively in the ADI Criminal Appellate

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[28] http://www.adi-sandiego.com/manual.html.

[29] The crucial date for starting the 90-day period is the *filing* of the state high court order or opinion, not its *finality* under state law. However, since the state decision must be final in order for the United States Supreme Court to have jurisdiction, a petition for certiorari filed before the state decision becomes final is premature.

[30] Antiterrorism and Effective Death Penalty Act of 1996. (28 U.S.C. § 2241 et seq.)

Practice Manual, *supra*, chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," §9.4 et seq.[31]

The petition must also meet AEDPA's substantive standards and demonstrate that the state court decision is contrary to, or constitutes an unreasonable application of, clearly established United States Supreme Court authority. (28 U.S.C. § 2254(d); *Williams v. Taylor* (2000) 529 U.S. 362; see also *Bell v. Cone* (2002) 535 U.S. 685. These standards are examined in depth in the ADI manual, *supra*, chapter 9, §9.15 et seq.

[31] http://www.adi-sandiego.com/manual.html.