

**FIRST DISTRICT APPELLATE PROJECT  
TRAINING SEMINAR  
January 26, 2008**

# **THE PERILS OF PENDENCY**

*Pending Cases in the U.S. and California Supreme Courts*

**Special Bonus Feature #1:  
Ninth Circuit En Banc Cases Too!**

**But wait, there's more.....**

**Special Bonus Feature #2:  
*Blakely-Cunningham* Update!**

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*Pending Cases in the U.S. and California Supreme Courts*

Prepared by J. Bradley O’Connell  
First District Appellate Project, Assistant Director  
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# THE PERILS OF PENDENCY

## *Pending Cases in the U.S. and California Supreme Courts*

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### I. U.S. SUPREME COURT – CERT. GRANTED CASES: Selected Highlights

These summaries are based primarily on the Granted & Noted List, October 2007 Term, on the Supreme Court's web site:

<http://www.supremecourtus.gov/orders/07grantednotedlist.html>

Additional information has been obtained from SCOTUSBlog – a web site on Supreme Court practice maintained by two Washington, D.C., firms, Akin Gump Strauss Hauer & Feld and Howe & Russell: <http://www.scotusblog.com/wp/>

#### **Confrontation**

- *Giles v. California*, 07-6053, cert. gr., Jan. 11, 2008. Cal. Supreme Court opinion: *People v. Giles* (2007) 40 Cal.4th 833.

This latest installment in the *Crawford v. Washington* saga concerns the “forfeiture by wrongdoing” exception to the confrontation clause: “Does a criminal defendant ‘forfeit’ his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant’s actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?”

#### **Search & Seizure**

- *Virginia v. Moore*, 06-1082; cert. gr., Sept. 25, 2007; argued Jan. 14, 2008.

*Moore* concerns the relationship between state law on the authority for arrests and the constitutionality of a search under the Fourth Amendment. “Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?” *Moore* concerns whether violations of state provisions governing arrests, such as statutory prohibitions on custodial arrests for certain minor offenses, also affect the constitutionality of the arrest or search under the Fourth Amendment and the availability of the exclusionary remedy.

### ***Faretta* Self-Representation, Defendant's Competency and Right to Fair Trial**

- *Indiana v. Edwards*, 07-208, cert. gr., Dec. 7, 2007.

*Edwards* poses issues concerning *Faretta's* application to a defendant who is mentally ill, but meets the usual standard for competency to stand trial (akin to Cal. Pen. Code § 1368), including whether a trial court can deny self-representation on grounds of assuring the defendant's right to a fair trial. "May states adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?"

### **Prosecutorial Misconduct – *Batson* and Other Evidence of Racial Bias**

- *Synder v. Louisiana*, cert. gr., June. 25, 2007; argued Dec. 4, 2007.

This is the capital appeal of an African-American man convicted and sentenced by an all-white jury. The case concerns two different types of alleged prosecutorial racial bias – *Batson* error in the use of peremptory challenges against black jurors and the prosecutor's references to the O.J. Simpson case during closing arguments at trial. In addition to more traditional *Batson* issues (such as the role of juror comparisons and alleged disparate questioning of white and black jurors), the case concerns whether the later O.J. Simpson references relate back to the *Batson* claim and represent evidence of prosecutorial racial bias and of likely discriminatory intent during jury selection?

### **Death Penalty**

- *Baez v. Rees*, 07-5439; cert. gr., Sept. 25, 2007; argued Jan. 7, 2008.

This is the Kentucky lethal injection case, which has resulted in a de facto national moratorium on executions, as the Supreme Court has stayed other scheduled executions pending *Baez*. The case does not represent a blanket challenge to the constitutionality of lethal injections, but concerns the standards under which courts must evaluate whether a state's execution protocol constitutes cruel and unusual punishment by inflicting unnecessary or excessive pain and suffering.

- *Kennedy v. Louisiana*, 07-343; cert. gr., Jan. 4, 2008.

*Kennedy* concerns the constitutionality of the death penalty for a non-homicide offense: "Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty." Prior Supreme Court case law bars capital punishment for rape of an adult victim, so the issue is whether the victim's age (under 12) renders the offense so egregious and sufficiently "narrows the class" of eligible offenses that the statute comports with Eight Amendment standards.

## Retroactivity & Federalism

- *Danforth v. Minnesota*, 06-8273, cert. gr., May 21, 2007; argued Oct. 31, 2007.

Like *Virginia v. Moore* (summarized under Search & Seizure), *Danforth* concerns the interplay between state law and the remedies for federal constitutional violations – including whether a state court may choose to apply a new federal constitutional rule (*Crawford v. Washington*) retroactively in state post-conviction proceedings, even if the relevant federal decision does not meet the *Teague* test for retroactive application in federal habeas proceedings. “Are state supreme courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law- or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*?”

## II. NINTH CIRCUIT – CASES PENDING ON EN BANC REVIEW.

The Ninth Circuit’s web site includes a link to a list of cases currently pending on en banc review; the list also includes summaries of the holdings in recently-decided en banc cases: <http://www.ca9.uscourts.gov/>

General note: Both of the pending en banc cases summarized below have arisen on federal habeas review of state convictions. Consequently, in each case, the Circuit is reviewing the merits under the deferential AEDPA/§ 2254(d)(1) standard of review, allowing habeas relief only where the state court decision was “contrary to” or an “unreasonable application” of clearly established federal law.

### *Miranda*

- *Anderson v. Terhune*, 04-17237. 9<sup>th</sup> Cir. panel opn., 467 F.3d 1208; rehearing en banc granted, Apr. 24, 2007; argued Oct. 9, 2007.

Whether a defendant’s comments during interrogation were sufficiently clear to invoke his *Miranda* rights under *Davis v. United States* (1994) 512 U.S. 452. At one point, Davis stated “I plead the Fifth.” Incredibly enough, the California appellate court viewed that statement as “ambiguous,” rather than as a sufficiently clear and unequivocal invocation of his right to remain silent. By a 2-1 vote, the Ninth Circuit panel found that the state court’s decision was neither an “unreasonable” determination of facts nor an unreasonable application of established federal law, as required under the AEDPA standard. However, even the panel majority intimated: “If this case were not before us on 28 U.S.C. § 2254 habeas review, we might be writing a very different opinion.”

## Self-Representation and AEDPA Issues on Review of State Court Decisions

- *Frantz v. Hazez*, 05-16024. En banc review ordered, Dec. 29, 2006 ; argued March 22, 2007.

The underlying claim concerns whether a self-represented defendant’s inability to participate in a bench conference on the jury’s request to hear a 911 tape represented a structural defect (as a denial of his right to self-representation) or was susceptible to harmless error review, as the Arizona appellate court found. The Circuit took the unusual step of ordering en banc review on its own motion, prior to any decision by the original 3-judge panel. Apparently because the petitioner chose to represent himself in the federal appeal, the Circuit appointed an attorney to file briefs as an amicus addressing several subtle issues concerning application of the AEDPA/§ 2254(d)(1) standard. These include whether the federal court must limit its § 2254(d)(1) review to the reasons stated in the state court decision. See briefing order, 465 F.3d 910 (9<sup>th</sup> Cir. 2006).

### III. CALIFORNIA SUPREME COURT – REVIEW GRANTED CASES: Selected Highlights

The summaries below are based primarily on the Judicial Council’s weekly press releases on review-granted cases, <http://www.courtinfo.ca.gov/courts/supreme/recent.htm>, and on the appellate opinions. (Citations are included only where the appellate opinion was published; however, the unpublished review-granted opinions are readily available, as well, on the Supreme Court’s web site.) Unless otherwise indicated, any quotations are from the Judicial Council’s summary. Another useful source for tracking California Supreme Court cases is Cal Law (affiliated with The Recorder): <http://www.law.com/jsp/ca/cscm/cur.jsp>.

**This is not a complete list of review-granted criminal cases.** Instead, this summary focuses on the issues likely to be of greatest interest to California criminal appellate practitioners. Counsel should consult one of the sources above for a more comprehensive listing of pending “lead cases.”

Finally, ***Blakely-Cunningham* developments, including issues still pending on review in the California Supreme Court, are summarized separately in the final section of this outline (Part IV).**

#### Homicide

- *People v. Chun*, S157601. Appellate opn., 155 Cal.App.4th 170; review gr., Dec. 19, 2007.

Felony-murder. “Does the offense of discharging a firearm at an occupied vehicle in violation of Penal Code section 246 merge with a resulting homicide under *People v. Ireland* (1969) 70 Cal.2d 522, if there is no admissible evidence of an independent and collateral criminal purpose other than to commit an assault?” *Chun* arises from the tension between: (1) the Court’s recent cases (*Randle* and *Robertson*) conditioning use of negligent firearm discharge (Pen. Code § 246.3) as a felony-murder predicate on the presence of a “collateral

purpose,” distinct from assault, and (2) its 1995 *Hansen* opinion which declined to apply a collateral purpose test and rejected a similar merger challenge to use of § 246 as a predicate offense.

- *People v. Medina*, S155823. Appellate opn., 153 Cal.App.4th 610; review gr., Oct. 31, 2007.

Natural and probable consequences doctrine. *Medina* concerns the outer bounds of use of a “natural and probable consequences” theory to hold participants in a gang-related fight liable for a homicide committed by another gang member. “Did the Court of Appeal err in holding the evidence insufficient to support defendants’ convictions for murder and attempted murder under the natural and probable consequences doctrine based on the target offenses of assault and battery?”

- *People v. Moye*, S157980. Review gr., Jan. 16, 2008.

Voluntary manslaughter/heat-of-passion. *Moye* concerns whether there was sufficient provocation to support requested instructions on the heat-of-passion theory of voluntary manslaughter and, if so, whether the refusal of that instruction was prejudicial. As phrased in the Attorney General’s petition for review (2007 WL 4593072): “Did [the appellate court] err in holding that the claim that appellant was acting in fear for his life, by itself, was sufficient to require an additional instruction on heat of passion voluntary manslaughter, without considering the effect of the other manslaughter instructions?”

## **Robbery**

- *People v. Gomez*, S140612. Appellate opn., 134 Cal.App.4th 1241; review gr., Mar. 22, 2006; set for argument, Feb. 6, 2008.

Immediate presence. *Gomez* involves a variation on a so-called “*Estes* robbery” (i.e., one in which the original taking is non-forcible but the thief subsequently uses force to retain possession of the goods). The twist in *Gomez* is that the taking apparently did not occur in the victim’s “immediate presence.” “Can a defendant be convicted of robbery for using force or fear in the victim’s immediate presence while carrying away stolen property, or does such a conviction require that the defendant use force or fear in the victim’s immediate presence while taking the property or preventing the victim from regaining it?”

- *People v. Scott*, S136498. Review gr., Nov. 16, 2005.

Multiple robbery convictions during robbery of store. *Scott* concerns the number of robbery convictions permissible when multiple store employees are present and subject to force or fear, but only one employee had access to the property ultimately taken: “Did the trial court err in instructing the jury that all employees have constructive possession of their employer’s property during a robbery, and, if so, what is the proper standard for determining whether an

employee has constructive possession of the employer's property during a robbery?"

### **Joinder & Severance; Cross-Admissibility of Offenses**

- *People v. Soper*, S152667. Review gr., June 27, 2007.

Cross-admissibility. In finding the defendant was entitled to severance of two murder counts, the appellate court held that the trial court erred in believing that evidence of two homicides would be cross-admissible. Consequently, the joinder/severance issue turns upon whether that evidence would be admissible anyway under "other offenses" (Evid. Code § 1101, 352) principles: "[D]id the [appellate court] err in holding that evidence of each murder could not be admitted on the question of intent or motive as to the other murder because identity was at issue and the crimes were not cross-admissible on that point?"

### **Search & Seizure**

- *People v. Galland*, S149890. Appellate opn., 146 Cal.App.4th 277; review gr., Apr. 18, 2007.

Sealed warrant affidavit. *Galland* concerns the consequences of a court's or magistrate's failure to retain a complete record of any confidential information submitted in support of a warrant affidavit – including application of the exclusionary rule as a sanction for the court's practice of returning the sealed showing to the police, rather than retaining it for the court's records.

- *In re Raymond C.*, S149728. Appellate opn., 145 Cal.App.4th 1320; review gr., March 21, 2007.
- *People v. Hernandez*, S150038. Appellate opn., 146 Cal.App.4th 773; review gr., March 21, 2007.

Traffic stops – license plates. "*Raymond C.* and *Hernandez* both present the following issue: If a police officer sees that a motor vehicle lacks a rear or both license plates, may the officer make a traffic stop to determine if the vehicle has a temporary permit or if a displayed temporary permit is a valid one?"

### **Wheeler-Batson**

- *People v. Lenix*, S148029. Review gr., Jan. 24, 2007.

The U.S. Supreme Court's *Miller-El* cases have affirmed the materiality of juror comparisons to assessment of the bona fides of a prosecutor's stated reasons for striking minority jurors (contrary to prior California cases which had insisted that such comparisons were irrelevant to *Wheeler-Batson* analysis). But, even after *Miller-El*, some California courts have resisted

juror comparisons on procedural grounds, and the California Supreme Court has now granted review on the following question: “Must an appellate court perform a comparative juror analysis for the first time on appeal to evaluate the genuineness of the prosecutor’s reasons for peremptorily challenging prospective jurors?” (In its own post-*Miller-El II* cases to date, the California Supreme Court has “assumed without deciding” that such comparisons are necessary on appeal, even if not specifically raised below.)

### **Prosecutorial Misconduct**

- *People v. Lopez*, S143615. Appellate opn., 138 Cal.App.4th 674; review gr., July 19, 2006; argued, Nov. 6, 2007.

*Lopez* concerns a variety of alleged instances of prosecutorial misconduct in the molestation trial of a Catholic priest. The appellate court found the prosecutor engaged in a pervasive pattern of “guilt by association” arguments, drawing from the well-publicized scandals involving other Catholic priests. (The *Lopez* appeal presents the prosecutorial misconduct issues in an ineffective assistance envelope, due to trial counsel’s failure to object on these grounds.)

### **Enhancements Based on Facts of Current Offense**

- *People v. Anderson*, S152695. Appellate opn., 149 Cal.App.4th 183, mod. 150 Cal.App.4th 305a; review gr., July 11, 2007.
- *Porter v. Superior Court*, S152273. Appellate opn., 148 Cal.App.4th 889; review gr., July 11, 2007.

Double jeopardy. *Anderson* and *Porter* each present issues concerning the applicability of double jeopardy principles to separate retrial of an enhancement allegation (without any retrial of the underlying criminal count). In *Anderson*, the jury deadlocked on a “one strike” allegation concerning a sexual assault, and, in *Porter*, the court granted a new trial limited to premeditation and gang allegations (while letting the attempted murder conviction stand). Each case concerns whether double jeopardy bars retrial of those separate enhancing allegations, in light of *Apprendi*’s treatment of enhancements as comparable to additional elements of the underlying offense.

- *People v. Pitto*, S139609. Appellate opn., 133 Cal.App.4th 1544; review gr., Feb. 8, 2006; argued Jan. 9, 2008.

Weapons. *Pitto* concerns whether the standard instructions for an arming enhancement (Pen. Code § 12022(c); CALJIC No.17.15) “adequately apprise the jury of the need for a ‘facilitative nexus’ between the handgun and the underlying crime, as those terms are utilized in *People v. Bland* (1995) 10 Cal.4th 991.”

- *People v. Cross*, S139791. Appellate opn., 134 Cal.App.4th 500; review gr., Mar. 1, 2006.

GBI/pregnancy. Where a child molestation offense results in pregnancy, can either the pregnancy itself or a “legal surgical abortion” to terminate the pregnancy support a great bodily injury enhancement (Pen. Code § 12022.7)?

### “Strikes” & Other Prior Conviction Enhancements

- *People v. Nguyen*, S154847. Appellate opn., 152 Cal.App.4th 1205; review gr., Oct. 10, 2007.

Juvenile priors. *Nguyen* poses one of the most crucial unresolved issues concerning the “prior conviction” exception to the *Apprendi* rights to jury determination and proof beyond a reasonable doubt of enhancing facts which increase the maximum term. The “prior conviction” exception rests, in part, on the fact that the defendant had the full range of constitutional rights in the prior proceeding. The inclusion of juvenile adjudications in California’s “three strikes” law (and those of some other jurisdictions) invites the question whether the jury trial right is essential to the constitutionality of a prior adjudication’s use as an enhancement: “Can a prior juvenile adjudication of a criminal offense in California constitutionally subject a defendant to the provisions of the three strikes law (Pen. Code, §§ 667, subs. (b)-(i), 1170.12) although there is no right to a jury trial in juvenile wardship proceedings in this state?”

- *People v. Delgado*, S141282. Review gr., Mar. 29, 2006.
- *People v. Miles*, S140413. Review gr., Mar. 29, 2006.

Proof of “serious felony” status. Both *Delgado* and *Miles* concern whether the description of the conviction offense in the prior judgment documents was sufficient to establish that it qualified as a “serious felony” (as necessary to support a “strike” or “serious felony” enhancement). “In *Delgado*, the issue is whether the reference to ‘245(a)(1) ASSLT W DWPN’ in the abstract of judgment for the prior conviction sufficed to prove that” the § 245(a)(1) conviction was based on “assault with a deadly weapon rather than assault by means of force likely to produce great bodily injury.” *Miles* concerns whether a federal judgment describing a conviction for 18 U.S.C. § 2113(a) as “armed bank robbery” established that the conviction was for “an offense that would constitute robbery under California law rather than the version of the federal crime that would be commercial burglary under California law.”

### Juveniles

- *In re Jose C.*, S158043. Appellate opn., 155 Cal.App.4th 115; review gr. , Jan. 16, 2008.

May a California juvenile court exercise jurisdiction over a wardship petition where the charged offense is a violation of federal law (bringing aliens into the U.S.)?

- See also *People v. Nguyen*, summarized above under “‘Strikes’ & Other Prior Conviction Enhancements” (constitutionality of use of prior juvenile adjudication as “strike”).

### **Guilty Plea Appeals**

- *People v. Cuevas*, S147510. Appellate opn., 142 Cal.App.4th 1141; review gr., Jan. 3, 2007.

Where a plea agreement specifies a “lid” (a maximum term allowable under the bargain), a defendant must obtain a certificate of probable cause in order to raise a Pen. Code § 654 challenge to a sentence which is within the “lid,” because the claim is considered a challenge to the validity of the plea bargain. (*People v. Shelton* (2006) 37 Cal.4th 759.) *Cuevas* concerns whether a defendant must also obtain a certificate in order to raise a § 654 claim where “the plea agreement did not specify a maximum sentence” but “he entered his no contest plea with an understanding of the maximum sentence he faced.” Although *Cuevas* is a § 654 case, its disposition may also affect *Blakely-Cunningham* claims. Some appellate courts have barred *Cunningham* challenges to upper terms on a similar theory that, in entering his plea after being advised of the maximum potential sentence for an offense, the defendant implicitly agreed that the court could sentence him to any term within that range. See *People v. French*, summarized in the “*Blakely-Cunningham* Update,” Part IV, *infra*.

### **Habeas Corpus**

- *People v. Villa*, S151561. Appellate opn., 148 Cal.App.4th 473; review gr. June 13, 2007.

Custody. *Villa* presents an important question on the “custody” requirement for habeas corpus, which has particular significance to the availability of that remedy to challenge a prior conviction in order to avoid deportation or other immigration consequences. “Is a habeas corpus petitioner ‘restrained of his liberty’ within the meaning of Penal Code section 1473, subdivision (a), when he is in the custody of federal immigration officials solely because of a California conviction on which the sentence has fully expired?”

### **Sex Offenders/Prop. 83 Residency Restrictions**

- *In re E.J.*, S156933; *In re S.P.*, S157631; *In re J.S.*, S157633; *In re K.T.*, S157634. OSC’s issued in all four cases, Dec. 12, 2007.

Under Proposition 83's revision of the residency restrictions on registered sex offenders, “it is unlawful for any person for whom registration is required pursuant to [Pen. Code] Section 290 to reside within 2000 feet of any public or private school, or park where children

regularly gather.” (Pen. Code § 3003.5(b).) “In each of these four matters, the [Supreme Court] issued an order to show cause why the petitioner is not entitled to relief from the residency restrictions imposed by Penal Code section 3003.5 ... on the ground the statute violates the ex post facto clauses of the state and federal Constitutions, has been impermissibly retroactively applied, constitutes an unreasonable parole condition, impinges on the petitioner’s substantive due process rights, and is unconstitutionally vague.”

### **SVP & Other Mental Hospital Commitments**

- *People v. Price*, S151207. Appellate opn., 147 Cal.App.4th 955; review gr., June 13, 2007.

Untimely NGI petition. *Price* presents yet another example of a recurring problem under California’s various mental commitment regimens (SVP, NGI, MDO) – whether the defendant has any meaningful remedy for the prosecution’s late filing of an extension petition or the failure to bring it to trial on time: “Did the untimely filing of the petition to extend an insanity commitment [Pen. Code § 1026.5(b)] deny defendant due process, when there was no good cause for the delay and the late filing allegedly left him with insufficient time to prepare for the hearing on the petition?”

- *In re Smith*, S145959. Appellate opn., 141 Cal.App.4th 217; review gr., Oct. 25, 2006; argued Jan. 9, 2008.

SVP – effect of reversal of underlying conviction. SVP proceedings can only be initiated upon the completion of the defendant’s prison term (or parole revocation) for a prior conviction (though the expiring sentence need not be for one of the predicate sex offenses). *Smith* concerns whether the SVP proceeding can continue when the prison sentence which allowed the original filing of the petition is vacated by the reversal of the underlying conviction: “Can a proceeding to commit a defendant as a sexually violent predator be maintained if the conviction on which the defendant was serving a prison sentence at the time that the sexually violent predator proceedings were initiated has been subsequently reversed on appeal?”

### **Parole**

- *In re Lawrence*, S154018. Appellate opn., 150 Cal.App.4th 1511; review gr., Sept. 19, 2007.
- *In re Jacobson*, S156416. Appellate opn., 154 Cal.App.4th 849; review gr. Dec. 12, 2007.

In the past few years, several decisions (both state and federal) have granted habeas relief from denials of parole by the Board of Parole Hearings (BPH) or from gubernatorial vetoes of BPH grants of parole. A recurring theme in those cases has been that BPH and/or the Governor have placed excessive emphasis on the “immutable factor” of the circumstances of the original murder, without sufficient consideration of subsequent circumstances, such

as the strength of the evidence of the defendant’s rehabilitation over the ensuing decades in prison. (Most of the cases involve murders in the early-to-mid 1980's.) Both *Lawrence* and *Jacobson* pose the same issue: “In making parole suitability determinations for life prisoners, to what extent should the Board of Parole Hearings, under Penal Code section 3041, and the Governor, under Article V, section 8(b) of the California Constitution and Penal Code section 3041.2, consider the prisoner’s current dangerousness, and at what point, if ever, is the gravity of the commitment offense and prior criminality insufficient to deny parole when the prisoner otherwise appears rehabilitated?”

- *In re Shaputis*, S155872. Review gr. Oct. 24, 2007.

“(1) In assessing whether ‘some evidence’ supports a decision by the Governor to deny parole, is the inquiry limited to whether the reasons stated have a factual basis or should a reviewing court also examine whether the evidence supports a finding that the inmate presents an unreasonable current risk of danger to the public? (2) When a reviewing court determines that a gubernatorial parole decision is not supported by sufficient evidence, should it remand the matter to the executive branch to proceed in accordance with due process, or should it order the inmate’s immediate release?”

#### IV. ***BLAKELY-CUNNINGHAM UPDATE***

##### **Cert. denied in *Black II***

Shortly after its opinion in *Cunningham v. California* (2007) 549 U.S. \_\_\_ [127 S.Ct. 856], sustaining the *Blakely* challenge to California’s Determinate Sentence Law, the U.S. Supreme Court vacated “*Black I*” (the Cal. Supreme Court decision upholding the DSL) and remanded it for reconsideration in light of *Cunningham*. On remand, the California Supreme Court held that there is no Sixth Amendment error as long as the sentencing court cited one valid aggravating factor – that is, (1) a factor supported by a jury finding; (2) a factor which the defendant admitted; or (3) a factor within the “prior conviction” exception to the right to jury trial. (*People v. Black* (2007) 41 Cal.4th 799 (“*Black II*”).) Under *Black II*, a sentencing court’s partial reliance on a single valid factor is constitutionally sufficient to authorize an upper term, even if the court also cited multiple other factors to which the jury trial right would otherwise apply. The California Supreme Court also adhered to its *Black I* holding that a court’s discretionary decision to impose a consecutive term does not implicate *Blakely*. (For more complete summaries of both *Black II* and the companion opinion, *People v. Sandoval* (2007) 41 Cal.4th 825 (outlining the prejudice analysis for *Cunningham* error), see the “*Blakely Resources*” section of the FDAP web site, [www.fdap.org](http://www.fdap.org).)

Black again petitioned for certiorari. The petition sought review of both *Black II*’s “single valid factor” analysis and its consecutive sentencing holding, as well as other aspects of its

analysis. (The complete *Black II* cert. petition is available on FDAP's web site.) On Jan. 14, 2007, the U.S. Supreme Court denied certiorari in *Black II*. (*Black v. California*, No. 07-6140.)

### ***Cunningham* Issues Still Pending in California Supreme Court**

In the immediate wake of *Cunningham*, the California Supreme Court granted review in multiple lead cases posing various *Blakely-Cunningham* claims and also requested supplemental briefing in *People v. Towne* (which has been pending since shortly after the original decision in *Blakely v. Washington*).

The Court heard arguments in *Black II* and *Sandoval* on an expedited basis and issued its decisions in those cases in July 2007, as summarized above. However, the other review-granted cases remain pending. The Court heard arguments in *People v. French* in Jan. 2007, but has not yet scheduled argument in the others.

The summaries below are based primarily on the Judicial Council's classification of the cases in its Feb. 9, 2007, press release, announcing the multiple grants of review in *Cunningham*-related cases.

- *People v. French*, S148845. Review. gr., Feb. 7, 2007; argued Jan. 8, 2008.

Guilty plea appeals. *French* poses several procedural and substantive issues surrounding *Cunningham* challenges to upper terms imposed following guilty or no contest pleas. The Attorney General has argued that a challenge to the constitutionality of judicial fact-finding at sentencing implicates the legality of the plea bargain and requires a certificate of probable cause. *French* also concerns whether the colloquy surrounding the advisement of the maximum penal consequences for the plea and the admission of a factual basis can be read as an admission of aggravating facts sufficient to justify an upper term.

- *People v. Towne*, S125677. Review. gr., July 14, 2004.
- *People v. Hernandez*, S148974. Review. gr., Feb. 7, 2007.
- *People v. Pardo*, S148914. Review. gr., Feb. 7, 2007.

### Recidivist factors.

In *Black II*, the California Supreme Court held that the aggravating factor of "numerous" or "increasingly serious" prior convictions (Cal. Rules of Court, rule 4.421(b)(2)) comes within the "prior conviction" exception to the *Apprendi-Blakely-Cunningham* right to jury trial. Consequently, under *Black II*'s reasoning, there is no *Cunningham* error where the sentencing court relied, in part, on the "numerous/increasingly serious" priors factor (even if the court also cited additional aggravating circumstances). *Towne*, *Hernandez*, and *Pardo*

pose issues concerning the status of the other “recidivist” factors listed in rule 4.421(b) – including service of a prior prison term, probation or parole status at the time of the current offense, and poor prior performance on probation or parole.

- *People v. Mvuemba*, S149247. Review. gr., Feb. 7, 2007.

The Judicial Council’s Feb. 2007 press release placed both *Mvuemba* and *Sandoval* in the category of “cases in which the trial court imposed an upper-term sentence based on aggravating factors that had no relationship to prior convictions.” Since then, the Supreme Court has, of course, heard and decided *People v. Sandoval* (2007) 41 Cal.4th 825. However, the Court has retained *Mvuemba* on its docket, rather than simply retransfer it to the Court of Appeal for reconsideration in light of *Sandoval*. It is unclear which questions the Supreme Court may be planning to address in *Mvuemba* (assuming that it ultimately hears and decides the case). In addition to the upper term issues, the merits briefs in *Mvuemba* also address the effect of *Cunningham* on discretionary full-force consecutive sentencing under Pen. Code § 667.6(c) and on factual determinations incident to a sentencing court’s decision whether to stay a term under Pen. Code § 654.

- *In re Gomez*, S155425. Appellate opn., 153 Cal.App.4th 1516; review gr., Oct. 24, 2007.

Retroactivity. This habeas case concerns the applicability of *Cunningham* to cases which became “final” on direct appeal *after the date of Blakely v. Washington* (June 24, 2004) *but before the date of Cunningham v. California* (Jan. 22, 2007). There is no question that *Cunningham* is fully applicable to all cases which were not yet “final” on direct appeal as of that date – i.e., cases which were pending on cert. and later remanded to the California courts, cases in which the time for petitioning for cert. had not expired as of the date of *Cunningham*, or cases which were still pending on direct appeal in the California courts. *Gomez* concerns only the applicability of *Cunningham* to cases in which the direct appeal was concluded for all purposes prior to the issuance of *Cunningham*, such as affirmances in which there was no cert. petition.