IN THE SUPREME COURT OF THE UNITED STATES

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LONNIE LEE BURTON, :

Petitioner :

v. : No. 05-9222

BELINDA STEWART, SUPERINTENDENT, :

STAFFORD CREEK CORRECTIONS CENTER.:

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Washington, D.C.

Tuesday, November 7, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Burton versus Stewart.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Thank you, Mr. Chief Justice, and may it please the Court:

In Sharp versus Pain, the Ninth Circuit opinion that first decided the question that's before you today, the Ninth Circuit said, and I'm quoting: "The rule of Blakely that the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict, was not clear until the Blakely decision itself." The Ninth Circuit is simply wrong. In this Court's Apprendi decision it laid down precisely that rule. At page 483 of that decision this Court described the statutory maximum concept as, quote, "the maximum a defendant would receive if punished according to the facts reflected in the jury verdict alone" -- virtually the identical language.

JUSTICE SOUTER: Mr. Fisher, you know, assuming we read it the way you read it, I've got a

basic problem that doesn't really surface until you get to the end of the briefs and I wonder if you would comment on it at the beginning of the argument. That is -- or I'll put it in the form of a question.

Is the decision which the judge makes here to sentence consecutively rather than concurrently, a decision that requires the finding of any fact about the commission of the crimes themselves or the circumstances of those crimes or about the defendant's character?

Does the judge have to make or does the fact -- some fact finder have to make a finding on any of those subjects -- crimes, circumstances, character of the defendant?

MR. FISHER: Yes, he does, Justice Souter.

JUSTICE SOUTER: What is that fact?

MR. FISHER: It's precisely the same kind of fact that the judge had to find in Blakely itself. Under the Washington, Revised Code of Washington, the statute, the statute for running sentences consecutively in the fashion that Mr. Burton's were run consecutively, refers the judge back to the very same provision that was at issue in Blakely itself, which is the aggravating factors provision of Washington, which was formerly codified at section 390 and is now codified at section 400.

JUSTICE SOUTER: I thought the only fact that had to be found was that, given the classification sentencing scheme Washington had, there would be, in effect, a free crime, no incremental punishment, unless there were consecutive sentencing. That's not a fact that falls within any of those categories of crime, character, or circumstances.

MR. FISHER: That would be a fact, Justice Souter, but that is not the way the Washington law works. It is colloquially known as the free crime aggravator. But in the Washington Supreme Court decision in Hughes which is cited at the end of our reply brief the Washington Supreme Court made clear that to invoke that aggravator a court has to find that there was extraordinarily serious culpability or extraordinarily serious harm that accompanies the multiple offenses.

JUSTICE SOUTER: So it's a misnomer to say it's a mere free crime criterion? It's free crime plus some further fact?

MR. FISHER: That's right. And this Court's decision -- I'm sorry. The Washington Supreme Court decision in Hughes clearly lays that out. If you have any doubt about the way the consecutive sentences work in Washington, I want to give you one other citation, to

a new Washington Court of Appeals decision that considers a consecutive sentences imposed exactly the same way that Mr. Burton's was. That is to say, they are run consecutively based on the clearly too lenient factor. That case is called State versus Washington and it was just reported at 143 P.3d 606, 143 P.3d 606. The Washington Court of Appeals in that case, considering a sentence just like Mr. Burton's, says that it does trigger and violate Blakely.

JUSTICE SOUTER: So the extra fact then is a lot like the sort of heinous, atrocious and cruel aggravator? I mean, it's comparable to it?

MR. FISHER: Exactly, it's part of the same list. And as this Court said in Apprendi itself, that extra culpability, which is one of the ways this aggravator can be met, is the quintessential type of element that needs to be proven beyond a reasonable doubt .

JUSTICE BREYER: When you say extra culpability, do you mean the nature of the crime? Suppose there are three crimes all committed at the same time -- murder, rape, and kidnapping.

They're all very serious crimes. And if you sentence them consecutively, you will take into account that there were three. If you sentence them

concurrently, it doesn't matter. The Washington court says, we're not just looking to the fact that murder or rape or kidnapping are serious; we're looking to sentence consecutively if do you more than that. You have to look to see that the kidnapping was a special kind of kidnapping.

MR. FISHER: That's right, Justice Breyer. In section -- the current section is section 589 of the Washington Code and it says that sentences shall run concurrently unless the judge makes an extra finding of exactly the same type the judge is required to find in Blakely. And if you look at Blakely itself, remember Blakely involved concurrent sentences. And so what Washington is doing is saying all sentences should run concurrently unless there's an extra fact, something about the additional crimes that would otherwise be running concurrently, that simply requires the judge to go above and beyond the ordinary concurrent sentences and punish those crimes separately.

JUSTICE SOUTER: But could the nature of the additional crimes themselves satisfy it? In other words, could the judge say, well, all three -- it might be one thing if one were serious and the other two were trivial, but all of these three are very serious. Now, that's in effect a value judgment, not a finding of

discrete fact. Could that value judgment satisfy the extraordinary criterion that Washington says there must be in addition to free crime.

MR. FISHER: No, it couldn't, and the Washington decision that I've cited to you will help you with this, because it makes it clear that to trigger an aggravator to run sentences concurrently, just as under Blakely itself, there has to be something above and beyond the elements of the crime or the crimes themselves. It can't simply be -- I'm sorry. It can't simply be that there were three crimes committed and all three of them are very serious.
It has to be something about the crime, the additional crimes, that takes it above and beyond the ordinary commission of that crime.

JUSTICE STEVENS: But, Mr. Fisher, even if it's true that there are other examples out there that might qualify for that example, it's not true of this case?

MR. FISHER: I'm not sure I follow, Justice Stevens.

JUSTICE STEVENS: In this particular case, there was -- it was necessary to make an additional finding of fact, even though there may be cases out there in which you could get consecutive sentences

without an additional finding of fact?

MR. FISHER: You're certainly right that in this case you needed to have an extra finding of fact. There are some situations under the Washington Code and I believe in the majority of other States where it is up to the judge's discretion whether to run sentences concurrently, and he could do it for the reason that Justice Souter described. So what Washington does in its respondent's brief is it cites these other State decisions, from other States that simply have different sentencing systems than we have in Washington.

CHIEF JUSTICE ROBERTS: I'm not sure I understand that. I mean, we have not held, for example, that the fact of a prior conviction is something that has to be submitted to a jury under Blakely. Why, if you're determining that sentences run consecutively, isn't that just the same as looking at a simultaneous conviction and saying they're going to run consecutively?

MR. FISHER: Under some State systems that might be the case, Mr. Chief Justice. However, in Washington the way that the code works is that judges are directed that for multiple crimes the sentences shall run consecutively.

CHIEF JUSTICE ROBERTS: So you'd have --

MR. FISHER: Unless they make the exact kind of extra finding, and it refers them to the precise same statute that was at issue in Blakely itself.

CHIEF JUSTICE ROBERTS: And you're saying that that extra finding can't simply be that this is a conviction for a particular serious crime that's going to go unpunished otherwise?

MR. FISHER: That's right.

CHIEF JUSTICE ROBERTS: So under this system if you had a regime where if you're convicted of murder and you've been convicted of rape before that, you get an enhanced sentence beyond the normal murder sentence, that would not contravene Blakely. But if you're convicted at the same time for rape and murder and those two sentences run consecutively, you say that that does violate Blakely.

MR. FISHER: If the judge needs to make an extra finding beyond the elements of either of those two crimes to run them consecutively, then it would violate Blakely.

THE COURT: But we've never held that? We've never held that consecutive -- that the treatment of sentences as concurrent or consecutive is covered by Blakely?

MR. FISHER: You haven't had a case in the

Apprendi-Blakely line of cases dealing with consecutive sentences. But what you've done is laid down a rule from the very State that we're dealing with here that says that if the judge needs to make an extra finding beyond the elements of the crimes of conviction and beyond the facts encompassed in the jury's finding of guilt for those crimes, then those findings need to be proved to a jury beyond a reasonable doubt. That's why in this case that line, that rule, is triggered.

The Ninth Circuit of course didn't talk about any of this. What it said, as I mentioned, is that it simply took Apprendi to be a purely formalistic rule that had nothing to do with the facts according to the jury verdict, but it just had to do with whatever the State happened to label as the statutory maximum. In Apprendi this Court said, not once but three times, that the statutory maximum concept was triggered according to the facts encompassed in the jury verdict. And like the Washington courts, the Ninth Circuit simply ignored that language in this Court's opinion.

Lest there be any doubt about the way that concept mapped onto this case, this Court said in Apprendi itself that the relevant inquiry was not one of form but one of effect: Does the required finding take a defendant to a higher sentence level than would

otherwise be permissible based on the facts encompassed in the jury verdict?

JUSTICE GINSBURG: Mr. Fisher, there's another potential impediment in this case and I would like you to comment on it. That is the petition from the sentence, it was second in time. There was a prior petition that challenged just the conviction, and under the governing statute, to have a second petition, you've got to get permission from the court of appeals and it has to meet stringent criteria.

How do you get past that? You went out concentrating on the petition addressed to the sentence which is a second petition.

MR. FISHER: This is the very first petition that Mr. Burton has filed against the 1998 judgment. He did file earlier a petition against the original judgment of 1994. In the joint appendix at page 34, that is where that petition is reprinted. He says quite clearly that he is challenging the 1994 judgment in that petition, whereas here this is his first petition against the 1998 judgment.

JUSTICE GINSBURG: So did -- then you are bifurcating the judgment in a criminal case, which is not the sentence. You are saying there's an earlier judgment, and looking at it as we would as if it were a

civil case, if you have a determination of liability, that doesn't give you a final judgment. The judgment will come at the end of the case when damages are determined.

MR. FISHER: That's right, Justice Ginsburg. And if what the State is saying is correct, which is to say that we don't have any judgment at all until the sentence is final, then all you get from that is that Mr. Burton's first petition should have been dismissed and the court could have gotten it dismissed. But we submit what you can't do from that is retroactively change the first petition that he explicitly told the court was against the 1994 judgment, and that he told the court in that same filing on JA 35 and JA 40, that his sentence was still on direct review. You can't retroactively change that challenge to the 1994 judgment into one against the 1998 judgment, for two reasons.

One is that if the State is right, the district court wouldn't have had jurisdiction under that 1998 -- challenge against the 1998 judgment either, because as Mr. Burton forthrightly told the court, that sentence was still on direct review. But even if you get past that, we submit that this Court's Castro decision simply doesn't allow a court, especially retroactively, to recharacterize a habeas petition that

the petitioner himself said was against one judgment as against another.

JUSTICE KENNEDY: So you think there can always be two petitions, one -- of sentences on review?

MR. FISHER: No, there can't, Justice Kennedy. And so what should have happened according to the state's theory, is that the first petition should, should simply have been dismissed.

JUSTICE KENNEDY: Bit is that also your theory?

MR. FISHER: I think that's -- this Court hasn't laid down a solid decision. But I think that's a better reading.

JUSTICE KENNEDY: But are you -- are you asking us to say that while the sentence is still under review, there can be no habeas petition filing?

MR. FISHER: Am I asking --

JUSTICE KENNEDY: Why isn't that up to the option of the petitioner? He can take his chances or he can wait.

MR. FISHER: I think that is a fair characterization, Justice Kennedy. But what Mr. Burton did is he want to the district court saying I'm challenging the 1994 judgment. And as I was saying, under Castro before that gets recharacterized --

JUSTICE KENNEDY: I'm asking if it is your position whether or not he properly can do that?

MR. FISHER: I don't think so. But I'm just recognizing that that's a jurisdictional question that this Court would decide for itself. But assuming that he can't do that, what the district court would have had to say is, Mr. Burton, you're not allowed to challenge the 1994 judgment. And let's assume for the moment he could have challenged the 1998 judgment. The district judge would have said, "Now Mr. Burton, you're only challenging your conviction for the 1994 judgment. You need to wait until you're ready to challenge your sentence, and then you can challenge the 1998 judgment." Presumably -- and this is I think a fair inference especially from the petition itself as it is reprinted, since he told the district court that he was challenging his sentence, if he was told he couldn't bring it at that time he would have said okay, I will withdraw it and wait until I can challenge my sentence.

JUSTICE SOUTER: But if the first proceeding was not in fact jurisdictionally barred, then you would lose under the second and successive objection in this case, right?

MR. FISHER: I don't know that we would, Justice Souter.

JUSTICE SOUTER: Why not?

MR. FISHER: Because it is a common rule that -- this Court hasn't had a case exactly like this, but the lower courts do all the time; and the Fourth Circuit case in Taylor which I've cited in the reply brief is one of them. Where, it is a common practice for a petitioner to bring one petition against a judgment and then be partially successful, and then bring a new petition against something in the new judgment. And that's essentially what happened here. And it may --

JUSTICE SOUTER: Aren't those cases in which the first judgment is complete, he simply does not attack everything that was a predicate for the first judgment; and then if there is, in fact, a new trial, and a new judgment, of course, the habeas possibility arises again, whereas in this case, the first judgment was not complete.

MR. FISHER: No, you put your finger on it exactly. And so, but we still think that, that, either the court had jurisdiction or it didn't. And if it had jurisdiction, then it must be -- fall in somehow into the category that you're talking about.

JUSTICE STEVENS: But that's not necessarily true. Isn't it also possible if, at the time of the

first judgment the judge could have said, well you really haven't exhausted your remedies because it is not final until the whole thing is over. But nevertheless, because exhaustion is not a jurisdictional matter, I'm going to go ahead and decide it.

MR. FISHER: Could a district judge have done that?

JUSTICE STEVENS: Yes.

MR. FISHER: I think what would have needed to have happened here, since Mr. Burton at pages 35 and 40 of the joint appendix, told the district judge, I'm still challenging my sentence on direct appeal, under AEDPA and customary comity principles, the judge would have needed to say, you need either to renounce that appeal from the State court or renounce this one. You couldn't do both at the same time.

Mr. Burton, if he had wanted to, I think it is fair to say, could have gone into district court and said, I now have a new judgment and I'm going to challenge my conviction and sentence because I have no intention of challenging my sentence through State court proceedings. And perhaps he could have done that. But that would be a very different situation than what we have here.

If I can turn back to the, not a new rule

question, another angle at this is not simply to look at the text of this Court's opinion in Apprendi which we submit told a State court in this situation all it would have needed to know, but also perhaps it is helpful to look behind that and look at the statutes that were in play in New Jersey and in Washington. And even if you did that it becomes, we submit, very clear that a district judge, any reasonable trial judge, that is, would have known that Apprendi applied here.

What you had in New Jersey was essentially two statutes. One that said an ordinary commission of a crime is punishable up to 10 years. And a second statute that said if you commit that crime with some kind of extra -- extra bad circumstance, there a hate crime, then you get -- you can get a higher sentence.

Exactly the same thing was true in Washington. We had one statute that said this is what the, this is what the punishment is for the ordinary commission of this crime. And we had an extra statute that said, but if you commit that crime with extra bad circumstances -- and here the only difference was, there was a list of circumstances, not just a single one -- but if you commit the crime with extra circumstances, then you can get extra punishment.

And the analogy that the respondents want to

draw between the Washington sentencing system and the Federal guidelines just simply doesn't hold up.

CHIEF JUSTICE ROBERTS: So you think Blakely was not a new rule but Booker was?

MR. FISHER: I think that's fair to say, Mr. Chief Justice. Because in Blakely all you needed to do was apply Apprendi which said that if you have two different statutory thresholds, the pertinent threshold for Sixth Amendment and Fourteenth Amendment purposes is the one that cabins the judge's discretion based on the facts in the jury verdict. To decide Booker this Court had to take the term statutory maximum and apply that to a different type of threshold, which was as this Court put it a court rule or a quasi legislative enactment.

So under -- under the system that this Court reviewed in Booker, you had only a single true statutory maximum. And then you had to decide whether the Apprendi principle ought to be in play for the Federal sentencing guidelines. And if there is any confusion on that, a trial judge could have looked at Apprendi itself where this Court and Justice Thomas's concurrence made clear that there was unique status of the Federal sentencing guidelines that made it a more difficult question.

However, here where you didn't have anything

like that, we had just a simple situation where there were two statutes, one maximum for the ordinary crime, and then an additional maximum for the crime being committed with aggravating circumstances. And so it was a very clear map line. And that's what this Court said in Blakely, of course. It said, it didn't break any new ground in the decision in Blakely. It simply said that, took the state's argument and rejected it by saying our precedents on this point are clear. And it just simply quoted the Apprendi language, that the statutory maximum for Sixth and Fourteenth Amendment purposes is the maximum that a defendant may receive based on the facts and the jury verdict alone.

JUSTICE GINSBURG: There were decisions going the other way.

MR. FISHER: There were lower court decisions?

JUSTICE GINSBURG: Yes.

MR. FISHER: Yes, there were. And I think, if we want to talk about these, it is important first to be clear about what we are talking about. There were, there was a Supreme Court of Kansas that had looked to the relevant language in Apprendi and decided that its sentencing guidelines system could not stand. And then you had, on the other side the Supreme Court of

Washington, and the Supreme Court of Oregon, and a couple of other State intermediate courts, I think some in unpublished decisions, that had gone the other way.

But I think it is very telling, Justice Ginsburg, if you want to look at those State supreme -- I'm sorry, those State supreme court and lower court decisions, because none of them -- not a single one -- quotes Apprendi or even acknowledges the passages in Apprendi that said the test is not one of form but of effect. And there's several passages in Apprendi that said that the statutory maximum was the maximum allowed based on the facts in the jury verdict. So once you take those into account, we submit, as the Kansas Supreme Court realized, there is only one conclusion that you can reach. The only way those lower courts were able to come to a contrary decision was simply to pluck out -- pluck out other sentences of Apprendi and not acknowledge the rest of the opinion. And of course, the rest of the opinion where this Court has these passages, pages 483, 482, are the absolute guts, the building blocks of the opinion itself. It is where the Court canvasses the historical rule that was incorporated into our constitutional system. And so it is not as though that is some sort of dicta that or loose language that this Court had in its opinion. It

was the very guts of the holding of Apprendi.

And we submit that, in a Teague analysis where you are indeed supposed to look to whether a reasonable jurist would have found something, not just the fact that they exist, but whether a reasonable jurist would have reached a given conclusion, once you take the whole of Apprendi into account, there was only one conclusion that a reasonable jurist could have come to.

JUSTICE KENNEDY: I suppose that doesn't make the dissenters in Blakely feel very good.

MR. FISHER: Well, Justice Kennedy, I think, as I understand the dissents in, in Blakely, the dissents in Blakely primarily were saying that Apprendi itself was a bad idea. And that Apprendi really wasn't dictated by the Sixth and Fourteenth Amendments. I see almost nothing, in fact really nothing in the dissents of Blakely itself that says taking Apprendi as the law, we can distinguish it from the facts in this case. There was nothing of that in the dissents.

JUSTICE KENNEDY: Of course you have to show that the result was dictated by the prior precedent. That's a strong phrase. We said it in Stringer -- Stringer versus Black. But if it has a new application, that's -- that's new. Even though the principle is the

same.

MR. FISHER: I think the Stringer test is helpful because there, of course, this Court said that one of its prior decisions was not a new rule, because even though there was a different State sentencing system that slightly different before the Court in the subsequent case, the principle from the prior case dictated only one result. And I think once you go back to the dissents in Blakely and compare them let's say, with the dissents in Booker, on the merits that is, in Booker, I think again it is telling, because the dissenters in Blakely had nothing to say in terms of a possible way to distinguish one case from the other; whereas in Booker, the dissents did point out we don't have to extend it this far. We can limit to it to true statutes and not go this far. So there is a difference.

Really what this case, I think one way to phrase it in terms of what it comes down to, is whether when this Court lays a decision down like Apprendi, that has a clear rule and lots of historical, robust reasoning behind it, saying why we are adopting a certain rule, whether it is up to the lower courts, in this case the State courts, to second-guess this Court and say I don't know if the Court really means what it says, as Justice Breyer later put it in the Blakely

dissent.

We think that, we submit what this Court should say is that when we say something is the law, that lower courts ought to assume that's the law, at least until we tell them somehow that the law is different.

If there are no more questions on the new rule, I will quickly address the watershed argument. Because if for some reason this Court adopted the state's view that really all Apprendi was was a highly formalistic rule about what is a statutory maximum, and that -- and that just simply labeling, courts could have evaded it, we think that Blakely itself then has to be considered a watershed exception -- a watershed rule. And the reason why is because, is because of an error that runs throughout the state's brief.

And the state's position is basically that this can't be watershed because Apprendi and Blakely deal with circumstances where a defendant has already been convicted of a crime and all we're considering is what sentence ought to be imposed. But, of course, that -- that contravenes the very holding of Apprendi and Blakely which is to remedy the fact that the defendant is being sentenced for a greater crime than the jury actually found him guilty of. And --

CHIEF JUSTICE ROBERTS: This argument, this argument assumes that we rule against you on whether or not it is a new rule.

MR. FISHER: I think that's right, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Don't you have -- don't you have to address AEDPA before we get to that question?

MR. FISHER: In the watershed realm?

CHIEF JUSTICE ROBERTS: In other words, it doesn't matter it it's a watershed, I guess it is a point of argument, but it is not clear that it matters whether it is a watershed rule if you read AEDPA 2254(d)(1) by its terms.

MR. FISHER: If this Court concluded in the Whorton case that watershed did not survive AEDPA, then of course you're right, watershed doesn't -- can't get us home here. But as this case comes to the Court, as I understand it, this Court is considering this case in a posture that it really dealt with in Horn versus Banks where it said that even post AEDPA, what a court is supposed to do is conduct what this Court termed a threshold Teague inquiry as to whether Teague is satisfied. And of course in Horn, this Court mentioned the watershed exception itself.

So we think that what this Court should really do is address that threshold question to the extent it needs to holistically.

If there are no more questions, I'll reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Fisher.

Mr. Collins.

ORAL ARGUMENT OF WILLIAM B. COLLINS

ON BEHALF OF RESPONDENT

MR. COLLINS: Mr. Chief Justice, and may it please the Court:

I would like to begin where Justice Ginsburg began, with the issue of successive petitions. We believe that the petition before this Court is a successive petition barred under AEDPA. Now my brother, Mr. Fisher says that it's not a successive petition because the first petition challenged the 1994 judgment. But that is simply not correct as a matter of the facts of this case.

A new judgment was entered in March of 1998. That judgment was entered as a result of Mr. Burton's conviction being affirmed and his sentence being reversed. So when he was in custody, when he filed his first petition, he was in custody pursuant to that

amended judgment.

JUSTICE SOUTER: So that is the only judgment that could be attacked on habeas?

MR. COLLINS: Exactly, Your Honor. So he has an amended judgment filed in March of 1998. He files his first petition challenging his conviction under that petition. Later, in 2002, he files a second petition challenging his sentence.

CHIEF JUSTICE ROBERTS: It doesn't matter -- I'm looking at joint appendix page 34, date of judgment of conviction, he puts in December 16, 1994.

MR. COLLINS: He does put that in, Your Honor, but I don't think that's determinative. If you take a look at page 35, on question 8, they say, did you appeal from the judgment of conviction? Answer, yes. If you did appeal, answer the following. And it lays out the facts that he appealed, that his conviction was affirmed, that his sentence was reversed, and then a new judgment is entered in March of 1998.

He is not in custody pursuant to the 1994 judgment. He is in custody --

CHIEF JUSTICE ROBERTS: Where does it say a new judgment was issued in March of '98?

MR. COLLINS: Your Honor, that's in the joint appendix at page 3, which shows that --

CHIEF JUSTICE ROBERTS: Oh, I thought you meant it was in his petition.

MR. COLLINS: No, no, it wasn't in his petition, Your Honor, but it doesn't seem -- the fact that he was looking back at his conviction, original conviction being 1994, and that's what he wrote down, doesn't mean that that was the conviction and that was the judgment under which he was in custody, because it simply wasn't. The original 1994 judgment no longer existed because a new judgment had been entered. So because -- and I don't think -- I think what we disagree about in this is which judgment, if the first petition went to the first -- to the 1994 judgment, and the second petition went to the 1998 judgment, then we would agree with Mr. Fisher that it is not successive.

On the other hand, I believe I heard him say that if you agree with us, that the only judgment in existence at the time he filed his petition was the 1998 judgment. Then he's filed a successive petition with regard to that judgment, one in December of 1998 dealing with the conviction; a second in 2002, dealing with the sentence.

So since it's a successive petition and Mr. Burton did not go through the gatekeeping function that AEDPA requires, there is no -- the district court

had no jurisdiction and subsequently, we believe that this Court does not have jurisdiction.

JUSTICE BREYER: The fact is, we're looking at page 34, 34 of the joint appendix, and that is the first petition that was filed; is that right?

MR. COLLINS: That's correct, Your Honor.

JUSTICE BREYER: So you look at it and it says, filed December 28, and maybe this is what you said. Then it says date of judgment of conviction, December 16, 1994. So looking at that, you'd think that is what he was attacking. Where does it say he's attacking anything else?

MR. COLLINS: Well, Your Honor, it doesn't say he's attacking anything else, but the problem with that is that when he filed this petition, he was not being confined --

JUSTICE BREYER: Yes, but I imagine there are tens of thousands off petitions filed in the Federal system. And I would think that judges when they're trying to look at those petitions, or the magistrate looks at them and says what judgment are you attacking, he has to figure that out often for statute of limitations purposes, or some other purpose. He'd look over there, go down and read that line two, and he'd think yeah, that's the judgment that's being attacked,

unless of course there's some indication that it's something else.

I've never heard of this before. Is there any precedent on that where even though the petition refers to date A, and there's nothing in to suggest anything other than date A, because it turns out that there's a different judgment that in fact, he's being held, which is date B, that the court says oh, you're attacking date B.

Is there any precedent that says that's how it's read?

MR. COLLINS: I'm not aware of any precedent.

JUSTICE BREYER: No. So this might be the first time. I don't see a reason why you wouldn't read the petition that's filed in an ordinary way and say the judgment that's being attacked is the judgment that it refers to.

MR. COLLINS: Well, Your Honor, I think you have to say the judgment that's being attacked is the judgment by which he's being confined. I mean, he --

JUSTICE BREYER: I don't know what implication this is going to have for a lot of these petitions. I don't know one way or the other, but it might be there are thousands right now in the Federal

court which have date A, and somebody is going to go back and say no, it is really date B or something. I'm a little nervous about it. If you're not nervous, you're the ones in charge.

JUSTICE SOUTER: Well, Mr. Collins, isn't it your position that, number one, the only judgment that he can attack on habeas is the judgment that is extant at the time of the habeas proceeding, and that is the '92 judgment that follows the resentencing? But he may in attacking that judgment attack the premise of conviction which occurred earlier?

MR. COLLINS: Exactly, Your Honor.

JUSTICE SOUTER: And if he chooses to attack only the earlier conviction which is the premise of the later judgment, he has simply in effect waived any other issue. And when he comes in later and tries to raise the issue that he could have attacked under the '92 judgment, he's in effect trying to split up his habeas, it's second and successive, and that's why he can't do it.

MR. COLLINS: That's exactly right, Your Honor.

CHIEF JUSTICE ROBERTS: And further, I thought you told me that the petition goes on to indicate that the conviction while affirmed, that the

sentence was reversed, looking at 9(b) on joint appendix 35.

MR. COLLINS: Yes, Your Honor.

CHIEF JUSTICE ROBERTS: Which in other words, he details in the petition the subsequent history that would have resulted in a new judgment.

MR. COLLINS: That's right, Your Honor.

Next I would like to go briefly to the question that Justice Souter asked about --

JUSTICE STEVENS: May I just be sure I understand one thing about that? So you're saying at the time he filed the petition on December 28, 1998, he had already had, the second judgment had already been entered by the Washington Supreme Court?

MR. COLLINS: It had been entered by the trial court, Your Honor, so he --

JUSTICE STEVENS: Pursuant to the reversal of the --

MR. COLLINS: Exactly, Your Honor. That sentence is on page -- if you look at page 3 of the joint appendix, that is the second amended judgment filed in the superior court in Washington on March 16, 1998, and he was confined under the authority of this judgment.

JUSTICE STEVENS: Of the second judgment?

MR. COLLINS: Of the second judgment.

JUSTICE SCALIA: Why does it make any less sense to allow separate habeas challenges to, first, the conviction, and then the sentence, than it does to allow separate appeals to this Court from each of those? And once again under the statute, we entertain appeals only from final judgment, but you can bring here on certiorari the judgment of conviction, even though proceedings for the sentence are still in progress.

MR. COLLINS: Well, Your Honor, I think we're talking about the habeas corpus statute and there the Court --

JUSTICE SCALIA: A fortiori, we have a lot more control over habeas corpus, which is an equitable remedy, than we do over, what is it, 1257, our jurisdictional statute under certiorari.

Why does it make any more sense for habeas purposes to insist that he await the final sentence before he gets review of the premise for that sentence, namely the conviction?

MR. COLLINS: Your Honor, I'm sorry.

I think that a couple things are being confused here.

JUSTICE SCALIA: All right.

MR. COLLINS: The first thing is when -- is

this a successive -- is this a successive petition, and we would say it is, because he filed the first one and then the second one.

Now the question of whether he can get relief under the first -- under his first habeas petition does not depend on the entry of a final judgment. In fact, under the facts of this case, the judgment was entered in March of 1998. In December of 1998, he filed his first petition. And in fact, the first petition was denied in April of 2000 on the merits, because it had been exhausted, he didn't have to wait for that, because those claims were exhausted and because they were ripe, because they -- the factual predicates had occurred in the trial court, then that was all that was required for him to bring those claims. He didn't have to wait for a final judgment.

JUSTICE SCALIA: But you're saying he can't later bring any claim about the sentence?

MR. COLLINS: That's because Congress in AEDPA has declared that you have to bring all of your claims in your -- at one time, and if you don't, then your petition should be dismissed as successive, unless you go through the gatekeeping solution.

JUSTICE SOUTER: So that if the statute governing our review had an exhaustion requirement and a

second and successive requirement comparable to the AEDPA requirement, the case that Justice Scalia put would be exactly like this case?

MR. COLLINS: I believe so, Your Honor.

JUSTICE SOUTER: Okay.

MR. COLLINS: So I just briefly want to go, Justice Souter, to where you started about the consecutive sentence issue.

We believe that consecutive sentence is quite different than, from what exists in Blakely and that, in fact, there aren't really additional findings of fact. I think you referred to about the crime, about the circumstances, about the character. In fact, in this case, the finding of fact entered by the trial court in order to justify the exceptional sentence -- this is on page 27 of the joint appendix, finding of fact 18 -- if the court were to sentence the defendant to a standard range sentence on each count run concurrently, he would receive the same punishment as if he had committed only the rape in the first degree. This would effectively result in the free crimes of robbery in the first degree and burglary in the first degree because he would receive no additional penalty for those crimes. Now --

JUSTICE SOUTER: That's -- I keep doing

this. I'm sorry. Is that sufficient, as you understand it, under the Washington case that your brother cited to me?

MR. COLLINS: I believe it is, Your Honor.

JUSTICE SOUTER: Okay.

JUSTICE GINSBURG: I thought the law was that the sentence shall be concurrent unless, and the unless is that the judge makes an additional finding, the very same kind of finding that he would make in determining aggravating factor.

MR. COLLINS: Your Honor, the sentence could have been run consecutively because of an aggravating factor. In fact, in this case the trial court judge, in fact, had three independent and separate reasons for running the sentence consecutively. Two of those would be, I think we would say aggravating factors that the Blakely reasoning would apply to. But the court of appeals when it considered this case only looked at the free crimes element to make that decision.

JUSTICE STEVENS: Maybe you can give me just a little more help on this. The finding number 18 that you referred to says in substance, if by just sentencing him on the basis of the jury verdict he won't get -- he'll get a free pass. But it doesn't say the judge can -- could therefore increase the sentence. It seems

to me there had to be additional findings that justify a result that he thought would have been a miscarriage of justice.

MR. COLLINS: No, Your Honor. I don't think that's right.

JUSTICE STEVENS: You think that just having pointed out that he would get a pass would have been sufficient to justify consecutive sentences?

MR. COLLINS: I think it would, and the State supreme court affirmed this decision.

JUSTICE STEVENS: Yeah, but he did make additional findings. It goes on. In fact, 19 and 20 are additional findings.

MR. COLLINS: Your Honor, I think -- I mean, I agree with you that he did make additional findings. But --

JUSTICE STEVENS: It nowhere says they're unnecessary either.

MR. COLLINS: That's true, Your Honor. But if you take a look at the court of appeals opinion which is at page 52 and 53 of the joint appendix, when the court of appeals looks at the sentence, what the court of appeals says is, "nonetheless, the sentencing court concluded that the multiple offender policy alone justified the exceptional sentence. The fact that the

defendant offender score for rape in the first degree is 16, thus invoking the multiple offense policy of the Sentencing Reform Act standing alone, is a substantial and compelling reason and justification for imposing the exceptional sentence here."

JUSTICE SOUTER: That is to say that that would have been sufficient.

MR. COLLINS: Exactly.

JUSTICE SOUTER: But in fact that is not what the trial court premised its decision on, because, as Justice Stevens points out, it went on in findings 19, 20, and 21 about deliberate cruelty, sophistication and planning, and so on. Having been through those findings, the court says, from the foregoing facts the court now makes the following conclusions of law.

It seems to me as though the trial court was basing its decision on those foregoing facts as well as upon finding 18, which was the free crime finding.

MR. COLLINS: Well, I think that the --

JUSTICE SOUTER: I guess what I'm saying is the fact that he might have -- I'm assuming for the sake of argument that the trial court might on the basis simply of the free crime conclusion have sentenced consecutively, is simply not the case that we've got, because he sentenced consecutively on that basis and on

cruelty, sophistication, and so on.

MR. COLLINS: Well, Your Honor, I believe that the court of appeals felt that that consecutive sentence on the free crimes was -- standing alone would have been sufficient.

JUSTICE BREYER: I don't want to take you up. Let me just have one on the merits, one. I mean, the reason I want you to get to the merits, and I put in my dissent. I was trying as hard as I could to show why I thought this case was wrong. I start the dissent by saying that -- what it says, and then I quote the two sentences that any fact, et cetera, any fact that increases beyond the prescribed statutory maximum must be submitted to a jury and prescribed statutory maximum, again quote, means "solely on the basis of the facts reflected in the jury verdict." Okay.

Then at the end of the opinion I say: "Until now I would have thought the Court might have limited Apprendi so its underlying principle wouldn't cause so much harm." Now, the next sentence of course I explain how they might have limited Apprendi, but somehow that disappeared from the opinion because I guess I couldn't think of it.

So you're going to tell me now -- I mean, I didn't say how they might have limited Apprendi and I

couldn't think of how they might have limited Apprendi, and they read Apprendi to mean what it said. Now, you tell me the phrase I might have put in but couldn't think of that would have limited Apprendi?

MR. COLLINS: Well, Your Honor, I think that you could have said that the definition of "statutory maximum" is the traditional statutory maximum that was at issue in Apprendi. And in fact in the Apprendi decision the Court specifically, I think in response to Justice O'Connor's dissent, explained that Walton versus Arizona was still good law. And as you know, in Walton the jury would find somebody guilty of aggravated first degree murder, but they could not receive the death penalty unless the judge made additional findings in a hearing.

And it seemed to say that the statutory maximum was death and that in fact the judge's findings would not take you above that statutory maximum. I think that --

JUSTICE GINSBURG: Wasn't that overturned in Ring?

MR. COLLINS: It was overturned in Ring, Your Honor. But when you had lower court appellate judges looking at your decision in Apprendi and seeing the fact that Walton and Apprendi were consistent, it

was logical for them to conclude, as virtually every single court did except for Kansas, that the definition of "statutory maximum" was the traditional statutory maximum that was in Apprendi.

JUSTICE SOUTER: Was it logical for them to conclude it or were they -- were they expressing the hope that the Court would draw a distinction which it had not drawn in the formulation that it gave in Apprendi? It's one thing to say that if you draw no further distinctions, Apprendi requires a certain result. It's another thing to say but maybe they will draw a distinction and we're going to predict that they will, and hence not apply Apprendi.

Weren't the other appellate courts to which you refer engaged in the latter exercise, which I call the exercise of hope?

MR. COLLINS: I'm not sure that I would agree with that, Justice Souter, only because as I think Justice O'Connor explained in her dissent, there are two ways to read Apprendi, and one of those ways would result in upholding guideline systems which are now invalid because of Blakely and Booker, but really quite different from Apprendi because those systems involve what you would call guided discretion. That is, in Apprendi if you wanted the aggravating factor if the

judge found it by a preponderance then the sentence was enhanced.

JUSTICE SOUTER: Okay, but doesn't that require drawing a distinction that Apprendi did not speak to? And isn't it still the case that, I think Mr. Fisher points out that three times we repeated in Apprendi the formula about fact, beyond fact found by a jury on the basis of which, et cetera, the range increases.

Isn't the distinction which -- and I trust your recollection here -- that Justice O'Connor had in mind and that they had in mind a distinction which simply was not addressed in Apprendi and would have been something new as opposed to merely an application of what was implicit in Apprendi?

MR. COLLINS: I believe it definitely would have been something new, Your Honor.

JUSTICE SOUTER: Yes.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Collins.

Mr. Roberts?

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

MR. ROBERTS: Mr. Chief Justice and may it

please the Court:

If I could begin by addressing the issues that you were just talking about, there was a distinction that the Court could have drawn between Apprendi and Blakely and that reasonable jurists could have drawn and did draw. One was the formal distinction that you were discussing before with the State, which was supported by Justice O'Connor's proposing that as an interpretation in her dissent and the majority not responding to that, that that distinction was contrary to the rule but implausible, but in fact accepting the -- accepting that it was a plausible distinction and saying that it still wouldn't have made a difference, that the Apprendi rule still was important.

The second -- and in addition to that, that distinction that Justice O'Connor drew there was consistent with the Apprendi Court's distinction of Walton. And you have to look at what reasonable jurists could have interpreted looking at that decision at the time with those distinctions and what the Court said in Apprendi.

But in addition to that, there was more than a formal distinction that could have been drawn between the system in Apprendi and the Washington guidelines system. That's the distinction that we proposed in our

amicus brief in Blakely and it rested on the fact that sentencing guideline systems like Washington try to channel but not to eliminate the discretion that sentencing judges have to sentence within the otherwise applicable limits. And in the Washington system the sentencing judge retained a significant degree of discretion that reasonable jurists could have analogized to traditional sentencing systems that aren't constrained by Apprendi.

The facts, the facts on which the judge could rely to go above the guidelines, were not specified as in Apprendi and as in Ring by the legislature, but it was a wide open set that enabled the judge himself or herself to determine what facts the judge thought could justify a higher sentence; and in addition, the facts alone didn't trigger the higher sentence. The judge had to look at those facts and make the additional determination that those facts rose to the level of substantial and compelling reasons that justified the higher sentence.

In that respect, the judge had a degree of sentencing discretion to decide what facts justified it and whether it was in fact justified.

Now, of course, this Court rejected those distinctions in Blakely. But the question is whether a

reasonable jurist could have accepted those distinctions and drawn a difference, and we submit that they could have.

CHIEF JUSTICE ROBERTS: Mr. Roberts, do you have a position on whether we have a successive petition problem here?

MR. ROBERTS: We don't have a position on that precise, on that particular issue here, because it can't arise for Federal prisoners. But let me explain why it can't arise for Federal prisoners because perhaps that will give the Court some guidance in resolving the issue. In the Federal system, it's well established that the conviction and the sentence are part of a unitary judgment and that that unitary judgment doesn't become final until the conviction and the sentence have both been fully adjudicated.

That understanding is reflected in the language of 28 U.S.C. 2255, which is the statute that authorizes collateral attacks by Federal prisoners. That statute authorizes attacks -- what it authorizes is motions to vacate, set aside, or correct a sentence. So it's clear from that that it's not authorizing collateral attacks on a conviction independent of the attendant sentence. And I think that could shed some guidance here, because 2255 was intended to be a

parallel and substitute remedy to traditional habeas for Federal prisoners.

I would also make a point on the other sort of preliminary issues that were being discussed on the consecutive sentence issue, that it's not only the fact that the judge said that the multiple offense policy standing alone could justify the consecutive sentence here and that the court of appeals relied on that in upholding that.

But the court of appeals went further, because petitioner had made a separate challenge to -- and this is on page 52 and 53 of the joint appendix. Petitioner made a separate challenge to the other two aggravating factors. Petitioner argued that the district court wasn't allowed to rely on -- excuse me, the trial court couldn't rely on those two other aggravating factors because he had not relied on them in the original sentencing and this was a resentencing.

The court of appeals rejected that challenge and it rejected that challenge because it said the sentencing court concluded that the multiple offense policy alone justified the exceptional sentence, and then on page 53 it said: "The sentencing court did not rely on the additional aggravating factors for imposing an exceptional sentence." So I think these --

JUSTICE SOUTER: Is that true in fact?

MR. ROBERTS: Well, that is how --

JUSTICE SOUTER: I'm mean, I'm sure you're reading correctly, but is that in fact true? Because, having talked, as I just read out a moment ago, having spoken about free crimes, aggravating factors, it says, on the basis of the foregoing facts I now draw the following conclusions of law.

MR. ROBERTS: The trial court said each of the three standing alone was sufficient. But what the court of appeals said is these other two have been challenged, but these other two are -- we're not going to deal with this challenge to these other two factors because they're out of the case. So I think that this Court has to take the case as coming from -- coming from the Washington courts as if what the courts essentially said is those other two are not in the case any more.

JUSTICE SOUTER: So we can treat it in effect -- and this may be the way to do it -- we can treat it as the ultimate sentencer was the Washington appellate court and that's what they said?

MR. ROBERTS: Well, what the Washington appellate court essentially, they could have said petitioner is right, those other two aggravating factors

couldn't be relied on, and so we're relying on this the standing alone. What they chose to do is, we're going to interpret what the trial court did as relying only on the one. And that was the basis for responding to that claim of error, and I do think that the Court has to take this case as coming on that basis.

If I could turn to the issue of Blakely retroactivity for a few minutes. In addition to the points that I made before about why Blakely was a new rule, I would also submit that Blakely is not a watershed rule because it's not a bedrock rule that's essential to a fair trial, and rules are only bedrock if they approach the fundamental and sweeping importance of Gideon, and Blakely doesn't have that kind of importance for three reasons. First, the right to counsel pervasively affects every aspect of the trial, but Blakely affects only the procedure for determining the punishment of defendants who have already been found guilt beyond a reasonable doubt of all the elements of a crime.

Second, a felony trial in which the defendant is denied counsel is inherently unfair, but it's not inherently unfair to use the preponderance standard to find facts that determine the extent of punishment, and in fact the Constitution permits the use

of a preponderance standard to find many facts that have as much or more impact on punishment as facts covered by Blakely. Those include facts that trigger mandatory minimums, facts on which a judge relies to sentence within a broad statutory range, and even facts on which a judge relies to sentence above the standard range in advisory guideline systems.

Third, counsel is so essential to a fair trial that deprivation of the right can never be discounted as harmless error. But this Court held in Recuenco that Blakely errors can be harmless, and in reaching that holding the Court expressly concluded that Blakely errors do not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

That conclusion seems to strongly suggest that Blakely is not a bedrock rule essential to a fair trial.

If the Court has no further questions --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Fisher, you have four minutes remaining.

REBUTTAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF PETITIONER

MR. FISHER: Let me say one word on jurisdiction and then turn to two comments on the

merits. On jurisdiction, I think Mr. Roberts is right that this rarely happens in the Federal system. It rarely happens in the State system. We can't find any other case where a petitioner has gone in naming, as the State would say, in effect the wrong judgment and saying: "I'm challenging this judgment."

But what happened here was just that. Mr. Burton went in and said he was challenging the 1994 judgment. And under this Court's Castro decision, when a pro se petitioner comes in and says I'm doing one thing, in that case making a motion for a new trial, it can't be converted into something else which is a first habeas petition without advising the petitioner. And here, not only was he not advised by the trial court but the State in its own answer, which we attached to our reply brief, agreed that he could challenge the 1994 conviction, and said that conviction is final, and he can challenge that judgment, the 1994 judgment.

So it's way too late in the day for the State to stand up to you now and say this pro se petitioner should bear the burden of bringing an improper petition.

On the merits, I don't want to elaborate beyond simply just telling this Court that if you look at the Hughes decision and you look at the Washington

decision from the Washington state courts, it is clear that an extra finding was necessary here, even if the only aggravator in play is the free crimes are clearly too lenient factor. Hughes makes it crystal clear that a judge needs to find, and I'm quoting, "extraordinarily serious harm or culpability arising from the multiple offenses." And to the extent that the State stands before you now and quotes from parts of Mr. Burton's case where the trial judge did not explicitly make that finding, that only reinforces the strength of his habeas petition now, that under Washington state law, the judge needed to make that kind of an extra finding and the judge didn't do so.

Let me finally turn to a discussion about whether this Court's treatment of Walton and Apprendi could have given a State judge a reasonable basis to distinguish the system at issue in Blakely. We don't think it could because this Court didn't simply say in Apprendi that Walton stands. It explicitly said the reason why the Arizona capital system as we understand it is okay is because it's nothing more than a system that is permissible under Williams against New York.

It's one where on the basis of the jury's finding of guilt that the death penalty is permissible without anything else. And so the only disagreement

between the majority and Justice O'Connor's dissent was as to the way Arizona's system worked, but any judge that would have looked at Apprendi would have seen, the majority is telling us that a system is okay so long as the jury verdict itself allows the ultimate sentence.

That is exactly the kind of system that was not in place in Washington, so a judge should have full well realized.

And of course as Justice Ginsburg pointed out, once it became clear to this Court the way that Arizona's capital sentencing system functioned, this Court had little difficulty simply applying the Apprendi rule and agreeing that that system had to be invalid too. And just like the Blakely decision itself, not even the dissenters suggested that Apprendi dictated otherwise.

If this Court has no further questions, I'll submit the case.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Fisher. The case is submitted.

(Whereupon, at 12:01 a.m., the case in the above-entitled matter was submitted.)

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