

## MEMORANDUM

To: First Circuit Practitioners and Others Interested in *Ex Post Facto*/Due Process Arguments  
Fr: Amy Baron-Evans  
Re: United States v. Lata, \_\_\_ F.3d \_\_\_, 2005 WL 1491483 (1<sup>st</sup> Cir. June 24, 2005)  
Da: August 4, 2005

In United States v. Lata, \_\_\_ F.3d \_\_\_, 2005 WL 1491483 (1<sup>st</sup> Cir. June 24, 2005), the First Circuit rejected the defendant's claim that his sentence violated *ex post facto* principles incorporated in the Due Process Clause. This is a confused opinion with a narrow holding that is correct, but much surrounding *dicta* that is wrong and subject to misuse in other cases.

You should continue to raise the issue in cases where the offense was committed before January 12, 2005, when Booker was decided. If you are in the First Circuit, you should affirmatively deal with Lata's offending *dicta*, and even if you are elsewhere. It has already been misused by a district court in the Eastern District of New York. See United States v. Luciana, \_\_\_ F.Supp.2d \_\_\_, 2005 WL 1804202 at \*9 (E.D.N.Y. July 28, 2005).

### A. *Brief Summary of Ex Post Facto/Due Process Arguments*

Before looking at Lata, the arguments, which are set forth in detail in Part VIII of the Federal Sentencing Guidelines Conference Defense Attorney Training memorandum (as revised 8/3/05) also attached to this email, are:

(1) Straight Fair Warning Argument: The sentence may not exceed the top of the guideline range (fully adjusted with judicial factfinding) in effect when the defendant committed the offense unless based on an upward departure that complies with strict standards for upward departure contained in the Guidelines Manual and the *de novo* standard of review of such departures set forth in now-excised 18 U.S.C. § 3742(e).

(2) Fair Warning Plus Sixth Amendment Argument: (a) Fair Warning: The Booker remedy raises the maximum potential punishment from the top of the guideline range (fully adjusted with judicial factfinding) in effect when the defendant committed the offense to the U.S. Code maximum. Because this change was unexpected and indefensible in light of the law in effect when the defendant committed the offense, it violates fair warning principles inherent in the Due Process Clause. Thus, the Booker remedy may not be used *at all* in sentencing a defendant who committed the offense before Booker was decided. Instead, the mandatory guidelines in effect when the defendant committed the offense must be used. (b) Sixth Amendment: Mandatory guidelines can be constitutionally applied only if based solely on facts found by a jury or admitted by the defendant. Thus, the sentence may not exceed the guideline range corresponding to the facts found by a jury or admitted by the defendant.

B. *Lata in the District Court*

Lata was convicted in the District of New Hampshire of a bank robbery he committed on November 12, 2002. He was sentenced by Judge DiClerico on August 2, 2004. This was post-Blakely, pre-Booker. Judge DiClerico held that the Guidelines were unconstitutional in light of Blakely. Lata (like Fanfan) argued that this meant no enhancements based on judge-found facts could be imposed; the government argued that it meant the Guidelines were “not severable” and thus advisory. Judge DiClerico sided with the government, holding that the Guidelines were advisory.

Lata’s guideline range without enhancements was 37-46 months, with enhancements it was 70-87 months, and Judge DiClerico sentenced him to 96 months. The increase over the ordinary 70-87 month range was “based on Lata’s extensive criminal record” over a long period of time much of which was not reflected in his criminal history points, and “the fear induced by the threat of the bomb and the gun at the robbery.” Lata, 2005 WL 1491483 at \*1. In other words, although the judge did not call it an upward departure, it was a valid upward departure under § 4A1.3 (criminal history points understated seriousness of criminal history and likelihood of recidivism), and §5K2.0 (circumstances not adequately taken into account in the guidelines).

Lata raised both of the arguments above in the district court. The district court rejected them for reasons that do not appear in the First Circuit’s opinion. The district court could easily have rejected the Straight Fair Warning argument because there were valid grounds for upward departure. But that is not enough to reject the Fair Warning/Sixth Amendment Argument because the Booker remedy raised the maximum potential punishment, it could therefore not be used in sentencing Lata *at all*, instead Lata had to be sentenced under the mandatory guidelines, and under the Sixth Amendment that guideline sentence could not be increased based on judge-found facts. We do not know why Judge DiClerico rejected the Fair Warning/Sixth Amendment Argument, but a number of courts have rejected it by claiming that the maximum potential punishment for fair warning purposes was always the U.S. Code maximum. That is wrong. The Supreme Court has squarely held that *in a guidelines system*, the maximum potential sentence for fair warning purposes is the presumptive sentencing guidelines range on the date of the offense, even if the statutory maximum is higher and the court could upwardly depart from the presumptive range. See Miller v. Florida, 482 U.S. 423, 431, 432-33, 435 (1987). Every court of appeals has applied Miller to the Federal Sentencing Guidelines.

C. *Lata in the First Circuit*

Fair Warning/Sixth Amendment Argument: It does not appear that the First Circuit actually addressed this argument. It seems only to have addressed a Blakely-type argument:

In his initial brief, Lata argued that no jury having passed on the facts underlying the enhancements to his guideline sentence (five levels and the

two probation-related criminal history points), the maximum possible sentence for him was within the 37-46 month range; this is the range that would have resulted if he had been sentenced without enhancements, using an offense level of 20 and a criminal history category of II. This argument is defeated by Booker, which permits enhancements based on judge-found facts with advisory guidelines, Booker, 125 S. Ct. at 749-50; United States v. Antonakopoulos, 399 F.3d 68, 75 (1<sup>st</sup> Cir. 2005), and need not be further considered.

Thus, Lata should be read as not raising or addressing the Fair Warning/Sixth Amendment Argument. That argument therefore remains open. As discussed below, however, the opinion contains incorrect *dicta* that can be misused with respect to either argument.

Straight Fair Warning Argument: The First Circuit described as Lata's "fallback argument" that a sentence above the ordinary guideline range of 70-87 months violated both the *Ex Post Facto* Clause and the Due Process Clause. Id. at \*2.

The court first held that the sentence did not violate the *Ex Post Facto* Clause itself because it applies only to changes made by Congress or the Sentencing Commission, and not by judicial interpretations like Booker. Id. at \*2. That is correct.

The court then acknowledged that "after-the-offense enlargement of the . . . maximum sentence by judicial construction can raise due process objections based on lack of fair warning . . . when the alteration is 'unexpected and indefensible' by reference to the case law that had been expressed prior to the offense." Id. at \*3. The court did not have to reach whether the Booker remedy met the "unexpected and indefensible" test because the sentence was the same as it would have been under the guidelines with an upward departure. After lengthy, erroneous, unnecessary *dicta* about the "unexpected and indefensible" test (see below), the court finally said all it needed to say and all the opinion means:

Even under mandatory guidelines, a defendant with a criminal record not fully reflected by criminal history points was always on notice that the top of his guideline range might be exceeded. U.S.S.G. § 4A1.3; United States v. Black, 78 F.3d 1, 8 (1<sup>st</sup> Cir. 1996). Lata's pre-sentence report indicated that an upward departure might be warranted because of the character of his criminal record. Nothing in the guidelines flatly forbade the judge from departing based on the fear induced by the threat of the bomb and gun. The result does not violate the due process clause.

Id. at \*4.

The court then left open the Straight Fair Warning Argument for cases in which there was no valid ground for upward departure: "We reserve for the future the case . . . in which a sentence is imposed for a pre-Booker crime that is

higher than any that might realistically have been imagined at the time of the crime *or based on factors previously discouraged, prohibited, or not recognized under the guidelines.*” Id. at \*4 (emphasis supplied).

D. *Incorrect Dicta Re Fair Warning:*

1) Suggestions that the fair warning test is subjective rather than objective

The court acknowledged that “the Supreme Court’s concern with fair notice goes beyond actual reliance. Under Bouie, Rogers and Marks, some court-made changes in criminal law may be so surprising and troubling (‘unexpected and indefensible’) as to offend a sense of fair warning even if the defendant probably paid no attention to the case law.” Id. at \*3.

In several passages, however, Judge Boudin veers into a subjective test, which is confusing and wrong. He states that:

- the *Ex Post Facto* Clause is overly protective of reliance because it applies to changes in the maximum sentence “even in situations where there is no possibility that the defendant in fact relied on the earlier version of the statute in committing the crime,” id. at \*2, thus suggesting that the Due Process Clause, in contrast, does not apply if the defendant did not in fact rely on the earlier version.
- “the criminal’s reliance on earlier glosses is usually an imaginary concern: rarely is the decision to commit the crime affected by close attention to the statutory penalties, let alone the more obscure intermediate step of guideline calculations. Lata certainly does not claim that he in fact relied on the mandatory guidelines when he robbed the bank.” Id. at \*3.
- “Lata’s own sentencing expectations when he committed the crime, if any, surely related to results.” Id. at \*4. (whatever this means)

Nonetheless, as the court grudgingly admits, the fair warning test is an objective one. A subjective test would be directly contrary to the whole notion that higher sentences create deterrence, that defendants are guilty even if they never read the law, etc.

2) Incorrect Description of the Fair Warning Test

Judge Boudin acknowledges that the “unexpected and indefensible” test means “inconsistent with prior law,” but also says it means “a polite synonym for ‘wrong,’” “‘unjustified,’ ‘arbitrary,’ or ‘vindictive’ breaks with prior law.” Id. at \*3.

This is incorrect. In Rogers, the Court said the “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue” test “adequately respects the due process concern with fundamental fairness *and* protects

against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law.” 532 U.S. at 462 (emphasis supplied). In other words, fundamental fairness in the form of fair warning is the touchstone, and if the defendant has fair warning, he will also be protected against unjustified, arbitrary or vindictive changes in the law.

The correct test is whether the Booker remedy was objectively foreseeable in light of the statutes, guidelines and caselaw in existence at the time of the offense.

In Bouie v. City of Columbia, 378 U.S. 347 (1964), the Supreme Court said that a defendant is deprived of fair warning by an “unforeseeable and retroactive judicial expansion of narrow and precise statutory language. . . . Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, s 10, of the Constitution forbids. . . . If a judicial construction of a criminal statute is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ it must not be given retroactive effect.” Id. at 353. It held that the South Carolina Supreme Court’s expansion of the state trespassing statute violated the Due Process Clause because it was “clearly at variance with the statutory language,” and “has not the slightest support in prior . . . decisions.” Id. at 356.

In Marks v. United States, 430 U.S. 188 (1977), the Court followed Bouie and held that an “unforeseeable” judicial relaxation of the definition of obscenity violated the Due Process Clause because it “marked a significant departure from” prior law. Id. at 191-96.

In Rogers v. Tennessee, 532 U.S. 451 (2001), the Court considered a common law rule that was changed retroactively. The Court quoted the standard from Bouie as above. Id. at 457. It said that when “the allegedly impermissible judicial application of a rule of law involves not the interpretation of a statute but an act of common law judging,” strict application of the *ex post facto* test (simply whether the law has changed in a way that is more onerous) would be too restrictive. Id. at 461. Thus, “we conclude that a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.’” Id. at 462.

### 3) Correct Application of the Fair Warning Test

Rogers indicates that where a change in law is *not* common law judging, but “the interpretation of a statute,” the simple question should be whether the law has changed in a way that makes it more onerous. The Booker remedy was a judicial interpretation of a statute, not common law judging. It makes no difference, however, because the Booker remedy changed the law to make it more onerous, and it was unexpected and indefensible. In particular, it increases the potential punishment from the presumptive guideline range to the U.S. code maximum, and also permits the court to use reasons to

increase the sentence that were not available under the Guidelines and subject to less meaningful appellate review.

On November 12, 2002, when Lata committed the offense, he had fair warning that the maximum potential punishment was the top of the applicable guideline range, and that that range could be exceeded only for reasons complying with the Guidelines' strict departure policy statements and the *de novo* standard of review.

The Booker remedy, by making the guidelines advisory, raised the potential punishment to the U.S. code maximum and permitted courts to sentence up to that maximum for reasons discouraged, prohibited, or not recognized under the guidelines, subject only to reasonableness review rather than *de novo* review.

The Booker remedial majority stated that “[w]e do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system,” but, “given today’s constitutional holding, that is not a choice that remains open.” 125 S. Ct. at 767. The remedial majority therefore “significantly alter[ed] the system that Congress designed.” Id. at 757. As the constitutional majority emphasized, Booker, 125 S. Ct. at 750, and the remedial majority acknowledged, id. at 759, the Guidelines “as written” were mandatory up to the moment Booker was decided on January 12, 2005. The plain language of the statute made them mandatory, see 18 U.S.C. § 3553(b)(1) (court “shall impose a sentence of the kind, and within the range” established by the Guidelines), an unbroken line of Supreme Court decisions said they were mandatory, see Mistretta v. United States, 488 U.S. 361, 391 (1989), Stinson v. United States, 508 U.S. 36, 42 (1993), Glover v. United States, 531 U.S. 198, 203-04 (2001), United States v. R.L.C., 503 U.S. 291, 297-98, 306 (1992), and nothing in either Booker opinion found “any constitutional infirmity in” the sections that were excised. Booker, 125 S. Ct. at 771 (Stevens, J., dissenting). The revision of the statute was so “unexpected and indefensible” in reference to prior law that neither the government, nor the respondents, nor any of the *amici* contemplated or requested it. Id. at 771 (Stevens, J., dissenting).

#### 4) Lata’s Misapplication of the Fair Warning Test

According to Judge Boudin, Apprendi and Blakely made “some major change in guideline status or operations seem[] possible,” that in Booker the government had “urged a similar result to that reached by the Supreme Court,” and that the “Booker majority” would not call its decision “indefensible” Id. at \*3.

This is more than a little disingenuous. Before Blakely and Booker, the First Circuit and every other court of appeals had held that it was not remotely possible that Apprendi had anything to do with the Guidelines. See, e.g., United States v. Picanso, 333 F.3d 21, 25-26 (1<sup>st</sup> Cir. 2003) (Boudin, J.).

Furthermore, this gets entirely wrong the relevant date and the relevant change in law. The only relevant date for fair warning purposes is the date of the offense, in this case, November 12, 2002. By then, no court had ever held that the Guidelines were

advisory or that federal courts had discretion to sentence up to the statutory maximum for reasons prohibited, discouraged or not recognized by the Guidelines. By then, Jones (1999), Apprendi (2000), and Ring (2002) had been decided. Each of those cases held that it violated the Constitution for a judge to find facts raising the statutory maximum penalty. If these decisions portended anything, it was that judges would not be permitted to increase the guideline range based on judge-found facts. Judge Boudin cites Blakely as support for the proposition that the Booker revision of the statute might not have been unexpected and indefensible, but the precise opposite is true. The Court held that its “precedents make clear” that “the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004) (emphasis in original), citing Ring and Apprendi.

Thus, while Booker’s constitutional holding *might* have been reasonably foreseeable to Lata (though every court of appeals had rejected the argument that Apprendi applied to the Guidelines), Booker’s remedial revision of the statute – making the Guidelines advisory, increasing the maximum from the presumptive guideline range to the U.S. code statutory maximum, and permitting sentences up to that new maximum for reasons not permitted by the Guidelines -- was unexpected and indefensible with reference to the law in effect when Lata committed the offense.

Judge Boudin also suggests that the relevant maximum for fair notice purposes is the U.S. code maximum, stating that “Lata would have known only one thing for certain, namely, the 20-year maximum statutory sentence for bank robbery.” Id. at \*4. He then acknowledges that “[t]o some,” this might “seem unrealistic” because “it is not easy to imagine a 20-year sentence in this case being imposed under the guidelines.” Id. This analysis is unduly mushy. As noted above, the Supreme Court has squarely held that in a guidelines system, the maximum sentence for fair warning purposes is the presumptive sentencing guidelines range on the date of the offense, even if the statutory maximum is higher and the court could upwardly depart from the presumptive range. See Miller v. Florida, 482 U.S. at 431, 432-33, 435.

Judge Boudin also denigrates the importance for fair warning purposes of a “mere” change in sentencing law, stating that “Booker, after all, does not lay down a new fixed rule of primary conduct or redefine elements of a crime . . . but is only part of a mechanism or framework by which an ultimate sentence is developed.” Lata, at \*4. He does not go so far as to say that fair warning requirements do not apply to sentencing laws, which would be flatly inconsistent with the court’s statement earlier in the opinion that “after-the-offense enlargement of the . . . maximum sentence by judicial construction can raise due process objections based on lack of fair warning . . . when the alteration is ‘unexpected and indefensible’ by reference to the case law that had been expressed prior to the offense.” Id. at \*3. Every court but the Ninth Circuit agrees. Furthermore, it is plain from Blakely and the first half of Booker that five members of the Supreme Court view sentencing as the main event.

After all of this meandering, incorrect *dicta*, the court correctly concludes that it need not adopt a final position on whether the Booker remedy was unexpected and indefensible because it makes no difference in this case because there was a valid ground for upward departure. Id. at \*4. (It would, however, make a difference if the court had addressed the Fair Warning/Sixth Amendment Argument.)

*E. Bright Spots*

Though age and infirmity were discouraged bases for departure, they may be considered under 3553(a), especially if they diminish the risk of re-offense. United States v. Lata, \_\_\_ F.3d \_\_\_, 2005 WL 1491483 at \*5 (June 24, 2005).

When a case is remanded for re-sentencing based on facts that existed but the court was constrained from fully considering at the initial sentencing, the court may also consider facts that arose after the initial sentencing, such as a worsening of the defendant's medical condition. United States v. Lata, \_\_\_ F.3d \_\_\_, 2005 WL 1491483, at \*5 & n.3 (1<sup>st</sup> Cir. June 24, 2005). Beware of how this could be used against you and how to avoid it. See Part IX of the Federal Sentencing Guidelines Conference Defense Attorney Training memorandum.