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5 IN THE UNITED STATES DISTRICT COURT  
6  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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9 BERNARD A. KING,

No. C 05-3666 WHA (PR)

10 Petitioner,

**ORDER STAYING CASE**

11 v.

12 GEORGE M. GALAZA, Warden,

13 Respondent.  
14 \_\_\_\_\_/

15 This is a habeas case filed pro se by a state prisoner. The only remaining issue in the  
16 case is whether the sentencing court violated *Cunningham v. California*, 127 S. Ct. 856, 871  
17 (2007), in imposing an upper term and consecutive sentences. In the answer respondent argues  
18 that the *Cunningham* claim is not exhausted, that it is barred by *Teague v. Lane*, 489 U.S. 288  
19 (1989), and that facts used to impose the upper term fell within the “prior conviction” exception  
20 to the *Cunningham* rule that sentencing facts must be found by a jury rather than the court.  
21 Respondent recognizes that all these contentions were rejected in *Butler v. Curry*, 528 F.3d  
22 624 (9th Cir. 2008), but has raised them to preserve them.

23 The mandate has not yet issued in *Butler*, because the Ninth Circuit has stayed issuance  
24 of the mandate until at least October 27, 2008, to allow time for the state to decide whether to  
25 petition for certiorari. *Butler v. Curry*, No. 07-56204 (Order July 28, 2008). This case  
26 therefore will be stayed pending issuance of the mandate in *Butler*, which will simplify ruling  
27 on

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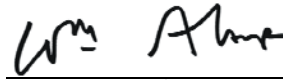
2 respondent's contentions.<sup>1</sup> Also, the clerk will be instructed to administratively close the case,  
3 a purely statistical matter that has no legal effect.

4 **CONCLUSION**

5 This case is **STAYED** until November 3, 2008. The clerk shall administratively close the  
6 case.

7 **IT IS SO ORDERED.**

8 Dated: September 30, 2008.



9 WILLIAM ALSUP  
10 UNITED STATES DISTRICT JUDGE

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<sup>1</sup> This stay does not fall afoul of *Yong v. INS*, 208 F.3d 1116, 1120-22 (9th Cir. 2000), because the stay will not be indefinite.

**United States District Court**

For the Northern District of California

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