

GVRs AND THEIR AFTERMATH IN THE SEVENTH CIRCUIT AND BEYOND

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In 2000, the U.S. Supreme Court decided *Apprendi v. New Jersey*,¹ and in 2004, *Blakely v. Washington*,² both of which concerned state court sentencing procedures. However, the Court did not make clear whether or not these precedents extended to federal court sentencing. The Seventh Circuit, in *U.S. v. Booker* (2004),³ reasoned that these decisions must hold also for federal sentencing, hence reversing the elevated sentence imposed by the judge under the preponderance of evidence standard, and remanding it to the Wisconsin district court for resentencing. The Supreme Court granted cert to *U.S. v. Booker*⁴ (along with a First Circuit district court case, *U.S. v. Fanfan*⁵) to resolve the question, siding with the Seventh Circuit. It then proceeded, in record numbers, to issue “Grant, Vacate and Remand” dispositions of sentences across the country. This article asks whether the High Court was effective in changing sentencing law across the country?

The Supreme Court has effect only when those charged with the implementation of its decisions comply with its rulings. Indeed, “a decision by the High Court is more final, but has little more vitality than the lower courts are willing to give it.”⁶ Gaining compliance would seemingly be difficult, given the institutional structure of the Court and the size of the

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1. 530 U.S. 466 (2000).
2. 542 U.S. 296 (2004).
3. 375 F.3d 508, 514 (7th Cir. 2004).
4. *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004).
5. 2004 U.S. Dist. LEXIS 18593 (D. Me., June 28, 2004).
6. STEPHEN T. EARLY, *CONSTITUTIONAL COURTS OF THE UNITED STATES: THE FORMAL AND INFORMAL RELATIONSHIPS BETWEEN THE DISTRICT COURTS, THE COURTS OF APPEALS, AND THE SUPREME COURT OF THE U.S.* 7 (1977).

federal and state judiciaries.⁷ However, much research has considered whether lower courts comply with Supreme Court precedent, largely finding that they do.⁸ That research often concludes that the lower court complies because of its perception that it should; it complies because of what the Supreme Court *is* rather than what it *does*.⁹ A circuit court judge, when asked about the relationship between the Supreme Court and the lower courts, cited Justice Jackson's relatively famous aphorism: "We are not final because we are infallible, but we are infallible only because we are final."¹⁰ The normative power of the Court with respect to its lower court "agents" has the potential to be powerful.¹¹

This article, however, seeks to determine the extent to which the Supreme Court does indeed gain compliance through monitoring in a way not considered by the previous research on point, by considering circuit court reactions to "Grant, Vacate, and Remand" (GVR) dispositions by the Supreme Court, in light of its decision in *U.S. v. Booker*. Unlike the U.S. Courts of Appeals, the U.S. Supreme Court is not (supposedly) in the business of error correction.¹² The Court should decide, according to its own testimony, only those cases that are "of . . . general public importance or concern."¹³ A circuit judge highlighted this by saying, "Well, they [the Supreme Court] don't decide cases. They decide issues." Therefore, when the Supreme Court engages in what looks to be error correction, that is, GVRing cases that are

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7. Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 865–872 (1983); SARA C. BENESH, *THE U.S. COURT OF APPEALS AND THE LAW OF CONFESSIONS* 12–13 (2002).
 8. See, e.g., Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interaction*, 38 AM. J. POL. SCI. 673 (1994); BENESH, *supra* note 7; Sara C. Benesh & A. Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alterations of Precedent*, 64 J. POL. 534 (2001); Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes: Miranda and New York Times in the United States Courts of Appeals*, 43 W. POL. Q. 297 (1990); Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325 (1987).
 9. BENESH, *supra* note 7 at 3 & 129; on subordinates responding to authority merely because they are the authority in general, see HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS*. (4th ed. 1997).
 10. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). Confidential interview by author, (Apr. 16, 2007) (on file with author).
 11. Richard L. Pacelle & Lawrence Baum, *Supreme Court Authority in the Judiciary: A Study of Remands*, 20 AM. POL. Q. 169, 186 (1992).
 12. EARLY, *supra* note 6; Hellman, *supra* note 7; H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 100 (1991); J. Mitchell Armbruster, *Deciding Not to Decide: The Supreme Court's Expanding Use of the "GVR" Power Continued in Thomas v. American Home Products, Inc. and Department of the Interior v. South Dakota*, 76 N.C.L. REV. 1387 (1998).
 13. Hellman, *supra* note 7, at 800.

similar to one recently decided, but decided in the “wrong” direction, we might question its motives.

One clerk was quoted by Perry as saying that these cases could be explained via “the Zorro concept—where they strike like lightning to do justice.”¹⁴ This suggests that it may be difficult for the justices not to correct an error brought to its attention when it is as easy as issuing a GVR order to fix it.¹⁵ This article asserts that the motive on the part of the Supreme Court is to enhance its monitoring capacity, in the most expedient way possible. So, rather than hear more cases on the merits to be sure lower courts are compliant (and that national law is coherent), the Court will gather cases together and mass-produce guidance by remanding them to the circuits in light of fully-argued and decided cases. The circuits, for their part, are expected to examine the Supreme Court’s precedent carefully, sometimes calling for briefs from the parties on the applicability of the precedent to the decision, and then decide whether or not to change the previous disposition. The Seventh Circuit’s Rule 54, for example, says, “When the Supreme Court remands a case to this court for further proceedings, counsel for the parties shall, within 21 days after the issuance of a certified copy of the Supreme Court’s judgment pursuant to its Rule 45.3, file statements of their positions as to the action which ought to be taken by this court on remand.”¹⁶

Because I know so little about this process,¹⁷ I am interested in learning more. In this article, I consider the reaction of circuit courts to a GVR from the Supreme Court concerning *U.S. v. Booker*. Do the circuits treat it as akin to a reversal? Is it merely a suggestion to check the sentence again? Scant scholarly attention has been paid to the meaning of the GVR and little is known about the effectiveness of remands from higher courts to lower courts in general. Examining reactions of the Courts of Appeals to GVRs after

14. PERRY, *supra* note 12.

15. Armbruster, *supra* note 12.

16. Available at <http://www.ca7.uscourts.gov/Rules/rules.htm>. Judges in other circuits also mentioned this as a potential next step after receiving a GVR. See, e.g., *Hernandez v. Denton*, 929 F.2d 1374, 1374 (9th Cir. 1990), where Judge Schroeder, writing for the panel, says, “We have given further consideration after requesting briefs from the parties as to the bearing of that decision on this case.” And the Fourth Circuit rule on remands notes that judges “may require additional briefs and oral argument.” Available at www.ca4.uscourts.gov/pdf/rules.pdf. In addition, the caselaw concerning *Booker* suggests that, at least in some cases if not in all, panels in the First, Fifth, Eighth, Tenth, and Eleventh Circuits also requested such briefs. Indeed, in the Eleventh, it is also by rule, according to several decisions (see, e.g., *United States v. Roach*, 140 F. App’x 619, 619 (11th Cir. 2005)) (though the author could not locate the rule in the Eleventh Circuit’s Rules and Internal Operating Procedures). This idea of requesting briefs was mentioned by all judges interviewed, as well, especially in reference to “close” cases.

17. One of the leading works on point calls it “the most puzzling mode of disposition in the Court’s repertory.” Hellman, *supra* note 7.

Booker, along with interviews with some circuit judges about their perceptions of the GVR generally and GVRs in light of *Booker* specifically, I begin to comprehend more fully the role that these summary dispositions play in the judicial hierarchy and how circuit differences manifest themselves here.¹⁸ The Seventh Circuit, by complying, in effect, prospectively with what it expected to hear from the U.S. Supreme Court, and by monitoring its district courts, is especially instructive. I start by summarizing the state of the knowledge on Grant, Vacate, Remand dispositions.¹⁹

GRANT, VACATE, AND REMANDS²⁰

Grant, Vacate, and Remand dispositions, hereinafter GVRs, went largely unnoticed until Professor Arthur Hellman wrote a *University of Pittsburgh Law Review* article and subsequent *Judicature* article about them.²¹ Even after, it was not until 2004 when more articles considering this particular form of decision making in the Supreme Court were published.²² Political scientists have all but ignored these decisions; the singular exception is Pacelle and Baum's article on remands, which considers all sorts of remands of which GVRs are but one type.²³ The Spaeth database only includes GVR orders and codes anything of substance from them when they are accompanied by a

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18. In order to collect the data, I first printed all of the Court's orders in the 2004 and 2005 Terms; e.g., the first two following *Booker*. (These are available on the Supreme Court's website, www.supremecourtus.gov.) My research assistants then engaged in LEXIS searches to find the lower court's reaction to the GVR disposition. They surely missed some cases (the Supreme Court provides only the name of the case and sometimes chooses one of many parties, sometimes even misspelling the parties' names, along with the circuit so some were difficult to find) and others may not have been decided by the circuit court as of this writing. For those we did find, my team coded a sample of the decisions for a host of variables of interest, some of them discussed in this article. In order to supplement this data collection, I also spoke to four circuit court judges. For the purposes of this article, they remain entirely anonymous, including any attribution of their comments to their home circuit. All of the judges were extremely accommodating and we very much appreciate the substantial time they gave us.
 19. This material is more fully discussed by Sara C. Benesh, Jennifer Luse, Amanda Schaeffer, and Nicole Simmons, *Supreme Court Monitoring Via GVRs*, Paper presented at the Annual Meeting of the Midwest Political Science Association, April 23, 2006. (On file with author.)
 20. *Id.*
 21. Hellman, *supra* note 7; Arthur A. Hellman, "Granted, vacated, and remanded"—shedding light on a dark corner of Supreme Court practice, 67(8) *JUDICATURE* 389 (1984) [hereinafter Hellman, *Granted*]. See also Arthur A. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 *HASTINGS CONST. L. Q.* 5 (1983) [hereinafter Hellman, *Second Thoughts*].
 22. Michael Berch, *Symposium: We've Only Just Begun: The Impact of Remand Orders on American Jurisprudence*, 36 *ARIZ. ST. L. J.* 493, 512 (2004).
 23. *Supra*, note 11.

dissent, which is rare.²⁴

Given this scant attention, attempts to ascertain what drives the decision to issue one of these orders starts largely with a blank slate. But first, before attempting to understand why the Court issues these orders and what the circuits make of them, I should be clear about what, in fact, these decisions are. It appears to be the case that the Supreme Court issues a GVR when it determines that a lower court might benefit from a recent ruling in reevaluating their decision. In the Supreme Court's words, these are a "customary procedure,"²⁵ though debate among the justices as to the circumstances under which they are appropriate suggests that their use is not so clear. Indeed, most of the law review literature on topic recounts debate, coming especially from Justices Scalia, Thomas, and Rehnquist, over their (over-)use.²⁶ Generally, these orders, usually only a couple of sentences long, state that the petition for cert in the case is granted, the judgment is vacated, and the case remanded "in light of" some intervening Supreme Court decision.²⁷ An example, in its entirety:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *Unitherm Food Sys. v. Swift-Eckrich*, 546 U.S. ____ (2006).²⁸

The Court has given some guidelines about when it will issue a GVR. In *Henry v. City of Rock Hill*,²⁹ the Court said that a case will be remanded in light of another case when the Court is "not certain that the case [is] free from all obstacles to reversal on [the] intervening precedent."³⁰ The Court warned, though, that such a disposition "does not amount to a final determination on the merits" but that it "indicate[s] that we [find the "in light of" case]

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24. See Harold J. Spaeth, *The United States Supreme Court Databases*, available online at <http://web.as.uky.edu/polisci/ulmerproject/sctdata.htm> (last visited Apr. 8, 2008). This is especially true given that it appears that the justices use a "rule of six" in deciding to hand down a GVR order. In other words, six justices have to agree to GVR a case before it happens; hence, there is not much room left for dissent (PERRY, *supra* note 12, at 100). Note, though, that there do exist GVRs with four dissenters, which casts some doubt on the tenacity of this "rule." See Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L. J. 551, 567 n. 96 (2004).
 25. *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945).
 26. See, e.g., Armbruster, *supra* note 12, at 1391-92; Martin, *supra* note 24.
 27. While most often a case is GVR'd in light of another Supreme Court case, the Court also occasionally GVRs in light of a recently passed statute, a state court decision that impacts a diversity case, a new agency interpretation, or a confession of error by the Solicitor General.
 28. *Vazquez-Valentin v. Santiago-Diaz*, 546 U.S. 1163 (2006).
 29. *Henry v. City of Rock Hill*, 376 U.S. 776 (1964).
 30. *Id.* at 776.

sufficiently analogous and, perhaps, decisive to compel re-examination of the case.”³¹ In *Lawrence v. Chater*,³² the Court used a two-part test to decide whether a GVR may be an appropriate resolution for a given case: “Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.”³³ However, the Court added that “if it appears that the intervening development is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.”³⁴

However, many lower courts do not have the benefit of studying these statements by the Supreme Court, so their meaning may not be clear to them.³⁵ In addition, the numbers are such that while there may be a large number of such dispositions each term, any one court or especially any one judge will likely have little familiarity with the process. Our data and interviews support this quite dramatically. Indeed, one judge declined to be interviewed because the judge had never been on a panel that considered a GVR from the Supreme Court, and another could not recall the last time a case had been GVR’d to the judge’s panel. The judge was correct to be unsure, as we had only a couple of cases in which the judge had participated in our larger dataset, which includes both *Booker* and non-*Booker* remands; hardly memorable to a judge hearing hundreds of cases each year.

Indeed, because of their uncertain meaning and their rarity for an individual judge, some legal scholars argue that GVRs do a disservice to the lower courts.³⁶ Rather than an additional monitoring device they, like Hellman,³⁷ see them as merely puzzling to the lower courts. Chermersinsky and Miltenberg say that “nothing in the last 20 years has provided any clarity as to how lower courts are to treat “GVR” . . . orders. The confusion exists in the press, among lawyers and, most importantly, in the lower courts.”³⁸ They

31. *Id.* at 777.

32. *Lawrence v. Chater*, 516 U.S. 163 (1996).

33. *Id.* at 167.

34. *Id.* at 168.

35. Erwin Chermersinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L. J. 513, 517 (2004).

36. *Id.* at 518; Armbruster, *supra* note 12.

37. Hellman, *Second Thoughts*, *supra* note 21.

38. Chermersinsky & Miltenberg, *supra* note 35, at 513.

cite one instance in the California Court of Appeal where a judge on the panel suggested that a GVR order from the Supreme Court was a merits decision,³⁹ i.e., that their previous decision was automatically void, treating the GVR like a reversal by the High Court.⁴⁰ Other courts, reacting to the same “in light of” decision reacted differently, some reinstating their previous decision, others changing their decision far less than did the California court. Chermersky and Miltenberg argue that the Supreme Court should use GVRs less often and should be more careful to be sure that the intervening decision is truly on point when they do so.⁴¹

While Justice Stevens has suggested that the decision to GVR is an “action on the merits,”⁴² thereby asserting that the justices do examine the case they eventually GVR to be sure its new decision is relevant, and Hellman also suggests that the Court checks for similarity of cases and real error,⁴³ one interviewed judge suggested that, in the judge’s experience, the Supreme Court usually issued GVRs in an extremely haphazard way, resulting in the judge’s court merely reaffirming their previous judgment since the “in light of” case had little to do with theirs. While the literature and the judges suggest that GVRs can cause confusion in the lower courts, one of the judges interviewed suggested that closely-divided decisions were far more problematic than summary dispositions in terms of providing less-than-ideal guidance.

Many of the judges interviewed discussed what they thought the process at the Supreme Court might look like. One judge thought it was fairly superficial and a housekeeping sort of device. As noted earlier, this judge felt that most GVRs were, at best, tangentially related to the circuit’s case. Another judge expressed discomfort with and disinterest in “psychoanalyzing the Justices,” arguing that the judge just does not know enough about psychology to try to ascertain what the Justices intended or even to predict how they might vote in a given case. These judges asserted that they, as circuit court judges, just do the best they can and, if they are wrong, assume the Supreme Court will reverse them. They are, after all, as one judge reminded me, “such inferior courts as Congress may from time to time ordain and establish.”⁴⁴ Another judge felt the Court proceeded with “an abundance of caution” in determining whether to deny cert outright or to GVR and that,

39. The “in light of” case was *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

40. Chermersky & Miltenberg, *supra* note 35, at 515.

41. *Id.* at 515–516 & 526.

42. *Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J. dissenting).

43. Hellman, *Second Thoughts*, *supra* note 21, at 10.

44. Confidential interview with circuit court judge, April 16, 2007 (on file with author).

in the judge's view, the Supreme Court "is probably saying, look, it may well be that the panel that decided that case no longer wants it to become final knowing what we've just done in this other case."⁴⁵

HOW OFTEN A GVR

Most of the scholarship on point argues that the use of the GVR has increased over time,⁴⁶ especially since the 1960s. Martin notes that the number is fairly consistent, ranging from 5 to 100 per term (2004).⁴⁷ Numbers from the Court's order lists for Supreme Court Terms 2003–2007 are presented in Table 1. As can be seen there, the number of *U.S. v. Booker* GVRs dwarfs the numbers of non-*Booker* cases over the five terms combined; "everyone" sentenced under the federal guidelines appealed their sentences after that case. Ignoring that aberration for a second, there were 39 cases in 2003, 44 in 2004, and 22 in 2005 that received GVR dispositions. In 2006, however, there were 260 non-*Booker* GVRs, though many GVRs to the state courts that term were a result of the Court's sentencing decision in *Cunningham v. California*.⁴⁸ As of this writing, there were 105 GVRs in the current term. In other words, even barring a major decision like *Booker* or *Cunningham*, in which mass GVRs are necessary due to the nature of a given precedent, the Court uses GVRs frequently and consistently, but do not generally do so to an overwhelming extent. However, they do GVR nearly as many cases as they treat fully these days, as seen by comparing Tables 1 and 2, so the number is not inconsequential, and, in the case of *Booker* and other similar decisions, there is seemingly huge additional potential for direct Supreme Court impact on circuit and district court decision making. As Table 2 shows, the Court decided only 267 cases over OT 2003–2006; from Table 1, we can see that it GVR'd 1061 cases over that same time period, an increase of almost 400%.

REASONS FOR THE GVR

Therefore, I suggest that GVRs are an additional means by which the Supreme Court can efficiently engage in additional monitoring of the lower courts; they are an economical means by which to deal with a burgeoning

45. Confidential interview with circuit court judge, April 15, 2007 (on file with author).

46. See, e.g., Chemerinsky & Miltenberg, *supra* note 35, at 518; Hellman, *Second Thoughts*, *supra* note 21, at 7–11; Armbruster, *supra* note 12, 1388; Martin, *supra* note 24, 551.

47. Martin, *supra* note 24.

48. 549 U.S. 270(2007).

docket. As Chemerinsky and Miltenberg suggest, “A GVR order is so easy for the Supreme Court: it disposes of a case without needing to address its merits.”⁴⁹ Others highlight the “bang for the buck” theory, arguing that, even with decreased plenary caseloads, the Supreme Court can have a large impact via the GVR.⁵⁰ And Justice Scalia himself makes the argument that there is monitoring involved in GVRs, though he wishes there were not: “In my view we have no power to make such a tutelary remand, as to a schoolboy made to do his homework again.”⁵¹

Not everyone agrees with this hypothesized motivation for GVRing; that is, enhanced, efficient monitoring. Some argue that the Court uses them to promote “equity among litigants,” which could be termed “judicial equal protection.”⁵² The thinking here is that an individual should not lose his or her case merely because he or she happened to have his or her case decided while the Supreme Court was considering another case that it eventually reversed; that “like cases be treated alike,”⁵³ or that a party is not denied the benefit of the correct ruling due to an “accident of timing.”⁵⁴ Oftentimes, cases eventually GVR’d begin as cert petitions that are held by the Supreme Court until it issues a ruling in a similar case to which they have decided to give plenary hearing. Once the decision in the similar case is announced, the held cases are GVR’d in light of the new case. Justice Scalia has said that the Court “regularly holds cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be “GVR’d” when the case is decided.”⁵⁵ Not only does this serve equity concerns, but also has institutional benefits for the Court.⁵⁶ However, key to uncovering the extent to which these dispositions might serve as additional points of monitoring are the lower courts’ reactions

49. Chemerinsky & Miltenberg, *supra* note 35, at 526.

50. David C. Vladeck, *Keeping Score: The Utility of Empirical Measurements in Judicial Selection*, 32 FLA. ST. U. L. REV. 1415 (2005). However, Martin claims that the GVR has actually created “perverse incentives that increase transaction costs, delay adjudication, burden both the Supreme Court and lower courts, and result in both systemic and individualized injustice” as litigants gain incentives to file even meritless to keep a case alive. See Martin, *supra* note 24, at 552.

51. *Lawrence v. Chater*, 516 U.S. 163, 185–186 (1996) (Scalia, J., dissenting).

52. Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PITT. L. REV. 1067, 1111 (1988).

53. *Id.* at 1113.

54. Hellman, *Granted*, *supra* note 21, at 844.

55. *Lawrence*, 516 U.S. at 181 (1996) (Scalia, J., dissenting).

56. Revesz & Karlan, *supra* note 52. Other scholars have observed also that when a case is held and the Court denies cert it may be a signal that the Court “thought that the decision it declined to review (or even to GVR) was consistent with its recent opinion.” David W. Robertson and Michael F. Sturly, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 30 TUL. MAR. L. J. 195, 217 (2006).

to them and their perceptions of them. The reactions of the circuit courts to *Booker* remands is used here for illustration of the extent to which effective monitoring is obtained via GVRs.

A FOCUS ON *BOOKER*

As noted above, the *Booker* case involved the mandatory nature of the U.S. Sentencing Guidelines.⁵⁷ In that case, the U.S. Supreme Court decided that, when a defendant's sentence is enhanced due to a factual finding by the district judge using only the preponderance of the evidence standard, the defendant is denied the Sixth Amendment right to a jury trial. Treating the Guidelines as mandatory rather than advisory further exacerbates this problem and hence that portion of the Sentencing Reform Act that requires a judge to adhere to the Guidelines was deemed unconstitutional. Hence, the Court (1) found that any fact used to enhance a sentence need be found by the jury using a "beyond a reasonable doubt" standard; (2) rendered the Guidelines to be advisory rather than mandatory; (3) affirmed that district court judges should still take the Guidelines into account in sentencing; and (4) directed the circuit courts to review sentences for unreasonableness. The Court also expected the circuits to consider whether the question was raised in a timely manner and to use doctrines such as the plain-error test, and, for non-constitutional claims, harmless error analysis, to decide whether or not to remand to the district court for resentencing.

The Seventh Circuit, which, as mentioned earlier, decided the case that was eventually reviewed by the Supreme Court, both preemptively complied with the Court (by extending its decisions regarding state sentencing practices to the federal case) and worked to ensure that its district courts also reacted to the Supreme Court's decision in *Booker*. In *U.S. v. Paladino*,⁵⁸ the circuit created a procedure by which sentencing decisions would be reviewed. In that decision, which was not a GVR from the Supreme Court, the Seventh Circuit considered how to apply the plain-error rule to sentencing appeals in light of *Booker*. That the Seventh Circuit received several of these cases from litigants suggests, first, that litigants sought the consideration of the circuit before appealing for a writ of cert in accordance with the Supreme Court's new rules regarding sentencing, and second, that the Seventh Circuit was actively seeking to establish a routine with respect to these cases and their consideration of them in order that they might fully comply with Supreme Court precedent. Here, the circuit considered the interpretations of other

57. *United States v. Booker*, 543 U.S. 220 (2005).

58. 401 F.3d 471 (7th Cir. 2005).

circuits to ascertain what it saw as the most faithful reading of the *Booker* decision, settling on something between the Sixth and Fourth Circuit's (which, as shown in Table 5, below, assumes every defendant deserves to be resentenced) and the Eleventh Circuit's (which basically determined that a defendant can never establish plain error) interpretation. It adopted a procedure much like that of the Second Circuit's, in which a limited remand would be used to ascertain, from the district court judge, whether or not the sentence would have been different had s/he understood the Guidelines to be advisory rather than mandatory. This seems to be very much in line with the Court's ruling on point, and demonstrates a circuit taking seriously its role as a lower court and as a reviewer of the trial court.

ARE THEY EFFECTIVE?

Interestingly, one of the judges with whom I talked expressed the opinion that the *Booker* remands did not have much effect; i.e., that the sentences were largely reinstated. "There's no point in having a sentencing commission," after all, "if we don't pay some attention to the guidelines," the judge said.⁵⁹ In order to ascertain whether this judge's intuition is correct, Table 3 shows, for 129⁶⁰ of the circuit court responses to *Booker* GVRs, that, indeed, most cases fall into the category in which the circuit had originally affirmed the sentence and, on GVR review from the Supreme Court, affirmed it again. Some would consider this to be noncompliant behavior, but before doing so, one ought to look more closely.

Indeed, according to our interviews, the law review literature, and the Supreme Court itself, a lower court judge need not reverse himself or herself merely because the Supreme Court issues a GVR; rather, the lower court is to examine the case cited by the Court in the order and then determine whether or not further action need be taken.⁶¹ Our Table 4 shows that, even though in the vast majority of cases the circuit reinstates its original opinion about the validity of the sentence on remand, most of those reinstatements are reasonable. After reading the *Booker* case and these responses to *Booker* GVRs, cases were coded as being either "compliant" with the letter and spirit of *Booker* or

59. Confidential interview of circuit judge, April 16, 2007 (on file with author).

60. For the purposes of this article, an approximate 20 percent sample of the 695 GVR'd cases that could be located were coded.

61. See, e.g., Martin, *supra* note 24; Henry v. City of Rock Hill, 376 U.S. 776 (1964). But see some of the evidence cited in Hellman, *Granted*, *supra* note 21.

“not compliant” with either the letter or spirit.⁶² As Table 4 demonstrates, over 80% of cases were coded as compliant in OT 2004, and all of the cases in OT 2005 were coded thusly.

As Tables 5 and 6 demonstrate, however, this behavior is not universal nor is it fully consistent across circuits. Indeed, while many circuits decided all of their cases in a way that could be plausibly considered to be compliant with the *Booker* decision, the Eleventh Circuit, adopting as it did an extremely inflexible approach to *Booker* claims, was only half-compliant with the decision. The First Circuit was also less compliant than other circuits, though the small numbers of cases from each circuit makes it a bit premature to make any broad claims. The Ninth Circuit, in *U.S. v. Ameline*,⁶³ does a nice job of categorizing the various standards of the circuits. It agrees with the Second, Seventh, and D.C. Circuits that a limited remand procedure is the most compliant with *Booker*, asking the district judge himself or herself whether a different sentence would have resulted under an advisory scheme rather than trying to divine that information. On the other hand, the First, Fifth, Eighth and Eleventh Circuits, when they could not determine whether a difference in sentencing would result on remand, find that the defendant therefore has not met his or her strong burden and so deny relief (or deny relief outright because the claim was not preserved). Finally, the Third and the Sixth take the opposite extreme approach, according to the Ninth Circuit, and find it far easier for the defendant’s sentence to be vacated. Indeed, the sentence is vacated and remanded whenever the sentence imposed is longer than the sentence that would have been imposed using only facts admitted by the defendant or found by a jury.

BUT, IS THE SUPREME COURT WATCHING?

As shown, there are many cases in which the lower court reinstates its original ruling after reviewing the Supreme Court’s “in light of” case, and so we might pursue the idea of monitoring further by seeking to understand the extent to which the Supreme Court is “watching” for resolutions of its orders. In other words, is the Supreme Court more likely to review an appeal of the circuit’s response to its GVR? Especially given the differential standards

62. Cases were coded compliant if they treated the *Booker* case, reviewed the lower court record and the supplemental briefs of the parties, and affirmed the sentence only after conducting either plain-error review or harmless error review, depending upon whether the *Booker* error was preserved on appeal. If the circuit panel merely dismissed the claim because it was not preserved, it was coded non-compliant as were any decisions that merely affirmed the sentence without discussion.

63. 409 F.3d 1073 (9th Cir. 2005) (en banc).

being used in the circuits, as noted above, we might expect the Supreme Court to weigh in on which approach is closest to its preferences. The judges interviewed did seem to get the sense that the Supreme Court was “watching,” though it did not appear that this sense was universal, nor was it significant to them in their decision making. They basically told us that if the case is not on point, they state that and move on, and even if it is, sometimes the disposition remains the same for some other reason. So, again, they do their best and await the result. There is an amusing story of a back-and-forth between the Supreme Court and a state court,⁶⁴ but, given the number of petitions the Court receives each year and the nature of the cases receiving GVR treatment, it seems unlikely that the lower court would again be reviewed very often. In other words, while there are stories, there is no real systematic evidence that the resolution of a case on remand from the Supreme Court via GVR is more likely to attract the justices’ attention on cert. Indeed, given Rehnquist’s repeated arguments that these cases given GVR treatment are not certworthy under Rule 10,⁶⁵ they may be even less likely to be reheard. One of the judges we interviewed could not think of a case in which that had happened, adding “it’s kind of important not to think that the Supreme Court is automatically gunning for you if they vacate and remand for reconsideration in light of. They are not necessarily. They just don’t want to have to deal with ten variations of a decision they just reached. And they think the lower courts, for the most part, will be capable of applying the Supreme Court’s ruling.”⁶⁶

Hellman finds that, during the period 1975–1979, while most litigants sought appeal, only 12 of 53 received plenary consideration and only 6 of those were reversed. In addition, 2 received summary treatment reversing or vacating.⁶⁷ “For the most part, the Court simply denied certiorari, usually without any notation of dissent.”⁶⁸ Considering only those cases GVR’d in light of *Booker*, I find, universally, that the Supreme Court is not interested in revisiting the decision of the circuit courts on remand, regardless of the standard they employ in resolving *Booker* GVRs. While cert was filed often in these cases (47% of the litigants in the cases under consideration had petitioned for cert after the circuit court’s decision as of this writing), *none* were accepted by the Court for review.⁶⁹

64. See Hellman, *supra* note 7, at 838.

65. Arbruster, *supra* note 12, at 1392–1394.

66. Confidential interview with circuit judge, April 14, 2007 (on file with author).

67. Hellman, *supra* note 7, at 842–843.

68. *Id.*

69. This is not to say that the Supreme Court has *never* reconsidered a case originally GVR’d in light of *Booker*. It is only the case that there are no such instances in my dataset. The Court, in cases GVR’d in light of other decisions, does sometimes, though extremely rarely, grant cert after the circuit court’s

And so, again, we raise the question of why the circuit would comply with the Supreme Court's ruling. When asked outright, the judges interviewed said exactly what some of the scholarship on impact and compliance cited at the beginning of the article said: they provide some variation on, "because they are the Supreme Court and that's our job." Indeed, precedent is often argued to be a strong constraint, especially when it is of the hierarchical type, and adherence to remand orders, at least according to Berch, should be even higher given their direct nature.⁷⁰ However, Berch tells stories of noncompliance, arguing that summary remands provide too much leeway to lower court judges.⁷¹ But, as our analysis shows, very few circuit court decisions thwart GVRs in this way, even if they reach the same disposition after the remand. Even those we consider to be noncompliant are, in fact, using a general rule about timeliness and so they could certainly argue that they are complying with the GVR.

When a case is squarely on point, none of the judges interviewed would go any further; they would simply reverse their previous decision and move on. If the ruling is on point for only one part of a multi-issue decision, though, it will not always change the case and so the case might still be reaffirmed. One judge described it thusly:

... [in a] case where we have multiple issues, and we went on one—we acknowledge, of course, as we have to, our prior opinion relied on such and such issue and that that question is now foreclosed by the Supreme Court's decision in such and such—that issue is not necessarily dispositive of this whole case because there's also an argument for this, that, and you go into and say why. Those arguments, those issues survive even though Supreme Court has foreclosed one issue.⁷²

The data I collected support their claims.

decision on remand. (It did so and reversed the circuit's decision in two cases GVR'd in light of cases other than *Booker* from 2005–2007. See Benesh et. al., *supra* note 19.) The Court also may re-GVR a case in light of another precedent, as it did in *Billingslea v. United States* (2006). In *Wright v. Van Patten*, 127 S. Ct. 743 (2008), the Supreme Court reversed summarily a circuit court's decision after a GVR in light of *Carey v. Musladin*, 549 U.S. 70 (2006).

70. Michael A. Berch, *We've Only Just Begun: The Impact of Remand Orders from Higher to Lower Courts on American Jurisprudence*, 36 ARIZ. ST. L. J. 493 (2004).

71. *Id.*

72. Confidential interview with circuit court judge, April 14, 2007 (on file with author).

CONCLUSIONS AND DIRECTIONS FOR FURTHER RESEARCH

I need more data and more interviews, of course, and this article is part of a long-term project exploring the nature of the relationship between the Supreme Court and the circuits. It would be fruitful to more completely include the district courts into this equation. How do they react to those GVRs that get passed along to them? And how do they perceive remands from the circuits? A clear picture of the "hierarchy of justice" will emerge only when we include all three levels of federal courts into the equation. It is surely the case, as evidenced by the Seventh Circuit cases we cite, that the circuits may indeed be acting as a principal to the district courts, at least in the sentencing area.⁷³

It would also be useful to explore this process in issue areas other than sentencing to see if some sorts of cases gain more compliance than others, which ones, and why. These questions seem to have explicit bearing on the cert process, and the Supreme Court's process and decision making in this area is an additional puzzle to be worked out.

In addition, 54% of the cases in which the circuit considers the Supreme Court's order are rendered in unpublished decisions and almost none of them were preceded by oral arguments. We are only beginning to understand the ramifications of circuit differences in publication and oral argument rates and a study aimed to ascertain the extent to which these factors influence outcomes; at least when the Supreme Court GVRs a case to a circuit, would be enlightening as well.

Finally, the circuit differences uncovered here, both qualitatively via the language and standards used by the various circuits in considering how to apply the Court's ruling in *Booker*, and quantitatively differentiating the circuits in terms of their compliance, demonstrate the utility of considering the circuits as so many individual courts rather than as one big whole. Only then will we be able to more ably model the decision-making behavior of the judges on these benches. These are all federal appellate courts, to be sure. But they each have their own histories, their own norms, and their own rules and all of these must complicate decision making on these benches.

Overall, I have so much more to learn about the relationship between the Supreme Court and the circuit courts and the decision-making behavior of the circuits more generally; this project is only a start.

73. Indeed, it may well be the case that the circuits are far better at prescribing action by the district court judges in terms of what they need to do to comply with Supreme Court precedent than the Supreme Court itself.

**Table 1:
Frequencies of GVR Dispositions**

October Term	GVR to Circuit (non-Booker)	GVR to State Court	GVR in light of <i>U.S. v. Booker</i> (all to circuits)
2003	25 (64%)	14 (36%)	0 (0%) (Not decided yet)
2004	32 (5%)	12 (2%)	660 (94%)
2005	18 (32%)	4 (7%)	35 (61%)
2006	59 (23%)	201 (77%)*	1 (0.4%)
2007**	102 (97%)	3 (3%)	0 (0%)
Total	236 (20%)	234 (20%)	696 60%)

Source: "Orders" and "Miscellaneous Orders," U.S. Supreme Court, Available online at www.supremecourtus.gov. Last visited January 15, 2008.

* Most of these were in light of *Cunningham v. California*, 549 U.S. ___, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007), another sentencing case.

** Up to and including January 14, 2008.

**Table 2:
Case Dispositions on the Merits by Year**

October Term	Reviewing Circuit	Reviewing State Court
2003	68	8
2004	70	12
2005	65	17
2006	64	7
Total	267	44

Source: *Harvard Law Review*, Table IIE, various November issues.

Table 3:
Disposition Before and After *Booker* GVR
(Percentage of total number in parens)

Disposition Prior to GVR	Disposition After GVR			
	Affirm	Reverse (at least in part)	Vacate (at least in part)	Remand to District Court (only)
Affirm	85 (66%)	1 (0.8%)	21 (16%)	17 (13%)
Reverse (at least in part)	0	1 (0.8%)	0	0
Vacate (at least in part)	0	0	2 (1.6%)	0
Dismiss	2 (1.6%)	0	0	0

Source: Data collected by author; sample of responses to *Booker* GVRs, OT 2004–2005. Percentages do not total 100% due to rounding.

Table 4:
“Compliance” with *Booker* GVR

October Term	Complied with GVR? (Subjective Coding; Number of Total Cases in Parens)	
2004	81%	(99)
2005	100%	(30)
Total	85%	(129)

Source: Data collected by author; sample of responses to *Booker* GVRs, OT 2004–2005.

**Table 5:
Standards Employed by the Circuits**

Circuit	Sample Language
1	<p>“The defendants did not preserve an attack on the guidelines in the district court. Thus, under our precedents, the question whether we should now remand for resentencing under the post-<i>Booker</i> advisory guideline regime depends on whether the defendants can establish a likelihood that in the event of a remand, their new sentences might well be less than the sentences imposed on them under the mandatory guidelines . . . It is enough that we think that the district judge in the circumstances of this case deserves an opportunity to consider the matter himself.” <i>United States v. Bradley</i>, 426 F.3d 54, 55–56 (1st Cir. 2005).</p> <p>“In this type of case, we are not ‘overly demanding as to proof of probability.’” <i>United States v. Pacheco</i>, 138 F. App’x 331, 332 (1st Cir. 2005).</p>
3	<p>“This circuit has taken the position that <i>Booker</i> sentencing issues raised on direct appeal are best determined by the district courts in the first instance.” <i>United States v. Miller</i>, 417 F.3d 358, 362 (3d Cir. 2005)</p>
4	<p>In light of the excision of § 3742(e) by the Supreme Court, we will affirm the sentence imposed as long as it is within the statutorily prescribed range, see <i>Apprendi</i>, and is reasonable, see <i>Booker</i>, Opinion of Justice Breyer for the Court at 18 . . . However, Hughes raised this issue for the first time on appeal. Because this issue was not advanced in the district court, we review the district court decision for plain error . . . In <i>Booker</i>, the Court ruled that a sentence exceeding the maximum allowed based only on the facts found by the jury violates the Sixth Amendment . . . [Hughes] must establish that the error affected his substantial rights, i.e., that it was prejudicial. To demonstrate that the error was prejudicial, Hughes must show that “the error actually affected the outcome of the proceedings . . . Our discretion is appropriately exercised only when failure to do so would result in a miscarriage of justice, such as when the defendant is actually innocent or the error seriously</p>

affects the fairness, integrity or public reputation of judicial proceedings."

"*Booker* wrought a major change in how federal sentencing is to be conducted. As the law now stands, sentencing courts are no longer bound by the ranges prescribed by the guidelines. As long as a sentence falls within the statutorily prescribed range, the sentence is now reviewable only for reasonableness. Under the record before us, to leave standing this sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy 'the fairness, integrity or public reputation of judicial proceedings.' We therefore exercise our discretion to correct this plain error."

Footnote 8: "In determining whether the exercise of our discretion is warranted, it is not enough for us to say that the sentence imposed by the district court is reasonable irrespective of the error. The fact remains that a sentence has yet to be imposed under a regime in which the guidelines are treated as advisory. To leave standing this sentence simply because it may happen to fall within the range of reasonableness unquestionably impugns the fairness, integrity, or public reputation of judicial proceedings. Indeed, the determination of reasonableness depends not only on an evaluation of the actual sentence imposed but also the method employed in determining it. Moreover, declining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to performing the sentencing function ourselves. This is so because the district court was never called upon to impose a sentence in the exercise of its discretion. That the particular sentence imposed here might be reasonable is not to say that the district court, now vested with broader sentencing discretion, could not have imposed a different sentence that might also have been reasonable. We simply do not know how the district court would have sentenced Hughes had it been operating under the regime established by *Booker*." *United States v. Hughes*, 396 F.3d 374, 380–81 (4th Cir. 2005).

5

"In light of *Booker*, we have reviewed numerous sentences under this plain error standard. Often, and likely quite rightly, our opinions do not provide any extended analysis, as most defendants have no evidence suggesting that any *Booker* error affected their substantial rights. Our opinions . . . have focused on two issues:

first, whether the judge made any statements during the sentencing indicating that he would have imposed a lesser sentence had he not considered the Guidelines mandatory; second, the relationship between the actual sentence imposed and the range of sentences provided by the Guidelines . . . Our cases have placed a substantial burden upon defendants to show specific statements of the sentencing judge that suggest a lower sentence would be imposed under an advisory system . . . Sentences that fall at the absolute maximum of the Guidelines provide the strongest support for the argument that the judge would not have imposed a lesser sentence . . . sentences falling at the absolute minimum of the Guidelines provide the strongest support for the argument that the judge would have imposed a lesser sentence.” *United States v. Rodriguez-Guiteirez*, 428 F.3d 201, 203–05 (5th Cir. 2005).

“The government is likely correct that, as Deckard failed to mount a Sixth Amendment challenge to the district court’s application of the Sentencing Guidelines, and raising it for the first time in his petition for certiorari, we should not consider it. We nevertheless do so, albeit under plain error.” *United States v. Deckard*, 156 F. App’x 628, 628 (5th Cir. 2005).

6 “Regardless of whether the district court imposed Settle’s sentence in violation of the Sixth Amendment, this Court must remand for resentencing in light of our holding in *United States v. Barnett*. In *Barnett*, this Court established a presumption that any pre-*Booker* sentencing determination constitutes plain error because the Guidelines were then mandatory. Consequently, a defendant must be re-sentenced unless the sentencing record contains clear and specific evidence to the effect that, even if the sentencing court had known the Guidelines were advisory, it would have sentenced the defendant to the same (or a longer) term of imprisonment.” *United States v. Settle*, 414 F.3d 629, 631–32 (6th Cir. 2005).

7 “The issue is the meaning of plain error in the context of an illegal sentence . . . sentencing is not either-or; it is the choice of a point within a range established by Congress, and normally the range is a broad one . . . unless any of the judges in the cases before us had said in sentencing a defendant pre-*Booker* that he would have given the same sentence even if the guidelines were merely advisory . . . it is impossible for a reviewing court to determine—without consulting

the sentencing judge . . . –whether the judge would have done that . . . To tell a defendant we know your sentence would have been 60 months shorter had the district judge known the guidelines were merely advisory, because he’s told us it would have been—but that is your tough luck and you’ll just have to stew in prison for 60 additional months because of an acknowledged violation of the Constitution—would undermine the fairness, the integrity, and the public repute of this federal judicial process . . . 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.” *United States v. Paladino*, 401 F.3d 471, 481–83 (7th Cir. 2005).

- 8 “After studying [the parties’ briefs as to *Booker*’s effect] as well as the record, we conclude that Mugan is not entitled to relief under *Booker* because he failed to raise a Sixth Amendment objection to his sentence in the district court, and he has not shown plain error . . . To establish plain error, Mugan must establish (1) an error, (2) that is plain, that not only (3) affected his substantial rights, but also (4) ‘seriously affected the fairness, integrity, or public reputation of judicial proceedings.’ When, as here, the sentencing court treated the guidelines as mandatory, the first two factors of the plain error test are established. To meet the third factor, Mugan must show a ‘reasonable probability’ that the court would have imposed a more lenient sentence under the now advisory guidelines.” *United States v. Mugan*, 441 F.3d 622, 625, 633 (8th Cir. 2006).
- 9 “Left unresolved by *Booker* is the question of what relief, if any, is to be afforded to a defendant who did not raise a Sixth Amendment challenge prior to sentencing . . . we hold that when we are faced with an unreserved *Booker* error that may have affected a defendant’s substantial rights, and the record is insufficiently clear to conduct a complete plain error analysis, a limited remand to the district court is appropriate for the purpose of ascertaining whether the sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory.” *United States v. Ameline*, 409 F.3d 1073, 1074–75 (9th Cir. 2005) (en banc).

“We surmise that the record in very few cases will provide a reliable answer to the question of whether the judge would have imposed a different sentence had the Guidelines been viewed as advisory . . . Pre-*Booker*, there simply would have been no need or practical reason for the judge to make such a record, since the judge could not have expected then that it would make a legal difference. We conclude that the best way to deal with this unusual situation is to follow the approach adopted by our colleagues on the Second, Seventh, and DC Circuits and ask the person who knows the answer, the sentencing judge.” *Id.* at 1079.

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“Because Mr. Hernandez-Noriega did not raise a *Booker* claim before the district court, we review for plain error. To establish plain error, he must demonstrate there is (1) error, (2) that it is plain and (3) the error affects his substantial rights. If these three prongs are met, we may exercise our discretion to correct the error if (4) it ‘seriously affects the fairness, integrity, or public reputation of judicial proceedings’ . . . the standard for fourth-prong error is ‘formidable.’ We may only exercise our discretion when an error is ‘particularly egregious,’ constitutes ‘a miscarriage of justice,’ and when ‘core notions of justice are offended.’ We have identified several non-exclusive factors that may demonstrate that the fourth prong has been established: [1] a sentence increased substantially based on a *Booker* error, [2] a showing that the district court would likely impose a significantly lighter sentence on remand, [3] a substantial lack of evidence to support the sentence the Guidelines required the district court to impose, and /or [4] a showing that objective consideration of the [sentencing statute] factors warrants a departure from the sentence suggested by the Guidelines. Mr. Hernandez-Noriega bears the burden of demonstrating that the error satisfies this demanding standard.” *United States v. Hernandez-Noriega*, 153 F. App’x 536, 538–39 (10th Cir. 2005).

11

“The decision of the Supreme Court in *Booker* does not change our resolution of this appeal. In Wren’s initial brief to this Court, Wren did not make any argument about the Apprendi/Blakely line of cases. Instead, Wren first presented an argument regarding the Sentencing Guidelines in his petition for writ of certiorari. Nothing in *Booker* or the remand order of the Supreme Court ‘requires or suggests that we are obligated to consider an issue not raised in any

of the briefs that appellant has filed with us . . . [or] treat the case as though the [*Booker*] issue had been timely raised in this Court.’ We therefore ‘apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned,’ and conclude that Wren abandoned any arguments he may have under *Booker*.” *United States v. Wren*, 132 F. App’x 817, 818 (11th Cir. 2005).

Table 6: “Compliance” by Circuit with *Booker* GVRs

Circuit	Percent Complied (Subjective) (Number of cases in parens)	
1	75%	(4)
3	100%	(8)
4	92%	(12)
5	98%	(40)
6	100%	(3)
7	100%	(2)
8	100%	(4)
9	100%	(13)
10	100%	(8)
11	54%	(35)
Total	85%	(129)

Source: Data collected by author; sample of responses to *Booker* GVRs, OT 2004–2005. There were no cases in the sample from the Second or DC Circuits.

