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“The pursuit of justice is a team effort.”

Newsletter

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UNITED STATES V. BOOKER

Supreme Court Rules that the Sentencing Guidelines are Unconstitutional Potentially Thousands Eligible for Relief

“If the government can manipulate the guidelines to suit themselves, a defendant's constitutional guarantees wouldn't be worth much. *** The government is addicted to plea bargaining and the focus of our entire criminal justice

system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen.” *United States v. Green*, 2004 U.S. Dist. LEXIS 11292 *3, *6 (D.Mass June 18, 2004).

abuse and manipulation of the system, the Supreme Court has slowly recognized the unconstitutionality of the Federal Sentencing Guidelines in a series of cases, see *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 124 S. Ct. 2531 (2004). This series of decisions culminated with the recent Supreme Court decision in *United States v. Booker*, 2005 U.S. LEXIS 628 (Jan. 12, 2005), which has finally struck down the system that has unconstitutionally tied the hands of

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The holding in *United States v. Booker*, 2005 U.S. LEXIS 628 (Jan. 12, 2005) is the Supreme Court’s recognition that the federal sentencing system in place since 1987 is unconstitutional – and it is about time.

Perhaps due to the government’s

judges, and ensure that thousands of defendants were imprisoned based on mere allegations of the government.

In *Blakely v. Washington*, 124 S. Ct. 2531 (2004), the Court found that *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and *Ring v. Arizona*, 536 U.S. 584 (2002), made clear "that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *** When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.'" *Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004).

The *Blakely* decision clarified what was meant by the term "statutory maximum," but as a result of that clarification, called into question the constitutionality of current sentencing practices in federal court. After *Blakely*, a circuit conflict existed as to whether or not the ruling applied to the Guidelines, leading the Supreme Court to grant certiorari to the government in *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004) For over six months defendants and attorneys waited for a decision, hoping that the Guidelines would finally be held unconstitutional.

The Booker Decision

That day has come with the decision in *United States v. Booker*, 2005 U.S. LEXIS 628 (Jan. 12, 2005) The *Booker* Court determined that the rule announce in *Blakely* did apply to the Federal Sentencing Guidelines – namely that every fact used to increase a defendant's statutory maximum sentence must be either reflected in the jury verdict or admitted. The "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely* at 2537. Because the Guidelines were binding on the sentencing courts, they violated the Sixth Amendment. In order to solve this problem, the *Booker* Court held that the Guidelines were no longer binding and were merely advisory. *Id.* *44, 49.

Who does it affect?

At this point, it is impossible to predict exactly how that various federal courts will implement the rule in *Booker*. In fact, since there is no precedent to follow, potentially every criminal defendant who received a sentence in excess of the statutory minimum based on Guidelines' enhancements has the potential for relief.

Defendants awaiting sentencing can certainly benefit from the decision. The *Booker* Court determined that the only way to keep the Guidelines was to remove the requirement that the guideline range of imprisonment was binding on sentencing courts. Courts may use the guideline range established by the probation office, but they are now merely advisory. Therefore,

defendants waiting to be sentenced are in a good position because after *Booker*, sentencing courts have virtually unfettered discretion to sentence defendants anywhere between the minimum and maximum sentence set by statute. Many mitigating factors may now be taken into consideration by the courts at sentencing that used to be prohibited. Potentially, a sentencing court can consider a defendant's family responsibilities, drug dependence, work history, post-offense rehabilitation, etc.... in determining where to sentence a defendant. A judge should now take into consideration a defendant's cooperation or assistance to the authorities – even in the absence of a government filed § 5K1.1 motion. The only requirement is that the sentence is reasonable under the circumstances.

Also, defendants who have recently been sentenced and are currently appealing their conviction and sentence have an opportunity to ask for a corrected sentence based on *Booker*. Many circuits had determined that the *Blakely* case did not apply to the Federal Sentencing Guidelines. Defendants who were sentenced in those jurisdictions were sentenced under the mistake belief that the Guidelines were binding on the sentencing court. The *Booker* decision confirms that because the Guidelines were binding on a sentencing court, the system is unconstitutional. Further, the Court explicitly stated that its holding applies to all federal defendants with appeals currently pending. These defendants should all have an opportunity for relief under *Booker*.

Will *Booker* be applied retroactively to cases on collateral review?

Thousands of defendants were sentenced under this unconstitutional system over the past 18 years. The vast majority of these individuals received enhanced punishments in violation of the Sixth Amendment. NLPA believes that each of these defendants should be eligible for relief. However, the Court did not state whether defendants sentenced over the past 18 years will have the ability to challenge their sentence in a post-conviction motion. Therefore, the question of retroactively remains unanswered.

The research staff at NLPA is already working on arguments for attorneys and their clients concerning retroactive application of *Booker* to defendants whose convictions have already become final. It is important that the *Booker* and *Blakely* Courts relied, at least partially on *Jones v. United States*, 526 U.S. 227 (1999) in determining that the Guidelines were unconstitutional. This provides a strong basis to argue that the *Booker* case is simply a clarification of the holding in *Jones*. Therefore, defendants sentenced after *Jones* in 1999 should have a strong argument that the *Booker* holding applies to them. In these instances, we believe that relief may be pursued in a §§ 2255 or 2241 motions.

Clearly, the *Booker* decision is a giant leap forward for the rights of the accused. The system the government has abused for 18 years is crumbling, putting U.S. Attorneys on their heels. The

climate is right for thousands of defendants to seek reductions in their sentences. The government has an interest in preventing defendants from receiving relief based on the *Booker* decision – and you better believe they are going to do whatever possible to keep defendants locked up. National Legal Professional Associates stands ready to continue to help attorneys lead the fight for justice and help defendants obtain the relief they deserve.

TWELVE DAYS AFTER BOOKER NLPA HAS ITS FIRST BOOKER VICTORY

Wilson v. United States

Supreme Court Remands Case Based on Arguments Made Even Before *Blakely* and *Booker*.

Ever since the Supreme Court decision in *Jones v. United States*, 526 U.S. 227 (1999), National Legal Professional Associates (NLPA) has provided attorneys with cutting edge research concerning the Federal Sentencing Guidelines. These arguments were based on the fundamental concept that defendants should only be punished based on conduct proven beyond a reasonable doubt, and that the Guidelines violated this principle. Although this argument did not have support in the various circuit courts it made common sense, and some aggressive defense attorneys had the vision to make the argument, preserving it for their clients. The case of *Wilson v. United States*, Case No.04-5523 is an

example of how NLPA's research coupled with thoughtful and aggressive attorney representation resulted in a Supreme Court victory.

In 2002, Timothy Wilson was charged with one count of conspiracy to distribute marijuana and one count of possession with intent to distribute marijuana. The jury acquitted Mr. Wilson of the conspiracy charge, but returned a guilty verdict as to the possession charge. The verdict also included a finding that the offense involved between 50 kilograms of marijuana. When the presentence report was prepared, Mr. Wilson was astonished to see that even though the jury had acquitted him of the conspiracy charge, he was going to be punished based on all of the marijuana involved in the conspiracy. Instead of being punished based 50 kilograms of marijuana, the government was trying to punish him based on up to 1,000 kilograms! Mr. Wilson then hired NLPA to assist his attorney.

Beginning in the Fall of 2002, NLPA assisted Mr. Wilson's trial counsel, Robert S. Mullen, in preparing arguments combating the enhancements for drug amount and weapon possession, and other enhancements. NLPA provided research arguing that it was unconstitutional to hold Mr. Wilson responsible for marijuana amounts that were expressly rejected in the jury's verdict. It was argued that the government should not be permitted to circumvent the jury's findings regarding drug amounts and punish Mr. Wilson for conduct dismissed by the jury. Although the argument was based on common sense, it was not supported by Sixth Circuit or

Supreme Court precedent and was denied by the sentencing court. Mr. Wilson's objections were denied and his sentence was enhanced.

Although discouraged, Mr. Wilson did not give up. He retained *Robinson & Brandt* to represent him on direct appeal to the Sixth Circuit and again hired NLPA to assist with research. NLPA assisted attorney Matthew M. Robinson in researching arguments for direct appeal. Importantly, Mr. Wilson's appeal was filed in April 2003, more than one year prior to the *Blakely* decision. One argument made in the brief was that it was a violation of Mr. Wilson's Sixth Amendment right to a jury to punish Mr. Wilson for conduct that was neither admitted nor proved to a jury beyond a reasonable doubt. If the sentencing guidelines allow the district court to punish Mr. Wilson for relevant conduct that a jury specifically rejected through acquittal and a specific finding, the sentencing guidelines are unconstitutional. Again, the argument was denied and Mr. Wilson's appeal was dismissed.

Again, although discouraged, Mr. Wilson did not give up and decided to proceed to the Supreme Court. Once again, Mr. Wilson hired NLPA to assist *Robinson & Brandt* in the research and preparation of a writ of certiorari to the U.S. Supreme Court. The writ of certiorari continued the same argument raised on direct appeal - namely that it was a violation of the Sixth Amendment to increase Mr. Wilson's sentence under the Guidelines based on conduct never proved to a jury beyond a reasonable doubt. The research was provided in June of 2004, just

prior to the decision in *Blakely*.

After Mr. Wilson's petition was filed in the Supreme Court, *Blakely v. Washington* was decided, followed by the Supreme Court decision in *United States v. Booker*. These decisions confirmed what Mr. Wilson had argued all along - that his Sixth Amendment rights were violated when his sentence was enhanced based on facts never proven to a jury. After fighting this issue for more than three years, Mr. Wilson's refusal to give up finally paid off with a Supreme Court victory! On January 24, 2005, the Court issued an Order granting Mr. Wilson's petition for writ of certiorari vacating the judgement denying his appeal.

Mr. Wilson's case is an example of how NLPA's cutting edge research, combined with experienced, thoughtful, and aggressive attorney representation can pay off. Mr. Wilson's is just one of many cases where NLPA has assisted counsel in making these cutting edge arguments. We anticipate future victories in those cases. To all of you who turned their noses up at NLPA in the past - "we told you so." To those of you who would like NLPA's research assistance, contact NLPA.

NLPA ENJOYS BANNER YEAR IN ASSISTING ATTORNEYS DURING 2004

Continuing its tradition in achieving success in their cases, during 2004, NLPA's lawyers assisted attorneys with 28 cases that produced a successful result. These cases were as follows:

Hawkins, Christopher: NLPA was hired to assist with Mr. Hawkins' sentencing. His PSI recommended 292-365 months. He actually received 235 months, and was saved 57 months in prison.

Pina, Jeffrey Todd: NLPA was hired to assist Mr. Pina and his attorney with sentencing. Mr. Pina's PSI report recommended 420 months to life imprisonment. He received a sentence of 211 months.

Rivera, Jesus: NLPA was initially hired by Robinson & Brandt to assist with the trial preparation for Mr. Rivera. Using the issues on Mr. Rivera's appeal concerning the same double jeopardy issues that NLPA prepared previously, Mr. Rivera's appeal was granted and his conviction set aside - saving him 18 years in prison!

Washington, Marcus: NLPA was hired to assist Mr. Washington's attorney in the preparation of research for his sentencing. The PSI recommended a sentencing range of 292-365 months. At sentencing Mr. Washington received a term of 262 months - saving him at least 3 years in prison.

Glenn Mathis - NLPA was hired to assist Mr. Mathis and his attorney with his sentencing. The PSI recommend a sentence of 262-327 months. With our help Mr. Mathis received a total of 199 months imprisonment - saving him over 63 months in prison!

Thomas, II, John - NLPA was hired to assist Mr. Thomas and his attorney with his sentencing. His PSI recommended a sentence of 262-327 months. With our help, Mr. Thomas received a sentence of 188 months - saving him more than 6

years in prison.

Fernandez, Agapito - Another Sentencing Victory! NLPA was hired to assist Mr. Fernandez with his sentencing. His PSI recommended 108-135 months. With our help we achieved a sentence for Mr. Fernandez of 78 months. This is more than 33 months in prison.

Holland, Francine- NLPA was hired to assist with Ms. Holland's sentencing. The PSI on her case recommended base level of 36 with a guideline range of 188-235 months. If the court determined that Ms. Holland obstructed justice the offense level would be increased to 38 and a guideline range of 235-293 months. With NLPA's assistance on the case, Ms. Holland received a sentence of 120 months!!!

Stratton, Joseph - NLPA assisted with the sentencing on the case of Joseph Stratton. PSI gave Mr. Stratton an offense level of 42 with criminal history. Guideline range was 360-480 months. Mr. Stratton received 292 months with our assistance.

Sanford, Jr., Glen-Mr. Sanford's family hired NLPA to assist their attorney with the sentencing of his case. Mr. Sanford's PSI recommended 63-78 months. With NLPA's assistance on the case, Mr. Sanford received a sentence of only 54 months. Saving him at least a year in prison. We are now able to assist with bootcamp placement since Mr. Sanford now falls into the guideline range to qualify for the program.

Howell, Gregory - NLPA was hired to assist Mr. Howells attorney with his case out of the Middle District of Florida. His PSI recommended an offense level of 34 and a guideline range of 262-327 months. Though NLPA only prepared a partial draft of research, his attorney found it to be very helpful. Mr. Howell was sentenced to a term of 200 months. This saved him at least 62 months in prison!

Caccamo, Todd - NLPA assisted Mr. Caccamo's attorney, Charles Murray with a Motion to Withdraw his plea. Mr. Caccamo's plea was withdrawn and his conviction was overturned.

Otero, Ruben - NLPA was hired to assist with Mr. Otero's sentencing. His PSI recommended 151-188 months. At his sentencing hearing Mr. Otero received a sentence of 105 months. This saved him more than 3 years in prison.

Lafuente, Fabian - NLPA assisted Mr. Lafuente's attorney with his sentencing. His PSI recommended 360 to life in prison. At sentencing Mr. Lafuente received a sentence of 300 months for counts 1 & 2 and 60 months on count 3 to run concurrent.

Davis, Kimani - NLPA was hired to assist counsel with the sentencing of Kimani Davis. His PSI recommended 108-135 months in prison. NLPA prepared research to address all of the downward departures that we felt he may qualify for including an issue of coercion or duress and was able to

achieve a sentence for Mr. Davis of 24 months with the recommendation he participate in the boot camp program. This sentence saved him at least 10 years in prison!

Rios, Jesus- NLPA was hired to assist Attorney Charles Murray with a Motion for New Trial. Mr. Rios was sentenced to life. However, at the hearing on Mr. Rios' post-conviction motion the court overturned his conviction and ordered a new trial to take place.

Salters, Gary- NLPA was hired to assist Mr. Salters counsel with his sentencing. His PSI recommended a guideline range of 262-327 months. At his sentencing Mr. Salters only received a sentence of 108 months! This saved him over 154 months in prison.

Reese, Louis Van-NLPA was hired to assist Mr. Reese's counsel in preparation for his sentencing. His PSI report recommended 97-121 months. Mr. Reese was sentenced to 86 months - at least 11 months less than would have otherwise been the case.

Barrett, Terry-NLPA assisted Rob Ratliff in the preparation of a § 2255 motion on the case of Mr. Barrett in 2001. Mr. Barrett was serving a life sentence prior to this motion. However, as the result of our research assistance Rob was able to get his sentence reduced from life to 185 months! We are now hopeful to get his sentence reduced further in the filing of a Blakely motion.

Harris, Tommie - NLPA was hired to assist Mr. Jones' attorney with his sentencing. His PSI recommended a guideline range of 138-157 months. He received a sentence of 123 months - saving him anywhere from 15 to 34 months in jail.

Jones, Leroy D. - NLPA was also hired to assist with the sentencing research for Mr. Jones. His PSI recommended a guideline range of 235-293 month sentence. With our help Mr. Jones' attorney was able to achieve getting him a sentence of 192 months. This saved Mr. Jones more than 41 months in prison!

Taylor, Jimmie - NLPA assisted Mr. Taylor's counsel in preparing sentencing research. His PSI recommended a guideline range of 195-228 months. NLPA and Mr. Taylor's counsel were able to achieve a sentence of 135 months. This saved Mr. Taylor more than 5 years in prison!

DeSilva, Michael - NLPA Assisted Mr. DeSilva's attorney in the preparation of a sentencing memorandum to attack the guideline range of 295-353 months that his PSI was recommending. Mr. DeSilva received a sentence of only 90 months! This saved him over 17 years in prison!

Jones, Robert M. - NLPA assisted counsel with Mr. Jones' case. His PSI recommended a guideline range of 151-181 months. NLPA and Mr. Jones' attorney were able to achieve a sentence of 75 months, saving Mr. Jones more than 76 months in prison.

Morris, Arnold - NLPA Assisted Mr. Morris' attorney in preparing a sentencing memorandum to attack his guideline range of 46-57 months. At his sentencing Mr. Morris received a prison term of 30 months. This saved him 16-27 months in prison.

Seamans, Kevin - NLPA Assisted Mr. Seamans' attorney with his sentencing. His PSI recommended a guideline range of 121-151 months. With our help Mr. Seamans' attorney was able to achieve a sentence of 66 months. This saved him over 55 months in prison!

Donovan, Patrick - NLPA assisted Mr. Donovan's attorney with the sentencing of his case in which he was facing a guideline range of 360 months to life in prison. He ended up receiving a total sentence of 151 months - saving him more than 209 months in prison.

Major, Jr., Keith - NLPA did research on Mr. Major's case to help lower his guideline range of 70-87 months. With our help his attorney was able to achieve a sentence of 46 months. We are now hopeful that we will be able to help Mr. Major make application to the Federal Boot Camp Program.

NLPA News Law Update

US v. SMITH (7th Cir. 12/27/04 - No. 03-3004) Defendant's drug conviction is affirmed, however, his sentence is vacated where it violated the Sixth Amendment since it included an enhancement for obstruction of justice that was based solely on the judge's finding of fact.

US v. CHANDLER (11th Cir. 10/19/04 - No. 03-10725) Defendants' convictions for conspiracy to commit mail fraud are reversed where the government cannot prove defendants' membership in the indicted conspiracy.

US v. RODRIGUEZ-MARRERO (1st Circuit 11/05/04 - No. 01-1647) Defendant's conviction for conspiracy to commit murder is reversed where the district court erred in admitting testimonial hearsay against him in violation of *Crawford v. Washington*, 124 S.Ct. 1354 (2004).

US v. CROMER (6th 11/30/04 - No. 02-2394) Defendant's drug conviction is reversed where the district court improperly allowed a witness to testify about hearsay statements made by a confidential informant, implicating defendant to drug activity, without requiring the production of the informant. See, *Crawford v. Washington*, 124 S.Ct. 1354 (2004).

US v. HILLIARD (8th Cir. 12/28/04 - No. 04-1033) District court's decision to grant defendant habeas relief based on its holdings that his trial counsel was ineffective is affirmed. Counsel failed to file a timely motion for new trial and the failure to file the motion was prejudicial. Not filing a dispositive motion, particularly when directed to do so by the district court, is a classic dereliction of an attorney's obligation to provide his client with the type of performance required by the Sixth Amendment.

US v. ROGERS (7th Cir. 11/05/04 - No. 02-3578, 03-1870) Defendant's drug conviction is reversed where the in-court identification by a witness was unduly suggestive and improperly admitted into evidence.

US v. WASHINGTON (9th Cir. 11/02/04 - No. 02-10526) Defendant's conviction for being a felon in possession of a firearm is reversed where the district court improperly denied defendant's motion to suppress evidence after police officers violated defendant's Fourth Amendment rights.

US v. TORRES-RUIZ (10th Cir. 11/03/04 - No. 03-4160) Defendant's sentence for illegal reentry following deportation is vacated where the district court erred in characterizing a prior California state conviction for felony driving under the influence as a "crime of violence."

US v. GILBERT (7th Cir. 12/09/04 - No. 03-3365) Defendant's conviction for being a felon in possession of a firearm is reversed where the admission of pre-trial statements made to police officers by defendant's wife was unconstitutional.

US v. WILSON (7th Cir. 12/02/04 - No. 03-2170) The defendant pleaded guilty pursuant to a plea agreement contemplating the possibility that, based on his cooperation, the government would move for a reduced sentence on his behalf under either U.S.S.G. § 5K1.1 or Rule 35(b) of the Federal Rules of Criminal Procedure. The defendant cooperated, and the government admitted at sentencing that it intended to file a Rule 35(b) motion. After waiting nearly a year for the government to take action to trigger a sentence reduction, the defendant filed a motion to compel the government to file a Rule 35(b) motion on his behalf. The district court ultimately denied the motion, and the defendant appealed. The Seventh Circuit remanded the case for a new sentencing because the government's decision not to file a Rule 35(b) motion lacked a rational relationship to a legitimate government interest and was made in bad faith.

US v. CALDERON (2nd Cir. 12/01/04 - No. 03-1091) Dismissal of defendant's indictment for illegal reentry after deportation is affirmed where the district court properly determined that defendant's collateral challenge to the deportation order met the standard set out in 8 U.S.C. section 1326(d), and the deportation order thus could not sustain a charge of illegal reentry.

US v. BLANCO (9th Cir. 12/27/04 - No. 03-10390) Defendant's drug conviction is reversed where the government suppressed information about a confidential informant that should have been given to defendant under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. US*, 405 U.S. 150 (1970).

US v. WILSON (11th Cir. 12/07/04 - No. 03-14408) Defendant's sentence is vacated where the district court improperly applied a two-level enhancement under U.S.S.G. section 3C1.2 for reckless endangerment during flight. The defendant's flight alone can not justify a § 3C1.2, even if the pursuing officer is injured during the pursuit.

JONES v. BRAXTON (4th Cir. 12/28/04 - No. 03-6891) A certificate of appealability is required in order to appeal from the dismissal of a habeas petition when the district court dismisses the habeas petition as an unauthorized successive petition.

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About NLPA

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You are important to us and we hope we can commence and maintain a long-term relationship with you. Please know that we are here to assist in all your needs.

If you would like to know more about the services we offer, please contact us at:

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