CUNNINGHAM UPDATE

I.

BACKGROUND

In *Apprendi v. United States* (2000) 530 U.S. 466, 490, the Supreme Court held:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. (*Id*. at p. 490.)

On June 24, 2004, the United States Supreme Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 413].)

In *People v. Black* (2005) 35 Cal.4th 1238, 6 of 7 California Supreme Court justices said *Blakely* did not apply in California, because the statutory maximum is the upper term, not the middle term. A lone dissenter, Justice Kennard, said *Blakely* did apply to California's Determinate Sentencing Law, but once there was one aggravating factor found true by a jury or admitted by a defendant, the "statutory maximum" was then the upper term, and the court could engage in any fact-finding it wanted without violating *Blakely*.

On January 22, 2007, the United States Supreme Court decided *Cunningham v. California* (2007) 549 U.S. ___ [127 S. Ct. 856; 166 L. Ed. 2d 856]. The court held the "statutory maximum" per *Blakely* was the mid-term, not the upper term. The Court analyzed the California Supreme Court's assumptions in *Black* and found that each violated "*Apprendi*'s 'bright-line rule.'" (*Id.* at p. ___ [127 S.Ct. at p. 869].) It held that *Black* misunderstood prior U.S. Supreme Court precedent in its erroneous belief that there was no "bright-line rule" on this issue. (*Ibid.*)

II.

SB 40: THE LIKELY SHORT LIFE-SPAN OF THE *BLAKELY/CUNNINGHAM* CHALLENGE TO UPPER TERMS

Except for a couple of issues (see below), legal argument based on *Blakely* and *Cunningham* will have a short life. On March 30, 2007 Governor Arnold Schwarzenegger signed urgency legislation changing California's sentencing law. Under the new law, contained in SB 40, the mid-term is no longer the presumptive sentence. The sentencing judge has total discretion in deciding whether to impose the upper, mid or low term.

- Arguably, SB 40 should not apply retroactively, as that would violate the *ex post facto* clause. (See *Miller v. Florida* (1987) 482 U.S. 423, 433 [departure from presumptive sentence under revised sentencing guideline violated *ex post facto* prohibitions]; but see *Dobbert v. Florida* (1977) 432 U.S. 282 [no ex-post facto violation where death penalty law changed so that judge, not jury, made ultimate decision whether death penalty should be imposed].)

- However, in *Booker* the Supreme Court altered the federal sentencing system and allowed the alteration to apply to cases pending on appeal at that time. It never considered whether this violated *ex post facto* principles

- Chief Justice George has publicly stated SB 40 will not apply retroactively. He made this statement in a February 15 radio interview with Michael Krasny on National Public Radio. Justice George said SB 40 "cannot ... affect ... past cases."

- Jeff Adachi, the Public Defender in San Francisco, believes SB 40 is unconstitutional because California's triad sentencing system does not provide a sufficient range of sentencing options to allow a judge genuine authority to sentence among a range of sentences. His argument is based on the Supreme Court's statement in *Cunningham* that some states "have chosen to permit judges genuinely "to exercise broad discretion . . . within a statutory range." (*Cunningham, supra*, [127 S.Ct. at p. 871].) Mr. Adachi believes the system now in place still violates the constitutional right to have a jury decide all the facts since giving judges only three choices does not amount to broad discretion within a statutory range. He is confident SB 40 will not survive constitutional challenge. I am not so confident, but the challenge should be made, nonetheless.

III.

PEOPLE v. TOWNE, S125677

Cunningham left many questions unanswered. It was a case where every aggravating factor involved the crime committed, and none of the factors were found true by the jury. A major unanswered question is what happens when the sentencing court finds several aggravating factors, and one or more involve the defendant's past criminality, or recidivism.

In *People v. Towne*, S125677 the Supreme Court asked for supplemental briefing on two issues:

- Do *Cunningham* and *Almendarez-Torres v. United States* (1998) 523 U.S. 224 "permit the trial judge to impose the upper term based on its own finding that the defendant's prior convictions as an adult are numerous and of increasing seriousness, the defendant has served a prior prison term; the defendant was on parole when the crime was committed; or, the defendant's prior performance on probation or parole was unsatisfactory. These are the four aggravating factors listed in California Rules of Court, rule 4.421(b)(2) to (b)(5)."

- If there is a single aggravating factor which satisfies the requirements of *Blakely* (e.g, defendant admits a prison prior), is the defendant then eligible for the upper term, permitting the court to make its own findings on other aggravating factors without violating *Blakely*? (NOTE: this is the position taken in Kennard's dissenting opinion in *Black*.)

The Supreme Court will probably decide aggravating factors involving a defendant's criminal history can be decided by the judge under *Almendarez-Torres v. United States*, *supra*, 523 U.S. 224. As for the second question, despite Kennard's concurring and dissenting opinion in *Black*, court of appeal opinions have not adopted her position that only one valid aggravating factor is sufficient to satisfy *Blakely*. Despite the presence of a valid aggravating factor involving recidivism, appellate courts have generally reversed and remanded where the sentencing court also relied on invalid aggravating factors and the court cannot determine that the error was harmless. It is difficult to predict what the Supreme Court will decide.

A. Mere Fact of Prior Conviction or Recidivism?

In *Almendarez-Torres v. United States* (1998) 523 U.S. 224 a defendant pled guilty and admitted he had suffered specified prior convictions. The sentencing court enhanced the sentence based on those prior convictions. The Supreme Court held the defendant had no right to a jury trial concerning the priors. It reasoned that recidivism was a traditional "sentencing factor" and did not "relate to the commission of the offense" (*id*. at pp. 243-248) and was therefore not covered by the constitutional guarantee that all elements of an offense must be found by a jury beyond a reasonable doubt.

In discussing *Almendarez-Torres*, the *Apprendi* majority stated:

> Because Almendarez-Torres had *admitted* the three earlier convictions for aggravated felonies - all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own - no question concerning the right to a jury trial or the standard of proof that would apply to a contested

> issue of fact was before the Court." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 488 [emphasis in original].)

The Court later concluded:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range. (*Id*. at p. 488.)

The Attorney General's position in *Towne* is that the prior conviction exception to *Blakely* covers any factor relating to recidivism, including four of five factors listed in rule 4.421(b):

> (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;
>
> (3) The defendant has served a prior prison term;
>
> (4) The defendant was on probation or parole when the crime was committed; and
>
> (5) The defendant's prior performance on probation or parole was unsatisfactory.

The appellant's position in *Towne* is that the *Almendarez-Torres* exception may no longer be viable and is at the very least limited to the mere fact of a prior conviction itself. The only facts a judge could find should be limited to the facts necessarily established by the prior jury finding or defendant's admissions in a plea. Under this view, the question whether a defendant served a prior prison term or is on probation or parole requires findings beyond the mere fact of a prior conviction.

Appellant relies on the criticism of *Almendarez-Torres* in subsequent opinions. "[I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." (*Apprendi, supra*, 530 U.S. at p. 490.) And in a concurring opinion, Justice Thomas said the holding of *Almendarez-Torres* was flawed and should be reconsidered in an appropriate case. (*Shepard v. United States* (2005) 544 U.S. 13, 27-28 (conc. opn. of Thomas, J.).)

Unfortunately for us, the majority of cases to consider the issue take the view urged by the Attorney General. The following cases have held the judge can make findings related to recidivism without violating *Blakely*:

- *United States v. Smith* (6th Cir. 2007) 474 F.3d 888 [finding defendant's criminal history was "extensive and egregious"])

- *United States v. Alford* (6th Cir. 2006) 436 F.3d 677, 681 [finding prior conviction involved "crime of violence"]

- *United States v. Greer* (11th Cir. 2006) 440 F.3d 1267, 1273-1275 [same]

- *United States v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820 [finding the defendant was on probation at time of current offense]

- *United States v. Fagans* (2nd Cir. 2005) 406 F.3d 138, 142 ["the type and length of a sentence imposed seem logically to fall within this exception"]

- *Unites States v. Kempis-Bonola* (8th Cir. 2002) 287 F.3d 699, 703 [prior conviction exception applies to "sentencing related circumstances of recidivism"]

- *United States v. Santiago* (2nd Cir. 2001) 268 F.3d 151, 156 [judges can determine the "'who, what, when and where' of a prior conviction"]

- Maryland: *State v. Stewart* (Md. 2002) 791 A.2d 143, 151-152 ["no right to a jury trial on matters related to the broader issue of recidivism"]

- Washington: *State v. Jones* (Wash. 2006) 149 P.3d 636, 640-641 [finding defendant was on probation at time of offense]. Connecticut, Indiana and Minnesota agree. *State v. Fagan* (Conn. 2006) 905 A.2d 1101, 1121; *Ryle v. State* (Ind. 2005) 842 N.E.2d 320, 323-325; *State v. Allen* (Minn. 2005) 706 N.W.2d 40, 47-48. The court in *Jones* reasoned that "[P]robation is a direct derivative of the defendant's prior criminal conviction . . . and the determination involves nothing more than a review of the defendant's status as a repeat offender." (*Jones, supra*, 149 P.3d at p. 640.)

The California Supreme Court has also adopted an expansive view of the *Almendarez-Torres* exception in *People v. McGee* (2006) 38 Cal.4th 682, 695-70. In that case it held that the court, not the jury, was the proper entity to examine documents concerning a Nevada prior conviction to determine whether it qualified as a serious felony in California. Other courts to consider the issue have reached the same conclusion. (See *United States v. Santiago* (2d

Cir. 2001) 268 F.3d 151; *United States v. Reeves* (8th Cir. 2005) 410 F.3d 1031, 1035; *United States v. Williams* (7th Cir. 2005) 410 F.3d 397, 402; see also *United States v. Morris* (7th Cir. 2002) 293 F.3d 1010, 1012-1013 [no right to a jury trial on the issue of whether prior convictions were committed on a single occasion, for purposes of the armed career-criminal enhancement].)

There are few cases which adopt the opposite view as urged by the appellant in *Towne.*

- North Carolina: *State v. Wissink* (N.C. 2005) 617 S.E.2d 319 [probationary status was outside the exception for a prior conviction]

- Oregon: *State v. Steele* (Ore. 2006) 134 P.3d 1054 [similar prior convictions and probationary status were outside the exception for prior convictions]

In the short term, there is some hope on this issue as the Sixth District recently held in a published case that the "prior conviction" exception should be narrowly interpreted, which is the position urged by appellant in *Towne*. In *People v. Guess* (April 24, 2007) ___ Cal.App.4th ___ [2007 Cal.App.LEXIS 646], the analysis of the court of appeal mirrors the argument presented by appellant in *Towne*. The court notes that *Apprendi* describes *Almendarez-Torres* as an "exceptional departure" from the rule that a jury decides all facts, even those related to sentencing. It quoted the portion of *Apprendi* where the Supreme Court noted that in *Almendarez-Torres* the defendant had admitted the prior convictions, "all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own." (*Apprendi, supra*, 530 U.S. at p. 488.) The court in *Guess* stated, as we have been consistently arguing, "It is questionable whether a majority of the current U.S. Supreme Court supports this exception." The Sixth District then held the defendant's parole status does not come withing the "prior conviction" exception. The court then reversed and remanded the upper-term sentence because all five factors - parole status and four factors concerning the way the crime was committed - "should have first been found by a jury."

The narrow interpretation of the "prior conviction" exception is the minority view, however. Given the antipathy to *Blakely* (as reflected in *Black*) and given its views expressed in *McGee*, the California Supreme Court is likely to find the *Almendarez-Torres* exception applies to a broader range of recidivism factors, and not only to the mere fact of a prior conviction.

If you choose to litigate this issue you should be prepared to file a cert. petition with the United States Supreme Court. This issue cannot be raised in a federal habeas petition because the AEDPA standard cannot be met. It is very difficult to argue the view taken by

a majority of courts (including most federal circuits) is contrary to, or an unreasonable application of, United States Supreme Court precedent.

B. Does One Valid Aggravating Factor Satisfy Blakely?

In *Towne*, appellant was acquitted of carjacking, kidnapping, robbery, grand theft, criminal threats, kidnapping for carjacking and kidnapping to commit robbery. He was only convicted of unlawful taking of a vehicle. (Veh. Code, § 10851.) The court imposed the upper term after finding appellant terrified the victim, appellant was an innocent of sorts (a mitigating factor), and appellant had a lengthy (ten year) criminal history. The Supreme Court has sought briefing on the question whether *Blakely* is satisfied if there is a single aggravating factor which is either found by the jury, admitted by the defendant, or subject to the *Almendarez-Torres* exception.

The Attorney General contends that "the presence of a single circumstance in aggravation renders a defendant *eligible* for the upper term and provides the trial court with the statutory *authority* to impose the upper term." (Respondent's Supplemental Brief.) Thus, it argues that a trial court acquires the legal authority to impose an upper term upon the initial finding of a single aggravating circumstance rather than upon any subsequent weighing process.

The Attorney General also contends the presence of a single aggravating factor which satisfies *Blakely* renders any error harmless because the single valid factor made defendant eligible for the upper term. Under this view, even if there are no recidivist factors, if the appellate court determines beyond a reasonable doubt that the jury would have found at least one of the aggravating circumstances to be true, the error is harmless. Once this finding is made by the appellate court, "the reviewing court does not need to further determine whether the trial court would have sentenced the defendant to the same upper term sentence in light of the *Cunningham* error."

The Attorney General's argument finds support in Justice Kennard's concurring and dissenting opinion in *Black:* "Once the upper term became the statutory maximum in this manner, defendant's right to jury trial under the federal Constitution's Sixth Amendment was satisfied, and the trial court on its own properly could--and did--make additional findings of offense-based aggravating circumstances in support of its discretionary sentence choice to impose the upper term." (*People v. Black, supra,* 35 Cal.4th at p. 1270, (conc. and dis. opn. of Kennard, J.).)

Appellant's position is that if the sentencing court relies on a mixture of factors which comply with *Blakely* and others which do not, there is a constitutional violation. Under this view, the presence of a single valid aggravating factor does not make a defendant eligible

for the upper term since the court must first assess the value of the aggravating factor and find it sufficient to justify the imposition of the upper term. The imposition of the upper term is justified only if circumstances in aggravation exist and they "outweigh circumstances in mitigation." (*People v. Hall* (1994) 8 Cal.4th 950, 957.) As for prejudice, appellant contends that unless the reviewing court can determine that the factors which violate *Blakely* did not contribute to the determination that aggravation justified the upper term, it cannot find the error harmless beyond a reasonable doubt.

Here are some thoughts:

- To date, the California courts of appeal, including the Sixth District, are adopting the position argued by the appellant in *Towne*. Despite Kennard's views expressed in *Black*, I have not seen a single case where the appellate court has held a single valid aggravating factor means there is no violation of *Blakely* or renders the error harmless.

- Citing *People v. Hill* (2005) 131 Cal.App.4th 1089, The Attorney General consistently argues any *Blakely* issue is waived if no objection was made on *Blakely* grounds in the superior court. The Sixth District has consistently rejected this argument. (See, e.g., *People v. Guess*, *supra,* ___ Cal.App.4th at p. ___ [2007 Cal.App.LEXIS 646, at p. 30].) *Hill* involved a sentencing which occurred after *Blakely* but before *Black*. At that time, a *Blakely* challenge had great potential. After *Black* was decided, any objection to an upper-term sentence on *Blakely* grounds would have been futile. An appellate claim is not forfeited if an objection would have been futile.

- As you continue raising *Blakely* issues you must argue prejudice. In *Washington v. Recuenco* (2006) 548 U.S. ___ [126 S.Ct. 2546, 165 L.Ed.2d 466] the United States Supreme Court held that *Blakely/Apprendi* error is not structural error, and is subject to harmless error analysis. (*Id*. at pp. 2551-2553; 165 L.Ed. 2d at pp. 474-477.) The Court analogized to *Neder v. United States* (1999) 527 U.S. 1, 8, which applied harmless error analysis to the failure to obtain a jury finding on an element of the offense. Noting that after *Apprendi*, sentencing factors had been treated as elements that had to be tried to a jury and proved beyond a reasonable doubt, the Court concluded that the same rule of prejudice as was applied to the error in *Neder* should apply to failures to obtain a jury verdict on sentencing factors. (*Washington v. Recuenco*, *supra*, 548 U.S. ___ [126 S.Ct. at pp. 2552-2553; 165 L.Ed. 2d at pp. 475-477].)

- Since the error is constitutional, it would be subject to the *Chapman* standard of prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 34.) There are probably two levels of harmless error analysis in the *Blakely* context. First, the *Chapman* standard must be applied to determine whether it is clear beyond a reasonable doubt that the aggravating factor relied upon would have been found by the jury had it been asked to determine the issue (this is the *Neder* analysis). If the court relied on some factors which satisfied the constitution and some which did not, and the reviewing court cannot say beyond a reasonable doubt a jury would have found these factors true based on overwhelming evidence, the *Chapman* standard must also be applied to determine whether it can be said beyond a reasonable doubt the sentencing court would have imposed the upper term by relying only on factors that were constitutionally sound.

- The prejudice analysis urged by the appellant in *Towne* is consistent with the analysis California courts have traditionally employed when deciding whether a sentencing judge's reliance on improper factors requires reversal. Applying the *Watson* standard, the test has always been whether it is reasonably likely the court would have imposed a different sentence in the absence of the error. (See, e.g., *People v. Ginese* (1981) 121 Cal.App.3d 468, 479; *People v. Flores* (1981) 115 Cal.App.3d 924, 927; *People v. Covino* (1980) 100 Cal. App. 3d 660, 670-672.) The recent cases I have seen which decide whether *Blakely* error is harmless have considered whether the judge would have imposed the same sentence in the absence of the error. (See, e.g., *People v. Perez* (2007) 148 Cal.App.4th 353, 372-373; *People v. Banks* (April 13, 2007) ___ Cal.App.4th ___ [2007 Cal. App. LEXIS 580].) To date, no case has adopted the Attorney General's position that a single recidivist factor means there is no *Blakely* error or that any error is necessarily harmless.

- It might be argued that in *Recuenco* the Supreme Court did not decide whether the sentencing court's failure to apply the proof-beyond-a-reasonable-doubt standard to its findings was structural error. The judge would have made any findings under a preponderance-of-the-evidence standard. (See Rule 4.420(b) ["Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence"].) Under *Blakely* the beyond-a-reasonable-doubt standard applies to findings of aggravating facts. An error which deprives a defendant of the requirement of proof beyond a reasonable doubt is arguably structural error under *Sullivan v. Louisiana* (1993) 508 U.S. 275. This is not likely to be a winning issue, so if you choose to raise it be sure to also argue prejudice under the *Chapman* standard.

IV.

WHAT'S LEFT AFTER THE PASSAGE OF SB 40?

SB 40 should not apply retroactively. Therefore, we can still challenge upper term sentences in any case which was still pending on appeal on July 24, 2004, and those current cases in which the defendant committed the crime prior to April 2, 2007. Also, the imposition of consecutive sentences and the application of Penal Code sections 654 and 667.6, subdivision (d), are potential issues unaffected by *Cunningham* and the passage of SB 40.

A. Retroactivity of *Blakely*

Blakely applies to any case which was not yet final on June 24, 2004, the day that opinion issued. However, it does not apply to any case which was final prior to June 24, 2004. An appeal is final 90 days after a petition for review is denied (the 90 days being the time during which appellant can file a cert. petition with the United States Supreme Court). Blakely does not apply retroactively because it involves a procedural "new rule." *Blakely* announced a new rule. It involved a new rule because the Court's holding was not obvious to all of us, even though we knew about *Apprendi*. New rules are either substantive or procedural. Only substantive new rules apply to all cases, whether final or not. A new rule is "substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes .... In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural." (*Schriro v. Summerlin* (2004) 542 U.S. 348, 352.) For example, when the Supreme Court declared that a sodomy statute was unconstitutional, that was a new substantive rule which would apply to any sodomy conviction, no matter when it was suffered. *Blakely* only involved determining punishment, so it was a procedural new rule. It therefore does not apply to any case which was final before June 24, 2004. If you continue to get letters from former clients asking about *Cunningham*, determine whether their appeal was final prior to June 24, 2004 and advise them accordingly.

There is one exception to the rule limiting retroactivity. A procedural rule will apply retroactively, even to cases which were final before it was decided, if it is a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." (*Schriro v. Summerlin*, *supra*, at p. 352.) These are rare instances.

In *Schriro*, the issue involved the retroactivity of a new rule requiring the jury rather than the judge find aggravating circumstances justifying imposition of the death penalty. The Supreme Court held the rule was not retroactive. "Rules that allocate decisionmaking authority [between a judge and jury] are prototypical procedural rules." (*Schriro*, *supra*, 542 U.S. at p. 353.) The court held the new rule was not a "watershed rule" implicating the accuracy of the proceedings.

Under *Schriro*, *Blakely* does not apply to any case which was final before it was decided. (See *In re Consiglio* (2005) 128 Cal.App.4th 511, 514-515; *United States v. Cruz* (9th Cir. 2005) 423 F.3d 1119, 1120 and cases cited in the opinion.)

B. Imposition of an Upper Term in Cases Before the Passage of SB 40

There will still be a number of cases where the imposition of the upper term can be challenged on *Blakely* grounds. Sample *Blakely* briefs are available at the FDAP website. The following argument should be considered

- The mere fact of a prior conviction is the only fact which is not subject to *Blakely*'s requirement that aggravating facts be found by the jury applying the beyond a reasonable doubt standard. (Sample argument available in briefing at FDAP.org.) This argument is not likely to be successful in the Sixth District. For example, in *People v. Johnson* (2007, H029905) 2007 Cal. App. Unpub. LEXIS 2479 the court held the *Almendarez-Torres* exception applied to findings defendant's prior convictions were numerous and of increasing seriousness, defendant had suffered prior prison terms, defendant was on probation at the time he committed the crime, and defendant's past performance on probation and parole was poor. The court noted all these facts could be found based on the criminal record sheets (CLETS, CII, FBI), which could properly be considered under *People v. Martinez* (2000) 22 Cal.4th 106. Also, defendant did not contest the truth of any of those findings. If you are going to challenge *Almendarez-Torres,* be prepared to file a cert. petition with the United States Supreme Court.

- The presence of any factor which does not comport with *Blakely* results in a constitutional violation. "*[A]ny fact* that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham*, *supra*, 127 S.Ct. at pp. 863-864, italics added; see sample argument at FDAP.org.) No Sixth District panel has adopted the position, argued by the Attorney General in *Towne*, that a single valid aggravating factor means there is no *Blakely* violation.

- Argue prejudice. Do not merely argue it is structural error. If any aggravating factor mentioned by the judge was or could have been disputed, argue there is no basis to decide beyond a reasonable doubt the jury would have made the same decision. Also argue it cannot be said beyond a reasonable doubt the error did not contribute to the court's decision to impose the upper term. To date, no Sixth District panel has accepted the argument that a single valid aggravating factor means any *Blakely* error was harmless because that single factor made defendant eligible for the upper term.

- If, as in most cases, your case involves a mixture of recidivist facts and crime-related facts, and the judge says that any of the aggravating factors, alone, would have justified the imposition of the upper term, you are in trouble. Under that scenario the appellate court will find any *Blakely* error harmless since the record provides a basis to find beyond a reasonable doubt the result would have been the same without the error. (See *People v. Perez*, *supra*, 148 Cal.App.4th at pp. 372-373 [where court said any aggravating factor, alone, would warrant the upper term, and two of the five involved recidivism, *Blakely* error found harmless]; *People v. Johnson* (H029905) 2007 Cal. App. Unpub. LEXIS 2479 [where court said *any* aggravating factor outweighed single mitigating factor, and there were three valid recidivist aggravating factors, *Blakely* error found harmless].)

- If, on the other hand, you have a mixed case and the sentencing court does not say any aggravating factor would warrant the upper term, you have a much stronger argument that the error was prejudicial, particularly if the sentencing court emphasized a factor which violated *Blakely*. (See *People v. Banks*, *supra*___ Cal.App.4th ___ [2007 Cal. App. LEXIS 580] [court imposed upper term based on four factors concerning the commission of the crime and two recidivist factors - criminal record and poor performance on parole. Reversed where appellate court was not convinced same sentence would have been imposed absent *Blakely* error]; *People v. McClain* (H029806) [three of four aggravating factors, including one court said was most significant, violated *Blakely*; court could not find error harmless beyond a reasonable doubt].)

- If you have a case where the defendant has no prior convictions and all the aggravating factors listed by the court concerned how the crime was committed, you should argue the appellate court should impose the middle term rather than remand the case for resentencing. (See *People v. Diaz* (April 25, 2007) ___ Cal.App.4th ___ [2007 Cal.App.LEXIS 655, at pp. 32-40.) *Diaz* contains a thorough analysis of the issue which can be used even after the inevitable grant of review.

C. Consecutive Sentences

Previously, we urged panel members to argue consecutive sentences were subject to *Blakely*. Then along came *Black*. In addition to holding *Blakely* did not apply in California at all, the Supreme Court also reasoned:

> The jury's verdict finding the defendant guilty of two or more crimes authorizes the statutory maximum sentence for each offense. When a judge

> considers the circumstances of each offense and the defendant's criminal history in determining whether the sentences are to be served concurrently or consecutively, he or she cannot be said to have usurped the jury's historical role. Permitting a judge to make any factual findings related to the choice between concurrent or consecutive sentences does not create an opportunity for legislatures to eliminate the right to a jury trial on elements of the offenses. (*Black*, *supra*, at p. 1263.)

Black was vacated by the United States Supreme Court in *Cunningham*. One would think a vacated opinion is not authoritative. However, some judges in the Sixth District are still citing *Black* as the basis for rejecting claims that *Blakely* applies to the imposition of consecutive sentences. (*People v. Bernard* (H030145) 2007 Cal. App. Unpub. LEXIS 2803.) However, even if it is no longer binding, the Supreme Court is sure to reach the same conclusion when it decides *Black* the second time. *Cunningham* did not invalidate the court's second reason for finding *Blakely* does not apply to consecutive sentences. This was the analysis of a Sixth District panel in *People v. Barrow* (H030041) 2007 Cal. App. Unpub. LEXIS 2638. Even though it found *Black* had been vacated, and was therefore not binding, it decided the Supreme Court will reach the same result and therefore rejected a claim that consecutive sentences violated *Blakely*.

There seems to be no hope of challenging the imposition of consecutive sentences on *Blakely* grounds in California courts. The United States Supreme Court has never addressed the issue. If you choose to continue making this argument to ostensibly preserve it for federal review, you should be prepared to file a cert. petition with the United States Supreme Court. Under the AEDPA standard, this is not an issue which can be argued effectively in a federal habeas petition.

D. Penal Code section 654.

In *Black* the Supreme Court held that *Blakely* did not apply to decisions concerning whether Penal Code section 654 prohibited the imposition of a separate sentence. (*Black*, *supra*, 35 Cal.3d at p. 1264.) However, this was mere dicta, since that issue was not presented in *Black*. In a dissent in a case decided before *Blakely*, a justice cogently argued why *Apprendi* required the jury make the findings whether section 654 applies in a case. (See *People v. Cleveland* (2001) 87 Cal.App.4th 263, 272-282, dis. opn. of Johnson, J.) This issue may still be worth arguing, but only if you are prepared to file a cert. petition with the United States Supreme Court. Given the California Supreme Court's dicta in *Black*, this issue will not succeed in California appellate courts.

E. Findings that Sex Crimes Were Committed on Separate Occasions

Certain sentencing provisions in sex crime cases require a determination whether sexual assaults were committed on separate occasions or a single occasion. Penal Code section 667.61, subdivision (g), provides that "The term specified . . . shall be imposed on the defendant once for any offense or offenses committed against a single victim during *a single occasion*. . . ." This provision "may only be reasonably interpreted as providing separate terms for offenses committed on each single occasion." (*People v. Jackson* (1998) 66 Cal.App.4th 182, 193.) Penal Code section 667.6, subdivision (d), provides that "A full, separate, and consecutive term shall be served for each" conviction of a felony entailing "sexually assaultive behavior," as specified, "if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions ..., the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." It can be argued these are findings which must be made by a jury beyond a reasonable doubt.

People v. Groves (2003) 107 Cal.App.4th 1227 held that the sentencing court's determination whether sexual offenses were committed on "separate occasions" did not violate *Apprendi*, *supra*, 530 U.S. 466. The court reasoned that *Apprendi* did not require a jury to make that determination because "the specific fact at issue is not an element of the crime but is a factor that comes into play only after the defendant has been found guilty of the charges beyond a reasonable doubt and no increase in sentence beyond the statutory maximum for the offense established by the jury is implicated ... . [Citations.]" (*Id*. at pp. 1230-1231.) That reasoning can be challenged. *Blakely* and *Cunningham* make clear that labeling a finding a "sentencing factor" which only comes into play after a defendant is found guilty does not exempt it from the jury trial requirement set forth in *Apprendi*. As Justice Scalia said in a concurring opinion in *Ring v. Arizona* (2002) 536 U.S. 584, 602 & 610, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt." (conc. opn. of Scalia, J.)

However, in a decision published April 25, 2007, the court applied *Blakely* and *Cunningham* and held there was no Sixth Amendment violation when the court imposed sentences under section 667.6, subdivision (d), because the court could have imposed the same sentence the court could have imposed the same sentence under section 667.6, subdivision (c) without engaging in any "judicial factfinding beyond the facts contained in the verdict itself." (*People v. Diaz*, *supra*, ___ Cal.App.4th ___ [2007 Cal.App.LEXIS 655, at p. 30].)

In *People v. Saphao* (2005) 126 Cal.App.4th 935 (review granted and later dismissed), the court of appeal held that under *Blakely* the finding required to impose separate life sentences pursuant to section 667.61, subdivision (g) had to be found by the jury beyond a reasonable doubt. *Saphao* cannot be cited since review was granted and later dismissed after *Black* was decided. However, its reasoning can be used to make the same argument. As with any other argument involving a consecutive sentence, you should be prepared to pursue the issue in a cert. petition since it will no doubt lose in California courts.