

No. 07- 061046 JAN 29 2007

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

CETEWAYO ASKIA BRIGGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the Court's decision in *United States v. Booker* announce a new rule as defined in *Teague v. Lane*, or was the holding dictated by *Apprendi v. New Jersey*?

(2) If *Booker* announced a new rule, should it be applied retroactively to cases on collateral review?

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Cetewayo Askia Briggs respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS AND ORDERS BELOW

The August 31, 2000 Judgment in a Criminal Case of the United States District Court for the Western District of Michigan is unreported and is reproduced in the appendix hereto ("Pet. App.") at 28a. The December 12, 2001 opinion of the United States Court of Appeals for the Sixth Circuit is reported at 27 F. App'x 547 and reproduced at Pet. App. 19a. The April 15, 2002 denial by this Court of a petition for writ of certiorari is reported at 535 U.S. 1011 and reproduced at Pet. App. 18a. The January 7, 2004 Opinion and Order of the United States District Court for the Western District of Michigan is unreported and is reproduced at Pet. App. 13a. The June 30, 2006 opinion of the Sixth Circuit is reported at 187 F. App'x 540 and is reproduced at Pet. App. 2a. The October 31, 2006 denial by the Sixth Circuit of rehearing *en banc* is unreported and is reproduced at Pet. App. 1a.

JURISDICTION

The Sixth Circuit entered judgment on June 30, 2006. Pet. App. 2a. On October 31, 2006, the Sixth Circuit denied a timely filed petition for rehearing or rehearing *en banc*. Pet. App. 1a. The jurisdiction of the Sixth Circuit was invoked pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property without due process of law . . ." U.S. Const. amend. V.

The Sixth Amendment to the Constitution provides, in pertinent part: "In all criminal prosecutions, the accused

shall enjoy the right to a speedy and public trial, by an impartial jury” U.S. Const. amend. VI.

STATEMENT OF THE CASE

The District Court increased Petitioner’s sentence pursuant to the federal sentencing guidelines solely because the court found certain additional facts, by a preponderance of the evidence, that had not been admitted by Petitioner or proven to a jury beyond a reasonable doubt. If those events occurred today, an appellate court would be required to invalidate the sentence under this Court’s holding in *United States v. Booker*. Petitioner seeks retroactive application of the *Booker* holding to his case, which currently is on collateral review.

On January 11, 2000, a grand jury charged Cetewayo Askia Briggs with conspiring to manufacture and manufacturing cocaine base in violation of 21 U.S.C. §§ 846 and 841(a)(1). Pet. App. 47-48a. The indictment did not specify the quantity of cocaine base involved.¹

On March 21, 2000, a jury convicted Petitioner of both counts. The jury made no determination as to the quantity of cocaine base at issue. Instead, the District Court instructed the jury not to make a quantity determination:

The government is not required to prove that the defendant conspired to manufacture or manufactured any particular amount of cocaine base. Quantity is not an element of these offenses.

Pet. App. 45a. The jury’s verdict form similarly did not specify the quantity of drugs involved. Pet. App. 46a.

¹ The text following Counts One and Two on the indictment lists “21 U.S.C. § 841(b)(1)(A)(iii).” Pet. App. 47-48a. Section 841(b)(a)(A)(iii) specifies penalties for a violation of 21 U.S.C. § 841(a)(1) involving at least 50 grams of cocaine base.

Before Petitioner's sentencing hearing, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that any fact (other than a prior conviction) that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 490.

During his sentencing hearing on August 23, 2000, Petitioner argued that *Apprendi* prohibited the District Court from sentencing him to a term of incarceration longer than 20 years – the maximum penalty available under section 841(a)(1) without a finding as to quantity of drugs involved. Pet. App. 41a. Petitioner also argued that *Apprendi* prohibited the District Court from determining quantity by a preponderance of the evidence. *Id.* The District Court disagreed:

This Court finds that because the Sixth Circuit instruction was followed, which this Court had no alternative but to do, therefore, the jury did not have before it the quantity determination. And the quantity determination under existing law is to, by a preponderance of the evidence, conclude from a trial transcript, from a guilty plea taking, from other sources, many times witnesses called, the aggregate amount that can be fairly attributable to a defendant in a conspiracy.

Pet. App. 41-42a.

Using this rationale, the District Court determined based on a preponderance of the evidence that Petitioner's crimes involved at least 3 kilograms of cocaine base. Pet. App. 42a. The District Court calculated Petitioner's base offense level under the federal sentencing guidelines as 38. *Id.* at 43a. The applicable penalty range under the guidelines demanded a term of incarceration of 235 to 293 months. Federal Sentencing Guidelines Manual (hereinafter "USSG") § 5.A

(May 1, 2000). Without the District Court's quantity determination, Petitioner's maximum sentence under the guidelines would have been 151 months' imprisonment.²

On August 23, 2000, the District Court sentenced Petitioner to 240 months' imprisonment, the statutory maximum. Pet. App. 29a. The District Court believed that *Apprendi* foreclosed a judge-made factual finding only if it led to a sentence exceeding the statutory maximum. Pet. App. 42a. The District Court did not, however, consider the effect its factual finding had on the calculation of Petitioner's sentence. Without its factual finding, the maximum sentence the District Court could have imposed under the then-mandatory federal sentencing guidelines was 151 months' imprisonment. USSG § 2D1.1(4). Because of the District Court's quantity determination, however, Petitioner received a prison term over seven years longer than he otherwise would have under the guidelines.

On December 12, 2001, the Sixth Circuit affirmed Petitioner's conviction. Pet. App. 19a. Among other things, the Sixth Circuit determined that because Petitioner's sentence did not exceed 20 years, the statutory maximum under "21 U.S.C. § 960(b)(2)(B),"³ it did not violate *Apprendi*. Pet. App. 27a. The Sixth Circuit's opinion made no mention of the federal sentencing guidelines.

Petitioner petitioned this Court for a writ of certiorari, which was denied on April 15, 2002. Pet. App. 18a.

² Violations of 21 U.S.C. § 841(a)(1) involving at least 50 grams of cocaine base required a base offense level of 32, USSG § 2D1.1(4), carrying a punishment range of 121-151 months' imprisonment.

³ The Sixth Circuit listed "§ 960(b)(2)(B)" as the applicable penalty provision. Pet. App. 27a. The penalties found in section 960(b)(2)(B) apply only to violations of 21 U.S.C. §§ 952, 953, 955, 957, and 959, none of which apply to Petitioner's case. 21 U.S.C. § 960(a)(1).

Petitioner, acting pro se, filed a timely motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Motion to Vacate, Set Aside, or Correct Sentence, *Briggs v. United States*, No. 03-cv-00215-RHB (W.D. Mich. Mar. 31, 2003). Petitioner contended his conviction and sentence violated his rights under the Fifth and Sixth Amendments. *Id.* at 2. The District Court denied Petitioner's motion on January 7, 2004. Pet. App. 13a.

On June 24, 2004, this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), and applied *Apprendi's* holding to Washington's determinate sentencing scheme. The Court held "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." *Id.* at 303 (emphasis in original).

On January 11, 2005, the Sixth Circuit granted Petitioner a certificate of appealability on: (1) whether trial counsel rendered ineffective assistance; and (2) whether Petitioner's sentence was illegal in light of *Blakely*. Pet. App. 38-39a.

On January 12, 2005, this Court decided *United States v. Booker*, 543 U.S. 220 (2005), and, using the reasoning set forth in *Blakely*, confirmed that *Apprendi's* holding applied to sentences decided under the federal sentencing guidelines. The Court's holding impacted all cases then pending on direct review. *Id.* at 245.

On June 30, 2006, the Sixth Circuit, following its prior decision in *Humphress v. United States*, 398 F.3d 855 (6th Cir. 2005) (holding that *Booker* does not apply retroactively to cases already final on direct review), affirmed the District Court's denial of Petitioner's § 2255 claims. Pet. App. 2a. While Petitioner acknowledged the *Humphress* authority in his Sixth Circuit appeal, he preserved the issue of *Booker's* retroactivity for review by this Court. Final Brief for Appellant Cetewayo Askia Briggs at 3 n.1, *Briggs v. United States*, No. 04-1315 (6th Cir. Aug. 1, 2005).

Petitioner requested *en banc* review of the panel's decision, and, on October 31, 2006, the Sixth Circuit denied that request. Pet. App. 1a. Petitioner now seeks relief from the Sixth Circuit's ruling.

REASONS FOR GRANTING THE WRIT

This case presents an appropriate vehicle to adjudicate an issue that this Court found necessary, but unable, to address in *Burton v. Stewart*, 127 S. Ct. 793 (2007). In *Burton*, this Court granted certiorari to determine whether *Blakely v. Washington*, 542 U.S. 296 (2004), the state-law analogue to *United States v. Booker*, 543 U.S. 220 (2005), announced a new rule, and if so, whether it applies retroactively. This Court dismissed *Burton* without reaching the merits, however, because the district court lacked jurisdiction to entertain the underlying petition. This case again presents the question of retroactivity, here, of the closely-related *Booker* decision. The question is of crucial importance to thousands of prisoners nationwide. Conflicting decisions among state supreme courts and federal courts of appeals reflect confusion over whether the Court's holding in *Booker* announced a new rule and, if it did, whether it applies retroactively to cases on collateral review.

I. THIS COURT SHOULD RESOLVE THE IMPORTANT ISSUE OF, AND SPLIT OF AUTHORITY OVER, WHETHER *BOOKER* ANNOUNCED A NEW RULE.

Booker's holding is rooted in this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Court affirmed and expanded the rule originally expressed in *Jones v. United States*, 526 U.S. 227 (1999): "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." *Apprendi*, 530 U.S. at 490. The Court considered New Jersey's sentencing scheme that allowed imposition of "sentence enhancements" of up to 20

years if the judge determined by a preponderance of the evidence that the defendant “acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.” *Id.* at 468-69 (quoting N.J. Stat. Ann. § 2C:44-3(e) (2000)). The Court ruled that New Jersey’s sentencing scheme violated the defendant’s Sixth and Fourteenth Amendment rights. While allowing judicial discretion to impose sentences *within* the range proscribed by statute, *id.* at 481, the Court held that judicial fact-finding violated the Constitution when it increased a defendant’s maximum sentence. The Court explained 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 494.⁴

The Court noted its holding implicated two constitutional rights: the right to due process of law guaranteed by the Fifth and Fourteenth Amendments, and the right to trial by jury guaranteed by the Sixth Amendment. *Apprendi*, 530 U.S. at 476-77. Due process concerns demanded that facts increasing a defendant’s sentence be determined beyond a reasonable doubt. *Id.* at 478. Sixth Amendment concerns demanded that facts increasing a defendant’s sentence be proved to a jury. *Id.* at 477. Finally, the Court dismissed the notion of any constitutional distinction between an “element” of an offense and a “sentencing factor.” *Id.* at 478. However termed, any fact that had the effect of increasing a defendant’s punishment must be proved to a jury beyond a reasonable doubt.

⁴ See also *id.* at 498 (Scalia, J., concurring) (“But the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt* by the *unanimous vote of 12 of his fellow citizens.*”) (emphasis in original).

In *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied*, 542 U.S. 961 (2004), the Court applied *Apprendi*'s holding to Washington's sentencing scheme that allowed the judge to impose a sentence above the standard range if he found "substantial and compelling reasons." *Id.* at 299. In *Blakely*, the standard sentencing range for second-degree kidnapping with a firearm was 49 to 53 months' incarceration. *Id.* The petitioner entered into a plea agreement and admitted only the elements of the charged offenses. *Id.* At sentencing, however, the judge imposed an exceptional sentence of 90 months based upon his finding that the petitioner acted with "deliberate cruelty." *Id.* at 300.

On certiorari to this Court, Justice Scalia stated: "This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*." *Blakely*, 542 U.S. at 301. After applying *Apprendi*'s rule, the Court reversed. Central to *Blakely*'s holding was the Court's explanation of how to define "statutory maximum" in the *Apprendi* context: "Our precedents make clear, however, 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*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis in original) (internal citations omitted). Because the petitioner in *Blakely* had not admitted to acting with "deliberate cruelty," nor had that fact been found beyond a reasonable doubt by a jury, the sentencing judge could not impose a greater sentence on him than the 53 months allowed by the standard sentencing range.

With *United States v. Booker*, 543 U.S. 220 (2005), this Court extended *Blakely* and applied the rule announced in *Apprendi* to the federal sentencing guidelines. In *Booker*, the petitioner was convicted by a jury of possessing with intent

to distribute at least 50 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) (the same statutory offense at issue in Petitioner's case), carrying a potential sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(A)(iii). *Booker*, 543 U.S. at 227. Under the facts as found by the jury, the federal sentencing guidelines mandated a base offense level of 32 and a sentencing range of 210-262 months. *Id.* at 235. At sentencing, however, the judge determined by a preponderance of the evidence that the petitioner possessed an additional 566 grams of cocaine base. *Id.* Based on the judge's additional finding, the sentencing guidelines mandated a sentence between 360 months and life imprisonment. *Id.* at 227.

This Court held that *Booker's* increased maximum sentence was unconstitutional. Using the same analysis as in *Blakely*, the Court "reaffirm[ed its] holding in *Apprendi*" and held that, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244. As with *Blakely*, *Booker's* "statutory maximum" was the highest sentence in the range mandated by the federal sentencing guidelines, not the highest sentence that could be imposed by statute. *Id.* at 235. Instead of striking down the federal sentencing guidelines as completely unconstitutional, however, the Court excised provisions making the guidelines binding on judges – rendering the guidelines advisory instead of mandatory. *Id.* at 245.

The Court's recent opinion in *Cunningham v. California*, 549 U.S. ___ (2007) (slip op.), further underscores the significance of *Booker* and *Blakely*. In *Cunningham*, Justice Ginsburg explained that California's determinate sentencing law ("DSL"), which permitted a trial judge to find facts by a preponderance of the evidence that exposed a defendant to an elevated "upper term" sentence, violated the petitioner's

constitutional rights. *Id.* at __. The Court reiterated its “longstanding common-law practice” and “explicit statement in our [recent] decisions” that any fact exposing a defendant to a greater sentence must be proved to a jury beyond a reasonable doubt. *Id.* at __. After applying the reasoning from *Booker*, the Court held that the determinate nature of California’s DSL rendered the petitioner’s sentence unconstitutional. The Court also rejected the notion that California’s system was merely an “advisory” system granting judges discretion to select a sentence within a given range, *see id.* at __ (Alito, J., dissenting); instead, the system mandated increased sentences. Because California’s DSL mandated elevated sentences on the basis of judicial findings of fact by a preponderance of the evidence, the system could not stand. *Id.* at __.

A. This Court Recognized The Importance Of Determining Whether *Booker* (and *Blakely*) Apply Retroactively By Granting Certiorari In *Burton v. Stewart*.

Both *Booker* and *Blakely* involved challenges to a sentence on direct appeal, and this Court has yet to rule on whether either or both of those holdings apply retroactively to sentences on collateral review. The Court granted certiorari in *Burton v. Stewart*, 127 S. Ct. 793 (2007), because *Burton* posed a fundamental question: Did the decision in *Blakely* announce a “new” rule, and if so, does *Blakely* apply retroactively? *Burton* arose, at least in part, due to conflicts among the lower courts of appeals over whether *Blakely* should apply retroactively.

A decision on the merits in *Burton* could have impacted hundreds of prisoners nationwide, and it would have dispelled confusion among the lower courts over whether *Blakely* and *Booker* apply retroactively. The Court’s decision in *Burton* did not reach the question of retroactivity, however, because of jurisdictional error in the lower courts. The District Court in *Burton* lacked jurisdiction to entertain

Burton's habeas petition because of his filing of a "second or successive" petition without seeking or obtaining authorization from the Court of Appeals. *Burton*, 127 S. Ct. at 796. This Court ultimately dismissed the petition without issuing any ruling on its retroactivity questions. *Id.* at 799. As a consequence, *Burton's* important questions remain unanswered.

This case presents an opportunity to determine the retroactivity of the similarly-reasoned, and equally-important, *Booker* decision. As this Court has recognized, *Blakely* and *Booker* are similar in many respects. See *Booker*, 543 U.S. at 233, 235 ("[T]here is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case."); *Cunningham*, 549 U.S. at __ (applying "both parts of the Court's *Booker* opinion" to California's DSL). Both cases involved mandatory sentencing schemes, and *Apprendi's* holding provided the foundation for both decisions: a due process right to determination beyond a reasonable doubt of facts increasing a defendant's sentence over the prescribed "statutory maximum," and a Sixth Amendment right to have those facts determined by the jury. *Apprendi*, 530 U.S. at 476-77, 491-92. *Blakely* explained that the phrase "statutory maximum" encompasses not only the maximum penalty written into criminal statutes by the legislature but also the maximum a judge could lawfully impose under the applicable determinate sentencing guidelines. *Blakely*, 542 U.S. at 303. *Booker* applied similar reasoning to the federal sentencing guidelines. See also *Cunningham*, 549 U.S. at __ ("reaffirming" and "applying" *Apprendi*). As a consequence, both *Blakely* and *Booker* stand for the same constitutional principle. See Nicholas J. Eichenseer, Comment, *Reasonable Doubt in the Rear-View Mirror: The Case for Blakely-Booker Retroactivity in the Federal System*, 2005 Wis. L. Rev. 1137, 1143 (2005) (hereinafter "Eichenseer"). A ruling here on the important issue of *Booker's* retroactivity will necessarily provide

guidance to the lower courts on the issue of *Blakely*'s retroactivity as well.⁵

B. Courts Are Divided Over The Issue Of Whether *Booker* Announced A New Rule.

A split of authority has opened among courts over whether *Booker* and *Blakely* articulated a "new" rule, or rather were dictated by *Apprendi*. The Court should grant certiorari to resolve whether *Booker* announced a new rule.

In *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), *reh'g denied*, 163 S.W.3d 632 (Tenn. 2005), the Supreme Court of Tennessee determined that the Court's holdings in *Blakely* and *Booker* were dictated by *Apprendi*. The defendants in *Gomez* were sentenced based on enhancement factors found by a judge by a preponderance of the evidence. *Id.* at 648. While their case was pending on direct appeal, the Court decided *Blakely*, and the defendants argued that the *Blakely* decision mandated reversal. The Supreme Court of Tennessee began its analysis by considering whether *Blakely* and *Booker* announced "new" rules:

First, we are of the opinion that *Blakely* did not announce a new rule. Admittedly, the United States Supreme Court has not squarely addressed this issue. However, the Court has suggested that *Blakely* was applying a previously recognized principle of law, rather than announcing a new rule. For example, in *United States v. Booker*, the Court at the outset refers to 'our *Apprendi* line of cases,' making it clear that *Apprendi*, not *Blakely*, established the operative rule of law Thus, the language of *Booker* demonstrates that the

⁵ Given that *Blakely* and *Booker* flow equally from *Apprendi* and stand for the same constitutional principles, there is no reason why the Court's decision in this case would not also guide the lower courts in determining *Blakely*'s retroactivity.

United States Supreme Court does not regard *Blakely* as having announced a new rule of law.

Id. at 649-50 (internal citations omitted).⁶

The Supreme Court of Tennessee also distinguished the “old” constitutional rule of *Apprendi*, which was applied and extended by *Booker*, from the “new” statute-specific rules of *Booker*. *Id.* at 650 n.14. According to the court, *Booker*’s core is an “old” rule dictated by *Apprendi*: 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. *Booker*’s new rules address the remedial provisions of those decisions, such as those excising the mandatory sections of the federal sentencing guidelines:

In our view, the new rule of *Booker* was the Court’s holding that the Federal Sentencing Guidelines violated the Sixth Amendment, the Court’s excision of the mandatory portions of the Guidelines, and the Court’s application of the excised Guidelines. *See Humphress v. United States*, 398 F.3d 855, 861 (6th Cir. 2005). The Sixth Amendment principle necessitating the Court’s holding was not new and was the same principle discussed in *Jones v. United States*, 526 U.S. 227, 119

⁶ Despite its determination that *Blakely* and *Booker* did not announce new rules, the Supreme Court of Tennessee refused to grant defendants any relief. The court reasoned that because their case arose on direct review, defendants were required to preserve their constitutional claims of error in order to assert plenary application of *Blakely*. *Gomez*, 163 S.W.3d at 651. Reviewing instead for plain error, the court concluded that the Tennessee laws allowing judicial findings of fact did not affect the *range* of punishment to which a defendant was exposed. *Id.* at 659-60. Without a mandatory increase of maximum punishment, the court found no conflict with this Court’s *Blakely* and *Booker* decisions. *Id.* at 661.

S.Ct. 1215, 143 L.Ed.2d 311 (1999) and clearly “expressed in *Apprendi*.” *Blakely*, 124 S.Ct. at 2536.

Id.

Gomez is in direct conflict with precedent in the Sixth Circuit. In *Humphress v. United States*, 398 F.3d 855 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 199 (2005), the United States Court of Appeals for the Sixth Circuit held that *Booker* does not apply retroactively to cases on collateral review. The court based the holding in part on its finding that “[t]he *Booker* rule is clearly new.” *Humphress*, 398 F.3d at 861. According to the court, *Booker*’s rule was not dictated by existing precedent because the “unlawfulness” of the defendant’s conviction was not apparent to all reasonable jurists at the time *Booker* was decided. *Id.* (citing *Beard v. Banks*, 542 U.S. 406, 413 (2004)). The court referred to federal appeals courts that disagreed, at the time, over whether this Court’s holding in *Blakely* applied to the federal sentencing guidelines. *Id.* (citing *United States v. Koch*, 383 F.3d 436 (6th Cir. 2004) (en banc)). The court also cited to *Booker*’s quote from *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), which stated that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final . . .” *Id.* According to the court, *Booker*’s discussion of *Griffith* would have been unnecessary if the rule had been dictated by precedent.

Where, as here, a state court of last resort is in conflict with a United States court of appeals over a question of federal law, it is appropriate for this Court to resolve that conflict. Sup. Ct. R 10; *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting). Indeed, the Supreme Court of Tennessee recognized this Court’s important role in resolving conflicts. *Gomez*, 163 S.W.3d at 650 (“[T]he United States Supreme Court is the final arbiter of this issue.”).

The conflict among the courts supports the grant of certiorari. On one pole, several states have determined that the rule announced in *Booker* and *Blakely* was dictated by *Apprendi* and therefore entitled to retroactive application. *Gomez*, 163 S.W.3d at 649-50; *Smart v. State*, 146 P.3d 15, 41 (Alaska 2006) (Mannheimer, Judge, concurring). On the other pole, the Sixth Circuit, and other circuits, have declared that *Booker* announced a new rule and does not apply retroactively. E.g., *Humphress*, 398 F.3d at 860; *Guzman v. United States*, 404 F.3d 139, 142 (2d Cir. 2006). Both sides of the debate have ruled without citing to precedent from this Court. The Court should grant certiorari and resolve the disputed question of whether *Booker* announced a new rule.

II. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENT.

The Rule Announced In *Booker* Was Not A New Rule, But Rather Was Dictated By *Apprendi*.

Under the Court's ruling in *Teague v. Lane*, 489 U.S. 288, *reh'g denied*, 490 U.S. 1031 (1989), the determination of whether a constitutional rule of criminal procedure applies retroactively to a case on collateral review⁷ involves a three-step process. *Id.* at 310-11; *see also Beard*, 542 U.S. at 411. The court must first determine when the defendant's conviction became final.⁸ *Beard*, 542 U.S. at 411. "Second,

⁷ New rules of criminal procedure generally apply retroactively to cases on direct review or not yet final. *Teague*, 489 U.S. at 304-05.

⁸ A federal conviction becomes final when "this Court affirms [the] conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003) (citing *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)). Petitioner's conviction and sentence became final on April 15, 2002, the date on which this Court denied his petition for a writ of certiorari.

it must ascertain the legal landscape as it then existed and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually ‘new.’” *Id.* (internal citations and quotation marks omitted). Finally, if the rule is “new,” the court must consider whether the rule falls into either of two exceptions to non-retroactivity. *Id.*

As this Court’s precedent makes clear, merely applying a rule announced in a prior opinion does not announce a new rule. New rules are those that “brea[k] new ground,” *Butler v. McKellar*, 494 U.S. 407, 412 (1990); conversely, applications of “old rules” do not constitute new rules. In *Stringer v. Black*, 503 U.S. 222 (1992), this Court held that its decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988), did not announce a new rule. According to the Court, *Maynard* “applied the same analysis and reasoning” found in *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Stringer*, 503 U.S. at 228. The Court explained: “In applying *Godfrey* to the language before us in *Maynard*, we did not break new ground.” *Stringer*, 503 U.S. at 229 (internal quotation marks omitted); see also *Penry v. Lynaugh*, 492 U.S. 302 (1989) (relief 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)).

This Court’s holdings in *Booker* and *Blakely* are clear applications of the rule announced in *Apprendi*. Both cases stated explicitly that the Court was “applying” the *Apprendi* rule, *Blakely*, 542 U.S. at 301; *Booker*, 543 U.S. at 245,⁹ and this Court’s more-recent decision reinforced the notion that *Blakely* and *Booker* were “reaffirmations” and “applications” of *Apprendi*’s rule. *Cunningham*, 549 U.S. at __, __ (Alito,

⁹ See also *Booker*, 543 U.S. at 232 (“For reasons explained in *Jones*, *Apprendi*, and *Ring*, the requirements of the Sixth Amendment were clear.”).

J., dissenting). In *Booker*, this Court also recognized its adherence to constitutional principles:

More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law.

Booker, 543 U.S. at 238. *Blakely* and *Booker* applied those principles to the questions presented. See *Booker*, 543 U.S. at 332 (Breyer, J., dissenting in part) (“*Blakely* purports to follow, not to extend, *Apprendi*.”); *Cunningham*, 549 U.S. at __ (“We now turn to the instant case in light of both parts of the Court’s *Booker* opinion . . .”). At least one state had already previewed *Blakely* and *Booker* by applying *Apprendi*’s rule to its sentencing guidelines before the *Blakely* decision. *State v. Gould*, 271 Kan. 394, 404-14, 23 P.3d 801, 809 (2001) (vacating sentence decided under Kansas’s determinate sentencing guidelines because the guidelines mandated “upward departures” based on judicial fact-finding by a preponderance of the evidence); *Blakely*, 542 U.S. at 309.

Blakely’s and *Booker*’s applications of *Apprendi* were necessary because this Court purposely left undecided how its holding would apply to state and federal determinate sentencing schemes. *Apprendi*, 530 U.S. at 550-51 (O’Connor, J., dissenting). Indeed, the dissenters in *Apprendi* recognized its holding “strongly suggest[ed]” that the federal sentencing guidelines were unconstitutional. *Id.* at 524, 551-52 (O’Connor, J., dissenting); see also *id.* at 561-62 (Breyer, J., dissenting). The dissenters in *Blakely* also recognized there was no logical reason not to extend *Apprendi*’s rule to the federal sentencing guidelines. *Blakely*, 542 U.S. at 314, 324 (O’Connor, J., dissenting); *id.* at 346 (Breyer, J., dissenting). When those questions

presented themselves in *Blakely* and *Booker*, this Court resoundingly reaffirmed *Apprendi*'s rule.

Traditional constitutional principles underlying *Apprendi* apply equally to state and federal sentences held unconstitutional in *Blakely* and *Booker*. In each case, fact-finding by twelve of the defendant's peers stood as a bulwark against factual determination by one government appointee. *Cunningham*, 549 U.S. at __ (fact-finding should not be the "bailiwick" of a judge). This Court recognized in *Apprendi* that a judicial finding of fact increasing the maximum punishment appears no different to a defendant than a verdict of guilt as to some greater offense – precisely what the Sixth Amendment protects against. *Blakely* and *Booker* created nothing new. They simply reflected "respect for longstanding precedent," *Blakely*, 542 U.S. at 305, and applied *Apprendi*'s constitutional principles to the specific situations presented.

Because *Booker* did not announce a new rule, the Sixth Circuit erred in following its *Humphress* decision and in holding that *Booker* does not impact cases, like Petitioner's, that are on collateral review. This Court should grant certiorari and reverse the Sixth Circuit's ruling.

A. Even If *Booker* Announced A New Rule, The Sixth Circuit Erred In Holding That It Does Not Apply Retroactively.

1. *Booker* announced a substantive rule falling under the first *Teague* exception.

Under *Teague*, "new" rules of criminal procedure apply retroactively on collateral review if the rule falls under at least one of two exceptions. *Teague*'s bar on retroactivity does not apply to: (1) "rules forbidding punishment 'of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Beard*, 542 U.S. at 416 (quoting

Penry, 492 U.S. at 330 (1989)); or (2) “watershed” rules of criminal procedure. *Beard*, 542 U.S. at 417. Even if *Booker* announced a new rule, it applies retroactively because it falls under one or both of *Teague*’s exceptions.

Rules falling within *Teague*’s first exception “are more accurately characterized as substantive rules not subject to [*Teague*’s] bar.” *Beard*, 542 U.S. at 411 n.3 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004)). “New substantive rules generally apply retroactively.” *Summerlin*, 542 U.S. at 351 (emphasis in original).

The determination of what constitutes a substantive rule versus a procedural one is made by considering the “principal functions of habeas corpus.” *Bousley v. United States*, 523 U.S. 614, 620 (1998) (quoting *Teague*, 489 U.S. at 312). In *Summerlin*, this Court provided guidance on what constitutes a substantive rule. Substantive rules include rules that narrow the scope of a criminal statute by interpreting its terms and those “constitutional determinations that place particular conduct or persons . . . beyond the State’s power to punish.” *Summerlin*, 542 U.S. at 352. Substantive rules are entitled to retroactive application because without their application a defendant is placed in significant risk that he could “face[] a punishment that the law cannot impose on him.” *Id.* In addition, “[a] decision that modifies the elements of an offense is normally substantive rather than procedural.” *Id.* at 354. These rules are substantive because the “[n]ew elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa.” *Id.* In contrast, rules that regulate only the “manner of determining the defendant’s culpability are procedural.” *Id.* at 353 (emphasis in original).

The standard used to determine sentencing factors, which underlies constitutional due process and is at the core of this

Court's holding in *Booker*, is a substantive rule. Stated another way, whether facts¹⁰ are determined beyond a reasonable doubt, as opposed to by a preponderance of the evidence, is a substantive difference. *Kessack v. United States*, No. C05-1828Z, 2006 U.S. Dist. LEXIS 80734, at *12 (W.D. Wash. Nov. 1, 2006).

The Court has consistently reaffirmed the importance of "beyond a reasonable doubt" determinations in criminal prosecutions. *In re Winship*, 397 U.S. 358, 364 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). "Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *Winship*, 397 U.S. at 362. This high standard of proof safeguards against the possibility that a defendant's fate is incorrectly decided due to fact-finding errors. It stands as "a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363. This Court's recent opinions continue to underscore the importance of the beyond a reasonable doubt standard. *E.g.*, *Cunningham*, 549 U.S. at ___ (facts must be "established beyond a reasonable doubt, not merely by a preponderance of the evidence.").

The "beyond a reasonable doubt" requirement of *Winship* and *Mullaney* is substantive. This Court recognized the substantive nature of the "beyond a reasonable doubt" standard by deciding that both *Winship* and *Mullaney* are entitled to retroactive application. *See Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972) (applying *Winship* retroactively); *Hankerson v. North Carolina*, 432 U.S. 233, 240 (1970) (holding that *Mullaney* applies retroactively);

¹⁰ The Court has consistently held that sentencing factors are subject to the same Sixth Amendment scrutiny as the actual elements of a criminal offense. *Washington v. Recuenco*, 126 S. Ct. 2546, 2552 (2006); *Apprendi*, 530 U.S. at 478.

accord *United States v. Johnson*, 457 U.S. 537, 563 n.21 (1982). As this Court stated in *Ivan V.*:

Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect.

407 U.S. at 205. *Teague* simply continued the precedent set in *Ivan V.* and *Hankerson* by holding that substantive rules apply retroactively to cases on collateral review. *Beard*, 542 U.S. at 411 n.3.

The rule in *Blakely* and *Booker* is substantive for the same reasons. The Fifth Amendment requirement that facts underlying enhanced punishments be determined beyond a reasonable doubt ensures accuracy of punishments imposed under federal and state sentencing schemes. If one of the “principal functions” of habeas corpus 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), then the beyond a reasonable doubt requirement unquestionably serves the principal functions of the Great Writ. See Eichenseer, 2005 Wis. L. Rev. at 1160-61.

The rule in *Blakely* and *Booker* also “modifie[d] the elements of an offense” by removing the guidelines’ mandatory character. Post-*Blakely* and -*Booker*, defendants cannot be punished any more than the facts as determined by a jury beyond a reasonable doubt will allow. Any greater punishment is, in essence, punishment for a different criminal offense since it requires proof of additional facts. “This idea comports with the Court’s long-held view that when a fact aggravates or mitigates the primary measure of culpability – punishment – it is an element for *Winship* purposes regardless of how the legislature labels it.”

Eichenseer, 2005 Wis. L. Rev. at 1170 (citing *Mullaney*, 421 U.S. at 698-99).

This Court's precedent also shows that the choice between a determination beyond a reasonable doubt or by a preponderance of the evidence is a substantive one. In *Booker*, Justice Thomas recognized that instead of implicating a defendant's Sixth Amendment right to jury trial, the *standard* used to determine punishment implicates due process rights. *Booker*, 543 U.S. at 317, 319 n.6 (Thomas, J., dissenting in part) ("The Fifth Amendment requires proof beyond a reasonable doubt . . ."). Other courts have reached the same conclusion:

Schardt and Schriro both address the procedural question of changing the identity of the decisionmaker, not the substantive question of what standard should be used to make the decision. Consequently, neither the Supreme Court in Schriro nor the Ninth Circuit in Schardt and Cruz considers the implications of *Blakely* under a Fifth Amendment lens.

Kessack, 2006 U.S. Dist. LEXIS 80734, at *12 (citing *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005), and *United States v. Cruz*, 423 F.3d 1119 (9th Cir. 2005)).

Finally, commentary by this Court on the retroactivity of *Booker* and *Blakely* seems to indicate that the rule is a substantive one deserving retroactive application:

And despite the fact that we hold in *Schriro v. Summerlin*, *ante*, that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack.

Blakely, 542 U.S. at 323-24 (O'Connor, J., dissenting) (internal citation omitted).

The only opportunity this Court has had to rule on the retroactivity of a decision like *Booker* was in *Schriro v. Summerlin*. In *Summerlin*, this Court held that the rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002), did not apply retroactively to cases on collateral review. *Ring* held that “a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty.” *Summerlin*, 542 U.S. at 353 (quoting *Ring*, 536 U.S. at 609). According to the Court, “*Ring*’s holding is properly classified as procedural.” *Summerlin*, 542 U.S. at 353.

However, *Ring*, and by extension *Summerlin*, did not implicate the important substantive determination of *how* the fact-finder decides. The sentencing judge in *Ring* determined aggravating factors beyond a reasonable doubt. *Summerlin*, 542 U.S. at 351 n.1 (citing *State v. Jordan*, 126 Ariz. 283, 286, *cert. denied*, 449 U.S. 986 (1980)). *Summerlin* reserved decision on the key constitutional question presented here: whether the beyond a reasonable doubt requirement requires retroactive application as a substantive rule. *See id.*; Eichenseer, 2005 Wis. L. Rev. at 1159-60.

In this case, the District Court found facts by a preponderance of the evidence, and it used those facts to increase Petitioner’s sentence. The Court’s decisions in *Winship*, *Mullaney*, *Ivan V.*, and *Hankerson* show that determination beyond a reasonable doubt is a substantive difference from determination by a preponderance of the evidence. Overturning the defendant’s presumption of innocence requires nothing less. The Sixth Circuit erred in failing to find that, even if *Booker* announced a new rule, it applies retroactively to Petitioner’s case. This Court should grant certiorari and reverse.

2. ***Booker* announced a watershed rule of criminal procedure.**

The second exception in *Teague*'s general bar on retroactivity is for "watershed" rules of criminal procedure. *Teague*, 489 U.S. at 311. "[A] new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)). Watershed rules are those that both "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted," *Teague*, 489 U.S. at 312 (quoting *Desist*, 394 U.S. at 262 (Harlan, J., dissenting)) (internal quotation marks omitted), and "alter our understanding of the *bedrock procedural elements* that . . . vitiate the fairness of a particular conviction." *Id.* at 311 (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J., concurring in the judgments in part and dissenting in part)); accord *Tyler v. Cain*, 533 U.S. 656, 665 (2001). *Booker*'s application of *Apprendi* to the federal sentencing guidelines is a watershed rule, and it deserves retroactive application.

Booker's holding encompasses two key, inextricable, prohibitions: (1) facts increasing a defendant's maximum sentence cannot be determined by the court alone, implicating a defendant's Sixth Amendment rights; and (2) those facts must be proved beyond a reasonable doubt, implicating a defendant's Fifth Amendment rights. See *Apprendi*, 530 U.S. at 476-77, 497. Those two rights in combination require *Booker*'s retroactive application. Absent the protections granted through the holding in *Booker*, defendants could be sentenced to vastly increased sentences due to judicial fact-finding and/or facts proved to a standard less than beyond a reasonable doubt. See *Summerlin*, 542 U.S. at 358-59 (Breyer, J., dissenting) (internal citation omitted) ("In *Ring v. Arizona*, this Court

held that a jury, not a judge, must make the findings necessary to qualify a person for punishment by death. In my view, that holding amounts to a ‘watershed’ procedural ruling”). The Fifth and Sixth Amendment rights protected in *Booker* are equally important as the right to counsel protected in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which this Court has identified as a watershed rule. *Beard*, 542 U.S. at 417-18.

Each constitutional right implicated in *Booker* is entitled to primacy on its own. Proof beyond a reasonable doubt is one of the most deeply-entrenched protections in American criminal law. *E.g.*, *Winship*, 397 U.S. at 370 (proof beyond a reasonable doubt is the Constitution’s “instruct[ion to] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions”); *Mullaney*, 421 U.S. at 704; *Apprendi*, 530 U.S. at 490. The Sixth Amendment right to jury trial is similarly entrenched in American jurisprudence. *Duncan v. Louisiana*, 391 U.S. 145, 149-51 (1968) (the jury trial right is “fundamental to the American scheme of justice.”).

Given their individual importances, the combination of Fifth and Sixth Amendment implications in *Booker* clearly rises to “watershed” status. This Court’s refusal to grant retroactive status to *Ring* implicated only the jury trial right; the defendant’s due process rights were not before the Court. *Booker* is different.

In *Booker*, this Court made clear that *both* the Fifth and Sixth Amendment rights required extension of *Apprendi*’s rule. Those rights in combination make *Booker* deserving of retroactive application. *See Note, Rethinking Retroactivity*, 118 Harv. L. Rev. 1642, 1663 (2004) (“[T]he *Summerlin* Court’s near-exclusive emphasis on considerations of accuracy strongly suggests that the *Winship* right guaranteed in *Apprendi* should survive the Court’s retroactivity analysis [] [b]ecause only *Apprendi*’s reasonable doubt guarantee unambiguously improves the accuracy of underlying

criminal proceedings”). Significantly, this Court recently re-affirmed *Booker*’s importance by using its rule to analyze the California system at issue in *Cunningham*.

The circumstances in this case are precisely what the Court was trying to guard against with *Apprendi* and *Booker*. Had the District Court not made its preponderance of the evidence finding, Petitioner would have received a sentence at least seven years shorter. Given the enormity of difference between sitting in prison and residing at home, it seems unsatisfactory that the only distinction of consequence appears to be “the date on which [the defendant was] convicted and sentenced.” Eichenseer, 2005 Wis. L. Rev. at 1180. By any standard, depriving a defendant of his liberty under a set of procedures that this Court now holds as unconstitutional offends due process. It is “implicit in the concept of ordered liberty” that the facts underlying Petitioner’s sentence should have been proved to a jury beyond a reasonable doubt. See *Mackey*, 401 U.S. at 692; *Rethinking Retroactivity*, 118 Harv. L. Rev. at 1664. The Constitution guarantees as much. *Booker*’s rule is of watershed importance to criminal defendants, and the Sixth Circuit erred in failing to apply it retroactively to Petitioner’s case. For this reason, too, the Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

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