When the Meaning of "Plain Error" Isn't So Plain: Deciphering Plain Error in the Context of *Booker*

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> "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."
>
> *Thomas Jefferson, July 19, 1789*[1]

Introduction

For the better part of two decades, the Sentencing Reform Act of 1984 ("The Act") and the Guidelines promulgated by the United States Sentencing Commission governed the federal criminal sentencing landscape.[2] These Guidelines steered sentencing judges until January of 2005 when the United States Supreme Court made the Act and Guidelines advisory. In *United States v. Booker*, the Court declared that the sentencing judge's ability to enhance a sentence based on facts found by the bench, and not the jury, ran afoul of the Sixth Amendment right to a jury trial.[3] Because of this fundamental inconsistency with the Constitution, the Court removed the mandatory provision of the Guidelines.[4]

With this dramatic shift in the sentencing sphere, courts are

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1. Letter from Thomas Jefferson to Abbe Arnoux (July, 19, 1789), *in* 15 PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd ed. 1958).

2. *See* Sentencing Act of 1987, Pub. L. No. 100-182, § 2, 101 Stat. 1266 (stating that the Sentencing Guidelines took effect on November 1, 1987); Booker v. United States, 543 U.S. 220 (2005) (stating that in 2005, the mandatory provision of the Guidelines was unconstitutional).

3. 543 U.S. at 244.

4. *Id.* at 259.

being forced to deal with the question of what is to be done with the criminal defendants who were subject to unconstitutional judicial fact-finding prior to *Booker*. The circuit courts have unanimously held that criminal defendants that were convicted and had exhausted all available appeals prior to *Booker* are entitled to no relief.[5] However, the answer for defendants convicted prior to, but appealing after *Booker* is not so manifest. The Court has commanded that such defendants must show "plain error" on the part of sentencing judges in order to get a new sentencing hearing.[6] While this seems like a fairly bright line, the Court of Appeals has split on what the meaning of "plain error" is in the context of *Booker* error.

This article will address how plain error should be handled in *Booker* cases. Part I of this article will give a brief overview of the Federal Sentencing Guidelines. Part II will address the Court's decision in *Booker* and the foundational cases leading up to it. Part III will address the three-way circuit split on the meaning on plain error and the possible problems with these various interpretations. Finally, Part IV will argue that while some courts may reach the correct result, no court has correctly analyzed the problem because the judiciary has failed to detect that *Booker* error is a constitutional structural error entitling the criminal defendant to a new sentencing hearing automatically.

I. The Nuts and Bolts of the Federal Sentencing Guidelines

The Federal Sentencing Guidelines essentially ask the sentencing judge to place the criminally convicted in the appropriate box on the sentencing grid. The sentencing grid is a table containing forty-plus offense levels on the y-axis and six criminal history categories on its x-axis.[7] At the point of intersections for the X and Y values is the total offense level, which corresponds to a given sentencing range.[8] Once the sentencing range is determined, the sentencing judge is mandated to hand down a sentence within the limits of the given sentencing range unless unusual circumstances exist.[9]

To identify the offense level, the sentencing judge must first find

5. *See, e.g.*, Humphress v. United States, 398 F.3d 855, 860 (6th Cir. 2005).

6. *Booker*, 543 U.S. at 268.

7. Honorable Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 6 (1991).

8. *Id.*

9. *Id.* at 8.

what the base level of the offense is according to the applicable provision of the Guidelines.[10] Then, adjustments are made based on the circumstances and facts surrounding the crime.[11] Finally, additional adjustments to the offense level may be appropriate based on "(1) the victim's characteristics, (2) the defendant's role in the offense, (3) whether the defendant obstructed justice, (4) the incidence of multiple counts, and (5) whether the defendant accepted responsibility for his [or her] actions."[12] It is this calculus that produces the final offense level.

Criminal History Level is determined by assigning a predetermined number of points to each of the defendant's past offenses.[13] Then, the sentencing judge places the defendant in the criminal history category that corresponds to the point total.[14] Once armed with the necessary figures for the offense level and criminal history level, the judge can find the appropriate sentencing range and sentence accordingly.[15] However, in instances when the sentencing judge finds circumstances "not adequately taken into consideration by the Sentencing Commission," he or she could choose a sentence that is above or below the range proposed by the Guidelines. [16]

Given the abstractness of the Guidelines, an example may be instructive. Consider the calculus undertaken by the trial court, as reviewed by the First Circuit Court of Appeals in *United States v. Antonakopoulos*.[17] Stelios Antonakopoulos was convicted of embezzlement, which carries a base offense level of four.[18] The court, without the aid of a jury, concluded that the amount of money lost due to the embezzlement was more than $350,000 but less than $500,000. Such a loss equated to an increase of eleven levels on the offense total, bringing the total level to fifteen.[19] The court, also acting without a jury, then enhanced the offense level by four for

10. *Id.* at 6.

11. *Id.* at 7.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Factors taken into account when sentencing within a given range include "seriousness of the offense, deterrence, public protection, the indicated sentencing range under the Guidelines, policy statements of the Sentencing Commission, and avoidance of unwarranted disparities in sentencing . . . ." *Id.*

16. *Id.* at 18.

17. 399 F.3d 68 (1st Cir. 2005).

18. *Id.* at 74.

19. *Id.*

more than minimal planning and for Antonakopoulous's role in the offense, taking the grand total to an offense level of nineteen.[20] With the lowest possible criminal history classification of category one, the court identified the appropriate range from the sentencing grid to be thirty to thirty-seven months in prison.[21]

II. *United States v. Booker* and Its Family Tree

A. *Booker*'s Facts

When the Court granted the petition for writ of certiorari in *Booker*, it consolidated a pair of cases dealing with the interplay of the Sixth Amendment right to a jury trial: the aforementioned *Booker* and *United States v. Fanfan*.[22] For the purposes of this article, the crimes committed by Booker and Fanfan are not as important as the subsequent procedural events and Supreme Court decision. As such, the facts will be dealt with briefly.

Freddie J. Booker was charged with possession with intent to distribute at least fifty grams of crack cocaine.[23] After hearing evidence that Booker possessed 92.5 grams of narcotics, the jury returned a guilty verdict.[24] Based upon Booker's criminal history and the verdict returned by the jury, the applicable sentencing range laid down by the Guidelines was between 210 and 262 months.[25] However, during a post trial sentencing hearing, the district court judge found by a preponderance of the evidence that Booker actually possessed 566 grams of crack above the amount found by the jury and that he was guilty of obstructing justice.[26] These findings raised Booker's offense level from thrity-two to thirty-six and his applicable sentencing range to between 360 months and life.[27]

Duncan Fanfan was found guilty of conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine.[28] Based on this alone, Fanfan's corresponding sentencing maximum

20. *Id.*
21. *Id.*
22. United States v. Booker, 543 U.S 220, 227-28 (2005).
23. *Id.* at 227.
24. *Id.*
25. *Id.*
26. *Id.*
27. United States v. Booker, 375 F.3d 508, 509 (7th Cir. 2004).
28. *Booker*, 543 U.S. at 228.

was seventy-eight months.[29] However, during the sentencing hearing, the trial judge found by a preponderance of the evidence that Fanfan was responsible for 2500 grams of cocaine powder and 261.6 grams of crack cocaine.[30] Also, the judge found Fanfan to be "an organizer, leader, manager, or supervisor in the criminal activity."[31] These findings increased Fanfan's applicable sentencing range to between 188 to 235 months.[32] Nevertheless, the district judge recognized the Sixth Amendment issues presented by such an increase and chose to implement the shorter sentence founded on the jury verdict alone.[33]

B. The Supreme Court's Decision and Its Roots

The majority's opinion in *Booker* is parceled into two distinct but related parts. Justice Stevens, writing on behalf of a five Justice majority, addressed the question of whether the Federal Sentencing Guidelines violate the Sixth Amendment right to a jury trial.[34] The Court answered that question in the affirmative.[35] Justice Breyer, also writing on behalf of a five vote majority,[36] addressed the question of how to remedy the Sixth Amendment problem.[37] The Court's solution was to remove the provision in the Guidelines that made them mandatory.[38] While this decision turned the sentencing world on its ear, it was by no means out of the blue. In fact, *Booker* represented the culmination of a modern revolution in the Supreme Court's jurisprudence regarding the interplay between mandatory sentencing and jury trials.

In 1999, the Court took up *Jones v. United States* and struck down a federal carjacking statute which called for longer sentences corresponding to the level of injury caused to the victim: fifteen years

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 229.

34. *Id.* at 226.

35. *Id.* at 229.

36. It should be noted that the five Justice majority backing Justice Stevens was not the same as that of Justice Breyer. In fact the only Justice that was common to both opinions was Justice Ginsburg. Justice Stevens sported a majority of Justice Scalia, Justice Souter, Justice Thomas and Justice Ginsburg. On the other hand, Justice Breyer's opinion was joined by Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy and Justice Ginsburg. *See id.* at 225, 244.

37. *Id.* at 246.

38. *Id.* at 260.

in jail for no injury, twenty-five years for serious injury, and life in prison if the victim was killed.[39] Facts about the level of injury to the victim never had to be indicated in the indictment, officially charged, put to the jury, or proven beyond reasonable doubt.[40] The Government argued that the scheme simply enumerated sentencing factors that the judge could constitutionally consider.[41] The Court disagreed and stated that the fairest reading of the statute was that the level of the injury to the victim amounted to an element of the crime and that to read it any other way brought into play serious Sixth Amendment concerns.[42] Though only dealing with the Federal carjacking statute, the Court noted in footnote 11 of its opinion that this outcome could lead to the broader but completely permissible "rule requiring jury determination of facts that raise a sentencing ceiling . . . ."[43]

In 2000, the Court was once again asked to determine the role of the jury in finding facts that increase criminal penalties in *Apprendi v. New Jersey*.[44] *Apprendi* examined the constitutionality of New Jersey's hate crime "sentence enhancement."[45] The defendant in that case pleaded guilty to second-degree possession of a firearm, which carried a sentencing range of five to ten years.[46] The trial court, without the aid of a jury, found that the defendant's actions were in violation of New Jersey's hate crime legislation and handed down a twelve-year sentence.[47] The Court declared that labeling the hate crime provision as a "sentencing enhancement," as opposed to an element, was an instance of distinction without difference.[48] Making the leap that was threatened in footnote eleven of *Jones*,[49] the Court stated, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

39. 526 U.S. 227, 230 (1999).
40. *Id.* at 230-31.
41. *Id.* at 233.
42. *Id.* at 239.
43. *Id.* at 251 n.11.
44. 530 U.S. 466 (2000).
45. *Id.* at 468.
46. *Id* at 469-70.
47. *Id.* at 471.
48. *Id.* at 478.
49. Jones v. United States, 526 U.S. 227, 251 n.11 (1999).

reasonable doubt."[50]

In 2004, the Court's decision in *Blakely v. Washington* went beyond individual statutes and stuck down the entire sentencing scheme of the State of Washington because it contravened the requirements of the Sixth Amendment.[51] In that case, the defendant pled guilty to kidnapping, which under the Washington sentencing guidelines carried a sentence of forty-nine to fifty-three months.[52] The trial judge, without a jury and over the recommendations of the prosecutor, found that the defendant acted with "deliberate cruelty" and increased the sentence to ninety months.[53] The Court overturned the sentence because the trial judge had failed to heed the rule of *Apprendi* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury . . . ."[54] Since Washington allowed judges to find facts without a jury that would raise the sentencing ceiling, the sentence in *Blakely* and the scheme that allowed for such judicial fact finding was deemed to be inapposite with the Sixth Amendment.[55]

In a footnote in *Blakely*, the Court noted that the *Amicus Curiae* brief for the United States urged for the sentence to be affirmed and noted the differences between Washington's sentencing regime and the Guidelines.[56] While the *Blakely* opinion stated that the Court's opinion did not extend to the Federal sentencing sphere, the writing was on the wall.[57] It was a short leap to extend the reasoning of *Blakely* in *Booker* and strike down the Guidelines. When *Booker* hit the Court's docket in 2004, Justice Stevens, writing for the majority in *Booker*, noted the undeniable similarities when he stated, "[T]here is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedure . . . ."[58]

Justice Stevens's conclusions in *Booker* were premised on a fairly

50. *Apprendi*, 530 U.S. at 490.

51. 542 U.S. 296, 305 (2004).

52. *Id.* at 299.

53. *Id.* at 300.

54. *Id.* at 301, 305.

55. *Id.* at 305, 313.

56. *Id.* at 305 n.9 ("The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as *Amicus Curiae* 25-30. The Federal Guidelines are not before us, and we express no opinion on them.").

57. *Id.*

58. 543 U.S. 220, 233 (2005).

straightforward analysis. The Guidelines were necessary and binding on all judges.[59] The Guidelines imbued judges with the ability to increase the prescribed sentencing range when the judge found the existence of mitigating or aggravating factors by a preponderance of the evidence.[60] Such aggravating or mitigating factors did not have to be found by a jury.[61] *Blakely* stated that the Sixth Amendment requires that the facts essential to a given punishment must be found by a jury beyond a reasonable doubt.[62] Hence, the Federal Sentencing Guidelines, which allowed for judge-found facts to be the basis of an increased sentence by a preponderance of the evidence, were necessarily unconstitutional.[63]

In addition, the Court voiced the philosophical concern that the Guidelines allowed the power pendulum to swing too far in favor of judges and too far away from juries.[64] As sentencing ranges increased and legislatures charged judges with finding facts that determined the upper limits of sentences, the role of the jury greatly decreased.[65] In the words of the Court, "As the enhancements became greater, the jury's finding of the underlying crime became less significant."[66] Essentially, Justice Stevens viewed the trend in sentencing as eroding the right to a jury trial. While the words of the Sixth Amendment would exist as part of the Constitution, the power of the jury would be so diminutive as compared to that of judges that the essence of the right to a trial by a *jury* would be rendered meaningless.[67] As Justice Stevens wrote, deeming the Guidelines unconstitutional was "not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance."[68]

As applied to *Booker*, the Court stated that the increased sentence was unconstitutional. Since the district court judge imposed a sentence authorized by the jury facts but lower than that authorized

59. *Id.* at 233-34.

60. *Id* at 234, 236.

61. *Id.* at 236.

62. *Id.* at 232.

63. *Id.* at 233.

64. *Id.* at 236.

65. *Id.*

66. *Id.*

67. *Id.* at 237.

68. *Id.* It should also be noted that Justice Stevens dealt with the argument that doing away with the Guidelines would impinge judicial efficiency. He handled these arguments easily by noting that the efficiencies of the law had to bend to the fundamental legal principles. *Id.* at 244.

by the Guidelines, Fanfan's sentence was held not to violate the Sixth Amendment.[69] Nevertheless, the sentence was vacated for re-sentencing consistent with the Court's opinion.[70] However, the larger question looming in front of the Court was not how to deal with Booker and Fanfan's sentences, but rather how to deal with sentences handed down before and after the Court's decision. Writing for a majority different than that of Justice Stevens, Justice Breyer inked the opinion addressing what should be done with the Guidelines going forward.[71]

In the remedial section of *Booker*, Justice Breyer noted that Guidelines could not stand as written and that severance and excision of the unconstitutional portions was necessary.[72] Most notably, the provision that made the Guidelines binding on all judges was removed, making the Guidelines discretionary.[73] Going forward, judges were to consult the Guidelines but were not bound by them.[74] Also, the Court recognized that the outcome in *Booker* would affect appeals.[75] To guide the courts in reviewing such cases, Justice Breyer ended his opinion with the following:

> As these dispositions indicate, we must apply today's holdings — both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act — to all cases on direct review. That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the "plain-error" test.[76]

The Court gave no further explanation on how to apply these tests, and the circuit courts have been forced to grapple with the effects of *Booker* on sentencing appeals with relatively little guidance from the Court.

69. *Id.* at 267.
70. *Id.*
71. *Id.* at 245.
72. *Id.* at 258.
73. *Id.* at 259.
74. *Id.* at 266.
75. *Id.* at 268.
76. *Id.*

III. The Fallout from the *Booker* Bomb

The Sixth Amendment to the United States Constitution reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[77]

When a defendant fails to raise an objection on Sixth Amendment grounds during trial, the appellate court may consider the objection provided the defendant can show "plain error."[78] This requirement has been codified as Federal Rule of Criminal Procedure 52(b), which reads, "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[79] The purpose behind this rule is to "to prevent wholesale reversals for immaterial and harmless error."[80] As the Court stated, "A defendant is entitled to a fair trial but not a perfect one."[81]

The Supreme Court in *United States v. Olano* provided a three prong test for determining if something falls under the broad category of "plain error:" there must be (1) an error,[82] (2) the error must be "plain,"[83] and (3) the error must "affect substantial rights."[84] If these three requirements are met, the appellate court has the discretion to correct the error if "in those circumstances in which a miscarriage of justice would otherwise result."[85] In applying the *Olano* test, the lower courts have diverged in what plain error means in the context of appeals on *Booker* claims. This divergence largely centers on what

77. U.S. CONST. amend. VI.

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

79. *Id.*

80. Steele v. United States, 243 F.2d 712, 715 (5th Cir. 1957).

81. Lutwak v. United States, 344 U.S. 604, 619 (1953).

82. "Error" is defined as "deviation from a legal rule . . . ." United States v. Olano, 507 U.S. 725, 732-33 (1993).

83. An error is plain if "clear" or "obvious." *Id.* at 734. An error need not be plain at the time it is made. It need only be plain at the time of appeal to fulfill the second prong of the *Olano* test. Johnson v. United States, 520 U.S. 461, 468 (1997).

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

85. *Id.* at 736 (quoting United States v. Young, 470 U.S. 1, 15 (1985)). Note this paper will not discuss this point as it is more focused on courts application of *Olano* and their finding of when something is actually plain error allowing for the exercise of discretion.

"affect substantial rights" means in cases where a defendant's sentence was unconstitutionally enhanced but no objection was made during the trial. This split can be broadly framed into three categories: (1) almost every unconstitutional sentence affects substantial rights; (2) almost no unconstitutional sentence affects substantial rights; and (3) we should go ask the trial judge if the unconstitutional sentence affects substantial rights.[86] While each of these has a reasonable basis, they all suffer from drawbacks that leave them flawed.

A. Almost Every Unconstitutional Sentence Affects Substantial Rights

On February 2, 2005, a mere twenty-one days after the opinion in *Booker* came down, the Sixth Circuit Court of Appeals in *United States v. Oliver* took up the issue of how to deal with *Booker* error[87] when no objection was raised at trial.[88] As noted above, the "error" and "plain" prongs of the *Olano* test are satisfied in the minds of every circuit. However, *Oliver*'s view of the third prong of the plain error test has proven to be the most lenient. In the defendant's case, the court overturned the sentence as plain error without a showing that the Guidelines actually caused the judge to increase the sentence; rather, the court noted that it was possible that the scheme of the Guidelines could have led the judge to increase the sentence.[89]

In *Oliver*, the defendant was charged with various drug-related offenses and released on bond.[90] After testing positive for drugs, the defendant's bond was modified to require that he be placed in a residential halfway house and drug treatment program.[91] After roughly two months, the defendant left the halfway house without permission.[92] The defendant was later found at his residence.[93] The Government alleged that the defendant made the following confessions to police while at the residence: (1) he installed cameras

86. *See* Sentencing Law and Policy, http://sentencing.typepad.com /sentencing_law_and_policy/2005/03/threering_circu.html (last visited Oct. 24, 2006) (noting this three-way split and referring to the divergence among the federal cirucits as a "three-ring circus").

87. From this point forward, "*Booker* error" will refer to unconstitutional sentences like that in *Booker*.

88. 397 F.3d 369 (6th Cir. 2005).

89. *Id.* at 380-81; *see also* United States v. Hughes, 396 F.3d 374 (4th Cir. 2005).

90. *Oliver*, 397 F.3d at 373.

91. *Id.*

92. *Id.*

93. *Id.*

to alert him of when police were approaching; (2) drugs had been manufactured in the house that day; and (3) the defendant had used drugs the day prior to his arrest.[94] This evidence was allowed to come in at trial and the defendant was convicted of conspiracy to possess methamphetamines with the intent to distribute.[95] During the sentencing hearing, the judge found the flight from the halfway house to be an obstruction of justice.[96] This allowed the judge to sentence the defendant to 180 months in prison, as opposed to using the range of 135 to 168 months, which is the range supported by the jury's findings alone. [97]

In considering whether the increased sentence substantially affected Oliver's right, the court cited to *United States v. Swanberg*[98] and noted that "a sentencing error affects substantial rights where it causes the defendant 'to receive a more severe sentence.'"[99] Thus, in the context of the Guidelines, the relevant question would seem to be the following: did the unconstitutional federal sentencing scheme cause the judge to increase the sentence beyond what would have been given otherwise?[100] In looking to the effect on substantial rights, the court stated, "As a result Oliver *arguably* received a sentence that was longer than his sentence would have been absent a Sixth Amendment violation."[101] Consequently, the court exercised its discretion, found that the sentence "would diminish the integrity and public reputation of the judicial system [and] also would diminish the fairness of the criminal sentencing system," and overturned the sentence.[102]

There is one very noteworthy point about this analysis that leads the reader to question it. The verbal disconnect between the

94. *Id.* at 373-74.

95. *Id.* at 374.

96. *Id.*

97. *Id.*

98. 370 F.3d 622 (6th Cir. 2004).

99. *Oliver*, 397 F.3d at 379.

100. It should be noted that the relevant inquiry is whether a shorter sentence would have been given if the judge had not been bound by the Guidelines and not whether the sentence was above the applicable range. That is because *Booker* did not make the sentences being handed down for given convictions unconstitutional. Rather, it was the binding nature of the Guidelines. As such, the circuits must examine whether the sentence would have been the same had the Guidelines been applied in the constitutional advisory manner. *See, e.g.*, United States v. Paladino, 401 F.3d 471, 483 (7th Cir. 2005).

101. *Oliver*, 397 F.3d at 380 (emphasis added).

102. *Id.*

standards of *Swanberg* and that employed in *Oliver* is obvious. *Swanberg* directs that a sentence affects substantial rights when the error causes the defendant to get a more severe sentence.[103] *Oliver*, on the other hand, requires that the defendant only show that he *arguably* received a stiffer penalty.[104] Anytime there is an enhanced penalty, there is an argument to be made that that the defendant received a sentence beyond what would have otherwise been handed down. As such, *Booker* errors affect substantial rights.

Furthermore, even if this idea fits with the Sixth Circuit's jurisprudence, it does not comport with *Olano*. *Olano* clearly states that the third prong is that the error affect substantial rights, not that there be a chance that it affect substantial rights.[105] To apply the test in a manner like the Sixth Circuit did is to conspicuously and illicitly extend the Supreme Court's plain error rubric. Also, this undercuts the purpose of the plain error analysis. The purpose of plain error is to eliminate stale claims and maintain judicial efficiency.[106] By holding that the defendant need only make a showing that it is possible that the error affected substantial rights eviscerates the plain error doctrine and renders it unable to perform its intended purpose.

B. Almost No Unconstitutional Sentence Affects Substantial Rights

On the other end of the spectrum is the Fifth Circuit Court of Appeals decision in *United States v. Mares*.[107] Coming roughly a month and a half after the Court's opinion in *Booker*, *Mares* represents a standard that is almost hopelessly unattainable for defendants bringing appeals for *Booker* error.[108] Under this approach, appealing defendants must show that the sentencing judge would have "reached a significantly different result" under a federal sentencing system that was advisory.[109]

In *Mares*, the defendant, Samuel Mares, Jr., and Alfredo Martinez got into a physical altercation with two persons who believed that Mares and Martinez had robbed them.[110] During the

103. 370 F.3d at 629.

104. 397 F.3d at 380.

105. United States v. Olano, 507 U.S. 725, 734 (1993).

106. Steele v. United States, 243 F.2d 712, 715 (5th Cir. 1957).

107. 402 F.3d 511 (5th Cir. 2005); *see also* United States v. Antonakopolous, 399 F.3d 68, 79-80 (1st Cir. 2005); United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005).

108. *Mares*, 402 F.3d 511.

109. *Id.* at 521.

110. *Id.* at 513.

fight, Mares was stabbed, and several witnesses testified that gunshots were fired from the vehicle that Mares and Martinez used to flee the scene.[111] The next morning, an ambulance arrived at the home of Mares's girlfriend to treat Mares's stab wounds.[112] While loading Mares into the ambulance, one of the paramedics noticed a bulky object in Mares's pocket.[113] He pulled it out and discovered it was a magazine clip with 27 rounds of ammunition.[114] The district court found Mares to be a felon in possession of ammunition.[115] Based on this finding, the trial court increased the base offense level from twenty-four to twenty-eight and enhanced Mares's sentence based on the finding that Mares had been in possession in connection with an armed robbery.[116]

Much like the court in *Oliver*, *Mares* recognized that *Booker* error was indeed an "error" and "plain," and thus satisfied the first two prongs of *Olano*.[117] However, the *Mares* court's conception of the third prong provides a much higher bar for defendants to clear. The court begins by noting that the purpose of holding appeals to a plain error standard is to "encourage timely objections and reduce wasteful reversals."[118] In the words of the Supreme Court in *United States v. Dominguez Benitez*, establishing prejudice "should not be too easy."[119] In effectuating this goal, the Fifth Circuit stated its rule regarding *Booker* error as follows: "Since the error was using extra verdict enhancements to reach a sentence under Guidelines that bind the judge, the pertinent question is whether Mares demonstrated that the sentencing judge — sentencing under an advisory scheme rather than a mandatory one — would have reached a significantly different result."[120] As this applied to Mares, the court found that there was no indication in the record that the sentencing judge would have reached a different conclusion under a constitutional sentence system.[121] As such, the *Mares* court failed to establish plain error and his sentence

111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 516.
116. *Id.* at 516-17.
117. *Id.* at 520-21.
118. *Id.* at 521.
119. *Id.* (quoting United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004)).
120. *Id.*
121. *Id.* at 522.

was upheld.[122]

The following language in *Mares* illustrates the problem with the Fifth Circuit's approach: "there is no indication in the record . . . ."[123] Forcing the appealing defendant to point to the trial record and state with particularity the passages that indicate that the judge would have ruled differently but for the mandatory nature of the Guidelines is an exceedingly difficult task. In fact, the only sentences that will be overturned are those that were given by the brooding judge who happened to complain about the mechanics of the Guidelines. This is an arbitrary way for deciding whether the denial of Sixth Amendment rights amounts to plain error. The Fifth Circuit's approach asks not whether the judge would have ruled differently knowing that the Guidelines were advisory, but rather did the judge happen to ponder the workings of the Guidelines and state for the record that in this specific case he disagreed. This way of determining who gets a re-sentencing hearing is problematic. It asks, "Did the judge happen to state what he or she would have done?" as opposed to the simpler question that more accurately reflects what the third prong of *Olano* is meant to investigate: "What would the judge have done under different circumstances?"[124] In short, the absence of statement in the record cannot provide sufficient evidence of how a judge would have sentenced in the post-*Booker* world.

C. We Should Go Ask the Trial Judge Whether the Unconstitutional Sentence Affects Substantial Rights

Within six weeks of the Court issuing its opinion in *Booker*, the upper and lower limits of what could be considered to affect substantial rights had been set. In an effort to avoid the necessarily over- and under-inclusive approaches mentioned above, Judge Richard Posner and the Seventh Circuit announced a middle approach in *United States v. Paladino*.[125] Essentially, the Seventh Circuit's approach was to "pass the buck" on the third prong of *Olano*.[126] Rather than trying to glean from the record whether the

122. *Id.*

123. *Id.*

124. As *Mares* itself put it, the relevant inquiry is whether "the sentencing judge — sentencing under an advisory scheme rather than a mandatory one — would have reached a significantly different result." *Id.* at 521.

125. 401 F.3d 471 (7th Cir. 2005).

126. *Id.* at 483.

judge would have acted differently[127] or asking whether the defendant's rights were *arguably* substantially affected,[128] Judge Posner promulgates the scheme of asking the actual sentencing judge in the case whether he or she would have acted differently had the Guidelines been different.[129]

Paladino presented the appeals of several co-defendants who were appealing convictions of a litany of federal crimes stemming from a scam that defrauded investors of $11 million.[130] Five of the co-defendants (whose sentences ranged from 72 to 188 months) received enhanced sentences that contravened the holding of *Booker*.[131] These enhancements had been based on determinations of fact by the judge (such as being an organizer of the fraudulent conspiracy or a supervisor of others involved in it, abusing a position of trust, etc.), not the jury.[132]

Judge Posner's analysis of the plain error issue begins by conceding that *Booker* error is indeed plain and an error, and thus satisfies the first two prongs of *Olano*.[133] The Government made two arguments in favor of upholding the defendants' sentences. One, the sentences handed down followed the Guidelines, and since the Guidelines still exist in an advisory form, the sentencing judge would have probably done the same thing in the post-*Booker* regime.[134] The court dismissed this argument noting that the issue was not so black and white.[135] Absent a statement on the record by the sentencing judge that he or she would have given the same sentence, the court could not say that under the advisory system the same sentence would have been handed down.[136] Two, the Government argued that since the sentencing judge had not given the minimum sentence, it can be inferred that the judge would not have given a lower sentence if not bound by the Guidelines.[137] Judge Posner dispensed of this argument equally quickly, noting that judges sentenced in relation to the

127. United States v. Oliver, 397 F.3d 369, 380 (6th Cir. 2005).
128. *Mares*, 402 F.3d at 521.
129. *Paladino*, 401 F.3d at 483.
130. *Id.* at 474.
131. *Id.* at 479.
132. *Id.*
133. *Id.* at 481.
134. *Id.* at 482.
135. *Id.*
136. *Id.*
137. *Id.*

sentencing ranges. As such, the sentences, although not at the extremes of the range, were still necessarily influenced by the binding nature of the unconstitutional scheme.[138]

Dispensing with arguments that would uphold the sentences without question, Judge Posner moved on to laying out the middle ground approach to the third prong of *Olano* in cases of *Booker* error.[139] As a fundamental premise, Judge Posner stated, "It is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person."[140] The court then noted that the opposite error is to believe that every case of *Booker* error fulfilled the third prong because if the judge would have given the same sentence, no true effect on the defendant would have existed.[141] As such, *Paladino* sets forth the following procedure: "The only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge."[142] The fundamental premise was that the court would retain appellate jurisdiction over the matter but order a limited remand which would ask the sentencing judge if he or she would have sentenced the defendant differently and to provide reasoning for this position.[143]

The Seventh Circuit's methodology has the benefit of being the Goldilocks of the *Booker* error world: It is not as harsh as *Mares* and not as lenient as *Oliver*. Nevertheless, Judge Posner's system is problematic. First, the *Paladino* dissents are quick to point out that automatic limited remand will lead to nothing more than a cursory look at the sentence.[144] In the words of Judge Ripple, "The constitutional right at stake hardly is vindicated by a looks-all-right-to-me assessment by a busy district court."[145] Also, Judge Posner

138. *Id.* at 482-83.

139. *Id.* at 483.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 484. It should be noted that the Second Circuit in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and the Ninth Circuit in *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005), have adopted similar, but not identical, systems. While the Seventh Circuit retains appellate jurisdiction, these other circuits do not. *Ameline*, 409 F.3d at 1080.

144. *Paladino*, 401 F.3d at 486 (Ripple, J., dissenting); *see also id.* at 488 (Kanne, J., dissenting).

145. *Id.* at 486 (Ripple, J., dissenting).

stated that this system was "the shortest, the easiest, the quickest, and the surest way . . . ."[146] However, this very well may not be the case. While it is short, easy, and quick for the appellate panel, it asks already busy judges to go back into cases gone by and re-familiarize themselves with a case that left the trial court years earlier. Furthermore, one must ask whether it is really efficient for cases to be bouncing back and forth from the appellate docket to the sentencing judge's docket and back again. Finally, while *Paladino* attempts to lay down an incredibly pragmatic way of evaluating the third prong, it fails to anticipate the inevitable changes at the trial court level. When a sentencing judge retires or dies, the appellate court loses the ability to remand the case to the sentencing court. For those defendants whose sentencing judge no longer occupies the bench, the question of whether the sentence would have been different is necessarily unanswerable. In short, the system of *Paladino* is hopelessly flawed.

IV. *Booker* Error As Structural Constitutional Error

In *Antonakopoulos*, the First Circuit flippantly tucked into a footnote the following argument about the relationship between *Booker* error and structural error:

> Nor is [*Booker* error] structural error. In certain structural error cases, those which "undermine the fairness of a criminal proceeding as a whole," errors can be corrected regardless of an individualized showing of prejudice to the defendant. Because sentencing as under a mandatory system is not an error that "undermines the fairness of a criminal proceeding as a whole," . . . a Booker type error is not a structural error . . . .[147]

Though not being as blunt as the *Antonakopoulos* court, circuits across the nation have refused to deem *Booker* error structural. However, this position is an incorrect analysis of what is and is not structural error. While auto-remand analyses like that of *Oliver* tend to reach the proper result, the rationale is incorrect. The previously discussed approaches to plain error are hopelessly misguided because *Booker* error is structural error which, by definition, requires no showing of effect on substantial rights to warrant re-sentencing.

In *Arizona v. Fulminante*, the Court created a dichotomy between trial errors, which could be examined under plain error/harmless error[148] analyses, and structural errors, which require

146. *Id.* at 483 (majority opinion).

147. United States v. Antonakopoulos 399 F.3d 68, 80 n.11 (1st Cir. 2005).

148. It should be noted that harmless error is the counterpart to plain error. FED. R.

automatic reversal.[149] This opinion was based on *Chapman v. California,* which declared that "a constitutional error does not automatically require reversal," but that some constitutional errors are so grievous as to require reversal at all times.[150] Chief Justice Rehnquist then proceeded to draw a line between trial and structural errors.[151] In the words of the Court, a trial error is an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence."[152] On the other hand, structural errors are "defects in the constitution of the trial mechanism, which defy analysis .... The entire conduct of the trial from beginning to end is obviously affected [by the error]."[153] Two years after *Fulminante*, the Court indicated that the trial/structural error dichotomy was here to stay in *Sullivan v. Louisiana.*[154] In *Sullivan*, the Court reiterated the *Fulminate* definition of structural error and noted that structural error covered "'basic protection[s] whose precise effects are unmeasurable ....'"[155]

The line between what is a trial error and what is a structural error is blurry at best. The troubling nature of applying the *Fulminante* dichotomy led one commentator to state that "efforts devoted by litigants and courts to comprehend and apply Fulminante's [sic] dichotomy are doomed to fail."[156] Since this is the case, the Court's decisions on what constitutes structural error almost always contain a list of examples of structural errors.[157] Such errors include, but are not limited to (1) complete denial of counsel,[158] (2) biased trial judge,[159] (3) racial discrimination in selection of grand

CRIM. P. 52. While structural error usually comes up in the context of harmless error, the general rule is structural error is never harmless error and always plain error. *See* United States v. Dominguez Benitez, 542 U.S. 74, 81 (2004) (discussing how structural error is plain error).

149. 499 U.S. 279 (1991).

150. *Id.* at 306, 308 (citing Chapman v. California, 386 U.S. 18 (1967)).

151. *Id.* at 307-10.

152. *Id.* at 307-08.

153. *Id.* at 309.

154. 508 U.S. 275 (1993).

155. *Id.* at 281.

156. David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 KAN. L. REV. 1401, 1401 (1997).

157. *See, e.g., Fulminante*, 499 U.S. at 309-10; *Sullivan*, 508 U.S. at 280; Neder v. United States, 527 U.S. 1, 8 (1999).

158. Gideon v. Wainwright, 372 U.S. 335 (1963).

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

jury,[160] (4) denial of self-representation,[161] (5) denial of a public trial,[162] and (6) defective reasonable-doubt instructions.[163] With these examples in mind, and working off the language of *Fulminante* and *Sullivan*, a two-part criteria for what constitutes structural error has emerged. First, the error must affect a basic protection that deals with reliability of the truth-finding process.[164] Second, the impact of the error must escape rationale review.[165] If these two criteria are fulfilled, an error is plain error by default.

A. *Booker* Error As a Basic Protection

In *Neder v. United States*, the Court described the first prong of the structural error inquiry in the following amorphous terms:

> [A structural error is] a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such errors infect the entire trial process, and necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.[166]

This description, while eloquent, fails to give much guidance on how to locate the line between structural and trial errors. *Fulminante* dispenses of any argument that all constitutional errors are structural by making clear that "most constitutional errors can be harmless."[167] Thus, though all constitutional rights are in some sense basic protections, it is unclear when a constitutional right rises to the level of basic protection pertaining to the reliability of the process sufficient enough to fall into the structural error category. Nevertheless, the location of the dividing line need not be decided for the purposes of this article. This is because a strong analogy to a former structural error case shows that *Booker* error is enough of a "'basic protection[]' without which 'a criminal trial cannot reliably

160. Vasquez v. Hillery, 474 U.S. 254 (1986).

161. McKaskle v. Wiggins, 465 U.S. 168 (1984).

162. Waller v. Georgia, 467 U.S. 39 (1984).

163. Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993).

164. William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1424 (2001).

165. *Id.* at 1424-25.

166. Neder v. United States, 527 U.S. 1, 8-9 (1999) (internal citations and quotations omitted; ellipsis in original).

167. Arizona v. Fulminante, 499 U.S. 279, 306 (1991).

serve its function as a vehicle for determination of guilt or innocence'" to be considered structural in nature.[168]

In *Sullivan*, the Court determined that a constitutionally deficient reasonable doubt instruction is a structural error.[169] Sullivan was charged with first-degree murder in the course of committing armed robbery.[170] During the trial, the judge gave a reasonable doubt instruction to the jury that mirrored one that had been deemed unconstitutional in *Cage v. Louisiana*.[171] Justice Scalia, writing for a unanimous Court, noted that the Sixth Amendment was "fundamental to the American scheme of justice . . . ."[172] He then noted the interrelated nature of the Fifth and Sixth Amendments and that to violate the Fifth Amendment requirement that all elements be found beyond a reasonable doubt would necessarily throw out of balance the power structure between the judge and the jury.[173]

Justice Scalia's logic on the nature of the error unfolded in the following manner. During a criminal proceeding, a judge may direct a verdict in favor of the defendant if the evidence is legally insufficient to establish guilt.[174] However, no matter how overwhelming the evidence is, the judge may not direct a verdict for the plaintiff.[175] Justice Scalia postulated that failure to give a sufficient instruction as to the burden of proof meant that juries were left deciding if the defendant was "*probably* guilty."[176] Then the judge would step in and ascertain whether the evidence in the case leads to the conclusion that the defendant was guilty beyond a reasonable doubt.[177] Such a method would step on the toes of juries, and the Sixth Amendment as a whole, because "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt."[178] Then, after discussing the standards set forth by *Fulminante*, Justice Scalia applied the above logic and stated that a deficient reasonable doubt instruction was structural error because

168. *Neder*, 527 U.S. at 8-9 (quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986)).
169. Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993).
170. *Id.* at 276.
171. *Id.* at 277.
172. *Id.* (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).
173. *Id.* at 278.
174. *Id.* at 277.
175. *Id.*
176. *Id.* at 278.
177. *Id.*
178. *Id.*

"the jury guarantee [is] a 'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function."[179]

The unconstitutional instruction in *Sullivan* and *Booker* error deal with two separate but related problems: burden of proof and submission of issues to the jury. Dealing with the first problem, both *Sullivan* and *Booker* error are indelibly stained by the inappropriate standard of proof. In *Sullivan*, Justice Scalia stated that unguided juries, when left to their own devices, would merely ask if the defendant was "*probably*" guilty.[180] Similarly, one of the troubling aspects of *Booker* error is that judges find facts that raise the sentencing ceiling by a *preponderance of the evidence.* A preponderance of the evidence is equivalent to allowing juries to be guided by a "probably guilty" standard and as such, mirrors one of the major evils Justice Scalia was trying to avoid. Furthermore, *Sullivan* showed concerns over the fact that issues were submitted to the jury, but in the instance of a deficient beyond-a-reasonable-doubt instruction, the judge became the ultimate arbiter of the verdict.[181] Likewise, the fundamental underpinning is that the judge, not the jury, is the one finding the facts that lead to a sentencing enhancement. In fact, *Booker* error is more egregious than the error in *Sullivan* because in *Sullivan* the issue actually reached the jury. Though the system in *Sullivan* was fundamentally flawed, the jury still had an opportunity to weigh in on the finding of fact. In cases of *Booker* error, no such opportunity was present.

In short, *Sullivan* declared that the Sixth Amendment is a basic protection that weighs on the reliability of the trial. In that case, the incorrect burden of proof and removal of the issue from the province of the jury amounted to structural error.[182] In instances of *Booker* error, issues are found by the judge, not the jury, and by a burden of proof lower than the beyond a reasonable doubt standard. Hence,

179. *Id.* at 281.

180. *Id.* at 278.

181. *Id.*

182. *Id.* at 281-82. Some may point to this language and say that *Booker* error does not deprive a defendant of a jury because the majority of the issue relating to the guilt of the accused reached the jury. This is incorrect because the issues taken out of the grasp of the jury increase the sentence of the defendant. Under the former incarnation of the Guidelines, this was tantamount to removing an entire cause of action with the sentence the length of the enhancement. As such, the Supreme Court's deference to the Sixth Amendment cannot be circumvented by noting that some of the sentence was pursuant to a jury verdict. To maintain the intent and purpose of *Rose*, not allowing a jury to find facts that increase the sentencing ceiling must be deemed structural errors.

Booker error implicates the same basic protection and it flouts that protection in the same way as *Sullivan.*

Beyond this, the idea that *Booker* error disregards a basic protection is bolstered by language in the Supreme Court's decision in *Rose v. Clark.*[183] The Court in *Rose* said, "Where that right [to a jury trial] is altogether denied, the State cannot contend that the deprivation was harmless [and thus a structural error] because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty."[184] This quotation has two effects. First, it is the ready-made counterpoint to those who wish to invoke the following words of *Fulminante*: "most constitutional errors can be harmless."[185] This may be the position of the Supreme Court, but "most" is not "all," and it cannot be assumed that, by virtue of these six words, *Booker* error is not structural. Second, *Rose* evinces the Court's deference to the guarantees of the Sixth Amendment and lends credence to the idea that right to a jury is a basic protection that cannot be lightly eschewed. This leaves little doubt that the jurisprudence of the Court dictates that the right to a jury is a basic protection that fulfills the first prong of the structural error inquiry.

B. *Booker* Error As Unmeasurable

The second prong of the structural error requires that the error "defy analysis by harmless [or plain] error standards . . . ."[186] Provided that an error can be analyzed in the context of other evidence, such an error will be analyzed for plain error.[187] This prong's application to *Booker* error, unlike the first prong, is more self-evident. The fact that the error's impact is not measurable is the problem that plagues the three approaches to plain error in *Booker* error cases discussed above. In cases like *Oliver*, almost all plaintiffs are deemed to have suffered plain error. However, this viewpoint rests not on an analysis of any given evidence in the record that plain error occurred. On the other hand, case like *Mares* present defendants with an almost unprovable burden. This approach does not turn on whether plain error occurred, but rather automatically assumes that it did not because the court has no way of gleaning if it did. Finally, *Paladino*

183. 478 U.S. 570, 578 (1986).

184. *Id.*

185. Arizona v. Fulminante, 499 U.S. 279, 306 (1991).

186. *Id.* at 309.

187. *See id.* at 310 (discussing this process in the context of involuntary confessions).

seems to present a way to measure the error, but this remains fatally flawed. The cursory review that is bound to take place and the reality that judges leave the bench render this an option that is not viable.

Furthermore, unlike other types of error, the record tends not to speak to the subject matter that *Booker* error deals with. For example, in *California v. Roy*, the Court stated that a judge failing to instruct a jury on an element of a crime was trial error because the effect was not always unmeasurable.[188] The premise was that other evidence in the record could show whether this omission made a difference.[189] *Booker* error is different because the record will almost invariably be barren of information on the pertinent subject. Errors like that in *Roy* can be analyzed in the context of the record because the record deals largely with evidence that directly weighs on the problem that the trial error created. However, *Booker* error is a fundamentally different inquiry: what was the state of mind of the judge at the time of sentencing? Would the judge have sentenced in the same way if the Guidelines had been advisory? This is something that the record rarely, if ever, exposes. For that reason, *Booker* error cannot be said to be lumped into "trial error" category. Thus, with these two prongs fulfilled, it is manifest that *Booker* error is structural in nature.[190]

Conclusion

When the Federal Sentencing Guidelines came to an end, a

188. 519 U.S. 2, 6 (1996).

189. *Id.* Some may try to draw analogy to this case and say that *Booker* error is akin to omitting an element. This is incorrect for two reasons. One, as noted above, the evidence in the record speaks to omission in *Roy*, but not to the judge's state of mind, which is the relevant inquiry in cases of *Booker* error. Thus, *Booker* error is unmeasurable, while omission of an element is not. Two, Justice Scalia seems to hint at the concern of a slippery slope. Deeming omission of an element structural error could lead to misdescription of an element to be deemed structural error. *Id.* at 5. *Booker* error, on the other hand, is a more narrow class of errors that does not lend itself to such an extension. As such, drawing comparison to *Roy* does little to undermine the position taken in this article.

190. Recently (June 2006), the Court decided Washington v. Recuenco. 126 S. Ct. 2546 (2006). The core holding of *Recuenco* was that harmless error analysis could be applied to *Blakely* errors. *Id.* at 2553. Outside of dealing only with *Blakely* error and making no mention of *Booker*, the Court largely relied on *Neder*, a case dealing with harmless error analysis when an instruction on an element is omitted. *Id.* at 2552. This article previously pointed out the problems associated with comparing that type of error and *Booker* error, *supra* note 188, and the Court did not have occasion to tackle the arguments made in this article. As such, *Recuenco* does not change the position stated in this article.

whole new crop of problems were born. In dealing with unpreserved *Booker* error, the circuit courts have been left drifting in an enormous ocean sans compass. Because of this, a multi-way split on what plain error means after *Booker* has emerged. This has meant that defendants' chances of success on appeal have been largely dictated by what circuit a given case is in and not the merits of the case.

While the more lenient approach to plain error tends to reach the correct result, no circuit in the land has pegged the rationale. All circuits have failed to detect that *Booker* error is structural and is plain error by definition. *Booker* error both mirrors past errors and defies measurement by looking at the record. Put simply, *Booker* error is structural in nature and those defendants who have endured *Booker* error should automatically be granted new sentencing hearings.