

BOOKER
LITIGATION STRATEGIES
MANUAL

A Reference for Criminal Defense Attorneys
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UNITED STATES v. BOOKER
Litigation Strategies for Criminal Defense Attorneys¹
Revised April 15, 2005

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 guideline 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 manual discusses *Booker* and reviews defense litigation strategies in light of the Court's ground-breaking decision. This revised version of the manual includes new sections covering the implications of *Shepard v. United States*, 125 S. Ct. 1254 (2005), *Crawford v. Washington*, 541 U.S. 36 (2004) as well as other recent Supreme Court cases related to sentencing. It has also been updated to include recent cases from the circuit and district courts applying *Booker*. This and future versions of the manual will be available at www.fd.org.

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 brainstorming sessions of Assistant Federal Defenders from around the country. This manual 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. The additions to this revised version have drawn on ideas and case law presented in three excellent resources: "*Booker* Litigation Strategies" (March 28, 2005) by Amy Baron-Evans, National Sentencing Resource Counsel to the Federal Defenders; "A *Booker* Advisory: Into the Breyer Patch," *The Champion* (March 2005) by Steven G. Kalar, Jane L. McClellan, and Jon M. Sands; "Post-*Booker* Federal Decisions – An Outline" (updated periodically) by Frances H. Pratt, Research and Writing Attorney, Federal Defender Office, Alexandria, VA (most recent update available at www.fd.org).

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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.

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.

Because judge-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. *See United States v. Denardi*, 892 F.2d 269, 276-77 (3d Cir. 1989) (Becker, J., concurring in part, dissenting in part) (since § 3553(a) requires sentence to be no greater than necessary to meet 4 purposes of sentencing, imposition of sentence greater than necessary to meet those purposes is reversible, even if within guideline range).

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 factors 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* 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, 912, 925 (D. Utah Jan. 13, 2005). *See also United States v. Wilson*, 355 F. Supp. 2d 1269 (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*, 353 F. Supp. 2d 984, 986 (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.

Id. at 987.

Similarly, in *United States v. Issa M. Jaber*, ___ F. Supp. 2d ___, 2005 WL 605787, 2005 U.S. Dist. LEXIS 4028 (D. Mass. Mar. 16, 2005), Judge Gertner of the District of Massachusetts provided an in-depth analysis of why the *Wilson* approach is wrong “both as a matter of law and fact.” *Id.* at *4. Judge Gertner explained that “the *Wilson* method comes perilously close to the mandatory regime found to be constitutionally infirm in *Booker*,” *id.*, and that “*Wilson* overstates the case for deference to the Commission, particularly in individual cases.” *Id.* at *5. Judge Gertner’s opinion provides an excellent point-by-point

counter argument to *Wilson*. See also *United States v. Myers*, 353 F. Supp. 2d 1026 (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*, 400 F.3d 646, 655-56 (9th Cir. Feb. 9, 2005) (advisory guideline range is “only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence”), *reh’g en banc granted*, 401 F.3d 1007 (9th Cir. 2005).

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 range 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.

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.

1. The § 3553(a) statutory factors

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

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.

The Sentencing Commission, however, in the “Life After *Booker*” presentations it has been giving to judges, probation officers and attorneys, is of course urging a guideline-centric approach. The Commission’s approach consists of three steps: Step One: Calculate the guidelines according to all of the rules of the manual (including the “one book” rule) to arrive at a guideline range; Step Two: Determine if a “departure” is warranted on the grounds authorized/addressed in the manual; Step Three: Determine if a “variance” (which the Commission uses linguistically to distinguish other aggravating and mitigating factors which are not addressed in the manual from the term “departure”) is warranted under § 3553(a). Counsel should urge the courts to avoid this approach and instead use the statutory factors approach outlined above.

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.

2. The § 3553(c) Statement of Reasons

Under Section 3553(c), the district court must still state the reasons for the sentence imposed. *See United States v. Webb*, ___ F.3d ___, 2005 WL 763367 n.8 (6th Cir. April 6, 2005) (citing § 3553(c) and stating, “Post-*Booker* we continue to expect district judges to provide reasoned explanation for their sentencing decisions in order to facilitate appellate review.”). In the case of a sentence outside the guideline range, § 3553(c)(2) requires that reasons must be stated *with specificity and in writing* in the judgment and commitment order. *See United States v. Crosby*, 397 F.3d 103, 116 (2nd Cir. 2005) (observing that *Booker* left § 3553(c) “unimpaired”).⁵

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. 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. Nellum*, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (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); *United States v. Naylor*, __ F. Supp. 2d __, 2005 WL 525409, *2, 2005 U.S. Dist. LEXIS 3418 (W.D. Va. Mar. 7, 2005) (Jones, J.) (concluding that sentence below career offender guideline range was reasonable in part because of defendant’s youth when he committed his predicate offenses – he was 17 – and noting that in *Roper v. Simmons*, 125 S. Ct. 1183, 1194-96 (2005), the Supreme Court found significant differences in moral responsibility for crime between adults and juveniles).

<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), *ex post facto* principles inherent in the Due Process Clause, taken together with *Booker*’s Sixth Amendment ruling, 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.

This argument proceeds in two distinct steps: The first step is the due process and *ex post facto* argument that any increase in the sentencing range cannot be applied retroactively. This first step, when taken alone, establishes that the top of the pre-*Booker* guideline range (arrived at through judicial fact-finding) is the maximum

sentence that can be imposed for pre-*Booker* offenses. The second step is to apply *Booker*'s Sixth Amendment ruling to the calculation of that mandatory guideline range. This step establishes that the sentence can be no higher than the range as calculated based on facts proven to the jury or admitted by the defendant. Thus, the first step sets what can be called a "due process/*ex post facto* ceiling" for the sentence, and the second step sets a lower, "Sixth Amendment ceiling" for the sentence based on *Booker*.

1. Step One: Applying principles of due process and *ex post facto*

a. *Ex post facto* principles are inherent in the Due Process Clause.

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 decision-making are inherent in the notion of due process." *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001); U.S. Const. art. I, § 9, cl. 3. As the Court explained in *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964), "If a . . . legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that [the Court] is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-54.⁶

The Due Process Clause imposes a limitation on *ex post facto* judicial construction because it contains the basic principle of "fair warning." *Rogers*, 532 U.S. 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 *Bouie*, 378 U.S. at 352). 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.

⁶ It should be noted that *Rogers* limits the broad language of *Bouie* and states that *Bouie* does not go so far as to "incorporate jot-for-jot" into the Due Process Clause the specific categories of laws that violate the Ex Post Facto Clause under *Calder v. Bull*, 3 U.S. 386, 390 (1798). *Rogers*, 532 U.S. at 459. For this reason, the analysis here focuses on the *Rogers* test for when judicial construction of a statute violates due process.

Rogers, 532 U.S. at 457 (quoting *Bouie*, 378 U.S. at 354).⁷

b. The *Booker* remedy of advisory guidelines raises due process/*ex post facto* concerns.

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 maximum penalty that may be imposed for federal crimes by eliminating the mandatory nature of the guidelines. As *Booker* makes clear, under the mandatory federal guideline system that was in effect before *Booker*, the “statutory maximum” sentence was the top of the applicable guideline range. 125 S. Ct. at 749 (quoting *Blakely*, 124 S. Ct. at 2537).

Moreover, it should be noted that long before *Booker*, every circuit recognized that because of the mandatory nature of the guidelines, any amendment that would raise a defendant’s guideline range could not be applied to conduct occurring before the amendment took effect without violating *ex post facto* principles.⁸ These decisions were based on the Supreme Court’s decision in *Miller v. Florida*, 482 U.S. 423 (1987), which held that retroactive

⁷ 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. It should be noted that the circuit courts have applied this due process/*ex post facto* principle to judicial interpretations of sentencing laws, and not just to judicial interpretations of laws defining an offense. See *Johnson v. Kindt*, 158 F.3d 1060, 1063 (10th Cir. 1998), *cert. denied*, 525 U.S. 1075 (1999); *Davis v. State of Nebraska*, 958 F.2d 831, 833-34 (8th Cir. 1992); *Helton v. Fauver*, 930 F.2d 1040, 1045 (3d Cir. 1991); *Dale v. Haeberlin*, 878 F.2d 930, 934 (6th Cir. 1989), *cert. denied*, 494 U.S. 1058 (1990).

⁸ Following are the decisions from every circuit holding that guideline amendments raising the guideline range for a defendant cannot be applied retroactively under the Ex Post Facto Clause: *United States v. Haroutunian*, 920 F.2d 1040, 1042 (1st Cir. 1990); *United States v. Young*, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); *United States v. Kopp*, 951 F.2d 521, 526 (3d Cir. 1991); *United States v. Morrow*, 925 F.2d 779, 782-83 (4th Cir. 1991); *United States v. Suarez*, 911 F.2d 1016, 1021-22 (5th Cir. 1990); *United States v. Nagi*, 947 F.2d 211, 213 n.1 (6th Cir. 1991); *United States v. Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994); *United States v. Bell*, 991 F.2d 1445, 1448-52 (8th Cir. 1993); *United States v. Sweeten*, 933 F.2d 765, 772 (9th Cir. 1991); *United States v. Smith*, 930 F.2d 1450, 1452 n.3 (10th Cir.), *cert. denied*, 502 U.S. 879 (1991); *United States v. Worthy*, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 304-05 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 901 (1992).

application of Florida’s revised sentencing guidelines violated the *Ex Post Facto Clause*. As the Court explained, *ex post facto* concerns are implicated by “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Id.* at 429 (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798)).

The remedial majority in *Booker*, by excising the provision that had made the guidelines mandatory (18 U.S.C. § 3553(b)(1)), raised the maximum from the top of the guideline range to the maximum allowed under the statute defining the offense. This judicial interpretation of the SRA expands the criminal penalty for all federal crimes, and cannot be applied retroactively to the detriment of defendants 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 457.⁹

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

⁹ A persuasive argument can be made that these tests are not really two separate tests at all, but just different ways of stating the same test, and that the issue is simply whether the change in the statutory construction was unforeseeable. See Douglas A. Morris, “Booker’s Impact on Due Process Rights of Defendants In Pipeline Cases,” *The Champion* p. 12, at p. 14 (May, 2005) (“Precedent shows that most courts do not address unexpectedness or indefensibility, but simply determine whether the change was *unforeseeable*. If used at all, these two terms sometimes are used interchangeably or are used to describe the ‘degree’ of *unforeseeability*.”).

As the two terms are used here, “unexpected” focuses on what interpretation could be expected by examining the plain language of the statute in question. “Indefensible by reference to prior law” focuses on whether any prior case law supports the interpretation adopted by the Court, and whether such case law could have put the defendant on notice. Regardless of whether these are seen as two tests or one, the ultimate issue is foreseeability.

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 construction. The Supreme Court itself had given the statute exactly the opposite construction in several cases.¹⁰ See *Stinson v. United States*, 508 U.S. 36, 42 (1993) (reaffirming “binding” nature of guidelines and citing prior cases); *Mistretta v. United States*, 488 U.S. 361, 391 (1988). The Court’s interpretation in *Booker*, therefore, was “unexpected.”

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.” The remedial majority, like the state supreme court reversed in *Bowie*, 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, and both *Booker* majorities agreed that the guidelines as written were mandatory up until *Booker* was decided. *Booker*, 125 S. Ct. at 750, 759. 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.¹¹

¹⁰ 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).

¹¹ To say that *Booker* is “indefensible by reference to the law which had been expressed prior to the conduct at issue” is not to say that *Booker* is a poorly reasoned decision.

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 unanimous case law that the guidelines were binding, and thus, absent aggravating circumstances as defined in the guidelines, the judge could not sentence above the top of the applicable guideline range. *Booker* unexpectedly struck that binding language, and thereby raised the maximum sentence that could be imposed. As *Miller* makes clear, Congress could not have made such a change to the guidelines retroactive by virtue of the *Ex Post Facto* Clause, 482 U.S. at 434-35, and the courts cannot make such a change retroactive by virtue of the Due Process Clause. See *United States v. Marks*, 430 U.S. 188, 191-92 (1977).¹²

This first step, taken by itself, establishes a due process/*ex post facto* ceiling for the sentences for pre-*Booker* offenses. This ceiling is the top of the guideline range as it would have been calculated before *Booker* – under the mandatory guideline system with judicial fact-finding.

Indeed, one might view *Booker* as a particularly well-reasoned opinion that is completely “defensible” by virtue of its own logic, while still recognizing that its interpretation of § 3553(b)(1) is “indefensible” *by reference to the prior case law interpreting this statute.*

¹² *Miller* also makes clear that the fact that the same sentence could have been imposed through an upward departure from the mandatory guideline range does not mean there is no *ex post facto* problem with a retroactive increase in the range. In *Miller*, the Florida guidelines in effect at the time of the offense called for a presumptive sentence of 3 ½ to 4 ½ years in prison. The revised guidelines in effect at the time of sentencing, however, called for a presumptive range of 5 ½ to 7 years, and the judge imposed 7 years. 482 U.S. at 424. The Court ruled that even though the original guidelines would have permitted an upward departure to 7 years based on “clear and convincing reasons” and based on factors not adequately considered by the guidelines, the use of the revised guidelines nonetheless violated the *Ex Post Facto* Clause because they did not merely create “flexible ‘guideposts,’” but instead created a “high hurdle that must be cleared before discretion can be exercised, . . .” 482 U.S. at 435. The revised guideline system thus made “more onerous the punishment for crimes committed before its enactment.” *Id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 36 (1981)). *Miller* thus reiterates the well-established principle that a defendant is not barred from raising an *ex post facto* challenge to a new penal statute merely because the same sentence could have been imposed under the old statute. 482 U.S. at 432.

2. Step Two: Applying *Booker*'s Sixth Amendment ruling

In some cases, all the facts needed for the guideline calculations will have been admitted or proven to the jury, and thus the second step will not be necessary since it will not provide a lower ceiling. However, where there has been judicial fact-finding, this second step should be applied to set a "Sixth Amendment ceiling." The second step is analytically separate from the first – determining what sentence can be imposed for offenses committed pre-*Booker* under the mandatory guidelines that were in effect, taking into account *Booker*'s Sixth Amendment ruling. In accordance with the Sixth Amendment, under a mandatory guideline system 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 any detrimental effect of Booker's remedy ruling.* Defendants need not choose between their constitutional rights; they are entitled to have both their due process and their Sixth Amendment rights respected.

The Supreme Court confirmed the propriety of this approach in *Marks v. United States*, 430 U.S. 193 (1977). The Court held in *Marks* that the *ex post facto* principle inherent in 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." *Id.* at 196-97. Thus, 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.

While it certainly is true that defendants pre-*Booker* were "on notice" that a sentence could be imposed that was higher than the range applicable taking account of only jury-found or admitted facts (since the guidelines called for judicial determination of enhancement facts) 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.

Thus, due process and *ex post facto* principles, when applied together with *Booker*'s Sixth Amendment ruling, require that for all offenses committed prior to *Booker*, the sentence not exceed the Sixth Amendment ceiling –

the top of the guideline range as calculated based only on facts proven to a jury or admitted by the defendant.¹³

3. What's wrong with *Duncan*

The Eleventh Circuit rejected the due process argument in *United States v. Duncan*, 400 F.3d 1297 (11th Cir. 2005), but the court's reasoning is flawed because it fails to recognize that in the pre-*Booker* era, the mandatory guidelines set the maximum sentence the judge could impose, absent aggravating circumstances, and any retroactive change in that maximum would thus violate *ex post facto*.

The Eleventh Circuit's reasoning in *Duncan* is simple: At the time *Duncan* committed his offense (possession with intent to deliver at least 5 kilograms of cocaine), the statutory maximum sentence was life imprisonment. The guidelines, according to the circuit, "also informed *Duncan* that a judge would engage in fact-finding to determine his sentence and could impose a sentence of up to life imprisonment. *Duncan*, therefore, had ample warning at the time he committed his crime that life imprisonment was a potential consequence of his actions." *Id.* at 1307. Further on, the court notes that although the guidelines were mandatory, circuit law recognized the U.S. Code as the source of the maximum sentence. *Id.* at 1308. In effect, the circuit reasons that because the guidelines, although mandatory, permitted upward departures, the top of the guideline range was not really a maximum that was binding on the sentencing court.

¹³ 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*, 519 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.

This line of reasoning, however, was rejected by the Supreme Court in *Booker*, when it observed that the availability of a departure under the guidelines does not mean that the judge is “bound only by the statutory maximum.” *Booker*, 125 S. Ct. at 750. As the Court explained, “In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range.” *Id.* See also *Miller*, 482 U.S. at 434 (rejecting state’s arguments that the increase in the presumptive guideline for the offense was not *ex post facto* because the court could have imposed the same sentence under prior law and revised guidelines “merely guide and channel” the judge’s discretion).

The *Booker* Court’s observation about the binding nature of the guidelines, moreover, was nothing new. As noted above, soon after the guidelines came into effect, the Supreme Court in *Mistretta* and *Stinson* held that the guidelines were binding. All the circuits necessarily followed suit, treating the guideline ranges in a typical case as “additional minimums and maximums that are superimposed over the minimums and maximums statutorily enacted by Congress.” *United States v. Seacott*, 15 F.3d 1380, 1385 (7th Cir. 1994) (quoting *United States v. Bell*, 991 F.2d 1445, 1450 (8th Cir. 1993)).

It makes no difference for *ex post facto* and due process purposes that the guideline range maximum was not called the “statutory maximum” until *Booker*; the guideline maximum was binding nonetheless, and any retroactive increase would violate the *ex post facto* and due process principle of fair notice. Indeed, as discussed above, for precisely this reason all circuits, including the Eleventh, recognized in the early 1990s that any retroactive increase in the guideline range would be an impermissible *ex post facto* violation. See *United States v. Worthy*, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990). See also cases cited in fn. 8 *supra*. Although those cases all involved guideline amendments by the Sentencing Commission, the *ex post facto* and fair notice principles are the same, regardless of whether the increase in the guideline range is brought about by the Supreme Court or a legislative entity.

Duncan relies upon *Dobbert v. Florida*, 432 U.S. 282 (1977), but for reasons well articulated in *Miller v. Florida*, 482 U.S. 435 (1987), *Dobbert* is inapplicable here where there has been a *substantive* change in the penalty, and not merely a *procedural* one. In *Dobbert*, the capital sentencing statute in effect at the time defendant committed several murders was later found unconstitutional on procedural grounds by the state supreme court. By the time of defendant’s sentencing, however, a new statute was in place that met constitutional requirements. *Dobbert*

argued that at the time of the murders there was no death penalty “in effect,” and that application of the new statute would violate the *Ex Post Facto* Clause. The Supreme Court rejected this argument, reasoning that the existence of the original capital sentencing statute put *Dobbert* on notice of the possibility of the death penalty. *Dobbert*, 432 U.S. at 297-98. Thus, in *Dobbert*, the penalty did not change, but the procedure for implementing it did.

In *Miller*, the Supreme Court held that *Dobbert* does not apply when there is a substantive change in the penalty and not merely a procedural one. *Miller* involved an increase in the guideline range under Florida’s revised sentencing guidelines. The Court ruled that retroactive application of the revised guidelines to the detriment of the defendant would violate the *Ex Post Facto* Clause. *Miller*, 482 U.S. at 431. The Court distinguished *Dobbert*, noting that “the statute on the books at the time *Dobbert* committed the crimes warned him of the specific punishment Florida prescribed for first-degree murder,” whereas in *Miller*, the statute in effect at the time the defendant committed the crime did not warn him of the higher guideline range that would take effect under the revised guidelines. *Id.*

Likewise, the change brought about by the *Booker* remedy is a substantive one – it raises the potential punishment in the typical crime from the top of the guideline range to the maximum allowed under the statute of conviction. *Miller* makes clear that *Dobbert* does not apply to such a substantive change in the penalty, and that *ex post facto* principles bar the retroactive application of the penalty increase. *Miller* also makes clear that *ex post facto* principles apply to increases in the guidelines, even though judges under the Florida system, as under the federal guidelines, retained some discretion to depart above the range for reasons not adequately considered by the guidelines. *Id.* at 435.

Duncan, accordingly, was wrongly decided, and *ex post facto* principles do apply to the substantive penalty increase wrought by the *Booker* remedy. Under the *ex post facto* principles inherent in the Due Process Clause, sentences for offenses committed before *Booker* therefore cannot exceed the top of the guideline range, and under *Booker*’s Sixth Amendment ruling this guideline range must be calculated based on facts admitted or proven to the jury.

THE BOTTOM LINE: 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. Alternative *Ex Post Facto* Clause Argument¹⁴

In addition to the argument above based on the Due Process Clause, it can also be argued that retroactive application of the *Booker* remedy directly violates the *Ex Post Facto* Clause, even though this clause applies only to legislative actions. This argument depends on viewing *Booker*’s unique approach to statutory construction and excision as, in effect, an implied legislative change in the statute. Viewed as a legislative change, the *Ex Post Facto* Clause applies directly, and it bars any retroactive application of the *Booker* remedy to the detriment of defendants. This argument has appeal particularly since it is difficult to find any other instance where the Supreme Court has so directly rewritten a congressional statute by striking language that in and of itself was not unconstitutional. Such an action ought to be viewed as legislative in essence, and therefore as being subject to the *Ex Post Facto* Clause.

The *Booker* remedy of advisory guidelines can be viewed as an implied legislative change because *Booker* ruled that this was the remedy Congress would have intended, given *Booker*’s Sixth Amendment ruling. 125 S. Ct. at 767 (“[W]e have examined the statute in depth to determine Congress’s likely intent *in light of today’s holding*) (emphasis in original). In effect, the Court read into the SRA a specific savings provision that provided for the excision of §§ 3553(b)(1) and 3742(e) in the event the Court applied the Sixth Amendment jury trial requirement to guidelines enhancements. This event occurred with the *Booker* opinion, and thus, as of the date of that opinion, Congress’s implicit savings clause took effect. Thus viewed as a legislative change, the advisory guidelines cannot, under *Miller*, 482 U.S. at 431, be applied to the detriment of defendants for offenses occurring before the date of the *Booker* opinion. Stated differently, legislative actions that the Court rules Congress would have intended must be subject to the same *Ex Post Facto* Clause limitation as legislation that Congress actually passes.

¹⁴ This *Ex Post Facto* Clause argument has been developed by Steve Sady, Chief Deputy Federal Defender for Oregon. See “*Booker*: Ex Post Facto Independent of Due Process,” <http://circuit9.blogspot.com/2005/02/booker-ex-post-facto-independent-of.html>.

This *Ex Post Facto* Clause argument dovetails with the Due Process argument above, and provides an alternative method of arguing for the *ex post facto* principle in “Step one.” The best approach is probably to make both arguments. “Step two,” involving the application of *Booker*’s Sixth Amendment holding, remains the same, regardless of which argument is accepted for Step one.

THE BOTTOM LINE: The *Ex Post Facto* Clause applies directly to the *Booker* remedy of advisory guidelines if this remedy is viewed as a statutory change that Congress intended and effectively imposed.

E. 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.¹⁵ 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 car jacking 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

¹⁵ See “*Booker*: Reasonable Doubt survives,” by Steve Sady, Chief Deputy Federal Defender for Oregon: <http://circuit9.blogspot.com/2005/01/booker-reasonable-doubt-survives.html>; see also Letter Memorandum, Federal Public Defender, District of Oregon, Jan 31, 2005, http://www.federaldefenders.org/blog_doubtredux.pdf.

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*, 400 F.3d 646, 656 n.7 (9th Cir. 2005) *reh'g en banc granted*, 401 F.3d 1007 (9th Cir. 2005). The Fifth Circuit has ruled that proof by a preponderance of the evidence is sufficient. *United States v. Mares*, ___ F.3d ___, 2005 WL 503715, *7 (5th Cir. Mar. 4, 2005). Several district courts, however, have ruled that since 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.¹⁶ *See, e.g., United States v. West*, 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005) (Sweet, J.); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028 (D. Neb. Feb. 1, 2005) (Bataillon, J.). *See also United States v. Gray*, ___ F. Supp. 2d ___, 2005 WL 613645 (S.D.W.Va. Mar. 17, 2005) (Goodwin, J.) (ruling that court will calculate guideline range based first on preponderance standard, and then compare it with range based on reasonable doubt standard so as to weigh reliability of initial guideline range).

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.

F. Applying *Crawford's* Confrontation Clause ruling at sentencing

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held under the Sixth Amendment Confrontation Clause that testimonial out-of-court statements (such as statements to police or under oath), regardless of their reliability, are not admissible at trial unless the witness is unavailable *and* the defendant had a prior opportunity to cross-examine the witness. *Id.* at 59. The Court has not, however, ruled expressly on when, if at all, the right of

¹⁶ This approach of requiring proof beyond a reasonable doubt would be consistent with the circuits which suggested, pre-*Booker*, that when an enhancement or an upward departure results in a large increase in the guideline range, the preponderance standard may not be sufficient and the courts may need to require proof by a higher standard. *See United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996), *cert. denied*, 522 U.S. 868 (1997); *United States v. Kikumura*, 918 F.2d 1084, 1101-02 (3d Cir. 1990); *United States v. Trujillo*, 959 F.2d 1377, 1382 (7th Cir. 1992); *United States v. Townley*, 929 F.2d 365, 369 (8th Cir. 1991); *United States v. Munoz*, 233 F.3d 1117, 1127 (9th Cir. 2000); *United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 (D.C. Cir. 1992).

confrontation applies at sentencing. The question, then, is to what extent the *Crawford* ruling might apply at sentencing in light of *Booker*?

Jeffrey Fisher, who argued (and won) both *Crawford* and *Blakely*, suggests that *Crawford* may apply, depending on the importance of the fact at issue to the sentence. As Fisher explained in a blog posting, “[I]f the sentencing judge thinks that the fact at issue, if found, will cause him to impose a higher sentence under a combination of the guidelines and the factors in 18 U.S.C. § 3553(a), then there is a strong argument that *Crawford* ought to apply at least as a discretionary matter.”¹⁷ See *United States v. Gray*, ___ F. Supp. 2d ___, 2005 WL 613645, *9-*10 (S.D.W.Va. March 17, 2005) (Goodwin, J.) (ruling that sentencing judges are not required to apply *Crawford* at sentencing, but strongly encouraging use of witness testimony and cross-examination in order to resolve factual disputes at sentencing because of “truth seeking function of the Confrontation Clause”).

Taking the analysis one step further, Fisher says, “Indeed, if the judge thinks that a fact at issue will require him, as a matter of statutory reasonableness on appellate review, to impose a higher sentence, then *Crawford* may well apply as a matter of right.” Fisher also suggests that apart from the Sixth Amendment right, the due process right to a sentence based upon reliable evidence may require that the right of confrontation be accorded defendants at sentencing for any testimonial evidence that could effect the length of the sentence. *Crawford*’s description of the importance of cross-examination in ensuring reliability would strongly support this analysis. In view of the concern for avoiding constitutional doubt, then, *Crawford* supports extending the right of confrontation to sentencing proceedings, particularly with regard to factual issues that may significantly affect the length of the sentence.

THE BOTTOM LINE: *Crawford* and the doctrine of constitutional doubt support granting the right of confrontation at sentencing.

G. 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

¹⁷ Jeffrey Fisher’s blog comments regarding *Crawford*’s applicability can be found at: <http://confrontationright.blogspot.com/2005/04crawford-and-sentencing.html>.

were not charged and proved to the jury. See *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1027 (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) (Keenan, J.). The Third Circuit has taken the same view in a not-precedential opinion. See *United States v. Lorenzo M. King*, No. 03-4715, p. 4 n.2 (Apr. 14, 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*, 397 F.3d 103, 115 (2nd Cir. 2005).

Reconciling the view of the district courts and the Third Circuit mentioned above with the remedy majority in *Booker* presents a challenge; Breyer, writing for the remedy majority, rejects any jury fact-finding requirement for sentencing facts, saying that such an approach “would destroy the system.” 125 S. Ct. at 760 (listing five reasons for rejecting this approach). However, to the extent that pre-*Booker* offenses are involved, the due process and *ex post facto* argument presented above supports requiring the jury fact-finding approach.

Counsel may be concerned that 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.” In such cases, counsel could urge the district court to 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: For *post-Booker* offenses, it is unclear whether 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.

H. 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 under pre-*Booker* case law. See *United States v. Hickman*, 991 F.2d 1110, 1114 (3d Cir. 1993); *United States v. Baird*, 109 F.3d 856, 872 (3d Cir.), *cert. denied*, 522 U.S. 898 (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.

I. 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.¹⁸ Following are three situations in which this argument can be made:

1. 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).¹⁹ These findings thus support sentencing defendants convicted of trafficking in

¹⁸ See Anne Blanchard, Kristen Gartman Rogers, *Presumptively Unreasonable: Using the Sentencing Commission’s Words to Attack the Advisory Guidelines*, *The Champion* Vol. 29, No.2, pp. 24-27 (March, 2005).

¹⁹ The Commission’s 15 Year Report is available on their web site at: http://www.ussc.gov/15_year/15year.htm

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.)

Several district courts have applied this sentencing disparity argument in cases involving crack cocaine to conclude that a sentence below the guideline range was reasonable. *See United States v. John Smith*, __ F. Supp. 2d __, 2005 WL 549057, *6-*10 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (concluding after in-depth review of case law and commentary that 1 to 100 ratio lacks justification and creates unwarranted sentencing disparity); *Simon v. United States*, __ F. Supp. 2d __, 2005 WL 711916, 2005 U.S. Dist LEXIS 4551 (E.D.N.Y. Mar. 17, 2005) (Sifton, J.) (imposing sentence below guideline range for crack cocaine based primarily on disparity between crack and powder); *United States v. Harris*, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005) (Robertson, J.) (Sentencing Commission’s findings regarding crack/powder disparity “are sound authority” for conclusion that guideline ranges for crack are “greater than necessary”).

2. 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 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.

3. "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-Barrrios*, 355 F. Supp. 2d 958, 963 (E.D. Wis. Feb. 2, 2005) (Adelman, J.) (imposing sentence below guideline range based in part on unwarranted disparity among defendants charged with illegal reentry); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1030-31 (D. Neb. Feb 1, 2005) (Bataillon, J.) (imposing sentence below guideline range based in part on the "regional sentencing disparities that occur in the prosecution and charging of immigration offenses and [on the fact] that in other districts a similar defendant would not be prosecuted for illegal entry, but would be simply deported").

<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 illegal re-entry.</p>

J. 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.

K. 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.²⁰ But as the Department of Justice now agrees, the guideline range that results from application of the safety valve is now advisory. *See United States v. Duran*, No. 04-CR-396, 2005 WL 395439, *4 (D. Utah Feb.17, 2005) (Cassell, J.).

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” At first glance, one might interpret the word “shall” to mean that the guideline range is mandatory in the limited circumstance of the application of the safety valve.

The most coherent way to read the statute in light of *Booker*, however, is 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 to 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

²⁰ 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, (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. 18 U.S.C. § 3553(f).

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.

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.

THE BOTTOM LINE: The safety valve continues in effect, but as the DOJ now agrees, the guideline range resulting from the safety valve is advisory in light of *Booker*.

L. 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.” See *United States v. Sharpley*, 399 F.3d 123, 127 n.3 (2d Cir. 2005) (noting that *Booker*’s reasoning applies equally to § 3553(b)(2), and that the Court’s failure to excise this section was most likely an “oversight”).

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

M. The prior conviction exception, *Shepard* and *Almendarez-Torres*

Booker, like *Apprendi* and *Blakely*, expressly creates an exception from its Sixth Amendment holding for facts of prior conviction, stating, “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 (emphasis added). But this exception is not consistent with the broad reasoning of these three cases, which would seem to require that *any fact* increasing the sentence range must be either admitted or proven to the jury. See *Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring).

In *Shepard v. United States*, 125 S. Ct. 1254 (2005), decided after *Booker*, the Court strongly suggested that the prior conviction exception should be viewed narrowly and that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), on which this exception is based, may soon be overturned. Particularly in view of *Shepard*, defense counsel must be sure to object to any statutory sentencing enhancements based on prior convictions that were not admitted or proven to the jury.²¹

1. The basic holding of *Shepard*

Shepard was charged with gun possession. Under the Armed Career Criminal Act (“ACCA” 18 U.S.C. § 924(e)), a defendant charged with gun possession under 18 U.S.C. § 922 faces a dramatic sentencing enhancement – from a maximum of 10 years to a minimum of 15 years and a maximum of life – if he or she has three prior convictions for serious drug offenses or violent felonies, including burglary. *Shepard* held that a prior conviction for non-generic burglary based on a guilty plea can count as a qualifying violent felony only if the charging document, plea agreement, or plea colloquy make clear that the offense conduct actually constituted generic burglary.²²

In so holding, *Shepard* simply extended the “categorical approach” of *Taylor v. United States*, 495 U.S. 575 (1990), to guilty pleas. *Taylor* held that a prior

²¹ This section draws substantially on the excellent work of a number of people in the defender community from around the country, including Alan DuBois (*Shepard* Outline), Felicia Sarner (“Recidivists Enhancements in the Aftermath of *Shepard*” in the Liberty Legend), and Amy Baron Evans (“*Booker* Litigation Strategies” memo).

²² “Generic burglary,” as the term is used in *Shepard*, is the “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime,” while “non-generic burglary” refers to burglary when it is more broadly defined to include, for example, entries into boats and cars. 125 S. Ct. at 1257.

conviction for burglary must be for generic burglary (which does not include entry into boats or cars). Under the “categorical approach,” the court cannot delve into the underlying facts of the conviction, but instead must look only to the statutory elements. The Court created a “narrow exception,” however, for cases in which the statutory definition is broader than generic burglary, but the indictment or information and jury instructions show that the defendant was only charged with generic burglary, and the jury necessarily had to find the elements of generic burglary in order to convict.

Shepard, in applying *Taylor*’s categorical approach to cases tried without a jury, ruled that the closest analog to jury instructions “would be a bench-trial judge’s formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge, Fed. R. Crim. P. 11(a)(3), shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea.” *Shepard*, 125 S. Ct. at 1259-60. The Court emphatically rejected the government’s request to broaden the categorical approach to include documents such as police reports submitted in support of complaints. *Id.* at 1260.

2. The implications of *Shepard* for the prior conviction exception

Although the defendant in *Shepard* did not challenge *Almendarez-Torres* or the prior conviction exception, parts of *Shepard* make clear that five Justices would support overturning that decision and eliminating the exception. And until that happens, *Shepard* also makes clear that *Almendarez-Torres* should be read very narrowly to apply only to facts established by the record of conviction.

In section III of the opinion, which only commanded a four-justice plurality, Justice Souter explains that the Court’s holding limiting the scope of judicial fact-finding regarding prior convictions is required also by the “rule of reading statutes to avoid serious risks of unconstitutionality.” 125 S. Ct. at 1263. As Souter explained, judicial fact-finding about a disputed prior conviction “raises the concern underlying *Jones* [*v. United States*, 526 U.S. 227, 243 n.6 (1999)] and *Apprendi*: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury’s finding of any disputed fact essential to increase the ceiling of a potential sentence.” *Id.* at 1262. Souter then notes that the dissent charges the Court’s decision “may portend the extension of *Apprendi* . . . to proof of prior convictions.” *Id.* at 1263 n.5. Souter does nothing to dispel this impression, but instead observes that any risk that a defendant might be prejudiced by proof of prior convictions to the jury could easily be addressed by the defendant waiving the right to have the jury decide that issue.

The fair implication of this plurality opinion is that any judge fact-finding that strays beyond the “fact of prior conviction,” whether that be facts regarding

probationary status, release date from custody, or nature of offense, risks constitutional infirmity. Thus, the *Almendarez-Torres* exception for facts of prior conviction should be construed very narrowly so as to minimize this risk.

Justice Thomas concurred in the other parts of the opinion but did not join in Part III only because it did not go far enough. Thomas states that “a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided,” and he would find the ACCA unconstitutional as applied to Shepard because it requires an increase in the sentence based on facts (the prior convictions) not admitted by the defendant or proven to a jury. *Shepard*, 125 S. Ct. at 1264 (Thomas, J. concurring).

3. Applying *Shepard*

- a. *Check the prior offense charging documents and statutes of conviction:* In any case in which the defendant faces enhancement for prior convictions under the ACCA or similar statutes, such as illegal re-entry (8 U.S.C. § 1326(b)), drug trafficking (21 U.S.C. § 841(b)), three strikes (18 U.S.C. § 3559), and sexual abuse (18 U.S.C. § 2241, et seq.; § 2426), or even the career offender provision of the guidelines USSG § 4B1.1, defense counsel must check the applicable state or federal statutes to see whether the prior convictions as specified in the charging documents count as predicate felonies under the “categorical approach.” If the crime is defined broadly and encompasses conduct that does not meet the definition of “violent felony” or “serious drug trafficking offense,” counsel should check the charging document, plea colloquy, and plea agreement (or jury instructions if there was a jury trial) to verify that those documents do not narrow the offense of conviction so that it does qualify. The same is true for statutes written in outline form, defining various types of conduct disjunctively as a certain crime, some of which may not qualify for the enhancement. As long as the documents permitted under *Shepard* do not narrow the offense, the conviction does not qualify and the enhancement cannot apply. Under *Shepard*, the government cannot use any other documents, such as police reports, presentence reports or complaints, to show that the convictions do meet the statutory definitions.
- b. *Move to strike surplusage from indictment:* If the government tries to preempt the constitutional challenge to the enhancements by charging the prior convictions in the indictment and proving them to the jury, move to strike the prior convictions as surplusage on the ground that only Congress can add elements to the offenses, and both Congress and the courts have made clear that the prior

convictions are only sentencing factors. *See United States v. Jackson*, 390 U.S. 570, 580 (1968) (courts are not free to impose upon an unwilling defendant a jury fact-finding procedure not authorized by Congress, solely for the purpose of rescuing a statute from the charge of unconstitutionality).

If the motion to strike is unsuccessful, and the case goes to trial, move to bifurcate the trial so that the presentation of evidence and the deliberations regarding the prior convictions take place after the jury determines whether defendant was guilty of the offense. In the alternative, consider Justice Souter's suggestion: "[A]ny defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions." *Shepard*, 125 S. Ct. at 1263 n.5. But make clear that you are preserving your original objection to the inclusion of this surplusage in the indictment, and presenting this alternative only now that the judge has overruled that objection.

- c. *Do not admit to prior convictions at guilty plea or any other time:* Be sure defendant does not admit to the prior convictions at any point (e.g., in plea agreement, plea or PSI interview), since that would waive the challenge.

If the defendant wishes to plead guilty to the offense and the court insists that the defendant also admit to the prior convictions, object that under the Fifth Amendment the defendant need only plead guilty to the elements of the offense. Under *Mitchell v. United States*, 526 U.S. 314 (1999), a defendant who pleads guilty retains the Fifth Amendment right to remain silent with regard to sentencing issues. As the Court explained, "The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." *Id.* at 330. No negative inference, moreover, can be drawn from the defendant's exercise of this right to remain silent regarding sentencing issues. *Id.* The exercise of this privilege also should not affect the reduction for acceptance of responsibility under USSG § 3E1.1, since that section only requires acceptance of responsibility for the "offense," and neither the guideline nor the commentary suggests the defendant must also admit to prior convictions.

- d. *At sentencing, argue the unconstitutionality of statutory recidivist enhancements based on Thomas's concurrence:* If a statutory enhancement based on prior convictions does apply, object at sentencing to the constitutionality of this enhancement, whether

under ACCA, § 1326(b) illegal re-entry, § 841(b) drug trafficking, or § 2241 sexual abuse. Argue based on Thomas’s concurrences in *Shepard* and *Apprendi* that *Almendarez-Torres* should be overruled, and that the fact of prior conviction should be covered by the rule of *Apprendi* – prior convictions used to enhance the sentence must be charged in the indictment and proven to the jury beyond a reasonable doubt.²³ (Remember, this position is consistent with the motion to strike the priors from the indictment as surplusage because the argument is that only Congress, and not the courts, can correct the statute by making the prior convictions elements of the offense.) And in order to keep the issue alive as long as possible, raise this issue on appeal and file a petition for certiorari if necessary.

- e. *In the alternative, argue that Shepard limits what the court may consider in determining whether the enhancement applies:* If the court rejects your constitutional argument against the enhancement, argue that *Shepard* sharply limits what the court can consider in determining factually whether the statutory enhancement applies. For example, the ACCA requires proof of more than the mere fact of prior convictions; the government must also establish that these prior offenses were “committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). These facts relating to timing may not be apparent from the court records. *Shepard* strongly suggests that the *Almendarez-Torres* exception for facts of prior conviction should be strictly limited under the rule of constitutional avoidance to facts conclusively established by the court record of the conviction. As the Court in *Shepard*, states, “While the disputed fact here [regarding the nature

²³ A persuasive argument can also be made that *Almendarez-Torres* does not need to be overruled, but instead can be viewed as limited to its facts and the Fifth Amendment issue raised in that case. There, the defendant admitted in the course of pleading guilty to violating 8 U.S.C. § 1326 that he had been deported pursuant to three earlier felony convictions. 523 U.S. at 227. For this reason, as the Court in *Apprendi* noted, *Almendarez-Torres* raised “no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact.” *Apprendi*, 530 U.S. at 488. The only issue there was whether under the Fifth Amendment the prior convictions should have been charged in the indictment. Since the Sixth Amendment jury trial issue was not factually or legally presented in *ALMENDAREZ-Torres*, that case should be seen as only a limited ruling on the Fifth Amendment indictment issue. Thus, *Almendarez-Torres* does not preclude application of *Apprendi*’s Sixth Amendment ruling to prior convictions. See Brief of NACDL as Amicus Curiae, *Shepard v. United States*, 125 S. Ct. 1254 (2005), pp. 7 n.2, 8 n.3; Colleen P. Murphy, *The Use of Prior Convictions After Apprendi*, 37 U.C. Davis L. Rev. 973, 994 (2004).

of the burglary] can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.” *Shepard*, 125 S. Ct. at 1262.

By this reasoning, facts relating to the timing of the convictions, since they go beyond the mere fact of conviction, should be subject to the rule of *Apprendi* – the government should be required to prove such facts to the jury beyond a reasonable doubt. The same argument can be made with regard to all other facts that go beyond the mere “fact of conviction,” such as facts regarding whether the prior conviction qualifies as a “violent felony,” or an “aggravated felony,” or a “serious drug offense.” Such facts go beyond the narrow *Almendarez-Torres* exception for “fact of conviction,” and thus, in any case where these facts were not found by the jury beyond a reasonable doubt, under *Shepard* and the rule of constitutional avoidance, the enhancement cannot apply.

Alternatively, even if the court is permitted to find these facts, under *Shepard*, the court should be limited to examining the documents *Shepard* authorizes – the charging documents, plea agreement, plea colloquy, (or jury instructions if there was jury trial). And under the doctrine of constitutional avoidance, the *Shepard* limitation regarding the records the court may consider should apply not just to determinations for statutory enhancement purposes, but also to all criminal history determinations under the guidelines. *See United States v. Harper*, __ F. Supp. 2d __, 2005 WL 646366 (E.D. Tex. Mar. 17, 2005) (Clark, J.) (rejecting, in light of *Shepard*, government argument that enhancements should be found by preponderance of the evidence, and concluding that enhancements can only be based “upon jury findings, prior convictions, the court documents and statutory definitions pertinent to such convictions, and admissions by a defendant”).

THE BOTTOM LINE: *Shepard* is yet another signal that *Almendarez-Torres* is likely to be overturned, and thus it is particularly important to preserve objections to statutory sentence enhancements based on prior convictions. *Shepard* can also be read broadly for the principle that judicial fact-finding regarding facts of prior conviction should be limited to the mere fact of the conviction itself.

N. Mandatory Minimum Sentences, *Harris*, and *Booker*

Even though *Booker* does not directly address statutory mandatory minimum sentences, it provides further support for continuing to object to the application of mandatory minimum sentences whenever the triggering facts have not been either admitted or proven to the jury beyond a reasonable doubt. The Supreme Court upheld the constitutionality of mandatory minimum sentences based on judicial fact-finding in *Harris v. United States*, 536 U.S. 545, 567-68 (2002). But *Harris* was decided by a 5 to 4 vote, in which one of the five majority justices was Justice Breyer, who candidly acknowledged that this holding could not logically be squared with *Apprendi*. Breyer nonetheless concurred in the result because he could not “yet accept” *Apprendi*’s rule. *Id.* at 569. Since Breyer’s remedy opinion in *Booker* was predicated on the application of *Apprendi*’s rule to the federal guidelines, he presumably does now accept its rule and would thus vote to overturn *Harris*. Significantly, *Booker* does not even cite *Harris*, thus further indicating that *Harris* is most likely ready to be overruled.

THE BOTTOM LINE: *Harris* is likely to be overruled, and thus counsel should be sure to preserve objections to mandatory minimum sentences imposed based only on judge-found facts on the ground that the rule of *Apprendi* should apply to mandatory minimum sentences.

O. *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.), *cert. denied*, 537 U.S. 1050 (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.

P. *Booker*’s effect on supervised release

Although *Booker* itself does not speak to the issue, a strong argument can be made that the logic of *Booker* prevents district courts from imposing supervised release revocation sentences, and, indeed, from imposing supervised release in the first place, as is permitted by 18 U.S.C. § 3583.²⁴

The Sixth Amendment ruling of *Booker* requires that every fact (other than a prior conviction) essential to the punishment imposed be admitted by the defendant or found by a jury beyond a reasonable doubt. The fact of violation is essential to revocation resentencing; but for the violation finding, the district court would be powerless to revoke or resentence. Revocation resentencings therefore violate the Sixth Amendment. The *Booker* remedy does not cure the violation because, regardless of what maximum Sixth Amendment-compliant punishment can now be imposed in the first instance, a revocation sentence is still contingent on fact-finding regarding the release violation.²⁵

²⁴ This argument was developed by Steven F. Hubachek, Assistant Federal Defender, San Diego.

²⁵ The advisory nature of the revocation resentencing ranges set forth in U.S.S.G. § 7B1.4 is irrelevant to the Sixth Amendment analysis. While it was the mandatory nature of the guidelines ranges that *Booker* determined made enhancement facts essential to punishment, it is something else – the statutory inability to revoke supervised release absent a violation – that

Moreover, no remedy can be fashioned to save supervised release: it is clear that Congress did not intend to permit jury fact-finding at revocation proceedings, and there is no provision that can be severed and struck from Section 3583 to cure the Sixth Amendment infirmity. Because supervised release is not “fully operative” absent revocation procedures, the severance and excision of the revocation provisions is not possible, and the entire supervised release provision of the SRA should be stricken.²⁶ *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

THE BOTTOM LINE: Imposition of supervised release and revocation sentencing upon violation of the conditions of supervised release should be challenged under *Booker*.

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*.) See *United States v. Dottery*, 353 F. Supp. 2d 894, 899 (E.D. Mich. Jan 24, 2005) (Lawson, J.) (dismissing superceding indictment which added only sentencing factors, and ordering trial on original indictment); *United States v. Cormier*, 226 F.R.D. 23, 25-27 (D. Me. Jan. 28, 2005) (Woodcock, J.) (“Sentencing allegations, which do not allege elements of the charged offenses and are matters only for determination at sentencing under the advisory Sentencing Guidelines, have no place within the charging

makes the violation finding essential to the revocation sentence.

²⁶ It is the non-severability of the revocation provisions from the rest of Section 3583 that dooms supervised release in its entirety; the imposition of a term of supervised release in the first instance is authorized by the conviction, so there is no Sixth Amendment violation. See *Booker*, 125 S. Ct. at 764 (noting, in *dictum*, validity of supervised release). The conviction by itself does not authorize revocation or resentencing, however; violation fact-finding is a necessary intermediate step.

document against the defendant.”) *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.

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-*Booker*, appeal waivers should be agreed to only when the defendant receives a substantial benefit in the plea agreement.

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).

THE BOTTOM LINE: While sentencing facts found by a jury post-*Blakely* do not bind the sentencing judge, facts that the jury found unproven cannot be used in the sentencing determination for offenses occurring before *Booker*.

C. Cases on Appeal

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.²⁷

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

²⁷ 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*, 397 F.3d 103, 115 (2d Cir. 2005).

conduct a sentencing hearing under an advisory guidelines regime.

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.

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) 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.), *cert. denied*, 502 U.S. 992 (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,²⁸ 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*, 397 F.3d 103, 115-16 (2d Cir. 2005) (declining, however, to require “specific articulation” of sentencing factors); *United States v. Webb*, ___ F.3d ___, 2005 WL 763367, *7 (6th Cir. Apr. 6, 2005) (“[W]e may conclude that a sentence is unreasonable when the district judge fails to ‘consider’ the applicable Guidelines range or neglects to ‘consider’ the other factors listed in 19 U.S.C. § 3553(a), and simply selects what the judge deems an appropriate sentence without such required consideration.”).

b. *Guidelines Sentence Not Necessarily “Reasonable”*

It is important to emphasize that a sentence within the applicable guidelines range is not automatically, or even presumptively, “reasonable” under *Booker*, nor is a sentence outside the range presumptively unreasonable. See, e.g., *United States v. Webb*, ___ F.3d ___, 2005 WL

²⁸ 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.”

763367, n.9 (6th Cir. Apr. 6, 2005) (declining to hold that a sentence within a proper guideline range is *per se* reasonable since such a holding would be inconsistent with *Booker* and would effectively re-institute mandatory adherence to the guidelines); *United States v. Newsom*, __ F.3d __, 2005 WL 736259, at *5 (7th Cir. Apr. 5, 2005); *United States v. Rubenstein*, __ F.3d __, 2005 WL 730081, at *7 (2^d Cir. Mar. 31, 2005) (Cardamone, J., concurring).

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

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*, 397 F.3d at 114; *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 or *de novo* review), some deference for issues of guideline application to facts (abuse of discretion review), and substantial deference for factual conclusions (clear error review). See *United States v. Villegas*, __ F.3d __, 2005 WL 627963, *2-*3, 2005 U.S. App. LEXIS 4517 (5th Cir. Mar. 17, 2005) (employing *de novo* standard to review district court's interpretation and application of guidelines when court imposes a sentence within the guideline range); *United States v. Hughes*, 401 F.3d 540, 557 (4th Cir. 2005) (employing *de novo* and clear error standards to guideline issues); *United States v. Killgo*, 397 F.3d 628, 631 (8th Cir. 2005) (subsuming clear error standard in reasonableness review). See generally *United States v. Lennon*, 372 F.3d 535, 538 (3^d Cir. 2004) (listing standards). 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.

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

To date, the Third Circuit has issued only two precedential *Booker* decisions. In *United States v. Davis*, 397 F.3d 173 (3d Cir. 2005), the Court, in a one-sentence *Booker* discussion, announced that “the judges of this court” have determined that *Booker* issues are “best determined by the district court in the first instance.” *Davis*, 397 F.3d at 183. The Court remanded without expressly conducting a plain error analysis, even though no *Apprendi/Blakely* objection was raised below. Although *Davis* is a drug case, it is not clear from the opinion whether the defendants’ sentences were enhanced in violation of the Sixth Amendment.

Most of the Third Circuit’s *Booker* remands have come in not-precedential decisions, some of which suggest a liberal remand approach even absent a Sixth Amendment violation and objection below. *See, e.g., United States v. Able*, No. 04-1915, 2005 WL 428758 (3d Cir. Feb. 24, 2005) (not precedential). It appears that the Court has concluded that the tests for harmless error and plain error are necessarily satisfied in any case on appeal in which the defendant was sentenced under the mandatory guidelines. It also appears that the Court has concluded that remand is appropriate even if the defendant signed a plea agreement waiving the right to appeal sentencing issues. *See United States v. Herman Foman*, No. 04-2508 (3d Cir. Apr. 7, 2005) (not precedential) (remanding for resentencing in light of *Booker* in case in which defendant waived his right to appeal except with regard to suppression issue; government argued appellate waiver required dismissal of appeal; opinion does not mention waiver).

Although the Third Circuit is taking a broad approach to the application of plain error analysis, other courts of appeals have been less indulgent. 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*).²⁹ See *Johnson v. United States*, 520 U.S. 461, 468 (1997). The courts of appeals are unanimous in this respect.

It is the last two requirements, prejudice and harm to the integrity of the justice system, that have posed a barrier to relief in some cases. The courts of appeals have broken into three groups in their treatment of plain error.

- a. *Group One (3d, 4th, 6th, and 9th Cir.): Prejudice Presumed from Application of Unconstitutionally Enhanced (or Mandatory) Guideline Range and Error Must Be Corrected Through Remand*

The Third, Fourth, Sixth, and Ninth Circuits presume prejudice to a certain degree. This is most clear 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).³⁰ In such cases, these courts have ruled that the application of the incorrect guideline range is sufficient to establish prejudice and require resentencing.³¹ See *United States v. Ordaz*, 398 F.3d 236, 239 (3d Cir. 2005); *United States v. Hughes*, 401 F.3d 540, 548 (4th Cir. 2005); *United States v. Oliver*, 397 F.3d 369, 380 (6th Cir. 2005); *United States v.*

²⁹ 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*.

³⁰ 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. *United States v. Spivey*, No. 04-2057, 2005 WL 647345 (3d Cir. Mar. 22, 2005) (not precedential) (recognizing probationary status and proximity findings as potentially violative of Sixth Amendment); *United States v. Ordaz*, 398 F.3d 236, 241 (3d Cir. 2005) (classification of prior conviction permissible under *Almendarez-Torres*). 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).

³¹ 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*, 396 F.3d 1140, 1143 (10th Cir. 2005).

Barnett, 398 F.3d 516, 529 (6th Cir. 2005); *United States v. Hines*, 398 F.3d 713, 722 (6th Cir. 2005); *United States v. Ameline*, 400 F.3d 646, 655 (9th Cir. 2005), *reh'g en banc granted*, 401 F.3d 1007 (9th Cir. 2005).

Even absent a Sixth Amendment violation, prejudice should be presumed simply from the fact that the defendant was sentenced under a mandatory guidelines scheme. *See, e.g., United States v. Able*, No. 04-1915, 2005 WL 428758 (3d Cir. Feb. 24, 2005) (not precedential). 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*, 397 F.3d at 118.

b. *Group Two (1st, 5th, 10th and 11th Cir.): Burden of Proof on Defendant to Show Prejudice or Miscarriage of Justice*

At the other end of the spectrum, the First, Fifth, Tenth and Eleventh Circuits require defendants to show a reasonable probability of a lesser sentence to be entitled to a *Booker* remand. The First Circuit tempers this requirement somewhat by allowing defendants to show prejudice by offering new facts/arguments on appeal and not being overly demanding on the issue of proof. *See United States v. Antonakopoulos*, 399 F.3d 68, 81 (1st Cir. 2005); *United States v. Heldeman*, ___ F.3d ___, 2005 WL 708397 (1st Cir. Mar. 29, 2005). The Fifth, Tenth and Eleventh Circuits, however, require defendants to show prejudice on the record below, which typically does not reflect any consideration of the Section 3553(a) factors. Absent a fortuitous comment on the record regarding the district court’s wish to sentence lower, remand will likely not be ordered. *United States v. Mares*, ___ F.3d ___, 2005 WL 503715, *9 (5th Cir. Mar. 4, 2005); *United States v. Dazey*, No. 03-6187, slip op. at 50 (10th Cir. Apr. 13, 2005); *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir. 2005).

The Tenth Circuit has taken a more extreme view in cases involving no Sixth Amendment violation, holding that defendants in cases of “non-constitutional *Booker* error” generally will not be able to meet the fourth prong of plain error – showing that the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *See United States v. Gonzalez-Huerta*, ___ F.3d ___, 2005 WL 807008, *8 (10th Cir. Apr. 8, 2005) (en banc). The court in *Gonzalez-Huerta* ruled that because the sentence was consistent with the national norm and the record was devoid of any mitigating evidence, the defendant could not show, as required by the fourth prong, that his sentence was “particularly egregious or a miscarriage of justice.” *Id.*

- c. *Group Three (2d and 7th Cir.): Presumptive Remand for Limited Purpose of Permitting District Court to State Whether a Lesser Sentence Would Have Been Imposed and, If So, for Resentencing*

A middle approach is followed by the Second and Seventh Circuits, which remand 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*, 397 F.3d 103, 117 (2d Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 483-84 (7th Cir. 2005).

THE BOTTOM LINE: There are currently three general approaches to plain error, ranging from presumptive remands to, in effect, presumptive affirmances. Although some *en banc* activity may harmonize these approaches, and a few appeals courts have yet to weigh in, unless the Supreme Court resolves the matter it is likely that the *Booker* “pipeline” cases will be given different treatment in the various circuits.

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

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.”). The Third Circuit seems to agree. *United States v. Ordaz*, 398 F.3d 236, 239 (3d Cir. 2005) (remanding where Sixth Amendment violation occurred without expressly applying harmless error analysis). 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, it is the government's burden to show at the very least that the appellate court should have no "grave doubt" as to whether the error substantially influenced the outcome of the proceedings.³² *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946). 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.) (en banc), cert. denied, 514 U.S. 1067 (1995). The prejudice arguments discussed above in relation to plain error are equally applicable to harmless error analysis. See *United States v. Labastida-Segura*, 396 F.3d 1140, 1143 (10th Cir. Feb. 4, 2005) (remanding for resentencing in case involving preserved *Booker* error, but no Sixth Amendment violation, because sentence was at bottom of guideline range and judge under advisory guidelines might have imposed lower sentence).

THE BOTTOM LINE: If *Booker* claims are subject 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.³³ A district court's

³² In the event harmless error analysis is applied in the context of a Sixth Amendment violation below, the government must show under constitutional harmless error analysis that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

³³ 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

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. *See, e.g., United States v. Anderson*, No. 04-4621, 2005 WL 735587 (4th Cir. Mar. 31, 2005) (affirming based on alternate sentence).

Although this argument has superficial appeal, it should not prevent resentencing. 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*, 397 F.3d at 118 (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.

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. Several courts have ruled that *Blakely/Booker* issues may be raised in this fashion. *See, e.g., Oliver*, 397 F.3d 369, 377; *Hines*, 2005 WL 280503, at *5.

sentence violates due process and *ex post facto* principles as discussed earlier in this memorandum (IV.C).

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.

The Third Circuit has taken a unique approach to the raising of *Booker* claims. In each pending criminal appeal, the court has issued an order requiring the filing of short letter briefs if a *Booker* claim is being raised. The court has likewise directed parties in newly-filed appeals not to address any *Booker* claim in the merits briefs, but to submit a letter brief subject to the same requirements as those required in pending appeals.

D. Resentencing after remand in light of *Booker*: The presumption of vindictiveness

In addition to the issues discussed above, due process limits the sentence a judge may impose when a sentence has been vacated and remanded for resentencing in light of *Booker*. Under *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969), “Due process of law, . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.” *Id.* at 725. Vindictiveness is presumed, accordingly, whenever a higher sentence is imposed upon remand for resentencing, unless the court states affirmatively on the record reasons that are “based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.” *Id.* at 726; *see also Alabama v. Smith*, 490 U.S. 794, 798-799 (1989) (reiterating *Pearce* rule, but holding that it does not apply upon retrial after appeal). The same due process concerns also preclude the prosecutor from seeking a higher sentence unless the presumption of vindictiveness is rebutted. *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974).

THE BOTTOM LINE: Under the Due Process Clause, unconstitutional vindictiveness is presumed if the court imposes a higher sentence upon remand for resentencing, unless the court gives specific reasons and facts in support of the higher sentence.

E. 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. It can be argued that either *Booker*, *Blakely*, or *Apprendi* established a new rule of criminal procedure.³⁴

a) 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 *Guzman v. United States*, __ F.3d __, 2005 WL 803214, *2 (2d Cir. Apr. 8, 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 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

³⁴ The Supreme Court has never expressly held that *Teague* applies to § 2255 motions. See *Teague*, 489 U.S. at 327 n.1 (Brennan, J. dissenting) (whether *Teague* applies to § 2255 proceedings is an open question). The Court has noted, moreover, that the “*Teague* rule is grounded in important considerations of federal-state relations,” *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). These considerations are not present in the § 2255 context. Thus, a strong argument can be made that the *Teague* retroactivity bar should not apply to § 2255 motions. To the extent that the *Teague* rule also reflects concerns for finality, those concerns are adequately addressed by the one year statute of limitations under § 2255. See generally Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure*, 4th Ed., § 25.6, Finality, pp. 1112-12 n.19 (2001). An example of a motion making this argument is available on line at: http://sentencing.typepad.com/sentencing_law_and_policy/files/teague_not_applicable_2255memotion.pdf.

cause and prejudice for a procedural default.

The next step in the argument (and the more difficult one) is to establish that *Booker* qualifies as a “watershed rule.” This requires distinguishing *Schriro 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 since 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. Wilbur*, 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 (as applied to the federal guidelines in *Booker*) constitutes a watershed rule, which would be fully retroactive. In addition, all the Justices in *Summerlin* appeared to agree that the first requirement for a watershed rule, fundamental fairness, was met -- the battle was over whether the jury requirement increased accuracy. Moreover, Justice O’Connor wrote that, despite *Summerlin*, even final guideline judgments “arguably remain open to collateral attack.” *Blakely*, 124 S. Ct. at 2549. See generally, Note, Rethinking Retroactivity, 118 Harv. L. Rev. 1642, 1663 (March 2005) (arguing that *Apprendi* should apply retroactively because “*Apprendi*’s reasonable doubt guarantee unambiguously improves the accuracy of underlying criminal proceedings”).

Several circuits, however, have ruled that *Booker*, although establishing a new procedural rule, is not retroactive for the same reasons *Summerlin* found *Ring* not retroactive. See *Guzman v. United States*, __ F.3d __, 2005 WL 803214, *3 (2d Cir. Apr. 8, 2005); *Varela v. United States*, 400 F.3d 864, 867 (11th Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 863 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005).

b) *Blakely* as the new procedural rule

Blakely can be viewed as the key decision establishing the new procedural rule at issue because it was not until *Blakely* that the Supreme Court clarified that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts*

reflected in the jury verdict or admitted by the defendant.” *Blakely*, 124 S. Ct. at 2537. See *United States v. Price*, 400 F.3d 844, 847 (10th Cir. 2005). As argued above, this new rule should be viewed as a watershed rule because it implicates the burden of proof and therefore affects the accuracy of the proceeding. The Tenth Circuit in *Price*, however, while holding that *Blakely* did announce a new rule, rejected the argument that it was a watershed rule on the basis of *Summerlin*. *Price*, 400 F.3d at 848.

c) *Apprendi* as the new procedural rule

Another approach is to argue that neither *Booker* nor *Blakely* announced 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 (June 26, 2000). The disadvantage in cases where the sentencing was post-*Apprendi* 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.³⁵ See *People v. Johnson*, __ P.3d __, 2005 WL 774416, No. 03CA2339 (Colo. App. Apr. 7, 2005) (holding that *Apprendi* established a new rule which *Blakely* merely explained and

³⁵ 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.

clarified, and therefore *Blakely*'s explanation of the rule is retroactive to the date *Apprendi* was decided – June 26, 2000). (The five circuits cited above, however, which have held that either *Booker* or *Blakely* established the new rule, are to the contrary.)

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 constituted "cause" and that they were prejudiced, 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; *see also United States v. McKie*, 73 F.3d 1149, 1151 (D.C. Cir. 1996) ("interpretation of the substantive terms of a federal statute" not subject to *Teague* analysis).

Booker qualifies as a substantive holding because the Court, through statutory construction and excision, changed the meaning of a criminal statute – the SRA. The effect of this change 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. (*But see* four circuits mentioned above which held that *Booker* established a new procedural rule, and not a substantive one.)

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*.

THE BOTTOM LINE: Much of the analysis for § 2255 purposes depends on whether *Booker* or *Blakely* is seen as establishing a new procedural rule that is a “watershed” rule, or whether *Booker* and *Blakely* were dictated by prior precedent, or whether *Booker* establishes a new substantive rule that is automatically retroactive.

VI. Other Resources

The following web sites 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. Includes most recent update of this “*Booker* Litigation Strategies Manual,” as well as updates of “Post *Booker* Federal Decisions - An Outline” (by Frances H. Pratt).
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 Defender blog, under “D - Web Law Blogs.”

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