

--- F.3d ----, 2005 WL 820550 (3rd Cir.)

### [Briefs and Other Related Documents](#)

United States Court of Appeals,  
Third Circuit.  
In re Anthony Bola OLOPADE, Petitioner.  
No. 05-1617.  
Submitted Under Third Circuit LAR 34.1(a) March 10, 2005.  
Filed April 11, 2005.

**Background:** Defendant whose motion to vacate his conviction of conspiracy to import heroin was denied applied for permission to file a second or successive motion to vacate. The government moved to dismiss.

**Holding:** The Court of Appeals, [Sloviter](#), Circuit Judge, held that the rule of [United States v. Booker](#), which extended rule of [Apprendi](#) to the Federal Sentencing Guidelines, was not retroactively applicable to case on collateral review.

Application denied without prejudice; motion to dismiss granted.

[1]

- 🔑 [110](#) Criminal Law
  - 🔑 [110XXX](#) Post-Conviction Relief
    - 🔑 [110XXX\(C\)](#) Proceedings
      - 🔑 [110XXX\(C\)3](#) Hearing and Determination
        - 🔑 [110K1666](#) Effect of Determination
          - 🔑 [110K1668](#) Successive Post-Conviction Proceedings
            - 🔑 [110K1668\(3\)](#) k. Particular Issues and Cases. [Most Cited Cases](#)

Before the Court of Appeals could grant postconviction relief movant permission to file a second or successive motion in the District Court, he had to first make out a prima facie showing that his request to file a second or successive motion relied on 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.A. §§ 2244\(b\)\(3\), 2255](#).

[2]

- 🔑 [106](#) Courts
  - 🔑 [106II](#) Establishment, Organization, and Procedure
    - 🔑 [106II\(H\)](#) Effect of Reversal or Overruling
      - 🔑 [106k100](#) In General
        - 🔑 [106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

A new rule of constitutional law is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive. [28 U.S.C.A. § 2255](#).

[3]

- 🔑 [106](#) Courts
  - 🔑 [106II](#) Establishment, Organization, and Procedure
    - 🔑 [106II\(H\)](#) Effect of Reversal or Overruling
      - 🔑 [106k100](#) In General
        - 🔑 [106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

For purpose of the rule that a new rule of constitutional law is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive, 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. [28 U.S.C.A. § 2255](#).

[4]

🔑 [106](#) Courts

🔑 [106II](#) Establishment, Organization, and Procedure

🔑 [106II\(H\)](#) Effect of Reversal or Overruling

🔑 [106k100](#) In General

🔑 [106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

Rule of [United States v. Booker](#), which extended rule of [Apprendi](#) to the Federal Sentencing Guidelines, was not retroactively applicable to case on collateral review. [18 U.S.C.A. §§ 3553\(b\)\(1\), 3742\(e\)](#); [28 U.S.C.A. § 2255](#); [U.S.S.G. § 1B1.1](#) et seq., 18 U.S.C.A.

#### West Codenotes

Recognized as Unconstitutional

[18 U.S.C.A. §§ 3553\(b\)\(1\), 3742\(e\)](#).

Anthony Bola Olopade, Elkton FCI, Lisbon, Ohio, Petitioner pro se.

[Christopher J. Christie](#), United States Attorney, George S. Leone, Chief, Appeals Division, United States Department of Justice, Newark, New Jersey, for Respondent.

Before [SLOVITER](#), [NYGAARD](#), and FUENTES, Circuit Judges.

#### OPINION OF THE COURT

[SLOVITER](#), Circuit Judge.

\* 1 Anthony Olopade has filed an application in this court pursuant to [28 U.S.C. § 2244](#) seeking permission to file a second or successive motion under [28 U.S.C. § 2255](#) to vacate his sentence. In ruling on that application, we must decide whether the United States Supreme Court's recent decision in [United States v. Booker](#), 543 U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), applies to persons seeking permission to file second or successive [§ 2255](#) motions. In keeping with the holdings of all the other courts that have addressed related issues, [\[FN1\]](#) we hold that [Booker](#) cannot be relied on for that purpose.

#### I.

In 1998, a jury convicted Anthony Olopade in the United States District Court for the District of New Jersey of conspiracy to import heroin. The District Court thereafter imposed a sentence of 240 months imprisonment. On direct appeal, this court affirmed Olopade's conviction and sentence. [United States v. Olopade](#), 205 F.3d 1330 (3d Cir.1999) (table).

In 2001, Olopade filed a motion for a writ of habeas corpus under [28 U.S.C. § 2255](#) in the United States District Court for the District of New Jersey. In that motion, Olopade claimed, *inter alia*, that (1) his sentence violated the principle established in [Apprendi v. New Jersey](#), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because the quantity of narcotics was not proven to the jury beyond a reasonable doubt; (2) that the indictment was defective because it failed to allege a drug amount; and (3) that his trial counsel was ineffective under the standard set forth in [Strickland v. Washington](#), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On April 24, 2003, the District Court entered a memorandum and order denying Olopade's motion; thereafter, this court denied Olopade's request for a certificate of appealability ("COA").

In 2004, relying on the Supreme Court's decision in [Blakely v. Washington](#), 542 U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), Olopade sought this court's authorization under [28 U.S.C. § 2244](#) to file a second or successive motion to vacate his sentence under [28 U.S.C. § 2255](#). We denied Olopade's request in an unpublished order dated September 29, 2004.

In the wake of the Supreme Court's decisions in [Booker](#), Olopade has yet again sought this court's

authorization under [§ 2244](#) to file a second or successive habeas corpus motion. In his *pro se* application titled "Request for Permission to File a Second or Successive Petition in the District Court," which was filed with this court on February 28, 2005, Olopade argues that a second or successive [§ 2255](#) motion is appropriate in his case because such a motion would rely on new rules of law that were previously unavailable, *i.e.*, the holdings in [Booker](#). In response, the United States, by way of a letter motion dated March 10, 2005, has asked this court to dismiss Olopade's most recent [§ 2244](#) request. [\[FN2\]](#) We will do so.

## II.

As we discussed in more detail in our opinion in [United States v. Ordaz](#), 398 F.3d 236, 238-39 (3d Cir.2005), the Supreme Court held this term in [United States v. Booker](#) that "the Sixth Amendment as construed in [Blakely](#) does apply to the [Federal] Sentencing Guidelines." [Booker](#), 543 U.S. at ----, 125 S.Ct. at 746 (Stevens, J.). [Booker](#) was decided by two opinions of the Court. In the first opinion, authored by Justice Stevens for a majority of five, the Court reaffirmed the holding 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," and the Court extended that rule to the Federal Sentencing Guidelines. [Booker](#), 543 U.S. at ----, 125 S.Ct. at 756 (Stevens, J.). The second opinion, authored by Justice Breyer for a majority of five, focused on the remedy. The Court held that [18 U.S.C. § 3553\(b\)\(1\)](#), the provision of the Sentencing Reform Act of 1984 that made the Guidelines mandatory, was incompatible with the Court's constitutional ruling; thus, the Court severed and excised [§ 3553\(b\)\(1\)](#). Similarly, [18 U.S.C. § 3742\(e\)](#), "the provision that set [ ] forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range," was also severed and excised because it contained critical cross-references to the section that made the Guidelines mandatory. [Booker](#), 543 U.S. at ----, 125 S.Ct. at 764 (Breyer, J.). The net result was to delete the mandatory nature of the Guidelines and transform them to advisory guidelines. In his most recent [28 U.S.C. § 2244](#) application, Olopade seeks to avail himself of the two [Booker](#) holdings.

\*2 [\[1\]](#) The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), however, has "greatly restrict[ed] the power of federal courts to award relief to ... prisoners who file second or successive habeas corpus applications." [Tyler v. Cain](#), 533 U.S. 656, 661, 121 S.Ct. 2478, 150 L.Ed.2d 632 (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).

[\[2\]\[3\]](#) This issue is controlled by the decision in [Tyler v. Cain](#), 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (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, 121 S.Ct. 2478 (internal quotations omitted). [\[FN3\]](#) 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.

[\[4\]](#) 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 not mention collateral review and only expressly applied its holdings to cases on direct appeal. [Booker](#), 125 S.Ct. at 769 (Breyer, J.) ("[W]e

must apply today's holdings--both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act--to all cases on direct review." ). [FN4] 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." ).

\*3 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. ----, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), strongly suggests precisely the opposite. In *Schriro*, the Court held that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (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) ("[W]e 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." ). [FN5]

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*. [FN6] 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. [FN7]

### 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.

FN1. See, e.g., *Varela v. United States*, 400 F.3d 864, 868 (11th Cir.2005) (per curiam) ("[W]e 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) ("[W]e 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) ("[N]either *Booker* nor *Blakely [v. Washington]*, 542 U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004),] apply retroactively to Green's collateral challenge."); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir.2005) ("*Booker* does not apply retroactively to criminal cases that became final before its release on January 12, 2005."); *Gerrish v. United States*, 353 F.Supp.2d 95, 96 (D.Me.2005) ("*Booker* ... [is] not applicable to cases that were not on direct appeal when [it was] decided."); *United States v. Johnson*, 353 F.Supp.2d 656, 658 (E.D.Va.2005) (finding that *Booker* does "not apply retroactively on collateral review").

FN2. 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.

FN3. 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).

FN4. 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, 109 S.Ct. 1060, 103 L.Ed.2d 334 (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.

FN5. 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, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), a decision which the Supreme Court held to apply retroactively in *Ivan V. v. City of N.Y.*, 407 U.S. 203, 204, 92 S.Ct. 1951, 32 L.Ed.2d 659 (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.](#)

[FN6.](#) 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.

[FN7.](#) In its letter motion dated March 10, 2005, the United States urged that a without prejudice dismissal is the appropriate outcome.

C.A.3,2005.  
In re Olopade  
--- F.3d ----, 2005 WL 820550 (3rd Cir.)

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- [05-1617](#) (Docket) (Feb. 28, 2005)

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