

NOTABLE BOOKER-RELATED CASES DECIDED IN FEBRUARY 2006

TABLE OF CONTENTS

- I. “Straddle” or “Pipeline” Cases 1
 - A. Appellate Waivers 1
 - B. Remand Necessary/Unnecessary 1
 - C. Ex Post Facto 3
- II. Guideline Error 3
- III. Presumption of Reasonableness 3
- IV. Role of the District Court 3
- V. Review for Reasonableness 4
 - A. Guideline Sentences Found Reasonable 4
 - B. Below Guideline Sentences Found Unreasonable 5
 - C. Above Guideline Sentences Found Reasonable 6
 - D. Extent of Variance 7
 - E. Disparity 7
 - 1. Crack vs. Powder 7
 - 2. “Fast-Track” 8
 - 3. Among Co-Defendants 8

I. “Straddle” or “Pipeline” Cases

A. Appellate Waivers

United States v. Story, ___ F.3d ___, 2006 WL 242552 (5th Cir. Feb. 2, 2006): A defendant’s waiver, in a plea agreement, of his statutory right to appeal is enforceable against the defendant by the government. However, where the government declines or otherwise neglects to enforce the waiver, the appellate court has jurisdiction over the appeal.

B. Remand Necessary/Unnecessary

United States v. Martin, ___ F.3d ___, 2006 WL 385316 (6th Cir. Feb. 21, 2006): In a “straddle” case, a “presumption of prejudice” arises from a district court’s failure to treat the guidelines as advisory. The presumption mandates that a sentence be vacated and remanded unless the Government presents “clear and specific evidence that the district court would not have . . . sentenced the defendant to a lower sentence if it had treated the Guidelines as advisory.”

United States v. Booker, 436 F.3d 238 (D.C. Cir. 2006): After Blakely but before Booker, the district court imposed sentence upon a defendant convicted at trial of drug distribution and firearms offenses, including a violation of Section 924(c). At that time, the sentencing judge imposed alternate sentences. First, the judge assumed that continued mandatory nature of guideline sentencing and imposed an aggregate sentence of 35 years. Then, assuming the guidelines to be unconstitutional, the court imposed an aggregate sentence of 30 years. On a post-Booker appeal, both parties agreed that the imposition of a 35-year mandatory guideline sentence constituted error. At issue, however, was the effect of the 30-year alternate sentence: upon the vacatur of the mandatory guideline sentence, would the alternate sentence become the sentence in a self-executing manner or was a remand necessary? Deciding that the 30-year alternate term did not, at the time it was announced, constitute a “judgment of the court,” the court remanded the case to the district court for imposition of a post-Booker sentence.

United States v. Story, ___ F.3d ___, 2006 WL 242552 (5th Cir. Feb. 2, 2006): At a post-Blakely but pre-Booker sentencing hearing, the district court announced three sentences for a defendant convicted of a firearms offense. First, the court assumed the on-going validity of the guidelines in imposing a 63-month term of imprisonment at the low-end of a range arrived at by judicial findings of facts neither found by a jury nor admitted by the defendant. Second, the court assumed the guidelines to be unconstitutional and stated that, in that event, it would still impose a 63-month sentence. Finally, the court, envisioning the possibility of a sentencing regime in which the guidelines were to be applied only to facts found by a jury or admitted by the defendant, stated that such a sentence would be 21 months. On post-Booker appellate review, the Fifth Circuit decided a remand was necessary given its inability to determine what sentence the district court would have imposed had it known the precise outcome of Booker.

United States v. Gokey, ___ F.3d ___, 2006 WL 301897 (7th Cir. Feb. 6, 2006): A

defendant appearing for sentencing before Booker and on a range of 168 to 210 months received a sentence of 235 months from a judge anticipating the guidelines to be “defunct.” The court therefore viewed its role as imposing a sentence within the statutory maximum, consistent with Section 3553, and in disregard of the guidelines. The court also imposed an alternate mandatory guideline sentence of 210 months. On a post-Booker appeal, the court vacated the sentence and remanded the case for the imposition of a Section 3553 sentence in which the guidelines are treated as advisory.

United States v. Woods, ___ F.3d ___, 2006 WL 325262 (5th Cir. Feb. 13, 2006): Sentencing the defendant prior to Booker, the court treated the defendant severely. It imposed a sentence at the high-end of a guideline range it treated as mandatory and ordered the federal sentence to run fully consecutive to any sentence the defendant might receive in then-pending state cases. Despite the district court’s obvious desire to severely sanction the defendant, the imposition of a mandatory guideline sentence was not, on this post-Booker appeal, harmless. The Government’s contention that “there is no basis in the record for concluding that Woods would have received a lesser sentence if the district court had proceeded under advisory guidelines . . . misconceives the burden of proof where the defendant preserves the Booker error with an objection.” In that case, “It is the Government’s burden, not [the defendant’s], to prove that the sentence imposed would be the same.”

United States v. Knows His Gun, ___ F.3d ___, 2006 WL 335799 (9th Cir. Feb. 15, 2006): No remand is necessary when, at a pre-Booker sentencing, the district court “correctly anticipated” the Supreme Court’s subsequent holding in imposing a then-alternate sentence. In this case, the sentencing judge imposed the alternate sentence on the assumption that the guidelines, even if found unconstitutional, would provide “useful instruction” and the court “explicitly considered many of the factors listed in § 3553(a).”

United States v. McCaffrey, ___ F.3d ___, 2006 WL 318993 (7th Cir. Feb. 13, 2006): After receiving a pre-Booker mandatory guideline sentence of 240 months, a defendant convicted of a child pornography offense raised an unpreserved Booker claim on appeal. Specifically, he sought a limited remand to permit the district court an opportunity to determine whether the same or a different sentence would be imposed pursuant to advisory guidelines. On plain error review, the defendant was unable to show that his substantial rights were affected: “there is no question about what the judge would have done had he known the guidelines were advisory; he would have put McCaffrey away for as long as he could..”

United States v. Hamilton, ___ F.3d ___, 2006 WL 350066 (5th Cir. Feb. 16, 2006): While the district court plainly erred in imposing, prior to Booker, mandatory guideline sentences upon the defendants, the plain error did not affect the defendants’ substantial rights as necessary to obtain a remand on an unpreserved claim of error. “The transcript of the sentencing hearing indicates that the district court made no suggestion of an inclination to sentence outside the Guidelines or hint of constraint to sentence within them. There is no statement by the district court judge to indicate what he might have done were the Guidelines not mandatory. Thus, we do not know what the trial judge would have done had the Guidelines been advisory . . . [a]nd,

on such a record, Appellants cannot show that the district court, sentencing under an advisory scheme, would have reached a significantly different result.”

C. Ex Post Facto

United States v. Kelly, 436 F.3d 992 (8th Cir. 2006): The imposition of a post-Booker above-guidelines sentence upon a defendant who committed his offense at a time when the guidelines were mandatory did not violate Due Process or the Ex Post Facto Clause. At the time the defendant pleaded guilty, he was advised of the statutory maximum such that he had fair warning of the possible punishment.

II. Guideline Error

United States v. Kristl, ___ F.3d ___, 2006 WL 367848 (10th Cir. Feb. 17, 2006): Booker's requirement that a sentencing court consider the guidelines requires the court to correctly calculate the guidelines. When a court fails to do so, the resulting sentence is unreasonable unless the error is harmless. Here, the district court erroneously calculated the defendant's criminal history score – it assessed Chapter Four points against a prior conviction on the basis of the sentence originally imposed, not the sentence as reduced on a reconsideration motion – so that a remand was necessary.

III. Presumption of Reasonableness

United States v. Claiborne, ___ F.3d ___, 2006 WL 452899 (8th Cir. Feb. 27, 2006): “[T]he guidelines sentencing range, though advisory, is presumed reasonable.”

United States v. Lewis, 436 F.3d 939 (8th Cir. 2006): “A sentence falling within the applicable guideline range is presumptively reasonable.”

United States v. Cooper, ___ F.3d ___, 2006 WL 330324 (3rd Cir. Feb. 14, 2006): Declining “to adopt a rebuttable presumption of reasonableness for within-guidelines sentences,” the court explains that a “within-guidelines sentence is more likely to be reasonable than one that lies outside the advisory guidelines range.” Conversely, “it is less likely that a within-guidelines sentence, as opposed to an outside-guidelines sentence, will be unreasonable.”

United States v. Green, 436 F.3d 449 (4th Cir. 2006): After Booker, a sentence imposed within the Sentencing Guidelines range is presumptively reasonable.

IV. Role of the District Court

United States v. Shafer, ___ F.3d ___, 2006 WL 453200 (8th Cir. Feb. 27, 2006): Though Section 5G1.3 governing the imposition of concurrent or consecutive sentence upon a defendant serving an undischarged term of imprisonment is now advisory, “it is essential that the district court explain why it . . . made the [federal] sentence concurrent to the undischarged portion of a

sentence for unrelated crimes.”

United States v. Williams, 436 F.3d 767 (7th Cir.): Under circumstances in which the district court discussed the mitigating facts presented by the defendant, the district court reasonably imposed a sentence at the low-end of the applicable guideline range. The guidelines are presumptively reasonable, a district court’s decision is reviewed “deferentially,” and “this [was] not a case where the judge passed over in silence the principal argument made by the defendant.” Instead, the district court “considered both [the defendant’s] background, and the nature of the offense” in deciding “that a sentence within the guidelines would be appropriate not only to deter [the defendant] from possessing a gun in the future, but to send a message to the community to stop carrying firearms.”

United States v. Williams, ___ F.3d ___, 2006 WL 288652 (11th Cir. Feb. 8, 2006): Though the district court’s pre-Booker imposition of a mandatory guideline sentence of life upon a convicted drug dealer did not constitute plain error, a remand was still necessary due to the sentencing judge’s non-compliance with Section 3553(c)(1). That provision requires a court to “state in open court the reasons for its imposition of the particular sentence and, if the sentence . . . exceeds 24 months, the reason for imposing a sentence at a particular point within the range.” In this case, “the trial court offered no reason for the life sentence it elected to impose upon [the] 26 year-old [defendant].”

United States v. Lewis, 436 F.3d 939 (8th Cir. 2006): In response to the defendant’s complaint that “the court failed to analyze the § 3553(a) factors sufficiently,” the court found no error: “[S]entencing courts are not obligated to provide ‘robotic incantations about each statutory factor considered.’”

United States v. Green, 436 F.3d 449 (4th Cir. 2006): The district court’s task is to: (1) properly calculate the sentence range recommended by the Sentencing Guidelines; (2) determine whether a sentence within that range and within statutory limits serves the statutory sentencing factors and, if not, select a sentence that does serve those factors; (3) implement mandatory statutory limitations; and (4) articulate the reasons for selecting the particular sentence, especially explaining why a sentence outside of the Sentencing Guideline range better serves the relevant statutory sentencing purposes.

V. Review for Reasonableness

A. Guideline Sentences Found Reasonable

United States v. Richardson, ___ F.3d ___, 2006 318615 (6th Cir. Feb. 13, 2006): A 19-year old career offender pleaded guilty to bank robbery and received a 180-month term of imprisonment. His advisory guideline range was 151 to 188 months. On appeal, the court found this sentence reasonable given that the “district court articulated and explained its reasons,” and “explicitly considered many § 3553(a) factors.” The court’s decision to sentence the defendant at the higher end of the range turned on his “history of violent behavior, including three felony

convictions by the time he was nineteen” along with his “continued problems with violence since being incarcerated for this offense, which evidenced ‘his continuing inability to control his emotions and his impulses and his reactions, even after he’s gotten free of drugs.’”

United States v. Cooper, ___ F.3d ___, 2006 WL 330324 (3rd Cir. Feb. 14, 2006): Sentenced three weeks after the decision in Booker, the defendant who had pleaded guilty to conspiring to distribute crack received a sentence of 105 months (which represented the high-end of the range following a seven-level substantial assistance departure from the career offender guideline). In so doing, the court rejected the defendant’s request for an 84-month sentence and articulated its reasons for doing so, listing the Section 3553(a) factors and describing the 105-month sentence as “satisf[ying] the purposes set forth” in the statute and “reasonable in light of these considerations.”

United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006): While there might be an illegal re-entry case in which it would be reasonable to vary from a guideline range arrived at by application of the 16-level increase for a defendant’s prior crime of violence, in this case there were “no extraordinary mitigating circumstances that made it unreasonable for the district court to follow the recommended enhancement with respect to [the defendant’s] prior conviction at age 35 for sexual intercourse with a 12 year-old child.”

B. Below Guideline Sentences Found Unreasonable

United States v. Shafer, ___ F.3d ___, 2006 WL 453200 (8th Cir. Feb. 27, 2006): “[W]ithout explaining why,” the district court varied downward from 60 months (the statutory maximum in a case with an advisory range in excess of that term) to 48 months, to run concurrently with an existing term of imprisonment, despite the fact the sentencing judge described the defendant as “an initial mover” of a “very serious” and “repugnant” filming of a 15-year old girl. The crime, according to the judge, “not only ha[d] to be punished but deterred” and, beyond that, the court noted that the defendant was arrears on child support obligations. “Nothing in the sentencing record,” in which “all the factors cited by the district court . . . argue against leniency,” “appears to us to justify any variance of this extraordinary magnitude.”

United States v. Gatewood, ___ F.3d ___, 2006 WL 452902 (8th Cir. Feb. 27, 2006): In a felon-in-possession case with an advisory guideline range of 63 to 78 months, it was unreasonable for the district court to impose a three-year term of imprisonment. The forty-three percent variance from the low-end of the applicable range was imposed without “explanation of why this sentence is warranted by the other § 3553(a) factors.” “Moreover, our review of the record suggests [the defendant] is hardly the sort of felon-in-possession offender who warrants a downward variance.” He “used a stolen shotgun to aggressively threaten a grocery store cashier while robbing the store. The violent nature of this relevant conduct argues against leniency. [His] criminal history, while not egregious, does not justify extreme leniency. [He] argues that the sentence is unreasonable because of his history of drug abuse. But the Guidelines prohibit departures based upon drug dependence or abuse because ‘substance abuse is highly correlated to an increased propensity to commit crime.’ [citations omitted]. . . . [He] has a lengthy history

of drug abuse without the extraordinary and successful effort to turn his life around . . .”

United States v. McManus, 436 F.3d 871 (8th Cir. 2006): Each of two defendants in a drug case received unreasonable downward variances. As to the first defendant, the district court’s focus upon the absence of criminal history – “one of the considerations that determined her advisory guidelines range” – did not “justif[y] a variance of this magnitude,” 54 percent “below the low end of the presumptively reasonable guidelines range.” As to the second defendant, the court noted the existence of factors such as the defendant having put himself through community college while on pretrial release that might “warrant a minor variance from the guidelines range” it found “nothing in the record which would justify a variance of this magnitude” (a 33 month downward variance from the low-end of the advisory guideline range).

United States v. Claiborne, ___ F.3d ___, 2006 WL 452899 (8th Cir. Feb. 27, 2006): It was unreasonable for the district court to impose a 15-month term of imprisonment when the advisory guideline range for the attempted distribution of less than 10 grams of crack cocaine otherwise produced an advisory guideline range of 37 to 46 months. Only “extraordinary circumstances” would justify this “extraordinary” “sixty percent downward variance.” Though the “small amount of crack cocaine seized” and the defendant’s “lack of criminal history” were indeed mitigating, those factors were “taken into account in determining his guidelines range” which included a “safety valve” reduction.

C. Above Guideline Sentences Found Reasonable

United States v. Larrabee, 436 F.3d 890 (8th Cir. 2006): Though the upward variance of 54 percent in a second-degree murder case was “significant,” the “district court did not exceed the permissible bounds of its discretion and, therefore, the sentence is reasonable.” The district court considered, as it must, the applicable guideline range but also considered the circumstances surrounding the murder (the defendant inflicted an injury he knew to be very serious, he chose to continue drinking rather than rendering any aid, he beat a second man to prevent that person from assisting the initial victim, and then fled the jurisdiction), the defendant’s substantial criminal history and the defendant’s lack of success in relation to prior rehabilitative programs offered to him. Ultimately, the sentencing judge, in stating its belief “that the defendant has a long record of violence” and “needs to be confined for a long period of time to protect the public,” made “clear that the court also considered the need for the sentence imposed to protect the public from further crimes of the defendant.”

United States v. Smith, ___ F.3d ___, 2006 WL 367011 (5th Cir. Feb. 17, 2006): The district court varied upward in this felon-in-possession case and, in so doing, satisfied its obligation of carefully explaining its rationale for doing so. Moreover, that rationale – the defendant’s lack of education, his status as a felon, that the grip of the gun was wrapped with tape, his three “narcotics convictions,” and his being on parole for only a month at the commission of the instant offense – was consistent with the court’s duty to evaluate the “nature and circumstances of the offense,” the “history and characteristics of the defendant,” and the need “to protect the public from further crimes of the defendant.”

D. Extent of Variance

United States v. Moreland, ___ F.3d ___, 2006 WL 399691 (4th Cir. Feb. 22, 2006): Given the defendant’s appearance as “a small-time drug dealer,” it was reasonable for the district court to vary downward to the 10-year statutory minimum from the 360-to-life career offender guideline range. However, the fact that it may have been reasonable to vary downward does not end the inquiry. “[W]hen the variance is a substantial one – such as the two-thirds reduction from the bottom of the advisory guideline range that is at issue here – [a court] must more carefully scrutinize the reasoning offered by the district court in support of the sentence. The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be.” While “the problem does not lie in the manner in which the district court set forth its reasoning concerning the sentence imposed . . . the circumstances of this case are not so compelling as to warrant the substantial variance imposed by the district court.” Despite the defendant’s “small-time” status, “He is . . . a repeat drug dealer who appears to have come to [the state] for the sole purpose of selling cocaine base.” While the district court noted his “ability and potential to become a productive member of society” based on his completion of high school and some college and his employment history,” the record suggests a “desultory pursuit of education” and a “spotty employment history” which call into question his willingness, if not his ability, to become a productive member of society.” If a two-thirds reduction is appropriate under these circumstances, “it is difficult to imagine any meaningful limit on the discretion of the district court.”

United States v. Claiborne, ___ F.3d ___, 2006 WL 452899 (8th Cir. Feb. 27, 2006): When asked to review a sentence varying from the guidelines, “we must examine whether ‘the district court’s decision to grant a § 3553(a) variance . . . is reasonable, and whether the extent of any § 3553(a) variance . . . is reasonable.’” [citations omitted]. A sentence varying from the guidelines is reasonable “so long as the judge offers appropriate justification” under the statute and “[h]ow compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.”

E. Disparity

1. Crack vs. Powder

United States v. Eura, ___ F.3d ___, 2006 WL 440099 (4th Cir. Feb. 24, 2006): While implicitly acknowledging the controversy surrounding the 100:1 crack versus powder ratio, the court ultimately concluded that “sentencing courts should not be in the business of making legislative judgments concerning crack cocaine and powder cocaine.” Thus, it was unreasonable for the district court to vary downward from the guideline range to the statutory minimum based on the case being one in which “the guideline does not provide – the crack guideline does not provide an appropriate, fair and just punishment.” A court can impose “a non-Guidelines sentence that is reasonable” only for “the individual aspects of the defendant’s case that fit within the factors listed in 18 U.S.C. § 3553(a).” Disagreement with the legislatively-decided ratio is not an individualized, case-specific circumstance.

2. “Fast-Track”

United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006): In this re-entry case, it was not unreasonable for the sentencing court to decline an invitation for a downward variance based on the lack of a “fast-track” program in the District of Missouri. While courts are, by statute, required to avoid unwarranted sentencing disparities, the fact that Congress and the Attorney General have chosen to implement fast-track policies in some jurisdictions but not others indicates that any resulting disparity is not unwarranted.

3. Among Co-Defendants

United States v. Boscarino, ___ F.3d ___, 2006 WL 287405 (7th Cir. Feb. 8, 2006): That a co-defendant who pleaded guilty and provided substantial assistance to the prosecution received a 20 month sentence did not mean that the defendant, who was convicted, was unreasonably sentenced to 36 months. While Section 3553(a)(6) dictates that courts seek to avoid unwarranted disparities, “A sentencing difference is not a forbidden ‘disparity’ if it is justified by legitimate considerations, such as rewards for cooperation.”