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U.S. Supreme Court Pushes New Mexico Into Apprendi-land: Felony Sentencing in Jeopardy

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This is the second article For the Defense has published about constitutional challenges to New Mexico's felony sentencing procedure. The first appeared in the May 2006 edition.

Thanks to the United States Supreme Court, the constitutional right to a jury trial might enjoy fuller protection in New Mexico sometime soon. In *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, the New Mexico Supreme Court rejected our argument that it is unconstitutional to increase felony sentences by up to one-third based on aggravating facts found by a judge under a preponderance of the evidence standard. *Lopez* relied heavily on the reasoning the California Supreme Court employed in upholding its felony sentencing procedure. In *Cunningham v. California*, _ S. Ct. _ (2007), the United States Supreme Court overruled the California Supreme Court's decision and shredded its reasoning. Because the California and New Mexico schemes are identical for constitutional purposes, *Cunningham* has revived the constitutional jury-trial guarantee for our clients in state court.

Issue. Do the Fourteenth Amendment and Sixth Amendment prohibit a district court from imposing an aggravated sentence under NMSA 1978, § 31-18-15.1 (1993) based on facts a judge found by a preponderance of the evidence, but that a client never admitted and that the state never proved to a jury beyond a reasonable doubt? This issue arises when the state

asks a district court judge to impose an aggravated sentence under § 31-18-15.1, rather than the basic sentence in § 31-18-15. The question is whether our clients have a constitutional right to require the state to prove aggravating facts to a jury beyond a reasonable doubt.

Litigation. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the United States Supreme Court held that the Sixth Amendment and Fourteenth Amendment require that "[o]ther 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 490. In the wake of *Apprendi*, courts disagreed about what the Supreme Court meant by "statutory maximum."

In *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004), the Court explained that the "statutory maximum" 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*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

The Court also emphasized that *Apprendi* defined a "bright-line rule." *Blakely*, 542 U.S. at 308. Writing for the Court, Justice

Scalia recognized that “the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.” *Id.*

After *Blakely*, we raised constitutional challenges to New Mexico’s aggravated felony procedure in several appeals. The Appellate Division of the New Mexico Public Defender and *amicus curiae* NMCDLA briefed and argued the issue for the defense in the New Mexico Supreme Court. Citing *Blakely*, the plain language of the sentencing statutes, and the decisions of other state courts addressing the constitutionality of similar sentencing schemes, we argued that the “statutory maximum” is the basic sentence in § 31-18-15 because § 31-18-15.1 does not permit a judge to impose a longer sentence, unless she finds facts beyond the elements of the offense. Therefore, any enhancement of the basic sentence must be based on facts that the defendant admitted or that the state proved to a jury beyond a reasonable doubt. In other words, the Constitution prohibits the enhancement of basic sentences based on facts a judge has found by a preponderance of the evidence.

To remedy the constitutional defect, we argued that the Court should require the state to prove all aggravating circumstances to juries beyond a reasonable doubt. We asked the Court to implement jury fact-finding by exercising its power of superintending control to adopt new procedural rules, uniform jury instructions, and special interrogatories for district courts to use whenever the state seeks to enhance basic felony sentences.

A divided Court rejected our arguments, upholding New Mexico’s sentencing procedure.¹ *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521.² The Court identified several ambiguities in *Blakely*’s definition of “statutory maximum,” noted that the resolution of the constitutional issue hinges on the exact meaning of that phrase, and rejected our argument that the “statutory maximum” is the applicable basic sentence in § 31-18-15. Instead, the Court held that the “statutory maximum” is the longest applicable enhanced sentence available under § 31-18-15.1.

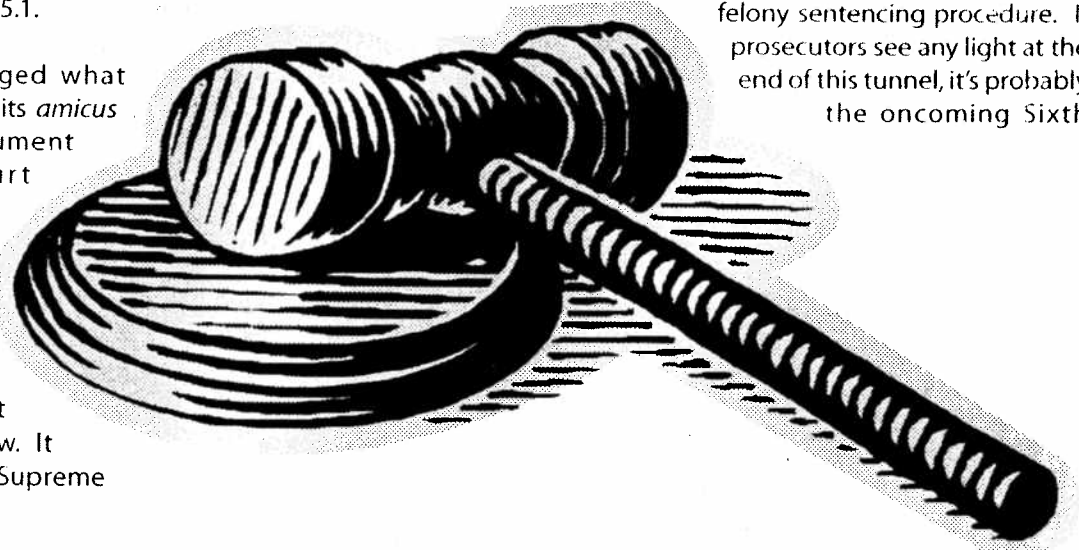
The Court acknowledged what NMCDLA pointed out in its *amicus* brief and in post-argument letters to the Court regarding supplemental authority—that a majority of supreme courts in states with similar schemes had struck those schemes down. But the Court adopted the minority view. It followed the California Supreme

Court’s reasoning in *People v. Black*, 35 Cal. 4th 1238, 29 Cal.Rptr.3d 740, 113 P.3d 534 (2005), which held that California’s sentencing scheme is constitutionally sound because the longest enhanced felony sentence is the “statutory maximum.” Both California and New Mexico permit enhancement of basic sentences only upon judicial findings of aggravating circumstances.

Relying on *Black*, the New Mexico Supreme Court held that *Apprendi* and its progeny do not prohibit the use of such factual determinations to enhance the basic sentence because they are not functional equivalents of elements of the crime. *Lopez*, 2005-NMSC-036, ¶ 40. Quoting *Black*, our Court wrote that “the United States Supreme Court cases ought not be viewed as ‘drawing a bright line[.]’” *Id.*, ¶ 46.

In *Cunningham*, 2007 WL 135687, * 13 (2007), the United States Supreme Court found it “remarkabl[e]” that the California Supreme Court concluded that *Apprendi* and its offspring did not draw a bright line. “Asking whether a defendant’s basic jury-trial right is preserved, though some facts essential to the punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*’s ‘bright-line rule’ was designed to exclude.” *Id.* The Court overruled *Black*, holding that the “statutory maximum” is the middle term sentence—the sentence a court must impose absent additional judicial findings. *Id.* at * 4. Because California’s scheme “allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment.” *Id.* at * 14.

A petition for writ of certiorari is pending in the United States Supreme Court in *Frawley v. New Mexico*, No. 05-9004, our counterpart to *Cunningham*. According to Jeffrey Fisher, the former clerk to Justice Stevens who was counsel of record in *Blakely*, the Court is likely to grant the petition in *Frawley*, vacate the New Mexico Supreme Court’s decision, and remand the case for reconsideration in light of *Cunningham*. Our Supreme Court would then revisit the constitutionality of New Mexico’s felony sentencing procedure. If prosecutors see any light at the end of this tunnel, it’s probably the oncoming Sixth



Amendment train.

Practice tips. First, to state the obvious, we should cite *Cunningham* now. At sentencing, we should cite *Cunningham* when objecting to the aggravation of our clients' sentences based on facts a judge found by a preponderance of the evidence. We should insist on jury determinations beyond a reasonable doubt.

On appeal, we should raise *Cunningham* in our docketing statements and briefs, regardless of whether the issue was preserved. If the issue was not preserved, we should argue that the error was fundamental. See Rule 12-216(B)(2) NMRA. If it's too late to cite *Cunningham* in appellate briefs or at oral argument, we should send supplemental authority letters in our pending cases. See Rule 12-213(D)(2) NMRA. We should be prepared to respond to the state's harmless error arguments. See *Washington v. Recuenco*, 126 S. Ct. 2546, 2553 (2006) ("Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error."); *State v. McDonald*, 2004-NMSC-033, ¶¶ 9-18, 136 N.M. 417, 99 P.3d 667 (*Blakely* error is not structural and may be harmless).

We should also cite *Cunningham* in post-conviction proceedings. One significant obstacle is the argument that *Blakely* announced a new rule that does not apply retroactively. The issue was before the United States Supreme Court this term in *Burton v. Stewart*, 127 S. Ct. 793 (2007), but the Court disposed of the habeas claim on other grounds.³

Second, we should not allow our clients to admit aggravating circumstances. When our clients make such admissions, we should argue that they cannot be used to

enhance their sentences, unless our clients knowingly and voluntarily waived their right to a jury trial. See *Blakely*, 542 U.S. at 310 (requiring "appropriate waivers"); *United States v. Thomas*, 389 F.3d 424, 426 (3d Cir. 2004) (listing types of admissions that may be used to enhance sentence); *State v. Paredes*, 2004-NMSC-36, ¶ 7, 136 N.M. 533 (waiver of right to jury trial must be knowing and voluntary).

If we persevere, we should be able to use *Cunningham* to prevent our clients from losing their liberty based on facts found by a judge by a mere preponderance of the evidence. As the United States Supreme Court has reaffirmed, the Constitution requires the state to prove to a jury beyond a reasonable doubt every fact essential to the punishment.

Zachary A. Ives briefed and argued this issue on behalf of amicus curiae NMCDLA in the New Mexico Supreme Court.

Endnotes

¹ Justice Chavez dissented from the sentencing holding. He agreed with the defense that the statutory maximum is the basic sentence, that our sentencing scheme is unconstitutional because it allows enhancement of that sentence based on judge-found facts, and that the proper remedy is jury fact-finding.

² The Court ordered NMCDLA to file its *amicus* brief in *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, but did not reach the sentencing issue in that case because it reversed Jernigan's conviction.

³ Using the *Apprendi* line of cases in post-conviction challenges is a complex subject that is beyond the scope of this article. Research on this and other sentencing issues might begin at Professor Douglas A. Berman's sentencing blog (<http://sentencing.typepad.com>).

Public Defender Independent Commission Update

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HB 348 – the bill to create an independent commission to oversee the Public Defender Department – had a dramatic debut at the House Health and Government Affairs Committee on February 1st. Debate on the bill went on for almost an hour, with Phyllis Subin, Judges Neil Candelaria and Barbara Vigil, and Coalition supporters from NMCDLA (thanks Ray!), the NM Center on Law and Poverty, Voices for Children, the Human Needs Coordinating Council, the ACLU, and others speaking in favor of the bill and John Bigelow, David Eisenberg, and DAs Donald Gallegos and Lem Martinez speaking in opposition. Finally, the bill was passed out of committee, with no recommendation, on a 5-3 vote. It now heads to House Judiciary, where the bill's sponsor, Rep. Al Park, is the Chairman. **The bill is scheduled to be heard on Wednesday, February 21, at 1:30 in Room 307 of the Roundhouse.** Once again, turnout and vocal support will be crucial in our effort to pass HB 348 out of committee and bring it to a full vote on the House floor. If you have any questions about the bill, please don't hesitate to contact me at homer@nmpovertylaw.org or 255-2840.