April 14, 2012

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RE: ADDENDUM TO APRIL 11, 2012 LAMBROS OVERVIEW OF U.S. SUPREME COURT CASES AS TO INEFFECTIVE ASSISTANCE OF COUNSEL DURING "PLEA NEGOTIATIONS": LAFLER vs. COOPER, No. 10-209 (March 21, 2012); MISSOURI vs. FRYE, No. 10-444 (March 21, 2012).

QUESTION PRESENTED:

IS JOHN GREGORY LAMBROS ENTITLED TO A SECOND OR SUCCESSIVE 28 U.S.C. §2255 MOTION DUE TO "A NEW RULE OF CONSTITUTIONAL LAW", BASED ON: LAFLER and MISSOURI?

QUICK ANSWER:

NEW SUPREME COURT CASES MAY BE MADE RETROACTIVELY APPLICABLE TO CASES ON COLLATERAL REVIEW, AND THEREFORE RELIEF MAY BE HAD ON A SECOND OR SUCCESSIVE §2255 MOTION UNDER §2255, SUBJECT TO CERTIFICATION PURSUANT TO 28 U.S.C. §2244, ONLY IF IT CONTAINS "A NEW RULE OF CONSTITUTIONAL LAW, MADE RETROACTIVE TO CASES ON COLLATERAL REVIEW BY THE SUPREME COURT, THAT WAS PREVIOUSLY UNAVAILABLE". See, TYLER vs. CAIN, 533 U.S. 656, 660-61, 150 L. Ed. 2d 632 (2001).

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to all but Part IV, DISSENTING, stated in LAFLER vs. COOPER, No. 10-209:

"..... Even if it were not foreclosed, the constitutional right to effective plea-bargainers that it establishes is at least a **NEW RULE OF LAW**, which does not undermine the Michigan Court of Appeals' ....". See, CRIMINAL LAW REPORTER, Volume 90, No. 25, Page 877.

PART III: "It is impossible to conclude discussion of today's extraordinary opinion

without commenting upon the **REMEDY IT PROVIDES FOR THE UNCONSTITUTIONAL CONVICTION.** It is a **REMEDY** unheard-of in American jurisprudence - and, I would be willing to bet, in the jurisprudence of any other country. - - - The Court **REQUIRES** Michigan to **"REOFFER THE PLEA AGREEMENT" THAT WAS REJECTED BECAUSE OF BAD ADVICE FROM COUNSEL."** (emphasis added) See, CRIMINAL LAW REPORTER, Volume 90, No. 25, Page 880.

PART IV: ..... "Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a **CONSTITUTIONAL ENTITLEMENT.** ..... Thus, even though there is no doubt that the respondent here is guilty of the offense with which he was charged; even though he has received the exorbitant gold standard of American justice - a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and (in Michigan as in most States) the requirement of a unanimous guilty verdict by impartial jurors; **THE COURT SAYS THAT HIS CONVICTION IS INVALID BECAUSE HE WAS DEPRIVED OF HIS CONSTITUTIONAL ENTITLEMENT TO PLEA-BARGAIN."** (emphasis added) See, CRIMINAL LAW REPORTER, Volume 90, No. 25, Page 880.

PART IV: .... "Today's decision **UPENDS DECADES OF OUR CASES,** violates a federal statute, and opens a whole new boutique of constitutional jurisprudence ("plea-bargaining law") without even specifying the remedies the boutique offers." (emphasis added) See, CRIMINAL LAW REPORTER, Volume 90, No. 25, Page 881.

JUSTICE ALITO, DISSENTING. : "For the reasons set out in Parts I and II of JUSTICE SCALIA'S dissent, the Court's holding in this case misapplies our ineffective - assistance - of - counsel case law and **VIOLATES THE REQUIREMENTS OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.** Respondent received a trial that was free of any identified constitutional error, and, as a result, there is no basis for concluding that respondent suffered prejudice and **CERTAINLY NOT FOR GRANTING HABEAS RELIEF."** ..... **"TIME WILL TELL HOW THIS WORKS OUT. THE COURT, FOR ITS PART, FINDS IT UNNECESSARY TO DEFINE 'THE BOUNDARIES OF PROPER DISCREATION' IN TODAY'S OPINION."** (emphasis added) See, CRIMINAL LAW REPORTER, Volume 90, No. 25, Page 881.

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EXCELLENT OVERVIEW OF: TYLER vs. CAIN, 533 U.S. 656, 661, 150 L.Ed.2d 632 (2001), by the Third Circuit Court of Appeals from IN RE OLOPADE, 403 F.3d 159, 162-164 (3rd Cir. 2005). **See attached pages 162 thru 164:**

> "The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), however, has "greatly restricted the power of federal courts to award relief to .... prisoners who file **SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATIONS."** Id. at 162

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") , however, has "greatly restricted the power **{403 F.3d 162}** of federal courts to award relief to . . .prisoners who file second or successive habeas corpus applications." *Tyler v. Cain*, 533 U.S. 656, 661, 150 L. Ed. 2d 632, 121 S. Ct. 2478 (2001). Specifically, AEDPA mandates that:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
>
> (1) [certain types of newly discovered evidence]; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.28 U.S.C. § 2255. The certification process to which § 2255 refers is 28 U.S.C. § 2244(b)(3). Section 2244(b)(3) sets forth the protocols and standards for requests for second or successive habeas corpus applications in the court of appeals. Among other requirements, a prisoner in Olopade's procedural posture must make "a *prima facie showing* that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C) (emphasis added). Thus, § 2255, read in conjunction with § 2244(b)(3)(C), makes explicit that before we can grant Olopade permission to file a second or successive motion in the District Court, he must first make out a "prima facie showing" that his request to file a second or successive motion relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *See generally In re Turner*, 267 F.3d 225, 227 (3d Cir. 2001).

This issue is controlled by the decision in *Tyler v. Cain*, 533 U.S. 656, 150 L. Ed. 2d 632, 121 S. Ct. 2478 (2001). In *Tyler*, the Supreme Court 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. at 663 (internal quotations omitted). 3 After *Tyler*, the relevant question is not whether the Supreme Court should make a case applicable retroactively to cases on collateral review but whether it has done so; likewise, it is insufficient that two or more of the Court's decisions read together merely suggest that a rule has retroactive effect. Rather, the Supreme Court must have explicitly held, or two or more of its decisions when read together must absolutely dictate, that a particular rule is retroactively applicable to cases on collateral review. *In re Turner*, 267 F.3d at 229.

It is clear that the Supreme Court has not expressly held that *Booker* is applicable to cases on collateral review. In the *Booker* decision itself, the Court did **{403 F.3d 163}** not mention collateral review and only expressly applied its holdings to cases on direct appeal. *Booker*, 125 S. Ct. at 769 (Breyer, J.) ("We must apply today's holdings -- both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act -- to all cases on direct review."). 4 And, in no subsequent case has the Supreme Court addressed, let alone decided, whether *Booker* has retroactive effect. *See Bey*, 399 F.3d at 1269 ("The Court decided *Booker* on direct appeal and did not expressly declare, nor has it since declared, that *Booker* should be applied retroactively to cases on collateral review.").

Of course, "just because the [Supreme] Court has never specifically considered the retroactivity of [a particular decision] does not foreclose the possibility that the Court has 'made' [the decision] retroactive on collateral review." *In re Turner*, 267 F.3d at 229. Rather, as noted above, an amalgam of Supreme Court holdings could have "made" *Booker* applicable retroactively to cases on collateral review if the holdings, when read together, *"dictate"* such a result. *In re Turner*, 267 F.3d at 229.

Here, however, there is no combination of Supreme Court decisions that "dictates" that *Booker* has retroactive force on collateral review; indeed, the most analogous Supreme Court case, *Schriro v. Summerlin*, 542 U.S. , 542 U.S. 348, 159 L. Ed. 2d 442, 124 S. Ct. 2519, (2004), strongly suggests precisely the opposite. In *Schriro*, the Court held that *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d

556, 122 S. Ct. 2428 (2002), in which the Court applied *Apprendi* and found unconstitutional the provisions of the State of Arizona's death penalty sentencing scheme that allowed a judge rather than a jury to find aggravating factors, did not announce a "watershed rule[]of criminal procedure" applicable retroactively to cases on collateral review. *Schriro*, 542 U.S. at ,124 S. Ct. at 2524; *accord United States v. Swinton*, 333 F.3d 481, 491 (3d Cir. 2003) ("We hold that *Apprendi* does not apply retroactively to cases on collateral review."). Considering that *Booker*, like *Ring*, is simply the application of the principles of *Apprendi* to a particular subject, we conclude that the *Schriro* holding strongly suggests that *Booker* is likewise not retroactively applicable to cases on collateral review. *See McReynolds*, 397 F.3d at 480 ("Although the Supreme Court did not address the retroactivity question in *Booker*, its decision in *Schriro* . . .is all but conclusive on the point."). 5

{403 F.3d 164} In conclusion, we will deny Olopade's request for leave to file a second or successive habeas corpus motion because he cannot make a "prima facie showing," 28 U.S.C. § 2244(b)(3)(C), that *Booker* constitutes "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2255.

Of course, our holding today does not address the underlying merits of Olopade's claims under *Booker*. 6 In such a situation, it is appropriate to deny Olopade's request to file a second or successive motion without prejudice in the event that the Supreme Court subsequently makes *Booker* retroactive to cases on collateral review. *See In re Turner*, 267 F.3d at 231. 7

III.

For these reasons, we will deny without prejudice Olopade's application for permission to file a second or successive habeas corpus motion and will grant the United States' motion to dismiss.

Footnotes

1

See, e. g., Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005) (per curiam) ("We conclude that *Booker* . . .falls squarely under the category of new rules of criminal procedure that do not apply retroactively to § 2255 cases on collateral review."); *Bey v. United States*, 399 F.3d 1266, 1269 (10th Cir. 2005) ("*Booker* may not be applied retroactively to second or successive habeas petitions."); *Humphress v. United States*, 398 F.3d 855, 860 (6th Cir. 2005) ("We conclude that *Booker's* rule does not apply retroactively in collateral proceedings . . .."); *Green v. United States*, 397 F.3d 101, 103 (2d Cir. 2005) (per curiam) ("Neither *Booker* nor *Blakely [v. Washington*, 159 L. Ed. 2d 403, 542 U.S. 296, 124 S. Ct. 2531 (2004),] apply retroactively to Green's collateral challenge."); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005)

2

On March 28, 2005, Olopade filed a reply to the United States' response. In this reply, Olopade attempts to backpedal somewhat from his February 28, 2005 request. Specifically, Olopade argues that he in fact does not need this court's permission to proceed with his *Booker*-based motion in the District Court because the claim is not new, second, or successive but is rather the continuation of his *Apprendi* claim, which was the subject of his initial § 2255 motion. This argument is spurious. The District Court denied Olopade's first § 2255 motion on the merits; this court declined to grant a COA. Thus, a motion filed by Olopade for a writ of habeas corpus, whether premised on *Booker* or otherwise, would be "second or successive" and therefore must be authorized by this court. *See* 28 U.S.C. §§ 2244(b)(3), 2255.

3

In *Tyler*, the Court decided the fate of a *state* prisoner who was seeking collateral relief under 28 U.S.C. § 2254 in the federal courts. Thus, the *Tyler* Court addressed 28 U.S.C. § 2244(b)(2) rather than the above-quoted language from 28 U.S.C. § 2255. The relevant portion of § 2244(b)(2), however, is identical to the section of § 2255 that is implicated in this case. *Compare* 28 U.S.C. § 2244(b)(2) ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . .the applicant shows that the claim relies on *a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable* . . .") (emphasis added), *with* 28 U.S.C. § 2255 ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . .*a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.*") (emphasis added). Due to this identity of language, we have applied the *Tyler* holding to federal prisoners seeking to file second or successive habeas applications. *See In re Turner*, 267 F.3d 225, 227-28 (3d Cir. 2001).
4

After *Booker* issued on January 12, 2005, this court, of course, has applied the *Booker* rules to cases that were then pending on direct review. *See, e. g., United States v. Ordaz*, 398 F.3d 236, 239 (3d Cir. 2005); *United States v. Davis*, 397 F.3d 173, 183 (3d Cir. 2005). Olopade suggests that applying *Booker* to cases that were pending on direct appeal as of January 12, 2005 but not to those cases that were on collateral review as of that date would deny prisoners seeking collateral review the equal protection of the law. There is, however, an important distinction between cases on direct appeal and those on collateral review. *See Teague v. Lane*, 489 U.S. 288, 305-09, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) (O'Connor, J.). Simply put, because prisoners seeking collateral review are not similarly situated to prisoners whose cases are on direct appeal, it is constitutionally permissible to apply different rules to the two different categories of prisoners.
5

In his March 28, 2005 reply, Olopade avers that *Booker* is actually an extension of the rule of *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), a decision which the Supreme Court held to apply retroactively in Ivan V. v. New York, 407 U.S. 203, 204, 32 L. Ed. 2d 659, 92 S. Ct. 1951 (1972). Pointing to the retroactive effect of *Booker's* putative pedigree, he argues that *Booker* is similarly retroactively applicable. This argument, however, is more-or-less foreclosed by our decision in *In re Turner*, in which we rejected the argument that because *Apprendi* is arguably an extension of *In re Winship*, *Apprendi* similarly applies retroactively to cases on collateral review. *In re Turner*, 267 F.3d at 230-31. To paraphrase our conclusion in *In re Turner*, the most Olopade can claim with his *In re Winship* argument is that the Supreme Court *should* make *Booker* retroactive to cases on collateral review, not that existing precedents, such as *Ivan V.*, dictate that result. *In re Turner*, 267 F.3d at 231.
6

Likewise, our dictum aside, we leave for another day the question whether *Booker* applies retroactively to prisoners who were in the initial § 2255 motion stage as of January 12, 2005.
7

In its letter motion dated March 10, 2005, the United States urged that a without prejudice dismissal is the appropriate outcome.