

# THE NEW YORK CRIMINAL BAR ASSOCIATION

An Affiliate of the National Association of Criminal Defense Lawyers



## *NYCBA Members Newsletter*

Vol. 2, No. 4

January, 2005

**Greetings** and welcome to the January 2005 issue of our Newsletter.

### **President's Message:**

The sentencing landscape in both the state and federal system has shifted significantly in the past month with the change in the Rockefeller Drug laws in New York State and the decision by the United States Supreme Court regarding the Federal Sentencing Guidelines in *U.S. v. Booker*.

The New York Criminal Bar Association has tried to keep you updated on these and other topics. According to the response we have gotten from our membership, this Newsletter and the email bulletins we periodically send you are of tremendous value to you. We expect you will find this issue of the NYCBA Newsletter again helpful. Remember, however, we are always open to new ideas from you and look forward to your input.

### **Upcoming Events:**

The annual meeting of the New York Criminal Bar Association will be held on February 28, 2005, at 5:30 p.m., in the 15th floor Central Jury Room at 100 Centre St., New York, NY. At the meeting, the Members will be asked to vote on the new officers and directors for the coming year. In that connection, the Board has nominated the following persons for the offices set forth below:

**Position**

**Candidate**

President:	Henry Steinglass
Vice President:	Mathew Mari
Secretary:	Leonard Levenson
Treasurer:	Michael Bachrach
Directors:	Michael Joseph
	Michele Maxian
	Norman Reimer

Immediately following the Annual Meeting, there will be a special CLE program, entitled "**Update in the New York Court of Appeals.**" This seminar will be presented by the Hon. James A. Yates, Justice, N.Y.S. Supreme Court, 1st Judicial District. Two hours of New York State MCLE credit will be awarded to all who arrive by 5:45, register and stay for the full program.

***Blakely v. Washington Update:***

By now, we assume that everyone is aware that, on January 12, 2005, the United States Supreme Court held that the Federal Sentencing Guidelines are no longer mandatory. In *U.S. v. Booker, No. 04-104*, a complex and splintered two-part decision, the Court first held, by a 5-to-4 majority, that the Sixth Amendment, as construed in *Blakely v. Washington, 124 S.Ct. 2531 (June 24, 2004)*, applies to the Federal Sentencing Guidelines; and that the Guidelines violate the Sixth Amendment to the extent that they allow judicial - rather than jury - factfinding to form the basis for sentencing enhancements.

Then, in a separate ruling by a different 5-to-4 majority, the Court held that the appropriate "remedy" to cure the constitutional infirmities was to declare that the Guidelines were no longer mandatory - but rather "effectively advisory" - a solution which the Breyer majority said was the one which Congress would have preferred.

The Court effectuated that solution by declaring invalid and excising two provisions of the Sentencing Reform Act of 1984, namely, 18 U.S.C. § 3553(b) (1), the provision that made the Guidelines mandatory, and 18 U.S.C. § 3742(e), a provision that provided, *inter alia*, for a *de novo* review of departures granted by

sentencing judges. The Court also directed that henceforth on appeal sentences would be reviewed for "unreasonableness."

In the minds of most commentators, *Booker* may have raised as many questions - both political and legal - as it answered.

At the top of that list is how Congress will react to a system that puts more sentencing discretion back in the hands of the judges - after a prolonged period during which Congress went out of its way to diminish the discretion of judges at sentencing.

On the legal side, the Court's decision left unanswered many questions about the impact of that ruling on appeals. For example, while the Court acknowledged that its decision must be applied to all cases on direct review, it did not address the issue of retroactivity. Thus, it is unclear what groups of prisoners are eligible to seek relief based on *Booker*. Does the ruling apply only to sentences imposed after January 12, 2005? Or will it also apply to sentences imposed before June 24, 2004 (the date of *Blakely*), or even sentences imposed before June 26, 2000, the date on which the Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000) - since *Apprendi* was the true precursor of *Booker*? Commentators are also split on whether judicial enhancements have in fact been disavowed, or will now merely be examined under the guise of the court's discretion in choosing whether to apply the recommended Guideline range.

The Second Circuit is expected to rule momentarily on this case, having posted a Special Order of a Stay, telling all lawyers in the 200+ pending *Blakely* cases that are being "held" pursuant to previous orders not to file supplemental papers in order to avoid "an unnecessary burden on counsel for the defendants and the Government." The order also included this statement: "It is anticipated that a panel of this Court will issue an opinion adjudicating the merits of a sentencing appeal in light of *Booker* and *Fanfan*." In the meantime, on January 24, 2005, the Supreme Court formally dismissed the Sentencing Guidelines questions certified by the Second Circuit in *U.S. v. Penaranda*, 375 F.3d 238 (2nd Cir. 2005).

For those interested in following the latest *Booker* developments we recommend Professor Douglas Berman's [Sentencing Law and Policy](#) site on the Internet and the special *Booker* Resource Center on the Internet maintained by *Punch and Jurists* at <http://www.ussguide.com/members/BulletinBoard/Booker/index.cfm/>. Although that latter site requires a Username and a Password, all members of the NYCBA have full access privileges to it simply by using the same access codes they use to login to the NYCBA's Website at [www.nycrimbar.org](http://www.nycrimbar.org).

There are a number of excellent articles analyzing the *Booker* decision on the Media Articles section of that Website, including:

"[\*The Short Life of the Feeney Amendment\*](#)," by Dan Christiansen, Daily Business Review, January 24, 2005.

"[\*The Supreme Court's New Blockbuster U.S. Sentencing Guidelines Decision: A Clear Sixth Amendment Ruling with an Invitation to Congress to Create a Better Remedy\*](#)," by Mark Allenbaugh, Esq., FindLaw's Writ, January 14, 2005.

"[\*Supreme Court to Congress: Here's what you really meant\*](#)," by Andrew Leonard, for Salon.com, January 14, 2005

## Rockefeller Drug Laws - An Update:

The recent amendments to the Rockefeller Drug Laws are now effective; and Alan Rosenthal, Esq., Counsel, of the [Center for Community Alternatives](#), maintains a special [Guide](#) to the Rockefeller Drug Reform Law, which includes an extremely useful [Sentencing Chart for Drug Offenses Under Rockefeller Drug Law Reform](#); a copy of the full text of the law; and a sample Application for Resentencing.

## New Blogs of Note:

[Confrontation Blog](#) - A blog, located at <http://confrontationright.blogspot.com/>, which is maintained by Professor Richard D. Friedman of the University of Michigan Law School and which is devoted to reporting and commenting on the latest and most significant new developments related to the Supreme Court's landmark Confrontation Clause decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

[White Collar Crime Prof. Blog](#) - a blog, maintained by Professors Peter J. Henning of Wayne State University Law School and Ellen S. Podgor of Georgia State University College of Law, which concentrates on white collar crime and sentencing, and which is located at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/](http://lawprofessors.typepad.com/whitecollarcrime_blog/)

[VISALaw.com](http://www.visalaw.com) - Called "*The Immigration Law Portel*" by its sponsors, Messrs. Suskind and Susser, a large nation-wide immigration law firm, this site provides ready access to many timely immigration law issues and resources. The site is located at [www.visalaw.com/blog.html](http://www.visalaw.com/blog.html)

[DUIBLOG](http://www.duiblog.com/) - A blog maintained by Los Angles defense attorney Lawrence Taylor which addresses a broad range of topics helpful to the defense of DUI charges. The site is located at <http://www.duiblog.com/>

## NYCBA Web Site:

Each month, we try to point out some of the latest resources that we have posted on our Web site at [www.nycrimbar.org/](http://www.nycrimbar.org/). In keeping with that tradition, we note the following items:

### Legal Memoranda:

["Immigration Detention and Removal Guide for Detainees and their Families,"](#) by Bryan Lonagan and the Immigration Law Unit of the Legal Aid Society, October 2004.

### Court Decisions:

We have recently added a number of new decisions to this section of our Website including the following:

Judge Weinstein's decision in [Wray v. City of New York, 340 F.Supp.2d 291 \(E.D.N.Y. 2004\)](#) in which he analyzed and summarized the current state of the law relating to civil right claims for damages, under 42 U.S. C. § 1983, against the police for alleged constitutional violations. The plaintiff in this case was an arrestee whose conviction was set aside after a finding that the identification procedures used by the New York City Police Department were unduly suggestive; and he raised numerous claims including one of failure to train the police properly. Judge Weinstein refused to grant summary judgment to the police on that claim "in view of the strong statement of the Court of Appeals for

the Second Circuit with respect to inadequate police activity." (*Id.*, at 307, citing *Walker v. City of New York*, 974 F.2d 293 (2nd Cir. 1992)).

Judge McAvoy's decision in [\*U.S. v. Johnson, No. 97-CR-0206 \(N.D.N.Y. Jan. 5, 2005\)\*](#), in which he held that a sex offender who used the Internet to lure young victims into child pornography may be barred from using the Internet, even in the performance of his job. In so ruling, Judge McAvoy distinguished two prior Second Circuit decisions where similar restrictions were stricken, namely *U.S. v. Peterson*, 248 F.3d 79 (2nd Cir. 2001) and *U.S. v. Sofsky*, 287 F.3d 122 (2nd Cir. 2002).

## Computer Tips:

We have recently posted a number of articles on the Computer Tips section of our Website, including the following:

["Terminating Spyware With Extreme Prejudice,"](#) by Rachel Dodes, The New York Times, December 30, 2004.

["New Computer? Six Steps to Safer Computing,"](#) by Rob Pegoraro, Washington Post, December 19, 2004.

["PC Security 101 for Lawyers,"](#) by Brett Burney, Law.com, December 17, 2004.

["Malware: What it is and how to prevent it,"](#) by Adam Baratz and Charles McLaughlin of ARS Technica. (**Note:** This is a link to multi-page article posted on the ArsTechnica Website. To read the entire article please make sure to click on the "Next" button at the bottom of each page.)

["How Internet Cookies Work,"](#) by Marshall Brain - an informative and fun article that explains - in plain English - how our computers are increasingly being used to track just about everything we do.

Yours for a better defense,

Harvey Fishbein  
President

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### Internet and Newsletter Committee:

Harvey Fishbein  
Scott Tulman  
Peter G. Schmidt  
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