

Developments in California Criminal Law: Contributions from the Courts

This is a court of law, young man, not a court of justice.[†]

INTRODUCTION

A defendant traveling through the California criminal justice system will pass through various stages: arrest, plea or trial, sentencing, imprisonment, and, for some, imposition of the death penalty. The treatment the defendant receives at each of these stages by the assorted players—police, prosecution, judges, incarceration facilities and their custodians—is the product of a complicated compromise of competing interests, from law enforcement seeking the capture and punishment of criminals, to the Legislature feeling pressure from a sometimes humanitarian, sometimes scared and angry public. While not immune to the influences of societal pressure, courts are relied upon to be the bastion of even-handed justice, the voice of impartiality protecting both the victim and the criminal with equal measure, when other players are swept away by social passions. Courts attempt to balance the enforcement of the law with the protection of individual liberty along each stage of a criminal defendant's journey.

This article explores significant cases of 2007 impacting these stages of the California criminal justice system: changes in search and seizure law; changes in sentencing law; developments in prison reform; and recent developments concerning the constitutionality of lethal injection.

I. SEARCH AND SEIZURE

Brendlin v. California

A constant area of contention in criminal law involves locating the delicate balance between allowing the police enough discretionary power to prevent and solve crime effectively, and ensuring the protection of our Fourth Amendment right to be free from unreasonable search and seizure.

Overruling a California Supreme Court decision, the United States

[†] Oliver Wendell Holmes, in *THE WORDSWORTH DICTIONARY OF QUOTATIONS* 172 (3d ed. 1998).

Supreme Court in *Brendlin v. California*¹ came down emphatically in favor of protecting constitutional rights. A unanimous Court ruled that passengers of stopped vehicles are considered detained for Fourth Amendment purposes during police vehicle stops, and so, like drivers, can challenge the legality of the initial stop.²

In this case, officers stopped a car without sufficient cause.³ One of the officers recognized the passenger, Bruce Brendlin, and arrested him after confirming that Brendlin was in violation of his parole with an outstanding no-bail warrant.⁴ The officers searched the defendant, the driver, and the vehicle, uncovering both drugs and objects used to produce methamphetamine.⁵ Brendlin was charged with possession and manufacture of methamphetamine.⁶ Arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop, Brendlin moved to suppress the evidence as the fruit of an unconstitutional search.⁷ The California Supreme Court held that while the government conceded that there was no reasonable basis to suspect unlawful operation of the car, suppression was not required because a passenger “is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer’s investigation or show of authority.”⁸ The California Supreme Court reasoned that once a car has been pulled over, a passenger “would feel free to depart or otherwise conduct his or her affairs as though the police were not present.”⁹ Thus, a passenger was not seized and could not challenge the constitutionality of a police stop.¹⁰

The United States Supreme Court applied the test devised in *United States v. Mendenhall*,¹¹ which states that “a person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.”¹² Questioning whether a reasonable person in the defendant’s position would have felt free to “terminate the encounter” between himself and the police officers once the vehicle had been stopped, the Court concluded that

1. 127 S. Ct. 2400 (2007).

2. *Id.*

3. The car’s registration tags were expired, but had a temporary tag which, when scanned, indicated that registration renewal was being processed. *Id.* at 2403-04.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Brendlin*, 127 S. Ct. at 2403-04.

8. *People v. Brendlin*, 136 P.3d 845 (Cal. 2006).

9. The Court stated that “absent some directive from the police, and as long as the rules of the road are otherwise obeyed, the passenger is free to do what the driver cannot—i.e., exit the vehicle . . . and thereby terminate the encounter with the officer.” *Id.* at 852.

10. *Id.*

11. 446 U.S. 544 (1980).

12. *Id.* at 554; see also *Brendlin*, 127 S. Ct. at 2405.

any reasonable person would have “understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.”¹³ Replying to the California Court’s assertion that the officer’s show of authority (such as flashing lights) was only directed at the driver, the Court pointed out that under the *Mendenhall* test, the key factor is not whether an officer intends to direct his or her display of authority at a particular person but rather whether a reasonable person in that particular person’s position would understand themselves to be under the control of that officer.¹⁴ The Court concluded that since “all the occupants were subject to like control by the successful display of authority,” the defendant “was seized from the moment [the driver’s] car came to a halt on the side of the road.”¹⁵

The Supreme Court’s decision in *Brendlin* will have a profound effect on the rights of passengers, especially given the current level of deference United States courts give to the actions of police officers once they have engaged in a vehicle stop.¹⁶ Pre-*Brendlin* case law subjected both passengers and drivers of a stopped vehicle to various types of searches and seizures, yet provided legal recourse to drivers only if the car was pulled over illegally. The Court’s ruling in *Brendlin* clarifies that passengers’ rights under the Fourth Amendment are the same as those enjoyed by drivers.

Other Search and Seizure Cases

California courts have likewise been laboring to clarify the Fourth Amendment balance between effective law enforcement and the protection of individual rights. The California Supreme Court held in *People v. Rivera*¹⁷ that police were not required to verify an anonymous tip before conducting a “knock and talk.” The “knock and talk” procedure enables police officers to approach residences and ask for consent to search; if granted, the officers can then search the residence without having to get a warrant.¹⁸ In this case, police received an anonymous tip that a person “who may have had an outstanding warrant” was at a particular address.¹⁹ Without verifying the information, the officers obtained consent to search the residence from its owner, who was not the person sought. After locating the target, Rivera, in the rear-yard shed, officers detained and arrested him based on a subsequently verified outstanding

13. *Brendlin*, 127 S. Ct. at 2406-07.

14. *Id.* at 2408.

15. *Id.*

16. For example, officers may order all occupants out of a stopped vehicle without having to show cause. *Maryland v. Wilson*, 519 U.S. 408, 415 (1997). Any contraband thereby revealed is considered in plain view (e.g., a shirt shifts while occupant is exiting vehicle, revealing gun in waistband; a baggie is knocked to the floor while occupant is exiting vehicle), and can be confiscated and used both to charge the person in question as well as to justify further searching of his or her person and the vehicle. *Id.*

17. *People v. Rivera*, 159 P.3d 60 (Cal. 2007).

18. *Id.* at 61-62.

19. *Id.* at 60.

warrant.²⁰ The Court held that the officers were entitled to rely on the tip without corroborating its information. It held that officers needed no evidence of wrongdoing to approach someone and ask to talk or to enter a home, and that the reliability of the tip was irrelevant because the police had entered the residence with the owner's consent. Therefore, if upheld as valid on remand, the subsequent search and detention of the defendant was a legal basis for the discovery of the warrant and arrest.²¹

In *People v. Colbert*,²² the California Sixth District Court of Appeal held that a police officer had legitimate probable cause to pull over a vehicle because the officer had an objective basis for his belief that a tree-shaped air freshener hanging from the rearview mirror was obstructing the driver's view through the windshield in violation of California Vehicle Code section 26708(a)(2) (prohibiting objects hung from rearview mirrors that obstruct the driver's vision).²³ In *People v. Garry*,²⁴ the California First District Court of Appeal held that an officer who turns his or her spotlight on a person and quickly walks towards them asking questions has detained that person for Fourth Amendment purposes.²⁵ The evidence resulting from the encounter may be suppressed if the initial basis for the detention was not based on sufficient reasonable suspicion.²⁶

II. SENTENCING

As part of a statewide move away from a rehabilitative focus in incarceration and towards a punitive one, in 1977 the California legislature enacted the Determinate Sentencing Law (DSL).²⁷ The DSL replaced a sentencing scheme that prescribed minimum and maximum sentences for particular offenses, with terms often ranging as broadly as one year to life, which would be imposed by the court upon a guilty verdict.²⁸ The actual time spent in prison by the inmate was ultimately determined by the Adult Authority parole board, allowing for adjustments depending on how the particular defendant had behaved in prison,²⁹ whether he or she had participated in rehabilitation or education programs, and other factors decided on a case-by-case basis.³⁰

20. *Id.* at 61.

21. *Id.* at 64.

22. *People v. Colbert*, 68 Cal. Rptr. 3d 912 (Cal. Ct. App. 2007).

23. *Id.* at 913. The "objective basis" here was the officer's observation of the size of the air freshener, and his own personal experience of having a similarly sized air freshener interfere with his own ability to see through the windshield of his personal vehicle. *Id.* at 916.

24. *People v. Garry*, 67 Cal. Rptr. 3d 849 (Cal. Ct. App. 2007).

25. *Id.* at 858.

26. *Id.*

27. CAL. PENAL CODE § 1170 (West 2006).

28. *Cunningham v. California*, 127 S. Ct. 856, 861 (2007).

29. *Id.*

30. *Id.*

By contrast, the DSL instructed the court, rather than a parole board or prison officials, to decide at the time of sentencing the amount of time an inmate spent in prison.³¹ The court had to choose among three statutorily fixed terms for a given crime; a lower, middle, and upper term.³² Further, the court was required to sentence the defendant to the middle term unless “circumstances in aggravation or mitigation” were found to warrant sentencing to either the lower or higher term.³³ A selection of the upper term was justified if the circumstances in aggravation outweighed the circumstances in mitigation.³⁴ A judge could find mitigating circumstances if they were proved by a preponderance of the evidence.³⁵ On January 22, 2007, in *Cunningham v. California*,³⁶ the United States Supreme Court determined that by placing “sentence-elevating factfinding within a judge’s province,” the DSL violated a defendant’s right to a trial by jury as guaranteed by the Sixth and Fourteenth Amendments.³⁷

Cunningham was the result of a line of important Supreme Court decisions involving Sixth Amendment rights and sentencing. Seven years earlier in *Apprendi v. New Jersey*,³⁸ the Supreme Court held that under the Sixth Amendment a jury must find beyond a reasonable doubt any fact which exposes a defendant to a sentence higher than the relevant statutory maximum.³⁹ Charles Apprendi fired a gun into the home of an African-American family that had recently settled in the neighborhood.⁴⁰ When questioned by the police, Apprendi said that he shot into the house because its occupants were “black in color,” and that he did not want them in the neighborhood.⁴¹ After Apprendi pled guilty to a weapons possession charge, the trial judge sentenced him to twelve years, two years above the statutory maximum for that charge, having found by a preponderance of evidence that Apprendi’s crime was motivated by racial hatred (a sentence enhancement under the New Jersey Hate Crime Statute).⁴² The Supreme Court found that the Hate Crime statute violated the Sixth Amendment right to a jury trial, because it allowed a judge to increase a defendant’s sentence beyond its statutory maximum based solely on his or her own finding of an aggravating

31. § 1170(b).

32. *Id.*

33. *Id.*

34. DSL directs the Judicial Council to “promote uniformity in sentencing under 1170” by adopting rules governing the imposition of the lower or upper term. § 1170.3(a)(2). The Judicial Council’s rules deem that “the middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.” CAL. CT. R. 4.420(a).

35. CAL. CT. R. 4.420(b).

36. 127 S. Ct. at 860.

37. *Id.*

38. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

39. *Id.*

40. *Id.* at 469.

41. *Id.*

42. *Id.* at 469-70.

factor—upon only a preponderance of the evidence standard.⁴³

The Court expanded this rule in 2004 in *Blakely v. Washington*, finding that *Apprendi* applied to facts permitting a sentence in excess of the “standard range” of Washington’s Sentencing Reform Act.⁴⁴ In 2005, the Court further found in *United States v. Booker* that *Blakely* applied to the federal sentencing guidelines (hereinafter “Guidelines”): all facts triggering sentence range elevation beyond the maximum range of the Guidelines must also be found by a jury beyond a reasonable doubt.⁴⁵

Meanwhile, the California Supreme Court heard *People v. Black*⁴⁶ in 2005, wherein they found that DSL, which allowed a court to find facts by a preponderance of evidence and to use those facts to impose a higher sentence than would be otherwise warranted by the jury’s findings, withstood *Apprendi*.⁴⁷ The court found that since the DSL “simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge’s selection of an appropriate sentence within a statutorily prescribed sentencing range,” the upper term under DSL represents the statutory maximum; therefore, a judge’s selection of that upper term does not

43. *Id.* at 490.

44. *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004). In this case, Ralph Blakely was charged with the first-degree kidnapping of his wife and son. *Id.* at 298. At the plea hearing, Blakely pled only to facts supporting this charge, facts which under Washington’s sentencing scheme warranted a maximum sentence of thirty-five months. *Id.* at 299. The judge imposed a sentence of ninety months, finding that Blakely had acted with deliberate cruelty. *Id.* The Supreme Court found that because the sentence imposed—more than three years above the statutory maximum sentence—was supported neither by facts found by a jury nor facts admitted by the defendant, the sentence violated the defendant’s Sixth Amendment right to a jury trial. *Id.* at 300.

45. *United States v. Booker*, 543 U.S. 220, 243-44 (2005). Booker was found guilty by a jury of possessing with intent to distribute at least fifty grams of cocaine base. *Id.* at 226. For this crime, the federal statutory provision was ten years to life, and based on the specifics of the case, the Guidelines required the judge to impose a sentence of not less than 210 and not more than 262 months. *Id.* At sentencing, the judge found by a preponderance of evidence that Booker had possessed more grams of cocaine base than what the jury had found, and that he had obstructed justice. *Id.* Under the Guidelines, these findings mandated a sentence between 360 months and life. *Id.* Booker received a thirty-year sentence instead of the twenty-one years and ten month sentence he would have received based on the jury’s findings. *Id.* The Court gave its decision in two parts: Justice Stevens delivered the majority opinion that held the Sixth Amendment as construed in *Blakely* applied to the Guidelines. *Id.* at 233. Justice Breyer delivered the majority opinion which considered the remedy for the constitutional violation. *Id.* at 258-59. He concluded that the provision of the Guidelines that creates their mandatory nature was incompatible with the first holding in the case, and therefore must be severed. *Id.* His ruling thus rendered the Guidelines effectively advisory. *Id.* The Court further held that district courts should focus on a broad range of factors in sentencing, and appellate courts should use a standard of reasonableness when reviewing sentences. *Id.* at 261.

46. *People v. Black*, 113 P.3d 534 (Cal. 2005) [hereinafter *Black I*]. A defendant convicted of one count of continuous sexual abuse of a child under fourteen was sentenced to an upper term of sixteen years imprisonment. *Id.* at 536.

47. *Id.*

violate *Apprendi* and its resulting progeny.⁴⁸ In support of the conclusion that the upper term represented the statutory maximum for *Apprendi* purposes, the California Supreme Court held that: (1) the DSL is intended to give the judge guided discretion in deciding what sentence was justified;⁴⁹ (2) the risk of sentences being much tougher compared to the prior indeterminate sentencing was low as the DSL reduced penalties for most crimes;⁵⁰ and (3) DSL required that statutory sentencing enhancements (as distinguished from aggravators) be both charged in an indictment and found beyond a reasonable doubt by a jury.⁵¹

The United States Supreme Court disagreed, striking down California's DSL as unconstitutional in *Cunningham v. California*.⁵² John Cunningham was tried and convicted of continuous sexual abuse of a child under the age of fourteen.⁵³ During the sentencing hearing, the trial judge found six circumstances in aggravation, including the violent nature of the crime and the vulnerability of the victim, and one circumstance in mitigation (no prior criminal record).⁵⁴ Concluding that the aggravating factors outweighed those in mitigation, the judge sentenced Cunningham to the upper term of sixteen years for his crime.⁵⁵ The California Court of Appeal confirmed the sentence,⁵⁶ and the California Supreme Court, which had recently published its decision in *Black I*, denied review.

In reversing,⁵⁷ the Supreme Court found that "[i]n all material respects, California's DSL resembles the sentencing systems invalidated in *Blakely* and *Booker*."⁵⁸ The majority opinion in *Cunningham* addressed the California Supreme Court's arguments in *Black I* by stating that while the California Court appeared to have satisfied itself that DSL did not "implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee," the United States Supreme Court's decisions in this area did not leave room for that inquiry. "Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge . . . is the *very* inquiry *Apprendi*'s 'bright-line rule' was designed to exclude."⁵⁹ California's attempted comparison of the DSL to the post-*Booker*

48. *Id.* at 543.

49. *Id.* at 544.

50. *Id.* at 544-46.

51. *Black I*, 113 P.3d at 545.

52. *Cunningham*, 127 S. Ct. at 860.

53. *Id.*

54. *Id.*

55. *Id.* at 861. The crime in question had a possible lower term of six years, a middle term of twelve years, and an upper term of sixteen years. CAL. PENAL CODE ANN. § 288.5(a) (West 1999).

56. *Id.* at 860.

57. *Cunningham*, 127 S. Ct. at 860.

58. *Id.* at 862.

59. *Id.* at 869.

type of sentencing was “unavailing.”⁶⁰ First, the statutory maximum sentence for *Apprendi* purposes is the “maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant.”⁶¹ Second, under DSL (as under the pre-*Booker* Guidelines) a judge must select the middle term unless the court finds aggravating circumstances during a sentencing hearing warranting the imposition of the upper term.⁶² Therefore, the DSL’s middle-term is the *de facto* statutory maximum.⁶³ The Court held that since the upper term was selected when a judge, not a jury, found additional facts—not beyond a reasonable doubt but by a preponderance of the evidence—the DSL violated the rule of *Apprendi*.⁶⁴

The Court left it to California to determine how to better the State’s sentencing scheme.⁶⁵ California worked quickly to curb the potentially implosive impact of *Cunningham*. In 2007, the California Legislature enacted Senate Bill 40, which essentially attempts to “*Booker-ize*” the DSL by giving the court full discretion to determine which term to impose so long as that choice is based not on facts but on stated “reasons.”⁶⁶ On July 19, 2007, the California Supreme Court issued two unanimous decisions that similarly limited the impact of *Cunningham*: *People v. Black*⁶⁷ (“Black II”) and *People v. Sandoval*.⁶⁸

Black II came before the California Supreme Court after having been remanded back by the United States Supreme Court in light of *Cunningham*. The California Supreme Court again affirmed the Court of Appeal’s approval of the defendant’s upper term sentence, finding that as long as one aggravating factor was “established by means that satisfy Sixth Amendment requirements,” sentencing the defendant to an upper term did not violate his Sixth Amendment rights.⁶⁹ In this case, the court had cited among other aggravating factors the use of force towards the victim, and the defendant’s criminal history.⁷⁰ The

60. *Id.* at 868.

61. *Id.*

62. *Cunningham*, 127 S. Ct. at 869.

63. *Id.*

64. *Id.* at 863-64.

65. *Id.* at 864.

66. Senate Bill 40 modified Cal. Penal Code § 1170(b). As an emergency provision, Senate Bill 40 went into effect immediately, and has a sunset date of January 1, 2009. For more information regarding Senate Bill 40 and *Cunningham*, see Casey McTigue, Note, *The Problem of Post-Cunningham Judicial Review: The Impact of Gall, Kimbrough, and SB 40 on California Sentencing*, 13 BERKELEY J. CRIM. L. 201, 210-12 (2008) and Warren Ko, Summary, 2007 *California Criminal Legislation: Meaningful Change, or Preserving the Status Quo?*, 13 BERKELEY J. CRIM. L. 97, 106-110 (2008).

67. 161 P.3d 1130 (Cal. 2007) [hereinafter *Black II*].

68. 161 P.3d 1146 (Cal. 2007).

69. *Black II*, 161 P.3d at 1134.

70. The defendant in this case was convicted by a jury of one count of continuous sexual abuse of a child under the age of fourteen and two counts of lewd and lascivious conduct. The defendant was sentenced to the upper term on the continuous sexual abuse count, with remaining terms to be served consecutively. *Id.*

Court held that the jury found the use of force beyond a reasonable doubt.⁷¹ A defendant's prior criminal history is always considered a fact the truth of which need not be established beyond a reasonable doubt by a jury.⁷² The "Sixth Amendment question," the Court held, "is whether the law *forbids* a judge to increase [a] defendant's sentence *unless* the judge finds facts that the jury did not."⁷³ The Court concluded:

So long as a single aggravating circumstance that renders a defendant *eligible* for the upper term has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial.⁷⁴

In this case, because the Court had found that two aggravating factors had satisfied the Sixth Amendment, imposition of the upper term sentence did not violate the defendant's Sixth Amendment rights.⁷⁵

On the same day, the California Supreme Court issued its ruling in *People v. Sandoval*.⁷⁶ Sandoval was charged with two counts of premeditated murder and one count of attempted premeditated murder.⁷⁷ The jury convicted the defendant of two counts of voluntary manslaughter and one count of attempted voluntary manslaughter.⁷⁸ The trial court, relying on aggravating factors not found by the jury and not admitted by the defendant, sentenced the defendant to the upper term of eleven years on one count of voluntary manslaughter.⁷⁹ The Court of Appeal affirmed.⁸⁰ In reversing and remanding the case with directions for re-sentencing, the California Supreme Court indirectly settled two issues. First, in cases where the upper sentence term was imposed in such a way that violated *Cunningham*, the sentence can still be upheld if a reviewing court finds that the violation was harmless error.⁸¹ Second, when a case is remanded to the trial court for re-sentencing in light of a *Cunningham* violation, the trial judge must merely assert reasons for imposing the lower, middle, or upper term, consistent with the legislative amendments to the DSL enacted after *Cunningham*.⁸²

71. *Id.* at 1141.

72. *Id.* at 1142.

73. *Id.*

74. *Black II*, 161 P.3d at 1142.

75. The court also found that a defendant did not waive his right to appeal the issue when he failed to object to the finding of aggravating circumstances without a jury, and that the imposition of consecutive sentences does not implicate a defendant's Sixth Amendment rights. *Id.* at 1144.

76. 161 P.3d 1146 (Cal. 2007).

77. *Id.* at 1150.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Sandoval*, 161 P.3d at 1150.

82. *Id.* at 1164.

Two cases currently pending in the California Supreme Court will decide other significant *Cunningham*-related issues. *People v. French*⁸³ will address the issue of whether a defendant pleading guilty or no contest can be sentenced to an upper term. The defendant in this case pled no contest to charges involving the molestation of children, and the trial court sentenced him to the maximum aggregate sentence of eighteen years.⁸⁴ The Third District Court of Appeal affirmed the sentence, finding that when the defendant pled no contest he both stipulated to facts allowing for the imposition of the maximum sentence, and was aware that this maximum sentence was one possible sentence he could receive.⁸⁵ The Court of Appeal held that “[w]here, as here, a defendant agrees that the court has the authority to sentence that defendant to an upper term, he is deemed to have admitted that his conduct, as a matter of fact, can support that term.”⁸⁶

People v. Towne will address the issue of what aggravating factors a judge can properly rely on in imposing an upper term sentence, and whether the sentence is constitutional under *Cunningham* if a judge relies on both proper and improper factors when sentencing a defendant.⁸⁷ The jury acquitted the defendant in this case of seven of the eight counts charged, including those involving any violence or threat of violence.⁸⁸ However, based on two witnesses’ testimony describing the alleged victim’s terror, the trial court sentenced the defendant to the upper term of four years for the offense, and doubled the term based on the defendant’s criminal history.⁸⁹ The California Supreme Court ordered supplemental briefs on two issues. First, do *Cunningham* and *Almendarez-Torres*⁹⁰ allow a trial judge to sentence defendants to upper terms based on certain aggravating factors not found by a jury?⁹¹ Second, is *Cunningham* violated if the trial court relies on one properly found aggravating factor along with factors not properly established?⁹²

83. *People v. French*, 2006 WL 3059802 (Cal. Dist. App. Oct. 30, 2006), *rev. gr.* S148845 (Feb. 7, 2007).

84. *Id.* at *1.

85. *Id.*

86. *Id.*

87. *People v. Towne*, 2004 WL 1088900 (Cal. Ct. App. May 17, 2004). *See also* First District Appellate Project: Fdap.org, *Cunningham* and *Blakely* Resources, Pending U.S. and California Supreme Court Cases, <http://www.fdap.org/blakely4.shtml> (last visited Apr. 19, 2008) [hereinafter *Cunningham* and *Blakely* Resources].

88. *Towne*, 2004 WL 1088900.

89. *Id.*

90. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that a sentencing enhancement based on a prior conviction did not invoke the Sixth Amendment requirement that a jury decide the fact beyond a reasonable doubt).

91. Several of these possible factors include: (1) the fact that the defendant had numerous previous adult convictions of increasing seriousness; (2) the defendant has served time in prison before; and (3) that the defendant was on parole at the time of the alleged offense. The defendant had also had a poor parole record in the past. *Cunningham* and *Blakely* Resources, *supra* note 87.

92. *Cunningham* and *Blakely* Resources, *supra* note 87.

On September 12, 2007, the California Supreme Court disposed of over 200 cases that had been awaiting resolution of *Cunningham*-related issues.⁹³ The court dismissed 145 cases, finding the sentences properly affirmed by the Court of Appeal under *Black II*; transferred back seventy-five cases to the originating Court of Appeal for reconsideration in light of *Black II* and *Sandoval*; and held over twenty-two cases pending the outcome in *Towne* and twelve cases pending the resolution of *French*.⁹⁴ Meanwhile, the Supreme Court declined to hear *Black II*, denying certiorari on January 14, 2008.⁹⁵

III. JUVENILE JUSTICE

Created in the early nineteenth century, our current juvenile justice system was conceived with the idea that children were inherently different from adults, and should be rehabilitated rather than punished when they committed crimes.⁹⁶ It was the responsibility of the state to both protect and rehabilitate young criminals; children were thus found delinquent rather than “guilty,” and the issue at stake in juvenile proceedings was custody rather than incarceration.⁹⁷ With the primary purpose of juvenile proceedings being rehabilitation of the offender, it was felt that juvenile courts needed few of the due process safeguards of an ordinary trial: there was no right to a jury, no right to representation, and the judge had at her disposal a full range of remedial solutions not limited to incarceration.⁹⁸ While concerns regarding the lack of constitutional protections afforded juveniles led to a series of Supreme Court decisions in the 1960s that rendered juvenile courts more similar to adult criminal courts, differences between the juvenile and adult court systems remain.⁹⁹ The current focus on Sixth Amendment rights¹⁰⁰ has brought to the forefront questions about sentencing factors and juvenile court proceedings, with mixed results from California courts.

In *People v. Grayson*, the First District Court of Appeal held that it was acceptable to use juvenile priors as strikes under the Three Strikes Law: “Given that juvenile adjudications are fully consistent with constitutional principles and sufficiently reliable for juvenile court purposes, even in the absence of the right to a jury trial, we see no reason to preclude their use by trial courts in

93. Press Release, California Supreme Court, California Supreme Court Disposes of Sentencing Cases (Sept. 12, 2007) (*available at* <http://www.fdap.org/downloads/blakely/CalSupremePressRelease9-12-07.PDF>).

94. *Id.*

95. *Black v. California*, 128 S. Ct. 1063 (2008).

96. Center on Juvenile and Criminal Justice, Intro to California’s Juvenile Justice System, <http://www.cjcj.org/jjic/intro.php> (last visited December 17, 2007). Prior to this time, juvenile criminals were tried alongside adults in criminal court. *Id.*

97. *Id.*

98. *Id.*

99. Prominent among these is the lack of a right to jury trial. *See id.*

100. For further information, see discussion of *Cunningham*, *supra* note 52-65 and accompanying text. HeinOnline -- 13 Berkeley J. Crim. L. 87 2008

enhancing criminal defendants' sentences."¹⁰¹ Similarly, in *People v. Tu*, the First District Court of Appeal affirmed the imposition of an upper term sentence that used a prior juvenile adjudication as the aggravating factor.¹⁰²

While the courts held in *Tu* that juvenile convictions can be used as an aggravating factor, the Sixth District Court of Appeal held in *People v. Nguyen* that juvenile priors cannot be used as strike priors under the Three Strikes Law.¹⁰³ The court reasoned that because a juvenile offender does not have a right to a jury trial, juvenile adjudications should not be considered "prior convictions" under *Apprendi*.¹⁰⁴ Therefore, using juvenile priors to elevate the maximum punishment for an offense is unconstitutional in light of *Apprendi* and *Blakely*. "*Apprendi* and its progeny compel us to recognize that the Sixth Amendment right to a jury trial is an integral part of the process that is due before a prior conviction may be used to increase the maximum sentence for a criminal offense."¹⁰⁵ On October 10, 2007, the California Supreme Court unanimously granted review of the case.¹⁰⁶

If the California Supreme Court reverses the Sixth District Court of Appeal's decision in *Nguyen*, a juvenile conviction of certain crimes would officially count as a "strike" if the defendant was sixteen or older when the crime was committed. This would in effect subject defendants to potential sentences of twenty-five years to life based upon a crime committed as a juvenile, where the defendant was found guilty without a jury trial. Juvenile convictions could also be used under *Black II* as the one aggravating factor warranting imposition of an upper sentence term, even though the conviction would have been obtained without the benefit of a jury trial. This is despite the fact that "the certainty that procedural safeguards [attach] to any 'fact' of prior convictions" is what "[mitigates] 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."¹⁰⁷

Juvenile justice policy has also seen reform in regards to search and seizure policy. On December 5, 2007, a federal lawsuit in the Northern District of California alleging Fourth Amendment violations by way of blanket strip-search policies at Contra Costa Juvenile Hall survived summary judgment.¹⁰⁸ The two plaintiffs, minors Katherine Ermitano and Russell Moyle, were subjected to full body strip searches and visual body cavity searches, not only upon arrival at juvenile hall but also after every instance they left their housing

101. *People v. Grayson*, 66 Cal. Rptr. 3d 603, 610 (Cal. Ct. App. 2007).

102. *People v. Tu*, 64 Cal. Rptr. 3d 878 (Cal. Ct. App. 2007).

103. *People v. Nguyen*, 62 Cal. Rptr. 3d 255, 256 (Cal. Ct. App. 2007).

104. *Id.* at 281.

105. *Id.* at 256.

106. *People v. Nguyen*, 169 P.3d 882 (Cal. 2007).

107. *Apprendi*, 530 U.S. at 488.

108. *Moyle v. County of Contra Costa*, No. C-05-02324, 2007 U.S. Dist. WL 4287315 (N.D. Cal. Dec. 5, 2007).
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unit, including after court hearings, visitations with parents, and meetings with lawyers.¹⁰⁹ The defendants were unable to show that the searches would likely lead to the discovery of contraband or weapons.¹¹⁰ The court denied summary judgment, finding that the defendants had not met their burden of proof establishing that blanket strip searches survived constitutional scrutiny.¹¹¹ While the juvenile hall in question modified its policy in 2005, strip and cavity searches are a common practice in juvenile facilities. The outcome of this case could have substantial importance to the practice generally, as well as to those 14,700 juvenile offenders booked at juvenile hall during the years implicated in the suit, from 2000 to 2005.¹¹²

IV. PRISON REFORM

California's prison system, once the envy and study of other states,¹¹³ has degenerated so drastically that federal courts have been forced to act. The failure of California's prison system can be traced back to a philosophical swing away from rehabilitation and towards punishment beginning in the 1970s, which led to the enactment of various "tough on crime" policies.¹¹⁴ The DSL eliminated discretionary sentencing and mandated prison stays of specified lengths for crimes; the Three Strikes law, enacted in 1995, mandated sentences of twenty-five years to life for most offenders with two previous violent or serious felony convictions.¹¹⁵ Discretionary parole release, which under indeterminate sentencing was given to prisoners released early as a reward for good behavior, was eliminated: inmates are now released from prison when their statutorily defined term is concluded, and virtually every inmate is placed on mandatory parole, which can last up to three years after release regardless of the inmate's behavior during incarceration.¹¹⁶ Only a small percentage of the prison population has access to any sort of rehabilitative or educational program; most inmates merely wait out their sentence, emerging no more prepared to change their life than they were upon entering prison.¹¹⁷ The result is that six out of ten admissions to California prisons are reentering parolees,¹¹⁸

109. *Id.* at *5.

110. *Id.*

111. *Id.* at *12

112. *See id.* at *17.

113. John Pomfret, *California's Crisis in Prison Systems a Threat to Public*, WASH. POST, June 11, 2006, at A3.

114. LITTLE HOOVER COMMISSION, SOLVING CALIFORNIA'S CORRECTIONS CRISIS: TIME IS RUNNING OUT 185, 1 (2007) [hereinafter LHC].

115. CAL. PENAL CODE § 667 (1994).

116. LHC, *supra* note 114 at 22-23. Discretionary parole now exists in California primarily for the most serious offenders and for those sentenced to an indeterminate term under the Three Strikes Law. *Id.*

117. *Id.* at 24.

118. *Id.* at 22.

and California has one of the highest recidivism rates in the country.¹¹⁹

In short, California's criminals are being sentenced to longer prison stays without regard to individual circumstances. There is a critical lack of access to rehabilitation programs: more convicts are returning to prison due to inflexible parole policies, and the Three Strikes law subjects those returning to prison to potential life sentences for crimes that otherwise might receive far shorter sentences. These conditions have resulted in an exploding prison population that has long since outgrown the housing California has provided for it. Approximately 170,000 prisoners reside in facilities designed for half that number, resulting in 19,000 prisoners being double- or triple- bunked in dorms, classrooms, and hallways.¹²⁰ Some facilities have wings that are so antiquated that the electricity has to be shut off during storms to keep the inmates from being electrocuted.¹²¹ Where drug rehabilitation programs exist, wait lists can be three months long.¹²² Due to deficiencies in access to basic medical care, an inmate needlessly dies every six to seven days in California prisons, and United States District Judge Thelton Henderson, who oversees one of the federal lawsuits involving such deficiencies, declared that this statistic "barely provides a window into the waste of human life occurring behind California's prison walls."¹²³

The prison emergency in California has given rise to three major federal class actions, all rooted in the Eight Amendment.¹²⁴ *Plata v. Schwarzenegger* addresses prison medical services.¹²⁵ *Coleman v. Schwarzenegger* looks at the mental health care services in prisons.¹²⁶ *Perez v. Tilton* examines the dental services available in prisons.¹²⁷ All three cases are currently active, with the judges and court-appointed representatives from each working to change the conditions in California prisons.

Plata v. Schwarzenegger is the largest prison class action lawsuit ever to be filed in California. The suit, filed in 2001, alleged that constitutionally inadequate medical care was being provided in California prisons.¹²⁸ In 2002, a settlement agreement mandated that the California Department of Corrections overhaul its medical care policies and procedures, and implement ways to

119. *Id.* at ii.

120. *Id.* at 19.

121. Pomfret, *supra* note 113.

122. *Id.*

123. Findings of Fact and Conclusions of Law Re Appointment of Receiver at 1-2, in *Plata v. Schwarzenegger*, 2007 U.S. Dist. LEXIS 68365 (N.D. Cal. 2005), available at <http://www.cpirnc.org/docs/court/PlataFindingsFactConclusionsLaw1005.pdf>. [hereinafter Findings of Fact].

124. U.S. CONST. AMEND. VIII (" . . . and no cruel or unusual punishment shall be inflicted").

125. *Plata*, 2007 U.S. Dist. LEXIS 68365.

126. *Coleman v. Schwarzenegger*, 912 F. Supp. 1282 (E.D. Cal. 1995).

127. *Perez v. Tilton*, 128 S. Ct. 258 (2007).

128. *Plata*, 2007 U.S. Dist. LEXIS 68365.

ensure inmates received adequate access to medical care.¹²⁹

However, in February 2005, Judge Henderson toured San Quentin's facilities and was horrified at the conditions:¹³⁰ the main medical examining room, in which over 100 men a day were examined, lacked any means of sterilization.¹³¹ The dentist did not wash his hands or change his gloves in between patients.¹³² The Outpatient Housing Unit, holding inmates at double its capacity, was dirty, and the lack of an examination table meant that medical examinations were often conducted on the floor or through food slots.¹³³ Overcrowding of the prison had resulted in over 350 prisoners being double-bunked in what once had been a gymnasium and along the corridors of units "where they are subjected to having feces and urine flung at them from above, and where water continually seeps from the walls and collects in pools in the floors."¹³⁴ Hundreds of health service request forms, some of which dealt with medication refills, sat on the desk of the triage nurse—a position that had been vacant for over a month.¹³⁵

With palpable emotion, Judge Henderson stated that "despite the best efforts of [appointed officials], little real progress is being made. The problem of a highly dysfunctional, largely decrepit, overly bureaucratic, and politically driven prison system . . . is too far gone to be corrected by conventional methods."¹³⁶ On June 30, 2005, Judge Henderson placed California's prison health care system into receivership.¹³⁷ Robert Sillen was appointed receiver the following February.¹³⁸

Two other federal lawsuits similarly addressed the constitutionality of conditions in California prisons. *Coleman v. Schwarzenegger* involved a 1990 class action lawsuit filed against California corrections and mental health

129. *Id.*

130. Order to Show Cause Re Civil Contempt and Appointment of Interim Receiver at 4 (May 10, 2005), *Plata*, 2007 U.S. Dist. LEXIS 68365, [hereinafter Order to Show Cause] available at <http://www.PC-CA-0018-006-1-pdf>. San Quentin was in the first group of institutions scheduled to "achieve compliance" in 2003, and had been the subject of various other federal and state court orders. *Id.* The order instructed defendants to show cause why "a receiver should not be appointed to manage health care delivery for the Department of Corrections until defendants prove that they are capable and willing to do so themselves . . . and why they should not be held in civil contempt of this Court's prior orders." *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 5.

134. Order to Show Cause, *supra* note 130, at 5.

135. *Id.* at 6.

136. *Id.* at 1.

137. Findings of Fact, *supra* note 123, at 1.

138. Order Appointing Receiver at 2 (Feb. 14 2006), *Plata*, 2007 U.S. Dist. LEXIS 68365. In January of 2008, Judge Henderson, while praising aspects of Sillen's job performance as Receiver, stated that it was "time for a more collaborative approach" to the issue, and abruptly removed Sillen from his position, replacing him with Clark Kelso, a law professor at the University of the Pacific, McGeorge School of Law in Sacramento. Bob Egelko, *New Overseer for Prison Healthcare System*, S.F. CHRON., Jan. 24, 2008, at B3.

officials by mentally ill inmates, alleging that the mental health care provisions at California prisons violated the inmates' constitutional rights.¹³⁹ On September 13, 1995, the court held that the defendants had been deliberately indifferent to inmates' medical needs in violation of the Eighth Amendment.¹⁴⁰ The evidence revealed deficiencies in access to care, medication management and involuntary medication, understaffing and training, and medical records; that tasers and 37 millimeter guns were used with deliberate indifference to the welfare of inmates with serious mental disorders; and that present policies regarding the housing of mentally ill inmates violated the Eighth Amendment.¹⁴¹ Judge Karlton ordered that new policies be created, and appointed a special master, J. Michael Keating, to oversee compliance with the court order.¹⁴²

Perez v. Tilton, filed on December 19, 2005 on behalf of Carlos Perez and other prisoners, was an offshoot of *Plata* that sought to redress the unconstitutional conditions involving the CDCR's dental health care program.¹⁴³ The parties reached a settlement agreement on August 21, 2006, which contained requirements for systemic improvements in the dental care of all inmates. On February 8, 2007, Doctors Shulman and Scalzo were appointed Representatives of the Court in overseeing and coordinating these improvements.¹⁴⁴

In January 2007, the three judges collectively issued an order instructing the Receiver in *Plata*, the Court Representatives in *Perez*, and the Special Master in *Coleman* to coordinate their efforts towards remedying these conditions through formal monthly meetings.¹⁴⁵ Since many issues in the cases overlap, coordination of efforts would ostensibly reduce unnecessary and costly duplication, while encouraging collaboration. United States District Court Judge Claudia Wilken, who presided in *Armstrong v. Schwarzenegger*, another federal class action lawsuit involving the rights of disabled inmates under the ADA, has since joined in this collaboration.¹⁴⁶

Overcrowding is the most immediate cause of the constitutional violations at issue in these lawsuits. Under the Prison Litigation Reform Act (PLRA) of 1995, any court order that reduces or limits prison populations must be the

139. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2007 U.S. Dist. LEXIS 74740 (N.D. Cal. Oct. 5, 2007).

140. *Id.*

141. *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995).

142. *Id.* at 1325.

143. *Perez v. Tilton*, No. C 05-05241 JSW, 2006 U.S. Dist. LEXIS 63318 (N.D. Cal. August 21, 2006).

144. Order Appointing Court Experts as Court Representatives, *Perez*, 2006 U.S. Dist. LEXIS 63318.

145. California Prison Health Care Receivership Corp., FAQs, <http://www.cprinc.org/faq.htm> (last visited Apr. 19, 2008).

146. *Id.*

result of a decision made by a three-judge court.¹⁴⁷ In a joint hearing on July 23, 2007, Judges Henderson and Karlton issued an order that a three-judge court be convened in order to consider capping California's prison population.¹⁴⁸ Ninth Circuit Judge Stephen Reinhardt joined Henderson and Karlton to form the panel.¹⁴⁹ Under the PLRA, the panel may only issue a prisoner release order if it is satisfied "by clear and convincing evidence" (1) that overcrowding is the primary cause of the constitutional violations; and (2) that no other solution will cure the violations.¹⁵⁰ On October 10, 2007, the panel filed an order bifurcating the proceedings.¹⁵¹ During the first phase, the court will consider whether the two conditions set forth by the PLRA have been met; in the second phase, the court will decide whether and under what conditions a prison release order will be imposed.¹⁵² In an order filed October 10, 2007, the panel set trial proceedings for Phase I to begin in February of 2008.¹⁵³

V. LETHAL INJECTION

As long as there has been a death penalty in the United States there has also been opposition to it. Challenges have been brought on grounds of morality, effectiveness, and constitutional soundness. Support for the death penalty has waxed and waned over the years in response to various influences and trends in social theory.¹⁵⁴ Yet even when support for the death penalty has been at its lowest, a significant percentage of the public has always been present to voice the opinion that the death penalty is an important social tool necessary to maintain law and order. This constant support of the death penalty

147. 18 U.S.C. §§ 3626(a)(3)(B), (g)(4) (2008).

148. Order Granting Plaintiff's Motion to Convene Three-Judge Court, *Plata*, 2007 U.S. Dist. LEXIS 68365, available at www.cprinc.org/docs/court/OrderRePanelOvercrowding072307.pdf

149. *Id.*

150. 18 U.S.C. § 3626(a)(3)(E) (2008).

151. Order Bifurcating Proceedings and Setting Deadlines for Phase I, *Plata*, 2007 U.S. Dist. LEXIS 68365.

152. *Id.*

153. *Id.*

154. Death penalty reform has waxed and waned over the years. Consider the following: efforts in some states to find more humane methods of execution, legislation limiting the death penalty to crimes of murder and treason, outright banning of the death penalty, and writings of criminologists in the 1920s to 1940s arguing that the death penalty was a necessary social tool. At one point, social sentiment, coupled with such external pressures as the Great Depression and Prohibition, led to the highest rate of executions ever seen in this country. In the 1950s the pendulum swung back away from support for the death penalty, the number of executions was cut nearly in half (from 1289 in the 1940s to 715 in the 1950s). DeathPenaltyInfo.org, History of the Death Penalty,

<http://www.deathpenaltyinfo.org/article.php?scid=15&did=410#EarlyandMidTwentiethCentury> (last visited June 8, 2008). After *Furman*, support for the death penalty again soared, with juries doling out increasing numbers of death sentences culminating in a high of 317 in 1996; by 2006, the number of juries sentencing defendants to death had dropped to fifty-three. Stuart Taylor, Jr., *The Death Penalty: Slowly Fading*, THE NAT'L L.J., Nov. 19, 2007, 2007-13 Berkeley J. Crim. L. 93, 2008.

could be the reason why the Supreme Court has always come short of declaring outright that the death penalty is unconstitutional. Rather, the Court has leaned towards rulings that either limit the scope of the applicability of the death penalty, or rulings that find particular methods of administering the death penalty unconstitutional¹⁵⁵—leaving states with the option of finding different, presumably less “cruel and unusual,” methods of execution.¹⁵⁶

Similarly, in December 2006 United States District Court Judge Jeremy Fogel effectively stayed all California executions in *Morales v. Tilton*,¹⁵⁷ pending the case’s resolution, finding that California’s lethal injection method of administering the death penalty violated the Eighth Amendment’s ban on cruel and unusual punishment.¹⁵⁸ *Morales v. Tilton* was the latest in a series of appeals attempting to stay the execution of convicted rapist and murderer Michael Morales.

Michael Morales was convicted and sentenced to death on April 25, 1989 for the 1981 murder of a seventeen-year-old girl.¹⁵⁹ On January 13, 2006, Morales filed a constitutional challenge in federal court, alleging that California’s lethal injection practice violates the Eighth Amendment’s prohibition on cruel and unusual punishment.

The court responded only to the “very narrow question [of whether] . . . California’s lethal-injection protocol—as actually administered in practice—create[s] an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment.”¹⁶⁰ Answering this inquiry in the affirmative, the court stated that the drugs used by the state could potentially be implemented in ways that would not violate the constitution; the issue was one of form rather than substance.¹⁶¹ Judge Fogel cited such concerns as lack of consistent staff members performing the executions; lack of adequate training and supervision of staff members performing the executions; poorly maintained records; improperly mixed drugs; and a poorly lit execution

155. See *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that under the Eighth Amendment a punishment would be “cruel and unusual” if it was arbitrary, disproportionately severe to fit the crime, offended society’s sense of justice, or was not more effective than a less severe penalty); *Coker v. Georgia*, 433 U.S. 548 (1977) (holding that death is an unconstitutional punishment for the crime of rape absent the death of the victim); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that execution of the mentally retarded violated the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding unconstitutional the execution of defendants whose crimes were committed under the age of eighteen).

156. See *Furman*, 408 U.S. 238. While the ruling in *Furman* effectively voided forty death penalty statutes, the majority ruling left open the option for states to rewrite their statutes in conformity with *Furman* and reinstate the death penalty—which thirty-five states proceeded to do, in varying ways. *Id.*

157. *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006) [hereinafter *Morales*].

158. *Id.*

159. *Morales v. Woodford*, 388 F.3d 1159, 1163-67 (9th Cir. 2004) [hereinafter *Woodford*].

160. *Morales*, 465 F. Supp. 2d at 972.

161. *Id.*

area, which prevents adequate monitoring of inmates during executions.¹⁶² Finding that California's "implementation of lethal injection is broken," but could be fixed, Judge Fogel ordered Governor Schwarzenegger to work with prison officials in revising California's execution procedure.¹⁶³ On May 15, 2007, the state revealed a revised procedure, along with assurances regarding improvements in training and staff.¹⁶⁴ Judge Fogel scheduled a visit to the new execution chamber in advance of the December 10-11 hearing, pushed back from its original date in October.¹⁶⁵ The visit has since been postponed for a second time.¹⁶⁶

However, recent Supreme Court activity surrounding the constitutionality of lethal injections could effectively make this case moot.¹⁶⁷ On January 7, 2008 in *Baze v. Rees*, the Supreme Court heard arguments on a constitutional challenge to the three chemical formula used by thirty-six states in carrying out executions by lethal injection.¹⁶⁸ The Court's ruling in *Baze v. Rees* will answer three questions:

I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?

II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?

III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?¹⁶⁹

162. *Id.*

163. *Id.* at 974.

164. LETHAL INJECTION PROTOCOL REVIEW TEAM, CALIFORNIA DEPT. OF CORRECTIONS AND REHABILITATION, STATE OF CALIFORNIA LETHAL INJECTION PROTOCOL REVIEW (2007), available at <http://www.deathpenaltyinfo.org/CALethlInject.pdf>. See also Death Penalty Information Center, Lethal Injection: National Moratorium on Executions Emerges After Supreme Court Grants Review, <http://www.deathpenaltyinfo.org/article.php?did=1686&scid=64> (last visited Apr. 19, 2008) [hereinafter National Moratorium].

165. National Moratorium, *supra* note 164.

166. *Id.*

167. Editor's Note: *Rees* was decided April 16, after this article was submitted for publication. The Court upheld the methods of execution 7-2. *Baze v. Rees*, 128 S. Ct. 1520 (2008).

168. National Moratorium, *supra* note 164. Of the thirty-eight states that have the death penalty, thirty-seven accomplish their executions by use of lethal injection. Thirty-six of these, California among them, use a particular combination of drugs to bring about the end result. This method is the basis of the Eighth Amendment constitutional challenge in this case. *Id.*

169. LethalInjection.org, *Baze v. Rees* Q&A: What Questions Has the U.S. Supreme Court

Oral arguments were heard on January 7, 2008.¹⁷⁰

If the Supreme Court rules in favor of the petitioners in *Baze v. Rees* and finds this particular method of lethal injection unconstitutional, California, along with its thirty-five brethren in tri-chemical execution, will be forced to not merely fix its broken implementation, but to find a new method of execution altogether.¹⁷¹

CONCLUSION

Justice, I think, is the tolerable accommodation of the conflicting interests of society, and I don't believe there is any royal road to attain such accommodation concretely. ‡

Faced with a system that fails to reform seventy percent of its criminals and boasts the most depraved prison conditions in the country, there is little doubt that all signs point toward the need for a major overhaul of California's criminal justice system. To rid the system of its current injustices, changes are needed at all stages, from law enforcement, sentencing, parole, and incarceration to the death penalty. Given their impartial position as the champion for both the criminal and the public, courts should play a vital role in the years to come in safeguarding the interests of both sides as the state wrestles to arrive at viable solutions to these vast and daunting problems.

Asked the Parties to Address?, <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/Public/QA/I.html> (last visited Apr. 19, 2008).

170. Transcript of Oral Argument, *Baze*, 128 S. Ct. 1520, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-5439.pdf.

171. *Baze*, 128 S. Ct. 1520.

‡ Judge Learned Hand, quoted in Philip Hamburger, *The Great Judge*, LIFE MAGAZINE, Nov. 4, 1946, at 122-25. HeinOnline -- 13 Berkeley J. Crim. L. 96 2008