**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

---

**NO. 06-10018-G**

---

**ROBERT D. BLANDFORD**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA**

**Respondent.**

---

# REQUEST FOR CERTIFICATE OF APPEALABILITY

---


**THE LAW OFFICE OF**
**WILLIAM MALLORY KENT**

**WILLIAM MALLORY KENT**
**Fla. Bar No. 0260738**
**1932 Perry Place**
**Jacksonville, Florida 322027**
**904-398-8000 Telephone**
**904-348-3124 Fax**
**kent@williamkent.com**

**Counsel for Petitioner**
**ROBERT D. BLANDFORD**

**NO. 06-10018-G**

**ROBERT D. BLANDFORD v. UNITED STATES OF AMERICA**

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

1. Robert Blandford, Defendant/Appellant:
2. Donald M. Briskman, Counsel for McNab
3. Charles E. Butler, Jr., Senior United States District Court Judge
4. William E. Cassady, United States Magistrate Judge
5. Robert F. Clark, Counsel for Blandford
6. Elinor Colbourn, Attorney for Wildlife and Marine Resources Section
7. Christ N. Coumanis, Counsel for McNab
8. J. Patrick Courtney III, Counsel for McNab
9. David Debold, Counsel for McNab
10. Miguel A. Estrada, Counsel for McNab
11. Martin A. Feigenbaum, Counsel for Schoenwetter
12. Diane Huang, Co-Defendant
13. Victor T. Hudson II, Counsel for McNab
14. Willie J. Huntley Jr., Counsel for Schoenwetter

15. Dennis B. Keene, Counsel for Huang

16. William Mallory Kent, Appellate counsel for Blandford

17. Dennis J. Knizley, Counsel for Blandford & Schoenwetter

18. Richard H. Loftin, Assistant United States Attorney

19. Arthur J. Madden, Counsel for Schoenwetter

20. Jon A. May, Counsel for Blandford

21. David Henson McNab, Co-Defendant

22. Maria E. Murphy, Assistant United States Attorney

23. Peter J. Murtha, Attorney for U.S. Department of Justice

24. Mark Pizzo, United States Magistrate Judge

25. Frank A. Rubino, Counsel for McNab

26. Abner Schoenwetter, Co-Defendant

27. Patrick H. Sims, Counsel for McNab, Blandford

28. William H. Steele, United States Magistrate Judge

29. John M. Tatum, Counsel for Huang

30. Richard W. Vollmer, United States District Court Judge

31. William W. Watts III, Counsel for McNab

32. David York, Office of the United States Attorney

33. Alex L. Zipperer, Counsel for Huang

## TABLE OF CONTENTS

**Page**

CERTIFICATE OF INTERESTED PERSONS . . . . . C1 of 2

TABLE OF CONTENTS . . . . . i

TABLE OF CITATIONS . . . . . ii

STATEMENT OF THE CASE . . . . . 1

BASIC PRINCIPLES AND ISSUES PRESENTED . . . . . 12

ARGUMENTS . . . . . 17

I. THE ELEVENTH CIRCUIT VIOLATED BLANDFORD'S DUE PROCESS RIGHTS BY REFUSING TO APPLY A "CHANGE" IN THE LAW THAT INDISPUTABLY OCCURRED BEFORE HIS CONVICTION BECAME FINAL . . . . . 17

II. BLANDFORD IS ENTITLED TO BE RESENTENCED UNDER *BOOKER v. UNITED STATES*, EITHER ON THE THEORY THAT *BOOKER* IS THE APPLICATION OF AN EXISTING RULE UNDER *YATES v. AIKEN* AND *PENRY v. LYNAUGH*, OR, ALTERNATIVELY BECAUSE *BOOKER* IS RETROACTIVE UNDER *TEAGUE v. LANE*. . . . . 27

CONCLUSION . . . . . 43

CERTIFICATE OF TYPE SIZE AND STYLE . . . . . 44

## TABLE OF CITATIONS

**Page**

**CASES**

*Agan v. Dugger*, 828 F.2d 1496 (11th Cir. 1987), cert. denied, 487 U.S. 1205 (1988 . . . . . )15

*Apprendi v. New Jersey*, 530 U.S. 466 (2000) . . . . . 27-29, 31, 37

*Beard v. Banks,* 542 U.S. 406 (2004) . . . . . 29

*Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997) . . . . . 24

*Blakely v. United States*, 542 U.S. 296 (2004) . . . . . 27, 30, 31

*Blandford v. United States*, 540 U.S. 1177, 124 S.Ct. 1407, 72 USLW 3310, 72 USLW 3535, 158 L.Ed.2d 77, 72 USLW 3523 (2004) . . . . . 11

*Booker v. United States*, 543 U.S. 220 (2005) . . . . . 27-33, 38, 41

*Bousley v. United States*, 523 U.S. 614, 620 (1998) . . . . . 19

*Bunkley v. Florida*, 538 U.S. 835, 836 (2003) (per curiam) . . . . . 19

*Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) . . . . . 34

*Calderon v. Thompson,* 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) . . . . . 21

*Carpenters v. United States,* 330 U.S. 395, 410, 67 S.Ct. 775, 783, 91 L.Ed. 973 (1947) . . . . . 25

*Cool v. United States,* 409 U.S. 100, 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335 (1972 . . . . . )25

*Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) . . . . . 23

*Cooper v. Woodford*, 358 F.3d 1117, 1119-1120 (9th Cir. 2004) . . . . . 23

*Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969) . . . . . 29, 39

*Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) . . . 30

*Duncan v. Louisiana,* 391 U.S. 145, 157-158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968 . . . . . )37

*Eagle v. Linahan*, 268 F.3d 1306 (11th Cir. 2001) . . . . . 14

*Fiore v. White*, 531 U.S. 225, 228-29 (2001) . . . . . 19

*Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) . . . . 32

*Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000) . . . . . 15

*Griffith v. Kentucky*, 479 U.S. 314, 322, 328 (1987) . . . . . 17, 18

*Henry v. Department of Corrections*, 197 F.3d 1361, 1364-66 (11th Cir.1999) . . . . . 12

*Herrera v. Collins,* 506 U.S. 390, 432 n. 2, 113 S.Ct. 853, 877 n. 2, 122 L.Ed.2d 203 (1993) . . . . . 21, 22

*High v. Head*, 209 F.3d 1257, 1270 (11th cir. 2000) . . . . . 24

*Humphress v. United States*, 398 F.3d 855, 862 (6th Cir. 2005) . . . . . 34

*In re Lott*, 366 F.3d 431, 432-433 (6th Cir. 2004) . . . . . 23

*In re Lott*m 366 F.3d 431, 432-433 (6th Cir. 2004) . . . . . 24

*In re Will C. Dean*, 375 F.3d 1287 (11th Cir. 2004) . . . . . 38

*In re Winship*, 397 U.S. 358, 364 (1970) . . . . . 17

*Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 2627 (1986) . . . . . 23

*Lee v. Missouri,* 439 U.S. 461, 462, 99 S.Ct. 710, 711, 58 L.Ed.2d 736 (1979) (*per curiam*) . . . . . 30

*Leland v. Oregon,* 343 U.S. 790, 795, 72 S.Ct. 1002, 1005, 96 L.Ed. 1302 (1952) . . . . . 25

*Mackey v. United States*, 401 U.S. 667, 695 (1971) . . . . . 32, 39, 40

*Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649-2650 (1986) . . . . . 24

*Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998) . . . . . 14

*Patterson v. New York,* 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977) . . . . . 25

*Penry v. Lynaugh*,492 U.S. 302, 314-315, 109 S.Ct. 2934,2944-2945 (1989) . . 28, 31, 36

*Peoples v. Haley*, 227 F.3d 1342 (11th Cir. 2000) . . . . . 13

*Powell v. Nevada*, 511 U.S. 79, 84-85 (1994) . . . . . 17

*Ring v. Arizona,* 536 U.S. 584 (2002) . . . . . 37

*Rosales-Garcia v. Holland*, 322 F.3d 386, 399 (6th Cir. 2003) . . . . . 23

*Saffle v. Parks*, 494 U.S. 484, 491, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) . . . 33

*Sandstrom v. Montana,* 442 U.S. 510, 524, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39 (1979) . . . . . 24

*Schlup v. Delo,* 513 U.S. 298, 317, 115 S.Ct. 851, 862, 130 L.Ed.2d 808 (1995) . . . . . 21

*Schriro v. Summerlin*, 124 S. Ct. 2519 (2004) . . . . . 34

*Schriro v. Summerlin*, 124 S. Ct. 2519 (2004) . . . . . 14, 15

*Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) . . 13, 14

*Sparf v. United States,* 156 U.S. 51, 105-106, 15 S.Ct. 273, 294-295, 39 L.Ed. 343 (1895) . . . . . 25

*Spaziano v. Florida,* 468 U.S. 447, 486-487, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) . . . . . 38

*Teague v. Lane*, 489 U.S. 288 (1989) . . . . . 29, 31, 32, 37-40

*Triestman v. United States*, 124 F.3d 361 (2nd Cir. 1997) . . . . . 20, 28

*Truesdale v. Aiken,* 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987) . . . . . 30

*United States v. Gentry*, 432 F.3d 600, 602-603 (5th Cir. 2005) . . . . . 34

*United States v. Johnson,* 457 U.S. 537, 549, 102 S.Ct. 2579, 2586, 73 L.Ed.2d 202 (1982) . . . . . 30

*United States v. Johnson*, 457 U.S. 537, 561 (1982) . . . . . 18

*United States v. Martin Linen Supply Co.,* 430 U.S. 564, 572-573, 97 S.Ct. 1349, 1355-1356, 51 L.Ed.2d 642 (1977) . . . . . 25

*United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003) . . . . . 1

*White v. Florida*, 458 U.S. 1301, 1302 (1982) . . . . . 15

*Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) . . . . . 28

**STATUTES**

16 U.S.C. § 3373(d)(2) . . . . . 4

16 U.S.C. § 3373(d)(3)(A)(i) . . . . . 4

16 U.S.C. §§ 3372(a)(2)(A) and 3373(d)(1)(B) . . . . . 4

18 U.S.C. § 1957 . . . . . 4

18 U.S.C. § 371 . . . . . 3

18 U.S.C. § 545 . . . . . 4

28 U.S.C. § 2253 . . . . . 12

28 U.S.C. § 2253(c) . . . . . 12

28 U.S.C. § 2254 . . . . . 12

Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") . . . . . 12

Lacey Act . . . . . 2

Title 28, U.S.C. § 2255 . . . . . 1, 11

**RULES**

Rule 22(b), Federal Rules of Appellate Procedure . . . . . 12

Rule 26.1, Federal Rules of Criminal Procedure . . . . . 9

**OTHER AUTHORITIES**

Due Process Clause of the United States Constitution . . . . . 17, 19, 20

Fifth Amendment to the United States Constitution . . . . . 27

Sixth Amendment to the United States Constitution . . . . . 27, 29, 37

## STATEMENT OF THE CASE

This is a request for a certificate of appealability ("COA") from a denial of a timely filed federal habeas petition filed under authority of 28 U.S.C. § 2255, in the United States District Court for the Southern District of Alabama, Charles E. Butler, Jr., Senior United States District Court Judge. The request for COA was first presented to Judge Butler, who denied it, and who also denied a motion for reconsideration.

## BACKGROUND

The background of this case is found in *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003). On February 3, 1999, agents of the National Marine Fisheries Service (NMFS) received an anonymous fax which advised that McNab's cargo transport vessel, the M/V CARIBBEAN CLIPPER, would arrive in Bayou la Batre on February 5, 1999, with shipment that included undersized lobster and lobster packed in bulk for exportation contrary to Honduran law. In response to the fax, NMFS contacted the Direccion General de Pesca y Acuicultura (DIGEPESCA) in Honduras and confirmed with them that McNab's shipment had been illegally transported in violation of the Fishing Law, the Industrial and Hygienic Sanitary Inspection Regulation for Fish Products and Resolution No. 030-95. The director general provided authentic copies of the applicable laws and stated that DIGEPESCA

was ready to support all efforts by the United States to prosecute persons who violate the Lacey Act.

In early March of 1999, NMFS agents seized McNab's shipment of lobster upon the director general's assurances that the lobster had been exported in violation of Honduran law. NMFS continued to communicate with Honduran officials about the Honduran laws and the legality of the seized lobster shipment. In June of 1999, NMFS special agents and an attorney in the United States National Oceanic and Atmospheric Administration Office of the General Counsel met with various Honduran officials from the Secretaria de Agricultura y Ganaderia (SAG) in Tegucigalpa, Honduras. The minister, the vice minister, the director of legal services, the director of legal affairs, the secretary general of the SAG, the director general of the DIGEPESCA, and the legal advisor for the Servicio Nacional de Sanidad Agropecuaria (SENASA) confirmed that the lobsters had been exported illegally without first being inspected and processed. Furthermore, the Honduran officials confirmed that there was a 5.5 inch limit for lobster tails and that all catches had to be reported to Honduran officials. The officials provided certified copies of the laws in question.

In September of 1999, NMFS agents inspected the lobster shipment that had been seized earlier in the year. The inspection confirmed that the seized lobsters were

packed in bulk plastic bags without being processed and that revealed a significant number had a tail length that was less than the 5.5 inches required by the Honduran size limit restriction. The inspection further revealed that many of the lobster were egg-bearing or had their eggs removed.

In March of 2000, a legal advisor in the Despacho Ministerial and a SAG legal advisor traveled to Alabama to meet with government prosecutors and investigators. Both legal advisors provided written statements that cited Resolution 030-95 as a valid law regulating the lobster fishing industry. They also described the processing requirements mandated by Regulation 0008-93. They further explained that Honduras prohibits the harvesting of egg-bearing lobsters.

Based upon the NMFS's investigation and the verification of the applicable foreign laws by the Honduran officials charged with regulating the lobster fishing industry, the government decided to prosecute the defendants for their roles in the illegal importing scheme. *McNab* at 1232-33.

## PROCEDURAL HISTORY

McNab, Blandford, Schoenwetter and Huang were charged in a forty-seven count second superseding indictment in September of 2000. All four defendants were charged with conspiracy in violation of 18 U.S.C. § 371. McNab, Blandford, and Schoenwetter were charged with knowingly importing merchandise into the United

States in violation of 18 U.S.C. § 545. Blandford was charged with violating the Lacey Act by dealing in fish and wildlife that he knew were unlawfully taken, possessed, transported, or sold in violation of 16 U.S.C. §§ 3372(a)(2)(A) and 3373(d)(1)(B); and by the lesser included offense of dealing in fish and wildlife that he should have known were unlawfully taken, possessed, transported, or sold in violation of 16 U.S.C. §§ 3372(a)(2)(A) and 3373(d)(2). Huang was charged with violating the Lacey Act by dealing in fish and wildlife that she should have known were unlawfully taken, possessed, transported, or sold in violation of 16 U.S.C. §§ 3372(a)(2)(A) and 3373(d)(2); and by falsely labeling fish or wildlife in violation of 16 U.S.C. § 3373(d)(3)(A)(i). McNab and Blandford also were charged with engaging in monetary transactions involving criminally derived property in violation of 18 U.S.C. § 1957 and with conspiring to engage in monetary transactions involving criminally derived property in violation of 18 U.S.C. §§ 1957 and1956(h). In total, McNab was charged in 28 counts, Blandford in 37 counts, Schoenwetter in 7counts and Huang in 17 counts. Each charge required proof of an underlying violation of the Lacey Act, 16 U.S.C. §§ 3372 et seq. The Lacey Act violations required proof that the petitioner imported "fish or wildlife taken, possessed, transported or sold ... in violation of any foreign law." At trial, the United States presented evidence of Honduran violations including: (1) harvesting undersized lobster, in violation of

Resolution 030-95; (2) lack of processing and improper packaging of lobster, in violation of Acuerdo 0008-93; and (3) harvesting egg-bearing lobsters and lack of required reporting and landing of harvest, in violation of Decree No. 154.

The district court conducted a pretrial hearing to determine the validity of the foreign law in September of 2000. The defendants vigorously challenged the validity of these laws. In support of their position, they presented the testimony of two experts in Honduran law and submitted numerous legal opinions from members of the Honduran legal community including the Attorney General of Honduras and the regional prosecutor as well as a declaration from a practicing attorney. *McNab* at 1233. Following the hearing, the district court ruled that Honduran law prohibited, among other things: 1) harvesting undersized lobster; 2) harvesting egg-bearing lobsters; 3) exporting lobsters without first having them inspected and processed; 4)harvesting lobsters without reporting the catch to Honduran authorities; and 5) exporting lobsters without first landing them in a Honduran port. (R4-209).[1]

The defendants were convicted after a 15 day trial. After the trial, the defendants filed numerous motions which included a motion to dismiss the indictment, a motion for a new trial based on newly discovered evidence, and a motion for redetermination of foreign law based upon developments in Honduran

[1] References are to the prior record on appeal.

law. (R4-240; R5-300, 336; R9-241, 313, 346; R11-242; R12-315, 342, 385; R15-243, 330, 344). Among other arguments, defendants continued to attack the validity of three of the five Honduran laws underlying their convictions: the size limit, the prohibition against harvesting egg-bearing lobsters, and the processing and inspection requirement. (R5-324, 325, 326, 336). The district court denied all of the defendants' post-trial motions. (R5-270, 328; R6-397; R9-271, 275; R12-272; R15-361).

In August of 2001, McNab, Blandford and Schoenwetter were sentenced to serve 97months imprisonment and Huang was sentenced to 24 months imprisonment.

The defendants filed a direct appeal of their convictions, continuing their claim that the Honduran laws used as the predicates for the Lacey Act convictions were invalid or void during the period charged in the indictment. These appeals were docketed in the Court of Appeals as Eleventh Circuit No. 01-15148-JJ. Briefing on No. 01-15148-JJ was completed on January 3,2002.

On January 9, 2002, McNab filed with the district court a motion for a new trial based on newly discovered evidence and asked the court to certify its intention to grant a new trial upon remand. (R-Supp.1-415). The remaining defendants subsequently adopted this motion.(R-Supp.2-417; R-Supp.3 -418; R-Supp.4 -420). The district court denied the motions on January 31, 2002. (R-Supp.1-419). Blandford and Schoenwetter filed timely notices of appealfrom the January 31st order. (R-

Supp.2 - 424; R-Supp.3- 423). These appeals were docketed in the Eleventh Circuit as No. 02-10810-JJ.

In February 2002, each of the defendants filed a motion for reconsideration of the district court's January 31st order. (R-Supp.1-433). On March 1, 2002, the district court, on reconsideration, issued an order reaffirming its January 31st order. (R-Supp.1-433). Each of the defendants then filed a timely notice of appeal from the court's January 31 and March 1 orders.(R-Supp.1-436; R-Supp.2-437; R-Supp. 3-438; R-Supp. 4 -439). These appeals were docketed as Eleventh Circuit No. 02-11264-JJ.

On April 23, 2002, the Eleventh Circuit issued an order that, *inter alia*, consolidated the defendants' three appeals and directed the Clerk to set a briefing schedule in Eleventh Circuit Nos. 02-10810-JJ and 02-11264-JJ.

The defendants submitted various documents along with their appellate briefs, including 1) a Special Report of Recommendations by the Honduran National Rights Commissioner; 2) a statement by Guillermo Alvarado Downing, Minister of Agriculture and Livestock; 3) a decision by the Honduran Court of Appeals for Administrative Law, dated October 15, 2001; 4) Decree198-2001, dated November 1, 2001; 5) a statement by Francisco Rodas, Director General of SENASA, dated January 11, 2002; 6) two cover letters conveying Alvarado's letter to the Honduran

Consulate in the United States; 7) a statement by Francisco Rodas dated January 25,2002; 8) a cover letter from the Honduran Embassy to the United States Department of State conveying Alvarado's November 15, 2002 statement; 9) an excerpt from a 1961 Chilean textbook; and 10) an affidavit from Nicholas Cruz Torres, a Honduran attorney, discussing the Chilean textbook. (United States Brief, p.19). Additionally, they included the statement of Secretary General Liliana Paz that she erred in her previous interpretation of Honduran law. (McNab 1st Brief).

On March 21, 2003, a divided panel of the Eleventh Circuit affirmed Mr. Blandford and Mr. McNab's convictions. The court acknowledged that Honduran government officials had opined that Honduran law had not been violated. 331 F.3d at 1240. The majority declined, however, to overturn the district court's determination regarding Honduran law. Crucial to the court's decision was its holding that the testimony of Liliana Paz had constituted the official position of the Honduran government at the time of that testimony. *Id.* at 1234-35, 1241 & n.25. The Eleventh Circuit's opinion, therefore, focused on whether it should recognize "the posttrial shift in the Honduran government's position regarding the validity of the laws at issue in this case." *Id.* The court decided that it need not respect the position of the Honduran government, and throughout its opinion it found Paz's testimony dispositive. *Id.* at 1241 & n.25, 1243 n.29, 1245 n.33.

The court also stated that the district court's initial determination of foreign law should receive deference. The court described the process that a district court must go through to determine foreign law, and explained that it involved a complex inquiry that is fundamentally based on the reception of evidence, suggesting that courts of appeals are ill-equipped to second guess these findings on the basis of intervening evidence. *Id.* at 1241 (describing the requirements of Fed. R. Crim. P. 26.1). According to the panel majority, the district court was particularly entitled to rely upon the testimony of a foreign government official and may give that testimony near dispositive weight. *Id.* ("The court reasonably may assume that statements from foreign officials are a reliable and accurate source and may use such statements as a basis for its determination of the validity of foreign laws during a given time period."). While at times the panel majority discussed the intervening pronouncements by Honduran courts, in each instance the majority determined that they were only a recent view from the Honduran government—a view that was in competition with the testimony "of foreign officials charged with enforcing the laws of their country" on which it believed that the district court had relied, and that the district court testimony would receive preference. *Id.* at 1241.

Operating under this view of the authoritative nature of the pre-trial evidence on Honduran law, the court of appeals reviewed the various provisions and concluded

that they were in effect and applicable to Mr. Blandford's conduct at the time in question.

Judge Fay, writing in dissent, sharply disagreed with this characterization of the testimony by Honduran government employees before the district court. In his view, the testimony presented by the government at the pre-trial hearing was no more than the personal opinion of a mid-level government employee. In contrast, the Honduran government's *official* position, as announced through its official representative to the United States, reflected a normal process of governmental decision-making. As matters advanced, those senior government officials who have the lawfully delegated power to offer official legal interpretations put forward the government's official position. Ultimately, the courts of that country also arrived at a different interpretation of the law, just as can happen in the United States. 331 F.3d at 1247 (Fay, J., dissenting).

Blandford petitioned the Eleventh Circuit for panel rehearing and rehearing *en banc*. The Government of Honduras filed an *amicus* brief. The panel granted rehearing solely to delete the part of its opinion explicitly holding that the prosecution's interpretation of foreign law should be granted deference. *McNab,* 331 F.3d at 1228 (order granting rehearing in part). The court did not modify its opinion in any other way.

Blandford and McNab then filed a petition for writ of *certiorari* with the Supreme Court of the United States. The Due Process argument presented in this Request for Certificate of Appealability was raised for the first time in Petitioner McNab's petition for certiorari in response to what was perceived as a Due Process violation by the decision of this Court in denying retroactive application of the Honduran's government's changed interpretation of its laws to their case.

The Supreme Court denied the petition on February 23, 2004, *Blandford v. United States*, 540 U.S. 1177, 124 S.Ct. 1407, 72 USLW 3310, 72 USLW 3535, 158 L.Ed.2d 77, 72 USLW 3523 (2004), thus terminating direct review of their convictions and sentences.

Blandford then filed his motion pursuant to 28 U.S.C. § 2255 and requested that he be allowed to adopt the arguments made in McNab's petition which was filed separately. The District Court allowed Blandford to adopt McNab's arguments.

The District ordered a response from the Government, then summarily denied relief, and denied Blandford's request for a COA without substantive explanation, and denied Blandford's motion for reconsideration in which Blandford invited the District Court to articulate the basis for the denial of the requested COA. Whereupon this motion followed in a timely manner renewing Blandford's request for a COA at this Court.

## BASIC PRINCIPLES AND ISSUES PRESENTED

Robert D. Blandford requests this honorable Court issue a Certificate of Appealability, pursuant to Title 28, United States Code, § 2253(c), and Rule 22(b), Federal Rules of Appellate Procedure. Rule 22(b) of the Federal Rules of Appellate Procedure and Title 28 U.S.C. § 2253 require issuance of a certificate of appealability before an appeal may be heard of a denial of a petition for relief under 28 U.S.C. §2255.

Blandford filed a timely petition under § 2255, which was denied by the District Court. Thereafter Blandford filed a timely notice of appeal and request for certificate of appealability, which request was denied by the District Court.

The Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended Title 28 U.S.C. § 2253 to require a petitioner to request a certificate of appealability ("COA") instead of a certificate of probable cause ("CPC"), in order to appeal the denial of a petition filed under 28 U.S.C. § 2254, *see Henry v. Department of Corrections*, 197 F.3d 1361, 1364-66 (11th Cir.1999) (describing statutory history), and established a statutory standard, set out in section 2253(c)(2), for the issuance of a COA. See 28 U.S.C. § 2253(c)(2) (Supp. IV 1999). Unlike the procedure for the issuance of a CPC, under the amended version of section 2253, the district court, when granting a COA, must "indicate [for] which specific issue or

issues" the petitioner has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. §§ 2253(c)(2), (3). *Peoples v. Haley*, 227 F.3d 1342 (11th Cir. 2000). The Supreme Court, in *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), held that, in a section 2254 or 2255 proceeding:

> when a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition after April 24, 1996 (the effective date of the AEDPA), the right to appeal is governed by the certificate of appealability (COA) requirements now found at 28 U.S.C. § 2253(c) (1994 ed., Supp. III). This is true whether the habeas corpus petition was filed in the district court before or after AEDPA's effective date.
>
> Subsection (c), as amended by the AEDPA, provides:
>
> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In *Slack* the Supreme Court decided that the pre-AEDPA showing a petitioner had to make to obtain a CPC and the post-AEDPA statutory standard for obtaining

a COA are substantially the same. See *Slack*, 529 U.S. at 483-84, 120 S. Ct. at 1603, ("Except for substituting the word 'constitutional' for the word 'federal,' § 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle* . . . ."[*Barefoot v. Estelle*, 483 U.S. 880, 103 S.Ct. 3383 (1983)] ). The primary difference between the certificates, then, is that a COA must specify on its face the issues on which the petitioner has been granted leave to appeal. Appellate review of an unsuccessful habeas petition is limited to the issues enumerated in the properly granted COA. See *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998); *Eagle v. Linahan*, 268 F.3d 1306 (11th Cir. 2001).

In *Slack*, the Supreme Court clearly laid out the tests that courts should apply in deciding whether to grant a COA, both as to claims disposed of by the district court on the merits and those disposed of on procedural grounds. "Where a district court has rejected the constitutional claims on the merits, . . . the petitioner [seeking a COA] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604. Where a district court has disposed of claims raised in a habeas petition on procedural grounds, a COA will be granted only if the court concludes that "jurists of reason" would find it debatable both "whether the petition states a valid claim of the denial of a constitutional right" and "whether the district court was

correct in its procedural ruling." *Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000) (quoting *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604).

The standard for issuance of a CPC is found in *Barefoot v. Estelle*, 460 U.S. 880, 893 (1983). To qualify under Barefoot, an appeal must raise at least one issue as to which the petitioner makes a substantial showing of the denial of a federal right. Cf. *Agan v. Dugger*, 828 F.2d 1496 (11th Cir. 1987), cert. denied, 487 U.S. 1205 (1988).

A certificate *must* issue if the appeal presents a "question of some substance," i.e., at least one issue (1) that is "'debatable among jurists of reason'"; (2) "'that a court *could* resolve in a different manner'"; (3) that is "'adequate to deserve encouragement to proceed further'"; or (4) that is not "squarely foreclosed by statute, rule, or authoritative court decision, or . . . [that is not] lacking any factual basis in the record." *Barefoot, supra*, 463 U.S. at 893 n.4, (quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982)).

Petitioner Blandford requests a certificate of appealability on all grounds and arguments in support thereof set forth in Blandford's § 2255 petition [Criminal Docket 500] as well as the grounds and arguments set forth in co-defendant David Henson McNab's § 2255 petition [Criminal Docket 495 and 497], which were adopted by Blandford with permission of the District Court [Criminal Docket 525],

however, this memorandum of law will focus on only two points, without however intending to abandon his request for the remaining issues. Our focus in this memorandum is on the following two issues:

I. The Eleventh Circuit Violated Blandford's Due Process Rights By Refusing To Apply A "Change" In The Law That Indisputably Occurred Before His Conviction Became Final.

II. Blandford Is Entitled to Be Resentenced under *Booker v. United States*, Either on the Theory That *Booker* Is the Application of an Existing Rule under *Yates v. Aiken* and *Penry v. Lynaugh*, or Because *Booker* Is Retroactive under *Teague v. Lane*.

## ARGUMENTS

### I. THE ELEVENTH CIRCUIT VIOLATED BLANDFORD'S DUE PROCESS RIGHTS BY REFUSING TO APPLY A "CHANGE" IN THE LAW THAT INDISPUTABLY OCCURRED BEFORE HIS CONVICTION BECAME FINAL.

Under the Due Process Clause, a conviction is not valid unless each and every element is proved to a jury, beyond a reasonable doubt. *See, e.g., In re Winship*, 397 U.S. 358, 364 (1970). Elementary notions of due process also guarantee to a defendant that, until the conclusion of direct review, his conviction is not yet "final" and must be reexamined in light of any intervening changes in the law. *Griffith v. Kentucky*, 479 U.S. 314, 322, 328 (1987). Here, the most dispositive evidence available—the opinions of the Attorney General of Honduras—were issued before Mr. Blandford's conviction became final. Thus, although the new evidence of Honduran law itself establishes that Mr. Blandford's conduct was *never* illegal, and that Honduras's official position has never "changed," Mr. Blandford is entitled to relief even if the new evidence is viewed—however wrongly—as a "change" in Honduran law.

In *Griffith*, the Supreme Court made clear that a bare minimum due process requirement is that a defendant be able to take advantage of new legal rules announced during the pendency of direct review. *Id.* at 326-28; *see also Powell v.*

*Nevada*, 511 U.S. 79, 84-85 (1994). This categorical rule is based on a principle of fundamental fairness: "similarly situated defendants" should be treated the "same." *Griffith*, 479 U.S. 323, 327; *see also United States v. Johnson*, 457 U.S. 537, 561 (1982) (explaining the constitutional grounding of this principle). When the law has changed, applying that law to a defendant whose prosecution may be initiated after the change, but not to one for whom direct review is still pending, creates a constitutionally intolerable disparity in treatment.

Nowhere is such an unconstitutional disparity any clearer than in this case. The official interpretation of law by the Honduran government at the time of Mr. Blandford's appeal and at the time of his petition for writ of certiorari was that the laws in question were void and unenforceable at the time of the charged shipments.[2] Whether that official interpretation was the government's first official interpretation or a change from a previous official interpretation (as the prosecution has contended), under *Griffith* Mr. Blandford was entitled to the benefit of it. Depriving Mr. Blandford of that protection means that a person who engaged in precisely the same

[2] Honduras is a civil law country in which the final authority to interpret the laws rests with Congress, and—as noted earlier—in which the Attorney General is its sole "Legal Representative." Thus, the interpretations of the Honduran Congress and Attorney General, which conclusively established that Blandford violated no Honduran law and hence no U.S. law, are at least the equivalent of rulings by the highest court of a state on the elements of a state offense.

conduct as Mr. Blandford, at precisely the same time, and whose foreign law hearing occurred a matter of several months after Mr. Blandford's, would not have been subject to prosecution.

This is the very result that the Due Process Clause guards against, and therefore it would be unconstitutional for the courts to rely on such coincidences of timing.

These constitutional concerns are all the more acute when the change in the law affects the substantive scope of a criminal statute. A holding that "a substantive federal criminal statute does not reach certain conduct" directly implicates whether a defendant was properly convicted of criminal conduct. *Bousley v. United States*, 523 U.S. 614, 620 (1998); *see also Bunkley v. Florida*, 538 U.S. 835, 836 (2003) (per curiam) (state statute); *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (state statute). Thus, the Supreme Court has been even more insistent that these "substantive" developments are retroactively applied than it has with rules of procedure, without which there is only "an impermissibly large *risk* that the innocent will be convicted." *Bousley*, 523 U.S. at 620 (emphasis added). On the basis of this concern, changes in the law that narrow a substantive element of a federal criminal statute are applied retroactively to any conviction, whether "final" or not at the time of the change, and are not limited by any rules of "finality." The application of a premature rule of "finality" when it comes to changes in foreign law—changes that directly alter the

substantive scope of an element of a federal criminal statute—violates this principle of due process. This constitutional defect in Blandford's conviction is appropriate for resolution on a motion to vacate pursuant to 28 U.S.C. § 2255. The Due Process Clause requires that Blandford's conviction and sentence be vacated on the facts of this case.

**ACTUAL INNOCENCE**

Blandford asserts that his 2255 petition is not subject to the procedural limitations applied that the District Court, if to apply such limitations would be to bar his right to judicial review and habeas relief of his confinement, an unconstitutional deprivation on the facts of Blandford's case, given that Blandford asserts (1) that he is both factually and legally innocent of the crime for which he was convicted and is imprisoned, and (2) that his conviction was obtained as the result of a constitutional violation. *Cf. Triestman v. United States*, 124 F.3d 361 (2nd Cir. 1997).

The accompanying constitutional violation in Blandford's case - - separate from his claim of actual innocence - - is the denial of Due Process by the failure to apply retroactively the change in Honduran law and the failure to insure Constitutionally reliable sentencing under the Sixth Amendment as applied by *Apprendi/Blakely/Booker*.

Blandford is asserting both (1) an independent, substantive constitutional claim

of actual innocence, that is, that it violates the Eighth Amendment to incarcerate a person such as himself who is actually innocent,[3] and his right to pursue such claim independent of any associated constitutional violation as well as (2) a "gateway" claim of actual innocence accompanied by a claim of a separate constitutional violation.

Blandford's second argument in its basic terms is not novel but has been accepted by this and other courts under the "miscarriage of justice" actual innocence gateway claim standard of *Calderon v. Thompson,* 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) and *Schlup v. Delo,* 513 U.S. 298, 317, 115 S.Ct. 851, 862, 130 L.Ed.2d 808 (1995).[4]

Under *Calderon*, Blandford's actual innocence claims are subject to the more

---

[3] The continued incarceration of an innocent person violates the Eighth Amendment, and for that reason, such a person must have recourse to the judicial system. *See Herrera v. Collins,* 506 U.S. 390, 432 n. 2, 113 S.Ct. 853, 877 n. 2, 122 L.Ed.2d 203 (1993) (Blackmun, *J.,* dissenting) (explaining that it "may violate the Eighth Amendment to imprison someone who is actually innocent," but declining to address the question, because the Court was "not asked to decide in this case whether petitioner's continued imprisonment would violate the Constitution if he actually is innocent").

[4] Arguably Blandford's current petition would be neither second nor successive because his first 2254 petition was not denied on the merits but denied solely on the basis that it was time barred. *See United States v. Barrett*, 178 F.3d 34, 43 (1st Cir. 1999), quoting *Pratt v. United States*, 129 F.3d 54, 60 (1st Cir. 1997) ("a numerically second petition is not 'second or successive' if . . . the earlier petition terminated without a judgment on the merits.")

lenient standard of *Schlup v. Delo,* 513 U.S. 298, 317, 115 S.Ct. 851, 862, 130 L.Ed.2d 808 (1995), that is, Blandford must make only a prima facie showing at this Court that it is "more likely than not" that no reasonable juror would have found Blandford guilty beyond a reasonable doubt had the jury been properly advised on Honduran law as subsequently determined by the Honduran courts and government, and this finding can be predicated on all available evidence, including evidence that was excluded at trial, even if such evidence is not newly discovered as required by § 2245. Instead, there must only be evidence that was not considered at trial by the jury.

The trial jury was prevented from hearing evidence tending to show Blandford's innocence, such evidence consisting of the defense favorable interpretation of the applicable Honduran regulations.

Blandford's first argument - - his right to present an independent, stand alone Eighth Amendment claim of actual innocence, has been discussed but not decided in a number of cases. *See Herrera v. Collins,* 506 U.S. 390, 432 n. 2, 113 S.Ct. 853, 877 n. 2, 122 L.Ed.2d 203 (1993) (Blackmun, *J.,* dissenting) (explaining that it "may violate the Eighth Amendment to imprison someone who is actually innocent," but declining to address the question, because the Court was "not asked to decide in this case whether petitioner's continued imprisonment would violate the Constitution if

he actually is innocent"). It may not require decision in Blandford's case either because Blandford's right to relief on his constitutional claim once the Court addresses its merits having allowed Blandford to pass through the actual innocence gateway, is clear.

In any event, at this stage of the proceeding all that Blandford must make is a *prima facie* showing that he has a *colorable* actual innocence claim. *In re Lott*, 366 F.3d 431, 432-433 (6th Cir. 2004); *Cooper v. Woodford*, 358 F.3d 1117, 1119-1120 (9th Cir. 2004); *Rosales-Garcia v. Holland*, 322 F.3d 386, 399 (6th Cir. 2003); *see also Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 2627 (1986) ("In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the "ends of justice" require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.") The *prima facie* showing at this stage is nothing more than a sufficient showing of *possible* merit to warrant fuller exploration by the district court. *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004). A *prima facie* showing, as Judge Posner pointed out for the Seventh Circuit, is not a difficult standard to meet - - it is simply a showing of possible merit, which must be determined under the expedited deadline of 28 U.S.C. § 2244, based on nothing more than the bare pleadings and attachments.

*Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997), *In re Lott*m 366 F.3d 431, 432-433 (6th Cir. 2004).

Under the accompanying constitutional claim Blandford must show that the constitutional violation has probably resulted in the conviction of one who is actually innocent. *High v. Head*, 209 F.3d 1257, 1270 (11th cir. 2000) (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649-2650 (1986). That is a given in Blandford's case. In Blandford's case the District Court determined the governing Honduran law, and determined it incorrectly in light of subsequent developments, thus, in effect directing a verdict on this element of the case.

*In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-1073, 25 L.Ed.2d 368 (1970), announced the proposition that the Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime, and *Sandstrom v. Montana,* 442 U.S. 510, 524, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39 (1979), established a corollary, that a jury instruction which shifts to the defendant the burden of proof on a requisite element of mental state violates due process. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." In *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968), the Court found this right to trial by jury in serious criminal cases to be "fundamental to the

American scheme of justice," and therefore applicable in state proceedings. The right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." See *Sparf v. United States,* 156 U.S. 51, 105-106, 15 S.Ct. 273, 294-295, 39 L.Ed. 343 (1895). Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. *Ibid.* See also *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 572-573, 97 S.Ct. 1349, 1355-1356, 51 L.Ed.2d 642 (1977); *Carpenters v. United States,* 330 U.S. 395, 410, 67 S.Ct. 775, 783, 91 L.Ed. 973 (1947).

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, see, *e.g., Patterson v. New York,* 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977); *Leland v. Oregon,* 343 U.S. 790, 795, 72 S.Ct. 1002, 1005, 96 L.Ed. 1302 (1952), and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, *e.g., In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970); *Cool v. United States,* 409 U.S. 100, 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335 (1972) (*per curiam*). This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings.

*Winship, supra.*

The Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. Both as to the instruction on the foreign law and the determination of sentencing factors during the mandatory guideline sentencing proceeding, Blandford's Fifth and Sixth Amendment right to jury trial were denied. This is the nub of the problem in Blandford's case.

The record in Blandford's case establishes that *an actually innocent man* was convicted and wrongfully sentenced. His actual innocence should override any procedural bar to the Court considering his constitutional claims both as to the merits of his conviction and to his sentencing as well.

## II. BLANDFORD IS ENTITLED TO BE RESENTENCED UNDER *BOOKER v. UNITED STATES*, EITHER ON THE THEORY THAT *BOOKER* IS THE APPLICATION OF AN EXISTING RULE UNDER *YATES v. AIKEN* AND *PENRY v. LYNAUGH*, OR, ALTERNATIVELY BECAUSE *BOOKER* IS RETROACTIVE UNDER *TEAGUE v. LANE*.

*Booker v. United States*, 543 U.S. 220 (2005), held the federal sentencing guidelines unconstitutional when applied in a mandatory fashion, as was required by 18 U.S. C. § 3553(b)(1). The use of the mandatory federal sentencing guidelines to determine Blandford's sentence violated his rights under the Sixth and Fifth Amendments to the United States Constitution to have the government charge by indictment and prove beyond a reasonable doubt to a unanimous jury all factors used to determine his sentence. *Booker* was an application of the rule announced in *Blakely v. United States*, 542 U.S. 296 (2004), which in turn was an application of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Blandford raised an *Apprendi* challenge to his sentence in his initial direct appeal brief filed with this Court:

> The JUDGE erred by sentencing BLANDFORD to a total term of imprisonment more than five years, the statutory maximum under count l(d), for a violation of 18 U.S.C. 371. The JUDGE imposed a sentence of 97 months imprisonment under counts 28-39, which related to 1957 money laundering, by employing USSG 2S1.1, the Guideline for 1956

"promotion" money laundering. However, he did this only to be able to constructively impose punishment under count 1(d) in excess of the statutory maximum under 18 U.S.C. 371. The JUDGE did this without having the jury find beyond a reasonable doubt an aggravating factor to increase the statutory maximum under Section 371, thereby violating the holding in Apprendi v. New Jersey, 120 S. Ct. 2348, 2362-64 (2000).

[Blandford's Initial Direct Appeal Brief, November 21, 2001 in *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003)]

We submit that Blandford is entitled to resentencing based on the *Booker/Blakely/Apprendi* rule without regard for the retroactivity *vel non* of *Booker*.

As dramatic an impact as *Booker* has made, it is not a "new rule" for purposes of retroactivity analysis under *Teague v. Lane*,[5] but is merely an application of the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), to a new set of facts and the result in *Blakely* was dictated and compelled by *Apprendi*. Therefore, under *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) and *Penry v. Lynaugh*,492 U.S. 302, 314-315, 109 S.Ct. 2934,2944-2945 (1989), Blandford is entitled to the application of *Booker* to his timely first petition under 28 U.S.C. § 2255.

A case announces a new constitutional rule if the Supreme Court bases its

[5] *Teague v. Lane*, 489 U.S. 288 (1989).

decision in the Constitution and the rule it announces was not dictated nor compelled by precedent. *Beard v. Banks,* 542 U.S. 406 (2004). As dramatic as *Booker* seems, *Booker* merely reiterates the holding in *Apprendi* that, under the Sixth Amendment, all facts used to increase a defendant's sentence beyond the statutory maximum must be charged and proven to a jury. The rule announced in *Booker* is based in the Constitution and was clearly dictated and compelled by *Apprendi* and its progeny.[6]

To decide Blandford's petition, therefore, it is not necessary to determine whether *Booker* is *retroactively* applicable to cases on collateral review under *Teague v. Lane*, 489 U.S. 288 (1989). Many "new" holdings are merely applications of principles that are well settled at the time of conviction. As Justice Harlan explained in *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969):

> The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law . . . One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this

---

[6] Some courts have been distracted by language in *Beard* that to not be a "new rule," the application of the existing precedent must be apparent to "all reasonable jurists." Surely that was an unfortunate turn of phrase which when examined is seen to have no content, because in fact every application of the *Yates* "not a new rule" approach has been in the context of dissents and splits of authority if not complete unanimity of authority *against* the application of the rule.

> Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against the application of the 'new' rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final.

394 U.S., at 263-264, 89 S.Ct., at 1041.

This reasoning, which the Supreme Court endorsed in *Yates v. Aiken*, 484 U.S. 211 (1964), is controlling in Blandford's case because the decision in *Booker* was merely an application of the principle that governed the decision in *Apprendi,* which had been decided before Blandford's sentencing took place. *Cf. United States v. Johnson,* 457 U.S. 537, 549, 102 S.Ct. 2579, 2586, 73 L.Ed.2d 202 (1982): "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *See also Truesdale v. Aiken,* 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987) (*per curiam* ); *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Lee v. Missouri,* 439 U.S. 461, 462, 99 S.Ct. 710, 711, 58 L.Ed.2d 736 (1979) (*per curiam*).

The Eleventh Circuit itself has already described *Booker's* sire*, Blakely v.*

*Washington,* as "revisiting" *Apprendi v. New Jersey*, and quoted from the *Blakely* decision in which Justice Scalia explained that the Supreme Court's precedents made clear that a judge could not determine factors that would increase a sentence:

> ***[o]ur 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.* . . . 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," ... and the judge exceeds his proper authority.

*Id.* at 7 (some mphasis in original) (citations omitted), *In re Dean,* 375 F.3d 1287 (11th Cir. 2004).

*A fortiori* it would follow that because *Blakely* is merely an *application* of clear precedents, then *Booker/Blakely* cannot be a new rule for retroactivity purposes. Because it is not a new rule, Blandford is entitled to its application in this petition under *Yates* and *Penry*.

As the Supreme Court indicated in *Teague*, "[i]n general ... a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." 489 U.S., at 301, 109 S.Ct., at 1070. Or, "[t]o 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." Ibid. (emphasis in

original). *Teague* noted that "[i]t is admittedly often difficult to determine when a case announces a new rule." Ibid. Justice Harlan recognized "the inevitable difficulties that will arise in attempting 'to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" *Mackey v. United States*, 401 U.S. 667, 695 (1971) (opinion concurring in judgments in part and dissenting in part) (quoting *Desist v. United States*, 394 U.S. 244, 263, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting)). See generally *Yates v. Aiken*, 484 U.S. 211, 216-217, 108 S.Ct. 534, 537-538, 98 L.Ed.2d 546 (1988) (concluding that *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), did not announce a new rule but was "merely an application of the principle that governed the decision in *Sandstrom v. Montana*, [442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979),] which had been decided before petitioner's trial took place").

In order to determine whether *Booker* should be applied retroactively or whether retroactivity analysis even comes into play, this Court must determine whether it is a "new rule" as contemplated by *Teague*. A rule is new when it "breaks new ground or imposes a *new obligation* on the States or the Federal government" or if it "was not *dictated* by precedent existing at the time the defendant's conviction

became final." *Teague,* 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334. A rule is not new where precedents "inform, or even control or govern" but do not "compel" its creation. *Saffle v. Parks*, 494 U.S. 484, 491, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

*Booker* does not impose any new obligations on the Federal government, instead it merely results in the abolition of the *guidelines* putting the federal courts and federal judges back to where they had always been and reinstating a sentencing regime which had existed since the founding of the Republic. No *new* obligations are imposed by *Booker*.

The Eleventh Circuit recently declined to apply *Booker* or *Blakely* retroactively to a case on collateral review. See *Varela, supra*. That opinion is not relevant to Blandford's ability to rely on *Booker*, but it is very relevant to the decision whether Blandford qualifies for grant of a COA. We say that because this Court granted a COA to Varela to determine *Teague* retroactivity in his case - - a case that raised only one of two exceptions to the *Teague* rule. Surely this petition presents a similar but different substantial question for COA - - whether Blandford meets the test of the second exception of *Teague* retroactivity, a compelling question which has not been decided by any decision of this Court.

Other Circuit Courts have granted COAs on appeals which addressed this

question. *United States v. Gentry*, 432 F.3d 600, 602-603 (5th Cir. 2005);[7] and *Humphress v. United States*, 398 F.3d 855, 862 (6th Cir. 2005).

Apparently it is a substantial question to Justice O'Connor, because in her dissent in *Shriro v. Summerlin*, 124 S.Ct. 2519 (2004), she implied that despite *Schriro,* sentences like Blandford's may be susceptible to retroactive application of *Blakely* on collateral attack:

> And, despite the fact that we hold in *Schriro v. Summerlin, ante,* ---U.S. ----, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), 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.

In *Varela*, the Court addressed whether *Booker* meets either of *Teague*'s two narrow exceptions to its rule against retroactive application of new rules of procedure. It determined that the Supreme Court's decision in *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004), "is essentially dispositive" because there "the Supreme Court concluded that the new requirement in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), which, like *Blakely* and *Booker*, is an application of *Apprendi*'s principles, does not

---

[7] An excellent analysis of the proper application of *Penry* can be found in *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) - although not involving the federal sentencing guidelines.

apply retroactively to cases on collateral review." *Varela* at 7. But while *Summerlin* held that the right to jury findings failed to meet the two exceptions to the bar in *Teague*, it did not decide the issue critical to Blandford's 2255 motion: whether the Supreme Court decisions following *Apprendi* have themselves announced new rules. *Teague* only applies to the retroactive application of a new rule. The conviction in *Summerlin* became final in 1983, see 124 S. Ct. at 2521, well before *Apprendi* or *Ring* were decided. Thus, in *Summerlin* there was no question that the rule to be applied was new.

In *Varela*, the Eleventh Circuit had no need to decide if *Booker* or *Blakely* themselves announced new rules, because *Varela's conviction became final before Apprendi*. As noted above, *Apprendi* established the new rule, and *Booker* merely applied that rule to the federal guidelines. Thus, the restrictions in *Teague* do not apply.[8]

---

[8] Even if *Booker* had established a new rule, *Summerlin* would not preclude its retroactive application under *Teague*. In *Summerlin*, the Court dealt solely with the importance of the identity of the factfinder (jury versus judge), not the importance of a heightened burden of proof (beyond a reasonable doubt versus preponderance of the evidence). See *Summerlin*, 124 S. Ct. at 2522 n. 1 ("Because Arizona law already required aggravating factors to be proved beyond a reasonable doubt, that aspect of *Apprendi* was not at issue." (citation omitted)). Though it is debatable whether judicial factfinding seriously diminishes the accuracy of the proceedings, see *Summerlin*, 124 S. Ct. at 2525, the requirement of proof beyond a reasonable doubt significantly reduces the risk that innocent conduct will be punished, and such a burden of proof implicates the fundamental

In any event, *Varela* is not dispositive because *Varela* did not consider whether *Booker* announced a "new rule," instead, petitioner Varela argued that *Booker* presented a new rule which was implicit in the concept of ordered liberty, one of the two *Teague* exceptions to non-retroactivity. Therefore, the starting point for this Court's decision in *Varela* was that *Booker* announced a new rule, and the question at issue was, did that new rule meet a *Teague* exception. So, *Varela* did not *hold* that *Booker* announces a new rule for *Yates/Penry* purposes, rather *Varela* - - based on the petitioner's own argument - - started from that proposition, which remained unanalyzed.

Because *Booker* is not a new rule, but is merely an application of an existing rule, it is applicable to a timely first habeas petition under 28 U.S.C. § 2255.

As of April 30, 2006, this Court has not addressed Petitioner Blandford's *Penry/Yates* argument in any decision, published or unpublished. Clearly this argument satisfies the "fairly debatable" standard for a COA.

Blandford argues in the alternative that *Booker* meets the first criterion of

---

fairness of the proceedings. Cf. *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (pre-*Teague* case on direct appeal dealing with the burden of proof in juvenile proceedings; "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.").

retroactivity under *Teague v. Lane*,[9] that its holding is "implicit in the concept of ordered liberty." Cf. *Apprendi v. New Jersey,* 530 U.S. 466, 499, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (Scalia, J., concurring) (absent *Apprendi's* rule jury trial right "has no intelligible content"); *Ring v. Arizona,* 536 U.S. 584 (2002), (Scalia, J., concurring) (*Apprendi* involves the fundamental meaning of the jury trial guarantee); *Blakely v. Washington, post*, 124 S.Ct. 2531, 2536 (tracing *Apprendi's* conception of the jury trial right back to Blackstone); *Duncan v. Louisiana,* 391 U.S. 145, 157-158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (Sixth Amendment jury trial guarantee is a "fundamental right"). Its rule also is "central to an accurate determination" of sentencing factors which increase a statutory maximum. *Teague, supra,* at 313, 109 S.Ct. 1060. This is because *Booker* and *Blakely* (from *Apprendi*) impose a requirement of juror unanimity and proof beyond a reasonable doubt.

As we see in Blandford's case - and it is by no means atypical of the Kafkaesque proceedings which routinely occurred under the federal Sentencing Guidelines - the scales tipped easily and readily in favor of the government's request for "enhancements" because nothing more than a preponderance of the evidence was

---

[9] A panel of this Court has held that *Booker* is *not* retroactive for purposes of an initial timely 2255 petition. *Varela v. United States*, 400 F.3d 864 (11th Cir. 2005). *See also*, *Dohrmann v. United States*, 442 F.3d 1279 (11th Cir. 2006) (*Apprendi* does not apply retroactively to a 2241 petition). This argument is being made to preserve the issue for consideration by the United States Supreme Court.

required and that preponderance was decided by a single judge in the presence of the advocates in the midst of interruptions and argumentation. No better system has ever been devised than the jury and secret deliberations uninterrupted by lawyers' arguments with proof beyond and to the exclusion of every reasonable doubt which must be decided by unanimous verdict to reach an *accurate* verdict.

As Justice Stevens has pointed out:

> Juries - comprised as they are of a fair cross section of the community - are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench." *Spaziano v. Florida,* 468 U.S. 447, 486-487, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (Sevens, J., concurring in part and dissenting in part) (footnote omitted).

The right to have jury sentencing as to factors which increase the statutory maximum is both a fundamental aspect of constitutional liberty and also significantly more likely to produce an accurate assessment of sentencing factors and result in the appropriate punishment.

*Booker* satisfies both prongs of the retroactivity requirement of *Teague v. Lane* and as such is entitled to retroactive application to timely first petitions under 28 U.S.C. § 2255.[10]

---

[10] The decision of the Eleventh Circuit in *In re Will C. Dean*, 375 F.3d 1287 (11th Cir. 2004), is not controlling of this decision. *Dean* decided only that the

*Teague's* basic purpose strongly favors retroactive application of *'s* rule. *Teague's* retroactivity principles reflect the Court's effort to balance competing considerations. See 489 U.S., at 309-313, 109 S.Ct. 1060; *Mackey v. United States,* 401 U.S. 667, 675, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in two judgments and dissenting in one); *Desist v. United States,* 394 U.S. 244, 256, 89 S.Ct. 1030 (1969) (Harlan, J., dissenting). On the one hand, interests related to certain of the Great Writ's basic objectives - protecting the innocent against erroneous conviction or punishment and assuring fundamentally fair procedures - favor applying a new procedural rule retroactively. *Teague, supra,* at 312-313, 109 S.Ct. 1060; *Mackey,* 401 U.S., at 693-694, 91 S.Ct. 1171. So too does the legal system's commitment to "equal justice" *i.e.,* to "assur[ing] a uniformity of ultimate treatment among prisoners." *Id.,* at 689, 91 S.Ct. 1171.

Consider, too, the law's commitment to uniformity. *Mackey, supra,* at 689, 91 S.Ct. 1171. Is treatment "uniform" when two offenders each have been sentenced to guideline sentences through the use of procedures that we now know violate the Constitution - but one is allowed to rot in prison while the other receives a new, constitutionally proper sentencing proceeding?

---

Supreme Court had not made *Blakely* retroactive for purposes of a *successive* 2255 petition. Supreme Court express retroactivity is not required, of course, for a timely first 2255 petition.

Certainly the ordinary citizen will not understand the difference nor will the prisoner. That citizen and that prisoner will simply witness two individuals, both sentenced through the use of unconstitutional procedures, one individual serves out an unconstitutional sentence, the other perhaps returning home to his family, all through an accident of timing. How can any Court square such a result with the fundamental purpose of the Great Writ and a system of law based on reason and equal justice?

On the other hand, *Teague* recognizes that important interests argue against, and indeed generally forbid, retroactive application of new procedural rules. These interests include the "interest in insuring that there will at some point be the certainty that comes with an end to litigation;" the desirability of assuring that "attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community"; and the fact that society does not have endless resources to spend upon retrials, which (where witnesses have become unavailable and other evidence stale) may well produce unreliable results. *Mackey, supra,* at 690-691, 91 S.Ct. 1160 (internal quotation marks omitted); see also *Teague,* 489 U.S., at 308-310, 109 S.Ct. 1060.

None of these interests, however, support denying retroactive application of . Finality and an end to litigation would be hastened rather than delayed by retroactive

application of *Booker*. Each inmate aggrieved by the federal sentencing guidelines would receive one final Constitutional resentencing. The focus would be on whether the inmate can be safely restored to the community not on technical absurdities. Finally, and most importantly, imagine the huge net benefit and savings of resources which would result from opening the prison doors to the thousands of federal inmates senselessly imprisoned for decades or life because mandated by the federal Sentencing Guidelines.[11] The vast majority of federal inmates are persons like Blandford - convicted of non-violent offenses and suffering under guideline sentences that defy rational explanation serving only to embitter the inmate, his family and friends, to create disrespect for the federal judicial system, and needlessly burden the taxpayers with the costs of unnecessary incarceration.

It is not enough, and it is not right, to simply call a halt to the federal sentencing guidelines. Instead, the Courts - this Court - must go back and right the wrongs that have been committed in the name of the guidelines. Persons such as Blandford who have been unconstitutionally deprived of their liberty have the right

---

[11] The federal Bureau of Prisons webpage states that it is responsible for over 180,000 federal inmates. Of incarcerated inmates, *less than ten percent were convicted of crimes of violence.* BOP data suggests that it costs on average $22,176 per year to house a federal inmate. This amounts to almost Four Billion Dollars ($4,000,000,000.00) per year. There is no question but that it would result in a net savings of resources to apply retroactively, assuming that there was on average a reduction in sentence imposed under the resentencings.

to be resentenced at a rational, fair and *Constitutional* sentencing proceeding.

There was much wrong and little right about the federal sentencing guidelines, but one concept that the guidelines paid lip service to deserves mention - acceptance of responsibility. Now is the time and this is the case for the Court to accept responsibility for the guidelines. The first small step in that direction would be to resentence Blandford to time served - which has been more than sufficient punishment to satisfy the requirements of 18 U.S.C. § 3553.

We respectfully disagree with *Varela*, for the reasons stated above, and we suggest that in fact *Booker* meets the *Teague* test for retroactivity, however, our primary argument is that *Booker* is not subject to retroactivity analysis because of the *Penry-Yates* rule.

## CONCLUSION

Based on the foregoing, Petitioner Blandford respectfully submits that he has made a substantial showing of the denial of a constitutional right as to the above issues and is entitled to the issuance of a certificate of appealability.[12]

THE LAW OFFICE OF
WILLIAM MALLORY KENT

_____

WILLIAM MALLORY KENT
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207-3443
(904) 398-8000 Telephone
(904) 348-3124 Facsimile
kent@williamkent.com Email
www.williamkent.com Webpage

[12] Additionally Blandford requests a certificate of appealability on the remaining issues set forth in his 2255 petition and does not intend to abandon his request for a COA on those issues by not raising a separate argument in support thereof in this memorandum of law.

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains approximately 11,533 words.

## CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing *Certificate of Interested Persons* has been furnished to Richard Loftin, Assistant United States Attorney, 63 South Royal Street, Suite 600, Mobile, Alabama, 36602, by United States Postal Service, this the 1st day of May, 2006.

_____
William Mallory Kent