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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JALAL KHALID SAADE on Habeas Corpus.	G038712 (Super. Ct. No. M11225) O P I N I O N

Appeal from a judgment by the Superior Court of Orange County, Kazuharu Makino, Judge. Reversed with directions.

Tony Rackauckas, District Attorney, Matthew Lockhart, Deputy District Attorney, for Plaintiff and Appellant.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Respondent.

* * *

The trial court granted defendant Jalal Khalid Saade's petition for writ of habeas corpus, ruling that the decision of the United States Supreme Court in *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*) applied retroactively to defendant's aggravated term sentence for first degree burglary, even though defendant's sentence was final when *Cunningham* was decided.

We reverse the judgment, and reinstate defendant's original sentence. *Cunningham* does not apply retroactively to sentences for which all avenues of direct appeal have been exhausted. Our conclusion is not altered by the recent decision of the United States Supreme Court in *Danforth v. Minnesota* (2008) ___U.S. ___ [128 S.Ct. 1029] (*Danforth*), which held that states are free to give broader retroactive effect to new federal constitutional rules of criminal procedure than would otherwise be available under the high court's analysis in *Teague v. Lane* (1989) 489 U.S. 288 (*Teague*).

On collateral review, California courts have applied a federal test (most recently *Teague*) where the decision being analyzed for retroactivity was a United States Supreme Court decision based on a federal constitutional right. But where a state court decision founded on a state-based right is the subject of the retroactivity inquiry, California courts have applied the test first set forth in *In re Johnson* (1970) 3 Cal.3d 404, 410 (*Johnson*). We conclude the retroactivity analysis under either *Teague* or *Johnson* arrives at the same result: *Cunningham* is not retroactive. Thus, the permission granted by *Danforth*, allowing us to grant broader relief on habeas corpus by applying state law to determine the retroactivity of *Cunningham*, does not assist defendant's cause.

PROCEDURAL BACKGROUND

In July 2003, a jury convicted defendant of first degree burglary (Pen. Code §§ 459, 460, subd. (a)) and cutting a utility line (Pen. Code § 591). In August 2003, the trial court sentenced him to the aggravated term of six years in state prison. The upper

term was based on the court's finding that the manner in which defendant carried out the crime indicated planning and sophistication because defendant "had in his possession items to commit the offense including gloves, mask, flashlight, dark clothing, pepper spray, and items used in the security profession."

Defendant appealed, contending his sentence violated the Sixth and Fourteenth Amendments to the United States Constitution under the decisions of the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). In *Apprendi*, the Supreme Court held, "Other than the fact of 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*, at p. 490.) In *Blakely*, the United States Supreme Court held that "[t]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, at p. 303, italics omitted.)

On June 28, 2005, we affirmed defendant's conviction in an unpublished opinion. (*People v. Saade* (June 28, 2005, G032844) [nonpub. opn.].) We concluded defendant's sentence did not violate his Sixth Amendment jury trial right under *Blakely*. In doing so, we relied on *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), where the California Supreme Court held that "judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive term under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.)

On January 22, 2007, in *Cunningham*, *supra*, 549 U.S. 270, the United States Supreme Court overruled *Black I* and held that "California's determinate sentencing law (DSL) violates a defendant's federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution by assigning to the trial judge, rather than the jury, the authority to make the factual findings

that subject a defendant to the possibility of an upper term sentence." (*People v. Black* (2007) 41 Cal.4th 799, 805 (*Black II*).)

The following month, defendant filed a petition for writ of habeas corpus. Defendant argued his sentence violated his Sixth Amendment right under *Cunningham* because it was imposed based on facts found true by the sentencing judge rather than by a jury. The trial court agreed and concluded *Cunningham* applied retroactively to defendant's case. The court granted the petition, vacated defendant's sentence, and directed the sentencing judge "to conduct a new sentencing hearing in compliance with *Cunningham* . . . ."

We reverse the judgment and hold *Cunningham* does not apply retroactively to sentences for which all avenues of direct appeal had been exhausted before the *Cunningham* decision was issued. Defendant's conviction was final in November 2005, well before *Cunningham* was decided.[1]

DISCUSSION

The issue before us is whether the rule announced in *Cunningham* should apply retroactively to defendant's case.[2] Our review is de novo. (*In re Serrano* (1995) 10 Cal.4th 447, 457 [where the lower court rules on a petition for writ of habeas corpus without conducting an evidentiary hearing, the standard of review is de novo].)

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[1] "State convictions are final 'for purposes of [the] retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'" (*Beard v. Banks* (2004) 542 U.S. 406, 411 (*Beard*).) On August 31, 2005, the California Supreme Court denied defendant's petition for review. Defendant's time to file a petition for writ of certiorari expired on November 29, 2005. (U.S. Supreme Ct. Rules, rule 13.)

[2] This issue is currently before the California Supreme Court. (*In re Gomez*, review granted October 24, 2007, S155425.)

In *Teague, supra*, 489 U.S. 288, the United States Supreme Court held that, as a general rule, "new constitutional rules of criminal procedure" will not be applied retroactively to cases which were final "before the new rules are announced." (*Id.* at p. 310.) "Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review" requires the court to determine if "the rule is actually 'new.'" (*Beard, supra*, 542 U.S. at p. 411.) "[I]f the rule is new, the court must consider whether [the rule] falls within either of the two exceptions to nonretroactivity." (*Ibid.*) "A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a '"watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'" (*Whorton v. Bockting* (2007) ___ U.S. ___, ___ [127 S.Ct. 1173, 1180] (*Whorton*).)

Numerous courts — including the California Courts of Appeal — have applied the *Teague* analysis on collateral review to determine whether a new federal constitutional rule of criminal procedure applies retroactively. (See *In re Moore* (2005) 133 Cal.App.4th 68, 75-76 [applying *Teague* analysis to determine whether *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) would be given retroactive effect]; *In re Consiglio* (2005) 128 Cal.App.4th 511, 514 [citing *Schriro v. Summerlin* (2004) 542 U.S. 348, 351 (*Schriro*), which relied on *Teague*, in deciding whether *Blakely*, *supra*, 542 U.S. 296 would be given retroactive effect]; see also 4 Witkin & Epstein, Cal. Criminal Law (3d. ed. 2000) Introduction to Criminal Procedure § 11, p. 18 [collecting federal cases].) And the parties briefed the issue using the *Teague* analysis.

But at oral argument, defendant brought to our attention *Danforth, supra*, 128 S.Ct. 1029, a case decided by the United States Supreme Court a few days earlier. In *Danforth*, a jury convicted the defendant of criminal sexual conduct with a minor. (*Id.* at p. 1033.) At trial, the minor did not testify; instead, the jury watched a videotaped interview with the child. (*Ibid.*) After defendant's conviction became final, the United

States Supreme Court decided *Crawford*, *supra*, 541 U.S. 36, which announced a "'new rule' for evaluating the reliability of testimonial statements in criminal cases." (*Danforth,* p. 1033.) Defendant then filed a petition for writ of habeas corpus in the Minnesota state court, arguing that the admission of the videotape violated his Sixth Amendment right to confront witnesses against him as outlined in *Crawford*. The Minnesota trial court ruled *Crawford* would not be applied retroactively. On appeal, the Minnesota Supreme Court performed the *Teague* analysis and agreed with the trial court, concluding *Crawford* could not be retroactively applied to defendant's case. (*Danforth,* at pp. 1033-1034.) The court also determined it could not retroactively apply *Crawford* to a broader class of cases than the limited class permitted by *Teague*. (*Danforth,* at p. 1033.)

The United States Supreme Court reversed. It held that "the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on *federal* habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*." (*Danforth*, *supra*, 128 S.Ct. at p. 1042, italics added.) But *Danforth* did *not* hold that the *Teague* framework for determining retroactivity *cannot* be applied in state courts. *Danforth* merely clarified that *Teague* had "considered what constitutional violations may be remedied on federal habeas" but not "whether States can provide remedies for violations of these rights in their own postconviction proceedings." (*Danforth,* at p. 1038.) Thus, under *Danforth*, states are free either to adopt the *Teague* analysis as part of state law or to adopt a standard providing greater retroactive relief than available under *Teague*.

The California Supreme Court has neither expressly adopted nor expressly rejected the *Teague* analytical framework where the new rule of criminal procedure is based on the federal Constitution. Our high court has, however, suggested by negative implication that the United States Supreme Court's retroactivity analysis *would* apply where the new rule of criminal procedure is based on the federal Constitution. (*People v.*

Murtishaw (1989) 48 Cal.3d 1001, 1012-1013 (*Murtishaw*) [justifying departure from federal retroactivity standard for cases on direct review because the new rule was based on state law, not the federal Constitution or federal judicial supervisory power]; *People v. Carrera* (1989) 49 Cal.3d 291, 327 (*Carrera*) [same].) And, as noted above, California Courts of Appeal have utilized the *Teague* analysis to determine retroactivity of new federal constitutional rules of criminal procedure on collateral review.

Moreover, nearly 20 years before the United States Supreme Court's decision in *Teague*, the California Supreme Court adopted the then-extant United States Supreme Court standard for determining the retroactivity of a new rule based on the federal Constitution. In *Johnson, supra*, 3 Cal.3d 404, our high court considered whether a United States Supreme Court decision should be applied retroactively in a state habeas corpus proceeding. *Johnson* held that the retroactivity of a new rule "is to be determined by '"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."'" (*Id*. at p. 410.) The *Johnson* test was taken verbatim from *Desist v. United States* (1969) 394 U.S. 244, 249, a (now outdated) United States Supreme Court case governing when decisions should be applied retroactively on direct review, even though the issue in *Johnson* was raised in a state habeas corpus proceeding.[3] Perhaps significantly, the *Johnson* court adopted the federal retroactivity test even though, presaging *Danforth* by nearly 40 years, it recognized that "the states are free to give greater retroactive impact to a decision than the federal courts choose to give." (*Johnson*, at p. 415.)

Although the *Johnson* test was based on a United States Supreme Court decision which has since been superseded, California courts have uniformly applied the *Johnson* test on collateral review where the issue is the retroactivity of a new rule based

[3] *Desist* was superseded by *Griffith v. Kentucky* (1987) 479 U.S. 314.

on *state* decisional or statutory law.[4] (See *In re Joe R.* (1980) 27 Cal.3d 496, 510-511 (*Joe R.*) [applying *Johnson* test and concluding *In re Scott K.* (1979) 24 Cal.3d 395, 403-404 (*Scott K.*), where our Supreme Court held, under California's Constitution, that a father's consent could not justify a warrantless search of a locked toolbox in his minor son's bedroom, did not apply retroactively]; *In re Pratt* (1980) 112 Cal.App.3d 795, 860-861 (*Pratt*) [applying *Johnson* test and concluding *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751-752, where the California Supreme Court held that the right to counsel guaranteed by the California Constitution is violated when a state agent is present at a confidential attorney-client conference, did not apply retroactively].)

Thus, California courts have applied the *Johnson* test on collateral review to determine the retroactivity of a state-created right and applied *Teague* to determine the retroactivity of a right based on the federal Constitution. Our high court, however, has never held that *Johnson* is *not* an appropriate tool to determine whether a newly-

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[4] California courts also apply the *Johnson* test on direct review where the new rule is founded on state law. (See e.g., *People v. Alvas* (1990) 221 Cal.App.3d 1459, 1465-1466 (*Alvas*); *People v. Ruhl* (1985) 168 Cal.App.3d 311, 317-318 (*Ruhl*); *People v. Cantu* (1984) 161 Cal.App.3d 259, 267-269 (*Cantu*).) In *People v. Guerra* (1984) 37 Cal.3d 385, 413 and footnote 24 (*Guerra*), the California Supreme Court applied the *Johnson* test to determine whether the rule announced in *People v. Shirley* (1982) 31 Cal.3d 18, 66-67 (*Shirley*), applied to cases that were not yet final when *Shirley* was decided. On direct review, courts now refer to the test of retroactivity articulated in *Johnson* as "*Guerra*'s test of retroactivity." (See *People v. Hedgecock* (1990) 51 Cal.3d 395, 410, fn. 4; see also *People v. Walsh* (1996) 49 Cal.App.4th 1096, 1103; *People v. Lopez* (1993) 21 Cal.App.4th 225, 229.)

On direct review, where the new rule is based on the federal constitution, the *Griffith* test controls. "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." (*Griffith v. Kentucky*, *supra*, 479 U.S. at p. 328.) Where the new rule is based on state law, however, the California Supreme Court has declared the *Griffith* retroactivity standard not binding on direct review. (*Murtishaw*, *supra*, 48 Cal.3d at pp. 1012-1013.)

announced federal right applies retroactively. And *Danforth* allows us to apply California law to determine whether *Cunningham* should be given broader retroactive effect than would be available under *Teague*. Whether *Danforth* will cause our Supreme Court to depart from the *Teague* analysis currently utilized by the California Courts of Appeal when determining whether a new rule, based on a federal constitutional right, is retroactive on collateral review, is not yet known. Our high court may decide to adopt the *Teague* formulation as the law of California, much as it did in *Johnson*, where it adopted the then federal standard, even while recognizing it could, as a matter of state law, give broader relief on collateral review of final judgments. Or our Supreme Court may decide it prefers the *Johnson* formulation as a rule now well-embedded as part of our state law. Or it may ultimately adopt a rule that differs from both *Teague* and *Johnson*. We think it more likely, however, that the California Supreme Court will adopt either *Johnson* or *Teague* as the better or more appropriate rule, and not manufacture still a third rule. Accordingly, we analyze the retroactivity issue in defendant's case separately under both the *Johnson* and *Teague* formulations to determine (1) whether *Johnson* would provide retroactive relief not available under *Teague* and (2) whether under either *Johnson* or *Teague* defendant should obtain retroactive relief.

Under the Johnson Formulation, Cunningham Is Not Retroactive

Our first task under *Johnson* is to determine whether *Cunningham* announced a new rule. (*Johnson, supra,* 3 Cal.3d at p. 410; see also *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 36 (*Donaldson*).) This requires no nice distinction between direct and collateral review. California law on this threshold issue is to be found primarily in cases on direct review or not yet final. Under California law, a rule or decision is "new" if it involves a "'clear break with the past.'" (*Guerra, supra,* 37 Cal.3d at p. 401.) There is a "'clear break with the past'" only "when the decision (1) explicitly overrules a precedent of [the California Supreme Court] [citation], or (2) disapproves a

practice impliedly sanctioned by prior decisions of [the California Supreme Court] [citation], or (3) disapproves a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities [citation]." (*Ibid.*; see also *Donaldson, supra,* 35 Cal.3d at p. 37.)

Cunningham is unquestionably "new" for purposes of the *Johnson* retroactivity test because it "explicitly overrule[d]" *Black I*, "a precedent of [the California Supreme] court." (*Guerra, supra*, 37 Cal.3d at p. 401.) In no uncertain terms, *Cunningham* overruled *Black I* and held that California's determinate sentencing law violates a defendant's Sixth and Fourteenth Amendment right to a jury trial to the extent it allows a judge to sentence a defendant to an upper term based on facts found by the court and not by a jury beyond a reasonable doubt. (*Black II, supra*, 41 Cal.4th at p. 805.) As such, *Cunningham* announced a "new" rule of criminal procedure.

The retroactivity of a new rule under *Johnson* "is to be determined by '"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."'" (*Johnson, supra,* 3 Cal.3d at p. 410.) But the first factor of the *Johnson* test — the purpose of the new rule — is the crucial factor in determining retroactivity: "[T]he factors of reliance and burden on the administration of justice are of significant relevance only . . . after the purpose of the new rule is considered." (*Ibid.;* see also *Guerra, supra*, 37 Cal.3d at pp. 401-402.)

Under *Johnson*, "the more directly the new rule in question serves to preclude the conviction of innocent persons, the more likely it is that the rule will be afforded retrospective application. Further, if the rule relates to the characteristics of the judicial system which are essential to minimizing convictions of the innocent, it will apply retroactively *regardless* of the reliance of prosecutors on former law, and *regardless* of the burden which retroactivity will place upon the judicial system." (*Johnson, supra,* 3 Cal.3d. at p. 413.) "[T]he most consistent application of this principle

[of applying new rules retroactively] has been in cases in which the primary purpose of the new rule is to promote reliable determinations of guilt or innocence." (*Guerra, supra*, 37 Cal.3d at p. 402.) Therefore, and in accordance with *Johnson*, a California court will, on collateral review, give retroactive effect to a new rule where it "vindicat[es] a right which is essential to a reliable determination of whether an accused should suffer a penal sanction." (*Johnson*, at p. 411.)

Several California courts have applied the *Johnson* test on collateral review and have concluded the purpose of a new rule militates against retroactive application. (See *Joe R., supra*, 27 Cal.3d at p. 512 [the aim of the exclusionary rule in *Scott K.* was "not to protect the integrity of the factfinding process but to deter invasion of minor's property and privacy rights"]; *Pratt, supra*, 112 Cal.App.3d at pp. 860-861 [rule that a defendant's right to counsel is violated when a state agent is present at a confidential attorney-client conference did not apply retroactively; the presence of FBI "informants in the defense camp had as much effect on whether or not defendant . . . was afforded a fair trial . . . as did the furniture in the areas where the discussions were conducted"]; see also *In re Lopez* (1965) 62 Cal.2d 368, 372 ["new interpretations of constitutional rights have been, and should be, applied retroactively only in those situations in which such new rules protect the innocent defendant against the possibility of conviction of a crime he [or she] did not commit"].)[5]

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[5] On direct review, courts have also concluded a new rule does not apply retroactively where the purpose of the rule is not integral to a fair determination of guilt or innocence. (See, e.g., *Alvas, supra*, 221 Cal.App.3d at pp. 1465-1466 [rule that "ha[d] no bearing on the reliability of the fact-finding process, but instead assure[d] application of a procedural safeguard and aid[ed] appellate courts in determining whether the individual made an intelligent and knowing waiver of the right" to a jury trial did not apply retroactively]; *Ruhl, supra*, 168 Cal.App.3d at pp. 317-318 [no retroactive application of rule regarding defendant's waiver of right to be sentenced by judge who takes plea bargain; rule was "collateral to a fair determination of guilt or innocence"]; *Cantu, supra*, 161 Cal.App.3d at pp. 267-270 [rule governing the evidence necessary to establish a violation of the fair cross-section rule did not apply retroactively; the rule was

The rule in *Cunningham* does nothing to preclude the conviction of an innocent defendant or, put another way, to "vindicat[e] a right which is essential to a reliable determination of whether an accused should suffer a penal sanction." (*Johnson, supra,* 3 Cal.3d at p. 411.) *Cunningham* does not "promote reliable determinations of guilt or innocence" (*Guerra, supra,* 37 Cal.3d. at p. 402) — it only prescribes the procedure for determining the punishment a defendant receives after he or she is found guilty. As such, *Cunningham*'s purpose is "collateral to or relatively far removed from the reliability of the fact-finding process at trial." (*Johnson*, at pp. 411-412.) Thus, under the *Johnson* retroactivity analysis, the purpose of the *Cunningham* rule points plainly toward prospectivity and we need not consider the factors of reliance and burden on the administration of justice to conclude that *Cunningham* does not apply retroactively. (See *Guerra, supra*, 37 Cal.3d at pp. 401-402.)

Under the Teague Formulation, Cunningham Is Not Retroactive

Under *Teague,* the threshold question again is whether *Cunningham* announced a "new rule" or merely reiterated an "old rule." (*Teague, supra*, 489 U.S. 288, 311; *Whorton, supra,* 127 S.Ct. at p. 1181.) Looking now to federal law to determine whether a rule is "new" under *Teague*, we first ascertain when defendant's conviction became final. (*Beard, supra*, 542 U.S. at p. 411.) Then we "assay the legal landscape" as of the date when defendant's conviction became final and ask "'whether the rule later announced in [*Cunningham*] was *dictated* by then-existing precedent — whether, that is, the unlawfulness of [defendant's sentence] was apparent to all reasonable jurists.'" (*Id*. at p. 413.)

"not directed at vindicating a right which is essential to a reliable determination of whether an accused should suffer a penal sanction"]; *People v. Kaanehe* (1977) 19 Cal.3d 1, 10 [exclusionary rule did not apply retroactively; the purpose of the rule was to deter illegal police conduct, not to "ensure the reliability of the fact-finding process at trial"].)

Defendant's conviction became final on November 29, 2005. Under *Teague*, we examine the "legal landscape" in 2005 to determine whether the rule in *Cunningham* was dictated by then-existing precedent, or, put another way, whether the result reached in *Cunningham* was "'apparent to all reasonable jurists'" in 2005. (*Beard, supra,* 542 U.S. at p. 413.) The answer is no. For California courts, *Black I*, *supra*, 35 Cal.4th 1238, defined the legal landscape in 2005. Five months before defendant's conviction became final, *Black I* held California's determinate sentencing law did not violate the Sixth Amendment under the decisions in *Apprendi* and *Blakely*. (*Black I*, at p. 1254.) When our high court decided *Black I*, only one justice dissented. (See *id*. at p. 1264 (dis. opn. of Kennard, J.).) And when the United States Supreme Court issued its opinion in *Cunningham*, three justices dissented. (*Cunningham*, 549 U.S. at pp.___-___ [127 S.Ct. at pp. 872-873] (dis. opns of Kennedy, J. and Alito, J., both joined by Breyer, J.). We are not prepared to say that six of the seven justices of the California Supreme Court and three of the nine justices of the United States Supreme Court were "[un]reasonable jurists." Thus, we must conclude the result reached in *Cunningham* was not dictated by existing precedent in 2005, when defendant's conviction became final, nor was it apparent to all reasonable jurists in 2005. (See *Beard, supra*, 542 U.S. at pp. 414-415; *U.S. v. Cruz* (9th Cir. 2005) 423 F.3d 1119, 1120.)

Defendant nevertheless argues the relevant "legal landscape" for retroactivity purposes consists *solely* of United States Supreme Court precedent. And because the legal landscape, according to defendant, consists only of United States Supreme Court cases, *Cunningham* did not announce a new rule because *Apprendi* and *Blakely* were part of the "legal landscape" when *Cunningham* was decided. Citing *Graham v. Collins* (1993) 506 U.S. 461, 468 (*Graham*), defendant argues the United States Supreme Court in that case cited only its own precedent when it defined the "legal landscape" and, as a result, the "legal landscape" for purposes of the retroactivity analysis consists only of United States Supreme Court decisions. *Graham* does not advance

defendant's argument. There, the United States Supreme Court held *Penry v. Lynaugh* (1989) 492 U.S. 302, did not apply retroactively, in part because it would "have been anything but clear to reasonable jurists [when defendant's conviction became final] that [his] sentencing proceeding did not comport with the Constitution." (*Graham, supra,* 506 U.S. at p. 468.) Nothing stated in the *Graham* opinion even remotely stands for the proposition that the "legal landscape" for retroactivity purposes is *limited* to United States Supreme Court precedent.

Moreover, eliminating the decisions of the California Supreme Court — including *Black I* — from the "legal landscape" of 2005 would require us to ignore decisions of the California Supreme Court, which we are bound to follow unless overruled by the United States Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) It would also contravene the explicit directions given by the United States Supreme Court in *Butler v. McKellar* (1990) 494 U.S. 407. In *Butler*, the court explained "[t]he 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by *state courts* even though they are shown to be contrary to later decisions." (*Id.* at p. 414, italics added.)

Having concluded that *Cunningham* announced a new rule, we apply the retroactivity rules under *Teague*. A new rule applies retroactively under *Teague* only if: "(1) the rule is substantive or (2) the rule is a '"watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'" (*Whorton, supra,* 127 S.Ct. at p. 1180; see also *Schriro, supra,* 542 U.S. at p. 351.) A rule is substantive "if it alters the range of conduct or the class of persons that the law punishes." (*Schriro,* at p. 353.) A rule is procedural if it "regulate[s] only the *manner of determining* the defendant's culpability." (*Ibid.*) *Cunningham*'s holding is undoubtedly procedural because it does not alter the range of conduct or the class of persons punished by the law. It affects only the manner in which defendant's sentence is determined. (See, e.g., *Schriro,* at p. 353 ["[r]ules that allocate decisionmaking authority [between a judge

and a jury] are prototypical procedural rules"]; *People v. Amons* (2005) 125 Cal.App.4th 855, 864-865 (*Amons*) [*Blakely* announced "a procedural rule that affects only the manner of determining the defendant's punishment"].)

A procedural rule cannot be applied retroactively in a collateral attack unless "it is a '"watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'" (*Whorton, supra*, 127 S.Ct. at p. 1181.) Because the exception for watershed rules of criminal procedure is "'extremely narrow'" numerous courts have rejected claims that a new rule is a watershed rule. (*Id.* at pp. 1181-1182 [citing cases].) "[T]o qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent 'an "'impermissibly large risk'" of an inaccurate conviction. [Citations.] Second, the rule must 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" (*Id.* at p. 1182.)

Cunningham did not announce a watershed rule. *Cunningham* affects the length of a defendant's sentence — it does not affect the validity of the underlying conviction. That *Cunningham* "shifts some factfinding duties" during sentencing from a judge to a jury "does not implicate the intrinsic reliability and fundamental fairness of sentencing proceedings." (*Amons, supra,* 125 Cal.App.4th at p. 866 [*Blakely* did not announce a watershed rule]; see also *Neder v. U.S.* (1999) 527 U.S. 1, 15.) A defendant can obtain a fair and accurate trial without the rule in *Cunningham* because the rule announced in that case "'"merely limits the potential penalty to be imposed on [an undoubtedly] guilty defendant."'" (*In re Consiglio, supra,* 128 Cal.App.4th at p. 516.)

Although Phrased Differently, Johnson and Teague Converge to the Same Result

As discussed above, the *Johnson* test focuses on the purpose of the new rule and whether that purpose is to "preclude the conviction of innocent persons" (*Johnson, supra*, 3 Cal.3d at p. 413) or to "promote reliable determinations of guilt or innocence."

(*Guerra, supra*, 37 Cal.3d at p. 402.) The *Teague* analysis uses somewhat different language — it considers whether the rule "alters the range of conduct or class of persons the law punishes" (*Schriro, supra*, 542 U.S. at p. 353) or whether the new rule is "necessary to prevent . . . an inaccurate conviction." (*Whorton, supra*, 127 S.Ct. at p. 1182.) Although the *Johnson* test is phrased differently than the *Teague* analysis, the focus of each analytical tool is the same: to determine whether the new rule prevents an innocent defendant from being convicted of a crime he or she did not commit. And under both *Johnson* and *Teague*, *Cunningham* affects the manner in which a defendant's sentence is determined — it does not shield a defendant from a wrongful conviction. (*Amons, supra*, 125 Cal.App.4th at p. 866.) As such, California law under the *Johnson* formulation does not provide broader relief than allowed under *Teague*. *Cunningham* does not — under either *Teague* or *Johnson* — apply retroactively to defendant's conviction, which was final well before *Cunningham* was decided.

DISPOSITION

The court's judgment is reversed. The court is directed to enter a new judgment denying defendant's petition for writ of habeas corpus and reinstating defendant's original sentence.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.