Denver Law Review

Volume 83
Issue 3 *Tenth Circuit Surveys*

Article 20

Spring 4-1-2006

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REQUIRING THE UNKNOWN OR PRESERVING REASON: *UNITED STATES V. GONZALEZ-HUERTA* AND THE TENTH CIRCUIT'S COMPROMISE APPROACH TO *BOOKER* ERROR

INTRODUCTION

The United States Supreme Court's decision in *United States v. Booker*[1] sent shockwaves throughout both the criminal justice community and society at large. The method for sentencing all federal offenders had been struck down as a violation of the constitutionally protected right to a jury trial, and the Court changed the previously mandatory sentencing structure into an advisory guideline.[2] The Court provided that "normal prudential doctrines" should guide the review of the now unconstitutional sentences, but unfortunately that guidance was not sufficient.[3]

Left with the overwhelming task of reviewing the constitutionality of each pending sentence and guided by the ambiguous and scantly described "plain error doctrine," a significant disparity developed in the approaches that various federal appellate courts employed. Some circuits utilized a hard line approach to resentencing, buoyed by the textual reading of plain error precedent.[4] Others were more lenient and addressed the fundamental fairness issues by remanding cases for the sole purpose of determining if the district court would have imposed a different sentence under the post-*Booker* structure.[5] Yet even other circuits gave full deference to the rights of defendants by presuming the mere application of mandatory sentencing guidelines constituted prejudice.[6] The several different approaches resulted in only one clear rule—that defendants were being treated differently based solely on geography—a situation the original Sentencing Reform Act was expressly designed to defeat.[7]

Within this context, the Tenth Circuit added yet another layer to the methods of applying *Booker* with its decision in *United States v. Gon-*

1. 125 S. Ct. 738 (2005). For further discussion of *Booker* in this issue, *see* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665 (2006).

2. *Booker*, 125 S. Ct. at 752.

3. *Id.* at 769.

4. *See* United States v. Antonakopoulos, 399 F.3d 68, 78-79 (1st Cir. 2005); 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. Pirani, 406 F.3d 543 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547); United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 2935 (U.S. June 20, 2005) (No. 04-1148).

5. *See* United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005); United States v. Paladino, 401 F.3d 472 (7th Cir. 2005), *cert. denied*, Peyton v. United States, 126 S. Ct. 106 (U.S., Oct. 3, 2005) (No. 04-10402); United States v. Ameline, 409 F.3d 1073, 1078-79 (9th Cir. 2005); United States v. Coles, 403 F.3d 764, 768 (D.C. Cir. 2005).

6. *See* United States v. Hughes, 401 F.3d 540, 548 (4th Cir. 2005); United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).

7. *See* Koon v. United States, 518 U.S. 81, 92 (1996).

zalez-Huerta.[8] The Tenth Circuit found that the fourth prong of plain error review, rather than the third prong that most other circuits were relying upon, was the proper basis for refusing to remand a sentence based solely on prior convictions and facts admitted by the defendant.[9] Although seemingly falling in line with the other hard line circuits, such as the First, Fifth, and Eleventh, this article perceives the Tenth Circuit's decision as a distinct and more appropriate determination resulting from the Supreme Court's guidance in *Booker* that not every sentence deserves remand.[10]

This article will analyze the *Gonzalez-Huerta* decision within the context of both the sister Circuits' decisions and the brief history of the plain error review doctrine. Part I will discuss the history of the Federal Sentencing Guidelines, including the legal challenges to the mandatory sentencing regime, and the development of the plain error doctrine. Part II will discuss the Tenth Circuit's decision in *Gonzalez-Huerta* and compare the decisions of the other circuits. In Part III, this article agrees with the ultimate outcome of the *Gonzalez-Huerta* decision and the analysis of the fourth element of plain error review. However, the Tenth Circuit's decision to place the burden on the defendant to satisfy the third element of plain error review is a mistake given fairness considerations and the difficulty of establishing prejudice in post-*Booker* sentence challenges. Finally, this article will conclude that the *Gonzalez-Huerta* decision represents the clearest application of the Supreme Court's intent under both *Booker* and the plain error doctrine precedent.

I. BACKGROUND

A. United States Federal Sentencing Guidelines

1. History

Since the founding of the United States of America, federal judges have been given unfettered discretion when determining an offender's sentence after a conviction, with the power to impose anything between parole and the statutory maximum.[11] Judges' expansive power over sentencing was moderately curtailed by the establishment of a parole commission, which arose in response to a shift towards the rehabilitative model of criminal punishment.[12] Although judges still imposed the sentences, the parole commission determined the actual time served through

8. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).

9. *Gonzalez-Huerta*, 403 F.3d at 739.

10. *Booker*, 125 S. Ct. at 769.

11. UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2005), http://www.ussc.gov/general/USSCoverview_2005.pdf [*hereinafter* USSC OVERVIEW].

12. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225-28 (1993).

the discretion to release convicted offenders prior to the expiration of their sentences.[13] After an offender had served one-third of his sentence,[14] the parole commission could release the offender upon a finding that the welfare of society would not be threatened and the offender would not reviolate the laws.[15] Outside of the creation of the parole commission, federal judges' sentencing power remained largely unchecked until the Reagan era.[16]

Extensive criticism was directed at the indiscriminate sentencing system during the early 1970's. The most persuasive voices in favor of binding sentencing guidelines were those of Judge Marvin E. Frankel[17] and Senator Edward M. Kennedy.[18] Surprisingly, the main support for sentencing guidelines originated from liberals who viewed them as anti-imprisonment and anti-discrimination measures.[19] Debate over sentencing guidelines lasted over a decade,[20] and Congress finally responded by abolishing the indeterminate sentencing structure and passing the Sentencing Reform Act within provisions of the Comprehensive Crime Control Act of 1984.[21] The main goals of the Sentencing Reform Act were to increase the consistency of sentencing and incorporate the four main purposes of criminal punishment (i.e., retribution, deterrence, incapacitation, and rehabilitation).[22] The structure that replaced indeterminate sentencing was a set of Sentencing Guidelines established by an administrative agency within the judiciary called the United States Sentencing Commission ("Sentencing Commission").[23] The Sentencing Commission developed the Federal Sentencing Guidelines ("Sentencing Guidelines"), which were to provide certainty in sentencing and acceptance of the four purposes of criminal justice.[24] The Sentencing Guidelines went into effect on November 1, 1987,[25] and provided a mandatory range for

13. Act of June 25, 1910, ch. 387, 36 Stat. 819, 819 (1910) (subsequently codified at 18 U.S.C. § 4205(a) (1982) (repealed 1984)) (establishing parole commissions at each of the three existing federal penitentiary systems).

14. *Id.*

15. *Id.* at 819-20.

16. *See* Stith & Koh, *supra* note 12, at 223.

17. *Id.* at 228-30 (noting that Frankel's book, *Criminal Sentences: Law Without Order*, earned him the title of "father of sentencing reform").

18. *Id.* at 230-36 (noting that Senator Kennedy's main interest was the passage of a bill that overhauled all federal criminal statutes, but that Kennedy spearheaded a bipartisan movement for sentencing guidelines).

19. *Id.* at 223, 232-33 (discussing the participation of Senator John L. McClellan and Professor Alan Dershowitz in garnering support for the sentencing guidelines).

20. *Id.* at 223, 225, 228-30.

21. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551 to 3559, 3561 to 3566, 3571 to 3574, 3581 to 3586, & 28 U.S.C. §§ 991 to 998 (1988)).

22. USSC OVERVIEW, *supra* note 11, at 1. *See also* Stith & Koh, *supra* note 12, at 239-43.

23. 28 U.S.C. § 991 (2005) (creating a seven-member commission within the judiciary for the purpose of establishing sentencing policies and practices).

24. *Id.*

25. USSC OVERVIEW, *supra* note 11, at 2.

sentencing.[26] The Sentencing Reform Act included a list of factors which could be considered for increasing or decreasing a sentence.[27] Any deviation from the prescribed range required the judge to detail the specific reasons for the departure.[28]

2. Challenges

The Sentencing Guidelines elicited strident reactions from both liberal and conservatives that soon led to legal challenges of the Sentencing Reform Act. Within two years of enactment of the Sentencing Guidelines in 1987, the formation and duties of the Sentencing Commission were unsuccessfully challenged in *Mistretta v. United States*,[29] based upon constitutional delegation and separation of powers arguments.[30] The Court quickly dismissed the delegation issue by describing the historically low bar for administrative delegations,[31] and then addressed the separation of powers concern that the integrity of the judicial branch may be threatened by having judges review the constitutionality of mandatory sentences created by fellow judges.[32] The Court analogized the Sentencing Commission's functions to that of developing the Federal Rules of Civil and Criminal Procedure,[33] labeled those functions as within the purview of the judicial branch,[34] and found the vesting of those functions within the judiciary to be acceptable under a flexible checks and balances interpretation of separation of powers.[35] Justice Scalia, in a scathing dissent, viewed the functions of the Sentencing Commission as entirely legislative and thus inappropriately exercised within the judicial branch.[36]

After *Mistretta*, the Sentencing Guidelines were left undisturbed until a series of Supreme Court cases regarding state criminal sentencing provided a constitutional basis under the Sixth Amendment[37] for challenging the federal sentencing structure. An important initial breakthrough occurred in *Apprendi v. New Jersey*,[38] in which a slim five to four majority of the Court established the rule: "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must

26. 18 U.S.C. § 3553 (2005).
27. *Id.* (describing factors such as nature of the offense, effectuating the four purposes of criminal punishment, any pertinent policy statement, sentencing consistency, and the need for restitution).
28. *Id.* (requiring the judge to detail the specific reason for the sentence in a written order).
29. 488 U.S. 361 (1989).
30. *Mistretta*, 488 U.S. at 370-71.
31. *Id.* at 371-80.
32. *Id.* at 383.
33. *Id.* at 392-93.
34. *Id.* at 396-97.
35. *Id.* at 412.
36. *Id.* at 413 (Scalia, J., dissenting).
37. U.S. CONST. amend. VI (guaranteeing the right to a "public trial, by an impartial jury of the State and district wherein the crime shall have been committed").
38. 530 U.S. 466 (2000).

be submitted to a jury, and proved beyond a reasonable doubt."[39] In *Apprendi*, the defendant pled guilty to a state weapons offense with a statutory maximum of ten years, among other charges.[40] However, under a separate bias enhancement statute, the state judge imposed a twelve year sentence after determining that the defendant was motivated by racial animus.[41] The Court struck down the enhanced sentence, finding that the judge's use of facts not determined by a jury at sentencing violated the jury trial right because the use of an additional fact is the functional equivalent of an element, which juries must determine.[42]

An equally important extension of the *Apprendi* rule occurred in *Ring v. Arizona*[43] along the same slim majority. Ring was convicted of felony murder, and Arizona state law required the judge to consider an enumerated list of aggravating factors[44] in addition to any mitigating factors presented by the defense.[45] The state judge sentenced Ring to death, but the Court struck down the sentence after applying the *Apprendi* rule and reasoning that if a "State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."[46]

The next link in the chain was *Blakely v. Washington*,[47] a case that some scholars feel was an inevitable result of the Court's broad application of the *Appendi* reasoning in the *Ring* decision.[48] Blakely pled guilty to second degree kidnapping, an offense that was limited to a sentencing range of forty-nine to fifty-three months under Washington's Sentencing Reform Act.[49] However, the judge found Blakely acted with "deliberate cruelty,"[50] an aggravating factor which allowed the judge to increase the sentence up to the ten year maximum,[51] and the judge imposed a sentence of ninety months—three years over the suggested range but still under the statutory maximum.[52] The Court again struck down the sentence stating that the "relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the

39. *Apprendi*, 530 U.S. at 490.
40. *Id.* at 469-71.
41. *Id.* at 471.
42. *Id.* at 494 n.19, 497.
43. 536 U.S. 584 (2002).
44. *Ring*, 536 U.S. at 592 n.1.
45. *Id.* at 592-93 (requiring the judge to find the existence of at least one aggravating factor and no mitigating factors in order to impose the death penalty).
46. *Id.* at 602.
47. 124 S. Ct. 2531 (2004).
48. David Y. Yellen, *Reuschlein Lecture: Saving Federal Sentencing Reform After Apprendi, Ring, Blakely, and Booker*, 50 VILL. L. REV. 163, 170 (2005).
49. WASH. REV. CODE ANN. § 9.94A.320 (2005).
50. *Blakely*, 124 S. Ct. at 2535.
51. WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (current version at WASH. REV. CODE ANN. § 9.94A.535(2)(a) (2005)).
52. *Blakely*, 124 S. Ct. at 2535.

maximum he may impose *without* any additional findings."[53] Thus, all facts forming the basis for any sentence exceeding a state sentencing guideline must be found beyond a reasonable doubt by a jury, even if a determination of that fact is expressly delegated to the judge's discretion by the legislature.

The reasoning of *Apprendi*, *Ring*, and *Blakely* culminated with the Court's determination in *United States v. Booker*[54] that mandatory application of the federal Sentencing Guidelines violated the Sixth Amendment right to a jury trial.[55] The combined defendants, Booker and Fanfan, faced similar circumstances at the federal level as the defendant in *Blakely*, namely an enhancement of their sentences under judicially determined aggravating factors.[56] The Court reiterated the *Apprendi* rule and included an additional caveat that allowed prior convictions to be considered along with jury-determined facts.[57]

In addition to holding that judge-determined sentence enhancement violated the Sixth Amendment, the Court enacted a "remedial holding" in which it excised two provisions of the Sentencing Reform Act and changed the nature of the Sentencing Guidelines from mandatory to advisory.[58] The impact of these two separate holdings, the primary and the remedial, was to create two types of error under *Booker*. The first type is called "constitutional *Booker* error" because it violates the Sixth Amendment jury trial provision, and it arises when a defendant's sentence was increased to a level above the guideline range based on non-jury determined facts.[59] The second type of error is called "non-constitutional *Booker* error" because mandatory application of the Sentencing Guidelines now violates the express (albeit revised) wording of the Sentencing Reform Act.[60] The subtle point regarding non-constitutional *Booker* error is that the sentence itself is fully constitutional, and the only error is the statutorily violative act of *mandatory* application as opposed to the *advisory* application required by the post-*Booker* Sentencing Guidelines.[61]

Finally, the Court provided the following significant guidance to aid lower courts in reviewing *Booker* challenges to sentences imposed under the Sentencing Guidelines:

> That does not mean that every sentence will give rise to a Sixth Amendment violation or that every appeal will lead to a new sentenc-

53. *Id.* at 2537 (quotations omitted).
54. 125 S. Ct. 738 (2005).
55. *Booker*, 125 S. Ct. at 756.
56. *Id.* at 746-47.
57. *Id.* at 756.
58. *Id.*
59. *Gonzalez-Huerta*, 403 F.3d at 731.
60. *Id.* at 731-32.
61. *See* United States v. Rodriguez, 398 F.3d 1291, 1300-03 (11th Cir. 2005).

> ing hearing. That is because reviewing courts are expected to apply ordinary prudential doctrines, determining, e.g., whether the issue was raised below and whether it fails the "plain-error" test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.[62]

The reference to plain error review of sentencing cases is crucial to understanding the subsequent impact of *Booker* on appellate review of sentencing and the subsequent disparate treatment of that standard by various Circuit courts.

B. Plain Error Analysis

Federal Rule of Criminal Procedure 52(b) provides: "plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[63] Otherwise known as the "plain error standard of review," Rule 52(b) allows a court to remedy egregious violations of justice and fairness even when a party has failed to object to the issue at trial, and thus has effectively waived the issue on appeal.[64] The procedural rule codified the common law "plain error doctrine" which allowed appeals courts to notice an error *sua sponte* regardless of whether a party properly objected if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[65] The Court later described the purpose of Rule 52(b) as providing an avenue for redressing miscarriages of justice.[66]

A complete framework for determining when plain error constituted grounds for remand didn't develop until 1992 in *United States v. Olano*.[67] The error alleged in *Olano* was the trial court's decision to allow two alternate jurors to be present in the deliberation room with the other twelve actual jurors, and the Court established the following four-part test for analyzing plain error under Rule 52(b): (1) error occurred;[68] (2) the error was plain;[69] (3) the error affected substantial rights;[70] and (4)

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62. *Booker*, 125 S. Ct. at 738.

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

64. *Id.*

65. United States v. Atkinson, 297 U.S. 157, 160 (1936).

66. United States v. Frady, 456 U.S. 152, 163 (1982).

67. 507 U.S. 725 (1993).

68. *Olano*, 507 U.S. at 732-33 (noting that error is any derivation from a legal rule that is not waived). The Court also draws a distinction between "waiver" and "forfeiture"; the latter is the failure to object, while the former is the "intentional relinquishment or abandonment of a known right." *Id.* Waiver forecloses application of Rule 52(b), while forfeiture satisfies the first element. *Id.*

69. *Id.* at 734 (describing the meaning of "plain" as equivalent to "clear" or "obvious").

70. *Id.* at 734-35 (further defining the requirement that the error affect the results of the trial proceedings). Note that, in *Olano*, Justice O'Connor lists this third element as the final limitation, but both courts and scholars include O'Connor's guidance regarding when appellate courts should implement their optional discretion under Rule 52(b) as a fourth element. *United States v. Burbage*,

invocation of the court's discretion under Rule 52(b) would remedy an error that substantially affects the fairness, integrity, or public reputation of judicial proceedings.[71]

The Court characterized plain error review as analogous to harmless error review but with one substantial difference—the burden of persuasion rests with the defendant, not the government, under plain error review for both the "substantial rights" and the "judicial integrity" elements.[72] The Court relied on the discrepancy in language between Rules 52(a) and 52(b), the latter authorizing remedy only when the error does affect substantial rights, as the source of the burden shifting.[73] The Court also placed emphasis on the need for a distinction between plain and harmless error in order to encourage defendants to object.[74] Finally, based upon the specific facts of *Olano*, the Court concluded that no substantial rights were affected and reinstated the jury's verdict without deciding upon the judicial integrity element.[75]

However, despite the general rule that the burden of persuasion lies with the defendant, *Olano* provides a basis for two possible exceptions. The majority describes a "special category of forfeited errors" and a class of "errors that should be presumed prejudicial" but the majority specifically declines to address these categories.[76] Although the Court specifically declined to address the effect of these exceptions, the implication is that the Court may exercise its discretion under Rule 52(b) and rectify easily remedied and presumptively prejudicial errors despite any showing of prejudice or effect on the proceedings.[77]

The commonly used term for the first of the *Olano* exceptions is "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."[78] Structural error is limited to very exceptional circumstances such as faulty jury instructions,[79] total denial of the right to counsel,[80] and the lack of an impartial judge.[81] Furthermore, a strong presumption against structural error exists when the right to counsel and the

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365 F.3d 1174, 1180 (10th Cir. 2004); Jeffery L. Lowry, *Plain Error Rule – Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1072 (1994).

71. *Olano*, 507 U.S. at 735-37 (refusing to limit application of Rule 52(b) to when the defendant is actually innocent).

72. *Id.* at 734-35.

73. *Id.*

74. *Id.*

75. *Id.* at 739-41.

76. *Id.* at 735.

77. *Id.* at 735-36.

78. Arizona v. Fulminante, 499 U.S. 279, 309-10 (1986) (internal citation omitted).

79. Sullivan v. Louisiana, 508 U.S. 275, 280 (1993).

80. Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).

81. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

right to an impartial adjudicator are satisfied.[82] Consequently, structural error arguments are rarely successful. However, the existence of these exceptions provides a point of departure for the federal circuits undertaking review of non-constitutional *Booker* error, with some courts finding the exceptions are satisfied and others finding they are not.

One final and important aspect of plain error review is that the Supreme Court consistently decides plain error cases by presuming the third element is satisfied and deciding the case based solely upon the fourth element.[83] Since both prongs must be satisfied by the defendant, the result is usually against the defendant, but the general technique of presuming satisfaction of the third element is important in *United States v. Gonzalez-Huerta.*

II. JUDICIAL DECISIONS

A. United States v. Gonzalez-Huerta[84]

In *United States v. Gonzalez-Huerta,* the Tenth Circuit addressed for the first time within its jurisdiction the standard of review applicable to a defendant who alleged non-constitutional *Booker* error and raised the issue for the first time on appeal. Prior to the *Gonzalez-Huerta* decision, the Tenth Circuit had established that mandatory application of the Sentencing Guidelines constituted harmful error warranting remand of the sentence,[85] but now the court was faced with review under the plain error standard, rather than the harmless error standard. The Tenth Circuit heard the case *en banc* due to its importance.[86]

1. Facts

Sergio Gonzalez-Huerta was convicted of burglary in California in 1994 and served a prison term.[87] Six years after his conviction, Mr. Gonzalez-Huerta was deported to Mexico, but was again apprehended in New Mexico for possession of a controlled substance.[88] While in jail on the substance charge, federal authorities charged Mr. Gonzalez-Huerta with illegal reentry by a deported alien convicted of an aggravated felony.[89] Mr. Gonzalez-Huerta pled guilty to the charged offense and was

82. Neder v. United States, 527 U.S. 1, 8 (1999).

83. *See* Johnson v. United States, 520 U.S. 461, 469 (1997) ("[E]ven assuming that the failure to submit materiality to the jury 'affected substantial rights,' it does not meet the final requirement of *Olano.*"); United States v. Cotton, 535 U.S. 625, 632-33 (2002) ("[W]e need not resolve whether respondents satisfy this element of the plain-error inquiry, because even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.").

84. 403 F.3d 727 (10th Cir. 2005), *cert. denied,* 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).

85. United States v. Labatstida-Segura, 396 F.3d 1140, 1143 (10th Cir. 2005).

86. *Gonzalez-Huerta,* 403 F.3d at 731.

87. *Id.* at 730.

88. *Id.*

89. *Id.*

sentenced to fifty-seven months.[90] When determining the sentence, the only facts used by the district court included the fact of the prior burglary conviction and those facts admitted by Mr. Gonzalez-Huerta in his plea.[91] According to the federal Sentencing Guidelines, Mr. Gonzalez-Huerta's offense level was twenty-one and his criminal history was Category IV, which mandated a sentence between fifty-seven and seventy-one months for the offense charged.[92] The district court imposed the minimum sentence, and Mr. Gonzalez-Huerta did not object to the application of the Sentencing Guidelines during the proceedings.[93] The groundbreaking decisions in *Blakely v. Washington*[94] and *United States v. Booker*[95] were handed down subsequent to Mr. Gonzalez-Huerta's sentencing but prior to the hearing of his appeal.[96]

Mr. Gonzalez-Huerta presented three theories for reversal on appeal: the sentence imposed violated the Sixth Amendment as interpreted by *Booker*, the district court's use of a prior conviction contravened the *Blakely* holding, and a Due Process challenge to the sentence under *Hicks v. Oklahoma*.[97] The court quickly dismissed the latter two arguments. The prior conviction challenge contravened the jurisprudential rule that only the Supreme Court can overrule its own precedent,[98] and the Due Process challenge lacked the necessary statutory liberty interest element.[99]

In his only remaining argument, Mr. Gonzalez-Huerta argued that he should be resentenced according to the holdings of *Blakely* and *Booker*.[100] The central issue in the case, as framed by the Tenth Circuit, was whether the mandatory application of the federal Sentencing Guidelines constitutes reversible error under plain error review when the only facts relied upon at sentencing are prior convictions and those admitted by the defendant.

2. Decision

The Tenth Circuit parted ways with its sister circuits and determined that mandatory application of the Sentencing Guidelines in of

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. 542 U.S. 296 (2004).
95. 543 U.S. 220 (2005).
96. *Gonzalez-Huerta*, 403 F.3d at 730.
97. 447 U.S. 343 (1980). Mr. Gonzalez-Huerta argued the legislature created a statutory liberty interest in sentencing procedures that cannot be removed without due process, but failed to specify which provision of the Sentencing Reform Act established any statutory interest. *Gonzalez-Huerta*, 403 F.3d at 732 n.2.
98. *Id.* at 731 n.1 (discussing the argument that *Booker* questioned the Supreme Court's ruling in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).
99. *Id.* at 732 n.2 (discussing Mr. Gonzalez-Huerta's failure to allege the Sentencing Reform Act created a statutory liberty interest).
100. *Id.* at 730-31.

itself does not satisfy the fourth element of plain error analysis, namely the judicial integrity and fairness requirement, and therefore sentences imposed based solely on prior convictions and admitted facts are not eligible for remand.[101] The court initiated its analysis by determining that the present facts represented non-constitutional *Booker* error,[102] the proper standard of review was plain error,[103] and that the first two requirements under *Olano* were satisfied.[104] The court then stated that the real issue in this case was whether Mr. Gonzalez-Huerta could satisfy the third and fourth *Olano* elements, namely the substantial rights and judicial integrity requirements.

Turning to the substantial rights element, the court described the general rule that the defendant holds the burden to demonstrate "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different."[105] Mr. Gonzalez-Huerta, instead of addressing the burden directly, invoked the two *Olano* exceptions.

Mr. Gonzalez-Huerta first argued that mandatory application of the Sentencing Guidelines is structural error, and thus the burden is shifted to the government.[106] The court held that non-constitutional *Booker* error is not structural error for three reasons: (1) structural error must be constitutional error, which non-constitutional *Booker* error is not; (2) the *Neder* strong presumption against structural error exists in this case due to the presence of counsel and an impartial judge; and (3) the "defining feature" of structural error isn't present in this case.[107] According to the court, the defining feature of structural error is that its effect on the proceedings is unquantifiable,[108] and non-constitutional *Booker* error is readily quantifiable because if it is present, the court can find the substantial rights element is satisfied.[109]

Mr. Gonzalez-Huerta then argued the significant change in well-settled law wrought by *Booker* for cases on appeal, typically termed an "intervening decision," created presumptively prejudicial error.[110] The

101. *Id.* at 739.

102. *Id.* at 732 (discussing that the district court had not enhanced Mr. Gonzalez-Huerta's sentence based on judicially-determined facts, which would have violated the Sixth Amendment under the *Booker* holding).

103. *Id.* (discussing that the appropriate standard was dictated by Mr. Gonzalez-Huerta's failure to raise the issue below).

104. *Id.* (discussing that the district court's mandatory application of the Sentencing Guidelines was clearly erroneous under the holding of *Booker*, and the error was clear at the time of appeal).

105. *Id.* at 733 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004)).

106. *Gonzalez-Huerta*, 403 F.3d at 733.

107. *Id.* at 734.

108. *Id.*

109. *Id.* The Tenth Circuit points to the Eleventh Circuit's decision in *United States v. Shelton*, 400 F.3d 1325, 1328, 1332-33 (11th Cir. 2005), as an example where the effect of prejudice is quantified and then turns to the First Circuit's decision in *United States v. Antonakopoulos*, 399 F.3d 68, 80 n.11 (1st Cir. 2005), as support for the general holding that non-constitutional *Booker* error is not structural error. *Id.*

110. *Id.*

Sixth Circuit adopted the presumptively prejudicial approach in *United States v. Barnett*,[111] and Mr. Gonzalez-Huerta asked the Tenth Circuit to follow the *Barnett* approach.[112] The Tenth Circuit declined the request because the Supreme Court never used the presumptively prejudicial exception to remand a case,[113] defendants alleging *Booker* error can make an alternative showing of prejudice,[114] mitigating sentencing factors could and should have been presented to the District Court regardless of the *Booker* decision,[115] and allowing the burden to rest with the government would substantially confuse the line between plain error review and harmful error review.[116]

Having concluded that the defendant holds the burden under the substantial rights prong, the court skipped the analysis of Mr. Gonzalez-Huerta's satisfaction of that burden and moved directly to the judicial integrity prong of plain error review.[117] The court emphasized the separation between the third and fourth prongs of plain error review, which had been condensed by some other circuits,[118] and reiterated that the Supreme Court had "never shifted the burden to the [government] to establish that the error did not seriously affect the fairness . . . of judicial proceedings."[119] The court focused on the impact of intervening decisions on the integrity of the judicial process, and concluded that mandatory application of the Sentencing Guidelines did not result in a miscarriage of justice and therefore Mr. Gonzalez-Huerta had no right to remand.[120] Of importance to the Tenth Circuit were the facts that non-constitutional, as opposed to constitutional, *Booker* error occurred, Mr. Gonzalez-Huerta's sentence was within the national norm, and no mitigating evidence appeared in the record.[121] The court felt these facts mitigated the impact of the error on judicial integrity because no "core notions of justice" were offended.[122] Mr. Gonzalez-Huerta failed his burden, according to the court, because he presented no evidence other than a mere recitation that injustice would result, which the court found insufficient.[123] Finally, the Tenth Circuit affirmed the District Court's sentence on the

111. 398 F.3d 516, 526-529 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (2005).

112. *Gonzalez-Huerta*, 403 F.3d at 735.

113. *Id.* (noting that the Supreme Court had the opportunity to term an intervening decision as presumptively prejudicial in *Johnson v. United States*, 520 U.S. 461, 469-70 (1997), but failed to do so).

114. *Id.* (noting several methods of demonstrating prejudice, which defeats the notion that the defendant cannot make a specific showing of prejudice).

115. *Id.* (discussing the dissent by Chief Judge Boggs in *Barnett*, 398 F.3d at 537-38).

116. *Id.* (noting that an essential distinction between plain error and harmless error is that the burden rests with the defendant in the former).

117. *Id.* at 736 (noting that a specific determination under the third prong is unnecessary because Mr. Gonzalez-Huerta holds the burden under the fourth prong as well).

118. *See, e.g.*, United States v. Crosby, 397 F.3d 103, 118 (2d Cir. 2005).

119. *Gonzalez-Huerta*, 403 F.3d at 737.

120. *Id.* at 737-39.

121. *Id.* at 738-39.

122. *Id.* at 739.

123. *Id.* at 737-38.

basis that Mr. Gonzalez-Huerta had failed to satisfy the fourth prong of plain error review.[124]

3. Concurrences

Three concurrences accompanied the majority decision authored by Chief Judge Tacha, Judge Ebel, and Judge Hartz. Chief Judge Tacha, joined by Judge Kelly, Judge Murphy, Judge O'Brien, Judge McConnell, and Judge Tymkovich, wrote separately to conclude that Mr. Gonzalez-Huerta had failed the third prong of plain error review as well as the fourth prong.[125] Chief Judge Tacha criticized Mr. Gonzalez-Huerta's failure to present any mitigating evidence, which left the record devoid of anything but speculation that suggested a lower sentence would be imposed on remand.[126] Chief Judge Tacha also took the opportunity to engage in a statistics battle with the dissent in order to counter the argument that the third and fourth prongs are satisfied per se by the significant number of district judges that were imposing sentences below the Guidelines range after *Booker*.[127] The United States Sentencing Commission had compiled figures on severity of federal sentences imposed after *Booker*,[128] which Chief Judge Tacha compared to pre-*Booker* figures and concluded that there was only a 1.8 percent increase in the number of sentences imposed below the Sentencing Guidelines, while there was also a 1.1 percent increase in the number of sentences imposed above the Sentencing Guidelines.[129] Consequently, according to Chief Judge Tacha, there can be no inference drawn from statistics that a lower sentence is likely because the chance of a higher sentence is roughly equivalent.[130]

Both Judges Ebel and Hartz wrote separately primarily to put forth additional analysis under the fourth prong. Judge Ebel, who interestingly agreed with the majority on the fourth prong but sided with the dissent on the third prong,[131] set forth three factors to be considered under the judicial integrity element: (1) constitutionality of the error; (2) whether the defendant's sentence falls within the Guidelines range; and (3) whether the record on its face suggests the district court was likely to impose a different sentence.[132] Judge Ebel concluded that all three factors weighed against Mr. Gonzalez-Huerta and thus his sentence should be affirmed.[133] Judge Hartz viewed the fourth prong through a wide lens,

124. *Id.* at 739.
125. *Id.* at 739-40 (Tacha, C.J., concurring).
126. *Id.* at 740 (Tacha, C.J., concurring).
127. *Id.* at 741 (Tacha, C.J., concurring).
128. Linda D. Maxfield, U.S. Sentencing Comm'n, Data Extract on March 3: Numbers on Post-Booker Sentencings at 2 (Mar. 22, 2005), http://www.famm.org/pdfs/booker_032205.pdf
129. *Gonzalez-Huerta*, 403 F.3d at 741 (Tacha, C.J., concurring).
130. *Id.* (Tacha, C.J., concurring).
131. *Id.* at 742 (Ebel, J., concurring)
132. *Id.* at 743 (Ebel, J., concurring).
133. *Id.* at 744 (Ebel, J., concurring).

stating the "fairness" to be considered is determined according to the federal justice system as a whole, not just the particular sentence in any one case.[134] Given the purpose of the Sentencing Guidelines was to create uniformity between similarly situated defendants, Judge Hartz stated that allowing a remand in Mr. Gonzalez-Huerta's case may actually harm fairness.[135] Remand of every sentence would result in more disparate sentences, which undermines the fundamental purpose of the Sentencing Guidelines and thus results in unfairness to the federal criminal justice system in general.[136] Judge Hartz implied the source of this disparity is "the disconnect between the constitutional violation and the remedy" in *Booker* because it created a unique situation where the constitutional remedy has residual impacts on defendants whose constitutional rights were not violated.[137]

4. Dissents

Judges Briscoe and Lucero dissented separately from the majority decision, with the former authoring the main dissent. Judge Briscoe challenged the majority's opinion on the basis that the burden should not rest with the defendant to show prejudice.[138] Judge Briscoe explained three paths to accomplish that goal: harmless-error review should be applied in lieu of plain error, the presumptively prejudicial *Olano* exception should apply, or the intervening decision doctrine could be applied in every non-constitutional *Booker* error case to shift the burden away from the defendant.[139]

While conceding that Mr. Gonzalez-Huerta failed to object to the mandatory application of the Sentencing Guidelines at trial, Judge Briscoe argued that *Booker* error does not mesh with the traditional distinction between harmless and plain error because the defendant had no true opportunity to object.[140] Judge Briscoe noted that, at the time of trial, not one person, ranging from defense counsel to the judge, knew that an objection to the mandatory application would have any effectiveness.[141] Thus, the mandatory application of the Guidelines "substantially undermined any need or incentive for sentencing courts pre-*Booker* to note their objections" and deprived Mr. Gonzalez-Huerta of any mean-

134. *Id.* at 746-47 (Hartz, J., concurring).
135. *Id.* at 745-46 (Hartz, J., concurring).
136. *Id.* at 747 (Hartz, J., concurring).
137. *Id.* at 745 (Hartz, J., concurring).
138. *Id.* at 753 (Briscoe, J., dissenting).
139. *Id.* at 750, 753-55 (Briscoe, J., dissenting).
140. *Id.* at 750-53 (Briscoe, J., dissenting).
141. *See id.* at 747 (Briscoe, J., dissenting).

ingful opportunity to object.[142] Since the defendant had no opportunity to object, the burden should rest on the government.[143]

Judge Briscoe suggested the application of harmless-error review and the intervening decision doctrine as possible solutions,[144] but she mainly relied on the *Olano* presumptively prejudicial exception as the actual solution.[145] Citing the significant number of defendants who were given below-Guidelines sentences post-*Booker* and the practical impossibility of showing prejudice outside of fortuitous statements by the judge, Judge Briscoe fell in line with the Sixth Circuit[146] and concluded that prejudice should be presumed in non-constitutional *Booker* error cases as a matter of course.[147] Judge Briscoe then analyzed the application of her perception of plain error review to the instant case, which took on a decidedly different flavor from the majority opinion.[148] The presumption of prejudice automatically satisfied the third prong, and the accompanying assumption that a lighter sentence was inevitable satisfied the fourth prong.[149]

The final dissenting opinion, Judge Lucero's, further exemplified the diversity of views amongst the Tenth Circuit judges.[150] Judge Lucero agreed with Judge Briscoe's analysis of the fourth prong based on the hypothesis that if the fourth prong could not be satisfied by mandatory application, then the Supreme Court would have had no reason to remand Fanfan's sentence for further sentencing.[151] However, Judge Lucero wrote separately to express solidarity with the "limited remand" position of the Second and Seventh Circuits regarding the third prong.[152] The limited remand would allow the district judge to determine if a lighter sentence could be imposed, and if needed, impose it.[153]

Obviously, there is a wide range of sentiments among the judges within the Tenth Circuit, which indicates the likely diversity of opinion among the other federal circuits. The following section explores the different approaches to judicial review by the appellate circuits in regards to

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142. *Id.* at 752 (Briscoe, J., dissenting) (quoting United States v. Barnett, 398 F.3d 516, 529 (6th Cir. 2005)).

143. *See id.* at 753 (Briscoe, J., dissenting).

144. *Id.* at 749, 755 (Briscoe, J., dissenting) (noting the four main directives that result from the language in *Booker*, with application of harmless error review as one of them).

145. *Id.* at 753 (Briscoe, J., dissenting).

146. *See Barnett*, 398 F.3d at 527-28.

147. *Gonzalez-Huerta*, 403 F.3d at 754 (Briscoe, J., dissenting).

148. *Id.* at 756-59 (Briscoe, J., dissenting).

149. *Id.* at 757-59 (Briscoe, J., dissenting).

150. *See id.* at 761-63 (Lucero, J., dissenting) (providing the third point of view on the proper analysis of the substantial rights prong).

151. *Id.* at 761 (Lucero, J., dissenting).

152. *Id.* at 762 (Lucero, J., dissenting).

153. *Id.* at 762 (Lucero, J., dissenting) (quoting the Second Circuit's decision in United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005)).

post-*Booker* sentencing. The sentiment surrounding the discrepancy among the circuits was best captured by Judge Lucero's dissent:

> The division on this court over the proper approach to *Booker* cases pending direct review is replicated among the various circuit courts. This wide ranging 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.[154]

B. Circuit Splits

Below is an overview of the different federal circuit positions:

Position	Circuit	Decision
Hard-line Approach Decided on Third Prong Burden on Defendant	1st	*United States v. Antonakopoulos*[155]
	5th	*United States v. Mares*[156]
	8th	*United States v. Pirani*[157]
	11th	*United States v. Rodriquez*[158]
Compromise Approach Decided on Fourth Prong Burden on Defendant	10th	*United States v. Gonzalez-Huerta*[159]
Limited Remand	2d	*United States v. Crosby*[160]
	7th	*United States v. Paladino*[161]
	9th	*United States v. Ameline*[162]
	D.C.	*United States v. Coles*[163]
Presumption of Prejudice Burden on Government	4th	*United States v. Hughes (Hughes I)*[164]
		United States v. Hughes (Hughes II)[165]
	6th	*United States v. Barnett*[166]
No Set Standard Automatic Remand	3d	*United States v. Davis*[167]

154. *Id.* at 763 (Lucero, J. dissenting).
155. 399 F.3d 68 (1st Cir. 2005).
156. 402 F.3d 511 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (U.S. Oct. 3, 2005) (No. 04-9517).
157. 406 F.3d 543 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547).
158. 398 F.3d 1291 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 2935 (U.S. June 20, 2005) (No. 04-1148).
159. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).
160. 397 F.3d 103 (2d Cir. 2005).
161. 401 F.3d 472 (7th Cir. 2005), *cert. denied*, Peyton v. United States, 126 S. Ct. 106 (U.S., Oct. 3, 2005) (No. 04-10402).
162. 409 F.3d 1073 (9th Cir. 2005).
163. 403 F.3d 764 (D.C. Cir. 2005).
164. 396 F.3d 374 (4th Cir. 2005).
165. 401 F.3d 540 (4th Cir. 2005).
166. 398 F.3d 516 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).
167. 407 F.3d 162 (3d Cir. 2005).

While each case indicates a particular stance, their fact patterns differ slightly, which can be outcome-determinative. The analysis will proceed from the defendant's perspective: harshest to lightest.

1. Burden on the Defendant to Demonstrate Prejudice

The First, Fifth, Eighth and Eleventh Circuits each adopted a hard-line stance towards plain error review, namely the burden rests with the defendant to satisfy the third prong of *Olano*.[168] All four of these circuits additionally reached determinations that a trial judge's use of sentencing enhancements not found by a jury, which constitutes *Blakely* error, does not warrant remand per se,[169] and neither circuit gave deference to the argument that remand is more suitable when *Blakely* error occurs.

In the Eleventh Circuit's *Rodriguez* decision, which was decided first, the sentence of a convicted ecstasy dealer was based on the drug quantity and enhanced due to obstruction of justice, which were both facts found by the judge instead of the jury.[170] The Eleventh Circuit described the immense difficulty of overcoming the defendant's burden under the third prong by stating, "[I]f it is equally plausible that the error worked in favor of the defense, the defendant loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped[,] the defendant loses."[171] Having concluded that the burden was not satisfied by Mr. Rodriguez, the Eleventh Circuit criticized the presumed prejudicial and limited remand approaches of the Fourth, Sixth and Second Circuits.[172] In doing so, the Eleventh Circuit both reiterated the principle that the mere use of sentencing enhancements is not unconstitutional under *Booker*[173] and emphasized that the job of *Booker* review lies with the appellate courts, not the trial courts.[174]

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168. *See* United States v. Antonakopoulos, 399 F.3d 68, 78-79 (1st Cir. 2005); 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. Pirani, 406 F.3d 543 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547); United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 2935 (U.S. June 20, 2005) (No. 04-1148).

169. *See Antonakopoulos*, 399 F.3d at 79 (rejecting a *per se* remand of all cases where sentence enhancements were used); *Mares*, 402 F.3d at 521 (agreeing with the Eleventh Circuit's characterization of *Booker* error); *Rodriguez*, 398 F.3d at 1300 (noting that Justice Breyer's majority opinion expressly stated the Sentencing Guidelines were constitutional once the mandatory provisions were excised).

170. *See Rodriguez*, 398 F.3d at 1294 (noting the jury failed to make a determination on the drug quantity and that the pre-sentencing report recommended an enhancement based on lying under oath).

171. *Id.* at 1300.

172. *Id.* at 1301-02.

173. *Id.* at 1303-04 (noting that both the Fourth Circuit in *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005), and the Sixth Circuit in *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005), stated the constitutional error was the use of sentencing enhancements that were not found by a jury).

174. *Id.* at 1305 ("The determination of plain error is the duty of courts of appeal, not district courts.").

Without a substantial degree of analysis, the Fifth Circuit agreed heavily with the *Rodriguez* decision and wholly adopted its reasoning in *United States v. Mares*,[175] which affirmed the conviction and the sentence of a felon in possession of ammunition.[176] The primary emphasis for both of these circuits is whether a substantially different result would have occurred at trial under an advisory guidelines scheme.[177] If the record is silent or the defendant cannot reasonably show that a different result is probable, then the defendant loses.[178]

The First Circuit reached essentially the same conclusions as the Eleventh and the Fifth Circuits in *United States v. Antonakopoulos*,[179] but provided some additional guidance for when remand is appropriate under *Booker*.[180] Specifically, the court stated that remand is more appropriate in the following circumstances: when the district judge misapplies the guidelines;[181] when mitigating circumstances existed at trial but could not be considered under the mandatory regime;[182] when the trial judge expresses on record that the Sentencing Guidelines were unfair;[183] and when a reasonable probability exists that the result would have been different.[184] In the end, the First Circuit used the traditional plain error approach to affirm the sentence of a bank manager who embezzled from his employer that was based not only on the jury findings, but also on the pre-sentence report and sentence enhancements.[185]

The Eighth Circuit benefited from deciding *United States v. Pirani*[186] well after the decisions of most of the sister circuits, and decided that the proper approach among the splits is that of the First, Fifth, and Eleventh Circuits.[187] A former sheriff's deputy in Arkansas was convicted of making false statements to federal investigators who suspected that deputies were stealing drug money seized during the course of their duties.[188] The Eighth Circuit agreed that the third *Olano* factor depended upon a defendant's showing a reasonable probability that a different sentence would have been imposed,[189] but the court parted ways with the

175. 402 F.3d 511, 522 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 43 (U.S. Oct. 3, 2005) (No. 04-9517).
176. *Mares*, 402 F.3d at 521-22.
177. *See Rodriguez*, 398 F.3d at 1302; *Mares*, 402 F.3d at 521.
178. *See Rodriguez*, 398 F.3d at 1300; *Mares*, 402 F.3d at 521.
179. 399 F.3d 68 (1st Cir. 2005).
180. *See Antonakopoulos*, 399 F.3d at 81.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* (noting that this final situation can overcome silence by the trial judge).
185. *Id.* at 84.
186. 406 F.3d 543 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547).
187. *Pirani*, 406 F.3d at 547.
188. *Id.*
189. *Id.* at 551-52 (noting its agreement with the First, Second, Fifth, Seventh, and Eleventh Circuits on this point).

limited remand circuits on the basis that such a "creative approach" violates the express command from the Supreme Court in *Booker* to apply ordinary prudential doctrines.[190] Consequently, the defendant's sentence was affirmed after he failed to satisfy the *Olano* third prong burden.[191]

2. Limited Remand

Four circuits have adopted the middle-ground approach of limited remand for the purpose of determining whether the defendant was prejudiced by the mandatory application of the Sentencing Guidelines.[192] The Second Circuit was the first to articulate this standard in *United States v. Crosby*[193] as 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."[194] *Crosby* involved a felon who pled guilty to possession of a firearm and was sentenced based on his plea, two prior convictions for violent offenses, and three sentence enhancements for behavior during the act and subsequent investigation.[195] The Second Circuit agreed that the use of sentencing enhancements didn't violate the Constitution after *Booker* because the enhancements didn't push the defendant over the "statutory maximum" as required by *Apprendi*.[196] However, the Second Circuit stated that a proper application of plain error review requires knowing what the sentencing judge would have done, which wasn't likely under the pre-*Booker* regime, and thus limited remand was required.[197]

The Seventh Circuit followed the *Crosby* approach in remanding the sentences of several defendants in a consolidated appeal in *United States v. Paladino*.[198] In a colorful opinion, the Seventh Circuit described the "epistemic fog" of not knowing what course of action the trial judge would have taken in a discretionary scheme and decided the most rational approach to *Booker* review was to simply ask the trial judge.[199] In reaching this conclusion, the Seventh Circuit determined that the fatal

190. *Id.* at 552.

191. *Id.* at 553 (noting that the fourth prong need not be considered because the third prong is unsatisfied).

192. *See* United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005); United States v. Paladino, 401 F.3d 471, 484 (7th Cir. 2005), *cert. denied*, Peyton v. United States, 126 S. Ct. 106 (2005); United States v. Ameline, 409 F.3d 1073, 1078-79 (9th Cir. 2005); United States v. Coles, 403 F.3d 764, 768 (D.C. Cir. 2005).

193. 397 F.3d 103 (2d Cir. 2005).

194. *Crosby*, 397 F.3d at 117.

195. *Id.* at 106 (noting that the defendant had recklessly endangered the life of a police officer, created a substantial risk of injury for a police officer, and had obstructed justice).

196. *Id.* at 109 n.6.

197. *Id.* at 118-19.

198. *Paladino*, 401 F.3d at 485. The court affirmed the convictions of all the defendants and the sentence of one defendant, Peyton, who challenged his sentence on the basis of a "recidivist" enhancement, which the Seventh Circuit stated was not affected by *Booker*. *Id.* at 480.

199. *Paladino*, 401 F.3d at 482, 484.

flaw in the presumed prejudice approach is that no prejudice results if the trial judge would impose the same sentence,[200] and the hardline refusal to remand unjustly "condem[s] some unknown fraction of criminal defendants to serve an illegal sentence."[201]

Similarly, in *United States v. Ameline*,[202] the Ninth Circuit remanded a sentence where the defendant pled guilty to possession of "some methamphetamine."[203] The trial judge utilized the pre-sentencing figure of 1,079.3 grams of methamphetamine as the basis for sentencing, which the Ninth Circuit stated resulted in constitutional error that demanded resentencing under *Booker*.[204] The Ninth Circuit expressly agreed with the limited remand approach.[205]

Finally, in a relatively short opinion, the District of Columbia Circuit adopted the *Crosby* limited remand approach in *United States v. Coles*.[206] The court remanded the sentence of a former Special Assistant to the Secretary of the District of Columbia convicted of attempting to obtain grant money fraudulently because the record was unclear as to whether the defendant was prejudiced.[207] The most interesting aspect of the *Coles* decision is the D.C. Circuit's criticism of the presumed prejudicial approach that "courts employing this approach assess error and prejudice as if the pre-*Booker*, mandatory sentencing regime were still in place, and as if the error were judicial factfinding under that regime."[208] The skewed perspective of the Fourth and Ninth Circuits, according to the D.C. Circuit, directly conflicts with the *Booker* guidance by ignoring what the trial judge would have done.[209]

3. Presumed Prejudicial

The final prominent position taken by the federal circuits is that of the Fourth and Sixth Circuits, which remand any sentence which is increased based on any fact not found by a jury, including pre-sentencing reports and sentencing enhancements.[210] This position was first described by the Fourth Circuit in *United States v. Hughes*,[211] which af-

200. *Id.* at 483 (criticizing the Sixth Circuit's decision in *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005)).
201. *Id.* at 484-85.
202. 409 F.3d 1073 (9th Cir. 2005).
203. *Ameline*, 409 F.3d at 1075.
204. *Id.* at 1075, 1078.
205. *Id.* at 1079-80.
206. 403 F.3d 764, 765 (D.C. Cir. 2005).
207. *Coles*, 403 F.3d at 765, 769-70.
208. *Id.* at 768.
209. *Id.*
210. *See* United States v. Hughes, 396 F.3d 374, 376 (4th Cir. 2005) [hereinafter *Hughes I*]; United States v. Hughes, 401 F.3d 540, 548 (4th Cir. 2005) [hereinafter *Hughes II*]; United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).
211. 396 F.3d 374 (4th Cir. 2005).

firmed a defendant's convictions but remanded his sentence.[212] Hughes was convicted by a jury of bankruptcy fraud and perjury, but the judge imposed a forty-six month sentence based on five enhancements which the jury did not find.[213] The Fourth Circuit framed the constitutional violation as judicial action which "imposes a sentence greater than the maximum authorized by the facts found by the jury alone."[214] There was neither mention of the statutory maximum nor any reference to the portion of the *Booker* decision which authorized the use of sentencing enhancements.[215]

The Fourth Circuit concluded that plain error review was the proper standard because Hughes raised his Sixth Amendment challenge for the first time on appeal,[216] but then proceeded to find that plain error had occurred because each of the four *Olano* prongs were satisfied.[217] The third prong was satisfied by the discrepancy in the Guidelines range between Offense Level 10, which the jury facts warranted, and Offense Level 22, which was the actual level used as enhanced by five judge-found factors.[218] Likewise, the Fourth Circuit held the fourth prong was satisfied due to the major change in federal sentencing law that *Booker* imposed.[219] Oddly enough, the Fourth Circuit, when providing guidance to the trial judge for resentencing, determined that the "district court correctly determined the range prescribed by the guidelines, on remand the court shall consider that range,"[220] which seems to contradict the determination that use of sentencing enhancements to increase the guidelines range violates the Sixth Amendment.[221]

The Fourth Circuit reiterated its position in response to stark criticism from other circuits, particularly the Eleventh Circuit, when it granted a rehearing before a three judge panel.[222] In *Hughes II*, the Fourth Circuit essentially amended its decision in *Hughes I* with additional analysis under the third and fourth *Olano* prongs.[223] Chief Judge Wilkins, writing for the majority, drew support mainly from *Kotteakos v. United States*[224] for the proposition that the main goal of the substantial rights inquiry was not to decide the outcome of an error-free trial, but rather to determine the reasonable effect the error had on the proceed-

212. *Hughes I*, 396 F.3d at 376.
213. *Id.*
214. *Id.* at 378.
215. *See id.* at 379 (noting that the prescribed Guidelines-range for the facts found by the jury authorized a 12-month maximum sentence, which the 46-month actual sentence clearly exceeds).
216. *Id.* at 379.
217. *Id.* at 380-81.
218. *Id.* at 380.
219. *Id.* at 380-81.
220. *Id.* at 385 (noting that the other factors under the Sentencing Guidelines should be considered as well).
221. *Id.* at 378.
222. *Hughes I*, 401 F.3d at 543.
223. *Hughes II*, 401 F.3d at 548.
224. 328 U.S. 750 (1946).

ing.[225] If the reasonable effect is ambiguous, then the court cannot conclude that the defendant's substantial rights were not affected.[226] Furthermore, the Fourth Circuit stated that the appropriate examination of the substantial rights prong is "whether the district court could have imposed the sentence it did without exceeding the relevant Sixth Amendment limitation,"[227] which can never be satisfied when sentencing enhancements were used because they are not facts found by a jury.[228]

The Sixth Circuit followed the Fourth Circuit's decision in *Hughes I* with its decision in *United States v. Barnett*.[229] The *Barnett* defendant was convicted of gun possession and sentenced to 265 months based on three prior violent felonies.[230] The Sixth Circuit held that prejudice should be presumed because the defendant may have received a sentence as low as 180 months, the statutory minimum, and the inherent nature of *Booker* error made it exceptionally difficult to make a showing of prejudice.[231]

Finally, the Third Circuit appears to follow the "presumed prejudicial" approach, but has declined to expressly adopt any specific line of reasoning.[232] The Third Circuit consistently remands *Booker* cases for resentencing under the rationale that, "[T]he sentencing issues appellant raises are best determined by the District Court in the first instance, [consequently] we will vacate the sentence and remand for resentencing in accordance with *Booker*."[233] However, the Third Circuit provides only cryptic reasoning for its automatic remand approach. In an *en banc* decision, Judge Scirica stated in dicta that prejudice should be presumed because "mandatory sentencing was governed by an erroneous scheme."[234] Furthermore, the court viewed the possibility of stripping discretion from the trial court as sufficient harm to the integrity of the judicial system.[235]

III. ANALYSIS

The only undisputed principle in all sentencing challenges after *United States v. Booker*[236] is that plain error occurs through the mandatory application of the Federal Sentencing Guidelines. The clarity ends there, as several unresolved issues regarding plain error review as estab-

225. *Hughes II*, 401 F.3d at 548.
226. *Id.* (quoting *Kotteakos*, 328 U.S. at 765).
227. *Id.* at 551.
228. *See id.* at 548 (noting that the maximum sentence under the facts found solely by the jury would have been 12 months).
229. 398 F.3d 516 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).
230. *Id.* at 521.
231. *Id.* at 526-27.
232. *See, e.g.*, United States v. Bruce, 405 F.3d 145, 150 (3d Cir. 2005).
233. *Id.* at 150. *See also* United States v. Davis, 407 F.3d 162, 166 (3d Cir. 2005) (en banc).
234. *Davis*, 407 F.3d at 165.
235. *Id.*
236. 125 S. Ct. 738 (2005).

lished in *United States v. Olano*[237] have led to a wide-ranging circuit split. The dispute centers on the prejudice created by mandatory sentencing, and understanding the pros and cons of each circuit's approach is crucial to analyzing the effectiveness of the Tenth Circuit's decision in *United States v. Gonzalez-Huerta*.[238] Moreover, the limitations of plain error review, particularly its ability to address sweeping changes in settled law, must also be examined as a contributing source of the disparity in post-*Booker* review. Ultimately, the Tenth Circuit reached the correct outcome in *Gonzalez-Huerta* through reliance on the judicial integrity requirement of plain error review, although burdening criminal defendants to demonstrate prejudice is fundamentally unfair and should not be followed.

A. Requiring the Unknown

The Tenth Circuit incorrectly agreed with the hardline circuits by placing the burden of satisfying the third *Olano* prong with the defendant, which requires him to demonstrate a reasonable probability of prejudice.[239] The Fourth and Sixth Circuits presume prejudice in post-*Booker* review based on the language in *Olano*[240] and the difficulty of establishing that a different outcome would result under an advisory sentencing regime.[241] The Tenth Circuit rejected the "presume prejudice" approach because the Supreme Court had never mentioned nor applied such a presumption after its mere mention in *Olano*.[242] Specifically, Chief Judge Tacha cited the Court's decision in *Johnson v. United States*,[243] which addressed an intervening decision and failed to mention presuming prejudice in its analysis.[244] However, *Johnson* indirectly presumed prejudice by "assuming that the failure to submit materiality to the jury affected substantial rights."[245] Also, reliance on the lack of additional case support for presuming prejudice is misguided, particularly given that *Olano* was decided within the last fifteen years.[246] Insufficient time to develop may be equally culpable for the Supreme Court's failure to mention presuming prejudice, and thus should not be cited as support for rejecting such an approach. Finally, if any situation satisfies the intent of the *Olano* exception, the significant change wrought by *Booker*'s intervening decision should qualify. The only other Supreme Court case

237. 507 U.S. 725 (1993).
238. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).
239. *Gonzalez-Huerta*, 403 F.3d at 736.
240. *Olano*, 507 U.S. at 735 (noting that some errors "should be presumed prejudicial if the defendant cannot make a specific showing of prejudice").
241. *See* United States v. Hughes, 401 F.3d 540, 548 (4th Cir. 2005); United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).
242. *Gonzalez-Huerta*, 403 F.3d at 735.
243. 520 U.S. 461 (1997).
244. *Gonzalez-Huerta*, 403 F.3d at 735.
245. *Johnson*, 520 U.S. at 469 (quotations omitted).
246. *Olano*, 507 U.S. at 725 (decided in 1993).

to address the impact of an intervening decision was *Johnson*, which considered the change to materiality determinations in *United States v. Gaudin*,[247] and that decision assumed the prejudice element to be satisfied.[248]

The Tenth Circuit also refused to presume prejudice because a criminal defendant could possibly demonstrate prejudice based on the record.[249] The most common avenue for demonstrating prejudice is through judicial comment that a lower sentence is warranted.[250] However, the majority's characterization is essentially a straw man that "ignores the reality of the pre-*Booker* sentencing landscape"[251] where judicial comments criticizing the Sentencing Guidelines are unnecessary and discouraged by existing case law. Guiding principles should not be supported by their extremes, and the presence of sufficient evidence in the trial record to establish prejudice is certainly an extreme situation in post-*Booker* challenges.

Finally, the Tenth Circuit relied on the need to maintain a distinction between plain error and harmless error review as support for its position.[252] The Supreme Court likewise cited concern for distinguishing plain and harmless error as a reason for placing the burden with the defendant in plain error review.[253] However, the main policy support for shifting the burden, which rests with the government in harmless error review, is the need to encourage defendants to object timely and assert their rights as a fundamental part of the adversary system.[254] Most, if not all, plain error post-*Booker* sentencing challenges do not satisfy the policy of encouraging objections because the affected defendants did not know at the time of their trial that a legal right to object to mandatory application of the Sentencing Guidelines existed. As stated by Judge Briscoe in her dissent, "there was no opportunity or incentive, as there is now post-*Booker*, for Gonzalez-Huerta or the government to present evidence or arguments outside of the bounds allowed by the Guidelines."[255] In a similar vein, the Second Circuit stated, "[i]f we were to penalize defendants for failing to challenge entrenched precedent, we would be insisting upon an omniscience on the part of defendants . . . [and] would only encourage frivolous objections and appeals."[256] Therefore, the need for a true distinction between plain and harmless error is minimal, and

247. 515 U.S. 506 (1995).
248. *Johnson*, 520 U.S. at 467.
249. *Gonzalez-Huerta*, 403 F.3d at 735-36.
250. United States v. Shelton, 400 F.3d 1325, 1328 (11th Cir. 2005).
251. *Gonzalez-Huerta*, 403 F.3d at 752 (Briscoe, J., dissenting).
252. *Id.* at 736.
253. *Olano*, 507 U.S. at 734-35.
254. *See* Lowry, *supra* note 70, at 1080 (quoting United States v. Silverstein, 732 F.2d 1338, 1349 (7th Cir. 1984)).
255. *Gonzalez-Huerta*, 403 F.3d at 751 (Briscoe, J., dissenting).
256. United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994).

although the failure to object should give rise to plain error review, defendants should not be doubly penalized by a strict enforcement of the burden, which would otherwise rest with the government under the common law plain error doctrine.[257]

Furthermore, general policy arguments support adopting of presuming prejudice under the third prong of *Olano*. Conceding prejudice within the context of significant intervening decisions prevents undermining the fairness of judicial proceedings. Requiring defendants to produce the unknown, namely the actions a sentencing judge would have perused under an advisory regime, is fundamentally unfair. The "limited remand" approach of the Second, Seventh, Ninth, and District of Columbia Circuits addresses the fairness issue, but it fails to meet the judicial efficiency goals of plain error review. Assuming prejudice would allow the appellate courts to decide *Booker* cases based upon the impact to the integrity of the judiciary, which is more reliant on policy considerations which appeals courts are best equipped to handle.

Since the burden under the third *Olano* prong should rest with the government in post-*Booker* review cases, the arguments presented by Chief Judge Tacha and Judge Briscoe regarding satisfaction of that burden are moot. However, one prominent aspect of Mr. Gonzalez-Huerta's case that was ignored by both sides of the debate, and indeed every circuit to address *Booker* review, is the fact that Mr. Gonzalez-Huerta was sentenced to the absolute minimum within the proscribed sentencing range.[258] Supporters of remand could cite minimum range application as an implicit statement by the sentencing judge that he would impose a lower sentence if it were possible. Although the ability of minimum range application to demonstrate prejudice is tenuous, it provides a valuable argument when faced with the alternative of a silent trial record and may persuade a court to grant limited remand.

B. Preserving Reason

Despite the limitations of the prejudice element analysis, the Tenth Circuit's analysis and conclusion under the judicial integrity element provided the saving grace of the *Gonzalez-Huerta* decision. Even if prejudice to the defendant is presumed, remand is only warranted if the prejudice results in a miscarriage of justice.[259] Thus, the reviewing appellate court can exercise its discretion under the fourth *Olano* prong when the circumstances of the case deserve remedy, but can decline if the circumstances do not. The Supreme Court followed this exact reasoning in *Johnson*, where it examined the merits of the underlying materiality dispute and declined to remand because the evidence supporting

257. *See* Lowry, *supra* note 70, at 1078-80.
258. *Gonzalez-Huerta*, 403 F.3d at 730.
259. *Id.* at 736-37 (citing United States v. Gilkey, 118 F.3d 702, 704 (10th Cir. 1997)).

the trial court's ruling was "overwhelming."[260] Likewise in *Gonzalez-Huerta*, the judicial integrity element provided a dispositive basis of decision because Mr. Gonzalez-Huerta failed to, and indeed was unable to, provide evidence that mandatory application of the Sentencing Guidelines caused injustice.[261]

The fairness of Mr. Gonzalez-Huerta's sentence is, similar to *Johnson*, overwhelming. The only enhancement used at sentencing was the prior conviction,[262] which *Booker* expressly approved.[263] The trial court imposed the minimum sentence of the corresponding sentencing range.[264] Mr. Gonzalez-Huerta presented no mitigating evidence which was rejected by the mandatory regime.[265] Most importantly, the Sentencing Guidelines are still used as the national standard and meant to provide consistency among criminal defendants.[266] Although the recent trend in sentencing is the increased imposition of below-guidelines sentences,[267] the overwhelming majority of post-*Booker* sentences are within the Sentencing Guidelines.[268] As a result, Mr. Gonzalez-Huerta's sentence is conclusively fair because it comports with the national norm and is based solely on constitutional facts, and as such does not give rise to the necessary "miscarriage of justice" required for plain error remand.

Furthermore, the Supreme Court's guidance for handling post-*Booker* review expressly stated that not every appeal would lead to resentencing,[269] and that guidance would be vitiated entirely if remand was granted in *Gonzalez-Huerta*.[270] The only possible prejudice to Mr. Gonzalez-Huerta was the mandatory application of the Sentencing Guidelines.[271] Therefore, if remand were granted, it would implicitly amount to a statement that mandatory application alone is sufficient to warrant resentencing. Since every pre-*Booker* sentence was statutorily required to be mandatory, then every sentence would have to be remanded. Such a result violates the express intent of the Supreme Court and cannot be rationally sustained. Consequently, the automatic remand approaches of

260. *Johnson*, 520 U.S. at 469-70.
261. *Gonzalez-Huerta*, 403 F.3d at 737-38.
262. *Id.* at 730.
263. 125 S. Ct. 738, 756 (2005).
264. *Gonzalez-Huerta*, 403 F.3d at 730.
265. *See id.* at 735-36.
266. *See* Koon v. United States, 518 U.S. 81, 92 (1996).
267. UNITED STATES SENTENCING COMMISSION, SPECIAL POST-BOOKER CODING PROJECT DATA EXTRACTION DATE: DECEMBER 21, 2005 at 1 (Jan. 5, 2006), http://www.ussc.gov/Blakely/PostBooker_010506.pdf (noting that only 1.7% of cases sentenced subsequent to the *Booker* decision are above the guidelines, while 37.1% of the cases are below the guidelines, although 24.4% of the below-guidelines sentences are government sponsored).
268. *Id.* at 1 (noting that 61.2% of cases sentenced subsequent to the *Booker* decision are within the guidelines).
269. United States v. Booker, 125 S. Ct. 738, 769 (2005).
270. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).
271. *Id.* at 730-31 (noting the basis of sentencing was limited to admitted facts and prior convictions).

the Second, Third, Seventh, Ninth, and District of Columbia Circuits, even if limited, cannot be sustained for this reason.[272] The Fourth and Sixth Circuits' "presumed prejudicial" approach also fails under the Supreme Court's limits on remand because both circuits compress the separate elements under *Olano*, so instead of merely presuming prejudice to the defendant, the court also presumes injustice results regardless of the circumstances in individual cases.[273] Failure to distinguish between the third and fourth *Olano* prongs, when combined with presuming prejudice, holds the same effect as the Third Circuit's "automatic remand" approach. Consequently, the only feasible approaches are those of the First, Fifth, Eighth, Tenth, and Eleventh Circuits because they preclude remand in every case.[274]

CONCLUSION

The Tenth Circuit's decision in *United States v. Gonzalez-Huerta*[275] establishes the correct outcome under the holding of *United States v. Booker*[276] and the judicial integrity element of plain error review established in *United States v. Olano*.[277] Fairness warrants providing the defendant with leniency regarding prejudicial effect of the plain error, particularly caused by an intervening decision requiring a defendant to see the future in order to properly object in good faith. However, unless the asserted error causes a miscarriage of justice or fails to comport with appropriate policy considerations, then the reviewing court should refuse to exercise its discretion under the fourth *Olano* prong.

One technique the Tenth Circuit would be well-advised to adopt is avoidance of disparate treatment through broad interpretation of the objection required to trigger harmless error review. The First Circuit has supported such an approach in *United States v. Heldeman*[278] and *United States v. Antonakopoulos*.[279] The *Antonakopoulos* court viewed any ar-

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272. *See* United States v. Davis, 407 U.S. 162, 166 (3d Cir. 2005); United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005); United States v. Paladino, 401 F.3d 472 (7th Cir. 2005), *cert. denied*, Peyton v. United States, 126 S. Ct. 106 (U.S., Oct. 3, 2005) (No. 04-10402); United States v. Ameline, 409 F.3d 1073, 1078-79 (9th Cir. 2005); United States v. Coles, 403 F.3d 764, 768 (D.C. Cir. 2005).

273. *See* United States v. Hughes, 396 F.3d 374, 376 (4th Cir. 2005); United States v. Hughes, 401 F.3d 540, 548 (4th Cir. 2005); United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 33 (U.S. Sept. 20, 2005) (No. 04-1690).

274. *See* United States v. Antonakopoulos, 399 F.3d 68, 78-79 (1st Cir. 2005); 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. Pirani, 406 F.3d 543 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 266 (U.S. Oct. 3, 2005) (No. 05-5547); United States v. Gonzalez-Huerta, 403 F.3d 727, 736 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407); United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005), *cert. denied*, 125 S. Ct. 2935 (U.S. June 20, 2005) (No. 04-1148).

275. 403 F.3d 727 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 495 (U.S. Oct. 17, 2005) (No. 05-6407).

276. 125 S. Ct. 738 (2005).

277. 507 U.S. 725 (1993).

278. 402 F.3d 220 (1st Cir. 2005).

279. 399 F.3d 68 (1st Cir. 2005).

gument under *Apprendi v. New Jersey*,[280] *Blakely v. Washington*,[281] or a general challenge to the constitutionality of the Sentencing Guidelines as sufficient to trigger harmless error,[282] which typically results in remand for resentencing.[283] Avoidance of customarily applying plain error review would help mitigate the disparate treatment of similarly situated defendants that are merely separated by the passage of time, during which the *Blakely* and *Booker* arguments became available and provided defendants with a basis to object. Specifically, the Tenth Circuit could avoid the disparity exemplified by the cases of Mr. Gonzalez-Huerta and Mr. Labastida-Segura. Mr. Labastida-Segura pled guilty to reentering the United States after being deported, and was sentenced based on admitted facts and a prior felony conviction.[284] Despite the striking similarity in circumstances to *Gonzalez-Huerta*, the Tenth Circuit remanded for resentencing.[285] The only distinction was that Mr. Labastida-Segura's trial was not conducted until after the *Blakely* decision and he prudently filed a motion to have the Sentencing Guidelines declared unconstitutional,[286] which entitled him to a harmless error standard of review on appeal.[287] Avoidance through interpretation would allow more defendants to challenge their sentences under harmless error review and would foster the appearance of equitable treatment of comparable defendants.

The wide-ranging circuit split deserves resolution by the Supreme Court. Different geographic areas are treating similar defendants differently—undermining not only the purposes of the Guidelines but also the spirit of justice in the criminal punishment system. However, given the fact that the Court has denied certiorari in almost half of the controlling appellate circuit cases, including *Gonzalez-Huerta*,[288] and the temporary nature of *Booker* error, the possibility exists that the Court may simply wait for the discrepancy to elapse. The discrepancy among the circuits over *Booker* review presents an opportunity for the Court to add significantly to the plain error review precedent and should not be foregone.

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280. 530 U.S. 466 (2000).
281. 124 S. Ct. 2531 (2004).
282. *See Antonakopoulos*, 399 F.3d at 76. *See also Heldeman*, 402 F.3d at 224.
283. *See, e.g.*, United States v. Labastida-Segura, 396 F.3d 1140, 1143 (10th Cir. 2005).
284. *Id.* at 1141-42.
285. *Id.* at 1143.
286. *Id.* at 1142.
287. *Id.* at 1143.
288. *See supra* Part II.B (noting that six of the thirteen controlling cases in each respective circuit have been denied certiorari to date).

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