NO. 05-9222

IN THE SUPREME COURT OF THE UNITED STATES

LONNIE L. BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

Petitioner received a consecutive sentence totaling 562 months—304 months for a rape conviction, 153 months for a robbery conviction, and 105 months for a burglary conviction. The terms that comprise the petitioner's sentence were within the standard range for each offense.

1. Is the holding in *Blakely* a new rule or is it dictated by *Apprendi*?
2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

PARTIES

The Petitioner is Lonnie L. Burton. The Respondent is Doug Waddington, Superintendent of the Washington Corrections Center.

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STATEMENT

Burton is a prisoner in custody under the judgment of a Washington state court. J.A. at 3–21. Burton challenges his custody in this habeas corpus proceeding, alleging his consecutive standard range sentences violate his Sixth and Fourteenth Amendment rights. Burton claims he should benefit from the retroactive application of the rule of *Blakely v. Washington*, 542 U.S. 296 (2004): if any fact, other than the fact of a prior conviction, increases the penalty for a crime beyond the maximum sentence a judge may impose solely on the basis of facts admitted or reflected in the jury verdict, then that fact must be submitted to the jury and proved beyond a reasonable doubt.

The judgment at issue was entered for Burton's 1994 convictions for rape, robbery and burglary. J.A. at 3–21. The Washington Court of Appeals affirmed the three convictions on direct appeal, but remanded for re-sentencing. *State v. Burton*, 86 Wash. App. 1046, 1997 WL 306429 (1997), *review denied*, 133 Wash. 2d 1025, 950 P.2d 475 (1997), *cert. denied sub nom. Burton v. Washington*, 523 U.S. 1082 (1998). As directed, the state trial court re-sentenced Burton, and the court entered the second amended judgment and sentence on March 16, 1998. J.A. at 3–21.

In the amended judgment, the trial court imposed a sentence for each offense that fell within the standard sentencing range for the particular offense. J.A. at 6, 9. The standard range for the rape offense was 234 to 304 months, and the court sentenced Burton to 304 months for the rape

conviction. J.A. at 6, 9. The standard range for the robbery offense was 153 to 195 months, and the court sentenced Burton to 153 months for the robbery conviction. J.A. at 6, 9. The standard range for the burglary offense was 105 to 134 months, and the court sentenced Burton to 105 months for the burglary conviction. J.A. at 6, 9. The trial court then ran the individual sentences for each offense consecutively, rather than concurrently, for a cumulative total sentence of 562 months. J.A. at 9. The trial court ran the sentences consecutively based upon the "multiple offense policy", and the state appellate courts concluded this policy alone justified the consecutive sentences. J.A. at 30, 52–53.[1]

Under the multiple offense policy, the court will generally run sentences for multiple current offenses concurrently, but the court may chose to run the sentences consecutively when the combination of concurrent sentences and a defendant's high offender score will result "in 'free crimes'—crimes for which there is no additional penalty." *State v. Smith*, 123

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[1] Contrary to the suggestion in Burton's brief, the aggravating factor of deliberate cruelty at issue in *Blakely* is not an issue in this case. The trial court imposed an alternative sentence above the standard range, but the Washington Court of Appeals vacated the alternative sentence, finding it invalid under state law. J.A. at 9, 53. In addition, although the trial court found multiple factors to support the second amended judgment and sentence (*see* J.A. at 7, 9, 22–33), the Washington Court of Appeals relied solely upon the multiple offense policy to affirm the trial court's decision to impose consecutive sentences. J.A. at 50–53. Since the appellate court did not rely on either the alternative sentence, or the other aggravating factors cited by the trial court, those facts are not relevant here. *Blakely*, 542 U.S. at 300 n.4.

Wash. 2d 51, 56, 864 P.2d 1371 (1993) (quoting *State v. Stephens*, 116 Wash. 2d 238, 243, 803 P.2d 319 (1991)); *see also* Wash. Rev. Code § 9.94A.589(1)(a) (formerly Wash. Rev. Code § 9.94A.400); Wash. Rev. Code § 9.94A.535(2)(c). Under the multiple offense policy, the court may run sentences consecutively if concurrent sentences would result in some of the current convictions going unpunished. *Smith*, 123 Wash. 2d at 55–56.

Burton's criminal record gave him an offender score of 16 for the rape conviction. J.A. at 26; Wash. Rev. Code § 9.94A.525. This offender score placed Burton over the sentencing grid's top end "9 or more" offender score category. Wash. Rev. Code § 9.94A.510. If the trial court had imposed concurrent sentences for the rape, robbery and burglary convictions, Burton would be punished for the rape conviction, but not for his robbery and burglary convictions. J.A. at 27. The trial court imposed consecutive sentences so that Burton was punished for each of the crimes of which he was convicted by the jury beyond a reasonable doubt, thereby avoiding free crimes. J.A. at 27, 50–52. Burton appealed the second amended judgment and sentence to the Washington Court of Appeals. *See* J.A. at 45.

In December of 1998, while the direct appeal remained pending in the Washington state courts, Burton filed his first federal habeas corpus petition, challenging his custody under the second amended judgment and sentence. J.A 34–41. The 1998 federal petition challenged the validity of Burton's three convictions. J.A. at 39. The district court denied the petition with prejudice on April 6,

2000. J.A. at 42. The Ninth Circuit affirmed the district court's judgment dismissing the petition. *Burton v. Walter*, No. 00-35579, 2001 WL 1243655 (9th Cir. May 30, 2001).

On July 17, 2000, the Washington Court of Appeals issued an opinion affirming the second amended judgment and sentence. J.A. at 43–54. The Washington Supreme Court denied review on December 5, 2000. J.A. at 55.

In January 2002, Burton initiated this action, filing a second habeas corpus petition challenging his custody under the second amended judgment and sentence. *See* J.A. at 56. Burton had not obtained permission from the Ninth Circuit to file the petition as required by 28 U.S.C. § 2244(b). Respondent answered the petition, arguing that the district court lacked jurisdiction because Burton had not obtained leave to file the petition. Respondent also addressed the merits of Burton's claims.

The United States Magistrate Judge issued a report and recommendation, recommending that the district court deny the petition. J.A. at 56–76. The magistrate judge concluded the current petition was not barred under 28 U.S.C. § 2244(b), but also concluded that Burton was not entitled to relief on the merits of his claims. J.A. at 56–76. Burton objected to the report and recommendation. Respondent filed a response, again arguing the district court lacked jurisdiction. The district court adopted the report and recommendation, and denied the 2002 habeas corpus petition.[2] J.A. at 77. Burton

[2] During the course of the current federal proceedings, the Washington state courts denied a personal restraint

appealed from the district court's judgment to the Ninth Circuit.

While the appeal was pending in the Ninth Circuit, this Court issued the decision in *Blakely v. Washington*, 542 U.S. 296 (2004), on June 24, 2004, and the decision in *United States v. Booker*, 543 U.S. 220 (2005), on January 12, 2005. The Ninth Circuit directed the parties to submit supplemental briefing addressing the effect, if any, of *Blakely* and *Booker* on Burton's appeal. Respondent argued the rule in *Blakely* did not apply because *Blakely* announced a new rule that was not clearly established either at the time the state court judgment became final, or at the time of the state court adjudication of Burton's claim. Respondent also argued that, even if *Blakely* did apply, Burton's sentence did not violate the holding of *Blakely* because no fact was found by the judge that increased it beyond the statutory maximum. After considering the supplemental arguments, the Ninth Circuit affirmed the district court's judgment. J.A. at 78–82. The Ninth Circuit held that *Blakely* did not apply retroactively in habeas corpus proceedings. J.A. at 81 (citing *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005)). The Ninth Circuit ruled the state court decision that Burton's sentence was constitutional was a reasonable application of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). J.A. at

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petition challenging the second amended judgment and sentence. The records from this state court collateral challenge were not made a part of the federal court record, but Burton has appended some of the records to his opening brief. Petr.'s Br. at 1a–4a.

81–82. The Ninth Circuit denied Burton's petition for rehearing and rehearing *en banc*. J.A. at 83.

SUMMARY OF THE ARGUMENT

Burton is not entitled to relief because his petition is barred as a second or successive petition under 28 U.S.C. § 2244(b). In 1998, Burton filed his first habeas petition, challenging his convictions under the state court judgment. The lower courts denied the petition on the merits. In 2002, Burton filed this second petition, this time challenging the sentence under the same state court judgment. The 2002 petition was a second or successive petition, and 28 U.S.C. § 2244(b) required Burton to obtain authorization from the Ninth Circuit to file the 2002 petition. Since the Ninth Circuit did not authorize the filing of the 2002 petition, the district court lacked jurisdiction to consider the petition.

Burton also is not entitled to relief because *Blakely* created a new rule which does not apply retroactively in a habeas corpus proceeding. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that a sentence above a traditional statutory maximum must be based upon facts found by a jury beyond a reasonable doubt. In *Blakely*, the Court extended *Apprendi* and held for the first time that any fact (other than a prior conviction) used to impose a sentence above a standard sentencing range, but below a traditional statutory maximum, must be proven to the jury beyond a reasonable doubt. Until the Court issued *Blakely*, this rule was not dictated by the Court's precedent. The vast majority of reasonable jurists believed *Apprendi* did not extend to sentences above a standard range but

below a traditional statutory maximum. The *Blakely* Court therefore imposed a new obligation that was not dictated by precedent. In doing so, *Blakely* created a new rule.

This new rule does not apply retroactively in a habeas proceeding because the rule does not fall within the narrow exceptions to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). The *Blakely* rule does not qualify as a retroactive watershed rule because it is not a fundamental rule altering our understanding of "bedrock procedural elements", and it does not seriously enhance the likelihood of obtaining an accurate conviction. The error in *Blakely* does not constitute a jurisdictional defect equivalent to the fundamental error in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Since a sentencing proceeding conducted without the protections of *Blakely* can still be a fundamentally fair proceeding, and can still result in an accurate sentence, *Blakely* is not a watershed rule.

The new *Blakely* rule also does not apply retroactively under 28 U.S.C. § 2254(d) because the rule was not clearly established federal law in cases adjudicated prior to the issuance of the *Blakely* decision. The habeas statute specifically limits relief to claims based upon a holding of the Court in existence at the time of the state court adjudication. The habeas statute does not authorize a grant of relief based upon the retroactive application of later decided Supreme Court opinions. Since *Blakely* did not exist at the time of the state court adjudication of Burton's claims, Burton may not obtain relief on a claim asserting a *Blakely* violation.

Finally, even if the Court applied *Blakely* retroactively, Burton is not entitled to relief because the state court decision that Burton's sentence is constitutional is a reasonable application of *Blakely*. *Blakely* did not hold that consecutive standard range sentences violate the Constitution. The Court's holding simply did not establish the rule advanced by Burton's claim. Because the rule sought by Burton is not based upon an express holding of the Court, Burton is not entitled to relief.

ARGUMENT

A. The Court Should Dismiss The Writ As Improvidently Granted Because Relief Is Barred Under 28 U.S.C. § 2244(b)

Burton is not entitled to relief in this habeas corpus proceeding. The current habeas corpus petition is a second or successive petition, and Burton did not comply with the gate-keeping requirement of 28 U.S.C. § 2244(b). The district court therefore lacked jurisdiction to consider Burton's petition.[3]

The statute governing second and successive petitions is explicit. A claim presented in a second or successive habeas corpus petition that was not presented in a prior petition shall be dismissed unless the new claim falls within one of two narrow exceptions. 28 U.S.C. § 2244(b)(2); *Tyler v. Cain*, 533 U.S. 656, 661 (2001). The claim must rely on a new rule of constitutional law made retroactive to cases on collateral review by this Court, or it must rely

[3] Respondent raised this issue in his brief in opposition to the petition for a writ of certiorari. Respt.'s Br. Opp'n at 5–7.

upon a factual predicate that could not have been discovered previously through the exercise of due diligence. 28 U.S.C. § 2244(b)(2); *Tyler*, 533 U.S. at 661–62. The statute is also explicit that, before a petitioner may file a second or successive petition in the district court, the petitioner must first obtain an order from the court of appeals authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A); *Tyler*, 533 U.S. at 664; *Felker v. Turpin*, 518 U.S. 651, 657 (1996). The district court may not consider a successive petition unless and until the circuit court authorizes the filing of the petition. 28 U.S.C. § 2244(b)(3)(A).

On December 28, 1998, Burton filed his first federal petition challenging his custody under the second amended judgment and sentence. J.A. at 34. This 1998 petition challenged the validity of the convictions, but not the sentence, under the second amended judgment and sentence. J.A. at 34–41. The district court denied the 1998 petition on the merits. J.A. at 42. In 2002, Burton filed his current petition, again challenging his custody under the second amendment judgment and sentence. *See* J.A. at 56. The 2002 petition challenged the validity of the sentence, but not the convictions. *See* J.A. at 56. While the 1998 petition challenged the convictions and the 2002 petition challenged the sentence, it is undisputed that Burton's two habeas corpus petitions challenged the same custody imposed by the same state court judgment. Because Burton had previously filed an application for habeas corpus relief challenging this custody, Burton had to obtain authorization from the Ninth Circuit to file the 2002 petition. 28 U.S.C. § 2244(b)(3)(A). The

district court lacked jurisdiction because Burton did not obtain authorization to file the 2002 petition.

The Ninth Circuit incorrectly concluded the 2002 petition was not a second or successive petition because Burton had not yet exhausted his current claims when he filed the earlier petition in 1998. J.A. at 79. In reaching this conclusion, the Ninth Circuit erroneously determined the non-exhaustion of the sentencing claims gave Burton a "'legitimate excuse for failing to raise a claim at the appropriate time.'" J.A. at 79 (quoting *McCleskey v. Zant*, 499 U.S. 467, 490 (1991)). However, the language cited from *McCleskey* did not mean that the non-exhaustion of a claim excused the filing of a petition after a prisoner had previously litigated the merits of a first petition. On the contrary, the cited language and the remaining opinion in *McCleskey* established that a petitioner must satisfy the cause and prejudice or actual innocence standard in order to avoid an "abuse of the writ" when filing a second petition. *McCleskey v. Zant*, 499 U.S. 467, 489–502 (1991). The strict standard adopted in *McCleskey* was later replaced by an even stricter standard in 28 U.S.C. § 2244(b).

Contrary to the Ninth Circuit's conclusion, this Court has never held that a lack of exhaustion excuses a failure to raise new claims in an earlier petition. Instead, the Court has repeatedly warned prisoners that, by proceeding with only exhausted claims in a first petition, a prisoner risks dismissal under the abuse of the writ doctrine if he or she returns to federal court with later exhausted claims. *Rose v. Lundy*, 455 U.S. 509, 521 (1982) (plurality

opinion); *McCleskey*, 499 U.S. at 489; *Slack v. McDaniel*, 529 U.S. 473, 486–87 (2000).

The phrase "second or successive petition" is a term of art, and the Court's decision in *Rose* "instructs us in reaching our understanding of the term." *Slack*, 529 U.S. at 486. Establishing a total exhaustion rule, *Rose* held that a district court must dismiss a habeas petition containing both exhausted and unexhausted claims. *Rose*, 455 U.S. at 522 (plurality opinion). The requirement to dismiss a "mixed petition" left the prisoner with the choice of returning to state court to exhaust state remedies, or amending the petition to present only exhausted claims to the district court. *Rose*, 455 U.S. at 510, 520. A prisoner who chose to return to state court to exhaust state remedies, rather than proceeding with only the exhausted claims in federal court, could later file a new habeas petition containing all the claims without facing the abuse of the writ doctrine. *Slack*, 529 U.S. at 486.

On the other hand, if the prisoner chose to proceed forward in district court with only the exhausted claims, "the prisoner would risk forfeiting consideration of his unexhausted claims in federal court." *Rose*, 455 U.S. at 520. *Rose* explicitly warned prisoners that a subsequently filed petition faced dismissal as an abuse of the writ. *Id*. at 521; *Slack*, 529 U.S. at 486–87. "Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." *Rose*, 455 U.S. at 521. "[T]he fact that a claim is not exhausted does not justify the deliberate withholding of the claim from a federal habeas petition." *Floyd v.*

Alexander, 148 F.3d 615, 618 (6th Cir. 1998) (citing *Herbst v. Scott*, 42 F.3d 902, 906 (5th Cir. 1995)); *Tyler v. Armontrout*, 917 F.2d 1138, 1140–41 (8th Cir. 1990); *Clanton v. Muncy*, 845 F.2d 1238, 1241 (4th Cir. 1988); *McCorquodale v. Kemp*, 832 F.2d 543, 545–46 (11th Cir. 1987)).

Rose clearly instructs us that Burton's 2002 petition is a "second or successive petition." The state trial court entered the second amended judgment and sentence in March 1998, eight months before Burton filed his 1998 habeas corpus petition. By the time Burton filed his 1998 petition, he knew or should have known the basis of the sentencing claims he would later raise in his 2002 habeas petition. Rather than including the sentencing claims in the 1998 petition, Burton chose to pursue only claims challenging his convictions. J.A. at 34–41. Burton delayed raising the sentencing claims until 2002. The fact that the sentencing claims were not yet exhausted in 1998 does not alter the conclusion that the 2002 petition is a "second or successive petition."

Contrary to the arguments raised in Burton's reply to the brief in opposition, Burton could have raised the claims in a single petition. Burton could have chosen to raise all of his claims in the 1998 petition. In the alternative, Burton could have finished exhausting his state court remedies, and raised all of his claims in the 2002 petition. If Burton had chosen either of these options, Burton could have avoided filing a "second or successive petition."

If Burton had raised the unexhausted claims in the first petition, the district court could have

stayed the first petition to allow Burton an opportunity to exhaust the unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 273–79 (2005) (court may hold petition in abeyance to allow exhaustion); *Pace v. DiGuglielmo,* 544 U.S. 408, 416–17 (2005) (recognizing the abeyance procedure may be utilized to avoid any concerns raised by the statute of limitations). In such a case, Burton could have pursued all of his claims, challenging both the convictions and the sentence, in a single petition. Although Burton argued in his reply to the brief in opposition that it was unclear in 1998 if the district court could stay a habeas corpus petition (*see* Reply at 10), the Ninth Circuit had held as early as 1993 that a district court should stay a petition in order to allow exhaustion of state remedies. *Fetterly v. Paskett*, 997 F.2d 1295, 1301–02 (9th Cir. 1993). And the Ninth Circuit reaffirmed this ruling several months before Burton filed his 1998 petition. *Calderon v. United States Dist. Court* (*Thomas*), 144 F.3d 618, 620 (9th Cir. 1998) (citing *Calderon v. United States Dist. Court* (*Taylor*), 134 F.3d 981, 987–88 (9th Cir. 1998)). Burton could have avoided the successive petition issue by filing a single petition in 1998 raising all of his claims.

If Burton had raised all of his claims in the 1998 petition, it is possible that Respondent might have waived the exhaustion requirement since exhaustion is not jurisdictional and the Court's opinions in 1998 did not support Burton's sentencing claims. *See* 28 U.S.C. § 2254(b)(2) (court may deny claim on the merits despite failure to exhaust). Respondent may have asked the court to deny the claims despite the lack of exhaustion since the claims

were not based upon clearly established federal law. Even if Respondent had not waived exhaustion, inclusion of the sentencing claims in the 1998 petition would have made it a mixed petition, containing exhausted and unexhausted claims. If the court did not stay the petition, the court would have dismissed the petition without prejudice as a mixed petition. Burton then could have returned to federal court after exhausting his sentencing claims. *Slack*, 529 U.S. at 486–88.

Burton also could have chosen not to file a federal petition until he exhausted all of his claims. The statute of limitations did not begin to run on any of Burton's claims until March 5, 2001, when the second amended judgment became final on the conclusion of direct review. 28 U.S.C. § 2254(d)(1). The statute of limitations did not expire until one year later, on March 5, 2002. Burton filed his current petition in January 2002, well within the statute of limitations. Burton could have chosen to wait until he filed his 2002 petition to raise all of his claims in a single petition. Although Burton argued in his reply to the brief in opposition that it was unclear in 1998 when the statute of limitation might begin to run, this alleged confusion is not a basis for ignoring the statutory requirements of 28 U.S.C. § 2244(b). *Pace,* 544 U.S. at 416–17.

Burton had several options to avoid filing a second or successive petition, but he chose none of these options. Instead, Burton chose to file a petition in 1998, challenging his convictions, but not his sentence. The district court considered the 1998 petition on the merits, and denied the petition with prejudice. Consequently, Burton's current petition,

filed in 2002, is a second or successive petition. The district court therefore lacked jurisdiction to consider the 2002 petition because the Ninth Circuit had not issued an order authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A).

Even if Burton had filed a motion seeking authorization to file his 2002 petition, the Ninth Circuit could not have granted such authorization. The sentencing claims raised in Burton's 2002 petition did not satisfy the new rule exception to 28 U.S.C. § 2244(b) since this Court has not "made" the new rule of *Blakely* retroactive in a holding of the Court. *Tyler*, 533 U.S. at 662–67.

Because the 2002 petition was a second application for habeas corpus relief, the district court was required to dismiss the petition. *Tyler*, 533 U.S. at 667–68. The Court cannot decide in this case whether *Blakely* "is retroactive to cases on collateral review, because that decision would not help [Burton] in this case." *Id.* at 668. "Any statement on [*Blakely's*] retroactivity would be dictum . . . ." *Id.*

B. *Blakely* Does Not Apply Retroactively In Federal Habeas Corpus Proceedings

Blakely created a new rule by imposing on state courts a new obligation that reasonable jurists overwhelmingly believed was not dictated by prior precedent. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court "held that 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *See Washington v. Recuenco*, 126 S. Ct. 2546, 2549 (2006). (quoting *Apprendi*, 530

U.S. at 490). Thus, *Apprendi* contemplated a traditional statutory maximum. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court expanded *Apprendi* and for the first time "clarified that 'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.'" *Recuenco*, 126 S. Ct. at 2549 (quoting *Blakely*, 542 U.S. at 303). This new rule does not apply retroactively in a habeas proceeding because the rule does not fall within the narrow exceptions to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989).

1. *Teague* Non-Retroactivity Standard

Where the State claims that relief is barred under the non-retroactivity doctrine of *Teague*, a federal court must proceed in three steps. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). "First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes." *Id*. A state court judgment becomes final for retroactivity analysis when the time for filing a petition for writ of certiorari has elapsed or a timely-filed petition has been finally denied. *Griffith v. Kentucky,* 479 U.S. 314, 321 n.6 (1987). "Second, the court must survey the legal landscape as it then existed, and determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." *Caspari*, 510 U.S. at 390 (citations omitted) (internal quotation marks omitted) (quoting *Graham v. Collins*, 506 U.S. 461,

468 (1993); *Saffle v. Parks*, 494 U.S. 484, 488 (1990)). Unless reasonable jurists would have felt compelled by existing precedent to grant relief, the federal court is precluded from granting relief. *Goeke v. Branch*, 514 U.S. 115 (1995); *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Third, the court must decide whether the new rule falls within one of the narrow exceptions to the non-retroactivity doctrine. *Caspari*, 510 U.S. at 390.

2. *Blakely* Created A New Rule

Aptly described by Justice O'Connor as a "number 10 earthquake" (*see* David E. Johnson, *Justice For All: Analyzing Blakely Retroactivity And Ensuring Just Sentences In Pre-Blakely Convictions*, 66 Ohio St. L.J. 875, 884 (2005)), the *Blakely* decision sent shockwaves across the nation. *Blakely* altered the legal landscape that had existed for more than two decades, invalidating the fact finding process used in determinate sentencing systems. *See Simpson v. United States*, 376 F.3d 679, 680–81 (7th Cir. 2004). *Blakely* created a new rule.[4]

"'A case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Caspari*, 510 U.S. at 390 (quoting *Teague*, 489 U.S. at 301). A rule is new "when it breaks new grounds or imposes a new obligation on the States or the Federal

[4] The non-retroactivity doctrine of *Teague* is distinct from 28 U.S.C. § 2254(d) (*see Horn v. Banks*, 536 U.S. 266, 272 (2002)), but the Court has applied a similar standard for determining whether a rule is an "old rule" under *Teague*, and "clearly established Federal law" under 28 U.S.C. § 2254(d)(1). *Williams*, 529 U.S. at 412.

Government." *Teague*, 489 U.S. at 301. A decision creates a new rule unless reasonable jurists would have felt compelled by existing precedent to grant the relief required by the new rule. *Saffle*, 494 U.S. at 488. Application of an old rule in a new setting, or in a manner not dictated by precedent, constitutes the creation of a new rule. *Stringer v. Black*, 503 U.S. 222, 228 (1992). Even if application of the existing rule in the novel situation may be considered "governed" by prior precedent, the new application of the rule still creates a new rule. *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

The "new rule" principle protects the reasonable judgments of state courts, and the State's interest in the finality of judgments. *Beard v. Banks*, 542 U.S. 406, 413 (2004). The principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414. The principle "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). This principle serves the primary function of habeas corpus, which is "to ensure that state convictions comport with the *federal* law that was established at the time petitioner's conviction became final." *Id*. at 239.

Extending precedent so as to apply an old rule in a novel setting does as much harm to the interests of finality, predictability, and comity as does the invocation of a new rule that was not dictated by precedent. *Stringer*, 503 U.S. at 228. If courts could

grant relief by simply extending an old rule in a novel manner not dictated by precedent, the function of habeas corpus review would be severely compromised. This is especially true under the current standards imposed by 28 U.S.C. § 2254(d)(1), which prohibit relief unless the state court decision on the constitutional issue was an unreasonable application of the Supreme Court precedent in existence at the time of the state court adjudication. As the Court previously recognized, "[s]ection 2254(d) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004).

Thus, whether the Court is establishing a new rule in the first instance, or extending an existing rule to a new situation, the Court must "'determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution.'" *Caspari*, 510 U.S. at 390 (quoting *Saffle*, 494 U.S. at 488). The Court "will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). Since reasonable jurists did not believe the Court's precedent required the extension of the *Apprendi* rule in the manner later adopted in *Blakely*, the Court's decision in *Blakely* established a new rule.

In *Butler*, Butler sought relief based upon the retroactive application of this Court's decision in *Arizona v. Roberson*, 486 U.S. 675 (1988). *Butler*, 494 U.S. at 408–09. In *Edwards v. Arizona,* 451 U.S. 477, 484–85 (1981), the Court had held that, upon a request for counsel, police must cease an interrogation and may not reinitiate questioning until counsel is provided to the defendant. Declining to craft an exception to the *Edwards* rule, the *Roberson* Court held the fifth amendment bars the police from reinitiating any interrogation following a request for counsel even in the context of a separate investigation. *Roberson*, 486 U.S. at 677–78. Seeking habeas relief, Butler argued that *Teague* did not bar retroactive application of *Roberson* because the decision did not announce a new rule. *Butler*, 494 U.S. at 414. Butler argued the *Roberson* decision was merely an application of *Edwards* to a slightly different set of facts. *Id.* In support of this argument, Butler pointed out that *Roberson* was "directly controlled by *Edwards*", that *Roberson* was within the "logical compass" of "*Edwards*", and that *Roberson* concerned Arizona's attempt to create an "exception" to *Edwards*. *Id.* at 414–15. Rejecting Butler's argument, the Court held that *Roberson* established a new rule of criminal procedure because it was not dictated by *Edwards*. *Id.* at 415. "[T]he fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*." *Id.* The Court concluded the outcome in *Roberson* was susceptible to debate among reasonable minds, as evidenced by

the differing opinions taken by the judges of the Fourth and Seventh Circuits. *Butler*, 494 U.S. at 415.

Similarly, in *Caspari*, the Eighth Circuit had held that a non-capital sentence enhancement violated the double jeopardy rule established for capital sentencing in *Bullington v. Missouri*, 451 U.S. 430 (1981). *Caspari*, 510 U.S. at 387. Applying the *Bullington* rule, the Eighth Circuit found "'it is a short step to apply the same double jeopardy protection to a non-capital sentencing hearing as the Supreme Court applied to a capital sentencing hearing.'" *Id.* at 388. The Eighth Circuit believed this short step did not require the announcement of a new rule and, thus, did not violate the non-retroactivity doctrine of *Teague*. *Id.* Reversing, this Court noted that it had not applied the double jeopardy rule to a non-capital case, and that several courts had reached conflicting decisions on this issue. *Id.* at 393–95. The Court found the lack of Supreme Court authority, and the split of authority amongst the lower courts, demonstrated the application of the old rule in this new manner required the announcement and application of a new rule. *Id.*

The fact that the Court's opinions did not foreclose application of *Apprendi* in the manner established in *Blakely* is not significant. *Caspari*, 510 U.S. at 393. What is significant, especially under the constraints of 28 U.S.C. § 2254(d)(1), is that until *Blakely*, the Court had never applied *Apprendi* in the context of a determinate sentence which fell above a standard range, but below a pre-*Blakely* traditional statutory maximum, and the Court's precedent did not *dictate* that *Apprendi*

applied to such a sentence. *Caspari*, 510 U.S. at 393; *see also Kane v. Espitia*, 126 S. Ct. 407, 408 (2005) (the fact that a rule may be implied from the Court's opinion is not sufficient a basis for granting habeas corpus relief under 28 U.S.C. § 2254(d)).

Apprendi itself concerned only a sentence above the traditional statutory maximum for an offense. *Apprendi v. New Jersey*, 530 U.S. 466, 469–69 (2000). The Court specifically noted it was expressing no view on whether the rule applied to determinate sentencing schemes. *Id.* at 497 n.21. Also, the dissent noted that *Apprendi* failed to "clarify the contours of the constitutional principle underlying its decision." *Id.* at 540 (O'Connor, J., dissenting). The dissent identified "several plausible interpretations of the constitutional principle on which the Court's decision rests." *Id.* Under one interpretation of *Apprendi*, the interpretation later adopted by the vast majority of lower courts, judges could still find facts and impose sentences above a statutory standard sentencing range so long as the sentence did not exceed the traditional statutory maximum. *Id.* at 540–41. *Apprendi* did not dictate the result in *Blakely* since under a reasonable interpretation of *Apprendi*:

> "A State could, however, remove from the jury (and subject to a standard of proof below 'beyond a reasonable doubt') the assessment of those facts that define narrower ranges of punishment, *within the overall statutory range*, to which the defendant may be sentenced." *Apprendi*, 530 U.S. at 540 (O'Connor, J., dissenting).

In determining whether *Apprendi* dictated the result in *Blakely*, it is also significant that *Blakely* itself resulted in a 5/4 split. While the mere existence of a dissent does not suffice to show that a rule is new, the fact that four justices dissented in *Blakely* shows that reasonable jurists could and did differ on whether *Apprendi* applied to determinate sentencing. *Beard*, 542 U.S. at 416 n.5.

The vast majority of lower courts did not believe *Apprendi* applied to determinate sentences below a traditional statutory maximum. Prior to *Blakely*, "only one court had ever applied *Apprendi* to invalidate application of a guidelines scheme." *Blakely v. Washington*, 542 U.S. 296, 320 n.1 (2004) (O'Connor, J., dissenting) (citing cases); *see also Schardt v. Payne*, 414 F.3d 1025, 1035 (9th Cir. 2005) (citing cases); *United States v. Price*, 400 F.3d 844, 847–48 (10th Cir. 2005) (citing cases). In addition, the vast majority of courts since *Blakely* have held that the Court created a new rule. *See, e.g., Schardt,* 414 F.3d at 1034–35 (citing cases); *Price*, 400 U.S. at 847–48 (citing cases); *Simpson*, 376 F.3d at 681; *State v. Houston,* 702 N.W.2d 268, 273 (Minn. 2005); *State v. Evans*, 154 Wash. 2d 438, 114 P.3d 627 (2005); *State v. Febles*, 210 Ariz. 589, 591, 115 P.3d 629 (Ct. App. 2005). The overwhelming agreement of jurists that *Apprendi* did not apply to sentences above a standard range but within the traditional statutory maximum, and the agreement that *Blakely* created a new rule, demonstrates that *Blakely* is a new rule. *O'Dell*, 521 U.S. at 166 n.3 (prior decisions of state and federal courts reaching opposite conclusion demonstrated

that *Simmons v. South Carolina*, 512 U.S. 154 (1994), created a rule).

Burton argues *Blakely* did not create a new rule because the Court simply applied *Apprendi* to an exceptional sentence in a determinate sentencing system. In support of this argument, Burton relies on the Court's decisions in *Francis v. Franklin*, 471 U.S. 307 (1985), *Stringer v. Black*, 503 U.S. 222 (1992), and *Penry v. Lynaugh*, 492 U.S. 302 (1989). These cases involve application of an existing rule in a similar situation with slightly different facts.

Burton argues that this case is like *Francis*, *Stinger*, and *Penry* because *Blakely* simply applied the principle of *Apprendi* that the definition of the term "statutory maximum" was the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Petr.'s Br. at 19. However, this principle was not clearly established in *Apprendi* since reasonable jurists did not believe *Apprendi's* "statutory maximum" language included the top end of standard ranges in a determinate sentencing scheme. *See Washington v. Recuenco*, 126 S. Ct. 2546, 2549 (2006) (*Blakely* clarified the term "statutory maximum").[5]

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[5] *United States v. Whooten*, 279 F.3d 58, 60 (1st Cir. 2002) ("*Apprendi* only applies when a defendant's sentence exceeds the statutory maximum . . . *Apprendi* does not prevent a sentencing judge from making factual findings that increase a defendant's sentence, as long as such an increase falls within the statutory maximum." (citations omitted)); *United States v. Szur*, 289 F.3d 200, 219 (2d Cir. 2002) ("The constitutional rule of *Apprendi* does not apply where the sentence imposed is not greater than the prescribed statutory maximum for the offense

of conviction." (quoting *United States v. Thomas*, 274 F.3d 655, 664 (2d Cir. 2001)); *United States v. DeSumma*, 272 F.3d 176, 181 (3d Cir. 2001) ("This Court has since concluded, however, that when the actual sentence imposed does not exceed the statutory maximum, *Apprendi* is not implicated."); *United States v. Kinter*, 235 F.3d 192, 199–200 (4th Cir. 2000) ("[A]ll of the Courts of Appeals to have considered the issue have thus far agreed, that to find the 'prescribed statutory maximum' as contemplated in *Apprendi*, one need only look to the language of the statute criminalizing the offense, and no further."); *United States v. Randle*, 304 F.3d 373, 378 (5th Cir. 2002) ("*Apprendi* does not apply to judge-made determinations pursuant to the Sentencing Guidelines. . . . Because *Apprendi* only addresses facts that increase the penalty for a crime beyond the statutory maximum, it does not apply to those findings that merely cause the guideline range to shift within the statutory range."); *United States v. Helton*, 349 F.3d 295, 299 (6th Cir. 2003) ("*Apprendi* do[es] not apply to the Sentencing Guidelines when the defendant's sentence remains below the *maximum* sentence authorized by statute."); *United States v. Johnson*, 335 F.3d 589, 591 (7th Cir. 2003) ("The Supreme Court's decision in *Apprendi* establishes the general rule that 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. However, a particular sentence does not implicate *Apprendi* unless it exceeds a default statutory maximum." (citation omitted)); *United States v. Piggie*, 316 F.3d 789, 791 (8th Cir. 2003) ("[T]he rule of *Apprendi* only applies where the non-jury factual determination increases the maximum sentence beyond the statutory range authorized by the jury's verdict."); *United States v. Sullivan*, 255 F.3d 1256, 1265 (10th Cir. 2001) ("*Apprendi* does not apply to sentencing factors that increase a defendant's guideline range but do not increase the statutory maximum."); *United States v. Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003) ("[I]n *Apprendi*, the Supreme Court held that any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *United States v. Weaver*, 281 F.3d 228, 234 (D.C. Cir. 2002) ("We have, on

Even this Court's opinions issued after *Apprendi* but prior to *Blakely* did not indicate that the rule subsequently announced in *Blakely* was dictated by *Apprendi*. For example, in *Harris v. United States*, 536 U.S. 545 (2002) the Court considered the application of *Apprendi* to a statutorily imposed minimum sentence. The *Harris* Court cited *Apprendi* for the proposition that, under the jury's verdict in *Apprendi*, "the Government has been authorized to impose any sentence below the maximum." *Harris*, 536 U.S. at 565. Although the *Harris* Court repeatedly referred to *Apprendi's* statutory maximum sentence, the *Harris* Court never indicated that the statutory maximum meant anything less than a traditional statutory maximum, rather than the maximum sentence a judge may impose solely on the basis of facts admitted or reflected in the jury verdict. *Id.* at 562–68 (referring to the 10-year statutory maximum at issue in the New Jersey statute). The *Harris* Court never said *Apprendi's* "statutory maximum" meant the top end of a standard sentencing range below the traditional statutory maximum. *Harris*, 536 U.S. at 562–68.

Burton claims that the Washington Supreme Court's decision applying *Apprendi* was a decision no reasonable jurist would have made. Petr.'s Br. at 22. But the reasoning of the Washington Supreme Court was the same as the decisions of the circuit

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numerous occasions, refused to extend *Apprendi* beyond its holding that any factor other than a prior conviction triggering a sentence above the statutory maximum must be submitted to and found by a jury.").

courts. Like the federal courts, the Washington Supreme Court concluded that exceptional determinate sentences complied with *Apprendi* because such sentences were still within the maximum sentence authorized by the statute. *State v. Gore*, 143 Wash. 2d 288, 314, 21 P.3d 262, 277 (2001) ("The state statutory scheme permits a judge to impose an exceptional sentence—still within the range determined by the Legislature and not exceeding the maximum—after considering the circumstances of an offense . . . .").

Burton attempts to distinguish the decisions of the federal circuit courts because they dealt with the federal sentencing guidelines, which were not imposed by statute. Petr.'s Br. at 23–24. This argument is not well taken for two reasons. First, this Court acknowledged in *United States v. Booker*, 543 U.S. 220, 233 (2005), that "the dissenting opinions in *Blakely* recognized that there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*.]" In "both systems . . . the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges." *Booker*, 543 U.S. at 221. Prior to *Blakely*, the reasoning of the courts was that the same sentencing factors were permissible, so long as the sentence did not exceed the statutory maximum.

Second, even if the decisions of the Circuit Courts could be distinguished because the federal guidelines were not statutory, reasonable jurists in other state courts reached the same conclusion in

upholding sentencing systems that did not involve the federal guidelines.[6]

Burton also argues that *Blakely* recognized that it was merely applying the rule in *Apprendi*, focusing on the language in *Blakely* that this "case requires us to apply the rule we expressed in *Apprendi*." *Blakely v. Washington*, 542 U.S. 296, 301 (2004); Petr.'s Br. at 19. This language is not determinative of the question. As discussed above, the fact is that courts "frequently view their decisions as 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts." *Butler v. McKellar*, 494 U.S. 407, 415 (1990). *Supra* p. 20.

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[6] *Altman v. State*, 852 So. 2d 870, 876 (Fla. Dist. Ct. App. 2003) ("Appellant . . . argues that the determination of victim injury sexual contact points should have been submitted to the jury and proven beyond a reasonable doubt, as required by *Apprendi*. This argument fails, however, because appellant's sentence did not exceed the statutory maximum penalty." (citation omitted)); *State v. Armour*, 874 So. 2d 304, 311 (La. Ct. App. 2004) ("The jurisprudence has recognized that when, as here, a defendant is sentenced within the prescribed statutory maximum, no *Apprendi* violation occurs."); *State v. McCoy*, 631 N.W.2d 446, 451 (Minn. Ct. App. 2001) ("*Apprendi* . . . appl[ies] only to situations where a court sentences a defendant to a term that *exceeds* the statutory maximum."); *State v. Freeman*, 267 Neb. 737, 750, 677 N.W.2d 164, 176 (2004) ("The key provision of the holding in *Apprendi* is that the jury must determine any fact that increases the penalty for a crime beyond the prescribed statutory maximum."); *State v. Dilts*, 336 Or. 158, 169, 82 P.3d 593, 599 (2003) ("[T]he crucial difference between the sentence that the defendant in *Apprendi* received and the sentence imposed on defendant is that defendant's sentence did not exceed the prescribed statutory maximum penalty for the offense to which he pleaded guilty . . . .").

Blakely's extension of *Apprendi* established a new rule because it "would not have been an illogical or even a grudging application of [*Apprendi*]" to conclude that it did not extend in the manner later held in *Blakely*. *Butler*, 494 U.S. at 415.

Burton also incorrectly argues that the dissent in *Blakely* recognized the Court did not create a new rule. Petr.'s Br. at 20–21. Until *Blakely*, Justice Breyer believed the Court would not have applied *Apprendi* to determinate sentencing reforms. *Blakely*, 542 U.S. at 346 (Breyer, J., dissenting). And Justice O'Connor stated "there is no map of the uncharted territory blazed by today's unprecedented holding." *Id.* at 320 n.1 (O'Connor, J., dissenting). The dissents repeatedly recognized that *Blakely* imposed a new burden on the state courts. *See, e.g., id.* at 318 (O'Connor, J., dissenting) ("extension of *Apprendi* to the present context will impose significant costs on a legislature's determination that a particular fact, not historically an element, warrants a higher sentence"); *id.* ("facts that historically have been taken into account by sentencing judges . . . all must now be charged in an indictment and submitted to a jury"); *Blakely*, 542 U.S. at 319–320 & n.1 (discussing the drastic costs and new burdens imposed on states and the federal government resulting from the Court's extension of *Apprendi*); *id.* at 324 (noting the sentencing guidelines were not before the Court in *Apprendi*); *id.* at 326–27 (Kennedy, J., dissenting) (the Constitution does not require the rule established by the Court in *Blakely*). In light of Justice O'Connor's dissent in *Apprendi* identifying possible interpretations of the *Apprendi* decision, and the

statement that *Blakely* blazed uncharted territory in an unprecedented holding, the dissents in *Blakely* did not concede that *Blakely* was dictated by *Apprendi*. Because reasonable jurists, including the Court's own Justices, did not consider that *Blakely*'s extension of *Apprendi* was dictated by precedent, *Blakely* concerned a "development in the law over which reasonable jurists could disagree." *Caspari v. Bohlen*, 510 U.S. 383, 395 (1994) (quoting *Sawyer v. Smith*, 497 U.S. 227, 234 (1990)). *Blakely* established a new rule.

3. *Blakely* Does Not Fall Within The Narrow Exceptions To The *Teague* Non-Retroactivity Doctrine

When a conviction is final, a new "rule applies only in limited circumstances." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). "New *substantive* rules generally apply retroactively . . . because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 351–52 (citations omitted) (internal quotation marks omitted). "New rules of procedure, on the other hand, generally do not apply retroactively." *Id.* at 352. Procedural rules "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* "Because of this more speculative connection to innocence, [the Court gives] retroactive effect to only a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of

the criminal proceeding." *Schriro*, 542 U.S. at 352 (internal quotation marks omitted).

Burton argues that the new rule in *Blakely* should be applied retroactively as a procedural rule rather than a substantive rule. Petr.'s Br. at 31–36. This argument is not well taken because the rule in *Blakely* is not a fundamental rule altering our understanding of bedrock procedural elements, and it does not seriously enhance the likelihood of obtaining an accurate conviction.

To be a watershed rule, a rule must meet two requirements. *Tyler v. Cain*, 533 U.S. at 656, 665 (2001). If the new rule fails to satisfy either requirement, the rule is not a watershed rule and it does not apply retroactively. *Id.* First, the new rule must "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (internal quotation marks omitted) (quoting *Teague*, 489 U.S. at 311). Second, an infringement of the rule must "seriously diminish the likelihood of obtaining an accurate conviction." *Tyler*, 533 U.S. at 665 (quoting *Sawyer*, 497 U.S. at 242). It is not enough that the new rule is "fundamental" in some abstract sense. *Schriro*, 542 U.S. at 352. Rather, the rule must critically enhance the accuracy of the fact finding process. *Id.* "This class of rules is extremely narrow, and it is unlikely that any has yet to emerge." *Id.* at 352 (internal quotation marks omitted) (quoting *Tyler v. Cain*, 533 U.S. at 667 n.7).

First, *Blakely* is not a watershed rule because it is not a fundamental rule altering our understanding of "bedrock procedural elements." In

Washington v. Recuenco, 126 S. Ct. 2546 (2006), the Court held that *Blakely* error was trial error, not structural error. A violation of *Blakely* therefore does not necessarily render a criminal trial fundamentally unfair. *Id.* Although the standard for determining structural error is not coextensive with the standard for determining *Teague's* watershed exception (*see Tyler*, 533 U.S. at 666), the conclusion that *Blakely* error is not structural error demonstrates the rule is not a bedrock procedural element essential to the fairness of the proceeding. *Blakely* is not a watershed rule since a defendant may still receive a fair trial despite the absence of *Blakely's* protections.

The only example of a watershed rule is the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963). A comparison of *Blakely* to *Gideon* demonstrates that *Blakely* is not a watershed rule. *See O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (finding rule was not watershed when compared to *Gideon*). *Gideon* maintains a special status in relation to other constitutional rights. *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 404 (2001). "[T]he 'failure to appoint counsel for an indigent is a unique constitutional defect rising to the level of a jurisdictional defect,' which therefore warrants special treatment among alleged constitutional violations." *Id.* (quoting *Custis v. United States,* 511 U.S. 485, 496, (1994)). A violation of *Gideon's* right to counsel is a structural error, requiring automatic reversal in any case where the right is violated. A violation of *Blakely* is not jurisdictional, and the error does not entitle the defendant to automatic relief. The *Blakely* error may

be harmless, and a federal court must deny habeas relief if the error did not cause actual prejudice. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). The rule announced in *Blakely* does not rise to level of watershed rule such as the right to counsel established in *Gideon*.

In fact, the right to counsel under *Gideon* is so fundamental that an alleged *Gideon* error is the only exception to the rule prohibiting a collateral challenge to expired prior convictions. *Lackawanna County Dist. Attorney*, 532 U.S. at 404; *Daniels v. United States*, 532 U.S. 374 (2001). Unlike *Gideon* error, an error concerning the failure to prove an element or sentencing factor beyond a reasonable doubt is not an exception to the rule announced in *Lackawanna*. The fact that a *Blakely* error, unlike a *Gideon* error, would not allow for consideration of an allegedly unconstitutional expired conviction demonstrates *Blakely* is not the equivalent of *Gideon*.

Second, a violation of the *Blakely* rule does not seriously diminish the accuracy of a defendant's convictions, especially Burton's.[7] "The rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'" *Schriro*, 542 U.S. at 352. A violation of the *Blakely* rule does not necessarily render unreliable the vehicle for determining guilt or innocence. *Recuenco*, 126 S. Ct. at 2551–52. Even though a jury may not have found

[7] There is no doubt that Burton committed the crimes of rape, robbery and burglary since the jury found him guilty of each crime beyond a reasonable doubt, and the state and federal courts have upheld the validity of his convictions.

the facts underlying the enhanced sentence, the accuracy of the sentence is not seriously diminished. *See Schriro*, 542 U.S. at 356. The rule announced in *Blakely* "has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception." *Saffle v. Parks*, 494 U.S. 494, 495 (1990).

Burton argues that *Blakely* created a fundamental right that critically enhanced the fact finding process because the Court combined the right to a jury trial with the right to have facts proven beyond a reasonable doubt. This combination does not demonstrate that *Blakely* is a watershed rule. In *Schriro*, the Court determined that jury fact finding does not critically enhance the accuracy of the proceeding. *Schriro*, 542 U.S. at 355–58. Burton agrees that a jury finding does not necessarily increase the accuracy of the proceeding. Petr.'s Br. at 33. *Blakely's* recognition of the right to jury fact-finding in a determinate sentencing proceeding is not a watershed rule.

Similarly, the right to a burden of proof of beyond a reasonable doubt does not seriously enhance the accuracy of the proceeding where the issue is not the guilt or innocence of the defendant, but the appropriate punishment for the defendant whose guilt has already been determined. While the use of the beyond a reasonable doubt standard in determining guilt serves the principle that it is better to let a thousand guilty defendants go free than to convict a person who is actually innocent, the burden of proof plays a less important role when guilt has been decided, and the criminal proceeding reaches the sentencing phase. The *Blakely* rule does

not involve whether the defendant is actually guilty or innocent, but the appropriate punishment for a defendant who has already been found guilty of a crime beyond a reasonable doubt.

Burton relies on two pre-*Teague* cases, *Ivan v. City of New York*, 407 U.S. 203 (1972) (per curiam) and *Hankerson v. North Carolina*, 432 U.S. 233 (1977), to argue that the right to a reasonable doubt standard must apply retroactively. Burton argues that because the Court retroactively applied the rule from *In re Winship*, 397 U.S. 358 (1970), in these two cases, the *Blakely* rule must also apply retroactively. These cases have no relevance to the issue before this Court. *Ivan* involved the direct review of a decision of the New York Court of Appeals. *Ivan*, 407 U.S. at 203–04. *Hankerson*, involved the direct review of a decision of the North Carolina Supreme Court. *Hankerson*, 432 U.S. at 239–40. Neither case involved the retroactive application of a new rule in a federal habeas corpus proceeding, and, since *Teague* had not been decided, neither case involved the issue of whether *In re Winship* constituted a watershed rule. If *Ivan* and *Hankerson* had involved a collateral challenge and had been decided post-*Teague*, it is doubtful the Court would have applied the rule retroactively. *See Hankerson*, 432 U.S. at 247 (Powell, J., concurring in judgment) (discussing costs associated with retro-actively applying new rules on collateral review). Contrary to Burton's arguments, *Ivan* and *Hanker-son* do not show that *Blakely* is a watershed rule.

As discussed above, a comparison of *Blakely* with *Gideon* demonstrates *Blakely* does not rise to the level of a watershed rule. A comparison of

Blakely to the Court's prior *Teague* jurisprudence further demonstrates that *Blakely* is not a watershed rule. The relevant frame of reference for retroactivity analysis is not the purpose of the new rule, but the purpose of habeas review. *Sawyer*, 497 U.S. at 239 (citing *Teague,* 489 U.S. at 306). "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Brecht*, 507 U.S. at 633 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). The principle purpose of the writ is not "to inquire whether a criminal convict did in fact commit the deed alleged." *Teague,* 489 U.S. at 312 (quoting *Mackey v. United States,* 401 U.S. 667, 694 (1971)). Rather, the purpose of federal habeas review is "to ensure that state convictions comport with the *federal* law that was established at the time petitioner's conviction became final." *Sawyer*, 497 U.S. at 239. For this reason, the Court has explained that the watershed rules are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal means." *Teague*, 489 U.S. at 313 (quoting *Rose v. Lundy,* 455 U.S. 509, 544 (1982) (Stevens, J., dissenting)). Despite Burton's arguments, the Court's prior *Teague* jurisprudence has not identified as a watershed rule the requirement that facts used to enhance a sentence must be proven beyond a reasonable doubt.

Although *Blakely* created the right to have a jury determine, under the beyond a reasonable doubt

standard, the facts used to enhance a sentence in a determinate sentencing system, this does not automatically demonstrate that the absence of this right seriously diminished the accuracy of the sentencing proceeding. Since there is no doubt of the defendant's guilt, and the deprivation of the right may be harmless, Burton does not show that a sentencing proceeding without the protections announced in *Blakely* seriously diminished the accuracy of the proceeding. Because Burton must show the new *Blakely* rule meets *both* requirements of a watershed rule—(1) that it is a fundamental rule altering our understanding of bedrock procedural elements essential to the fairness of the proceeding, and (2) that a violation of the rule seriously diminishes the accuracy of the conviction—and he cannot show either, *Blakely* did not create a watershed rule.

C. Regardless Of Whether *Blakely* Is Retroactive Under *Teague v. Lane*, 28 U.S.C. § 2254(d)(1) Prohibits Granting Relief In This Case

The Court has "long recognized that 'the power to award the writ by any of the courts of the United States, must be given by written law . . . .'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Ex parte Bollman*, 4 Cranch 75, 94 (1807)).[8] The

[8] Contrary to the arguments of amicus Ratliff, due process does not require the retroactive application of new rules on collateral review. The Due Process Clause does not guarantee a right to collaterally challenge a judgment of conviction. *United States v. MacCollom*, 426 U.S. 317, 323 (1976); *Murray v. Giarratano*, 492 U.S. 1, 8 (1989). Conse-

authority to grant habeas relief to a state prisoner is limited by 28 U.S.C. § 2254, which specifies the conditions under which such relief may be granted. *Felker*, 518 U.S. at 662.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." *Williams v. Taylor*, 529 U.S. 362, 399 (2000). AEDPA changed the standards governing the "consideration of habeas petitions by imposing new requirements for the granting of relief to state prisoners." *Felker*, 518 U.S. at 662. The statute now prohibits a federal court from granting relief on any claim adjudicated on the merits in state court unless the state court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412.

The holding of an opinion is limited to the final result of the case as well as the portions of the opinion necessary to that result. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). Explanatory language in an opinion is dicta if it was not essential to the disposition of the contested issues. *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001). An expression by the Court that

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quently, the Due Process Clause does not guarantee the retroactive application of new rules.

goes beyond the point actually decided is not a holding. *Humphrey's Executor v. United States*, 295 U.S. 602, 626–27 (1935); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399–400 (1821). That a rule may be necessarily implied by a holding is not sufficient to render the rule "clearly established Federal law." *Kane v. Espitia*, 126 S. Ct. 407, 408 (2005). "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001).

The statute also limits a federal court's review of habeas claim to those holdings in existence "*as of the time of the relevant state-court decision*." *Williams*, 529 U.S. at 412 (emphasis added). The statute requires the Court "to limit our analysis to the law as it was 'clearly established' by our precedents at the time of the state court's decision." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). The statute requires the Court to look only "for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" *Yarborough v. Alvarado*, 541 U.S. 652, 660–61 (2004) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003)).

Thus, the statute places two clear conditions on the grant of habeas relief to a state prisoner. First, the statute limits relief only to those claims that are based upon a holding of the Court. Second, the statute limits relief only to those claims that are based upon a holding existing at the time of the state court adjudication of the claim. Burton's challenge to his sentence fails to satisfy either of these two conditions. Although Burton seeks relief based upon *Blakely*, the decision did not exist at the time of the

state court adjudication of Burton's claim. Moreover, Burton's particular claim, that the imposition of consecutive standard range sentences is unconstitutional, is not based upon the holding of *Blakely*. The statute therefore bars relief.

1. 28 U.S.C. § 2254(d)(1) Bars Relief Because The Statute Does Not Allow A Court To Grant Relief By Retroactively Applying New Rules

Burton cannot obtain relief because *Blakely* did not exist at the time of the state court adjudication in this case. The statute specifically limits review of habeas claim to those holdings in existence "*as of the time of the relevant state-court decision*." *Williams*, 529 U.S. at 412 (emphasis added). The statute limits the federal court's analysis to the law in existence at the time of the state court decision. *Wiggins*, 539 U.S. at 520. Unlike *Teague's* non-retroactivity doctrine, the habeas statute simply does not allow for the retroactive application of new rules.[9]

The Court has recognized that, despite some similarities, "the AEDPA and *Teague* inquires are distinct." *Horn v. Banks,* 536 U.S. 266, 272 (2002). The statutory requirement that a claim be based upon "clearly established Federal law" bears only a slight connection to the Court's *Teague* jurisprudence. *Williams*, 529 U.S. at 412. While a Supreme Court opinion that is an old rule under

[9] The issue of whether 28 U.S.C. § 2254(d)(1) incorporated the *Teague* exceptions to non-retroactivity is also before the Court in *Whorton v. Bockting*, No. 05-595.

Teague will also constitute "clearly established Federal law" for purposes of 28 U.S.C. § 2254(d), the remaining analysis differs significantly from *Teague* when determining retroactivity and the availability of relief. For example, *Teague* considers whether a rule is clearly established from the date the state court judgment becomes final, while the statute determines clearly established federal law from the date of the state court adjudication. The statute also differs from *Teague* in that the statute limits the source of clearly established federal law to the holdings of the Court, while *Teague* allows consideration of lower court opinions. *Williams*, 529 U.S. at 412. Similar to these examples, the statute also differs from *Teague* in that, unlike *Teague*, the statute does not authorize retroactive application of any rule that was not clearly established at the time of the state court adjudication.

A comparison of 28 U.S.C. § 2254(d) with other AEDPA provisions demonstrates the statute does not allow for retroactive application of new rules. Congress expressly authorized the filing of a second or successive petition where the new claim is based upon a "new rule of constitutional law, made retroactive to cases on collateral review, by the Supreme Court . . . ." 28 U.S.C. § 2244(b)(2)(A). Congress used the same language to designate when a district court is authorized to conduct an evidentiary hearing to further develop the factual record. 28 U.S.C. § 2254(e)(2)(A). Congress used similar language to declare when the statute of limitations begins to run for a claim based upon a new rule. 28 U.S.C. § 2244(d)(1)(D). In each of these statutes, Congress used specific language to

expressly allow consideration of new rules made retroactive to collateral review. These three provisions, however, are inapplicable to the standard of review imposed by 28 U.S.C. § 2254(d). *House v. Bell*, 126 S. Ct. 2064, 2078 (2006). Conspicuously absent from 28 U.S.C. § 2254(d) is any language authorizing the courts to grant relief based upon the retroactive application of a new rule. Congress knew how to include language authorizing the use of retroactively applied new rules, but chose not to use such language when enacting 28 U.S.C. § 2254(d). The absence of such language demonstrates the habeas statute does not allow relief based upon the retroactive application of a new rule.

The use of the past tense of the "to be" verb also demonstrates Congress' intent to limit the applicable federal law to that law in existence at the time of the state court adjudication. If Congress wanted to allow relief based upon a conflict between a state court decision and a later announced and retroactively applied rule of federal law, Congress would have authorized the courts to determine whether the state court adjudication "is" at the time of habeas review contrary to or an unreasonable application of federal law. By conditioning relief upon a decision that "was" unreasonable in light of federal law in existence at the time of the state court adjudication, Congress protected the State's interest in finality by eliminating the power of federal courts to retroactively apply a new rule.

The statute bars relief unless the state court adjudication was contrary to or an unreasonable application of clearly established federal law as it existed at the time of the state court

adjudication. *Blakely* was not clearly established federal law because *Blakely* simply did not exist at the time of the state court adjudication of Burton's claim. The statute therefore bars the federal courts from granting relief based upon a retroactive application of *Blakely*.

2. 28 U.S.C. § 2254(d)(1) Bars Relief Because Burton's Sentence Does Not Violate A Holding Of The Court

Even if *Blakely* applies retroactively to cases on collateral review, Burton is not entitled to relief. *Blakely*, as well as *Apprendi*, involved the validity of an individual sentence imposed above the statutory maximum of a single offense. Neither case involved a decision, based upon the defendant's criminal history, to run multiple standard range sentences consecutive to each other. Burton's sentence does not violate clearly established federal law because this Court has never held that consecutive standard range sentences are unconstitutional. Even if *Blakely* applies retroactively, Burton is not entitled to relief under 28 U.S.C. § 2254(d) since his sentence is not unconstitutional under a holding of this Court.

In 2000, the Court held that "[o]ther 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 v. New Jersey*, 530 U.S. 466, 490 (2000). In reaching this holding, *Apprendi* expressly stated the narrow issue before the Court was the validity of an individual sentence on an individual offense. *Id*. at 474. The Court specifically set aside as irrelevant to this narrow

issue the argument that a judge could have imposed consecutive sentences on two other counts to reach the same sentence imposed on the single count. *Id*. "The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count." *Id*. The sentences on the other counts were not relevant to the issue before the Court. *Id*. *Apprendi* did not even consider, let alone hold, that judicial imposition of consecutive sentences violates the Constitution.

In *Blakely*, the Court expanded *Apprendi,* holding for the first time that the "statutory maximum" for purposes of an *Apprendi* analysis includes not only the statutory maximum for an offense, but also the top end of a statutorily established standard range for the offense. *Blakely*, 542 U.S. at 303–04. As in *Apprendi*, however, the *Blakely* Court again considered only the validity of an individual sentence imposed for a single offense. *Blakely*, 542 U.S. at 298–99. As in *Apprendi*, the Court noted a sentence on a separate offense was not relevant to the issue before the Court. *Id*. at 299 n.2. As with *Apprendi*, the *Blakely* Court did not consider the issue of a judge running multiple standard range sentences consecutive to each other.

Neither *Apprendi* nor *Blakely* considered the validity of consecutive sentences. Neither *Apprendi* nor *Blakely* held that imposition of consecutive standard range sentences violate the Constitution. The Court's holdings simply did not establish the rule advanced by Burton's claim. Because the rule sought by Burton is not based upon an express holding of the Court, Burton is not entitled to relief.

Even assuming this Court may someday establish the rule asserted by Burton, the rule cannot be announced and applied in this habeas proceeding since *Blakely* itself says nothing about a trial court's authority to impose consecutive sentences. *Kane*, 126 S. Ct. at 408. Moreover, even if the Court were to subsequently hold that *Blakely* applies to consecutive sentences, Burton is not entitled to relief because the state court decision was, at the time, a reasonable application of then existing federal law. The vast majority of courts considering the issue have overwhelmingly concluded that *Apprendi* and *Blakely* do not apply to the imposition of consecutive sentences, at least where the sentences for each individual count does not exceed the statutory maximum for that count.[10] In light of the nearly universal agreement that *Apprendi* and *Blakely* do not apply to consecutive sentencing, the conclusion that Burton's sentence is constitutional cannot be an unreasonable application of clearly established federal law.

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[10] *See*, *e.g.*, *United States v. White*, 240 F.3d 127, 135 (2d Cir. 2001); *United States v. Hernandez*, 330 F.3d 964, 982 (7th Cir. 2003); *United States v. Harrison*, 340 F.3d 497, 500 (8th Cir. 2003); *United States v. Buckland,* 289 F.3d 558, 570 (9th Cir. 2002) (en banc); *United States v. Chorin*, 322 F.3d 274, 278–79 (3d Cir. 2003); *United States v. Lott*, 310 F.3d 1231, 1242–43 (10th Cir. 2002); *United States v. Davis*, 329 F.3d 1250, 1254 (11th Cir. 2003); *United States v. Lafayette*, 337 F.3d 1043, 1049 n.11 (D.C. Cir. 2003); *State v. Cubias*, 155 Wash. 2d 549, 553–54, 120 P.3d 929 (2005); *People v. Wagener*, 196 Ill. 2d 269, 282–86, 752 N.E.2d 430, 440–42, 256 Ill. Dec. 550, 560–62 (2001); *State v. Higgins*, 149 N.H. 290, 301–03, 821 A.2d 964, 975–76 (2003); *State v. Senske*, 692 N.W.2d 743, 749 (Minn. Ct. App. 2005); *State v. Abdullah*, 184 N.J. 497, 514, 878 A.2d 746, 756–57 (2005).

Finally, even if the Court were to extend *Blakely* to govern consecutive sentencing, the conclusion that Burton's sentence is constitutional would still be a reasonable application of such a rule. "'*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.'" *Blakely*, 542 U.S. at 301 (emphasis added) (quoting *Apprendi*, 530 U.S. at 490). The Court has not fully explained the meaning of the phrase "other than the fact of a prior conviction", but it is objectively reasonable for a jurist to determine that the phrase includes a decision to run sentences consecutively in light of the defendant's criminal history.

A jurist could reasonably conclude the judicial imposition of consecutive sentences in order to avoid rewarding Burton for the commission of multiple crimes is based upon the fact of his convictions for those crimes. The jury's role is to determine facts necessary to constitute a statutory offense. *Apprendi*, 530 U.S. at 483. In this case, the jury determined these facts beyond a reasonable doubt, finding that Burton committed the offenses of rape, robbery and burglary. The trial court then made the legal judgment to impose consecutive sentences in order to punish Burton for each one of the crimes the jury had found Burton had committed. In making this legal judgment, the only facts the court considered were the facts of the jury's verdict on the three crimes, and the facts of Burton's prior convictions used in calculating the offender score. J.A. at 26–27, 50–53. The legal judgment that

Burton should be punished for each of his crimes of conviction does not violate *Blakely*.

Apprendi and *Blakely* both concerned cases where an increased punishment resulted from findings of historical facts, other than a fact of conviction, that were the equivalent of elements of an offense. *Apprendi* concerned the determination that the crime of possession of a firearm for an unlawful purpose was actually a hate-crime. *Apprendi*, 530 U.S. at 468. To impose the enhanced sentence in *Apprendi*, the court had to find the defendant committed the crime "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Apprendi*, 530 U.S. at 469 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000)). This factual finding was the equivalent of an element of a greater offense since the finding increased the statutory maximum of the crime from 10 to 20 years. *Apprendi*, 530 U.S. at 469. Similarly, *Blakely* concerned the determination that the crime of kidnapping was committed with "deliberate cruelty." *Blakely*, 542 U.S. at 300. This finding was the equivalent of an element since it allowed the trial court to impose a sentence that could not be imposed based solely upon the facts admitted in the defendant's guilty plea. *Id.* at 304.

Unlike *Apprendi* and *Blakely*, Burton was not sentenced to prison for more than the law allowed for his crimes of conviction. As required in *Blakely*, Burton received a standard range sentence for each offense. J.A. at 6, 9. And, unlike *Apprendi* and *Blakely*, other than his prior convictions used to calculate the offender score, the court based Burton's

sentence solely upon the facts contained in the jury's verdict. The trial court determined Burton would be punished only for the rape conviction if the sentences ran concurrent to each other. The court made the legal judgment that Burton should be punished for each crime of conviction, rather than rewarding Burton with free crimes.

The judge made a legal judgment to run the sentences consecutively.[11] The judicial determination that an offender should be punished for each crime of conviction neither alters the maximum penalty for the crime committed, nor creates a separate offense calling for an additional penalty. Nothing in the history of common law "suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481. Nothing in the history of common law, or in the provisions of the Constitution, prohibit a judge from determining that not punishing a defendant for each crime of conviction would be "clearly too lenient."

The Court has not clearly held that a sentence, imposed to ensure that the defendant is punished for each crime he commits, violates the

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[11] It is notable that Burton fails to identify what fact had to be pled and proven to the jury before the court could decide to run his sentences consecutively. Burton fails to identify what fact must be found before a court makes the legal judgment that a punishment is "clearly too lenient." The inability to identify such a fact demonstrates the state court decision was a reasonable application of federal law even if *Blakely* applies retroactively.

Constitution. Consequently, even if *Blakely* applied retroactively and the Court extended the *Blakely* rule to consecutive standard range sentences, the decision to run Burton's sentences consecutively would be a reasonable application of such a rule. Burton is not entitled to relief under 28 U.S.C. § 2254(d).

CONCLUSION

For the reasons stated herein, the Court should affirm the judgment of the Ninth Circuit.

Respectfully Submitted.

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