All about *Booker*

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On January 12, 2005, the Supreme Court announced its much-anticipated opinion in *United States v. Booker,* 543 U.S. --, 125 S.Ct. 738, 160 L.ed.2d 621, (Jan. 12, 2005).

All about *Booker* explains the case and what it could mean for defendants, inmates and their attorneys. It is current through March 14, 2005.

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supplements our *Booker* Alert of January 28 through March 7, 2005.

Background information

Booker is the latest in a series of cases that began with *Apprendi v. New Jersey,* 530 U.S. 466 (2000). That case held that any fact which affects the statutory maximum sentence must be charged in the indictment and then proven to a jury beyond a reasonable doubt. The Court grounded this ruling on the Fifth and Sixth Amendments. The Fifth Amendment Due Process Clause requires that every element in a criminal offense be proven beyond a reasonable doubt. The Sixth Amendment gives defendants the right to have juries make that determination.

Apprendi did not decide that the tops of correctly-calculated guideline ranges were also "statutory maximums." Although there was a good argument that they were, the Courts of Appeals that considered the question each held that *Apprendi* did not apply to the Guidelines.

The correctness of these opinions came into question when the Supreme Court decided *Ring v. Arizona,* 536 U. S. 584 (2002). *Ring* involved an Arizona death penalty statute that in some ways worked like the Sentencing Guidelines. In Arizona, a jury decided whether a defendant was guilty of a capital offense – an offense that could potentially result in the death penalty. But even after a jury had found a defendant guilty of a capital offense, a court could not impose the death penalty unless the *judge* found that certain aggravating factors were present. Under the Sentencing Guidelines before *Booker,* a jury would find the facts necessary to convict. Under the Sentencing Guidelines before *Booker,* a jury would find the facts necessary to convict. The sentence was based on factual findings made at sentencing by a judge. The judge determined a guideline range based on a variety of factors, some of which pertained to the offense conduct and some of which pertained to the offender. Unfortunately, other than a defendant's criminal history score, only limited facts pertaining to the offender's history and characteristics could be considered in determining the maximum guideline sentence or in deciding whether to impose a sentence outside the guideline range (a "departure").

In *Ring,* the Supreme Court found the Arizona death penalty statute violated the principle it had established in *Apprendi.* An Arizona

court could not impose the death penalty in a capital case unless the aggravating factors were charged in the indictment and proved to the jury beyond a reasonable doubt. Although the Arizona death penalty law worked something like the sentencing guidelines, following *Ring,* no Court of Appeals found the guidelines unconstitutional as applied. Then came *Blakely v. Washington,* 542 U. S. ___, 124 S.Ct. 2531 (2004).

Blakely involved a Washington state sentencing appeal. The defendant in that case had pled guilty to kidnaping. Although Washington provided for a 10-year maximum for kidnaping, Washington's Sentencing Reform Act provided for a sentence of from 49 to 53 months based solely on the facts to which Blakely had admitted as part of his guilty plea. Washington law required the judge to find an aggravating factor before it could impose a sentence higher than 53 months. The sentencing judge found such a factor and sentenced Blakely to 90 months' imprisonment. The Supreme Court reversed. The Court held, based on *Apprendi* and *Ring,* that the sentence violated the Fifth and Sixth Amendment rights protected by *Apprendi*, because any sentence greater than 53 months was based on facts which the defendant had not admitted as part of his plea.

Following *Blakely,* many federal courts began to apply these principles to the Guidelines. See, *e.g., United States v. Ameline,* 376 F.3d 967 (9th Cir. 2004). The government petitioned the Supreme Court for certiorari in two of them – *United States v. Booker* and *United States v. Fanfan.* The Court agreed to decide whether the Federal Sentencing Guidelines are unconstitutional, and if they are, what the remedy should be. On January 12, 2005, the Supreme Court decided both of these cases in one opinion. Since *United States v. Booker* is the first case listed in the caption, that is how it is cited.

What issue did *Booker* decide?

Booker did not hold that the *Guidelines* are unconstitutional. In fact, the Supreme Court held that the Guidelines, in and of themselves, *are* constitutional. What the Supreme Court found to be unconstitutional was the *way* the Sentencing Reform Act required district courts to *use* the guidelines. *Booker* held that the Sentencing Reform Act violates defendants' Constitutional rights in two ways. First, the Act violates their Sixth Amendment rights, because it requires *judges*, not juries, to decide facts which affect the maximum sentences to which defendants are exposed. Second, it violates their Fifth

Amendment rights, because it requires judges to find those facts by a *preponderance of the evidence,* rather than "beyond a reasonable doubt," and does not limit the sentence calculation to facts alleged in the indictment.

However, since *Booker* held the guidelines to be merely advisory (see below) to be taken into consideration with at least six other factors, the sentencing judge need not limit his sentence to facts found by the jury or admitted by the defendant.

The Court considered two ways to correct these problems. One way would have been to treat facts which affect the calculation of the guidelines or departures as if they were elements of offenses. Indictments would have to charge such factors, and prosecutors would have to prove them beyond a reasonable doubt to a jury. Justice Stevens favored this approach in a dissenting opinion. The majority of the Court did not. (The Court did not even discuss a third possibility, declaring the entire current federal sentencing law unconstitutional and returning to the pre-1987 system.)

The solution that the Court majority approved was to "excise" (cut out) the two sections of the Sentencing Reform Act that required sentencing courts to impose sentence within the guideline range, unless there is a reason to depart. Those two sections are 18 U.S.C. §§ 3553(b) and 3742(e). Without those sections in place, the Court reasoned, the Guidelines no longer establish different "statutory maximums" for each level of offense. Thus, the *Blakely* principle is not violated.

Without these two sections, most of the Sentencing Reform Act stands, but under the surviving portions, the Guidelines are merely advisory. Courts must still calculate and consider the guideline range as well as any grounds to "depart." What they don't have to do is sentence within the range (even if there is no basis to depart).

What does *Booker* mean for defendants who have not yet been sentenced?

After *Booker,* courts will calculate a defendant's guideline range the way they did before *Blakely.* Judges will determine the offense level using the application principles established by the Guidelines. As before, they will select the offense guideline based on the offense of conviction and will make other guideline decisions using "relevant conduct." Courts

will probably still make factual determinations using the preponderance of the evidence standard although, arguably, they should be held to a higher standard such as "clear and convincing" evidence or even "beyond a reasonable doubt." In *United States v. Amaline*, ___ F.3d ___, 2005 WL ___, U.S. App. LEXIS 2032 (9th Cir. Feb. 9, 2005) the Court of Appeals reiterated that in certain circumstances, the applicable burden of proof at sentencing may be clear and convincing evidence. *See United States v. Johansson*, 249 F.3d 848, 853-54 (9th Cir. 2001), or even reasonable doubt. *See United States v. Thomas*, 355 F.3d 1191, 1202 (9th Cir. 2004). *See also United States v. Huerta-Rodriguez*, ___ F.Supp. 2d ___, 2005 WL 318640, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) ("it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proven beyond a reasonable doubt."). *United States v. Ochoa-Suarez*, 2005 WL 287400, 2005 U.S. Dist. LEXIS 1667 (S.D.N.Y. Feb. 7, 2005) (because there has been no finding beyond a reasonable doubt by a jury that defendant qualified as a manager or supervisor under U.S.S.G. § 3B1.1, the three-level enhancement of defendant's offense level under the now advisory-only sentence guidelines, for role in the offense, is rejected and there is no three-level adjustment for "role in the offense.") Courts will be required to "consider" the guideline range, as well as any bases for departure from that range, but they will no longer be *required* to impose sentence within that range – even where there is no basis to "depart" that the Sentencing Commission has approved.

In emphasizing how important it is for district judges to fully explain and document their post-*Booker* sentencing decisions, as discussed here, many Commissioners and witnesses at the U.S. Sentencing Commission's recent hearing expressed the view that judges at sentencing must now (1) calculate and applicable guideline range, and then (2) make traditional departure determinations under the guidelines, and then (3) decide whether to follow or vary from the (now advisory) guidelines based on the following 18 U.S.C. § 3553 (a) factors.

Under 18 U.S.C. § 3553(a), the key requirement is that the sentence in each case must be "sufficient, but not greater than necessary":

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2).

Moreover, under 3553(a)(1) a sentencing court must consider, when deciding the sentence to be imposed, the nature and circumstances of the offense and the history and characteristics of the defendant. The court must also consider the kinds of sentences available, 18 U.S.C. § 3553(a)(3); the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, 18 U.S.C. § 3553(a)(6); and the need to provide restitution to any victims of the offense, 18 U.S.C. § (a)(7). This will lead to more individualized sentencing because after *Booker*, the sentencing guidelines are only one factor out of many that must be considered by sentencing judges.

When courts had to impose sentence within the guideline range (barring a departure), they were limited to considering these factors to determine where in the range to impose sentence. It is now possible for courts to disagree with the judgment of the Sentencing Commission as to what the appropriate sentence should be.

In addition, 18 U.S.C. § 3662 provides that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence." Further, 18 U.S.C. § 3553(a)(2)(D) requires a sentencing court to evaluate the need to provide the defendant with education, training, treatment or medical care in the most effective manner. This directive might conflict with the guidelines, which in most cases offer only prison. In some cases, a defendant's education, treatment or medical needs may be better served by a sentence which permits the offender to remain in the community. Finally, 18 U.S.C. § 3553(a)(7) directs courts to consider "the need to provide restitution to any victims of the offense." In many cases, imposing a sentence of no or only a short period of imprisonment will best accomplish this goal by allowing the defendant to work and pay back the victim. The guidelines do not

account for this. In fact, the former mandatory guideline regime forbid departures to facilitate restitution. *United States v. Seacott,* 15 F.3d 1380, 1388-89 (7th Cir. 1994).

Not only must courts consider the factors of § 3553(a), courts are no longer bound by the departure methodology of the guidelines. Rather, a sentence outside the calculated guideline range may be justified by factors that would not have previously justified a departure from the guideline range.

For example, in crack cocaine cases, the Guidelines treat one gram of crack like 100 grams of powder cocaine. A judge who does not think that crack cocaine is 100 times worse than powder may now impose a lower sentence than the Guidelines recommend, even though such a disagreement would not support a departure – at least so long as the judge does not go below a mandatory minimum on that basis. *United States v. Smith*, CR-02-163 (E.D. Wisc. Mar. 2, 2005)

The *Booker* decision also allows for consideration of factors previously precluded from consideration under the guidelines, as well as unusual factors present in a case. As Judge Lynn Adelman of the Eastern District of Wisconsin recently noted:

> under § 3553(a)(1) a sentencing court must consider the "history and characteristics of the defendant." But under the guidelines, courts are generally forbidden to consider the defendant's age, U.S.S.G. § 5H1.1, his education and vocational skills, § 5H1.2, his mental and emotional condition, § 5H1.3, his physical condition including drug or alcohol dependence, § 5H1.4, his employment record, § 5H1.5, his family ties and responsibilities, § 5H1.6, his socio-economic status,§ 5H1.10, his civic and military contributions, § 5H1.11, and his lack of guidance as a youth, §5H1.12. The guidelines' prohibition of considering these factors cannot be squared with the § 3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant. The only aspect of a defendant's history that the guidelines permit court to consider is criminal history. Thus, in cases in which a defendant's history and character are positive, consideration of all of the § 3553(a) factors might call for a sentence outside the guideline range.

United States v. Ranum, ___ F.Supp. 2d ___, 2005 WL 161223, 2005 U.S. Dist. LEXIS 1338 (E.D. Wisc. 1/19/05). Judge Adelman concluded in that case that a sentence below the sentencing guidelines was justified**.** In *Ranum*, the defendant, a bank employee, had pleaded guilty to misapplication of bank funds by a bank officer. The defendant's guideline range was 37-46 months, after upward adjustments for loss, more than minimum planning, and abuse of position of trust. However, after considering all of the relevant factors, Judge Adelman imposed a sentence of one year and a day. In concluding that such a sentence was appropriate, Judge Adelman considered the defendant's motive for the offense, his responsibility for providing care of his elderly parents, and his history and character, which were exemplary prior to the offense conduct.

In other cases:

- A judge imposed a sentence outside the guidelines in a case involving a defendant with a lengthy history of mental illness, whose need for treatment would be best addressed by a split sentence in Zone C. *United States v. Jones*, ___ F.Supp. 2d ___, 2005 WL 12730 2005 U.S. Dist. LEXIS 833 (D. Me. 1/21/05) (in 18 U.S.C. § 922(g)(4) case (possession of firearm by person previously committed involuntarily to mental health institution), while concluding that it could not grant departure sought by defendant, government, and probation to take defendant from Zone D to Zone C, court concluded that it could achieve same result after *Booker* in considering Guidelines as advisory and as one factor under 18 U.S.C. § 3553(a)).

- *United States v. Myers*, ___ F.Supp. 2d. ___, 2005 WL 165314, 2005 U.S. Dist. LEXIS 1342 (S.D. Iowa Jan. 26, 2005) (Pratt, J.) (in sawed-off shotgun case in which guideline range was 20-30 months, sentencing defendant to 3 months probation; reviewing *Booker* and *Ranum*, *(supra)*; finding *Ranum* persuasive and adopting Judge Adelman's view because "[t]o treat the Guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guideline range would be presumptively unreasonable in the absence of clearly identified factors . . . {and} making the Guidelines, in effect, still mandatory;" viewing *Booker* "as an invitation, not to unmoored decision

making, but to the type of careful analysis of the evidence that *should* be considered when depriving a person of his or her liberty).

- *United States v. Galvez-Barrios*, ___ F.Supp. 2d ___, 2005 WL 323703, 2005 U.S. Dist. LEXIS 1997 (E.D. Wis. Feb. 2, 2005) (where guideline range was 41-51 months, imposing sentence of 24 months after consideration of history of U.S.S.G. § 21.1.2 and unwarranted disparity in sentences among § 1326 defendants, among other factors).

- *United States v. Kelley,* ___ F.Supp. 2d ___, 2005 WL 323813 (D. Neb. Feb. 1, 2005) (where enhancements moved minimum end of guideline range from four months and Zone C to eighteen months and Zone D, finding that defendant should be sentenced to time served and six months of home confinement).

- *United States v. Nellum*, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005) (in crack case where guideline range was 168-210 months, imposing sentence of 108 months where, "given the particular circumstances of this case --Nellum's age, the likelihood of recidivism, his status as a veteran, his strong family ties, his medical condition, and his serious drug dependency–the Court does not view that disparity as being "unwarranted;"" using age/recidivism info from Sentencing Commission; declining to address 100-to-1 crack-powder issue but considering fact that drug weight escalated based on controlled buys).

- *United States v. Blume*, 2005 WL 356816 (S.D.N.Y. Feb. 14, 2005) (defendant sentenced to probation because it represented his first criminal conviction and he appeared to pose no threat to the safety of the community).

How *Booker* affects defendants who have pled guilty under a plea agreement, but who have not yet been sentenced, depends on the particular language of each plea agreement. Defendants in this situation should consult with their attorneys to decide how best to take advantage of *Booker.*

Does *Booker* apply to mandatory minimum sentences?

No.

Could *Booker* result in some defendants receiving longer sentences than they would have received if courts were still required to impose sentences within the ranges established by the Guidelines?

It could. However, there are special considerations which may protect defendants who committed their crimes before January 12, 2005 (the date the Supreme Court decided *Booker*) and defendants who are being resentenced. Because *Booker* in effect rewrote an important aspect of the Sentencing Reform Act, defendants may be protected by Supreme Court cases, such as *Marks v. United States,* 423 U.S. 188 (1977), which holds that Due Process protects a defendant from the ill-effect of judicial rewriting of statutes, when that rewriting occurred *after* a defendant committed his or her crimes, more or less in the same way that the Constitution's *Ex Post Facto* Clause protects against adverse retroactive legislation. For a general discussion of *Ex Post Facto* principles, see *Garner v. Jones,* 529 U.S. 244 (2000), and *Miller v. Florida,* 482 U.S. 423 (1987). Defendants who are being resentenced may also be protected by *North Carolina v. Pearce,* 395 U.S. 711 (1969), and cases interpreting *Pearce,* which prevent courts from imposing higher sentences at resentencing after a successful appeal, unless the appearance of vindictiveness is eliminated.

What does *Booker* mean for defendants who are currently negotiating plea agreements?

Booker is likely to change the way defense counsel negotiate plea agreements. Since locking in offense levels will no longer guarantee a sentence within a particular range, counsel will want to think about whether it is better to be free to argue for a much lower sentence or to lock in a particular sentence with a Rule 11(c)(1)(C) plea. Locking in a sentence may be particularly attractive where there is a greater than averagepossibility that a court will want to impose a sentence *higher* than the guideline range.

How does *Booker* affect cases that are currently on appeal?

Booker applies to all cases currently on direct appeal. Defendants who have already filed briefs that did not include a *Booker*-type issue

should ask their attorneys to consider filing a supplemental brief that raises the issue. Defendants who raised the issue in a previously-filed brief should consider filing a supplemental brief or letter that discusses *Booker*. If defense counsel did not raise a *Booker*-type objection in the district court, then the Court of Appeals will review for "plain error" – a standard of review that is less favorable to the defense, but not insurmountable in most cases. *United States v. Cotton*, 535 U.S. 625 (2002). Several federal circuit courts have issued published opinions applying plain error review to Booker error. In United States v. Hughes, 396 F.3d 374 (4th Cir. 2005), the Fourth Circuit vacated a mandatory guideline sentence as plain error. The vacated sentence exceeded that which could have been imposed based solely on the jury verdict, but the sentence was properly calculated under the formerly mandatory sentencing guidelines. The Sixth Circuit has issued multiple decisions, largely in accord with the Fourth. E.g., United States v. Milan, 2005 WL 309934 (6th Cir. Feb. 10, 2005); United States v. McDaniel, 2005 WL 366899 (6th Cir. Feb. 17, 2005)(reversing and remanding sentence for Booker error under the Armed Career Criminal Act). See also, United States v. Coffey, 395 F.3d 856 (8th Cir. 2005).)

In contrast, the Fifth and Eleventh Circuits have applied plain error review in the strictest fashion. United States v. Rodriguez, 2005 WL 272952 (11th Cir. Feb. 4, 2005); United States v. Mares, No. 03-21035 (5th Cir. Mar. 4, 2005). Most recently, that court affirmed a guideline sentence of life imprisonment as "reasonable," even though it increased the defendant's sentence based on conduct of which he had been acquitted. United States v. Duncan, 2005 WL 428414 (11th Cir. Feb. 24, 2005). The court concluded that while the defendant could satisfy the first two factors of the four-part plain error test, he could not show that the error had affected his substantial rights, because he did "not point to anything indicating a `reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion.'" See also United States v. Antonakopoulos, 2005 WL 407365 (1st Cir. Feb. 22, 2005)(rejecting automatic plain error rule either for Fifth or Sixth Amendment violation or mandatory guideline sentencing).

The Second and Seventh Circuits have adopted a slightly different middle ground practice, not of remanding cases to the district court for resentencing, but of remanding for consideration whether to resentence the defendant. United States v. Crosby, 397 F.3d 103 (2d Cir. 2005); United States v. Paladino, 2005 WL 435430 (7th Cir Feb. 25. 2005) (providing for limited remand to inquire of district judge whether he would

have imposed the same sentence under an advisory guideline regime; if not, court will grant a full remand for resentencing).

After *Booker,* defendants will still be able to appeal sentences as provided in 18 U.S.C. § 3742(a). What will change is that Courts of Appeals will not necessarily reverse when a district court imposes a sentence that is not within the properly calculated guideline range or when a court improperly departs. The Courts of Appeals will review such sentences for "reasonableness." This is the standard that formerly governed appeals of the extent of departures. Defendants will also be able to appeal legal errors in following the statute and rules of procedure. If the judge made an error in calculating the guideline range, and the sentence imposed depended on that calculation, this would also be an appealable issue.

Waiver of Appeal Rights

The Eighth and Eleventh Circuits have found that the waiver of appeal in the plea agreement will foreclose any appeal. *United States v. Rubbo*, ___ F.3d ___, 2005 WL 120507, 2005 U.S. App. LEXIS 1096 (11th Cir. Jan. 21, 2005)(finding that *Apprendi/Blakely/ Booker* claims do not fall outside the scope of waiver of appeal; enforcing waiver and dismissing appeal); *United States v. Killgo*, ___ F.3d ___, 2005 WL 292503, 2005 U.S. App. LEXIS 2016 (8th Cir. Feb. 9, 2005) (in fraud and money-laundering case, refusing to consider *Blakely/Booker* claim where defendant had waived right to appeal "'any sentence imposed' except 'any issues solely involving a matter of law brought to the court's attention at the time of sentencing at which the court agrees further review is needed;'" stating that defendant "did not bring any issue akin to *Blakely* or *Booker* to the district court's attention" and that the "fact that Killgo did not anticipate the *Blakely* or *Booker* rulings does not place the issue outside the scope of his waiver").

Can a *Booker* issue be raised in first § 2255 motions?

There is no simple answer to this question. It depends on whether the rule announced in *Booker* is considered to be a "new rule" of constitutional procedure. New rules of constitutional procedure cannot normally be raised in § 2255 motions. See *Teague v. Lane,* 489 U.S. 288 (1989). It could be argued that the decision in *Booker* was not "new," because it was "dictated" by the Court's previous decision in *Blakely* (and perhaps even by its previous decisions in *Ring* or even *Apprendi*). See *Stringer v. Black,*

503 U.S. 222, 227 (1992) ("a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal habeas corpus relief unless the decision was dictated by precedent existing when the judgment in question became final"). If the rule is not "new," then a court will not refuse to consider the issue in a § 2255 motion, just because a defendant's case became final before *Booker.*

Similarly, if the rule is not procedural, but is substantive, then it is retroactive to cases that were final on direct appeal when the *Booker* decision issued. It can be argued that the transformation of the guidelines into an advisory system works a substantive alteration in federal sentencing law in terms of the sentence outside the guidelines. The *Booker* decision also may be substantive, because it does not just affect sentencing procedure, but the actual sentence that can be imposed. If the result had been reversed, *i.e.,* if the guidelines had been transformed from an advisory system to a mandatory one, such a change clearly would be substantive and retroactive application would be precluded by the *ex post facto* clause to the extent that it disadvantaged the defendant. See *United States v. Chea*, 231 F.3d 531, 536-37 (9th Cir. 2000) (later guideline which limited discretion to impose a lesser sentence could not be imposed retroactively); *Mickens-Thomas v. Vaughn*, 321 F.3d 374, 384-85 (3d Cir. 2003) (alteration in parole rules to place emphasis on public safety disadvantaged the defendant; retroactive application violated the *ex post facto* clause.

Even though the majority in *Booker* believes that the decision in that case was compelled by its previous decision in *Blakely* and *Apprendi,* it is not clear that courts will conclude that the rule in *Booker* is not "new." The Supreme Court has held that a case establishes a "new rule" when one or more Justices believe that the decision, even if the decision is correct, was not *dictated* by precedent. *Beard v. Banks,* 540 U.S. 668 (2004). If a decision is not "dictated by precedent," it is, by definition, "new." *Booker* includes a dissenting opinion by Justice Breyer, which was joined by three other Justices, that argues that the result in *Booker* was *not* dictated by *Apprendi* or *Blakely.* This by itself may mean that *Booker* establishes a "new" rule. If it does, then defendants whose cases became final before *Booker,* will not be able to raise a *Booker* issue in a § 2255 motion – unless one of the exceptions to the *Teague* rule applies.

Teague provides two exceptions to its general rule. The first exception applies when the new rule places certain "certain kinds of

primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." 489 U.S. at 307. That exception would not apply to *Booker.* The second *Teague* exception applies if the new rule represents a "watershed" change that is necessary to the fundamental fairness of the criminal proceeding and improves the accuracy of the criminal process. There is an argument that the principles underlying *Booker* meet this test.

Booker invalidated the mandatory aspect of the guidelines, because when the guidelines were mandatory, *judges* made decisions which affected the "statutory maximum" sentence using a preponderance of the evidence standard, even though the Constitution demanded proof beyond a reasonable doubt in such a mandatory system. Since courts made such decisions using a less fair and accurate standard of proof, it is arguable that the rule in *Booker* was necessary to the fundamental fairness of the sentencing phase of the criminal proceeding and improves the accuracy of the criminal process. In addition, it may be worth noting that the Supreme Court devised the *Teague* rule, in part, to minimize federal court interference with state criminal proceedings through habeas corpus cases. That concern does not apply in § 2255 cases, which involve only *federal* convictions. It is therefore possible that the Court will apply the *Teague* rule less stringently in § 2255 cases than it has in state prisoners' habeas cases under 28 U.S.C. § 2254.

Nonetheless, at least two circuit courts have held that a *Booker* claim cannot be raised in a § 2255 motion. *Huphress v. United* States, No. 03-5951 (t6h Cir. Feb. 25, 2005); *McReynolds v. United States*, ___ F.3d ___, 2005 WL 237642, 2005 U.S. App. LEXIS 1638 (7th Cir. Feb. 2, 2004) (granting certificate of appealability because defendants had substantial showing of denial of constitutional right, but in concluding that *Booker* is not retroactive, finding that "[a]lthough the Supreme Court did not address the retroactivity question in *Booker*, its decision in *Schiro v. Summerlin*, 124 S. Ct. 2519 (2004), is all but conclusive on the point; *Varela v. United States*, ___ F.3d ___, 2005 WL 367095 (11th Cir. Feb. 17, 2005) (granting certificate of appealability, but concluding that although neither Eleventh Circuit nor Supreme Court has addressed retroactivity of *Blakely* and *Booker*, *Schiro v. Summerlin*, "is essentially dispositive" of issue; joining Seventh Circuit in *McReynolds, supra). But, see, United States v. Siegelbaum*, 2005 WL 196526, 2005 U.S. Dist. LEXIS 2087 (D. Or. Jan. 26, 2005) (Panner, J.) (containing interesting discussion of retroactivity; ultimately concluding, without deciding retroactivity issue, that defendant was not entitled to relief because he got benefit of his plea

bargain).

Does *Booker* affect the statute of limitations for filing § 2255 motions?

It might. Section 2255 motions must be filed within one year of the latest of several events. All defendants may file § 2255 motions within one year of the date that a defendant's judgment of conviction becomes "final." If that date, has already passed, defendants also have one year from:

> the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

28 U.S.C. § 2255. In this case, the *right* that was "newly recognized" was not necessarily recognized by *Booker.* Courts may find that it was first recognized by the Supreme Court in *Blakely* or *Ring,* or even *Apprendi. Booker* simply applied that "right" to the Sentencing Guidelines. That would mean that defendants whose judgment of conviction became final more than a year ago, may have until June 24, 2005 (a year from the date that *Blakely* was decided), for example, to file their first motions. More than a year has already passed since the announcement of the decisions in *Apprendi* and *Ring.*

Can *Booker* be raised in a second or successive § 2255 motion?

Defendants cannot file second or successive § 2255 motions without first getting permission from the Court of Appeals. There are two bases on which the Court of Appeals can give permission to file a second § 2255 motion. The first is that there is new evidence that the defendant is innocent (evidence that would not have allowed any reasonable jury to have found him or her guilty). The second is a new rule of constitutional law that the Supreme Court itself has made retroactively applicable to cases on collateral review. See *Tyler v. Cain,* 533 U.S. 656, 667 (2001). Although the rule announced in *Apprendi/Ring/Blakely/Booker* is arguably a new rule of Constitutional law, so far the Supreme Court has not made it retroactively applicable to cases on collateral review (such as § 2255 motions). Until and unless it does so, defendants will not be able to get permission to file a second or successive § 2255 motion to raise a *Booker* issue. *In re Anderson*, ___ F.3d ___, 2005 WL 123923, 2005 U.S.

App. LEXIS 1097 (11th Cir. Jan. 21, 2005) (denying application for leave to file second or successive petition in part because Supreme Court has not made *Booker* retroactive); *Green v. United States*, ___ F.3d ___, 2005 WL 237204, 2005 U.S. App. LEXIS, 1652 (2d Cir. Feb. 2, 2005) (in case in which defendant was sentenced to four life terms and 100 years in prison for racketeering and drug trafficking in 1994, denying application to file second motion because neither *Booker* nor *Blakely* apply retroactively).

28 U.S.C. § 2241 motions.

No court has held that a 2241 motion can be used to raise a *Booker* claim. *Godines v. Joslin*, 2005 WL 177959 (N.D. Tex. Jan. 27, 2005) (in case where petitioner had previously filed a § 2255 motion, recommending that motion made pursuant to 28 U.S.C. § 2241 motion be denied because it should be construed as § 2255 motion and petitioner did not demonstrate that savings clause of § 2255 applied where *Booker* has not been made retroactive); *see* U.S. Dist. LEXIS 1785 (N.D. Tex. Feb. 8, 2005); *Rodriguez v. Joslin*, 2005 WL 178034, 2005 U.S. Dist. LEXIS 1103 (N.D. Tex. Jan. 27, 2005) (Sanderson, M.J.) (in case where petitioner had previously filed a § 2255 motion, recommending that motion made pursuant to 28 U.S.C. § 2241 motion be denied because it should be construed as § 2255 motion and petitioner did not demonstrate that savings clause of § 2255 applied where *Booker* has not been made retroactive; further, court has no jurisdiction where Fifth Circuit has not issued order granting petitioner leave to file second § 2255 motion).

Do you think you have a *Booker* issue?

People who believe that they may benefit from the Supreme Court's opinion in *Booker* should seek advice from competent counsel. The Law Offices of Alan Ellis is available to review federal criminal defendants' or inmates' cases to seek out *Booker* problems.

About Our Firm

The Law Offices of Alan Ellis is a full-service sentencing and post-conviction law firm representing exclusively federal criminal defendants and inmates throughout the United States and abroad.

For 25 years, we have worked with defendants and inmates and consulted with many of the nation's leading criminal defense attorneys to develop strategies that obtain the lowest possible sentence for clients, to be served at the best facility possible, with the greatest opportunity for early release.

Areas of expertise include:

- Plea negotiations.
- Sentencing representation and consultant.
- Prison designation, transfers and disciplinary matters.
- Rule 35 motions.
- Direct appeals in all circuits from conviction and sentence.
- Supreme court practice.
- Habeas corpus 2241 and 2255 petitions.
- Parole representation.
- Prisoner transfer treaty work for foreign inmates.

The firm has a national practice with regional offices in Sausalito (San Francisco) California and Ardmore (Philadelphia) Pennsylvania. Many of the firm's attorneys have served as federal law clerks, and several are former law school professors. Affiliated with the firm as a sentencing specialist who is a licensed clinical social worker, and a federal prison consultant formerly employed by the Bureau of Prisons.

Approximately one-half of our work comes to us from defense attorneys requesting our assistance on cases. The remainder of our cases comes to us as a result of defendants, inmates or their family and friends contacting us directly with requests for representation. With increasing frequency, we are being called upon to consult and assist earlier on in the criminal defense process. This is due in no small part to the importance of plea-bargaining and the significant recognition that planning and preparation for sentencing and post-conviction remedies must not be relegated to the post-verdict or part-plea stage of the proceedings.

When an individual calls us after being sentencing we generally require a thorough review of the record before we will agree to represent the person in a post-conviction proceeding. Cases involving sentencing, however, do not require a comprehensive review of the record before we will agree to accept representation.

Alan Ellis is nationally recognized as an expert in federal sentencing and post conviction relief. For the past 25 years, he has successfully represented federal criminal defendants and prisoners throughout the United States. He is a sought-after lecturer in criminal law education programs for attorneys and is widely published with more than 80 articles to his credit.

Mr. Ellis authors a regular quarterly column on Federal Sentencing for the American Bar Association's Criminal Justice Magazine, and is the Publisher of Federal Presentence and Post Conviction News and the co-author of the Federal Prison Guidebook.

He is the former President of the National Association of Criminal Defense Lawyers (NACDL); a former member of the Board of Directors of the National Council on Crime and delinquency; a Fellow of the American Board of Criminal Lawyers; and a Past President of the ACLU of Central Pennsylvania.

Mr. Ellis is a past winner of the Robert C. Heeney Award, NACDL's most prestigious honor, given annually to the criminal defense attorney who "best exemplifies the goals and values of the Association and the legal profession."

A former law professor and federal law clerk to two federal judges, Mr. Ellis is a 1967 graduate of Villanova University School of law and an editor of the Villanova Law Review.