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December 24, 2007

Frederick K. Ohlrich, Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *In re Gomez*, S155425, Court of Appeal No. B197980, 153 Cal.App.4th 1516
Letter of Amicus Curiae Appellate Defenders, Inc., in Support of Petition for Review; Alternatively, Request for Depublication

Dear Mr. Ohlrich:

This amicus curiae letter is submitted in support of the petition for review[1] in this case. (Cal. Rules of Court, rule 8.500(g).) In the alternative it seeks depublication of the opinion. (Rule 8.1125.)

In re Gomez (2007) 153 Cal.App.4th 1516 holds that the decision of the United States Supreme Court in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] announced "new law" within the meaning of *Teague v. Lane* (1989) 489 U.S. 288, when it determined that the California Determinate Sentencing Law violates *Blakely v. Washington* (2004) 542 U.S. 296.[2] The Court of Appeal denies Gomez's petition for writ of habeas corpus, saying *Cunningham* may not be applied to him on collateral review because his case was already final for purposes of direct appeal[3] when *Cunningham* was decided on January 22, 2007, even though it was not yet on

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[1]Petitioner's counsel filed a petition for habeas corpus from the denial of habeas corpus in the Court of Appeal; however, according to the court's docket Web site, this court has treated it as a petition for review.

[2]Although the habeas corpus petition Gomez filed seeks to apply earlier precedent than *Blakely*, such as *Apprendi v. New Jersey* (2000) 530 U.S. 466, it is unnecessary to address older cases, since *Blakely* was decided before Gomez's case became final and is clearly applicable here. The Court of Appeal reaches this conclusion, as well. (*Gomez*, at p. 1523, fn. 7.)

[3]The opinion in Gomez's original appeal (B177065) was issued on September 8, 2005. No petition for review was filed.

appeal when *Blakely* was issued on June 24, 2004. *Gomez* is wrongly decided, because *Cunningham* was a straightforward application of *Blakely* and did not modify or reinterpret *Blakely* at all, or announce any identifiable "new rule of law." In reaching its conclusion, *Gomez* misstates the doctrine of "new law," using an oversimplified show-of-hands test (disagreement among jurists), rather than a comparative analysis of the legal principles underlying *Blakely* and *Cunningham*.

Statement of Interest

Appellate Defenders, Inc., is a not-for-profit corporation that contracts with the Administrative Office of the Courts to administer the system for appointed counsel in the Fourth Appellate District. A significant number of cases handled through our program have involved issues under *Blakely*. Many of those cases, like Gomez's, became final after *Blakely* was decided but before *Cunningham*. Although the clients in such cases are entitled to the benefit of *Blakely*, *In re Gomez* denies it them and to numerous others around the state in the same posture, basing its decision on an incorrect concept of what constitutes "new law." Review, or at the least depublication, is necessary to ensure persons are not improperly denied constitutional protections that applied to them before their cases became final and thus may be vindicated by habeas corpus, and also to ensure the lower courts correctly apply the doctrine of "new law."

Discussion

The essence of *Gomez*'s rationale is that the decision in *Cunningham*, finding California's DSL to violate the rule of *Blakely*, was "not apparent to all reasonable jurists" – in other words, judges had disagreed on the matter. (*In re Gomez*, *supra*, 153 Cal.App.4th 1516, 1522, internal quotation marks omitted.) Specifically, it points to the fact that this court had reached a different conclusion in *People v. Black* (2005) 35 Cal.4th 1248 (*Black I*), that before then the Courts of Appeal had reached varying results, and that *Cunningham* itself produced three dissents. It concludes: "'[T]he outcome in [*Cunningham*] was susceptible to debate among reasonable minds.' . . . It is readily apparent, therefore, that *Cunningham* announced a new rule of law." (*Gomez*, at p. 1522.) The Court of Appeal's cursory analysis and its conclusion are faulty.

The flaw in *Gomez* lies in its major premise – that the existence of prior disagreement among judges and cases necessarily makes a rule of law "new." That test is too facile and proves too much. The Supreme Court of the United States is not likely to take many cases in which there is no disagreement or conflict or in which the result is "apparent to all." With this test, virtually no Supreme Court case could ever be considered an application of existing law. But that is not what the Supreme Court itself has held.

The existence of disagreement may be evidence of new law and is often used for that purpose, as is demonstrated in the cases *Gomez* cites, but it is not the ultimate test. The ultimate test is the legal principles on which the older case and the more recent one were decided. A decision may be "new" in relation to a precedent if it in some material way alters the legal principles laid down in the former or if it is based on the older case only at a high level of abstraction or generality. It cannot be "new" if it purports only to apply the precedent to a materially indistinguishable situation.

In *Stringer v. Black* (1992) 503 U.S. 222 (qualified on another point in *Brown v. Sanders* (2006) 546 U.S. 212), the petitioner's Mississippi appeal became final in 1985. On habeas corpus he relied on the later decision in *Clemons v. Mississippi* (1990) 494 U.S. 738, which applied the earlier rule of *Godfrey v. Georgia* (1980) 446 U.S. 420[4] to the Mississippi sentencing scheme. The state claimed *Clemons* was "new law" and inapplicable on habeas corpus. *Clemons* was decided by a fractured court with a five-justice majority decision and two separate concurring and dissenting opinions, and the state court had ruled against the petitioner on appeal. Before *Clemons* the Fifth Circuit had concluded that *Godfrey* did not apply to Mississippi. The federal district court and Court of Appeals had ruled against Stringer.

Despite the disagreements within the *Clemons* court and opposite rulings in the lower courts, the Supreme Court in *Stringer* found that *Clemons* was directly dictated by *Godfrey* and thus could be used on habeas corpus for the proposition that *Godfrey* applies to Mississippi sentencing. The court pointed out that the existence of contrary opinions is "relevant . . . but not dispositive": "[T]he ultimate decision whether *Clemons* was dictated by precedent is based on an objective reading of the relevant cases." (*Stringer v. Black*, *supra*, 503 U.S. at p. 237.) In response to the state's reliance on the Fifth Circuit cases as proving that *Clemons* could not have been dictated by precedent, the court said: "The short answer to the State's argument is that the Fifth Circuit made a serious mistake." (*Ibid.*)

If we substitute California for Mississippi, *Cunningham* for *Clemons*, *Blakely* for *Godfrey*, and *Black I* for the Fifth Circuit precedents, the fallacy of the test used in *Gomez* becomes apparent. Just as the existence of conflicting opinions before and within *Clemons* did not per se establish that case was new law, so the fact *Black I* and lower courts had reached different conclusions before *Cunningham*, or that there were three dissents in that case, does not automatically make *Cunningham* new law. Such

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[4] *Godfrey* found an aggravating factor (that the crime was "outrageously or wantonly vile, horrible and inhuman") impermissibly vague for use in imposing the death penalty.

disagreement proves that legal judgments as to the applicability of precedent may be quite difficult; but it does not, in and of itself, make such judgments "new" law.

Other United States Supreme Court decisions have found a later case dictated by precedent, even though that case was hardly free from disagreement. *Yates v. Aiken* (1988) 484 U.S. 211, for example, held that *Francis v. Franklin* (1985) 471 U.S. 307 was a mere application of *Sandstrom v. Montana* (1979) 442 U.S. 510, not a new rule of law, despite the fact *Francis* was a 5-4 decision and the state and federal district courts had ruled against Francis. An analogous issue arose in *Abdul-Kabir v. Quarterman* (2007) __ U.S. __ [127 S.Ct. 1654, 167 L.Ed.2d 585], where the question was whether there was "clearly established" Supreme Court authority on a particular matter for purposes of federal habeas corpus (28 U.S.C. § 2254(d)(1)). The issue was hardly an open-and-shut one: the state court, federal district court, and federal Court of Appeals all had ruled against the petitioner, and ultimately there was a four-justice dissent in *Abdul-Kabir*. The precedents relied on also were severely split decisions. Notwithstanding this level of disagreement, the majority held that the result was "dictated" by Supreme Court authority in effect at the time of the original state appeal. (*Abdul-Kabir*, 127 S.Ct. at p. 1659; see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 318-319, abrogated on other grounds in *Atkins v. Virginia* (2002) 536 U.S. 304 [petitioner not seeking "new rule" in first claim, failure to instruct on mitigating evidence; however, second claim – that it is unconstitutional to execute the mentally retarded – would be new, thus not reviewable on habeas corpus].)

One need only scan the *Cunningham* opinion to discern that it was solely a straightforward application of precedent. In unambiguous, occasionally blunt, language and a constant refrain quoting *Apprendi* and *Blakely*, the court made clear the result was foreordained by these cases. It noted: "As this Court's decisions instruct," the Constitution prohibits a sentencing scheme, like the DSL, "that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 860.) The court had said so "repeatedly." (*Id*. at pp. 863-864.) The court said *Apprendi* established a "bright-line rule," adding "that should be the end of the matter." (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 868.) Rejecting the reasoning of *Black I* that the DSL gave ample discretion to trial judges, the court rejoined: "We cautioned in *Blakely* . . . that broad discretion . . . does not shield a sentencing system from the force of our decisions." (*Cunningham*, *supra*, 127 S.Ct. at p. 869.) As to *Black I*'s points that the DSL reduced the penalties for most crimes over the previous indeterminate sentencing regime, that defendants "cannot reasonably expect a guarantee that the upper term will not be imposed," and that statutory enhancements must be proved to a jury beyond a reasonable doubt, *Cunningham* again pointed to precedent (127 S.Ct. at p. 869, italics original):

> Our decisions, however, leave no room for such an 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 . . . . But see *Black*, 35 Cal.4th, at 1260 . . . (stating, remarkably, that "the high court precedents do not draw a bright line").

One may contrast *Cunningham* with cases found to have established new law. In some, the new case directly overruled precedent. (E.g., *Whorton v. Bockting* (2007) ___ U.S. ___ [127 S.Ct. 1173, 1181, 167 L.Ed.2d 1] [*Crawford v. Washington* (2004) 541 U.S. 36 was new law]; *Schriro v. Summerlin* (2004) 542 U.S. 348 [same re *Ring v. Arizona* (2002) 536 U.S. 584].) In others the new case, although citing precedent, extended it to conceptually distinct areas. (E.g., *O'Dell v. Netherland* (1997) 521 U.S. 151 [*Simmons v. South Carolina* (1994) 512 U.S. 154, holding capital defendant must be permitted to inform sentencing jury he is parole-ineligible if the prosecution argues future danger, not compelled by cases dealing with other kinds of evidence]; *Sawyer v. Smith* (1990) 497 U.S. 227, 236 [prior Eighth Amendment jurisprudence gave "general support" to *Caldwell v. Mississippi* (1985) 472 U.S. 320 at an abstract level, but did not compel its conclusion]; *Butler v. McKellar* (1990) 494 U.S. 407 [*Arizona v. Roberson* (1988) 486 U.S. 675 was not mere application of precedent on resumption of interrogation after invocation of rights, but rather involved new question – interrogation on unrelated case]; see also *Saffle v. Parks* (1990) 494 U.S. 484, 490 [noting "simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors"].) In still others, the new case did not purport to be applying precedent. (E.g., *Lambrix v. Singletary* (1997) 520 U.S. 518, 529 [*Espinosa v. Florida* (1992) 505 U.S. 1079 "cited only a single case . . . in support of its central conclusion . . . [a]nd it introduced that lone citation with a 'cf.'– an introductory signal which shows authority that supports the point in dictum or by analogy, not one that 'controls' or 'dictates' the result"].)

The differences between these cases and *Cunningham* are apparent. Unlike *Crawford* and *Ring*, *Cunningham* did not part company with any previous rulings but emphatically reasserted them and insisted they be applied. Unlike *O'Dell*, *Caldwell*, *Roberson*, and *Saffle*, it did not require extension of precedents to related but logically different areas, but rather applied them directly to a sentencing system the court found indistinguishable from Washington's. Unlike *Espinosa*, *Cunningham* included multiple citations to *Apprendi-Blakely* undiminished by "cf." or other signals, and its holding was explicitly and exclusively based on precedent: "To summarize: . . . our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the

upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 871.) *Cunningham* could hardly have made it plainer that *Apprendi-Blakely* dictated its result.

The applicability of *Apprendi-Blakely* to the DSL was the very question before the California Court of Appeal in *People v. Cunningham* (2005, unpublished, No. A103501), the sole question on which certiorari was granted, and the sole issue resolved. *Cunningham* involved no effort to recognize new constitutional rights or create law. One cannot identify any legal principle it stated that was not already explicit in *Blakely*. It did not "break[] new ground or impose[] a new obligation on the States . . . ." (*Teague v. Lane*, *supra*, 489 U.S. 288, 301.) Indeed, it found "no room" for doubt as to the outcome under *Blakely*'s *Apprendi* -based "bright line rule." If a California petitioner in Gomez's position were to seek habeas corpus solely under *Blakely*, without relying on *Cunningham*, the right to relief would still be undeniable. Every legal principle on which the petitioner would rely could expressly be found in *Blakely.*

Conclusion

In re Gomez, *supra*, 153 Cal.App.4th 1516 misstates the legal definition of a "new rule of law," applying an oversimplified test that takes the existence of disagreement as the sine qua non of newness. The correct test is whether the result in the newer case follows inexorably from the older one as a matter of objective legal principle, even if applying that principle is difficult and has produced disagreement among jurists. Under the correct test, *Cunningham* must be seen as the direct result of *Blakely.* Defendants whose cases were not yet final when *Blakely* was decided are entitled to the benefits of that case. Nothing whatever in *Cunningham*, which forcefully reasserts *Blakely*, undercuts that right. Yet that is exactly what *Gomez* would do.

Because *In re Gomez* states an erroneous principle of law and would deny numerous persons the benefits of unambiguous United States Supreme Court precedent, amicus curiae Appellate Defenders, Inc., supports Gomez's petition for review. In the alternative, we request that the lower court opinion be depublished.

Respectfully submitted,

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