NO. 08-517

In the Supreme Court of the United States

BEN CURRY, *Petitioner,*

v.

FRANK BUTLER, *Respondent.*

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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BEN CURRY, *Petitioner,*

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Ben Curry, Warden, respectfully submits this reply to petitioner Frank Butler's opposition to the petition for writ of certiorari ("the opposition"). In the petition, the Warden seeks review on whether, in light of *Teague* v. *Lane*, 489 U.S. 288 (1989), and 28 U.S.C. § 2254(d), a federal court may grant habeas relief on a California petitioner's claim that his upper-term sentence, imposed and final prior to *Cunningham* v. *California*, 127 S. Ct. 856 (2007), violated his right to jury trial. This Court should resolve this issue for three reasons. First, the Ninth Circuit's decision burdens courts and the States by requiring relitigation of hundreds of additional upper-term sentences. Second, the retroactivity question is important as evidenced by this Court's aborted grant of certiorari on a similar issue in *Burton* v. *Waddington*, 547 U.S. 1178 (2006). Third, the Ninth Circuit's published decision is wrong under both *Teague*

v. Lane, and 28 U.S.C. § 2254(d), because it was reasonable before *Cunningham* for a court to find that California's DSL was distinguishable from the systems at issue in *Blakely* and *Booker*. In other words, before *Cunningham*, there was no clearly established Supreme Court law prohibiting a system like the DSL. (Pet. for Writ of Cert. at 4-16.)

A. The Ninth Circuit's Decision Impacts Many Cases

The Ninth Circuit's published decision finding *Cunningham* retroactive back to the time of *Blakely* is forcing relitigation in federal court of hundreds of additional upper-term sentences, which will result in many additional resentencings in state court. The decision also conflicts with the proper resolution of this issue by the vast majority of state and federal courts considering it, including the New Mexico Supreme Court. And this decision is a final determination of the question presented. (Pet. at 6-9.)

In the opposition, Butler asserts that the petition should not be reviewed because the matter is "interlocutory," as there is no final judgment on the merits. (Opp. at 9-10.) But this Court may review federal circuit court cases "before or after rendition of judgment or decree." 28 U.S.C. § 1254(1). Further, the Ninth Circuit's holding on the retroactivity issue is binding on lower courts and wholly distinct from a harmless error determination. Waiting for the matter to percolate down to the district court and up again to the Ninth Circuit on appeal to a final judgment on the merits of the *Cunningham* claim would not aid review of this retroactivity question. As proof of this, this Court often grants certiorari before final judgment in habeas cases on significant threshold issues where the

circuit courts have issued published opinions on them. See, e.g., *Evans* v. *Chavis*, 546 U.S. 189, 191-92 (2006); *Pliler* v. *Ford*, 542 U.S. 225, 228-30 (2004); *Baldwin* v. *Reese* (2004) 541 U.S. 27, 30 (2004); *Artuz* v. *Bennett*, 531 U.S. 4, 6-7 (2000); *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 842 (1999). In this case as well, the Ninth Circuit has issued a published opinion on a significant threshold issue: whether *Cunningham* can be applied retroactively to past convictions on federal habeas.

Butler also maintains that the Ninth Circuit's opinion will have little impact because "the vast majority of California upper-term sentences will not violate the Sixth Amendment . . . because most upper-term sentences in California, like the sentence imposed in [*People* v. *Black*, 161 P.3d 1130 (Cal. 2007)] itself, rest on at least one *Apprendi*-compliant factor[], such as numerous prior convictions, or the service of a prior prison term." (Opp. at 10-11.) But because of the Ninth Circuit's narrow interpretation of the prior conviction exception, the federal courts will likely grant relief in many cases where the California courts will not. (Pet. at 7-8.) Specifically, contrary to Butler's assertion, it is doubtful that a California trial court's findings that the defendant's prior convictions were "numerous or of increasing seriousness" (Cal. Rule of Ct. 4.421(b)(2)) or that the defendant "served a prior prison term" (Cal. Rule of Ct. 4.421(b)(3)) would fall within the Ninth Circuit's interpretation of the exception because each requires "qualitative evaluations of the nature or seriousness of past crimes" or else "cannot be made solely by looking to the documents of conviction." (Pet. App. at 31-32.) The Ninth Circuit already has decided in this case that a judicial finding that a defendant was on probation at the time of his conviction (Cal. Rule of Ct. 4.421(b)(4)) does not qualify under the Ninth Circuit's strict test. (Pet. App. 35-38.)

Butler also notes, as did the Warden, that "any resentencing that does occur would likely result in the same upper-term sentence" under California's modified system. (Opp. at 11.) Butler understandably does not defend, however, the unnecessary expense and time to the parties and courts of the additional litigation that the Ninth Circuit's opinion causes. Moreover, the Ninth Circuit's decision might well cause sentences to be reduced in California state courts in some cases involving past convictions -- where the defendants were sentenced to upper terms under the *enhancement* statute, which neither the Legislature nor the California Supreme Court has reformed to date. See *People* v. *Lincoln*, 68 Cal. Rptr. 3d 596, 603-04 (Cal. Ct. App. 2007); Cal. Penal Code § 1170.1(d).

Butler does not contest that California, New Mexico, and Tennessee had similar systems that were invalidated after *Cunningham*. He also states that New Mexico "might be affected" by the resolution of the question presented by the Ninth Circuit's opinion. (Opp. at 11-12.) This apparent concession is appropriate, given that the New Mexico Supreme Court's decision is directly at odds with the Ninth Circuit's decision.

Butler disputes, however, that the retroactivity question would actually impact Tennessee, or Hawaii, states whose sentencing systems were also invalidated by *Cunningham*. (Opp. at 11 & n.1.) This is a relatively minor point of contention given the large quantity of cases that the Ninth Circuit's decision affects in California alone. Still, the Warden disagrees as to Tennessee,[1/] but does submit that Hawaii's situation is

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1. Butler points out that in 2005, the Tennessee Legislature passed amendments to its statute to address any

more difficult to predict because it stands on a different footing than California, Tennessee, and New Mexico[2/].

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possible Sixth Amendment defect and argues that the *Cunningham* retroactivity issue is thus no longer viable there. He also asserts that the *Cunningham* retroactivity issue has apparently not been decided in Tennessee's state or federal courts. (Opp. at 12 n.1.) But, in fact, both the state appellate courts and the federal district courts in Tennessee have unanimously been holding that *Cunningham* does not apply retroactively to past convictions. See, e.g., *Thacker* v. *Tennessee*, No. CV 08-118, 2008 WL 1929982, *1 (E.D. Tenn. Apr. 30, 2008); *Shelly* v. *Turner*, No. 2007-02039, 2008 WL 539045, *2 (Tenn. Crim. App. Feb. 27, 2008); *Lyons* v. *State*, No. 2005-01446, 2007 WL 2700097, *12 (Tenn. Crim. App. Feb. 25, 2008); *Anderson* v. *Carlton*, No. 2007-01465, 2008 WL 110084, *2 (Tenn. Crim. App. Jan. 11, 2008); *Davis* v. *United States*, No. CV 07-107, 2007 WL 2138619, *2 (E.D. Tenn. July 23, 2007). Perhaps this lower court unanimity is why the Sixth Circuit and Tennessee Supreme Court have not yet addressed this issue.

2. Butler acknowledges that Hawaii's federal courts are directly bound by the Ninth Circuit's holding on *Cunningham*'s retroactivity yet argues that the opinion will not affect Hawaii because the Ninth Circuit had already invalidated Hawaii's system in 2006. (Opp. at 11-12 n.1 (citing *Kaua v. Frank*, 436 F.3d 1057, 1062 (9th Cir. 2006)).) The Hawaii *state* courts, however, did not find their system unconstitutional until after *Cunningham* in 2007, when this Court reversed the Hawaii Supreme Court's contrary determination. *State* v. *Maugaotega*, 114 P.3d 905, 916 (Haw. 2005), *judgment vacated and remanded in light of Cunningham*, 127 S. Ct. 1210 (2007), *opinion on remand*, 168 P.3d 562 (Haw. 2007). Thus, presumably, the Hawaii state courts continued to apply this system until *Cunningham*. See *Loher* v. *State*, 193 P.3d 438, 452 n.16 (Haw. Ct. App. 2008). It is true that Hawaii is differently situated than California, in that its system was mainly distinguished from *Blakely* on the same ground articulated in Justice Kennedy's concurrence in *Cunningham*, whereas California's system (as well as those of Tennessee and New Mexico) was distinguished from *Blakely* on the same ground articulated in Justice Alito's concurrence. This case involves the reasonableness of the latter opinion, not the former. That said, it seems likely that the Hawaii Supreme Court, like New Mexico, would find its own

Because hundreds of California upper-term sentences final before *Cunningham* will now be reopened for further relitigation because of the Ninth Circuit's decision, the question presented is an important one that this Court should resolve.

B. There Is a Split of Authority Between the Ninth Circuit and the New Mexico Supreme Court

The Ninth Circuit's decision holding under *Teague* that *Cunningham* should be retroactively applied to convictions final before its issuance directly conflicts with the New Mexico Supreme Court's decision holding the opposite under *Teague*. See *State* v. *Frawley*, 172 P.3d 144, 156-57 (N.M. 2007); Sup. Ct. R. 10(b). Butler contends that there is no conflict because the New Mexico Supreme Court in *Frawley* did not actually find *Cunningham* nonretroactive, but only found its own *Frawley* decision nonretroactive. (Opp. at 13-15.) But the *Frawley* decision applied *Cunningham* in overruling its prior decision applying *Blakely* and *Booker*. Thus, declaring its own decision a new rule was declaring *Cunningham* a new rule.

The New Mexico Supreme Court in 2005 upheld its system under *Blakely* and *Booker* but then in 2007 declared it unconstitutional under *Cunningham*. *State*

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pre-*Cunningham* decision reasonable and nonretroactive despite the Ninth Circuit's decision in this case. *Loher* v. *State*, 193 P.3d at 453 n.18. Moreover, the Ninth Circuit's decision in *Kaua* was issued before *Cunningham*, so the Ninth Circuit never had an opportunity to analyze whether Justice Kennedy's concurrence was reasonable. A decision from this Court that one *Cunningham* dissent was reasonable might cause the Ninth Circuit to revisit *Kaua* and make a similar examination as to the other dissent.

v. *Lopez*, 123 P.3d 754, 761-68 (N.M. 2005), *overruled in light of Cunningham*, *State* v. *Frawley*, 172 P.3d at 152-53. It then set out to determine whether this 2007 decision stated a new rule under *Teague*. *Frawley*, 172 P.3d at 156 ("Having concluded that Section 31-18-15.1 is facially unconstitutional after *Cunningham,* the question remains whether our holding applies prospectively or retroactively. The answer to this question turns on whether the rule we announce is old or new under the analysis set forth in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).").

By holding that its decision in *Frawley* stated a new rule under *Teague*, the New Mexico Supreme Court effectively determined that its own prior interpretation of *Blakely* and *Booker* in *Lopez* was reasonable before *Cunningham*. This *Lopez* opinion set forth the same interpretation as earlier set forth in the California Supreme Court's *Black* opinion and later in Justice Alito's dissent. *Lopez*, 123 P.3d at 767-68 (agreeing with the California Supreme Court that *Apprendi, Blakely*, and *Booker* "established a constitutionally significant distinction between a sentencing scheme that permits judges to exercise judicial discretion within a range and one that assigns to judges the type of factfinding role traditionally exercised by juries in determining the existence or nonexistence of elements of an offense."). Thus, the New Mexico Supreme Court's decision was contrary to the Ninth Circuit's decision on this same federal question.

Like the Warden, Butler notes that the question of whether *Cunningham* should be applied retroactively to habeas petitions in state court is pending before the California Supreme Court in *In re Gomez*, 64 Cal. Rptr. 3d 281, 284-85 (Cal. Ct. App. 2007), *petition for review granted*, 169 P.3d 887 (Cal. Oct. 24, 2007) (No. S155425). (Opp. at 15-17.) At bottom, the resolution of

the question presented in this petition would affect many cases regardless of whether the California Supreme Court agrees with the Ninth Circuit or instead "with nearly every other court that has considered the issue to date." *Loher* v. *State*, 193 P.3d at 453 n.17; see Pet. at 8. The Warden additionally notes that the California Supreme Court has scheduled oral argument in *Gomez* for December 3.

C. The Ninth Circuit's Decision Erroneously Held That *Cunningham* Was Not a New Rule and That the California Supreme Court's Decision Was Contrary to Clearly Established Supreme Court Law

Butler contends that the Ninth Circuit correctly held that it was unreasonable before *Cunningham* to find that California's procedure for imposing upper terms was consistent with *Blakely* and *Booker*. (Opp. at 17-24.) But a court before *Cunningham* could reasonably find that the upper term was the maximum sentence reflected in the jury verdict under the *Blakely* test because the upper term was within a single range specified by the criminal statute, like an elevated sentence within a single range specified by a criminal statute in the *Booker* remedial system. A court could reasonably contrast these two systems with those that this Court found to violate the right to jury trial in *Apprendi*, *Blakely*, and *Booker*, all of which involved penalties *above* the initial range provided by law. (See Pet. at 10-16.) Although a majority of this Court ultimately rejected Justice Alito's articulation of this distinction, his interpretation was still a reasonable, good-faith application of precedent to a different type of statutory scheme.

Butler does not contest that this distinction was reasonable in theory, but argues that California's upper term was not actually part of the initial range because of California's separate statute that mandated the middle term unless the trial court found an aggravating or mitigating circumstance. (Opp. at 20-21.) This separate statute, former California Penal Code section 1170(b), however, did not purport to provide any lower range, as did the statutes at issue in *Apprendi*, *Blakely*, and *Booker*, but instead circumscribed the trial court's discretion within the same range (lower, middle, or upper) described by the punishing statute for the specific crime. Thus, California's system was an example of this distinguishable type of sentencing scheme.

Butler then focuses on language in the *Cunningham* majority critical of opposing positions, in arguing that the result was compelled by precedent. (Opp. at 21-23.) As discussed in the petition, however (Pet. at 15-16), this Court has used similar language in other opinions before later declaring that opinion stated a new rule under *Teague*. See, e.g., *Simmons* v. *South Carolina*, 512 U.S. 154, 164 (1994) ("The trial court's refusal to apprize the jury of information so crucial to its sentencing determination . . . cannot be reconciled with our well-established precedents interpreting the Due Process Clause."), later found to state a new rule in *O'Dell* v. *Netherland*, 521 U.S. 151, 160 (1997); *Mills* v. *Maryland*, 486 U.S. 367, 374 (1988) ("it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances so postulated by petitioner or the dissent"), later found to state a new rule in *Beard* v. *Banks*, 542 U.S. 406, 413-16 (2004).

Butler also contends that "this case does not present the Court with the opportunity to reach the

question presented in the aborted grant of certiorari in *Burton* v. *Washington*, 547 U.S. 1178 (2006)." (Opp. at 19 n.2.) Of course, whether *Cunningham* is retroactive is a different question than that which was presented in *Burton*, whether *Blakely* is retroactive. But it is a similar question that would enable this Court to finally address whether *Teague* and 28 U.S.C. § 2254(d) impact one of its landmark Sixth Amendment cases applying *Apprendi*.

Further, the *Cunningham*-retroactivity question may have more practical significance than the *Blakely*-retroactivity question at this point in time. This is because most federal habeas petitioners in states affected by the 2004 *Blakely* decision are now time-barred from raising their claims, whereas most petitioners in states affected by the 2007 *Cunningham* decision are not. See generally 28 U.S.C. § 2244(d) (setting forth a one-year period of limitation for filing federal habeas petitions). This Court should therefore agree to hear this timely and consequential question.

CONCLUSION

This Court should grant the petition for writ of certiorari.

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Respectfully submitted,

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