Minutes of the February 15, 2005
United States Sentencing Commission
Public Meeting

Chair Hinojosa called the meeting to order at 1:43 p.m. in the Judicial Conference Center, Thurgood Marshall Federal Judiciary Building.

The following Commissioners and staff participated in the meeting:

Ricardo H. Hinojosa, Chair
Ruben Castillo, Vice Chair
William K. Sessions, III, Vice Chair
John R. Steer, Vice Chair
Michael E. Horowitz, Commissioner
Beryl Howell, Commissioner
Deborah Rhodes, Commissioner Ex Officio
Edward F. Reilly, Jr., Commissioner Ex Officio
Timothy B. McGrath, Staff Director
Charles R. Tetzlaff, General Counsel
Judith Sheon, Special Counsel

Chair Hinojosa called the meeting to order and announced he would save the Chair's Report for his opening remarks at the public hearing at 2 p.m.

Chair Hinojosa then called for a motion to adopt the January 27, 2005 minutes. Vice-Chair Steer made the motion, which was seconded by Vice-Chair Sessions. The motion passed unanimously.

Chair Hinojosa called on Charles Tetzlaff, General Counsel, to present the proposed amendments and issues for comment for a possible vote to publish in the Federal Register.

General Counsel Tetzlaff stated that the first proposed amendment implements the Identity Theft Penalty Enhancement Act, which creates two new offenses for aggravated identity theft. The Act provides for mandatory consecutive penalties for use of false identification documents in eleven categories of fraud offenses. A conviction carries a mandatory two-year consecutive sentence. A mandatory five-year consecutive sentence is required for use of false identification in a federal crime of terrorism.

The proposed amendment creates a new guideline at §2B1.6 (Aggravated Identity Theft) and sets the guideline sentence as the term of imprisonment required by statute. The proposed amendment also responds to the directive in section 5 of the Act and amends §3B1.3 (Abuse of Position of Trust or Use of Special Skills) to ensure that an adjustment under this guideline applies to a defendant who uses his or her position in order to unlawfully obtain any means of identification.

Finally, the proposed amendment seeks to simplify the identity theft enhancement at §2B1.1(b)(10) by changing it from an enhancement based on relevant conduct to an enhancement based on the offense of conviction. There is also one issue for comment.

General Counsel Tetzlaff stated that a motion to publish the proposed amendment and issue for comment was in order. The motion to publish should include a reduction of the usual 60 day comment period set out in Rule 4.4 of the Commission Rules of Practice and Procedure to 30 days because the 60 days is not practicable as a result of the impact on the Commission during this amendment cycle of the Blakely and Booker decisions. Finally, the motion should provide staff with the authority to make technical and conforming changes if necessary.

Chair Hinojosa called for the motion. Vice-Chair Steer so moved, and Vice-Chair Sessions seconded the motion. The motion passed unanimously.

General Counsel Tetzlaff stated that the second proposed amendment is in response to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which increased both the fines and statutory maximum terms of imprisonment under the Sherman Antitrust Act. The maximum term of imprisonment under the Act was raised from 3 years to 10 years.

The proposed amendment provides for a base offense level of either level 12 or level 14 under antitrust guideline, §2R1.1. The proposed amendment also eliminates the one-level increase for bid rigging cases at §2R1.1(b)(1) on the basis that the majority of cases reviewed involve bid rigging, and that factor can be incorporated into the new base offense level. There are two issues for comment.

General Counsel Tetzlaff stated that a motion to publish the proposed amendment and issues for comment was in order. The motion to publish should include a reduction of the usual 60 day comment period set out in Rule 4.4 of the Commission Rules of Practice and Procedure to 30 days because the 60 days is not practicable as a result of the impact on the Commission during this amendment cycle of the Blakely and Booker decisions. Finally, the motion should provide staff with the authority to make technical and conforming changes if necessary.

Chair Hinojosa called for the motion. Commissioner Castillo so moved, and Commissioner Howell seconded the motion. The motion passed unanimously with some discussion. Commissioner Castillo commented that in light of the Act passed by Congress and the Commission's work on public corruption and white collar offenses, he believes the increase is justified for this particular category of offenses and will push for the highest penalties.

General Counsel Tetzlaff stated that the third proposed amendment is comprised of seven miscellaneous issues. One is a proposed issue for comment in response to a directive from Congress to review and consider amending the guidelines to provide for increased penalties for offenses involving anabolic steroids. The issue for comment seeks general comment on how the Commission should implement the directive and specifically whether the Commission should amend the Drug Equivalency Tables and/or the Notes to the Drug Quantity Table in §2D1.1 to provide a heightened marijuana equivalency for anabolic steroids and if so, what should be the amended equivalency rate.

The remaining miscellaneous amendments were not specifically discussed as many were of a technical and conforming nature.

General Counsel Tetzlaff stated that a motion to publish the proposed miscellaneous amendments was in order. The motion to publish should include a reduction of the usual 60 day comment period set out in Rule 4.4 of the Commission Rules of Practice and Procedure to 30 days because the 60 days is not practicable as a result of the impact on the Commission during this amendment cycle of the Blakely and Booker decisions. Finally, the motion should provide staff with the authority to make technical and conforming changes if necessary.

Chair Hinojosa called for a motion. Vice Chair Steer made the motion but amended it to publish the proposed issue for comment relating to anabolic steroids separately from the other miscellaneous amendments. Commissioner Horowitz seconded the motion as amended. The amended motion passed unanimously.

There being no further matters for consideration, Vice-Chair Steer moved to adjourn, and Vice-Chair Sessions seconded the motion. The motion passed unanimously, and Chair Hinojosa adjourned the meeting at 1:53 p.m.

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MEMORANDUM

TO: Commissioners
Office of General Counsel

FROM: Kelley L. Land, Staff Attorney
Office of General Counsel

THROUGH: Charles R. Tetzlaff, General Counsel
Office of General Counsel

DATE: March 15, 2005

SUBJECT: Status of post-*Booker* Case Law; Substantive Circuit Court and Representative District Court Opinions.[1]

INTRODUCTION

Since the Supreme Court decided *United States v. Booker*, 125 S. Ct. 738 (2005), on January 12, 2005, every circuit and numerous district courts have given their interpretation of various aspects of the opinion. This memo explores the substantive post-*Booker* circuit court opinions to date, and also highlights representative opinions (*i.e.*, it is not a comprehensive compilation) from some district courts.

CIRCUIT COURT OPINIONS

I. First Circuit

A. Plain Error Standard

United States v. Antonakopoulos, 2005 WL 407365 (1st Cir. Feb. 22, 2005)

In *Antonakopoulos*, Circuit Court Judges Selya, Stahl and Lynch set forth the standard of review for unpreserved claims of sentencing errors after *Booker*. The defendant in the present

[1] This is an updated version of the Status of post-*Booker* Case Law memorandum last updated on February 15, 2005, covering substantive circuit court opinions and representative district court opinions available through Monday, March 14, 2005.

case argued that *Booker* automatically required resentencing because the sentencing court rather than the jury made the factual findings which enhanced his sentence. The court found that "[t]he error [was] not that a judge (by a preponderance of the evidence) determined facts under the Guidelines which increased the sentence beyond that authorized by the jury verdict or an admission by the defendant; the error [was] only that the judge did so in a mandatory Guidelines system." *Id.* at *4.

The court stated for all unpreserved claims of *Booker* error, it intended to apply conventional plain-error doctrine, where the *Booker* error is that the defendant's guideline sentence was imposed under a mandatory system.[2] The court determined that the first two *Olano* prongs for a plain error finding will be met whenever the sentencing court treated the guidelines as mandatory. For the third prong, the court found that *Olano* makes it clear that under a plain-error analysis, it is the defendant who bears the burden of persuasion with respect to prejudice. And, to meet both the third and forth prongs, the court asserted that in its view, ordinarily the defendant "must point to circumstances creating a reasonable probability that the district court would impose a different sentence more favorable under the new 'advisory Guidelines' *Booker* regime." *Id.* at *5 (citing *United States v. Dominguez-Benitez*, 124 S. Ct. 2333 (2004)). The court rejected a *per se* remand rule solely on the basis that a sentence was enhanced by judicial fact-finding, disagreeing with the Fourth Circuit in *United States v. Hughes* and the Sixth Circuit in *United States v. Milan* and *United States v. Oliver*, discussed in Parts IV and VI below. *Id.* at *8. The First Circuit found that standing alone, judicial fact-finding is insufficient to meet the third and forth prongs of *Olano*, because nothing in *Booker* requires submission of the facts to a jury, so long as the guidelines are not mandatory. *Id.* at *9. Therefore, the court also rejected a *per se* remand rule solely on the basis that the guidelines are no longer mandatory. In the court's view, it cannot be said that all sentences imposed before *Booker* threatened the fairness, integrity, or public reputation of judicial proceedings or undermined confidence in the outcome of the sentence simply because the guidelines were mandatory. *Id.*

In considering all future appeals in which remand may be warranted, the court asserted the following; first, where it engages in a plain-error review and finds it clear that the sentencing court has made an error under the guidelines, there is a strong argument for remand; second, where a district judge has expressed that the sentence imposed was unjust, grossly unfair, or disporportionate to the crime committed and that he would have sentenced otherwise if possible, there is a powerful argument for a remand; and third, even in cases where the sentencing judge is silent, there may be cases in which the appellate panel is convinced by the defendant, based on the facts of the case, that the sentence would, with reasonable probability, have been different such that both the third and fourth prongs are met, and thus a remand will be warranted. *Id.* at *9-10.

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[2] In *United States v. Olano*, 507 U.S. 725 (1993), the Supreme Court held "[t]here must be an 'error' that is 'plain' and that 'affect[s] substantial rights.' Moreover, Rule 52(b) leave the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 1776.

United States v. Serrano-Beauvaix, 2005 WL 503247 (1st Cir. March 4, 2005)

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

Circuit Judge Lipez concurred, but stated he did not believe the court should require defendants who invoke unpreserved *Booker* errors to make a specific showing of prejudice to satisfy the third prong of plain-error review. Instead, he believes such error should entitle the defendant to a presumption of prejudice, which the government can then rebut; the same approach adopted by a panel of the Sixth Circuit in *United States v. Barnett*, 2005 WL 357015 (6th Cir. Feb. 16, 2005), discussed in Part VI below. Judge Lipez stated this approach has also been applied by sister circuits in other contexts "where the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred." *Id.*

II. Second Circuit

A. Plain Error Standard

United States v. Crosby, 2005 WL 240916 (2d Cir. Feb. 2, 2005)[3]

In *Crosby*, Circuit Judges Newman, Kearse, and Cabranes engaged in a detailed analysis of federal sentencing law prior to *Booker* and *Fanfan* and discussed at length the *Booker* and *Fanfan* opinions. It then opined that after *Booker* and *Fanfan*, sentencing courts remain under a continuing duty to "consider" the guidelines by first determining the guideline range in the same manner as before *Booker* and *Fanfan*. *Id.* at *18-19. Once this range has been determined, the sentencing court has the duty under 18 U.S.C. § 3553(a)(4), to "consider" the range, along with

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

the factors of § 3553(a). *Id.* at *22-23. The court stated that in this instant appeal, it did not need to determine what degree of consideration is required or what weight should be given to the guidelines, because "[w]e think it more consonant with the day-to-day role of district judges in imposing sentences and the episodic role of appellate judges in reviewing sentences, especially under the now applicable standard of 'reasonableness,' to permit the concept of 'consideration' . . . to evolve as district judges faithfully perform their statutory duties. Therefore, we will not prescribe any formulation a sentencing judge will be obliged to follow in order to demonstrate discharge of the duty to 'consider' the Guidelines." *Id.* at *24.

With respect to appellate review of sentences post-*Booker*, the court noted that the review for reasonableness is not limited to a consideration of the length of a sentence, and that a sentence will not be reasonable if legal errors led to its imposition. *Id.* at *27. The possibility of a sentence which is unreasonable for legal error in the method of its selection concerned the court because it will be impossible to tell whether the sentencing court would have imposed the same sentence had it not been compelled to impose a guideline range. *Id.* at *30. The court then declined to fashion any *per se* rule as to the reasonableness of every sentence within an applicable guideline range or the unreasonableness of every sentence outside the applicable guideline range, because it found that such a *per se* rule would "risk being invalidated as contrary to the Supreme Court's holding in *Booker/Fanfan*, because [that] would effectively re-institute mandatory adherence to the Guidelines." *Id.* at *31. Additionally, the court noted that even if, prior to *Booker*, a sentencing court had indicated an alternative sentence that would be imposed if compliance with the guidelines were not required, the alternative sentence would not necessarily be the same one the court would have imposed in compliance with the duty to consider all factors listed in § 3553(a). *Id.* at *39.

Finally, the court laid out in detail its plan for how it will handle all post-*Booker* appeals on direct review. It concluded that it was appropriate, for all pre-*Blakely* and pre-*Booker* sentences pending on direct review, to remand to the district court "not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine *whether* to resentence, now fully informed of the new sentencing regime, and if so, to resentence." *Id.* at *37 (emphasis in original). It stated that a remand for determination of whether to resentence is appropriate in order to undertake a proper application of the plain error and harmless error doctrines. *Id.* at *38 "In short, a sentence imposed under a mistaken perception of the requirements of law will satisfy plain error analysis if the sentence imposed under a correct understanding would have been materially different. It is readily apparent to us that a sentence imposed prior to *Booker/Fanfan* was imposed without an understanding of sentencing law as subsequently explained by the Supreme Court. However, we cannot know whether a correct perception of the law would have produced a different sentence. . . . If a district court determines that a nontrivially different sentence would have been imposed, that determination completes the demonstration that the plain error test is met." *Id.* at *41-42.[4]

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[4] On February 11, 2005, in ***United States v. Konstantakakos***, 2005 WL 348376 (2d Cir. Feb. 11, 2005), the Second Circuit conducted a more detailed plan error standard of review, citing the four prongs the defendant is required to demonstrate, as stated in *Olano*.

C. Revocation of Supervised Release

United States v. Fleming, No. 04-1817, slip op. (2d Cir. Feb. 2, 2005)

Circuit Judge Newman determined in *Fleming* that the sentencing court did not err in its consideration of relevant sentencing factors or in the length of the sentence imposed after the defendant's third violation of conditions of his supervised release. Acknowledging that *Booker* excised and severed 18 U.S.C. § 3742(e), which specified standards for appellate review, the court looked to § 3583(e) which requires a judge to consider most of the factors listed in § 3553(a) in a revocation of supervised release, including applicable policy statements. *Id.* at 3-4. In this case, the recommended term of imprisonment under §7B1.1(a)(3) was 5 to 11 months, and the sentencing court imposed a two year term of imprisonment. *Id.* at 6-7. The court stated once the Supreme Court excised § 3742(e), which included a "plainly unreasonable" review for sentences for which there was no guideline, *Booker*'s announced standard of reasonableness is to be applied "not only to review of sentences for which there are guidelines but also to review sentences for which there are no guidelines." *Id.* at *8. The court found that as long as the sentencing judge was aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates a misunderstanding about their relevance, the court would accept that the requisite consideration under § 3583(e) has been met, and further found that "reasonableness" in the context of review of sentences is a flexible concept. *Id.* at 9-10. Under the circumstances in the present case, the court did not find the two year sentence to be unreasonable. *Id.* at 14.

The court distinguished this case from *United States v. Crosby*, discussed above, wherein it had observed that in many cases, it will not be possible to tell whether the sentencing judge would have given a different sentence if it had been fully informed of the applicable requirements of the Sentencing Reform Act (SRA) and *Booker*. In the present case, the court stated that although it had remanded in *Crosby* to afford the sentencing court an opportunity to consider whether to resentence, here, the sentencing court was functioning under Chapter 7 of the guidelines which was advisory even before *Booker*, and knowing it was not bound by the policy statements, had chosen to exercise its discretion. *Id.*

III. Third Circuit

A. Plain Error Standard

The Third Circuit has not yet ruled on the plain error standard of review for sentencings pursuant to *Booker*. Instead, the circuit's judges have held that with respect to alleged sentencing errors, the issue is best determined by the district court in the first instance, vacating the sentence and remanding for resentencing, doing so first in *United States v. Mortimer*, 2005 WL 318650 (3d Cir. Feb. 10, 2005), discussed more fully below.[5]

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[5] The court has since followed the line of reasoning that *Booker* issues are "best determined by the district court in the first instance in subsequent opinions without further substantive discussion. In ***United States v. Able***,

B. Criminal History Calculation

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

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

C. Drug Quantity Calculation

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

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

2005 WL 428758 (3d Cir. Feb. 24, 2005), Circuit Judges Greenberg, Sloviter and Fuentes, determined that the sentencing court treated the guidelines as mandatory rather than advisory, because it stated in its statement of reasons that "[t]he sentence is within the guideline range, the range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by the application of the guidelines." *Id.* at *1. Therefore, because the court determined that the defendant's sentencing issues are best determined by the district court in the first instance, it remanded for resentencing. *Id.* In ***United States v. Marquez***, 2005 WL 455858 (3d Cir. Feb. 28, 2005), in an opinion written by Circuit Judge Aldisert, he and Circuit Judges Sloviter and Ambro stated that the unspecified sentencing issues challenged by the defendant were best determined by the district court in the first instance, and therefore vacated the sentence and remanded for resentencing. *Id.* at *2.

E. Concurrent Sentence Rule

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

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

IV. Fourth Circuit

A. Plain Error Standard

United States v. Hughes, 396 F.3d 374 (4th Cir. Jan. 24, 2005)[6]

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

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[6] On March 8, 2005, the same panel which decided *United States v. Hughes* granted a rehearing of *Hughes* at the direction of the Court on the government's Petition for Rehearing En Banc. *United States v. Hughes*, No. 03-4172, slip op. (4th Cir. March 8, 2005).

United States v. Gilchrist, No. 03-4379, slip op. (4th Cir. March 8, 2005)

In *Gilchrist*, the court remanded for resentencing pursuant to *Hughes* in an opinion for the court by Senior Circuit Judge Hamilton, with concurrences by Circuit Judges Neimeyer and Luttig, on the same day the panel in *Hughes* granted a rehearing. In his concurrence, Circuit Judge Luttig stated he did not believe the remand to be absolutely necessary, and explained why he believed the panel fundamentally erred in its decision in *Hughes*. *Id.* at 3. Specifically, he determined the *Hughes* panel erred in its identification of the error, whether the error affected *Hughes* substantial rights, and in its decision to exercise its discretion to recognize the error, thereby misapplying the plain error doctrine. *Id.*

Judge Luttig explained that the panel's mistake was in not considering as error the sentencing court's application of the guidelines in their mandatory form, but instead as the imposition of a sentence based on facts found by the judge, thereby failing to take into account both the entirety of the holding in *Booker* and that the central premise of *Booker* is that if the guidelines could be read as advisory, the selection of a particular sentence based on differing sets of facts would not implicate the Sixth Amendment. *Id.* at 7-8. Judge Luttig pointed out that despite the fact there was no Sixth Amendment violation in Fanfan's case, the Court vacated and remanded in order to permit the government to seek resentencing, based on the extra-verdict facts that the district court refused to consider. *Id.* at 9. Further, Judge Luttig stated that the *Hughes* panel erred by holding that the defendant's substantial rights were violated because he would have received a lower sentence had the sentencing court imposed a sentence in accordance with the facts found by the jury. *Id.* at 10. "[P]rejudice must be determined by comparing what the district court did under a mandatory regime to 'what the district court would have done had it imposed a sentence in the exercise of its discretion pursuant to § 3553(a) . . . an inquiry expressly rejected in *Hughes*." *Id. (quoting Booker*, at 380). Finally, Judge Luttig stated the *Hughes* panel erred in exercising its discretion to notice the error on the ground that *Booker* wrought a major change in how sentencing is to be conducted, stating the panel's conclusion would compel remand in every case where the court must apply Rule 52(b) to *Booker* errors. *Id.* at 13. In his view, the *Hughes* panel's defense of its exercise of discretion, resting not on the presence of a Sixth Amendment violation, applies to all sentences imposed prior to *Booker*, even those imposed at the court's direction in *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004), because even in those cases, the sentences were not imposed under a regime in which the guidelines were treated as advisory. *Id.*

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

In *Washington*, Circuit Judges Niemeyer, Luttig and King determined that the plain error test was satisfied in that the judicial fact-finding leading to an enhancement for obstruction of justice resulted in a sentence exceeding the maximum sentence authorized by the jury verdict pursuant to the then-mandatory guidelines. *Id.* at *15-16. Further, the court found the error was prejudicial and affected the defendant's substantial rights because the enhancement led to a greater sentence than authorized. *Id.* Quoting from *Hughes*, above, the court stated "'the fact remains that a sentence has yet to be imposed under a regime in which the Guidelines are treated

as advisory,' and '[w]e simply do not know how the district court would have sentenced [the defendant] had it been operating under the regime established by *Booker*.'" *Id.* at *17. Therefore, the court vacated the sentence and remanded for resentencing. *Id. (quoting Hughes*, at *18)).

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

United States v. Doane, 2005 WL 327559 (4th Cir. Feb. 11, 2005)

In *Doane*, the defendant was sentenced after *Blakely*, and pursuant to *United States v. Hammoud*, the sentencing court also specified an alternative sentence. The appeal was held in abeyance pending the decision in *Booker*. *Id.* at *1. The defendant moved for an expedited remand of his case to implement the alternative sentence,
noting that he had already served more time than the district court set forth in that alternative sentence. *Id.* The court granted the motion for remand to allow the district court to reconsider the defendant's sentence in light of *Booker* and *Hughes*. *Id.*

V. Fifth Circuit

A. Plain Error Standard

United States v. Mares, 2005 WL 503713 (5th Cir. March 4, 2005)

In *Mares*, in an opinion written by Circuit Judge Davis and circulated to all members of the court, Circuit Judges Jolly, Davis, and Clement agreed with the Eleventh Circuit in *United States v. Rodriguez*, 2005 WL 272952 (11th Cir. Feb. 4, 2005), discussed in Part XI below, and found that the defendant did not meet the third prong of the plain error test because he could not show his sentence affected the outcome of his proceedings, and therefore, the sentence should be affirmed. *Id.* at *1. The court stated that it was the mandatory aspect of the sentencing scheme prior to *Booker* which violated the Sixth Amendment's requirement of a jury trial, but that even in the discretionary sentencing system established by *Booker*, a sentencing court must still carefully consider the statutory scheme created by the SRA and the guidelines. *Id.* at *6. The duty to consider the guidelines, in the court's view, will ordinarily require the sentencing judge to determine the applicable guideline range even though the judge is not required to sentence within that range. *Id.* The court stated that *Booker* contemplates that with the mandatory use of the guidelines excised, the Sixth Amendment will not impede a sentencing judge from finding all facts relevant to sentencing, and the judge is entitled to find by a preponderance of the evidence all those facts relevant to the determination of the guideline range and to the determination of a non-guideline sentence. *Id.* at *7.

In the present case, the court found that the defendant did not meet the third prong of the plain error test because he did not demonstrate a probability "sufficient to undermine confidence in the outcome," where the sentencing judge imposed the statutory maximum sentence when the bottom of the guideline range was lower. *Id.* at *9. The court found no indication in the record other than that to explain whether the sentencing judge would have reached a different

conclusion if the guidelines were advisory. Therefore, the court found the defendant could not meet his burden of demonstrating that the result would likely have been different had the judge sentenced him under the post-*Booker* scheme. *Id.*

The court also explained how it will conduct future sentencing reviews. If the sentencing judge exercises her discretion to impose a sentence within a properly calculated guideline range, in the court's reasonableness review, it will infer that the judge considered all the factors for a fair sentence set forth in the guidelines, and given the deference due that discretion, it will be rare for a reviewing court to say such a sentence is unreasonable. *Id.* at *7. Further, when the judge exercises her discretion to impose a sentence within the guideline range, and states so on the record, little explanation is required by the court. However, when the judge elects to give a non-guideline sentence, he should carefully articulate fact-specific reasons that the sentence selected is appropriate. *Id.* The court stated it will give due deference to a sentence if the sentencing court follows these principles, commits no legal errors, and gives appropriate reasons for the sentence. *Id.*

VI. Sixth Circuit

A. Plain Error Standard

United States v. Oliver, No. 03-2126, slip op. (6th Cir. Feb. 2, 2005)

In *Oliver*, Circuit Judge Moore found the sentencing court had plainly erred in increasing the defendant's sentence pursuant to the guidelines, in violation of the Sixth Amendment, and remanded in accordance with *Booker*. *Id.* at 2. The court found that all four prongs of the plain error test had been met; first, an error occurred because the guidelines were mandatory at the time the sentence was imposed and are currently advisory; second, that error was plain because the Supreme Court has held that an error need not always be obvious at the time of the determination as long as it is evidently plain at the time of appellate consideration; third, the error affected the defendant's substantial rights because the sentencing court's determination unconstitutionally increased the defendant's sentence beyond that which was supported by the jury verdict and the defendant's criminal history; and fourth, the sentencing error that led to a violation of the Sixth Amendment by the imposition a more severe sentence than supported by the jury verdict would diminish the integrity and public reputation of the judicial system. *Id.* at 7.

United States v. Bruce, No. 03-3110, slip op. (6th Cir. Feb. 3, 2005)

In a footnote in *Bruce*, Circuit Judges Nelson and Cook and District Judge Rosen stated that they recognized the guidelines are no longer mandatory under *Booker*, but that it remained an important part of the appellate review process to determine what the guidelines would call for under the specific facts and circumstances of each case. *Id.* at 11, n. 10. In that analysis, the court opined that the sentence imposed, with an enhancement for obstruction of justice by a preponderance of the evidence based on judicial fact-finding, contravened the defendant's Sixth

Amendment right to a jury finding of all facts beyond a reasonable doubt. *Id.* at 17. The court applied a plain error standard of review, finding first, although the lower court's error was not apparent until *Booker*, both the Supreme Court and this court had previously recognized that whether an error is plain is satisfied as long as the error is evident at the time of the appellate review. *Id.* The court then left unresolved the question whether the error affected the defendant's substantial rights, because it found the fourth prong of the test, whether the error seriously affected the fairness, integrity or public reputation of judicial proceedings, had not been met, creating an inner-circuit split on this issue with *United States v. Oliver*, discussed above. *Id.* Specifically, the court found guidance from prior decisions which had held an *Apprendi* violation does not satisfy the fourth prong if the evidence bearing upon the issue that was impermissibly determined by the lower court was overwhelming uncontroverted. *Id.* at 17-18. In that vein, the court found that because the sentencing court had sentenced the defendant at the top of the guideline range within a mandatory sentencing scheme, it was "surely not inclined" to have imposed a shorter sentence regardless of its power to do so under a more open-ended advisory scheme. *Id.* Therefore, the court affirmed the defendant's sentence.

United States v. Milan, No. 02-6245, slip op. (6th Cir. Feb. 10, 2005)

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

The Sixth Circuit acknowledged that while its plain error analysis agreed with the Sixth Circuit's recent decision in *Oliver*, above, it was not in keeping with that circuit's decision in *Bruce*, above. Citing to a Sixth Circuit Rule, in a footnote, the court stated "[t]o the extent *Bruce* conflicts with *Oliver*, we note that we must follow *Oliver* because it was decided first." *Id.* at 6, n. 3 (*citing* 6th Cir. R. 20(c)). The court also acknowledged the existence of a circuit conflict on the question of plain error analysis, with two circuits concluding that because the *Booker* remedy was to render the guidelines advisory instead of invalidating them in their entirety or grafting a sentencing jury requirement on to them, *Booker*-type violations may not constitute plain error. *Id.* (*citing United States v. Rodriguez*, 2005 WL 272952 (11th Cir. Feb. 4, 2005) and *United States v. Crosby*, 2005 WL 240916 (2d Cir. Feb. 2, 2005)). In the court's analysis, in the

Eleventh Circuit, most Sixth Amendment errors will not result in remands for resentencing because the defendant will not be able to demonstrate a reasonable probability that he was prejudiced by the error. *Id.* The court did not agree with the Eleventh's Circuit's decision in *Rodriguez*, in which the court found the defendant's sentence did not affect his substantial rights, when the Court in *Booker* had found on similar facts that it did. Additionally, the court noted that in the Second Circuit's approach to remand all cases in *Crosby*, the sentencing court is not to automatically resentence but is to conduct a plain or harmless error inquiry in order to determine whether it ought to resentence or not. *Id.* The court took issue with this decision, noting that the *Booker* court had instructed "reviewing courts" to determine whether a sentencing error was plain. *Id.* at 7.

United States v. Hamm, No. 03-5658, slip op. (6th Cir. March 8, 2005)

The court in *Hamm* remanded for resentencing, concluding the sentence imposed was invalid even though the sentence was based solely on facts admitted by the defendant in his guilty plea. Under a plain error test, the court found that the first two requirements were met in that the court imposed the sentence under a mandatory system. Although not a violation of the defendant's Sixth Amendment rights, the court found the case analogous to *Fanfan*. *Id.* at 3. Because the judge expressed sympathy for the defendant and stated that he was bound under the law to how far he could go from the guideline range, the court believed the sentencing court might have sentenced the defendant to a shorter sentence if it had felt it were free to do so. Therefore, the court concluded that the defendant's substantial rights were affected. *Id.* at 4. Finally, the court found that an exercise of its discretion was appropriate given that "[w]e would be usurping the discretionary power granted to the district courts by *Booker* if we were to assume that the district court would have given [the defendant] the same sentence post-*Booker*." *Id.*

B. Drug Quantity Calculation

United States v. Hines, No. 03-6622, slip op. (6th Cir. Feb. 7, 2005)

Circuit Judges Cole and Clay and District Judge Hood found in *Hines* that although the sentencing court's factual findings were supported by the record, the defendant was entitled to a resentencing under *Booker*. *Id.* at 19. The defendant and a co-defendant were convicted of conspiracy to distribute 500 grams or more of methamphetamine, and at sentencing, the court determined the defendant possessed 32 pounds of methamphetamine during the course of the conspiracy and that he was subject to a firearm enhancement. The court sentenced the defendant to 235 months' imprisonment. *Id.* at 5. The jury had heard evidence that the defendant was responsible for between 5 to 15 kilograms of methamphetamine and that he had possessed a firearm during the relevant time period, and the government argued that any error under *Booker* was harmless and did not affect the defendant's substantial rights because such evidence must have been accepted by the jury. *Id.* at 23. The court found that the government's argument ignored the applicability of *Booker* and stated the fact that the jury heard such evidence was immaterial because the jury did not make any specific factual finding, and it was improper to speculate. *Id.* at 24. Because appellate courts should review and not determine the decision of the sentencing court, the court vacated and remanded for resentencing. *Id.* at 26.

C. Career Offender

1. Section 924(c) Firearm-Type Provision

United States v. Harris, No. 03-6207/6255, slip op. (6th Cir. Feb. 8, 2005)

In *Harris*, Circuit Judge Moore determined that *Booker* extends to judicial fact determinations under 18 U.S.C. § 924(c), and held that the Firearm-Type Provision mandatory minimum in §2K2.4(b) is not binding on a sentencing court unless the type of firearm involved in the offense is charged in the indictment and proven to a jury beyond a reasonable doubt. *Id.* at 1-2. The court stated that the Supreme Court had earlier implied that § 924(c) sets forth a statutory maximum sentence of life in prison regardless of whether the sentencing court finds any of the factors enhancing the required minimum. *Id.* at 4 (citing *Harris v. United States*, 536 U.S. 545 (2002)). The court also stated that unlike most guideline provisions which provide for overlapping ranges, the provision relating to § 924(c) does not provide for ranges but instead mandates that except when a defendant qualifies as a career offender under §4B1.1, the guideline sentence is the minimum term of imprisonment required in the statute. *Id.* Finding that *Booker* applies to judicial fact determinations under the guidelines, although the Supreme Court did not address whether *Booker* applies to fact determinations under statutory provisions, the court determined the pertinent question was how to reconcile the guideline's now recommendation for the minimum sentence in a factual situation with the possibility of a maximum sentence of life imprisonment under § 924(c). "Given the severe constraints on imposition of a life sentence in the pre-*Booker* world, it would seem strikingly at odds with the principles set forth in *Booker* to hold that the sudden advisory nature of the Guidelines prevents the (still mandatory) provisions of § 924(c) from violating the Sixth Amendment." *Id.* at 5. Thereafter, it found that after *Booker*, the enhancement contained in the § 924 Firearm-Type Provision cannot constitutionally be imposed on the basis of judicial fact finding. *Id.*

In the court's opinion, the doctrine of constitutional avoidance counsels the court to treat the provision as setting forth elements rather than sentencing factors, and to construe it as setting forth sentencing factors would cause the court to face a serious constitutional problem due to the potential conflict with *Booker*'s Sixth Amendment ruling. "We conclude that the tradition of treating firearm type as an element . . . the sharply higher penalties involved . . . and the serious constitutional problems that would result from a contrary conclusion . . . are together sufficient to overcome the presumption, based on the structure of the statute, that § 924(c)(1)(B) is intended to set out sentencing factors rather than elements of separate crimes. *Id.* at 7. Concluding that the firearm types are elements of separate crimes, it held that *Booker* requires an enhancement based on type of firearm to be charged in the indictment and proven to a jury beyond a reasonable doubt. *Id.* at 8.

2. Section 924(e) Armed Career Criminal Act

United States v. Barnett, 2005 WL 357015 (6th Cir. Feb. 16, 2005)

In *Barnett*, the defendant was sentenced under the Armed Career Criminal Act (ACCA), found at 18 U.S.C. § 924(e), based on three prior aggravated or violent felonies. *Id.* at *3. He was sentenced to 265 months, the middle of the applicable guideline range. The defendant argued that application of the ACCA violated *Booker* because the sentencing court determined the nature of his prior convictions. Writing for the court, Circuit Judge Martin found that existing case law establishes that *Apprendi* does not require the nature or character of prior convictions to be determined by a jury. *Id.* at *6. The defendant further argued that because *Booker* made the guidelines advisory, his sentence imposed under a mandatory system should be vacated and remanded. The court reviewed the sentence for plain error, and agreed with the defendant that it was plain error to sentence him under a mandatory guideline scheme. *Id.* at *7.

Further, relying on the Supreme Court's decision in *Olano* with respect to the third prong of the plain error test, the court stated in some situations, a presumption of prejudice is appropriate if the defendant cannot make a specific showing of prejudice, thus satisfying the third prong where the inherent nature of the error made it exceptionally difficult to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred. *Id.* at *9. The court was convinced the instant case was such a case where prejudice should be presumed, asserting that if the sentencing court had not been bound by the guideline range, the defendant may have received a lower sentence because the court would have had the discretion under the new advisory scheme to impose a sentence as low as 18 months, the statutory minimum provided by the ACCA. Additionally, the court found it would be difficult for the defendant to show his sentence would have been different, agreeing with the Second Circuit in *Crosby*, discussed in Part II above, which had stated it would be "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-Guideline sentence." *Id.* (*quoting United States v. Crosby*, 2005 WL 240916 (2d Cir. Feb. 2, 2005)). The court held that the defendant's substantial rights were affected, and further concluded that an exercise of its discretion was appropriate because it would be fundamentally unfair to allow his sentence to stand in light of the development in the applicable legal framework. *Id.* at *11. Finally, the court declined to address the reasonableness of the defendant's sentence without first giving the sentencing court an opportunity to resentence him under the new post-*Booker* framework. *Id.* Therefore, the court vacated the sentence and remanded for resentencing.

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

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

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

3. §4B1.1 Career Offender

United States v. Gonzalez, 2005 WL 415957 (6th Cir. Feb. 22, 2005)

In *Gonzalez*, the defendant was convicted of possession with intent to distribute, and because of two prior felony drug convictions, the sentencing court found him to be a career offender under §4B1.1, and sentenced him at the bottom of the applicable guideline range. *Id.* at *1. Writing for Circuit Judges Rogers and Duplantier, Circuit Judge Merritt found that under *Booker*, prior convictions may be used as upward adjustments without violating the Sixth Amendment prohibition on adjustments based on judicial fact-finding. *Id.* at *2. Nevertheless, the court held that *Booker* and *Fanfan* establish that the guidelines are now advisory, leaving the sentence to the reasonable discretion of the sentencing court, and opined the sentencing judge may no longer approve of the sentence imposed, based on what it found to be a particularly strong inference, where the defendant was sentenced at the bottom of the guideline range. Because it was unclear to the court what sentence the judge might impose if not bound by the career criminal provision of the guidelines, the court remanded for resentencing. *Id.*

E. Amount of Loss Calculation

United States v. Davis, 2005 U.S. App. LEXIS 1204 (6th Cir. Jan. 21, 2005)

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

violated the Sixth Amendment, this sentence, too, violated the Sixth Amendment. *Id.* at *9. Therefore, the court remanded the case for resentencing.

United States v. Murdock, 2005 WL 350812 (6th Cir. Feb. 15, 2005)

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

F. Safety Valve Provision

United States v. Ross, No. 02-6435, slip op. (6th Cir. Feb. 23, 2005)

In *Ross*, the defendant pleaded guilty to drug trafficking offenses and argued that his possession of a firearm was not relevant conduct sufficient to foreclose application of the safety valve. Specifically, he argued that *Booker* entitled him to be resentenced, and the government agreed and waived its right to argue plain error. *Id.* at 1. Circuit Judges Merritt, Daughtrey and Sutton vacated the sentence and remanded for resentencing. *Id.* The applicable guideline as determined by the sentencing court was 87 to 108 months, but one of the counts carried a statutory minimum sentence of 10 years. The defendant was sentenced to 120 months because the sentencing court decided that the safety valve could not be applied due to his possession of a firearm. *Id.* at 3-4. The defendant asserted that this finding of relevant conduct constituted a Sixth Amendment violation because it led to an increase in his sentence without a finding of the jury. *Id.* at 4. The government waived its right to argue that the defendant failed to satisfy the components of a plain-error review, stating in its brief "[p]ursuant to *United States v. Booker*, . . . the case should be remanded for resentencing." *Id.* Therefore, the court remanded the sentence for resentencing without substantive discussion. *Id.* at 5.

VII. Seventh Circuit

A. Plain Error Standard

United States v. Paladino, 2005 WL 435430 (7th Cir. Feb. 25, 2005)

In *Paladino*, the court consolidated several criminal appeals which addressed the application of the plain-error doctrine to appeals from sentences rendered under the guidelines before *Booker*. *Id.* at *1. The government conceded that all the sentences violated the Sixth Amendment right to a jury trial as interpreted in *Booker* because in all of them, the judge enhanced the sentences on the basis of facts not determined by the jury. *Id.* However, the government further argued that if a sentence was legal before *Booker* was decided, in cannot be plainly erroneous, stating that because the guidelines remain valid, a sentence that complies with

them would very unlikely be reversed. *Id.* at *8. In an opinion written by Circuit Judge Posner for himself and Circuit Judges Wood and Williams, and circulated to the entire court, the court disagreed, finding that unless any of the judges had said at sentencing pre-*Booker* that he would have given the same sentence even if the guidelines were advisory, "it is impossible for a reviewing court to determine - without consulting the sentencing judge - . . . whether the judge would have done that." *Id.* The court directed a limited remand for all defendants except one who had challenged a judicial determination of facts which established his recidivist status. *Id.* at *6.[7]

The government also argued that if the judge imposed a sentence higher than the guideline minimum, it is clear the judge would not have imposed a lighter sentence even if he had known the guidelines were advisory. *Id.* at *9. The court disagreed, stating a conscientious judge would pick a sentence relative to the guideline range regardless of his private views, and if he thought the defendant was a more serious offender than an offender at the bottom of the range, he would give him a higher sentence even if he thought the entire range was too high. *Id.*

The court found that if the sentencing judge might have decided to impose a lighter sentence than dictated by the guidelines had he not thought he was bound by them, his error in having thought himself so bound may have precipitated a miscarriage of justice. *Id.* Additionally, the court stated that it would be an error to assume that every sentence imposed in violation of the Sixth Amendment is plainly erroneous and automatically entitles the defendant to be resentenced, the error the court asserted was committed by the Fourth Circuit in *Hughes* and the Sixth Circuit in *Oliver*, discussed in Parts IV and VI, above. *Id.* at *10. In the court's view, what those courts overlooked is that if the judge would have imposed the same sentence even if he thought the guidelines were advisory and the sentence would have been lawful under the post-*Booker* scheme, there is no prejudice to the defendant. *Id.* The court held that the only practical way to determine whether the kind of plain error argued in these consolidated sentences had actually occurred is to ask the sentencing judge, and in that way, it agreed in part with the Second Circuit in *Crosby*, discussed in Part II above, that when it is difficult for an appellate court to determine whether the error is prejudicial, it should, while retaining jurisdiction, order a limited remand to permit the sentencing court to determine whether it would reimpose the sentence. *Id.* If so, the court said it will affirm the original sentence against a plain-error challenge provided the sentence is reasonable. Lastly, the court determined that if the judge states on limited remand that he would have imposed a different sentence had he known the guidelines were advisory, it would vacate the original sentence and remand for resentencing. *Id.*

Further, the court disagreed with the Eleventh Circuit in *United States v. Rodriguez*,

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[7] In ***United States v. Brown***, 2005 U.S. App. LEXIS 1034 (7th Cir. Jan. 14, 2005), the defendant questioned whether he could argue that his sentence was unconstitutional in light of *Blakely* and *Booker*. *Id.* at *2. The defendant's offense level had been increased by the sentencing court due to his multiple previous convictions for crimes of violence or controlled substance offenses. Circuit Judges Easterbrook, Ripple, and Sykes found that he had not objected to the characterization of his prior convictions and that even after *Blakely*, the existence of prior convictions does not need to be proven beyond a reasonable doubt. *Id.*

discussed in Part XI below, in which the Eleventh Circuit concluded that when it is impossible for a reviewing court to know what sentence the court would have given had it known the guidelines were advisory, because the defendant in such a case cannot show his substantial rights were affected, he therefore cannot establish plain error. *Id.* at *11. In the court's view, "given the alternative of simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog, we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence." *Id.*

Circuit Judge Ripple dissented, stating that the approach formulated by the panel, which requires a sentencing court to make "an abbreviated quick look," is hardly a substitute for the sentencing process the Supreme Court has said is mandated by the Constitution. *Id.* at *12. "Until the court undertakes a new sentencing process - cognizant of the freedom to impose any sentence it deems appropriate as long as the applicable guidelines ranges and the 18 U.S.C. § 3553(a) factors are considered - the district court cannot accurately assess whether and how its discretion ought to be exercised." *Id.* In Judge Ripple's opinion, the panel's holding requires the court to pre-judge and pre-evaluate evidence it has not heard, and the constitutional right at stake "hardly is vindicated by a looks-all-right-to-me assessment by a busy district court." *Id.*

Additionally, Circuit Judge Kanne dissented, expressing concern for the proposed mechanism to remedy the unconstitutionally imposed sentences. In his view, all sentences must be vacated and remanded to the sentencing courts for resentencing in light of *Booker*. *Id.* at *14. Judge Kanne pointed out that in *Booker*, although Fanfan's sentence did not violate the Sixth Amendment, it was nonetheless deemed unconstitutional because it was imposed under a mandatory guideline regime. Therefore, Judge Kanne stated "*any* sentence handed down under a mandatory guideline regime is unconstitutional," agreeing with the Fourth Circuit in *Hughes*, the Sixth Circuit in *Milan*, and the Ninth Circuit in *Ameline*, discussed in Part IV, VI, and IX, respectively. *Id.* at 14-15. (emphasis in original).

United States v. Lee, 2004 WL 3205270 (7th Cir. Feb. 25, 2005)

In *Lee*, because the sentence was at the statutory maximum and the guideline range was higher than that maximum, the defendant did not contend that his sentence was improper under *Booker*, and instead contended that the sentencing court violated the Sixth Amendment because it made judicial findings that established the range. *Id.* at *1. In an opinion written by Circuit Judge Easterbrook, he and Judges Wood and Sykes found that under *Paladino*, a remand is necessary only when uncertainty otherwise would leave the court unsure about what the sentencing court would have done with additional discretion. *Id.* at *2. However, in the instant case, the sentencing court had expressed a strong preference to give a higher sentence if he had been able to do so, but that it was bound by the statutory maximum. Therefore, the court was assured that none of the defendant's substantial rights were adversely affected by the application of pre-*Booker* law, and affirmed the sentence. *Id.* at *3.

VIII. Eighth Circuit

A. Plain Error Standard

United States v. Easter, 2005 WL 566606 (8th Cir. March 11, 2005)

The defendant argued that the sentencing court plainly erred by making factual findings that increased his punishment under §§3A1.2 for official victim and 4B1.1 for being a career offender. *Id.* at *1. In a per curiam decision, and without substantive discussion, Circuit Judges Wollman, Murphy, and Benton found, assuming arguendo that it should review for plain error under *Booker*, any error in the §3A1.2 finding did not affect the defendant's substantial rights. Even without that enhancement, the same total offense level and criminal history category would have resulted in the defendant's classification as a career offender based on his two prior felony convictions for crimes of violence. *Id.* Additionally, the court stated that *Booker* reaffirmed that a fact of a prior conviction does not need to be established by a guilty plea or a jury verdict. *Id.* Therefore, the court affirmed the sentence.

B. Standard of Review in Cases Not Involving Sixth Amendment Violation

United States v. Sayre, 2005 WL 544819 (8th Cir. March 9, 2005)

In *Sayre*, writing for Circuit Judges Bye and Gruender, Circuit Judge Beam stated that because the defendant admitted all facts used by the district court in imposing the sentence, there was no Sixth Amendment violation. *Id.* at *1. The sentencing court had imposed a 48 month sentence where the defendant, a former state judge, pleaded guilty to extortion after accepting a bribe and a second charge of conspiring to obstruct justice by killing a witness was dismissed. *Id.* The sentencing court imposed a two level enhancement for obstruction of justice which the defendant agreed to, and an additional four level departure for the seriousness of the obstructive conduct, over the defendant's challenge. *Id.* The court discussed the proper appellate standard of review in cases where there is no Sixth Amendment violation; whether there must be an objection to the mandatory nature of the guidelines in order to preserve that error on appeal, or whether a general objection to the imposed sentence is sufficient to preserve a *Booker* error. *Id.* The court found that in this case, although the sentencing court followed a mandatory sentencing scheme, it did not affect the defendant's ultimate sentence. *Id.* at *2. "Clearly, the district court wanted to fully account for [the defendant's] behavior and have that conduct reflected in [his] ultimate sentence," where the sentencing judge stated "'I am going somewhat over the Government's recommendation . . . In a goal I set for myself I won't use a five-year sentence, but I will use a four-year sentence. . . . I am satisfied that the seriousness of the offense requires that at least a four-year sentence be imposed." *Id.* Because there was no question that the sentencing court clearly imposed the sentence it believed appropriate on the facts, the court affirmed the sentence, finding it reasonably reflected the seriousness of the conduct. *Id.*

B. Drug Quantity Calculation

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

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

United States v. Fox, No. 03-3554, slip. op. (8th Cir. Jan. 31, 2005)

In *Fox*, Circuit Judges Loken and Smith and District Judge Dorr remanded the case for further consideration in light of *Blakely*. *Id.* at 2. The jury had made a specific finding that the defendant was responsible for at least 50 but less than 500 grams of methamphetamine, but based on a preponderance of the evidence, the sentencing court found him responsible for 1.8 kilograms. *Id.* at 13. Because the defendant had preserved this sentencing issue, the court held that pursuant to *Booker*, he was entitled to a new sentencing proceeding. *Id.*[8]

United States v. Selwyn, No. 04-2164, slip op. (8th Cir. Feb. 23, 2005)

In a drug conviction for possession with intent to distribute, the jury made no finding regarding the amount of methamphetamine involved, nor was an amount indicated in the indictment. *Id.* at 3, 4. The sentencing court in *Selwyn* determined at sentencing that the defendant was responsible for an amount increasing his sentencing range from 10 to 16 months to 21 to 27 months. The defendant objected to the quantity, thus preserving the issue for appeal. *Id.* at 4. In his appeal, the defendant contended his sentence was imposed in violation of the Sixth Amendment. *Id.* Quoting from *Booker* that facts necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to the jury beyond a reasonable doubt, Circuit Judges Heaney, Wollman and Fagg remanded for resentencing. *Id.*

C. Criminal History Calculation

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

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[8] The Eighth Circuit has since remanded for resentencing in other post-*Booker* cases in which the defendant had raised the issue at sentencing, thereby preserving the issue for *Booker* purposes. *United States v. Fellers*, 2005 WL 350959 (8th Cir. Feb. 15, 2005); *United States v. Morin*, 2005 WL 450106 (8th Cir. Feb. 28, 2005); *United States v. Sdoulam*, 2005 WL 474337 (8th Cir. March 2, 2005).

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

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

United States v. Cramer, 2005 WL 244277 (8th Cir. Feb. 3, 2005)

Circuit Judge Smith reviewed an upward enhancement imposed pursuant to §4A1.3 for unreasonableness in *Cramer*, and judged it with respect to the factors in § 3553(a), citing *Booker*. *Id.* at *4. The court found when a defendant fails to make an objection to specific factual allegations contained in the PSR, a sentencing court may accept those facts as true for purposes of sentencing. *Id.* at *5 (citing *United States v. Bougie*, 279 F.3d 648, 650 (8th Cir. 2002)). Because the defendant in this case did not contest facts listed in the PSR, the court found that the facts supported the sentencing court's finding that the defendant's prior criminal record underrepresented his criminal history and likelihood to recidivate, and concluded there was sufficient evidence to support an upward departure under §4A1.3. Thus, the sentence was reasonable. *Id.*

2. Section 924(e) Armed Career Criminal Act

United States v. Nolan, No. 03-3811, slip op. (8th Cir. Feb. 11, 2005)

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

3. Statutory Minimum Based on Prior Conviction

United States v. Vieth, 2005 WL 284724 (8th Cir. Feb. 8, 2005)

The defendant in *Vieth* argued that he should be resentenced pursuant to *Booker* because he received a sentencing enhancement for his conviction under 18 U.S.C. § 841(b)(1)(B) due to a prior drug felony conviction. *Id.* at *4. Circuit Judges Melloy, Murphy, and Lay determined the jury had found beyond a reasonable doubt a quantity of methamphetamine in excess of 50 grams which resulted in a mandatory minimum sentence of five years, but because the defendant had a prior drug felony conviction, the sentencing court imposed the statutory minimum sentence of ten years. *Id.* The court found that because the sentence was not determined based on an application of the guidelines, and because the Supreme Court has determined in *Blakely* and *Booker* that the fact of a prior conviction is a fact for the court to determine, there was no *Blakely/Booker* issue in the case. *Id.*

D. Revocation of Supervised Release

United States v. Edwards, 2005 WL 517019 (8th Cir. March 7, 2005)

In *Edwards*, the defendant brought an appeal following his revocation of supervised release. In a per curiam decision, Circuit Judges Smith, Heaney and Colloton stated that although *Booker* significantly changed the federal sentencing scheme, "its effect on sentences imposed for supervised release violations is far less dramatic," because the federal guidelines associated with supervised release violations were considered advisory even prior to *Booker*. *Id.* at *1. Therefore, the court found no error in the sentencing court's consultation of the guidelines in determining the defendant's sentence, and stated its review of the guidelines applied by the sentencing court, given the defendant's criminal history and the nature of his violation, determined that he received the lowest sentence suggested. Thus, the court did not find such a sentence unreasonable. *Id.*

United States v. Cotton, 2005 WL 525226 (8th Cir. March 8, 2005)

The defendant in *Cotton* contended that the sentence imposed upon her revocation for supervised release was unreasonable. *Id.* at *1. The recommended sentence for her violation was 7 to 13 months' imprisonment but the PSR recommended a sentence of 46 months. Writing on behalf of Circuit Judges Riley and Gruender, Circuit Judge Gibson affirmed the sentence, stating that although *Booker* prescribed a new standard of review for guidelines cases generally, the new standard of review did not change the result in this case concerning a revocation of supervised release, because the standard is the same one the court would have used otherwise. *Id.* at *3.

IX. Ninth Circuit

A. Plain Error Standard

United States v. Ameline, No. 02-30326, slip op. (9th Cir. Feb. 10, 2005)[9]

In *Ameline*, Circuit Judges Wardlaw, Gould, and Peaz granted the defendant's petition for rehearing to reconsider the court's post-*Blakely* holding in *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004), in which it held that the defendant's sentence under the guidelines violated the Sixth Amendment, and directed that a jury determine both the amount of drugs attributable to him and whether he possessed a weapon. *Id.* at 1. The court found that although its original *Ameline* opinion was consistent with *Booker*'s holding that the Sixth Amendment applies to the guidelines, it was at odds with *Booker*'s severability remedy that eliminated the mandatory nature of the guidelines. *Id.* In the present case, in applying a plain error review, the court concluded the defendant's sentence of 150 months violated the Sixth Amendment and was an error which seriously affected the fairness of his proceedings, and thus vacated and remanded for resentencing. *Id.* at 6. The court found that the sentence exceeded the maximum authorized by the facts established by the plea or a jury verdict because the defendant admitted to only a detectable amount of methamphetamine, and therefore faced a potential sentence of 0 to 20 years under the statute, and that the maximum sentence the court could have imposed under the guidelines based on that admission was sixteen months. *Id.* In providing guidance to the sentencing court, the Ninth Circuit stated *Booker* did not relieve the district court from its obligation to determine the guideline range, and in making that determination, the court must comply with Rule 32 and the basic procedural rules adopted to ensure fairness and integrity in the sentencing process. *Id.* at 7. Although the court originally directed that no petition for rehearing would be entertained and that the mandate shall issue forthwith, the following day, on February 10, 2005, the court recalled the mandate and directed the parties to file any petition for rehearing and/or rehearing en banc.[10]

B. Drug Quantity Calculation

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

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

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[9] On March 11, 2005, the Ninth Circuit granted a rehearing *en banc* in *United States v. Ameline*, directing that the previous panel decision of February 10, 2005, not be cited as precedent. *United States v. Ameline*, No. 02-30326, slip op. (9th Cir. March 11, 2005).

[10] The Ninth Circuit has remanded numerous sentences in light of *Booker* and *United States v. Ameline*, without further explanation. ***United States v. Standley***, 2005 WL 319110 (9th Cir. Feb. 9, 2005); ***United States v. Anaya***, 2005 WL 327637 (9th Cir. Feb. 11, 2005); ***United States v. Perez***, 2005 WL 466053 (9th Cir. Feb. 15, 2005); ***United States v. Sumner***, 2005 WL 428832 (9th Cir. Feb. 24, 2005); ***United States v. Luna***, 2005 WL 518721 (9th Cir. March 8, 2005).

de novo standard of review in that there was overwhelming evidence of the defendant's involvement, the court remanded for resentencing pursuant to *Booker*. *Id.* at *10-11.

C. Downward Departure

United States v. Ruiz-Alonso, No. 03-50125, slip op. (9th Cir. Feb. 11, 2005)

In *Ruiz-Alonso*, the government appealed the sentencing court's decision to depart downward 4 levels in an illegal reentry case due, in part, to the defendant's cultural assimilation. *Id.* at 3. Circuit Judge Graber stated "because we cannot say that the district judge would have imposed the same sentence in the absence of mandatory Guidelines and de novo review of departures," and the court vacated the sentence and remanded for resentencing in a manner consistent with *Booker*. *Id.* at 4.

X. Tenth Circuit

A. Plain Error Standard

United States v. Labastida-Segura, No. 04-1311, slip op. (10th Cir. Feb. 4, 2005)

In *Labastida-Segura*, Circuit Judges Kelly, O'Brien, and Tymkovich found that the parties stipulated in the plea agreement to the offense conduct in a violation for unlawful re-entry by a previously deported alien. *Id.* at 2. However, because the sentencing court did not apply the guidelines in an advisory fashion, the court held that the remedial holding in *Booker* must be applied even though the defendant's sentence did not involve a Sixth Amendment violation. *Id.* at 4. The court noted that had the guidelines been applied in an advisory fashion, its review would be limited to whether the sentence was unreasonable considering the factors in § 3553(a). *Id.* Citing to *Williams v. United States*, 503 U.S. 193, 203 (1992), the court stated the Supreme Court has held that once an appellate court has decided the sentencing court misapplied the guidelines, a remand is appropriate unless the appellate court concludes that the error was harmless. *Id.* Because the sentencing court plainly sentenced the defendant under a mandatory guideline scheme, and although the Supreme Court indicated that not every guideline sentence contains a Sixth Amendment error and not every appeal requires resentencing, the court found that it could not conclude the error in this case was harmless. *Id.* at 5. In the instant case, where the guideline sentence was already at the bottom of the range, the court reasoned, to say the sentencing court would have imposed the same sentence given the new legal landscape, "places us in a zone of speculation and conjecture - we simply do not know what the district court would have done after hearing from the parties. Though an appellate court may judge whether a district court exercised its discretion (and whether it abused that discretion), it cannot exercise the district court's discretion." *Id.* Therefore, the court remanded the case to the sentencing court.[11]

B. Drug Quantity Calculation

United States v. Lynch, No. 04-5111, slip op. (10th Cir. Feb. 11, 2005)

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[11] In ***United States v. Arroyo-Berzoza***, 2005 WL 408062 (10th Cir. Feb. 22, 2005), Circuit Judge Anderson remanded for resentencing citing *Labastida-Segura*, even though the defendant admitted the conduct charged in the indictment and it was clear no Sixth Amendment violation occurred. *Id.* at *1. The court determined it must apply the remedial holding of *Booker* to the defendant's direct appeal because the sentencing court's error of sentencing the defendant under a mandatory scheme was not harmless. *Id.*

The government appealed the sentenced imposed in *Lynch* because the sentencing court applied the offense level for the quantity of drugs admitted by the defendant in his plea agreement instead of the quantity of drugs contained in the PSR as attributable to the defendant. *Id.* at 1. Circuit Judges Kelly, O'Brien and Tymkovich determined the court must remand for further proceedings because in *United States v. Fanfan*, the Supreme Court remanded for resentencing even though Fanfan's sentence involved no Sixth Amendment violation. *Id.* at *1. The court found that in *Fanfan*, the Supreme Court stated "'the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions. Hence we vacate the judgment of the District Court and remand the case . . ." *Id.* The Tenth Circuit stated that in imposing this remedy, the Supreme Court specifically rejected the defense suggestions that "the Sixth Amendment holding be engrafted on the Sentencing Guidelines, or that provisions of the Sentencing Guidelines allowing judicial factfinding be excised." *Id.* (quoting *Booker*, 125 S. Ct. at 768-69)).

C. Restitution

United States v. Garcia-Castillo, No 03-2166, slip op. (10th Cir. Feb. 11, 2005)

In *Garcia-Castillo*, Circuit Judges Kelly, Anderson, and Lucero found that a restitution order did not violate *Blakely* even though a jury did not make the factual findings underlying the order. First, the court found that restitution ordered under the VWPA and the MVRA is not a criminal punishment. *Id.* at 5. Additionally, the court stated assuming arguendo that restitution was criminal punishment subject to *Blakely/Booker*, the Sixth Amendment was not implicated in the present case because by entering into the plea agreement, the defendant admitted the facts underlying the order and is unconditionally bound by its terms and what it encompasses. *Id.* at 6. Alternatively, the court found that even if restitution was criminal punishment, it would apply a plain error standard and any error would not have been plain. *Id.* at 7. Specifically, the court determined for an error to be plain, it must be "clear and obvious" and because there is a lack of uniformity in the law of the Tenth Circuit and in other circuits regarding whether restitution is criminal punishment, it is far from "clear and obvious" that restitution implicates the Sixth Amendment. *Id.* at 7.

XI. Eleventh Circuit

A. Plain Error Standard

United States v. Rodriguez, No. 04-12676, slip op. (11th Cir. Feb. 4, 2005)

In *Rodriguez*, Circuit Judge Carnes held that the defendant did not meet the third prong of the plain error test in that the sentence imposed did not violate his substantial rights, reaching a different conclusion on this issue than had the Second Circuit in *Crosby*, the Fourth Circuit in *Hughes*, and the Sixth Circuit in *Oliver*. *Id.* at 23. As the court opined, the Supreme Court has instructed appellate courts that plain error review should be used sparingly, and the burden was on the defendant to show that the error actually did make a difference, stating, "if it is equally plausible that the error worked in favor of the defense, the defendant loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses." *Id.* at 16, 20 (*citing Jones v. Unites States*, 527 U.S. 373, 389 (1999)). The third prong requires that an error have affected substantial rights, which requires that the error "'must have affected the outcome of the district court proceedings.'" *Id.* at 18 (*quoting United States v. Cotton*, 535 U.S. 625, 631-32 (2002)). According to the court, the standard for showing that the third prong has been met is to show the reasonable probability of a different result formulation, meaning a probability 'sufficient to undermine confidence in the outcome.'" *Id.* at 18 (*quoting United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004)).

In the instant case, the court found that the error committed before *Booker* was not that there were "extra-verdict enhancements - enhancements based on facts found by a judge that were not admitted by the defendant or established by the jury verdict - that led to an increase in the defendant's sentence. The error [was] that there were extra-verdict enhancements *used in a mandatory guidelines system*." *Id.* at 20 (emphasis added). The court additionally found that if the same extra-verdict enhancements had been found and used in the same way in an advisory system, the result would have been constitutionally permissible under *Booker*, for two reasons. *Id.* First, according to the court, Justice Steven's majority opinion in *Booker* explicitly stated "[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id.* (*quoting Booker*, at 750)). Second, the *Booker* opinion authored by Justice Breyer specifically provides for extra-verdict enhancements in all future sentencings by holding that the guideline system was constitutional once two parts of the SRA were severed, and no other part of the SRA or the guidelines regarding extra-verdict enhancements was so severed. *Id.* at 21. In applying the third prong, the court determined the question to ask is whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of a binding fashion by the sentencing judge. *Id.* at 22. The court found it obvious that it did not know if a different sentence would have resulted, and therefore it was controlled by the *Jones* decision, which directed that where the effect of an error on the result in the sentencing court is uncertain or indeterminate, the appellant did not meet his burden of showing prejudice and therefore had not met his burden of showing that his substantial rights were affected. *Id.* Therefore, the court affirmed the sentence.

United States v. Curtis, No. 02-16224 (11th Cir. Feb. 28, 2005)

The defendant's appeal in *Curtis* was first heard after *Blakely,* wherein in a footnote, the court conducted a plain error analysis and concluded that the defendant had failed to satisfy the second prong because there error was not obvious, and had also failed the fourth prong. *Id.* at *2. In this appeal, the court granted rehearing for the sole purpose of withdrawing that footnote as it

appeared, and substituted a new footnote instead. *Id.* at *3. The new footnote states that the plain error analysis in the instant case is controlled by *Rodriguez*, and as in that case, the defendant satisfied the first two prongs of the analysis. *Id.* However, the footnote further states that as in *Rodriguez*, the defendant cannot satisfy the third prong because to do so he must show that the error affected his substantial rights, which "almost always requires that the error must have affected the outcome of the proceedings below." *Id.* Morever, the court stated that the defendant bears the burden of persuasion with respect to establishing prejudice. In applying the *Rodriguez* analysis, the court concluded that the defendant cannot satisfy the third prong because nothing in the record suggests there was a reasonable probability of a different result if the sentencing judge had applied the guidelines in an advisory fashion. *Id.* at *4. The sentencing court sentenced the defendant to the maximum term of imprisonment permitted by the applicable guidelines, which is inconsistent with a suggestion that he might have imposed a lesser sentence if he had realized the guidelines were advisory. Thereafter, the court reaffirmed the text of its original opinion. *Id.*

United States v. Shelton, No. 04-12602, slip op. (11th Cir. Feb. 25, 2005)

In *Shelton*, Circuit Judge Hull, writing for Circuit Judge Marcus determined that there was no Sixth Amendment violation where the sentencing court found the quantity amount used to determine the sentence, and the defendant filed no objection to the PSR that established the offense conduct and the relevant conduct and drug quantities. *Id.* at 5. However, at sentencing the court expressed dissatisfaction with the sentence it imposed, commenting that the sentence was "very, very severe" due to the criminal history points and the mandatory consecutive five year sentence on a § 924(c) firearm count, and stating that Congress has taken a "very, very hard stance when it comes to guns and drugs," and indicating that the guidelines and relevant conduct dictated the result. *Id.* at 6-7.

In a review for plain error, the court first rejected the defendant's argument that the sentencing court erred when it enhanced his sentence based solely on judicial fact-finding of drug quantity and his prior convictions, and held that *Booker* reaffirmed the Court's holding in *Apprendi* that any fact other than a prior conviction must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at 8. The court further found that the first prong was not satisfied because the defendant admitted to the drug quantity by raising no objections to the PSR and not disputing any factual matters. *Id.* at 19. However, the court found error in the sentence imposed, because the sentencing court sentenced the defendant under a mandatory guideline scheme even in the absence of a Sixth Amendment violation. The court held the defendant carried his burden of satisfying the third prong that there was a reasonable probability of a different result if the guidelines had been applied as advisory, because the sentencing court expressed several times its view that the sentence required by the guidelines was too severe and sentenced the defendant to the lowest possible sentence it could. *Id.* at 14-15. Therefore, the fourth prong was also satisfied because the sentence seriously affected the fairness and integrity of judicial proceedings, and exercise of the court's discretion was warranted. *Id.* at 16. The

court vacated the defendant's sentence and remanded for resentencing. *Id.* at 17.[12]

B. Drug Quantity Calculation

United States v. Grinard-Henry, No. 04-12677, slip op. (11th Cir. Feb. 11, 2005)

The defendant in *Grinard-Henry* appealed his sentence, challenging the sentencing court's drug quantity determination on *Blakely* grounds, claiming the amount was greater than the amount to which he pleaded guilty. The government moved to dismiss his appeal based on a waiver in his plea agreement. *Id.* at 2. Circuit Judges Marcus, Hull and Carnes determined one exception in his plea agreement allowed him to appeal a sentence "above the statutory maximum," and the court determined that it had recently held in *United States v. Rubbo*, that the term "statutory maximum" in a plea agreement permitting appeal in the limited circumstances of a sentence exceeding the statutory maximum refers to "the longest sentence that the statute which punishes a crime permits a court to impose, regardless of whether the actual sentence must be shortened in a particular case because of the principles involved in the *Apprendi/Booker* line of decisions." *Id.* at 5. In this case, the court found the defendant's sentence did not exceed the relevant statutory maximum and he was therefore not entitled to appeal his sentence under this exception. *Id.* Another exception in his plea agreement was one allowing the defendant to appeal a sentence in violation of the law, apart from sentencing guidelines. The defendant asserted the sentencing court sentenced him based on a drug quantity greater than the quantity to which he pleaded guilty and thus his sentence violated the Fifth and Sixth Amendments. *Id.* at 5. However, the court found that his appeal, in effect, asserted the guidelines were unconstitutionally applied and thus his challenge involved the application of the guidelines, not a violation of law apart from the guidelines. *Id.*

D. *Ex Post Facto* Laws

United States v. Duncan, No. 03-15315, slip op. (11th Cir. Feb. 24, 2005)

In *Duncan*, the defendant was convicted by a jury of a conspiracy involving 5 or more kilograms of cocaine. In applying the court's reasoning in *Rodriguez*, Circuit Judges Anderson, Birch and District Judge Land sitting by designation, found that the defendant did not satisfy the third prong of plain error analysis because he could not show that an error affected his substantial rights. *Id.* at 2. The court emphasized that Justice Breyer's opinion in *Booker* left as the only maximum sentence the one set out in the statute and the only error by the sentencing court was that the judge perceived the guidelines to be mandatory when they are now deemed to be advisory. *Id.* at 12-13. However, the defendant could not show that the error affected his substantial rights because he acknowledged that "[i]t is simply impossible to determine whether the district court would have imposed the same sentence under a discretionary Guideline

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[12] However, in ***United States v. Frye***, 2005 WL 315563 (11th Cir. Feb. 10, 2005), where the defendant admitted the facts in the factual resume that led to the sentence imposed which included sentencing enhancements, in a per curiam opinion, Circuit Judges Carnes, Marcus, and Pryor held that the sentence did not violate the Sixth Amendment, without any discussion regarding the sentencing judge's discussion on the record concerning the sentence imposed. *Id.* at *5.

scheme." *Id.* at 14. Because the defendant bears the burden of persuasion with respect to prejudice, he was not able to meet the burden. *Id.*

The defendant additionally argued that Justice Steven's *Booker* opinion should be applied retroactively, but that applying Justice Breyer's *Booker* opinion retroactively would violate the Due Process Clause because of the Supreme Court's holding in *Bouie v. Columbia*, 378 U.S. 347 (1964), where the Court held that judicial enlargement of a criminal statute, applied retroactively, violated the Due Process Clause because it was unforeseeable and therefore like an *ex post facto* law. *Id.* at 20. He argued that the remedial opinion authored by Justice Breyer, if applied retroactively, would increase the sentence authorized by the jury's verdict to a maximum of life, and therefore would operate as an *ex post facto* law in violation of his due process rights. *Id.* at 21. However, the court found that at the time he committed the offense, the statute subjected the defendant to a sentence of life imprisonment if he was convicted of possessing at least 5 kilograms of cocaine powder. The guidelines at the time also subjected the defendant to up to life imprisonment. Therefore, the court found the defendant had ample warning at the time he committed the offense that life imprisonment was a potential consequence of his actions. *Id.*

XII. District of Columbia Circuit

A. Plain Error Standard

United States v. Coumaris, 2005 WL 525213 (D.C. Cir. March 8, 2005)

Blakely was decided after the parties in Coumaries filed their appellate briefs, and the court deferred resolution of this appeal until *Booker* was decided. After *Booker*, the government moved to vacate the defendant's sentence and remand for resentencing, conceding that the mandatory enhancements to his sentence were unconstitutional. *Id.* at *3, 6. Although the defendant challenged the alleged improper application of enhancements to his base offense level, the court did not reach those challenges because it granted the government's Motion to Remand pursuant to *Booker*. *Id.* at *6. The government also agreed with the defendant that, by noting his objection to the PSR that *Apprendi* had rendered the guidelines problematic, he had "made a sufficient objection in the district court to preserve a Sixth Amendment challenge to his sentence." *Id.* at *6. The court therefore found that the *Booker* challenge in this case was governed by the harmless error standard of review appropriate for constitutional error, and noted that the government stated it could not satisfy that standard, conceding that it could not demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained." *Id.*

Although the defendant urged the court to resolve his specific challenges to the application of the guidelines, the court declined to do so, determining that because the sentencing court might impose a different sentence on remand and because the parties might decide to not appeal that sentence, in its view, any consideration of the defendant's objections would be "premature at best and unnecessary at worst." *Id.* at *7.

I. Advisory Guidelines Are to Be Given Great Weight

In the Eighth and Tenth Circuits, five judges in four districts have ruled that the post-*Booker* advisory guidelines are to be given great weight. Judge Cassell in the District of Utah was first, followed by Judge Holmes in the Northern District of Oklahoma, both in the Tenth Circuit, and by Judges Battalion and Kopf, both in the District of Nebraska, and Judge Hovland in the Northern District of North Dakota, in the Eighth Circuit.

A. Eighth Circuit

1. District of Nebraska

United States v. Huerta-Rodriguez, No. 04-365,slip op. (D. Neb. Feb. 1, 2005)

In *Huerta-Rodriguez*, Judge Battalion emphasized that although the court is not bound by the guidelines, it must "consult" and "take them into account when sentencing." *Id.* at 2. It found that the Supreme Court in *Booker* had neither held nor implied that the measure of reasonableness is the guideline range, and instead stated it was mindful that "'any system which [holds] it is *per se* unreasonable (and hence reversible) for a sentencing judge to reject the guidelines is indistinguishable from the mandatory system.'" *Id.* at 3 (*quoting Booker*, at 794 (Scalia, J., dissenting)). Therefore, the court determined that its measure of reasonableness will be guided by the statutory factors set out in § 3553(a), together with consideration of the advisory guidelines. *Id.*

Significantly, the court quoted Justice Thomas' dissent in *Booker* to find that "the Due Process Clause is implicated whenever a judge determines a fact by a standard lower than beyond a reasonable doubt if that factual finding would increase the punishment above the lawful sentence that could have been imposed absent that fact." *Id.* at 4 (*citing* Thomas' dissent which stated the Court's holding in *Booker* corrects the Sentencing Commission's mistaken belief, set out in §6A1.3, that the preponderance of the evidence standard is appropriate to meet due process requirements; "[t]he Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by a jury or admitted by the defendant." *Booker*, at 798 n. 6)).[13] Thus, the court found that because a sentencing court's discretion is constrained by "reasonableness," the "upper limit of a lawful sentence is no longer the 'maximum term of imprisonment' under a statute that sets out a generally broad range (*i.e.*, the 'statutory maximum'), but the highest point within that range that is 'reasonable.'" *Id.* at 4-5. The court stated the fact that its discretion is curtailed by a requirement of reasonableness meant it could not sentence a defendant above a reasonable point within a sentencing range without affording the defendant the procedural protections of the Fifth and Sixth Amendments. *Id.* Thereafter, the court found that it could not adopt the government's position that a sentence

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[13] In a footnote, the court acknowledged this approach is similar to one it used after the *Blakely* opinion was issued, in *United States v. Terrell*, 2004 WL 1661018 (D. Neb. July 22, 2004), and stated although it is not mandated by *Booker*, it is also not inconsistent with nor prohibited by Booker. *Id.* at *9, n. 8.

should fall within the guidelines range absent highly unusual circumstances, because a wholesale application of the guidelines as *per se* reasonable would effectively convert the advisory guideline system to a mandatory scheme. Similarly, the court stated it would not preserve a "de facto" mandatory guideline scheme by affording the guidelines a presumption of reasonableness in every case. *Id.* at *6. On this point, it was the court's view that although some guidelines are based in part on statistical analyses of pre-guideline sentences, for policy reasons and because of applicable statutory minima, other guidelines are less reliable appraisals of fair sentences. *Id.* at *6-7. The court found "[w]hatever the constitutional limitations on the advisory statutory sentencing scheme, . . . it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt," and further held it would continue to require that facts that enhance a sentence are properly pled in an indictment and either admitted or submitted to the jury for determination by proof beyond a reasonable doubt. *Id.* at *11-12.

United States v. Wanning, No. 03-3001, slip op. (D. Neb. Feb. 3, 2005)

In *Wanning*, Judge Kopf adopted the view of Judge Cassell in *United States v. Wilson I*, and found that the guidelines provide the presumptively reasonable sentence even though they are advisory. *Id.* at 2. In the court's opinion, because the guidelines and their ranges were explicitly crafted by the Commission at the direction of Congress to implement the statutory purposes of sentencing, and because Congress kept the power to accept or reject both the initial guidelines and any amendments, "judges cannot reasonably conclude that Congress willfully or negligently allowed Guideline ranges to be implemented that contradicted the statutes [it] enacted for the purpose of setting sentencing goals." *Id.* at 6-7. Further, the court argued that if a sentencing court does not give the guidelines considerable weight or deference, there is nothing to harmonize and implement the varied statutory goals of sentencing, leading to a "mix-and-match" approach which would return sentencing practice to a pre-guideline system. *Id.* at 9. Such a practice, asserted the court, flies in the face of what Congress intended in adopting the guideline sentencing scheme. *Id.* Additionally, the court stated "under the advisory Guideline scheme, a judge should depart from the Guidelines when normal departure theory warrants. The judge should also deviate from the Guidelines when normal departure theory fails but another sentencing range from within the Guidelines more accurately (and honestly) describes the real offense behavior." *Id.* at 12. In the instant case, the court believed the 18 month sentence it imposed under the guidelines for access-device fraud was reasonable because it fell within the advisory guideline range, substantial weight was given to the guidelines, a downward departure under normal departure theory was not warranted, and there were no other sufficient reasons given to impose a different sentence. *Id.*

United States v. Peach, 2005 WL 352636 (D.N.D. Feb. 15, 2005)

In *Peach*, Judge Hovland followed Judge Kopf's opinion in *United States v. Wanning* when he determined that the guidelines should be given substantial weight and the guideline range established by the Commission provides a presumptively reasonable sentence. *Id.*

B. Tenth Circuit

1. District of Utah

United States v. Wilson, 2005 WL 78552 (D. Utah Jan. 13, 2005)

The defendant in *Wilson* was convicted of bank robbery and had an extensive criminal history. Upon reviewing the applicable congressional mandates in the SRA, and congressional history in the sentencing realm, Judge Cassell first concluded that considerable weight should be given to the guidelines, and that further, with respect to the congressionally mandated goal of achieving uniformity, the guidelines are the only way to create consistent sentencing because they are the only uniform standard available. *Id.* at *1. The court stated that for all future sentencings, it will give heavy weight to the guidelines in determining the appropriate sentence. *Id.* Because the court asserted that judicial discretion in sentencing is limited by clear congressional directives and mandates regarding the guidelines, in all but the most unusual sentences, the guideline sentence will be the appropriate sentence. *Id.* at *3. Additionally, the court found that the Commission was bound by the terms of the "parsimony provision" of § 3553(a) which requires courts to impose a sentence sufficient but not greater than necessary to comply with purposes set forth in the SRA when it promulgated the guidelines. *Id.* at *10. Therefore, the guidelines should be followed to avoid unwarranted sentencing disparity and should be given great weight to avoid disparities, pursuant to § 3553(a)(6). In the court's opinion, the only way to do this is to apply some uniform measure in all cases, and the only current standard is the guideline scheme. The court further stated it would only deviate from the guidelines in unusual cases, and only for clearly identified and persuasive reasons. *Id.* at *12.

United States v. Wilson (II), No. 03-00882, slip op. (D. Utah Feb. 2, 2005)

In *Wilson II*, Judge Cassell revisited the sentence he imposed in *Wilson I*, above, after the defendant filed a motion to reconsider, based on several district courts' opinions, but most noteably Judge Adelman's opinion in *United States v. Ranum*, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005) (discussed below) which followed a more flexible approach to sentencing.[14] The court found that Judge Adelman's approach was flawed for three reasons. *Id.* at 10. First, without clear justification, *Ranum* altered the guideline approach of giving limited effect to offender characteristics. In the court's reasoning, *Ranum*'s contention that the guidelines forbid consideration of offender characteristics is wrong, and stated the Commission has carefully calibrated the extent to which offender characteristics should determine a sentence, taking into account those characteristics Congress has specifically forbidden. *Id.* at 12-13. Additionally, the court noted that there are certain factors the Commission has explained are "not ordinarily relevant" in the determination of whether to impose a sentence outside the applicable range, but that are still potentially available for a determination within the applicable range. *Id.* Second, the court disagreed with *Ranum* because Judge Adelman gave undue emphasis to the idea that an offender might become rehabilitated in prison. The court asserted that Congress, in enacting the SRA, specifically gave rehabilitation a secondary role in the determination of a

[14] Other cases cited by the court which have rejected the reasoning in *Wilson I* include ***United States v. Myers***, 2005 WL 165314 (S.D. Iowa Jan. 26, 2005); ***United States v. West***, 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005); and ***United States v. Huerta-Rodriguez***, No. 04-365, slip op. (D. Neb. Feb. 1, 2005). *Wilson II*, *2, at n. 5.

sentence, and that the guidelines have already properly implemented that Congressional will. *Id.* at 10. Finally, the court argued that *Ranum* did not pay enough attention to the statutory requirement to avoid unwarranted sentencing disparity. The court reiterated its argument in *Wilson I* that only close adherence to the guidelines offer any prospect of treating similarly-situation offenders similarly. *Id.*

The court stated that it remained convinced the guidelines should be given great weight in determining the appropriate sentence and should vary from the guidelines only in rare cases, as it had found in *Wilson I*. *Id.* at 2. Additionally, the court rejected *Ranum*'s contention that courts should no longer follow the departure methodology in sentencing because courts are free to disagree with the actual range proposed by the guidelines as long as the sentence is reasonable and supported by reasons in § 3553(a). *Id.* at 28 (citing *Ranum*, at *2). The court instead found that it is critical for courts to follow the departure methodology because *Booker* commands that courts must consult the guidelines and take them into account. In the court's opinion, sentencing courts can only follow *Booker*'s requirement if they calculate and consider the guideline advice. *Id.* at 28 (*citing United States v. Crosby*, at 24, discussed *infra*). Further, following this methodology is important for purposes of allowing the Commission and Congress to monitor how the new system is working, and the PROTECT Act specifically requires courts to state their reasons in writing for issuing a sentence outside the guideline range for this reason. *Id.* at 30. Finally, the court stated that following this methodology is important because it guides the exercise of discretion, and will therefore help to minimize unwarranted sentencing disparities. *Id.*

United States v. Duran, 2005 WL 234778 (D. Utah Jan. 31, 2005)

Judge Cassell held in *Duran* that under *Booker*, the guidelines are advisory under the safety valve provision of § 3553(f), finding that the same constitutional defect in judicial fact-finding in a mandatory guideline scheme exists when a sentencing court uses the guidelines to determine a sentence under the safety valve. *Id.* at *1. The government argued that because Section 3553(f) states the court "shall impose a sentence pursuant to the guidelines . . . without regard to any statutory minimum sentence," the court was required to impose a sentence no lower than the guideline range determined after application of the safety valve. *Id.* The court held, however, that the advisory guidelines are not transformed into mandatory guidelines under the safety valve provision because the statute itself only directs the court to impose a sentence "pursuant to" the guidelines, and thus, so long as the court consults the guidelines in determining an appropriate sentence, any resulting sentence will be "pursuant" to the guidelines. *Id.* at *2. In the court's view, any other reading of the safety valve provision renders it unconstitutional under the Sixth Amendment as interpreted by *Booker*. *Id.* Continuing to give considerable weight to the guidelines as it had explained in *United States v. Wilson*, the court engaged in the guideline application, awarding the defendant an acceptance of responsibility decrease and an additional 2 level decrease for the safety valve under §5C1.2, for a guideline range of 87 to 108 months. Although this sentence was below the ten year statutory mandatory minimum, the court found the safety valve provision permitted it to impose this lower sentence. The court then held judgment for an additional 14 days to allow the government to file any objection after consulting with the Criminal Division of the Department of Justice, stating it "would appreciate understanding how the Department intends to approach this issue in other cases." *Id.* at *4.

3. Northern District of Oklahoma

United States v. Barkley, No. 04-CR-119, slip op. (N.D. Ok. Jan. 24, 2005)

According to Judge Holmes, courts may constitutionally apply the guidelines if the manner of their application fully protects the Sixth Amendment rights articulated in *Booker*. *Id.* at 13. The courts should exercise their discretion by strictly applying the guidelines in all cases, modified to satisfy *Blakley*. Therefore, the court found that in the instant case, the guidelines should be applied consistent with *Blakely* and *Booker*, and as a result, sentencing the defendant under the guidelines will be constitutional. *Id.* at 14. The court relied heavily on its belief that Congress will reimpose a mandatory sentencing system, which under *Booker* must reflect modifications as necessary to accomplish the Sixth Amendment rights described in *Blakely*. *Id.* at 9. The court's belief centers on its finding that as a matter of history, policy, and common sense, the best sentencing system is one that is mandatory and fully accommodates the Sixth Amendment rights. Because Congress is going to seek a mandatory system as the most effective means of achieving uniformity, the court believes the best course of action is to apply the guidelines in sentencing, with the necessary changes to meet the *Blakely* requirements. *Id.* at 10. Additionally, the court found that a mandatory sentencing system is better and more effective in promoting uniformity, with the modifications needed to satisfy *Blakely* creating a better system for protecting defendants' rights. *Id.* at 11.

Further, the court stated that the burden of proof for sentencing factors should be one of beyond a reasonable doubt, either to the jury in a trial, or to the judge with a proper waiver and consent, and the rules of evidence should apply. To ensure that *Blakely* and *Booker* are followed, the court stated that the trial court must put before the jury each fact that must be established to support an enhancement. *Id.* at 24. Finally, the court acknowledged that there will be the rare case where evidence regarding sentencing factors might be prejudicial, including relevant conduct, and in that case, a second phase will be required for presentation to the jury. *Id.* at 26. Therefore, the government should charge the relevant conduct in the indictment wherever possible. *Id.*

II. Advisory Guidelines Not Followed; Sentence Imposed Below Guideline Range

Many more district judges have imposed sentences below the applicable post-*Booker* advisory guideline range than have followed the advisory guideline range. Seven district judges in the First, Second, Fourth, Seventh, and Eighth Circuits have not followed the advisory guidelines, beginning first with Judge Adelman in the Eastern District of Wisconsin and followed by Judge Simon in the Northern District of Indiana, both in the Seventh Circuit; Judge Hornsby in the District of Maine and Judge Gertner in the District of Massachusetts, both in the First Circuit; Judge Sweet in the Southern District of New York in the Second Circuit in an opinion at odds with his fellow judge in *United States v. Ochoa-Suarez*; Chief Judge Jones in the Western District of Virginia in the Fourth Circuit; and Judge Pratt in the Southern District of Iowa in the Eighth Circuit.

A. First Circuit

1. District of Maine

United States v. Revock, 2005 U.S. Dist. LEXIS 1151 (D. Me. Jan. 28, 2005)

In *Revock*, one co-defendant was sentenced after *Blakely* but prior to *Booker*, and the second co-defendant was to be sentenced after *Booker* was decided. The first defendant received no enhancement for the obliterated serial number because there had been no stipulation to the fact, but because of the sentencing delay for the defendant in *Revock* until after *Booker*, Judge Hornby found he was able to find that fact by a preponderance of the evidence and without a jury finding as long as he treated the guideline calculation as advisory. *Id.* at *2. The court asserted that according to *Booker*, he was to look to the sentencing factors in § 3553(a) to determine whether to apply the advisory guideline sentence, and that one factor to consider was "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* at *4. Because both defendants' conduct was not just similar but identical, the court concluded that the guideline sentence for the second defendant impeded the statutory goal of sentencing uniformity, and after considering all the other § 3553(a) factors and finding none which counseled a different outcome, sentenced him outside and below the applicable guideline range so he would receive the same sentence as the first defendant. *Id.* The court, however, specified that its decision, based upon the disparity factor of § 3553(a), represented a very narrow category of cases and applied to defendants with similar records who engaged in joint criminal behavior where one defendant was sentenced between *Blakely* and *Booker* without an appeal and benefitted from the district's post-*Blakely* approach, and the other defendant was sentenced after *Booker* without receiving the same benefit. *Id.* at *5.

United States v. Jones, 2005 WL 121730 (D. Me. Jan. 21, 2005)

In *Jones*, the defendant, the government, and the probation office all asked the sentencing judge to depart downward from Zone D to Zone C, pursuant to §§5H1.3, 5K2.13, 5K2.19, and 5K2.0. Judge Hornby found none of the departures appropriate in this case, and therefore concluded that a guideline-type sentence was not appropriate. *Id.* at *1-2. The court noted that under *Booker*, it would review the sentencing factors under 18 U.S.C. § 3553(a) in determining wether the advisory guidelines, and decided to not do so in this case. *Id.* at *3. The court therefore used the factors in § 3553 to find 1) a sentence under § 3553(a)(2)(D), which reflects the need to provide medical care or other correctional treatment, would accomplish that need better than a sentence under the guidelines; 2) the need to protect the public as stated in § 3553(a)(2)(c) would not be better accomplished by a few more months in prison as would occur under the guidelines, and this need to protect the public was offset by the increased risk to the defendant's mental health which would have occurred with the longer term of imprisonment suggested under the guidelines due to the interruption of his treatment; and 3) that § 3553(a) looks to the nature and circumstances of the offense, and in this case, the defendant would not have possessed the guns as a mental patient had he known that he was prohibited from doing so. *Id.* The court found that the guidelines do not authorize a departure, but that sentencing the defendant in Zone C instead of Zone D would better accomplish the statutory goals of sentencing than the guideline sentence. *Id.*

2. District of Massachusetts

United States v. Jaber, No. 02-10201, slip op. (D. Mass. March 3, 2005)

In *Jaber*, Judge Gertner determined that *Booker* does not necessitate reconsideration of any sentences she imposed in light of her post-*Blakely* approach in *United States v. Mueffelman*. The court agreed with the Second Circuit opinion in *Crosby*, discussed above, that it is not useful to determine in advance the weight that judges should give to applicable guideline ranges. *Id.* at 10. The judge also expressed concern over Judge Cassell's approach in *Wilson*, determining that the *Wilson* method "comes perilously close to the mandatory regime found to be unconstitutionally infirm in *Booker*" and the court's finding that the guidelines are entitled to heavy weight. *Id.* at 11, 12. In her view, the *Wilson* court's reliance on the Commission's studies, which helped the court find the guidelines in fact achieved the statutory purposes of sentencing, was misplaced. *Id.* at 13. Judge Gertner stated the Commission made no effort to implement the statutory purposes of sentencing and in effect, the purposes enumerated under § 3553(a) became irrelevant to the guidelines. *Id.* at 17. The court opined that the only way for courts to truly consider the guidelines is to "do in each case just what the Commission failed to do - to explain, correlate to the purposes of sentencing, cite to authoritative sources, and be subject to appellate review. As for the Commission, it can now return to what it was supposed to do as well - to studying the impact of sentences on crime control, as well as monitoring disparity." *Id.* at 22.

B. Second Circuit

1. Southern District of New York

United States v. West, 2005 U.S. Dist. LEXIS 1123 (S.D.N.Y. Jan. 27, 2005)

In *West*, Judge Sweet cited approvingly to Judge Adelman's opinion in *United States v. Ranum*, and stated that the guideline calculations are to be treated as "just one of a number of sentencing factors." *Id.* at *5 (*quoting Ranum*, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005)). Although the court acknowledged that other district courts imposing sentences after *Booker* have concluded that the guidelines should remain the dominant or even determinative factor in the sentencing analysis, the court found instead that under § 3553(a), the sentencing court is required to consider "a host of individual variables and characteristics excluded from those calculations called for by the Guidelines." *Id.* at *6 (*citing United States v. Barkley*, No. 04-119, slip op., at 13-14 (N.D. Ok. Jan. 24, 2005); and *United States v. Wilson*, 2005 WL 78552 (D. Utah Jan. 13, 2005)). According to the court, the appropriate consideration of a number of factors in § 3553(a), including the defendant's history and characteristics, requires reliance upon facts not typically either admitted by the defendant or found by a jury. *Id.* at *7. Therefore, the court stated it would sentence the defendant based upon the facts admitted in connection with his plea and upon those facts found by the court in the context of its analysis under § 3553(a) as limited by both *Apprendi* and *Booker*. *Id.*

The sentence imposed fell at the bottom of the advisory guideline range and represented the statutory maximum term of imprisonment and supervised release for the underlying offense, and the court found that the terms imposed "befit the need for a sentence . . . to reflect the seriousness of the offense and to provide just punishment in light of an offense that affected scores of victims, some 200 of whom have submitted statements to the court describing the

financial, familial and emotional toll that their dealings with [the defendant] has taken" and that by imposing a sentence within the guideline range, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" is presumptively satisfied. *Id.* at *20 (*citing* 18 U.S. C. § 3553(a)(6)).

C. Fourth Circuit

1. Western District of Virginia

United States v. Mullins, 2005 WL 372209 (W.D. Va. Feb. 16, 2005)

In *Mullins*, the defendant was convicted after pleading guilty to, in part, possessing a semiautomatic assault rifle and selling a firearm without the proper documentation. The defendant file a Motion for Downward Departure on the basis that possession of a semiautomatic assault rifle is no longer a crime, after September 13, 2004. *Id.* at *2. Chief Judge Jones stated the first step after *Booker* in determining a sentence is to determine the guideline range prescribed after making such findings of fact that are necessary and noted neither the defendant nor the government . *Id.* (*quoting Hughes*). The sentencing court found there had yet not been any authoritative formulation following *Booker* as to the weight to be given to the guidelines, comparing *United States v. Wilson* and *United States v. Ranum*. *Id.* at *3. However, in the instant case, the judge found that evaluation of the sentencing goals justify a sentence below the guidelines. Booker requires a sentencing court to impose a sentence not greater than necessary to comply with certain listed sentencing purposes, including "affording adequate deterrence to criminal conduct." *Id.* In the present case, the court found neither the defendant nor others can be deterred by a sentence based on the guideline range for possession of a semiautomatic assault rifle because that conduct is no longer criminal. "Instead, the more apt guidelines range should be based on the conduct that is still criminal - selling a firearm without the proper documentation." *Id.* Taking into account the guidelines as well as the 3553(a) goals, the court found the reasonable sentence to be 40 months' imprisonment, giving "recognition to the range while also applying an appropriate reduction because of the removal of criminality of the offense used to calculate that range." Id.

D. Seventh Circuit

1. Eastern District of Wisconsin

United States v. Ranum, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005)

In *Ranum*, Judge Adelman found that under *Booker*, courts must treat the guidelines as just one of a number of sentencing factors. According to the court, *Booker* makes clear that the courts may no longer uncritically apply the guidelines, and stated that Judge Cassell's opinion in *United States v. Wilson* is inconsistent with the holdings of the merits-majority in *Booker,* which rejected mandatory guideline sentences based on judicial fact-finding, and with the remedial-majority in *Booker*, which directed courts to consider all of the § 3553(a) factors, many of which the court found are either rejected or ignored by the guidelines. *Id.* at *1 *(citing Wilson*, 2005 WL 78552 (D. Utah Jan. 13, 2005)). For example, the court found that pursuant to § 3553(a)(1), a sentencing court must consider the history and characteristics of the defendant, but the

guidelines forbid or discourage courts from considering the defendant's age, educational and vocational skills, mental and emotional condition, physical condition, drug and alcohol dependence, employment record, family ties, socio-economic status, and civic and military contributions. In the opinion of the court, the guidelines' prohibition or discouragement of these factors cannot square with § 3553(a)(1)'s requirement to evaluate the history and characteristics of the defendant. Because courts must now consider all the § 3553(a) factors, the courts will have to resolve the conflict when the guidelines conflict with the other factors in § 3553(a). *Id.* However, the court acknowledged that courts must seriously consider the guidelines, and because the Commission has collected a great deal of data over the years, courts not imposing sentences within the advisory guideline range should provide an explanation. *Id.* at *2. Additionally, the court stated that the guidelines are not binding and courts need not justify a sentence outside of them by citing factors that take the case outside the "heartland." *Id.* Courts are free to disagree with the guideline range so long as the ultimate sentence is reasonable and carefully supported by reasons tied to the § 3553(a) factors. *Id.*

In the present case, the judge declined to follow the guidelines and instead imposed a sentence which it found was sufficient but not greater than necessary to satisfy the statutory purposes of sentencing. *Id.* The court did consider the guidelines, and came up with a range of 37 to 46 months, with supported enhancements. However, the court rejected this range and instead imposed a sentence of one year and one day. *Id.* at *4. According to the court, in terms of the nature of the offense, while this present offense was serious, it was mitigated by the defendant's lack of personal gain or improper personal gain of another, and there was no harm intended to the bank. Further, the defendant's guideline range was based on the amount of loss, and because he only made loans outside of his lending authority, although he was reckless with his employer's money, it was not the same as stealing it. Thus, in the court's view, the guideline range, which depended on the amount of loss, was greater than necessary. *Id.* at *5. The court also considered the history and character of the defendant and found he was a single father of two children; had a father with Alzheimer's disease and a mother with depression; he suffered from serious health problems; was not a danger to society and was highly unlikely to re-offend. *Id.* at *6. However, in order to promote respect for the law and because of the significant loss to the bank, the court concluded that the defendant must be confined for a significant period of time. But because the sentence called for by the guidelines was much greater than necessary to satisfy the purposes of sentencing set forth in § 3553(a), and because the guideline range did not properly account for the defendant's absence of interest in any personal gain, the sentence imposed should be below that range. *Id.*

United States v. Galvez-Barrios, No. 04-CR-14, slip. op. (E.D. Wis. Feb. 2, 2005)

In *Galvez-Barrios*, Judge Adelman followed the methodology he first set forth in *United States v. Ranum*, above, in sentencing the defendant who had been convicted of unlawful re-entry. The PSR recommended a guideline range of 41 to 51 months, and the court imposed a 24 month sentence. The court determined first, with respect to the "nature of the offense" factors of § 3553(a), the seriousness of the defendant's illegal re-entry was mitigated by the fact that he committed the crime to support his family, and had not violated the law after he arrived in the United States. *Id.* at 4. Further, with respect to his "history and character" factors, the court found he had paid taxes and filed tax returns, "atypical conduct among the § 1326 defendants I have seen;" his family had encountered financial difficulties in his absence; and he had strong

family ties in this country and no such ties in his home country. *Id.* With respect to the "needs of the public" factors, the court determined a need to promote respect for the immigration law and to deter removed felons from re-entering the country supported a substantial sentence, however, in the view of the court, the defendant was not dangerous and a lengthy incarceration was not necessary to protect the public. *Id.* at 5.

Taking the guidelines into consideration, the court found that the guideline calculation at §2L1.2 was flawed in that it establishes the offense level based on prior convictions, where other Chapter Two guidelines establish the offense level based on the defendant's relevant conduct. After examining the history of the Commission's amendments to §2L1.2, including citing to an article asserting that the Commission had no studies recommending a high level for a prior aggravated felony and that there were no other grounds to warrant the high level, the court stated that it was not sound policy to increase a defendant's sentence twice for his prior record. *Id.* at 7-8 (*citing* Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent. Rep. 275 (March/Apr. 1996)). Additionally, the court was troubled by the unwarranted sentencing disparity under §2L1.2 for § 1326 offenders due to the fast-track programs in certain judicial districts which did not include the District of Wisconsin. *Id.* at *8-9 (*citing* Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 262-63 (March/Apr. 2002)). Under *Booker*, the court opined that it may be appropriate in some cases for courts to exercise their discretion to minimize the sentencing disparity that fast-track programs create. *Id.* at 10. In the instant case, the court held the advisory guideline range was "somewhat greater than necessary" to satisfy the purposes of sentencing and translated the sentence imposed under the § 3553(a) factors into an effective 4 level reduction by analogy to §5K3.1, and a 3 level reduction "based on his motive for re-entering the United States," which it stated "effectively discounted the 16 level enhancement [in §2L1.2], recognized defendant's good character and honorable motive for re-entering, and eliminated unwarranted sentencing disparity, while still treating the offense as a serious one." *Id.* at 11. However, the court also effectively increased the defendant's criminal history to a criminal history category III to reflect a prior uncharged illegal re-entry offense, which created a 21 to 27 month guideline range. *Id.*

United States v. Smith, No. 02-163, slip op. (E.D. Wis. March 3, 2005)

In *Smith*, Judge Adelman sentenced the defendant who had pleaded guilty to possession with intent to distribute more than 50 grams of cocaine base. *Id.* at 1. The government had moved for a 6 level downward departure based on the defendant's substantial assistance, but Judge Adelman determined a 10 level downward departure was appropriate, based on the defendant "zealously assist[ing]" the government with cooperation that was "enormously useful leading to multiple arrests and convictions;" his controlled buys while repeatedly wearing a wire; the high risk of personal injury involved in his cooperation; and because he provided information that was consistently reliable. *Id.* at 8-9. Judge Aldeman also engaged in a protracted discussion concerning the guideline disparity between cocaine base and powder cocaine, observing the defendant's guideline sentence was driven largely by the weight of the drugs, and courts, commentators and the Commission have long criticized this disparity which "lacks persuasive penological or scientific justification, and creates a racially disparate impact in federal sentencing." *Id.* at 13. The court found the Commission had studied the issue in depth and had concluded that the assumptions underlying the disparity between crack and powder are

unsupported by data. *Id.* at 15 (*citing* former Chair Murphy's Statement to Senate Judiciary Committee, May 22, 2002, 14 Fed. Sent. Rtpr. 236, 237 (Nov./Dec. 2001)). Judge Adelman was particularly concerned that the "unjustifiably harsh crack penalties disporportionately impact on black defendants," while noting that the Commission has repeatedly sought to reduce the disparity. *Id.* at 17, 19. Concluding that in the present case adhering to the guidelines would result in a sentence greater than necessary and would create an unwarranted disparity between defendants convicted of possessing powder cocaine and those convicted of possessing crack cocaine, the court sentenced the defendant to a term of 18 months' imprisonment even though the statutory minimum was 10 years. *Id.* at 22.

2. Northern District of Indiana

United States v. Nellum, No. 04-30, slip op. (N.D. Ind. Feb. 3, 2005)

In *Nellum*, the defendant was convicted of distribution of five grams or more of crack cocaine. Judge Simon stated that *Booker* raises the question of how much weight the court should give to the advisory guidelines and the general factors set forth in § 3553(a). *Id.* at 2. The court determined the task is complicated because many of the § 3553(a) factors are factors that the guidelines "either reject or ignore." *Id.* (*quoting United States v. Ranum*, 2005 WL 161223, at *1 (E.D. Wis. Jan. 19, 2005)). The court considered all the evidence, reviewed the PSR, and determined the applicable guideline range. In determining the applicable range, the court applied §1B1.3 to find the defendant responsible for more crack cocaine that in the count of conviction, and also applied a gun enhancement even though the guns were not possessed by the defendant during the offense of conviction, based on §1B1.3. After applying the acceptance of responsibility guideline, the defendant faced a guideline range of 168-210 months. *Id.* at 4.

The court next considered the § 3553(a) factors, including the need for the sentence to reflect the seriousness of the offense and the need to deter the defendant and others from committing further crimes. *Id.* The court found that many factors in the deterrence element mitigated the defendant's sentence, including that the defendant was 57 years old. *Id.* at 5. According to the court, the likelihood of recidivism by a 65 year old is very low, citing to the Commission's Recidivism Report released in May, 2004. "Under the guidelines, the age of the offender is not ordinarily relevant in determining the sentence. *See* §5H1.1. But under § 3553(a)(2)(c), age of the offender is plainly relevant to the issue of 'protect[ing] the public from further crimes of the defendant'." *Id.* Further, the court considered the history and characteristics of the defendant, finding he had a good relationship with his children and was a good father, and determined that under the guidelines, family ties are not ordinarily relevant, but under the statute, family ties are pertinent to crafting an appropriate sentence. *Id.* at 7. Additionally, the court stated the evidence from the sentencing hearing "established beyond a doubt" that the defendant was a serious crack addict who supported his habit by selling drugs, and that while under the guidelines, drug addiction is not ordinarily relevant to sentencing, under § 3553(a), the defendant's need for correctional treatment is relevant. The court also found that the defendant had serious medical problems, not relevant under the guidelines, but § 3553(a) and *Booker* require judges to "impose sentences that . . . effectively provide the defendant with needed medical care." *Id.* at 7. Finally, the court found that while the defendant's veteran status was not ordinarily relevant under the guidelines, it was very relevant that he "honorably served this country." *Id.* at *8. The court also considered the nature of the offense, and cited the

Commission's Fifteen Year Report released in November 2004, in which the Commission noted that it had recommended in 2001 the crack cocaine threshold be raised, replacing the 100 to 1 ratio with a 20 to 1 ratio. *Id.* However, the court stated it did not need to address the 100 to 1 ratio in crafting the sentence because it relied on the other factors it was required to take into consideration in arriving at the sentence. *Id.* at 8. The court determined that a 108 month sentence, less than the term called for by the guidelines, was sufficient because it protects the public, and provides just punishment and adequate deterrence. *Id.* at 5.

E. Eighth Circuit

1. Southern District of Iowa

United States v. Myers, 2005 WL 165314 (S.D. Iowa Jan. 26, 2005)

In *Myers*, Judge Pratt recognized that different interpretations of *Booker* have emerged, citing Judge Cassell's opinion in *United States v. Wilson*, 2005 WL 78552 (D. Utah Jan. 13, 2005), in which the court determined that the guidelines are still presumptive and should only be departed from in unusual cases, and Judge Adelman's opinion in *United States v. Ranum*, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005), in which the court concluded the guidelines are not presumptive but advisory, and should be treated as one factor to be considered in conjunction with other factors that are enumerated in § 3553(a). The court adopted Judge Adelman's view, stating "to 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 reasons." *Id.* at *1. According to the court, if the guidelines are presumptive they would continue to overshadow the other factors listed in § 3553(a) which would cause an imbalance in the application of the statute to a particular defendant by making the guidelines, in effect, still mandatory. *Id.* Because the court found that the guiding principle in *Booker* is that true uniformity exists "not in a one-size-fits-all scheme, but in 'similar relationships between sentence and real conduct,'" it stated it would endeavor to "square the real conduct presented by the evidence presented concerning a particular defendant, with the public interests expressed through the sentencing statute, in order to deliver a judgment" as even-handed and reasonable as possible. *Id.* at *3.

In the instant case, the defendant was charged with unlawful possession of an illegal firearm after selling a sawed-off shot gun to his cousin in 1974. The cousin then used the sawed-off shotgun to bludgeon someone to death in 2004. The court found that a term of imprisonment was completely unwarranted for this defendant based on these facts and the defendant's exemplary history, aberrant behavior, and other such factors. However, the court found that out of respect for the fact that a violation of federal law occurred, and to deter others from committing similar acts, the defendant should be sentenced to three months' probation. *Id.* at *6.

III. Advisory Guideline Sentence Followed

In only three district courts in two circuits have judges followed the post-*Booker* advisory guideline range. The first was Judge Woodcock in the District of Maine, followed by Judge Woodlock in the District of Massachusettes, all in the First Circuit, and Judge Keenan, in the Southern District of New York in the Second Circuit, in an opinion at odds with his fellow judge's opinion in *United States v. West*.

A. First Circuit

1. District of Maine

United States v. Beal, 2005 WL 112402 (D. Me. Jan 19, 2005)

In a footnote, Judge Woodcock acknowledged that *Booker* states a court must consult the guidelines and take them into account when sentencing. The court applied §5K2.12's requirements, and denied the defendant's motion for a downward departure. *Id.* at *1.

United States v. Davis, 2005 WL 91257 (D. Me. Jan 18, 2005) Judge Woodcock

In a footnote, Judge Woodcock acknowledged that the court is not bound by the guidelines but must consult them and take them into account when sentencing. The court found that the defendant's prior conviction for a state crime was a crime of violence under §§2K2.1(a) and 4B1.2. *Id.* at *1.

2. District of Massachusetts

United States v. Ziskind, 2005 WL 181881 (D. Mass. Jan. 25, 2005)

In *Ziskind*, the defendant moved for a stay of execution of his sentence, claiming *Booker* cast doubt on the integrity of the jury's verdict and the propriety of his sentence. Without any discussion explaining his reasoning, Judge Woodlock stated "[t]reating the guidelines [as advisory], I find that the sentence imposed under the mandatory guidelines scheme would in all likelihood by the sentence I would impose under an advisory guidelines sentencing scheme. Consequently, I am of the view that refinement of federal sentencing guidelines law provided by *Booker* is of no particular assistance in supporting the defendant's claims of material impropriety in his sentence." *Id.* at *2.

B. Second Circuit

1. Southern District of New York

United States v. Ochoa-Suarez, 2005 WL 287400 (S.D.N.Y. Feb. 7, 2005)

Judge Keenan found that the sentence he originally imposed the day before *Booker* was decided, which concluded that the defendant qualified as a manager or supervisor under §3B1.1, must be set aside after *Booker* because there was no finding beyond a reasonable doubt by the jury on those facts. *Id.* at *2. Therefore, the court rejected the enhancement under the now-

advisory guidelines for the role in the offense. The defendant had also asserted that she qualified for the safety-valve under 18 U.S.C. § 3553(f), but the court held that *Booker* did not affect the application of that provision in this case. The court found that the defendant did not meet the five criteria to qualify, in part, because testimony at the *Fatico* hearing disclosed she was a manager and supervisor in the criminal activity for safety-valve purposes, and the enterprise was a continuing one. In the court's view, this has nothing to do with the guidelines which are not implicated by the mandatory minimum statute. *Id.* The resulting guideline range applicable to the defendant was a level 31, with a criminal history category I, for a guideline total of 108 to 135 months. The judge then imposed the ten year mandatory minimum sentence. *Id.*

IV. Sentencing Allegations Listed in Indictments; Surplusage

A. First Circuit

1. District of Maine

United States v. Cormier, 2005 WL 213513 (D. Me. Jan. 28, 2005)

In *Cormier*, the defendant moved to strike the section in his indictment entitled "Sentencing Allegations." Concluding the sentencing allegations contained in the indictment were surplusage, Judge Woodcock ordered they be striken, pursuant to F.R.C.P. 7(d). *Id.* at *1. The court recognized its holding was inapposite to its post-*Blakely* holding in *United States v. Baert*, 2004 WL 2009275, at *1 (D. Me. Sept. 8, 2004), which stated "[g]iven this District's interpretation of *Blakely* . . . the government must include such allegations in order to obtain what it considers an appropriate sentence under the . . . guidelines," but asserted that in light of *Booker*, the defendant's Motion to Strike the allegations must be granted. *Id.* at *2 *(citing United States v. Dose*, 2005 WL 106493 (N.D. Iowa Jan. 12, 2005), below). The court's reasoning was that with an advisory guideline scheme, none of the facts contained in the Sentencing Allegations portion of the indictment must be proven to the jury in order for the court to consider them at sentencing, and therefore the Allegations were surplusage. *Id.* In the instant case, the Sentencing Allegations alleged a drug quantity, and while the court acknowledged drug quantity is an element of the offense for a violation of 21 U.S.C. § 841, it stated that the indictment referred to the drug amounts in the specific penalty provisions, and that prejudice exists when an indictment sets out drug amounts in a separate and prominent sentencing section. *Id.* at *4.

B. Sixth Circuit

1. Eastern District of Michigan

United States v. Dottery, 2005 U.S. Dist. LEXIS 1071 (E.D. Mich. Jan. 24, 2005)

In *Dottery*, the grand jury returned a superceding indictment which added additional facts to address "sentencing factors" that could be relevant to determining the sentencing range under the guidelines. *Id.* at *3-4. Judge Lawson stated that the court did not need to decide whether this practice amounted to prosecutorial misconduct because *Booker* rendered the addition of sentencing factors to the indictment unnecessary. *Id.* at *

C. Eighth Circuit

1. Northern District of Iowa

United States v. Dose, 2005 U.S. Dist. LEXIS 526 (N.D. Iowa, Jan. 12, 2005)

In *Dose*, Magistrate Judge Zoss recommended that in light of *Booker*, the defendant's Motion to Strike the Notice of Additional Relevant Facts from the superceding indictment be granted, asserting that because the Supreme Court has held the guidelines not mandatory, none of the facts contained in the Notice must be proven to a jury in order for the court to consider those factors at the time of sentencing. Therefore, the judge believed the Notice was surplusage and recommended it be striken. *Id.*

V. New Trial Ordered Due to Booker Violations

A. Sixth Circuit, Northern District of Ohio

United States v. Williams, 2005 WL 323679 (N.D. Ohio Feb. 4, 2005)

In *Williams*, Judge Aldrich found that *Booker* announced a new rule and thus it applies to all criminal cases still pending on direct review, finding that a case announces a new rule "'if the result was not dictated by precedent existing at the time the defendant's conviction became final.'" *Id.* at *5 (quoting *Blakely*, at 2549). Therefore, the court found Booker applied to this defendant's convictions and any sentence that may be imposed. *Id.* The court also found that the defendant was entitled to a new trial because the jury was never expressly charged with finding the amounht of loss beyond a reasonable doubt and under *Booker*, that is a fact that must be admitted by the defendant or expressly found by the jury before it may be used to help convict him or to inrease his sentence. *Id.* Because the court found that the estimate given by the government's witness on the amount of loss was unreliable, and because the jury will have to decide that same factual issue at sentencing, the jury's consideration of loss when weighing guilt or innocence "cannot be neatly separated from its revisiting the issue for purposes of sentencing. Their factual findings at the two stages of these proceedings are inextricably intertwined." *Id.* The court stated that at all phases of the prosecution, potentially determinative factual issues concerning the elements of the offense "or necessarily influence their determination of an element "should be expressly submitted to the jury" to find beyond a reasonable doubt. *Id.* at *7. Therefore, the court vacated the defendant's conviction, finding the defendant was entitled to a new trial pursuant to *Blakely* and *Booker*. *Id.*[15]

VI. Habeas Petitions

Every court that has considered whether *Booker* applies retroactively to cases on

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[15] In a companion case, the court also vacated the co-defendant's conviction for the same reasons. ***United States v. Rohira***, 2005 WL 323677 (N.D. Ohio, Feb. 4, 2005).

collateral review has held that it does not. *See* ***United States v. Green***, 2005 WL 237204, at *1 (2d Cir. Feb. 2, 2005) (finding neither *Blakely* nor *Booker* apply retroactively to collateral challenge; Supreme Court noted holding in case applies to 'all cases on direct review' but made no explicit statement of retroactivity to collateral review."); ***United States v. Humphress***, 2005 WL 433191 (6th Cir. Feb. 25, 2005); ***McReynolds v. United States***, No. 04-2520, slip op. (7th Cir. Feb. 2, 2005) (holding *Booker* does not apply retroactively; Supreme Court did not address issue but *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004), was conclusive, where Court held *Ring v. Arizona*, 536 U.S. 584 (2004), not retroactive on collateral review, and finding *Booker*, like *Apprendi* and *Ring*, must be treated as procedural decision for purposes of retroactivity analysis, and procedural rule to be applied retroactively only if establishes watershed rules of criminal procedure and Booker not watershed rule, so not retroactive to cases final before *Booker*); ***United States v. Leonard***, 2005 WL 139183, at *1 (10th Cir. Jan. 24, 2005) (finding defendant exhausted direct appeal before *Blakely* was decided, and therefore, *Blakely* and *Booker*, which established new rule of criminal procedure and therefore apply retroactively only to cases pending on direct review, are not applicable); ***United States v. Anderson***, 2005 WL 123923, at *1-2 (11th Cir. Jan. 21, 2005) (holding where defendant filed application seeking order allowing district court to consider a second motion under 18 U.S.C. § 2255 and claiming life sentence violated new rules of constitutional law established in *Blakely* and *Booker*, that Supreme Court has not expressly declared *Booker* retroactive on collateral review; Eleventh Circuit previously held Supreme Court did not make *Blakely* retroactive on collateral review for purposes of rules governing filing of successive habeas actions, *Booker* cannot be applied retroactively on collateral review); ***Garrish v. United States***, 2005 U.S. Dist. LEXIS 1013, at *1 (D. Me. Jan. 25, 2005) (finding *Blakely* and *Booker* not applicable to cases not on direct appeal when decided; "by its very terms, *Booker* states that it is to apply 'to all cases on direct review'"with no reference to cases on collateral review); ***Warren v. United States***, 2005 U.S. Dist. LEXIS 989, at *27 (D. Conn. Jan. 25, 2005) (holding defendant could not be afforded relief under *Blakely* or *Booker*; Supreme Court has not announced *Blakely* to be new rule of constitutional law nor held it applied retroactively on collateral review); ***United States v. Williams***, 2005 WL 240939 (E.D. Pa. Jan. 31, 2005) (holding *Booker* not retroactive to cases on collateral review); ***United States v. Johnson***, 2005 U.S. Dist. LEXIS 1053, at *1 (E.D. Va. Jan. 21, 2005) (finding *Apprendi*, *Blakely*, and *Booker* do not constitute newly recognized rights by Supreme Court which are made retroactively applicable to cases on collateral review); ***United States v. Siegelbaum***, No. 04-1380, slip op., at 3, 10-11 (D. Ore. Jan. __, 2005) (stating Supreme Court has not yet stated whether the rule announced in *Blakely* and *Booker* is retroactive to cases on collateral review, *Blakely* and *Booker* announced a new rule, rule is procedural, and procedural rules are generally not retroactive, but also finding it could not exclude possibility that Supreme Court might apply *Blakely/Booker* retroactively in some situations). *But see* ***United States v. Baez***, 2005 WL 106901, at *6 (S.D.N.Y. Jan. 19, 2005) (finding not clear what effect *Booker* will have on habeas petitions and therefore considering possible issues raised by *Booker* and finding defendant's sentence based on statutory mandates not guideline enhancements, thus holdings of *Booker* to no avail).

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March 15, 2005

MEMORANDUM

TO: Chair Hinojosa
Commissioners
Tim McGrath

FROM: Identity Theft Team

SUBJECT: Aggravated Identity Theft Amendments

OVERVIEW

At its February 16, 2005 meeting, the Commission voted to publish proposed amendments that: (1) incorporate the directives of the Identity Theft Penalty Enhancement Act, and (2) simplify the existing enhancement at §2B1.1(b)(10). This memorandum identifies possible changes to the proposed amendments suggested by the Commissioners at that meeting and identified by staff after further consideration. It also addresses policy considerations inherent in the ultimate decision of whether to simplify the existing enhancement at §2B1.1(b)(10).

Immediately following the Commission's vote to publish, staff contacted representatives of the Department of Justice and the Practitioners' Advisory Group in light of the abbreviated 30-day period of public comment. The Practitioners' Advisory Group submitted the attached letter of comment, and DOJ representatives have had several discussions with Commission staff.

AGGRAVATED IDENTITY THEFT

Consecutive Mandatory Minima

The proposed amendment creates a new guideline at §2B1.6 for the two and five-year consecutive mandatory minima created by the new criminal statute at 18 U.S.C. § 1028A. The proposed amendment tracks existing guideline treatment at §2K2.4 of statutes involving consecutive mandatory minima, such as 18 U.S.C. § 924(c).

Abuse of Trust

The Identity Theft Penalty Enhancement Act contains a directive that provides that the Commission is to "*[a]mend U.S.S.G. section 3B1.3 . . . to apply to and punish offenses in which the defendant exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification,[as defined by statute]*."

The proposed published amendment incorporated this directive by providing in the Commentary to §3B1.3, at Application Note 1(B), that the "abuse of trust" adjustment will apply to a "*defendant who uses his or her position in order to obtain unlawfully, or use without authority, any means of identification.*" Further staff review and discussion with DOJ resulted in changing the proposed adjustment to track the precise language of the statutory directive. In addition, the proposed amendment now explicitly provides that the identity theft-related adjustment applies irrespective of the general rule in §3B1.3. These changes are reflected in the revised draft amendment at §3B1.3, Application Note 2.

In addition, as suggested at the Commission meeting, examples have been added to suggest the scope and nature of the term "position" within the proposed amendment. Discussions with DOJ resulted in the range of proposed examples now included in the revised draft amendment at §3B1.3, Application Note 2(B)(i) to (iii).

EXISTING IDENTITY THEFT ENHANCEMENT

The existing enhancement at §2B1.1(b)(10) is a consolidation of enhancements promulgated in response to various statutes enacted in the late 1990's. These are: 18 U.S.C. §1028(a)(5) (criminalizing the production, transfer, or possession of document-making implements or authentication features (counterfeit devices)); 18 U.S.C. §1029(a)(4) (criminalizing the production, trafficking, control, custody, or possession of device-making equipment (in connection with access devices)); and 18 U.S.C. §1028(a)(7) (criminalizing the misuse of another person's means of identification).[1]

The proposed amendment to §2B1.1(b)(10) replaces the descriptive language of the offense conduct in each enhancement with a reference to the statutory section, so that the enhancement will apply upon conviction of the particular statute. With respect to counterfeit and access devices, the existing guideline at §2B1.1(b)(10) (A) and (B) essentially tracks the statutory language, so that there is no appreciable difference between the scope of these statutes and the respective enhancements.

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[1] The scope of this statute was broadened this past year by the Identity Theft Penalty Enhancement Act which added the term "possesses" to the definition of the offense at § 1027(a)(7) and the phrase "in connection with," so that the statute in its entirely now provides:

"*knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet ,or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law*;" [emphasis added]

This is not the case, however, with the proposed amendment regarding the identity theft portion of §2B1.1(b)(10) at subsection (C). The current enhancement attaches to any offender whose offense conduct includes either the possession of five or more means of identification or who create or "breed" identification means based on another person's documents or information (such as using a stolen driver's license to obtain a credit card in another person's name) irrespective of the statute of conviction. For example, an offender convicted under 18 U.S.C. § 1344 of a massive bank fraud scheme that involves stolen and/or falsely created identification documents merits this enhancement. If the Commission adopts the proposal to tie the enhancement to the statute of conviction, however, such relevant conduct will no longer factor into the guideline sentence.

In this way, the proposed amendment will narrow the application of the enhancement. In FY 2003, 768 offenders sentenced under §2B1.1 received the enhancement at subsection (b)(10). (It is not possible to distinguish from our data how many of these offenders received the enhancement under the identity theft prong at subsection (C).) Only 97 of these 768 offenders (13%), however, were convicted under one of the three statutory provisions referenced in the proposed amendment. Absent a change in charging practices, it appears likely that the enhancement would no longer apply to many offenders who currently receive it.

In another way, the proposal to simplify the enhancement will broaden the scope of the enhancement to a wider range of offenders. For example, a conviction under § 1028(a)(7) is possible if a 19-year old student uses a friend's identification to get into a bar (and assuming that this constitutes a felony under a particular State or local law). Similarly, an offender who steals a credit card and then uses it to make a purchase, would, if convicted under § 1028(a)(7), merit the two-level enhancement or the floor of level 12 under the proposed amendment, while such an offender does not qualify under the existing enhancement. In FY 2003, a total of 64 offenders were convicted under one of the three statutes referenced in the proposed revision to subsection (b)(10) but did not receive the existing enhancement. Sixty of these offenders were convicted under § 1028(a)(7).

As noted at the time of its promulgation in 2000, the existing identity theft enhancement was crafted to eliminate such a broad scope, and instead punish more severely only more egregious offenders. At that time, consistent with the extensive legislative history and case file research, it was determined that the more egregious offenders meriting additional punishment (and the severity of a floor of 12 levels) were those offenders who either have five unauthorized means of identification in their possession, or attempt to "breed" or create another's means of identification.

Against this historic backdrop, however, it must be noted that in passing the Identity Theft Penalty Enhancement Act last summer, Congress also specifically broadened the scope of § 1028(a)(7) (see footnote 1 above) to cover the mere unauthorized possession of another person's identification means. Accordingly, the Commission may, on balance, consider it appropriate to amend the enhancement so that it is coextensive with a statutory violation of § 1028(a)(7).

ISSUE FOR COMMENT: MULTIPLE COUNTS OF CONVICTIONS

Staff suggests that the Commission include a number of provisions at appropriate guidelines in order to address the provision of section 2 of the Identity Theft Penalty Enhancement Act that provides that "a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, *provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission . . .*"[emphasis added].

The proposed amendment states a general rule at §5G1.2, Application Note 2(B) that, for multiple counts of conviction of 18 U.S.C.§ 1028A, the court has discretion to impose concurrent or consecutive sentences. The proposed amendment then provides a non-exhaustive list of factors for the court to consider in determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently or consecutively to each other. Next, the proposed amendment adds a new rule to §3D1.1 that multiple counts of § 1028A are excluded from the general grouping rules at §§3D1.2 - 3D1.5. Finally, the proposed amendment makes conforming additions and changes to the new proposed guideline at §2B1.6 (Aggravated Identity Theft) at Application Note 1 and §3D1.1(b)(1) and (2).

Attachment

REVISED PROPOSED AMENDMENT: AGGRAVATED IDENTITY THEFT

Synopsis of Proposed Amendment: *The proposed amendment implements sections 2 and 5 of Public Law 108–275, 118 Stat. 831 (July 15, 2004), the "Identity Theft Penalty Enhancement Act" ("the Act"), which creates two new criminal offenses and provides a specific directive to the Sentencing Commission regarding the upward adjustment at §3B1.3 (Abuse of Position of Trust/Special Skill). First, the Act creates a new offense at 18 U.S.C. § 1028A(a)(1) that prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, specific enumerated felonies. These felonies consist of various types of fraud, including mail and wire fraud in connection with passports, visas and other immigration, nationality, and citizenship laws, programs under the Social Security Act, and the acquisition of firearms. A conviction under 1028A(a)(1) carries a two-year mandatory sentence that must run consecutive to any other term of imprisonment, including the sentence for the underlying felony conviction. The new criminal offense at 18 U.S.C. § 1028A(b)(1) prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, specific felonies enumerated in section 2332b(g)(5)(B) ("federal crimes of terrorism"). Section 1028A(b)(1) provides a 5-year mandatory sentence that must run consecutive to any other term of imprisonment, including the sentence for the underlying felony conviction.*

In response to the creation of these new offenses, the proposed amendment creates a new guideline at §2B1.6 (Aggravated Identity Theft). The proposed guideline is patterned after §2K2.4 (Use of a Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to a Certain Crimes). Because the new offenses carry a mandatory consecutive term of imprisonment, the proposed guideline, as does §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) , provides that the "guideline sentence is the term of imprisonment required by statute". To avoid double-counting, the amendment proposes an application note that prohibits the application of any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense in cases in which a sentence under §2B1.6 is imposed in conjunction with a sentence for an underlying offense.

Second, section 5 directs the Commission to amend the Abuse of Trust guideline at §3B1.3 to include a "defendant [who] exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification . . . ." The Act also includes a general directive to the Commission to review and amend its guidelines and policy statements to ensure that the guideline offense levels and enhancements appropriately punish identity theft offenses involving an abuse of trust. In response to the directive, the proposed amendment amends §3B1.3(Abuse of Position of Trust or Use of Special Skill) by adding Application Note 2(B) to ensure that an adjustment under this guideline applies to "a defendant who exceeds or abuses his or her position in order to obtain unlawfully, or use without authority, any means of identification [of another person].". To avoid double-counting, the amendment proposes an application note that prohibits this adjustment if the defendant is

convicted of 18 U.S.C. § 1028A, or the base offense level or a specific offense characteristic in Chapter Two applicable to the defendant incorporates this factor.

Third, the proposed amendment simplifies the application of the three-pronged enhancement at subsection (b)(10) of the fraud guideline, §2B1.1, which currently covers access devices, counterfeit devices, and identity theft by changing it from an enhancement based on relevant conduct to an enhancement based on the offense of conviction. This proposal is in response to comments from practitioners, since the enhancement's promulgation in 2001, that the enhancement in its current form is confusing and applied inconsistently.

Finally, the proposed amendment adds a number of provisions at appropriate guidelines in order to provide guidance to courts in accordance with section 2 of the Identity Theft Penalty Enhancement Act (18 U.S.C. § 1028A(b)(4)), that provides that "a term of imprisonment imposed on a person for violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission . . . ."

Accordingly, the proposed amendment states the general rule at §5G1.2 (Sentencing on Multiple Counts of Conviction), Application Note 2(B) that, for multiple counts of conviction of 18 U.S.C.§ 1028A, the court has discretion to impose concurrent or consecutive sentences. The proposed amendment provides a non-exhaustive list of factors for the court to consider in determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently or consecutively to each other. Next, the proposed amendment modifies §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to make clear that § 1028A offenses are excluded from the general grouping rules at §§3D1.2 - 3D1.5. Finally, the proposed amendment makes conforming additions and changes to the new proposed guideline at §2B1.6 (Aggravated Identity Theft) at Application Note 1 and §3D1.1(b)(1) and (2).

Proposed Amendment

§2B1.6. Aggravated Identity Theft

(a) If the defendant was convicted of violating 18 U.S.C. § 1028A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Commentary

Statutory Provision: 18 U.S.C. § 1028A. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Imposition of Sentence.—

(A) In General.—Except as provided in subdivision (B), section 1028A of title 18, United State Code, provides a mandatory term of imprisonment of 2 years. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 1028A is the term required by that statute. Section 1028A of title 18, United State Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

(B) Multiple Convictions Under Section 1028A.—Section 1028A(a)(4) provides that in the case of multiple convictions under 18 U.S.C. § 1028A, the sentences imposed on such counts may, in the discretion of the court, run concurrently, in whole or in part, to each other. See the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance regarding imposition of sentence on multiple counts of 18 U.S.C. § 1028A.

2. Inapplicability of Chapter Two Enhancement.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). "Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7).

* * *

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:

(1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in §3D1.2.

(2) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.

(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.

(b) Exclude from the application of §§3D1.2-3D1.5 the following:

(1) ~~a~~Any count for which the statute (~~1~~A) specifies a term of imprisonment to be imposed; and (~~2~~B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).

(2) Any count of conviction under 18 U.S.C. § 1028A, regardless of whether the statute requires that the sentence be imposed consecutively to any other term of imprisonment. See Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how such sentences should be imposed.

* * *

§5G1.2. Sentencing on Multiple Counts of Conviction

* * *

Commentary

2. *Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).—*

(A) *In General.—Subsection (a) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment) and 18 U.S.C. § 1028A (requiring a mandatory minimum term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subdivision (B), the sentence imposed to run consecutively to any other term of imprisonment. Except for certain career offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. See, e.g., the Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. ~~Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.~~ Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.*

(B) *Multiple Convictions Under 18 U.S.C. § 1028A.—Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However,*

18 U.S.C. § 1028A permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section "concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission."

In determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently or consecutively to each other, the court should consider the following non-exhaustive list of factors:

(i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive terms of imprisonment in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B).

(ii) Whether the underlying offenses are groupable under §3D1.2 (Multiple Counts). Generally, multiple counts of § 1028A should run concurrently in cases in which the underlying offenses are groupable under §3D1.2.

(iii) Whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by a concurrent or a consecutive sentence.

(C) Imposition of Supervised Release.—In the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e).

§2B1.1. **Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

* * *

(b) Specific Offense Characteristics

* * *

~~(10) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any~~

~~other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.~~

(10) If the defendant was convicted of an offense under 18 U.S.C. § 1028(a)(5), (a)(7), or § 1029(a)(4), increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

* * *

Commentary

* * *

Application Notes:

* * *

~~*9. Application of Subsection (b)(10).—*~~

~~*(A) Definitions.—For purposes of subsection (b)(10):*~~

~~*"Authentication feature" has the meaning given that term in 18 U.S.C. § 1028(d)(1).*~~

~~*"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service. "Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).*~~

~~*"Device-making equipment" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).*~~

~~*"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).*~~

~~*"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.*~~

~~*"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).*~~

~~*(B) Authentication Features and Identification Documents.—Offenses involving authentication features, identification documents, false identification documents, and*~~

~~*means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.*~~

~~*(C) Application of Subsection (b)(10)(C)(i).—*~~

~~*(i) In General.—Subsection (b)(10)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.*~~

~~*(ii) Examples.—Examples of conduct to which subsection (b)(10)(C)(i) applies are as follows:*~~

~~*(I) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.*~~

~~*(II) A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.*~~

~~*(iii) Nonapplicability of Subsection (b)(10)(C)(i).—Examples of conduct to which subsection (b)(10)(C)(i) does not apply are as follows:*~~

~~*(I) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.*~~

~~*(II) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.*~~

~~*(D) Application of Subsection (b)(10)(C)(ii).—Subsection (b)(10)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.*~~

9. *Application of Subsection (b)(10).—Subsection (b)(10) provides a 2-level increase, and a minimum offense level of level 12, if the defendant was convicted of an offense under 18 U.S.C. § 1028(a)(5) or (a)(7), or § 1029(a)(4).*

§3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by **2** levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

general

Commentary

Application Notes:

1. *Definition.—"Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.*

high level

~~*Notwithstanding the preceding paragraph, because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail.*~~

2. *Application of Adjustment in Certain Circumstances.—Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:*

2 exceptions to high level 1) postal 2) low level theft.

(A) *An employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail.*

(B) *A defendant who exceeds or abuses the authority of his or her position in order to obtain unlawfully, or use without authority, any means of identification ~~of another person~~]. "Means of identification" has the meaning given that term in*

18 U.S.C. § 1028(d)(7). The following are examples to which this subdivision would apply: (i) an employee of a state motor vehicle department who exceeds or abuses the authority of his or her position by knowingly issuing a driver's license based on false, incomplete, or misleading information; (ii) a hospital orderly who exceeds or abuses the authority of his or her position by obtaining and/or misusing information from a patient chart; and (iii) a volunteer at a charitable organization who exceeds or abuses the authority of his or her position by obtaining and/or misusing information from a donor's file.

* * *

5. *Inapplicability of Adjustment.—Do not apply this adjustment if the defendant is convicted of 18 U.S.C. § 1028A or the base offense level or specific offense characteristic in Chapter Two incorporates this factor.*

* * *

STATUTORY INDEX - APPENDIX A

* * *

18 U.S.C. § 1028	2B1.1
18 U.S.C. § 1028A	2B1.6

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March 10, 2005

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RE: Comments to Proposed Amendment: Aggravated Identity Theft

Dear Ms. Desio:

Thank you for the opportunity to comment on the proposed amendment dealing with aggravated identity theft. We have reviewed the proposed amendment and have the following comments and observations.

A. Amendment to U.S.S.G. § 2B1.1(b)(10)

The Commission proposes revising § 2B1.1(b)(10) by striking the original language and inserting language that any defendant who is convicted of an offense under 18 U.S.C. § 1028(a)(5), (a)(7), or § 1029(a)(4) shall receive this adjustment. This amendment may have the effect of including some defendants who would not have received this adjustment under the prior language, and excluding others who might have received the (b)(10) adjustment under the prior language. We perceive no change as to those defendants convicted of violations under §§ 1028(a)(5) and 1029(a)(4). The (b)(10) adjustment probably would have applied to them under the old language as it will under the new language. On the other hand, not all defendants convicted of § 1028(a)(7) may have received the adjustment under the old language. The language of § 1028(a)(7) is very broad, and encompasses criminal conduct that previously was not described in (b)(10).

For example, a defendant convicted of bank fraud, which involved fraudulent use of another's credit card or checking account, would not receive the (b)(10) adjustment, because bank fraud is not a conviction under 18 U.S.C. § 1028(a)(5), (a)(7), or § 1029(a)(4) . But, a defendant convicted under § 1028(a)(7) may have committed arguably less serious criminal conduct such as a minor crime involving immigration documents and yet this adjustment would apply to him. Because this amendment may advantage some defendants and disadvantage others, we have no position on the amendment. However, we suggest that the Commission continue to study this amendment and ascertain how it is applied to defendants and in what types of cases.

B. Multiple Counts of Aggravated Identity Theft under 18 U.S.C. § 1028A

Section 2 of the Identity Theft Penalty Enhancement Act, at 18 U.S.C. § 1028A(b)(4), states that a term of imprisonment for a violation of the aggravated identity theft statute may run concurrently to another conviction for § 1028A, "provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission." This language invites the Commission to address this issue in the Guidelines, and we believe that the Commission should do so. If Congress believed that concurrent sentences were never appropriate then it clearly would have said this in the statute, as it has in the context of convictions for use of a firearm during a crime of violence or drug trafficking offense (18 U.S.C. § 924(c)), which never run concurrently.

We believe that the criteria set forth in the grouping rules together with the relevant conduct rules set forth the correct criteria for determining whether convictions for § 1028A should run concurrently. If the conduct that is the subject of multiple convictions for § 1028A involved acts or transactions that were connected by a common criminal objective, constituted part of a common scheme or plan, or would otherwise qualify as "relevant conduct," as that term is defined in U.S.S.G. § 1B1.3, then the sentences for such violations of § 1028A should run concurrently with each other.

In the commission of such offenses, a defendant might use an individual's "means of identification" on multiple occasions. Or, in the course of committing a large scale fraud, a defendant might use the means of identification of several different persons. A defendant who commits fraud by using one person's identification 20 times should not serve 20 consecutive terms of imprisonment for aggravated identity theft. Nor should the individual who uses the identity of 100 persons in the commission of a large scale fraud be facing 100 consecutive terms of imprisonment. If the harm is greater because of either the number of times an identity was used or the number of identities used, then this greater harm will be reflected in the sentence for the underlying offense, which will take into account, under § 2B1.1, the amount of loss and number of victims. Therefore, we strongly urge the Commission to include strong language in the Guidelines indicating that the court should impose concurrent sentences for convictions of § 1028A any time the conduct involves the same course of conduct.

As always, we thank you for the opportunity to respond to the proposed amendments. Please feel free to contact us with any questions or for further comment.

Very truly yours,

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Federal Public Defender
Chair, Federal Defender Sentencing Committee

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U.S. Department of Justice
Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 25, 2005

The Honorable Ricardo H. Hinojosa
Chair, U.S. Sentencing Commission
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Dear Judge Hinojosa:

On behalf of the Department of Justice, I submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register in February, 2005. We thank the Commissioners and Commission staff for addressing these important issues in addition to the valuable work the Commission has already done in response to the Supreme Court's decision in United States v. Booker. We look forward to working with the Commission on these issues to ensure a fair sentencing guidelines system that serves justice and the American people.

IDENTITY THEFT

In 2004, Congress passed the Identity Theft Penalty Enhancement Act, Public Law 108–275, 118 Stat. 831 (July 15, 2004), which created new offenses and established penalties for aggravated identity theft, at 18 U.S.C. § 1028A. Specifically, § 1028A(a)(1) prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, certain enumerated felony fraud offenses. This section carries a two-year mandatory sentence that must run consecutively to any other term of imprisonment, including the sentence for the underlying felony conviction. A second criminal offense, at 18 U.S.C. § 1028A(b)(1), prohibits the unauthorized transfer, use, or possession of a means of identification of another person during, or in relation to, federal crimes of terrorism, enumerated in 18 U.S.C. § 2332b(g)(5)(B). This section carries a five-year mandatory sentence that must run consecutively to any other term of imprisonment, including the sentence for the underlying felony conviction. The Act also expanded existing identity theft statutes, such as 18 U.S.C. § 1028(a)(7).

Finally, section 5 of the Act directed the Commission to "review and amend its guidelines and its policy statements to ensure that the guideline offense levels and enhancements appropriately punish identity theft offenses involving an abuse of position." Congress further directed the Commission to

"[a]mend U.S.S.G. section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to apply to and punish offenses in which the defendant exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification . . ."

Aggravated Identity Theft – § 2B1.6

The Department supports the proposed guideline at § 2B1.6 for the new offenses of aggravated identity theft. The new offenses carry a mandatory consecutive term of imprisonment; consequently, the proposed guideline provides that the "guideline sentence is the term of imprisonment required by statute." This guideline is consistent with § 2K2.4 (Use of a Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), which applies to a statute carrying a mandatory consecutive term of imprisonment and provides that the "guideline sentence is the term of imprisonment required by statute."

In order to avoid double counting for defendants who are sentenced to enhanced penalties under the new guideline, the amendment proposes an Application Note prohibiting the application of any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. The Department agrees that it is appropriate to avoid double counting and notes that this Application Note is consistent with one following § 2K2.4.

Abuse of Trust – § 3B1.3

The published proposal amends the Application Note to § 3B1.3 to include "a defendant who uses his or her position in order to obtain unlawfully, or use without authority, any means of identification . . ." The Department supports this amendment which ensures that all defendants – including clerks and similar employees – who abuse their position by stealing identity are punished for the abuse of trust, notwithstanding their lack of managerial discretion or whether the conduct significantly facilitated the commission or concealment of the offense. The Department suggests that the Application Note should unambiguously state that the enhancement applies, without qualification, to everyone who exceeds or abuses the authority of their position in order to obtain, transfer or use without authority any means of identification, as prohibited by the Act. The Department also suggests that the Application Note provide a variety of examples demonstrating this. The Department would be pleased to provide draft language to the Commission staff.

The published proposal also adds an Application Note which directs that the abuse of trust enhancement should not apply if the defendant is convicted of identity theft under 18 U.S.C. § 1028A. The Department disagrees with this limitation. Congress recognized that identity theft and abuse of trust are separate harms. That is why it directed the Commission to "ensure that the guideline offense levels and enhancements appropriately punish *identity theft offenses involving an abuse of position*." The proposed Application Note would undercut congressional intent because it would not distinguish *identity offenses involving an abuse of position* from other identity offenses. All defendants who abuse their position of trust in order to commit identity theft should receive an enhancement for the abuse of trust.

§ 2B1.1(b)(10)

The published proposal would also amend § 2B1.1(b)(10) and the corresponding Application Note to authorize a two-level enhancement for a defendant "convicted of an offense under 18 U.S.C. § 1028(a)(5), (a)(7), or 1029(a)(4)." The Department opposes this amendment, which would significantly narrow the applicability of the enhancement in a way which was not intended by Congress. The amendment should not be restricted to defendants who are "convicted" of identity theft crimes. Rather, it should apply if the underlying offense "involved" the unauthorized transfer, possession or use of another person's means of identification (except for aggravated identity theft which already includes an enhancement).

ANTITRUST PENALTIES

The proposed guideline amendments for antitrust violations largely implement the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, recently passed by Congress. Section 215 of that Act increased the maximum term of imprisonment for violations of Sherman Act §§ 1-3, 15 U.S.C. §§ 1-3, from 3 years to 10 years. The Act also increased the maximum fine for corporations from $10,000,000 to $100,000,000, and increased the maximum fine for individuals from $350,000 to $1,000,000. Finally, the legislative history of the Act provides that "this section (Section 215 of the Act) will require the United States Sentencing Commission to revise the existing antitrust sentencing guideline to increase terms of incarceration of antitrust violations to reflect the new statutory maximum."

We believe Congress had two purposes for this substantial increase. One purpose was to recognize that criminal antitrust violations are serious white-collar crimes meriting punishment more commensurate with other serious white-collar crimes such as mail and wire fraud. The second purpose was to provide additional deterrence to large-scale cartel violations of the type that the Department continues to uncover involving hundreds of millions, and even billions, of dollars of affected commerce. There is no indication that Congress had any reservations concerning how sentences are calculated for antitrust violations under § 2R1.1; there is only a desire expressed that the Commission amend § 2R1.1 "to increase terms of incarceration . . . to reflect the new statutory maximum."

The Department strongly supports amending § 2R1.1, both by increasing the base offense level in § 2R1.1(a) and by adjusting the volume of commerce table in § 2R1.1(b)(2) upward to reflect the increased penalties provided for antitrust violations by Congress and the higher volumes of affected commerce that the Department has encountered in antitrust cases since the table was last amended in 1991. Failure to do so would be a repudiation of the congressional intention that the antitrust guideline implement the enhanced punishment for antitrust violations provided in the Act.

Base Offense Level

The Commission has solicited comment on whether to increase the base offense level in § 2R1.1(a) from 10 to somewhere in the range of 12 to 14. We support such an increase, and suggest a base offense level of 13. We believe that this is necessary to reflect the serious nature of antitrust violations and the harm caused by them, to punish the antitrust offenses proportionally to other sophisticated white collar offenses, and to deter others from committing antitrust offenses.

We do not, however, believe that an increase in the base offense level is warranted to incorporate the one-level increase for bid-rigging violations now contained in § 2R1.1(b)(1). The Commission proposes doing so for the stated reason that the "significant majority" of antitrust cases sentenced under the Guidelines have been bid-rigging cases. That is not in accord with the Department's experience. While there have been years where particular investigations have resulted in large numbers of bid-rigging cases, over the last 10 years only about one-half of the individuals charged by the Antitrust Division have been charged with bid rigging.

Volume of Commerce Table

Increasing the volume of commerce table in § 2R1.1(b)(2), in conjunction with increasing the base offense level, is also warranted. Doing so would, in the words of the Commission, "foster greater proportionality between § 2R1.1 offenses and fraud offenses sentenced pursuant to § 2B1.1." It is also essential to provide effective punishment for violations affecting greater than $100 million in commerce, the current highest volume of commerce offense level adjustment. Since that limit was adopted in 1991 (increased from the original $50 million limit set in 1987), the Department has prosecuted a number of antitrust violations affecting more than $100 million – and even more than $1 billion – in commerce, and the volume of commerce table should be amended to reflect this new reality.

Starting in 1996, the Department began prosecuting international price-fixing and market-allocation cartels that involved volumes of commerce well beyond $100 million. The first such case involved the U.S. company Archer-Daniels-Midland and various co-conspirators from Europe and Asia that conspired to fix prices and allocate sales volumes of the food additive citric acid and the feed additive lysine. We calculated ADM's volume of commerce to be approximately $150 million in the lysine conspiracy and $350 million in the citric acid conspiracy. Other notable defendants in these conspiracies included Ajinomoto Co., with a $122 million volume of affected commerce in the lysine conspiracy, and Haarmann & Reimer Corp., with $400 million in affected commerce in the citric acid conspiracy.

In 1998, the Department began prosecuting companies involved in fixing prices and allocating markets for graphite electrodes. UCAR International, Inc. was the first company to be charged in this conspiracy. UCAR's volume of affected commerce was $713 million during the period of the conspiracy. Subsequent companies sentenced in the graphite electrode conspiracy included SGL Carbon AG, with $485 million in affected commerce, Showa Denko Carbon, Inc., with $325 million in affected commerce and Mitsubishi Corp., with $175 million in affected commerce.

In 1999, F. Hoffmann-La Roche Ltd. and BASF AG, respectively Swiss and German pharmaceutical companies, pled guilty to price fixing and market allocation with respect to vitamins used as nutritional supplements or to enrich human food and animal feed. Hoffmann-La Roche's volume of commerce affected by the conspiracy was calculated to be $3.280 billion; BASF's volume of affected commerce was $1.460 billion. Other companies participating in the vitamins conspiracy included Takeda Chemicals Industries, Ltd., with $361 million in affected commerce and Eisai Co., Ltd., with $194 million in affected commerce.

High volume of commerce cases continue to be prosecuted. Among the more recent examples, in 2004, Bayer AG pled guilty to participating in an international conspiracy to fix the price of rubber

chemicals, with a volume of affected commerce of $233 million. Also in 2004, as part of an ongoing investigation of an international conspiracy to fix prices of dynamic random access memory (DRAM) – a commonly used semiconductor memory product providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunication and consumer electronic products – Infineon Technologies AG pled guilty with a volume of commerce of $1.050 billion. In addition, the Department has recently entered into plea agreements which are not yet public where the volumes of affected commerce are $133 million, $379 million and $411 million. Clearly, this history justifies adding additional adjustments for volume of commerce between the current $100 million top and $1 billion.

Recommended Table

The Department suggests amending § 2R1.1 as follows:

(1) Section 2R1.1(a) is amended by striking "10" and inserting "13".

(2) The volume of commerce table in Section 2R1.1(b)(2) is amended to read as follows:

"(2) If the volume of commerce attributable to the defendant was more than $1,000,000, adjust the offense level as follows:

Volume of Commerce (Apply the Greatest)	**Adjustment to Offense Level**
(A) More than $1,000,000	add 1
(B) More than $5,000,000	add 2
(C) More than $10,000,000	add 3
(D) More than $20,000,000	add 4
(E) More than $40,000,000	add 5
(F) More than $80,000,000	add 7
(G) More than $160,000,000	add 9
(H) More than $320,000,000	add 11
(I) More than $640,000,000	add 13
(J) More than $1,000,000,000	add 15."

At the low end of the table, the adjustments for "more than $400,000" and "more than $2,500,000" in affected commerce currently found in § 2R1.1 have been eliminated. This is principally a reflection of the passage of time since 1991. Due to inflation, an offense affecting $1,000,000 in commerce today is similar in impact to an offense affecting $400,000 in 1991, and the interval between $1,000,000 and $2,500,000 no longer captures the significant increase in harm that it did 14 years ago.

Congressional Intent

We believe the table above implements the intent of Congress when passing the Act. One of the principal congressional purposes behind increasing the Sherman Act maximum was to acknowledge and punish cartel violations with very high volumes of affected commerce – higher than the current $100 million top adjustment. As such, the adjustments for affected volumes of commerce up to "more than $40,000,000" are one level while adjustments for affected volumes of commerce beginning at "more than $80,000,000" are two levels. Thus, while increases in levels of punishment are warranted for antitrust offenses across-the-board, the need for greater deterrence of the largest offenses justifies the two-level increases for violations affecting commerce greater than $80 million. In addition, our proposed table acknowledges the greater absolute amounts of harm caused by the larger violations, i.e., the difference between an offense that affects $4 million more in commerce warrants less additional punishment than an offense that affects $360 million more in commerce.

This level of punishment appropriately reflects and implements the 10-year maximum penalty provided by Congress for antitrust violations, ensuring that the most serious offenders are sentenced toward the higher end of the spectrum. The proposal takes into account the fact that virtually all defendants to be sentenced under the guideline will have a Criminal History Category of I. It also allows courts ample flexibility to impose any applicable Chapter III adjustments.

For example, under our proposed table, a defendant guilty of participating in a cartel violation affecting more than $1 billion in commerce would receive an offense level of 28 before any adjustments. Such a defendant who did no more than enter a timely guilty plea, and thus qualify for a three-level downward adjustment for acceptance of responsibility, would receive an offense level of 25, punishable by a possible sentence of 4 years and 9 months in prison, or less than half the statutory maximum. On the other hand, the ringleader of a $1 billion plus cartel who refused to accept responsibility, was convicted, and received a four-level upward adjustment for aggravating role in the offense would have an offense level of 32, and would be incarcerated for the statutory maximum.

Another way to consider our proposal is by comparing the offense levels for an amended § 2R1.1 with the offense levels provided in existing §2B1.1 for wire and mail fraud offenses (which carry 20-year statutory maximum terms of incarceration), inasmuch as Congress increased the Sherman Act maximum in part to obtain greater comparability in sentences between these similar white-collar crimes. To begin, some conversion factor needs to be applied to the volume of commerce table in § 2R1.1(b)(2) so that it can be compared to the loss table in § 2B1.1(b)(1). The Guidelines provide such a conversion factor in § 2R1.1(d)(1), which states that for antitrust offenses pecuniary loss should be considered to be 20 percent of the affected volume of commerce. On that basis, the following comparison can be made:

§ 2R1.1		§ 2B1.1	
Volume of Commerce	**Offense Level**	**Loss**	**Offense Level**
Base	13	Base	6
More than $1,000,000	14	More than $200,000	18
More than $5,000,000	15	More than $1,000,000	22
More than $10,000,000	16	More than $1,000,000	22
More than $20,000,000	17	More than $2,500,000	24
More than $40,000,000	18	More than $7,000,000	26
More than $80,000,000	20	More than $7,000,000	26
More than $160,000,000	22	More than $20,000,000	28
More than $320,000,000	24	More than $50,000,000	30
More than $640,000,000	26	More than $100,000,000	32
More than $1,000,000,000	28	More than $200,000,000	34

The base offense level for fraud offenses applies to violations that cause a loss of $5,000 or less – far smaller than the smallest antitrust violation that would be prosecuted by the Department. By the time an antitrust violation has reached the first volume-of-commerce adjustment, it would receive an offense level four levels lower than a comparable fraud violation. From there on, antitrust violations would receive offense levels between six and eight levels lower than a comparable fraud violation. By contrast, under the current version of § 2R1.1 an antitrust violation affecting more than $100 million in commerce receives an offense level of 17, while a fraud violation causing a loss greater than $20 million has an offense level of 28, a difference of 11 offense levels. We believe that the revisions to § 2R1.1 that we propose appropriately narrow the gap between antitrust and fraud violations in light of the new Sherman Act maximum penalty and congressional intent to foster greater proportionality between antitrust and fraud offenses.

The increased Sherman Act statutory maximums provided in Section 215 of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 were designed to work in conjunction with the enhancements to the Antitrust Division's leniency program set out in Sections 211-214 of the Act. Congress determined that increasing antitrust penalties while providing increased incentives to cooperate with the Department would result in more effective detection and deterrence of antitrust violations. We concur in that determination. The Department believes that with the tools at our disposal both outside the Guidelines, such as the Antitrust Division's leniency policy, and inside the Guidelines, such as substantial assistance departures and acceptance of responsibility adjustments, higher levels of punishment for antitrust violations as set out in our proposal will lead to increased

deterrence, greater cooperation with government prosecutors and strengthened enforcement of antitrust laws.

The Department strongly supports amending § 2R1.1 in the manner we have described. We believe the guideline amendments we recommend reflect congressional intent by properly imposing sentences within the entire range of increased penalties and by reflecting both the rate of inflation and the higher volumes of affected commerce that the Department has encountered in antitrust cases since the table was last amended in 1991.

ANABOLIC STEROIDS

The Commission requested comment on the implementation of Section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108-358, which directs the Commission to review the Federal sentencing guidelines with respect to offenses involving anabolic steroids and to consider amending the guidelines to provide for increased penalties in a manner that reflects the seriousness of the offense and the need to deter anabolic steroid trafficking and use.

Background

Anabolic steroids are Schedule III controlled substances. 21 U.S.C. § 812(c)-Schedule III(e); 21 C.F.R. § 1308.13(f). The maximum penalty for a Schedule III controlled substance offense under 21 U.S.C. § 841 is five (5) years, or 10 years if the person has a prior felony drug offense conviction. 21 U.S.C. § 841(b)(1)(D); 21 U.S.C. § 960(b)(4) (5 year maximum term of imprisonment for import violations).

Anabolic steroids are synthetic drugs that mimic the actions of the primary male sex hormone, testosterone. In the licit market, they require a prescription, and are dispensed to treat conditions associated with low testosterone levels, such as delayed puberty or body wasting associated with AIDS. See Testimony of Nora D. Volkow, M.D., Director of the National Institute on Drug Abuse (NIDA), before the House Committee on Government Reform, "Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use," March 17, 2005.

Synthetic testosterone promotes skeletal muscle growth and enhances physical performance. As such, anabolic steroids are diverted as performance enhancing drugs by athletes, body builders, and those aspiring to improve their competitiveness or appearance. As Dr. Volkow noted in her congressional testimony, however, steroid abuse carries significant side effects, including liver and heart disease, stroke, and behavioral changes such as increased aggression and depression. Id. The consequences can be devastating. See Testimony of Donald M. Hooten before the House Committee on Government Reform, March 17, 2005 ("I am convinced that [my teenage son's] secret use of steroids played a significant role in causing the severe depression that resulted in his suicide").

The sentencing guidelines currently treat anabolic steroids differently than other Schedule III controlled substance pharmaceuticals. Under § 2D1.1, Notes to Drug Quantity Table (F), for Schedule III drugs, one "unit" equals one pill, capsule or tablet, or if in liquid form, one unit equals 0.5 ml. In

contrast, for anabolic steroids, one "unit" means 50 tablets, or if in liquid form, one unit equals a 10 cc vial of injectable steroid. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g. one 50 cc vial equals five 10 cc vials). §2D1.1, Notes to Drug Quantity Table (G).

The Drug Equivalency Table under § 2D1.1 establishes one unit of a Schedule III substance to be equivalent to one gram of marijuana. In the Drug Quantity Table, § 2D1.1(c), offenders responsible for 40,000 or more units of Schedule III substances receive a maximum base offense level of 20.

History of Sentencing Guideline Amendments

It is useful briefly to set forth the history of the guidelines pertaining to anabolic steroids. The Anabolic Steroid Control Act of 1990, which was part of the Crime Control Act of 1990, Pub. L. 101-647, placed anabolic steroids in Schedule III of the Controlled Substances Act. Effective November 1, 1991, in Amendment 369, the Commission amended § 2D1.1 to provide that one unit of anabolic steroids was equivalent to 50 tablets or a 10 cc vial, and 40,000 units or more of anabolic steroids would yield a base offense level of 20. The Commission explained its rationale for the amendment as follows: "[b]ecause of the variety of substances involved, the Commission has determined that a measure based on quantity unit, rather than weight, provides the most appropriate measure of the scale of the offense." U.S.S.G. Appendix C, Vol. I, at 229-30 (describing Amendment 369).

At the time Amendment 369 became effective, sentencing for other Schedule III controlled substances, and Schedule I and II depressants, was based on the weight of a mixture or substance, with 20 kilograms or more of Schedule III controlled substances or Schedule I and II depressants necessary to achieve a base offense level of 20. This changed on November 1, 1995, through Amendment 517, which implemented the current "unit" based system for Schedule III controlled substances that remains in place today.

Under Amendment 517, offense levels in the Drug Quantity Table for Schedule III, IV and V controlled substances were to be based on the number of tablets rather than the gross weight of the tablets. While the definition of a "unit" for anabolic steroids remained the same, a unit of a Schedule III non-anabolic controlled substance was calculated to be "one pill, capsule, or tablet . . . If the substance is in liquid form, one 'unit' means 0.5 gms." See U.S.S.G. Appendix C, Vol. I, at 426-29 (describing Amendment 517); see also Note (F) to § 2D1.1(c). Noting that the pre-Amendment 517 system led to offense levels based on the total weight of the pill, most of which was "filler" rather than controlled substance, the Commission concluded that applying the Drug Quantity Table based on the number of pills "will both simplify the guideline and more fairly assess the scale and seriousness of the offense." Id. at 429. Neither Amendment 369 nor 517 set forth an explanation for the disparity between anabolic steroids and other Schedule III controlled substances.

In its Federal Register notice of February 23, 2005, the Commission requested public comment regarding whether the guidelines should be amended, consistent with the Anabolic Steroid Control Act of 2004, to provide for increased sentences for anabolic steroid offenses. More specifically, the Commission asked whether (and if so, how) the Drug Equivalency Tables and/or the Notes to the Drug Quantity Table in § 2D1.1 should be amended to provide a heightened marijuana equivalency for anabolic steroids. The Commission asked whether anabolic steroids should be treated as all other

Schedule III controlled substances, with one unit equal to one tablet, and hence equal to one gram of marijuana.

Treatment of Steroids Under Schedule III

We believe that the Notes to the Drug Quantity Table should be amended so that anabolic steroids are treated the same as other Schedule III controlled substance pharmaceuticals. Recent congressional hearings, and the attention brought to the issue by the passage of the Anabolic Steroid Control Act of 2004, have highlighted the dangers associated with illicit anabolic steroid use, and the current dosage equivalency is inadequate to address the problem.

For all Schedule III drugs other than anabolic steroids, a "unit" is defined as one tablet or pill. Thus, a dosage unit for sentencing purposes equates to a therapeutic dose of the Schedule III drug. Hydrocodone in pill form, known by the common trade names of Vicodin and Lortab, is available in various pill strengths, including 5 mg, 7.5 mg and 10 mg of active ingredient. See Physicians Desk Reference, Thompson PDR 58th Ed., 2004, at 525-28 (Vicodin 5/500mg – "usual adult dosage is one or two tablets every four to six hours . . . the total daily dosage should not exceed 8 tablets," PDR at 526); Vicoden ES 7.5/750 mg (daily dosage is one tablet every four to six hours with daily dosage not to exceed 5 tablets, PDR at 527); Vicoden HP 10/660 mg, usual adult dosage is one tablet every four to six hours, with daily dosage not to exceed 6 tablets, PDR at 528). Lortab is available in tablets of 2.5/500 mg (one or two tablets every four to six hours not to exceed 8 tablets); 5/500 mg (same); 7.5/500 mg (one tablet every four to six hours not to exceed 6 tablets); and 10/500 mg (same), with adult dosages as indicated in parenthesis. PDR at 3236.

Similarly, we believe that a dosage unit under the guidelines for anabolic steroids should be equal to one tablet, which constitutes a therapeutic dose. For instance, oxandrolone, an anabolic steroid sold under the trade name Oxandrin, is available in 2.5 mg and 10 mg tablets. It is used to promote weight gain following extensive surgery or severe trauma, and the normal adult dosage varies from 2.5 mg to 20 mg daily. See PDR, at 3043. Another anabolic steroid, Testosterone Ethanate, sold under the brand name Delatestryl, is indicated for testosterone replacement therapy in the case of primary hypogonadism or delayed puberty and is sold as a single dose injectable 1 ml solution containing 200 mg/ml. See PDR, at 3042.

We recognize that anabolic steroids are ingested at much higher levels by body builders in the illicit market. In a process known as "stacking," weight lifters frequently ingest two or three different anabolic steroids in various dosages over a six to 12 week cycle. Nevertheless, we understand that in the past, where a therapeutic dose is available, it has been and should be the basis for establishing the pertinent sentencing guideline.

The PDR dosing information clearly indicates that therapeutic doses of anabolic steroids are consistent with the therapeutic doses of other Schedule III controlled substances. Accordingly, for sentencing purposes, anabolic steroid dosage equivalencies should be made to conform to other Schedule III substances.

Drug Seizure Data

An analysis of drug seizure data from DEA's analytical laboratories also lends support to the Department's position that the current sentencing regime is inadequate. Over the last two years, DEA has completed two significant anabolic steroid investigations, and DEA's laboratory system analyzed exhibits from those investigations. In addition, DEA analyzed exhibits from seizures at the border and cases where anabolic steroids were found during the execution of search warrants or at seizures made as a result of searches incident to an arrest.

The first DEA steroid investigation targeted an organization using a source of supply located in Asia. The drug trafficking organization distributed anabolic steroids to at least 100 identified customers in the United States and was responsible for the distribution of approximately 20,000 to 23,000 dosage units per month. The second case involved a drug trafficking organization with approximately 50 identified U.S. customers. The organization distributed between 17,000 and 25,000 dosage units per month.

DEA's laboratory seizure analysis from 2003 suggests that anabolic steroid seizures in major cases consist of quantities in the order of magnitude of 20,000 to 40,000 tablets and 2,000 to 6,000 ml. We assume that the largest seizures involve distributions by major traffickers, and the average seizure is more reflective of personal use quantities.

A partial list of DEA laboratory data includes the following:

Drug Type	No. of Exhibits	Largest Seizure	Ave. Seizure
Methandienone	4	44,000 tablets	11,258 tablets
Methandrostenolone	95	15,213 tablets	751 tablets
Methenelone Enanthate	4	1,752 ml	455 ml
Nandrolone Decanoate	106	6,000 ml	109 ml
Oxymetholone	29	6,000 tablets	508 tablets
Stanozolol	100	9,576 tablets	369 tablets
Testosterone	118	5,800 ml	162 ml
Testosterone Cypionate	54	5,000 ml	292 ml
Testosterone Ethanoate	77	2,270 ml	125 ml
Testosterone Propionate	102	6,030 vials	177 ml
Trenbolone Acetate	32	1,600 tablets	79 tablets

From this data, we note that even in the case of the largest seizure involving 44,000 tablets of Methandienone, the current dosage conversion under the guidelines would be 880 units (44,000 divided by 50), which yields a base offense level of 8. A first time offender would face a sentence of 0-6 months and would be in Zone A of the sentencing table, even without credit for acceptance of responsibility. Similarly, for injectable steroids, the largest exhibit was 6,000 ml, which equates to 600 10 cc vials, or 600 units. Again, this yields a base offense level of 8. These sentences are inadequate. They do not reflect the seriousness of the offense, or provide adequate deterrence.

Finally, our analysis suggests that the current equivalencies are inconsistent with congressional intent that anabolic steroids be treated as Schedule III controlled substances. Indeed, under the current

regime, anabolic steroid traffickers are treated more leniently under the guidelines than drug traffickers who illegally distribute equivalent quantities of Schedule IV drugs. For instance, 1 tablet of an anabolic steroid equals 1/50th of a dosage unit, and because 1 unit equals 1 gram of marijuana, 1 tablet of an anabolic steroid equals 1/50 of a gram of marijuana, or 20 milligrams of marijuana. In contrast, 1 tablet of a Schedule IV controlled substance such as Xanax (benzodiazepine) or phentermine (diet pill) equals 1 unit, which equals .0625 grams of marijuana, or 62.5 mg of marijuana. In other words, it takes three (3) anabolic steroid tablets (20 mgs of marijuana x 3) to equal one (1) Xanax or phentermine tablet (62.5 mgs of marijuana) for sentencing purposes.

The Department asks the Sentencing Commission to acknowledge the dangerous effects of anabolic steroids and to amend the guidelines to more accurately reflect the seriousness of offenses involving such substances. For the purposes of the guidelines, there is no principled basis for distinguishing between anabolic steroids and all other Schedule III controlled substances. If anabolic steroids were treated as other Schedule III substances, then a large scale distributor would face a base offense level of 20 based on a drug trafficking scheme involving 40,000 or more dosage units. DEA drug seizure data suggests that modification of the dose equivalencies as advocated by the Department would yield more appropriate sentences for large scale traffickers without capturing those who handle personal use quantities. Accordingly, the Department urges the Commission to adopt parity between anabolic steroids and other Schedule III drugs for sentencing purposes.

* * * * * * *

Thank you for the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to our continuing work with the Commission in the important area of sentencing guidelines and policy.

Sincerely,

Deborah J. Rhodes
Counselor to the Assistant Attorney General

Notes/Handouts

Commission Working Session 3/22/05

① Report of the Chair
- dinner tonight at 5:30
- update on judicial conference mtg - very little discussion on sentencing
- data
*** - EDPa & SDNY have sent nothing in on data and a phone call needs to be made to them.
- budget update
new appropriations subcommittee
- commissioner seminar attendance
need more info from the data (eg - extent of departures - Howell
Hinojosa - crack & illegal reentry w/o fast track are key areas of concern for Booker variances / departures

② Staff Director ~~Legislature~~ Update - ~~Ken~~ Jim
- Jim back
- Linda did great job w/ data collection efforts
- Ken going, Lisa coming back
- Drake going to DOD

③ Legislative Update - Ken
*** (a) intellectual property law - may be enacted soon.
directive to C to amend gls
180 days to promulgate
(b) gang legislation introduced in House
(c) pending immigration bill in House - may or may not move
(d) Booker update
- Senate on go-slow approach per Michael O'Neill
- House - Jay seems to be looking at targeted approach
concept: cooperation w/ motions
consideration of other prohibited grounds

not given to gls - Crack disparities

Commission Working Session, cont 3/22/05

④ Antitrust

Chair - did we talk to defenders on this?

Tom - we talked to PMG, DOJ, ABA antitrust division

Tom - presents slides.

Hinojosa - remember, above level 16, get 3 for AR.

Rhodes - table is raised at threshold in DOJ proposal.

*** Horowitz -

- simplify loss tables considerably - worth trying to get an even lower # of rows on the table.
- on BOL -
  - ~~Hinojosa~~ worries about increasing BOL to 13 or 14 - not every antitrust case needs jail time.

Steer - wants theoretically sound gl.

- some presumptions are open to question
- we've priced some frauds too high with overly long prison sentences
- role couldn't operate well in past b/c of ~~obstruc~~ stat max - Now role can work better b/c of higher stat max
- hesitant to re-jigger the table based on fraud table.

*** Hinojosa - next time materials should indicate effect on inflation on the dollar

Sessions focus on the enhancements

(4) Antitrust, cont

Sessions - focus in on the particular aggravators

*** Hinojosa - some increase in the BOL
- serious questions on rewriting the table
- separate (b)(1) should stay in.

Rhodes - pay attention to what Congress wanted to do.
- does table get recalibrated?
- does table get updated?
↓ Steer agrees that that's no problem.

Me? ** rewrite AN on role? based on Steer comments

Sessions - simplification good - eg - 2 level increases
Steer - not much simplification to make these two levels - the table is straightforward
Castillo - disagrees w/ Horowitz on seriousness. combines elements of public corruption and economic crimes - would think about going to BOL of 13.
Horowitz - make the GL as sophisticated that should be applied.

(5) Anabolic Steroids - Low priority.

*** Howell - what's the usage pattern? Need to understand the patterns w/ more info. what # of tablets are for distribution

(6) Miscellaneous Amdts

nothing to change

(7) ID Theft - Paula presents

~~***~~ Steer - in 5G1.2 approach put in "partially consecutive" as well

Hinojosa - be clear we haven't changed anything from what statute requires

- why change 2B1.1(b)(10) - concerns about what cases are being lost.

~~***~~ Hinojosa - clarify its identification info in 3B1.3 AN 2B

get rid of "of another person"

(8) Booker Data Update - Linda presents

(9) Booker Case Law Review - Kelley presents

July 11 & 12 - Sentencing Institute in DC

CLC Meeting in Idaho on June 6-7

(10) Training Update - Pam M presents

(11) Other ~~Other~~ Issues

(a) atty-client waiver

~~***~~ Horowitz - respond to the ltr and ask them for evidence

~~***~~ Steer - don't ignore the letter

~~***~~ Hinojosa agrees

(b) Retroactivity of 2004 Amendments

~~***~~ - Have staff prepare retroactivity analysis and vote on these at the April mtg

~~***~~ make sure posted notice of mtg allows for vote on retroactivity.

(12) Booker Actions/Discussions

Hinojosa - where is the DOJ on actions?

Rhodes - options still being deliberated. timing is still sooner rather than later

Castillo - we should be ready when time comes for legislation to offer legislation that's limited and gives us control and a deeper legislation that provides for Blakelyization

Howell - important for Commission to be perceived as not a proponent of particular legislation but to be a fair assessor of other legislative proposals.

Hinojosa - we have worked on all of these proposals - we'd be the only players in the system to favor Blakelyization that would be difficult

much depends on what DOJ wants

- we should make sure the Commission role is provided for in any legislation
- we may need some statutory changes for advisory glo.

Steer - have we made any dissemination of our hearing materials? -

*** pulling these materials together into one document would be useful to some people - for the Hill, academics, etc.

Hinojosa - bullet correction for a while to see if it works is the best fix for now, and one we could probably all agree on.

Vicite Phonoprueen 3/22/05

Private Mtg

in weight
Std of review
Cooperation } A.G. concern
Some judges not calculating the Ghs

· Call Districts that haven't sent in Documents,
EDPa, SDNY.

· Budget -

Data — incr. in no. of mos. departures
what types of cases.

NACD and Heritage Ctr. lobbying together for Congress
not to do anything.

Disparity problems — crack cocaine
Fast Track - dists that do
not have it.

Legislative:
Intell. Prop (Arts Act.) -
New offense - cam ordering of movie
General directive — def. of uploading
Similar to NET Act & similar definitions.
180 day time frame.
Intellect. Prop subcomm in Senate Jud. -
Sen. Hatch chair.
Gang legislation - new mm.
No direction for Comm.

Jay asking questions on Immigration

O'Neill - says Sen. going above. Look at data.

Appeal - counsel -

Coop. w/o a written plea agr't.

Prohibited departure?

Circ. Probable departure

Weight & Ch. Penalties valid

View that stat. does not allow appeal if w/in the Ch. range.

Anti Trust

DOJ – BOL 13

and revised table –

Stewart 2 – Proposes simplification of box tables – reduce no. of levels in table –

BOL – opposed to 13/14 level. Favors 12?

Only other D.C. where we think everyone should go to prison

Bribery

obstruction

This is not of same level.

Steer – Agrees to accept fraud G.L. or gold standard. Fraud table may do too much work

Need to leave room for chap 3 adjustments

Resistant to chg. table. Has confidence in prior Comm's who worked on it – Block & Breyer. In Senate & DOJ's tables

Chair → * What impact does inflation have on numbers in table.

Increase BOL

Issue is whether to revise table

Leave 1 level and going above.

Agreement to extend tables at upper end.

Segovia & Horwitz support simplifying table, 2 levels instead of 4, Speer doesn't agree.

Castillo – Combine pub. corruption & economic crime. Supports BOL 13

Horwitz – wrong to rely on judges depending on advisory Gls., We should write Gls based on what is correct & appropriate.

Anabolic Steroids
50 tabs to 1 unit

Sept 1990 - request from DOJ to look at steroids.

Typical approach
street level 26
high level dealer 32

Howell — wants more info on
dieting
takes 2 mill. pills to get to level 20

CHC letter

- No position on any of the amends.

- Observations – Prefer Comm consider retro at time promulgate amends.

Reg Brault – confusing statement in background commentary – refers to less than 6 mos. reduction in G.L. range w/ average actual sentence reduction

Mit. Role – Work load.

Impact of Booker –

GL + new advisory + whole sentence reevaluated.

PEC – Due to difficulty in determining G.L. range appears this Commentary suggests against retro –

ID Theft

3 issues
Carey - mrr.
Abuse of Trust
Simplification