

**UNITED STATES COURT OF APPEALS**  
**TENTH CIRCUIT**

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**June 15, 2005**

**PATRICK FISHER**  
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL ROBERT PENA,

Defendant - Appellant.

No. 05-1044

(D.C. No. 04-CR-31-RB)

(D. Colorado)

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**ORDER AND JUDGMENT\***

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Before **SEYMOUR, HARTZ, and McCONNELL**, Circuit Judges.

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Defendant Michael Robert Pena pleaded guilty to unlawful possession of a firearm by a convicted felon. *See* 18 U.S.C. § 922(g)(1). The district court sentenced him to 70 months' imprisonment, the bottom of the applicable Sentencing Guidelines range. At the sentencing hearing Defendant raised an

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\*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

objection under *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Defendant appeals.

After Defendant filed his notice of appeal but before he filed his opening brief, the United States Supreme Court handed down *United States v. Booker*, 125 S. Ct. 738 (2005). He now argues that the district court committed nonconstitutional *Booker* error because it sentenced him under the mandatory guidelines regime. The government concedes that *United States v. Labastida-Segura*, 396 F.3d 1140 (10th Cir. 2005), requires Defendant's case to be remanded for resentencing.

We agree. We VACATE Defendant's sentence and REMAND to the district court for resentencing.

ENTERED FOR THE COURT

Harris L Hartz  
Circuit Judge