## *UNITED STATES V. BOOKER*: MIRACLE OR MIRAGE?

By Marc Fernich and Debra Karlstein[1]

David Byrne's "same as it ever was"? Or Bob Dylan's "revolution in the air"? Either lyric might describe the uncertain state of federal sentencing in the wake of *United States v. Booker*,[2] the long-awaited Supreme Court decision on the future of the U.S. Sentencing Guidelines. This article explores some of *Booker*'s conflicting legal implications and offers tips for effectively negotiating them. We begin, however, by taking a critical look at the decision itself.

### *Booker*'s Twin Holdings

As widely reported, *Booker* produced two separate majority opinions for a deeply divided Court.

In the first opinion, an unusual five-Justice lineup[3] – the so-called "merits majority" – extended the logic of *Blakely v. Washington*[4] to hold the federal Sentencing Guidelines unconstitutional on their face. In brief, *Blakely* involved a Washington state sentencing scheme in which prison terms were increased – beyond the presumptive statutory range for the crime of conviction – based on factual findings made by a judge instead of a jury. Applying the rule of *Apprendi v. New Jersey*,[5] the Supreme Court rejected this procedure as violating the Sixth Amendment right to a jury trial.

In *Booker*, the merits majority found no "relevant" or principled distinction between the Washington system condemned in *Blakely* and the federal Guidelines. *See Booker*, 2005 WL 50108, at *8, *10. Hence they too were deemed fatally defective, likewise offending the Sixth Amendment jury trial guarantee. In reaching this conclusion, the merits majority emphatically reaffirmed *Blakely*'s fundamental teachings: that criminal defendants are entitled to a jury determination of **all** facts "essential to the punishment," and judicial sentencing power is strictly circumscribed by "the facts reflected in the jury verdict or admitted by the defendant." *Blakely*,

---

[1] The authors are sole practitioners in Manhattan. Excerpts from Mr. Fernich's "*Blakely v. Washington*: A Selective User's Guide," this article's precursor, appeared in the September/October 2004 issue of the *Mouthpiece*.

[2] Nos. 04-104-05, 125 S. Ct. 738, 2005 WL 50108 (Jan. 12, 2005).

[3] Stevens, J., joined by Scalia, Souter, Thomas and Ginsburg, JJ.

[4] 124 S. Ct. 2531 (2004).

[5] 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

124 S. Ct. at 2531, 2537. In other words, the sentence may not exceed the scope of the jury's verdict or the defendant's admissions.

This aspect of the *Booker* holding – that the Guidelines infringe the Sixth Amendment as construed in *Blakely* – was widely anticipated. Somewhat more surprising, and certainly more controversial, was the remedy the Court devised. Thus, in the second majority opinion, a different array of Justices[6] – the so-called "remedial majority" – dismissed the idea of jury sentencing as unwieldy, impractical and contrary to the text and purpose of the Sentencing Reform Act of 1984 (SRA). *See Booker*, 2005 WL 50108, at *18-*23. Instead, the remedial majority opted to sever the SRA provision that made the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), and downgraded them to mere "advisory" status. *Id.* at *15. In addition, the remedial majority struck another SRA provision governing appellate review of Guideline sentences,[7] replacing it with a judicially-crafted "reasonableness" standard. *Id.* at *25-*27.

According to the remedial majority, these two revisions – declaring the Guidelines advisory and changing the standard of review – relieved the main constitutional flaw identified by the merits majority: namely, the Guidelines' "mandatory" and "binding" character. *Id.* at *8-*9 ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.") (merits majority opinion of Stevens, J.) (citations omitted). So modified, the Guidelines could ostensibly be applied in a constitutional manner, consistent with the Sixth Amendment as amplified in *Blakely*.

The upshot of the remedial majority's work is to restore substantial sentencing discretion to district court judges – **if** they choose to exercise it. While still "required" to "consult," "consider" and "account" for the Guidelines, those judges are now free to sentence anywhere within the statutory maximum for the offense of conviction, with due regard for the general sentencing goals recited in 18 U.S.C. § 3553(a).[8] *Id.* at *16, *27. In essence, then, Justice Breyer adopted the remedy proposed by the government[9] and endorsed by many lower courts immediately following *Blakely* – especially Second Circuit courts. *See, e.g., United States v. Emmenegger*, 329 F. Supp. 2d 416 (S.D.N.Y. 2004) (Lynch, J.); *United States v. Einstman*, 325 F. Supp. 2d 373 (S.D.N.Y. 2004) (McMahon, J.); *United States v. Marrero*, 325 F. Supp. 2d 453 (S.D.N.Y. 2004) (Rakoff, J.)

---

[6] Breyer, J., joined by Rehnquist, C.J., and O'Connor, Kennedy and Ginsburg, JJ.

[7] *See* 18 U.S.C. § 3742(e), amended in 2003's controversial PROTECT Act.

[8] Roughly speaking, these goals include retribution, general deterrence, incapacitation/specific deterrence and rehabilitation. *See Booker*, 2005 WL 50108, at *30.

[9] *See Booker*, 2005 WL 50108, at *28 ("Government's remedial suggestion ... coincides significantly with our own") (opinion of Breyer, J.).

## The Breyer "Fix": Right Result, Wrong Reasoning

Does Justice Breyer's novel remedy – carving up the SRA, pronouncing the Guidelines advisory and maintaining sentencing authority in judges rather than juries – pass critical muster? On a practical level, it certainly addresses the Guidelines' prime source of judicial criticism: their **mandatory**, and often extreme, sentence enhancements for uncharged conduct proven by a bare preponderance of the evidence. *See, e.g., United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996) (consideration of uncharged conduct mandatory under pre-*Booker* Guidelines); *United States v. Concepcion*, 983 F.2d 369, 394 (2d Cir. 1992) (Newman, J., concurring) (denouncing Sentencing Commission's "entirely unjustified decision to price relevant conduct at exactly the same level of severity as convicted conduct"). For as *Booker* makes clear, courts now may reduce or completely disregard such enhancements if, for example, they dwarf the penalty for the offense of conviction or the evidence supporting them is suspect.

But if the Guidelines' overriding goals are uniformity and proportionality – ensuring that similar offenders receive similar sentences for similar crimes – a discretionary system can only achieve the opposite effect. Indeed, unwarranted disparities are bound to proliferate in a regime where sentences vary according to judges' personal, "philosophical and political" views, *United States v. Barkley*, No. 04-CR-119-H, slip op. at 11-12 (N.D. Okla. Jan. 24, 2005), and the degree of deference they choose to give the Guidelines. For defense lawyers, such a system is fine if one is privileged to appear before a fair sentencing judge. But what if one happens to draw a notoriously unreasonable sentencer? Radically different sentences for substantially similar conduct are sure to ensue. This is precisely the kind of arbitrariness the Guidelines sought to avoid.

By contrast, arbitrariness would be greatly diminished in a regime of sentencing juries (unless, of course, one distrusts juries altogether – a notion at odds with our system's basic assumptions). A simple example illustrates the point. Suppose jury A convicts extortion defendant 1 of certain relevant conduct and assorted upward adjustments. Now suppose jury B acquits extortion defendant 2 of identical relevant conduct and the same upward adjustments. Because the two defendants are not similarly situated, any resulting sentence disparity would be wholly **justified** – ***not*** "unreasonable" – and therefore fully consonant with the goals of uniformity and proportionality.

In other words, a jury sentencing regime would be both self-defining and self-executing; the verdicts themselves define classes of similarly situated defendants, thereby ensuring the consistency and proportionality the SRA demands. To this end, it bears recalling that *Blakely* is a case about the right to trial by **jury** – ***not*** trial by sentencing judge. A system of sentencing juries, not one of guided judicial discretion, better comports with that spirit.

Finally, as Justice Scalia pointed out in his remedial dissent, the "reasonableness" standard of appellate review appears nothing less than a judicial invention, devoid of textual support and plucked straight from "Wonderland." *Booker*, 2005 WL 50108, at *49 (remedial dissenting opinion of Scalia, J.).

In sum, by transforming the Guidelines from a catechism of binding directives to a catalogue of advisory suggestions – *i.e.*, a system of channeled discretion – the remedial majority may well have reached the right result in *Booker*. But the opinion's forced reasoning indicates that Justice Breyer – a key architect and leading proponent of the Guidelines[10] – went to extraordinary lengths to salvage his partial creation. And salvage he did. For his majority opinion implicitly invites willing judges to continue following the Guidelines, mechanically imposing the same sentences under the pretense of "discretion" rather than compulsion. Such an approach would effectively gut *Blakely* and the *Booker* merits opinion, reducing them to so many empty words. *See United States v. Huerta-Rodriguez*, No. 8:04CR365, slip op. at 4 n.4 (D. Neb. Feb. 1, 2005) ("If not properly construed, *Booker*'s remedial scheme risks thwarting the purposes of its substantive majority holding.").

***

Like *Blakely* before it, *Booker* is, in the final analysis, a decision that raises far more questions than it answers. Here are a few of those open questions with some attempted, albeit tentative, responses.

## Select *Booker* Questions that Federal Practitioners Should Monitor

### 1. Just How "Advisory" are the Advisory Guidelines?

A threshold issue arising under *Booker* involves the degree of deference the advisory Guidelines command. As noted, the Court's remedial opinion still **requires** sentencing judges to "consider," "consult" and "account" for the Guidelines. *Id.* at *16, *27 (remedial majority opinion of Breyer, J.). But "different interpretations and applications" of this instruction have already "emerged." *United States v. Myers*, No. 3:03-CR–147, _ F. Supp. 2d _, 2005 WL 165314, at *1 (S.D. Iowa Jan. 26, 2005).

At one end of the spectrum is the view embodied in *United States v. Wilson*.[11] There, Utah District Judge Paul G. Cassell flatly decreed that he will follow the Guidelines and impose their prescribed sentence "in all but the most exceptional cases." *Wilson*, 2005 WL 78552, at *12. With respect, this position amounts to a blanket abdication of discretion and an apparent evasion of *Blakely* and the *Booker* merits opinion – a reflexive and unfounded "fear of

[10] Breyer, "Chief Counsel for the Senate Judiciary Committee" during the SRA's "gestation," also served as "Vice-Chair of the First Sentencing Commission" that drafted the Guidelines. *United States v. Leach*, 325 F. Supp. 2d 557, 559 n.1 (E.D. Pa. 2004).

[11] No. 2:03-CR-00882-PGC, _ F. Supp. 2d _, 2005 WL 78552 (D. Utah Jan. 13, 2005).

judging."[12] *See Huerta-Rodriguez*, slip op. at 6 ("wholesale application ... converts the now-advisory guidelines to mandatory guidelines," breeding the same unconstitutionality as in *Blakely*). Thus, as Mr. Byrne might say, *Wilson* represents the "same as it ever was" school of *post-Booker* sentencing.

At the opposite extreme is the view reflected in *United States v. Ranum*.[13] In *Ranum*, Wisconsin District Judge Lynn Adelman elected to "treat the guidelines as just one of a number of sentencing factors" spelled out in 18 U.S.C. § 3553(a), including the defendant's "history and characteristics." *Ranum,* slip op. at 2-4 ("in every case, courts must now consider **all** of the § 3553(a) factors, not just the guidelines"). Applied to Ranum, a sympathetic defendant with compelling personal qualities, appealing family circumstances and strong proof in mitigation, this approach yielded a year and a day sentence where the Guidelines called for 37-46 months. *Id.* at 13; *accord Myers*, 2005 WL 165314 at *1, *5-*6 (adopting *Ranum*'s multi-factor approach and imposing probationary sentence where Guidelines called for 20-30 months imprisonment); *United States v. Jones*, No. CRIM.04-96-P-H, _ F. Supp. 2d _, 2005 WL 121730 (D. Me. Jan. 21, 2005) (imposing discretionary probation term under § 3553(a) where defendant, whose Guideline sentence was at least one year, did not qualify for downward departure); *United States v. Revock*, No. CRIM.04-105-P-H, _ F. Supp. 2d _, 2005 WL 188704 (D. Me. Jan. 28, 2005) (cutting defendant's sentence to eliminate disparity among codefendants, an impermissible departure ground under the Guidelines).

While it is "harder" work than automatically applying the Guidelines across-the-board, such individualized sentencing better suits "the holdings of the merits majority in *Booker*." *Ranum*, slip op. at 2, 5. For as Judge Adelman colorfully put it, "*Booker* is **not** [] an invitation to do business as []usual." *Id.* at 5 (emphasis supplied). *See also United States v. West*, No. 03 CR 508 (RWS), 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005) (Sweet, J.) (following *Ranum*); *Huerta-Rodriguez*, slip op. at 3, 8-9, 14-15 (employing similar multi-factor approach). *Ranum* and its progeny thus evidence a sense of "revolution in the air," as Mr. Dylan might say.

A third perspective comes from Northern District of Oklahoma Chief Judge Sven Erik Holmes in the *Barkley* decision. In an ironic twist, the *Barkley* Court exercised its procedural discretion under *Booker* to implement the remedy championed by the *Booker* merits majority! Hence, in trial cases before Chief Judge Holmes, **juries** will find the "facts necessary to support relevant sentencing enhancements" by proof beyond a reasonable doubt. *Barkley*, slip op. at 16-17. In plea cases, the Court will find enhancing facts in accordance with the Federal Rules of Evidence, also applying the reasonable doubt standard. *Id.* at 15-16. Though innovative and stoutly pro-defense, this approach effectively defies the *Booker* remedial majority and follows its remedial dissents. As such, it could well be rebuked by the Tenth Circuit. *But see Huerta-*

---

[12] *See* Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998).

[13] No. 04-CR-31, slip op. (E.D. Wis. Jan. _, 2005).

*Rodriguez*, slip op. at 11-12 (adopting similar protocol as neither compelled nor foreclosed by *Booker*).

These wildly diverse methodologies, all forged within two short weeks of *Booker*, confirm that "discretionary sentencing" – even in guided form – will revive the unwarranted disparities that "Congress hoped to" eliminate. *Myers*, 2005 WL 165314, at *3. Nonetheless, defense counsel should take full advantage of this flux by advocating the approach likely to net the lowest sentence. For example, if a given judge is a particularly harsh sentencer – one consistently inclined to exceed the prescribed Guidelines range – counsel will want the certainty and protection afforded by the Guidelines. In that instance, he should urge Judge Cassell's categorical approach, insisting that the Guidelines be applied as written "in all but the most exceptional cases." *Wilson*, 2005 WL 78552, at *12. On the other hand, if the judge is thoughtful and compassionate, counsel will aim to maximize her discretion by pushing Judge Adelman's totality of the circumstances approach.

Whichever approach prevails, sentencing counsel will need to devote increased attention to developing the defendant's "history and characteristics." *Ranum*, slip op. at 2-3. For those factors, "either reject[ed] or ignore[d]" by the Guidelines, assume much greater significance in a discretionary regime. *Id.* at 2.

Finally, while abrogating the *Apprendi/Blakely* jury trial right, *Booker* does **not** appear to disturb their requirement that sentence-boosting facts – those not embraced by the jury verdict – be proved beyond a reasonable doubt. Thus, when courts seek to impose Guidelines enhancements as a matter of "discretion," counsel should demand application of a heightened standard of proof, if not the entirety of the Federal Rules of Evidence. This position finds support in Chief Judge Holmes' *Barkley* holding and, more formidably, footnote 6 of Justice Thomas' remedial dissent in *Booker*. As Justice Thomas wrote there:

> The commentary to [U.S.S.G.] § 6A1.3 states that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the faces of a case." 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*, 2005 WL 50108, at *54 n.6 (remedial dissenting opinion of Thomas, J.) (emphasis supplied).[14] *Accord Huerta-Rodriguez*, slip op. at 3-4, 11-12 (relying partly on footnote 6 to require proof beyond a reasonable doubt for all enhancing facts, as "it can never be 'reasonable' to base any significant" sentence "increase" on a lesser standard).

## 2. What are *Booker*'s *Ex Post Facto* Consequences?

Can a district court, exercising its newfound discretion, sentence a defendant **above** the Guidelines based on pre-*Booker* conduct? Relatedly, can a defendant receive a higher sentence on remand, also as an act of *Booker* discretion, following a pre-*Booker* appeal? The Supreme Court's treatment of Ducan Fanfan, Booker's co-respondent, may suggest an affirmative answer. Believing that *Blakely* confined him to the unenhanced base offense level, the district judge sentenced Fanfan well below the now advisory Guideline range for his serious drug crimes. *See Booker*, 2005 WL 50108, at *5-*6. In reversing, the Supreme Court remanded for a resentencing that surely will lead to more prison time, perhaps tacitly sanctioning that result. *See id.* at *29. But the propriety of such an increase – a premature consideration in *Booker* – was not actually before the Court.

Another potential hurdle is the "sentencing package" doctrine, a statutory and double jeopardy construct that may apply by analogy to *ex post facto* claims. In certain circumstances, that doctrine permits heavier sentences on remand where the original sentence, part of which was vacated on appeal, constituted a single interdependent "package." *See, e.g., United States v. Gordils*, 117 F.3d 99, 103-04 (2d Cir. 1997). Overturned Guideline sentences conceivably fit that description.

Despite these and other obstacles, there are plausible arguments against applying the *Booker* remedy retrospectively, to allow discretionary sentences exceeding the Guidelines for pre-*Booker* conduct. For example:

A. In effectively rewriting the SRA to render mandatory Guidelines advisory, the remedial majority essentially engaged in an act of judicial legislation, triggering *ex post facto* concerns. *Cf. Rogers v. Tennessee*, 532 U.S. 451, 456-63 (2001) (due process clause, not *ex post facto* analysis, determines retroactivity of common law judicial decisions). Under the mandatory Guidelines regime, a court could not enhance a defendant's sentence – for, say, relevant conduct, role in the offense, drug or loss amount or obstruction of justice – absent particularized legal and factual findings, specified in the Guidelines manual and the cases interpreting it. Yet under the *Booker* remedial opinion, the court now may impose or reimpose an equal or greater sentence as

---

[14] *A fortiori*, counsel should also press the reasonable doubt standard if a court seeks to impose a discretionary sentence exceeding the Guidelines altogether. *Cf. United States v. Watts*, 519 U.S. 148, 156 & n.2 (1997) (reserving question whether augmented burden of proof is appropriate for "relevant conduct that would dramatically increase the sentence," and collecting cases endorsing that proposition).

a matter of discretion, without making the prescribed findings – *i.e.*, without satisfying the Guidelines' legal and factual strictures. By eliminating the need for such compulsory findings – and, concomitantly, the government's need to establish the underlying facts – the remedial majority reduced the quantum of proof necessary to secure an enhanced sentence. To that extent, it "alter[ed] the legal rules of evidence" applicable at sentencing, requiring "less" to enhance than "the law in effect at the time" of the offense. *Carmell v. Texas*, 529 U.S. 530 (2000) (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798)) (internal quotes omitted). Accordingly, a sentence above the unenhanced base offense level for pre-*Booker* conduct – and certainly one above the Guidelines entirely – violates the *ex post facto* clause. *See Calder*, 3 Dall. at 390 (identifying four categories of *ex post facto* violations). Put more concisely, post-*Booker* sentences for pre-*Booker* conduct are capped at the unenhanced base offense level.

B. As the commentary to U.S.S.G. § 1B1.11 recognizes, courts "generally have held that the *ex post facto* clause" prohibits the retroactive application of "sentencing guideline amendments that subject the defendant to increased punishment." By parity of reasoning, retroactive application of the *Booker* remedy should also be barred insofar as it, too, results in "increased punishment."

C. Some Internet commentators have floated the theory that defendants are entitled to the benefit of the *Booker* merits opinion without the possible burden of its remedial holding. Under this theory, the merits holding clearly favors defendants by extending the *Apprendi*/*Blakely* rule – limiting sentencing exposure to facts reflected in the jury verdict – to the Guidelines context. Because it is beneficial, this facet of *Booker* plainly applies to defendants pending sentence or direct appeal. *See Booker*, 2005 WL 50108, at *29 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). In contrast, the remedial holding, to the extent it allows sentences above the Guidelines, is potentially disadvantageous. Under *ex post facto*-type principles incorporated in the due process clause, such a detrimental ruling cannot be applied retroactively to defendants whose conduct precedes *Booker* where, as here, it is "unexpected and indefensible by reference to [prior] law." *Rogers*, 532 U.S. at 462 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)) (internal quotes omitted); *see Marks v. United States*, 430 U.S. 188, 196-97 & n.13 (1977). Consequently, the argument goes, a post-*Booker* sentence for a pre-*Booker* crime may not exceed the presumptive Guideline range – the unenhanced base offense level – making the case a one-way lever favoring lower sentences.

D. Finally, absent some explanation "supported by independent reasons in the record," resentencing a defendant above the Guidelines, where the criminal activity predates *Booker*, appears presumptively vindictive and may violate due process. *United States v. King*, 126 F.3d 394, 397 (2d Cir. 1997) (discussing *North Carolina v. Pearce*, 395 U.S. 711 (1969)); *see Alabama v. Smith*, 490 U.S. 794, 802 (1989).

To summarize, counsel facing the prospect of a higher-than-Guidelines sentence for pre-*Booker* conduct – whether initially or on remand – should raise all the foregoing objections and any others they can discern.

### 3. Can the Government Enforce a Pre-*Booker* Plea Agreement?

In *Blakely*'s aftermath, some courts suggested that a pre-*Blakely* sentencing stipulation might not be valid or enforceable. After all, they reasoned, how could a defendant have knowingly and intelligently relinquished rights – including the right to be sentenced solely on jury-found facts – that did not yet exist? *See, e.g., United States v. Ameline*, 376 F.3d 967, 976 n.9 (9th Cir. 2004); *United States v. Agett*, 327 F. Supp. 2d 899, 903 n.2 (E.D. Tenn. 2004); *United States v. Terrell*, 2004 U.S. Dist. LEXIS 13781, at *14-*15 & n.3 (D. Neb. July 22, 2004); *United States v. Harris*, 325 F. Supp. 2d 562, 564-65 (W.D. Pa. 2004).

Unfortunately, the only court to consider a similar post-*Booker* argument has soundly rejected it.[15] In *United States v. Parsons*, the defendant attacked the validity of a pre-*Booker* plea agreement in which he stipulated that "the amount of loss attributable to him was between $1.5 million and $2.5 million, requiring a 12-level enhancement." Slip op. at 3 (8th Cir. Jan. 28, 2005). Specifically, the defendant contended that he never would have conceded the loss amount had he known it "'had to be proven beyond a reasonable doubt.'" *Id.* Rebuffing his claim, the Eighth Circuit observed that the *Apprendi*/*Blakely*/*Booker* rule expressly exempts facts admitted by the defendant. The Court also cited cases holding that a subsequent change of law does not invalidate a prior voluntary guilty plea. *Id.* at 3-4 (citing *Brady v. United States*, 397 U.S. 742, 757 (1970) and *United States v. Reyes-Acosta*, 334 F. Supp. 2d 1077, 1078-82 (N.D. Ill. 2004)). Of course, this circular reasoning begs the question whether Parsons' admissions were knowing and intelligent, and whether his plea was truly voluntary.

*Parsons* aside, the unenforceability argument seems worth pursuing, as it gained some preliminary traction post-*Blakely*.

### 4. When is a *Booker* Error Preserved for Appellate Review?

The *Booker* Court did not intend that every case on appeal be remanded for resentencing. Rather, appellate courts were directed "to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Booker,* 125 S.Ct. at 769. *See also Ameline*, 376 F.3d at 978-79 (pre-*Booker* case extending *Blakely* to Guidelines but applying plain error analysis because defendant failed to object in district court).

A critical question for appellants thus becomes whether "the issue" of a Sixth Amendment violation was raised below. Presumably most defendants sentenced after *Blakely* preserved this objection with enough specificity. But what of those defendants sentenced before

---

[15] *Cf. Sweet*, 2005 WL 180930, at *5-*6 (enforcing a pre-*Booker* sentencing stipulation without considering whether it was knowing and voluntary); *Wilson*, 2005 WL 78552, at *15 & n.97 (declining to enforce *Blakely* waiver to avoid additional litigation); *United States v. Rubbo*, No. 04-10874, _ F.3d _, 2005 WL 120507, at *_ (11th Cir. Jan. _, 2005) (*Booker* rights waivable in plea agreement) (*dictum*).

*Blakely* who lacked the clairvoyance to argue that judge-found enhancements violated their jury trial rights? How precisely must an objection be framed to preserve a *Booker* claim? *See United States v. Coffey*, No. 04-2176, -2247, slip op. at 7 n.5 (8th Cir. Jan. 21, 2005) (expressly reserving this issue).

Practitioners in this position should argue that a *Booker* claim is preserved with respect to any enhancement contested at sentencing. Supporting this view is the decision in *Coffey*, which held that the defendant had "preserved the issue" by objecting to his sentence on the ground that there was insufficient evidence to calculate drug quantity. *Id.* at 7; *see also United States v. Davis*, No. 03-4114, 2005 WL 130154 (6th Cir. Jan. 21, 2005) (unpublished) (defendant adequately preserved *Booker* challenge to loss enhancement by objecting on other grounds in district court and raising a Sixth Amendment challenge on appeal post-*Blakely*).

Significantly, *Booker* suggests by negative implication that reversal is automatic, without a showing of prejudice or resort to harmless error analysis, in cases involving a constitutional violation. *See* 125 S. Ct. at 769 ("in cases **not** involving a Sixth Amendment violation, whether resentencing is warranted ... may depend upon application of the harmless-error doctrine") (emphasis supplied). Hence, at least where the issue is preserved, appellate counsel should argue that a judicially-enhanced sentence – one resulting in extra prison time – can **never** be harmless. To the contrary, it is presumptively prejudicial and ranks as *per se* reversible error. *See, e.g., United States v. Reese*, No. 03-13117, _ F.3d _, 2005 WL 172024 (11th Cir. Jan. 27, 2005); *United States v. Burgess*, No. 04-1543, 2005 WL 124523 (8th Cir. Jan. 24, 2005) (unpublished); *United States v. Fox*, No. 03-3554, _ F.3d _, 2005 WL 195429, at *7-*8 (8th Cir. Jan. 31, 2005) (all finding preserved *Booker* error and remanding for resentencing without engaging in prejudice or harmless error analysis).

Alternatively, counsel may still pursue an unpreserved *Booker* claim under a plain error theory. Extremely helpful in this regard is the Fourth Circuit's opinion in *United States v. Hughes*, which indicates that the imposition of a mandatory enhancement under the pre-*Booker* regime **always** amounts to plain error. No. 03-4172, _ F.3d _, 2005 WL 147059, at *5 (4th Cir. Jan. 24, 2005); *cf. Coffey*, slip op. at 7 n.5 (expressing no opinion whether "a sentence handed down under the mandatory Guidelines system is plainly erroneous"). The Court held that "declining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to performing the sentencing function ourselves. This is so because the district court was never called upon to impose a sentence in the exercise of its discretion." 2005 WL 147059, at *5, *9 n.8. The Sixth Circuit reached a similar conclusion in *United States v. Oliver*, ruling that "the district court plainly erred by applying the federal sentencing guidelines as mandatory rather than advisory and thereby sentencing Oliver beyond the sentencing range which the jury verdict and Oliver's criminal history supported." No. 03-2126, slip op. at 2 (6th Cir. Feb. 2, 2005). *But see United States v. Tanner*, No. 02-10661 *et al.*, 2005 WL 147590, at *2 & n.1 (9th Cir. Jan. 25, 2005) (affirming judicially-imposed leadership adjustment as reasonable under *Booker*); *cf. United States v. Yahnke*, No. 04-1098, slip op. (8th Cir. Feb. 1, 2005) (same as to upward criminal history departure).

In short, unless and until the Second Circuit rules otherwise, appellate lawyers should argue that a *Booker* claim is preserved with respect to any contested enhancement or, in the alternative, advance this challenge under a plain error theory.

**5. Does *Booker* Apply Retroactively to Cases on Collateral Review?**

Can defendants whose convictions have become final via direct appeal pursue *Booker* claims by collaterally attacking their sentences under 28 U.S.C. § 2255?

The *Booker* Court was not required to, and did not, pass on this question. *See United States v. Siegelbaum*, CR-02-1179-01-PA, slip op. at 3 (D. Ore. Jan. __, 2005) (Panner, J.) ("The lower-court decisions that the Court was reviewing were direct appeals. Discussion of retroactivity would have been gratuitous, and was not briefed. Consequently, no inference can be drawn from the Court's failure to discuss that issue.") Judge Panner's thorough analysis in *Siegelbaum* makes a viable case for retroactivity, at least with respect to first § 2255 petitions. While we doubt *Booker* will ultimately be held retroactive, the issue currently remains open in the Second Circuit. For those practitioners wishing to press it, here's a summary of the argument.

The first step in analyzing retroactivity is to determine whether *Booker* announced a "new rule" of law.[16] This is the easy part, since Justice Breyer's opinion specifically says it announces a new rule applicable, at a minimum, "to all cases on direct review." *Booker,* 2005 WL 50108, at *29 ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final") (quoting *Griffith,* 479 U.S. at 328) (internal quotes omitted).

The second step is to decide whether the "new rule" is "substantive" (in which case it may apply retroactively) or "procedural" (in which case it would not apply retroactively unless it qualified as "watershed"). *See Schriro v. Summerlin*, 124 S. Ct. 2519, 2522-23 (2004) (citing cases). The government will undoubtedly rely on *Summerlin*, which found that *Ring v. Arizona*[17] – an *Apprendi* progeny – announced a new procedural rule and was therefore not retroactive. *See also Coleman v. United States,* 329 F.3d 77 (2d Cir. 2003) (holding that *Apprendi* announced a new, but not watershed, rule of procedure). Indeed, many courts have already invoked *Summerlin* to find *Booker* retroactively inapplicable to first § 2255 petitions.[18]

---

[16] *See Teague v. Lane*, 489 U.S. 288, 301 (1989) ("a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").

[17] 536 U.S. 584 (2002).

[18] *See*, *e.g., United States v.* McReynolds, No. 04-2520 *et al.*, slip op. (7th Cir. Feb. 2, 2005); *United States v. Gerrish*, No. CIV. 04-153-P-H, -154-P-H, _ F. Supp. 2d __, 2005 WL

(continued...)

But as Judge Panner correctly observed, *Summerlin* only "addressed the allocation of factfinding responsibility between the judge and jury. There is a second component to *Blakely/Booker* that *Schiro* [sic] did not address, namely that facts used to enhance a sentence, if not admitted, must be proven beyond a reasonable doubt rather than by a preponderance of the evidence." *Siegelbaum*, slip op. at 5-6. In that vein, new rules involving the reasonable doubt standard have been held retroactive in other contexts. *Hankerson v. North Carolina*, 432 U.S. 2339 (1989); *Ivan V. v. City of New York*, 407 U.S. 203 (1972). And Judge Panner points out that "at least five Justices have said that sentence enhancements are of sufficient importance to warrant application of the reasonable doubt standard in some instances." Slip op. at 6-7 (citing *Apprendi*, *Blakely* and *Booker*). For that reason, he concluded "the Court might apply *Blakely/Booker* retroactively in some situations." *Id.* at 7; *accord Huerta-Rodriguez*, slip op. at 11 n.9 (agreeing in *dicta*). The argument for retroactivity appears strongest where the enhancement is the "tail" that "wags the dog" of the substantive offense, drastically inflating the presumptive sentence. *Cf. McMillan v. Pennsylvania,* 477 U.S. 79, 88 (1986).

In contrast to first § 2255 petitions, however, only the Supreme Court itself can declare a new rule of procedure retroactive for purposes of allowing second or successive collateral attacks. *See Carmona v. United States*, 390 F.3d 200, 202 (2d Cir. 2004). The Second Circuit held in *Carmona* that it would not consider successive petitions raising *Blakely* claims unless and until the Supreme Court explicitly made the decision retroactive. *Id*., 300 F.3d at 202 & n. 2. Since the Court has yet to do so, it is highly remote that the Second Circuit will authorize a successive petition on *Booker* grounds. *See, e.g., In re Anderson*, No. 05-10045-F, _ F.3d _, 2005 WL 123923 (11th Cir. Jan. 21, 2005); *Hamlin v. United States*, No. Civ.05-11-B-S *et al.*, 2005 WL 102959 (D. Me. Jan. 19, 2005); *Godines v. Joslin*, No. 3:04-CV-2094-L, 2005 WL 177959 (N.D. Tex. Jan. 27, 2005); *Rodriguez v. Joslin*, No. 3:04-CV-2202-G, 2005 WL 178034 (N.D. Tex. Jan. 27, 2005) (all holding *Booker* retroactively inapplicable to second or successive collateral attacks).

***

In the end, only time and Congressional reaction will tell if *Booker* marks a retreat or a revolution in the ongoing debate over the future of federal sentencing. Meanwhile, until the dust settles, the case presents a potentially unprecedented opportunity for creative advocacy. We hope this article provides some rudimentary tools for seizing that opportunity. For while Congress may yet have the last word, the next battle in the sentencing wars will be fought in the

---

[18](...continued)
159642 (D. Me. Jan. 25, 2005); *United States v. Stevens*, No. Civ.05-10-B-S, CRIM.97-45-B-S, 2005 WL 102958 (D. Me. Jan. 18, 2005); *Quirion v. United States*, No. Civ.05-06-B-W, CRIM.03-21-B-W, 2005 WL 83832 (D. Me. Jan. 14, 2005); *cf. United States v. Leonard*, No. 04-6197, 2005 WL 139183 (10th Cir. Jan. 24, 2005); *Warren v. United States*, No. CRIM.3:97 *et al.*, 2005 WL 165385 (D. Conn. Jan. 25, 2005); *United States v. Minicone*, No. 89-CR-173, _ F. Supp. 2d _, 2005 WL 195383 (N.D.N.Y. Jan. 26, 2005).

trenches – by prosecutors, defense lawyers and district judges. And make no mistake, the consequences are enormous – not just for our clients, but for the Third Branch itself. Why? As the battle unfolds, we will be helping to build a new common law of federal sentencing from the ground up. And if all the players approach that task soberly and responsibly, with an appropriate seriousness of purpose, perhaps Congressional intervention – most likely with stiff mandatory sentences – can be averted altogether. May the Force be with you.