No. 07-____

IN THE

Supreme Court of the United States

JIMMY RAY VALENTINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Based on its own factual findings by a preponderance of the evidence under the then-mandatory Federal Sentencing Guidelines, the district court sentenced Petitioner to prison for 23 years more than what would have been allowed based on the facts found by the jury. Petitioner's sentence became final after *Apprendi v. New Jersey* but before *United States v. Booker*.

The questions presented are:

1. Did *Booker* announce a new rule or was it dictated by *Apprendi*?
2. If *Booker* announced a new rule, is it a watershed rule of criminal procedure entitling it to retroactive application?

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PETITION FOR WRIT OF CERTIORARI

Jimmy Ray Valentine respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The orders of the district court denying Mr. Valentine's motions for relief under 28 U.S.C. § 2255 (Pet. App. 102a-109a), for leave to amend his § 2255 motion (Pet. App. 100a-101a), and for a certificate of appealability (Pet. App. 110a-113a) are unreported. The order of the Sixth Circuit granting a certificate of appealability (Pet. App. 114a-115a) is unreported. The opinion of the Sixth Circuit is reported at 488 F.3d 325 (Pet. App. 1a-55a). The order of the Sixth Circuit denying the petition for rehearing en banc (Pet. App. 116a) is unreported.

JURISDICTION

The Sixth Circuit issued its opinion on May 14, 2007. On December 17, 2007, the Sixth Circuit denied Mr. Valentine's petition for rehearing en banc. On February 21, 2008, Justice Stevens extended the time to file a petition for a writ of certiorari until May 15, 2008. Pet. App. 117a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

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

STATEMENT OF THE CASE

This case presents the important and recurring issue of whether a defendant whose sentence became final after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but before *United States v. Booker*, 543 U.S. 220 (2005), may invoke *Booker* on collateral review. In this case, a divided panel of the United States Court of Appeals for the Sixth Circuit held that (1) *Booker* was a "new rule" not dictated by *Apprendi*, and (2) *Booker*'s new rule did not apply retroactively as a watershed rule of criminal procedure. If *Booker* were to apply to this case, as it does to cases on direct review, Mr. Valentine's sentence would likely be significantly reduced because, contrary to *Booker*, his maximum sentence was increased based on judicial findings by a preponderance of the evidence.

A. Petitioner's Conviction, Sentence, And Direct Appeal

In 1999, a grand jury charged Mr. Valentine and several others with conspiring to distribute and to possess with intent to distribute an unspecified quantity of cocaine, crack cocaine (also known as cocaine base), and marijuana.[1] Pet. App. 118a-120a.

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[1] The text following the conspiracy charge identifies 21 U.S.C. §§ 846(a), 841(a), and 841(b)(1)(A). The former two provisions govern the elements of the offense, and the latter—

At trial, the district court instructed the jury that the government was not required to prove drug quantity as an element of the offense,[2] and the jury found Mr. Valentine guilty of the conspiracy charge with respect to cocaine and crack cocaine. Pet. App. 56a-57a. Consistent with the court's instruction, the verdict did not attribute any particular amount of drugs to Mr. Valentine. Accordingly, Mr. Valentine faced a statutory maximum sentence of twenty years' imprisonment. *See* 21 U.S.C. § 841(b)(1)(C) (providing for imprisonment of "not more than 20 years" if the crime involves an unspecified quantity of drugs). The Federal Sentencing Guidelines, in turn, assigned a base offense level of 12 for an unspecified quantity of drugs, and that level prescribed a sentencing range of 10 to 16 months' imprisonment. *See* U.S. Sentencing Guidelines Manual

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§ 841(b)(1)(A)—specifies the penalty for an offense involving at least 50 grams of crack cocaine (or 5 kilograms or more of cocaine). The indictment, however, did not specify any quantity. The penalty provision governing an unspecified quantity of drugs is § 841(b)(1)(C). A final penalty provision—§841(b)(1)(B)—governs offenses involving 5 or more grams of crack cocaine (or 500 grams or more of cocaine).

[2] The court stated:

> You heard a lot of testimony about quantities, but the Government is not required to prove that defendants conspired to distribute or possess with intent to distribute any particular amount of cocaine or cocaine base; in other words, crack cocaine, or marijuana. Quantity is simply not an element in this offense.

Pet. App. 126a.

§ 2D1.1(c)(14) & ch. 5, pt. A (Sentencing Table) (1998).

In sentencing Mr. Valentine, the district court made two findings under the Sentencing Guidelines, each by a preponderance of the evidence, that increased Mr. Valentine's maximum sentence. Pet. App. 127a-136a. First, the court found that Mr. Valentine was responsible for 1.5 kilograms of crack cocaine, which resulted in a base offense level of 38—as opposed to the base offense level of 12 for an unspecified quantity. Pet. App. 128a-131a. Second, while "unconvinced" that Mr. Valentine was "an organizer/leader" of the conspiracy, the district court nonetheless found that Mr. Valentine played an aggravating role in the offense, for which the court increased his offense level by 2 points to level 40. *See* U.S. Sentencing Guidelines Manual § 3B1.1(c); Pet. App. 133a-134a. Because Mr. Valentine was a first-time offender, the district court placed Mr. Valentine in Criminal History Category I. Pet. App. 135a. For that category, along with offense level 40, the Guidelines prescribed a sentencing range of 292 to 365 months' imprisonment. Pet. App. 135a.

The district court observed that the range essentially amounted to "life in prison." Pet. App. 128a. The court denounced the long sentence as not "fair." Pet. App. 128a; *see also* Pet. App. 68a (stating that the Guidelines "call[ed] for much too severe a punishment"). Because, however, application of the Guidelines was mandatory, the court concluded that the long sentence was nothing it could "have anything to say about," Pet. App. 128a, and the court sentenced Mr. Valentine to 292 months in prison, the lowest end of the prescribed range, Pet. App. 135a.

This sentence was 52 months longer than the 240-month (20-year) statutory maximum governing drug convictions based on an unspecified quantity, and at least 276 months (23 years) longer than the 10-to-16-month Guidelines sentence consistent with the facts found by the jury.

On appeal, Mr. Valentine argued, among other things, that his sentence should be vacated and remanded in light of *Apprendi*, which this Court decided while his appeal was pending. Pet. App. 96a. (Thus, *Apprendi* was available to Mr. Valentine on direct appeal.) *Apprendi* held that any fact, other than a prior conviction, that increases the maximum penalty for a crime must be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. The Sixth Circuit rejected Mr. Valentine's *Apprendi* argument.

The Sixth Circuit acknowledged that the district court plainly erred by instructing the jury that drug quantity was not an element that the government had to prove and by sentencing Mr. Valentine beyond the 20-year statutory maximum governing drug convictions involving an unspecified quantity. Nevertheless, the Sixth Circuit determined that the error "'did not seriously affect the fairness, integrity, or public reputation of judicial proceedings' because it is clear beyond a reasonable doubt that any jury would have found that the conspiracy involved more than 5 grams of crack," thereby extending the statutory maximum for the offense to 40 years. Pet. App. 99a (quoting *United States v. Cotton*, 535 U.S. 625, 632-33 (2002)); *see* 21 U.S.C. § 841(b)(1)(B) (setting penalty of 5 to 40 years for offense involving 5 or more grams of cocaine base). The Sixth Circuit

therefore affirmed Mr. Valentine's conviction and sentence. Pet. App. 99a.

B. Petitioner's Motion For Relief Under 28 U.S.C. § 2255

After exhausting his direct appeals, Mr. Valentine, acting *pro se*, timely moved for relief under 28 U.S.C. § 2255, alleging ineffective assistance of counsel. Pet. App. 102a. Shortly thereafter, this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), holding unconstitutional the application of Washington's determinate sentencing law, which permitted a court to make findings to impose a sentence beyond the "standard range." Accordingly, within the time period for seeking § 2255 relief, Mr. Valentine sought leave to amend his § 2255 petition to raise a sentencing claim under *Blakely*. Pet. App. 137a-138a. Namely, Mr. Valentine relied on *Blakely* to assert that his sentence violated the Sixth Amendment because it was increased based on the district court's findings of drug quantity and role in the offense. Pet. App. 137a-138a. The district court denied Mr. Valentine's motion for leave to amend, determining that *Blakely* did not apply on collateral review and, therefore, that an amendment to raise his sentencing claim would be futile. Pet. App. 100a-101a. The court also rejected Mr. Valentine's claim of ineffective assistance of counsel. Pet. App. 104a-108a. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2255.

Mr. Valentine filed an application for a certificate of appealability, which the district court denied. Pet. App. 110a-113a. Mr. Valentine thereafter filed a *pro se* appeal with the Sixth Circuit. Pet. App. 114a-

115a. While that appeal was pending, this Court decided *Booker*, which held unconstitutional the mandatory application of the Federal Sentencing Guidelines. The Sixth Circuit construed Mr. Valentine's *pro se* appeal as an application for a certificate of appealability and granted a certificate on both Mr. Valentine's ineffective assistance of counsel claim and his request to amend his § 2255 motion to raise his sentencing claim. Pet. App. 114a-115a. The Sixth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

C. The Court Of Appeals' Decision

On appeal, a divided panel of the Sixth Circuit concluded that *Booker* announced a "new rule" that did not apply on collateral review to petitioners, like Mr. Valentine, whose convictions became final after *Apprendi* but before *Booker*—therefore, the panel majority rejected Mr. Valentine's sentencing claim. Pet. App. 1a-55a. The majority nonetheless acknowledged that, if *Booker* did apply, Mr. Valentine stated a "cognizable *Booker* claim[ ]" entitling him to be resentenced because his sentence had been increased based on facts found by a judge by a preponderance rather than by a jury beyond a reasonable doubt. Pet. App. 5a.

In reaching its conclusion on whether *Booker* applied, and noting that "new rules" generally do not apply on collateral review, the majority first considered whether the rule of *Booker* was in fact "new." Pet. App. 5a-9a. The majority held that *Booker* is a new rule, even in light of *Apprendi*. Pet. App. 9a. The majority further held that the "new rule" of *Booker* did not apply on collateral review

because it was neither a substantive rule nor a watershed rule of criminal procedure, the two types of new rules that may apply retroactively on collateral review. Pet. App. 10a-11a.

In a lengthy dissent, Judge Martin disagreed with both of the majority's holdings. As to the majority's new-rule analysis, he stated that "neither *Blakely* nor *Booker* created a new rule, but merely applied the rule already laid down in *Apprendi*." Pet. App. 30a (Martin, J., concurring in part & dissenting in part). Elaborating, he stated that *Booker* "simply applied the same legal principles . . . articulated in *Apprendi* and *Blakely* to a new sentencing scheme." Pet. App. 41a. "Revolutionary as the holding in *Booker* may have seemed," Judge Martin continued, "the true upheaval actually occurred in *Apprendi* through its resuscitation of the Sixth Amendment jury trial right." Pet. App. 41a. Therefore, Judge Martin asserted, *Booker* should apply to habeas petitioners, like Mr. Valentine, "whose convictions became final *after* the Court issued its decision in *Apprendi*." Pet. App. 30a.

As to the majority's holding that *Booker* does not apply on collateral review even as a watershed rule of criminal procedure, Judge Martin noted that "a strong argument can . . . be made that" *Booker* should be applied on collateral review as a watershed rule because it is a rule "clearly . . . implicating fundamental fairness and accuracy." Pet. App. 46a-47a n.10.

The Sixth Circuit denied Mr. Valentine's petition for rehearing en banc. Pet. App. 116a. Mr. Valentine now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for two reasons.

First, as this Court recognized in granting certiorari on the similar *Blakely* question presented in *Burton v. Waddington*, 547 U.S. 1178 (2006), *decided sub nom. Burton v. Stewart*, 127 S. Ct. 793 (2007), the question of whether *Booker* applies on collateral review is of great national importance. It implicates the fundamental constitutional rights of due process and trial by jury and affects numerous prisoners nationwide. Moreover, the *Booker* and *Blakely* questions have generated a conflict among the courts. This Court's resolution is warranted.

Second, the language of this Court's precedent shows that the Sixth Circuit and other courts of appeals have erred in not applying *Booker* on collateral review. This Court's decisions show that *Booker* is not a new rule but merely was dictated by *Apprendi*. Even if *Booker* had announced a new rule, this Court's decisions further show that *Booker*'s effect on criminal proceedings entitles it to retroactive application as a watershed rule of criminal procedure.

I. *BOOKER*'S APPLICABILITY ON COLLATERAL REVIEW IS A QUESTION OF GREAT NATIONAL IMPORTANCE, IMPLICATING FUNDAMENTAL CONSTITUTIONAL RIGHTS

This case presents the Court with an opportunity to resolve the important and recurring issue of whether *Booker* applies on collateral review. A decision on that issue will also likely provide

definitive guidance on whether *Blakely* applies on collateral review.

This Court recognized the importance of this *Booker* issue when it granted certiorari in *Burton* to address the similar *Blakely* question, but the Court was unable to address the question because that petitioner's claim was procedurally barred. Since *Burton*, the issue of *Booker*'s and *Blakely*'s applicability on collateral review has continued to recur in and divide the courts. Therefore, this Court should grant the petition to decide the issue squarely presented by this case of whether *Booker* applies on collateral review.

A. Whether *Booker* Applies On Collateral Review Is A Question Of National Importance Implicating The Fundamental Constitutional Rights To Due Process And Trial By Jury

As this Court has noted, the rights involved in the *Apprendi* line of cases "are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.'" *Apprendi*, 530 U.S. at 476-77 (citations omitted; alteration in original). These protections are "basic precepts, firmly rooted in the common law" that "have their genesis in the ideals [of] our constitutional tradition," *Booker*, 543 U.S. at 230, 238, and "have been acknowledged by courts and treatises since the earliest days of graduated sentencing," *Blakely*, 542 U.S. at 302. Accordingly, at common law, a judge could not "impose a more severe sentence than the

maximum authorized by the facts found by the jury." *Apprendi*, 530 U.S. at 482 n.9.

This traditional restriction on judicial power, resuscitated by *Apprendi*, is not a "mere procedural formality." *Blakely*, 542 U.S. at 306. It reflects a fundamental judgment by the Framers of the Constitution about how to allocate authority in our constitutional system. *See Jones v. United States*, 526 U.S. 227, 244 (1999) (noting that "tension between jury powers and powers exclusively judicial would likely have been very much to the fore in the Framers' conception of the jury right"). As the Court explained in *Blakely*, the right to have a jury find, beyond a reasonable doubt, all facts essential to the punishment imposed "reflects . . . the need to give intelligible content to the right of jury trial. That right is . . . a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." 542 U.S. at 305-06.

Booker held that mandatory application of the Federal Sentencing Guidelines was inconsistent with these constitutional rights. Under *Booker*, federal defendants are now being sentenced in a manner consistent with the Constitution. *Booker* also explicitly permitted defendants whose sentences were still on direct appeal, like the defendants in *Booker*, to seek resentencing in that constitutional manner. 543 U.S. at 268 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

Yet *Booker* is of importance to more than those defendants sentenced now and in the future. *Booker* "mean[s] that virtually every federal sentence handed

down during the *last twenty years* [when the mandatory Federal Sentencing Guidelines were in effect] had been imposed in an illegal fashion." Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 940 (2006) (emphasis added). Thus, the question of whether *Booker* applies to prisoners already on collateral review is "something more than a purely academic exercise." Pet. App. 50a (Martin, J., concurring in part & dissenting in part). It concerns how long a defendant "will spend in prison based on facts that were not found by a jury beyond a reasonable doubt," and for numerous defendants still in prison the issue "carries profound implications regarding both the length of sentences and the methods by which they are imposed." Pet. App. 49a (Martin, J., concurring in part & dissenting in part).

Mr. Valentine's case illustrates the profound implications that *Booker*'s application would have for defendants seeking to invoke *Booker* on collateral review, and why guidance from this Court is warranted. Based on the jury verdict alone, which contained no finding of an amount of drugs, Mr. Valentine's sentencing range under the Guidelines would have been 10 to 16 months. Because, however, the Guidelines required the district court to increase Mr. Valentine's maximum sentence based on the court's findings of drug quantity and role in the offense, Mr. Valentine's sentencing range became 292 to 365 months, and he was sentenced to 292 months.

If Mr. Valentine were resentenced consistent with *Booker*, he would likely receive a sentence shorter than the 24-year sentence he is serving—indeed,

closer, if not significantly closer, to the 10 to 16 months authorized by the jury's verdict. While the district court would have broad discretion in imposing a sentence within the statutory range (here, up to 20 years), it would not be obligated to adhere to the range prescribed by the Guidelines even with its judicial findings of drug quantity and role in the offense. Notably, at Mr. Valentine's sentencing, the judge expressed strong disagreement with that range, asserted that such a lengthy sentence was unfair, and imposed the minimum allowed. Pet. App. 128a-135a. It is therefore likely that, under *Booker*, the district court would sentence Mr. Valentine to some amount less, if not substantially less, than the 20-year statutory maximum. *Cf. United States v. Davis*, 397 F.3d 340, 349 (6th Cir. 2005) (vacating for resentencing under *Booker* when "the district court's comments at sentencing make it seem likely . . . that Defendant would have gotten [a shorter sentence] had the court used its discretion"); *accord United States v. Hall*, 411 F.3d 651, 653 (6th Cir. 2005); *United States v. Hamm*, 400 F.3d 336, 340 (6th Cir. 2005).

Accordingly, the applicability of *Booker* on collateral review is significant for Mr. Valentine and other habeas petitioners. Of course, it is unlikely that every petitioner seeking relief based on *Booker* would benefit from this Court holding that *Booker* applies on collateral review. As an initial matter, if the Court determines that *Apprendi* dictated *Booker*, that ruling would not reach petitioners whose sentences became final *before Apprendi* was decided. Even for those petitioners with sentences governed by *Apprendi*, this Court's decision would not affect

those without sentence enhancements implicating *Blakely* or *Booker*. *See Booker*, 543 U.S. at 275-76 (Stevens, J., dissenting). Nonetheless, the number of potentially affected petitioners makes the issue important well beyond this single case.[3]

In addition to the significance of the *Booker* issue to numerous prisoners nationwide, this issue and the constitutional rights that are involved broadly implicate important societal values. As Judge Martin observed in dissent below, "[o]f . . . greater importance than any numerical disparities in the lengths of sentences . . . is the less concrete but more profound value of imposing criminal sentences *only after* ensuring that vital, centuries-old Constitutional guarantees have been met." Pet. App. 53a. "[T]he *Apprendi* line of cases," Judge Martin continued, "means much more than how long the government can send a defendant to jail—it speaks volumes about how we, as a democratic society, are able to follow the strictures that represent the very backbone of our legal and Constitutional system." Pet. App. 53a-54a. To give effect to these important societal values embodied in the Constitution, this Court should

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[3] Notably, while the number of prisoners standing to benefit from the application of *Booker* on collateral review is significant, it is not so great as to overwhelm the courts. Even with the increased number of § 2255 motions since *Booker* was decided, the judiciary has been able to "handle[] the increased workload flowing from *Booker* without any additional funding." *See* Admin. Office of the U.S. Courts, Report on the Impact of the *Booker* Case on the Workload of the Federal Judiciary 3 (2006), *available at* http://www.uscourts.gov/library/BookerReport.pdf.

grant the petition and determine whether *Booker* applies on collateral review.

B. This Court Recognized The Importance Of *Booker*'s Applicability On Collateral Review When It Granted Certiorari In *Burton*

This Court came close to resolving the issue of *Booker*'s applicability when it granted certiorari in *Burton*, "to determine whether [the] decision in *Blakely v. Washington* announced a new rule [in light of *Apprendi*] and, if so, whether it applie[d] retroactively on collateral review." *Burton v. Stewart*, 127 S. Ct. 793, 794 (2007) (per curiam) (citation omitted). *Burton* was likely to provide guidance on the similar *Booker* issue because *Blakely* and *Booker* are similarly reasoned and based on the same constitutional premise—that judicial factfinding by a preponderance of the evidence at sentencing can violate the Sixth Amendment. *See Booker*, 543 U.S. at 226 (considering "[w]hether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant"); *Blakely*, 542 U.S. at 298 ("We consider whether [judicial factfinding] violated petitioner's Sixth Amendment right to trial by jury."); *see also Booker*, 543 U.S. at 233 (holding that "there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]").

The Court, however, never addressed the merits of the questions presented in *Burton*. In that case, the

sentencing challenge was raised in an unauthorized "second or successive" habeas petition, which deprived the district court of jurisdiction. *Burton*, 127 S. Ct. at 796. That, in turn, precluded the Court from considering the *Blakely* issue, and accordingly no light was shed on whether *Booker* might apply on collateral review. *Id.*

This case presents the Court with an opportunity to answer the *Booker* question. In addition to providing definitive guidance on *Booker*'s applicability, the Court's answer could also provide definitive guidance on *Blakely*'s applicability. The same reasons that warranted review in *Burton* warrant review here.

C. The Question Of *Booker*'s Applicability On Collateral Review Is Ripe For This Court's Consideration

Whether *Booker* applies on collateral review is a question that will now benefit only from this Court's consideration; further percolation in the courts of appeals is unlikely to be of assistance. Nine federal courts of appeals have published opinions on whether *Apprendi* dictated *Booker* and, if not, whether *Booker* applies retroactively. *See* Pet App. 1a-55a; *Guzman v. United States*, 404 F.3d 139, 144 (2d Cir. 2005); *Lloyd v. United States*, 407 F.3d 608, 615-16 (3d Cir. 2005); *United States v. Morris*, 429 F.3d 65, 72 (4th Cir. 2005); *United States v. Gentry*, 432 F.3d 600, 605-06 (5th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005); *Never Misses A Shot v. United States*, 413 F.3d 781, 783 (8th Cir. 2005) (per curiam); *United States v. Cruz*, 423 F.3d 1119, 1120 (9th Cir. 2005) (per curiam); *United*

States v. Bellamy, 411 F.3d 1182, 1188 (10th Cir. 2005); *see also Hicks v. United States*, 146 F. App'x 396, 398 (11th Cir. 2005) (per curiam) (unpublished opinion). Courts of appeals have also addressed the question of *Booker*'s applicability on collateral review for petitioners sentenced before *Apprendi*. *See In re Fashina*, 486 F.3d 1300, 1306-07 (D.C. Cir. 2007); *Cirilo-Muñoz v. United States*, 404 F.3d 527, 533 (1st Cir. 2005); *Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005) (per curiam); *see also Humphress v. United States*, 398 F.3d 855, 860 (6th Cir. 2005). Additionally, courts of appeals have considered whether *Blakely* applies on collateral review to defendants sentenced after *Apprendi*. *See, e.g.*, *United States v. Hernandez*, 436 F.3d 851, 855 (8th Cir. 2006); *Schardt v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005); *United States v. Price*, 400 F.3d 844, 849 (10th Cir. 2005).

Moreover, some state courts have held contrary to the federal courts of appeals—creating a divergence of views that would benefit from this Court's review.[4]

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[4] Commentators have noted the need for this Court's review. *See* Robert L. Boone, Comment, Booker *Defined: Examining the Application of* United States v. Booker *in the Nation's Most Divergent Circuit Courts*, 95 Cal. L. Rev. 1079, 1112 (2007) (noting courts' reluctance to apply *Booker* on collateral review and concluding that courts will continue to apply *Booker* narrowly "[p]ending clarification by the Supreme Court"); Nicholas J. Eichenseer, Comment, *Reasonable Doubt in the Rear-View Mirror: The Case for* Blakely-Booker *Retroactivity in the Federal System*, 2005 Wis. L. Rev. 1137, 1137-38 (noting "the pressing question of whether the thousands of federal prisoners sentenced before *Blakely* and *Booker* are entitled to . . . relief"); Jon Wool, *Beyond* Blakely*: Implications of the*

See Smart v. State, 146 P.3d 15, 35 (Alaska Ct. App. 2006) (holding that *Blakely*'s requirement of proof beyond a reasonable doubt applies retroactively under state retroactivity standards); *Isaac v. State*, 911 So. 2d 813, 814-15 (Fla. Dist. Ct. App. 2005) (per curiam) (applying *Blakely* to a petitioner sentenced after *Apprendi* and before *Blakely*).

As the volume and division of the case law suggest, the Court's decision on the questions presented in this case would clarify the state of the law for numerous prisoners like Mr. Valentine who were sentenced under the mandatory application of the Guidelines. Moreover, with the issue already addressed by most courts of appeals, further percolation is unlikely to occur or be significant. Final guidance from this Court is warranted.

II. THE SIXTH CIRCUIT'S REFUSAL TO APPLY *BOOKER* ON COLLATERAL REVIEW CONFLICTS WITH THIS COURT'S PRECEDENT

This Court's review is also warranted because the Sixth Circuit's decision conflicts with unequivocal language in this Court's opinions showing that *Booker* did not announce a "new rule," but instead merely applied the principle announced in *Apprendi*. Therefore, *Booker* applies on collateral review to

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Booker *Decision for State Sentencing Systems*, 17 Fed. Sent'g Rep. 285, 2005 WL 2922207, at *6-7 (2005) (explaining that neither *Blakely* nor *Booker* hold that their rulings apply on collateral review, which has created unresolved questions for courts).

sentences that became final after *Apprendi*. Furthermore, even if *Booker* had announced a new rule, *Booker*'s effect on criminal proceedings makes it a watershed rule of criminal procedure warranting retroactive application.

A. The Court Of Appeals' Holding That *Booker* Is A New Rule Conflicts With This Court's Precedent

Language and reasoning in the *Apprendi* line of cases make clear that *Apprendi* dictated the decision in *Booker*. Accordingly, *Booker* should apply on collateral review to sentences governed by *Apprendi*.

"Under the *Teague* [*v. Lane*, 489 U.S. 288 (1989),] framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 127 S. Ct. 1173, 1180 (2007). A decision announces a "new rule" if it "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was *not* "*dictated* by precedent existing at the time the defendant's conviction became final." *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (quoting *Teague*, 489 U.S. at 301) (internal quotation marks omitted). A decision does not announce a new rule if it merely applies or was dictated by existing precedent. *Goeke v. Branch*, 514 U.S. 115, 121 (1995) (per curiam); *Teague*, 489 U.S. at 307.

Applying these principles here, it is clear that *Apprendi*, not *Booker*, is the "new rule" that required the result in *Booker*. In *Apprendi*, this Court held that judicial factfinding that increases the maximum prison sentence for an offense violates a defendant's

"constitutional right to have a jury find" all facts essential to the imposition of a particular sentence "on the basis of proof beyond a reasonable doubt." 530 U.S. at 475-76.

Because the sentencing enhancement held unconstitutional in *Apprendi* was created by statute, the Court unsurprisingly phrased its holding in terms of a "statutory" maximum, writing that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490; *see Booker*, 543 U.S. at 238 (explaining that the Court in *Apprendi* phrased its holding in terms of a "statutory maximum" because "we were only considering a statute in that case"). But the particular scheme at issue in *Apprendi* did not limit the principle that decision announced—that any fact that increases a defendant's maximum sentence must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490; *see also id.* at 494 ("[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

In her dissenting opinion in *Apprendi*, Justice O'Connor predicted the effect of applying *Apprendi* to determinate sentencing schemes like those at issue in *Blakely* and *Booker*. She correctly observed that the principle underlying *Apprendi* was that "any fact (other than prior conviction) that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable

doubt." *Id.* at 543-44. Foreseeing how the Court would apply *Apprendi* in *Blakely* and *Booker*, Justice O'Connor concluded:

> The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal Sentencing Guidelines).

Id. at 544.[5]

Subsequent decisions applied *Apprendi* to hold unconstitutional state sentencing regimes. In *Ring v. Arizona*, 536 U.S. 584 (2002), which involved an Arizona law permitting the trial judge alone to find the "aggravating factors" required to increase a defendant's sentence from life in prison to the death penalty, the Court reiterated that, "[i]f a State makes

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[5] Similarly, the dissenting opinion of Justice Breyer, which defended determinate sentencing laws as "necessary for the fair functioning of the criminal justice system," *id.* at 555 (Breyer, J., dissenting), was premised on the notion that *Apprendi* sounded the death knell for such laws. See also *Rita v. United States*, 127 S. Ct. 2456, 2486 (2007) (Souter, J., dissenting), noting that *Apprendi* held that it was impermissible for "a judge alone . . . [to] find a fact necessary to raise the upper limit of a sentencing range," and that "[f]rom the moment *Apprendi* drew that line . . . its holding carried apparent implications for the regime of Guidelines sentencing adopted in 1984."

an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602 (citing *Apprendi*, 530 U.S. at 482-83). *Apprendi* was thus all the authority the Court needed to find the Arizona law unconstitutional. *Id.* at 609 ("Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S. at 494 n.19, the Sixth Amendment requires that they be found by a jury.").

Then, in *Blakely*, the Court applied *Apprendi* to Washington's sentencing scheme, which permitted a judge to impose a sentence above the "standard range" if the judge found "'substantial and compelling reasons justifying an exceptional sentence.'" *Blakely*, 542 U.S. at 299 (citation omitted). In the very first sentence of the opinion, the Court made clear that its analysis broke no new ground: "This case requires us *to apply* the rule we expressed in *Apprendi* . . . ." *Id.* at 301 (emphasis added). In concluding that the judicial factfinding allowed by the Washington scheme was unconstitutional, the Court emphasized, as it did in *Ring*, that under "the rule we expressed in *Apprendi*," the "'statutory maximum' . . . is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 301, 303 (citing *Ring*, 536 U.S. at 602) (emphasis in original).

Booker was the next decision in this Court's *Apprendi* line of cases. Dealing this time with the federal sentencing scheme, *Booker* reached the inevitable conclusion that mandatory application of the Federal Sentencing Guidelines violated the

principle of *Apprendi* because judicial findings based on a preponderance of the evidence, rather than jury findings by proof beyond a reasonable doubt, could increase a defendant's maximum sentence. *Booker* repeatedly makes clear that it, like *Blakely*, was simply another application of *Apprendi*. For instance, the Court described the constitutional defect of the Federal Sentencing Guidelines as an "*Apprendi* problem." *Id.* at 234; *see also id.* at 326 (Breyer, J., dissenting) ("The Court today *applies* its decisions in *Apprendi v. New Jersey* and *Blakely v. Washington* to the Federal Sentencing Guidelines." (citations omitted; emphasis added)).[6] Further, in holding that its "*Apprendi* line of cases" applied to the Guidelines, the Court stated that it was simply "reaffirm[ing] [its] holding in *Apprendi*." *Id.* at 229, 244; *see also id.* at 259 (discussing the constitutionality of the Guidelines in terms of "*Apprendi*'s requirement").

Since *Booker*, the Court has continued to confirm that *Booker* merely applied *Apprendi* to reach its result. *See, e.g.*, *Cunningham v. California*, 127 S. Ct. 856, 864 (2007) (acknowledging that *Booker* "reaffirmed the rule of *Apprendi*," merely "applying" that decision to different facts).

As the Court's decisions show, *Booker* did not create a new rule, but merely applied the rule in

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[6] See also *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting) (emphasis added), noting that, before *Booker*, "courts with the foresight to *apply Apprendi* to the Guidelines" had "require[d] any additional facts necessary for a possible high subrange sentence to be charged and submitted to the jury."

Apprendi. *Booker* should therefore apply to petitioners, like Mr. Valentine, whose sentences are governed by *Apprendi*.

B. The Court Of Appeals' Decision Also Conflicts With This Court's Precedent That, Even If *Booker* Is A New Rule, It Is A Watershed Rule Of Criminal Procedure Warranting Retroactive Application

Even if the Sixth Circuit had correctly concluded that *Booker* announced a new rule notwithstanding *Apprendi*, this Court's review is warranted because the Sixth Circuit's holding that *Booker* was not a watershed rule misapplied this Court's precedent. This Court has made clear that—in rejecting judicial findings by a preponderance of the evidence for facts increasing a defendant's maximum Guidelines sentence, in favor of jury findings beyond a reasonable doubt—*Booker* announced a watershed rule. That watershed rule is entitled to retroactive application.

Unlike the new-rule analysis discussed above, which focuses on whether a certain result in one case follows from precedent established in a previous case, the watershed-rule analysis focuses on the effect that the rule has on the criminal proceeding. Thus, as this Court has explained, even a new rule can apply retroactively on collateral review if it is a "watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton*, 127 S. Ct. at 1180 (alteration in original; internal quotation marks omitted)).

As relevant here, this Court has recognized that proof beyond a reasonable doubt—the proof that

Booker requires, along with jury factfinding, to increase a defendant's maximum Guidelines sentence—is fundamental to the fairness and accuracy of criminal proceedings. To be sufficiently "fundamental" to warrant retroactive application, the rule "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* at 1182 (internal quotation marks omitted). The reasonable-doubt standard that *Booker* applies to sentencing proceedings meets this test because, as the Court has observed, that standard is a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 U.S. 358, 363 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). In *Winship*, which held that the Constitution required the beyond-a-reasonable-doubt standard in criminal proceedings, the Court reasoned that "a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of *fundamental fairness*, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *Id.* (alteration in original; emphasis added; and internal quotation marks omitted).

The reasonable-doubt standard is also critical to the accuracy of criminal proceedings—the other requirement for retroactive application of a watershed rule of criminal procedure. This Court has instructed that the standard "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.*; *see also Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975) (discussing how the reasonable-doubt

standard promotes "the societal interests in the reliability of jury verdicts"). Importantly, the Court has noted that the standard "overcome[s] an aspect of a criminal trial," *i.e.*, the risk of conviction based on factual error, "that substantially impairs the truth-finding function." *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (per curiam); *see also Winship*, 397 U.S. at 362 (noting that the reasonable-doubt standard "developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property" (internal quotation marks omitted)).

Indeed, the Court has not hesitated to apply retroactively its decisions in *Winship* and *Mullaney*. *See Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977) (applying *Mullaney* retroactively); *Ivan V.*, 407 U.S. at 205 (applying *Winship* retroactively).[7] Of course, *Winship* and *Mullaney* dealt with the reasonable-doubt standard for the determination of guilt, not for the imposition of a sentence. Nonetheless, in *Apprendi*, the Court wrote that fairness and accuracy concerns—the crucial factors in retroactivity analysis under *Teague*—required that the reasonable-doubt standard apply in sentencing proceedings.[8] The Court observed that the standard

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[7] Although these cases were decided prior to *Teague*, they are consistent with *Teague*'s reasoning. *See Schriro v. Summerlin*, 542 U.S. 348, 357 (2004) (deeming pre-*Teague* retroactivity authority "germane" to the *Teague* analysis).

[8] Dismissing any distinction between how *Winship*'s protections apply to determinations of guilt and to sentencing determinations, the Court wrote:

serves fundamental fairness concerns by "'provid[ing] concrete substance for the presumption of innocence.'" *Apprendi*, 530 U.S. at 484 (quoting *Winship*, 397 U.S. at 363). As to accuracy, the Court emphasized that the reasonable-doubt standard "reduce[s] the risk of imposing . . . deprivations [of liberty] erroneously." *Id.*

The fairness and accuracy concerns that supported the Court's holding in *Apprendi* also underlie *Booker*'s application of the reasonable-doubt requirement to sentencing proceedings under the Federal Sentencing Guidelines. *See Booker*, 543 U.S. at 243-44. Like *Winship* and *Mullaney*, *Booker*, too, should be applied retroactively.

In holding otherwise, the Sixth Circuit and other courts refusing to apply *Booker* retroactively (*see, e.g.*, *Guzman*, 404 F.3d at 143-44; *McReynolds*, 397 F.3d at 480) have relied on this Court's holding in *Schriro v. Summerlin*, 542 U.S. 348 (2004)—the only decision in the *Apprendi* line of cases in which this Court evaluated retroactivity. *Schriro* held that *Ring*

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.

Apprendi, 530 U.S. at 484.

was not a watershed rule. That holding, however, does not prevent *Booker* from applying retroactively.

The issue in *Ring* was solely whether the factfinder (of aggravating factors authorizing the death penalty) should be the judge or the jury. *Ring* did not address the appropriate standard of proof because the sentencing scheme at issue already required proof beyond a reasonable doubt. *See Ring*, 536 U.S. at 597 & n.4. *Booker*, on the other hand, held unconstitutional not only judicial factfinding requiring an increased sentence under the Federal Sentencing Guidelines, but also such factfinding by a preponderance of the evidence. Accordingly, the conclusion in *Schriro*—that *Ring*'s requirement of jury, rather than judicial, fact-finding does not amount to a watershed rule—does not apply to *Booker*. *See United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028 n.9 (D. Neb. 2005) ("Although a misallocation of factfinding responsibility (judge versus jury) does not warrant retroactive application, the same cannot be said for the retroactivity of application of a preponderance of evidence standard as opposed to a reasonable doubt standard."), *aff'd*, 158 F. App'x 754 (8th Cir. 2005).

In rejecting the combination of judicial factfinding by a preponderance of the evidence in favor of the combination of jury factfinding beyond a reasonable doubt, *Booker* announced a watershed rule. This Court should grant review and, if it determines that *Booker* is a new rule, the Court should further determine that *Booker* is a watershed rule that applies on collateral review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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