

No. 11-__

IN THE
Supreme Court of the United States

MARK HENRY PANTLE,
Petitioner,
v.

UNITED STATES
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a clearly erroneous increase in a defendant's sentencing range under the United States Sentencing Guidelines constitute reversible plain error?

2. Alternatively, does such an error give rise to a presumption of plain error that may only be overcome by clear evidence that the district court would inevitably have imposed the same sentence?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Henry Pantle respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 637 F.3d 1172. The sentencing hearing transcript (Pet. App. B) and judgment of the district court (Pet. App. C) are unpublished.

JURISDICTION

The court of appeals entered judgment on April 4, 2011. Pet. App. 1a. The petition for rehearing and rehearing en banc was denied on May 27, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3553(a) provides:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
- (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

- (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

FED. R. CRIM. P. 52(b) provides:

A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a) provides, in relevant part:

Base Offense Level (Apply the Greatest):

...

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

...

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) is convicted under 18 U.S.C. § 922(d) . .

..

U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) provides:

The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves

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conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF THE CASE

This case involves the circumstances in which a district court's miscalculation of a defendant's sentencing range under the United States Sentencing Guidelines is "plain error" in the wake of this Court's holding that the Guidelines are advisory.¹ After erroneously inflating petitioner's Guidelines range from a range of 70 to 87 months to a range of 168 to 210 months, the district court sentenced petitioner to the statutory maximum penalty of 120 months. On appeal, the Eleventh Circuit held as a matter of law that such a sentence is never "plain error" because, under the advisory Guidelines regime, the district court always has the legal authority to impose a variant sentence up to the statutory maximum. The court of appeals also relied on the district court's statement that even the 120-month sentence was not reasonable—a statement made when the district court believed that petitioner's Guidelines sentence was in fact at least 48 months longer than the statutory maximum.

1. Petitioner was convicted in the United States District Court for the Northern District of Florida for knowingly possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). The probation officer preparing the

¹ This petition will refer to the United States Sentencing Guidelines as "USSG" or "Guidelines." The 2008 USSG Manual was in effect during the events that gave rise to this case.

Presentence Investigation Report (“PSI”) determined that petitioner had two prior convictions for crimes of violence, and therefore set petitioner’s base offense level using USSG § 2K2.1(a)(2), which calls for a base offense level of 24. After all relevant adjustments, the PSI set petitioner’s total offense level at 30, and assigned him a criminal history category of VI, resulting in an advisory Guidelines range of 168 to 210 months’ imprisonment. Because petitioner’s Guidelines range exceeded the statutory maximum penalty of 120 months, the statutory maximum became the advisory sentence. *See* USSG § 5G1.1(a). The PSI did not identify “any factors concerning the offense or the offender which would warrant a departure from the prescribed guideline range.” PSI ¶ 123.

The sentencing hearing was brief. The district court asked petitioner’s attorney for his views on sentencing, and received the following response: “Given the fact, Your Honor, that this is a trial case and given the fact that Mr. Pantle’s guideline range far exceeds the statutory maximum, I don’t have anything for the Court this afternoon.” App. 15a–16a. The court then adopted the PSI without objection. App. 16a. Petitioner waived allocution, and then the district court sentenced petitioner to the statutory maximum:

It’s the judgment of the Court that you be committed to the custody of the Bureau of Prisons to be in prison for a term of 120 months. And I have reviewed all of the factors in Title 18, 3553(a), as well as the

guidelines. And while I'm not willing to find that this sentence is reasonable, it is the maximum permitted, and therefore, I do think that it will serve the sentencing purpose and meet the general goals of punishment and hopefully deter anyone else from similar criminal conduct.

App. 16a. Petitioner's counsel did not object to the sentence, and the district court provided no additional explanation for the length of the prison term.

After sentencing, this Court decided *Johnson v. United States*, 130 S. Ct. 1265 (2010), which held that Florida's battery statute, FLA. STAT. § 784.03, does not categorically qualify as a "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1)—a definition that "closely tracks" the Guidelines definition of "crime of violence," see *James v. United States*, 550 U.S. 192, 206 (2007) (internal quotation marks omitted). One of petitioner's prior convictions was under the Florida battery statute.

Petitioner appealed, arguing that the district court had improperly classified both of his prior convictions as crimes of violence and therefore wrongly imposed a base offense level that was ten levels too high. Petitioner explained that his two prior convictions were under statutes containing multiple generic crimes, not all of which qualify as

crimes of violence.² Applying the “modified categorical approach,” under which the court considers “charging documents, plea agreements, [and] transcripts of plea colloquies” to determine the offense of conviction in a plea scenario, *Johnson*, 130 S. Ct. at 1273 (internal quotation marks omitted), petitioner argued that the Government had failed to show that he had been convicted of crimes of violence.

Absent the erroneous enhancement to his base offense level, petitioner’s Guidelines range would have been 70 to 87 months, far below the erroneous range of 168 to 210 months, and a full 33 to 50 months below the 120 months to which he was actually sentenced.

Petitioner acknowledged that because he did not object to his sentence at trial, his claim on appeal was subject to plain error review, so that he would be entitled to relief only if there was an error, that was

² In addition to his conviction under the Florida battery statute, petitioner had pled guilty to attempted first degree assault in violation of ALA. CODE §§ 13A-6-20(a) and 13A-4-2—which covers not only intentional violent conduct, but also reckless conduct, *id.* § 13A-6-20(a)(3), as well as causing injury while driving intoxicated, *id.* § 13A-6-20(a)(5); see *Begay v. United States*, 553 U.S. 137, 144–48 (2008) (holding that the term “violent felony” under ACCA does not reach conduct that is merely reckless, and specifically does not reach drunk driving); see also *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 (2004) (holding that driving under the influence was not a “crime of violence” under 18 U.S.C. § 16).

clear or obvious, that affected his substantial rights, and that also seriously affected the fairness, integrity or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732–34, 736 (1993).

Petitioner argued that his claim satisfied the plain error standard because the district court’s miscalculation of his Guidelines range likely resulted in a higher sentence. The Eleventh Circuit previously had held exactly this. *See United States v. Antonietti*, 86 F.3d 206, 209 (11th Cir. 1996). Petitioner also noted that the PSI, which the district court had adopted, did not identify “any factors concerning the offense or the offender which would warrant a departure from the prescribed guideline range.” PSI ¶ 123. As a consequence, petitioner argued, there was a reasonable probability that the district court would have given him a lower sentence had it applied the correct Guidelines range.

The Eleventh Circuit nonetheless affirmed. The court of appeals assumed that the district court had erred in characterizing petitioner’s prior convictions as crimes of violence, and that this error was plain. App. 9a.³ However, the court held that the error did

³ Because the Eleventh Circuit assumed plain error, the sentencing error is not before this Court. Rather, it will be an issue for the Eleventh Circuit to address in the first instance on remand. *Cf. Glover v. United States*, 531 U.S. 198, 204–05 (2001) (determining that a Guidelines miscalculation would result in prejudice, but remanding

not affect petitioner’s “substantial rights.” In response to petitioner’s arguments, the court set aside its prior precedent, noting that *Antonietti* was decided before this Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), which held the Guidelines to be advisory. The Eleventh Circuit reasoned that while petitioner might have been entitled to relief under the mandatory Guidelines regime, after *Booker*, “we do not know that Pantle would not have received the same sentence without the (assumed) error.” App. 12a. The court noted that under its more recent precedent, defendants bore the burden to demonstrate that errors actually resulted in prejudice, and that any uncertainty as to the effect of an error was sufficient to defeat petitioner’s claim. App. 10a (citing *United States v. Rodriguez*, 398 F.3d 1291, 1300 (11th Cir. 2005)).

The Eleventh Circuit held that petitioner failed to meet that burden because “the maximum sentence permitted by the statute is 120 months,” and “[a]lthough [petitioner’s] guidelines range would be different, he *could* still receive the same 120-month sentence because § 3553(a) would *permit* the district court to vary upward to that sentence.” App. 11a–12a (emphasis added). The court held that this uncertainty prevented petitioner from demonstrating a reasonable probability that the error had affected his substantial rights. Elaborating, the court noted:

for the courts below to resolve whether error had occurred).

We can go further than that. In fact, the record actually establishes a reasonable probability that Pantle would not have received a lower sentence. After all, the district court expressly indicated that it believed the 120-month sentence was not long enough but could not go higher because that was the statutory maximum.

App. 12a.

Pantle timely petitioned for rehearing and rehearing en banc, which was denied on May 27, 2011. *See* App. 31a–32a.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit’s Decision Deepens An Existing Circuit Split Regarding Whether An Erroneous Guidelines Calculation Constitutes Plain Error, And Conflicts With The Precedent Of The Majority Of Federal Circuits.

Certiorari is warranted because the Eleventh Circuit’s decision deepens an existing conflict among the circuits about the appropriate appellate response to Guidelines miscalculations. The Eleventh Circuit held that because the Guidelines are advisory, a defendant sentenced under an incorrect Guidelines range cannot meet the plain error test so long as the district court could have lawfully entered the same sentence by exercising its discretion to impose an upward variance from the recommended sentencing range. That holding is consistent with the precedent

of one other court—the Eighth Circuit—but in conflict with the majority view of the federal courts of appeals. The conflict is well-developed and entrenched: almost every circuit court has issued at least one precedential opinion on this question.

1. The Eleventh Circuit’s decision cannot be reconciled with the holdings of the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits. These courts have held that an error in calculating a defendant’s Guidelines range is sufficiently grave that it either constitutes plain error per se, or warrants a presumption that it affected the defendant’s substantial rights, and thus constituted plain error.

The Second Circuit has held that “a defendant’s substantial rights are affected by *any error* that results in a significantly overstated Guidelines range, because the advisory Guidelines range is the starting point for the district court’s determination of the sentence.” *United States v. Folkes*, 622 F.3d 152, 158 (2d Cir. 2010) (internal citations and quotation marks omitted). In a case involving an enhancement similar to that at issue in this case, that court held that the defendant’s “substantial rights were affected by the district court’s error because, although he was given a below-Guidelines sentence, the advisory Guidelines range, which was the starting point for the district court’s determination of the sentence it imposed, would have been significantly lower.” *United States v. Gamez*, 577 F.3d 394, 401 (2d Cir. 2009).

The Fourth and Sixth Circuits have similarly concluded that a Guidelines miscalculation

constitutes plain error *per se*. In *United States v. Slade*, 631 F.3d 185 (4th Cir. 2011), the Fourth Circuit considered the effect of an improperly applied sentencing enhancement on plain error review. With regard to substantial rights, the court held that the defendant's burden was met because "had the district court correctly calculated [defendant's] Guidelines range, it might have given [defendant] a lower imprisonment term." *Id.* at 191. This created "a nonspeculative basis to infer prejudice that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 192 (internal quotation marks omitted); *see also United States v. Gibbs*, 626 F.3d 344, 356 (6th Cir. 2010) (holding that the erroneous application of the very enhancement at issue in this case, USSG § 2K2.1(a)(2), "affected the defendant's substantial rights" because he was entitled to a "substantially lower" Guidelines range); *United States v. Baker*, 559 F.3d 443, 454 (6th Cir. 2009) (holding that erroneous determination that a prior conviction was a "crime of violence" affected defendant's substantial rights by increasing his Guidelines range).

Three courts of appeals have held that a miscalculation of the defendant's Guidelines range presumptively affects the defendant's substantial rights. In *United States v. Meacham*, the Tenth Circuit noted that on plain error review, "a sentence based on an incorrect Guidelines range requires us to remand unless the error did not affect the district court's selection of a particular sentence." 567 F.3d 1184, 1191 (10th Cir. 2009) (internal quotation marks omitted); *see also United States v. Jumah*, 599 F.3d

799, 813 (7th Cir. 2010) (holding that an error in calculating the defendant’s base offense level constituted plain error); *United States v. Hammons*, 558 F.3d 1100, 1105 (9th Cir. 2009) (holding that the procedural errors of “failure to calculate the appropriate guideline range” and “reliance on an incorrect Criminal History Category calculation . . . constituted plain error”).

The Fifth Circuit has adopted a slightly different rule. That court has held that the defendant’s substantial rights presumptively are affected when there is no overlap between the correct Guidelines range and the erroneous one, *see United States v. Dickson*, 632 F.3d 186, 191 (5th Cir. 2011), or when there is a partial overlap, but the defendant’s sentence was not within the overlapping portion of the range, *see United States v. Mudekunye*, -- F.3d --, 2011 WL 2675959, at *7 (5th Cir. 2011) (per curiam). In *Mudekunye*, the Fifth Circuit affirmed its approach in the face of a dissent advocating the rule adopted by the Eleventh Circuit in this case. 2011 WL 2675959, at *14, *17 (Barksdale, J., dissenting). Of course, under the Fifth Circuit’s rule, the error in this case would presumptively have affected petitioner’s substantial rights.

Finally, the Eleventh Circuit’s holdings are in particularly stark contrast with those of the Third Circuit. While the former reasoned that by rendering the Guidelines advisory, *Booker* made it more difficult for a defendant to demonstrate prejudice from a procedural sentencing error, the latter has held that *Booker* had precisely the opposite effect. In

United States v. Vazquez-Lebron, the Third Circuit, reviewing for plain error, held that “[i]n the post-*Booker* era, very few procedural errors by a District Court will fail to be prejudicial, even when the Court might reasonably have imposed the same sentence under the correct procedure.” 582 F.3d 443, 446 (3d Cir. 2009). This is so, the court reasoned, because “different procedures may lead to different sentences, and thus an error of procedure is seldom harmless. It is difficult to conclude that a District Court *would have* reached the same result in a given case merely because it *could have* reasonably imposed the same sentence on a defendant.” *Id.* at 447. With regard to the specific issue of Guidelines miscalculations, the Third Circuit has concluded that such errors affect substantial rights, and thus meet the standard for plain error. *See United States v. Wood*, 486 F.3d 781, 790 (3d Cir. 2007). The court has reasoned that “[a] correct calculation . . . is crucial to the sentencing process and result,” and thus “improper calculation of the Guidelines range can rarely be shown not to affect the sentence imposed.” *United States v. Langford*, 516 F.3d 205, 212, 215 (3d Cir. 2008).⁴

⁴ *Langford* did not involve plain error review. However, the *Langford* court cited with approval the reasoning of a prior case that was decided on plain error review. *See* 516 F.3d at 216 (affirming the continuing validity of pre-*Booker* precedent holding that on plain error review, “application of an incorrect Federal Sentencing Guidelines Range presumptively affects

The common thread running through the decisions of these eight courts, and totally absent from the Eleventh Circuit's reasoning, is that an erroneously high Guidelines range derails the sentencing process from the outset, pushing the sentencing court toward a harsher sentence. Thus, all of these courts have held that a miscalculated Guidelines range presents a risk of prejudice so grave that the court of appeals should presume, even on plain error review, that the miscalculation affected the defendant's substantial rights, a presumption that the Eleventh Circuit refused to embrace in this case.

3. The Eleventh Circuit's rule finds its closest counterparts in the holdings of the Eighth Circuit, which has ruled that after *Booker* and *Gall v. United States*, 552 U.S. 38 (2007), an appellant on plain error review must show conclusively that an error in calculating his Guidelines range affected his substantial rights. In *United States v. Wright*, 401 F. Appx. 168 (8th Cir. 2010) (unpublished disposition), the sentencing court had miscalculated the defendant's Guidelines range as 135 to 168 months, instead of the proper range of 121 to 151 months. The defendant was sentenced to 168 months' imprisonment, and the Eighth Circuit held that the error in calculating the Guidelines range, although plain, had not affected the appellant's substantial

substantial rights") (quoting *United States v. Knight*, 266 F.3d 203, 205 (3d Cir. 2001)).

rights because the district court had expressly stated during sentencing that due to the amount of “gratuitous evil involved” in the offense, a sentence at the top of the Guidelines range was appropriate. *Id.* at 171. The *Wright* court, like the Eleventh Circuit, noted that the advisory nature of the Guidelines weighed against a finding of prejudice. *Id.* And in *United States v. Ault*, the court held that even though the district court had miscalculated the defendant’s Guidelines range, the defendant had not shown that the error had affected her substantial rights because her ultimate sentence (124 months) was below both her original range (168 to 210 months) and her corrected range (151 to 188 months). 598 F.3d 1039, 1042-43 (8th Cir. 2010). The *Ault* court likewise shed the weight of pre-*Booker* precedent by highlighting the now-advisory nature of the Guidelines. *See id.* at 1042.

While the Eighth and Eleventh Circuits’ opinions adopt similar reasoning, the decision in this case goes further than either of the cited Eighth Circuit cases insofar as the court below effectively held that a statutorily permissible sentence can never affect a defendant’s substantial rights, while the Eighth Circuit’s holdings were more fact-bound. Thus, the Eleventh Circuit has taken the most extreme position on this issue to date.

II. Certiorari Is Warranted To Address A Second Conflict Regarding When The Presumption Of Plain Error Is Overcome.

The Eleventh Circuit’s statement that the district court’s explanation created a “reasonable

probability” that petitioner would have received the same sentence absent the error creates a second conflict. Circuit courts that have affirmed sentences after a Guidelines miscalculation have done so only when the record clearly establishes that the district court had reasons independent of the error for imposing the sentence. The Eleventh Circuit’s decision to affirm on the basis of the district court’s brief explanation, which expressly referenced the Guidelines, conflicts with these holdings.

1. In this case, the Eleventh Circuit stated that “the record actually establishes a reasonable probability that Pantle would not have received a lower sentence. After all, the district court expressly indicated that it believed the 120-month sentence was not long enough but could not go higher because that was the statutory maximum.” App. 12a. To the extent that this statement constitutes an alternate holding, and not mere dictum,⁵ the Eleventh Circuit

⁵ There is a high likelihood that the Eleventh Circuit’s statement was dictum. The court held that petitioner’s claim failed because “we do not know that Pantle would not have received the same sentence without the assumed error To put it in terms of the third prong standard, Pantle has not demonstrated that there is a reasonable probability that he would have received a lower sentence if the two prior convictions had not been counted as crimes of violence.” App. 12a. The court then went on to state: “We can go further than that. In fact, the record actually establishes a reasonable probability that Pantle would not have received a lower sentence. After

created a new rule of law that a two-sentence justification for an above-Guidelines prison term, which did not set forth any specific rationale for a variant sentence, constitutes a sufficient explanation for such a sentence. While some courts of appeals have been willing to affirm in cases involving miscalculated Guidelines ranges when the record presents strong evidence that the district court's sentencing decision was unrelated to the error, no court has so held when confronted with a record as sparse and as slanted as the one in this case.

The Fifth Circuit has held on multiple occasions that a district court would have imposed an upward variance had it not miscalculated the Guidelines range. However, the district courts' statements in those cases stand in marked contrast with the statements in this case. In *United States v. Dickson*, the district court had stated that the defendant "was one of the most vicious predators on children" ever to appear before the court, that the case constituted "a very exceptional case," and that "a reasonable sentence . . . would be one that would ensure to the maximum possible extent that this defendant will never be free in society again." 632 F.3d 186, 191 (5th Cir. 2011). And in *United States v. Davis*, 602

all, the district court expressly indicated that it believed the 120-month sentence was not long enough but could not go higher because that was the statutory maximum." App. 12a. The latter statement was not essential to the Eleventh Circuit's holding.

F.3d 643 (5th Cir. 2010), the court of appeals concluded that the court would have imposed an upward variance from the corrected range because it had done the same even from the greater, incorrect range, had commented on the seriousness of the defendants' violations, and had made "no statements . . . to indicate that the court . . . relied on the incorrect advisory range in determining his sentence." *Id.* at 648-49.

The Ninth Circuit, in *United States v. Hammons*, examined the sentencing record after the district court had miscalculated the defendant's guidelines range. The court acknowledged that the ultimate sentence fell within the correct Guidelines range, but reasoned that "it is unclear whether the district court intended to sentence [the defendant] to the high-end of the guideline range, or one month below the high-end of the guideline range." 558 F.3d 1100, 1106 (9th Cir. 2009). Because the record was so sparse, "it is difficult to discern the district court's intentions," and thus, the error "could easily have affected [the defendant's] substantial rights and led the district court to impose an additional one month of imprisonment." *Id.* This holding cannot be reconciled with the Eleventh Circuit's holding in this case, which held that a bare record was grounds to affirm, rather than reverse, the district court.

The Seventh and Tenth Circuits likewise have held that "[a] sentence based on an incorrect Guideline range" constitutes an error affecting substantial rights, which "requires us to remand unless the error 'did not affect the district court's

selection of a particular sentence.” *United States v. Meacham*, 567 F.3d 1184, 1191 (10th Cir. 2009) (quoting *United States v. Avila*, 557 F.3d 809, 822 (7th Cir. 2009)). These courts have not commented extensively on the amount of explanation required, but the Tenth Circuit did note that when “the district court did not indicate that the § 3553(a) factors justified a higher-than Guidelines sentence,” remand was necessary. *Id.* at 1191. Under that holding, remand would be required in this case.

Finally, albeit not in plain error cases, the Third Circuit has held that “[i]n order to conclude that a district court would not have imposed a different sentence, the record must be clear. A ‘blanket statement’ that the sentence imposed is fair is not sufficient” *United States v. Langford*, 516 F.3d 205, 218 (3d Cir. 2008). “Moreover, when the starting point for the § 3553(a) analysis is incorrect, the end point, i.e., the resulting sentence, can rarely be shown to be unaffected.” *Id.* at 217; *see also United States v. Lofink*, 564 F.3d 232, 238-39 (3d Cir. 2009) (affirming that “because the Guidelines still play an integral role in criminal sentencing, . . . we require that the entirety of the Guidelines calculation be done correctly” before a district court considers whether to adopt a variant sentence by applying the § 3553(a) factors) (internal quotation marks omitted).

The Eleventh Circuit’s decision conflicts with these holdings, not only because it relied on the district court’s very brief explanation, but because there is no reasonable reading of the district court’s statement that would permit the Eleventh Circuit to

conclude that the district court reached its sentencing decision independently of the Guidelines error. To recap the proceedings before the district court: petitioner's counsel had stated to the court that he had no arguments in mitigation, primarily because he thought that "Pantle's guideline range far exceed[ed] the statutory maximum," App. 16a; then the court adopted the PSI, which included the miscalculated Guidelines range suggesting that petitioner should be sentenced to 168 to 210 months in prison, *id.*; and finally, the court explained its sentence by noting that it had considered "all of the factors in Title 18, 3553(a), as well as the guidelines," *id.*

Thus, at the time the district court declared that the sentence was not "reasonable," it clearly believed that under the Guidelines, petitioner deserved to serve at least 48 to 90 months more in prison. Far from being "independent" of the Guidelines error, the district court's sentencing decision hinged on it, a fact that would have constituted grounds for resentencing in at least the Third, Fifth, Seventh, Ninth, and Tenth Circuits. The Eleventh Circuit's decision to the contrary created a new circuit conflict that this Court should grant certiorari to resolve.

2. Both circuit conflicts are ripe for resolution. As noted above, the disagreement among the circuits is entrenched. The Eleventh Circuit declined to hear this case en banc, the Eleventh Circuit's approach has been rejected in the Fifth Circuit, and the majority of circuits have repeatedly applied their various rules to the cases before them.

The conflict is also important: the disparity in appellate review standards undermines one of the principal goals of federal sentencing reform, which is to “avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct” 28 U.S.C. § 991(b)(1)(B); *see also Booker*, 543 U.S. 220, 253 (2005). Defendants whose attorneys fail to object when their Guidelines ranges are improperly calculated can obtain relief on appeal in a majority of jurisdictions, but defendants in the Eighth and Eleventh Circuits frequently are denied the same opportunity. Thus, many defendants in the Eighth and Eleventh Circuits will predictably serve additional prison time avoided by otherwise identically situated defendants in other circuits due simply to the misfortune of geography.

The problem is especially acute when, as in this case, the errors involve the application of enhancements for committing crimes of violence, because the resulting sentencing disparities are severe. Here, the wrongful application of the enhancement moved the top of petitioner’s Guidelines range from 87 months to 210 months—a difference of over ten years—before the higher value was replaced by the 120-month statutory maximum, a change that still resulted in an increase to petitioner’s recommended range of at least 33 months, and possibly 50.

Nor is this case idiosyncratic. This issue arises frequently, as multiple enhancements are keyed to the definition of “crime of violence” in USSG § 4B1.2,

and that definition continues to evolve in response to this Court’s holdings regarding which state laws do and do not constitute crimes of violence or “violent felonies” under the similarly worded ACCA. *See, e.g., Sykes v. United States*, 131 S. Ct. 2267, 2270 (2011) (holding that vehicular flight in Indiana constitutes a “violent felony”); *Johnson v. United States*, 130 S. Ct. 1265, 1269-70 (2010) (holding that Florida’s battery statute does not categorically constitute a violent felony); *Chambers v. United States*, 555 U.S. 122, 130 (2009) (holding that failure to report for incarceration does not constitute a violent felony); *Begay v. United States*, 553 U.S. 137, 148 (2010) (holding that driving under the influence does not constitute a violent felony); *James v. United States*, 550 U.S. 192, 209 (2007) (holding that attempted burglary constitutes a “violent felony”); *Derby v. United States*, 131 S. Ct. 2858, 2589–60 (2011) (Scalia, J., dissenting from denial of certiorari) (noting the ambiguity inherent in determining whether a crime constitutes a “violent felony”).

Furthermore, a large number of cases involving such enhancements are decided on plain error review. In many cases, like this one, intervening precedent alters the understanding of what constitutes a “crime of violence,” resulting in retroactive changes to the rules that attorneys and district courts did not anticipate at the time of sentencing. In other cases, the complexity of the Guidelines overwhelms attorneys and prevents them from objecting to enhancements when they rightly should. It should be noted, however, that even though the number of plain error cases is high, the

cost of correcting these errors is low: resentencing is not the same as a new trial, and for a small administrative cost, society can avoid many years of wrongfully imposed prison time.

This Court should grant certiorari to set a clear, uniform standard for plain error review of miscalculations of Guidelines ranges.

III. Certiorari Is Warranted Because The Ruling Below Conflicts With This Court's Precedents.

Certiorari should be granted because the judgment of the Eleventh Circuit conflicts with this Court's precedents relating to plain error, to the significance of the Guidelines, and to procedural sentencing errors.

1. Federal Rule of Criminal Procedure 52(b) provides that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” This Court has explained that in order to obtain relief on plain error review, four criteria must be met: (1) there must be an error that has not been waived by the appellant; (2) the error must be clear or obvious; (3) the error must have affected the appellant’s “substantial rights”; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009) (citing *United States v. Olano*, 507 U.S. 725, 734, 736 (1993)). In this case, the Eleventh Circuit assumed that the first two prongs of the

standard were met—thus, there was error, and it was obvious.

With regard to the “substantial rights” prong of the test, this Court has stated that “[i]n the ordinary case, to meet this standard an error must be ‘prejudicial,’ which means that there must be a reasonable probability that the error affected the outcome of the trial.” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Olano*, 507 U.S. at 734–35). This Court has not expressly applied the “substantial rights” test to a procedural sentencing error, but the courts of appeals broadly agree that the test is satisfied when the appellant can show a “reasonable probability” that he would have received a lower sentence but for the error. The appellant bears the burden to show that his substantial rights were affected. *Olano*, 507 U.S. at 734.

As noted in Section I, *supra*, the majority of the courts of appeals have held that an appellant satisfies this burden by showing that he was sentenced based on an erroneous Guidelines range, when the correct range might have resulted in a lower sentence. In this case, however, the Eleventh Circuit, citing *Booker*, eschewed that approach and instead decided that petitioner’s Guidelines range was irrelevant to his substantial rights because the district court possessed the ability to impose an upward variance. In effect, the Eleventh Circuit required petitioner to demonstrate far more than a “reasonable probability” that he would have received a different sentence—it required him to prove it to a

certainty—and it held that because of *Booker*, he could not.

2. Before discussing this Court’s precedents in detail, it is important to note that the Eleventh Circuit’s holding ignores the realities of modern sentencing. As a practical matter, even after *Booker*, the Guidelines continue to exert a strong influence on sentencing judges, especially when it comes to defining the maximum sentence. Data collected by the United States Sentencing Commission confirm that in 2010, 55 percent of all sentences were within the applicable Guidelines range, while 43.2 percent were below the range (either with or without a recommendation from the Government), and *only 1.8 percent* of sentences were above the range. *See* United States Sentencing Commission, ANNUAL REPORT 2010, at 33 (2010). The Sentencing Commission’s annual reports prior to 2010 reveal that the 1.8 percent figure is not anomalous. For each of the years from 2006 until 2009, the percentage of sentences including an upward variance were 1.6, 1.5, 1.5, and 2, respectively. *See* United States Sentencing Commission, ANNUAL REPORT 2006, at 36 (2006); ANNUAL REPORT 2007, at 30 (2007); ANNUAL REPORT 2008, at 36 (2008); ANNUAL REPORT 2009, at 38 (2009). Perhaps, as one prominent sentencing judge has noted, “after twenty years of strict enforcement, the Federal Sentencing Guidelines have a gravitational pull on sentencing and are likely to shape the way judges view sentencing, even if they are now only advisory.” Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL’Y REV. 261, 262 (2009). Whatever the

reason, the data establish conclusively that upward variances from Guidelines sentences are rare.

In light of the infrequency with which courts vary upward in sentencing, it seems obvious that any time a district court erroneously sentences a defendant to a prison term greater than that authorized by his correct Guidelines range, there is a “reasonable probability” that, but for the error, the defendant would have received a lower sentence. And in the face of this data, the Eleventh Circuit’s statement that the district court “could have” imposed an upward variance is misleading insofar as it fails to acknowledge that, as a statistical matter, the court was approximately thirty times more likely to impose a within-Guidelines sentence than an upward variance. This is especially true when, as here, neither petitioner nor his attorney argued for leniency because they believed that petitioner’s “guideline range far exceeds the statutory maximum,” the district court adopted without objection a PSI containing the erroneous Guidelines calculation, and when the court then mentioned the Guidelines as a basis for its sentencing decision, and did not state that it would have varied upward from the Guidelines range. App. 15a–16a.

This perhaps explains why in multiple cases in the courts of appeals, the Government has acknowledged the error when a sentencing court applies an improper Guidelines range, and it has encouraged courts to correct it. *See, e.g., Folkes*, 622 F.3d at 158 (“The Government admits that the district court’s error [in applying a crime of violence

enhancement] was plain, and urges us to exercise our discretion to correct it.”); *Jumah*, 599 F.3d at 813 (“[T]he Government admits that the district court committed plain error by basing its Guidelines calculations on the gross weight of the tablets, instead of the weight of the drugs within them.”); *Wood*, 486 F.3d at 790 (“In this case, the Government concedes that all three prongs of plain error review have been met”). The Government’s willingness to acknowledge this error in multiple cases is telling: it demonstrates that even the Government recognizes the grave risk of injustice and harm to substantial rights that stems from a miscalculated Guidelines range.

3. The Eleventh Circuit’s reliance on *Booker* as support for its conclusion that the error in this case did not affect petitioner’s substantial rights is misplaced because *Booker* rendered the Guidelines advisory, not irrelevant. Indeed, the *Booker* opinion was explicit that “district courts, while not bound to apply the Guidelines, *must* consult those Guidelines and take them into account when sentencing.” *Booker*, 543 U.S. at 264 (Breyer, J.) (emphasis added).

The *Booker* Court strived to resolve the Sixth Amendment problems of mandatory Guidelines without striking down the entire Sentencing Reform Act (“the Act”). The Court held that the appropriate remedy was to sever the provisions of the Act that compelled application of the Guidelines, thus making “the Guidelines effectively advisory.” 543 U.S. at 245.

Thus, the remaining provisions of the Act continue to govern sentencing procedures. Most prominent among these is 18 U.S.C. § 3553(a), which provides that a sentencing court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes” of sentencing set forth in the statute. The statute requires sentencing courts to consider a number of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant, the purposes of sentencing (which include just punishment, deterrence, protecting the public, and providing the defendant with appropriate training, care, and other treatment), the kinds of sentences available, the relevant sentencing Guidelines, any relevant policy statements issued by the Sentencing Commission, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and the need for restitution. 543 U.S. at 245. After *Booker*, these factors form the basis for individualized sentences in federal courts.

In this case, the Eleventh Circuit held that because *Booker* authorized district courts to vary upward from Guidelines sentences based on the Section 3553(a) factors, the erroneous Guidelines range did not affect petitioner’s substantial rights. This analysis is wrong because it constructs a false dichotomy between the Guidelines on the one hand, and the section 3553(a) factors on the other—holding that the former has no influence over the application of the latter. But contrary to the Eleventh Circuit’s holding, section 3553(a) is not independent from the

Guidelines. Indeed, the Guidelines range is itself one of the section 3553(a) factors that a sentencing court “*must consult . . . and take . . . into account.*” See 18 U.S.C. § 3553(a)(4); *Booker*, 543 U.S. at 264 (Breyer, J.) (emphasis added).

This Court’s post-*Booker* precedents establish beyond a doubt that although the Guidelines are not mandatory, they play a vital role in sentencing determinations such that an error in their calculation is likely to inflict prejudice, and thereby affect substantial rights. In *Kimbrough v. United States*, the Court noted that even after *Booker*, section 3553(a) “still requires a court to give respectful consideration to the Guidelines.” 552 U.S. 85, 101 (2007). In fact, the Court went even further than that, stating that “in the ordinary case, the Commission’s recommendation of a sentencing range will reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.” *Id.* at 109 (internal quotation marks omitted).

In *Gall*, this Court set forth a procedure for sentencing decisions, stating that “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” 552 U.S. at 49 (internal citation omitted). And in *Nelson v. United States*, the Court reiterated that “the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory

sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter.” 129 S. Ct. 890, 891–92 (2009). If the district court improperly calculates the Guidelines range, then it not only adopts the wrong “starting point,” but it also loses its point of “reference” for the remainder of the sentencing inquiry. The risk of prejudice to a defendant from such an error is clear.

This Court’s statements about appellate review of sentencing errors provide further support for the conclusion that a miscalculation of the defendant’s Guidelines range affects substantial rights. In *Gall*, this Court held that whatever sentence a defendant receives, an appellate court must begin its review by “ensur[ing] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range” 552 U.S. at 51. Only if the reviewing court determines that there are no procedural errors must it then “give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify” the sentence. *Id.* Likewise, in *Rita v. United States*, 551 U.S. 338, 341, 347 (2007), this Court held that a sentence within the Guidelines range may be entitled to a presumption of reasonableness on appeal, provided that the range was “properly calculated.” These statements embody an acknowledgement that when the Guidelines range has not been properly calculated, the district court’s ultimate sentencing decision is suspect, and appellate courts should be vigilant against such errors.

3. Apart from its incorrect assessment of the significance of the Guidelines, the Eleventh Circuit also improperly collapsed the distinction between procedural and substantive reasonableness enshrined in this Court's cases. As noted in *Gall*, the first step in appellate review of sentencing is to ensure that no significant procedural error occurred. 552 U.S. at 51. If "the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.* But if, as here, the district court's decision was not procedurally sound, then even a substantively reasonable sentence cannot survive appellate scrutiny. See, e.g., *Nelson*, 129 S. Ct. at 892 (reversing appellate court's determination that a sentencing proceeding involving procedural error nevertheless arrived at a reasonable sentence). The Eleventh Circuit reversed this order of operations and held, in essence, that the substantive reasonableness of the sentence excused the procedural error. That approach is flatly inconsistent with this Court's precedents.

4. The need for an error-free process is especially strong when, as here, the district court offered virtually no explanation for the sentence. "After settling on the appropriate sentence," the district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50. And it is "uncontroversial that a major departure [from the Guidelines range] should be

supported by a more significant justification than a minor one.” *Id.*

Had the district court properly calculated the Guidelines range in this case, it would have had to explain why it was sentencing petitioner to 120 months in prison when the Guidelines advised a range of 70 to 87 months. But here, the district court stated only that it had arrived at the sentence by reviewing “all of the factors in Title 18, 3553(a), as well as the guidelines,” and that “I do think that [the 120-month sentence] will serve the sentencing purpose and meet the general goals of punishment and hopefully deter anyone else from similar criminal conduct.” App. 16a.

The Eleventh Circuit stated that the district court might have varied upward because the court had stated that it did not believe that a 120-month sentence was “reasonable.” App. 12a. But the court of appeals glossed over the strong probability that the district court’s view regarding what sentence was “reasonable” was rooted in its erroneous belief that the Guidelines called for a much-longer 168- to 210-month prison term. Indeed, the district court’s explanation does not provide any other plausible justification for a 120-month sentence—at least not one that would survive appellate review. See *Kimbrough*, 552 U.S. at 109 (holding that “closer [appellate] review may be in order when the sentencing judge varies from the Guidelines based solely on the judge’s view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case”) (internal quotation marks

omitted); *see also Gall*, 552 U.S. at 50 (holding that the sentencing judge “must make an individualized assessment based on the facts presented,” and that any explanation for a variance must be “sufficiently compelling to support the degree of the variance”).

5. In sum, plain error review on sentencing requires the appellant to demonstrate a “reasonable probability” that he would have received a lower sentence but for the sentencing court’s errors. This Court should hold that this standard is met when the appellant shows that he was sentenced under an incorrect Guidelines range, and that his sentence exceeds that contemplated in the correct range. This Court should further hold that in order to affirm a sentence in these circumstances, the sentencing court must have offered an explanation rooted in the section 3553(a) factors that would justify an upward variance from the correct Guidelines range to the sentence actually imposed.

In this case, petitioner made precisely the required showing. He argued to the Eleventh Circuit that he had received a sentence in excess of his correct Guidelines range. He added further that the PSI recommended no grounds for a departure from the Guidelines range, and the district court likewise offered no justification for a variance. Indeed, the district court expressly stated that it had arrived at its ultimate sentence, in part, by consulting the Guidelines. App. 16a. But the Eleventh Circuit refused to accept that these facts created a “reasonable probability” that the district court would have imposed a different sentence. The court of

appeals concluded instead that the residual uncertainty inherent in an advisory Guidelines regime doomed petitioner's claim. App. 10a–12a.

The Eleventh Circuit's holding cannot be squared with this Court's recent decisions admonishing district courts to begin sentencing by carefully and correctly determining the proper Guidelines range. Nor can the decision below be reconciled with years of sentencing data, which show that since *Booker*, in any given year, 2 percent or less of all sentences have involved upward variances. Based on these authorities, it is clear that when petitioner received a sentence 33 months greater than his correct Guidelines range would authorize, there was a "reasonable probability" that the miscalculation augmented his ultimate sentence. The Eleventh Circuit erred in concluding otherwise.

5. Additionally, and independently, this Court has noted with regard to the "substantial rights" prong that a showing of prejudice may not be required in all instances. "There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome" *Olano*, 507 U.S. at 735 (referring to so-called "structural errors"). Separately, there may also be a range of "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.* This Court should clarify whether a procedural sentencing error of the type at issue here falls within either exceptional category.

Since *Olano*, many have argued that various "structural errors" should fall within this category,

but the Court has declined to resolve on the issue. *See, e.g., Marcus*, 130 S. Ct. at 2164-65; *Puckett*, 129 S. Ct. at 1432. “Structural errors” are errors “that affect the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error.” *Marcus*, 130 S. Ct. at 2164 (internal citations, quotation marks, and alterations omitted). The sentencing error here is not a structural error *per se*, but it shares two key features with those errors. First, because the Guidelines are “the starting point and the initial benchmark” of the sentencing proceedings, *Gall*, 552 U.S. at 49, an error in their calculation is likely to cast ripples throughout the process, tainting the judge’s perception of what constitutes a “reasonable” sentence, and altering the ultimate sentence to an unknown degree, but always to the defendant’s detriment. Second, in some cases, including this one, the lack of a robust sentencing record makes it difficult to point to specific prejudice, but the fault for that does not lie with the defendant.

Because the risk of prejudice from a miscalculated Guidelines range is so great, this Court should hold that such errors fall within the exceptional category of errors under *Olano* for which a showing of particular prejudice is not required.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 25, 2011