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MEMORANDUM FOR CHIEF, CRIMINAL INVESTIGATION

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SUBJECT: 2006 Post-*Booker* Sentencing Update

This memorandum highlights several recent decisions in sentencing law that have impacted the sentencing landscape since the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005). Specifically, this memorandum cites case law that will likely impact sentencing in criminal tax cases.

HISTORY

The Sentencing Reform Act of 1984, codified at 18 U.S.C. § 3551-3742, in part, created the United States Sentencing Commission ("U.S.S.C."), a permanent, independent agency within the judicial branch tasked with promulgating a comprehensive set of sentencing guidelines and modifying and revising those guidelines as necessary on an annual basis.

As a result of the Commission's efforts, the United States Sentencing Guidelines ("Guidelines") were promulgated and took effect on November 1, 1987. The Guidelines sought to promote honesty, uniformity, and proportionality in federal sentencing. The Guidelines, however, gave rise to several challenges on constitutional grounds.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The Court reasoned that, "[t]he Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.*

In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court, relying on its decision in *Apprendi*, invalidated an upward departure under the Washington State sentencing guidelines imposed on the basis of facts found by the court at sentencing.

The Court held that "...the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment and the judge exceeds his proper authority." *Id.* at 303-04.

In *Booker*, the Supreme Court, applying its logic in *Apprendi* and *Blakely*, excised those provisions of the Federal Sentencing Act which made application of the Guidelines mandatory and set forth applicable standards of review on appeal, i.e., 18 U.S.C. §§ 3553(b)(1), 3742(b). Since the Guidelines were no longer binding on sentencing courts, they became merely advisory. However, they remain a relevant factor for the sentencing judge to consider in conjunction with the factors set forth in 18 U.S.C. § 3553(a) before making a sentencing determination. Appeals from such decisions are now reviewed for "unreasonableness". *Id.* at 259-60.

In *Booker*, the Court held that the Sixth Amendment, as construed in *Blakely*, applies to the Guidelines, stating that "[a]ny fact (other than a prior conviction) which is 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 a jury beyond a reasonable doubt." *Id.* at 244.

Post-*Booker* Sentencing Statistics[1]

Post-*Booker* statistics reveal that the majority of sentences imposed in federal criminal cases continue to fall within the applicable Guidelines range. Nationally, 85.9% of all sentences are either within the Guidelines range or reflect government-sponsored, below range sentences. Thus, 14.1% of sentences fall below the Guidelines range as a result of judges' exercise of discretion under *Booker*.

In criminal tax cases, this percentage is higher. According to statistics issued by the U.S.S.C. on March 16, 2006, 768 defendants have been sentenced post-*Booker* under the Guidelines for tax offenses (U.S.S.G. § 2T1.1 et seq.). Of these 768, approximately 18.5% received sentences below the applicable Guidelines range based on the judge's exercise of discretion under *Booker*.[2] Generally, statistics show that in terms of median sentences, defendants in tax prosecutions have fared better post-*Booker* than defendants in other fraud cases.

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[1] Tigue, John and Temkin, Jeremy, *Sentencing in Criminal Tax Cases Post-Booker*, New York Law Journal, Vol. 235, No. 96, (May 18, 2006). Available at http://www.nylj.com.

[2] Another 18.5% received sentences below the Guidelines range based on government or non-government sponsored departures.

Recent Case Law

Advisory Nature

Although the Supreme Court's decision in *Booker* rendered the Guidelines advisory rather than mandatory, district courts have a continuing duty to consider the Guidelines, along with the other factors listed in 18 U.S.C. § 3553(a). *United States v. Bliss*, 430 F.3d 640 (2d Cir. 2005). In *United States v. Zavala*, 443 F.3d 1165 (9th Cir. 2006), the Ninth Circuit held that a district court should use the Guidelines calculation as a starting point when selecting the most appropriate sentence for a particular defendant, but must not accord that factor greater weight than they accord the other statutory sentencing factors under U.S.S.G. § 1B1.1 et seq. and 18 U.S.C. § 3553(a).

Standard of Review

Courts have held that the standard of review for sentences imposed after *Booker* is one of reasonableness. *See United States v. Ossa-Gallegos*, 453 F.3d 371 (6th Cir. 2006). After *Booker*, just as before, the court reviews de novo the district court's interpretation and application of the Guidelines. The district court's factual findings are reviewed for clear error. *See United States v. Yi*, 451 F.3d 362 (5th Cir. 2006).

Booker does not apply to criminal convictions that became final before the rule was announced. *See Lefkowitz v. United States*, 446 F.3d 788 (8th Cir. 2006). However, the rule may apply to sentences pending at the time *Booker* was decided. Those claims are reviewed for plain error where the defendant did not raise any Sixth Amendment argument or challenge to the Guidelines before the district court, but for harmless error where such objections were preserved before the district court. *See United States v. Saldana*, 427 F.3d 298 (5th Cir. 2005); *see also United States v. Webb*, 403 F.3d 373 (6th Cir. 2005). In *Washington v. Recuenco*, No. 05-83 (U.S. 2006), the Supreme Court held appellate courts can uphold state and federal sentences handed down before the Court's decision in *Booker* if the court's reliance on judicial fact-finding at sentencing constituted harmless error.

In *United States v. Charon*, 442 F.3d 881 (5th Cir. 2006), the Fifth Circuit joined other circuits in holding there was no violation of the Ex Post Facto Clause with respect to the district court's application of the remedial holding of *Booker* at sentencing because the defendant had fair warning that his conduct was criminal, that enhancements or upward departures could be applied to his sentence, and that he could be sentenced as high as the statutory maximum.

Presumption of Reasonableness

There is a circuit split over whether a sentence within the Guidelines is entitled to a presumption of reasonableness on appeal. In *United States v. Mykytiuk*, 415 F. 3d 606, (7th Cir. 2005), the Seventh Circuit affirmed a 150-month sentence imposed by the district court after declaring "that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness." *See also United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006); *United States v. Smith*, 440 F.3d 704 (5th Cir. 2006); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *United States v. Foreman*, 436 F.3d 638 (6th Cir. 2006); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006); *United States v. Boscarino*, 437 F.3d 634 (7th Cir. 2006); *United States v. Anderson*, 446 F.3d 870 (8th Cir. 2006); *United States v.* Bueno, 443 F.3d 1017 (8th Cir. 2006); *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006).

Conversely, in *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006), the Second Circuit held that sentencing ranges set forth in the Guidelines are no longer presumptively reasonable. *See also United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006); *United States v. Guerrero-Velasquez*, 434 F.3d 1193 (9th Cir. 2006); *United States v. Lisbon*, 166 Fed.Appx. 457 (11th Cir. 2006)(citing *United States v. Talley*, 431 F.3d 784 (11th Cir. 2005).[3]

Unreasonable Sentences

Courts have already found some sentences unreasonable under the new standard of review. In *United States v. Martin*, 455 F.3d 1227 (11th Cir. 2006), the Eleventh Circuit found unreasonable a one week sentence for former HealthSouth CFO. Despite the defendant's extraordinary cooperation, the court found the sentence wildly disproportionate given the size of the fraud scheme in which the defendant participated. In *United States v. Ture*, 450 F.3d 352 (8th Cir. 2006), the Eighth Circuit held that a downward variance from an advisory Guidelines range of 12 to 18 months imprisonment to two years of probation and 300 hours of community service was unreasonable for a defendant convicted of willfully attempting to evade federal income tax.

Departures

In *United States v. Arnaout*, 431 F.3d 994 (7th Cir. 2005), the Seventh Circuit declared the concept of "departures" under the Guidelines obsolete in the post-*Booker* world. In *United States v. Mohamed*, 2006 WL 2328722 (9th Cir. 2006), the Ninth Circuit concurred holding the limitations the Guidelines impose on departures no longer provide meaningful guidance in assessing the reasonableness of a post-*Booker* sentence

[3] The First and D.C. Circuits have yet to adopt a position on this issue.

outside the Guidelines range. By contrast, other circuits have concluded that the departure provisions of the Guidelines, though non-binding, remain "a relevant consideration for determining the appropriate Guidelines sentence." *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006). There is not, however, a uniform standard for evaluating post-*Booker* departures. Compare *United States v. Selioutsky*, 409 F.3d 114 (2d Cir. 2005), *United States v. Jackson*, 408 F.3d 301 (6th Cir. 2005), and *United States v. Crawford*, 407 F.3d 1174 (11th Cir. 2005).

There is also a circuit split over whether a district court must give parties notice of intent to depart from the Guidelines. *See United States v. Walker*, 447 F.3d 999 (7th Cir. 2006)(holding notice not required); *United States v. Evans-Martinez*, 448 F.3d 1163 (9th Cir. 2006)(holding notice required).

Enhancements

In *United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006), the D.C. Circuit held that a sentencing enhancement above that authorized by a defendant's guilty plea or a jury verdict may be based on acquitted conduct without violating the Sixth Amendment, so long as that conduct has been proved by a preponderance of the evidence. *See also United States v. Iskander*, 407 F.3d 232 (4th Cir. 2005)(vacating sentence on grounds that sentence exceeded the maximum authorized by jury-found facts).

Forfeitures

In *United States v. Alamoudi*, 452 F.3d 310 (4th Cir. 2006), the Fourth Circuit held that *Booker* does not apply to forfeitures. Specifically, the court stated that *Booker* is only violated "when a court imposes a punishment beyond the maximum that the court could have imposed based solely on facts admitted by the defendant or determined by the jury. Thus, for a *Booker* violation to be possible at all, the law must impose a maximum above which a sentence may not rise. Although criminal forfeiture undoubtedly constitutes an element of punishment, there is no statutory (or guideline) maximum limit on forfeitures...[b]ecause no statutory or other maximum limits the amount of forfeiture, a forfeiture order can never violate *Booker*." *Id.* at 314.

Restitution

In *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006), the Second Circuit held that orders requiring defendants to make restitution under the Mandatory Victims Restitution Act ("MVRA") for loss amounts not admitted in defendants' plea allocutions did not violate defendants' rights under the Sixth Amendment as enunciated in *Booker*. *See also United States v. Boccagna*, 450 F.3d 107 (2d Cir. 2006).

In *United States v. Leahy*, 438 F.3d 328 (3d Cir. 2006), the Third Circuit held *Booker* cannot be violated with respect to restitution orders. Specifically, the court stated that "[u]nder both the Victim Witness Protection Act ("VWPA") and the MVRA, when a defendant is convicted of certain specified offenses, restitution is authorized as a matter of course in the full amount of each victim's losses. Hence, under a plain reading of the governing statutory framework, the restitution amount authorized by a guilty plea or jury verdict-the full amount of loss-may not be exceeded by a district court's restitution order; that is, a district court is not permitted to order restitution in excess of that amount. In imposing restitution, a district court is thus by no means imposing a punishment beyond that authorized by jury-found or admitted facts. Though post-conviction judicial fact-finding determines the amount of restitution a defendant must pay, a restitution order does not punish a defendant beyond the 'statutory maximum'."