IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE SOTERO GOMEZ On Habeas Corpus	Supreme Court No. S155425 Court of Appeal No. B197980 Superior Court No. KA064573

BRIEF OF AMICUS CURIAE APPELLATE DEFENDERS, INC. IN SUPPORT OF PETITIONER SOTERO GOMEZ

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This brief of amicus curiae Appellate Defenders, Inc., is submitted in conjunction with an application for the permission of the Chief Justice to file it. (Cal. Rules of Court, rule 8.520(f).) The brief supports the position of petitioner Sotero Gomez.

I.

BACKGROUND

At issue in this case is whether defendants whose cases became final before *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856], but after *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], can assert rights under either or both of those cases on habeas corpus.

A. Proceedings

Petitioner Sotero Gomez was sentenced to the upper term in 2004 over his objection that the sentence violated *Blakely* because none of the factors in aggravation had been found by a jury beyond a reasonable doubt. The Court of Appeal affirmed on direct appeal, relying on this court's decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*). (B177065, decided Sep. 8, 2005, unpublished.) After *Cunningham* found *Black I* to have been incorrectly decided, Gomez filed a petition for habeas corpus again alleging the sentence violated *Blakely*, in the superior court, which denied it. He then sought habeas corpus in the Court of Appeal.

The Court of Appeal denied the petition. The court concluded that, under *Teague v. Lane* (1989) 489 U.S. 288 [109 S.Ct.1060, 103 L.Ed.2d 334], *Cunningham* could not be asserted on habeas corpus by defendants

whose cases were final before it was decided,[1] because it announced "new law." This conclusion was based on the fact there was disagreement among jurists on *Blakely*'s applicability to the California Determinate Sentencing Law: *Black I* had found it inapplicable, lower courts had disagreed among themselves, and *Cunningham* itself produced three dissents. The *Gomez* court held:

> "[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.

(*In re Gomez* (2007) 153 Cal.App.4th 1516, 1522, superseded by grant of review Oct. 24, 2007, S155425.)

B. Positions on Review

In his Opening Brief on the Merits (OBM), petitioner Gomez argues *Cunningham* was a straightforward application of *Blakely*, not "new law," and so may be used as the basis for collateral relief. (OBM, at pp. 10-13.) In any event, he urges, he is entitled to the benefit of *Blakely* itself, which was decided long before his case became final and so is incontestably applicable to him for *Teague* purposes. (OBM, at pp. 8-9, 21.)

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[1]Gomez's case was not final when *Blakely* was issued on June 24, 2004, but it was final for purposes of direct appeal when *Cunningham* was decided on January 22, 2007.

The respondent's Answer Brief on the Merits (ABM) follows the Court of Appeal's disagreement-among-jurists test. *Cunningham* must have announced "new law" because its result was not readily foreseeable, as evidenced by the disparate conclusions the courts and individual judges had reached. (ABM, pp. 13-22.)

C. Summary of Position of Amicus Curiae

Amicus curiae contends the Court of Appeal started from an erroneous premise – that disagreements among judges is the test for "new law." That show-of-hands test confuses a "new" rule *changing* the law with a "difficult" decision interpreting and applying *extant* law. *Teague* protects final judgments from challenges based on changes in the law; it does not relieve courts from making difficult decisions on the application of existing law.

The correct test is based on the legal rules underlying the decisions. If a recent case merely restates the principles of a precedent and finds it requires a given result in the later case, it does not announce new law. If it changes the rule of the precedent, materially extends it beyond its original meaning, or finds the precedent applicable at only a high level of generality, then the case is properly considered new law.

A comparison of *Cunningham* with *Blakely* can produce no meaningful differences in their underlying legal principles. *Cunningham* announced no new rule and made no change in the law. Instead it reaffirmed existing law, determining that *Blakely* itself prohibits a DSL upper term based on facts not found by a jury beyond a reasonable doubt.

One cannot reasonably contend that Gomez is seeking to take advantage of a constitutional rule not in existence at the time his conviction became final. He is arguing – and has consistently argued from the time he was sentenced – that *Blakely* prohibits the imposition of the upper term on him. It would be anomalous indeed to deny him and similarly situated defendants the benefits of *Blakely* merely because in the interim the United States Supreme Court has vindicated that position.

In any event, regardless of *Teague*'s dictates, that case binds only federal courts, and California has the power to offer broader remedies. (*Danforth v. Minnesota* (Feb. 20, 2008, No. 06-8273) ___U.S.___ [2008 U.S. Lexis 2012, 76 U.S.L.W. 4069].) While *Cunningham* was pending, this court issued a series of orders denying review "without prejudice to any relief to which defendant might be entitled after . . . *Cunningham*." The reasonable implication was that California would provide a habeas corpus remedy if *Cunningham* were to be decided favorably. Doing so would be

both consistent with established practice and sensible as policy: keeping these cases on the appellate courts' dockets or else forcing defendants to resort to federal court before the law was settled would have been wasteful of judicial resources. Fairness and economy therefore dictate that habeas corpus be available to defendants in Gomez's position.

II.

UNDER THE CORRECT TEST FOR "NEW LAW," *CUNNINGHAM* MAY BE ASSERTED ON HABEAS CORPUS BECAUSE IT WAS A STRAIGHTFORWARD APPLICATION OF *BLAKELY*

For the most part, the parties address the issue within the context of *Teague v. Lane*, *supra*, 489 U.S. 288. Respondent's brief does note that the states may choose to give broader retroactive relief than federal courts may offer. (ABM, at p. 12, citing *People v. Johnson* (1970) 3 Cal.3d 404, 415.) It argues, alternatively, that habeas corpus would be unavailable under *Linkletter v. Walker* (1965) 381 U.S. 618 [85 S.Ct. 1731, 14 L.Ed.2d 601], as well as *Teague*. (ABM, at pp. 25-26.)

After the parties' briefing was completed, the United States Supreme Court held in *Danforth v. Minnesota*, *supra*, ___U.S.___ [2008 U.S. Lexis 2012, 76 U.S.L.W. 4069] that state courts are not bound by the limitations on federal habeas corpus and may offer broader habeas corpus remedies than would be available under *Teague* (or, for that matter, *Linkletter*).

This part, II, of amicus curiae's brief assumes without conceding that California would apply the principles of *Teague* in determining the availability of state habeas corpus to assert *Blakely* rights, even though it is not bound to do so. It takes the position that, even on its own terms, *Teague*

does not foreclose habeas corpus in this situation because *Cunningham* is not new law. Part III urges that, regardless of *Teague* constraints on federal habeas corpus, California should grant collateral relief in cases such as this.

A. *Teague* Restrictions Do Not Apply When the Law Is Unchanged

Under the retroactivity principles of *Teague v. Lane*, *supra*, 489 U.S. 288, for purposes of federal habeas corpus, a prisoner attacking a state conviction may assert a decision announcing a new procedural rule only if the petitioner's case was not yet final on appellate review at the time of the new decision.[2] A new decision cannot be the basis for federal collateral relief in cases final before it was issued.

Teague was concerned with protecting a settled judgment, entered in reliance on a particular constitutional rule, against a change in the rule announced after it became final. As it explained: "'[S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.'" (*Teague v. Lane*, *supra*, 489 U.S. at p. 310.)

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[2]Exceptions are fundamental "watershed" principles or interpretations of substantive law

Teague's restrictions come into play only, however, when the new decision *changes* the law. A retroactivity issue does not even arise when a recent case is not changing the law but is elucidating that law and applying it to a new situation. (E.g., *Stringer v. Black* (1992) 503 U.S. 222 [112 S.Ct. 1130, 117 L.Ed.2d 367], qualified on another point in *Brown v. Sanders* (2006) 546 U.S. 212 [126 S.Ct. 884, 163 L.Ed.2d 723]; *Yates v. Aiken* (1988) 484 U.S. 211, 216-217 [108 S.Ct. 534, 98 L.Ed.2d 546]; see *Saffle v. Parks* (1990) 494 U.S. 484, 489-491 [110 S.Ct. 1257, 108 L.Ed.2d 415].) *Teague* does not deprive defendants of habeas corpus as a vehicle for asserting rights that explicitly existed before a judgment became final. Such rights do not go away merely because determination of their applicability is a difficult process, requiring both considerable time and debate among jurists.

In *United States v. Johnson* (1982) 457 U.S. 537, 549 [102 S.Ct. 2579, 73 L.Ed.2d 202], the court noted that retroactivity is a non-issue when a case merely applies established law to a new situation:

> [W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

Respondent's efforts to dismiss *Johnson* on the ground its "retroactivity analysis was supplanted by *Teague*" (ABM, at p. 20) are misplaced. *Johnson*'s retroactivity analysis as to changes in the law was indeed superseded by *Griffith v. Kentucky* (1987) 479 U.S. 314 [107 S.Ct. 708, 93 L.Ed.2d 649] and *Teague v. Lane*, *supra*, 489 U.S. 288. But petitioner is not seeking to apply that analysis. Petitioner is citing *Johnson* for the principle that no question of retroactivity even comes up in cases that do not change the law but are merely following existent law. (OBM, at p. 10.) That principle is fully consistent with *Teague*, which presupposes a change.

This court likewise explained in *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 36-37:

> In determining whether a decision should be given retroactive effect, the California courts undertake first a threshold inquiry, inquiring whether the decision established new standards or a new rule of law. If it does not establish a new rule or standards, but only elucidates and enforces prior law, no question of retroactivity arises.

If a new case is merely applying precedent, it is the precedent, not the new case, that is the relevant benchmark for purposes of retroactivity analysis. In the present case, Gomez and amicus curiae argue, that precedent is at the least *Blakely*,[3] which was decided before Gomez's case

[3]Although for simplicity this brief uses *Blakely* as the controlling precedent, *Cunningham* also referred repeatedly to the earlier decision in

became final and therefore is available to him and similarly situated defendants on habeas corpus. Applying *Cunningham* is merely applying *Blakely*, not discovering a "new constitutional command[]" (*Teague v. Lane*, *supra*, 489 U.S. at p. 310), unforeseeable when these cases became final.

B. Under the Correct Test – Whether the Result in the More Recent Case Was Compelled by Precedent – *Cunningham* Did Not Create New Law, but Merely Reaffirmed and Applied *Blakely*.

1. If a later case is based on the same specific legal principles as the precedent and does not purport to modify or extend those principles in any meaningful way, the case does not create new law.

A case does not announce a new rule if it has "'simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" (*Yates v. Aiken*, *supra*, 484 U.S. 211, 216, quoting dis. opn. of Harlan, J., in *Desist v. United States* (1969) 394 U.S. 244, 263 [89 S.Ct.1030, 22 L.Ed.2d 248], whose reasoning was adopted in both *Teague*

Apprendi v. New Jersey (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed 2d 435], as well as *United States v. Booker* (2005) 543 U.S. 220 [160 L.Ed.2d 621, 125 S.Ct. 738]. This brief does not address the question of retroactivity to cases final before *Blakely*.

v. Lane, *supra*, 489 U.S. 288 and *Griffith v. Kentucky*, *supra*, 479 U.S. 314.)

This court has put it similarly, in *Donaldson v. Superior Court*, *supra*, 35 Cal.3d 24, 36: a decision does not establish new law if it "only elucidates and enforces prior law." (See also *Wright v. West* (1992) 505 U.S. 277, 304, conc. opn. of O'Connor, J. [112 S.Ct. 2482, 120 L.Ed.2d 225] [case is not "new" if "it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law," internal quotation marks omitted].)

The definition of "new law" may be contrasted: "In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." (*Teague v. Lane*, *supra*, 489 U.S. 288, 301.)

2. *Cunningham* explicitly was applying *Blakely* to the DSL and neither created nor even alluded to any new principles of law.

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* and referring to "this Court's decisions," "our precedents," and the like, the court made clear the result was foreordained by earlier cases. It noted: "As this Court's decisions instruct," the Constitution prohibits a sentencing scheme, like the DSL, that allows judicial fact-finding to elevate a sentence. (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 860.) The court had said so "repeatedly." (*Id*. at pp. 863-864.) The court could find no room for doubt: *Apprendi* established a "bright-line rule," and "[t]hat should be the end of the matter." (*Id.* at p. 868.)

Rejecting the reasoning of *Black I* that the DSL did not violate *Blakely* because it gave ample discretion to 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." (*Cunningham*, *supra*, 127 S.Ct. at p. 869.) As to *Black I*'s observations that the DSL reduced the penalties for most crimes over the previous indeterminate sentencing 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 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").

(*Ibid*., italics original) Fact-finding of the sort required under the DSL, "our decisions make plain," requires a jury finding beyond a reasonable doubt. (*Id.* at p. 870.)

The fundamental holding of *Cunningham* was that there were no relevant legal differences between the Washington sentencing system invalidated in *Blakely* and the California DSL. Justice Kennard's dissenting opinion in *Black I*, vindicated in *Cunningham*, made that point explicitly in addressing the majority's efforts to distinguish *Blakely*:

> • In both, the sentencing court could base an upper term sentence on any aggravating factor it judged significant.
>
> • In both, the aggravating factors had to be "reasonably related to the decision being made."
>
> • In neither did the adoption of the sentencing law significantly increase the length of potential sentences for most crimes.
>
> • The fact California law required *some* sentence-increasing factors to be found by a jury beyond a reasonable doubt (e.g., enhancements), did not save it from *Blakely* error. Like Washington's law, the DSL permitted other factors to increase the sentence without such a finding (e.g., aggravating factors).
>
> • While Washington's, but not California's, law required aggravating facts to be justified by "substantial and compelling

> reasons," such a difference could not save either from the defect that they allowed increasing a sentence on the basis of facts not found by a jury beyond a reasonable doubt (indeed, Washington's standard was *more* protective of defendants than California's).

(*People v. Black*, *supra*, 35 Cal.4th 1238, 1271-1272, dis. opn. of Kennard, J.) These essential features make the DSL and the Washington system "closely analogous," indeed, legally indistinguishable. (See *Desist v. United States*, *supra*, 394 U.S. 244, 263, dis. opn. of Harlan, J. [application of established law to "closely analogous" situation does not create new law]; see also *Smith v. Robbins* (2000) 528 U.S. 259, 302 [120 S.Ct. 746, 145 L.Ed.2d 756], dis. opn. of Souter, J. [*Teague* did not bar petitioner's claim: "Once general rules are announced they do not become 'new' again with every particular violation that may subsequently occur"].[4])

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. One cannot identify a single legal principle in *Cunningham* that was not already explicit in *Blakely*. It did not "break[] new ground or impose[] a new obligation on the States." (*Teague*

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[4]The *Smith* dissent's disagreement with the majority was not on this point. The majority did not discuss the *Teague* objection raised by the respondent.

v. Lane, *supra*, 489 U.S. 288, 301.) It did not "discover . . . new constitutional commands." (*Id*. at p. 310.) Indeed, it found "no room" for doubt as to the outcome under *Blakely*'s *Apprendi*-based "bright line rule." *Cunningham* need not have said in so many words that it was not establishing "new law": its analysis and reasoning speak for themselves.

The bottom line is this: If a California petitioner with a case final after *Blakely* and an upper term entered in violation of that case were to seek habeas corpus solely under *Blakely*, the right to relief would be undeniable.[5] Every legal principle on which the petitioner would rely could expressly be found in *Blakely*.

3. *Cunningham* squarely belongs with cases held not to establish new law and indeed is among the easiest to identify as based solely on precedent.

Cunningham is more self-evidently a direct application of precedent than many United States Supreme Court cases finding no new law. These cases stress that the new decision need not be identical to a precedent – a "spotted calf" – in order to be dictated by it.

Yates v. Aiken, *supra*, 484 U.S. 211, for example, found *Francis v. Franklin* (1985) 471 U.S. 307 [105 S.Ct. 1965, 85 L.Ed.2d 344] was

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[5]Gomez, in fact, makes that very argument – that *Blakely* alone warrants relief. (OBM 8-9, 21.)

dictated by *Sandstrom v. Montana* (1979) 442 U.S. 510, 515 [99 S.Ct. 2450, 61 L.Ed.2d 39]. The *Francis* jury was told: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." Over four dissents, the *Francis* court held that "[t]hese words carry precisely the message of the language condemned in *Sandstrom*," namely, "The law presumes that a person intends the ordinary consequences of his voluntary acts." (*Francis v. Franklin*, *supra*, 471 U.S. at p. 316.)

Respondent misguidedly suggests *Yates* was superseded by *Teague v. Lane*, *supra*, 489 U.S. 288. (ABM, p. 19.) As this brief pointed out in discussing the same fallacy in respondent's efforts to distinguish *United States v. Johnson*, *supra*, 457 U.S. 537, 549 (part II-A, *ante*), *Teague* altered the retroactive applicability of *new* procedural rules; its restrictive principles presuppose a change in the law. If that precondition is not met, *Teague* is irrelevant: it does not negate the self-evident principle, found applicable in *Yates*, that cases are governed by the law already in existence when they are decided. *Teague* cited *Yates* with approval (*Teague*, 489

U.S. at p. 307), and *Yates* is valid law today as an application of existing law.

Another example is *Stringer v. Black*, *supra*, 503 U.S. 222. In that case the petitioner's Mississippi appeal became final in 1985. On habeas corpus he relied on a decision made five years later in *Clemons v. Mississippi* (1990) 494 U.S. 738 [110 S.Ct. 1441, 108 L.Ed.2d 725], which applied *Godfrey v. Georgia* (1980) 446 U.S. 420 [100 S.Ct. 1759, 64 L.Ed.2d 398] to the Mississippi sentencing scheme.

Godfrey had found an aggravating factor (the crime was "outrageously or wantonly vile, horrible and inhuman") impermissibly vague for imposing the death penalty. Under Georgia's "threshold eligibility" sentencing system, that factor served to make the defendant eligible for the death penalty, but thereafter had no specific function. *Clemons* involved Mississippi's "weighing" system, which required the jury to weigh aggravating against mitigating factors. Clemons' jury found one *Godfrey*-violative factor and one valid aggravating factor. The Supreme Court held that, unlike the "threshold eligibility" system, in a "weighing system" the mere existence of a single valid factor was inadequate to uphold the sentence; the state appellate court must reweigh the factors on the basis of valid factors alone or engage in a harmless error

analysis. (*Clemons v. Mississippi*, *supra*, 494 U.S. at pp. 751-754; see also *People v. Bacigalupo* (1993) 6 Cal.4th 457, 472-473.)

Although the state in *Stringer* argued *Clemons* was new law because of the differences between the Georgia and Mississippi statutes, the court found that case was directly dictated by *Godfrey* and thus could be used on habeas corpus:

> We acknowledge there are differences in the use of aggravating factors under the Mississippi capital sentencing system and their use in the Georgia system in *Godfrey*. In our view, however, those differences could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final.

(*Stringer*, at p. 229.)[6]

Penry v. Lynaugh (1989) 492 U.S. 302, 318-319 [109 S.Ct. 2934, 106 L.Ed.2d 256], abrogated on other grounds in *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335], the petitioner argued that Texas law unconstitutionally restricted the ability of the trier to consider mitigating evidence and required supplemental jury instructions. If the ruling sought would be new law, under *Teague* the issue would not be

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[6]In *Stringer* the petitioner also relied on *Maynard v. Cartwright* (1988) 486 U.S. 356 [108 S.Ct. 1853, 100 L.Ed.2d 372], which found infirm a Oklahoma statutory factor, "especially heinous, atrocious, or cruel." The state "wise[ly]" conceded *Maynard* did not "break new ground." (*Stringer v. Black*, *supra*, 503 U.S. at pp. 228-229.)

cognizable on habeas corpus. The court determined it would not be new law, because the outcome was controlled by *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S. Ct. 2954, 57 L.Ed.2d 973] and *Eddings v. Oklahoma* (1982) 455 U.S. 104 [102 S.Ct. 869, 71 L.Ed.2d 1], which held that in a capital case the law may not prevent the sentencing authority from considering certain kinds of mitigating factors.[7]

Lee v. Missouri (1979) 439 U.S. 461 [99 S.Ct. 710, 58 L.Ed.2d 736], per curiam, found the court's decision in *Duren v. Missouri* (1979) 439 U.S. 357 [99 S.Ct. 664, 58 L.Ed.2d 579], invalidating a system that gave women an exemption from jury service on request, to be compelled by *Taylor v. Louisiana* (1975) 419 U.S. 522 [95 S.Ct. 692, 42 L.Ed.2d 690], invalidating a system excluding women from service except on request.

In a per curiam order, *Truesdale v. Aiken* (1987) 480 U.S. 527 [107 S.Ct. 1394, 94 L.Ed.2d 539] required the state to apply *Skipper v. South Carolina* (1986) 476 U.S. 1 [106 S.Ct. 1669, 90 L.Ed.2d 1] to cases final before *Skipper* was decided. *Skipper* concluded the exclusion of evidence of the defendant's good behavior in jail, in response to the prosecutor's

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[7]A second issue raise in *Penry* – the constitutionality of executing a mentally retarded person would be new law, but could be considered on habeas corpus under *Teague* because it came within the "substantive law" exception.

argument he would be a danger if imprisoned, violated his right to present mitigating facts. *Truesdale*'s implicit holding, more fully elucidated by the dissent, was that *Skipper* was merely a straightforward application of *Lockett v. Ohio*, *supra*, 438 U.S. 586, which held invalid a statute that did not permit the sentencing judge to consider certain mitigating factors.

Cunningham is at least as self-evidently a direct application of precedent as the cases cited above and is arguably far more so. For example, the instruction in *Francis* was arguably less problematic than that in *Sandstrom*, notably because it said the presumption was rebuttable; *Yates* nevertheless found it governed by that case. Similarly, *Clemons* involved a system weighing aggravating against mitigating factors, whereas *Godfrey* dealt with a quite different "threshold eligibility" system; yet *Stringer* found *Godfrey* controlling. Although the jury "exemption on request" system invalidated in *Duren* was less likely to exclude women than that in *Taylor*, which exempted women altogether unless they proactively requested to serve, *Lee* held *Duren* retroactive. *Penry* held the rule sought – supplemental jury instructions on mitigating evidence – was compelled by *Lockett v. Ohio*, *supra*, 438 U.S. 586 and *Eddings v. Oklahoma, supra*, 455 U.S. 104, although those precedents had addressed different issues – legal limitations on the kinds of mitigation the sentencing judge is permitted to

consider. *Truesdale* found the decision in *Skipper* (exclusion of evidence of good behavior in jail), like that in *Penry*, was also likewise dictated by *Lockett* and *Eddings*.

All of these other cases to some extent stretched the boundaries of the precedent, applying it to distinct situations that conceivably could have been found legally distinguishable but were not. *Cunningham* did no stretching at all. As argued above, one can find no meaningful differences between the California's DSL and the Washington system invalidated in *Blakely*. Both required a standard range sentence in the absence of findings in aggravation and permitted those findings to be made by a judge instead of a jury, by a preponderance of the evidence instead of beyond a reasonable doubt. In both it was this feature – not incidental details – that the court held violated *Apprendi.*

4. *Cunningham* is unlike "new law" cases that contradict or significantly extend precedent, or are based on it only at a high level of generality.

The cases cited above, finding a recent decision merely applied precedent, may be contrasted with others concluding a recent decision announced new law.

In some, the new case directly overruled precedent. For example, *Whorton v. Bockting* (2007) ___ U.S. ___ [127 S.Ct. 1173, 1181, 167

L.Ed.2d 1] held *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] could not be asserted on habeas corpus in cases final before it was decided because it was "flatly inconsistent with the prior governing precedent," which it overruled. Similarly, *Schriro v. Summerlin* (2004) 542 U.S. 348, 351 [124 S.Ct. 2519, 159 L.Ed.2d 442], found *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], applying *Apprendi* to the selection of the death penalty, was new because it "specifically overruled" a precedent.

Unlike *Crawford* and *Ring*, *Cunningham* did not part company with any previous rulings but emphatically reasserted them and insisted they be applied.

In some cases the recent decision did not purport to be applying precedent. *Lambrix v. Singletary* (1997) 520 U.S. 518 [117 S.Ct. 1517, 137 L.Ed.2d 771] held that *Espinosa v. Florida* (1992) 505 U.S. 1079 [112 S.Ct. 2926, 120 L.Ed.2d 854] announced a new rule, noting *Espinosa* "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." (*Lambrix*, at p. 529.)

Unlike *Espinosa*, *Cunningham* included multiple citations to *Apprendi-Blakely* undiminished by "cf." or other signals.

Beyond these relatively clear-cut situations, the line is fuzzier, requiring the court to determine whether a recent decision was dictated by precedent or was based on it only at a high level of generality or abstraction and extended it to conceptually distinguishable areas.

For example, *O'Dell v. Netherland* (1997) 521 U.S. 151 [117 S.Ct. 1969, 138 L.Ed.2d 351] determined *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S.Ct. 2187, 129 L.Ed.2d 133], which held that a capital defendant must be permitted to inform the sentencing jury he is parole-ineligible if the prosecution argues he could pose a future danger, was not compelled by earlier cases. One of those, *Gardner v. Florida* (1977) 430 U.S. 349 [97 S.Ct. 1197, 51 L.Ed.2d 393] prohibited a death sentence based in part on undisclosed information on the defendant's character. The other, *Skipper v. South Carolina*, *supra*, 476 U.S. 1, discussed above, dealt with evidence of good behavior in jail. *O'Dell* noted there is an important distinction between evidence about the <u>individual defendant</u>, as in *Gardner* and *Skipper*, and evidence about the <u>law</u>, as in *Simmons*, especially in light of the uncertain legal terrain on evidence about

legal consequences.[8] (*O'Dell*, at pp. 162-165; see also *Graham v. Collins* (1993) 506 U.S. 461 [113 S.Ct. 892, 122 L.Ed. 2d 260] [claim in habeas corpus proceeding that Texas law prevented jury from giving full effect to mitigating evidence was barred by *Teague*, because resolving it would require new law].)

Another example is *Sawyer v. Smith* (1990) 497 U.S. 227 [110 S.Ct. 2822, 111 L.Ed.2d 193]. *Sawyer* found to be new law the rule of *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, which held the prosecution may not suggest the jury itself would not determine whether the defendant would die, because the state Supreme Court would review the judgment. Prior Eighth Amendment jurisprudence on reliability in capital sentencing gave "general support" to *Caldwell* but did not compel its conclusion: "[T]he test would be meaningless if applied at this level of generality." (*Sawyer*, at p. 236.)

Similarly, *Butler v. McKellar* (1990) 494 U.S. 407, 415 [110 S.Ct. 1212, 108 L.Ed.2d 347] held that *Arizona v. Roberson* (1988) 486 U.S. 675

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[8]See, e.g., compare *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171] (upholding instruction that life without parole sentence could be commuted), with *Caldwell v. Mississippi* (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231] (state may not leave jury with impression that death sentence was not final because it would be extensively reviewed).

[108 S.Ct. 2093, 100 L.Ed.2d 704] was not a mere application of precedent on the resumption of interrogation after an invocation of constitutional rights, but rather involved a conceptually different question – interrogation on an unrelated case.

Saffle v. Parks, *supra*, 494 U.S. 484 declined to consider on habeas corpus an issue whether jurors may be instructed not to base its sentence on sympathy for the defendant. It held such an rule would be new law, not dictated by the precedents of *Lockett v. Ohio*, *supra*, 438 U.S. 586 and *Eddings v. Oklahoma*, *supra*, 455 U.S. 104. The court noted: "There is a 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." (*Id*. at p. 490.)

The differences between these cases and *Cunningham* are apparent. Unlike *O'Dell*, *Caldwell*, *Roberson*, and *Saffle*, it did not require extension of precedents to related but logically distinct areas, nor did it find support in *Blakely* et al. only at a high level of abstraction or generality; rather, it applied their "bright line rule" directly to a sentencing system the court found indistinguishable from Washington's. *Cunningham*'s 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.

Applying *Cunningham* on habeas corpus to cases that became final after *Blakely* would not frustrate California's interests in finality of judgments. *Cunningham* did not "'discover . . . new constitutional commands'" (*Teague v. Lane*, *supra*, 489 U.S. at p. 310), of which California had no notice when it decided cases that became final after *Blakely*. It merely determined *Black I* had erred in interpreting *Blakely*.

C. Disagreement Among Jurists on the Outcome of a Case Does Not Necessarily Make It a New Rule of Law.

The relationship between precedent and cases applying it is not altered, logically, just because judges have disagreed on the matter. Disagreement proves that legal judgments applying precedent can be quite difficult – indeed, if they were always obvious, we would not need appellate courts to elucidate the law. It does not in and of itself convert the application into "new" law. The existence of disagreement may *suggest* new law and may be used as a starting point for inquiry into that question,

or as corroboration of a conclusion that a case announced new law, but it is not the ultimate test.

The Court of Appeal's show-of-hands test, equating disagreement with newness, not only focuses on tangential matters, but 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. Indeed, respondent attempts to parlay the very grant of certiorari in *Cunningham* into evidence that the Supreme Court considered that case to be new law. (ABM, at p. 15.) But the decisions of the Supreme Court itself disprove the theory, as shown below.

The disagreement test commingles cases finding "new" law with those making "difficult" judgment calls on existing law. The Supreme Court must do both: it not only moves the law forward to new areas, but also interprets existing law. Disagreement is surely evidence of difficulty; it says little about the relationship of a case with its predecessors.

1. A number of cases have been held not to establish new law despite disagreement among courts as to their outcome

In *Stringer v. Black*, *supra*, 503 U.S. 222, discussed above, the state contended *Clemons v. Mississippi*, *supra*, 494 U.S. 738 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; the state court and the federal district court and Court of Appeals had ruled against Stringer; the Fifth Circuit had reached the opposite conclusion from *Clemons* in other precedents.

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 v. Georgia*, *supra*, 446 U.S. 420 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.) Dismissing the state's reliance on the Fifth Circuit cases as proof 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."[9] (*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 the Court of Appeal 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.

Other United States Supreme Court decisions have found a later case dictated by precedent even when that case was hardly free from disagreement. *Yates v. Aiken*, *supra*, 484 U.S. 211, for example, held that *Francis v. Franklin*, *supra*, 471 U.S. 307 was a mere application of prior law, despite the fact *Francis* was a 5-4 decision and the state and federal district courts had ruled against Francis.

There were four dissenters in *Penry v. Lynaugh*, *supra*, 492 U.S. 302. They disagreed with the majority on the need for supplemental

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[9]*Cunningham* expressed a similar assessment of *Black I*'s conclusion that *Apprendi* and *Blakely* do not establish a "bright line." (*Cunningham v. California*, *supra*, 127 S.Ct. 856, 869.)

instructions on mitigating factors and with its conclusion that the outcome that the rule sought in that case was dictated by *Lockett v. Ohio*, *supra*, 438 U.S. 586 and *Eddings v. Oklahoma*, *supra*, 455 U.S. 104.

Similarly, *Truesdale v. Aiken*, *supra*, 480 U.S. 527 ordered *Skipper v. South Carolina*, *supra*, 476 U.S. 1 to be applied retroactively, even though four justices in *Skipper* had concluded the result in that case was "'not required by our decisions in *Lockett* and *Eddings* . . . .'" And *Lee v. Missouri*, *supra*, found *Duren v. Missouri*, *supra*, retroactive, even though there was a dissent in *Duren*.

An analogous situation 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" law that the Texas death penalty law required supplemental jury instructions on mitigating evidence at the time of the state court's decision. (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. Despite 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.)

Respondent argues *Abdul-Kabir* is inapplicable because it is not an application of *Teague* retroactivity principles. Amicus curiae agrees that *Abdul-Kabir* was interpreting AEDPA's condition that federal law be "clearly established"[10] and thus provides only analogous support, not direct authority, for the proposition that disagreement does not per se make a rule "new" within the meaning of *Teague*.

Nevertheless, "old law" under *Teague* and "clearly established law" under AEDPA are related concepts. Decisions in one of those areas can be instructive in analyzing the other. (E.g., *Williams v. Taylor* (2000) 529 U.S. 362, 412 [120 S.Ct. 1495, 146 L.Ed.2d 389] ["whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law . . .' under § 2254(d)(1)"]; see also *Abdul-Kabir v. Quarterman*, *supra*, 127 S.Ct. at pp. 1665, fn. 10, 1670 [discussing *Teague* cases]; *Smith v. Robbins*, *supra*, 528 U.S. 259, 302, dis. opn. of Souter, J. [when

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[10]Section 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act of 1996, at Title 28 United States Code section 2241 et seq., provides that federal habeas corpus relief is available to a state prisoner attacking a conviction only if the state decision was "contrary to, or involved an unreasonable application of, *clearly established Federal law*, as determined by the Supreme Court of the United States." (Emphasis added.)

applicable standards have already been articulated, habeas corpus petitioner is not seeking "new" rule; "the same point, of course, would answer any objection under the AEDPA . . .'"][11]; *Schardt v. Payne* (9th Cir. 2005) 414 F.3d 1025, 1036-1037 [stating inverse of *Williams v. Taylor*: "if a case creates a new rule under *Teague*, then it is not a clearly established rule under 28 U.S.C. § 2254(d)(1)"]; *Vasquez v. Strack* (2d Cir. 2000) 228 F.3d 143, 149-150 [same conclusion as *Schardt*; noting *Teague* establishes "some guidance" as to whether rule is clearly established].)

2. The disagreement among jurists test is a secondary adjunct to, and not a substitute for, the essential test – whether the earlier decision dictated the result in the later one.

It is true that some decisions of the United States Supreme Court have invoked variations of the "reasonable jurists could have differed" terminology and alluded to the fact of disagreement among jurists in determining whether a recent decision stated new law or merely applied precedent. (E.g., *Beard v. Banks* (2004) 542 U.S. 406, 415 [124 S.Ct. 2504, 159 L.Ed.2d 494] ["there is no need to guess" as to susceptibility of debate among reasonable jurists, citing dissents in earlier cases]; *O'Dell v. Netherland*, *supra*, 521 U.S. 151, 159-160 [noting "array of views"

[11]The dissent's disagreement with the majority was not on this point. The majority did not discuss *Teague* or AEDPA requirements.

expressed in more recent case]; *Sawyer v. Smith*, *supra*, 4.97 U.S. 227, 159-160 [pointing to dissents in more recent case, *Simmons v. South Carolina*, *supra*, 512 U.S. 154]; *Butler v. McKellar*, *supra*, 494 U.S. 407, 415 [noting "differing positions taken by the judges" of lower courts].)

All of these decisions, however, used that terminology and analysis in the much larger context of evaluating whether there were material differences between the more recent decision and the precedent, and assaying the legal landscape at the time of the more recent one. None of them held differences of view could be the *sole* basis for finding the more recent decision new. *Beard v. Banks*, *supra*, 542 U.S. 406, 414, for example, noted that the newer cases[12] introduced an "innovation," extending the general *Lockett -Eddings*[13] principle against laws prohibiting the consideration of mitigating evidence to a law prohibiting consideration of mitigating facts that were not found unanimously. As discussed in part II-B-4, *ante*, *O'Dell*, *Sawyer*, and *Butler* likewise engaged in an extended analysis of current law, including decisions that might have pointed to a contrary conclusion, at the time of the more recent decision and noted

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[12]*McKoy v. North Carolina* (1990) 494 U.S. 433 [110 S.Ct. 1227, 108 L.Ed.2d 369] and *Mills v. Maryland* (1988) 486 U.S. 367 [108 S.Ct. 1860, 100 L.Ed.2d 384].

[13]*Eddings v. Oklahoma*, *supra*, 455 U.S. 104 and *Lockett v. Ohio*, *supra*, 438 U.S. 586.

specific difference in legal principles between that case and the precedent supporting it. None mentioned the "disagreement" point other than briefly, and none adopted the approach of the Court of Appeal and respondent in the present case, reasoning simply: "There were different opinions among judges. Case closed."

A reasonable jurist test can be "misleading," as the court pointed out in *Williams v. Taylor*, *supra*, 529 U.S. 362, 409. The proper focus is on the objective question of *reasonableness* – whether the later case is properly and materially distinguishable from the older one. It should not be turned into a subjective one – what judges have in fact found. (*Id*. at pp. 409-410.) Like the innumerable other "reasonable __ " tests in the law (reasonable person, jury, trial court, etc.), the reasonable jurist is a hypothetical figure, an abstract way of stating a legal test. It is not a poll among actual judges.[14]

Justice O'Connor's concurring opinion in *Wright v. West*, *supra*, 505 U.S. 277, 304, explained:

> To determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be

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[14]It is assuredly not a matter of determining the personal "reasonableness" of individual judges or courts. The court in *Stringer v. Black*, *supra*, 503 U.S. 222, 237, was not casting aspersions on the Fifth Circuit judges when it said they made "a serious mistake" in interpreting precedent; it was stating an objective legal conclusion that a different result was compelled by the precedent.

> meaningfully distinguished from that established by binding precedent at the time his state court conviction became final. . . . 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. *Stringer v. Black*, 503 U.S. 222, 237 . . . . If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable.

(Emphasis added.) *Cunningham* expressly found the "proffered factual distinctions" in *Black I* did not change the force with which *Blakely* principles apply.

Fennen v. Nakayema (E.D. Cal. 2007) 494 F. Supp.2d 1148, cited by respondent for its holding that *Cunningham* stated new law (ABM, at pp. 2, 13, 16-17), is unpersuasive because it rested solely on the disagreement among jurists test. The court acknowledged *Blakely* was "a central underpinning" of *Cunningham*, but also pointed to *Black I* and the dissents in *Cunningham*, concluding: "In light of this array of authority on the opposite side of the *Cunningham* court, it cannot be said that the result in *Cunningham* was dictated by *Blakely*." (*Id*. at p. 1155.) The court identified no factual or legal distinctions whatever between the two cases.

Disagreement among jurists is not the principal test, much less a conclusive one, for what constitutes new law. At most it serves to provide some corroborating external evidence for an objective conclusion, based on legally material differences, that the more recent case states new law. It surely may not be invoked as the entire basis for denying a petitioner's rights under a directly applicable precedent such as *Blakely*.

Nevertheless, that is exactly how the Court of Appeal and respondent have used the disagreement test. Neither has identified a single principle in *Cunningham* that was not explicit in *Blakely* nor a single material distinction between the former DSL invalidated in *Cunningham* and the Washington system. invalidated in *Blakely*.

III.

PROVIDING A HABEAS CORPUS REMEDY FOR ASSERTING *BLAKELY* RIGHTS IS CONSISTENT WITH ESTABLISHED STATE PRACTICE AND SERVES THE INTERESTS OF BOTH FAIRNESS AND ECONOMY

As noted at the start of this brief, *Danforth v. Minnesota*, *supra*, ___U.S.___ [2008 U.S. Lexis 2012, 76 U.S.L.W. 4069] held that states are not bound to follow the constraints on federal habeas corpus availability set out in *Teague v. Lane*, *supra*, 489 U.S. 288 and are free to adopt broader remedies for state defendants. Part II argued that, even if *Teague* principles were applied in California, Gomez and other defendants in his position would be entitled to assert *Cunningham* on habeas corpus. This part, III, urges that California should, as a matter of fairness and sound policy, exercise its independent authority under *Danforth* to provide a habeas corpus remedy to those defendants.

A. California May and Does Fashion Its Own Retroactivity Rules and Habeas Corpus Remedies as Circumstances Dictate

Danforth reaffirmed that *Teague* is a prudential limitation on the power of federal courts to exercise habeas corpus jurisdiction to review state convictions, imposed by the United States Supreme Court in the

interest of comity.[15] The consideration of comity does not apply when a state is fashioning its own procedural remedies.

California has previously interpreted retroactivity principles independently of federal rules. For example, in *People v. Carrera* (1989) 49 Cal.3d 291, 327-328, involving the violation of a state statutory right, the court declined to follow the retroactivity holding of *Griffith v. Kentucky*, *supra*, 479 U.S. 314. This court has made some decisions prospective only, or applicable only to specified events occurring after the decision. (E.g., *Donaldson v. Superior Court, supra,* 35 Cal.3d 24, 39 [police conduct]; *People v. Engelman* (2002) 28 Cal.4th 436, 449, and *People v. Roberts* (1992) 2 Cal.4th 271, 314 [instructions]); *People v. Scott* (1994) 9 Cal.4th 331, 357-358, and *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [sentencing procedures].)

This court also has exercised the power to determine the scope of its own habeas corpus remedies independently of federal rules. (E.g., *In re Clark* (1993) 5 Cal.4th 750, 795-799 [standards for "successive" petitions do not precisely conform to federal ones].) It has especially been inclined to make habeas corpus widely available when the only relief asked is resentencing, not retrial. (*People v. Tenorio* (1970) 3 Cal.3d 89, 95, fn. 2

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[15]AEDPA imposed other restrictions, not relevant here.

[habeas corpus permitted to obtain benefit of holding on discretion to strike narcotics prior: "Inasmuch as today's decision relates only to sentencing and will not require any retrials, we have concluded that it should enjoy fully retroactive effect"]; see also *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530 fn. 13 (holding re discretion to strike priors is "fully retroactive"; habeas corpus available to obtain resentencing]; *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 [holding re fully consecutive sentences has "full retroactive effect"; "[w]here a court may have been influenced by an erroneous understanding of the scope of its sentencing powers, habeas corpus is a proper remedy to secure reconsideration of the sentence imposed"].)

Other states have likewise adopted retroactivity and habeas corpus policies outside of the federal structure. For example, in *Colwell v. State* (2002) 118 Nev. 807, 817- 818 [59 P.3d 463], the Nevada Supreme Court held: "*Teague* is not controlling on this court, other than in the minimum constitutional protections established by its two exceptions." It added: "This is a corollary of the elementary rule that 'States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.'" (*Id*. at p. 818, fn. 41, quoting *California v. Ramos*, *supra*, 463 U.S. 992, 1013-1014.) In *State v. Whitfield* (Mo. 2003) 107

S.W.3d 253, 267-268, the Missouri Supreme Court held it would apply *Ring v. Arizona*, *supra*, 536 U.S. 584, under the standards of *Linkletter v. Walker*, *supra*, 381 U.S. 618, rather than *Teague*. (See also *Cowell v. Leapley* (S.D.1990) 458 N.W.2d 514, 517-518; *State v. Lark* (1989) 117 N.J. 331, 334-335 [567 A.2d 197]; *Ex parte Coker* (Ala. 1990, modified 1991) 575 So. 2d 43, 52; *State v. Fair* (1972) 263 Or. 383 [502 P.2d 1150, 1152]; see Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief* (2004) 38 Valparaiso U. L.Rev. 421; Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies* (1995) 44 Ala. L.Rev. 421, 445-458.)

B. Considerations of Both Fairness and Economy Require Habeas Corpus Be Available to Post-*Blakely* Defendants Whose Cases Became Final Before *Cunningham* Was Resolved.

It must be kept in mind that the rights enunciated in *Blakely-Cunningham* predated both of those decisions, and all defendants sentenced under the DSL were entitled to them. As *Danforth* explained:

> [T]he source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the "retroactivity" of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.

(*Danforth v. Minnesota*, *supra*, ___U.S.___ [2008 U.S. Lexis 2012, [*13], 76 U.S.L.W. 4069].) The issue here is whether Gomez and other post-*Blakely* defendants are entitled to a remedy for their violation.

It is unnecessary here to resolve the full scope of the retroactivity-remedy issue to answer this question. At the very least California should offer a remedy to post-*Blakely* defendants. After that decision, the state was unequivocally on notice of the federal constitutional requirements in the context of upper term sentencing in the DSL. As *Cunningham* reiterated it: "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.' [*Apprendi v. New Jersey*, *supra*,] 530 U.S., at 490." (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 868.) The court then added, pointedly, "'[T]hat should be the end of the matter,' *Blakely*, 542 U.S., at 313." (*Ibid*.)

Once *Blakely* was issued, California was obligated to protect these right by restructuring its sentencing system and providing appellate remedies for violations. *Black I* misread *Blakely*, however, and, during its temporary detour away from the "bright line," withheld that protection. Defendants whose cases became final in the window between *Blakely* and

Cunningham should not lose rights they were explicitly entitled to before then, simply because it took time to correct *Black I*'s error.

This court has suggested it would protect the rights of defendants caught in that interval. In hundreds of pre-*Cunningham* cases, the court denied review with an order like this:[16]

> Petition for review denied without prejudice to any relief to which defendant might be entitled after the United States Supreme Court determines in *Cunningham v. California*, No. 05-6551, the effect of *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531] and *United States v. Booker* (2005) 543 U.S. 220 [160 L.Ed.2d 621, 125 S.Ct. 738], on California law.

The reasonable implication of such orders is that a grant of review to keep those cases alive on direct appeal was not necessary to protect a defendant's ability to assert *Blakely* rights. In other words, if the United States Supreme Court in *Cunningham* determined the DSL violates *Blakely*, California would afford a post-appeal procedural mechanism – habeas corpus – to obtain relief.

These orders served a practical function: conservation of judicial resources. The alternative (other than foreclosing state relief altogether and

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[16]Before the grant of certiorari in *Cunningham*, the court issued variations on that order, depending on the timing of the petition, which included the language "without prejudice to any relief to which defendant might be entitled . . . ."

forcing recourse to federal court) would have been for the court needlessly to clog its own docket with hundreds of grant-and-hold cases pending the final resolution of *Blakely*'s applicability to the DSL. At the conclusion of this process, the court would have had to re-review each case separately to fashion an appropriate remand order. After going back through the Court of Appeal, also consuming resources there, many cases ultimately would have ended up in the superior court for resentencing. This result could be achieved more efficiently by taking the cases out of the appellate process and permitting them to go directly to the superior court by means of habeas corpus for resentencing if *Cunningham* was resolved favorably to the defendant.

Doing so has served to keep numerous cases out of the judicial system altogether. After the decisions in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825, only a limited number of defendants will be entitled to any relief at all.[17] Counsel can pursue those cases by habeas corpus and screen out the others without ever going to court.

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[17]Potential petitioners must meet *Black II*'s interpretation of the DSL (a single valid factor in aggravation is sufficient to uphold an upper term) and its broad reading of the recidivist exception to *Blakely*. They also must overcome *Sandoval*'s restrictive harmless error test.

Denying review and withholding assurance of a post-appeal remedy would have forced pre-*Cunningham* defendants to pursue federal relief prematurely, because of AEDPA's one-year habeas corpus statute of limitations (28 U.S.C. § 2244(d)(1)) and the 90-day limit for certiorari (U.S. Supreme Ct. Rules, rule 13). It would have required wholesale filings in federal court before the process of settling the law was completed – a process that, foreseeably, would take several years.[18] Further, a number of these filings would have been resolved in a partial legal vacuum. They either would have had to be redone as the law evolved or, worse, would have become unreviewable even though wrong. Such a result would serve the interests of neither judicial efficiency nor justice. This court's approach of assuring a state remedy if *Cunningham* was favorably resolved was a far better solution.

Offering the remedy of habeas corpus to defendants sentenced in violation of *Blakely* would be consonant with California's long-standing policy. As a matter of judicial economy, comity, and fairness, California

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[18]Almost a year elapsed between *Blakely* (June 24, 2004) and this court's decision in *Black I* (June 20, 2005), another 10 months before the grant of certiorari in *Cunningham* (February 21, 2006), another 11 months before the decision in *Cunningham* (January 22, 2007), and still another seven months before this court's decisions in *People v. Black* (2007) 41 Cal.4th 799 and *People v. Sandoval* (2007) 41 Cal.4th 825 (July 19, 2007).

courts will normally accept state habeas corpus jurisdiction for the correction of federal constitutional errors; they will not require the defendant to resort to federal court. This court in *In re Spencer* (1965) 63 Cal.2d 400, 405-406, held that, whether or not the federal Constitution actually requires a state to offer a habeas corpus remedy, California will make it available once a federal right is established. It would be "pointless," *Spencer* noted, to refuse to correct an error for which the defendant would be entitled to federal relief. (*Ibid.*; see also *Sawyer v. Smith*, *supra*, 497 U.S. 227, 241 ["State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution"].)

Spencer expanded on its rationale:

> [T]he grant of state collateral relief in these circumstances accords with our traditional habeas corpus rules. This court normally affords collateral relief on constitutional grounds if the petitioner had no opportunity to raise the constitutional issue at trial and on appeal.

(*In re Spencer*, *supra*, 63 Cal.2d at p. 406.) Defendants whose cases became final before *Cunningham* are squarely within the logic of *Spencer*. They had "no opportunity" for relief at trial and on direct appeal because lower state courts were bound by *Black I* and this court was denying review in many cases with the order quoted above.

As a matter of federal constitutional law, post-*Blakely* defendants are entitled to the benefits of that decision. (*Griffith v. Kentucky*, *supra*, 479 U.S. 314, 328 [constitutional rule on "the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"]; cf. *People v. Carrera*, *supra*, 49 Cal.3d 291, 327 [California is not obliged to adopt *Griffith* standard when dealing with state law, distinguishing rules "binding on state . . . courts as a matter of federal constitutional law"].) These defendants did not lose that entitlement because California temporarily misconstrued *Blakely* and declined to apply it to the DSL when they still had an appellate remedy. This court should honor the reasonable expectation of relief for those whose cases became final while they were awaiting definitive resolution of the question, "Does the DSL system for selecting the upper term conform to *Blakely*?" That question has been answered, and California should now enforce those rights.

IV.

CONCLUSION

Even under restrictive principles of retroactivity, Gomez and other defendants whose cases were not yet final when *Blakely* was decided have a right to the benefits of that decision. They did not lose that right merely because their cases became final before the United States Supreme Court issued *Cunningham*. *Cunningham* did not announce any new law, but resolved the single issue before it: *Blakely* does indeed apply to the California Determinate Sentencing Law. Habeas corpus is necessary to assert these uncontested *Blakely* rights and, under long-standing California policy, should be made available in order to ensure the efficient and fair administration of justice.

For these reasons, amicus curiae Appellate Defenders, Inc., joins petitioner Sotero Gomez in seeking reversal of the Court of Appeal decision denying a writ of habeas corpus.

Respectfully submitted,

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