

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

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## **I. Appellate Review Issues**

### **A. Admissions**

United States v. Buonocore, 416 F.3d 1124 (10th Cir. 2005): In reviewing the defendant's sentence for distributing ephedrine and pseudoephedrine for the manufacture of methamphetamine, the Court held that (1) no constitutional Booker error had occurred because defense counsel had admitted at sentencing that the defendant unlawfully distributed the ephedrine and pseudoephedrine quantities found by the district court and (2) the non-constitutional error in treating the Guidelines as mandatory did not meet the fourth prong of plain error review. (But see concurring opinion in which Judge Seymour concludes that "other than the fact of a prior conviction, a defendant's (and surely a defense counsel's) admission of facts outside the guilty plea context or outside the context of a formal stipulation cannot function as a waiver of his Sixth Amendment rights and does not permit an increase in the relevant statutory maximum sentence within the meaning of Booker.")

### **B. Appeal Waivers**

United States v. Amiker, 414 F.3d 606 (6th Cir. 2005): The Court distinguishes its prior opinion in United States v. Bradley, 400 F.3d 459 (6th Cir. 2005) in holding that Amiker did not waive his right to re-sentencing under Booker by explicitly agreeing to be sentenced under the Guidelines. [Click here to view case excerpt<sup>1</sup>](#)

### **C. Harmless Error**

United States v. Christopher, 415 F.3d 590 (6th Cir. 2005): Joining the First, Third, Fourth, Seventh, Eighth and Tenth Circuits, the Sixth Circuit held that the announcement of alternative sentences by the district court can render Booker error harmless. [Click here to view case excerpt](#)

### **D. Plain Error**

United States v. Johnson, 414 F.3d 1260 (10th Cir. 2005): In this drug conspiracy case, the Tenth Circuit remands for resentencing, finding that the defendant had demonstrated constitutional Booker error as a result of two errors: (1) an incorrect calculation of the defendant's criminal history based on the probation officer's mistaken belief that the defendant was on parole when he began participating in the conspiracy and (2) enhancement for use of a firearm based on judicially found facts. [Click here to view case excerpt](#)

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

United States v. Graham, 413 F.3d 1211 (10th Cir. 2005), cert. denied, 126 S. Ct. 635 (2005): In reviewing a sentence for interstate travel to engage in a sex act with a child under 16 years of age, the Court rejects the defendant's Booker claim challenging two of the sentence enhancements imposed by the district court, holding that the defendant failed to satisfy the third prong of the plain error test. [Click here to view case excerpt](#)

#### **E. Reasonableness**

United States v. Shannon, 414 F.3d 921 (8th Cir. 2005): In reviewing a sentence imposed after Blakely but before Booker, the Court held that remand for re-sentencing was unnecessary, and that the district court's imposition of a 58-month sentence was not unreasonable, even though the applicable guideline range (as recommended in the pre-sentence report) was 6-12 months. [Click here to view case excerpt](#)

United States v. Dean, 414 F.3d 725 (7th Cir. 2005): The Seventh Circuit held that the district court erred in making guidelines calculations based on disputed allegations in the PSR; if there are disputed facts, the defendant must be given the chance to present testimony. However, the Seventh Circuit also rejected the defendant's argument that the sentencing court must explicitly analyze each one of the section 3553(a) factors when imposing a sentence outside of the guidelines range. [Click here to view case excerpt](#)

United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005): On a Paladino remand, the district judge indicated that his original 150-month sentence would remain the same, notwithstanding Booker. This sentence was within the guidelines. In holding that this sentence was reasonable, the Seventh Circuit defined the test it was applying to reach this determination. [Click here to view case excerpt](#)

United States v. Christopher, 415 F.3d 590 (6th Cir. 2005): In reviewing the district court's imposition of a sentence after remand, the Court holds that the sentence was reasonable even though nothing in the record indicated that the district court considered the section 3553(a) factors. [Click here to view case excerpt](#)

#### **II. Ex Post Facto/Due Process**

United States v. Jamison, 416 F.3d 538 (7th Cir. 2005): The Seventh Circuit rejects the defendant's claim that application of the Booker remedy violates the ex post facto clause by exposing him to a longer sentence. (Jamison's case was on direct review at the time Booker was decided.) [Click here to view case excerpt](#)

#### **III. Prior Convictions**

United States v. Cheek, 415 F.3d 349 (4th Cir. 2005), cert. denied, 126 S. Ct. 640 (2005): In rejecting the defendant's claim that Almendarez-Torres is no longer good law, the Fourth Circuit provided a lengthy defense of the Almendarez-Torres "prior conviction exception" to the

Apprendi/Blakely rule. [Click here to view case excerpt](#)

#### **IV. Section 3553(a) Factors**

##### **A. Section 3553(a)(2)(A) [Seriousness of Offense]**

United States v. Lucania, 379 F. Supp. 2d 288 (E.D. N.Y. 2005): In imposing an above-the-guideline range sentence, the court considered section 3553(a), in particular what sentence would adequately take into account the seriousness of the offense and the need for deterrence. Judge Sifton analyzes the seriousness of the offense (dealing in and transporting firearms) by examining the offense's impact on the local community. [Click here to view case excerpt](#)

##### **B. Section 3553(a)(2)(B) [Deterrence]**

United States v. Lucania, 379 F. Supp.2d 288 (E.D.N.Y. 2005): In addition to general deterrence (see discussion in part V.A., above), the court considers "specific" deterrence, and takes into account the defendants' advanced age in fashioning an appropriate sentence.

##### **C. Section 3353(a)(2)(c) [Protection of Public]**

United States v. Schwartz, 379 F. Supp. 2d 716 (E.D. Pa. 2005): Judge Dalzell declares a government motion for an upward departure moot after he justifies an above-guideline sentence on Booker grounds in this fraud case. [Click here to view case excerpt](#)

United States v. Lucania, 379 F. Supp. 2d 288 (E.D.N.Y.): The court notes the reduced recidivism rates for older defendants, and takes into account the defendant's advanced age in fashioning an appropriate sentence.

##### **D. Section 3553(a)(6) [Avoidance of Unwarranted Sentence Disparities]**

United States v. Lucania, 379 F. Supp. 2d 288 (E.D.N.Y. 2005): In justifying above-guideline sentence due to "local" impact of the offense (see discussion in part V.A., above), the court explains why the imposition of such a sentence does not create unwarranted sentencing disparity, particularly in light of fast-track programs. [Click here to view case excerpt](#)

#### **V. Specific Offenses**

##### **Firearms**

United States v. Beaudion, 416 F.3d. 965 (9th Cir. 2005): Defendant pleaded guilty to 18 U.S.C. § 924(c), admitting that he robbed a bank, but disputing that he "brandished" the rifle that he had with him. Over his objection, the court sentenced him to the seven-month statutory mandatory minimum for "brandishing." Beaudion argued on appeal that Harris v. United States, 536 U.S. 545 (2002) was no longer good law in light of Blakely and Booker. The Seventh

Circuit avoided addressing the constitutionality of Harris by concluding that the district court's imposition of the mandatory minimum was based on Beaudion's admissions, not a factual determination by the judge. [Click here to view case excerpt](#)

## **VI. Supervised Release**

United States v. McNeil, 415 F.3d 273 (2d Cir. 2005): In this appeal from a judgment revoking supervised release, the Court rejected the defendant's argument that Booker required vacatur of his sentence because the judge, not a jury, found the violation of release, and the resulting 15-month sentence, when added to the 33 months already served, exceeded the 41-month maximum range applicable to the original conviction under the guidelines. The Court did, however, take pains to explain away the "tension" between judicial factfinding within the federal supervised release scheme and the rationale of Blakely and Booker. [Click here to view case excerpt](#)