

**Ninth Circuit Court of Appeals No. 04-36008
District Court No. CR-02-32-M-DWM**

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

RICARDO BAUTISTA-RAMOS,

Defendant-Appellant.

OPENING BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

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SUBMITTED: February 7, 2005

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OPENING RECORD OF DEFENDANT-APPELLANT

I. JURISDICTION

A. IN THE DISTRICT COURT

The United States District Court for the District of Montana had jurisdiction over Petitioner-Appellant Ricardo Bautista-Ramos' motion to vacate his sentence under 28 U.S.C. §§ 2241 and 2255, because Mr. Bautista-Ramos filed his motion to correct his sentence before the same district court that originally sentenced him.

B. APPELLATE JURISDICTION

This Court has appellate jurisdiction over this case, pursuant to 28 U.S.C. §

2253(c), because the district court issued a certificate of appealability authorizing review of the district court's denial of Mr. Bautista-Ramos' motion to vacate his sentence. (CR 31; ER 79.)

C. APPEALABILITY OF THE DISTRICT COURT ORDER AND TIMELINESS OF APPEAL

Mr. Bautista-Ramos filed this appeal in timely fashion because the district court issued its denial of his motion to vacate his sentence on October 14, 2004, which included a certificate of appealability, and Mr. Bautista-Ramos filed his notice of appeal of that denial on October 20, 2004, in compliance with the time limit set forth in Rule 4 of the Federal Rules of Appellate Procedure. (CR 32; ER 80-82.)

II. STATEMENT OF THE ISSUES

CERTIFIED ISSUE

- A. Whether the Supreme Court’s holding in Part One of *United States v. Booker* applies retroactively to Mr. Bautista-Ramos’ sentence?¹

NON-CERTIFIED ISSUE

- B. Whether the Supreme Court’s remedy announced in Part Two of *United States v. Booker* applies retroactively to Mr. Bautista-Ramos’ sentence?²

III. STATEMENT OF THE CASE

A. NATURE OF THE APPEAL

Mr. Bautista-Ramos appeals the district court’s denial of his motion to vacate his sentence, which the district court based on its ruling that the Supreme Court’s holding in *Blakely v. Washington*, 124 S.Ct. 2531 (U.S. 2004), does not apply to cases on collateral review. That challenge was certified for appeal by the

¹ The question actually certified by the district court asked whether the holding in *Blakely v. Washington* applies retroactively to Mr. Bautista-Ramos’ sentence, which of course assumed that the holding in *Blakely* applies to the United States Sentencing Guidelines. *Booker* issued subsequently, and Justice Stevens’ opinion of the Court (“Part One”) ratified that assumption. Thus, Mr. Bautista-Ramos has substituted “the holding in Part One of *United States v. Booker*” for “the holding in *Blakely v. Washington*.”

² Herein, “Part Two” refers to Justice Breyer’s opinion of the Court.

district court. Mr. Bautista-Ramos also asks this Court to answer a question implicated by the Supreme Court's subsequent application of *Blakely* in *United States v. Booker*, 2005 WL 50108 (2005) — namely, does the constitutional remedy announced in Part Two of *Booker* apply to Mr. Bautista-Ramos' sentence in the context of his first and timely challenge under 28 U.S.C. § 2255? The district court never had an opportunity to reach that issue, as *Booker* was issued subsequent to the district court's denial of Mr. Bautista-Ramos' motion under § 2255.

B. COURSE OF THE PROCEEDINGS

On May 17, 2002, Mr. Bautista-Ramos was indicted for being an illegal alien found in the United States without authorization after having been deported, in violation of 8 U.S.C. § 1326(a). The Indictment did not allege that Mr. Bautista-Ramos had been convicted of an aggravated felony prior to deportation. (CR 4; ER 1-2.)

On July 1, 2002, Mr. Bautista-Ramos entered a guilty plea to that offense. At the change of plea hearing, Mr. Bautista did not admit that he had been convicted of an aggravated felony prior to deportation. (CR 37; ER 3-27.)

The Presentence Investigation Report (“PSR”) subsequently generated by the United States Probation Office assigned to Mr. Bautista-Ramos a Total Offense

Level of 21, based on a Base Offense Level of 8, a sixteen-level increase in offense level for alleged aggravated felony convictions prior to deportation, and a three-level reduction for timely acceptance of responsibility. The PSR also assigned Mr. Bautista-Ramos 13 criminal history points, which barely put him in Criminal History Category of Level VI. Based on the foregoing, the PSR set Mr. Bautista-Ramos' sentencing range at 77-96 months imprisonment. (CR 18; ER 50-51; PSR, ¶¶ 20-28, 30-40, and 59.)

Neither party filed any formal objections to the above calculations, but Mr. Bautista-Ramos filed a sentencing memorandum advancing five grounds for downward departure from the 77-96 month range: (1) over-representation of Criminal History Category; (2) cultural assimilation to the United States; (3) family ties and responsibilities; (4) consent to deportation following imprisonment; and (5) a combination of the foregoing factors. (CR 16.)

At sentencing, held on September 19, 2002, the district court rejected Mr. Bautista-Ramos' departure arguments. (CR 18; ER 47-51.) The court sentenced Mr. Bautista-Ramos at the low end of his assigned guideline range to a sentence of 77 months imprisonment, to be followed by three years of supervised release. (CR 18; ER 55.) The court's written Judgment issued on September 19, 2002. (CR 19; ER 62-67.) Mr. Bautista-Ramos filed a Notice of Appeal on September 27, 2002.

(CR 20; ER 68-69.)

Mr. Bautista-Ramos' appeal focused on the issue of whether the district court erroneously failed to recognize its discretion to look at mitigating facts relating to Mr. Bautista-Ramos' prior convictions with an eye toward whether his Criminal History Category was over-representative. A panel of this Court held in an unpublished memorandum that it lacked jurisdiction over the appeal because the district court had recognized its discretion to depart in the case of an over-representative Criminal History Category. *United States v. Bautista-Ramos*, 61 Fed.Appx. 449 (2003). The panel denied rehearing on June 12, 2003, and the Supreme Court denied certiorari on October 20, 2003. *Bautista-Ramos v. United States*, 540 U.S. 976 (2003).

On September 20, 2004, Mr. Bautista-Ramos filed a motion under 28 U.S.C. § 2255 to vacate his sentence. (CR 30; ER 70-75.) He alleged that his sentence was "increased based on facts not charged or found by a jury beyond a reasonable doubt, in violation of the Sixth Amendment right to a jury trial." The "facts" referenced by Mr. Bautista-Ramos were the fact and nature of his alleged aggravated felony convictions prior to deportation. (CR 30; ER 73.) In support of his claim, Mr. Bautista explained that the purported "prior conviction exception"

first articulated in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), does not apply to holdings based on the Sixth Amendment right to a jury trial, such as the holdings in *Blakely* and *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). (CR 30; ER 74.)

On October 14, 2004, the district court denied Mr. Bautista-Ramos' motion to vacate his sentence. In so doing, the court ruled that the holding in *Blakely* does not apply to cases on collateral review. However, recognizing that Mr. Bautista-Ramos had advanced a colorable argument, the court granted a certificate of appealability regarding the issue of whether the holding in *Blakely* applies to cases on collateral review. (CR 31; ER 76-79.) On October 20, 2004, Mr. Bautista-Ramos filed his Notice of Appeal. (CR 32; ER 80-82.)

C. DISPOSITION IN THE DISTRICT COURT

The district court originally sentenced Mr. Bautista-Ramos to 77 months imprisonment, to be followed by three years of supervised release. (CR 19; ER 62-67.) The district court has now denied Mr. Bautista-Ramos' motion to vacate that sentence on the ground that the sentence was impermissibly increased on the basis of alleged prior aggravated felony convictions, the existence and nature of which were never charged nor proved to a jury beyond a reasonable doubt. The court ruled that the holding in *Blakely* does not apply to cases on collateral review. The

court granted a certificate of appealability relating to that ruling.

D. BAIL STATUS

Mr. Bautista-Ramos is presently serving his 77 month term of imprisonment at California City CI. His full address is set forth in the certificate of service.

IV. STATEMENT OF FACTS

A. The Alleged Aggravated Felonys Prior to Deportation

Mr. Bautista-Ramos' PSR assigned him a sixteen-level increase in his offense level on the basis of alleged aggravated felony convictions prior to deportation. (PSR, ¶ 21.) Mr. Bautista-Ramos did not object to that assignment at sentencing. (CR 18; ER 37.) However, he has never knowingly admitted, under the beyond a reasonable doubt standard, that he has received an aggravated felony conviction prior to deportation.

B. Relevant Sentencing Factors Under Part 2 of *Booker*

1. Over-representative Criminal History Category

The PSR assigned Mr. Bautista-Ramos 13 criminal history points, the least number of points resulting in a Criminal History Category of Level VI. (PSR, ¶ 30-40.)

Six of Mr. Bautista-Ramos' criminal history points related to events that

transpired when he was an immature young man, before he became a father.³ Three of those points related to an alleged conviction in 1990 for the attempted sale of cocaine. (PSR, ¶ 32.) Mr. Bautista-Ramos was 23 years old at the time. He proffered to the district court that the relevant transaction involved a quarter gram of cocaine, and that in all, only a gram of cocaine was seized from him. (CR 16.) Three more points related to a 1993 firearm prosecution that involved no violence. (PSR, ¶ 33.) Mr. Bautista-Ramos was 26 years old at that time.

A majority of Mr. Bautista-Ramos' 13 criminal history points — i.e., 7 points — related to domestic disputes between him and his wife that occurred during the two years that preceded his present prosecution; as Mr. Bautista-Ramos attempted to demonstrate to the district court, these criminal history points resulted in large part because Mr. Bautista-Ramos' wife employed false allegations and devious tactics to frustrate his attempts to be with his children.⁴

³ Mr. Bautista-Ramos is currently 38 years old. He has three children, ages 10, 6, and 5.

⁴ The facts alleged in the following paragraphs are documented in some part by the PSR (¶¶ 34-40) and are supported in larger part by letters submitted in support of Mr. Bautista-Ramos' sentencing memorandum. The letters were authored by Mr. Bautista-Ramos, his sister-in-law Rosemary Bautista, and his brother Jose Bautista. (ER 28-34.) The district court considered the letters before denying Mr. Bautista-Ramos a downward departure from his guideline sentencing

Just prior to his arrest for the above gun offense, Mr. Bautista-Ramos had married a United States citizen named Jonna Jordan, the daughter of Mr. Bautista-Ramos' boss on a farm in Montana. Mr. Bautista-Ramos had moved to Montana because his brother Jose lived there with his wife Rosemary and their children. While Mr. Bautista-Ramos was in prison for the gun offense, Jonna gave birth to the first of their three children. Family life worked a very positive change on Mr. Bautista-Ramos. Upon meeting his daughter Teresa for the first time, he resolved to live a life free of crime so that he would not be an absent parent. In the following four years, he and Jonna had a boy and another girl. The family lived in Vancouver, Washington. Mr. Bautista-Ramos was, and is, devoted to all of his children. Although his illegal immigration status complicated his search for steady employment, he worked when he could, and he watched his children when he was out of work.

Jonna, unfortunately, deteriorated into an unfit mother. She drank heavily and abused prescription medications. She also abused Mr. Bautista-Ramos. Because he was not interested in using alcohol or drugs, Jonna associated with other persons, including other men, who would. Eventually, Jonna tired of her relationship with Mr. Bautista-Ramos. At one point, Jonna had one of her cousins

range. (CR 19; ER 37-38.)

break Mr. Bautista-Ramos' jaw so that she could appropriate his pain medications.

Although an unfit mother, Jonna did not want to give up the children. When she tried one day to leave with them, Mr. Bautista-Ramos sought to incapacitate the family vehicle. She called the police and claimed that he hit her. The incident led to three misdemeanor charges against Mr. Bautista-Ramos, plus a restraining order. He was at a disadvantage because, unlike Jonna, he lacked legal status, and he spoke little English. He pled guilty and received a short jail term on the advice from his public attorney that going to trial would lengthen the time before he would see his children again.

Because of the restraining order and his lack of steady employment, Mr. Bautista-Ramos had nowhere to stay in Washington. He rejoined his brother's family in Montana. Although he became close with his brother's children, he yearned to be with his own children. He worked hard to buy them toys and school supplies, which he sent them in the mail.

After Mr. Bautista-Ramos had been in Montana for a few months, Jonna called his brother's house. Apparently, she had a scheme to finalize her separation with Mr. Bautista-Ramos and her custody of their children. She told Rosemary that she had asked the court in Washington to dissolve the restraining order against Mr. Bautista-Ramos. Rosemary was suspicious, but she relayed the information to

Mr. Bautista-Ramos. A few days later, Jonna showed up at Jose's house with the children. She was more interested in plying Rosemary for painkillers than in taking Mr. Bautista home to Washington. When Rosemary refused to share the pain medications she had been prescribed following a recent surgery, Jonna proposed that Mr. Bautista-Ramos seek more medication for his jaw, which still hurt from the earlier beating at the hands of Jonna's cousin.

Mr. Bautista-Ramos returned to Washington with Jonna so that he could be with his children. Shortly after the family arrived there, Jonna called the police and claimed that Mr. Bautista-Ramos had suddenly showed up in Vancouver and started stalking her. She also claimed that he hit her, though there was no physical evidence of an assault. As it turns out, Jonna had never asked the court to dissolve the restraining order.

A felony warrant was put out for Mr. Bautista-Ramos' arrest, because of which he avoided Jonna. But that also kept him away from his children. He could only stand that for so long. He wanted nothing to do with Jonna, but there was no way to see his children without contacting her. He learned that she had taken them to her boyfriend's apartment. He went there. After releasing the air in one of her tires so that she could not drive away with the children, he attempted to contact Jonna from a nearby payphone. The police were called to the scene, and Mr.

Bautista-Ramos was arrested for misdemeanor violation of the restraining order and for felony violation of the restraining order based on Jonna's earlier false allegations. He eventually pled guilty to both charges for the same reason that he had pled guilty to the initial domestic assault charge — i.e., his public defender advised him that it would be pointless, and would likely result in a lengthier incarceration and thus a lengthier separation from his children, if he went to trial.

The sentences resulting from the foregoing domestic matters led directly to four criminal history points in this case, plus three more points because the present offense was committed (1) while Mr. Bautista was on unsupervised probation for the felony violation of the restraining order, and (2) less than two years after Mr. Bautista-Ramos' release from jail for the felony violation. *See* U.S.S.G. § 4A1.1(d) and (e).

2. Cultural Assimilation and Family Ties

Mr. Bautista-Ramos' only real human connections in this world live here in the United States. Nor does Mr. Bautista-Ramos know a life anywhere else.

Following the lead of his older brothers Rosario and Jose, who moved to the United States in the 1970s, Mr. Bautista-Ramos moved to the United States from Mexico in 1980 at the age of 13. Aside from three extremely brief interludes following deportations in 1991, 1996, and 2002, he has been in the United States

since 1980. He has not seen his two sisters, who live in Mexico, since he was 13 and they were, respectively, 11 and 2. He is estranged from his father, who lives in Mexico, because his father left his mother when he was a boy. His mother died in Mexico in 1987.

In contrast, Mr. Bautista-Ramos is close with his brothers and their families, who legally reside in the United States. He lived with Rosario from 1980 to 1988. Since then, he has spent much time with Jose's family, and he is particularly close with Jose's oldest son Fabian.

And of course, Mr. Bautista-Ramos' own three children live here in the United States. He came back to the United States following his most recent deportation so that he could be with them and so that he could live in the country that has been his home for the last two-thirds of his life.

3. Voluntary Deportation and Regional Disparity in Immigration Cases

Before the district court, Mr. Bautista-Ramos volunteered to waive all immigration and deportation proceedings following his term of imprisonment. (CR 19; ER 45.)

Unlike in other regions of the country, where illegal aliens are often simply deported, or where "fast-track" programs are in place, illegal re-entry defendants in Montana are prosecuted to the full extent of the law. Such regional disparity

undermines the goal of sentencing uniformity. See *United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000), *United States v. Estrada-Plata*, 57 F.3d 757 (9th Cir. 1995), and *United States v. Contreras v. Gomez*, 991 F. Supp. 1242 (E.D. Wash. 1998) (all three cases providing overviews of “fast-track” programs implemented in parts of the United States other than Montana prior to Mr. Bautista-Ramos’ prosecution); see also, *United States v. Huerta-Rodriguez*, Cause No. 8:04 CR 365 (D. Neb. 02-01-05) (Judge Bataillon citing regional disparity as a post-*Booker* factor for imposing an illegal re-entry sentence below the advisory guideline range); see also, U.S.S.G. § 5K3.1 (2004) (permitting downward departures pursuant to a “early disposition” program upon motion from the government); finally, see, Testimony of William Mercer, United States Attorney for the District of Montana, *United States Sentencing Commission Public Hearing*, August 19, 2003, at 41 (“[Montana doesn’t] have an early disposition program. We won’t have an early disposition program.”).

V. SUMMARY OF ARGUMENT

The rule in *Blakely v. Washington*, which has been applied by Part One of *Booker* to the United States Sentencing Guidelines, applies retroactively on collateral review because its heightened burden of proof not only vindicates fundamental fairness, but also enhances the accuracy of sentencing.

The remedy announced in Part Two of *Booker* effects a substantive change because it lowers the floor of all sentencing ranges outside Zone A of the Sentencing Table, in essence lowering statutory minimum sentences. As a new substantive rule, it applies retroactively on collateral review.

Insofar as the remedy announced in Part Two of *Booker* has procedural import, it too vindicates fundamental fairness and enhances sentencing accuracy, in particular by allowing sentencing judges more flexibility to consider “real offense conduct” and individual life circumstances, which in turn promotes greater sentencing uniformity. For all of the foregoing reasons, Mr. Bautista-Ramos is entitled to be resentenced under *Booker*.

VI. ARGUMENT

A. **The Supreme Court’s holding in Part One of *United States v. Booker* applies retroactively to Mr. Bautista-Ramos’ sentence.**

Standard of Review

A district court’s decision denying a federal prisoner’s 28 U.S.C. § 2255 motion is reviewed de novo. *United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003).

Reviewability

The district court issued a certificate of appealability authorizing Mr. Bautista-Ramos to obtain review of the issue of whether the Supreme Court’s holding in *Blakely v. Washington* applies to cases on collateral review. As the Supreme Court in *United States v. Booker* has subsequently applied its holding in

Blakely to the United States Sentencing Guidelines, Mr. Bautista has updated the statement of issue.

Argument

In denying Mr. Bautista-Ramos' motion to vacate his sentence, the district court asserted that relevant case law "compels the conclusion that *Blakely* is not retroactively applicable." (CR 31; ER 78.) In reaching that conclusion, the court observed that on the same day that *Blakely* issued, the Supreme Court also announced another decision, *Schriro v. Summerlin*, 124 S.Ct. 2519 (U.S. 2004), holding that an earlier *Apprendi*-based decision had "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Id.* at 2526 (referring to *Ring v. Arizona*, 536 U.S. 584 (2002)).

The district court's syllogism fails, though, because it resulted from the erroneous premise that all new procedural rules emanating from *Apprendi* are necessarily equal for purposes of retroactivity. Ironically, the analysis from *Summerlin*, as opposed to its holding, supplies the clearest explanation for why that premise is flawed. Namely, *Summerlin* addressed an *Apprendi*-based new rule that did not implicate a heightened burden of proof, and thus did not satisfy the accuracy prong of the retroactivity test. *Blakely*, however, and now *Booker*, raise the burden of proof at sentencing from a preponderance of the evidence to beyond

a reasonable doubt. That alteration substantially enhances the accuracy of sentencing determinations.

1. Summerlin held that the rule announced in Ring does not apply retroactively because that rule does not enhance the accuracy of death penalty determinations; had the Supreme Court held that the rule enhances accuracy, the Court would have held that it applies retroactively.

New procedural rules of constitutional law generally are not applied retroactively on collateral review. *Teague v. Lane*, 489 U.S. 288, 305-10 (1989) (plurality opinion); and *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989) (majority opinion adopting *Teague*), abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002). This general rule has two exceptions. The first, not implicated here, applies to “rules that place an entire category of primary conduct beyond the reach of the criminal law.” *Sawyer v. Smith*, 497 U.S. 227, 241 (1990) (citing *Teague*, 489 U.S. at 311). The second, squarely implicated herein, applies to new rules that require “the observance of those procedures that are implicit in the concept of ordered liberty.” *Teague*, 489 U.S. at 311 (internal quotations omitted). This second set of exceptional new rules vindicate two separate principles: (1) the fundamental fairness of the relevant underlying proceeding, and (2) the accuracy of that proceeding. *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *Teague*, 489 U.S. at 312 (citations omitted).

Summerlin concluded that the rule announced in *Ring v. Arizona*, which extended *Apprendi*'s jury finding requirement to capital punishment determinations, does not qualify under the second exception discussed directly above, and therefore does not apply retroactively on collateral review. 124 S.Ct. at 2524-26. The Court began by recalling that *Teague*'s second exception applies to new procedural rules that implicate "the fundamental fairness and accuracy" of the relevant underlying proceeding. *Id.* at 2523 (internal quotations omitted) (emphasis added). The Court emphasized that the exception requires two discrete criteria: "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.'" *Id.* (quoting *Teague*, 489 U.S. at 313).

The Court then evaluated the *Ring* rule in terms of the two criteria. While the Court agreed that the right to a jury determination is fundamental, *id.* at 2526, the Court held that judicial factfinding in capital punishment proceedings does not "seriously diminish[] accuracy as to produce an impermissibly large risk of injustice." *Id.* at 2525 (quotations omitted); and *id.* at 2525-26. The four dissenting justices began their analysis by noting that all nine justices agreed that the *Ring* rule meets the first criteria because it implicates fundamental fairness; the dissenters then explained their belief that juries are better equipped than judges to

apply the value-based community standards that capital punishment determinations entail. *Id.* at 2528 (Breyer, J., dissenting, joined by Stevens, J., Souter, J., and Ginsburg, J.)

Simply stated, had a majority of the Court in *Summerlin* found that the *Ring* rule sufficiently implicates the accuracy of capital punishment determination, the Court would have held that the rule applies retroactively on collateral review.

2. Because, unlike the *Ring* rule, the rule announced in *Blakely* requires a heightened burden of proof, it sufficiently implicates the accuracy of sentencing proceedings that it must be applied retroactively on collateral review. Thus, Mr. Bautista-Ramos' sentence should be vacated.

Significantly, the (absence of) retroactivity of the *Ring* rule did not turn on a modification of the applicable burden of proof, as prior to the announcement of the *Ring* rule, “Arizona law already required aggravating factors to be proved beyond a reasonable doubt.” *Summerlin*, 124 S.Ct. at 2522 n. 1 (citation omitted). The *Ring* rule simply requires a jury, rather than a judge, to find the requisite aggravating factors beyond a reasonable doubt. *Id.* at 2522 (citing *Ring*, 536 U.S. at 603-09). *Blakely*, on the other hand, announced a two-part rule that directly implicates a heightened burden of proof — namely, that, absent a waiver or stipulation, a defendant’s sentencing range cannot be increased based on a given fact unless (1) that fact is found by a jury, (2) beyond a reasonable doubt. 124 S.Ct. at 2536-37; *United States v. Ameline*, 376 F.3d 967, 980 (9th Cir. 2004) (“[W]e hold that the district judge's imposition of this sentence after determining the material sentencing facts by a preponderance of the evidence, rather than relying on a jury's determination of the facts beyond a reasonable doubt, violated Ameline's Sixth Amendment rights as explained in *Blakely*.”) Part One of *Booker* held that the same principle applies to sentencing increases under the mandatory sentencing

scheme that prevailed under the Guidelines at the time of Mr. Bautista-Ramos' sentencing. 125 S.Ct. 748-56.

The concern for accuracy, of course, lies at the heart of the requirement of proof beyond a reasonable doubt in criminal proceedings. The Supreme Court has made that clear in several cases. For instance, in *Cage v. Louisiana*, the Court stated that the reasonable doubt standard "plays a vital role in the American scheme of criminal procedure" because, *inter alia*, "it is a prime instrument for reducing the risk of convictions resting on factual error." 498 U.S. 39, 39-40 (1990) (per curiam) (quotations omitted), overruled on another ground, *Estelle v. McGuire*, 502 U.S. 62, 72 n. 4 (1991). In the seminal reasonable doubt case, *In re Winship*, 397 U.S. 358, 363-64 (1970), wherein the reasonable doubt standard was extended to juvenile delinquency proceedings, the Court observed:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

Moreover, in specifically rejecting a preponderance of the evidence standard, the

Winship Court stated:

There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue....

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364 (quotations omitted).

Indeed, in a later juvenile case, the Supreme Court gave retroactive application to the holding in *Winship* exclusively out of a due process concern for heightened accuracy, stating:

Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.

* * *

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

Ivan V. v. New York, 407 U.S. 203, 204-05 (1972) (quotation and footnote omitted).

The Supreme Court's analysis in *Hankerson v. North Carolina*, 432 U.S. 233 (1977), is similarly instructive. There, the Court gave retroactive application to its earlier holding in *Mullaney v. Wilbur* that a state cannot shift the burden of proof to the defendant to prove that a homicide was mitigated by heat of passion or sudden provocation; rather, if there is any evidence of such passion or provocation, the state is required to prove its irrelevance to the homicide beyond a reasonable doubt. 421 U.S. 684, 703-04 (1975). Tellingly, given the nature of the present appeal, the passion/provocation determination in *Mullaney* was relevant to the defendant's sentence, not his underlying criminal liability, which had to be decided

by the jury before the passion/provocation issue was addressed. *Id.* at 697.

Two years later, applying *Mullaney* retroactively, the Court stated:

In *Ivan V.* [], this Court ... said:

Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect....

Winship expressly held that the reasonable-doubt standard “is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law . . . Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.’ To this end, the reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.’

* * *

Ivan V. controls this case. In *Mullaney v. Wilbur*, as in *In re Winship*, the Court held that due process requires the States in some circumstances to apply the reasonable-doubt standard of proof rather than some

lesser standard under which an accused would more easily lose his liberty. In *Mullaney*, as in *Winship*, the rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that “substantially impairs the truth-finding function.”

* * *

[W]e have never deviated from the rule stated in *Ivan V.* that “(w)here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule (is) given complete retroactive effect.” The reasonable-doubt standard of proof is as “substantial” a requirement under *Mullaney* as it was in *Winship*.

Hankerson, 432 U.S. at 240-44 (internal citations omitted).

In light of the foregoing holdings and pronouncements by the Supreme Court, the standard of proof prong of the rule announced in *Blakely* and now *Booker* renders the Court’s holding in *Summerlin* inapposite to the present challenge. *Summerlin*’s analysis, on the other hand, coupled with the above precedent, compels the conclusion that Part One of *Booker* applies retroactively on collateral review. The district court’s reliance on *Summerlin*’s holding, therefore, as well as its neglect of *Summerlin*’s analysis, led the court to erroneously deny Mr. Bautista-Ramos’ motion to vacate his sentence. Mr. Bautista’s 77 month sentence therefore unconstitutionally exceeds the 12-18 month sentencing range

justified by the facts proven beyond a reasonable doubt by way of his guilty plea.⁵

3. The so-called “prior conviction exception” to the rule of *Apprendi* is dicta that has been subsequently repudiated by a majority of the justices of the Supreme Court.

The so-called “prior conviction exception” to the *Apprendi* rule is no longer, if it ever was, good law. *Apprendi*’s sentence was not increased on the basis of a prior conviction. See *Apprendi v. New Jersey*, 530 U.S. 466, 468-469 (2000); accord *id.* at 490 (“[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”). The “[o]ther than the fact of a prior conviction” lead-in to the *Apprendi* rule is, accordingly, dicta, as it was not essential to the Court’s decision to decide whether the fact of a prior conviction is subject to jury trial under the Sixth Amendment, as opposed to whether such a fact must be alleged in an indictment in federal criminal proceedings pursuant to the Fifth Amendment. Accord *Apprendi, supra*, with *Almendarez-Torres*.

⁵ The 12-18 month figure reflects a base offense level of 8, with no enhancement for an aggravated felony conviction prior to deportation, with a two-level reduction for acceptance of responsibility to level 6, coupled with a Criminal History Category of VI. As explained in the next section of this brief, the aggravated felony increase is unconstitutional because there is not really a “prior

In *Almendarez-Torres*, the Supreme Court held that a federal statute enhancing a sentence — for any alien who reentered the United States illegally — on the basis of recidivism did not make recidivism an “element” of that federal offense, such that it had to be alleged in a federal indictment under the Fifth Amendment. See *Almendarez-Torres*, 523 U.S. at 226-227. When analyzed as a Sixth Amendment trial-by-jury issue, however, the *Apprendi* Court expressly noted that *Almendarez-Torres*’ holding marked “an exceptional departure from the historic practice” undergirding the rule that facts upon which a maximum sentence is contingent are elements of the offense being punished by that sentence and, thus, are the domain of the jury. *Apprendi*, 530 U.S. at 487. *Almendarez-Torres* was, accordingly, explicitly called into doubt — at least if its rationale were extended to the analysis under the Sixth Amendment — by the *Apprendi* Court. *Id.* at 489 (noting that “it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivism issue were contested” under the Sixth, rather than merely the Fifth, Amendment); see also *id.* at 520-521 (Thomas, J., joined by Scalia, J., concurring). Thus, not only is the so-called “prior conviction exception” dicta, it is **disfavored dicta**.

And, perhaps most importantly, no less than five Justices — Justices

conviction exception” to *Apprendi* and its progeny.

Thomas and Scalia, as reflected in Justice Thomas' concurring opinion in *Apprendi*, together with Justices Stevens, Souter, and Ginsburg, as reflected by their joining Thomas' dissenting opinion in *Harris* — agree that facts of prior conviction are *not* exempt from *Apprendi*'s rule. See *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) (“[i]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact — of whatever sort, *including the fact of a prior conviction* — the core crime and the aggravating fact together constitute an aggravated crime” (emphasis added)); see also *Harris v. United States*, 536 U.S. 545, 575 (2002) (Thomas, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (same). And Justice Thomas, whose fifth vote was necessary to make up the *Almendarez-Torres* majority, has since recognized he “succumbed” to error in doing so. See *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring). Indeed, as a corrective, Justice Thomas' concurrence in *Apprendi* is a lengthy treatise on just why *Almendarez-Torres* was not only wrongly decided on its own terms under the Fifth Amendment, but is indefensible when subjected to analysis under the Sixth Amendment. See *Apprendi*, 530 U.S. at 501-523.

Mr. Bautista-Ramos advances the foregoing argument not so much because he expects this Court to reach its merits, but rather to demonstrate that his

argument about the retroactivity of Part One of *Booker* is not moot simply because the “fact” at issue in his case is whether he has a prior conviction for an aggravated felony. Mr. Bautista-Ramos respectfully submits that he has made a colorable argument that such a “fact” is not excepted from the rule of *Apprendi*, as now extended by Part One of *Booker*. Thus, the parties should have an opportunity to litigate the (dubious) viability of the prior conviction exception before the district court on remand. Moreover, for reasons explained below, Mr. Bautista-Ramos’ sentence should be vacated and remanded for resentencing in accordance with Part Two of *Booker*.

B. The Supreme Court’s remedy announced in Part Two of *United States v. Booker* applies retroactively to Mr. Bautista-Ramos’ sentence.

Case law cited at the outset of *Summerlin* instructs that Part Two of *Booker* (a.k.a. the Remedy Opinion), in which the Supreme Court transformed the Guidelines’ mandatory directive, also applies retroactively to cases on collateral review. In the context of the present case, regardless of whether the applicable advisory guideline sentencing range would reflect a prior aggravated felony conviction, the district court would have much greater flexibility to take into account the factors set forth in the Statement of Facts section of this brief.

1. Part Two of *Booker* announced a substantive change that automatically applies retroactively because otherwise Mr. Bautista-

Ramos will continue to face a punishment that was impermissibly imposed upon him.

As recognized in case law cited at the outset of *Summerlin*, new constitutional rules that are substantive in nature apply retroactively to cases on collateral review:

When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). As to convictions that are already final, however, the rule applies only in limited circumstances. New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, see *Bousley v. United States*, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, see *Saffle v. Parks*, 494 U.S. 484, 494- 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). [FN4] 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. *Bousley*, supra, at 620, 118 S.Ct. 1604 (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)).

FN4. We have sometimes referred to rules of this latter type as falling under an exception to *Teague's* bar on retroactive application of

procedural rules, see, e.g., *Horn v. Banks*, 536 U.S. 266, 271, and n. 5, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002) (per curiam); they are more accurately characterized as substantive rules not subject to the bar.

Summerlin, 124 S.Ct. at 2522-23 (emphasis added).

A new rule that decriminalizes conduct is of course substantive, but, as is reflected in the language emphasized above, so is a new rule that reduces the penalty for an offense. That proposition is confirmed by the directive borrowed from Justice Harlan at the outset of the Supreme Court’s seminal retroactivity analysis set forth in *Teague v. Lane*:

Justice Harlan believed that new rules generally should not be applied retroactively to cases on collateral review. He argued that retroactivity for cases on collateral review could “be responsibly [determined] only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise. The relevant frame of reference, in other words, is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available.”

409 U.S. at 305-06 (quoting *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., opinion concurring in judgments in part and dissenting in part)).

Bearing that directive in mind, it is clear from the language of 28 U.S.C. § 2255 that one of the “purposes for which the writ of habeas corpus is made

available” is to ensure that defendants do not serve illegally excessive imprisonment. Indeed, the statute reads in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Id.

The government will no doubt argue that Part Two of *Booker* works a procedural change, rather than a substantive change, because it directs district courts to undertake a new sentencing process. Such a contention, though, suffers from at least two flaws. First, a new procedural rule and a new substantive rule are not mutually exclusive from one another. Ultimately, Part Two of *Booker* works both types of changes. Second, the characterization of Part Two’s remedy as solely procedural fails to recall the nature of the ailment — namely, the previously mandatory nature of the Guidelines. It was that mandatory nature that implicated the Sixth Amendment right to a jury trial regarding any fact that would increase punishment. As Justice Stevens wrote for the Court in Part One of *Booker*:

If the Guidelines as currently written could be read as

merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.... Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges; it is that circumstance that makes the Court's answer to the second question presented possible.

125 S.Ct. at 750 (internal citations omitted).

Put otherwise, as reflected in *Blakely*, when the Guidelines were mandatory, the respective guideline sentencing ranges were essentially statutory in force and effect. 124 S.Ct., at 2537 (“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; italicized emphasis original). Such force and effect is lost, though, now that the Guidelines are advisory. However that change might affect the ceiling of a previously mandatory guideline sentencing range,⁶ it clearly lowers the floor of every range outside of Zone A of the Sentencing Table. To use the present case as

⁶ This appeal in no way raises the specter of whether a sentence can be imposed above a now advisory guideline range on the basis of a fact that has not

an illustration (setting aside for a moment the issue of alleged prior aggravated felonies), whereas before the district court was constrained to sentence Mr. Bautista-Ramos within the 77-96 month range, now the facts set forth above in Section B of the Statement of Facts would authorize any reasonable sentence below that range. While the court's arrival at such a sentence would be by way of a new procedural rule, the actual availability of such a sentence constitutes a substantive change. It must be given retroactive application.

been admitted or proved beyond a reasonable doubt.

2. Even if the remedy announced in Part Two of *Booker* is deemed wholly procedural, it should apply retroactively on collateral review to Mr. Bautista-Ramos' sentence.

As explained above, a new rule of criminal procedure will apply retroactively on collateral review if observance of the new procedure is implicit in the concept of ordered liberty such that the procedure vindicates both fundamental fairness and accuracy. *Saffle v. Parks*, 494 U.S. at 495 (1990); *Teague*, 489 U.S. at 311-12. It goes without saying that the remedy announced in Part Two of *Booker*, given that it remedies violations of the Sixth Amendment right to a jury trial, vindicates fundamental fairness. Simply put, the remedy was imposed because defendants were being punished on the basis of facts that had not been admitted or proved beyond a reasonable doubt.

But the analysis of Part Two of *Booker* also makes clear that its remedy was designed to vindicate the accuracy of sentencing. Justice Breyer begins Part Two by describing two potential remedies: (1) retention of the mandatory Guidelines system with the Sixth Amendment jury trial right engrafted onto it; and (2) replacement of the mandatory provisions of the system with advisory language. 125 S.Ct. at 758. It was the latter option, of course, that the majority chose. In so doing, the majority took careful lengths to explain how an advisory system would be better suited to provide for sentencing based on “real conduct,” which in turn

would promote the fundamentally important policy of sentencing uniformity. *Id.* at 759-63. Which is to say, the second option was chosen because the majority found it better suited to vindicate the accuracy in sentencing that was the overarching goal of the Sentencing Reform Act of 1984.

The present case is a perfect example of how the advisory system will enhance the accuracy of sentencing. Rather than being constrained to the facts of Mr. Bautista-Ramos' prior deportations and criminal history, which mechanically assign him a mandatory sentencing range, the district court would be obligated to consider other important individualized factors, such as why Mr. Bautista-Ramos returned to the United States following his last deportation (to be with his family), the length of time he has spent in the United States (two-thirds of his life), whether he has human connections in Mexico (no), whether illegal re-entry defendants tend to receive longer sentences in Montana than elsewhere (yes), and the circumstances of his criminal history (two serious offenses as a young man, followed by a law-abiding period of fatherhood, then more recently blemished by unfortunate domestic offense convictions motivated by love for his children and in part fabricated by his wife).

VII. CONCLUSION

For the reasons set forth above, this Court should reverse the district court's denial of Mr. Bautista-Ramos' motion to vacate his sentence and remand with instruction that the district court resentence Mr. Bautista-Ramos in accordance with the holdings in *United States v. Booker*.

Respectfully submitted February 7, 2005.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed.R.App.P.32(a)(7)(C) and Ninth Circuit Rule 32-1, this Opening Brief complies with the type-volume limitations of Fed.R.App.P.32(a)(7)(B) because it contains 7,927 words, excluding parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii). (An Opening Brief must not exceed 14,000 words, excluding tables and certificates).

This brief complies with the typeface requirements of Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word Perfect, Version 9, in Times New Roman 14.

DATED this 7th day of February, 2005.

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STATEMENT OF RELATED CASES

The undersigned, counsel of record for the Defendant-Appellant RICARDO BAUTISTA-RAMOS, certifies pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, that to his knowledge the following related cases, all involving the *Blakely/Booker* retroactivity issue briefed herein, are pending in this Court: *United States v. Birky*, CA No. 03-30405, *United States v. Timothy Boule*, CA No. 04-35962, *United States v. JoAnn Goodman*, CA No. 04-35996, *United States v. LeMay*, CA No. 05-35111, *United States v. Joseph Warren*, CA No. 04-35756, and *United States v. Zurmiller*, CA No. 04-36130.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on February 7, 2005, a copy of the foregoing Opening Brief has been placed in the United States Mail, postage prepaid, addressed to the following:

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