

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
October Term, [leave blank, clerk will fill in]  
\_\_\_\_\_

[appellant's name],

Petitioner

v.

THE STATE OF CALIFORNIA,

Respondent.

\_\_\_\_\_  
On Petition For a Writ of Certiorari to the California Court of  
Appeal, First Appellate District, Division **XXXXX**  
\_\_\_\_\_

**PETITION FOR WRIT OF CERTIORARI**

[attorney name]\*  
[attorney address]  
[attorney phone number]  
Counsel for Petitioner

\*Counsel of Record

## Question Presented

Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d, 124 S.Ct. 2531 (2004).

The identical question is pending before this Court in *Cunningham v. California*, no. 05-6551, cert. granted Feb. 21, 2006. \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, 2006 WL 386377.

## **Parties to the Proceedings**

The parties to the proceedings in the California Court of Appeal included the State of California and petitioner \_\_\_\_\_. There are no parties to the proceedings other than those named in the petition.

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*Use note: Either option below may need to be adapted, depending on what appendices are actually used.*

### Option 1:

- A. Opinion of the California Court of Appeal, filed \_\_\_\_\_.
- B. Order of California Supreme Court denying review, filed \_\_\_\_\_.
- C. Reporter's Transcript of [Date of Sentencing], Sentencing Hearing in *People v.* [petitioner's name], [name of county] County Superior Court, no. \_\_\_\_\_.
- D. Rules 4.420, 4.421, 4.423 of the California Rules of Court.

### [Option 2

- A. Opinion of the California Court of Appeal, filed \_\_\_\_\_.
- B. Order of California Supreme Court denying review, filed \_\_\_\_\_.
- C. Original Opinion of California Court of Appeal, filed \_\_\_\_\_.
- D. Order of California Supreme Court Remanding for Reconsideration in light of *Black*, filed \_\_\_\_\_.

- E. Reporter's Transcript of [Date of Sentencing], Sentencing Hearing in *People v.* [petitioner's name], [name of county] County Superior Court, no. \_\_\_\_\_.
- F. Rules 4.420, 4.421, 4.423 of the California Rules of Court.

## Table of Authorities

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IN THE SUPREME COURT OF THE UNITED STATES

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[appellant's name here],

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On Petition For a Writ of Certiorari to the California Court of  
Appeal, First Appellate District, Division [\_\_\_\_\_]

\_\_\_\_\_

### PETITION FOR WRIT OF CERTIORARI

The petitioner, [appellant's name here], respectfully petitions this  
Court for a writ of certiorari to review the judgment and opinion of  
the California Court of Appeal, filed on [date].

### Opinions Below

*Use note: you may consider including the sentencing transcript as  
an appendix, if it is readily available.)*

**Option 1 (for cases with initial Court of Appeal opinions filed post-*Black*): The unpublished opinion of the California Court of Appeal, which is the subject of this petition, was filed on [date], and is attached as Appendix (App.) A. The California Supreme Court's one-page order denying review is attached as Appendix B. The transcript of the sentencing hearing is attached as Appendix C.]**

**[Option 2 (for cases with original opinions pre-dating *Black*): The unpublished opinion of the California Court of Appeal, which is the subject of this petition, was filed on [date], and is attached as Appendix (App.) A. The California Supreme Court's one-page order denying review of that opinion was filed on [date] and is attached as Appendix B. The earlier and now-vacated, unpublished opinion of the California Court of Appeal in this case was filed on [date], and is attached as Appendix C. The California Supreme Court's order remanding the case for reconsideration in light of its decision in *People v. Black*, 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (Cal. 2005) was filed on [date] and is attached as Appendix D. The transcript of the sentencing hearing is attached as Appendix E.]**

## **Jurisdiction**

The decision of the California Court of Appeal to be reviewed was filed on [date]. The California Supreme Court denied discretionary review on [date]. This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257(a).

### **Constitutional and Statutory Provisions Involved**

#### **A. Federal Constitutional Provisions**

The Sixth Amendment of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."

The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law ...."

#### **B. State Statutory Provisions**

Subdivision [\_\_\_] of section [\_\_\_\_\_] of the California Penal Code provides:

[insert relevant text of statute defining offense, including penalty]

[Option. If the offense statute merely states that the punishment is “state prison,” add the following optional paragraph:

Section 19 of the California Penal Code provides, in pertinent part:

**Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years ....**

Subdivision (b) of Section 1170, of the California Penal Code provides, in pertinent part (emphasis added):

When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, **the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. ...** In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer’s report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any

enhancement upon which sentence is imposed under any provision of law.

**C. California Rules of Court**

Relevant California Rules of Court are attached as appendix [D or F], including:

- Rule 4.420. Selection of base term of imprisonment
- Rule 4.421. Circumstances in aggravation
- Rule 4.423. Circumstances in mitigation

**Statement of the Case**

Petitioner is entitled to a summary reversal and remand for further consideration in the light of this Court's forthcoming decision in *Cunningham v. California*, no. 05-6551.

On [date],[**petitioner pleaded guilty to**] [**was convicted by jury of**], \_\_\_\_\_, a violation of section [\_\_\_\_\_]. Clerk's Transcript ("CT") \_\_\_\_.<sup>1</sup> At sentencing, the trial court found true [insert number of aggravating factors here] aggravating factors: [list aggravating factors here]. The court also found true [insert number of mitigating factors here] mitigating factor: [list mitigating factors here]. The

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<sup>1</sup> The "Clerk's Transcript" is the record on appeal filed in the California Court of Appeal.

Court then sentenced appellant to the upper term of [length of sentence] years. App. \_\_\_\_\_.

In the state court of appeal, petitioner, citing the Sixth and Fourteenth Amendments and this Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), argued that the judicial fact-finding at sentencing violated his federal constitutional rights to a jury trial and proof beyond a reasonable doubt.

*[Option 1: lost in court of appeal; review denied]*

**The California Court of Appeal, rejected petitioner's argument and affirmed his sentence. App. A \_\_\_\_\_. The court, bound by the California Supreme Court's decision in *People v. Black*, 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (Cal. 2005), agreed with the state that the California Determinate Sentencing Law ("DSL") is distinguishable from the sentencing schemes in Washington and the federal sentencing guidelines and that there is no constitutional right to a jury trial on facts used to impose the upper term. App. A \_\_\_\_\_. Petitioner sought discretionary review in the California Supreme Court. On [date], that court denied review. App. B.**

*[Option 2: appellant prevailed in court of appeal's 1st opn.; review granted; lost on remand in light of black; review denied:*

The California Court of Appeal, in its first and now vacated opinion, found *Blakely* error and vacated petitioner's sentence. App. C \_\_\_\_\_. The California Supreme Court granted review, deferring briefing pending its decision in *People v. Black*, S126182. On June 20, 2005, the California Supreme Court issued its opinion in *People v. Black*, 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (Cal. 2005), holding that there is no federal constitutional right to a jury trial on fact-finding relating to aggravating factors used to impose the upper term under California's Determinate Sentencing Law. The Court also held that there is no right to a jury trial on fact-finding used in the decision to impose sentences consecutively – a matter not at issue in this case. On \_\_\_\_\_, the California Supreme Court remanded the case to the Court of Appeal in light of *Black*. App. D. On \_\_\_\_\_, the California Court of Appeal issued a new opinion, the one now on review, rejecting petitioner's *Blakely* argument in light of *Black*. App. A \_\_\_\_\_. On [date], the California Supreme Court again denied review. App. B.

## Reasons for Granting the Writ

**This Case, in Which a *Blakely/Apprendi* Challenge to California's Sentencing Scheme Was Presented and Rejected in the State Courts, Should be Held for Disposition Pending This Court's Decision in *Cunningham v. California*, no. 05-6551.**

California's Determinate Sentencing Law (DSL) authorizes judges to impose upper term sentences based on aggravating factors which were neither proven to a jury nor admitted by the defendant. In *Cunningham v. California*, no. 05-6551, certiorari granted February 21, 2006, this Court will be determining whether the DSL violates the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to proof beyond a reasonable doubt.

As addressed more fully in the *Cunningham* certiorari petition, California law authorizes imposition of an "upper term" sentence (rather than the presumptive "middle term") only if the judge finds aggravating circumstances over and above the elements of the conviction offense. Cal. Pen. Code § 1170(b).

In this case, as in *Cunningham*, the sentencing judge based the upper term sentence on his/her own factual findings of multiple non-recidivist "aggravating circumstances" concerning the commission of the current offense, including \_\_\_\_\_ and

\_\_\_\_\_. Because those additional factual findings were necessary to authorization of an upper term sentence of \_\_\_\_ years, rather than a mid-term sentence of \_\_\_\_ years, the judge's adjudication of those facts under a preponderance standard deprived petitioner of his Sixth Amendment right to jury trial and his Fourteenth Amendment right to due process, just as in the pending *Cunningham* case and in *Blakely* itself. This case presents the same question and should be held pending a decision in *Cunningham*.

The *Blakely* claim in this case was preserved in state court. Appellant argued that he was sentenced in violation of *Blakely*. The state court of appeal denied the claim on the merits, bound by the state Supreme Court's decision in *Black* [citation]; the state supreme court summarily denied review. [citation]

**[optional text to be added, to the body or footnotes, as applicable:**

**OPTION 1: The state court of appeal, in its first opinion in this case (i.e. the opinion issued prior to *Black*), held that the *Blakely* violation in this case was prejudicial, requiring resentencing.**

**OPTION 2a - bracketed texts in this paragraph are examples:  
This case involves only aggravating factors related to the**

commission of the current offense: [victim vulnerability] and [abuse of a position of trust], and is thus unencumbered by the complexity of recidivist-related aggravating factors that might be covered by the exception to the right to a jury trial identified in *Apprendi*, 530 U.S. at 489-90 (citing *Almendarez-Torres v. United States*, 523 US 224 (1998)).

OPTION 2b - bracketed texts in this paragraph are examples: This case involves only aggravating factors which are not based on the mere fact of a prior conviction: [victim vulnerability] and [poor performance on probation], and is thus unencumbered by the complexity of recidivist-related aggravating factors that might be covered by the exception to the right to a jury trial identified in *Apprendi*, 530 U.S. at 489-90 (citing *Almendarez-Torres v. United States*, 523 US 224 (1998)). See *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1262 (2005) (reading *Almendarez-Torres* exception narrowly).

Because this Court's disposition of *Cunningham* will determine the legality of petitioner's sentence, this case should be held pending the decision in *Cunningham*.

**CONCLUSION**

For the foregoing reasons, petitioner requests that the Court hold this case for disposition pending its decision in *Cunningham*, 05-6551, and then grant certiorari, vacate the judgment of the California Court of Appeal, and remand the case for further proceedings in light of *Cunningham*.

Dated: \_\_\_\_\_

Respectfully submitted,

\_\_\_\_\_  
[attorney's name]  
Attorney for Petitioner

## Appendix

[insert appendices A-C or A-E noted in "Opinions Below" section]

## Appendix [D or F]

### California Rules of Court

#### *Rule 4.420. Selection of base term of imprisonment*

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute

circumstances in aggravation or mitigation justifying the term selected.

*Rule 4.421. Circumstances in aggravation*

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(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.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

*Rule 4.423. Circumstances in mitigation*

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.