

UNDER TYLER v. CAIN, THE COMBINATION OF SCHIRO v. SUMMERLIN AND WINSHIP MANDATES APPRENDI'S RETROACTIVE APPLICATION.

In *Tyler v. Cain*, 533 U.S. 656 (2001), the United States Supreme Court held that a new rule of criminal procedure may be made retroactive through a series of that Court's cases:

Justice BREYER observes that this Court can make a rule retroactive over the course of two cases. We do not disagree that, with the right combination of holdings, the Court could do this Multiple cases can render a new rule retroactive only if the holdings in those cases necessarily dictate retroactivity of the new rule.

Tyler, 533 U.S. at 666. In her concurrence, Justice O'Connor explained that the Court "ma[k]es' a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule." *Tyler*, 533 U.S. at 668-69 (O'Connor, J., concurring). Logic compels the retroactive application of *Apprendi* given the Supreme Court's recognition, in *Shiro*, that the *Apprendi* rule implicates fundamental fairness, and, in the host of Supreme Court decisions, of the heightened accuracy afforded by the criminal law's standard of proof beyond a reasonable doubt.

A. *Teague* Mandates That New Recognized Constitutional Rules Of Criminal Procedural Be Applied Retroactively Where The Rule Both: (1) Implicates The Fundamental Fairness Of The Proceeding; And (2) Heightens The Accuracy Or Reliability Of The Outcome.

In the plurality decision in *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court announced that new procedural rules of constitutional law would generally not be applied retroactively to cases on collateral review. That decision has since been adopted by a

majority of the Court. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989). *Teague* and its progeny recognize two exceptions to the general principle that new rules of constitutional procedure not apply retroactively. The first exception, not implicated here, is for “rules that place an entire category of primary conduct beyond the reach of the criminal law.” *Sawyer v. Smith*, 497 U.S. 227 (1990) (citing *Teague*, 489 U.S. at 311).

The second exception requires that a new rule be applied retroactively for “those procedures that are implicit in the concept of ordered liberty.” *Teague*, 489 U.S. at 311 (internal citations omitted). As the Court explained, such rules vindicate two discreet concerns: the fundamental fairness of the underlying proceeding; and the accuracy of that underlying criminal proceeding. *Saffle v. Parks*, 494 U.S. 484, 495 (1990). The *Teague* court explained that it was adapting a rule previously proposed by Justice Harlan: “We believe it desirable to combine the accuracy element of the *Desist*¹ version of the second exception with the *Mackey*² requirement that the procedure at issue must implicate fundamental fairness.” *Teague*, 489 U.S. at 312; *see also id.* at 302-13 (discussing Justice Harlan’s views in detail).

B. In *Schiro*, the Supreme Court Recognized That The *Apprendi* Rule Satisfies *Teague*’s Fundamental Fairness Prong.

¹*Desist v. United States*, 394 U.S. 244, 256-69 (1969) (Harlan, J. dissenting).

²*Mackey v. United States*, 401 U.S. 667, 675-702 (Harlan, J. concurring).

In *Schriro v. Summerlin*, No. 03-526, 2004 WL 1402732, at *5-7 (U.S. June 24, 2004), a five-justice majority concluded that the decision in *Ring v. Arizona*, 536 U.S. 610 (2002), applying *Apprendi* to Arizona's capital sentencing scheme, does not apply retroactively under *Teague*. The Court began by reiterating *Teague*'s second exceptions for rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at *3. The Court proceeded to parse these requirements: "That a new 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) (emphasis in original)). The Court went on to examine and reject the Ninth Circuit's conclusion that *Ring* fell within the second *Teague* exception, concluding that judicial fact-finding under a reasonable doubt standard was not shown to "seriously diminish" the accuracy of the sentencing. *Id.* at *5-7.

The *Schriro* majority's analysis of the second *Teague* exception began with its terse acknowledgment that the rule at issue was "fundamental," *id.* at *3, and then proceeded through a detailed analysis of the accuracy prong of the second exception, *id.* at *5-7. In the end, the Court reiterated that the "right to a jury trial is fundamental to our system of criminal procedure," but held that the *Ring* rule should not apply retroactively because it does not seriously enhance accuracy. *Id.* at *6-7.

The four dissenting justices disagreed, noting various reasons why jury findings are superior. *Schriro*, 2004 WL 1402732, at *9-12 (Breyer, J., dissenting). The dissent began its analysis by noting that all of the justices agreed that "*Ring* meets the first *Teague*

criterion,” by implicating fundamental fairness. *Id.* at *7. It was only on the second prong that the justices disagree. *Id.*³

C. The *Shriro* Court’s Conclusion That *Ring* Should Not Be Applied Retroactively Does Not Apply Here, Where The Lower Standard Of Proof Undermines The Accuracy Of The Proceeding’s Outcome, Because The Determination At Issue In *Ring* Was Made Under The Beyond A Reasonable Doubt Standard.

In *Shriro*, the majority’s analysis turned on its conclusion that the evidence that “judicial factfinding so ‘seriously diminishes accuracy’ . . . is simply too equivocal” to meet the second prong of *Teague*’s second exception to the general rule against retroactivity. *Schriro*, 2004 WL 1402732 at *5 (internal modifications omitted). That conclusion was limited to the *Ring* rule, however, “[b]ecause Arizona law already required aggravating factors to be proved beyond a reasonable doubt.” *Id.* at *2 n.1 (citing *State v. Jordan*, 126 Ariz. 283, 286, 614 P.2d 825, 828 (1980)). Because the rule at issue here allowed judicial factfinding under the diluted preponderance of the evidence standard, *Schriro*’s ultimate conclusion that accuracy is not “seriously diminished” where a judge makes findings beyond a reasonable doubt is inapposite.⁴

³The majority, which had already noted the “fundamental” character of the underlying right, *Schriro*, 2004 WL 1402732, at *3, did not take exception to the dissent’s characterization of the Court’s unanimity as to the first prong of *Teague*’s second exception analysis, although the majority did respond to three other “conten[tions]” of the dissent, *id.* at *6 & n.6.

⁴Justice O’Connor recently indicated in dissent that *Shriro* mandates that *Apprendi* not be applied retroactively. *Blakely v. Washington*, 2004 WL 1402697, at *16 (U. S. June 24, 2004) (O’Connor, J., dissenting). Justice O’Connor statement in *Blakely* is *dicta* in a dissenting opinion and is contrary to the Court’s reasoning in *Schriro*, in which she joined.

D. Increasing The Standard Of Proof From A Preponderance Of The Evidence To Beyond A Reasonable Doubt Seriously Enhances The Reliability And Accuracy Of The Outcome.

The requirement of proof beyond a reasonable doubt is central to protecting the rights of the accused and the accuracy of criminal convictions. The Supreme Court has articulated the importance of that burden of proof in several contexts. In *Cage v. Louisiana*, the Court emphasized the vital role of the reasonable doubt standard in avoiding convictions based on factual error:

[T]he Due Process Clause of the Fourteenth Amendment “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 . . . (1970) . . . This reasonable-doubt standard “plays a vital role in the American scheme of criminal procedure.” *Winship*, 397 U.S. at 363. Among other things, “it is a prime instrument for reducing the risk of convictions resting on factual error.”

498 U.S. 39, 39-40 (1990) (some internal citations omitted). *Winship* itself makes clear that the requirement of proof beyond a reasonable doubt is grounded upon accuracy concerns:

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 interest 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 a commission of a crime when there is reasonable doubt about his guilt.

397 U.S. at 364. The *Winship* Court specifically rejected the margin of error permitted by a preponderance standard:

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 at 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.

Winship, 397 U.S. at 364.⁵

The Supreme Court has repeatedly recognized the enhanced accuracy mandated by the rules in *Winship* and *Mullaney*. In *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972), the Court gave the rule announced in *Winship* retroactive effect, because “the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was

⁵The Court also highlighted society’s discreet interest in a more accurate standard:

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.

Winship, 397 U.S. at 364; *see also Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979) (“The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence.”); *Francis v. Franklin*, 471 U.S. 307, 322 n.8 (1985) (referring to the government’s burden to prove every element beyond a reasonable doubt as grounded in “bedrock due process principles”); *United States v. Nolasco*, 926 F.2d 869, 871 (9th Cir. 1991) (“The reasonable doubt standard gives substance to the presumption of innocence and instills confidence in the community that the innocent will not be condemned.”).

to overcome an aspect of a criminal trial that substantially impairs the truth-finding function.” Subsequently, in *Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977), the Supreme Court relied on *Ivan V.* and applied *Mullaney* retroactively, because “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.’” *Id.* at 242.

The Ninth Circuit’s pattern jury instructions further illustrate this point. Compare Ninth Cir. Model Jury Inst. - Crim. 3.5 (2004),⁶ with Ninth Cir. Model Jury Inst. - Civil 5.1 (2004).⁷ A factfinder who is firmly convinced of the truth of the fact found has reached, a priori, a more reliable conclusion than if he or she had concluded the fact was more likely than not true. As a long line of Supreme Court cases illustrates, the criminal law’s

⁶Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

⁷When a party has the burden of proof on any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

heightened standard of proof seriously enhances the accuracy of determinations.

E. After *Schriro*, The Ninth Circuit's Opinion In *Sanchez-Cervantes* Is No Longer Good Law.

In *United States v. Sanchez-Cervantes*, 282 F.3d 664 (2002), the Ninth Circuit concluded that the *Apprendi* rule should not be applied retroactively. In *Miller v. Gammie*, 335 F.3d 889, 899-901 (9th Cir. 2003) (en banc), the Ninth Circuit instructed appellate panels and district court judges not to follow a prior opinion from the Circuit courts when that opinion is “unreconcilable” with intervening Supreme Court decisions. Because *Sanchez-Cervantes* rationale is logically repudiated by the *Schriro* decision, *Sanchez-Cervantes* must no longer be followed.

In *Sanchez-Cervantes*, the panel analyzed *Apprendi*'s potential application to a federal prisoner's challenge to his sentence under 28 U.S.C. §2255. 282 F.3d at 666-69. The *Sanchez-Cervantes* Court recognized the two-part *Teague* test:

The Supreme Court has stated that to qualify under *Teague*[’s second exception, new procedural] rules must not only improve the accuracy of the trial but also must alter our understanding of the “bedrock procedural elements essential to the fairness of the proceeding.”

Sanchez-Cervantes, 282 F.3d at 670 (citing *O’Dell v. Netherland*, 521 U.S. 151, 167 (1997)).

The panel went on to hold that the *Apprendi* rule was not sufficiently “sweeping” or “bedrock” as to be considered “fundamental . . . within *Teague*’s second exception.”

Sanchez-Cervantes, 282 F.3d at 669-70. In *Schriro*, as discussed *supra*, the Supreme Court unanimously agreed that the *Ring* rule -- and therefore *Apprendi* -- involves fundamental fairness satisfying the first prong of *Teague*’s second exception. See *Schriro*, 2004 WL

1402732 at *3 (Scalia, J.); *id.* at *7-8 (Breyer, J., dissenting).

The *Sanchez-Cervantes* Court also made three brief references to the accuracy prong of *Teague*'s second exception, but its consideration improperly focused on the accuracy of the conviction rather than the sentence imposed. *Sanchez-Cervantes*, 282 F.3d at 669, 671. The panel began: "We do not believe that requiring the jury to make drug quantity determinations beyond a reasonable doubt will greatly affect the accuracy of convictions." *Sanchez-Cervantes*, 282 F.3d at 669. The panel's second reference to accuracy removes any doubt that the Court intended to focus upon the accuracy of *conviction* even though the issue presented was the *outcome of the sentencing* proceeding: "The alleged *Apprendi* error only concerns an enhancement of the defendant's sentence based on a drug quantity finding by the judge. Therefore, the accuracy of the underlying conviction is not an issue." *Id.* *Apprendi* made absolutely clear, it is not the label ("enhancement") that governs the analysis; the Constitution requires a jury finding beyond a reasonable doubt as to each fact, other than recidivism, establishing the applicable sentencing range. *Apprendi*, 534 U.S. at 494.⁸

The panel's final discussion of accuracy was in the context of dismissing Supreme

⁸ [T]he New Jersey Supreme Court correctly recognized that . . . "labels do not afford an acceptable answer." That point applies as well to the constitutionally novel and elusive distinction between "elements" and "sentencing factors." Despite what appears to us the clear elemental nature of the factor here, the 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?

Apprendi, 530 U.S. at 494 (citations omitted).

Court precedent giving *Winship* and *Mullaney* retroactive effect. *Sanchez-Cervantes*, 282 F.3d at 671. The panel concluded that *Winship* and *Mullaney* presented serious questions as to the accuracy of the determination of guilt, drawing an artificial distinction, eschewed in *Mullaney* and repudiated by *Apprendi*, *Ring*, and *Blakely*. *Apprendi*, 530 U.S. at 494-95; *Ring*, 536 U.S. at 597-609; *Blakely*, 2004 WL 1402697 at *6-7; *see also Ring*, 536 U.S. at 610 (Scalia, J., concurring).⁹ In *Mullaney*, 421 U.S. at 698, the Supreme Court condemned as unconstitutional Maine's attempt to characterize elements of its homicide statute as sentencing factors.

The distinction drawn by the *Sanchez-Cervantes* Court was also rejected by Blackstone centuries ago. 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 2-3 (Legal Classics Library Special ed. 1983).¹⁰ The framers of our constitution

⁹ The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the crime, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

Ring, 536 U.S. at 610 (Scalia, J., concurring).

¹⁰ [T]o know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern....

But even us in England, where our crown law is with justice supposed to be nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world We shall occasionally find room to remark some particulars, that seem to want revision and

eschewed the distinction drawn by the *Sanchez-Cervantes* panel as well:

Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, *and arbitrary punishments* upon arbitrary convictions have ever appeared to me to be great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas corpus act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.

THE FEDERALIST NO. 83 (Alexander Hamilton) (emphasis added).

The *Sanchez-Cervantes* panel also reasoned that the *Apprendi* rule would not have widespread application as “most sentences will not be affected by *Apprendi* because they fall within the statutory maximum of twenty years.” *Sanchez-Cervantes*, 282 F.3d at 669. Once again, that Court’s reasoning has been squarely rejected by the Supreme Court:

Our precedents make clear, however, that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.... [T]he relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* additional findings.

Blakely, 2004 WL 1502697 at *4 (emphasis in the original).

The *Sanchez-Cervantes* Court attempted to bolster its conclusion that *Apprendi*’s rule does not satisfy *Teague*’s fairness prong by noting that the Circuit had applied harmless error analysis to *Apprendi* claims. *Sanchez-Cervantes*, 282 F.3d at 670. It concluded: “Therefore, it would seem illogical to hold that such error is a watershed rule that ‘implicates the

amendment.

4 Blackstone, at 2-3.

fundamental fairness of the trial.’” *Id.* (internal brackets omitted). The Supreme Court recently expressed its unanimous disagreement with the panel’s logic. *Schriro*, 2004 WL 1402732, at *3; *id.*, at *7-8 (Breyer, J., dissenting). *Sanchez-Cervantes* is no longer good law. *See Miller*, 335 F.3d at 899-901.

CONCLUSION

In *Schriro*, the Supreme Court unanimously agreed that the *Ring/Apprendi* rule satisfies the fundamental fairness prong of *Teague*’s second exception to the general rule that new procedural rules will not apply retroactively. Unlike in *Schriro*, this case concerns a sentence that was increased based on facts found by a preponderance of the evidence rather than beyond a reasonable doubt. A long line of Supreme Court cases establishes the integral accuracy enhancing function of the beyond a reasonable doubt standard of proof. Combined, those Supreme Court precedents establish that the *Apprendi* rule must be applied retroactively to cases on collateral review.

T. J. Hester
Assistant Federal Defender (Portland, OR)
503 326-2123