PLAIN ERROR? THE SUPREME COURT'S REFUSAL TO RESOLVE THE CIRCUIT SPLIT IN *BOOKER* PIPELINE APPEALS AND THE RESULTING "GEOGRAPHIC CRAZYQUILT"[1]

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I. INTRODUCTION

On January 12, 2005, the United States Supreme Court issued its highly anticipated ruling in *United States v. Booker*[2] regarding the

1. United States v. Mooney, 425 F.3d 1093, 1105 (8th Cir. 2005) (Bright, J., dissenting) (calling the circuit split over plain error in *Booker* pipeline cases a "geographic crazyquilt" and urging the Supreme Court to resolve the split).

2. United States v. Booker, 543 U.S. 220 (2005). *Booker* was an appeal from the Court of Appeals for the Seventh Circuit and was joined with *United States v.*

constitutionality of the United States Sentencing Guidelines (Guidelines).[3] The issue raised in *Booker* was whether the Guidelines system, which mandated sentencing increases following judicial factfinding, was a violation of the Sixth Amendment's jury trial guarantee.[4] The judge-found facts led to a mandatory sentencing increase, which *Booker* held a violation of a defendant's Sixth Amendment right to a jury trial as construed in the *Apprendi v. New Jersey* line of cases.[5] The *Booker* decision ended a two-decade tension between the federal sentencing system and the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[6]

Fanfan, an appeal from the First Circuit raising the same issue. *Id.* at 226–29. The facts underlying these cases are similar in that each defendant received a longer sentence based on facts found by the sentencing judge using a preponderance of the evidence standard. *Id.* Defendant Freddie Booker was found guilty by a jury of possessing fifty or more grams of crack with the intent to distribute. *Id.* at 227. Under the Guidelines, this crime carried a sentencing range of 210 to 262 months. *Id.* In this case, however, the sentencing judge found, by a preponderance of the evidence, that Booker had possessed an additional 566 grams of crack. *Id.* The judge further found, also by a preponderance, that Booker had committed perjury during the trial. *Id.* This finding resulted in a further increase of his sentencing range. *Id.* This judicial factfinding led to a new applicable Guidelines range of thirty years to life. *Id.* Defendant Duncan Fanfan was found guilty of a conspiracy to distribute at least 500 grams of cocaine, which carried a maximum sentence of seventy-eight months under the Guidelines. *Id.* at 228. In addition to finding that Fanfan was a leader in this conspiracy, mandating a sentencing increase under the Guidelines, the sentencing judge also found Fanfan responsible for a larger quantity of cocaine and 261.6 grams of crack. *Id*. These findings were all made by the judge using a preponderance of the evidence standard and resulted in a sixteen year sentence. *Id.*

3. U.S. SENTENCING GUIDELINES MANUAL (2003). The Guidelines were promulgated by the United States Sentencing Commission pursuant to the passage of the Sentencing Reform Act of 1984. *Id.* § 1A1.1. The Guidelines marked a substantial departure from previous federal criminal sentencing procedures. *Id.* Prior to the passage of the Sentencing Reform Act, the determination of a particular defendant's sentence was left to the discretion of federal district court judges as long as the final sentence fell within the broad sentencing ranges set by Congress for each statutory offense. Gilles R. Bissonnette, *"Consulting" the Federal Sentencing Guidelines After* Booker, 53 UCLA L. REV. 1497, 1502 (2006). The Guidelines system revoked that discretion and essentially set up a sentencing matrix whereby the defendant's offense level was compared with the defendant's criminal history to devise the appropriate sentencing range. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(4), 4A1.1. The primary reason for this shift in federal sentencing practice was the desire to decrease sentencing disparities for defendants who committed similar crimes. *Id.* § 1A1.1(A)(3).

4. *Id.* at 226–27.

5. Apprendi v. New Jersey, 530 U.S. 466 (2000).

6. U.S. CONST. amend. VI.

A. *Pre*-Booker *Supreme Court Cases*

In *Apprendi*, the Supreme Court began to examine the Sixth Amendment implications of increased factfinding by judges in both state and federal criminal justice systems.[7] The Court held that "[o]ther 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."[8] *Apprendi* ruled unconstitutional a New Jersey hate crime statute that carried a substantially longer sentence for a defendant if the judge found that the crime was committed "'with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'"[9] Following the Court's decision in *Apprendi*, many practitioners and scholars began to suggest that the holding invalidated the federal sentencing system because the Guidelines similarly required a sentencing judge to find facts beyond those found by a jury which resulted in significant changes in the sentences imposed.[10]

In 2002, the Court continued to limit the factfinding role of sentencing judges in *Ring v. Arizona*.[11] The *Ring* decision held unconstitutional the Arizona practice of having sentencing judges in capital cases find the existence of statutory aggravating factors in order to impose the death penalty.[12]

The Court reached the height of its pre-*Booker* Sixth Amendment jurisprudence in *Blakely v. Washington*.[13] In *Blakely*, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[14] In so holding, the Court noted "the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed

7. *See Apprendi*, 530 U.S. 466.

8. *Id.* at 490.

9. *Id.* at 468–69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000)).

10. *See* Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of* United States v. Booker *and* United States v. Fanfan, 56 MERCER L. REV. 1131, 1136–37 (2005); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1086 (2005).

11. Ring v. Arizona, 536 U.S. 584 (2002).

12. *Id.* at 592–95, 609.

13. Blakely v. Washington, 542 U.S. 296 (2004).

14. *Id.* at 303.

under state law without the challenged factual finding."[15] At issue in *Blakely* was a Washington state determinate sentencing scheme that allowed sentencing increases based on certain facts found by the sentencing judge.[16]

B. *Sentencing in the Pre-*Booker *Federal System*

Following *Blakely*, many federal sentencing practitioners began to predict the demise of the federal Guidelines system.[17] The pre-*Booker* federal sentencing practices were quite similar to the system employed in the state of Washington.[18] In the federal system, a defendant is charged with a crime that has been statutorily defined by Congress. The offense carries with it a statutory offense range for sentencing purposes. Once the defendant has pled guilty to the offense, or has been found guilty by a jury, the case goes to the judge for sentencing. This is where the Guidelines system is implemented. The Guidelines provide a grid-like system where the conduct underlying the criminal proceeding and the defendant's criminal history interact to produce a sentencing range.[19] Under chapter 2 of the Guidelines, certain categories of offenses are cross-referenced with the statutory offense and a base offense level is provided.[20] The applicable category in chapter 2 also provides certain "specific offense characteristics" that can serve to increase the base offense level.[21] Chapter 3 outlines

15. *Id.* (discussing the trend of decision-making in *Apprendi, Ring*, and *Blakely* itself).

16. *See id.* at 308, 313–14 (holding defendant's kidnapping sentence was unconstitutional because the judge increased the sentence by more than three years following a judicial finding that the defendant had acted with "deliberate cruelty").

17. *See, e.g.*, Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT'G REP. 316 (2004) (analyzing the future of the Guidelines following the *Blakely* decision).

18. *See* United States v. Booker, 543 U.S. 220, 233 (2005) (finding "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]"); *Blakely*, 542 U.S. at 325 (O'Connor, J., dissenting) ("Washington's scheme is almost identical to the upward departure regime established by [the Federal Sentencing Guidelines]. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack.").

19. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 5A (2003).

20. *Id.* ch. 2.

21. *Id.* For example, 18 U.S.C. § 2113 makes it a federal crime to commit bank robbery. 18 U.S.C. § 2113 (2000). Section 2113 refers to the "Robbery" category of the Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 2B3.1. The "Robbery" section of the Guidelines establishes a base offense level of twenty. *Id.* The section then specifies additions to the base offense level for certain characteristics of the actual

adjustments that are common in a wide variety of offenses. The Commission put them in a separate chapter rather than having to specify them individually under all the categories in chapter 2.[22] For example, if a defendant was an organizer or leader in a criminal activity that involved at least five people, the base offense level is increased by four levels.[23] However, if the defendant is deemed to have been a "minimal participant" in the criminal activity, the base offense level is decreased by four levels.[24] Once the offense level has been calculated pursuant to chapters 2 and 3, the resulting number forms the vertical axis on the Sentencing Table.[25] The horizontal axis of the Sentencing Table is labeled "Criminal History Category" and creates a rating system based on the defendant's number of criminal history points.[26] Criminal history points are intricately calculated pursuant to chapter 4.[27] "The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment."[28]

Before the district court holds a sentencing hearing, the defendant's case is submitted to the United States Probation Office where the probation officer researches the victim's past criminal history and the facts underlying the offense.[29] The probation officer then recommends sentencing enhancements (upward departures) and sentencing deductions (downward departures) by applying the Guidelines, and ultimately recommends a sentence to the judge.[30] All of the information gathered is compiled and presented in the presentence investigation report.[31] Sentencing judges then determine by a preponderance of the evidence, based primarily on the presentence investigation report, whether the facts

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conduct underlying the robbery charge. *Id.* Additional levels are added to the base offense level depending on varying levels of firearm use, bodily injury to the victim, and amounts stolen. *Id.* For example, if a defendant discharged a firearm during the robbery, seven levels are added to the base offense level. *Id.* § 2B3.1(b)(2)(A). If that same defendant caused "serious bodily injury" four more levels would be added. *Id.* § 2B3.1(b)(3)(B). However, if a defendant merely possessed a firearm and no injuries resulted, the base offense level is increased by five levels. *Id.* § 2B3.1(b)(2)(C).

22. *Id.* ch. 3.
23. *Id.* § 3B1.1.
24. *Id.* § 3B1.2.
25. *Id.* § 5A.
26. *Id.*
27. *Id.* ch. 4.
28. *Id.* § 5A.
29. 18 U.S.C. § 3552 (2000).
30. *Id.*
31. *Id.*

support the specified enhancements and then issue a sentence from within the enhanced Guidelines range.[32] These sentences depend on facts found using a watered-down preponderance of the evidence standard implemented by sentencing judges and are generally not part of the defendant's indictment. The Sixth Amendment concerns raised by this system are evident.

C. *The* Booker *Decision*

In *Booker*, the Court held the Guidelines system violates the Sixth Amendment, but instead of striking down the system as a whole, as had been done to the very similar state sentencing scheme in *Blakely*, the Court severed and excised two provisions of the Sentencing Reform Act in order to cure the constitutional violation.[33]

In finding that the federal sentencing scheme was inconsistent with the Sixth Amendment's jury trial guarantee, the Court rested its decision on the conclusion in *Blakely* that a defendant has a constitutional right to have a jury find the existence of "'any particular fact' that the law makes essential to his punishment."[34] Thereby, the Court reaffirmed the *Apprendi* rule and applied it to the Guidelines system. Additionally, the Court noted the enhanced role that judicial factfinding plays in federal sentencing.[35] The Court stated that the Guidelines scheme permits sentencing increases not wholly supported by a jury verdict, but rather with a "'judge acquir[ing] that authority only upon finding some additional fact.'"[36]

Although the Court held the Guidelines scheme violated the Sixth Amendment, the Court did not mandate a revision of federal sentencing practice or require that every fact underlying a sentencing enhancement be charged in the indictment and tried to a jury.[37] Instead, the Court stated:

32. *See generally* United States v. Booker, 543 U.S. 220, 236 (2005) ("It became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be . . . proved by more than a preponderance.").

33. *Booker*, 543 U.S. at 244–46.

34. *Id.* at 232 (quoting Blakely v. Washington, 542 U.S. 296, 301 (2004)).

35. *Id.* at 236 ("The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance.").

36. *Id.* at 235 (quoting *Blakely*, 542 U.S. at 305).

37. *Id.* at 233.

"[E]veryone agrees that the constitutional issues presented . . . would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges."[38] The Court then proceeded, in the remedial portion of the opinion delivered by Justice Breyer,[39] to engage in a complicated severability analysis.[40] The goal of the Court was to sever the portions of the Sentencing Reform Act that led to the constitutional violation, yet leave intact a system as close to what was intended by Congress as possible and remain within the purview of the Sixth Amendment.[41] The excised provision relevant to this Note mandated the application of the Guidelines range by district court judges.[42] To some, the *Booker* holding was a surprise given that it followed closely in the footsteps of *Blakely*,[43] which flatly struck down the state of Washington's determinate sentencing scheme—a scheme that was practically indistinguishable from the Guidelines.[44]

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38. *Id.*

39. It is interesting to note that Justice Stephen Breyer, who voted against *Booker*'s constitutional holding (that the Guidelines system was unconstitutional), but who authored the remedial holding of *Booker*, which effectively saved the Guidelines, was a member of the United States Sentencing Commission responsible for promulgating the Guidelines pursuant to Congressional direction in the Sentencing Reform Act of 1984. SUPREME COURT OF THE UNITED STATES, THE JUSTICES OF THE SUPREME COURT 1, 3 (2006), http://www.supremecourtus.gov/about/biographies current.pdf.

40. *Booker*, 543 U.S. at 244–67.

41. *Id.* at 244–58.

42. *See id.* at 245. The Court excised § 3553(b) which states "[t]he court shall impose a sentence . . . within the range, referred to in [the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b) (2000 & Supp. 2004); *Booker*, 543 U.S. at 245. As the Court noted in *Booker*, however, the ability of a district court judge to grant a departure of this kind is very rare in that "departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the [Sentencing] Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible." *Booker*, 543 U.S. at 234. The other portion of the Sentencing Reform Act excised by the remedial majority in *Booker*, not directly related to the subject of this Note, is 18 U.S.C. § 3742(e) (2000 & Supp. 2004), which provided that the circuit courts review sentences de novo. *Id.* at 245. Instead, circuits are now required to apply reasonableness review to post-*Booker* sentences on appeal. *Id.* at 261–62.

43. *See* Blakely v. Washington, 542 U.S. 296, 325 (2004) (O'Connor, J., dissenting).

44. *See, e.g.*, Alan Vinegrad & Douglas Bloom, 'Booker': *One Year Later*, N.Y. L.J., Jan. 13, 2006, at 3, 3 ("While many predicted that the Court would hold that

Although *Booker* resolved the pressing issue of whether the Guidelines scheme was unconstitutional, it left many questions unanswered and opened the doors for a flood of litigation on many other sentencing issues.[45] One of the most interesting, and perhaps the most troubling, issues raised by the holding in *Booker* is how the courts should treat direct appeals raising the Sixth Amendment *Booker* error. This Note examines the approaches the federal courts of appeals currently take in hearing the appeals of defendants who were sentenced under the now unconstitutional pre-*Booker* scheme and whose cases are still on direct appeal. The situation is complicated by the fact that *Booker*, which conclusively established the validity of a Sixth Amendment challenge to the Guidelines, had not been decided when these defendants were sentenced and many did not preserve the argument for appeal.[46] At the time of their direct appeals, however, the system under which they had been sentenced *was* clearly unconstitutional.[47] The direct appeals of the defendants sentenced in this narrow period of time are now being handled by the courts of appeals, which have fallen into a deep three-way split over the application of plain error to direct appeals raising the unpreserved *Booker* issue.

II. THREE DIVERGENT APPROACHES TO PLAIN ERROR

The remedial decision in *Booker* was self-limiting in that it held itself applicable to all cases on direct review, but it also indicated that not every appeal would lead to a new sentencing hearing.[48] The Court specifically stated:

> That fact [application of the *Booker* rule to all cases on direct appeal] does not mean that we believe that every sentence gives rise to a Sixth

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the federal Sentencing Guidelines violated the Sixth Amendment, few predicted the course the Court would take in establishing a remedy.").

45. For discussion and analysis of the many post-*Booker* issues in need of resolution, see Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of* United States v. Booker *and* United States v. Fanfan, 56 MERCER L. REV. 1131 (2005); Stephen G. Kalar et al., *A* Booker *Advisory: Into the Breyer Patch*, 29 CHAMPION 8 (Mar. 2005); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082 (2005); Marcia G. Shein, United States v. Booker*: Where Are We Now?*, 52 FED. LAW. 22 (May 2005).

46. See *Booker*, 543 U.S. at 226–27 (establishing the validity of Sixth Amendment challenges to the Guidelines scheme).

47. *Id.* at 243–44.

48. *Booker*, 543 U.S. at 268 ("'[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final . . . .'") (quoting Griffith v. Kentucky, 479 U.S. 314, 328 (1987)).

> Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the "plain-error" test.[49]

The application of plain error is dictated by Federal Rule of Criminal Procedure 52(b).[50] The rule provides that "plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[51] The concept of plain error was further developed by the Supreme Court in *United States v. Olano*[52] and *United States v. Johnson*.[53] Plain error under *Olano* and its progeny requires that the following elements be met: (1) there is an error, (2) the error is plain, and (3) the error affects substantial rights.[54] If an unpreserved error meets these requirements, "an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'"[55] The interaction of these factors is such that a reviewing court is not mandated to correct the constitutional error by remand to the district court if the first three *Olano* elements are met, but it may *choose* to exercise this discretion and remand if the fourth element is also present.[56]

In January of 2005, following the *Booker* ruling, thousands of federal prisoners across the nation filed direct appeals requesting resentencing hearings in light of *Booker* and the new discretionary Guidelines scheme.[57] The courts of appeals soon released leading opinions explaining how each circuit would approach *Booker* appeals filed by defendants who had been sentenced under the unconstitutional pre-*Booker* system and who were now raising the Sixth Amendment error of the Guidelines system for the

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49. *Id.*

50. FED. R. CRIM. P. 52(b).

51. *Id.*

52. United States v. Olano, 507 U.S. 728 (1993).

53. Johnson v. United States, 520 U.S. 461 (1997).

54. *Olano*, 507 U.S. at 732.

55. *Johnson*, 520 U.S. at 467 (quoting *Olano*, 507 U.S. at 732).

56. *Olano*, 507 U.S. at 735 ("Rule 52(b) is permissive, not mandatory. If the forfeited error is plain and affect[s] substantial rights, the court of appeals has authority to order the correction, but is not required to do so." (internal quotation marks omitted)).

57. *See, e.g.*, Jeff Chorney, *9th Circuit Splits on Resentencing*, THE RECORDER, June 2, 2005 (noting that the Ninth Circuit alone was potentially facing the prospect of 700 direct appeals raising the *Booker* error).

first time on direct appeal.[58] From this, three divergent methods of analyzing plain error in *Booker* pipeline appeals have emerged. It is now clear that the various circuits have come to starkly different conclusions with regard to how post-*Booker* appeals should be handled when the issue was not raised at the district court level and how the doctrine of plain error must be applied.[59]

All circuits are in agreement on the first two elements of plain error—that *Booker* pipeline appeals must demonstrate that: (1) there is an error, and (2) the error is plain.[60] The split over plain error presents itself in the determination of the third element of plain error, that the error affects substantial rights,[61] and to a lesser extent, the fourth element, that the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."[62] This Note divides the courts of appeals into three groups based on the approach each uses to determine the third prong of plain error: the strictest standard, the automatic remand, and the middle ground. This Note will provide a short summary of the leading case from each circuit within the designated groups. However, even within the three groups—most notably those circuits using the middle ground standard—the circuits are not uniform in their process for determining whether a given defendant's sentence, imposed under a pre-*Booker* mandatory Guidelines system, affects substantial rights. The extent of variation, both among the three approaches and among the circuits within a given approach, further demonstrates the need for the Supreme Court to resolve this split.

58. *See* United States v. Pirani, 406 F.3d 543 (8th Cir. 2005) (en banc) (determining the best approach for handling *Booker* pipeline appeals); United States v. Davis, 407 F.3d 162 (3d Cir. 2005) (same); United States v. Coles, 403 F.3d 764 (D.C. Cir. 2005) (same); United States v. Gonzales-Huerta, 403 F.3d 727 (10th Cir. 2005) (same); United States v. Hughes, 401 F.3d 540 (4th Cir. 2005) (same); United States v. Mares, 402 F.3d 511 (5th Cir. 2005) (same); United States v. Paladino, 401 F.3d 471 (7th Cir. 2005) (same); United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005) (same); United States v. Ameline, 400 F.3d 646 (9th Cir. 2005) (same); United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005) (same); United States v. Crosby, 397 F.3d 103 (2d Cir. 2005) (same); United States v. Oliver, 397 F.3d 369 (6th Cir. 2005) (same).

59. *See, e.g.*, *Davis*, 407 F.3d 162 (providing an example of what this Note calls the automatic remand); *Coles*, 403 F.3d 764 (providing an example of what this Note calls the middle ground); *Antonakopoulos*, 399 F.3d 68 (providing an example of what this Note calls the strictest standard).

60. *Olano*, 507 U.S. at 732; *Johnson*, 520 U.S. at 468 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration.").

61. *Olano*, 507 U.S. at 732.

62. *Id.* (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

A. *The Strictest Standard*

In response to *Booker*'s mandate to apply its constitutional rule according to the "ordinary prudential doctrine" of plain error, the most common approach is the strictest standard.[63] The courts of appeals for the First, Fifth, Eighth, Tenth, and Eleventh Circuits have all adopted a similar method of plain error analysis for unpreserved claims of constitutional sentencing error in the wake of *Booker*—the violation of the defendant's Sixth Amendment right by the use of judge-found facts to increase a sentence.

The First Circuit, in *United States v. Antonakopoulos*,[64] held that the *Booker* error at issue was the defendant's sentencing under a mandatory Guidelines system.[65] The court expressly held that the *Booker* error *was not* that the defendant's sentence was improperly lengthened based on certain judicially determined facts found by a preponderance of the evidence.[66] The First Circuit stated:

> [T]o meet the other two requirements—that this error affected defendant's substantial rights and would impair confidence in the justice of the proceedings—we think that ordinarily the defendant must point to circumstances creating a reasonable probability that the district court would impose a different sentence more favorable to the defendant under the new "advisory Guidelines" *Booker* regime.[67]

Similarly, the Fifth Circuit, in *United States v. Mares*, defined the *Booker* error as the use of "extra verdict enhancements to compute the defendant's sentence in a mandatory Guideline system."[68] The Fifth Circuit defined its approach to prong three of the plain error test—that the error affects substantial rights—by concluding that "the pertinent question is whether [the defendant] demonstrated that the sentencing judge—sentencing under an advisory scheme rather than a mandatory one—would

63. United States v. Booker, 543 U.S. 220, 268 (2005).

64. United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005) (reviewing a bank fraud scheme sentence that had been enhanced by several judicially found facts).

65. *Id.* at 75.

66. *Id.*

67. *Id.*

68. United States v. Mares, 402 F.3d 511, 521 (5th Cir. 2005) (reviewing a sentence where a defendant was found guilty of being a felon in possession of ammunition and given a sentencing enhancement after the judge found that the possession was in connection with an armed robbery).

have reached a significantly different result."[69] The court admitted that there was no real indication of what the sentencing judge would have done under a discretionary Guidelines system, and therefore held that the third prong for plain error was not met because the burden is on the defendant to demonstrate that a more favorable sentence would have likely been imposed absent the error.[70] The specific sentence imposed by the district court in *Mares* was the maximum allowed under the Guidelines range, which seemed to indicate that the judge would not have imposed a more favorable sentence under a discretionary system.[71]

The Eighth Circuit, in *United States v. Pirani*,[72] over two vigorous dissenting opinions,[73] decided its approach to plain error relatively late compared to the other courts ruling on the issue and was therefore able to consider and reject the other two approaches to handling plain error on *Booker* appeals.[74] The *Pirani* majority defined the *Booker* error as "the *combination* of the [judge-found] enhancement[s] and a mandatory Guidelines regime."[75] The court then held that the relevant question in determining whether a defendant could show that the *Booker* error affected his substantial rights is "what sentence *would have been* imposed absent the error," and a defendant must demonstrate a reasonable probability that a lesser sentence would have been imposed under an advisory Guidelines system.[76]

The Tenth Circuit, in *United States v. Gonzalez-Huerta*, came to the same conclusion as the First, Fifth, Eighth, and Eleventh Circuits stating that the defendant, although sentenced under the pre-*Booker* mandatory sentencing system, was not entitled to resentencing. [77] Taking a slightly different approach, however, the court decided the case on the fourth

69. *Id.*

70. *Id.* at 522.

71. *Id.* The fact that the sentencing judge could have originally sentenced the defendant to a 110-month sentence, but decided to impose the maximum 120 months, was not a sufficient indication that the defendant would have received a more favorable sentence under a discretionary system. *Id.*

72. United States v. Pirani, 406 F.3d 543 (8th Cir. 2005) (en banc).

73. *See id.* at 562 (Arnold, J., dissenting) (Bye, J., concurring in part and dissenting in part).

74. *See id.* at 551–52. For an analysis and critique of the other two approaches considered and rejected by the majority and dissenting opinions in *Pirani*, see *infra* Parts II.B–C.

75. *Pirani*, 406 F.3d at 551.

76. *Id.*

77. United States v. Gonzalez-Huerta, 403 F.3d 727, 739 (10th Cir. 2005).

prong for plain error, rather than the third.[78] Although the question in *Gonzalez-Huerta* was resolved based on the fourth prong of the *Olano* test for plain error, the Tenth Circuit did determine (in accordance with the First, Fifth, Eighth, and Eleventh Circuits) that the third prong—that the error affect the defendant's substantial rights—was to be answered by a determination of whether "the appellant [could] show 'a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.'"[79] The Tenth Circuit also advised that one way a defendant could successfully demonstrate this is by pointing to a statement made by the sentencing judge indicating she would have imposed a lesser sentence on this particular defendant if the Guidelines had not been mandatory.[80]

The Eleventh Circuit, in *United States v. Rodriguez*, also defined the *Booker* error as the use of extra-verdict enhancements that led to a mandatory sentence increase.[81] Noting that meeting the third prong to establish plain error was "anything but easy," the court held that in order to establish that the error affected substantial rights a defendant is required to demonstrate to a reasonable probability that his sentence would have been lower if the sentence had been imposed absent the *Booker* error.[82] The court candidly noted that it had no way of determining, based on the available record, whether the defendant would have received a more lenient sentence if the Guidelines had been advisory.[83] Because the court would be required to speculate, it determined that the defendant had not met the burden of establishing that the error affected his substantial rights.[84] In finding that the third prong was not met in this case, the court

78. *Id.* at 736 ("We need not determine whether [the defendant] can satisfy [the third prong] because even if he were to meet the third prong, he must also satisfy the fourth prong to obtain relief . . . [and he] does not satisfy this prong." (citations omitted)). Therefore, the Tenth Circuit did not decide the issue of whether the *Booker* error affected the defendant's substantial rights, but rather resolved the question by determining the *Booker* error did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Id.*

79. *Id.* at 733 (quoting United States v. Brown, 316 F.3d 1151, 1158 (10th Cir. 2003)).

80. *Id.* at 734.

81. United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005).

82. *Id.* at 1299–300. As will be discussed in Part IV of this Note, *Rodriguez* is the case in which the Supreme Court was asked to grant certiorari to resolve the plain error circuit split, and in which it declined to do so.

83. *Id.* at 1301 ("The record provides no reason to believe any result is more likely than the other. We just don't know.").

84. *Id.* The Eleventh Circuit relied on the Supreme Court decision in *Jones v.*

did not analyze the fourth prong requirement that the error undermine public confidence in our judicial system.[85]

The strictest standard has met with much criticism. The primary argument against this approach involves its harshness and the high risk that a defendant is serving a sentence longer than the sentence that would have been imposed by the same judge applying post-*Booker* discretion.[86] The Seventh Circuit harshly criticized the approach taken in *Rodriguez* when advancing its own approach, and stated it could not "fathom why the Eleventh Circuit want[ed] to condemn some unknown fraction of criminal defendants to serve an illegal sentence."[87]

B. *The Automatic Remand*

In stark contrast to the circuits applying the strictest standard are the Third, Fourth, and Sixth Circuits whose defendant-friendly application of plain error in *Booker* pipeline appeals results in a virtually automatic remand for resentencing. This approach is beneficial in that it provides uniform treatment of all post-*Booker* appeals. Each defendant who might have been affected by the Sixth Amendment error in the original sentencing hearing has the opportunity to find justice on appeal.[88]

The Third Circuit's leading opinion on this issue, *United States v. Davis*, held that the *Booker* error included both the mandatory Guidelines application and the use of judicial factfinding to support sentences longer than those authorized by the jury verdict.[89] The Court further held that the record provided no indication of what sentence would have been imposed by the judge under a discretionary sentencing system.[90] Instead of determining that this necessarily meant the defendant had not met his burden of showing that the error did affect his substantial rights, the court reasoned this error was presumably prejudicial.[91] The Third Circuit

United States, 527 U.S. 373, 394–95 (1999), to determine that the need to speculate necessarily meant the defendant had "not met his burden of showing that his substantial rights ha[d] been affected" by the error. *Id.*

85. *Rodriguez*, 398 F.3d at 1301.

86. *See* United States v. Paladino, 401 F.3d 471, 484 (7th Cir. 2005) (criticizing the approach used in *Rodriguez*).

87. *Id.* Part II.C will further discuss *United States v. Paladino* as the Seventh Circuit's leading case in the handling of plain error the middle ground approach.

88. *See, e.g.*, United States v. Davis, 407 F.3d 162, 165–66 (3d Cir. 2005).

89. United States v. Davis, 407 F.3d 162, 164 (3d Cir. 2005).

90. *Id.* at 164–65.

91. *Id.* at 165.

stated:

> [T]he mandatory nature of the Guidelines controlled the District Court's analysis. Because the sentencing calculus was governed by a Guidelines framework erroneously believed to be mandatory, the outcome of each sentencing hearing conducted under this framework was necessarily affected. Although plain error jurisprudence generally places the burden on an appellant to demonstrate specific prejudice flowing from the District Court's error, in this context where mandatory sentencing was governed by an erroneous scheme prejudice can be presumed.[92]

This reading essentially leads to a remand of all sentences imposed pre-*Booker* because any sentence imposed under the impression that the Guidelines range was mandatory presumably affected substantial rights.[93] Because it was clear that the Guidelines were mandatory until *Booker* was issued, most pre-*Booker* sentences in the Third Circuit meet this standard and are accordingly remanded for sentencing if appealed.[94]

The Fourth Circuit, taking a somewhat different approach, ruled that the *Booker* error was the issuance of any sentence pursuant to judicially-determined facts in excess of the facts supported by the jury verdict.[95] The court further held that the defendant had established that this error affected his substantial rights because using judge-determined facts in sentencing increased the applicable Guidelines beyond what the jury verdict would have supported.[96] This is a somewhat different approach because the Fourth Circuit did not directly consider the *Booker* remedy of a discretionary sentencing system, and therefore did not discuss how to determine if the mandatory Guidelines scheme impacted a given sentence.[97] Instead, the court ruled that the use of any judge-found facts to increase sentences formed the basis for plain error.[98] Although a slightly different approach to the analysis, the result is the same: any sentence imposed pre-*Booker* with the use of judge-found sentencing enhancements must be remanded. Because the pre-*Booker* system mandated that judges

92. *Id.*

93. *Id.*

94. United States v. Booker, 543 U.S. 220, 233–34 (2005) ("The Guidelines as written . . . are not advisory; they are mandatory and binding on all judges" and thus "have the force and effect of laws.").

95. United States v. Hughes, 401 F.3d 540, 546 (4th Cir. 2005).

96. *Id.* at 547.

97. *Id.* at 551 n.8.

98. *Id.* at 550–51.

find facts to support statutory enhancements, the effect of the Fourth Circuit's ruling is that almost all pre-*Booker* sentences will be remanded.

The Sixth Circuit follows a similar model and has determined that the plain error of pre-*Booker* sentences was not the mandatory Guidelines scheme, but rather the use of judicially determined facts to support sentencing enhancements beyond what the jury verdict authorized.[99] Again, as with the Fourth Circuit's ruling, this opinion has the practical effect of remanding any appeal of a pre-*Booker* sentence because judges were required to find facts to support sentencing enhancements. These enhancements were often beyond what the facts found by the jury, or admitted to by the defendant, could support.

C. *The Middle Ground*

Using a somewhat novel approach, the D.C., Second, Seventh, and Ninth Circuits have adopted what this Note calls the middle ground approach, between the strictest standard and the automatic remand. As discussed in Part III, this approach provides the many benefits of both the strictest standard and the automatic remand while minimizing the respective drawbacks of each.

The D.C. Circuit, in *United States v. Coles*, held that *Booker* errors necessarily met the first and second prongs of plain error, and that the third requirement—that the error affect substantial rights—would be analyzed under a standard of "whether there would have been a materially different result, more favorable to the defendant, had the sentence been imposed in accordance with the post-*Booker* sentencing regime."[100] The determination of what qualifies as affecting substantial rights is the same as it is in both the courts using the strictest standard and the courts using the automatic remand approach. The novelty in the approach used by the D.C., Second, and Seventh Circuits, however, arises in the way each court determines whether the defendant would actually have received a more lenient sentence if it had been imposed in the post-*Booker* system of discretion. To learn whether the *Booker* error made any difference in the outcome of a particular defendant's sentence when the record is silent as to the error's prejudicial effect, the D.C. Circuit simply remands the record to the district court so that it can review the case, using the Guidelines as advisory rather

99. *See* United States v. Oliver, 397 F.3d 369, 379–80 (6th Cir. 2005) (holding that the defendant's substantial rights were affected because of the extension of the defendant's sentence beyond that supported by the facts determined by the jury).

100. United States v. Coles, 403 F.3d 764, 767 (D.C. Cir. 2005).

than mandatory, and indicate "whether it would have imposed a different sentence materially more favorable to the defendant."[101] On remand, the D.C. Circuit retains jurisdiction over the case. The district court does not have to actually resentence the defendant; it only has to indicate whether the sentence was made independently of the mandatory nature of the Guidelines.[102]

The Second Circuit announced its procedure for handling *Booker* pipeline appeals based on plain error in *United States v. Crosby*.[103] The court in *Crosby* acknowledged the Supreme Court's "admonition" to the courts of appeals to use "'ordinary prudential doctrines'" including plain error, when determining whether a resentencing should be granted.[104] The Second Circuit, which was the first to adopt this middle ground approach, discounted the argument that the appellate court's only options were to disregard the error or impose a resentencing.[105] In fashioning its approach, the court relied on language from the Sentencing Reform Act itself: "'If the court of appeals determines that the sentence—(1) was imposed in violation of law, . . . the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.'"[106] The Second Circuit then asserted:

> [T]he "further sentencing proceedings" generally appropriate for pre-*Booker* . . . sentences pending on direct review will be a 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.[107]

The court, acknowledging that the language of the Sentencing Reform Act contemplated a remand for resentencing, reasoned that if remand were appropriate for a full resentencing then surely the court also had the power to remand for the issue of whether to resentence.[108]

The Seventh Circuit, in *United States v. Paladino*, adopted its middle ground approach, similar to the D.C. and Second Circuit models, after the

101. *Id.* at 770.
102. *Id.*
103. United States v. Crosby, 397 F.3d 103 (2d Cir. 2005).
104. *Id.* at 116 (quoting United States v. Booker, 543 U.S. 220, 268 (2005)).
105. *Id.* at 117.
106. *Id.* (quoting the Sentencing Reform Act, 18 U.S.C. § 3742(f)(1) (2000)).
107. *Id.*
108. *Id.*

Crosby decision was issued.[109] The Seventh Circuit pragmatically stated that "[t]he only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge."[110] Procedurally, the Seventh Circuit still retains jurisdiction over the appeal while ordering a limited remand to the district court to allow the sentencing judge to indicate whether he would impose the same sentence if the case were fully remanded.[111] If the judge indicates in this limited remand that he would have sentenced differently absent *Booker* error, the Seventh Circuit will vacate the sentence originally imposed and remand for a resentencing consistent with the *Booker* mandate.[112]

III. ADVOCATING FOR THE MIDDLE GROUND

Of the three methods, the middle ground approach has met with the least favor for handling plain error claims for sentences imposed before *Booker* was decided.[113] This is unfortunate because the middle ground approach is the fairest and most sensible. The middle ground approach avoids the problems inherent in both the strictest standard and the automatic remand approaches.

A. *Accuracy in Results*

The circuits employing the strictest standard approach to plain error have no way of guaranteeing that their disposition of appeals is accurate, or whether defendants serving unconstitutionally long sentences because of error in their sentencing hearings have the opportunity to benefit from the ruling in *Booker*. Requiring a defendant to show that he or she would have received a more favorable sentence if the judge had known that the Guidelines range would be declared discretionary is practically impossible given that it had been well-established pre-*Booker* that the Guidelines range had the full force and effect of law and was mandatory upon sentencing judges.[114] In fact, the *Booker* remedy itself was to excise

109. United States v. Paladino, 401 F.3d 471 (7th Cir. 2005).

110. *Id.* at 483.

111. *Id.* at 484.

112. *Id.*

113. *See supra* Part II (demonstrating that five circuits have adopted the strictest standard for plain error, three circuits have implemented the automatic remand system, and four circuits have adopted the middle ground approach, which this Note argues is the most desirable for the promotion of justice).

114. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 367 (1989) (noting that

language from the Sentencing Reform Act that stated a sentencing court "'*shall* impose a sentence'" established by the Guidelines.[115]

The federal courts of appeals are incapable of gauging the prejudice actually suffered by these defendants because the sentencing judge understandably thought the Guidelines should be applied in a mandatory fashion. A reviewing court cannot delve into the sentencing judge's mind to determine whether the judge would have sentenced differently knowing the Guidelines would eventually be declared advisory; therefore, circuits using the strictest standard have decided to determine whether the defendant in a specific appeal would have received a shorter sentence based solely on the record available for review. This record usually includes only the transcript from the sentencing hearing and any sentencing memorandum prepared by the district court. The courts of appeals must examine these documents to determine whether the sentencing judge made any on-the-record remarks about desiring to impose a lower sentence but did not do so only because of the mandatory nature of the Guidelines sentencing scheme.[116] This is clearly an arbitrary system of justice when the length (and constitutionality) of a defendant's sentence is based upon the "vocal nature of the sentencing judge."[117]

Congress had clearly chosen to adopt a "mandatory-guideline system" and not a system that would have been merely advisory, and therefore the Guidelines were "binding on the courts" (citing S. REP. NO. 98-225, at 62, 78–79 (1982))).

115. United States v. Booker, 543 U.S. 220, 233–34 (2005).

116. *See, e.g.*, United States v. Betterton, 417 F.3d 826, 832–33 (8th Cir. 2005). In granting this particular defendant a resentencing hearing, the Eighth Circuit determined that the statement by the sentencing judge, "'if I had discretion, I would not be giving you a 360-month sentence'" along with a statement that the Guidelines range was "'too harsh and too severe'" was enough for the defendant to establish that the sentencing judge would have given a shorter sentence absent the *Booker* error. *Id.* *But see* United States v. Hansen, 434 F.3d 92 (1st Cir. 2006). In *United States v. Hansen*, the First Circuit determined that the defendant could not show a reasonable probability that he would have received a shorter sentence absent the *Booker* error despite several remarks by the sentencing judge that appeared to indicate she felt constrained by the Guidelines. *Id.* at 98–99. Following the ruling, the district court judge who had sentenced the defendant in *Hansen* actually wrote a letter to the circuit court panel who decided the case, expressing her displeasure at the way her comments at both the hearing and in the sentencing memorandum had been construed by the panel. *See* Letter from Judge Nancy Gertner, United States District Court (Jan. 25, 2006), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/plain_error_on_.html. Judge Gertner stated that "based upon [her] recollection of the facts, and [her] review of the record, there was at least a 'reasonable probability' that a more lenient sentence would have been imposed under an advisory guideline regime." *Id.*

117. United States v. Pirani, 406 F.3d 543, 565 (8th Cir. 2005) (Bye, J.,

Moreover, there are many reasons why a sentencing judge might be reluctant to openly express a desire to impose a lower sentence or even to show a general dislike for the Guidelines. Such reluctance for an appellate court applying the strictest standard would result in a lack of sufficient on-the-record statements, even if the sentencing judge actually had a desire to impose a lower sentence.

One reason that a district court judge might refrain from making on-the-record comments revealing dissatisfaction with the harshness of the Guidelines is that judges might feel powerless and trapped within the system, making such comments superfluous. The Guidelines system has remained in place for approximately twenty years even though it has received considerable criticism from the bench since its inception. Unless the particular judge simply wanted to vent frustration regarding the lack of discretion judges employed before *Booker*, there would be no real reason for a judge to make comments about the harshness of the Guidelines. The possibility that a sentencing judge would express sympathy for the sentence mandated in a particular case is also unlikely in today's political climate, where any indication of "judicial activism" and any appearance of being soft on crime is quickly and loudly met by politicians and pundits who are concerned that today's judiciary is overstepping its powers.[118] Furthermore, given that at least one court employing the strictest standard routinely favors upward sentencing departures but frowns upon downward sentencing departures, district court judges in this circuit might be wary of drawing attention to a desire to hand out lower sentences in certain cases.[119]

The courts applying the strictest standard have also routinely held that the most commonly found evidence of a judge's desire to impose a lower sentence—the imposition of a sentence at the lowest possible point of the Guidelines range—is not enough to demonstrate that the same judge

concurring in part and dissenting in part).

118. *See, e.g.*, Douglas A. Kelly, *Minnesota Federal Judge Caught in a Constitutional Crossfire*, 27 HAMLINE L. REV. 427 (2004) (discussing the predicament of Chief Judge James Rosenbaum of the District of Minnesota after he testified before a House Judiciary subcommittee in favor of a proposed amendment to the Guidelines that would allow a sentencing judge to depart downward in sentencing upon a determination that the defendant was a low-level participant in a drug conspiracy).

119. *See* United States v. Yirkovsky, 338 F.3d 936, 942–44 (8th Cir. 2003) (Heaney, J., dissenting) (noting the Eighth Circuit's "disturbing trend toward increasingly punitive sentencing" in light of the fact that the court had affirmed only two out of twenty-five appeals of downward departures while affirming forty-four out of forty-six upward departures in the time period from May 2000 until the time of this decision).

might have departed even further downward with advisory Guidelines.[120]

The refusal of these courts to consider the implications of lowest-end sentences along with the potential reluctance of sentencing judges to make the remarks required by reviewing courts means that the risk of false negatives in the circuits applying the strictest standard is substantial. The circuits employing the middle ground avoid this hazard. In fact, the approach used should create a system where each and every defendant who would have received a more favorable sentence under an advisory regime will have the opportunity to have the error corrected. These circuits do what a cursory glance at statements made on the record cannot do—go inside the sentencing judge's head by simply asking the judge if the *Booker* error made a difference, thereby ensuring justice for all defendants sentenced in the unconstitutional pre-*Booker* system. This approach guarantees justice, promises uniformity, and eliminates the arbitrary sentencing factor of how vocal the sentencing judge happened to be.

B. *Effectiveness of Judicial Proceedings*

The circuits employing the automatic remand approach similarly guarantee uniformity and ensure fairness in the treatment of *Booker* pipeline appeals; this approach, however, creates the risk of false positives. In this context, false positives mean that some cases will be remanded to the district courts for resentencing where the district court judge will simply impose the same sentence because the mandatory nature of the Guidelines did not play a role in the original sentencing analysis. Yet, this is preferable to the system used by the circuits applying the strictest standard, which creates false negatives, because no defendant will serve a longer sentence due to the unconstitutional imposition of the original sentence. Nevertheless, this approach is problematic in that it will result in a waste of resources and unnecessarily delay the resolution of the judicial proceeding. Federal district courts are already overburdened without an additional onslaught of needless remands for resentencing.[121]

120. *See, e.g.*, *Pirani*, 406 F.3d at 553 (holding that a sentence at the lowest possible end of the Guidelines range "is insufficient, without more, to demonstrate a reasonable probability that the court would have imposed a lesser sentence absent the *Booker* error").

121. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 405 tbl.5.8 (2003), http://www.albany.edu/sourcebook/pdf/t58.pdf. These statistics show that in 2003, a total of 70,642 cases were filed in the federal district courts, making each federal district court judge responsible for an average of 104 new cases each year. *Id.* *See also* Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990) (refusing to consider citizenship of all

In contrast, the middle ground approach avoids putting an unnecessary burden on federal district courts by only remanding the limited question of the effect of the *Booker* error, and then only remanding the case for a full resentencing if the error did cause a sentence increase. In short, the approach offered in the middle ground circuits avoids the risk of unfairness to defendants sentenced pre-*Booker* while avoiding the unnecessary remands inherent in an automatic remand approach.

IV. THE SUPREME COURT DENIES CERTIORARI IN *UNITED STATES V. RODRIGUEZ*[122]

Many federal criminal law practitioners were hopeful that the Court would resolve the deep circuit split over plain error in *Booker* pipeline cases. The perfect opportunity for the Court to weigh-in on this issue was presented when *Rodriguez* was appealed to the Supreme Court; despite the Solicitor General's recommendation that the Court grant certiorari, it declined to resolve the issue.[123]

Of course, the Court's decision whether to grant petitions for a writ of certiorari is discretionary; however, in light of relevant Court rules, *Rodriguez* presented the archetypal case in which the Court should grant certioriari.[124] Rule 10 of the Supreme Court provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following . . . indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of

members of unincorporated businesses when determining whether diversity jurisdiction exists due to concerns regarding the already overburdened federal court system).

122. United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005), *cert. denied*, 545 U.S. 1127 (2005).

123. *Id.*

124. It is not only defendants and the federal courts of appeals who have urged the Supreme Court to resolve this issue. When the defendant in *Rodriguez* filed a petition for a writ of certiorari, the Solicitor General joined him in urging the Court to grant certiorari. "Some of the differences among the courts of appeals illuminate basic disagreements about the proper approach to plain-error review, and they therefore have the potential to affect criminal cases not involving *Booker* error. The conflict in the circuits therefore warrants resolution by this Court." Brief for the United States at 19, Rodriguez v. United States, 545 U.S. 1127 (2005) (No. 04-1148), 2005 WL 1210522 at *19.

> appeals on the same important matter . . . .[125]

This Court rule includes a circuit split on an important issue as a primary factor lending itself to a grant of certiorari. The issue regarding the management of plain error in *Booker* pipeline appeals is undeniably important because it involves a defendant's fundamental Sixth Amendment right to a jury trial—a right "essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."[126] In fact, the Constitutional guarantee of a jury trial in criminal cases has been held to "reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge," which is exactly the problem in pre-*Booker* sentencings.[127] Clearly, there is a deeply entrenched circuit split over the application of plain error in *Booker* appeals and there is just as clearly an important fundamental right at issue. Presumably, the Court's reason for denying certiorari is that its opinion would affect only a limited group of cases decided before *Booker* that were still on direct appeal.

The circuits themselves have acknowledged the need for the Supreme Court to fulfill its role and provide a uniform standard. For example, in a dissent in *United States v. Mooney*, Judge Bright of the Eighth Circuit explicitly "urge[d] the Supreme Court to resolve the circuits' split on [the plain error] issue."[128] Perhaps even more critically, Judge Lucero concluded his dissent to the application of plain error in the Tenth Circuit by stating: "This wide ranging [plain error] circuit split results in the disparate treatment of criminal defendants throughout the nation. Such uneven administration of justice cries out for a uniform declaration of policy by the Supreme Court."[129]

In October 2006, the Court granted certiorari in *Washington v. Recuenco*, and provided a glimmer of hope that this circuit split would be resolved.[130] In *Recuenco*, a defendant in Washington received a sentencing

125. SUP. CT. R. 10.

126. *See* Duncan v. Louisiana, 391 U.S. 145, 158 (1968) (holding the Sixth Amendment right to a jury trial is fundamental and incorporated against the states through the Fourteenth Amendment).

127. *Id.* at 156.

128. United States v. Mooney, 425 F.3d 1093, 1105 (8th Cir. 2005) (Bright, J., dissenting).

129. United States v. Gonzalez-Huerta, 403 F.3d 727, 763 (10th Cir. 2005) (Lucero, J., dissenting).

130. State v. Recuenco, 110 P.3d 188 (Wash. 2005), *cert. granted*, 74 U.S.L.W. 3050 (U.S. Oct. 17, 2005) (No. 05-83).

enhancement after the judge found that the defendant had been armed with a firearm.[131] The case presented a factual situation analogous to the facts in many *Booker* plain error appeals.[132] Although drafted as a *Blakely* appeal, it had implications for *Booker* cases because it raised the issue of whether a sentence that was enhanced in violation of *Blakely*'s Sixth Amendment holding could be reviewed for "harmless error."[133] Because the test for harmless error, like the test for plain error, involves a determination of whether a forfeited error affects a defendant's substantial rights, the Court's ruling in this case could have had implications and provided guidance for the courts applying plain error in *Booker* appeals.[134] If the Court were to hold that *Blakely* errors cannot be harmless it would demonstrate that *Booker* errors necessarily meet the plain error requirements.[135] However, the Court not only ruled that the *Blakely* error in that case was harmless, it held "the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal . . . [because] most constitutional errors can be harmless."[136]

V. CONCLUSION

Unfortunately, *Booker* raised just as many questions as it answered. One key question left unanswered was the availability of remedies to those defendants serving their unconstitutional pre-*Booker* sentences. Had the Supreme Court, as it did in *Blakely v. Washington*,[137] simply ruled the Guidelines unconstitutional and stopped there, the question would have been simple, as most defendants could have met the plain error standard by showing that this sentencing error—any judicial sentencing increase—affected substantial rights. But, in the somewhat surprising ruling, the Supreme Court admitted the Sixth Amendment defect in federal sentencing and cured the constitutional problem by making the Guidelines

131. *Id.*

132. *Id.*

133. Blakely v. Washington, 542 U.S. 296, 314 (2004).

134. FED. R. CRIM. P. 52(a).

135. Federal Rule of Criminal Procedure 52(a) provides that "[a]ny error . . . that does not affect substantial rights must be disregarded." *Id.* This means a determination by the Court that *Blakely* judicial factfinding can never be harmless—or that it must always affect substantial rights—could serve to confirm the automatic remand approach to plain error.

136. Washington v. Recuenco, 126 S. Ct. 2546, 2551 (2006) (quoting Neder v. United States, 527 U.S. 1, 8 (1999) (internal quotation marks omitted)).

137. *Blakely*, 542 U.S. at 301–08, 313–14.

advisory.[138] The remedy portion of the *Booker* opinion has led to the *Booker* error being defined as the mandatory application of the Guidelines system—not the use of judicial enhancements. This characterization of the error at issue has further led to a defendant having to establish the nearly impossible: showing conclusively that they would have received a more favorable sentence if the sentencing judge had only known then what the judge knows now—that imposition of a sentence within the Guidelines range is not required.

Since *Booker* was handed down in January 2005, the circuit courts have fallen into a deep split over the application of the plain error standard, specifically the third prong requirement that the error affects substantial rights in *Booker* pipeline appeals. This split is felt most powerfully by those defendants who did not have the foresight to commit their crimes in a circuit that applies a workable standard.

The Supreme Court missed an opportunity in *Rodriguez* to standardize the approach to plain error in *Booker* pipeline appeals. Instead, over the requests of both the defendant and the Solicitor General, as well as the requests of many federal judges across the country, the Court refused to grant certiorari.[139]

At the end of all this litigation, the "landmark" decision in *Booker* means very little to those defendants sentenced in the unconstitutional pre-*Booker* system who failed to raise the Sixth Amendment issue at trial.[140]

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138. *Id.*

139. United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005), *cert. denied*, 545 U.S. 1127 (2005).

140. In contrast, those defendants who have been sentenced following the *Booker* ruling presumably benefited from the newly returned discretion of federal district court judges. Statistics of the types of sentences being imposed post-*Booker* have been accumulated and monitored by many groups, including the United States Sentencing Commission. Based on the Sentencing Commission's statistics of post-*Booker* sentences compiled through December 21, 2005, thirty-eight percent of the sentences imposed by the federal courts were below the Guidelines range, whereas only twenty-seven percent of federal sentences were below the applicable Guidelines range in the year preceding the *Blakely* decision. *See* U.S. SENTENCING COMM'N, SPECIAL POST-BOOKER CODING PROJECT 1, 7 (2006), http://www.ussc.gov/Blakely/PostBooker_010506.pdf; *see also* United States v. Salazar-Pacheco, No. 6:05-cr-137-O-1-37KRS (M.D. Fla. Jan. 20, 2006); United States v. Myers, 353 F. Supp. 2d 1026 (S.D. Iowa 2005); United States v. Ranum, 353 F. Supp. 2d 984 (D. Wis. 2005); United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005). These cases highlight the division over another question left open in *Booker*: the proper weight to be given to the applicable Guidelines range in relation to the other factors for consideration outlined in the Sentencing Reform Act.

As the circuit courts clear out the *Booker* pipeline cases and the sentences become final, the only remaining remedy is a habeas suit. However, because the right elucidated in *Booker* has recently been determined to be procedural, the doors to the federal courts are effectively closed because new rules of criminal procedure do not apply retroactively to cases pending on collateral appeal.[141] When this door slams shut, the "geographic crazyquilt" created by this circuit split stops referring simply to the way the circuits are handling *Booker* pipeline appeals and soon refers to defendants imprisoned for similar crimes serving radically disparate sentences.

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141. It is unlikely the *Booker* rule will be applied retroactively. Each court of appeals that has considered the issue of the *Booker* rule's retroactive application to cases in the context of habeas corpus suits has ruled that the error is one of procedure and thus not available for review in habeas suits. *See, e.g.*, In re Zambrano, 433 F.3d 886 (D.C. Cir. 2006); United States v. Gentry, 432 F.3d 600 (5th Cir. 2005); United States v. Morris, 429 F.3d 65 (4th Cir. 2005); United States v. Cruz, 423 F.3d 1119 (9th Cir. 2005); Lloyd v. United States, 407 F.3d 608 (3d Cir. 2005); Guzman v. United States, 404 F.3d 139 (2d Cir. 2005); Humphress v. United States, 398 F.3d 855 (6th Cir. 2005); McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005). In June 2006, the Supreme Court announced that it would take up the issue of *Blakely*'s retroactivity in the case of *Burton v. Waddington*, 142 F. App'x 297 (9th Cir. 2006), *cert. granted*, 126 S. Ct. 2352 (2006). Due to the similarity of the *Blakely* and *Booker* opinions, the Supreme Court's holding in *Burton* should be dispositive of the issue.

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