NO.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *People* v. *Black*, 113 P.3d 534 (Cal. 2005), the California Supreme Court upheld the state's "upper term" sentencing procedure against a claim that it violated the defendant's right to a jury trial under *Blakely* v. *Washington*, 542 U.S. 296 (2004). But, in *Cunningham* v. *California*, 549 U.S. 270 (2007), this Court disagreed with *Black* and held the California upper-term procedure unconstitutional.

In this case, the Ninth Circuit invalidated a pre-*Cunningham* California upper-term sentence. The question presented, concerning the status of pre-*Cunningham* final sentences challenged collaterally on jury-trial grounds, is:

In light of *Teague* v. *Lane*, 489 U.S. 288 (1989), and 28 U.S.C. § 2254(d), may a federal court grant habeas relief on a California petitioner's claim that his upper-term sentence, imposed and final prior to *Cunningham*, violated his right to jury trial?

PETITION FOR WRIT OF CERTIORARI

Ben Curry, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit's opinion is reported at 528 F.3d 624 (9th Cir. 2008). The order of the Ninth Circuit denying rehearing and rehearing en banc, the orders of the district court and the California Supreme Court, and the opinions of the California Court of Appeal, all are unreported. The Appendix to this petition contains each of these orders and opinions.

JURISDICTION

The Court of Appeals filed its opinion on June 9, 2008. (App. B.) The Court of Appeals denied the Warden's petition for rehearing and suggestion for rehearing en banc on July 18, 2008. (App. A.) The Warden timely invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . .

The Fourteenth Amendment provides, in pertinent part

> No state . . . shall deprive any person of life,

> liberty, or property without due process of law . . . ."

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

Section 273.5(a) of the California Penal Code provides, in pertinent part:

> Any person who willfully inflicts upon a person who is his or her spouse . . . corporal injury resulting in a traumatic condition . . . shall be punished by imprisonment . . . for two, three, or four years . . . .

Former section 1170(b) of the California Penal Code provided, in pertinent part:

> When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.

STATEMENT OF THE CASE

In 2001, Frank Butler stood behind his wife during an argument and struck her on the head "three or four times" with an iron. Her injuries, which resulted in

"blood everywhere," required treatment at a hospital. (App. J102.) In 2003, a Los Angeles County jury convicted Butler of spousal battery and assault with a deadly weapon. Under California law, spousal battery carried a sentence of two, three, or four years in prison. (Cal. Penal Code § 273.5(a).). At the time of sentencing, the court could impose only the middle of these three terms unless an aggravating or mitigating circumstance was present. (Former Cal. Penal Code § 1170(b).) In imposing sentence, the trial court selected the "upper term" of four years for the spousal battery, citing as aggravating circumstances the facts that the victim was extremely vulnerable and that Butler was on probation at the time of the offense. (App. B.)

In June 2004, in *Blakely* v. *Washington*, 542 U.S. 296 (2004), this Court invalidated Washington's procedure for imposing exceptional sentences on the ground that it violated Blakely's Sixth Amendment right to jury trial. *Id.* at 303-05. Subsequently, in *People* v. *Black*, 113 P.3d 534 (Cal. 2005) (*Black I*), the California Supreme Court upheld California's procedure for imposing upper terms against a *Blakely* challenge. *Id.* at 542-43. In September 2005, under *Black I*, the California Court of Appeal on direct review rejected Butler's claim that his upper-term sentence violated *Blakely.* (App. H.)

In December 2006, Butler challenged his upper-term sentence in a federal habeas petition. A month later, in January 2007, this Court decided *Cunningham* v. *California*, 549 U.S. 270 (2007), disagreeing with *Black I* and holding that Cunningham's upper-term sentence violated his right to jury trial. In response to *Cunningham*, the California Legislature amended California Penal Code section 1170(b) to eliminate the requirement that the sentencing court find an additional fact in order to impose an upper or lower

term. Subsequently, the California Supreme Court judicially adopted this remedy as to resentencings after *Cunningham* reversals. *People* v. *Sandoval*, 161 P.3d 1146, 1157-64 (Cal. 2007).

In July 2007, the district court in this case found, under *Cunningham*, that Butler's upper-term sentence violated the right to jury trial, and granted the writ. (Apps. C, D, E, F, G.) Butler appealed. The Ninth Circuit in a published opinion affirmed in part, vacated in part, and remanded for further proceedings. The Ninth Circuit held that *Cunningham* had not announced a "new rule" under the *Teague* anti-retroactivity doctrine; the panel thus applied it to upset petitioner's pre-*Cunningham* final judgment. The Ninth Circuit also held that the state court's determination that California's upper- term procedure complied with the Sixth Amendment was "contrary to" clearly established Supreme Court authority under the deferential habeas corpus review standard of 28 U.S.C. § 2254(d). The panel remanded the case to the district court for an evidentiary hearing on whether the error was harmless. (App. B.)

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S HOLDING THAT *CUNNINGHAM* MUST BE APPLIED RETROACTIVELY TO FINAL JUDGMENTS CONFLICTS WITH THE PROPER RESOLUTION OF THIS ISSUE BY OTHER COURTS AND AFFECTS HUNDREDS OF CASES

After *Blakely*, but before *Cunningham*, the state supreme courts in California, New Mexico, Tennessee, and Hawaii rejected jury-trial challenges to their sentencing systems. Each of these state supreme

courts favorably compared its system to the remedial system approved by this Court in *United States* v. *Booker*, 543 U.S. 220 (2005), to rectify *Blakely* jury-trial infirmities in the federal sentencing scheme.

The *Cunningham* majority, it is true, disagreed with the California Supreme Court's *Black I* ruling that California's former upper-term system was constitutional. Nevertheless, three dissenting Justices of this Court employed an analysis closely resembling the approach of the supreme courts of California, New Mexico, and Tennessee, and maintained that the Court should have upheld California's sentencing system. *Cunningham*, 127 S. Ct. at 873-81 (Alito, J., dissenting); see also *id.* at 872-73 (Kennedy, J., dissenting) (additionally drawing the same offense/offender distinction that the Hawaii Supreme Court had made).

In light of the reasonable and substantial disagreement about whether the *Blakely* rule invalidated a system like California's, the lower courts had almost unanimously held, under *Teague v. Lane*, 489 U.S. 288 (1989), that reasonable jurists could have disagreed about whether California's former system was valid prior to *Cunningham*, and that *Cunningham* therefore could not be applied retroactively on habeas to final convictions. These courts include those directly affected by *Cunningham*, including the New Mexico Supreme Court, the California Court of Appeal, and several United States district courts in California and Tennessee. See *State* v. *Frawley*, 172 P.3d 144, 154 (N.M. 2007); *Loher* v. *State*, 2008 WL 2721179, *15 n.17 (No. 27644, Haw. Ct. App., Jul. 14, 2008) (citing numerous cases and noting that the Ninth Circuit "appears to have disagreed with nearly every other court that has considered the issue to date").

The Ninth Circuit, almost alone, expressed a

different view in this case. The Ninth Circuit—although correctly noting how this Court ultimately decided *Cunningham*—incorrectly held that the state court's ruling in this case was "contrary" to "clearly established" pre-*Cunningham* law of this Court and that no reasonable jurist could have disagreed. (App. B11-B25.) The Ninth Circuit erred by failing to recognize that it was at least *reasonable* for a pre-*Cunningham* state court to hold that California's system complied with the constitution—even though that view eventually was later rejected as incorrect in *Cunningham*. By applying *Cunningham* retroactively to all upper-term cases back to *Blakely*, the Ninth Circuit's rule improperly forces the re-litigation of hundreds of additional convictions on habeas corpus, resulting in many resentencings.

A. The Ninth Circuit's decision burdens courts and the States by requiring re-litigation of hundreds of additional *Cunningham* upper-term sentences.

By declaring *Cunningham* retroactive back to *Blakely*, the Ninth Circuit has opened the floodgates to relitigating more than two-and-a-half years' worth of California upper-term sentences that became final between June 24, 2004, the date of *Blakely*, and January 23, 2007, the date of *Cunningham*. See www.westlaw.com (listing 2,606 appellate opinions in the California state courts in a search for "*Blakely* v. *Washington*" before January 23, 2007, and 488 opinions thus far in the lower federal courts in a search for "*Cunningham* v. *California*"). This case is an example of the additional time and resources the Ninth Circuit's decision will cause to be expended. After making a binding determination about the retroactivity issue, the Ninth Circuit ordered the district court to hold a

hearing on harmless error.

Other states will be similarly affected, with practical burdens that are difficult to forecast. The Ninth Circuit's decision will affect those sentences that the Hawaii state courts had found *Blakely*-compliant but that later were found to violate *Cunningham*. The effect also may be felt in New Mexico, for the Ninth Circuit's retroactivity holding conflicts with that of the New Mexico Supreme Court.

It is true that, in most of the re-sentencings that will be required in California, the petitioners likely will again receive the same upper-term sentences—based this time on the reformed sentencing system set forth by the California Supreme Court after *Cunningham*. See *People* v. *Sandoval*, 161 P.3d 1146, 1158-64 (Cal. 2007) ("It seems likely that in all but the rarest of cases the level of discretion afforded the trial court under the Attorney General's proposal [adopted by the California Supreme Court] would lead to the same sentence as that which would have been imposed under the DSL as initially enacted."). But that hardly mitigates the expense that the Ninth Circuit's retroactivity holding saddles the State and state courts with.

The prospect of many expensive re-sentencing proceedings is exacerbated, moreover, by the Ninth Circuit's narrow view of this Court's recognized *Almendarez-Torres* rule exempting from the scope of the jury-trial right aggravated sentences based on a judicial finding of recidivism. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 226, 230-31, 238-47 (1998). The Ninth Circuit takes a narrow view of this exception, limiting it to findings of prior convictions only, as opposed to findings that the defendant's prior convictions were serious or that the defendant committed the new crime while on probation. (App. B-31-38.) The Ninth Circuit's view sharply contrasts

with the California Supreme Court's broader view. See *People* v. *Towne*, 186 P.3d 10, 17-20 (Cal. 2008) (listing the majority of federal and state courts that have disagreed with the Ninth Circuit's interpretation); App. B29-B38.

The Warden notes that the issue of whether *Cunningham* will operate retroactively in state habeas corpus proceedings to judgments becoming final before *Cunningham* but after *Blakely* is currently pending and fully briefed in the California Supreme Court. See *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). The state supreme court's decision will affect a large number of such state habeas cases. It is unknown whether the California Supreme Court will apply *Teague* or some other retroactivity test, and it is unknown how the *Cunningham* ruling would be treated under any test adopted by the state court. See *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1038-42 (2008) (unlike federal courts, state courts are free to apply a retroactivity test other than *Teague*). But for the California Supreme Court to apply *Cunningham* retroactively under *Teague* would require it to condemn its own *Black I* holding as not merely wrong but so clearly wrong that no reasonable jurist could have disagreed with it.

Even if the California Supreme Court were to decide that *Cunningham* is retroactive under *Teague,* or under another test, the Ninth Circuit's opinion in this case will still affect hundreds of federal habeas cases. In these cases, the Ninth Circuit will frequently grant relief where the California state courts did not, due to their disparate interpretations of the recidivism exception.

B. The retroactivity question is an important question, as evidenced by this Court's aborted grant of certiorari in *Burton* v. *Waddington*.

Granting certiorari in this case would also give this Court an opportunity to consider an important issue closely related to the one that previously evaded review because of a procedural impediment. This Court previously granted certiorari on whether *Blakely* should be applied retroactively under *Teague*. *Burton* v. *Waddington*, 547 U.S. 1178 (2006). But the Court had to dismiss review of that case because it involved a unauthorized successive habeas petition under 28 U.S.C. § 2244(b). *Burton* v. *Stewart*, 127 S. Ct. 793, 794 (2007) (per curiam).

Although a smaller (but still very large) group of cases is implicated by the question presented in this case—roughly speaking, sentences meted out after *Blakely* but before *Cunningham*—the retroactivity issue still merits certiorari review. In view of the strong lower court consensus that *Blakely* is not retroactive under *Teague*, and the growing consensus that *Cunningham* is not retroactive either, the Ninth Circuit's conclusion sharply conflicts with the New Mexico Supreme Court and other lower courts.

Unlike the situation in *Burton*, no procedural defect is present in this case, as the Ninth Circuit fully resolved the *Teague* and § 2254(d) issues. Further, the Ninth Circuit's remand for an evidentiary hearing in this case can have no effect on these threshold decisions. See 28 U.S.C. § 1254(1).

C. The Ninth Circuit's published decision is erroneous under both *Teague* v. *Lane* and 28 U.S.C. § 2254(d).

The Ninth Circuit erroneously held that the California Supreme Court's decision in *Black I* was "contrary to clearly-established law" and did not qualify for protection as part of the class of "good-faith interpretations of existing precedents made by state courts" defined in *Teague*. (App. B11-B25; see *Butler* v. *McKellar*, 494 U.S. 407, 414 (1990).)

Under *Teague*, a new rule of constitutional law cannot be applied retroactively on federal collateral review to upset a state conviction or sentence unless the new rule forbids criminal punishment of primary, individual conduct or is a "watershed" rule of criminal procedure. *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994). A rule is new under *Teague* where "reasonable jurists . . . 'would [not] have deemed themselves compelled to accept [the petitioner's] claim'" when his conviction became final. *Johnson* v. *Texas*, 509 U.S. 350, 366 (1993). This Court has vigorously enforced the *Teague* new rule principle in a variety of contexts and has hardly ever found a rule to be "old" for habeas corpus purposes.[1/]

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1. See *Whorton* v. *Bockting*, 127 S. Ct. 1173, 1182 (2007); *Beard* v. *Banks*, 542 U.S. 406, 414 (2004); *Schriro* v. *Summerlin*, 542 U.S. 348, 352-53 (2004); *Stewart* v. *LaGrand*, 526 U.S. 115, 119 (1999); *Breard* v. *Greene*, 523 U.S. 371, 377 (1998); *O'Dell* v. *Netherland*, 521 U.S. 151, 160 (1997); *Lambrix* v. *Singletary*, 520 U.S. 518, 528 (1997); *Gray* v. *Netherland*, 518 U.S. 152, 169-70 (1996); *Goeke* v. *Branch*, 514 U.S. 115, 118-21 (1995); *Caspari* v. *Bohlen*, 510 U.S. 383, 393 (1994); *Gilmore* v. *Taylor*, 508 U.S. 333, 344 (1993); *Graham* v. *Collins*, 506 U.S. 461, 468 (1993); *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990); *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990); *Saffle* v. *Parks*, 494 U.S. 484, 494 (1990); *Teague,*

Such rare "old rules" under *Teague* are similar to the "clearly established Federal law" that restricts federal habeas corpus relief under § 2254(d). See *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). For example, in *Carey* v. *Musladin*, 127 U.S. 649, 653-54 (2006), this Court recently explained that a federal court erroneously grants habeas relief if it applies a Supreme Court precedent to a new context. *Id.* at 653-54 (Supreme Court's prejudice test for state-sponsored courtroom practices did not create clearly established Supreme Court law regarding private-actor courtroom conduct).

A survey of the legal landscape at the time Butler's conviction became final and when the state courts last resolved his claims—in 2005, after *Blakely* and *Booker* but before *Cunningham*—demonstrates that a reasonable state judge could have discerned material distinctions between the California system at issue in *Cunningham* and the sentencing schemes at issue in *Booker*, *Blakely*, and *Apprendi,* and could have rejected Butler's claim based on those differences. Under *Teague* and § 2254(d), then, the Ninth Circuit should not have used its own interpretation of the law set out in those cases to grant Butler relief.

In each of these three earlier cases, 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. *Booker*, 543 U.S. at 226-37; *Blakely*, 542 U.S. at 298-305, 308-09; *Apprendi*, 530 U.S. at 490. By contrast, the *Cunningham* majority found that the right to jury trial was violated

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489 U.S. at 301; but see *Bousley* v. *United States*, 523 U.S. 614, 619-21 (1998); *Stringer* v. *Black*, 503 U.S. 222, 229 (1992); *Penry* v. *Lynaugh*, 492 U.S. 302, 315 (1989), *abrogated on another ground, Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002).

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. See *Cunningham*, 127 S. Ct. at 869. Because the upper term was within the initial range that the criminal statute specified, however, Justice Alito (joined by Justices Breyer and Kennedy)—like the California state courts dealing with Butler's claim—reasonably found that the upper term was based on the facts reflected in the jury verdict, even though the trial court made additional factual findings in selecting a sentence within that range. *Cunningham*, 127 S. Ct. at 873-81 (Alito, J., dissenting); see *Booker*, 543 U.S. at 233 ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); *Blakely*, 542 U.S. at 303 ("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*."); see also *Booker*, 543 U.S. at 278 (Stevens, J., dissenting from the remedy) (giving an example complying with *Blakely* where a sentencing court in its discretion "relies upon factual determinations beyond the facts found by the jury" to sentence within "the defendant's initial sentencing range").

Moreover, as Justice Alito explained, there was a sound comparison between the "remedial" system found to be constitutional in *Booker* and the California system challenged in *Cunningham*:

> The California sentencing law that the Court strikes down today is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court

> approved in *United States* v. *Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Both sentencing schemes grant trial judges considerable discretion in sentencing; both subject the exercise of that discretion to appellate review for "reasonableness"; and both—the California law explicitly, and the federal scheme implicitly—require a sentencing judge to find some factor to justify a sentence above the minimum that could be imposed based solely on the jury's verdict. Because this Court has held unequivocally that the post-*Booker* federal sentencing system satisfies the requirements of the Sixth Amendment, the same should be true with regard to the California system.

Cunningham, 127 S. Ct. at 873 (Alito, J., dissenting).

Indeed, in a post-*Cunningham* Supreme Court concurring opinion, two members of the *majority* in *Cunningham*—Justices Scalia and Thomas—affirmed the validity of Justice Alito's comparison between the California system and post-*Booker* federal system:

> Under the scheme promulgated today, some sentences reversed as excessive will be legally authorized in later cases only because additional judge-found facts are present; and, *as Justice Alito argued in Cunningham*, some lengthy sentences will be affirmed (*i.e.*, held lawful) only because of the presence of aggravating facts, not found by the jury, that distinguish the case from the mine-run.

Rita v. *United States*, 127 S. Ct. at 2475-76 (Scalia, J., concurring) (italics added).

There is further evidence that *Blakely* had not "clearly established," or "dictated" to "all reasonable jurists," that the California system was constitutionally

infirm. The California Supreme Court and two other state supreme courts addressing sentences of a similar type—requiring a fact to impose a higher sentence *within* the initial prescribed range—had also rejected *Blakely* challenges on the basis of this distinguishing characteristic, also analogizing their systems to the *Booker* remedial system. *Black I,* 113 P.3d at 543, *judgment vacated and remanded in light of Cunningham,* 127 S. Ct. 1210 (2007), *opinion on remand*, 161 P.3d 1130 (Cal. 2007) (*Black II*); *State* v. *Lopez*, 123 P.3d 754, 761-68 (N.M. 2005), *overruled in light of Cunningham*, *State* v. *Frawley*, 172 P.3d at144, 152-53 (N.M. 2007); *State* v. *Gomez*, 163 S.W.3d 632, 661-62 (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); see also *State* v. *Maugaotega*, 114 P.3d 905, 916 (Haw. 2005) (distinguishing Hawaii's system from *Blakely* based on the intrinsic/extrinsic (i.e., offense/offender) reasoning that Justice Kennedy later articulated in his separate dissent in *Cunningham*), *judgment vacated and remanded in light of Cunningham*, 127 S. Ct. 1210 (2007), *opinion on remand*, 168 P.3d 562 (Haw. 2007). These cases show that the issue presented in *Cunningham* was unsettled, to say the least, and it seems likely that this Court granted certiorari in *Cunningham*, at least in part, because of the lack of national uniformity on this issue. *Cunningham*, certainly, was no per curiam decision. And three justices reasonably dissented.

Further, this Court has proscribed the retroactive application of a constitutional rule regarding one state's sentencing law to another state's sentencing law where there were arguable legal distinctions between these laws. In *Lambrix* v. *Singletary*, 520 U.S. 518, 527-39 (1997), this Court held that its cases repeatedly

prohibiting the jury's consideration of invalid sentencing factors, in the capital sentencing systems of Mississippi, Oklahoma, and Georgia, could not apply retroactively to Florida's system. The Court determined that—even though it ultimately had decided in *Espinosa v. Florida*, 505 U.S. 1079 (1992), that the Florida system was unconstitutional—*Espinosa* stated a new rule because a court "could reasonably have reached a conclusion contrary to our holding in that case." *Lambrix*, 520 U.S. at 538. Just as *Espinosa* was not necessarily dictated by this Court's prior precedent, the *Cunningham* decision was not compelled by the Court's prior precedent. See also *O'Dell* v. *Netherland*, 521 U.S. 151, 161, 165 (1997).

Nor does language in the *Cunningham* majority opinion finding California's system "functionally indistinguishable" from the system at issue in *Blakely,* and sharply criticizing opposing arguments, foreclose a determination that, before *Cunningham*, it was reasonable to uphold California's system under *Blakely* and *Booker*. See, e.g., *Cunningham*, 127 S. Ct. at 868-70 & n.15. On the contrary, this Court has emphasized that language in an opinion suggesting that prior precedent controlled the result does not preclude finding that the opinion introduces a new rule. See *Butler v. McKellar*, 494 U.S. at 415 (finding *Miranda* case of *Arizona* v. *Roberson*, 486 U.S. 675 (1988), to be a new rule under *Teague*, despite the *Roberson* majority's conclusion that it was "directly controlled" by prior precedent, reasoning that "[c]ourts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts"); see also *O'Dell*, 521 U.S. at 157-66 (finding *Simmons* v. *South Carolina*, 512 U.S. 154, 162, 164-65 (1994) to state a

new *Teague* rule notwithstanding dismissive language in the *Simmons* opinion on direct appeal); *Beard* v. *Banks*, 542 U.S. 406, 413-16 (2004) (same as to *Mills* v. *Maryland*, 486 U.S. 367, 374-75, 377 n.10, 379 n.11, 381, 384 (1988)). In short, the *Cunningham* majority opinion was a lengthy and detailed analysis that aimed to present a definitive resolution of a question that had generated considerable controversy and conflict in the lower courts.

The Ninth Circuit should have rejected Butler's claim that *Cunningham* applies retroactively to cases final after *Blakely* because the California Supreme Court's decision to the contrary was a reasonable application of *Apprendi*, *Blakely*, and *Booker*. The Ninth Circuit's published decision conflicts with virtually every other lower court decision on the issue. It contradicts this Court's *Teague* precedents and it exceeds the limited authority of federal courts to grant habeas relief under § 2254(d)(1). It should not stand uncorrected.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Dated: November 21, 2008

Respectfully submitted,

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