

Booker & Beyond: Federal Sentencing Under the Advisory Guidelines

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Internet Resources

There are several resources available on the internet to help you understand federal sentencing in the Post-Booker world. A few are described below.

http://sentencing.typepad.com/sentencing_law_and_policy

This weblog is maintained by Ohio State Super-Professor Douglas Berman. The blog includes a current review of developments in sentencing, with a special focus on the effects of Booker. This is especially useful for keeping track of national developments and for access to the most recent slip opinions, as well as expert commentary on sentencing issues.

<http://www.uscc.gov>

USCC.gov is the official website of the United States Sentencing Commission. It is most useful for a downloadable set of the current guidelines and other documents, including a very helpful Guideline worksheet which guides you through the calculation of an individual sentence.

<http://fd.org/txw/>

This site is run by the Western District's Federal Defender Office. It contains a brief bank, updates on the law, and useful documents including Michael R. Levine's "108 Easy Mitigating Factors."

<http://fd.org/>

Operated by the Training Branch of the Federal Defender, this site contains up-to-date case law and analysis, as well as links to weblogs for additional information.

SELECTED FIFTH CIRCUIT BOOKER OPINIONS

Plain Error and Standard of Review

United States v. Mares, 402 F.3d 511 (5th Cir. 2005)
United States v. Villegas, 404 F.3d 355 (5th Cir. 2005)

Plain Error and Prejudice

United States v. Bringier, 405 F.3d 310 (5th Cir. 2005)
United States v. Pennell, No. 03-50926, 2005 WL 1030123
(5th Cir. May 5, 2005)

Preserved Error

United States v. Akpan, No. 03-20875, 2005 WL 852416
(5th Cir. Apr. 14, 2005)
United States v. Pineiro, No. 03-30437, 2005 WL 1189713
(5th Cir. May 20, 2005)

Appeal Waivers

United States v. McKinney, No. 04-41223, 2005 WL 887153
(5th Cir. Apr. 15, 2005)
United States v. Morales-Pineda, No. 04-50369, unpub.
op., 2005 WL 1253832 (5th Cir. May 20, 2005)

Ex Post Facto

United States v. Scroggins, No. 03-30481, 2005 WL
1324808
(5th Cir. June 6, 2005)

Habeas

United States v. Elwood, No. 05-30269, 2005 WL 976998
(5th Cir. Apr. 28, 2005)

Analysis of a Few Post-Booker Fifth Circuit Sentencing Cases

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

Mares was convicted at trial of being a felon in possession of ammunition and sentenced to 120 months prior to the Booker decision. On appeal he challenged the sentence, as the judge had enhanced his sentence based on the court's finding that he possessed the ammunition in connection with an armed robbery.

In addressing the case, the Circuit Court set out a five important rules for judges in post-Booker sentencing:

1. Consideration of the Guidelines

A judge must still “determine the applicable Guidelines range even though the judge is not required to sentence within that range.”

2. Judicial Fact-finding

If the guideline calculation requires fact-finding, the trial court is “entitled to find by a preponderance of the evidence all the facts relevant to the determination of a Guideline sentencing range and all facts relevant to the determination of a non-Guidelines sentence.”

3. Sentences within the Guidelines Presumed Fair

If a trial judge sentences “within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors set forth in the Guidelines. Given the deference due the sentencing judge's discretion under the Booker/FanFan regime, it will be rare for a reviewing court to say such a sentence is ‘unreasonable.’”

4. Non-Guideline Sentences Must Be Substantiated

When a judge “elects to give a non-Guideline sentence, she should carefully articulate the reasons she concludes that the sentence she has selected is appropriate for that defendant.”

5. Great Deference To Be Shown to Sentencing Courts

“If the sentencing judge follows the principles set forth above, commits no legal error in the procedure followed in arriving at the sentence, and gives appropriate reasons for her sentence, we will give great deference to that sentence.”

In reference to the case before it (a pre-Booker sentencing), the Circuit Court found that the enhancement under the mandatory sentencing scheme was “plain error,” but that Mares failed to show that the sentence would have been different had the sentencing Guidelines been advisory at the time of the sentencing.

United States v. Pennell, 2005 WL 1030123 (5th Cir., May 4, 2005)

As in Mares, the appellant in Pennell had been sentenced prior to Booker, and the judge had enhanced his sentence based on facts found by the court at sentencing. As in Mares, the Fifth Circuit found that there was plain error, but (unlike Mares) further found that the appellant had carried his burden to show that the sentence would have been different but for the mandatory guidelines. This was based on the trial court’s statement at sentencing that “... from many standpoints of fairness and justice, it might be better to sentence people just based on actual loss, but I don’t think that’s the way the guidelines are written... So I feel constrained to overrule your objection.”

The Circuit Court also found that the fourth prong of the plain error test (that the error “seriously affected the fairness, integrity or public reputation of judicial proceedings”), because court directly stated that “fairness and justice” might dictate a different result.

While this opinion sheds no light on post-Booker sentencing, it does provide an example of a successful appeal of a pre-Booker sentencing.

See also United States v. Galvan, 2005 WL 1334539 (5th Cir. June 7, 2005) (same outcome and analysis).