No. 12-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY DAVILA

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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QUESTION PRESENTED

Whether the court of appeals erred in holding that any degree of judicial participation in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1), automatically requires vacatur of a defendant's guilty plea, irrespective of whether the error prejudiced the defendant.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, 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.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 664 F.3d 1355.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2011. A petition for rehearing was denied on April 6, 2012 (App., *infra*, 9a-10a). On June 26, 2012, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 4, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 11(c)(1) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.

Rule 11(h) of the Federal Rules of Criminal Procedure provides:

> A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

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

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Georgia, respondent was convicted of conspiring to file fraudulent tax-refund claims, in violation of 18 U.S.C. 286. App., *infra*, 1a. The district court sentenced respondent to 115 months of imprisonment, to be followed by three years of supervised release. 09-cr-60 Docket entry No. 95, at 2-3 (S.D. Ga. Nov. 16, 2010). The court of appeals vacated the conviction and sentence and remanded for further proceedings. App., *infra*, 1a-5a.

1. Respondent defrauded the federal government by filing more than 130 falsified tax returns with the Internal Revenue Service (IRS). Docket entry No. 121, at 20-

26 (filed Jan. 11, 2011) (Plea Hearing Tr.). According to an informant, respondent would identify state prisoners on the Florida Department of Corrections website, obtain the prisoners' personal information from casefiles at the local courthouse, and then file federal tax-refund claims in the prisoners' names to be paid into his own bank accounts. *Id.* at 20-22. The IRS issued refunds on 87 of the claims, and respondent banked more than $423,500 as a result of his scheme. *Id.* at 24.

In May 2009, a federal grand jury in the Southern District of Georgia indicted respondent on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 286 and 2; 11 counts of presenting a false claim to the United States, in violation of 18 U.S.C. 287 and 2; 11 counts of mail fraud, in violation of 18 U.S.C. 1341 (Supp. II 2008); and 11 counts of aggravated identity theft, in violation of 18 U.S.C. 1028A. Docket entry No. 1 (May 7, 2009). The district court appointed counsel to represent him. Docket entry No. 33 (July 20, 2009).

2. Respondent subsequently sent a letter to the court requesting different counsel. C.A. E.R. Ex. B. One of his complaints was that his counsel had "never mentioned a defense at all" other than "to plead guilty." *Id.* at 1-2. On February 8, 2010, a magistrate judge held an ex parte hearing with respondent and his counsel and denied respondent's request. See Docket entry No. 127, at 13 (filed Jan. 18, 2011) (Ex Parte Hearing Tr.).

At the hearing, the magistrate judge stated that "oftentimes * * * the best advice a lawyer can give his client" is to plead guilty. Ex Parte Hearing Tr. 8. The magistrate judge also raised the possibility that respondent's counsel might not have discussed other strategies because "there may not be a viable defense to these

charges." *Id.* at 11. And the magistrate judge later stated that

> [t]he only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance. I don't know what the guidelines of this case would figure out to be but not as bad as armed bank robbery but probably pretty bad because your criminal history score would be so high. * * * [M]ake no mistake about it, that two- or three-level reduction for acceptance is something that you have the key to and you can ensure that you get that reduction in sentence simply by virtue of being forthcoming and not trying to make yourself look like you really didn't know what was going on. In order to get the reduction for acceptance, you've got to come to the cross. You've got to go there and you've got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the district judge and he will say, you know, that Davila guy, he's got a long criminal history but when we were in there talking about this case he gave it all up so give him the two-level, give him the three-level reduction.

Id. at 16-17.

3. Approximately a month after the ex parte hearing, respondent filed a motion demanding a speedy trial.

Docket entry No. 46 (Mar. 5, 2010). The district court set a trial date for April 2010, which was later continued at the government's request. Docket entry No. 53 (Mar. 25, 2010), No. 56 (Apr. 2, 2010).

On May 11, 2010, more than three months after the ex parte hearing, respondent and his counsel signed a plea agreement pursuant to which respondent would plead guilty to the conspiracy charge in exchange for dismissal of the other 33 charges. Docket entry No. 62 (May 17, 2011). Six days later, respondent entered his guilty plea before a district judge (not the magistrate judge who had presided over the ex parte hearing). Plea Hearing Tr. 1-43. Respondent stated under oath at the hearing that no one had forced or pressured him to plead guilty. *Id.* at 39. The district judge found that the plea was "voluntary, knowing, and not the result of any force, pressure, threats, or promises, other than the promises made by the government in the plea agreement." *Id.* at 41.

4. In September 2010, the magistrate judge granted respondent permission to proceed pro se and appointed his prior counsel as stand-by counsel. See Docket entry No. 122 at 4 (filed Jan. 11, 2011) (Sentencing Tr.). Respondent then moved to vacate his plea and to dismiss the indictment, alleging that the government had knowingly included false statements in the indictment and that his counsel had given him bad advice about whether to admit the factual basis for his plea. Docket entry No. 79 (Sept. 15, 2010), No. 87 (Oct. 26, 2010).

When the district judge took up the matter at the beginning of respondent's sentencing hearing, respondent explained to the district judge that the guilty plea had been a "strategic decision" designed to expose the

alleged government misconduct. Sentencing Tr. 5, 7, 8. Respondent also asserted that his plea decision had been influenced by misinformation from his counsel about the effect that the plea would have in a separate prosecution against him in another jurisdiction. *Id.* at 10-11. Neither respondent's written nor oral submissions in support of his plea-withdrawal request suggested that his decision to plead guilty had been influenced by the magistrate judge's remarks at the ex parte hearing (or even mentioned those remarks at all). See Docket entry No. 79, 80, 84, 87; Sentencing Tr. 3-19.

The district judge declined to set aside the plea, finding that respondent had "failed to provide * * * any evidence of government misconduct" and that "it is clear * * * that the entry of the guilty plea * * * was knowing and voluntary." Sentencing Tr. 15-18. The district judge sentenced respondent to 115 months of imprisonment. *Id.* at 41.

5. The court of appeals assigned respondent's trial counsel to represent him on appeal. 10-15310 Docket entry (11th Cir. Nov. 29, 2010). Pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), respondent's counsel filed a motion to withdraw and a brief explaining why no nonfrivolous grounds for appeal existed. 10-15310 Docket entry (11th Cir. Apr. 4, 2011). Respondent filed his own pro se brief seeking to set aside his conviction. 10-15310 Docket entry (11th Cir. Apr. 22, 2011).

The court of appeals denied counsel's *Anders* motion and ordered further briefing on an issue that neither respondent nor his counsel had identified in their briefs. App., *infra*, 6a-8a. Specifically, the court stated that its "independent review" of the record had "revealed an irregularity in the statements of a magistrate judge,

made during a hearing prior to [respondent's] plea, which appeared to urge [respondent] to cooperate and be candid about his criminal conduct to obtain favorable sentencing consequences." *Id.* at 7a. The court requested that respondent's counsel address whether this amounted to reversible error under Federal Rule of Criminal Procedure 11(c)(1), which states that a court "must not participate in [plea] discussions." See App., *infra*, 7a-8a.

Respondent (through his counsel) then filed a brief requesting that his guilty plea be set aside on Rule 11(c)(1) grounds. Resp. C.A. Br. 17-45. He argued that the magistrate's comments warranted such relief even under the plain-error standard of review generally applicable to errors raised for the first time on appeal. *Ibid.* In response, the government conceded that the magistrate's comments had violated Rule 11(c)(1), but contended that respondent could not meet the plain-error standard's requirement that he show an effect on his substantial rights as a prerequisite to relief. Gov't C.A. Br. 11-26. In particular, the government contended that respondent could not show "a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 15 (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004)); see *id.* at 14-26. The government pointed out the three-month gap between the comments and the plea; the different judge who presided over the plea and sentencing hearings; respondent's denial at the plea hearing that anyone had pressured or coerced his plea; respondent's later explanation to the district judge that he had pleaded guilty for "strategic" reasons; and the failure of either respondent or

his counsel to identify the issue before the court of appeals raised it. *Id.* at 11-12.

6. The court of appeals vacated respondent's conviction and remanded the case with instructions that it be reassigned to a different district judge. App., *infra*, 5a. It recognized that "[w]here, as here, the defendant fails to object to an asserted Rule 11 violation before the district court, we review the alleged violation for plain error." *Id.* at 3a. And it explained that "[u]nder the plain error standard, the defendant ordinarily must show that: (1) error existed (2) the error was plain, and (3) it affected the defendant's substantial rights; and (4) it seriously affected the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (internal quotation marks omitted).

The court nevertheless relied on circuit precedent to hold that in a case of Rule 11(c)(1) error, a defendant "need not show any individualized prejudice" to obtain relief. App., *infra*, 5a. The court explained that, in its view, "Rule 11(c)(1) states a 'bright line rule': it prohibits 'the participation of the judge in plea negotiations under any circumstances . . . and admits of no exceptions.'" *Id.* at 3a (quoting *United States* v. *Johnson*, 89 F.3d 778, 783 (11th Cir. 1996)) (brackets omitted). "Thus," it continued, "'judicial participation *is plain error, and the defendant need not show actual prejudice*.'" *Ibid.* (citing *United States* v. *Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993)) (brackets omitted). The court acknowledged that "while other circuits recognize harmless error in the context of judicial participation, we do not." *Ibid.*

7. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 9a-10a.

REASONS FOR GRANTING THE PETITION

The court of appeals has adopted the inflexible approach of automatically granting appellate relief following any degree of judicial participation in plea negotiations, regardless of whether the defendant was prejudiced. That approach cannot be squared with the text of Rule 11 or this Court's cases interpreting that Rule, which make clear that a showing of prejudice is a prerequisite for granting relief for a Rule 11 violation. It additionally conflicts with decisions in the majority of circuits that have addressed the issue and provides a windfall for defendants, like respondent, whose guilty-plea decisions were unaffected by Rule 11 error. This recurring and important issue of federal criminal procedure warrants this Court's review.

A. The Court Of Appeals Erred In Granting Relief For A Rule 11 Error Without Analyzing Prejudice

1. An appellate court's authority to set aside a criminal conviction based on an error typically "is tied in some way" to whether the error prejudiced the defendant. *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 (2004). Rule 52 of the Federal Rules of Criminal Procedure permits a reviewing court to grant relief only when an error has "affect[ed] substantial rights," Fed. R. Crim. P. 52(a)-(b), a phrase that this Court has long "taken to mean error with a prejudicial effect on the outcome of a judicial proceeding," *Dominguez Benitez*, 542 U.S. at 81 (citing *Kotteakos* v. *United States*, 328 U.S. 750 (1946)). "When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error'

inquiry—to determine whether the error was prejudicial." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). If the defendant did not make a timely objection, then Rule 52(b)'s plain-error standard "normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.*

The harmless-error and plain-error prejudice standards apply with full force when the error at issue is a violation of Federal Rule of Criminal Procedure 11. Rule 11 describes the procedures for pleas in criminal cases, including the requirement that a district court, before accepting a guilty plea, advise the defendant of various rights and determine that the defendant understands certain features of the case. Fed. R. Crim. P. 11(b). The Rule also authorizes the defendant and the government to "discuss and reach a plea agreement," but requires that a "court must not participate in these discussions." Fed. R. Crim. P. 11(c)(1); see Fed. R. Crim. P. 11(b). Subsection (h) of Rule 11 expressly states that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights." The Advisory Committee Notes explain that "Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11 advisory committee's note (1983); see *United States* v. *Vonn*, 535 U.S. 55, 64 n.6 (2002) (stating that Advisory Committee Notes are a "reliable source of insight into the meaning of" Rule 11(h)).

The scope of Rule 11(h) encompasses all potential Rule 11 violations, including violations of Rule 11(c)(1)'s prohibition against judicial participation in plea negotia-

tions. The original 1983 version of Rule 11(h) explicitly provided that "*[a]ny* variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 11(h) (1983) (emphasis added); see *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). The breadth of Rule 11(h) remains unchanged following a 2002 amendment that replaced "[a]ny variance" with "[a] variance," as the alteration was "intended to be stylistic only." Fed. R. Crim. P. 11 advisory committee's note (2002).

Although Rule 11(h) specifically addresses only the applicability of harmless-error review, this Court has held that Rule 11 violations are also subject to plain-error review under Rule 52(b). In *United States* v. *Vonn*, the Court "considered the standard that applies when a defendant is dilatory in raising Rule 11 error, and held that reversal is not in order unless the error is plain." *Dominguez Benitez*, 542 U.S. at 80; see *Vonn*, 535 U.S. at 62-74. The Court expanded on *Vonn* in *United States* v. *Dominguez Benitez*, explaining that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83. In evaluating such a claim of prejudice, the reviewing court "may consult the whole record," *Vonn*, 535 U.S. at 59, including any "evidence indicating the relative significance of other facts that may have borne on [the defendant's] choice regardless of any Rule 11 error," *Dominguez Benitez*, 542 U.S.

at 84. "[R]elief on direct appeal, given the plain-error standard that will apply in many cases, will be difficult to get, as it should be." *Id.* at 83 n.9.

2. Under the court of appeals' approach here, however, relief on appeal is not "difficult to get," but is instead automatic, in cases where a district court is deemed to have participated in plea discussions in violation of Rule 11(c)(1). The court of appeals explained that it does not "recognize harmless error in the context of judicial participation." App., *infra*, 3a. Nor does it require a defendant who has forfeited his judicial-participation claim to show "any individualized prejudice" or "actual prejudice" to prevail on plain-error review. *Id.* at 3a-5a (internal quotation marks and emphasis omitted).

Nothing justifies the court of appeals' categorical excision of the prejudice inquiry that Rules 11(h) and 52 require. "It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that * * * error requires reversal without regard to the mistake's effect on the proceeding." *Dominguez Benitez*, 542 U.S. at 81. This Court has found only "a very limited class of errors" to be structural. *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010) (internal quotation marks and citation omitted). That limited class—which includes, for example, denial of counsel of choice, denial of self-representation, denial of a public trial, and denial of a reasonable-doubt instruction, see *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006)—does not include Rule 11(c)(1) errors or any other type of Rule 11 error. Indeed, the Court has expressly observed that the erroneous omission of one of Rule 11's required plea-colloquy warnings is not even

"colorably structural." *Dominguez Benitez*, 542 U.S. at 81 n.6.

Almost invariably, structural errors are "fundamental constitutional errors" that additionally "defy analysis by harmless error standards" because they "affect[] the framework within which the trial proceeds." *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999) (internal quotation marks and citations omitted). Rule 11 errors satisfy neither condition. First, Rule 11 is not "constitutionally mandated," but is instead a prophylactic rule "designed to assist" in assuring "that a defendant's guilty plea is truly voluntary." *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969); see *Halliday* v. *United States*, 394 U.S. 831, 833 (1969) (per curiam) ("[A] large number of constitutionally valid convictions * * * may have been obtained without full compliance with Rule 11."). Before the Rule was amended in 1974 to preclude judicial participation in plea discussions, some commentators described such participation as "common practice," and the amendment reflected a policy choice rather than a constitutional imperative. Fed. R. Crim. P. 11 advisory committee's note (1974). Because Rule 11's requirements lack constitutional dimension, a "formal violation" of the Rule is not constitutional error, *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979), and *a fortiori* is not "fundamental constitutional error[]," *Neder*, 527 U.S. at 7.

Second, Rule 11 error does not "infect" the entire guilty-plea process, but is simply an error in the plea process itself. See *Neder*, 527 U.S. at 8 (jury instruction error). "The concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty

plea." *Timmreck*, 441 U.S. at 784 (internal quotation marks and citation omitted). Case-specific prejudice analysis, rather than an irrebuttable presumption of prejudice, is the best way to address concerns (see App., *infra*, 3a-4a) that judicial commentary on plea discussions may coerce a defendant to plead or cast doubt on the judge's impartiality. See *United States* v. *Bradley*, 455 F.3d 453, 463 (4th Cir. 2006) (applying plain-error review notwithstanding view that judicial participation in plea discussions is frequently prejudicial); *United States* v. *Miles*, 10 F.3d 1135, 1140-1141 (5th Cir. 1993) (same for harmless-error review). Such analysis permits the reviewing court to go beyond the bare fact of judicial participation and examine both the specific comments made by the judge and any other individualized circumstances that might show how those comments did or did not affect the particular proceedings. See *Dominguez Benitez*, 542 U.S. at 84-85; *Vonn*, 535 U.S. at 74-75. The reviewing court may find, for example, that the judge's comments merely expressed what was already obvious to the negotiating parties, were entirely neutral, or even discouraged the defendant from pleading. See, *e.g.*, p. 19, *infra* (discussing lack of prejudice in this case).

3. The court of appeals has never explained how its automatic-vacatur approach for judicial-participation errors can be squared with either Rule 11(h) or this Court's decisions holding that forfeited Rule 11 errors are subject to plain-error review. To the contrary, the court's approach is the product of its uncritical reliance on circuit precedent that predates those authorities.

The court of appeals supported its approach in this case by citing two prior circuit decisions, *United States*

v. *Casallas*, 59 F.3d 1173 (11th Cir. 1995), and *United States* v. *Corbitt*, 996 F.2d 1132 (11th Cir. 1993). App., *infra*, 3a. Those decisions, in turn, cite *United States* v. *Adams*, 634 F.2d 830 (1981), a precedent from the court's origins as part of the Fifth Circuit. See *Casallas*, 59 F.3d at 1177 & n.8; *Corbitt*, 996 F.2d at 1134-1135; see also *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting Fifth Circuit cases decided before October 1, 1981 as binding precedent).

In *Adams*, the Fifth Circuit relied on its "supervisory power over the district courts" to hold that a defendant is entitled to automatic appellate relief whenever a district court participates in any way in plea discussions. 634 F.2d at 835-843. The decision's reasoning drew heavily on *McCarthy* v. *United States*, in which this Court had used its supervisory authority to vacate a plea following a plea-colloquy omission that violated a very early version of Rule 11. 394 U.S. at 464, 468-472; see *Adams*, 634 F.2d at 836-842. The reasoning and result in *Adams* were consistent with other contemporaneous decisions in which some circuits "felt bound to treat all Rule 11 lapses as equal and to read *McCarthy* as mandating automatic reversal for any one of them." *Vonn*, 535 U.S. at 70.

Those circuit decisions, however, "imposed a cost on Rule 11 mistakes that *McCarthy* neither required nor justified, and by 1983 the practice of automatic reversal for error threatening little prejudice to a defendant or disgrace to the legal system prompted further revision of Rule 11"—namely, the enactment of Rule 11(h). *Vonn*, 535 U.S. at 70; see Fed. R. Crim. P. 11 advisory committee's note (1983). "[T]he one clearly expressed objective of Rule 11(h) was to end the practice * * * of

reversing automatically for any Rule 11 error" based on an "expansive reading of *McCarthy*." *Vonn*, 535 U.S. at 66; see also Fed. R. Crim. P. 11 advisory committee's note (1983) ("[A] harmless error provision has been added to Rule 11 because some courts have read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings."). Rule 11(h) requires reviewing courts to disregard Rule 11 errors that do not affect substantial rights, and it thus forecloses those courts from "invok-[ing] supervisory power to circumvent [that] harmless-error inquiry." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988) (discussing Rule 52(a)); see Fed. R. Crim. P. 11 advisory committee's note (1983) (stating that Rule 11(h) "makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11"). As this Court has explained in the Rule 52(a) context, "federal courts have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia*, 487 U.S. at 255.

B. The Court Of Appeals' Approach Conflicts With The Decisions Of Other Circuits

1. As the decision in this case recognized, "other circuits recognize harmless error in the context of judicial participation" and thus do not follow the Eleventh Circuit's automatic-vacatur approach. App., *infra*, 3a. Indeed, that is the practice in the majority of circuits that have squarely addressed the question presented. Decisions in the First, Third, Fourth, Fifth, and Seventh Circuits have all inquired into prejudice as a prerequisite to vacating a guilty plea on grounds of judicial participation in plea negotiations. See *United States* v.

Pagan-Ortega, 372 F.3d 22, 27-28 (1st Cir. 2004); *United States* v. *Ebel*, 299 F.3d 187, 191 (3d Cir. 2002); *Bradley*, 455 F.3d at 463 (4th Cir.); *Miles*, 10 F.3d at 1140-1141 (5th Cir.); *United States* v. *Kraus*, 137 F.3d 447, 457 (7th Cir. 1998).

The Fifth Circuit's decision in *United States* v. *Miles* puts the circuit conflict in particularly stark relief. As previously noted (p. 15, *supra*), the seminal precedent supporting the Eleventh Circuit's automatic-vacatur rule, *Adams* v. *United States*, was actually a Fifth Circuit decision. But in the Fifth Circuit itself, *Adams* is no longer good law. The Fifth Circuit recognized in *Miles* that whereas under *Adams*, it "might have found that a guilty plea entered after judicial participation was reversible *per se*," Rule 11(h) and a recent en banc decision "compel[led] harmless error review." 10 F.3d at 1140-1141; see *United States* v. *Johnson*, 1 F.3d 296 (5th Cir. 1993) (en banc).

The Second Circuit has indicated that it likewise applies harmless-error review to violations of Rule 11(c)(1). See *United States* v. *Paul*, 634 F.3d 668, 673 (2d Cir.) ("Even if the District Court's remarks constituted error (which they do not), such error was certainly harmless."), cert. denied, 132 S. Ct. 538 (2011). The Eighth, Tenth, and D.C. Circuits appear not to have squarely addressed the issue. See *United States* v. *Nesgoda*, 559 F.3d 867, 869-870 & n.1 (8th Cir.) (requiring prejudice to prevail on postconviction review but reserving issue of standard applicable on direct appeal), cert. denied, 130 S. Ct. 169 (2009); *United States* v. *Cano-Varela*, 497 F.3d 1122, 1131-1134 (10th Cir. 2007) (finding prejudice but reserving question of what stan-

dard of review applies); *United States* v. *Baker*, 489 F.3d 366, 371-375 (D.C. Cir. 2007) (same).

Both the Sixth and Ninth Circuits have, like the Eleventh Circuit, granted appellate relief for a judicial-participation error without analyzing prejudice. See *United States* v. *Barrett*, 982 F.2d 193, 196 (6th Cir. 1992); *United States* v. *Anderson*, 993 F.2d 1435, 1438-1439 (9th Cir. 1993); but see *United States* v. *Thornton*, 609 F.3d 373, 379 (6th Cir.) (requiring showing of "actual prejudice" for judicial-participation error when defendant wound up going to trial rather than pleading guilty), cert. denied, 130 S. Ct. 3343 (2010). But even assuming those circuits would continue that practice following this Court's decisions in *Vonn* and *Dominguez Benitez*, the Eleventh Circuit's approach here would still be the minority rule.

2. In cases of judicial-participation error, whether or not the reviewing court analyzes prejudice can easily be outcome-determinative. Although some courts have expressed the view that judicial-participation errors are likely to be prejudicial, see, *e.g.*, *Bradley*, 455 F.3d at 463, courts have allowed pleas to stand in cases where individualized prejudice analysis cuts against the defendant. See, *e.g.*, *Pagan-Ortega*, 372 F.3d at 28 (finding district judge's comments that plea offer was a "good deal" and a "super break" not to be plain error); *Ebel*, 299 F.3d at 191-192 (finding district judge's announcement that he would go along with the non-binding recommended sentence if the defendant pleaded to be harmless error); see also *Nesgoda*, 559 F.3d at 869-870 (finding district judge's comments on proposed plea agreement not to be plain error).

This very case should come out differently under a prejudice analysis. Although the government has conceded that the magistrate judge's comments violated Rule 11(c)(1), the procedural history of this case demonstrates that those comments had no appreciable impact on respondent's decision to plead guilty. Respondent filed a motion demanding a speedy trial shortly after the magistrate made the comments; he never mentioned the comments when he asked the district court to set aside his plea, but instead explained that he had pleaded for "strategic" reasons; and he did not even think to argue judicial-participation error on appeal until the court, after an "independent review" of the record, specifically requested briefing on that subject. See pp. 4-8, *supra*.

Moreover, any effect the comments might have had was dissipated by the three-month interval between the comments and the plea and by the absence of the magistrate judge from the plea and sentencing proceedings (over which the district judge presided). Gov't C.A. Br. 3-6. Even the Eleventh Circuit appears to agree that the passage of time and a fresh judge are sufficient to cure judicial-participation error, as that is the appellate remedy it grants in cases where it finds such error. See App., *infra*, 5a. When a defendant, like respondent here, has already effectively received that remedy, an appellate-court order requiring further proceedings before yet another judge wastes resources and accomplishes nothing.

3. The circuit conflict will persist unless and until this Court intervenes. The Eleventh Circuit deems itself bound by *Adams* in the absence of an en banc decision overruling it. *Casallas*, 59 F.3d at 1177. And the court has now denied the government's petition for en

banc review. App., *infra*, 9a-10a. The court has thus adhered to its automatic-vacatur practice notwithstanding changes to Rule 11 and this Court's decisions in *Vonn* and *Dominguez Benitez*. Review by this Court is necessary to correct that erroneous practice.

C. The Question Presented Is Recurring And Important

Without this Court's intervention, the circuit conflict will continue to affect a substantial number of cases. Guilty pleas account for 97% of federal criminal convictions. *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012). District courts presiding over such cases cannot stay completely removed from all matters touching upon plea discussions; those courts will sometimes run afoul of Rule 11(c)(1); and reviewing courts will have to address those Rule 11(c)(1) errors.

The magistrate judge in this case was forced to confront the issue of ongoing plea negotiations when respondent asked that his attorney be removed because he was overly focused on a guilty plea. See App., *infra*, 1a-2a. But even in the absence of such a motion, at least some degree of judicial inquiry into plea discussions is not only to be expected, but also encouraged, during the colloquy preceding the entry of a guilty plea. This Court has recently emphasized that plea-entry proceedings provide "the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea." *Frye*, 132 S. Ct. at 1406. Courts can "guard against" a later claim of ineffective assistance of counsel "by establishing * * * that the defendant has been

given proper advice or, if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered." *Id.* at 1406-1407.

It is easy for a judge diligently attempting to assure that a defendant's constitutional rights were not violated in the plea-negotiation process to inadvertently "cross[] the line into the realm of participation" barred by Rule 11(c)(1). *Casallas*, 59 F.3d at 1178. That is especially true in the Eleventh Circuit, which has a particularly broad conception of Rule 11(c)(1) error. In the Eleventh Circuit's view, the rule "imposes 'an absolute prohibition on all forms of judicial participation in . . . the plea negotiation process.'" *United States* v. *Tobin*, 676 F.3d 1264, 1303 (2012) (quoting *Adams*, 634 F.2d at 835). The court has "made it clear that [it] will not engage in the exercise of determining the degree to which a district court discusses the subject of plea negotiations" in determining whether Rule 11(c)(1) error has occurred. *Id.* at 1306 (citing *Casallas*, 59 F.3d at 1178). Rather, the court applies a bright-line rule that "district courts should not offer any comments 'touching upon' this subject" for any reason. *Id.* at 1307 (quoting *United States* v. *Diaz*, 138 F.3d 1359, 1363 (11th Cir.), cert. denied, 525 U.S. 913 (1998)); see *id.* at 1306. Even though a Rule 11(c)(1) error may be "'motivated primarily by the concern that the defendant be thoroughly apprised of the situation that he faced,'" that "'concern, however well-intentioned,' will not excuse judicial participation." App., *infra*, 4a-5a (quoting *Casallas*, 59 F.3d at 1178) (brackets omitted).

The government has little, if any, way to prevent district courts from straying into commentary that may

violate Rule 11(c)(1). Indeed, in this case, the colloquy that crossed the line occurred in ex parte proceedings involving only respondent and his counsel. And the decision below—which vacated a plea entered in front of a different judge three months after the comments were made—suggests that little can be done to cure such violations after the fact, except to wait for an appeal and the inevitable remand for further proceedings. Indeed, the Eleventh Circuit has recently held that judicial comments in violation of Rule 11(c)(1) entitle a defendant to appellate relief even if the defendant never pleads guilty at all and can demonstrate no prejudice from the violation at his trial or sentencing. *Tobin*, 676 F.3d. at 1307-1308 (remanding for resentencing before a different judge in that circumstance). Particularly because the Eleventh Circuit requires no objection in the district court, but remands violations on appeal without requiring a showing of prejudice, defendants may reserve an objection until after sentencing and then strategically raise it for the first time on appeal. This Court should grant certiorari to reaffirm that Rule 11(h) put an end to that sort of "cost[ly]" automatic-remand practice. *Vonn*, 535 U.S. at 70.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-15310; 11-10224

NON-ARGUMENT CALENDAR

D.C. DOCKET No. 1:09-cr-00060-JRH-WLB-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY DAVILA, DEFENDANT-APPELLANT

Appeals from the United States District Court
for the Southern District of Georgia

Dec. 21, 2011

Before: TJOFLAT, PRYOR and KRAVITCH, Circuit Judges.

PER CURIAM:

Anthony Davila appeals following his conviction for conspiracy to defraud the United States by obtaining false tax refunds, 18 U.S.C. § 286.[1] During a February

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[1] Davila also purports to appeal the denial of a post-judgment motion for reconsideration, but, by failing to include any challenge to this ruling in his opening brief, he has abandoned this issue on appeal. *See United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003).

2010 hearing before a magistrate judge, Davila requested the discharge of his court-appointed attorney, expressing a concern that counsel had not discussed any pertinent strategies with him except to plead guilty. The magistrate judge responded that "there may not be viable defenses to these charges," and that pleading guilty sometimes was the best advice an attorney could provide his client. The magistrate judge proceeded to inform Davila that:

> The only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance.

In May 2010, Davila entered a plea of guilty before the district court, and on November 15, 2010, the court sentenced him to 115 months' imprisonment.

On appeal, Davila argues that the magistrate judge's comments at the *in camera* hearing amounted to improper participation in his plea discussions, requiring that his conviction be vacated. Davila specifically asserts that the magistrate judge commented on the weight of the evidence against him and suggested that a plea would result in a sentence more favorable than the sentence he would receive if he stood trial and was found guilty. He also asserts that he was entitled to the vacatur of his conviction despite his failure to object to the magistrate judge's comments because there was "no

question" that the comments violated his substantial rights and undermined the integrity of the proceedings.

Where, as here, the defendant fails to object to an asserted Rule 11 violation before the district court, we review the alleged violation for plain error. *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005). Under the plain error standard, the defendant ordinarily must show that: (1) error existed (2) the error was plain, and (3) it affected the defendant's substantial rights; and (4) it "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id*.

The Federal Rules of Criminal Procedure provide that "an attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. *The court must not participate in these discussions*." Fed. R. Crim. P. 11(c)(1) (emphasis added). Rule 11(c)(1) states a "bright line rule": it prohibits "the participation of the judge in plea negotiations under any circumstances . . . [and] admits of no exceptions." *United States v. Johnson*, 89 F.3d 778, 783 (11th Cir. 1996) (quotation omitted). Thus, "[j]udicial participation *is plain error, and the defendant need not show actual prejudice*." *United States v. Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993) (emphasis added). Notably, while other circuits recognize harmless error in the context of judicial participation, we do not. *See United States v. Casallas*, 59 F.3d 1173, 1177 n.8 (11th Cir. 1995).

Three rationales support the absolute ban on judicial participation: "(1) judicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty; (2) the prohibition protects

the integrity of the judicial process; and (3) the ban preserves the judge's impartiality after the negotiations are completed." *Johnson*, 89 F.3d at 782-83 (quotation omitted). Thus, prior to any agreement by the parties, "a court should not offer comments touching upon proposed or possible plea agreements," which go beyond a source of information to plea negotiators and amount to "indications of what the judge will accept" that "will quickly become the focal point of further discussions." *United States v. Diaz*, 138 F.3d 1359, 1363 (11th Cir. 1998) (quotations omitted).

When the district court contrasts the sentence a defendant would receive if he pled guilty with the sentence he would receive if he went to trial and was found guilty, judicial participation is presumed and the conviction must be set aside. *See Casallas*, 59 F.3d at 1177 (holding that a court's comments contrasting the likely minimum sentence he would receive if he pled with the minimum sentence he would receive if he went to trial, and suggesting that the defendant "talk to his lawyer and see if [a trial] is really what he wants to do" operated to coerce the plea in violation of Rule 11(c)(1)). Similarly, a court may not comment on the "weight and nature of the evidence against" a defendant. *Diaz*, 138 F.3d at 1361-63 (holding that the district court violated Rule 11 by participating in plea discussions, in part, due to its comments that the evidence against the defendant was "kind of compelling," but declining to vacate the conviction because the defendant proceeded to trial nonetheless).

As a bright line rule, we usually refrain from inquiring into the degree of judicial participation. *Casallas*, 59 F.3d at 1178. Furthermore, while a court may be "moti-

vated primarily by the concern that [the defendant] be thoroughly apprised of the situation that he faced, . . . this concern, however well-intentioned," will not excuse judicial participation. *Id.* When a Rule 11(c)(1) violation requires remand, "the case should be reassigned to another judge even if there is no evidence that the judge is vindictive or biased, as the means to extend the prophylactic scheme established by Rule 11 and to prevent the possible mis-impression created by the judge's participation." *Corbitt*, 996 F.2d at 1135.

We agree with Davila that the magistrate judge's comments at the *in camera* hearing amounted to judicial participation in plea discussions, and the record reflects that he pled guilty after these comments were made. Under our binding precedent, Davila need not show any individualized prejudice. Accordingly, we vacate Davila's conviction and remand for the case with the instruction that Davila's not guilty plea be reinstated and that the Chief Judge of the District Court reassign the case to another district judge with the instruction that the magistrate judge who handled Davila's case is disqualified.

VACATED and REMANDED, with instructions.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 10-15310-II; 11-10224-II

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY DAVILA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of Georgia

[Filed: July 11, 2011]

ORDER

Michael N. Loebl, appointed counsel for Anthony Davila in this direct criminal appeal, has moved to withdraw from further representation of Davila, because, in his opinion, the appeal is without merit. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), arguing that there are no issues of arguable merit to be raised on Davila's behalf. Davila has responded in opposition to counsel's *Anders* motion.

An attorney who finds an appeal "wholly frivolous" and seeks to withdraw from further representation nev-

ertheless must remain in the role of an active advocate on behalf of the client. *Anders,* 386 U.S. at 744, 87 S. Ct. at 1400. Thus, counsel seeking to withdraw from further representation based upon the belief that an appeal is wholly frivolous must accompany the motion to withdraw with a brief that "set[s] out *any* irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious." *United States v. Blackwell,* 767 F.2d 1486, 1487-88 (11th Cir. 1985) (emphasis in original).

Counsel must conduct "a conscientious examination" of the entire record on appeal. *Penson v. Ohio,* 488 U.S. 75, 80, 109 S. Ct. 346, 350, 102 L. Ed. 2d 300 (1988) (quotation omitted). Counsel then must isolate the pages of the record relevant to those arguably meritorious points and cite relevant legal authority. *See United States v. Edwards,* 822 F.2d 1012, 1013 (11th Cir. 1987). After plenary review of the record, the appeals court must independently determine whether the case is wholly frivolous. *Anders,* 386 U.S. at 744, 87 S. Ct. at 1400.

Although counsel's brief discusses multiple potential issues that Davila could appeal and argues that none of these issues have arguable merit, independent review has revealed an irregularity in the statements of a magistrate judge, made during a hearing prior to Davila's plea, which appeared to urge Davila to cooperate and be candid about his criminal conduct to obtain favorable sentencing consequences. Counsel does not address, however, whether this irregularity constituted an issue of arguable merit or express an opinion as to whether judicial participation occurred. *See, e.g., United States*

v. *Johnson,* 89 F.3d 778, 783 (11th Cir. 1996) (remarking that Fed. R. Crim. P. 11(c)(1) is a "bright line rule" that prohibits "the participation of the judge in plea negotiations under any circumstances . . . [and] admits of no exceptions") (quotation omitted); *United States v. Casallas,* 59 F.3d 1173, 1177 (11th Cir. 1995) (holding that reversible judicial participation occurred where the district court contrasted the likely sentence a defendant would received if he pled guilty with the likely sentence he would receive if he proceeded to trial). We remind counsel that, pursuant to his obligation under *Anders,* he is required to address "any irregularity" in the proceedings. *See Blackwell,* 767 F.2d at 1487.

Accordingly, counsel's motion to withdraw is **DENIED WITHOUT PREJUDICE**. Counsel may renew his motion under *Anders* or, alternatively, file a merits brief that challenges the magistrate's pre-plea statements under Rule 11(c)(1), or raises any other issue that he deems to have arguable merit. Should counsel elect to renew his *Anders* motion, he is hereby **DIRECTED** to address the arguable merit, for legal or strategic reasons, of an appellate challenge to the knowing and voluntary nature of Davila's guilty plea notwithstanding the magistrate's statements to him.

/s/ ILLEGIBLE
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 10-15310-DD; 11-10224-DD

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY DAVILA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of Georgia

[Apr. 6, 2012]

ON PETITION(S) FOR REHEARING
AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, PRYOR and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.
ENTERED FOR THE COURT:

/s/ ILLEGIBLE
UNITED STATES CIRCUIT JUDGE