

05-4375-pr; 06-3550-pr; 07-1599-pr; 07-3588-pr; 07-3949-pr
Besser v. Walsh; Phillips v. Artus; Portalatin v. Graham; Morris v. Artus;
Washington v. Poole

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 AUGUST TERM, 2007

4 (Argued in Tandem: April 16, 2008 Decided: March 31, 2010)

5 Docket Nos. 05-4375-pr, 06-3550-pr, 07-1599-pr, 07-3588-pr,
6 07-3949-pr
7 (consolidated for disposition)
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9

10 JAMES BESSER, a/k/a JAMES ZERILLI,
11 Petitioner-Appellant,
12

13 v.

No. 05-4375-pr

14
15 JAMES WALSH, Superintendent, Sullivan Correctional Facility,
16 Respondent-Appellee.
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19

20 WILLIAM PHILLIPS,
21 Petitioner-Appellant,
22

23 v.

No. 06-3550-pr

24
25 DALE ARTUS, Superintendent, Clinton Correctional Facility,
26 and ANDREW M. CUOMO, New York State Attorney General,*
27 Respondents-Appellees.
28
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30

31 CARLOS PORTALATIN,
32 Petitioner-Appellee,
33

34 v.

No. 07-1599-pr

35
36 HAROLD GRAHAM, Superintendent, Auburn Correctional Facility,
37 Respondent-Appellant.
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*Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Andrew M. Cuomo, New York State Attorney General, is automatically substituted as respondent-appellee for Elliot L. Spitzer, former New York State Attorney General.

1 VANCE MORRIS,
2 Petitioner-Appellant,

3
4 v.

No. 07-3588-pr

5
6 DALE ARTUS, Superintendent, Clinton Correctional Facility, and
7 ANDREW M. CUOMO, New York State Attorney General,**
8 Respondents-Appellees.

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12 WILLIAM WASHINGTON,
13 Petitioner-Appellee,

14
15 v.

No. 07-3949-pr

16
17 THOMAS POOLE, Superintendent, Five Points Correctional Facility,
18 Respondent-Appellant.***

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20 - - - - -
21
22 B e f o r e: WINTER, SACK, Circuit Judges and MURTHA, District
23 Judge.****

24 Five New York prisoners, sentenced under New York's
25 persistent offender statute, petitioned for a writ of habeas
26 corpus. We hold principally that the New York courts' upholding
27 of the constitutionality of the New York state persistent felony
28 offender statute after the United States Supreme Court's decision
29 in Blakely v. Washington, 542 U.S. 296 (2004), was an
30 unreasonable application of clearly established Sixth and

**Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Andrew M. Cuomo, New York State Attorney General, is automatically substituted as respondent-appellee for Elliot L. Spitzer, former New York State Attorney General.

***The Clerk of the Court is directed to amend the official caption in these cases to conform to the listing of the parties above.

****The Honorable J. Garvan Murtha, United States District Judge for the District of Vermont, sitting by designation.

1 Fourteenth Amendment law.

2 RICHARD M. GREENBERG, Office of the
3 Appellate Defender, New York, New York,
4 for Petitioner-Appellant Besser.

5
6 MARTIN M. LUCENTE, The Legal Aid
7 Society, Criminal Appeals Bureau, New
8 York, New York, for Petitioner-Appellant
9 Phillips.

10
11 JOSHUA MICHAEL LEVINE (Lynne W.L.
12 Fahey), Appellate Advocates, New York,
13 New York, for Petitioner-Appellee
14 Portalatin.

15
16 ANDREW C. FINE (Paul Wiener), The Legal
17 Aid Society, Criminal Appeals Bureau,
18 New York, New York, for Petitioner-
19 Appellant Morris.

20
21 JONATHAN M. KIRSHBAUM (Robert S. Dean),
22 Center For Appellate Litigation, New
23 York, New York, for Petitioner-Appellee
24 Washington.

25
26 MARK DWYER, Assistant District Attorney,
27 of counsel (Robert M. Morgenthau,
28 District Attorney, New York County;
29 Morrie I. Kleinbart, Special Assistant
30 District Attorney; Nicole Beder,
31 Assistant District Attorney, of
32 counsel), New York, New York, for
33 Respondent-Appellee Walsh.

34
35 ROSEANN B. MACKECHNIE, Deputy Solicitor
36 General for Criminal Matters (Andrew M.
37 Cuomo, Attorney General of the State of
38 New York; Barbara D. Underwood,
39 Solicitor General; Malancha Chanda,
40 Assistant Attorney General, of counsel),
41 New York, New York, for Respondents-
42 Appellees Artus and Cuomo.

43
44 LEONARD JOBLove, Assistant District
45 Attorney, of counsel (Charles J. Hynes,
46 District Attorney, Kings County; Ann
47 Bordley, Assistant District Attorney, of
48 counsel), Brooklyn, New York, for
49 Respondent-Appellant Graham.

1 Andrew M. Cuomo, Attorney General of the
2 State of New York (Barbara D. Underwood,
3 Solicitor General; Roseann B.
4 MacKechnie, Deputy Solicitor General for
5 Criminal Matters; Malancha Chanda,
6 Assistant Attorney General, of counsel),
7 New York, New York, for Respondent-
8 Appellant Poole.
9

10 Marshall A. Mintz, Mintz & Oppenheim
11 LLP, New York, New York (Richard D.
12 Willstatter, Chair of the Amicus Curiae
13 Committee of the New York State
14 Association of Criminal Defense Lawyers,
15 Vice-Chair of the 2nd Circuit Amicus
16 Curiae Committee of the National
17 Association of Criminal Defense Lawyers,
18 White Plains, New York), for Amici
19 Curiae New York State Association of
20 Criminal Defense Lawyers and National
21 Association of Criminal Defense Lawyers.
22

23 WINTER, Circuit Judge:

24 The principal question on appeal is whether New York state
25 court decisions affirming sentences enhanced under New York's
26 persistent felony offender ("PFO") statute, N.Y. Penal Law §
27 70.10, unreasonably applied clearly established federal law. 28
28 U.S.C. § 2254(d).

29 The district court issued a writ of habeas corpus in the
30 petitions of Carlos Portalatin and William Washington and the
31 relevant state authorities brought this appeal.¹ See Washington
32 v. Poole, 507 F. Supp. 2d 342, 344 (S.D.N.Y. 2007) (Koeltl, J.);
33 Portalatin v. Graham, 478 F. Supp. 2d 385, 386 (E.D.N.Y. 2007)
34 (Gleeson, J.). The district court declined to issue the writ in
35 the petitions of James Besser, William Phillips, and Vance
36 Morris, who then appealed. See Morris v. Artus, No. 06 Civ.
37 4095(RKS), 2007 WL 2200699, at *1 (S.D.N.Y. July 30, 2007)

1 (Sweet, J.); Phillips v. Artus, No. 05 Civ. 7974(PAC), 2006 WL
2 1867386, at *1 (S.D.N.Y. June 30, 2006) (Crotty, J.); Besser v.
3 Walsh, No. 02 Civ. 6775(LAK), 2005 WL 1489141, at *1 (S.D.N.Y.
4 June 22, 2005) (Kaplan, J.). Because these five appeals
5 presented substantially similar or overlapping issues, we heard
6 them together.

7 We hold that the Sixth Amendment right to a jury trial,
8 applicable to the states as incorporated by the Fourteenth
9 Amendment, prohibits the type of judicial fact-finding resulting
10 in enhanced sentences under New York's PFO statute. We also hold
11 that this prohibition was not clearly established until Blakely
12 v. Washington, 542 U.S. 296 (2004). Because Besser's conviction
13 became final before Blakely issued, the state court decisions
14 upholding his conviction were neither contrary to nor an
15 unreasonable application of clearly established federal law. We
16 therefore affirm the denial of the writ as to Besser. However,
17 because the relevant state court decisions upholding enhanced
18 sentences for Phillips, Morris, Portalatin, and Washington were
19 issued after Blakely, those decisions were not reasonable
20 applications of clearly established law. Nevertheless, we remand
21 these cases to the district court for a determination of whether
22 the error was harmless.

23 BACKGROUND

24 a) The Persistent Felony Offender Statute

25 There are three increasingly harsh levels of sentencing
26 applicable to felony offenders under Article 70 of New York's

1 penal laws pertinent to this appeal. First-time felony offenders
2 are generally sentenced according to indeterminate ranges based
3 on the class of offense. See N.Y. Penal Law § 70.00.² Second
4 felony offenders are subject to enhanced sentences, based solely
5 upon the finding of one qualifying prior felony conviction, again
6 according to the class of offense. See id. § 70.06. Under the
7 PFO statute, a defendant who has been previously convicted of two
8 felonies is a "persistent felony offender" (sometimes "PFO").
9 See id. § 70.10(1)(a). PFO's may be sentenced to an
10 indeterminate sentence in the range authorized for Class A-I
11 felony offenders rather than the range authorized for the class
12 of the defendant's actual offense. See id. § 70.10(2);³ see also
13 N.Y. Crim. Proc. Law § 400.20(1)(b). Class A-I felonies carry a
14 minimum sentence of 15 years and a maximum of life.⁴ See N.Y.
15 Penal Law §§ 70.00(2)(a), 70.00(3)(a)(i).⁵

16 The difference in a defendant's sentencing exposure depends
17 heavily upon which level's range is applicable. Once classified
18 as a PFO, a defendant may be subject to a minimum sentence
19 exceeding the maximum sentence for second felony offenders
20 applicable to the crime committed. For example, a first-time
21 offender convicted of a Class E felony would be subject to a term
22 of 1 1/3 to 4 years. See id. § 70.00(2)-(3). Were the defendant
23 sentenced for a Class E felony as a second felony offender, he or
24 she would be subject to a term of 1.5 to 4 years. See id. §
25 70.06(3)-(4). The same defendant given the enhanced sentence

1 under the PFO statute would be subject to a term of 15 years to
2 life. See id. §§ 70.00(2)-(3), 70.10(2).

3 Under the provisions applicable to first and second felony
4 offenders, the existence or non-existence of a prior felony alone
5 determines the applicable range. See id. §§ 70.00-70.06. To
6 sentence under the PFO statute, the sentencing court must make a
7 finding of at least two prior felony convictions, rendering that
8 defendant a PFO and exposing him or her to a Class A-I sentence.
9 See id. § 70.10. After making that finding, the court turns to
10 whether "the history and character of the defendant and the
11 nature and circumstances of his criminal conduct" (sometimes
12 "history/character/criminal conduct"), id. § 70.10(2); N.Y. Crim.
13 Proc. Law § 400.20(1), is such that the PFO should, in the public
14 interest, be given a Class A-I sentence.⁶ N.Y. Crim. Proc. Law §
15 400.20(1). In making this finding, the court must conduct a
16 hearing at which the prosecution bears the burden of proof and
17 "[m]atters pertaining to the defendant's history and character
18 and the nature and circumstances of his criminal conduct" must be
19 established by a preponderance of the evidence. Id. § 400.20(5).
20 "Uncontroverted allegations in the statement of the court are
21 deemed evidence in the record." Id. § 400.20(7).

22 If the sentencing court imposes a Class A-I sentence, "the
23 reasons for the court's opinion shall be set forth in the
24 record." N.Y. Penal Law § 70.10(2). The imposition of that
25 enhanced sentence is then subject to two kinds of appellate
26 review. First, an appellate court has the power, in the

1 "interest[s] of justice," to reduce a Class A-I sentence within
2 the Class A-I range, e.g., from 19 years to life to 15 years to
3 life. See N.Y. Crim. Proc. Law § 470.20(6). Second, an
4 imposition of a Class A-I sentence is subject to an "interest[s]
5 of justice" review and will be "held erroneous as a matter of
6 law, [if] the sentencing court acts arbitrarily or irrationally."
7 People v. Rivera, 833 N.E.2d 194, 199 (N.Y. 2005). Were
8 imposition of a Class A-I sentence under the PFO statute found by
9 an appellate court to be "arbitrary[]" or "irrational[,]" the
10 court must resentence the defendant or remand for resentencing to
11 a "legally authorized lesser sentence," N.Y. Crim. Proc. Law §
12 470.20; see also People v. LaSalle, 734 N.E.2d 749, 750 (N.Y.
13 2000) (memorandum decision), usually as a second felony offender
14 or second violent felony offender. See, e.g., People v.
15 Williams, 658 N.Y.S.2d 264, 265 (App. Div. 1997); see also People
16 v. Greene, 871 N.Y.S.2d 323, 325 (App. Div. 2008) (citing
17 Williams, 658 N.Y.S.2d at 265); People v. Truesdale, 845 N.Y.S.2d
18 363, 364-65 (App. Div. 2007); cf. People v. Wilsey, 753 N.Y.S.2d
19 232, 233 (App. Div. 2003); People v. Yale, 373 N.Y.S.2d 901, 904-
20 06 (App. Div. 1975).

21 Because second felony offender status usually exposes a
22 defendant to maximum sentences below the maximum (and often the
23 minimum) of the Class A-I range, serious constitutional issues
24 arise, as discussed infra, and our interpretation of the PFO
25 statute is critical to the constitutional analysis. In the
26 briefs submitted by state authorities, it was suggested that a

1 finding of two felony convictions alone locks in the Class A-I
2 range, with life as a maximum. We disagree. The
3 history/character/criminal conduct findings, which are subject to
4 appellate review, are necessary to lock in the Class A-I range
5 and, if such findings do not justify a Class A-I sentence,
6 require the sentencing court to sentence the defendant in a
7 lesser range, usually as a second felony (or violent felony)
8 offender.⁷

9 The state authorities rely for their argument upon language
10 in Rivera. We therefore quote the pertinent portion of that
11 decision at length:

12 [D]efendants are eligible for persistent
13 felony offender sentencing based solely on
14 whether they had two prior felony
15 convictions. Thus, . . . no further findings
16 are required. This conclusion takes
17 defendant's sentence outside the scope of the
18 violations described in Apprendi and its
19 progeny.
20

21 The [United States] Supreme Court has
22 held that a judge (as opposed to a jury) may
23 find the fact of a defendant's prior
24 conviction without violating the Sixth
25 Amendment
26

27 After determining defendant's status as
28 a persistent felony offender, the [court that
29 sentenced Rivera] went on to consider other
30 facts in weighing whether to impose the
31 authorized persistent felony offender
32 sentence. . . . If, based on all it heard,
33 the [sentencing] court's view of the facts
34 surrounding defendant's history and character
35 were different, the court might well have
36 exercised its discretion to impose a less
37 severe sentence.
38

39 Nevertheless, the relevant question
40 under the United States Constitution is not
41 whether those facts were essential to the

1 trial court's opinion ([N.Y. Crim. Proc. Law
2 §] 400.20[1][b]), but whether there are any
3 facts other than the predicate convictions
4 that must be found to make recidivist
5 sentencing possible (see Blakely, 542 U.S. at
6 302-303 . . .). Our answer is no. . . .

7
8

9
10 To reiterate our analysis . . . , a
11 defendant adjudicated as a persistent felony
12 offender has a statutory right to present
13 evidence that might influence the court to
14 exercise its discretion to hand down a
15 sentence as if no recidivism finding existed,
16 while the People retain the burden to show
17 that the defendant deserves the higher
18 sentence. Nevertheless, once a defendant is
19 adjudged a persistent felony offender, a
20 recidivism sentence cannot be held erroneous
21 as a matter of law, unless the sentencing
22 court acts arbitrarily or irrationally.

23
24 The court's opinion is, of course,
25 subject to appellate review, as is any
26 exercise of discretion. The Appellate
27 Division, in its own discretion, may conclude
28 that a persistent felony offender sentence is
29 too harsh or otherwise improvident. . . . A
30 determination of that kind, however, is based
31 not on the law but as an exercise of the
32 Appellate Division's discretion in the
33 interest of justice as reserved uniquely to
34 that Court ([N.Y. Crim. Proc. Law §] 470.20
35 [6]).⁷

36
37 ⁷ See e.g., People v. Williams, 239
38 A.D.2d 269, 269-270, 658 N.Y.S.2d 264 (1st
39 Dept 1997) (reducing a persistent felony
40 offender sentence in the interest of justice,
41 based on defendant's rehabilitation)

42
43 Rivera, 833 N.E.2d at 198-99.

44 While Rivera states that two prior convictions alone render
45 a defendant "eligible for," or "subject to," a Class A-I sentence
46 -- or make such a sentence "possible" -- it follows the language
47 of the PFO statute in giving a sentencing court discretion to

1 impose such a sentence but only if the court finds that "the
2 history and character of the defendant and the nature and
3 circumstances of [defendant's] criminal conduct indicate that
4 extended incarceration and life-time supervision will best serve
5 the public interest" N.Y. Penal Law § 70.10; Rivera, 833
6 N.E.2d at 197-98. Rivera, therefore, confirms that, while a
7 defendant with two or more felony convictions is, by virtue of
8 that fact alone, "eligible for" and "subject to" a Class A-I
9 sentence, a sentencing court may not impose a Class A-I sentence
10 unless it has found that the history/character/criminal conduct
11 factors justify that enhanced sentence. See Rivera, 833 N.E.2d
12 at 198-99. As Rivera stated, these factors govern "whether to
13 impose the authorized persistent offender sentence" or whether
14 "to hand down a sentence as if no recidivism finding existed."
15 Id. Further, Rivera cited as an example of the proper procedure
16 People v. Williams, 658 N.Y.S.2d 264, a decision that found a
17 Class A-I sentence to be "an improvident exercise of discretion"
18 and ordered the resentencing of the defendant "as a second felony
19 offender." Williams, 658 N.Y.S.2d at 265; see Rivera, 833 N.E.2d
20 at 199 n.7.

21 Therefore, it is clear from the statute and from Rivera
22 that, absent findings beyond the existence of two or more felony
23 convictions, the Class A-I range may not be imposed, and a
24 defendant must be sentenced within a lesser range, usually as a
25 second felony offender. (Of course, the criminal history may in
26 some cases be sufficient to support such findings.) It is also

1 clear that a Class A-I sentence usually has a statutory maximum
2 above the statutory maximum for second felony offenders. Compare
3 N.Y. Penal Law §§ 70.04(3), 70.06(3), with id. § 70.00(2)(a).

4 The New York Court of Appeals has repeatedly rejected Sixth
5 Amendment challenges to the sentencing scheme. See People v.
6 Quinones, 906 N.E.2d 1033, 1034 (N.Y. 2009); Rivera, 833 N.E.2d
7 at 195; People v. Rosen, 752 N.E.2d 844, 846 (N.Y. 2001). Before
8 Blakely and Cunningham v. California, 127 S. Ct. 856 (2007), we
9 twice held that Rosen did not unreasonably apply either Apprendi
10 v. New Jersey, 530 U.S. 466 (2000), or the Supreme Court's later
11 decision in Ring v. Arizona, 536 U.S. 584 (2002). See Brown v.
12 Miller ("Brown II"), 451 F.3d 54, 56-57 (2d Cir. 2006)
13 (addressing both Apprendi and Ring); Brown v. Greiner ("Brown
14 I"), 409 F.3d 523, 526 (2d Cir. 2005) (addressing Apprendi).
15 But, as discussed infra, neither Brown decision addresses the
16 effect of the Supreme Court's more recent decisions in Blakely
17 and Cunningham.

18 b) Prior State Court and Federal Proceedings Concerning the
19 Petitions

20 1) James Besser

21 Besser was convicted, following a jury trial, of one count
22 of enterprise corruption, a Class B felony, in violation of New
23 York Penal Law § 460.20. The jury found that he had committed
24 three predicate criminal acts with the intent to participate in
25 the affairs of the Colombo Organized Crime Family.

1 New York moved to have Besser sentenced as a Class A-I
2 offender pursuant to the PFO statute. Counsel for Besser
3 registered objections to, inter alia, substantial portions of the
4 state's statement of alleged facts regarding his history and
5 character and its supporting exhibits, which included court and
6 police records.

7 The court found the predicate felony convictions qualified
8 Besser for sentencing pursuant to the PFO statute. The judge
9 then reviewed the evidence submitted by the state that included
10 information relating to Besser's uncharged murder attempts and to
11 a brutal beating for which charges were then pending. It
12 concluded that Besser's "history and character warrant[ed] a
13 sentence of extended incarceration and lifetime supervision . . .
14 ." Besser received a sentence under the PFO statute of 15 years
15 to life imprisonment. Had Besser been sentenced as a second
16 felony offender, he would have been subject to a sentence of a
17 minimum of 4.5 years to a maximum of 25 years. See N.Y. Penal
18 Law § 70.06(3)-(4).

19 Besser appealed, challenging, inter alia, his sentence as
20 imposed in violation of his Sixth Amendment rights under
21 Apprendi. On May 1, 2001, the New York Court of Appeals rejected
22 that challenge, stating that because Besser had failed to raise
23 the Apprendi claim before the sentencing court, the issue was not
24 preserved. See People v. Besser, 749 N.E.2d 727, 733 (N.Y. 2001)
25 (citing Rosen, 752 N.E.2d 844).

1 On August 26, 2002, Besser filed the present petition in the
2 Southern District. Judge Kaplan denied the petition, based on
3 our decision in Brown I, 409 F.3d 523, but "grant[ed] a
4 certificate of appealability on the question whether New York's
5 [PFO] statute violates the rule of Apprendi" See Besser
6 v. Walsh, 2005 WL 1489141, at *1.

7 2) Vance Morris

8 Morris was convicted by a jury, of sixteen counts of first
9 degree criminal contempt, a Class E felony. See N.Y. Penal Law §
10 215.51(b). The conviction was based on two telephone threats
11 against his girlfriend in violation of four separate orders of
12 protection issued as a result of repeated violent acts and
13 general mayhem at his girlfriend's apartment and in her
14 community. The state moved to sentence Morris as a Class A-I
15 offender under the PFO statute. Morris conceded several prior
16 felony convictions for attempted robbery, robbery, grand larceny,
17 and possession of a controlled substance, but disputed whether
18 his criminal conduct, history and character warranted an enhanced
19 sentence. At the sentencing hearing on July 24, 2002, the court
20 first determined Morris to be a PFO based on three qualifying
21 prior felony convictions. The court then examined the evidence
22 regarding Morris's history and character. Noting the state's
23 evidence regarding the defendant's "relevant criminal conduct,
24 his bad acts, uncontrollable [rage], defiance of authority and
25 hostile conduct toward women," the court sentenced Morris to
26 sixteen concurrent indeterminate terms of 15 years to life

1 imprisonment. Had Morris been sentenced as a second felony
2 offender for any of these counts, he would have been subject to a
3 minimum of 1.5 years and a maximum of 4 years. See N.Y. Penal
4 Law § 70.06(3)-(4).

5 On appeal, Morris raised several issues, including, for the
6 first time, an Apprendi challenge to his sentence. On August 4,
7 2005, the Appellate Division unanimously affirmed, stating that
8 even if Morris had preserved the Apprendi challenge, it would be
9 rejected. See People v. Morris, 800 N.Y.S.2d 6, 7 (App. Div.
10 2005) (citing Rivera, 833 N.E.2d 194, and Rosen, 752 N.E.2d 844).
11 On September 27, 2005, the New York Court of Appeals summarily
12 denied Morris leave to appeal. People v. Morris, 837 N.E.2d 744
13 (N.Y. 2005).

14 Morris subsequently petitioned for a writ of habeas corpus
15 pursuant to 28 U.S.C. § 2254. Relying on Brown I, 409 F.3d 523,
16 and Brown II, 451 F.3d 54, as well as Rivera, 833 N.E.2d 194,
17 Judge Sweet denied the petition. Morris v. Artus, 2007 WL
18 2200699, at *8-*10. Morris then brought this appeal.

19 3) William Phillips

20 Phillips was convicted by a jury of second degree robbery of
21 a candy and newspaper store, a Class C violent felony offense at
22 that time,⁸ in violation of New York Penal Law § 160.10(1). The
23 state moved to have Phillips sentenced as a Class A-I offender.
24 At the sentencing hearing, Phillips did not deny his six prior
25 felony convictions, nor did he raise any constitutional challenge
26 to the PFO statute or his prior convictions. Phillips did,

1 however, contest whether his criminal conduct, history, and
2 character was of the kind warranting an enhanced sentence. The
3 court found that in light of Phillips's failure to take advantage
4 of "favorable plea bargains, minimal sentences, early parole, a
5 temporary release program, community service in lieu of
6 incarceration and a drug program," he had shown "time and again,
7 throughout his entire adult life, that he cannot be trusted to
8 function normally in society and that he is unwilling and unable
9 to rehabilitate himself." Phillips was sentenced to a term of 16
10 years to life in prison. If Phillips had not been sentenced
11 pursuant to the PFO statute, he would have been sentenced as a
12 second violent felony offender because of a 1987 guilty plea for
13 attempted robbery in the second degree, a Class D violent felony
14 offense at that time. See N.Y. Penal Law §§ 70.02(1), 70.04(1).
15 Had he been sentenced as a second violent felony offender, he
16 would have been subject to a determinate sentence, with a minimum
17 of 7 years and a maximum of 15 years. See N.Y. Penal Law §
18 70.04(3)(b).

19 In a collateral proceeding brought pursuant to New York
20 Criminal Procedure Law § 440.20, Phillips raised for the first
21 time an Apprendi challenge to his sentence. On June 25, 2003,
22 the court rejected his claim on the merits.

23 Thereafter, Phillips appealed both his conviction and the
24 denial of his Section 440.20 motion. On December 18, 2003, the
25 Appellate Division unanimously affirmed the underlying conviction
26 and the denial of the Section 440.20 motion, concluding that "the

1 particular facts upon which the sentencing court based its
2 determination were all permissible under Apprendi”
3 People v. Phillips, 768 N.Y.S.2d 812, 812 (App. Div. 2003). The
4 New York Court of Appeals denied Phillips leave to appeal without
5 prejudice to renewal, and then, on September 30, 2004, denied
6 leave again upon reconsideration. People v. Phillips, 816 N.E.2d
7 207 (N.Y. 2004), on reconsideration, 818 N.E.2d 680 (N.Y. 2004).

8 Phillips then brought the instant petition in the Southern
9 District for a writ of habeas corpus. On June 30, 2006, Judge
10 Crotty rejected Phillips’s Apprendi challenge, relying on Brown
11 I, 409 F.3d 523, and Brown II, 451 F.3d 54. Phillips v. Artus,
12 2006 WL 1867386, at *5-*7. The court declined to issue a
13 certificate of appealability. Id. at *7. Phillips then moved
14 for a certificate of appealability in this court, which was
15 granted.⁹

16 4) Carlos Portalatin

17 Portalatin was found guilty by a jury of one count each of
18 second degree kidnapping and first degree robbery in connection
19 with a carjacking incident. See N.Y. Penal Law §§ 135.20,
20 160.15. Both of these offenses are Class B violent felony
21 offenses. See N.Y. Penal Law § 70.02(1). The state moved to
22 sentence Portalatin as a Class A-I. At the sentencing hearing on
23 April 28, 2003, the trial court adjudicated Portalatin a PFO,
24 citing two prior convictions. Portalatin contended that his
25 criminal conduct, history, and character were not of the kind to
26 warrant an enhanced sentence. As to his history and character,

1 the court noted that "looking back on the history of this
2 defendant, and having read these reports, it is clear that there
3 is very little in his experience or his life that would support
4 the story he gave on the witness stand" In light of
5 Portalatin's repeated parole revocations, disinclination to
6 accept drug treatment, repeated drug charges, "inclination to
7 prey upon others," his inability to "control his own problems,"
8 the fact that a carjacking is a "truly terrifying experience,"
9 and his displaying what appeared to be a firearm during the
10 crime, the court imposed two concurrent terms of 18 years to life
11 imprisonment. If Portalatin had not been sentenced as a PFO, he
12 would have been sentenced as a second violent felony offender due
13 to a previous conviction in 1995 for attempted burglary in the
14 second degree, a Class D violent felony offense. See N.Y. Penal
15 Law §§ 70.02(1), 70.04(1). As a second violent felony offender,
16 Portalatin would have been subject to a determinate sentence for
17 each count that was between 10 to 25 years. See N.Y. Penal Law §
18 70.04(3)(a).

19 Portalatin brought an Apprendi challenge to his sentencing
20 under the PFO statute for the first time in his appeal to the
21 Appellate Division. Finding Portalatin's Apprendi challenge both
22 unpreserved and without merit, the court affirmed his judgment of
23 conviction and sentence on May 16, 2005. People v. Portalatin,
24 795 N.Y.S.2d 334, 335 (App. Div. 2005) (citing Rosen, 752 N.E.2d
25 844). On July 6, 2005, Portalatin's application for leave to

1 appeal was denied by the New York Court of Appeals. People v.
2 Portalatin, 5 N.Y.3d 793, 793 (2005).

3 Portalatin then sought a writ of habeas corpus in the
4 Eastern District, which Judge Gleeson granted on March 22, 2007.
5 Portalatin v. Graham, 478 F. Supp. 2d at 386. The state then
6 took this appeal.

7 5) William Washington

8 Washington was convicted by a jury of fourth degree grand
9 larceny, a Class E felony, in connection with his theft of a
10 wallet at a bus terminal. See N.Y. Penal Law § 155.30. The
11 state moved to sentence Washington pursuant to the PFO statute.
12 Washington's memorandum in opposition raised constitutional
13 objections to the PFO statute based on Apprendi, Ring, and Harris
14 v. United States, 536 U.S. 545 (2002). At the PFO hearing on
15 January 23, 2003, Washington conceded two prior felony
16 convictions. He also reasserted his Apprendi argument and
17 contested whether his criminal conduct, history and background
18 were of the kind to warrant an enhanced sentence. At the
19 sentencing hearing on January 30, 2003, the court concluded that
20 the two unchallenged prior felony convictions triggered the PFO
21 statute. With respect to Washington's criminal conduct, history,
22 and character, the court noted some fifty-seven arrests outside
23 of New York and fifteen theft-related misdemeanor and felony
24 convictions in New York, the defendant's extensive pattern of
25 thefts in the same locale, and a history of recidivism placing
26 him "far beyond any rehabilitation." The court then sentenced

1 Washington to a term of 20 years to life imprisonment. Had
2 Washington been sentenced as a second felony offender, he would
3 have been subject to an indeterminate sentence of a minimum of
4 1.5 years and a maximum of 4 years. See N.Y. Penal Law §
5 70.06(3)-(4).

6 On August 4, 2005, the Appellate Division upheld the
7 constitutionality of the PFO sentencing scheme and affirmed
8 Washington's adjudication as a persistent felony offender. See
9 People v. Washington, 799 N.Y.S.2d 217, 218 (App. Div. 2005)
10 (citing Rivera, 833 N.E.2d 194; Rosen, 752 N.E.2d 844). The
11 court nonetheless exercised its discretion to reduce the sentence
12 in the interest of justice to a Class A-I sentence of 15 years to
13 life. See id. at 217-18; see also N.Y. Penal Law § 70.00(2)-(3).
14 Thereafter, the New York Court of Appeals denied leave to appeal,
15 People v. Washington, 5 N.Y.3d 834 (2005), and on January 9,
16 2006, the United States Supreme Court denied Washington's
17 petition for certiorari. Washington v. New York, 546 U.S. 1104
18 (2006). Washington then petitioned in the Southern District for
19 a writ of habeas corpus, which Judge Koeltl granted on August 28,
20 2007. See Washington v. Poole, 507 F. Supp. 2d 342, 344
21 (S.D.N.Y. 2007). The state then brought this appeal.

22 DISCUSSION

23 a) Standard of Review

24 We review de novo a decision to grant or deny a petition for
25 writ of habeas corpus. Morris v. Reynolds, 264 F.3d 38, 45 (2d
26 Cir. 2001). Under the Antiterrorism and Effective Death Penalty

1 Act ("AEDPA"), "with respect to any claim that was adjudicated on
2 the merits in State court proceedings," a federal court may not
3 grant habeas relief unless the state court's resolution of the
4 claim on the merits:

5 (1) resulted in a decision
6 that was contrary to, or involved
7 an unreasonable application of,
8 clearly established Federal law, as
9 determined by the Supreme Court of
10 the United States; or
11

12 (2) resulted in a decision
13 that was based on an unreasonable
14 determination of the facts in light
15 of the evidence presented in the
16 State court proceeding.
17

18 28 U.S.C. § 2254(d).

19 A state court decision is "contrary to" clearly established
20 law for AEDPA purposes only if "the state court arrives at a
21 conclusion opposite to that reached by [the Supreme] Court on a
22 question of law or if the state court decides a case differently
23 than [the] Court has on a set of materially indistinguishable
24 facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000)
25 (O'Connor, J., for the Court). An "unreasonable application" of
26 clearly established federal law occurs "if [a] state court
27 'correctly identifies the governing legal rule but applies it
28 unreasonably to the facts of a particular prisoner's case,' or
29 refuses to extend a legal principle that the Supreme Court has
30 clearly established to a new situation in which it should
31 govern." Hoi Man Yung v. Walker, 468 F.3d 169, 176 (2d Cir.
32 2006) (quoting Williams, 529 U.S. at 407-08) (citations omitted).
33 The proper inquiry is not whether a state court's application of,

1 or refusal to extend, the governing law was erroneous, but
2 whether it was "objectively unreasonable," Williams, 529 U.S. at
3 409-10, "mean[ing] that petitioner must identify some increment
4 of incorrectness beyond error in order to obtain habeas relief."
5 Cotto v. Herbert, 331 F.3d 217, 248 (2d Cir. 2003) (internal
6 quotation marks omitted).

7 Clearly established federal law "refers to the holdings, as
8 opposed to the dicta, of [Supreme Court] decisions as of the time
9 of the relevant state-court decision." Williams, 529 U.S. at
10 412. To assess "clearly established" law, federal habeas courts
11 apply rules of retroactivity that are generally consistent with
12 those set forth in Teague v. Lane, 489 U.S. 288 (1989). See
13 Mungo v. Duncan, 393 F.3d 327, 333-34 (2d Cir. 2004). Teague
14 prohibits the retroactive application of "new" legal rules on
15 collateral review. Teague, 489 U.S. at 295-96; see also id. at
16 301 (O'Connor, J., concurring). Under Teague, "a case announces
17 a new rule if the result was not dictated by precedent existing
18 at the time the defendant's conviction became final." Id. at
19 301. AEDPA similarly forbids retroactive application of "new"
20 legal rules. See McKinney v. Artuz, 326 F.3d 87, 96 (2d Cir.
21 2003) ("Clearly established federal law . . . is law that is
22 'dictated by [Supreme Court] precedent existing at the time the
23 defendant's conviction became final.'") (quoting Williams, 529
24 U.S. at 381 (Stevens, J., concurring)). However, as explained
25 infra, the point of reference for determining "clearly

1 established law" may differ from the reference point used under
2 Teague to determine whether a legal rule is "new."

3 AEDPA deference applies only if a state court has disposed
4 of a federal claim "on the merits" and "reduce[d] its disposition
5 to judgment." See Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir.
6 2001). In the present matter, petitioners' federal claims were
7 all disposed "on the merits" by the New York courts. Phillips's
8 federal claim was rejected "on the merits" by the state court's
9 conclusion that "the particular facts upon which the sentencing
10 court based its determination were all permissible under Apprendi
11" People v. Phillips, 768 N.Y.S.2d at 812. The state
12 court similarly rejected Washington's claim "on the merits" by
13 concluding that "[t]he procedure under which defendant was
14 adjudicated a persistent felony offender is not
15 unconstitutional." People v. Washington, 799 N.Y.S.2d at 218.

16 The federal claims raised by Portalatin, Morris, and Besser
17 were also decided "on the merits" for AEDPA purposes because each
18 state court cited People v. Rosen in ruling that those claims
19 were procedurally barred. See People v. Besser, 749 N.E.2d at
20 733; People v. Morris, 800 N.Y.S.2d at 7; People v. Portalatin,
21 795 N.Y.S.2d at 335. We held in Brown I that the state court in
22 People v. Rosen could not have invoked state procedural law and
23 barred Rosen's Sixth Amendment claim without first having found
24 that the claim was without merit. Brown I, 409 F.3d at 532. And
25 we later held in Brown II that a citation to Rosen in holding
26 that a claim is procedurally barred establishes that the state

1 court decision was interwoven with federal law. Brown II, 451
2 F.3d at 56-57. Therefore, the procedural rulings in the present
3 matter are not "adequate" and "independent" grounds for the
4 decision and do not bar us from addressing the federal claims on
5 habeas review. See Brown II, 451 F.3d at 56-57; Brown I, 409
6 F.3d at 532. We thus proceed with these appeals under AEDPA's
7 deferential standard of review.

8 b) AEDPA Claim and "Clearly Established" Sixth Amendment Law

9 Our analysis will proceed as follows: we first address
10 whether it was objectively unreasonable to uphold petitioners'
11 Class A-I sentences in light of the Supreme Court decisions
12 applying Apprendi. We then turn to whether that law was "clearly
13 established" at the relevant time for each petitioner. This
14 inquiry leads to two further questions: first, to what period of
15 time do we look in determining whether a legal rule was "clearly
16 established" under AEDPA; second, to what extent does AEDPA allow
17 us to consider Supreme Court cases that postdate the relevant
18 period selected.

19 1) The Apprendi Rule

20 The Sixth and Fourteenth Amendments guarantee that in
21 federal and state "criminal prosecutions, the accused shall enjoy
22 the right to a speedy and public trial, by an impartial jury
23" U.S. Const. amend. VI; Duncan v. Louisiana, 391 U.S.
24 145, 149 (1968) (holding that the Fourteenth Amendment affords
25 defendants the right to a jury trial in state prosecutions to the
26 same extent the Sixth Amendment affords this right in federal

1 prosecutions). The Supreme Court has concluded that this
2 guarantee requires that a jury, not a judge, find any facts
3 (other than the fact of a prior conviction(s)) that may increase
4 the penalty for a crime beyond the ordinary statutory maximum.
5 Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

6 In Apprendi, the petitioner was convicted of possession of a
7 firearm for an unlawful purpose, punishable under New Jersey law
8 by a term of incarceration of 5 to 10 years. Id. at 468. A
9 separate hate crime statute, however, authorized an "extended
10 term" of imprisonment of 10 to 20 years if the trial judge found
11 that "[t]he defendant in committing the crime acted with a
12 purpose to intimidate an individual or group of individuals
13 because of race, color, gender, handicap, religion, sexual
14 orientation or ethnicity." Id. at 468-69 (quoting N.J. Stat.
15 Ann. § 2C:44-3(e)) (alteration in original). Having made such a
16 finding, the trial judge sentenced Apprendi to 12 years
17 imprisonment. Id. at 471. The Supreme Court held that the
18 enhanced sentence violated the Sixth Amendment, id. at 497,
19 concluding that other than the fact of a prior conviction, "any
20 fact that increases the penalty for a crime beyond the prescribed
21 statutory maximum must be submitted to a jury, and proved beyond
22 a reasonable doubt," id. at 490. The Court emphasized that "the
23 relevant inquiry is one not of form, but of effect." Id. at 494.

24 On several subsequent occasions, the Supreme Court
25 elaborated on the reach of Apprendi. In Ring, the Supreme Court
26 addressed a capital sentencing scheme that required sentencing

1 judges to find at least one statutorily-enumerated aggravating
2 circumstance before imposing the death penalty. See Ring, 536
3 U.S. at 592-93. Absent such a finding and “[b]ased solely on the
4 jury’s verdict finding . . . [of guilt], the maximum punishment
5 [Ring] could have received was life imprisonment.” Id. at 597
6 (citing Ariz. Rev. Stat. § 13-703). Ring concluded that this
7 scheme ran afoul of Apprendi, id. at 609, explaining that “[i]f a
8 State makes an increase in a defendant’s authorized punishment
9 contingent on the finding of a fact, that fact -- no matter how
10 the State labels it -- must be found by a jury beyond a
11 reasonable doubt,” id. at 602.

12 Then came Blakely. Under Washington state’s Sentencing
13 Reform Act, judges were ordinarily required to impose a sentence
14 within a “standard range” that might well be significantly below
15 the statutory maximum for the underlying offense. See Blakely,
16 542 U.S. at 299. The charged offense in Blakely’s case, second
17 degree kidnapping, was a class of felony subject to a maximum
18 sentence of 10 years. Id. (citing Wash. Rev. Code §§
19 9A.20.021(1)(b), 9A.40.030(3)). Other provisions, however,
20 further limited the range for a defendant in Blakely’s
21 circumstances to a “standard” sentencing range of 49 to 53
22 months. Id. And yet another provision permitted the sentencing
23 court to impose a sentence above that “standard” range if it made
24 factual findings on the record sufficient to support a conclusion
25 that there were “substantial and compelling reasons justifying an
26 exceptional sentence,” based on a non-exhaustive list of

1 aggravating factors. Id. (quoting Wash. Rev. Code §
2 9.94A.120(2)). The sentencing judge found that, in kidnapping
3 his ex-wife, Blakely had acted with deliberate cruelty and
4 accordingly sentenced him above the standard range to a term of
5 incarceration of 90 months. Id. at 300.

6 The Supreme Court stated that review of Blakely's sentence
7 required "apply[ing] the rule we expressed in Apprendi v. New
8 Jersey: 'Other than the fact of a prior conviction, any fact that
9 increases the penalty for a crime beyond the prescribed statutory
10 maximum must be submitted to a jury, and proved beyond a
11 reasonable doubt.'" Blakely, 542 U.S. at 301 (quoting Apprendi,
12 530 U.S. at 490) (citation omitted). The Court then reiterated
13 that "the 'statutory maximum' for Apprendi purposes is the
14 maximum sentence a judge may impose solely on the basis of the
15 facts reflected in the jury verdict or admitted by the
16 defendant." Id. at 303 (emphasis in original). Thus, for
17 purposes of Apprendi, the statutory maximum for Blakely was not
18 the 10 years prescribed for the class of felony, but the top of
19 the standard range, 53 months, the applicable maximum absent
20 additional fact-finding. See id. at 303-04. Because a judge had
21 to find facts in order to impose a sentence beyond the 53 month-
22 range, the Court concluded that Washington's sentence violated
23 the Sixth Amendment. See id. at 313-14.

24 In so holding, Blakely rejected the argument that the
25 Apprendi rule did not apply because Washington's sentencing laws
26 did not require the finding of any specific fact or facts, but

1 rather required application of the amorphous test of "substantial
2 and compelling reasons," id. at 299, as a prerequisite for the
3 imposition of a sentence enhanced beyond the standard range. See
4 id. at 305. The Court explained that it was irrelevant
5 "[w]hether the judge's authority to impose an enhanced sentence
6 depends on finding a specified fact (as in Apprendi), one of
7 several specified facts (as in Ring), or any aggravating fact (as
8 [in Blakely]))" Id. It also rejected as irrelevant the
9 fact that a sentencing court, after finding aggravating facts,
10 was required to assess the appropriateness of an enhanced
11 sentence. See id. at 305 n.8 ("Whether the judicially determined
12 facts require a sentence enhancement or merely allow it, the
13 verdict alone does not authorize the sentence." (emphasis
14 omitted)). Because the judge-made "deliberate cruelty" finding
15 resulted in Blakely being sentenced beyond 53 months, the Court
16 reversed the state court's decision that there was no Apprendi
17 violation and remanded for further proceedings. Id. at 298, 303,
18 314.

19 Blakely clarified Apprendi by making it unambiguously clear
20 that any fact (other than a prior conviction), no matter how
21 generalized or amorphous, that increases a sentence for a
22 specific crime beyond the statutory maximum must be found by a
23 jury. Before Blakely, a court could reasonably have concluded
24 (as was argued in Blakely) that certain kinds of judicial fact-
25 finding did not violate Apprendi even if it resulted in a
26 sentence beyond a statutory maximum. Indeed, we so held in Brown

1 II, 451 F.3d at 55, and Brown I, 409 F.3d at 526. Of course,
2 those decisions involved the reasonableness of New York court
3 decisions upholding the PFO statute before Blakely and do not
4 answer the question before us with regard to four of the
5 petitioners, as discussed infra. See Brown II, 451 F.3d at 59
6 n.3; Brown I, 409 F.3d at 533 & n.3.

7 In Brown I, we concluded that it was not unreasonable to
8 read Apprendi to proscribe only those sentencing schemes that
9 permit a court to find some statutorily-enumerated, specific
10 fact(s) to impose an enhanced sentence. Brown I, 409 F.3d at
11 534-35. Brown II reconsidered that holding in light of Ring and
12 concluded that Ring had not undermined Brown I. Brown II, 451
13 F.3d at 55. We held that, even after Ring, it was not
14 unreasonable "to conclude that [] determinations regarding the
15 defendant's history, character, and offense fall into a different
16 category from the essential statutory elements of heightened
17 sentencing, or functional equivalents thereof, that were
18 addressed by the Supreme Court's Apprendi ruling." Id. at 58
19 (quoting Brown I, 409 F.3d at 535). In other words, because the
20 "'amorphous' determination" required by the statute did not
21 require "judicial factfinding of an element of the crime," it did
22 not violate Apprendi. Id. at 59. However, while Brown I and
23 Brown II remain good law as to the issue they addressed --
24 whether upholding the PFO statute was an unreasonable application
25 of clearly established federal law after Apprendi but before
26 Blakely/Cunningham -- Blakely makes it clear that even

1 "amorphous" judicial findings that alter maximum sentences offend
2 the Sixth Amendment.

3 Cunningham v. California, 127 S. Ct. 856 (2007), also
4 requires discussion because the challenged sentencing regime,
5 California's determinate sentencing law ("DSL"), bears a
6 remarkable similarity to both the sentencing scheme in Blakely
7 and the New York PFO statute. Under the DSL, substantive
8 offenses were assigned upper, middle, and lower range maximum
9 sentences. Id. at 861. In Cunningham's case, the lower range
10 was 6 years, the middle range was 12 years, and the upper range
11 was 16 years. Id. at 860. Sentencing judges were required to
12 impose the middle range unless there were "circumstances in
13 aggravation or mitigation of the crime." Id. at 861 (quoting
14 Cal. Penal Code § 1170(b)). "Circumstances in aggravation," were
15 defined as "facts which justify the imposition of the upper
16 prison term." Id. at 862 (quoting Cal. Jud. Council Rule
17 4.405(d)) (emphasis omitted). Such facts were to be "established
18 by a preponderance of the evidence," and "stated orally on the
19 record." Id. (quoting Cal. Jud. Council Rule 4.420(b), (e)).

20 The Supreme Court held in Cunningham that "[b]ecause
21 circumstances in aggravation are found by the judge, not the
22 jury, and need only be established by a preponderance of the
23 evidence, not beyond a reasonable doubt, the DSL violates
24 Apprendi's bright-line rule." Id. at 868 (citations omitted).
25 In reaching this conclusion, the Court rejected the contention
26 that the upper range was the relevant statutory maximum for

1 Apprendi purposes and that judges were simply exercising the
2 traditional discretion common to sentencing. Id. It reiterated
3 that “[i]f the jury’s verdict alone does not authorize the
4 sentence, if, instead, the judge must find an additional fact to
5 impose the longer term, the Sixth Amendment requirement is not
6 satisfied.” Id. at 869.

7 Cunningham also rejected an attempt to compare California’s
8 mandatory sentencing scheme and the post-Booker Federal
9 Sentencing Guidelines, id. at 869-70, which had been rendered
10 advisory by the Court, see United States v. Booker, 543 U.S. 220,
11 246 (2005) (Breyer, J., for the Court). That the sentencing
12 schemes of both California and the United States required that
13 resultant sentences be reasonable did not, in the Court’s view,
14 cure the California scheme’s constitutional infirmity in
15 requiring judges to find facts to impose the increase in a
16 sentence beyond the maximum sentence prescribed by the middle
17 range. See Cunningham, 127 S. Ct. at 870.

18 2) Was Blakely “clearly established” at the relevant time
19 for each petitioner?

20 As noted, the legal rule invoked by petitioners was not
21 clearly established until Blakely clarified Apprendi. Therefore,
22 we must decide whether Blakely was clearly established federal
23 law “as of the time of the relevant state-court decision” for
24 each petitioner. Williams, 529 U.S. at 412 (O’Connor, J., for
25 the Court). If Blakely postdates the “relevant time” for any
26 petitioner, then our Brown cases would control and foreclose the

1 current challenge. See Brown II, 409 F.3d at 535; Brown I, 451
2 F.3d at 59.

3 For all but one petitioner, it does not matter which formula
4 we use in assessing the "relevant time." Besser's conviction
5 became final well before Blakely, and our Brown decisions dispose
6 of his claim for habeas relief. Similarly, because the state
7 court decisions involving Portalatin, Morris and Washington all
8 postdate Blakely, their claims are not controlled by the Brown
9 decisions, and we must instead evaluate New York's sentencing law
10 in light of Blakely. However, Blakely came down after the New
11 York Appellate Division decided Phillips' appeal but before the
12 Court of Appeals of New York denied Phillips leave to appeal.
13 Phillips' appeal thus turns on which approach we adopt in
14 determining the relevant time.

15 We have previously noted that the Supreme Court has offered
16 "inconsistent guidance" on this question. See Brown II, 451 F.3d
17 at 57 n.1; Brown I, 409 F.3d at 533 n.3.¹⁰ However, as the Court
18 recently explained, "the relevant state-court judgment for
19 purposes of our review under AEDPA is that adjudicating the
20 merits of [petitioner's] state habeas application, in which these
21 claims were properly raised" Abdul-Kabir v. Quarterman,
22 127 S. Ct. 1654, 1659 (2007).

23 We understand this formulation to mean that any state court
24 decision involving the merits of an Apprendi claim is an
25 application of federal law, whether or not the decision contains
26 a discussion. Even if such a decision is a denial of leave to

1 appeal or denial of a motion for reconsideration, application of
2 federal law is still a factor that we must deem a state court to
3 have considered. Therefore, we understand the relevant time to
4 be the date on which a decision regarded as final under state law
5 -- which may or may not include the certiorari period (not an
6 issue here) -- has been entered in a proceeding deemed to involve
7 the merits for federal habeas purposes. We believe that rule is
8 not only fully consistent with Section 2254(d), which triggers
9 AEDPA review once a claim has been "adjudicated on the merits in
10 State court proceedings," 28 U.S.C. § 2254(d), but also provides
11 a bright-line rule.

12 Applying this formulation here, Phillips may rely on Blakely
13 as clearly established while the state courts were actively
14 reviewing his claims. Thus, Blakely is clearly established law
15 for purposes of the petitions filed by Portalatin, Morris,
16 Washington, and Phillips.

17 3) Cunningham and "Clearly Established" Law

18 We turn to a final issue related to the term "clearly
19 established federal law." As noted, Cunningham invalidated a
20 statutory scheme very similar to the PFO statute. The state
21 argues that we may not consider Cunningham because it postdates
22 the relevant state court decisions for the remaining petitioners.
23 We disagree. Under both AEDPA and Teague, a petitioner may rely
24 on a decision issued subsequent to the relevant period if that
25 decision is "dictated" by preexisting Supreme Court precedent.
26 See Artuz, 326 F.3d at 96; see also Williams, 529 U.S. at 381

1 (Stevens, J., concurring) (quoting Teague, 489 U.S. at 301); id.
2 at 412 (O'Connor, J., for the Court). By "dictated," we mean
3 that the result must have been "apparent to all reasonable
4 jurists" during the operative time frame. See Beard v. Banks,
5 542 U.S. 406, 413 (2004) (quoting Lambrix v. Singletary, 520 U.S.
6 518, 528 (1997)). Accordingly, neither Teague nor AEDPA preclude
7 us from considering post-dated decisions that merely restate or
8 codify "old" rules of law that were "clearly established" at the
9 time.

10 Applying that principle here, we conclude that Blakely
11 compelled the result in Cunningham and that we must therefore
12 consider it as "clearly established law" for AEDPA purposes.
13 Cunningham presented no issue of fact or law materially
14 distinguishable from Blakely because the sentencing schemes in
15 Blakely and Cunningham were "closely analogous." See Butler v.
16 Curry, 528 F.3d 624, 635-36 (9th Cir. 2008). Both schemes
17 required a judge to impose a sentence within a standard range
18 absent a finding of circumstances (other than those taken into
19 account in the conviction) justifying an enhanced sentence. See
20 Cunningham, 127 S. Ct. at 861-62; Blakely, 542 U.S. at 304. And
21 we agree with the Ninth Circuit that Cunningham, in rejecting
22 California's scheme, merely "reiterated the[] same points,
23 rejecting arguments already disapproved in Blakely. . . . [It]
24 did not add "any new elements or criteria for" determining when
25 a state statute violates the Sixth Amendment." Butler, 528 F.3d
26 at 636 (citation omitted).

1 To be sure, the statutory scheme in Blakely is not precisely
2 identical to the scheme in Cunningham. But a decision does not
3 announce a “new” legal rule simply because it applies “a
4 well-established constitutional principle to govern a case which
5 is closely analogous to those which have been previously
6 considered in the prior case law.” Penry v. Lynaugh, 492 U.S.
7 302, 314 (1989) (quoting Mackey v. United States, 401 U.S. 667,
8 695 (1971) (Harlan, J., concurring in part and dissenting in
9 part)), abrogated on other grounds by Atkins v. Virginia, 536
10 U.S. 304, 307, 321 (2002). Holding otherwise would render any
11 application of Blakely a “new” rule and thus not “clearly
12 established law” for AEDPA purposes. See Butler, 528 F.3d at
13 638-39; see also Duncan v. United States, 552 F.3d 442, 445 (6th
14 Cir. 2009) (“[T]he Apprendi line of cases is long. Logically, at
15 some point in this chain . . . the rule Apprendi announced must
16 stop being a new rule in every varying application and instead
17 must become an old one that applies on collateral review.”).

18 Because Cunningham presented no issue of law or fact
19 materially distinguishable from Blakely, we conclude that Blakely
20 dictated the result in Cunningham. Indeed, the Court’s opinion
21 in Cunningham suggests as much. See Cunningham, 127 S. Ct. at
22 868 (“[T]hat should be the end of the matter” (quoting
23 Blakely, 542 U.S. at 313)). As such, we may consider it in
24 determining whether the state courts here unreasonably applied
25 clearly established federal law.

1 c) AEDPA and "Contrary to," or "Unreasonable Application" of
2 "Clearly Established Law"

3 In rejecting the Sixth Amendment challenges of Phillips,
4 Portalatin, Morris and Washington to the PFO statute, New York
5 courts relied on the views expressed by the Court of Appeals in a
6 series of opinions. We now turn to whether, in view of Blakely
7 and Cunningham, those decisions are "contrary to" or an
8 "unreasonable application of" clearly established Sixth Amendment
9 law.

10 The New York Court of Appeals has considered Apprendi
11 arguments with regard to the PFO statute on at least three
12 occasions and each time has concluded that the scheme is
13 constitutional. See Quinones, 906 N.E.2d 1033; Rivera, 833
14 N.E.2d 194; Rosen, 752 N.E.2d 844. Rivera, decided after Blakely
15 and Booker, elaborates on Rosen and offers the most thorough
16 interpretation and analysis of the PFO statute. The court's more
17 recent decision in Quinones merely reiterates and confirms the
18 logic of Rosen and Rivera. Compare Quinones, 906 N.E.2d at 1036-
19 42, with Rivera, 833 N.E.2d at 197-201, and Rosen, 752 N.E.2d at
20 846-47.

21 In upholding the PFO statute, Rivera emphasized that the
22 history/character/criminal conduct findings are of the sort that
23 have always guided the exercise of discretion in sentencing,
24 Rivera, 833 N.E.2d at 199-200, and that "fall[] squarely within
25 the most traditional discretionary sentencing role of the judge."
26 Id. at 200. By way of footnote, Rivera noted:

1 . . . Our statutes contemplate that
2 the sentencing court—after it has
3 adjudicated the defendant a persistent
4 felony offender—will consider
5 holistically the defendant’s entire
6 circumstances and character, including
7 traits touching upon the need for
8 deterrence, retribution and
9 rehabilitation unrelated to the crime of
10 conviction. This is different from the
11 type of factfinding involved in
12 Appendi. In this respect, we note that
13 in Brown v. Greiner, 409 F.3d 523, 534
14 [(2d Cir. 2005)], the United States
15 Court of Appeals for the Second Circuit
16 described the contested second phase of
17 our sentencing procedure as “a vague,
18 amorphous assessment” of whether the
19 public interest would be served through
20 imposition of the recidivist sentence.

21
22 Id. at 200 n.8. The Court of Appeals also analogized the
23 history/character/criminal conduct findings to the federal
24 Guidelines provision in Section 3553(a). See id. at 199.
25 Finally, it concluded, “[o]nce the defendant is adjudicated a
26 persistent felony offender, the requirement that the sentencing
27 justice reach an opinion as to the defendant’s history and
28 character is merely another way of saying that the court should
29 exercise its discretion.” Id. at 201.

30 To reiterate our earlier discussion of New York’s sentencing
31 scheme: first felony offenders are generally subject to a low
32 minimum and a maximum that varies greatly depending on the crime,
33 see N.Y. Penal Law § 70.00; second felony offenders are generally
34 subject to a higher minimum and a maximum that is the same as
35 that for first felony offenders, see N.Y. Penal Law § 70.06; a
36 defendant with two felony convictions is a PFO subject to a Class
37 A-I maximum of life but may be sentenced within a lower range,

1 usually as a second felony offender or second violent felony
2 offender, if the prosecution fails to show that the
3 history/character/criminal conduct factors justify a Class A-I
4 sentence, see N.Y. Penal Law § 70.10; N.Y. Crim. Proc. Law §
5 470.20. We believe that upholding this scheme was an
6 unreasonable application of Blakely/Cunningham. There is no
7 material difference between the PFO statute and the schemes that
8 the Supreme Court found objectionable in Blakely/Cunningham.

9 Under both the Washington law at issue in Blakely and the
10 California law challenged in Cunningham, the convicted defendant
11 was "eligible for" or "subject to" a sentencing range with a high
12 maximum.¹¹ See Cunningham, 127 S. Ct. at 861-62; Blakely, 542
13 U.S. at 299. However, before a sentencing court could exercise
14 its discretion to impose a sentence in the range with the high
15 maximum, it had to conclude that some aggravating or compelling
16 circumstance justified it. See Cunningham, 127 S. Ct. at 861
17 (allowing for an enhanced sentence upon the finding of
18 "circumstances in aggravation"); Blakely, 542 U.S. at 299
19 (allowing for enhanced sentencing upon a finding of "substantial
20 and compelling reasons"). In the absence of such findings, these
21 sentencing courts lacked any discretion to sentence above the
22 standard range that had a lower maximum. See Cunningham, 127 S.
23 Ct. at 862; Blakely, 542 U.S. at 304. Additionally, under both
24 schemes, a decision to sentence above the standard range was
25 reviewable for evidentiary sufficiency. See Cunningham, 127 S.
26 Ct. at 861 n.2; Blakely, 542 U.S. at 299-300, 304.

1 New York's scheme is virtually indistinguishable in these
2 respects. The law allows higher-tier, Class A-I sentencing when
3 the sentencing judge has made factual findings related to a
4 defendant's criminal history, character, and nature of the
5 criminal conduct that justify the higher sentencing range. See
6 N.Y. Penal Law § 70.10(2); N.Y. Crim. Proc. Law § 400.20(1);
7 Rivera, 833 N.E.2d at 197 n.3 ("The law goes on to require a
8 hearing or hearings, at which the People must prove to the court,
9 beyond a reasonable doubt, the fact of defendant's prior
10 convictions, and either party may offer evidence (subject to a
11 preponderance-of-the-evidence standard) bearing on the court's
12 exercise of discretion as to whether a recidivist sentence is
13 warranted." (citation omitted)). To be sure, the quantity and
14 quality of the prior offenses alone may suffice to show facts
15 justifying a Class A-I sentence. See Rivera, 833 N.E.2d at 201
16 ("If, for example, a defendant had an especially long and
17 disturbing history of criminal convictions, a persistent felony
18 offender sentence might well be within the trial justice's
19 discretion even with no further factual findings."). Absent such
20 fact-finding, a judge lacks discretion to select the Class A-I
21 sentence and must provide a sentence authorized by the other
22 provisions of Article 70, such as a second felony offender
23 sentence. See N.Y. Penal Law § 70.10(2); N.Y. Crim. Proc. Law §
24 400.20(1); Rivera, 833 N.E.2d at 198 ("Criminal Procedure Law §
25 400.20(1) provides that a defendant may not be sentenced as a
26 persistent felony offender until the court has made the requisite

1 judgment as to the defendant's character and the criminality.").
2 Moreover, as in Blakely, an enhanced sentence under New York law
3 is subject to a standard of appellate review focused on the
4 judge's role as fact-finder in imposing the enhanced sentence.
5 See Blakely, 542 U.S. at 299-300; Rivera, 833 N.E.2d at 199
6 ("[O]nce a defendant is adjudged a persistent felony offender, a
7 recidivism sentence cannot be held erroneous as a matter of law,
8 unless the sentencing court acts arbitrarily or irrationally.");
9 People v. Jennings, 822 N.Y.S.2d 501, 502 (App. Div. 2006) ("The
10 adjudication of defendant as a persistent felony offender was not
11 an abuse of discretion."). We thus see no material difference
12 between the elements of the PFO statute and the elements of the
13 sentencing schemes found objectionable in Blakely and Cunningham.

14 For the reader's benefit, we include a chart comparing the
15 sentences that Blakely and Cunningham were subject to, see
16 generally Cunningham, 237 S. Ct. at 861; Blakely, 542 U.S. at
17 299, with the sentences petitioner Morris was subject to under
18 the New York scheme.

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	"Lesser" Sentence	Requisite Judicial Fact-Finding to Enhance Sentence	"Enhanced" or "Upper Tier" Sentence
<p>Washington Sentencing Law (Blakely)</p> <p>second-degree kidnapping with a firearm</p>	<p>"Standard" term of 49 to 53 months</p> <p>Wash. Rev. Code §§ 9.94A.310, 9.94A.320</p>	<p>"substantial and compelling reasons justifying an exceptional sentence"</p> <p>Wash. Rev. Code § 9.94A.120(2)</p>	<p>10-year Maximum Sentence</p> <p>Wash. Rev. Code § 9A.20.021(1)(b)</p>
<p>California DSL (Cunningham)</p> <p>continuous sexual abuse of a child under 14</p>	<p>"Middle" term of 12 years</p> <p>Cal. Penal Code § 288.5(a)</p>	<p>"the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime"</p> <p>Cal. Penal Code § 1170(b)</p>	<p>16-year Maximum Sentence</p> <p>Cal. Penal Code § 288.5(a)</p>
<p>New York's Sentencing Scheme (Morris)</p> <p>Class E felony conviction</p>	<p>Second Felony Offender Sentence - indeterminate term of 1.5 to 4 years</p> <p>N.Y. Penal Law § 70.06(3)-(4)</p>	<p>Two qualifying prior felony convictions</p> <p>AND</p> <p>"the court . . . is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest"</p> <p>N.Y. Penal Law § 70.10</p>	<p>Indeterminate term of 15 years to life</p> <p>N.Y. Penal Law §§ 70.00(2)-(3), 70.10(2)</p>

1 In addition, the statutory labels "history and character"
2 and "nature and circumstances of [the] criminal conduct" can no
3 longer (after Blakely/Cunningham) reasonably be described as the
4 kind of judicial fact-finding constitutionally permissible, see
5 Almendarez-Torres v. United States, 523 U.S. 224, 226-27 (1998),
6 because they are amorphous and do not involve hard facts. The
7 Blakely standard determined to be a jury question was only
8 "substantial and compelling reasons," see Blakely, 542 U.S. at
9 299, while the corresponding test in Cunningham was
10 "circumstances in aggravation," see Cunningham, 127 S. Ct. at
11 861. If anything, the PFO statute's history/character/criminal
12 conduct standard is less amorphous than those. Finally,
13 Cunningham rejected the attempted analogy to the federal
14 guidelines. See id. at 869-71.

15 To sum up, the PFO statute cannot be squared with the
16 statement by Justice Ginsburg in her opinion for the Court in
17 Cunningham: "If the jury's verdict alone does not authorize the
18 sentence, if, instead, the judge must find an additional fact to
19 impose the longer term, the Sixth Amendment requirement is not
20 satisfied." Id. at 869.

21 d) Harmless Error

22 However, it is not enough to conclude that New York state
23 courts have unreasonably applied the Sixth Amendment to Phillips,
24 Washington, Morris, and Portalatin. The state also contends that
25 any constitutional error in their sentencing was harmless. In
26 light of our conclusion that the state court decisions affirming

1 Besser's sentence were not unreasonable applications of clearly
2 established law, we need not discuss this issue with respect to
3 him.

4 Many constitutional errors are not such as to "necessarily
5 render[] a criminal trial fundamentally unfair or an unreliable
6 vehicle for determining guilt or innocence." Washington v.
7 Recuenco, 548 U.S. 212, 218-19 (2006) (quoting Neder v. United
8 States, 527 U.S. 1, 9 (1999)). So long as the "defendant had
9 counsel and was tried by an impartial adjudicator, there is a
10 strong presumption that any other [constitutional] errors that
11 may have occurred are subject to harmless-error analysis." Id.
12 at 218 (quoting Neder, 527 U.S. at 8) (alteration in original).
13 Accordingly, the Supreme Court has held that a state court's
14 failure to submit a sentencing factor to the jury, a Sixth
15 Amendment violation under Blakely, is not structural error and is
16 subject to harmless error analysis. Id. at 221-22.

17 In deciding whether the application of the unconstitutional
18 statute to each petitioner was harmless, we must apply the Brecht
19 v. Abrahamson, 507 U.S. 619 (1993), test and ask if the error
20 "had substantial and injurious effect or influence" on the
21 sentence. Id. at 631 (quoting Kotteakos v. United States, 328
22 U.S. 750, 776 (1946)); see also Fry v. Pliler, 127 S. Ct. 2321,
23 2328 (2007) (holding that a federal habeas "court must assess the
24 prejudicial impact of constitutional error in a state-court
25 criminal trial under the substantial and injurious effect
26 standard . . . , whether or not the state appellate court

1 recognized the error . . .") (internal quotation marks omitted);
2 Recuenco, 548 U.S. at 221-22; Calderon v. Coleman, 525 U.S. 141,
3 145-47 (1998) (per curiam) (holding that for habeas relief to be
4 granted based on constitutional error in the capital penalty
5 phase, the error must have had substantial and injurious effect
6 on the jury's verdict in the penalty phase); Brinson v. Walker,
7 547 F.3d 387, 395 (2d Cir. 2008); Butler, 528 F.3d at 648.

8 The State bears the burden of persuasion in such cases, Fry,
9 127 S. Ct. at 2327 n.3; United States v. Dominguez Benitez, 542
10 U.S. 74, 81 n.7 (2004), and "in cases of grave doubt as to
11 harmlessness the petitioner must win," O'Neal v. McAninch, 513
12 U.S. 432, 437 (1995). Grave doubt exists when, "in the judge's
13 mind, the matter is so evenly balanced that he feels himself in
14 virtual equipoise as to the harmlessness of the error." Id. at
15 435.

16 In the present case, we believe it prudent to remand for
17 further proceedings on the question of harmlessness. No district
18 court made a detailed analysis of the harmless error issue with
19 respect to the sentences for the four petitioners, and we do not
20 believe the record on appeal is sufficiently developed for us to
21 address the matter accurately in the first instance. We
22 therefore remand the remaining four petitions for proceedings
23 consistent with this opinion.

24 CONCLUSION

25 We have considered the parties' remaining claims and find
26 them to be without merit. For the foregoing reasons, we affirm

1 the district court's order in Besser. We vacate and remand in
2 Portalatin, Washington, Morris, and Phillips. Any subsequent
3 appeal in any of the remanded cases should be referred for
4 decision to this panel in light of the time it has invested in
5 these matters. All parties to such an appeal are directed to
6 inform the clerk of our instruction.

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FOOTNOTES

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3 1. We use the term "state authorities" to refer collectively to the various state officials that have filed briefs as appellants or appellees.

2. Because a defendant sentenced to an indeterminate sentence receives a sentence that is a range of years, rather than a set term, the New York statutes frequently refer to the "maximum term" and the "minimum period of imprisonment." See, e.g., N.Y. Penal Law § 70.00(2)-(3). This should not be confused with this opinion's use of the terms "maximum" and "minimum," which are used to refer to the outer boundaries of the sentence, rather than a specific range, that a defendant could permissibly receive.

3. The PFO statute reads:

1. Definition of persistent felony offender.

(a) A persistent felony offender is a person, other than a persistent violent felony offender as defined in section 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.

(b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:

(i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor; and

(ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and

(iii) that the defendant was not pardoned on the ground of innocence; and

(iv) that such conviction was for a felony offense other than persistent sexual abuse, as defined in section 130.53 of this chapter.

(c) For the purpose of determining whether a person has two or more previous felony convictions, two or more convictions of crimes that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction.

2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00, 70.02, 70.04, 70.06 or subdivision five of section 70.80 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.

N.Y. Penal Law § 70.10.

4. Because the maximum sentence for a Class A felon is already life imprisonment, see N.Y. Penal Law § 70.00(2)(a), neither the second felony offender nor the PFO statute alters the maximum sentence for such convicted defendants. Defendants convicted of lesser felony classes (except for a terrorist offense, see N.Y. Penal Law § 490.25(2)(c), of no pertinence here) may be subject to a maximum sentence of life imprisonment only by virtue of the PFO statute, see id. §§ 70.00-70.06, 70.10(2), or the persistent violent felony offender statute, see id. § 70.08(2); see also infra note 5.

5. There are also three increasingly harsh tiers that apply to the sentencing for those convicted of a "violent felony offense." A violent felony offense is specified by statute and includes a broad range of criminal activity. See N.Y. Penal Law § 70.02(1). A first-time felony offender convicted of a violent felony offense is generally sentenced to a determinate sentence based on the class of offense. See id. § 70.02. Moreover, if there is a finding that the violent felony offender was previously convicted of one qualifying prior violent felony conviction, the defendant is sentenced to a determinate sentence as a second violent felony offender. See id. § 70.04.

If there is a finding that the violent felony offender was previously convicted of one qualifying felony conviction, as opposed to one qualifying violent felony conviction, the defendant is sentenced to a determinate sentence as a second

felony offender. See id. § 70.06(6). While the minimum determinate sentence a second violent felony offender may receive is greater than the minimum determinate sentence a second felony offender convicted of a violent felony may receive, the maximum determinate sentence that may be imposed is the same. Compare id. § 70.04 with id. § 70.06(6).

Article 70 also includes a persistent violent felony offender provision. See id. § 70.08. A persistent violent felony offender, as opposed to a persistent felony offender, is "a person who stands convicted of a violent felony offense . . . or the offense of predatory sexual assault . . . or the offense of predatory sexual assault against a child . . . , after having previously been subjected to two or more predicate violent felony convictions" Id. § 70.08(1)(a). This persistent offender provision requires imposition of an indeterminate sentence with a statutory maximum of life imprisonment solely upon the court's finding of qualifying predicate convictions. Id. § 70.08(2). However, this provision is not at issue in this appeal.

6. The pertinent provision reads:

[A Class A-I] sentence may not be imposed unless, based upon evidence in the record of a hearing held pursuant to this section, the court (a) has found that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, and (b) is of the opinion that the history and character of the

defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest.

N.Y. Crim. Proc. Law § 400.20(1).

7. With regard to a PFO convicted of a Class C, D, or E felony, there is a sentencing "dead-zone" between the legally-authorized sentencing ranges available to a court. For example, in the case of a PFO convicted of a Class D felony, a court may impose a sentence within a range of 15 years to life imprisonment if it has found facts relevant to history/character/criminal conduct that warrant such a sentence. See N.Y. Penal Law §§ 70.00(2)-(3), 70.10(2). If the court's fact-finding causes it to exercise its discretion not to impose a PFO sentence, then the statutory maximum (if not a persistent violent felony offender) generally available to the court is 7 years. See id. §§ 70.00(2)(d), 70.02(3)(c), 70.04(3)(c), 70.06(3)(d). In such a case, a court may not impose a sentence within a range of 8 to 14 years, as no provision of New York law makes that a legally-authorized sentencing range. See People v. Jennings, 822 N.Y.S.2d 501, 502 (App. Div. 2006) ("If the sentencing court had not found defendant a persistent felony offender, the maximum sentence it could have imposed would have been an indeterminate term of 2 to 4 years, the same sentence defendant received for each of his prior two felonies."); see also People v. Wilsey, 753 N.Y.S.2d

232, 233 (App. Div. 2003); People v. Yale, 373 N.Y.S.2d 901, 904-06 (App. Div. 1975). With regard to Class B felons, a different kind of dead-zone exists. These felons may be sentenced within the Class A-I range, but with maximum sentences of 25, see N.Y. Penal Law §§ 70.00(2)(b), 70.02(3)(a), 70.04(3)(a), 70.06(3)(b), 70.06(6)(a), or 30 years, see id. § 70.02(3)(a). The dead zone here is between the maximum term of years and life imprisonment. Such PFOs may be sentenced to life imprisonment if the requisite fact-findings as to history/character/criminal conduct are made. See id. § 70.10(2); N.Y. Crim. Proc. Law § 400.20(1).

8. New York's Penal Law has since been amended, and now violations of New York Penal Law § 160.10(1) are Class C felony offenses.

9. We certified three issues: (i) which date -- that of the entry of the Appellate Division's opinion, the date the New York Court of Appeals denied leave to appeal, or the date upon which the conviction became final -- is the relevant time for determining the applicable Supreme Court precedent; (ii) if Blakely v. Washington, 542 U.S. 296 (2004), applies, whether the state court's determination was an unreasonable application of the holding in that case; and (iii) what is the effect, if any, of People v. Rivera, 833 N.E.2d 194 (N.Y. 2005).

10. The confusion originates with Williams v. Taylor, 529 U.S.

362 (2000), which considered the interplay between AEDPA and Teague v. Lane, 489 U.S. 288 (1988). See Williams, 529 U.S. at 412 (O'Connor, J., for the Court). As we noted earlier, the Court read the term "clearly established federal law" as generally codifying Teague v. Lane's rule against retroactive application of cases announcing "new" legal rules. See id. at 390-91 (Stevens, J., for the Court) (citing Teague, 489 U.S. at 301). However, the court gave two different answers as to whether the operative period for assessing "clearly established" law was the same as the period for determining whether a rule is "new" for Teague purposes. Under Teague, the relevant period is "the time the defendant's conviction became final." See Teague, 489 U.S. at 301 (O'Connor, J., concurring). Justice Stevens, speaking for the Court, concluded that the relevant period for AEDPA purposes was the same. See Williams, 529 U.S. at 390 (Stevens, J., for the Court). Justice O'Connor, speaking later for the Court, concluded that habeas courts should look to "clearly established" law at the time of the "relevant state-court decision" or "state-court adjudication." Id. at 412 (O'Connor, J., for the Court).

11. Indeed, the statute in Blakely stated that the maximum sentence for the crime was the higher limit but was held unconstitutional because a "standard" sentencing range with a lower limit was mandatory absent the required findings. See Blakely, 542 U.S. at 299, 303-05.