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Booker Defined: Examining the Application of United States v. Booker in the Nation's Most Divergent Circuit Courts

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INTRODUCTION

For much of the twentieth century, the imprisonment of individuals who have violated criminal codes has been the dominant, and even preferred, form of punishment in American criminal justice. In fact, it is challenging to find examples of the criminal justice system offering meaningful alternatives to incarceration. Moreover, the prominence of prisons and prison life in American television shows, movies, and books reflects the nation’s enduring attachment to this means of dealing with its criminals.

Yet the belief that offenders also should be treated fairly has been equally popular with Americans, and since its birth, the United States has endeavored to make this ideal a reality. These efforts have led to such accomplishments as the passage of the Sixth Amendment, which guarantees that offenders receive fair trials, and the funding of public defender offices, which ensures that criminal defendants have the assistance of counsel.

Unfortunately, not all of America’s efforts to ensure just punishment have been successful. In particular, the Federal Sentencing Guidelines ("Guidelines") have had disappointing effects. Originally created to ensure that
similar offenses resulted in similar punishments, the Guidelines established sentencing ranges for all federal offenses and instructed judges on how to compute the appropriate sentence for each defendant. However, the Guidelines proved to be flawed. Their requirement that judges calculate the appropriate sentence using their own findings of fact regarding a defendant's conduct resulted in sentences in excess of those warranted by jury verdicts.

This, in turn, raised Sixth Amendment concerns as defendants were being sentenced based on facts that had not been proven to a jury.

In an effort to correct the negative effects of the Guidelines, the Supreme Court in United States v. Booker, 543 U.S. 220 (2005), held that the Guidelines were unconstitutional and should be treated as advisory rather than mandatory. Given that the Guidelines had been in effect, virtually without change for nearly twenty years, the Court's ruling in Booker is the most significant reform of sentencing practices in a generation. The critical question now is, what happens next? Although it will likely be years before this question can be fully answered, this Note seeks to analyze how some courts are beginning to deal with Booker-related issues, and what this might mean for sentencing in the future.

In Part I of this Note, I will briefly discuss the history of the prison system in America and the ideas that guided its twentieth-century development. In Part II, I will examine the creation of the Federal Sentencing Guidelines and how they worked in practice. Part III of the piece will describe the events that led to the eventual demise of the Guidelines. Part IV will discuss how the Fourth and Ninth Circuit Courts of Appeals are handling Booker-related issues. And Part V will conclude by exploring the role of policy in influencing the courts' decisions regarding Booker-based appeals.

1. See Mistretta v. United States, 488 U.S. 361, 367, 369 (1989) (noting that the Sentencing Reform Act created the Commission "to devise guidelines to be used for sentencing" and to "promulgate determinative-sentence guidelines").

2. See United States v. Watts, 519 U.S. 148 (1997). Section 1B1.3 of the Guidelines sets forth the "Relevant Conduct" provision, which directs the sentencing judge to consider:

   (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant;

   (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation of the offense, or in the course of attempting to avoid direction or responsibility for that offense...

U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004). "The relevant conduct provisions are designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional." United States v. Witte, 515 U.S. 389, 402 (1995) (citation omitted).
THE EARLY PRISON MODEL

A. Justifications for Incarceration

In the early days of colonial America, individuals convicted of crimes were punished predominately by death, bodily affliction, or fines. This system of punishment was influenced by contemporary English practices. At the time, the English viewed crime as an offense against the state. The best way to rectify such an offense was for the state to administer corporal punishment and become the recipient of monies extracted from offenders. Punishments such as amputation, flogging, and enslavement were frequently enforced, and the death penalty was assessed for a variety of crimes, including those not involving violent acts against a person.

With the coming of the Enlightenment era, however, the American colonies soon replaced corporal punishment with imprisonment. The Enlightenment era spawned utilitarian ideas that led Americans to embrace the notion that individuals are free and responsible agents, capable of autonomously choosing whether or not to violate legal and moral precepts. Just as humans could respond to negative influences by choosing to break the law, they could also respond to measures designed to encourage them to obey the law. Consequently, the American idea of punishment evolved towards inflicting sufficient harm upon offenders to preclude them from choosing to violate the law again.

The system resulting from this idea would come to be known as the “rehabilitation” model of incarceration. Its goals seemed to be accomplished

5. Id. at 581 (citing Furman v. Georgia, 408 U.S. 238, 333-36 (1972) (discussing the ways in which England changed its view of crime in the period following the Norman invasion)).
8. Id. (citing President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 162-63 (1967) (noting that the shift from corporal punishment to imprisonment resulted from changes in philosophy in Western Europe)).
9. Standen, supra note 3, at 581-82 (citing The Challenge of Crime in a Free Society, supra note 8, at 162 (noting that criminals had “deliberately chosen to violate the law because it gave them pleasure or profit”).
10. Id. at 584 (citing Nicholas N. Kittrie, The Right to Be Different: Deviance and Enforced Therapy 20-23 (1971)).
11. Id. (citing The Challenge of Crime in a Free Society, supra note 8, at 162-63 (discussing imprisonment as a way to make lawbreaking painful)).
best by confining criminals to prisons for significant periods of time. The amount of time a criminal should be imprisoned would be indefinite, as it would be impossible to affix a precise date at which a criminal would respond positively to incarceration and be reformed. Furthermore, prison life would be unpleasant to endure, as this would encourage inmates to reflect upon their wrongful behavior and seek to change it.

B. The Triumph of the Rehabilitation Model of Incarceration

The rehabilitation model of punishment continued to increase in popularity, coming to shape most twentieth-century criminal reform in the United States. In 1910, the federal government itself embraced the notion of rehabilitation, when Congress created a parole system for federal prisoners. By the 1960s, the rehabilitation ideal had become the dominant theory of criminal punishment for the entire country.

Modern rehabilitation was based on two beliefs: "first, inmates should be provided an incentive for betterment, and, second, that experts—not judges—should determine when sufficient improvement had taken place." After conviction for a crime, a defendant's punishment would be shaped by both an indeterminate sentence imposed by the judge and a system of parole in which properly informed experts, rather than judges, would ultimately decide when to release the inmate. Under this model, a judge sentencing a defendant was constrained only by the maximum sentence authorized by statute. The judge could impose a prison term of any length up to the statutory maximum, or choose to impose an alternative sanction such as probation. In making her decision, the judge was free to consider any information about the offender or

13. Id. (citing Rubin, supra note 3, at 27-28).
15. Id. at 1313. (citing Peter B. Hoffman, U.S. Parole Commission, History of the Federal Parole System 1 (2003)).
16. Id. (citing Nagel, supra note 12, at 895).
17. Id. at 1314 (quoting Stith & Cabranes, supra note 14, at 17).
18. Id. (citing Stith & Cabranes, supra note 14, at 17-18).
20. Id. at 165. (citing Stith & Koh, supra note 19, at 226 (explaining that "parole authorities were assigned the task of determining the actual release date for most federal prisoners").
the offense.\textsuperscript{21}

In theory, parole would serve as a check on this wide judicial discretion, as parole officers were allowed to correct excessive sentences.\textsuperscript{22} Typically an inmate could be eligible for release on parole after serving one-third of the maximum sentence.\textsuperscript{23} However, it was the parole board’s responsibility to make an individualized assessment of the offender’s needs and progress in determining the exact release date once this milestone had passed.\textsuperscript{24}

As time progressed, serious flaws in this system started to emerge. By the 1970s, empirical research began to show that unfounded disparities existed on both federal and state levels in sentencing and parole.\textsuperscript{25} Moreover, the harsh environment of many prisons made them difficult places to foster rehabilitation, even for inmates committed to reforming themselves.\textsuperscript{26} Nevertheless, the rehabilitation model remained largely unchanged for many years.\textsuperscript{27}

\section*{II \hspace{1em} THE BIRTH OF THE FEDERAL SENTENCING GUIDELINES}

\textit{A. The Failure of the Rehabilitation Model}

Towards the end of the 1960s and early part of the 1970s, the rehabilitation model came under increasing attack as both conservatives and liberals found fault with existing sentencing practices.\textsuperscript{28} Conservatives believed that liberal judges were too free to impose lenient sentences, and that social work-oriented parole boards released offenders too early.\textsuperscript{29} Liberals also found judicial discretion troublesome. They believed it led to sentencing disparities in which similar criminal offenders in similar cases received quite different sentences, and that such inconsistencies were influenced by the race and class of defendants.\textsuperscript{30} In addition, liberals doubted the effectiveness of rehabilitation

\begin{itemize}
\item \textsuperscript{21} Id. (citing Stith & Koh, \textit{supra} note 19, at 226 (discussing federal prisoner parole availability)).
\item \textsuperscript{22} Chiu, \textit{supra} note 14, at 1314 (citing Marvin E. Frankel, \textit{Criminal Sentences: Law Without Order} 3-49 (1973)).
\item \textsuperscript{23} Yellen, \textit{supra} note 19, at 165 (citing Stith & Koh, \textit{supra} note 19, at 226 (discussing federal prisoner parole availability)).
\item \textsuperscript{24} Id. (citing Stith & Koh, \textit{supra} note 19 at 227 (explaining that when rehabilitation was viewed as one goal of imprisonment, “parole officers” power to determine a sentence’s duration was seen both as a valuable incentive to prison inmates to rehabilitate themselves and as a vehicle to permit “experts” to determine when sufficient rehabilitation had occurred to warrant release from prison’)).
\item \textsuperscript{25} Chiu, \textit{supra} note 14, at 1314 (citing Stith & Cabrantes, \textit{supra} note 14, at 31).
\item \textsuperscript{26} Yellen, \textit{supra} note 19, at 165.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id. at 165-66.
\item \textsuperscript{30} Id. at 166.
\end{itemize}
and were troubled by the idea that offenders were incarcerated "for their own good." 31

B. The Development of Guidelines

Despite the differences in how liberals and conservatives diagnosed the problems of the sentencing system, leaders of each group came together to reform sentencing practices. 32 This bipartisan alliance culminated with Senators Edward Kennedy, Orrin Hatch, Joseph Biden, and Strom Thurmond's sponsorship of the 1984 Sentencing Reform Act. 33 The goals of the Act were to: (1) reduce unwarranted disparity; (2) assure certainty and severity of punishment; and (3) increase rationality and transparency of punishment. 34 To accomplish these ends, the bill created the United States Sentencing Commission. The Commission was given the power to promulgate "guidelines" establishing sentencing ranges for all federal offenses. 35

In creating the Guidelines, the Commission took several steps to determine the appropriate sentencing range for each crime. First, the Commission grouped comparable crimes into general classes of offenses. 36 The Commission hoped that this would produce a system in which defendants who committed similar crimes would receive similar sentences. 37 Second, the Commission calculated the average time served for each class of crime, analyzing data from over 10,000 sentencing reports and 100,000 federal convictions. 38 It used this information to set the possible baseline sentencing range, referred to as the "Offense Level" in the Guidelines table. 39 Finally, the Commission used this data to integrate a defendant’s criminal history into the sentencing calculus.

The result was the Sentencing Table, a grid 40 containing forty-three

31. Id. (citing Stith & Koh, supra note 19, at 227 (describing liberal critiques of indeterminate sentencing and parole)).
32. Id.
35. Mistretta v. United States, 488 U.S. at 367, 369 (noting that the Sentencing Reform Act created the Commission "to devise guidelines to be used for sentencing" and to "promulgate determinative-sentence guidelines").
37. Id. at 1317.
38. Id. (citing HOFER ET AL., supra note 34).
39. Id.
40. Id. (citing HOFER ET AL., supra note 34, at 15).
“Offense Level[s]” along its vertical axis, and six classes of a “Criminal History Category” along its horizontal axis. The horizontal axis adjusted the severity of a potential sentence based upon the defendant’s past criminal record. The vertical axis “reflect[ed] a base severity score for the crime committed, adjusted for those characteristics of the defendant’s criminal behavior that the Sentencing Commission has deemed relevant to sentencing.” Although not visible in the grid, the Commission identified certain factors associated with each crime that could either increase or decrease defendants’ offense levels, and consequently their ultimate sentences. The more serious the offense and the more extensive the defendant’s criminal history, the longer the sentence would be.

C. The Application of the Guidelines

To determine a defendant’s location on the grid, judges were required to follow instructions in the Guidelines manual that sometimes required them to perform complicated calculations. Although the statute permitted departures from Guidelines-mandated sentencing ranges, such deviations were allowed only when the court found “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”

Perhaps the most controversial feature of the Guidelines was their version of “real offense sentencing.” The Guidelines required a judge to sentence a defendant based upon the totality of the defendant’s conduct, not just the offense with which the defendant was charged. At sentencing, the judge was directed to make critical findings of fact about what the defendant did based on a “preponderance of the evidence” standard. In some instances, the judge’s findings would go beyond the scope of a jury’s guilty verdict, or those facts which a defendant might have admitted at the plea hearing or sentencing. It was this aspect of the Guidelines that would lead to the Court’s decision in Booker to strip the Guidelines of their mandatory authority.

42. Id. at 541 (citing Bowman, supra note 41, at 306).
43. Id. (citing Stith & Cabrantes, supra note 14, at 3).
44. Chiu, supra note 14, at 1317 (citing Hofer et al., supra note 34, at 14).
45. See USSG Sentencing Table, Ch. 5, Pt. A, 18 U.S.C.A.
46. Darmer, supra note 33, at 543 (citing Bowman, supra note 41 at 306).
50. Id.
The following illustrates how judicial findings required under the Guidelines could drastically affect a defendant's sentence. Suppose a jury convicted a criminal defendant of committing a federal bank robbery. Under 18 U.S.C. § 2113(a), the statutory sentencing range for stealing something of value from a bank would be zero to twenty years. In the pre-Guidelines era, a judge could consider a variety of post-conviction evidence before imposing a sentence in the applicable statutory range. Under the Guidelines, however, a sentencing judge would analyze the defendant's conduct using predetermined criminal categories and appurtenant offense levels. The offense levels, adjusted for specified aggravating and mitigating factors and combined with the defendant's criminal history, would produce a Guidelines sentencing range much narrower than the statutory range. For instance, the base offense level for a first-time bank robber convicted under 18 U.S.C. § 2113(a) would yield a Guidelines sentencing range of forty-one to fifty-one months (approximately 3-5 years). But if the judge at sentencing found by a preponderance of evidence that the defendant stole $1,000,000, the offense level would increase, and the Guidelines range would now be sixty-three to seventy-eight months (approximately 5-6 years). It was the constitutionality of this type of sentence enhancement that eventually came into question. In a line of cases examined in Part III of this note, the Supreme Court probed the limits of judicial fact-finding, culminating in Booker's landmark holding rendering the Guidelines advisory.

III

THE EROSION OF THE CONSTITUTIONALITY OF THE GUIDELINES

A. The Problem with the Guidelines

The Commission originally established the Guidelines to uphold one of the underlying principles of the Constitution: fairness. By requiring that judges impose similar sentences for similar crimes, the Guidelines were supposed to eliminate unjust disparities in sentencing. However, the Guidelines proved to be flawed, as they also required judges to make independent findings of fact about a defendant's conduct. This often resulted in defendants unfairly

52. Id.
53. Id.
54. Id.
57. Green, supra note 51; see also U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(7) (2004).
receiving sentences in excess of those warranted by the jury’s verdict. The legal theory is that, where the jury’s guilty verdict did not authorize some incremental portion of the punishment, that part of the sentence was imposed in violation of the Sixth Amendment right to a jury trial.\textsuperscript{58}

The Supreme Court, however, was slow to embrace this theory. It was not until twenty years after the implementation of the Guidelines that the Court acknowledged and tried to resolve the Guidelines’ Sixth Amendment issues. In Booker, the Court announced its solution to sever the mandatory nature of the Guidelines’ sentence enhancements, leaving the Guidelines as merely advisory.\textsuperscript{59} The following cases show the steps leading up to the Court’s ultimate decision.

\textit{B. The First Blow to the Constitutionality of the Guidelines: Apprendi v. New Jersey}

1. Case Background: Apprendi v. New Jersey

One of the first Supreme Court cases to successfully stretch the limits of the Sixth Amendment as applied to sentencing was \textit{Apprendi v. New Jersey}.\textsuperscript{60} \textit{Apprendi} challenged the imposition of an increased sentence based on a judicial finding that the defendant’s crime was motivated by racial bias. The defendant, Charles C. Apprendi, Jr., fired several bullets into the home of an African-American family who had recently moved into a previously all-white neighborhood in Vineland, New Jersey.\textsuperscript{61} Shortly after his arrest, Apprendi admitted that he was the shooter. Although he did not know the occupants of the house personally, he said he did not want them in the neighborhood “because they [were] black in color.”\textsuperscript{62}

Two New Jersey statutes were applicable to Apprendi’s case. One classified the possession of a firearm for an unlawful purpose as a second-degree offense, imposing a sentence of five to ten years in prison.\textsuperscript{63} The other, New Jersey’s hate crime law, allowed imprisonment to be extended from ten to twenty years for second-degree offenses committed with a purpose to intimidate the victim because of race.\textsuperscript{64} In determining whether a biased purpose existed, the trial judge drew conclusions from the preponderance of the evidence, a standard of proof less stringent than the reasonable doubt standard for determining guilt.\textsuperscript{65}

\textsuperscript{58.} Green, \textit{supra} note 51, at 397.
\textsuperscript{60.} 530 U.S. 466 (2000).
\textsuperscript{61.} \textit{Id.} at 469.
\textsuperscript{62.} \textit{Id.}
\textsuperscript{63.} \textit{Id.} at 468.
\textsuperscript{64.} \textit{Id.} at 468, 469.
\textsuperscript{65.} \textit{Id.} at 468.
Apprendi pled guilty to two counts of possession of a firearm for an unlawful purpose. The trial judge then held an evidentiary hearing to determine Apprendi's purpose for the shooting. After hearing testimony from character witnesses, the police officer who arrested Apprendi, and Apprendi himself, the judge concluded that the crime was racially motivated. Consequently, the hate crime enhancement applied. The judge sentenced Apprendi to twelve years in prison on the count relating to the shooting – two years above the maximum sentence authorized by the firearms-possession statute alone.

2. The Holding: Apprendi v. New Jersey

In a five-to-four decision written by Justice John Paul Stevens, the Supreme Court held that New Jersey's hate crime statute violated the Due Process Clause of the Fourteenth Amendment because it authorized a judge to impose a longer sentence than the maximum that could be given based on the jury's factual determination. As support, the Court cited its prior holding in Jones v. United States, which held that any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Hesitant, however, to undermine judicial discretion in sentencing completely, the Court noted that its decision allowed a judge to consider various sources in determining a sentence so long as her discretion "was bound by the range of sentencing options prescribed by the legislature."

3. The Dissenters: Apprendi v. New Jersey

Some dissenters in Apprendi, particularly Justice Sandra Day O'Connor, believed the Court's decision would call into question the constitutionality of "federal and state determinate-sentencing schemes . . . unleash[ing] a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part." In fact, Apprendi was to have no such effect. Just as the Court in Apprendi ruled on the appellant's claim without ruling on the constitutionality

66. Apprendi, 530 U.S. at 469-70.
67. Id. at 470.
68. Id. at 471.
69. Id.
70. Id.
71. Id. at 468.
72. Apprendi, 530 U.S. at 476.
73. Id.
74. Id. at 481.
75. Id. at 550, 551 (O'Connor, J., dissenting).
of the Guidelines, the Court applied *Apprendi* to two subsequent cases, *Ring v. Arizona* and *Harris v. United States*, without raising the constitutionality of the Guidelines or realizing the fears of the *Apprendi* dissenters. In fact, no federal court ever found the Guidelines unconstitutional based solely on *Apprendi*.

C. The Second Blow to the Constitutionality of the Guidelines:
Blakely v. Washington

I. Case Background: Blakely v. Washington

After *Apprendi*, the next major application of the Sixth Amendment to sentencing procedures occurred in *Blakely v. Washington*. *Blakely* invalidated a state sentencing scheme that allowed a judge to increase the defendant’s sentence after finding that he acted with deliberate cruelty. Ralph Howard Blakely, Jr. abducted his estranged wife from their home in rural Washington, “binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck.” He ordered their thirteen-year-old son, Ralph, to follow them in another car, threatening to shoot the boy’s mother if he did not do so. Although the boy escaped, Blakely’s wife remained captive until her husband arrived at a friend’s house. Blakely was arrested after his friend called the police. He pled guilty to reduced charges of second-degree kidnapping involving domestic violence and use of a firearm. Blakely entered a guilty plea admitting the elements of second-degree kidnapping and the domestic violence firearm allegations, but no other relevant facts.

The state of Washington utilized its own sentencing guidelines. Three provisions of the State’s guidelines applied to Blakely. First, Washington state law provided a ten-year maximum sentence for class B felonies such as second-degree kidnapping. Second, the Washington guidelines limited prison time
for a defendant convicted of second-degree kidnapping with a firearm to a "standard range" of forty-nine to fifty-three months. Third, a judge was allowed to impose a sentence above the "standard range" if he found "substantial and compelling reasons justifying an exceptional sentence." However, such reasons must take into account "factors other than those which are used in computing the standard range sentence for the offense." In addition, when a judge imposed an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it.

Upholding its side of Blakely's plea agreement, the State of Washington recommended a sentence of forty-nine to fifty-three months. However, after hearing the victim's description of the kidnapping, the judge decided to impose an exceptional sentence of ninety months. The judge justified his departure from the standard range sentence for Blakely's crime on the ground that Blakely had acted with "deliberate cruelty," a recognized basis for enhanced sentencing in domestic-violence cases.

2. The Holding: Blakely v. Washington

In a five-to-four decision written by Justice Antonin Scalia, the Supreme Court held that Washington's sentencing procedure denied Blakely his Sixth Amendment right to have a jury determine all facts relevant to his sentence. Although Blakely's ninety-month sentence still fell within the statutory maximum of ten years set for class B felonies, the Court found this fact immaterial. The majority stated that the "statutory maximum" for Apprendi purposes is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Under this standard, Blakely's sentence was invalid.

3. The Dissenters: Blakely v. Washington

Once again, Justice O'Connor led the dissenters in predicting an ominous future for state and federal sentencing guidelines. She wrote that the Court's
decision "cast doubt over . . . all" sentencing guidelines.\textsuperscript{101} In addition, Justice O'Connor feared for the constitutionality of sentences already imposed under sentencing guidelines, claiming that, "tens of thousands of criminal judgments are [now] in jeopardy."\textsuperscript{102} Although many courts did go on to invalidate the Federal Guidelines after Blakely,\textsuperscript{103} it can hardly be said that Blakely destroyed the Guidelines, or that the courts were deluged with challenges to existing federal sentences. This is because, as in Apprendi, the Court made it clear that the Federal Guidelines were not before it, and therefore its decision was not to be construed as expressing an opinion on them.\textsuperscript{104}

\textbf{D. The Death of the Guidelines: United States v. Booker}

With the Court's decisions in Apprendi and Blakely, the life of the Federal Sentencing Guidelines appeared to be drawing to a close. Although the Court had craftily avoided addressing the issue of the Guidelines' ultimate constitutionality in the past, each new Sixth Amendment challenge made it harder to do so. Finally, in United States v. Booker,\textsuperscript{105} the Court ruled on the validity of the Federal Sentencing Guidelines. In Booker, the Court consolidated two drug cases to determine if the Guidelines violated the Sixth Amendment.\textsuperscript{106}

\textit{1. Case Background: United States v. Booker}

In the first case, United States v. Booker, defendant Freddie Booker was charged with possession and intent to distribute at least fifty grams of cocaine base (crack).\textsuperscript{107} After hearing evidence that he had 92.5 grams in his duffle bag, a jury returned a guilty verdict.\textsuperscript{108} The relevant statute prescribed a minimum sentence of ten years in prison and a maximum sentence of life.\textsuperscript{109} Based on Booker's criminal history and the quantity of drugs found by the jury, the Federal Sentencing Guidelines required the trial judge to select a "base" sentence ranging from a minimum of 210 months in prison to a maximum of 262.\textsuperscript{110} The judge, however, found by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he also was

\begin{itemize}
  \item \textsuperscript{101} Id.
  \item \textsuperscript{102} Id. at 326.
  \item \textsuperscript{104} Blakely, 542 U.S. at 305.
  \item \textsuperscript{105} United States v. Booker, 543 U.S. 220 (2005).
  \item \textsuperscript{106} Id. at 226.
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id.
\end{itemize}
guilty of obstructing justice.\textsuperscript{111} Given these new findings, the Guidelines then mandated that the judge select a sentence between 360 months and life imprisonment.\textsuperscript{112} The judge sentenced Booker to thirty years in prison, instead of the sentence of twenty-one years and ten months that he could have imposed based solely on the facts proven to the jury.\textsuperscript{113}

On appeal, the Seventh Circuit held that this application of the Guidelines conflicted with \textit{Apprendi}.\textsuperscript{114} It relied on the Court’s holding in \textit{Blakely} that “the ‘statutory maximum’ for \textit{Apprendi} purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”\textsuperscript{115} The Seventh Circuit found that the sentence violated the Sixth Amendment, and remanded the case for resentencing.\textsuperscript{116}

2. Case Background: United States v. Fanfan

In \textit{United States v. Fanfan}, the second case considered in the \textit{Booker} opinion, defendant Duncan Fanfan faced drug-related conspiracy charges.\textsuperscript{117} Like Booker, Fanfan was tried before a jury, which found him guilty of conspiring to possess and distribute a specific quantity of drugs, in this case 500 or more grams of cocaine.\textsuperscript{118} Under the Federal Sentencing Guidelines, the jury’s verdict authorized a maximum sentence of seventy-eight months in prison.\textsuperscript{119}

After Fanfan’s conviction, the trial judge conducted a sentencing hearing at which he found additional facts that, under the Guidelines, authorized a sentence in the 188 to 235 month range.\textsuperscript{120} In particular, the judge found that Fanfan was responsible for 2.5 kilograms of cocaine powder and 261.6 grams of crack, and also had been an organizer, leader, manager, or supervisor of criminal activity.\textsuperscript{121} Under the Guidelines, these findings required an enhanced sentence of fifteen to sixteen years instead of the five or six years authorized by the jury verdict alone.\textsuperscript{122}

Relying mostly on \textit{Blakely}, the judge concluded that he could not follow the provisions of the Guidelines “which involve drug quantity and role enhancement.”\textsuperscript{123} He instead followed the sections of the Guidelines that did

\begin{thebibliography}{99}
\bibitem{111} \textit{Booker}, 543 U.S. at 226.
\bibitem{112} \textit{Id.}
\bibitem{113} \textit{Id.}
\bibitem{114} \textit{Id.}
\bibitem{115} \textit{Id.} at 226-28.
\bibitem{116} \textit{Id.} at 228-29.
\bibitem{117} \textit{Booker}, 543 U.S. at 228-29.
\bibitem{118} \textit{Id.}
\bibitem{119} \textit{Id.}
\bibitem{120} \textit{Id.}
\bibitem{121} \textit{Id.}
\bibitem{122} \textit{Id.}
\bibitem{123} \textit{Booker}, 543 U.S. at 228-29.
\end{thebibliography}
not implicate the Sixth Amendment, and imposed a sentence "based solely upon the guilty verdict in [the] case." In response, the government filed a notice of appeal in the First Circuit and a petition for a writ of certiorari before judgment. The Supreme Court granted the petition and consolidated its opinion on the case with that of Booker.

3. The Holding: United States v. Booker

In reviewing the consolidated case on appeal, the Supreme Court considered two questions. First, whether the Sixth Amendment prohibited the Guidelines’ imposition of an enhanced sentence based on the judge’s determination of facts neither found by a jury nor admitted by a defendant. Second, if this did violate the Sixth Amendment, was the mandatory nature of the Guidelines severable, “such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.”

The Court answered these questions in a rare split majority opinion. In a five-to-four opinion written by Justice Stevens, the Court held that its decision in Blakely applied to the Federal Sentencing Guidelines. Thus, the Guidelines’ requirement that judges enhance sentences based on their own findings of fact violated defendants’ Sixth Amendment rights. The Court applied the same reasoning it applied in Blakely and Apprendi to support its holding, emphasizing “the defendant’s right to have the jury find the existence of ‘any particular fact’ that the law makes essential to his punishment.”

In a separate five-to-four decision written by Justice Stephen Breyer, the Court answered the second question, holding that, although the mandatory nature of the Guidelines’ sentence enhancements violated the Sixth Amendment, this provision could be “severed and excised” to make the Guidelines merely advisory. As such, a sentencing court would still be required to consider the Guidelines, but would now have the freedom to “tailor” a sentence “in light of other statutory concerns.” However, in removing the mandatory provisions from the Guidelines, the Court left the Guidelines without a standard of review for sentences challenged on appeal.

124. Id.
125. Id.
126. Id. at 229.
127. Id. at 229 n.1.
128. Id.
129. Booker, 543 U.S. at 225.
130. Id. at 242.
131. Id. at 232.
132. Id. at 244.
133. Id. at 245-46.
134. Id.
135. Booker, 543 U.S. at 260.
To address this problem the Court looked to previous versions of the excised section, concluding that sentences should be reviewed for "unreasonableness." 136

Although Booker appeared to offer a final response to the constitutional concerns surrounding the Guidelines, the decision raised as many questions as it answered. In the wake of the decision, lower courts have struggled to determine what deference to give the now-advisory Guidelines, and how appeals concerning pre-Booker sentencing should be handled.

IV
THE POST-BOOKER EFFECT

In this Part I will examine how two lower federal courts have handled some major sentencing issues that have arisen as a result of Booker. These include the extent to which Booker should be applied retroactively, how courts should address Booker appeals, and whether appeal waivers agreed to before Booker was decided should preclude Booker-based appeals. This is not an exhaustive list of all the issues Booker has sparked, but rather an illustration of the questions that courts are likely to face in the wake of this landmark decision.

In discussing these issues I have chosen to highlight opinions issued by the Fourth and Ninth Circuit Courts of Appeals. My decision to select opinions from these courts stems from their reputations, and consequently the implications their decisions may have. As legal scholars and practitioners are aware, the Fourth Circuit has come to be known as the nation’s most conservative federal court of appeals. Conversely, the Ninth Circuit has a reputation as the most liberal circuit court.

Yet as the following cases demonstrate, despite their differing reputations, these courts share a similar approach to handling appeals arising from Booker. This common view is that pre-Booker defendants have no right to a Booker-based appeal or habeas review. Although it may seem surprising that these two circuits would take a similar bright-line approach on such a major criminal justice issue, it should not be. As will be discussed in Part V, their approaches may in fact be responses to some of the policy concerns Booker implicates.

A. Booker and Retroaction

The first post-Booker issue I will discuss is the extent to which Booker should apply retroactively. This is an important issue because Booker potentially could result in thousands of prisoners being resentedenced. Such a broad application of the decision would place an enormous strain on the American criminal justice system. In exploring this issue I will examine the

136. Id.
Ninth Circuit's opinion in United States v. Cruz and the Fourth Circuit's opinion in United States v. Morris. Although the circuit courts differ in their analyses, they both conclude that prisoners sentenced pre-Booker do not have the right to a Booker-related appeal.

1. Case Background: United States v. Cruz

Susana Cruz was convicted in June 1999 of one count of conspiracy to commit offenses relating to cocaine distribution and possession; three counts of possession with intent to distribute cocaine; three counts of maintaining a place for cocaine distribution and possession; two counts of making premises available for the storage and distribution of cocaine; and one count of interstate travel to promote cocaine trafficking. On January 21, 2000, Cruz was sentenced in district court to 168 months in prison. The Ninth Circuit affirmed Cruz's conviction and sentence on May 7, 2001.

On July 3, 2002, Cruz brought a petition under 28 U.S.C. § 2255 collaterally attacking her sentence. The district court denied her petition and she appealed to the circuit court. While her appeal was pending before the Ninth Circuit, the Supreme Court decided Booker, and on January 14, 2005, the Ninth Circuit issued an order permitting Cruz and the United States to file supplemental briefing on the application of Booker to her case. After reviewing the supplemental briefings, the Ninth Circuit found that the appellant had made a "substantial showing of the denial of a constitutional right." Consequently, the court expanded the certificate of appealability to allow it to consider the Booker issue.

2. Case Analysis and Holding: United States v. Cruz

In considering the Booker issue, the Court found that the district court had relied upon facts not found by the jury to increase the maximum sentence applicable to Cruz under the then-mandatory Federal Sentencing Guidelines. Cruz's 168-month sentence was based in part upon the district court judge's finding that she was responsible for possession or conspiracy to transport a total of 60 kilograms of cocaine, a fact not found by the jury. However, the court

137. United States v. Cruz, 423 F.3d 1119 (9th Cir. 2005).
139. Cruz, 423 F.3d at 1119.
140. See id.
141. See id.
142. See id.
143. See id. at 1119, 1120
144. Id. at 1120
145. Cruz, 423 F.3d at 1120 (quoting 28 U.S.C. § 2253(c)(2)).
146. Id.
147. Id.
148. Id.
declined to remand the case for resentencing and instead held that "Booker is not retroactive, and does not apply to cases on collateral review where the conviction was final as of the date of Booker's publication."\textsuperscript{149}

In reaching its decision, the court analyzed Booker under the Supreme Court's Schriro v. Summerlin decision,\textsuperscript{150} that in order for new rules of constitutional law to have retroactive affect they must either be substantive or procedural.\textsuperscript{151} Moreover, if procedural, they must be "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'"\textsuperscript{152} Citing the court's then-recent application of Schriro to the Supreme Court's holding in Blakely in a case entitled Schardt v. Payne,\textsuperscript{153} the Ninth Circuit tersely concluded that Booker announced a procedural rule, not a substantive one.\textsuperscript{154} The Ninth Circuit then went on to conclude that the Booker rule "fits squarely within the [Supreme] Court's holding [in Schriro] that a 'change in the law requiring that juries, rather than judges, make the factual findings on which a sentence is based [does] not announce a watershed rule of criminal procedure.'"\textsuperscript{155}

The Fourth Circuit reached a similar conclusion in the case of United States v. Morris, in which another defendant sought resentencing based on the new Booker rule.\textsuperscript{156} However, the Fourth Circuit's opinion in Morris more fully illustrates the rationale for denying a retroactive extension of Booker.

3. Case Background: United States v. Morris

In 2002, Debra Lynn Morris pled guilty to conspiring to distribute oxycodone and methadone, being a felon in possession of ammunition, and retaliating against an informant.\textsuperscript{157} The indictment against Morris did not allege an explicit drug quantity, and she did not admit to a specific amount in her plea.\textsuperscript{158} However, at her sentencing hearing, the government presented evidence suggesting that Morris was responsible for 2,460.80 grams of prescription drugs.\textsuperscript{159} Despite Morris's attempts to contest the quantity, the district court accepted the government's argument. Consequently, Morris was sentenced to 200 months on the conspiracy count and concurrent 120-month terms for the other counts.\textsuperscript{160} The Fourth Circuit affirmed Morris's conviction.

\textsuperscript{149} Id. at 1121.
\textsuperscript{150} 542 U.S. 348 (2004).
\textsuperscript{151} Cruz, 423 F.3d at 1120.
\textsuperscript{152} Id. (quoting Schriro, 542 U.S. at 352).
\textsuperscript{153} 414 F.3d 1025 (9th Cir. 2005).
\textsuperscript{154} See Cruz, 423 F.3d at 1120.
\textsuperscript{155} Id. at 1120, 1121.
\textsuperscript{156} United States. v. Morris, 429 F.3d 65 (4th Cir. 2005).
\textsuperscript{157} Id. at 67.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 68.
\textsuperscript{160} Id.
and sentence in June 2003.161

After the Supreme Court decided Blakely in June 2004, Morris filed her § 2255 motion raising several grounds for relief, including invalidation of her sentence under Blakely.162 While defendant’s motion was pending, the Fourth Circuit ruled in United States v. Hammoud163 that Blakely did not apply to Guideline sentences.164 Consequently, the district court rejected Morris’ Blakely claim, and went on to reject her other claims as well.165 Morris appealed the district court decision.166 While her appeal was pending, the Supreme Court decided in Booker that Blakely did apply to the Guidelines.167 The Fourth Circuit therefore granted Morris a certificate of appealability to determine whether Booker would apply retroactively to her conviction.168


The Fourth Circuit held that the rule in Booker did not apply retroactively.169 In making this determination the court applied the three-step analysis the Supreme Court developed in Teague v. Lane to determine whether a new rule of criminal procedure should apply retroactively.170 The analysis requires a court to first determine when a defendant’s conviction became final.171 If the conviction was final before the new rule was decided, the court then must decide if the rule in question is actually “new.”172 If the rule is considered new, then the court must consider whether the rule is of “watershed” magnitude.173 If the rule is considered a watershed rule of criminal procedure, then the new rule shall apply retroactively.

The Fourth Circuit quickly determined that Morris’ conviction was final before the rule in Booker was decided.174 Morris’ conviction had been affirmed in June 2003, “[and] she did not seek certiorari review, so her conviction became final in 2003, well before Booker (or Blakely) was decided.”175

The court then held that the Booker rule was “new.”176 In making this determination the court followed the principle that “a case announces a new

161. Id.
162. Morris, 429 F.3d at 68.
163. 378 F.3d 426 (4th Cir. 2004).
164. Morris, 429 F.3d at 68.
165. Id.  
166. Id.
167. Id. at 69.
168. Id. at 69.
169. Id.  
170. Morris, 429 F.3d at 69.
171. Id.  
172. Id.  
173. Id. at 70.  
174. Id.  
175. Id.  
176. Morris, 429 F.3d at 71. 
rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” 177 The Fourth Circuit pointed out that in *Booker* the Supreme Court stated, “the rule must apply to all cases on direct review.” 178 The circuit court reasoned that the Supreme Court would have found it unnecessary to mention this extension of the rule if precedent already dictated it. 179 Furthermore, the court noted that four dissenting Justices in *Booker* explained why the holding in *Booker* was not compelled by *Apprendi* or *Blakely*, 180 thus casting doubt on the defendant’s argument that *Booker* had been dictated by *Apprendi*. 181

Finally, the court held that although the rule was new, it was not one of watershed magnitude. 182 To qualify as a watershed rule, its infringement must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter judicial understanding of the “bedrock procedural elements” essential to the fairness of a proceeding. 183 With little explanation, the court reasoned that rules such as *Booker* “are not the types of watershed rules implicating fundamental fairness that require retroactive application.” 184 The court determined that sentences would be decided in essentially the same way after *Booker* as they had been before, with the sole difference being that judges would now enjoy a degree of flexibility in applying the Guidelines. 185 Thus, the court concluded, the practical net result of *Booker* was minimal and it therefore did not qualify as a watershed change. 186

5. The Potential Significance of the Courts’ Holdings

The Ninth and Fourth Circuits’ decisions in *Cruz* and *Morris* should quell the fears of some of the Justices that chaos would ensue once the Guidelines were deemed unconstitutional. Although there are sure to be challenges to the applicability of *Booker*, these rulings limit the possibility that *Booker* will jeopardize “tens of thousands of criminal judgments.” 187 Currently, at least nine other circuit courts have considered the issue presented in *Cruz* and *Morris*, and in turn have found that *Booker* does not apply retroactively. 188 For all practical purposes, the holdings in *Cruz* and *Morris* represent the law of the land – yet the accuracy of these decisions remains open to question.

177. *Id.* at 70 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).
178. *Id.*
179. *Id.* at 70-71.
180. *Id.* at 71.
181. *Id.*
183. *Id.* (quoting Tyler v. Cain, 533 U.S. 656, 665 (2001)).
184. *Id.* at 72 (quoting United States v. Sanders, 247 F.3d 139, 148 (4th Cir. 2001)).
185. *Id.* (citing McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005).
186. *Id.*
188. See *Morris*, 429 F.3d at 66.
There are several reasons, for example, to believe that the Fourth Circuit's *Morris* analysis in particular is flawed. The Fourth Circuit reasoned that because the Supreme Court stated in *Booker* that its rule must apply to all cases on direct review, the holding was not dictated by precedent, and thus was "new." 189 This is a rather bold inference from a seemingly rote statement by the Court. It is equally likely that the Court was merely trying to clear up the confusion surrounding its prior rulings in *Apprendi* and *Blakely*.

Like *Booker*, both *Apprendi* and *Blakely* stood for the proposition that increasing a defendant's sentence based on judicial fact-finding was unconstitutional. 190 However, it was unclear whether *Apprendi* and *Blakely* should have retroactive effect. Some courts went on to invalidate the Federal Guidelines after *Blakely*, 191 and some did not. 192 It is entirely possible that in *Booker* the Court was simply trying to clearly state how courts should apply its prior rulings.

In *Morris*, the defendant made just this argument and stressed that *Booker*’s wording seemed to indicate that the Court was reaffirming its *Apprendi* rule. 193 However, the Fourth Circuit dismissed this reasoning, claiming that such language was not necessarily dispositive deciding whether a rule was new. 194 Even if it is not dispositive, it would seem that this language, combined with the confusion surrounding the application of *Apprendi* and *Blakely*, would be enough to permit a court to hold that the *Booker* rule was not new. The court, after all, supported its analysis with the clearly nondispositive fact that four dissenting Justices argued that legal logic did not require the extension of *Apprendi* and *Blakely* to the Guidelines. 195 If the court can use a nondispositive fact to conclude that the *Booker* rule is new, it could just as easily use a nondispositive fact, like the one Morris proffered, to conclude that the rule is not new. In doing so, the court at least would have contextual support for its inference, as it is clear that there was confusion among the lower courts in how to apply *Apprendi* and *Blakely*.

The Fourth Circuit’s rationale for determining that *Booker* is not a rule of watershed magnitude is similarly flawed. The court reasoned that *Booker* was not a watershed change because it moved no decision from judge to jury, did not change the burden of persuasion, and did not fundamentally affect the

189. *Id.* at 70-71.
192. See United States v. Duncan, 381 F.3d 1070 (11th Cir. 2004); United States v. Koch, 383 F.3d 436 (6th Cir. 2004); United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004).
193. See *Morris*, 429 F.3d at 71 n.7.
194. *Id.*
195. *Id.*
accuracy and fairness of the criminal process.\textsuperscript{196} The court’s reasoning, however, is largely based on purely technical truths. Under \textit{Booker}, judges can still make factual determinations that may result in increased sentences.\textsuperscript{197} What \textit{Booker} changed was the Guidelines’ requirement that judges enhance sentences based on these findings of fact.\textsuperscript{198} Yet in relying on such technicalities, the Fourth Circuit failed to realize the real potential of \textit{Booker}. Since judges are no longer required to enhance sentences, they may simply stop doing so, restoring the primacy of the jury’s initial determinations. In this sense, \textit{Booker} may indeed have shifted sentencing decisions from the judge to the jury. Thus, although the courts may have been right to hold that \textit{Booker} does not presently constitute a watershed change, the extent to which judges use their new freedom to refrain from enhancing sentences may produce a very different practical result.

\textbf{B. Booker and Sentences Awaiting Review}

Although both the Ninth and Fourth Circuits have agreed that \textit{Booker} will have no retroactive effect on cases that were final before \textit{Booker} was published, they are split in determining how to apply \textit{Booker} to sentences pending appellate affirmation while \textit{Booker} was being decided. Defendants in many of these cases did not raise a Sixth Amendment violation claim at their district court hearing. However, while they were awaiting decisions on their appeals, the Supreme Court granted certiorari in the \textit{Booker} case, prompting these defendants to amend their claims to include Sixth Amendment violations. Following the Supreme Court’s decision, the circuit courts were then forced to decide how to deal with an unpreserved \textit{Booker} error. How courts come down on this issue is important because if unpreserved \textit{Booker} errors are not appealable, then \textit{Booker} will have a very narrow application. Although both the Fourth and Ninth Circuits determined that defendants such as these had a right to a \textit{Booker} appeal, the courts employed different methods to deal with such appeals. The Fourth Circuit’s approach is best outlined in \textit{United States v. Hughes},\textsuperscript{199} while that of the Ninth Circuit is discussed in \textit{United States v. Ameline}.\textsuperscript{200}

\textit{1. Case Background: United States v. Hughes}

Defendant David Hughes was convicted by a district court for his involvement in a bankruptcy scandal.\textsuperscript{201} According to the facts stated in the

\begin{flushright}
\textsuperscript{196} \textit{Id.} at 72. \\
\textsuperscript{198} See \textit{id.} \\
\textsuperscript{199} 401 F.3d 540 (4th Cir. 2005). \\
\textsuperscript{200} 409 F.3d 1073 (9th Cir. 2005). \\
\textsuperscript{201} \textit{Hughes}, 401 F.3d at 543.
\end{flushright}
opinion, Hughes’s wife, Norma Gerstenfeld, filed for Chapter 11 bankruptcy protection in October 1997. He assisted his wife throughout the proceedings, as she was physically disabled. Hughes filed a number of schedules with the bankruptcy court under penalty of perjury that dramatically underreported the value of Gerstenfeld’s personal property. He also arranged for some of his wife’s assets to be sold at auction without first obtaining permission from the bankruptcy trustee. On two separate occasions, Hughes lied under oath about these improper transactions.

A jury found Hughes guilty of three counts of bankruptcy fraud, and two counts of perjury. At sentencing, the district court grouped the five counts together and calculated the sentence to include enhancements for 1) loss greater than $200,000; 2) more than minimal planning; 3) commission of offense during bankruptcy proceedings; 4) abuse of position of trust; and 5) obstruction of justice. The enhancements to the defendant’s sentence were based upon facts found by the district court judge, not by the jury. Hughes was sentenced to forty-six months in prison. Hughes appealed the district court’s decision, arguing that the court violated his Sixth Amendment rights by imposing a sentence exceeding the maximum authorized by the jury findings alone.


On appeal, the Fourth Circuit held that in light of Booker, Hughes’s sentence should be vacated and remanded for resentencing. In making its decision, the court applied the plain error test. This test allows appellate courts to review claims of error in district court proceedings even if the parties did not bring the error to the district court’s attention when the case was before it. In reviewing for plain error, a court must consider three factors: 1) whether an error occurred; 2) whether the error was plain; and 3) whether the error affected the defendant’s substantial rights, i.e., whether the sentence imposed was longer than it would have been without a Sixth Amendment violation.

202. Id. at 544.
203. Id.
204. Id.
205. Id.
206. Id.
207. Hughes, 401 F.3d at 544.
208. Id.
209. Id.
210. Id.
211. Id. at 545.
212. Id. at 560.
213. See FED. R. CRIM. P. 52(b); Hughes, 401 F.3d at 547.
addition, a court must also evaluate whether the error warrants reversal.\(^\text{215}\)

In its analysis, the Fourth Circuit found that 1) an error occurred, as Hughes’s sentence was based in part on facts found by the judge; 2) the error was plain, as *Booker* made it unconstitutional to impose a sentence greater than the maximum authorized under the Guidelines by the facts found by the jury; and 3) the error affected the defendant’s substantial rights, as the district court imposed a sentence of forty-six months when the maximum sentence permitted by the jury verdict was twelve months.\(^\text{216}\) In addition, the court determined that the exercise of its discretion was warranted, since Hughes’s sentence was nearly four times as long as the maximum sentence authorized by the jury verdict.\(^\text{217}\)

In reviewing a similar case, the Ninth Circuit decided to take a different approach in analyzing an unpreserved *Booker* error. Realizing that the record for most cases will be insufficiently clear to conduct a complete plain error analysis, the Ninth Circuit has chosen to grant a limited remand to district courts instead. This approach is outlined in detail in *United States v. Ameline*.\(^\text{223}\)

### 3. Case Background: United States v. Ameline

Following a plea agreement, defendant Alfred Ameline pled guilty to knowingly conspiring to distribute methamphetamine.\(^\text{218}\) The court-approved plea did not specify the quantity of drugs involved.\(^\text{219}\) In preparation for his sentencing hearing, the probation office prepared a presentence report (PSR) estimating the amount of methamphetamines involved in the defendant’s conduct.\(^\text{220}\) The PSR attributed 1,079.3 grams of methamphetamine to Ameline.\(^\text{221}\) This calculation was based solely on investigative reports reviewed by the probation officer.\(^\text{222}\)

Ameline filed objections to the PSR, but did not challenge the recommended drug quantity enhancement under the Sixth Amendment.\(^\text{223}\) At the sentencing hearing, the district judge treated the PSR as prima facie evidence and found the defendant guilty of possessing 1,603.60 grams of methamphetamine.\(^\text{224}\) Ameline appealed the district court’s decision, contesting

\(^{215}\) *Id.* at 555.

\(^{216}\) *Id.* at 547, 548.

\(^{217}\) *Id.* at 555.

\(^{218}\) *United States v. Ameline*, 409 F.3d 1073, 1075 (9th Cir. 2005).

\(^{219}\) *Id.*

\(^{220}\) *Id.*

\(^{221}\) *Id.*

\(^{222}\) *Id.*

\(^{223}\) *Id.*

\(^{224}\) *Ameline*, 409 F.3d at 1076. The PSR described two additional transactions, but the probation officer did not include those transactions in his calculation. The district court, however, included the amounts of the transactions described, thus resulting in finding defendant responsible for 1,603.60 grams instead of 1,079.3.
the propriety of judicial fact-finding under a mandatory sentencing regime.\textsuperscript{225}

Before the three-judge panel of the circuit court reached a decision on Ameline’s appeal, the Supreme Court announced its decision in \textit{Blakely}.\textsuperscript{226} In light of this case, the panel held that the determination of material sentencing facts by the district judge violated Ameline’s Sixth Amendment rights and amounted to reversible plain error.\textsuperscript{227} The court vacated the sentence and remanded with instructions that, if necessary, a jury must determine the amount of drugs attributable to Ameline.\textsuperscript{228}

However, within days of the filing of the panel’s decision, the Supreme Court granted certiorari in \textit{Booker}.\textsuperscript{229} This led the circuit court to defer further action on the case until the Supreme Court announced its decision.\textsuperscript{230} After the Supreme Court’s decision was announced, the three-judge panel affirmed its earlier decision that the district court had committed reversible plain error.\textsuperscript{231} However, the circuit court then decided to vacate the panel opinion and grant rehearing en banc.\textsuperscript{232}


The Ninth Circuit remanded the case to the district court for the limited purpose of deciding whether the judge would have given Ameline a different sentence had the Guidelines not been mandatory.\textsuperscript{233} Like the Fourth Circuit, the Ninth Circuit also began its analysis by examining the three prongs of the plain error test.\textsuperscript{234} If all three conditions were satisfied, the court could then “exercise its discretion to notice a forfeited error that seriously affects the fairness, integrity, or public reputation of the judicial proceeding.”\textsuperscript{235}

The court found that the first two prongs were easily met, as the district judge enhanced Ameline’s sentence in reliance upon judge-made findings under the then-mandatory Guidelines.\textsuperscript{236} However, the court had difficulty determining whether the error affected Ameline’s “substantial rights,” that is, whether Ameline’s sentencing had been affected by the “erroneous enhancement” of his sentence under the Guidelines.\textsuperscript{237} The difficulty arose because the record in \textit{Ameline}, like that in most pre-\textit{Booker} cases, did not say
how the district court would have proceeded had the Guidelines been advisory rather than mandatory at the time of sentencing.\textsuperscript{238} This is because both the district court and the parties were operating under the reasonable belief that the Guidelines were mandatory.\textsuperscript{239} There was no practical reason yet for a judge to express a view on the Guidelines, since she could not have expected that it would make a legal difference.\textsuperscript{240}

The Ninth Circuit determined that the best way to deal with this uncertainty is to simply remand to the district court to answer the question whether the sentence would have been different had the court known the Guidelines were advisory.\textsuperscript{241} If the district court responds affirmatively, the defendant’s sentence may be viewed as an illegal sentence and thus a miscarriage of justice.\textsuperscript{242} If so, the original sentence will be vacated and the district court will resentence the defendant in accordance with the Guidelines as modified by \textit{Booker}.\textsuperscript{243} If, however, the district court responds in the negative and explains its reasons on the record, the original sentence will stand, provided it is reasonable.\textsuperscript{244}

The court rationalized that this would be the best approach in dealing with unpreserved \textit{Booker} errors where it is unclear if the error had a substantial effect on the defendant’s sentence.\textsuperscript{245} It would be a mistake, the court determined, to infer from a district court’s silence that it would not have made a different decision under a different sentencing scheme.\textsuperscript{246} Likewise, it “would be a mistake . . . to attribute fresh meaning” to “stray comments” a district judge may have “made in an entirely different context.”\textsuperscript{247} Thus, the Ninth Circuit ruled that this limited remand procedure would be the protocol for assessing the existence of plain error in pre-\textit{Booker} sentencing appeals.\textsuperscript{248}

5. The Potential Significance of the Courts’ Holdings

The main difference between the Fourth Circuit and Ninth Circuit approaches is that the Fourth Circuit decides based on the record whether a defendant’s substantial rights were affected by a \textit{Booker} error, while the Ninth leaves that decision for the district judge to make.\textsuperscript{249} The Ninth Circuit

\begin{itemize}
\item \textsuperscript{238} \textit{Id.} at 1078-79.
\item \textsuperscript{239} \textit{Id.} at 1079.
\item \textsuperscript{240} \textit{Id.}
\item \textsuperscript{241} \textit{Id.}
\item \textsuperscript{242} \textit{Ameline}, 409 F.3d at 1079.
\item \textsuperscript{243} \textit{Id.}
\item \textsuperscript{244} \textit{Id.}
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.} at 1082.
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{248} \textit{Ameline}, 409 F.3d at 1079.
\item \textsuperscript{249} \textit{See} United States v. Hughes, 401 F.3d 540, 547-48 (4th Cir. 2005); \textit{Ameline}, 409 F.3d at 1079.
\end{itemize}
rationalizes its approach by claiming that only the district judge who sentenced a defendant can speak to the degree that the Guidelines affected the defendant's sentencing.  

Although the Ninth Circuit's approach seems to be the more conscientious of the two, one could argue that it is actually unnecessary. For example, in *Hughes* the Fourth Circuit decided that the defendant's sentence itself proved the defendant's substantial rights were affected by the Guidelines. In making that determination, the court simply looked to see whether the defendant's sentence exceeded the maximum permitted by the jury. Since it did, the court determined that the sentence must have been the result of the district judge's sense of obligation under the Guidelines to enhance the defendant's sentence based on facts revealed at the sentencing hearing.

Arguably, if the sentence exceeds the one the jury recommended based on its own fact-finding, then one can be certain that it was unduly influenced by the Guidelines. Otherwise, why would the judge increase a defendant's sentence? Of course, it may be the case that the judge may have increased the defendant's sentence not because she felt obligated to do so under the Guidelines, but simply because she wanted to. Perhaps the facts presented at the sentencing hearing led the judge to believe that a harsher sentence was necessary, albeit not required. After all, *Booker* does not ban judges from enhancing sentences based on their own factual determinations; it only prevents the Guidelines from requiring that they do so.

Under the Ninth Circuit's approach, if the district judge responds to the limited remand by saying that defendant's sentence would have been the same regardless of the Guidelines, the sentence would still be subject to review by the appellate court for reasonableness. Likewise, under the Fourth Circuit's approach, if the government successfully argues that the judge did not increase the defendant's sentence because of the Guidelines, the sentence is subject to reasonableness review by the circuit court. Thus, regardless of whether the district judge is given a chance to explain her reasoning in enhancing a defendant's sentence, the appellate court is likely to review the sentence for reasonableness anyway.

The Fourth and Ninth Circuit holdings raise one additional issue. Assuming that plain error is found under either of the approaches, the reviewing court then must determine whether the error warrants reversal. In

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250. *Ameline*, 409 F.3d at 1079.
251. *Hughes*, 401 F.3d at 548-49.
252. *Id.* at 547-48.
253. *Id.*
255. See *Ameline*, 409 F.3d at 1085.
256. See *Booker*, 543 U.S. at 260-61
257. See *Hughes*, 401 F.3d at 555; *Ameline*, 409 F.3d at 1078.
making this determination, the court not only has to consider whether the sentence was reasonable, but it must also consider whether the error affected the fairness of the judicial proceeding. These somewhat ambiguous requirements may result in divergent sentences being affirmed.

For instance, what if Hughes’s original sentence had not been four times the maximum time authorized by the jury verdict, but only one month longer? Could it still be said that the error was so unreasonable as to warrant reversal? One court’s decision on this issue could vary from that of another’s depending on the significance it attaches to such an increment. But should it? It would seem that any illegal increase in a defendant’s sentence automatically should be viewed as unreasonable, affecting the fairness of the proceeding, and warranting reversal. This is an issue that is likely to be litigated intensely in the future, possibly forcing the Supreme Court to strengthen the review standard for Booker appeals.

C. Booker and Appeal Waivers

The third major issue courts are likely to face is whether a pre-Booker appeal waiver bars a post-Booker sentencing challenge. In federal court, a defendant can waive the right to appeal his sentence pursuant to a plea agreement. Such waivers are deemed valid if the defendant entered into the agreement knowingly and voluntarily. However, even a knowing and voluntary waiver of this right cannot prohibit the defendant from challenging a few kinds of narrowly construed errors. For example, a defendant cannot waive his right to appellate review of an excessive sentence imposed because of a constitutionally impermissible factor such as race. A defendant’s waiver is implicitly conditioned on the assumption that the proceedings following entry of the plea will fall within constitutional limitations.

How will such waivers work in the context of Booker? Can a defendant who entered into a plea agreement when the Guidelines were still mandatory be said to have knowingly and intelligently waived an appeal under Booker? According to both the Fourth and Ninth Circuits, the answer is yes. Both circuits have decided that Booker appeals should not be granted to prisoners who waived their right to an appeal before Booker was announced, once again limiting the rights of defendants sentenced before Booker. The Fourth Circuit confronted this issue in United States v. Johnson, while the Ninth Circuit.

258. See Booker, 543 U.S. at 260-61.
260. Id.
261. Id.
262. Id.
263. Id.
264. Id. at 137.
dealt with it in *United States v. Cardenas*.265

1. Case Background: United States v. Johnson

In *Johnson*, defendant Tyronski Johnson was arrested in July 2003 at the scene of a car accident after police officers found an unregistered gun in his glove compartment.266 While still at the site of the accident, Johnson refused to take a sobriety test. Subsequently, police officers took him to a hospital to screen his blood for illegal substances.267 Johnson tested positive for phencyclidine (PCP) and a derivative of marijuana.268

Johnson was charged with possession of a firearm by a convicted felon (Count 1), possession of marijuana (Count 2), and operating a motor vehicle while under the influence of drugs (Count 3).269 He then entered into a plea agreement with the government agreeing to plead guilty to Counts 1 and 3 in exchange for the Government agreeing to dismiss Count 2 and recommend that the court order Johnson's sentence for Count 3 to run concurrently with his sentence for Count 1.270 As part of the plea, Johnson signed a standard waiver of his appellate rights.271 The district court sentenced Johnson to forty months imprisonment on Count 1 and six months imprisonment on Count 3, to run concurrently with the sentence on Count 1, pursuant to the then-mandatory sentencing guidelines.272

After the Supreme Court issued its decision in *Booker*, Johnson filed a supplemental brief arguing that his sentence should be vacated because the court had imposed it under a mandatory rather than an advisory regime.273 As Johnson had signed an appeal waiver, the Fourth Circuit requested supplemental briefing as to whether that provision of the plea agreement precluded Johnson from raising a *Booker* challenge to his sentence on appeal. In response, Johnson argued that he had not knowingly and intelligently agreed to waive an appeal under *Booker* because his *Booker* challenge fell outside the scope of his appeal waiver.274 Johnson claimed that he could not have waived his right to bring a *Booker* challenge because at the time he pled guilty, "[n]either the [c]ourt, the Government, [n]or [he had] anticipated or had basis to anticipate" that the Supreme Court would subsequently hold the Guidelines advisory rather than mandatory.275

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265. 405 F.3d 1046 (9th Cir. 2005).
266. *Johnson*, 410 F.3d at 141-42.
267. *Id.* at 142.
268. *Id.*
269. *Id.* at 143.
270. *Id.*
271. *Id.*
272. *Johnson*, 410 F.3d at 143.
273. *Id.* at 150.
274. *Id.* at 152.
275. *Id.*

In reviewing Johnson's claim, the Fourth Circuit found that Supreme Court precedent foreclosed this line of argument.276 To support its conclusion, the Fourth Circuit cited Brady v. United States, 397 U.S. 742, 757 (1970), in which the Supreme Court held that "absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."277 In addition, the Fourth Circuit pointed out that "[a] plea agreement, like any contract, allocates risk."278 The possibility of a favorable change in law occurring after a plea is entered into is one of those risks.279 Declining to enforce Johnson's appeal waiver because of a subsequent change in the law would deprive the Government of some of the benefits of its bargain, which in turn could work to the detriment of defendants who might find the Government less willing to offer plea agreements in the future.280 The court therefore affirmed the judgment of the district court and dismissed Johnson's challenge to his sentence.281

Although the Ninth Circuit took a different approach, it reached the same conclusion when faced with the issue of appeal waivers in United States v. Cardenas.282

3. Case Background: United States v. Cardenas

Pursuant to a plea agreement, Martin Cardenas pled guilty to three counts of possessing heroin with intent to distribute, and one count of possessing heroin and cocaine with intent to distribute.283 The agreement subjected him to a mandatory minimum sentence of ten years imprisonment unless he qualified for the safety valve."284 In addition, he agreed to waive the right to appeal his sentence.285 The government agreed to recommend the appropriate Guidelines calculations if the court determined that the mandatory minimum prison sentence did not apply.286

At the defendant's sentencing hearing, the district court determined that

276. Id.
277. Id.
278. Johnson, 410 F.3d at 153.
279. Id.
280. Id.
281. Id.
282. 405 F.3d 1046 (9th Cir. 2005).
283. Id. at 1047.
284. Id., See Criminal Practice Manual, CRPMAN § 103:39 for an explanation of what safety valves are and how they work. In sum, safety valve provisions authorize a sentence to be set below the otherwise applicable statutory minimum for an offense in certain situations.
285. Id.
286. Id.
Cardenas did not qualify for the safety valve and thus sentenced him to the mandatory minimum of ten years imprisonment.\textsuperscript{287} Despite the defendant’s knowing and unequivocal waiver of his right to appeal his sentence, Cardenas appealed, arguing that \textit{Booker} rendered his waiver of appeal of the sentence involuntary and unknowing.\textsuperscript{288}

4. \textbf{Case Analysis and Holding: United States v. Cardenas}

With very little discussion, the Ninth Circuit held that \textit{Booker} does not bear on mandatory minimums and a change in the law does not make a plea involuntary and unknowing.\textsuperscript{289} In support of its decision the court cited a previous Ninth Circuit opinion, \textit{United States v. Johnson},\textsuperscript{290} in which the court denied another defendant’s challenge to the validity of his appeal waiver.\textsuperscript{291} The court in \textit{Johnson} reasoned that because the defendant’s waiver stated that it applied to “any sentence imposed by the district judge,” it was not limited to issues arising from the law as it stood at the time of his plea.\textsuperscript{292} In addition, the court found that just because the defendant did not foresee the specific issue he later sought to appeal, that did not mean he had not knowingly and voluntarily agreed to the waiver.\textsuperscript{293}

5. \textbf{The Potential Significance of the Courts’ Holdings}

The Fourth and Ninth Circuits’ decisions seem to have foreclosed the possibility of a defendant obtaining a new sentence under \textit{Booker} if he previously had agreed to an appeal waiver. However, both courts’ analyses on the issue are so weak that they, or perhaps the Supreme Court, should consider whether they in fact have reached the right conclusion.

For example, in deciding \textit{Johnson}, the Fourth Circuit relied on the Supreme Court’s holding in \textit{Brady} that a guilty plea does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.\textsuperscript{294} \textit{Brady} dealt with a defendant who appealed a plea of guilty, claiming that he had been pressured by his counsel and falsely told that his plea would result in a reduced sentence.\textsuperscript{295} In \textit{Johnson}, however, the defendant did not appeal his guilty plea.\textsuperscript{296} Rather, the defendant in \textit{Johnson} appealed the validity of his appeal waiver after the Supreme Court ruled that the Guidelines

\textsuperscript{287} Id. at 1047-48.
\textsuperscript{288} Cardenas, 405 F.3d at 1048.
\textsuperscript{289} See id.
\textsuperscript{290} 67 F.3d 200 (9th Cir. 1995).
\textsuperscript{291} Cardenas, 405 F.3d at 1048.
\textsuperscript{292} Johnson, 67 F.3d at 202-03; Cardenas, 405 F.3d at 1048.
\textsuperscript{293} Johnson, 67 F.3d at 202-03.
\textsuperscript{294} United States v. Johnson, 410 F.3d 137, 152 (4th Cir. 2005).
\textsuperscript{295} Brady v. United States, 397 U.S. 742, 744 (1970).
\textsuperscript{296} Johnson, 410 F.3d 137, 150 (4th Cir. 2005).
under which he was sentenced were unconstitutional. This was a different issue than that before the Court in Brady, as the Brady decision came in 1970, well before the creation of the Guidelines. Thus the circuit court’s reliance on Brady for the proposition that a change in the law does not affect the validity of appeal waivers was misplaced.

In addition, the Fourth Circuit claimed that the possibility of a favorable change in the law is one of the risks one takes when taking a plea agreement. Was the Booker decision merely a change in the law? The Fourth Circuit took for granted that it was, yet Booker did not just alter how sentences were to be decided: it declared that the previous way in which they were decided was unconstitutional. Such a pronouncement amounts to more than just a favorable change of the law. Furthermore, the Fourth Circuit itself stated that a defendant’s agreement to waive appellate review is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with the Constitution. Although both the defendant and the government believed at the time the proceedings were conducted within constitutional limitations, Booker has revealed since that they were not. It seems only right that steps based on assumptions that are now contrary to Booker should be corrected.

In Cardenas, the Ninth Circuit similarly erred in declining to uphold pre-Booker appeal waivers. The court’s holding drew on a case it decided ten years earlier, United States v. Johnson. In Johnson, the defendant attempted to appeal his sentence on the basis of a new crime bill. The crime bill allowed for certain drug offenders to be sentenced without regard to statutory minimums. The court reasoned that because the defendant signed an appeal waiver stating that it would apply to “any sentence imposed by the district judge,” it was not limited to issues arising from the law as it stood at the time of his plea.

However, the issue that post-Booker defendants are raising before appellate courts is significantly different from that argued in Johnson. The defendant in Johnson wanted to apply a new affirmative statute to his sentence. Cardenas and other similarly situated defendants did not ask the courts to apply a new statute to their sentences, but rather that the courts simply

297. Id.
298. See Brady, 397 U.S. at 742.
299. Johnson, 410 F.3d at 153.
301. See Johnson, 410 F.3d at 151.
302. United States v. Cardenas, 405 F.3d 1048 (9th Cir. 2005).
303. United States v. Johnson, 67 F.3d 201 (9th Cir. 1995).
304. Id.
305. Id. at 202.
306. Id. at 201.
correct the now-unconstitutional application of the Guidelines.\textsuperscript{307} Such a request should not be foreclosed on account of appeal waivers because, unlike in \textit{Johnson}, the issue is not just one that the defendant \textit{did not} foresee, but one that, given the unexpected holding in \textit{Booker}, the defendant \textit{could not} have foreseen. Thus, the Ninth Circuit, along with the Fourth Circuit, should reconsider the issue of pre-\textit{Booker} appeal waivers in light of the weaknesses of the two courts' analyses.

\textbf{V} \\
\textbf{CRITIQUE OF THE CIRCUIT COURTS' DECISIONS}

Despite the ideological differences between the Fourth and the Ninth Circuits, they still see eye-to-eye on many of the important appeal issues \textit{Booker} raises. In sum, they agree that defendants sentenced before \textit{Booker} do not have a right to use the case as a basis to appeal their sentences. Considering the magnitude of the \textit{Booker} decision and the criminal justice issues it implicates, some might find the Fourth and Ninth Circuits alliance on \textit{Booker} issues surprising. I believe, however, that the courts' policy concerns regarding judicial efficiency and expanding the rights of convicted defendants are likely to have led them to reach the same conclusion. And considering the importance of these concerns, the courts' decisions are perhaps not all that surprising.

One concern these courts may share is whether a broad reading of \textit{Booker} would require extensive resentencing of current inmates. Justice O'Connor's presaged this concern in her \textit{Apprendi} dissent.\textsuperscript{308} The majority in \textit{Apprendi} held that a state statute that authorized the increase of a defendant's sentence based on judicial fact-finding was unconstitutional.\textsuperscript{309} In her dissent, Justice O'Connor expressed concern that the Court's decision would call into question the constitutionality of "federal and state determinate-sentencing schemes... unleash[ing] a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part."\textsuperscript{310}

It appears from the Fourth and Ninth Circuits' decisions that these courts may have shared Justice O'Connor's fears. By ruling that \textit{Booker} does not apply retroactively, and that pre-\textit{Booker} appeal waivers are valid, the circuit courts have headed off the potential onslaught of countless petitions from defendants requesting resentencing. Allowing all convicted defendants who were sentenced in the last twenty years to appeal their sentences would put an enormous strain on the courts, compromising their ability to operate efficiently. It is not unlikely that in addition to considering the case law itself, the courts also gave thought to the pragmatic implications of broadly applying such a

\textsuperscript{307} See Cardenas, 405 F.3d at 1048.
\textsuperscript{308} 530 U.S. 466 (2000).
\textsuperscript{309} \textit{id.} at 476.
\textsuperscript{310} \textit{id.} at 550-51 (O'Connor, J., dissenting).
The courts' decision to deny retroactivity might have also been influenced by the fact that Booker appeals concern defendants who have already been found guilty. The principal example of a case that has passed the Teague analysis, and thus was deemed worthy of being applied retroactively, is Gideon v. Wainwright. In Gideon, the Supreme Court held that state courts were required to provide lawyers for indigent defendants, because of the essential role of counsel at trial. The defendants in Booker, however, are different from those affected by Gideon. For as some commentators noted in regards to the rule in Apprendi (which is essentially the same as the rule in Booker), "unlike deprivations of counsel, [the Apprendi rule] does not protect the blameless from punishment, but instead protects the unquestionably blameworthy from unauthorized amounts of punishment."

This link between guilt and appropriate sentencing may have influenced the courts' decision not to apply Booker retroactively. The courts may have reasoned that one major result from Booker is that convicted defendants may now receive shorter sentences. Some might argue that such a result is tolerable because such defendants were improperly sentenced in the first place. Yet the courts may have felt differently because the result would help those who were "unquestionably blameworthy." Although the courts did support their holdings with relevant case law, it is also possible that their analyses were influenced by a limited concern for defendants who had already been found guilty.

CONCLUSION

It appears that Booker has placed courts in the age-old precarious position of being stuck between a rock and a hard place. On the one hand, as my analysis has shown, there is legal basis to argue that Booker should be applied more broadly, and by choosing not to do so, courts are curtailing defendants' constitutional rights. On the other hand, however, there are legitimate policy concerns suggesting that broadening Booker's application would be troublesome. Pending clarification by the Supreme Court, or legislation by Congress, federal courts are likely to continue to take the middle road on thorny Booker-related issues; recognizing Booker in their analysis, but ultimately applying it narrowly. It is my hope, however, that whatever the courts decide is

312. Id. at 344-45.
314. King & Klein, supra note 313, at 333.
the ultimate limit of *Booker's* application, it will be consistent with the constitutional protections the founding fathers intended for the American people.