No. 11-257

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

On plain error review, most circuits hold that the application of an erroneously high sentencing Guidelines range prejudices the defendant and requires resentencing. Those courts reason that the Guidelines are so central to the sentencing process that such an error necessarily creates a reasonable probability that the defendant's sentence was improperly inflated. The Eleventh Circuit adopted the opposite rule based on a vastly different conception of the role of the Guidelines in sentencing and the requirements of plain error review. It held that in such a case, the defendant is not prejudiced and is not entitled to resentencing, because under the advisory Guidelines regime the district court theoretically could have imposed the same sentence even absent the error.

The government does not deny that this conflict is square and irreconcilable, given the Eleventh Circuit's denial of en banc review. *See* Pet. 12-18. Nor does it dispute the Petition's showing that the Eleventh Circuit's decision conflicts with this Court's precedent. *See id.* 26-38. Finally, the importance of the question presented is indisputable, given that defendants bring thousands of plain error sentencing appeals every year.

The government instead maintains that even the circuits that deem such errors prejudicial would find no plain error on the facts of this case. That argument fails for three independent reasons: it misapprehends the rule applied by other circuits; it misstates the facts of this case; and it mischaracterizes the Eleventh Circuit's decision.

Because this case is an ideal vehicle to resolve the conflict in the circuits on this important and recurring question, certiorari should be granted.

I. Other Circuits Deem Guidelines Errors To Be Prejudicial Unless The Record Establishes With Certainty That The District Judge Inevitably Would Have Imposed The Same Sentence.

As the government acknowledges, most circuits hold that the prejudice caused by an erroneous Guidelines range is overcome only if "the district court *makes clear* that it would have imposed the same sentence absent the error." BIO 8. (emphasis added). Decisions of five circuits illustrate that this demanding standard would not be satisfied on the facts of this case.

a. The First Circuit holds that the application of a clearly incorrect Guidelines range is plain error. *E.g.*, *United States v. Correy*, 570 F.3d 373, 395 (1st Cir. 2009). In *United States v. Rodriguez*, 630 F.3d 39, 43 (1st Cir. 2010), that court recognized that an error might not be prejudicial if the judge were to "make clear that a dispute about a Guidelines calculation did not matter to the sentence." That would be true if "the district judge had been faced with an explicit choice between the two sets of Guidelines, and thus understood the magnitude of the difference between them, when he said the choice did not affect the sentence." *Id.* But the First Circuit held that even a district judge's statement that he "would impose the *same sentence* without the guidelines, that is, on a nonguideline basis" was insufficiently definitive to render a Guidelines

calculation error non-prejudicial. *Id.* (emphasis added).

b. The Third Circuit holds that the application of an erroneous Guidelines range is prejudicial if "we cannot *be sure* that the district court would have imposed the same sentence if not for the error." *United States v. Vazquez-Lebron*, 582 F.3d 443, 446-47 (3d Cir. 2009) (emphasis added). That court reasons that, because "different procedures may lead to different sentences," such an error "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.

Thus, in *United States v. Porter*, 413 F. App'x 526, 530-31 (3d Cir. 2011), the court found prejudice, notwithstanding that the district court not only could have imposed the same sentence on another ground, but "nearly did so"; the court held that the error required reversal because the district judge "did not make findings that allow[ed]" for the same sentence to be imposed on the alternative ground. *Id.* Similarly, in *United States v. Rose*, 365 F. App'x 384 (3d Cir. 2010), the Third Circuit found prejudice from the misstatement of the defendant's offense conduct notwithstanding that (as one member of the panel emphasized) the district judge correctly calculated the Guidelines range; the majority reasoned that "we are unable to say that the mistake had *no effect* on the District Court's ultimate decision on sentencing," and that to deny relief "[w]e must 'possess *a sure conviction* that the error did not prejudice the defendant.'" *Id.* at 390-91 (quoting *United States v.*

Zehrbach, 47 F.3d 1252, 1265 (3d Cir. 1995) (emphasis added)).

c. The Fifth Circuit holds as a matter of law that "a defendant has shown a reasonable probability that he would have received a lesser sentence" if "the incorrect range is significantly higher than the true Guidelines range." *United States v. Mudekunye*, 646 F.3d 281, 289 (5th Cir. 2011). In *United States v. Moreno-Florean*, 542 F.3d 445, 457 (5th Cir. 2008), the government argued the district court would have imposed the same sentence notwithstanding the error because "the district court provided detailed, fact specific reasons for its sentence based on the factors under 18 U.S.C. § 3553(a)," but the Fifth Circuit found dispositive that the district court did not formally "impose any alternative sentence." The Fifth Circuit held that the district court was required to "first properly calculate the applicable guideline range." *Id.* Similarly, in *United States v. Dentler*, 492 F.3d 306 (5th Cir. 2007), "the district court made numerous comments at sentencing suggesting that it sought to impose the highest sentence possible," but the Fifth Circuit nonetheless held that the erroneous sentencing factor was prejudicial because "if a sentence is imposed as a result of an incorrect application of the sentencing guidelines the sentence must be vacated and the case remanded for further sentencing proceedings." *Id.* at 313 (internal quotation marks and citations omitted).

d. The Sixth Circuit consistently finds plain error on the basis of erroneous Guidelines ranges. *E.g.*, *United States v. Gibbs*, 626 F.3d 344, 356 (6th Cir. 2010). It recognizes that "the record will be sufficient to rebut the presumption of prejudice" if

"the trial record contains *clear and specific evidence* that the district court would not have, in any event, sentenced the defendant to a lower sentence under an advisory Guidelines regime," but the court will not make "an educated guess as to the likely outcome of a remand." *United States v. Barnett*, 398 F.3d 516, 529 (6th Cir. 2005) (emphasis added) (internal quotation marks omitted); *see also United States v. Morgan*, 435 F.3d 660, 665 (6th Cir. 2006) (same). Thus, in *United States v. Wilson*, 614 F.3d 219, 225 (6th Cir. 2010), that court held that the judge's statement that "lesser sentences than the one to be imposed in this case have been utterly ineffective" was insufficient to dispel prejudice because it "was likely colored by" the original sentencing error, and because there was no proof that "another of the district court's considerations had independently justified the entirety of" the sentence. And in *United States v. Story*, 503 F.3d 436, 440-41 (6th Cir. 2007), although the district court provided several uncontested reasons why its 300-month sentence was required, the Sixth Circuit held that the district judge's erroneous recitation of the bottom end of the Guidelines range required resentencing because "it is certainly possible that the overall sentence was" affected by the error.

e. The Seventh Circuit agrees that an erroneous Guidelines range is prejudicial. *E.g.*, *United States v. Garrett*, 528 F.3d 525, 530 (7th Cir. 2008). It requires resentencing unless "the error *in no way affected* the district court's selection of a particular sentence." *United States v. Farmer*, 543 F.3d 363, 375 (7th Cir. 2008) (emphasis added). In *United States v. Durham*, 645 F.3d 883, 900 (7th Cir. 2011),

the court found plain error from the district judge's consideration of a single erroneous sentencing factor that the judge mentioned "only once," notwithstanding that the judge had instead "focused on the violent nature of the crime, the fact that [the defendant] readily agreed to participate despite having been paroled just nine months earlier, and [the defendant's] significant criminal history." And in *United States v. Johnson*, 612 F.3d 889, 897 (7th Cir. 2010), the court found plain error notwithstanding that the district judge stated that the defendant's "criminal history category was under-represented," that the defendant "has repeatedly lied," and that the defendant "is not supervisable," because those statements did not explain the district judge's deviation from the proper Guidelines range. *Id*.

II. The Record Refutes The Government's Claim That The District Judge Would Have Imposed The Same Sentence Absent The Error.

The government's assertion that petitioner "cannot point to any evidence in the record" indicating that the Guidelines error affected his sentence, BIO 13, ignores the holdings of other circuits that the error itself establishes prejudice as a matter of law because it taints the entire sentencing process. There certainly is no serious argument that other courts of appeals would have found no prejudice on these facts, particularly given that the district judge's view of the sentence was based squarely on the erroneous Guidelines range.

At sentencing, the district judge had before him no facts beyond those set forth in the Presentence Investigation Report (PSI), which he adopted. Pet. App. 16a; *see also* App., *infra* (reproducing the cited paragraphs of the PSI). The PSI set forth the erroneous 168 to 210 month Guidelines range, PSI ¶ 107, specified that neither the government nor petitioner's counsel had any objection to that range, *id.* ¶ 125, and stated that there were no "factors concerning the offense or the offender which would warrant a departure from the prescribed guideline range," *id.* ¶ 123.

When asked to comment "as to sentence," petitioner's counsel expressly drew the judge's attention to the fact that the statutory maximum of 120 months was dramatically lower than the recommended sentence under the (erroneous) Guidelines range: "[G]iven the fact that Mr. Pantle's guideline range *far exceeds* the statutory maximum, I don't have anything for this Court this afternoon." Pet. App. 15a-16a (emphasis added). The judge then stated:

> I do determine the Presentence Report to be accurate as it is presented . . ., and its findings will be considered in the imposition of sentence.
>
> 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.

Id. 16a. The judge's statement that the 120-month sentence was not "reasonable," BIO 12, was *literally* the next sentence out of his mouth after these explicit references to both the PSI and the Guidelines range. Pet. App. 16a.

The government's assertion that there is not "any basis in the record – such as any reference to the Guidelines range – to conclude that the district court viewed the statutory maximum sentence as unreasonably low because of the higher Guidelines range," BIO 12, is thus willfully blind to the sentencing proceeding. The transcript makes plain that the district judge's stated preference for a longer sentence was rooted in the fact that the Probation Office, the prosecution, and the defense had all *agreed* that the statutory maximum sentence was 48 to 90 months below the Guidelines range. The judge's frustration with a sentence that all the parties in the case told him was unreasonably lenient was perfectly natural.[1]

The government's attempt to imply that the judge would have varied upwards from the correct Guidelines range to re-impose the 120-month sentence on some other, unstated basis strains credulity. Remarkably, the government omits that

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[1] The Eleventh Circuit did not place any weight on the district judge's later statement that he opposed granting petitioner early release from the 120-month sentence. *See* Pet. App. 18a. In any event, the judge did not indicate that this statement was based on any consideration other than the 168 to 210 month Guidelines range.

its own position was that there is *no* basis for an upward variance beyond the Guidelines range. As the PSI explains, the sentencing range already accounts for the factors that might have led the judge to favor a higher sentence. *See* PSI ¶¶ 18-19 (including enhancements). The PSI then explains that there should be *no* "victim-related adjustments," *no* "adjustment for role in the offense," *no* "adjustment for obstruction of justice," and *no* "Chapter Four enhancements." *Id.* ¶¶ 20-22, 25 (capitalization omitted). It critically concludes that there is *no* basis for any "departure from the prescribed guideline range." *Id.* ¶ 123. After reviewing those recommendations, the government did not "submit[] any objections." *Id.* ¶ 125.

The government's claim that "petitioner unduly minimizes the record evidence demonstrating that the district court would have imposed the same sentence," BIO 11, thus takes real chutzpah. The government does not dispute that upward variances occur in less than two percent of cases, Pet. 28, and it concedes that a variant sentence would only be lawful if accompanied by "a 'specific reason,'" BIO 7 (quoting 18 U.S.C. § 3553(c)(2)). The court gave no such reason here, and the government (having disavowed any variance) does not identify a potential justification in the record.

III. The Eleventh Circuit's Decision Rested On Its Legal Rule That Guidelines Calculation Errors Are Not Inherently Or Presumptively Prejudicial.

Lacking any support for its position in either the decisions of other circuits or the sentencing record in

this case, the government is reduced to arguing that the Eleventh Circuit "concluded that the district court would have imposed the statutory maximum sentence, whatever the applicable Guidelines range," BIO 5, so that petitioner supposedly raises a "fact-bound dispute about whether other courts of appeals would have found this record evidence sufficient," *id.* 10. Both of those assertions are meritless.

The Eleventh Circuit held that claims of plain error in sentencing are governed by the principle that "[i]t is the defendant rather than the [g]overnment who bears the burden of persuasion with respect to prejudice." Pet. App. 10a (quoting *United States v. Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005)). On that view, where "uncertainty exists, the burden is the decisive factor." *Id.* (quoting *Rodriguez*, 398 F.3d at 1300).

The Eleventh Circuit then explained why, in its view, petitioner "failed to meet his burden." *Id.* The Eleventh Circuit first held – contrary to other circuits – that after *Booker*, the effect of a Guidelines miscalculation is uncertain, and so does not necessarily affect the defendant's substantial rights. Pet. App. 11a-12a. The Eleventh Circuit then considered whether petitioner could satisfy that court's unique rule that the defendant must come forward with additional evidence of prejudice. *Id.* 12a. The court found a single relevant fact in the record: that "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." *Id.* On that basis alone, the court concluded that petitioner "failed to carry *his burden* of showing a reasonable probability of a

different result." *Id.* (emphasis added). Because the court held that it did "not know whether [petitioner] would have received the same sentence without the (assumed) error," it denied him relief. *Id.*

The Eleventh Circuit thus manifestly did not conclude that the district court would inevitably have imposed the same sentence even absent the sentencing error. *Contra* BIO 5. The most that the court said was that the district judge's comment on the 120-month sentence showed "a reasonable probability that [petitioner] would not have received a lower sentence." Pet. App. 12a. But that sentence cannot bear the great weight the government would place on it, because it cannot be divorced from the court's principal – and unprecedented – holding that the erroneous Guidelines range itself was not inherently prejudicial. *Id.* 11a. Having ruled as a matter of law that the error does not provide proof of prejudice, the Eleventh Circuit concluded that the judge's comment that a lengthy term was appropriate sufficiently showed that petitioner would not benefit from resentencing. *Id.* The court of appeals explained that "the burden is the *decisive factor*, and [petitioner] has not carried it." *Id.* 10a (emphasis added).

Had the court instead adopted the rule applied by the majority of circuits, it obviously would have found that resentencing was required. Those courts find plain error whenever they "cannot be sure" that the defendant was not prejudiced, *Vazquez-Lebron*, 582 F.3d at 446, because there is not "clear and specific evidence," *Barnett*, 398 F.3d at 529, "that the error in no way affected" the sentence, *Farmer*, 543 F.3d at 375. Given that those courts find prejudice

even when the district judge expressly stated that he "would impose the same sentence without the guidelines," *Rodriguez*, 630 F.3d at 43, provided "detailed, fact specific reasons" for imposing the same sentence, *Moreno-Florean*, 542 F.3d at 457, and explained that he "sought to impose the highest sentence possible," *Dentler*, 492 F.3d at 313, they manifestly would require resentencing because it is "certainly possible" that this error here had an effect, *Story*, 503 F.3d at 440. Those circuits would recognize that even the meager statements that the district judge did make were "likely colored by" the Guidelines error. *Wilson*, 614 F.3d at 225. And they would find it critical that the district judge "did not make findings," *Porter*, 413 Fed. App'x at 531, that would have "independently justified the entirety" of the original sentence, *Wilson*, 614 F.3d at 225.

Review of this question is not "fact-bound." *Contra* BIO 10. The Eleventh Circuit itself stated that its novel burden of proof was "decisive." The clear record in the case, as well as the fact that the government disputes neither the underlying sentencing error nor its effect on the Guidelines range, makes this case an ideal vehicle to resolve the questions presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Excerpts from the Presentence Investigation Report

Offense Level Computations

16. The 2008 edition of the Guidelines Manual has been used in this case.	
17. Base Offense Level: The guideline for violation of 18 U.S.C. § 922(g)(1) is found in §2K2.1. Pursuant to §2K2.1(a)(2)(A), 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, the base offense level shall be 24. [See Paragraphs 43 and 56 for qualifying convictions]	24
18. Specific Offense Characteristic(s): Pursuant to §2K2.1(b)(4)(A), if any firearm was stolen, increase by two levels.	+2
19. Specific Offense Characteristic(s): Pursuant to §2K2.1(b)(6), if the defendant used or possessed any firearm or ammunition in connection with another felony offense, increase by four levels. The defendant possessed a firearm in connection with the felony offense of Aggravated Assault with Deadly Weapon with Intent to Kill [See Paragraph 62]	+4
20. Victim-Related Adjustments: None	0
21. Adjustment for Role in the Offense: None	0
22. Adjustment for Obstruction of Justice: None	0
23. Adjusted Offense Level (Subtotal):	30

24. Cross Reference: Pursuant to §2K2.1(c)(1), if the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another felony offense, apply§2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the other offense, if the resulting offense is greater than above. The defendant possessed the firearm in connection with the felony offense of Aggravated Assault with Deadly Weapon with Intent to Kill. However, the cross reference to §2A2.2 (Aggravated Assault) does not result in a higher offense level than determined above.

25. Chapter Four Enhancements: None 0

26. Adjustment for Acceptance of Responsibility: The defendant has failed to accept personal responsibility for his involvement in the offense as required by §3E1.1. 0

27. Total Offense Level: 30

. . .

107. Guideline Provisions: Based on a total offense level of 30 and a criminal history category of VI, the guideline imprisonment range is 168 to 210 months. However, pursuant to §5G1.1(a), where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily maximum sentence

123. The probation officer has not identified any factors concerning the offense or the offender which would warrant a departure from the prescribed guideline range.

. . .

125. The presentence report was disclosed to the government and defense counsel on June 9, 2009. The government has not submitted any objections to the presentence report. In a letter dated June 29, 2009, defense counsel makes numerous clarifications to the presentence report. However, defense counsel did not submit any objections or clarifications that affect sentencing and require court findings.