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

Michael Guasco
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


\(^2\) Id.


\(^4\) See id.

\(^5\) See id. at 268 (Breyer, J., for the Court in part).
disparity has emerged. The various circuits have adopted four different interpretations of what the Court meant by "ordinary prudential doctrines." The one clear fact that has emerged is that defendants are being treated differently based solely on where they committed their crimes, exactly the type of disparity that Congress was trying to avoid when it created the Sentencing Guidelines. The Solicitor General has urged the Supreme Court to address this disparity. However, to date the Supreme Court has declined to do so.

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. 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. However, while his case was on direct review, the Supreme Court decided, in Blakely v. Washington, that Washington's sentencing scheme was unconstitutional. 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. The panel held that the Guidelines did violate the Sixth Amendment and remanded his case for a new sentencing hearing.

Ameline filed a petition for rehearing. 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. The original panel, noting that Ameline had not raised a Sixth

---


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.


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].


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].


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. The Ninth Circuit then took the case en banc to decide what procedure would be used for defendants raising unpreserved *Booker* error. The en banc panel adopted the "limited-remand" approach.

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. Part II sets forth the history of the traditional plain error standard of review and the contemporary "Plain Error Problem." Part III examines the limited-remand approach and compares it with the approach taken in other circuits. 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. 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.

I. BACKGROUND

From the late nineteenth century until 1984, most federal crimes were sentenced based upon an indeterminate sentencing scheme. 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. Congress had the authority to legislate a determinate sentence for each particular crime. However,
Congress generally gave the sentencing judge the discretion to choose the particular sentence from within a range of sentences. Courts soon recognized that a sentence under such a scheme was virtually free from any form of appellate review.

A. SENTENCING REFORM ACT OF 1984

For several years, Congress was concerned with the "intolerable disparities that plagued the indeterminate federal sentencing system." In 1958, Congress responded to the noted disparities by establishing a sentencing institute and advisory council to make advisory criteria for sentencing. 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." However, this seemed to have little effect.

Several studies demonstrated the ineffectiveness of the advisory criteria. One such study reported that "the range of average sentences..."
2007] LIMITED REMAND IN SENTENCING REHEARINGS 613

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

The cornerstone of the SRA was the creation of a sentencing guidelines system. The act created the independent Sentencing Commission. The primary role of the Sentencing Commission was to establish a set of guidelines to be used during sentencing by district judges. The Sentencing Guidelines were supposed to further the objectives of the SRA. 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.

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

---

46 See Hatch, supra note 1, at 188-189.
47 See id., at 188.
the Guidelines were merely advisory. However, under the Senate’s version, the Guidelines were mandatory. Several senators expressed their desire to keep the Guidelines mandatory. 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.

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. While only one of the cases actually involved the federal criminal system, these cases led to the question whether the Sentencing Guidelines were constitutional.

1. Jones v. United States

In Jones v. United States, the Court interpreted the federal carjacking statute. According to the statute, if a carjacking resulted in serious bodily harm or in death, the sentence was increased. This additional fact was determined by the judge and was viewed as a “sentencing factor” by the lower courts. In a five-to-four decision, the
Court determined that this is not a sentencing factor; rather, the statute establishes three distinct crimes. The first crime is a carjacking with no serious injury, the second is a carjacking resulting in serious bodily injury, and the third is a carjacking resulting in death.

Justices Stevens and Scalia each filed a concurring opinion. Both argued that it is "unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties." 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. While the Court's opinion does not actually stand for the proposition that a trial court cannot use sentencing enhancements, the two concurring opinions laid the groundwork for the line of cases that would ultimately result in the Booker decision.

2. Apprendi v. New Jersey

In Apprendi v. New Jersey, the Court examined New Jersey's hate-crime statute. 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. The grand jury returned a twenty-three-count indictment. 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

---

60 Jones, 526 U.S. at 229.
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).
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).
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). The prosecution dismissed the remaining twenty counts. 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. The prosecution reserved the right to seek an enhancement based on New Jersey’s hate-crime law as to count eighteen, and Apprendi reserved the right to challenge the constitutionality of the hate-crime enhancement. 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. This additional finding established Apprendi’s eligibility for a hate-crime enhancement. This determination was made by the judge under a preponderance-of-the-evidence standard.

A five-justice majority 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. The same five justices in the Apprendi majority would later decide Blakely and Booker. Apprendi signaled where the Court was headed with regard to sentencing factors and would be a basis for the following decisions.

3. Ring v. Arizona

The Court continued the trend of disfavoring so-called sentencing

---

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).
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.
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).

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. See *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)).

Timothy Ring was involved in a robbery with two other men. One person died and Ring was charged with premeditated murder and felony murder. See *Ring*, 536 U.S. at 590-591. The jury found Ring guilty of felony murder rather than premeditated first-degree murder. Id. The trial judge then found that Ring was a major participant in the robbery and that he was the actual killer. Id. at 594. Based on these findings, the trial judge sentenced Ring to death.

The Supreme Court of Arizona took Ring’s case on automatic direct appeal. See *State v. Ring*, 25 P.3d 1139, 1142 (Ariz. 2001). 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. *Ring* filed a petition for certiorari, which was granted. See *Ring v. Arizona*, 534 U.S. 1103 (2002) (order granting certiorari).

The United States Supreme Court held that it was unconstitutional for the judge, rather than the jury, to find the aggravating factors. See *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.

As a result, the maximum penalty for which Ring was eligible based on the jury verdict alone was life without the possibility of parole. See *Ring*, 536 U.S. 584, 597 (2002). 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
leniency. The Court earlier had ruled that Arizona’s sentencing scheme was constitutional. However, the Court stated that the earlier decision was incompatible with Apprendi and could not stand. In a concurring opinion, Justice Scalia, joined by Justice Thomas, made the Court’s position clear. 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.”


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

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. The State of Washington argued that there was no

---

98 See ARIZ. REV. STAT. ANN. § 13-703(C) (West Supp. 2001)
100 See Ring, 536 U.S. at 589.
101 See Ring, 536 U.S. at 610 (Scalia, J., concurring).
103 Id. at 298.
106 Blakely, 542 U.S. at 299.
107 Id. at 299-300.
Apprendi violation because the statutory maximum was not the fifty-three months but rather the ten-year maximum for class B felonies. 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." 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. 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. 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. 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. However, she did not elaborate on what that political check might be.

C. Booker Makes It Official

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

---

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.
116 Id. (commenting on Justice O'Connor's dissent).
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. These courts were not making any judicial findings of fact whatsoever. 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. The Court agreed to hold a special session to determine the constitutionality of the Guidelines. The Court granted certiorari in two cases, *United States v. Booker* and *United States v. Fanfan*. 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. 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. Despite the fact that the *Blakely* Court had stated that the Guidelines were not at risk of being declared unconstitutional, the Court found that they were indistinguishable from the sentencing scheme that the State of Washington employed. 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. Thus, the Guidelines were not entirely eliminated.
In total, five opinions were issued, accumulating over 100 pages.\textsuperscript{130} The remedial opinion specifically stated that the decision would apply to all cases on direct review at the time of the decision.\textsuperscript{131} The Court further stated that not all cases would require a remand and a new sentencing hearing.\textsuperscript{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.\textsuperscript{133} The Court simply referred to "ordinary prudential concerns."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{137}

The typical plain-error case places the burden of showing prejudice on the appellant.\textsuperscript{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.\textsuperscript{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."\textsuperscript{140} However, the Court specifically

\textsuperscript{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)


\textsuperscript{131}See id. at 268 (Breyer, J., for the Court in part).

\textsuperscript{132}Id.

\textsuperscript{133}See Jenkins, supra note 6, at 821.

\textsuperscript{134}Olano, 543 U.S. at 268 (Breyer, J., for the Court in part).

\textsuperscript{135}FED. R. CRIM. P. 52(b).

\textsuperscript{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.

\textsuperscript{137}See Johnson v. United States, 520 U.S. 461, 467 (1997).

\textsuperscript{138}See Olano, 507 U.S. at 734.

\textsuperscript{139}Id. at 735.

\textsuperscript{140}Id.
declined to elaborate on what it meant by either of these categories. 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. 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." 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. Because of this, claims of structural error rarely succeed. 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.

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. 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. 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 . . . ". Any case that was on direct appeal at the time that Booker was announced would satisfy this prong.

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

141 Id.
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).
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).
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. In most circumstances it will be impossible to tell whether the sentence would have been the same. 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.” Most of the circuits assume that if the third prong is met, then the fourth prong is automatically met as well.

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.” 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. This has created a disparity similar to the disparities that Congress attempted to avoid in creating the Sentencing Guidelines. It is a disparity that the Supreme Court has so far declined to address.

A. THE “HARD-LINE” APPROACH

Several circuits have held that traditional plain-error review should apply. 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. Under

---

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.\textsuperscript{162}

B. THE PRESUMPTION-OF-PREJUDICE APPROACH

Other circuits have taken the opposite approach.\textsuperscript{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.\textsuperscript{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.\textsuperscript{165} If the former would have been more favorable to the defendant, then the defendant has shown prejudice.\textsuperscript{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.”\textsuperscript{167}

C. THE SO-CALLED “COMPROMISE” APPROACH

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

In the en banc decision that adopted the “compromise” position, the majority did not even seek to answer the third prong.\textsuperscript{170} Instead, the court took judicial notice of the fact that the defendant had his sentence

\textsuperscript{162}See Nall, supra note 146, at 635.

\textsuperscript{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.

\textsuperscript{164}See Davis, 407 F.3d at 162; Hughes, 401 F.3d at 548; Oliver, 397 F.3d at 369.

\textsuperscript{165}See, e.g., Hughes, 401 F.3d at 548.

\textsuperscript{166} Id.

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

\textsuperscript{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).

\textsuperscript{169}See United States v. Gonzales-Huerta, 403 F.3d 727, 736 (10th Cir. 2005) (en banc).

\textsuperscript{170}See Jenkins, supra note 6, at 815; see also Gonzales-Huerta, 403 F.3d at 736.
enhanced based only on a prior conviction.\textsuperscript{171} In addition, his sentence was on the low end of the scale of what he could have received.\textsuperscript{172} The court assumed that the third prong of the plain-error test was met and proceeded to analyze the fourth prong.\textsuperscript{173} Under the compromise approach, the burden of showing that the error affected the integrity of the proceedings is on the defendant.\textsuperscript{174}

D. The "Limited-Remand" Approach

In \textit{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.\textsuperscript{175} The court acknowledged that different circuits have taken different paths and stated that it benefited from discussions by the other circuits.\textsuperscript{176} The court chose to join the Second, Seventh, and D.C. Circuits in creating a "limited-remand" procedure.\textsuperscript{177}

The Ninth Circuit's limited-remand procedure established a new version of the plain-error standard of review.\textsuperscript{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-\textit{Booker} advisory guidelines.\textsuperscript{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.\textsuperscript{180} The court reasoned that "the power to remand for resentencing necessarily encompasses the lesser power to order a limited remand."\textsuperscript{181}

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

\begin{footnotesize}
\begin{enumerate}
\item[Gonzales-Huerta, 403 F.3d at 738-39.]
\item[Id.]
\item[Id. at 736.]
\item[See Jenkins, supra note 6, at 826.]
\item[United States v. Ameline, 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc) [Ameline III].]
\item[Id.]
\item[Id. at 1079.]
\item[See id.]
\item[Id.]
\item[Id.]
\item[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)).]
\item[Ameline III, 409 F.3d at 1084.]
\item[Id. This will be accomplished by asking defendant's counsel to brief whether the]
\end{enumerate}
\end{footnotesize}
must search the record to determine if it is clear whether the sentence would have been different under the new advisory scheme. In most cases, it will be unclear from the record. If the panel reaches such a dead end, it will order a limited remand.

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

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. This is the approach taken by the "hard-line" circuits. The fatal flaw in this approach is that in essentially every case, it will be impossible to make such a showing. As the majority in Ameline pointed out, the trial judge had no reason to make a record from which the defendant wants to pursue the error. Id.
which the defendant can show prejudice.\textsuperscript{195} Occasionally, a judge might have used the record to express disapproval of mandatory guidelines.\textsuperscript{196} However, this was extremely rare because judges realized that this was a fruitless action.\textsuperscript{197} The sentence was mandatory under the Guidelines whether or not the judge approved.\textsuperscript{198} This gave the court little incentive to express its disapproval with the mandatory Guidelines.\textsuperscript{199} Forcing the defendant to make a showing of prejudice is, in many cases, forcing the defendant to make an impossible showing.\textsuperscript{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."\textsuperscript{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.\textsuperscript{202} To establish plain error, a defendant must make some showing of prejudice.\textsuperscript{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.\textsuperscript{204} In addition, sentencing hearings are lengthy.\textsuperscript{205} A judge must examine all evidence that is part of the presentence report and hear any additional evidence that a defendant may present.\textsuperscript{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

\begin{footnotesize}
\begin{tabular}{l}
\textsuperscript{195} See Ameline III, 409 F.3d at 1084. \\
\textsuperscript{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). \\
\textsuperscript{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. \\
\textsuperscript{198} 18 U.S.C.A. 3553(b)(1) (West 2007). \\
\textsuperscript{199} See Judge Henderson Interview, supra note 196. \\
\textsuperscript{200} See United States v. Paladino, 401 F.3d 471, 484 (7th Cir. 2005). \\
\textsuperscript{201} Id. \\
\textsuperscript{203} FED. R. CRIM. P. 52(b). \\
\textsuperscript{204} But see Nall, supra note 146, at 621 (reaching the opposite conclusion). \\
\textsuperscript{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. \\
\textsuperscript{206} See FED. R. CRIM. P. 32(i).
\end{tabular}
\end{footnotesize}
did provide.\textsuperscript{207} The Court stated that not "every appeal will lead to a new sentencing hearing."\textsuperscript{208}

The so-called "compromise" approach adopted by the Tenth Circuit is no compromise at all.\textsuperscript{209} The court refused to address the standard regarding the showing required to establish prejudice.\textsuperscript{210} Instead, the Tenth Circuit jumped straight to the fourth prong.\textsuperscript{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.\textsuperscript{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.\textsuperscript{213} If this showing is made, then the defendant has met the third prong.\textsuperscript{214} In essence, the so-called "compromise" is nothing more than taking the hard-line approach.\textsuperscript{215} For example, Judge Michael McConnell examined the difficulty for a defendant to make a showing that would satisfy the Tenth Circuit's approach.\textsuperscript{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.\textsuperscript{217} Of these cases, every defendant received a new sentence and over half had their sentences reduced by more than forty percent.\textsuperscript{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
the other three options. This approach allows the defendant a chance at making a showing of prejudice without inappropriately shifting the burden to the government. 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.

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

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

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

---

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.
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. The purpose of plain-error review is to avoid miscarriages of justice because they cast doubt on the integrity of the court. Appellate courts should seek to avoid these injustices whenever possible. In the case of post-

Booker error, the limited-remand approach is neither the most efficient nor the easiest on the defendant. However, with these two competing considerations in mind, it is definitely the best approach.

However, proper use of judicial resources is an issue of serious concern. Federal courts are overburdened. Several of the Federal Rules of Civil Procedure have preserving judicial economy as a goal. For this reason, the court should have imposed a higher burden on the defendant. 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. It is hard to imagine a case that does not meet this burden. 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. Unfortunately, this wastes precious resources in cases in which there is no question that the sentence would have been the same.

---

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.\footnote{But see Nall, supra note 146, at 641 (arguing that there should be no burden on the defendant whatsoever).} 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.\footnote{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.} Yet because this burden should be highly fact-specific, it would be hard to articulate.\footnote{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.} 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.\footnote{See supra note 208 and accompanying text.} These circuits also rely on the presumption of prejudice, which the Supreme Court mentioned in \textit{Olano}\footnote{See generally United States v. Olano, 507 U.S. 725 (1993).} but which the Court has never actually applied.\footnote{See McConnell, supra note 202, at 665.} On the other hand, the circuits that follow the hard-line approach impose a nearly impossible burden on defendants.\footnote{See supra notes 200-201 and accompanying text.} 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.\footnote{See supra note 209 and accompanying text.} The limited-remand approach resolves these two conflicting interests in the
best way possible.\textsuperscript{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.

MICHAEL GUASCO*

\textsuperscript{252} See supra notes 219-246 and accompanying text.

* J.D. Candidate, 2008, Golden Gate University School of Law, San Francisco, CA; B.A. Politics, 2003, Saint Mary’s College of California, Moraga, CA. I would like to thank Daljit Dhani and Megan Kelly for all of their insight and recommendations and the entire Law Review Editorial Board for being there to answer everything from what font to use to substantive law questions. I would also like to thank all of my friends for letting me bounce ideas off of them; you guys are incredible. Most importantly, I would like to thank my beautiful wife, Jenn, for putting up with me and being such a rock of support. I definitely could not do any of this without her. I love you Jenn.