No. 04-35738

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEREMIAH SKIDMORE,

Petitioner - Appellant

v.

UNITED STATES OF AMERICA,

Respondent - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The defendant has not requested oral argument. Because the issue addressed herein is resolved by binding circuit and Supreme Court precedent, the United States also does not request argument.

IN THE UNITED STATES COURT OF APPEALS
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No. 04-35738

JEREMIAH SKIDMORE,

Petitioner - Appellant

v.

UNITED STATES OF AMERICA,

Respondent - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

The defendant was convicted by a jury of violating 18 U.S.C. 241 and sentenced to 100 months' imprisonment. The district court entered final judgment on March 5, 2002, and this Court affirmed the defendant's conviction and sentence on August 26, 2003. On April 5, 2004, the Supreme Court denied the defendant's petition for a writ of certiorari. On August 2, 2004, the defendant filed a motion in the district court to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C.

2255. In an order dated August 9, 2004, the court dismissed the motion and granted a limited certificate of appealability on whether *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), is retroactively applicable to cases on collateral review. The defendant filed a timely notice of appeal from that order on August 20, 2004. This Court has jurisdiction to review the district court's order pursuant to 28 U.S.C. 2253(c)(1)(B).

STATEMENT OF THE ISSUE

The district court certified the following question for review:

Whether *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), is retroactively applicable to cases on collateral review.

STATEMENT OF THE CASE

The defendant was convicted by a jury in the District of Montana of violating 18 U.S.C. 241. Following a hearing held on February 28, 2002, the district court sentenced the defendant to 100 months' imprisonment.[1] The court began with a base offense level of 15, as set forth in the base offense level guideline for aggravated assault, U.S.S.G. § 2A2.2, and which is incorporated by reference in

the base offense level guideline for a violation of 18 U.S.C. 241, U.S.S.G. §

[1] The court calculated the defendant's sentence in accordance with the 2001 edition of the United States Sentencing Guidelines (U.S.S.G.). Att. A, Skidmore Sent. Tr. 10, 15.

2H1.1(a)(1). Pursuant to the specific offense characteristics for the aggravated assault guideline, the court enhanced the defendant's sentence by three levels for brandishing or using a dangerous weapon. U.S.S.G. § 2A2.2(b)(2)(C). The court further increased that offense level by four levels for the defendant's leadership role in the offense, U.S.S.G. § 3B1.1(a); by two levels for use of a minor, U.S.S.G. § 3B1.4; by three levels for selecting his victims based on race, U.S.S.G. § 3A1.1(a); and by two levels for obstruction of justice, U.S.S.G. § 3C1.1. The total offense level was 29. Att. A, Skidmore Sent. Tr. 10-11.

Following arguments by counsel, the court noted that the defendant had one criminal history point and concluded "that the applicable guideline range based on the offense level of 29, criminal history category of I, Class C felony, is 87 to 108 months." Att. A, Skidmore Sent. Tr. 13. Accordingly, the court sentenced the defendant to 100 months' imprisonment. Att. A, Skidmore Sent. Tr. 15. The court explained:

> I find, and the jury found, of course, that this defendant was convicted of conspiracy against rights. This offense stemmed from his involvement in a white supremacist group called the Montana Front Working Class Skinheads. While involved, this defendant recruited new members, assisted in the oversight of the group's activities, and encouraged violence against racial and religious minorities.
>
> I did note that Mr. Skidmore's arrest record revealed a prior conviction for assault. It involved the attack, as I recall, of a Native American.

> He has admitted a history of illegal drug use.
>
> I believe that a sentence at the middle to the high end of the guidelines would adequately reflect the serious nature of the current offense, promote respect for the law, and would provide just punishment.
>
> Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Jeremiah Skidmore, is hereby committed to the custody of the Bureau of Prisons for a term of 100 months on Count I of the indictment.
>
> The Court has sentenced the defendant at this point within the applicable guideline range because of the serious nature of white supremacist activity, their advocacy for violence against racial minorities as well as religious folks, as well as the fact that the defendant has a previous conviction similar in nature to this.

Att. A, Skidmore Sent. Tr. 14-15.

The defendant appealed from the final judgment of the district court and on August 26, 2003, this Court affirmed the defendant's conviction and sentence. See *United States* v. *Allen*, 341 F.3d 870 (9th Cir. 2003). On April 5, 2004, the Supreme Court denied the defendant's petition for a writ of certiorari. *Allen* v. *United States*, 124 S. Ct. 1876 (2004).

On June 24, 2004 the Supreme Court decided *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). In that case, the Court applied the rule it announced in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed with a purpose to intimidate because of race, color, gender, handicap, religion, sexual orientation or ethnicity. 530 U.S. at 468-469. In *Blakely*, the Court applied the *Apprendi* rule to invalidate an upward departure under the Washington state sentencing guidelines that was imposed on the basis of facts found by the court at sentencing. 124 S. Ct. at 2537-2538. In so doing, the Court clarified that the relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. *Id.* at 2537. The Court "express[ed] no opinion" on whether its decision applied to the United States Sentencing Guidelines. *Id.* at 2538 n.9.[2]

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[2] The Supreme Court resolved this question on January 12, 2005, in *United States* v. *Booker*, No. 04-104, slip op. 2 (opinion of Stevens, J.), holding that "the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines." The Court further concluded that "in light of this holding, two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of

making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent." *Booker*, slip op. 2 (opinion of Stevens. J.). Despite striking down these provisions, the Court reaffirmed that "[m]ost of the statute is perfectly valid," *id.* at 15 (opinion of Breyer, J.), and thus adopted an approach that "would (through severance and excision of two provisions) make the Guidelines system advisory while

(continued...)

On August 2, 2004, the defendant filed a motion in the district court to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. 2255, on the ground that, under *Apprendi* and *Blakely*, his sentence violated his Sixth Amendment right to a jury trial. The court dismissed the motion, citing circuit precedent that holds that *Apprendi* is not retroactively applicable to cases on collateral review. Att. B, Order 2 (citing, *inter alia*, *United States* v. *Sanchez-Cervantes*, 282 F.3d 664, 667-668, 671 (9th Cir.) cert. denied, 537 U.S. 939 (2002)). The court also noted that, in a case decided on the very same day as *Blakely*, the Supreme Court itself held that *Ring* v. *Arizona*, 536 U.S. 584 (2002), another application of *Apprendi*, does not have retroactive effect to cases on collateral review. Att. B, Order 3 (citing *Schriro* v. *Summerlin*, 124 S. Ct. 2519,

2526 (2004). Nonetheless, the court granted a limited certificate of appealability on whether *Blakely* is retroactively applicable, explaining that "reasonable jurists may find it necessary to change Ninth Circuit precedent." Att. B, Order 3.

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[2](...continued)
maintaining a strong connection between the sentence imposed and the offender's real conduct," *id.* at 3 (opinion of Breyer, J.). The Court issued its decision in *Booker* several weeks after the defendant in this case submitted his opening brief as appellant and one week before the United States' brief as appellee was due. The position of the United States and the retroactivity analysis set forth herein is not changed by *Booker*.

The defendant filed a timely notice of appeal. In his notice, the defendant requested that the district court "expand the certificate of appealability to include the following questions: (1) whether *Blakely* is retroactively applicable only to cases on collateral review 'that become final *after Apprendi* was decided'?[;] (2) [d]id *Blakely*'s holding clarify what *Apprendi* meant all along?[; and] (3) [w]ill *United States v. Booker*, 04-104, and *United States v. Fanfan*, 04-105[,] be applied retroactively upon their disposition in the Supreme Court?" Att. C, NOA 2.[3]

The court did not grant the defendant's request to expand the certificate of appealability.

SUMMARY OF ARGUMENT

The Supreme Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), is not retroactively applicable to cases on collateral review because that case announced a new constitutional rule of criminal procedure that does not fit within either of the two exceptions articulated in *Teague* v. *Lane*, 489 U.S. 288 (1989). The rule announced in *Blakely* is subject to *Teague*'s bar on retroactive application because it is a constitutional rule of criminal procedure, rather than a substantive

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[3] With respect to the first question, the position of the United States is that the rule announced in *Blakely* is not retroactively applicable to cases that became final before *Blakely* was decided. Accordingly, it is irrelevant that the defendant's conviction became final before *Blakely* but after *Apprendi*.

rule. Indeed, *Blakely* merely applied the rule announced in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). On the same day that the Supreme Court decided *Blakely*, the Court held that *Ring* v. *Arizona*, 536 U.S. 584, 592-593 (2002), another application of *Apprendi*, was properly classified as "procedural" because its holding did not alter the range of conduct or class of persons that the law punishes. Similarly, *Blakely* announced a procedural rule; like *Ring*, *Blakely* altered only *the range of permissible methods* for determining a defendant's sentence.

Moreover, the rule announced in *Blakely* is "new" for *Teague* purposes because there was no binding precedent that existed at the time the defendant's conviction became final that required a court to direct the jury to make findings, beyond a reasonable doubt, to determine whether sentencing enhancements should be imposed under the United States Sentencing Guidelines. To the contrary, because the defendant was sentenced within the statutory maximum, existing precedent at the time of his conviction contemplated that the judge would make these findings, not the jury.

Finally, the rule announced in *Blakely* is not retroactively applicable to the defendant's case on collateral review because it does not fall within either of the two exceptions to the *Teague* rule; that is, it does not: (1) place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to

prescribe; nor does it (2) constitute a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Indeed, the Court rejected the argument that the rule announced in *Ring*, *Blakely*'s predecessor, constituted a watershed rule retroactively applicable under *Teague*'s second exception. Accordingly, like *Ring*, *Blakely* is not retroactively applicable to cases on collateral review, and this Court should affirm the district court's dismissal of the defendant's Section 2255 motion.

ARGUMENT[4]

BLAKELY IS NOT RETROACTIVELY APPLICABLE TO CASES ON COLLATERAL REVIEW

A. Standard Of Review

This Court reviews *de novo* the district court's dismissal of the defendant's Section 2255 motion. See, *e.g.*, *Ivy* v. *Pontesso*, 328 F.3d 1057, 1059 (9th Cir.), cert. denied, 540 U.S. 1051 (2003).

B. Applicable Legal Standards

More than a decade ago, the Supreme Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become

[4] Pursuant to Circuit Rule 22-1(f), the United States does not address the uncertified issues presented in the defendant's opening brief.

final before the new rules are announced." *Teague* v. *Lane*, 489 U.S. 288, 310 (1989). "*Teague* by its terms applies only to procedural rules," and not to substantive rules deciding the meaning or scope of a criminal statute. *Bousley* v. *United States*, 523 U.S. 614, 620 (1998). "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2523 (2004). "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Id.* at 2522-2523 (quoting *Bousley*, 523 U.S. at 620). By contrast, rules of procedure "generally do not apply retroactively [because t]hey do not produce a class of persons convicted of conduct that the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* 2523.

A rule of criminal procedure is "new" for *Teague* purposes "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301; see also *Gonzales* v. *Pliler*, 341 F.3d 897, 904 (9th Cir. 2003) ("If the rule a habeas petitioner seeks to assert can be 'meaningfully distinguished from that established by binding precedent at the time his * * * conviction became final,' the rule is a 'new' one, typically inapplicable on collateral

review."). The "new rule" principle therefore "validates reasonable, good-faith interpretations of existing precedents made by * * * courts even though they are shown to be contrary to later decisions." *Butler* v. *McKellar*, 494 U.S. 407, 414 (1990). Accordingly, a conviction or sentence will not be disturbed unless it can be said that the court, at the time the conviction or sentence became final, acted in a manner that was "objectively unreasonabl[e]." *O'Dell* v. *Netherland,* 521 U.S. 151, 156 (1997).

There are two exceptions to *Teague*'s bar on retroactive application of new rules of criminal procedure. First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[5] *Teague*, 489 U.S. at 311; accord *United States* v. *Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir.), cert. denied, 537 U.S. 939 (2002)). Second, a new rule should be applied retroactively if it constitutes a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311). The Supreme Court has "repeatedly emphasized the limited scope of the second *Teague* exception, explaining that 'it is

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[5] The Supreme Court recently noted that rules that fall within this first exception "are more accurately characterized as substantive rules not subject to [*Teague*'s] bar." *Schriro*, 124 S. Ct. at 2522 n.4.

clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.'" *Beard* v. *Banks*, 124 S. Ct. 2504, 2513 (2004) (quoting *O'Dell*, 521 U.S. at 157); see also *Sanchez-Cervantes*, 282 F.3d at 669 n.23 (noting that the Supreme Court has "stated that not all new rules relating to due process or the fundamental requirements of due process alter our understanding of bedrock procedural elements" so as to qualify as "watershed rules" under *Teague*). Furthermore, the Supreme Court has explicitly noted that "[t]his class of rules is extremely narrow, and 'it is unlikely that any . . . ha[s] yet to emerge.'" *Schriro*, 124 S. Ct. at 2523 (quoting *Tyler* v. *Cain*, 533 U.S. 656, 667 n.7 (2001)). Thus, "it should come as no surprise that [the Supreme Court] has yet to find a new rule that falls under the second *Teague* exception." *Beard*, 124 S. Ct. at 2513-2514.

Thus, when a defendant attempts to claim the benefit of a judicial opinion issued after the defendant is convicted, the court must first determine whether the opinion announces a rule of criminal procedure or whether it is a substantive rule. *Ibid.* If the court determines that the rule is procedural, the court must then conduct a *Teague* analysis in three steps:

> First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must survey the legal landscape as it then existed and determine

> whether a * * * court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Jones v. *Smith*, 231 F.3d 1227, 1237 (9th Cir. 2000) (quoting *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994)).

As explained below, *Blakely* announced a new constitutional rule of criminal procedure that cannot be retroactively applied to the defendant's case on collateral attack because it does not fit within either of the two *Teague* exceptions.

C. Blakely *Announced A Constitutional Rule Of Criminal Procedure*

In evaluating whether *Blakely* is a constitutional rule of criminal procedure, it is necessary to briefly examine the genesis of the Court's decision in that case. *Blakely* has its roots in the Supreme Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), where the Court announced the following rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Ring* v. *Arizona*, 536 U.S. 584, 592-593 (2002), the Supreme Court applied the rule announced in *Apprendi* to require that a jury, rather than a judge, determine the existence of any aggravating factor required to authorize the imposition of the death penalty under the relevant state sentencing scheme.

In *Blakely*, the Supreme Court extended the rule announced in *Apprendi* and *Ring* to invalidate an upward departure under the Washington state sentencing guidelines that was imposed on the basis of facts found by the judge at sentencing, even though the sentence was lower than the statutory maximum for the crime. The Court held that the sentence violated the Sixth Amendment because the sentence was imposed based on facts that were "neither admitted by [the defendant] nor found by a jury." *Blakely*, 124 S. Ct. at 2533. More importantly, the Court defined the phrase "statutory maximum" to mean "the maximum sentence a judge may

impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*." *Id*. at 2537.

As the foregoing makes clear, *Blakely* announced a rule of criminal procedure, rather than a substantive rule of law. Indeed, on the very same day it decided *Blakely*, the Supreme Court held that its decision in *Ring*, the immediate predecessor of *Blakely*, was "properly classified as procedural." *Schriro*, 124 S. Ct. at 2523. Like the holding at issue in *Ring*, the holding in *Blakely* did not alter the range of conduct made criminal by Washington law, and "rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize." *Ibid.* Instead, *Blakely*, like *Ring*, "altered the range of permissible methods for determining [a defendant's punishment], requiring that a jury rather than a judge find the essential facts bearing on punishment." *Ibid.* As Justice Scalia (the author of both *Schriro* and *Blakely*) wrote for the Court in *Schriro*, "[r]ules that allocate decisionmaking authority in this fashion are prototypical procedural rules." *Ibid.*

Furthermore, all of the federal courts of appeals to address the issue have held that *Apprendi*, the progenitor of both *Ring* and *Blakely*, announced a rule of criminal procedure, rather than a substantive rule. See *United States* v. *Swinton*, 333 F.3d 481, 488-489 (3d Cir. 2003) (citing cases). Thus, it is clear that *Blakely*, like

Ring and *Apprendi*, announced a rule of criminal procedure rather than a substantive rule, and that this Court must conduct a *Teague* analysis to determine whether this rule applies to the defendant's case on collateral review.

D. Teague *Bars Retroactive Application Of Blakely To The Defendant's Case On Collateral Review*

1. Blakely *Announced A New Rule Under* Teague

In order to determine whether the procedural rule announced in *Blakely* is "new" for *Teague* purposes, this Court must: (1) determine when defendant's conviction and sentence became final; and (2) survey the legal landscape as it then existed and decide whether a court considering the defendant's claim at that time would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution. *Jones*, 231 F.3d at 1237.

The defendant's conviction and sentence became final on April 5, 2004, when the Supreme Court denied his petition for a writ of certiorari. See *Clay* v. *United States*, 537 U.S. 522, 527 (2003) (explaining that a conviction becomes final when Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires"). An examination of the legal landscape at that time demonstrates that a district court judge was not prohibited, by the precedent existing at that time, from

determining at sentencing a defendant's role in the offense or his use of a minor or from imposing any other sentence enhancement under the United States Sentencing Guidelines, when the resulting sentence was within the statutory maximum. Indeed, this Court and all other federal courts of appeals to address this issue after *Apprendi* but before *Blakely* was decided upheld such enhancements against *Apprendi* challenges. See, *e.g.*, *United States* v. *Alvarez*, 358 F.3d 1194, 1211-1212 (9th Cir.), cert. denied, 125 S. Ct. 126 (2004); *Simpson* v. *United States*, 376 F.3d 679, 681 (7th Cir. 2004) (citing cases).

Thus, *Blakely* must be considered a "new rule" for *Teague* purposes because there was no binding precedent that existed at the time the defendant's conviction became final that required a court to direct the jury to make findings, beyond a reasonable doubt, concerning the defendant's role in the offense or his use of a minor, etc. To the contrary, the uniform and binding precedent at the time required the judge to make these findings, not the jury. Moreover, the only federal court of appeals to directly address whether *Blakely* announced a new rule of constitutional criminal procedure has concluded that it did. See *Simpson,* 376 F.3d at 681 ("The rule announced in *Blakely* is based in the Constitution and was not dictated or compelled by *Apprendi* or its progeny.").

Finally, in applying *Blakely* to the United States Sentencing Guidelines, the

Supreme Court in *United States* v. *Booker*, No. 04-104 (Jan. 12, 2005), slip. op. 15 (opinion of Breyer, J.), did not invalidate the statute as a whole, but rather, made the guidelines advisory instead of mandatory. In stating that this holding must be applied "to all cases on direct review," *id.* at 25 (opinion of Breyer, J.), the Court cited *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987), for the proposition that "a *new rule* for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." (emphasis added).

2. The Rule Announced In Blakely *Does Not Fit Within Either Of The* Teague *Exceptions*

As noted above, the two *Teague* exceptions apply to new rules that: (1) place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prescribe," *Teague*, 489 U.S. at 311 (citation omitted), or (2) constitute "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495 (quoting *Teague*, 489 U.S. at 311); accord *Sanchez-Cervantes*, 282 F.3d at 668-669. In this case, it is clear that the first exception is not applicable to the rule announced in *Blakely* because that case did not place any kind of conduct beyond the reach of the criminal law, let alone the federal civil rights conspiracy offense of

which the defendant was convicted. Cf. *Schriro*, 124 S. Ct. at 2523-2524. Accordingly, this case does not fit within the first *Teague* exception.

It is also clear from the Supreme Court's recent decision in *Schriro* that the rule announced in *Blakely* does not fit within the second *Teague* exception because it does not constitute the type of "watershed rule" that implicates either fundamental fairness or accuracy to such a degree as to be "implicit in the concept of ordered liberty." *Beard*, 124 S. Ct. at 2513 (citation omitted). To the contrary, the Supreme Court in *Schriro* rejected the argument that *Ring* constituted a watershed rule of criminal procedure, even though *Ring*, like *Blakely*, prohibited a sentence to be increased above the otherwise applicable statutory maximum unless a jury found the facts authorizing such an enhancement under the reasonable doubt standard. 124 S. Ct. at 2524-2526.

In rejecting the argument that *Ring* constituted a watershed rule, the Court noted that the relevant question was whether judicial fact-finding so "'*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct that the law does not reach." *Id.* at 2525 (quoting *Teague*, 489 U.S. at 312-313). Given that "many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*," the Court found it "implausible" that "judicial factfinding so '*seriously* diminishe[s]' accuracy as to produce an

'impermissibly large risk' of injustice." *Ibid.* Thus, because the Supreme Court has directly rejected the argument that *Ring* constitutes a watershed rule of criminal procedure, and given that *Ring* is the immediate predecessor to *Blakely* and that its reasoning parallels *Blakely*, it is clear that *Blakely* does not constitute a watershed rule of criminal procedure that may be applied retroactively to cases on collateral review. See also *Sanchez-Cervantes*, 282 F.3d at 669 (holding that *Apprendi* did not announce a watershed rule of criminal procedure to be applied retroactively to cases on collateral review); *Cook* v. *United States*, 386 F.3d 949, 950 (9th Cir. 2004) (observing that "the Supreme Court has not made *Blakely* retroactive to cases on collateral review" for purposes of authorizing a second or successive Section 2255 motion).[6]

Finally, the defendant's contention (Def. Br. 8-9, 13-14) that this Court's decision in *United States* v. *Ameline*, 376 F.3d 967 (9th Cir. 2004), supports his argument that *Blakely* announced a watershed rule that is retroactively applicable to

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[6] Although the retroactivity standard for successive motions is slightly different than the retroactivity standard for initial Section 2255 motions because the Supreme Court itself must make the rule retroactive for purposes of a successive
Section 2255 motion, the Eleventh Circuit noted in *In re Dean*, 375 F.3d 1287 (11th Cir. 2004), that "the Supreme Court has strongly implied that *Blakely* is not to be applied retroactively[,]" even to initial Section 2255 motions. This Court cited *Dean* in deciding *Cook*.

his case is without merit. To the contrary, *Ameline* reaffirmed the general rule that this Court will apply changes in existing law that occur *while a case is pending*, but not ones that occur after a case becomes final. See *id.* at 974 (citing *DeGurules* v. *INS*, 833 F.2d 861, 863 (9th Cir. 1987)); see also *Booker*, slip op. 25 (opinion of Breyer, J.) (stating that its application of *Blakely* to the federal sentencing guidelines must be applied "to all cases on *direct* review" (emphasis added)).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of the defendant's Section 2255 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE is proportionally spaced, has a typeface of 14 points, and contains 4774 words.

____

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CERTIFICATE OF SERVICE

I hereby certify, that on January 19, 2005, two copies of the foregoing UNITED STATES' BRIEF AS APPELLEE were served by first-class mail, postage prepaid, on:

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