

SENTENCES AFTER *BOOKER*: IMPOSITION AND REVIEW

As of July 10, 2005

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TABLE OF CONTENTS

Introduction	1
I. Indictment Issues	1
II. Plea Issues	2
III. Sentencing Issues	3
A. “Consideration” of Guidelines Under 18 U.S.C. § 3553(a); Meaning of “Advisory”	3
B. Statement of Reasons	8
C. Standard of Proof	9
D. Specific Statutes	12
1. 8 U.S.C. § 1326, Illegal Reentry After Deportation	12
2. 18 U.S.C. § 115, Assaulting Federal Officials, etc.	13
3. 18 U.S.C. § 922(g), Firearm Possession by Prohibited Person	13
4. 18 U.S.C. § 922(o), Possession of Machine Gun	14
5. 18 U.S.C. § 922(v), Possession of Semi-Automatic Weapon	14
6. 18 U.S.C. § 924(c), Use or Possession in Connection with Another Offense	14
7. 18 U.S.C. § 924(e) / U.S.S.G. § 4B1.4, Armed Career Criminal Act	15
8. 18 U.S.C. § 982 et seq., Forfeiture	16
9. 18 U.S.C. § 1542, False Statements Regarding Passports	17
10. 18 U.S.C. § 2113, Bank Robbery	17

11.	18 U.S.C. § 2251 et seq., Sexual Exploitation and Other Abuse of Children	17
12.	18 U.S.C. § 3553(b)(2), Guidelines in Child Crimes and Sexual Offenses	18
13.	18 U.S.C. § 3553(e) / U.S.S.G. 5K1.1, Substantial Assistance	18
14.	18 U.S.C. § 3553(f) / U.S.S.G. § 5C1.2, Safety Valve	20
15.	18 U.S.C. § 3583 / U.S.S.G. § 5D1.1 et seq., Supervised Release	20
16.	18 U.S.C. § 3663 et seq., Restitution	21
17.	21 U.S.C. § 841 et seq., Controlled Substances	21
E.	Specific Guidelines	24
1.	U.S.S.G. § 1B1.3, Relevant Conduct	24
2.	U.S.S.G. § 2B1.1, Fraud and Theft Offenses	25
3.	U.S.S.G. § 2B3.1, Robbery	26
4.	U.S.S.G. § 2B5.1, Counterfeiting	26
5.	U.S.S.G. § 2D1.1, Drug Offenses	26
6.	U.S.S.G. § 2G2.1 et seq., Child Pornography	30
7.	U.S.S.G. § 2H1.1, Offenses Involving Individual Rights	30
8.	U.S.S.G. § 2K2.1 et seq., Firearms	30
9.	U.S.S.G. § 2L1.2, Illegal Reentry After Deportation	31
10.	U.S.S.G. § 2S1.1, Money Laundering	34
11.	U.S.S.G. § 3B1, Role in the Offense	34
12.	U.S.S.G. § 3C1.1, Obstruction of Justice	34

13.	U.S.S.G. § 3E1.1, Acceptance of Responsibility	35
14.	U.S.S.G. § 4A1.1 et seq., Criminal History	35
15.	U.S.S.G. §§ 4B1.1 & 4B1.2, Career Offender	37
16.	U.S.S.G. § 5C1.1, Imposition of Imprisonment (Zones)	41
17.	U.S.S.G. § 5E1.2, Fines	41
18.	U.S.S.G. §§ 5H, 5K, Departures	41
F.	Specific Offender or Offense Characteristics	44
G.	Unwarranted Disparity	44
1.	Disparity as General Matter	44
2.	Disparity Based on Crack-Powder Ratio	44
3.	Disparity Based on Sentences of Others	45
4.	Disparity Based on State Sentence for Similar Conduct	46
5.	Disparity Based on Other Factors	47
H.	Ex Post Facto and Due Process Issues	47
I.	Vindictiveness at Resentencing After <i>Booker</i> Remand	49
J.	General / Other	49
IV.	Revocation Issues	50
V.	Appellate Review Issues	52
A.	Bail, Release, or Stay of Sentence Pending Appeal	52
B.	Appellate Jurisdiction	52
C.	Meaning of “Reasonableness”: Methodology for Review	53

1.	In General	53
2.	Sentences Within Guideline Range	60
3.	Sentence Below Guideline Range	61
4.	Revocation Cases	61
D.	Meaning of “Reasonableness”: Specific Cases	62
E.	Harmless Error Review	63
F.	Plain Error Review	63
G.	“Admissions” by Defendant	63
H.	Waivers of Appeal	63
I.	<i>Anders</i> Briefs	63

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INTRODUCTION

This outline reflects many, but not all, of the decisions in federal courts interpreting and applying *United States v. Booker*, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), to sentences imposed after the decision issued on January 12, 2005. The outline and its companion, “Review of Sentences Imposed Before *Booker*,” replace “Post-*Booker* Federal Decisions – An Outline” (last updated May 18, 2005).

The compilation is based on searches in Westlaw (database ALLFEDS) and Lexis (database for all federal cases), run on July 10, using the following query: “United States v. Booker” and date(aft 01/11/2005). To obtain an updated version of this outline, go to <http://www.fd.org>.¹

Within sections and subsections, appellate decisions come first, followed by district court decisions, and are arranged chronologically within each subgroup. Decisions that, in the compiler’s judgment, are significant because they contain particularly lengthy, thoughtful, or otherwise useful discussion are marked with an asterisk (*).

While every effort has been made to provide accurate information, readers should review cases for themselves and check for subsequent history. Occasionally, an opinion is amended, such that the description offered in this outline is no longer correct. Please report errors to fran_pratt@fd.org.

I. INDICTMENT ISSUES

United States v. Glover, 413 F.3d 1206 (10th Cir. July 1, 2005) (rejecting argument that facts used to increase base offense level must be alleged in indictment)

¹ To see two other outlines that contain more comprehensive summaries of published decisions, go to http://sentencing.typepad.com/sentencing_law_and_policy/2005/03/more_summaries_.html. These summaries were prepared by Daniel J. Capra, professor at Fordham Law School, as of March 14, 2005. The U.S. Sentencing Commission has also posted on its web site a compilation of selected decisions. It is available at http://www.ussc.gov/Blakely/Sel_PostBooker.pdf.

United States v. Dose, 2005 WL 106493, 2005 U.S. Dist. LEXIS 526 (N.D. Iowa Jan. 12, 2005) (Zoss, M.J.) (recommending in light of *Booker* that defendants' motion to strike "notice of additional relevant facts" from superseding indictment as surplusage be granted)

United States v. Dottery, 353 F. Supp. 2d 894 (E.D. Mich. Jan. 24, 2005) (Lawson, J.) (because *Booker* has rendered addition of sentencing factors to indictment unnecessary, concluding that "[s]ince the superseding indictment added only the sentencing factors and nothing else, the Court believes that all prejudice, real and imagined, will be removed by dismissing the superseding indictment and proceeding to trial on the original indictment")

* *United States v. Cormier*, 226 F.R.D. 23 (D. Me. Jan. 28, 2005) (Woodcock, J.) (in drug case, granting motion to strike surplusage from indictment; includes discussion of non-drug-quantity-related versus drug-quantity allegations)

United States v. Megale, 363 F. Supp. 2d 359 (D. Conn. April 4, 2005) (Arterton, J.) (granting motion to strike sentencing allegations from indictment where government did not object in light of *Booker*)

United States v. Robinson, 2005 WL 1126847 (E.D. Wis. May 12, 2005) (Goodstein, M.J.) (granting defendants' motion to strike sentencing allegations from indictment that was handed down shortly before *Booker* decided)

II. PLEA ISSUES

United States v. Cieslowski, 410 F.3d 353 (7th Cir. June 1, 2005) (discussing impact of *Booker* on Fed. R. Crim. P. 11(c)(1)(C) pleas and concluding that decision has no impact)

United States v. Forbey, 366 F. Supp. 2d 207 (D. Me. Mar. 25, 2005) (Hornby, J.) (rejecting plea agreement and sentencing defendant to statutory maximum for possession of stolen ammunition, 10 years, while at same time expressing understanding of why government chose to drop felon-in-possession charge where defendant qualified as armed career criminal, necessitating 15-year mandatory minimum; defendant declined offer from court to allow him to withdraw plea)

United States v. Bundy, 359 F. Supp. 2d 535 (W.D. Va. Mar. 28, 2005) (Jones, J.) (on remand following appeal, where defendant had already served 16 months of originally imposed term of 37 months and parties entered into new plea agreement that specified that defendant would receive sentencing of time served, explaining why court would accept plea and concluding that agreed-upon sentence is reasonable)

United States v. Stergios, 370 F. Supp. 2d 328 (D. Me. April 4, 2005) (Singal, J.) (where defendant entered plea in October 2004 and stipulated to specific guidelines calculations, but agreement stated that parties recognized that court was not bound by those calculations, rejecting defendant's

argument that it would be unfair to sentence him based on higher calculations because defendant relied on *Blakely* at time of plea and thought that court would not be able to increase sentence based on judicial fact-finding; defendant declined offer from court to allow him to withdraw plea in light of *Booker*)

United States v. Leland, 370 F. Supp. 2d 337 (D. Me. April 7, 2005) (Woodcock, J.) (where defendant entered plea on January 27, 2004, case was continued in light of *Blakely* and pending decision in *Booker*, and defendant sought to withdraw plea on January 19, 2005 (one week after *Booker* decided; defendant asserted decision as one of six reasons), denying motion in part because “[t]he pre-*Blakely* to post-*Booker* changes in the law standing alone do not state a ‘fair and just reason’ for allowing the withdrawal of [defendant’s] guilty plea”; relying on *United States v. Sahlin*, 399 F.3d 27 (1st Cir. Feb. 22, 2005))

United States v. Moten, 2005 U.S. Dist. LEXIS 8946 (D. Kan. April 26, 2005) (Crow, J.) (where defendant argued in sentencing memorandum for sentence of probation or home detention and government claimed that defendant breached plea agreement (signed before *Blakely* and *Booker*), in which she had agreed not to seek any “downward adjustment,” rejecting government’s claim and agreeing with defendant that requesting particular form of sentence is not seeking “downward adjustment;” plain language of term refers to Chapter Two and Three adjustments)

* *United States v. Cosimi*, 368 F. Supp. 2d 345 (S.D. N.Y. May 11, 2005) (Marrero, J.) (rejecting government’s argument that defendant breached plea agreement where defendant stated specifically in sentencing position that he was bound by terms of post-*Blakely*, pre-*Booker* plea agreement that guideline range was 57-71 months but urged court to sentence below guideline range on basis of other § 3553(a) factors)

III. SENTENCING ISSUES

A. “Consideration” of Guidelines Under 18 U.S.C. § 3553(a); Meaning of “Advisory”

* *United States v. Crosby*, 397 F.3d 103 (2d Cir. Feb. 2, 2005, amended Mar. 18, 2005) (in first post-*Booker* decision from circuit, attempting to provide general guidance to district courts; noting that district court cannot satisfy duty to consider Guidelines by general reference to them but declining to define “consideration” of Guidelines and instead allowing it to evolve); see *United States v. Ochoa-Suarez*, 2005 WL 287400, 2005 U.S. Dist. LEXIS 1667 (S.D.N.Y. Feb. 7, 2005) (Keenan, J.) (interpreting and applying *Crosby*); *United States v. Mascolo*, 2005 WL 351108, 2005 U.S. Dist. LEXIS 2032 (S.D.N.Y. Feb. 9, 2005) (Sweet, J.) (same)

United States v. Fleming, 397 F.3d 95 (2d Cir. Feb. 2, 2005) (in appeal from imposition of two-year sentence of imprisonment upon revocation of supervised release for drug abuse-related violations,

finding that *Booker*'s "reasonableness" standard of review applies to revocation sentences; discussing meaning of "consideration" of recommended range)

United States v. Oliver, 397 F.3d 369 (6th Cir. Feb. 2, 2005) (while finding that facts supporting enhancement existed, such that enhancement *could* be applied, leaving it to district court as to whether it *ought* to be applied now that Guidelines are advisory)

United States v. Moreno-Hernandez, 397 F.3d 1248 (9th Cir. Feb. 18, 2005) (noting that although guidelines are no longer mandatory, a district court must nonetheless "at least consider the available sentence under the now-discretionary federal Guidelines" and, in so doing, must "begin . . . with the proper interpretation of the Guidelines in determining whether to exercise its discretion")

United States v. Daidone, unpublished, 2005 WL 435409, 2005 U.S. App. LEXIS 3487 (2d Cir. Feb. 25, 2005) (on appeal of grant of downward departure based on family circumstances, remanding in light of *Booker* and *Crosby*, and giving district court specific guidance as to what findings to make to enable appellate review for reasonableness)

United States v. Mares, 402 F.3d 511 (5th Cir. Mar. 4, 2005) (in first opinion from circuit to address *Booker*, discussing what "consideration" of Guidelines entails)

United States v. Chan-Astorga, unpublished, 2005 WL 663426, 2005 U.S. App. LEXIS 3984 (9th Cir. Mar. 9, 2005) (stating that "[b]ecause it is unclear whether the District Judge would have imposed a two-point enhancement and/or granted a four-point downward departure [sic, adjustment] had he known that the Sentencing Guidelines were advisory and not mandatory in light of the Supreme Court's decisions in [*Booker*], Chan's sentence must be recalculated")

United States v. Cano-Silva, 402 F.3d 1031 (10th Cir. Mar. 28, 2005) (in case where district court had granted minor role adjustment in part because it believed range without adjustment was too harsh, remanding based on errors in Guidelines calculations and stating that "[u]nder *Booker*, the Sentencing Guidelines are no longer mandatory, and the district judge will be free to determine whether the defendant is eligible for a minor-role adjustment without any concern that the result would compel what the judge considers an unwarranted sentence")

United States v. George, 403 F.3d 470 (7th Cir. April 4, 2005) (stating that after *Booker*, "the Guidelines continue to inform district courts' decisions. Judges need not rehearse on the record all of the considerations that 18 U.S.C. § 3553(a) lists; it is enough to calculate the range correctly and explain why (if the sentence lies outside it) this defendant deserves more or less. That's the approach we have taken for decisions to reimprison a person after revoking supervised release It makes sense to follow the same approach for the Guidelines as a whole in *Booker*'s wake.") (N.B.: this seems to suggest that a sentence within a guideline range will be found to be reasonable)

United States v. Webb, 403 F.3d 373 (6th Cir. April 6, 2005) (stating that court declined “to define rigidly at this time either the meaning of reasonableness or the procedures that a district court must employ in sentencing post-*Booker*;” instead, finding “it prudent to permit a clarification of these concepts to evolve on a case-by-case basis at both the district court and appellate levels;” noting that court declined to address “whether a district court must always calculate the precise appropriate Guidelines range in order to comply with *Booker*; further noting that while court declined “to indicate what weight the district courts must give to the appropriate Guidelines range, or any other § 3553(a) factor, we also decline to hold that a sentence within a proper Guidelines range is per-se reasonable”); see *United States v. Jackson*, 408 F.3d 301 (6th Cir. May 24, 2005) (stating that “[a]lthough we are fully cognizant of the fact that district courts are no longer bound by the Guidelines in the manner they once were, a fact which inevitably may empower district courts with greater flexibility in sentencing, we nonetheless find that, pursuant to *Booker*, we as an appellate court must still have the articulation of the reasons the district court reached the sentence ultimately imposed, as required by 18 U.S.C. § 3553(c)” and “[i]n our view, *Booker* requires an acknowledgment of the defendant’s applicable Guidelines range as well as a discussion of the reasonableness of a variation from that range. Further, in determining the sentence, the district court must consider the advisory provisions of the Guidelines and the other factors identified in 18 U.S.C. § 3553(a)”)

United States v. Hopkins, unpublished, 2005 WL 827136, 2005 U.S. App. LEXIS 5968 (10th Cir. April 11, 2005) (in remanding case for resentencing, stating that while “[a]fter *Booker*, courts are no longer constrained by the mandatory application of the Guidelines[,] [n]onetheless, a sentencing court is required to ‘consult’ the Guidelines and the factors set forth in 18 U.S.C. § 3553(a) before imposing a sentence. . . . Consistent with the *Booker* remedial scheme, the sentencing court as fact finder should calculate the range prescribed by the Guidelines. The court must then review the other relevant factors contained in the Guidelines, including those in § 3553(a), and impose a reasonable sentence. In applying the Guidelines’ factors, the court should take care to explain its reasoning, especially if it imposed a sentence outside the Guidelines’ range. While the Guidelines are no longer mandatory, it is clear from *Booker* that the now-discretionary Guidelines will be a vital barometer of reasonableness on appellate review”)

United States v. Gray, 405 F.3d 227 (4th Cir. April 29, 2005) (noting that “[a]lthough the Sentencing Guidelines are no longer mandatory, *Booker* makes clear that a sentencing court must still ‘consult [the] Guidelines and take them into account when sentencing.’ On remand, the district court should first determine the appropriate sentencing range under the Guidelines, making all factual findings appropriate for that determination. The court should consider this sentencing range along with the other factors described in 18 U.S.C. § 3553(a), and then impose a sentence. If that sentence falls outside the Guidelines range, the court should explain its reasons for the departure, as required by 18 U.S.C. § 3553(c)(2). The sentence must be ‘within the statutorily prescribed range and . . . reasonable.’”) (internal citations omitted); see also *United States v. Iskander*, 407 F.3d 232 (4th Cir. May 9, 2005); *United States v. Pierce*, 409 F.3d 228 (4th Cir. May 26, 2005); *United States v. Riggs*, 410 F.3d 136 (4th Cir. June 3, 2005)

United States v. Mashek, 406 F.3d 1012 (8th Cir. May 10, 2005) (noting that “[t]he appropriate guidelines range, though now calculated under an advisory system, remains the critical starting point for the imposition of a sentence under § 3553(a)”); *cf. United States v. Storer*, 413 F.3d 918 (8th Cir. June 30, 2005) (when defendant sentenced during period in which Eighth Circuit had held Guidelines unconstitutional after *Blakely* and district court sentenced defendant to statutory maximum of 240 months without considering Guidelines as advisory, vacating sentence and remanding for resentencing); *United States v. Bruce*, 413 F.3d 784 (8th Cir. July 7, 2005) (similar)

United States v. Robles, 408 F.3d 1324 (11th Cir. May 10, 2005) (stating that “[e]ven if Robles was sentenced post-*Booker* and we were reviewing for reasonableness, we would not expect the district court in every case to conduct an accounting of every § 3553(a) factor, as Robles suggests, and expound upon how each factor played a role in its sentencing decision. Certainly, the more insight a district court can provide us with, the better it will be for appellate review, especially when the court sentences outside of the guidelines; however, when a district court sentences within the guidelines, we could not expect a court to do more than was done in this case” in announcing alternative sentence)

United States v. Winters, 411 F.3d 967 (8th Cir. June 22, 2005) (rejecting defendant’s argument that procedural sections of guidelines, such as grouping rules, remain mandatory)

* *United States v. Wilson* (“*Wilson I*”), 350 F. Supp. 2d 910 (D. Utah Jan. 13, 2005) (Cassell, J.) (in a lengthy opinion in which court considered “just how ‘advisory’ the Guidelines are,” concluding that “that in exercising its discretion in imposing sentences, the court will give heavy weight to the recommended Guidelines sentence in determining what sentence is appropriate. The court, in the exercise of its discretion, will only deviate from those Guidelines in unusual cases for clearly identified and persuasive reasons. This is the only course that implements the congressionally-mandated purposes behind imposing criminal sentences.”)

* *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. Jan. 19, 2005) (Adelman, J.) (in explaining why court was imposing sentence lower than that recommended by Guidelines, stating that while court agreed that it must seriously consider Guidelines, “*Booker* is not an invitation to do business as usual;” courts need not follow old departure methodology in imposing sentence outside guideline range; disagreeing with Judge Cassell in *Wilson*, *supra*); *cf. United States v. Smith*, 359 F. Supp. 2d 771 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (briefly summarizing post-*Booker* sentencing methodology); *United States v. Roen*, 360 F. Supp. 2d 926 (E.D. Wis. Feb. 25, 2005) (Adelman, J.) (explaining analysis to be followed in determining appropriate sentence following revocation – and now all cases, after *Booker*; because guidelines are advisory, a sentence outside of suggested range is *not* a departure)

United States v. Jones, 352 F. Supp. 2d 22 (D. Me. Jan. 21, 2005) (Hornby, J.) (in 18 U.S.C. § 922(g)(4) case (possession of firearm by person previously committed involuntarily to mental health institution), while concluding that he could not grant departure sought by defendant, government, and

probation to take defendant from Zone D to Zone C, court concluded that it could achieve same result after *Booker* in considering Guidelines as advisory and as one factor under 18 U.S.C. § 3553(a))

* *United States v. Barkley*, 369 F. Supp. 2d 1309 (N.D. Okla. Jan. 24, 2005) (Holmes, J.) (stating that the Guidelines would be “faithfully follow[ed]” in all cases, “with only such modifications as the Court finds are necessary to satisfy the requirements of the Sixth Amendment articulated in *Blakely*”; that is, within the context of the advisory Guidelines, the court will apply the Sixth Amendment)

* *United States v. Myers*, 353 F. Supp. 2d 1026 (S.D. Iowa Jan. 26, 2005) (Pratt, J.) (in sawed-off shotgun case in which guideline range was 20-30 months, sentencing defendant to 3 months probation; reviewing *Booker*, *Wilson* (*supra*), and *Ranum* (*supra*); finding *Ranum* persuasive and adopting Judge Adelman’s view because “[t]o treat the Guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guideline range would be presumptively unreasonable in the absence of clearly identified factors . . . [and] making the Guidelines, in effect, still mandatory;” viewing *Booker* “as an invitation, not to unmoored decision making, but to the type of careful analysis of the evidence that *should* be considered when depriving a person of his or her liberty”)

* *United States v. West*, 2005 WL 180930, 2005 U.S. Dist. LEXIS 1123 (S.D.N.Y. Jan. 27, 2005) (Sweet, J.) (in wire fraud case, where stipulated guideline range was 57-71 months, sentencing defendant to 60 months, the statutory maximum; following *Ranum* (*supra*), in that Guidelines are only one factor to consider; notably, stating that “[n]othing in *Booker* appears to suggest that such fact-finding, as limited by the principles of *Apprendi* and its progeny, is inappropriate. Accordingly, this Court will sentence West based upon the facts admitted in connection with his plea and upon those facts found by the Court in the context of analysis under subsection 3553(a), as limited by *Apprendi* and *Booker*”); cf. *United States v. Rodriguez*, 2005 WL 323713, 2005 U.S. Dist. 6655 (S.D.N.Y. Feb. 8, 2005) (Sweet, J.) (briefly discussing *Crosby*, not mentioning *West* or *Ranum*)

United States v. Wilson (“*Wilson II*”), 355 F. Supp. 2d 1269 (D. Utah Feb. 2, 2005) (Cassell, J.) (denying motion to reconsider sentence in light of *Ranum* and similar cases; explaining why court believes *Ranum* is flawed)

United States v. Musick, 2005 WL 1278429 (E.D. Tenn. Feb. 2, 2005) (Greer, J.) (stating that “[i]n deciding the question of how much weight the guidelines should carry in arriving at a reasonable sentence, this Court FINDS, post *Booker*, that the guidelines, although advisory and only one factor among others to be considered in arriving at a reasonable sentence, are entitled to substantial weight in the sentencing decision” and that “[o]nly when clearly outweighed by some other factor(s) set forth in § 3553(a) will the Court be inclined to sentence outside the appropriate guideline range”)

United States v. Wanning, 354 F. Supp. 2d 1056 (D. Neb. Feb. 3, 2005) (Kopf, J.) (explaining why court agrees with Judge Cassell in *Wilson* and disagrees with Judge Pratt in *Myers*)

United States v. Penniegraft, 357 F. Supp. 2d 854 (M.D.N.C. Feb. 7, 2005) (Beaty, J.) (explaining procedure court will follow in light of *Booker* and Fourth Circuit’s *Hughes* decision; finding that “[i]t is important to note that a sentence under this format will not represent a ‘departure’ under the Guidelines, and will not be considered as a ‘departure’ for purposes of reporting or recording the Court’s post-*Booker* sentence”)

United States v. Biheiri, 356 F. Supp. 2d 589 (E.D. Va. Feb. 9, 2005) (Ellis, J.) (while recognizing debate, not explicitly taking one side or the other)

United States v. Peach, 356 F. Supp. 2d 1018 (D.N.D. Feb. 15, 2005) (Hovland, J.) (after reviewing some of decisions listed *supra* and U.S.S.C. chairman’s House Judiciary Committee testimony, concluding that court “will continue to give consideration to the ‘advisory; Sentencing Guidelines which will be afforded ‘substantial weight’ in sentencing hearings [because] [t]he federal Sentencing Guidelines, policy statements, and the sentencing tables and ranges were created at the direction of Congress [and] [t]he statutory purposes of sentencing, as directed by Congress, are best reflected in the Guidelines”)

* *United States v. Jaber*, 362 F. Supp. 2d 365 (D. Mass. Mar. 16, 2005) (Gertner, J.) (in lengthy opinion, explaining how court will apply “advisory” guidelines; discussing significant concerns about bases upon which approach adopted in *Wilson I* and *Wilson II* is predicated)

Simon v. United States, 361 F. Supp. 2d 35 (S.D.N.Y. Mar. 17, 2005) (Sifton, J.) (explaining why court will give equal, not greater, weight to Guidelines vis-a-vis other § 3553(a) factors)

United States v. Gray, 362 F. Supp. 2d 714 (S.D. W. Va. Mar. 17, 2005) (Goodwin, J.) (stating that as general matter, court “will continue to place great weight in the recommendation offered by the Guidelines, as such advice is the product of almost two decades of expert analysis and consideration,” but noting that “[o]ne of the fundamental problems with advice is determining how much confidence to place in it;” announcing intention to apply both preponderance and reasonable doubt standards to aid in determining how much weight to give advisory guideline range)

* *United States v. Phelps*, 366 F. Supp. 2d 580 (E.D. Tenn. April 1, 2005) (Collier, J.) (after reviewing main cases (*Wilson*, *Ranum*, etc), thoughtfully and thoroughly explaining why court will take a middle ground, and when court will or will not treat guidelines as controlling)

B. Statement of Reasons

United States v. Gray, 405 F.3d 227 (4th Cir. April 29, 2005) (noting that “ the district court should first determine the appropriate sentencing range under the Guidelines, making all factual findings appropriate for that determination. The court should consider this sentencing range along with the other factors described in 18 U.S.C. § 3553(a), and then impose a sentence. If that sentence falls outside the Guidelines range, the court should explain its reasons for the departure, as required by 18 U.S.C. §

3553(c)(2). The sentence must be ‘within the statutorily prescribed range and . . . reasonable.’”) (internal citations omitted); *see also United States v. Iskander*, 407 F.3d 232 (4th Cir. May 9, 2005); *United States v. Pierce*, 409 F.3d 228 (4th Cir. May 26, 2005); *United States v. Riggs*, 410 F.3d 136 (4th Cir. June 3, 2005)

United States v. Dean, 414 F.3d 725 (7th Cir. 2005) (stating that “the sentencing judge can discuss the application of the statutory factors to the defendant not in checklist fashion but instead in the form of an adequate statement of the judge’s reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant. ‘Judges need not rehearse on the record all of the considerations that 18 U.S.C. §3553(a) lists; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less.’ This shortcut is justified by the indeterminate and interminable character of inquiry into the meaning and application of each of the ‘philosophical’ concepts in which section 3553(a) abounds. However, the 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.”) (internal citations omitted)

C. Standard of Proof

United States v. Mares, 402 F.3d 511 (5th Cir. Mar. 4, 2005) (in first opinion from circuit to address *Booker*, stating that district judge is “entitled” to apply preponderance standard to finding of facts relevant to guideline range and facts relevant to non-guidelines sentence) (N.B.: this does not appear to require court to use preponderance standard); *United States v. Cruz*, unpublished, 2005 WL 1444230, 2005 U.S. App. LEXIS 11873 (5th Cir. June 21, 2005) (stating that “in the post-*Booker* regime, Cruz is entitled only to a district court determination of an advisory guidelines range using a preponderance of the evidence standard of review and a consideration of the other sentencing factors set forth in 18 U.S.C. § 3553(a)”)

* *United States v. Dazey*, 403 F.3d 1147 (10th Cir. April 13, 2005) (in context of determining whether defendant met burden of showing prejudice for plain error review, stating that “[d]istrict courts might reasonably take into consideration the strength of the evidence in support of sentencing enhancements, rather than (as in the pre-*Booker* world) looking solely to whether there was a preponderance of the evidence, and applying Guidelines-specified enhancements accordingly”); *see also United States v. Magallanez*, 408 F.3d 672 (10th Cir. May 17, 2005) (in regard to consideration of acquitted conduct, stating that “[a]pplying the logic of *Watts* to the Guidelines system as modified by *Booker*, we conclude that when a district court makes a determination of sentencing facts by a preponderance test under the now-advisory Guidelines, it is not bound by jury determinations reached through application of the more onerous reasonable doubt standard”); *United States v. Dalton*, 409 F.3d 1247 (10th Cir. June 1, 2005) (stating that *Booker* “does not render judicial fact-finding by a preponderance of the evidence per se unconstitutional. The remedial portion of *Booker* demonstrates that

such fact-finding is unconstitutional only when it operates to increase a defendant's sentence *mandatorily*. We recently noted that "in sentencing criminal defendants for federal crimes, district courts are still required to consider Guideline ranges, which are determined through application of the preponderance standard, just as they were before. The only difference is that the court has latitude, subject to reasonableness review, to depart from the resulting Guideline range.")

United States v. Betro, unpublished, 2005 WL 1140293, 2005 U.S. App. LEXIS 8146 (7th Cir. May 9, 2005) (stating that "*Booker* does not prevent a sentencing judge from making factual findings that have the effect of increasing the guideline range so long as the court understands that the range is advisory rather than binding" with "see" cite to *United States v. Della Rose*, 403 F.3d 891, 907 (7th Cir. April 8, 2005)).

* *United States v. Barkley*, 369 F. Supp. 2d 1309 (N.D. Okla. Jan. 24, 2005) (Holmes, J.) (stating that the Guidelines would be "faithfully follow[ed]" in all cases, "with only such modifications as the Court finds are necessary to satisfy the requirements of the Sixth Amendment articulated in *Blakely*"; that is, within the context of the advisory Guidelines, the court will apply the Sixth Amendment)

* *United States v. West*, 2005 WL 180930, 2005 U.S. Dist. LEXIS 1123 (S.D.N.Y. Jan. 27, 2005) (Sweet, J.) (in wire fraud case, where stipulated guideline range was 57-71 months, sentencing defendant to 60 months, the statutory maximum; following *Ranum* (*supra*), in that Guidelines are only one factor to consider; notably, stating that "[n]othing in *Booker* appears to suggest that such fact-finding, as limited by the principles of *Apprendi* and its progeny, is inappropriate. Accordingly, this Court will sentence West based upon the facts admitted in connection with his plea and upon those facts found by the Court in the context of analysis under subsection 3553(a), as limited by *Apprendi* and *Booker*")

* *United States v. Revock*, 353 F. Supp. 2d 127 (D. Me. Jan. 28, 2005) (Hornby, J.) (finding that after *Booker*, enhancements need be proven only by preponderance of evidence and that jury verdict or defendant's stipulation is not required; where co-defendant did not receive enhancement because he was sentenced after *Blakely* but before *Booker* and defendant was otherwise identically situated to co-defendant, court would not apply enhancement even under preponderance standard, to avoid unwarranted disparity)

* *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (finding that "[i]n order to comply with due process in determining a reasonable sentence, this court will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant's sentence;" while defendant can waive jury trial, he cannot waive standard of proof; while approach may not be required by *Booker*, neither is it prohibited); *see also United States v. Kelley*, 355 F. Supp. 2d 1031 (D. Neb. Feb. 1, 2005) (Bataillon, J.)

United States v. Ochoa-Suarez, 2005 WL 287400, 2005 U.S. Dist. LEXIS 1667 (S.D.N.Y. Feb. 7, 2005) (Keenan, J.) (finding that while before *Booker* court would have applied U.S.S.G. § 3B1.1, after *Booker* it would not because there has been no finding by a jury beyond a reasonable doubt)

United States v. Carvajal, 2005 WL 476125, 2005 U.S. Dist. LEXIS 3076 (S.D.N.Y. Feb. 22, 2005) (Hellerstein, J.) (stating that court believes that Sixth Amendment holding of *Booker* “requires the District Judge to be skeptically careful of unarticulated facts and considerations subsumed in a sentence” and that “[t]he structure of factual hearings and formal findings are necessary if we are to conform our conduct to the Sentencing Reform Act, as we must, and if we are to respect the rationale that led the United States Supreme Court to invalidate the mandatory quality of the Act, but to uphold the Act in all other respects”)

United States v. Smith, 359 F. Supp. 2d 771 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (noting that *Booker* did not change government’s burden of proving enhancements)

* *United States v. Gray*, 362 F. Supp. 2d 714 (S.D. W. Va. Mar. 17, 2005) (Goodwin, J.) (after extended discussion, concluding that court will apply both preponderance and reasonable doubt standards to fact-finding in cases to aid in determining how much weight to give advisory guideline range)

United States v. Harper, 360 F. Supp. 2d 833 (E.D. Tex. Mar. 17, 2005) (Clark, J.) (on government motion pursuant to Fed. R. Crim. P. 35(a), rejecting government’s argument (based on Fifth Circuit’s *Mares* decision) that preponderance standard applies in light of subsequent Supreme Court decision in *Shepard*, 2005 WL 516494; concluding that sentencing enhancements “require more than inferences drawn from a preponderance of evidence”)

United States v. Phelps, 366 F. Supp. 2d 580 (E.D. Tenn. April 1, 2005) (Collier, J.) (in determining advisory guideline range, court “will continue to apply the preponderance of evidence standard and will not consider itself restricted by the Federal Rules of Evidence”)

United States v. Pimental, 367 F. Supp. 2d 143 (D. Mass. April 21, 2005) (Gertner, J.) (replacing opinion issued April 15, 2005) (finding that because certain facts, like amount of loss, “continue to assume inordinate importance in the sentencing outcome,” “they should be tested by our highest standard of proof;” further stating that “[w]e cannot have it both ways: We cannot say that facts found by the judge are only advisory, that as a result, few procedural protections are necessary and also say that the Guidelines are critically important” and that “[i]f the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof, namely proof beyond a reasonable doubt”)

United States v. Coleman, 370 F. Supp. 2d 661 (S.D. Ohio May 24, 2005) (Marbley, J.) (after reviewing what the appellate courts have said so far regarding standard of proof, stating that “[t]his Court believes that the all enhancements should be determined by beyond a reasonable doubt, but, in light of

Yagar's dicta [*United States v. Yagar*, 404 F.3d 967 (6th Cir. April 18, 2005)] and the multi-circuit consensus, the Court will continue to review enhancements, with the exception of those relating to acquitted conduct by a preponderance of the evidence”)

United States v. Malouf, ___ F. Supp. 2d ___, 2005 WL 1398624, 2005 U.S. Dist. LEXIS 11620 (D. Mass. June 14, 2005) (Gertner, J.) (considering impact of *Blakely*, *Booker*, and *Shepard* on standard of proof for determination of mandatory minimum sentences under 21 U.S.C. § 841 for conspiracies)

United States v. Schuler, 373 F. Supp. 2d 1244 (D. Wyo. June 16, 2005) (Brimmer, J.) (finding that district court has discretion “as how to establish the factual basis for the sentencing factors. Thus, a District Court may either allow the jury to find sentencing factors beyond a reasonable doubt or under *Booker* and the new sentencing regime, a District Court may also, within the bounds of the Constitution, find the sentencing factors by a preponderance of the evidence on its own accord.”)

D. Specific Statutes

1. 8 U.S.C. § 1326, Illegal Reentry After Deportation (see also cases listed under U.S.S.G. § 2L1.2)

United States v. Cerna-Salguero, 399 F.3d 887 (8th Cir. Mar. 3, 2005) (rejecting Sixth Amendment challenge to increase in statutory penalty based on prior conviction where *Booker* did not overrule *Almendarez-Torres v. United States*)

* *United States v. Trujillo-Terrazas*, 405 F.3d 814 (10th Cir. April 13, 2005) (where defendant received 16-level bump for third degree arson conviction that resulted from throwing lit match into car (causing \$35 in damage for which restitution was ordered), finding plain error in sentencing under mandatory scheme where district court had sentenced defendant to low end of range (41 months) and stated that it wished that it did not have to send anyone to jail, but that guidelines were mandatory)

United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (where guideline range was 70-87 months (57-71 months after government concession), imposing sentence of 36 months based on fact that district court would have granted downward departure for overrepresentation of criminal history, fact that conviction used to enhance offense level from 8 to 24 was for offense that occurred nearly ten years ago, and fact that “in other districts a similar defendant would not be prosecuted for illegal reentry, but would simply be deported”)

United States v. Galvez-Barrios, 355 F. Supp. 2d 958 (E.D. Wis. Feb. 2, 2005) (Adelman, J.) (where guideline range was 41-51 months, imposing sentence of 24 months after consideration of history of U.S.S.G. § 2L1.2 and unwarranted disparity in sentences among § 1326 defendants, among other factors)

United States v. Marinaro, 2005 WL 851334, 2005 U.S. Dist. LEXIS 6877 (D. Me. April 13, 2005) (Woodcock, J.) (in lengthy opinion, explaining why court was granting departure under U.S.S.G. § 4A1.3, denying departure under § 5H1.6, discussing § 5K1.3, rejecting argument regarding double-counting of prior conviction, rejecting departure for combination of circumstances, and after considering § 3553(a) factors, concluding that sentence within guideline range after departure was appropriate)

United States v. Ramirez-Ramirez, 365 F. Supp. 2d 728 (E.D. Va. April 18, 2005) (Lee, J.) (where guideline range was 46-57 months, imposing sentence of 24 months, based in part on lack of “fast track” program in district)

United States v. Perez-Nunez, 368 F. Supp. 2d 1265 (D.N.M. April 26, 2005) (Brack, J.) (where defendant received 16-level bump for misdemeanor assault conviction for throwing rock at car, for which he spent 24 days in jail, departing from advisory guideline range of 57-71 and sentencing defendant to 24 months)

2. 18 U.S.C. § 115, Assaulting Federal Officials, etc.

United States v. James, unpublished, 2005 WL 647768, 2005 U.S. App. LEXIS 4349 (7th Cir. Mar. 10, 2005) (in *Anders* case where defendant sentenced after Seventh Circuit’s opinion in *Booker*, guideline range was 18-24 months, and judge imposed 12 months in part because “the judge explained that he was persuaded by James’s assurances that he does not intend to harm anyone and can follow rules” and “[t]he judge said that he wanted to give James a chance to follow through on those promises,” concluding that it would be frivolous to challenge sentence as unreasonable)

3. 18 U.S.C. § 922(g), Firearm Possession by Prohibited Person
(see also cases listed under U.S.S.G. § 2K2.1)

United States v. Rogers, 400 F.3d 640 (8th Cir. Mar. 16, 2005) (reversing sentence of probation as unreasonable where district court had departed down from 51-63 month range in felon-in-possession case based on extraordinary rehabilitation because rehabilitation was not extraordinary and defendant had not shown respect for law, probation would not provide deterrence for defendant or protect public, and did not consider Congress’ desire to prevent unwarranted disparity)

United States v. Peach, 356 F. Supp. 2d 1018 (D.N.D. Feb. 15, 2005) (Hovland, J.) (where felon-in-possession case involved drive-by shooting and parties had agreed to guideline range of 100-125 months, imposing sentence of 100 months)

United States v. Anderson, 365 F. Supp. 2d 67 (D. Me. April 20, 2005) (Hornby, J.) (in § 922(g)(9) case where guideline range appears to be 15-21 months, in zone D, imposing split sentence in Zone C (18 months, split 9 months imprisonment and 9 months home detention))

United States v. Pineyro, 372F. Supp. 2d 133 (D. Mass. May 17, 2005) (Gertner, J.) (granting downward departure to time served (approximately 15 months) based on extraordinary physical condition because defendant suffers from heterotopic ossification (“HO”))

4. 18 U.S.C. § 922(o), Possession of Machine Gun

United States v. Webb, 403 F.3d 373 (6th Cir. April 6, 2005) (after reviewing defendant’s sentence of 105 months for plain error and finding none, discussing whether sentence was reasonable and concluding that it was where district court properly calculated guidelines and considered other pertinent § 3553(a) factors)

5. 18 U.S.C. § 922(v), Possession of Semi-Automatic Weapon

United States v. Mullins, 356 F. Supp. 2d 617 (W.D. Va. Feb. 16, 2005) (Jones, J.) (where ban on possession of semi-automatic assault weapons expired one month after charged date of defendant’s possession of weapon, finding it appropriate to sentence below advisory guideline range of 57-71 months “because neither the defendant nor others can be deterred by a sentence based the guideline range for possession of a semi-automatic assault rifle, since that conduct is no longer criminal;” imposing sentence of 40 months)

6. 18 U.S.C. § 924(c), Use or Possession in Connection with Another Offense

United States v. Harris, 397 F.3d 404 (6th Cir. Feb. 8, 2005) (discussing impact of *Booker* on 18 U.S.C. § 924(c) in light of Supreme Court’s previous decisions in *Castillo* and *Harris*)

United States v. Groce, 398 F.3d 679 (4th Cir. Feb. 28, 2005) (rejecting defendant’s claim that *Blakely* entitled defendant to jury determination of whether she “brandished” firearm in light of *Harris v. United States*, but remanding for determination by district court as to whether facts support finding of “brandishing” as statutory definition was interpreted by court of appeals)

United States v. Robinson, 404 F.3d 850 (4th Cir. April 18, 2005) (*Booker* did not alter rule that court cannot depart below statutory mandatory minimum except upon government’s motion for substantial assistance; court has no discretion to impose sentence outside of statutory range set by Congress for offense)

United States v. Duncan, 413 F.3d 680 (7th Cir. July 1, 2005) (rejecting argument that *Blakely* and *Booker* require jury findings as to type of firearm before district court can increase applicable mandatory minimum because *Harris* is still controlling law; in footnote, collecting other post-*Booker* cases addressing mandatory minimum sentences; seemingly suggesting with approval that district court can adjust non-mandatory sentence on another count to achieve overall sentence in light of mandatory sentence)

United States v. Keller, 413 F.3d 706 (8th Cir. July 5, 2005) (finding, in light of *Harris*, that “[b]asing a 2-year increase in the defendant’s minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments. Congress simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the precise weight to be given that factor. That factor need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.”)

7. 18 U.S.C. § 924(e) / U.S.S.G. § 4B1.4, Armed Career Criminal Act

United States v. Nolan, 397 F.3d 665 (8th Cir. Feb. 11, 2005) (in footnote, rejecting *Blakely / Booker* challenge because defendant was sentenced pursuant to statute, not Guidelines, and because Supreme Court has consistently stated that fact of prior conviction is for court, not jury, to find); *United States v. Patterson*, 412 F.3d 10115 (8th Cir. May 13, 2005)

United States v. Barnett, 398 F.3d 516 (6th Cir. Feb. 16, 2005) (rejecting defendant’s argument that jury, not judge, was required to determine nature of prior convictions in light of case law holding that district court’s authority under *Apprendi* to determine existence of prior conviction included determinations regarding their nature); *United States v. Powers*, unpublished, 2005 WL 977136, 2005 U.S. App. LEXIS 7390 (6th Cir. April 28, 2005) (rejecting argument that jury must determine that convictions stemmed from offenses committed on separate convictions; acknowledging that “while both *Booker* and *Shepard* might foreshadow the demise of *Almendarez-Torres*,” that case remains law)

United States v. Hamberlin, unpublished, 2005 WL 513482, 2005 U.S. App. LEXIS 3479 (7th Cir. Feb. 25, 2005) (rejecting argument that prior convictions were required to be alleged in indictment and found by jury beyond reasonable doubt or admitted by defendant)

United States v. Montgomery, 402 F.3d 482 (5th Cir. Mar. 1, 2005) (declining to address impact of *Booker* on defendant’s argument that ACCA enhancement violated his Sixth Amendment rights where court found that defendant’s prior conviction did not qualify as “violent felony”)

United States v. Wilder, unpublished, 2005 WL 647771, 2005 U.S. App. LEXIS 4347 (7th Cir. Mar. 11, 2005) (after remanding on other grounds, noting that *Booker* does not affect 180-month sentence imposed for § 924(e))

United States v. Moore, 401 F.3d 1220 (10th Cir. Mar. 23, 2005) (because *Almendarez-Torres* is still good law, government need not charge or prove “fact of prior conviction;” whether a prior conviction qualifies as a “violent felony” is legal question for court, not “fact” to be proved; “*Apprendi*’s and *Booker*’s exception for prior convictions subsumes inquiries into whether a given conviction constitutes a ‘violent felony’”); see *United States v. Williams*, 403 F.3d 1188 (10th Cir. April 15, 2005); *United States v. Serrano*, 406 F.3d 1208 (10th Cir. May 3, 2005)

United States v. Lewis, 406 F.3d 11 (1st Cir. April 19, 2005) (in footnote, stating that district court's finding that defendant was armed career criminal does not implicate *Booker* because prior convictions are not facts that jury must find beyond reasonable doubt)

United States v. Greer, 359 F. Supp. 2d 1376 (M.D. Ga. Feb. 17, 2005) (Land, J.) (finding that jury must determine nature of prior conviction before court can impose ACCA sentence in limited set of cases in which it is necessary to look beyond face of statute to indictment, plea agreement or jury instructions, to determine if conviction can be used)

United States v. Lewis, 372 F. Supp. 2d 1 (D. Mass. June 23, 2005) (Harrington, J.) (on remand from First Circuit (see listing *supra*), reducing sentence from 235 months to 180 months; stating that “[t]he variance . . . is occasioned primarily by the Court’s desire to reduce somewhat the disparity between Defendant Lewis’ sentence and that of his co-defendant who had received a term of 130 months” and because the new sentence “is also the term urged upon the Court by Defendant Lewis’ counsel at the original disposition as being a reasonable and fair sentence for his client”)

8. 18 U.S.C. § 982 et seq., Forfeiture

United States v. Swanson, 394 F.3d 520 (7th Cir. Jan. 7, 2005) (in decision issued before Supreme Court decided *Booker*, stating that *Blakely* and *Booker* do not affect way in which findings about restitution or forfeiture are to be made)

United States v. Tedder, 403 F.3d 836 (7th Cir. April 6, 2005) (*Apprendi* and *Booker* do not apply to forfeiture because forfeiture has no statutory maximum)

United States v. Hall, 411 F.3d 651 (6th Cir. May 6, 2005) (courts after *Apprendi* concluded that the decision did not require jury findings beyond a reasonable doubt as to forfeiture; nothing in *Booker* changes that analysis) (originally unpublished)

United States v. Washington, unpublished, 2005 WL 1199284, 2005 U.S. App. LEXIS 9304 (5th Cir. May 20, 2005) (neither *Blakely* nor *Booker* overruled *Libretti v. United States*, 516 U.S. 29 (1995), which held that right to jury verdict on forfeiture did not fall under Sixth Amendment)

United States v. Fruchter, 411 F.3d 377 (2d Cir. June 14, 2005) (*Booker* does not apply to forfeiture proceeding in RICO case, 18 U.S.C. § 1963(a)(3), because criminal forfeiture is not a determinate scheme and because *Booker* exempted the forfeiture procedure statute, 18 U.S.C. § 3554, from its holding; in any event, *Libretti* remains controlling)

United States v. Anderson, 2005 WL 1027174 (D. Neb. May 2, 2005) (Kopf, J.) (finding that “[t]he conclusion that the sixth amendment does not apply to criminal forfeitures is not altered by *Apprendi*,” citing *Tedder*, *supra*)

United States v. Dolney, 2005 WL 1076269, 2005 U.S. Dist. LEXIS 9053 (E.D.N.Y. May 3, 2005) (discussing and rejecting defendant's argument in pre-trial motion that forfeiture must be proven to jury beyond reasonable doubt, principally because there is no statutory maximum to limit amount of forfeiture; only essential fact for which Sixth Amendment requires jury finding beyond reasonable doubt in regard to forfeiture is finding of defendant's guilt)

United States v. One Parcel of Property Located at 32 Medley Lane, 372 F. Supp. 2d 248 (D. Conn. May 31, 2005) (Kravitz, J.) (in civil forfeiture case, finding that *Booker* does not require jury to determine question of constitutional excessiveness of forfeiture determination)

9. 18 U.S.C. § 1542, False Statements Regarding Passports

United States v. Doe, unpublished, 2005 WL 767155, 2005 U.S. App. LEXIS 5707 (2d Cir. April 6, 2005) (where guideline range was 6-12 months for making false statements on passport applications but district court imposed 10-year sentence because defendant would not disclose true name, finding sentence unreasonable “[i]n light of the crime charged, the sentencing range recommended, Doe's lack of any provable criminal history, and the district court's inadequate balancing of these factors against the perceived threat posed by Doe”)

10. 18 U.S.C. § 2113, Bank Robbery

United States v. Pallowick, 364 F. Supp. 2d 923 (E.D. Wis. April 1, 2005) (Adelman, J.) (where defendant committed six armed bank robberies and guideline range was 70-87 months, imposing sentence of 46 months based on defendant's history of mental illness and mitigated nature of offenses)

11. 18 U.S.C. § 2251 et seq. Sexual Exploitation and Other Abuse of Children

United States v. Bach, 400 F.3d 622 (8th Cir. Mar. 14, 2005) (where mandatory minimum sentence based on enhancement for prior conviction was less than maximum for unenhanced offense, finding that application of mandatory minimum was proper under *Blakely*, *Apprendi*, and *Almendarez-Torres*)

United States v. Davison, unpublished, 2005 WL 913114, 2005 U.S. App. LEXIS 7191 (11th Cir. April 20, 2005) (where mandatory minimum sentence of 120 months based on prior conviction was over guideline range of 63-78 months, stating that *Booker* is not implicated when defendant's sentence is enhanced based on prior conviction); *United States v. Kangas*, unpublished, 2005 WL 1140770, 2005 U.S. App. LEXIS 9022 (11th Cir. May 16, 2005)

United States v. Zastoupil, 2005 WL 1308689, 2005 U.S. Dist. LEXIS 11634 (D.N.D. June 14, 2005) (Hovland, J.) (in horrendous child sexual exploitation case where mandatory minimum was 25 years and advisory guideline range was 360 months to life, imposing 50-year sentence)

12. 18 U.S.C. § 3553(b)(2), Guidelines in Child Crimes and Sexual Offenses

United States v. Sharpley, 399 F.3d 123 (2d Cir. Feb. 16, 2005) (while declining to rule on issue because any error was harmless, observing that court saw “no unique feature of Guidelines sentences for child crimes and sexual offenses that would prevent them from violating the Sixth Amendment in the same manner as Guidelines sentences for other crimes” and further observing that “[f]or this reason, we suspect that the Supreme Court’s failure to excise the entirety of Section 3553(b) was simply an oversight”)

United States v. Yazzie, 407 F.3d 1139 (10th Cir. May 20, 2005) (holding that § 3553(b)(2) must be excised under reasoning of *Booker*)

United States v. Selioutsky, 409 F.3d 114 (2d Cir. May 27, 2005) (concluding that “the *Booker* rationale requires us to consider subsection 3553(b)(2) to be excised [because] [t]here is no principled basis for distinguishing subsection 3553(b)(1) from 3553(b)(2) with respect to the rationale of *Booker*”)

13. 18 U.S.C. § 3553(e) / U.S.S.G. 5K1.1, Substantial Assistance

United States v. Doe, 398 F.3d 1254 (10th Cir. Feb. 24, 2005) (declining to address *Blakely* / *Booker* issues, but remanding case for resentencing where district court failed to fully consider defendant’s cooperation in deciding whether (and how far) to depart upward) (N.B.: the resolution of this case seems to suggest that departure analysis applies as it did before in order to determine applicable guideline range, which only then becomes advisory)

United States v. Dalton, 404 F.3d 1029 (8th Cir. April 13, 2005) (on appeal by government of extent of departure down from 240 months where government had recommended 10% but court departed by 75% to 60 months with almost no explanation, reversing after concluding that district court abused its discretion; stating that although district court is not required to examine every one of factors given in non-exhaustive list, “what the district court *is* required to do is act reasonably when exercising the discretion it is given, and we will not infer a reasoned exercise of discretion from a record that suggests otherwise or is silent”); *United States v. Pizano*, 403 F.3d 991 (8th Cir. April 13, 2005) (similar, but *affirming* departure from 70-87 month range to 18 months where government recommended 10%, where district court addressed all factors listed in § 5K1.1 and appellate court’s own review of § 3553(a) factors led it to conclude that they support reasonableness of sentence); *United States v. Haack*, 403 F.3d 997 (8th Cir. April 13, 2005) (similar; government recommended 10% reduction from mandatory minimum sentence of 180 months, but district court departed to 78 months) (N.B.: in *Haack*, court noted that the same panel heard all three of these cases on the same day, and that they came from the same sentencing judge, and that it was “obvious that the sentencing judge was frustrated by the government’s identical

recommendations of ten percent departures in each of these three dissimilar cases;” the court went to state that “[a] recommendation by the government that does not adequately explain its reasoning is entitled to less weight, in the court’s view, than a more fully explained recommendation”); *United States v. Christenson*, 403 F.3d 1006 (8th Cir. April 13, 2005) (in another case from same sentencing judge heard on same day by a different panel, *affirming* departure from 240-month mandatory minimum to 60 months where government recommended 10% reduction and defense counsel asked for 144, in middle of what would have been 135-168 month range absent mandatory minimum; citing approvingly to *Pizano* and distinguishing case from *Dalton* and *Haack*), *reh’g en banc granted* (8th Cir. June 20, 2005)

United States v. Romero, unpublished, 2005 WL 914849, 2005 U.S. App. LEXIS 7022 (3d Cir. April 21, 2005) (remanding for resentencing under *Booker* even when “the only issue in this appeal is whether the District Court erred in failing to grant Romero a downward departure for substantial assistance where the Government did not move for one”)

United States v. Botts, unpublished, 2005 WL 1432476, 2005 U.S. App. LEXIS 12078 (11th Cir. June 21, 2005) (where guideline sentence was 60 months and government recommended 5K departure to 40 months, reversing sentence of 60 months of probation because district court gave extraordinary departure for which it failed to give any reasons); *United States v. Martin*, unpublished, 2005 WL 1432474, 2005 U.S. App. LEXIS 12284 (11th Cir. June 21, 2005) (in companion case, where guideline sentence was 108-135 months and government recommended 5K departure to 62 months, reversing sentence of 60 months’ probation because district court gave extraordinary departure for which it failed to give any reasons)

United States v. Pepper, 412 F.3d 995 (8th Cir. June 24, 2005) (even after *Booker*, because district court must still apply guidelines correctly in determining extent of 5K departure, court may consider only matters related to substantial assistance; collecting cases from other circuits)

United States v. Smith, 359 F. Supp. 2d 771 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (departing downward for substantial assistance, U.S.S.G. § 5K1.1, before determining final sentence based on § 3553(a) factors); *see United States v. Beamon*, 373F. Supp. 2d 878 (E.D. Wis. June 16, 2005) (Adelman, J.) (similar)

* *United States v. Belvett*, 2005 WL 852649, 2005 U.S. Dist. LEXIS 4659 (M.D. Fla. Mar. 17, 2005) (Presnell, J.) (taking government to task for suggesting to court that any departure greater than the two levels that the government recommended would be *per se* unreasonable; noting that government’s policy suggests that it still treats guidelines as mandatory minimum)

United States v. Hubbard, 369 F. Supp. 2d 146 (D. Mass. April 25, 2005) (Ponsor, J.) (where defendant’s career offender guideline range was 188-235 months, sentencing defendant to 108 months based in part upon defendant’s horrific childhood and diminished capacity that resulted and cooperation offered by defendant to government; stating that “[t]he possibility that defendant’s cooperation and

assistance may not have been sufficient to justify a downward departure under the old mandatory system . . . does not foreclose the court from considering this factor under § 3553”)

United States v. Murray, 2005 WL 1200185 (S.D.N.Y. May 20, 2005) (Baer, J.) (after initially declining to resentence defendant upon remand after appeal, upon request for reconsideration, agreeing to resentence him based on his cooperation where government declined to move for substantial assistance departure)

14. 18 U.S.C. § 3553(f) / U.S.S.G. § 5C1.2, Safety Valve

United States v. Serrano-Beauvaix, 400 F.3d 50 (1st Cir. Mar. 4, 2005) (noting that “[t]he effect of *Booker*, if any, on the safety valve has not been determined”); see *United States v. Bermudez*, 407 F.3d 536 (1st Cir. May 23, 2005) (claim that judicial fact-finding prevented defendant from receiving lower sentence does not implicate *Blakely*)

United States v. Payton, 405 F.3d 1168 (10th Cir. May 4, 2005) (district court’s finding that defendant did not qualify for safety valve did not violate Sixth Amendment because defendant did not receive higher sentence; stating that “[n]othing in *Booker*’s holding or reasoning suggests that judicial fact-finding to determine whether a lower sentence than the mandatory minimum is warranted implicates a defendant’s Sixth Amendment rights”)

United States v. Duran, 2005 WL 234778, 2005 U.S. Dist. LEXIS 1287 (D. Utah Jan. 31, 2005) (Cassell, J.) (rejecting government’s argument that Guidelines remain mandatory when court sentences defendant pursuant to “safety valve” provision); revised opinion issued Feb. 17, 2005, see 2005 WL 395439 (D. Utah Feb. 17, 2005) (Cassell, J.)

United States v. Ochoa-Suarez, 2005 WL 287400, 2005 U.S. Dist. LEXIS 1667 (S.D.N.Y. Feb. 7, 2005) (Keenan, J.) (finding that *Booker* does not affect safety valve)

United States v. Cherry, 366 F. Supp. 2d 372 (E.D. Va. April 25, 2005) (Jackson, J.) (concluding that guideline range determined under statutory provision for safety valve should be advisory only)

15. 18 U.S.C. § 3583 / U.S.S.G. § 5D1.1 et seq., Supervised Release

United States v. Parsons, unpublished, 2005 WL 1077229, 2005 U.S. App. LEXIS 8099 (4th Cir. May 9, 2005) (although finding meritless defendant’s argument that after *Booker*, district court had no statutory authority to impose supervised release, stating that “[b]ecause Parsons’ sentence is vacated in light of *Booker*, however, the district court may, of course, reconsider the length of the supervised release term to be imposed on resentencing”)

United States v. Melton, unpublished, 2005 WL 1475302, 2005 U.S. App. LEXIS 12185 (recognizing that after *Booker*, district court is no longer required to impose term of supervised release because guidelines are advisory)

16. 18 U.S.C. § 3663 et seq., Restitution

United States v. Swanson, 394 F.3d 520 (7th Cir. 2005) (in decision issued before Supreme Court decided *Booker*, stating that *Blakely* and *Booker* do not affect way in which findings about restitution or forfeiture are to be made)

United States v. Garcia-Castillo, unpublished, 2005 WL 327698, 2005 U.S. App. LEXIS 2254 (10th Cir. Feb. 11, 2005) (where argument raised for first time on appeal, reviewing for plain error and rejecting argument that *Blakely* and *Booker* apply to restitution because restitution is not punishment; further, defendant admitted underlying facts)

United States v. George, 403 F.3d 470 (7th Cir. April 4, 2005) (rejecting as “misguided” defendant’s contention that *Booker* applies to restitution determinations because “[t]here is no ‘statutory maximum’ for restitution; indeed, it is not a criminal punishment but instead is a civil remedy administered for convenience by courts that have entered criminal convictions . . . so the sixth amendment does not apply”); *cf. United States v. Pree*, 408 F.3d 855 (7th Cir. May 20, 2005) (remanding case for reconsideration of restitution ordered as special condition of supervised release pursuant to mandatory guidelines)

United States v. DeSoto, unpublished, 2005 WL 901878, 2005 U.S. App. LEXIS 7242 (11th Cir. April 19, 2005) (stating that because neither Supreme Court or Eleventh Circuit has addressed whether *Booker* applies to restitution, any error cannot be plain); *United States v. King*, 414 F.3d 1329 (11th Cir. June 30, 2005) (similar; in footnote, collecting cases from other circuits)

United States v. Collardeau, 2005 WL 1106475 (D.N.J. April 28, 2005) (Bassler, J.) (noting that *Booker* has no effect on determination of restitution)

17. 21 U.S.C. § 841 et seq., Controlled Substances
(see also cases under U.S.S.G. § 2D1.1)

United States v. Joiner, unpublished, 2005 WL 351152, 2005 U.S. App. LEXIS 2601 (6th Cir. Feb. 14, 2005) (where defendant was sentenced to mandatory minimum statutory term of imprisonment, affirming sentence because it was not affected by *Booker* error); *United States v. Johnson*, unpublished, 2005 WL 1059276, 2005 U.S. App. LEXIS 7965 (6th Cir. May 5, 2005) (*Booker* does not apply when defendant sentenced to mandatory minimum)

United States v. Sanchez, unpublished, 2005 WL 419464, 2005 U.S. App. LEXIS 3196 (3d Cir. Feb. 23, 2005) (in *Anders* case where district court sentenced defendant to 120 months (down from range of 235-293 months) even though it had granted government's 18 U.S.C. § 3553(e) motion, noting "that this case presents no issues under [*Booker*]" because "the District Court imposed a sentence (120 months, or 10 years) which equaled the statutory mandatory minimum" and "[a] court may impose the statutory mandatory minimum sentence without the need for any jury-factfinding or admission beyond the fact of conviction itself")

United States v. Thomas, 398 F.3d 1058 (8th Cir. Feb. 23, 2005) (in *pro se* appeal where defendant received mandatory life sentence based on prior convictions, rejecting argument that prior conviction exception in *Apprendi* did not survive *Blakely*; noting that *Booker* specifically reaffirmed *Apprendi*'s holding); see also *United States v. Orozco-Castillo*, 404 F.3d 1101 (8th Cir. April 22, 2005); *United States v. Velazquez*, 410 F.3d 1011 (8th Cir. June 8, 2005)

United States v. Paladino, 401 F.3d 471 (7th Cir. Feb. 25, 2005) (where defendant was sentenced to increased mandatory minimum sentence based on prior convictions, rejecting argument that district court could not find facts regarding convictions in light of *Harris v. United States*, 536 U.S. 545 (2002))

United States v. Curry, 404 F.3d 316 (5th Cir. Mar. 15, 2005) (declining to consider *Booker* arguments because defendant was sentenced to statutory mandatory minimum sentence based on prior conviction)

United States v. Rojas-Coria, 401 F.3d 871 (8th Cir. Mar. 17, 2005) (noting that *Booker* had no impact on appeal where defendant was sentenced to mandatory minimum of 120 months)

United States v. Garcia-Rodriguez, unpublished, 2005 WL 752728, 2005 U.S. App. LEXIS 5351 (10th Cir. April 4, 2005) (on plain error review, rejecting defendant's argument that district court could not sentence him to a mandatory life sentence based on two prior convictions when he challenged whether he was person convicted because court applied proof beyond a reasonable doubt standard, as required by 21 U.S.C. § 851); *United States v. Jeffrey*, unpublished, 2005 WL 827153, 2005 U.S. App. LEXIS 5969 (10th Cir. April 11, 2005) (rejecting defendant's argument that mandatory life sentence violated Sixth Amendment because sentence enhancement procedure of 21 U.S.C. § 851 actually sets forth elements of offense that must be found by jury; stating that "Jeffrey has provided us with no good reason to depart from" *Almendarez-Torres*, *Blakely*, and *Booker*; noting *Shepard* but stating that court is bound by existing precedent); *United States v. Stiger*, 413 F.3d 1185 (10th Cir. June 30, 2005) (relying on other post-*Booker* decisions to find that *Booker* did not overrule *Almendarez-Torres* with regard to prior convictions used to increase statutory minimum sentence)

United States v. Stiger, 413 F.3d 1185 (10th Cir. June 30, 2005) (in drug conspiracy case, *Apprendi* and *Booker* do not require jury to find type and amount of drug attributable to individual co-conspirators, only as to conspiracy as a whole; joining other circuits in so holdings)

United States v. Morin, 2005 WL 1114908 (D.N.D. Mar. 2, 2005) (in methamphetamine case where advisory guideline range was 324-405 months, imposing sentence of 264 months based on relatively short period of time defendant was involved in conspiracy, fact that defendant felt he could not provide cooperation because of danger to his family, need to make sentence comparable to that of co-defendant, and court's belief that "[w]hatever sentence is imposed should still allow him to get out before he is too old to be able to make a living")

United States v. Phillips, 368 F. Supp. 2d 1259 (D.N.M. Mar. 21, 2005) (Black, J.) (imposing 38-month sentence on defendant convicted of transporting 600K of marijuana because, "[g]iven his age and minimal involvement in the crime, 38 months in a federal penitentiary is 'just punishment' which will protect the public from any threat Mr. Phillips will engage in, future illegal conduct, and I do not believe it can be considered 'unreasonably short' given the 'seriousness' of the offense")

United States v. Carmona-Rodriguez, 2005 WL 840464, 2005 U.S. Dist. LEXIS 6254 (S.D.N.Y. April 11, 2005) (Sweet, J.) (where 55-year old female defendant convicted of conspiring to distribute heroin met requirements of safety valve, 18 U.S.C. § 3553(f), thus removing 5-year mandatory minimum, and advisory guideline range was 46-57 months, sentencing defendant to 30 months based on low risk of recidivism and health issues); *United States v. Castillo*, 2005 WL 1214280, 2005 U.S. Dist. LEXIS 9780 (S.D.N.Y. May 20, 2005) (Sweet, J.) (where defendant convicted of crack and powder offenses qualified for safety valve and guideline range was 135-168 months, sentencing defendant to 87 months based on crack-powder disparity); *United States v. Hernandez*, 2005 WL 1330764, 2005 U.S. Dist. LEXIS 10839 (S.D.N.Y. June 2, 2005) (Sweet, J.) (in cocaine conspiracy case, departing downward from guideline range of 37-46 months (after applying safety valve) to 8 months (time served) based on family circumstances); *cf. United States v. Molina*, 2005 WL 991907 (S.D.N.Y. April 27, 2005) (Sweet, J.) (where defendant pled to conspiring to distribute powder cocaine and advisory guideline range was 37-46 months, sentencing defendant to 37 months); *United States v. Estevez*, 2005 WL 1053591, 2005 U.S. Dist. LEXIS 8128 (S.D.N.Y. May 4, 2005) (Sweet, J.) (where defendant pled guilty to conspiring to distribute powder cocaine and distribution of powder cocaine and advisory guideline range was 78-97 months, sentencing defendant to 78 months); *United States v. Delarosa*, 2005 WL 1423272, 2005 U.S. Dist. LEXIS 12042 (S.D.N.Y. June 15, 2005) (Sweet, J.) (giving low end of guideline range, 188 months, in heroin conspiracy case)

United States v. Agostini, 365 F. Supp. 2d 530 (S.D.N.Y. April 13, 2005) (Marrero, J.) (departing upward 38 months, to 300 months, where operation of grouping rules effectively negated defendant's conviction for brutal assault of perceived informant (because calculation for assault was significantly lower than calculation for drug offenses), but declining to depart up on basis of criminal history)

United States v. Toback, 2005 WL 992004, 2005 U.S. Dist. LEXIS 6778 (S.D.N.Y. April 19, 2005) (Sweet, J.) (where defendant pled guilty to offense involving 1,4-butanediol, an analogue of GHB, sentencing to time served (one day) and three years of supervised release instead of 10-16 months, where defendant was sole owner and proprietor of small business employing over 80 people that would be devastated without him); *United States v. Roberts*, 2005 WL 1153757, 2005 U.S. Dist. LEXIS 9141 (S.D.N.Y. May 16, 2005) (Sweet, J.) (sentencing Toback's co-defendant to time served and 3 years of supervised release, of which 10 months are home confinement principally because of need for defendant to care for long-time companion who has debilitating illness and is completely dependent on defendant, and also because defendant's conduct was on perimeter of Analogue Statute's proscribed conduct)

United States v. Cherry, 366 F. Supp. 2d 372 (E.D. Va. April 25, 2005) (Jackson, J.) (where defendant qualified for safety valve treatment and final advisory guideline range was 30-37 months (instead of 60 months required by statute), imposing sentence of 4 months (per PACER entry for judgment on April 29, No. 2:04CR104-3) after considering that defendant, an educated, intelligent person with record of consistent employment and support from family and friends, engaged in single instance of driving acquaintance to drug transaction, and that government frequently would charge such conduct as misprision)

United States v. Williams, 372 F. Supp. 2d 1335 (M.D. Fla. May 5, 2005) (Presnell, J.) (where defendant, a long-time petty dealer in marijuana and powder cocaine, was prosecuted federally for crack based on three undercover buys set up by confidential informant, government filed § 851 notice on day of trial, and guideline range of 360-life was based on career offender status (where defendant was already a CH VI), sentencing defendant to 204 months (17 years) based on arbitrary compounding of criminal history and fact that offense level was driven up by sting operation involving crack; taking government to task, among other things, for its "disingenuous" position that any sentence under guideline range is not reasonable, thereby flouting *Booker*'s remedial holding)

United States v. Malouf, ___ F. Supp. 2d ___, 2005 WL 1398624, 2005 U.S. Dist. LEXIS 11620 (D. Mass. June 14, 2005) (Gertner, J.) (considering impact of *Blakely*, *Booker*, and *Shepard* on standard of proof for determination of mandatory minimum sentences under 21 U.S.C. § 841 for conspiracies)

E. Specific Guidelines

1. U.S.S.G. § 1B1.3, Relevant Conduct

United States v. Duncan, 400 F.3d 1297 (11th Cir. Feb. 24, 2005) (discussing use of acquitted conduct and stating that "*Booker* does not suggest that the consideration of acquitted conduct violates the Sixth Amendment as long as the judge does not impose a sentencing that exceeds what was authorized by the jury verdict")

United States v. Magallanez, 408 F.3d 672 (10th Cir. May 17, 2005) (in regard to consideration of acquitted conduct, stating that “[a]pplying the logic of *Watts* to the Guidelines system as modified by *Booker*, we conclude that when a district court makes a determination of sentencing facts by a preponderance test under the now-advisory Guidelines, it is not bound by jury determinations reached through application of the more onerous reasonable doubt standard”)

United States v. Agostini, 365 F. Supp. 2d 530 (S.D.N.Y. April 13, 2005) (Marrero, J.) (stating that “*Booker* did not alter the court’s ability to enhance a defendant’s sentence on the basis of acquitted conduct”)

United States v. Pimental, 367 F. Supp. 2d 143 (D. Mass. April 21, 2005) (Gertner, J.) (replacing opinion issued April 15, 2005) (explaining at length why court should / will not consider acquitted conduct in determining advisory guideline range)

United States v. Coleman, 370 F. Supp. 2d 661 (S.D. Ohio May 24, 2005) (Marbley, J.) (although acknowledging that court will generally apply preponderance standard, stating that “[a]t sentencing, acquitted conduct should always be considered using a reasonable doubt standard; otherwise, a defendant’s Sixth Amendment right to a jury trial is eviscerated”; explaining reasoning in lengthy discussion)

United States v. Ferby, 2005 WL 1544802 (W.D.N.Y. July 1, 2005) (Arcara, J.) (explaining why court could consider acquitted conduct in determining advisory guideline range)

2. U.S.S.G. § 2B1.1, Fraud and Theft Offenses

United States v. Carey, 368 F. Supp. 2d 891 (E.D. Wis. April 25, 2005) (Adelman, J.) (where guideline range was 15-21 months in social security disability benefit fraud case that government charged under 18 U.S.C. § 1343, reducing sentence slightly because government chose to prosecute case under wire fraud statute instead of offense such as 18 U.S.C. § 641, which triggers lower base offense level because it carries lower statutory maximum; sentencing defendant to year and a day)

United States v. Duff, 371 F. Supp. 2d 959 (N.D. Ill. May 27, 2005) (Bucklo, J.) (in case involving contract fraud, insurance fraud, money laundering and tax evasion, sentencing defendant to 188 months given scope of criminal activity, length of time it went on, number of people corrupted by defendant and number of victims involved, and fact that “Mr. Duff’s actions were not driven by any even perceived necessity. Motivated purely by greed, he was willing to risk harm to all those who worked with him, commanding them to participate in his conduct, and even requiring criminal conduct by his mother”)

United States v. Eberhard, 2005 WL 1384038, 2005 U.S. Dist. LEXIS 11273 (S.D.N.Y. June 9, 2005) (Sweet, J.) (in securities fraud case, where guideline range was 151-188 months, sentencing defendant, who was 41, to 151 months, principally because of harm caused by offense: “Eberhard’s

criminal conduct has harmed a significant number of people, not only causing tremendous financial loss and emotional stress to his clients but also burdening his clients' families and loved ones with the financial uncertainty that comes with having one's financial security abruptly and irrevocably eliminated. . . . Eberhard's carefully crafted and executed criminal conduct has devastated his former clients, many of whom are senior citizens, and left them in financial ruin. Eberhard, consciously and over an extended period of time, exploited his experience in the securities industry and his friendships – many of his former clients were friends of his or had been referred to him by his friends – to enrich himself with total disregard for the consequences of his actions.”)

United States v. Devoy, 2005 WL 1563337 (E.D. Wis. June 28, 2005) (Adelman, J.) (where defendant pled guilty to defrauding her employer and guideline range was 12-18 months, reducing range slightly to 10-16 months in part because defendant had already paid restitution in full (reduction allowed for split sentence), and imposing sentence of 12 months, including 6 in prison)

3. U.S.S.G. § 2B3.1, Robbery

United States v. Pallowick, 364 F. Supp. 2d 923 (E.D. Wis. April 1, 2005) (Adelman, J.) (where defendant committed six armed bank robberies and guideline range was 70-87 months, imposing sentence of 46 months based on defendant's history of mental illness and mitigated nature of offenses)

4. U.S.S.G. § 2B5.1, Counterfeiting

United States v. Kelley, 355 F. Supp. 2d 1031 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (where enhancements moved minimum end of guideline range from four months and Zone C to eighteen months and Zone D, finding that defendant should be sentenced to time served and six months of home confinement)

5. U.S.S.G. § 2D1.1, Drug Offenses

(see also cases under 21 U.S.C. § 841 et seq., Controlled Substances)

United States v. Wyatt, unpublished, 2005 WL 1006889, 2005 U.S. App. LEXIS 7709 (11th Cir. April 29, 2005) (where defendant pled guilty to conspiracy to distribute 5 grams or more of methamphetamine, and guideline range was 78-97 months but mandatory minimum was 120 months, finding no *Blakely* or *Booker* error in applying enhancement pursuant to § 2D1.1(b)(5)(B))

United States v. Morin, 2005 WL 1114908 (D.N.D. Mar. 2, 2005) (in methamphetamine case where advisory guideline range was 324-405 months, imposing sentence of 264 months based on relatively short period of time defendant was involved in conspiracy, fact that defendant felt he could not provide cooperation because of danger to his family, need to make sentence comparable to that of co-defendant, and court's belief that “[w]hatever sentence is imposed should still allow him to get out before he is too old to be able to make a living”)

* *United States v. Smith*, 359 F. Supp. 2d 771 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (discussing in detail crack / powder cocaine disparity; citing numerous sources) (N.B.: in addition, one source not cited directly in the opinion is the Sentencing Commission's Report to the Congress: Cocaine and Federal Sentencing Policy (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm)

United States v. Harris, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005) (Robertson, J.) (where guideline ranges for two defendants were, respectively, 120-150 months and 70-87 months, sentencing them to 96 and 60 months, in part on basis that evidence was questionable as to amounts of crack handled by each defendant and in part on basis of crack/powder disparity; as to latter, finding that Sentencing Commission's findings "are sound authority for the proposition that the sentencing ranges for [the defendants'] crime by the Guidelines are greater than necessary")

United States v. Thomas, 360 F. Supp. 2d 238 (D. Mass. Mar. 14, 2005) (Ponsor, J.) (finding that while drug was cocaine base, there was insufficient evidence to find that it was specifically crack cocaine for purpose of Guidelines; in choosing between guideline range of 262-327 months, and 360-life, selecting 262 months because although defendant was career offender, offense involved two small hand-to-hand buys, defendant lost family at young age; and concluding that "[w]hile a very long sentence is appropriate, an essentially life-extinguishing sentence in these circumstances is not reasonable"); *see also United States v. Hubbard*, 369 F. Supp. 2d 146 (D. Mass. April 25, 2005) (Ponsor, J.)

* *Simon v. United States*, 361 F. Supp. 2d 35 (S.D.N.Y. Mar. 17, 2005) (Sifton, J.) (in imposing sentence lower than what advisory guideline range called for based on 600 grams of crack, considering disparity between crack and powder as principal factor, but also considering defendant's age, medical condition, procedural history of case, and sentence of co-defendant) (N.B.: the court cites to a Sentencing Commission study on correlation between public opinion and guideline sentencing, available at http://www.ussc.gov/nss/jp_exsum.htm)

United States v. Phillips, 368 F. Supp. 2d 1259 (D.N.M. Mar. 21, 2005) (Black, J.) (imposing 38-month sentence on defendant convicted of transporting 600K of marijuana because, "[g]iven his age and minimal involvement in the crime, 38 months in a federal penitentiary is 'just punishment' which will protect the public from any threat Mr. Phillips will engage in, future illegal conduct, and I do not believe it can be considered 'unreasonably short' given the 'seriousness' of the offense")

United States v. Hoskins, 364 F. Supp. 2d 1214 (D. Mont. April 8, 2005) (Molloy, J.) (where guidelines call for life sentence, sentencing 38-year-old defendant to 300 months on drug counts (10-year minimum enhanced by § 851 to 20-year minimum) and 60 consecutive on § 924(c) count because Congress requires no less than 25 years and 30 years "as a practical matter amounts to a *de facto* life sentence when viewed in conjunction with the term of supervised release, which will continue until Hoskins dies;" noting that while "[t]he Government asks me to impose a life sentence simply because it is the sentence dictated by the advisory Guideline[,] [t]hat argument assumes that *Booker*'s abandonment of

mandatory guidelines is illusory[,]” but “[u]pon examination of the entire *Booker* opinion, I am convinced that the Supreme Court did not intend for the Guidelines to be advisory in theory by mandatory in fact”)

United States v. Carmona-Rodriguez, 2005 WL 840464, 2005 U.S. Dist. LEXIS 6254 (S.D.N.Y. April 11, 2005) (Sweet, J.) (where 55-year old female defendant convicted of conspiring to distribute heroin met requirements of safety valve, 18 U.S.C. § 3553(f), thus removing 5-year mandatory minimum, and advisory guideline range was 46-57 months, sentencing defendant to 30 months based on low risk of recidivism and health issues); *cf. United States v. Molina*, 2005 WL 991907 (S.D.N.Y. April 27, 2005) (Sweet, J.) (where defendant pled to conspiring to distribute powder cocaine and advisory guideline range was 37-46 months, sentencing defendant to 37 months); *United States v. Estevez*, 2005 WL 1053591, 2005 U.S. Dist. LEXIS 8128 (S.D.N.Y. May 4, 2005) (Sweet, J.) (where defendant pled guilty to conspiring to distribute powder cocaine and distribution of powder cocaine and advisory guideline range was 78-97 months, sentencing defendant to 78 months)

United States v. Agostini, 365 F. Supp. 2d 530 (S.D.N.Y. April 13, 2005) (Marrero, J.) (departing upward 38 months, to 300 months, where operation of grouping rules effectively negated defendant’s conviction for brutal assault of perceived informant (because calculation for assault was significantly lower than calculation for drug offenses), but declining to depart up on basis of criminal history)

United States v. Tabor, 365 F. Supp. 2d 1052 (D. Neb. April 18, 2005) (Kopf, J.) (despite court’s personal disagreement with crack guidelines, deciding that they, like all other guidelines, “should be given heavy weight;” concluding that sentence within advisory guideline range was reasonable; noting that sentence could have been lower had defendant admitted conduct and plead guilty, as he was eligible for safety valve)

United States v. Toback, 2005 WL 992004, 2005 U.S. Dist. LEXIS 6778 (S.D.N.Y. April 19, 2005) (Sweet, J.) (where defendant pled guilty to offense involving 1,4-butanediol, an analogue of GHB, sentencing to time served (one day) and three years of supervised release instead of 10-16 months, where defendant was sole owner and proprietor of small business employing over 80 people that would be devastated without him); *United States v. Roberts*, 2005 WL 1153757, 2005 U.S. Dist. LEXIS 9141 (S.D.N.Y. May 16, 2005) (Sweet, J.) (sentencing Toback’s co-defendant to time served and 3 years of supervised release, of which 10 months are home confinement principally because of need for defendant to care for long-time companion who has debilitating illness and is completely dependent on defendant, and also because defendant’s conduct was on perimeter of Analogue Statute’s proscribed conduct)

United States v. Cherry, 366 F. Supp. 2d 372 (E.D. Va. April 25, 2005) (Jackson, J.) (where defendant qualified for safety valve treatment and final advisory guideline range was 30-37 months (instead of 60 months required by statute), imposing sentence of 4 months (per PACER entry for judgment on April 29, No. 2:04CR104-3) after considering that defendant, an educated, intelligent person with record of consistent employment and support from family and friends, engaged in single instance of driving acquaintance to drug transaction, and that government frequently would charge such conduct as misprision)

United States v. Haj, 2005 U.S. Dist. LEXIS 8947 (D. Kan. April 28, 2005) (Crow, J.) (in methamphetamine case where plea agreement contemplated that low of guideline range would be 210 months, sentencing defendant to that where defendant, although having only one prior conviction, had history of transporting pseudoephedrine and instant offense was of large scale; rejecting defendant's argument that he would be subject to abuse in prison because he was Arabic)

United States v. Clay, 2005 WL 1076243 (E.D. Tenn. May 6, 2005) (Greer, J.) (where advisory guideline range was 235-293 months, imposing sentence of 156 months based on defendant's horrendous childhood, his withdrawal from conspiracy, over-representation of his criminal history, and crack-powder disparity)

United States v. Cosimi, 368 F. Supp. 2d 345 (S.D. N.Y. May 11, 2005) (Marrero, J.) (in Ecstasy importation case, sentencing defendant to 57 months, low end of advisory guideline range)

United States v. Kee, 2005 WL 1162449, 2005 U.S. Dist. LEXIS 9312 (S.D.N.Y. May 13, 2005) (Sweet, J.) (in Ecstasy distribution conspiracy case where advisory guideline range was 24-30 months, government had agreed to 18-24 months, and defense requested time served, sentencing defendant to 12 months, taking particular note of "the fact that Kee had apparently not engaged in criminal activity prior to this offense and that she has received virtually no formal education"); *United States v. Chen*, 2005 WL 1423274, 2005 U.S. Dist. LEXIS 12045 (S.D.N.Y. June 15, 2005) (Sweet, J.) (in co-defendant's case, where guideline range was 46-57 months, sentencing defendant to 34 months)

United States v. Hernandez, 2005 WL 1242344, 2005 U.S. Dist. LEXIS 10026 (S.D.N.Y. May 24, 2005) (Sweet, J.) (where defendant pled to heroin distribution conspiracy and guideline range was 70-87 months, sentencing defendant to 50 months based on age (48) and lower likelihood of recidivism, and defendant's physical condition (hepatitis B, high blood pressure, and hematoma on chest the size of a grapefruit, necessitating ongoing medical treatment; noting that "this non-Guidelines sentence is proportional to those imposed by the *Carmona-Rodriguez*, *Nellum* and *Simon* courts")

United States v. Frye, 370 F. Supp. 2d 495 (W.D. Va. May 20, 2005) (Jones, J.) (where defendant pled to violating 21 U.S.C. § 858 (knowingly and intentionally creating a substantial risk of harm to human life while manufacturing methamphetamine) and guideline range was 70-87 months, sentencing defendant to 40 months based on age, methamphetamine addiction, need for treatment, etc)

United States v. Rodriguez, 2005 WL 1319259, 2005 U.S. Dist. LEXIS 10745 (D. Neb. June 3, 2005) (Bataillon, J.) (where parties stipulated to guideline range in methamphetamine case of 78-97 months, sentencing defendant to 60 months (mandatory minimum) after finding, among other things, that "although the crime was indeed serious, defendant's role was not significant and she was placed in a situation where it would have been difficult, if not impossible, for her to have defied her husband and stepson who were heavily involved in the drug conspiracy" and that "[a]lthough she reaped some of the monetary benefits of the drug trade, she did so in order to support her family and to pay bills")

United States v. Greer, 375 F. Supp. 2d 790 (E.D. Wis. June 27, 2005) (Adelman, J.) (where defendant pled to telephone count, 21 U.S.C. § 843, and guideline range was 46-47 (capped by statutory maximum at 48 months), sentencing defendant to 5 years of probation where defendant had become marginally involved in drug conspiracy because of her boyfriend and incarceration would likely cause her to lose her children and house; citing to “The Girlfriend Problem”)

6. U.S.S.G. § 2G2.1 et seq., Child Pornography

United States v. Bailey, 369 F. Supp. 2d 1090 (D. Neb. May 12, 2005) (Kopf, J.) (where defendant had not actually downloaded images, where criminal history overrepresented likelihood of recidivism, and principally because defendant’s presence as caretaker was critical to his young daughter’s recovery from sexual abuse, applying pre-PROTECT Act law to depart down to probation)

United States v. Zastoupil, 2005 WL 1308689, 2005 U.S. Dist. LEXIS 11634 (D.N.D. June 14, 2005) (Hovland, J.) (in horrendous child sexual exploitation case where mandatory minimum was 25 years and advisory guideline range was 360 months to life, imposing 50-year sentence)

7. U.S.S.G. § 2H1.1, Offenses Involving Individual Rights

United States v. Strange, 370 F. Supp. 2d 644 (N.D. Ohio May 19, 2005) (Wells, J.) (sentencing former sheriff’s deputy who beat inmate to 21 months, 6 months below guideline range of 27-33 months, on basis of § 3553(a) factors after rejecting departures requested by defense)

8. U.S.S.G. § 2K2.1 et seq., Firearms

United States v. Green, unpublished, 2005 WL 602697, 2005 U.S. App. LEXIS 4393 (6th Cir. Mar. 15, 2005) (finding Sixth Amendment error in adding 4-level enhancement for use of firearm in connection with another offense and that error was prejudicial where “[t]here were several material fact disputes affecting the appropriate Guideline range” and the court sentenced defendant at the bottom of the range, stating “you have my reservations, especially about the felony firearm”)

* *United States v. Washington*, 404 F.3d 834 (4th Cir. April 15, 2005) (where defendant’s base offense level was increased on basis of prior conviction for crime of violence and district court considered facts outside charging document in determining whether conviction fell within catch-all phrase of § 4B1.2 definition (“by its nature presented a serious potential risk of physical injury”), finding Sixth Amendment error in light of *Booker* and *Shepard*) (N.B.: there was a vigorous dissent attacking several aspects of majority opinion); cf. *United States v. Collins*, 412 F.3d 515 (4th Cir. June 20, 2005) (discussing cases, finding that convictions used to make defendant career offender were undisputed and that defendant conceded that they were separated by intervening arrest, such that cases were not implicated)

United States v. Lewis, 405 F.3d 511 (7th Cir. April 19, 2005) (stating that *Booker* excludes consideration of prior convictions from its rule, and that even if criminal history was for a jury's consideration, defendant waived claim when, at jury trial, he opted to rely on *Old Chief* to keep jury from learning details about his prior conviction: "A defendant cannot insist during trial that the jury be kept in ignorance yet demand after its end that he receive a lower sentence because the jury did not pass on the very issue that had been withheld at his request") (N.B.: court seemingly does not consider possibility of bifurcated proceeding on nature of prior conviction); see *United States v. Williams*, 410 F.3d 397 (7th Cir. June 9, 2005)

United States v. Frappier, ___ F. Supp. 2d ___, 2005 WL 1362902, 2005 U.S. Dist. LEXIS 11234 (D. Me. June 8, 2005) (Woodcock, J.) (where guideline range was 46-57 months, departing down to 20 months based in part on over-representation of criminal history and in part on nature of offense, that defendant's "sole motivation in possessing the firearms was to do for his sons what his father had done for him: teach them how to use a rifle. There is no evidence he ever actually used either firearm, except firing the firearms from five to six times while instructing them in the operation and safety of the weapons. His older son, Daniel, is currently applying this knowledge as a member of the United States Army about to be shipped to Iraq. . . . [Further], the uncontradicted evidence of his motivation compels the ancillary conclusion that he did not possess the weapon for any illegal purpose.")

United States v. Brannon, ___ F. Supp. 2d ___, 2005 WL 1629845 (E.D. Wis. July 7, 2005) (Adelman, J.) (sentencing defendant to 3 months where advisory guideline range was 27-33 months, in large part because federal prosecution came so much later that defendant had served much of state sentence on charges arising out of same search of home as federal charge)

9. U.S.S.G. § 2L1.2, Illegal Reentry After Deportation

* *United States v. Labastida-Segura*, 396 F.3d 1140 (10th Cir. Feb. 4, 2005) (in illegal reentry case in which defendant stipulated to offense conduct but reserved right to challenge whether prior conviction constituted "aggravated felony," finding that *Booker*'s remedial holding must be applied even where sentence does not involve Sixth Amendment violation; stating that reviewing court could not conclude that error was harmless: "where it was already at the bottom of the guidelines range, to say that the district court would have imposed the same sentence given the new legal landscape (even after consulting the Sentencing Guidelines in an advisory capacity) places us in the zone of speculation and conjecture – we simply do not know what the district court would have done after hearing from the parties;" stating that appellate court cannot exercise district court's discretion)

United States v. Villanueva-Martinez, unpublished, 2005 WL 712458, 2005 U.S. App. LEXIS 5228 (8th Cir. Mar. 30, 2005) (in rejecting defendant's Sixth Amendment claim regarding 16-level increase, relying on *Almendarez-Torres* and fact that defendant admitted at plea that he had aggravated felony conviction)

United States v. Camacho-Ibarquen, 404 F.3d 1283 (11th Cir. Mar. 30, 2005) (on plain error review, rejecting claim of Sixth Amendment error where defendant's guilty plea established only that prior conviction was "aggravated felony" warranting 8-level increase, not conviction warranting 16-level increase, because *Almendarez-Torres* is still controlling law; noting Supreme Court's recent *Shepard* decision "may arguably cast doubt on the future prospects" of *Almendarez*)

United States v. Orduno-Mireles, 405 F.3d 960 (11th Cir. April 6, 2005) (on plain error review, rejecting Sixth Amendment challenge to 16-level enhancement of sentence based on crime of violence; noting that *Shepard* does not change analysis because nothing in record indicates that district court resolved previously unadjudicated facts; further noting that as to error in sentencing defendant under mandatory scheme, nothing in record indicates that district court would have imposed lower sentence if it could have; distinguishing *Shelton*); cf. *United States v. Rodriguez*, unpublished, 2005 WL 901837 (11th Cir. April 19, 2005) (on harmless error review where defendant sentenced to 77 months, summarily rejecting challenge to use of prior conviction; as to sentencing under mandatory system, finding no harm because district court stated that if guidelines were advisory, it would have imposed sentence of 15 years, more than twice what defendant received)

* *United States v. Trujillo-Terrazas*, 405 F.3d 814 (10th Cir. April 13, 2005) (where defendant received 16-level bump for third degree arson conviction that resulted from throwing lit match into car belonging to his ex-girlfriend's new love interest (causing \$35 in damage for which restitution was ordered), finding plain error in sentencing under mandatory scheme where district court had sentenced defendant to low end of range (41 months) and stated that it wished that it did not have to send anyone to jail, but that guidelines were mandatory; stating that the "relatively trivial nature of Mr. Trujillo's criminal history is at odds with the substantial 16 level enhancement suggested by the Guidelines" and that the "blunter" approach of Guidelines of looking only at the offense of conviction and not the actual conduct "means that "the Guidelines do not distinguish between tossing a lighted match through a car window, doing minor damage, and a more substantial crime of violence such as an arson resulting in the complete destruction of a building or vehicle;" observing that "[t]o punish this prior conduct in the same manner could be seen to run afoul of § 3553(a)(6), which strives to achieve uniform sentences for defendants with similar patterns of conduct")

United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (where guideline range was 70-87 months (57-71 months after government concession), imposing sentence of 36 months based on fact that district court would have granted downward departure for overrepresentation of criminal history, fact that conviction used to enhance offense level from 8 to 24 was for offense that occurred nearly ten years ago, and fact that "in other districts a similar defendant would not be prosecuted for illegal reentry, but would simply be deported")

United States v. Galvez-Barrios, 355 F. Supp. 2d 958 (E.D. Wis. Feb. 2, 2005) (Adelman, J.) (where guideline range was 41-51 months, imposing sentence of 24 months after consideration of history

of U.S.S.G. § 2L1.2 and unwarranted disparity in sentences among § 1326 defendants, among other factors)

United States v. Marinaro, 2005 WL 851334 (D. Me. April 13, 2005) (Woodcock, J.) (in lengthy opinion, explaining why court was granting departure under U.S.S.G. § 4A1.3, denying departure under § 5H1.6, discussing § 5K1.3, rejecting departure for combination of circumstances, rejecting argument regarding double-counting of prior conviction, and after considering § 3553(a) factors, concluding that sentence within guideline range after departure was appropriate)

United States v. Ramirez-Ramirez, 365 F. Supp. 2d 728 (E.D. Va. April 18, 2005) (Lee, J.) (where guideline range was 46-57 months, imposing sentence of 24 months, based in part on lack of “fast track” program in district)

United States v. Perez-Nunez, 368 F. Supp. 2d 1265 (D.N.M. April 26, 2005) (Brack, J.) (where defendant received 16-level bump for misdemeanor assault conviction for throwing rock at car, for which he spent 24 days in jail, departing from advisory guideline range of 57-71 and sentencing defendant to 24 months)

United States v. Bazan-Cervantes, 2005 U.S. Dist. LEXIS 8175 (W.D. Ky. May. 3, 2005) (Coffman, J.) (applying categorical approach to determining if prior conviction was aggravated felony or drug trafficking offense; stating that “[t]he need to use the categorical approach is supported, if not directly, then by analogy, by [*Booker*]” and that “[a] court finding that a prior conviction exists is not the same as the court guessing what facts the convicting jury found persuasive or what facts the defendant believed supported his or her guilty plea”)

United States v. Perez-Chavez, 2005 U.S. Dist. LEXIS 9252 (D. Utah May 16, 2005) (Cassell, J.) (in thorough opinion, stating that “the court reluctantly concludes that it cannot vary from the Guidelines and give Mr. Perez-Chavez the shorter sentence he would receive in Arizona and other fact-track districts,” but departing down based on extraordinary family circumstances from advisory guideline range of 18-24 months to 8 months)

United States v. Rosales-Valdez, 375 F. Supp. 2d 1165 (D.N.M. June 17, 2005) (Browning, J.) (where guideline range was 57-71 months, imposing sentence of 24 months because, “[w]hile the Court does not believe that the facts and circumstances of Rosales-Valdez’ case warrant a downward departure under the Guidelines, the Court concludes that some of the arguments he makes for a downward departure justify a deviation from the Guidelines sentence. The United States Attorney’s Office, before it discovered the 1993 Arizona conviction for Attempted Aggravated Assault, was comfortable with a sentence of twelve to eighteen months. While the Court thinks that the sentence should reflect this violent crime, the conviction is so old it does not could toward his criminal history category and the Court thinks that fifty-seven months, the minimum of the Guidelines range, is too high for such an old conviction”)

United States v. Brenman, 2005 WL 1799210 (D. Kan. June 29, 2005) (Crow, J.) (where advisory guideline range was 57-71 months but parties had informally agreed to 24 months, sentencing defendant to 24 months; rejecting defendant's arguments for sentence between 6-12 months based on over-representation of prior drug conviction, his motives for returning to United States, and lack of fast-track program)

10. U.S.S.G. § 2S1.1, Money Laundering

United States v. Musick, 2005 WL 1278429 (E.D. Tenn. Feb. 2, 2005) (Greer, J.) (where defendant convicted of money laundering conspiracy and advisory guideline range was 41-51 months, sentencing defendant to 30 months)

11. U.S.S.G. § 3B1, Role in the Offense

United States v. Johnson, unpublished, 2005 WL 826131, 2005 U.S. App. LEXIS 5463 (7th Cir. April 5, 2005) (where none of defendants argued that denial of reduction for mitigating role constituted error under either substantive or remedial holding of *Booker*, declining to address issue because each defendant's sentence contained other clear *Booker* error; noting that "[i]n any event the district court can consider its decision not to reduce each defendant's sentence for a minimal role when it evaluates on limited remand whether it would have imposed the same sentence for each defendant under the now-advisory guidelines sentencing regime"); see *United States v. Miller*, 405 F.3d 551 (7th Cir. April 20, 2005) (stating that issue of denial of mitigating role adjustment is not question under *Booker* because role adjustment would reduce sentence, not enhance it)

United States v. DeJesus-Batres, 410 F.3d 154 (5th Cir. May 17, 2005) (noting that court reads *Booker* "to apply only to sentencing adjustments based on judge-found facts which increase a defendant's sentence, not to mitigating adjustments")

12. U.S.S.G. § 3C1.1, Obstruction of Justice

United States v. Holmes, 406 F.3d 337 (5th Cir. April 6, 2005) (finding *Booker* Sixth Amendment error where jury was never presented with question whether defendant obstructed justice based on his perjury at his trial: "Insofar as the jury was not specifically asked and instructed to find beyond a reasonable doubt (as is required with the elements of charged offenses) whether Holmes committed perjury while on the stand, and thus obstructed justice, imposing this enhancement under a mandatory guidelines regime was error under the Sixth Amendment[;]" in footnote, explaining why fact that jury must have rejected defendant's testimony was not sufficient finding by jury that defendant perjured himself to permit enhancement of sentence under mandatory system)

United States v. White, 406 F.3d 827 (7th Cir. May 3, 2005) (finding that district court’s fact-finding that defendant lied under oath during detention hearing and assisted in destruction of evidence “squarely violates our new understanding of the Sixth Amendment as divined by *Booker*”)

* *United States v. Jaber*, 362 F. Supp. 2d 365 (D. Mass. Mar. 16, 2005) (Gertner, J.) (in footnote 22, noting that “in [the court’s] judgment, ‘obstruction of justice’ enhancements raise concerns under both *Booker* and *Blakely* where the government has a choice of charging a separate offense – which would have been subject to a jury trial and the full panoply of a sentence for another offense”)

13. U.S.S.G. § 3E1.1, Acceptance of Responsibility

United States v. Catala, unpublished, 2005 WL 1395163, 2005 U.S. App. LEXIS 11185 (4th Cir. June 14, 2005) (after *Booker*, “we no longer construe § 3E1.1(b) to require a government motion before a district court can award a third-level adjustment, and must review the district court’s determination under this new remedial interpretation of the Guidelines”; while government motion remains important, district court can make own determination as to whether defendant meets criteria for third point, and “[i]n certain circumstances, a court should consider the rationale behind the government’s refusal to make a motion for the third-level adjustment to determine whether such rationale falls within the parameters of § 3E1.1(b)”)

United States v. Clyburn, 368 F. Supp. 2d 545 (W.D. Va. May 13, 2005) (Jones, J.) (where defendant went to trial and was convicted of several methamphetamine charges and § 922(g) charge and court had granted Rule 29 motion as to § 924(c) charge, sentencing defendant as though he had gotten acceptance of responsibility after finding that had defendant entered into plea agreement, he would have gotten acceptance and that it was likely that defendant would have entered into plea agreement had he not been charged with § 924(c) offense)

United States v. Duff, 371 F. Supp. 2d 959 (N.D. Ill. May 27, 2005) (Bucklo, J.) (stating at sentencing hearing that under circuit law, it was possible that “on these facts if I were limited to the Sentencing Guidelines that I could not deny the Guideline reduction for acceptance of responsibility despite my belief that his guilty plea is simply ‘spin control’” but “[s]ince this sentence, under *Booker*, is not limited to consideration of a narrow range following a strict determination of points under a particular Guidelines Manual, however, I considered the sentencing range that would be applicable with or without acceptance of responsibility”)

14. U.S.S.G. § 4A1.1 et seq., Criminal History

United States v. Adams, 401 F.3d 886 (8th Cir. Mar. 22, 2005) (where district court sentenced defendant at high end of guideline range after departing upward for under-representation of criminal history, court could not say that sentence was unreasonable given circumstances of case; citing to two other post-*Booker* decisions for support)

United States v. Pineda-Rodriguez, unpublished, 2005 WL 1039453, 2005 U.S. App. LEXIS 7943 (10th Cir. May 4, 2005) (rejecting argument that facts giving rise to “recency” points, § 4A1.2(d) and (e), had to be alleged in indictment and proven to jury; concluding that such facts are within “prior conviction” exception, even after *Shepard*, because “[I]ike the ‘fact’ of a prior conviction, those ancillary ‘facts’ are merely aspects of the defendant’s recidivist potential, they are easily verified, and their application for purposes of enhancing a sentence under USSG § 4A1.1 requires nothing more than official records, a calendar, and the most self-evident mathematical computation”)

United States v. Carpenter, 406 F.3d 915 (7th Cir. May 6, 2005) (district court’s determination of criminal history category does not violate Sixth Amendment because *Booker* excepts prior convictions from its rule, and “[c]riminal history is all about prior convictions; its ascertainment therefore is an issue of law excluded by *Booker*’s own formulation”)

United States v. Winters, 411 F.3d 967 (8th Cir. June 22, 2005) (in dicta, stating that “there would have been no Sixth Amendment violation by its criminal history findings, for facts related to prior convictions are sentencing factors for the court not the jury”)

United States v. Tejada-Cruz, unpublished, 2005 WL 1509043 (4th Cir. June 27, 2005) (where defendant raised *Blakely* challenge to addition of three “recency” points to criminal history score, stating that “[b]ecause Tejada-Cruz is not challenging the fact of his prior convictions or disputing a fact about the convictions, we conclude that the district court’s addition of three points to his criminal history score based on the prior convictions and their recency did not violate his Sixth Amendment rights”)

United States v. Harris, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005) (Robertson, J.) (in imposing sentence on street-level drug dealer who had sixteen prior convictions, noting that rationale of keeping criminals off street for as long as possible “makes more sense in the context of life sentences for violent criminals than it does for small-time drug dealers Ten years will not teach Harris a more effective lesson than eight. If he has not decided to be a law-abiding citizen after 8 years, he will recidivate and he will be locked up again. The incremental value to the public of an additional two-year hiatus until Harris’s putative next crime . . . does not overbalance the value of two years of Harris’s life.”)

United States v. Forbey, 366 F. Supp. 2d 207 (D. Me. Mar. 25, 2005) (Hornby, J.) (where advisory range was 37-46 months and government request increase to 63-78 months based on defendant’s criminal history, determining “to grant the government’s motion to depart upward, but to a higher sentence than the government requests, because the defendant’s criminal history category [IV] severely underrepresents the seriousness of his criminal history and the virtual certainty that he will commit other crimes;” sentencing defendant to 120 months, the statutory maximum for offense)

United States v. Clay, 2005 WL 1076243 (E.D. Tenn. May 6, 2005) (Greer, J.) (where advisory guideline range was 235-293 months, imposing sentence of 156 months based on defendant’s horrendous

childhood, his withdrawal from conspiracy, over-representation of his criminal history, and crack-powder disparity)

United States v. Rodriguez, 2005 WL 1319259, 2005 U.S. Dist. LEXIS 10745 (D. Neb. June 3, 2005) (Bataillon, J.) (where parties stipulated to guideline range in methamphetamine case of 78-97 months, sentencing defendant to 60 months (mandatory minimum) after finding, among other things, that criminal history category of II, for shoplifting four packs of cigarettes, overrepresented seriousness of prior conviction)

United States v. Frappier, ___ F. Supp. 2d ____, 2005 WL 1362902, 2005 U.S. Dist. LEXIS 11234 (D. Me. June 8, 2005) (Woodcock, J.) (in firearms possession case, where relevant conduct guideline required use of date that firearms were acquired, rather than date that police discovered firearms, which resulted in use of criminal convictions that would otherwise have been too old to count to increase both offense level and criminal history score, departing downward in part based on over-representation of likelihood of recidivism based on age of convictions and defendant's current age)

15. U.S.S.G. §§ 4B1.1 & 4B1.2, Career Offender

United States v. Gonzalez, unpublished, 2005 WL 415957, 2005 U.S. App. LEXIS 3154 (6th Cir. Feb. 22, 2005) (where defendant was sentenced as career offender, U.S.S.G. § 4B1.1, finding no Sixth Amendment error in use of prior convictions to enhance sentence, but vacating sentence because Guidelines are now advisory)

United States v. Mitchell, unpublished, 2005 WL 567813, 2005 U.S. App. LEXIS 4218 (3d Cir. Mar. 11, 2005) (where defendant sentenced as career offender and counsel submitted *Anders* brief, remanding to district court in keeping with Third Circuit's post-*Booker* determination that "the sentencing issues appellant raises are best determined by the District Court in the first instance")

United States v. Easter, unpublished, 2005 WL 566606, 2005 U.S. App. LEXIS 4125, 4129 (8th Cir. Mar. 11, 2005) (summarily affirming sentence over argument that district erred in finding facts as to official victim enhancement where defendant was sentenced as career offender; failing to discuss finding of fact as to U.S.S.G. § 4B1.1's age requirement or second error of sentencing under mandatory, rather than advisory system); *see Marcussen, infra*

United States v. Funk, unpublished, 2005 WL 602597, 2005 U.S. App. LEXIS 4338 (6th Cir. Mar. 15, 2005) (finding that although there was no Sixth Amendment error (even as to lack of jury's finding of defendant's age, because defendant did not deny that he was at least 18 at time of instant offense), error in sentencing defendant under mandatory guidelines was prejudicial where district court sentenced defendant to bottom end of range and stated that it thought sentence was too severe)

United States v. Rosas, 401 F.3d 843 (7th Cir. Mar. 24, 2005) (finding that *Blakely* and *Booker* implicate only questions of fact, whereas nature of prior conviction, as well as its mere existence, are questions of law; affirming sentence with no discussion of error in sentencing under mandatory sentencing scheme); *cf. United States v. Schlifer*, 403 F.3d 849 (7th Cir. April 7, 2005) (characterizing defendant's *Blakely / Booker* argument as "frivolous" because "fact of prior conviction" still falls outside *Apprendi* rule, but because defendant also argued that district court erred in sentencing him under mandatory guidelines and government could not establish that error was harmless, reversing and remanding for resentencing). *But see Ngo, infra*

United States v. Harden, unpublished, 2005 WL 697068, 2005 U.S. App. LEXIS 4924 (6th Cir. Mar. 25, 2005) (where defendant's guideline range based on career offender (262-327 months) but defendant received downward departure to 188 months based on substantial assistance even after his grounds for other departure bases were denied, remanding in light of *Booker* where defendant argued on appeal that district court erroneously believed it was required to follow Guidelines); *see also United States v. Schlifer*, 403 F.3d 849 (7th Cir. April 7, 2005) (similar)

United States v. Marcussen, 403 F.3d 982 (8th Cir. April 11, 2005) (finding that *Booker* "squarely rejects" argument that Sixth Amendment requires proof of prior convictions beyond reasonable doubt; also rejecting argument that whether conviction is for "crime" of violence" requires finding of fact beyond mere fact of conviction; noting that *Shepard* "lends further support to the rule that the sentencing court, not a jury, must determine whether prior convictions qualify as violent felonies;" finding error in sentencing defendant under mandatory guideline to be harmless because district court stated that it would give same sentence if it had discretion; finally, finding 210-month sentence to be reasonable)

* *United States v. Washington*, 404 F.3d 834 (4th Cir. April 15, 2005) (where defendant's base offense level was increased on basis of prior conviction for crime of violence and district court considered facts outside charging document in determining whether conviction fell within catch-all phrase of § 4B1.2 definition ("by its nature presented a serious potential risk of physical injury"), finding Sixth Amendment error in light of *Booker* and *Shepard*) (N.B.: there was a vigorous dissent attacking several aspects of majority opinion); *see also Ngo, infra; cf. United States v. Collins*, 412 F.3d 515 (4th Cir. June 20, 2005) (discussing cases, finding that convictions used to make defendant career offender were undisputed and that defendant conceded that they were separated by intervening arrest, such that cases were not implicated)

United States v. Lewis, unpublished, 2005 WL 1003840, 2005 U.S. App. LEXIS 7712 (11th Cir. April 29, 2005) (finding that district court did not err, plainly or otherwise, in using defendant's prior convictions to sentence him as career offender because enhancement did not implicate *Apprendi*, *Blakely*, or *Booker*, "as those cases clearly exempt prior convictions from the types of facts that must be admitted by the defendant or proved to a jury beyond a reasonable doubt;" opinion does not discuss error in sentencing under mandatory scheme); *United States v. Lester*, unpublished, 2005 WL 1006874, 2005 U.S. App. LEXIS 7707 (11th Cir. April 29, 2005) (similar)

United States v. Guervara, 408 F.3d 252 (5th Cir. May 2, 2005) (deciding that “[t]here is no Sixth Amendment violation with respect to post-trial consideration of career offender status” because “*Booker* explicitly excepts from Sixth Amendment analysis the third component of the crime of violence determination, the fact of two prior convictions;” acknowledging, however, that the age requirement (at least 18 years old at time of instant offense) is a fact, not a question of law (but defendant had stipulated to his age in competency report))

* *United States v. Ngo*, 406 F.3d 839 (7th Cir. May 3, 2005) (where defendant had argued that prior convictions were related because they were part of common scheme or plan, finding that after *Booker* and *Shepard*, district court violated Sixth Amendment by making factual findings that offenses were unrelated; distinguishing relatedness based on consolidation of proceedings; noting that Sixth Amendment problem is cured for guidelines sentences in light of *Booker*’s remedial opinion, but remains for statutory enhancements because court has no discretion); *cf. United States v. Vallejo*, unpublished, 2005 WL 1389601, 2005 U.S. App. LEXIS 10837 (7th Cir. June 7, 2005) (no prohibited fact-finding where district court relied on facts as laid out in plea agreement for previous conviction to determine if conviction was part of common scheme or plan)

* *United States v. Woodard*, 408 F.3d 396 (7th Cir. May 18, 2005) (in remanding case on plain error review for district court’s consideration of whether it would impose lower sentence, advising that “When making this decision, the judge should bear in mind that *Booker* does not affect § 994(h), which calls for career offenders to be sentenced at or near the statutory maximum”)

United States v. Carvajal, 2005 WL476125, 2005 U.S. Dist. LEXIS 3076 (S.D.N.Y. Feb. 22, 2005) (Hellerstein, J.) (where guideline range was 262-327 months, imposing sentence of 168 months on defendant who is 34 years old on basis of just punishment and rehabilitation; latter goal “cannot be served if a defendant can look forward to nothing beyond imprisonment. Hope is the necessary condition of mankind, for we are all created in the image of God. A judge should be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life”)

United States v. Naylor, 359 F. Supp. 2d 521 (W.D. Va. Mar. 7, 2005) (Jones, J.) (where PSR classified defendant as career offender based on two sets of convictions arising from conduct occurring during one six-week period when defendant had turned 17, sentencing defendant to 120 months (instead of 188-235 months) based on defendant’s young age at time of prior conduct (citing to *Roper v. Simmons*, U.S. Mar. 1, 2005) and fact that convictions barely fell within Chapter Four rules regarding counting of prior convictions)

United States v. Thomas, 360 F. Supp. 2d 238 (D. Mass. Mar. 14, 2005) (Ponsor, J.) (in choosing between guideline range of 262-327 months, and 360-life (depending on whether drug was crack or another form of cocaine base), selecting 262 months because although defendant was career offender, offense involved two small hand-to-hand buys, defendant lost family at young age, defendant would be

released in late fifties or early sixties; and concluding that “[w]hile a very long sentence is appropriate, an essentially life-extinguishing sentence in these circumstances is not reasonable”)

United States v. Hubbard, 369 F. Supp. 2d 146 (D. Mass. April 25, 2005) (Ponsor, J.) (where defendant’s career offender guideline range was 188-235 months, sentencing defendant to 108 months based in part upon defendant’s horrific childhood and diminished capacity that resulted and cooperation offered by defendant to government)

United States v. Corber, 2005 U.S. Dist. LEXIS 8927 (D. Kan. April 13, 2005) (Crow, J.) (where drug guidelines put defendant at 120-150 months but career offender guideline put defendant at 262-327 months, and defendant had gone to trial because he was afraid of losing custody of his children, sentencing defendant to 136 months on basis that defendant was former small-time burglar and not a drug dealer and defendant’s father and uncle had received substantially lower sentences for arguably worse conduct); *cf. United States v. Anderson*, 2005 WL 1345844, 2005 U.S. Dist. LEXIS 10815 (D. Kan. May 11, 2005) (Crow, J.) (sentencing defendant within career offender guideline after finding that “[f]or the fifteen years prior to arrest here, the defendant spent most of it, over ten years, incarcerated. His prior convictions involved violent conduct and weapons. He violated parole numerous times. His criminal history and arrest record shows repeated involvement with controlled substances and weapons. Considering all of these circumstances, the court finds that the defendant has earned the title of ‘career offender’ and that a sentence within those recommended guideline provisions is appropriate”)

United States v. Moreland, 366 F. Supp. 2d 416 (S.D. W. Va. April 27, 2005) (Goodwin, J.) (where career offender guideline range was 360-life, sentencing defendant to 120 mandatory minimum where instant offense involved 7.85 grams of crack for which guideline range would have been 78-97 months, definition of “controlled substance offense” does not distinguish between distribution of single marijuana cigarette and drug kingpin, defendant’s priors were relatively old and minor, and imposition of sentence 20 years longer would cost enormous amount of money)

United States v. Williams, 372 F. Supp. 2d 1335 (M.D. Fla. May 5, 2005) (Presnell, J.) (where defendant, a long-time petty dealer in marijuana and powder cocaine, was prosecuted federally for crack based on three undercover buys set up by confidential informant, government filed § 851 notice on day of trial, and guideline range of 360-life was based on career offender status (where defendant was already a CH VI), sentencing defendant to 204 months (17 years) based on arbitrary compounding of criminal history and fact that offense level was driven up by sting operation involving crack; taking government to task, among other things, for its “disingenuous” position that any sentence under guideline range is not reasonable, thereby flouting *Booker*’s remedial holding)

United States v. Serrano, 2005 WL 1214314, 2005 U.S. Dist. LEXIS 9782 (S.D.N.Y. May 19, 2005) (Sweet, J.) (where defendant’s career offender guideline range was 262-327 months, departing down to 120 months (mandatory minimum) because defendant is heroin addict and because of nature and

age of prior convictions used for career offender designation); *United States v. Hernandez*, 2005 WL 1423276, 2005 U.S. Dist. LEXIS 12043 (S.D.N.Y. June 13, 2005) (similar for co-defendant)

16. U.S.S.G. § 5C1.1, Imposition of Imprisonment (Zones)

United States v. Anderson, 365 F. Supp. 2d 67 (D. Me. April 20, 2005) (Hornby, J.) (in § 922(g)(9) case where guideline range appears to be 15-21 months, in zone D, imposing split sentence in Zone C (18 months, split 9 months imprisonment and 9 months home detention))

17. U.S.S.G. § 5E1.2, Fines

United States v. Huber, 404 F.3d 1047 (8th Cir. April 21, 2005) (rejecting government's argument that district court erred in failing to impose fine that government claimed was required because guidelines are now advisory and there is no statutory authority requiring imposition of fine)

18. U.S.S.G. §§ 5H, 5K, Departures

United States v. Doe, 398 F.3d 1254 (10th Cir. Feb. 24, 2005) (declining to address *Blakely* / *Booker* issues, but remanding case for resentencing where district court failed to fully consider defendant's cooperation in deciding whether (and how far) to depart upward) (N.B.: the resolution of this case seems to suggest that departure analysis applies as it did before in order to determine applicable guideline range, which only then becomes advisory)

United States v. Daidone, unpublished, 2005 WL 435409, 2005 U.S. App. LEXIS 3487 (2d Cir. Feb. 25, 2005) (on appeal of grant of downward departure based on family circumstances, remanding in light of *Booker* and *Crosby*, and giving district court specific guidance as to what findings to make to enable appellate review for reasonableness)

* *United States v. Paladino*, 401 F.3d 471 (7th Cir. Feb. 25, 2005) (where government had cross-appealed extent of downward departure (from 235 months to 180 months, based on rehabilitation and overstatement of criminal history) before *Booker* and subsequently dropped cross-appeal, noting that “[u]nder the new sentencing regime the judge must justify departing from the guidelines, and the justification has to be reasonable, but we cannot think on what basis a 15-year sentence for Peyton, who was 34 years old when sentenced, could be thought unreasonably short”)

United States v. Rogers, 400 F.3d 640 (8th Cir. Mar. 16, 2005) (reversing sentence of probation as unreasonable where district court had departed down from 51-63 month range in felon-in-possession case based on extraordinary rehabilitation because rehabilitation was not extraordinary and defendant had not shown respect for law, probation would not provide deterrence for defendant or protect public, and did not consider Congress' desire to prevent unwarranted disparity); *cf. United States v. Hadash*, 408 F.3d 1080 (8th Cir. May 27, 2005) (stating that “[b]ecause the guidelines are now advisory, a reasonable

departure is not limited solely to circumstances that the formerly mandatory guidelines framework would have deemed permissible bases for departure. . . . Although the sentencing court has discretion to impose a sentence once it has considered all the § 3553(a) factors, its ruling ‘may be unreasonable if [it] fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.’”) (citations omitted)

United States v. Mojica, unpublished, 2005 WL 705365, 2005 U.S. App. LEXIS 4982 (9th Cir. Mar. 29, 2005) (where government appealed grant of downward departure for cultural assimilation and other factors, finding that district court did not “take account” properly of Guidelines)

United States v. Forrest, 402 F.3d 678 (6th Cir. Mar. 30, 2005) (on appeal by government where district court departed downward “on the basis of the atypicality of the prosecution of a garden-variety convenience store in federal court under the Hobbs Act,” finding that while district court’s concern about punitive federal prosecution was understandable, “the motivation of the prosecutor has not bearing . . . on the typicality of the defendant’s misconduct;” finding that district court misapplied departure provisions; also noting that under dual sovereignty doctrine, prosecution by both state and federal governments was permissible, so “[i]t follows, in our view, that the district court’s assessment of [the defendant’s] conduct at sentencing should not depend on the charging decisions made by the two sovereigns”)

United States v. Hairston, unpublished, 2005 WL 773950 (6th Cir. April 7, 2005) (on appeal by government of 8-level downward departure for post-offense rehabilitation in drug case (from range of 121-151 months to 60 months), remanding for resentencing under *Booker*, but strongly endorsing district court’s decision to depart down and instructing lower court to provide more detailed rationale for extent of reduction so that appellate court can properly review it for reasonableness on any subsequent appeal)

United States v. Smith, unpublished, 2005 WL 894910, 2005 U.S. App. LEXIS 7217 (11th Cir. April 18, 2005) (where district court departed down 20 levels, from range of 78-98 months, to impose sentence of time served (35 days) on basis of defendant’s physical condition (non-Hodgkins lymphoma in remission), concluding that whether viewed before or after *Booker*, extent of departure was unreasonable)

* *United States v. Gorsuch*, 404 F.3d 543 (1st Cir. April 19, 2005) (suggesting that defendant’s “serious mental illness, maternal responsibilities, and lack of a criminal record may be more relevant than under the pre-*Booker* regime of mandatory guidelines;” declining to resolve issue regarding U.S.S.G. § 5K2.13 because “in the post-*Booker* world, the guidelines are only advisory and the district court may justify a sentence below the guideline level based upon a broader appraisal”)

United States v. Cunningham, 405 F.3d 497 (7th Cir. April 19, 2005) (where district court departed upward by 75 months (to 210 months) in pre-*Booker* child porn production case because

defendant had sexual relations with victim, summarily stating that, “[b]ased on our review of the record, we refuse to hold that this decision by the judge was unreasonable”)

United States v. Riggs, 410 F.3d 136 (4th Cir. June 3, 2005) (where court had previously reversed grant of downward departure for diminished capacity, following GVR from Supreme Court, reinstating previous opinion because “[u]pon further consideration, we conclude that *Booker* does not alter our analysis of the downward departure issue”)

United States v. Santos Monroy, unpublished, 2005 WL 1406169, 2005 U.S. App. LEXIS 11538 (10th Cir. June 16, 2005) (stating that “there is nothing in the remedial portion of *Booker* which impugns the continued vitality of departures or Rule 32(h). *Booker* ‘makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well.’ Tailoring a sentence will no doubt occasionally involve, as it has in the past, departure from a standard guideline range. Such departures, as with those under the now-excised §§3553(b)(1), are subject to Rule 32(h). Post-*Booker*, we will review a sentence under a standard of reasonableness. It is to this standard that departures are now tied, not the strictures of the now-excised § 3553(b)(1).”) (internal citations omitted)

United States v. Smith, 359 F. Supp. 2d 771 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (departing downward for substantial assistance, U.S.S.G. § 5K1.1, before determining final sentence based on § 3553(a) factors) (N.B.: the discussion of how the court arrived at the reduced guideline range is instructive)

United States v. Pallowick, 364 F. Supp. 2d 923 (E.D. Wis. April 1, 2005) (Adelman, J.) (where defendant committed six armed bank robberies and guideline range was 70-87 months, imposing sentence of 46 months based on defendant’s history of mental illness and mitigated nature of offenses)

* *United States v. Phelps*, 366 F. Supp. 2d 580 (E.D. Tenn. April 1, 2005) (Collier, J.) (in explaining procedure court will follow after *Booker*, stating that “[i]n order for the Court to fully consider the Guidelines and policy statements in a given case, the advisory Guideline range must necessarily include a determination with respect to any departures contemplated or provided Overlooking the departure aspects of the Guidelines or treating the Court’s new *Booker* discretion as a substitute for or overlay of existing departure practice would sever a critical component of the Guidelines scheme, thus rendering any resulting advisory Guideline range incomplete;” later in opinion, discussing discouraged factors and 18 U.S.C. § 3661 at some length)

United States v. Bailey, 369 F. Supp. 2d 1090 (D. Neb. May 12, 2005) (Kopf, J.) (where defendant had not actually downloaded images, where criminal history overrepresented likelihood of recidivism, and principally because defendant’s presence as caretaker was critical to his young daughter’s recovery from sexual abuse, applying pre-PROTECT Act law to depart down to probation)

United States v. Pineyro, 372 F. Supp. 2d 133 (D. Mass. May 17, 2005) (Gertner, J.) (in felon-in-possession case, 18 U.S.C. § 922(g), granting downward departure to time served (approximately 15 months) based on extraordinary physical condition because defendant suffers from heterotopic ossification (“HO”))

United States v. Hernandez, 2005 WL 1330764, 2005 U.S. Dist. LEXIS 10839 (S.D.N.Y. June 2, 2005) (Sweet, J.) (in cocaine conspiracy case, departing downward from guideline range of 37-46 months (after applying safety valve) to 8 months (time served) based on family circumstances)

F. Specific Offender or Offense Characteristics

United States v. Nellum, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005) (Simon, J.) (in crack case where guideline range was 168-210 months, imposing sentence of 108 months where, “given the particular circumstances of this case – Nellum’s age, the likelihood of recidivism, his status as a veteran, his strong family ties, his medical condition, and his serious drug dependency – the Court does not view that disparity as being ‘unwarranted;’” using age/recidivism info from Sentencing Commission; declining to address 100-to-1 crack-powder issue but considering fact that drug weight escalated based on controlled buys)

United States v. Carmona-Rodriguez, 2005 WL 840464, 2005 U.S. Dist. LEXIS 6254 (S.D.N.Y. April 11, 2005) (Sweet, J.) (where 55-year old female defendant convicted of conspiring to distribute heroin met requirements of safety valve, 18 U.S.C. § 3553(f), thus removing 5-year mandatory minimum, and advisory guideline range was 46-57 months, sentencing defendant to 30 months based on low risk of recidivism and health issues) (N.B.: court relies on *Nellum*, *supra*, and cites to Sentencing Commission’s study on recidivism, available at http://www.ussc.gov/publicat/Recidivism_General.pdf)

G. Unwarranted Disparity

1. Disparity as General Matter

United States v. Musick, 2005 WL 1278429 (E.D. Tenn. Feb. 2, 2005) (Greer, J.) (finding that “the only standard that the Court has to apply to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct is the guidelines”)

2. Disparity Based on Crack-Powder Ratio

* *United States v. Smith*, 359 F. Supp. 2d 771 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (discussing in detail crack / powder cocaine disparity; citing numerous sources) (N.B.: in addition, one source not cited directly in the opinion is the Sentencing Commission’s Report to the Congress: Cocaine and Federal Sentencing Policy (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm); *United States v. Beamon*, 373 F. Supp.

2d 878 (E.D. Wis. June 16, 2005) (Adelman, J.) (similar); *United States v. Leroy*, 373 F. Supp. 2d 887 (E.D. Wis. June 20, 2005) (Adelman, J.) (rejecting various arguments made by government as to why court must apply 100:1 ratio)

United States v. Harris, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005) (Robertson, J.) (where guideline ranges for two defendants were, respectively, 120-150 months and 70-87 months, sentencing them to 96 and 60 months, in part on basis that evidence was questionable as to amounts of crack handled by each defendant and in part on basis of crack/powder disparity; as to latter, finding that Sentencing Commission's findings "are sound authority for the proposition that the sentencing ranges for [the defendants'] crime by the Guidelines are greater than necessary")

United States v. Thomas, 360 F. Supp. 2d 238 (D. Mass. Mar. 14, 2005) (Ponsor, J.) (finding that while drug was cocaine base, there was insufficient evidence to find that it was specifically crack cocaine for purpose of Guidelines; in choosing between guideline range of 262-327 months, and 360-life, selecting 262 months because although defendant was career offender, offense involved two small hand-to-hand buys, defendant lost family at young age; and concluding that "[w]hile a very long sentence is appropriate, an essentially life-extinguishing sentence in these circumstances is not reasonable"); *see also United States v. Hubbard*, 369 F. Supp. 2d 146 (D. Mass. April 25, 2005) (Ponsor, J.)

* *Simon v. United States*, 361 F. Supp. 2d 35 (S.D.N.Y. Mar. 17, 2005) (Sifton, J.) (in imposing sentence lower than what advisory guideline range called for based on 600 grams of crack, considering disparity between crack and powder as principal factor, but also considering defendant's age, medical condition, procedural history of case, and sentence of co-defendant) (N.B.: the court cites to a Sentencing Commission study on correlation between public opinion and guideline sentencing, available at http://www.ussc.gov/nss/jp_exsum.htm)

United States v. Clay, 2005 WL 1076243 (E.D. Tenn. May 6, 2005) (Greer, J.) (where advisory guideline range was 235-293 months, imposing sentence of 156 months based in part on crack-powder disparity)

United States v. Castillo, 2005 WL 1214280, 2005 U.S. Dist. LEXIS 9780 (S.D.N.Y. May 20, 2005) (Sweet, J.) (where defendant convicted of crack and powder offenses qualified for safety valve and guideline range was 135-168 months, sentencing defendant to 87 months based on crack-powder disparity)

3. Disparity Based on Sentences of Others

United States v. Valdivia-Perez, unpublished, 2005 WL 1324020, 2005 U.S. App. LEXIS 10482 (8th Cir. June 6, 2005) (on plain error review of pre-*Booker* sentence, finding plain error where district court indicated that it would consider departing if law allowing it to based on disparity between defendant's sentencing range and co-conspirators' much shorter sentences)

United States v. Gray, 362 F. Supp. 2d 714 (S.D. W. Va. Mar. 17, 2005) (Goodwin, J.) (where one defendant's guideline range was 97–121 months and other defendant's range was 135-168 months (because he did not get acceptance of responsibility), giving both defendants 97 months because their criminal conduct was roughly comparable and they were in same criminal history category)

United States v. Hensley, 363 F. Supp. 2d 843 (W.D. Va. Mar. 29, 2005) (Jones, J.) (finding that whereas before *Booker*, court could not consider disparity between co-defendants as basis for imposing sentence below guideline range, after *Booker* court may do so; concluding that because of similarity in conduct and records, a sentence below advisory guideline range for one defendant was appropriate; imposing sentence of 12 months instead of 37-46 months)

United States v. Colby, 367 F. Supp. 2d 1 (D. Me. May 3, 2005) (Woodcock, J.) (where co-defendant was sentenced in between *Blakely* and *Booker* and received reduced sentence, imposing same sentence upon defendant to avoid disparity; following *Revoock*, 353 F. Supp. 2d 127 (D. Me. 2005))

* *United States v. Chen*, 2005 WL 1423274, 2005 U.S. Dist. LEXIS 12045 (S.D.N.Y. June 15, 2005) (Sweet, J.) (in Ecstasy distribution conspiracy case where guideline range was 46-57 months, sentencing defendant to 34 months based in part on disparity between co-defendants; collecting cases); *United States v. Brock*, 2005 WL 1423265, 2005 U.S. Dist. LEXIS 12035 (S.D.N.Y. June 15, 2005) (Sweet, J.) (similar); *United States v. Melendez*, 2005 WL 1423268, 2005 U.S. Dist. LEXIS 12038 (S.D.N.Y. June 15, 2005) (Sweet, J.) (similar); *United States v. Asiedu*, 2005 WL 1423261, 2005 U.S. Dist. LEXIS 12036 (S.D.N.Y. June 15, 2005) (Sweet, J.) (similar); *United States v. Green*, 2005 WL 1423255, 2005 U.S. Dist. LEXIS 12036 (S.D.N.Y. June 15, 2005) (Sweet, J.) (similar)

4. Disparity Based on State Sentence for Similar Conduct

United States v. Wilkerson, 411 F.3d 1 (1st Cir. June 9, 2005) (on plain error review of pre-*Booker* sentence, finding plain error where district court district court “repeatedly expressed his concern about disparate treatment between federal and state court sentences in similar cases, but stated that the Guidelines did not permit him to take that disparity into account,” but that now “the need to avoid unwarranted sentencing disparities [is] among the factors to be considered by the now advisory Guidelines”; remanding case for resentencing)

United States v. Rodriguez, 2005 WL 1319259, 2005 U.S. Dist. LEXIS 10745 (D. Neb. June 3, 2005) (Bataillon, J.) (where parties stipulated to guideline range in methamphetamine case of 78-97 months, sentencing defendant to 60 months (mandatory minimum) after finding, among other things, “that had Ms. Rodriguez been charged in state court with a similar offense, she would most likely not be faced with the specter of losing custody of her children by reason of a lengthy incarceration”)

5. Disparity Based on Other Factors

United States v. Cherry, 366 F. Supp. 2d 372 (E.D. Va. April 25, 2005) (Jackson, J.) (in imposing sentence below advisory guideline range upon defendant, who engaged in single instance of driving acquaintance to drug transaction, stating that court “finds this sentence is not disproportionate to what offenders with similar backgrounds and offense conduct receive” and that “[i]n the Court’s experience, the Government has frequently charged Defendants who have engaged in similar conduct with Misprision of a Felony, an offense which carries a much less severe penalty than the charge with which the Government has chosen to proceed in this case” (§ 841(b)(1)(B), 5-year mandatory minimum)

United States v. Carey, 368 F. Supp. 2d 891 (E.D. Wis. April 25, 2005) (Adelman, J.) (where guideline range was 15-21 months in social security disability benefit fraud case that government charged under 18 U.S.C. § 1343, reducing sentence slightly because government chose to prosecute case under wire fraud statute instead of offense such as 18 U.S.C. § 641, which triggers lower base offense level because it carries lower statutory maximum; sentencing defendant to year and a day)

United States v. Moreland, 366 F. Supp. 2d 416 (S.D. W. Va. April 27, 2005) (Goodwin, J.) (discussing unwarranted disparity in context of career offender guideline)

H. Ex Post Facto and Due Process Issues²

United States v. Crosby, 397 F.3d 103 (2d Cir. Feb. 2, 2005, amended Mar. 18, 2005) (in footnote 17, noting but not intimating any view on applicability of Ex Post Facto Clause)

United States v. Duncan, 400 F.3d 1297 (11th Cir. Feb. 24, 2005) (rejecting argument that retroactive application of *Booker*’s remedial holding violates ex post facto principles)

United States v. Scroggins, 411 F.3d 572 (5th Cir. June 6, 2005) (holding that Due Process Clause did not prohibit district court, on resentencing, from imposing sentence greater than that authorized by jury verdict, but merely required that any resentencing occur under advisory sentencing scheme; higher sentence would not violate ex post facto principles)

² Cf. *United States v. Borer*, 412 F.3d 987 (8th Cir. June 22, 2005) (holding that “[t]he addition of the motion requirement [to § 3E1.1] changes the operation of the guideline to Borer’s detriment after his commission of the offense. The PROTECT Act amendment made it materially more difficult for Borer to earn a reduction for acceptance of responsibility by adding a requirement that the government authorize the court to grant a third level reduction. As a result, the statute was ‘retrospective and more onerous than the law in effect on the date of the offense.’ The amended guideline would result in a substantial disadvantage to Borer because he would receive a longer sentence for the same conduct simply because he did not receive a motion from the government.”)

United States v. Allen, unpublished, 2005 WL 1349984, 2005 U.S. App. LEXIS 10952 (10th Cir. June 8, 2005) (in remanding case for resentencing, stating that “the district court may opt to resentence Mr. Allen to a sentence lower than, greater than, or identical to, the sentence originally imposed, within the constraints of *Booker*, which we will review for reasonableness”)

United States v. Mitchell, unpublished, 2005 WL 1349571, 2005 U.S. App. LEXIS 10851 (11th Cir. June 8, 2005) (in remanding case for resentencing, noting that “[w]e . . . will not attempt to decide now whether a particular sentence below or above the Guidelines range might be reasonable in this case. If there is an appeal of the actual post-remand sentence which raises that issue, we can decide it then.”)

United States v. Lata, 415 F.3d 107 (1st Cir. June 24, 2005) (concluding that ex post facto clause is not offended by imposing on a defendant who committed his crime and was sentenced between *Blakely* and *Booker* a sentence that is within the statutory maximum but higher than the sentence that he would normally have received (absent departures) under the mandatory guideline regime; also rejecting due process claim in part because “the sentence imposed is not wildly different than a sentence that might well have been imposed under the guidelines for someone with Lata’s criminal record and offense-related conduct;” reserving “for the future the case, if one ever arises, in which a sentence is imposed for a pre-*Booker* crime that is higher than any that might realistically have been imagined at the time of the crime or based on factors previously discouraged, prohibited, or not recognized under the guidelines)

* *United States v. Gray*, 362 F. Supp. 2d 714 (S.D. W. Va. Mar. 17, 2005) (Goodwin, J.) (in extended discussion, rejecting argument that retroactive application of *Booker*’s remedial holding violates ex post facto principles)

United States v. Stanley, 2005 U.S. Dist. LEXIS 8944 (D. Kan. April 5, 2005) (Crow, J.) (where defendant’s offense occurred before *Booker* but he was sentenced after, rejecting defendant’s argument that applying remedial portion of decision would violated due process; relying on *Duncan* and *Gray, supra*)

United States v. Correa, 2005 WL 1113817, 2005 U.S. Dist. LEXIS 8781 (W.D. Wis. May 10, 2005) (Crabb, J.) (upon motion for reconsideration of ruling following court of appeal’s limited remand, rejecting defendant’s argument that imposing sentence under advisory guidelines that is same as what court previously imposed under mandatory guidelines violates Ex Post Facto Clause)

United States v. Green, 2005 WL 1460176 (S.D. Ohio June 21, 2005) (Smith, J.) (upon resentencing after remand from Supreme Court, rejecting defendant’s ex post facto argument with little explanation than to state that the court agreed with the decision of another judge eight days earlier and that “Defendant’s Ex Post Facto argument misinterprets *Booker* and the Court finds it unpersuasive”)

United States v. Null, 2005 WL 1527747 (E.D. Pa. June 28, 2005) (Schiller, J.) (denying motion for release pending appeal after finding that defendant's due process / ex post facto argument did not raise substantial question for purposes of appeal)

I. Vindictiveness at Resentencing After *Booker* Remand

United States v. Goldberg, 406 F.3d 891 (7th Cir. May 5, 2005) (while acknowledging that “[w]hen there is no relevant legal or factual change between sentence and resentence, the motive for an increase in punishment is indeed suspect” stating that “*Booker* brought about a fundamental change in the sentencing regime. The guidelines, mandatory when Goldberg was sentenced, are now advisory. Were he to be resentenced, it would be under a different standard, one that would entitle the judge to raise or lower the sentence, provided the new sentence was justifiable under the standard of reasonableness. No inference of vindictiveness would arise from the exercise of the judge's new authority.”)

United States v. Hymes, 2005 WL 1353835 (D. Alaska June 3, 2005) (Sedwick, J.) (denying defendant's motion to recuse judge because of judge's statement that at resentencing, post-*Booker* sentence could be either above or below a guideline range (which was “accurate assessment of the law post-*Booker*,” and “gave both parties fair warning of the range of outcomes possible at a re-sentencing”); also noting that “Hymes also argues that he cannot be subjected to a vindictive new sentence. The legal proposition is correct, but since he has not been re-sentenced, there has been no new sentencing proceeding, and there are no facts to be examined for evidence of vindictiveness. This argument is, at best, premature.”)

United States v. Andrews, 2005 WL 1593467 (D. Me. June 30, 2005) (Woodcock, J.) (discussing whether, in light of Supreme Court cases on vindictiveness, court could look to additional convictions that defendant sustained after original federal sentencing to increase new federal sentence, and concluding that it could)

J. General / Other

United States v. Kuhn, 351 F. Supp. 2d 696 (E.D. Mich. Jan. 12, 2005) (Lawson, J.) (upon remand after government won appeal regarding downward departure; after considering Guidelines as advisory and according them significant weight, granting downward departure from range of 21-27 months to 6 months in community confinement, the same sentence previously imposed)

United States v. Beal (In re Beal), 352 F. Supp. 2d 14 (D. Me. Jan. 19, 2005) (Woodcock, J.) (while acknowledging that Guidelines are now advisory, noting that court “must consult those guidelines and take them into account;” denying defendant's motion for downward departure based on U.S.S.G. § 5K2.12, because defendant did not carry burden of establishing that she committed embezzled money from employer as a result of coercion and duress)

United States v. Davis, 353 F. Supp. 2d 91 (D. Me. Jan. 19, 2005) (Woodcock, J.) (while acknowledging that Guidelines are now advisory, noting that court “must consult those guidelines and take them into account; ruling that Florida conviction for robbery by sudden snatching is crime of violence for purposes of U.S.S.G. § 2K2.1(a) and § 4B1.2)

United States v. Nellum, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005) (Simon, J.) (in crack case where guideline range was 168-210 months, imposing sentence of 108 months where, “given the particular circumstances of this case – Nellum’s age, the likelihood of recidivism, his status as a veteran, his strong family ties, his medical condition, and his serious drug dependency – the Court does not view that disparity as being ‘unwarranted;’” using age/recidivism info from Sentencing Commission; declining to address 100-to-1 crack-powder issue but considering fact that drug weight escalated based on controlled buys)

IV. REVOCATION ISSUES

United States v. Fleming, 397 F.3d 95 (2d Cir. Feb. 2, 2005) (in appeal from imposition of two-year sentence of imprisonment upon revocation of supervised release for drug abuse-related violations, finding that *Booker*’s “reasonableness” standard of review applies to revocation sentences; discussing meaning of “consideration” of recommended range)

United States v. Calderon, unpublished, 2005 WL 319115, 2005 U.S. App. LEXIS 2184 (10th Cir. Feb. 10, 2005) (noting *Booker* in passing while affirming sentence imposed upon revocation as not plainly unreasonable; dismissing as frivolous appeal where defendant’s brief was submitted pursuant to *Anders*)

United States v. Brown, unpublished, 2005 WL 518704, 2005 U.S. App. LEXIS 3717 (4th Cir. Mar. 4, 2005) (finding that “contrary to Brown’s argument, the Supreme Court did not totally invalidate the Sentencing Reform Act, but in fact left the great majority of the Act’s provisions intact and legally effective;” “[m]ore specifically, the provision of the Act that governs supervised release was not affected by *Booker*;” and [f]inally, the change effected by *Booker* – making the Sentencing Guidelines merely advisory – was not a change in the manner in which the Guidelines were applied to revocations of supervised release pre-*Booker*”); *United States v. Bonner*, unpublished, 2005 WL 735586, 2005 U.S. App. LEXIS 5208 (4th Cir. Mar. 31, 2005) (same); see *United States v. Bush*, unpublished, 2005 WL 735583, 2005 U.S. App. LEXIS 5206 (4th Cir. Mar. 31, 2005) (in *Anders* case suggesting that length of sentence imposed upon revocation was unreasonable, noting that “[b]ecause the sentencing guidelines relating to revocation of supervised release have always been advisory, the sentence in this appeal is not impacted by” *Booker*); *United States v. Craft*, unpublished, 2005 WL 775857, 2005 U.S. App. LEXIS 5654 (4th Cir. April 7, 2005) (on plain error review of reasonableness of sentence, stating the same); *United States v. Redman*, unpublished, 2005 WL 807020, 2005 U.S. App. LEXIS 5836 (4th Cir. April 8, 2005)

United States v. Edwards, 400 F.3d 591 (8th Cir. Mar. 7, 2005) (in *Anders* case, finding no error in district court's consultation of guidelines where they were already advisory for supervised release violations; further, in light of defendant's criminal history and nature of violation and fact that defendant received sentence at low end of recommended range, "we cannot say that in this instance such a sentence was unreasonable"); see *United States v. Shurn*, unpublished, 2005 WL 873663, 2005 U.S. App. LEXIS 6620 (8th Cir. April 18, 2005) (Supreme Court has never recognized Sixth Amendment right to jury in context of revocation proceedings); *United States v. Coleman*, 404 F.3d 1103 (8th Cir. April 25, 2005) (stating that "the advisory sentencing guidelines scheme that *Booker* creates is precisely what prevailed before *Booker* with respect to fixing penalties for violating the kind of release conditions that Mr. Coleman violated")

United States v. Cotton, 399 F.3d 913 (8th Cir. Mar. 8, 2005) (noting that while *Booker* "vitaly affects the standard of review in guidelines cases," "the new standard of review will not change the result in this case, because the new standard is actually the same as the one we would have used otherwise," i.e., "review for unreasonableness")

United States v. Johnson, 403 F.3d 813 (6th Cir. April 15, 2005) (discussing, without deciding, impact of *Booker* on previous standard of review for revocation in § 3742(e), i.e., whether standard continues to be "plainly unreasonable," or is now "unreasonable;" concluding that term of imprisonment imposed was appropriate under either standard); *United States v. Chiles*, unpublished, 2005 WL 1506052 (6th Cir. June 27, 2005) (same)

United States v. Tedford, 405 F.3d 1159 (10th Cir. May 3, 2005) (first noting that although *Booker* altered standard of review for most sentencing cases, it did not change standard of review for revocation cases, which under circuit precedent is that "imposition of a sentence in excess of that recommended by the Chapter 7 policy statements . . . will be upheld 'if it can be determined from the record to have been reasoned and reasonable'"; stating that "we do not hold that Defendant's sentence, which is more than four times the outside limit of the recommended Guideline range to be reasonable. We hold that the sentence is not unreasonable for the reasons presented by Defendant"; rejecting defendant's argument that district court improperly relied on consideration of probation office's resources because it was not enumerated Guideline factor)

United States v. Work, 409 F.3d 484 (1st Cir. June 3, 2005) (rejecting on two grounds appellant's argument that he could not receive any term of imprisonment upon revocation that was greater than the difference between the amount of imprisonment imposed upon him for the original, underlying offense and the top of the *Blakely*-ized guideline range for that offense)

United States v. Turner, unpublished, 2005 WL 1331500, 2005 U.S. App. LEXIS 10630 (11th Cir. June 7, 2005) (concluding that district court did not commit *Booker* error by sentencing defendant under mandatory guidelines because supervised release provisions of guidelines have always been advisory, and that 24-month sentence imposed upon revocation to run consecutively to 20-year state sentence was

reasonable); *United States v. Echarte*, unpublished, 2005 WL 1506034 (11th Cir. June 27, 2005) (finding no plain error in sentencing defendant for supervised release violation in light of *Booker* because revocation guidelines before *Booker* were advisory, not mandatory)

United States v. Powell, unpublished, 2005 WL 1519355 (11th Cir. June 28, 2005) (in probation revocation case where defendant received 60-month sentence, reviewing defendant's sentence for reasonableness rather than plain unreasonableness (and citing *Fleming*, *Cotton*, and *Tedford*, *supra*) and finding sentence to be reasonable)

United States v. Roen, 360 F. Supp. 2d 926 (E.D. Wis. Feb. 25, 2005) (Adelman, J.) (explaining analysis to be followed in determining appropriate sentence following revocation – and now all cases, after *Booker*; because guidelines are advisory, a sentence outside of suggested range is *not* a departure; applying principles to instant case and finding sentence of 24 months to be sufficient be not greater than necessary)

V. APPELLATE REVIEW ISSUES

(Appellate discussions of substantive sentencing issues are incorporated under the appropriate subsections in the Sentencing Issues section, *supra*)

A. Bail, Release, or Stay of Sentence Pending Appeal

United States v. Flowers, 2005 WL 1173312 (D. Or. April 25, 2005) (finding that “[w]hile there are at least two issues that are unsettled – whether the court may make any factual findings, and if so what burden of proof applies – I am unable to find by clear and convincing evidence that the appeal will likely result in a reduced term of imprisonment less than the duration of the appeal process”)

United States v. Null, 2005 WL 1527747 (E.D. Pa. June 28, 2005) (Schiller, J.) (denying motion for release pending appeal after finding that defendant's due process / ex post facto argument did not raise substantial question for purposes of appeal)

B. Appellate Jurisdiction

United States v. Ruiz-Alonso, 397 F.3d 815 (9th Cir. Feb. 11, 2005) (noting that 18 U.S.C. § 3742(b) remained intact after *Booker*, as Supreme Court excised only subsection (e), and thus court of appeals continues to have jurisdiction over sentencing appeals; further, in appeal by government, it need not provide proof of authorization by Solicitor General in order for court to hear appeal)

C. Meaning of “Reasonableness”: Methodology for Review

1. In General

United States v. Yahnke, 395 F.3d 823 (8th Cir. Feb. 1, 2005) (in methamphetamine case in which district court *sua sponte* departed upward on basis of under-represented criminal history (a second-degree murder conviction for which defendant received 50 years but served only 7 years, various parole violations, and other incidents of criminal conduct) from CH III to CH V, reviewing departure for reasonableness rather than *de novo*, and concluding that sentence was reasonable and not an abuse of discretion)

* *United States v. Crosby*, 397 F.3d 103 (2d Cir. Feb. 2, 2005, amended Mar. 18, 2005) (noting that district court cannot satisfy duty to consider Guidelines by general reference to them but declining to define “consideration” of Guidelines and instead allowing it to evolve; in discussing “reasonableness,” analogizing it to abuse of discretion review and stating that if district court makes procedural or legal error, sentence will not be found reasonable; in discussing types of errors that may be committed, stating that “[f]irst, and most obviously, a sentencing judge would violate the Sixth Amendment by making factual findings and *mandatorily* enhancing a sentence above the range applicable to facts found by a jury or admitted by a defendant,” but at same time, “a sentencing judge would also violate section 3553(a) by limiting consideration of the applicable Guidelines range to the facts found by the jury or admitted by the defendant, instead of considering the applicable Guidelines range, as required by subsection 3553(a)(4), based on the facts found by the court;” discussing when remand is appropriate); *see Fagans, infra*

United States v. Stewart, unpublished, 2005 WL 281418, 2005 U.S. App. LEXIS 1922 (9th Cir. Feb. 7, 2005) (in case involving upward departure pursuant to U.S.S.G. § 5K2.14, vacating and remanding; stating that “[b]ecause under *Booker* the district court may still consider the correct guideline range before imposing a sentence on remand, we take this opportunity to note that the district court misapplied Section 5K2.14” and explaining how district court erred); *see also United States v. Mojica*, unpublished, 2005 WL 705365, 2005 U.S. App. LEXIS 4982 (9th Cir. Mar. 29, 2005) (where government appealed grant of downward departure for cultural assimilation and other factors, finding that district court did not “take account” properly of Guidelines)

United States v. Killgo, 397 F.3d 628 (8th Cir. Feb. 9, 2005) (in fraud and money-laundering case involving appeal of relevant conduct issue in relation to loss, reviewing sentence imposed for unreasonableness, “judging it with regard to the factors in 18 U.S.C. § 3553(a);” stating that defendant’s “appeal relates directly to § 3553(a)(4)(A); that is, he essentially claims that the reasonableness of his sentence is directly linked to the district court’s misapplication of a relevant Guideline;” reviewing factual claim for clear error; concluding that district court properly considered particular transactions and that court could not say that sentence was unreasonable); *see Mathijssen, infra*

United States v. Ruiz-Alonso, 397 F.3d 815 (9th Cir. Feb. 11, 2005) (where government appealed downward departure in illegal reentry case, 8 U.S.C. § 1326, and case was argued and submitted before *Booker* came out, vacating sentence and remanding “[b]ecause we cannot say that the district judge would have imposed the same sentence in the absence of mandatory Guidelines and de novo review of downward departures”)

United States v. Lussier, 397 F.3d 1125 (8th Cir. Feb. 17, 2005) (in appeal challenging denial of reduction for possession of firearm for lawful sporting purposes, U.S.S.G. § 2K2.1(b)(2), stating that defendant “argues that the district court abused its discretion in failing to grant a reduction in offense level pursuant;” stating that court will “give deference to a district court’s sentencing decision and will reverse a sentence applying the Guidelines only if it is unreasonable;” and concluding that on facts of case, “the denial of the § 2K2.1(b)(2) downward departure was not unreasonable”)

* *United States v. Paladino*, 401 F.3d 471 (7th Cir. Feb. 25, 2005) (where government had cross-appealed extent of downward departure (from 235 months to 180 months, based on rehabilitation and overstatement of criminal history) before *Booker* and subsequently dropped cross-appeal, noting that “[u]nder the new sentencing regime the judge must justify departing from the guidelines, and the justification has to be reasonable, but we cannot think on what basis a 15-year sentence for Peyton, who was 34 years old when sentenced, could be thought unreasonably short”); cf. *George*, *infra*

* *United States v. Mares*, 402 F.3d 511 (5th Cir. Mar. 4, 2005) (in first opinion from circuit to address *Booker*, discussing “reasonableness” review; distinguishing between review of sentences within guideline range and those that are not)

United States v. Jones, 399 F.3d 640 (6th Cir. Mar. 3, 2005) (stating that “the district court’s sentence, and its exercise of discretion (if any), must be reviewed by an appellate court for ‘reasonableness.’ Accordingly, on remand, we encourage the sentencing judge to explicitly state his reasons for applying particular Guidelines, and sentencing within the recommended Guidelines range, or in the alternative, for choosing to sentence outside that range. Such a statement will facilitate appellate review as to whether the sentence was ‘reasonable.’ However, we take no position as to the content or extent of such a statement.”); see also *United States v. Tate*, unpublished, 2005 WL 513491, 2005 U.S. App. LEXIS 3569 (6th Cir. Mar. 3, 2005) (similar)

United States v. Edwards, 400 F.3d 591 (8th Cir. Mar. 7, 2005) (on *Anders* appeal from revocation of supervised release, in light of defendant’s criminal history and nature of violation and fact that defendant received sentence at low end of recommended range, “we cannot say that in this instance such a sentence was unreasonable”)

United States v. Cotton, 399 F.3d 913 (8th Cir. Mar. 8, 2005) (on appeal from revocation of supervised release, concluding that where “[t]he district court explicitly discussed the statutory sentencing

goals and gave four good reasons for its sentence,” and “[c]onsidering the statutory goals of sentencing and the facts and circumstances of this case, the sentence imposed is not unreasonable”)

United States v. Rogers, 400 F.3d 640 (8th Cir. Mar. 16, 2005) (reversing and vacating sentence of probation as unreasonable where district court had departed down from 51-63 month range in felon-in-possession case based on extraordinary rehabilitation because rehabilitation was not extraordinary and defendant had not shown respect for law, probation would not provide deterrence for defendant or protect public, and did not consider Congress’ desire to prevent unwarranted disparity)

* *United States v. Villegas*, 404 F.3d 355 (5th Cir. Mar. 17, 2005) (concluding that although standard of review is now for reasonableness, appellate court still continues to review district court’s application of Guidelines *de novo*; reviewing other post-*Booker* decisions that reached same conclusion); *United States v. Creech*, 408 F.3d 264 (5th Cir. May 3, 2005) (noting that *Booker*’s requirement that district courts consider Guidelines “indicates that *Booker* did not alter the standard of review we must employ, as part of our overall review of the sentence, to determine whether the district court properly interpreted and applied the Guidelines”); *see id.* (Garza, J., dissenting)

United States v. Chriswell, 401 F.3d 459 (6th Cir. Mar. 18, 2005) (because district court is still required to consider Guidelines under § 3553(a), “the proper interpretation of the various provisions of the Sentencing Guidelines remains vitally important for this court” and “[t]his court must review the district court’s statutory construction and interpretation of the now-advisory sentencing guidelines *de novo*”); *United States v. Davidson*, 409 F.3d 304 (6th Cir. May 18, 2005) (citing to *Chriswell* and other cases, stating that “[w]e continue, in reviewing individual Guidelines determinations, to apply the standards of review we applied prior to *Booker*. Accordingly, for purposes of determining the Guidelines *recommendation*, we continue to accept a district court’s factual finding . . . unless it is clearly erroneous, but to subject a district court’s finding on a mixed question of law and fact . . . to *de novo* review.”); *see also United States v. Forrest*, 402 F.3d 678 (6th Cir. Mar. 30, 2005) (on appeal by government where district court departed downward “on the basis of the atypicality of the prosecution of a garden-variety convenience store in federal court under the Hobbs Act,” agreeing with government that district court erred in its understanding of departure guidelines and remanding for resentencing “with the guidelines – construed in accordance with this opinion – to be taken into account by the district court, but no longer to be treated as mandatory”)

United States v. Abdel-Karim, unpublished, 2005 WL 697215, 2005 U.S. App. LEXIS 4877 (7th Cir. Mar. 23, 2005) (in *Anders* appeal where defendant convicted of 18 U.S.C. § 2320(a) and district court “clearly stated that it did not consider the guidelines binding,” instead “employ[ing] its discretion to impose an indeterminate sentence that was within the statutory maximum of 10 years’ imprisonment;” reviewing sentence imposed (six months of home confinement and two years of probation) for reasonableness and concluding that “no principled argument could be made” that it was unreasonable)

United States v. George, 403 F.3d 470 (7th Cir. April 4, 2005) (in appeal of sentence imposed after Seventh Circuit's opinion in *Booker*, where district court sentenced without regard to Guidelines (pursuant to which range would have been 63-78 months) and imposed sentence of 48 months, stating that "George does not contend that his actual sentence is unreasonable, the post-*Booker* of appellate review. It is hard to conceive of below-range sentences that would be unreasonably high. George's is not. The United States would have better claim to be the party aggrieved by the district court's disposition [but] it has not appealed"); see *United States v. Betro*, unpublished, 2005 WL 1140293, 2005 U.S. App. LEXIS 8146 (7th Cir. May 9, 2005) (stating that "Betro does not specifically argue that the sentence imposed by the district court is unreasonable, but even if he had, we would find the sentence reasonable. The district court imposed a sentence within the guideline range, and also properly referenced several of the factors in 18 U.S.C. § 3553(a)")

United States v. Doe, unpublished, 2005 WL 767155, 2005 U.S. App. LEXIS 5707 (2d Cir. April 6, 2005) (where guideline range was 6-12 months for making false statements on passport applications but district court imposed 10-year sentence because defendant would not disclose true name, finding sentence unreasonable "[i]n light of the crime charged, the sentencing range recommended, Doe's lack of any provable criminal history, and the district court's inadequate balancing of these factors against the perceived threat posed by Doe")

* *United States v. Webb*, 403 F.3d 373 (6th Cir. April 6, 2005) (after reviewing defendant's sentence (105 months for possession of machine gun in violation of 18 U.S.C. § 922(o)) for plain error and finding none, discussing whether sentence was reasonable and concluding that it was where district court properly calculated guidelines and considered other pertinent § 3553(a) factors); in discussing "reasonableness," stating that "we read *Booker* as instructing appellate courts in determining reasonableness to consider not only the length of the sentence but also the factors evaluated and the procedures employed by the district court in reaching its sentencing determination," but "declin[ing], however, to define rigidly at this time either the meaning of reasonableness or the procedures that a district court must employ in sentencing post-*Booker*;" instead, finding "it prudent to permit a clarification of these concepts to evolve on a case-by-case basis at both the district court and appellate levels;" noting that court declined to address "whether a district court must always calculate the precise appropriate Guidelines range in order to comply with *Booker*; further noting that while court declined "to indicate what weight the district courts must give to the appropriate Guidelines range, or any other § 3553(a) factor, we also decline to hold that a sentence within a proper Guidelines range is per-se reasonable")

United States v. Marcussen, 403 F.3d 982 (8th Cir. April 11, 2005) (finding 210-month sentence based on career offender status to be reasonable; noting that "[w]e think it apparent that in most, if not all, cases involving appellate review of sentences pronounced in a manner consistent with *Booker*, the reviewing court will need to consult the guidelines as advisory, just as the sentencing court is required to do, and to review the sentencing court's guidelines calculation to the extent it is challenged on appeal in order to determine what the guidelines *advise* in the particular circumstances of the case" and, further, that "[w]e think this ordinarily will have to be done to glean some reliable idea as to what constitutes a proper

starting point – and in many cases a resting point – toward a reasonable sentence for the particular offense of conviction and the particular defendant and to achieve one of the primary goals of the Sentencing Reform Act of 1984: to reduce disparity in the sentences imposed on similarly situated defendants”)

* *United States v. Hopkins*, unpublished, 2005 WL 827136, 2005 U.S. App. LEXIS 5968 (10th Cir. April 11, 2005) (in remanding case for resentencing, stating that while “[a]fter *Booker*, courts are no longer constrained by the mandatory application of the Guidelines[,] [n]onetheless, a sentencing court is required to ‘consult’ the Guidelines and the factors set forth in 18 U.S.C. § 3553(a) before imposing a sentence. . . . Consistent with the *Booker* remedial scheme, the sentencing court as fact finder should calculate the range prescribed by the Guidelines. The court must then review the other relevant factors contained in the Guidelines, including those in § 3553(a), and impose a reasonable sentence. In applying the Guidelines’ factors, the court should take care to explain its reasoning, especially if it imposed a sentence outside the Guidelines’ range. While the Guidelines are no longer mandatory, it is clear from *Booker* that the now-discretionary Guidelines will be a vital barometer of reasonableness on appellate review”); see *Tedford*, *infra*

United States v. Smith, unpublished, 2005 WL 894910, 2005 U.S. App. LEXIS 7217 (11th Cir. April 18, 2005) (where district court departed down 20 levels, from range of 78-98 months, to impose sentence of time served (35 days) on basis of defendant’s physical condition (non-Hodgkins lymphoma in remission), concluding that whether viewed before or after *Booker*, extent of departure was unreasonable)

United States v. Cunningham, 405 F.3d 497 (7th Cir. April 19, 2005) (where district court departed upward by 75 months (to 210 months) in pre-*Booker* child porn production case because defendant had sexual relations with victim, summarily stating that, “[b]ased on our review of the record, we refuse to hold that this decision by the judge was unreasonable”)

United States v. Skoczen, 405 F.3d 537 (7th Cir. April 20, 2005) (stating that “the Guidelines do retain force even though they are no longer mandatory, and thus errors in their application remain relevant” and “[e]ven under an advisory regime, if a district court makes a mistake in calculations under the Guidelines, its judgment about a reasonable sentence would presumably be affected by that error and thus (putting aside the implications of plain error review) remand would be required just as before”); see also *United States v. Scott*, 405 F.3d 615 (7th Cir. April 25, 2005) (stating that because § 3742(f)(1), which requires resentencing when challenged sentence results from incorrect application of guidelines, survived *Booker*, “[a]n incorrect application of the guidelines requires resentencing under the post-*Booker* regime”) (citing *United States v. Gleich*, 397 F.3d 608, 615 (8th Cir. 2005))

United States v. Strbac, unpublished, 2005 WL 953845, 2005 U.S. App. LEXIS 7266 (6th Cir. April 25, 2005) (after finding no error because district court imposed alternative sentence that was same as sentence under mandatory guidelines, reviewing for reasonableness and concluding that sentence was reasonable where district court appropriately consulted guidelines, applied enhancement and explained

reasons for doing so, and imposed sentence within range after expressly considering various § 3553(a) factors)

United States v. Fagans, 406 F.3d 138 (2d Cir. April 27, 2005) (in context of determining whether to address guidelines calculation error in pre-*Booker* sentencing appeal, stating that after *Booker*, “[i]n many circumstances, an incorrect calculation of the applicable Guidelines range will taint not only a Guidelines sentence, if one is imposed, but also a non-Guidelines sentence, which may have been explicitly selected with what was thought to be the applicable Guidelines range as a frame of reference”)

United States v. Sutton, 406 F.3d 472 (7th Cir. April 28, 2005) (stating that “[d]rug quantity is a factual finding that we review in the same manner as before *Booker*, for clear error”)

United States v. Mathijssen, 406 F.3d 496 (8th Cir. May 2, 2005) (concluding that “that the unreasonableness standard articulated by the Supreme Court in *Booker* applies only to the district court’s determination of the appropriate ultimate sentence to impose based on all the factors in 18 U.S.C. § 3553(a), not to the district court’s interpretation of the meaning and applicability of the guidelines themselves. We must continue to interpret the correct meaning and application of guidelines language, because the district court must continue to determine ‘the appropriate guidelines sentencing range,’ as it did pre-*Booker*, before it considers the other factors in 18 U.S.C. § 3553(a). The now-advisory guidelines, when correctly applied, become a consideration for the district court in choosing a reasonable ultimate sentence. Reasonableness, therefore, may be ‘directly linked to the district court’s misapplication of a relevant Guideline,’ but is based on broader considerations than whether the guidelines were properly applied.”) (citations omitted); *United States v. Mashek*, 406 F.3d 1012 (8th Cir. May 10, 2005) (explaining that district court’s calculations of guidelines will continue to be reviewed for clear error as to factual findings and *de novo* as to legal conclusions); see *Hadash*, *infra*

United States v. Crawford, 407 F.3d 1174 (11th Cir. May 2, 2005) (finding that “[a]lthough *Booker* established a ‘reasonableness’ standard for the sentence finally imposed on a defendant, the Supreme Court concluded in *Booker* that district courts must still consider the Guidelines in determining a defendant’s sentence” and that “[n]othing in *Booker* suggests that a reasonableness standard should govern review of the interpretation and application as advisory of the Guidelines by a district court;” accordingly, agreeing with Fifth Circuit “that *Booker* does not alter our review of the application of the Guidelines”)

* *United States v. Tedford*, 405 F.3d 1159 (10th Cir. May 3, 2005) (in revocation case, first noting that although *Booker* altered standard of review for most sentencing cases, it did not change standard of review for revocation cases, which under circuit precedent is that “imposition of a sentence in excess of that recommended by the Chapter 7 policy statements . . . will be upheld ‘if it can be determined from the record to have been reasoned and reasonable’”; stating that “we do not hold that Defendant’s sentence, which is more than four times the outside limit of the recommended Guideline range to be reasonable. We hold that the sentence is not unreasonable for the reasons presented by Defendant”;

rejecting defendant's argument that district court improperly relied on consideration of probation office's resources because it was not enumerated Guideline factor); *cf. Hopkins, supra*

United States v. Souser, 405 F.3d 1162 (10th Cir. May 4, 2005) (finding that for sentences imposed before *Booker* issued, where district court applied mandatory guidelines without exercising any discretion, stating that "reviewing for reasonableness – a standard of review compatible only with the review of a discretionary sentence below – is inappropriate" and applying pre-*Booker* standard of review)

United States v. Toohey, unpublished, 2005 WL 1220361, 2005 U.S. App. LEXIS 9437 (2d Cir. May 23, 2005) (stating that "[u]nder the advisory Guidelines system recognized in *Booker*, the reasonableness of a sentence will depend, in large part, on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)" and that "[f]urther, because *Booker* did not excise § 3553(c) from federal sentencing law, a district court that does not sentence within the applicable Guidelines range must still provide a 'specific' statement of reasons for its decision, both orally at the time of sentencing and in writing on the judgment of conviction")

United States v. Hadash, 408 F.3d 1080 (8th Cir. May 27, 2005) (summarizing methodology of review as follows: "[w]e first ask whether the district court correctly applied the guidelines in determining a guidelines sentencing range. If the guidelines were correctly applied, we then consider whether the sentence chosen by the district court was reasonable in light of all the § 3553(a) factors. If, however, the guidelines were incorrectly applied, 'we will remand for resentencing as required by 18 U.S.C. § 3742(f)(1) without reaching the reasonableness of the resulting sentence in light of § 3553(a).' Remand is unnecessary, however, if the error in application was harmless, such as when the district court would have imposed the same sentence absent the error;" next, "[w]e have stated that our reasonableness review is akin to the pre-PROTECT Act appellate practice for reviewing downward departures: abuse of discretion review;" and finally, "[a]fter *Booker*, therefore, we ask 'whether the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance or guidelines departure is reasonable.' Because the guidelines are now advisory, a reasonable departure is not limited solely to circumstances that the formerly mandatory guidelines framework would have deemed permissible bases for departure. We must consider more broadly whether the district court considered and weighed the § 3553(a) factors in addition to the recommended guidelines range and stated its reasons for choosing the particular sentence. We recognize that deference is often appropriate because the district court is in a better position to judge the credibility of the witnesses and to find the relevant facts. Although the sentencing court has discretion to impose a sentence once it has considered all the § 3553(a) factors, its ruling 'may be unreasonable if [it] fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.'" (citations omitted)

* *United States v. Price*, 409 F.3d 436 (D.C. Cir. June 3, 2005) ("Under *Booker*, we review the District Court's sentence to ensure that it is reasonable in light of the sentencing factors that Congress

specified in 18 U.S.C. § 3553(a). As the Court explained in *Booker*: ‘Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.’ These factors include, among others, the nature of the offense, the defendant’s history, the need for the sentence to promote adequate deterrence and to provide the defendant with needed educational or vocational training, any pertinent policy statements issued by the Sentencing Commission, the need to avoid unwarranted sentencing disparities among similarly situated defendants, and the need to provide restitution to any victims. . . . In deciding whether a sentence is reasonable, we must also consider whether the District Court committed legal error. ‘[A] sentence would not be “reasonable,” regardless of length, if legal errors, properly to be considered on appeal, led to its imposition.’ A failure to follow the strictures of the Sentencing Guidelines is among the errors that might cause a sentence to be overturned on appeal. We do not mean to suggest that the District Court is required to adhere to the Sentencing Guidelines. Under *Booker*, the Guidelines are now *advisory*, *i.e.*, one among a number of factors to be weighed by the District Court in sentencing. Rather, what we do hold here is that when the District Court purports to apply the Guidelines it must do so without error.”) (citations omitted)

2. Sentences Within Guideline Range

United States v. Mares, 402 F.3d 511 (5th Cir. Mar. 4, 2005) (stating that “[i]f the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guidelines range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines” and that therefore, “[g]iven the deference due the sentencing judge’s discretion under the *Booker/ Fanfan* regime, it will be rare for a review court to say such a sentence is unreasonable”), *pet. for cert. filed*, Mar. 31, 2005 (No. 04-9517)

United States v. Gonzalez, unpublished, 2005 WL 1427496, 2005 U.S. App. LEXIS 11864 (3d Cir. June 20, 2005) (stating that “[a]lthough the Sentencing Guidelines are not mandatory, sentences within the prescribed range are presumptively reasonable” and citing *United States v. Hughes*, 401 F.3d 540, 546-47 (4th Cir. 2005))

United States v. Nelson, unpublished, 2005 WL 1506161 (7th Cir. June 27, 2005) (in *Anders* case where district court refused to depart down in imposing sentence pre-*Booker*, stating that “[b]efore the Supreme Court’s decision in *United States v. Booker*, a discretionary refusal to depart downward was not reviewable unless the district court mistakenly believed it lacked authority to depart” and “[e]ven if *Booker* now requires us to review the failure to depart for reasonableness, the district court’s decision to remain within the correctly calculated guidelines meets that standard”) (citation omitted)

United States v. Archuleta, 412 F.3d 1003 (8th Cir. June 28, 2005) (stating that “[w]hile we have not yet held that a sentence within a correctly calculated Guideline range is reasonable per se, Archuleta has put forth no reason to establish that he should have been sentenced outside of that range”);

United States v. Lincoln, 413 F.3d 716 (8th Cir. July 5, 2005) (finding sentence of 324 months to be presumptively reasonable because it was within advisory guideline range)

United States v. Mykytiuk, 415 F.3d 606 (7th Cir. July 7, 2005) (concluding that “while a *per se* or conclusively presumed reasonableness test would undo the Supreme Court’s merits analysis in *Booker*,” an appropriate way in which “to express the new balance . . . is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness” and further declaring that “[w]hile we fully expect that it will be a rare Guidelines sentence that is unreasonable, the Court’s charge that we measure each defendant’s sentence against the factors set forth in § 3553(a) requires the door to be left open for this possibility”)

3. Sentences Below Guideline Range

United States v. Ingles, 408 F.3d 405 (8th Cir. June 2, 2005) (discussing, without deciding, impact of *Booker* on review of sentences resulting from downward departure where there is error in calculation of guideline range)

United States v. Noe, 411 F.3d 878 (8th Cir. June 9, 2005) (in case involving pre-*Booker* sentences, in regard to one defendant’s challenge to extent of § 5K1.1 departure as abuse of discretion (by not going even lower), disposing of claim because defendant “did in fact receive a substantial downward departure in his sentence and “[i]n this circuit, the extent of a district court’s downward departure is not reviewable”) (N.B.: query whether that line of cases is still good in light of *Booker*’s new reasonableness standard of review)

United States v. Kicklighter, 413 F.3d 915 (8th Cir. June 30, 2005) (on appeal by government where guideline range was 188-235 months, affirming sentence imposed of 120 months)

4. Revocation Cases

United States v. Fleming, 397 F.3d 95 (2d Cir. Feb. 2, 2005) (in appeal from imposition of two-year sentence of imprisonment upon revocation of supervised release for drug abuse-related violations, finding that *Booker*’s “reasonableness” standard of review applies to revocation sentences; discussing meaning of “consideration” of recommended range)

United States v. Cotton, 399 F.3d 913 (8th Cir. Mar. 8, 2005) (noting that while *Booker* “vitaly affects the standard of review in guidelines cases,” “the new standard of review will not change the result in this case, because the new standard is actually the same as the one we would have used otherwise,” i.e., “review for unreasonableness”)

United States v. Tedford, 405 F.3d 1159 (10th Cir. May 3, 2005) (first noting that although *Booker* altered standard of review for most sentencing cases, it did not change standard of review for

revocation cases, which under circuit precedent is that “imposition of a sentence in excess of that recommended by the Chapter 7 policy statements . . . will be upheld ‘if it can be determined from the record to have been reasoned and reasonable’”; stating that “we do not hold that Defendant’s sentence, which is more than four times the outside limit of the recommended Guideline range to be reasonable. We hold that the sentence is not unreasonable for the reasons presented by Defendant”; rejecting defendant’s argument that district court improperly relied on consideration of probation office’s resources because it was not enumerated Guideline factor)

United States v. Turner, unpublished, 2005 WL 1331500, 2005 U.S. App. LEXIS 10630 (11th Cir. June 7, 2005) (stating that standard of review for sentences imposed in supervised release revocation is now reasonableness, not plain unreasonableness; relying on cases listed *supra*)

D. Meaning of “Reasonableness”: Specific Cases

United States v. Romer, unpublished, 2005 WL 1154304, 2005 U.S. App. LEXIS 9057 (8th Cir. May 17, 2005) (in very brief per curiam opinion, stating that district court did not abuse discretion by sentencing defendant at top of guideline range (at sentencing held before *Blakely* came out; defendant raised no *Booker* issue on appeal) and that 235-month sentence was reasonable for attempted carjacking and felon-in-possession convictions)

United States v. Roy, 408 F.3d 484 (8th Cir. May 20, 2005) (in case involving assault with dangerous weapon on federal officer where district court sentenced defendant to 90 months before *Booker*, after concluding that there was no *Booker* error on which relief could be granted, reviewing sentence for reasonableness; stating that “[a]mong the factors that we consider when conducting our unreasonableness inquiry are: the applicable guidelines range for the offense of conviction; the nature and circumstances of the offense and the history and characteristics of the defendant; and the need for the sentence imposed to reflect the seriousness of the offense, to provide adequate deterrence, to promote respect for the law, and to provide just punishment” and citing § 3553(a); concluding that “[a]lthough the district court did not explicitly address each of the 18 U.S.C. § 3553(a) factors, we are unable to say, based on the record, that the sentence it imposed was unreasonable”)

United States v. Applewhite, unpublished, 2005 WL 1353623, 2005 U.S. App. LEXIS 10743 (7th Cir. June 8, 2005) (upon reconsideration after limited remand to district court to address *Booker* plain error, where district court stated that it would impose same 50-month sentence under advisory guidelines as it did under mandatory guidelines, reviewing sentence for reasonableness and stating that “[a]s the district court looked at proper factors when deciding upon the sentence and reached a sentence that was within the range provided by the advisory guidelines, we are satisfied that the sentence is reasonable”)

United States v. Mitra, unpublished, 2005 WL 1390278, 2005 U.S. App. LEXIS 11161 (7th Cir. June 13, 2005) (upon reconsideration after limited remand to district court to address *Booker* plain error, where district court stated that it would impose same sentence under advisory guidelines as it did

under mandatory guidelines, reviewing sentence for reasonableness and stating that “[t]he range under the Guidelines is 87 to 108 months, and Mitra’s sentence of 96 months is slightly below its mid-point. We do not see any reason why such a sentence would be deemed ‘unreasonable’ in post-*Booker* practice”); *United States v. Applebee*, 2005 WL 1416014, 2005 U.S. App. LEXIS 11780 (7th Cir. June 17, 2005) (similar, 155-month sentence slightly above midpoint of 100-125 month range)

E. Harmless Error Review

There are no cases yet addressing harmless error review in the context of sentences imposed after *Booker*.

United States v. Hadash, 408 F.3d 1080 (8th Cir. May 27, 2005) (in government appeal of sentence imposed pre-*Booker*, discussing and applying post-*Booker* methodology of review; finding district court’s error in granting downward adjustment to be harmless where district court stated that it would alternatively depart down to the same level, and finding that district court’s decision to depart down was reasonable; affirming sentence)

F. Plain Error Review

There are no cases yet addressing plain error review in the context of sentences imposed after *Booker*.

G. “Admissions” by Defendant

There are no cases yet addressing “admissions” in the context of sentences imposed after *Booker*.

H. Waivers of Appeal

There are no cases yet addressing appeal waivers in the context of sentences imposed after *Booker*.

I. Anders Briefs

There are no cases yet addressing *Anders* briefs in the context of sentences imposed after *Booker*.