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Your Responsibility When Using the Information Provided Below:

When putting this material together, we did our best to give you useful and accurate information because we know that prisoners often have trouble getting legal information and we cannot give specific advice to all prisoners who ask for it. The laws change often and can be looked at in different ways. We do not always have the resources to make changes to this material every time the law changes. If you want legal advice backed by a guarantee, try to hire a lawyer to address your specific problem. If you use this pamphlet, it is your responsibility to make sure that the law has not changed and still applies to your situation. Most of the materials you need should be available in your institution's law library.

**INFORMATION REGARDING CASES AND LEGISLATION
AFFECTING THE SENTENCING OF CALIFORNIA PRISONERS
(*BLAKELY AND CUNNINGHAM CASES*)**

(Updated 12/30/2009)

We are sending you this letter because you have asked for information or advice about the California sentencing laws in light of the United States Supreme Court's decisions in *Blakely v. Washington* and *Cunningham v. California*. These cases concern the federal constitutional limits on judges' powers to make factual findings necessary to impose higher criminal sentences.

We cannot provide legal representation to prisoners who want to challenge to their sentences based on *Blakely* and *Cunningham*. Also, because we receive a large volume of mail, we are unable to provide individualized responses to all the prisoners and parolees who write to us. In this letter, we will attempt to answer the most common questions about these cases.

I. THE BASIC FEDERAL CONSTITUTIONAL PRINCIPLES

Over the past 10 years, the United States Supreme Court has decided a string of cases on judges' discretion to decide the length of the sentences imposed in criminal cases. The basic question in each of these cases was whether the existence of facts used to justify a longer sentence can be determined by a judge using a preponderance of the evidence standard or whether such facts must be determined by a jury and found true beyond a reasonable doubt.

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In *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. 296, the United States Supreme Court held that the Sixth Amendment to the United States Constitution requires that any fact used to increase punishment beyond a presumptive “statutory maximum” sentence must be either admitted by the defendant or pled and proven to a jury beyond a reasonable doubt. *Apprendi* held that jury fact-finding was required where a New Jersey statute authorized an enhanced sentence if the facts showed the crime was motivated by prejudice toward another group of people. *Blakely* held that jury fact-finding was required where a Washington statute allowed a sentence higher than the “standard range” if there were “aggravating facts” that justified a longer term.

In both *Apprendi* and *Blakely*, the Court affirmed that this general rule does not apply to any increase in punishment that is based on the “fact of a prior conviction.” In other words, a judge can decide to impose a longer sentence due to a prior conviction and the defendant has no federal constitutional right to require that the existence of the prior conviction be found true by a jury. (See also *Almendarez-Torres v. United States* (1998) 523 U.S. 224.) *Apprendi* and *Blakely* also held that a defendant can waive his constitutional rights and either admit the aggravating facts or agree to have a judge determine the existence of those facts.

From 1977 until March 30, 2007, California’s Determinate Sentencing Law (“the DSL”) allowed a judge to select the sentence for most felony crimes from three possible terms – a low term, a middle term or an upper term. However, a judge could not impose anything other than the middle term unless he or she found by a preponderance of the evidence (meaning it was more likely than not) that there were “mitigating” or “aggravating” factors and that such factors justified a low or upper term. (Former Penal Code § 1170(b); former Cal. Rules of Court, rules 4.420 through 4.423.) In *Cunningham v. California* (2007) 549 U.S. 270, the United States Supreme Court held that this method for imposing high terms violated criminal defendants’ rights to trial by jury and proof of facts beyond a reasonable doubt under the Sixth and Fourteenth Amendments.¹ The Court opined that because the middle term sentence was the highest term that could be imposed based on the jury’s verdict alone, it was unconstitutional to allow a judge to impose a higher sentence based on facts that were not found by the jury to be true beyond a reasonable doubt or not admitted to be true by the defendant. The Court left it up to California officials to decide how to change the sentencing laws so that they did not violate the federal constitution.

For many years, California laws have allowed judges discretion as to whether to run the terms for multiple charges consecutively (one after the other) or concurrently (together at the same time). (Penal Code § 669; Cal. Rules of Court, rule 4.425). The California Supreme Court has held that this part of the California sentencing law does not violate the federal constitution. (See *People v. Black* (2007) 41 Cal.4th 799, 820-821.) The United States Supreme Court has not addressed this part of the California sentencing law; however, in a case involving Oregon sentencing laws, the Court held that the Sixth and Fourteenth Amendments do not prohibit judges from deciding whether multiple terms will run concurrently or consecutively. (*Oregon v. Ice* (2009) 129 S.Ct. 711.)

¹ *Cunningham* overturned a previous California Supreme Court decision, *People v. Black* (2005) 35 Cal.4th 1238.

II. APPLICATIONS IN CALIFORNIA CASES

In the wake of the United States Supreme Court decision in *Cunningham*, the California legislature and courts have taken actions affecting sentencing procedures for criminal defendants. The result is that relatively few California prisoners are entitled to re-sentencing under *Cunningham* and even those prisoners who are re-sentenced are not likely to get shorter terms.

Effective March 30, 2007, the California legislature changed the sentencing laws by amending Penal Code § 1170(b) so that the middle term sentence is no longer the “presumptive maximum statutory term.” As of that date, a judge does not have to make factual findings to support the upper term; instead, the decision as to which term will be imposed rests “within the sound discretion of the court” based on what the judge believes “best serves the interests of justice.” A federal sentencing scheme of this nature had been approved by the United States Supreme Court in *United States v. Booker* (2005) 543 U.S. 220, and in *Cunningham*, the Court suggested that such a change would solve the Sixth Amendment problems with California’s sentencing laws.

A few months later, the California Supreme Court issued two important opinions applying the *Cunningham* decision to defendants who had been sentenced under the pre-March 30, 2007 law. In *People v. Black* (2007) 41 Cal.4th 799, the Court decided that imposition of an upper term sentence does not violate a defendant’s Sixth Amendment right to a jury trial if there is even a single aggravating factor that has been properly established by the jury’s verdict or the defendant’s admissions or based on the fact of a prior conviction. (See also *Butler v. Curry* (9th Cir. 2008) 528 F.3d 624, 642.) For example, in the *Black* case there was no Sixth Amendment error in selecting the upper term because two aggravating factors were properly established -- the jury had concluded that the crime involved force or violence and the judge had found that Black had numerous and serious prior convictions.

In *People v. Sandoval* (2007) 41 Cal.4th 825, the California Supreme Court decided that a Sixth Amendment violation must result in reversal of a sentence unless the error was harmless. An error is harmless only if it can be said beyond a reasonable doubt that a jury would have found the disputed aggravating factors to be true. Where a Sixth Amendment error is not harmless, the case must be remanded for re-sentencing. However, the Court decided that at the re-sentencing, judges should apply a “reformed” version of Penal Code § 1170(b) like version that went into effect on March 30, 2007. Thus, at a re-sentencing hearing, a judge has full discretion to impose either the lower, middle or upper term. The Court held that applying the “reformed” statute at re-sentencing did not violate the federal Constitution’s requirement of due process or prohibition on ex post facto laws.

The courts have also discussed what types of “aggravating factors” are based on “the fact of a prior conviction” and thus never need to be presented to a jury. In *People v. Towne* (2008) 44 Cal.4th 63, 80, the California Supreme Court adopted a broad interpretation of this exception. The Court held that the right to jury trial does not apply to allegations that the defendant (1) was on probation or parole at time of the new offense, (2) had served a prior prison term, or (3) had performed unsatisfactorily on probation or parole by committing a new criminal offense.² However, defendants sentenced under the

² The federal Ninth Circuit Court of Appeals has interpreted the “fact of a prior conviction” exception more narrowly. That Court concluded that the defendant’s status of being on probation does not come within the exception. Nor does the exception apply where a prior offense is a juvenile

pre-2007 law did have a right to jury trial as to whether they performed unsatisfactorily on probation or parole due to behavior other than committing a new crime (such as missing appointments, failing a drug test or stopping counseling). (*Towne*, at pp. 80-83.) In *People v. Nguyen* (2009) 46 Cal.4th 1007, the California Supreme Court also held that a juvenile adjudication falls within the “fact of a prior conviction” exception.

SUMMARY OF WHO IS AND IS NOT ENTITLED TO RE-SENTENCING PURSUANT TO THE *BLAKELY/CUNNINGHAM* CASES

Here is a summary of where the law stands as of December 2009:

- C The only people who may be able to get re-sentenced pursuant to *Cunningham* are those who received upper term sentences or upper term conduct enhancements prior to March 30, 2007. *Cunningham* does not affect consecutive sentences, full-term consecutive sentences for sex crimes, indeterminate life terms, life terms under the Three Strikes law or doubled terms under the Two Strikes Law.³ *Cunningham* does not affect sentences imposed on or after March 30, 2007.
- C A person has no Sixth Amendment claim for re-sentencing if he or she received an upper term because of (1) a “fact of a prior conviction” (as broadly interpreted by the California Supreme Court) or (2) a fact inherent in the jury’s findings or (3) a fact the defendant admitted was true. There is no Sixth Amendment violation even if the judge also relied on other invalid aggravating factors or even if there were one or more mitigating factors.
- C A person has no Sixth Amendment claim for re-sentencing if he or she pled guilty with the agreement that the court would impose the upper term.
- C Because of limits on retroactive application of most new “procedural rules,” the *Blakely/Cunningham* decisions do not affect any case in which the judgment was “final”

adjudication. (*Butler v. Curry* (9th Cir. 2008) 528 F.3d 624, 641, 643-644.) However, the Court recognized that other federal courts have issued contrary decisions, such that the California Supreme Court decisions interpreting the exception are not unreasonable and must be honored by the federal courts unless and until United Supreme Court specifically rules otherwise. (*Kessee v. Mendoza-Powers* (9th Cir. 2009) 574 F.3d 675, 678-679; see also *Butler*, at pp. 648-649.)

³ A person can find out how his or her sentence was calculated by looking at the Abstract of Judgment (AOJ) that the superior court issued in the case. In the part of the AOJ that lists the felony convictions, there is a section that says “Term L, M, U.” If that section is marked with a “U”, the prisoner received an upper term. (See Judicial Council Form CR 290.1.) The AOJ should be in the prisoner’s prison c-file or in the transcripts from a direct appeal. If a person has any doubt about whether the AOJ is accurate, he or she can double check it against the sentencing reporter’s transcript, which should also be in the prison c-file or the appellate case record. The sentencing transcript should also reveal what specific aggravating or mitigating factors were found true by the sentencing judge.

before *Blakely* was decided on June 24, 2004.⁴ (*In re Consiglio* (2005) 128 Cal.App.4th 511, 514-515; *Schardt v. Payne* (9th Cir.2005) 414 F.3d 1025, 1036.) People whose criminal judgments became final between the time *Blakely* was decided (June 24, 2004) and the time *Cunningham* was decided (January 22, 2007) may file habeas corpus petitions to enforce their right to have a jury consider whether aggravating sentence factors were supported by the facts. (*In re Gomez* (2009) 45 Cal.4th 650; *Butler v. Curry* (9th Cir. 2008) 528 F.3d 624, 634-639.) Defendants whose cases did not become final until after *Cunningham* can also ask for re-sentencing based on that decision, preferably by raising the argument on direct appeal but also possibly by filing habeas corpus petitions. As discussed previously, upper term sentences imposed on or after March 30, 2007 are valid under *Blakely* /*Cunningham* because the legislature has now given judges discretion to impose upper terms without any additional fact finding.

- C Even if a person meets all of the requirements described above, he or she will be granted a re-sentencing hearing only if the Sixth Amendment violation was not “harmless.” The violation will be deemed harmless if the reviewing court concludes beyond a reasonable doubt that the jury would have found the disputed aggravating factors to be true.

- C ***And – very importantly – even a person whose Sixth Amendment rights were violated will be subject to the total discretion of the judge when he or she appears for re-sentencing. Although such a person may possibly receive a low or middle term, there is no rule prohibiting the judge from again sentencing him or her to an upper term.***

Prisoners who have questions about their particular cases, and who are not currently represented by an attorney, may want to contact their former trial or appellate attorneys for advice on how to proceed.

⁴ The date that a case became final depends on how far the defendant appealed the case. “A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.” (*Caspari v. Bohlen* (1994) 510 U.S. 383, 390.) If a defendant did not appeal the conviction, the judgment arguably did not become final until 60 days after the sentence was entered, which is when the defendant no longer had a right to file a notice of appeal. (See *People v. Amons* (2005) 125 Cal.App.4th 855, 869; *People v. Colado* (1995) 32 Cal.App.4th 260; Cal. Rules of Court, rule 8.104.) If the defendant did appeal, but did not file a petition for review in the California Supreme Court, he or she can argue that the judgment became final either 40 or 60 days after the Court of Appeal decision was issued; 40 days was the deadline for filing a petition for review and 60 days was the deadline for the court to grant review on its own motion. (Cal. Rules of Ct., rules 8.264(b) and 8.500(e).) If the defendant filed a timely petition for review in the California Supreme Court, then the date of finality was 90 days after the petition was denied or 90 days after the California Supreme Court decided the case after granting review. (*Caspari v. Bohlen, supra*, at p. 390.) However, if the defendant filed a petition for certiorari in the U.S. Supreme Court, the case was not final until the certiorari petition was denied. (*Ibid.*) If the defendant still has a direct appeal pending at any stage of the process, then the case is not yet final.