UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
Plaintiff,	
v.	**CR. NO. xxx**
Defendant,	
Defendant.	

MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

Defendant, through undersigned counsel, hereby respectfully moves this Court pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Defendant is in federal custody in Kentucky. On February 9, 2000, this Court sentenced defendant to 120 months' imprisonment, three years' supervised release, and a special assessment of $100. Defendant appealed his conviction and his sentence, and his appeal was denied on July 3, 2001. United States v. Defendant, (D.C. Cir. 2001). No petition for certiorari was filed and this is defendant's first § 2255 motion. Defendant seeks resentencing pursuant to United States v. Booker, 125 S. Ct. 738 (2005).

BACKGROUND

Defendant was arrested on Georgia Avenue, N.W., on August 11, 1999, by officers who testified that they stopped his car after observing that it did not have an inspection sticker. In connection with the stop, officers found a gun in the sun roof of the car. The officers also searched the trunk of the car and found a large knife. At his trial on 18 U.S.C. § 922(g) charges, the government introduced the knife into evidence.

The Court sentenced defendant to 120 months, the maximum statutory sentence available under 18 U.S.C. § 922(g), using a guideline range of 120-150 months. To reach that range, the Court applied U.S.S.G. §

2K2.1(a)(2), which established an offense level of 24 based on two prior convictions for crimes of violence or drug trafficking offenses. That level was enhanced by two points under U.S.S.G. § 2K2.1(b)(4), based on evidence that the gun had been stolen. This Court calculated defendant's criminal history to be a category VI.

Defendant appealed the introduction of the knife into evidence under Federal Rules of Evidence 401, 402 and 404(b). The appellate court found that admission of the knife was error, but that the error was harmless in the context of other evidence supporting the jury's verdict. Defendant also argued on appeal that the Constitution required jury findings beyond a reasonable doubt for all facts used to enhance his sentence, pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000). That claim was also rejected on appeal.

ARGUMENT

I. Defendant's Claims Are Timely Under 28 U.S.C. § 2255(6) ¶3

Defendant's direct case became final more than one year before the filing of this motion and, therefore, his § 2255 claims are not timely under § 2255(6) ¶1, which allows the filing of § 2255 claims up to one year from the date on which the conviction became final. These claims are timely, however, under ¶3 of that provision, which states:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of——
>
> . . .
>
> (3) 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(6). The rights asserted in this motion were newly recognized by the Supreme Court in United States v. Booker, 125 S. Ct. 738 (2005), or alternatively, in Blakely v. Washington, 124 S. Ct. 2531

(2004). In either event, these claims are timely if, as argued below, this Court holds that Booker is retroactively applicable to cases on collateral review. See United States v. Dodd, 365 F.3d 1273, 1278 (11th Cir. 2004) ("every circuit to consider [the] issue has held that a court other than the Supreme Court can make the retroactivity decision for purposes of § 2255(3)"), cert. granted, 125 S. Ct. 607 (2004) (agreeing to decide whether one-year period stems from date on which right is first recognized or date on which right is found to apply retroactively).

II. This Court Should Reduce Defendant's Sentence Pursuant to Blakely and Booker

The Supreme Court in Blakely explained 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." Blakely, 124 S. Ct. at 2537 (emphasis in original). In Booker, the Supreme Court applied Blakely to find the United States Sentencing Guidelines unconstitutional. Booker, 125 S. Ct. at 755-56. As a remedy, a different majority of the Court severed and excised 18 U.S.C. § 3553(b)(1), which required mandatory application of the guidelines, and 18 U.S.C. § 3742(e), which governed appellate review in a manner no longer relevant to advisory guidelines. Id. at 756-57.

District courts applying Booker are now required to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)" of 18 U.S.C. § 3553(a). 18 U.S.C. § 3553(a); see also 18 U.S.C. § 3551 (defendant "shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) . . . ."). Subsections (A) through (D) of § 3553(a)(2) highlight the primary purposes of sentencing, including the seriousness of the offense, the need to afford deterrence and protect the public, and the need for

rehabilitative or correctional treatment. In determining a sentence consistent with these goals, the court must consider a number of factors, see § 3553(a)(1)-(7), including both the sentencing guidelines and policy statements issued by the Sentencing Commission. 18 U.S.C. § 3553(a)(4) & (5). A court may consider all "information concerning the background, character, and conduct of a person convicted of an offense," 18 U.S.C. § 3661, and is also directed to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). If a court imposed a sentence based solely on the guidelines without considering the goals stated in § 3553(a)(2)(A) through (D) and additional factors listed in § 3553(a), that sentence would violate both statutory mandates, as noted above, and the Constitution, under Blakely and Booker.

Defendant was plainly prejudiced by the Court's use of mandatory guidelines to sentence him. Here, the statutory maximum sentence was also the low end of the guideline range, leaving the Court with no sentencing options. February 9, 2000 Sentencing Transcript ("Sent. Tr.") at 3 ("It appears that I have no discretion at all.") (attached as Exhibit 1). At sentencing, defense counsel contested certain criminal history points calculated by the probation office and the Court agreed to reduce the criminal history score from 16 to 13, as the evidence did not show that defendant had counsel in connection with some of his prior convictions. Id. at 4-6.

At the sentencing hearing, defendant offered extensive allocution, stating that in the past, he had been caught up in peer pressure, "trying to be cool," and that "a lot of times my pride got in the way." Sent. Tr. at 6-7; see also PSR at 15 ¶ 52. He said that he had tried to stay employed and take care of his kids and but that he did not have very much

education and it was hard to make a good income. Sent. Tr. at 8. He understood he would receive a ten-year sentence but wanted to express to the Court that he was "not a bad person" and that he hoped to use his time "to get some type of education so when I do come back on the street . . . it will be beneficial to me and my kids." "So my kids won't have to go through the same things I went through . . . ." Id. at 8-9. Defendant did not expect that his environment, or, for example, the fact that he had been homeless at times, "justified anything I did," and explained that he was trying to express his feelings to the Court. Id. at 10. He hoped to use his time "to change my life." Id. In response, the Court observed:

> I wish we had that on videotape. I'd like to show that. I'd like to show what you just said to every high school kid in this city and every kid in every youth-at-risk place in the country.
>
> I also wish that the Bureau of Prisons had a program to allow people like you while you're doing your time to go out and speak to high school kids. I think you'd have a lot to tell them.

Id. at 10-11.

In addition, the presentence report noted that defendant "likes to help others," that he "would like to 'own a homeless shelter because he does not think that anyone should be without a home,'" and that he "would like to 'own his own photography studio.'" Presentence Report (PSR) at 17 ¶ 60. The PSR also reported that defendant has two children, then aged 8 and 9, and that the woman he lived with at the time of this offense, Lashawn Hunter, reported that he is a "'giving, kind person, and is good with the kids.'" Id. at 16 ¶ 59.

In this case, the Court had no opportunity to consider defendant's comments, his potential for rehabilitation, his ability to communicate with at-risk youths, his interest in helping the homeless, family ties,

or any of the factors stated in § 3553(a) in sentencing defendant——even to select a sentence within the guideline range. Instead, the Court was required to treat defendant as the most culpable type of § 922(g) offender. There is at least a reasonable probability that the Court, had it imposed a statutory sentence without mandatory guidelines, would have imposed a sentence lower than ten years.

III. The Court's Decision in Booker is Retroactively Applicable to Cases on Collateral Review Because It Is Substantive, Not Procedural

In Teague v. Lane, 489 U.S. 288, 310 (1989), the Court ruled that new constitutional rules of criminal procedure are not retroactively applicable to cases on collateral review unless they meet one of two narrow exceptions. In contrast to procedural rules, however, new rules of substantive law are not subject to Teague, and may be retroactively applied to cases on collateral review. See Schriro v. Summerlin, 124 S. Ct. 2519, 2522-23 (2004); Bousley v. United States, 523 U.S. 614, 620-21 (1998). "New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms . . . ." Summerlin, 124 S. Ct. at 2522 (emphasis in original and citation to Bousley omitted). "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." Id. at 2523.

In Summerlin, the Court held that its ruling in Ring v. Arizona, 536 U.S. 584 (2002), was procedural because it required jury findings on the elements of the offense rather than changing those elements in any way. Summerlin 124 S. Ct. at 2524. The same analysis applies to the Court's holding in Blakely, which required jury findings on facts used to enhance the sentence under Washington state criminal statutes. Had it prevailed, that analysis would also apply to the remedy endorsed by the justices who dissented from the remedial majority in Booker, in an opinion authored

by Justice Stevens. Booker, 125 S. Ct. 771-89. In contrast, the remedy adopted by the Court in Booker states a substantive rule, which bears no resemblance to the remedies adopted in Ring and Blakely.

The rule is substantive, first, because the Court severed and excised 18 U.S.C. §§ 3553(b)(1) and 3742(e). In both the civil and criminal context, a court's interpretation of a statute is retroactive to the date of enactment of the statute. Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."); United States v. McKie, 73 F.3d 1149, 1151 (D.C. Cir. 1996) ("a court's interpretation of a substantive criminal statute generally declares what the statute meant from the date of its enactment, not from the date of the decision"); see also Bousley, 523 U.S. at 625-26 (Stevens, J., concurring in part and dissenting in part) (Court in Bailey "merely explained what § 924(c) had meant ever since the statute was enacted"). In accordance with those principles, Teague is "inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." Bousley, 523 U.S. at 620; see also McKie, 73 F.3d at 1151 ("interpretation of the substantive terms of a federal statute" not subject to Teague analysis). The fact that the statutory provisions at issue here govern sentencing does not change this analysis. Moreover, as the sentencing guidelines are no longer mandatory, Booker "narrow[s] the scope of a criminal statute by interpreting its terms . . . ." Summerlin, 124 S. Ct. at 2522.

Second, Booker's remedial holding is substantive because it "alters the range of conduct [and] the class of persons that the law punishes." Summerlin, 124 S. Ct. at 2523. The guidelines are replete with examples

of both conduct and groups of persons that were necessarily punished before Booker and not after Booker. To note just a few, after Booker, a judge imposing sentence on one defendant who trafficked in 15 grams of cocaine base and another comparable defendant or co-defendant who trafficked in 15 grams of cocaine powder might not impose the guidelines sentence on the first defendant if the judge found that sentence to be unfair or inconsistent with the goals of § 3553(a). Compare U.S.S.G. § 2D1.1(c)(7) (base offense level 26) with § 2D1.1(c)(14) (base offense level 12); see also United States v. Smith, 2005 WL 549057, at *8-*9 (E.D. Wisc. March 3, 2005) (discussing history and criticism of 100:1 crack/cocaine ratio and imposing sentence based on 20:1 ratio instead); Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 132 (November 2004) ("Fifteen Year Assessment") ("[T]he harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine. . . . This one sentencing rule contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination. Revising the crack cocaine thresholds would better reduce [differences in average sentences between African-American and White offenders] than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system."). After Booker, a judge might not apply the career offender guidelines formerly required by U.S.S.G. § 4B1.1 for a defendant convicted of a drug trafficking offense who had two felony prior convictions for such offenses. See Fifteen Year Assessment at 131, 134 (career offender guideline disproportionally impacts a "particular offender group" but serves "no clear sentencing purpose" and, particularly for drug offenders, "[t]he recidivism rate for

career offenders more closely resembles the rates for offenders in the lower criminal history categories in which they would be placed under the normal criminal history scoring rules in Chapter Four of the Guidelines Manual.") (emphasis in original). After Booker, a court might impose lower sentences on offenders in locations where the "fast-track" is not available, to conform those sentences to similarly situated offenders in geographical areas in which the Attorney General routinely requests four-level reductions for acceptance of responsibility. See U.S.S.G. § 5K3.1 (approving four-level downward departure pursuant to early disposition or fast-track program); 18 U.S.C. § 3553(a)(6) (recommending uniformity in sentencing).

The Court's repeal of mandatory sentencing rules in Booker thus alters a defendant's substantive rights by placing certain conduct and groups of persons outside the power of the guidelines to mandatorily punish. The ruling is substantive regardless of the fact that a defendant could receive the same sentence before and after Booker. See Lindsey v. Washington, 301 U.S. 397, 100-02 (1937). In Lindsey, the defendants committed the offense when state statutes permitted a maximum sentence of not more than fifteen years, but they were sentenced under an amended statute that required a maximum fifteen-year term. Though the state court had denied the petitioners' ex post facto claims on the basis that the amended law did not impose a greater punishment, the Supreme Court reversed, stating: "It is true that petitioners might have been sentenced to fifteen years under the old statute. But the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and

control prior to the expiration of the fifteen-year term." Lindsey, 301 U.S. at 401-02; see also Miller v. Florida, 482 U.S. 423, 432 (1987) (rejecting respondent's argument that petitioner was not disadvantaged because he "'cannot show definitively that he would have gotten a lesser sentence'"); Weaver v. Graham, 450 U.S. 24, 33-34 (1981) ("petitioner is [ ] disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct") (emphasis added). Accordingly, the failure to apply Booker retroactively "'carr[ies] a significant risk'" that the defendant "faces a punishment that the law cannot impose upon him," Summerlin, 124 S. Ct. at 2522-23 (citing Bousley, 523 U.S. at 620), at least mandatorily.

Furthermore, by making the guidelines advisory, the Court altered the applicable statutory maximum sentence, as defined in Blakely, from the top of the guideline range to the maximum defined by statute. Blakely, 124 S. Ct. at 2537 ("the 'statutory maximum' for [Apprendi v. New Jersey, 530 U.S. 466 (2000)] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury veridct or admitted by the defendant.") (emphasis in original). In addition, in almost all cases, the change lowers the minimum applicable sentence in addition to raising the maximum. If, hypothetically, Congress had enacted mandatory guidelines and later amended the law to make them advisory——or the reverse——the amendment would plainly be substantive rather than procedural, for the same reason the Court has held comparable statutory amendments to be substantive changes in the law in violation of the Ex Post Facto Clause. See, e.g., Miller, 482 U.S. at 432 (ex post facto violations generally involve substantive rather than procedural changes in law, and Florida's amendment of parole guidelines was not merely procedural and violates Ex Post Facto Clause); Weaver, 450 U.S.

at 33-34 & 36 n.21 (1981) (rejecting respondent's claim that statute is "merely procedural" and holding that change in gain-time credits applied to sentence violates Ex Post Facto Clause). There is no reason to apply a higher standard for finding law to be substantive and not subject to Teague than the standard applied for purposes of the Ex Post Facto Clause.

This Court should reject the reasoning of the Seventh Circuit in McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005), rehearing denied (February 24, 2005). That court held that Booker is procedural because "no conduct that was forbidden before Booker is permitted today" and "[n]o primary conduct has been made lawful . . . ." Id. To the contrary, conduct and individuals necessarily punished before Booker are not necessarily punished after it and, therefore, previously forbidden conduct may now be permitted. Even if courts take into account conduct referred to in the guidelines, under Booker, they are no longer required to impose the same degree of increase or decrease in the sentence for such conduct. And as explained above, and pursuant to Lindsey, the fact that a court would be authorized to impose the same sentence based on the same guideline considerations after Booker does not alter the substantive nature of excising § 3553(b)(1), because that sentence is no longer mandatory. The McReynolds court also states that "no maximum available sentence has been reduced." Id. Notably, however, and as pointed out above, after Booker virtually all minimum sentences have been reduced and maximum sentences increased, by removing the upper and lower limits imposed by the guidelines. Whether a law is substantive does not depend on whether it increases or decreases punishment, and Booker does both. The McReyolds court incorrectly appears to address only the type of substantive change that would also fall under Teague's first exception,

placing conduct or individuals out of the reach of the power of the government to punish. See Summerlin, 125 S. Ct. at 2522 & n.4. Such new rules would be substantive but they do not define the only type of substantive new rules not subject to Teague in the first place.

For these reasons, this Court should find that Booker states a substantive new rule, and that it is retroactively applicable to cases on collateral review.

IV. Alternatively, the Rules Adopted in Booker and Blakely Implicate Fundamental Fairness Under Teague's Second Exception for Watershed New Rulings

In Teague, the Court recognized an exception to its rule prohibiting the retroactive application of new constitutional rules of criminal procedure for "watershed" decisions critical to the fundamental fairness and accuracy of the criminal process. 489 U.S. at 311. If it does not hold that Booker states a substantive new rule, this Court should hold that Booker and Blakely constitute "watershed" new rules applicable to this case on collateral review. As the Supreme Court has clarified, this exception "give[s] retroactive effect to only a small set of '"watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.' 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.' This class of rules is extremely narrow, and 'it is unlikely that any . . . "has yet to emerge."'" Schriro v. Summerlin, 124 S. Ct. at 2523 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague, 489 U.S. at 311)) and Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001)) (emphasis in Summerlin).

In Summerlin, decided the same day as Blakely, the Supreme Court ruled that Ring v. Arizona, 536 U.S. 584 (2002), was not a watershed

ruling that could be retroactively applied to cases on collateral review. In Ring, the Court applied Apprendi to require jury findings of aggravated facts supporting a death sentence, but the only issue in that case involved the identity of the factfinder, since the statute at issue there already required the judge to make findings of aggravated facts supporting death beyond a reasonable doubt. Ring, 536 U.S. at 597, 609. In turn, thus, Summerlin involved the finder of fact but not the standard of proof. Summerlin, 124 S. Ct. at 2522 n.1. Writing for the majority, Justice Scalia stated in Summerlin that "[t]he right to jury trial is fundamental to our system of criminal procedure," id. at 2526, and as the dissenting justices note, "[t]he majority does not deny that Ring meets the first criterion of Teague, that its holding is 'implicit in the concept of ordered liberty.'" Id. The Court declined to find retroactivity instead on a secondary inquiry involving accuracy, explaining that the question was not whether juries or judges were more accurate finders of fact, but "whether judicial factfinding so 'seriously diminishe[s]' accuracy that there is an 'impermissibly large risk'" of punishing conduct the law does not reach." Summerlin, 124 S. Ct. at 2525 (quoting Teague, 312-13 (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J. dissenting)). The Court found the evidence to be "simply too equivocal to support that conclusion." Id.

In contrast to Ring, Blakely's application to the federal sentencing guidelines requires jury findings beyond a reasonable doubt. The Supreme Court explained the crucial nature of this right in In re Winship:

> The reasonable-doubt standard plays a vital rule in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. . . "[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the

> strength of the same evidence as would suffice in a civil case."
>
> . . .
>
> "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."

In re Winship, 397 U.S. 358, 363-64 (1970) (citations omitted). The Court also described the history of that standard, noting that it "dates at least from our earliest years as a nation." Id. at 361-62 (citing treatises citing standard from 1798 and numerous cases as early as 1881); see also Apprendi, 530 U.S. at 499-518 (2000) (Thomas, J., concurring) (explaining historical basis for rule adopted in that case).

The Court applied Winship to habeas corpus proceedings in Jackson v. Virginia, 443 U.S. 307, 320-24 (1979) (explaining applicability of doctrine on collateral review). In Jackson, the Court explained that "proof beyond a reasonable doubt has traditionally been regarded as the decisive difference between criminal culpability and civil liability," and that "Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof——defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Id. at 315-16. The Court also stated: "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." Id. at 316-17. "The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." Id. at 323.

In Cage v. Louisiana, 498 U.S. 39, 41 (1990), citing Winship, the Court described the reasonable doubt standard as "'a prime instrument for reducing the risk of convictions resting on factual error.'" In Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993), the Court held that the failure to give a proper reasonable doubt instruction was equivalent to denial of the right to jury trial. "[T]o hypothesize a guilty verdict that was never in fact rendered——no matter how inescapable the findings to support that verdict might be——would violate the jury-trial guarantee." Id. at 279. Accordingly, the Court found that error in failing to instruct the jury correctly about reasonable doubt could never be harmless, and constitutes structural error. Id. at 280-81. See also Ivan V. v. City of New York, 407 U.S. 203, 203-04 (1972) (affirming "bedrock" nature of reasonable doubt standard and holding that "Winship is thus to be given complete retroactive effect," in case involving retroactivity on direct appeal); Hankerson v. North Carolina, 432 U.S. 233, 241-42 (1977) (applying Ivan V. to hold that Mullaney v. Wilbur, 421 U.S. 684 (1975), which prohibits requiring defendant to prove lack of malice, applies retroactively to case on direct appeal); Reed v. Ross, 468 U.S. 1, 4-5 (1984) (interpreting Hankerson to require retroactive

application of Mullaney to case on collateral review).[1] The reasonable doubt standard stems not only from the right to jury trial reviewed in Ring, but also from the Due Process Clause, as does the right to counsel recognized in Gideon v. Wainwright, 372 U.S. 335, 341 (1963), which is recognized to be "watershed" and retroactively applicable. See Beard v. Banks, 124 S. Ct. 2504, 2514 (2004).

Imposing a sentence based on potentially inaccurate factual findings is just as important a violation of due process as upholding a conviction based on such findings. This is particularly true given the fact that sentence enhancements under the guidelines can double, triple or quadruple a sentence, or even increase a sentence by a multiplier of more than 30. Booker, 125 S. Ct. at 752 (citing examples); see also Blakely, 124 S. Ct. at 2541 (defendant "would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment . . . based not on facts proved to his peers beyond a reasonable doubt but on facts extracted after trial from a report complied by a probation officer who the judge thinks more likely got it right than got it wrong"). Even if the increase in the sentence is less significant, it involves the loss of liberty. Furthermore, if sentencing facts must be proven beyond a reasonable doubt to a jury, they are indistinguishable from elements of the offense. Here, the imposition of sentence enhancements based on a preponderance of the evidence creates "an impermissibly large risk" that an individual "innocent" of conduct on which the sentence enhancements are based would receive a significantly longer term of imprisonment. See Teague, 489 U.S. at 312 (new rule should be retroactive if "'it creates an impermissibly large

[1] These cases were decided before Griffith v. Kentucky, 479 U.S. 314 (1987), and Teague clarified the application of new law to cases not yet final on direct review, and retroactivity on collateral review.

risk that the innocent will be convicted'") (citing Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

For all of these reasons, the requirement of proof beyond a reasonable doubt, at issue in Blakely and Booker but not in Ring and Summerlin, is an essential component of the fundamental fairness of criminal proceedings. The Court has already recognized the fundamental nature of this right in Summerlin, 124 S. Ct. at 2526, as noted above. Without proof beyond a reasonable doubt, there is an "'impermissibly large risk'" that a defendant is serving an unlawful and unfair term of punishment. Summerlin, 124 S. Ct. at 2525 (citations omitted). Thus, the rule announced in Booker and Blakely is critical to the accuracy of the findings of fact on which criminal sentences are based, and meets the standard articulated in Teague for a "'bedrock'" new rule. Teague, 489 U.S. at 311 (citing Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part)).

A number of courts have rejected the retroactive application of Booker without considering arguments raised here. See, e.g., United States v. Price, 2005 WL 535361, *4 (10th Cir. March 8, 2005) (rejecting watershed argument based on earlier law rejecting similar claim with respect to Apprendi); Varela v. United States, 2005 WL 367095, *2-*4 & n.1 (11th Cir. February 17, 2005) (Summerlin controls watershed analysis of Booker); Humphress v. United States, 398 F.3d 855, 863 (6th Cir. 2005) (same); but see United States v. Siegelbaum, 2005 WL 196526, *3-*4 (D. Ore. January 26, 2005) (leaving open question whether proof beyond a reasonable doubt standard supports retroactive application of Blakely and Booker). The Seventh Circuit rejected the argument that Booker is watershed on the basis that a court imposing sentence after Booker may still consider findings made by preponderance of the evidence to impose

an advisory sentence. McReynolds, 397 F.3d at 481; see also United States v. Rucker, 2005 WL 331336, at *10 (D. Utah February 10, 2005) (applying similar analysis). This Court should decline to follow that analysis because it incorrectly ignores the rights decision in Booker that forced the remedial result. To the extent that Booker announced a new constitutional rule of criminal procedure, it is the rule prohibiting a sentence to be mandatorily increased based on facts not proven to a jury beyond a reasonable doubt, and that is the rule that should be analyzed as a watershed exception to Teague's doctrine.

For these reasons, this Court should conclude that Blakely and Booker state watershed new rules not subject to Teague's limit on retroactivity. Cf. Bockting v. Bayer, 2005 WL 406284, *6-*9 (9th Cir. February 22, 2005) (Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), upholding defendant's rights under Confrontation Clause, applies retroactively to cases on collateral review under watershed exception to Teague).

CONCLUSION

For the reasons stated above, defendant respectfully requests that

this Court vacate his sentence and schedule a resentencing hearing.

Respectfully submitted,

A.J. KRAMER
FEDERAL PUBLIC DEFENDER

/S/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 was served by first class mail on the 23rd day of March, 2005, upon Robert D. Okun, Chief, Special Proceedings Section, United States Attorney's Office, 555 Fourth Street, N.W., Room 10-836, Washington, D.C. 20530.

/S/

Beverly G. Dyer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
Plaintiff,	
v.	**CR. NO. xxx**
Defendant,	
Defendant.	

ORDER

Upon consideration of defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, it is this ___ day of _____, hereby

ORDERED that defendant's motion should be, and is hereby, granted, and a sentencing hearing is hereby scheduled for _____ _____.

_____
UNITED STATES DISTRICT COURT JUDGE