

In The  
UNITED STATES COURT OF APPEALS  
For The Eighth Circuit

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No. 03-2871  
Criminal

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UNITED STATES OF AMERICA,

appellee,

v.

LOUIS F. PIRANI,

appellant.

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On Appeal from the United States District Court  
for the District of Arkansas

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**BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT'S  
PETITION FOR REHEARING AND REHEARING EN BANC**

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National Association of Criminal Defense Lawyers  
and  
Minnesota Association of Criminal Defense Lawyers

VIRGINIA VILLA  
DEBORAH ELLIS  
700 St. Paul Building  
6 West Fifth Street  
St. Paul, MN 55102  
(651) 297-6400

Counsel for Amici Curiae

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## **RULE 29(c) STATEMENT**

### **Identity of Amici:**

The National Association of Criminal Defense Lawyers (“NACDL”) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA’s House of Delegates.

The Minnesota Association of Criminal Defense Lawyers (“MACDL”) is an association with over 200 members within the State of Minnesota and is an affiliate of NACDL.

### **Amici Interest:**

NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice. In furtherance of this and other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in the United States Supreme Court and others, addressing a wide variety of criminal-justice issues.

MACDL was founded in 1988 to promote study and research in the field of criminal defense law; to advance the knowledge of law in the field of criminal defense by lecture, seminars and publications; to promote the proper

administration of criminal justice; and to foster, maintain, and encourage the integrity, independence, and expertise of the defense lawyer in criminal cases. The mission of MACDL is to preserve the adversary system of justice; to maintain and foster independent and able criminal defense lawyers; to ensure justice and due process for persons accused of crime; to protect individual rights; and to improve criminal law, its practice and procedures.

**Source of authority to file:**

This Court entered an order dated February 1, 2005, stating that other interested persons may file briefs amicus curiae addressing the questions identified in that order on or before February 23, 2005, without the need to obtain leave of court to do so pursuant to F.R.A.P. 29.

**PARTICIPATION IN ORAL ARGUMENT**

The Court may grant permission of an amicus curiae to participate in oral argument. F.R.A.P. 29(g). The Amici Curiae request the opportunity to participate in oral argument.

## ARGUMENT

### **THE HOLDING IN *UNITED STATES V. BOOKER*, 125 S.CT. 738 (2005) REQUIRES REMAND IN ALL CASES THAT DO NOT CONTAIN AN APPEAL WAIVER FOR A DETERMINATION, IN THE FIRST INSTANCE, OF WHETHER THE DISTRICT COURT, UNDER CURRENT LAW, WOULD RENDER A DIFFERENT SENTENCE**

Louis Pirani was convicted by a jury of making a false statement, 18 U.S.C. § 1001, but was sentenced as if he had been convicted of obstruction of justice. The jury was not requested nor required to determine whether Mr. Pirani, by making a false statement, had obstructed justice. This Court originally affirmed his conviction but vacated his sentence, finding that the use of the cross-reference under U.S.S.G. § 2F1.1 constituted plain error after the United States Supreme Court decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2005). *See United States v. Pirani*, No. 03-2871, slip op. at 19 (8<sup>th</sup> Cir. Aug. 5, 2004) *opinion vacated and rehearing en banc granted* Aug. 16, 2004. Although the panel split on the issue of plain error, the dissenting judge did so on the basis that the Supreme Court had not yet spoken on the issue of *Blakely*'s application to the Federal Guidelines. *See id.*, slip op. at 23 (Smith, J., dissenting in part) (“The majority also notes that ‘if the Court soon adopts the view of the majority of the circuits, there will be no question the error in the instant case contravenes clearly established law.’ I agree. But the Court has not done so.”) As Supreme Court has now spoken on the issue, *see United States v. Booker*, 125 S.Ct. 739 (2005), it would appear that the dissenting Judge in *Pirani* has conceded that the error in Mr. Pirani's case contravenes clearly established law.

**A. The basis of the *Pirani* panel decision is still good law**

The panel's original decision was based on the premise that the error was not only plain (in that the applicability of *Blakely* to the Federal Sentencing Guidelines could not reasonably be disputed), but also held that the error prejudiced the defendant:

Perhaps an error more prejudicial to the rights of a defendant cannot be conceived than the denial in whole of his right to litigate the elements of the offense for which he is punished. Mr. Pirani did not receive notice of, much less have an opportunity to contest as such, any evidence tending to prove the elements of obstruction. In other words, he was denied the right to hold the government to its burden of alleging and then proving the elements of obstruction to the jury beyond a reasonable doubt.

*Pirani*, slip op. at 21. The panel therefore found the imposed sentence did violate the Sixth Amendment, and that such violation prejudiced the defendant.

The legal landscape has shifted since the panel originally considered this case, most notably due to the Supreme Court issuance of its decision in *United States v. Booker*, 125 S.Ct. 738 (2005), but it has not done so in a manner that invalidates the panel's opinion. The *Booker* Court confirmed the *Pirani* Court's estimation that the *Blakely* must apply to the Federal Sentencing Guidelines. However, the Court also provided an unusual and unexpected remedy: it re-interpreted the Sentencing Reform Act of 1984 to make the Guidelines purely advisory.

In so doing, the Court recognized that its application of the Sixth Amendment to the Guidelines, as well as its remedial interpretation of the Sentencing Reform Act of 1984, must be applied to all cases pending on direct

review. *Booker*, 125 S.Ct. at 769. In so ruling, the Court also stated:

That ... does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the “plain error” test. It is also because, in cases not involved a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon the application of the harmless-error doctrine.

*Id.* The Court indicated that the work of appellate review in cases affected by *Booker* should include the following steps: 1) determine whether there was a Sixth Amendment violation and 2) if there was, whether that violation amounts to plain error. If there was not a Sixth Amendment violation, the Court indicated that remand may still be warranted.

In Mr. Pirani’s case, the panel has already answered the first two questions: there was a Sixth Amendment error, and it was prejudicial. Nothing in either the *Booker* opinion, or in the instant proceedings, indicate that the panel’s opinion in this respect was flawed.

**B. Cases, such as *Pirani*, in which Sixth Amendment violations occurred should be remanded, along with those cases that may otherwise be affected by the remedy provided in *Booker***

The disposition of Mr. Pirani’s individual case does not answer the question of what should happen in other cases pending appellate review. These cases incorporate a wide range of circumstances. These cases may be grouped into 4 broad categories:

1) those with clear Sixth-Amendment violations, such as in the case of Mr.

Pirani, in which key sentencing decisions were never presented to a jury;

2) those with clear Sixth-Amendment violations where enhancements were imposed in cases involving guilty pleas, but where the enhancements were not agreed to and the facts were not admitted to by the defendant;

3) those where no Sixth-Amendment violation occurred, but were sentenced under a mandatory-guideline construct; and

4) those in which the defendant waived his or her right to appeal the sentence.<sup>1</sup>

The number of cases that fall within these categories is difficult to determine. In an effort to foreclose the filing of unnecessary pleadings, this Court issued an order on September 27, 2004 directing that supplemental briefs raising *Blakely* issues would not be accepted. The Court has issued opinions in ten cases indicating that counsel sought to raise a *Blakely* issue but that the Court would not consider the issue until *Booker* had been decided, and would hold the mandate in those cases pending decision.<sup>2</sup> At least thirty-one cases have had certiorari

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<sup>1</sup>Such waivers may be explicitly set forth in a plea agreement or may occur due to a failure to either brief, or to request leave to file a supplemental brief, the sentencing issue. See e.g. *United States v. Cramer*, 2005 WL 244277 (8<sup>th</sup> Cir. Feb. 3, 2005)(filing 28j letter insufficient to raise sentencing issue).

<sup>2</sup>See *United States v. Frazier*, 394 F.3d 612 (8<sup>th</sup> Cir. 2005); *United States v. Meza-Gonzalez*, 394 F.3d 587 (8<sup>th</sup> Cir. 2005); *United States v. Borer*, 394 F.3d 569 (8<sup>th</sup> Cir. 2005); *United States v. Howard*, 394 F.3d 582 (8<sup>th</sup> Cir. 2005); *United States v. Clawson*, 392 F.3d 324 (8<sup>th</sup> Cir. 2004); *United States v. Phillips*, 390 F.3d 574 (8<sup>th</sup> Cir. 2004); *United States v. Andersen*, 116 Fed.Appx. 52 (8<sup>th</sup> Cir. 2004)(unpublished); *United States v. Pierce*, 388 F.3d 1136 (8<sup>th</sup> Cir. 2004); *United States v. Rosales*, 111 Fed.Appx. 857 (8<sup>th</sup> Cir. 2004)(unpublished); *United States v. Gomez*, 111 Fed. Appx. 855 (8<sup>th</sup> Cir. 2004)(unpublished).

granted by the United States Supreme Court in which judgment of this Court was vacated and the case remanded for reconsideration in light of *Booker*.<sup>3</sup> There are an untold number of cases pending decision which came under this Court's September 27, 2004 order which may merit a remand in light of *Booker*. Given that the Court is already considering this issue *en banc*, it should decide what will happen with these other cases.

In all of these case, the procedure for appellate review set forth by the Supreme Court should be applied. However, that does not mean that the Court

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<sup>3</sup>See *Smith v. United States*, 2005 WL 405646 (U.S. Feb. 16, 2005); *Wingate v. United States*, 2005 WL 126485 (U.S. Jan. 24, 2005); *Francis v. United States*, 2005 WL 124101 (U.S. Jan. 24, 2005); *Courtney v. United States*, 2005 WL 124098 (Jan. 24, 2005); *Hourston v. United States*, 2005 WL 126349 (U.S. Jan. 24, 2005); *Jackson v. United States*, 2005 WL 124280 (U.S. Jan. 24, 2005); *Red Elk v. United States*, 2005 WL 125746 (U.S. Jan. 24, 2005); *Bern v. United States*, 2005 WL 124646 (U.S. Jan. 24, 2005); *Smith v. United States*, 2005 WL 124246 (U.S. Jan. 24, 2005); *Smith v. United States*, 2005 WL 124281 (U.S. Jan. 24, 2005); *Davis v. United States*, 2005 WL 126389 (U.S. Jan. 24, 2005); *Kanatzar v. United States*, 2005 WL 126492 (U.S. Jan. 24, 2005); *Simmons v. United States*, 2005 WL 126464 (U.S. Jan. 24, 2005); *Turnbull v. United States*, 2005 WL 123974 (U.S. Jan. 24, 2005); *Davis v. United States*, 2005 WL 123978 (U.S. Jan. 24, 2005); *Norman v. United States*, 2005 WL 123979 (U.S. Jan. 24, 2005); *Schoenauer v. United States*, 2005 WL 123980 (U.S. Jan. 24, 2005); *Martinez-Figeroa v. United States*, 2005 WL 124171 (U.S. Jan. 24, 2005); *Zimmerman v. United States*, 2005 WL 124192 (U.S. Jan. 24, 2005); *Parks v. United States*, 2005 WL 124205 (U.S. Jan. 24, 2005); *Rodriguez v. United States*, 2005 WL 124199 (U.S. Jan. 24, 2005); *Abbott v. United States*, 2005 WL 126479 (Jan. 24, 2005); *Carpenter v. United States*, 2005 WL 126379 (U.S. Jan. 24, 2005); *Beltran-Hernandez*, 2005 WL 126518 (U.S. Jan. 24, 2005); *Leisure v. United States*, 2005 WL 126576 (U.S. Jan. 24, 2005); *Thorn v. United States*, 2005 WL 126578 (U.S. Jan. 24, 2005); *Payne v. United States*, 2005 WL 126581 (U.S. Jan. 24, 2005); *Bass v. United States*, 2005 WL 126603 (U.S. Jan. 24, 2005); *Dobbs v. United States*, 2005 WL 126604 (U.S. Jan. 24, 2005); *Leatham v. United States*, 2005 WL 126632 (U.S. Jan. 24, 2005); *Gonzalez v. United States*, 2005 WL 126488 (U.S. Jan. 24, 2005).

need do so in an in-depth and time-consuming manner. Cases may be sorted into the four broad categories outlined above. Cases that fall within the first three categories should be remanded to the district courts for review.

**1. All Sixth Amendment violation cases should be remanded**

The Court should, as an initial matter, remand those cases in which a Sixth Amendment violation clearly occurred. Determination of Sixth Amendment violations may appear to be duplicitous at this stage of proceedings, since on remand, the district court will not be bound by the Sentencing Guidelines. However, even though the Guidelines are now purely advisory, they still constitute a mandatory consideration sentencing consideration under 18 U.S.C. § 3553(a)(4)(A). It is how a district court is to find the facts to come to a guidelines calculation that renders the Sixth Amendment considerations still relevant for purposes of federal sentencing.

Several courts of appeal have considered the question of the Sixth Amendment component of the *Booker* analysis and have come to a general consensus that, where a sentence was imposed in a case where the jury was either not required to find the facts at issue, or where the defendant did not stipulate to those fact, then a Sixth Amendment violation has occurred. Those cases should be remanded to the district court for sentencing proceedings consistent with the Sixth Amendment. In *United States v. Crosby*, 2005 WL 240916 (2<sup>nd</sup> Cir. Feb. 3, 2005), the Court engaged in a complex analysis regarding plain error and the Sixth Amendment. The Court in that case was disposed to remand all cases to the

district courts for an initial determination as to whether the Sixth Amendment had been violated in the initial sentencing proceeding, and in cases where no such error occurred, to determine whether a different sentence under advisory guidelines would have been imposed.

The Fourth Circuit was more direct in its analysis. In *United States v. Hughes*, 396 F.3d 374 (4<sup>th</sup> Cir. 2005), the Court found that any case in which the district court imposed a sentence pre-*Booker* that exceeded the maximum sentence authorized by the facts found by the jury alone violates the Sixth Amendment and must be remanded. The Sixth Circuit came to a similar conclusion in *United States v. Oliver*, 2005 WL 233779 (6<sup>th</sup> Cir. Feb. 2, 2005). The Ninth Circuit, in *United States v. Ameline*, 2005 WL 350811 (9<sup>th</sup> Cir. Feb. 9, 2005) also agreed with this analysis and specifically rejected using the “reasonableness” standard of review on an appeal in which a Sixth Amendment violation had occurred.

The only Circuit to take a contrary view is the Eleventh. In *United States v. Rodriguez*, 2005 WL 272952 (11<sup>th</sup> Cir. Feb. 4, 2005), the Court found that the prejudice prong of the plain error test cannot be met where the Court cannot determine whether the sentencing result would be different. In other words, the Eleventh Circuit believes that the plain-error test must be applied to a sentencing procedure that has already occurred, but applying the remedy provided by the Supreme Court, namely advisory guidelines. The problem with the Eleventh Circuit’s analysis is that it directly conflicts with the explicit terms set forth for appellate review in *Booker*: first determining whether a Sixth Amendment

violation occurred, and second, whether that violation results in prejudice (namely, and increased potential maximum sentence under the Guidelines).

The circuits that have ordered remands based on Sixth Amendment violations have recognized that *Booker* opinion necessarily means that the reasonable doubt standard still applies to the factual findings a court must make in order to calculate a sentencing range under the Federal Guidelines. This conclusion has support in a long line of Supreme Court cases, not the least of which is *Booker*. The Eleventh Circuit's analysis, that a "do over" under advisory guidelines may make no difference, fails to account for *Booker's* mandate that the standard for factual findings affecting the upper limits of a sentence must be proven beyond a reasonable doubt.

That the reasonable doubt standard now applies to contested Guideline factors finds support not only in the *Booker* decision, but also by other recent decisions of the Court. In *Jones v. United States*, 526 U.S. 227 (1999), the Court faced the issue as to whether the car-jacking statute, 18 U.S.C. § 2119, contained separate offenses or whether the increased penalties were sentencing factors to be found by a judge. The Court, using the doctrine of constitutional doubt, found the statute to contain separate offenses. In so doing, the Court noted, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact, other than a prior conviction," that increases a maximum penalty must be plead and proven beyond a reasonable doubt. *Id.* at 243 n.6.

The Court's subsequent ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) cemented the proposition that there cannot be a reasoned distinction between "sentencing facts" and elements of an offense where such facts increase a maximum penalty. *Apprendi* expressly referred back to the Sixth Amendment component of the reasonable doubt standard: "Since [*In re Winship*, 397 U.S. 358 (1970)], we have made clear beyond peradventure that *Winship's* due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi*, 530 U.S. at 484 quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998)(alterations added). The *Booker* remedy simply means that such facts need not be submitted to a jury, but it does not change the necessity for findings beyond a reasonable doubt for contested sentencing issues. This system would be particularly appropriate where the enhancement mandated by the Guidelines depends upon a finding that the defendant committed a new offense that has not yet resulted in any conviction. *See e.g.* U.S.S.G § 2K2.1(b)(5) (increasing offense level for possession of firearm in connection with another offense).

**2. All cases sentenced under the mandatory guideline system, and which do not contain appeal waivers, should be remanded to the district courts**

The third issue outlined in the *Booker* opinion that must be considered by a reviewing court, is whether any non-Sixth Amendment error is harmless. In other words, district courts were bound by mandatory guidelines until *Booker*, but are

not so bound now. In some instances this may make a difference. In others, it may not.<sup>4</sup> As noted by the Second Circuit in *Crosby*, if sentencing under advisory guidelines would make a difference, it cannot be said to be harmless error. However, the question remains as to how to differentiate between those cases.

Several circuits have come to the conclusion that re-sentencing in all such cases where the appellate court cannot determine whether the creation of advisory, rather than mandatory, guidelines would make a difference is the appropriate remedy. The Third Circuit in *United States v. Davis*, 2005 WL 334370 (3<sup>rd</sup> Cir. Feb. 11, 2005) the court indicated that sentencing issues raised under *Booker* are best determined by the district court in the first instance. The Sixth Circuit in *United States v. Barnett*, 2005 WL 357015 (6<sup>th</sup> Cir. Feb. 16, 2005) decided that it will presume prejudice in all cases in which the district court construed the Guidelines as mandatory and therefore will remand in all such cases. The Tenth Circuit has taken a similar approach, finding that the decision of whether to abide by the guidelines is a question that must be answered in the first instance by the district court. An appellate court can review the exercise of a district court's discretion, but it cannot exercise it in the first instance. *See United States v. Labastida-Segura*, 2005 WL 273315 (10<sup>th</sup> Cir. Feb. 4, 2005). A similar

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<sup>4</sup>*See e.g. United States v. Little Dog*, Appeal No. 04-1834 (8<sup>th</sup> Cir. Feb. 22, 2005)(finding that, where district court stated it would not impose different sentence even if it had the power to do so, appellant failed to establish a *Booker* error). The *Little Dog* court's reasoning follows that in *United States v. Bruce*, 2005 WL 241254 (6<sup>th</sup> Cir. Feb. 3, 2005), where the Court reviewed the entire record and determined that the district court's statements of record indicate that a different sentence would not be imposed on remand.

disposition in cases where the record does not clearly indicate the futility of remand is an appropriate result.

**3. Remand with instructions will not only place sentencing decisions in the correct courts, but will also promote efficiency in the disposition of cases pending on appeal**

As noted above, the cases presently pending before this Court may be sorted into four broad categories. However, this Court must still determine a means of performing that sorting process. One way would simply be to issue standard orders in all cases in which either briefing, or a request for briefing, regarding *Blakely* or *Booker* has been raised remanding the case to the district court for consideration in light of *Booker*. Such standard orders may reflect the three-step process outlined in *Booker* for determination of whether a Sixth Amendment violation occurred, and if not, whether a sentence would differ under an advisory sentencing scheme. If either situation arose, then the district court should hold a new sentencing hearing, issuing a new judgment with the required statement of reasons. If not, then the district court would be able to impose the same sentence, with an explanation of its reasons for doing so. This would allow the district courts to exercise the discretion with which they are bestowed, while allowing a record to be made which could then be reviewed by this Court, if the parties considered such further review to be necessary.

Should the Court not wish to remand all cases, then it should order briefing in those cases in which briefing has not occurred allowing the parties to address the category in which they believe the case falls. This approach would entail a

significant amount of work by this Court, and may result in nearly the same number of remand orders. The Court may be further hampered by cases in which the record does not sufficiently reflect whether the district court would have imposed the same sentence under an advisory, rather than mandatory, guideline sentencing scheme.

### CONCLUSION

For the above reasons, *amici* respectfully suggest that the panel opinion in *United States v. Pirani*, No. 03-2871(8<sup>th</sup> Cir. Aug. 5, 2004) and its attendant reasoning be adopted by the entire court. Further *amici* also suggest that this Court follow the general practices of the Second, Third, Fourth, Sixth, Ninth and Tenth Circuits in remanding cases potentially affected by the *Booker* decision, either due to a Sixth Amendment violation or due to imposition of sentence under a mandatory sentencing scheme, for re-consideration of sentencing issues in the first instance by the district court.

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Respectfully submitted,

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VIRGINIA G. VILLA

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DEBORAH ELLIS  
700 St. Paul Building  
6 West Fifth Street  
St. Paul, MN 55102  
(651) 297-6400  
Attorneys for Amicus Curiae  
NACDL and MACDL

# ADDENDUM