

**REVIEW OF SENTENCES IMPOSED BEFORE *BOOKER***

As of July 10, 2005

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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 before the decision was issued on January 12, 2005. The outline and its companion, “Sentences After *Booker*: Imposition and Review,” replace “Post-*Booker* Federal Decisions – An Outline” (last updated May 18, 2005). To obtain an updated version of this outline, go to <http://www.fd.org>.<sup>1</sup> However, after May 18, only cases of particular significance (or from districts not previously listed) will be included.

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).

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](mailto:fran_pratt@fd.org).

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<sup>1</sup> 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](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.uscc.gov/Blakely/Sel\\_PostBooker.pdf](http://www.uscc.gov/Blakely/Sel_PostBooker.pdf).

## I. POST-SENTENCING DISTRICT COURT MOTIONS

(For habeas corpus petitions and other post-conviction pleadings not covered here, see Part III)

### A. 18 U.S.C. § 3582

*United States v. Mitchell*, unpublished, 2005 WL 387974, 2005 U.S. App. LEXIS 2907 (2d Cir. Feb. 18, 2005) (finding that defendant's "effort somehow to import *Blakely* and, by extension, *Booker* into a recalculation of his sentence under 18 U.S.C. § 3582(c)(2) is a collateral attack on the original judgment" that court has already rejected; citing *Green v. United States* (under Retroactivity as to Second or Successive § 2255 Motions))

*United States v. Standiford*, unpublished, 2005 WL 589986, 2005 U.S. App. LEXIS 4144 (7th Cir. Mar. 8, 2005) (where defendant, having previously filed two 28 U.S.C. § 2255 motions, filed motion pursuant to § 3582(c)(2) and raised *Booker* claim for first time, denying motion)

*United States v. Evans*, unpublished, 2005 WL 768772, 2005 U.S. App. LEXIS 5481 (5th Cir. April 5, 2005) (*Blakely / Booker* claims fall outside scope of § 3582(c)(2)); *United States v. Morrison*, unpublished, 2005 WL 927202, 2005 U.S. App. LEXIS 6896 (5th Cir. April 20, 2005) (*Apprendi, Blakely, and Booker* claims not cognizable in context of 3582(c) motion); *United States v. Privette*, unpublished, 2005 WL 995951, 2005 U.S. App. LEXIS 7495 (5th Cir. April 29, 2005) (*Booker* is inapplicable to § 3582(c) motion because provision is not implicated by Supreme Court ruling that is not related to actual amendment of Guidelines)

*United States v. Joseph*, unpublished, 2005 WL 1038766, 2005 U.S. App. LEXIS 7962 (11th Cir. May 4, 2005) (*Booker* is inapplicable because § 3582(c) only authorizes modifications to sentences as result of amendment to Guidelines that Sentencing Commission has made retroactive)

*United States v. Contreras*, 2005 WL 147276, 2005 U.S. Dist. LEXIS 931 (S.D.N.Y. Jan. 21, 2005) (Casey, J.) (in ruling on motion made pursuant to 18 U.S.C. § 3582 regarding applicability of U.S.S.G. amend. 640, noting that because defendant did not qualify for safety valve in first instance, court need not address "more complicated issue" of effect of *Booker* on defendant's sentence)

*United States v. Ervan*, 2005 WL 567844, 2005 U.S. Dist. LEXIS 4356 (W.D. Wis. Feb. 23, 2005) (Crabb, J.) (treating motion filed ostensibly pursuant to § 3582 as second § 2255 and dismissing it because defendant did not have authorization from court of appeals to file it)

*United States v. Dorsey*, 2005 WL 906356, 2005 U.S. Dist. LEXIS 6676 (E.D. Pa. April 11, 2005) (Sanchez, J.) (*Booker* does not support claim that Sentencing Commission has lowered sentencing range; further, courts addressing retroactivity of *Booker* had unanimously found it is not retroactive); *United States v. Hall*, 2005 WL 1149798, 2005 U.S. Dist. 8741 (E.D. Pa. May 17, 2005) (Kelly, J.)

*United States v. James*, 2005 WL 1026028 (M.D. Fla. April 27, 2005) (Steele, J.) (after rejecting defendant's arguments as to applicability of U.S.S.G. amendment 599 and determining that § 3582(c) does not provide jurisdiction for court to consider defendant's challenge to prior convictions used to sentence him under § 924(e), stating that "[s]imilarly, defendant's argument's under [*Booker*] cannot be reviewed" because decision is not retroactive to cases that became final before it was decided on January 12, 2005)

*Garcia-Corona v. United States*, 2005 WL 1019475, 2005 U.S. Dist. LEXIS 8672 (D. Utah April 28, 2005) (Kimball, J.) (in § 2255 motion where defendant argued that he was entitled to reduction in sentence because guideline range was lowered, rejecting argument because guideline had not been amended)

*United States v. Delpit*, 2005 WL 1080519, 2005 U.S. Dist. LEXIS 8430 (D. Minn. May 2, 2005) (Magnuson, J.) (where defendant filed motion pursuant to § 3582 but did not argue that an amendment to the Guidelines applied retroactively, appearing instead to argue that *Booker* invalidated all Sentencing Guidelines, finding that *Booker* does not apply retroactively and that Guidelines must still be considered)

*United States v. Watson*, 2005 WL 1106604, 2005 U.S. Dist. LEXIS 8562 (E.D. Va. May 9, 2005) (Cacheris, J.) (finding that *Booker* does not support defendant's argument that his 151-month sentence for drug should be reduced pursuant to § 3582(c); noting further that under advisory guidelines, court would have imposed same sentence)

*Riley v. United States*, 2005 WL 1330728 (S.D. Ga. May 11, 2005) (Alaimo, J.) (rejecting defendant's *Booker* claim because conviction was final, but finding *sua sponte* that reduction in sentence was appropriate based on amendment 668 (eff. Nov. 1, 2004)); see *United States v. Riley*, 2005 WL 1378766 (S.D. Ga. June 7, 2005) (Alaimo, J.) (denying government's motion for reconsideration)

*United States v. Neal*, 2005 WL 1320331 (N.D. Iowa June 1, 2005) (at defendant's request, recharacterizing motion as § 2255 petition, then denying it because it was untimely and *Booker* is not retroactive)

*United States v. Durr*, 2005 WL 1318836 (S.D. Ohio June 1, 2005) (Smith, J.) (rejecting defendant's assertion that "the recent *Booker* decision, which effectively made the sentencing guidelines advisory, changed the sentencing scheme in such a way as to justify a sentence reduction under section 3582(c)(2)" because "[i] the Court were to accept defendant's argument that anyone can file a section 3582(c)(2) motion for resentencing based on the general effect *Booker* had on the guidelines, then practically anyone could move for a sentence reduction. In the end, *Booker* would essentially become retroactive, albeit through the guise of a section 3582(c)(2) motion. This is not what the Supreme Court intended.")

*United States v. Morrison*, 2005 WL 1373108 (E.D. Mo. June 13, 2005) (Hamilton, J.) (rejecting “defendant’s argument that the switch from the mandatory application of the Guidelines to the advisory nature of the Guidelines constitutes a ‘lowering’ of the Guidelines as used in § 3582(c)(2)” because “[e]ven if the change from mandatory to advisory constitutes a ‘lowering’ of the Guidelines, such action was not taken – as § 3582 requires – by the Sentencing Commission”); *United States v. Fuentes*, 2005 WL 1501526 (E.D. Mo. June 13, 2005) (Hamilton, J.) (same)

*United States v. Gomez*, 2005 WL 1431690 (S.D.N.Y. June 17, 2005) (Buchwald, J.) (finding that “[d]espite its creativity, defendant’s motion is denied because the statutory requirements of section 3582(c)(2) have not been met” because “[w]hile the *Booker* decision did change the application of the Guidelines, the actual ranges themselves have not changed at all”)

#### B. Other Motions

*United States v. Vanhorn*, 399 F.3d 884 (8th Cir. Mar. 1, 2005) (on appeal from denial of motion to modify restitution after appeal of conviction and sentence, finding that *Booker* and Guidelines did not apply to post-judgment proceeding)

*United States v. Green*, 405 F.3d 1180 (10th Cir. May 6, 2005) (in *Anders* case, where district court originally sentenced defendant on day that *Blakely* issued, defendant moved six days later to correct sentence pursuant to Fed. R. Crim. P. 35(a), and court resentenced defendant on tenth business day after original sentencing, holding that district court did not have jurisdiction to resentence defendant)

*United States v. Ziskind*, 367 F. Supp. 2d 4 (D. Mass. Jan. 25, 2005) (Woodlock, J.) (denying motion for stay of execution of sentence because, “the sentence imposed [by the court] under the mandatory guidelines scheme would in all likelihood be the sentence [it] would impose under an advisory guidelines sentencing scheme”)

*United States v. Olivares*, 2005 U.S. Dist. LEXIS 1392 (S.D.N.Y. Feb. 1, 2005) (Stein, J.) (denying motion for extension of time to file notice of appeal under Fed. R. App. P. 4(b)(4) where request made 3-1/2 months after judgment entered and because defendant had not shown good cause or excusable neglect in that *Booker* did not affect mandatory minimum sentence he received)

*United States v. Rohira*, 355 F. Supp. 2d 894 (N.D. Ohio Feb. 4, 2005) (Aldrich, J.) (granting motion for new trial in light of *Booker* because jury was not charged with finding loss amount beyond reasonable doubt, government agent’s unreliable loss estimate may have tainted jury’s decision on guilt, and “jury will have to consider that same factual issue at sentencing”); *see also United States v. Williams*, 355 F. Supp. 2d 903 (N.D. Ohio Feb. 4, 2005) (Aldrich, J.) (granting motion of co-defendant, who was tried separately, on same basis)

*United States v. Penniegraft*, 357 F. Supp. 2d 854 (M.D.N.C. Feb. 7, 2005) (Beaty, J.) (declining to address whether pre-*Booker* sentence qualifies as “clear error” under Fed. R. Crim. P. 35(a) where motions made outside 7-day time frame, such that court did not have jurisdiction to consider issue; granting motion to extend time for filing notice of appeal pursuant to Fed. R. App. P. 4(b)(4) as to some defendants)

*United States v. Comarovschi*, 359 F. Supp. 2d 532 (W.D. Va. Mar. 15, 2005) (Michael, J.) (where pursuant to Fourth Circuit’s *Hammoud* decision, at sentencing in September 2004, court had stated that sentence of probation, not 24 months, was appropriate, but defendant did not appeal due to appeal waiver in plea agreement, denying “motion for order amending sentence” because *Booker* did not apply to cases no longer on direct review, court did not have jurisdiction under Fed. R. Crim. P. 35, and *Hammoud* did not carve out exception to rule of finality of judgments)

*United States v. Gaston*, 2005 WL 941139 (N.D. Fla. April 5, 2005) (Sherrill, M.J.) (where defendant moved pursuant to version of Fed. R. Crim. P. 35(a) that applied to offenses before Nov. 1, 1987 (having previously filed a § 2255 motion and applied to file a second), denying motion in part because defendant was convicted of conspiracy that “straddled” implementation of Guidelines and because defendant’s claim would be cognizable only on second § 2255 motion)

*United States v. Enigwe*, 2005 WL 928536, 2005 U.S. Dist. LEXIS 6809 (E.D. Pa. April 18, 2005) (DuBois, J.) (denying motion to quash judgment pursuant to Fed. R. Crim. P. 12(b)(2) because motion to challenge indictment must be made prior to completion of direct appeal)

*United States v. Hawkins*, 2005 WL 1138769 (M.D. Ala. April 25, 2005) (Coody, M.J.) (where motion purportedly filed pursuant to Fed. R. Crim. P. 35(a) was filed more than 7 days after sentencing, construing motion as second § 2255 motion and recommending denial of motion because defendant did not have requisite certification from Eleventh Circuit); *United States v. Nix*, 2005 WL 1389873 (M.D. Ala. June 9, 2005) (Walker, M.J.)

## II. APPELLATE PROCEDURE ISSUES

### A. Bail or Release Pending Appeal

*United States v. Morales*, unpublished, 2005 WL 388301, 2005 U.S. App. LEXIS 2957 (9th Cir. Feb. 18, 2005) (denying motion for release pending appeal as moot because sentence vacated and case remanded for resentencing)

*United States v. Lawrence*, unpublished, 2005 WL 681879, 2005 U.S. App. LEXIS 4863 (10th Cir. Mar. 25, 2005) (affirming denial of release pending appeal where even if defendant succeeded in

winning *Booker* argument on plain error review, *Booker* would permit reimposition of same sentence; accordingly, could not say that it was likely that appeal would result in reduction of sentence)

*United States v. Henningsen*, 402 F.3d 748 (7th Cir. Mar. 29, 2005) (denying motion for stay of sentence and release from custody where defendant could not show that appeal was likely to result in sentence that was less than time he had already served (17 of 33 months) plus expected duration of appeal because “Henningsen’s appeal cannot be expected to take 16 more months [notwithstanding limited remand to district court pursuant to *Paladino*], and because it is not clear whether the district court will decide to resentence in light of *Booker*”)

*United States v. Munoz Franco*, 356 F. Supp. 2d 20 (D.P.R. Jan. 28, 2005) (Dominguez, J.) (denying bail because defendants failed to demonstrate that any of the numerous “issues presented in the opinion of the court fail to reach the required threshold of a ‘close’ question of fact or law”)

*United States v. Brown*, 356 F. Supp. 2d 470 (M.D. Pa. Feb. 10, 2005) (Rambo, J.) (denying motion in part because at time of sentencing, court had applied *Blakely* and imposed sentence using discretionary scheme in which it relied on Guidelines as a “measuring point”)

*United States v. Capanelli*, 2005 WL 774124, 2005 U.S. Dist. LEXIS 5733 (S.D.N.Y. April 6, 2005) (Height, J.) (where oral argument on merits appeal was already completed and case is awaiting decision, denying second motion for release pending appeal that was based on changed circumstances (i.e., *Booker* and *Crosby*), because it is more appropriate for court of appeals to rule on release question pursuant to Fed. R. App. 9(b)).

#### 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)

*United States v. Stonefish*, 402 F.3d 691 (6th Cir. Mar. 30, 2005) (finding that consideration of sentence in light of *Booker* was moot because defendant had been released from federal custody)

#### C. Motions for Remand

*United States v. Mortimer*, unpublished, 2005 WL 318650, 2005 U.S. App. LEXIS 2208 (3d Cir. Feb. 8, 2005) (where case was on appeal when *Blakely* came out and defendant subsequently filed objections to sentence in district court and filed motion for summary remand in court of appeals (which court denied but held C.A.V.), vacating sentence and remanding)

*United States v. Doane*, unpublished, 2005 WL 327559, 2005 U.S. App. LEXIS 2364 (4th Cir. Feb. 11, 2005) (granting motion for expedited remand where district court had announced alternative sentence pursuant to *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004), and alternative sentence was shorter than time defendant had already served); *United States v. Scott*, unpublished, 2005 WL 742864, 2005 U.S. App. LEXIS 5210 (4th Cir. Mar. 31, 2005) (granting defendant's motion for expedited remand where government did not oppose remand and, at original sentencing, district court had announced alternative sentence of 30 months, 16 months less than sentence imposed under mandatory guidelines); *United States v. Thompson*, 2005 WL 1023308, 2005 U.S. App. LEXIS 7638 (4th Cir. May 3, 2005) (over objection of government, granting motion for expedited remand to allow implementation of lower alternative sentence; remanding for resentencing, but declining request to direct district court to implement alternative sentence of probation)

*United States v. Coumaris*, 399 F.3d 343 (D.C. Cir. Mar. 8, 2005) (in first opinion from circuit, granting government's motion for remand in light of *Booker*; declining to address defendant's arguments regarding district court's application of guidelines on ground that "[b]ecause the district court might impose a different sentence on remand, and because the parties might choose not to appeal that sentence, consideration of objections to the court's original guidelines calculations would be premature at best and unnecessary at worst")

*United States v. Sanchez-Birruetta*, unpublished, 2005 WL 662655, 2005 U.S. App. LEXIS 4673 (9th Cir. Mar. 18, 2005) (where at oral argument both sides asserted that case should be remanded because even though there was no Sixth Amendment error in using defendant's prior drug conviction to enhance sentence under U.S.S.G. § 2L1.2, district court sentenced defendant under mandatory scheme, remanding case)

*United States v. Turner*, unpublished, 2005 U.S. App. LEXIS 5786 (D.C. Cir. April 7, 2005) (granting unopposed motion for remand for resentencing without prejudice to filing of new appeal raising pretrial and trial issues); *United States v. Saunders*, unpublished, 2005 U.S. App. LEXIS 5787 ((D.C. Cir. April 7, 2005) (same)

*United States v. Foster*, unpublished, 2005 WL 858062 (6th Cir. April 14, 2005) (in appeal from denial of suppression motion, denying motion for remand for resentencing where defendant had waived right to appeal sentence)

*United States v. Rice*, 405 F.3d 1108 (10th Cir. April 28, 2005) (upon joint request of parties, remanding for resentencing in accordance with *Booker*)

D. Sufficiency of Raising of *Blakely* Issue

1. Objection in District Court

*United States v. Coffey*, 395 F.3d 856 (8th Cir. Jan. 21, 2005) (where defendant had asserted before sentencing that there was insufficient evidence on which to calculate any drug quantity and apparently did not raise *Blakely* challenge until appeal, court of appeals simply remanded case, noting that “[w]e express no opinion on whether a sentence handed down under the mandatory Guidelines system is plainly erroneous, nor do we consider the outer limits of precisely what will preserve the issue”), *called into question by United States v. Pirani*, 406 F.3d 543 (8th Cir. April 29, 2005) (en banc)

*United States v. Davis*, 397 F.3d 340 (6th Cir. Jan. 21, 2005, reissued Feb. 9, 2005) (in fraud case where sentencing pre-dated *Blakely*, such that defendant did not object to loss calculation on basis of Sixth Amendment but did object “vehemently” on other grounds, finding that *Blakely* issue was not preserved; remanding case for resentencing in light of *Booker*) (N.B.: this opinion was originally unpublished; it was reissued as published on Feb. 9; in the original version, the court of appeals had found that the objection was sufficiently preserved, even without reference to the Sixth Amendment) (N.B.: see also *Hines*, *infra*)

*United States v. Reese*, 397 F.3d 1337 (11th Cir. Jan. 27, 2005) (in case where defendant raised *Apprendi* challenge in district court and on appeal in briefs submitted prior to *Blakely*, supplemental briefs were filed in light of *Blakely*, panel decision issued last September (382 F.3d 1308) but mandate was withheld at request of member of court, now vacating prior opinion and remanding for resentencing consistent with *Booker*)

*United States v. Fox*, 396 F.3d 1018 (8th Cir. Jan. 31, 2005) (in case in which defendant went to trial and jury found 500 grams of methamphetamine, but he was sentenced on basis of 1.814 kilos of meth (to which he objected although it is not clear on what basis), and defendant raised *Blakely* issue in *pro se* brief, finding that defendant had preserved issue and remanding case for resentencing), *called into question by United States v. Pirani*, 406 F.3d 543 (8th Cir. April 29, 2005) (en banc)

*United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. Feb. 4, 2005) (in MDMA case that went to trial, where defendant had objected at sentencing (held before *Blakely*) about use of inconsistent, uncertain, and vague trial testimony to set quantity of tablets, rejecting this contention; further, on plain error review, rejecting *Blakely* claim because, while there was error that was plain, it did not affect defendant’s substantial rights), *reh’g denied*, 406 F.3d 1261 (11th Cir. April 19, 2005) (order accompanied by lengthy concurring and dissenting opinions), *cert. denied*, 2005 WL 483174 (June 20, 2005)

*United States v. Hines*, 398 F.3d 713 (6th Cir. Feb. 7, 2005, reissued Feb. 23, 2005) (where defendant had objected to drug quantity and firearm possession found by district court on basis of evidence, finding that court’s determinations were supported by record; because defendant had not raised

Sixth Amendment claim in district court, reviewing *Booker* claim only for plain error, which was present) (N.B.: this opinion was originally unpublished; see also *Davis* (6th Cir), *supra*)

*United States v. Davis*, 397 F.3d 173 (3d Cir. Feb. 11, 2005) (stating *in toto*, without indicating whether issue had been raised below, that “Appellants challenge their sentences under [*Booker*]. In light of the determination of the judges of this court that the sentencing issues appellants raise are best determined by the District Court in the first instance, we vacate the sentences and remand for re-sentencing in accordance with *Booker*.”), *gov’t pet. for reh’g denied*, 407 F.3d 162 (3d Cir. April 28, 2005) (in opinion by chief judge, providing some explanation of circuit’s approach)

*United States v. Selwyn*, 398 F.3d 1064 (8th Cir. Feb. 23, 2005) (in methamphetamine case where defendant objected below to inclusion in drug quantity determination of personal use amounts, following trial in which jury made no findings as to drug quantity, finding that defendant had preserved Sixth Amendment issue for appeal when he objected to drug quantity findings; citing *Fox*, *supra*; declining to address other sentencing claims “beyond noting that they may be considered at the new sentencing proceeding”), *called into question by United States v. Pirani*, 406 F.3d 543 (8th Cir. April 29, 2005) (en banc)

*United States v. Duncan*, 400 F.3d 1297 (11th Cir. Feb. 24, 2005) (finding defendant’s objection to drug quantity determination based on sufficiency of evidence insufficient to preserve Sixth Amendment objection); *see also Dowling*, *infra*

*United States v. Sdoulam*, 398 F.3d 981 (8th Cir. Mar. 2, 2005) (where defendant objected to district court’s finding of drug quantity following jury trial and to application of obstruction of justice enhancement, finding that defendant had preserved Sixth Amendment challenge; following *Coffey* and *Fox*, *supra*), *called into question by United States v. Pirani*, 406 F.3d 543 (8th Cir. April 29, 2005) (en banc)

*United States v. Payne*, unpublished, 2005 WL 518709, 2005 U.S. App. LEXIS 3716 (4th Cir. Mar. 4, 2005) (where defendant “raised *Blakely* in her motion for release pending appeal, filed within seven days of sentencing, we conclude that she did not thereby preserve the issue for appeal” because “[a]t that point, the district court was without authority to alter the sentence except for arithmetical, technical, or other clear error” and “[t]he constitutional error in *Payne*’s sentence became ‘clear’ only with the Supreme Court’s decision in *Booker*;” however, finding plain error and remanding for resentencing)

*United States v. Mares*, 402 F.3d 511 (5th Cir. Mar. 4, 2005) (where defendant objected to 4-level increase pursuant to U.S.S.G. § 2K2.1(b)(5) “on the basis that they did not comport with the facts proven at trial,” noting that defendant “did not thereafter challenge the sufficiency of evidence for the court’s factual finding or otherwise object to the enhancement;” reviewing for plain error), *pet. for cert. filed* (U.S. Mar. 31, 2005) (No. 04-9517); *see also Bringier*, *infra*

*United States v. Story*, unpublished, 2005 WL 566696, 2005 U.S. App. LEXIS 4096 (6th Cir. Mar. 9, 2005) (in case where defendant objected to gun enhancement at sentencing on basis that evidence was uncorroborated and unreliable, but did not object to drug quantity on any basis, reviewing *Booker* Sixth Amendment claim for harmless error as to gun but for plain error as to drug quantity)

*United States v. MacKinnon*, 401 F.3d 8 (1st Cir. Mar. 16, 2005) (noting that a defendant will be deemed to have raised *Booker* issue if he argued error under *Apprendi* or *Blakely* in district court, or that guidelines were unconstitutional); cf. *Heldeman*, *infra*

*United States v. Smith*, 401 F.3d 497 (D.C. Cir. Mar. 18, 2005) (per curiam) (in first opinion from circuit to address plain error, on petition for rehearing and with practically no discussion, finding that where defendant had raised Sixth Amendment argument at original sentencing but did not do so at sentencing following remand after first appeal, defendant had not preserved error)

*United States v. Dowling*, 403 F.3d 1142 (11th Cir. Mar. 23, 2005) (statement in PSR objection that jury's special verdict as to drug quantity "must be respected" is insufficient to preserve *Booker* claim where it did not reference Sixth Amendment or *Apprendi*); see also *United States v. Conte*, unpublished, 2005 WL 954055, 2005 U.S. App. LEXIS 7227 (11th Cir. April 25, 2005) (relying on *Dowling* to reject defendant's contention that she preserved issue when she objected in district court that drug quantity overrepresented her conduct because she was not aware of some of drugs in her possession)

*United States v. Mooney*, 401 F.3d 940 (8th Cir. Mar. 28, 2005) (remanding to district court for determination of whether defendant had preserved issues because "[i]t is not clear from the record before us whether Mooney asked the district court at trial to submit the issue of gain to the jury or whether he had raised a constitutional issue at his sentencing" and because "the district court is in a better position to determine what happened at trial"), *reh'g en banc ordered sua sponte*, 2005 U.S. App. LEXIS 7404 (8th Cir. April 28, 2005)

\* *United States v. Heldeman*, 402 F.3d 220 (1st Cir. Mar. 29, 2005) (stating that "[t]he court has offered to treat almost any colorable claim in the district court as preserving the *Booker* issue and avoiding plain error requirements")

\* *United States v. Bringier*, 405 F.3d 310 (5th Cir. Mar. 31, 2005) (where defendant had challenged application of aggravating role enhancement, U.S.S.G. § 3B1.1, on basis that "the evidence at trial did not support a finding by the district court that he was a leader or organizer," and on appeal argued "that his objections below capture the essence of *Blakely* and the Sixth Amendment, and thus that this court should consider the error preserved for review," stating that defendant "did not make a *Blakely* or Sixth Amendment argument below, and we decline [his] suggestion that we consider his arguments below in the 'essence' of *Blakely* and the Sixth Amendment;" proceeding to review claims only for plain error and finding that defendant did not carry burden of showing that error affected his substantial rights)

*United States v. Mykytiuk*, 402 F.3d 773 (7th Cir. April 1, 2005) (where district court applied enhancement under drug guideline for creating substantial risk of harm to human life when fire occurred in methamphetamine lab and defendant objected on basis that he caused fire but did not do so while manufacturing meth and later withdrew objection, concluding “that Mykytiuk’s objection was not enough to allow him to escape the plain error standard of review,” but granting limited remand pursuant to *Paladino*)

*United States v. Kirkham*, unpublished, 2005 WL 827119, 2005 U.S. App. LEXIS 6134 (5th Cir. April 11, 2005) (where defendants objected to loss amount on basis that it must be proved in court and government never attempted to prove dollar amount, although they did not cite *Apprendi* or Sixth Amendment, finding that *Blakely/Booker* argument was preserved); *United States v. Akpan*, 407 F.3d 360 (5th Cir. April 14, 2005) (where one defendant repeatedly objected to district court’s determination of loss on ground that it had not been proven at trial and that amount must be limited to what was in indictment, but did not explicitly mention Sixth Amendment, *Apprendi*, or *Blakely* until Rule 28(j), find that argument as to loss (but perhaps not other enhancements) was preserved)

*United States v. Salazar-Samaniega*, unpublished, 2005 WL 941686, 2005 U.S. App. LEXIS 7061 (10th Cir. April 25, 2005) (where defendant was sentenced on date *Blakely* came out and filed Rule 35(a) six days later that district court did not rule upon but from which defendant appealed, stating that “parties are in agreement that defendant has properly preserved *Blakely/Booker* error and that a remand for resentencing . . . is required”)

*United States v. Fagans*, 406 F.3d 138 (2d Cir. April 27, 2005) (stating that “[a]lthough the Defendant’s objection, based on *Blakely*, to the compulsory use of the Guidelines could be viewed as limited to preserving only a Sixth Amendment objection, we think he sufficiently alerted the District Court to his claim that it was unlawful to use the Guidelines in a compulsory manner” and concluding that “[t]he Defendant’s objection to the compulsory use of the Guidelines was adequately preserved”)

\* *United States v. Pirani*, 406 F.3d 543 (8th Cir. April 29, 2005) (en banc) (although defendant objected to application of enhancements because they had not been proven beyond a reasonable doubt, finding that “[b]ecause Pirani did not couple this statement with a specific reference to *Apprendi* or *Blakely* or the Sixth Amendment, he did not preserve the very different question of whether the district court committed *Booker* error in construing the Guidelines as mandatory when invoking [a] cross-reference . . . .”; stating that *Coffey*, *Fox*, *Selwyn*, and *Sdoulam*, all *supra*, are not controlling) (N.B.: Heaney, J., dissents on this point)

## 2. Presentation in Court of Appeals

*United States v. Burgess*, unpublished, 2005 WL 124523, 2005 U.S. App. LEXIS 1135 (8th Cir. Jan. 24, 2005) (responding to defendant’s *pro se* supplemental brief, which raised *Blakely* claim, and remanding in light of *Booker*)

*United States v. Reese*, 397 F.3d 1337 (11th Cir. Jan. 27, 2005) (in case where defendant raised *Apprendi* challenge in district court and on appeal in briefs submitted prior to *Blakely*, supplemental briefs were filed in light of *Blakely*, panel decision issued last September (382 F.3d 1308) but mandate was withheld at request of member of court, now vacating prior opinion and remanding for resentencing consistent with *Booker*)

*United States v. Parsons*, 396 F.3d 1015 (8th Cir. Jan. 28, 2005) (per curiam) ((1) in case submitted for decision in December 2004, denying motion to file supplemental briefing in light of *Blakely*, where defendant claimed he “would never had admitted to the amount of loss . . . if he had known that these factors had to be proven beyond a reasonable doubt,” because defendant was sentenced only on basis of facts he admitted as part of plea; (2) further, developments in law in *Blakely* and *Booker* do not invalidate plea; (3) finally, finding that “there would no merit to an argument that Parsons is entitled to resentencing under advisory Guidelines” where he was sentenced at the low of the range that he had agreed to in his plea agreement), *aff’d after reh’g*, 408 F.3d 519 (8th Cir. May 26, 2005) (finding no plain error in sentencing under mandatory scheme); *distinguished by United States v. Haidley*, 400 F.3d 642 (8th Cir. Mar. 16, 2005)

\* *United States v. Oliver*, 397 F.3d 369 (6th Cir. Feb. 2, 2005) (finding that raising *Blakely* issue for first time in Rule 28(j) letter and at oral argument was sufficient to raise issue on appeal); *see also United States v. Trammel*, 404 F.3d 397 (6th Cir. April 8, 2005) (where defendant raised *Booker* claim for very first time at oral argument, considering it and granting remand; stating that “[w]hile this Court is generally suspicious of new claims advanced at oral argument, ‘this Court has discretion to correct plain errors affecting important rights of criminal defendants, even when not raised on appeal,’” as provided in Fed. R. Crim. P. 52(b))

*United States v. Cramer*, 396 F.3d 960 (8th Cir. Feb. 3, 2005) (declining to consider *Blakely* / *Booker* clam when raised for first time in Rule 28(j) letter where defendant had not sought to file a supplemental brief; reviewing “the sentence imposed for unreasonableness, judging it with regard to the factors in 18 U.S.C. § 3553(a)”)

*United States v. Hines*, 398 F.3d 713 (6th Cir. Feb. 7, 2005, reissued Feb. 23, 2005) (finding that defendant sufficiently raised *Blakely* issue in court of appeals by filing supplemental briefing after *Blakely*) (N.B.: this opinion was originally unpublished)

*United States v. Vieth*, 397 F.3d 615 (8th Cir. Feb. 8, 2005) (finding that “[e]ven if we were to address the merits of the issue raised in the Rule 28(j) letter [i.e., raised for the first time], the defendant would not be entitled to resentencing” because sentence was based on mandatory minimum, not Guidelines); *cited in United States v. Mullins*, 399 F.3d 888 (8th Cir. Mar. 3, 2005)

*United States v. Washington*, 398 F.3d 306 (4th Cir. Feb. 11, 2005) (noting that “[a]lthough appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker*

principles apply in this proceeding because the Court specifically mandated that we “must apply [*Booker*] . . . to all cases on direct review”)

*United States v. Little Dog*, 398 F.3d 1032 (8th Cir. Feb. 22, 2005) (denying motion for supplemental briefing on *Booker* when defendant was sentenced as career offender pursuant to U.S.S.G. § 4B1.1 and district court expressly considered and rejected possibility of upward or downward departure)

*United States v. Duran-Salazar*, unpublished, 2005 WL 419735, 2005 U.S. App. LEXIS 3143 (10th Cir. Feb. 23, 2005) (declining to address *Booker* claim when it was made for first time in Rule 28(j) supplemental authority letter)

*United States v. Vanhorn*, 399 F.3d 884 (8th Cir. Mar. 1, 2005) (where defendant filed supplemental brief in appeal from denial of motion to modify restitution after appeal of conviction and sentence, finding that *Booker* and Guidelines did not apply to post-judgment proceeding)

*United States v. Jefferson*, unpublished, 2005 WL 481572, 2005 U.S. App. LEXIS 3511 (10th Cir. Mar. 2, 2005) (where defendant voluntarily dismissed appeal of conviction of sentence in order to get Rule 35(b) motion, then appealed on *Blakely* issue after receiving 50% reduction in sentence, finding defendant had waived Sixth Amendment argument by not raising it in original appeal and dismissing for lack of jurisdiction)

*United States v. Pierce*, 400 F.3d 176 (4th Cir. Mar. 7, 2005) (basing dissent in part on majority’s failure to recognize plain error in sentencing based on *Booker* and noting that “[a]lthough Pierce did not directly raise this issue in briefing or oral argument, both of which took place pre-*Booker*, he did argue that the district court’s finding on the amount of loss was *not supported by the evidence before the jury* at trial” and “I would thus *sua sponte* recognize the plain *Booker* error in this case”), *sentence vacated upon rehearing*, 409 F.3d 228 (4th Cir. May 26, 2005)

*United States v. Aune*, unpublished, 2005 WL 591215, 2005 U.S. App. LEXIS 4271 (10th Cir. Mar. 15, 2005) (after denying *Blakely* argument as to one enhancement, stating that “[f]urthermore, because Aune does not assert that the district court erred under [*Booker*], we need not consider its application to his appeal”)

*United States v. Camacho-Ibarquen*, 404 F.3d 1283 (11th Cir. Mar. 30, 2005) (noting that where defendant raised Sixth Amendment error claim but not statutory error claim, “[w]e will not force upon Camacho an argument that he has not made which could produce a result that he does not want”), *on pet’n for reh’g*, 410 F.3d 1307 (11th Cir. June 2, 2005)

*United States v. Bifulco*, unpublished, 2005 WL 834641, 2005 U.S. App. LEXIS 6105 (2d Cir. April 11, 2005) (declining to address constitutionality of defendant’s sentence where, if defendant had

asserted Sixth Amendment claim, he would be entitled to a *Crosby* remand but he failed to do raise claim in briefs or by way of a Rule 28(j) letter)

*United States v. Dacus*, 408 F.3d 686 (11th Cir. May 3, 2005) (where defendant did not raise *Booker* claim in opening brief, but government conceded *Booker* error in its brief and defendant adopted government's position in his reply brief, stating that "[a]lthough we ordinarily refuse to consider an argument not raised in an initial brief, we consider the argument that Dacus's sentence was erroneous under *Booker* because both parties have joined the issue without objection"); see *United States v. Higdon*, \_\_\_ F.3d \_\_\_, 2005 WL 1744939 (11th Cir. July 8, 2005) (denying rehearing; concurrence and dissent lay out arguments for and against allowing issue to be raised for first time in supplemental brief)

*United States v. Vazquez-Rivera*, 407 F.3d 476 (1st Cir. May 18, 2005) (where defendant objected on basis of *Apprendi* in district court to judicial fact-finding but did not raise issue in opening brief on appeal (filed before *Blakely*), considering argument when raised in reply brief over government's argument of waiver)

*United States v. Taing*, unpublished, 2005 WL 1395110, 2005 U.S. App. LEXIS 11231 (10th Cir. June 14, 2005) (where defendant raised *Booker* claim for first time in Rule 28(j) letter but did not seek permission to file supplemental brief, declining to consider issue because court will not consider issues raised for first time in Rule 28(j) letter)

### 3. Not Raised in Either Court

*United States v. Cole*, 395 F.3d 929 (8th Cir. Jan. 27, 2005) (affirming sentence; noting at end of opinion that defendant had not raised any claims that implicate *Booker*)

*United States v. Grant*, 397 F.3d 1330 (11th Cir. Jan. 27, 2005) (affirming sentence; noting at beginning of opinion that defendant had not contended that *Apprendi*, *Blakely*, or *Booker* affected his sentence)

*United States v. Ribeiro*, 397 F.3d 43 (1st Cir. Feb. 8, 2005) (in case in which only suppression issues were raised, noting in passing that defendant was sentenced under mandatory Guidelines that *Booker* made advisory; defendant had been sentenced to 180 months, which reflected downward departure for diminished capacity)

*United States v. Konstantakakos*, unpublished, 2005 WL 348376, 2005 U.S. App. LEXIS 2250 (2d Cir. Feb. 11, 2005) (although remanding case as to lead defendant, who raised *Blakely* claim, affirming sentence as to defendant who neither raised own Sixth Amendment challenge nor joined in co-defendant's argument)

*United States v. McDaniel*, 398 F.3d 540 (6th Cir. Feb. 17, 2005) (noting that “[b]ecause neither *Booker* nor *Blakely* had been decided when [defendants] were sentenced or when the parties’ briefs were due to this court, and because neither [defendant] has taken any affirmative steps manifesting an intention to relinquish or abandon *Booker* rights, our review of [the defendants’] *Booker* claims is not foreclosed by the waiver doctrine;” further noting that “[w]hile it is clear that neither [defendant] has waived his *Booker* rights, whether they have forfeited their *Booker* claims (thereby requiring plain-error review) or whether they preserved them in the district court below (thereby requiring de novo review) is a closer question,” but finding that court need not decide question because remand is required even under plain error review)

*United States v. Moreno-Hernandez*, 397 F.3d 1248 (9th Cir. Feb. 18, 2005) (where defendant’s “entire appeal centered on the validity of the sixteen-level enhancement then required by the Guidelines,” finding that “[w]e cannot know whether the district court would have applied this enhancement under a system in which the Guidelines were only advisory” and that “[t]he appropriate course, consequently, is to vacate Moreno-Hernandez’s sentence and remand for re-sentencing”)

*United States v. Hardnett*, unpublished, 2005 WL 488796, 2005 U.S. App. LEXIS 3610 (4th Cir. Mar. 3, 2005) (in *Anders* case where neither counsel nor defendant raised claim, finding error in imposition of life sentence based on judicial findings)

*United States v. Dockery*, 401 F.3d 1261 (11th Cir. Mar. 3, 2005) (following GVR from Supreme Court in light of *Booker*, declining to consider *Booker* issue where defendant did not raise it while case was before court on appeal and nothing in *Booker* requires court to consider it as if timely raised) (N.B.: compare with *Washington*, cited *supra* in subpart 2 (presentation in court of appeals))

*United States v. Lebovitz*, 401 F.3d 1263 (11th Cir. Mar. 4, 2005) (noting that where neither party raised at any time any issue relating to *Booker*, court would say nothing about decision)

*United States v. Adams*, 401 F.3d 886 (8th Cir. Mar. 22, 2005) (where one defendant did not raise Sixth Amendment argument on appeal, court would not consider whether *Booker* affected sentence, but would review sentence for unreasonableness)

*United States v. Flemmi*, 402 F.3d 79 (1st Cir. Mar. 25, 2005) (where defendant made no argument in district or circuit courts about constitutionality of Guidelines or their application to his case, “we need not consider the effect of” *Booker*)

*United States v. Acuna-Valenzuela*, unpublished, 2005 WL 681786, 2005 U.S. App. LEXIS 4862 (10th Cir. Mar. 25, 2005) (where sentencing occurred after *Blakely* came down and after Supreme Court granted cert. in *Booker*, and defendant raised no *Blakely* objection in district court or argument on appeal, court would not *sua sponte* consider effect of *Booker*)

*United States v. Byrd*, 403 F.3d 1278 (11th Cir. Mar. 25, 2005) (where defendant challenged only his conviction on appeal and did not raise or attempt to raise any issue related to *Booker*, “we have no occasion to decide whether that decision might affect his case”)

*United States v. Parra*, 402 F.3d 752 (7th Cir. Mar. 29, 2005) (stating that although one defendant raised no argument in either district court or court of appeals, “[n]onetheless, it is still within this court’s discretion to recognize plain error where it occurs;” remanding on limited basis to district court “because Arturo’s sentence may be tainted with plain error”)

*United States v. Camacho-Ibarquen*, 404 F.3d 1283 (11th Cir. Mar. 30, 2005) (noting that where defendant raised Sixth Amendment error claim but not statutory error claim, “[w]e will not force upon Camacho an argument that he has not made which could produce a result that he does not want”), *on pet’n for reh’g*, 410 F.3d 1307 (11th Cir. June 2, 2005)

E. Harmless Error Review

(for cases addressing the impact on substantial rights, see *infra* section F.2)

*United States v. Harrower*, unpublished, 2005 WL 226164, 2005 U.S. App. LEXIS 1506 (4th Cir. Jan. 31, 2005) (where defendant had preserved *Blakely* error in fraudulent loan application case in which he received five months imprisonment and five years supervised release, granting defendant’s motion to submit case on briefs, vacating sentence, and remanding for resentencing)

\* *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); see *United States v. Serrano-Dominguez*, 406 F.3d 1221 (10th Cir. May 4, 2005) (in similar case, finding error harmless where district court had announced alternative sentence that was same as sentence imposed under mandatory guidelines); *United States v. Willis*, unpublished, 2005 WL 1525340 (10th Cir. June 29, 2005) (finding error to be harmless “[a]fter carefully considering the record as a whole, in the context of the district court’s rejection of Willis’s downward departure motion following a full evidentiary hearing on the elements that Willis contended were relevant, and the court’s decision to sentence Willis in the middle of the Guidelines range”); see also *Riccardi*, *infra*

*United States v. Fellers*, 397 F.3d 1090 (8th Cir. Feb. 15, 2005) (remanding for resentencing where jury had specifically rejected drug quantity used by court at sentencing and defendant had raised issue at sentencing)

*United States v. Sharpley*, 399 F.3d 123 (2d Cir. Feb. 16, 2005) (in case where defendant was sentenced before *Blakely* (and therefore presumably did not raise Sixth Amendment challenge), observing twice that “this is the rare case” where use of mandatory guideline scheme was harmless “even under” *Booker* and *Crosby*)

*United States v. Ordaz*, 398 F.3d 236 (3d Cir. Feb. 23, 2005) (where defendant had objected on *Apprendi* grounds to judicial fact-finding as to drug quantities and prior convictions at sentencing held in March 2004, vacating sentence and remanding without discussion of what the error was or whether it was harmless), *cited in United States v. Able*, unpublished, 2005 WL 428758, 2005 U.S. App. LEXIS 3229 (3d Cir. Feb. 24, 2005) (where defendant received sentence at high end of guideline range, remanding for resentencing) (N.B.: it is not clear from decision whether issue was preserved where sentencing occurred in March 2004); *see also 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”); *but see United States v. Hill*, 411 F.3d 425 (3d Cir. June 14, 2005) (denying motion for summary remand where district court had indicated it would impose same sentence in alternative under indeterminate scheme)

*United States v. Hazelwood*, 398 F.3d 792 (6th Cir. Feb. 23, 2005) (in determining whether improper application of enhancement was harmless where district court had sentenced defendant at low end of range and had indicated that it might have sentenced differently if it had sustained other objections, concluding that “[a]s a result, it is at least possible, even under a non-mandatory guidelines system, that the judge, considering the proper Guideline range, would have sentenced Hazelwood to a sentence below that which he actually received;” declining to consider defendant’s unpreserved claims of Sixth Amendment violations)

*United States v. Newill*, unpublished, 2005 WL 468312, 2005 U.S. App. LEXIS 3463 (4th Cir. Mar. 1, 2005) (remanding for resentencing where jury had found defendant’s offense involved lower drug quantity than that used by court at sentencing and defendant had raised Sixth Amendment issue at sentencing)

*United States v. Collins*, 401 F.3d 212 (4th Cir. Mar. 2, 2005) (discussing *Hughes*; stating that “[the] mandate from the Supreme Court present[ed] the courts of appeal with two options: decide whether a district court’s sentence, under the old regime, was reasonable, or remand the case and direct the district court to resentence the Defendant in accordance with *Booker*. In *Hughes*, this Court emphatically chose the second option . . . .”) (N.B.: although not at all clear from the opinion, trial counsel raised the Sixth Amendment argument at the sentencing)

*United States v. Jones*, 399 F.3d 640 (6th Cir. Mar. 3, 2005) (because defendant raised challenge in district court, reviewing ruling *de novo*; describing “the district court’s factual finding as to the amount of drugs, resulting in an enhancement of Jones’ sentence under the Guidelines, [as] the textbook example of a Sixth Amendment violation under *Booker*”)

*United States v. Story*, unpublished, 2005 WL 566696, 2005 U.S. App. LEXIS 4096 (6th Cir. Mar. 9, 2005) (in case where defendant objected to gun enhancement at sentencing on basis that evidence was uncorroborated and unreliable, stating that because the defendant’s “appeal raises a genuine Sixth Amendment violation and he preserved the objection, we do not determine whether the sentence impose was unreasonable,” preferring to remand case to district court)

*United States v. Sayre*, 400 F.3d 599 (8th Cir. Mar. 9, 2005) (where district court departed upward for particularly serious nature of obstructive conduct as to which defendant had agreed two-level adjustment under U.S.S.G. § 3C1.1 was proper, finding that defendant’s substantial rights were not affected because it was clear from record that lower court had exercised discretion to impose what it believed was appropriate sentence)

\* *United States v. Haidley*, 400 F.3d 642 (8th Cir. Mar. 16, 2005) (where defendant had objected specifically to mandatory application of guidelines, there was no Sixth Amendment error, and defendant received low end of range, concluding that error in sentencing defendant under mandatory scheme was not harmless; discussing difference between constitutional and non-constitutional error vis-a-vis government’s burden to show harmlessness; regardless of which standard applies, finding error was not harmless because district court sentenced at bottom of range and defendant had pointed to facts that can be considered under § 3553(a)); see *United States v. Garcia*, 406 F.3d 527 (8th Cir. April 27, 2005) (following *Haidley* in similar circumstances, even where low end of guideline range was only one month over statutory mandatory minimum)

*United States v. Jardine*, unpublished, 2005 WL 678381, 2005 U.S. App. LEXIS 4870 (9th Cir. Mar. 24, 2005) (reviewing for harmless error because defendant had raised *Apprendi* objection at sentencing; vacating and remanding where judge, not jury, found quantity of drugs)

*United States v. Anderson*, unpublished, 2005 WL 735587, 2005 U.S. App. LEXIS 5205 (4th Cir. Mar. 31, 2005) (concluding “that because the alternative sentence the district court pronounced in case the federal sentencing guidelines were invalidated was identical to the mandatory sentence imposed . . . , any error resulting from the sentence imposed by the district court was harmless”); *United States v. Washington*, unpublished, 2005 WL 752372, 2005 U.S. App. LEXIS 5296 (4th Cir. April 1, 2005) (same); *United States v. Martinez*, unpublished, 2005 WL 826124, 2005 U.S. App. LEXIS 5959 (4th Cir. April 11, 2005) (same)

*United States v. Paz*, 405 F.3d 946 (11th Cir. April 5, 2005) (in first opinion from circuit to address harmless error review, finding that government could not prove beyond a reasonable doubt that

the constitutional error of judicial fact-finding was harmless where district court stated at sentencing that it would have sentenced defendant to six months, not ten months, of imprisonment if the Guidelines were found to be unconstitutional in part or in whole); *United States v. Nelson*, unpublished, 2005 WL 956962, 2005 U.S. App. LEXIS 7398 (11th Cir. April 26, 2005) (government could not carry burden where, in sentencing defendant at low end of range, district court stated that “perhaps the purposes of statutory sentencing would be served at an even lower range”); *United States v. Valencia-Aguirre*, unpublished, 2005 WL 1006840, 2005 U.S. App. LEXIS 7665 (11th Cir. April 29, 2005) (government could not carry burden where district court “stated that the base offense level [in this drug importation case] was ‘undoubtedly high,’ but that it would adhere strictly to the guidelines”); *United States v. Harris*, unpublished, 2005 WL 1006052, 2005 U.S. App. LEXIS 7662 (11th Cir. May 2, 2005) (government could not carry burden where district court stated that “the guidelines are such that I have to impose a sentence in the penitentiary” and gave sentence at low end of range); *United States v. Robles*, 408 F.3d 1324 (11th Cir. May 10, 2005) (finding error to be harmless where district court announced alternative sentence that was same as sentence imposed under mandatory guidelines); *United States v. Petho*, 409 F.3d 1277 (11th Cir. May 18, 2005) (same); see *Davis* (May 4), *infra*

*United States v. Thompson*, 403 F.3d 533 (8th Cir. April 6, 2005) (where guideline range for felon in possession was 41-51 months, district court imposed sentence in middle of range of 46 months and district court “insulated” sentence by announcing identical alternative sentence, finding that error in sentencing defendant under mandatory system was harmless and summarily finding that sentence was reasonable); *United States v. Bassett*, 406 F.3d 526 (8th Cir. May 6, 2005) (similar result in child porn cases where guideline sentence and alternative sentence were both 90 months)

\* *United States v. Schlifer*, 403 F.3d 849 (7th Cir. April 7, 2005) (where defendant who was sentenced as career offender and received downward departure for substantial assistance made both Sixth Amendment and severability arguments in district court, reviewing for harmless error; finding no Sixth Amendment error in sentencing as career offender, but finding error in sentencing under mandatory guidelines; reversing and remanding for resentencing after rejecting government’s arguments that error was harmless because defendant received 3-level cooperation departure (“This argument has some facial appeal, but it ignores the fact that a sentencing judge, prior to *Booker*, had the guidelines and the appellate standard of review in mind when fashioning a departure”), and that error was harmless because district court rejected defendant’s request for downward departure (“the court’s denial of Schlifer’s motion sheds no light on whether the court would have departed had Schlifer presented different grounds, or whether the court might have granted the very same motion had it known that *Booker* effectively allows greater latitude in making departure decisions”))

*United States v. Bethea*, unpublished, 2005 WL 807016, 2005 U.S. App. LEXIS 5837 (4th Cir. April 8, 2005) (in escape case, 18 U.S.C. § 751(a), where district court departed upward to statutory maximum and announced that it would impose the same sentence even if the guidelines were not mandatory, finding *Booker* error harmless because the alternate sentence was based upon the guidelines

and the factors under § 3553(a) and was not greater than the statutory maximum; further finding, with no explanation whatsoever, that sentence was reasonable)

*United States v. Kirkham*, unpublished, 2005 WL 827119, 2005 U.S. App. LEXIS 6134 (5th Cir. April 11, 2005) (where government did not argue that district court's use of mandatory guidelines did not affect defendants' substantial rights, and instead agreed that sentences must be vacated and cases sent back, stating that "[w]e glean no indication from the record on appeal that the mandatory nature of the Guidelines and the facts found by the court rather than by the jury did not affect the length of the defendants' sentences" and remanding cases)

*United States v. Marcussen*, 403 F.3d 982 (8th Cir. April 11, 2005) (finding error in sentencing defendant as career offender under mandatory guidelines to be harmless because district court stated that it would give same sentence if it had discretion)

*United States v. Lang*, 405 F.3d 1060 (10th Cir. April 12, 2005) (where original sentences vacated on appeal by government of downward departure, and defendants objected at resentencing based on *Blakely*, finding that harmless error review applied because scope of remand from first appeal did not prevent district court from considering *Blakely* claim; discussing mandate rule; remanding for resentencing where there was Sixth Amendment error that government did not contend was harmless)

*United States v. Drayton*, unpublished, 2005 WL 846140, 2005 U.S. App. LEXIS 6192 (3d Cir. April 13, 2005) (in case sentenced on July 28, 2004 (after *Blakely*), where guideline range was 63-78 months but statutory maximum was 60 months and court imposed 60 months, remanding because district court's statement that "[b]ecause I believe that I am bound by the guidelines, I will impose a guideline sentence" suggested that "the guidelines may have impacted on the sentence the court imposed")

*United States v. Garcia*, 405 F.3d 1260 (11th Cir. April 13, 2005) (vacating sentence and remanding where jury found defendant responsible for no more than 100 marijuana plants in special interrogatory but district court found defendant responsible for 312 plants using a preponderance standard based on trial evidence, defendant raised *Apprendi*-type challenge in district court and in opening and supplemental briefs on appeal, and "[a]t no point [did] the government argue[ ] that either plain error or harmless error should apply" to claim)

*United States v. Akpan*, 407 F.3d 360 (5th Cir. April 14, 2005) (where Sixth Amendment issue was preserved, stating that "[w]e recognize that several circuit courts appear to be taking divergent positions on the question whether a harmless error analysis applies when a Sixth Amendment violation occurs" and that "[w]ere we to review Okoro's sentence for harmless error, however, we would find that here the error was harmful" because government could not demonstrate beyond a reasonable doubt that district court would not have sentenced Okoro differently under advisory guidelines) (N.B.: in contrast, for co-defendant who had not preserved Sixth Amendment issue, court found that he could not demonstrate that district court would have sentenced him differently under advisory guidelines); *United*

*States v. Cardenas*, unpublished, 2005 WL 1444234, 2005 U.S. App. LEXIS 11941 (5th Cir. June 21, 2005) (finding error to be harmless because district court issued identical alternative sentence)

*United States v. Bourgeois*, unpublished, 2005 WL 879599, 2005 U.S. App. LEXIS 6599 (1st Cir. April 18, 2005) (noting difference in what government must prove to show error harmless depending on whether error is of constitutional dimension; where district court sentenced defendant at bottom of range and counsel made extensive proffer of witnesses to be called if guidelines were not mandatory, court of appeals was “reluctant to say” that error was harmless)

*United States v. Riccardi*, 405 F.3d 852 (10th Cir. April 19, 2005) (after finding Sixth Amendment error, concluding that it was harmless because evidence at trial overwhelmingly supported district court’s factual findings, jury made findings that supported some of enhancements, defendant did not challenge factual sufficiency, and district court sentenced defendant at top of guideline range after referring to § 3553(a) factors) (N.B.: this appears to be first opinion to apply *Cotton*-type analysis to Sixth Amendment error); *cf. United States v. Windrix*, 405 F.3d 1146 (10th Cir. May 3, 2005) (finding error in district court’s finding of drug quantity not to be harmless without undertaking *Cotton* analysis)

*United States v. Davis*, 407 F.3d 1269 (11th Cir. May 4, 2005) (rejecting government’s argument that grant of its motion for substantial assistance departure eliminated or rendered harmless any *Booker* error because district court’s discretion was not unfettered, but rather limited to considering only the assistance defendant had provided; “[i]mportantly, the sentencing court could not permissibly consider the sentencing factors announced in 18 U.S.C. § 3553(a)”; *see United States v. Morgan*, unpublished, 2005 WL 1519358 (11th Cir. June 28, 2005) (similar with respect to district court’s refusal to depart down on other bases; relying on *Davis*); *cf. United States v. Tesoriero*, 413 F.3d 291 (2d Cir. June 28, 2005) (similar to *Davis*))

*United States v. Ollson*, 413 F.3d 1119 (10th Cir. June 22, 2005) (finding error to be harmless where district court granted § 5K1.1 departure and sentenced defendant to 46 months, not quite 20% below 57-month low end of applicable guideline range)

## F. Plain Error Review

### 1. Nature and Existence of Error

*United States v. Milan*, 398 F.3d 445 (6th Cir. Feb. 10, 2005) (in two-defendant appeal in which both defendant pled guilty to drug offenses, finding plain error as to one defendant because district court found facts that he did not admit, but no error as to second defendant because he was sentenced only on basis of facts he admitted; discussing Second, Fourth and Eleventh Circuits’ differing approaches to plain error analysis; noting that panel is bound by Sixth Circuit’s first plain error decision in *Oliver*); *see Bradley*, *infra*

*United States v. Murdock*, 398 F.3d 491 (6th Cir. Feb. 15, 2005) (finding no Sixth Amendment error because district court based fraud loss only on amounts admitted by defendant; citing to *Milan, supra*, and noting that “[t]his opinion should not be read to foreclose a defendant’s argument, in the appropriate case, that this Court should vacate and remand his sentence on the ground that the district court regarded the Sentencing Guidelines as mandatory at the time of his sentencing. However, Murdock has made no such argument in this case, and we decline to do so on his behalf.”); see *Bradley, infra*

\* *United States v. Barnett*, 398 F.3d 516 (6th Cir. Feb. 16, 2005) (in ACCA case where default offense level under U.S.S.G. § 4B1.4 applied (i.e., such that there was no fact-finding, and court held in earlier portion of opinion that there was no Sixth Amendment violation in district court determining nature of prior convictions), finding that treatment by district court of Guidelines as mandatory constituted error), *pet. for cert. filed by U.S.*; see *Bradley, infra*

*United States v. Gonzalez*, unpublished, 2005 WL 415957, 2005 U.S. App. LEXIS 3154 (6th Cir. Feb. 22, 2005) (where defendant’s drug guideline offense level calculated on basis of amount of drug found by jury in 2003 trial but defendant was sentenced as career offender, U.S.S.G. § 4B1.1, vacating sentence and remanding “[s]ince the mandatory element of the Guidelines has been removed, leaving the sentence to the reasonable discretion of the district court, [which] may no longer approve of the 22-year sentence which [it] was required to impose;” further noting that such an “inference is particularly strong here, where the judge] sentenced the defendant at the bottom of the Guideline range”)

\* *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. Feb. 22, 2005) (in first opinion from circuit regarding *Booker*, stating that “[t]he *Booker* error is that the defendant’s Guidelines sentence was imposed under a mandatory system” and that “[t]he error is not that a judge (by a preponderance of the evidence) determined facts under the Guidelines which increased a sentence beyond that authorized by the jury verdict or an admission by the defendant; the error is only that the judge did so in a mandatory Guidelines system;” and finally, that “[a] mandatory minimum sentence imposed as required by a statute based on facts found by a jury or admitted by a defendant is not a candidate for *Booker* error”); see also *United States v. Serrano-Beauvaix*, 400 F.3d 50 (1st Cir. Mar. 4, 2005) (Lipez, J., concurring, joined by Torruella, J.); *United States v. MacKinnon*, 401 F.3d 8 (1st Cir. Mar. 16, 2005)

*United States v. Williams*, 399 F.3d 450 (2d Cir. Feb. 23, 2005) (in follow-up to *Crosby*, agreeing with Eleventh Circuit in *Rodriguez* that “the Sixth Amendment error is the mandatory use of the Guidelines enhancement, not the fact of the enhancement”)

*United States v. Shelton*, 400 F.3d 1325 (11th Cir. Feb. 25, 2005) (noting two forms of error, one under Sixth Amendment stemming from judicial fact-finding in mandatory scheme, and one based on mandatory nature of guidelines; finding no Sixth Amendment error in fact-finding as to drug quantity where defendant “admitted” facts by failing to dispute PSR; but finding plain error as to sentencing under mandatory system and that error affected defendant’s substantial rights because defendant had established reasonable probability that outcome would have been different under advisory system in that district

expressed several times that it thought sentence was too severe); see *United States v. Camacho-Ibarquen*, 404 F.3d 1283 (11th Cir. Mar. 30, 2005) (noting that where defendant raised Sixth Amendment error claim but not statutory error claim, “[o]ur finding of *Shelton* error would not help him achieve that goal [of obtaining lower sentence] and might result in a longer sentence than he has now” and that “[w]e will not force upon Camacho an argument that he has not made which could produce a result that he does not want”), *on pet’n for reh’g*, 410 F.3d 1307 (11th Cir. June 2, 2005)

*United States v. Mares*, 402 F.3d 511 (5th Cir. Mar. 4, 2005) (in first opinion from circuit to address *Booker*, finding Sixth Amendment error to be that district court increased sentence based on its findings of facts under mandatory Guidelines system), *pet. for cert. filed* (U.S. Mar. 31, 2005) (No. 04-9517); *cf. United States v. Martinez-Lugo*, 411 F.3d 597 (5th Cir. June 7, 2005) (describing non-constitutional remedy error as *Fanfan* error, i.e., sentencing under mandatory scheme without any Sixth Amendment error)

*United States v. Gilchrist*, unpublished, 2005 WL 599745, 2005 U.S. App. LEXIS 3945 (4th Cir. Mar. 8, 2005) (Luttig, J., concurring in grant of rehearing and order of remand) (explaining in extended discussion the two forms of error established by *Booker*); *United States v. Washington*, 404 F.3d 834 (4th Cir. April 15, 2005) (Luttig, J., dissenting)

*United States v. Bradley*, 400 F.3d 459 (6th Cir. Mar. 10, 2005) (noting that the fact that defendant “does not have a tenable *constitutional* claim, however, does not prove the absence of a tenable *statutory* claim”)

*United States v. McCraven*, 401 F.3d 693 (6th Cir. Mar. 17, 2005) (finding no Sixth Amendment error in application of “gun bump” under U.S.S.G. § 2D1.1(b)(1) where defendant pled guilty to firearm charge; however, remanding for resentencing “[b]ecause the remedy ordered by the Court in *Booker* had the effect of altering the Sentencing Reform Act to make the guidelines advisory [and] we believe that it would be prudent to accord the district court an opportunity to take another look at the sentence in light of the new dispensation”)

*United States v. Howard*, unpublished, 2005 WL 612121, 2005 U.S. App. LEXIS 4446 (6th Cir. Mar. 17, 2005) (noting that if counsel’s concession as to four-level enhancement for loss at pre-*Blakely* sentencing constituted admission by defendant, then there was no harm sustained from Sixth Amendment violation in also applying two-level obstruction of justice enhancement because sentence actually imposed fell within range that would have applied without obstruction enhancement)

*United States v. Kopietz*, unpublished, 2005 WL 705768, 2005 U.S. App. LEXIS 4986 (6th Cir. Mar. 29, 2005) (while finding no Sixth Amendment error because defendant’s sentence fell within range established by facts he admitted at plea, finding plain error when it was clear that court sentenced defendant on basis that Guidelines were mandatory; looking at comments judge made at plea regarding effect of PROTECT Act in limiting judge’s discretion to depart down)

*United States v. Webb*, 403 F.3d 373 (6th Cir. April 6, 2005) (on plain error review, while finding no Sixth Amendment error, finding that district court did err in determining defendant's sentence based on presumption that Guidelines were mandatory)

*United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. April 8, 2005) (en banc) (noting "two distinct types" of *Booker* error: (1) "a court could err by relying upon judge-found facts, other than those of prior convictions, to enhance a defendant's sentence mandatorily" ("constitutional *Booker* error"), and (2) "a sentencing court could err by applying the Guidelines in a mandatory fashion, as opposed to a discretionary fashion, even though the resulting sentence was calculated solely upon facts that were admitted by the defendant, found by the jury, or based upon the fact of a prior conviction" ("non-constitutional *Booker* error"); *United States v. Lawrence*, 405 F.3d 888 (10th Cir. April 20, 2005); *United States v. Benson*, unpublished, 2005 WL 1041370, 2005 U.S. App. LEXIS 8160 (10th Cir. May 5, 2005) (defendant could not show that Sixth Amendment error affected substantial rights where district court granted defendant's request for departure and imposed sentence of 72 months, down from 87-108 month range)

*United States v. Bush*, 405 F.3d 909 (10th Cir. April 26, 2005) (finding no Sixth Amendment error where defendant's base offense level was determined based only on combination of amounts of drugs alleged in indictment, which jury necessarily found in convicting him)

\* *United States v. Pirani*, 406 F.3d 543 (8th Cir. April 29, 2005) (en banc) (Sixth Amendment error "was not merely the enhancement of a sentence on the basis of judge-found facts" but rather, the "constitutional error arose from the *combination* of the enhancement and a mandatory Guidelines regime")

*United States v. Ameline*, 409 F.3d 1073 (9th Cir. June 1, 2005) (en banc) (in regard to Sixth Amendment error, stating that "[s]tanding alone, judicial consideration of facts and circumstances does not violate the Sixth Amendment right to trial" and that "[a] constitutional infirmity arises only when extra-verdict findings are made in a mandatory guidelines system"; collecting cases from other circuits)

## 2. Error's Impact Upon Substantial Rights

\* *United States v. Hughes*, 396 F.3d 374 (4th Cir. Jan. 24, 2005) (finding Sixth Amendment plain error in sentencing of defendant based on judicial factfinding under mandatory guideline scheme), *opinion reissued with revisions after panel reh'g*, 401 F.3d 540 (4th Cir. Mar. 16, 2005) (explaining at length why court analyzed third prong as it did), *reh'g en banc denied*, April 8, 2005; *United States v. Ruhbayan*, 406 F.3d 292 (4th Cir. April 21, 2005) (not only finding error in judicial factfinding but further stating that "[b]ecause the court's calculation of the other enhancements and departures rested in part on its application of the § 3B1.1(a) enhancement, its reliance on facts permeated Ruhbayan's sentencing")

*United States v. Bruce*, 396 F.3d 697 (6th Cir. Feb. 3, 2005) (in case involving application of U.S.S.G. § 3C1.1 based on defendant's false statement to probation officer regarding his citizenship, although finding that error occurred that was plain, declining to decide whether error affected substantial rights and declining to exercise discretion to notice error where defendant contested only that statement was not material, not that he had made statement, and where district court had sentenced defendant at top end of range, such that it declined to exercise discretion it had even under mandatory system), *vacated*, 405 F.3d 1034 (6th Cir. April 7, 2005)

\* *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. Feb. 4, 2005) (in MDMA case that went to trial, where defendant had objected at sentencing (held before *Blakely*) about use of inconsistent, uncertain, and vague trial testimony to set quantity of tablets, rejecting this contention; further, on plain error review, rejecting *Blakely* claim because, while there was error that was plain, it did not affect defendant's substantial rights; burden was on defendant to show prejudice; any argument that outcome would have been different was pure speculation; discussing and rejecting positions of Second, Fourth, and Sixth Circuits in, respectively, *Crosby*, *Hughes*, and *Oliver*), *reh'g denied*, 406 F.3d 1261 (11th Cir. April 19, 2005) (order accompanied by lengthy concurring and dissenting opinions), *cert. denied*, 2005 WL 483174 (June 20, 2005); *see United States v. Ingraham*, unpublished, 2005 WL 1052021, 2005 U.S. App. LEXIS 7810 (11th Cir. May 4, 2005) (clarifying that while not explicitly addressed in *Rodriguez*, court rejected argument that Sixth Amendment error is structural); *United States v. Williams*, 408 F.3d 745 (11th Cir. May 6, 2005) (where defendant pled to multiple Hobbs Act robberies, district court applied firearm enhancement only once instead of for each count, and sentenced defendant to concurrent sentences at high end of range, concluding that district court selected 262 month sentence "because he considered that to be the appropriate sentence and not because he thought that the Sentencing Guidelines mandated that sentence")

*United States v. Hines*, 398 F.3d 713 (6th Cir. Feb. 7, 2005, reissued Feb. 23, 2005) (on plain error, rejecting government's argument that defendant's substantial rights were not affected where jury heard evidence regarding drug quantity and firearm possession because argument "ignores impact and applicability of *Booker*" and because "the Government's view of an effect on the substantial rights of Hines is unduly limited," even while acknowledging that district court's factual findings as to drug quantity and firearms were supported by trial record) (N.B.: this opinion was originally unpublished)

\* *United States v. Barnett*, 398 F.3d 516 (6th Cir. Feb. 16, 2005) (2-1) (in ACCA case where district court had imposed sentence in middle of range, stating that "[w]e are convinced that this is an appropriate case in which to presume prejudice" because district court might well have imposed lower sentence under discretionary scheme but defendant faced "extraordinary difficulty" in showing that his sentence would have been different; noting that "[the] fundamental difference between the pre- and post-*Booker* sentencing frameworks illustrates our deep concern with speculating, based merely on a middle-of-the-range sentence imposed under the mandatory Guidelines framework, that the district court would not have sentenced Barnett to a lower sentence under the advisory Guidelines regime"), *pet. for cert. filed by U.S.*; *see United States v. Terry*,

\* *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. Feb. 22, 2005) (in first opinion from circuit regarding *Booker*, discussing different standards for assessing effect of error on outcome; concluding that standard expressed in *United States v. Dominguez-Benitez*, 124 S. Ct. 2333 (2004) – that “[a] defendant must . . . satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding” – is most apt); *but see United States v. Serrano-Beauvaix*, 400 F.3d 50 (1st Cir. Mar. 4, 2005) (Lipez, J., concurring, joined by Torruella, J.) (while recognizing that *Antonakopoulos* is binding on subsequent panels, writing to explain that defendants should be entitled to presumption of prejudice that government must then try to rebut); *United States v. Santiago-Vazquez*, unpublished, 2005 WL 779641, 2005 U.S. App. LEXIS 5657 (1st Cir. April 7, 2005) (Carter, D. Me., sitting by designation, concurring) (concurring in rejection of defendant’s *Booker* challenge only because panel bound by *Antonakopoulos*; believing that decision to be even more flawed than even Judge Lipez suggests)

\* *United States v. Williams*, 399 F.3d 450 (2d Cir. Feb. 23, 2005) (in follow-up to *Crosby*, defending court’s remand approach by explaining why court disagrees with Eleventh Circuit in *Rodriguez* as to need for defendant to demonstrate prejudice, but also suggesting that approach of Fourth Circuit (*Hughes*) and Sixth Circuit (*Oliver*) of requiring remand, while “far more consonant with precepts of justice than an affirmance,” may go too far in other direction)

\* *United States v. Paladino*, 401 F.3d 471 (7th Cir. Feb. 25, 2005) (in first opinion from circuit on plain error, rejecting government’s argument that if a “judge imposed a sentence higher than the guideline minimum, this shows that he wouldn’t have imposed a lighter sentence even if he had known the guidelines were merely advisory” because “[a] conscientious judge . . . would pick a sentence relative to the guideline range,” i.e., “if he thought the defendant a more serious offender than an offender at the bottom of the range, he would give him a higher sentence even if he thought the entire range too high;” adopting approach (with modification) of Second Circuit in *Crosby* and *Williams* of remanding to district court to determine if that court would give different sentence under advisory Guidelines); *see, e.g., United States v. Re*, 401 F.3d 828 (7th Cir. Mar. 22, 2005); *United States v. Melendez*, 401 F.3d 851 (7th Cir. Mar. 24, 2005); *United States v. Spano*, 401 F.3d 837 (7th Cir. Mar. 24, 2005); *United States v. Della Rose*, 403 F.3d 891 (7th Cir. April 8, 2005) (remanding where district court sentenced defendant to high end of range)

*United States v. Lee*, 399 F.3d 864 (7th Cir. Feb. 25, 2005) (expanding on *Paladino, supra*; finding no plain error where defendant was sentenced to statutory maximum, which was well below guideline range (as to which district court made various factual findings that increased it), and district court “expressed frustration at his inability to impose a higher” sentence); *see United States v. Rodriguez-Garza*, unpublished, 2005 WL 697213, 2005 U.S. App. LEXIS 4876 (7th Cir. Mar. 22, 2005) (finding limited remand unnecessary because district court had stated it would impose same sentence if guidelines were found unconstitutional)

*United States v. Shelton*, 400 F.3d 1325 (11th Cir. Feb. 25, 2005) (finding no Sixth Amendment error, but finding plain error as to sentencing under mandatory system and that error affected defendant’s

substantial rights because defendant had established reasonable probability that outcome would have been different under advisory system in that district expressed several times that it thought sentence was too severe); *see United States v. Claudio*, unpublished, 2005 WL 901860, 2005 U.S. App. LEXIS 7222 (11th Cir. April 19, 2005) (finding defendant satisfied third prong where district court sentenced him to low end of range, recognized several mitigating factors, and stated that it had no choice but to sentence him as it did); *United States v. Martinez*, 407 F.3d 1170 (11th Cir. April 29, 2005) (finding defendant satisfied third prong where district court repeatedly expressed frustration at having to sentence defendant as career offender); *United States v. Ballestero*, unpublished, 2005 WL 1038769, 2005 U.S. App. LEXIS 7960 (11th Cir. May 4, 2005) (finding defendant satisfied third prong where district court granted two reductions and stated that “I intend, of course, to sentence him at the lowest end of the guideline, the lowest I can give him”)

*United States v. Williams*, unpublished, 2005 WL 513506, 2005 U.S. App. LEXIS 3658 (6th Cir. Mar. 3, 2005) (applying *Barnett*’s rebuttable presumption of prejudice and finding plain error where district court had denied downward departure but had “struggled” with decision to sentence defendant to imprisonment rather than home confinement)

*United States v. Serrano-Beauvaix*, 400 F.3d 50 (1st Cir. Mar. 4, 2005) (following *Antonakopoulos*; finding that district court’s statement that “I have to consider the fact that I cannot sentence him to 60 months” and that “[t]he lowest I can sentence [the defendant] is 63” months is not enough for defendant to carry burden that there was reasonable probability that he would be sentenced more leniently under advisory Guidelines)

*United States v. Mares*, 402 F.3d 511 (5th Cir. Mar. 4, 2005) (in first opinion from circuit to address *Booker*, agreeing with Eleventh Circuit in *Rodriguez* that defendant bears heavy burden in establishing that error affected his substantial rights, i.e., that district court would reach significantly different result under advisory scheme; finding that defendant here did not carry burden), *pet. for cert. filed* (U.S. Mar. 31, 2005) (No. 04-9517); *followed in United States v. Mendoza-Baena*, unpublished, 2005 WL 607919, 2005 U.S. App. LEXIS 4369 (5th Cir. Mar. 16, 2005) (affirming sentence where district court did not rely on any fact not found by jury in setting sentence and nothing in record indicated that court would have sentenced defendant differently); *United States v. Pratt*, unpublished, 2005 WL 629824, 2005 U.S. App. LEXIS 4546 (5th Cir. Mar. 18, 2005) (finding that error did not affect substantial rights where district court sentenced defendant to 104 months, in middle of 92-115 month range); *United States v. Infante*, 404 F.3d 376 (5th Cir. Mar. 21, 2005) (finding that error did not affect defendant’s substantial rights where “[t]he judge imposed a sentence in the middle of the properly determined Guidelines range, and there is no indication in the record from the judge’s remarks or otherwise that the judge would have reached a different conclusion in an advisory regime”); *United States v. Valenzuela-Quevedo*, 407 F.3d 728 (5th Cir. April 25, 2005) (finding that error did not affect substantial rights where “district court explicitly stated that [defendant] had not learned from his prior mistakes; indicated he felt that one of [defendant’s] prior sentences was an inadequate penalty . . .; discussed with disapproval [defendant’s]

criminal record . . . ; and evinced approval of the applicability of the career offender designation . . . .”); *cf. Pennell, infra*

*United States v. Hamm*, 400 F.3d 336 (6th Cir. Mar. 8, 2005) (in child sex case in which there was no Sixth Amendment error because defendant was sentenced based solely on facts he admitted, finding error in sentencing under mandatory Guidelines where, although district court denied downward departure, it sentenced defendant to low end of range: “Based upon the district court’s imposition of a sentence at the low end of the range and its apparent sympathy for Hamm, we believe that the court might have sentenced Hamm to fewer than 33 months in prison if it had felt that it were free to do so.”); *cf. United States v. Schneiderhan*, 404 F.3d 73 (1st Cir. April 13, 2005) (in case involving Sixth Amendment error, finding no effect on substantial rights where, although district court sentenced defendant at low end of range, court rejected request for downward departure, stating, “I recognize my authority under [*Koon*] . . . but I find that is it not appropriate in the circumstances of this case to depart downward in view of the seriousness of the offenses of which the jury has found the defendant guilty and the absence of any expression of genuine remorse for the commission of the crime”); *United States v. Cacho-Bonilla*, 404 F.3d 84 (1st Cir. April 14, 2005) (finding no reasonable probability that defendant would receive lower sentence where district court rejected one ground for departure, took another into account by sentencing at low end of range, and stated that while court gave every break that it could, it was enough, and the behavior warranted a sentence that reflected the seriousness of the offense)

*United States v. Sayre*, 400 F.3d 599 (8th Cir. Mar. 9, 2005) (where district court departed upward for particularly serious nature of obstructive conduct as to which defendant had agreed two-level adjustment under U.S.S.G. § 3C1.1 was proper, finding that defendant’s substantial rights were not affected because it was clear from record that lower court had exercised discretion to impose what it believed was appropriate sentence)

*United States v. Ryan*, unpublished, 2005 WL 566726, 2005 U.S. App. LEXIS 4096 (6th Cir. Mar. 10, 2005) (where government conceded that there was Sixth Amendment error because district court engaged in factfinding but argued that evidence was overwhelming as to enhancement, relying on *Oliver* and § 3742(f)(1) to remand for resentencing)

*United States v. Funk*, unpublished, 2005 WL 602597, 2005 U.S. App. LEXIS 4338 (6th Cir. Mar. 15, 2005) (after finding that there was no Sixth Amendment error in sentencing defendant as career offender, finding that there was error in sentencing defendant under mandatory guidelines and that error was prejudicial where district court sentenced defendant to bottom end of range and stated that it thought sentence was too severe)

*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. Villegas*, 404 F.3d 355 (5th Cir. Mar. 17, 2005) (distinguishing between harm that defendant must show for *Booker* error and harm that he must show for error stemming from misapplication of Guidelines; as to former, question is whether defendant can show “a reasonable probability that the district court would have imposed a different sentence had the Guidelines been advisory instead of mandatory;” as to the latter, “the proper question is whether the defendant can show a reasonable probability that, but for the district court’s misapplication of the Guidelines, he would have received a lesser sentence”); *cf. United States v. Martinez-Lugo*, 411 F.3d 597 (5th Cir. June 7, 2005) (concluding “that a district court’s *Fanfan* error [i.e., sentencing under mandatory scheme without Sixth amendment error] will be treated the same as *Booker* error in cases where the sentencing predated those decisions”)

*United States v. Smith*, 401 F.3d 497 (D.C. Cir. Mar. 18, 2005) (per curiam) (in first opinion from circuit to address plain error, on petition for rehearing and with practically no discussion, finding that defendant could not establish prejudice because district court had departed upward); *see Coles, infra*

*United States v. Dowling*, 403 F.3d 1142 (11th Cir. Mar. 23, 2005) (where defendant was sentenced to statutory maximum for offense of conviction, which was well below guideline range, finding that defendant’s substantial rights were not affected)

*United States v. Jackson*, 401 F.3d 747 (6th Cir. Mar. 24, 2005) (finding defendant’s substantial rights were affected “because the judge, though sentencing Jackson to the middle of the Guidelines range, stated that the Guidelines were a failure and that he could not depart from them even if he wanted to”); *cf. United States v. Kavo*, unpublished, 2005 WL 783351, 2005 U.S. App. LEXIS 5632 (6th Cir. April 1, 2005) (noting that “[o]f course, it does not logically follow that a sentence longer than the minimum guidelines punishment indicated an aversion to a lesser sentence in all instances. For example, a district judge, faced with a then-mandatory 121-151 month sentencing range, might well have sentenced a defendant to 136 months because of a belief that the circumstances surrounding the crime justified a sentence midway . . . Governed only by his or her discretion, however, that sentencer might well conclude that an appropriate punishment might well fall somewhere midway between the statutory minimum sentence of one year and the 121-month sentence originally imposed”); *see also Paladino, supra; United States v. Mancias-Campos*, unpublished, 2005 WL 977438, 2005 U.S. App. LEXIS 7456 (6th Cir. April 28, 2005) (remanding where district court in § 1326 case sentenced defendant to 72 months, 2 months over low end of range); *United States v. Terry*, unpublished, 2005 WL 977350, 2005 U.S. App. LEXIS 7391 (6th Cir. April 28, 2005) (where government conceded that remand was appropriate, remanding even though district had sentenced defendant at top of guideline range in § 922(g) case)

*United States v. Carpenter*, 403 F.3d 9 (1st Cir. Mar. 29, 2005) (defendant could not establish prejudice where district court gave maximum sentence allowed by statute (10 years for 18 U.S.C.

§ 922(g)) and stated that “[t]his defendant is a danger to the community . . . I give him the longest sentence I can give him for the protection of society. . . . Even if I [had discretion], this is what I would do in order to separate him from society”); *see also United States v. Brennick*, 405 F.3d 96 (1st Cir. April 26, 2005) (finding that defendant could not show any indication, much less reasonable probability that he would have gotten more favorable sentence where court sentenced him to high end of 210-240 month range and stated that it would have gone higher if it was not capped by statutory maximum)

\* *United States v. Heldeman*, 402 F.3d 220 (1st Cir. Mar. 29, 2005) (stating that court is not inclined “to be overly demanding as to proof of probability where, either in the existing record or by plausible proffer, there is reasonable indication that the district judge might well have reached a different result under advisory guidelines,” in part because “[e]ven where plain error is required, we have recognized that a district judge may well not have expressed his or her reservations because the guidelines made them hopeless, and so invited proffers by the defendant as to what the defendant might have said if the guidelines had been advisory at the time,” and in part because “it will be easy enough for the district judge on remand to say no with a minimum expenditure of effort if the sentence imposed under the pre-*Booker* guidelines regime is also the one that the judge would have imposed under the more relaxed post-*Booker* framework;” vacating and remanding where defendant had asked for downward departure at original sentence based on age and poor physical condition, which district court had considered “legitimate” and somewhat mitigating,” but not enough to justify departure); *see also United States v. Morin*, 403 F.3d 41 (1st Cir. April 8, 2005) (remanding for resentencing where defendant, who was found to be a career offender, had asked for departure based on tiny amount of cocaine base (190 mg) involved in instant offense, which district court denied because it did not believe that the small quantity could be a basis for departure but said it would depart if it could); *United States v. Lewis*, 406 F.3d 11 (1st Cir. April 19, 2005) (where defendant sentenced as armed career criminal (§ 924(e)) to 235 months after counsel requested mandatory minimum of 180 months, finding from district court’s exchange with government attorney that court may have denied request for lower sentence because it believed it was bound by guidelines); *cf. United States v. Schneiderhan*, 404 F.3d 73 (1st Cir. April 13, 2005) (rejecting defendant’s attempt to add in a factor not articulated at the sentencing hearing, i.e., disparity in sentences between defendant and his co-defendants)

*United States v. Webb*, 403 F.3d 373 (6th Cir. April 6, 2005) (finding that defendant’s substantial rights were not affected by district court’s error in sentencing defendant under mandatory Guidelines where defendant and government had agreed in plea to enhancements that defendant received, district court sentenced defendant at top of guideline range, and district court considered upward departure; concluding that, “[b]ased on these facts, . . . this is an exceptional case where the record contains clear and specific evidence that the district court would not have sentenced Webb to a lower sentence under an advisory Guidelines regime” and that “[a]s a result, we conclude that the record in this case is sufficient to rebut the prejudice presumed under *Barnett*”); *cf. United States v. Moore*, unpublished, 2005 WL 843740, 2005 U.S. App. LEXIS 6446 (6th Cir. April 12, 2005) (finding no error where one defendant agreed that government could ask for no more than 35 years and defendant could ask for no less than 25 years, and defendant received 400 months (33-1/3 years) based on defendant’s “age at commitment, his advanced

age and lack of threat to society at time of his release;” noting that the “district court, then, did not engage in fact finding, it merely applied the terms of the plea agreement” and “there is no possible claim of prejudice given that Moore stipulated to a range of no more than 35 years and the court only sentenced him to 33 years”)

\* *United States v. Coles*, 403 F.3d 764 (D.C. Cir. April 8, 2005) (in second opinion from circuit on plain error, holding that, “in assessing whether the District Court’s *Booker* error was prejudicial, we must determine whether there would have been a materially different result, more favorable to the defendant, had the sentence been imposed in accordance with the post-*Booker* sentencing regime;” noting that “this mode of inquiry has been adopted, either implicitly or explicitly, by the First, Second, Fifth, Seventh, and Eleventh Circuits,” and collecting cases; explaining that problem with Fourth and Ninth Circuits’ approach “is that it employs the wrong baseline for determining prejudice in light of *Booker*’s remedy;” joining Second and Seventh Circuits in conducting limited remands where it is not clear from record what district court might have done under advisory system; noting slightly different approaches taken by Second and Seventh Circuits, and adopting Seventh Circuit approach of retaining authority to vacate sentence; applied to case at hand, remanding because district court imposed sentence in middle of range)

\* *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. April 8, 2005) (en banc) (in majority opinion in case involving only remedy error, finding that defendant bears burden of showing that sentence would have been different absent error; rejecting use of limited remand adopted by Second and Seventh Circuit in *Crosby* and *Paladino* because plain error must be assessed based on record on appeal; finding that sentencing under mandatory guidelines is not structural error; rejecting Sixth Circuit’s approach in *Barnett* of presuming prejudice unless government can show defendant not prejudiced; declining to decide whether defendant met third prong because he did not satisfy fourth prong, that court should exercise discretion to correct error, *see infra*); *see Clifton, infra*; *United States v. Dowlin*, 408 F.3d 647 (10th Cir. May 17, 2005) (rejecting argument that Sixth Amendment error is structural; joining First Circuit in finding that such error is not structural)

*United States v. Trujillo-Terrazas*, 405 F.3d 814 (10th Cir. April 13, 2005) (in illegal reentry case, 8 U.S.C. § 1326, where defendant received 16-level bump for 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. Williams*, 403 F.3d 1188 (10th Cir. April 15, 2005) (finding plain error where, in sentencing defendant to 210 months as armed career criminal, district court went on at length about its displeasure and frustration with severity of sentence it was required to impose); *cf. United States v. Gamble*, unpublished, 2005 WL 1009736, 2005 U.S. App. LEXIS 7696 (10th Cir. May 2, 2005) (finding that defendant’s rights were not affected where, although district court sentenced defendant at low end of range determined through application of career offender guideline, court denied downward departure for overstatement of criminal history and did not express any dissatisfaction with guidelines)

\* *United States v. Dazey*, 403 F.3d 1147 (10th Cir. April 13, 2005) (in case involving Sixth Amendment, stating that a defendant can show his substantial rights were affected at least two ways: “First, if the defendant shows a reasonable probability that a jury applying a reasonable doubt standard would not have found the same material facts that a judge found by a preponderance of the evidence,” an “inquiry [that] requires the appellate court to review the evidence submitted at the sentencing hearing and the factual basis for any objection the defendant may have made to the facts on which the sentence was predicated;” and second, “a defendant may show that the district court’s error affected his substantial rights by demonstrating a reasonable probability that, under the specific facts of his case as analyzed under the sentencing factors of 18 U.S.C. § 3553(a), the district court judge would reasonably impose a sentence outside the Guidelines range;” explaining disagreement with approach of Fourth and Sixth Circuits in *Hughes* and *Oliver*, respectively; concluding that “there is a reasonable probability that a jury evaluating the evidence presented at [the defendant’s] trial would not determine, beyond a reasonable doubt, that Mr. Dazey could reasonably foresee the full extent of investor losses;” further concluding “there is a reasonable probability that if the district court judge had not thought himself bound by the mandatory Guidelines . . . he might have determined that Mr. Dazey’s conduct warranted a sentence below that prescribed for losses of more than \$7 million;” exercising discretion to correct error); *see Clifton, infra*

*United States v. Hall*, unpublished, 2005 WL 843824, 2005 U.S. App. LEXIS 6441 (6th Cir. April 13, 2005) (finding that *Barnett*’s presumption of prejudice overcome where district court sentenced defendant to top of range (21 months) and stated, “Mr Hall, what is going to drive the [c]ourt in this sentence is your criminal background . . . . The [c]ourt imposes this sentencing to protect society from future misdeeds by Mr. Hall and also to reflect the seriousness of the offense”); *but see United States v. Pittman*, unpublished, 2005 WL 843662, 2005 U.S. App. LEXIS 6452 (6th Cir. April 13, 2005) (where district court sentenced defendant to top of range (57 months), finding that government’s position in opposition to remand could not be sustained in light of *Barnett* and that proper course of action was to remand; Batchelder, J., wrote separately to express disagreement with court’s approach to plain error analysis)

*United States v. Akpan*, 407 F.3d 360 (5th Cir. April 14, 2005) (for defendant who had not preserved Sixth Amendment issue, finding that he could not demonstrate that district court would have sentenced him differently under advisory guidelines where “[t]he district court made no remarks on the record to indicate that (1) it was bound by the Guidelines, (2) it felt constrained by the Guidelines to sentence [defendant] in the way that it did, or (3) it would have sentenced him differently if it had had the discretion to do so”) (N.B.: in contrast, for defendant who had preserved Sixth Amendment issue, granting resentencing where government could not demonstrate beyond a reasonable doubt that district court would not have sentenced that defendant differently under advisory guidelines)

*United States v. Clifton*, 406 F.3d 1173 (10th Cir. April 25, 2005) (discussing both *Gonzalez-Huerta* and *Dazey* and summarizing ways in which defendant can demonstrate how constitutional or non-constitutional error impacts his substantial rights)

\* *United States v. White*, 405 F.3d 208 (4th Cir. April 26, 2005) (in case involving only remedy error, holding that defendant must show actual prejudice, i.e., a non-speculative basis to conclude that application of mandatory guidelines affected district court's selection of sentence; discussing and rejecting presumption of prejudice and structural error); see *United States v. Harp*, 406 F.3d 242 (4th Cir. May 4, 2005) (where defendant sentenced as career offender but received downward departure from range of 188-235 months to 128 months, finding that defendant could not establish that his substantial rights were affected by application of mandatory system because sentence was based on range recommended by government for cooperation); cf. *United States v. Bartram*, 407 F.3d 307 (4th Cir. April 28, 2005) (in drug case where guideline range was 121-151 months and district court sentenced defendant to 132 months, and where there was no Sixth Amendment error because objection as to drug quantity withdrawn at sentencing, such that only *Booker* error was sentencing under mandatory system, reviewing sentence only for reasonableness (and concluding that it was) without discussing third or fourth prongs of plain error analysis; one judge dissents from analysis on ground that *White* controls; third judge concurs only in judgment)

\* *United States v. Pirani*, 406 F.3d 543 (8th Cir. April 29, 2005) (en banc) (rejecting Fourth Circuit's definition of Sixth Amendment error in *Hughes*; joining First, Second, Fifth, Seventh, and Eleventh Circuits in concluding "that the third *Olano* factor turns on whether Pirani has demonstrated a reasonable probability that he would have received a more favorable sentence with the *Booker* error eliminated by making the Guidelines advisory," based upon the appellate record as a whole but rejecting Second and Seventh Circuit's limited remand approach; finding that defendant could not establish prejudice where, after district court had rejected higher range, he was sentenced at bottom of range and court had commented that although some factors weighed against low end of range, court believed minimum sentence was appropriate) (N.B.: Arnold and Smith, JJ., in dissent, would adopt Seventh Circuit's approach; Bye, J., in dissent, would follow Sixth Circuit and presume prejudice)

*United States v. Guervara*, 408 F.3d 252 (5th Cir. May 2, 2005) (finding that judicial fact-finding as to Chapter Two and Three offense level, which violated Sixth Amendment, did not affect defendant's substantial rights because defendant's guideline range was ultimately determined by career offender guideline); see also *United States v. Serrano*, 406 F.3d 1208 (10th Cir. May 3, 2005) (finding that judicial fact-finding as to Chapter Two and Three offense level, which violated Sixth Amendment, did not affect defendant's substantial rights because defendant's guideline range was ultimately determined by armed career criminal status); *United States v. Harp*, 406 F.3d 242 (4th Cir. May 4, 2005) (noting that any Sixth Amendment challenge to Chapter Two enhancements would have been fruitless because defendant was sentenced as career offender and then received downward departure for substantial assistance)

\* *United States v. Creech*, 408 F.3d 264 (5th Cir. May 3, 2005) (stating that "mere sympathy toward either the defendant or the defendant's family is not indicative of a judge's desire to sentence differently under a non-mandatory Guidelines regime" and "[n]either is a sentencing judge's mere summary

of sentencing law as it existed at the time sufficient, where, as here, the summary contains no indication that the district court wished to imposed a different sentence”)

*United States v. Brown*, unpublished, 2005 WL 1022097, 2005 U.S. App. LEXIS 7725 (9th Cir. May 3, 2005) (finding that discretionary application of Guidelines would not change sentencing outcome where district court had departed upward on basis of criminal history)

*United States v. Pennell*, 409 F.3d 240 (5th Cir. May 4, 2005) (finding that defendant carried burden of demonstrating prejudice from Sixth Amendment error where district court stated that “from many standpoints of fairness and justice, it might be better to sentence people just based on actual loss, but I don’t think that’s the way the guidelines are written . . . [s]o I feel constrained to overrule your objection” to use of intended loss)

*United States v. Ameline*, 409 F.3d 1073 (9th Cir. June 1, 2005) (en banc) (stating that “[b]ecause the error turns on the use of judge-found facts in a mandatory guidelines system and those guidelines are now advisory, [a defendant] must show a reasonable probability that he would have received a different sentence had the district judge known that the sentencing guidelines were advisory”; joining Second, Seventh, and D.C. Circuits in concluding that in cases where it is not clear from record whether district court would give “materially different” sentence, remanding to district court)

*United States v. Hauk*, 412 F.3d 1179 (10th Cir. June 24, 2005) (finding defendant established that his substantial rights were affected where evidence relating to relevant conduct (jointly undertaken criminal activity, specifically drug dealing) was sufficiently equivocal that, while evidence was sufficient under preponderance standard, “we question whether a jury would come to the same conclusion using the more onerous reasonable doubt standard”; exercising discretion to correct error and remanding case for resentencing)

### 3. Discretion to Correct Error

\* *United States v. Hughes*, 396 F.3d 374 (4th Cir. Jan. 24, 2005) (finding plain error in sentencing of defendant based on judicial factfinding under mandatory guideline scheme and remanding for resentencing under advisory scheme), *opinion reissued with revisions after panel reh’g*, 401 F.3d 540 (4th Cir. Mar. 16, 2005), *reh’g en banc denied*, April 8, 2005; *see also United States v. Washington*, 398 F.3d 306 (4th Cir. Feb. 11, 2005) (in follow-up case to *Hughes* in which evidence supporting enhancement was presented at trial, “readily” finding plain error and vacating sentence); *United States v. Collins*, 401 F.3d 212 (4th Cir. Mar. 2, 2005) (discussing *Hughes*; stating that “[the] mandate from the Supreme Court present[ed] the courts of appeal with two options: decide whether a district court’s sentence, under the old regime, was reasonable, or remand the case and direct the district court to resentence the Defendant in accordance with *Booker*. In *Hughes*, this Court emphatically chose the second option. . . .”); *United States v. Johnson*, 400 F.3d 187 (4th Cir. Mar. 8, 2005) (remanding case); *United States v. Gray*, 405 F.3d 227 (4th Cir. April 29, 2005) (fraud case involving murder where district

court calculated offense level of 43 in alternative ways); *United States v. Ebersole*, 411 F.3d 517 (4th Cir. June 14, 2005); *but see United States v. Gilchrist*, unpublished, 2005 WL 599745, 2005 U.S. App. LEXIS 3945 (4th Cir. Mar. 8, 2005) (Luttig, J., concurring in grant of rehearing and order of remand) (explaining why he believes *Hughes* is “fundamentally flawed”)

\* *United States v. Oliver*, 397 F.3d 369 (6th Cir. Feb. 2, 2005) (finding plain error in application of U.S.S.G. § 3C1.1, obstruction of justice enhancement for flight from half-way house during pre-trial release, and exercising discretion to correct error; mere fact that evidence of flight before jury at trial does not change Sixth Amendment analysis where jury did not make finding; while finding that flight qualifies as obstruction and thus *could* be applied, leaving it to district court as to whether it *ought* to be applied now that Guidelines are advisory)

*United States v. Bruce*, 396 F.3d 697 (6th Cir. Feb. 3, 2005) (in case involving application of U.S.S.G. § 3C1.1 based on defendant’s false statement to probation officer regarding his citizenship, although finding that error occurred that was plain, declining to decide whether error affected substantial rights and declining to exercise discretion to notice error where defendant contested only that statement was not material, not that he had made statement, and where district court had sentenced defendant at top end of range, thus declining to exercise discretion it had even under mandatory system), *vacated*, 405 F.3d 1034 (6th Cir. April 7, 2005)

*United States v. Milan*, 398 F.3d 445 (6th Cir. Feb. 10, 2005) (in two-defendant appeal in which both defendant pled guilty to drug offenses, finding plain error as to one defendant because district court found facts that he did not admit, but no error as to second defendant because he was sentenced only on basis of facts he admitted; discussing Second, Fourth and Eleventh Circuits’ differing approaches to plain error analysis; noting that panel is bound by Sixth Circuit’s first plain error decision in *Oliver*)

\* *United States v. Barnett*, 398 F.3d 516 (6th Cir. Feb. 16, 2005) (in ACCA case where district court had imposed sentence in middle of range, exercising discretion to correct error because “it would be fundamentally unfair to allow Barnett’s sentence to stand in light of this substantial development in, and alteration of, the applicable legal framework;” further declining to consider reasonableness of sentence without giving district court opportunity to resentence defendant under new framework), *pet. for cert. filed by U.S.*

\* *United States v. Williams*, 399 F.3d 450 (2d Cir. Feb. 23, 2005) (in follow-up to *Crosby*, discussing fourth prong of *Olano* analysis at some length)

*United States v. Coles*, 403 F.3d 764 (D.C. Cir. April 8, 2005) (stating that because court was “convinced that, if the District Court’s error was prejudicial, the error ‘would seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings,’” “the only question remaining is whether the District Court’s error affected Coles’ substantial rights in a material way”)

\* *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. April 8, 2005) (en banc) (in majority opinion, stating that whereas several courts of appeals have collapsed third and fourth prongs into one, court “cannot subscribe to this approach” because it is “bound to treat the third and fourth prongs as independent inquiries” under *Olano*; further, even if prejudice could be assumed under third prong, Supreme Court has never shifted burden to appellee on fourth prong; “[t]o the contrary, the Supreme Court has consistently applied the fourth prong . . . rigorously – even when the error is the result of an intervening Supreme Court decision that alters well-settled law;” finding that defendant did not meet fourth prong (i.e., he did not establish that sentence imposed was particularly egregious or a miscarriage of justice) where his sentence was within national norm and record contained no mitigating evidence); see *Clifton, infra*; see also *United States v. Sierra-Castillo*, 405 F.3d 932 (10th Cir. May 3, 2005)

\* *United States v. Trujillo-Terrazas*, 405 F.3d 814 (10th Cir. April 13, 2005) (in illegal reentry case, 8 U.S.C. § 1326, 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), discussing constitutional error versus non-constitutional error; stating that although remand in run-of-the-mill case might itself impugn fairness, integrity, and public reputation “because another defendant convicted of an identical crime under identical circumstances could receive quite a different sentence from a less sympathetic judge,” in this case, “[t]o allow the mismatch between the sentence suggested by a principled application of the post-*Booker* sentencing framework and the actual sentence given to Mr. Trujillo would call into question the fairness, integrity, and public reputation of judicial proceedings”)

\* *United States v. Dazey*, 403 F.3d 1147 (10th Cir. April 13, 2005) (distinguishing between what defendant must show for fourth prong in case of constitutional error versus non-constitutional error (the former is somewhat less demanding); giving three reasons why court would exercise discretion to correct error in this case: error was constitutional in nature, the defendant vigorously contested the sentencing court’s factual findings that increased his sentence, and the increase in the sentence resulting from the contested factual findings was substantial); see *Clifton, infra*

*United States v. Macedo*, 406 F.3d 778 (7th Cir. April 14, 2005) (in dicta, discussing difference between third and fourth prongs)

*United States v. Williams*, 403 F.3d 1188 (10th Cir. April 15, 2005) (finding plain error where district, in sentencing defendant to 210 months as armed career criminal, district court went on at length about its displeasure and frustration with severity of sentence it was required to impose; concluding that, “in the unique circumstances of this case, and regardless of factors which are developed for the application of plain error post-*Booker*, Williams has satisfied the third and fourth prongs of plain-error review, such that we must notice the error and remand this case for resentencing at or above the statutory minimum” of 15 years)

*United States v. Lawrence*, 405 F.3d 888 (10th Cir. April 20, 2005) (declining to exercise discretion to correct Sixth Amendment error where, even though district court felt bound by guidelines, it

sentenced defendant to 72 months, 2 months over low end of guideline range, and denied motions for downward departures after recognizing its authority to depart down); *United States v. Mozee*, 405 F.3d 1082 (10th Cir. April 27, 2005) (declining to correct Sixth Amendment error where district court sentenced defendant to top end of guidelines, which was also statutory maximum); *United States v. Phillips*, unpublished, 2005 WL 1231993, 2005 U.S. App. 9734 (10th Cir. May 25, 2005) (declining to correct Sixth Amendment error where district court sentenced defendant in middle of range); *United States v. Lauder*, 409 F.3d 1254 (10th Cir. June 8, 2005) (declining to correct error where district court sentenced defendant 5 months over low end of 235-293 month range and nothing in record suggested that downward departure might be appropriate); *United States v. Thomas*, 410 F.3d 1235 (10th Cir. June 14, 2005); *United States v. Soderstrand*, 412 F.3d 1146 (10th Cir. June 16, 2005)

*United States v. Clifton*, 406 F.3d 1173 (10th Cir. April 25, 2005) (discussing both *Gonzalez-Huerta* and *Dazey* and summarizing three factors that court will consider in determining whether to notice and correct error)

\* *United States v. Pirani*, 406 F.3d 543 (8th Cir. April 29, 2005) (en banc) (in dicta, commenting that *Booker* error is different from situation in which incorrect mandatory guideline was applied to impose higher sentence, because “[i]f the mandatory guidelines were properly applied, the sentence itself is not illegal under the advisory regime mandated by *Booker*, only the process the district court used in arriving at that sentence;” analogizing situation to *Cotton* fourth prong analysis; concluding that “we do not foreclose the possibility that there may be plain *Booker* errors that meet the third *Olano* factor but not the fourth”)

*United States v. Pennell*, 409 F.3d 240 (5th Cir. May 4, 2005) (after finding that defendant carried burden of demonstrating prejudice from Sixth Amendment error where district court stated that “from many standpoints of fairness and justice, it might be better to sentence people just based on actual loss, but I don’t think that’s the way the guidelines are written . . . [s]o I feel constrained to overrule your objection” to use of intended loss, also finding that defendant carried burden on fourth prong)

*United States v. Ameline*, 409 F.3d 1073 (9th Cir. June 1, 2005) (en banc) (stating that the inquiry “whether a plain and demonstrably prejudicial error ‘seriously affects the fairness, integrity, or public reputation of [the] judicial proceedings’ . . . hinges on the question presented to the district court.” i.e., whether it would have imposed a materially different sentence had it known the guidelines were advisory)

#### 4. District Courts’ Consideration Upon Limited Remand

*United States v. Lugo*, 361 F. Supp. 2d 91 (E.D.N.Y. Mar. 24, 2005) (Weinstein, J.) (spelling out parameters for limited remand from Second Circuit in light of *Crosby*: counsel are to submit briefing, counsel are to be present at hearing and defendant to be present by telephone; if resentencing is ordered, then defendant shall be present in person)

*United States v. Jasper*, 2005 WL 774519, 2005 U.S. Dist. LEXIS 5724 (S.D.N.Y. April 6, 2005) (Leisure, J.) (on limited remand in conformity with *Crosby*, denying defense counsel's request for conference to present arguments supporting a reduced sentence and directing parties to file written submissions concerning possible resentencing)

*United States v. Turner*, 2005 U.S. Dist. LEXIS 6368 (N.D. Ind. April 13, 2005) (Miller, J.) (after hearing argument from counsel, discussing each § 3553(a) factors (and for several factors, stating that guidelines are best indicator); where guideline range was 235-293 months and defendant faced additional 30 years in consecutive mandatory minimums, observing that "[t]he principal gravitation to a sentence below the range comes in the sheer magnitude of what this means" (a sentence of more than 50 years), but finding that an otherwise reasonable sentence of 22 years for conduct does not become "unreasonable because the defendant also engaged in conduct that Congress deems sufficiently serious to require an extra 30 years' imprisonment"; concluding that if required to resentence defendant, court would reimpose original sentence)

*United States v. Correa*, 2005 WL 1113817, 2005 U.S. Dist. LEXIS 8781 (W.D. Wis. May 10, 2005) (Crabb, J.) (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. Murray*, 2005 WL 1200185, 2005 U.S. Dist. LEXIS 9543, 9649 (S.D.N.Y. May 20, 2005) (Baer, J.) (after initially declining to resentence defendant, upon request for reconsideration, agreeing to resentence him based on his cooperation where government declined to move for substantial assistance departure)

*United States v. Anderson*, 2005 U.S. Dist. LEXIS 10842 (S.D.N.Y. May 26, 2005) (Koetl, J.) (explaining why court was declining to resentence defendant and why original sentence was appropriate)

*United States v. Imperl*, 2005 WL 1315411 (E.D. Wis. June 2, 2005) (Adelman, J.) (explaining why court would impose same sentence); *see* 2005 WL 1553974 (7th Cir. July 1, 2005) (affirming sentence)

*United States v. Gerancon*, 2005 WL 1388739, 2005 U.S. Dist. LEXIS 11290 (D. Conn. June 8, 2005) (Underhill, J.) (explaining why court was declining to resentence defendant and why original sentence was appropriate; although court might have been inclined to impose lower sentence on basis of crack-powder disparity, it did not because drug quantity was quite conservatively estimated, previous decision not to add gun bump was a very close call, and defendant was quite evasive during proffer sessions with government)

*United States v. Weeks*, 371 F. Supp. 2d 392 (W.D.N.Y. June 15, 2005) (Larimar, J.) (declining to change original sentence)

*United States v. Ortiz-Zayas*, 2005 WL 1430489, 2005 U.S. Dist. LEXIS 11973 (S.D.N.Y. June 17, 2005) (Sweet, J.) (reducing sentencing from 91 to 60 months based on disparity with co-defendant's sentence)

*United States v. Givens*, 375 F. Supp. 2d 202 (W.D.N.Y. July 6, 2005) (Larimer, J.) (declining to resentence defendant below the 18 months imposed at original sentencing (the low end of the guideline range) based on defendant's criminal history; but for government's § 5K1.1, court would have imposed more time)

G. "Admissions" by Defendant

*United States v. Almonte*, unpublished, 2005 WL 894850, 2005 U.S. App. LEXIS 7253 (11th Cir. April 18, 2005) (where defendant agreed with government's factual proffer at plea and did not dispute plea colloquy, stating that "a stipulation to a specific drug quantity – whether as part of a written plea agreement, part of a jury trial, or at sentencing – serve[s] as the equivalent of a jury finding on that issue, since the stipulation takes the issue away from the jury"); *see also United States v. Claudio*, unpublished, 2005 WL 901860, 2005 U.S. App. LEXIS 7222 (11th Cir. April 19, 2005) (finding no Sixth Amendment error where defendant did not object to PSR and signed plea agreement that included factual statement); *United States v. Davison*, unpublished, 2005 WL 913114, 2005 U.S. App. LEXIS 7191 (11th Cir. April 20, 2005) (finding that defendant admitted to prior conviction where, after reviewing government's "notice" pleading during plea agreement, he disagreed with other information but not with information regarding prior conviction, and he did not object to PSR's recitation of it); *cf. United States v. Burge*, 407 F.3d 1183(11th Cir. May 2, 2005) (finding no Sixth Amendment violation because defendant, who initially objected to proposed enhancements, abandoned objections at sentencing, thereby admitting facts; citing *United States v. Shelton*, 400 F.3d 1325, 1328-29 (11th Cir. 2005))

*United States v. Oliver*, unpublished, 2005 WL 894584, 2005 U.S. App. LEXIS 6654 (6th Cir. April 19, 2005) (noting without deciding that there was "some question" as to whether defendant's acknowledgment in sentencing memorandum regarding defendant's statement to FBI); *cf. United States v. Harris*, unpublished, 2005 WL 894581, 2005 U.S. App. LEXIS 6655 (6th Cir. April 19, 2005) (stating that "Harris did not object to the PSR at sentencing and thus is deemed to have admitted the fact therein")

*United States v. Cunningham*, 405 F.3d 497 (7th Cir. April 19, 2005) (in regard to appellate counsel's statement in opening brief and at oral argument that defendant did not contest certain enhancements, stating that "[s]uch a clear, deliberate and unambiguous concession is sufficient to establish a judicial admission and evinces an intentional waiver of the right to challenge the court's imposition of a base offense level increase"); *cf. United states v. Jaimes-Jaimes*, 406 F.3d 845 (7th Cir. May 4, 2005) (discussing when counsel's statements in district court can be used as evidence of waiver of issue on appeal)

*United States v. Brown*, unpublished, 2005 WL 957329, 2005 U.S. App. LEXIS 7422 (8th Cir. April 27, 2005) (in *Anders* appeal, granting motion of counsel to withdraw in part where defendant could not establish Sixth Amendment error where he was sentenced as per plea agreement made pursuant to Fed. R. Crim. P. 11(c)(1)(C))

*United States v. Sutton*, 406 F.3d 472 (7th Cir. April 28, 2005) (where defendant plead without a plea agreement and gave inconsistent references to quantity of drugs involved in offense, there was Sixth Amendment error in district court's determination of drug quantity by a preponderance of evidence)

*United States v. Bartram*, 407 F.3d 307 (4th Cir. April 28, 2005) (finding there was no Sixth Amendment error because initial objection as to drug quantity was withdrawn at sentencing hearing, and defendant admitted through counsel that he was involved with at least 150 grams of crack, the amount used to set base offense level); *United States v. Price*, unpublished, 2005 WL 1403025, 2005 U.S. App. LEXIS 11312 (4th Cir. June 15, 2005) (because defendant did not contest calculation of offense level and agreed at sentencing that calculation was correct, he admitted fact upon which enhancement was based, so there was no Sixth Amendment error)

*United States v. Snitz*, unpublished, 2005 WL 1009718, 2005 U.S. App. LEXIS 7684 (10th Cir. May 2, 2005) (finding defendant admitted to facts used to enhance sentence where he signed statement of facts that described firearms found with drugs, even though firearms not mentioned by prosecutor in summarizing facts at plea hearing; noting that it was unnecessary to determine whether defendant's failure to object to enhancement constituted admission)

*United States v. McCully*, 407 F.3d 931 (8th Cir. May 13, 2005) (finding that defendant's "Sixth Amendment rights were not violated because she admitted the facts supporting the enhancements by failing to object to the PSR")

#### H. Consideration of Other Sentencing Issues Prior to Remand

*United States v. Hughes*, 396 F.3d 374 (4th Cir. Jan. 24, 2005) (after finding plain error in sentencing of defendant under mandatory guideline scheme, considering other sentencing issues raised by defendant "[b]ecause [as] the district court must consider the correct guideline range before imposing a sentence on remand, the same calculation issues already raised by Hughes are likely to arise again," but noting that not every case will require such consideration), *opinion reissued with revisions after panel reh'g*, 401 F.3d 540 (4th Cir. Mar. 16, 2005), *reh'g en banc denied*, April 8, 2005; *United States v. Ruhbayan*, 406 F.3d 292 (4th Cir. April 21, 2005); *cf. United States v. Eanes*, unpublished, 2005 WL 736696, 2005 U.S. App. LEXIS 5209 (4th Cir. Mar. 31, 2005) (concluding that it was not necessary to resolve defendant's challenge to district court's application of U.S.S.G. § 2K2.1(b)(5) enhancement for using or possessing firearm in connection with felony drug offense)

*United States v. Ordaz*, 398 F.3d 236 (3d Cir. Feb. 23, 2005) (noting in passing that “[i]n addition to his *Blakely* arguments, Ordaz argues that the District Court made factual errors in applying the Guidelines, an issue we leave to the District Court on remand”); *see also United States v. Kleinpaste*, unpublished, 2005 WL 524949, 2005 U.S. App. LEXIS 3736 (3d Cir. Mar. 7, 2005) (remanding case in light of *Booker* after “[h]aving determined that the sentencing issues appellant raises are best determined by the district court in the first instance”)

*United States v. Selwyn*, 398 F.3d 1064 (8th Cir. Feb. 23, 2005) (after deciding to remand in light of Sixth Amendment error, declining to address other sentencing claims raised on appeal “beyond noting that they may be considered at the new sentencing proceeding”)

*United States v. Coumaris*, 399 F.3d 343 (D.C. Cir. Mar. 8, 2005) (in first opinion from circuit, granting government’s motion for remand in light of *Booker*; declining to address defendant’s arguments regarding district court’s application of guidelines on ground that “[b]ecause the district court might impose a different sentence on remand, and because the parties might choose not to appeal that sentence, consideration of objections to the court’s original guidelines calculations would be premature at best and unnecessary at worst”)

*United States v. Milstein*, 401 F.3d 53 (2d Cir. Mar. 10, 2005) (addressing challenges to application of specific guideline provisions because “although the Guidelines are no longer mandatory, a sentencing court is nonetheless required to consider the relevant guidelines provisions in determining a reasonable sentence”); *see also United States v. Goykhaman*, unpublished, 2005 WL 714124, 2005 U.S. App. LEXIS 5230 (2d Cir. Mar. 29, 2005) (noting that “a review of the district court’s application of the Guidelines is necessary [because where] a district court errs in calculating a defendant’s Guidelines sentence, a *Crosby* remand – whereby the district court would first decide *whether to* resentence, comparing the Guidelines sentence and the post-*Booker* sentence that would have been imposed – is inappropriate”)

*United States v. Rubenstein*, 403 F.3d 93 (2d Cir. Mar. 31, 2005) (although typically court would simply remand case for resentencing pursuant to *Crosby*, “[h]ere, however, we conclude that the sentencing enhancements – one of which was made in error – may have an appreciable influence under the discretionary regime that will govern the resentencing, and under which the Guidelines sentence will be a benchmark or a point of reference or departure;” noting, however, that “[o]ur decision of these Guidelines issues obviates any future challenge to the reasonableness of a discretionary sentence on the ground that it was made under the influence of these enhancement rulings[,]” but “[t]his Guidelines analysis does not, however, foreclose future reasonableness review of defendants’ sentence[s] on other grounds (including those enumerated in 18 U.S.C. § 3553(a)), and we express no opinion as to whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable”); *see United States v. Savarese*, 404 F.3d 651 (2d Cir. April 14, 2005)

*United States v. Morin*, 403 F.3d 41 (1st Cir. April 8, 2005) (declining government’s request for ruling on whether smallness of drug quantity involved in instant offense can justify downward departure from career offender status because “Morin could raise other arguments under advisory guidelines that were previously concluded,” “[t]he district court may decide to reduce Morin’s sentence based on other grounds, and may not need to address the ‘smallness’ question at all,” and finally, “[p]rudence dictates that we refrain from answering questions that may have nothing to do with the ultimate resolution of the case”)

*United States v. Yagar*, 404 F.3d 967 (6th Cir. April 18, 2005) (stating that court would consider defendant’s guidelines calculation challenges “because the district court will need to consider the correct Guidelines-recommended sentence in fashioning its own post-*Booker* sentence on remand”)

*United States v. Godding*, 405 F.3d 125 (2d Cir. April 19, 2005) (in embezzlement case where government appealed from grant of downward departure but then moved for limited remand pursuant to *Crosby*, addressing comment made by district court comments regarding bank’s failure to detect embezzlement)

#### I. Appeals by Government

*United States v. Lynch*, 397 F.3d 1270 (10th Cir. Feb. 11, 2005) (where district court granted defendant’s *Blakely* objection and based sentence only on quantity of methamphetamine defendant had admitted at plea, remanding for resentencing)

*United States v. Sharpley*, 399 F.3d 123 (2d Cir. Feb. 16, 2005) (after concluding that error in original sentencing was harmless as to defendant because he received mandatory minimum sentence that was higher than guideline range, noting “that the analysis would be quite different if we were to consider the government’s interests” because district court could have given sentence higher than mandatory minimum; but declining to remand case where government had not cross-appealed and did not seek remand under *Crosby* when invited to do so)

*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. 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. 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. Hairston*, unpublished, 2005 WL 773950, 2005 U.S. App. LEXIS 5831 (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. Hopkins*, unpublished, 2005 WL 827136, 2005 U.S. App. LEXIS 5968 (10th Cir. April 11, 2005) (where defendant appealed partly on *Blakely* grounds and government cross-appealed on basis that district court underestimated drug quantity when it applied incorrect methodology, reversing district court without addressing defendant’s arguments)

*United States v. Crass*, unpublished, 2005 WL 834674, 2005 U.S. App. LEXIS 5954 (10th Cir. April 12, 2005) (on appeal by government of pre-*Booker* downward departure based on exceptional post-offense rehabilitation and diminished capacity resulting from unmedicated bi-polar condition, reversing departure based first ground where participation in drug program was ordered as part of pre-trial release; declining to address second ground; noting that “district court may determine anew whether Ms. Crass was entitled to a downward departure under the guidelines and then ‘take account of the Guidelines together with other sentencing goals’ in imposing her sentence”)

*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)

## J. Waivers of Appeal

\* *United States v. Rubbo*, 396 F.3d 1330 (11th Cir. Jan. 21, 2005) (finding that *Apprendi* / *Blakely* / *Booker* claims do not fall outside of scope of waiver of appeal; enforcing waiver and dismissing appeal); *see also United States v. Grinard-Henry*, 399 F.3d 1294 (11th Cir. Feb. 11, 2005) (denying defendant’s motion for reconsideration of dismissal of appeal); *United States v. Frye*, 402 F.3d 1123 (11th Cir. Mar. 11, 2005) (citing to earlier cases, stating that “[a]n appeal waiver includes the waiver of the right to appeal difficult or debatable legal issues or even blatant error”); *cf. United States v. Harris*, unpublished, 2005 WL 1006052, 2005 U.S. App. LEXIS 7662 (11th Cir. May 2, 2005) (finding that defendant had not waived appeal of *Blakely* / *Booker* issue where appeal waiver provision expressly permitted appeal of application of enhancement at issue); *United States v. Stevenson*, unpublished, 2005 WL 1123522, 2005 U.S. App. LEXIS 8548 (11th Cir. May 12, 2005) (considering merits of appeal

notwithstanding waiver because district court did not explicitly inform defendant that he was waiving right to appeal sentence)

*United States v. Fleischer*, unpublished, 2005 WL 272113, 2005 U.S. App. LEXIS 1799 (2d Cir. Feb. 3, 2005) (finding waiver of appeal valid as to Sixth Amendment claim where sentence fell within range stipulated in plea agreement)

*United States v. Killgo*, 397 F.3d 628 (8th Cir. Feb. 9, 2005) (in fraud and money-laundering case, refusing to consider *Blakely* / *Booker* claim where defendant had waived right to appeal “any sentence imposed’ except ‘any issues solely involving a matter of law brought to the court’s attention at the time of sentencing at which the court agrees further review is needed;” stating that defendant “did not bring any issue akin to *Blakely* or *Booker* to the district court’s attention” and that “[t]he fact that Killgo did not anticipate the *Blakely* or *Booker* rulings does not place the issue outside the scope of his waiver;” however, going on to review sentence for reasonableness and stating that “[w]hile Killgo’s appeal waiver is sufficient to bar his Sixth Amendment claim, we recognize that it did not waive the application of a constitutional standard of review on appeal”); *see United States v. Rosales*, unpublished, 2005 WL 1162935, 2005 U.S. App. LEXIS 9379 (8th Cir. May 18, 2005) (Heaney, J., dissenting, on ground that one instance of miscarriage-of-justice exception to appeal waiver is when sentence exceeds statutory maximum, and that *Blakely* teaches that defendant’s sentence exceeded statutory maximum when based on facts admitted by him or not found by jury)

*United States v. Sharpley*, 399 F.3d 123 (2d Cir. Feb. 16, 2005) (where defendant received fifteen-year mandatory minimum sentence and had waived appeal of any sentence at or under that minimum, stating that “we need not decide whether Sharpley’s waiver of his appeal rights, or such waivers generally, preclude any consideration of sentencing issues arising under *Blakely* or *Booker*” and “express[ing] no opinion on this issue because even if we were to consider the waiver ineffective, this is the rare case where we can determine without remand that the district court’s use of the Guidelines as a mandatory regime was harmless error”)

*United States v. Alarid*, unpublished, 2005 WL 375728, 2005 U.S. App. LEXIS 2837 (9th Cir. Feb. 17, 2005) (finding under plain error review that waiver of appeal was unenforceable where, although district court mentioned possibility of appeal waiver during plea colloquy, “it failed to discuss the specific terms of the waiver and ensure Alarid’s understanding as required by” Rule 11, and waiver was therefore not knowingly and voluntarily made; remanding for resentencing in light of *Booker*)

\* *United States v. Bradley*, 400 F.3d 459 (6th Cir. Mar. 10, 2005) (where (1) defendant had stipulated to career offender status and probable guideline range (and in fact received what he had bargained for), (2) had agreed to waive appeal as to everything except ineffective assistance of counsel or prosecutorial misconduct (and where government had waived its right to appeal), and (3) government dismissed § 924(c) charge, finding that *Booker* did not give defendant right to appeal sentence or to be resentenced where “changes in the law generally do not permit either the government or a criminal

defendant to renege on a plea agreement;” relying on *Brady v. United States*, 397 U.S. 742 (1970), and other Supreme Court cases); *see also Goodrum v. United States*, unpublished, 2005 WL 705772, 2005 U.S. App. LEXIS 4989 (6th Cir. Mar. 29, 2005) (finding that defendant knowingly and voluntarily waived appeal); *United States v. Luebbert*, 411 F.3d 602 (6th Cir. June 1, 2005) (on remand from Supreme Court, finding waiver precludes *Booker* claim)

*United States v. Lea*, 400 F.3d 1115 (8th Cir. Mar. 24, 2005) (where plea agreement allowed appeal of issues not specifically listed in or addressed by plea agreement, finding that waiver of appeal did not preclude appeal as to constitutionality of Guidelines after *Blakely* because that issue was not specifically addressed or listed); *cf. United States v. Fogg*, 409 F.3d 1022 (8th Cir. May 20, 2005) (citing to *Killgo*, *supra*, stating that “[u]nless expressly reserved, however, the right to appellate relief under *Booker* is among the rights waived by a valid appeal waiver, even if the parties did not anticipate the *Blakely/Booker* rulings”); *United States v. Reeves*, 410 F.3d 1031 (8th Cir. June 10, 2005); *United States v. Burns*, 409 F.3d 994 (8th Cir. June 10, 2005)

*United States v. McGilvery*, 403 F.3d 361 (6th Cir. April 5, 2005) (where “[t]he Court and the parties have unnecessarily devoted substantial time and resources on this appeal,” stating that “[i]n order to avoid similar situations in the future, we strongly encourage the government to promptly file a motion to dismiss the defendant’s appeal where the defendant waived his appellate rights as part of a plea agreement, and to attach a copy of the appellate waiver provision and the transcript of the plea colloquy . . . .”)

*United States v. Webb*, 403 F.3d 373 (6th Cir. April 6, 2005) (finding that defendant did not waive right to appeal his sentence where waiver provision in plea agreement precluded collateral attack of both conviction and sentence but precluded direct appeal only of conviction)

*United States v. McKinney*, 406 F.3d 744 (5th Cir. April 15, 2005) (where plea agreement provided that defendant waived right to appeal unless district court upwardly departed, rejecting defendant’s argument that basing of guideline range on facts not admitted by defendant was upward departure to which waiver did not apply, because *Booker* did not change definition of guideline range; granting government’s motion to dismiss appeal); *see also United States v. Harrington*, unpublished, 2005 WL 977821, 2005 U.S. App. LEXIS 7257 (5th Cir. April 27, 2005) (on GVR from Supreme Court, rejecting argument that waiver allowed appeal of sentence below statutory maximum that exceeded guideline range where plea agreement expressly named statutory maximum as what defendant accepted; dismissing appeal); *United States v. Cortez*, 413 F.3d 502 (5th Cir. June 16, 2005) (on panel rehearing, applying *McKinney*); *United States v. Bond*, 414 F.3d 542 (5th Cir. June 21, 2005)

*United States v. Harris*, unpublished, 2005 WL 894581, 2005 U.S. App. LEXIS 6655 (6th Cir. April 18, 2005) (where government did not argue that defendant had waived right to appeal until oral argument, finding that government had waived its right to argue waiver, citing *United States v. Wright*, 343 F.3d 849, 867 (6th Cir. 2003))

*United States v. Bownes*, 405 F.3d 634 (7th Cir. April 26, 2005) (enforcing broad language of waiver against argument that exception to it should be made for “sea change” wrought by *Booker*)

*United States v. Morgan*, 406 F.3d 135 (2d Cir. April 27, 2005) (enforcing waiver of appeal as to sentence where defendant did not seek relief from underlying plea); *United States v. Haynes*, 412 F.3d 37 (2d Cir. June 13, 2005) (enforcing waiver of appeal where defendant had raised *Blakely* challenge at sentencing; rejecting defendant’s argument that fact that he preserved issue differentiates his case from *Morgan*)

*United States v. Porter*, 405 F.3d 1136 (10th Cir. May 3, 2005) (*Blakely* / *Booker* issue fell within plain language of waiver, and enforcement of waiver would not constitute miscarriage of justice); *United States v. Green*, 405 F.3d 1180 (10th Cir. May 6, 2005) (in *Anders* case, finding waiver to be enforceable and that defendant knowingly and voluntarily waived appellate rights); *United States v. Benoit*, unpublished, 2005 WL 1060610, 2005 U.S. App. LEXIS 8164 (10th Cir. May 6, 2005); *United States v. Maldonado*, 410 F.3d 1231 (10th Cir. June 14, 2005) (enforcing appeal waiver where defendant did not establish that “enforcement of the waiver seriously affects the fairness, integrity or public reputation of judicial proceedings,” on which defendant bears burden); *cf. United States v. Taylor*, 413 F.3d 1146 (10th Cir. June 28, 2005) (considering *Blakely* / *Booker* argument where waiver expressly did “not apply to appeals or [collateral attack] challenges based on changes in the law reflected in Tenth Circuit or Supreme Court cases decided after the date of this agreement that are held by the Tenth Circuit or Supreme Court to have retroactive effect”)

*United States v. Cardenas*, 405 F.3d 1046 (9th Cir. May 4, 2005) (finding that defendant’s argument as to appeal waiver on *Booker* issue “fails both because *Booker* does not bear on mandatory minimums [to which defendant was sentenced after failing to meet safety valve criteria] and because a change in the law does not make a plea involuntary and unknowing”); *United States v. Palmer*, unpublished, 2005 WL 1253900, 2005 U.S. App. LEXIS 9991 (9th Cir. May 26, 2005) (enforcing appeal waiver that made exception for appeal only when district court departed upward)

*United States v. Lockett*, 406 F.3d 207 (3rd Cir. May 5, 2005) (holding “that where a criminal defendant entered into a plea agreement in which he or she waives the right to appeal, the defendant is not entitled to resentencing in light of *Booker*”); *cf. United States v. Davenport*, unpublished, 2005 WL 1324011, 2005 U.S. App. LEXIS 10396 (declining to apply *Lockett* where plea agreement, which expressly reserved right to appeal denial of suppression motion, did not expressly waive right to appeal sentence)

*United States v. Blick*, 408 F.3d 162 (4th Cir. May 27, 2005) (enforcing waiver of appeal over arguments that defendant did not knowingly and intelligently waive appeal as to *Blakely* / *Booker* claim when case had not been decided at time of plea, that claim was outside scope of waiver) (N.B.: one judge dissented, agreeing with the defense that a defendant cannot waive appeal of an unconstitutional sentencing

procedure, as that falls outside scope of waiver); *see also United States v. Johnson*, 410 F.3d 137 (4th Cir. June 8, 2005)

K. *Anders* Briefs

*United States v. Brown*, unpublished, 2005 WL 130176, 2005 U.S. App. LEXIS 1034 (7th Cir. Jan. 14, 2005) (in *Anders* case, considering whether defendant could have challenged sentence under *Blakely* on ground that prior convictions were used to increase base offense level; noting that “Brown did not object to the characterization of his previous convictions . . . as crimes of violence or controlled substance offenses, and even after *Blakely*, the existence of a prior conviction need not be proven beyond a reasonable doubt;” concluding that “any argument that Brown’s sentence is unconstitutional would be frivolous”)

In two unpublished decisions, each involving *Anders* briefs and all written by a visiting district judge sitting by designation, the Third Circuit found that because the defendants admitted facts during guilty plea, the Sixth Amendment requirement of *Booker* was satisfied; however, neither opinion discusses whether, even without Sixth Amendment errors, the cases should be remanded for resentencing. *United States v. Rodriguez*, unpublished, 2005 WL 256346, 2005 U.S. App. LEXIS 1719 (3d Cir. Feb. 3, 2005) (Shadur, D.J., N.D. Ill.); *United States v. Ripoli*, unpublished, 2005 WL 238133, 2005 U.S. App. LEXIS 1774 (3d Cir. Feb. 2, 2005) (Shadur, D.J., N.D. Ill.); *compare Mitchell and Rivera, infra*

In a third unpublished decision, also involving *Anders* and the same visiting district judge, that was more complicated because the appeal was closely related to two cases in which the defendant had waived appeal, the Third Circuit found that the one possible *Blakely/Booker* error was moot because its impact on the sentence in one of the other cases could not be corrected where that case was final. The decision is also notable because the court chastised appointed counsel for his failure to “thoroughly search the record and the law in service of his client” as to the *Blakely* issue. *United States v. Fisher*, unpublished, 2005 WL 271541, 2005 U.S. App. LEXIS 1848 (3d Cir. Feb. 4, 2005). And in a fourth unpublished *Anders* case, the Third Circuit disposed of *Booker* by stating that the case presented no *Booker* issue because the district court sentenced the defendant to a statutory mandatory minimum sentence – even though the court had granted the government’s 18 U.S.C. § 3553(e) motion, such that the mandatory minimum did not apply. *United States v. Sanchez*, unpublished, 2005 WL 419464, 2005 U.S. App. LEXIS 3196 (3d Cir. Feb. 23, 2005)

*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. Cadez*, unpublished, 2005 WL 388158, 2005 U.S. App. LEXIS 2942 (9th Cir. Feb. 18, 2005) (affirming conviction but, “[i]n light of the brevity of the sentence” (37 months in fraud

case), vacating sentence and remanding for resentencing; denying counsel's motion to withdraw); *see also United States v. Ewalt*, unpublished, 2005 WL 388296, 2005 U.S. App. LEXIS 2949 (9th Cir. Feb. 18, 2005) (affirming conviction but vacating sentence and remanding for resentencing; denying counsel's motion to withdraw)

*United States v. Hardnett*, unpublished, 2005 WL 488796, 2005 U.S. App. LEXIS 3610 (4th Cir. Mar. 3, 2005) (in *Anders* case where neither counsel nor defendant raised claim, finding error in imposition of life sentence based on judicial findings)

*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. Abdel-Karim*, unpublished, 2005 WL 697215, 2005 U.S. App. LEXIS 4877 (7th Cir. Mar. 23, 2005) (where defendant convicted of 18 U.S.C. § 2320(a), finding that defendant's "sentence would not implicate *Booker* because it did not involve the application of the sentencing guidelines" and although the district court "considered the guidelines 'as a matter of reference,' . . . it clearly stated that it did not consider the guidelines binding" and instead "employed 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. Rivera*, unpublished, 2005 WL 757927, 2005 U.S. App. LEXIS 5429 (3d Cir. April 5, 2005) (where counsel originally submitted *Anders* brief, case was held pending *Booker*, and counsel subsequently informed court that defendant now challenged sentence under *Booker*, remanding

*United States v. Haynes*, unpublished, 2005 WL 896441 2005 U.S. App. LEXIS 6637 (10th Cir. April 19, 2005) (where defendant had raised *Blakely* below and received split sentence, reviewing sentencing under mandatory guidelines for harmless error, denying counsel's motion to withdraw and remanding case for resentencing); *United States v. Medley*, unpublished, 2005 WL 914848, 2005 U.S. App. LEXIS 7011 (10th Cir. April 21, 2005); *cf. United States v. Zamorron-Perez*, unpublished, 2005 WL 906587, 2005 U.S. App. LEXIS 6987 (10th Cir. April 20, 2005) (where defendant had not raised challenge below, finding that even if defendant could satisfy third prong of plain error review, he could not satisfy fourth prong where district court exercised discretion by sentencing defendant to high end of guideline range)

*United States v. Brown*, unpublished, 2005 WL 957329, 2005 U.S. App. LEXIS 7422 (8th Cir. April 27, 2005) (granting motion of counsel to withdraw in part where defendant could not establish Sixth Amendment error where he was sentenced as per plea agreement made pursuant to Fed. R. Crim. P. 11(c)(1)(C))

L. Petitions for Rehearing

*United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. Feb. 22, 2005) (in first opinion from circuit regarding *Booker*, stating in footnote that “[t]his opinion is, of course, without prejudice to petitions for rehearing and rehearing en banc”)

*United States v. Smith*, 401 F.3d 497 (D.C. Cir. Mar. 18, 2005) (per curiam) (in first opinion from circuit to address plain error, on petition for rehearing and with practically no discussion, finding that defendant could not establish prejudice because district court had departed upward)

*United States v. Hernandez-Gonzalez*, 405 F.3d 260 (5th Cir. Mar. 30, 2005) (where defendant raised *Booker* claim for first time in petition for rehearing, stating that court will not consider claims raised for first time on rehearing absent “extraordinary circumstances;” because defendant could not show that plain error occurred, “it is obvious that the much more demanding standard for extraordinary circumstances cannot be satisfied” and that “[t]herefore, we need not address what would constitute such circumstances when the *Booker* issue is raised for the first time in a petition for rehearing”)

*United States v. Shider*, unpublished, 2005 WL 735593, 2005 U.S. App. LEXIS 5201 (4th Cir. Mar. 31, 2005) (granting petition solely as to sentencing issue; finding that district court plainly erred in imposing sentence that exceeded maximum allowed on basis of facts admitted by defendant at plea)

*United States v. Custer*, unpublished, 2005 WL 845687, 2005 U.S. App. LEXIS 6083 (11th Cir. April 13, 2005) (granting petition for panel rehearing and remanding for resentencing where defendant had raised *Blakely* / *Booker* claims in both district and appeals court and plea agreement did not contain waiver of appeal of sentence)

*United States v. Baker*, 406 F.3d 911 (7th Cir. May 6, 2005) (where appellate counsel originally submitted *Anders* brief, court issued decision on day that *Blakely* was decided, and counsel petitioned for rehearing in light of *Blakely*, granting rehearing and remanding case pursuant to *Paladino*)

*United States v. Fraser*, 407 F.3d 9 (1st Cir. May 10, 2005) (treating untimely petition for rehearing as motion to recall mandate and finding that defendant did not present “extraordinary circumstances;” stating that recall of mandate would undercut finality of judgments and threaten restrictions on habeas relief)

*United States v. Pierce*, 409 F.3d 228 (4th Cir. May 26, 2005) (where defendant raised *Booker* claim for first time in petition for rehearing and where government conceded error, applying plain error analysis as to Sixth Amendment error and finding that case must be remanded)

*United States v. Lopez*, unpublished, 2005 WL 1413304, 2005 U.S. App. LEXIS 11600 (8th Cir. June 17, 2005) (on petition for rehearing, reviewing *Booker* claim for plain error and finding none)

*United States v. Pipkins*, 412 F.3d 1251 (11th Cir. June 20, 2005) (where defendants first raised *Blakely* / *Booker* issue in petition for rehearing en banc, finding that issue was not timely raised and declining to consider it)

M. Motions to Recall the Mandate

*United States v. Falls*, unpublished, 2005 WL 846237, 2005 U.S. App. LEXIS 6966 (10th Cir. April 13, 2005) (declining to recall mandate issued in March 2004 in light of *Booker*; briefly discussing court's inherent authority to recall mandate; distinguishing case in which it has done so)

*United States v. Wyche*, unpublished, 2005 U.S. App. 6370 (D.C. Cir. April 13, 2005) (denying motion because “[a] motion to recall the mandate may not be used to avoid the restrictions on successive motions filed pursuant to 28 U.S.C. § 2255 . . . [a]nd defendant has not satisfied those restrictions because the Supreme Court has not made [*Apprendi*, *Blakely*, or *Booker*] retroactively applicable to cases on collateral review”)

*United States v. Fraser*, 407 F.3d 9 (1st Cir. May 10, 2005) (treating untimely petition for rehearing as motion to recall mandate and finding that defendant did not present “extraordinary circumstances;” stating that recall of mandate would undercut finality of judgments and threaten restrictions on habeas relief)

N. Remands from Supreme Court

*United States v. Loverson*, unpublished, 2005 WL 486760, 2005 U.S. App. LEXIS 3601 (6th Cir. Mar. 1, 2005) (following GVR from Supreme Court in light of *Booker*, reconsidering and concluding that district court's sentence must be vacated; remanding for resentencing)

*United States v. Moreno*, unpublished, 2005 WL 487315, 2005 U.S. App. LEXIS 3590 (9th Cir. Mar. 3, 2005) (following GVR, vacating sentence and remanding for resentencing without discussion)

*United States v. Dockery*, 401 F.3d 1261 (11th Cir. Mar. 3, 2005) (following GVR, declining to consider *Booker* issue where defendant did not raise it while case before court on appeal and nothing in *Booker* requires court to consider it as if timely raised); *United States v. Garcia-Rodriguez*, unpublished, 2005 WL 901916, 2005 U.S. App. LEXIS 7189 (11th Cir. April 19, 2005); *United States v. Senn*, unpublished, 2005 WL 1006885, 2005 U.S. App. LEXIS 7714 (11th Cir. April 29, 2005) (following *Dockery* where although issue not raised in opening appellate brief (which was filed well before *Blakely* came out), defendant requested opportunity to file supplemental brief, which court denied); *United States v. McCrimon*, unpublished, 2005 WL 1006055, 2005 U.S. App. LEXIS 7658 (11th Cir. May 2, 2005) (similar, but appellate attorney originally filed *Anders* brief); *United States v. Bennett*, unpublished, 2005 WL 1052235, 2005 U.S. App. LEXIS 7932 (11th Cir. May 5, 2005) (following GVR, declining to consider issue where defendant first raised *Blakely* in motion to supplement petition for rehearing); *cf.*

*United States v. Sears*, 411 F.3d 1240 (11th Cir. June 8, 2005) (where appellate court had remanded for resentencing on non-*Booker* issue after *Blakely* and defendant was not permitted to file supplemental brief raising *Blakely* claim, and defendant was resentenced after *Booker* but before case was GVR'd from Supreme Court and defendant declined district court's offer to resentence pursuant to *Booker* because he might get higher sentence, holding that defendant was not entitled to be resentenced under *Booker* because he had affirmatively waived issue); cf. *United States v. Mohammed*, unpublished, 2005 WL 1412068, 2005 U.S. App. LEXIS 11577 (11th Cir. June 16, 2005) (where defendant had made *Apprendi* challenge in district court and on appeal, remanding for resentencing)

*United States v. Haynes*, unpublished, 2005 WL 712801, 2005 U.S. App. LEXIS 5193 (6th Cir. Mar. 30, 2005) (following GVR, vacating and remanding to district court where 84-month sentence was in middle of 78-97 month range)

*United States v. Bowker*, unpublished, 2005 WL 773957, 2005 U.S. App. LEXIS 5801 (6th Cir. April 6, 2005) (following GVR, vacating and remanding to district court where 96-month sentence exceeded maximum sentence allowed by Guidelines based solely on facts found by jury beyond reasonable doubt)

*United States v. Malveaux*, unpublished, 2005 WL 827121, 2005 U.S. App. LEXIS 5960 (5th Cir. April 11, 2005) (following GVR, reviewing for plain error; finding that error did not affect substantial rights where defendant was sentenced to 80 months, in middle of 70-87 month range, and district court declined to depart upward; stating that “[t]he district court’s decision to sentence Malveaux in the upper half of the guidelines range, as well as his expression of satisfaction with the sentence given, indicates that he would not have reached a significantly different result under an advisory guidelines regime”); *United States v. Madrigal*, unpublished, 2005 WL 913476, 2005 U.S. App. LEXIS 6863 (5th Cir. April 20, 2005) (following GVR, reviewing for plain error and finding that error did not affect substantial rights where district court expressly denied defendant’s request for sentence at low end of range); *but see Taylor, infra*

*United States v. Brightwell*, unpublished, 2005 WL 894903, 2005 U.S. App. LEXIS 6675 (3d Cir. April 19, 2005) (following GVR, summarily vacating portion of previous decision relating to sentence and remanding for resentencing)

*United States v. Alva*, 405 F.3d 383 (6th Cir. April 26, 2005) (on GVR where issue raised for first time in cert. petition, reviewing for plain error and remanding because district court had found guideline range to be “extraordinary and far more than sufficient”)

*United States v. Hammoud*, 405 F.3d 1034 (4th Cir. April 27, 2005) (following GVR, finding that where defendant had challenged guideline sentence on Sixth Amendment grounds in district court, government could not prove that error did not affect defendant’s substantial rights)

*United States v. Harrington*, unpublished, 2005 WL 977821, 2005 U.S. App. LEXIS 7257 (5th Cir. April 27, 2005) (on GVR from Supreme Court, rejecting argument that waiver allowed appeal of sentence below statutory maximum that exceeded guideline range where plea agreement expressly named statutory maximum as what defendant accepted; dismissing appeal)

*United States v. Rice*, 405 F.3d 1108 (10th Cir. April 28, 2005) (upon joint request of parties, remanding for resentencing in accordance with *Booker*); *United States v. Mack*, unpublished, 2005 WL 1060586, 2005 U.S. App. LEXIS 8615 (10th Cir. May 6, 2005) (on GVR, where defendant had raised *Blakely*-type objection in district court, finding that defendant had adequately raised issue below, such that harmless error analysis applied, and that government did not meet burden of showing that error was harmless); *United States v. Drewry*, unpublished, 2005 WL 1324886, 2005 U.S. App. LEXIS 10965 (10th Cir. June 6, 2005) (where defendant raised *Blakely* issue for first time in petition for certiorari, considering claim on plain error review and concluding that defendant could not establish impact on substantial rights); *United States v. Chavez*, unpublished, 2005 WL 1444258, 2005 U.S. App. LEXIS 11950 (10th Cir. June 21, 2005) (discussing, without deciding, whether defendant waived issue by not raising it until cert. stage; finding defendant did not establish plain error)

*United States v. Taylor*, 409 F.3d 675 (5th Cir. May 17, 2005) (where defendant raised *Blakely/Booker* issue for first time in petition for certiorari, holding that court would not consider issue on remand from Supreme Court absent extraordinary circumstances, and that defendant failed to establish plain error, much less extraordinary circumstances); *United States v. Lewis*, 412 F.3d 614 (5th Cir. June 14, 2005); *United States v. Higginbotham*, unpublished, 2005 WL 1427690, 2005 U.S. App. LEXIS 11788 (5th Cir. June 20, 2005) (rejecting defendant's argument that *Taylor* does not control); *United States v. Ogle*, 415 F.3d 382 (5th Cir. June 27, 2005)

### III. POST-CONVICTION ISSUES

(For other post-sentencing motions not included here, see Part I)

#### A. Appointment of Counsel for § 2255 Motion

*Violette v. United States*, 365 F. Supp. 2d 2 (D. Me. April 8, 2005) (Singal, J.) (where appointed counsel submitted response to government's opposition to defendant's § 2255 motion, discussing *Anders* and whether it is applicable to habeas proceedings)

*United States v. Fulk*, 365 F. Supp. 2d 742 (W.D. Va. April 15, 2005) (denying motion for appointment of counsel to pursue *Booker* claim where, because *Booker* is not retroactive, it would not be in interests of justice to appoint counsel)

B. Ineffective Assistance of Trial or Appellate Counsel

*Fuller v. United States*, 398 F.3d 644 (7th Cir. Feb. 18, 2005) (noting that petitioner did not argue that his trial counsel was ineffective for failing to anticipate *Blakely* and *Booker* and make Sixth Amendment challenge to sentencing enhancements; “[i]ndeed, ‘no such argument would be tenable’”)

*United States v. Carew*, unpublished, 2005 WL 1526136 (10th Cir. June 29, 2005) (counsel was not ineffective because “[g]iven our precedent at the time and the five-year gap between *Apprendi* and *Booker*, counsel’s failure to predict *Booker’s* constitutional and remedial holdings is not objectively unreasonable”)

*Suveges v. United States*, 2005 WL 226221, 2005 U.S. Dist. LEXIS 1359 (D. Me. Jan. 28, 2005) (Kravchuk, M.J.) (denying claim that attorney was ineffective for not raising Sixth Amendment claim)

*United States v. Wenzel*, 359 F. Supp. 2d 403 (W.D. Pa. Mar. 2, 2005) (McLaughlin, J.) (in context of procedural default, finding that counsel was not ineffective for failing to argue that *Apprendi* applied to Guidelines)

*United States v. Saeteurn*, 2005 WL 831264 (D. Alaska, Mar. 11, 2005) (Roberts, M.J.) (where counsel at sentencing had challenged gun bump because jury had acquitted defendant on § 924(c) count and hung on § 922(g) count, but appellate counsel raised no sentencing issues in brief (although defendant raised Sixth Amendment issue in supplemental *pro se* brief that court of appeals declined to file), finding appellate counsel was not ineffective for failing to raise *Blakely* / *Booker* issue when *Blakely* had not yet been decided; stating that [t]he objective standard of reasonableness contemplated in *Strickland* does not include holding counsel to somehow intuiting what the law might be in the future”)

*United States v. Muniz*, 360 F. Supp. 2d 574 (S.D.N.Y. Mar. 14, 2005) (Stein, J.) (denying § 2255 motion in part on basis that counsel was not ineffective for failing to anticipate change in law when advising defendant at plea)

*May v. United States*, 2005 WL 839101 (D. Me. April 8, 2005) (Hornby, J.) (denying motion made pursuant to Fed. R. Civ. P. 15(a) to amend § 2255 petition to include claim of ineffective assistance of counsel based on failure to raise Sixth Amendment claim or to argue for use of advisory guidelines, in part because defendant could not show prejudice as court would impose same sentence under advisory guidelines)

*Johnson v. United States*, 2005 WL 1123588 (N.D. Ohio April 13, 2005) (Matia, J.) (where defendant was sentenced five months before *Blakely* and a year before *Booker*, stating that “[c]ounsel cannot be considered ineffective for failing to realize that a change in the law would later occur”); *Mayle v. United States*, 2005 WL 1154186, 2005 U.S. Dist. LEXIS 9473 (N.D. Ohio May 16, 2005) (Limbort, M.J.) (similar result as to appellate counsel)

*Breazeale v. United States*, 2005 WL 950618, 2005 U.S. Dist. LEXIS 7057 (E.D. Pa. April 21, 2005) (DuBois, J.) (finding that trial counsel was not ineffective in failing to object to sentencing enhancements based on *Apprendi*, *Blakely*, and *Booker* where defendant's sentence was well below relevant statutory maximum of 80 years and because it is not ineffective to fail to forecast change in law)

*Lach v. United States*, 2005 WL 1019238, 2005 U.S. Dist. LEXIS 9265 (D. Utah April 28, 2005) (Kimball, J.) (where defendant sentenced on July 14, 2005, between *Blakely* and *Booker*, it was not ineffective for counsel to fail to raise *Blakely* challenge)

*Hutchings v. United States*, 2005 WL 1172439, 2005 U.S. Dist. LEXIS 8104 (N.D. Ind. May 3, 2005) (Miller, J.) (where defendant sentenced in March 2004, before *Blakely* was decided but after cert. had been granted, noting that "attorney's failure to predict the decision in [*Blakely*] doesn't establish that counsel's performance was outside the range of professional, competent assistance")

*Sprouse v. United States*, 2005 WL 1278947, 2005 U.S. Dist. LEXIS 10250 (W.D. Va. May 26, 2005) (Michael, J.) (trial counsel was not ineffective for failing to make *Apprendi* challenge to application of enhancement at pre-*Blakely* sentencing)

*Stuut v. United States*, 2005 WL 1389181 (W.D. Mich. June. 10, 2005) (Bell, J.) (counsel was not ineffective for failing to raise *Blakely* challenge at sentencing in February 2002 or on appeal); *Conley v. United States*, 2005 WL 1420843 (W.D. Mich. June 15, 2005) (Quist, J.)

*United States v. Williams*, 374 F. Supp. 2d 173 (D.D.C. June 22, 2005) (Huvelle, J.) (counsel was not ineffective for advising defendant to dismiss appeal four days after *Blakely* where "in order to find a non-frivolous grounds for an appeal, counsel would have had to foresee not just that *Blakely* would be extended to the Federal Sentencing Guidelines, but also that the Supreme Court would invalidate the mandatory nature of the Guidelines;" concluding that [c]ertainly, this could hardly have been expected, and thus, counsel's failure to d[i]vine the Supreme Court's resolution of *Booker* cannot be considered outside the 'range of competence'")

### C. Amendment of § 2255 Motions

*United States v. Russell*, 2005 WL 281183, 2005 U.S. Dist. LEXIS 1610 (E.D. Pa. Feb. 3, 2005) (Bartle, J.) (permitting defendant to amend first § 2255 motion to include *Booker* claim, but then rejecting it because *Booker* is not retroactive)

*Collins v. United States*, 2005 WL 465408, 2005 U.S. Dist. LEXIS 2850 (D. Conn. Feb. 25, 2005) (Underhill, J.) (granting defendant's motion to file supplemental brief, but finding that even if defendant's sentence were before court for reconsideration, where defendant was sentenced originally as career offender, range was 151-181 months, and court imposed sentence of 154 months, court would impose same sentence)

*United States v. Tam*, 2005 WL 486772, 2005 U.S. Dist. LEXIS 3154 (E.D. Pa. Mar. 1, 2005) (Yohn, J.) (amendment of § 2255 motion to include *Blakely* claim is not possible once motion has been decided on merits)

*Stevens v. United States*, 2005 WL 756826, 2005 U.S. Dist. LEXIS 5481 (S.D.N.Y. April 4, 2005) (Duffy, J.) (denying motion for leave to amend § 2255 to include *Booker* claim where amendment would be futile, as it would be here because *Booker* does not apply retroactively)

*Morales v. United States*, 2005 WL 807051, 2005 U.S. Dist. LEXIS 5896 (D. Minn. April 7, 2005) (Montgomery, J.) (finding that *Blakely / Booker* claims as to drug quantity relate back to original under Fed. R. Civ. P. 15(c) and are not time-barred by one-year statute of limitations, but that claims relating to career offender status do not relate back and are therefore untimely)

*May v. United States*, 2005 WL 839101 (D. Me. April 8, 2005) (Hornby, J.) (denying motion made pursuant to Fed. R. Civ. P. 15(a) to amend § 2255 petition to include *Booker* claim because *Booker* does not apply retroactively to cases on collateral review, so amendment would be futile; further finding futility because (after reviewing case file again) court would impose same sentence under advisory guidelines where court had granted government's § 5K1.1 motion at original sentence and imposed a sentence lower than what government had requested; also denying request to amend petition to include claim of ineffective assistance of counsel based on failure to raise Sixth Amendment claim or to argue for use of advisory guidelines)

*Descent v. United States*, 2005 WL 1026044 (M.D. Fla. April 25, 2005) (Moody, J.) (denying motion to supplement § 2255 motion in light of *Booker* because amendment would be futile as Eleventh Circuit held in *Varela* that *Booker* was not retroactive)

*United States v. Quackenbush*, 369 F. Supp. 2d 958 (W.D. Tenn. April 26, 2005) (Donald, J.) (declining to permit defendant to amend § 2255 motion with *Blakely / Booker* claim because claim not timely as decisions have not been made retroactive)

*Simpson v. United States*, 2005 WL 1076534 (N.D. W. Va. May 4, 2005) (Kaull, M.J.) (recommending that motion to amend § 2255 motion with *Blakely / Booker* claim be denied because claim not timely as decisions have not been made retroactive; discussing *Siegelbaum* opinion and whether reasonable doubt requirement could be retroactive); *Crawford v. United States*, 2005 WL 1330519 (N.D. W. Va. June 3, 2005) (Seibert, M.J.)

*United States v. Brooks*, 2005 WL 1263044 (E.D. Tenn. May 26, 2005) (Collier, J.) (denying motion to amend § 2255 motion to add *Blakely / Booker* claim because defendant has no viable claim as decisions are not retroactive)

D. Statute of Limitations

\* *United States v. McClinton*, 2005 WL 318835, 2005 U.S. Dist. LEXIS 1961 (W.D. Wis. Feb. 8, 2005) (Crabb, J.) (finding motion untimely because it was filed almost seven years after defendant's conviction became final; *Booker* announces new right, but Seventh Circuit has already held it is not retroactive (see *McReynolds, infra*), so third prong of statute of limitations does not apply), *cert. of appeal. granted*, 2005 WL 956037, 2005 U.S. Dist. LEXIS 7665 (W.D. Wis. April 26, 2005) (Crabb, J.); see also *United States v. Wood*, 2005 WL 372260, 2005 U.S. Dist. LEXIS 2356 (W.D. Wis. Feb. 9, 2005) (Crabb, J.) (same); *United States v. Vicario*, 2005 WL 366958, 2005 U.S. Dist. LEXIS 2368 (W.D. Wis. Feb. 10, 2005) (Crabb, J.) (same); *United States v. Vaughn*, 2005 WL 372255, 2005 U.S. Dist. LEXIS 2355 (W.D. Wis. Feb. 11, 2005) (Crabb, J.) (same)

*United States v. Palmer*, 2005 WL 323731, 2005 U.S. Dist. LEXIS 1938 (N.D. Tex. Feb. 9, 2005) (Buchmeyer, J.; Sanderson, M.J.) (finding that defendant's motion was filed eleven months after one-year statute of limitations had run based on finality of conviction; denying request for equitable tolling) (N.B.: regarding triggering date of case announcing new right, court confuses and/or conflates provisions applicable to first and second § 2255 motions); see also *United States v. Newsome*, 2005 WL 491491 (N.D. Tex. Mar. 3, 2005) (Cummings, J.) (similar)

*Langley v. United States*, 2005 WL 1114316 (M.D.N.C. Feb. 25, 2005) (Dixon, M.J.) (recommending that § 2255 motion be denied as untimely because Supreme Court has not made *Booker* retroactive)

*Mingo v. United States*, 360 F. Supp. 2d 591 (S.D.N.Y. Mar. 17, 2005) (Stein, J.) (finding petitioner's motion timely vis-a-vis finality of original conviction; discussing "mail box rule" for prisoner pleadings. but finding that claims failed because *Booker* and *Blakely* are not retroactive)

*Lopez v. United States*, 2005 WL 735039 (N.D. Tex. Mar. 30, 2005) (Cummings, J.) (in addition to finding that defendant's motion was time-barred because *Booker* is not retroactive, also briefly discussing how defendant had not established that statute of limitations should be equitably tolled)

*Bailey v. United States*, 2005 WL 1049980 (E.D. Mich. April 19, 2005) (Roberts, J.) (dismissing motion as untimely when it was filed six months after conviction became final and Sixth Circuit had found in *Humphress* that *Booker* is not retroactive)

*Gomez-Calderav. United States*, 2005 WL 1106949, 2005 U.S. Dist. LEXIS 8288 (W.D. Tex. April 22, 2005) (Briones, J.) (denying motion as untimely; finding that no exceptional circumstances existed to permit equitable tolling); *Robledo-Arechar v. United States*, 2005 WL 1109450, 2005 U.S. Dist. LEXIS 8292 (W.D. Tex. May 6, 2005) (Montalvo, J.)

*Mendez v. United States*, 2005 U.S. Dist. LEXIS 7928 (N.D. Ind. April 29, 2005) (Springman, J.) (dismissing motion as untimely where defendant did not file until more than a year after conviction became final and no circumstances existed to justify tolling of statute of limitations)

*Buckhanan v. United States*, 2005 WL 1005096, 2005 U.S. Dist. LEXIS 8624 (W.D. Va. April 29, 2005) (Turk, J.) (dismissing motion as untimely because defendant's conviction became final more than a year prior to filing of motion and court has previously held that *Booker* is not retroactive; citing *Lilly v. United States*, 342 F. Supp. 2d 532 (W.D. Va. 2004))

*United States v. Ramirez*, 2005 WL 1027167 (D. Neb. May 2, 2005) (Kopf, J.) (dismissing motion as untimely because defendant's conviction became final more than a year prior to filing of motion and *Booker* is not retroactive); *United States v. Carillo*, 2005 WL 1027171 (D. Neb. May 2, 2005) (Kopf, J.) (same)

*Arnette v. United States*, 2005 WL 1026711, 2005 U.S. Dist. LEXIS 7734 (E.D. Va. May 2, 2005) (Friedman, J.) (dismissing motion as untimely because defendant's conviction became final more than a year prior to filing of motion and *Booker* is not retroactive)

*United States v. McCarty*, 2005 WL 1079274, 2005 U.S. Dist. LEXIS 9148 (E.D. Ky. May 3, 2005) (Hood, J.) (dismissing motion as untimely because *Blakely* and *Booker* are not retroactive)

*United States v. Pearson*, 2005 WL 1058935 (N.D. Iowa May 4, 2005) (Reade, J.) (denying motion as untimely because defendant's conviction became final more than a year prior to filing of motion and *Booker* is not retroactive)

*Borne v. United States*, 2005 WL 1074378, 2005 U.S. Dist. LEXIS 9090 (E.D. Tenn. May 4, 2005) (Edgar, J.) (denying motion as untimely because defendant's conviction became final more than a year prior to filing of motion and *Booker* is not retroactive; noting that one-year period does not start over upon reduction of sentence pursuant to Fed. R. Crim. P. 35(b))

*United States v. Lopez-Cerda*, 2005 WL 1056658 (E.D. Wash. May 4, 2005) (Quackenbush, J.) (denying motion as untimely because defendant's conviction became final more than a year prior to filing of motion and *Booker* is not retroactive)

*United States v. Quinonez*, 2005 WL 1353946, 2005 U.S. Dist. LEXIS 10858 (D. Conn. May 31, 2005) (Droney, J.) (denying motion as untimely because defendant's conviction became final more than a year prior to filing of motion and *Booker* is not retroactive)

*Matthews v. United States*, 2005 WL 1384053 (W.D. Mo. June 8, 2005) (Laughrey, J.) (denying § 2255 motion as untimely because *Booker* is not retroactive)

*United States v. Thompson*, 2005 WL 1388566 (D. Alaska June 9, 2005) (Holland, J.) (ordering defendant to show cause why his § 2255 motion should not be dismissed as untimely where *Blakely* and *Booker* are not retroactive; stating that “[i]n his response, Mr. Thompson should explain whether there are any extraordinary circumstances, outside of his control, which made it impossible to file his motion on time” and that “Mr. Thompson should remember that the Supreme Court’s decisions *Booker* and *Blakely* will not be considered extraordinary circumstances outside of his control, for tolling purposes”)

E. Procedural Default of *Booker* Claims

\* *Rucker v. United States*, 2005 WL 331336, 2005 U.S. Dist. LEXIS 2004 (D. Utah Feb. 10, 2005) (Cassell, J.) (discussing procedural default, exceptions to default rule based on cause and prejudice or actual innocence, and government default of default)

*United States v. Kelley*, 2005 WL 466208, 2005 U.S. Dist. LEXIS 2909 (D. Kan. Feb. 21, 2005) (Robinson, J.) (government raised procedural default, but court did not address because it found *Booker* not retroactive)

*Fisher v. United States*, 2005 WL 525655, 2005 U.S. Dist. LEXIS 3514 (D. Minn. Mar. 2, 2005) (Frank, J.) (although not couched in terms of cause and prejudice, denying *Blakely* claim because if court were to resentence defendant after *Booker*, court would impose considerably longer sentence)

*United States v. Wenzel*, 359 F. Supp. 2d 403 (W.D. Pa. Mar. 2, 2005) (McLaughlin, J.) (finding that defendant did not establish cause that would excuse procedural default because counsel’s failure to raise *Apprendi* claim did not constitute ineffective assistance; further finding that futility of raising claim does not establish cause for default; finally finding that defendant waived *Apprendi* claim by entering into plea contemplating that certain conduct would be used)

*Nam v. United States*, 2005 WL 9433630, 2005 U.S. Dist. LEXIS 6767 (E.D. Va. April 20, 2005) (Hilton, J.) (where defendant pled guilty in November 2003, relying on *Apprendi* to find that defendant could not establish “cause” by showing that failure to preserve sentencing claim was result of novelty of issue; further finding that defendant could not show prejudice where he agreed to enhancement and sentence was within resulting guideline range)

*United States v. Carter*, 2005 WL 1039412 (D. Alaska May 2, 2005) (Branson, M.J.) (where defendant pled guilty in July 2003, finding that defendant could not establish cause for default by claiming that raising issue would have been futile because *Apprendi* was decided in 2000 and *Blakely* and *Booker* derived from it, thus claim was not so novel that its legal basis was not reasonably available)

F. Claims of Actual Innocence

*Rucker v. United States*, 2005 WL 331336, 2005 U.S. Dist. LEXIS 2004 (D. Utah Feb. 10, 2005) (Cassell, J.) (discussing in part exception to procedural default rule based on actual innocence)

*Humphrey v. Outlaw*, 2005 WL 1009559, 2005 U.S. Dist. LEXIS 8205 (W.D. Tenn. Mar. 28, 2005) (Donald, J.) (noting that defendant did not attempt to demonstrate actual innocence, and that claim of actual innocence requires innocence as matter of fact, not merely legal insufficiency)

G. Retroactivity of *Booker*

1. Operative Date for Calculating Finality of Conviction

*McReynolds v. United States*, 397 F.3d 479 (7th Cir. Feb. 2, 2005) (finding that pertinent date is January 12, 2005 (date *Booker* was decided), not June 24, 2004 (date *Blakely* was decided), for purposes of finality of convictions and retroactivity of *Booker* (but also finding *Booker* is not retroactive))

*Guzman v. United States*, 404 F.3d 139 (2d Cir. April 8, 2005) (*Booker* does not apply to cases in which the conviction became final “as of” January 12, 2005, the date that *Booker* issued)

*Lloyd v. United States*, 407 F.3d 608 (3d Cir. May 17, 2005) (concluding that “[b]ecause *Booker* announced a rule that is ‘new’ and ‘procedural,’ but not ‘watershed,’ *Booker* does not apply retroactively to initial motions under § 2255 where the judgment was final as of January 12, 2005, the date *Booker* issued”)

*United States v. Bellamy*, 411 F.3d 1182 (10th Cir. June 16, 2005) (*Booker* does not apply retroactively to criminal cases that became final before decision date of January 12, 2005)

*United States v. Love*, 2005 WL 552132, 2005 U.S. Dist. LEXIS 4339 (W.D. Wis. Mar. 3, 2005) (Crabb, J.) (using January 12, 2005, as relevant date by which to determine finality of conviction, because while “*Blakely* may have signaled the end of mandatory sentencing guidelines, . . . it did not establish that point”)

*United States v. Chappell*, 2005 WL 806702, 2005 U.S. Dist. LEXIS 5886 (D. Kan. April 7, 2005) (Lungstrum, J.) (using January 12, 2005, the date *Booker* was decided, for measuring finality of conviction)

*Morales v. United States*, 2005 WL 807051, 2005 U.S. Dist. LEXIS 5896 (D. Minn. April 7, 2005) (Montgomery, J.) (although defendant raised claims under *Blakely*, using date *Booker* was decided to measure finality of conviction (which was on April 6, 2001))

*Gomez-Caldera v. United States*, 2005 WL 1106949, 2005 U.S. Dist. LEXIS 8288 (W.D. Tex. April 22, 2005) (Briones, J.) (January 12, 2005, not June 24, 2004, “is appropriate dividing line for deciding whether a judgment may be attacked pursuant to the new rule”)

*United States v. James*, 2005 WL 1026028 (M.D. Fla. April 27, 2005) (Steele, J.) (in context of § 3582(c) motion, noting that *Booker* is not retroactive to cases that became final before it was decided on January 12, 2005)

*United States v. Vega*, 2005 WL 1154388 (M.D. Pa. May 2, 2005) (McClure, J.) (*Booker* is not retroactive to convictions that became final before January 12, 2005)

## 2. Retroactivity as to First § 2255 Motions

*McReynolds v. United States*, 397 F.3d 479 (7th Cir. Feb. 2, 2005) (granting certificate of appealability because defendants had substantial showing of denial of constitutional right, but in concluding that *Booker* is not retroactive, finding that “[a]lthough the Supreme Court did not address the retroactivity question in *Booker*, its decision in *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004), is all but conclusive on the point”), *cert. denied*, 125 S. Ct. 2559; *see United States v. Nordstrom*, 2005 WL 366961, 2005 U.S. Dist. LEXIS 2357 (W.D. Wis. Feb. 9, 2005) (Crabb, J.)

*Varela v. United States*, 400 F.3d 864 (11th Cir. Feb. 17, 2005) (per curiam) (granting certificate of appealability, but concluding that although neither Eleventh Circuit nor Supreme Court have addressed retroactivity of *Blakely* and *Booker*, *Schriro v. Summerlin*, “is essentially dispositive” of issue; joining Seventh Circuit in *McReynolds*, *supra*)

\* *Humphress v. United States*, 398 F.3d 855 (6th Cir. Feb. 25, 2005) (laying out steps of analysis, concluding that *Booker* is not retroactive; finding that reasoning in *Schriro v. Summerlin* “applies with equal force to *Booker*”)

\* *United States v. Price*, 400 F.3d 844 (10th Cir. Mar. 8, 2005) (on petition for rehearing of denial of certificate of appealability in light of *Booker*, finding that *Blakely* announced procedural rule; laying out steps of *Teague* analysis; finding *Blakely* did not announce new watershed rule); *see also United States v. Leonard*, unpublished, 2005 WL 139183, 2005 U.S. App. LEXIS 1176 (10th Cir. Jan. 24, 2005) (summarily determining that *Blakely* and *Booker* are not applicable to defendant’s case because his conviction became final before *Blakely* came out); *United States v. Bellamy*, 411 F.3d 1182 (10th Cir. June 16, 2005)

*Guzman v. United States*, 404 F.3d 139 (2d Cir. April 8, 2005) (*Booker* established a new rule that is not substantive and is not a watershed rule of procedure; finding that decision in *Booker* was not dictated by *Apprendi* or even *Blakely*)

*In re Olopade*, 403 F.3d 159 (3d Cir. April 11, 2005) (in case involving application for leave to file second § 2255 motion, noting that, “our dictum aside, we leave for another day the question whether *Booker* applies retroactively to prisoners who were in the initial § 2255 motion stage as of January 12, 2005”)

*Cirilo-Munoz v. United States*, 404 F.3d 527 (1st Cir. April 15, 2005, as amended April 21, 2005) (in dicta, stating that “the use of judge-made findings at sentencing does not undermine ‘accuracy’ (in terms of substantially different outcomes) or undermine fundamental fairness,” and “[a]s for the application of mandatory rather than advisory guidelines, it is unclear that advisory guidelines will alter a great number of sentences;” further, “[r]ealistically, it is unlikely that the Supreme Court will adopt a retroactivity analysis that opens up to required reexamination practically all of the federal sentences imposed since the guidelines went into effect in 1987”)

*Lloyd v. United States*, 407 F.3d 608 (3d Cir. May 17, 2005) (joining other circuits that have held *Booker* not to be retroactive to cases that were final when *Booker* came down; however, “we reject the government’s contention that the ‘watershed rule’ exception only applies to new procedural rules that improve the accuracy of the guilt or innocence of a defendant. It is just not so that because *Booker* only impacts sentencing, the ‘watershed rule’ exception cannot apply.”)

*United States v. Never Misses a Shot*, 413 F.3d 781 (8th Cir. July 7, 2005) (joining other circuits in holding that *Booker* is not retroactive: “Similarly, as all circuit courts considering the issue to date have held, we conclude the ‘new rule’ announced in *Booker* does not apply to criminal convictions that became final before the rule was announced, and thus does not benefit movants in collateral proceedings”)

*Schardt v. Payne*, 414 F.3d 1025 (9th Cir. July 8, 2005) (in § 2254 proceeding, holding that *Blakely* is not retroactive)

*Quirion v. United States*, 2005 WL 83832, 2005 U.S. Dist. LEXIS 569 (D. Me. Jan. 14, 2005) (Kravchuk, M.J.) (recommendation of magistrate judge that district court find that *Booker* should not be retroactive); *see also Stevens v. United States*, 2005 WL 102958, 2005 U.S. Dist. LEXIS 608 (D. Me. Jan. 18, 2005) (Kravchuk, M.J.) (same, when claim was not raised on direct appeal); *Williams v. United States*, 2005 WL 1140626 (D. Me. May 13, 2005) (Kravchuk, M.J.)

*Baez v. United States*, 2005 WL 106901, 2005 U.S. Dist. LEXIS 735 (S.D.N.Y. Jan. 19, 2005) (Batts, J.) (in ruling on § 2255 motion filed well before *Blakely* and *Booker* were decided, court considered *sua sponte* whether defendant could get relief under *Booker* and concluded that he could not because the mandatory minimum sentences to which he was subject exceeded the sentence calculated under the Guidelines)

*United States v. Larry*, 2005 U.S. Dist. LEXIS 853 (N.D. Tex. Jan. 19, 2005) (Kaplan, M.J.) (because *Booker* stated that it applied to cases on direct review, and because both *Blakely* and *Booker*

involve new rules of criminal procedure and do not fall within either *Teague* exception, *Booker* is not retroactive)

*United States v. Johnson*, 353 F. Supp. 2d 656 (E.D. Va. Jan. 21, 2005) (Smith, J.) (*Blakely* and *Booker* do not apply retroactively; there is nothing in either decision indicated that Supreme Court meant to overrule the many cases holding that *Apprendi* is not retroactive); *see also Irving v. United States*, 2005 WL 940567, 2005 U.S. Dist. LEXIS 6699 (E.D. Va. April 18, 2005) (Spencer, J.); *Nam v. United States*, 2005 U.S. Dist. LEXIS 6767 (E.D. Va. April 20, 2005) (Hilton, J.); *Arnette v. United States*, 2005 WL 1026711, 2005 U.S. Dist. LEXIS 7734 (E.D. Va. May 2, 2005) (Friedman, J.); *United States v. Hepburn*, 2005 WL 1038758, 2005 U.S. Dist. LEXIS 8135 (E.D. Va. May 3, 2005) (Brinkema, J.); *Smalls v. United States*, 2005 WL 1106622, 2005 U.S. Dist. LEXIS 8563 (E.D. Va. May 10, 2005) (Cacheris, J.); *United States v. Hernandez*, 371 F. Supp. 2d 788 (E.D. Va. May 24, 2005) (Ellis, J.)

*Gerrish v. United States*, 353 F. Supp. 2d 95 (D. Me. Jan. 25, 2005) (Hornby, J.) (denying certificate of appealability following denial of § 2255 motion because *Blakely* and *Booker* are not retroactive)

*Warren v. United States*, 2005 WL 165385, 2005 U.S. Dist. LEXIS 989 (D. Conn. Jan. 25, 2005) (Thompson, J.) (denying first § 2255 motion based on *Apprendi* because decision announced new rule of law that was procedural and that did not meet either exception for new procedural rules in *Teague v. Lane*; Part II gives succinct general overview of habeas law and procedure)

\* *United States v. Siegelbaum*, 359 F. Supp. 2d 1104 (D. Or. Jan. 26, 2005) (Panner, J.) (containing interesting discussion of retroactivity; ultimately concluding, without deciding retroactivity issue, that defendant was not entitled to relief because he got benefit of his plea bargain)

*King v. Jeter*, 2005 WL 195446, 2005 U.S. Dist. LEXIS 1189 (N.D. Tex. Jan. 27, 2005) (Fitzwater, J.) (stating that *Booker*, like *Blakely*, does not implicate petitioner's conviction for a substantive offense, and that *Booker* is not retroactive when first raised on collateral review)

*Tuttamore v. United States*, 2005 WL 234368, 2005 U.S. Dist. LEXIS 1403 (N.D. Ohio Feb. 1, 2005) (Carr, J.) (noting that *Booker* is not retroactive and citing to some of cases listed above); *see Johnson v. United States*, 2005 WL 1123588 (N.D. Ohio April 13, 2005) (Matia, J.) (similar); *Mayle v. United States*, 2005 WL 1154186 (N.D. Ohio May 16, 2005) (Limbort, M.J.)

*United States v. Williams*, 2005 WL 240939, 2005 U.S. Dist. LEXIS 1371 (E.D. Pa. Jan. 31, 2005) (Bartle, J.) (relying on Third Circuit case as to retroactivity of *Apprendi*, finding that *Booker* is not retroactive); *see also United States v. Russell*, 2005 WL 281183, 2005 U.S. Dist. LEXIS 1610 (E.D. Pa. Feb. 3, 2005) (Bartle, J.) (permitting defendant to amend first § 2255 motion to include *Booker* claim, but then rejecting it because *Booker* is not retroactive); *see Aikens, infra*

\* *Rucker v. United States*, 2005 WL 331336, 2005 U.S. Dist. LEXIS 2004 (D. Utah Feb. 10, 2005) (Cassell, J.) (in lengthy and thorough discussion, concluding that *Booker* is new procedural rule that is not retroactive); *see also Jaffe v. United States*, 2005 WL 589330, 2005 U.S. Dist. LEXIS 3914 (D. Utah Mar. 11, 2005) (Sam, J.) (relying heavily on *McReynolds*, *supra*, to find that *Booker* is not retroactive); *Garcia-Corona v. United States*, 2005 WL 1019475, 2005 U.S. Dist. LEXIS 8672 (D. Utah April 28, 2005) (Kimball, J.) (reviewing two lines of cases regarding retroactivity of *Booker* (first, that it is not retroactive because it is new procedural rule that is not watershed, and second, that Supreme Court has not held decision to be retroactive) and denying motion under both approaches); *Maes v. United States*, 2005 WL 1018465, 2005 U.S. Dist. LEXIS 8671 (D. Utah April 28, 2005) (Kimball, J.) (same); *Lach v. United States*, 2005 WL 1019238, 2005 U.S. Dist. LEXIS 9265 (D. Utah April 28, 2005) (Kimball, J.) (same); *Collier v. United States*, 2005 WL 1019599, 2005 U.S. Dist. LEXIS 9264 (D. Utah April 28, 2005) (Kimball, J.) (same); *Sanchez v. United States*, 2005 WL 1019762, 2005 U.S. Dist. LEXIS 9266 (D. Utah April 28, 2005) (Kimball, J.) (same); *Rocin-Soto v. United States*, 2005 WL 1019941, 2005 U.S. Dist. LEXIS 9326 (D. Utah April 28, 2005) (Kimball, J.) (same); *see also Christensen v. United States*, 2005 WL 1019003, 2005 U.S. Dist. LEXIS 9263 (D. Utah April 28, 2005) (Kimball, J.) (in firearm possession case where defendant's sentence based in part on prior conviction that was crime of violence, finding that "[t]his case does not present a *Booker* issue because whether a crime is a crime of violence is [a] question of law" and "[e]ven if this case presented a *Booker* issue, *Booker* would not apply because *Booker* does not apply retroactively to cases on collateral review"); *Lara-Lizaola v. United States*, 2005 WL 1000234, 2005 U.S. Dist. LEXIS 8499 (D. Utah April 28, 2005) (Sam, J.) (similar result in illegal reentry case)

*United States v. Ceja*, 2005 WL 300415 (N.D. Ill. Feb. 7, 2005) (Grady, J.) (without citing to *McReynolds*, finding that *Blakely* and *Booker* are not retroactive); *see also United States v. Gholson*, 2005 WL 388569, 2005 U.S. Dist. LEXIS 7752 (N.D. Ill. Feb. 14, 2005) (Pallmeyer, J.); *Varela v. United States*, 364 F. Supp. 2d 720 (N.D. Ill. Mar. 7, 2005) (Norgle, J.); *McGraw v. United States*, 2005 WL 946998, 2005 U.S. Dist. LEXIS 7535 (N.D. Ill. April 11, 2005) (Gettleman, J.) (relying on *McReynolds*)

*United States v. Reno*, 2005 WL 475369, 2005 U.S. Dist. LEXIS 3100 (D. Kan. Feb. 17, 2005) (Crow, J.) (in case where defendant pled guilty after *Apprendi* and stipulated to facts that were used to increase sentence, finding even if there was Sixth Amendment violation, *Booker* was not retroactive; string-citing cases finding *Apprendi* and *Blakely* not retroactive; quoting heavily from *McReynolds*); *see also United States v. Gill*, 2005 WL 475375, 2005 U.S. Dist. LEXIS 3099 (D. Kan. Feb. 28, 2005) (Crow, J.) (in case where defendant pled guilty after *Apprendi* and stipulated to facts that were used to increase sentence, finding even if there was Sixth Amendment violation, *Booker* was not retroactive; finding that *Booker* was "new" rule because Supreme Court cited to *Griffith v. Kentucky*; string-citing recent cases re. retroactivity)

*United States v. Marple*, 2005 WL 466216, 2005 U.S. Dist. LEXIS 2908 (D. Kan. Feb. 21, 2005) (Robinson, J.) (finding *Booker* is not retroactive in light of *Schriro v. Summerlin*; decision

establishes new rule of procedure that is not a watershed rule); *see also United States v. Shirack*, 2005 WL 466213, 2005 U.S. Dist. LEXIS 2912 (D. Kan. Feb. 21, 2005) (Robinson, J.) (same); *United States v. Kelley*, 2005 WL 466208, 2005 U.S. Dist. LEXIS 2909 (D. Kan. Feb. 21, 2005) (Robinson, J.) (same; government also raised procedural default, which court did not address); *United v. Lewis*, 2005 WL 466214, 2005 U.S. Dist. LEXIS 2911 (D. Kan. Feb. 22, 2005) (Robinson, J.) (same; government also raised waiver of § 2255 rights, which court did not address); *United States v. Merriweather*, 2005 WL 663596, 2005 U.S. Dist. LEXIS 4516 (D. Kan. Mar. 21, 2005) (Robinson, J.) (same; collecting recent cases)

*Hamdani v. United States*, 2005 WL 419727, 2005 U.S. Dist. LEXIS 2576 (E.D.N.Y. Feb. 22, 2005) (Trager, J.) (distinguishing Second Circuit cases re. retroactivity as to second § 2255 motions, but nonetheless finding *Booker* not retroactive); *followed in Woodard v. United States*, 2005 WL 524725, 2005 U.S. Dist. LEXIS 3400 (E.D.N.Y. Mar. 7, 2005) (Block, J.); *Rodriguez v. United States*, 2005 WL 755769, 2005 U.S. Dist. LEXIS 5497 (E.D.N.Y. April 4, 2005) (Block, J.)

*Nnebe v. United States*, 2005 WL 427534, 2005 U.S. Dist. LEXIS 2732 (S.D.N.Y. Feb. 22, 2005) (Scheidlin, J.) (relying on cases involving second § 2255 motions to determine that *Blakely* and *Booker* are not retroactive as to first § 2255 motion; declining to issue certificate of appealability)

\* *United States v. Aikens*, 358 F. Supp. 2d 433 (E.D. Pa. Feb. 25, 2005) (DuBois, J.) (in fairly detailed analysis, finding *Blakely* and *Booker* not retroactive, but granting certificate of appealability); *see Armstrong, infra*; *see also United States v. Enigwe*, 2005 WL 928536, 2005 U.S. Dist. LEXIS 6809 (E.D. Pa. April 18, 2005) (DuBois, J.)

\* *United States v. Wenzel*, 359 F. Supp. 2d 403 (W.D. Pa. Mar. 2, 2005) (McLaughlin, J.) (in fairly extended analysis, concluding that *Blakely* and *Booker* are not retroactive, but granting certificate of appealability)

*LaPointe v. United States*, 2005 WL 670742 (W.D. Mo. Mar. 10, 2005) (Smith, J.) (neither *Blakely* nor *Booker* are retroactive)

*United States v. Saeturn*, 2005 WL 831264 (D. Alaska, Mar. 11, 2005) (Roberts, M.J.) (finding *Booker* is not retroactive because it is new rule that does not fall into either of *Teague*'s exceptions); *see also United States v. Carter*, 2005 WL 1039412 (D. Alaska May 2, 2005) (Branson, M.J.) (same)

*United States v. Shevi*, 2005 WL 661558, 2005 U.S. Dist. LEXIS 4492 (D. Minn. Mar. 22, 2005) (Montgomery, J.) (in somewhat extended discussion, finding *Blakely* and *Booker* are not retroactive); *see Rodriguez v. United States*, 2005 WL 1073655, 2005 U.S. Dist. LEXIS 8936 (D. Minn. Mar. 8, 2005) (Tunheim, J.); *Morales v. United States*, 2005 WL 807051, 2005 U.S. Dist. LEXIS 5896 (D. Minn. April 7, 2005) (Montgomery, J.); *see also Soberanis-Sagrero v. United States*, 2005

WL 1041489 (D. Minn. Mar. 8, 2005) (Tunheim, J.); *Majors v. United States*, 2005 WL 1041486 (D. Minn. Mar. 30, 2005) (Tunheim, J.)

*Cox v. United States*, 361 F. Supp. 2d 485 (D. Md. Mar. 24, 2005) (Legg, J.) (summarily noting that *Blakely* and *Booker* are not retroactive)

\* *United States v. Mathis*, 2005 WL 692082, 2005 U.S. Dist. LEXIS 5136 (D.D.C. Mar. 24, 2005) (Kollar-Kotelly, J.) (framing *Booker* decision as stating rule that “the Federal Sentencing Guidelines are merely advisory because, if mandatory, they would violate the Sixth Amendment;” finding that rule is new because not dictated by *Apprendi* at time defendant’s conviction and sentence became final in 2001, and that it does not fall within *Teague* exceptions, in particular that it is not a “watershed” decision “because simply converting the Federal Sentencing Guidelines from mandatory to advisory is not ‘so central to an accurate determination of guilt or innocence’ that any sentence imposed prior to this change would be seen as fundamentally unfair”); see also *United States v. Hall*, 2005 U.S. Dist. LEXIS 7996 (D.D.C. April 19, 2005) (Huvelle, J.) (*Booker* is new rule that is procedural, not substantive, and is not a watershed rule; as such, it is not retroactive); *United States v. Agramonte*, 366 F. Supp. 2d 83 (D.D.C. April 28, 2005) (Friedman, J.)

\* *Armstrong v. United States*, 2005 WL 724121, 2005 U.S. Dist. LEXIS 6383 (E.D. Pa. Mar. 28, 2005) (Sanchez, J.) (recognizing that “[r]easoned arguments also counter the conclusion that *Booker* is not retroactive” as (1) “Justice O’Connor suggested in her dissent to *Blakely*, ‘all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack;” (2) “[a] Note in the Harvard Law Review argues forcefully for the retroactive application of *Apprendi*’s reasonable doubt standard, which, if it were to prevail, would extend to *Blakely* and *Booker*” (citing 118 Harv. L.Rev. 1642, 1663); and (3) “[t]he Third Circuit has not spoken on the issue of retroactivity”)

*Hukvari v. United State*, 2005 WL 756790, 2005 U.S. Dist. LEXIS 5597 (D.N.H. April 1, 2005) (McAuliffe, J.) (noting that while First Circuit has not yet addressed issue, “the prevailing view among courts of appeals and district courts is that neither *Booker* nor *Blakely* is retroactively applicable”); see also *Bromley v. United States*, 2005 WL 762602, 2005 U.S. Dist. LEXIS 5809 (D.N.H. April 5, 2005) (McAuliffe, J.); *Burley v. United States*, 2005 WL 762610, 2005 U.S. Dist. LEXIS 5911 (D.N.H. April 5, 2005) (McAuliffe, J.) (also noting that “it is unlikely that petitioner’s sentence under a discretionary system would have been less, [as] he obtained a substantial downward departure” for his cooperation); *DeFrancesco v. United States*, 2005 WL 762597, 2005 U.S. Dist. LEXIS 5808 (D.N.H. April 5, 2005) (McAuliffe, J.)

*Aragonez-Sandoval v. United States*, 2005 WL 1106945, 2005 U.S. Dist. LEXIS 8287 (W.D. Tex. April 8, 2005) (Montalvo, J.) (finding that *Booker* is not retroactive); see *Salazar-Armendariz v. United States*, 2005 WL 1106951, 2005 U.S. Dist. LEXIS 8194 (W.D. Tex. April 21, 2005) (Briones, J.) (noting that court agrees with every circuit court to consider issue that *Booker* is not retroactive);

*Gomez-Caldera v. United States*, 2005 WL 1106949, 2005 U.S. Dist. LEXIS 8288 (W.D. Tex. April 22, 2005) (Briones, J.) (same)

*Hernandez-Vega v. United States*, 2005 WL 991256, 2005 U.S. Dist. LEXIS 8215 (D.P.R. April 19, 2005) (Casellas, J.) (denying defendant's objections because magistrate judge did not err in analyzing petition under *Blakely* and *Booker* where decisions are not retroactive)

*United States v. Seigler*, 2005 WL 950621 (N.D. Fla. April 20, 2005) (Hinkle, J.) (recognizing that while it could be argued that reasonable doubt aspect of *Apprendi* should be retroactive, Eleventh Circuit precedent foreclosed that assertion, at least in district court)

*Halliburton v. United States*, 2005 WL 1028172, 2005 U.S. Dist. LEXIS 9110 (E.D. Mich. April 21, 2005) (Steeh, J.) (relying on Second Circuit's *Green* decision to find that *Booker* is not retroactive because Supreme Court has not made it so, even though defendant's petition appears to be his first)

*United States v. Alexander*, 2005 WL 1038603, 2005 U.S. Dist. LEXIS 8039 (E.D. La. April 22, 2005) (Fallon, J.) (*Blakely* and *Booker* do not apply retroactively); *United States v. DeClassis*, 2005 WL 1074988, 2005 U.S. Dist. LEXIS 8356 (E.D. La. May 3, 2005) (Fallon, J.) (even if *Booker* did apply retroactively, defendant's claim would fail because his sentence was not enhanced on basis of any fact not admitted by him)

*United States v. Satterwhite*, 2005 U.S. Dist. LEXIS 9870, 9872 (S.D. Ohio April 25, 2005) (Merz, M.J., Rice, J.) (*Booker* is not applicable to cases on collateral review)

*United States v. Rozema*, 2005 WL 1026043 (M.D. Fla. April 26, 2005) (Merryday, J.) (rejecting defendant's challenge to validity of sentence based on *Booker* and *Blakely* because decisions are not applicable to cases on collateral review as they are not retroactive); *Estupinan v. United States*, 2005 WL 1126559 (M.D. Fla. May 5, 2005) (Moody, J.)

*United States v. Argento*, 371 F. Supp. 2d 1167 (C.D. Cal. April 27, 2005) (Kozinski, C.J., sitting by designation) (*Booker* is a new rule because it was not dictated by precedent; it is procedural rule, and it is not "watershed" rule, thus it cannot be applied retroactively to conviction that is final)

*United States v. Taylor*, 2005 WL 984525 (N.D. Iowa April 28, 2005) (Reade, J.) (finding that Supreme Court did not intend for *Booker* to apply collaterally because court stated that decision applied to cases on direct review; noting that although Eighth Circuit has not yet addressed retroactivity, "a review of the applicable case law indicates the consensus of circuit courts is that *Booker* does not apply retroactively on collateral review"); *United States v. Knight*, 2005 WL 1058936 (N.D. Iowa May 4, 2005) (Reade, J.); *United States v. Pearson*, 2005 WL 1058935 (N.D. Iowa May 4, 2005) (Reade, J.); *United States v. Myers*, 2005 WL 1048760 (N.D. Iowa May 4, 2005) (Reade, J.)

*United States v. Ramirez*, 2005 WL 1027167 (D. Neb. May 2, 2005) (Kopf, J.) (finding *Booker* is not retroactive); *United States v. Carillo*, 2005 WL 1027171 (D. Neb. May 2, 2005) (Kopf, J.) (same)

*Gray v. United States*, 2005 WL 1200204 (N.D.N.Y. May 2, 2005) (McAvoy, J.) (in very short opinion, finding *Booker* not retroactive)

*United States v. Lopez-Cerda*, 2005 WL 1056658 (E.D. Wash. May 4, 2005) (Quackenbush, J.) (Supreme Court has not declared that *Booker* is retroactive and is unlikely to do so)

*Sangster v. United States*, 2005 WL 1127130 (M.D. Ga. May 5, 2005) (Lawson, J.) (adopting magistrate judge's recommendation that motion be denied because *Booker* is not retroactive; also noting that "even if Sangster could establish a *Booker* error, at best, he would be entitled to a resentencing hearing, in which the Court could engage in the same judicial factfinding and could impose the same sentence, but such sentence would not be mandatory")

*United States v. Jackson*, 2005 WL 1154833 (M.D. Pa. May 9, 2005) (Kane, J.) (finding *Booker* is not retroactive as to first § 2255 motions, but dismissing motion without prejudice in case Third Circuit or Supreme Court finds that it is)

*Fain v. United States*, 2005 WL 1111235 (W.D. Wash. May 9, 2005) (Tanner, J.) (in very brief discussion, stating that Supreme Court has not made *Booker* retroactive)

*United States v. Velasquez*, 2005 WL 1155164 (S.D. Tex. May 10, 2005) (Jack, J.) (*Booker* is not retroactive to cases on collateral review); *United States v. Parra-DeRodriguez*, 2005 WL 1155162 (S.D. Tex. May 10, 2005) (Jack, J.); *United States v. Ronje*, 2005 WL 1155695 (S.D. Tex. May 11, 2005) (Jack, J.)

*United States v. Campbell*, 2005 WL 1138825 (E.D. Tenn. May 12, 2005) (Collier, J.) (denying motion because *Booker* not retroactive); *Byrge v. United States*, 2005 WL 1130350 (E.D. Tenn. May 12, 2005) (Phillips, J.)

*Grant v. United States*, 2005 WL 1147416 (D. Del. May 16, 2005) (Robinson, J.) (after requesting briefing from parties of effect of *Booker*, concluding that decision is not retroactive in light of decisions of Third Circuit and other courts)

*Big Crow v. United States*, 2005 WL 1176106 (D.S.D. May 16, 2005) (Kornmann, J.) (collecting cases holding that *Booker* is not retroactive); *Leaf v. United States*, 2005 WL 1229738 (D.S.D. May 19, 2005) (Kornmann, J.)

*United States v. Robinson*, 2005 WL 1198908 (E.D. Wis. May 18, 2005) (Randa, J.) (*Booker* is not retroactively applicable); *Congemi v. United States*, 2005 WL 1269129 (E.D. Wis. May 26, 2005) (Clevert, J.)

*Potts v. United States*, 2005 WL 1216968 (D.N.J. May 19, 2005) (Wolfson, J.) (*Booker* is not retroactive)

*Moss v. United States*, 2005 WL 1214240, 2005 U.S. Dist. LEXIS 10155 (S.D. Ill. May 20, 2005) (Murphy, J.) (*Booker* is not retroactive)

*Medina v. United States*, 2005 WL 1223411, 2005 U.S. Dist. LEXIS 9776 (D. Mass. May 23, 2005) (O'Toole, J.) (finding that “[i]n the absence of retroactivity, the *Booker* and *Blakely* principles do not pertain”)

*United States v. Harris*, 2005 WL 1242219, 2005 U.S. Dist. LEXIS 9917 (E.D. Ky. May 24, 2005) (Bertelsman, J.) (finding that “[a]s this court is bound by the Sixth Circuit’s published *Humphress* decision, *Blakely* and its progeny cannot be applied retroactively on collateral review”)

*United States v. Abernathy*, 2005 WL 1278842 (D. Vt. May 26, 2005) (Niedermeier, M.J.) (finding that law in circuit is that *Booker* is not retroactive); *United States v. Breault*, 2005 WL 1278517 (D. Vt. May 26, 2005) (Niedermeier, M.J.)

*United States v. Adkins*, 2005 WL 1308055 (W.D. Mich. May 27, 2005) (Scoville, M.J.) (*Booker* is not retroactive); *United States v. Lopez*, 2005 WL 1308051 (W.D. Mich. May 27, 2005) (Scoville, M.J.)

*Leigh v. United States*, 2005 WL 1334568, 1334571 (N.D. W. Va. June 3, 2005) (Seibert, M.J.) (recommending that defendant’s *Booker* claim be denied because, although Fourth Circuit has not addressed retroactivity of decision, other circuits have held that it is not)

### 3. Retroactivity as to Second or Successive § 2255 Motions

*In re Anderson*, 396 F.3d 1336 (11th Cir. Jan. 21, 2005) (denying application for leave to file second or successive petition in part because Supreme Court has not made *Booker* retroactive)

*Green v. United States*, 397 F.3d 101 (2d Cir. Feb. 2, 2005) (in case in which defendant was sentenced to four life terms and 100 years in prison for racketeering and drug trafficking in 1994, denying application to file second motion because neither *Booker* nor *Blakely* apply retroactively)

*Bey v. United States*, 399 F.3d 1266 (10th Cir. Mar. 1, 2005) (denying authorization to file second or successive § 2255 motion based on *Blakely* and *Booker* because Supreme Court has not made

decisions retroactive); *see also United States v. Lucero*, 2005 WL 388731, 2005 U.S. App. LEXIS 2928 (10th Cir. Feb. 18, 2005) (treating Rule 60)b) motion to reconsider denial of § 2255 motion as second or successive § 2255 motion and denying authorization to file it because Supreme Court has not made *Booker* retroactive)

*In re Hinton*, unpublished, 2005 WL 566608, 2005 U.S. App. LEXIS 4090 (D.C. Cir. Mar. 10, 2005) (with practically no discussion, denying authorization to file successive motion because Supreme Court has not made either *Blakely* nor *Booker* retroactive); *In re Harris*, 2005 U.S. App. LEXIS 5763 (D.C. Cir. April 1, 2005) (same)

*In re Olopade*, 403 F.3d 159 (3d Cir. April 11, 2005) (holding that *Booker* does not apply to defendants seeking permission to file second or successive § 2255 motions because Supreme Court has not made decision retroactive, and there is no combination of Supreme Court decisions that “dictates” that decision be retroactive; rejecting in a footnote defendant’s argument that *Booker* is extension of *In re Winship*, which was retroactive; denying petitioner’s application for leave to file second § 2255) without prejudice in case Supreme Court does make *Booker* retroactive)

*In re Elwood*, 408 F.3d 211 (5th Cir. April 28, 2005) (applying analysis of *Tyler v. Cain*, finding that *Booker* is not retroactive because Supreme Court has not announced that it is, nor has Supreme issued decision or combination of decisions that necessarily dictate *Booker*’s retroactivity); *followed in United States v. Morales-Gomez*, 2005 WL 1025990, 2005 U.S. Dist. LEXIS 7582 (N.D. Tex. April 29, 2005) (Averitte, M.J.) (also noting that defendant may not even have *Booker* claim, as sentence enhancement was based on prior conviction); *United States v. Moore*, 2005 WL 1025991, 2005 U.S. Dist. LEXIS 7533 (N.D. Tex. April 29, 2005) (Averitte, M.J.)

*United States v. Fowler*, unpublished, 2005 WL 1416002, 2005 U.S. App. LEXIS 11721 (4th Cir. June 17, 2005) (denying authorization to file second § 2255 motion “because neither *Booker* nor *Blakely* announced a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review”)

*Hamlin v. United States*, 2005 WL 102959, 2005 U.S. Dist. LEXIS 751 (D. Me. Jan. 19, 2005) (Kravchuk, M.J.) (recommendation of magistrate judge denying second § 2255 motion because Supreme Court has not made *Booker* retroactive)

*United States v. Massey*, 2005 U.S. Dist. LEXIS 1094 (N.D. Tex. Jan. 26, 2005) (Kaplan, M.J.) (recommending that motion be dismissed without prejudice because petitioner had not moved in Fifth Circuit for permission to file successive motion); *see also United States v. Bullard*, 2005 WL 283188 (N.D. Tex. Feb. 3, 2005) (Means, J.) (dismissing as successive motion filed without certification from court of appeals); *United States v. Hartman*, 2005 WL 491532, 2005 U.S. Dist. LEXIS 3211 (N.D. Tex. Mar. 2, 2005) (Kaplan, M.J.) (same), 2005 U.S. Dist. LEXIS 4527 (N.D. Tex. Mar. 22, 2005) (Buchmeyer, J.) (adopting report and recommendation); *Cyrus v. United States*, 2005 WL 637939, 2005

U.S. Dist. LEXIS 4190 (N.D. Tex. Mar. 18, 2005) (Stickney, M.J.) (same), 2005 U.S. Dist. LEXIS 5093 (N.D. Tex. Mar. 30, 2005) (Sanders, J.) (adopting report and recommendation)

*United States v. Barnes*, 2005 WL 217027, 2005 U.S. Dist. LEXIS 1203 (E.D. Pa. Jan. 28, 2005) (Bartle, J.) (denying without prejudice defendant's second motion under 28 U.S.C. § 2255 because petitioner had not moved in Third Circuit for permission to file motion); *United States v. Golden*, 2005 WL 950610 (E.D. Pa. April 22, 2005) (Sanchez, J.) (denying motion both because petitioner did not obtain certification and because *Booker* is not retroactive)

\* *United States v. Walton*, 2005 WL 661362 (D. Alaska Mar. 18, 2005) (Roberts, M.J.) (recommending that pleading be construed as second petition and dismissed; discussing whether *Booker* is not "new" rule that can be applied retroactively)

*Butts v. United States*, 2005 WL 1021615 (E.D. Va. April 29, 2005) (Friedman, J.) (dismissing motions based on *Blakely* and *Booker* because court did not have jurisdiction where motions were successive requests for § 2255 relief that had not been authorized by Fourth Circuit)

*Ramirez-Ferrer v. United States*, 2005 WL 1153772, 2005 U.S. Dist. LEXIS 9374 (D.P.R. April 29, 2005) (collecting cases holding that *Booker* is not retroactive)

#### H. § 2241 Motions

*Padilla v. United States*, \_\_\_ F.3d \_\_\_, 2005 WL 1595291 (5th Cir. July 8, 2005) (*Blakely/Booker* claim does not fall under savings clause)

*Alexander v. Wendt*, unpublished, 2005 WL 746525, 2005 U.S. App. LEXIS 5301 (5th Cir. April 1, 2005) (affirming denial of § 2241 motion in part because "[r]egarding his guideline adjustment, Alexander does not seek relief under 28 U.S.C. § 2255, nor does he make any argument regarding the savings clause of 28 U.S.C. § 2255. He therefore has made no argument supporting relief under *Booker* or *Blakely* in the context of this case")

*Godines v. Joslin*, 2005 WL 177959 (N.D. Tex. Jan. 27, 2005) (Sanderson, M.J.) (in case where petitioner had previously filed a § 2255 motion, recommending that motion made pursuant to 28 U.S.C. § 2241 motion be denied because it should be construed as § 2255 motion and petitioner did not demonstrate that savings clause of § 2255 applied where *Booker* has not been made retroactive), 2005 U.S. Dist. LEXIS 1875 (N.D. Tex. Feb. 8, 2005) (Lindsay, J.) (adopting magistrate's findings and recommendation)

*Rodriguez v. Joslin*, 2005 WL 178034, 2005 U.S. Dist. LEXIS 1103 (N.D. Tex. Jan. 27, 2005) (Sanderson, M.J.) (in case where petitioner had previously filed a § 2255 motion, recommending that motion made pursuant to 28 U.S.C. § 2241 be denied because it should be construed as § 2255 motion)

and petitioner did not demonstrate that savings clause of § 2255 applied where *Booker* has not been made retroactive; further, court has no jurisdiction where Fifth Circuit has not issued order granting petitioner leave to file second § 2255 motion)

*Lindsey v. Jeter*, 2005 WL 233799, 2005 U.S. Dist. LEXIS 1385 (N.D. Tex. Jan. 31, 2005) (Bleil, M.J.) (in case where petitioner had previously filed a § 2255 motion, recommending that motion made pursuant to 28 U.S.C. § 2241 be denied petitioner did not demonstrate that savings clause of § 2255 applied where *Booker* has not been made retroactive), 2005 WL 550380, 2005 U.S. Dist. LEXIS 3621 (N.D. Tex. Mar. 8, 2005) (Means, J.) (adopting report and recommendation); *see also Kenemore v. Jeter*; 2005 U.S. Dist. LEXIS 2317 (N.D. Tex. Feb. 16, 2005) (Bleil, M.J.); *Thomas v. Jeter*, 2005 WL 415896, 2005 U.S. Dist. LEXIS 2424 (N.D. Tex. Feb. 17, 2005) (Bleil, M.J.) (same), 2005 WL 623503, 2005 U.S. Dist. LEXIS 4095 (N.D. Tex. Mar. 16, 2005) (Means, J.) (adopting report and recommendation); *Phillips v. Jeter*, 2005 WL 465160, 2005 U.S. Dist. LEXIS 2939 (N.D. Tex. Feb. 25, 2005) (Bleil, M.J.) (same)

*Mack v. McFadden*, 2005 WL 1155678 (W.D. Mo. Feb. 4, 2005) (England, M.J.) (recommending that petition be dismissed without prejudice because claims are cognizable only by § 2255 motion, if at all), 2005 WL 1155682 (W.D. Mo. May 16, 2005) (Whipple, J.) (adopting recommendation; rejecting defendant's argument that savings clause is triggered because Supreme Court has not yet ruled on retroactivity of *Blakely* and *Booker*, such that § 2255 motion is inadequate)

*Owens v. Van Buren*, 2005 WL 283614, 2005 U.S. Dist. LEXIS 1663 (N.D. Tex. Feb. 7, 2005) (Bleil, M.J.) (finding that *Booker* claim that was raised for first time in defendant's traverse to government's response would not be considered because it did not reply to specific point in government's pleading), 2005 WL 525219, 2005 U.S. Dist. LEXIS 3412 (N.D. Tex. Mar. 7, 2005) (Means, J.) (adopting report and recommendation)

*Johnson v. Apker*, 2005 WL 1162461 (M.D. Pa. Mar. 14, 2005) (McClure, J.) (discussing when § 2241 may be used in lieu of § 2255 motion; concluding that "the fact that *Blakely* and *Booker* were decided after both conclusion of Petitioner's direct appeal and § 2255 action, does not allow him to assert a *Blakely/Booker* claim in a § 2241 petition"); *Gorko v. Holt*, 2005 WL 1138479 (M.D. Pa. May 13, 2005) (McClure, J.); *Grecco v. Williamson*, 2005 WL 1138463 (M.D. Pa. May 13, 2005) (Kane, J.)

*Francois v. Rivera*, 2005 WL 927408 (N.D. Fla. Mar. 22, 2005) (Kornblum, M.J.) (savings clause of § 2255 is not triggered to allow § 2241 petition until *Booker* is found retroactive)

*Watts v. United States*, 2005 WL 1035992 (E.D. Tex. Mar. 23, 2005) (Hines, M.J.) (recommending dismissal of petition because defendant did not meet criteria required to support claim under savings clause of § 2255); *Ridick v. Miles*, 2005 WL 994612 (E.D. Tex. April 26, 2005) (Hines, M.J.) (similar); *Cambray v. Morris*, 2005 WL 1266688 (E.D. Tex. May 26, 2005) (Heartfield, J.)

*Humphrey v. Outlaw*, 2005 WL 1009559, 2005 U.S. Dist. LEXIS 8205 (W.D. Tenn. Mar. 28, 2005) (Donald, J.) (denying petition in part because *Booker* is not retroactive (relying on Sixth Circuit's *Humphress* decision); noting that defendant did not attempt to demonstrate actual innocence)

*Tineo v. Le Blanc*, 2005 WL 740520, 2005 U.S. Dist. LEXIS 5289 (D. Minn. Mar. 31, 2005) (Montgomery, J.) (where petitioner had previously filed § 2255 motion, agreeing with magistrate's recommendation that § 2241 motion be denied because it should be construed as second § 2255 motion and court had no jurisdiction where Seventh Circuit had not issued order granting petitioner leave to file second § 2255 motion; further, *Booker* has not been made retroactive)

*United States v. Stafford*, 2005 WL 775317, 2005 U.S. Dist. LEXIS 5906 (W.D. Wis. April 5, 2005) (Crabb, J.) (where defendant cited to cases permitting filing of § 2241 motion, rejecting his reliance on cases because they involved claims of actual innocence, not sentencing challenging; construing motion as sixth § 2255 that court lacks authority to entertain without certification from court of appeals)

*Fuell v. United States*, 2005 WL 1114410 (N.D. W. Va. April 7, 2005) (Kaul, M.J.) (discussing Fourth Circuit's test for when § 2241 motion can be used instead of § 2255 motion and concluding that defendant had not satisfied test)

*Eng v. Drew*, 2005 WL 928630 (N.D.N.Y. April 20, 2005) (Kahn, J.) (although it is unlikely that second § 2255 would be available to petitioner to raise *Booker* claim, "that alone does not establish that this remedy is inadequate or ineffective"); *Oliver v. Craig*, 2005 WL 1174066 (N.D.N.Y. April 29, 2005) (Mordue, J.)

*Ellis v. Bledsoe*, 2005 WL 1035438 (W.D. Va. May 4, 2005) (Kiser, J.) (discussing Fourth Circuit's test for when § 2241 motion can be used instead of § 2255 motion and concluding that defendant had not satisfied test; denying certificate of appealability)

*Ford v. Warden of F.C.I. El Reno*, 2005 WL 1074601, 2005 U.S. Dist. LEXIS 9241, 9246 (W.D. Okla. May 6, 2005) (Heaton, J.) (adopting magistrate judge's report and recommendation, which found that defendant could not use § 2241 motion because "his previous failure to obtain permission to file a successive § 2255 motion does not bring him within the narrow exception established by the savings clause, particularly where the Seventh Circuit has made it clear that his application can be renewed in the event the Supreme Court makes its holdings in *Blakely* and *Booker* retroactive")

*Presley v. O'Brien*, 2005 WL 1140724 (E.D. Ky. May 12, 2005) (Wilhoit, J.) (denying § 2241 petition because it "failed to pass the threshold of demonstrating both that his remedy by a §§ 2255 motion to the trial court is inadequate and ineffective and that he is actually innocent of criminal conduct under an intervening ruling handed down by the Supreme Court of the United States")

*Lewis v. Veltri*, 2005 WL 12247721, 2005 U.S. Dist. LEXIS 10380 (S.D. Ill. May 23, 2005) (Murphy, J.) (discussing when § 2241 motion may be used; dismissing motion because defendant cannot show he is actually innocent of charges and *Booker* is not retroactive)

*Queen v. Miner*, 2005 WL 1252260 (D.N.J. May 25, 2005) (Wolfson, J.) (Supreme Court has not made *Booker* retroactive and Third Circuit has held that it is not); *Smith v. Miner*, 2005 WL 1334637 (D.N.J. June 3, 2005) (Wolfson, J.); *Woolfolk v. Miner*, 2005 WL 1334631 (D.N.J. June 3, 2005) (Kugler, J.)

*Polydor v. Sniezik*, 2005 WL 1244819 (N.D. Ohio May 25, 2005) (Economus, J.) (rejecting defendant's claim of innocence and analogy of *Booker* to *Bailey*; finding that "[w]hether or not Mr. Polydor's sentence enhancement for possessing an additional 32 kilograms is valid under *Booker* is a question of legal sufficiency, not factual innocence"); *Maxwell v. Sniezik*, 2005 WL 1334642 (N.D. Ohio June 3, 2005) (Nugent, J.)

*Lomax v. Daniels*, 2005 WL 1278934 (D. Or. May 25, 2005) (Marsh, J.) (rejecting argument that reasonable doubt aspect of *Blakely* is not a new rule because it is based on *In re Winship* as "based upon the faulty premise that the extension of the holding in *Winship* to sentencing enhancements is not a new rule which triggers retroactivity analysis")

*Johnson v. U.S. District Court*, 2005 WL 1353755 (W.D. Ky. June 2, 2005) (Russell, J.) (denying § 2241 motion in part because "the Supreme Court's decision in *Booker* does not clear the way for him to bring his present habeas petition as the Sixth Circuit has now held that *Booker* does not apply retroactively to cases on collateral review")

#### I. Rule 59(e) Motions to Alter or Amend Judgment

*United States v. Parlin*, 2005 WL 544186, 2005 U.S. Dist. LEXIS 3478 (N.D. Tex. Mar. 8, 2005) (Ramirez, M.J.) (declining to reconsider, in light of *Booker*, dismissal of § 2255 motion raising *Blakely* challenge where dismissal was based on waiver of § 2255 rights)

*Duran v. United States*, 2005 U.S. Dist. LEXIS 6859 (N.D. Ind. April 18, 2005) (Miller, J.) (explaining standards for granting of Fed. R. Civ. P. 59(e) motion, and finding defendant did not meet them where he waived right to collaterally attack sentence and in light of *McReynolds*; declining to issue certificate of appealability)

*United States v. Ocasio*, 2005 WL 1489462, 2005 U.S. Dist. LEXIS 12242 (D. Conn. June 20, 2005) (Droney, J.) (denying motion for reconsideration because *Booker* is not retroactive)

J. Rule 60(b) Motions for Relief from Judgment

*United States v. Tam*, 2005 WL 486772, 2005 U.S. Dist. LEXIS 3154 (E.D. Pa. Mar. 1, 2005) (Yohn, J.) (defendant cannot use Rule 60(b) motion to collaterally attack underlying judgment; such motion will be treated as second or successive § 2255 motion, which requires authorization from court of appeals), *cert. of appeal. denied*, 2005 WL 1030197, 2005 U.S. Dist. LEXIS 7788 (E.D. Pa. May 3, 2005) (Yohn, J.); *cf. United States v. Enigwe*, 2005 WL 928536, 2005 U.S. Dist. LEXIS 6809 (E.D. Pa. April 18, 2005) (DuBois, J.)

*United States v. Vasquez*, 2005 WL 775900, 2005 U.S. Dist. LEXIS 5718 (E.D.N.Y. April 6, 2005) (Block, J.) (finding that *Booker* does not present an extraordinary circumstance or work an undue hardship within the scope of Rule 60(b)(6) because it does not call into correctness the denial of defendant's § 2255 motion); *Vega v. United States*, 2005 WL 1124512 (E.D.N.Y. May 10, 2005) (Sifton, J.)

*United States v. Lockett*, 2005 WL 1081130, 2005 U.S. Dist. LEXIS 8434 (D. Minn. May 2, 2005) (Magnuson, J.) (agreeing with other courts that *Booker* is not retroactive)

*Weatherspoon v. United States*, 2005 WL 1174121 (N.D. Ind. May 4, 2005) (Lee, J.) (construing motion as second § 2255 and dismissing for failure to obtain authorization from court of appeals to file)

*United States v. Coley*, 2005 WL 1107375, 2005 U.S. Dist. LEXIS 9758 (D. Del. May 6, 2005) (Farnan, J.) (denying claims because *Blakely* and *Booker* cannot be applied retroactively to cases on collateral review)

*United States v. Williams*, 2005 WL 1277930 (M.D. Ala. May 9, 2005) (Boyd, M.J.) (construing motion as second § 2255 and recommending dismissal for failure to obtain authorization from court of appeals to file)

*Thomas v. United States*, 2005 U.S. Dist. LEXIS 9525 (W.D.N.C. May 9, 2005) (Thornburg, J.) (construing motion as second § 2255 and dismissing for failure to obtain authorization from court of appeals to file; finding that *Blakely* and *Booker* are not retroactively applicable)

*United States v. Carter*, 2005 WL 1349121 (E.D. Mich. May 10, 2005) (finding no reason to apply *Blakely* and *Booker* to Rule 60(b) motion because they are not retroactive, so no relief is warranted)

*Negron v. United States*, 2005 WL 1153773 (S.D.N.Y. May 16, 2005) (Chin, J.) (denying claims because *Booker* cannot be applied retroactively to cases on collateral review)

*United States v. Cabrero*, 2005 WL 1484669 (E.D. Tenn. June 21, 2005) (Edgar, J.) (calling “Motion to Amend or Reduce Sentence” based on Rule 60(b) frivolous because rule as one of civil procedure, is not applicable to criminal cases except in limited context of habeas corpus and post-conviction proceedings)

K. Writs of Error Coram Nobis

*United States v. Helmos Food Product*, 407 F.3d 848 (7th Cir. May 11, 2005) (where defendant sought to challenge fine via coram nobis, noting that *Booker* does not affect analysis of case because it was not on direct appeal and *Booker* does not apply to criminal cases that became final before decision issued on January 12, 2005)

*United States v. Tarver*, 2005 WL 724202, 2005 U.S. Dist. LEXIS 4972 (N.D. Tex. Mar. 25, 2005) (Stickney, M.J.) (in considering motion styled as writ of error coram nobis, noting that writ extends only to persons no longer in custody but that defendant remained in prison; further, because defendant raised *Blakely/Booker* claims, giving notice to defendant that court would construe writ as § 2255 motion, see *Castro v. United States*, 540 U.S. 375 (2003))

*Ross v. United States*, 2005 WL 1041483, 2005 U.S. Dist. LEXIS 8093 (D. Minn. April 19, 2005) (Tunheim, J.) (denying motion because *Blakely* and *Booker* are not retroactive)

*United States v. Lockett*, 2005 WL 1081130, 2005 U.S. Dist. LEXIS 8434 (D. Minn. May 2, 2005) (Magnuson, J.) (agreeing with other courts that *Booker* is not retroactive)

*Weatherspoon v. United States*, 2005 WL 1174121 (N.D. Ind. May 4, 2005) (Lee, J.) (construing motion as second § 2255 and dismissing for failure to obtain authorization from court of appeals to file)

L. Writs of Mandamus

*In re Spotts*, unpublished, 2005 WL 715396, 2005 U.S. App. LEXIS 5111 (4th Cir. Mar. 30, 2005) (denying petition for writ of mandamus to force district court to apply *Booker* retroactively to defendant’s case; briefly discussing law regarding mandamus)

M. Other “Motions” for Relief

*United States v. Woods*, 2005 WL 1138788 (M.D. Ala. April 22, 2005) (Coody, M.J.) (construing “Motion for Post-Trial Relief, to Modify Sentencing Order and to Provide an Updated (Revised) Pre-Sentencing Investigation Report” as second § 2255 motion and denying it because defendant had not received requisite certification from Eleventh Circuit); see *United States v. Strickland*, 2005 WL 1367221 (M.D. Ala. May 17, 2005) (Walker, M.J.)

*United States v. Wrenn*, 2005 WL 1389060 (D. Or. May 10, 2005) (Redden, J.) (construing “Writ of Error Audita Querala” as § 2255 petition and denying it as time-barred)

*Finley v. United States*, 2005 WL 1474113 (E.D. Mo. June 14, 2005) (Limbaugh, J.) (denying petitioner’s “Writ of Error Audita Querala” because *Booker* does not apply retroactively)

N. Waivers of § 2255 Rights

*United States v. Braxton*, 358 F. Supp. 2d 497 (W.D. Va. Feb. 14, 2005) (Michael, J.) (where defendant had waived rights both to appeal and to pursue § 2255, and defendant subsequently filed § 2255 motion raising both *Blakely* claim and ineffective assistance of counsel claim (the latter based in part upon counsel’s failure to file a notice of appeal despite defendant’s request that she do so), finding that waiver of § 2255 rights can include waiver of IAC claims, and that defendant’s waiver was knowing and voluntary; dismissing *Blakely* claim based on valid waiver); *see also Bacon v. United States*, 2005 WL 1355167 (W.D. Va. June 6, 2005) (Moon, J.) (relying on Fourth Circuit’s recent *LeMaster* decision to dismiss § 2255 motion based on waiver of collateral attack rights)

*United v. Lewis*, 2005 WL 466214, 2005 U.S. Dist. LEXIS 2911 (D. Kan. Feb. 22, 2005) (Robinson, J.) (government raised waiver of § 2255 rights, but court did not address because it found *Booker* not retroactive); *see United States v. Orr*, 2005 WL 731074, 2005 U.S. Dist. LEXIS 5167 (D. Kan. Mar. 28, 2005) (Robinson, J.) (denying § 2255 motion in part because of waiver of appeal and collateral attack)

*United States v. Parlin*, 2005 WL 544186, 2005 U.S. Dist. LEXIS 3478 (N.D. Tex. Mar. 8, 2005) (Ramirez, M.J.) (declining to reconsider, in light of *Booker*, dismissal of § 2255 motion raising *Blakely* challenge where dismissal was based on waiver of § 2255 rights)

*United States v. Muniz*, 360 F. Supp. 2d 574 (S.D.N.Y. Mar. 14, 2005) (Stein, J.) (denying § 2255 motion in part on basis that defendant knowingly and voluntarily waived right to appeal and/or collaterally attack his sentence)

*Hardaway v. United States*, 2005 U.S. Dist. LEXIS 4064 (N.D. Ind. Mar. 14, 2005) (Simon, J.) (denying § 2255 motion in part because defendant had knowingly and voluntarily waived right to appeal and/or collaterally attack his sentence); *Hutchings v. United States*, 2005 WL 1172439, 2005 U.S. Dist. LEXIS 8104 (N.D. Ind. May 3, 2005) (Miller, J.) (dismissing claim of ineffective assistance of counsel based on counsel’s failure to raise *Blakely* at March 2004 sentencing where defendant had agreed in plea agreement not to bring § 2255 motion)

*United States v. Sullivan*, 2005 WL 825779 (D.N.D. April 6, 2005) (Hovland, J.) (dismissing second petition because defendant had expressly waived right to bring § 2255 motions and because

defendant did not obtain certification from court of appeals; declining to grant certificate of appealability because appeal would be frivolous)

*United States v. Chappell*, 2005 WL 806702, 2005 U.S. Dist. LEXIS 5886 (D. Kan. April 7, 2005) (Lungstrum, J.) (where defendant had waived right to bring § 2255 motion except for “any issue relating to retroactive changes effecting [sic] the guidelines,” enforcing waiver because *Booker* does not fall within exception to waiver because it is not retroactive, i.e., “*Booker* does not implicate a retroactive change to the Sentencing Guidelines;” further finding that waiver was knowing and voluntary, and that there would be no miscarriage of justice in enforcing it); *United States v. Herrera*, 2005 WL 806701, 2005 U.S. Dist. LEXIS 5888 (D. Kan. April 7, 2005) (Lungstrum, J.) (same, except waiver contained no exceptions); *United States v. Smith*, 2005 WL 839157, 2005 U.S. Dist. LEXIS 6183 (D. Kan. April 11, 2005) (Lungstrum, J.) (same)

*Adams v. United States*, 2005 WL 1005091 (W.D. Mo. April 27, 2005) (Smith, J.) (denying motion where defendant waived § 2255 rights as part of plea; stating that “[i]n this case, Movant’s agreement was part of a larger *quid pro quo* in that both parties withdrew certain arguments, made concessions, and reached a compromise rather than submit their disputes to the Court for resolution” and that “Movant surrendered the right to seek postconviction relief as part of the bargain he struck with the Government; he cannot resurrect that right”)

*United States v. Carter*, 2005 WL 1039412 (D. Alaska May 2, 2005) (Branson, M.J.) (finding that because defendant knowingly and voluntarily waived right to bring § 2255 motion and did not allege either that he had ineffective assistance of counsel or entered his plea involuntarily, he could not challenge sentence)

*United States v. Simon-Guzman*, 2005 WL 1155159 (S.D. Tex. May 2, 2005) (Jack, J.) (finding defendant’s waiver of § 2255 rights valid and enforceable; dismissing motion and denying certificate of appealability)

*United States v. Powell*, 2005 WL 1080678, 2005 U.S. Dist. LEXIS 8436 (D. Minn. May 2, 2005) (Magnuson, J.) (finding that defendant waived § 2255 rights, but addressing merits of § 2255 anyway, and finding motion to be completely without merit); *United States v. Escobar*, 2005 WL 1073651, 2005 U.S. Dist. LEXIS 8418 (D. Minn. May 6, 2005) (Montgomery, J.)

O. Other Grounds for Dismissal or Denial of § 2255 Motions

*United States v. Morris*, 2005 WL 80881, 2005 U.S. Dist. LEXIS 418 (D. Conn. Jan. 12, 2005) (Underhill, J.) (noting that even if *Blakely* and *Booker* applied to cases on collateral review, court would have imposed same sentence whether Guidelines were mandatory or advisory)

*Snyder v. United States*, 2005 WL 562485, 2005 U.S. Dist. LEXIS 3482 (N.D. Ohio Mar. 8, 2005) (Carr, J.) (dismissing *Booker* claims because (1) at plea, defendant admitted to facts that were used to enhance his sentence and waived right to trial by jury by pleading guilty, and (2) fact that subsequent changes in law favored defendant did not affect validity of plea)

*United States v. Guzman*, 2005 WL 629550, 2005 U.S. Dist. LEXIS 4136 (D. Mass. Mar. 17, 2005) (O'Toole, J.) (dismissing *Blakely* and *Booker* claim because defendant would not have received a more favorable sentence had he been sentenced before cases came out)

*United States v. Corral*, 362 F. Supp. 2d 1143 (D.N.D. Mar. 30, 2005) (Hovland, J.) (denying § 2255 motion raising Sixth Amendment claims in part because defendant admitted in plea agreement to facts supporting enhancements for drug quantity and aggravating role and because *Booker* does not apply to criminal history calculations)

*Smirlock v. United States*, 2005 WL 975875, 2005 U.S. Dist. LEXIS 7321 (S.D.N.Y. April 25, 2005) (ruling that even if *Booker* applied, court would not grant relief because “there is no question that the Court would have imposed the same sentence had the case not been governed by the guidelines”)

*United States v. Singh*, 2005 WL 1056605 (E.D. Wash. May 4, 2005) (Quackenbush, J.) (denying defendant’s motion because defendant was sentenced to mandatory minimum on drug count, as to which jury had found triggering quantity of drugs, and because *Harris v. United States* remains good law)

*Guzman v. United States*, 2005 WL 1377910, 2005 U.S. Dist. LEXIS 11083 (D. Mass. June 8, 2005) (Zobel, J.) (denying § 2255 motion because defendant stipulated to quantity of drugs used to set offense level and because he subsequently received § 5K1.1 departure down to mandatory minimum sentence)

P. Certificates of Appealability (“COA”)

*United States v. Lamson*, unpublished, 2005 WL 1189832, 2005 U.S. App. LEXIS 9871 (10th Cir. May 20, 2005) (denying COA on *Blakely* issue as issue was within scope of plea agreement waiver because decision has not been held to be retroactive); *United States v. Ellis*, unpublished, 2005 WL 1189830, 2005 U.S. App. LEXIS 93313 (10th Cir. May 20, 2005) (similar); *United States v. Meza-Hernandez*, unpublished, 2005 WL 1231927, 2005 U.S. App. LEXIS 9874 (10th Cir. May 25, 2005)

*United States v. Bellamy*, 411 F.3d 1182 (10th Cir. June 16, 2005) (denying COA and holding that *Booker* does not apply retroactively to criminal cases that became final before decision date of January 12, 2005)

*United States v. Love*, 2005 WL 552132, 2005 U.S. Dist. LEXIS 4339 (W.D. Wis. Mar. 3, 2005) (Crabb, J.) (discussing and applying standard for COA; denying request); *see also United States v. Raines*, 2005 WL 568044, 2005 U.S. Dist. LEXIS 4337 (W.D. Wis. Mar. 8, 2005) (Crabb, J.); *United States v. Miller*, 2005 WL 568064, 2005 U.S. Dist. LEXIS 4338 (W.D. Wis. Mar. 8, 2005) (Crabb, J.); *United States v. McClinton*, 2005 WL 956037, 2005 U.S. Dist. LEXIS 7665 (W.D. Wis. April 26, 2005) (Crabb, J.) (granting COA).

*Soberanis-Sagrero v. United States*, 2005 WL 1041489 (D. Minn. Mar. 8, 2005) (Tunheim, J.) (granting COA because Eighth Circuit had not yet decided retroactivity of *Blakely* and *Booker*); *Majors v. United States*, 2005 WL 1041486 (D. Minn. Mar. 30, 2005) (Tunheim, J.) (same)

*Armstrong v. United States*, 2005 WL 724121, 2005 U.S. Dist. LEXIS 6383 (E.D. Pa. Mar. 28, 2005) (Sanchez, J.) (issuing COA because “[r]easoned arguments also counter the conclusion that *Booker* is not retroactive” as (1) “Justice O’Connor suggested in her dissent to *Blakely*, ‘all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack;” (2) “[a] Note in the Harvard Law Review argues forcefully for the retroactive application of *Apprendi*’s reasonable doubt standard, which, if it were to prevail, would extend to *Blakely* and *Booker*” (citing 118 Harv. L. Rev. 1642, 1663); and (3) “[t]he Third Circuit has not spoken on the issue of retroactivity”)

*Humphrey v. Outlaw*, 2005 WL 1009559, 2005 U.S. Dist. LEXIS 8205 (W.D. Tenn. Mar. 28, 2005) (Donald, J.) (denying certificate of appealability based on conclusion that issue was frivolous and that therefore appeal would not be taken in good faith)

*Stanley v. United States*, 2005 WL 713620, 2005 U.S. Dist. LEXIS 5006 (N.D.N.Y. Mar. 29, 2005) (Munson, J.) (declining to reconsider denial of COA as to *Blakely* issue because *Booker* opinion made clear it would not apply retroactively)

*Johnson v. United States*, 2005 U.S. Dist. LEXIS 6029 (N.D. Ind. April 4, 2005) (Miller, J.) (denying COA because what defendant intended to argue on appeal, that it was error to deny him a determination by a jury, beyond a reasonable doubt, facts used to increase his punishment, does not make requisite “substantial showing” of denial of constitutional right)

*Salazar-Armendariz v. United States*, 2005 U.S. Dist. LEXIS 8194 (W.D. Tex. April 21, 2005) (Briones, J.) (declining to issue COA after concluding that reasonable jurists would not debate whether defendant had valid claim for relief)

*United States v. Taylor*, 2005 WL 984525 (N.D. Iowa April 28, 2005) (Reade, J.) (denying COA because defendant had not made substantial showing of denial of constitutional right, i.e., that issue must be debatable among reasonable jurists)

*United States v. Tam*, 2005 WL 1030197, 2005 U.S. Dist. LEXIS 7788 (E.D. Pa. May 3, 2005) (Yohn, J.) (denying COA for denial of Rule 60(b) motion)

*United States v. Fields*, 2005 WL 1485238 (D. Alaska May 9, 2005) (Holland, J.) (denying COA from denial of motion made pursuant to 18 U.S.C. § 3582(c) where it was apparent that defendant was trying to avoid time limits of § 2255)