

NOTABLE BOOKER-RELATED CASES DECIDED IN AUGUST 2005

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I. Appellate Review Issues

A. Harmless Error

United States v. Lake, 419 F. 3d 111 (2d Cir. 2005): The Second Circuit remands for resentencing where the defendant cited Blakely and Apprendi, thus preserving his objection to the district court's imposition of Guidelines enhancements based on judicial fact-finding, and where the government failed to prove that the sentencing error was harmless.

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United States v. Martinez, 418 F. 3d 1130 (10th Cir. 2005), cert. denied, 126 S. Ct. 841 (2005): The district court departed upward four levels from the PSR recommendation under mandatory Guidelines. The Tenth Circuit held that the error in applying the mandatory guidelines was harmless where it was clear from the district court's comments regarding the inadequacy of the PSR recommendation that it would not have imposed a more lenient sentence post-Booker.

B. Jurisdiction

United States v. Melendez-Torres, 420 F.3d 45 (1st Cir. 2005): The First Circuit holds that post-Booker the appellate court still lacks jurisdiction to review a sentencing court's refusal to grant a downward departure from the Guidelines. [Click here to view case excerpt](#)

United States v. Winingear, 422 F.3d 1241 (11th Cir. 2005): The Eleventh Circuit follows the lead of other Circuits in holding that, post-Booker, the Court still lacks jurisdiction to review a sentencing court's decision not to apply a downward departure from the Guidelines.

C. Plain Error

United States v. Chandler, 419 F. 3d 484 (6th Cir. 2005): In contrast with United States v. Barnett, 398 F. 3d 516 (6th Cir. 2005) (presuming that the defendant's substantial rights have been affected where the district court imposes a sentence under the mandatory Guidelines), the Sixth Circuit declines to remand for resentencing based on the district court's perfunctory declaration that, in addition to a Guidelines sentence, it was also imposing an alternative sentence using the Section 3553(a) factors.

United States v. Badilla, 419 F.3d 1128 (10th Cir. 2005): The Tenth Circuit holds that the district court's imposition of an obstruction of justice sentencing increase under mandatory Guidelines was not plainly erroneous because had the issue gone to the jury it would have found that the defendant lied on the stand when he denied knowledge of the presence of drugs in the

¹ For a printer-friendly version of this document that includes all case excerpts, [click here](#).

vehicle he was driving.

D. Reasonableness

United States v. Winters, 416 F.3d 856 (8th Cir. 2005): Applying the reasonableness standard of review, the Eighth Circuit affirms the district court's imposition of an above-the-guideline sentence in this voluntary manslaughter case. [Click here to view case excerpt](#)

United States v. Bryant, 420 F.3d 652 (7th Cir. 2005): The Seventh Circuit reaffirms that sentences properly calculated under the Guidelines "are entitled to a rebuttable presumption of reasonableness." See also United States v. Paulus, 419 F.3d 693 (7th Cir. 2005).

United States v. Chauncey, 420 F.3d 864 (8th Cir. 2005): The Eighth Circuit affirms as reasonable a 100-month sentence for possession with intent to distribute two ounces of marijuana where the defendant was a career offender. [Click here to view case excerpt](#)

United States v. Winingear, 422 F.3d 1241 (11th Cir. 2005): In reviewing a sentence for mail fraud, the Eleventh Circuit declines to address the degree of deference owed to sentences within the guideline range, implicitly rejecting the government's argument that all sentences within the guideline range should be deemed per se reasonable.

II. Ex Post Facto/Due Process

United States v. Dupas, 419 F.3d 916 (9th Cir. 2005): The Ninth Circuit rejects the defendant's claim that "the retroactivity principles of the Fifth Amendment's Due Process Clause preclude the retroactive application of the remedial holding of" Booker. The defendant had argued that defendants in pending cases must be afforded the benefit of a constitutional rule such as Justice Stevens' Sixth Amendment holding, but retroactive application of new judicial interpretations of criminal statutes is barred by the ex post facto principles established in Bouie v. City of Columbia, 378 U.S. 347 (1964). [Click here to view case excerpt](#)

United States v. Rines, 419 F.3d 1104 (10th Cir. 2005), cert. denied, 74 USLW 3392 (U.S. Jan 09, 2006) (NO. 05-7719): The Tenth Circuit rejects the argument that applying the remedial holding in Booker to a sentence imposed prior to Booker violates the Fifth Amendment's Due Process Clause. [Click here to view case excerpt](#)

III. Fast Track

United States v. Melendez-Torres, 420 F.3d 45 (1st Cir. 2005): The First Circuit rejects the defendant's argument that the absence of a fast track program in the District of Maine violates his equal protection rights. (Note that the defendant did not make a § 3553(a) unwarranted disparity claim on these grounds.) [Click here to view case excerpt](#)

United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107 (E.D. Wis. 2005): discussed in Part VIII(E) below.

IV. Jury Instructions

United States v. Badilla, 419 F.3d 1128 (10th Cir. 2005): On remand from the Supreme Court, the Tenth Circuit held that a jury instruction stating the jury could infer, but was not required to infer, that a driver in sole possession of the vehicle in which a large quantity of marijuana was found had knowledge of the drugs, did not violate the defendant's Sixth Amendment right to have jury determine any fact that would increase defendant's sentence. [Click here to view case excerpt](#)

V. Mandatory Minimums

United States v. Jones, 418 F.3d 726 (7th Cir. 2005), cert. denied, 126 S. Ct. 817 (2005): The Seventh Circuit holds that Harris v. United States remains good law and rejects the defendant's claim that the imposition of a mandatory minimum sentence based on judicial fact-finding is unconstitutional after Booker. [Click here to view case excerpt](#)

United States v. Gonzales, 420 F.3d 111 (2d Cir. 2005): Distinguishing Harris, the Second Circuit clarifies that statutory drug quantity is an element in all prosecutions of aggravated offenses under 21 U.S.C. § 841, and as a result, the quantity must be proven to a jury or admitted by the defendant. [Click here to view case excerpt](#)

United States v. Alexander, 381 F. Supp. 2d 884 (E.D. Wis. 2005): discussed in Part VIII(B) below.

VI. Plea Issues

United States v. Roque, 421 F. 3d 118 (2d Cir. 2005), cert. denied, --- S.Ct. ----, 2006 WL 37802, 74 USLW 3392 (Jan. 9, 2006): The defendant, who entered a guilty plea prior to Booker, sought to withdraw the plea as not knowing, intelligent, or voluntary because it was entered on the false assumption that the Guidelines were mandatory rather than advisory. Under the terms of the plea agreement, the defendant stipulated to a particular sentence range under the mandatory Guidelines, and waived his right to appeal any sentence within that range. The Second Circuit held that the defendant was not entitled to withdraw his guilty plea based on an "alleged mistake as to the mandatory nature" of the Guidelines. [Click here to view case excerpt](#)

VII. Restitution

United States v. Sosebee, 419 F.3d 451 (6th Cir. 2005), cert. denied, 126 S. Ct. 843 (2005): The Sixth Circuit holds "that restitution is not subject to Booker analysis because the statutes authorizing restitution, unlike ordinary penalty statutes, do not provide a determinate statutory maximum." [Click here to view case excerpt](#)

United States v. Day, 418 F. 3d 746 (7th Cir. 2005): The Seventh Circuit reiterates that

Booker does not apply to restitution, except in cases where the imposition of restitution is a condition of release. [Click here to view case excerpt](#)

United States v. Carruth, 418 F.3d 900 (8th Cir. 2005): The Eighth Circuit, in accord with all other Circuits addressing the issue, holds that the Apprendi-Blakely-Booker line of cases does not prohibit judicial fact finding for restitution orders. [Click here to view case excerpt](#)

VIII. Section 3553(a)

A. General

United States v. Garey, 383 F. Supp. 2d 1374 (M.D. Ga. 2005): The defendant was convicted after trial of various charges arising from threats to blow up a shopping mall. The district court granted a variance from the guideline sentence after finding that the guideline range was based in part on conduct for which the defendant was not indicted and could not have been convicted. [Click here to view case excerpt](#)

B. Mandatory Minimums

United States v. Alexander, 381 F. Supp. 2d 884 (E.D. Wis. 2005): Defendant pleaded guilty to all three counts of the indictment: (1) carrying a firearm during a drug trafficking offense, (2) possession with intent to distribute heroin, and (3) felon in possession of a firearm. Judge Adelman sentenced the defendant below the guideline range on counts two and three, finding that imposition of the guideline sentence, added to the 60 month mandatory minimum on count one, would be contrary to the goals of the Sentencing Reform Act. [Click here to view case excerpt](#)

C. Rehabilitation

United States v. Hawkins, 380 F. Supp. 2d 143 (E.D.N.Y. 2005): On the basis of extraordinary rehabilitation the court sentenced the defendant to probation. The court provided an extensive analysis of the meaning of rehabilitation and its role in sentencing. In addition, although the court found that a downward departure from the guideline sentence on rehabilitation grounds was appropriate, it also pointed out that, post-Booker, it should not be as difficult to show that a lesser sentence is justified on rehabilitation grounds as it was under a mandatory guidelines regime.

D. Mental Illness

United States v. Roach, 2005 WL 2035653 (N.D. Ill. Aug. 22, 2005): Recognizing the relationship between the defendant's psychiatric disorders and her criminal conduct, the court imposes a sentence of 5 years probation, including community and home confinement, finding that the guideline range of 12 to 18 months imprisonment did not further the sentencing goals of § 3553(a). [Click here to view case excerpt](#)

E. Unwarranted Disparity (Fast Track)

United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107 (E.D. Wis. 2005): In imposing sentence, the district court states that it would have imposed a below-guideline sentence based on fast track disparity had other § 3553(a) factors not counseled against leniency. The court provided a detailed explanation of why it is appropriate for a sentencing court to consider the absence of a fast track program as one factor in determining a proper sentence.

IX. Standard of Proof

A. Acquitted Conduct

United States v. Price, 418 F.3d 771 (7th Cir. 2005): The Seventh Circuit holds that Booker has no effect on United States v. Watts, 519 U.S. 148 (1997) and that therefore the district court did not err in considering conduct underlying the conspiracy charge of which the defendant had been acquitted in determining the defendant's sentence.

B. Reasonable Doubt

United States v. Okai, No. 4:05CR19, 2005 WL 2042301 (D. Neb. Aug. 22, 2005): Defendant pleaded guilty to counterfeiting but disputed the amount of loss, which was not charged in the indictment. In imposing sentence the court finds that under the Due Process Clause of the Fifth Amendment, the defendant's sentence must be based on facts proven beyond a reasonable doubt. [Click here to view case excerpt](#)