

**NOTABLE BOOKER-RELATED CASES DECIDED IN DECEMBER 2005**

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## **I. “Straddle” or “Pipeline” Cases**

### **A. Procedural Issues**

#### **1. Appeal Waivers**

United States v. Burns, 433 F.3d 442 (5<sup>th</sup> Cir. 2005): An appellate waiver that is otherwise enforceable against a defendant applies to an appeal seeking to raise a Booker claim. The fact the waiver occurred prior to Booker does not alter the validity of the waiver.

United States v. Hamdi, 432 F.3d 115 (2005): By agreeing, in a pre-Booker, plea agreement that his sentence would be “governed by the United States Sentencing Guidelines,” the defendant did not waive his right to seek post-Booker appellate review of a mandatory guideline sentence.

#### **2. Harmless Error**

United States v. Cain, 433 F.3d 1345 (11<sup>th</sup> Cir. 2005): The district court’s pre-Booker “extra-verdict” enhancement of a defendant’s felon-in-possession offense level for the handgun being stolen violated the Sixth Amendment and, as constitutional error, not harmless beyond a reasonable doubt.

#### **3. Plain Error**

United States v. Moreno-Trevino, 432 F.3d 1181 (10<sup>th</sup> Cir. 2005): In an illegal reentry case involving an apparently unreserved claim, it was not, prior to Booker, plain error for the district court to treat the guidelines as mandatory. Any error was not particularly egregious, would not result in a miscarriage of justice if uncorrected, and there was no evidence that the district court would have imposed a significantly lighter sentence under advisory guidelines.

United States v. Harris, \_\_\_ F.3d \_\_\_, 2005 WL 3529015 (5<sup>th</sup> Cir. Dec. 27, 2005): Defendant’s unreserved claim that the court based his pre-Booker sentence on facts neither admitted by him nor found by a jury did not involve plain error. For an error to affect substantial rights, the defendant must show that it affected the outcome of the district court proceedings. “This standard requires the defendant to ‘demonstrate a probability sufficient to undermine confidence in the outcome’” and there “is no indication in the record that the district court would have imposed a lesser sentence had sentencing been under the Booker advisory regime rather than the pre-Booker mandatory regime.”

United States v. Gomez, 431 F.3d 818 (D.C. Cir. 2005): It was plain error to impose a pre-Booker mandatory guideline sentence upon a defendant convicted of a five-year mandatory minimum crack offense. If the record provided confidence that a Section 3553 sentence would not have been lower, the defendant’s “substantial rights” were affected. But, here, the record suggested a “reasonable likelihood” that a post-Booker sentence would have been lower than the

pre-Booker mandatory guideline sentence. Accordingly, the pre-Booker sentencing affected the defendant's substantial rights. [Click here to view case excerpt](#)<sup>1</sup>

United States v. Simpson, 430 F.3d 1177 (D.C. Cir. 2005): Defendant received a pre-Booker mandatory guideline sentence of 46 months after pleading guilty to illegal reentry. The sentence represented a term within the then-mandatory guideline range but the district court additionally stated it would impose the same sentence in its discretion if the guidelines were advisory. On appeal and subject to plain error review, the defendant raised a post-Booker challenge to his sentence. In affirming the sentence, the court noted that it was error to impose a mandatory guideline sentence upon the defendant but that the district court's alternative sentence which "made clear that it did consider those factors" set forth at Section 3553(a) so that the court's "prescience" in predicting an advisory guidelines regime resulted in a sentence that was not clearly erroneous.

## **B. Substantive Issues**

United States v. Lister, 432 F.3d 754 (7<sup>th</sup> Cir. 2005): Pre-Booker imposition of a 405 month sentence – that being the high-end of the applicable guideline range – did not require a remand where the district court, anticipating that the guidelines might be deemed advisory, "explicitly made a discretionary decision as to the proper sentence" and, in doing so, considered the statutory sentencing factors.

## **II. Retroactivity**

United States v. Gentry, 432 F.3d 600 (5<sup>th</sup> Cir. 2005): Booker is not retroactive to a defendant seeking Section 2255 relief from a conviction and sentence that became final before Booker.

## **III. Burden of Proof**

United States v. Brown, 430 F.3d 942 (8<sup>th</sup> Cir. 2005). A defendant raised a constitutional challenge to the district court's imposition of a post-Booker advisory guideline sentence in which his Section 2K2.1 offense level had been increased based on a fact – the defendant's use of the relevant firearm in connection with another felony offense – found by the court by less than proof beyond a reasonable doubt and on the basis of hearsay testimony. On appeal, the court affirmed the sentence, explaining that "In determining the appropriate guidelines sentencing range to be considered as a factor under § 3553(a), we see nothing in Booker that would require the court to determine the sentence in any manner other than the way the sentence would have been determined pre-Booker."

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

#### **IV. Review for “Reasonableness”**

##### **A. Role of the District Court**

United States v. Bokhari, 430 F.3d 861 (7<sup>th</sup> Cir. 2005): “[A] crucial predicate to [appellate] review for reasonableness is the district court’s proper – and explicit – determination of the total offense level and corresponding sentencing range under the Guidelines. Thus, a remand was necessary in a white collar case in which the defendants received 72-month sentences following a proceeding at which the district court resolved 10 levels worth of disputed guideline issues by concluding that the offense level should be “somewhere in the 26 range.” This left the reviewing court without “specific information pertaining to the district court’s calculation of the total offense level” and “unable to “determine whether the sentence [fell] within the Guidelines range (and therefore is entitled to a presumption of reasonableness) or whether it falls outside of the recommended range (and therefore requires additional reasoning from the district court).”

United States v. Lister, 432 F.3d 754 (7<sup>th</sup> Cir. 2005). In a case in which the defendant admitted involvement in the distribution of 1.8 kilograms of crack cocaine, a sentence – imposed prior to Booker and in the alternative – of 405 months (the high-end of the applicable guideline range) was reasonable. The court’s alternative sentence pre-supposed that the guidelines might be deemed advisory and “explicitly considered § 3553(a).” [Click here to view case excerpt](#)

##### **B. Rebuttable Presumption of Reasonableness**

United States v. Bokhari, 430 F.3d 861 (7<sup>th</sup> Cir. 2005): “If [a] sentence imposed falls within the properly calculated range prescribed by the Guidelines, a rebuttable presumption of reasonableness applies to that sentence.” On the other hand, “[i]f the sentence imposed falls outside of the applicable range, the district court should explain the reasons for its departure from the Guidelines’ now-advisory range.”

United States v. Lopez, 430 F.3d 854 (7<sup>th</sup> Cir. 2005): Applying a rebuttable presumption of reasonableness to the review of a within-guidelines sentence, the court deemed reasonable the defendant’s 21-year term of imprisonment (168 months at the low-end of the applicable guideline for bank robbery plus seven statutorily consecutive years for a “brandish” violation of Section 924(c)). Though, as the defendant contended, the district court “did not specifically reference every factor named in Section 3553(a), such a checklist is unnecessary.” Instead, the district court’s statement that the defendant did not “belong on the scrap heap” due to his cooperation, the related nature of the offenses, his drug problem, and his supportive family” along with the court’s stated perception that the nature of the defendant’s crimes “just cries out for a severe punishment” establish that the court reasonably balanced the various statutory concerns.

### **C. Downward Departures**

United States v. Menyweather, 431 F.3d 692 (9<sup>th</sup> Cir. 2005). In a mail fraud case, the defendant received a pre-Booker sentence of probation with a condition requiring her to spend 20 consecutive weekends in a “jail-type institution.” The sentence flowed from a guideline range of zero to six months resulting from an eight-level downward departure based on the defendant’s mental and emotional condition, diminished capacity, and extraordinary family circumstances. The Government appealed and, after the Supreme Court’s decision in Booker, the Ninth Circuit first concluded that the district court did not abuse its discretion in departing downward (in doing so, the court noted that Booker has disposed of the “Feeney Amendment’s” requirement that decisions to depart be reviewed de novo). Then, the court further explained that “any error” in the court’s decision to depart “was harmless in view of the sentencing factors listed in 18 U.S.C. § 3553(a)” and because, on any post-Booker remand, the district court would impose the same sentence again. Ultimately, the court deemed the sentence “reasonable.”

### **D. “Fast-Track” Disparity**

United States v. Morales-Chaires, 430 F.3d 1124 (10<sup>th</sup> Cir. 2005). The district court did not act unreasonably in declining to impose a below guidelines sentence based on defendant’s contention that the lack of a “fast-track program” in his district for illegal immigration offenses created an unwarranted sentencing disparity pursuant to Section 3553(a)(6). Avoiding unwarranted sentencing disparities is but one of the statutory factors that a sentencing court must consider and, here, the district court clearly considered all relevant factors in determining the appropriateness of a within-guidelines sentence.