LEGAL BULLETIN 9.1

Post-Conviction Remedies
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Introduction

The term "post-conviction remedies" in this bulletin refers to specific types of legal challenges to guilty pleas, convictions and sentences. These challenges are known as "collateral actions" and do not include direct appeals. Post-conviction remedies are primarily constitutionally based procedural approaches provided by the law to insure justice is done.

The two main types of procedures reviewed in this bulletin are federal habeas corpus and state post-conviction procedures. The state procedures vary somewhat from state to state. This review is not intended to provide all the specific details and requirements of each state, but rather to offer general information about common legal principles and standards that apply to post-conviction actions. This bulletin will serve only as an introduction to "post-conviction remedies" and should be followed up with your own research.

Post-conviction motions / petitions are the most frequently filed legal actions by state and federal prisoners. State post-conviction remedies may be called by different names such as: habeas corpus, writ of coram nobis, or under the title of the particular state law (i.e. Post Conviction Relief Act). Regardless of the particular name used, there are many common requirements and considerations. Generally, appeals may be taken from unfavorable dispositions of post-conviction actions. Do not confuse any mention of these appeals with direct appeals.

We will focus attention on federal cases about federal habeas corpus law. However, you should be aware there are state habeas corpus laws and cases for state post-conviction procedures and can be found under the statutory citations and reported court decisions of the states. While most of the legal principles and standards in the states are similar, there are differences and variations between the federal and state and from state to state. Sometimes these differences are substantive. For example, variations about the quality and amount of evidence

needed may exist. Other times the differences are procedural, such as time limit requirements for filing. Be sure the court decisions and laws you are relying upon are applicable to your particular location, situation and legal status.

Federal Habeas Corpus

Habeas corpus is a Latin phrase meaning, "you have the body." The "great writ" of habeas corpus is protected by the United States Constitution in Article I, which provides that "the privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public safety may require it."

A writ of habeas corpus is an action that claims a prisoner's conviction (§2241) or sentence (§2254 for state prisoners and §2255 for federal prisoners) was unlawful. Habeas corpus statutes are found at 28 U.S.C. §§ 2241 – 2266. The statute on counsel in death penalty cases is located at 21 U.S.C. § 848(q). A habeas corpus action is not used for seeking monetary damages. The purpose of a federal writ of habeas corpus is to assert that a conviction and sentence were obtained in violation of the U.S. Constitution or federal law. If the court agrees with you, it may throw out the conviction. Release from incarceration on the dismissed charge can be a remedy for habeas corpus actions.

Before you can get habeas corpus relief from a court you must prove you are in custody or under an active sentence in some form (i.e. incarceration, probation or parole). Drollinger v. Milligan, 552 F.2d 1220,1224 (1977). This requirement should present no problem for prisoners, but you must state it in your petition. We suggest you make copies of your sentencing orders and attach them as exhibits to your petition. A sample federal habeas corpus petition is attached to this bulletin for your review. You may obtain your own either from the institution where you are housed or from the federal district court that has jurisdiction in your location. There is a five $5.00 filing fee.

A petitioner is not considered to be in custody for purposes of establishing jurisdiction for habeas corpus relief if his sentence is fully expired when the habeas petition is filed. See Maleng v. Cook, 490 U.S. 488 (1989). However, note that a prisoner who is serving consecutive state sentences and is in custody under any one of them may challenge the sentence scheduled to run first, even after it has expired, until all sentences have been served.

After satisfying the custody requirement, your habeas petition must also show you have exhausted all of your available remedies. For federal prisoners, the exhaustion of remedies means appealing your federal conviction or sentence all the way through the federal court system. For state prisoners, this means that you must have appealed the issues in your present habeas petition all the way up and that the state's highest court has ruled on them. Also, if a state has provided post-conviction remedy procedures, these must also ordinarily be exhausted before the petitioner seeks federal habeas corpus relief.

The courts will usually deny your habeas petition if you have not exhausted your remedies by appealing them as far as you can. Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed 2d 318 (1992), U.S. v. Addonizio, 442

U.S. 178, 190, 99 S. Ct. 2236 (1979), Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977). However, there may be exceptions. See Granberry v. Greer, 481 U.S. 129 (1987), Castille v. Peoples, 489 U.S. 346 (1989).

To preserve the issues for habeas review, they must be included in all the appeals leading up to the habeas petition. There are exceptions, such as newly discovered evidence of actual innocence. However, there still may be time limits and other procedural requirements that can affect the willingness of the court to hear such issues.

The prisoner pursuing an appeal of a habeas corpus petition denial before a federal court must first be granted a certificate of appealability (COA). In order to get a Certificate of Appealability the prisoner must make a substantial showing of the denial of a constitutional right. On the issue of whether the Supreme Court of the United States may review denials of certificates of appealability see Federal Rules of Appellate Procedure 22 (b) and Felker v. Turpin, 518 U.S. 651 (1996).

Checklist:

(1) File under the correct section of the law.
(2) State the reasons for your petition, showing how your sentence and / or incarceration were the result of a violation of the federal constitution.
(3) Explain your custody status.
(4) Provide specific information of how you have exhausted your remedies through the appeals process.
(5) Reference the issues in your habeas petition to their dispositions throughout the appeals process.

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996. This Act reformed federal habeas corpus. It introduced stricter standards and procedural requirements for federal habeas corpus petitions.

The law established a one (1) year deadline to apply for a writ of habeas corpus. This one-year period begins to run from the latest of:

1. The date of final judgment (date of conclusion of direct appeals or expiration of the time for seeking such review).
2. The removal of an unconstitutional impediment created by State action that had prevented filing.
3. The date on which the asserted constitutional right was first recognized by the Supreme Court, only if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, and
4. The date on which the factual basis could have been discovered through the exercise of due diligence.

See Miller v. New Jersey State Department of Corrections, 145 F. 3d 616 (3rd Cir. 1998), United States v. Flores, 135 F.3d 1000 (5th Cir. 1998).

The federal court must find that there has been a clear violation of a constitutional right. It is not enough for a federal court to determine that it would have reached a different result. The decision under review must be found to be unreasonable. There must also be a showing of prejudice and that the prejudice seriously undermined the truth-finding process.

For example, in Porter v. Singletary, 49 F3d 1483 (11th Cir. 1995) the court found sufficient evidence of a constitutional violation based upon the unanticipated and unpredictable remarks by the judge to the Clerk of Courts and reporters during trial that he had a fixed predisposition to sentence the defendant to death if convicted. Because of the quality of supporting evidence, the court held that Porter's averments about the bias of the judge was not a mere rumor or unsupported allegation. The Clerk of Court had provided a sworn affidavit supporting the truth of the petitioner's claim on this issue.

In order for a federal court to grant relief on a state prisoner's state conviction, the prisoner must first exhaust his state remedies. However a federal court may deny a petition on the merits despite a failure to exhaust state remedies. Hoxsie v. Kerby, 108 F.3d 1239 (10th Cir.).

If a petitioner has failed to develop the factual basis of a claim in state court proceedings, the federal court is not to hold an evidentiary hearing on the claims unless the applicant shows that the claim relies upon:

(1) A new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(2) The discovery of a factual basis that could not have been previously discovered through the exercise of due diligence.
(3) There is also the requirement that the petitioner must establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The requirement that a prisoner develop a factual basis in the record relates to his own decisions or omissions. In Love v. Morton, 112 F.3d 131 (3rd Cir. 1997) the court found that an abrupt decision by the state trial judge to declare a mistrial made it impossible for the petitioner to develop the record sufficiently. Therefore, his petition was not found to be insufficient because the failure to develop the record did not result from of a decision or omission by the prisoner.

When a federal court reviewing a state conviction collateral challenge holds an evidentiary hearing, there is a presumption that the findings of fact by the state court are correct. See Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997). This presumption is rebuttal. Even though the habeas court will give deference to the fact finding of the trial court, that deference can be overcome if it is shown that the factfinder's conclusions were unreasonable, improper, or not supported by the record of the case.

Any claims presented in a second or successive habeas corpus application will be dismissed unless based upon a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. A second or successive petition may also survive if

based upon the discovery of a factual basis that could not have been previously discovered through the exercise of due diligence. Also, it must be shown that the facts underlying the claim viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The 1996 law provides the application shall be dismissed if any claim presented in a second or successive petition was presented in a prior application. This was designed to prevent prisoners from repeatedly attacking the validity of their conviction or sentence. A petition is considered successive when it: (1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or (2) otherwise constitutes an abuse of the writ. In the case of In re Cain, 137 F.3d 234 (5th Cir. 1998), the court held that a prisoner's challenge to two post sentence administrative actions in which he contended that his good time credits were taken in violation of due process of law was not barred as a successive petition nor was it an abuse of the writ.

In Hope v. United States, 108 F.3d 119 (7th Cir. 1997), the court held that a second or successive petition must properly challenge the underlying conviction with evidence of actual innocence. The petitioner in Hope was attempting to request that his sentence be corrected, claiming that he was wrongfully sentenced as a career criminal. The court reasoned that because his claim went only to the sentence and not the underlying conviction, it was not permitted under the Act.

In Felker v. Turpin, 101 F.3d 95 (11th Cir. 1996), the court treated a claim filed as a civil rights action under 42 U.S.C. § 1983 by Georgia prisoners who had already filed habeas corpus petitions as a second or successive habeas claim and denied relief. The prisoners' claim was that Georgia's use of electrocution to carry out a death sentence was cruel and unusual punishment in violation of the Eighth Amendment, and therefore it did not come within the strict standards of the 1996 Act for allowing review of second or successive habeas filings. There are other situations in which a prisoner has first sought post-conviction relief under a section other than the habeas section of the law and courts have considered the "first" habeas petition as second or successive as a result, even though it was the first petition filed under the habeas sections of the law. See Burris v. Parke, 130 F. 3d 782 (7th Cir. 1997).

Parks v. Reynolds, 958 F.2d 989 (10th Cir.), cert. denied 503 U.S. 928 (1992) stated that claims of factual innocence must be supported by sufficient allegations of facts that had the jury been given an opportunity to consider them, they would have been convinced the defendant was factually innocent. Therefore, it is not enough to try to only show that the new evidence would raise doubts about guilt or merely challenge the credibility of prosecution witnesses.

McCleskey v. Zant, 499 U.S. 467 (1991) involved a state conviction of a Georgia death row prisoner. He had filed three habeas corpus petitions, one in the state and two in the federal court under 28 U.S.C. § 2254. Each filing raised a new claim of a constitutional violation in his state conviction. In his first

federal habeas petition, he neglected to include a claim made in the state court. He later included this claim in the second federal habeas petition. The 11th Circuit Court of Appeals dismissed the second habeas as an "abuse of the writ." The court stated that the second federal court writ could be dismissed when the petitioner had omitted, abandoned, or failed to raise questions which should have been included in the first federal habeas. Upon review, the Supreme Court held that for a second or successive habeas to be accepted, the petitioner must show cause and prejudice as to why the new issues were not included in the previous filing. It was also decided that the petitioner must show actual prejudice affecting the outcome of his or her case.

A lesson to be drawn from the above case is to be very careful to list and research all possible issues and include them in the first filing. Do not think that you can hold back certain issues for another try in case you lose the first time. It is likely that the court will not even consider the merits of issues that they deem to be waived or procedurally forfeited because they were not included earlier.

General information

Counsel: There is no federal constitutional right to counsel after the first appeal in the state system. Coleman v. Thompson, 501 U.S. 722 (1991). The decision of whether to appoint counsel in state and federal post-conviction proceedings rests with the discretion of the judge. If the judge decides an evidentiary hearing is required, counsel must be appointed. See Abdullah v. Norris, 18 F. 3d 571, 573 (8th Cir. 1994). However, death row inmates have a right to counsel to pursue federal habeas corpus relief. Inmates should file a motion with the court requesting the appointment of counsel. If a prisoner is unable to afford legal representation, a request for court appointed counsel should be made with an In Forma Paupris (IFP) motion.

If a prisoner does not want to be represented by counsel, he has a constitutional right to represent himself. Faretta v. California, 422 U.S. 806 (1975), Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993). When a prisoner decides to waive the right to counsel, the court must make a finding that the waiver was knowing, intelligent and voluntary. Except in rare and exceptional circumstances, we strongly encourage inmates to seek and use counsel.

Discovery: A habeas corpus petitioner is entitled to seek discovery under the Federal Rules of Civil Procedure if the judge grants permission to do so. An example of a case where good cause was shown was in Bracy v. Gramley, 117 S.Ct. 1793 (1997). Bracy contended that the trial judge denied him a fair trial. The judge had been convicted of taking bribes to "fix" some criminal cases. Bracy argued that the judge was biased toward the prosecution in cases where he had not been bribed in order to "cover-up" his corruption in the bribe cases.

Relief: The federal judge has the authority to grant any form of relief "as law and justice require" including permanent discharge. Permanent discharge means dismissing the charges with prejudice, so that the defendant is freed from

custody and does not have to face the charges again. Examples of permanent discharge as an appropriate order would be in cases involving violations of Double Jeopardy and Ex Post Facto Clauses. Another form of relief is conditional release, granting release unless the state either retries the petitioner within a reasonable time or corrects the violation of the Constitution or laws.

Non-retroactivity: In Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court stated, "We believe that the Constitution neither prohibits nor requires retrospective effect." If a case is decided after the defendant's appeals are exhausted and he is attempting to use the decision as a basis to collaterally challenge his conviction or sentence, then the court may or may not apply the case. In determining whether or not to make a retroactive application the court will consider (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement on the old standards, and (c) the effect on the administration of justice of a retrospective application.

Evidentiary Hearings

The federal court must grant an evidentiary hearing if the state trier of fact did not afford the petitioner a full and fair fact hearing. There is a presumption of correctness of a state court's fact finding, but not of mixed fact and law determinations. The areas of mixed law and fact that the Supreme Court has specifically accepted include: impermissibly suggestive pre-trial identification procedures, ineffective assistance of counsel, voluntariness of a confession, and whether a suspect was in custody and therefore entitled to Miranda warnings.

Townsend v. Sain, 372 U.S. 293 (1963) held that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances:

1. If the merits of the factual dispute were not resolved in the state hearing.
2. If the state determination is not fairly supported by the record as a whole.
3. If the fact finding procedure used by the state was not adequate to afford a full and fair hearing
4. If there are substantial allegations of newly discovered evidence.
5. If the material facts were not adequately developed at the state hearing.
6. If for any reason it appears that the state court did not give the habeas applicant a full and fair hearing.

The criteria set forth above in Townsend was basically adopted and incorporated in §2254 of the habeas corpus act. There have been other Court decisions after Townsend modifying the decision and adding other requirements that must be met in order to get an evidentiary hearing.

In Pitsonbarger v. Gramley, 103 F.3d 1293 (7th Cir. 1996), the court held that a federal court may not grant an evidentiary hearing on claims that a habeas petitioner could have developed in state court proceedings unless several criteria were satisfied. The applicant must show either that: (a) the claim relies upon a

new rule of constitutional law, that has been made retroactive by the Supreme Court to cases on collateral review and that was previously unavailable, or (b) the discovery of a factual basis that could not have been previously discovered through the exercise of due diligence. Furthermore, the petitioner must establish by clear and convincing evidence that except for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The habeas corpus law requires that the federal courts presume that the fact finding of the state courts are correct. The Supreme Court in Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) modified Townsend by holding that the petitioner must show a fundamental miscarriage of justice would result if not allowed to have an evidentiary hearing. The decision changed the fifth circumstance listed above under Townsend. The prisoner must not only show the facts were not developed at the state level, but also must show that it caused a resulting prejudice. See Chacon v. Wood, 36 F.3d 1459 (9th Cir. 1994). Also, remember that the federal court retains the right to hold an evidentiary hearing even though one is not required. See Pagan v. Keane, 984 F. 2d 61 (2nd Cir. 1993).

There are differing opinions among the circuit courts concerning which types of claims are governed by the presumption of correctness doctrine and which are not. A few of these are set forth below:

Lacy v. Gardino, 791 F.2d 980 (1st Cir.), *cert. denied* 479 U.S. 888 (1986) held that a state court finding of harmless error is not entitled to the presumption of correctness.

Velez v. Schmer, 724 F.2d 249 (1st Cir. 1984) held that the reliability of an identification is a factual question.

Deputy v. Taylor, 19 F 3d 1485 (3rd Cir), *cert. denied* 512 U.S. 1230 (1994) held that a state court's conclusion that constitutional error was harmless is a mixed question of law and fact, rather than a factual finding entitled to the presumption of correctness.

Pryor v. Rose, 724 F.2d 525 (6th Cir. 1984) held that whether multiple crimes committed during a single transaction are the same offense is a question not subject to the presumption of correctness.

The burden is on the applicant to establish with convincing evidence that the factual determination by a state court was erroneous. It will be necessary for the petitioner to research the particular issue to find out how the Court of Appeals in his or her jurisdiction has addressed the question.

Appeals

As mentioned above, in order to appeal the denial of habeas corpus relief by a federal district court to the court of appeals, the petitioner must obtain a certificate of probable cause. 28 U.S.C. §2253. The requirement to obtain a certificate applies to all state prisoners, whether they are proceeding pro se or with counsel. If the state or its representative is appealing, a certificate of probable cause is not required.

Generally, a petitioner must make a substantial showing of the denial of a federal right or demonstrate that the issues are debatable among judges. Review may also be allowed if it can be shown there is a question about differing interpretations of law that should be addressed and resolved. The petitioner does not need to show that he or she should ultimately prevail on the merits at this stage of the proceedings. See Barefoot v. Estelle, 463 U.S.880 (1983).

The courts are supposed to give pro se filings by prisoners some leeway since prisoners are usually not trained in the formalities of legal practice. Haines v. Kerner, 404 U.S. 519 (1972). For example, a notice of appeal may be treated as if it were a request for a certificate of probable cause instead of being dismissed for not using the proper form and practice of seeking the certificate. Some circuits have held that a request for a certificate of probable cause can serve "double duty" as a notice of appeal. Ortberg v. Moody, 961 F.2d 135 (9th Cir.), *cert. denied* 506 U.S. 878 (1992), Knox v. Wyoming, 959 F.2d 866, 867-68 (10th Cir. 1992).

State Post-Conviction Remedies

Each state has its own procedures for post-conviction collateral challenges to convictions and sentences. This bulletin will not attempt to present the specific information for all fifty states. The information below is provided to offer some understanding of the terms and legal principles that are generally common to the states. It will be necessary for you to research the particular laws and cases of the state in question, and based upon that research, to incorporate the information provided here with the particulars of the applicable state law.

The requirement that a person be in custody or serving probation or parole must be satisfied before seeking collateral relief. Once a person is no longer under a court order of custody, the conviction usually can only be addressed through expungment proceedings, pardon, or in rare circumstances, the reopening of the case by the prosecutor.

Most states also require a petitioner to exhaust his or her direct appeals and post-trial motions before accepting a collateral challenge for review. Once again, one must be sure to preserve issues for future review by raising them at the first opportunity.

There are various grounds upon which a prisoner may seek state collateral relief. If a claim for relief is based upon a claim that there was a federal constitutional or statutory violation or state constitutional violation, the denial of the right must be shown to have caused actual prejudice and seriously undermined the truth finding process.

Often constitutional claims are linked to allegations that the petitioner was prejudiced by ineffective representation by counsel. This approach is often helpful in avoiding a court finding that the issues were waived, if the reason they were not raised was due to counsel's ineffectiveness. Certain situations involve non-waivable issues, such as double jeopardy.

Many states have established and interpreted their post-conviction laws and case decisions similarly to the federal habeas corpus model and decisions. State

laws and constitutions may provide more individual protections and rights than their federal counterparts. It may be helpful to research the cases that have been decided under a particular theory of law and find out if the state has afforded greater protection than federal law provides.

Another phrase often found in collateral challenge cases is "harmless error." Harmless error means that even though the court or prosecution may have done something in violation of a person's rights, the result of the case would likely have been the same.

For example, Brady v. Maryland, 373 U.S. 83 (1963) held that the prosecution must turn over to the defense exculpatory evidence (evidence that points toward innocence) in its possession. Suppose that the petitioner's trial counsel knew there was such evidence and failed to seek it and the prosecution failed in its duty to turn it over. The state petitioner could claim his counsel was ineffective for his failure to secure this information, and that the failure resulted in a constitutional violation. When the court reviews this issue, it will make a determination about the quality of the evidence and what possible effect it may have had on the outcome of the trial.

For purposes of our example, let us assume the evidence the prosecution did not turn over was that one of three eyewitnesses required glasses and was not wearing them at the time he claimed to have seen the incident. This information could have been favorable to the defendant in challenging the reliability of the observations of that witness. However, the court can rule that even though the prosecution knew and should have provided the information to defense counsel and defense counsel should have pursued the information, the error was harmless. This conclusion would be based upon an evaluation of the evidence as a whole. The court may reason that the jury could have relied upon the testimony of the other two witnesses and reasonably come to a determination of guilt without the need of the testimony of the witness who had not been wearing glasses.

However, if the prosecution had information that all three eyewitnesses were actually at work in another part of town at the time of the incident, this information would be important to the truth determining process. Failure of defense counsel to seek and use this information would be ineffectiveness of counsel. The prosecution's failure to provide the discovery information would be a constitutional violation, obviously prejudicial, and not a harmless error, therefore requiring the court to order a remedy for the petitioner.

Strickland v. Washington, 466 U.S. 668 (1984) and the cases that have come after require counsel's actions or omissions to have been prejudicial and inadequate. If there is some reasonable explanation for counsel's failures, the mere fact that he or she were unsuccessful does not establish ineffectiveness. The ineffectiveness must have caused some serious prejudice or significantly contributed to a constitutional violation which undermined the truth finding process.

Check the state law, rules and court decisions for the following:

Eligibility –the custody requirements to seek relief.

Preservation of issues –the state law on preserving issues and the effect of previous litigation.

Jurisdiction – the court that must be petitioned first in collateral challenge matters and what must be done to get to that point.

Time for filing – how long and under what circumstances you have to file and any exceptions or special circumstances that would excuse failure to file on time.

Appointment of counsel – what motion is required and the provisions for indigent petitioners.

There are many possible grounds for seeking post-conviction relief. Some of these reasons and related cases about the legal principles are set forth below. This list is not meant to be all-inclusive, but rather to provide a starting point that can lead to research in the various digests, court reporter case books, etc.

Arrest, Search and Seizure:

United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L.Ed.2d 677 (1984).
Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357, 118 S. Ct. 2014, 141 L.Ed.2d 344 (1988).
Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983).
Knowles v. Iowa, 525 U.S. 113, 119 S. Ct. 484, 142 L.Ed.2d 492 (1998).

Police Interrogation and Confessions

Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L.Ed.2d 297 (1980).
Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394 (1990).
Withrow v. Williams, 507 U.S. 680, 113 S. Ct. 1745, 123 L.Ed.2d 407 (1993).
Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L.Ed.2d 364 (1986).

Duty to Disclose

Brady v. Maryland, 373 U.S. 83 (1963).
Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987).
Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970).

Guilty Pleas

North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).

Role of Legal Counsel

Strickland v. Washington, 466 U.S. 668 (1984).
Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988 (1986).
Wheat v.United States, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

Trial

White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).
Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).
Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973).
Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464 (1986).
Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993).

Blakely and Booker: Effect on Post-Conviction Relief

Recently, the Supreme Court has made a number of decisions affecting sentencing in criminal proceedings. In Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the Court held that "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." In 2004, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) expanded the ruling in Apprendi, which was limited to sentences which exceeded the statutory maximum. The Supreme Court ruled that "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings."

Most recently, United States v. Booker, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) reaffirmed Apprendi and decided the holding in Blakely was applicable to the Federal Sentencing Guidelines. According to the Supreme Court, the Sixth Amendment requires that a jury, not judge, find beyond a reasonable doubt any facts other than prior convictions which are "necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict." Furthermore, the Federal Sentencing Guidelines were no longer mandatory, but merely advisory, and should be considered along with other statutory sentencing factors. A Court of Appeals should review sentences by employing a "reasonableness" standard.

Since this bulletin focuses on post-conviction remedies, the following cases illustrate how Blakely and Booker have been analyzed by courts in that stage of proceedings.

Ineffective Counsel

Generally, if a petitioner's attorney did not raise a Blakely or Booker challenge during a sentencing that occurred prior to the Supreme Court's decisions in these two cases, the petitioner will not succeed in a claim of ineffective counsel.

Although the petitioner in Fuller v. United States, 398 F. 3d 644, 2005 U.S. App. LEXIS 2886 (7th Cir. 2005) did not argue that his trial counsel was ineffective for not anticipating and making Blakely and Booker sentencing challenges, the court noted that such an argument would not be tenable.

In Suveges v. United States, 2005 U.S. Dist. LEXIS 1359 (U.S.D.C. Me. 2005), the petitioner did claim that his attorney was ineffective for not raising a Sixth Amendment challenge. However, the court denied his claim because at the time of the petitioner's sentencing and direct appeal, circuit precedent foreclosed such a challenge. Therefore, under the governing law at the time, his counsel was not ineffective.

Amendments to § 2255 Motions

Although the court permitted an amendment to a § 2255 motion to include a Booker claim in United States v. Russell, 2005 U.S. Dist. LEXIS 1610 (E.D. Pa. 2005), it ultimately rejected the motion by deciding Booker was not retroactive on a collateral attack of a sentence.

The court also allowed the petitioner to file a supplemental brief in Collins v. United States, 2005 U.S. Dist. LEXIS 2850 (U.S.D.C. Conn. 2005). However, the court ruled that it would have imposed the same sentence under Booker.

In United States v. Tam, 2005 U.S. Dist. LEXIS 3154 (E.D. Pa. 2005), the court did not permit the amendment of a § 2255 motion to include a Blakely claim. It stated that such an amendment is not possible if the motion has already been decided on the merits.

Effect on Statute of Limitations

At least one circuit has ruled that since Booker is not considered retroactive for purposes of collateral actions, it does not extend a petitioner's statute of limitations regarding the filing of a § 2255 motion. In United States v. McClinton, 2005 U.S. Dist. LEXIS 1961 (W.D. Wis. 2005), the petitioner's motion was deemed untimely since it was filed seven years after his conviction became final. The court acknowledged that Booker did announce a new right, but since the 7th Circuit had already found it not to be retroactive, it did not

affect the petitioner's statute of limitations. See also United States v. Wood, 2005 U.S. Dist. LEXIS 2356 (W.D. Wis. 2005), United States v. Vicario, 2005 U.S. Dist. LEXIS 2368 (W.D. Wis. 2005), United States v. Vaughn, 2005 U.S. Dist. LEXIS 2355 (W.D. Wis. 2005).

Retroactivity of Blakely and Booker to First §2255 Motions

In the Supreme Court's Booker opinion, it made the decision retroactive to cases on direct appeal and those that were not yet finalized. January 12, 2005 is the pertinent date for purposes of finality of convictions when considering implications of Booker, according to McReynolds v. United States, 397 F. 3d 479 (7th Cir. 2005). The Supreme Court made no statement regarding retroactivity for cases on collateral review. United States v. Swinton, 333 F. 3d 481, 2003 U.S. App. LEXIS 12697 (3d Cir. 2003) stated that when a new right is recognized by the Supreme Court, lower federal courts may determine its retroactivity when raised in a first § 2255 motion. Lower courts have used different types of reasoning in determining whether or not Blakely and Booker should be retroactive to § 2255 motions.

Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) stated that a new procedural right was retroactive only if it established a "watershed rule" that implicated the fundamental fairness and accuracy of criminal proceedings. The court in Varela v. United States, 400 F. 3d 864, 2005 U.S. App. LEXIS 2768 (11th Cir. 2005) followed this reasoning, ruling that Schriro v. Summerlin was basically dispositive on the issue of retroactivity. The choice between a judge and jury as fact finder did not make a fundamental difference in the fairness or accuracy of the proceedings. In effect, the only change made by Blakely and Booker was the degree of flexibility judges had in applying sentencing guidelines. Therefore, no "watershed rule" was involved and Booker and Blakely were not retroactive. Rucker v. United States, 2005 U.S. Dist. LEXIS 2004 (U.S.D.C. Utah 2005) also determined Booker was not retroactive because it did not implicate fundamental fairness or accuracy; instead, it merely refined the constitutional understanding of how sentencing proceedings are to be conducted. The reasoning of Schriro v. Summerlin was cited by McReynolds v. United States, 397 F. 3d 479 (7th Cir. 2005) as well in deciding Booker was not retroactive.

However, in United States v. Siegelbaum, 359 F. Supp. 2d 1104, 2005 U.S. Dist. LEXIS 2087 (U.S.D.C. Or. 2005), the court used the same analysis, but came to a less definitive conclusion. In the lower court's analysis, it found that Booker established a new procedural rule, but that the "factfinding responsibility" element did not make the fundamental difference in the fairness or accuracy of the proceedings necessary to make Booker retroactive. However, the court suggested the requirement that sentence-enhancing facts be proven beyond a reasonable doubt may be enough of a fundamental difference. The

court did not resolve the retroactivity issue, but denied the petitioner's motion on other grounds.

Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) presented a slightly different standard regarding the issue of retroactivity. The Court stated that a new rule of criminal procedure could not be applied retroactively on collateral review, except where the new rule placed certain kinds of conduct beyond the power of the government to proscribe or required the observance of procedures that are "implicit in the concept of ordered liberty." United States v. Larry, 2005 U.S. Dist. LEXIS 853 (N.D. Tex. 2005) ruled that Booker involved a new rule of criminal procedure that did not fall under either Teague exception, and was therefore not retroactive to cases on collateral review.

Retroactivity of Blakely and Booker to Second §2255 Motions

Blakely and Booker have also been found to not apply retroactively to second or successive § 2255 motions. Under Tyler v. Cain, 533 U.S. 656, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001), in a second or successive § 2255 motion, a new rule can only be made retroactive if the Supreme Court explicitly holds it to be so. Therefore, because the Supreme Court did not explicitly state its position on retroactivity in such cases, Blakely and Booker could not be retroactive. In re Anderson, 396 F. 3d 1336 (11th Cir. 2005) is illustrative of this point. In this case, the court denied the petitioner's application for leave to file a second § 2255 motion in part because the Supreme Court had not made Booker retroactive in any explicit holdings. See also Bey v. United States, 399 F. 3d 1266, 2005 U.S. App. LEXIS 3451 (10th Cir. 2005).

Some court have used this reasoning in deciding first § 2255 motions. For example, the court in Nnebe v. United States, 2005 U.S. Dist. LEXIS 2732 (S.D. N.Y. 2005), through reliance on cases involving second § 2255 motions, ruled Blakely and Booker were not retroactive (unless the Supreme Court says so) as applied to first § 2255 motions.

Stipulation of Sentence-Enhancing Factors

Generally, if a defendant has stipulated to the facts used to enhance his sentence, he will not succeed in a Blakely or Booker challenge to his sentence. For example, in United States v. Tam, 2005 U.S. Dist. LEXIS 3154 (E.D. Pa. 2005), the petitioner had stipulated in his plea agreement the quantity of drugs on which his sentence was based. Therefore, the court found Blakely would probably not be applicable to his case. See also United States v. Gill, 2005 U.S. Dist. LEXIS 3099 (U.S.D.C. Kan. 2005). Similarly, the defendant in United States v. Reno, 2005 U.S. Dist. LEXIS 3100 (U.S.D.C. Kan. 2005) had pled guilty after Apprendi and stipulated to the facts used to increase his sentence, so

there was no Sixth Amendment violation. Furthermore, even if there was such a violation, Booker did not apply retroactively.

Other Case Law

The following cases also address the non-retroactive nature of Blakely and Booker under the same types of analysis as the cases previously described:

Humphress v. United States, 398 F. 3d 855, 2005 U.S. App. LEXIS 3274 (6th Cir. 2005)
Quirion v. United States, 2005 U.S. Dist. LEXIS 569 (U.S.D.C. Me. 2005)
United States v. Johnson, 353 F. Supp. 2d 656, U.S. Dist. LEXIS 1053 (E.D. Va. 2005)
Warren v. United States, 2005 U.S. Dist. LEXIS 989 (U.S.D.C. Conn. 2005)
United States v. Marple, 2005 U.S. Dist. LEXIS 2908 (U.S.D.C. Kan. 2005)
United States v. Aikens, 358 F. Supp. 2d 433, 2005 U.S. Dist. LEXIS 2928 (E.D. Pa. 2005)
Green v. United States, 397 F. 3d 101 (2d Cir. 2005)