No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

ROBERT D. BLANDFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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 and Blandford is Entitled to Issuance of a Certificate of Appealability to Appeal this Question.

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* and Blandford is Entitled to Issuance of a Certificate of Appealability to Appeal this Question.

LIST OF PARTIES

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The petitioner, **ROBERT D. BLANDFORD**, respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit Court of Appeals entered *** affirming without written opinion the denial of a certificate of appealability ("COA") by the United States Court of Appeals for the Eleventh Circuit, of an appeal of a denial by the United States District Court for the Southern District of Alabama of a petition for relief under Title 28, United States Code, § 2255.

OPINION AND DECISION BELOW

The decision without opinion of the Eleventh Circuit Court of Appeals (Appendix., *infra*) was unreported. The decision and opinion of the Southern District of Alabama denying relief under 28 U.S.C. § 2255 and denying a certificate of appealability was also unreported but a copy of both decisions is included in the Appendix, *infra*.

JURISDICTION

Petitioner **ROBERT D. BLANDFORD** filed in the United States District Court for the Southern District of Alabama a timely motion under 28 U.S.C. § 2255 attacking the judgment and sentence in his federal criminal case. The District Court summarily denied Blandford's 2255 motion on and denied his request for a certificate of appealability ("COA"). Blandford renewed his request for a COA at the Eleventh Circuit Court of Appeals which also denied it. Within the time for rehearing, this Court granted certiorari in *Burton v. Waddington*, 126 S.Ct.2352 (June 5, 2006). In part in reliance upon the granting of certiorari in *Burton*, Blandford filed a motion styled Petition for Rehearing En Banc, which the Eleventh Circuit treated as a motion for reconsideration, which was denied by an order dated July 12, 2006. This petition followed in a timely manner. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit pursuant to Title 28 U.S.C., § 1254(1). *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution provides:

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS MATERIAL TO THE ISSUES PRESENTED

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 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

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

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 appeal from 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) Decree 198-2001, 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 had 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 this Court. The Due Process argument presented in this petition for certiorari requesting a certificate of appealability was raised for the first time in Petitioner McNab's petition for certiorari in response to what was argued as a Due Process violation by the decision of the Eleventh Circuit Court of Appeals in denying retroactive application of the Honduran's government's changed interpretation of its laws as they applied to Blandford and McNab's case.

This 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 Due Process and other 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. Blandford then sought a COA from the Eleventh Circuit and was denied. After the Eleventh Circuit denied Blandford's COA, this Court granted certiorari in *Burton v. Waddington*. Blandford moved for reconsideration in part on that basis and was again denied the requested COA. This petition for certiorari has followed in a timely manner.

Blandford's COA request and this certiorari petition presents two issues. Blandford argues (1) that he is entitled to the application of *Booker v. United States*, 543 U.S. 220 (2005) to his initial,

timely filed habeas petition under 28 U.S.C. § 2255, and (2) that he was denied Due Process of law when the Eleventh Circuit refused to apply a substantive change in the law that indisputably occurred before his conviction became final on direct appeal and which had the effect of exonerating him.

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 AND BLANDFORD IS ENTITLED TO A CERTIFICATE OF APPEALABILITY TO APPEAL THIS QUESTION.

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 opinion of the Attorney General of Honduras—was issued before Mr. Blandford's conviction became final. Thus the new evidence of Honduran law establishes that Mr. Blandford's conduct was *not* illegal.

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 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

[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.

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.

Blandford's case was controlled by Honduran law - if Blandford violated Honduran law, he was guilty, if not, not.[3] The district court determined that Blandford violated Honduran law *as it existed at the time of the offense.* The district court and the Eleventh Circuit Court of Appeals refused to consider what the Eleventh Circuit characterized as a *change in Honduran law announced after the determination was made by the district court.*

Blandford's argument is that he is entitled as a matter of Due Process to the application of a change in the law that became effective prior to his conviction becoming final on direct appeal.

In the direct appeal decision, this Court concluded:

> We review a district court's interpretation of foreign law de novo. *United States v. Gecas,* 120 F.3d 1419, 1424 (11th Cir.1997) (en banc). Our determination of foreign law is complicated by the posttrial shift in the Honduran government's position regarding the validity of the laws at issue in this case. The Honduran government now maintains that the laws were invalid at the time of the lobster shipments or have

[3] "As we begin our analysis, we must make clear that the crux of this case is the validity of the Honduran laws during the time period covered by the indictment." *United States v. McNab,* 331 F.3d 1228, 1240 (11th Cir. 2003).

> been repealed retroactively. Thus, we must decide whether we are bound by the Honduran government's current position regarding the validity of these laws, or whether we are free to follow the Honduran government's original position.

United States v. McNab, 331 F.3d 1228, 1240 (11th Cir. 2003) (footnote omitted).

The Eleventh Circuit's direct appeal decision pretermitted any discussion of the principles asserted in Blandford's 2255 petition, that is, that pursuant to *Griffith v. Kentucky*, 479 U.S. 314, 322, 328 (1987), the Supreme Court made clear that Due Process requires 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).

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 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 peculiar facts of this case.[4]

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[4] Blandford's current counsel was not counsel on the direct appeal, but we believe that Blandford's appellate counsel presented a form of this argument in his petition for rehearing on the direct appeal. That petition was denied without written opinion other than to delete a footnote in the prior published decision. This briefing and ruling does not constitute a procedural bar to litigating the issue as a constitutional claim in a subsequent 2255 petition, because rejection of a petition for panel or *en banc* rehearing does not constitute a decision "on the merits" regarding arguments submitted in support of that petition. Panel and *en banc* rehearings are discretionary remedies, and the court need not make any decision on the merits to dispatch such petitions. *See*, e.g., Fed. R. App. P. 35(a) (rehearing *en banc* reserved for preserving uniformity of decisions and matters of

Blandford has established more than a fairly debatable issue, he has established that under controlling law he is entitled to the requested relief. Therefore Blandford meets the standard for issuance of a COA on his Due Process argument.

ACTUAL INNOCENCE

Blandford asserts that his 2255 petition is not subject to the ordinary procedural limitations, 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

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exceptional importance). Thus, the Eleventh Circuit has held that the denial of a rehearing petition is not a ruling on the merits. *Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991) (accepting the argument that denial of rehearing is "equivalent to the denial of certiorari by the United States Supreme Court, which does not constitute an opinion on the merits of the case in which the petition is denied"); *see also Riley v. Camp*, 130 F.3d 958, 985 n.7 (11th Cir. 1997) (Birch, J., concurring) ("A denial of *en banc* rehearing is similar to a denial of *certiorari* by the Supreme Court; it communicates little, if anything, about the position of the court or the issues presented."). That the panel decided on rehearing to modify a small piece of its opinion does not indicate that the court considered the merits of any of the other arguments in that rehearing petition, or even felt that they were appropriate for consideration on rehearing rather than on a motion to vacate under Section 2255.

is actually innocent,[5] 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.

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

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[5] 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").

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* AND BLANDFORD IS ENTITLED TO A CERTIFICATE OF APPEALABILITY TO APPEAL THIS QUESTION.

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 the Eleventh Circuit Court of Appeals:

> The Judge erred by sentencing Blandford to a total term of imprisonment more than five years, the statutory maximum under count 1(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*,[6] 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 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*

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

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.

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 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*).

In *Blakely* 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. . . .*

(underlined emphasis added)

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*.

Surely this petition presents a substantial question for COA - - whether Blandford meets the test of the second exception of *Teague* retroactivity. 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 former 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.

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. Clearly this argument satisfies the "fairly debatable" standard for a COA.

Blandford argues in the alternative that *Booker* meets the first criterion of retroactivity under *Teague v. Lane*, 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

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[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.

requirement of juror unanimity and proof beyond a reasonable doubt. *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.

At this time *Burton v. Waddington* is pending before this Court. The questions presented in *Burton* are (1) whether *Blakely v. Washington*, 542 U.S. 296 (2004), is merely an extension of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which was clearly dictated by *Apprendi*, so that it is not a "new rule" and therefore not subject to the bar against retroactive application for habeas corpus purposes, or, alternatively, (2) if it is a "new rule," that it is subject to retroactive application under *Teague v. Lane*, 489 U.S. 288 (1989) and AEDPA.

Given that every federal circuit court of appeals, including the Eleventh Circuit, has previously held that *Blakely* is not retroactively applicable for habeas purposes, the clear portent of certiorari being granted is that every circuit has gotten this question wrong. *See, e.g., In re Dean*, 375 F.3d 1287 (11th Cir. 2004).

In any event, right or wrong, the granting of certiorari on this question[8] is sufficient to demonstrate that it is a close question, one fairly debatable among jurists of reason. According to the Eleventh Circuit "a 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." *United States v. Giancola,* 754 F.2d 898, 901 (11th Cir. 1985). *See also United States v. Handy,* 761 F.2d 1279, 1281 (9th Cir. 1985)("substantial" question is one that is "fairly debatable").

[8] Although the vehicle chosen is a *Blakely* petition, if *Blakely* is retroactive, then perforce *Booker* will be as well given that *Booker* was nothing more than the application of *Blakely* to the federal sentencing guidelines.

When the Supreme Court has granted certiorari on the very question at issue in the habeas, it must be said that that issue then becomes a close question, one which could be decided either way. *Cf. United States v. Giancola,* 754 F.2d 898, 901 (11th Cir.1985) (adopting *United States v. Miller,* 753 F.2d 19 (3d Cir.1985), cited in *United States v. Fernandez,* 905 F.2d 350, 354 (11th Cir. 1990).

What was controlling precedent, is now up for review and at least four justices of the United States Supreme Court have decided that the consistent holding of every federal circuit court of appeals on this issue merits reconsideration. The Supreme Court recognized in *Slack v. McDaniel*, 529 U.S. 473 (2000), that the "substantial showing" standard for a COA is relatively low and is the same as the prior standard for issuance of a Certificate of Probable Cause ("CPC"), apart from the requirement that the court identify specific appealable issues. *Slack,* 529 U.S. at 483, 120 S.Ct. 1595. This standard, articulated in *Barefoot v. Estelle,* 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), permits appeal where petitioner can "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further." *Id.* at n. 4.

Given the grant of certiorari in *Burton v. Waddington*, this certainly is a question that deserves and has been given encouragement to proceed further, therefore Blandford has made a sufficient showing for issuance of a COA on the *Booker* issue.[9]

[9] Although the narrow question in *Burton* is *Blakely* retroactivity, not *Booker* retroactivity, the case clearly presents an occasion for this Court to decide the retroactivity of *Booker* as well. If this Court is not inclined to grant certiorari on this ground at this time or in this case, Blandford would respectfully request that his petition be held pending the decision in *Burton* for its possible application to his case and a remand for further consideration in light of *Burton* once decided.

CONCLUSION

Based on the foregoing, Petitioner **ROBERT D. BLANDFORD,** respectfully requests this Honorable Court grant his petition for a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

ROBERT D. BLANDFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

I, **WILLIAM M. KENT**, do declare that on this date, October 10, 2006, I have served the attached Petition for Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Mr. Robert D. Blandford
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PO Box 019120
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Solicitor General
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_____
A F F I A N T

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CRIMINAL DEFENSE
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ADMITTED TO THE FLORIDA BAR 1978

October 10, 2006

William K. Suter, Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: ROBERT D. BLANDFORD v. UNITED STATES OF AMERICA

Dear Mr. Suter:

Enclosed are the original and ten (10) copies of Petitioner Blandford's Petition for Writ of Certiorari. Also enclosed is a Proof of Service. Please file and docket these items.

If you have any questions, or if additional information is needed, please advise. Thank you for your assistance in this matter.

Sincerely,

WILLIAM MALLORY KENT