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Federal Sentencing Guidelines *The Importance of Objections*

3rd Circuit outlines review of post-Booker sentences. The Third Circuit outlined how it will proceed to review sentences for reasonableness after *U.S. v. Booker*, 543 U.S. 230 (2005). First, the appellate court must be satisfied that the court exercised its discretion by considering the relevant sentencing factors in 18 U.S.C. §3553(a). The record must demonstrate the trial court gave meaningful consideration to the §3553(a) factors. The court need not discuss every argument made by a litigant if an argument is clearly without merit. The court is not required to discuss and make findings as to each of the §3553(a) factors if the records make clear the court took the factors into account in sentencing. A court is also not required to routinely state by rote that they have read the *Booker* decision or that they know the sentencing guidelines are now advisory. the appellate court must also determine whether those factors were reasonably applied to the circumstances of the case. While it is less likely that a "within-guidelines" sentence, as opposed to an "outside-guidelines" sentence will be unreasonable, the panel refused to adopt a rebuttable presumption of reasonableness for "within-guidelines" sentences. Defendants already bear the burden of proving the unreasonableness of sentences on appeal. *U.S. v. Cooper*, 473 F.3d 324 (3rd Cir. 2006).

10th Circuit outlines post-Booker standard of review. In its first case considering a sentence imposed after *Booker*, the Tenth Circuit "delineate[d] the contours of this newly pronounced standard of review." Reasonableness review is guided by the factors set forth in 18 U.S.C.

§3553(a). However, the now-advisory Guidelines are one of the factors to be considered in imposing a sentence, which means that district court "must consult the Guidelines and take them into account when sentencing." The Tenth Circuit joined other circuits in holding that a sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness. This is a deferential standard that either the defendant or the government may rebut by demonstrating that the sentence is unreasonable when viewed against the other factors delineated in §3553(a). This new standard of review does not dispute the oft-cited principle that in considering the district court's application of the Guidelines, the appellate court reviews factual findings for clear error and legal determinations *de novo*. *U.S. v. Kristl*, 437 F.3d 1050 (10th Cir. 2006).

5th Circuit holds that Booker error in applying increase for pointing gun at officers was not harmless error. Defendant was convicted of being a felon in possession of a firearm and related drug charges. He argued that a three-point enhancement under §3A1.2(b) for aiming a firearm at pursuing officers violated his Sixth Amendment rights. The increase applies if, "in a manner creating a substantial risk of serious bodily injury," the defendant "assaulted" a law enforcement officer "during the course of the offense or immediate flight therefrom." The Fifth Circuit held that defendant's Sixth Amendment rights were violated because the jury did not necessarily find that defendant aimed a firearm at the officers or otherwise engaged in conduct that created a substantial risk of serious injury. The error was not harmless under Rule 52(a). Although there is some indication in the record that the district court would have imposed the same or a harsher sentence under an advisory guideline

scheme, it did not expressly state such an intention. *U.S. v. Cain*, F.3d (5th Cir. Feb. 15, 2006) No. 05-30003.

A note from Marcia:

"The following case emphasizes the importance of sentencing objections and mitigation memorandum."

5th Circuit finds no plain error even if reasonable probability that court would impose lesser sentence under advisory guidelines. Defendant argued for the first time in a supplemental brief on appeal that the district court's application of the mandatory Sentencing Guidelines was reversible error. Under the plain-error standard, the court could correct an error in defendant's sentence only if he demonstrated that there was (1) error, (2) that was plain, and (3) that affected substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice the error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. The Fifth Circuit agreed that the judge's comments (expressing disagreement with precedent) might satisfy the third prong of plain error review because they suggested the court might have imposed a lesser sentence under an advisory guideline regime. However, even if these remarks satisfied the third prong, they were not sufficient to show a "possibility of injustice so grave as to warrant disregard of usual procedural rule." *U.S. v. Duarte-Juarez*, F.3d (5th Cir. Feb. 23, 2006) No. 03-41602.

5th Circuit holds that sentence at top of guideline maximum was insufficient to show *Booker* error was harmless. The government conceded that the court erred by enhancing defendants' offense level under the pre-*Booker* mandatory guideline system based on facts to which defendant did not admit and not found by a jury beyond a reasonable doubt. Defendant preserved his challenge by raising an *Apprendi* challenge in the district court. The government argued that the error was harmless based principally on the court's decision to sentence defendant at the top of the applicable guideline range. The Fifth Circuit held that a sentence at the

top of the guideline range is insufficient by itself to establish that a *Booker* error is harmless. While this may be sufficient under the plain error standard, under the harmless error standard the government bears a heavy burden of demonstrating that the court would not have imposed a different sentence under the advisory regime. The fact that the court imposed defendant's sentence to run consecutively with any sentence imposed in defendant's pending state criminal proceedings might, in some circumstances, suggest the error was harmless. However, there was no relationship between the state offenses and the current federal offenses. The mere imposition of consecutive sentences for unrelated crimes has little or not probative value tending to demonstrate that *Booker* error was harmless. *U.S. v. Woods*, F.3d (5th Cir. Feb. 13, 2006) No. 04-11058

8th Circuit holds that defendant did not meet burden of showing his sentence was not influenced by *Booker* error. Defendant was convicted of a drug conspiracy involving 50 to 500 grams of methamphetamine. Although the court treated the guidelines as mandatory, it considered the jury finding of drug quantity to be binding, and refused to hold defendant responsible for more drugs or to apply a firearm enhancement. It also enhanced his sentence for obstruction of justice on the assumption that the guilty verdict meant the jury had found his testimony to be false. Both sides agreed that the district court committed *Booker* error by treating the Guidelines as mandatory and by applying an obstruction enhancement based upon the jury's general verdict. The Eighth Circuit agreed. The court also erred by refusing to make independent determinations as to the quantity of drugs for which defendant was responsible and as to whether he possessed firearms during his offense. As the beneficiary of the *Booker* error, defendant had to show that his sentence was not substantially influenced by it, and he did not meet that burden. The PSR recommended that defendant be held responsible for at least 1.5 kilograms of meth and enhancements for obstruction of justice and possession of a firearm. Had these enhancements been applied, defendant would have had a total offense level of 38 rather than 32, and a guideline range of 324-405 months instead of 168-210 months. Thus, the errors clearly influenced his

sentence. *U.S. v. Gutierrez*, 437 F.3d 733 (8th Cir. 2006).

4th Circuit says traditional departures remain important after *Booker*. The district court imposed a sentence of 10 years' imprisonment, a two-thirds reduction from the bottom of the advisory guideline range. The Fourth Circuit noted that the continuing validity of departures in a post-*Booker* federal sentencing proceeding has "been a subject of dispute among the circuits." It believed, however, "that so-called 'traditional departures' – *i.e.*, those made pursuant to specific guideline provision or case law – remain an important part of sentencing even after *Booker*." The panel suggested in a footnote, however, that it was "less certain" that court must continue to provide notice of an intent to depart on a ground not identified for departure in the PSR or a in a party's prehearing submission. *U.S. v. Moreland*, 437 F.3d 424 (4th Cir. 2006).

4th Circuit says variance from career offender guideline was warranted, but extent was unreasonable. Defendant was convicted of two counts of possession of cocaine base with intent to distribute. the district court imposed a sentence of 10 years imprisonment, a two-thirds reduction from the bottom of the advisory guideline range. The Fourth Circuit ruled that the district court acted reasonably in deciding to impose a variance sentence, but the extent of the variance was unreasonable. The district court reasonably determined that sentencing defendant as a career offender would not comport with the goals of §3553(a). His prior offenses involved small quantities of drugs and no firearms or violence. However, the court committed "a clear error of judgment by arriving at a sentence outside the limited range of choice dictated by the facts of the case." The circumstances of the case were not so compelling as to warrant the maximum possible downward variance. Although defendant was a small-time drug dealer, he was a *repeat* drug offender who came to West Virginia for the sole purpose of selling cocaine base. Defendant's "desultory pursuit of his education and his spotty employment history" (six jobs over the course of seven years) provided "little confidence in his willingness to become a productive member of

society." *U.S. v. Moreland*, 437 F.3d 424 (4th Cir. 2006).

5th Circuit reverses where court failed to adequately consider the Guidelines. Defendant pled guilty to possessing child pornography. The district court calculated an advisory guideline range of 15-21 months, but announced that it would not follow the Guidelines, characterizing them as "totally discretionary." The Fifth Circuit reversed a sentence of 60 months' probation, holding that it did not adequately take into account the Sentencing Guidelines, failed to sufficiently reflect the seriousness of defendant's offense, and improperly gave weight to the sentence of a co-defendant. The district court did not calculate the correct guideline range – it erroneously ruled that it could not adjust defendant's sentence based on facts neither admitted by him nor proven beyond a reasonable doubt. The court also ignored Guidelines provisions related to probation – the Guidelines do not authorize probation where the applicable guideline range is in Zone C or D. The judge also severely misjudged the seriousness of defendant's offense – the court criticized child pornography laws and suggested that the offense was not harmful to children because defendant himself did not physically molest anyone. Finally, the court took into account that a co-defendant received a guideline sentence of 60 months' probation. However, the co-defendant had received a \$5K1.1 substantial assistance departure, and thus any disparity in sentence was not "unwarranted." *U.S. v. Duhon*, _F.3d_ (5th Cir. Feb. 17, 2006) No. 05-30387.

APPLICATION PRINCIPLES

9th Circuit holds that failure to allow allocution on remand requires vacating sentence. The Ninth Circuit vacated defendant's sentence on two grounds and remanded for resentencing. At resentencing, the district court conducted an evidentiary hearing on defendant's role in the offense and reconsidered the schedule of payments for defendant's restitution obligation. The court did not address defendant personally or permit him to speak, as required by Federal Rule of Criminal Procedure 32(i)(4)(A)(ii). The Ninth Circuit held that because the district court could have lowered defendant's sentence in response

to his allocution, the failure to accord defendant his right to allocution was not harmless. It therefore vacated defendant's sentence. *U.S. v. Gunning*, F.3d (9th Cir. Mar. 31, 2005) No. 04-30104.

OFFENSE CONDUCT

D.C. Circuit rejects increase based on co-conspirator's possession of weapons where no finding of scope of conspiratorial agreement.

Defendant pled guilty to drug conspiracy charges. The district court applied a two-level §2D1.1(b)(1) increase because it found that defendant must have known that other individuals with whom he had been indicted regularly used guns. However, the district court made no explicit finding as to the scope of defendant's conspiratorial agreement. The D.C. Circuit remanded. A court may not avoid its responsibility to "spell out" explicit findings by reasoning that defendant could be held responsible for the gang's crimes because he pled guilty to a conspiracy and there was "only one conspiracy in this case." To satisfy this circuit's "strict procedural mandate," the district court must link evidence to a specific finding as to the contours of defendant's conspiratorial agreement before it can attribute any co-conspirators' acts to him. *U.S. v. Tabron*, 437 F.3d 63 (D.C. Cir. 2006).

CRIMINAL HISTORY

11th Circuit holds that judge may determine nature of prior conviction under ACCA. A jury convicted defendant of violating 18 U.S.C. §922(g)(1), and it also found that he had been convicted of at least one of three previous felonies listed in the indictment. There was no dispute that court documents introduced at trial proved the existence of those three convictions, and also proved that each was for a "violent felony" under the Armed Career Criminal Act. However, the district court refused to sentence defendant under the ACCA because it believed that if anything beyond the conviction itself and the statutory elements had to be considered in making the violent crime finding, the Constitution required the jury make it. The Eleventh Circuit held that the determination of whether a prior conviction is a violent felony under the ACCA is for the district court not the jury. Contrary to the district

court's suggestion, *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998) (factual issue of whether a defendant has been convicted of an aggravated felony is not an element of the offense) is still good law, and has not been undermined by *U.S. v. Booker*, 125 S.Ct 738 (2005) or *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The principles of *Apprendi* and *Booker* do not forbid a judge from determining "the factual nature of a prior conviction." *U.S. v. Greer*, F.3d (11th Cir. Feb. 24, 2006) No. 05-11295, *vacating and superceding* 435 F.3d 1327 (11th Cir. 2006). **Marcia's note: "Argue the facts"**

DEPARTURES

8th Circuit says court may consider rehabilitation in determining length of imprisonment. (719)(775)

The judge stated that "incarceration will provide [defendant] with needed educational and vocational training, medical care, and other correctional treatment in the most effective manner." Defendant argued that this was directly contrary to the statutory prohibition in 18 U.S.C. §3583 against using imprisonment to promote rehabilitation. Then Eighth Circuit disagreed. Section 3553(a)(2)(D) provides that a court must consider, for sentencing purposes, the need for the sentence imposed to provide the defendant "with needed educational or vocational training, medical care, or other correctional treatment." The combination of §3582(a) and §3553(a)(2)(D) means that for purposes of initial sentencing, a court may not consider rehabilitative goals in considering whether to impose a sentence of imprisonment. However, it may consider rehabilitative goals in determining whether to sentence a defendant within a particular guideline range. Thus after the court chooses imprisonment as a proper punishment, it is not prohibited under §3582 from considering correction and rehabilitation in determining the length of imprisonment. *U.S. v. Hawk Wing*, 433 F.3d 622 (8th Cir. 2006).

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SENTENCING HEARING

9th Circuit says clear-and-convincing standard applies to cross-reference that results in at least a 105-month sentence increase. (755) Defendant was convicted of a Hobbs Act robbery that involved the murder of the victim. In a special interrogatory, the jury found that the government had failed to prove beyond a reasonable doubt that defendant murdered the victim. At sentencing, however, the court found by clear and convincing evidence that defendant committed the murder. On that basis, the court used the guideline for first-degree murder, §2A1.1, to determine defendant's sentence. The Ninth Circuit found no error in using the first-degree murder guideline, but it held that because the use of the first-degree murder guideline increased defendant's sentencing range by between 105 and 203 months, the court was required to use the clear-and-convincing evidence standard of proof. *U.S. v. Lynch*, _F.3d_ (9th Cir. Feb. 10, 2006) No. 02-30216 (en banc).

6th Circuit holds that 6th Amendment rights not violated by admission of hearsay at sentencing. Based on *Crawford v. Washington*, 541 U.S. 36 (2004), defendant argued that the district court's admission of hearsay testimony at sentencing violated his Sixth Amendment right to confrontation. However, *Crawford* did not address whether the Sixth Amendment right to confront witnesses applies at sentencing. It was well-settled that pre-*Crawford*, testimonial hearsay was admissible at sentencing if it bore some minimum indicia of reliability. The Sixth Circuit held that *Crawford* did not affect this long-standing principle. There is nothing specific in other cases such as *Blakely v. Washington*, 542 U.S. 296 (2004) or *U.S. v. Booker*, 543 U.S. 230 (2005) that would cause the court to reverse its long-settled rule of law that the Confrontation Clause permits the admission of testimonial hearsay evidence at sentencing proceedings. *U.S. v. Katzopoulos*, 437 F.3d 569 (6th Cir. 2006).

PLEA AGREEMENTS

6th Circuit holds that agreement to be sentenced under Guidelines did not waive Booker appeal. Defendant's plea agreement provided that his sentencing "will be governed by the United States Sentencing Guidelines" and that his sentence would be based upon "the entire scope of the defendant's criminal conduct, criminal history, and pursuant to other factors and guidelines set forth in the Sentencing Guidelines." The government argued that defendant waived any right to object to his Guideline sentence based on *U.S. v. Booker*, 543 U.S. 230 (2005). The Sixth Circuit disagreed, since the plea agreement did not contain a waiver of appeal. That distinguished this case from *U.S. v. Bradley*, 400 F.3d 459 (6th Cir. 2005), where the court held that a defendant could not raise a *Booker* claim where his plea agreement contained language in which the defendant agreed to be sentenced under the Guidelines and also a clause waiving defendant's right to appeal. *U.S. v. Alford*, 436 F.3d 677 (6th Cir. 2006).

Sources:
Federal Sentencing Guide, Vol. 17, No. 4, February 20, 2006.
Federal Sentencing Guide, Vol. 17, No. 5, March 6, 2006.
Federal Sentencing Guide, Vol. 17, No. 6, March 20, 2006.
Federal Sentencing Guide, Vol. 17, No. 7, April 3, 2006.

COA GRANTED
United States v. Giles
Western District of Louisiana
Representation by Marcia G. Shein

Issue:
Whether the District Court erred by denying Petitioner's claim that his counsel was ineffective for failing to present a defense at trial that is recognized under the law

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