

**NOTABLE BOOKER-RELATED CASES DECIDED IN JANUARY 2006**

## TABLE OF CONTENTS

I.	Appellate Review Issues .....	3
A.	Preserving <u>Booker</u> Error .....	3
B.	Standard of Review .....	3
C.	Jurisdiction .....	4
D.	Harmless Error .....	5
E.	Reasonableness .....	5
1.	Reasonableness of a Guideline Sentence .....	5
2.	Burden .....	7
3.	Disparity .....	7
II.	Guideline Adjustments .....	8
A.	Safety Valve .....	8
B.	Aggravated Felony .....	8
C.	Crack Cocaine v. Powder Cocaine .....	8
D.	Prior Conviction .....	10
III.	Indictment .....	10
A.	Surplusage .....	10
B.	Facts not alleged in the Indictment .....	10
IV.	Special Jury Form .....	11
V.	3553(a) Factors .....	12
VI.	Departures .....	14
VII.	Relevant Conduct .....	16

### I. APPELLATE REVIEW ISSUES

## **A. Preserving Booker Error**

United States v. Rodriguez, 433 F.3d 411, (4<sup>th</sup> Cir. (Va.)), January 03, 2006: Enough to make a Blakely objection to preserve a claim of statutory Booker error. This is the unanimous view of the nine court of appeals.

United States v. Walter, 434 F.3d 30, (1<sup>st</sup> Cir. (Mass.)), January 11, 2006: Booker preserved if “there is reasonable indication that the district judge might well have reached a different result under advisory guidelines.” In this case, the district court judge unequivocally signaled his displeasure with the severity of the mandatory sentencing enhancements he felt obliged to apply.

## **B. Standard of Review**

United States v. Rodriguez, 433 F.3d 411, (4<sup>th</sup> Cir. (Va.)), January 03, 2006: If objection is reserved, then the standard of review is that of harmless error. Under harmless error, the burden is on the government to show that such an error did not affect the defendant's substantial rights. In order to obtain relief for an unpreserved statutory Booker error, plain error analysis applies and a defendant is bears the burden of showing that an error occurred, that it was plain, and that the error affected his substantial rights. The Fourth Circuit went on to say in this case, if there was a plain error analysis, there would be no reversible error because was no indication that the sentencing court would have imposed a different sentence under advisory guidelines.

United States v. Della Rose, 435 F.3d 735 (7<sup>th</sup> Cir. (IL.)) January 25, 2006: Plain error applies when no Booker type objection made at time of sentencing.

United States v. Cantrell, Sr., 433 F.3d 1269 (9<sup>th</sup> Cir.(Mont)) January 12, 2006: Booker mandates that appellate courts should review sentences for reasonableness .... applies only to the Court of Appeals' review of the ultimate sentence; after Booker the Court of Appeals continues to review the district court's interpretation of the Sentencing Guidelines de novo, the district court's application of the Sentencing Guidelines to the facts of a case for abuse of discretion, and the district court's factual findings for clear error. *See United States v. Kimbrew*, 406 F.3d 906, 916 (9<sup>th</sup> Cir.), cert. denied, 126 S.Ct. 636 (2005).

United States v. Allen, 434 F.3d 1166, (9<sup>th</sup> Cir. (Cal.)) January 12, 2006: The district court recognized that the Guidelines are no longer mandatory but stated that it was using them as persuasive guidance. Because the district court's interpretation of the guidelines essentially controlled its determination the defendant's sentence, de novo review applies. *See United States v. Smith*, 424 F.3d 992, 1015 (9th Cir.2005) (*citing United States v. Kimbrew*, 406 F.3d 1149, 1152 (9th Cir.2005)).

### C. Jurisdiction

United States v. Mickelson, 433 F.3d 1050 (8<sup>th</sup> Cir.(IA)) January 06, 2006: The government argued that the court lacks jurisdiction to review Mr. Mickelson's sentence because he was sentenced within the guideline range and a sentence within the guideline range is not listed as on the bases for appellate review in 18 U.S.C. 3742(a). In a lengthy discussion, the court disagrees with the government and states the following:

By selecting a reasonableness standard of review as most compatible with the Act and applicable to sentences either "within or outside" the range of the now advisory guidelines, Booker, 125 S.Ct. at 765, the Court conformed the Act to its sixth amendment remedy and provided for appellate review over all discretionary sentencing decisions for unreasonableness. As we recognized in United States v. Haack, 403 F.3d 997, 1002-03 (8th Cir.2005), calculation of the appropriate guideline sentence is only the first step in sentencing decisions under Booker, for the court must also consider the § 3553(a) factors before making its ultimate decision. Under this regime a guideline sentence, although presumptively reasonable, United States v. Lincoln, 413 F.3d 716, 717-18 (8th Cir.2005), can still be unreasonable when all the § 3553(a) factors are taken into consideration. The extent of a departure was always reviewed under the Act for reasonableness using the § 3553(a) factors, 18 U.S.C. § 3742(e)(3), and consideration of these factors under the discretionary guideline system is similarly subject to review for reasonableness. Adoption of the rule urged by the government, that a sentence within the guideline range is not subject to reasonableness review, would have the effect of returning federal sentencing to something like the mandatory guideline system found unconstitutional in Booker. *See* 125 S.Ct. at 746. Under such a rule trial courts would be encouraged to sentence only within the guideline range to avoid having sentences overturned on appeal. This would effectively restore the rigidity in sentencing which the Booker majority held to violate the sixth amendment rights of defendants. *See id.* at 750- 51. It is unlikely that Congress would have intended the appellate review it created in § 3742(a) to be construed so restrictively since the legislative history shows its purpose in enlarging such review was to reduce disparity and to identify potential sentencing problems. In contrast to the sentencing scheme before Booker when a sentence outside the mandatory guideline range was permitted only on very limited grounds, there are now more sentencing variables. Both the grounds to support a sentence outside the range and the sentencing judge's discretion in weighing those grounds have increased significantly. While appellate review of sentences within the guideline range was not seen as essential to the functioning of the original mandatory system, with advisory guidelines appellate review of sentences both within and without the guideline range is critically important to meet the congressional goals of eliminating sentencing disparities and refining the guideline system.

## **D. Harmless Error**

United States v. Laufle, 433 F.3d 981, (7<sup>th</sup> Cir (Wis.)), January 11, 2006: District court's error in treating Sentencing Guidelines as mandatory was harmless, where district court determined that it would have imposed same sentence even if Guidelines were deemed advisory.

United States v. Till, 434 F.3d 880, (6<sup>th</sup> Cir. (Mich.) January 20, 2006 :No remand for *Booker* re-sentencing where the court below has expressly contemplated an advisory-only Guidelines regime and imposed an identical alternative sentence.

## **E. Reasonableness**

### **1. Reasonableness of a Guideline Sentence**

United States v. Williams, 436 F.3d 706, (6<sup>th</sup> Cir. (Tenn.) January 31, 2006: Guidelines are presumptively reasonable. The Court writes:

Although several of our sister circuits have concluded that any sentence within the applicable Guidelines range garners a presumption of reasonableness, this court has yet to articulate what weight should be accorded the Guidelines relative to the other sentencing factors listed in § 3553(a) *See United States v. Webb*, 403 F.3d 373, 385 n. 9 (6<sup>th</sup> Cir.2005) (declining “to indicate what weight the district courts must give to the appropriate Guidelines range, or any other § 3553(a) factor); see also *id.* at 385 (Kennedy, J., dissenting). We now join several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness. Such a presumption comports with the Supreme Court's remedial decision in *Booker*.

United States v. Chamness, 435 F.3d. 724, (7<sup>th</sup> Cir. (Ill.)) January 25, 2006: A Sentence within a properly calculated guideline range, as is the case here, is presumptively reasonable, United States v. Mykytiuk, 415 F.3d 606, 608 (7<sup>th</sup> Cir. 2005), and Chamness does not identify any factor under 18 U.S.C. § 3553(a) that might allow us to conclude that the district court was obligated to impose a lower sentence. Therefore, Chamness does not rebut the presumption that this Guidelines sentence was reasonable.

United States v. Alonzo, 435 F.3d 551, (5<sup>th</sup> Cir (Tex.)) January 09, 2006: Properly calculated Guideline sentence is presumptively reasonable, per se. The Court states:

We agree with our sister circuits that have held that a sentence within a properly calculated Guideline range is presumptively reasonable. In stating this, we do not

intend to add to a defendant's burden of demonstrating that a sentence is unreasonable...Additionally, the Second, Sixth, and Eleventh Circuits have rejected deeming a sentence in an applicable Guideline range reasonable per se. United States v. Crosby, 397 F.3d 103, 115 (2d Cir.2005); United States v. Webb, 403 F.3d 373, 385 n. 9 (6th Cir.2005); United States v. Talley, 431 F.3d 784, 786-87 (11th Cir.2005). We likewise decline to find a properly calculated Guidelines sentence reasonable per se. "To say that a sentence within the Guidelines range is 'by itself' reasonable is to ignore the requirement that the district court, when determining a sentence, take into account the other factors listed in section 3553(a)." Talley, 431 F.3d at 786.

United States v. Laufle, 433 F.3d 981, (7<sup>th</sup>, Cir. (Wis.)) January 11, 2006: A sentence is presumptively reasonable if within the Guidelines range. (*Citing*: United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir.2005)).

United States v. Vasquez, 433 F.3d 666, (8<sup>th</sup>. Cir (Iowa)), January 11, 2006. A sentence within an advisory guidelines range may be unreasonable if the sentencing court: (1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors but in weighing those factors commits a clear error of judgment. (*Citing*) United States v. Haack, 403 F.3d 997, 1004 (8th Cir.2005)

United States v. Guerrero-Velasquez, 434 F.3d 1193, (9<sup>th</sup> Cir. (Wash.)), January 19, 2006. A sentence by the guidelines is presumptively reasonable. In a footnote Judge Bybee writes:

“We realize, of course, that the sentencing guidelines are advisory and not mandatory. See United States v. Booker, 543 U.S. 220 (2005); United States v. Ameline, 409 F.3d 1073 (9<sup>th</sup> Cir. 2005) (en banc). However, the guidelines are still an important aid for district judges seeking to determine the appropriate sentence for a defendant and which help to maintain uniformity in sentencing throughout the country. It is therefore appropriate that we consider whether the district judge correctly interpreted and applied the guidelines below. We also note that, on appellate review, a sentence by the guidelines is presumptively reasonable.”

United States v. Valencia-Aguirre, 409 F.Supp.2d 1358 (11<sup>th</sup> Cir. (M.D.Fla.)) January 09, 2006: Recommended guidelines sentence is reasonable. Long opinion about the definition of reasonableness.

## 2. Burden

United States v. Della Rose, 435 F.3d 735, (7<sup>th</sup> Cir. (IL)), January 25, 2006: Quoting United States v. Mykytiuk, 415 F.3d 606, 608 (7<sup>th</sup> Cir. 2005), the Court states:

“The defendant bears the burden of establishing that his sentence is unreasonable in light of the sentencing factors set forth in section 3553(a).”

United States v. Laufle, 433 F.3d 981, (7<sup>th</sup> Cir. (Wis.)) January 11, 2006: The court suggests that it is the defendant’s burden to rebut the presumption of reasonable. The Court states:

“Granting due deference to the district judge's discretion in sentencing, we cannot say that Laufle has rebutted the presumption of reasonableness that attaches to a sentence within the advisory Guidelines range.”

United States v. Chamness, 435 F.3d. 724, (7<sup>th</sup> Cir. (Ill.)) January 25, 2006: See in “reasonable guidelines” section.

United States v. Brock, 433 F.3d 931 (7<sup>th</sup> Cir. (Ind)) January 09, 2006: Defendant may rebut the presumption of reasonableness only “by demonstrating that his.. [s]entence is unreasonable when measured against the factor set forths in §3553(a)”. United States v. Mykytiuk, 415 F.3d 606, 608 (7<sup>th</sup> Cir. 2005).

## 3. Disparity

United States v. Vaughn, 433 F.3d 917, (7<sup>th</sup> Cir. (Wis.)) January 06, 2006: Any disparity between defendant's sentence and the sentences received by his co-conspirators did not render defendant's sentence unreasonable, given that defendant's sentence was correctly calculated and fell within the Guidelines' range.

United States v. Clark, 434 F.3d 684, (4<sup>th</sup> Cir. (Va.)) January 12, 2006: The need to avoid unwarranted sentencing disparities refers to federal defendants, and does not mean comparing a federal defendant to a state defendant. The Court states:

(The) district court either failed to consider or considered improperly the need to avoid unwarranted sentencing disparities among federal defendants as required by 18 U.S.C. 3553(a)(6)

United States v. Plouffe, 436 F.3d 1062 (9<sup>th</sup> Cir. (Mont.)) January 18, 2006: Plouffe's sentence was nearly twice as long as the 37-month sentence imposed on his co-defendant. But this is not grounds for finding that his sentence is unreasonable. Rather, this result is consistent with the directive of *Booker* that sentencing courts are to consider how the sentencing factors apply to each defendant and determine whether an individualized sentence is warranted.

## II. GUIDELINE ADJUSTMENTS

## **A. Safety Valve**

United States v. Holguin, 436 F.3d 111 (2<sup>nd</sup> Cir. (Conn)) January 26, 2006: Second Circuit (joining the first and tenth district (see United States v. Bermudez, 407 F.3d 536, 544-45 (1<sup>st</sup> Cir.), United States v. Payton, 405 F.3d 1168, 1173 (10<sup>th</sup> Cir.)) rejected the Booker-based claims about judicial fact-finding in the application of the statutory safety-valve. The Court states:

Apprendi, Blakely, and Booker teach that facts supporting a sentence must be found by a jury when they are either (1) a condition of guilt of the crime, or (2) permit a higher maximum sentence to be imposed..... Facts that permit a higher maximum sentence are treated like conditions of guilt of a crime because they effectively function to create a separate offense.

Here, judicial fact-finding as to whether a defendant was a supervisor or leader (and thus barred from or entitled to safety valve relief) does not permit a higher maximum sentence to be imposed; the only effect of the judicial fact-finding is either to reduce a defendant's sentencing range or to leave the sentencing range alone, not to increase it.

The Court went on to say the judicial fact-finding by a preponderance of the evidence is permissible because, again, it did not increase the maximum sentence.

## **B. Aggravated Felony**

United States v. Rodriguez, 433 F.3d 411, (4<sup>th</sup> Cir. (Va.)), January 03, 2006: The Defendant pled guilty to entering the United States illegally. His guideline offense level was enhanced by 16-levels for a prior crime of violence (two counts of aggravated sexual battery). He objected to the enhancement at trial on Blakely principles. The Fourth circuit states there is a violation of the Sixth Amendment if sentencing court enhances a sentence beyond the maximum authorized by facts found by a jury beyond a reasonable doubt or admitted by the defendant.

## **C. Crack Cocaine v. Powder Cocaine**

United States v. Pho, 4323 F.3d 53, (1<sup>st</sup> Cir. (RI)), January 5, 2006: Courts may not sentence outside advisory guidelines based solely on its categorical rejection of the guidelines' crack and powder cocaine disparity. The sentencing guidelines call for a 100:1 ratio between crack and powder cocaine ( a defendant with 1 gram of crack is treated the same as a defendant with a 100 grams of powder). Chief Judge Torres from Rhode Island called the ratio "excessive" and instead sentenced the defendant to a 20:1 ratio formula. (This formal was suggested by the U.S. Sentencing Commission but never adopted by Congress). The Court states:

"Laboring in uncharted waters, the lower court jettisoned the guidelines and

constructed a new sentencing range by using the 20:1 crack -to-powder ratio in lieu of the 100:1 ratio embedded in both the statutory scheme and the guidelines. This approach, which evinced a categorical, policy-based rejection of the 100:1 ratio, amounted to error as a matter of law. .. The district court’s categorical rejection of the 100:1 ration impermissibly usurps Congress’ judgement about the proper sentencing policy for cocaine offenses.

Matters of policy typically are for Congress. See, e.g., Plumley v. S. Container, Inc., 303 F.3d 364, 374 (1st Cir.2002) (explaining that "it is Congress's mission to set the policy of positive law," whereas a court's role is "to interpret that law"); United States v. Robinson, 144 F.3d 104, 110 (1st Cir.1998) (stating that the 100:1 crack-to-powder ratio is "a permissible policy choice articulated by Congress" and that, therefore, the courts "are obliged to give it effect"). A corollary to this principle is that, in the absence of constitutional infirmity, federal courts are bound by Congress's policy judgments, including judgments concerning the appropriate penalties for federal crimes. See Eirby, 262 F.3d at 41.

This holding recognizes that sentencing decisions must be done case by case and must be grounded in case-specific considerations, not in general disagreement with broad-based policies enunciated by Congress or the Commission, as its agent.”

United States v. Williams, 435 F.1350, (11th Cir, (Fla.)) January 13, 2006: Where district court correctly calculated the guidelines range, weighed statutory factors, and gave specific, valid reasons for sentencing lower than this advisory range, it did not act unreasonably in sentencing career offender convicted of selling \$350 of crack cocaine to only a 90 month term. The sentencing court stated “the [Guidelines ...do not produce a just and reasonable result”. The sentencing judge went on to find that the difference between career offender and non career offender.

“I think in light of Booker, ... the Court is till required– and I give considerable deference and weight to the [Guidelines because a great deal to try to obtain some degree of consistency throughout the county.”

The Eleventh Circuit was clear to indicated that this was not case where the sentencing court disagreed with the guidelines (unlike Pho court), but instead correctly calculated the Guidelines range, and then gave specific and valid reasons for sentencing lower than the advisory range.

#### **D. Prior Convictions**

United States v. Gibson, 434 F.3d 1234, (11<sup>th</sup> Cir. (Fla.)) January 04, 2006: The defendant argued that because he never stipulated to facts of his prior convictions, he never waived his Fifth and Sixth Amendment rights to have those facts of his prior conviction charged in an indictment and proven to a jury beyond a reasonable doubt. The Court dispels this argument and states:

The Fifth and Sixth Amendment concerns expressed in Apprendi, Blakely and Booker are not implicated when a defendant's sentence is enhanced based on his prior convictions...whether Gibson's prior convictions were felonies involving a controlled substance is a question of law to be answered by the court, not a question of fact to be found by the jury.

United States v. Greer, 435 F.3d 1327, (11<sup>th</sup> Cir. (Ga.)) January 10, 2006: Determination of whether prior felony was a violent felony, for purpose of enhanced sentence under ACCA, was for the district court, not jury.

### **III. INDICTMENT**

#### **A. Surplusage**

United States v. Hedgepeth, 434 F.3d 609, (3<sup>rd</sup> Cir.(Pa.)) January 12, 2006: Surplusage may be stricken from an indictment or information upon the defendant's timely motion and when the surplusage is both immaterial and prejudice

#### **B. Facts not alleged in the Indictment**

United States v. Sheikh, 433 F.3d 905, (2<sup>nd</sup> Cir. (NY)) January 05, 2006: The court turns down the theory that it is a violation of the defendant's Fifth and Sixth Amendment by enhancing a sentence based on facts not alleged in the indictment, in this case the loss amount. So long as the facts found by the district court do not increase the sentence beyond the statutory maximum authorized by the verdict or trigger a mandatory minimum sentence not authorities by the verdict that simultaneously raises a corresponding maximum, the district court did not violate the a defendant's Fifth or Sixth Amendment rights by imposing a sentence based on fats alleged in the Indictment.

### **IV. SPECIAL VERDICT FORM**

United States v. Hedgepeth, 434 F.3d 609, (3<sup>rd</sup> Cir.(Pa.)) January 12, 2006: Special sentencing interrogatories are appropriate when they are considered by the jury after a guilty verdict is rendered. The court states:

Although special interrogatories are disfavored in criminal trials, this court has established no per se rule against them. United States v. Palmeri, 630 F.2d 192, 202 (3d Cir.1980), *cert. denied*, 450 U.S. 967, 101 S.Ct. 1484, 67 L.Ed.2d 616 (1981) (citations omitted). Nevertheless, there are circumstances where the use of special findings may be necessary, including where a determination of certain facts will be crucial to the sentence.” United States v. Desmond, 670 F.2d 414, 418 (3d Cir.1982); *see also* United States v. Barrett, 870 F.2d 953, 955 (3d Cir.1989) “sharply contrast[ing]” use of special interrogatories “to assist in sentencing” with their impermissible use “to clarify an ambiguous verdict”).

## V. 3553(a) FACTORS

United States v. Williams, 436 F.3d 706, (6<sup>th</sup> Cir.(Tenn)) January 31, 2006: The defendant argues that the sentencing court did not articulated 3553(a) factors. However, says the court “such consideration.. need not be evidenced explicitly, and Williams fails to point to any indication that the district court ignored those factors”.

United States v. McBride, 434 F.3d 470 (6<sup>th</sup> Cir.(Ohio)) January 17, 2006: The district court’s opinion should be sufficiently detailed to reflect 3553(a) factors.

United States v. Della Rose, 435 F.3d 735, (7<sup>th</sup> Cir. (IL)), January 25, 2006: The Court states “the district court understood that it would have much broader discretion in sentencing Della Rose today that it did in 2003”. Factors such as community contributions and collateral consequences are given more weight now than before.

“After Booker, certainly, a federal judge may give these factors much more weight than the Guidelines themselves would have allowed”

United States v. Clark, 434 F.3d 684, (4<sup>th</sup> Cir. (Va.)) January 12, 2006: The need to avoid unwarranted sentencing disparities refers to federal defendants, and does not mean comparing federal defendant to state defendant. The court states:

(The) district court either failed to consider or considered improperly the need to avoid unwarranted sentencing disparities among federal defendants as required by 18 U.S.C. 3553(a)(6)

In the Judge Gribbonmotz’s dissent, she agrees with the majority, but writes that state sentences do matter when considering 3553(a) factors.

I agree that the sentence in this case must be vacated and the case remanded for re-sentencing. I write separately to emphasize that, given the substantial, albeit not unchecked, discretion federal district courts enjoy after United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), they can take into account state sentencing practice in certain cases.

Federal law instructs district courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C.A. § 3553(a)(6) (West 2000). It seems to me that the fairest reading of this mandate, albeit not the only plausible reading, *see, e.g., United States v. Lucania*, 379 F.Supp.2d 288, 296-97 (E.D.N.Y.2005), is that it generally bars federal courts from basing a sentence on consideration of state sentences. Congress established a Sentencing Commission and authorized detailed sentencing guidelines at least in part to eliminate unwarranted disparities in sentences among *federal* defendants. Permitting federal courts to consider an individual state's sentence for an analogous state crime would often cause

disparities among federal defendants convicted of the same crimes. Accordingly, in the usual case federal courts should not consider state practice in imposing sentences. There are, however, some cases in which consideration of state sentences will not conflict with 3553(a)(6)'s mandate to "avoid unwarranted sentence disparities" and may in fact help courts to apply correctly the other factors set forth in § 3553(a). One example is when a federal criminal statute incorporates state law. *See, e.g.*, 18 U.S.C.A. § 13(a) (assimilating state criminal law for land within federal jurisdiction); 18 U.S.C.A. § 1960(b)(1)(A) (defining the federal crime of operating "an unlicensed money transmitting business" as, *inter alia*, operating "without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law"). When the effect and reach of a federal statute depend on state law, consideration of the sentence mandated by state law seems entirely appropriate. We must not lose sight of the fact that avoidance of "unwarranted sentence disparities" is not the only command of § 3553(a). In that statute Congress also directs courts to assign sentences that "reflect the seriousness of the offense," "promote respect for the law," "provide just punishment," and "afford adequate deterrence to criminal conduct." 18 U.S.C.A. § 3553(a). Federal courts may well have difficulty evaluating the "seriousness" of a crime defined by state law without looking to see how the state punishes that behavior.

Section 3553(a)(6) does not, and should not, prohibit a district court from exercising its discretion to consider state sentences in cases in which Congress itself has decided that state law determines whether the activity at issue is punishable as a federal offense. Concerns about disparities among federal defendants are necessarily lessened in such cases because federal law intentionally incorporates variations in state law. It would be unreasonable to hold in such cases that a federal court may not consider state sentencing practice. In sum, 3553(a)'s broad language indicates that district courts enjoy significant discretion in sentencing, provided, of course, that they devise reasonable sentences. Application of the § 3553(a) factors is neither a mechanical nor an automatic process--some factors may weigh more heavily than others depending on the facts of an individual case. Although the sentence in this case did not comply with § 3553(a), we should not interpret § 3553(a)(6) so narrowly as to curtail a district court's discretion to strike a fair balance among the § 3553(a) factors. This discretion includes the ability, in a proper case, to consider state sentencing practice in this balance.

United States v. Brock, 433 F.3d 931 (7<sup>th</sup> Cir. (Ind)) January 9, 2006: Meaningful consideration should be given to §3553(a) factors. Although it is preferable that a district court give a thorough explanation of its consideration of these factors in its order on remand, this not mandated.

United States v. Martinez, 434 F.3d 1318, (11<sup>th</sup> Cir. (Fla.)) January 09, 2006: Sentences within the guidelines range are reviewable for unreasonableness. In this case, the Court looked at

the final sentence to determine that indeed the sentence was reasonable. The Court states:

(W)e review Martinez's final sentence, in its entirety, for unreasonableness in light of the factors in 3553(a). *See United States v. Winingear*, 422 F.3d at 1245 ("We do not apply the reasonableness standard to each individual decision made during the sentencing process; rather, we review the final sentence for reasonableness.").

United States v. Cantrell, Sr., 433 F.3d 1269 (9<sup>th</sup> Cir.(Mont)) January 12, 2006: If there is no error in applying guidelines, then look to the overall reasonableness of the sentence in light of 18 U.S.C. § 3553(a) factors, including the applicable Guidelines range. The court states that first, the guideline application must be reviewed then look at the reasonableness of the sentence.

United States v. Feemster, 435 F.3d 881, (8<sup>th</sup> Cir. (Mo.)) Sentencing court must explain the reasons for the sentence imposed with some degree of specificity.

The court simply stated that it already had, appropriately referencing the impact of the defendant's youth as a mitigating factor. Booker mandates that the sentencing court go further, and consider all factors enumerated in § 3553(a).

## **VI. DEPARTURES**

United States v. McBride, 434 F.3d 470 (6<sup>th</sup> Cir.(Ohio)) January 17, 2006: At McBride's original sentencing hearing, the court did not believe that the disparity between actual and intended loss was not grounds for a downward departure and sentenced under mandatory guidelines. The Sixth circuit ruled this holding was plain error and remanded to the sentencing court for re-sentencing. Unfortunately, at re-sentencing, the district court rejected the downward departure. Also at the re-sentencing, the district court announced a sentence pursuant to 3553(a) (treating the guidelines as advisory), which was identical to the sentence announced under the guidelines.

Judge Boyce writes: "Achieving agreement between the circuit courts and within each circuit on post-Booker issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow. The courts have particularly struggled to-and often failed at-properly applying the remedial portion of Booker along with the remedy."

United States v. Vaughn, 433 F.3d 917, (7<sup>th</sup> Cir. (Wis.)) January 06, 2006: The Court states that departures should be reviewed as to determine, in part, a reasonable sentence. The Court states:

However, as we recently remarked, the concept of a discretionary departure-- over which we previously had no jurisdiction--"has been rendered obsolete in the post-Booker world. Instead, 'what is at stake is the reasonableness of the sentence, not the correctness of the

departures as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory.' " United States v. Arnaout, 2005 WL 3242213, at \*7 (7th Cir.2005) (internal citation omitted). Post-*Booker*, because we must review all sentences for reasonableness in light of the factors specified in § 3553(a), we necessarily must scrutinize, as part of that review, the district court's refusal to depart from the advisory sentencing range.

United States v. Vasquez, 433 F.3d 666, (8<sup>th</sup> Cir. (Iowa)) January 11, 2006: The discretionary denial of a motion for downward departure is unreviewable unless the court failed to recognize its authority to depart." United States v. Andreano, 417 F.3d 967, 970 (8<sup>th</sup> Cir.2005).

United States v. Wing, 433 F.3d. 622 (8<sup>th</sup> Cir.(SD)), January 06, 2006: Departures should be determined as pre-*Booker*. The Court, quoting United States v. Haack, 403 F.3d 997(8<sup>th</sup> Cir. 2005), does a three step analysis:

Since United States v. Booker, 543 U.S. 220, 245, 125 S.Ct. 738, 757, 160 L.Ed.2d 621 (2005), which declared the Federal Sentencing Guidelines to be advisory, our circuit has urged district courts to follow a three-step sentencing approach. Haack, 403 F.3d at 1002 (*citing* United States v. Crosby, 397 F.3d 103, 113 (2d Cir.2005)). First, the sentencing court must “determine the appropriate guidelines sentencing range, since that range does remain an important factor to be considered in the imposition of a sentence.”*Id.* at 1003. When determining the appropriate sentencing range, the district court should identify potential sentencing ranges, the reason why the court is not choosing a specific range, and other §3553(a) factors. *Id.* The district court should not “determine the sentence in any manner other than the way the sentence would have been determined pre-*Booker*.” *Id.* Second, after determining the appropriate sentencing range, the district court must decide if a “traditional departure” is appropriate under Part K or § 4A1.3. *Id.* at 1003. Finally, after the district court determines the Guidelines sentence, it must consider “all other factors in § 3553(a) to determine whether to impose the sentence under the guidelines or a non-guidelines sentence.” *Id.* When a court of appeals reviews a district court's sentencing determination for reasonableness, “the correct guidelines range is still ‘the critical starting point for the imposition of a sentence.’ ” United States v. Hadash, 408 F.3d 1080, 1082 (8<sup>th</sup> Cir.2005) (*citing* United States v. Mashek, 406 F.3d 1012(8<sup>th</sup> Cir.2005).

## VII. RELEVANT CONDUCT

United States v. Alonzo, 435 F.3d 551 (5<sup>th</sup> Cir. (Tex.)) January 09, 2006: The Sixth Amendment will not impede a sentencing judge from finding all facts relevant to sentencing. The Court states:

It is apparent that facts relevant to sentencing include relevant conduct under U.S.S.G. § 1B1.3. *See* United States v. Duncan, 400 F.3d 1297, 1305 (11<sup>th</sup> Cir.2005) (holding that *Booker* allows a sentence to be calculated based upon relevant conduct of which the defendant was acquitted).

U.S. v. Robinson, 435 F.3d 699, (7<sup>th</sup> Cir. (Ind.)) January 13, 2006: At sentencing, district court judges must resolve disputed factual issues, determine relevant conduct by a preponderance of the evidence, and apply the appropriate sentence enhancements in order to compute the advisory guidelines sentence range. The Court states:

Here, the district judge was concerned that because the firing of the gun was not charged, admitted, or found by a jury, he would run afoul of the Sixth Amendment by finding facts. True, *Booker* holds that judges may not find facts that increase the maximum punishment and that a mandatory sentencing guidelines scheme violates that rule. But *Booker* resolved the problem by making the guidelines advisory; judicial fact-finding in sentencing is acceptable because the guidelines are now nonbinding. Dean, 414 F.3d at 730; McReynolds v. United States, 397 F.3d 479, 481 (7<sup>th</sup> Cir.2005). In an overabundance of Sixth Amendment caution, the district judge declined to determine whether Robinson fired his gun. By sidestepping this determination, the district judge erred as a matter of law by failing to resolve a disputed sentencing fact essential to a properly calculated guidelines range.

United States v. Adair, 436 F.3d 520, (5<sup>th</sup> Cir. (La.)) January 13, 2006: It is clear that the district court committed *Booker* error because it enhanced Adair's sentence based on factors that Adair never admitted to and that were not found by a jury beyond a reasonable doubt. *Booker*, 125 S.Ct. at 756 ("Any 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."). It is also clear that Adair preserved his objection to this error. In response to the presentence report, Adair argued that his recommended sentence violated his Sixth Amendment rights because the sentence was computed pursuant to factors that were not found by the jury.

United States v. Wade, 435 F.3d 829, (8<sup>th</sup> Cir. (Ark.)) January 13, 2006: Judicial fact-finding is by preponderance of the evidence. The Court states:

We have previously determined that "the remedial opinion in *Booker* held that such judicial fact-finding [by the preponderance of the evidence] for sentencing

purposes does not violate the Sixth Amendment when made as part of an advisory Guidelines regime." United States v. Vaughn, 410 F.3d 1002, 1004 (8th Cir.2005), *cert. denied*, --- U.S. ----, 126 S.Ct. 1103, --- L.Ed.2d ----, 2006 WL 37911 (2005). *See also* United States v. Patient Transfer Service, Inc., 413 F.3d 734, 745 (8th Cir.2005) (recognizing that "the Supreme Court maintained the trial court's fact finding authority without setting a new standard" in Booker).