

What Happens Now That Your Appeal in the State Court of Appeal Has Ended?

The following information applies to you if your case was decided in either the Third or Fifth District Court of Appeal. Now that your appointed attorney has decided not to pursue your case any further, you have the option of pursuing your case further on your own by filing either a petition for rehearing in the Court of Appeal or a petition for review in the California Supreme Court. If you wish to proceed on your own, you may find this information on these two types of petitions helpful.

A petition for rehearing is addressed to the Court of Appeal asking that court to reconsider your case. A petition for review is addressed to the California Supreme Court and asks that court to hear and decide your case. Please bear in mind that time limitations apply to both types of petitions and are crucial.

Why file a petition? It is important to remember that you cannot successfully pursue a writ of habeas corpus in federal court unless you have first petitioned for review in the California Supreme Court. If you are considering pursuing the case on your own in federal court, you should begin making preparations now by requesting information and forms for filing a petition for writ of habeas corpus by a state prisoner by writing to Federal District Court, Eastern District of California, 501 I Street, Room 4-200, Sacramento, CA 95814.

The reason to start now is there are some restrictions in federal law regarding the filing of federal petitions for writ of habeas corpus by state prisoners. The law is called “The Antiterrorism and Effective Death Penalty Act of 1996” or AEDPA. Two aspects of this law are of special importance to you. First, this law creates a statute of limitations of one year for non-death penalty cases – you must file within that statute of limitations or the federal court will reject your petition. Second, the law requires that all issues be included in the original petition; that is, only **one** petition is allowed and later petitions raising additional issues will be rejected.

The statute of limitations, or deadline, provisions are in section 101 of Title 1 of this law, and these provisions are stated in 28 United States Code section 2244. Generally, a petition is timely if it is filed within one year plus 90 days from the date the case becomes final in the California Supreme Court. But, the safest course for you is to **file within one year** of the date of the Court of Appeal opinion if you plan to pursue your appeal on federal grounds. The limits on successor petitions are found in section 106 of Title 1, and this provision is also in 28 United States Code section 2244.

Client Instructions for Filing a Petition for Rehearing

A petition for rehearing is addressed to the Court of Appeal which decided your case. It asks that court to reconsider your case and the opinion that it has already issued. Such petitions are rarely granted and it is not usually necessary to petition for rehearing before asking the California Supreme Court to review your case. However, you may want to consider a petition for rehearing in the Court of Appeal anyway; on rare occasions, the Court of Appeal does rehear a case.

The Rules of Court do not define the grounds for rehearing, but the court will grant a rehearing only if one of the following has occurred:

1. The court's opinion contains an important material error of fact or law;
2. The court's opinion overlooks either a well established law or a conflicting authority;
3. The opinion has been substantially affected by intervening authority (i.e., cases decided or statutes enacted after the brief was filed);
4. The opinion relies on a theory not briefed by the parties (Gov. Code, § 68081); or
5. Serious question exists as to whether the case was decided correctly.

A petition for rehearing generally is not appropriate merely to re-argue the points already presented in briefs and rejected. Consider carefully whether the court properly understood the point and authorities and simply disagreed with the conclusion being urged – if so, a petition for rehearing is not appropriate. The petition also should not address points that were not included in the briefs on appeal.

Time deadline: A petition for rehearing must be filed in the Court of Appeal within 15 days after the Court of Appeal filed its decision. (Cal. Rules of Court, rule 8.268(b)(1); see also rule 8.25.) The date the decision was filed can be determined by looking at the date stamped on the first page of the court's opinion.

Mail copies of the petition as follows:

Signed original + 4 copies (5 total):

Cases in the Third:

Clerk of the Court of Appeal

Third District

914 Capitol Mall, 4th Flr.

Sacramento, CA 95814 (new address eff. 2/4/13)

Cases in the Fifth:

Clerk of the Court of Appeal

Fifth District

2424 Ventura Street

Fresno, CA 93721

1 copy:

Office of the Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550

(or instead serve 1 copy on **County Counsel** in dependency cases; see proof of service at the back of any brief previously filed in your case for the name and address)

1 copy:

Clerk of the Superior Court
(see proof of service address of county court)

1 copy:

District Attorney (if criminal case)
(see proof of service address in County of conviction)

You should be able to find the addresses for the Superior Court and the District Attorney (or County Counsel) on the proof of service at the back of any briefs previously filed in your case such as the green-covered opening brief. If you cannot afford to make copies of the petition, you can send the original to the Court of Appeal and include a letter to the court stating that you do not have funds to make copies of the petition.

The Court of Appeal will grant or deny your request for rehearing rather quickly, usually within two weeks after you file your petition. See the attached sample for the proper format of the petition.

If you do not ask the Court of Appeal for a rehearing, or if it was denied, or if the Court of Appeal reheard your case and again decided it adversely, you may ask the California Supreme Court to review your case. If you do, refer to the separate instructions for filing a Petition for Review in the California Supreme Court.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

_____ [THIRD/FIFTH] APPELLATE DISTRICT

PEOPLE OF THE STATE OF
CALIFORNIA

Plaintiff and Respondent,

vs.

CHARLES DOE,

Defendant and Appellant

F0101010

_____ County Superior Court

No. 10101

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF _____

Honorable Peter M. Schultz, Judge

PETITION FOR REHEARING IN LIGHT OF THE RECENT DECISION IN
CUNNINGHAM V CALIFORNIA ___ U.S. ___ (NO. 05-6551, JANUARY 22, 2007)

CHARLES DOE
Defendant/Appellant
In Pro. Per.
Address

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SAMPLE ONLY

LAW AND ARGUMENT

I. AFTER THIS COURT ISSUED ITS OPINION ON JANUARY 9, 2007, THE UNITED STATES SUPREME COURT DECIDED *CUNNINGHAM V. CALIFORNIA* (JANUARY 22, 2007, NO 05-6551; WL 135687) IN WHICH THE SUPREME COURT RULED THAT THE CALIFORNIA DETERMINATE SENTENCING SCHEME VIOLATES THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL.

A. Appellant objected to the reliance on facts not found by a jury to impose the upper term.

In his opening brief, appellant argued that the trial court violated his Sixth Amendment right to a jury trial by relying on facts not found to be true by a jury to justify imposing the upper term of four years for violating Penal Code section 245, subdivision (a)(1). (AOB 13.) The trial court considered as aggravating circumstances appellant's prior unsatisfactory performance on probation and parole and that he had suffered several significant misdemeanor convictions. In addition, the court found that the victim was particularly vulnerable because she was highly intoxicated. (*Ibid.*) Based on the law as it existed at the time, the court found no error in the procedure used by the trial court and affirmed the conviction. (See *People v. Black* (2005) 35 Cal.4th 1238.)

B. In *Cunningham v. California* (January 22, 2007, No 05-6551; WL 13568), the United States Supreme Court ruled that the California determinate sentencing statute violates the Sixth Amendment right to a jury trial by permitting judges to make factual findings that justify imposing the upper term.

In *Cunningham v. California, supra*, (No. 05-6551, WL 135687), the court engaged in lengthy analysis of the California sentencing scheme. The California statute is unconstitutional because it requires imposition of the middle term of the applicable triad, unless facts that justify imposition of the upper term are found to be true by the court. The California statute does not require that facts that justify imposition of the

upper term be found to be true by a jury or admitted by the defendant. The court stated that,

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, see *supra*, at 5, the DSL violates *Apprendi's* bright-line rule: Except for 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.” 530 U. S., at 490.

(*Id.* at p. 16, slip opinion)

To summarize: Contrary to the *Black* court’s holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California’s statutes, not the upper term, as the relevant statutory maximum. 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.

(*Id.* at p. 21, slip opinion.(footnote omitted)).

C. Granting a rehearing is the most expeditious way for the court to review its initial decision on this issue.

Since the decision rendered by this court on January 9, 2007 is not yet final, the court has the authority to grant a rehearing. (Cal. Rules of Court, rule 8.268(a)) That is the most expeditious way to apply *Cunningham* to this case.

Conclusion

Petitioner respectfully requests the court grant a rehearing in this matter to reconsider the legality of the sentencing procedure used by the trial court and to order that appellant's term for the violation of Penal Code section 245, subdivision (a)(1) be reduced to the middle term, or that the case be remanded to the trial court for a sentencing hearing conducted in compliance with *Cunningham*.

Dated: January 23, 2007

Respectfully submitted,

Charles Doe
Defendant/Appellant
In Pro. Per.

SAMPLE ONLY

CERTIFICATE OF LENGTH
Pursuant to rule 8.204(c) of the California Rules of Court

I, Charles Doe, appellant, certify pursuant to the California Rules of Court, rule 8.204(c) that the word processing program Microsoft Word used to generate this Petition for Rehearing indicates that the word count for this document is 612 words, which does not include the cover or the tables. This petition complies with the rule that limits a petition to 25,500 words (Cal. Rules of Court, rule 8.360). I certify that I prepared this document in Word, and that this is the word count Word generated for this document.

Dated: January 23, 2007

Charles Doe
Defendant/Appellant
In Pro. Per.

[Attach **Proof of Service**: See copy from the opening brief]