<u>NOTABLE BOOKER-RELATED CASES DECIDED IN OCTOBER 2005</u>

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I. Appellate Review Issues

A. Preserving Error

United States v. Mooney, 425 F.3d 1093 (8th Cir.(Minn)) October 10, 2005: To have preserved a Sixth Amendment claim of sentencing error for appellate review, defendant would have had to request at trial that the question of his gain be submitted to the jury (fraud case), argue that the guidelines were unconstitutional, or contend that the sentencing procedures violated Blakely or Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This was not the case, and therefore the sentence is reviewed for plain error. The question is whether Mooney has demonstrated that his "substantial rights" were affected, which requires showing a reasonable probability that the district court would have imposed a different sentence had it treated the guidelines as advisory instead of mandatory.

United States v. Fuller, 426 F.3d 556 (2nd cir. (N.Y.)), October 17, 2005: Fuller was sentenced pre-Booker. The district court anticipating that the guideline law may change, imposed two identical sentences. The first sentence assumed that guidelines were non-existent and the second sentence imposed assumed the guidelines were mandatory. In the "mandatory guideline" sentence, the judge applied several enhancements and upward departures. Not good enough says this Court:

> Because the District Court imposed its alternative non-Guidelines sentence on the assumption that the Guidelines "don't exist at all"-and thereby acted on a proverbial blank slate without explicitly considering all the factors listed in 18 U.S.C. §3553(a), including the Guidelines, *see* 18 U.S.C. §3553(a)(4)(A), as required by Crosby, *see* 397 F.3d at 111-we hold, once again with the benefit of hindsight, that the District Court erred in formulating Fuller's sentence.

B. Standard of Review

United States. v. Mateo-Espejo, 426 F.3d 508 (1st cir. (R.I,)) October 21, 2005: Plain error review so the appellant must show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected [his] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." To satisfy the third element, the appellant must demonstrate a reasonable probability that he would have received a lesser sentence under an advisory guidelines regime. Here, the district court indicated its reluctance to impose the low-end sentence that the government strongly recommended. The third element is not met.

United States v. Martinez-Flores, 428 F.3d 22 (1st cir. (N.H.)),October 28, 2005: Plain error review because Booker issue was not preserved. To survive plain error review, we must find "a reasonable probability that the district court would impose a different sentence more

favorable to the defendant under the new advisory Guidelines Booker regime". Not so in this case.

C. Plain Error Survival

United States. v. York, 428 F.3d 1325 (11th cir. (Ga.)), October 27, 2005: No Booker error because the defendant's substantial rights were not affected. Defendant did not show that there was a reasonable probability that the district court would have imposed a different sentence if the guidelines were not mandatory.

U.S. v. Rodriguez-Gutierrez, 428 F.3d 201 (5th cir. (La.)), October 05, 2005: District Court's statement at sentencing that "[t]here are many immigration laws that I don't agree with," by itself, was insufficient to show prejudice to defendant's substantial rights. Sentence at Sentencing Guidelines maximum is non-conclusive evidence that court would not have imposed lesser sentence under advisory Guidelines regime, while sentence at Guidelines minimum is non-conclusive evidence that district court would have imposed lesser sentence under advisory regime.

II. Sentencing

A. Reasonableness

United States v. Johnson, 427 F.3d 423 (7th cir. (Ind.)), October 14, 2005: Imposition of a sentence nearly triple that of the high end of the guidelines range was appropriately justified by sentencing judge, and thus reasonable. (Child pornography involving minor children, dogs and adult males).

United States v. Castro-Juarez, 425 F.3d 430 (7th cir. (Ill.)), October 03, 2005: The district court sentenced Castro-Juarez to 48-months. This was more than twice the high end of the guideline range, and more than three times the low end of the range that the prosecutor recommended as an appropriate sentence. The sentencing court based the sentence on criminal history pursuant to U.S.S.G. § 4A1.3(a)(1); When assessing a reasonable sentence this Court quotes previous cases:

> "[T]he farther the judge's sentence departs from the guidelines sentence (in either direction-that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed." United States v. Dean, 414 F.3d 725, 729 (7th Cir.2005).

Of interest is that the Court states:

> As we have noted, a sentence imposed within a properly calculated Guidelines range is presumptively reasonable. Mykytiuk, 415 F.3d at 608. We have left room for the possibility that there will be some cases in which a sentence within the Guidelines range, measured against the factors identified in section 3553(a), stands out as unreasonable. But those cases, as we said in Mykytiuk, will be rare. Id.

B. Re-sentencing

United States v. Duncan, 427 F.3d 464 (7th cir. (Ind.)) October 21, 2005: Case was remanded to permit the district court to assess the case and to inform the court whether it was inclined to re-sentence the defendant. This Court retained jurisdiction in order to complete plain error review upon receiving the views of the district court as to whether it was disposed to re-sentence. The district court was without jurisdiction to re-sentence the defendant. The Court further states:

> We take this opportunity to respectfully remind the district court that, upon re-sentencing, it must provide a reasoned explanation for its action so that we are able to fulfill, in due course, our duty to determine whether the sentence is reasonable. Accordingly, the amended judgment of the district court appealed in 05-3655 and 05-3727 is vacated because the district court was without jurisdiction to enter such a judgment. The sentence in 04-1916 is vacated, and the case is remanded in order to permit the district court to re-sentence the defendant. The district court and the parties shall proceed in accordance with the procedure set forth in Paladino

United States v. Spencer, 150 Fed.Appx. 901 (10th cir. (Utah)), October 18, 2005: The Court states:

> On remand for re-sentencing of defendant for attempted manufacture of methamphetamine after defendant's Sixth Amendment right to jury trial was violated by enhancement of his base offense level under mandatory sentencing guidelines based on court's finding as to drug quantity, government would not be permitted to present new evidence as to drug quantity; defendant notified government at pre-sentence evidentiary hearing and in sentencing memorandum that evidence of drug quantity was insufficient, and despite that notice, government declined to alert court to problem or attempt to supplement sentencing record.

C. Judicial Fact Finding

United States v. Corchado, 427 F.3d 815 (10th cir. (N.M.)) October 25, 2005:

Defendant's criminal history category could be increased by two points based upon judicial fact-finding without violating Sixth Amendment requirement that jury convict defendant. Based upon facts established beyond reasonable doubt, the judge could determine fact of prior conviction

United States v. Spencer, 150 Fed.Appx. 901 (10th cir. (Utah)), October 18, 2005:
In sentencing defendant for attempted manufacture of methamphetamine, district court violated defendant's Sixth Amendment right to jury trial by enhancing defendant's base offense level under mandatory sentencing guidelines based on court's finding as to drug quantity.

III. Supervised Release

United States v. Hinson, 429 F.3d 114 (5th cir. (Tex.)), October 21, 2005: The defendant was not entitled to a jury trial to determine whether the terms of her supervised release had been violated, and (2) court did not violate defendant's Sixth Amendment right to a jury trial in revoking her supervised release and imposing a two-year sentence of re-imprisonment based on facts neither found by a jury nor admitted by her.

IV. 3553(a) Factors

A. General

United States v. Kurti, 427 F.3d 159 (2nd cir. (N.Y.)), October 19, 2005: The district court imposed a single sentence of 360 months' imprisonment, despite the fact that Kurti was sentenced on two counts, each carrying a statutory minimum term of 20 years' imprisonment. The court did not specify either the length of time to be served on each count or which portion of the sentence of a count was to run consecutively to the other.

In light of Booker, Section 5G1.2 is no longer mandatory. However, a remand is required since the 360 months exceeded the 240-month maximum on each count and to determine whether or not the court would have imposed the same sentence in light of Booker and 3553(a) factors.

United States v. Fuller, 426 F.3d 556 (2nd cir. (N.Y.)), October 17, 2005: Fuller was sentenced pre-Booker. The district court anticipating that the guidelines law may change, imposed two identical sentences. The first sentence assumed that guidelines were non-existent and the second sentence imposed assumed the guidelines were mandatory. In the "mandatory guideline"sentence, the judge applied several enhancements and upward departures. Not good enough says this Court:

> Because the District Court imposed its alternative non-Guidelines sentence on the assumption that the Guidelines "don't exist at all"-and thereby acted on a proverbial blank slate without explicitly considering all the factors listed in 18 U.S.C. §3553(a), including the Guidelines, see18 U.S.C. §3553(a)(4)(A), as required by Crosby, see 397 F.3d at 111-we hold, once again with the benefit of hindsight, that the District Court erred in formulating Fuller's sentence.

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B. Sentencing Disparties

United States v. Jimenez-Guiterrez, 425 F.3d 1123, (8th Cir. (Mo.)) October 12, 2005: The sentencing court treated the Guidelines as mandatory. Plain error exists in this case because the defendant can show a reasonable probability that the district court would have granted a more favorable sentence had it treated the Guidelines as advisory. *See* United States v. Pirani, 406 F.3d 543 (8th Cir. 2005). The sentencing court was dissatisfied with the discrepancy between the sentence imposed upon the courier, who cooperated and received twenty four months and the minimum sentence available to the defendant, 188 months. In a concurring opinion, Judge Colloton writes:

> It seems to me that there is a substantial question whether a district court may, in essence, create a "sentence disparity" by granting a reduction under the now-advisory guidelines to one defendant based on the provision of substantial assistance, and then "reasonably," within the meaning of United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), vary from the advisory guidelines based solely on this "disparity" when sentencing another defendant who declined an opportunity to provide such assistance. Congress clearly thought it appropriate that defendants who provide substantial assistance should receive lower sentences than would otherwise be imposed, *see* 28 U.S.C. § 994(n); 18 U.S.C. § 3553(e), so it is difficult to conclude that Congress at the same time believed that such reductions in sentence would cause "unwarranted sentence disparities" that need to be avoided. *See* 18 U.S.C. § 3553(a)(6)

United States v. Martinez-Flores, 428 F.3d 22 (1st cir. (N.H.)),October 28, 2005: In discussing fast-track, the Court states:

> It is arguable that even post- Booker, it would never be reasonable to depart downward based on disparities between fast-track and non-fast-track jurisdictions given Congress' clear (if implied) statement in the PROTECT Act provision that such disparities are acceptable. See United States v. Perez-Chavez, No. 2:05-CR-00003PGC, 2005 U.S. Dist. LEXIS 9252, at *18-*23 (C.D.Utah May 16, 2005) (holding, in light of the PROTECT Act provision, that “Congress has concluded that the advantages stemming from fast-track programs outweigh their disadvantages, and that any disparity that results from fast-track programs is not ‘unwarranted’ ”).

V. Departures

United States v. Johnson, 427 F.3d 423 (7th cir. (Ind.)), October 14, 2005: See above for details on case. Commenting about departures, the Court states:

It is now clear that after Booker 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. Castro-Juarez, 425 F.3d 430, 432 (7th Cir.2005) (“the question ··· is ultimately the reasonableness of the sentence the district court imposed, not the court's application of a guideline authorizing an upward departure”). Now, instead of employing the pre- *Booker* terminology of departures, we have moved toward characterizing sentences as either fitting within the advisory guidelines range or not. *See* United States v. Dean, 414 F.3d 725, 729 (7th Cir.2005).