

POST-BOOKER DECISIONS – AN OUTLINE

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This outline reflects many, but not all, of the decisions interpreting and applying *United States v. Booker*, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). The compilation is based primarily on searches in Westlaw (database ALLFEDS) and Lexis (database for all federal cases) 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 (*). Please report errors in this outline to fran_pratt@fd.org.

I. INDICTMENT ISSUES

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

United States v. Dottery, ___ F. Supp. 2d ___, 2005 WL 174634, U.S. Dist. LEXIS 1071 (E.D. Mich. Jan. 24, 2005) (Lawson, J.) (because *Booker* has rendered addition of sentencing factors to indictment unnecessary, concluding that “[s]ince the superseding indictment added only the sentencing factors and nothing else, the Court believes that all prejudice, real and imagined, will be removed by dismissing the superseding indictment and proceeding to trial on the original indictment”)

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

II. SENTENCING ISSUES

A. “Consideration” of Guidelines Under 18 U.S.C. § 3535(a); Meaning of “Advisory”

* *United States v. Crosby*, ___ F.3d ___, 2005 WL 240916, 2005 U.S. App. LEXIS 1699 (2d Cir. Feb. 2, 2005) (in first post-*Booker* decision from circuit, attempting to provide general guidance to district courts; noting that district court cannot satisfy duty to consider Guidelines by general reference to them but declining to define “consideration” of Guidelines and instead allowing it to evolve); see *United States v. Ochoa-Suarez*, 2005 WL 287400, 2005 U.S. Dist. LEXIS 1667 (S.D.N.Y. Feb. 7, 2005)

(Keenan, J.) (interpreting and applying *Crosby*); *United States v. Mascolo*, 2005 WL 351108, 2005 U.S. Dist. LEXIS 2032 (S.D.N.Y. Feb. 9, 2005) (Sweet, J.) (same)

* *United States v. Ameline*, ___ F.3d ___, 2005 WL ____, U.S. App. LEXIS 2032 (9th Cir. Feb. 9, 2005) (in first case published post-Booker decision from circuit, attempting to provide general guidance to district courts; emphasizing that advisory guideline range is “only *one* of many factors that a sentencing judge must consider in determining an appropriate individualized sentence;” specifically noting that Guidelines’ limitations on factors that lower court may consider in sentencing, such as those concerning departures set out in U.S.S.G. § 5K2.0(d), no longer constrain court’s discretion in fashioning a sentencing within guideline range)

United States v. Fleming, ___ F.3d ___, 2005 WL 237200, 2005 U.S. App. LEXIS 1651 (2d Cir. Feb. 2, 2005) (in appeal from imposition of two-year sentence of imprisonment upon revocation of supervised release for drug abuse-related violations, finding that *Booker*’s “reasonableness” standard of review applies to revocation sentences; discussing meaning of “consideration” of recommended range)

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

* *United States v. Ranum*, ___ F. Supp. 2d ___, 2005 WL 161223, 2005 U.S. Dist. LEXIS 1338 (E.D. Wis. Jan. 19, 2005) (Adelman, J.) (in explaining why court was imposing sentence lower than that recommended by Guidelines, stating that while court agreed that it must seriously consider Guidelines, “*Booker* is not an invitation to do business as usual;” courts need not follow old departure methodology in imposing sentence outside guideline range; disagreeing with Judge Cassell in *Wilson, supra*)

United States v. Jones, ___ F. Supp. 2d ___, 2005 WL 121730, 2005 U.S. Dist. LEXIS 833 (D. Me. Jan. 21, 2005) (Hornby, J.) (in 18 U.S.C. § 922(g)(4) case (possession of firearm by person previously committed involuntarily to mental health institution), while concluding that he could not grant departure sought by defendant, government, and probation to take defendant from Zone D to Zone C, court concluded that it could achieve same result after *Booker* in considering Guidelines as advisory and as one factor under 18 U.S.C. § 3553(a))

* *United States v. Barkley*, 2005 U.S. Dist. LEXIS 2060 (N.D. Okla. Jan. 24, 2005) (Holmes, J.) (No. 04 Cr. 119(H)) (stating that the Guidelines would be “faithfully follow[ed]” in all cases, “with only such modifications as the Court finds are necessary to satisfy the requirements of the Sixth Amendment articulated in *Blakely*”; that is, within the context of the advisory Guidelines, the court will apply the Sixth Amendment)

* *United States v. Myers*, ___ F. Supp. 2d ____, 2005 WL 165314, 2005 U.S. Dist. LEXIS 1342 (S.D. Iowa Jan. 26, 2005) (Pratt, J.) (in sawed-off shotgun case in which guideline range was 20-30 months, sentencing defendant to 3 months probation; reviewing *Booker*, *Wilson* (*supra*), and *Ranum* (*supra*); finding *Ranum* persuasive and adopting Judge Adelman's view because "[t]o treat the Guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guideline range would be presumptively unreasonable in the absence of clearly identified factors . . . [and] making the Guidelines, in effect, still mandatory;" viewing *Booker* "as an invitation, not to unmoored decision making, but to the type of careful analysis of the evidence that *should* be considered when depriving a person of his or her liberty")

* *United States v. West*, 2005 WL 180930, 2005 U.S. Dist. LEXIS 1123 (S.D.N.Y. Jan. 27, 2005) (Sweet, J.) (in wire fraud case, where stipulated guideline range was 57-71 months, sentencing defendant to 60 months, the statutory maximum; following *Ranum* (*supra*), in that Guidelines are only one factor to consider; notably, stating that "[n]othing in *Booker* appears to suggest that such fact-finding, as limited by the principles of *Apprendi* and its progeny, is inappropriate. Accordingly, this Court will sentence West based upon the facts admitted in connection with his plea and upon those facts found by the Court in the context of analysis under subsection 3553(a), as limited by *Apprendi* and *Booker*"; cf. *United States v. Rodriguez*, 2005 WL 323713, 2003 U.S. Dist. 694 (S.D.N.Y. Feb. 8, 2005) (Sweet, J.) (briefly discussing *Crosby*, not mentioning *West* or *Ranum*)

United States v. Wilson ("Wilson II"), ___ F. Supp. 2d ____, 2005 WL 273168, 2005 U.S. Dist. LEXIS 1486 (D. Utah Feb. 2, 2005) (Cassell, J.) (denying motion to reconsider sentence in light of *Ranum* and similar cases; explaining why court believes *Ranum* is flawed)

United States v. Wanning, ___ F. Supp. 2d ____, 2005 WL 273158 (D. Neb. Feb. 3, 2005) (Kopf, J.) (explaining why court agrees with Judge Cassell in *Wilson* and disagrees with Judge Pratt in *Myers*)

United States v. Biheiri, ___ F. Supp. 2d ____, 2005 WL 350585 (E.D. Va. Feb. 9, 2005) (Ellis, J.) (while recognizing debate, not explicitly taking one side or the other)

United States v. Peach, ___ F. Supp. 2d ____, 2005 WL 352636 (D.N.D. Feb. 15, 2005) (Hovland, C.J.) (after reviewing some of decisions listed *supra* and U.S.S.C. chairman's House Judiciary Committee testimony, concluding that court "will continue to give consideration to the 'advisory; Sentencing Guidelines which will be afforded 'substantial weight' in sentencing hearings [because] [t]he federal Sentencing Guidelines, policy statements, and the sentencing tables and ranges were created at the direction of Congress [and] [t]he statutory purposes of sentencing, as directed by Congress, are best reflected in the Guidelines")

B. Standard of Proof

* *United States v. Ameline*, ___ F.3d ____, 2005 WL _____, U.S. App. LEXIS 2032 (9th Cir. Feb. 9, 2005) (in first case published post-Booker decision from circuit, attempting to provide general guidance to district courts; reaffirming that baseline rules that ensured fairness and integrity in sentencing process remain in force in post-Booker sentencing regime; declining to decide whether Booker majority remedial opinion affected standard of proof, but specifically noting that Ninth Circuit has applied different standards of proof in different contexts)

* *United States v. Barkley*, 2005 U.S. Dist. LEXIS 2060 (N.D. Okla. Jan. 24, 2005) (Holmes, J.) (No. 04 Cr. 119(H)) (stating that the Guidelines would be “faithfully follow[ed]” in all cases, “with only such modifications as the Court finds are necessary to satisfy the requirements of the Sixth Amendment articulated in *Blakely*”; that is, within the context of the advisory Guidelines, the court will apply the Sixth Amendment)

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

* *United States v. Revock*, ___ F. Supp. 2d ____, 2005 WL 188704, 2005 U.S. Dist. LEXIS 1151 (D. Me. Jan. 28, 2005) (Hornby, J.) (finding that after *Booker*, enhancements need be proven only by preponderance of evidence and that jury verdict or defendant’s stipulation is not required; where co-defendant did not receive enhancement because he was sentenced after *Blakely* but before *Booker* and defendant was otherwise identically situated to co-defendant, court would not apply enhancement even under preponderance standard, to avoid unwarranted disparity)

* *United States v. Huerta-Rodriguez*, ___ F. Supp. 2d ____, 2005 WL 318640, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (finding that “[i]n order to comply with due process in determining a reasonable sentence, this court will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant's sentence;” while defendant can waive jury trial, he cannot waive standard of proof; while approach may not be required by *Booker*, neither is it prohibited); *see also United States v. Kelley*, ___ F. Supp. 2d ____, 2005 WL 323813 (D. Neb. Feb. 1, 2005) (Bataillon, J.)

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

C. Specific Statutes

1. 8 U.S.C. § 1326, Illegal Reentry After Deportation

United States v. Huerta-Rodriguez, ___ F. Supp. 2d ___, 2005 WL 318640, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (where guideline range was 70-87 months (57-70 months after government concession), imposing sentence of 36 months based on fact that district court would have granted downward departure for over-representation of criminal history, fact that conviction used to enhance offense level from 8 to 24 was for offense that occurred nearly ten years ago, and fact that “in other districts a similar defendant would not be prosecuted for illegal reentry, but would simply be deported”)

United States v. Galvez-Barrios, ___ F. Supp. 2d ___, 2005 WL 323703, 2005 U.S. Dist. LEXIS 1997 (E.D. Wis. Feb. 2, 2005) (Adelman, J.) (where guideline range was 41-51 months, imposing sentence of 24 months after consideration of history of U.S.S.G. § 2L1.2 and unwarranted disparity in sentences among § 1326 defendants, among other factors)

2. 18 U.S.C. § 922(g)

United States v. Peach, ___ F. Supp. 2d ___, 2005 WL 352636 (D.N.D. Feb. 15, 2005) (where felon-in-possession case involved drive-y shooting and parties had agreed to guideline range of 100-125 months, imposing sentence of 100 months)

3. 18 U.S.C. § 924(c)

United States v. Harris, ___ F.3d ___, 2005 WL 291521, 2005 U.S. App. LEXIS 1970 (6th Cir. Feb. 8, 2005) (discussing impact of *Booker* on 18 U.S.C. § 924(c) in light of Supreme Court’s previous decisions in *Castillo* and *Harris*)

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

United States v. Nolan, ___ F.3d ___, 2005 WL 323696, 2005 U.S. App. LEXIS 2230 (8th Cir. Feb. 11, 2005) (in footnote, rejecting *Blakely* / *Booker* challenge because defendant was sentenced pursuant to statute, not Guidelines, and because Supreme Court has consistently stated that fact of prior conviction is for court, not jury, to find)

United States v. Barnett, ___ F.3d ___, 2005 WL 357015, 2005 U.S. App. LEXIS 2644 (6th Cir. Feb. 16, 2005) (rejecting defendant’s argument that jury, not judge, was required to determine nature of prior convictions in light of case law holding that district court’s authority under *Apprendi* to determine existence of prior conviction included determinations regarding their nature)

5. 18 U.S.C. § 3553(b)(2), Guidelines in Child Crimes and Sexual Offenses

United States v. Sharpley, ___ F.3d ___, 2005 WL 357449, 2005 U.S. App. LEXIS 2670 (2d Cir. Feb. 16, 2005) (while declining to actually rule on issue because any error was harmless in that case, observing that court saw “no unique feature of Guidelines sentences for child crimes and sexual offenses that would prevent them from violating the Sixth Amendment in the same manner as Guidelines sentences for other crimes” and further observing that “[f]or this reason, we suspect that the Supreme Court’s failure to excise the entirety of Section 3553(b) was simply an oversight”)

6. 18 U.S.C. § 3553(f) / U.S.S.G. § 5C1.2, Safety Valve

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

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

7. 18 U.S.C. § 3663 et seq., Restitution

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

D. Specific Guidelines

1. U.S.S.G. § 2B5.1, Counterfeiting

United States v. Kelley, ___ F. Supp. 2d ___, 2005 WL 323813 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (where enhancements moved minimum end of guideline range from four months and Zone C to eighteen months and Zone D, finding that defendant should be sentenced to time served and six months of home confinement)

2. U.S.S.G. § 2L2.1, Illegal Reentry After Deportation

United States v. Huerta-Rodriguez, ___ F. Supp. 2d ___, 2005 WL 318640, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (where guideline range was 70-87 months (57-70 months after government concession), imposing sentence of 36 months based on fact that district court would have granted downward departure for over-representation of criminal history, fact that conviction used to enhance offense level from 8 to 24 was for offense that occurred nearly ten years ago, and fact that

“in other districts a similar defendant would not be prosecuted for illegal reentry, but would simply be deported”)

United States v. Galvez-Barrios, ___ F. Supp. 2d ___, 2005 WL 323703, 2005 U.S. Dist. LEXIS 1997 (E.D. Wis. Feb. 2, 2005) (Adelman, J.) (where guideline range was 41-51 months, imposing sentence of 24 months after consideration of history of U.S.S.G. § 2L1.2 and unwarranted disparity in sentences among § 1326 defendants, among other factors)

E. Specific Offender or Offense Characteristics

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

F. Unwarranted Disparity

United States v. Galvez-Barrios, ___ F. Supp. 2d ___, 2005 WL 323703, 2005 U.S. Dist. LEXIS 1997 (E.D. Wis. Feb. 2, 2005) (Adelman, J.) (in illegal reentry case, 8 U.S.C. § 1326, where guideline range was 41-51 months, imposing sentence of 24 months after consideration of history of U.S.S.G. § 2L1.2 and unwarranted disparity in sentences among § 1326 defendants, among other factors)

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

G. Ex Post Facto Issues

United States v. Crosby, ___ F.3d ___, 2005 WL 240916, 2005 U.S. App. LEXIS 1699 (2d Cir. Feb. 2, 2005) (in footnote 17, noting, but not intimating any view on applicability of Ex Post Facto Clause)

H. General / Other

United States v. Kuhn, ___ F. Supp. 2d ____, 2005 WL 66758, U.S. Dist. LEXIS 373 (E.D. Mich. Jan. 12, 2005) (Lawson, J.) (upon remand after government won appeal regarding downward departure; after considering Guidelines as advisory and according them significant weight, granting downward departure from range of 21-27 months to 6 months in community confinement, the same sentence previously imposed)

United States v. Beal (In re Beal), ___ F. Supp. 2d ____, 2005 WL 112402, 2005 U.S. Dist. LEXIS 750 (D. Me. Jan. 19, 2005) (Woodcock, J.) (while acknowledging that Guidelines are now advisory, noting that court “must consult those guidelines and take them into account;” denying defendant’s motion for downward departure based on U.S.S.G. § 5K2.12, because defendant did not carry burden of establishing that she committed embezzled money from employer as a result of coercion and duress)

United States v. Davis, ___ F. Supp. 2d ____, 2005 WL 91257, 2005 U.S. Dist. LEXIS 609 (D. Me. Jan. 19, 2005) (Woodcock, J.) (while acknowledging that Guidelines are now advisory, noting that court “must consult those guidelines and take them into account;” ruling that Florida conviction for robbery by sudden snatching is crime of violence for purposes of U.S.S.G. § 2K2.1(a) and § 4B1.2)

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

III. POST-SENTENCING DISTRICT COURT MOTIONS

(For habeas corpus petitions, see Part VI, below)

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. Ziskind, 2002 WL 181881, 2005 U.S. Dist. LEXIS 1047 (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, ___ F. Supp. 2d ___, 2005 WL 323677, 2005 U.S. Dist. LEXIS 1981 (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*, ___ F. Supp. 2d ___, 2005 WL 323679, 2005 U.S. Dist. LEXIS 1980 (N.D. Ohio Feb. 4, 2005) (Aldrich, J.) (granting motion of co-defendant, who was tried separately, on same basis)

IV. REVOCATION ISSUES

United States v. Fleming, ___ F.3d ___, 2005 WL 237200, 2005 U.S. App. LEXIS 1651 (2d Cir. Feb. 2, 2005) (in appeal from imposition of two-year sentence of imprisonment upon revocation of supervised release for drug abuse-related violations, finding that *Booker*'s "reasonableness" standard of review applies to revocation sentences; discussing meaning of "consideration" of recommended range)

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

V. APPELLATE ISSUES

A. Bail Pending Appeal

United States v. Munoz Franco, ___ F. Supp. 2d ___, 2005 WL 299992, 2005 U.S. Dist. LEXIS 1795 (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, ___ F. Supp. 2d ___, 2005 WL 318701, U.S. Dist. LEXIS 1812 (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")

B. Motion 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)

C. Meaning of “Reasonableness;” Methodology for Review

United States v. Tanner, unpublished, 2005 WL 147590, 2005 U.S. App. LEXIS 1215 (9th Cir. Jan. 25, 2005) (noting that as to sentencing issues raised by both defendant and government (on cross-appeal), “this issue would have been difficult. Now that the Sentencing Guidelines are merely guidelines channeling the reasonable exercise of the district court's discretion, we cannot say, in light of the district judge's careful consideration of both the guidelines and the individual circumstances of this case, that the sentencing decisions were unreasonable”)

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

* *United States v. Crosby*, ___ F.3d ___, 2005 WL 240916, 2005 U.S. App. LEXIS 1699 (2d Cir. Feb. 2, 2005) (noting that district court cannot satisfy duty to consider Guidelines by general reference to them but declining to define “consideration” of Guidelines and instead allowing it to evolve; in discussing “reasonableness,” analogizing it to abuse of discretion review and stating that if district court makes procedural or legal error, sentence will not be found reasonable; in discussing types of errors that may be committed, stating that “[f]irst, and most obviously, a sentencing judge would violate the Sixth Amendment by making factual findings and *mandatorily* enhancing a sentence above the range applicable to facts found by a jury or admitted by a defendant,” but at same time, “a sentencing judge would also violate section 3553(a) by limiting consideration of the applicable Guidelines range to the facts found by the jury or admitted by the defendant, instead of considering the applicable Guidelines range, as required by subsection 3553(a)(4), based on the facts found by the court;” discussing when remand is appropriate)

United States v. Fleming, ___ F.3d ___, 2005 WL 237200, 2005 U.S. App. LEXIS 1651 (2d Cir. Feb. 2, 2005) (in appeal from imposition of two-year sentence of imprisonment upon revocation of

supervised release for drug abuse-related violations, finding that *Booker*'s "reasonableness" standard of review applies to revocation sentences; discussing meaning of "consideration" of recommended range)

United States v. Stewart, unpublished, 2005 WL 281418, 2005 U.S. App. LEXIS 1922 (9th Cir. Feb. 7, 2005) (in case involving upward departure pursuant to U.S.S.G. § 5K2.14, vacating and remanding; stating that "[b]ecause under *Booker* the district court may still consider the correct guideline range before imposing a sentence on remand, we take this opportunity to note that the district court misapplied Section 5K2.14" and explaining how district court erred)

United States v. Killgo, ___ F.3d ___, 2005 WL 292503, 2005 U.S. App. LEXIS 2016 (8th Cir. Feb. 9, 2005) (in fraud and money-laundering case involving appeal of relevant conduct issue in relation to loss, reviewing sentence imposed for unreasonableness, "judging it with regard to the factors in 18 U.S.C. § 3553(a); stating that defendant's "appeal relates directly to § 3553(a)(4)(A); that is, he essentially claims that the reasonableness of his sentence is directly linked to the district court's misapplication of a relevant Guideline;" reviewing factual claim for clear error; concluding that district court properly considered particular transactions and that court could not say that sentence was unreasonable)

United States v. Lussier, ___ F.3d ___, 2005 U.S. App. LEXIS 2735 (8th Cir. Feb. 17, 2005) (in appeal challenging denial of reduction for possession of firearm for lawful sporting purposes, U.S.S.G. § 2K2.1(b)(2), stating that defendant "argues that the district court abused its discretion in failing to grant a reduction in offense level pursuant;" stating that court will "give deference to a district court's sentencing decision and will reverse a sentence applying the Guidelines only if it is unreasonable;" and concluding that on facts of case, "the denial of the § 2K2.1(b)(2) downward departure was not unreasonable")

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")

United States v. Davis, ___ F.3d ___, 2005 WL 130154, 2005 U.S. App. LEXIS 1204 (6th Cir. Jan. 21, 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 on other grounds, finding that *Blakely* issue was sufficiently preserved; remanding case for resentencing in light of *Booker*)

United States v. Reese, ___ F.3d ___, 2005 WL 172024, 2005 U.S. App. LEXIS 1324 (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, ___ F.3d ____, 2005 WL 195429, 2005 U.S. App. LEXIS 1454 (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)

United States v. Rodriguez, ___ F.3d ____, 2005 WL 272952, 2005 U.S. App. LEXIS 1832 (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)

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, ___ F.3d ____, 2005 WL 172024, 2005 U.S. App. LEXIS 1324 (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, ___ F.3d ____, 2005 WL 180495, 2005 U.S. App. LEXIS 1406 (8th Cir. Jan. 28, 2005) (per curiam) ((1) in case submitted for decision last December, 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,” 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)

* *United States v. Oliver*, ___ F.3d ____, 2005 WL 233779, 2005 U.S. App. LEXIS 1623 (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)

United States v. Cramer, ___ F.3d ____, 2005 WL 244277, 2005 U.S. App. LEXIS 1707 (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, unpublished, 2005 WL 280503, U.S. App. LEXIS 1906 (6th Cir. Feb. 7, 2005) (finding that defendant sufficiently raised *Blakely* issue in court of appeals by filing supplemental briefing after *Blakely*)

United States v. Vieth, ___ F.3d ___, 2005 WL 284724, 2005 U.S. App. LEXIS 1971 (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)

United States v. Washington, ___ F.3d ___, 2005 WL 326986, 2005 U.S. App. LEXIS 2241 (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”)

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, ___ F.3d ___, 2005 WL 172157, 2005 U.S. App. LEXIS 1337 (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, ___ F.3d ___, 2005 WL 288977, 2005 U.S. App. LEXIS 1980 (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)

E. Harmless Error Review

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*, ___ F.3d ___, 2005 WL 273315, 2005 U.S. App. LEXIS 1835 (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 sone of speculation and conjecture – we simply do not know what the district court would have done after hearing from the parties;” stating that appellate court cannot exercise district court’s discretion)

United States v. Fellers, ___ F.3d ___, 2005 WL 350959, 2005 U.S. App. LEXIS 2511 (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, ___ F.3d ___, 2005 WL 357449, 2005 U.S. App. LEXIS 2670 (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*)

F. Plain Error Review

1. Existence of Error

United States v. Milan, ___ F.3d ___, 2005 WL 309934, 2005 U.S. App. LEXIS 2161 (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. Frye, ___ F.3d ___, 2005 WL 315563, 2005 U.S. App. LEXIS 2519 (11th Cir. Feb. 10, 2005) (per curiam) (in methamphetamine manufacturing case, finding that defendant’s admissions in factual resume supporting plea were sufficient to support findings by district court that defendant was organizer/leader under U.S.S.G. § 3B1.1 and that offense involved substantial risk to human life under U.S.S.G. § 2D1.1(b)(5)(B); thus there was no Sixth Amendment violation)

United States v. Murdock, ___ F.3d ___, 2005 WL 350812, 2005 U.S. App. LEXIS 2510 (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.”)

* *United States v. Barnett*, ___ F.3d ___, 2005 WL 357015, 2005 U.S. App. LEXIS 2644 (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 court determining nature of prior convictions), finding that treatment by district court of Guidelines as mandatory constituted error)

2. Error’s Impact Upon Substantial Rights

United States v. Bruce, ___ F.3d ___, 2005 WL 241254, 2005 U.S. App. LEXIS 1712 (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)

* *United States v. Rodriguez*, ___ F.3d ___, 2005 WL 272952, 2005 U.S. App. LEXIS 1832 (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*)

United States v. Hines, unpublished, 2005 WL 280503, U.S. App. LEXIS 1906 (6th Cir. Feb. 7, 2005) (on plain error, rejecting government’s argument that defendant’s substantial rights were not affected 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 was supported by trial record)

* *United States v. Barnett*, ___ F.3d ___, 2005 WL 357015, 2005 U.S. App. LEXIS 2644 (6th Cir. Feb. 16, 2005) (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”); *but see* dissenting opinion by Boggs, C.J.

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 under mandatory guideline scheme and remanding for resentencing under advisory scheme); *see also United States v. Washington*, ___ F.3d ___, 2005 WL 326986, 2005 U.S. App. LEXIS 2241 (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. Oliver*, ___ F.3d ___, 2005 WL 233779, 2005 U.S. App. LEXIS 1623 (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, ___ F.3d ___, 2005 WL 241254, 2005 U.S. App. LEXIS 1712 (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)

United States v. Ameline, ___ F.3d ___, 2005 WL _____, U.S. App. LEXIS 2032 (9th Cir. Feb. 9, 2005) (following Fourth Circuit’s decision in *Hughes* in holding that under plain error standard, only “the *truly* exceptional case . . . will not require remand for resentencing under the new advisory guideline regime”)

United States v. Milan, ___ F.3d ___, 2005 WL 309934, 2005 U.S. App. LEXIS 2161 (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*, ___ F.3d ___, 2005 WL 357015, 2005 U.S. App. LEXIS 2644 (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)

G. Appeals by Government

United States v. Lynch, ___ F.3d ___, 2005 WL 327710, U.S. App. LEXIS 2260 (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, ___ F.3d ___, 2005 WL 357449, 2005 U.S. App. LEXIS 2670 (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)

H. Waiver of Appeal Rights

* *United States v. Rubbo*, ___ F.3d ___, 2005 WL 120507, 2005 U.S. App. LEXIS 1096 (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*, ___ F.3d ___, 2005 WL 327265, U.S. App. LEXIS 2251 (11th Cir. Feb. 11, 2005) (denying defendant's motion for reconsideration of dismissal of appeal)

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, ___ F.3d ___, 2005 WL 292503, 2005 U.S. App. LEXIS 2016 (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")

United States v. Sharpley, ___ F.3d ___, 2005 WL 357449, 2005 U.S. App. LEXIS 2670 (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")

I. 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 Ripoli*, unpublished, 2005 WL 238133, 2005 U.S. App. LEXIS 1774 (3d Cir. Feb. 2, 2005) (Shadur., D.J., N.D. Ill.)

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)

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*)

VI. POST-CONVICTION ISSUES

A. Amendment of § 2255 Motion

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)

B. 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)

United States v. Palmer, 2005 WL 323731, 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) (NB: regarding triggering date of case announcing new right, court confuses and/or conflates provisions applicable to first and second § 2255 motions)

C. Procedural Default of Booker Claim

* *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)

C. Retroactivity of Booker

1. Operative Date for Calculating Finality of Conviction

McReynolds v. United States, ___ F.3d ___, 2005 WL 237642, 2005 U.S. App. LEXIS 1638 (7th Cir. Feb. 2, 2004) (finding that pertinent date is January 12, 2005, not June 24, 2004, for purposes of finality of convictions and retroactivity of *Booker* (but also finding *Booker* is not retroactive))

2. Retroactivity as to First § 2255 Motions

McReynolds v. United States, ___ F.3d ___, 2005 WL 237642, 2005 U.S. App. LEXIS 1638 (7th Cir. Feb. 2, 2004) (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 *Schiro v. Summerlin*, 124 S. Ct. 2519 (2004), is all but conclusive on the point”)

Varela v. United States, ___ F.3d ___, 2005 WL 367095 (11th Cir. Feb. 17, 2005) (granting certificate of appealability, but concluding that although neither Eleventh Circuit nor Supreme Court have addressed retroactivity of *Blakely* and *Booker*, *Schiro v. Summerlin*, “is essentially dispositive” of issue; joining Seventh Circuit in *McReynolds, supra*)

United States v. Morris, 2005 WL 80881, 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)

Quirion v. United States, 2005 WL 83832, 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); *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)

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, ___ F. Supp. 2d ___, 2005 WL 170708, 2005 U.S. Dist. LEXIS 1053 (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)

Gerrish v. United States, ___ F. Supp. 2d ___, 2005 WL 159642, 2005 U.S. Dist. LEXIS 1013 (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*, 2005 WL 196526, 2005 U.S. Dist. LEXIS 2087 (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) (noting that *Booker* is not retroactive and citing to some of cases listed above)

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)

* *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)

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)

3. Retroactivity as to Second or Successive § 2255 Motions

In re Anderson, ___ F.3d ___, 2005 WL 123923, 2005 U.S. App. LEXIS 1097 (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, ___ F.3d ___, 2005 WL 237204, 2005 U.S. App. LEXIS 1652 (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)

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. 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)

E. § 2241 Motions

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); *see* U.S. Dist. LEXIS 1785 (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 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; 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 motion be denied petitioner did not demonstrate that savings clause of § 2255 applied where *Booker* has not been made retroactive)

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)