THE LIFE AND TIMES OF THE CALIFORNIA DETERMINATE SENTENCING SYSTEM: *CUNNINGHAM* AND FAMILY

BY
ELAINE A. ALEXANDER

This memo discusses the implications for California of the historic – or maybe not so historic – decision in *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856], decided January 22, 2007, which held the Determinate Sentencing Law (DSL) violates *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. 296, because it permits imposition of the upper term on the basis of facts not found true by a jury beyond a reasonable doubt.[1] To many it seemed to have wrought a major revolution. Thousands of upper-term sentences were threatened, and the system was facing a tidal wave of potential resentencings, possibly to juries.

In real life, *Cunningham*'s effects so far have been far less dramatic and in fact quite modest. After that decision, the DSL was revised in Senate Bill 40,[2] which made the middle term only one of three choices, rather than the legally presumptive one. That change applies to crimes committed after its effective date of March 30, 2007. For cases in which the criminal act occurred before that date, the California Supreme Court has read *Cunningham* as restrictively as possible, permitting resentencing only in a narrow group of cases. And when resentencing does occur, it will be under the court's retrospective "reformation" of the DSL along the same lines as SB 40. With these changes, judges are permitted to impose the upper term *without* any additional fact-finding. California has patched up the fatal problems with a few bandaids, basically leaving the major features of the DSL intact – and often less favorable to defendants than originally, because they no longer have the protection of a presumptive middle term.

That does not mean everything is exactly the same. It is not. There are still issues left for the future, and many clients whose sentences occurred in the past may have rights and remedies they did not have when the saga began. Lawyers have the responsibility to

---

[1]This memo deals with the substantive aspects of *Cunningham*. Procedural guidance can be found in previous memos, such as "*Blakely-Cunningham* After *Black II-Sandoval*," part II (http://www.adi-sandiego.com/PDFs/Black-Sandoval%20memo%20by%20ADI%20Aug%202007.pdf), and "*Cunningham v. California*," (http://www.adi-sandiego.com/PDFs/Cunningham%20memo%20to%20panel%20-%20Jan%202007.pdf).

[2]Statutes 2007, chapter 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, California Rules of Court, were amended effective May 23, 2007.

sort these things out for clients, give them a realistic idea of what can and cannot be achieved, and then assert and protect the rights they do have.

This memo first surveys the legal landscape and history to help clarify what has gone on. There has been some confusion over that. Just recently, for example, we have seen arguments asserting that *Cunningham* ruled it is unconstitutional to impose the upper term, period. That is a basic misconception. So first it is important to review what the lead cases actually have held. Then we can explore what issues might remain.

The appendix, "The A-B-C's of It All: *Apprendi*, *Blakely*, *Cunningham*, and Kin," is a list and summary of the main cases in the area. The cases listed include the leading United States Supreme Court decisions in the area and their family tree (ancestors and near kin), the holdings of the California Supreme Court and some cases pending there; and some relevant Court of Appeal decisions. This part of the memo touches on the highlights.

I. THE ODYSSEY

For the past seven years and more, the United States Supreme Court has been leading us on a wild journey. Just when we think we have the constitutional sentencing landscape properly mapped out, they set off an earthquake. After climbing out of the rubble, we have to start surveying the legal terrain all over again. And then more seismic activity. If they ever made a movie about it, Indiana Jones would have to star.

A. Days of Relative Tranquility

For decades, states had been going along contentedly with elaborately drawn up sentencing systems. Many were similar in structure to California's Determinate Sentencing Law. Under the DSL, a given crime had a "normal" or presumptive sentence – the middle term. The court was required to impose it unless it found facts justifying the upper or lower term. Such facts were found by the judge at sentencing, using a preponderance of the evidence standard. The judge was required to state reasons for an upper or lower term.

These systems were complex and difficult to understand and apply. Errors inevitably occurred, and many criticized the harshness and fickleness of punishment. But few states seriously thought the systems themselves – their basic *structure* – would be found unconstitutional. Their self-assurance on this matter would not survive the 21st century.

B. Intimations of Things To Come

It all started with *Apprendi*. Well, not really. There had been portents of *Apprendi* and its successors earlier. These cases are listed in the appendix as "ancestors." I will discuss a couple of them here.

1. *Jones*

The closest the Supreme Court had come to hinting at the upheaval to come was *Jones v. United States* (1999) 526 U.S. 227, involving the federal carjacking statute, which prescribed three levels of punishment depending on the degree of harm to the victim. The court interpreted the statute as defining three distinct offenses, with the degree of harm to the victim as an element – not as a single offense, with degree of harm as a sentencing factor affecting the choice of penalty.

The court did so partly out of concern that a contrary interpretation would raise serious questions of constitutionality, because "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Jones v. United States supra*, 526 U.S. at p. 243, fn. 6.) Given that the case was resolved by statutory interpretation, however, *Jones* did not stand for that proposition directly.

2. *Almendarez-Torres*

Almendarez-Torres v. United States (1998) 523 U.S. 224 is undoubtedly the most important ancestor to *Apprendi* because it is still a hot-button case and still the primary exception to *Cunningham*. The defendant pleaded guilty to an indictment charging him with being in the United States after being deported – a crime punishable by no more than two years. In doing so he admitted the earlier deportation had been because of convictions for "aggravated" felonies. He was sentenced for being in the United States after deportation for aggravated felonies – a crime subjecting him to a sentence of up to 20 years. He objected he had not been charged with that crime, but a much lesser one. On appeal the Supreme Court held that imposing a greater sentence based on criminal history does not violate due process. Recidivism is a traditional basis for a increasing a sentence and does not have to charged in order to be a lawful factor in punishment.

Note: Almendarez-Torres had *admitted* the prior convictions, and so did not raise any question concerning the right to a jury trial or the standard of proof. The issue focused on the absence of an indictment charging the greater offense. The Supreme Court made a special point of saying the case did not resolve whether the priors, if

contested, would have to be proved beyond a reasonable doubt. (*Almendarez-Torres v. United States*, *supra*, 523 U.S. at pp. 247-248.)

Nevertheless all subsequent cases, including *Apprendi*, *Blakely*, *Booker*,[3] and *Cunningham*, have said, citing *Almendarez-Torres*, that facts used to increase a sentence, "except for the fact of a prior conviction," must be found by a jury and proved beyond a reasonable doubt. This language seems to treat the fact of a prior conviction as a full "exception" to the rule of those cases. The court has not yet ruled directly on the point, however. Nor has it decided whether the "narrow exception" it identified in *Apprendi*[4] covers recidivist factors related to but extending beyond "the fact of a prior conviction." (See part II-A-2, *post*, for potential issue based on this point.)

C. ***Apprendi***

The first real upheaval came with *Apprendi v. New Jersey*, *supra*, 530 U.S. 466. The defendant pleaded guilty to possession of a firearm for unlawful purpose, which was normally punishable by 5-10 year term. At sentencing the court found by a preponderance that the crime was motivated by racial bias and gave him a sentence of 12 years.

The Supreme Court found this procedure to violate due process, both the right to a jury trial and the principle of *In re Winship* (1970) 397 U.S. 358, holding that every element of a crime must be proved beyond a reasonable doubt. In short, a defendant has a constitutional right to have a *jury* find facts (such as bias) that increase the sentence beyond the normal statutory maximum – and to do so *beyond a reasonable doubt*.

There are exceptions. The defendant can waive a jury trial. Or the defendant can admit the material facts. Another exception is a finding of criminal history within the meaning of *Almendarez-Torres*, which *Apprendi* implicitly criticized but found unnecessary to re-examine.

Although there had been rumblings in earlier cases (notably *Jones*), *Apprendi* seemed to come out of the blue to many courts and observers. It was seen at first as a potentially cataclysmic decision that would threaten established sentencing systems throughout the country. This fear was readily dissolved, however, as federal and state courts began to read *Apprendi* narrowly to mean that sentences imposed after judge fact-finding are invalid only if literally beyond the "statutory maximum" for the crime *generically*. Thus in California the statutory maximum would be the upper term (e.g., *In*

---

[3] *Booker v. United States* (2005) 543 U.S. 220.

[4] *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 490.

re Varnell (2003) 30 Cal.4th 1132, 1141-1142), even though under Penal Code section 1170, subdivision (b) the court had to find facts in aggravation in order to impose the upper term.[5] The practical effect of *Apprendi* was therefore quite confined.

D. ***Blakely***

The complacency that had settled in after *Apprendi* was shattered four years later, in 2004, when the Supreme Court issued *Blakely v. Washington*, *supra*, 542 U.S. 296. Blakely pleaded guilty to kidnaping. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. But the trial court imposed an "exceptional" sentence of 90 months after finding he acted with "deliberate cruelty." The Supreme Court held this was inconsistent with *Apprendi*. The statutory maximum is not the maximum possible for *any* violation of the statute, but rather the maximum for the violation the defendant has been found guilty of, or has admitted. With the usual exceptions, no additional fact-finding can support a sentence higher than that, unless submitted to a jury and found true beyond a reasonable doubt.

No longer was it possible to distinguish or interpret away *Apprendi*'s requirements. In the absence of a waiver or an admission or recidivism within the meaning of *Almendarez-Torres*, a sentence could not be based on facts found by a judge or under a standard of less than beyond a reasonable doubt. In state after state, courts found their sentencing schemes unconstitutional and began to look for ways of modifying them in a way to comport with *Blakely*. California was a temporary exception – we'll get to that in a moment.

E. ***Booker***

The next case chronologically, for our purposes, was *Booker v. United States* (2005) 543 U.S. 220. From hindsight, *Booker* can be described as proof – all in one opinion – that if the Supreme Court can giveth, it can also taketh away. In unrelated cases, Booker and Fanfan were convicted by juries of cocaine offenses. At sentencing the trial court found facts by a preponderance standard that, under the federal Sentencing Guidelines, moved the case into a higher sentence range. Booker received an increased sentence. The judge in Fanfan's case determined *Blakely* prohibited an upward departure, and the Government appealed.

A five-judge majority in *Booker* found the federal sentencing system unconstitutional insofar as it required the judge to make factual findings in order to select an upward departure. This seems straightforward. But then a different five-judge

---

[5] *Black I* held to this position even after *Blakely*. (*People v. Black* (2005) 35 Cal.4th 1238, 1257.) See part I-F, *post*.

majority addressed the question of remedy. All nine justices agreed that it was the *mandatory* nature of the federal sentencing system that created the problems: if a judge were permitted to select an upward departure without making specific findings, there were be no constitutional violation. The majority decided that the solution most consistent with Congress's likely intent, if it had known of the constitutional infirmities of the existing system, would be to "reform" the federal statute to make the Guidelines advisory rather than mandatory. A judge should consult the Guidelines, but is not obligated to find additional facts in order to choose a sentence outside the range calculated under the Guidelines. Sentencing decisions are to be reviewed for reasonableness.

This revised system was to be applied to both Booker and Fanfan on remand and to all other defendants whose cases were not yet final when *Booker* was decided. Neither the majority nor the dissent made any reference whatever to the potential ex post facto/due process problems created by retroactively revising the system to make it easier to select an upward departure.

Booker signaled that *Blakely* was hardly the revolution it had seemed in 2004. Its remedy offered a relatively easy fix – excising a word or section here or there, changing "shall" to "may," making the upper term the presumptive one, and so on. The apparent inevitability of introducing juries into sentencing or invalidating entire determinate sentencing systems no longer loomed. Although it was by no means universal, a number of states followed the *Booker* reformation model. Frankly, it seemed to me that the handwriting was on the wall for California sentencing: the presumption of the middle term would disappear. In a message on "*Blakely* in Real Life,"[6] I warned attorneys not to get their clients' hopes up for widespread reductions to the middle term.

F. ***Black I***

My prediction about the middle term was wrong (for a while): the change to the DSL along *Booker* lines was not to be (yet). Into the mix stepped the California Supreme Court in *Black I* (*People v. Black* (2005) 35 Cal.4th 1238). Addressing *Blakely*'s impact on California sentencing directly for the first time, and declining to take the easy "out" offered by *Booker*, the California Supreme Court upheld California's sentencing system in its entirety. The court said the DSL was more like the reformed federal system after *Booker* than like the Washington system invalidated in *Blakely*. It is not necessary to get into *Black I* much further because, although it held sway in California for more than a year, the decision was not destined for a long shelf life.

---

[6] *Blakely* After *Black*" (2005), pages 6-8. On the ADI website at: http://www.adi-sandiego.com/PDFs/Blakely%20after%20Black.pdf.

G. *Cunningham*

On January 22, 2007, in *Cunningham v. California*, *supra*, 127 S.Ct. 856, the Supreme Court overruled *Black I*, 6-3, and held that the DSL violated *Apprendi-Blakely* because it permitted imposition of the upper term on the basis of judicial fact-finding by a preponderance of the evidence. In direct, occasionally blunt language, the court left little doubt that the result was dictated by its *Apprendi-Blakely* precedents.[7]

H. *Black II* and *Sandoval*

In July 2007 the California Supreme Court responded to *Cunningham* with the second *Black* decision, *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), and the companion case of *People v. Sandoval* (2007) 41 Cal.4th 825. This time the court did not find *Blakely* inapplicable altogether – *Cunningham* foreclosed that – but it nevertheless rendered it as toothless as possible.[8] Part II of this memo discusses ways of challenging a number of the rulings in these cases.

1. Single valid factor

One of the most remarkable aspects of the decisions is the single valid factor test[9] the court announced in *Black II*. Under it, *Blakely* is satisfied as long as the trial court relied on at least one fact in aggravation that meets *Blakely*'s criteria – either the jury found it beyond a reasonable doubt, or the defendant admitted it, or the defendant waived a jury on that point, or the fact relates to a prior criminal record. Citing *People v. Osband* (1996) 13 Cal.4th 622, 728, the court reasoned one such fact makes the defendant *legally eligible* for the upper term, and thereafter the defendant is no longer *entitled* to the middle term sentence. Once a valid factor is established, the trial court is permitted to consider *non-Blakely* factors in deciding whether to impose the upper term. Thus the sentence passes constitutional muster.

---

[7]See "*Cunningham v. California*," (http://www.adi-sandiego.com/PDFs/Cunningham%20memo%20to%20panel%20-%20Jan%202007.pdf). See also ADI amicus curiae letter in *In re Gomez*, S155425, originally 153 Cal.App.4th 1516, review granted October 24, 2007, which argues *Cunningham* was not "new law," but rather applied established precedent, and so may be asserted on habeas corpus.

[8]See ADI analysis of *Black II-Sandoval* at http://www.adi-sandiego.com/PDFs/Black-Sandoval%20memo%20by%20ADI%20Aug%202007.pdf .

[9]See ADI analysis of this test in the separate accompanying memo, "Single Valid Factor Test: A Critique," and a summary of that analysis, *post*, at II-A-1.

This is true even though the appellate court is quite certain the trial court would not have found that aggravating factors outweighed mitigating ones if there had been only the one valid factor in aggravation. Indeed, it is apparently true (although the court does not analyze it this way) even if an upper term based only on the one valid factor would have been an abuse of discretion, as a matter of law.

2. Broad reading of recidivist exception

Another significant ruling in *Black II* is its interpretation of the *Almendarez-Torres* recidivist exception.[10] Addressing the trial court's reliance on the defendant's record of numerous or increasingly serious offenses, the Supreme Court rejects the argument that this factor requires findings beyond the mere "fact" of a prior conviction – namely, their number and seriousness. It held that the recidivist exception extends beyond the existence of the conviction and encompasses other facts determinable by reviewing past criminal records, as well as judgments about those record. Combined with the single valid factor test, the broad reading of the *Almendarez-Torres* exception protects a number of upper term sentences that would otherwise be vulnerable to reversal. If the trial court mentioned the factor of numerous or increasingly serious prior offenses, no matter what else entered into the sentencing decision, under *Black II* that is enough to shield the sentence from *Blakely* error.

3. Consecutive sentences

As it had in *Black I*, the Supreme Court found no constitutional problem with relying on non-*Blakely* compliant factors in imposing a consecutive as opposed to concurrent sentence. 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. Thus the preconditions for applying *Blakely* do not exist.

4. *Sandoval* prejudice test

In *People v. Sandoval*, *supra*, 41 Cal.4th 825, the Supreme Court further curtailed *Blakely*'s impact on California upper term sentences, this time by adopting a highly forgiving test for harmless error.[11] It held that *Blakely*-violative factors in aggravation must be examined as to each invalid factor under the test of *Chapman v. California* (1967) 386 U.S. 18, 24. *Chapman* specifies that federal constitutional error is prejudicial unless the reviewing court finds beyond a reasonable doubt that the error did not affect the outcome. In the area of sentencing, harmless error review generally asks whether the

---

[10]See II-A-2, *post*, for possible challenges to this holding.

[11]See II-A-3, *post*, for possible challenges to this test.

judge would have imposed the same sentence if the error had not occurred. (E.g., *People v. Osband*, *supra*, 13 Cal.4th 622, 728-729.)

But the *Sandoval* test is different: "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." (*People v. Sandoval*, *supra*, 41 Cal.4th 825, 839.) Thus, if a jury would have found one factor true, the overall sentence is valid, even if the error was prejudicial as to every other factor, and even if one can confidently say the sentencing judge would not or could not have imposed the upper term on the basis of the one erroneous but harmless factor.

5. *Sandoval* remedy

Sandoval found every erroneous factor the judge relied on to be prejudicial, and therefore reversal was required. The court then turned to the question how the judge should approach sentencing, since under *Cunningham* it could not be done the same way as the first time. *Sandoval* adopted a *Booker*-like remedy and reformed the DSL to make it discretionary rather than mandatory. The main feature now is that there is no longer a presumption in favor of the middle term. In essence, a defendant convicted of a crime carrying a determinate sentence is automatically eligible for the upper term (or lower term) even if the judge does no additional fact-finding. The judge still must give reasons for the decision (including the middle term) on the record, and that decision is reviewable for abuse of discretion, but the decision-making process no longer requires a recitation of specific aggravating or mitigating facts and a finding of whether one kind outweighs the other.

Sandoval's remedy mirrors the amendments to the DSL the Legislature enacted in SB 40 after *Cunningham*, effective March 30, 2007. Since legislation normally is prospective only (Pen. Code, § 3), *Sandoval* presumably applies to cases where the crime was committed before March 30 of this year, and SB 40 would apply to criminal acts committed afterward.

In adopting its remedy, *Sandoval* (unlike *Booker*) ruled directly on the question of ex post facto/due process considerations. It rejected the defendant's argument that it could not reform the DSL by retroactively modifying the punishment applicable to a given act. The court found, first, the revised system does not substantially disadvantage a defendant in comparison with the former one. Second, the due process principles

applicable to retroactive application of *judicial* decisions are different from, and less exacting than, the ex post facto prohibitions against *legislative* enactments.[12]

II. WHAT'S LEFT

Now we turn to what, after all these twists and turns, is still open to defendants to litigate under *Blakely-Cunningham*.

A. Challenge to *Black II-Sandoval* Resolution of Issues

Black II and *Sandoval* are not necessarily the last word on the issues they resolved, even though they are binding on lower California courts unless overruled. Challenging them by certiorari in the United States Supreme Court is a logical place to start, and federal habeas corpus is another possibility. In lower California courts, these arguments can be made in fairly summary fashion, because those courts are bound by *Black II-Sandoval*. A petition for review is always necessary to preserve an issue for federal review.

A petition for certiorari on behalf of Black has already been filed in the United States Supreme Court, and the court has asked the Attorney General to respond. The petition challenges the California Supreme Court's single valid factor analysis, its interpretation of *Almendarez-Torres*, and the retroactive application of its reformation.

1. Single valid factor

The California Supreme Court's ruling that a single valid factor in aggravation is sufficient to shield an upper term sentence from *Blakely* error altogether is by no means invulnerable, and in good test cases the issue should be raised on certiorari. An analysis with points and authorities is set forth in an accompanying separate memo, "Single Valid Factor Test: A Critique." In summary:

Black II has retrospectively converted California's "weighing" system, which required the balancing of aggravating and mitigating factors, into an "eligibility" system, in which the only function of an aggravating factor would be to create threshold eligibility for an enhanced sentence. The problem is, this system never existed in California. Nowhere in the history of the DSL, including the court's own precedents, is there support for *Black II*'s assertion that a single valid aggravating factor necessarily made a defendant legally eligible for the upper term. Under the former DSL, before

---

[12]See analysis in the separate accompanying memo, "Due Process / Ex Post Facto Issues in *Sandoval* Remedy," summarized at II-A-4, *post*.

imposing the upper term the trial court was obliged by law to find that the factors in aggravation outweighed those in mitigation; the defendant did not become legally eligible for the upper term until that finding was made. Further, this finding had to be reasonable: in some cases, it would be an abuse of discretion to impose the upper term, even with an aggravating factor. It does not make sense to conclude, as *Black II* apparently does, that a defendant was *legally eligible* for an upper term sentence when *as a matter of law* it could not be imposed.

While normally a state Supreme Court's interpretation of state law is binding on the United States Supreme Court, that principle does not permit a state court to rewrite the legal past into something that never existed, nor to adopt an internally incoherent theory. *Black II* does both. (See cases cited and expanded argument in separately posted analysis, "Single Valid Factor Test: A Critique," *supra*, accompanying this memo.) *Black II*'s single valid factor test is thus a proper and potentially strong subject for certiorari.

A good test case would be one in which only a weak factor or factors in aggravation remain after *Blakely*-violative ones are excised, and there are strong factors in mitigation. In such a case, it is obvious the trial court might have exercised its discretion differently without the invalid factors. Best would be a case in which imposition of the upper term on the basis of only one valid factor would have been impermissible as a matter of law.

2. ***Almendarez-Torres* prior convictions exception**

Another possible challenge to *Black II* would be its interpretation of *Almendarez-Torres*. But even before that one might consider a challenge to *Almendarez-Torres* itself. That case was decided by a 5-4 vote, and one of the majority, Justice Thomas, has since changed his mind. Further, the four who dissented are still on the court – Justices Scalia, Stevens, Souter, and Ginsburg. Theoretically that would make a majority to overrule *Almendarez-Torres* altogether. Nevertheless, Justice Stevens, at least, has expressed unwillingness to re-examine it. Last year, in an order denying certiorari in cases raising the issue, he said, that although he believed *Almendarez-Torres* was wrongly decided, the denial of a jury trial on the narrow issue of priors will seldom prejudice the accused, and courts have relied on the case repeatedly. "Accordingly, there is no special justification for overruling *Almendarez-Torres* . . . . The doctrine of stare decisis provides a sufficient basis for the denial of certiorari in these cases." (*Rangel-Reyes v. United States* (2006) __ U.S. __ [126 S.Ct. 2873].)

Assuming defendants have to live with some kind of recidivist exception, *Black II*'s interpretation of its scope is broader than the language the United States Supreme. *Black II* found the exception covers, not just the "fact of a prior conviction," but other, related decisions regarding priors. To be fair, this is the interpretation a number of lower federal courts have also given to the recidivist factor.

However, it is arguable the United States Supreme Court takes a different view. In *Apprendi*, the court characterized *Almendarez-Torres* as "a narrow exception" to its rule. (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 490.) Although it may be difficult to get the Supreme Court to revisit *Almendarez-Torres* altogether, it is still possible to argue the exception is confined to the bare "fact of a prior conviction." After all, that is the language the court itself has consistently used. (See also *Stokes v. Schriro* (9th Cir. 2006) 465 F.3d 397, 404 [finding that prior was "strikingly similar to present crime" is beyond recidivist exception]; *United States v. Kortgaard* (9th Cir. 2005) 425 F.3d 602, 607-610 ["seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes" are judgments going beyond fact of a prior conviction and so require compliance with *Booker*].)

3. ***Sandoval*** **prejudice test**

Under the test for harmless error adopted in *Sandoval*, the question becomes, would a jury have found *any* factor relied on by the judge true beyond a reasonable doubt if the factor had been submitted to it? If the answer is yes as to any one factor, the case is over – one does not look at the sentencing decision as a whole. This test is open to challenge as inconsistent with federal constitutional law.

The harmless error test for federal constitutional error is whether the reviewing court can say beyond a reasonable doubt that the *outcome* would have been the same without the error. (*Chapman v. California*, *supra*, 386 U.S. 18, 24; e.g., *Neder v. United States* (1999) 527 U.S. 1, 15-17, 19-20; *People v. Cage* (2007) 40 Cal.4th 965, 991-992; *People v. Huggins* (2006) 38 Cal.4th 175, 249.)

In the area of sentencing, harmless error review generally asks whether the judge would have imposed the same sentence if the error had not occurred. (E.g., *Jones v. United States* (1999) 527 U.S. 373, 402-405; *Sochor v. Florida* (1992) 504 U.S. 527, 540; *Clemons v. Mississippi* (1990) 494 U.S. 738, 753; *People v. Osband*, *supra*,13 Cal.4th 622, 728-729; *People v. Robertson* (1989) 48 Cal.3d 18, 62; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1226; *People v. Thomas* (1990) 219 Cal.App.3d 134, 148-149; *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319-1320; *People v. Goldberg* (1983) 148 Cal.App.3d 1160, 1163; *People v. Burney* (1981) 115 Cal.App.3d 497, 505.) But *Sandoval* splits this test into particles, allowing a no-prejudice determination on any *one* factor to trump the overall decision.

Let us take an example. Suppose the sentencing judge found six aggravating and six mitigating factors, then selected the upper term. All six aggravating factors were invalid; but as to one of those, the appellate court decides a jury would have found it true. It is virtually certain the judge would not have imposed the upper term if there had been just one aggravating factor to weigh against the six mitigating factors. Indeed it might very likely have been an abuse of discretion to do so. In this situation can any reviewing

court appropriately find beyond a reasonable doubt that the outcome would have been the same in the absence of the *Blakely* error? No. This sounds exactly like *Chapman* prejudicial error. But *Sandoval* says it is not. This conclusion is a questionable application of federal constitutional law and thus a possible area for certiorari.

4. Ex post facto challenge to *Sandoval* remedy

The *Booker*-like remedy in *Sandoval*, based on the changes SB 40 made to the DSL, is open to challenge on the ground its retroactive application violates the principles against ex post facto laws inherent in due process. This argument is developed more fully in one of the attached memos, "Judicial Decisions Having the Effect of an Ex Post Facto Law." In summary:

The reformed DSL is potentially less favorable to many defendants than the original version, in a number of considerably overlapping ways: (1) it eliminates an element needed to impose the upper term – i.e., facts in aggravation that outweigh those in mitigation; (2) it increases the potential punishment for the bare offense (the one found by the jury) to the upper term; (3) it eliminates the protection of a presumptive middle term; (4) it lowers the burden of proof for facts necessary to impose the upper term from an unconstitutionally *low* preponderance standard to *nothing*. All of these changes are classic ex post facto violations. (*Calder v. Bull* (1798) 3 U.S. (3 Dallas) 386, 390.)

It is an ironic twist that all of these detrimental changes were wrought in the name of protecting defendants' fundamental constitutional rights. (E.g., *Blakely v. Washington*, *supra*, 542 U.S. 296, 313-314 ["The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors,'" quoting Blackstone].) Those seeking redress for denial of a jury trial and application of an unconstitutionally low burden of proof in the imposition of an upper term are told, in effect: "Yes, you were denied these rights, and we will safeguard them. To remedy the violation of your rights, you will now be resentenced under a less favorable law. It will still be without a jury and will now be under an even lower burden of proof – but your rights won't be violated, because we have rewritten the law in such a way that you don't have those rights any more."

Sandoval does not deal with these specific objections. It reasons that the changes to the reformed DSL do not as a whole substantially "disadvantage" defendants and are not "unexpected and indefensible." (*People v. Sandoval*, *supra*, 41 Cal.4th 825, 855-857.) Neither of these tests is a correct one constitutionally. First, ex post facto principles do not require or permit the weighing of pros and cons of a new law but ask whether the law falls into a *Calder v. Bull* category. Second, while the "unexpected and indefensible" test logical applies when a state court has interpreted a law in an unforeseeable and unreasonable way, so that persons would not have been on notice that a

particular act might be criminal (e.g., *Bouie v. Columbia* (1964) 378 U.S. 347, 353-354), it distorts the analysis when a case *changes existing law*; when the law is explicit, persons have the right to rely on it (e.g., *Marks v. United States* (1977) 430 U.S. 188). The proper principle is: "If a state legislature is barred by the Ex Post Facto Clause from passing . . . a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (*Bouie*, at pp. 353-354.) Even the Attorney General has not contended SB 40 could be constitutionally applied to acts committed before its effective date, but *Sandoval*'s remedy effectively does that.

The ex post facto argument is a strong one in principle and should be taken up to the United States Supreme Court. Admittedly, however, the job is an uphill one, because the same argument can be leveled against the court's own *Booker* remedy. It would likely take a lot to persuade the court to hold its own decision unconstitutional, given that the federal courts have been applying it for nearly three years. Ideally, an argument would distinguish *Booker*'s reformed system from *Sandoval*'s, so that invalidating the retroactive application of the latter would not mean invalidating the former.

To avoid the argument that a defendant who was sentenced to the upper term initially cannot be worse off on resentencing under the reformed law (*People v. Sandoval*, *supra*, 41 Cal.4th 825, 855), a good test case would be one in which the defendant committed the crime before *Sandoval* was issued (July 19, 2007) but was sentenced later under it.

B. Issues Unresolved by *Black II-Sandoval*

Finally, in addition to these various challenges to *Black II-Sandoval*'s holdings, there are a number of *Cunningham* issues not addressed in those decisions. Where appropriate, these issues should be raised in the trial court, briefed fully on appeal, and preserved in a petition for review. Some have been decided in Court of Appeal cases; these are binding on trial courts until a contrary Court of Appeal decision comes out or the Supreme Court grants review or depublishes.[13] If the issue was resolved in one of these cases unfavorably, it should be preserved by appropriate objection in the trial court, acknowledging the Court of Appeal decision, and appealed.

The issues not decided by the Supreme Court in *Black II-Sandoval* include – and this is by no means an exhaustive list:[14]

---

[13] *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.

[14] The appendix lists a number of cases decided after *Black II-Sandoval* and indicates their status as of the time this memo was published. Counsel should check the current status when considering issues based on them.

1. Recidivism

Black II addresses only the numerous or increasingly serious factor under the *Almendarez-Torres* exception. Other recidivist factors are still open to argument, including parole/probation status or performance and prior prison term, listed in rule 4.421(b)(3)-(5), as well as others a judge may mention.[15] *People v. Yim* (2007) 152 Cal.App.4th 366 held that on-parole status and poor performance on parole come within recidivist exception.

A hot topic is whether the use of juvenile adjudications as prior convictions under the *Almendarez-Torres* exception is permissible. The California Supreme Court has recently granted review in *People v. Nguyen* (2007) 152 Cal.App.4th 1205, which held the exception inapplicable. (See also review granted cases of *People v. Tu*, S156995, reported at 154 Cal.App.4th 735, and *In re Antonio P.*, S156335, reported at 153 Cal.App.4th 1540 [grant and hold behind *Nguyen*, reaching opposite conclusion from *Nguyen*].)

Did *Cunningham* abrogate *People v. McGee* (2006) 38 Cal.4th 682, which permits the judge to make findings on whether priors qualify as strikes? *People v. Jefferson* (2007) 154 Cal.App.4th 1381 held no.

People v. Cardenas (2007) 155 Cal.App.4th 1468, 1480-1483 rejected the argument that the mere *existence* of a criminal history is sufficient to uphold an upper term and found the trial court must have actually *relied* on recidivist history in sentencing.

2. Non-recidivist factors in aggravation

Sandoval found several factors subject to *Cunningham* – great amount of violence, callous behavior, lack of concern for consequences, particularly vulnerable victims, "motivating force" behind the crimes, and planning and premeditation. There is a good chance that similar non-recidivist factors listed in rule 4.421 will be treated the same, and so those issues should be raised where appropriate. (E.g., *People v. Lincoln* (Nov. 27, 2007, B188042) ___ Cal.App.4th ___ [circumstances of offense, particularly vulnerable victims, planning, opportunity to deliberate, close proximity of victims, and inherent high risk are subject to *Cunningham*]; *People v. Cardenas*, *supra*, 155 Cal.App.4th 1468 [planning and sophistication].)

---

[15]California Rules of Court, 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."

3. Factual determinations necessary for sentencing decision

Cunningham arguably applies to other factual determinations applicable to sentencing, such as:

Whether the defendant had a separate "intent and objective" for multiple offenses occurring during a course of criminal conduct within the meaning of Penal Code section 654. (But see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268-271.)

Whether the offenses involved the separate victims or occasions under Penal Code section 667.6, subdivisions (c) and (d) or 667.61, subdivision (i). (This issue is on review in *People v. Mvuemba*, S149247.)

Whether offenses were committed on different occasions and arose from different sets of operative facts for consecutive sentences under the Three Strikes Law, Penal Code sections 667, subdivision (c)(6) and (7), and 1170.12, subdivision (a)(6) and (7).

4. Use of *Sandoval* reformation to argue reversal for consideration of lower term

Another argument on appeal, for middle terms imposed before *Sandoval* or SB 40, is that the sentencing 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.

5. Juvenile terms

Does *Cunningham* apply to calculations of the maximum period of a juvenile confinement? *In re Christian G*. (2007) 153 Cal.App.4th 708 held no.

6. Applicability of *Cunningham* on habeas corpus

On review in the California Supreme Court is *In re Gomez*, S155425. The Court of Appeal (153 Cal.App.4th 1516) held *Cunningham* stated a new rule of law and so may not be raised on habeas corpus in cases final for appellate purposes when it was decided. My amicus curiae letter in support of the petition for review in *Gomez* is reproduced in an separately posted accompanying document. Unless a given case is urgent, it would be best to wait for the Supreme Court ruling in that case before seeking habeas corpus, to avoid the possibility of successive petition problems.

CONCLUSION

In conclusion, despite the fitful signals of fundamental change the United States Supreme Court has sent, it is doubtful, to say the least, that defendants as a whole are in a better position after *Apprendi-Blakely-Cunningham* et al. than they were before this whole journey started. Some individuals are better off; a number in the future may be worse off because of the revisions to the DSL. Regardless, we as lawyers have a responsibility to make the best of it in the here and now. I am betting the last chapter is not yet written, and perhaps we can help write it.

(Adapted from address to California Attorneys for Criminal Justice, October 27, 2007)

– APPENDIX –

THE A-B-C'S OF IT ALL: *APPRENDI*, *BLAKELY*, *CUNNINGHAM*, AND KIN

Lead United States Supreme Court Cases

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

> Defendant pleaded guilty to possession of a firearm for an unlawful purpose, normally punishable by a 5-10 year term. At sentencing, the trial court found by a preponderance of the evidence that the crime was motivated by racial bias, which enhanced the possible term to 10-20 years; Apprendi's sentence was 12 years. Reversed: A defendant has a constitutional right to have a *jury* find facts (such as bias) that increase the sentence beyond the normal statutory maximum by proof *beyond a reasonable doubt*. (Stevens, with Ginsburg, Souter, Scalia, Thomas. Concur: Scalia, Thomas. Dissent: O'Connor, with Rehnquist, Kennedy, Breyer.)

Blakely v. Washington (2004) 542 U.S. 296

> Defendant pleaded guilty to kidnaping. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. After a three-day hearing, the trial court imposed an "exceptional" sentence of 90 months after finding he acted with "deliberate cruelty." Held: The sentencing procedure deprived defendant of the right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. 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. It is not the maximum that can be imposed after findings of *additional* facts. "Our commitment to *Apprendi* . . . reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. . . . . *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. . . ." (542 U.S. at pp. 305-306.) (Scalia, with Stevens, Souter, Thomas, Ginsburg. Dissents: O'Connor, Kennedy, Breyer, with Rehnquist.)

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

> In unrelated cases, Booker and Fanfan were convicted by juries of cocaine offenses. At a sentencing hearing the trial court found facts by a preponderance that raised the permissible sentence from the base range that would have been called for given facts found by a jury. Booker received an increased sentence. The

judge in Fanfan's case determined *Blakely* prohibited an upward departure, and the Government appealed.

Held: The Sixth Amendment is violated by the imposition of an enhanced sentence under the Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. (Stevens, with Scalia, Souter, Thomas, Ginsburg.)

Remedy: The provision of the statute that makes the Guidelines mandatory must be severed and excised, rendering them effectively advisory. A sentencing court must *consider* Guidelines ranges, but may tailor the sentence in light of other statutory concerns as well. If advisory, the statute falls outside of *Apprendi.* Also excised is the provision that sets forth standards of review on appeal, including de novo review of departures from the Guidelines range; the new, correct standard is review for unreasonableness. Both Booker's and Fanfan's cases remanded for resentencing under revised system. (Breyer, with Rehnquist, O'Connor, Kennedy, Ginsburg.)

Cunningham v. California (2007) 549 U.S. __ [127 S.Ct. 856]

Cunningham was convicted of continuous sexual abuse of a child under 14, which is punishable by 6, 12, or 16 years. The California Determinate Sentencing Law obliged the trial judge to sentence Cunningham to the 12-year middle term unless the judge found one or more additional facts in aggravation. The trial court found six aggravating factors (none involving criminal history) and one mitigating factor and imposed the upper term.

Held: The DSL violates *Apprendi-Blakely*'s "bright-line" rule. It allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.

Rejects *Black I* points: (1) *Black I* held California judicial fact-finding is the type that "traditionally has been incident" to sentencing and does not represent a shift the proof from elements to sentencing factors," thus diminishing the jury's role. *Cunningham* states that is not the test: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." Likewise irrelevant were the facts the DSL reduced most penalties, or that judges have broad discretion, or that enhancements are tried to a jury. *Black I*'s attempt to type DSL judicial factfinding as a "reasonableness constraint" like the *Booker* reformation

does not work; the federal system "operates within Sixth Amendment constraints, . . . not as a substitute for those constraints."

(Ginsburg, with Roberts, Stevens, Scalia, Souter, Thomas. Dissents: Kennedy and Alito, with Breyer.)

Ancestors of Lead Cases

In re Winship (1970) 397 U.S. 358

Due process requires the prosecution to prove every element of a crime beyond a reasonable doubt.

Mullaney v. Wilbur (1975) 421 U.S. 684

Maine statute presumed that a defendant who acted with an intent to kill possessed "malice aforethought" and therefore was subject to life imprisonment. It put the burden on the defendant of proving that he acted with a lesser degree of culpability, such as in the heat of passion. Held: The law is unconstitutional. Per Maine law an element of murder is malice, and therefore under *Winship* the prosecution must prove beyond a reasonable doubt that the defendant did not act in the heat of passion on sudden provocation; it cannot rely on a presumption.

Patterson v. New York (1977) 432 U.S. 197

New York law allowed defendants to raise and prove extreme emotional distress as an affirmative defense to murder. The law still required the state to prove every element of murder. New York, unlike Maine, had not made malice aforethought, or any described mens rea, part of its statutory definition of second-degree murder; one could tell from the face of the statute that if one intended to cause the death of another person and did cause that death, one could be subject to sentence for a second-degree offense. The court cautioned there were "obviously constitutional limits beyond which the States may not go" in reallocating burdens of proof by labeling elements of crimes as affirmative defenses. (432 U.S. at p. 210.)

Sandstrom v. Montana (1979) 442 U.S. 510

Defendant was charged with "deliberate homicide" and raised a defense his act was not purposeful or knowing because of a personality disorder aggravated by alcohol consumption. The jury was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts." When intent is an

element of the crime charged, such a jury instruction violates the due process requirement that the state prove every element of a criminal offense beyond a reasonable doubt. A reasonable juror could easily have viewed the instruction as mandatory.

McMillan v. Pennsylvania (1986) 477 U.S. 79

Mandatory *minimum* penalty of five years, if the judge found by a preponderance of the evidence that the person visibly possessed a firearm in the course of specified felonies, did not impermissibly reduce burden of proof or tailor the form of a criminal statute solely to avoid the beyond a reasonable doubt standard. The statute simply prescribed how to weigh a factor traditionally considered relevant to punishment. It did not increase the maximum penalty but operated solely to "limit the sentencing court's discretion in selecting a penalty within the range already available to it." (477 U.S. at pp. 87-88.)

Jones v. United States (1999) 526 U.S. 227

Federal carjacking statute is interpreted as defining three distinct offenses, depending on the degree of harm to the victim, not a single offense with a choice of three penalties. Degree of harm is an element, requiring charges in an indictment and jury findings, rather than a sentencing factor. A contrary interpretation would raise serious questions of constitutionality because, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (526 U.S. at p. 243, fn. 6.)

Almendarez-Torres v. United States (1998) 523 U.S. 224[1]

> Defendant pleaded guilty to indictment charging him with being in U.S. after being deported, punishable by no more than two years. Admitting the earlier deportation had been because of convictions for "aggravated" felonies, he was sentenced under a law subjecting him to a sentence of up to 20 years. Held: Punishing for a greater offense than that alleged in the indictment did not violate due process. Recidivism is a traditional basis for a increasing a sentence. Defendant had *admitted* the prior convictions – all of which had been entered in proceedings with substantial procedural safeguards of their own, and so there was no question concerning the right to a jury trial or the standard of proof. (Breyer, with Rehnquist, O'Connor, Kennedy, Thomas.[2] Dissent: Scalia, with Stevens, Souter, Ginsburg.)

Near Kin

Ring v. Arizona (2002) 536 U.S. 584

> Law authorizing the death penalty if the judge finds one of ten aggravating factors violates *Apprendi*, because that sentence could not have been imposed without the challenged factual finding.

Schriro v. Summerlin (2004) 542 U.S. 348

> *Ring* was not a "watershed" rule so as to make it applicable on habeas corpus to cases already final for purposes of direct review when it was decided. (*Teague v. Lane* (1989) 489 U.S. 288, 314 [new procedural rule of law cannot be raised on habeas corpus if petitioner's case was final for purposes of appellate review when

---

[1]*Apprendi* stated: "Even though it is arguable that *Almendarez-Torres* was incorrectly decided, . . . we need not revisit it for purposes of our decision today to treat the case as a narrow exception. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 489-490.) "[R]ecidivism 'does not relate to the commission of the offense' . . . . Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." (*Id*. at p. 496.)

[2]Justice Thomas repudiated his *Almendarez-Torres* vote in his concurring opinion in *Apprendi.* (530 U.S. at pp. 520-521.)

> new rule was adopted, unless it was of "watershed" type, an "absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty' . . . "].)

Shepard v. United States (2005) 544 U.S. 13

> To avoid *Apprendi-Jones* problems arising from judicial fact-finding, under act that 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."

Washington v. Recuenco (2006) 548 U.S. ___ [126 S.Ct. 2546]

> A violation of *Blakely* is not structural error and is subject to harmless error review under the *Chapman*[3] standard. Relies on *Neder v. United States* (1999) 527 U.S. 1 (omitted instruction on an element of the crime is subject to harmless error analysis and can be found not prejudicial if a reviewing court concludes beyond a reasonable doubt that the jury verdict would have been the same absent the error).

Rita v. United States (2007) 551 U.S. ___ [127 S.Ct. 2456]

> A reviewing court may rebuttably presume a federal sentence is reasonable if it is within the within properly calculated Sentencing Guidelines range.

See also *Rangel-Reyes v. United States* (2006) ___U.S.___ [126 S.Ct. 2873], concurrence of Justice Stevens in denial of certiorari:

> "While I continue to believe that *Almendarez-Torres* . . . was wrongly decided, that is not a sufficient reason for revisiting the issue. The denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history . . . will seldom create any significant risk of prejudice to the accused. Accordingly, there is no special justification for overruling *Almendarez-Torres*. Moreover, countless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations. The doctrine of stare decisis provides a sufficient basis for the denial of certiorari in these cases."

---

[3] *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).

California Supreme Court Cases Applying *Apprendi-Blakely*

Black I: People v. Black (2005) 35 Cal.4th 1238

California DSL complies with *Blakely*. Disapproved in *Cunningham v. California* (above).

Black II: People v. Black (2007) 41 Cal.4th 799

Construing California DSL in light of *Cunningham*: There is no constitutional violation so long as the sentencing court relied on at least one "valid" 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.

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)). Those come within the recidivist exception of *Almendarez-Torres.*

The decision to impose consecutive rather than concurrent terms is not subject to *Apprendi-Blakely-Cunningham*.

People v. Sandoval (2007) 41 Cal.4th 825

Decided on same day as *Black II*. Harmless error: If all of sentencing factors were invalid, the reviewing court must apply the *Chapman* standard to each of the cited aggravating factors and may remand only if the error was prejudicial as to every cited factor.

Remedy: For cases where the crime was committed before the effective date of Senate Bill 40,[4] a *Booker*-type "reformation" applies, making sentencing factors discretionary rather mandatory. Modeled on SB 40, this system authorizes the trial court to impose the lower, middle, or upper term. The court is required to state reasons for a sentencing decision, even the middle term. But it is not be required

[4]Statutes 2007, chapter 3, amending Penal Code section 1170, subdivisions (b) and (c), among other things. SB 40 became effective March 30, 2007. Related sentencing rules 4.405 through 4.452 were amended effective May 23, 2007.

to find "facts," in aggravation or mitigation. The sentencing decision is subject to review for abuse of discretion.

Rejects the argument that applying the reformed DSL to cases in which the criminal act occurred before the date of *Sandoval* (July 19, 2007) would violate the principles of due process akin to the prohibition against ex post facto laws.[5] The revised system does not substantially disadvantage a defendant. Due process prohibits only judicial decisions that make an "unexpected and indefensible" change in the law; this is not co-extensive with ex post facto prohibitions, which apply to legislative enactments.

Briefed and still pending before the California Supreme Court:

- Use of acquitted counts as factors in aggravation. (*People v. Towne*, S125677.)

- Application of the *Almendarez-Torres* exception to use of prior prison terms and being or performing poorly on probation or parole. (*People v. Hernandez*, S148974; *People v. Pardo*, S148914; People *v. Towne*, S125677.)

- Full consecutive sentences for certain sex offenses under Penal Code section 667.6. (*People v. Mvuemba*, S149247.)

- Imposition of upper term on basis of aggravating factor (taking advantage of position of trust) not charged, on theory defendant is "deemed," by virtue of no-contest plea, to have stipulated to that fact. (*People v. French*, S148845; see also People v. Ayala, S157148, reported at 155 Cal.App.4th 604 (grant and hold behind *French*).

- Applicability of *Cunningham* to Penal Code section 654 decisions. (*People v. Mvuemba*, S149247.)

Recent grants of review:

- *People v. Nguyen*, S154847, reported at 152 Cal.App.4th 1205 (holding prior juvenile adjudications may not be used as aggravating factor within meaning of *Almendarez-Torres*); *People v. Grayson*, S157952, reported at 155 Cal.App.4th 1059, *People v. Tu*, S156995, reported at 154 Cal.App.4th 735, and *In re Antonio*

---

[5]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.

P., S156335, reported at 153 Cal.App.4th 1540 (grant and hold cases behind *Nguyen*, reaching opposite conclusion from *Nguyen*); cf. *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187.).

- *In re Gomez*, S155425, reported at 153 Cal.App.4th 1516 (holding *Cunningham* stated new rule of law and so may not be raised on habeas corpus in cases final for appellate purposes when it was decided). See appendix D for ADI's amicus curiae letter in support of the petition for review.

See also:

- *People v. Osband* (1996) 13 Cal.4th 622, 728: "Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if '[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.' Only a single aggravating factor is required to impose the upper term . . . . In this case, the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term, and on this record we discern no reasonable probability that it would not have done so."

Court of Appeal Decisions Applying *Cunningham*, *Black II-Sandoval*[6]

- "Planning and sophistication" factor implicates *Cunningham*. (*People v. Cardenas* (2007) 155 Cal.App.4th 1468, petition for review pending as of date of this publication, S158137).

- On-parole and poor performance on parole are permissible factors within recidivist exception. (*People v. Yim* (2007) 152 Cal.App.4th 366, no petition for review filed, remittitur issued Aug. 21, 2007.)

- Mere *existence* of a criminal history is insufficient to uphold an upper term; the trial court must have actually *relied* on recidivist history in sentencing. (*People v. Cardenas* (2007) 155 Cal.App.4th 1468, petition for review pending as of date of this publication, S158137).

[6]Many of these cases were not final as of the time this publication was prepared. Attorneys should check for current status before citing them.

• *Harvey*[7] waiver constitutes waiver of right to a jury trial on some aggravating factors. (*People v. Linarez* (2007) 155 Cal.App.4th 1393, petition for review pending as of date of this publication, S158154; *People v. Munoz* (2007) 155 Cal.App.4th 160, review denied Dec. 12, 2007, S157536.)

• Calculation of maximum juvenile confinement not subject to *Cunningham*. (*In re Christian G.* (2007) 153 Cal.App.4th 708, review denied Oct. 24, 2007, S155836.)

• People may file information alleging facts in aggravation, to comply with *Cunningham*. (*Barragan v. Superior Court* (2007) 148 Cal.App.4th 1478, review denied June 13, 2007, S151684.)

• *Cunningham* did not abrogate *Kelii* or *McGee*,[8] which permit judge to make finding on whether priors qualify as strikes. (*People v. Jefferson* (2007) 154 Cal.App.4th 1381, review denied Dec. 12, 2007, S157176, Kennard, J., dissenting.)

---

[7]*People v. Harvey* (1979) 25 Cal.3d 754.

[8]*People v. Kelii* (1999) 21 Cal.4th 452 and *People v. McGee* (2006) 38 Cal.4th 682.