No. 05-9222

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

LONNIE L. BURTON

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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The state does not provide a convincing reason to deny review of the questions presented by Mr. Burton. The cases cited by the state in its attempt to refute the existence of a conflict on whether *Blakely* announces a new rule only demonstrate the confusion that permeates the lower courts on the issue of retroactivity in connection with the *Apprendi/Blakely/Booker* line of cases. The state's argument that the decision below is consistent with this Court's precedent also fails because *Blakely v. Washington,* 542 U.S. 296 (2004) did not redefine the term "statutory maximum."

In addition, although they dominate the response, the state's arguments that Mr. Burton's case provides a poor vehicle for addressing the questions presented are unpersuasive. Contrary to the state's assertions, 28 U.S.C. § 2254(d) does not preclude relief for Mr. Burton, and the district court did not lack subject matter jurisdiction.

A. There is a Conflict About Whether the Holding in *Blakely* is a New Rule.

The lower courts are confused about how to address retroactivity issues arising from the *Apprendi/Blakely/Booker* line of cases and are in conflict on whether *Blakely* announced a new rule.

Of the cases cited by the state as concluding that *Blakely* is a new rule, only two of them actually hold that *Blakely* is a new rule. *See Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005); *United States v. Price*, 400 F.3d 844 (10th Cir. 2005); BIO at 8. Both of these cases are discussed in Mr. Burton's Petition for Certiorari. *Schardt* is the only one addressing a claim under a *statutory* guidelines system. 414 F.3d at 1032-33. In *Price*,

the underlying claim challenges a sentence imposed under the *non-statutory* federal guidelines. 400 F.3d at 846-47. The holding in *Price* that *Blakely* is a new rule suggests that the Tenth Circuit interprets *Blakely* as expanding the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker*, 543 U.S. 220 (2005) as merely applying the rule set forth in *Blakely*.

A third case cited by the state makes no holding about the retroactivity of *Blakely*, but does conclude *Booker* should not apply retroactively. *See Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005). The fourth case, *Simpson v. United States*, does not decide, but only "*assum*[*es*] that the Supreme Court announced a new rule in *Blakely*" and concludes the claim and a successive petition are premature because the Supreme Court has not made *Blakely* retroactive under 28 U.S.C. § 2244(b)(2)(A). 376 F.3d 679, 680-81 (7th Cir. 2004) (emphasis added).

Although the state denies it, the lower courts are in conflict about whether *Blakely* announced a new rule. In conflict with the Ninth Circuit's opinion in *Schardt* and the case below is the Tennessee Supreme Court's opinion in *State v. Gomez*, 163 S.W.3d 632, 649-50 (Tenn. 2005). Examining this Court's analysis and language in *Apprendi*, *Blakely* and *Booker*, rather than relying as the Ninth Circuit has done on lower court opinions about whether *Apprendi* should be applied to the *non-statutory* federal guidelines, the Tennessee Supreme Court concluded *Blakely* did not announce a new rule.

The state correctly points out that the *Gomez* does not hold that *Blakely* applies

retroactively. BIO at 11. Mr. Burton has not suggested it did. The Tennessee Supreme Court, however, did conclude that the holding in *Blakely* is not a new rule. *See Gomez*, 163 S.W.3d at 649-50. The determination that *Blakely* is not a new rule arose in *Gomez* not as part of a *Teague* analysis, but in connection with an application of *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Id.* at 648-50. In *Griffith*, this Court held that new rules must be applied to cases pending on direct review. 479 U.S. at 322-23. *Griffith* and *Teague* are essentially flip sides of the same "new rule" coin. That the issue arose under *Griffith* rather than *Teague* does not diminish the conflict on the identical issue of whether the holding in *Blakely* is a new rule.

Contrary to the state's suggestion, the Tennessee Supreme Court's footnote that *Blakely* likely would not serve as a basis for relief in a collateral proceeding is not inconsistent with its holding that *Blakely* is not a new rule. BIO at 11. The footnote states that under state law, reopening a collateral proceeding would require a claim based on a new rule that applies retroactively. *See Gomez*, 163 S.W.3d at 651 n.16. Since the Tennessee Supreme Court had just concluded that *Blakely* is not a new rule, it is not surprising that court also determined *Blakely* would not provide a basis for state collateral review.

In addition to the Tennessee Supreme Court, the Colorado Court of Appeals has also held that *Blakely* did not announce a new rule. *See State v. Johnson*, 121 P.3d 285, 286-87 (Colo. Ct. App. 2005). The state argues that this is not a legitimate conflict

because the decision will "likely [be] altered by the Colorado Supreme Court. BIO at 11. The state, however, provides no factual basis for this assertion.

B. The Decision Below Contravenes This Court's Precedent.

The state argues that the opinion below is consistent with this Court's precedent. Specifically, the state asserts that the holding in *Blakely* is a new rule because it expanded the definition of "statutory maximum."

In *Apprendi* this Court ruled that the "statutory maximum" was the maximum statutory sentence the defendant could receive "if punished according to the facts in the jury verdict alone." 530 U.S. at 483; *see also id.* at 469. The holding in *Blakely* did not expand that definition. Using almost verbatim language from *Apprendi*, this Court held in *Blakely*: "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.*" 542 U.S. at 303. The portion of *Blakely* that was new was the passage that extended beyond the facts of the case and implicated *non-statutory* guidelines:

> When a judge inflicts punishment that the jury's verdict does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

Id. at 304. As Mr. Burton's case involves *statutory* mandatory guidelines, it is governed by the holding in *Blakely*, which is not new, but compelled by *Apprendi*.

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C. If *Blakely* Did Announce A New Rule, Whether It Applies Retroactively Is An Issue Of Great Importance.

If *Blakely* is a new rule its retroactivity is an important issue this Court should resolve, and the state does not argue otherwise.

The state argues certiorari is not warranted because this Court and all the circuit courts that have considered the issue decided that *Blakely* did not announce a watershed rule. Its argument, however, ignores that *Blakely* requires not only that a jury rather than a judge make certain fact-findings for sentencing, but also that those facts be proven beyond a reasonable doubt. It is the portion of *Blakely* that requires proof beyond a reasonable doubt that this Court has already made retroactive and is a watershed rule. The state has not provided a persuasive reason not to grant certiorari on this issue.

This Court's decision in *Schriro v. Summerlin*, 543 U.S. 348 (2004) does not answer the question of whether the standard of proof required in *Blakely* applies retroactively. The standard of proof was not at issue in that case.

This Court's jurisprudence establishes that proof beyond a reasonable doubt is a bedrock principle of criminal law and substantially affects the truth-finding function. *See, e.g., Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977); *Ivan V. v. City of New York*, 407 U.S. 203, 204-05 (1972). Whether *Blakely*'s requirement that this standard be applied to certain factual findings at sentencing is a watershed rule is an important issue on which this Court should grant review.

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D. Mr. Burton's Case is An Excellent Vehicle for the Questions Presented.

Due to the Anti-Terrorism and Effective Death Penalty Act's ("AEDPA") myriad procedural barriers to federal habeas relief, states are almost always guaranteed an argument that any given habeas case is a poor vehicle for resolving the questions presented. Despite AEDPA's fertile soil, the state fails to provide a persuasive argument that Mr. Burton's case is a poor vehicle for addressing the questions presented.

1. Contrary to the State's Assertion, § 2254(d) Does Not Render This Case a Poor Vehicle to Address the Issues Presented.[1]

The state first argues that "the *Blakely* rule did not exist at the time of the state court adjudication of Burton's claim" and that "[p]rior 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." BIO at 14-15. This argument begs the question of whether the holding in *Blakely* announced a new rule. If, as Mr. Burton argues is the case, the new rule was established in *Apprendi*, not *Blakely*, the state's argument is without merit.

The state's second argument is that even if *Blakely* applies retroactively, 28 U.S.C.

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[1] If the state's argument on the application of 28 U.S.C. § 2254(d) affects this Court's decision on whether to grant Mr. Burton's petition, Mr. Burton requests this Court hold his petition until it has issued an opinion in *Carey v. Musladin*, No. 05-785, a case that likely will further define the parameters of what constitutes clearly established Supreme Court law for purposes of 28 U.S.C. § 2254(d)(1).

§ 2254(d) precludes relief because the sentence on each of the three separate counts of conviction does not exceed the standard range for that count and *"Blakely* did not involve the imposition of consecutive sentences." BIO at 16. This argument relies on a distinction without a difference.

Mr. Burton's punishment exceeds the maximum sentence the judge could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" and thus violates Mr. Burton's constitutional rights as recognized in *Apprendi* and *Blakely*. By statute, there was a presumption that Mr. Burton's sentences would run concurrently. *See* RCW 9.94A.400 (1998).[2] The presumption was only overcome because the sentencing judge made specific additional findings. *Id*; RCW 9.94A.120 (1998); RCW 9.94A.390 (1998).

To increase Mr. Burton's punishment 258 months beyond the 304 months he would receive if his sentences ran concurrently, the judge applied the exceptional sentence provisions and found that application of the concurrent sentence provision in RCW 9.94A.400 "results in a presumptive sentence that is clearly too lenient." RCW 9.94A.390 (1998). In other words the judge relied on a fact not proven to a jury beyond a reasonable doubt to exceed the statutory maximum sentence available without that

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[2] The statute provides: "Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.120 and 9.94A.390(2)(f) or any other provision of RCW 9.94A.390." RCW 9.94A.400 (1998).

finding. Mr. Burton's exceptional sentence is unconstitutional. As the Ohio Supreme Court recently recognized when addressing consecutive sentences under a similar statutory scheme, "because the total punishment increases through consecutive sentences only after judicial findings beyond those determined by a jury or stipulated to by a defendant, [the consecutive sentence statute] violates principles announced in *Blakely*." *State v. Foster*, 845 N.E. 2d 470, 491 (Ohio 2006).[3]

The state's final argument is that even if consecutive sentences are governed by *Blakely* the judicial fact-finding at issue here, that the imposition of concurrent sentences in this case is "clearly too lenient," is a criminal history finding and not of a type governed by *Blakely*. BIO at 17-19.[4] This argument has been squarely rejected by the Washington Supreme Court. In *State v. Hughes*, the Washington Supreme Court held the "clearly too lenient" provision "is not based solely on the objective determination of the existence of prior convictions; instead, it also requires the conclusion of whether the presumptive sentence calculated is clearly too lenient in light of the other convictions. . . . *Blakely* did not authorize such additional judicial fact finding. The too lenient conclusion is one that must be made by the jury." 110 P.3d 192, 202 (Wash. 2005).

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[3] The state's reliance on *State v. Cubias*, 120 P.3d 929 (Wash. 2005) is misplaced because the imposition of consecutive sentences in that case did not depend on judicial fact-findings.

[4] The state relies on *State v. Smith*, 864 P.2d 1371 (Wash. 1993). *Smith*, however, was specifically overruled on the relevant point by *State v. Hughes*, 110 P.3d 192, 203 (Wash. 2005).

2. The State's Erroneous Argument That the District Court Lacked Subject Matter Jurisdiction is Not a Reason to Deny Certiorari in this Case.

As in the district court and the Ninth Circuit, the state here argues the district court lacked subject matter jurisdiction. And, as both the district court and Ninth Circuit concluded, the state is wrong.

The fact that a petition is second in number does not automatically render it "second or successive" under 28 U.S.C. § 2244. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-44 (1998). The statute incorporates the abuse of the writ doctrine. *See Slack v. McDaniel*, 529 U.S. 473, 486 (2000); *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996). Accordingly, the relevant inquiry is not confined to the number of petitions filed, but must also consider whether a petitioner has a "legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 490 (1991).

Mr. Burton diligently pursued his appeals and post-conviction proceedings. When Mr. Burton filed his first federal habeas petition in 1998, the judgment on his 1994 conviction was final and all state remedies related to his conviction were exhausted. He diligently filed a habeas petition on those claims in 1998 before the one-year statute of limitations expired. While the habeas petition on his conviction was pending, Mr. Burton diligently pursued his state remedies on the sentence he received at his third re-sentencing in 1998. As soon as he had exhausted state court remedies on his sentencing claim, Mr. Burton, in 2002, filed a second habeas petition raising claims only about his sentence.

The state argues Mr. Burton, in 1998, should have filed a mixed petition and utilized the "stay and abey" procedure to avoid filing a second petition in 2002. In 1998, however, this was not a viable option for Mr. Burton. A Ninth Circuit opinion published in 1998 commented that the "legitimacy of the district court's self-titled 'procedural device of withdrawal and abeyance' presents an important and difficult question of first impression in this Circuit." *Calderon v. United States District Court (Taylor)*, 134 F.3d 981, 983 (9th Cir. 1998). The Ninth Circuit held that it could not say the district court erred in holding the amendment exhausted petition in abeyance, but also indicated that an attempt to re-amend the petition to add previously unexhausted claims might be subject to an abuse of the writ challenge. *Id.* at 988-89. The current stay and abey procedures were not fully approved by the Ninth Circuit until 2001. *See Jackson v. Roe*, 425 F.3d 654, 659 (9th Cir. 2005). Thus, given the state of the law in 1998, Mr. Burton did not fail to raise his sentencing claim at the appropriate time, or, at a minimum, has a legitimate excuse for not filing a mixed petition at that time.

The state also argues that Mr. Burton should have waited until 2002 to file a single petition addressing his conviction and sentencing claims. In 1998, however, it was unclear whether the federal statute of limitations ran from the time the judgment of conviction was final or from the time the judgment on sentence was final. For Mr. Burton to wait was a risky proposition. As the district court below observed:

> Had petitioner waited to file his claims challenging his conviction, he was at risk of losing the opportunity to present

them in 2002 due to the one-year statute of limitations imposed under AEDPA.

The uncertainty over when a judgment becomes final was not clarified in the Ninth Circuit until 2000. *See United States v. Colvin*, 204 F.3d 1221 (9th Cir. 2000). Mr. Burton therefore should also be excused from waiting until 2002 to file a habeas petition.

Under the specific circumstances of this case, Mr. Burton did not abuse the writ of habeas corpus but acted diligently and reasonably. The lower courts correctly concluded Mr. Burton's 2002 petition was not a "second or successive" petition for purposes of § 2244. Accordingly, the state's argument that the district court lacked subject matter jurisdiction is not a reason to deny Mr. Burton's petition for certiorari.

CONCLUSION

The state has not offered a persuasive reason for this Court to deny Mr. Burton's petition for certiorari. For the reasons set forth in his petition, and those addressed in this reply, this Court should grant the petition for a writ of certiorari.

DATED this 5th day of May, 2006.

Respectfully submitted,

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ORIGINAL

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that the following is true and correct:

Pursuant to Supreme Court Rule 29.3, I served a copy of the Petitioner's Reply in Support of Petition for *Certiorari* to the United States Court of Appeals for the Ninth Circuit on all parties requiring service, by depositing a copy with the United States Postal Service with first-class postage prepaid on May 5, 2006, addressed to:

John J. Samson
Office of the Attorney General
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504
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(Attorney for Respondent)

DATED this 5th day of May 2006.

Brian Tsuchida

SUBSCRIBED AND SWORN to before me this 5th day of May 2006.

Julie L. Fox Valencia
NOTARY PUBLIC in and for the State of Washington, residing at Seattle, WA
My appointment expires: 8/14/08

FEDERAL PUBLIC DEFENDER
Western District of Washington

May 5, 2006

Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: *Lonnie L. Burton v. Doug Waddington*, No. 05-9222
Reply in Support of Petition for Certiorari

Dear Mr. Suter:

Enclosed for filing please find an original and ten copies of Petitioner's Reply in Support of Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit and Certificate of Service by mail.

Very truly yours,

Brian Tsuchida
Assistant Federal Public Defender
Attorney for Lonnie L. Burton

BT/kac

Enclosure(s)

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