

NOTABLE BOOKER-RELATED CASES DECIDED IN SEPTEMBER 2005

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I. Appellate Review Issues

A. Jurisdiction

United States v. Puckett, 422 F.3d 340 (6th Cir. 2005): The Sixth Circuit, following the lead of other recent circuit decisions, holds that even after Booker it lacks jurisdiction to review discretionary denials of departures.

B. Pre-Pipeline Cases

United States v. Saikaly, 424 F.3d 514 (6th Cir. 2005): The Sixth Circuit rejects a defendant's effort to use a motion to recall the mandate to permit the defendant to pursue a Booker claim in a case that became final in early 2004. [Click here to view case excerpt¹](#)

C. Retroactivity

United States v. Cruz, 423 F.3d 1119 (9th Cir. 2005), cert. denied, 126 S. Ct. 1181 (2006): The Ninth Circuit holds that Booker does not apply retroactively to convictions that became final prior to its publication.

II. Mandatory Minimums

United States v. Dare, 425 F.3d 634 (9th Cir. 2005): The Ninth Circuit, following Harris, upholds the imposition of a mandatory minimum based on judicial fact-finding by a preponderance of the evidence, rejecting the defendant's argument that it should not apply the mandatory minimum because the statutory factor of discharging a firearm pursuant to 18 U.S.C. § 924© had the disproportionate impact of doubling his sentence from five to ten years.

United States v. Garner, No. 4:01 CR 321, 2005 WL 2133606 (N.D. Ohio, Sept.1, 2005): The district court, finding tension between Harris and Booker, imposes a sentence within the advisory guideline range, a sentence supported by the jury verdict, rather than the more severe mandatory minimum sentence that would have been triggered under 21 U.S.C. § 841(b)(1)(B) had the court itself determined the amount of cocaine attributable to the defendant. [Click here to view case excerpt](#)

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

III. Prior Convictions

United States v. Kortgaard, 425 F. 3d 602 (9th Cir. 2005): The Ninth Circuit holds that upward departures under § 4A1.3 of the Sentencing Guidelines involve factual findings beyond the fact of a prior conviction and therefore do not fall within Apprendi's exception. As a result, the Court remanded for resentencing where the district court departed under a mandatory guidelines scheme on the basis of the defendant's prior convictions.

[Click here to view case excerpt](#)

United States v. Carrillo-Beltran, 424 F.3d 845 (8th Cir. 2005), cert. denied, 74 U.S.L.W. 3473 (2006): The Eighth Circuit holds that it was proper for the district court judge to determine whether or not a prior conviction committed under an alias should properly be attributed to the defendant, explaining that a "court must be allowed to determine not only the 'fact of a prior conviction' but also those facts so 'intimately related' to the prior conviction to fall within the Apprendi exception."

IV. Safety Valve

United States v. Ramirez, 425 F.3d 154 (2d Cir. 2005): The Second Circuit held that the district court's denial of safety valve relief, based on the defendant's two criminal history points, did not violate the Sixth Amendment; Booker did not render the Guidelines advisory for purposes of calculating a defendant's criminal history, nor did it render advisory the safety valve provision itself. [Click here to view case excerpt](#)

V. Section 3553(a)

United States v. Milne, 384 F. Supp. 2d 1309 (E.D. Wis. 2005): In sentencing defendant below the guideline range for bank fraud, Judge Adelman finds that, among other factors, the fact that the defendant reported his misconduct to the bank and the extent of his cooperation with authorities bore on his character and the length of sentence required to provide the necessary degree of punishment and deterrence. [Click here to view case excerpt](#)

United States v. Engler, 422 F.3d 692 (8th Cir. 2005): Notwithstanding its holding that the Booker error in this pipeline case was harmless, the Eighth Circuit noted its concern with the district court's failure to discuss any of the § 3553(a) factors in arriving at its alternative sentence. [Click here to view case excerpt](#)

United States v. Scott, 426 F.3d 1324 (11th Cir. 2005): The Eleventh Circuit holds that Booker does not require the district court to state on the record that it has explicitly considered each of the § 3553(a) factors. [Click here to view case excerpt](#)

VI. Unwarranted Disparity

United States v. Gipson, 425 F.3d 335, reh'g en banc denied, 431 F.3d 993 (7th Cir. 2005): The Seventh Circuit rejects the claim that “a sentence based upon the guidelines is unreasonable because the guidelines punish crack cocaine offenses too severely relative to offenses involving powder cocaine.” [Click here to view case excerpt](#)

United States v. Perry, 389 F. Supp. 2d 278 (D. R.I. 2005): In this drug case, Judge Smith sentenced the defendant to the statutory minimum instead of the applicable Guideline range, finding that the Guideline disparity between powder cocaine and crack cocaine was far greater than necessary to promote the principles of § 3553. *[Note: This case is of questionable validity in the First Circuit in light of United States v. Pho, 433 F.3d 53 (1st Cir. 2006).]* [Click here to view case excerpt](#)