POST-*BOOKER* FEDERAL DECISIONS – AN OUTLINE

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This outline reflects many, but not all, of the decisions in federal courts interpreting and applying *United States v. Booker*, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). The compilation is based primarily on searches in Westlaw (database ALLFEDS) and Lexis (database for all federal cases) using the following query: "United States v. Booker" and date(aft 01/11/2005). Within sections and subsections, appellate decisions come first, followed by district court decisions, and are arranged chronologically within each subgroup.[1] Decisions that, in the compiler's judgment, are significant because they contain particularly lengthy, thoughtful, or otherwise useful discussion are marked with an asterisk (*). Please report errors in this outline to fran_pratt@fd.org.

I. INDICTMENT ISSUES

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

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

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

II. PLEA ISSUES

United States v. Sahlin, 399 F.3d 27 (1st Cir. Feb. 22, 2005) (holding "that *Booker* provides no basis to permit a defendant who has pled guilty to withdraw his plea on the basis that it is involuntary, and we reject Sahlin's other Rule 11 arguments")

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[1] To see other outlines that contain more comprehensive summaries of published decisions, go to http://sentencing.typepad.com/sentencing_law_and_policy/2005/03/more_summaries_.html. These summaries were prepared by Daniel J. Capra, professor at Fordham Law School, as of March 14, 2005.

United States v. Serrano-Beauvaix, ___ F.3d ____, 2005 WL 503247, 2005 U.S. App. LEXIS 3638 (1st Cir. Mar. 4, 2005) (finding that by pleading guilty, defendant waived argument that jury, not judge, should have made factual determinations used to increase guideline range) (N.B.: in contrast, appellant who argued that error was his sentencing under a mandatory scheme at least received plain error review)

III. SENTENCING ISSUES

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

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

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

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

* *United States v. Ameline*, ___ F.3d ____, 2005 WL 350811, 2005 U.S. App. LEXIS 2032 (9th Cir. Feb. 9, 2005; amended Feb. 10, 2005) (in first case published post-*Booker* decision from circuit, attempting to provide general guidance to district courts; emphasizing that advisory guideline range is "only *one* of many factors that a sentencing judge must consider in determining an appropriate individualized sentence;" specifically noting that Guidelines' limitations on factors that lower court may consider in sentencing, such as those concerning departures set out in U.S.S.G. § 5K2.0(d), no longer constrain court's discretion in fashioning a sentencing within guideline range), *reh'g en banc granted* Mar. 11, 2005

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

United States v. Mares, ___ F.3d ____, 2005 WL 503715, 2005 U.S. App. LEXIS 3653 (5th Cir. Mar. 4, 2005) (in first opinion from circuit to address *Booker*, discussing what "consideration" of Guidelines entails)

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

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

* *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. Jan. 19, 2005) (Adelman, J.) (in explaining why court was imposing sentence lower than that recommended by Guidelines, stating that while court agreed that it must seriously consider Guidelines, "*Booker* is not an invitation to do business as usual;" courts need not follow old departure methodology in imposing sentence outside guideline range; disagreeing with Judge Cassell in *Wilson*, *supra*); *cf. United States v. Smith*, ___ F. Supp. 2d ____, 2005 WL 549057 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (briefly summarizing post-*Booker* sentencing methodology); *United States v. Roen*, ___ F. Supp. 2d ____, 2005 WL 549058 (E.D. Wis. Feb. 25, 2005) (Adelman, J.) (explaining analysis to be followed in determining appropriate sentence following revocation – and now all cases, after *Booker*; because guidelines are advisory, a sentence outside of suggested range is *not* a departure)

United States v. Jones, 352 F. Supp. 2d 22 (D. Me. Jan. 21, 2005) (Hornby, J.) (in 18 U.S.C. § 922(g)(4) case (possession of firearm by person previously committed involuntarily to mental health institution), while concluding that he could not grant departure sought by defendant, government, and probation to take defendant from Zone D to Zone C, court concluded that it could achieve same result after *Booker* in considering Guidelines as advisory and as one factor under 18 U.S.C. § 3553(a))

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

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

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

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

United States v. Wanning, ___ F. Supp. 2d ____, 2005 WL 273158, 2005 U.S. Dist. LEXIS 2477 (D. Neb. Feb. 3, 2005) (Kopf, J.) (explaining why court agrees with Judge Cassell in *Wilson* and disagrees with Judge Pratt in *Myers*)

United States v. Penniegraft, ___ F. Supp. 2d _____, 2005 WL 433798, 2005 U.S. Dist. LEXIS 2820 (M.D.N.C. Feb. 7, 2005) (explaining procedure court will follow in light of *Booker* and Fourth Circuit's *Hughes* decision; finding that "[i]t is important to note that a sentence under this format will not represent a 'departure' under the Guidelines, and will not be considered as a 'departure' for purposes of reporting or recording the Court's post-*Booker* sentence")

United States v. Biheiri, ___ F. Supp. 2d ____, 2005 WL 350585, 2005 U.S. Dist. LEXIS 2322 (E.D. Va. Feb. 9, 2005) (Ellis, J.) (while recognizing debate, not explicitly taking one side or the other)

United States v. Peach, ___ F. Supp. 2d ____, 2005 WL 352636, 2005 U.S. Dist. LEXIS 2630 (D.N.D. Feb. 15, 2005) (Hovland, J.) (after reviewing some of decisions listed *supra* and U.S.S.C. chairman's House Judiciary Committee testimony, concluding that court "will continue to give consideration to the 'advisory; Sentencing Guidelines which will be afforded 'substantial weight' in sentencing hearings [because] [t]he federal Sentencing Guidelines, policy statements, and the sentencing tables and ranges were

created at the direction of Congress [and] [t]he statutory purposes of sentencing, as directed by Congress, are best reflected in the Guidelines")

* *United States v. Jaber*, not currently on Westlaw or Lexis, but available at http://sentencing.typepad.com/sentencing_law_and_policy/files/gertner_jabarmomohsentenmemo.pdf (D. Mass. Mar. 3, 2005) (Gertner, J.) (in lengthy opinion, explaining how court will apply "advisory" guidelines; discussing significant concerns about bases upon which approach adopted in *Wilson I* and *Wilson II* is predicated)

B. Standard of Proof

* *United States v. Ameline*, ___ F.3d ____, 2005 WL 350811, 2005 U.S. App. LEXIS 2032 (9th Cir. Feb. 9, 2005; amended Feb. 10, 2005) (in first case published post-*Booker* decision from circuit, attempting to provide general guidance to district courts; reaffirming that baseline rules that ensured fairness and integrity in sentencing process remain in force in post-*Booker* sentencing regime; declining to decide whether *Booker* majority remedial opinion affected standard of proof, but specifically noting that Ninth Circuit has applied different standards of proof in different contexts), *reh'g en banc granted* Mar. 11, 2005

United States v. Mares, ___ F.3d ____, 2005 WL 503715, 2005 U.S. App. LEXIS 3653 (5th Cir. Mar. 4, 2005) (in first opinion from circuit to address *Booker*, stating that district judge is "entitled" to apply preponderance standard to finding of facts relevant to guideline range and facts relevant to non-guidelines sentence) (N.B.: this does not appear to require court to use preponderance standard)

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

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

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

defendant, court would not apply enhancement even under preponderance standard, to avoid unwarranted disparity)

* *United States v. Huerta-Rodriguez*, ___ F. Supp. 2d ____, 2005 WL 318640, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (finding that "[i]n order to comply with due process in determining a reasonable sentence, this court will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant's sentence;" while defendant can waive jury trial, he cannot waive standard of proof; while approach may not be required by *Booker*, neither is it prohibited); *see also United States v. Kelley*, ___ F. Supp. 2d ____, 2005 WL 323813, 2005 U.S. Dist. LEXIS 2513 (D. Neb. Feb. 1, 2005) (Bataillon, J.)

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

United States v. Carvajal, 2005 WL 476125, 2005 U.S. Dist. LEXIS 3058 (S.D.N.Y. Feb. 22, 2005) (Hellerstein, J.) (stating that court believes that Sixth Amendment holding of *Booker* "requires the District Judge to be skeptically careful of unarticulated facts and considerations subsumed in a sentence" and that "[t]he structure of factual hearings and formal findings are necessary if we are to conform our conduct to the Sentencing Reform Act, as we must, and if we are to respect the rationale that led the United States Supreme Court to invalidate the mandatory quality of the Act, but to uphold the Act in all other respects")

United States v. Smith, ___ F. Supp. 2d ____, 2005 WL 549057 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (noting that *Booker* did not change government's burden of proving enhancements)

C. Specific Statutes

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

United States v. Cerna-Salguero, ___ F.3d ____, 2005 WL 486707, 2005 U.S. App. LEXIS 3563 (8th Cir. Mar. 3, 2005) (rejecting Sixth Amendment challenge to increase in statutory penalty based on prior conviction where *Booker* did not overrule *Almendarez-Torres v. United States*)

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

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

2. 18 U.S.C. § 922(g), Firearm Possession by Prohibited Person

United States v. Peach, ___ F. Supp. 2d ____, 2005 WL 352636, 2005 U.S. Dist. LEXIS 2630 (D.N.D. Feb. 15, 2005) (where felon-in-possession case involved drive-by shooting and parties had agreed to guideline range of 100-125 months, imposing sentence of 100 months)

3. 18 U.S.C. § 922(v), Possession of Semi-Automatic Weapon

United States v. Mullins, ___ F. Supp. 2d ____, 2005 WL 372209, 2005 U.S. Dist. LEXIS 2194 (W.D. Va. Feb. 16, 2005) (Jones, J.) (where ban on possession of semi-automatic assault weapons expired one month after charged date of defendant's possession of weapon, finding it appropriate to sentence below advisory guideline range of 57-71 months "because neither the defendant nor others can be deterred by a sentence based the guideline range for possession of a semi-automatic assault rifle, since that conduct is no longer criminal;" imposing sentence of 40 months)

4. 18 U.S.C. § 924(c), Use or Possession in Connection with Another Offense

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

United States v. Groce, ___ F.3d _____, 2005 WL 456016, 2005 U.S. App. LEXIS 3398 (4th Cir. Feb. 28, 2005) (rejecting defendant's claim that *Blakely* entitled defendant to jury determination of whether she "brandished" firearm in light of *Harris v. United States*, but remanding for determination by district court as to whether facts support finding of "brandishing" as statutory definition was interpreted by court of appeals)

United States v. Greer, ___ F. Supp. 2d ____, 2005 WL 396368, 2005 U.S. Dist. LEXIS 2796 (M.D. Ga. Feb. 17, 2005) (finding that jury must determine nature of prior conviction before court can impose ACCA sentence in limited set of cases in which it is necessary to look beyond face of statute to indictment, plea agreement or jury instructions, to determine if conviction can be used)

5. 18 U.S.C. § 924(e), Armed Career Criminal Act

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

United States v. Barnett, 398 F.3d 516 (6th Cir. Feb. 16, 2005) (rejecting defendant's argument that jury, not judge, was required to determine nature of prior convictions in light of case law holding that district court's authority under *Apprendi* to determine existence of prior conviction included determinations regarding their nature)

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

United States v. Montgomery, ___ F.3d _____, 2005 WL 469607, 2005 U.S. App. LEXIS 3469 (5th Cir. Mar. 1, 2005) (declining to address impact of *Booker* on defendant's argument that ACCA enhancement violated his Sixth Amendment rights where court found that defendant's prior conviction did not qualify as "violent felony")

6. 18 U.S.C. § 2251, Sexual Exploitation of Children

United States v. Bach, ___ F.3d ____, 2005 WL 578770, 2005 U.S. App. LEXIS 4178 (8th Cir. Mar. 14, 2005) (where mandatory minimum sentence based on enhancement for prior conviction was less than maximum for unenhanced offense, finding that application of mandatory minimum was proper under *Blakely*, *Apprendi*, and *Almendarez-Torres*)

7. 18 U.S.C. § 3553(b)(2), Guidelines in Child Crimes and Sexual Offenses

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

8. 18 U.S.C. § 3553(e) / U.S.S.G. 5K1.1, Substantial Assistance

United States v. Doe, ___ F.3d ____, 2005 WL 428916, 2005 U.S. App. LEXIS 3225 (10th Cir. Feb. 24, 2005) (declining to address *Blakely* / *Booker* issues, but remanding case for resentencing where district court failed to fully consider defendant's cooperation in deciding whether (and how far) to depart upward) (N.B.: the resolution of this case seems to suggests that departure analysis applies as it did before in order to determine applicable guideline range, which only then becomes advisory)

United States v. Smith, ___ F. Supp. 2d ____, 2005 WL 549057 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (departing downward for substantial assistance, U.S.S.G. § 5K1.1, before determining final sentence based on § 3553(a) factors)

9. 18 U.S.C. § 3553(f) / U.S.S.G. § 5C1.2, Safety Valve

United States v. Serrano-Beauvaix, ___ F.3d ____, 2005 WL 503247, 2005 U.S. App. LEXIS 3638 (1st Cir. Mar. 4, 2005) (noting that "[t]he effect of *Booker*, if any, on the safety valve has not been determined")

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

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

10. 18 U.S.C. § 3663 et seq., Restitution

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

11. 21 U.S.C. § 841, Controlled Substances

United States v. Joyner, unpublished, 2005 WL 351152 (6th Cir. Feb. 14, 2005) (where defendant was sentenced to mandatory minimum statutory term of imprisonment, affirming sentence because it was not affected by *Booker* error)

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

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

United States v. Paladino, ___ F.3d ____, 2005 WL 435430, 2005 U.S. App. LEXIS 3291 (7th Cir. Feb. 25, 2005) (where defendant was sentenced to increased mandatory minimum sentence

based on prior convictions, rejecting argument that district court could not find facts regarding convictions in light of *Harris v. United States*, 536 U.S. 545 (2002))

D. Specific Guidelines

1. U.S.S.G. § 1B1.3, Relevant Conduct

United States v. Duncan, ___ F.3d ____, 2005 WL 428414, 2005 U.S. App. LEXIS 3269 (11th Cir. Feb. 24, 2005) (discussing use of acquitted conduct and stating that "*Booker* does not suggest that the consideration of acquitted conduct violates the Sixth Amendment as long as the judge does not impose a sentencing that exceeds what was authorized by the jury verdict")

2. U.S.S.G. § 2B5.1, Counterfeiting

United States v. Kelley, ___ F. Supp. 2d ____, 2005 WL 323813, 2005 U.S. Dist. LEXIS 2513 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (where enhancements moved minimum end of guideline range from four months and Zone C to eighteen months and Zone D, finding that defendant should be sentenced to time served and six months of home confinement)

3. U.S.S.G. § 2D1.1, Drug Offenses

* *United States v. Smith*, ___ F. Supp. 2d ____, 2005 WL 549057 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (discussing in detail crack / powder cocaine disparity; citing numerous sources) (N.B.: in addition, one source not cited directly in the opinion is the Sentencing Commission's Report to the Congress: Cocaine and Federal Sentencing Policy (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm)

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

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

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

5. U.S.S.G. § C1.1, Obstruction of Justice

* *United States v. Jaber*, not currently on Westlaw or Lexis, but available at http://sentencing.typepad.com/sentencing_law_and_policy/files/gertner_jabarmomohsentenmemo.pdf (D. Mass. Mar. 3, 2005) (Gertner, J.) (in footnote 22, noting that "in [the court's] judgment, 'obstruction of justice' enhancements raise concerns under both *Booker* and *Blakely* where the government has a choice of charging a separate offense – which would have been subject to a jury trial and the full panoply of a sentence for another offense")

6. U.S.S.G. § 4B1.1, Career Offender

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

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

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

United States v. Carvajal, 2005 WL 476125 (S.D.N.Y. Feb. 22, 2005) (Hellerstein, J.) (where guideline range was 262-327 months, imposing sentence of 168 months on defendant who is 34 years old on basis of just punishment and rehabilitation; latter goal "cannot be served if a defendant can look forward to nothing beyond imprisonment. Hope is the necessary condition of mankind, for we are all created in the image of God. A judge should be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life")

United States v. Naylor, ___ F. Supp. 2d ____, 2005 WL 525409, 2005 U.S. Dist. LEXIS 3418 (W.D. Va. Mar. 7, 2005) (Jones, J.) (where PSR classified defendant as career offender based on two sets of convictions arising from conduct occurring during one six-week period when defendant had turned 17, sentencing defendant to 120 months (instead of 188-235 months) based on defendant's young age at time of prior conduct (citing to *Roper v. Simmons*, U.S. Mar. 1, 2005) and fact that convictions barely fell within Chapter Four rules regarding counting of prior convictions)

7. U.S.S.G. §§ 5H, 5K, Departures

United States v. Doe, ___ F.3d ____, 2005 WL 428916, 2005 U.S. App. LEXIS 3225 (10th Cir. Feb. 24, 2005) (declining to address *Blakely* / *Booker* issues, but remanding case for resentencing where district court failed to fully consider defendant's cooperation in deciding whether (and how far) to depart upward) (N.B.: the resolution of this case seems to suggests that departure analysis applies as it did before in order to determine applicable guideline range, which only then becomes advisory)

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

* *United States v. Paladino*, ___ F.3d ____, 2005 WL 435430, 2005 U.S. App. LEXIS 3291 (7th Cir. Feb. 25, 2005) (where government had cross-appealed extent of downward departure (from 235 months to 180 months, based on rehabilitation and overstatement of criminal history) before *Booker* and subsequently dropped cross-appeal, noting that "[u]nder the new sentencing regime the judge must justify departing from the guidelines, and the justification has to be reasonable, but we cannot think on what basis a 15-year sentence for Peyton, who was 34 years old when sentenced, could be thought unreasonably short")

United States v. Smith, ___ F. Supp. 2d ____, 2005 WL 549057 (E.D. Wis. Mar. 3, 2005) (Adelman, J.) (departing downward for substantial assistance, U.S.S.G. § 5K1.1, before determining final sentence based on § 3553(a) factors) (N.B.: the discussion of how the court arrived at the reduced guideline range is instructive)

E. Specific Offender or Offense Characteristics

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

F. Unwarranted Disparity

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

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

G. Ex Post Facto Issues

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

United States v. Duncan, ___ F.3d ____, 2005 WL 428414, 2005 U.S. App. LEXIS 3269 (11th Cir. Feb. 24, 2005) (rejecting argument that retroactive application of *Booker*'s remedial holding violates ex post facto principles)

H. General / Other

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

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

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

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

IV. POST-SENTENCING DISTRICT COURT MOTIONS

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

1. 18 U.S.C. § 3582

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

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

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

2. Other Motions

United States v. Ziskind, 2002 WL 181881, 2005 U.S. Dist. LEXIS 1047 (D. Mass. Jan. 25, 2005) (Woodlock, J.) (denying motion for stay of execution of sentence because, "the sentence imposed [by the court] under the mandatory guidelines scheme would in all likelihood be the sentence [it] would impose under an advisory guidelines sentencing scheme")

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

United States v. Rohira, ___ F. Supp. 2d ____, 2005 WL 323677, 2005 U.S. Dist. LEXIS 1981 (N.D. Ohio Feb. 4, 2005) (Aldrich, J.) (granting motion for new trial in light of *Booker* because jury was not charged with finding loss amount beyond reasonable doubt, government agent's unreliable loss estimate may have tainted jury's decision on guilt, and "jury will have to consider that same factual issue at sentencing"); *see also United States v. Williams*, ___ F. Supp. 2d ____, 2005 WL 323679, 2005 U.S. Dist. LEXIS 1980 (N.D. Ohio Feb. 4, 2005) (Aldrich, J.) (granting motion of co-defendant, who was tried separately, on same basis)

United States v. Penniegraft, ___ F. Supp. 2d _____, 2005 WL 433798, 2005 U.S. Dist. LEXIS 2820 (M.D.N.C. Feb. 7, 2005) (declining to address whether pre-*Booker* sentence qualifies as "clear error" under Fed. R. Crim. P. 35(a) where motions made outside 7-day time frame, such that court did not have jurisdiction to consider issue; granting motion to extend time for filing notice of appeal pursuant to Fed. R. App. P. 4(b)(4) as to some defendants)

United States v. Vanhorn, ___ F.3d ____, 2005 WL 465180, 2005 U.S. App. LEXIS 3428 (8th Cir. Mar. 1, 2005) (on appeal from denial of motion to modify restitution after appeal of conviction and sentence, finding that *Booker* and Guidelines did not apply to post-judgment proceeding)

V. REVOCATION ISSUES

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

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

United States v. Brown, unpublished, 2005 WL 518704, 2005 U.S. App. LEXIS 3717 (4th Cir. Mar. 4, 2005) (finding that "contrary to Brown's argument, the Supreme Court did not totally invalidate the Sentencing Reform Act, but in fact left the great majority of the Act's provisions intact and legally effective;" "[m]ore specifically, the provision of the Act that governs supervised release was not affected by *Booker*;" and [f]inally, the change effected by *Booker* – making the Sentencing Guidelines merely advisory – was not a change in the manner in which the Guidelines were applied to revocations of supervised release pre-*Booker*")

United States v. Edwards, ___ F.3d ____, 2005 WL 517019, 2005 U.S. App. LEXIS 3734 (8th Cir. Mar. 7, 2005) (in *Anders* case, finding no error in district court's consultation of guidelines where they were already advisory for supervised release violations; further, in light of defendant's criminal history and nature of violation and fact that defendant received sentence at low end of recommended range, "we cannot say that in this instance such a sentence was unreasonable")

United States v. Cotton, ___ F.3d ____, 2005 WL 525226, 2005 U.S. App. LEXIS 3799 (8th Cir. Mar. 8, 2005) (noting that while *Booker* "vitally affects the standard of review in guidelines cases," "the new standard of review will not change the result in this case, because the new standard is actually the same as the one we would have used otherwise," i.e., "review for unreasonableness")

United States v. Roen, ___ F. Supp. 2d ____, 2005 WL 549058 (E.D. Wis. Feb. 25, 2005) (Adelman, J.) (explaining analysis to be followed in determining appropriate sentence following revocation – and now all cases, after *Booker*; because guidelines are advisory, a sentence outside of suggested range is *not* a departure; applying principles to instant case and finding sentence of 24 months to be sufficient be not greater than necessary)

VI. APPELLATE PROCEDURE ISSUES

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

A. Bail Pending Appeal

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

United States v. Munoz Franco, ___ F. Supp. 2d ____, 2005 WL 299992, 2005 U.S. Dist. LEXIS 1795 (D.P.R. Jan. 28, 2005) (Dominguez, J.) (denying bail because defendants failed to demonstrate that any of the numerous "issues presented in the opinion of the court fail to reach the required threshold of a 'close' question of fact or law")

United States v. Brown, ___ F. Supp. 2d ____, 2005 WL 318701, 2005 U.S. Dist. LEXIS 1812 (M.D. Pa. Feb. 10, 2005) (Rambo, J.) (denying motion in part because at time of sentencing, court had applied *Blakely* and imposed sentence using discretionary scheme in which it relied on Guidelines as a "measuring point")

B. Appellate Jurisdiction

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

C. Motion for Remand

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

United States v. Doane, unpublished, 2005 WL 327559, 2005 U.S. App. LEXIS 2364 (4th Cir. Feb. 11, 2005) (granting motion for expedited remand where district court had announced alternative sentence pursuant to *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004), and alternative sentence was shorter than time defendant had already served)

United States v. Coumaris, ___ F.3d ____, 2005 WL 525213, 2005 U.S. App. LEXIS 3774 (D.C. Cir. Mar. 8, 2005) (in first opinion from circuit, granting government's motion for remand in light of *Booker*; declining to address defendant's arguments regarding district court's application of guidelines on ground that "[b]ecause the district court might impose a different sentence on remand, and because the parties might choose not to appeal that sentence, consideration of objections to the court's original guidelines calculations would be premature at best and unnecessary at worst")

D. Meaning of "Reasonableness;" Methodology for Review

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

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

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

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

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

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

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

United States v. Ruiz-Alonso, 397 F.3d 815 (9th Cir. Feb. 11, 2005) (where government appealed downward departure in illegal reentry case, 8 U.S.C. § 1326, and case was argued and submitted before *Booker* came out, vacating sentence and remanding "[b]ecause we cannot say that the district judge would have imposed the same sentence in the absence of mandatory Guidelines and de novo review of downward departures") (N.B.: i.e., court declined to review departure for reasonableness; compare with *Tanner*, *supra*)

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

* *United States v. Paladino*, ___ F.3d ____, 2005 WL 435430, 2005 U.S. App. LEXIS 3291 (7th Cir. Feb. 25, 2005) (where government had cross-appealed extent of downward departure (from 235 months to 180 months, based on rehabilitation and overstatement of criminal history) before *Booker* and subsequently dropped cross-appeal, noting that "[u]nder the new sentencing regime the judge must justify departing from the guidelines, and the justification has to be reasonable, but we cannot think on what basis a 15-year sentence for Peyton, who was 34 years old when sentenced, could be thought unreasonably short")

* *United States v. Mares*, ___ F.3d ____, 2005 WL 503715, 2005 U.S. App. LEXIS 3653 (5th Cir. Mar. 4, 2005) (in first opinion from circuit to address *Booker*, discussing "reasonableness" review; distinguishing between review of sentences within guideline range and those that are not)

United States v. Jones, ___ F.3d ____, 2005 WL 486675, 2005 U.S. App. LEXIS 3569 (6th Cir. Mar. 3, 2005) (stating that "[t]he district court's sentence, and its exercise of discretion (if any), must be reviewed by an appellate court for 'reasonableness.' Accordingly, on remand, we encourage the sentencing judge to explicitly state his reasons for applying particular Guidelines, and sentencing within the recommended Guidelines range, or in the alternative, for choosing to sentence outside that range. Such a statement will facilitate appellate review as to whether the sentence was 'reasonable.' However, we take no position as to the content or extent of such a statement."); *see also United States v. Tate*, unpublished, 2005 WL 513491, 2005 U.S. App. LEXIS 3569 (6th Cir. Mar. 3, 2005) (similar)

United States v. Edwards, ___ F.3d ____, 2005 WL 517019, 2005 U.S. App. LEXIS 3734 (8th Cir. Mar. 7, 2005) (on *Anders* appeal from revocation of supervised release, in light of defendant's criminal history and nature of violation and fact that defendant received sentence at low end of recommended range, "we cannot say that in this instance such a sentence was unreasonable")

United States v. Cotton, ___ F.3d ____, 2005 WL 525226, 2005 U.S. App. LEXIS 3799 (8th Cir. Mar. 8, 2005) (on appeal from revocation of supervised release, concluding that where "[t]he district court explicitly discussed the statutory sentencing goals and gave four good reasons for its sentence," and "[c]onsidering the statutory goals of sentencing and the facts and circumstances of this case, the sentence imposed is not unreasonable")

E. Sufficiency of Raising of *Blakely* Issue

1. Objection in District Court

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

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

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

withheld at request of member of court, now vacating prior opinion and remanding for resentencing consistent with *Booker*)

United States v. Fox, 396 F.3d 1018 (8th Cir. Jan. 31, 2005) (in case in which defendant went to trial and jury found 500 grams of methamphetamine, but he was sentenced on basis of 1.814 kilos of meth (to which he objected although it is not clear on what basis), and defendant raised *Blakely* issue in *pro se* brief, finding that defendant had preserved issue and remanding case for resentencing) (N.B.: see also *Selwyn*, *infra*)

United States v. Rodriguez, 398 F.3d 1291 (11th Cir. Feb. 4, 2005) (in MDMA case that went to trial, where defendant had objected at sentencing (held before *Blakely*) about use of inconsistent, uncertain, and vague trial testimony to set quantity of tablets, rejecting this contention; further, on plain error review, rejecting *Blakely* claim because, while there was error that was plain, it did not affect defendant's substantial rights)

United States v. Hines, 398 F.3d 713 (6th Cir. Feb. 7, 2005, reissued Feb. 23, 2005) (where defendant had objected to drug quantity and firearm possession found by district court on basis of evidence, finding that court's determinations were supported by record; because defendant had not raised Sixth Amendment claim in district court, reviewing *Booker* claim only for plain error, which was present) (N.B.: this opinion was originally unpublished; see also *Davis* (6th Cir), *supra*)

United States v. Davis, 397 F.3d 173 (3d Cir. Feb. 11, 2005) (stating *in toto*, without indicating whether issue had been raised below, that "Appellants challenge their sentences under [*Booker*]. In light of the determination of the judges of this court that the sentencing issues appellants raise are best determined by the District Court in the first instance, we vacate the sentences and remand for re-sentencing in accordance with Booker.")

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

United States v. Duncan, ___ F.3d ____, 2005 WL 428414, 2005 U.S. App. LEXIS 3269 (11th Cir. Feb. 24, 2005) (finding defendant's objection to drug quantity determination based on sufficiency of evidence insufficient to preserve Sixth Amendment objection)

United States v. Sdoulam, ___ F.3d ____, 2005 WL 474337, 2005 U.S. App. LEXIS 3475 (8th Cir. Mar. 2, 2005) (where defendant objected to district court's finding of drug quantity following jury trial and to application of obstruction of justice enhancement, finding that defendant had preserved Sixth Amendment challenge; following *Coffey* and *Fox*, *supra*)

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

United States v. Mares, ___ F.3d ____, 2005 WL 503715, 2005 U.S. App. LEXIS 3653 (5th Cir. Mar. 4, 2005) (where defendant objected to 4-level increase pursuant to U.S.S.G. § 2K2,1(b)(5) "on the basis that they did not comport with the facts proven at trial," noting that defendant "did not thereafter challenge the sufficiency of evidence for the court's factual finding or otherwise object to the enhancement;" reviewing for plain error)

United States v. Story, unpublished, 2006 WL 566696, 2005 U.S. App. LEXIS 4096 (6th Cir. Mar. 9, 2005) (in case where defendant objected to gun enhancement at sentencing on basis that evidence was uncorroborated and unreliable, but did not object to drug quantity on any basis, reviewing *Booker* Sixth Amendment claim for harmless error as to gun but for plain error as to drug quantity)

2. Presentation in Court of Appeals

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

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

United States v. Parsons, 396 F.3d 1015 (8th Cir. Jan. 28, 2005) (per curiam) ((1) in case submitted for decision last December, denying motion to file supplemental briefing in light of *Blakely*, where defendant claimed he "'would never had admitted to the amount of loss . . . if he had known that these factors had to be proven beyond a reasonable,'" because defendant was sentenced only on basis of facts he admitted as part of plea; (2) further, developments in law in *Blakely* and *Booker* do not invalidate plea; (3) finally, finding that "there would no merit to an argument that Parsons is entitled to resentencing under advisory Guidelines" where he was sentenced at the low of the range that he had agreed to in his plea agreement)

* *United States v. Oliver*, 397 F.3d 369 (6th Cir. Feb. 2, 2005) (finding that raising *Blakely* issue for first time in Rule 28(j) letter and at oral argument was sufficient to raise issue on appeal)

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

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

United States v. Vieth, 397 F.3d 615 (8th Cir. Feb. 8, 2005) (finding that "[e]ven if we were to address the merits of the issue raised in the Rule 28(j) letter [i.e., raised for the first time], the defendant would not be entitled to resentencing" because sentence was based on mandatory minimum, not Guidelines); *cited in United States v. Mullins*, ___ F.3d ____, 2005 WL 486709, 2005 U.S. App. LEXIS 3652 (8th Cir. Mar. 3, 2005)

United States v. Washington, 398 F.3d 306 (4th Cir. Feb. 11, 2005) (noting that "[a]lthough appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we "must apply [*Booker*] . . . to all cases on direct review")

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

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

United States v. Vanhorn, ___ F.3d ____, 2005 WL 465180, 2005 U.S. App. LEXIS 3428 (8th Cir. Mar. 1, 2005) (where defendant filed supplemental brief in appeal from denial of motion to modify restitution after appeal of conviction and sentence, finding that *Booker* and Guidelines did not apply to post-judgment proceeding)

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

United States v. Pierce, ___ F.3d ____, 2005 WL 523364, 2005 U.S. App. LEXIS 3749 (4th Cir. Mar. 7, 2005) (basing dissent in part on majority's failure to recognize plain error in sentencing based on *Booker* and noting that "[a]lthough Pierce did not directly raise this issue in briefing or oral argument,

both of which took place pre-*Booker*, he did argue that the district court's finding on the amount of loss was *not supported by the evidence before the jury* at trial" and "I would thus *sua sponte* recognize the plain *Booker* error in this case")

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

3. Not Raised in Either Court

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

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

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

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

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

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

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

United States v. Dockery, ___ F.3d ____, 2005 WL 487735, 2005 U.S. App. LEXIS 3585 (11th Cir. Mar. 3, 2005) (following GVR from Supreme Court in light of *Booker*, declining to consider *Booker* issue where defendant did not raise it while case was before court on appeal and nothing in *Booker* requires court to consider it as if timely raised) (N.B.: compare with *Washington*, cited *supra* in subpart 3 (presentation in court of appeals))

United States v. Lebovitz, ___ F.3d ____, 2005 WL 503259, 2005 U.S. App. LEXIS 3648 (11th Cir. Mar. 4, 2005) (noting that where neither party raised at any time any issue relating to *Booker*, court would say nothing about decision)

F. Harmless Error Review

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

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

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

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

United States v. Ordaz, 398 F.3d 236 (3d Cir. Feb. 23, 2005) (where defendant had objected on *Apprendi* grounds to judicial fact-finding as to drug quantities and prior convictions at sentencing held

in March 2004, vacating sentence and remanding without discussion of what the error was or whether it was harmless), *cited in United States v. Able*, unpublished, 2005 WL 428758, 2005 U.S. App. LEXIS 3229 (3d Cir. Feb. 24, 2005) (where defendant received sentence at high end of guideline range, remanding for resentencing) (N.B.: it is not clear from decision whether issue was preserved where sentencing occurred in March 2004)

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

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

United States v. Collins, ___ F.3d ____, 2005 WL 476912, 2005 U.S. App. LEXIS 3503 (4th Cir. Mar. 2, 2005) (discussing *Hughes*; stating that "[the] mandate from the Supreme Court present[ed] the courts of appeal with two options: decide whether a district court's sentence, under the old regime, was reasonable, or remand the case and direct the district court to resentence the Defendant in accordance with *Booker*. In *Hughes*, this Court emphatically chose the second option . . . .") (N.B.: although not at all clear from the opinion, trial counsel raised the Sixth Amendment argument at the sentencing)

United States v. Jones, ___ F.3d ____, 2005 WL 486675, 2005 U.S. App. LEXIS 3569 (6th Cir. Mar. 3, 2005) (because defendant raised challenge in district court, reviewing ruling *de novo*; describing "the district court's factual finding as to the amount of drugs, resulting in an enhancement of Jones' sentence under the Guidelines, [as] the textbook example of a Sixth Amendment violation under *Booker*")

United States v. Story, unpublished, 2006 WL 566696, 2005 U.S. App. LEXIS 4096 (6th Cir. Mar. 9, 2005) (in case where defendant objected to gun enhancement at sentencing on basis that evidence was uncorroborated and unreliable, stating that because the defendant's "appeal raises a genuine Sixth Amendment violation and he preserved the objection, we do not determine whether the sentence impose was unreasonable," preferring to remand case to district court)

United States v. Sayre, ___ F.3d ____, 2005 WL 544819, 2005 U.S. App. LEXIS 3919 (8th Cir. Mar. 9, 2005) (where district court departed upward for particularly serious nature of obstructive conduct as to which defendant had agreed two-level adjustment under U.S.S.G. § 3C1.1 was proper,

finding that defendant's substantial rights were not affected because it was clear from record that lower court had exercised discretion to impose what it believed was appropriate sentence)

G. Plain Error Review

1. Nature and Existence of Error

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

United States v. Frye, ___ F.3d ____, 2005 WL 315563, 2005 U.S. App. LEXIS 2519 (11th Cir. Feb. 10, 2005) (per curiam) (in methamphetamine manufacturing case, finding that defendant's admissions in factual resume supporting plea were sufficient to support findings by district court that defendant was organizer/leader under U.S.S.G. § 3B1.1 and that offense involved substantial risk to human life under U.S.S.G. § 2D1.1(b)(5)(B); thus there was no Sixth Amendment violation), *opinion withdrawn and appeal dismissed*, ___ F.3d ____, 2005 WL 564039, 2005 U.S. App. LEXIS 4174 (11th Cir. Mar. 11, 2005)

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

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

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

* *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. Feb. 22, 2005) (in first opinion from circuit regarding *Booker*, stating that "[t]he *Booker* error is that the defendant's Guidelines sentence was imposed under a mandatory system" and that "[t]he error is not that a judge (by a preponderance of the evidence) determined facts under the Guidelines which increased a sentence beyond that authorized by the jury verdict or an admission by the defendant; the error is only that the judge did so in a mandatory Guidelines system;" and finally, that "[a] mandatory minimum sentence imposed as required by a statute based on facts found by a jury or admitted by a defendant is not a candidate for *Booker* error"); *see also United States v. Serrano-Beauvaix*, ___ F.3d ____, 2005 WL 503247, 2005 U.S. App. LEXIS 3638 (1st Cir. Mar. 4, 2005) (Lipez, J., concurring, joined by Torruella, J.)

United States v. Williams, ___ F.3d ____, 2005 WL 425212, 2005 U.S. App. LEXIS 3198 (2d Cir. Feb. 23, 2005) (in follow-up to *Crosby*, agreeing with Eleventh Circuit in *Rodriguez* that "the Sixth Amendment error is the mandatory use of the Guidelines enhancement, not the fact of the enhancement")

United States v. Shelton, ___ F.3d ____, 2005 WL 435120, 2005 U.S. App. LEXIS 3290 (11th Cir. Feb. 25, 2005) (noting two forms of error, one under Sixth Amendment stemming from judicial fact-finding in mandatory scheme, and one based on mandatory nature of guidelines; finding no Sixth Amendment error in fact-finding as to drug quantity where defendant "admitted" facts by failing to dispute PSR; but finding plain error as to sentencing under mandatory system and that error affected defendant's substantial rights because defendant had established reasonable probability that outcome would have been different under advisory system in that district expressed several times that it thought sentence was too severe)

United States v. Mares, ___ F.3d ____, 2005 WL 503715, 2005 U.S. App. LEXIS 3653 (5th Cir. Mar. 4, 2005) (in first opinion from circuit to address *Booker*, finding error to be that district court increased sentence based on its findings of facts under mandatory Guidelines system)

United States v. Gilchrist, unpublished, 2005 U.S. App. LEXIS 3945 (4th Cir. Mar. 8, 2005) (Luttig, J., concurring in grant of rehearing and order of remand) (explaining in extended discussion the two forms of error established by *Booker*)

United States v. Bradley, ___ F.3d ____, 2005 WL 549176, 2005 U.S. App. LEXIS 3970 (6th Cir. Mar. 10, 2005) (noting that although defendant "does not have a tenable *constitutional* claim, however, does not prove the absence of a tenable *statutory* claim")

2. Error's Impact Upon Substantial Rights

United States v. Bruce, 396 F.3d 697 (6th Cir. Feb. 3, 2005) (in case involving application of U.S.S.G. § 3C1.1 based on defendant's false statement to probation officer regarding his citizenship, although finding that error occurred that was plain, declining to decide whether error affected substantial rights and declining to exercise discretion to notice error where defendant contested only that statement was

not material, not that he had made statement, and where district court had sentenced defendant at top end of range, such that it declined to exercise discretion it had even under mandatory system)

* *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. Feb. 4, 2005) (in MDMA case that went to trial, where defendant had objected at sentencing (held before *Blakely*) about use of inconsistent, uncertain, and vague trial testimony to set quantity of tablets, rejecting this contention; further, on plain error review, rejecting *Blakely* claim because, while there was error that was plain, it did not affect defendant's substantial rights; burden was on defendant to show prejudice; any argument that outcome would have been different was pure speculation; discussing and rejecting positions of Second, Fourth, and Sixth Circuits in, respectively, *Crosby*, *Hughes*, and *Oliver*)

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

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

* *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. Feb. 22, 2005) (in first opinion from circuit regarding *Booker*, discussing different standards for assessing effect of error on outcome; concluding that standard expressed in *United States v. Dominguez-Benitez*, 124 S. Ct. 2333 (2004) – that"[a] defendant must . . . satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding" – is most apt); *but see United States v. Serrano-Beauvaix*, ___ F.3d ____, 2005 WL 503247, 2005 U.S. App. LEXIS 3638 (1st Cir. Mar. 4, 2005) (Lipez, J., concurring, joined by Torruella, J.) (while recognizing that *Antonakopoulos* is binding on subsequent panels, writing to explain that defendants should be entitled to presumption of prejudice that government then try to rebut)

* *United States v. Williams*, ___ F.3d ____, 2005 WL 425212, 2005 U.S. App. LEXIS 3198 (2d Cir. Feb. 23, 2005) (in follow-up to *Crosby*, defending court's remand approach by explaining why court disagrees with Eleventh Circuit in *Rodriguez* as to need for defendant to demonstrate prejudice, but

also suggesting that approach of Fourth Circuit (*Hughes*) and Sixth Circuit (*Oliver*) of requiring remand, while "far more consonant with precepts of justice than an affirmance," may go too far in other direction)

* *United States v. Paladino*, ___ F.3d ____, 2005 WL 435430, 2005 U.S. App. LEXIS 3291 (7th Cir. Feb. 25, 2005) (in first opinion from circuit on plain error, rejecting government's argument that if a "judge imposed a sentence higher that the guideline minimum, this shows that he wouldn't have imposed a lighter sentence even if he had known the guidelines were merely advisory" because "[a] conscientious judge . . . would pick a sentence relative to the guideline range," i.e., "[I] he thought the defendant a more serious offender than an offender at the bottom of the range, he would give him a higher sentence even if he thought the entire range too high;" adopting approach (with modification) of Second Circuit in *Crosby* and *Williams* of remanding to district court to determine if that court would give different sentence under advisory Guidelines)

United States v. Lee, ___ F.3d ____, 2004 WL 3205270, 2005 U.S. App. LEXIS 3481 (7th Cir. Feb. 25, 2005) (expanding on *Paladino*, *supra*; finding no plain error where defendant was sentenced to statutory maximum, which was well below guideline range (as to which district court made various factual findings that increased it), and district court "expressed frustration at his inability to impose a higher" sentence)

United States v. Shelton, ___ F.3d ____, 2005 WL 435120, 2005 U.S. App. LEXIS 3290 (11th Cir. Feb. 25, 2005) (finding no Sixth Amendment error, but finding plain error as to sentencing under mandatory system and that error affected defendant's substantial rights because defendant had established reasonable probability that outcome would have been different under advisory system in that district expressed several times that it thought sentence was too severe)

United States v. Williams, unpublished, 2005 WL 513506, 2005 U.S. App. LEXIS 36558 (6th Cir. Mar. 3, 2005) (applying *Barnett*'s rebuttable presumption of prejudice and finding plain error where district court had denied downward departure but had "struggled" with decision to sentence defendant to imprisonment rather than home confinement)

United States v. Serrano-Beauvaix, ___ F.3d ____, 2005 WL 503247, 2005 U.S. App. LEXIS 3638 (1st Cir. Mar. 4, 2005) (following *Antonakopoulos*; finding that finding that district court's statement that "I have to consider the fact that I cannot sentence him to 60 months" and that "[t]he lowest I can sentence [the defendant] is 63" months is not enough for defendant to carry burden that there was reasonable probability that he would sentenced more leniently under advisory Guidelines)

United States v. Mares, ___ F.3d ____, 2005 WL 503715, 2005 U.S. App. LEXIS 3653 (5th Cir. Mar. 4, 2005) (in first opinion from circuit to address *Booker*, agreeing with Eleventh Circuit in *Rodriguez* that defendant bears heavy burden in establishing that error affected his substantial rights; finding that defendant here did not carry burden)

United States v. Hamm, ___ F.3d ____, 2005 WL 525232, 2005 U.S. App. LEXIS 3796 (6th Cir. Mar. 8, 2005) (in child sex case in which there was no Sixth Amendment error because defendant was sentenced based solely on facts he admitted, finding error in sentencing under mandatory Guidelines where, although district court denied downward departure, it sentenced defendant to low end of range: "Based upon the district court's imposition of a sentence at the low end of the range and its apparent sympathy for Hamm, we believe that the court might have sentenced Hamm to fewer than 33 months in prison if it had filed that it were free to do so.")

United States v. Sayre, ___ F.3d ____, 2005 WL 544819, 2005 U.S. App. LEXIS 3919 (8th Cir. Mar. 9, 2005) (where district court departed upward for particularly serious nature of obstructive conduct as to which defendant had agreed two-level adjustment under U.S.S.G. § 3C1.1 was proper, finding that defendant's substantial rights were not affected because it was clear from record that lower court had exercised discretion to impose what it believed was appropriate sentence)

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

3. Discretion to Correct Error

* *United States v. Hughes*, 396 F.3d 374 (4th Cir. Jan. 24, 2005) (finding plain error in sentencing of defendant based on judicial factfinding under mandatory guideline scheme and remanding for resentencing under advisory scheme), opinion reissued with revisions, Mar. 16, 2005, available at http://pacer.ca4.uscourts.gov/opinion.pdf/034172.P.pdf; *see also United States v. Washington*, 398 F.3d 306 (4th Cir. Feb. 11, 2005) (in follow-up case to *Hughes* in which evidence supporting enhancement was presented at trial, "readily" finding plain error and vacating sentence), *pet. for panel rhrg granted* Mar. 8, 2005; *United States v. Collins*, ___ F.3d ____, 2005 WL 476912, 2005 U.S. App. LEXIS 3503 (4th Cir. Mar. 2, 2005) (discussing *Hughes*; stating that "[the] mandate from the Supreme Court present[ed] the courts of appeal with two options: decide whether a district court's sentence, under the old regime, was reasonable, or remand the case and direct the district court to resentence the Defendant in accordance with *Booker*. In *Hughes*, this Court emphatically chose the second option . . . ."); *United States v. Johnson*, ___ F.3d ____, 2005 WL 526889, 2005 U.S. App. LEXIS 3807 (4th Cir. Mar. 8, 2005) (remanding case); *but see United States v. Gilchrist*, unpublished, 2005 U.S. App. LEXIS 3945 (4th Cir. Mar. 8, 2005) (Luttig, J., concurring in grant of rehearing and order of remand) (explaining why he believes *Hughes* is "fundamentally flawed")

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

obstruction and thus *could* be applied, leaving it to district court as to whether it *ought* to be applied now that Guidelines are advisory);

United States v. Bruce, 397 F.3d 697 (6th Cir. Feb. 3, 2005) (in case involving application of U.S.S.G. § 3C1.1 based on defendant's false statement to probation officer regarding his citizenship, although finding that error occurred that was plain, declining to decide whether error affected substantial rights and declining to exercise discretion to notice error where defendant contested only that statement was not material, not that he had made statement, and where district court had sentenced defendant at top end of range, thus declining to exercise discretion it had even under mandatory system)

United States v. Ameline, ___ F.3d ____, 2005 WL 350811, 2005 U.S. App. LEXIS 2032 (9th Cir. Feb. 9, 2005; amended Feb. 10, 2005) (following Fourth Circuit's decision in *Hughes* in holding that under plain error standard, only "the *truly* exceptional case . . . will not require remand for resentencing under the new advisory guideline regime"), *reh'g en banc granted* Mar. 11, 2005

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

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

* *United States v. Williams*, ___ F.3d ____, 2005 WL 425212, 2005 U.S. App. LEXIS 3198 (2d Cir. Feb. 23, 2005) (in follow-up to *Crosby*, discussing fourth prong of *Olano* analysis at some length)

H. Consideration of Other Sentencing Issues Prior to Remand

United States v. Hughes, 396 F.3d 374 (4th Cir. Jan. 24, 2005) (after finding plain error in sentencing of defendant under mandatory guideline scheme, considering other sentencing issues raised by defendant "[b]ecause [as] the district court must consider the correct guideline range before imposing a sentence on remand, the same calculation issues already raised by Hughes are likely to arise again"), opinion reissued with revisions, Mar. 16, 2005, at http://pacer.ca4.uscourts.gov/opinion.pdf/034172.P.pdf

United States v. Ordaz, 398 F.3d 236 (3d Cir. Feb. 23, 2005) (noting in passing that "[i]n addition to his *Blakely* arguments, Ordaz argues that the District Court made factual errors in applying the Guidelines, an issue we leave to the District Court on remand"); *see also United States v. Kleinpaste*, unpublished, 2005 WL 524949, 2005 U.S. App. LEXIS 3736 (3d Cir. Mar. 7, 2005) (remanding case

in light of *Booker* after "[h]aving determined that the sentencing issues appellant raises are best determined by the district court in the first instance")

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

United States v. Coumaris, ___ F.3d ____, 2005 WL 525213, 2005 U.S. App. LEXIS 3774 (D.C. Cir. Mar. 8, 2005) (in first opinion from circuit, granting government's motion for remand in light of *Booker*; declining to address defendant's arguments regarding district court's application of guidelines on ground that "[b]ecause the district court might impose a different sentence on remand, and because the parties might choose not to appeal that sentence, consideration of objections to the court's original guidelines calculations would be premature at best and unnecessary at worst")

United States v. Milstein, ___ F.3d ____, 2005 WL 550672, 2005 U.S. App. LEXIS 4009 (2d Cir. Mar. 10, 2005) (addressing challenges to application of specific guideline provisions because "although the Guidelines are no longer mandatory, a sentencing court is nonetheless required to consider the relevant guidelines provisions in determining a reasonable sentence")

I. Appeals by Government

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

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

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

United States v. Paladino, ___ F.3d ____, 2005 WL 435430, 2005 U.S. App. LEXIS 3291 (7th Cir. Feb. 25, 2005) (where government had cross-appealed extent of downward departure (from 235 months to 180 months, based on rehabilitation and overstatement of criminal history) before *Booker* and subsequently dropped cross-appeal, noting that "[u]nder the new sentencing regime the judge must justify

departing from the guidelines, and the justification has to be reasonable, but we cannot think on what basis a 15-year sentence for Peyton, who was 34 years old when sentenced, could be thought unreasonably short")

J. Waiver of Appeal Rights

* *United States v. Rubbo*, 396 F.3d 1330 (11th Cir. Jan. 21, 2005) (finding that *Apprendi* / *Blakely* / *Booker* claims do not fall outside of scope of waiver of appeal; enforcing waiver and dismissing appeal); *see also United States v. Grinard-Henry*, ___ F.3d ____, 2005 WL 327265, 2005 U.S. App. LEXIS 2251 (11th Cir. Feb. 11, 2005) (denying defendant's motion for reconsideration of dismissal of appeal); *United States v. Frye*, ___ F.3d ____, 2005 WL 564039, 2005 U.S. App. LEXIS 4174 (11th Cir. Mar. 11, 2005) (citing to earlier cases, stating that "'[a]n appeal waiver includes the waiver of the right to appeal difficult or debatable legal issues or even blatant error'")

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

United States v. Killgo, 397 F.3d 628 (8th Cir. Feb. 9, 2005) (in fraud and money-laundering case, refusing to consider *Blakely* / *Booker* claim where defendant had waived right to appeal "'any sentence imposed' except 'any issues solely involving a matter of law brought to the court's attention at the time of sentencing at which the court agrees further review is needed;'" stating that defendant "did not bring any issue akin to *Blakely* or *Booker* to the district court's attention" and that "[t]he fact that Killgo did not anticipate the *Blakely* or *Booker* rulings does not place the issue outside the scope of his waiver")

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

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

* *United States v. Bradley*, ___ F.3d ____, 2005 WL 549176, 2005 U.S. App. LEXIS 3970 (6th Cir. Mar. 10, 2005) (where (1) defendant had stipulated to career offender status and probable guideline range (and in fact received what he had bargained for), (2) had agreed to waive appeal as to

everything except ineffective assistance of counsel or prosecutorial misconduct (and where government had waived its right to appeal), and (3) government dismissed § 924(c) charge, finding that *Booker* did not give defendant right to appeal sentence or to be resentenced where "changes in the law generally do not permit either the government or a criminal defendant to renege on a plea agreement;" relying on *Brady v. United Statse*, 397 U.S. 742 (1970), and other Supreme Court cases)

K. *Anders* Briefs

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

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

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

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

United States v. Cadez, unpublished, 2005 WL 388158, 2005 U.S. App. LEXIS 2942 (9th Cir. Feb. 18, 2005) (affirming conviction but, "[i]n light of the brevity of the sentence" (37 months in fraud case), vacating sentence and remanding for resentencing; denying counsel's motion to withdraw); *see also United States v. Ewalt*, unpublished, 2005 WL 388296, 2005 U.S. App. LEXIS 2949 (9th Cir. Feb. 18, 2005) (affirming conviction but vacating sentencing and remanding for resentencing' denying counsel's motion to withdraw)

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

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

L. Petitions for Rehearing

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

M. Remand from Supreme Court

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

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

United States v. Dockery, ___ F.3d ____, 2005 WL 487735, 2005 U.S. App. LEXIS 3585 (11th Cir. Mar. 3, 2005) (following GVR, declining to consider *Booker* issue where defendant did not raise it while case before court on appeal and nothing in *Booker* requires court to consider it as if timely raised)

VII. POST-CONVICTION ISSUES

A. Ineffective Assistance of Counsel

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

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

United States v. Wenzel, ___ F. Supp. 2d ____, 2005 WL 579064, 2005 U.S. Dist. LEXIS 3898 (W.D. Pa. Mar. 2, 2005) (in context of procedural default, finding that counsel was not ineffective for failing to argue that *Apprendi* applied to Guidelines)

United States v. Muniz, 2005 WL 589396, 2005 U.S. Dist. LEXIS 3862 (S.D.N.Y. Mar. 14, 2005) (Stein, J.) (denying § 2255 motion in part on basis that counsel was not ineffective for failing to anticipate change in law when advising defendant at plea)

B. Amendment of § 2255 Motion

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

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

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

C. Statute of Limitations

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

(Crabb, J.) (same); *United States v. Vicario*, 2005 WL 366958, 2005 U.S. Dist. LEXIS 2368 (W.D. Wis. Feb. 10, 2005) (Crabb, J.) (same); *United States v. Vaughn*, 2005 WL 372255, 2005 U.S. Dist. LEXIS 2355 (W.D. Wis. Feb. 11, 2005) (Crabb, J.) (same)

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

D. Procedural Default of *Booker* Claim

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

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

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

United States v. Wenzel, ___ F. Supp. 2d ____, 2005 WL 579064, 2005 U.S. Dist. LEXIS 3898 (W.D. Pa. Mar. 2, 2005) (finding that defendant did not cause that would excuse procedural default because counsel's failure to raise *Apprendi* claim did not constitute ineffective assistance; further finding that futility of raising claim does not establish cause for default; finally finding that defendant waived *Apprendi* claim by entering into plea contemplating that certain conduct would be used)

E. Retroactivity of *Booker*

1. Operative Date for Calculating Finality of Conviction

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

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

2. Retroactivity as to First § 2255 Motions

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

Varela v. United States, ___ F.3d ____, 2005 WL 367095, 2005 U.S. App. LEXIS 2768 (11th Cir. Feb. 17, 2005) (per curiam) (granting certificate of appealability, but concluding that although neither Eleventh Circuit nor Supreme Court have addressed retroactivity of *Blakely* and *Booker*, *Schriro v. Summerlin*, "is essentially dispositive" of issue; joining Seventh Circuit in *McReynolds*, *supra*)

* *Humphress v. United States*, ___ F.3d _____, 2005 WL 433191, 2005 U.S. App. LEXIS 3274 (6th Cir. Feb. 25, 2005) (laying out steps of analysis, concluding that *Booker* is not retroactive; finding that reasoning in *Schriro v. Summerlin* "applies with equal force to *Booker*")

* *United States v. Price*, ___ F.3d ____, 2005 WL 535361, 2005 U.S. App. LEXIS 3817 (10th Cir. Mar. 8, 2005) (on petition for rehearing of denial of certificate of appealability in light of *Booker*, finding that *Blakely* announced procedural rule; laying out steps of *Teague* analysis; finding *Blakely* did not announce new watershed rule); *see also United States v. Leonard*, unpublished, 2005 WL 139183, 2005 U.S. App. LEXIS 1176 (10th Cir. Jan. 24, 2005) (summarily determining that *Blakely* and *Booker* are not applicable to defendant's case because his conviction became final before *Blakely* came out)

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

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

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

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

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

United States v. Johnson, 353 F. Supp. 2d 656 (E.D. Va. Jan. 21, 2005) (Smith, J.) (*Blakely* and *Booker* do not apply retroactively; there is nothing in either decision indicated that Supreme Court meant to overrule the many cases holding that *Apprendi* is not retroactive)

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

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

* *United States v. Siegelbaum*, 2005 WL 196526, 2005 U.S. Dist. LEXIS 2087 (D. Or. Jan. 26, 2005) (Panner, J.) (containing interesting discussion of retroactivity; ultimately concluding, without deciding retroactivity issue, that defendant was not entitled to relief because he got benefit of his plea bargain)

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

Tuttamore v. United States, 2005 WL 234368, 2005 U.S. Dist. LEXIS 1403 (N.D. Ohio Feb. 1, 2005) (noting that *Booker* is not retroactive and citing to some of cases listed above)

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

* *Rucker v. United States*, 2005 WL 331336, 2005 U.S. Dist. LEXIS 2004 (D. Utah Feb. 10, 2005) (Cassell, J.) (in lengthy and thorough discussion, concluding that *Booker* is new procedural rule that is not retroactive); *see also Jaffe v. United States*, 2005 WL 589330, 2005 U.S. Dist. LEXIS 3914 (D. Utah., Mar. 11, 2005) (Sam, J.) (relying heavily on *McReynolds*, *supra*, to find that *Booker* is not retroactive)

United States v. Ceja, 2005 WL 300415 (N.D. Ill. Feb. 7. 2005) (Grady, J.) (without citing to *McReynolds*, finding that *Blakely* and *Booker* are not retroactive)

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

United States v. Marple, 2005 WL 466216, 2005 U.S. Dist. LEXIS 2908 (D. Kan. Feb. 21, 2005) (Robinson, J.) (finding *Booker* is not retroactive in light of *Schriro v. Summerlin*; decision establishes new rule of procedure that is not a watershed rule); *see also United States v. Shirack*, 2005 WL 466213, 2005 U.S. Dist. LEXIS 2912 (D. Kan. Feb. 21, 2005) (Robinson, J.) (same); *United States v. Kelley*, 2005 WL 466208, 2005 U.S. Dist. LEXIS 2909 (D. Kan. Feb. 21, 2005) (Robinson, J.) (same; government also raised procedural default, which court did not address); *United v. Lewis*, 2005 WL 466214, 2005 U.S. Dist. LEXIS 291 (D. Kan. Feb. 22, 2005) (Robinson, J.) (same; government also raised waiver of § 2255 rights, which court did not address)

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

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

* *United States v. Aikens*, ___ F. Supp. 2d _____, 2005 WL 433440, 2005 U.S. Dist. LEXIS 2928 (E.D. Pa. Feb. 25, 2005) (DuBois, J.) (in fairly detailed analysis, finding *Blakely* and *Booker* not retroactive, but granting certificate of appealability)

* *United States v. Wenzel*, ___ F. Supp. 2d ____, 2005 WL 579064, 2005 U.S. Dist. LEXIS 3898 (W.D. Pa. Mar. 2, 2005) (in fairly extended analysis, concluding that *Blakely* and *Booker* are not retroactive, but granting certificate of appealability)

3. Retroactivity as to Second or Successive § 2255 Motions

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

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

Bey v. United States, ___ F.3d ____, 2005 WL 469667, 2005 U.S. App. LEXIS 3451 (10th Cir. Mar. 1, 2005) (denying authorization to file second or successive § 2255 motion based on *Blakely* and *Booker* because Supreme Court has not made decisions retroactive); *see also United States v. Lucero*, 2005 WL 388731, 2005 U.S. App. LEXIS 2928 (10th Cir. Feb. 18, 2005) (treating Rule 60)b) motion to reconsider denial of § 2255 motion as second or successive § 2255 motion and denying authorization to file it because Supreme Court has not made *Booker* retroactive)

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

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

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

United States v. Barnes, 2005 WL 217027, 2005 U.S. Dist. LEXIS 1203 (E.D. Pa. Jan. 28, 2005) (Bartle, J.) (denying without prejudice defendant's second motion under 28 U.S.C. § 2255 because petitioner had not moved in Third Circuit for permission to file motion)

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

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

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

United States v. Tam, 2005 WL 486772, 2005 U.S. Dist. LEXIS 3154 (E.D. Pa. Mar. 1, 2005) (Yohn, J.) (defendant cannot use Rule 60(b) motion to collaterally attack underlying judgment; such motion will be treated as second or successive § 2255 motion, which requires authorization from court of appeals)

H. § 2241 Motions

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

Rodriguez v. Joslin, 2005 WL 178034, 2005 U.S. Dist. LEXIS 1103 (N.D. Tex. Jan. 27, 2005) (Sanderson, M.J.) (in case where petitioner had previously filed a § 2255 motion, recommending that motion made pursuant to 28 U.S.C. § 2241 motion be denied because it should be construed as § 2255 motion and petitioner did not demonstrate that savings clause of § 2255 applied where *Booker* has not been made retroactive; further, court has no jurisdiction where Fifth Circuit has not issued order granting petitioner leave to file second § 2255 motion)

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

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

I. Waiver of § 2255 Rights

United States v. Braxton, ___ F. Supp. 2d _____, 2005 WL 433635, 2005 U.S. Dist. LEXIS 2718 (W.D. Va. Feb. 14, 2005) (where defendant had waived rights both to appeal and to pursue § 2255, and defendant subsequently filed § 2255 motion raising both *Blakely* claim and ineffective assistance of counsel claim (the latter based in part upon counsel's failure to file a notice of appeal despite defendant's request that she do so), finding that waiver of § 2255 rights can include waiver of IAC claims, and that defendant's waiver was knowing and voluntary; dismissing *Blakely* claim based on valid waiver)

United v. Lewis, 2005 U.S. Dist. LEXIS 291 (D. Kan. Feb. 22, 2005) (Robinson, J.) (government raised waiver of § 2255 rights, but court did not address because it found *Booker* not retroactive)

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

United States v. Muniz, 2005 WL 589396, 2005 U.S. Dist. LEXIS 3862 (S.D.N.Y. Mar. 14, 2005) (Stein, J.) (denying § 2255 motion in part on basis that defendant knowingly and voluntarily waived right to appeal and/or collaterally attack his sentence)

J. Other Grounds for Dismissal of § 2255 Motion

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

K. Certificates of Appealability

United States v. Love, 2005 WL 552132 (W.D. Wis. Mar. 3, 2005) (Crabb, J.) (discussing and applying standard for COA; denying request); *see also United States v. Raines*, 2005 WL 568044 (W.D. Wis. Mar. 8, 2005) (Crabb, J.); *United States v. Miller*, 2005 WL 568064 (W.D. Wis. Mar. 8, 2005) (Crabb, J.)