No. 05-9222

In The Supreme Court of the United States

LONNIE L. BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

PAMELA HARRIS
National Association of Criminal Defense Lawyers
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

SUZANNE ELLIOTT
Washington Association of Criminal Defense Lawyers
705 Second Ave.,
1300 Hoge Bldg.
Seattle, WA 98104
(206) 623-0291

SHERYL GORDON MCCLOUD
Counsel of Record
National Association of Criminal Defense Lawyers
1301 Fifth Ave., Suite 3401
Seattle, WA 98101
(206) 224-8777

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question presented in petitioner Lonnie L. Burton's petition for writ of certiorari is:

> Mr. Burton was given an exceptional sentence of 258 months above the 304 month ceiling of the statutory sentencing range, and this Washington state sentence became final after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but before *Blakely v. Washington*, 542 U.S. 296 (2004).
>
> 1. Is the holding in *Blakely* a new rule or is it dictated by *Apprendi*?
>
> 2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. The Washington Association of Criminal Defense Lawyers (WACDL) is a non-profit corporation organized in 1987, and it has over 960 criminal defense lawyer members in the state of Washington. It is a state affiliate of NACDL.

NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights, including the right to a trial by jury at issue in this case, and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. To promote these goals, NACDL has frequently appeared as *amicus curiae* before this Court in all manner of cases concerning substantive criminal law and criminal procedure, including *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

SUMMARY OF ARGUMENT

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, has made any monetary contribution to its preparation or submission. See Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

We agree with petitioner Mr. Burton that *Blakely* did not announce a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), but instead applied the constitutional rule announced four years earlier in *Apprendi*. But if *Blakely* or *Apprendi* did announce a new rule, it must be considered a new rule with retroactive effect under *Teague.* This brief focuses on one aspect of that retroactivity analysis: whether *Apprendi* or *Blakely* created a "watershed" rule of criminal procedure that is exempt from the *Teague v. Lane*, 489 U.S. 288, 310-12, bar on retroactive application.

To constitute a watershed change within the meaning of *Teague,* the new rule of criminal procedure must go to the heart of the accuracy of the guilt/innocence determination. Since *Apprendi* and *Blakely* both require that a defendant must be proven guilty by the traditional beyond-a-reasonable-doubt standard prior to punishment, it neatly fits into that category. Argument Section I (A).

Some courts have rejected this conclusion, because they treat *Apprendi* and *Blakely* as decisions affecting sentencing rather than guilt. But those courts have fallen into the same formalism that plagued the New Jersey Supreme Court in *Apprendi* and the Washington Supreme Court in *Blakely*: they treat the "fact that increases the penalty for a crime beyond the prescribed statutory maximum" as a sentencing factor because state law allocated it to the sentencing court, instead of treating it as a trial factor because federal constitutional law allocates it "to a jury, [to be] … proved beyond a reasonable doubt." The federal constitutional characterization must trump the inaccurate state statutory characterization. Argument Section I(B).

When we look at the facts upon which *Apprendi* and *Blakely* operate – that is, the facts that were previously determined by a judge at sentencing by the preponderance of evidence standard under state Guidelines' sentencing statutes

– we find that in many Washington state cases, these were facts of other, additional, uncharged crimes, that the state could not prove beyond a reasonable doubt. These are quintessential examples of guilt-phase, not sentencing-phase, issues. In addition, we find Washington cases in which the difference between the preponderance and beyond-a-reasonable-doubt standards of proof would have been outcome determinative. These are quintessential examples of how the change in the burden of proof goes to the heart of the accuracy of the determination of innocence or guilt. Argument Section I(C).

One of the central purposes of the writ is to ensure that the innocent are not convicted and punished. *Blakely* and *Apprendi* further this core purpose. Applying the burden-of-proof holdings of those cases retroactively will therefore bolster the core purposes of the writ, not expand its traditional scope of operation. Section II.

ARGUMENT

I. THE *APPRENDI/BLAKELY* BURDEN OF PROOF HOLDING IS A "WATERSHED" CHANGE IN THE LAW BECAUSE IT BEARS SO DIRECTLY ON THE QUESTION OF GUILT OR INNOCENCE

A. "Watershed" Rules of Criminal Procedure Must Be Central to an Accurate Determination of Innocence or Guilt, and a Rule Requiring Use of the Beyond-a-Reasonable-Doubt Standard Is

In *Teague v. Lane*, 489 U.S. 288, 311-12, this Court held that new rules of criminal procedure are not applicable to cases that became final before the rule is announced unless the rule decriminalizes certain conduct or prohibits the

imposition of certain types of punishment for a class of defendants, or constitutes a "watershed" rule of criminal procedure.

We concern ourselves here with the "watershed" exception. It is designed for that class of new rules that (1) "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction"[2] and (2) go to the heart of the accuracy of the guilt/innocence determination, that is, rules that "implicate the fundamental fairness of the trial."[3]

Thus, this Court defines the sorts of procedural rules falling within the "accuracy" prong of this definition, and implicating the guilt-innocence determination sufficiently to fit within *Teague*'s "watershed" exception, as follows:

> The second exception permits federal courts on collateral review to announce "'watershed rules of criminal procedure' *implicating the fundamental fairness and accuracy* of the criminal proceeding." Whatever the precise scope of this exception, it is clearly meant to apply only to a small core of rules requiring "observance of 'those procedures that ... are "implicit in the concept of ordered liberty."'"

Graham v. Collins, 506 U.S. 461, 478 (1993) (citing *Teague* and other decisions of this Court) (emphasis added). Decisions fitting within this exception will therefore

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[2] *Teague*, 489 U.S. at 311 (citation omitted) (emphasis in *Teague*).

[3] *Teague*, 489 U.S. at 312.

"implicate the fundamental fairness and accuracy of the criminal proceeding." They will be "central to an accurate determination of innocence or guilt." *Id.*

Since *Apprendi* and *Blakely* both require that a defendant be proven guilty by the traditional beyond-a-reasonable-doubt standard prior to punishment, they neatly fit within that category. This Court has explicitly held that use of the beyond-a-reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error"; that it "provides concrete substance for the presumption of innocence"; and that it would be fundamentally unfair for someone to be "imprisoned for years on the strength of the same evidence as would suffice in a civil case." *In re Winship,* 397 U.S. 358, 363 (1970).

B. Treating *Apprendi* and *Blakely* as Bearing Solely on Sentencing Allows the Inaccurate State Law Characterization of the Sentence-Changing Fact to Trump the Federal Constitutional Characterization of that Fact

The government has argued, in a similar context, that *Booker*[4] does not fall within the "watershed" exception because it concerns sentencing, not the guilt innocence determination at trial. *E.g. Regaldo v. United States*, 334 F.3d 520, 527 (6th Cir.), *cert. denied,* 540 U.S. 1024 (2003) (accepting this argument).

But that is not an accurate description of *Apprendi* or *Blakely*. Those decisions did challenge procedures used at sentencing. But the challenge raised – and accepted – in each of those cases was that the particular fact at issue should not have been determined at a sentencing proceeding at all. It

[4] *United States v. Booker*, 543 U.S. 220 (2005).

should have been determined in a trial-like proceeding, with trial-like protections.

Thus, characterizing *Apprendi* and *Blakely* as limited to sentencing misses the point of those decisions. It is true that the defendants in those cases challenged sentencing proceedings. But they won – and hence they established the rule that "any fact" used to increase sentence over a statutory maximum must be treated as a trial-like factor, to be determined by the jury beyond a reasonable doubt, not at sentencing. *See Lloyd v. United States,* 407 F.3d 608, 614-15 (3rd Cir. 2005) ("*Summerlin*[5] leaves little doubt that the 'watershed rule' exception can apply to a procedural rule that only affects sentencing; indeed, were it otherwise, the Court would not have needed to examine whether *Ring*'s[6] holding applied retroactively. More importantly, *Apprendi* and its progeny have made clear that distinguishing between a conviction and a sentence obscures what matters for constitutional purposes – namely, facts that increase a defendant's punishment. … Accordingly, while the *Summerlin* Court held that *Ring* does not apply retroactively, it did not do so because *Ring* merely affected sentencing decisions.").

We are therefore left with the question of whether *Winship*'s characterization of the centrality of the beyond-a-reasonable doubt standard to accuracy remains correct. Do either *Apprendi* or *Blakely* increase significantly the accuracy of the guilt/innocence determination; does either one "implicate the fundamental fairness and accuracy of the criminal proceeding" in a way that is "central to an accurate determination of innocence or guilt"?

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[5] *Schriro v. Summerlin,* 542 U.S. 348 (2004).

[6] *Ring v. Arizona*, 536 U.S. 584 (2002).

C. The Types of "Facts" On Which *Apprendi* and *Blakely* Operate Include Findings of Guilt of Other, Uncharged, Crimes; These Are Quintessential Guilt-Phase Issues That Go to the Accuracy of the Innocence or Guilt Decision

One way to answer this question is to look at the accuracy of the determination of the existence of exceptional sentencing factors that have increased the statutory maximum sentence available under mandatory, statutory, state Guidelines sentencing hearings, before *Blakely*. In other words, have there been defendants who received sentences above a state statutory Guidelines maximum based on factors that the state could prove by the lesser, preponderance of evidence standard, but could not prove beyond a reasonable doubt?[7] *Cf. United States v. Watts*, 519 U.S. 148 (1997) (pre-*Apprendi* holding that at sentencing, court may consider conduct of which defendant has been acquitted, if it is proven by preponderance of evidence).

1. Schardt v. Payne[8] is the Paradigm Example Because the State Conceded Inability to Prove Guilt of Other, Uncharged Crimes, Beyond a Reasonable Doubt

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[7] The question presented here thus differs from the question addressed in *Schriro v. Summerlin*, 542 U.S. 348, 355-56. In that case, this Court rejected the claim that *Ring v. Arizona*, 536 U.S. 584, was a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, because judicial factfinding could not be said to "*seriously* diminish[] accuracy." (Emphasis in *Schriro.*) Here, we deal with whether a higher burden of proof (rather than a different factfinder) affects accuracy.

[8] *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005), *cert. petition filed*, Nov. 10, 2005 (No. 05-9237).

The decision in *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005), provides a striking example of just such an increase in sentence, above the Guidelines maximum, based on other, current, uncharged, crimes, which the state *admitted* that it could not prove beyond a reasonable doubt. The nature of the burden of proof as substantive, and in fact outcome-determinative, is particularly clear from the *Schardt* case – because the upward departure factor there was the existence of additional current crimes that were not proven to the jury, and because the state explicitly acknowledged on the record at the time of sentencing that it would have been unable to prove those additional current crimes by the beyond a reasonable doubt standard at trial and hence was forced to do it by the preponderance of evidence standard, instead.

In the *Schardt* case, the trial court instructed the jury that it could convict of the single charged crime if it agreed that a single rape occurred:

> There are allegations that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant, *one or more particular acts must be proved* beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

Schardt, 414 F.3d at 1028-29.

Then at sentencing, the state sought an exceptional sentence, stating that it sought to impose punishment for additional crimes that were not proven at trial:

> The State seeks an exceptional sentence of 204 months on the basis that the defendant, for a period of more than one year, continuously, habitually, and systematically engaged B.E., his surrogate stepdaughter, in a deliberate, calculated pattern of sexual abuse.

State's Sentencing Memorandum, App. 1.

Critically, the state admitted that *it could not prove such crimes at a trial*:

> In the instant case, for B.E., there are few separately identifiable incidents of abuse that can be plotted on the calendar with any real sequential or chronological accuracy, rather the acts of sexual assault committed against her may best be characterized as an indistinguishable blur. She cannot sort through the many, many trips into the defendant's bedroom, or he into hers, or the two of them together in the living room on the couch ...; the memories have become tangled, blended, disordered.

Id., App. 2.

The state even acknowledged its inability to prove such crimes by the required, beyond a reasonable doubt, standard:

> As argued to the jury, the lone count charged was merely representative of the nature and scope of the defendant's victimization of B.E. Charging the defendant with each separate crime of rape or molest [sic] committed against B.E. would have been impractical and *would have presented, because of B.E.'s inability to*

> *sufficiently distinguish chronologically between episodes of abuse, significant proof problems at trial*.

Id., App. 3 (emphasis added).

The Superior Court accepted the state's request to impose an exceptional sentence above the standard range despite the state's admitted "significant proof problems at trial" with trying to prove that these acts occurred. The court imposed a sentence of 204 months, double the high end of the standard range. The trial court's findings show that this exceptional sentence was based squarely on the existence of multiple criminal acts, which the state acknowledged it could not prove at trial:

> 1. The defendant was victim B.E.'s surrogate stepfather and/or father-figure and was one of two primary custodial parents *during the entire span of time the offenses were committed*.
>
> 2. The offenses were committed against B.E. *over an approximately one year period when B.E. was between the ages of 10 years and 11 years old.*

Schardt, 414 F.3d at 1029 (emphasis added).

Gideon[9] might not have changed the outcome in *all* cases that were tried without a defense lawyer. But what made *Gideon* a watershed rule is the fact that it was a change in a "bedrock procedural element," and it held the potential for greatly increasing the accuracy of the guilt/innocence determination in most cases. *Apprendi* and *Blakely* might not change the outcome in all cases in which uncharged sentencing factors were determined by a preponderance of

[9] *Gideon v. Wainwright,* 372 U.S. 335 (1963).

the evidence, rather than beyond a reasonable doubt. But as even the state admitted, *Apprendi* and *Blakely* would definitely have changed the outcome *Schardt v. Payne*. It would have prevented a man who was convicted of a single crime, from receiving a greatly enhanced sentence above the statutory Guidelines sentencing maximum, because of other uncharged crimes.

Thus, when this Court decides whether *Apprendi* or *Blakely* are watershed decisions, it could keep in mind the fact that in some cases they would have completely changed the outcome. And they would have changed the outcome not because of a procedural detail, but because the state – with all of the evidence it could marshal, and none suppressed – still could not have proved its case.

2. Schardt is Not an Isolated Example

In Washington, the same sorts of exceptional sentences, above the standard range, have been imposed based on the same type and amount of evidence as in *Schardt v. Payne* for other, completely uncharged, crimes proven by only a preponderance of evidence. *E.g., State v. Xaviar*, 117 Wash. App. 196, 69 P.3d 901 (2003) (exceptional sentence of 480 months, twice the low end of the standard sentence range, imposed on defendant who pled guilty to sexual exploitation of a minor, first- and second-degree child rape, and first-degree child molestation, based in part on ongoing pattern of sexual abuse for other uncharged crimes to which defendant did not plead guilty; reversed for unrelated reason, *i.e.*, breach of plea bargain); *State v. Moreno*, 101 Wash. App. 1060, 2000 WL 11175681 (2000) (upholding trial court's consideration of "numerous uncharged acts of sexual abuse and child rape for the purpose of showing Moreno had a pattern of sexually abusing his daughter" as basis for exceptional sentence above standard range; reversing because

those facts were disputed and trial court failed to hold evidentiary hearing); *State v. Quigg*, 72 Wash. App. 828, 866 P.2d 655 (1994) (exceptional sentence above standard range upheld for uncharged crimes of sexual abuse of same victim on other occasions, different from those that the state charged and proved at trial, that is, two counts of first-degree rape of a child and two counts of child molestation); *State v. Brown*, 55 Wash. App. 738, 780 P.2d 880 (1989), *review denied*, 114 Wash.2d 1014, 791 P.2d 897 (1990) (upholding exceptional sentence above standard range for defendant "resident child molester" convicted of statutory rape and indecent liberties for additional uncharged crimes of the same sort under state statutory "multiple incidents" basis for exceptional sentence, specifically holding that this was proper where the other "multiple incidents" were different from the charged and proven crimes); *State v. Spisak*, 66 Wash. App. 813, 834 P.2d 57 (1992) (exceptional sentence above standard range upheld for future dangerousness, based upon disputed evidence of defendant's "'prior sexual misconduct,' including his numerous uncharged sexual offenses against children").

These results are not surprising, given that Washington statutes (pre-*Blakely*) permitted imposition of exceptional sentences above the Guidelines' statutory maximum based on just such uncharged crimes. State statutes did bar consideration of many uncharged crimes at sentencing, but explicitly allowed consideration of evidence at sentencing, by the then-applicable preponderance of evidence standard, tending to show that the "current offense involved multiple victims or multiple incidents per victim," former Wash. Rev. Code 9.94A.390(2)(d)(i), now Wash. Rev. Code 9.94A.535(3), or that "[t]he offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time." Former Wash. Rev. Code 9.94A.390(2)(g), now Wash. Rev. Code 9.94A.535(3);

former Wash. Rev. Code 9.94A.370(2), now Wash. Rev. Code 9.94A.530(2), (3).

It was not just uncharged sex crimes that could be presented, and proven, by the preponderance of evidence standard, at sentencing, to gain an exceptional sentence. It was also other crimes, including assault, psychological abuse and harassment. *E.g.*, *State v. Durall*, 116 Wash. App. 1059, 2003 WL 21000996 (2003) ("In considering an exceptional sentence, the trial court may consider whether the current offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. … Psychological abuse alone can support an exceptional sentence. … The trial court found that Durall subjected Carolyn to a pattern of psychological abuse that constituted domestic violence," exceptional sentence upheld); *State v. Van Buren*, 112 Wash. App. 585, 600-01, 49 P.3d 966, 973-74 (2002) (holding that state law bars sentencing court from increasing defendant's sentence above the standard range because of crimes "*wholly unrelated* to the current offense or facts that would elevate the degree of crime charged above that of the charged crime," but "the sentencing court may consider facts that establish elements of an additional uncharged crime when those facts are 'part and parcel' of the current offense"; hence facts of uncharged crime of assault preceding the death can be used to elevate sentence for murder above range) (emphasis in original); *State v. Tierney*, 74 Wash. App. 346, 872 P.2d 1145 (1994), *cert. denied,* 513 U.S. 1172 (1995) (sentencing court properly considered defendant's periodic harassment of victim over four years preceding the charged crimes of first-degree arson and residential burglary, as basis for exceptional sentence; "It is undisputed that the facts upon which the trial court relied to impose an exceptional sentence also constitute elements of other uncharged crimes.").

In fact, there are even Washington cases in which precisely the sort of additional criminal aggravating factor as the one present in *Apprendi* – racial animus – was used to support an exceptional sentence outside the standard range under Washington's Sentencing Reform Act. *State v. Spears*, 95 Wash. App. 1019, 1999 WL 239272 (1999), at ** 9-10 (racial animus against "Asians" and "Koreans" used to support exceptional sentence above standard range for murder and assault, despite the fact that malicious harassment based upon race is a separate and uncharged crime (Wash. Rev. Code 9A.36.080(1)), and despite the disputed nature of this racial animus factor at the evidentiary hearing, under the "exceptionally culpable mental state" aggravating factor).

These are all cases in which the state could not, or for some other reason did not, prove the additional, uncharged, crime by the beyond-a-reasonable-doubt standard. One is a case in which the state admitted that the outcome would have been different if the more demanding criminal standard of proof applied. *Schardt*, 414 F.3d 1025. In the other cases, we can only speculate on whether the state outcome might have been different at trial – just as we can only speculate about whether the presence of a lawyer might have made the outcome different at trial post-*Gideon*.

3. Still, Few Defendants Could Raise Such a Claim on Habeas

Still, the number of cases affected is not as drastic as it might seem at first glance. Several hundred people each year receive "exceptional" sentences outside the range in Washington.[10] That number, however, includes stipulated

[10] http://www.sgc.wa.gov/PUBS/statistical_summaries/statistic

exceptional sentences and downward departure sentences, neither of which would be implicated by a retroactivity decision in this case. In fact, the state has calculated the percentage of unstipulated, upward departure, exceptional sentences imposed each year in Washington at less than 0.6% of all sentencings, that is, between 100 and 200 per year.[11] Many of these are likely so old that the prisoners would not qualify for habeas relief under 28 U.S.C. § 2244(d)(i). All would be subject to other rules concerning the availability of habeas relief only for errors causing actual prejudice. *E.g., Brecht v. Abrahamson*, 507 U.S. 619 (2003) (habeas relief unavailable for constitutional violation unless the error had "substantial and injurous effect"). *See also Washington v. Recuenco*, __ U.S. __, 126 S.Ct. 2546 (2006) (*Blakely* error subject to harmless error review, not structural error requiring automatic reversal).

II. GIVEN THE WRIT'S IMPORTANCE IN PROTECTING THE INNOCENT AGAINST ERRONEOUS CONVICTION, DECISIONS FURTHERING THAT CORE PURPOSE ARE THE BEST CANDIDATES FOR RETROACTIVITY

One of the central purposes of the writ is to ensure against conviction and punishment of those who are innocent of committing the crime. *Bousley v. United States*, 523 U.S. 614, 620 (1998) ("one of the 'principal functions of habeas corpus [is] "to assure that no man has been incarcerated

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al_summary_2005.pdf; http://www.sgc.wa.gov/PUBS/statistical_summaries/fy2004_statistical_summary.pdf.

[11] Brief of Respondent, *State v. Base*, Wash. S. Ct. No. 76081-1 (dated Feb. 3, 2005), pp. 10-11 (case pending before Washington Supreme Court).

under a procedure which creates an impermissibly large risk that the innocent will be convicted"""); *O'Neal v. McAninch*, 513 U.S. 432, 444 (1995) ("basic purposes underlying the writ" include correcting "the sort [of constitutional error] that risks an unreliable trial outcome and the consequent conviction of an innocent person"). *See also Schriro v. Summerlin*, 542 U.S. 348, 362 (Breyer, J., dissenting, joined by Stevens, Souther and Ginsberg, JJ.) ("Great Writ's basic objectives" including "protecting the innocent against erroneous conviction").

As this Court stated in *Schlup v. Delo*, 513 U.S. 298, 324-35 (1995), "the individual interest in avoiding injustice is most compelling in the context of actual innocence." This is, of course, based on the "fundamental principle that it is never just to punish a man or woman for an innocent act." *United States v. Barron*, 172 F.3d 1153, 1161 (9th Cir. 1999) (en banc) (28 U.S.C. § 2255 case). *Cf. Kansas v. Marsh*, __ U.S. __, 126 S.Ct. 2516, 2544 (2006) (Souter, J., dissenting) (requirement of "reasoned moral judgment" mandates heightened certainty of guilt before imposing death sentence).

Blakely and *Apprendi* further this core purpose and fundamental principle. Applying the burden-of-proof holdings of those cases retroactively will therefore bolster the core purposes of the writ, not expand its traditional operation.

This core purpose and fundamental principle animates not just substantive habeas decisions of this Court – *e.g., Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming without deciding that in capital case, "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief …" – but also its procedural habeas decisions. In *House v. Bell*, ___ U.S. ___, 126 S.Ct.

2064, 2076-77 (2006), for example, this Court held that, under the actual innocence exception to the procedural bar rule, a habeas petitioner who claims actual innocence as a gateway to bring an otherwise defaulted claim must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Accord Schlup v. Delo*, 513 U.S. 298 (1995).

Thus, regardless of whether the standard of proof protection required by *Apprendi* and *Blakely* is characterized as procedural or substantive, it still implicates the guilt/innocence determination; it still goes to the fundamental fairness and accuracy of the process; and it still falls within the core concerns of federal habeas.

III. CONCLUSION

For all of the foregoing reasons, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

PAMELA HARRIS
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

SHERYL GORDON MCCLOUD
Counsel of Record
NATIONAL ASSOCIATION OF
OF CRIMINAL DEFENSE LAWYERS
1301 Fifth Ave., Suite 3401
Seattle, WA 98101
(206) 224-8777

SUZANNE ELLIOTT
WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
705 Second Ave., 1300 Hoge Bldg.
Seattle, WA 98104
(206) 623-0291

August 25, 2006

Attorneys for *Amici Curiae*

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON, Plaintiff, vs. SCHARDT, DALE E., Defendant.	) NO. 97-1-00768-7) STATE'S MEMORANDUM) IN SUPPORT OF) MOTION TO SENTENCE) DEFENDANT BEYOND) THE STANDARD RANGE)

ISSUE PRESENTED

The State seeks an exceptional sentence of 204 months on the basis that the defendant, for a period of more than one year, continuously, habitually, and systematically engaged B.E., his surrogate stepdaughter, in a deliberate, calculated pattern of sexual abuse.

RELEVANT FACTS

As the Court is familiar with the facts in this case having presided over the trial, they will not be repeated here in detail.

In the late Summer of 1995, B.E., along with her mother and younger brother, moved in with the defendant. The defendant thereafter assumed the role of step-parent. In fact, when interviewed by law enforcement the defendant described B.E. as his step-daughter. To the best of B.E.'s memory, the defendant began abusing her sexually in the Spring of 1996.

In her testimony at trial, 12 year-old B.E. detailed what it was like to have sexual contact with the defendant.

She described how it felt when he touched her vagina with his fingers, with his

* * *

(1990)." In *State v. Tierney,* 74 Wn.App. 346, 872 P.2d 1145, cert. denied 513 U.S. 1172 (1994), it was held that the "real facts" doctrine does not preclude reliance on facts that establish elements of additional uncharged crimes to enhance a sentence when those facts are part and parcel of the current offense, the doctrine only bars reliance on those facts wholly unrelated to the current offense or those facts that would elevate the degree of crime charged to a greater offense than that charged.

Additionally, the crimes constituting the pattern of abuse must be committed against the same victim. *State v. Collins,* 69 Wn.App. 110, 114, 847 P.2d 528, 531 (1993). Importantly, this factor applies even though the defendant was convicted on multiple counts, so long as there is proof of multiple acts of sexual abuse per count. *State v. Daniels,* at 564; *State v. Brown,* at 755-756. The inquiry for the court is whether record supports multiple incidents per count charged.

In the instant case, for B.E., there are few separately identifiable incidents of abuse that can be plotted on the calendar with any real sequential or chronological accuracy, rather the acts of sexual assault committed against her may best be characterized as an indistinguishable blur. She cannot sort through the many, many trips into the defendant's bedroom, or he into hers, or the two of them together in the living room on the couch, and successfully disconnect one episode from another; the memories have become tangled, blended, disordered. Like a ball of string whose tails are lost amongst the maze of over-lapping

lines, it is hard, very hard, for B.E. to separate the monotony of the middle from the terror that was the beginning and the relief that was the end.

As argued to the jury, the lone count charged was merely representative of the nature and scope of the defendant's victimization of B.E. Charging the defendant with each separate crime of rape or molest committed against B.E would have been impractical and would have presented, because of B.E.'s inability to sufficiently distinguish chronologically between episodes of abuse, significant proof problems at trial. However, as opined by the court in *Brown*, "these problems should not benefit the defendant at sentencing." *State v. Brown*, at 755.

CONCLUSION

For over a year rarely did a week go by where B.E. was not compelled to have sexual contact with the defendant at least once. Rarely did a week go by that this ten, then eleven-year-old, girl did not have to take her clothes off for the defendant so that he might use her body to service one or more of his sexually deviant needs. The multiple acts of sexual abuse committed against B.E. over this prolonged period of time are substantial and compelling reasons to impose an exceptional sentence. 204 months is proportionally consistent with the abuse the defendant visited upon this young girl. The State respectfully requests the court impose an exceptional sentence of 204 months.

Dated this 11th day of January 1999.

/s/ Michael C. Held
Michael C. Held, DPA #19696