

1 in great bodily injury, and arson of an inhabited structure. On direct appeal, the California
2 Court of Appeal affirmed the convictions, but found that the sentence for arson causing
3 great bodily injury should have been stayed. On remand, the sentencing court imposed a
4 sentence of fifteen years to life for second degree murder and a consecutive determinate
5 term of five years for arson of an inhabited structure. The California Court of Appeal
6 affirmed the sentence and the California Supreme Court denied review.

7 **STANDARD OF REVIEW**

8 A district court may not grant a petition challenging a state conviction or sentence on
9 the basis of a claim that was reviewed on the merits in state court unless the state court's
10 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an
11 unreasonable application of, clearly established Federal law, as determined by the
12 Supreme Court of the United States; or (2) resulted in a decision that was based on an
13 unreasonable determination of the facts in light of the evidence presented in the State court
14 proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to
15 mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000),
16 while the second prong applies to decisions based on factual determinations, *Miller-El v.*
17 *Cockrell*, 537 U.S. 322, 340 (2003).

18 A state court decision is "contrary to" Supreme Court authority, that is, falls under the
19 first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that
20 reached by [the Supreme] Court on a question of law or if the state court decides a case
21 differently than [the Supreme] Court has on a set of materially indistinguishable facts."
22 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application
23 of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly
24 identifies the governing legal principle from the Supreme Court's decisions but
25 "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The
26 federal court on habeas review may not issue the writ "simply because that court concludes
27 in its independent judgment that the relevant state-court decision applied clearly
28

1 established federal law erroneously or incorrectly.” *Id.* at 411. Rather, the application must
2 be “objectively unreasonable” to support granting the writ. *Id.* at 409.

3 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual
4 determination will not be overturned on factual grounds unless objectively unreasonable in
5 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. 322 at
6 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

7 When there is no reasoned opinion from the highest state court to consider the
8 petitioner’s claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*,
9 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th
10 Cir.2000).

11 **DISCUSSION**

12 As grounds for federal habeas relief, petitioner claims that the trial court violated her
13 Sixth Amendment right to a jury by deciding to run the five-year sentence on the third count
14 of arson of an inhabited structure consecutively to the 15-years-to-life sentence on the first
15 count of second degree murder.

16 Under California law, the sentencing judge has discretion to run sentences on
17 multiple counts concurrently or consecutively, and the judge may consider a number of
18 factors in making this decision. Cal. R. Ct. 4.425 (listing criteria to be considered by trial
19 court); *see also* Cal. Pen. Code § 669. The California Court of Appeal described the trial
20 court’s decision to impose the sentence consecutively as follows:

21 In discussing the reasons for imposing a consecutive term, the court
22 mentioned the number of people living in the hotel that were harmed by the
23 crime, the seriousness of the acts and defendant’s prior history of setting
24 fires. The court quoted the following paragraph from our opinion in the prior
25 appeal: “Defendant’s action had far-reaching effects. It ruined the owner’s
26 property, destroyed the homes of many victims and caused fear, panic and
physical distress to many residents. The fire spread to other buildings, which
were also evacuated. Evidence produced at defendant’s trial provides
support for a finding that there were multiple victims of the arson including
residents trapped in the burning hotel, those treated for smoke inhalation or
shock and the owners of the burned building.”

27 Resp Ex. A at 2.

28 Petitioner argues that the decision to run his sentences consecutively violated his

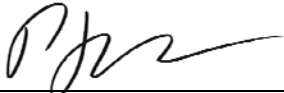
1 right to a jury because trial court based its decision on factual findings that were not made
2 by a jury. Petitioner's claim is based on the rule announced in *Apprendi v. New Jersey*, 530
3 U.S. 466, 488-90 (2000) ("Other than the fact of a prior conviction, any fact that increases
4 the penalty for a crime beyond the prescribed statutory maximum must be submitted to a
5 jury, and proved beyond a reasonable doubt.") and *Blakely v. Washington*, 542 U.S. 296,
6 303-04 (2004) ("statutory maximum" for *Apprendi* purposes is the maximum sentence
7 judge could impose based solely on the facts reflected in jury verdict or admitted by
8 defendant; that is, the relevant "statutory maximum" is not the sentence the judge could
9 impose after finding additional facts, but rather is the maximum he or she could impose
10 without any additional findings). However, petitioner's claim has recently been rejected by
11 the United States Supreme Court, which held that the rule in *Apprendi* and *Blakely* does not
12 apply to the decision to run sentences consecutively. *Oregon v. Ice*, 129 S.Ct 711, 714
13 (2009). When, as here, "a defendant has been tried and convicted of multiple offenses,
14 each involving discrete sentencing prescriptions," the Sixth Amendment does not require
15 "jury determination of any fact declared necessary to the imposition of consecutive, in lieu
16 of concurrent sentences " *Id.* Under *Ice*, the trial court's decision in this case to run
17 petitioner's sentences on counts one and three consecutively did not violate her Sixth
18 Amendment right to a jury. Accordingly, petitioner is not entitled to habeas relief.

19 **CONCLUSION**

20 For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**. The
21 clerk shall close the file.

22 **IT IS SO ORDERED.**

23 Dated: March 2, 2009

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26 PHYLLIS J. HAMILTON
27 United States District Judge