

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SONOMA**

**In re RAFAEL RIVAS,  
on habeas corpus.**

No.

Related Case Nos:

Superior Court No. SCR32686

Appeal No. A107031

Supreme Court No. S132284

**PETITION FOR WRIT OF HABEAS CORPUS  
AND REQUEST FOR RESENTENCING  
AFTER *CUNNINGHAM V. CALIFORNIA*  
(January 22, 2007, No. 05-6551) \_\_\_ U.S. \_\_\_  
[166 L.Ed.2d 856, 27 S.Ct. 856]**

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SONOMA

In re RAFAEL RIVAS,

No.

on habeas corpus.

**PETITION**

TO: THE PRESIDING JUSTICE OF THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA:

Petitioner, Rafael Rivas, by and through counsel, petitions for a Writ  
of Habeas Corpus and by this verified petition alleges the following:

**I.**

Petitioner's liberty is restrained pursuant to a judgment of conviction  
and sentence entered on May 27, 2004 by the Honorable Dean A. Beaupre  
in Sonoma County Superior Court No. SCR32686 committing him to the  
custody of the California Department of Corrections. Petitioner was found  
guilty after entry of a guilty plea on November 24, 2003, to one count of  
voluntary manslaughter (Pen. Code § 192) with personal gun use (Pen.  
Code § 12022.5). He was sentenced on May 27, 2002 to a term of 21 years.  
(See, Exhibit A.)

**II.**

The restraint on petitioner's liberty is illegal and in contravention of  
rights guaranteed him by the Fifth, Sixth and Fourteenth Amendments to  
the United States Constitution, because he was sentenced based on  
findings not proven to a jury beyond a reasonable doubt. (*Cunningham v.*

*California* (Jan. 22, 2007; 05-6551) \_\_\_ U.S. \_\_\_ [166 L.Ed.2d 856, 27 S.Ct. 856];  
*Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531].)

### III.

This petition is being filed in this court pursuant to its original habeas corpus jurisdiction. (Cal. Const., art. VI, § 10.) On June 24, 2004, while petitioner’s direct appeal was pending, the United States Supreme Court decided *Blakely*. Petitioner’s direct appeal, raising a *Blakely* claim, was denied by the Court of Appeal on February 15, 2005. The Supreme Court denied review on April 20, 2005. (See, Exhibit B.) *Cunningham* was decided on January 22, 2007, holding that California upper terms based on “aggravating factors” found true by a judge by a standard less than beyond a reasonable doubt are unconstitutional. Accordingly, petitioner has filed the current petition in this court requesting relief under *Cunningham*. No other post-conviction proceedings are pending.

### VI.

According to petitioner’s appellate record, the facts pertaining to the offense are as follows:

Alfonso Mares, the co-owner of Azteca Market on Frazier Street, in Santa Rosa, and his manager, Hector Montoya had closed the store about 8:20 p.m. on June 3, 1999. (CT 7-9.) At about 9:00, in addition to Mr. Mares and Mr. Montoya, a vendor named Mr. Christiakoff and Mr. Mares’s partner, Ben Tanuz were in the store. (CT 9.) Mr. Tanuz went into the meat department to retrieve some meat, when Mr. Rivas and another man came into the store. (CT 10.) Both were dressed in black and had ski

masks covering their faces. (CT 11-12.) Mr. Rivas had a gun, and ordered Mr. Mares to “Give [him] the money.” Mr. Mares said he would surrender the money. He turned to the safe, and he heard a shot. (CT 11, 18.) Though Mr. Mares was unaware of any struggle between Mr. Montoya and Mr. Rivas, later that night, Mr. Rivas told his friend, Roger Stephenson that the gun accidentally fired while he was wrestling with Mr. Montoya. (CT 51-52.) When Mr. Mares turned around, the men were gone and Mr. Montoya had been shot in the neck. Mr. Tanuz called the police, and Mr. Mares tried to stop the blood. (CT 13.) Mr. Montoya later died from the gun shot wound to his neck. (CT 82.)

#### VII.

Petitioner was represented at trial by appointed counsel, Bernabe Hernandez. He has been incarcerated since his conviction, and has no assets. Current counsel was appointed to represent petitioner in the Court of Appeal. (See, Exhibit C.) Current counsel for petitioner is filing this petition in order to protect petitioner’s federal constitutional rights. Petitioner will request appointment of counsel should a hearing be necessary in the Superior Court. Current counsel is available for appointment if it pleases the court.

#### VIII.

The California Supreme Court has denied petitioner’s claim made under *Blakely*. *Cunningham* was decided after petitioner’s judgment became final for purposes of direct review. Since he could not have raised the claim presented here under *Cunningham* in the Superior Court, the

Court of Appeal or the Supreme Court as part of his direct appeal, petitioner has no other plain, speedy or adequate remedy at law.

WHEREFORE, petitioner respectfully requests that this Court:

1. Issue a Writ of Habeas Corpus or Order to Show Cause to the California Department of Corrections and Rehabilitation to inquire into the legality of the restraint on petitioner's liberty; and
2. After hearing, issue an order vacating the judgment in this matter, remanding for resentencing and granting such further relief as is appropriate in the interest of justice.

DATED: March 6, 2007

Respectfully submitted,

By: \_\_\_\_\_  
ALAN SIRACO  
Attorney for Petitioner

## VERIFICATION

I, Alan Siraco, declare under penalty of perjury:

I am an attorney admitted to practice law in the State of California, and I was appointed appellate counsel for the petitioner herein by the Court of Appeal for the First Appellate District. Petitioner is incarcerated in Susanville, California, in another county at great distance from that in which I have an office.

I am authorized to file this petition for writ of habeas corpus on petitioner's behalf. All facts alleged in the above document, not otherwise supported by references to petitioner's appellate record, exhibits or other documents, are true of my own personal knowledge.

Executed this 6<sup>th</sup> day of March, 2007, at San Francisco, California.

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ALAN SIRACO

## MEMORANDUM OF POINTS AND AUTHORITIES

### THE IMPOSITION OF AN UPPER TERM SENTENCE VIOLATED PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO PROOF OF EACH SENTENCING FACT BEYOND A REASONABLE DOUBT AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

#### A. Under *Cunningham*, California Upper Terms Based On Facts Enumerated In Rule 4.421 Found True By A Judge By A Preponderance Of The Evidence Are Unconstitutional.

The United States Supreme Court has established that “every defendant has the *right* to insist that the prosecutor prove to the jury all facts legally essential to the punishment.” (*Blakely v. Washington* (2004) 542 U.S. 296, 313 [159 L.Ed.2d 403, 124 S.Ct. 2531], emphasis in original; U.S. Const., Amend. VI; *id.*, Amend. XIV.) Thus, there is a federal constitutional right to a jury trial and proof beyond a reasonable doubt “for any fact (other than prior conviction) that increases the maximum penalty for a crime.” (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, 490 [147 L.Ed.2d 435, 120 S.Ct. 2348].) The “maximum” sentence to which a judge can sentence a defendant without additional factual findings by a jury is “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely v. Washington, supra*, 542 U.S. at p. 303, emphasis in original.)

Recently, while acknowledging that the middle term is the “presumptive” term under California’s Determinate Sentencing Law (“DSL”), the California Supreme Court reasoned that the determinate triad represents a “statutory range” which the judge may impose based upon traditional judicial factfinding attendant to the imposition of sentence.

Accordingly, the court held that the upper term of the triad is the “statutory maximum” in California. (*People v. Black* (2005) 35 Cal.4th 1238.)

However, on January 22, 2007, the United States Supreme Court rejected the California Supreme Court’s reasoning in *Black*, and that decision is no longer valid. *Cunningham* established that because a DSL upper term requires findings of additional aggravating circumstances beyond the minimum elements of the offense, “the middle term prescribed in California’s statutes, not the upper term, is the relevant statutory maximum” for *Apprendi-Blakely* purposes. (*Cunningham v. California, supra*, slip opn. at pp. 15-16 [166 L.Ed.2d at p. 873].) “Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL violates *Apprendi*’s bright-line rule.” (*Ibid.*)

Specifically rejecting the reasoning in *Black*, the High Court held, “Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent. [Fn.]” (*Cunningham v. California, supra*, slip opn. at p. 21 [166 L.Ed.2d at p. 876].) *Cunningham* confirms that the sentencing judge’s determination of aggravating factors and his reliance on those factors to impose the middle term violated appellant’s constitutional rights to a jury trial and due process.

Under *Cunningham, Blakely* and *Apprendi*, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Cunningham v. California, supra*, slip opn. at p. 1 [166 L.Ed.2d at p. 864]; *Apprendi v. New Jersey, supra*, 530 U.S. at p. 490; *Blakely v. Washington, supra*, 542 U.S. at p. 301.) The sentencing court here imposed the upper base term after finding: the victim particularly vulnerable (Cal. Rules of Ct., rule 4.421(a)(3)) because the store was closed late at night; Mr. Rivas appeared to be a leader (Cal. Rules of Ct., rule 4.421(a)(4)); and “[t]he facts and circumstances of this case are simply off the scale in terms of being compared to other manslaughters.” (RT 1-2.) The latter finding appears to be a paraphrase of the rule requiring a finding that “the circumstances in aggravation outweigh the circumstances in mitigation.” (Cal. Rules of Ct., rule 4.420(b).) Though the court found petitioner had no prior record, the court ruled the “aggravating factors” outweighed the “mitigating factor,” and “reluctantly” imposed the high term of 11 years for the manslaughter and the high term of 10 years for the gun use enhancement. (Ex. A, p. 2.)

Though petitioner waived his right to a jury trial in favor of a bench trial, he did not waive his right to proof of the truth of each fact on which his punishment is based beyond a reasonable doubt. The sentencing court did not expressly state what standard of proof it was applying in making the findings of aggravating circumstances. However, from its silence this court must presume that the judge found the aggravating factors true by a mere preponderance of the evidence in accordance with rule 4.420(b) of the California Rules of Court. (*People v. Scott* (1994) 9 Cal.4th 331, 349

[preponderance standard applies]; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496 [presumption on a silent record is that the court followed settled law].) In view of the sentencing court's finding of aggravating factors by a lower standard of proof, the court's selection of the upper term was tainted by *Blakely* error and renders appellant's sentence unconstitutional. (See, *United States v. Velasco-Heredia* (9<sup>th</sup> Cir. 2003) 319 F.3d 1080, 1085 [*Apprendi* error occurred when trial court used the preponderance standard at sentencing to determine drug quantity].)

**B. Petitioner Is Entitled To A Reduction In His Prison Sentence.**

*Blakely* reversed the state court judgment based on the unconstitutional application of statute without engaging in harmless error analysis. (*Blakely v. Washington, supra*, 542 U.S. at p. 313.) Nor did *Apprendi* subject the state judgment it reversed to harmless error analysis. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 497.) Harmless error analysis is not applicable to a judgment imposed under an unconstitutional statute, especially where that statute takes away from the jury all determination of the matter at hand. (See, *Hicks v. Oklahoma* (1980) 447 U.S. 343, 345-347 [65 L.Ed.2d 175, 100 S.Ct. 2227] [rejecting state appellate court's harmless error analysis of sentence imposed according to unconstitutional statute].) Indeed, harmless error analysis makes no sense when the error is an utter denial of the right to a jury trial and proof beyond a reasonable doubt. "Where that right [to jury determination] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong

entity judged the defendant guilty.” (*Rose v. Clark* (1986) 478 U.S. 570, 578 [92 L.Ed.2d 460, 106 S. Ct. 3101].) However, the United States Supreme Court has held that failure to provide a jury trial regarding sentencing facts is analogous to an instructional error that removes an element from a jury’s consideration. As a result, the High Court has applied the *Chapman* standard to *Cunningham/Blakely* error. (*Washington v. Recuenco* (2006) \_\_\_ U.S. \_\_\_ [165 L.Ed.2d 466, 477, 26 S.Ct.2546, 2553].)

Under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S. Ct. 824], the prosecutor must show that the error was harmless beyond a reasonable doubt. That is, the sentence must have been “surely unattributable” to the erroneous evidentiary standard. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 113 S. Ct. 2078].) Here, that standard cannot be met. It is undisputed that the Probation Department recommended a term less than that imposed by the court. (CT II, p. 14; AUG RT, p. 4.) As previously mentioned, petitioner had no prior criminal history, and the court imposed the upper term only “reluctantly.” Further, as discussed, the evidence does not compel a finding that the aggravating circumstances were true beyond a reasonable doubt or that they outweighed the mitigating circumstance of appellant’s lack of criminal record.

The victim found to be particularly “vulnerable” was an employee in a store open to the public. Though the store was closed, the victim was not alone, and there is some indication that he initiated a struggle against appellant knowing he was armed. This does not fit the behavior profile of

a person in a vulnerable position.

The “sophistication” found by the trial court was based only on the fact petitioner had obtained a gun prior to attempting a robbery. (CT II, p. 11.) However, the presence of the gun was the cause of the failure of the robbery. The fact that no injury was intended in whatever planning took place was demonstrated by the fact that petitioner did not take advantage of the shooting. Instead, he and his companion ran out of the store without taking anything.

While it is not entirely unreasonable to conclude petitioner was the “leader” in the robbery, that inference is by no means compelled by the facts. Nor is the conclusion that the shooting is “off the charts.” In fact, discharge of a gun is to be expected when an armed person engages in a physical struggle with another. The probability of intentional or negligent discharge of a gun is the reason that a murder may be considered a natural and probable consequence of an armed robbery. (See, *People v. Nguyen* (1993) 21 Cal.App.4th 518, 530 [“murder is generally found to be a reasonably foreseeable result of a plan to commit robbery”]; *People v. Hammond* (1986) 181 Cal.App.3d 463, 468 [attempted murder a natural and probable consequence of armed robbery].)

### **CONCLUSION**

The prosecutor cannot show that the aggravating factors would surely have been found true beyond a reasonable doubt. Therefore, petitioner is entitled to have his judgment vacated and the matter remanded for resentencing.

DATED: March 7, 2007

Respectfully submitted,

By: \_\_\_\_\_  
ALAN SIRACO  
Attorney for Petitioner

## DECLARATION OF ALAN SIRACO

I, Alan Siraco, declare:

1. I am an active member of the California State Bar, a staff attorney with the First District Appellate Project, and I was appointed counsel for appellant in his direct appeal;
2. The documents attached as exhibits are true and correct copies of original documents maintained in petitioner's file;
3. After issuance of the Cunningham decision, I contacted petitioner to determine whether he had pursued any post-judgment relief in pro per;
4. On February 14, 2007, I received from petitioner a copy of a federal habeas petition he had filed in July 2006 raising sentencing error under *Blakely*, as we had argued in his direct appeal;
5. On March 5, 2007, I determined from the federal district court's on-line document retrieval system (PACER), that though the federal docket report shows petitioner paid the filing fee on August 8, 2006, petitioner's federal petition had been dismissed due to failure to pay the filing fee or request in forma pauperis status (Exhibit D).

I declare under penalty of perjury the foregoing is true. Executed this 7th day of March, 2007 at San Francisco, California.

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Alan Siraco

**PROOF OF SERVICE BY MAIL**

I am over the age of 18 years and not a party to this action. My business address is 730 Harrison Street, Suite 210, San Francisco, California, 94102.

On March 7, 2007, I served a copy of the attached PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR RESENTENCING on the following by placing a true copy thereof in an envelope with first class postage prepaid and depositing it in the United States mail, addressed as follows:

Office of the District Attorney  
600 Administration Drive  
Santa Rosa, California 95403  
(for respondent)

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7<sup>th</sup> day of March, 2007 at San Francisco, California.

\_\_\_\_\_  
ALAN SIRACO