LITIGATING
IN A POST-*BOOKER* WORLD

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On January 12, 2005, the Supreme Court announced its much-anticipated opinion in *United States v. Booker,* 543 U.S. __, 125 S. Ct. 738 (2005). This article explains the case, its probable effect on federal sentencing practice, and suggests potential areas for litigation in a post-*Booker* sentencing environment.

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

Apprendi decided whether a judge could increase a defendant's sentence above the statutory maximum, based on supplemental facts found by the judge at sentencing—not that the tops of correctly calculated guideline ranges were also "statutory maximums." (530 U.S. at 484-89.) After the Court's 2000 decision, every one of the federal courts of appeals held that *Apprendi* did not apply to determinations made under the U.S. Federal Sentencing Guidelines. (*See, e.g., United States v. Casas*, 356 F.3d 104, 128 (1st Cir. 2004); *United States v. Parmelee*, 319 F.3d 583, 592 (3d Cir. 2003); *United States v. Ochoa*, 311 F.3d 1133, 1134-35 (9th Cir. 2002).)

The correctness of these circuit opinions came into question when the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* involved an Arizona death penalty statute that in some ways worked like the federal sentencing guidelines. In *Ring*, the Supreme Court held that the Arizona death penalty statute violated the principle it had established in *Apprendi*. Arizona law precluded a judge from imposing the death penalty in a capital case unless he or she found certain aggravating factors, over and above the facts found by the jury. That procedure violated the Sixth Amendment, even though the judge had to make his or her finding using a standard of beyond a reasonable doubt. The Court ruled that to be constitutional, the aggravating factors used to increase the penalty from a maximum of life imprisonment to death had to be charged in the indictment and proved to the jury beyond a reasonable doubt. Despite the *Ring* ruling, no federal circuit revisited its conclusion that the federal sentencing guidelines were exempt from the principle established in *Apprendi*.

On June 24, 2004, the Supreme Court issued its decision in *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004). *Blakely* arose out of a Washington State sentencing appeal in which the defendant had pleaded guilty to kidnapping. The Washington state legislature, much like the U.S. Congress, had enacted a Sentencing Reform Act that provided determinate sentencing guideline ranges for each offense. Although one Washington statute provided for a 10-year maximum for kidnapping, the Sentencing Reform Act provided for a sentence of from 49 to 53 months based solely on the facts that Blakely had admitted as part of his guilty plea.

The *Blakely* decision clarified the definition of what constitutes a statutory maximum sentence for purposes of applying the *Apprendi* principle. The Supreme Court ruled that the statutory maximum was not the 10 years designated generally for second-degree felonies. Rather, it was ". . . the maximum (the judge) may impose without any additional findings. When a judge inflicts punishments that the jury's verdict alone does not allow, the jury has not found all the facts . . . and the judge exceeds his proper authority. (124 S. Ct. at 2537.) Thus, the statutory maximum was the 53 months established in the sentencing guideline presumptively applicable based upon the defendant's guilty plea.

The *Blakely* decision resulted in a flood of litigation over the federal sentencing guidelines. The circuits split over whether *Blakely* rendered the sentencing guidelines, or the Sentencing Reform Act, unconstitutional in whole or in part. (*Compare United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004), with *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004).)

The government separately petitioned the Supreme Court for certiorari in two cases that held that the *Blakely* decision rendered the implementation of the federal sentencing guidelines unconstitutional. (*See United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 04-104, and *United States v. Fanfan, cert. granted while pending in the 1st Circuit*, 04-105.)

The *Booker* decision

In *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005), five Supreme Court Justices concluded that

the Sentencing Reform Act was unconstitutional to the extent that it mandated that a judge increase a defendant's sentence above the statutory maximum, which was either inherent in the jury's verdict, the defendant's plea of guilty, or in admissions made by the defendant. The five Justices reiterated that a defendant's sentence was limited by the Fifth and Sixth Amendments to facts "reflected in the jury verdict or admitted by the defendant." (*Booker*, 125 S. Ct. at 749 (quoting *Blakely*, 124 S. Ct. at 2537.) The Court acknowledged that if the federal sentencing guidelines could be read merely as advisory provisions, their use would not implicate the Sixth Amendment. However, the guidelines were by law not merely advisory, but mandatory and binding, despite the availability of departures in specified circumstances. (*Id*. at 750-52.)

The Justices parted company, however, on the remedy for the constitutional violation that occurred in the *Booker* case. Justice Breyer wrote Part II of the Court's opinion, which set forth the remedy for the constitutional flaw identified in the first part of the opinion. (*See* 125 S. Ct. at 756.) Justice Ginsburg joined the four Justices who dissented as to Part I of the Court's opinion. The Court concluded that to apply the jury trial requirement to the sentencing decisions previously governed by the guidelines would thoroughly contradict Congress's intent in enacting the Sentencing Reform Act and the guidelines, and would be too difficult to administer. (125 S. Ct. at 761-64.) Instead, the Court adopted a remedy that it believed to be closer to its view of congressional intent by employing a severability analysis. (*Id*. at 764-68.) On this basis, the Court excised two provisions of the Sentencing Reform Act that the Court deemed incompatible with the constitutional holding. These provisions, 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e), mandated a sentence within the federal sentencing guidelines, and set forth the standards of review on appeal, including a de novo standard of review for any departures. (*Id*. at 764-66.)

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The end result of the *Booker* decision is that the federal sentencing process is governed by 18 U.S.C. § 3553(a). Under that law, the sentencing guidelines have only an advisory function. Because the guidelines are advisory, a district judge must consider the guidelines, along with all other relevant information, in imposing an individualized sentence, *see* 18 U.S.C. § 3553(a) (listing the factors to be considered in imposing sentence), but need not impose a sentence within the guideline range, even if there are no grounds to depart. The Court did not preclude district courts from imposing sentences based on facts that were neither inherent in the jury's verdict nor admitted by the defendant. Instead, because the guidelines are now advisory, they no longer create a "statutory maximum' under *Apprendi* and *Blakely*. Instead, the statutory maximum is the term set forth in the United States Code section that either establishes the offense of conviction or establishes the penalty for a particular offense. There is no constitutional impediment to a sentence anywhere within the statutory maximum.

Booker's impact on defendants not yet sentenced

The immediate effect of *Booker* is profound. Although the Supreme Court expressly directed district courts to consider the guidelines in imposing sentence, the courts are not bound by the guidelines. Rather, the courts are bound by 18 U.S.C. § 3553(a). Under 18 U.S.C. § 3553(a), the key requirement is that the sentence in each case must be "sufficient, but not greater than necessary" to,

> (A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (B) afford adequate deterrence to criminal conduct;
>
> (C) protect the public from further crimes of the defendant; and
>
> (D) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

(18 U.S.C. § 3553(a)(2).)

Further, the court must consider the kinds of sentences available, 18 U.S.C. § 3553(a)(3); the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, 18 U.S.C. § 3553(a)(6); and the need to provide restitution to any victims of the offense, 18 U.S.C. § (a)(7).

Section 3553(a)(1) also bears on the sentence to be imposed; that section directs the court to consider the nature and circumstances of the offense and the history and characteristics of the defendant. The history and character-

istics of the offender include matters beyond a defendant's criminal history, and encompass matters excluded from the court's consideration by the sentencing guidelines. For example, guideline policy statements largely precluded consideration of a defendant's history of childhood abuse, lack of youthful guidance, or drug addiction. (*See, e.g.*, U.S.S.G. § 5H1.1 (discouraging consideration of age); § 5H1.2 (discouraging consideration of education and vocational skills); § 5H1.3 (discouraging consideration of mental and emotional condition); § 5H1.4 (discouraging consideration of physical condition, including drug or alcohol dependence); § 5H1.5 (discouraging consideration of employment record); § 5H1.6 (discouraging consideration of family ties and responsibilities); § 5H1.11 (discouraging consideration of civic and military contributions); and § 5H1.12 (discouraging consideration of lack of guidance as a youth). Those policy statements are no longer binding on district courts. Rather, 18 U.S.C. § 3662 provides that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence." This directive might conflict with the guidelines, which in most cases offer only prison. For example, in some cases, a defendant's education, treatment, or medical needs may be better served by a sentence that permits the offender to remain in the community. Thus, a court may impose a sentence outside the guideline range based on factors precluded from consideration by the guidelines. (*See United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005).)

In cases in which a defendant's history and character are positive, or where the defendant's history contains significant mitigating factors, such as a chaotic and neglectful childhood, an appropriate sentence may be one outside the guideline range.

Another immediate effect of the *Booker* decision is that it is no longer appropriate to speak of the judge granting a "departure" from the guidelines. (*But see United States v. Wilson*, 355 F. Supp. 2d 1269 (D. Utah 2005) (ruling that judges must calculate the traditional guideline range, decide whether to depart from that range, and then, decide whether a variance from the guidelines is appropriate).) The departure methodology was based on the notion that the district courts retained a limited amount of discretion to sentence outside of the guidelines, provided that either the defendant or the government could establish that the case fell "outside the heartland" of the guidelines. (*Koon v. United* States, 518 U.S. 81, 95-96 (1996).) Departures either were based on a ground that had not been taken into account by the Sentencing Commission, or had been identified as a basis for departure by the commission. Since the guidelines themselves are advisory, it is no longer appropriate to refer to departures. Rather, the advocate should seek a sentence outside the established guideline range.

Courts are likely to continue to calculate a defendant's guideline range the way they did before *Blakely*. Judges will determine the offense level using the application principles established by the federal sentencing guidelines. As before, they will select the offense guideline based on the offense of conviction and will make other guideline decisions using the relevant conduct principles. While there are good arguments on due process grounds for applying a higher standard, *see United States v. Ameline*, 2005 WL 359711 (9th Cir. Feb. 10, 2005) (*reh'g en banc granted*, argued March 24, 2005), courts might still make factual determinations using the preponderance of the evidence standard. They may even continue to talk of "departures." On the other hand, because the guidelines are now advisory, there are fewer impediments to a sentence outside the established guideline range. As in preguideline sentencing, other factors may be more important than the guidelines.

The possibilities for creative sentencing practice abound. For example, in crack cocaine cases, the federal guidelines treat one gram of crack as equivalent to 100 grams of powder cocaine. A judge who, upon considering "the nature of the offense," does not think that crack cocaine is 100 times worse than powder may impose a lower sentence than the guidelines recommend, even though such a disagreement would not have supported a "downward departure" under the guidelines—at least so long as the judge does not go below a statutory mandatory minimum sentence. (*See United States v. Smith*, CR 02-163 (E.D. Wis. March 2, 2005) (reducing sentence for substantial assistance and for disparity between crack and powder cocaine).)

The *Ranum* decision, recently authored by Judge Lynn Adelman, is a fine example of the type of result that can be obtained after *Booker*. There, the judge concluded that a sentence below the sentencing guidelines was justified, because the defendant did not commit the offense for personal gain. In sentencing the defendant to one year and a day in custody instead of the 37 to 46 months called for by the guidelines, the court also considered his positive history and character, his health, and his family circumstances, which included an elderly father suffering from Alzheimer's disease. (*Id.*) Another judge recently imposed a sentence outside the guidelines in a case involving a defendant with a lengthy history of mental illness, whose need for treatment was best addressed by a split sentence in Zone C. (*United States v. Jones*, 352 F. Supp. 2d 22 (D. Me. 2005); *see also United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958 (E. D. Wis. 2005); *United States v. Kelley*, 355 F. Supp. 2d 1031 (D. Neb. 2005).)

A third judge has explained why *Booker* is not an invitation to "unmoored decision making, but to the type of

careful analysis of the evidence that *should* be considered when depriving a person of his or her liberty." (*United States v. Myers*, 353 F. Supp. 2d 1026 (S.D. Iowa 2005).) In imposing sentence, Judge Pratt considered the defendant's history and character, including his moral standards, his service as a role model for his children, the severe negative impact that the felony conviction alone would have on the defendant, the fact that he presented no danger to the community, and his undergoing significant alcohol treatment. After considering all of these factors, the judge sentenced the defendant to probation, rather than the term of imprisonment called for by the guidelines.

However, soon after the Supreme Court announced *Booker*, one judge concluded that the advisory guidelines are entitled to virtually controlling weight. In *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005), Judge Cassell gave short shrift to the nonguideline factors set forth in section 3553(a), other than the defendant's criminal history. The court concluded that the guidelines were entitled to controlling consideration largely because of the need for just punishment. The court noted that Congress believed guideline sentences to constitute just punishment and relied on the provisions of the Feeney Amendment, which attempted to limit sentences outside the guidelines. The court also relied on information indicating that public opinion regarding what constituted a "just sentence" for a given crime was close to the sentences prescribed by the guidelines.

Booker and plea agreements

How *Booker* affects defendants who have pled guilty under a pre-*Booker* plea agreement, but who have not yet been sentenced, depends on the particular language of each plea agreement. To the extent that a defendant admitted the existence of certain facts, those facts may be used to determine the defendant's sentence. (*See United States v. Parsons*, 396 F.3d 1015, 1017-18 (8th Cir. 2005).) However, at least in nonbinding agreements under Rule 11(e)(1)(B), stipulations to guideline ranges are not binding on the judge, and would likely not preclude the defendant from seeking a sentence outside the guidelines. On the other hand, the fact of the *Booker* decision does not provide a basis to withdraw a guilty plea on the ground that it was involuntary. (*United States v. Sahlin*, 399 F.3d 27 (1st Cir. 2005).)

Imposition of longer sentences

Theoretically, the *Booker* decision, to the extent that it permits imposition of "reasonable sentences" outside the guideline range, may sometimes permit district judges to impose even longer sentences on criminal defendants. After all, the rules restraining the court from imposing upward departures have been removed, just as have the restraints on downward departures. This is certainly a risk for defendants who committed their crimes after the date the *Booker* decision was issued.

There also is a risk of a longer sentence for a defendant who appeals, seeking resentencing. The Due Process Clause may protect against this result for those defendants who committed their crimes before January 12, 2005. Because *Booker* in effect rewrote an important aspect of the Sentencing Reform Act, defendants may be protected from a longer sentence, either initially or on remand, by the due process principle precluding retroactive application of a new, adverse judicial interpretation of a statute. (*See Marks v. United States*, 423 U.S. 188 (1977).) This due process principle operates similarly to the Constitution's Ex Post Facto Clause that protects against adverse retroactive legislation. (*See Garner v. Jones*, 529 U.S. 244 (2000); *Miller v. Florida*, 482 U.S. 423 (1987).)

Defendants who are being resentenced on remand also may be protected by *North Carolina v. Pearce*, 395 U.S. 711 (1969), and cases interpreting *Pearce*, which prevent courts from imposing higher sentences at resentencing after a successful appeal, unless the appearance of vindictiveness is eliminated.

Plea negotiation after *Booker*

Booker will certainly affect plea negotiation. Since locking in offense levels will no longer guarantee a sentence within a particular range, counsel will want to think about whether it is better to be free to argue for a much lower sentence or to ensure in a particular sentence with a Rule 11(c)(1)(C) plea. Locking in a sentence may be particularly attractive where there is a greater than average possibility that a court would exercise its discretion to impose a sentence *higher* than the guideline range.

It also is likely that counsel for the government may begin seeking additional defense waivers. For example, government counsel may seek a plea agreement under which the defense agrees not to seek a sentence below the guideline range based on a list of factors. Whether the rules of an open plea warrant entering into such agreements will have to be carefully considered in each case.

Cases pending on appeal

Booker applies to all cases not yet final on direct appeal. If defense counsel did not raise a *Booker*-type objection in the district court, then the court of appeals will review for "plain error." (*United States v. Cotton*, 535 U.S. 625 (2002).) Several federal circuit courts have issued published opinions applying plain error review to *Booker* error. In *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005), *reh'g granted and op. amended & reissued* 2005 WL 628224 (Mar. 16, 2005), the Fourth Circuit vacated a mandatory guideline sentence as plain error. The

vacated sentence exceeded that which could have been imposed based solely on the jury verdict, but the sentence was properly calculated under the formerly mandatory sentencing guidelines. The Sixth Circuit has issued multiple decisions, largely in accord with the Fourth. (E.g., *United States v. Milan*, 398 F.3d 445 (6th Cir. 2005); *United States v. McDaniel*, 398 F.3d 540 (6th Cir. 2005) (reversing and remanding sentence for *Booker* error under the Armed Career Criminal Act); *see also United States v. Coffey*, 395 F.3d 856 (8th Cir. 2005).)

In contrast, the Eleventh Circuit has applied plain error review in the strictest fashion. (*United States v. Rodriguez*, 2005 WL 272952 (11th Cir. Feb. 4, 2005).) Most recently, that court affirmed a guideline sentence of life imprisonment as "reasonable," even though it increased the defendant's sentence based on conduct of which he had been acquitted. (*United States v. Duncan*, 2005 WL 428414 (11th Cir. Feb. 24, 2005).) The court concluded that while the defendant could satisfy the first two factors of the four-part plain error test, he could not show that the error had affected his substantial rights, because he did "not point to anything indicating a 'reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion.' " (*See also United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005) (rejecting automatic plain error rule either for Fifth or Sixth Amendment violation or mandatory guideline sentencing).)

The Second Circuit has adopted a slightly different practice, not of remanding cases to the district court for resentencing, but of remanding for consideration whether to resentence the defendant. (*United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005); *cf. United States v. Paladino*, 2005 WL 435430 (7th Cir. Feb. 25, 2005) (providing for limited remand to inquire of district judge whether he would have imposed the same sentence under an advisory guideline regime; if not, court will grant a full remand for resentencing).)

Thus, practitioners should not treat vacatur and remand for resentencing as if it were a sure thing. The *Booker* opinion seemed to contemplate that at least some sentences would be affirmed as neither plainly erroneous, nor "unreasonable." It can be argued that any sentence, whether correctly calculated under the guidelines or not, should be vacated as plainly erroneous because, at a minimum, the district court imposed that sentence under the mistaken impression that the guidelines were mandatory. (*See Hughes*, 396 F.3d at 381 & n.8; *cf. Duncan*, 2005 WL 428414).) Only if the original record admits of no reasonable doubt that the post-*Booker* sentence would be the same could a "plain error" affirmance be appropriate. (*See Cotton*, 535 U.S. at 633; *but compare United States v. Parsons*, *supra*, 396 F.3d at 1017-18 (rejecting remand for resentencing under *Booker* even though district court had declined to depart downward from the formerly mandatory guidelines, where, pursuant to a plea agreement, the defendant agreed to certain guideline adjustments) and *Duncan* with *Milan*).)

Defendants sentenced after the issuance of the *Booker* decision will still be able to appeal sentences as provided in 18 U.S.C. § 3742(a). However, the sentences will not necessarily be reversed when a district court imposes a sentence outside the properly calculated guideline range. The courts of appeals will review such sentences and underlying section 3553(a) determination for "reasonableness." This standard, while vague, is similar to that which formerly governed appeals of the extent of departures. Defendants will retain the ability to appeal legal errors made in guideline calculation, if the sentence imposed depended on that calculation. Defendants also will retain the ability to appeal procedural errors committed in the imposition of sentence, such as violations of Federal Rule of Criminal Procedure 32.

Another aspect of *Booker* also is being evaluated by the circuit courts: whether a general waiver of the right to appeal the sentence includes waiver of an argument under *Blakely v. Washington*, or *Booker*. The Eleventh Circuit has held that a pre-*Booker* waiver of the right to appeal is binding on the defendant as to a claim based on *Blakely v. Washington* and *Booker v. United States*. (*See United States v. Rubbo*, 396 F.3d 1330 (11th Cir. 2005); *United States v. Grinard-Henry*, 399 F.3d 1294 (11th Cir. 2005).) The Eighth Circuit has reviewed a case for *Booker* error on direct appeal, even though the defendant's plea agreement contained a waiver of his right to appeal. (*United States v. Killgo*, 397 F.3d 628 (8th Cir. 2005); *see also*, *United States v. Jeronimo*, No. 03-30394, slip op. (9th Cir. Feb. 24, 2005).)

Retroactivity on collateral attack

The retroactivity question is a difficult one. Fundamentally, if the rule announced in *Booker* is considered to be a "new rule" of constitutional procedure, then it is unlikely to be retroactive to cases on collateral attack. (*See Stringer v. Black*, 503 U.S. 222, 227 (1992) ("a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal habeas corpus relief unless the decision was dictated by precedent existing when the judgment in question became final.") New rules of constitutional procedure cannot normally be raised in section 2255 motions. (*See Teague v. Lane*, 489 U.S. 288 (1989).) There are some strong indications that *Booker* will not be retroactive to cases on collateral attack.

Teague provides two exceptions to its general rule of nonretroactivity. The first exception applies when the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making

authority to proscribe." (489 U.S. at 307.) That exception would not apply to *Booker.* The second *Teague* exception applies if the new rule represents a "watershed" change that is necessary to the fundamental fairness of the criminal proceeding and improves the accuracy of the criminal process.

The Supreme Court has been reluctant to conclude that new rules of constitutional procedure are so necessary to fundamental fairness that they must be applied on collateral attack. The most recent example of this is the Court's decision in *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004), in which the Court held that its 2002 decision in *Ring v. Arizona* was not retroactive to cases on collateral attack—not even to those cases in which the identical claim had been raised and rejected previously. The *Ring* case involved factual findings beyond a reasonable doubt being made by a judge, rather than a jury. In *Schriro*, the Court concluded that having the findings made by a jury, rather than by a judge, did not itself necessarily improve the accuracy of the criminal process.

There is an argument that the principles underlying *Booker* meet the test for the second *Teague* exception. *Booker* invalidated the mandatory aspect of the guidelines, because when the guidelines were mandatory, *judges* made decisions that affected the "statutory maximum" sentence using a preponderance of the evidence standard, even though the Constitution demanded proof beyond a reasonable doubt in such a mandatory system. Since courts made such decisions using a less fair and accurate standard of proof, it is arguable that the rule in *Booker* was necessary to the fundamental fairness of the sentencing phase of the criminal proceeding and improves the accuracy of the criminal process. (*See United States v. Siegelbaum*, CV-04-1380 (D. Or. Jan. 2005) (stating that at least in some cases, *Booker* may be retroactive on collateral attack).)

In addition, it may be worth noting that the Supreme Court devised the *Teague* rule, in part, to minimize federal court interference with state criminal proceedings through habeas corpus cases. That concern does not apply in section 2255 cases, which involve only *federal* convictions. It is therefore possible that the Court will apply the *Teague* rule less stringently in section 2255 cases than it has in state prisoners' habeas cases under 28 U.S.C. § 2254.

There is a viable argument that the rule announced in *Booker v. United States* that was presaged by *Blakely v. Washington* is not a "new rule"—at least as to a defendant whose conviction was not yet final on appeal when the Supreme Court issued its decision in *Apprendi*, or possibly its decision in *Ring v. Arizona*. If the decision is not a "new rule," then it is not subject to the *Teague* bar. In other words, if the *Booker* decision was "dictated by" the new rule announced in *Apprendi v. New Jersey* as explicated in *Ring v. Arizona*, 536 U.S. 584 (2002), then it is not a "new rule" subject to the *Teague* bar. (*See Blakely v. Washington*, 124 S. Ct. at 2536.)

A case announces a new constitutional rule if the court bases its decision in the Constitution and the rule was not dictated or compelled by precedent. (*Beard v. Banks*, 124 S. Ct. 2504, 2511-13 (2004).) A decision not "dictated by precedent" is, by definition "new." *Booker* includes a dissenting opinion by Justice Breyer, which was joined by three other Justices, that argues that the result in *Booker* was *not* dictated by *Apprendi* or *Blakely*. This by itself may mean that *Booker* establishes a "new" rule. If it does, then defendants whose cases became final before *Booker*, will not be able to raise a *Booker* issue in a section 2255 motion—unless one of the exceptions to the *Teague* rule applies.

Recently, the Sixth and Seventh Circuits concluded that *Booker*, too, is a new rule, which cannot be given retrospective application under *Teague*. (*Humphress v. United States*, 398 F.3d 855, (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479 (7th Cir. 2005).) But the Sixth and Seventh Circuits' conclusions are questionable, given that the *Blakely* decision itself stated that it was an obvious application of *Apprendi*. (*Id*. at 2536.) Indeed, Justice Scalia wrote in *Blakely*: "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence that 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.) Justice Scalia, and the four Justices who joined his *Blakely* opinion, do not appear to believe that *Blakely*, and by extension *Booker*, created a "new rule." The conclusion is even more questionable as applied to *Booker*, which clearly was a direct application of *Blakely*.

Thus, even though the majority in *Booker* apparently believed that the decision in that case was compelled by its previous decisions in *Blakely* and *Apprendi*, courts may well conclude that the rule in *Booker* is not "new."

Similarly, if the rule is not procedural, but rather substantive, then it is retroactive to cases that were final on direct appeal when the *Booker* decision issued. It can be argued that the transformation of the guidelines into an advisory system works a substantive alteration in federal sentencing law in terms of the sentence outside the guidelines. The *Booker* decision also may be substantive, because it does not just affect sentencing procedure, but the actual sentence that can be imposed. If the result had been reversed, meaning, if the guidelines had been transformed from an advisory system to a mandatory one, such a change clearly would be substantive and retroactive application would be precluded by the Ex Post Facto Clause to the extent that it disadvantaged the defendant. (*See United States v. Chea*, 231 F.3d 531, 536-37 (9th Cir. 2000) (later guideline that limited discretion to

impose a lesser sentence could not be imposed retroactively); *Mickens-Thomas v. Vaughn*, 321 F.3d 374, 384-85 (3d Cir. 2003) (alteration in parole rules to place emphasis on public safety disadvantaged the defendant; retroactive application violated the Ex Post Facto Clause.)

Does *Booker* affect statute of limitations for 2255 motions?

Section 2255 motions must be filed within one year of the latest of several events. All defendants may file section 2255 motions within one year of the date that a defendant's judgment of conviction becomes "final." If that date has already passed, defendants also have one year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. (28 U.S.C. § 2255.) In this case, the *right* that was "newly recognized" was not necessarily recognized by *Booker*. Courts may find that it was first recognized by the Supreme Court in *Blakely* or *Ring*, or even *Apprendi*. *Booker* simply applied that "right" to the U.S. Sentencing Guidelines. That would mean that defendants whose judgment of conviction became final more than a year ago, may have until June 24, 2005 (a year from the date that *Blakely* was decided), for example, to file their first motions. More than a year has already passed since the announcement of the decisions in *Apprendi* and *Ring*.

Booker and second or successive 2255 motions

Defendants cannot file second or successive section 2255 motions without first getting permission from the court of appeals. There are two bases on which the court of appeals can give permission to file a second section 2255 motion. The first is that there is new evidence that the defendant is innocent (evidence that would not have allowed any reasonable jury to have found him or her guilty). The second is a new rule of constitutional law that the Supreme Court itself has made retroactively applicable to cases on collateral review. (*See Tyler v. Cain*, 533 U.S. 656, 667 (2001).) Although the rule announced in *Apprendi*/*Ring*/*Blakely*/*Booker* is arguably a new rule of constitutional law, so far the Supreme Court has not made it retroactively applicable to cases on collateral review (such as section 2255 motions). Until and unless it does so, defendants will not be able to get permission to file a second or successive section 2255 motion to raise a *Booker* issue. (*See In re Dean*, 375 F.3d 1287, 1290-91 (11th Cir. 2004).)

Conclusion

The *Booker* decision presents federal sentencing advocates with a tremendous opportunity to litigate for fair and just sentences for their clients. Attorneys who have practiced solely under the restrictive regime of the sentencing guidelines must now start thinking in terms of mitigation, alternatives to incarceration, and how to identify a sentence that is "not longer than necessary" to achieve the statutory goals of 18 U.S.C. § 3553(a)(2). Federal criminal defense lawyers may need to take a lesson from their comrades in the realm of capital litigation: these attorneys have repeatedly demonstrated how to save clients' lives through conducting a thorough investigation into the client's social and psychological history and producing evidence that mitigates the crimes committed.■