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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION**

EDUARDO MONGER,  
  
vs.  
  
ROSEANNE CAMPBELL, et al.,  
  
Respondent.

CASE NO. 1:06-CV-00699 MLH-WMC  
**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

On May 5, 2006, Petitioner filed this petition for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. No. 1.) Petitioner contends that a jury instruction concerning the use of a firearm was erroneous in violation of his Due Process rights. Petitioner also claims that the consecutive sentencing violated Blakely v. Washington, 542 U.S. 296 (2004). Finally, Petitioner argues that the trial court erred in its application of Cal. Penal Code § 654 in imposing a consecutive sentence for Count Three. On April 17, 2008, Respondent filed an answer. (Doc. No. 12.) On May 13, 2008, Petitioner filed a traverse. (Doc. No. 15.)

For the reasons set forth below, the Court DENIES the petition.

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1 **Background**

2 **A. Procedural History**

3 On April 14, 2003, a Stanislaus County Superior Court jury found Petitioner guilty of  
4 carjacking on Count One, robbery on Count Two, evading an officer of the peace on Count  
5 Three, and a hit and run on Count Four. (Clerk’s Transcript (“CT”) at 132-36.) The jury also  
6 found that Petitioner personally used a firearm during the carjacking’s commission. (CT at  
7 132.) On May 18, 2004, the court sentenced Petitioner as follows: five years for Count One,  
8 plus ten years for the personal use of a firearm enhancement, one year for Count Two, eight  
9 months for both Counts Three and Four. The trial court ruled that Petitioner’s sentences were  
10 all to run consecutively with Count One. (Reporter’s Transcript (“RT”) at 242-44.)

11 In ruling that the sentences should run consecutively, the trial court found that there was  
12 a “totally separate act, totally separate victim” in Counts One and Two. (RT at 242.) The trial  
13 court decided that the Count Three sentence should run consecutively because Petitioner  
14 “could have pulled over easily and just took the consequences.” (RT at 243.) Finally, the trial  
15 court held that the time for Count Four should run consecutively because Petitioner “could  
16 have stayed at the scene after crashing, and there would have been no problem.” (RT at 243-  
17 44.)

18 On July 6, 2005, the California Court of Appeal issued a decision affirming Petitioner’s  
19 convictions. (Lodgment 4 at 9.) On August 17, 2005, Petitioner filed for review by the  
20 California Supreme Court. (Lodgment 5 at 1.) On September 21, 2005, the California  
21 Supreme Court denied the petition for review. (Lodgment 6 at 2.)

22 **B. Factual History**

23 The state appellate court summarized the relevant facts as follows:

24 **Prosecution Case**

25 On August 1, 2003, after leaving her apartment to go to work, Sharon  
26 Brack drove to the manager’s office to pay her rent, got out of her car and went  
27 to the office. When she returned to her car, appellant was standing next to it.  
28 He pointed a handgun at Brack and demanded her car keys. Brack handed the

1 keys to appellant as he kept the gun pointed to her face. As Brack backed away,  
2 appellant got into the car and drove off.

3 On August 11, 2003, Jacqueline Izquierdo was working as a cashier at a  
4 USA gas station (gas station) in Modesto when, at approximately 7:00 p.m.,  
5 appellant approached her in her booth where the cash register was located and  
6 said to her "Give me your money." Izquierdo saw the appellant had what  
7 appeared to be a handgun. Appellant repeated his demand and Izquierdo handed  
8 him all the money in the register. Appellant left in a white Toyota, which was  
9 later determined to be Sharon Brack's car, and Izquierdo called the police.

10 City of Modesto Police Officer Brian Findlen responded to the police  
11 dispatcher's report of a robbery and headed in the direction of the gas station.  
12 On the way, he saw a white Toyota without license plates traveling in the  
13 opposite direction. The vehicle met the description broadcast by the dispatcher,  
14 so Officer Findlen made a U-turn. As he did so, the driver of the white Toyota,  
15 later determined to be appellant, accelerated. The officer activated his siren and  
16 emergency lights and gave chase. During the pursuit, appellant drove at speeds  
17 of up to 100 miles per hour, weaving through traffic, running stop signs and red  
18 lights and veering from lane to lane. Eventually, appellant collided with a city  
19 bus. Appellant attempted to flee on foot, but police apprehended him a short  
20 time later.

21 From the car, police recovered a black replica gun. Izquierdo identified  
22 it as the "gun" appellant pointed at her.

23 Brack testified that the gun appellant pointed at her was silver. When  
24 shown the black replica gun police seized from appellant's car, Brack testified  
25 that it was not the gun that appellant had pointed at her.

26 **Defense Case**

27 Appellant testified to the following. He committed the robbery of the gas  
28 station but he did not take Brack's car. He obtained the car from a man for the

1 purpose of selling it. The replica gun was already in the car when the appellant  
2 got the car.

3 (Lodgment 4 at 2-3.)

#### 4 **Discussion**

##### 5 **A. Standard of Review**

6 The Anti-Terrorism and Effective Death Penalty Act of 1996 (“ADEPA”) amended  
7 28 U.S.C. § 2254(d), to provide the following standard of review applicable to state court  
8 decisions:

9 (d) An application for a writ of habeas corpus on behalf of a person in custody  
10 pursuant to the judgment of a State court shall not be granted with respect to any  
11 claim that was adjudicated on the merits in State court proceedings unless the  
12 adjudication of the claim—

13 (1) resulted in a decision that was contrary to, or involved an  
14 unreasonable application of, clearly established Federal law, as  
15 determined by the Supreme Court of the United States; or

16 (2) resulted in a decision that was based on an unreasonable  
17 determination of the facts in light of the evidence presented in the State  
18 Court proceeding.

19 28 U.S.C. § 2254(d).

20 To obtain federal habeas relief, Petitioner must satisfy either § 2254(d)(1) or  
21 § 2254(d)(2). See Williams v. Taylor, 529 U.S. 362, 403 (2000). The Supreme Court has  
22 interpreted § 2254(d)(1) as follows:

23 Under the “contrary to” clause, a federal habeas court may grant the writ if the  
24 state court arrives at a conclusion opposite to that reached by this Court on a  
25 question of law or if the state court decides a case differently than this Court has  
26 on a set of materially indistinguishable facts. Under the “unreasonable  
27 application” clause, a federal habeas court may grant the writ if the state court  
28 identifies the correct governing legal principle from this Court’s decisions but

1           unreasonably applies that principle to the facts of the prisoner’s case.

2 Id. at 412-13; see also Lockyer v. Andrade, 538 U.S. 63, 73-76 (2003).

3 **B.     Petitioner’s Due Process Rights Were Not Violated By The Firearm Enhancement**  
4 **Jury Instruction**

5           Petitioner claims that the trial court used a jury instruction containing an incomplete  
6 definition of firearm in violation of his Due Process rights. (Doc. No. 1 at 5.) At Petitioner’s  
7 trial, the court provided the jury with the following instruction based on CALJIC No. 17.19:  
8 “It is alleged in Count I the defendant personally used a firearm during the commission of the  
9 crime charged....[¶] The word ‘firearm’ includes a pistol. [¶] The firearm need not be  
10 operable.” (CT at 101.) Following this instruction, the jury convicted Petitioner of carjacking  
11 and found that Petitioner personally used a firearm during the commission of the carjacking.

12           Under the Due Process Clause, the Court is required to instruct the jury on every  
13 element of the offense. See Sullivan v. Louisiana, 508 U.S. 275, 280-81 (1993). However,  
14 the definition of a firearm is not an element of the enhancement statute. People v. Runion,  
15 30 Cal. App. 4th 852, 857-58 (Cal. Ct. App. 1994). Due Process prevents the trial court from  
16 simply instructing the jury that the Petitioner used a firearm. See Medley v. Runnels, 506 F.3d  
17 857, 861 (9th Cir. 2007) (en banc). In Medley, the trial court instructed the jury that a “flare  
18 gun [i]s a firearm,” and the Ninth Circuit found this warranted habeas relief because “the issue  
19 must go to the jury when the object in question is not a traditional firearm, or when the defense  
20 raises a legitimate question as to whether the device meets the factual predicates for a  
21 ‘firearm.’” Id. at 866. Here, the issue of whether Petitioner used a firearm did go to the jury;  
22 the instruction given by the trial court specified that the jury “must determine whether the  
23 defendant personally used a firearm during the commission of the crime charged.” (CT 101.)

24           Petitioner also claims that the jury instruction defining firearm to include a pistol was  
25 incomplete. As the California Court of Appeal correctly explained, this argument fails because  
26 “[g]iven the common definition of firearm, it is not reasonably likely that the jurors, having  
27 been told that the prosecution was required to prove appellant used a firearm, would have  
28 concluded that the prosecution could meet this burden where the device used was a pistol of

1 the sort that was not also a firearm...On this record, the challenged instruction correctly  
2 convey the applicable law to the jury.” (Lodgment 4 at 5.) This Court agrees.

3 **C. Petitioner’s Right To A Jury Trial Was Not Impacted By The Trial Court’s**  
4 **Decision To Impose Sentences For Multiple Crimes Consecutively**

5 Petitioner argues that the trial court violated his Constitutional right to a jury trial by  
6 imposing consecutive sentences based on factors that were not found beyond a reasonable  
7 doubt by a jury. However, the Petitioner’s argument fails. In Blakely v. Washington, the  
8 Supreme Court reaffirmed the conclusion previously reached in Apprendi v. New Jersey that:  
9 ““Other than the fact of a prior conviction, any fact that increases the penalty for a crime  
10 beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a  
11 reasonable doubt.”” Blakely, 542 U.S. 296, 301 (2004) (quoting Apprendi, 530 U.S. 466, 490  
12 (2000)). Here, the trial court did not increase the penalty beyond the prescribed statutory  
13 maximum, but instead used its discretion to run the sentences consecutively.

14 The California Supreme Court specifically dealt with the constitutionality of  
15 California’s determinate sentencing law in People v. Black, 41 Cal. 4th 799 (Cal. 2007).  
16 Giving special consideration to the effect of Apprendi and Blakely, the California Supreme  
17 Court confirmed that imposing consecutive sentences does not constitute a penalty increase  
18 beyond the statutory maximum for a crime, and therefore “the judicial fact finding that occurs  
19 when a judge exercises discretion to impose...consecutive terms does not implicate a  
20 defendant’s Sixth Amendment right to a jury trial.” Black, 41 Cal. 4th at 808.

21 Furthermore, since no federal cases indicate that the decisions in Blakely and Apprendi  
22 apply contrary to the ruling of the California Supreme Court’s decision in Black, this Court  
23 could not grant relief on Petitioner’s consecutive sentencing claim because it would create a  
24 “new” constitutional rule impermissible under Teague v. Lane, 489 U.S. 288 (1989). In  
25 Teague, the United States Supreme Court made clear that a new rule of constitutional law  
26 cannot be applied retroactively on collateral review by a federal court to upset a state  
27 conviction or sentence unless the new rule forbids criminal punishment of primary, individual

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1 conduct or is a “watershed rule of criminal procedure. See Caspari v. Bohlen, 510 U.S. 383,  
2 396 (1994).

3 **D. Petitioner Is Not Entitled To Relief Based On His Contention That Imposing A**  
4 **Consecutive Sentence For Count Three Violates Cal. Penal Code § 654 Because**  
5 **Petitioner Does Not State a Cognizable Claim Under 28 U.S.C. §2254(a)**

6 Petitioner argues that the trial court violated the provision in section 654 providing that  
7 “an act or omission that which is made punishable in different ways by different provisions of  
8 this code may be punished under either of such provisions, but in no case can it be punished  
9 under more than one.” This Court cannot review errors in the application of Cal. Penal Code  
10 § 654 unless the error amounts to a violation of the Petitioner’s Due Process rights. Watts v.  
11 Bonneville, 879 F.2d 685, 687 (9th Cir. 1989).


12 Petitioner cannot establish a violation of his Due Process rights here. When reviewing  
13 the decision of the trial court, the California Court of Appeal correctly held that the imposition  
14 of a consecutive sentence on Count Three did not violate section 654 because Petitioner “had  
15 an opportunity to end his criminal conduct, but he instead chose to embark on a course of  
16 conduct that ... created a risk of harm beyond that created by the robbery.” (Lodgment 4 at 8-  
17 9.) As a result, Petitioner has not shown a violation of his Constitutional rights.

18 **Conclusion**

19 For the reasons stated above, the Court DENIES Petitioner’s petition for writ of  
20 habeas corpus pursuant to 28 U.S.C. § 2254.

21 IT IS SO ORDERED.

22 DATED: February 13, 2009

23   
24 MARILYN L. HUFF, District Judge  
25 UNITED STATES DISTRICT COURT  
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