ORIGINAL

NO. 05-9222

IN THE SUPREME COURT OF THE UNITED STATES

LONNIE LEE BURTON,

Petitioner,

v.

DOUGLAS WADDINGTON,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the district court lacked subject matter jurisdiction over the habeas corpus petition where Burton had previously filed a habeas corpus petition challenging his custody, and he did not obtain leave from the Ninth Circuit to file the current petition as required by 28 U.S.C. § 2244(b).

2. Whether *Blakely v. Washington*, 542 U.S. 296 (2004) applies retroactively in collateral proceedings filed under 28 U.S.C. § 2254 to cases where the state court judgment became final, and the state court adjudication of the merits of the claim occurred, prior to the issuance of the Court's decision in 2004.

3. Assuming *Blakely v. Washington* does apply retroactively, whether the state court adjudication of Burton's claim was contrary to or an unreasonable application of the holding in *Blakely* where each individual sentence imposed on Burton did not exceed the standard sentencing range for the particular offense.

PARTIES

The petitioner is Lonnie Lee Burton. The respondent is Douglas Waddington, the Superintendent of the Stafford Creek Corrections Center.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

The Attorney General of Washington, on behalf of respondent Douglas Waddington, the Superintendent of the Stafford Creek Corrections Center, respectfully requests that this Court deny the petition for a writ of certiorari in this case. This brief in opposition is being filed pursuant to a request from this Court that a response be filed to the petition.

I. STATEMENT OF THE CASE

Burton is in custody under the judgment of a Washington state court. On March 16, 1998, the state trial court entered a second amended judgment and sentence, sentencing Burton to 562 months for his convictions for rape, robbery and burglary. The sentence is labeled an "exceptional sentence" under Washington law because the court ordered the individual sentences for each offense to run consecutive rather than concurrent to each other. However, the individual sentence for each offense fell within the standard sentencing range for the particular offense.

The standard sentencing range for the rape offense was 234 to 304 months, and the state court sentenced Burton to 304 months for the rape conviction. The standard range for the robbery offense was 153 to 195 months, and the state court sentenced Burton to 153 months for the robbery conviction. The standard range for the burglary offense was 105 to 134 months, and the court sentenced Burton to 105 months for the burglary conviction. The court imposed an exceptional sentence by running the three individual sentences consecutive to each other, but the individual sentences did not exceed the statutory standard range sentence or the statutory maximum sentence for any of the individual offenses.

Burton was convicted of the three offenses in 1994, and he appealed to the Washington Court of Appeals. The state court affirmed the convictions, but remanded for re-sentencing. *State v. Burton*, 86 Wash. App. 1046 (1997) (Table) (WESTLAW 1997 WL 306). The Washington Supreme Court denied review on December 3, 1997, and this Court denied Burton's petition for a writ of certiorari on April 20, 1998. *State v. Burton*, 133 Wash.2d 1025, 950 P.2d 475 (1997), *cert. denied, Burton v. Washington*, 523 U.S. 1082 (1998). On March 16, 1998, the trial court entered the second amended judgment and sentence, imposing the current sentence. Burton appealed from the sentence to the Washington Court of Appeals.

In December of 1998, while Burton's appeal of the second amended judgment and sentence remained pending in state court, he filed his first federal habeas petition challenging his custody under the 1994 convictions. Since the state court had already entered the second amended judgment and sentence at the time Burton filed his first federal petition, Burton was in custody under the same judgment challenged in this current proceeding. The district court denied the first petition with prejudice on April 6, 2000, and the Ninth Circuit affirmed the district court's judgment on May 30, 2001. *Burton v. Walter*, No. 00-35579, 2001 WL 1243655 (9th Cir. May 30, 2001). On July 17, 2000, while the first habeas proceedings were ongoing, the Washington Court of Appeals issued an opinion affirming the amended judgment and sentence. *State v. Burton*, 101 Wash. App. 1041 (2000) (Table) (Westlaw 2000 WL 987045). The Washington Supreme Court denied review on December 5, 2000. *State v. Burton*, 142 Wash.2d 1009, 16 P.3d 1266 (2000) (Table).

In January 2002, Burton returned to federal court, filing his current federal habeas corpus petition in the district court. 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. The magistrate judge concluded that Burton's current habeas corpus petition was not a successive petition, but also concluded that Burton was not entitled to relief on the merits of his claims. 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, denied the petition, and entered judgment in favor of respondent on December 17, 2002. Burton appealed to the Ninth Circuit.

While Burton's 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 *Blakely* rule. The individual sentence for each offense did not exceed the standard sentencing range for that particular offense, and the decision to run the individual sentences consecutively was based upon the fact of Burton's convictions.

After considering the supplemental arguments, the Ninth Circuit affirmed the district court's judgment. Pet. App. 1a-3a. The Ninth Circuit agreed that *Blakely* did not apply retroactively in habeas corpus proceedings. Pet. App. 3(a) (citing *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005)). The Ninth Circuit also agreed that the state court adjudication was a reasonable application of the rule announced in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Pet. App. 3a.

II. REASONS FOR DENYING THE PETITION

There is no basis for granting the writ in this case. First, the district court lacked jurisdiction to consider the current habeas corpus petition because Burton did not comply with the gate keeping provisions of 28 U.S.C. § 2244(b). Second, although Burton argues the Ninth Circuit's decision conflicts with the decisions of two state courts, he does not show a legitimate conflict justifying review. The Ninth Circuit's decision is consistent with the decisions of the other circuit courts concerning the retroactive application of *Blakely* in federal habeas proceedings. In fact, every circuit court to have considered the issue has held that *Blakely* created a new rule of criminal procedure which does not apply retroactively on collateral review. Third, even if *Blakely* does apply retroactively, Burton's challenge still fails because his sentence does not violate the rule announced in *Blakely*.

A. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE HABEAS CORPUS PETITION BECAUSE BURTON DID NOT COMPLY WITH THE GATE KEEPING PROVISIONS OF 28 U.S.C. § 2244(B).

Before a petitioner may file a second habeas corpus petition in district court, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A). The statute creates a "gate keeping" mechanism for the consideration of successive petitions. *Felker v. Turpin*, 518 U.S. 651, 657 (1996). "The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court." *Id.* The applicant must show that the application satisfies the requirements of 28 U.S.C. § 2244(b). *Id.*

Burton previously filed a federal habeas corpus petition challenging his custody under the same judgment challenged in this proceeding. The first habeas corpus petition challenged the validity of the rape, robbery and burglary convictions, but did not challenge the sentence imposed by the state court. Burton filed the prior federal petition in December 1998. The state court had previously entered the second amended judgment and sentence in March 1998. Burton therefore previously filed a habeas corpus petition challenging his custody under the second amended judgment and sentence. Burton's current habeas corpus petition is a successive petition because the petition challenges the same state court judgment challenged by the first petition. 28 U.S.C. § 2244(b) required that Burton obtain leave to file the second petition. The district court lacked jurisdiction because Burton did not obtain permission to file the second petition.

Although Burton's current petition challenges the sentence imposed for the convictions, rather than the convictions themselves, the statute still required that Burton obtain leave from the Ninth Circuit to file the current petition. Burton's current challenge to the sentence was ripe at the time he filed his first habeas corpus petition in 1998 because the state court had imposed the sentence by the time Burton filed his first petition. The Ninth Circuit determined that the current claim was not ripe when Burton filed the first petition because the claim was unexhausted. Pet. App. 2a. The Ninth Circuit confused exhaustion with ripeness.

Burton could have avoided the successive petition issue by including his current claim in the first habeas corpus petition. If he had, the first petition would be a mixed petition, containing exhausted and unexhausted claims. The district court could have dismissed the petition without prejudice as a mixed petition. In such a case, Burton could return to federal court after exhausting his sentencing claim, and the petition would not be a "second or successive" petition. *Slack v. McDaniel*, 529 U.S. 473, 486-88 (2000). In the alternative, if Burton had raised the unexhausted claim in the first petition, the district court could have stayed the first petition to allow Burton an opportunity to exhaust the unexhausted claim. *Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528, 1532-35 (2005) (district court may hold petition in abeyance to allow exhaustion); *Pace v. DiGuglielmo,* 544 U.S. 408, 125 S. Ct. 1807, 1813-14 (2005) (recognizing the abeyance procedure may be utilized to avoid statute of limitations issue). In such a case, Burton could have pursued all of his claims, challenging both the convictions and the sentence, in a first petition.

Burton also could have avoided the issue of a successive petition simply by choosing not to file a habeas corpus petition until he completed his state court appeal from the second amended judgment and sentence. The statute of limitations begins to run from the date the judgment became final by the conclusion of direct review. 28 U.S.C. § 2244(d)(1)(A). The second amended judgment and sentence did not become final until March 5, 2001, ninety days after the Washington Supreme Court denied review on Burton's appeal from the amended sentence. *See State v. Burton*, 142 Wash.2d 1009, 16 P.3d 1266 (December 5, 2000) (Table). The statute of limitations did not expire until March 5, 2002. Burton filed his current petition within the statute of limitations in January 2002. Burton could have chosen to wait until he filed his current petition to raise all of his claims, challenging both the convictions and the sentence in a single petition.

Burton had several options to avoid filing a 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 successive petition. *See Slack v. McDaniel*, 529 U.S. at 486-87 ("It was only if a prisoner declined to return to state court and decided to proceed with his exhausted claims in federal court that the possibility arose that a subsequent petition would be considered second or successive and subject to dismissal as an abuse of the writ."). The district court lacked jurisdiction over the petition because Burton did not comply with 28 U.S.C. § 2244(b).

B. THE NINTH CIRCUIT'S DECISION THAT *BLAKELY* DOES NOT APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUIT COURTS.

Every circuit court to consider the retroactive application of the rule announced in *Blakely,* or of the equivalent rule governing federal sentences announced in *United States v. Booker*, 543 U.S. 220 (2005), has consistently held that the rule does not apply retroactively on collateral review because the rule constitutes a new rule of criminal procedure. *See, e.g., Guzman v. United States*, 404 F.3d 139, 141-44 (2nd Cir. 2005); *In re Olopade*, 403 F.3d 159, 160-64 (3rd Cir. 2005); *United States v. Gentry*, 432 F.3d 600, 602-06 (5th Cir. 2005); *Simpson v. United States*, 376 F.3d 679, 680-81 (7th Cir. 2004); *United States v. Price*, 400 F.3d 844, 845-49 (10th Cir. 2005); *United States v. Bellamy*, 411 F.3d 1182, 1186-88 (10th Cir. 2005); *In re Dean*, 375 F.3d 1287, 1290 (11th Cir. 2004); *United States v. Anderson*, 396 F.3d 1336, 1338-39 (11th Cir. 2005); *Varela v. United States*, 400 F.3d 84, 866-68 (11th Cir. 2005); *Michael v. Crosby*, 430 F.3d 1310, 1312 n.2 (11th Cir. 2005). The Ninth Circuit decision is consistent with the decisions of this Court and the other circuit courts. There is no conflict necessitating review.

1. The Circuit Courts Agree *Blakely* Created A New Rule Of Criminal Procedure That Was Not Clearly Established Prior To 2004.

All the circuit courts to consider the issue have concluded *Blakely* created a new rule of criminal procedure. *See, e.g., Schardt v. Payne*, 414 F.3d 1025, 1034-36 (9th Cir. 2005); *Simpson*, 376 F.3d at 680-81; *Price*, 400 F.3d at 847; *Varela*, 400 F.3d at 868. This conclusion is consistent with the Court's jurisprudence.

Under the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), a decision creates a new rule "when it breaks new grounds or imposes a new obligation on the States or the Federal 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 relief. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Application of an old rule in a new setting or in a manner not dictated by precedent constitutes a new rule under *Teague*. *Stringer v. Black*, 503 U.S. 222, 228 (1992).

Burton argues *Blakely* did not create a new rule because it was merely an application of *Apprendi*. However, *Blakely* did more than simply apply *Apprendi*. *Blakely* created a new rule by altering the legal landscape that had existed for twenty years. *Simpson*, 376 F.3d at 680-81. Since the 1980s, trial judges employing determinate sentencing schemes had resolved disputed issues of fact to determine both the applicable sentencing range and the appropriateness of departures from the sentencing range. *See United States v. Penaranda*, 375 F.3d 238, 242 (2nd Cir. 2004). Before *Blakely*, this Court did not hold such practice unconstitutional. *Id.* In 2000, this Court ruled 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*, 530 U.S. at 490. However, *Apprendi* referred to the "statutory maximum," and the lower courts commonly understood *Apprendi* to be limited to the traditional statutory maximum for an offense. *Penaranda*, 375 F.3d at 243; *Simpson*, 376 F.3d at 681. As the Ninth Circuit noted, "Every circuit court of appeals that addressed the

question presented in *Blakely* reached the opposite conclusion from the rule subsequently announced by the Supreme Court." *Schardt*, 414 F.3d at 1035 (citing cases). Prior to *Blakely*, the circuit courts simply did not apply *Apprendi* where a sentence exceeded the standard range but did not exceed the statutory maximum. *Id.* Prior to *Blakely*, the lower courts believed a trial judge could still properly resolve disputed facts when determining whether to impose a sentence above a standard sentencing range. "In fact, before *Blakely* was decided, every federal court of appeals had held that *Apprendi* did not apply to guideline calculations made within the statutory maximum." *Simpson*, 376 F.3d at 681 (citing cases).

In *Blakely*, this Court held 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 under a determinate sentencing scheme. *Blakely*, 542 U.S. at 302-05. "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* at 303-04. For the first time, the Court held unconstitutional the practice followed by many courts for imposing sentences above the standard range. *Blakely*, 542 U.S. Ct. at 314-26 (O'Connor, J., dissenting); *Blakely*, 542 U.S. at 326-28 (Kennedy, J., dissenting); *Penaranda*, 375 F.3d at 243; *Simpson*, 376 F.3d at 381. In light of the sea change created by *Blakely*, the Ninth Circuit and every other circuit court to have considered the issue correctly concluded that *Blakely* created a new rule of criminal procedure.

Burton cites to two decisions in an attempt to show a conflict with the Ninth Circuit's opinion. Pet. at 7-8. Neither citation demonstrates a legitimate conflict.

Burton cites to an opinion of the Tennessee Supreme Court. *State v. Gomez*, 163 S.W.3d 632, 649-50 (Tenn. 2005), *cert. petition filed*, 74 USLW 3131 (Aug 15, 2005) (NO. 05-296). While the Tennessee Supreme Court was "of the opinion that *Blakely* did not announce a new rule," *see Gomez*, 163 S.W.3d at 649, the court was not addressing the issue presented here. The Tennessee Supreme Court did not hold that *Blakely* applies retroactively in a collateral challenge. Rather, the case came before the Tennessee Supreme Court on direct appeal. *Id.* at 640. The court determined a *Blakely* claim on direct appeal should be reviewed under the plain error standard if the appellant fails to object in the trial court. *Id.* at 648-51. In reaching the decision, the Tennessee Supreme Court noted that *Blakely* likely would not serve as a basis for relief in a collateral challenge. *Id.* at 651 n.16. The state court agreed with the conclusion of the circuit courts that *Blakely* would not apply retroactively in a collateral proceeding. *Id.*

Burton also cites to a decision of the Colorado Court of Appeals. However, that state court decision does not demonstrate a sufficient conflict under Rule 10 because it is not from a state court of last resort. In fact, the Colorado Supreme Court has granted review of that decision. *State v. Johnson*, 121 P.3d 285, 286-87 (Colo. Ct. App. 2005), *cert. granted*, 2005 WL 3066832. The existence of a legitimate conflict is doubtful since the decision will be reviewed, and likely altered, by the Colorado Supreme Court.

2. The Circuit Courts Agree *Blakely* Does Not Fall Within The Narrow Exceptions To The Non-Retroactivity Doctrine.

When an opinion of the Court creates a new rule, the rule will apply to previously final judgments on collateral review only in limited circumstances. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). New substantive rules, those which decriminalize a class of conduct or prohibit capital punishment for a particular class of defendants, will generally apply retroactively. *Id.* Substantive rules apply retroactively because a significant risk exists that the defendant stands convicted of an act that is not criminal, or faces a punishment not allowed by law. *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)). "New rules of procedure, on the other hand, generally do not apply retroactively." *Schriro*, 542 U.S. at 352. Unlike substantive rules, procedural rules "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 which critically enhance the accuracy of the fact finding process. *Id.* The class of rules that might fall within this exception is "extremely narrow." *Id.*

In *Schriro*, the Court considered whether *Ring v. Arizona*, 536 U.S. 584 (2002), which like *Blakely* applied the *Apprendi* rule in a new manner, applied retroactively. *Schriro*, 542 U.S. at 349. The Court noted that rules which "regulated only the *manner of determining* the defendant's culpability are procedural." *Id.* at 353 (emphasis in original). The Court further noted that *Ring* merely altered the permissible method for determining the appropriate

punishment. *Id.* "Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules. . . ." *Id.* Under this standard, *Ring* created a new procedural rule that did not apply retroactively. *Id.*

Like *Ring*, *Blakely* did not narrow the scope of a criminal statute by interpreting its terms, or alter the range of conduct covered by a criminal statute. *Blakely* also did not place a class of persons beyond the State's power to punish for criminal activity. *Blakely* merely altered the permissible method for determining the appropriate punishment. Like *Ring*, *Blakely* merely allocates the decisionmaking authority from the judge to the jury. Like *Ring*, *Blakely* is a prototypical procedural rule.

The Ninth Circuit, as has every other circuit court to consider the issue, concluded *Blakely* created a new procedural rule that does not fall within the watershed exception. *Schardt*, 414 F.3d at 1036 (quoting *Price*, 400 F.3d at 848-49). The Ninth Circuit correctly determined that a rule transferring the fact finding authority from the judge to the jury does not seriously enhance the accuracy of the fact finding process. *Schardt*, 414 F.3d at 1036. As the Court declared in *Schriro*, "we cannot confidently say that judicial factfinding *seriously* diminishes accuracy." *Schriro*, 542 U.S. at 356. While Burton disagrees with the conclusion reached by the Ninth Circuit in his case, the Ninth Circuit's decision that *Blakely* did not announce a watershed rule is consistent with this Court's decision in *Schriro* and is consistent with the decisions of every circuit court to consider the issue. Review is not necessary.

3. 28 U.S.C. § 2254(d)(1) Prohibits A Grant Of Habeas Relief Based Upon The *Blakely* Rule Because The Rule Was Not Clearly Established Federal Law At The Time Of The State Court Adjudication.

The Antiterrorism and Effective Death Penalty Act prohibits relief on any claim adjudicated on the merits in state court unless the state court decision was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). The phrase clearly established federal law "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 v. Taylor*, 529 U.S. 362, 412 (2000) (emphasis added). Unlike *Teague's* non-retroactivity doctrine, the habeas statute does not provide an exception for retroactive application of new rules. *Cf. Horn v. Banks,* 536 U.S. 266, 272 (2002) (*Teague* analysis distinct from that of 28 U.S.C. 2254(d)). Regardless of whether the new rule is substantive or procedural, 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 adjudication.

The Court did not issue *Blakely* until several years after the state court adjudication of Burton's claim. Because the *Blakely* rule did not exist at the time of the state court adjudication, the rule was not "clearly established federal law" for purposes of 28 U.S.C. § 2254(d)(1). The state court adjudication could not be either contrary to, or an unreasonable application of *Blakely* since the rule did not exist at the time of the state court adjudication. Thus, 28 U.S.C. § 2254(d)(1) prohibits granting Burton relief based upon the *Blakely* rule.

4. The State Court Adjudication Was A Reasonable Application Of Clearly Established Federal Law As It Existed At The Time Of The Adjudication.

The Ninth Circuit correctly determined the state court adjudication was a reasonable application of clearly established federal law as the law existed at the time of the state court decision. Burton's sentence does not exceed the "statutory maximum" as that term was commonly understood before *Blakely*. In *Apprendi*, the Court held, "[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*, 530 U.S. at 490. Prior to *Blakely*, reasonable jurists consistently understood the term "statutory maximum" as used in *Apprendi* to refer not to the standard range, but to the traditional statutory maximum, *i.e.*, the maximum sentence that could ever be imposed for a particular offense. *See Schardt*, 414 F.3d at 1035 (citing *United States v. Garcia*, 240 F.3d 180, 183-84 (2nd. Cir. 2001); *United States v. Phillips*, 349 F.3d 138, 143 (3rd Cir. 2003); *United States v. Angle*, 254 F.3d 514, 518 (4th Cir. 2001); *United States v. Randel*, 304 F.3d 373, 378 (5th Cir. 2002); *United States v. Hughes*, 369 F.3d 941, 946-47 (6th Cir. 2004); *United States v. Patterson*, 348 F.3d 218, 228-29 (7th Cir. 2003); *United States v. Francis*, 367 F.3d 805, 820 (8th Cir. 2004); *United States v. Jardine*, 364 F.3d 1200, 1209 (10th Cir. 2004)); *see also Simpson*, 376 F.3d at 681; *Penaranda*, 375 F.3d at 243 & n.5 (citing cases); *State v. Gore*, 143 Wash.2d 288, 21 P.3d 267 (2001). Jurists generally agreed *Apprendi* did not address procedures utilized under determinate sentencing laws. The state court conclusion that

Burton's sentence did not violate *Apprendi* was a reasonable application of existing law.

C. ASSUMING *BLAKELY* APPLIES RETROACTIVELY IN THIS PROCEEDING, BURTON'S SENTENCE DOES NOT VIOLATE THE HOLDING IN *BLAKELY*.

Assuming *Blakely* applies retroactively, Burton still is not entitled to relief. The *Blakely* Court simply did not address the issue raised in Burton's challenge to his sentence. The state court adjudication of Burton's claim was not contrary or an unreasonable application of the holding in *Blakely*.

In *Blakely*, the Court held an individual sentence imposed for a single offense violated the Constitution because the individual sentence exceeded the standard sentencing range for that offense. *Blakely*, 542 U.S. at 298-301. *Blakely* did not involve the imposition of consecutive sentences. *State v. Cubias*, 155 Wash.2d 549, 553-54, 120 P.3d 929 (2005); *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 (2005). *Blakely* did not hold that imposing consecutive sentences where the individual sentences each fell within the standard sentencing range, violates the Constitution. Because *Blakely* did not reach this issue, and did not clearly establish such a rule in a holding of the Court, 28 U.S.C. § 2254(d) bars relief. Even if such a rule is implicit in *Blakely*, and it is not, Burton is not entitled to relief because *Blakely* did not expressly establish the rule in a holding of the Court. *Kane v. Espitia*, 126 S. Ct. 407, 408 (2005).

The individual sentences imposed for each of Burton's offenses do not exceed the statutory standard sentencing range for each individual offense. The court

imposed a standard range sentence for each offense, then ran the standard range sentences consecutive to each other. Running standard range sentences consecutive to each other does not violate the holding in *Blakely*.

Moreover, even if *Blakely* applied to a court's decision to run sentences consecutive to each other, the sentence still does not violate *Blakely*. Increasing a sentence above the statutory maximum sentence is constitutional where the increase is based upon a defendant's criminal history. "'*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 (quoting *Apprendi*, 530 U.S. at 490) (emphasis added). In this case, the state court ran the standard range sentences consecutive to each other based on the fact of Burton's convictions.

Under a provision of Washington law, when a defendant is sentenced for two or more current offenses that are not serious violent offenses arising from separate and distinct criminal conduct, the court will run the sentences concurrently. Wash. Rev. Code § 9.94A.589(1)(a) (formerly Wash. Rev. Code § 9.94A.400). This provision is referred to as the multiple offense policy. However, the effect of the multiple offense policy may result in punishment that is "clearly too lenient" for the crimes committed. *State v. Smith*, 123 Wash.2d 51, 55-56, 864 P.3d 1371 (1993). The commission of multiple current offenses, combined with the defendant's high offender score, may result in some of the current offenses going unpunished. *Id.* at 56; Wash. Rev. Code § 9.94A.535(2)(c). The operation of the multiple offense policy, when combined with

a high offender score, results "in 'free crimes' – crimes for which there is no additional penalty." *Smith*, 123 Wash.2d at 56 (quoting *State v. Stephens*, 116 Wash.2d 238, 243, 803 P.2d 319 (1991)). If the sentencing court determines the application of the multiple offense policy would result in "free crimes," the court may impose an exceptional sentence. Wash. Rev. Code § 9.94A.535(2)(c); *Smith*, 123 Wash.2d at 55-56. The court may impose a sentence above the standard range or, as it did in Burton's case, run the standard range sentences consecutive to each other. *Smith*, 123 Wash.2d at 55-56. Running the sentences consecutive to each other is "automatically" proper when concurrent sentences would result in "free crimes" without additional punishment. *Id.* at 56 and 58.

In this case, Burton's convictions for rape, robbery and burglary gave him an offender score of 16. Wash. Rev. Code § 9.94A.525. Burton's offender score placed him over the sentencing grid's top end "9 or more" category. Wash. Rev. Code § 9.94A.510. As a result of his high offender score, the standard range would not increase regardless of the number of crimes Burton had committed. As a result, if the court imposed concurrent sentences, Burton would receive "free crimes" – the commission of crimes without any accompanying punishment. *Smith*, 123 Wash.2d at 56. To avoid rewarding Burton with free crimes, or in other words to avoid not punishing Burton for each one of his crimes, the court ran the individual standard range sentences consecutive to each other. The court imposed the sentence based upon the fact of Burton's convictions.

While the Court has not fully explained the meaning of the phrase "other than the fact of a prior conviction," it is objectively reasonable for a jurist to determine that the basis of Burton's sentence falls within the scope of this phrase. A jurist could reasonably conclude the imposition of consecutive sentences in order to avoid rewarding a defendant for the commission of multiple crimes is based upon the fact of the convictions. *Cf. State v. Cubias*, 155 Wash.2d 549, 552-56, 120 P.3d 929 (2005) (imposition of consecutive sentences did not violate rule in *Blakely*); *State v. Louis*, 155 Wn.2d 563, 572, 120 P.3d 936 (2005) (same); *but see State v. Hughes*, 154 Wash.2d 118, 138-40, 110 P.3d 192 (2005) (holding "free crimes" factor does not fall within *Blakely's* "prior conviction" exception); *State v. Ose*, 156 Wash.2d 140, 148-49, 124 P.3d 635 (2005) (same). The Court has not clearly held that a sentence, imposed to ensure that the defendant is punished for each crime he commits, violates the Constitution. Consequently, Burton is not entitled to relief under 28 U.S.C. § 2254(d).

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III. CONCLUSION

For the reasons stated above, the Court should deny the Petition for Certiorari.

RESPECTFULLY SUBMITTED,

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April 26, 2006

NO. 05-9222

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

LONNIE LEE BURTON,

Petitioner,

v.

DOUGLAS WADDINGTON,
Superintendent, Stafford Creek
Corrections Center

Respondent.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that:

1. On April 26, 2006, the Respondent's Brief in Opposition in the above referenced case was served by mail in accordance with Rule 29.3

2. Three copies of the Respondent's Brief in Opposition were deposited in the United States Mail, with first-class postage prepaid, addressed to Counsel for Petitioner listed on the attached service list.

3. All parties required to be served have been served.

4. I am a member of the Bar of the Supreme Court of the United States

DATED this 26TH day of April, 2006.

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