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TRAINING BULLETIN: LEGAL UPDATE

MAJOR CHANGE TO SENTENCING LAWS

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On January 22, 2007 The United States Supreme Court ruled, in Cunningham v. California (2007 U.S. Lexis 1324), that a major component of California's sentencing law is unconstitutional. Let's take a quick review of the late, great determinate sentencing scheme at issue.

The Old Rule

While some felonies (murder, torture, aggravated sexual assault of a child) have a life sentence, most felonies have a determinate sentence. Each count of rape, for example, is punishable by 3 years, 6 years, or 8 years in state prison. For a determinate sentence, the midterm, in this case 6 years, is the default setting. The judge assumes that the midterm is the appropriate term. However, there is a list of factors, in Rule 4.423, relating to both the crime and the criminal which could mitigate the sentence to the lower term, in this case three years. There is another list of factors, in Rule 4.421, which could aggravate the sentence to the upper term, in this case eight years.

When a defendant is convicted, her case is referred to the probation department. The probation officer investigates the criminal's background, talks to the victim and others, makes a determination of which factors in aggravation and mitigation apply, if any, and suggests a sentence to the judge. At the actual sentencing, the judge is free to reject the probation officer's recommendation, but usually adopts it.

The important thing to note here is that it is the judge, not the jury, who decides which factors in mitigation or aggravation apply, and it is the judge who imposes the sentence. The only time a jury decides the sentence is in a death penalty case, and even then a judge can ignore a jury's finding that a death penalty is appropriate.

Then there are enhancements. If a felony involves the personal infliction of great bodily injury to the victim, for example, or use of a firearm to commit the felony, an enhancement can be pled and proved. If a jury finds the defendant is guilty, their next job is to determine if the enhancement is true. If the jury finds the enhancement is true beyond a reasonable doubt, this automatically adds a specified number of years to the sentence, but the jury is not told that. In fact, a jury is never informed of the actual or potential sentence during the trial.

The New Rule

The ruling in Cunningham is that factors in aggravation must now be pled, proved, and found true beyond a reasonable doubt *by a jury* before they can be imposed.

There are several possibilities about how the law could change in response to this. Part of the response could come from the state legislature, which could decide to just pick a term, for example the midterm, make that the sentence for the crime and be done with it. While this has a certain draconian simplicity to it, it does not take into account specific facts relating to both the crime and the criminal, and would treat all offenders alike.

In the meantime, courts and prosecutors need to work out whether a factor in aggravation can still be charged, and if so, how. Under the old rule, all factors in aggravation were open to consideration by the judge at every sentencing, other than those negotiated for a specific sentence, such as a fixed term in jail or prison. Now, asking juries to automatically consider factors in aggravation at every felony trial would lengthen trial considerably. It is possible that most counties will handle factors in aggravation the same way they currently handle "three strikes" cases, with a committee of veteran prosecutors who decide whether to file strike priors, or in this case factors in aggravation, in a particular case.

Cunningham says the jury must decide any fact (other than a prior conviction) that exposes a defendant to the upper term, but it doesn't say *when* the jury needs to decide this. If the prosecutor's office decides to seek factors in aggravation in a particular case, there are at least two ways to go about it.

An argument could be made that since factors in aggravation aren't relevant until the jury comes back with a guilty verdict, no evidence of factors in aggravation should be presented until there is a separate penalty phase after the jury verdict of guilty, if any.

It's more likely that factors in aggravation will be pled in the complaint, and then the information, just as enhancements are. The jury will be instructed not to consider the enhancements, or factors in aggravation, unless and until they reach a verdict of guilty. It will then be up to the jury to find the factors in aggravation true or not true. Of course, there are no CALCRIM jury instructions defining the factors in aggravation (yet), so judges will have to do their best to come up with clear jury instructions. It also means the factors in aggravation must be established by the police reports, just as enhancements are.

When you look at Rule 4.421 (and please turn to the back of your Penal Code book to do so), the eleven factors relating to the crime can probably be established by the police reports fairly easily. For example, if the property stolen is very valuable, or the contraband in question is a large amount, those facts do not require any additional investigation beyond that of the crime itself. Any jury who heard evidence of the elements of the crime would be hearing factors in aggravation relating to the crime at the same time, since they both involve the same evidence.

However, the five factors relating to the defendant are something else, because they clearly concern information beyond the facts of the charged offense. How will the prosecution prove the defendant's prior convictions are numerous or of increasing seriousness? Or that the defendant has engaged in violent conduct, possibly in another case, that indicates a serious danger to society? Or that the defendant's prior performance on probation or parole was unsatisfactory? All of this investigation which used to be conducted after the trial by the probation department will now need to be conducted before the trial by law enforcement.

There's one more problem that needs consideration. All of the factors in aggravation relating to the defendant, basically saying that he has a propensity for committing crimes, run directly contrary to Evidence Code section 1101(b), which makes propensity evidence inadmissible to prove the charged conduct. In other words, under Evidence Code section 1101(b) a history of bank robberies by the defendant would not be admissible to show he likes robbing banks and is therefore more likely to be guilty of the bank robbery he's currently charged with. It would only be admissible to show some fact other than propensity, for example a signature method of operation to prove identity.

In order to comply with Evidence Code section 1101(b), the jury would need to be kept ignorant of those prior bank robberies until the evidence of the charged offense was complete. Then, upon a verdict of guilty, if any, the evidence of the prior back robberies, which certainly qualify as a factor in aggravation, could come in for sentencing purposes. This brings us back to the idea of a penalty phase after the guilt phase, an additional burden for jurors.

Factors in Mitigation

These remain untouched by the decision in Cunningham, and probably will continue to be the subject of investigation by the probation department.

Watch This Space

For now, there is no clear plan in place for how to bring factors in aggravation to a decision by a jury. If nothing else, Cunningham is an example of why legal updates are so important to law enforcement.

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