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Supreme Court asked to apply sentencing rule retroactively

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Posted 11/7/2006 10:04 PM ET

By Joan Biskupic, USA TODAY

WASHINGTON — A lawyer for a convicted rapist seeking to cut his client's prison time urged the U.S. Supreme Court on Tuesday to retroactively apply its 2004 decision that limited judges' discretion in sentencing.

A decision, which could affect thousands of criminal cases, might clarify complicated sentencing standards and affect when convicts are able to appeal their cases based on any favorable high court ruling that comes after their trial.

The 2004 ruling (*Blakely v. Washington*) said that judges cannot boost a defendant's sentence based on factors, such as cruelty, that were not determined by a jury. The court said the Sixth Amendment right to a jury trial requires that any fact essential to a defendant's prison time be proved to a jury beyond a reasonable doubt. The decision has become part of a series of court cases bolstering the role of the jury.

Until the justices started down this path, trial judges had regularly enhanced a defendant's time behind bars based on weapons, drugs or other factors that the judge determined made the crime worse. The court's trend has spawned uncertainty in federal and state criminal systems, and a new generation of disputes is before the justices.

Tuesday's case tested whether the rule of *Blakely* should be applied retroactively to convicts who were sentenced before 2004 but whose appeals were not yet over.

The Justice Department urged the court not to apply the 2004 rule to past cases. It argues that the decision merely altered criminal procedure and did not rise to the level of a "watershed" rule affecting the fundamental fairness of a trial.

In Tuesday's dispute, Lonnie Lee Burton followed a 15-year-old boy home from school, forced his way into the house at gunpoint, raped the boy, then took \$160. A jury found him guilty of rape, robbery and burglary. A judge sentenced him to 304 months for the rape, 153 months for the robbery and 105 months for the burglary — a total of nearly 47 years — and ordered the sentences to run consecutively, rather than the norm of concurrently, based on Burton's criminal record and other factors. Those factors were not put to a jury.

Stanford University law professor Jeffrey Fisher, representing Burton, said he should get the benefit of *Blakely*. He added that a defendant must not be "sentenced for a greater crime than the jury actually found him guilty of."

Washington Deputy Solicitor General William Collins argued that the 2004 case should not be applied retroactively and insisted that Burton had failed to meet state and federal requirements for even challenging his sentence at this point.

The justices focused on the intricacies of sentencing law, as well as on technical rules that could affect Burton's

particular case.


Chief Justice John Roberts suggested that even if the *Blakely* rule rose to the level of a watershed, Burton might not be able to claim it in a last-ditch appeal of his case. Justices Anthony Kennedy and Stephen Breyer noted in their questions that the court has remained deeply divided over sentencing and that the dissenters in *Blakely* remain unhappy with the trend.

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