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Defining "Ordinary Prudential Doctrines" After Booker: Why the Limited Remand Is the Least of Many Evils

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NOTE

DEFINING "ORDINARY PRUDENTIAL DOCTRINES" AFTER *BOOKER*:

WHY THE LIMITED REMAND IS THE LEAST OF MANY EVILS

INTRODUCTION

In 1984, Congress created the Sentencing Guidelines to help prevent disparity in sentencing.[1] The Guidelines were supposed to narrow the discretion that sentencing judges exercised, in order to make sentences more uniform.[2] In *United States v. Booker*, however, the United States Supreme Court declared that the way in which federal criminal defendants had been sentenced for nearly twenty years was unconstitutional.[3] The Court stated that the Sixth Amendment right to trial by jury applies to the Sentencing Guidelines.[4] The Court went on to state that, in cases that were on direct review at the time of the decision, "ordinary prudential doctrines" would govern sentences that were suddenly unconstitutional.[5]

Following the Court's attempt at clarification in *Booker*, a new

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[1] *See* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 188-189 (1993). Senator Hatch was one of the primary drafters of the law that created the Sentencing Guidelines. *Id.*

[2] *Id.*

[3] *See* United States v. Booker, 543 U.S. 220, 226-227 (2005) (Stevens, J., for the Court in part).

[4] *See id.*

[5] *See id.* at 268 (Breyer, J., for the Court in part).

disparity has emerged.[6] The various circuits have adopted four different interpretations of what the Court meant by "ordinary prudential doctrines."[7] The one clear fact that has emerged is that defendants are being treated differently based solely on where they committed their crimes,[8] exactly the type of disparity that Congress was trying to avoid when it created the Sentencing Guidelines.[9] The Solicitor General has urged the Supreme Court to address this disparity.[10] However, to date the Supreme Court has declined to do so.[11]

The Ninth Circuit decided to use Alfred Ameline's case as its vehicle for choosing what approach it would take when a defendant had not preserved *Booker* error.[12] Ameline's case had already taken an extended tour through the federal courts. Ameline pled guilty to selling methamphetamines and was sentenced in 2002, before *Booker* was decided.[13] However, while his case was on direct review, the Supreme Court decided, in *Blakely v. Washington*, that Washington's sentencing scheme was unconstitutional.[14] In light of *Blakely*, Ameline's appellate panel *sua sponte* raised the issue of whether the Sentencing Guidelines violated the Sixth Amendment right to trial by jury.[15] The panel held that the Guidelines did violate the Sixth Amendment and remanded his case for a new sentencing hearing.[16]

Ameline filed a petition for rehearing.[17] While that petition was pending, the Supreme Court decided, in *United States v. Booker*, that the Sentencing Guidelines violate the Sixth Amendment right to trial by jury.[18] The original panel, noting that Ameline had not raised a Sixth

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[6] Peter A. Jenkins, *Requiring the Unknown or Preserving Reason:* United States v. Gonzalez-Huerta *and the Tenth Circuit's Compromise Approach to* Booker *Error*, 83 DENV. U. L. REV. 815 (2006).

[7] The four approaches, which will be discussed in detail *infra*, are (1) the hard-line approach, (2) the presumption-of-prejudice approach, (3) the "compromise" approach, and (4) the limited-remand approach.

[8] *See* Jenkins, *supra* note 6, at 815.

[9] *See* Hatch, *supra* note 1, at 188-189.

[10] *See* Brief of the United States, Rodriguez v. United States, 545 U.S. 1127 (2005) (No. 04-1148) 2005 WL 1210522 at *7.

[11] *See, e.g.*, Rodriguez v. United States, 545 U.S. 1127 (2005) (denying cert.).

[12] *See* United States v. Ameline, 401 F.3d 1007 (9th Cir. 2005) (order granting rehearing en banc). *Booker* error occurred whenever a defendant was sentenced under the mandatory Sentencing Guidelines. *See* United States v. Ameline, 409 F.3d 1073, 1077-1078 (9th Cir. 2005) [Ameline III].

[13] United States v. Ameline, 376 F.3d 967, 970-971 (9th Cir. 2003) [Ameline I].

[14] Blakely v. Washington, 542 U.S. 296, 305 (2004).

[15] *Ameline I*, 376 F.3d at 971.

[16] *Id.* at 984.

[17] United States v. Ameline, 400 F.3d 646, 651 (9th Cir. 2004) [Ameline II].

[18] United States v. Booker, 543 U.S. 220, 226-227 (2005) (Stevens, J., for the Court in part). The history and use of the Sentencing Guidelines are discussed *infra* at notes 27-52 and

Amendment challenge, held that the sentence amounted to plain error and again remanded for resentencing.[19] The Ninth Circuit then took the case en banc to decide what procedure would be used for defendants raising unpreserved *Booker* error.[20] The en banc panel adopted the "limited-remand" approach.[21]

This Note examines the limited-remand approach in comparison with the approaches taken by the different circuits. Part I discusses the history of the Sentencing Guidelines and the cases, up to and including *Booker*, that completely changed the way the Sentencing Guidelines were used.[22] Part II sets forth the history of the traditional plain error standard of review and the contemporary "Plain Error Problem."[23] Part III examines the limited-remand approach and compares it with the approach taken in other circuits.[24] Part IV argues that the limited-remand approach is the best of a list of bad possible choices but that the Ninth Circuit should have imposed a higher burden of proof on defendants before they could obtain a limited remand.[25] Finally, Part V concludes that although it alters the traditional plain-error standard of review, the limited-remand approach is the most consistent with the intent of the majority that authored the remedial portion of the *Booker* opinion but would be improved with a higher burden on defendants.[26]

I. BACKGROUND

From the late nineteenth century until 1984, most federal crimes were sentenced based upon an indeterminate sentencing scheme.[27] Under an indeterminate sentencing scheme, Congress simply set a range of sentences for each crime and left the particular sentence to the discretion of the sentencing judge.[28] Congress had the authority to legislate a determinate sentence for each particular crime.[29] However,

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accompanying text, as are the cases that led to *Booker* at notes 53-116 and accompanying text.

[19] *Ameline II*, 400 F.3d at 649-650.

[20] United States v. Ameline, 401 F.3d 1007 (9th Cir. 2005) (order granting rehearing en banc).

[21] United States v. Ameline, 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc) [Ameline III].

[22] *See infra* notes 27-134 and accompanying text.

[23] *See infra* notes 135-155 and accompanying text.

[24] *See infra* notes 156-191 and accompanying text.

[25] *See infra* notes 192-246 and accompanying text.

[26] *See infra* notes 247-252 and accompanying text.

[27] *See* Hatch, *supra* note 1, at 186.

[28] Mistretta v. United States, 488 U.S. 361, 363 (1989).

[29] *Id.* at 364 (citing United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) ("Congress, of course, has the power to fix the sentence for a federal crime . . . .")).

Congress generally gave the sentencing judge the discretion to choose the particular sentence from within a range of sentences.[30] Courts soon recognized that a sentence under such a scheme was virtually free from any form of appellate review.[31]

A. SENTENCING REFORM ACT OF 1984[32]

For several years, Congress was concerned with the "intolerable disparities that plagued the indeterminate federal sentencing system."[33] In 1958, Congress responded to the noted disparities by establishing a sentencing institute and advisory council to make advisory criteria for sentencing.[34] The purpose of these voluntary measures was to encourage "[f]ederal judges [to] reach a desirable degree of consensus as to the types of sentences which should be implemented in different kinds of cases."[35] However, this seemed to have little effect.[36]

Several studies demonstrated the ineffectiveness of the advisory criteria.[37] One such study reported that "the range of average sentences

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[30] *See, e.g.*, United States v. Grayson, 438 U.S. 41, 45-46 (1978) (noting that early in America's history each crime had a fixed sentence, which changed to providing a range of sentences for each crime).

[31] *See, e.g.*, Dorszynski v. United States, 418 U.S. 424, 440-41 (1974) (stating that the firmly established rule was that appellate courts lacked control over any sentence that was within the statutory range).

[32] The full legislative history of the Sentencing Reform Act is beyond the scope of this Note. For a thorough, though overly critical, examination of the legislative history of the act, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

[33] Brief for Senators Hatch, Kennedy and Feinstein as Amici Curiae, United States v. Booker, 543 U.S. 220 (2003) (Nos 04-104, 04-105), 2004 WL 1950640 at *6. As mentioned *supra*, Sen. Hatch was one of the key drafters of the law that created the Sentencing Guidelines. *See* Hatch, *supra* note 1. Sen. Kennedy was the other primary drafter of the law. *See id.* Under the indeterminate sentencing system, each crime had a range of sentences from which the sentencing judge could choose. For example, a crime might have had a sentence of six to sixteen years in prison. *See id.* The judge was given no guidance beyond that range and was free to choose from anywhere in that range. *See id.* The problem was an extreme lack of consistency. *See id.* One defendant could receive the six years in prison from a "lenient" judge, while someone who committed the same crime in the same manner, and who had the same criminal history, could receive sixteen years from a "tough" judge. *See id.*

[34] 28 U.S.C.A § 334(a) (West 2007).

[35] S. REP. NO. 85-2013, at 3 (1958)

[36] *See* Brief for Senators Hatch, Kennedy and Feinstein, *supra* note 33, at *9 (citing Marvin Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5, 66 (1972). Federal Judge Frankel—considered a leading authority on federal sentencing—said that "the sentencing institute is almost irrelevant" and that the disparities under the indeterminate sentencing scheme were "terrifying and intolerable for a society that professes devotion to the rule of law." *See id* at 5, 66.

[37] S. REP. NO. 98-225 at 44 n.145 (1983) (listing some of the studies that were presented to Congress).

for forgery [ran] from thirty months in the Third Circuit to eighty-two months in the District of Columbia."[38] The trend was noted in several other studies that Congress identified as part of a set of hearings.[39] Even worse, the trend indicated that several judges were considering factors that were inappropriate or even illegal to consider, such as race and gender.[40] In response, Congress passed the Sentencing Reform Act of 1984 ("SRA").[41] The SRA was the product of nearly a decade of work in the House and Senate to overhaul the federal sentencing scheme.[42]

The cornerstone of the SRA was the creation of a sentencing guidelines system.[43] The act created the independent Sentencing Commission.[44] The primary role of the Sentencing Commission was to establish a set of guidelines to be used during sentencing by district judges.[45] The Sentencing Guidelines were supposed to further the objectives of the SRA.[46] The objectives of sentencing as announced in the SRA were

> (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with educational or vocational training, medical care, or other correctional treatment.[47]

One area of debate was whether the Guidelines would be mandatory or advisory.[48] Under the House of Representatives' version of the bill,

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[38] S. REP. NO. 98-225 at 41 n.143 (1983) (quoting Whitney N. Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163, 167 (1973)).

[39] S. REP. NO. 98-225 at 44 (1983).

[40] *See* Brief for Senators Hatch, Kennedy and Feinstein, *supra* note 33, at *11 (citing REFORM OF THE FEDERAL CRIMINAL LAWS: HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES OF THE SENATE COMMITTEE ON THE JUDICIARY, 95TH CONG., 1ST SESS., PT. 13, 9047 (1977) (Testimony of Prof. Alan Dershowitz); H.R. REP. NO. 98-1017 at 102 (1983)).

[41] *See* Sentencing Reform Act of 1984, PUB. L. NO. 98-473, 98 STAT. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586, & 28 U.S.C. §§ 991-998 (1988)). The SRA was part of the Comprehensive Crime Control Act of 1984. *See also* Brief for Senators Hatch, Kennedy and Feinstein, *supra* note 33, at *12.

[42] S. REP. NO. 98-225 at 37 (1983).

[43] S. REP. NO. 98-225 at 51-52 (1983).

[44] 28 U.S.C.A. § 991(a) (West 2007).

[45] S. REP. NO. 98-225 at 54 (1983).

[46] *See* Hatch, *supra* note 1, at 188-189.

[47] *See id.*, at 188.

[48] *See* United States v. Booker, 543 U.S. 220, 294 (2005) (Stevens, J., concurring in part and dissenting in part) (citing H.R. 6012, 98th CONG., 2D SESS. (1983)).

the Guidelines were merely advisory.[49] However, under the Senate's version, the Guidelines were mandatory.[50] Several senators expressed their desire to keep the Guidelines mandatory.[51] As a result of a compromise between the House and the Senate, the Guidelines were made mandatory on district courts, and courts of appeals were granted explicit authority to review sentences and remand for resentencing if necessary.[52]

B. THE *JONES*, *APPRENDI*, *RING*, AND *BLAKELY* CASES CAST DOUBT ON THE SENTENCING GUIDELINES

Beginning in 1999, the Supreme Court began issuing decisions that cast doubt on judicial factfinding.[53] While only one of the cases actually involved the federal criminal system,[54] these cases led to the question whether the Sentencing Guidelines were constitutional.[55]

1. Jones v. United States

In *Jones v. United States*,[56] the Court interpreted the federal carjacking statute.[57] According to the statute, if a carjacking resulted in serious bodily harm or in death, the sentence was increased.[58] This additional fact was determined by the judge and was viewed as a "sentencing factor" by the lower courts.[59] In a five-to-four decision, the

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[49] *See Booker*, 543 U.S. at 294 (Stevens, J., concurring in part and dissenting in part) (citing H.R. 6012, 98th CONG., 2D SESS. (1983)).

[50] S. REP. NO. 98-225 at 79 (1983) (stating that the Senate Judiciary Committee specifically rejected a proposed amendment that would make the Guidelines advisory rather than mandatory, citing the "poor record of states . . . which have experimented with 'voluntary' guidelines.").

[51] The vote in the House was splintered on whether to keep the Guidelines mandatory, but the Senate was nearly unanimous, voting eighty-five to three in favor of making the Guidelines binding. *See Booker*, 543 U.S. at 294 (Stevens, J., concurring in part and dissenting in part) (citing 130 CONG. REC. 1649 (1984)).

[52] *See Booker*, 543 U.S. at 294 (Stevens, J., concurring in part and dissenting part) (citing 130 CONG. REC. 29730 (1984)).

[53] *See, e.g.*, Jones v. United States, 526 U.S. 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004).

[54] *See Jones*, 526 U.S. at 229.

[55] *See, e.g.*, *Blakely*, 542 U.S. at 325 (O'Connor, J., dissenting).

[56] *See Jones*, 526 U.S. at 229.

[57] 18 U.S.C.A. § 2119 (West 2007).

[58] 18 U.S.C.A. § 2119(2), (3) (West 2007).

[59] *See* United States v. Jones, 526 U.S. 227, 231-232 (1999). The Ninth and Eleventh Circuits had specifically interpreted the statute in such a way and no other circuit had reached the opposite interpretation. *See* United States v. Oliver, 60 F.3d 547, 551-554 (9th Cir. 1995); United States v. Williams, 51 F.3d 1004, 1009-1010 (11th Cir. 1995).

Court determined that this is not a sentencing factor; rather, the statute establishes three distinct crimes.[60] The first crime is a carjacking with no serious injury,[61] the second is a carjacking resulting in serious bodily injury,[62] and the third is a carjacking resulting in death.[63]

Justices Stevens and Scalia each filed a concurring opinion.[64] Both argued that it is "unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties."[65] The majority avoided the issue of declaring sentencing factors per se unconstitutional by determining that the carjacking statute established three separate crimes rather than one crime with two sentencing factors.[66] While the Court's opinion does not actually stand for the proposition that a trial court cannot use sentencing enhancements,[67] the two concurring opinions laid the groundwork for the line of cases that would ultimately result in the *Booker* decision.[68]

2. *Apprendi v. New Jersey*

In *Apprendi v. New Jersey*,[69] the Court examined New Jersey's hate-crime statute.[70] On December 22, 2004, Charles Apprendi fired several shots into the home of an African-American family that had just moved into a previously all-white neighborhood.[71] The grand jury returned a twenty-three-count indictment.[72] In a plea deal, Apprendi pleaded guilty to two counts of possession of a firearm for an unlawful purpose (counts three and eighteen) and one count of possession of an

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[60] *Jones*, 526 U.S. at 229.

[61] 18 U.S.C.A. § 2119(1) (West 2007).

[62] 18 U.S.C.A. § 2119(2) (West 2007).

[63] 18 U.S.C.A. § 2119(3) (West 2007).

[64] *Jones*, 526 U.S. at 252 (Stevens, J., concurring); *see also id.* at 253 (Scalia, J., concurring) (arguing that judicial factfinding that increases a defendant's sentence violates the Sixth Amendment right to trial by jury).

[65] United States v. Jones, 526 U.S. 227, 253 (1999) (Scalia, J., concurring).

[66] *Id.* at 243 n.6. The Court stated that, consistent with its practice, if a statute is capable of two interpretations, one of which raises constitutional questions and the other does not, the Court will choose the latter interpretation. *Id.*

[67] *Id.* at 239. The Court avoided the issue of sentencing enhancements in order to avoid making a constitutional decision. *See also id.* at 243 n.6 (noting the majority's constitutional concern, but simultaneously avoiding the question).

[68] *See id.* at 253 (Scalia, J., concurring).

[69] Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).

[70] *See id. See also* N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000).

[71] *Apprendi*, 530 U.S. at 469.

[72] *Id.*

anti-personnel bomb for an unlawful purpose (count twenty-two).[73] The prosecution dismissed the remaining twenty counts.[74] Counts three and eighteen each carried a possible sentence of five to ten years' imprisonment and count twenty-two carried a maximum sentence of three to five years' imprisonment.[75] The prosecution reserved the right to seek an enhancement based on New Jersey's hate-crime law as to count eighteen,[76] and Apprendi reserved the right to challenge the constitutionality of the hate-crime enhancement.[77] The trial court then found, based on Apprendi's comments to the police, that he had acted to intimidate a group based upon their race.[78] This additional finding established Apprendi's eligibility for a hate-crime enhancement.[79] This determination was made by the judge under a preponderance-of-the-evidence standard.[80]

A five-justice majority[81] of the Supreme Court held that the Constitution requires any fact, other than prior conviction, that expands the sentence beyond the statutory maximum, be decided by the jury using a beyond-a-reasonable-doubt standard.[82] The same five justices in the *Apprendi* majority would later decide *Blakely* and *Booker*.[83] *Apprendi* signaled where the Court was headed with regard to sentencing factors and would be a basis for the following decisions.[84]

3. *Ring v. Arizona*

The Court continued the trend of disfavoring so-called sentencing

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[73] N.J. STAT. ANN. § 2C:39-4(a) (West 1995) (possession of a gun for an unlawful purpose); N.J. STAT. ANN. § 2C:43-6(a)(3) (West 1995) (possession of an anti-personnel bomb); *Apprendi*, 530 U.S. at 469-470.

[74] Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).

[75] *Id.*

[76] N.J. STAT. ANN. § 2C:44-3(e). *See also Apprendi*, 530 U.S. at 470.

[77] *Apprendi*, 530 U.S. at 470.

[78] *Id.*

[79] *See* N.J. STAT. ANN. § 2C:44-3(e).

[80] Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).

[81] *Apprendi*, 530 U.S. at 468. The five justices were Justices Stevens, Scalia, Thomas, Souter and Ginsburg.

[82] *Apprendi*, 530 U.S. at 490.

[83] *See* Blakely v. Washington, 542 U.S. 296, 297 (2004); United States v. Booker, 543 U.S. 220, 225 (2005) (Stevens, J., for the Court in part).

[84] *See generally* Berman Douglas, *Appraising and Appreciating* Apprendi, 12 FED. SENTENCING REP. 303 (1999-2000). *See also Apprendi*, 530 U.S. at 523 (O'Connor, J., dissenting) (noting that the case would have far-reaching implications and would flood the lower courts with further litigation).

factors that expanded the sentence in *Ring v. Arizona*.[85] Arizona's sentencing scheme provided that if the jury convicted the defendant of first-degree murder, then the judge had the responsibility of finding the existence or non-existence of certain aggravating factors.[86]

Timothy Ring was involved in a robbery with two other men.[87] One person died and Ring was charged with premeditated murder and felony murder.[88] The jury found Ring guilty of felony murder rather than premeditated first-degree murder.[89] The trial judge then found that Ring was a major participant in the robbery and that he was the actual killer.[90] Based on these findings, the trial judge sentenced Ring to death.[91]

The Supreme Court of Arizona took Ring's case on automatic direct appeal.[92] While acknowledging that *Jones* and *Apprendi* cast some doubt on the state's capital system, the state court nonetheless held that the sentencing scheme was constitutional.[93] Ring filed a petition for certiorari, which was granted.[94] The United States Supreme Court held that it was unconstitutional for the judge, rather than the jury, to find the aggravating factors.[95] The Court pointed out that without the finding of an aggravating factor, Ring would not have been eligible for the death penalty.[96] As a result, the maximum penalty for which Ring was eligible based on the jury verdict alone was life without the possibility of parole.[97] Arizona law specifically provided that the judge alone should determine the existence of aggravating factors and that the judge could only sentence the defendant to death if the judge found at least one aggravating factor and no mitigating factor sufficient to justify

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[85] *See* Ring v. Arizona, 536 U.S. 584, 588 (2002).

[86] ARIZ. REV. STAT. ANN. § 13-703(C) (West Supp. 2001) (The statute in question was amended in 2002 to remove the reference to the judge holding the hearing. *See* ARIZ. REV. STAT. ANN. § 13-703(C) (West 2007).

[87] *Ring*, 536 U.S. at 590-591.

[88] *Id.*

[89] *Id.* The jury deadlocked on the premeditated murder charge, with six jurors voting to acquit. *Id.*

[90] *Id.* at 594.

[91] Ring v. Arizona, 536 U.S. 584, 594 (2002).

[92] *See* State v. Ring, 25 P.3d 1139, 1142 (Ariz. 2001).

[93] *Id.* at 1150-52.

[94] *See* Ring v. Arizona, 534 U.S. 1103 (2002) (order granting certiorari).

[95] *Ring*, 536 U.S. at 609. Justice Breyer wrote an opinion concurring in the judgment. *Id.* at 613. In it he argued that sentencing enhancements are constitutional but that only a jury can sentence a defendant to death. *Id.* at 614. No other justice joined in his opinion, and Justice Scalia filed a concurring opinion in which he specifically rejected Justice Breyer's position. *Id.* at 612.

[96] Ring v. Arizona, 536 U.S. 584, 597 (2002).

[97] *Id.* at 592.

leniency.[98]

The Court earlier had ruled that Arizona's sentencing scheme was constitutional.[99] However, the Court stated that the earlier decision was incompatible with *Apprendi* and could not stand.[100] In a concurring opinion, Justice Scalia, joined by Justice Thomas, made the Court's position clear.[101] He stated that the "guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."[102]

4. *Blakely v. Washington*

The Court made clear in *Blakely v. Washington* that determinate sentencing schemes had the same constitutional defects as those found in *Apprendi* and *Ring*.[103] In 1998, Ralph Blakely kidnapped his estranged wife and son.[104] The State of Washington initially charged him with kidnapping in the first degree.[105] Blakely eventually pled guilty to second-degree kidnapping involving domestic violence and the use of a firearm.[106] Under the facts admitted in his plea alone, the maximum sentence available was fifty-three months.[107] Despite this, the trial court sentenced him to ninety months because the court found that he acted with "deliberate cruelty."[108]

Following the trend that began in *Apprendi* and continued in *Ring*, the Court, in another five-to-four decision, held that the statutory maximum for a sentence is the highest sentence that a defendant could receive based upon the jury verdict or facts admitted at a sentencing hearing alone.[109] The State of Washington argued that there was no

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[98] *See* ARIZ. REV. STAT. ANN. § 13-703(C) (West Supp. 2001)

[99] *See* Walton v. Arizona, 497 U.S. 639 (1990).

[100] *See Ring*, 536 U.S. at 589.

[101] *See Ring*, 536 U.S. at 610 (Scalia, J., concurring).

[102] Ring v. Arizona, 536 U.S. 584, 610 (2002)

[103] *See* Blakely v. Washington, 542 U.S. 296, 303 (2004).

[104] *Id.* at 298.

[105] WASH. REV. CODE ANN. § 9A.40.020(1) (2000).

[106] *See* Blakely, 542 U.S. at 299. *See also* WASH. REV. CODE ANN. § 9A.40.030(1) (2000) (second degree kidnapping); WASH. REV. CODE ANN. § 10.99.020(3)(p) (2000) (defining crimes involving domestic violence); WASH. REV. CODE ANN. § 9.94A.125 (2000) (use of a firearm in the commission of a crime).

[107] *Blakely*, 542 U.S. at 299.

[108] *Id.* at 299-300.

[109] Blakely v. Washington, 542 U.S. 296, 313 (2004).

Apprendi violation because the statutory maximum was not the fifty-three months but rather the ten-year maximum for class B felonies.[110] In rejecting this argument, the Court stated specifically that the statutory maximum was the highest sentence "the judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[111]

The dissenters, led by Justice O'Connor, complained that this sentencing scheme was indistinguishable from the Federal Sentencing Guidelines (which had not been ruled unconstitutional) and that there was a distinct difference between sentencing factors and elements of the crime.[112] Justice Scalia, writing for the majority, responded to the criticism by stating that there was no decision being made with regard to the Sentencing Guidelines.[113] He went further to argue that under the system advocated by the dissenters, it would be perfectly constitutional to convict someone of illegal possession of a firearm but receive a sentence for killing someone.[114] Justice O'Connor argued that Justice Scalia was taking his argument to the extreme and that there was a built-in political check to prevent this.[115] However, she did not elaborate on what that political check might be.[116]

C. *BOOKER* MAKES IT OFFICIAL

Following *Blakely*, several courts were unsure whether the Guidelines were actually implicated.[117] Some courts were following the Guidelines, but only insofar as the facts of a guilty plea or a jury finding dictated.[118] At least one court declared the Guidelines in their entirety

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[110] *Id.* at 303.

[111] *Id.* (emphasis in original).

[112] *Id.* at 325 (O'Connor J., dissenting). *See also* Brief of the United States as Amicus Curiae Supporting Respondent, Blakely v. Washington, 542 U.S. 296 (2004) (No. 02-1632) 2004 WL 177025 at *1 (arguing that "[a]lthough the Washington sentencing guidelines system differs in significant respects from the United States Sentencing Guidelines, a decision invalidating judicial departure authority here could call into question the constitutionality of the federal Guidelines").

[113] *Blakely*, 542 U.S. at 305 n.9.

[114] *Id.* at 306.

[115] Blakely v. Washington, 542 U.S. 296, 307 n.10 (2004) (commenting on Justice O'Connor's dissent).

[116] *Id.* (commenting on Justice O'Connor's dissent).

[117] *See, e.g.*, Fanfan v. United States, No. 03-47, 2004 WL 1723114, at *5 (D. Me. June 28, 2004).

[118] *See* Fanfan v. United States, No. 03-47, 2004 WL 1723114, at *5 (D. Me. June 28, 2004); United States v. Booker, 375 F.3d 508, 510 (7th Cir. 2004). In *Fanfan*, the judge relied not only on the majority opinion in *Blakely* but also on the opinions of the dissenters and the Solicitor General's amicus brief. *Fanfan*, 2004 WL 1723114, at *5.

unconstitutional.[119] These courts were not making any judicial findings of fact whatsoever.[120] Given the upheaval in the state of the law and the need to have the issue clarified, the Senate unanimously passed a resolution asking the Supreme Court to declare whether the Guidelines were constitutional.[121] The Court agreed to hold a special session to determine the constitutionality of the Guidelines.[122] The Court granted certiorari in two cases, *United States v. Booker* and *United States v. Fanfan*.[123]

The Court granted certiorari on two questions: (1) whether the Sentencing Guidelines violated a defendant's Sixth Amendment rights as interpreted by *Blakely*, and (2) if the first question was answered in the affirmative, what was the remedy.[124] In an opinion authored by Justice Stevens, and joined by Justices Scalia, Thomas, Souter and Ginsburg, the Court held that the Guidelines, as applied in these cases, violated the defendants' Sixth Amendment rights.[125] Despite the fact that the *Blakely* Court had stated that the Guidelines were not at risk of being declared unconstitutional,[126] the Court found that they were indistinguishable from the sentencing scheme that the State of Washington employed.[127] In a separate opinion for the Court, authored by Justice Breyer, and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy and Ginsburg, the Court held that congressional intent dictated that the Guidelines be made advisory.[128] Thus, the Guidelines were not entirely eliminated.[129]

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[119] United States v. Ameline, 376 F.3d 967, 970 (9th Cir. 2004) [*Ameline I*].

[120] *See, e.g.*, Fanfan v. United States, No. 03-47, 2004 WL 1723114, at *5 (D. Me. June 28, 2004). Instead of making judicial findings of fact, these courts were basing the sentence solely on what was found by the jury or what was admitted in the guilty plea. *See id.*

[121] S. Con. Res. 130, 108th Cong. (2004); 150 CONG. REC. S8572 – S8574. The Senate Judiciary Committee also held a series of hearings in which testimony was presented regarding the state of the law. The transcripts of these hearings can be accessed at http://judiciary.senate.gov/hearing.cfm?id=1260 (last visited Mar. 27, 2007).

[122] *See* United States v. Booker, 542 U.S. 956 (2004); United States v. Fanfan, 542 U.S. 956 (2004) (order granting certiorari and setting an expedited briefing schedule).

[123] *See* United States v. Booker, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 542 U.S. 956 (2004); Fanfan v. United States, 2004 WL 1723114 (D. Me. 2004), *cert. granted before judgment*, 542 U.S. 956 (2004).

[124] United States v. Booker, 543 U.S. 220, 229 n.1 (2005) (Stevens, J., for the Court in part).

[125] *Id.* at 225-227 (Stevens, J. for the Court in part). The Court announced a joint decision for *United States v. Booker* and *United States v. Fanfan* as a single opinion under the heading United States v. Booker. *Id.* at 220. All references to *Booker* necessarily also encompass the *Fanfan* decision.

[126] *See* Blakely v. Washington, 542 U.S. 296, 305 n.9 (2004).

[127] *Booker*, 543 U.S. at 230 (Stevens, J., for the Court in part). Ironically, the Court partially relied on Justice O'Connor's dissenting opinion in Blakely. *Id.*

[128] *Id.* at 244-246 (Breyer, J., for the Court in part). Justice Breyer's opinion is referred to as the "remedial" opinion because it deals with the remedy to be applied after the Court declared the

In total, five opinions were issued, accumulating over 100 pages.[130]

The remedial opinion specifically stated that the decision would apply to all cases on direct review at the time of the decision.[131] The Court further stated that not all cases would require a remand and a new sentencing hearing.[132] What the court declined to do, however, was instruct the lower courts regarding exactly which sentences would require a new hearing and which would not.[133] The Court simply referred to "ordinary prudential concerns."[134]

II. THE "PLAIN-ERROR PROBLEM"

Federal Rule of Criminal Procedure 52(b) provides defendants an opportunity to challenge errors that were not preserved at trial.[135] Also known as the plain-error standard of review, Rule 52(b) gives courts the opportunity to correct particularly egregious errors that were not objected to at trial.[136] In order to show plain error that is reversible, an appellant must show the following: (1) that there was error; (2) that the error was plain; (3) that the error affected substantial rights; and (4) that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.[137]

The typical plain-error case places the burden of showing prejudice on the appellant.[138] In *United States v. Olano*, the Court held that while this is usually the case, there were two types of errors that were exceptions to this rule.[139] The two categories of exceptions the Court listed were "a special category of forfeited errors" and a class of "errors that should be presumed prejudicial."[140] However, the Court specifically

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mandatory Guidelines unconstitutional. *Id.*

[129] *Id.* Justice Breyer was actually involved in drafting the SRA. He was counsel to the Senate Judiciary Committee and was one of the first commissioners on the Sentencing Commission. *See* Michael O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 778 (2006)

[130] *See* United States v. Booker, 543 U.S. 220, 220-334 (2005).

[131] *See id.* at 268 (Breyer, J., for the Court in part).

[132] *Id.*

[133] *See* Jenkins, *supra* note 6, at 821.

[134] *Booker*, 543 U.S. at 268 (Breyer, J., for the Court in part).

[135] FED. R. CRIM. P. 52(b).

[136] *Id.* If a defendant does not object to an error at trial, then that objection is normally considered forfeited. *See* United States v. Olano, 507 U.S. 725, 734 (1993). The plain-error rule allows a defendant to avoid this harsh result in certain cases. *Id.*

[137] *See* Johnson v. United States, 520 U.S. 461, 467 (1997).

[138] *See Olano*, 507 U.S. at 734.

[139] *Id.* at 735.

[140] *Id.*

declined to elaborate on what it meant by either of these categories.[141] The clear implication is that there will be some cases in which the traditional burden does not apply to the defendant but rather to the government.[142] The first type of *Olano* exception has been referred to as a "structural error" and is defined as a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[143] There is a strong presumption that no structural error has occurred when there has been an impartial adjudicator and a competent lawyer to represent the defendant.[144] Because of this, claims of structural error rarely succeed.[145] While a claim that *Booker* error is structural is unlikely to succeed, the fact that there are exceptions provided a starting point for some circuits.[146]

Most of the circuits have found that *Booker* error comes not from judicial factfinding, but rather when the extra-verdict findings are made in a mandatory guideline system.[147] Consequently, anyone sentenced under the belief that the Sentencing Guidelines were mandatory has satisfied the first prong of the test to establish reversible plain error.[148] The second prong is similarly easy to satisfy, because an error is plain if it is "contrary to the law at the time of appeal . . . ."[149] Any case that was on direct appeal at the time that *Booker* was announced would satisfy this prong.[150]

The problem arises with the third prong.[151] If the defendant's sentence would have been the same under the advisory scheme, then no

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[141] *Id.*

[142] *See* United States v. Olano, 507 U.S. 725, 735 (1993).

[143] *See* Arizona v. Fulminante, 499 U.S. 279, 309-10 (1986).

[144] *See* Neder v. United States, 527 U.S. 1, 8 (1999).

[145] No circuit has referred to *Booker* error as structural. However, Judge Tjoflat of the Eleventh Circuit argued in dissent that *Booker* error is structural. *See* United States v. Rodriguez, 406 F.3d 1261, 1282 (11th Cir. 2005) (Tjoflat, J., dissenting from the denial of rehearing en banc).

[146] *See* Deborah Nall, *United States v. Booker: The Presumption of Prejudice in Plain Error Review*, 81 CHI-KENT LAW REVIEW 621, 635 (2006).

[147] *See, e.g.*, United States v. Antonakopoulos, 399 F.3d 68, 75 (1st Cir. 2005); United States v. Williams, 399 F.3d 450, 458 (2d Cir. 2005); United States v. Mares, 402 F.3d 511, 518 (5th Cir. 2005); United States v. Paladino, 401 F.3d 471, 482-83 (7th Cir. 2005); United States v. Pirani, 406 F.3d 543, 550 (8th Cir. 2005) (en banc); United States v. Lawrence, 405 F.3d 888, 906 (10th Cir. 2005); United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005); United States v. Smith, 401 F.3d 497, 499 (D.C. Cir. 2005) (per curiam).

[148] *See Rodriguez*, 406 F.3d at 1262 (Carnes, J., concurring in the denial of rehearing en banc).

[149] *See* Johnson v. United States, 520 U.S. 461, 468 (1997).

[150] *See Rodriguez*, 406 F.3d at 1262 (Carnes, J., concurring in the denial of rehearing en banc).

[151] *See* United States v. Ameline, 409 F.3d 1073, 1078 (9th Cir. 2005) [Ameline III].

substantial rights have been affected.[152] In most circumstances it will be impossible to tell whether the sentence would have been the same.[153] As the majority in *Ameline* explained, "the record in very few cases will provide a reliable answer to the question of whether the judge would have imposed a different sentence had the Guidelines been viewed as advisory."[154] Most of the circuits assume that if the third prong is met, then the fourth prong is automatically met as well.[155]

III. THE CIRCUITS' VARIOUS RESPONSES

In light of *Booker*, there has emerged a four-way circuit split regarding how to approach the "Plain-Error Problem."[156] The approach used by a particular defendant's circuit is one of the key factors in determining whether the defendant will receive a new sentencing hearing.[157] This has created a disparity similar to the disparities that Congress attempted to avoid in creating the Sentencing Guidelines.[158] It is a disparity that the Supreme Court has so far declined to address.[159]

A. THE "HARD-LINE" APPROACH

Several circuits have held that traditional plain-error review should apply.[160] The position of these courts is that if the appellate panel cannot determine whether the error was prejudicial, then the defendant has not met his or her burden and is not entitled to any form of relief.[161] Under

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[152] *See id.*

[153] *See id.*

[154] *Id.* at 1079.

[155] *See, e.g.*, United States v. Rodriguez, 406 F.3d 1261, 1265-66 (10th Cir. 2005) (Carnes, J., concurring in the denial of rehearing en banc). The one exception to this is the Tenth Circuit, which is discussed *infra*. *See infra* notes 168-174 and accompanying text.

[156] *See* Jenkins, *supra* note 6, at 815.

[157] *See id.*

[158] *See id.*

[159] *See, e.g.*, United States v. Rodriguez, 545 U.S. 1127 (2005) (denying certiorari in one of the cases that has raised the issue and in which the Solicitor General recommended that review be granted).

[160] The Circuits that have decided the traditional rule should be applied are the First, Fifth, Eighth, and Eleventh Circuits. *See* United States v. Pirani, 406 F.3d 543 (8th Cir. 2005) (en banc) *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547); United States v. Mares, 402 F.3d 511, 522 (5th Cir. 2005), *cert. denied* 126 S. Ct. 43 (U.S. Oct. 3, 2005) (No. 04-9517); United States v. Antonakopoulos, 399 F.3d 68, 78-79 (1st Cir. 2005); United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005), *cert. denied*, 545 U.S. 1127.

[161] *See Pirani*, 406 F.3d at 543; *Mares*, 402 F.3d at 522; *Antonakopoulos*, 399 F.3d at 78-79; *Rodriguez*, 398 F.3d at 130. Circuit Judges Wardlaw, Gould, O'Scannlain, and Bea argued in dissent that the Ninth Circuit should adopt the traditional form of plain error as well. *Ameline III*,

this approach, the inquiry shifts from whether the sentence would have been substantially different to whether the defendant can prove that it would have been substantially different.[162]

B. THE PRESUMPTION-OF-PREJUDICE APPROACH

Other circuits have taken the opposite approach.[163] These circuits have held that whenever a defendant's sentence was enhanced based on facts neither admitted nor found by the jury, the defendant has shown prejudice.[164] Under this approach, the appellate panel compares the sentence that the defendant could have received based solely on the jury's verdict or facts admitted by the defendant, with the sentence that he actually received.[165] If the former would have been more favorable to the defendant, then the defendant has shown prejudice.[166] These circuits implicitly reject the finding, made by the Ninth Circuit and others, that judicial factfinding is "erroneous only when coupled with a mandatory guidelines system."[167]

C. THE SO-CALLED "COMPROMISE" APPROACH

The Tenth Circuit has taken an approach that one writer characterized as a compromise.[168] Under the Tenth Circuit's approach, the emphasis is placed on the fourth prong of the plain-error standard of review.[169]

In the en banc decision that adopted the "compromise" position," the majority did not even seek to answer the third prong.[170] Instead, the court took judicial notice of the fact that the defendant had his sentence

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409 F.3d at 1087.

[162] *See* Nall, *supra* note 146, at 635.

[163] The Circuits that have explicitly adopted the presumption-of-prejudice approach are the Fourth and Sixth Circuits. *See* United States v. Hughes, 401 F.3d 540 (4th Cir. 2005); United States v. Oliver, 397 F.3d 369 (6th Cir. 2005). The Third Circuit, while consistently remanding for new sentencing, has actually refused to articulate a standard. *See, e.g.*, United States v. Davis, 407 F.3d 162 (3d Cir. 2005). Even though the Third Circuit refuses to articulate a standard, its practices show that the court is presuming prejudice. *See* Jenkins, *supra* note 6, at 830.

[164] *See Davis*, 407 F.3d at 162; *Hughes*, 401 F.3d at 548; *Oliver*, 397 F.3d at 369.

[165] *See, e.g.*, *Hughes*, 401 F.3d at 548.

[166] *Id.*

[167] United States v. Ameline, 409 F.3d 1073, 1081 (9th Cir 2005) (en banc) [Ameline III].

[168] *See* Jenkins, *supra* note 6, at 815 (characterizing the Tenth Circuit's approach in *United States v. Gonzales-Huerta* as a "compromise"); *see also* United States v. Gonzales-Huerta, 403 F.3d 727, 736 (10th Cir. 2005) (en banc).

[169] *See* United States v. Gonzales-Huerta, 403 F.3d 727, 736 (10th Cir. 2005) (en banc).

[170] *See* Jenkins, *supra* note 6, at 815; *see also Gonzales-Huerta*, 403 F.3d at 736.

enhanced based only on a prior conviction.[171] In addition, his sentence was on the low end of the scale of what he could have received.[172] The court assumed that the third prong of the plain-error test was met and proceeded to analyze the fourth prong.[173] Under the compromise approach, the burden of showing that the error affected the integrity of the proceedings is on the defendant.[174]

D. THE "LIMITED-REMAND" APPROACH

In *United States v. Ameline*, the Ninth Circuit considered what the appropriate procedure would be for individuals sentenced under the mandatory system but who failed to challenge the sentence at the time of sentencing.[175] The court acknowledged that different circuits have taken different paths and stated that it benefited from discussions by the other circuits.[176] The court chose to join the Second, Seventh, and D.C. Circuits in creating a "limited-remand" procedure.[177]

The Ninth Circuit's limited-remand procedure established a new version of the plain-error standard of review.[178] The new procedure requires the appellate panel to remand the case to the district court for the sole purpose of asking the lower court whether the sentence would have been different under the new post-*Booker* advisory guidelines.[179] The court relied on 18 U.S.C. § 3742(f), which grants the court of appeals the authority to remand a case solely for the purpose of resentencing.[180] The court reasoned that "the power to remand for resentencing necessarily encompasses the lesser power to order a limited remand."[181]

In section IV of the *Ameline* opinion, the majority clearly articulated the exact process.[182] First, when faced with unpreserved *Booker* error, the court must determine whether the defendant wants to pursue the error.[183] If the defendant does choose to pursue the error, then the panel

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[171] *Gonzales-Huerta*, 403 F.3d at 738-39.

[172] *Id.*

[173] *Id.* at 736.

[174] *See* Jenkins, *supra* note 6, at 826.

[175] United States v. Ameline, 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc) [Ameline III].

[176] *Id.*

[177] *Id.* at 1079.

[178] *See id.*

[179] *Id.*

[180] *Id.*

[181] United States v. Ameline, 409 F.3d 1073, 1079 (9th Cir. 2005) (en banc) [Ameline III] (summarizing United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005)).

[182] *Ameline III*, 409 F.3d at 1084.

[183] *Id.* This will be accomplished by asking defendant's counsel to brief whether the

must search the record to determine if it is clear whether the sentence would have been different under the new advisory scheme.[184] In most cases, it will be unclear from the record.[185] If the panel reaches such a dead end, it will order a limited remand.[186]

For the limited remand, the question posed to the district court is simply whether the sentence imposed would have been materially different.[187] If it would not have been materially different, then the district court should so indicate on the record.[188] If the sentence would have been different, then the error was prejudicial.[189] Failing to correct a prejudicial error affects the integrity, fairness and public reputation of the court.[190] Thus, to correct this error, the district court must vacate the original sentence and resentence the defendant.[191]

IV. THE NINTH CIRCUIT'S IMPERFECT APPROACH IS THE BEST OPTION

The typical plain-error case places the burden of showing prejudice on the defendant.[192] This is the approach taken by the "hard-line" circuits.[193] The fatal flaw in this approach is that in essentially every case, it will be impossible to make such a showing.[194] As the majority in *Ameline* pointed out, the trial judge had no reason to make a record from

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defendant wants to pursue the error. *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* In those rare instances in which the panel finds that the record is clear enough to make a determination that the sentencing judge would have sentenced the defendant to a more lenient sentence, the panel will order a full remand with a new sentencing hearing, rather than the limited remand. *See* United States v. Perez, 475 F.3d 1110, 1111 (9th Cir. 2007).

[187] United States v. Ameline, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc) [Ameline III].

[188] *Id.* at 1085.

[189] *Id.*

[190] *Id.*

[191] *Id.* The Seventh and D.C. Circuits' approach is slightly different. *See* United States v. Coles, 403 F.3d 764, 770 (D.C. Cir. 2005); United States v. Paladino, 401 F.3d 471 (7th Cir. 2005). Rather than have the district court immediately resentence the defendant, the district court must answer the question in the affirmative and send the case back to the court of appeals. *See Paladino*, 401 F.3d at 484 *Coles*, 403 F.3d at 770. Once the appellate court receives the case, the panel must vacate the sentence and remand to the district court for resentencing. *See Coles*, 403 F.3d at 770; *Paladino*, 401 F.3d at 484. This procedure is similar in substance but is unnecessarily convoluted. *See Coles*, 403 F.3d at 770; *Paladino*, 401 F.3d at 484.

[192] *See* FED. R. CRIM. P. 52(b).

[193] *See, e.g.*, United States v. Antonakopoulos, 399 F.3d 68, 78 (1st Cir. 2005)

[194] *See* United States v. Ameline, 409 F.3d 1073, 1081 (9th Cir. 2005) (en banc) [Ameline III] (quoting Judge Posner of the Seventh Circuit in *Paladino*, 401 F.3d at 484, who stated that placing the burden of showing prejudice on the defendant presents the defendant with an "*impossible burden*") (emphasis in original)).

which the defendant can show prejudice.[195] Occasionally, a judge might have used the record to express disapproval of mandatory guidelines.[196] However, this was extremely rare because judges realized that this was a fruitless action.[197] The sentence was mandatory under the Guidelines whether or not the judge approved.[198] This gave the court little incentive to express its disapproval with the mandatory Guidelines.[199] Forcing the defendant to make a showing of prejudice is, in many cases, forcing the defendant to make an impossible showing.[200] Judge Posner of the Seventh Circuit criticized the hard-line approach by saying that "we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence."[201]

On the other hand, the circuits that presume prejudice ignore plain-error review and create a system that is inefficient and wastes judicial resources.[202] To establish plain error, a defendant must make some showing of prejudice.[203] While it is inappropriate to force a defendant to make that showing in the traditional manner, it is also inappropriate to shift the burden on that question to the government.[204] In addition, sentencing hearings are lengthy.[205] A judge must examine all evidence that is part of the presentence report and hear any additional evidence that a defendant may present.[206] If the sentence is going to be substantially the same, the result is a colossal waste of judicial resources. Even worse, the circuits that follow the presumption of prejudice approach ignore the one clear piece of guidance that the Supreme Court

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[195] *See Ameline III*, 409 F.3d at 1084.

[196] *See id.* Other judges, such as Senior District Judge Thelton Henderson, complain about the Sentencing Guidelines in general. Judge Henderson has specifically complained about the high mandatory minimums on drug crimes. Interview with Thelton Henderson, Senior District Judge, Northern District of California (Winter, 1997-1998), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/dope/interviews/judge.html (last visited Mar. 27, 2007).

[197] *See id.* In Judge Henderson's interview, he stated that there was nothing a district judge could do other than give the sentence dictated by the Guidelines. *Id.*

[198] 18 U.S.C.A. 3553(b)(1) (West 2007).

[199] *See* Judge Henderson Interview, *supra* note 196.

[200] *See* United States v. Paladino, 401 F.3d 471, 484 (7th Cir. 2005).

[201] *Id.*

[202] *See, e.g.*, Judge Michael McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 667 (2006).

[203] FED. R. CRIM. P. 52(b).

[204] *But see* Nall, *supra* note 146, at 621 (reaching the opposite conclusion).

[205] *See* McConnell, *supra* note 202, at 667. As Judge McConnell points out, a sentencing hearing imposes high costs on the district courts, U.S. attorneys, public defenders, marshals, and prison authorities because of the requirements of the Federal Rules of Criminal Procedure. *Id.*

[206] *See* FED. R. CRIM. P. 32(i).

did provide.[207] The Court stated that not "every appeal will lead to a new sentencing hearing."[208]

The so-called "compromise" approach adopted by the Tenth Circuit is no compromise at all.[209] The court refused to address the standard regarding the showing required to establish prejudice.[210] Instead, the Tenth Circuit jumped straight to the fourth prong.[211] While it is important to look at the fourth prong, placing the burden on the defendant imposes just as difficult a task as showing prejudice.[212] The only way truly to show that the integrity of the court has been questioned is to show that the defendant received an illegal sentence.[213] If this showing is made, then the defendant has met the third prong.[214] In essence, the so-called "compromise" is nothing more than taking the hard-line approach.[215] For example, Judge Michael McConnell examined the difficulty for a defendant to make a showing that would satisfy the Tenth Circuit's approach.[216] According to Judge McConnell, as of 2006, only seven percent of defendants who challenged a mandatory application of the Guidelines using plain-error review had their sentences vacated and remanded for a new sentencing hearing.[217] Of these cases, every defendant received a new sentence and over half had their sentences reduced by more than forty percent.[218] Yet the question remains how many more sentences would have been different had they not failed to meet the Tenth Circuit's difficult standard.

The limited-remand approach resolves the problems presented by

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[207] *See* United States v. Booker, 543 U.S. 220, 268 (2005) (Breyer, J., for the Court in part).

[208] *Id.*

[209] *See* Jenkins, *supra* note 6, at 841. Even Jenkins, who argued that the Tenth Circuit's approach is a compromise, argued that it was inappropriate to place the burden of showing prejudice on the defendant. *Id.*

[210] The court was split on this issue of what showing was required to establish prejudice even more than the issue of what was required under the fourth prong. *See generally* United States v. Gonzalez-Huerta, 403 F.3d 727, 742 (10th Cir.2005) (Ebel, J., concurring). One judge who felt that the defendant failed the fourth prong actually sided with the dissenters regarding whether Gonzalez-Huerta had established prejudice. *See id.* (Ebel, J., concurring).

[211] *See* Jenkins, *supra* note 6, at 826.

[212] *See id.* at 842. The only way to show that an action casts doubt on the integrity of the proceedings will be to show that the sentence would have been different. *Id.* In practice, the "compromise" approach will play out exactly like the hard-line approach. *Id.*

[213] If the defendant did not receive an illegal sentence, then the sentence is legal. If the sentence is legal, then clearly the integrity of the court is not called into question.

[214] *See, e.g.*, United States v. Antonakopoulos, 399 F.3d 68, 78-79 (1st Cir. 2005).

[215] *See* Jenkins, *supra* note 6, at 815 (defending the notion of focusing on the fourth prong but criticizing the Tenth Circuit for placing the burden on the defendant).

[216] *See* McConnell, *supra* note 202, at 669.

[217] *Id.*

[218] *Id.* at 672.

the other three options.[219] This approach allows the defendant a chance at making a showing of prejudice without inappropriately shifting the burden to the government.[220] Judge Posner of the Seventh Circuit described the limited-remand approach as follows:

> It is the middle way between placing on the defendant the impossible burden of proving that the sentencing judge would have imposed a different sentence had the judge not thought the guidelines were mandatory and requiring that all defendants whose cases were pending when *Booker* was decided are entitled to be resentenced, even when it is clear that the judge would impose the same sentence and the court of appeals would affirm.[221]

This approach is certainly not perfect.[222] As the dissent in *Ameline* pointed out, this approach ignores the traditional plain-error standard of review.[223] By allowing a limited remand, the court lessens the burden on the defendant.[224] In addition, this approach is clearly not as efficient as the hard-line approach.[225] More judicial resources will be required under this approach.[226] However, courts should be concerned with justice first and judicial economy second.[227]

Another problem with the limited-remand approach is the fact that some of the sentencing judges will be unavailable.[228] Unfortunately, this is unavoidable. However, these cases will be fairly rare,[229] and courts should not use a rare occurrence to maintain an impossible standard of review for everyone.[230]

The Seventh Circuit pointed out that giving a defendant an illegal sentence was just as much a miscarriage of justice as convicting an

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[219] *See* United States v. Paladino, 401 F.3d 471, 484-85 (7th Cir. 2005).

[220] *See* United States v. Ameline, 409 F.3d 1073, 1080 (9th Cir. 2005) (en banc) [Ameline III].

[221] *Paladino*, 401 F.3d at 484-85.

[222] Even the majority in *Ameline* acknowledged that the limited remand is not a perfect option. *See Ameline III*, 409 F.3d at 1080.

[223] *Id.* at 1087 (Wardlaw, J., concurring in part and dissenting in part).

[224] *Id.*

[225] United States v. Ameline, 409 F.3d 1073, 1087 (9th Cir. 2005) (en banc) [Ameline III] (Wardlaw, J., concurring in part and dissenting in part).

[226] *Id.*

[227] *See* United States v. Paladino, 401 F.3d 471, 484 (7th Cir. 2005).

[228] *See Ameline III*, 409 F.3d at 1087 (Wardlaw, J., concurring in part and dissenting in part).

[229] *See Ameline III*, 409 F.3d at 1082.

[230] *See* United States v. Ameline, 409 F.3d 1073, 1080 (9th Cir. 2005) (en banc) [Ameline III].

innocent person.[231] The purpose of plain-error review is to avoid miscarriages of justice because they cast doubt on the integrity of the court.[232] Appellate courts should seek to avoid these injustices whenever possible.[233] In the case of post-*Booker* error, the limited-remand approach is neither the most efficient nor the easiest on the defendant.[234] However, with these two competing considerations in mind, it is definitely the best approach.[235]

However, proper use of judicial resources is an issue of serious concern.[236] Federal courts are overburdened.[237] Several of the Federal Rules of Civil Procedure have preserving judicial economy as a goal.[238] For this reason, the court should have imposed a higher burden on the defendant.[239] Under the current limited-remand approach, all a defendant has to show is that it is unclear whether the sentencing judge would have imposed a different sentence.[240] It is hard to imagine a case that does not meet this burden.[241] Further, a subsequent opinion explaining *Ameline* stated that the district court was required to consider, or at least solicit, the written views of counsel before answering the limited-remand question.[242] Unfortunately, this wastes precious resources in cases in which there is no question that the sentence would have been the same.[243]

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[231] *Paladino*, 401 F.3d at 483.

[232] FED. R. CRIM .P. 52(b).

[233] *See, e.g.*, United States v. Paladino, 401 F.3d 471, 483 (7th Cir. 2005).

[234] *See Ameline III*, 409 F.3d at 1087 (Wardlaw, J., concurring in part and dissenting in part).

[235] It is important to note that of the four approaches, the limited-remand and the hard-line approaches have attracted the most circuits, with four each. *See* United States v. Pirani, 406 F.3d 543 (8th Cir. 2005) (en banc); United States v. Mares, 402 F.3d 511 (5th Cir. 2005); United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005); United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005) (adopting hard-line approach); *see also* United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (en banc) [Ameline III]; United States v. Coles, 403 F.3d 764 (D.C. Cir. 2005); United States v. Paladino, 401 F.3d 471 (7th Cir. 2005); United States v. Crosby, 397 F.3d 103 (2d Cir. 2005) (adopting limited remand).

[236] *See Ameline III*, 409 F.3d at 1087 (Wardlaw, J., concurring in part and dissenting in part).

[237] *See id.*

[238] *See, e.g.*, FED. R. CIV. P. 12(g),(h)(1) (providing that certain defenses are waived if not consolidated with other defenses raised by motion).

[239] *But see* Nall, *supra* note 146, at 641 (arguing that there should be no burden on the defendant whatsoever).

[240] *Ameline III*, 409 F.3d at 1074.

[241] United States v. Ameline, 409 F.3d 1073, 1086 (9th Cir. 2005) (en banc) (Wardlaw, J., concurring in part and dissenting in part) [Ameline III].

[242] *See* United States v. Montgomery, 462 F.3d 1067, 1068 (9th Cir. 2006). While the Ninth Circuit has held that the sentencing judge must consider written materials that a defendant may want to offer, a recent case determined that the judge does not have to allow a defendant to allocute in person, especially when that defendant had the opportunity to do so at the first sentencing hearing but refused to do so. *See* United States v. Silva, 472 F.3d 683, 689 (9th Cir. 2007).

[243] *See, e.g.*, McConnell, *supra* note 202, at 665.

For this reason, the *Ameline* court should have imposed some burden on the defendant to show a reasonable probability that his or her sentence would have been different.[244] This burden may be low, but it would help to weed out those cases in which there is no chance that the defendant will receive a new sentence.[245] Yet because this burden should be highly fact-specific, it would be hard to articulate.[246] Some examples of ways in which a defendant might meet this burden include the following: showing that there was evidence that could not be considered by the district court under the mandatory Guidelines, or showing that the defendant's sentence was on the low end of what the judge could have given.

V. CONCLUSION

The circuits that automatically remand all cases with *Booker* error ignore the clear instruction from the Supreme Court that not all cases are entitled to a new sentencing hearing.[247] These circuits also rely on the presumption of prejudice, which the Supreme Court mentioned in *Olano*[248] but which the Court has never actually applied.[249] On the other hand, the circuits that follow the hard-line approach impose a nearly impossible burden on defendants.[250] Likewise, the Tenth Circuit's "compromise" is really no compromise and essentially imposes the same impossible burden on defendants as under the hard-line approach.[251] The limited-remand approach resolves these two conflicting interests in the

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[244] *But see* Nall, *supra* note 146, at 641 (arguing that there should be no burden on the defendant whatsoever).

[245] This would allow the burden to remain where it should be, on the defendant, rather than shifting the burden of negating prejudice to the government.

[246] The best way of wording it is to say that the defendant has shown that it is reasonably possible that the district court would have imposed a different sentence under an advisory Guideline system.

[247] *See supra* note 208 and accompanying text.

[248] *See generally* United States v. Olano, 507 U.S. 725 (1993).

[249] *See* McConnell, *supra* note 202, at 665.

[250] *See supra* notes 200-201 and accompanying text.

[251] *See supra* note 209 and accompanying text.

best way possible.[252] Moreover, by imposing a slightly higher burden on the defendant to show a reasonable probability that his or her sentence would have been different, the Ninth Circuit could have crafted an approach that is both sound and that reduces the load placed on district courts.

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[252] *See supra* notes 219-246 and accompanying text.

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