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The
Doing Time

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OUT FRONT

Most of this issue discusses *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *United States v. Booker*, 125 S. Ct. 738 (2005), as it should. You can read all the details inside. But two brief points at the outset, both philosophical in a sense.

First, when the Supreme Court struck down binding federal sentencing guidelines on January 12, 2005, it did so on grounds entirely different than those it had addressed in upholding the same federal sentencing guidelines fifteen years earlier in *Mistretta v. United States*, 488 U.S. 361 (1989). That says something timeless about the march of progress, as the common law method allows it. The incremental process of innovative thinking and adjustment, by parties to lawsuits,

their lawyers, and judges, over the long run produces new ideas and rules, and often draws new links between old ideas that might have seemed unlinked. So it was with the linkage between the Sixth Amendment and the federal sentencing guidelines, which fifteen years ago almost no one saw.

Second, as Rob Henak (see page 9) intentionally, or the United States Court of Appeals for the Seventh Circuit unintentionally, reminds us, process matters as much as outcome in preserving — or eroding — the legitimacy of a justice system. In *McReynolds v. United States*, hardly three weeks after *Booker*, the United States Court of Appeals for the Seventh Circuit abandoned its usual

process in fundamental ways, and in doing so needlessly called into question its own legitimacy. On an issue affecting the liberty and hopes of thousands of federal inmates sentenced under what we now know was an unconstitutional system, the *McReynolds* court denied retroactive application of *Booker* without ever appointing a lawyer to argue the inmates' side of the question (three inmates proceeded on their own from the beginning here, with only prison libraries to aid them; the government of course had a skilled lawyer representing it at every stage), without either side submitting briefs at all on the merits of that question, and without a single vote on the entire court for hearing the case before the court as a whole.

To put it bluntly, the Court of Appeals asked us to trust the *outcome* of an appeal when the court itself apparently did not trust the *process* of an appeal, with each side represented by capable lawyers who offer the best legal arguments for their respective clients. Whatever our faith in courts and their legitimacy, that says something about one court's faith in itself and in us. What it says is not good.

— Dean A. Strang

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BY THE NUMBERS

LIFE SENTENCES

In May 2004, The Sentencing Project released a study showing that the number of prisoners serving life sentences has increased 83 percent in the past 10 years. Nearly 128,000 people, or one of every 11 offenders in state and federal prisons, are serving life sentences. In 1992, 70,000 people had life sentences. The study also shows that the amount of time served by defendants given life sentences

increased from an average of 21 years to 29 years between 1991 and 1997.

The numbers were compiled from the Federal Bureau of Prisons and state correctional agencies.

PRISON GROWTH

According to “Prisoners in 2003,” the Justice Department Bureau of Justice Statistics’ most recent annual report on the state of prisons in the United States, on January 1, 2004, 2,212,475 persons were behind bars in the U.S. This works out to one in every 140 U.S. residents, the highest rate of incarceration in the entire world.

ALL THINGS BOOKER

A LAYPERSON’S GUIDE TO BOOKER

On January 12, 2005, the United States Supreme Court finally announced decisions in *United States v. Booker* and *United States v. Fanfan*. Decisions in these two cases were eagerly awaited after the Court’s decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), in June 2004.

In *Blakely*, the Court restated its decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), 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.” However, in *Blakely*, the Court defined maximum to mean the guideline maximum. Because *Blakely* involved a Washington state law, the question in *Booker/Fanfan* was whether the rule announced in *Blakely* applied to the Federal Sentencing Guidelines.

What were the facts in *Booker* and *Fanfan*?

Booker and *Fanfan* are two separate cases that were heard together at the Supreme Court.

The facts in *Booker* are all too common in federal court. The defendant in *Booker* was charged with intent to distribute at least 50 grams of cocaine base, which carries a mandatory minimum of 10 years and a maximum of life. At trial the jury heard evidence of 92.5 grams of cocaine base. The 92.5 grams heard by the jury and Booker’s criminal history meant a guideline range of 210 months to 262 months in prison. However, at sentencing the judge found that Booker was responsible for an additional 566 grams of cocaine base. The judge, using the preponderance standard, also enhanced his guideline range (or gave him points) for obstruction of justice. That resulted in a guideline range of 360 months to life. Booker was sentenced at the bottom of the

guideline to 360 months or 30 years in prison. He appealed.

In *Fanfan*, the defendant was charged with conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine. The jury's verdict alone authorized imprisonment for no more than 78 months under the Guidelines. At sentencing the judge found additional facts by a preponderance of the evidence: Fanfan was responsible for 2.5 kilograms of cocaine powder and 26.1 grams of crack, and Fanfan was a leader or organizer. With the additional facts, Fanfan's guideline range was 188 to 235 months of imprisonment. Relying on *Blakely*, the judge refused the enhancements and sentenced Fanfan to 78 months. The government appealed.

What did the Supreme Court say in *Booker/Fanfan*?

The Court said two things. First, the Supreme Court said that the *Apprendi/Blakely* rule does apply to the Federal Sentencing Guidelines. This means that facts that increase sentences such as drug amount, loss amount, role, obstruction, or upward departures must be either admitted by the defendant or proven to a jury beyond a reasonable doubt. This is so because of the Sixth Amendment right to a jury trial. This part of the *Booker* opinion is referred to as the "merits" portion or the "constitutional

violation" portion. Justice Stevens wrote that portion for a five-member majority.

Second, the Supreme Court said that the Guidelines are now advisory. This means that a judge has to consult but is not bound by the Guidelines in arriving at a reasonable sentence. This part of the opinion is referred to as the "remedy" portion of the opinion. Justice Breyer wrote that portion for a different five-member majority. Only one member of the Court, Justice Ginsburg, joined both the Stevens and the Breyer opinion.

In some ways, federal sentencing will look very much like sentencing before *Booker/Fanfan*. There will still be Guidelines calculations and presentence reports. Clients and lawyers will still need to calculate exposure under the Guidelines. But, a sentencing judge will also have to look at other factors in sentencing. Those factors are listed in 18 U.S.C. § 3553(a).

Does this decision affect mandatory minimum sentences?

No. By itself, the decision in *Booker* did not change the mandatory minimum laws. In 2002 the Supreme Court had already said that the *Apprendi* rule did not apply to mandatory minimums. *Harris v. United States*, 536 U.S. 545 (2002). For example in *Booker*, the defendant was charged under a drug law that

requires a sentence of at least 20 years in prison. The Supreme Court's ruling does not change that minimum 20 year requirement.

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), is another example of how *Booker* does not affect mandatory minimum statutes. ACCA requires a mandatory minimum of 15 years of prison for a defendant convicted of felon in possession of a firearm if a defendant has three prior convictions of serious drug offenses or violent felonies. Some lawyers think that *Booker* gives hope that the Supreme Court might overrule *Harris*, but that is very uncertain and remains to be seen.

What is the "prior conviction exception" to the *Booker* rule?

The rule of *Apprendi/Blakely* and now *Booker*, that every fact that increases the guideline sentencing maximum must either be admitted by the defendant or proven to a jury beyond a reasonable doubt, does not include points given or enhancements based on prior convictions that increase a sentence. For example, the points added to the criminal history category or because an offense was committed after a prior conviction probably do not fall under the *Apprendi/Blakely/Booker* rule. This prior conviction exception was announced by the Supreme Court in

Almendarez-Torres v. United States, 523 U.S. 224 (1997), and was not overruled by *Booker*. If an enhancement for a prior conviction requires some fact beyond the conviction itself, there may be a good argument under *Apprendi*, *Blakely*, and *Booker*.

Does the *Booker* decision affect "good time?"

No. The decision in *Booker* has nothing to do with good time. Any rumors saying that it does are not true.

See page 12 for an unrelated article on good time.

I was sentenced before *Booker* and the judge gave me points that increased my sentence. Do I have a *Booker* claim and can I get re-sentenced?

It depends. If you pled guilty and either in your plea agreement, plea hearing or at sentencing admitted to facts that increase your guideline range and your ultimate sentence, you probably do not have a *Booker* claim. You waived your Sixth Amendment right to have those facts proved to a jury beyond a reasonable doubt.

If you did not admit the facts that increased the guideline range through a plea agreement, at trial or at sentencing, then you may have a *Booker* claim. In that case, if you have a direct appeal pending, you should

consult your appellate lawyer. Your lawyer may need to supplement your brief to add a *Booker* claim. It is not automatic that you will get re-sentenced. The Court of Appeals will review your claim for harmless and plain error. If your direct appeal is over, and you want to file a motion under 28 U.S.C. § 2255, your chances are not good but at this point it depends on what circuit you must file in.

Tell me more. Can I raise a *Booker* claim by filing a habeas petition?

If you have gone through the direct appeal route, your only means of raising a *Booker* claim is through a collateral attack or habeas petition, § 2255. Generally, a habeas petition or § 2255 has to be filed within one year of your conviction becoming final or within one year after a new decision or rule of law on which you rely. But more importantly, whether a *Booker* claim can be raised on a habeas petition will turn on the question of retroactivity.

The Supreme Court did not say anything about *Booker* applying retroactively or to cases no longer pending. Whether *Booker* will be applied retroactively will be decided first by the district courts and federal courts of appeal. But in the Seventh Circuit, in a case called *McReynolds v. United States*, 2005 WL 237642, 2005

U.S. App. LEXIS 1638 (7th Cir. Feb. 2, 2005), the Court of Appeals already has decided that *Booker* does not apply back or retroactively to convictions that were final before January 12, 2005, the date of the *Booker* decision. On February 17, 2005, the Eleventh Circuit in *Varela v. United States*, No. 04-11728 slip op. (11th Cir. Feb. 17, 2005), agreed.

The rule on retroactivity is even worse for second or successive petitions. Generally, those petitions cannot succeed unless and until the Supreme Court itself announces that *Booker* is retroactive.

Finally, there is no right to counsel on a § 2255 motion or habeas. The district courts have discretion to appoint attorneys if they find that a § 2255 motion or habeas petition has some merit.

What if after *Blakely v. Washington*, my attorney did not raise a *Blakely* argument in my case (either in the district court or on appeal)?

If your case was pending in the district court or Court of Appeals after *Blakely* and your attorney failed to raise a *Blakely* argument, you may be able to argue in a § 2255 petition that, as a result of your attorney's failure to raise the argument, you received ineffective assistance of counsel in violation of the Sixth Amendment.

But, in order to demonstrate that your legal representation was ineffective you must show (1) that your attorney's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) that there is a reasonable probability that the deficient performance affected the ultimate outcome of the case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The fact that your attorney did not raise a *Blakely* argument does not necessarily make his or her performance constitutionally deficient, but it may. For example, your counsel may not have raised the issue because under the Guidelines you were eligible to receive some downward departures and a Guideline sentence resulted in less prison time than a non-Guideline sentence. Or, as another example, you may have waived your right to raise a *Blakely* argument, on your attorney's advice, as consideration for concessions from the government as you negotiated a plea agreement (in other words, you waived your *Blakely* argument in order to get a good deal from the government).

THE RETROACTIVITY QUESTION

One of the most-asked questions about *Booker* has been whether the decision is retroactive. In other words, does *Booker* apply to the thousands of inmates whose convictions have become final long

ago or who have already finished their direct appeal?

The Supreme Court did not state in *Booker* itself whether the *Blakely/Booker* rule applies retroactively. The question of retroactivity was not before the Supreme Court and was not briefed. Both *Booker* and *Fanfan* were direct appeals. Thus, the Supreme Court had no reason to address the retroactivity issue on collateral attack.

Generally, when a decision of the Supreme Court results in a new rule, that rule applies to all criminal cases still pending on direct appeal or in the district court. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). In *Booker* the Supreme Court instructed the Appellate Courts to review the cases still pending on direct review in light of the *Booker* decision. However, it also told the Appellate Courts to use traditional standards of review such as plain error and harmless error. This may mean that not all cases pending on direct review with *Booker* claims will get re-sentenced.

For final convictions, a new rule is only retroactive if it is either a new substantive rule or a "watershed" procedural rule. *Teague v. Lane*, 489 U.S. 288, 311 (1989). New substantive rules are rules that change the range of conduct or the class of persons that the law punishes. New substantive rules generally apply retroactively

because “they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment the law cannot impose upon him.” *Schriro v. Summerlin*, 124 S. Ct. 2519, 2522-23 (2004).

On the other hand, new rules of procedure generally do not apply retroactively. They “merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence,” retroactive effect is given to “only a small set of ‘watershed rules of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” *Schriro*, 124 S. Ct. at 2522-23.

Applying these principles, the Supreme Court, on the same day that *Blakely* was announced, held that *Ring v. Arizona*, 536 U.S. 584 (2002), which applied *Apprendi*’s principles to death penalty punishment phases, was not retroactive. *Schriro*, 124 S. Ct. 2519 at 2523.

On February 2, 2005, the Seventh Circuit in *McReynolds v. United States*, 2005 WL 237642, 2005 U.S. App. LEXIS 1638 (7th Cir. Feb. 2, 2005), became the first Court of Appeals to address whether *Booker* was retroactive. Citing *Schriro v.*

Summerlin, the Seventh Circuit found that the rule announced in *Booker* was procedural and concluded that *Booker* does not apply retroactively to criminal cases that became final before *Booker*’s release on January 12, 2005.

The Seventh Circuit, in *Curtis v. United States*, 294 F. 3d 841, 843 (7th Cir. 2002), has previously ruled that *Apprendi* is not retroactive. It extended the same reasoning to *Booker*.

The Eleventh Circuit agreed with the Seventh Circuit in *Varela v. United States*, (04-11728) (11th Cir. Feb 17, 2005).

District courts from other circuits that have addressed the issue have thus far reached the same conclusion. *Quirion v. United States*, 2005 WL 83832, U.S. Dist. Lexis 569 (D. Me. Jan. 14, 2005) (recommendation of magistrate judge that district court find *Booker* not retroactive); *United States v. Larry*, 2005 U.S. Dist. LEXIS 853 (N.D. Tex. Jan. 19, 2005) (because *Booker* stated that it applied to cases on direct review, and because both *Blakely* and *Booker* involve new rules of criminal procedure that do not fall within either *Teague* exception, *Booker* is not retroactive).

The only district court case, though not deciding the question, to provide a contrary analysis is *United States v.*

Siegelbaum (D.Or. undated). For now, based on the decisions addressing retroactivity, there appears to be very little hope of obtaining relief with a collateral attack unless the Supreme Court declares *Booker* retroactive in a future case.

THE SEVENTH CIRCUIT RUSH

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**This article first appeared in the February 16, 2005 edition of the Wisconsin Law Journal as a letter to the editor.*

The Seventh Circuit recently issued a decision deserving of condemnation by the legal community, not so much for its result (which is, nonetheless, questionable), but for the Court's decision to ignore regular standards of procedure to rush its views to publication. The Court not only decided an issue of major significance to the liberty of thousands of federal inmates without appointing counsel but, after finding the issues significant enough to justify an appeal, proceeded to decide that appeal without even providing the *pro se* litigants an opportunity to brief the issues.

First, some background. Since 1987, federal sentences have been controlled by the federal Sentencing Guidelines. Under the Guidelines system, the

sentencing court was required (absent very extraordinary circumstances), to impose a sentence within a prescribed range based upon certain factual findings made by the judge under a preponderance standard.

On January 12, 2005, however, the Supreme Court held that setting mandatory sentencing ranges based upon judicial findings by a preponderance of the evidence, as required by the federal Sentencing Guidelines, violates the fundamental principle that:

[a]ny 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.

United States v. Booker, 125 S. Ct. 738, 2005 WL 50108, *15 (2005) (reaffirming holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

Other than holding that its decision applies to all cases not yet final, the Court did not further address the issue of retroactivity. The Court thus left to the lower courts the initial determination of whether *Booker's* invalidation of the mandatory sentencing guidelines regime applies retroactively to some or all of the

thousands of federal inmates sentenced since 1987.

On February 2, 2005, a mere three weeks after *Booker*, the Seventh Circuit jumped into the breach, holding that *Booker* does not apply retroactively to sentences which became final before the date *Booker* was decided. *McReynolds v. United States*, Appeal Nos. 04-2520, 04-2632 & 04-2844 slip op. (7th Cir. 2005).

The major reason why the legal community should be concerned about *McReynolds* is not its ultimate decision against retroactivity, although there is plenty of reason to question that holding. Rather, the concern arises from the Court's willingness to ignore regular procedure in its extraordinary rush to judgment in this case.

McReynolds was not an extraordinary case. Three federal inmates, each proceeding *pro se*, challenged application of the Sentencing Guidelines on grounds similar to those ultimately found compelling in *Booker*. However, their convictions and sentences had become final and the district court had denied their petitions under 28 U.S.C. § 2255 before *Booker* was decided. The district court then denied them the certificates of appealability required to appeal that denial. See 28 U.S.C. § 2253(c)(2).

The inmates, still *pro se*, next sought the certificates directly from the Court of Appeals, and those requests were pending when the Supreme Court issued *Booker*.

Under normal circumstances such as this, the Court would merely grant the certificates and order briefing, either with appointed counsel or without. The certificate of appealability, after all, is not intended as a final decision on the merits, but merely a mechanism to weed out collateral challenges too frivolous to justify full briefing on the merits. The certificate is merely an initial hurdle to the appeal, similar to the filing of a notice of appeal.

The Court in *McReynolds* properly concluded that, in light of *Booker*, each petitioner had satisfied the required showing for a certificate of appealability by making a "substantial showing of the denial of a constitutional right." Rather than following standard procedure and the requirements of due process by ordering briefing, however, the Court then took the wholly extraordinary step of simply deciding the appeal without submissions by the parties on the issue of retroactivity.

The adversarial system is based on the belief that justice and the correct result will be achieved when the opposing sides are allowed to present their respective positions fully before an

unbiased tribunal. The central requirements of due process are notice and an opportunity to be heard prior to decision. When decisions of this magnitude are contemplated, moreover, affecting the lives and liberty of thousands of people, it also behooves the Court to appoint counsel before rushing to judgment.

For whatever reason, the Seventh Circuit in *McReynolds* chose to ignore these historic truths in its rush to clamp down on petitions by those whom the Supreme Court has now recognized to have been denied their constitutional rights at sentencing. Whether its decision on the merits ultimately will be upheld is open to question; the Court's circumvention of the adversarial process deprived it of substantial arguments contrary to its holding. Its choice to avoid ordinary procedures and due process, however, rightly deserves condemnation.

REACTIONS TO BOOKER

"Ours, of course, is not the last word. The ball now lies in Congress' court."

— Justice Breyer in *Booker*

Congress

On February 10, 2005, the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland

Security held hearings on the "Implications of *Booker/ Fanfan* decisions for the Federal Sentencing Guidelines."

The *Blakely* Task Force of American Bar Association Criminal Justice Section "urges the United States Congress to take certain steps to assure that federal sentencing practices are effective, fair and just and effectuate the goals of sentencing set forth in the Sentencing Reform Act."

The Task Force also recommends that Congress allow the new advisory system to remain in place at least 12 months to allow sufficient time to evaluate how it is working.

Sentencing Commission

The United States Sentencing Commission, the folks who write the Guidelines, held hearings on *Booker* on February 15 and February 16, 2005.

We will continue to watch for *Booker* reactions and report any significant developments in future issues.

BOP PROGRAMS, POLICIES, AND PROCEDURES

BAD NEWS ON GOOD TIME

In the last issue, we reported that Chief Judge Crabb in *White v. Scibana*, 321 F. Supp.2d 1037 (W.D. Wis. 2004), had found the good time statute unambiguous and ordered BOP to calculate good time at 54 days a year, not 47 days.

The government appealed. The Seventh Circuit overturned Judge Crabb's decision, holding that the statute is ambiguous and that BOP's interpretation is entitled to deference. *White v. Scibana*, 390 F.3d 997 (7th Cir. 2004). On January 16, 2005, White filed a petition for rehearing. The court denied rehearing in February.

We previously (Issue No. 3, Spring 2003) reported on BOP's complex calculation of good time.

NO MORE BOOT CAMP

"Boot camp" in the federal system has been discontinued. ICC Lompoc, CA, ICC Lewisburg, PA and FPC Bryan, Texas will no longer receive inmates for Boot Camp. The last class began on January 17, 2005, and will graduate on June 28, 2005. The three boot camp

facilities will be used as minimum security federal prison camps.

BOP's reasons for the change are budget considerations and that the program wasn't stopping recidivism as they had hoped.

HALFWAY HOUSE

We reported in Issue No. 3, Spring 2003, that effective December 2002, BOP had ceased to honor judicial recommendations to place inmates directly into community correction centers (CCC's), halfway houses, or other forms of community confinement for the imprisonment portions of their sentences. There are now three decisions on this controversial two-year old policy.

In *Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004), the First Circuit became the first Court of Appeals to address the BOP's policy of denying inmates placement in halfway houses for their sentences. The Court held that BOP's interpretation of the law was erroneous and invalid.

In *Elwood v. Jeter*, 386 F.3d 842 (8th Cir. 2004), the Eighth Circuit agreed with *Goldings*, and held that the BOP's new policy is based on an erroneous interpretation of 18 U.S.C. §§ 3621(b) and 3624(c), is invalid and that the statute imposes an affirmative

obligation on the BOP to take steps to facilitate a smooth re-entry for prisoners into the outside world.

In contrast, in *Richmond v. Scibana*, 387 F.3d 602 (7th Cir. 2004), the Seventh Circuit rejected a challenge to the Bureau of Prisons' revision of its halfway-house placement policy by holding that the petitioner should have proceeded under the Administrative Procedures Act, instead of 28 U.S.C. § 2241 and that he failed to exhaust his administrative remedies.

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