

BOOKER LITIGATION STRATEGIES

*A Reference for Criminal Defense Attorneys
Distributed February 17, 2005*

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UNITED STATES v. BOOKER
Litigation Strategies for Criminal Defense Attorneys¹
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On January 12, 2005, the Supreme Court handed down its decision in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*, 125 S. Ct. 738 (2005). The Court's decision consisted of two separate majority opinions.

In the first opinion, authored by Justice Stevens, the Court held that the rule of *Blakely v. Washington*, 124 S. Ct. 2531 (2004) applies to the federal sentencing guidelines because their mandatory application under the Sentencing Reform Act of 1984 (SRA) renders the top of each guidelines range a "statutory maximum" punishment for *Apprendi* purposes. Guidelines enhancements based on judge-found facts, which increase the applicable sentencing range and thus the statutory maximum, therefore violate the Sixth Amendment right to jury trial.

In the second opinion, authored by Justice Breyer, the Court held that the proper remedy, in light of the Court's Sixth Amendment holding, is for the Court to judicially strike the language from the SRA that makes the sentencing guidelines mandatory. The guidelines thus become "effectively advisory" in all cases, including those in which there are no Sixth Amendment-offending enhancements. As a result, the guidelines are now just one factor among several that sentencing courts are required to consider in imposing a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). This reference outline discusses *Booker* and reviews defense litigation strategies in light of this ground-breaking decision.

¹ Many of the ideas presented here were developed in discussions with Assistant Federal Defenders in the Federal Defender Office for the Eastern District of Pennsylvania, as well as at a brainstorming session of Assistant Federal Defenders from around the country held in December, 2004, and at a meeting of the Federal Defender Sentencing Advisory Group in January 2005. This reference outline has also benefitted substantially from the input of many other members of the Federal Public Defender community, who have been quickly and generously sharing their creative litigation strategies.

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I. The Supreme Court Decision

A. Facts and Lower Court Rulings

1. Booker

Booker was charged with possession with intent to distribute at least 50 grams of crack in violation of 21 U.S.C. § 841(a)(1). The jury convicted after hearing evidence that Booker possessed 92.5 grams of crack. At sentencing, which occurred before the *Blakely* decision, the district court found by a preponderance of the evidence that Booker possessed an additional 566 grams of crack and that he obstructed justice. Based on these findings, and on Booker's criminal history, the district court sentenced Booker to 360 months' imprisonment.

Booker's appeal was decided shortly after *Blakely* was handed down, with the Seventh Circuit holding that the Sixth Amendment prohibited the enhancement of Booker's sentence above the maximum sentence that could be imposed based solely on the facts reflected in the jury verdict or admitted by Booker. The Supreme Court granted *certiorari* and consolidated the case with *Fanfan*.

2. Fanfan

Fanfan was charged with conspiracy to distribute, and to possess with intent to distribute, at least 500 grams of cocaine in violation of 21 U.S.C. § 846, 841(a)(1), and 841(b)(1)(B)(ii). The jury convicted, specifically finding that the amount of cocaine involved was 500 grams or more. At sentencing, which occurred several days after the *Blakely* decision, the district court found by a preponderance of the evidence that Fanfan was responsible for 2.5 kilograms of cocaine and 261.6 grams of crack, and that Fanfan had a leadership role in the offense—facts that substantially increased Fanfan's guideline range.

Relying on *Blakely*, the district court refused to increase Fanfan's sentence beyond the maximum provided for by the guidelines taking account only of the facts reflected in the jury verdict. The court therefore sentenced Fanfan to 78 months' imprisonment, the top of the guideline range based on a drug quantity of 500 grams of cocaine and no enhancement for role in the offense. A writ of *certiorari* before judgment issued to the First Circuit Court of Appeals.

B. The Sixth Amendment Ruling

1. Holding

In an opinion authored by Justice Stevens, the Court ruled 5-4 that *Blakely*'s Sixth Amendment holding applies to the SRA and the federal sentencing guidelines.² In particular, the Court held that:

Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

Booker, 125 S. Ct. at 756.

2. Court's Reasoning

The SRA and the federal sentencing guidelines are part of a “new trend in the legislative regulation of sentencing,” where legislatures identify facts relevant to sentencing and increase the range of sentences possible when such facts are present. The effect of tying the range of possible sentences to facts historically found by judges at sentencing is to change the relative power of judge and jury. Under such systems, the length of a sentence is often driven more by the facts found by a judge at sentencing than by the facts found by the jury at trial. This “new sentencing regime” has “forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government.” *Booker*, 125 S. Ct. at 751-52.

The Court answered this question in *Blakely* in the context of a state sentencing scheme: a defendant is entitled to a jury determination, beyond a reasonable doubt, of every non-admitted fact (other than a prior conviction) that the law makes essential to his punishment—regardless of whether that fact is called an “element of the offense” or a “sentencing factor.” A fact is “essential to the punishment” if, absent the finding of the fact, the judge could not impose the given punishment, i.e., would be *required* to impose a lower sentence.

The *Booker* Sixth Amendment majority held that the mandatory nature of the federal sentencing guidelines triggers the Sixth Amendment, as was the case with the state sentencing scheme at issue in *Blakely*. *Booker*, 125 S. Ct. at 749-50. Because judge-

² The majority is comprised of the same justices as the *Apprendi* and *Blakely* majorities; joining Justice Stevens are Justices Scalia, Ginsberg, Souter, and Thomas.

found facts are essential to an enhanced sentence under the guidelines (i.e., absent those facts, a judge is *required* to sentence within a *lower range*), those facts must be found by a jury beyond a reasonable doubt unless they are admitted by the defendant. Without discussion, the *Booker* Court retained the so-called *Almendarez-Torres* exception to the rule of *Apprendi*, which permits a sentence-enhancing prior conviction to be found by a judge rather than by the jury.

C. The Remedy Ruling

1. Holding

In an opinion authored by Justice Breyer, the Court ruled 5-4 that the mandatory nature of the federal sentencing guidelines is “incompatible” with the *Booker* Court’s Sixth Amendment holding, and that 18 U.S.C. § 3553(b)(1) (providing that district courts “shall” impose a guidelines sentence) and § 3742(e) (setting forth standards of appellate review) can and must be severed from the remainder of the SRA and excised.³ *Booker*, 125 S. Ct. at 756-57. This, in the remedy majority’s words, makes the sentencing guidelines “effectively advisory” in all cases. *Id.* at 757.

The result is that district courts must now impose a sentence that is “sufficient but not greater than necessary” to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), after considering:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant [§ 3553(a)(1)];
- (2) the kinds of sentences available [§3553(a)(3)];
- (3) the guidelines and policy statements issued by the Sentencing Commission, including the (now non-mandatory) guideline range [§3553(a)(4) & (a)(5)];
- (4) the need to avoid unwarranted sentencing disparity among defendants with similar records that have been found guilty of similar conduct [§ 3553(a)(6)]; and
- (5) the need to provide restitution to any victim of the offense [§ 3553(a)(7)].

³ The remedy majority is comprised of the dissenters from the Sixth Amendment ruling, plus Justice Ginsburg.

Having stricken the SRA's provision governing the appellate standard of review for sentencing decisions, the remedy majority implies a new standard into the SRA: review for "reasonableness." *Booker*, 125 S. Ct. at 766.

2. Court's Reasoning

The remedy majority framed the issue as determining – based on the SRA's language, history and basic purposes – what sentencing scheme Congress would have intended to exist going forward given the Court's Sixth Amendment ruling. *Booker*, 125 S. Ct. at 756. The remedy majority first rejected the possibility of the SRA continuing in force with juries finding enhancement facts, concluding that Congress would prefer the total invalidation of the SRA to such a system.

The remedy majority then concluded that severance and excision of the sections of the SRA that make the sentencing guidelines mandatory would both cure the Sixth Amendment problem and be preferred (over total invalidation of the SRA) by Congress. An advisory guidelines system would promote some degree of sentencing uniformity because (1) judges would still be required "take account of" and "consult" the guidelines in determining a sentence, and (2) sentences would still be subject to the harmonizing effect of appellate review, with the Sentencing Commission able, in turn, to make guideline amendment decisions based on appellate case law.

Noting that this remedy imperfectly secures the goals of the SRA, the remedy majority notes that "the ball now lies in Congress' court." *Id.* at 768.

3. Application to Booker and Fanfan

The district court in *Booker* had enhanced Booker's sentence based on judicial fact-finding with respect to drug quantity and obstruction of justice, in violation of the Sixth Amendment. In *Fanfan*, the district court sentenced at the top of the guideline range applicable considering only facts supported by the jury verdict, thereby avoiding a Sixth Amendment violation. *Id.* at 769.

The remedy majority remanded both cases for resentencing under the remedial interpretation of the SRA announced in *Booker*. In doing so, the Court noted that both the Sixth Amendment holding and the remedial interpretation of the SRA will be applied "to *all* cases on direct review." *Id.* at 768-69 (emphasis added).

II. Determining a Sentence Post-Booker: The Basics of Section 3553(a)

Section 3553(a) is referred to in *Booker* and much post-*Booker* case law as containing various "factors" – one of which is the guidelines – that must now be considered in determining a sentence. This is a potentially misleading oversimplification. Section 3553(a) is comprised of two distinct parts: the so-called "sentencing mandate" contained in the

prefatory clause of Section 3553(a) and the “factors” to be considered in fulfilling that mandate. Because the sentencing mandate contains a limiting principle favorable to defendants, it must be made clear that *the sentencing mandate is an overriding principle that limits the sentence a court may impose*.

A. The Section 3553(a) Sentencing Mandate: The “Parsimony Provision”

The overriding principle and basic mandate of Section 3553(a) requires district courts to impose a sentence “*sufficient, but not greater than necessary*,” to comply with the four purposes of sentencing set forth in Section 3553(a)(2):

- (a) retribution (to reflect seriousness of the offense, to promote respect for the law, and to provide “just punishment”);
- (b) deterrence;
- (c) incapacitation (“to protect the public from further crimes”); and
- (d) rehabilitation (“to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

The sufficient-but-not-greater-than-necessary requirement is often referred to as the “parsimony provision.” *The Parsimony Provision is not just another “factor” to be considered along with the others set forth in Section 3553(a) (discussed below)—it sets an independent limit on the sentence a court may impose.*

B. The Section 3553(a) Factors to be Considered in Complying With the Sentencing Mandate

In determining the sentence minimally sufficient to comply with the Section 3553(a)(2) purposes of sentencing, the court must consider several factors listed in Section 3553(a). These are (1) “the nature and circumstances of the offense and the history and characteristics of the defendant;” (2) “the kinds of sentence available;” (3) the guidelines and policy statements issued by the Sentencing Commission, including the (now non-mandatory) guideline range; (4) the need to avoid unwarranted sentencing disparity; and (5) the need to provide restitution where applicable. 18 U.S.C. § 3553(a)(1), (a)(3), (a)(5)-(7).

Neither the statute itself nor *Booker* suggests that any one of these factors is to be given greater weight than any other factor. *However, it is important to remember that all factors are subservient to Section 3553(a)’s mandate to impose a sentence not greater than necessary to comply with the four purposes of sentencing.*

C. The Weight Given to the Guidelines

The first two published district court sentencing opinions after *Booker* have presented two very different views regarding how much weight should be given to

advisory guidelines. Judge Cassell of the District of Utah, the day after *Booker* was decided, ruled that he will continue to give “considerable weight” or “heavy weight” to the sentencing guidelines, deviating from the applicable range only “in unusual cases for clearly identified and persuasive reasons.” *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005). *See also United States v. Wilson*, ___ F. Supp. 2d ___, 2005 WL 273168 (D. Utah Feb. 2, 2005) (reaffirming position and responding to critics of the first *Wilson* decision).

In a much better reasoned opinion, Judge Adelman of the Eastern District of Wisconsin disagreed, noting that *Wilson* is inconsistent with the remedial majority in *Booker*, which “direct[s] courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore.” *United States v. Ranum*, ___ F. Supp. 2d ___, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005). Judge Adelman reasoned that while courts must “seriously consider” the guidelines and give reasons for sentences outside the range, “in doing so courts should not follow the old ‘departure’ methodology.” Judge Adelman went on to state,

The guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside the “heartland.” Rather, courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines, so long as that the ultimate sentence is reasonable and carefully supported by reasons tied to the § 3553(a) factors.

2005 WL 161223, at *2. *See also United States v. Myers*, 2005 WL 165314 (S.D. Iowa Jan. 26, 2005) (Pratt, J.) (agreeing with *Ranum* approach and arguing that the *Wilson* approach is in error because it makes the guidelines, “in effect, still mandatory”); *United States v. West*, 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005) (following *Ranum*); *United States v. Ameline*, No. 02-30326 (9th Cir. Feb. 9, 2005) (available at www.ca9.uscourts.gov) (stating that advisory guideline range is “only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence”).

If a judge does follow the approach of *Wilson*, defense counsel should object on the ground that such a sentencing practice effectively makes the guidelines as binding as they were before *Booker*. The *Wilson* approach therefore violates both the Sixth Amendment and the interpretation of Section 3553 adopted by the remedial majority in *Booker*. As Justice Scalia explains in his *Booker* dissent,

Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise – if it thought the Guidelines not only had to be

‘considered’ (as the amputated statute requires) but had generally to be followed – its opinion would surely say so.

Booker, 125 S. Ct. at 791 (Scalia, J., dissenting). Likewise, if the remedial majority thought the guidelines had to be given “heavy weight,” its opinion would have said so. The remedial majority clearly understood that giving any special weight to the guideline range relative to the other Section 3553(a) factors would violate the Sixth Amendment.

In the alternative, defense counsel can argue that since the “weighted guidelines” approach in effect makes the guidelines binding (thereby triggering the Sixth Amendment), courts employing this approach may enhance a sentence based only on facts proven to a jury beyond a reasonable doubt or admitted by the defendant.

<p>THE BOTTOM LINE: Courts must now impose a sentence that is minimally sufficient to accomplish certain specified purposes of sentencing, and the guidelines are only the third of five equally important factors to be considered in determining the minimally sufficient sentence.</p>
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III. Post-*Booker* Sentencing Practice

A. The Pre-Sentence Investigation Report and Form-1 Interview with Probation

The Probation Office will continue to produce pre-sentence investigation reports (PSRs) pursuant to Federal Rule of Criminal Procedure 32(d). In light of *Booker*, defense counsel should seek to have included in the PSR all information relevant to the Section 3553(a) sentencing factors. Although some such information has historically been included pursuant to Rule 32(d)(2), this information is now even more important (and requires more emphasis) as it can more heavily influence the sentence imposed. It is also even more critical that counsel attend all interviews with Probation.

The PSR objection procedure remains the same, and defense counsel should object (if advantageous) to any aspect of the PSR (including failure to include information provided by the defense) that might suggest that the sentencing guidelines carry more weight than the other Section 3553(a) factors.

THE BOTTOM LINE: Have all information relevant to the Section 3553(a) mandate and factors included in the PSR, and make sure to attend all interviews with Probation.

B. The Sentencing Memorandum and “Departure” Arguments

Sentencing memoranda should continue to address all guidelines issues and other objections to the PSR, but should emphasize Section 3553(a)’s mandate for a minimally sufficient sentence to achieve the goals of punishment in light of the Section 3553(a) factors, only one of which is the advisory guidelines sentence.

It is important to understand that traditional guidelines departures continue to exist and can be utilized by a court in arriving at the advisory guideline sentence. Therefore, when it is tactically appropriate, defense counsel should still make traditional departure arguments (based on departure case law) in order to influence the advisory guidelines sentence calculated by the district court.

What is new after *Booker* is that, even when no traditional departure is available or granted, the district court may still sentence outside the applicable guidelines range in exercising its discretion under Section 3553—without the need to justify the sentence under a “departure” or “heartland” methodology. To avoid confusion, this latter type of extra-range sentence based on statutory factors is best termed a “statutory” sentence rather than a “departure” sentence.⁴

THE BOTTOM LINE: Structure the sentencing memorandum around the Section 3553(a) mandate and factors, keeping in mind that you may argue for a traditional guidelines departure when the facts and departure law are favorable, and may also argue for a statutory sentence (below the guideline range) pursuant to the Section 3553(a) mandate and factors.

⁴ *A note about terminology:* Negative terminology such as “deviation” or “variation” from the guidelines, and “non-guidelines sentence” should be avoided since it is too guideline-centric. Instead, defense counsel should encourage courts to use the term “statutory sentence” for any sentence outside the guideline range that is based on the Section 3553(a) mandate and factors. The term “guidelines sentence” can be used to refer to any sentence within the guideline range, and “departure sentence” to any sentence in which the court follows traditional guidelines departure rules to sentence outside the range.

C. The Sentencing Hearing

Post-*Booker* sentencing hearings should be broader in scope than sentencing hearings under the mandatory guidelines. The district court must now consider the Section 3553(a) mandate and factors in arriving at a sentence, and in addition must still resolve objections to the PSR, rule on any departure motions under the guidelines, and determine the advisory guideline range. All of the procedural requirements of Rule 32(i) remain in effect.

The new importance of the Section 3553(a) factors relative to the guidelines means that some evidence and argument that may have previously had only a small potential impact on the sentence (or was not enough to support a departure) now become centrally important. Also, if defense counsel decides to make a traditional departure argument and it is rejected by the court in determining the advisory guideline sentence, counsel should remember that *the circumstances underlying the departure motion can still be used in the Section 3553(a) analysis to argue for the sentence desired.*

By force of habit, many judges post-*Booker* will proceed by first determining the advisory guidelines range (including consideration of traditional departure grounds) and only then considering the broader sentencing mandate and factors of Section 3553(a). *Nothing requires a judge to proceed in this potentially prejudicial fashion.* The danger in this approach is that the guidelines might be viewed not just as the first sentencing factor considered but rather as the substantive starting point in the sentencing analysis. When this is not desired, defense counsel should try to focus the court on the most helpful Section 3553(a) factors, which might include asking the court to start its sentencing analysis elsewhere than with the guidelines.

Under Section 3553(c), the district court must still state the reasons for the sentence imposed (with specificity in the case of a sentence outside the guideline range). Because this requirement survives *Booker*, it is important for defense counsel in advocating for a sentence below the guideline range to prepare a clear written statement of reasons for the sentence that the judge can adopt and include in the judgement and commitment order.⁵ As long as the judge considers all the factors mentioned above and includes this written statement of reasons, sentences below the guideline range should meet the new test for “reasonableness” on appellate review.

⁵ *Booker* likewise does not affect the requirement under Rule 32(h) and *Burns v. United States*, 501 U.S. 129, 138-39 (1991), that before the court can depart upward (or downward) from the guidelines on a ground not identified in the PSR or the parties’ filings, it must give the parties reasonable notice, specifically identifying the ground.

THE BOTTOM LINE: Attempt to organize the sentencing hearing around the Section 3553(a) mandate and factors most beneficial to the defense, resisting any default to the guidelines as the starting point of the sentencing analysis. Make sure the sentence imposed is supported by a statement of reasons grounded in the Section 3553(a) mandate and factors.

IV. Sentencing Arguments Available in Light of *Booker*

From an advocacy perspective, *Booker* returns sentencing to the pre-guidelines days in which there were no limits on what could be considered (and could actually have an impact) at sentencing. Defense counsel should make any and all arguments that will humanize the defendant, mitigate guilt, and encourage the judge to impose the lowest possible sentence. The only difference between pre-guidelines sentencing and post-*Booker* sentencing is that judges now have a longer list of factors (only one of which is the advisory guideline range) that they must “consider” before imposing a sentence that is “sufficient but not greater than necessary” to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). For this reason, and so as to protect favorable sentences from reversal for “unreasonableness” on appeal, defense counsel should couch sentencing arguments explicitly in terms of the Section 3553(a) factors and in relation to the purposes of sentencing.

What follows are several arguments, in addition to the basic factual arguments to be made under the Section 3553(a) mandate and factors, that may be pursued at sentencing.

A. Section 3582 Limits on Sentences of Imprisonment

Under 18 U.S.C. § 3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to “recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation” (emphasis added). Thus, to the extent that the defense has a good argument that a defendant is in need of rehabilitation, whether educational, vocational or medical, this separate statutory provision provides a strong argument for a lower or non-custodial sentence.

THE BOTTOM LINE: Rehabilitative arguments now serve as an independent basis for avoiding a sentence of imprisonment.

B. The Use of Information Under Section 3661

Under 18 U.S.C. § 3661, “*no limitation* shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence” (emphasis added). This statutory language certainly overrides the (now-advisory) policy statements in Part H of the sentencing guidelines, which list as “not ordinarily relevant” to sentencing a variety of factors such as the defendant’s age, educational and vocational skills, mental and emotional conditions, drug or alcohol dependence, and lack of guidance as a youth. *See* U.S.S.G. § 5H1. *See also United States v. Henry Nellum*, No. 2:04-CR-30 (N.D. Ind. Feb. 3, 2005) (Simon, J.) (taking into account fact that defendant, who was 57 at sentencing, would upon his release from prison have a very low likelihood of recidivism since recidivism reduces with age; citing Report of the U.S. Sentencing Commission, *Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines*, May 2004).

<p>THE BOTTOM LINE: Defendant characteristics that were “not relevant” or “not ordinarily relevant” under the guidelines may now be considered in fashioning the sentence.</p>

C. Due process (*ex post facto*) argument for all offenses committed pre-Booker: courts may sentence anywhere below, but not above, the top of the guidelines range taking account only of jury-found or admitted facts

In all cases involving offenses committed before the date *Booker* was decided (January 12, 2005), the *ex post facto* principles inherent in the Due Process Clause should bar courts from imposing a sentence any greater than the ‘*Blakely*-ized’ guideline range—the range as calculated only on the basis of facts proven to the jury beyond a reasonable doubt or admitted by the defendant.

Although the Ex Post Facto Clause of the Constitution, by its terms, applies only to acts by the legislature and not the judiciary, the Supreme Court has made clear “that limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process.” *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). As the *Rogers* Court explained, the Due Process Clause contains the basic principle of “fair warning.” *Id.* at 457. “Deprivation of the right to fair warning, . . . can result from . . . an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face.” *Id.* (citing *Bowie v. City of Columbia*, 378 U.S. 347, 352 (1964)). Thus, the Court held that

if a judicial construction of a criminal statute is ‘unexpected and indefensible by reference to the law which had been

expressed prior to the conduct in issue,’ [the construction] must not be given retroactive effect.

Rogers, 532 U.S. at 457 (quoting *Bouie*, 378 U.S. at 354).⁶

These Due Process and ex post facto principles come into play here because the remedial majority in Booker, through its new interpretation of the SRA, effectively raised the statutory maximum penalty that may be imposed for federal crimes. As Blakely and Booker make clear, “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.” *Booker*, 125 S. Ct. at 749 (quoting *Blakely*, 124 S. Ct. at 2537). Thus, under the mandatory federal guideline system that was in effect until *Booker* was decided, the “statutory maximum” sentence is the top of the guideline range, as calculated solely on the basis of the facts (other than a prior conviction) found by the jury beyond a reasonable doubt or admitted by the defendant.

The remedial majority in *Booker*, by judicially striking the provision that had made the guidelines mandatory, effectively raised the statutory maximum from the top of the un-enhanced guideline range to the maximum allowed under the statute for the offense at issue. This judicial interpretation of the SRA, which expands the criminal penalty for all federal crimes, cannot be applied retroactively to the detriment of the defendant in cases involving crimes committed before *Booker*.

Like the judicial construction at issue in *Bouie*, this construction is “clearly at odds with the statute’s plain language and had no support in prior [Court] decisions.” *Rogers*, 532 U.S. at 458. Specifically, the *Booker* Court’s remedial interpretation of Section 3553 meets the *Rogers* two-part test for non-retroactivity because it was (1) “unexpected,” and (2) “indefensible by reference to the law which had been expressed prior to the conduct in issue.” *Id.* at 457.

1) Unexpected: The test for whether *Booker* was “unexpected” focuses on the remedy decision (Justice Breyer’s opinion), not on the Sixth Amendment holding (Justice Stevens’ opinion). It is Justice Breyer’s remedy opinion that contains the judicial construction of the SRA at issue (striking the mandatory aspect of the guidelines and thereby raising the maximum sentence), and this construction was certainly “unexpected.” Indeed, it is directly contrary to the plain language of the stricken Section 3553(b)(1), which stated that “the court shall impose a sentence” in accordance with the guidelines. No person reading the SRA could have expected the Court’s advisory guidelines

⁶ In *Bouie*, a state supreme court’s expansive construction of a trespassing statute “violated this principle because it was so clearly at odds with the statute’s plain language and had no support in prior [state court] decisions.” *Rogers*, 532 U.S. at 458.

construction. Indeed, the Supreme Court itself has given the statute exactly the opposite construction in several cases.⁷ See *Stinson v. United States*, 508 U.S. 36, 42 (1993) (reaffirming “binding” nature of guidelines and citing prior cases).

2) Indefensible by reference to prior law: It is equally clear that the remedial majority’s construction of Section 3553 is “indefensible by reference to the law which had been expressed prior to the conduct in issue.” This point is made clear by the fact that the remedial majority, like the state supreme court reversed in *Bouie*, could not cite to a single prior decision to support its construction of the statute. As noted above, all the Court’s prior cases construing this statute had held that the guidelines were mandatory. Moreover, as Justice Stevens observes in his dissent, nothing in *Booker* even suggests that there is “any constitutional infirmity inherent” in Section 3553(b)(1). *Booker*, 125 S. Ct. at 771 (Stevens, J., dissenting). Thus, there was nothing in prior law that the Court could rely upon to support its construction/excision of § 3553(b)(1), and therefore it was “indefensible” by reference to prior law.

Accordingly, both prongs of the test for non-retroactivity are met, and *the Booker remedy cannot be applied to the detriment of a defendant who committed the offense before Booker was decided*. To state the argument in terms of the due process requirement of “notice,” before *Booker*, defendants were on notice by virtue of the plain statutory language and the case law that the guidelines were binding. *Booker* unexpectedly struck that binding language, and thereby raised the statutory maximum sentence. The legislature cannot do that retroactively by virtue of the Ex Post Facto Clause, and the courts cannot do that retroactively by virtue of the Due Process Clause. See *United States v. Marks*, 430 U.S. 188, 191-92 (1977).

The next, and analytically separate, question is what sentence *can* be imposed for offenses committed pre-*Booker*. Because the sentence imposed must comply with the Sixth Amendment, the guideline range can be based only on facts found by the jury or admitted by the defendant. *In other words, defendants whose offenses occurred pre-Booker get the benefit of Booker’s Sixth Amendment ruling but avoid*

⁷ Justice Scalia’s dissent in *Booker* also makes this point, noting that Congress “expected” the guidelines to be mandatory. *Booker*, 125 S. Ct. at 789 (Scalia, J. dissenting). Justice Stevens further emphasizes the entirely unexpected nature of the Court’s remedy, stating that the “novelty of this remedial maneuver perhaps explains why *no party or amicus curiae* to this litigation has requested the remedy the Court now orders.” *Booker*, 125 S. Ct. at 777 (Stevens, J., dissenting) (emphasis in original).

*any detrimental effect of Booker's remedy ruling.*⁸ Defendants need not choose between their constitutional rights; they are entitled to have both their right to due process and their Sixth Amendment rights respected.

While it certainly is true that defendants pre-*Booker* were “on notice” that a sentence higher than that applicable taking account of only jury-found or admitted facts could be imposed, since that is what the guidelines called for, that fact does not help the government. The government cannot violate a defendant’s Sixth Amendment rights just by giving notice that these violations will happen. That would be like saying that First Amendment rights can be violated as long as the government gives everyone notice of the censorship to be imposed.⁹

⁸ The Supreme Court confirmed the propriety of this approach in *Marks*: when the Court issues a decision that expands criminal liability in one respect, but limits criminal liability on constitutional grounds in another respect, defendants whose conduct preceded the decision are entitled to have the beneficial aspects of the decision apply without the retroactive application of the detrimental aspects. 430 U.S. at 196-97 (holding that Due Process Clause precludes application of standards expanding criminal liability for obscenity under *Miller v. California*, 413 U.S. 15 (1973), for offense committed before *Miller* was decided, but that nonetheless, “any constitutional principal enunciated in *Miller* which would serve to benefit petitioners must be applied in their case”).

⁹ It should be noted that there is nothing in *Booker* to suggest that the Court considered this due process/*ex post facto* argument. In remanding *Fanfan*, however, the Court did indicate that the government could seek resentencing under the “system set forth in today’s opinions,” a benefit that would be contrary to the due process argument outlined above given that *Fanfan* was already sentenced to the highest sentence possible taking account of only jury-found or admitted facts. While it could be argued that this remand implies there is no constitutional problem with *Fanfan* being given a higher sentence, a due process objection to such a sentence was not before the Court, and indeed could not be presented unless and until the district court actually imposed such a sentence. Thus, the Supreme Court simply did not have occasion to address this issue in *Booker*, and nothing can be read into its silence on the subject. Indeed, *Booker* itself illustrates this principle well. The Court in *Booker* notes that it previously held in *United States v. Watts*, 419 U.S. 148 (1997), that the Double Jeopardy Clause did not bar the judge from increasing the guideline range based on acquitted conduct. But the Court properly found this ruling was not dispositive of the issue in *Booker* because no Sixth Amendment claim was raised or addressed in *Watts*. *Booker*, 125 S. Ct. at 754.

THE BOTTOM LINE: The Due Process Clause bars retroactive application of the *Booker* remedy insofar as it increases the maximum sentence by making the guidelines advisory, and the Sixth Amendment prohibits any sentence above the top of the range taking account only of facts found by the jury or admitted by the defendant. Therefore, for offenses committed before *Booker* was decided, there is no mandatory sentencing “floor” but there is a mandatory sentencing “ceiling”— the top of the applicable guideline range taking account of only jury-found or admitted facts.

D. Burden of proof for sentencing enhancements: Beyond a reasonable doubt?

An argument can be made under the doctrine of avoidance of constitutional doubt that sentence enhancements must be proven beyond a reasonable doubt.¹⁰ The Sentencing Commission (pre-*Booker*) stated in its commentary to U.S.S.G. § 6A1.3 that it “believes that the use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns . . .” But as Justice Thomas points out in his dissent in *Booker*, “the Court’s holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.” *Booker*, 125 S. Ct. at 798 n.6 (Thomas, J., dissenting). The preponderance standard has no statutory basis, and particularly where the government is attempting to raise the guideline range through acquitted or uncharged conduct, it can be argued that the potential Fifth Amendment concerns are best avoided by requiring proof beyond a reasonable doubt. *Cf. Jones v. United States*, 526 U.S. 227, 229 (1999) (interpreting federal carjacking statute “in light of the rule that any interpretive uncertainty should be resolved to avoid serious questions about the statute’s constitutionality”).

The Ninth Circuit, while noting that the burden of proving any fact necessary to determine the base offense level or any enhancement rests squarely on the government, and that under certain circumstances that burden may be by clear and convincing evidence or even by proof beyond a reasonable doubt, declined to decide whether *Booker* affects the standard of proof. *United States v. Ameline*, No. 02-30326 (9th Cir. Feb. 9, 2005). Several district courts, however, have ruled that since

¹⁰ See web log post regarding burden of proof by Steve Sady, Chief Deputy Federal Defender for Oregon: <http://circuit9.blogspot.com/2005/01/booker-reasonable-doubt-survives.html>.

there is nothing in *Booker* to prohibit district courts from applying a higher burden of proof than the preponderance standard, they are free to require proof beyond a reasonable doubt.¹¹ See, e.g., *United States v. West*, 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005) (Sweet, J.); *United States v. Huerta-Rodriguez*, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) (Bataillon, J.).

THE BOTTOM LINE: There is nothing in *Booker* that compels a preponderance standard of proof for enhancement facts in the advisory guideline calculation, and it can be argued that the beyond-a-reasonable-doubt-standard is appropriate, particularly for substantial enhancements or those based on uncharged or acquitted conduct.

E. Can district courts require that any facts increasing the advisory guideline range be alleged in the indictment and proved to the jury?

There is nothing in *Booker* that requires, under the now-advisory guideline system, that facts increasing the guideline range be alleged in the indictment or proved to a jury beyond a reasonable doubt. Nonetheless, at least two district court judges have indicated that they will not consider facts at sentencing that were not charged and proved to the jury. See *United States v. Huerta-Rodriguez*, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) (Bataillon, J.); *United States v. Ochoa-Suarez*, 2005 WL 287400, 2005 U.S. Dist. LEXIS 1667 (S.D.N.Y. Feb. 7, 2005). The Second Circuit, however, has preemptively addressed this issue, stating that “a sentencing judge would . . . violate section 3553(a) by limiting consideration of the applicable Guideline range to the facts found by the jury or admitted by the defendant, instead of considering the applicable Guideline range, as required by subsection 3553(a)(4), based on the facts found by the court.” *United States v. Crosby*, 2005 WL 240916 *9, 2005 U.S. LEXIS 1699 (2d Cir. Feb. 2, 2005).

It may be tempting for defense counsel, following the district court rulings above and contrary to the Second Circuit, to argue that the district courts should not base sentencing determinations on any facts not charged or proved to the jury. But the important question is what is the best way of protecting a favorable sentence from being reversed as “unreasonable” on appeal? The remedy majority in *Booker* clearly rejects any jury trial requirement for sentencing facts, saying that such an approach “would destroy the system.” 125 S. Ct. at 760 (listing five reasons for rejecting this

¹¹ This approach would be consistent with the reasoning of the Third Circuit in *United States v. Kikumura*, 918 F.2d 1084, 1101-02 (1990), which reasoned that when an enhancement or an upward departure results in a large increase in the guideline range, the preponderance standard is not sufficient, and the courts should require proof by “clear and convincing evidence.”

approach). Thus, a sentencing court that refuses to consider facts not charged or proven to the jury might well have its sentence reversed on appeal on the ground that its sentencing procedure was legally erroneous, and therefore necessarily “unreasonable.” The district court could protect the exact same sentence from reversal simply by considering all the sentencing facts under one of the burdens of proof discussed above, and then imposing what it finds to be a reasonable sentence based on consideration of the statutory factors listed in Section 3553(a). As long as the judge follows this legally unassailable approach and gives reasons for the sentence, there should be little risk of reversal.

THE BOTTOM LINE: It is doubtful that a district court may categorically refuse to consider facts not charged or found by a jury in the sentencing determination; the safer approach is to encourage a court so inclined to reach a statutory sentence by giving little weight to such facts.

F. Arguments against sentences exceeding the guideline range

In addition to the due process and burden of proof arguments above, when the increase in the guideline range is pursuant to an upward departure, the defense can also oppose this increase by arguing that any such sentence is “unreasonable” if the court does not follow the “ratcheting” or “analogic reasoning” approaches required by the Third Circuit under pre-*Booker* caselaw. See *United States v. Hickman*, 991 F.2d 1110, 1114 (3d Cir. 1993); *United States v. Baird*, 109 F.3d 856, 872 (3d Cir. 1997). Although the court under *Booker* may have discretion to sentence all the way up to the statutory maximum, the requirement that the court “consider” the guidelines would seem to require that the court still apply the ratcheting or analogic reasoning approaches and consider each offense level increase before moving up to the next higher one.

THE BOTTOM LINE: By analogy to upward departure practice under the guidelines, district courts should be procedurally constrained in their ability to impose a statutory sentence above the guideline range.

G. Avoiding unwarranted disparity: career offender, crack, illegal reentry

Although the guidelines were intended to reduce unwarranted sentencing disparity across the country between similarly situated defendants, there are some guidelines which, as the Sentencing Commission itself has noted, increase disparity. In such cases, a powerful argument can be made that consideration of the sentencing factor

in 3553(a)(6) (“the need to avoid unwarranted sentencing disparity”), strongly supports imposing a sentence below the guideline range.¹² Following are three situations in which this argument can be made:

Crack Cocaine: The 1 to 100 quantity ratio of cocaine base to cocaine powder under the guidelines, according to the Sentencing Commission, leads to a substantial unwarranted disparity in sentencing that has increased the gap in average sentences between racial groups. This disparity is unwarranted because, as the Commission has reported, “the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine.” U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing*, pp. xv-xvi (Nov. 2004).¹³ These findings thus would support sentencing defendants convicted of trafficking in crack cocaine under the lower guidelines for cocaine powder. (Of course, to the extent that the sentence is controlled by the equally disproportionate mandatory minimum sentences for crack cocaine under 21 U.S.C. § 841(b), this argument regarding the guideline range may be of limited help.)

Career Offenders: The career offender provision, U.S.S.G. § 4B1.1, works a dramatic increase in both the offense level and the criminal history category and is meant to assure a prison term at or near the maximum authorized by statute. Applicable to those convicted of either a crime of violence or a controlled substance offense, this provision is triggered if the defendant has two prior convictions for such crimes. The Commission has found that because of the inclusion of drug trafficking crimes in the criteria for application of the career offender provision, this provision has a disparate impact on minority defendants that is not justified by recidivism rates.

The Commission’s logic is compelling. In its fifteen year study, the Commission states, “although Black offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline. Most of these offenders were subject to the guideline because of the inclusion of drug trafficking crimes in the criteria qualifying offenders for the guideline.” *Id.* at 133. The Commission goes on to note studies which have suggested that minorities have a higher risk of conviction for drug offenses because of the “relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods.” *Id.* at 134. The

¹² See *Presumptively Unreasonable: Using the Sentencing Commission’s Words to Attack the Advisory Guidelines*, by Anne Blanchard and Kristen Gartman Rogers (forthcoming article to be published in *The Champion*).

¹³ The Commission’s Fifteen Year Report is available on the Commission’s web site at: http://www.ussc.gov/15_year/15year.htm

Commission's analysis of recidivism rates for drug trafficking offenders sentenced as career offenders, however, "shows that their rates are much lower than other offenders who are assigned to criminal history category VI," and more closely resemble the rates for offenders in the lower criminal history categories in which they would be placed without application of the career offender provision. *Id.*

The Commission's study thus provides a "reasonable" basis for not applying the career offender provision in cases where the defendant (regardless of race) qualifies because one or more of the qualifying convictions are for drug offenses. In such cases, the career offender provision overstates the likelihood of recidivism. Instead, the guidelines as calculated *without* the career offender provision would provide a more appropriate range and would further the statutory goal of reducing unwarranted sentencing disparity.

"Fast track" or "early disposition" programs: Pursuant to the PROTECT Act, the Commission in 2003 issued a policy statement for "early disposition programs." U.S.S.G. § 5K3.1. This provision allows for up to a four-level downward departure in districts participating in the early disposition program, which is meant to give defendants sentencing concessions in exchange for a prompt guilty plea and the waiver of procedural rights such as the right to appeal. In cases involving aliens, the defendant also agrees to immediate deportation. The application of this program in some districts but not others obviously creates unwarranted sentencing disparities between similarly situated defendants. Thus, in districts that do not have such a program, a strong argument can be made that the appropriate guideline range would be the range that would result if the program were in effect there. *See United States v. Galvez-Barrios*, No. 04-CR-14 (E.D. Wis. Feb. 2, 2005) (Adelman, J.) (imposing sentence below guideline range based on unwarranted disparity among defendants charged with illegal reentry).

<p>THE BOTTOM LINE: The 3553(a)(6) factor of avoiding unwarranted disparity now provides a strong basis for not following various guideline provisions, including those applicable to crack cocaine, career offenders, and "fast-track" programs.</p>
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H. Probationary sentences and split sentences: Zones A, B, C

Since the guidelines are now advisory, the sentencing table and the restrictions on probationary sentences, sentences of home confinement, and split sentences in U.S.S.G. § 5A, 5B1, and 5C1 are also advisory. Thus, to receive a sentence of probation, the defendant does not have to come within Zones A or B, and to receive a split sentence the defendant does not have to come within Zone C. Defense

counsel, accordingly, can argue for a split sentence even for a defendant whom the judge wishes to sentence within Zone D.

THE BOTTOM LINE: The availability of probationary, home confinement, and split sentences no longer turns on where the defendant falls on the sentencing table.

I. *Booker*'s effect on restitution

In circuits that have held that restitution constitutes a penalty for a crime, a strong argument can be made that under *Apprendi* and *Booker*, restitution can be imposed only for an amount that has been proven to the jury beyond a reasonable doubt or admitted by the defendant. In *United States v. Syme*, 276 F.3d 131 (3d Cir. 2002), for example, the Third Circuit ruled that for purposes of analysis under *Apprendi*, restitution does constitute “the penalty for a crime.” *Id.* at 159. The Court also ruled, however, that *Apprendi* does not apply to restitution orders because there is no statutory maximum. *Id.* That ruling has now been undermined by the Supreme Court’s decisions in *Blakely* and *Booker*, which make clear 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.*” *Booker*, 125 S. Ct. at 749. Thus, the ‘statutory maximum’ restitution that may be imposed on a defendant depends on the amount of loss proven to the jury at trial or admitted by the defendant. Accordingly, in any case where the jury did not make a specific finding regarding the amount of loss, and where the defendant has not admitted to any amount, following the reasoning of *Apprendi*, *Blakely*, and *Booker*, no amount of restitution may be imposed.

THE BOTTOM LINE: In the Third Circuit, *Booker* should preclude any restitution order except for an amount charged and found by a jury or admitted by the defendant.

J. Safety valve

Booker does not directly affect the statutory “safety valve” provision of 18 U.S.C. § 3553(f). Thus, in order to qualify for the safety valve, which permits sentencing below the mandatory minimum sentence in drug cases, the defendant will still have to meet the five requirements of this statute.¹⁴ The question is whether the judge will

¹⁴ These requirements, which also appear in the guidelines at U.S.S.G. § 5C1.2, are as follows: (1) the defendant has no more than 1 criminal history point, (2) the defendant did not use force or violence or possess a gun, (3) the offense did not result in death or serious bodily injury,

then be required to impose a sentence within the guideline range, or whether the guideline range under *Booker* is advisory just as in all other guidelines cases.

Section 3553(f), which was not modified by *Booker*, states that if the court finds that the five safety valve requirements are met, “the court *shall impose a sentence pursuant to guidelines* promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence” Does the word “shall,” make the guidelines mandatory in the limited circumstance of the application of the safety valve? Since the safety valve only lowers the guideline range below the mandatory minimum and does not raise the maximum for *Apprendi* purposes, treating the safety valve guideline range as mandatory would not violate the Sixth Amendment.

Nonetheless, a strong argument can be made (under both *Booker* and the statutory language) that once the safety valve applies, the guideline range is advisory, just as it is in all other cases. *Booker* explicitly rejected the government’s invitation that it make the guidelines advisory only in cases where otherwise there would be a Sixth Amendment violation. Instead, *Booker* states, “we do not see how it is possible to leave the Guidelines as binding in other cases.” *Booker*, 125 S. Ct. at 768. As the Court explained, “we do believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would create.” *Id.* This language makes clear that the guidelines (as currently construed under *Booker*) cannot be mandatory under *any* circumstances, even where there would be no Sixth Amendment violation.

The statutory language at issue supports this same conclusion. The language in Section 3553(b)(1) which made the guidelines mandatory and which was stricken by *Booker*, is more specific than the language in section 3553(f). Section 3553(b)(1) stated that “the court shall impose a sentence of the kind, *and within the range*, referred to in subsection (a)(4)” (emphasis added). Since Section 3553(f) does not specify that the sentence need be “within the [guideline] range,” it does not provide an independent basis for making the guidelines mandatory when the safety valve applies. Therefore, the phrase “shall impose a sentence pursuant to the guidelines” in Section 3553(f) must be interpreted in light of *Booker* to mean only that the court must consider the guideline range, but the court is not bound by it.

(4) the defendant was not a leader or organizer, and (5) the defendant truthfully provides to the government all the information he or she has regarding the offense.

THE BOTTOM LINE: The safety valve continues in effect, but if applicable, should not be deemed to require mandatory adherence to the guidelines.

K. Child sex abuse cases

Likewise, the language in Section 3553(b)(2), which was enacted in 2003 as part of the PROTECT Act and applies specifically to crimes involving children and sexual offenses, must also now be read in light of *Booker* as requiring only that the sentencing court “consider” the guideline range. Although *Booker* does not mention this section since it was not at issue there, this section contains the exact same language that made the guidelines mandatory under Section 3553(b)(1) (“the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4)”), and it plainly suffers from the exact same Sixth Amendment problems identified by the Sixth Amendment majority in *Booker*. It must therefore be subject to the same remedy that the *Booker* remedial majority imposes. Thus, for all offenses, including child and sexual offenses covered by Section 3553(b)(2), the guidelines are “advisory.”

THE BOTTOM LINE: The guidelines should not be deemed mandatory in child sex abuse cases.

V. *Booker* Implications for Cases at Various Procedural Stages

A. Pre-plea and pre-trial cases

1. “Blakely-ized” Indictments

In cases that still have not gone to trial or resulted in guilty pleas, indictments issued before *Booker* may well include facts relevant only to guidelines sentencing. In light of *Booker*’s rejection of submitting guidelines sentencing facts to the jury for proof beyond a reasonable doubt, there is no basis for the government to include such facts in the indictment, and all such language should be struck as surplusage. (Of course, the practice of charging and proving to the jury the drug amount that triggers mandatory penalties under 21 U.S.C. § 841(b) will continue and is not affected by *Booker*.) *In the Eastern District of Pennsylvania, prosecutors have indicated that the government will not object to striking the surplusage in light of Booker, and the government may move on its own to supersede such indictments.*

Note that a motion to strike surplusage should be based not only on *Booker*, but also on the separate ground that there is no legislative or constitutional authority for

including sentencing facts in the indictment. As the government argued in its Supreme Court brief in *Booker*, only Congress can add elements to federal crimes, and thus, absent some Congressional action requiring that the jury find these facts beyond a reasonable doubt, there is no basis for including them in the indictment. See *United States v. Booker*, Brief for the United States, 59-66 (“Administering jury fact-finding under the guidelines would require procedural innovation far greater than is permissible.”) (This latter argument may seem unnecessary, but it may help with the Due Process and *ex post facto* argument discussed above, in which the defense may wish to argue at sentencing that the judge cannot sentence above the *Blakely*-ized guideline range.)

THE BOTTOM LINE: Sentencing facts added to indictments should be stricken.

2. Plea Agreements

Regular plea agreements have less value to the defense under *Booker*, although they may still be helpful with judges who have a strong inclination to follow the advisory guidelines post-*Booker*. Thus, a plea agreement containing stipulations to a guideline range without certain enhancements and with a reduction for acceptance of responsibility could be worthwhile, even though the judge would not be required to agree with the stipulations, and even though the guidelines themselves are now advisory.

On the other hand, “(c)-pleas” – plea agreements under Rule 11(c)(1)(c) in which the government and the defense agree that the sentence may not exceed a certain cap – now become much more valuable to both the defense and the government since they are a method of restoring some of the certainty to sentencing that is taken away by *Booker* making the guideline range advisory.

THE BOTTOM LINE: While value of “(c)-pleas” is potentially heightened by *Booker*, normal plea agreements may have less value depending on the sentencing practices of the particular judge.

3. Cooperation plea agreements under U.S.S.G. § 5K1.1

Section 5K1.1 cooperation plea agreements (in which the government promises to consider filing a § 5K1.1 motion for a downward departure if the defendant provides substantial assistance in the investigation or prosecution of another person) may still carry great weight with judges. But now, even in the absence of such an agreement and a government 5K1.1 motion, the court may sentence below the guideline range based on a defendant’s substantial assistance in the exercise of its Section 3553(a)

discretion in arriving at an appropriate “statutory” sentence. *Thus, although a judge may be more inclined to sentence below the range if the government has filed a § 5K1.1 motion, the motion is no longer a prerequisite.* The judge can sentence below the range without the government motion based on the substantial assistance the defendant has provided, and based on other reasons, as long as the judge considers all the Section 3553(a) factors (discussed above), gives specific reasons for the sentence (as required by 3553(c)), and the sentence is “reasonable.”

THE BOTTOM LINE: Section 5K1.1 cooperation plea agreements and government motions for downward departure under § 5K1.1 may still carry much weight, but they are not required in order for a judge to sentence below the guidelines based on cooperation.

4. Cooperation plea agreements under Section 3553(e)

Unlike § 5K1.1 agreements, cooperation plea agreements under 18 U.S.C. § 3553(e) – in which the government promises to consider filing a § 3553(e) motion for a sentence below any statutory mandatory minimum sentence based on substantial assistance – will be just as valuable as before. *Booker* does not affect the statutory mandatory minimum sentences under, for example, 21 U.S.C. § 841(b), and it does not affect the need for a government motion in order for the judge to be able to go below the mandatory minimum. Having a cooperation plea agreement in cases covered by § 3553(e), moreover, will preserve the ability of the defense to bring a challenge alleging bad faith on the part of the prosecutor in the event the prosecutor does not move for a downward departure in spite of the defendant providing substantial assistance. *See United States v. Isaac*, 141 F.3d 477 (3d Cir. 1998).

THE BOTTOM LINE: Because government motions under Section 3553(e) are still required for sentencing below a mandatory minimum, cooperation agreements in such cases remain valuable to the defense.

5. Blakely Waivers

In light of the remedy *Booker* establishes, there is no need for the “*Blakely* waivers” the government had been adding to plea agreements, waiving the defendant’s right to have sentencing facts proven to the jury. Prosecutors have been indicating that the government will agree to strike such waiver language from any plea agreements that were executed pre-*Booker*. Note that these waivers cannot reasonably be interpreted

as constituting an agreement that the sentence should be within the guideline range or that guidelines are mandatory.

6. Appeal Waivers

The government will continue to insert waivers of appellate rights into plea agreements, but the language is being changed somewhat so that the agreement will allow the defense to appeal the “reasonableness” of a sentence if it is above the guideline range.

Careful attention must be paid to the wording of these provisions, however. It appears the new standard language in the Eastern District of Pennsylvania permits an appeal when the district court “unreasonably departs upward” from the applicable guideline range. *This language is ambiguous and too narrow—the defense should preserve its right to appeal for reasonableness any sentence above the guideline range, not just sentences arrived at after the court “upwardly departs” while calculating the advisory guideline range.*

In light of *Booker* making the guidelines advisory, in the vast majority of cases there is no reason for the defense to agree to appeal waivers. Such waivers should be the exception, and defense counsel should agree to a waiver of appellate rights only if the government is giving the defense something substantial in exchange.

<p>THE BOTTOM LINE: Appeal waivers should be strictly scrutinized to ensure that the exception for appeals of sentences above the guideline range are not limited to “departure” sentences. As was the case pre-<i>Booker</i>, appeal waivers should be agreed to only when the defendant receives a substantial benefit in the plea agreement.</p>
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B. Post-plea/trial, pre-sentencing cases: Cases Tried Based on *Blakely*-ized Indictments

For cases that are post-trial and pre-sentence, *Booker* could have important implications if the indictment and the trial were “*Blakely*-ized” – in other words, if the indictment contained facts relevant to sentencing enhancements that were presented to the jury for a determination of whether they were proven beyond a reasonable doubt. If the trial on the sentencing facts was not bifurcated from the trial on the elements of the statutory offense, the defense may have a good argument on appeal that the jury was prejudiced by the inclusion of facts that *Booker* now makes clear should not be presented to the jury.

If the jury decided sentencing facts during a *Blakely*-ized trial, the question is what effect do those jury determinations have at sentencing in light of *Booker*. If the jury found that the sentencing facts were proven beyond a reasonable doubt, under *Booker*, such jury determinations should have no binding effect on the judge since it is up to the judge at sentencing to make those determinations. Of course, the fact that the jury has found the facts proven beyond a reasonable doubt might have a strong persuasive impact on the court, but the court still must make its own determination.

If, however, the jury found that some or all of the sentencing facts were not proven, then following the due process and *ex post facto* argument above, the court is bound by those determinations to the extent that it cannot go above the guideline range calculated pursuant to those jury determinations. Any sentence higher than the *Blakely*-ized guideline maximum would be a sentence higher than the law allowed at the time the offense was committed, and would violate the *ex post facto* principles inherent in the Due Process Clause. (See argument above, IV, C).

<p>THE BOTTOM LINE: While sentencing facts found by a jury post-<i>Blakely</i> do not bind the sentencing judge, facts that the jury found unproven cannot be used in the sentencing determination for offenses occurring before <i>Booker</i>.</p>
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C. Cases on Appeal

It appears that the Third Circuit is taking a liberal approach to ordering resentencings for defendants sentenced pre-*Booker* (whose cases are still on direct review). In *United States v. Davis*, ___ F. 3d ___, 2005 WL 334370 (3d Cir. Feb. 11, 2005) the court remanded for resentencing in light of *Booker* without going through a plain error or harmless error analysis (no *Blakely* objection was made in the district court in this case). Although *Davis* does not purport to establishing general policy in this regard, it is expected that the Third Circuit will be issuing a broad-based opinion on these issues very soon. In the meantime, several points concerning sentencing appeals are clear from *Booker* itself.

Booker fundamentally changes the rules concerning the availability and scope of appellate review of criminal sentences. *Courts of appeals now arguably have jurisdiction to review all sentences (regardless of whether they are within or outside the guidelines range) for “reasonableness” in light of the sentencing factors enumerated in 18 U.S.C. § 3553(a) and the reasons for imposing sentence articulated by the district court pursuant to § 3553(c). Booker*, 125 S. Ct. at 769. A district court’s discretionary decision not to depart under the guidelines, or to

sentence at a particular point within the guidelines range, should no longer bar appellate review of the sentence ultimately imposed.¹⁵

Booker therefore makes available a new argument in every sentencing appeal: that the sentence imposed is “unreasonable,” regardless of whether any error concerning guidelines interpretation or application exists. The availability of this new argument does not mean that former practice with respect to sentencing appeals is obsolete, however. Because district courts post-*Booker* will be calculating advisory guidelines sentences (based on range determinations as well as departure grounds), all of the typical pre-*Booker* issues regarding the interpretation and application of the guidelines (e.g., appropriateness of adjustments, criminal history points, departures, etc.) will continue to arise and can potentially be raised on appeal. Moreover, pre-*Booker* procedural issues arising under Rule 32 and/or relevant constitutional and statutory provisions remain subject to appeal. In fact, *Booker* is likely to raise a host of new procedural issues for appeal (e.g. concerning the manner of courts’ consideration of Section 3553(a) factors) as district courts have little guidance regarding how to conduct a sentencing hearing under an advisory guidelines regime.

<p>THE BOTTOM LINE: Every sentence should now be reviewable on appeal for “reasonableness;” guidelines and procedural issues will continue to arise in the course of reviewing the sentence.</p>

1. Standards of Review

a. *Reasonableness Review*

Booker suggests that the new “reasonableness” standard for the review of sentences is equivalent to the pre-2003 standard of review for departure sentences. That standard, codified at 18 U.S.C. § 3742(e)(3) (2003), required appeals courts to determine whether a sentence is “unreasonable” having regard for the Section 3553(a)

¹⁵ 18 U.S.C. § 3742(a), which survives *Booker*, continues to limit the grounds for a defendant’s appeal of sentence. Although this section has historically been interpreted to bar appeals of sentences within a properly calculated guideline range where there has been no other violation of law, *Booker* specifically reads Section 3742(a) to “provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the guidelines range in the exercise of his discretionary power under § 3553(a)).” *Booker*, 125 S. Ct. at 769. Moreover, insulating guideline sentences from reasonableness review would amount to establishing their *per se* reasonableness – a result in significant tension with both *Booker* opinions. Cf. *United States v. Crosby*, ___ F.3d ___, 2005 WL 240916, at *9 (2d Cir. Feb. 2, 2005).

factors and the district court's Section 3553(c) statement of reasons for imposing the particular sentence.

How the Third Circuit will interpret and apply *Booker*'s reasonableness standard remains to be seen. Here are two possible approaches based on circuit precedent.

- Abuse of Discretion With Guidelines as Benchmark for Reasonableness. In *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990), the Third Circuit stated that district courts have a “substantial amount of discretion” under the “deferential” Section 3742(e)(3) reasonableness standard. The Court, however, recognized the need for “objective standards” in order to prevent unwarranted sentencing disparity. *Kikumura*, 918 F.2d at 1110-11. Viewing the Section 3553(a) factors and the Section 3553(c) statement of reasons as providing insufficient guidance, the Court endorsed (but did not mandate) the notion of judging “reasonableness” by considering “open-textured” analogies to the sentencing guidelines.

Strictly tying reasonableness to the guidelines (e.g., reasonable if within or close to range, unreasonable otherwise) would run afoul of *Booker*'s Sixth Amendment holding, but the *Kikumura* approach might be loosely applied to utilize the guidelines as a rough benchmark for reasonableness.

- Abuse of Discretion Tied to Consideration of Factors and Articulation of Reasons. In *United States v. Blackston*, 940 F.2d 877 (3d Cir. 1991), the Third Circuit articulated a more deferential standard of reasonableness review—this time under the “plainly unreasonable” standard of 18 U.S.C. § 3742(e)(4). *Blackston* involved a sentence imposed after revocation of supervised release, the guidelines for which have always been considered advisory. Under *Blackston*, the Third Circuit has consistently affirmed extra-range revocation sentences looking only to whether the district court considered the advisory range and articulated reasons grounded in Section 3553(a) for sentencing outside the range. See, e.g., *Blackston*, 940 F.2d at 893-94; *United States v. Mahamoud*, 99 Fed. Appx. 439, 441-42 (3d Cir. 2004) (not precedential).

Although it can be argued that *Blackston*'s applicability is limited as it deals with Section 3742(e)(4)'s "plainly unreasonable" rather than the Section 3742(e)(3) "unreasonable" standard,¹⁶ the Second Circuit's lead post-*Booker* case calls the (e)(4) standard "especially relevant" given its pre-*Booker* use in the context of the advisory revocation guidelines. *United States v. Crosby*, ___ F.3d ___, 2005 WL 240916, at *9 (2d Cir. Feb. 2, 2005) (declining, however, to require "specific articulation" of sentencing factors).

b. *Underlying Standards of Review for Issues of Guideline Interpretation, Application, and Procedure*

Strictly speaking, *Booker*'s reasonableness review extends to issues of guideline interpretation, application, and procedure—not just to the length of the sentence ultimately imposed. Thus, a sentence resulting from such errors will likely be deemed "unreasonable" if the error was prejudicial and meets any other applicable requirements of harmless error or plain error analysis. See *Crosby*, ___ F.3d at ___, 2005 WL 240916, at *8; *Williams v. United States*, 503 U.S. 193, 202-04 (1992).

When considering whether such errors exist, however, the appeals courts are likely to extend the same deference to district courts that was traditionally applied in sentencing review under the guidelines: no deference for legal conclusions (plenary review), some deference for issues of guideline application to facts (abuse of discretion review), and substantial deference for factual conclusions (clear error review). See generally *United States v. Lennon*, 372 F.3d 535, 538 (3d Cir. 2004) (listing standards); *United States v. Hughes*, 396 F.3d 374 (6th Cir. 2005) (employing plenary and clear error standards to guideline issues); *United States v. Killgo*, ___ F.3d ___, 2005 WL 292503 (8th Cir. Feb. 9, 2005) (subsuming clear error standard in reasonableness review). Departure determinations, which may still be made in the context of determining an advisory guideline sentence, will be reviewed for abuse of discretion under the *Koon* standard.

¹⁶ The *Booker* court cited Section 3742(e)'s "plainly unreasonable" standard as evidence that courts are familiar with reasonableness standards in general, but nevertheless articulated the new sentencing review standard as merely "unreasonableness."

THE BOTTOM LINE: Although the precise nature of “reasonableness” review is not yet clear, it entails an abuse of discretion standard that may be tied loosely to the guidelines or simply to a procedural requirement that the court consider all applicable factors and articulate reasons for the sentence based on those factors. Issues of guideline interpretation and application may be decided in the course of reasonableness review, with customary deference being given to the district court on these matters.

2. Plain Error: Pre-Booker Sentencings Where No Apprendi/Blakely Objection Raised

Although it appears the Third Circuit may take a liberal approach to ordering resentencings for defendants sentenced pre-*Booker*, plain error analysis may be applied in some cases.

The plain error test’s first two requirements, error and its obviousness, are easily satisfied by the *Booker* decision itself because the existence and obviousness of error are judged at the time of appeal (post-*Booker*).¹⁷ See *Johnson v. United States*, 520 U.S. 461, 468 (1997). It is the last two requirements, prejudice and harm to the integrity of the justice system, that may pose a barrier to relief in some cases.

a. *Prejudice*

Prejudice may be easiest to show in cases in which a Sixth Amendment violation has clearly occurred (i.e., where the defendant received a non-recidivist guideline enhancement not supported by a jury finding or an admission).¹⁸ In such cases, several appellate courts have ruled that the

¹⁷ The error is potentially two-fold: a Sixth Amendment violation by virtue of increasing a defendant’s sentencing guidelines range based on judicial fact-finding, and error in failing to apply the remedy set forth in *Booker*.

¹⁸ Although *Booker* retains the prior conviction exception to the *Apprendi* rule, an argument can still be made that some criminal history findings (such as probationary status and proximity of the instant crime to release from prison, and perhaps others regarding the nature of the prior conviction) violate the Sixth Amendment. Likewise, what counts as an “admission” for *Booker* purposes is an open question in the Third Circuit. See *United States v. Thomas*, 389 F.3d 424 (3d Cir. 2004).

application of the incorrect guideline range is sufficient to establish prejudice and require resentencing. See *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005); *United States v. Oliver*, ___ F.3d ___, 2005 WL 233779 (6th Cir. Feb. 2, 2005); *United States v. Hines*, 2005 WL 280503 (6th Cir. Feb. 7, 2005); *United States v. Ameline*, ___ F.3d ___, (9th Cir. Feb. 9, 2005) (available at www.ca9.uscourts.gov). This would be consistent with Third Circuit law entitling a defendant to a correct determination of the applicable sentencing range. See *United States v. Knight*, 266 F.3d 203 (3d Cir. 2001). It also can be argued that *Booker* contemplates resentencing in all such cases. See *Booker*, 125 S. Ct. at 769 (remanding cases at issue).¹⁹ The Second Circuit has not gone quite so far, instead remanding all cases involving *Booker* error (Sixth Amendment violations as well as mandatory applications of the guidelines) for the district court to determine whether it would have imposed a “materially different” sentence under *Booker* and, if so, to resentence. *United States v. Crosby*, ___ F.3d ___, 2005 WL 240916 (2d Cir. Feb. 2, 2005).

Where there is arguably no Sixth Amendment violation (i.e., where the defendant received no enhancements, only recidivist enhancements, or only enhancements based on admitted conduct but was sentenced under mandatory guidelines), prejudice may be more difficult to show. There are several strategies to pursue in such cases:

- There is a strong argument that prejudice should be *presumed* when the district court treated the guidelines as binding and the record does not make certain that the same sentence would have been imposed under the *Booker* remedy. *United States v. Barnett*, ___ F.3d ___, 2005 WL 357015 (6th Cir. Feb. 16, 2005). Cf. *United States v. Adams*, 252 F.3d 276 (3d Cir. 2001); *United States v. Knight*, 266 F.3d 203 (3d Cir. 2001). As discussed further below, it should be argued that a post-*Blakely* “alternate discretionary sentence” is insufficient to defeat the presumption of prejudice. Likewise, it should be argued that the defense was unable to present all of the sentencing arguments now available to it under *Booker*. See *Crosby*, ___ F.3d at ___, 2005 WL 240916, at *11.

¹⁹ The Eleventh Circuit, however, has imposed a much more stringent prejudice rule, requiring defendants to show a reasonable probability that a lower sentence would have been imposed under an advisory guideline scheme. The court’s conclusion is based on its view that the only relevant error under *Booker* is the mandatory application of the guidelines, and thus a sentencing range adjustment is not necessarily prejudicial. *United States v. Rodriguez*, ___ F.3d ___, 2005 WL 272952 (11th Cir. Feb. 4, 2005).

- Even without a presumption of prejudice, the record in some cases will show that the district court may have been inclined to impose a lower sentence but for the guidelines. In such cases, prejudice should be found. In addition, in any case where the judge sentenced at the bottom of the guideline range, an argument can be made that the judge may have sentenced lower had the guidelines been viewed as non-binding. *See United States v. LaBastida-Segura*, __ F.3d __, 2005 WL 273315 (10th Cir. Feb. 4, 2005).

b. *Fairness and Integrity of Judicial Proceedings*

The fourth plain error requirement relates to an appellate court's discretionary decision whether to correct plain error. In *United States v. Cotton*, 535 U.S. 625 (2002), the Supreme Court declined to correct plain *Apprendi* error stemming from the failure to charge drug quantity in an indictment, ruling that the evidence of drug quantity presented to the jury was overwhelming and virtually uncontested. A similar result was reached by the Third Circuit in *United States v. Vazquez*, 271 F.3d 93 (3d Cir. 2001). At least one appellate court has taken the same position with respect to *Booker* error. *United States v. Bruce*, __ F.3d __, 2005 WL 241254 (6th Cir. Feb. 3, 2005). Other courts, however, have found the fourth requirement satisfied without conducting a *Cotton* analysis, citing the change wrought by *Booker* and the necessity of permitting defendants to be sentenced under its remedial interpretation of the SRA. *See Hughes*, 396 F.3d at __, 2005 WL 147059, at *5; *Crosby*, __ F.3d at __, 2005 WL 240916, at *13.

There are several ways to distinguish *Cotton* and urge the court to correct *Booker* error. First, of course, *Cotton* is inapplicable to the extent the evidence was less than "overwhelming" or was contested. Second, the Supreme Court's concern in *Cotton* was to prevent a sentencing "windfall" to the defendant; correcting *Booker* error, in contrast to correcting the *Apprendi* error at issue in *Cotton*, would not necessarily lead to any windfall as the district court would be free to sentence under the *Booker* remedial interpretation of the SRA. *See Oliver*, __ F.3d at __, 2005 WL 233779, at *9 n.3. Third, even assuming overwhelming evidence, a district court post-*Booker* is not bound to follow the guidelines, and assuming that it would do so usurps the district court's sentencing role. *See id.*; *Crosby*, __ F.3d at __, 2005 WL 240916, at *13.

THE BOTTOM LINE: If the Third Circuit decides to subject *Booker* claims to plain error review, prejudice can be shown by the existence of a Sixth Amendment violation, or, where there is no Sixth Amendment violation, should be presumed even if there is no indication in the record that the district court would have imposed a lower sentence had it not viewed the guidelines as binding. *Booker* errors should be corrected on appeal notwithstanding *United States v. Cotton*, for the reasons discussed above.

3. Harmless Error: Pre-*Booker* Sentencings Where *Apprendi/Blakely* Objection Raised

Although it appears the Third Circuit may likewise take a liberal approach to harmless error in assessing the need to resentence defendants sentenced pre-*Booker*, several points in this regard are important.

Booker itself suggests that resentencing will be required in *all* cases involving a Sixth Amendment violation, but that harmless error analysis *might* obviate a remand in some cases where there was no Sixth Amendment violation. *Booker*, 125 S. Ct. at 769 (“[I]n cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon the application of the harmless-error doctrine.”). It is therefore important to argue, if possible, that there was indeed a Sixth Amendment violation below.

If there was no Sixth Amendment violation, it may still be worth noting that the Supreme Court did not engage in a harmless error analysis before remanding the *Fanfan* case, which involved no Sixth Amendment violation. Assuming harmless error analysis applies, the test is whether it is “highly probable” that the error did not contribute to the result. In other words, the appellate court must “possess a ‘sure conviction that the error did not prejudice’ the defendant.” *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995) (en banc). The prejudice arguments discussed above in relation to plain error are equally applicable to harmless error analysis.

THE BOTTOM LINE: If the Third Circuit decides to subject *Booker* claims to harmless error review, it should be limited to cases where there was no Sixth Amendment violation and prejudice should be presumed.

4. Effect of Alternate Sentence on Harmless Error/Plain Error Analysis

After *Blakely*, many judges continued to apply the guidelines as written but began announcing “alternate” sentences that would presumably apply in the event the guidelines were later held unconstitutional. These alternate sentences were often identical to the guidelines sentence imposed.

Although it is doubtful that an “alternate sentence” could be given legal effect without a further sentencing proceeding after the invalidation of a “primary sentence,” these district court pronouncements have a potentially serious effect on plain error and harmless error analysis in cases in which there has been no clear Sixth Amendment violation.²⁰ A district court’s statement on the record that the same sentence would have been imposed under an indeterminate sentencing scheme arguably undercuts a finding of prejudice in such cases by clarifying what the sentencing court would have done if the guidelines were not mandatory.

Although this argument has superficial appeal, it should not prevent re-sentencing. It can be argued in these cases that the district court’s methodology in arriving at the alternate sentence is not necessarily consistent with, or equivalent to, the remedy provided for in *Booker*. The district court likely did not consider itself bound by 18 U.S.C. § 3553(a) as is the case after *Booker*, and so cannot be said to have necessarily arrived at a sentence in compliance with that decision. See *Crosby*, __ F.3d at __, 2005 WL 240916, at *11 (alternate sentences do not necessarily comply with *Booker*). Nor, in most cases, did the defense have an opportunity to present all of the sentencing arguments now available to it post-*Booker*. *Booker* itself provides considerable authority to order resentencing: the Court remanded the *Fanfan* case to the district court for resentencing despite the fact that the original sentence was imposed in compliance with the Sixth Amendment.

²⁰ Where there has been a Sixth Amendment violation, the defendant has been prejudiced by virtue of the fact that an alternate sentence the same or higher than the guidelines sentence violates due process as discussed earlier in this memorandum (IV.C).

THE BOTTOM LINE: Post-*Blakely* “alternate sentences” should not undercut a prejudice finding for purposes of plain error or harmless error analysis.

5. Post-*Booker* Sentencings

It is expected that harmless error and plain error analysis will apply in the normal fashion to *Booker* errors at post-*Booker* sentencings.

6. Supplementing Pending Appeals

If no *Blakely* or *Booker* issue was initially raised in a pending appeal, consideration must be given to supplementing the appeal. This may be done by motion, and samples are available from the Philadelphia Federal Defender Office. Several courts have ruled that *Blakely/Booker* issues may be raised in this fashion. See, e.g., *Oliver*, ___ F.3d at ___, 2005 WL 233779, at *9 n.1; *Hines*, 2005 WL 280503, at *5.

If a *Blakely* issue has already been raised or added by supplement, the appellant should consider submitting a supplemental authority letter pursuant to Fed. R. App. P. 28(j) discussing the impact of *Booker* and any applicable lower court decisions concerning *Booker*. Note that Rule 28(j) was recently amended to permit limited argument (maximum 350 words) in supplemental authority letters; consult the rule for specific requirements. *Note: in some cases, the Third Circuit has recently ordered appellants to give notice (by Rule 28(j) letter) of whether they are asserting a Booker challenge.*

D. Collateral Review: 2255 Petitions

Booker raises more questions than it answers regarding the possibility of attacking final convictions (convictions which are no longer on direct appellate review) under 28 U.S.C. § 2255. There are a number of issues that will have to be resolved through litigation. Most likely, the best overall strategy in any one case will be to raise as many alternative arguments as may apply given the procedural posture of the case.

1. *Teague* and retroactivity

Under *Teague v. Lane*, 489 U.S. 288, 311 (1989), when the Supreme Court announces a new rule of criminal procedure, although applicable to cases still on direct review, the new procedural rule is generally not retroactively applicable to cases that are past that stage – convictions that are final. *Teague*, however, carves out an exception for “‘watershed rules of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal

proceeding.” *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990) (quoting *Teague*, 489 U.S. at 311). New procedural rules that qualify under this exception are retroactively applicable and can be raised through a timely § 2255 petition.

Booker as the new procedural rule: An argument can be made that *Booker* announced a new rule of criminal procedure, since it resolved a question expressly reserved in *Blakely* – whether *Blakely* should apply to the federal sentencing guidelines. See *McReynolds v. United States*, No 04-2520, slip op. at 4 (7th Cir. Feb. 2, 2005). One advantage of this view is that the petitioner does not have to explain why this argument was not raised before, and thus does not have to argue cause and prejudice for a procedural default.

The next step in the argument is to establish that *Booker* qualifies as a “watershed rule.” This requires distinguishing *Schiro v. Summerlin*, 124 S. Ct. 2519 (2004). *Summerlin* held that *Ring v. Arizona*, 536 U.S. 584 (2002), which applied *Apprendi* in the death penalty context, is not retroactive on collateral review. *Summerlin* is distinguishable because the majority there noted that the question whether the beyond-a-reasonable-doubt requirement of *Apprendi* would be retroactive on collateral proceedings was not before it because Arizona required that judges find aggravating circumstances beyond a reasonable doubt in death cases. Given that prior burden of proof rulings, such as *In re Winship*, 397 U.S. 358 (1970) and *Mullaney v. Willbur*, 421 U.S. 684 (1975), were held retroactive because they were essential to accurate fact-finding, see *Ivan V. v. City of New York*, 407 U.S. 203 (1972) (*Winship* retroactive); *Hankerson v. North Carolina*, 432 U.S. 233 (1977) (*Mullaney* retroactive), and given the 5-4 split in *Summerlin*, it is at least arguable that the Court will hold that the *Apprendi* beyond a reasonable doubt requirement constitutes a watershed rule, which would be fully retroactive. In addition, all the Justices appear to agree that the first requirement for a watershed rule, fundamental fairness, is met -- the battle was over whether the jury requirement increased accuracy. The Third Circuit, in *United States v. Swinton*, 333 F.3d 491 (2003), held that the *Apprendi* rule did not come within *Teague*’s second exception for watershed changes. *Summerlin* casts considerable doubt over this conclusion. Moreover, Justice O’Connor wrote that, despite *Summerlin*, even final guideline judgments “arguably remain open to collateral attack.” *Blakely*, 124 S. Ct. at 2549.

Apprendi as the new procedural rule: Another approach is to argue that *Booker* did not announce the new rule, but instead just applied the rule first set forth in *Apprendi*. If a holding is “dictated” by existing precedent, then it is not a “new rule.” *Teague*, 489 U.S. at 301. The advantage of this approach is that it obviates the need to establish retroactivity under *Teague* for all cases that became final sometime after *Apprendi* was decided. The disadvantage is that if the *Apprendi* argument was not raised at the

sentencing and on direct appeal, petitioner will have to establish either cause and prejudice for the procedural default, or “actual innocence.” *Bousley v. United States*, 523 U.S. 614, 622 (1998).

A strong argument can be made using the language in *Booker* that the holding there was dictated by *Apprendi*. Justice Stevens, after repeatedly noting throughout his majority opinion that the Court was just following prior precedent, concluded by stating, “accordingly, we reaffirm our holding in *Apprendi*: any fact (other than the fact of prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *Booker*, 125 S. Ct. at 756. Likewise, Justice Breyer, at the very beginning of his remedial majority opinion, stated that the Court was “[a]pplying its decisions in *Apprendi* . . . and *Blakely* . . .” *Id.* This is about as close as the Court can come to saying its holding was effectively dictated by prior precedent.²¹

Petitioners who procedurally defaulted their *Apprendi* claim by not raising it on direct appeal will need to argue either that counsel’s ineffectiveness in failing to raise the claim constitutes “cause,” or that they were “actually innocent” of the sentence imposed because it was based on disputed facts, or, ideally, acquitted conduct. The test for actual innocence is whether “in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Bousley*, 118 S. Ct. at 1611.

2. *Booker* as a substantive (instead of a procedural) ruling

Another way of avoiding *Teague* retroactivity analysis is to argue that *Booker*, at least the remedial portion, is not a procedural holding but a substantive one. As the Court in *Bousley* explained, “[B]ecause *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.” *Id.* at 1610. New substantive rules established by the Supreme Court “apply retroactively because they ‘necessarily carry a significant risk that a defendant stands convicted of “an act that the law does not make criminal”’ or faces a punishment that the law cannot impose upon

²¹ Notably, the *Booker* Court went out of its way to state that the Sixth Amendment holding of *Blakely* was “clear” from the Court’s earlier decisions in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi*, and *Ring v. Arizona*, 536 U.S. 584 (2002). *Booker*, 125 S. Ct. at 749. The Court also characterized the “principles we sought to vindicate” in *Apprendi* as “not the product of recent innovations in our jurisprudence” and as “unquestionably applicable” to the federal sentencing guidelines. *Id.* at 753.

him.” *Schiro v. Summerlin*, 124 S. Ct. 2519, 2522-23 (2004) (quoting *Bousley*, 523 U.S. at 620).

Booker qualifies as a substantive holding because the Court, through statutory construction and excision, changed the substantive penalties that may be imposed in federal cases by making the guidelines advisory. The effect was to alter the mandatory minimum and maximum penalties (which under the binding guidelines system had been the guideline minimum and maximum), by replacing them with the minimum and the maximum penalty allowed under the statute for the offense of conviction. While it is true that *Summerlin* found that *Ring* (which applied *Apprendi* in the death penalty context) did not announce a substantive rule, but merely a procedural one, *Summerlin*, 124 S. Ct. at 2524, the remedy the Court imposed there was different than the remedy imposed in *Booker*. In *Ring*, the Court corrected the *Apprendi* error by changing the sentencing *procedure* to require fact finding of aggravating factors by the jury, instead of by the judge. See *Summerlin*, 124 S. Ct. at 2524. In *Booker*, the Court corrected the *Apprendi* error by changing the *substantive penalty* available. *Booker* therefore establishes a new substantive rule and should be given retroactive effect.

Aside from avoiding the *Teague* retroactivity problems, this “substantive rule” argument also has the advantage of avoiding the procedural default barrier. The issue could not have been raised before *Booker* was decided since it was only *Booker* that changed the substantive penalty. Section 2255 petitions raising this issue, moreover would be timely as long as they were filed within a year of *Booker*.

<p>THE BOTTOM LINE: Much of the analysis for § 2255 purposes depends on whether <i>Booker</i> is seen as establishing a new procedural rule that is a “watershed” rule, or whether <i>Booker</i> was dictated by prior precedent, or whether it establishes a new substantive rule that is automatically retroactive.</p>
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VI. Other Resources

The following websites have useful information on *Booker* developments. In addition, the Federal Defender Office for the Eastern District of Pennsylvania can be reached at (215) 928-1100.

1. <http://sentencing.typepad.com> – web log regarding sentencing issues maintained by law professor Douglas Berman.

2. <http://www.fd.org> – Federal Defender Services Training Branch website, with sample motions and briefs.
3. <http://circuit3.blogspot.com> – New Third Circuit Federal Defender web log site with summaries of recent Third Circuit decisions.
4. <http://circuit9.blogspot.com> – Ninth Circuit Federal Defender web log site.
5. <http://home.ix.netcom.com/~fpdfls2/BlogRecap4.htm> - Defender Web Law Blog, compiling the 3 most recent posts from all the Federal Defender Blogs. Link to this site is also on each circuit Federal Defender blog, under “D - Web Law Blogs.”