CUNNINGHAM V. CALIFORNIA

To: **Panel Attorneys for the Fourth Appellate District**

From: **Appellate Defenders, Inc., Elaine A. Alexander, Executive Director**

Date: **January 29, 2007**

As everyone undoubtedly knows by now, in *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 549 U.S.___ [2007 U.S. Lexis 1324], the United States Supreme Court struck down the part of the California sentencing system that permits imposition of the upper term on the basis of facts, other than a prior conviction, not found by a jury beyond a reasonable doubt or admitted by the defendant.[1] (See Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rules 4.420, 4.421.) The court held the California system violates the Sixth and Fourteenth Amendments, as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, and *Booker v. United States* (2005) 543 U.S. 220. In doing so it found *People v. Black* (2005) 35 Cal.4th 1238 to have been wrongly decided.

A few years ago ADI distributed a memo on "Measures Appellate Counsel Can Take in Responding to Changes in the Law Potentially Beneficial to Their Clients" (hereafter "Beneficial Changes").[2] It offers detailed guidance on handling cases with this and other potentially favorable issues from pre-AOB to post-remittitur stages, discusses federal and state law on retroactivity, and suggests procedures for dealing with urgent cases. We have also issued memos on *Blakely* itself.[3] The advice and authorities in these sources remain applicable except where obviously superseded by the decision in *Cunningham* or otherwise outdated (such as the California rule numbers).

Given the sources we have already provided and information being posted on other websites,[4] this memo outlines only the basics, with references to the earlier material.

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[1]The opinion is at http://www.supremecourtus.gov/opinions/06pdf/05-6551.pdf .

[2]http://www.adi-sandiego.com/PDFs/favorable%20changes%20revised.pdf

[3]"*Blakely* Alert to Panel (Summer 2004)," with updates in "*Blakely* After *Black*" (Sept. 2005) and "Grant of Certiorari in *Cunningham v. California*" (Apr. 2006), can be reached at: http://www.adi-sandiego.com/Articles/Blakely_Panel_Alert.htm

[4]The preliminary analysis of the First District Appellate Project, specifically for appointed appellate lawyers, is at http://www.fdap.org/CunninghamDecided1-23-07.shtml. Sample pleadings and arguments will be posted on ADI's and other appellate projects' websites as they are developed.

After time to reflect on the implications of the decision and observe the issues that arise, we will consider whether an expanded analysis is needed. We encourage attorneys to call the assigned ADI staff attorney if they have any questions.

Applicability to pending and past cases

As explained in "Beneficial Changes," *supra*, Part Two, on retroactivity, *Teague v. Lane* (1989) 489 U.S. 288[5] provides 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 to cases already final at that time. Exceptions to *Teague* 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.) 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.)

"Not yet final for purposes of appellate review" means the time for filing a petition for certiorari in the United States Supreme Court had not expired or, if a certiorari petition was filed, it had not yet been denied at the time of the new decision. A certiorari petition must be filed within 90 days after the date of the Supreme Court decision, either the denial of review or, in review-granted cases, of the opinion. (U.S. Supreme Ct. Rules, rule 13; Cal. Rules of Court, rules 8.264, 8.272, 8.532, 8.540; see ADI California Criminal Appellate Practice Manual, chapter 7, "The End Game: Decisions by Reviewing Courts And Processes After Decision," §§7.29 et seq., 7.74 et seq., 7.93 et seq., 7.100 et seq.)

Cunningham appears to be a straightforward application of prior Supreme Court precedents; it does not announce a new rule of law. It therefore should apply to cases not yet final as of the date of the governing precedent.

Identifying the governing precedent is a trickier matter. It is unclear from the opinion whether *Cunningham* considers *Blakely* to be a mere application of *Apprendi* or an extension or enlargement of it. Although *Blakely* undoubtedly took most observers and courts by surprise and has largely been seen as creating a new rule of law, the *Cunningham* opinion refers repeatedly to *Apprendi*, suggesting that case had led

[5]The discussion in this memo assumes the applicability of *Teague*. California state retroactivity law differs somewhat from the federal (see *People v. Carrera* (1989) 49 Cal.3d 291, 327-328 [declining to follow *Griffith v. Kentucky* (1987) 479 U.S. 314, 328, on retroactivity]), however, and it may be possible to argue for retroactive application of *Cunningham* under state law.

inexorably to *Blakely* and then to the present result. In relevant cases (pre-*Blakely*, post-*Apprendi*), counsel have grounds for arguing – and should argue – that the operative precedent is *Apprendi*, which was decided June 26, 2000. Whether or not that position is accepted, the *Cunningham* decision should indisputably be applicable to cases not final when *Blakely* was decided on June 24, 2004.

Next step for California

The next major step will probably be up to the California Supreme Court. After *Cunningham* returns to the Court of Appeal, the California Supreme Court may transfer it (or any other pending appeal) to itself before the Court of Appeal decision or may just grant review in some other case. (Cal. Rules of Court, rules 8.512(c), 8.552.) The most likely options before it, as suggested by decisions in other jurisdictions and the *Cunningham* opinion itself, are several:

• Decline to fashion a judicial remedy, leaving it to the Legislature to tailor the sentencing system to *Cunningham*. Because the current system must be applied constitutionally, by necessity such a decision requires imposition of no more than the midterm in the absence of *Blakely*-compliant or -exempt factors.[6] Simple reduction of existing upper term sentences to the middle term in many cases would be the most economical approach, in that it might avoid the need for thousands of individual resentencings. It would also be the most favorable to upper-term defendants, since in many cases other approaches offer a high probability that resentencing would result in no change in the ultimate outcome.

• Retain the current standards and require a jury finding as to aggravating factors and any other fact used to impose a sentence above that permitted by the underlying conviction.[7] The approach would unquestionably comply with *Cunningham*. Possible issues would be the absence of express statutory authority for such proceedings and the economic implications.

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[6]This approach was taken on an interim basis pending legislative action by the high courts in Arizona (*State v. Brown* (2004) 209 Ariz. 200); Colorado (*Lopez v. People* (Colo. 2005) 113 P.3d 713, 728); Maine (*State v. Schofield* (2005) 2005 ME 82); Minnesota (*State v. Shattuck* (2005) 704 N.W.2d 131, 143-148); North Carolina (*State v. Allen* (2005) 359 N.C. 425, 433); Oregon (*State v. Dilts* (2004) 337 Ore. 645, 654); and Washington (*State v. Hughes* (2005) 154 Wn.2d 118, 149-152, overruled on other grounds in *Washington v. Recuenco* (2006) 548 U.S.___ [126 S.Ct. 2546, 2553, fn. 4]).

[7]See footnote 17 of *Cunningham* decision and authorities cited for examples of states that have adopted this approach.

• "Reform" Penal Code section 1170(b) and the sentencing rules to make them discretionary rather than binding.[8] In other words, the jury's verdict on the underlying offense would authorize a punishment of the upper term without additional findings of fact, although the court must state reasons, consider the formal factors in mitigation and aggravation, and impose a reasonable sentence. In some cases the California Supreme Court has changed, added, or excised certain statutory provisions, when that was necessary to preserve its constitutionality and was consistent with legislative intent. (*In re Howard N.* (2005) 35 Cal.4th 117, 133-136.) In the *Cunningham* situation, this would require a finding the Legislature would have intended a discretionary system if it had known the law as originally enacted was unconstitutional.

Steps for counsel in the meantime

The steps outlined in "Beneficial Changes," *supra*, Part One, and "*Blakely* After *Black*," *supra*, pages 3-6, apply in the aftermath of *Cunningham*. In summary:

Step A. Identifying possibly affected cases

Counsel should identify all of their cases, pending and closed, to which *Cunningham* might apply and in which a credible argument for relief based on that case might be made. A factor to be weighed is prejudice – *Apprendi-Blakely* error is subject to a harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18 (*Washington v. Recuenco* (2006) 548 U.S.___ [126 S.Ct. 2546]), although it is unclear how that is to be applied. For purposes of listing possible cases, counsel should err on the overinclusive side and note all of those not yet final for appellate review purposes on June 26, 2000, when *Apprendi* was decided. Other sentence enlargements, such as consecutive sentences, that arguably come within the rationale of the decision, should also be included.[9]

Step B. Identifying potentially urgent cases

Cases requiring prompt action might include those in which the defendant would be entitled to imminent release if the sentence is reduced to the midterm. Others might be

[8]This approach has been applied to the federal system (*Booker v. United States* (2005) 543 U.S. 220) and in several states (*Natale v. New Jersey* (2005) 184 N.J. 458; *State v. Foster* (2006) 109 Ohio St.3d 1, 28-30; Ind. Code 35-50-2-1.3(a) (2006); Tenn. Code Ann. 40-35-210(c) (2005); see also footnote 18 of *Cunningham* decision.)

[9]Most "enhancements" as such are either *Blakely*-compliant in already providing for a jury finding beyond a reasonable doubt or, like prior convictions, are apparently *Blakely*-exempt.

those in which the AEDPA statute of limitations may soon expire;[10] although we anticipate California courts will provide adequate procedures for collateral relief,[11] it may be advisable to preserve the possibility of a federal remedy by ensuring a state habeas corpus petition is filed promptly, so as to toll the running of the federal statute of limitations. Other circumstances may create urgency, as well; counsel must consider the individual case and client. In urgent cases, counsel may follow the usual steps for raising the issues on or after appeal or may select a speedier path, as described in "Beneficial Changes," *supra* (section IV, Part One) and the ADI California Criminal Appellate Practice Manual, chapter 1, "The ABC's of Panel Membership: Basic Information for Appointed Counsel," §1.30 et seq.

Step C. Raising/citing *Cunningham* in pre-remittitur cases

Ever since *Blakely* was decided, ADI has been urging attorneys to preserve *Apprendi-Blakely* issues in all open cases. Counsel should now add a cite to *Cunningham*. (If they failed to raise the issue initially, they must remedy that omission right away.) Depending on the stage of the case, this means:

AOB not yet filed: Raise a *Cunningham* issue in the opening brief.

Post-AOB, pre-reply brief: Cite *Cunningham* in the reply brief. If a *Blakely* issue was not raised in the opening brief, it would be necessary to file a supplemental opening brief;[12] new issues may not be raised in a reply brief.

Post-reply brief, pre-opinion: File a supplemental opening brief. (Cal. Rules of Court, rule 8.200(a)(4).)[13]

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[10]Under AEDPA, the Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. § 2241 et seq.), the last date for filing a habeas corpus petition seeking review of a state conviction is generally one year after the decision becomes final for appellate review purposes (28 U.S.C. § 2244(d)(1)), as that concept was explained in the "Applicability to pending and past cases" section above. The filing of a state petition for collateral relief stops the running of the clock. (28 U.S.C. 2244(d)(2).) For detailed information see ADI California Criminal Appellate Practice Manual, chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," §9.4 et seq. (http://www.adi-sandiego.com/Articles/Manual2007/Ch%209%20-%20Federal%20habeas%20corpus2007.pdf.)

[11]See *In re Spencer* (1965) 63 Cal.2d 400, 405-406, stating California courts will normally accept state habeas corpus jurisdiction if federal habeas corpus relief would be available. (See also *In re Shipp* (1965) 62 Cal.2d 547, 553, fn. 2.)

[12]California Rules of Court, rule 8.200(a)(4). Normally this would require a request for leave to file the brief. Some districts have waived, or are considering waiving, that requirement. We will notify counsel if the Fourth Appellate District does so.

[13]See preceding footnote.

Opinion filed no more than 30 days ago: File a petition for rehearing. Include a request for late filing if opinion filed more than 15 days ago. (Rule 8.268(b)(4).)

Opinion filed more than 30 days ago, California Supreme Court still has jurisdiction to grant review:[14] File a petition for review, with a request for late filing if opinion filed more than 40 days ago (rule 8.500(e)(2)). If a petition for review is already filed, counsel may move to replace it with a new one, may seek to amend or supplement the one already filed, or may submit a letter requesting the Supreme Court to consider *Cunningham* in ruling on the petition.[15]

Case pending in California Supreme Court on grant of review: Counsel may seek to expand the scope of review (rule 8.516(a)(2) & (b)(2)) or move the case be remanded to the Court of Appeal, after decision on the review-granted issue, to consider *Cunningham* (rule 8.528(c); see also rule 8.200(b) on briefs after remand).

For greater detail see Part One, section II of "Beneficial Changes," *supra*, and "*Blakely* After *Black*," *supra*, pages 3-5.

The California Supreme Court loses jurisdiction when it denies review or the time for granting it expires. (See preceding footnote; Cal. Rules of Court, rule 8.532(b)(A).) At that time the remittitur must issue immediately. (Rule 8.272(b)(1)(A).)

Step D. Dealing with post-remittitur cases

Unless the case is an urgent one (see Step B), counsel probably can wait to see what remedies the California judiciary works out, although it is important to evaluate the pros and cons and to do some preliminary groundwork by at least contacting trial counsel and the client. Contact ADI for special situations.

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[14]If a petition for review has been filed, the court has 60 days from the filing of the last petition to decide; it may extend that time up to 90 days from the filing of the last petition. (Rule 8.512(b)(1). If no petition for review was filed, the Supreme Court has 30 days from the date of finality of the Court of Appeal opinion (see rule 8.264(b)) to grant review on its motion; it may order extensions of up to 90 days from the filing of the opinion. (Rule 8.512(c)(1).)

[15]None of these is entirely satisfactory. Withdrawing the petition and filing a new one is likely to create time problems. The Supreme Court clerk's office has told some attorneys it does not permit amending or supplementing petitions. A letter asking the court to consider *Cunningham* may not satisfactorily preserve the issue for federal exhaustion/procedural default purposes. Nevertheless, perhaps the most important point is to raise the issue somehow, in order to show diligence in pursuing state remedies.

Various post-remittitur remedies are analyzed in "Beneficial Changes," *supra* (Part One, section III), and "*Blakely* After *Black*," *supra*, pages 5-6. Guidance also can be found in the ADI California Criminal Appellate Practice Manual, chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision," §§7.45 and 7.99 on recalling the remittitur, and chapter 8, "Putting on the Writs: California Extraordinary Remedies."

The remedy of choice here may well be habeas corpus in the superior court, since a resentencing may be needed. In general, ADI takes the position it is the primary responsibility of trial counsel to handle such cases. Appellate counsel should communicate with trial counsel and monitor the case to make sure that 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 Court of Appeal, such as a motion to recall the remittitur under California Rules of Court, rule 8.272(c)(2) or habeas corpus in that court, appellate counsel has the presumptive responsibility. Counsel should consult the ADI staff attorney before taking either of these steps.

Step E. Checking for adverse consequences

As always, before filing anything counsel should confirm the client faces no downsides – adverse consequences – from proceeding with the argument. Sometimes hidden risks lurk in raising certain lines of argument, seeking certain remedies, or pursuing or reopening certain cases at all. If there are such risks, the client should be advised.

We offer an extensive treatment of the legal pitfalls in the ADI California Criminal Appellate Practice Manual, chapter 4, "On the Hunt: Issue Spotting and Selection,"§4.91 et seq.; see also chapter 1, "The ABC's of Panel Membership: Basic Information For Appointed Counsel," §1.29.

Other, very practical issues are raised in the section on "*Blakely* in Real Life," in "*Blakely* After *Black*," *supra*, pages 6-8.

Step F. Seeking the best remedy

In carrying out the various steps and measures described above, counsel should give careful thought to the remedy sought for the client. Of the various remedies open to the California Supreme Court outlined in the preceding section on "Next step for California," the simple imposition of the middle term in the absence of *Blakely*-compliant or -exempt factors would appear most favorable to the typical defendant. As a fallback, appellate counsel should consult the client and trial counsel to identify the remedy next most likely to benefit the individual client – jury determination of sentencing factors or court resentencing. Given that each option has its advantages to the system and has been selected by one court or another, counsel can offer credible arguments for the desired results.

Stay tuned . . . .

We recognize that no brief analysis can offer comprehensive guidance for every variable of case, client, attorney, and court. Further, the sentencing landscape is still in rapid flux. Attorneys should feel free to call the assigned ADI staff attorney at any time they have questions or concerns and to submit any sample briefing related to this matter they have developed. To keep our footing, we must stay in touch as the saga unfolds.