The Law Office
of William Mallory Kent
1932 Perry Place
Jacksonville, Florida 32207-3443

904-398-8000
kent@williamkent.com
www.williamkent.com

Booker Retroactivity Cases
Updated as of 9 a.m. EST, February 8, 2005

1. *Green v. U.S.* (2nd Cir) - *Booker* does not authorize a second or belated 2255.

Donald G. Green, *pro se* and incarcerated, moves in this Court for authorization to file a second or successive petition pursuant to 28 U.S.C. §§ 2255, challenging his 1994 federal court sentences for convictions on numerous counts related to racketeering and narcotics trafficking. Green was sentenced under the Federal Sentencing Guidelines ("Guidelines") to four life terms plus 110 years, based in part on sentence-enhancing factors which were found by the district court. Green's application for leave to file a second or successive motion asserted that his sentence was unconstitutional under *Blakely v. Washington,* --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and further requested that this Court consider the constitutionality of his sentence in light of any new rules articulated in the then-pending decision in *United States v. Booker,* --- U.S. ----, 125 S.Ct. 738, --- L.Ed.2d ---- (2005).
Blakely held that the Sixth Amendment prohibits sentences greater than "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." --- U.S. at ----, 124 S.Ct. at 2537 (emphasis omitted). In *Booker,* the Supreme Court held that the system of enhancements established by the Guidelines violated the Sixth Amendment as construed in *Blakely. See* --- U.S. at ---- - ----, 125 S.Ct. at 749-50. To solve this problem, the Supreme Court excised the provision of the Sentencing Reform Act that had made the Guidelines mandatory, 18 U.S.C. §§ 3553(b)(1), rendering the Guidelines effectively advisory. *Booker,* --- U.S. at ---- - ----, 125 S.Ct. at 756-57. In light of these holdings, we construe Green's application to argue that his sentence, based on facts found by the district court and under the mandatory Guidelines regime, was unconstitutionally imposed.
Green's previous Section 2255 motion, which argued that his sentence was unconstitutional under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), was denied on the merits in May 2002. [FN1] Green may not raise a new claim in a second or successive Section 2255 motion unless he can show that his new claim is based on: (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court;" or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and "the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C.

§§ 2244(b)(2). Green concedes that his application does not rely on newly discovered evidence, and therefore relies on the argument that the so-called "new rules of law" articulated in *Blakely* and *Booker* justify his application to file a second or successive Section 2255 petition.
In *Tyler v. Cain* the Supreme Court considered whether new rules of constitutional law apply retroactively to second or successive petitions, and held that "a new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive." 533 U.S. 656, 663, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (internal quotation marks omitted). In *Carmona v. United States,* this Court considered whether the Supreme Court's *Blakely* decision applied retroactively to second or successive petitions. *Carmona,* 390 F.3d 200, 202 (2d Cir.2004). This Court held that, because the Supreme Court had not clearly made *Blakely* retroactively applicable to cases on collateral review, *Blakely* did not retroactively apply to Carmona's application to file a second or successive petition. *Carmona,* 390 F.3d at 202-03. In *Booker,* the Supreme Court noted that its holdings in that case apply to "all cases on direct review" but made no explicit statement of retroactivity to collateral cases. *Booker,* --- U.S. at ----, 125 S.Ct. at 769. Thus, neither *Booker* nor *Blakely* apply retroactively to Green's collateral challenge. Accordingly, Green's application to file a second or successive Section 2255 petition is denied.

Green v. U.S. 2005 WL 237204, *1 (2nd Cir.) (C.A.2,2005)

2. *McReynolds v. U.S.* (7th Cir.) - *Booker* not Retroactive for Initial 2255 filed After January 12, 2005.

Marlon McReynolds, Jamie Thomas, and David Bennett were among the many persons convicted of participating in a large-scale cocaine-distribution enterprise. See *United States v. Dumes,* 313 F.3d 372 (7th Cir.2002). After the judgments became final, they sought collateral relief under 28 U.S.C. §§ 2255. They contended, among other things, that their sentences are invalid because the juries did not determine, beyond a reasonable doubt, the precise amounts of cocaine base (crack) and cocaine hydrochloride that led to their sentencing ranges. The district judge rejected these and related arguments, concluding that the sixth amendment's jury-trial right, as understood in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), did not require the jury to determine any issue other than the thresholds that set the statutory maximum penalty--and, as the jury found that these three conspired to distribute more than 50 grams of crack, a quantity that exposed each to life imprisonment, see 21 U.S.C. §§ 841(b)(1)(A)(iii), the court held that the sentences are lawful. Like the trial itself, the district court's decision followed this circuit's authority. See *United States v. Nance,* 236 F.3d 820, 824-25 (7th Cir.2000); *United States v. Smith,* 223 F.3d 554, 563-66 (7th Cir.2000). But in *United States v. Booker,* No. 04-104 (U.S. Jan. 12, 2005), the Supreme Court held that defendants have a right to a jury trial on any disputed factual subject that increases the maximum punishment, and that the federal Sentencing Guidelines come within this rule to the extent that their operation is mandatory. This means that the conditions for a certificate of appealability under 28 U.S.C. §§ 2253(c)(2) have been satisfied, as each appellant "has made a substantial showing of the denial of a constitutional right." The court therefore issues certificates of appealability on the question whether the proceedings violated the sixth amendment's right to jury trial. Because this is a collateral attack, however, we must consider the antecedent question whether the rights recognized by *Booker* apply retroactively on collateral review, and our certificates of appealability include this issue as well. See *Slack v. McDaniel,* 529 U.S. 473, 483-85, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Although the Supreme Court did not address the retroactivity question in *Booker,* its decision in *Schriro v. Summerlin,* --- U.S. ----, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), is all but conclusive on the point. *Summerlin* held that *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)--which, like *Booker,* applied *Apprendi* 's principles to a particular subject--is not retroactive on collateral review.
[1] *Ring* held, in reliance on *Apprendi,* that a defendant is entitled to a jury trial on all aggravating factors that may lead to the imposition of capital punishment. In *Summerlin* the Court concluded that

Ring cannot be treated as a new substantive rule--which is to say, a rule that "alters the range of conduct or the class of persons that the law punishes." --- U.S. at ----, 124 S.Ct. at 2523. It observed that "*Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable [in a particular way], requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules". *Ibid.* That is no less true of *Booker*--or for that matter *Apprendi* itself. We held in *Curtis v. United States,* 294 F.3d 841, 843 (7th Cir.2002), that *Apprendi* does not apply retroactively on collateral review, because it "is concerned with the identity of the decisionmaker, and the quantum of evidence required for a sentence, rather than with what primary conduct is unlawful". That, too, is equally true of *Booker*. No conduct that was forbidden before *Booker* is permitted today; no maximum available sentence has been reduced.
*2
The remedial portion of *Booker* drives the point home. The Court held that the federal Sentencing Guidelines remain in force as written, although 18 U.S.C. §§ 3553(b)(1), which makes their application mandatory, no longer governs. District judges must continue to follow their approach *as guidelines,* with appellate review to determine whether that task has been carried out reasonably. No primary conduct has been made lawful, and none of the many factors that affect sentences under the Sentencing Guidelines has been declared invalid. Consequently *Booker,* like *Apprendi* and *Ring,* must be treated as a procedural decision for purposes of retroactivity analysis.
[2] A procedural decision may be applied retroactively if it establishes one of those rare "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Summerlin,* 124 S.Ct. at 252; *Teague v. Lane,* 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). The Court held in *DeStefano v. Woods,* 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), and reiterated in *Summerlin,* that the choice between judges and juries as factfinders does not make such a fundamental difference; to the contrary, the Court stated in *Summerlin,* it is not clear which is more accurate. --- U.S. at ----, 124 S.Ct. at 2525. What is more, *Booker* does not in the end move any decision from judge to jury, or change the burden of persuasion. The remedial portion of *Booker* held that decisions about sentencing factors will continue to be made by judges, on the preponderance of the evidence, an approach that comports with the sixth amendment so long as the guideline system has some flexibility in application. As a practical matter, then, petitioners' sentences would be determined in the same way if they were sentenced today; the only change would be the degree of flexibility judges would enjoy in applying the guideline system. That is not a "watershed" change that fundamentally improves the accuracy of the criminal process. See also *Curtis,* 294 F.3d at 843-44.
We conclude, then, that *Booker* does not apply retroactively to criminal cases that became final before its release on January 12, 2005. That date, rather than June 24, 2004, on which *Blakely v. Washington,* --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), came down, is the appropriate dividing line; *Blakely* reserved decision about the status of the federal Sentencing Guidelines, see *id.* at 2538 n. 9, so *Booker* itself represents the establishment of a new rule about the federal system. Petitioners' convictions and sentences became final well before *Booker* was issued, and its approach therefore does not govern these collateral proceedings.
Because this decision affects a substantial volume of post-*Booker* litigation, it was circulated before release to all active judges. See Circuit Rule 40(e). No judge favored a hearing en banc.
We have considered petitioners' remaining arguments and conclude that they do not present substantial constitutional issues supporting certificates of appealability.

McReynolds v. U.S. L 237642, *1 -2 (7th Cir. (C.A.7 (Ind.),2005)

3. *U.S. v. Leonard*, (10th Cir.) - Cannot use 3582 or 3742 to Review a Sentence Already Final on Appeal, Retroactivity of *Booker* Extends only To Cases Not Yet Final on Direct Appeal, Meaning Until The Time to File Certioarari on the Appeal

Has Expired or Certiorari Denied.

Defendant-Appellant Peirri B. Leonard files this appeal, his fourth in this court, asking us to review the district court's denial of his motion to review his sentence. Finding that we lack jurisdiction, we dismiss the appeal.

I. BACKGROUND

Leonard pleaded guilty to 20 counts of making, uttering, and possessing counterfeit securities in violation of 18 U.S.C. §§ 513(a) (2000). At sentencing, the district court departed upward one criminal history category based on Leonard's long history of prior convictions. Leonard appealed his enhanced sentence, and we affirmed. *United States v. Leonard,* No. 01-6398, 2002 WL 31516890 (10th Cir. Nov. 13, 2002), *cert denied,* 537 U.S. 1240 (2003). Leonard then appealed the district court's denial of his 28 U.S.C. §§ 2255 motion based on ineffective assistance of counsel, and we denied Leonard a certificate of appealability. *United States v.. Leonard,* No. 03-6234, 2003 WL 22977654 (10th Cir. Dec. 19, 2003). Leonard next filed a motion for authorization to file a second or successive §§ 2255 motion, alleging that his sentence was improperly enhanced under the sentencing guidelines. We denied Leonard's motion. *Leonard v. United States,* 383 F.3d 1146 (10th Cir.2004). Finally, Leonard filed a motion in the district court for review of his sentence under 18 U.S.C. §§§§ 3742(a) (2000) and 3582(b) (2000). On May 27, 2004, the district court denied the motion, and this appeal followed.

II. ANALYSIS

By its terms, §§ 3742(a) does not grant jurisdiction to a district court to review a final sentence. [FN1] *See United States v. Auman,* 8 F.3d 1268, 1271 (8th Cir.1993). This section merely permits a defendant to file a notice of appeal in the district court for review of a final sentence. Once a notice of appeal has been filed, the district court's only role is to certify the record to the court of appeals. 18 U.S.C. §§ 3742(d). [FN2] Similarly, §§ 3582(b) does not grant jurisdiction to a district court to review a sentence. This section merely defines "final judgment." [FN3] As the Eighth Circuit has noted, §§ 3582(b) "does not grant jurisdiction to a district court to do anything, let alone correct an illegal sentence." *Auman,* 8 F.3d at 1271. The district court therefore did not have jurisdiction to consider the merits of Leonard's motion for review of sentence under §§ 3742(a) or §§ 3582(b). It is well settled that "[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer,* 293 U.S. 237, 244 (1934). Thus, because the district court did not have jurisdiction to consider Leonard's motion, we likewise have no jurisdiction to entertain this appeal.

FN1. Section 3742(a) provides in pertinent part:

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; ...

FN2. Section 3742(d) provides:

(d) Record on review.--If a notice of appeal is filed in the district court

pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals--

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

FN3. Section 3582(b) provides in pertinent part:

(b) Effect of finality of judgment.--Notwithstanding the fact that a sentence to imprisonment can subsequently be--

* * *

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; ...

a judgment of conviction that includes a sentence constitutes a final judgment for all other purposes.

Nevertheless, Leonard urges us to treat his motion as a properly filed notice of appeal under §§ 3742(a). Although we construe pro se pleadings liberally, *Ledbetter v. City of Topeka,* 318 F.3d 1183, 1187 (10th Cir.2003), the circumstances of this case do not justify such treatment. Leonard has already challenged his sentence under §§ 3742(a) on direct appeal, and we denied him any relief. *Leonard,* 2002 WL 31516890. Leonard's arguments for relief in the instant appeal are largely identical to his arguments on direct appeal, and we decline to give Leonard another bite at the same apple.
*2
The only appreciable difference between Leonard's direct appeal and the instant appeal is his argument based on *Blakely v. Washington,* ---U.S.----, 159 L.Ed.2d 403, 124 S.Ct. 2531 (2004).

According to Leonard, the district court improperly enhanced his sentence based on his leadership role and prior convictions. New rules of criminal procedure, however, are applied retroactively only to cases pending on direct review or cases that are not yet final. *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987). Leonard exhausted his direct appeal and his case was "final" prior to the Supreme Court's decision in *Blakely. See id.,* 479 U.S. at 321 n. 6 (a case is final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). Thus, *Blakely,* as well as the Supreme Court's more recent decision in *United States v. Booker,* ---S.Ct.----, 2005 WL 50108 (Jan. 12, 2005), have no applicability to Leonard's sentence.

III. CONCLUSION

Because we find that the district court had no jurisdiction under 18 U.S.C. §§§§ 3742(a) or 3582(b), we DISMISS the appeal.

U.S. v. Leonard L 139183, *1 -2 (10th Cir. (C.A.10 (Okla.),2005)

4. *In re Anderson* (11th Cir.) *Booker* Not Retroactive for Successive or Belated 2255.

As for Anderson's *Blakely* and *Booker* argument, however, a lengthier analysis is required. In *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000), the Supreme Court held that "[o]ther 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." The Court recently revisited that rule in the context of Washington State's sentencing guideline scheme, clarifying 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.* In other words, 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." *Blakely,* 124 S.Ct. at 2531, 2537 (citations omitted). Applying these principles, the Court held that Blakely's sentence--which was enhanced under the state guidelines based on the sentencing court's additional finding by a preponderance of the evidence that Blakely committed his kidnaping offense with deliberate cruelty--violated the Sixth Amendment. *Id.* at 2534-38.
In *Booker,* the Supreme Court recently found "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue" in *Blakely. Booker,* 125 S.Ct. at ----, 2005 WL 50108 at *8 (opinion of Stevens, J.). Thus, the Court held that the mandatory nature of the federal guidelines rendered them incompatible with the Sixth Amendment's guarantee to the right to a jury trial. *Id.* 125 S.Ct. at ---- - ----, slip op. at 8-10. Extending its holding in *Blakely* to the Sentencing Guidelines, the Court explicitly reaffirmed its rationale first pronounced in *Apprendi* 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." *Id.* 125 S.Ct. at ----, 2005 WL 50108 *15.
*3
[3] For a new rule to be retroactive to cases on collateral review for purposes of authorizing a

second or successive §§ 2255 motion or 28 U.S.C. §§ 2254 petition, the Supreme Court itself must make the rule retroactive. *Tyler v. Cain,* 533 U.S. 656, 662-63, 121 S.Ct. 2478, 2482, 150 L.Ed.2d 632 (2001); *In re Joshua,* 224 F.3d 1281, 1283 (11th Cir.2000). As the Court explained in *Tyler,* considering a successive habeas petition, "the Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court." *Tyler,* 533 U.S. at 663, 121 S.Ct. at 2482 (alteration in original). Thus, it is not enough that this Court may retroactively apply a new rule of constitutional law or hold that a new rule of constitutional law satisfies the criteria for retroactive application set forth by the Supreme Court in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *See Joshua,* 224 F.3d at 1283. When the Supreme Court makes a rule retroactive for collateral-review purposes, it does so unequivocally, in the form of a holding. *See Tyler,* 533 U.S. at 663, 121 S.Ct. at 2482. Thus, the Court does not make a rule retroactive through *dictum* or through multiple holdings, unless those holdings "necessarily dictate retroactivity of the new rule." *Id.* at 663 n. 4, 666, 121 S.Ct. at 2482 n. 4, 2484.

[4] Regardless of whether *Booker* established a "new rule of constitutional law" within the meaning of §§§§ 2244(b)(2)(A) and 2255, the Supreme Court has not expressly declared *Booker* to be retroactive to cases on collateral review. *See Booker,* 125 S.Ct. at ----, 2005 WL 50108 at *29 (opinion of Breyer, J.) (expressly extending the holding "to all cases on direct review"). Put simply, *Booker* itself was decided in the context of a direct appeal, and the Supreme Court has not since applied it to a case on collateral review. In addition to the fact that the Supreme Court has not held that *Booker* is retroactive to cases on collateral review, we previously have held that the Supreme Court has not made *Blakely* retroactive to cases on collateral review for purposes of the rules governing the filing of successive habeas actions. *See In re Dean,* 375 F.3d 1287, 1290 (11th Cir.2004). Indeed, as we noted in *Dean,* the Supreme Court has indicated the very opposite: [T]he Supreme Court has strongly implied that *Blakely* is not to be applied retroactively. The same day the Supreme Court decided *Blakely,* the Court also issued its decision in *Schriro v. Summerlin,* --- U.S. ----, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), holding that *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which extended application of *Apprendi* to facts increasing a defendant's sentence from life imprisonment to death, is not retroactive to cases on collateral review. *Summerlin,* 124 S.Ct. at 2526; *see also Blakely,* 124 S.Ct. at 2548-49 (O'Connor, J., dissenting) (recognizing the Court's holding in *Summerlin* "that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review"); *see also McCoy v. United States,* 266 F.3d 1245, 1256-58 (11th Cir.2001) (holding that *Apprendi* is not retroactive to cases on collateral review); *In re Joshua,* 224 F.3d at 1283 (denying the retroactive application of *Apprendi* to permit second or successive habeas petitions). Because *Blakely,* like *Ring,* is based on an extension of *Apprendi,* Dean cannot show that the Supreme Court has made that decision retroactive to cases already final on direct review. Accordingly, Dean's proposed claim fails to satisfy the statutory criteria. 28 U.S.C. §§ 2255.

*4

Id. It follows that because *Booker,* like *Blakely* and *Ring,* is based on an extension of *Apprendi,* Anderson cannot show that the Supreme Court has made that decision retroactive to cases already *final* on direct review.

Jerry J. Anderson has failed to make a *prima facie* showing of the existence of either of the grounds set forth in 28 U.S.C. §§ 2255, and accordingly, his application for leave to file a second or successive motion is hereby DENIED.

FN1. At the time Anderson filed his application for leave to file a successive motion to vacate, the Supreme Court had not yet issued its opinion in *Booker.* In fact, Anderson cited to the *Booker* lower court

opinions. The anticipatory nature of Anderson's argument, however, does not preclude us from considering and rejecting his claim based on his failure to present a new rule of constitutional law made retroactive by the Supreme Court to cases of collateral review, as we discuss *infra.*

In re Anderson L 123923, *2 -4 (C.A.11,2005)

5. *U.S. v. Davis* (6th Cir.) *Booker* Error Requires Remand for Resentencing Without a Trial Court Objection, *Booker* Applies to Case on Direct Appeal, Impliedly *Booker* Error is Plain Error.

Defendant also challenges the amount of monetary loss the district court concluded was attributable to his conduct. [FN7] This issue is squarely governed by the Supreme Court's decisions in *Booker* and *Blakely.* It is now settled law that the Sixth Amendment forbids a judge from increasing a defendant's sentence based on facts not admitted by the defendant or proven to a jury beyond a reasonable doubt. *Booker,* 543 U.S. at ---- (slip op. at 3), --- U.S. ---- at ----, 125 S.Ct. 738, --- L.Ed.2d ---- at -–-, 2005 WL 50108 at *5 (Stevens, J.); *Blakely,* 542 U.S. at ----, 124 S.Ct. at 2537. In other words, "[w]hen 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 and the judge exceeds his proper authority." *Blakely,* 542 U.S. at ----, 124 S.Ct. at 2537 (internal citations omitted).
In the case *sub judice,* the amount of the loss was not argued to the jury, which merely found Defendant guilty of bank fraud under 18 U.S.C. §§ 1344. The amount of loss is not an element of the offense, but rather is relevant to Defendant's sentence under the Guidelines. At the sentencing hearing before the district judge, Defendant argued that the amount of loss was as little as $161,000.00, or possibly no loss at all; conversely, the government argued that the amount of loss was $834,835.24. The district court judge rejected both the Defendant's and the government's calculations, instead performing an independent review of the evidence and concluding that the amount of loss attributable to Defendant's conduct was $914,478.68. Under the 2002 Guidelines applied by the district court, an amount of loss between $400,000.00 and $1,000,000.00 adds 14 levels to the base offense level, and in Defendant's case yielded a sentencing range of 33-41 months imprisonment. U.S.S.G. §§ 2B1.1(b)(1)(H) (2002). By contrast, had the district court determined that the amount of loss was the $161,000.00 figure raised by Defendant, only 10 levels would have been added to Defendant's base offense level, yielding a sentencing range of 21-27 months imprisonment. §§ 2B1.1(b)(1)(F). Alternatively, had the court found no loss at all, nothing would have been added to Defendant's base offense level, and the sentencing range would have been 0-6 months imprisonment. §§ 2B1.1(b)(1)(A). [FN8] We note the variation in Defendant's possible sentences in order to demonstrate that the district judge's calculation of the amount of loss clearly determined the length of Defendant's sentence under the Guidelines. Under *Booker,* this type of independent fact-finding by the district judge, which enhances Defendant's sentence beyond the facts established by the jury verdict, clearly violates the Sixth Amendment and requires us to remand for resentencing. *Booker,* 543 U.S. at ---- (slip op. at 20), --- U.S. ---- at ----, 125 S.Ct. 738, --- L.Ed.2d ---- at -–-, 2005 WL 50108 at *15 (Breyer, J.).
Our analysis of *Booker* rejects the notion that the maximum sentence authorized by §§ 1344, 30 years, is also the maximum sentence authorized by the jury verdict. Our conclusion is compelled

by the Supreme Court's own application of its holding to the facts in *Booker*. Booker was convicted by a jury of possessing at least 50 grams of crack cocaine, based upon evidence that he had 92.5 grams of crack in a duffel bag. *Id.,* 543 U.S. at ---- (slip op. at 10), --- U.S. ---- at ----, 125 S.Ct. 738, --- L.Ed.2d ---- at ----, 2005 WL 50108 at *9 (Stevens, J.). Had the district court calculated Booker's sentence using these amounts, the applicable Guideline range would have been 210-262 months. *Id.* However, the district judge engaged in independent fact-finding, concluded that Booker possessed an additional 566 grams of crack, and sentenced him to 360 months. *Id.* The additional quantity of crack was never argued to the jury, thus the Court concluded that "just as in *Blakely,* 'the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.' " *Id.,* 543 U.S. at ---- (slip op. at 11), --- U.S. ---- at ----, 125 S.Ct. 738, --- L.Ed.2d ---- at ----, 2005 WL 50108 at *10 (quoting *Blakely,* 542 U.S. at ----, 124 S.Ct. at 2538). The Court makes no reference to the maximum sentence authorized by the statute under which Booker was convicted, 21 U.S.C. §§ 841(b)(1)(A)(iii), which incidentally is life imprisonment. Rather, the Court's entire analysis refers to the maximum sentence authorized by the facts proven to the jury under the Guidelines: 262 months. We are therefore persuaded that our analysis of Defendant's sentence under the Guideline ranges, and not the statutory maximum of 30 years, is correct. Just as Booker's 360 month sentence, based on independent judicial fact-finding, violated the Sixth Amendment, so too did Defendant's 33 month sentence, based on the district judge's independent calculation of the amount of loss. The case therefore must be remanded to the district court for resentencing.

III. CONCLUSION

*10
For the reasons set forth above, we AFFIRM Defendant's conviction under 18 U.S.C. §§ 1344, but VACATE Defendant's sentence and REMAND this case for resentencing in a manner consistent with this opinion.

U.S. v. Davis L 130154, *9 -10 (6th Cir. (C.A.6 (Ohio),2005)

6. *U.S. v. Levy* (11th Cir.) 11th Circuit (Alone Among Circuits) Will Not Allow Raising *Booker* Claims Even on Direct Appeal if not Raised in the Initial Brief.

After *Blakely,* Levy filed a petition for rehearing in this Court and, for the first time, argued that he had a right to a jury trial regarding his federal sentencing enhancements. Although *Blakely* did not involve the federal sentencing guidelines, Levy argued that "the reasoning" of *Apprendi, Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Blakely* clearly lead to the conclusion that the federal sentencing guidelines are constitutionally infirm (hereinafter referred to as Levy's "*Blakely*-type" claim).
This Court properly denied Levy's petition for rehearing based on this Court's long-standing rule that issues raised for the first time in a petition for rehearing and not raised in an appellant's initial brief will not be considered. *See Levy,* 379 F.3d at 1242-45 (collecting cases). In denying Levy's petition for rehearing, this Court noted that
our practice has been longstanding. As we have explained, the rule requiring that issues be raised in opening briefs "serves valuable purposes, as do all of the procedural default rules, which is why we regularly apply them. *See generally Presnell v. Kemp,* 835 F.2d 1567, 1573-74 (11th Cir.1988)." *United States v. Ardley,* 273 F.3d 991, 991 (11th Cir.2001) (*en banc*). Importantly, this rule applies neutrally to all appellants, whether the government or the defendant.
Levy, 379 F.3d at 1244.

The dissent concedes that: (1) the *Levy* panel was bound by circuit precedent, *see United States v. Ardley,* 242 F.3d 989, 990 (11th Cir.2001) (collecting cases); and (2) this Court recently denied *en banc* review of the very question in this case; that is, whether the rules concerning retroactivity are subject to this Court's procedural rules. *See United States v. Ardley,* 273 F.3d 991 (11th Cir.2001) (denying rehearing *en banc* and explaining why Defendant's *Apprendi* claim was procedurally barred) (Carnes, J., concurring), *cert. denied, Ardley v. United States,* 535 U.S. 979, 122 S.Ct. 1457, 152 L.Ed.2d 397 (2002).
As in *Ardley,* there are two rules at issue in Levy's case: (1) the rule that *1329
Supreme Court decisions are to be retroactively applied to cases on direct review; and (2) the procedural rule that entirely new constitutional issues will not be considered for the first time by this Court in a petition for rehearing. The two rules in this case are equally important, but play separate roles and answer different questions. As we explained in *Ardley,*
[r]etroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway.
Ardley, 273 F.3d at 992 (Carnes, J., concurring). Many of the dissent's arguments in this case are answered in *Ardley,* 273 F.3d at 991-93. In particular, *Ardley* already explained why the dissent improperly conflates these two rules. *Id. Ardley* also articulates why, if the dissent's position was adopted, no type of procedural bar could be adopted on direct appeal. *Id.* at 992.
The dissent's main focus now is that under *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), this Court *is required* to allow Defendant Levy to raise, for the first time, a *Blakely*-type issue in a petition for rehearing *after* this Court has issued an opinion affirming his conviction and sentence. The dissent would have retroactivity rules trump and eliminate any procedural default rule on direct appeal. Essentially, the dissent's rule would be that a new Supreme Court decision applies retroactively *per se*--even if the defendant has never raised or preserved the constitutional issue and this Court has already affirmed the defendant's conviction and sentence--as long as the defendant is still in some phase of the direct appeal process. Nothing in *Griffith,* nor any other Supreme Court decision, requires this result. In fact, Supreme Court precedent indicates that the rules of retroactivity *are* subject to established principles of procedural default, waiver, and the like. Indeed, as outlined below, the defendant in *Griffith* timely preserved the constitutional error at issue during his trial and on appeal. The dissent dismisses the fact that the defendants in *Griffith* preserved the constitutional issue. That fact is important, however. We thus first examine *Griffith* in detail, and then other arguments in the dissent.

U.S. v. Levy 391 F.3d 1327, *1328 -1329 (C.A.11 (Fla.),2004)

7. *Tuttamore v. U.S.* (N.Dist.Ohio) - *Booker* Not Retroactive for Initial 2255.

To the extent that petitioner relies on *Booker,* he cannot do prevail, because the decision in *Booker* is not retroactive for purposes of §§ 2255 collateral attacks. *See, e.g., In re Anderson,* --- F.3d ----, ---, 2005 WL 123923, *3 (11th Cir.2005); *Gerrish v. U.S.,* --- F.Supp.2d ----, 2005 WL 159642 (D.Me.2005); *Warren v. U.S.,* 2005 WL 165385, *10 (D.Conn.2005).

Tuttamore v. U.S. 2005 WL 234368, *1 (N.D.Ohio) (N.D.Ohio,2005)

8. *Lindsey v. Jeter* (N.Dist.Texas) - 2255 Is Not an Inadequate Remedy to Permit Use of 2241 to Raise *Booker* Claim Just Because Defendant is Barred from Filing a Successive or Belated 2255. [This is one of several such cases to date, but this is

the only case I have summarized.]

The threshold question is whether Lindsey's claim is properly raised in a §§ 2241 habeas petition. Typically, §§ 2241 is used to challenge the manner in which a sentence is executed. *See Warren v. Miles,* 230 F.3d 688, 694 (5th Cir.2000). Section 2255, on the other hand, is the primary means under which a federal prisoner may collaterally attack the legality of his conviction or sentence. *See Cox v. Warden, Fed. Det. Ctr.,* 911 F.2d 1111, 1113 (5th Cir.1990). However, §§ 2241 may be used by a federal prisoner to challenge the legality of his conviction or sentence if he can satisfy the mandates of the so-called §§ 2255 "savings clause." *See Reyes-Requena v. United States,* 243 F.3d 893, 901 (5th Cir.2001). Section 2255 provides that a prisoner may file a writ of habeas corpus if a remedy by §§ 2255 motion is "inadequate or ineffective to test the legality of his detention." *See* 28 U.S.C. §§ 2255. To establish that a §§ 2255 motion is inadequate or ineffective, the prisoner must show that: (1) his claim is based on a retroactively applicable Supreme Court decision which establishes that he may have been convicted of a nonexistent offense, and (2) his claim was foreclosed by circuit law at the time when the claim should have been raised in his trial, appeal, or first §§ 2255 motion. *Reyes-Requena,* 243 F.3d at 904. [FN1] The petitioner bears the burden of demonstrating that the §§ 2255 remedy is inadequate or ineffective. *Jeffers v. Chandler,* 253 F.3d 827, 830 (5th Cir.2001); *Pack v. Yusuff,* 218 F.3d 448, 452 (5th Cir.2000). A prior unsuccessful §§ 2255 motion, or the inability to meet the statute's second or successive requirement, does not make §§ 2255 inadequate or ineffective. *Jeffers,* 253 F.3d at 830; *Toliver v. Dobre,* 211 F.3d 876, 878 (5th Cir.2000).

FN1. Lindsey contends it is erroneous for this court to rely on *Reyes-Requena,* a judicially created precedent, in deciding the issue. (Pet'r Reply at 2-3.) A federal district court, however, is bound by the precedent set forth by the higher courts. *See Gacy v. Welborn,* 994 F.2d 305, 309 (7th Cir.1993).

*2
Lindsey has not provided any valid reason why the §§ 2255's remedy is either inadequate or ineffective. He contends that he is entitled to seek §§ 2241 relief under the §§ 2255 savings clause based on the subsequent change in the law as articulated in *Blakely* and *Booker,* and made retroactive to his case, because he is not "guilty" of the sentence imposed. (Pet'r Reply at 3-7.) Although the Supreme Court's decisions in *Blakely* and *Booker* had not yet been decided at the time of Lindsey's trial, appeal, and/or prior §§ 2255 motions, Lindsey's claim does not implicate his conviction for a substantive offense. Nor has the Supreme Court expressly declared *Blakely* or *Booker* to be retroactive to cases on collateral review. *See Booker,* --- U.S. at ----, 125 S.Ct. at 769 (Op. by Breyer, J.) (expressly extending holding "to all cases on direct review"); *Schriro v. Summerlin,* --- U.S. ----, ----, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004) (holding *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which extended application of *Apprendi* to facts increasing a defendant's sentence from life imprisonment to death, is not retroactive to cases on collateral review). The fact that Lindsey may be precluded from raising his claim in a second or successive §§ 2255 motion does not make that remedy "inadequate or ineffective." *See Jeffers,* 253 F.3d at 830. Under these circumstances, Lindsey is precluded from challenging the legality of his sentence under §§ 2241.

II. RECOMMENDATION

Because Lindsey has not made the showing required to invoke the savings clause of §§ 2255 as to the claim presented in this habeas corpus proceeding, it is recommended that Lindsey's petition for writ of habeas corpus under §§ 2241 be denied.

Lindsey v. Jeter L 233799, *1 -2 (N.D.Tex.,2005)

9. *U.S. v. Williams* (E.Dist.Penn.) - *Booker* Not Retroactive for Initial 2255.

Our Court of Appeals explained in *Swinton* that the newly recognized constitutional right under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) was not retroactive. In that case, the Supreme Court ruled that, other than a prior conviction, any sentencing enhancement beyond the statutory maximum must be based upon facts found by a jury beyond a reasonable doubt. *Booker* is similar to *Apprendi.* In *Booker,* Justice Stevens' opinion for the Court ended with the following:
Accordingly we reaffirm our holding in *Apprendi:* 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.
Booker, --- U.S. at ----, 125 S.Ct. at 756.
We can see no reason why the analysis in *Swinton* concerning *Apprendi* should not apply equally to *Booker* and compel the conclusion that *Booker* is likewise not retroactive. Since, in our view, *Booker* is not retroactive on collateral attack, petitioner has not met the requirements of subsection (3) of the 6th paragraph of §§ 2255.
Accordingly, the motion of petitioner under 28 U.S.C. §§ 2255 will be denied.

ORDER

AND NOW, this 31st day of January, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:
(1) the motion of Nathaniel Williams for relief under 28 U.S.C. §§ 2255 is DENIED; and
(2) no certificate of appealability is issued.

U.S. v. Williams 2005 WL 240939, *2 (E.D.Pa.) (E.D.Pa.,2005)

10. *Suveges v. U.S.* (D.Maine) - Interesting Case in Which Judge Assumes, Without Deciding, that a Prior Resentencing under a Successful Prior 2255 Restarts the One Year Clock, but Denies *Booker* Claim finding *Booker* Not Retroactive for a First 2255 and Rejecting Argument that Trial Court Lawyer Was Ineffective for Not Making a *Booker* Claim at Sentencing pre-*Blakely*.

Robert Suveges has filed a motion pursuant to 28 U.S.C. §§ 2255 seeking to set aside his federal sentence. He asserts that two sentencing determinations made by this Court violated his Sixth

Amendment right to a jury trial and his attorney was ineffective for not advocating accordingly. Suveges has already filed one 28 U.S.C. §§ 2255 motion which resulted in his sentence being reduced from a 360-month term to a 180-month term. Suveges was spurred into §§ 2255 action again by the issuance of *United States v. Booker,* __ U.S. __, 2005 WL 50108 (Jan. 12, 2005) which held that the Sixth Amendment principles of *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Blakely v. Washington,* 542 U.S. __, 124 S.Ct. 2531 (2004) applied to the United States Sentencing Guidelines. Assuming, without deciding, that I could consider this as Suveges's first 28 U.S.C. §§ 2255 motion in light of his resentencing after his previous §§ 2255 motion, he is not entitled to any §§ 2255 relief based on *Booker.*

Suveges's oneyear to file a timely 28 U.S.C. §§ 2255 vis-àà-vis his resentencing judgment has unquestionably expired. *See* 28 U.S.C. §§ 2255 ¶¶ 6(1). Accordingly, with respect to the *Booker*-based challenge Suveges's presents, his only §§ 2255 ¶¶ 6 port in the storm would be subsection (3) which would give Suveges a year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

I have already addressed a similarly postured §§ 2255 *Booker* claim in *Stevens v. United States,* Civ. No. 05-10-B-S-, 2005 WL 102958, 1 (D.Me. Jan 18, 2005)(concluding that a District Court could make the initial ¶¶ 6(3) retroactivity determination on an untimely first petition). And, as I explained in *Stevens,* in *Quirion v. United States,* I concluded that *Booker* would not apply retroactively to timely-filed 28 U.S.C. §§ 2255 motions:

On the same day that *Blakely* was handed down, the United States Supreme Court concluded that one of *Blakely'* s direct ancestors, *Ring v. Arizona,* 536 U.S. 584 (2002)--which applied the principle of *Apprendi* to death sentences imposed on the basis of aggravating factors--was not to be applied retroactively to cases once they were final on direct review. *See Schriro v. Summerlin,* ___ U.S. ___, 124 S.Ct. 2519, 2526 (2004) (*"Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). In the wake of *Blakely,* most courts that considered the question have concluded that *Summerlin* answered the retroactivity question in the negative vis-a-vis *Blakely* grounds pressed in timely 28 U.S.C. §§ 2255 motions. *See, e.g., Burrell v. United States,* 384 F.3d 22, 26 n. 5 (2d Cir.2004) (observing this proposition in affirming the District Court's conclusion that the movant was not entitled to a certificate of appealability on the question of whether *Apprendi* applied retroactively); *Lilly v. United States,* 342 F.Supp.2d 532, 537 (W.D.Va.2004) ("In *Summerlin,* the Court found that *Ring v. Arizona,* 536 U.S. 584 (2002), a case that extended *Apprendi* to aggravating factors in capital cases, was a new procedural rule and was not retroactive. A similar analysis dictates that Blakely announced a new procedural rule and is similarly non-retroactive.") (citation omitted); *accord Orchard v. United States,* 332 F. Supp, 23 275 (D.Me.2004); *see also cf. In re Dean,* 375 F.3d 1287, 1290 (11th Cir.2004) ("Because *Blakely,* like *Ring,* is based on an extension of *Apprendi,* Dean cannot show that the Supreme Court has made that decision retroactive to cases already final on direct review. Accordingly, Dean's proposed claim fails to satisfy the statutory criteria [for filing a second or successive §§ 2255 motion].").

*2

Civ. No. 05-06-B-W, 2005 WL 83832, *3 (D.Me. Jan. 14, 2005).

Since the issuance of *Quirion* and *Stevens,* the Eleventh Circuit Court of Appeals has issued a decision on a second and successive petition that lends support for my conclusion, *In re Anderson,* __ F.3d. __, __, 2005 WL 123923, *2-4 (11th Cir Jan. 21, 2005), and District Court Judge Hornby, in this District, denied a certificate of appealability to two 28 U.S.C. §§ 2255 movants in *Gerrish v. United States,* Civ. Nos. 04-153-P-H & 04-154-P-H, 2005 WL 159642, *1 (D.Me. Jan. 25, 2005), concluding that *Blakely* and *Booker* are not applicable to cases that were not on direct appeal when they were decided.

The only new twist that Suveges's motion presents is his claim that his attorney was ineffective for not raising the *Booker*-esque Sixth Amendment challenge during his sentencings and on direct appeal. However, in an unpublished decision, the First Circuit Court of Appeals rejected an ineffective assistance argument regarding counsel's failure to raise a *Blakely* challenge to his Sentencing Guideline driven sentence on the ground that such a challenge was foreclosed by

circuit precedent. *Campbell v. United States,* No. 02-2378, 2004 WL 1888604, *3 (1st Cir. Aug. 25, 2004) (quoting *United States v. Campbell,* 268 F.3d 1, 7, n. 7 (1st Cir.2001)). While the inquiry might be a bit more difficult if Suveges's attorney failed to raise such a challenge in the intermission between *Blakely* and *Booker,* counsel's advocacy in Suveges's case occurred long before the dawn of *Apprendi* and was certainly not ineffective under the then governing law. Accordingly, I recommend that the Court DENY Suveges's late and latest 28 U.S.C. §§ 2255 motion.

Suveges v. U.S. L 226221, *1 -2 (D.Me.,2005)

11. *Siegelbaum v. U.S.* (Dist. Oregon) - Judge Assumes for Argument Sake That *Booker* is Retroactive for 2255, But Denies Relief Finding that *Booker* Relief is Only Available for Persons Who Contested the Facts That Determined the Guidelines.

B. *Whether Blakely and Booker Apply Retroactively to Cases on Collateral Review*
The Supreme Court has not yet stated whether the rule announced in *Blakely* and *Booker* applies retroactively to cases on collateral review. The lower-court decisions that the Court was reviewing were direct appeals. Discussion of retroactivity would have been gratuitous, and was not briefed. Consequently, no inference can be drawn from the Court's failure to discuss that issue.
In ascertaining whether *Booker* applies retroactively, the first step is to clarify what rule the Court announced, a process complicated here by the unusual alignment of justices. The *remedy* endorsed by five members of the Court (which made the Sentencing Guidelines advisory) must not be confused with the constitutional *violation* at issue. The constitutional violation was the enhancement of a sentence, above the "statutory maximum," based upon facts neither admitted by the defendant nor found by a jury to be true beyond a reasonable doubt. *Booker,* ___ at _____.
The second step in analyzing retroactivity is to determine whether *Blakely* and *Booker* announce a "new" rule. A "case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane,* 489 U.S. 288, 301 (1989) (plurality opinion). Siegelbaum's conviction was final in December 2002, after the decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Although *Blakely* and *Booker* are extensions of *Apprendi,* the latter's application to the federal sentencing guidelines was not "dictated" by *Apprendi.* Prior to *Blakely,* every Circuit that considered the question concluded that *Apprendi* did not apply to the federal sentencing guidelines. *See, e.g., United States v. Hernandez-Guardado,* 228 F.3d 1017, 1026-27 (9th Cir.2000).
Whether *Booker* was dictated by *Blakely* presents a closer question, but it is one I need not decide today. Siegelbaum's conviction became final before either *Booker* or *Blakely* was announced. Even if *Booker* were dictated by *Blakely,* it would still constitute a new rule so far as Siegelbaum is concerned.
The next step is to decide whether the new rule is "substantive" or "procedural." A rule is substantive, for the present purpose, if it alters the range of conduct or the class of persons the law punishes. Rules that regulate only the manner of determining the defendant's culpability are procedural. *Schriro v. Summerlin,* ___ U.S. ___, 124 S.Ct. 2519, 2523 (2004). Applying this definition, the rule announced in *Blakely* and *Booker* is procedural.
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. *Id.* at 2522-23 (internal citations and punctuation omitted). New rules of procedure generally are not retroactive. 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." *Id* . at 2523 (citations omitted). That a new procedural rule is "fundamental" in some abstract sense is not enough; the rule must be one "without which the likelihood of an accurate conviction is seriously diminished." *Id.* (citations omitted).
*3
The government asserts that retroactive application of *Blakely/Booker* is foreclosed by *Schiro.* That is only partly true. *Schiro* held that a rule "requiring that a jury rather than a judge find the essential facts bearing on punishment" in capital cases would not be applied retroactively to cases on collateral review. *Id.* at 2523-26. The Court was not persuaded that accuracy is so seriously diminished by judicial factfinding as to produce an impermissibly large risk of injustice. *Id. Schiro* addressed only the allocation of factfinding responsibility between the judge and jury. There is a second component to *Blakely/Booker* that *Schiro* did not address, namely, that facts used to enhance a sentence, if not admitted, must be proven beyond a reasonable doubt rather than by a preponderance of the evidence.
The Supreme Court has acknowledged that the standard of proof can significantly impact factfinding accuracy and society's confidence in the result. *In re Winship,* 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error") and at 364 ("the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law"); *Ivan V. v. City of New York,* 407 U.S. 203, 205 (1972) (purpose of reasonable doubt standard is "to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and *Winship* is thus to be given complete retroactive effect"); *Hankerson v. North Carolina,* 432 U.S. 233 (1977) (giving retroactive effect to rule requiring proof of all elements of crime beyond a reasonable doubt and voiding presumptions that shift burden of proof to defendant).
Winship, Ivan K., and *Hankerson* pre-date the retroactivity standard announced in *Teague.* Those decisions also concerned the validity of the underlying conviction, rather than a sentence enhancement. On the other hand, at least five Justices have said that sentence enhancements are of sufficient importance to warrant application of the reasonable doubt standard in some instances. *See Apprendi, Blakely,* and *Booker, supra.* Given this history, I cannot exclude the possibility that the Court might apply *Blakely/Booker* retroactively in some situations.
The government also argues that retroactivity is controlled by *United States v. Sanchez-Cervantes,* 282 F.3d 664, 671 (9th Cir.2002). I disagree. *Sanchez-Cervantes* held that *Apprendi* was not entitled to retroactive application. In reaching that conclusion, the panel relied upon a narrow interpretation of *Apprendi* that has now been repudiated in *Blakely* and *Booker.* As the concurring opinion by Judge Hug observed, if the panel's understanding of *Apprendi* was mistaken, then "the *Teague* analysis would be quite different." *Sanchez-Cevantes,* 282 F.3d at 673.
*4
The bottom line is that existing precedent does not definitively answer whether the rule announced in *Blakely/Booker* applies retroactively. Nevertheless, existing precedent does provide sufficient guidance to resolve Siegelbaum's motion.
C. *Siegelbaum is Not Entitled to Relief*
Under the standards first articulated in *Teague,* the only apparent justification for retroactive application of *Blakely/Booker* would be to redress potential miscarriages of justice resulting from an inaccurate fact-finding procedure.
Even assuming (but *not* deciding) that the rule announced in *Blakley/Booker* applies retroactively, relief would be limited to persons presently serving a sentence that was enhanced on the basis of *contested facts* that were not found to be true, beyond a reasonable doubt, nor admitted by the defendant. Only if a defendant actually disputed the facts that resulted in the sentence enhancement, and the court decided the matter against him, can the defendant show that he may have been prejudiced by application of the wrong standard of proof. [FN1] To vacate a sentence enhancement on the basis of *Blakely/Booker,* when a defendant never disputed the facts upon which that enhancement was premised, would confer an unwarranted windfall. [FN2]

FN1. Even then, a defendant would not necessarily be entitled to a reduced sentence. Arguably, he is entitled only to have the sentencing facts adjudicated under the proper standard of proof. Such questions must await another day, as I resolve Siegelbaum's §§ 2255 motion on other grounds.

FN2. This discussion presumes that a defendant had an opportunity to contest the sentencing facts, if he wished to do so, as was the practice under the federal sentencing guidelines. I do not consider how *Blakely/Booker* might apply to the various state court sentencing schemes, which may operate differently than the federal model.

Applying the foregoing standards, Siegelbaum is not entitled to relief. The 58-count indictment accused Siegelbaum of leading a bank fraud scheme. Eight other persons were indicted with Siegelbaum. All eventually pled guilty.

Siegelbaum agreed to plead guilty to a single count of bank fraud, involving an $8,900 check. The plea agreement makes clear that Siegelbaum's criminal conduct was more extensive. In that agreement, Siegelbaum stipulated to an order requiring him to pay $281,000 in restitution to the bank. Implicit in that stipulation is an acknowledgment that the loss to the bank greatly exceeded $8,900. The letter appended to, and made a part of, the plea agreement, recites in relevant part that:

3. The parties have reached the following agreements with respect to sentencing.... Because the attempted loss attributed to the conspiracy was in excess of $350,000, your client is subject to an additional 9-level increase in his offense level. In addition, because the offense involved more than minimal planning, your client should receive a 2-level enhancement under 2F2.2(b)(2). Furthermore, your client should receive a 4-level increase for being an organizer or leader * * * *

4. In exchange for the agreements set forth in this letter, the government agrees to recommend that defendant receive a 3-level adjustment for acceptance of responsibility pursuant to guideline section 3E1.1, which would result in a guideline range of 57-71 months prison. Because of the extensive nature of the defendant's crime, the fact that at least 44 victims were involved, and the facts [sic] that the defendant had in his possession sophisticated document-making equipment, the parties agree that the defendant should receive a sentence of 70 months.

*5

5. In exchange for the agreements set forth above, defendant agrees to waive his right to appeal his conviction or sentence in this case so long as the sentence imposed by the court is consistent with the above sentencing guidelines recommendations. In addition, the government agrees not to supersede the indictment to charge defendant in the substantive bank fraud counts that are now alleged against his coconspirators.

During the plea colloquy, the court carefully reviewed the agreement with Mr. Siegelbaum to ensure that he understood its terms. The prosecutor called the court's attention to the provisions whereby the parties agreed that 70 months was the appropriate sentence, and that "Mr. Siegelbaum will not have a right to ask for a downward adjustment under our agreement." Siegelbaum and his attorney both confirmed that this comported with their understanding of the

plea agreement.
Before accepting the plea, the court asked why Siegelbaum was agreeing to pay restitution of $281,000, when the count to which he was pleading guilty involved an $8,900 transaction. The prosecutor explained that "this is part of a much larger conspiracy involving 99 transactions, and the amount, the total potential loss was the amount of $342,000. The actual loss was $272,178." [FN3] Siegelbaum's attorney then confirmed that $281,000 was the correct sum of restitution.

FN3. The PSR indicates that, in addition to the $342,000 mentioned by the AUSA, Siegelbaum was involved in cashing other forged or counterfeit checks, hence the total attempted loss was $355,293.83. Adding those other checks to the $272,000 figure mentioned by the AUSA resulted in a total actual loss of $281,203.83.

The prosecutor also represented that, at trial, the government believed it could prove "Mr. Siegelbaum was the person who recruited others, providing false IDs ... that he created, providing them with unauthorized or stolen checks, and had them go from bank to bank, and then he received 50 percent of the proceeds." His "co-conspirators would dumpsterdize, if you will, at the Washington Mutual Bank branch ..." and Siegelbaum "would use [that] customer profile information to create those false IDs. He was the leader of that. So as part of our plea the relevant conduct is much greater, a much greater amount than that particular charge."
The Presentence Report (PSR) was fully consistent with the plea agreement, recommending the same upward and downward adjustments the parties had contemplated in that plea agreement. The PSR also set forth the facts supporting those adjustments. The PSR was made available to Siegelbaum's counsel in advance of the sentencing hearing. No objections were lodged.
At sentencing, Siegelbaum did not contest any of the upward enhancements, or the factual allegations upon which those enhancements were premised, nor did he contest the sentence recommended by both the government and the PSR writer. The court imposed a sentence of 70 months in prison, to be followed by a 5-year term of supervised release, and restitution of $281,000--the very same sentence that Siegelbaum agreed to in his plea bargain. In return, the government dismissed the remaining 12 counts of the indictment that were against Siegelbaum. Siegelbaum has suffered no injustice. He received the sentence for which he bargained. He did not contest the facts the court relied on in enhancing his sentence, nor was he harmed by application of a lesser standard of proof. Numerous charges against Siegelbaum were dismissed by the government, or foregone, in reliance upon his promise not to contest the sentence enhancements. Siegelbaum is not entitled to relief.

Conclusion

*6
The motion (# 256) for post-conviction relief under 28 U.S.C. §§ 2255 is denied.

12. *Stevens v. U.S.* (Dist. Maine) - Holds that *Booker* is Not Retroactive For Cases that Did not Raise a Blakely/Booker Claim on Direct Appeal Implying it Would be Available if a Booker/Blakely Claim Had Been Made on Direct Appeal.

Jason Stevens has filed a 28 U.S.C. §§ 2255 motion challenging his 116-month sentence for being a felon in possession of a firearm. [FN1] I have screened this motion pursuant to the expectation of Rule 4(b) of the Rules Governing §§ 2255 Cases and I conclude that Stevens is not entitled to the relief he seeks. Therefore, I recommend that the Court DISMISS the motion because it is facially without merit.

FN1. Stevens is also serving a twenty-seven month federal sentence in Criminal No. 00-86-B-S but he makes no mention of that conviction in his current 28 U.S.C. §§ 2255 motion and identifies only Criminal No. 97-45- B-S in the caption portion of his pleading.

Discussion

Stevens earlier filed a motion under Federal Rule of Criminal Procedure 35 raising a *Blakely v. Washington,* 542 U.S. ___, 124 S.Ct. 2531 (2004) challenge. After steps were taken to make sure that Stevens wished to proceed pursuant to Rule 35 (as opposed to 28 U.S.C. §§ 2255 as the United States had assumed in responding thereto) this Court denied Stevens's Rule 35 motion in an endorsed order on the basis that *Blakely* was not retroactive. (Docket No. 48.)
The United States Supreme Court extended the holding of *Blakely* to the United States Sentencing Guidelines, *see United States v. Booker,* 543 U.S. ___, 2005 WL 50108 (Jan. 12, 2005), and Stevens has wasted no time in pursuing relief by dint of this elaboration.
The amended judgment in Stevens's criminal case which reduced his sentence from 140-months to 116-months was entered on May 4, 1999. As Stevens indicates in his present 28 U.S.C. §§ 2255 motion, he did not take a direct appeal. Accordingly, Stevens's year to file a timely 28 U.S.C. §§ 2255 motion has long since expired. *See* 28 U.S.C. §§ 2255 ¶¶ 6(1). As a consequence, in view of the type of untimely challenge Stevens tenders, his only hope would be under ¶¶ 6 (3) of §§ 2255 which would give Stevens a year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."
Assuming that it would be for the District Court in the first instance to make the retroactivity determination under ¶¶ 6(3), *Ashley v. United States,* 266 F.3d 671, 674 (7th Cir.2001) ("A district judge may determine whether a novel decision of the Supreme Court applies retroactively, and thus whether a collateral attack is timely under §§ 2244(b)(2)(A) or §§ 2255 ¶¶ 6(3)."); *see also Wiegand v. United States,* 380 F.3d 890, 892-93 (6th Cir.2004) ("The district court here should decide retroactivity in the first instance. If the district court finds Wiegand filed timely, then it can address the merits of his claim."); *Dodd v. United States,* 365 F.3d 1273, 1278 (11th Cir.2004) ("[E]very circuit to consider this issue has held that a court other than the Supreme Court can make the retroactivity decision for purposes of §§ 2255 [¶¶ 6](3)."); *accord*

Murray v. Unites States, 2002 WL 982389, *1 n. 2 (D.Ma.2002), I have already concluded, in the context of a timely §§ 2255 motion, that *Booker* should not be applied retroactively to cases wherein the claim was not raised on direct review. In *Quirion v. United States,* I reasoned:
*2
On the same day that *Blakely* was handed down, the United States Supreme Court concluded that one of *Blakely'* s direct ancestors, *Ring v. Arizona,* 536 U.S. 584 (2002)--which applied the principle of *Apprendi* to death sentences imposed on the basis of aggravating factors--was not to be applied retroactively to cases once they were final on direct review. *See Schriro v. Summerlin,* ___ U.S. ___, 124 S.Ct. 2519, 2526 (2004) (*"Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). In the wake of *Blakely,* most courts that considered the question have concluded that *Summerlin* answered the retroactivity question in the negative vis-a-vis *Blakely* grounds pressed in timely 28 U.S.C. §§ 2255 motions. *See, e.g., Burrell v. United States,* 384 F.3d 22, 26 n. 5 (2d Cir.2004) (observing this proposition in affirming the District Court's conclusion that the movant was not entitled to a certificate of appealability on the question of whether *Apprendi* applied retroactively); *Lilly v. United States,* 342 F.Supp.2d 532, 537 (W.D.Va.2004) ("In *Summerlin,* the Court found that *Ring v. Arizona,* 536 U.S. 584 (2002), a case that extended *Apprendi* to aggravating factors in capital cases, was a new procedural rule and was not retroactive. A similar analysis dictates that Blakely announced a new procedural rule and is similarly non-retroactive.") (citation omitted); *accord Orchard v. United States,* 332 F. Supp, 23 275 (D.Me.2004); *see also cf. In re Dean,* 375 F.3d 1287, 1290 (11th Cir.2004) ("Because *Blakely,* like *Ring,* is based on an extension of *Apprendi,* Dean cannot show that the Supreme Court has made that decision retroactive to cases already final on direct review. Accordingly, Dean's proposed claim fails to satisfy the statutory criteria [for filing a second or successive §§ 2255 motion].").
The 'merits majority' in *Booker* expressly affirmed the holding of *Apprendi* concluding: "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." U.S. at ___, 2005 WL 50108, at *15; *see also Sepulveda v. United States,* 330 F.3d 55, 63 (1st Cir.2003) ("We hold, without serious question, that *Apprendi* prescribes a new rule of criminal procedure, and that Teague does not permit inferior federal courts to apply the *Apprendi* rule retroactively to cases on collateral review."). The fact that *Booker* applied *Apprendi* to the United States Sentencing Guidelines, as opposed to a state capital sentencing scheme, would not shift the tectonic plates of the *Summerlin* retroactivity analysis.
2005 U.S. Dist. Lexis 569, *7-10 (D.Me. Jan. 14, 2005).

Conclusion

*3
For the reasons stated above I recommend that the Court DENY Stevens 28 U.S.C. §§ 2255 relief.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. §§ 636(b)(1)(B) for which *de*

novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.
D.Me.,2005.

Stevens v. U.S. L 102958, *1 -3 (D.Me.,2005)

13. *U.S. v. Davis* (N.Dist.Indiana) - How Judges Like to Play Games - Even if *Booker* is Retroactive a Defendant Who Failed to Raise a *Booker* Claim on Direct Appeal has Procedurally Defaulted the Claim and it was Not Ineffective Assistance of Counsel for Lawyer to Not Make Booker Objections or File a Booker Appeal. In Plain English, Heads I Win, Tails You Lose.

MOODY, District Judge.
On June 4, 2004, defendant Ronald Davis filed a motion pursuant to 28 U.S.C. § 2255, which he then supplemented by two addenda, filed on July 19, 2004, and on September 3, 2004. A motion under § 2255 allows a federal prisoner "in custody ... claiming a right to be released" to attack his sentence on the grounds that it was imposed "in violation of the Constitution or laws of the United States, or that the court was without jurisdiction ..., or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255 ¶ 1. "If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party." Rule 4, Rules Governing Section 2255 Proceedings for the United States District Courts.
Pursuant to a written plea agreement, Davis pleaded guilty to one count of distribution of cocaine base (crack) in violation of 21 U.S.C. § 841(a)(1). Six other counts, involving conspiracy to distribute, actual distribution, and use of a communication device to facilitate these offenses, were dismissed. Davis was sentenced to a term of imprisonment of 168 months of incarceration, to be followed by a 3-year term of supervised release.
In his motion as originally filed, Davis raised two issues, both of which ultimately go to the length of his term of incarceration. First, Davis asserts that he received ineffective assistance of counsel because his attorney failed to file a notice of appeal. Davis claims that after his sentencing hearing he instructed his attorney to appeal one issue: the court's decision to adjust his base offense level upward under

§ 2D1.1(b)(1) of the United States Sentencing Guidelines for possession of a firearm, on the ground that the court erred because the facts did not support the adjustment. Second, Davis argues that his counsel gave ineffective assistance at the sentencing hearing by not successfully challenging the firearms adjustment. As to both issues, Davis requests relief in the form of a reduction in his term of imprisonment, to make it correspond to the term he would have received without the firearms adjustment to his base offense level. [FN1]

FN1. Were Davis to prevail on his claim regarding the neglected appeal, the court could not reform his sentence in that fashion, but would grant the remedy of allowing him to take a belated appeal with aid of counsel. Castellanos v. United States, 26 F.3d 717, 720 (7th Cir.1994).

*966
In the first addendum to his motion, Davis adds the claim that whether he possessed a firearm, and what quantity of crack [FN2] he distributed, were factual questions as to which a jury finding was necessary pursuant to Blakely v. Washington, --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and United States v. Booker, 375 F.3d 508 (7th Cir.2004), cert. granted, --- U.S. ----, 125 S.Ct. 11, 159 L.Ed.2d 838 (2004). In his second addendum, Davis contends that Blakely means that the court lacked jurisdiction to impose the allegedly unlawful portion of his sentence, that is, the term of incarceration that results from the court's factual findings on possession of a firearm and drug quantity.

FN2. Although Davis was sentenced after the decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), his term of incarceration was less than the 20-year statutory maximum applicable to distribution of any amount of cocaine provided in 21 U.S.C. § 841(b)(1)(C). At the time, this was thought to make a quantity finding unnecessary. United States v. Nance, 236 F.3d 820, 824-25 (7th Cir.2000).

Davis' written plea agreement is dispositive of the two issues he raised prior to the filing of the two addenda. In paragraph 9(e) of that agreement (filed with the court on February 2, 2001, docket entry # 56), Davis stated:
I am aware that my sentence will be determined in accordance with the United

States Sentencing Guidelines. ... I agree that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for my offense as set forth above in paragraph 9.b. of this plea agreement [20 years]. With that understanding, I expressly waive my right to appeal my sentence on any ground, including any appeal right conferred by Title 18, United States Code, Section 3742. I also agree not to contest my sentence or the manner in which it was determined in any post-conviction proceeding, including, but not limited to, a proceeding under Title 28, United States Code, Section 2255.
In the change of plea hearing held on February 6, 2001, the court carefully went over the entire plea agreement with Davis, including this provision.
[1] Davis has not alleged that he did not understand his plea agreement, nor does he allege that he received ineffective assistance of counsel in regard to his negotiation and acceptance of the agreement. In these circumstances, such waivers are generally enforceable. See United States v. Rhodes, 330 F.3d 949, 952 (7th Cir.2003); Mason v. United States, 211 F.3d 1065, 1069 (7th Cir.2000). The court is as satisfied today, as it was on February 6, 2001, that Davis voluntarily, knowingly and intelligently waived his right to file the appeal he now claims to have requested his attorney to file, [FN3] as well as the present § 2255 motion.

FN3. Thus, it is unlikely that Davis asked his attorney to file a notice of appeal on the § 2D1.1(b)(1) issue. Even if he did, his attorney would have reminded him that he had waived any such appeal.

That is true even when Davis casts the issue as having received ineffective assistance of counsel on the firearms issue at sentencing. That ineffective assistance claim goes directly to the manner in which his sentence was determined, on which Davis explicitly waived his right to file a § 2255 motion. Davis could have reserved the right to challenge his sentence based on ineffective assistance grounds, compare United States v. Kempis-Bonola, 287 F.3d 699, 700-01 (8th Cir.2002), but did not. That leaves open only the possibility of an ineffective assistance claim going directly to the negotiation of the plea agreement itself, and whether Davis intelligently waived his rights, which claim Davis does *967 not make. See Mason, 211 F.3d at 1069 (7th Cir.2000); Jones v. United States, 167 F.3d 1142, 1145 (7th Cir.1999). Unless Davis wants to invalidate the entire plea agreement and face all the charges that were dismissed (and he doesn't, he only wants his sentence "corrected" while retaining the other benefits he gained in the agreement), he cannot avoid that waiver. See United States v. Hare, 269 F.3d 859,

862 (7th Cir.2001).
Finally, this remains true whatever impact Apprendi/Blakely/Booker might potentially have, because in the agreement Davis based his waiver on an explicit admission that the maximum term of incarceration he faced under the indictment was 20 years, agreed that the court had jurisdiction and authority to give him any sentence up to that statutory maximum, and waived his right to contest the sentence or the manner in which it was determined. The court went over all of these terms with Davis in open court and was satisfied that he understood them and was making a voluntary and intelligent decision to plead guilty and waive any right thereafter to contest his sentence. Because Davis made the waiver knowing that he might be sentenced to up to 20 years of incarceration, the court believes the waiver is broad enough to foreclose him from using Apprendi/Blakely/Booker to obtain a change in his sentence, draining his § 2255 motion of any merit. Cf. Berkey v. United States, 318 F.3d 768, 773 (7th Cir.2003).
Assuming that the court is incorrect, and that Davis did not waive his right to file a § 2255 motion challenging his sentence based on a change in the applicable law (and that Blakely is a change in the applicable law, an issue discussed further below), there are at least two alternative reasons why he nevertheless cannot obtain relief in the present proceeding. The first is that the court does not believe that Blakely's change to the law is available to retroactively impact a final criminal judgment in a § 2255 proceeding. [FN4] Before explaining why, the court digresses momentarily to address Davis' second addendum, in which he argues that Blakely means that the court lacked jurisdiction to impose his sentence.

FN4. The court notes that Davis' addenda are to be viewed as amendments to his existing motion and not as second or successive motions. See Johnson v. United States, 196 F.3d 802, 805 (7th Cir.1999). Thus, because his Blakely argument is in his initial motion, the question of retroactivity is for this court to decide. See Ashley v. United States, 266 F.3d 671 (7th Cir.2001).

[2] Davis' whole purpose in making this argument is to avoid the question of retroactivity. As he states in the addendum's opening paragraph:
Jurisdiction may be raised at any time in the proceedings, including in a § 2255 motion. Jurisdiction is not subject to any kind of retroactivity decision.
As has been succinctly explained in cases like United States v. Bjorkman, 270 F.3d 482, 490-92 (7th Cir.2001), United States district judges always have subject-matter jurisdiction over indictments charging a violation of federal

criminal laws, including the power and jurisdiction to impose sentence. See United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Thus, that Blakely may mean that the court committed a sentencing error does not mean that the court lacked jurisdiction.

That conclusion puts the court back on track, which is a main line to the issue whether Blakely applies retroactively in collateral attacks on criminal judgments. The short and simple answer is "no." In Curtis v. United States, 294 F.3d 841 (7th Cir.2002), the court of appeals held that Apprendi does not apply retroactively in *968
§ 2255 proceedings. The court explained that because Apprendi is all about who decides factual questions, and by what standard, it is not a new substantive principle, but instead provides new procedural rights that are not "so fundamental that any system of ordered liberty is obliged to include them," and so does not apply retroactively. Curtis, 294 F.3d at 843; see Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

The court of appeals' retroactivity analysis of Apprendi is dispositive of this court's retroactivity analysis of Blakely. In Simpson v. United States, 376 F.3d 679, 681 (7th Cir.2004), the court of appeals explained that Blakely "iterates the holding in Apprendi." This is an apt description, since Blakely, like Apprendi, "is concerned with the identity of the decision-maker, and the quantum of evidence required for a sentence, rather than with what primary conduct is unlawful...." Curtis, 294 F.3d at 843. Blakely adds a new refinement, the clarification that the statutory maximum punishment is that which exists without the need for any additional fact-finding. Simpson, 376 F.3d at 681. Nevertheless, because Blakely is primarily concerned with the identity of the factfinder and the burden of proof to be applied to those facts which allow a particular maximum punishment, and because "[f]indings by federal district judges are adequate to make reliable decisions about punishment," Blakely, just like Apprendi, is not a "watershed" rule of criminal procedure that should be applied retroactively to cases on collateral review. See Curtis, 294 F.3d at 844; Teague, 489 U.S. at 311, 109 S.Ct. at 1075; but cf. Apprendi, 530 U.S. at 524, 120 S.Ct. at 2380 (O'Connor, J. dissenting) ("Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle" that facts increasing punishment must be charged in indictment, and found by jury beyond a reasonable doubt) (emphasis added).

This court's conclusion that it must decide whether or not Blakely has retroactive application in this § 2255 proceeding assumes that Blakely states a "new" constitutionally-required rule of procedure, [FN5] an assumption with which Davis, with good reason, takes exception. In Blakely the Court professed to be

doing nothing more than "apply[ing] the rule we expressed in Apprendi " which the Court understood to reflect "longstanding tenets of common-law criminal jurisprudence." Blakely, -- U.S. at ---, 124 S.Ct. at 2536. Thus, citing the portion of the opinion in which the Court observes that its "commitment to Apprendi" demonstrates "respect for longstanding precedent," Id., --- U.S. at ----, 124 S.Ct. at 2538, Davis argues that "this in itself defeats any notion that Blakely announced a new rule as it was 'dictated by precedent existing at the time [Petitioner's] conviction became final.' "

FN5. The court also assumes that Blakely concerns procedure, and not substance, because, rather than placing conduct beyond the power of criminal law-making authority, see United States v. Prevatte, 300 F.3d 792, 801 (7th Cir.2002) (citing Bousley v. United States, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610, 140 L.Ed.2d 828 (1998)), Blakely defines the "relevant" statutory maximum punishment a judge can impose for conduct defined as criminal. See Booker, 375 F.3d at 510.

The internal quotation marks reflect that Davis is quoting a portion of Justice O'Connor's dissent in Blakely, -- U.S. at ---, 124 S.Ct. at 2549, but he omits the word "not" which appears before "dictated" in the original. In the original, Justice O'Connor, quoting Teague, states: " '[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.' " Id. As the court will attempt to explain, Davis' omission of the word "not" *969
actually captures the essence of Justice O'Connor's message, which, unless read carefully, appears to suggest that Blakely provides a new rule.
First, Justice O'Connor notes that while the Court has held "a fortiori" that Apprendi does not apply retroactively on collateral review, the impact of Blakely means that "all criminal sentences imposed under the federal and state guidelines since Apprendi was decided in 2000 arguably remain open to collateral attack." Id. This conclusion would seem to flow, as Davis advocates, from the majority's rationale that Blakely simply applies the rule stated in Apprendi, as the conclusion is true only if Blakely does not provide a new rule. If Blakely does not provide a new rule, then, just as Davis argues, any attack on a sentence (imposed after Apprendi) using Blakely-based logic does not require retroactive application of Blakely, but instead is merely application of the law as it existed after Apprendi. However, immediately after this conclusion, Justice O'Connor makes a seemingly contradictory citation to Teague with the parenthetical explanation: " '[A] case

announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.' " Id. At first blush it therefore seems that Justice O'Connor is suggesting that Blakely provides a new constitutional rule, and one which may ultimately be held retroactive. In that event, however, Blakely's potential application would be to all prior sentences, not, as Justice O'Connor states, only to those coming after Apprendi. Because this court does not think Justice O'Connor, the author of the plurality opinion in Teague, would contradict herself in this manner (and because her dissent in Apprendi previewed its impact on determinate-sentencing schemes [FN6]), the court understands her citation of Teague to signal her agreement with the majority that the Blakely outcome was dictated by Apprendi, and therefore Blakely does not state a new rule.

FN6. Apprendi, 530 U.S. at 550-51, 120 S.Ct. at 2394-95 (O'Connor, J., dissenting).

Thus, while Davis' view that Blakely does not state a new rule may very well be correct, this court must take its cues from the Court of Appeals for the Seventh Circuit, and that court has already flatly stated that "[t]he rule announced in Blakely is based in the Constitution and was not dictated or compelled by Apprendi or its progeny," and proceeded on the assumption that Blakely states a new rule of constitutional law. Simpson, 376 F.3d at 681. As a result, the court believes that its decision above that Teague analysis must be employed is, for now, the correct rationale providing the correct result. But if the court is wrong, and Blakely is, as Davis contends, nothing more than application of existing precedent, that leads to the second, and alternative, reason why Davis cannot obtain relief. [3] If existing precedent at the time of Davis' sentencing showed the court to be in error, that error could have been raised, and corrected, on direct appeal. Because a § 2255 motion is not a substitute for taking a direct appeal, Davis must show cause and prejudice for failing to appeal the court's presumed error. Galbraith v. United States, 313 F.3d 1001, 1006 (7th Cir.2002); United States v. Barger, 178 F.3d 844, 848 (7th Cir.1999). The reason, of course, that Davis didn't raise the issue on appeal is that he did not take an appeal, and the reason why he didn't is because in his plea agreement he waived his right to appeal, all as is explained above. Although Davis argues that he nevertheless told his attorney to file a notice of appeal, but the attorney rendered ineffective assistance by failing to do so, that argument is, also as explained above, a *970

losing proposition. Coming essentially full-circle to the court's discussion above of the breadth and validity of Davis' plea agreement and waiver of the right to appeal or file a § 2255 motion, under the present circumstances the argument Davis would have to make (and he has not done so) is one sounding the theme that his attorney rendered ineffective assistance by persuading him to enter into a plea agreement without making a Blakely-type argument at sentencing and reserving the right to pursue that issue on appeal, making Davis' acceptance of that agreement less than intelligent and voluntary.

The problem with that ineffective-assistance argument is that "before Blakely was decided, every federal court of appeals had held that Apprendi did not apply to guideline calculations made within the statutory maximum," Simpson, 376 F.3d at 681, and the court of appeals has frequently stated that "[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law." Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir.1993); see also Valenzuela v. United States, 261 F.3d 694, 700 (7th Cir.2001); United States v. Smith, 241 F.3d 546, 548 (7th Cir.2001). Thus, even if Davis made what the court sees as his most appropriate claim of ineffective assistance of counsel, he still would not meet with success.

For the foregoing reasons, Davis' § 2255 motion is summarily DENIED and DISMISSED with prejudice pursuant to RULE 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts. The clerk shall enter final judgment accordingly in this collateral civil proceeding occasioned by the motion, and notify movant Davis.

SO ORDERED.

U.S. v. Davis 348 F.Supp.2d 964, *965 -970 (N.D.Ind.,2004)