No. 08-517

IN THE SUPREME COURT OF THE UNITED STATES

BEN CURRY, Warden,
Petitioner,

- v. -

FRANK BUTLER,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent Frank Butler, through counsel, asks leave to file the attached Brief for Respondent in Opposition to Petition for Writ of Certiorari in forma pauperis. Respondent was represented on appeal by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted

November 12, 2008

By _____
DAVINA T. CHEN
Deputy Federal Public Defender

Counsel for Respondent

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

SEAN K. KENNEDY
Federal Public Defender
Central District of California

DAVINA T. CHEN
Deputy Federal Public Defender
Central District of California
Counsel of Record
321 East 2nd Street
Los Angeles, California 90012
(213) 894-4863
Telephone: (213) 894-4863
Facsimile: (213) 894-0081

Counsel for Respondent

Question Presented

Is the holding in *Cunningham v. California*, 127 S.Ct. 856 (2007), a new rule, or is it dictated by *Blakely v. Washington*, 542 U.S. 296 (2004)?

List of Parties

Ben Curry, the Warden at California's Department of Corrections and Rehabilitations, Correctional Training Facility, Central Facility, is the petitioner here and was the respondent below.

Frank Butler is the respondent here and was the petitioner below.

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Opinions Below

The Ninth Circuit's opinion is reported at *Butler v. Curry*, 528 F.3d 624 (9th Cir. 2008) and reproduced at Appendix to Petition for Writ of Certiorari ("Pet. App.") B2-B46. All other relevant opinions and orders are unreported and reproduced at Pet. App. A, C-J.

Jurisdiction

The Ninth Circuit filed its opinion on June 8, 2008. (Pet. App. B). The Ninth Circuit denied the Warden's petition for rehearing and suggestion for rehearing en banc on July 18, 2008. (Pet. App. A). The Warden filed his petition for writ of certiorari ("Pet.") on October 16, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Additional Statutory or Other Provisions Involved

In addition on to the constitutional and statutory provisions set forth at pages 1-2 of the Petition, California Rule of Court 4.420(a) is involved. During the relevant time period, former Rule 4.420(a) provided in pertinent part:

> 4.420 Selection of base term of imprisonment
>
> (a) When a sentence of imprisonment is imposed . . . 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 the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. . . .

* * *

(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.

Statement of the Case

The background of this case is adequately described in the Ninth Circuit opinion, and for the sake of brevity respondent Frank Butler refers the Court to that opinion. (Pet. App. B4-B11). Butler adds the following:

Frank Butler asserted in the California courts and in his federal habeas petition that his sentence--an "upper-term" sentence imposed based on facts found by the court by a preponderance of the evidence--violated the Sixth Amendment. This claim was originally based on this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but while his direct appeal was pending, this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004). Because there was no constitutionally meaningful distinction between the sentencing system struck down in *Blakely* and

California's determinate sentencing law ("DSL") under which Mr. Butler's sentence was imposed, the California Court of Appeal reversed his sentence. As the California Court of Appeal held:

> The trial court imposed the high term of four years for the conviction of the corporal injury to a spouse, count I. It made factual findings to support the upper term sentence. But there were no jury findings on those sentencing issues. That violated Butler's constitutional right to a jury trial on the factors which supported the higher sentence. (*Blakely v. Washington* . .. 124 S.Ct. 2531).

(Pet. App. J106).

The State petitioned for review in the California Supreme Court, which remanded for reconsideration in light of *People v. Black*, 35 Cal. 4th 1238 (2005) (*Black I*), *judgment vacated and remanded in light of Cunningham*, 127 S.Ct. 1210 (2007), *opinion on remand*, *People v. Black*, 41 Cal. 4th 799 (2007) (*Black II*), the California Supreme Court decision upholding the DSL. (Pet. App. I). The California Court of Appeal reversed course and affirmed Mr. Butler's sentence. (Pet. App. L). Mr. Butler petitioned for a writ of habeas corpus in federal district court. While his petition was pending, this Court decided *Cunningham v. California*, 127 S.Ct. 856 (2007), which overruled *Black I* and held that the DSL violated the Sixth Amendment, as interpreted in *Apprendi* and *Blakely*. Mr. Butler's federal habeas petition was granted (Pet. App. C), but stayed by the district court pending the

Warden's appeal. The Ninth Circuit affirmed in part, reversed in part, and remanded for further fact-finding and harmless error analysis. (Pet. App. B).

The heart of the Ninth Circuit's holding that *Cunningham* is dictated by preexisting precedent, and thus is not a "new rule" for habeas purposes, was its analysis that California's sentencing system was not different in any constitutionally relevant way from the Washington system struck down in *Blakely*:

> . . . Taken together, *Apprendi*, *Blakely*, and *Booker*, firmly established that a sentencing scheme in which the maximum possible sentence is set based on facts found by a judge is not consistent with the Sixth Amendment.
>
> That the California DSL squarely violated this principle--and that the result in *Cunningham* was compelled by precedent--is best illustrated by comparing the Washington sentencing statute at issue in *Blakely* with California's DSL. The Washington law in *Blakely* provided that "[a] judge may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence.'" 542 U.S. at 299. California's DSL similarly required imposition of the middle term unless the judge found factors in aggravation or mitigation. *See* Cal. Penal Code § 1170(b); Cal. R. Ct. 4.420(a). Like California's DSL, Washington law provided a non-exhaustive list of possible reasons for an exceptional sentence, and stated that "a reason offered to justify an exceptional sentence [could] be considered only if it t[ook] into account factors other than those which are used in computing the standard range sentence for the offense," i.e., factors other than those found by a jury beyond a reasonable doubt. *Blakely*, 542 U.S. at 299, 304 (internal quotation marks omitted); *cf.* Cal.R.Ct. 4,421, 4,423 (lists of factors in aggravation and mitigation); *id.* 4.420(d) ("A fact that is an element of the crime upon which punishment is being imposed may not be used to impose the upper term.").

A judge's decision to impose an exceptional sentence under Washington law was reversible if "there [w]as insufficient evidence in the record to support the reasons for imposing an exceptional sentence." *Blakely*, 542 U.S. at 299-300. A judge's sentencing decision under the DSL was also reviewable. *See, e.g., People v. Osband*, 13 Cal. 4th 622, 728 (1996) (reviewing a sentence imposed under the DSL). Finally, like a judge applying the California DSL, the Washington sentencing judge was not required to impose an exceptional sentence if he found a single aggravating fact, but rather could make a judgment that a lower sentence was appropriate based on all the facts, as long as he provided sufficient reasons. *Blakely*, 542 U.S. at 305 n.8; *cf.* Cal. R. Ct. 4,420(b), (e).

Examining the Washington law at issue in *Blakely*, the Supreme Court recognized both that the judge had discretion to determine whether to impose an exceptional sentence and that there was not an exhaustive list of mitigating and aggravating factors. *Blakely*, 542 U.S. at 305 & n. 8. These factors did not affect the Court's conclusion that the Washington sentencing scheme violated the Sixth Amendment. *Id.* Instead, because the maximum possible penalty for the crime was set based on facts that had been found by a judge and not by a jury, the sentence was invalid. *Id. Cunningham* reiterated these same points, rejecting arguments already disapproved in *Blakely*. *See* 127 S.Ct. at 869 (noting that the Court had already held in *Blakely* that "broad discretion to decide what facts may support an enhances sentence is warranted in any particular case, does not shield a sentencing system" from the brightline rule of *Apprendi*).

In short, *Cunningham* did not add "'any new elements or criteria for'" determining when a state statute violates the Sixth Amendment. [citations omitted]. It simply applied the rule of *Blakely* to a distinct but closely analogous state sentencing scheme. That the Supreme Court held for the first time that *California*'s sentencing scheme violates the Sixth Amendment does not render its decision in *Cunningham* a new rule.

(Pet. App. B15-17). The Ninth Circuit also examined this Court's retroactivity

precedents, as set forth in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, considered whether the dissenting opinions in *Cunningham* altered its conclusion, and concluded that they did not. (Pet. App. B11-B14, B18-B22). In addition to holding that *Cunningham* is not a "new rule" after *Blakely*, the Ninth Circuit ruled that Mr. Butler need not return to the California courts to re-exhaust his claim in view of *Cunningham*, that *Black I* was contrary to clearly established law of this Court, in satisfaction of 28 U.S.C. 2254(d)(1), and that the state sentencing court violated Mr. Butler's Sixth Amendment rights when it imposed an upper-term sentence based on facts not found by a jury beyond a reasonable doubt. (Pet. App. B22-B38). But the Ninth Circuit did not grant relief. Rather, it remanded for further factfinding as to whether the error was harmless, pursuant to *Brecht v. Abrahamson*, 507 U.S. 619 (1993). (Pet. App. B44-B45).

The Warden petitioned for rehearing and suggested the Ninth Circuit rehear the matter en banc. The Ninth Circuit denied the petition without requesting a response. (Pet. App. A). The Warden then requested and received a stay of the Ninth Circuit's remand order and petitioned this Court for a writ of certiorari.

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Reasons for Denying the Petition

This case is a poor candidate for certiorari. Although the Warden's petition asserts that the Ninth Circuit's opinion "conflicts with the proper resolution of the issue by other courts" and "affects hundreds of cases," neither claim is entirely true. This Court should deny certiorari because the Warden's petition is interlocutory, the Ninth Circuit's decision does not conflict with any decision of any other United States court of appeals decision or of a state supreme court on a federal question, and the Ninth Circuit's decision was correct.

First, the Warden's petition is interlocutory and its description of the decision's effect overstated. The Ninth Circuit did not grant relief, but rather remanded Mr. Butler's case to the district court for a harmless error analysis. Therefore, no relief was granted by the decision, it is possible that no relief will ever be granted, and if relief were granted and affirmed on appeal the Warden could then petition for review of the final judgment. Moreover, although the Warden asserts that the decision will result in "many resentencings," no prisoner in California or any other state will be resentenced based on the decision until he demonstrates that the error in his case was not harmless. In addition, most states have avoided entirely the "burden" of retroactively applying *Cunningham* by recognizing very early on that *Blakely* applied to their presumptive sentencing systems and making the adjustments necessary to

conform those systems to the requirements of the Sixth Amendment. Because the Warden's petition is premature and its description of the effect of the decision below overstated, certiorari should be denied.

Certiorari should also be denied because no other United States court of appeals or state supreme court has held that *Cunningham* was *not* dictated by *Blakely*. No other United States court of appeals has considered the issue, nor has any state supreme court answered the federal question presented here. Indeed, even the California Supreme Court has not yet decided whether it will afford *Cunningham* retroactive applicability in state habeas. Given the California Supreme Court's pending consideration of the matter, any dormant conflict may well be resolved by the lower courts. Certiorari should be denied for this reason as well.

Ultimately, the Warden's petition boils down to an assertion that the Ninth Circuit was wrong and a request that this Court correct the error. But the petition fails here, too. The correctness of the Ninth Circuit's conclusion that *Cunningham* was dictated by *Blakely* is confirmed by the petition's failure to articulate what "new rule" was announced in *Cunningham*; its failure to identify any constitutionally meaningful distinction between the Washington sentencing system struck down in *Blakely* and the California system struck down in *Cunningham*; and by the language of *Cunningham* itself, in which this Court made clear that it found the California

Supreme Court's formulation and resolution of the question whether California's determinate sentencing law was constitutional in light of *Apprendi* and *Blakely* "remarkable" in light of the "bright-line" rule announced in those cases. The Ninth Circuit panel decision was unanimous, and rehearing en banc was denied without a request for response. Review is thus not only premature, but unwarranted.

This Court Should Deny the Petition Because (1) The Petition Is Interlocutory, (2) The Opinion Sought to be Reviewed Does Not Conflict With Any Other United States Court of Appeals, Or With Any State Court of Last Resort; and (3) It Was, In Any Event, Correctly Decided.

A. The Petition is Interlocutory and Its Predictions of the Affect of *Butler* Overstated

This Court generally awaits final judgment in the lower courts before exercising its certiorari jurisdiction. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) (citing cases). Here, there has been no final judgment. Because the Warden did not submit the probation report read by the state court sentencing judge to the federal district court on habeas, the Ninth Circuit found that the record was insufficient for it to determine whether the constitutional error was harmless and remanded for further factfinding. (Pet. App. B44-B45). Mr. Butler will not be entitled to a resentencing unless and until he can establish that the state court sentencing judge's finding that he was on probation at

the time he committed the crime of conviction was not harmless. *See Washington v. Recuenco*, 126 S.Ct. 2546, 2553 (2006) (holding *Blakely* sentencing errors subject to harmless error review). That is, Mr. Butler will not be entitled to a resentencing unless and until the district court determines, based on a review of the whole record, that "the error had a substantial and injurious effect" on his sentence. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Should the district court find the error to be not harmless, the Warden could appeal that determination to the Ninth Circuit, and should the Ninth Circuit agree that the error was not harmless, the Warden could then present a petition for review of the final order. *United States v. Virginia*, 518 U.S. 515, 526 (1996) (noting previous denial of certiorari at interlocutory state). In short, the interlocutory nature of the Warden's petition is itself reason to deny certiorari.

In addition, given the California Supreme Court's recent interpretation of its determinate sentencing law as allowing the imposition of an upper-term sentence if a *single* aggravating factor is found, *Black II*, 41 Cal. 4th at 812, 815, an interpretation accepted and applied in *Butler* (Pet. App. B27-B29), the vast majority of California upper-term sentences will not violate the Sixth Amendment. This is because most upper-term sentences in California, like the sentence imposed in *Black* itself, rest on at least one *Apprendi*-compliant factors, such as numerous prior convictions, or the service of a prior prison term. Cal. Rule of Ct. 4.421(b)(1), (3).

And, as even the Warden acknowledges, because the California Supreme Court in *People v. Sandoval*, 41 Cal. 4th 825 (2007), devised a retroactive remedy that allows courts to impose upper-term sentences *without* finding any aggravating factor at all, any resentencing that does occur would likely result in the same upper-term sentence. (Pet. 6-7).

Moreover, the procedural posture of this case renders the Warden's dire prediction regarding the "floodgates" for resentencings both premature and overstated. Not only will Mr. Butler not be entitled to a resentencing unless the district court finds, and the Ninth Circuit agrees, that the constitutional error was not harmless, but no prisoner will be resentenced pursuant to a federal writ of habeas corpus as a result of the Ninth Circuit's decision in this case unless and until he makes that showing. Other than California, the only state that might be affected is New Mexico, which has held as a matter of state law, that its *Cunningham*-compliant sentencing system will not be available on state collateral review. *See State v. Frawley*, 143 N.M. 7, 19-20 (2007); *but see* discussion of *Frawley*, *infra*, at 13-14.[1]

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[1]The other states the Warden describes as being potentially affected by *Butler* are Tennessee and Hawaii. Specific circumstances in these two states, however, render the likely impact of *Butler* on these states negligible.

Long before this Court vacated the Tennessee Supreme Court's decision upholding its sentencing scheme in *State v. Gomez*, 163 S.W.3d 632 (Tenn.2005), *judgment vacated and remanded in light of Cunningham*, 127 S.Ct. 1209 (2007), *opinion on remand*, 239 S.W.3d 733 (Tenn. 2007), the Tennessee legislature had passed and the Governor had signed legislation

This is because most other states with presumptive sentencing systems avoided the "burden" of large-scale resentencings by timely recognizing the applicability of *Blakely* to their own sentencing schemes and making the adjustments necessary to protect the Sixth and Fourteenth Amendment rights of the accused in their states. *See Cunningham,* 127 S.Ct. at 871 nn. 17, 18 (noting that Alaska, Arizona, Colorado, Kansas, Indiana, Minnesota, North Carolina, Oregon, Tennessee, Washington, had modified their systems in the wake of Apprendi and Blakely); *see also State v. Natale*, 184 N.J. 458 (2005) (New Jersey) ; *State v. Foster* , 109 Ohio St.3d 1, (2006) (Ohio).

Because the Warden's petition is interlocutory, and thus premature, and because its predictions of the effect of the decision below are vastly overstated,

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conforming Tennessee's sentencing scheme to the Sixth Amendment, amendments which applies retroactively at the defendant's request. 2005 Tennessee Laws Pub. Ch. 353 (S.B. 2249) (effective June 7, 2005). In addition, due to the one-year statute of limitations for post-conviction petitions, *see* Tenn. Code Ann. § 40-30-202, the holding in *Butler* that *Cunningham* is retroactive to *Blakely*--an issue that has not reached either the Tennessee Supreme Court, the Sixth Circuit Court of Appeals, or apparently any United States district court in Tennessee--is unlikely to affect Tennessee.

As for Hawaii, it lies within the Ninth Circuit. In 2006, the Ninth Circuit Court of Appeals affirmed the grant of a federal writ of habeas corpus on the ground that the prisoner's "extended sentence," imposed pursuant to Hawaii's sentencing scheme, violated *Apprendi*. *Kaua v. Frank*, 436 F.3d 1057 (9th Cir. 2006). This Court denied certiorari. 127 S.Ct. 1233 (2007). Because the federal courts have held that Hawaii's scheme violated *Apprendi*, without the clarification offered by *Blakely* or *Cunningham*, *see, e.g.*, *White v. Frank*, 2007 WL 1933109 (D. Hawaii June 28, 2007), the holding in *Butler* that *Cunningham* was dictated by *Blakely* is not likely to affect Hawaii.

certiorari should be denied.

B. There is No Circuit Split, Nor is there a Conflict on a Federal Question with Any State Court of Last Resort

Certiorari should also be denied because there is no relevant conflict of authority. In his petition, the Warden observes that the Ninth Circuit stands "almost alone" in holding that *Cunningham* is dictated by *Blakely* (Pet. 5), while taking care to refrain from arguing that a conflict between the Ninth Circuit's decision and that of another United States court of appeals or any state court of last resort justifies granting certiorari, pursuant to Supreme Court Rule 10(a). This is likely because there is no circuit split, nor is there a conflict with any state court of last resort on the question whether *Cunningham* is dictated by *Blakely*. This lack of a conflict of authority is another reason this Court should deny certiorari.

The Warden cites no United States court of appeals that has decided that *Teague* bars the application on federal habeas of *Cunningham* to convictions that were final after *Blakely* but before *Cunningham*. Respondent is unaware of any. The only state supreme court decision cited by the Warden as resolving the question in a manner that conflicts with *Butler* is the decision of the Supreme Court of New Mexico in *Frawley*, 143 N.M. at 19-20. But *Frawley* does not hold that *Cunningham* was not dictated by *Blakely*, let alone that *Teague* precludes reliance on *Cunningham*

for the purposes of federal habeas. *See Danforth v. Minnesota*, 128 S.Ct. 1029, 1038-1042 (2008) (holding that *Teague* established rule applicable to unique context of federal habeas). In its retroactivity analysis, the New Mexico Supreme Court does not even mention *Blakely* or *Cunningham*. Rather, it holds only that the rule it announced in *Frawley* must be a new rule because it not only was flatly inconsistent with the previously governing precedent of the New Mexico Supreme Court, but also explicitly overruled its earlier case, *State v. Lopez*, 138 N.M. 521 (2005). *Frawley*, 143 N.M. at 19-20. In other words, in *Frawley*, the New Mexico Supreme Court does not answer the "federal question" whether *Cunningham* is dictated by *Blakely*, and thus available on federal habeas, but rather the state question whether its own rule, announced in a state case that arose on direct review, would apply retroactively to other state cases that arose on state habeas. *Id.* Moreover, having arisen on direct review, the holding that the rule would not apply retroactively on collateral review is dicta. *Id.*

Given the illogic of a rule that the very existence of a state court decision that proves to be in conflict with preexisting United States Supreme Court precedent insulates the state court from "retroactive" application of the United States Supreme Court precedent, it's unknown whether New Mexico's Supreme Court will maintain this position when presented with the issue directly. Because it's unknown whether

New Mexico will offer state habeas relief on these grounds, it's also unknown whether the Tenth Circuit Court of Appeals will be required to decide whether *Cunningham* is available in federal habeas. And, finally, it's unknown how the Tenth Circuit would resolve the issue if presented. The Tenth Circuit has held, in a different context, that "*Cunningham* did not purport to announce a new rule of law; it simply applied the principles articulated in *Blakely* . . . , and *Booker*." *United States v. Holtz*, 2007 WL 1765526 (10th Cir. June 20, 2007) (citing *Cunningham*, 127 S.Ct. at 864). Of course, it's also unknown whether the Tenth Circuit would maintain its position that *Cunningham* did not announce a new rule if confronted with the question in the context of a *Teague* analysis. But the possibility that the Tenth Circuit might, ultimately, decide the question presented in a manner that conflicts with the Ninth Circuit's resolution in *Butler* does not present a conflict, but rather a prediction that a conflict will develop.

A prediction of a developing conflict is not a compelling reason for certiorari. To the contrary, as the Warden acknowledges, even the California Supreme Court has yet to decide whether *Cunningham* will operate retroactively in California state habeas. (Pet. 7-8) (noting that *In re Gomez*, 64 Cal. Rptr. 3d 281, 284-85 (Cal. Ct. App. 2007), *petition for review granted*, 67 Cal. Rptr. 3d 465 (Oct. 24, 2007) (No. S155425), is pending in the California Supreme Court). Its previous

pronouncements notwithstanding, the California Supreme Court's resolution cannot be predicted. The Warden's petition observes that "for the California Supreme Court to apply *Cunningham* under *Teague* would require it to condemn its own reasoning in *Black I* holding as not merely wrong but so clearly wrong that no reasonable jurist could have []agreed with it." (Pet. 8). But it also recognizes, consistent with *Danforth*, 128 S.Ct. at 1038-42, that *Teague* restricts only federal courts considering federal habeas corpus petitions and that the California Supreme Court is thus not limited by *Teague* when ruling on state habeas. (Pet. 7-8). Indeed, some have argued that the California Supreme Court has in the past and should now fashion its own retroactivity rules and habeas corpus remedies as circumstances dictate, and that considerations of both fairness and economy require that habeas corpus be available to post-*Blakely* defendants whose cases became final before *Cunningham* was decided. *Brief of Amicus Curiae Appellate Defenders, Inc., in Support of Petitioner Sotero Gomez*, 2008 WL 1962460, *47 (March 27, 2008); *cf. In re Harris*, 5 Cal.4th 813, 841 (1993) (listing cases permitting petitioners to raise in a petition for writ of habeas corpus an issue previously rejected on direct appeal when there has been a change in the law affecting the petition); *In re Jackson*, 61 Cal.2d 500 (1964) (applying retrospectively on habeas new doctrine announced by California Supreme Court). Thus, there is simply no way to predict what the California Supreme Court

will decide.

And there is no reason to do so now. Although the Warden's petition acknowledges that the California Supreme Court may well rule consistently with *Butler* and decide to apply *Cunningham* retroactively on state habeas, it argues that *Butler* would still affect hundreds of cases because the Ninth Circuit's view of the *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), exception to the rule of *Apprendi-Blakely-Cunningham* differs from the California Supreme Court's view. (Pet. 8). But the Warden has sought review only on the retroactivity question, accepting for the purposes of this petition the holding regarding the application of *Apprendi* to this case. Therefore, the Warden's observation that, even if the California Supreme Court rules consistently with *Butler*, *Butler* would impact cases should have no bearing on whether certiorari should be granted on the question presented.

Because the Ninth Circuit's decision here does not conflict with any decision of a United States court of appeals, or with a state court of last resort on a federal question, certiorari should be denied.

C. The Ninth Circuit's Decision Was Correct

Given the interlocutory nature of its petition and the absence of a conflict in authority, the Warden's petition is at bottom a request for this Court to correct what

it perceives to be an erroneous decision. This Court should deny certiorari not only because this Court is not primarily a court of error correction, but also because the Ninth Circuit's decision was correct.

Under *Teague*, "old" rules of criminal procedure apply "both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 127 S.Ct. 1173, 1180 (2007). Mr. Butler's conviction became final on November 7, 2005. The decision in *Cunningham* is thus a "new rule" only if "the result was not *dictated* by precedent" as of November 7, 2005." *Teague*, 489 U.S. at 301 (emphasis in original). Put another way, *Cunningham* "announces a new rule" if "it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.*

In 2000, before Mr. Butler's conviction was final, this Court announced that "other than the fact of a prior conviction, any fact that increased the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In 2005, before Mr. Butler's conviction was final, this Court reaffirmed that "the 'statutory maximum' for *Apprendi* purposes 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*, 542 U.S. at 303. Pursuant to the bright-line rules set forth in *Apprendi* and *Blakely*, the

imposition of an upper-term sentence pursuant to California's determinate sentencing law was unconstitutional. In *Cunningham*, 127 S.Ct. 856, this Court directly applied the rules of *Apprendi* and *Blakely* to the California law.[2]

In its opinion, the Ninth Circuit relied expressly on this Court's decisions in *Teague* and its progeny (Pet. App. B11- B14, B18-B19), compared in detail the Washington sentencing statue at issue in *Blakely* and California's determinate sentencing law (Pet. App. B15-B17), and considered explicitly the majority and dissenting decisions in *Cunningham* (Pet. App. B19-B21), before concluding that this Court's holding in *Cunningham* is dictated by precedent. (Pet. App. B22). The Warden makes no claim that the Ninth Circuit misstated the rule of law. Rather, the Warden simply disagrees with the conclusion the Ninth Circuit reached after carefully applying the properly stated rule of law.

This disagreement appears to be founded primarily on the Warden's assertion that this Court "has hardly ever found a rule to be 'old' for habeas corpus purposes" (Pet. 9-10), rather than the specific legal question presented. The Warden argues that the result in *Cunningham* is not dictated by precedent, but offers no explanation of

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[2]Because Mr. Butler's conviction was not final until after *Blakely* was decided, and thus Mr. Butler may rely on *Blakely* to establish that *Cunningham* was not a new rule, this case does not provide a vehicle for this Court to determine whether *Blakely* itself was a "new rule," or whether it was dictated by *Apprendi*. Therefore, contrary to the Warden's implication (Pet. 8-9), this case does not present the Court with the opportunity to reach the question presented in the aborted grant of certiorari in *Burton v. Waddington*, 547 U.S. 1178 (2006).

how the direct holdings of *Apprendi* or *Blakely* could reasonably lead to any result other than the result this Court reached in *Cunningham*. Nor does the petition explain how the "rule" of *Cunningham* "br[oke] new ground," or what "new obligation" it imposed on California.

Fundamentally, the Warden's argument is flawed because it does not identify any constitutionally meaningful distinction between California's determinate sentencing law and the Washington law at issue in *Blakely*. As the Ninth Circuit recognized, the lack of any relevant distinction between the two systems compelled the conclusion that *Cunningham* is dictated by *Blakely*. See, Statement of the Case *supra,* at 4-5 (quoting Ninth Circuit's discussion at Pet. App. B15-B17). Nevertheless, the Warden contends that, in *Booker*, *Blakely*, and *Apprendi*, "the defendant received punishment *above* the upper-most point of the initial prescribed sentencing range for the crime, based on a fact not found by the jury," whereas "the *Cunningham* majority found that the right to jury trial was violated even in a system like California's, where the trial court imposes an upper term *within* an initial prescribed sentencing range for the crime (lower, middle, and upper term), based on a fact not found by a jury." (Pet. 11) (emphases in Petition). The Warden's description of California's sentencing system as having an "initial prescribed sentencing range" of lower, middle, or upper terms conflicts with the plain language

of California's statute, which prescribes the presumptive--and thus the "initial"--sentence as the middle term. Cal. Penal Code § 1170(b); Cal. Rule of Court 4.420; *see also Black I*, 35 Cal.4th at 1254 ("The court cannot impose the upper term unless there is at least one aggravating factor"); *id.* at 1257 ("section 1170, subdivision (b) can be characterized as establishing the middle term sentence as a presumptive sentence"); *Cunningham*, 127 S.Ct. at 861-863. That is, the Warden's characterization of California's sentencing system for the purposes of distinguishing it from *Apprendi*, *Blakely*, and *Booker* is simply inaccurate.

Finally, that the result in *Cunningham* is dictated by *Apprendi* and *Blakely* is corroborated by the reasoning and the language of the opinion itself. One need only scan *Cunningham* to discern that it was solely a straightforward application of precedent. In unambiguous, occasionally blunt, language and a constant refrain quoting *Apprendi* and *Blakely* and referring to "this Court's decisions," and "our precedents," this Court made clear the result was foreordained by its earlier cases:

> Because circumstances in aggravation are found by a judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, . . . 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."

Cunningham, 127 S.Ct. at 868 (quoting *Apprendi*, 530 U.S. at 490). " '[T]hat should

be the end of the matter.'" *Id.* (quoting *Blakely*, 542 U.S. at 313).

Rejecting the reasoning of *Black I* that the DSL did not violate *Blakely* because it gave discretion to the trial judges, the court rejoined by citing precedent: "We cautioned in *Blakely* . . . that broad discretion . . . does not shield a sentencing system from the force of our decisions." *Id.* at 869. As to *Black I*'s observations that the DSL reduced the penalties for most crimes over the previous indeterminate sentencing the regime, that defendants cannot reasonably expect the upper term will not be imposed, and that statutory enhancements must be proved to a jury beyond a reasonable doubt, *Cunningham* again relied on precedent:

> Our decisions, however, leave no room for such examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the *very* inquiry *Apprendi's* "bright-line rule" was designed to exclude. *See Blakely* 542 U.S. at 307-308.

Cunningham, 127 S.Ct. at 869; *id.* (describing *Black I*'s observation that the high court's precedents do not draw a bright line as "remarkabl[e]."). Fact-finding of the sort required by California's law, "our decisions make plain," requires a jury finding beyond a reasonable doubt. *Id.* at 870.

Rather than explaining how *Cunningham* is not dictated by *Blakely*, what new ground is broken in *Cunningham*, or how California's law was constitutionally different from Washington's, the Warden relies on the fact that there were dissenting

opinions in *Cunningham*, and that lower courts--including the California Supreme Court--had expressed differing views. (Pet. 11-13). The very existence of these differing views is, to the Warden, evidence that "' reasonable jurists . . . "would [not] have deemed themselves compelled to accept [the petitioner's] claim"' when his conviction became final." (Pet. 9 (quoting *Johnson v. Texas*, 509 U.S. 350, 66 (1993)) (alterations in Petition).

But, whereas the "reasonable jurist" formulation is an aid in evaluating whether a decision is dictated by precedent, the Warden elevates it into a test of its own, suggesting that the very existence of differences of opinion indicates that a rule is "new." Such a test proves too much. As Justice O'Connor explained in her concurring opinion in *Wright v. West*, 505 U.S. 277, 304 (1992): "Even though we have characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent . . . , the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." And as the Ninth Circuit observed below, the dissenting opinions in *Cunningham* do not establish that the outcome there is not dictated by precedent. (Pet. App. B18-B21). *See, e.g., Cunningham*, 127 S.Ct. at 872 (Kennedy, J., dissenting) (citing only dissents from *Booker*, *Blakely*, *Apprendi*, and *Jones v. United States*, 526 U.S. 227 (1999)).

Although the Warden argues this Court has "hardly ever found a rule to be 'old' for habeas corpus purposes," this Court has held a number of cases not to establish new law *even* when there was substantial disagreement among courts and within this Court as to their outcome. *See, e.g., Stringer v. Black*, 503 U.S. 222, 236-37 (1992) (holding *Clemons v. Mississippi,* 484 U.S. 738 (1990), to be dictated by precedent despite fact that it was decided by fractured court with five-justice majority decision and two separate concurring and dissenting opinions; state court , federal district court, and Court of Appeals had ruled against Stringer, and Fifth Circuit had reached the opposite conclusion from *Clemons* in other cases); *Yates v. Aiken*, 484 U.S. 211 (1988) (holding *Francis v. Franklin*, 471 U.S. 307 (1988), was mere application of prior law, despite fact that *Francis* was 5-4 decision and state and federal courts had ruled against Francis).

In short, this Court should deny certiorari not only because the petition is interlocutory, and because there is no active split of authority, but also because the Ninth Circuit's resolution was correct. *Cunningham* is dictated by *Blakely* and *Apprendi*, and is thus not a new rule under *Teague.*

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Conclusion

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: November 12, 2008

By _____
DAVINA T. CHEN
Deputy Federal Public Defender

Attorneys for Respondent
Frank Butler

No. 08-517

IN THE SUPREME COURT OF THE UNITED STATES

BEN CURRY, Warden,
Petitioner,

- v. -

FRANK BUTLER,
Respondent.

CERTIFICATE OF SERVICE

I, Davina T. Chen, hereby certify that on this 12 day of Novemb, 2008, a copy of Motion for Leave to Proceed in Forma Pauperis and Brief for Respondent in Opposition to Petition for Writ of Certiorari were mailed postage prepaid, to the Lawrence M. Daniels, Esq., 300 South Spring Street, Suite 1702, Los Angeles, California 90013, counsel for Petitioner.

Executed on this 12 day of Novemb, 2008, in Los Angeles, California.

DAVINA T. CHEN
Deputy Federal Public Defender

Counsel for Respondent