

NOTABLE BOOKER-RELATED CASES DECIDED IN NOVEMBER 2005

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I. Appellate Review Issues

A. Harmless Error

United States v. Glover, 431 F.3d 744 (11th Cir. 2005): The Eleventh Circuit rejects the government’s argument that the preserved “statutory” Booker error was harmless because the sentencing judge (post-Blakely, but pre-Booker) imposed a sentence in the middle of the applicable guideline range. According to the Court, notwithstanding the Eighth and Tenth Circuits’ rulings that “a midrange sentence alone establishes that a statutory error was harmless,” the government could not rely upon a mid-range sentence alone to satisfy its burden under the harmless error standard.

United States v. Shamblin, 153 Fed. Appx. 247 (4th Cir. 2005): Upon the government’s appeal, the Fourth Circuit remands for resentencing in this Blakely-Booker interregnum case, holding that the district court committed two legal errors in sentencing the defendant after Blakely: (1) it treated the Guidelines as mandatory; and (2) it calculated the applicable Guidelines sentencing range based solely on the facts that the defendant had admitted rather than on its own findings found by a preponderance of the evidence. The Court held that these errors were not harmless, as evidenced by the district court’s remarks that the sentence it imposed at the defendant’s Blakely resentencing was “almost certainly inadequate.”

United States v. Schafer, 429 F.3d 789 (8th Cir. 2005): According to the Eighth Circuit, while the district court committed Booker error in imposing a mandatory sentence, the error was harmless where the district court, in response to the defendant’s Blakely objection, also imposed an alternative sentence that was higher than the guideline sentence based on its determination that such a sentence was necessary because the defendant presented a continued threat to the community.

United States v. Nickl, 427 F.3d 1286 (10th Cir. 2005): The Tenth Circuit remands for resentencing where the district court committed non-constitutional Booker error and where it was “impossible to know whether the court would impose the same sentencing if it viewed the guidelines as merely advisory.” [Click here to view case excerpt¹](#)

B. Plain Error

United States v. Smith, 429 F.3d 620 (6th Cir. 2005): In this pipeline case, plain error was shown where the district court increased the defendant’s sentence on the basis of judge-found facts that were not admitted by the defendant, the defendant had not expressly waived his right to appeal or agreed to be sentenced to a particular sentencing range.

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

C. Preservation

United States v. Munoz, 430 F.3d 1357 (11th Cir. 2005): In this pipeline case, the Eleventh Circuit discusses under what circumstances it will deem a Booker error to be preserved.

[Click here to view case excerpt](#)

D. Reasonableness

United States v. Newsom, 428 F.3d 635 (7th Cir. 2005), cert. denied, 74 U.S.L.W. 3486 (2006): In reviewing a sentence for reasonableness, the Seventh Circuit clarifies the degree of specificity required in a district court's discussion of the section 3553(a) factors. [Click here to view case excerpt](#)

United States v. Cunningham, 429 F. 3d 673 (7th Cir. 2005): The Seventh Circuit reverses a within-guidelines sentence, notwithstanding that it was at the bottom of the guideline range, for "inadequate explanation" where the record below "left in serious doubt whether the [sentencing] judge connected the facts relating to the statutory factors to the sentence he imposed." [Click here to view case excerpt](#)

United States v. Tobacco, 428 F.3d 1148 (8th Cir. 2005): The Eighth Circuit affirms a sentence as reasonable, rejecting the defendant's arguments that the district court inappropriately deemed imprisonment as a form of rehabilitation and that the court failed to take into account the defendant's family responsibilities.

II. Burden of Proof

United States v. Welch, 429 F.3d 702 (7th Cir. 2005): Pre-Booker the district court nearly doubled the defendant's sentence for bank robbery based in part of its finding by the preponderance of the evidence that the defendant had committed four other bank robberies that were not charged in the indictment. On a Paladino remand the district court found that it would have imposed the same sentence. The Seventh Circuit held that this sentence was reasonable under Booker, and that it was proper for the district court to consider evidence of prior crimes using the preponderance of the evidence standard.

III. Ex Post Facto/Due Process

United States v. Cross, 430 F.3d 406 (7th Cir. 2005): Following United States v. Jamison, 416 F.3d 538 (7th Cir. 2005), the Seventh Circuit rejects the defendant's ex post facto challenge to the retroactive application of the Booker remedy.

IV. Mandatory Minimums

United States v. Estrada, 428 F.3d 387 (2d Cir. 2005), cert. denied, 74 U.S.W.L. 3486 (2006): The Second Circuit upholds a mandatory minimum sentence of life imprisonment, relying on Harris and Almendarez-Torres for the proposition that “prior felony drug convictions triggering a mandatory minimum sentence of lifetime imprisonment under § 841(b)(1)(A) need not be charged in the indictment or proved to a jury beyond a reasonable doubt.”

United States v. Cannon, 429 F.3d 1158 (7th Cir.): On the government’s appeal, the Seventh Circuit held that neither the terms of the federal drug statutes nor the ruling in Booker provided authority for the district court to avoid the strict application of a life term under 21 U.S.C. § 841(b)(1)(A). Consequently, it vacated the 20-year sentence that the district court imposed based on the judge’s belief that the defendant’s criminal history was not serious enough to justify life imprisonment. [Click here to view case excerpt](#)

V. Prior Convictions

United States v. Estrada, 428 F.3d 387 (2d Cir. 2005), cert. denied, 74 U.S.W.L. 3486 (2006): see Mandatory Minimums above.

VI. Restitution

United States v. Mueffelman, 400 F. Supp. 2d 368 (D. Mass. 2005): In a detailed opinion, Judge Gertner finds that restitution under the MVRA should be treated as “a criminal punishment fully subject to Booker’s constraints.”

United States v. Visinaiz, 428 F.3d 1300 (10th Cir. 2005): The Tenth Circuit rejects the defendant’s argument that the district court’s amended restitution award pursuant to the Mandatory Victims Restitution Act was unreasonable under Booker because restitution is not criminal punishment and “Blakely and Booker only apply to judicial fact-finding that increases a criminal punishment in violation of the Sixth Amendment.”

VII. Safety Valve

United States v. Morrisette, 429 F.3d 318 (1st Cir. 2005): The First Circuit holds that Blakely and Booker are inapplicable to safety-valve eligibility findings because “Blakely, and by extension Booker, expressly relate only to the constitutionality of judicial factfinding which results in sentencing enhancements, not to sentencing reductions.”

United States v. Labrada-Bustamante, 428 F.3d 1252 (9th Cir. 2005): The Ninth Circuit rejects the defendant’s argument “that the five factors enumerated in section 3553(f) [Safety Valve] are unconstitutional under Blakely because each requires a finding of fact by a judge rather than a jury.” The defendant had argued that he should be able to avoid the ten-year statutory minimum of 21 U.S.C. § 841(b)(1)(A) notwithstanding the district court’s finding that

he failed to give a truthful statement about the circumstances of the offense as required under the fifth factor of the safety valve provision. According to the Court, “Because mandatory minimum sentences under section 841(b) presuppose a jury’s determination of the underlying facts, their imposition does not offend either Apprendi or Blakely . . . Duarte would have us hold that facts allowing a *decreased* sentence below that mandatory minimum must be found by a jury beyond a reasonable doubt as well. Neither Apprendi nor Blakely compels such a holding.”

VIII. Section 3553(a) Factors

A. Defendant’s History & Characteristics - Cooperation

United States v. Smith, 429 F.3d 620 (6th Cir. 2005): The Sixth Circuit holds that “even after Booker, a district court consulting the guidelines remains constrained in awarding a § 3E1.1(b) reduction absent a motion by the government.”

B. Unwarranted Disparity

United States v. Newsom, 428 F.3d 635 (7th Cir. 2005), cert. denied, 74 U.S.L.W. 3486 (2006): While agreeing that comparisons of sentences received by various defendants for the same offense conduct can be taken into account in determining an appropriate sentence, the Seventh Circuit rejects the defendant’s argument that his sentence was too long compared to the sentences received by other defendants in child pornography cases. [Click here to view case excerpt](#)

United States v. Cawthorn, 429 F.3d 793 (8th Cir. 2005): The Eight Circuit rejected defendant’s claim that “it was error for the court not to sentence outside the Guidelines range because it is always unreasonable to treat crack cocaine 100 times worse than powder cocaine.” [Click here to view case excerpt](#)

United States v. Duran, 399 F. Supp.2d 543 (S.D.N.Y. 2005): In an illegal reentry case, Judge Victor Marrero refused to impose a below-guideline sentence, rejecting defendant’s arguments that the guidelines double-counted his criminal history by factoring past criminal activity into the calculation of both his offense level and his criminal history category, and that the absence of a fast-track program in the Southern District of New York would lead to unwarranted sentencing disparities (although Judge Marrero did ultimately order that Duran’s sentence run concurrently to a related state sentence). In the course of his opinion, Judge Marrero discussed in detail the “significant legal and sentencing policy debate [that] exists among district courts throughout the country” concerning immigration offense sentencing. [Click here to view case excerpt](#)