Selected Post-*Booker* Decisions

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CIRCUIT COURT OPINIONS

I. First Circuit

A. Plain Error Standard

United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. Feb. 22, 2005)[1]

In *Antonakopoulos*, Circuit Court Judges Selya, Stahl and Lynch set forth the standard of review for unpreserved claims of sentencing errors after *Booker*. The defendant in the present case argued that *Booker* automatically required resentencing because the sentencing court rather than the jury made the factual findings which enhanced his sentence. The court found that "[t]he error [was] not that a judge (by a preponderance of the evidence) determined facts under the Guidelines which increased the sentence beyond that authorized by the jury verdict or an admission by the defendant; the error [was] only that the judge did so in a mandatory Guidelines system." *Id.* at 75.

The court stated for all unpreserved claims of *Booker* error, it intended to apply conventional plain-error doctrine, where the *Booker* error is that the defendant's guideline sentence was imposed under a mandatory system.[2] The court determined that the first two *Olano* prongs for a plain error finding will be met whenever the sentencing court treated the guidelines as mandatory. For the third prong, the court found that *Olano* makes it clear that under a plain error analysis, it is the defendant who bears the burden of persuasion with respect to prejudice. And, to meet both the third and forth prongs, the court asserted that in its view, ordinarily the defendant "must point to circumstances creating a reasonable probability that the district court would impose a different sentence more favorable under the new 'advisory Guidelines' *Booker* regime." *Id.* (*citing United States v. Dominguez-Benitez*, 542 U.S. 74 (2004)). The court rejected a *per se* remand rule solely on the basis that a sentence was enhanced by judicial fact-finding, disagreeing with the Fourth Circuit in *United States v. Hughes I* and the Sixth Circuit in *United States v. Milan* and *United States v. Oliver*, discussed in Parts IV and VI below. *Id.* at 79. The court found that standing alone, judicial fact-finding is insufficient to meet the third and forth prongs of *Olano*, because nothing in *Booker* requires submission of the facts to a jury, so long as the guidelines are not mandatory. *Id.* Therefore, the court also rejected a *per se* remand rule solely on the basis that the guidelines are no longer mandatory. In the court's view, it cannot be said that all sentences imposed before *Booker* threatened the fairness, integrity, or public reputation of judicial proceedings or undermined confidence in the outcome of the sentence simply because the guidelines were mandatory. *Id.* at 80.

In considering all future appeals in which remand may be warranted, the court asserted the following; first, where it engages in a plain-error review and finds it clear that the sentencing court

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[1] This document explores substantive post-*Booker* circuit court opinions and is not meant to be exhaustive of all decisions discussing the varied issues raised by the *Booker* opinion. Only cases which were available on Westlaw, Lexis-Nexis, and PACER through May 13, 2005, are included. Although the official citation form would not include the date of the decisions, these dates are being provided in this document as an aid to the reader.

[2] In *United States v. Olano*, 507 U.S. 725 (1993), the Supreme Court held "[t]here must be an 'error' that is 'plain' and that 'affect[s] substantial rights.' Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 732.

has made an error under the guidelines, there is a strong argument for remand; second, where a district judge has expressed that the sentence imposed was unjust, grossly unfair, or disproportionate to the crime committed and that he would have sentenced otherwise if possible, there is a powerful argument for a remand; and third, even in cases where the sentencing judge is silent, there may be cases in which the appellate panel is convinced by the defendant, based on the facts of the case, that the sentence would, with reasonable probability, have been different such that both the third and fourth prongs are met, and thus a remand will be warranted. *Id.* at 81-82.

United States v. Serrano-Beauvaix, 400 F.3d 50 (1st Cir. March 4, 2005)

In *Serrano-Beauvaix*, the defendant pleaded guilty to charges of conspiracy to distribute in excess of five kilograms of cocaine, and in the plea agreement, he stipulated to being personally responsible for one kilogram of cocaine, agreed to certain enhancements including a role enhancement, and acknowledged he did not qualify for the safety valve. Writing for the court, Circuit Judge Lynch found with respect to the role enhancement, the defendant had not met his burden of showing there was a "reasonable probability" that he would be sentenced more leniently under an advisory system because he waived his challenge by stipulating to the conduct. Further, where the sentencing court sentenced the defendant to the bottom end of the guideline range at 63 months with a statutory minimum of 60 months, the court found that because even post-*Booker*, the sentencing court must consult the guidelines and take them into account at sentencing, the defendant failed to meet his burden to show that the court would have imposed a different and more favorable sentence under the new post-*Booker* advisory system. *Id.*

Circuit Judge Lipez concurred, but stated he did not believe the court should require defendants who invoke unpreserved *Booker* errors to make a specific showing of prejudice to satisfy the third prong of plain-error review. Instead, he believes such error should entitle the defendant to a presumption of prejudice, which the government can then rebut; the same approach adopted by a panel of the Sixth Circuit in *United States v. Barnett*, 398 F.3d 516 (6th Cir. Feb. 16, 2005), discussed in Part VI below. Judge Lipez stated this approach has also been applied by sister circuits in other contexts "where the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred." *Id.*

B. Standard of Review for Interpretation and Application of the Guidelines

United States v. Bailey, 405 F.3d 102 (1st Cir. May 3, 2005)

In *Bailey*, the defendant, a county Sheriff's employee, was convicted on various charges, including assault on a pretrial detainee and obstructing a federal criminal investigation. The sentencing judge enhanced the defendant's sentence two levels, in part, after finding that the detainee was a vulnerable victim. *Id*. at 112. The defendant appealed his sentence, claiming first that application of the vulnerable victim enhancement was erroneous because the court failed to make a specific inquiry into the victim's situation and instead focused on the victim's status as a prisoner. *Id.* at 113. Additionally, the defendant claimed his Sixth Amendment rights were violated under *Booker* when the jury did not find all the facts used to determine the sentence beyond a reasonable doubt. *Id.*

Writing for Circuit Judges Torruella and Lipez, and without discussing any potential effect *Booker* may have upon the standard of review with respect to the interpretation and application of the guidelines, Circuit Judge Howard stated that a sentencing court's interpretation and application of the guidelines is reviewed *de novo* (*quoting United States v. Savarese*, 385 F.3d 15, 18 (1st Cir. 2004)). The court held that the sentencing court properly applied the §3A1.1 enhancement. *Id.* The court additionally found upon plain error review that the defendant failed to satisfy the third prong of the test outlined in *Olano* because he failed to present any argument regarding the probability that his sentence would be reduced under advisory guidelines. *Id.* at 114. Therefore, because the defendant failed to "'advance any viable theory as to how the *Booker* error' prejudiced his substantial rights," the court denied his request for a re-sentencing. *Id.*[3]

II. Second Circuit

A. Plain Error Standard

United States v. Crosby, 397 F.3d 103 (2d Cir. Feb. 2, 2005)[4]

In *Crosby*, Circuit Judges Newman, Kearse, and Cabranes engaged in a detailed analysis of federal sentencing law prior to *Booker* and *Fanfan* and discussed at length the *Booker* and *Fanfan* opinions. The court then opined that after *Booker* and *Fanfan*, sentencing courts remain under a continuing duty to "consider" the guidelines by first determining the guideline range in the same manner as before *Booker* and *Fanfan*. *Id.* at 112. Once this range has been determined, the sentencing court has the duty under 18 U.S.C. § 3553(a)(4), to "consider" the range, along with the factors of section 3553(a). *Id.* The court stated that in this instant appeal, it did not need to determine what degree of consideration is required or what weight should be given to the guidelines, because "[w]e think it more consonant with the day-to-day role of district judges in imposing sentences and the episodic role of appellate judges in reviewing sentences, especially under the now applicable standard of 'reasonableness,' to permit the concept of 'consideration' . . . to evolve as district judges faithfully perform their statutory duties. Therefore, we will not prescribe any formulation a sentencing judge will be obliged to follow in order to demonstrate discharge of the duty to 'consider' the Guidelines." *Id.* at 113.

With respect to appellate review of sentences post-*Booker*, the court noted that the review for reasonableness is not limited to a consideration of the length of a sentence, and that a sentence

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[3] In a previous opinion in *United States v. Figuereo*, 404 F.3d 537 (5th Cir. April 19, 2005), Circuit Judge Lipez stated "[w]e typically review the district court's factual findings for clear error and its interpretation and application of the sentencing guidelines *de novo*. Where the defendant raises objections on appeal that were not presented to the district court, however, the standard is different. Under these circumstances, 'our review is restricted to plain error.'" *Id.* at 540.

[4] On February 4, 2005, the Second Circuit issued a "Special Order of Inquiry to Appellants Regarding Remand Pursuant to *United States v. Crosby*," which explains that *United States v. Crosby* sets forth the post-*Booker* procedures for "remand for reconsideration" that are to be applied to all cases held since *Blakely*, and asks attorneys to complete a form indicating whether a defendant seeks a remand for sentence reconsideration. Available at: http://www.ca2.uscourts.gov/Docs/News/Post-Crosby%202.4.050001.pdf

will not be reasonable if legal errors led to its imposition. *Id.* at 114. The possibility of a sentence which is unreasonable for legal error in the method of its selection concerned the court because it will be impossible to tell whether the sentencing court would have imposed the same sentence had it not been compelled to impose a guideline range. *Id.* at 15. The court then declined to fashion any *per se* rule as to the reasonableness of every sentence within an applicable guideline range or the unreasonableness of every sentence outside the applicable guideline range, because it found that such a *per se* rule would "risk being invalidated as contrary to the Supreme Court's holding in *Booker/Fanfan*, because [that] would effectively re-institute mandatory adherence to the Guidelines." *Id.* Additionally, the court noted that even if, prior to *Booker*, a sentencing court had indicated an alternative sentence that would be imposed if compliance with the guidelines were not required, the alternative sentence would not necessarily be the same one the court would have imposed in compliance with the duty to consider all factors listed in § 3553(a). *Id.* at 118.

Finally, the court laid out in detail its plan for how it will handle all post-*Booker* appeals on direct review. It concluded that it was appropriate, for all pre-*Blakely* and pre-*Booker* sentences pending on direct review, to remand to the district court "not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine *whether* to resentence, now fully informed of the new sentencing regime, and if so, to resentence." *Id.* at 117 (emphasis in original). It stated that a remand for determination of whether to resentence is appropriate in order to undertake a proper application of the plain error and harmless error doctrines. *Id.* at 118. "In short, a sentence imposed under a mistaken perception of the requirements of law will satisfy plain error analysis if the sentence imposed under a correct understanding would have been materially different. It is readily apparent to us that a sentence imposed prior to *Booker/Fanfan* was imposed without an understanding of sentencing law as subsequently explained by the Supreme Court. However, we cannot know whether a correct perception of the law would have produced a different sentence. . . . If a district court determines that a nontrivially different sentence would have been imposed, that determination completes the demonstration that the plain error test is met." *Id.*[5]

United States v. Williams, 399 F.3d 450 (2d Cir. Feb. 23, 2005)

In *Williams*, the defendant was found guilty by a jury of recklessly causing the transportation of hazardous materials, and he was sentenced to 46 months' imprisonment. *Id.* at *1. On appeal, the defendant contended his sentence violated his Sixth Amendment rights under *Blakely* and *Booker*. *Id.* at *2. Circuit Judge Newman, writing for Circuit Judge Pooler and District Judge Brieant, sitting by designation, discussed at length their sister circuits' three different approaches to the plain error doctrine. *Id.* at *3. In the court's view, the pertinent issue in all the cases in which the courts have applied the *Olano* plain error prongs "was whether to correct an unpreserved error that occurred in the conduct of a jury trial." *Id.* at *4. However, in contrast, "the context of review of a sentencing error is fundamentally different," in part, because the cost of a resentence is far less than the cost of a retrial, and review of a sentencing error, unlike a trial error, "does not require the appellate court to make its estimate of whether it thinks the outcome would have been non-trivially

[5] On February 11, 2005, in *United States v. Konstantakakos*, 121 Fed. Appx. 902 (2d Cir. Feb. 11, 2005), the Second Circuit conducted a more detailed plain error review, citing the four prongs the defendant is required to demonstrate, as stated in *Olano*.

different had the error not occurred." *Id.* at *5. Therefore, the court found there is no need to apply the plain error doctrine in the sentencing context using "precisely the same procedure that has been used in the context of review of errors occurring at trial . . . . Moreover, we note that the Supreme Court has never applied the *Olano* formulation of the plain error doctrine to ignore a judge's sentencing error that affected substantial rights, nor required a court of appeals to do so." *Id.*

B. Harmless Error Standard

United States v. Fagans, 2005 WL 957187 (2d Cir. April 27, 2005)

In *Fagans*, the defendant pleaded guilty to possession of a stolen firearm. *Id*. at *1. In response to the PSR, and again at sentencing, the defendant objected to the mandatory application of the sentencing guidelines as an error under *Blakely*. *Id*. at *3. On appeal and in light of *Booker*, the court determined that the sentencing court's mandatory application of the guidelines in conformity with its post-*Blakely* decision in *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004), was erroneous. *Id*. at *4. Further, the court stated that because the defendant had preserved his objection, the procedure for applying the plain error standard it previously set forth in *Crosby*, discussed above, was inapplicable. *Id*. The court stated that it may elect to adjudicate the guideline calculation "either under Crosby if the Guidelines error is unpreserved, or for resentencing if the error is preserved."* *Id*. at *6. However, instead of simply reversing the erroneous sentence, the court stated that where a guideline issue was not difficult, it may adjudicate the calculation promptly on direct appeal so that subsequent proceedings will occur in light of a correct calculation. *Id*. In the instant case, the court elected to review the defendant's specific sentencing objections and found the calculation correct. *Id*. at *8. The court remanded the case to the district court with instructions to vacate the sentence and resentence the defendant in conformity with *Booker* and the instant opinion. *Id*.

C. Reasonableness

United States v. Doe, 2005 WL 767155 (2d Cir. April 6, 2005)

In *Doe*, the defendant was convicted of making false statements on passport applications. The PSR recommended a sentence of 6 to 12 months, and at the time of sentencing, the defendant had already been in prison for 18 months. Therefore, the PSR recommended he be sentenced to "time served" and released. *Id.* at *1. However, because the defendant had refused to reveal his true name, the sentencing court upwardly departed and imposed the statutory maximum sentence of 10 years. *Id.* In a summary order, Circuit Court Judges Wesley, Hall, and Chief District Court Judge Mukasey sitting by designation, reviewed the sentence for reasonableness pursuant to *Booker*. *Id.* The court found that because of the crime charged, the recommended guideline range, the lack of any provable criminal history, and the sentencing court's "inadequate balancing of these factors against the perceived threat posed by [the defendant]," the 10-year sentence was unreasonable, and vacated and remanded. *Id.*

D. Waiver of Right to Appeal Sentence

United States v. Morgan, 2005 WL 957186 (2d Cir. April 27, 2005)

The defendant in *Morgan* pleaded guilty to conspiracy to distribute and possess with intent to distribute marijuana before both *Blakely* and *Booker* were decided. Circuit Judge Parker, writing for Circuit Judges Straub and Pooler, found that for a defendant who seeks relief from his sentence but who had not timely appealed for relief from an underlying plea, an appeal waiver is enforceable and forecloses any right to appeal the sentence under *Blakely* and *Booker*. *Id.* at *1. The court found no indication that either party intended the appeal waiver not to apply to issues that might arise after the waiver in the agreement. *Id.* In the instant case, because the defendant entered into his agreement after *Apprendi* but before *Booker*, "there is every reason to assume [he] had knowledge of his *Apprendi* rights at the time he entered into the plea agreement." *Id.* Additionally, "[t]hat [he] did not, by contrast, have knowledge of his rights under *Booker/Fanfan* makes no material difference" because his inability to foresee that cases decided after the plea waiver would create new appeal issues did not give the defendant a basis for a failure to enforce an appeal waiver. *Id.*

E. Revocation of Supervised Release

United States v. Fleming, 397 F.3d 95 (2d Cir. Feb. 2, 2005)

Circuit Judge Newman determined in *Fleming* that the sentencing court did not err in its consideration of relevant sentencing factors or in the length of the sentence imposed after the defendant's third violation of conditions of his supervised release. Acknowledging that *Booker* excised and severed 18 U.S.C. § 3742(e), which specified standards for appellate review, the court looked to section 3583(e) which requires a judge to consider most of the factors listed in section 3553(a) in a revocation of supervised release, including applicable policy statements. *Id.* at 97-98. In this case, the recommended term of imprisonment under §7B1.1(a)(3) was 5 to 11 months, and the sentencing court imposed a 2-year term of imprisonment. *Id.* at 99. The court stated once the Supreme Court excised section 3742(e), which included a "plainly unreasonable" review for sentences for which there was no guideline, *Booker*'s announced standard of reasonableness is to be applied "not only to review of sentences for which there are guidelines but also to review sentences for which there are no applicable guidelines." *Id.* The court found that as long as the sentencing judge was aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates a misunderstanding about their relevance, the court would accept that the requisite consideration under section 3583(e) has been met, and further found that "reasonableness" in the context of review of sentences is a flexible concept. *Id.* at 100. Under the circumstances in the present case, the court did not find the two-year sentence to be unreasonable. *Id.* at 101.

The court distinguished this case from *United States v. Crosby*, discussed above, wherein it had observed that in many cases, it will not be possible to tell whether the sentencing judge would have given a different sentence if it had been fully informed of the applicable requirements of the Sentencing Reform Act (SRA) and *Booker*. In the present case, the court stated that although it had remanded in *Crosby* to afford the sentencing court an opportunity to consider whether to resentence, here, the sentencing court was functioning under Chapter Seven of the guidelines which was advisory even before *Booker*, and knowing it was not bound by the policy statements, had chosen to exercise its discretion. *Id.*

III. Third Circuit

A. Plain Error Standard

The Third Circuit has not yet ruled on the plain error standard of review for sentencings pursuant to *Booker*. Instead, the circuit's judges have held that with respect to alleged sentencing errors, the issue is best determined by the district court in the first instance, vacating the sentence and remanding for resentencing, doing so first in *United States v. Mortimer*, 2005 WL 318650 (3d Cir. Feb. 10, 2005), discussed more fully below.[6]

B. Criminal History Calculation

United States v. Ordaz, 398 F.3d 236 (3d Cir. Feb. 23, 2005)

In a case involving conspiracy to distribute cocaine where the jury was not asked to render a decision about drug weight nor asked to make a determination of the defendant's criminal history, the defendant appealed, arguing that the sentencing court improperly enhanced his sentence on the basis of those factors because the enhancements were not supported by facts found by the jury beyond a reasonable doubt. *Id.* at 238. The court found that with respect to the sentencing court's determination of drug weight, the issue was best determined by the sentencing court in the first instance, and therefore vacated the sentence and remanded. However, the court rejected the defendant's argument that the fact of a prior conviction must be submitted to the jury, and disagreed that *Blakely* made clear that *Almendarez-Torres* cannot stand. *Id.* at 241. Although the court determined there was tension between "the spirit of *Blakely* and *Booker* that all facts that increase the sentence should be found by the jury and the Court's decision in *Almendarez-Torre*s, which upholds sentences based on facts found by judges rather than juries," because it found that the holding in *Almendarez-Torres* remains binding law and nothing in *Blakely* or *Booker* holds otherwise, it held that the sentencing court's determination regarding the facts of the defendant's prior conviction did not violate the Sixth Amendment, "notwithstanding that the sentences were based, in part, on facts found by a judge rather than a jury." *Id.*

C. Drug Quantity Calculation

United States v. Mortimer, 2005 WL 318650 (3d Cir. Feb. 10, 2005)

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[6] The court has since followed the line of reasoning that *Booker* issues are "best determined by the district court in the first instance" in subsequent opinions without further substantive discussion. In *United States v. Able*, 124 Fed. Appx. 113 (3d Cir. Feb. 24, 2005), Circuit Judges Greenberg, Sloviter and Fuentes determined that the sentencing court treated the guidelines as mandatory rather than advisory, because it stated in its statement of reasons that "[t]he sentence is within the guideline range, the range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by the application of the guidelines." *Id.* at 113. Therefore, because the court determined that the defendant's sentencing issues are best determined by the district court in the first instance, it remanded for resentencing. *Id.* In *United States v. Marquez*, 2005 WL 455858 (3d Cir. Feb. 28, 2005), in an opinion written by Circuit Judge Aldisert, he and Circuit Judges Sloviter and Ambro stated that the unspecified sentencing issues challenged by the defendant were best determined by the district court in the first instance, and therefore vacated the sentence and remanded for resentencing. *Id.* at *2.

In *Mortimer*, the defendant raised issues concerning *Blakely* in a Motion for Summary Remand, claiming the sentencing court made factual findings regarding the quantity of drugs he possessed. Circuit Judge Van Antwerpen had originally denied the motion in August of 2004, but held the case pending a resolution of the *Blakely* matter. *Id.* at *4. Without substantive discussion, the court found that the defendant raised sentencing issues which are best determined by the district court in the first instance. Therefore, the court remanded for resentencing. *Id.*

D. Waiver of Right to Appeal Sentence

United States v. Lockett, 2005 WL 1038937 (3d Cir. May 5, 2005)

The defendant in *Lockett* pleaded guilty to possession with intent to distribute marijuana, possession of firearms in connection with a drug trafficking offense, and possession of firearms with obliterated serial numbers. In his written plea agreement, he reserved the right to appeal the denial of a motion to suppress, and the agreement further explicitly limited his right to appeal his sentence except based on a claim that the sentence exceeded the statutory maximum or that the judge erroneously departed upward. *Id.* at *2. On appeal, the defendant maintained his sentence was inconsistent with *Booker*. Circuit Judges Nygaard, McKee, and Rendell explained that part of the plea agreement contained the defendant's voluntary waiver of all rights to appeal or collaterally attack his sentence, with only unrelated exceptions, and waivers of appeal which are entered into knowingly and voluntarily are valid unless they work a miscarriage of justice. *Id.* at *4. Additionally, the court reasoned a waiver will not be invalidated simply because an unanticipated event has occurred in the future, and subsequent changes in the law do not render a plea invalid. *Id.* Therefore, the court dismissed the appeal. *Id.* at *5.

E. Concurrent Sentence Rule

United States v. Fisher, 2005 WL 271541 (3d Cir. Feb. 4, 2005)

In *Fisher*, the defendant pleaded guilty to two federal and two state charges which were consolidated for sentencing, and he was sentenced to concurrent terms of 96 months' imprisonment. He had waived his right to appeal the state convictions in a plea agreement. *Id.* at *1. In the instant appeal, he claimed an enhancement given for one federal crime for "sophisticated means" was improper because it relied on judicial fact-finding beyond facts he had admitted. *Id.* at *3. District Judge Shadur, sitting by designation, found that the sentence imposed for this federal crime was identical to the sentence imposed for the state crimes, and because his sentences for those crimes were final, *Booker* offered him no relief. *Id.* at *9. Any constitutional challenge to the sentence imposed for the federal crime which runs concurrently with the sentence for the state crimes was moot and no relief that could be granted would have any affect. *Id.* The court further stated that in any future federal prosecution of the defendant, the calculation of his criminal history score would consider the sentences imposed in the three cases as "one sentence" for purposes of §4A1.2(a)(2), using the longest of the sentences for the calculation. Thus, any reduction of the sentence in this case would have no effect on his future criminal history category, and there was no benefit to be gained from a favorable ruling on his Sixth Amendment challenge. Therefore, the court declined to review the sentence. *Id.* at *4.

IV. Fourth Circuit

A. Plain Error Standard

United States v. Hughes I, 396 F.3d 374 (4th Cir. Jan. 24, 2005)

In *Hughes I*, the sentencing court imposed a 46-month sentence when the guideline range authorized by the jury finding was a 6- to 12-month sentence. Chief Judge Wilkins and Judges Traxler and Gregory found that the court plainly erred by imposing the sentence because it exceeded the maximum authorized by the jury finding alone, and therefore it violated the Sixth Amendment. *Id.* at 374. The court also found the error was prejudicial, and that the sentence warranted reversal because sentencing courts are no longer bound by the guidelines. *Id.* at 376. According to the court, under the record before it, to leave the sentence standing would put in jeopardy the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 381. Although the court found that the district court did not err in its initial calculation of the guideline range, it held that in light of *Booker*, the sentence must be vacated and remanded. *Id.* at 385. The court directed the sentencing court upon remand to consider the guideline range as well as other relevant factors set forth in the guidelines, and those factors in section 3553(a), before imposing the sentence. *Id.*

United States v. Hughes II, 2005 U.S. App. LEXIS 4331 (4th Cir. March 16, 2005)

Upon rehearing, the panel filed an amended opinion to *Hughes I*, in which it found plain error and vacated and remanded for resentencing, "consistent with the remedial scheme set forth in Justice Breyer's opinion for the Court in *Booker*." *Id.* at 545. The court noted that since its initial decision in *Hughes I*, many other circuit courts have ruled that "an assessment of whether the defendant has been prejudiced by the Sixth Amendment error must account for the fact that any resentencing will be conducted pursuant to the remedial scheme announced in *Booker*," and have held that if the defendant cannot show that the sentencing court would have imposed a different sentence under an advisory scheme, the Sixth Amendment error did not affect the defendant's substantial rights. *Id.* at 549 (*citing Crosby*, discussed in Part II above, and *United States v. Mares*, *United States v. Paladino*, and *United States v. Rodriguez*, discussed in Parts V, VII, and XI below, respectively).

The court took special notice of the Eleventh Circuit's discussion in *Rodriguez* in which it had claimed the *Hughes* court failed to recognize "the prejudice inquiry must focus on what has to be changed to remedy the error." *Id.* at 549-550 (*quoting Rodriguez*, at 1303). The court disagreed with the analysis in *Rodriguez* that the refusal to incorporate the remedial scheme "'is wrong because it disconnects the error to be remedied on remand from the decision of whether there is to be a remand.'" *Id.* at 550. The *Rodriguez* court had additionally argued that the function of the third plain error prong is to prevent a remand for additional proceedings where the defendant cannot show there is a reasonable probability "'that a do-over would more likely than not produce a different result.'" *Id.* (*quoting Rodriguez*, at 1302). In the court's view, the Eleventh Circuit displayed a fundamental misunderstanding of what it means for an error to affect a defendant's substantial rights. "Any inquiry into whether a Sixth Amendment error affected a defendant's substantial rights must take as a given" that the sentencing court exceeded the Sixth Amendment limitation. *Id.* at 550. The court believes the prejudice inquiry in the case of a Sixth Amendment violation is instead

whether the sentencing court could have imposed the sentence it imposed without exceeding that Sixth Amendment limitation; if the answer is yes, the defendant failed to demonstrate an effect on his substantial rights, but if the answer is no, the defendant has made the requisite showing. *Id.* at 550-551.

The court further stated that an incorporation of the remedial scheme into a prejudicial analysis would be contrary to circuit precedent, and that "[c]onsidering the *Booker* remedy in determining whether a defendant has established an effect on substantial rights from a pre-*Booker* Sixth Amendment violation would essentially require us to disregard the Sixth Amendment." *Id.* at 551. Additionally, the court concluded that *Booker* supports its view that the defendant's Sixth Amendment claim should be analyzed "without reference to the remedial scheme," and therefore it declined to consider such scheme when it assessed whether the defendant had shown he was prejudiced by a violation of his Sixth Amendment rights. *Id.* at 552.

Regarding the fourth prong, the court determined it would exercise its discretion because the failure to do so would result in a miscarriage of justice affecting the fairness of judicial proceedings. *Id.* at 555. As a result of the plain and prejudicial Sixth Amendment error, the defendant was sentenced to a term of imprisonment nearly four times as long as the maximum sentence authorized by the jury verdict. The court reasoned that although the record did not provide any indication what sentence the sentencing court would have imposed had it treated the guidelines as advisory, there was nothing in the record to compel a conclusion that the defendant would receive the same sentence on remand. However, that possibility was not enough to dissuade the court from noticing the error. *Id.* at 556.

Finally, the court determined that the *Rodriguez* court failed to appreciate that post-*Booker*, there are two potential errors in a sentence imposed pursuant to the pre-*Booker* mandatory guideline scheme; a Sixth Amendment error, which the defendant in the instant case raised, and an error for failing to treat the guidelines as advisory, which the defendant did not raise. *Id.* at 552. "The creation of the *Booker* remedial scheme thus gave rise to a separate class of error, namely, the error of treating the guidelines as mandatory." *Id.* In the court's view, "such an error is distinct from the Sixth Amendment claim that gave rise to the decision in *Booker*, and it is non-constitutional in nature" and can be asserted even by those defendants whose sentences do not violate the Sixth Amendment. *Id.* at 553.

United States v. Gilchrist, 2005 U.S. App. LEXIS 3945 (4th Cir. March 8, 2005)

In *Gilchrist*, the court remanded for resentencing pursuant to *Hughes I* in an opinion for the court by Senior Circuit Judge Hamilton, with concurrences by Circuit Judges Neimeyer and Luttig, on the same day the panel in *Hughes I* granted a rehearing. In his concurrence, Judge Luttig stated he did not believe the remand to be absolutely necessary, and explained why he believed the court fundamentally erred in its decision in *Hughes I*. *Id.* at *2. Specifically, he determined the *Hughes I* panel erred in its identification of the error, whether the error affected Hughes' substantial rights, and in its decision to exercise its discretion to recognize the error, thereby misapplying the plain error doctrine. *Id.* at *4.

Judge Luttig explained that the panel's mistake was in not considering as error the sentencing court's application of the guidelines in their mandatory form, but instead as the imposition of a sentence based on facts found by the judge, thereby failing to take into account both the entirety of the holding in *Booker* and that the central premise of *Booker* is that if the guidelines could be read as advisory, the selection of a particular sentence based on differing sets of facts would not implicate the Sixth Amendment. *Id.* at *8. Judge Luttig pointed out that despite the fact there was no Sixth Amendment violation in Fanfan's case, the Court vacated and remanded in order to permit the government to seek resentencing, based on the extra-verdict facts that the district court refused to consider. *Id.* at *9. Further, Judge Luttig stated that the *Hughes I* panel erred by holding that the defendant's substantial rights were violated because he would have received a lower sentence had the sentencing court imposed a sentence in accordance with the facts found by the jury. *Id.* at *11. "[P]rejudice must be determined by comparing what the district court did under a mandatory regime to 'what the district court would have done had it imposed a sentence in the exercise of its discretion pursuant to § 3553(a)' . . . an inquiry expressly rejected in *Hughes*." *Id. (quoting Booker*, at 380). Finally, Judge Luttig stated the *Hughes I* panel erred in exercising its discretion to notice the error on the ground that *Booker* wrought a major change in how sentencing is to be conducted, stating the panel's conclusion would compel remand in every case where the court must apply Rule 52(b) to *Booker* errors. *Id.* at *15. In his view, the *Hughes I* panel's defense of its exercise of discretion, resting not on the presence of a Sixth Amendment violation, applies to all sentences imposed prior to *Booker*, even those imposed at the court's direction in *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004), because even in those cases, the sentences were not imposed under a regime in which the guidelines were treated as advisory. *Id.* at *15-16.

United States v. Washington, 398 F.3d 306 (4th Cir. Feb. 11, 2005)

In *Washington*, Circuit Judges Niemeyer, Luttig and King determined that the plain error test was satisfied in that the judicial fact-finding leading to an enhancement for obstruction of justice resulted in a sentence exceeding the maximum sentence authorized by the jury verdict pursuant to the then-mandatory guidelines. *Id.* at 312. Further, the court found the error was prejudicial and affected the defendant's substantial rights because the enhancement led to a greater sentence than authorized. *Id.* Quoting from *Hughes I*, above, the court stated "'the fact remains that a sentence has yet to be imposed under a regime in which the Guidelines are treated as advisory,' and '[w]e simply do not know how the district court would have sentenced [the defendant] had it been operating under the regime established by *Booker*.'" *Id.* at 313 *(quoting Hughes I*, at 37, n.8). Therefore, the court vacated the sentence and remanded for resentencing. *Id.*

B. Reasonableness

United States v. Bertram, 2005 WL 994828 (4th Cir. April 29, 2005)

In *Bertram*, the defendant pleaded guilty to distribution of cocaine base, and was sentenced to 132 months' imprisonment. *Id*. at *1. On appeal, he claimed the sentencing court erred in sentencing him based on 150 grams of cocaine base upon a finding of relevant conduct. *Id*. at *2. The defendant further argued *Apprendi* and *Blakely* rendered all guideline upward adjustments and departures based on facts not charged in the indictment or found by a jury beyond a reasonable doubt unconstitutional. *Id*. Lastly, he argued the only constitutional remedy to his sentence was to apply "only those guideline provisions consistent with the rule in *Blakely*, and in light of . . . *Booker*." *Id*.

Circuit Judge Widener, writing for Circuit Judges Niemeyer and Gregory, stated the Supreme Court in *Booker* instructed that the courts of appeals review sentencing decisions for unreasonableness. *Id*.[7] In Judge Widener's view, when the Supreme Court vacated the mandatory requirement from the guidelines, "it enacted a huge change in criminal procedure" and did not intend to restrict its requirement of reasonableness to the two sections of § 3742(f) in which the word "unreasonable" appears, and which were not excised in *Booker*. *Id*. at *5. Instead, the court found, the reasonable requirement is "to go with the permissive requirement imposed at the same time." *Id*. Therefore, the court determined that *Booker* requires the court of appeals to review actions by the sentencing court under the standards of the guideline system outlined in *Booker*, and, if its acts were reasonable, to affirm. *Id*. In the instant case, the court explained that although no quantity was alleged in the indictment, the defendant withdrew his objection to the 150 gram relevant conduct-quantity in the PSR at sentencing. *Id*. at *3. That amount made his base offense level 34, and after a three level reduction for his acceptance of responsibility, and with a criminal history category II, the applicable guideline range was 121 to 151 months. The corresponding statutory minimum was ten years and maximum was 20 years. *Id*. The court found that after careful consideration, the sentencing court imposed a sentence of 11 years, and because this sentence was within the guidelines, and near the low end of the guideline range, the sentence was reasonable. *Id*. at *4. Further, the court determined the sentence was also near the low end of the statutory range, and "[n]othing in the record shows that the district court considered any improper factor in sentencing or that any action of the district court was unreasonable." *Id*. at *5.

The court additionally found no merit in the defendant's claim that *Blakely* rendered as constitutionally infirm all upward adjustments and departures that were based on facts not charged in the indictment or found by a jury beyond a reasonable doubt. *Id*. at *6. In the instant case, the defendant waived his Sixth Amendment rights when he consented to the plea agreement, and the court stated his guilty plea submitted him to fact finding by the judge rather than the jury. *Id*. Because the facts used by the sentencing judge to determine the sentence were based on the

[7] Concurring in the judgment, Circuit Judge Niemeyer stated that although the majority suggested by reason of *Booker* the sentence should be reviewed for reasonableness, in his opinion, the court should have applied the plain error doctrine. *Id*. at *7. In his view, because the case did not concern a violation of the defendant's Sixth Amendment rights, the court's holding in *Hughes*, above, did not require resentencing, but a plain error review should still have been conducted. However, Judge Niemeyer stated he would have reached the same result under plain error review, because the defendant failed to carry his burden of showing that the error affected his substantial rights. *Id*. at *9.

defendant's own admissions, the court stated his argument under *Blakely* failed. *Id*. at *7. Therefore, the sentence was affirmed. *Id*.

C. Alternative Sentence Imposed Pursuant to *United States v. Hammoud*

United States v. Doane, 122 Fed. Appx. 32 (4th Cir. Feb. 11, 2005)

In *Doane*, the defendant was sentenced after *Blakely*, and pursuant to *United States v. Hammoud*, the sentencing court also specified an alternative sentence. The appeal was held in abeyance pending the decision in *Booker*. *Id.* at 33. The defendant moved for an expedited remand of his case to implement the alternative sentence, noting that he had already served more time than the district court set forth in that alternative sentence. *Id.* The court granted the motion for remand to allow the district court to reconsider the defendant's sentence in light of *Booker* and *Hughes I*. *Id.*

V. Fifth Circuit

A. Plain Error Standard

United States v. Mares, 402 F.3d 511 (5th Cir. March 4, 2005)

In *Mares*, in an opinion written by Circuit Judge Davis and circulated to all members of the court, Circuit Judges Jolly, Davis, and Clement agreed with the Eleventh Circuit in *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. Feb. 4, 2005), discussed in Part XI below, and found that the defendant did not meet the third prong of the plain error test because he could not show his sentence affected the outcome of his proceedings, and therefore, the sentence should be affirmed. *Id.* at 513. The court stated that it was the mandatory aspect of the sentencing scheme prior to *Booker* which violated the Sixth Amendment's requirement of a jury trial, but that even in the discretionary sentencing system established by *Booker*, a sentencing court must still carefully consider the statutory scheme created by the SRA and the guidelines. *Id.* at 518-519. The duty to consider the guidelines, in the court's view, will ordinarily require the sentencing judge to determine the applicable guideline range even though the judge is not required to sentence within that range. *Id.* at 519. The court stated that *Booker* contemplates that with the mandatory use of the guidelines excised, the Sixth Amendment will not impede a sentencing judge from finding all facts relevant to sentencing, and the judge is entitled to find by a preponderance of the evidence all those facts relevant to the determination of the guideline range and to the determination of a non-guideline sentence. *Id.* at 519.

In the present case, the court found that the defendant did not meet the third prong of the plain error test because he did not demonstrate a probability "sufficient to undermine confidence in the outcome," where the sentencing judge imposed the statutory maximum sentence when the bottom of the guideline range was lower. *Id.* at 521. The court found no indication in the record other than that to explain whether the sentencing judge would have reached a different conclusion if the guidelines were advisory. Therefore, the court found the defendant could not meet his burden of demonstrating that the result would likely have been different had the judge sentenced him under the post-*Booker* scheme. *Id.* at 522.

The court also explained how it will conduct future sentencing reviews. If the sentencing judge exercises the discretion to impose a sentence within a properly calculated guideline range, in the court's reasonableness review, it will infer that the judge considered all the factors for a fair sentence set forth in the guidelines, and given the deference due that discretion, it will be rare for a reviewing court to say such a sentence is unreasonable. *Id.* at 519. Further, when the judge exercises her discretion to impose a sentence within the guideline range, and states so on the record, little explanation is required by the court. However, when the judge elects to give a non-guideline sentence, he or she should carefully articulate fact-specific reasons that the sentence selected is appropriate. *Id.* The court stated it will give due deference to a sentence if the sentencing court follows these principles, commits no legal errors, and gives appropriate reasons for the sentence. *Id.* at 520.

B. Standard of Review for Interpretation and Application of the Guidelines

United States v. Villegas, 404 F.3d 355 (5th Cir. March 17, 2005)

The defendant in *Villegas* pleaded guilty to being an alien in unlawful possession of a firearm and the sentencing court enhanced his sentence four levels upon finding he possessed the firearm in connection with another felony offense. *Id.* at 358. The defendant appealed, alleging the court erred as a matter of law when it applied the enhancement and that his Sixth Amendment rights were violated because the government did not bear the burden of proving beyond a reasonable doubt that he committed another felony for application of the enhancement. *Id.* Because the defendant had not raised either objection in the sentencing court, the court stated its review was for plain error. *Id.* In a *per curiam* decision, Chief Judge King and Circuit Judges Benavides and Stewart stated that in light of *Booker*, the court must re-examine the proper standard of review to employ in resolving a claim that the sentencing court improperly applied the guidelines under the then-mandatory sentencing scheme. *Id.* at 357. The court found that although prior to *Booker*, it would have reviewed the sentencing court's interpretation and application of the guidelines *de novo*, the question presented in this case was whether the standard was changed by *Booker*'s excision of § 3742(e), which statutorily set out the standards for review of sentencing decisions. *Id.* at 359.

The court determined that although in *Booker* the Court excised § 3742(e) and stated that the remaining statute implied a standard of reasonableness in the review of sentences, "nothing suggests that *Booker* injected a reasonableness standard into the question whether the district court properly interpreted and applied the Guidelines or that an appellate court no longer reviews a district court's interpretation and application of the Guidelines *de novo*." *Id.* at 361. The court further reasoned that because both § 3742(a), which allows a defendant to appeal for review of an otherwise final sentence if the sentence was imposed as a result of an incorrect application of the guidelines, and § 3742(f), which provides that if the court of appeals determines the sentence was imposed in violation of law or as an incorrect application of the guidelines it is to remand the case for further proceedings, survived after *Booker*, courts of appeals are to maintain their review of the interpretation and application of the guidelines when a sentencing court has imposed a sentence under the guidelines. *Id.* at 362. Therefore, in reviewing the defendant's claims using a plain error test, the court stated that in its determination whether the sentencing court had erred and whether the error was plain, it is to review the district court's interpretation and application of the guidelines *de novo*. *Id.* at 363.

In the instant case, the court found the sentencing court erred when it enhanced the defendant's sentence, because the enhancement is only to apply when the defendant's use or possession may have facilitated the other felony offense, and his other felony offense occurred the day before he acquired possession of the firearm. Thus he satisfied the first two prongs of the plain error test. *Id.* at 364. Additionally, the court explained that because the error in this case was the misapplication of the guidelines, it was a different error than had been found in *Booker* itself, where the Sixth Amendment error was based on the judge-found facts in a mandatory guideline system. Therefore, the question in this case regarding the third prong of the plain error test was whether the defendant can show a reasonable probability that, but for the misapplication of the guidelines, he would have received a lesser sentence. *Id.* (differentiating *Mares*, above, where the third prong inquiry was whether the defendant could show reasonable probability that the sentencing court would have imposed a different sentence had the guidelines been advisory). Because the defendant showed that without the four level enhancement, his sentencing range would have been between 10 and 16 months instead of 21 to 27 months, the court found he had satisfied both the third prong, because his substantial rights were affected, and the fourth prong, because the error seriously affected the fairness and integrity of judicial proceedings. *Id.* at 365. The court vacated the sentence and remanded for resentencing, stating it did not need to consider the defendant's Sixth Amendment argument.[8]

C. Waiver of Right to Appeal Sentence

United States v. Harrington, 2005 WL 977821 (5th Cir. April 27, 2005)

In *Harrington*, the defendant's brief claimed that his sentence, imposed above the guideline range, was forbidden under *Blakely*, because his plea agreement waiver should be treated as one which allows an appeal if the guideline range was exceeded. *Id.* at *1. In an unpublished *per curiam* opinion upon remand from the Supreme Court for further consideration in light of *Booker*, and without a detailed factual analysis, the court rejected the defendant's argument that the waiver in his plea agreement allowed an appeal of a sentence below the statutory maximum because it exceeded the guideline range. *Id.* The court found the agreement expressly named the statutory maximum as what the defendant had accepted, not the guideline range. *Id.* Therefore, the court explained it continued to view the defendant's appeal post-*Booker* exactly as it had viewed his

[8] In *United States v. Creech*, 2005 WL 1022435 (5th Cir. May 3, 2005), Circuit Judge Garza stated in his dissent that he could not agree with the panel that *Booker*'s directive that courts must still consider the guidelines "'indicates that *Booker* did not alter the standard of review we must employ when reviewing a court's interpretation and application of the Guidelines.'" *Id.* at *8 (*quoting* n.2). Judge Garza stated this contravenes the clear language in *Booker* because nothing in *Booker* suggested a *de novo* review, but instead instructed courts of appeals to "'review sentencing decisions for unreasonableness.'" *Id.* Judge Garza reasoned that because § 3742(e) was excised in *Booker*, "we no longer review sentences for 'violation of law' and 'incorrect application' . . . but rather for unreasonableness." *Id.* Therefore, in his opinion, the court should review sentences for unreasonableness regardless of whether the sentencing court applied the guidelines or regardless of whether the court applied the guidelines correctly. *Id.* Further, he stated that the opinion in *Villegas* suggested that the improper application of the guidelines makes the sentence unreasonable *per se*, and reasoned "I agree that to ascertain whether the Guidelines have been applied properly, a *preliminary* step in our review, requires *de novo* review of legal issues . . . . However, any determination that either or both determinations of error does not end the inquiry as it did pre-*Booker*. The court must take the additional step to determine whether the sentence decision is unreasonable in light of the factors listed in § 3553(a). *Id.* at *9 (emphasis in original).

appeal pre-*Booker*; as one which is barred by the waiver, and it therefore dismissed the appeal. *Id.*

VI. Sixth Circuit

A. Plain Error Standard

United States v. Oliver, 397 F.3d 369 (6th Cir. Feb. 2, 2005)

In *Oliver*, Circuit Judges Moore and Gibbons and District Judge Mills found the sentencing court had plainly erred in increasing the defendant's sentence pursuant to the guidelines, in violation of the Sixth Amendment, and remanded in accordance with *Booker*. *Id.* at 373. The court found that all four prongs of the plain error test had been met; first, an error occurred because the guidelines were mandatory at the time the sentence was imposed and are currently advisory; second, that error was plain because the Supreme Court has held that an error need not always be obvious at the time of the determination as long as it is evidently plain at the time of appellate consideration; third, the error affected the defendant's substantial rights because the sentencing court's determination unconstitutionally increased the defendant's sentence beyond that which was supported by the jury verdict and the defendant's criminal history; and fourth, the sentencing error that led to a violation of the Sixth Amendment by the imposition of a more severe sentence than that supported by the jury verdict would diminish the integrity and public reputation of the judicial system. *Id.* at 379-80.

United States v. Bruce, 396 F.3d 697 (6th Cir. Feb. 3, 2005)

In a footnote in *Bruce*, Circuit Judges Nelson and Cook and District Judge Rosen stated that although the guidelines are no longer mandatory under *Booker*, it remained an important part of the appellate review process to determine what the guidelines would call for under the specific facts and circumstances of each case. *Id.* at 711, n.10. In that analysis, the court opined that the sentence imposed, with an enhancement for obstruction of justice by a preponderance of the evidence based on judicial fact-finding, contravened the defendant's Sixth Amendment right to a jury finding of all facts beyond a reasonable doubt. *Id.* at 718. The court applied a plain error standard of review, finding first, although the lower court's error was not apparent until *Booker*, both the Supreme Court and this court had previously recognized that whether an error is plain is satisfied as long as the error is evident at the time of the appellate review. *Id.* at 719. The court then left unresolved the question whether the error affected the defendant's substantial rights, because it found the fourth prong of the test, whether the error seriously affected the fairness, integrity or public reputation of judicial proceedings, had not been met, creating an inner-circuit split on this issue with *United States v. Oliver*, discussed above. *Id.* Specifically, the court found guidance from prior decisions which had held an *Apprendi* violation does not satisfy the fourth prong if the evidence bearing upon the issue that was impermissibly determined by the lower court was overwhelming and uncontroverted. *Id.* In that vein, the court found that because the sentencing court had sentenced the defendant at the top of the guideline range within a mandatory sentencing scheme, it was not inclined to have imposed a shorter sentence regardless of its power to do so under a more open-ended advisory scheme. *Id.* at 720. Therefore, the court affirmed the defendant's sentence.

United States v. Milan, 398 F.3d 445 (6th Cir. Feb. 10, 2005)

Circuit Judge Clay vacated the sentence and remanded for resentencing in *Milan* where the defendant only admitted to conspiring to possess with intent to distribute 50 grams or more of a mixture or substance containing cocaine base, and the sentencing court attributed at least 1.5 kilograms of crack cocaine to him for sentencing purposes. *Id.* at 449. The sentencing court had originally determined a base offense level of 38 applied, then applied a 2-level enhancement upon the government's allegation that the defendant possessed a firearm; a 4-level enhancement because he was an organizer or leader; a 3-level reduction for acceptance of responsibility; and a 4-level reduction based on a §5K1.1 motion for substantial assistance, for an adjusted offense level of 37 and a criminal history category of II, warranting a sentence between 235 and 293 months. The court imposed a sentence of 264 months. *Id.* Two years after the sentence was imposed, the government filed a second motion for a reduction in the defendant's sentence under §5K1.1, and his sentence was further reduced to 188 months. *Id.* The court found that the defendant's sentence was the result of plain error because, in part, the error determined the outcome of the sentencing court proceedings, stating "[i]t is clear that had the district court not found facts on its own at sentencing, which under *Booker* constitutes a violation of the Sixth Amendment, [the defendant's] sentence would have been materially different." *Id.* at 452.

The court acknowledged that while its plain error analysis agreed with the recent decision in *Oliver*, above, it was not in keeping with that circuit's decision in *Bruce*, above. Citing to a Sixth Circuit Rule, in a footnote, the court stated "[t]o the extent *Bruce* conflicts with *Oliver*, we note that we must follow *Oliver* because it was decided first." *Id.* at 453, n.3 (*citing* 6th Cir. R. 20(c)). The court also acknowledged the existence of a circuit conflict on the question of plain error analysis, with two circuits concluding that because the *Booker* remedy was to render the guidelines advisory instead of invalidating them in their entirety or grafting a sentencing jury requirement on to them, *Booker*-type violations may not constitute plain error. *Id.* (*citing United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. Feb. 4, 2005) and *United States v. Crosby*, 397 F.3d 103 (2d Cir. Feb. 2, 2005)). In the court's analysis, in the Eleventh Circuit, most Sixth Amendment errors will not result in remands for resentencing because the defendant will not be able to demonstrate a reasonable probability that he was prejudiced by the error. *Id.* The court did not agree with the Eleventh's Circuit's decision in *Rodriguez*, in which the court found the defendant's sentence did not affect his substantial rights. Additionally, the court noted that in the Second Circuit's approach to remand all cases in *Crosby*, the sentencing court is not to automatically resentence but is to conduct a plain or harmless error inquiry in order to determine whether it ought to resentence or not. The court took issue with this decision, noting that the *Booker* court had instructed "reviewing courts" to determine whether a sentencing error was plain. *Id.*

United States v. Hamm, 400 F.3d 336 (6th Cir. March 8, 2005)

The court in *Hamm* remanded for resentencing, concluding the sentence imposed was invalid even though the sentence was based solely on facts admitted by the defendant in his guilty plea. Under a plain error test, the court found that the first two requirements were met in that the court imposed the sentence under a mandatory system. Although not a violation of the defendant's Sixth Amendment rights, the court found the case analogous to *Fanfan*. *Id.* at 339. Because the judge expressed sympathy for the defendant and stated that he was bound under the law to how far he could go from the guideline range, the court believed the sentencing court might have sentenced the defendant to a shorter sentence if it had felt it were free to do so. Therefore, the court concluded

that the defendant's substantial rights were affected. *Id.* at 340. Finally, the court found that an exercise of its discretion was appropriate given that "[w]e would be usurping the discretionary power granted to the district courts by *Booker* if we were to assume that the district court would have given [the defendant] the same sentence post-*Booker*." *Id.*

B. Harmless Error Standard

United States v. Hazelwood, 398 F.3d 792 (6th Cir. Feb. 23, 2005)

In *Hazelwood*, Circuit Judge Cole writing for Circuit Judge Guy and District Court Tarnow sitting by designation, found that under a harmless error standard, a remand for error at sentencing is required unless the court is certain any such error is harmless and therefore did not affect the sentencing court's selection of the sentence imposed. In the instant case, the court found the sentencing court's imposition of a 2-level enhancement for the threat of death was improper because it related to the defendant's brandishing of a firearm, and therefore even prior to Booker the sentence would have been vacated and remanded. *Id.* at 800. The court is required by statute to consider the guidelines even though they are advisory, and by with its misinterpretation, the sentencing court did not properly consult them. *Id.* at 801. As a result, the court found it possible that even under an advisory system, had the sentencing court considered the proper range it would have sentenced the defendant below the sentence he received. Therefore, the court vacated the sentence and remanded for resentencing. *Id.* at 802.

C. Drug Quantity Calculation

United States v. Hines, 398 F.3d 713 (6th Cir. Feb. 7, 2005)

Circuit Judges Cole and Clay and District Judge Hood found in *Hines* that although the sentencing court's factual findings were supported by the record, the defendant was entitled to a resentencing under *Booker*. *Id.* at 720. The defendant and a codefendant were convicted of conspiracy to distribute 500 grams or more of methamphetamine, and at sentencing, the court determined the defendant possessed 32 pounds of methamphetamine during the course of the conspiracy and that he was subject to a firearm enhancement. The court sentenced the defendant to 235 months' imprisonment. *Id.* at 715. The jury had heard evidence that the defendant was responsible for between 5 to 15 kilograms of methamphetamine and that he had possessed a firearm during the relevant time period, and the government argued that any error under *Booker* was harmless and did not affect the defendant's substantial rights because such evidence must have been accepted by the jury. *Id.* at 721. The court found that the government's argument ignored the applicability of *Booker* and stated the fact that the jury heard such evidence was immaterial because the jury did not make any specific factual finding, and it was improper to speculate. *Id.* at 721-722. Because appellate courts should review and not determine the decision of the sentencing court, the court vacated and remanded for resentencing. *Id.* at 722.

D. Career Offender

1. Section 924(c) Firearm-Type Provision

United States v. Harris, 397 F.3d 404 (6th Cir. Feb. 8, 2005)

In *Harris*, Circuit Judge Moore, writing for herself and Judges Gilman and Keith, determined that *Booker* extends to judicial fact determinations under 18 U.S.C. § 924(c), and held that the Firearm-Type Provision mandatory minimum in §2K2.4(b) is not binding on a sentencing court unless the type of firearm involved in the offense is charged in the indictment and proven to a jury beyond a reasonable doubt. *Id.* at 406. The court stated that the Supreme Court had earlier implied that section 924(c) sets forth a statutory maximum sentence of life in prison regardless of whether the sentencing court finds any of the factors enhancing the required minimum. *Id.* at 411 (*citing Harris v. United States*, 536 U.S. 545 (2002)). The court also stated that unlike most guideline provisions which provide for overlapping ranges, the provision relating to section 924(c) does not provide for ranges but instead mandates that except when a defendant qualifies as a career offender under §4B1.1, the guideline sentence is the minimum term of imprisonment required in the statute. *Id.* Finding that *Booker* applies to judicial fact determinations under the guidelines, although the Supreme Court did not address whether *Booker* applies to fact determinations under statutory provisions, the court determined the pertinent question was how to reconcile the guideline's now recommendation for the minimum sentence in a factual situation with the possibility of a maximum sentence of life imprisonment under section 924(c). "Given the severe constraints on imposition of a life sentence in the pre-*Booker* world, it would seem strikingly at odds with the principles set forth in *Booker* to hold that the sudden advisory nature of the Guidelines prevents the (still mandatory) provisions of § 924(c) from violating the Sixth Amendment." *Id.* at 412. Thereafter, it found that after *Booker*, the enhancement contained in the section 924 Firearm-Type Provision cannot constitutionally be imposed on the basis of judicial fact finding. *Id.*

In the court's opinion, the doctrine of constitutional avoidance counsels the court to treat the provision as setting forth elements rather than sentencing factors, and to construe it as setting forth sentencing factors would cause the court to face a serious constitutional problem due to the potential conflict with *Booker*'s Sixth Amendment ruling. "We conclude that the tradition of treating firearm type as an element . . . the sharply higher penalties involved . . . and the serious constitutional problems that would result from a contrary conclusion . . . are together sufficient to overcome the presumption, based on the structure of the statute, that § 924(c)(1)(B) is intended to set out sentencing factors rather than elements of separate crimes." *Id.* at 413. Concluding that the firearm types are elements of separate crimes, it held that *Booker* requires an enhancement based on type of firearm to be charged in the indictment and proven to a jury beyond a reasonable doubt. *Id.* at 413-14. Therefore, the court vacated the application of the enhanced section 924(c)(1)(B) penalty and remanded for resentencing. *Id.* at 417.

2. Section 924(e) Armed Career Criminal Act

United States v. Barnett, 398 F.3d 516 (6th Cir. Feb. 16, 2005)

In *Barnett*, the defendant was sentenced under the Armed Career Criminal Act (ACCA), found at 18 U.S.C. § 924(e), based on three prior aggravated or violent felonies. *Id.* at 521. He was sentenced to 265 months, the middle of the applicable guideline range. The defendant argued that application of the ACCA violated *Booker* because the sentencing court determined the nature of his prior convictions. Writing for the court, Circuit Judge Martin found that existing case law establishes that *Apprendi* does not require the nature or character of prior convictions to be determined by a jury. *Id.* at *524. The defendant further argued that because *Booker* made the guidelines advisory, his sentence imposed under a mandatory system should be vacated and remanded. The court reviewed the sentence for plain error, and agreed with the defendant that it was plain error to sentence him under a mandatory guideline scheme. *Id.* at 526.

Further, relying on the Supreme Court's decision in *Olano* with respect to the third prong of the plain error test, the court stated in some situations, a presumption of prejudice is appropriate if the defendant cannot make a specific showing of prejudice, thus satisfying the third prong where the inherent nature of the error made it exceptionally difficult to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred. *Id.* at 526-27. The court was convinced the instant case was such a case where prejudice should be presumed, asserting that if the sentencing court had not been bound by the guideline range, the defendant may have received a lower sentence because the court would have had the discretion under the new advisory scheme to impose a sentence as low as 180 months, the statutory minimum provided by the ACCA. Additionally, the court found it would be difficult for the defendant to show his sentence would have been different, agreeing with the Second Circuit in *Crosby*, discussed in Part II above, which had stated it would be "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-Guideline sentence." *Id.* at 528. (*quoting United States v. Crosby*). The court held that the defendant's substantial rights were affected, and further concluded that an exercise of its discretion was appropriate because it would be fundamentally unfair to allow his sentence to stand in light of the development in the applicable legal framework. *Id.* at 530. Finally, the court declined to address the reasonableness of the defendant's sentence without first giving the sentencing court an opportunity to resentence him under the new post-*Booker* framework. *Id.* Therefore, the court vacated the sentence and remanded for resentencing.

District Judge Gwin, sitting by designation, filed a concurring opinion in which he argued that 18 U.S.C. § 3742(f)(1) *requires* a remand when a court of appeals determines a sentence was imposed in violation of law or imposed as a result of an incorrect application of the guidelines. *Id.* at 531. Additionally, Judge Gwin said the court had considered the case in light of one of the underlying principles of the plain error doctrine, the economy of judicial resources. Judge Gwin stated that he would remand the case based on minimal time needed to allow the district court to resentence the defendant under the correct guideline scheme. Specifically, he noted that the sentencing court is already familiar with the PSR, and because there had been earlier opportunities to present evidence on disputed guideline calculations, there would be no need to reopen the case

for a hearing; instead, the rehearing would simply allow the court to apply the proper standard. *Id.* at 534.

Dissenting in part, Circuit Judge Boggs stated that although he agreed with the court's conclusion that the use of a pre-*Booker* sentencing scheme was plainly erroneous, in his view, the defendant in the instant case did not show any prejudicial error in his specific sentencing. *Id*. Judge Boggs asserted that there was ample evidence on the record that the sentencing court believed the defendant's sentence was proper in light of traditional sentencing requirements, because he was sentenced in the middle of the applicable guideline range. According to Judge Boggs, "[w]ithin the guideline range, district judges have always exercised their discretion." *Id.* at 535. Had the sentencing court believed the defendant warranted a more lenient sentence, he argued, it was free to have reduced his term of imprisonment. Therefore he concluded that the mandatory nature of the guidelines at the time the defendant was sentenced did not affect the sentencing outcome, and the defendant did not demonstrate such an effect, as required. *Id.* Lastly, Judge Boggs stated that even assuming arguendo that the record was silent as to prejudice, the court should still affirm, because by stating that it "refuse[d] to speculate as to the district court's intentions in the pre-*Booker* world," it abrogated the long-held rule that "plain error review *requires* us to determine whether the outcome would be different had the law been correctly applied." *Id.* at 536 (emphasis in original). In his view, what the court dismissed as speculation was precisely the exercise that the court must undertake in a plain error review. *Id.*

3. §4B1.1 Career Offender

United States v. Gonzalez, 124 Fed. Appx. 347 (6th Cir. Feb. 22, 2005)

In *Gonzalez*, the defendant was convicted of possession with intent to distribute approximately 250 grams of cocaine, and because of two prior felony drug convictions, the sentencing court found him to be a career offender under §4B1.1, and sentenced him at the bottom of the applicable guideline range. *Id.* at 348-349. Writing for Circuit Judges Rogers and Duplantier, Circuit Judge Merritt found that under *Booker*, prior convictions may be used as upward adjustments without violating the Sixth Amendment prohibition on adjustments based on judicial fact-finding. *Id.* at 349. Nevertheless, the court held that *Booker* and *Fanfan* establish that the guidelines are now advisory, leaving the sentence to the reasonable discretion of the sentencing court, and opined the sentencing judge may no longer approve of the sentence imposed, based on what it found to be a particularly strong inference, where the defendant was sentenced at the bottom of the guideline range. Because it was unclear to the court what sentence the judge might impose if not bound by the career criminal provision of the guidelines, the court remanded for resentencing. *Id.* at 350.

E. Amount of Loss Calculation

United States v. Davis, 397 F.3d 340 (6th Cir. Jan. 21, 2005)

Davis came to the circuit court on direct review, and Circuit Judges Keith, Clay, and Cook stated that the sentencing judge independently made factual findings of the amount of loss which enhanced the defendant's sentence beyond the facts established by the jury verdict. The court found that just as *Booker*'s sentence was based on independent fact-finding and thus violated the Sixth

Amendment, this sentence, too, violated the Sixth Amendment. *Id.* at 350-51. Therefore, the court remanded the case for resentencing.

United States v. Murdock, 398 F.3d 491 (6th Cir. Feb. 15, 2005)

In *Murdock*, the defendant contended that his sentence must be vacated because the judge decided the amount of loss without submitting the issue to the jury for a determination beyond a reasonable doubt. Judges Clay, Cook, and Bright found that there was no Sixth Amendment violation because the sentencing court's determination of the amount of loss was supported by facts admitted by the defendant. *Id.* at 501. Therefore, the court affirmed the sentence. *Id.* at 503.

F. Safety Valve Provision

United States v. Ross, 2005 U.S. App. LEXIS 3263 (6th Cir. Feb. 23, 2005)

In *Ross*, the defendant pleaded guilty to drug trafficking offenses and argued that his possession of a firearm was not relevant conduct sufficient to foreclose application of the safety valve. Specifically, he argued that *Booker* entitled him to be resentenced, and the government agreed and waived its right to argue plain error. *Id.* at *2. Circuit Judges Merritt, Daughtrey and Sutton vacated the sentence and remanded for resentencing. *Id.* The applicable guideline as determined by the sentencing court was 87 to 108 months, but one of the counts carried a statutory minimum sentence of 10 years. The defendant was sentenced to 120 months because the sentencing court decided that the safety valve could not be applied due to his possession of a firearm. *Id.* at *5-6. The defendant asserted that this finding of relevant conduct constituted a Sixth Amendment violation because it led to an increase in his sentence without a finding of the jury. *Id.* at *6. The government waived its right to argue that the defendant failed to satisfy the components of a plain-error review, stating in its brief "[p]ursuant to *United States v. Booker*, . . . the case should be remanded for resentencing." *Id.* Therefore, the court remanded the sentence for resentencing without substantive discussion. *Id.* at *6-7.

G. Waiver of Right to Appeal Sentence

United States v. Yoon, 398 F.3d 802 (6th Cir. Feb. 24, 2005)

The defendant in *Yoon* pleaded guilty to conspiracy with intent to distribute marijuana and possession of cocaine with the intent to distribute. The sentencing court enhanced his sentence by two levels under §3C1.1 after he posted a webpage threatening a witness while on release pending sentencing. *Id.* at 804. Writing for Circuit Judges Kennedy and Gilman, District Judge Hood, sitting by designation, reasoned that because the defendant had signed an addendum to his plea petition which waived his right to appeal "any sentence within the maximum provided in the offense level as determined by the court or the manner in which that sentence was determined on the grounds set forth in 18 U.S.C. § 3742," there was no reason to find post-*Booker* that his waiver was not knowledgeable and voluntary and therefore held it should be enforced. *Id.* at 808. Likewise, the court found the defendant's argument that the two level enhancement violated *Blakely* failed because the defendant had clearly waived his right to appeal his sentence. *Id.*

United States v. Bradley, 400 F.3d 459 (6th Cir. March 10, 2005)

In *Bradley*, the defendant pleaded guilty to possession of cocaine with the intent to distribute and being a felon in possession of a firearm. On appeal, he argued that after *Booker*, he was no longer bound by the provision in his plea agreement which stated that he would be sentenced under the guidelines and that he could not appeal his sentence. *Id.* at 460. Writing for Circuit Judge Nelson and District Judge Wells sitting by designation, Circuit Judge Sutton held that changes in the law do not allow either the government or the defendant to renege on a plea agreement. Further, because the defendant agreed to be sentenced under the guidelines and waived his right to appeal the sentence imposed, the court found that *Booker* does not give him a right to be resentenced. *Id.* The court stated "the change in law does not suddenly make the plea involuntary or unknowing or otherwise undo its binding nature. A valid plea agreement, after all, requires knowledge of existing rights, not clairvoyance." *Id.* at 463.

The defendant also argued that his sentence was inconsistent with *Booker*. *Id.* at 462. However, the court rejected this argument, stating he was mistaken because the Sixth Amendment does not apply to the sentencing enhancement at issue where the defendant's enhancement arose from his status as a career offender, a status to which he stipulated in the plea agreement. Nonetheless, the court further reasoned that although he had no tenable constitutional claim, it did not mean he did not have a potentially tenable statutory claim, and that he might fairly argue that had he known the guidelines were merely advisory, he would not have accepted the plea bargain offer. *Id.* at 463. In the court's opinion, however, the terms of the plea agreement prevented it from granting the defendant's request for a remand. The court stated "[p]lea agreements, the Supreme Court has long instructed, may waive constitutional or statutory rights then in existence as well as those that courts may recognize in the future." *Id.* (*citing United States v. Ruiz*, 536 U.S. 622 (2002), and *United States v. Broce*, 488 U.S. 563 (1989), among other cases).

VII. Seventh Circuit

A. Plain Error Standard

United States v. Paladino, 401 F.3d 471 (7th Cir. Feb. 25, 2005)

In *Paladino*, the court consolidated several criminal appeals which addressed the application of the plain-error doctrine to appeals from sentences rendered under the guidelines before *Booker*. *Id.* at 471. The government conceded that all the sentences violated the Sixth Amendment right to a jury trial as interpreted in *Booker* because in all of them, the judge enhanced the sentences on the basis of facts not determined by the jury. *Id.* However, the government further argued that if a sentence was legal before *Booker* was decided, in cannot be plainly erroneous, stating that because the guidelines remain valid, a sentence that complies with them would very unlikely be reversed. *Id.* at 482. In an opinion written by Circuit Judge Posner for himself and Circuit Judges Wood and Williams, and circulated to the entire court, the court disagreed, finding that unless any of the judges had said at sentencing pre-*Booker* that he would have given the same sentence even if the guidelines were advisory, "it is impossible for a reviewing court to determine–without consulting the sentencing judge– . . . whether the judge would have done that." *Id.* at 471. The court directed a

limited remand for all defendants except one who had challenged a judicial determination of facts which established his recidivist status. *Id.* at 480.[9]

The government also argued that if the judge imposed a sentence higher than the guideline minimum, it is clear the judge would not have imposed a lighter sentence even if he had known the guidelines were advisory. *Id.* at 482. The court disagreed, stating a conscientious judge would pick a sentence relative to the guideline range regardless of his private views, and if he thought the defendant was 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 was too high. *Id.* at 482-483.

The court found that if the sentencing judge might have decided to impose a lighter sentence than dictated by the guidelines had he not thought he was bound by them, his error in having thought himself so bound may have precipitated a miscarriage of justice. *Id.* at 483. Additionally, the court stated that it would be an error to assume that every sentence imposed in violation of the Sixth Amendment is plainly erroneous and automatically entitles the defendant to be resentenced, the error the court asserted was committed by the Fourth Circuit in *Hughes I* and the Sixth Circuit in *Oliver,* discussed in Parts IV and VI, above. *Id.* In the court's view, what those courts overlooked is that if the judge would have imposed the same sentence even if he thought the guidelines were advisory and the sentence would have been lawful under the post-*Booker* scheme, there is no prejudice to the defendant. *Id.* The court held that the only practical way to determine whether the kind of plain error argued in these consolidated sentences had actually occurred is to ask the sentencing judge, and in that way, it agreed in part with the Second Circuit in *Crosby,* discussed in Part II above, that when it is difficult for an appellate court to determine whether the error is prejudicial, it should, while retaining jurisdiction, order a limited remand to permit the sentencing court to determine whether it would reimpose the sentence. *Id.* at 483-484. If so, the court said it will affirm the original sentence against a plain-error challenge provided the sentence is reasonable. Lastly, the court determined that if the judge states on limited remand that he would have imposed a different sentence had he known the guidelines were advisory, it would vacate the original sentence and remand for resentencing. *Id.*

Further, the court disagreed with the Eleventh Circuit in *United States v. Rodriguez,* discussed in Part XI below, in which the Eleventh Circuit concluded that when it is impossible for

[9]In *United States v. Castillo*, 2005 WL 1023029 (7th Cir. May 3, 2005), Circuit Judge Easterbrook dissented from the decision not to hear both *Castillo* and *United States v. White*, 2005 WL 1023032 (7th Cir. May 3, 2005), *en banc*. In his opinion, the cases expose one of the transition problems in the implementation of *Booker* where a sentencing judge treated the guidelines as conclusive and mandatory. Judge Easterbrook disagreed with the court's opinions which held that cases in which there is no Sixth Amendment violation should be treated the same as those in which the Constitution has been violated. *Id.* at *17. He argued that the fourth prong of the plain error test is not satisfied when the sentencing judge complied with all requirements of the Constitution, statutes and rules. He differentiated *Paladino*, a case in which the sentence was lengthened because of a constitutional violation and therefore met the plain error standard, from a case in which there was no violation of the Constitution. "The Sentencing Guidelines are not themselves an engine of wrong. They emphasize candor and consistency in sentencing. . ." *Id.* Because the Supreme Court held in *Summerlin* that sentences imposed in violation of another rule derived in *Apprendi* are not "so likely to be unjust that the new rule must apply retroactively," Judge Easterbrook stated if this is true when the Sixth Amendment has been violated,"what can be the source of injustice when it has been obeyed?" *Id.* at *18. He asserted it would be unsound to assert that applying the guidelines is so problematic that relief is likely under plain error, because "when every statute has been enforced accurately and constitutionally, the fairness, integrity, and public reputation of judicial proceedings are unimpaired." *Id.*

a reviewing court to know what sentence the court would have given had it known the guidelines were advisory, because the defendant in such a case cannot show his substantial rights were affected, he therefore cannot establish plain error. *Id.* at 484-485. In the court's view, "given the alternative of simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog, we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence." *Id.* at 485.

Circuit Judge Ripple dissented, stating that the approach formulated by the panel, which requires a sentencing court to make "an abbreviated quick look," is hardly a substitute for the sentencing process the Supreme Court has said is mandated by the Constitution. *Id.* at 486. "Until the court undertakes a new sentencing process–cognizant of the freedom to impose any sentence it deems appropriate as long as the applicable guidelines ranges and the 18 U.S.C. § 3553(a) factors are considered–the district court cannot accurately assess whether and how its discretion ought to be exercised." *Id.* In Judge Ripple's opinion, the panel's holding requires the court to pre-judge and pre-evaluate evidence it has not heard, and the constitutional right at stake "hardly is vindicated by a looks-all-right-to-me assessment by a busy district court." *Id.*

Additionally, Circuit Judge Kanne dissented, expressing concern for the proposed mechanism to remedy the unconstitutionally imposed sentences. In his view, all sentences must be vacated and remanded to the sentencing courts for resentencing in light of *Booker*. *Id.* at 487. Judge Kanne pointed out that in *Booker*, although Fanfan's sentence did not violate the Sixth Amendment, it was nonetheless deemed unconstitutional because it was imposed under a mandatory guideline regime. Therefore, Judge Kanne stated "*any* sentence handed down under a mandatory guideline regime is unconstitutional," agreeing with the Fourth Circuit in *Hughes I*, the Sixth Circuit in *Milan*, and the Ninth Circuit in *Ameline*, discussed in Parts IV, VI, and IX, respectively. *Id.* at 487-488. (emphasis in original).

United States v. Lee, 399 F.3d 864 (7th Cir. Feb. 25, 2005)

In *Lee*, because the sentence was at the statutory maximum and the guideline range was higher than that maximum, the defendant did not contend that his sentence was improper under *Booker*, and instead contended that the sentencing court violated the Sixth Amendment because it made judicial findings that established the range. *Id.* at 865-866. In an opinion written by Circuit Judge Easterbrook, he and Judges Wood and Sykes found that under *Paladino*, a remand is necessary only when uncertainty otherwise would leave the court unsure about what the sentencing court would have done with additional discretion. *Id.* at 866. However, in the instant case, the sentencing court had expressed a strong preference to give a higher sentence if he had been able to do so, but stated that it was bound by the statutory maximum. Therefore, the court was assured that none of the defendant's substantial rights were adversely affected by the application of pre-*Booker* law, and affirmed the sentence. *Id.* at 867.

B. Harmless Error Standard

United States v. Schlifer, 403 F.3d 849 (7th Cir. April 7, 2005)

In *Schlifer*, Circuit Judge Williams, writing for Circuit Judges Kanne and Evans, stated that the defendant had objected to being sentenced as a career offender at the sentencing hearing, contending that the sentencing court was required to find facts beyond the existence of two prior convictions, thus going beyond the "fact of a prior conviction" and exceeding the judicial fact-finding exception in *Blakely*. *Id.* at 851. At sentencing, the court denied the defendant's motion for a downward departure under §5K2.0 because his offense involved manufacturing methamphetamine for personal use and thus fell outside the heartland, but granted the government's motion pursuant to §5K1.1 for the defendant's substantial assistance, departing by 3 levels. *Id.* On appeal, the defendant reasserted his argument that he was impermissibly sentenced as a career offender without the issue being submitted to the jury and further argued that his sentence was erroneous because the court imposed the sentence under the mandatory guideline system in existence prior to *Booker*. *Id.* Rejecting his argument regarding whether the court's conclusion that the prior convictions were crimes of violence, the court nonetheless found that his objection to his sentence on *Blakely* grounds was specific enough to preserve the argument about the mandatory nature of the sentence. *Id.* at 854. Because the court found that the sentencing court's error in sentencing the defendant under mandatory guidelines amounted to a misapplication of the guidelines and that the sentence must be vacated unless the error was harmless. *Id.*

The government argued that the district court's decision to depart by 3 levels based on the defendant's assistance "signals the court's unwillingness to exercise the discretion already available to it by further lowering [the defendant's] sentence." *Id.* However the court held that "a departure decision, even if discretionary was nevertheless informed by the guidelines and thus sheds little light on what a sentencing judge would have done knowing that the guidelines were advisory." *Id.* Additionally, the government argued that the sentencing court's rejection of the defendant's §5K2.0 motion "evinces its unwillingness to impose a lower sentence." The court stated that the sentencing court's determination rested on whether the circumstances were outside the heartland and thus allowed it to depart under §5K2.0 and therefore the denial of the motion "sheds no light on whether the court would have departed had [the defendant] presented different grounds, or whether the court might have granted the very same motion" had it known the guidelines were advisory. *Id.* at 855. The court ultimately found that the government had failed to meet its burden of demonstrating that if the sentencing court had known the guidelines were advisory its choice of sentence would have been the same. Therefore, the court vacated the sentence and remanded for resentencing. *Id.*

VIII. Eighth Circuit

A. Plain Error Standard

United States v. Easter, 123 Fed. Appx. 270 (8th Cir. March 11, 2005)

The defendant argued that the sentencing court plainly erred by making factual findings that increased his punishment under §§3A1.2 for official victim and 4B1.1 for being a career offender. *Id.* at 270-271. In a per curiam decision, and without substantive discussion, Circuit Judges Wollman, Murphy, and Benton found, assuming arguendo that it should review for plain error under *Booker*, any error in the §3A1.2 finding did not affect the defendant's substantial rights. Even without that enhancement, the same total offense level and criminal history category would have resulted in the defendant's classification as a career offender based on his two prior felony

convictions for crimes of violence. *Id*. at 271. Additionally, the court stated that *Booker* reaffirmed that a fact of a prior conviction does not need to be established by a guilty plea or a jury verdict. *Id*. Therefore, the court affirmed the sentence.

United States v. Pirani, 2005 U.S. App. LEXIS 7445 (8th Cir. April 29, 2005)

In *Pirani*, the defendant was found guilty by a jury of making materially false statements to federal agents during a criminal investigation. *Id*. at *2. At sentencing, the defendant argued that his total offense level should be 6 under §2F1.1. *Id*. Instead, the court found his conduct established a violation of 18 U.S.C. § 1505, and therefore applied the cross-reference to §2J1.2. *Id*. The resulting total offense level was 12 with a sentencing range of 10 to 16 months. *Id*. at *3. The court imposed a 10-month sentence, with 5 months to be served in prison and 5 months under home detention. *Id*.

On appeal, the defendant argued that the sentencing court erred in applying §2J1.2. *Id*. After the parties' oral arguments, the Supreme Court issued its decision in *Blakely*, and the defendant amended his appeal, arguing the district court had also violated his Sixth Amendment rights. *Id*. Circuit Judges Bye, Heaney and Smith affirmed the conviction, but determined that the use of the cross reference violated the defendant's Sixth Amendment rights and was plain error requiring a remand for resentencing. *Id*. The *en banc* court vacated the panel's opinion and granted a rehearing before the court *en banc*.[10] The defendant argued that the plain error doctrine did not apply in this case because he preserved his *Booker* claims by raising several legal and factual sentencing objections before the district court. *Id*. at *6. The *en banc* court refused to accept the defendant's argument, stating that he did not allege *Booker* errors, making the plain error doctrine applicable. *Id*.

The court stated that the first two *Olano* factors were satisfied because the district court committed a *Booker* error by applying the guidelines as mandatory and the error is plain. *Id*. at *8. The court surveyed the decisions of other circuits who which had addressed plain error in the context of *Booker*, and rejected the approach of the Fourth Circuit in *Hughes* requiring the remand of all pending appeals where the district court imposed a mandatory, judge-found guideline enhancement. *Id*. (*citing Hughes*, discussed in Part IV above). The court in the instant case stated that "[t]he error in *Booker* is not merely the enhancement of a sentence on the basis of judge-found facts. The constitutional error arose from the <u>combination</u> of the enhancement and a mandatory Guidelines regime." *Id*. at *9 (emphasis in the original). Although the court agreed with *Hughes* that the focus for the inquiry on the third plain error factor rests on what sentence would have been imposed absent the error, it observed that the error can be excised in two different ways; either by limiting enhancements given under a mandatory regime to those consistent with the jury verdict, or by retaining judge-found enhancements, but applying them in an advisory regime. *Id*. The court agreed with the First, Second, Fifth, Seventh, and Eleventh Circuits that the third plain error factor turns on whether a defendant can demonstrate a reasonable probability that he would have received a more favorable sentence under an advisory guideline system. *Id*. at *10 (*citing Antonakopoulos*, *Williams*, *Mares*, and *Paladino*, discussed in Parts I, II, V, and VII above, respectively, and *United States v.*

[10] After the Supreme Court released its *Booker* decision, the *en banc* court requested supplemental briefs from the parties on whether the district court committed an error at sentencing in light of *Booker* and, if so, whether the error was plain, warranting relief under *Olano*. *Id*.

Rodriguez, discussed in Part XI below). "'[W]hat [the defendant] overlooked is that if the judge would have imposed the same sentence even if he had thought the guidelines merely advisory (in which event there would have been no Sixth Amendment violation), and the sentence would be lawful under the post-*Booker* regime, there is no prejudice to the defendant.'" (*citing Paladino*, discussed in Part VII above). The court concluded that the approaches adopted by *Crosby* and *Paladino* violated the Supreme Court's command in *Booker* to apply "ordinary prudential doctrines," including "the 'plain error' test." *Id*. The court noted that the Supreme Court has repeatedly stated that plain error review is in the discretion of the reviewing court and additionally, delegating the plain error prejudice question to the district court is contrary to Congressional intent. *Id*. at *11. The court, along with the Fifth and Eleventh Circuits, rejected the limited remand approach and stated instead that it will examine the third and fourth plain error factors based on the existing record on appeal, and will exercise its discretion under the fourth plain error factor if the defendant shows a reasonable probability that based upon the appellate record, he would have received a more favorable sentence but for the *Booker* error. *Id*. at *11.

In the instant case, the court rejected the defendant's argument that all cases that contained a *Booker* error should be remanded. *Id*. It noted that all sentences imposed by the district court contained a *Booker* error if the sentencing court believed the guidelines were mandatory at sentencing, but that by itself would not establish a reasonable probably that the defendant would have received a more favorable sentence under an advisory guidelines regime. *Id*. at *12. The question whether the defendant would have received a more favorable sentence is inherently fact specific. *Id*. In the instant case, the court observed, the defendant did not argue he would have received a more favorable sentence under an advisory guidelines system and the record on appeal did not support this contention. *Id*. The court noted that the sentence imposed was at the bottom of the guideline range, but that sentencing at the bottom of the applicable range is the norm for many judges and by itself is insufficient to demonstrate a reasonable probability that the court, absent the *Booker* error, would have imposed a lesser sentence. *Id*. Here, the court continued, the sentencing court applied the §2J1.2 cross reference, which avoided §2F1.1 enhancements that it considered "too high," and then further exercised its discretion in a matter favorable to the defendant by making part of the 10-month sentence home confinement. *Id*. Quoting the Eleventh Circuit's *Rodriguez* decision, the court determined "where the effect of the error on the result in the district court is uncertain or indeterminate – where we would have to speculate – the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error." *Id*. at *13. As a result, the court found that the defendant did not satisfy the third plain error factor and affirmed the district court's sentence.[11]

B. Harmless Error Standard

[11] Circuit Judge Arnold, joined by Circuit Judge Smith, dissented from the majority's conclusion that the defendant was not entitled to plain error relief. *Id*. at *27. The judge expressed his opinion that the court should adopt the "highly practical resolution" in *Paladino*, and remand cases to the sentencing court to certify whether it would have given the defendant a different sentence under an advisory guidelines system. *Id*. Contrary to the reasoning followed by the majority, the judge opined, a remand in this case is not a delegation, but rather, a device to gather relevant facts necessary for the court to fulfill its duties. *Id*. at *28. Additionally, Circuit Judge Bye, concurring in part, dissented from the majority's failure to adopt the presumption of prejudice approach articulated by the Sixth Circuit in *Barnett*, discussed in Part VI above. *Id*. at *35. By requiring the defendant to refer specifically to a *Booker* error to preserve the issue on appeal, the judge stated that the court was "out to punish defendants for failing to burden the court with objections deemed frivolous only months ago." *Id*. at *34.

United States v. Haidley, 400 F.3d 642 (8th Cir. March 16, 2005)

In *Haidley*, Circuit Judge Melloy, writing for Circuit Judges Heaney and Fagg, found that where the defendant challenged the constitutionality of the sentencing guidelines pursuant to *Blakely* in her sentencing, in which she had stipulated to the loss amount, she had preserved the error such that the harmless error standard applied. *Id.* at 644. It further found it was not harmless error to sentence the defendant under the mandatory guideline system where there was "grave doubt as to whether the outcome of the sentencing was substantially influenced by the error, that is, use of the sentencing guidelines as though mandatory," because the sentencing court made a conscious decision to sentence her at the bottom of the guideline range. *Id.* at 645. Because the court could not say with any confidence that the district court would not have sentenced the defendant to a lesser sentence had it realized the guidelines were advisory, it remanded for resentencing. *Id.*

United States v. Marcussen, 403 F.3d 982 (8th Cir. April 11, 2005)

In *Marcussen*, Circuit Judges Morris, Sheppard, Arnold, Bowman and Gruender affirmed the defendant's sentence, finding harmless error where the defendant was sentenced as a career offender based on prior predicate offenses neither charged in the indictment nor proven to the jury beyond a reasonable doubt. Writing for the court, Judge Bowman stated that although the sentencing court committed error when it sentenced the defendant under a mandatory guideline scheme, the error was harmless because the sentencing judge stated on the record the sentence he would have imposed were the mandatory guidelines not in place. *Id.* at 985. Specifically, the sentencing court expressed an alternative sentence which was to be imposed "[i]f, hereafter, the United States Sentencing Guidelines are found to be unconstitutional," and stated "[i]f it were totally within my discretion, and if I were to look at 18 United States Code Section 3553(a), 1 through 7, I would still give him 210 months." *Id.* The court found that because the sentencing court did consider the guidelines in its analysis of the section 3553(a) factors, any error committed in imposing the alternative sentence was harmless. *Id.*[12] Therefore, the court affirmed the sentence.

C. Standard of Review for Interpretation and Application of the Guidelines

United States v. Mashek, 2005 WL 1083465 (8th Cir. May 10, 2005)

In *Mashek*, after the defendant pleaded guilty to knowingly making her residence available for the manufacture of methamphetamine, the court denied her a two-level reduction under §2D1.1(b)(6), based on its determination that the reduction was inapplicable because her offense was not specifically listed under §5C1.2. *Id.* at *1. Because she timely objected to the denial at sentencing, Circuit Judges Gruender, Arnold and Bowman applied the harmless error standard of review. *Id.* On appeal, the defendant did not argue her sentence was unconstitutional pursuant to *Booker* although it was pronounced under a mandatory sentencing regime, but only challenged the interpretation and application of the guidelines. However, the court reasoned that it must apply *Booker*'s holding to all cases on direct review and therefore must determine the standard of review

[12] The court further found that the sentence was reasonable under Booker, as measured against the factors set forth in § 3553(a) because the sentencing court gave specific reasons why those factors supported a sentence of 210 months. *Id*. at *3.

for a timely raised challenge to the sentencing court's interpretation of the guidelines. *Id.* The court noted first that *Booker* excised § 3742(e) which had previously set forth a *de novo* standard of review of departures from the applicable guideline range. *Id.* It further noted that both the defendant and government have statutorily retained the right to challenge the interpretation or application of the guidelines post-*Booker*, and stated "[t]he duty to remand all sentences imposed as a result of an incorrect application of the guidelines exists independently of whether we would find the resulting sentence reasonable under the standard of review announced in *Booker*." *Id.* at *2. It found that in the context of departures, § 3742(f) does not provide for a court to affirm a sentence based on the overall reasonableness when it was imposed after an incorrect application of the guidelines, but that it commands the appeals court to remand when a sentencing court incorrectly applied the guidelines. *Id.*

Given the statutory mandate to review the sentencing court's interpretation and application of the guidelines independently of the reasonableness of the sentence, but also taking into account that the *Booker* Court did not announce a standard for reviewing legal conclusions inherent in the application of the advisory guidelines, the court looked to "the implications of the remaining statutory provisions and to experience from past practices of appellate courts." *Id.* (*citing Booker*, at 765). Noting that the *Booker* Court had looked to appellate practices prior to the PROTECT Act in deciding that a sentence was to be reviewed for reasonableness, the court held that according to its appellate practices prior to 2003, the appropriate standard for reviewing a sentencing court's interpretation and application of the guidelines post-*Booker* remained the *de novo* standard. *Id.* at *2-3. It reasoned that if the Supreme Court had intended to change the manner in which circuit courts were to review a sentencing court's legal conclusion, it would have explicitly stated such. *Id.*

Lastly, the court emphasized that post-*Booker* review of a timely raised challenge to the interpretation and application of the guidelines is a two-step process. The first step is to examine *de novo* whether the sentencing court correctly interpreted the guidelines; if the sentence was imposed as a result of an incorrect application or interpretation, the court stated it would remand for resentencing without reaching the reasonableness factor in light of § 3553(a). *Id.* If, however, the court determines that the sentencing court correctly calculated the applicable guideline range, the second step is a review of any challenge to the reasonableness of the sentence in light of § 3553(a), including whether the sentencing court's decision to grant a § 3553(a) variance from the guideline range was reasonable, and whether the extent of any variance or guideline range is reasonable. *Id.* at *4. In the instant case, the court found the district court erred by refusing to grant the defendant a two level reduction under §2D1.1(b)(6) and that the error was not harmless. Therefore, it did not reach the second step of the analysis to determine whether the sentence was reasonable, and instead vacated and remanded the sentence based on the erroneous application of the guidelines. *Id.* at *6.

United States v. Mathijssen, 2005 WL 1005003 (8th Cir. May 2, 2005)

The defendant in *Mathijssen* pleaded guilty to distribution of methamphetamine, and at sentencing the court applied an enhancement for the possession of a dangerous weapon and qualified the defendant as a career offender. *Id.* at *1. The district court found a total offense level of 31 and a criminal history category VI, with a corresponding sentencing range of 188 to 235 months. The defendant was sentenced to 188 months' imprisonment. *Id.* On appeal, the defendant argued the sentencing court improperly characterized him as a career offender and incorrectly increased his sentence on that basis. *Id.* at *3. Circuit Judge Wollman, writing for Circuit Judges Magill and Colloton, stated that after *Booker*, the court continues to review *de novo* the interpretation and application of the guidelines provisions, "but finding that the statute still implicitly provides that federal courts of appeal should review federal sentences 'for unreasonableness' in light of the factors set out in section 3553(a)." *Id.* The court concluded that the unreasonableness standard in *Booker* "applies only to the district court's determination of the appropriate ultimate sentence to impose based on all factors in 18 U.S.C. § 3553(a), not to the district court's interpretation of the meaning and applicability of the guidelines themselves." *Id.* at *4. Additionally, the court stated it must continue to interpret the correct meaning and application of the guideline language because the sentencing court must continue to determine the applicable guideline range before it considers the other factors in § 3553(a). "The now-advisory guidelines, when correctly applied, become a consideration for the district court in choosing a reasonable ultimate sentence." *Id.* at *5. Therefore, according to the court, reasonableness may be directly linked to a misapplication of the guidelines but is based on broader considerations than whether proper application of the guidelines was conducted by the sentencing court. *Id.* at *5-6.

In the instant case, the defendant only alleged an improper application of the guidelines and did not raise any general challenge to his sentence based on *Booker*. The court concluded, therefore, that it did not need to reach the question of reasonableness, but provided in a footnote that if it were to reach the question, it would affirm the defendant's sentence as not unreasonable. *Id.* at *6, n. 3. The court found that the district court properly applied the guidelines under both an enhancement under §2D1.1 and under the career offender guideline, and affirmed the sentence. *Id.* at *7, 8, 11.

D. Reasonableness

United States v. Rogers, 400 F.3d 640 (8th Cir. March 16, 2005)

In *Rogers*, the government appealed a downward departure granted under §5K2.0 for extraordinary rehabilitation, where the sentencing court departed from a guideline range of 51 to 63 months and imposed a sentence of five years' probation. *Id.* at 641. Writing for Circuit Court Judges Melloy and Bowman, Circuit Judge Benton stated that because the guidelines are advisory, the court would review the sentence for unreasonableness, and found the sentence imposed to be unreasonable. *Id.* at 642. According to the court, the facts in the case did not show extraordinary or atypical rehabilitation justifying a downward departure, and was unreasonable when measured against the factors of reasonableness set forth in § 3553(a). *Id.* Specifically, the court found the defendant's instant second parole violation illustrated that parole or probation is not adequate deterrance, citing § 3553(a)(2)(B); the sentence of probation did not adequately address the history and characteristics of the defendant, who admitted to use of numerous illegal drugs and had previous

convictions, citing § 3553(a)(1); and the sentence of probation did not properly consider Congress's desire to avoid unwarranted sentencing disparities, citing § 3553(a)(6). *Id.* Therefore, the court vacated the sentence and remanded for resentencing.

United States v. Sayre, 400 F.3d 599 (8th Cir. March 9, 2005)

In *Sayre*, writing for Circuit Judges Bye and Gruender, Circuit Judge Beam stated that because the defendant admitted all facts used by the district court in imposing the sentence, there was no Sixth Amendment violation. *Id.* at 600. The sentencing court had imposed a 48-month sentence where the defendant, a former state judge, pleaded guilty to extortion after accepting a bribe, and a second charge of conspiring to obstruct justice by killing a witness was dismissed. *Id.* at 599. The sentencing court imposed a 2-level enhancement for obstruction of justice which the defendant agreed to, and an additional 4-level departure for the seriousness of the obstructive conduct, over the defendant's challenge. *Id.* at 600. The court discussed the proper appellate standard of review in cases where there is no Sixth Amendment violation; whether there must be an objection to the mandatory nature of the guidelines in order to preserve that error on appeal, or whether a general objection to the imposed sentence is sufficient to preserve a *Booker* error. *Id.* The court found that in this case, although the sentencing court followed a mandatory sentencing scheme, it did not affect the defendant's ultimate sentence. *Id.* at 601. "Clearly, the district court wanted to fully account for [the defendant's] behavior and have that conduct reflected in [his] ultimate sentence," where the sentencing judge stated "'I am going somewhat over the Government's recommendation . . . In a goal I set for myself I won't use a five-year sentence, but I will use a four-year sentence. . . . I am satisfied that the seriousness of the offense requires that at least a four-year sentence be imposed." *Id.* Because there was no question that the sentencing court clearly imposed the sentence it believed appropriate on the facts, the court affirmed the sentence, finding it reasonably reflected the seriousness of the conduct. *Id.*

United States v. Haack, 403 F.3d 997 (8th Cir. April 13, 2005)

In *Haack*, the defendant pleaded guilty to drug conspiracy and firearm charges. *Id.* at 998. After the government moved for a §5K1.1 substantial assistance motion, the district court sentenced the defendant to 18 months on the drug charge and to a consecutive 60-month sentence on the § 924(c) charge. *Id.* at 999. This sentence represented a 57 percent downward departure from the 180-month mandatory minimum sentence before the granting of the substantial assistance motion. *Id.* at 1002. Because the government had only recommended a 10 percent downward departure, it appealed, claiming the sentencing court abused its discretion by departing to an unreasonable extent. *Id.* at 998.

Circuit Judge Melloy, writing for Circuit Judges Murphy and Hansen, determined the duty of the sentencing court is to determine if the sentence is unreasonable with regard to § 3553(a). *Id.* at 1003. In its view, the sentencing court must first determine the appropriate guideline sentencing range because that range is an important consideration in the imposition of a sentence. *Id.* at 1002-3. Once the range is determined, the sentencing court should then decide if a departure is appropriate under the guidelines. *Id.* at 1003. Finally, once the guideline sentence is determined, the district court is to consider other § 3553(a) factors to determine whether to impose the sentence under the guideline, or to impose a non-guideline sentence. *Id.* at 1003.

The court found that in determining the appropriate range to be considered as a factor under § 3553(a), nothing in *Booker* requires the court to determine the sentence differently than it would have before *Booker*. *Id.* In the instant case, the court noted there was no dispute about the applicable guideline range, but the dispute rested on whether the sentence imposed was a reasonable "guideline sentence." *Id.* Further, the court stated, if it was not a reasonable guideline sentence, the question was whether there were other factors under § 3553(a) that would make the sentence imposed by the sentencing court reasonable. *Id.* The court determined that the sentencing court "reached outside the permissible range of choice and abused its discretion by departing downward to an 'unreasonable degree,'" noting that the sentencing judge articulated no reasons for the departure other than the factors in §5K1.1 and its dissatisfaction with the then-mandatory sentencing guideline system. *Id*. at 1004. The court concluded that the sentencing judge departed excessively regarding two §5K1.1 factors, specifically; the significance and usefulness of the defendant's cooperation, and the nature and extent of the assistance. *Id.* at 1006. The assistance by the defendant in this case was described by the court as "minimal cooperation," and a departure to the extent given this defendant left little room for greater departures for defendants who provide a greater level of assistance. *Id.* at 1006-07. In addition, the court was troubled that the sentencing judge appeared to base part of the decision to depart on his dissatisfaction with the sentencing guidelines, stating its dissatisfaction was an improper or irrelevant factor to be considered. *Id.* at 1007. Having found the sentence an unreasonable guideline sentence, the court next examined the factors in § 3553(a) to determine if the sentence was a reasonable "non-guidelines sentence." *Id.* at 1006. After examining the record, the court held the sentence was also not a reasonable non-guidelines sentence, and vacated the sentence and remanded for resentencing. *Id.*[13]

E. Drug Quantity Calculation

United States v. Coffey, 395 F.3d 856 (8th Cir. Jan. 21, 2005)

[13] The Court of Appeals for the Eighth Circuit decided three additional §5K1.1 departure cases on the same day as *Haack*. In *United States v. Dalton*, 404 F.3d 1029 (8th Cir. April 13,2005), Circuit Judges Murphy, Hanson and Melloy reversed and remanded where the district court abused its discretion by not stating the reasons why it had departed 75 percent below the guideline sentence on a §5K1.1 motion when the government recommended only a 10 percent downward departure. *Id*. at 1033. The defendant was indicted for conspiring to distribute methamphetamine and initially cooperated, but subsequently absconded from pretrial release. *Id.* at 1031. The court stated that while the sentencing court was not required to provide a detailed analysis on each §5K1.1 factor, it was required to act reasonably in its discretion, and the Court of Appeals will not infer reasoned discretion when the record is silent. *Id*. Additionally, Circuit Judges Murphy, Hansen and Melloy in *United States v. Pizano,* 403 F.3d 1991 (8th Cir. April 13, 2005), determined that the sentencing court did not abuse its discretion where it granted a 75% downward departure when the government recommended a 10 percent departure. *Id*. at 994. The defendant pleaded guilty to conspiracy to distribute methamphetamine. *Id*. The sentencing court engaged in an extended colloquy at the sentencing hearing to determine the extent and nature of the defendant's assistance and based the reason for the extent of the departure upon its findings. *Id.* at 994. The court stated that the sentence was not inconsistent with the five §5K1.1 factors. *Id*. at 996. It added that while the government's recommendation was to be given "substantial weight," it was not the controlling factor in a §5K1.1 departure. *Id*. Finally, Circuit Judges Smith, Beam and Benton reached a similar determination in *United States v. Christenson*, 403 F.3d 1006 (8th Cir. April 13, 2005), affirming a 75 percent downward departure based on the government's §5K1.1 motion recommending a 10 percent decrease. *Id*. at 1008. The defendant pleaded guilty to conspiracy to distribute methamphetamine. *Id*. The sentencing court based its decision on the §5K1.1 factors, especially the willingness to cooperate early in the investigation and participate in a controlled buy. *Id*. at 1008-1009.

In *Coffey*, the jury checked the box on the verdict form indicating that the amount of crack attributable to the defendant was 50 or more grams. The sentencing court, however, went with the PSR which suggested holding the defendant responsible for 2.7 kilograms of crack. *Id.* at 859. Circuit Judges Wollman, Heaney and Fagg found that because *Booker* held that the mandatory guideline scheme was unconstitutional and made the guidelines effectively advisory, the case must be remanded for resentencing in accordance with *Booker*. *Id.* at 861. In a footnote, the court stated that it expressed no opinion whether a sentence handed down under the mandatory guideline system is plainly erroneous, nor did it consider the "outer limits of precisely what will preserve that issue." *Id.* at 861, n.5.

***United States v. Fox*,** 396 F.3d 1018 (8th Cir. Jan. 31, 2005)

In *Fox*, Circuit Judges Loken and Smith and District Judge Dorr remanded the case for further consideration in light of *Blakely*. *Id.* at 1020. The jury had made a specific finding that the defendant was responsible for at least 50 but less than 500 grams of methamphetamine, but based on a preponderance of the evidence, the sentencing court found him responsible for 1.8 kilograms. *Id.* at 1022. Because the defendant had preserved this sentencing issue, the court held that pursuant to *Booker*, he was entitled to a new sentencing proceeding. *Id.* at 1027.[14]

***United States v. Selwyn*,** 398 F.3d 1064 (8th Cir. Feb. 23, 2005)

In a drug conviction for possession with intent to distribute, the jury made no finding regarding the amount of methamphetamine involved, nor was an amount indicated in the indictment. *Id.* at 5. The sentencing court determined at sentencing that the defendant was responsible for an amount increasing his sentencing range from 10 to 16 months to 21 to 27 months. The defendant objected to the quantity, thus preserving the issue for appeal. *Id.* at 6. In his appeal, the defendant contended his sentence was imposed in violation of the Sixth Amendment. *Id.* Quoting from *Booker* that facts necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to the jury beyond a reasonable doubt, Circuit Judges Heaney, Wollman and Fagg remanded for resentencing. *Id.*

[14] The Eighth Circuit has since remanded for resentencing in other post-*Booker* cases in which the defendant had raised the issue at sentencing, thereby preserving the issue for *Booker* purposes. *United States v. Fellers*, 397 F.3d 1090 (8th Cir. Feb. 15, 2005); *United States v. Morin*, 125 Fed. Appx. 90 (8th Cir. Feb. 28, 2005); *United States v. Sdoulam*, 398 F.3d 981 (8th Cir. March 2, 2005).

F. Criminal History Calculation

1. §4A1.3 Inadequacy of Criminal History Category

United States v. Yahnke, 395 F.3d 823 (8th Cir. Feb. 1, 2005)

In *Yanhke*, the sentencing court departed upward two criminal history categories pursuant to §4A1.3 because of the defendant's prior second-degree murder conviction and his prior parole violations. *Id.* at 825. Circuit Judges Smith, Beam, and Benton stated that after *Booker*, circuit courts are to review sentences for unreasonableness, based on the factors in section 3553(a), and that even though the district court had labeled its reasons for departing in terms of the guidelines, the sentence was based on a consideration of the factors in that statute. *Id.* The court found that the sentencing court's interpretation of §4A1.3 was reasonable because neither the guidelines nor the commentary prohibit considering convictions also used to award criminal history points. *Id.* Therefore, because treating similar defendants with similar criminal histories is based on factors in section 3553(a), some categories of crime, such as murder, would be "under-represented by an inflexible 3-point addition for any sentence over one year and one month" as stated in §4A1.1(a). *Id.* Based on the record, the court found that the sentencing court's sentence was reasonable and was not an abuse of discretion. *Id.* at 826.

United States v. Cramer, 396 F.3d 960 (8th Cir. Feb. 3, 2005)

Circuit Judge Smith reviewed an upward enhancement imposed pursuant to §4A1.3 for unreasonableness in *Cramer*, and judged it with respect to the factors in section 3553(a), citing *Booker*. *Id.* at 965. The court found when a defendant fails to make an objection to specific factual allegations contained in the PSR, a sentencing court may accept those facts as true for purposes of sentencing. *Id.* at 965 (*citing United States v. Bougie*, 279 F.3d 648, 650 (8th Cir. 2002)). Because the defendant in this case did not contest facts listed in the PSR, the court found that the facts supported the sentencing court's finding that the defendant's prior criminal record under-represented his criminal history and likelihood to recidivate, and concluded there was sufficient evidence to support an upward departure under §4A1.3. Thus, the sentence was reasonable. *Id.* at 966.

2. Section 924(e) Armed Career Criminal Act

United States v. Nolan, 397 F.3d 665 (8th Cir. Feb. 11, 2005)

Circuit Judges Bye, Bowman, and Melloy stated in a footnote in *Nolan* that because the sentence was determined based not on an application of the guidelines, but on the mandatory minimum sentence set forth in the ACCA, the defendant was not entitled to resentencing. *Id.* at 5, n.2. The court further found that the sentencing court's classification of the defendant's prior convictions as violent felonies for purposes of imposing a sentence under the Act did not violate *Booker* because the Supreme Court has consistently said that the fact of a prior conviction is for the court to determine, not a jury. *Id.*

3. Statutory Minimum Based on Prior Conviction

United States v. Vieth, 397 F.3d 615 (8th Cir. Feb. 8, 2005)

The defendant in *Vieth* argued that he should be resentenced pursuant to *Booker* because he received a sentencing enhancement for his conviction under 18 U.S.C. § 841(b)(1)(B) due to a prior drug felony conviction. *Id.* at 618. Circuit Judges Melloy, Murphy, and Lay determined the jury had found beyond a reasonable doubt a quantity of methamphetamine in excess of 50 grams which resulted in a mandatory minimum sentence of five years, but because the defendant had a prior drug felony conviction, the sentencing court imposed the statutory minimum sentence of ten years. *Id.* The court found that because the sentence was not determined based on an application of the guidelines, and because the Supreme Court has determined in *Blakely* and *Booker* that the fact of a prior conviction is a fact for the court to determine, there was no *Blakely/Booker* issue in the case. *Id.*

G. Revocation of Supervised Release

United States v. Edwards, 400 F.3d 591 (8th Cir. March 7, 2005)

In *Edwards*, the defendant brought an appeal following his revocation of supervised release. In a *per curiam* decision, Circuit Judges Smith, Heaney and Colloton stated that although *Booker* significantly changed the federal sentencing scheme, "its effect on sentences imposed for supervised release violations is far less dramatic," because the federal guidelines associated with supervised release violations were considered advisory even prior to *Booker*. *Id.* at 592. Therefore, the court found no error in the sentencing court's consultation of the guidelines in determining the defendant's sentence, and stated its review of the guidelines applied by the sentencing court, given the defendant's criminal history and the nature of his violation, determined that he received the lowest sentence suggested. Thus, the court did not find such a sentence unreasonable. *Id.* at 593.

United States v. Cotton, 399 F.3d 913 (8th Cir. March 8, 2005)

The defendant in *Cotton* contended that the sentence imposed upon her revocation for supervised release was unreasonable. *Id.* at 914. The recommended sentence for her violation was 7 to 13 months' imprisonment but the PSR recommended a sentence of 46 months. Writing on behalf of Circuit Judges Riley and Gruender, Circuit Judge Gibson affirmed the sentence, stating that although *Booker* prescribed a new standard of review for guidelines cases generally, the new standard of review did not change the result in this case concerning a revocation of supervised release, because the standard is the same one the court would have used otherwise. *Id.* at 916.

H. Waiver of Right to Appeal Sentence

United States v. Killgo, 397 F.3d 628 (8th Cir. Feb. 9, 2005)

In *Killgo*, the defendant pleaded guilty to wire fraud and money laundering charges. In a footnote, Circuit Judge Smith explained that the defendant argued *Booker* required reversal of his sentence. *Id.* at 629, n.2. However, the court determined that in his plea agreement, the defendant

waived his 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.'" In the court's view, the defendant did not bring any issue akin to *Booker* to the attention of the sentencing court, and the fact that he did not anticipate the *Booker* ruling "does not place the issue outside the scope of his waiver." *Id.* The court affirmed the sentencing court's judgment. *Id.*

IX. Ninth Circuit

A. Plain Error Standard

United States v. Ameline, 400 F.3d 646 (9th Cir. Feb. 10, 2005)[15]

Circuit Judges Wardlaw, Gould, and Peaz granted the defendant's petition for rehearing to reconsider the court's post-*Blakely* holding in *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004), in which it held that the defendant's sentence under the guidelines violated the Sixth Amendment, and directed that a jury determine both the amount of drugs attributable to him and whether he possessed a weapon. *Id.* at 649. The court found that although its original *Ameline* opinion was consistent with *Booker*'s holding that the Sixth Amendment applies to the guidelines, it was at odds with *Booker*'s severability remedy that eliminated the mandatory nature of the guidelines. *Id.* In the present case, in applying a plain error review, the court concluded the defendant's sentence of 150 months violated the Sixth Amendment and was an error which seriously affected the fairness of his proceedings, and thus vacated and remanded for resentencing. *Id.* at 655. The court found that the sentence exceeded the maximum authorized by the facts established by the plea or a jury verdict because the defendant admitted to only a detectable amount of methamphetamine, and therefore faced a potential sentence of zero to 20 years under the statute, and that the maximum sentence the court could have imposed under the guidelines based on that admission was 16 months. *Id.* at 653. In providing guidance to the sentencing court, the Ninth Circuit stated *Booker* did not relieve the district court from its obligation to determine the guideline range, and in making that determination, the court must comply with Rule 32 and the basic procedural rules adopted to ensure fairness and integrity in the sentencing process. *Id.* at 650. Although the court originally directed that no petition for rehearing would be entertained and that the mandate would issue forthwith, the following day, on February 10, 2005, the court recalled the mandate and directed the parties to file any petition for rehearing and/or rehearing *en banc*.[16]

[15] On March 11, 2005, the Ninth Circuit granted a rehearing *en banc* in *United States v. Ameline*, directing that this panel decision of February 10, 2005, not be cited as precedent. *United States v. Ameline*, 401 F.3d 1007 (9th Cir. March 11, 2005).

[16] The Ninth Circuit has remanded numerous sentences in light of *Booker* and *United States v. Ameline*, without further explanation. *United States v. Standley*, 121 Fed. Appx. 728 (9th Cir. Feb. 9, 2005); *United States v. Anaya*, 122 Fed. Appx. 361 (9th Cir. Feb. 11, 2005); *United States v. Perez*, 124 Fed. Appx. 546 (9th Cir. Feb. 15, 2005); *United States v. Sumner*, 125 Fed. Appx. 118 (9th Cir. Feb. 24, 2005); *United States v. Luna*, 125 Fed. Appx. 134 (9th Cir. March 7, 2005).

B. Drug Quantity Calculation

United States v. Romero, 2005 U.S. App. LEXIS 940 (9th Cir. Jan. 19, 2005)

In *Romero*, the defendant appealed an alleged constructive amendment to the indictment by the district court, in violation of the Fifth Amendment. Although the indictment indicated the defendant and codefendants had aided and abetted in the possession of over 100 grams of heroin, the jury instructions stated that the defendants could be convicted if the amount of heroin was more or less than 100 grams. *Id.* at *5. Circuit Judges Browning, Reinhardt, and Thomas found the jury instructions constituted plain error and affected this defendant's substantial rights. Although the court affirmed the conviction because the defendant's claim failed one prong of the *de novo* standard of review in that there was overwhelming evidence of the defendant's involvement, the court remanded for resentencing pursuant to *Booker*. *Id.* at *10-11.

C. Downward Departure

United States v. Ruiz-Alonso, 397 F.3d 815 (9th Cir. Feb. 11, 2005)

In *Ruiz-Alonso*, the government appealed the sentencing court's decision to depart downward 4 levels in an illegal reentry case due, in part, to the defendant's cultural assimilation. *Id.* at 820. Circuit Judge Graber stated "we cannot say that the district judge would have imposed the same sentence in the absence of mandatory Guidelines and de novo review of departures." The court vacated the sentence and remanded for resentencing in a manner consistent with *Booker*. *Id.*

D. Waiver of Right to Appeal Sentence

United States v. Cardenas, 2005 WL 1027036 (9th Cir. May 4, 2005)

In *Cardenas*, the defendant pleaded guilty to possessing heroin and cocaine with the intent to distribute, and appealed the mandatory minimum ten year sentence imposed by the sentencing court. *Id.* at *1. In the plea agreement, the defendant admitted these crimes and agreed he was subject to a statutory minimum unless he qualified for the safety valve. He also agreed to waive any right to appeal his sentence. *Id.* A year after the written plea agreement was executed, the defendant signed a "Safety Valve Statement" admitting that he had sold drugs on more occasions than on those to which he had pled, and at sentencing, the court denied him a safety valve application. *Id.* On appeal, the defendant argued, in part, that the effect of *Booker* on the guidelines meant his waiver of appeal was involuntary and unknowing. *Id.* at *2. Circuit Judge Noonan, writing for Circuit Judges Thomas and Fisher, held that *Booker* does not bear on mandatory minimums and that a change in the law does not make a plea involuntary or unknowing. *Id.* Therefore, the court dismissed the appeal.

X. Tenth Circuit

A. Harmless Error Standard

United States v. Labastida-Segura, 396 F.3d 1140 (10th Cir. Feb. 4, 2005)[17]

In *Labastida-Segura*, Circuit Judges Kelly, O'Brien, and Tymkovich found that the parties stipulated in the plea agreement to the offense conduct in a violation for unlawful re-entry by a previously deported alien. *Id.* at 1142. However, because the sentencing court did not apply the guidelines in an advisory fashion, the court held that the remedial holding in *Booker* must be applied even though the defendant's sentence did not involve a Sixth Amendment violation. *Id.* The court noted that had the guidelines been applied in an advisory fashion, its review would be limited to whether the sentence was unreasonable considering the factors in section 3553(a). *Id.* Citing *Williams v. United States*, 503 U.S. 193, 203 (1992), the court stated the Supreme Court has held that once an appellate court has decided the sentencing court misapplied the guidelines, a remand is appropriate unless the appellate court concludes that the error was harmless. *Id.* at 1143. Because the sentencing court plainly sentenced the defendant under a mandatory guideline scheme, and although the Supreme Court indicated that not every guideline sentence contains a Sixth Amendment error and not every appeal requires resentencing, the court found that it could not conclude the error in this case was harmless. *Id.* In the instant case, where the guideline sentence was already at the bottom of the range, the court reasoned, to say the sentencing court would have imposed the same sentence given the new legal landscape, "places us in a zone of speculation and conjecture - we simply do not know what the district court would have done after hearing from the parties. Though an appellate court may judge whether a district court exercised its discretion (and whether it abused that discretion), it cannot exercise the district court's discretion." *Id.* Therefore, the court remanded the case to the sentencing court.[18]

B. Standard of Review for Interpretation and Application of the Guidelines

[17] In an *en banc* decision in *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. April 8, 2005), the Tenth Circuit further determined that there are two distinct types of error a sentencing court could make prior to *Booker*. The first error would occur when the sentencing court relied on judge-found facts other than those of prior convictions to enhance a sentence mandatorily, which would constitute a "constitutional *Booker* error." The second error would occur when the sentencing court applied the guidelines in a mandatory fashion even if the resulting sentence was calculated solely upon facts admitted by the defendant, found by a jury, or based upon the fact of the prior conviction, which would constitute a "non-constitutional *Booker* error." *Id.* at 731-732. Additionally, the court found in the instant case the defendant did not meet his burden under the fourth prong of plain error that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. The defendant offered nothing more in his appellate brief than the conclusory statement that "[t]o leave standing this sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 737. The court stated "[p]roviding this quotation is a far cry from establishing that a miscarriage of justice would occur if we do not remand," and found that the sentencing court's mandatory application of the guidelines in this case was not particularly egregious or a miscarriage of justice. *Id.* at 737-738.

[18] In *United States v. Arroyo-Berzoza*, 123 Fed. Appx. 943 (10th Cir. Feb. 22, 2005), Circuit Judge Anderson remanded for resentencing, citing *Labastida-Segura*, even though the defendant admitted the conduct charged in the indictment and it was clear no Sixth Amendment violation occurred. *Id.* at 944. The court determined it must apply the remedial holding of *Booker* to the defendant's direct appeal because the sentencing court's error of sentencing the defendant under a mandatory scheme was not harmless. *Id.* at 945.

United States v. Wheeler, 2005 WL 827168 (10th Cir. April 11, 2005)

The defendant in *Wheeler* pleaded guilty to brandishing a firearm during a crime of violence, and on appeal, he challenged the sentencing court's decision to depart upward from the statutory minimum. *Id.* at *1. In a *per curiam* decision, Circuit Judges Henry, Barrett and Murphy stated that the law governing the standard of review changed after *Booker*, which excised § 3742(e). Section 3742(e) directed that when reviewing a sentence that departed from the guidelines, the court should "give due deference to the district court's application of the guidelines to the facts" except with respect to certain determinations, including whether the facts of the case justified a departure, which was to be reviewed *de novo*. *Id.* at *4. The court determined that after the Court excised § 3742(e) in *Booker*, it held that appellate courts should now review sentences under a reasonableness standard. The courts stated "[a]lthough the Guidelines are now advisory, district courts must still 'consult the Guidelines and take them into account when sentencing.' Thus, appellate review continues to encompass review of the district court's interpretation and application of the Guidelines." *Id.* In the instant case, the court found that the district court's application of the guidelines was legally erroneous where the court departed upward under §2K2.4 based on the defendant's juvenile record by calculating what the sentence would have been if the Chapter Four guidelines applied. *Id.* Because the sentencing court's methodology was legally flawed, the court reversed the sentence and imposed a sentence of the statutory minimum of 74 months.[19]

United States v. Bush, 2005 WL 950650 (10th Cir. April 26, 2005)

In *Bush*, the defendant was convicted by a jury for distribution of cocaine and cocaine base. On appeal, the defendant contended the court erred by assessing a criminal history point for a prior uncounseled misdemeanor conviction. *Id.* at *9. After the sentencing court added a criminal history point for the conviction, increasing his criminal history category from II to III, the guideline range for the defendant was 188 to 235 months, and the court sentenced him to 188 months. *Id.* Writing for Circuit Judges Briscoe and Tymkovich, Circuit Judge Seymour determined the court normally reviews a sentencing court's interpretation and application of the guidelines *de novo*. The court stated, however "[b]ecause [the defendant] did not raise this objection below . . . we review for plain error." *Id.* In the instant case, the court held the defendant had not met his burden to overcome the presumption of regularity which attached to his prior conviction. Because there was no error, the court affirmed the sentence. *Id.* at *10-11.

C. Drug Quantity Calculation

United States v. Lynch, 397 F.3d 1270 (10th Cir. Feb. 11, 2005)

The government appealed the sentenced imposed in *Lynch* because the sentencing court applied the offense level for the quantity of drugs admitted by the defendant in his plea agreement instead of the quantity of drugs contained in the PSR as attributable to the defendant. *Id.* at 1271. Circuit Judges Kelly, O'Brien and Tymkovich determined the court must remand for further proceedings because in *United States v. Fanfan*, the Supreme Court remanded for resentencing even though Fanfan's sentence involved no Sixth Amendment violation. *Id.* at 1272. The court found

[19] The court stated it would not remand the case because this was the third sentence imposed on the defendant after two prior remands in which the sentencing court continued to erroneously upwardly depart. *Id.*

that in *Fanfan*, the Supreme Court stated "'the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions. Hence we vacate the judgment of the District Court and remand the case . . .'" *Id.* The Tenth Circuit stated that in imposing this remedy, the Supreme Court specifically rejected the defense suggestions that "the Sixth Amendment holding be engrafted on the Sentencing Guidelines." *Id.* (*quoting Booker*, 125 S. Ct. at 768-69)).

D. Restitution

United States v. Garcia-Castillo, 2005 U.S. App. LEXIS 2254 (10th Cir. Feb. 11, 2005)

In *Garcia-Castillo*, Circuit Judges Kelly, Anderson, and Lucero found that a restitution order did not violate *Blakely* even though a jury did not make the factual findings underlying the order. First, the court found that restitution ordered under the VWPA and the MVRA is not a criminal punishment. *Id.* at *14. Additionally, the court stated assuming arguendo that restitution was criminal punishment subject to *Blakely/Booker*, the Sixth Amendment was not implicated in the present case because by entering into the plea agreement, the defendant admitted the facts underlying the order and is unconditionally bound by its terms and what it encompasses. *Id.* at *16. Alternatively, the court found that even if restitution was criminal punishment, it would apply a plain error standard and any error would not have been plain. *Id.* at *19. Specifically, the court determined for an error to be plain, it must be "clear and obvious" and because there is a lack of uniformity in the law of the Tenth Circuit and in other circuits regarding whether restitution is criminal punishment, it is far from "clear and obvious" that restitution implicates the Sixth Amendment. *Id.* at *21.

E. Waiver of Right to Appeal Sentence

United States v. Porter, 2005 WL 1023395 (10th Cir. May 3, 2005)

In *Porter*, the defendant pleaded guilty to possession with intent to distribute five grams or more of methamphetamine and being a felon in possession of ammunition, and he was sentenced to 110 months' imprisonment. *Id.* at *1. The defendant's plea agreement limited his right to appeal his sentence except for any sentence above the maximum statutory penalty. *Id.* However, on appeal, he claimed he was entitled to be resentenced under *Booker*. *Id.* Circuit Judge Tymkovich, writing for Circuit Judges Kelly and Anderson, stated that the court applies well-established contract principles and a three-part test to interpret waivers of appeal; "whether the disputed appeal falls within the scope of the waiver of appellate rights; whether the defendant knowingly and voluntarily waived his appellate rights; and whether enforcing the waiver would result in a miscarriage of justice." *Id.* at *5. In the instant case, the defendant argued his sentence should be reversed in light of *Blakely*, arguing the waiver language "above the maximum statutory penalty" referred to the maximum the court could have imposed under the range based on facts to which he had admitted. The court found his interpretation of the waiver contradicted the plain language of the plea agreement because the waiver stated "statute of conviction" and nothing in the record showed the parties meant anything other than the plain meaning. *Id.* Additionally, the court found even if it was to adopt the defendant's argument, the Sixth Amendment rule announced in *Apprendi* and extended

in *Booker* would be inapplicable to him because his sentence was based on admitted facts, and thus his sentence was within the scope of the agreement. *Id.* at *6

United States v. Benoit, 2005 WL 1060610 (10th Cir. May 6, 2005)

The defendant in *Benoit* pleaded guilty to possession of a firearm by a convicted felon, possession of a firearm by an unlawful user of a controlled substance, and possession of methamphetamine, and was sentenced to 71 months' imprisonment, with a 12-month sentence on the drug count to run concurrently. *Id.* at *1. On appeal, the defendant argued the sentencing court misapplied §2K2.1, thus violating his Sixth Amendment rights as articulated in *Blakely*. *Id.* at *1. However, Circuit Judge McKay, writing for Circuit Judges Ebel and Henry, noted that the defendant had waived his right to appeal his sentence "'on any ground, except to challenge an upward departure from the applicable guideline range. . .'" *Id.* Because his argument on appeal did not relate to a challenge to an upward departure, the court held that a *Blakely* argument was within the scope of the waiver. *Id.* at *2. Therefore, the court enforced the defendant's waiver of his appellate rights and dismissed the appeal. *Id.*

XI. Eleventh Circuit

A. Plain Error Standard

United States v. Rodriguez, 398 F.3d 1291 (11th Cir. Feb. 4, 2005)

In *Rodriguez*, Circuit Judge Carnes, writing for Judges Marcus and Fay, held that the defendant did not meet the third prong of the plain error test in that the sentence imposed did not violate his substantial rights, reaching a different conclusion on this issue than had the Second Circuit in *Crosby*, the Fourth Circuit in *Hughes I*, and the Sixth Circuit in *Oliver*. *Id.* at 1301. As the court opined, the Supreme Court has instructed appellate courts that plain error review should be used sparingly, and the burden was on the defendant to show that the error actually did make a difference, stating, "if it is equally plausible that the error worked in favor of the defense, the defendant loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses." *Id.* at 1300 (*citing Jones v. Unites States*, 527 U.S. 373, 394-95 (1999)). The third prong requires that an error have affected substantial rights, which requires that the error "'must have affected the outcome of the district court proceedings.'" *Id.* at 1299 *(quoting United States v. Cotton*, 535 U.S. 625, 631-32 (2002)). According to the court, the standard for showing that the third prong has been met is to "show the reasonable probability of a different result," meaning a probability "sufficient to undermine confidence in the outcome." *Id.* (*quoting United States v. Dominguez Benitez*, 542 U.S. 74 (2004)).

In the instant case, the court found that the error committed before *Booker* was not that there were "extra-verdict enhancements–enhancements based on facts found by a judge that were not admitted by the defendant or established by the jury verdict–that led to an increase in the defendant's sentence. The error [was] that there were extra-verdict enhancements *used in a mandatory guidelines system*." *Id.* at 1300 (emphasis added). The court additionally found that if the same extra-verdict enhancements had been found and used in the same way in an advisory system, the result would have been constitutionally permissible under *Booker*, for two reasons. *Id.* First,

according to the court, Justice Steven's majority opinion in *Booker* explicitly stated "[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id.* (*quoting Booker*, at 750). Second, the *Booker* opinion authored by Justice Breyer specifically provides for extra-verdict enhancements in all future sentencings by holding that the guideline system was constitutional once two parts of the SRA were severed, and no other part of the SRA or the guidelines regarding extra-verdict enhancements was so severed. *Id.* In applying the third prong, the court determined the question to ask is whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of a binding fashion by the sentencing judge. *Id.* at 1301. The court found it obvious that it did not know if a different sentence would have resulted, and therefore it was controlled by the *Jones* decision, which directed that where the effect of an error on the result in the sentencing court is uncertain or indeterminate, the appellant did not meet his burden of showing prejudice and therefore had not met his burden of showing that his substantial rights were affected. *Id.* Therefore, the court affirmed the sentence.

United States v. Curtis, 400 F.3d 1334 (11th Cir. Feb. 28, 2005)

The defendant's appeal in *Curtis* was first heard after *Blakely*, wherein in a footnote, the court conducted a plain error analysis and concluded that the defendant had failed to satisfy the second prong because the error was not obvious, and had also failed to satisfy the fourth prong. *Id.* at 1335. In this appeal, in a *per curiam* decision, the court granted rehearing for the sole purpose of withdrawing that footnote as it appeared, and substituted a new footnote instead. *Id.* The new footnote states that the plain error analysis in the instant case is controlled by *Rodriguez*, and as in that case, the defendant satisfied the first two prongs of the analysis. *Id.* at 1335-1336. However, the footnote further states that as in *Rodriguez*, the defendant cannot satisfy the third prong because to do so he must show that the error affected his substantial rights, which "almost always requires that the error must have affected the outcome of the proceedings below." *Id.* at 1336. Moreover, the court stated that the defendant bears the burden of persuasion with respect to establishing prejudice. In applying the *Rodriguez* analysis, the court concluded that the defendant cannot satisfy the third prong because nothing in the record suggests there was a reasonable probability of a different result if the sentencing judge had applied the guidelines in an advisory fashion. *Id.* The sentencing court sentenced the defendant to the maximum term of imprisonment permitted by the applicable guidelines, which is inconsistent with a suggestion that he might have imposed a lesser sentence if he had realized the guidelines were advisory. Thereafter, the court reaffirmed the text of its original opinion. *Id.*

United States v. Shelton, 400 F.3d 1325 (11th Cir. Feb. 25, 2005)

In *Shelton*, Circuit Judge Hull, writing for Circuit Judge Marcus, determined that there was no Sixth Amendment violation where the sentencing court found the quantity amount used to determine the sentence, and the defendant filed no objection to the PSR that established the offense conduct and the relevant conduct and drug quantities. *Id.* at 1327-1328. However, at sentencing, the court expressed dissatisfaction with the sentence it imposed, commenting that the sentence was "very, very severe" due to the criminal history points and the mandatory consecutive five-year sentence on a section 924(c) firearm count, stating that Congress has taken a "very, very

hard stance when it comes to guns and drugs," and indicating that the guidelines and relevant conduct dictated the result. *Id.* at 1328.

In a review for plain error, the court first rejected the defendant's argument that the sentencing court erred when it enhanced his sentence based solely on judicial fact-finding of drug quantity and his prior convictions, and held that *Booker* reaffirmed the Court's holding in *Apprendi* that any fact other than a prior conviction must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at 1329. The court further found that the first prong was not satisfied because the defendant admitted to the drug quantity by raising no objections to the PSR and not disputing any factual matters. *Id.* at 1330. However, the court found error in the sentence imposed, because the sentencing court sentenced the defendant under a mandatory guideline scheme even in the absence of a Sixth Amendment violation. The court held the defendant carried his burden of satisfying the third prong that there was a reasonable probability of a different result if the guidelines had been applied as advisory, because the sentencing court expressed several times its view that the sentence required by the guidelines was too severe and sentenced the defendant to the lowest possible sentence it could. *Id.* at 1332-1333. Therefore, the fourth prong was also satisfied because the sentence seriously affected the fairness and integrity of judicial proceedings, and exercise of the court's discretion was warranted. *Id.* at 1333. The court vacated the defendant's sentence and remanded for resentencing. *Id.* at 1334.

B. Harmless Error Standard

United States v. Paz, 2005 WL 757876 (11th Cir. April 5, 2005)

In its first opportunity after *Booker* to address the application of the harmless error standard to a sentence imposed using extra-verdict enhancements in a mandatory guideline scheme, Circuit Judges Tjoflat, Anderson and Pryor, in a *per curiam* opinion, found where post-*Blakel*y, the district court stated it would have imposed a lesser sentence had the guidelines not been mandatory, application of the enhancements was not harmless error. *Id.* at *1. The sentencing court applied a 6-level enhancement for the amount of loss over the defendant's objection that it was based on facts neither charged in the indictment nor admitted by him in the plea agreement. *Id.* The court imposed a 10-month sentence, the minimal amount of the applicable guideline range of 10 to 16 months for an offense level 12. However, the sentencing court also stated that in the event the guidelines were found unconstitutional in whole or in part, it would have sentenced the defendant to a total of 6 months. *Id.* The court held that the government could not meet its burden that the error was harmless beyond a reasonable doubt, and therefore vacated the sentence and remanded for resentencing. *Id.* at *2.

United States v. Davis, 2005 U.S. App. LEXIS 7701 (11th Cir. May 4, 2005)

In *Davis*, the defendant pleaded guilty to possession of pseudoephedrine with intent to manufacture methamphetamine, and after a finding of acceptance of responsibility, the sentencing court found a guideline range of 51 to 63 months' imprisonment for an offense level 23 and a criminal history category II. *Id*. at *1-2. The government made a §5K1.1 motion for substantial assistance because of the defendant's cooperation which helped the government obtain guilty pleas from other defendants. *Id*. at *2. The sentencing court granted the motion an imposed a sentence

of 38 months' imprisonment. *Id*. The defendant appealed, claiming his Sixth Amendment rights were violated because his sentence was based on drug quantity facts found by the judge and not admitted by him. *Id*. at *3. Because the defendant had also raised this argument at sentencing, in a *per curiam* decision, Circuit Judges Anderson, Carnes, and Marcus determined the constitutional issue was to be reviewed *de novo*, and stated it would reverse and remand "unless the Government can demonstrate that the error was harmless beyond a reasonable doubt." *Id*.

The court explained that the harmless error analysis puts the burden o the government to show the error complained of, and that the mandatory, rather than advisory, application of the guidelines did not contribute to the defendant's sentence. *Id*. at *4 (citing *Paz,* above). In the instant case, the court determined it could not conclude the sentencing court's grant of the §5K1.1 motion either removed the *Booker* error or rendered it harmless beyond a reasonable doubt, rejecting the government's argument that the mandatory application of the guidelines was rendered harmless because of the downward departure. *Id*. at *5. In the court's view, the grant of a §5K1.1 motion did not give the sentencing court "unfettered" discretion, but rather "gave the court only limited discretion to consider the assistance [the defendant] rendered." *Id*. at *5-6. The sentencing court in this case considered factors unrelated to the nature and type of the defendant's assistance, and impermissibly considered the sentencing factors in § 3553(a) when exercising its discretion, and the court stated it could not know what it would have done had it understood the guidelines were advisory. *Id*. at *6. Thus, it found the government court not meet its burden of showing the mandatory application in violation of the defendant's Sixth Amendment rights was harmless beyond a reasonable doubt, and reversed and remanded for sentencing. *Id*.

C. Standard of Review for Interpretation and Application of the Guidelines

United States v. Crawford, 2005 WL 1005280 (11th Cir. May 2, 2005)

The defendant in *Crawford* pleaded guilty to aiding and abetting a scheme to defraud a state supplemental food program, and the government appealed the sentence imposed. *Id.* at *1. At sentencing, the court refused to grant a two level "more than minimal planning" enhancement under §2F1.1(b)(2), and granted a four level departure because it found the case fell outside the heartland of other such cases. *Id.* at *2. The government appealed the sentence. Circuit Judge Pryor, writing for Chief Judge Edmondson and Circuit Judge Marcus, explained that the appeal did not raise any issue of a violation of the Sixth Amendment and that neither party raised any issues of the application of the guidelines in a mandatory, rather than advisory, fashion. *Id.* at *3. However, the court stated "[b]ecause of the fundamental change in sentencing appeals effected by *Booker*, we must determine whether our post-*Booker* standards for reviewing application of the Sentencing Guidelines still apply." *Id.*

The court agreed with the Fifth Circuit in *Villegas*, discussed in Part V above, that *Booker* did not alter the standard of review of the application of the guidelines. *Id.* In the court's opinion, although *Booker* established a reasonableness standard for the sentence "finally imposed on a defendant, . .the Supreme Court concluded in *Booker* that district courts must still consider the Guidelines in determining a defendant's sentence." *Id.* at *3. Further, the court found that nothing in *Booker* suggested a reasonableness standard should apply upon review "of the interpretation and application as advisory of the Guidelines." *Id.* Additionally, the court stated that even though the

guidelines are now advisory, courts still remain under a duty to consult the guidelines under *Booker*, and this requirement obliges the court to calculate the sentencing range correctly. *Id.* at *4. A misinterpretation of the guidelines "'effectively means that [the district court] has not properly consulted the Guidelines.'" *Id.* (*quoting Hazelwood*, discussed in part VI above). The court reasoned that after the sentencing court has made the guideline calculation, it may impose a more severe or more lenient sentence as long as the sentence is reasonable. *Id.* In the instant case, the court held that both sentencing decisions made by the district court were erroneous, stating the denial of an enhancement for more than minimal planning was error because the defendant purchased food vouchers over 100 times over five years and had numerous opportunities to consider the consequences of his actions but did not voluntarily cease his participation in the scheme. *Id.* at *7-8. Additionally, the court held the grounds given by the district court for granting a four level departure were not permissible. *Id.* Therefore, the court vacated the sentence and remanded for resentencing. *Id.* at *9.

D. Drug Quantity Calculation

United States v. Grinard-Henry, 399 F.3d 1294 (11th Cir. Feb. 11, 2005)

The defendant in *Grinard-Henry* appealed his sentence, challenging the sentencing court's drug quantity determination on *Blakely* grounds, claiming the amount was greater than the amount to which he pleaded guilty. The government moved to dismiss his appeal based on a waiver in his plea agreement. *Id.* at 1295. Circuit Judges Marcus, Hull and Carnes determined one exception in his plea agreement allowed him to appeal a sentence "above the statutory maximum," and the court determined that it had recently held in *United States v. Rubbo*, that the term "statutory maximum" in a plea agreement permitting appeal in the limited circumstances of a sentence exceeding the statutory maximum refers to "the longest sentence that the statute which punishes a crime permits a court to impose, regardless of whether the actual sentence must be shortened in a particular case because of the principles involved in the *Apprendi/Booker* line of decisions." *Id.* at 1296. In this case, the court found the defendant's sentence did not exceed the relevant statutory maximum and he was therefore not entitled to appeal his sentence under this exception. *Id.* Another exception in his plea agreement was one allowing the defendant to appeal a sentence in violation of the law, apart from sentencing guidelines. The defendant asserted the sentencing court sentenced him based on a drug quantity greater than the quantity to which he pleaded guilty and thus his sentence violated the Fifth and Sixth Amendments. *Id.* at 1296-1297. However, the court found his appeal, in effect, asserted that the guidelines were not constitutionally applied and thus his challenge involved the application of the guidelines, not a violation of law apart from the guidelines. *Id.* at 1297.

E. *Ex Post Facto* Laws

United States v. Duncan, 400 F.3d 1297 (11th Cir. Feb. 24, 2005)

In *Duncan*, the defendant was convicted by a jury of a conspiracy involving five or more kilograms of cocaine. In applying the court's reasoning in *Rodriguez*, Circuit Judges Anderson, Birch and District Judge Land, sitting by designation, found that the defendant did not satisfy the third prong of plain error analysis because he could not show an error that affected his substantial rights. *Id.* at 1299. The court emphasized that Justice Breyer's opinion in *Booker* left as the only maximum sentence the one set out in the statute and the only error by the sentencing court was that the judge perceived the guidelines to be mandatory when they are now deemed to be advisory. *Id.* at 1303. However, the defendant could not show that the error affected his substantial rights because he acknowledged that "[i]t is simply impossible to determine whether the district court would have imposed the same sentence under a discretionary Guideline scheme." *Id.* at 1304. Because the defendant bears the burden of persuasion with respect to prejudice, he was not able to meet the burden. *Id.*

The defendant additionally argued that Justice Steven's *Booker* opinion should be applied retroactively, but that applying Justice Breyer's *Booker* opinion retroactively would violate the Due Process Clause because of the Supreme Court's holding in *Bouie v. Columbia*, 378 U.S. 347 (1964), where the Court held that judicial enlargement of a criminal statute, applied retroactively, violated the Due Process Clause because it was unforeseeable and therefore like an *ex post facto* law. *Id.* at 1306. He argued that the remedial opinion authored by Justice Breyer, if applied retroactively, would increase the sentence authorized by the jury's verdict to a maximum of life, and therefore would operate as an *ex post facto* law in violation of his due process rights. *Id.* at 1307. However, the court found that at the time he committed the offense, the statute subjected the defendant to a sentence of life imprisonment if he was convicted of possessing at least 5 kilograms of cocaine powder. The guidelines at the time also subjected the defendant to up to life imprisonment. Therefore, the court found the defendant had ample warning at the time he committed the offense that life imprisonment was a potential consequence of his actions. *Id.*

F. Waiver of Right to Appeal Sentence

United States v. Rubbo, 396 F.3d 1330 (11th Cir. Jan. 21, 2005)

The defendant in *Rubbo* pleaded guilty to conspiracy to commit mail and wire fraud. Although she had agreed to an appeal waiver in her plea agreement, on appeal she contended the waiver should not prevent her from raising any sentencing issues pursuant to *Booker*. *Id.* at 1331. The waiver limited her right to appeal "unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure . . ." *Id.* at 1333. The defendant argued the appeal was outside the scope of her appeal waiver because the sentence imposed exceeded the statutory maximum as defined in *Blakely*. *Id.* at 1332. Further, because the Supreme Court quoted the "statutory maximum" definition from *Blakely* in *Booker*, and her sentence went beyond the facts she admitted at her plea colloquy, she contended it also exceeded the statutory maximum sentence for *Booker* purposes. *Id.* at 1333-34. Writing for Circuit Judges Cox and Miles, Circuit Judge Carnes stated, however, that "statutory maximum" for *Booker* purposes is not the same as "the maximum

permitted by statute" in the plea agreement. *Id.* at 1334. The court stated that plea agreements are like contracts and should be interpreted in accord with what the parties intended. Further, nothing indicated the parties meant the language in the plea agreement to mean anything other than their usual and ordinary meaning, and that meaning describes "the upper limit of punishment that Congress has legislatively specified for violation of a statute." *Id.* Therefore, the court dismissed the appeal. *Id.* at 1335.

XII. District of Columbia Circuit

A. Plain Error Standard

United States v. Coles, 403 F.3d 764 (D.C. Cir. April 8, 2005)

In addressing the plain error standard, the District of Columbia Circuit aligned itself with the Second and Seventh Circuits in *Crosby* and *Paladino,* discussed in Parts II and VII above. In a *per curiam* opinion, Circuit Judges Edwards, Sentelle and Garland found that the sentencing court had increased the defendant's base offense level of 10 a total of 10 additional levels under §2C1.1(b)(1) and (b)(2)(B), increasing his sentencing range from 6 to 12 months to 33 to 41 months. *Id.* at 765. The defendant argued his Sixth Amendment rights were violated because the enhancements were based on facts neither admitted nor proved to the jury beyond a reasonable doubt. *Id.* at 767. The court found he met the first two prongs of the plain error test, thus establishing error. In assessing whether the sentencing court's *Booker* error was prejudicial, it adopted the approach that had been previously adopted either implicitly or explicitly by the First, Second, Fifth, Seventh and Eleventh Circuits; namely, that the pertinent question is whether the defendant demonstrated that the sentencing judge would have reached a different result under an advisory sentencing scheme. *Id.* at 767-768 (*citing Antonakopoulos*, *Crosby*, *Mares*, *Paladino*, and *Rodriguez*, discussed in Parts I, II, V, VII, and XI above). The court took issue with the Fourth and Ninth Circuit's approach in *Hughes* and *Ameline*, respectively, stating they employ "the wrong baseline for determining prejudice in light of *Booker*'s remedy" and that this approach assumes judicial fact finding is erroneous even under the advisory system. *Id.* at 768 (*citing Hughes* and *Ameline*, discussed in Parts IV and IX above).

The court concluded that because the record in the instant case was insufficient to determine whether the error was prejudicial, it would remand to the sentencing court so that court could determine whether it would have imposed a different sentence more favorable to the defendant if the sentencing had taken place under the post-*Booker* advisory guidelines. *Id.* at 770. In making this determination, and consistent with *Crosby*, the court stated "the District Court 'need not determine what that sentence would have been.'" *Id.* (*quoting Crosby*, 397 F.3d at 118 n. 20). Additionally, the court adopted the Seventh Circuit's approach, instructing that the appellate court retains jurisdiction throughout the limited remand such that the "reviewing courts" apply the relevant doctrines, as directed by *Booker*. *Id.* at 770-771. Therefore, it remanded the case to the sentencing court for the limited purpose of allowing it to determine whether it would have imposed a sentence materially more favorable to the defendant.

B. Harmless Error Standard

United States v. Coumaris, 399 F.3d 343 (D.C. Cir. March 8, 2005)

Blakely was decided after the parties in *Coumaris* filed their appellate briefs, and the court deferred resolution of this appeal until *Booker* was decided. After *Booker*, the government moved to vacate the defendant's sentence and remand for resentencing, conceding that the mandatory enhancements to his sentence were unconstitutional. *Id.* at 347-351. Although the defendant challenged the alleged improper application of enhancements to his base offense level, the court did not reach those challenges because it granted the government's Motion to Remand pursuant to *Booker*. *Id.* at 351. The government also agreed with the defendant that, by noting his objection to the PSR that *Apprendi* had rendered the guidelines problematic, he had "made a sufficient objection in the district court to preserve a Sixth Amendment challenge to his sentence." *Id.* The court therefore found that the *Booker* challenge in this case was governed by the harmless error standard of review appropriate for constitutional error, and noted that the government stated it could not satisfy that standard, conceding that it could not demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained." *Id.*

Although the defendant urged the court to resolve his specific challenges to the application of the guidelines, the court declined to do so, determining that because the sentencing court might impose a different sentence on remand and because the parties might decide to not appeal that sentence, in its view, any consideration of the defendant's objections would be "premature at best and unnecessary at worst." *Id.*

XIII. *Booker* Not Retroactive on Collateral Review

Every court that has considered whether *Booker* applies retroactively to cases on collateral review has held that it does not. *See United States v. Green*, 2005 WL 237204, at *1 (2d Cir. Feb. 2, 2005) (finding neither *Blakely* nor *Booker* apply retroactively to collateral challenge; Supreme Court noted holding in case applies to 'all cases on direct review' but made no explicit statement of retroactivity to collateral review."); *Guzman v. United States*, 2005 WL 803214 (2d Cir. April 8, 2005); *In re. Elwood*, 2005 WL 976998 (5th Cir. April 28, 2005) (finding Supreme Court strongly suggested *Apprendi*, and by logical extension, *Blakely* and *Booker*, not retroactively applicable to cases on collateral review); *United States v. Humphress*, 2005 WL 433191 (6th Cir. Feb. 25, 2005); *McReynolds v. United States*, 397 F.3d 479 (7th Cir. Feb. 2, 2005) (holding *Booker* does not apply retroactively; Supreme Court did not address issue but *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004), was conclusive, where the Court held *Ring v. Arizona*, 536 U.S. 584 (2004), not retroactive on collateral review, and finding *Booker*, like *Apprendi* and *Ring*, must be treated as procedural decision for purposes of retroactivity analysis, and procedural rule to be applied retroactively only if establishes watershed rules of criminal procedure and Booker not watershed rule, so not retroactive to cases final before *Booker*); *United States v. Leonard*, 2005 WL 139183, at *1 (10th Cir. Jan. 24, 2005) (finding defendant exhausted direct appeal before *Blakely* was decided, and therefore, *Blakely* and *Booker*, which established new rule of criminal procedure and therefore apply retroactively only to cases pending on direct review, are not applicable); *United States v. Anderson*, 2005 WL 123923, at *1-2 (11th Cir. Jan. 21, 2005) (holding where defendant filed application seeking order allowing district court to consider a second motion under 18 U.S.C. § 2255 and

claiming life sentence violated new rules of constitutional law established in *Blakely* and *Booker*, that Supreme Court has not expressly declared *Booker* retroactive on collateral review; Eleventh Circuit previously held Supreme Court did not make *Blakely* retroactive on collateral review for purposes of rules governing filing of successive habeas actions, *Booker* cannot be applied retroactively on collateral review); *Garrish v. United States*, 2005 U.S. Dist. LEXIS 1013, at *1 (D. Me. Jan. 25, 2005) (finding *Blakely* and *Booker* not applicable to cases not on direct appeal when decided; "by its very terms, *Booker* states that it is to apply 'to all cases on direct review'"with no reference to cases on collateral review); *Warren v. United States*, 2005 U.S. Dist. LEXIS 989, at *27 (D. Conn. Jan. 25, 2005) (holding defendant could not be afforded relief under *Blakely* or *Booker*; Supreme Court has not announced *Blakely* to be new rule of constitutional law nor held it applied retroactively on collateral review); *United States v. Williams*, 2005 WL 240939 (E.D. Pa. Jan. 31, 2005) (holding *Booker* not retroactive to cases on collateral review); *United States v. Johnson*, 2005 U.S. Dist. LEXIS 1053, at *1 (E.D. Va. Jan. 21, 2005) (finding *Apprendi*, *Blakely*, and *Booker* do not constitute newly recognized rights by Supreme Court which are made retroactively applicable to cases on collateral review); *United States v. Siegelbaum*, 2005 U.S. Dist. LEXIS 2087 (D. Ore. Jan. 26, 2005) (stating Supreme Court has not yet stated whether the rule announced in *Blakely* and *Booker* is retroactive to cases on collateral review, *Blakely* and *Booker* announced a new rule, rule is procedural, and procedural rules are generally not retroactive, but also finding it could not exclude possibility that Supreme Court might apply *Blakely/Booker* retroactively in some situations).