IN RE GOMEZ: POTENTIAL BENEFIT TO FORMER CLIENTS WITH *BLAKELY-CUNNINGHAM* ISSUES

By Elaine A. Alexander, Executive Director

In the case of *In re Gomez*, S155425, decided February 2, 2009, the California Supreme Court held that defendants whose cases became final after *Blakely v. Washington* (2004) 542 U.S. 296 but before *Cunningham v. California* (2007) 549 U.S. 270[1] are entitled to assert rights under those cases on habeas corpus. This memo explores how appellate counsel can help those former clients who may now be entitled to resentencing. ADI has addressed the topic of taking advantage of favorable changes in the changes on a number of occasions in the past, and at many points this memo refers readers to previous memos and/or the ADI California Criminal Appellate Practice Manual[2] for more detailed analysis and authorities.

In re Gomez

Sotero Gomez unsuccessfully challenged his upper term sentence under *Blakely* at trial and on appeal. After his case became final, *Cunningham* held the California Determinate Sentencing Law violates *Blakely* by allowing a judge to impose an upper term on the basis of facts not found by a jury beyond a reasonable doubt. Gomez then sought habeas corpus relief. The Court of Appeal held habeas corpus is not available to defendants whose cases became final before *Cunningham*, because that case created "new law" within the meaning of *Teague v. Lane* (1989) 489 U.S. 288. It reasoned that before *Cunningham* the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*) found the California DSL valid under *Blakely* and lower courts had disagreed among themselves on the issue.

The Supreme Court, in a unanimous opinion by Chief Justice George, rejected this conclusion and held habeas corpus is available to post-*Blakely* defendants. (Parenthetically, ADI filed an amicus curiae brief in the case.[3] The result was highly gratifying and hopefully, with the follow-up efforts of appointed counsel, will benefit a number of our clients.)

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[1]Cases becoming final on appeal after *Cunningham* are indisputably entitled to the benefits of that case. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328; *Teague v. Lane* (1989) 489 U.S. 288.)

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

[3]http://www.adi-sandiego.com/PDFs/ADI%20amicus%20brief%20in%20Gomez.pdf .

First, the court reiterated that California court policy is to provide a remedy on collateral review if that remedy would be available in the federal courts. (*In re Spencer* (1965) 63 Cal.2d 400, 405-406.)[4]

Second, the court found "little doubt that, if faced with the issue, the United States Supreme Court would conclude that *Cunningham* did not break new ground and that it was 'dictated by' *Blakely* — 'precedent existing at the time [petitioner's] conviction became final.' . . . The *Cunningham* decision . . . did not extend or modify the rule established in *Blakely*, but merely applied it to the California sentencing scheme."

Third, the court rejected the premise that disagreement among jurists per se makes a decision "new." Such a factor may be considered, but is not necessarily determinative. (E.g., *Stringer v. Black* (1992) 503 U.S. 222; *Penry v. Lynaugh* (1989) 492 U.S. 302.)

Gomez concluded: "Accordingly, *Cunningham* applies retroactively to any case in which the judgment was not final at the time the decision in *Blakely* was issued."

Follow-up by Appellate Counsel

As we have emphasized over and over, favorable decisions may impose responsibility on counsel to ensure that eligible clients are able to take advantage of the new decision. ADI'S website has a recently updated memo, "Potentially Favorable Changes in the Law" ("Favorable Changes"),[5] describing the steps counsel can take. Rather than repeat the details here, we refer counsel to that memo and others on relevant *Blakely-Cunningham* topics and simply highlight the important matters.

Identification of affected cases.

By its terms, *Gomez* applies to cases with *Blakely-Cunningham* issues that became final after June 24, 2004. Finality is defined as the date a petition for certiorari in the United States Supreme Court was denied or the time for petitioning for certiorari expired. (For example, if a petition for review was filed and denied and no certiorari petition was filed – the scenario in many *Blakely* cases – the case became final for *Gomez* purposes 90 days from the time the California Supreme Court denied review.)

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[4]The Ninth Circuit, like *Gomez*, has held *Cunningham* not to be new law under *Teague*. (*Butler v. Curry* (9th Cir. 2008) 528 F.3d 624, cert. denied *Curry v. Butler* (Dec. 15, 2008) ___ U.S. ___.)

[5]http://www.adi-sandiego.com/PDFs/Favorable%20changes%2011-08.pdf

Counsel should assess whether each of their cases in this category have viable *Blakely-Cunningham* issues. Many may not, in light of *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825.[6] As *Gomez* noted:

> In order to obtain relief, any such petitioner will be required to establish, of course, that a violation of the Sixth Amendment occurred in his or her case. Imposition of the upper term violates the Sixth Amendment under *Blakely* and *Cunningham* only if no legally sufficient aggravating circumstance has been found to exist by the jury or been established under one of the exceptions to *Blakely*'s jury trial requirement. (*Black II*, *supra*, 41 Cal.4th at p. 816.) Moreover, even if error is established, resentencing is not required if the record demonstrates the error was harmless beyond a reasonable doubt. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 838.)

ADI's memos on *Blakely-Cunningham* offer suggestions on potential approaches after the *Black II-Sandoval* decisions.[7]

Review for urgency

Counsel should endeavor to identify those cases in which the client potentially is eligible for relief and in which the relief, if granted, would entitle him or her to immediate or imminent relief. A case may fall in that category if the client would be eligible for release soon if the sentence were reduced to the middle term. Those cases should, of course, be given the highest priority. (See "Favorable Changes," *supra*, p. 2.)

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[6]Potential petitioners must meet *Black II*'s interpretation of the DSL (a single valid factor in aggravation is sufficient to uphold an upper term) and its broad reading of the recidivist exception to *Blakely*. They also must overcome *Sandoval*'s restrictive harmless error test.

[7]*Blakely-Cunningham A*fter *Black II-Sandoval:* http://www.adi-sandiego.com/pdfs/black-sandoval%20memo%20by%20adi%20aug%202007.pdf

"The Life And Times Of The California Determinate Sentencing System: Cunningham And Family": (http://www.adi-sandiego.com/PDFs/Blakely-Cunningham%20-%20history%20and%20issues.pdf)

"Single Valid Factor Test: A Critique": http://www.adi-sandiego.com/PDFs/Single%20valid%20factor%20test%20-%20critique.pdf

"Due Process / Ex Post Facto Issues In *Sandoval* Remedy": http://www.adi-sandiego.com/PDFs/Ex%20post%20facto%20issues%20in%20Sandoval%20remedy.pdf

Review for adverse consequences

Before proceeding with any filing, counsel should evaluate the possibility that the matter could backfire and cost the client additional time because, for instance, it might call attention to an unauthorized low sentence not yet noticed. (See "Favorable Changes," *supra*, pp. 2-3; ADI California Criminal Appellate Practice Manual, § 4.91 et seq. (ADI Manual)[8].)

Communication with client

Before proceeding further, counsel should contact the client, offering counsel's assessment, describing the steps that may be taken, analyzing the benefits and potential downside of a habeas corpus petition, and asking the client whether he or she would like to proceed. Sometimes prisoners do not want to be taken back to court for one reason or another. (See ADI's article on "*Blakely* After *Black*,"[9] especially the section entitled "*Blakely* in Real Life," and ADI Manual, *supra*, §4.111, on "unwanted" remedies.)

Coordination with trial counsel

Gomez explicitly laid out the procedure to be followed by those defendants who may be eligible for relief: "Those who wish to raise a challenge under *Blakely* to the imposition of an upper-term sentence may do so by filing a petition for writ of habeas corpus in the trial court." (Emphasis added.)

Proceedings in the trial court are presumptively the sphere of trial counsel. When habeas corpus in the trial court is the contemplated remedy, ADI's normal recommendation for appellate counsel is to contact trial counsel and see if he or she plans to take action, then to monitor the situation to ensure counsel does in fact take action. Appellate counsel can supply any briefing or research previously done to assist. (See "Favorable Changes," *supra*, especially part III on post-remittitur cases.

If after diligent inquiry it becomes apparent that trial counsel is not going to be following through in a meritorious case, please contact ADI. We can explore other possibilities.

Counsel who wish guidance or assistance with any of these matters may call the assigned ADI staff attorney in the case.

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

[9] http://www.adi-sandiego.com/PDFs/Blakely%20after%20Black.pdf