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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 NEW CASES AND LEGISLATION
AFFECTING THE SENTENCING OF CALIFORNIA PRISONERS
(*BLAKELY, CUNNINGHAM, BLACK AND SANDOVAL*)**

(Updated 7/24/2007)

We are sending you this letter because you have asked for information or advice about the recent California Supreme Court decisions in *People v. Black* and *People v. Sandoval* and how those cases interpreted the U.S. Supreme Court decision in *Cunningham v. California*. We cannot provide legal representation to prisoners who want to challenge to their sentences based on *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. Please note that this is an area of law that has been rapidly changing and that some of the information in this letter may become out-dated as the courts further address and clarify the issues.

I. THE UNITED STATES SUPREME COURT DECISIONS IN *BLAKELY V. WASHINGTON* AND *CUNNINGHAM V. CALIFORNIA*

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 of the U.S. Constitution requires that any fact used to increase punishment beyond the presumptive "statutory maximum" sentence must be either admitted by the defendant or pled and proven to a jury beyond a reasonable doubt. In both *Apprendi* and *Blakely*, the Court re-affirmed that this rule did not apply to an increase in punishment that is based on the "fact of a prior conviction;" in

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other words, a judge can increase a sentence based on the fact of a prior conviction even if the existence of the prior conviction was not found true by a jury applying the “beyond a reasonable doubt” standard. (See also *Almendarez-Torres v. United States* (1998) 523 U.S. 224.)

In *Cunningham v. California* (Jan. 22, 2007) 549 U.S. ___ [127 S.Ct. 856], the U.S. Supreme Court applied these Sixth Amendment principles to the portion of the California sentencing law that allowed judges to impose upper term sentences based on findings of fact made by a preponderance of the evidence. The Court found that part of California’s sentencing law to be unconstitutional, overturning a previous California Supreme Court decision on the issue, *People v. Black* (2005) 35 Cal.4th 1238.

In *Cunningham*, the U.S. Supreme Court analyzed California’s Determinate Sentencing Law (“the DSL”), which for most felony crimes allows a judge to select the sentence from three possible terms – a low term, a medium term or an upper term. For example, first degree burglary is punishable by the low term of 2 years, middle term of 4 years or upper term of 6 years. (Pen. Code § 461.) Under the provisions reviewed in *Cunningham*, a judge was supposed to impose the middle term unless he or she found by a preponderance of the evidence that there were “mitigating” or “aggravating” factors and that the balance of factors justified a low or upper term. (Former Pen. Code § 1170(b); former Cal. Rules of Court, rules 4.420 through 4.423.)

The U.S. Supreme Court in *Cunningham* held that this method for imposing high terms under the DSL violated criminal defendants’ rights to trial by jury and proof of facts beyond a reasonable doubt under the U.S. Constitution’s Sixth and Fourteenth Amendments. 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 high 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 U.S. Supreme Court left it up to California officials to decide how to change California’s sentencing laws so that they do not violate the federal constitution.

II. THE AMENDMENTS TO PENAL CODE § 1170 AND THE CALIFORNIA SUPREME COURT DECISIONS IN *PEOPLE V. BLACK* AND *PEOPLE V. SANDOVAL*.

The California legislature and courts have taken several steps in the wake of the *Cunningham* decision.

First, effective March 30, 2007, the California legislature amended Penal Code § 1170(b) so that the middle term sentence is no longer the presumptive maximum term. As of that date, a

judge does not have to make factual findings to support selection of the upper term; instead, the decision on which term will be selected rests “within the sound discretion of the court” based on what the judge believes “best serves the interests of justice.” A sentencing scheme of this nature was approved by the U.S. 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.

Second, on July 19, 2007, the California Supreme Court issued two important opinions applying the *Cunningham* decision to the pre-March 30, 2007 version of the DSL. In *People v. Black*, No. S126182, 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 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 the defendant’s prior convictions.
- In the *Black* case, there was no Sixth Amendment error in the imposition of 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 concluded that Black’s prior convictions were numerous or of increasing seriousness.
- There is no Sixth Amendment right to a jury trial on facts that support a trial court’s decision to impose consecutive sentences.

In *People v. Sandoval*, No. S148917 the Court decided that:

- Imposition of the upper term in the *Sandoval* case violated the defendant’s Sixth Amendment right to a jury trial because there were no aggravating factors established by the jury’s verdict, the defendant’s admissions, or any record of prior convictions.
- Such a Sixth Amendment violation must result in reversal unless the error was harmless beyond reasonable doubt. The court decided that the error in the *Sandoval* case was not harmless because it could not be determined beyond a reasonable doubt that a jury would have found the same aggravating factors to be true had the factors been fully tried.
- Where the Sixth Amendment has been violated and the error is not harmless, the case must be remanded for re-sentencing. However, the Court decided that on re-

sentencing, judges must apply a “reformed” version of Penal Code § 1170(b) that is essentially identical to the version that went into effect on March 30, 2007. Thus, at the sentencing hearing, the judge will have full discretion to impose either the lower, middle or upper term. The Court held that such an application of the “reformed” statute was consistent with the U.S. Supreme Court decision in the *Booker* case and did not violate the U.S. Constitution’s requirement of due process or prohibition on ex post facto laws.

III. SUMMARY OF THE CURRENT STATUS OF THE SIXTH AMENDMENT SENTENCING ISSUES

In the wake of the amendment of Penal Code § 1170(b) and the *Black* and *Sandoval* decisions, few prisoners are likely to benefit from the *Cunningham* interpretation of the Sixth Amendment. Here is a summary of where the law stands as of mid-July 2007:

- The only defendants who may be able to get re-sentenced pursuant to *Cunningham* are those who received upper term sentences or upper term conduct enhancements. *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.¹
- Still in dispute is the complicated question of to what extent *Cunningham* applies to cases that are no longer pending on direct appeal. Defendants whose cases became final² before June 26, 2000 (before *Apprendi* was decided) most likely

¹ A prisoner 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 prisoner 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 appeal documents. The sentencing transcript should also reveal what specific aggravating or mitigating factors were found by the sentencing judge.

² 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.”

cannot rely on the Sixth Amendment to seek re-sentencing. Defendants whose cases became final between June 26, 2000 and June 23, 2004 (after *Apprendi* was decided but before *Blakely* was decided), may or may not be able to benefit from the *Apprendi/Blakely/Cunningham* rulings; there are arguments to be made both ways. Defendants whose cases were not yet final on or before June 24, 2004 (when the *Blakely* case was decided) should generally be entitled to the benefit of the *Apprendi/Blakely/Cunningham* rulings. However, defendants who committed their crimes after March 30, 2007 will not be able to challenge their sentences under *Cunningham* because they will properly have been sentenced under the amended version of Penal Code § 1170(b).

- Defendants who received the upper term in part because of “prior convictions that are numerous or of increasing seriousness” or because of facts inherent in the jury’s findings have no Sixth Amendment claim for re-sentencing.
- Defendants also have no Sixth Amendment claim for re-sentencing if they pled guilty with the agreement that they would receive an upper term or if they specifically admitted any of the aggravating facts.
- ***And – very importantly – even prisoners whose Sixth Amendment rights were violated at sentencing will be subject to the total discretion of the sentencing court when they appear for re-sentencing and may again be re-sentenced to the upper term.***

(*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.

There is the possibility that the U.S. Supreme Court or other federal courts will find that the California Supreme Court's 2007 *Black* and *Sandoval* decisions were incorrect on some or all points. There is also a possibility that the U.S. Supreme Court will revisit the "fact of a prior conviction" issue and decide that there should not be a "fact of a prior conviction" exception to the Sixth Amendment rules. Even if the "fact of a prior conviction" exception remains valid, there are still some questions as to whether that exception includes aggravating factors such as "unsatisfactory prior performance on probation or parole," "on probation or parole at the time of the current offense," or "served a prior prison term." In future months, the state and federal courts are likely to publish more opinions discussing these and other issues related to the scope of the Sixth Amendment and the application of the *Apprendi/Blakely/Cunningham* rulings to California cases.

Unfortunately, it is likely to be some time before these matters will be fully resolved. Thus, any California prisoner who may potentially benefit from future favorable court decisions on these Sixth Amendment sentencing issues should keep his or her case going in the state and federal courts as long as possible. Prisoners who have questions about their particular cases and who are not currently represented by an attorney should attempt to contact their former trial or appellate attorneys for advice on how to proceed.