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 FOR PETITIONER

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QUESTIONS PRESENTED

Petitioner 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*, but before *Blakely v. Washington*:

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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BRIEF FOR PETITIONER

OPINIONS BELOW

The Memorandum and Disposition of the United States Court of Appeals for the Ninth Circuit is unpublished but is reported at *Burton v. Waddington*, 142 Fed. Appx. 297 (CA9 2005), and reproduced at J.A. 78. The decision of the United States District Court for the Western District of Washington is unpublished and is reproduced at J.A. 77.

JURISDICTION

The Ninth Circuit issued its decision on July 28, 2005. The Ninth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on October 13, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Based on factual findings it made by a preponderance of the evidence, a trial court in Washington State gave Petitioner Lonnie Lee Burton an "exceptional sentence" – enhancing his sentence by over twenty-one years more than was allowed by his jury verdict alone. Before Petitioner's sentence became final, this Court made clear in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the Sixth and Fourteenth Amendments prohibit courts from making their own findings to impose sentences above the "statutory maximum" permitted by "the jury verdict alone." *Id.* at 483, 490. Such facts must be proven to a jury beyond a reasonable doubt. *Id.* at 390. Petitioner, however, was unable to convince the Washington courts that this holding rendered his sentence unconstitutional. Accordingly, he brought the instant federal habeas petition, renewing his claim that the imposition of his exceptional sentence violated the Sixth and Fourteenth Amendments. While that petition was pending, this Court confirmed in *Blakely v. Washington*, 542 U.S. 296 (2004), that *Apprendi* applied specifically to Washington's system for imposing exceptional sentences. The issue here is whether the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), forecloses a federal court from applying *Blakely* to Petitioner's claim.

1. Based on information from a jailhouse informant, it was alleged that in 1991 Petitioner followed a teenager home from school, forced his way into his home, had sex with him, and stole $160 from a dresser before he left. J.A. 44. The State of Washington charged, and in 1994, convicted Petitioner of rape in the first degree (count I), robbery in the first degree (count II) and burglary in the first degree (count III). The Washington courts upheld Petitioner's convictions, and federal courts rejected Petitioner's

attempt to challenge them through habeas corpus proceedings. *See Burton v. Walter*, No. 00-35579, 2001 WL 1243655 (CA9 May 30, 2001) (affirming district court judgment).

The imposition of Petitioner's sentence did not go as smoothly. Washington appellate courts vacated his first two sentences for reasons not relevant here. On March 13, 1998, the trial court proceeded to sentence Petitioner a third time. Under Washington law as it existed at the time of Petitioner's sentencing – the same law that would later be the subject of this Court's *Blakely* decision – statutes subjected offenders to "standard" or "presumptive" sentences based on the crime(s) of conviction. Courts, however, could depart above these standard ranges and impose so-called "exceptional sentences" – up to a second statutorily established limit – upon finding "aggravating facts" not encompassed in jury verdicts. Washington law empowered courts themselves to make such findings by a preponderance of the evidence, rather than submitting such allegations for juries to find beyond a reasonable doubt. *See* Wash. Rev. Code. §§ 9.94A.120, 9.94A.390 (1998)[1]; *Blakely*, 542 U.S. at 299-300.

The trial court calculated the following statutory standard ranges for each for Petitioner's counts of conviction: Count I: 234-304 months; Count II: 153-195 months;

[1] These citations to Washington's sentencing code, and all others that follow, are to the law as it existed at the time of Petitioner's sentencing. The Washington Legislature recodified these sections in later years. Then, following the *Blakely* decision, the Legislature amended the State's sentencing laws to require that all aggravating facts supporting exceptional sentences (other than the fact of a prior conviction) be alleged in advance and, if disputed, proved to a jury beyond a reasonable doubt. *See* Wash. Rev. Code §§ 9.94A.535, 537 (2005).

Count III: 105-134 months. J.A. 6. Washington law required sentences for offenses such as these to run concurrently unless the trial court found aggravating facts were present "under the exceptional sentence provisions of [Wash. Rev. Code §] 9.94A.120 and 9.94A.390(2)(g) or any other provision of [Wash. Rev. Code §] 9.94A.390." Wash. Rev. Code § 9.94A.400 (1998). Accordingly, Petitioner's maximum sentence based on the jury verdict alone was 304 months – the top end of the highest of the three standard ranges. J.A. 6. His maximum possible exceptional sentence was life in prison. J.A. 6.

The trial court invoked the exceptional sentence provisions and imposed a total sentence of 562 months. J.A. 9. In support of this 258-month enhancement, the sentencing court found three aggravating facts to be present pursuant to Wash. Rev. Code § 9.94A.390: (a) Petitioner acted with "deliberate cruelty"[2]; (b) Petitioner's actions "demonstrate[d] sophistication and planning of [the] sort that makes the defendant a significantly different offender"; and (c) Petitioner's "long criminal history, combined with the 'multiple offense policy,' results in a sentence that is clearly too lenient in light of the purposes of the Sentencing Reform Act." J.A. 29-31.

2. The Washington Court of Appeals upheld Petitioner's sentence, and, on December 5, 2000, the Washington Supreme Court denied discretionary review. J.A. 55.

[2] This, of course, is the same aggravating factor that was later at issue in *Blakely*. *See Blakely*, 542 U.S. at 300.

3. Meanwhile, before Petitioner's sentence had become final, this Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (June 26, 2000), that the Sixth and Fourteenth Amendments require any fact (other than the fact of a prior conviction) "that increases the penalty for a crime beyond the prescribed statutory maximum [to] be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. This Court also defined "statutory maximum" as the statute setting the maximum sentence a defendant could receive "if punished according to the facts reflected in the jury verdict alone." *Id.* at 483. Upon receiving the Washington Supreme Court's denial of review, Petitioner filed a state habeas petition – known in Washington as a "personal restraint petition" or "PRP" – in the Washington Court of Appeals. Petitioner argued that the imposition of his exceptional sentence violated *Apprendi* because it exceeded the maximum sentence to which the jury verdict had exposed him.

While Petitioner's PRP was pending, the Washington Supreme Court took up the issue of whether the State's system for finding aggravating facts necessary to impose exceptional sentences ran afoul of the newly announced *Apprendi* rule. The Court held that it did not, reasoning that the "statutory maximum" in Washington's system was the statute setting the maximum possible exceptional sentence, not the maximum possible standard sentence. *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (Wash. 2001). The Court never mentioned the definition that *Apprendi* had given for the term "statutory maximum": "the maximum [a defendant] would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. at 483. Nor did it attempt to apply that definition

to Washington's system for imposing exceptional sentences.

Shortly thereafter, the Washington Court of Appeals denied Petitioner's PRP, explaining that the issue he raised was "clearly controlled by the recent [Washington] Supreme Court decision in *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001) (exceptional sentence may be imposed 'without factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt')." App. 2a.[3]

4. The Washington Supreme Court, through a commissioner, upheld the Washington Court of Appeals' denial of relief. The commissioner likewise relied on *Gore* for the proposition that "*Apprendi* does not apply to exceptional sentences that are otherwise within the statutory maximum for the crime." App. 3a. Like the Washington Supreme Court itself, the commissioner never mentioned the definition that *Apprendi* had given for the term "statutory maximum." Nor did he attempt to apply that definition to Petitioner's claim.

5. In January 2002, Petitioner filed a federal habeas petition in the U.S. District Court for the Western District of Washington. Among other claims, Petitioner renewed his *Apprendi* claim, asserting that his sentence in excess of the top of the range set by statute was unconstitutional because the factual findings used to support it were not submitted to a jury or proven beyond a reasonable doubt.

[3] The relevant state appellate decisions involving Petitioner's PRP are attached as an Appendix to this brief because neither party officially entered them into the record in the district court.

Petition for Writ of Habeas Corpus, No. C02-0140 (Dkt. No. 3) at 6. The district court denied the petition. J.A. 77.

6. Petitioner asked the Ninth Circuit for a certificate of appealability on his *Apprendi* claim. That court initially denied this request. But after this Court held in *Blakely* that the rule of *Apprendi* applied to Washington's system for imposing exceptional sentences, the Ninth Circuit reversed itself and granted a certificate of appealability on Petitioner's *Apprendi* claim.

On the merits, however, the Ninth Circuit affirmed the district court's denial of habeas relief. J.A. 78. As is pertinent here, the Ninth Circuit first agreed with the State that *Blakely* "established a new rule that does not apply retroactively on collateral review." *Id.* In this respect, the Ninth Circuit simply cited its decision in *Schardt v. Payne*, 414 F.3d 1025 (CA9 2005), which had addressed the identical issue a few weeks earlier and held that *Blakely* announced a new rule because all of the federal courts of appeals prior to *Blakely* had held that *Apprendi* did not apply to a different sentencing system: the non-statutory Federal Sentencing Guidelines. 414 F.3d at 1035. Then, the Ninth Circuit held that "because [Petitioner's] sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum of life imprisonment, it does not violate *Apprendi*." J.A. 81. Like the Washington courts and the *Schardt* panel before it, the Ninth Circuit never referenced *Apprendi*'s explicit definition of the term "statutory maximum" or attempted to apply it to Petitioner's sentence.

7. The Ninth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. J.A. 83.

8. This Court granted certiorari. 126 S. Ct. 2352 (2006).

SUMMARY OF ARGUMENT

The retroactivity doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989), does not bar applying this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), to Petitioner's habeas corpus claim.

I. The *Teague* doctrine applies only to decisions that announce "new rules" of criminal procedure, not to those that are "merely an application of the principle that governed" a prior Supreme Court case. *Teague*, 489 U.S. at 307 (quotation and citation omitted). The *Blakely* decision falls into the latter category. Before Petitioner's sentence became final, this Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the Sixth and Fourteenth Amendments require any fact (other than the fact of a prior conviction) "that increases the penalty for a crime beyond the prescribed statutory maximum [to] be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. This Court also emphasized that this inquiry was "one not of form, but of effect," explaining that the "statutory maximum" in any given sentencing regime is the statute setting the maximum sentence a defendant could receive "if punished according to the facts reflected in the jury verdict alone." *Id.* at 483, 494. The *Blakely* decision – as both the majority and dissents expressly recognized – simply applied this rule to Washington's system for finding aggravating facts necessary to impose exceptional sentences. Because the presence of such facts exposed defendants to greater punishment than authorized by jury

verdicts alone, judges' finding them by a preponderance of the evidence violated the Constitution.

The Ninth Circuit nevertheless reasoned that *Blakely* established a new rule because, prior to that decision, the federal courts of appeals unanimously agreed that *Apprendi* did not apply to a different sentencing system: the federal sentencing system. But that assertion fails to appreciate the difference between the Federal Sentencing Guidelines and the Washington exceptional sentence system at issue in *Blakely*. The Federal Sentencing Guidelines are not statutory in nature, so the announcement of *Apprendi*'s "statutory maximum" rule did not squarely implicate imposing sentences above the thresholds they established. The Washington exceptional sentence system in *Blakely*, however, set dual *statutory* limits – one for committing crimes without any aggravating factors, and one for committing crimes with aggravating factors. Accordingly, all this Court had to do to decide *Blakely* was to reiterate *Apprendi*'s holding that the relevant statutory maximum, for constitutional purposes, is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303 (citing *Apprendi*, 530 U.S. at 483). Because aggravating facts exposed Washington defendants to greater punishment than the State's statutory code otherwise authorized based on jury verdicts alone, courts' finding those facts by a preponderance of the evidence violated the Sixth and Fourteenth Amendments as surely as the same practice in *Apprendi* did.

II. Even if this Court were to hold that *Blakely* did somehow announce a "new rule," its rule would apply retroactively under *Teague*'s exception for "watershed rules of criminal procedure." To fall within this exception,

a new rule must meet two requirements: "[1] Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and [2] the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (quotations and citations omitted). The *Blakely* rule that facts that expose criminal defendants to punishment exceeding otherwise binding statutory limits must be proven to juries beyond a reasonable doubt satisfies each of these tests.

First, infringing the reasonable doubt component of the *Blakely* rule seriously diminishes the likelihood of obtaining an accurate conviction. Applying this same test in two pre-*Teague* cases, this Court has held that applying the preponderance-of-the-evidence standard instead of the reasonable doubt standard – even, as functionally is at issue here, with respect to a single element of a crime – "substantially impairs [a criminal trial's] truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972); *see also Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977). These holdings make eminent sense and control here. Whereas the reasonable doubt standard requires a fact-finder to "reach[ ] a subjective state of certitude of the facts in issue," the preponderance standard "calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." *In re Winship*, 397 U.S. 358, 364, 368 (1970) (quotations and citations omitted). It is obvious that using the latter inquiry to punish someone for something that the jury verdict itself does not otherwise allow

creates an impermissibly large risk of punishing someone for something they did not really do.

Second, both the reasonable doubt and jury trial components of the *Blakely* rule implicate our understanding of the bedrock procedural elements essential to the fairness of a proceeding. This Court has described both the reasonable doubt standard and the jury trial right as ancient guarantees "of surpassing importance." *Apprendi*, 530 U.S. at 476. And this Court's decision in *Blakely* makes clear that these protections are just as essential to fundamental fairness in the context of finding facts that expose criminal defendants to punishment exceeding otherwise binding statutory limits as they are in the rest of trials. Without these protections, legislatures could relegate juries simply to determining "that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306-07. Such a regime would flout our most basic conceptions of liberty.

ARGUMENT

This case comes to this Court on the threshold and limited question whether the Ninth Circuit correctly held that *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny preclude Petitioner from obtaining habeas relief on the basis of this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004). They do not. The *Teague* doctrine provides that state prisoners may not obtain federal habeas relief based on "new" constitutional rules announced after their convictions became final, unless the rule at issue (1)

"forbid[s] criminal punishment of certain primary conduct [or] prohibit[s] a certain category of punishment for a class of defendants because of the status of their offense," or (2) is a "watershed" rule. *Teague*, 489 U.S. at 311; *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). But Petitioner does not seek the benefit of a new rule; he seeks only the benefit of the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as it was straightforwardly applied in *Blakely*. And even if *Blakely* itself had announced a new rule, it would constitute a watershed rule to which Petitioner would still be entitled to retroactive benefit. Consequently, this Court should reverse the Ninth Circuit's decision and remand for further proceedings.

I. THIS COURT'S DECISION IN *BLAKELY V. WASHINGTON* DID NOT ANNOUNCE A "NEW RULE."

A. A Decision That Merely Applies A Rule Enunciated In A Prior Supreme Court Case Does Not Announce A New Rule.

1. In *Teague v. Lane*, 489 U.S. 288 (1989), the plurality opinion explained when a case announces a "new" rule:

> In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (citations omitted).[4] This Court ratified this general test later that same Term, *see Penry*, 492 U.S. at 314, and has reaffirmed its formulations many times since. *See, e.g., Beard v. Banks*, 542 U.S. 406, 413 (2004); *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997).

By contrast, a decision does not announce a new rule when it is "merely an application of the principle that governed" a prior Supreme Court case. *Teague*, 489 U.S. at 307. As Justice Kennedy has explained, "we ask whether the decision in question was dictated by precedent" in recognition of "[t]he comity interest served by *Teague*." *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment). If a decision of this Court was *not* dictated by precedent existing at the time the state prisoner's conviction became final, a federal court should not upset the finality of the conviction because the state court did not have fair notice that it was acting unconstitutionally. But if "all reasonable jurists" would have realized such precedent compelled the holding in the later decision, there is nothing unfair or subversive of federalism in applying the later decision to the prisoner's federal habeas claim. *Beard*, 542 U.S. at 413 (quoting *Lambrix*, 520 U.S. at 528).

Teague itself provided an example of a decision that simply applied the rule that governed a prior case and, therefore, did not announce a new rule: *Francis v. Franklin*, 471 U.S. 307 (1985), *cited in Teague*, 489 U.S. at 307. In *Francis*, this Court held that a jury instruction that allowed the jury to presume malice unconstitutionally

[4] All citations to *Teague* from this point forward are to the plurality opinion.

relieved the state of its burden of proof beyond a reasonable doubt. It explained its decision this way:

> *Sandstrom v. Montana* [442 U.S. 510 (1979)] made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in [*In re Winship*, 397 U.S. 358 (1970)] on the critical question of intent in a criminal prosecution. 442 U.S. at 521. Today we reaffirm the rule of *Sandstrom* and the wellspring due process principle from which it was drawn. The Court of Appeals faithfully and correctly applied this rule, and the court's judgment is therefore affirmed.

Francis, 471 U.S. at 326-27. Notwithstanding the dissent's complaint that *Francis* "needlessly extend[ed] our holding in [*Sandstrom*] to cases where the jury was not required to presume *conclusively* an element of a crime under state law," *id.* at 332 (emphasis added) (Rehnquist, J., dissenting), this Court held unanimously three years later that *Francis* did not announce a new rule because it "was merely an application of the principle that governed our decision in *Sandstrom v. Montana*." *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988), *quoted in Teague*, 489 U.S. at 307.

2. Post-*Teague* decisions from this Court reinforce that merely applying a rule announced in a prior Supreme Court case does not announce a new rule. In *Stringer v. Black*, 503 U.S. 222 (1992), this Court held that its decision in *Maynard v. Cartright*, 486 U.S. 356 (1988), did not announce a new rule because it "applied the same analysis and reasoning" found in a prior case. *Stringer*, 503 U.S. at 228. That prior case, *Godfrey v. Georgia*, 446 U.S. 420 (1980), had held that the aggravating factor of an "outrageously or

wantonly vile, horrible or inhuman" offense was unconstitutionally vague for purposes of determining eligibility for the death penalty. Although *Maynard* involved an aggravator with slightly different language – whether the offense was "especially heinous, atrocious, or cruel" – this Court explained in *Stringer* that "it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case." 503 U.S. at 228-29. The key, this Court explained, was that "[i]n applying *Godfrey* to the language before us in *Maynard*, we did not 'brea[k] new ground.'" *Stringer*, 503 U.S. at 229 (quoting *Butler v. McKellar*, 494 U.S. 407, 412 (1990)).

Stringer also concluded that this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), did not announce a new rule. Although this Court acknowledged that "there are differences in the use of aggravating factors under the Mississippi capital sentencing system [at issue in *Clemons*] and their use in the Georgia system in *Godfrey*," the Court explained that "those differences could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final." *Stringer*, 503 U.S. at 229. Because the rule adopted in *Godfrey* compelled the outcome in *Clemons*, *Clemons* did not announce a new rule.

Finally, this Court held in *Penry v. Lynaugh*, 492 U.S. 302 (1989), that the relief a state prisoner sought would not create a new rule because it was dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), both of which were decided before the prisoner's conviction became final. Penry sought relief based on the proposition that when a capital defendant presents mitigating evidence of mental retardation and an abused background, courts must "give[ ] jury instructions

that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death." *Penry*, 491 U.S. at 315. Both *Lockett* and *Eddings* had held that sentencers in capital cases could not be precluded from considering certain potentially mitigating evidence. Even though those cases dealt with different kinds of mitigating evidence, this Court concluded that the rule Penry sought was "dictated by *Eddings* and *Lockett*." *Penry*, 492 U.S. at 319.

3. This Court's recent applications of past decisions to new sets of facts confirm that when an established rule governs a certain dispute, that rule does not implicate *Teague*. In *Williams v. Taylor*, 529 U.S. 362 (2000), for example, this Court applied its decision in *Strickland v. Washington*, 466 U.S. 668 (1984), to a petitioner's federal habeas claim. This Court explained:

> That the *Strickland* test "of necessity requires a case-by-case examination of the evidence," *Wright*, 505 U.S. at 308 (Kennedy, J., concurring in judgment), obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court. This Court's precedent "dictated" that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams' ineffective-assistance claim. *Teague*, 489 U.S. at 301. And it can hardly be said that recognizing the right to effective counsel "breaks new ground or imposes a new obligation on the States."

Williams, 529 U.S. at 391 (quoting *Teague*, 489 U.S. at 301). Even though the precise basis for Williams' contention that he received ineffective assistance was different than the petitioner's in *Strickland*, Williams was nonetheless entitled to a full application of *Strickland*'s general

rule. *Id.* This Court recently reached a similar result in *Miller-El v. Dretke*, 545 U.S. 231 (2005), applying the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), to a new set of facts.

There can be no doubt, therefore, that Petitioner is entitled to apply the rule of *Apprendi* in his habeas petition. And to the extent the holding of *Blakely* flowed from simply applying *Apprendi* to a sentencing system that was different in form but not in kind from the one in *Apprendi*, Petitioner is entitled to the benefit of *Blakely* as well.

B. This Court's Decision In *Blakely* Simply Applied The Rule Already Announced In *Apprendi*.

This Court's opinions in *Apprendi* and *Blakely*, as well as a comparison between the underlying sentencing laws at issue in those cases, demonstrate that *Blakely* simply applied the rule already announced in *Apprendi.* It did not break new ground in holding that Washington's procedures for finding the aggravating facts supporting exceptional sentences were unconstitutional.

1. In *Apprendi*, this Court considered the legality of New Jersey's system for imposing a certain "sentence enhancement." Under that system, a defendant convicted of a given crime was subject to a statutorily established maximum sentence (in Apprendi's case, 10 years). A second statute, however, provided that a sentencing court could impose "an extended term" of imprisonment – up to 20 years – if it found by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or group on the basis of race or a similar characteristic. 530 U.S. at 468-69.

This Court in *Apprendi* ruled that New Jersey's sentence-enhancement system ran afoul of the Sixth and Fourteenth Amendments, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. But this Court did not stop there. This Court explained that the "statutory maximum" in a given sentencing scheme is the statute setting "the maximum [a defendant] would receive *if punished according to the facts reflected in the jury verdict alone*." *Id.* at 483 (emphasis added); *see also id.* at 483 n.10 (the statutory maximum is the statutory "outer limit[ ]" based on "the facts alleged in the indictment and found by the jury"). *Apprendi* explained, in other words, that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment *than that authorized by the jury's guilty verdict*?" *Id*. at 494 (emphasis added). Because the hate-crime enhancement at issue there "increased . . . the maximum range within which the judge could exercise his discretion," this Court held that the trial court erred in imposing the enhancement based on a fact that it found by a mere preponderance of the evidence. *Id.* at 474; *see also id.* at 491-92.

Four years later, in *Blakely*, this Court confronted Washington's system for imposing exceptional sentences. Under that system, a defendant convicted of a given crime or crimes was subject to a statutorily established "standard," or "presumptive," statutory range. A second statute, however, empowered sentencing courts to impose a longer – so-called "exceptional" – sentence if they found one or more "aggravating facts" beyond those encompassed in the

guilty verdict. *See Blakely*, 542 U.S. at 299-300. This Court held that the Washington system was unconstitutional in the same way as the New Jersey system in *Apprendi* had been.

One need look no farther than the language in *Blakely* itself to understand that *Blakely* did nothing more than apply the rule of *Apprendi*. At the outset of its analysis, this Court explained that:

> This case requires us to *apply the rule we expressed in Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

542 U.S. at 301 (emphasis added). The State argued that the "statutory maximum" in Washington's system was not the statute setting the maximum sentence based solely on the guilty verdict (in Blakely's case, 53 months), but instead was the statute establishing the maximum possible exceptional sentence (10 years). *Id.* at 303.

This Court, however, rejected the State's argument, holding in no uncertain terms:

> Our precedents *make clear* . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*

542 U.S. at 303 (first emphasis added); *compare Yates*, 484 U.S. at 216-17 (*Francis* did not announce new rule in part because it explained that prior precedent "made clear" that state's argument lacked merit). For this proposition,

this Court cited and quoted *Apprendi*'s statement that the statutory maximum is the statute setting "the maximum [a defendant] would receive if punished according to the facts reflected in the jury verdict alone." *Blakely*, 542 U.S. at 303 (quoting and citing *Apprendi*, 530 U.S. at 483).

Lest there be any doubt that *Blakely* broke no new legal ground, this Court further explained that "[t]he 'maximum sentence' is *no more* 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime)." *Blakely*, 542 U.S. at 304 (emphasis added). This Court's "commitment to *Apprendi* in this context" reflected nothing more than "respect for longstanding precedent" and a continuing need to give "intelligible content to the right of jury trial." *Blakely*, 542 U.S. at 305; *compare Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (*Apprendi* rule is necessary to give "intelligible content" to jury trial right).

This Court has noted that dissents from decisions also can illuminate whether those decisions announced new rules. *See Beard*, 542 U.S. at 415; *O'Dell v. Netherland*, 521 U.S. 151, 158-59 (1997). No dissent in *Blakely* disputed that *Apprendi* compelled the result the Court reached. The most any dissenter claimed was simply that this Court in *Blakely* made clear "it mean[t] what it said in *Apprendi.*" *Blakely*, 542 U.S. at 328 (Breyer, J., dissenting). Making clear that a prior opinion meant what it said, however, does not announce a new rule. The opinion must "break[ ] new ground" in some way necessary to its holding. *Graham v. Collins*, 506 U.S. 461, 467 (1993). Nothing in *Blakely* did so.

Instead of basing their disagreement on the holding in *Blakely*, therefore, the *Blakely* dissenters directed their ire

at the rule of *Apprendi* itself. *See, e.g.*, 542 U.S. at 321 (O'Connor, J., dissenting) (explaining that the "*Apprendi* dissenters" were unwilling to follow its rule here); *id.* at 333 (Breyer, J., dissenting) (criticizing what sentencing systems have to do to conform "to *Apprendi*'s dictates"); *compare* majority opinion at 306 (referring to dissenters as "[t]hose who would reject *Apprendi*"). That presumably is why Justice O'Connor went so far as to concede that, on the basis of *Teague*'s "dictated by precedent" principle, "all criminal sentences imposed under [systems similar to Washington's] since *Apprendi* was decided in 2000 arguably remain open to collateral attack." 542 U.S. at 323-24 (O'Connor, J., dissenting) (citing *Teague*, 489 U.S. at 301, for the proposition that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").

All that was necessary to reach the result in *Blakely*, in short, was to recognize *Apprendi*'s definition of "statutory maximum" and to apply it with equal force to a sentencing system that was colloquially known as a "sentencing guidelines" system. *See* Kate Stith, *Crime and Punishment Under the Constitution*, 2004 Sup. Ct. Rev. 221, 252-55 (2005) (*Apprendi* "foreordained" the result in *Blakely*; "[a]ll the Court had to do to decide *Blakely* was to apply the rule exactly as *Apprendi* had stated it."); R. Craig Green, Apprendi*'s Limits*, 39 U. Rich. L. Rev. 1155, 1169-82 (2005) ("the Court simply restated and applied *Apprendi*'s rule" in an "identical" manner). Indeed, in 2001, the Kansas Supreme Court unanimously invalidated the procedures in the Kansas Sentencing Guidelines for imposing enhanced sentences, accepting that "[u]nder *Apprendi*" the statutory maximum is the maximum punishment "authorized by the jury's verdict." *State v.*

Gould, 271 Kan. 394, 410, 23 P.3d 801 (Kan. 2001). The Washington Supreme Court, however, had upheld its exceptional sentence system by doing something no "reasonable jurists," *Beard*, 542 U.S. at 413 (quoting *Lambrix*, 520 U.S. at 528), would have done: failing to heed *Apprendi*'s definition of "statutory maximum" and its express admonition that applying this definition is a question "not of form, but of effect," 530 U.S. at 494. *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (Wash. 2001); *see also* App. 2a, 3a (rejecting Petitioner's claims on basis of *Gore*). The holding in *Blakely* simply forced Washington, as Kansas was already doing, to abide by clearly established law.

In holding that *Blakely* established a new rule, the Ninth Circuit simply duplicated the Washington courts' mistake: it ignored the definition of "statutory maximum" that *Apprendi* already had announced and this Court's admonition to focus not on form, but on effect of sentencing laws. *See* J.A. 81-82; *Schardt v. Payne*, 414 F.3d 1025, 1035 (CA9 2005). Once those directions are taken into account, it is clear that *Apprendi* foreordained the result in *Blakely*.

2. The Ninth Circuit reasoned that *Blakely* announced a new rule because "[e]very [federal] circuit court of appeals that addressed the question presented in *Blakely* reached the opposite conclusion from the rule subsequently announced by the Supreme Court." *Schardt*, 414 F.3d at 1035. In other words, the Ninth Circuit believed that *Blakely* announced a new rule because the holding in *Apprendi* did not dictate this Court's eventual holding in *United States v. Booker*, 543 U.S. 220 (2005), that the system in the Federal Sentencing Guidelines for enhancing sentences was unconstitutional.

This analysis, however, fails to appreciate the difference between the Washington sentencing system at issue in *Blakely* and the Federal Sentencing Guidelines. The holding in *Blakely* was not the same as the holding in *Booker*. Indeed, to the extent *Booker* is relevant here, this Court's analysis there confirms that the holding in *Blakely* was dictated by *Apprendi*, regardless of whether the holding in *Booker* was so dictated.

The Washington sentencing system at issue in *Blakely*, just like *Apprendi*, involved two *statutorily established* sentencing maximums: one for committing the crime without any aggravating circumstances, and one for committing the crime with at least one aggravating circumstance. And just like *Apprendi*, judges were empowered to find facts necessary to expose defendants to the higher maximum sentence. Accordingly, all this Court had to do to decide *Blakely* was to reiterate that the relevant statutory maximum, for purposes of the Sixth and Fourteenth Amendments, is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. at 303 (citing *Apprendi*, 530 U.S. at 483). Because Washington courts imposed exceptional sentences based on findings they made and that necessarily extended beyond the facts reflected in guilty verdicts, the system violated the Sixth and Fourteenth Amendments as surely as the one in *Apprendi* did.

The Federal Sentencing Guidelines, on the other hand, do not present a situation of dueling statutory maximums. For any given federal crime, the United States Code establishes a single maximum permissible sentence. The Guidelines (in their binding form prior to *Booker*) limited judicial discretion to impose sentences up to such

maximums not by statute, but by "quasi-legislative" rules enacted by an independent commission in the judicial branch. *See Mistretta v. United States*, 488 U.S. 361, 393 (1989). As Justice Thomas' concurrence in *Apprendi* indicated, therefore, the "unique status" of the Guidelines kept them from squarely implicating *Apprendi*'s "*statutory* maximum" rule and – for a time, at least – raised the possibility that they might be exempt from the *Apprendi* doctrine. 530 U.S. at 523 n.11 (Thomas, J., concurring).

The division of authority that *Blakely* triggered in the federal circuits concerning the constitutionality of the federal Guidelines underscores that even though the *Apprendi* rule did not neatly apply to the Guidelines, it did map directly onto Washington's "exceptional sentence" system. Some circuits, including the Ninth Circuit, concluded that because Washington's system took the form of a guidelines system, the Federal Sentencing Guidelines must be unconstitutional as well. *See United States v. Ameline*, 376 F.3d 967, 975-78 (CA9 2004); *United States v. Booker*, 375 F.3d 508 (CA7 2004). But other circuits and judges reasoned that because *Blakely*, like *Apprendi*, actually involved only "statutory sentencing thresholds," the decision could not be read as dictating that the Guidelines were invalid. *Booker*, 375 F.3d at 520 (Easterbrook, J., dissenting); *see also id.* ("*Apprendi* and *Blakely* hold that the Sixth Amendment commits to juries all statutory sentencing thresholds."). The Fourth Circuit, in fact, emphasized that considering "the factual and legal context in which *Blakely* was decided," *Blakely* "not only did not change the inquiry we must make, it also adhered to the rule the Court had announced in *Apprendi*." *United States v. Hammoud*, 381 F.3d 316, 348-50 (CA4 2004) (en banc).

Booker, to be sure, resolved this conflict in favor of robustly construing the *Apprendi* doctrine to cover binding thresholds in both statutory and non-statutory sentencing systems. But this Court never disagreed with the analysis of *Blakely* in opinions like the Fourth Circuit's. Indeed, this Court's reasoning in *Booker* further confirmed that *Blakely* – if not necessarily *Booker* – was dictated by *Apprendi*. The *Booker* Court first reiterated that "the requirements of the Sixth Amendment were *clear*" in *Blakely*. 543 U.S. at 232 (emphasis added). It then acknowledged that, in contrast to *Blakely*, "the language used in our holding in *Apprendi*" did not squarely cover the Federal Sentencing Guidelines because the Guidelines' sentencing thresholds are not statutory. *Booker*, 543 U.S. at 238. This difference required this Court to assess the general "principles [*Apprendi*] sought to vindicate." *Id.* After doing so, this Court held that the Sixth Amendment fact-finding requirements in *Apprendi* should apply "[r]egardless of whether the legal basis for the accusation is in a statute or in guidelines promulgated by an independent commission." *Id.* at 239.

Justice Breyer's opinion dissenting in part (for the same four Justices who dissented in *Blakely*) echoed this analysis. Unlike the dissenting opinions in *Blakely*, which had accepted that the result there was compelled by *Apprendi*, Justice Breyer's dissent in *Booker* argued that there was actually a "principled basis for refusing to extend *Apprendi*'s rule" to the Guidelines. *Booker*, 543 U.S. at 334 (Breyer, J., dissenting in part). That basis, the dissent explained, was that the Guidelines involve mere "administrative rules," so they do not allow Congress to label factual inquiries that should be elements as sentencing factors and thereby evade the beyond-a-reasonable-doubt

and jury-trial guarantees. *Id.* at 330-32. Furthermore, administrative rules created by a commission in the Judicial Branch resemble appellate decisionmaking concerning the reasonableness of sentences, which falls outside of *Apprendi*'s rule. To the extent *Blakely* could be read as implying that the *Apprendi* doctrine should apply with equal force to such rules, *Blakely* did not have to extend *Apprendi* in that manner because "*Blakely*, like *Apprendi*, involved sentences embodied in a statute." *Booker*, 543 U.S. at 332 (Breyer, J., dissenting in part).

In sum, the inquiry whether *Apprendi* dictated *Blakely* is not the same as whether *Apprendi* dictated *Booker*. This Court need not address here whether *Apprendi* dictated *Booker*. The only question here is whether the *holding* of *Blakely* – *i.e.*, that when there are two statutory sentencing thresholds, the statutory maximum for Sixth and Fourteenth Amendment purposes is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," 542 U.S. at 303 – was dictated by *Apprendi*. There can be no doubt that the answer is yes.

II. IF *BLAKELY* DID ANNOUNCE A NEW RULE, IT ANNOUNCED A WATERSHED RULE OF CRIMINAL PROCEDURE.

If this Court were to determine that the holding in *Blakely* somehow established a new rule, then *Teague* still would not bar applying it to Petitioner's claim because the *Blakely* rule qualifies as a "watershed rule[ ] of criminal procedure." *Teague*, 489 U.S. at 311. This exception to the general bar on retroactively applying new rules of criminal procedure to state prisoners gives life to Justice Harlan's observation – echoed contemporaneously by Justice Powell

and Judge Friendly and in later years repeatedly by this Court – that a central purpose of federal habeas review is to ensure that "no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting), *quoted in Teague*, 489 U.S. at 312; *see also Stone v. Powell*, 428 U.S. 465, 491-92 n.31 (1976) (habeas rules should "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"); Henry Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151-52 (1970) (same); *O'Neal v. McAninch*, 513 U.S. 432, 442 (1995) (the "basic purposes underlying the writ" include addressing "the sort [of constitutional error] that risks an unreliable trial outcome and the consequent conviction of an innocent person"); *Bousley v. United States*, 523 U.S. 614, 620 (1998) (same). This concern, of course, encompasses not only imprisoning individuals who are innocent of committing any crime but also those who committed some transgression but are innocent of a more serious offense for which a state is punishing them. Even when a state court's infringement of a constitutional rule was not apparent while a case was on direct review, federal courts must apply a "watershed" rule retroactively, in short, to address the "impermissibly large risk," *id.*, that a person may be serving prison time for something he did not do.

"To fall within this exception, a new rule must meet two requirements: [1] Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and [2] the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665

(2001) (internal quotations and citations omitted). The *Blakely* rule that facts that expose criminal defendants to punishment exceeding otherwise binding statutory limits must be proven to juries beyond a reasonable doubt satisfies each of these tests.

A. Infringing the *Blakely* Rule Seriously Diminishes the Likelihood of Obtaining An Accurate Conviction.

The *Apprendi*/*Blakely* rule has two distinct components: the requirement that facts authorizing a sentence above an otherwise binding statutory threshold be found beyond a reasonable doubt, and the requirement that those facts be found by a jury. *See Apprendi*, 530 U.S. at 476-78; *Blakely*, 542 U.S. at 301. Although this Court held in *Schriro v. Summerlin*, 542 U.S. 348 (2004), that infringing the jury-trial component of *Apprendi*'s rule (and by implication, *Blakely*'s rule) does not seriously diminish the likelihood of obtaining an accurate conviction, there is no question that infringing the reasonable doubt component of the *Apprendi*/*Blakely* rule – as the Washington courts did here – does so.

In a pair of pre-*Teague* cases, in fact, this Court already reached this conclusion while conducting the very same accuracy-diminishing inquiry that *Teague* later adopted. Initially, this Court addressed in *Ivan V. v. City of New York*, 407 U.S. 203 (1972), the question whether, under its old retroactivity jurisprudence, failing to apply the beyond-a-reasonable-doubt rule of *In re Winship*, 397 U.S. 358 (1970), "substantially impairs [a criminal trial's] truth-seeking function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Ivan V.*, 407 U.S. at 204. This Court held that it did, because

"the major purpose" of using the constitutional standard of proof beyond a reasonable doubt instead of a preponderance standard is "to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." *Id.* at 205; *see also Brinegar v. United States*, 338 U.S. 160, 174 (1949) (reasonable doubt standard "developed to safeguard men from dubious and unjust convictions"). Several years later, again applying the same test, this Court made clear that failing to use the reasonable doubt standard *even with respect to only one element of a crime* "substantially impairs the truth-finding function" of trial just as impermissibly as failing to use that standard across the board. *Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977). "The reasonable-doubt standard of proof is as 'substantial' a requirement under [*Mullaney v. Wilbur*, 421 U.S. 684 (1975)] as it was in *Winship*" because failing to use that standard with respect to a single element raises equally "serious questions about the accuracy of guilty verdicts in past trials." *Id.* at 243-44.

These holdings make eminent sense and control here. Whereas the reasonable doubt standard requires a fact-finder to "reach[ ] a subjective state of certitude of the facts in issue," the preponderance standard "calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." *Winship*, 397 U.S. at 364, 368 (quotation and citation omitted). It follows ineluctably that using a preponderance standard instead of the reasonable doubt standard presents "a *far greater* risk of factual errors that result in convicting the innocent." *Id.* at 371 (Harlan, J., concurring) (emphasis added); *see also Lego v. Twomey*, 404 U.S. 477, 493 (1972)

(Brennan, J., dissenting) ("Permitting proof by a preponderance of the evidence would necessarily result in the conviction of more defendants who are in fact innocent."). And this Court made clear in *Apprendi* and *Blakely* that even when a jury has found a defendant guilty beyond a reasonable doubt of a certain crime, the same inordinate level of risk is present when courts use a preponderance standard to assess whether the defendant should be punished more severely than a jury verdict alone allows. *See Apprendi*, 530 U.S. at 484-85; *Blakely*, 542 U.S. at 306, 311-12.

The Ninth Circuit nevertheless opined in the case that controlled its decision here that infringing on the *Blakely* rule does not seriously undermine the likelihood of obtaining an accurate conviction because the rule "does not affect the determination of a defendant's guilt or innocence" but rather "addresses only how a court imposes a sentence, once a defendant has been convicted." *Schardt*, 414 F.3d at 1036 (quoting *United States v. Price*, 400 F.3d 844, 848 (CA10 2005)). But this statement ignores the very holdings of *Blakely* and *Apprendi*. Those decisions hold that a "sentence enhancement" or "aggravating factor" that exposes a defendant to a longer sentence is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494 n.19; *see also Blakely*, 542 U.S. at 310-11 (repeatedly referring to sentence enhancements covered by *Blakely* as "elements"); *Washington v. Recuenco*, 126 S. Ct. 2546, 2552 (2006) (holding of *Apprendi* is that "elements and sentencing factors must be treated the same for Sixth Amendment purposes"). In other words, a State may not "circumvent the protections of *Winship* merely by 'redefin[ing] the elements that constitute different crimes, characterizing

them as factors that bear solely on the extent of punishment.'" *Apprendi*, 530 U.S. at 485 (*quoting Mullaney*, 421 U.S. at 698). Accordingly, the constitutional violation that *Blakely* addresses is failing to use the proper procedural protections (specifically, a jury and the beyond a reasonable doubt standard) for determining whether a defendant is guilty of an aggravated crime. That is exactly the sort of error that this Court has made abundantly clear seriously diminishes the likelihood of obtaining an accurate conviction.

B. The *Blakely* Rule Implicates Our Understanding Of The Bedrock Procedural Elements Essential To The Fairness Of A Proceeding.

The Ninth Circuit also erred in holding that the *Blakely* rule does not satisfy the "bedrock" prong of *Teague*'s watershed exception. The court concluded that neither the beyond-a-reasonable-doubt component nor the jury-trial component of the rule involves "the sort of error that necessarily undermines the fairness . . . of judicial proceedings." *Schardt*, 414 F.3d at 1036 (quotations and citations omitted). Both of these conclusions are mistaken. Each of the components of the *Blakely* rule independently satisfies this prong of *Teague*'s watershed exception.

1. The due process requirement that facts exposing defendants to punishment beyond otherwise applicable statutory maximums must be found beyond a reasonable doubt is a "bedrock procedural element essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (quotation and citation omitted). This Court's opinion in *Winship* leaves little doubt that the reasonable doubt standard is indispensable to any criminal adjudication:

> The reasonable-doubt standard plays a *vital role* in the American scheme of criminal procedure. It is a *prime instrument* for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – *that bedrock axiomatic and elementary principle* whose enforcement *lies at the foundation of the administration of our criminal law*. . . . [A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage *amounting to a lack of fundamental fairness*, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

397 U.S. at 363 (emphasis added) (quotation and citation omitted); *see also id.* at 372 (Harlan, J., concurring) (using reasonable doubt standard instead of a preponderance of the evidence standard is "an expression of fundamental procedural fairness . . . for criminal trials"); *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (The reasonable doubt standard "is an ancient and honored aspect of our criminal justice system."); *Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979) (a conviction that does not satisfy so "fundamental a substantive constitutional standard" cannot stand).

Applying the reasonable doubt standard is just as important in the context of factual findings, as in *Blakely*, that expose defendants to punishment beyond otherwise applicable statutory maximums as it is with respect to other elements of crimes. This Court reiterated in *Apprendi*, in just this context, that the reasonable doubt standard is a "constitutional protection[ ] of surpassing importance." 530 U.S. at 476. Without this rule, a defendant guilty of doing something wrong – but not something as serious as the government alleged – could see his

sentence "balloon . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report complied by a probation officer who the judge thinks more likely got it right than wrong." *Blakely*, 542 U.S. at 311-12; *see also id.* at 306 (dispensing with the *Blakely* rule "would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of possessing the firearm used to commit it – or of making an illegal lane change while fleeing the crime scene."). Such a regime would controvert our most fundamental conceptions of liberty.

2. Even if the beyond-a-reasonable-doubt component of *Blakely*'s rule did not implicate the bedrock procedural elements essential to the fairness of a proceeding, the jury-trial component of the rule would. While the Ninth Circuit suggested that this Court's decision in *Schriro* foreclosed such a conclusion, *see Schardt*, 414 F.3d at 1036, this is incorrect. *Schriro* held only that requiring a jury to find a fact exposing a defendant to heightened punishment did not satisfy the accuracy prong of *Teague*'s watershed exception, *see Schriro*, 542 U.S. at 355-58; this Court did not address the "bedrock" prong. A straightforward application of that prong dictates that the jury-trial component of *Blakely*'s rule satisfies it.

This Court has never wavered from the proposition that the right to trial by jury – a right that is "several centuries" old – is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149-51; *see also Schriro*, 542 U.S. at 358 ("The right to jury trial is fundamental to our system of criminal justice."). It "reflect[s] a fundamental decision about the exercise of official power," as well as "a profound judgment about the way in which law should be enforced and justice

administered." *Duncan*, 391 U.S. at 155-56. The jury is indispensable because it is the one decisionmaker that "stands between the individual and the power of the government." *Booker*, 543 U.S. at 237.

If this Court's recent decisions have made anything clear, it is that the right to jury trial is just as important in the context of factual determinations that expose defendants to heightened punishment as it is during the rest of trial. This Court explained in *Blakely* that the principle that juries must find every fact "the law makes essential of the punishment" has been "acknowledged by courts and treatises since the earliest days of graduated sentencing." *Blakely*, 542 U.S. at 302 (quotation and citation omitted). It continued:

> That right is no mere procedural formality, but a *fundamental reservation of power in our constitutional structure*. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.

Blakely, 542 U.S. at 305-06 (emphasis added). The *Blakely* rule is necessary, therefore, to prevent the jury from being "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 306-07; *see also Jones v. United States*, 526 U.S. 227, 243-44 (1999) (absent such a rule "the jury's role would . . . shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping"). Like the right to counsel at issue in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which this Court has identified as a watershed rule, *see Beard*, 542 U.S. at 417-18, the right to a jury

determination concerning every fact the law makes essential to punishment "may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon*, 372 U.S. at 344.

3. If there were any doubt that the *Blakely* rule satisfies the bedrock prong of *Teague*'s watershed exception, the *combination* of the reasonable doubt and jury-trial components would remove it. It is a truly rare decision of this Court that draws from the wellspring of two such fundamental elements of the American system of criminal justice.

Indeed, the extraordinary pedigree of the *Blakely* rule makes finding it a watershed rule entirely consistent with this Court's frequent observation that it is "unlikely that many such components of basic due process have yet to emerge." *Beard*, 542 U.S. at 417 (quoting *Graham*, 506 U.S. at 478 (quoting in turn *Teague*, 489 U.S. at 313)). This Court's holdings in *Apprendi* and *Blakely* did not discover any new constitutional rights. Rather, they required States that, in recent years, had adopted "novel[ ]" sentencing systems to reinstitute ancient procedural protections that States otherwise had followed since the founding and that had been recognized throughout the "uniform course of decision during the entire history of [this Court's] jurisprudence." *Apprendi*, 530 U.S. at 482-83, 490; *see also id.* at 501-18 (Thomas, J., concurring) (recounting common law jurisprudence in state courts); *Booker*, 543 U.S. at 236-37 (discussing States' recent shift in sentencing practices). As recently as 1980, in fact, the Washington Supreme Court had affirmed that "[o]ur cases involving . . . enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty."

State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980). The upshot of this history is that it is even more justifiable to apply a decision like *Blakely* retroactively than it would to apply a decision, such as *Gideon*, that created a new constitutional rule that States had no prior notice even existed.

That is not to say, of course, that every state prisoner sentenced in violation of *Blakely* should obtain federal habeas relief. Even within the presumably small group of those who are still in prison and procedurally able to raise such a claim in federal court, many will not be able to show that *Blakely* violations in their cases had a "substantial and injurious effect or influence" on their judgments. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). *Cf. Recuenco*, 126 S. Ct. at 2551-53 (*Blakely* errors may be deemed harmless at least when the State alleged the sentence enhancement at issue in the charging instrument and the issue was litigated at trial); *Booker*, 543 U.S. at 268 (*Booker* errors may be deemed harmless on appeal). But this reality does not give reason for refusing altogether to apply *Blakely* retroactively to such prisoners' claims. Convictions infringing the *Blakely* rule present "an impermissibly large risk," *Teague*, 489 U.S. at 312 (quoting *Desist*, 394 U.S. at 262 (Harlan, J., dissenting)), that the State of Washington is punishing someone for more serious conduct than he actually committed. A core purpose of the Great Writ is to provide a forum for identifying and remedying such injustices.

CONCLUSION

For the forgoing reasons, this Court should reverse the decision of the Court of Appeals and remand the case for further proceedings.

Respectfully submitted,

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August 2006

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

IN THE MATTER OF THE PERSONAL RESTRAINT OF: LONNIE BURTON, Petitioner.	No. 50246-8-I ORDER DISMISSING PERSONAL RESTRAINT PETITION (Filed May 7, 2002)

In 1991, Lonnie Burton forced a 15-year-old boy to have oral and anal intercourse with him. He then stole $160 from the dresser of the boy's parents. Burton was later convicted of first degree rape, first degree robbery, and first degree burglary. He has now filed this personal restraint petition contending the trial court erred in imposing a 562-month exceptional consecutive sentence for the rape, robbery, and burglary conviction. However, this court has previously dismissed at least one other petition in Cause No. 45074-3-I. Since it appears the issues raised in this petition are meritless either because they have previously been rejected by this court,[1] or are

[1] Petitioner contends the sentencing court miscalculated his offender score. The court rejected essentially the same issue on direct appeal in cause No. 42312-6-I. Moreover, post-conviction challenges must generally be brought within one year after a conviction becomes final. RCW 10.73.090, .100. While it appears the personal restraint petition was timely filed, the "Addendum to Personal Restraint Petition," in which the offender score issue is first raised, was not. *See In re Personal Restraint of Benn*, 134 Wn.2d 868, 938-39 952 P.2d 116 (1998). Because the claim is not exempt from the statute of limitations under RCW 10.73.100, *In re Personal Restraint Vehlewald*, 92 Wn. App. 197, 203, 963 P.2d 903 (1988), it is time-barred. *See Benn*, 134 Wn.2d at 939-40.

clearly controlled by settled law,[2] this successive petition is barred under RCW 10.73.140.[3]

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed.

Done this 7th day of May, 2002.

/s/ Cox, ACJ
Acting Chief Judge

[2] Petitioner contends that the trial court erred in imposing an exceptional sentence upward under *Apprendi v. New Jersey*, 530 U.S., 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This issue is clearly controlled by the recent Supreme Court decision in *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001) (exceptional sentence may be imposed "without factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt"). Petitioner's attempt to distinguish *Gore* and its broad holding is not persuasive.

[3] *See In re Personal Restraint of Becker*, 143 Wn.2d 491, 20 P.3d 409 (2001).

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of LONNIE BURTON, Petitioner.	) RULING DENYING) REVIEW)) (Filed July 16, 2002))	

Lonnie Burton seeks discretionary review of an order of the Acting Chief Judge of Division One of the Court of Appeals dismissing his personal restraint petition. RAP 16.14(c); RAP 13.5.

Mr. Burton argues that the trial court miscalculated his offender score. But he concedes this issue was raised and rejected on the merits on direct appeal. He does not show that the interests of justice require reconsideration of the issue. *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). Mr. Burton also challenges his exceptional sentence, relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But *Apprendi* does not apply to exceptional sentences that are otherwise within the statutory maximum for the crime. *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001). Mr. Burton argues *Gore* was wrongly decided, but he does persuasively show that to be the case.

The motion for discretionary review is denied.

/s/ Geoffrey Crooks
COMMISSIONER

July 16, 2002

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of LONNIE BURTON, Petitioner.	)	**ORDER** No. 72657-4 C/A No. 50264-8-I (Filed Oct. 8, 2002)

Department II of the Court (composed of Chief Justice Alexander and Justices Johnson, Sanders, Bridge and Owens) considered this matter at its September 4, 2002, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 8th day of October, 2002.

/s/ Gerry L. Alexander
CHIEF JUSTICE