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

REPLY BRIEF FOR THE UNITED STATES

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The court of appeals in this case held that a defendant "*need not show actual prejudice*" to obtain appellate relief for a violation of Federal Rule of Criminal Procedure 11(c)(1). Pet. App. 3a (quoting *United States* v. *Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993)) (emphasis added by court of appeals). "Notably," the court continued, "while other circuits recognize harmless error in the context of judicial participation, we do not." *Ibid.* (citing *United States* v. *Casallas*, 59 F.3d 1173, 1177 n.8 (11th Cir. 1995)). Respondent suggests that the court of appeals (like, he contends, other circuits that have adopted similar rules dispensing with prejudice analysis for Rule 11(c)(1) violations) in fact applies prejudice analysis and is in fact substantially consistent with other circuits that apply all four prongs of plain-error review to erroneous judicial participation in plea-agreement discussions.

As the petition explains, the court of appeals' practice of automatically vacating for any Rule 11(c)(1) error conflicts with the decisions of other courts of appeals; this Court's decisions in *United States* v. *Vonn*, 535 U.S. 55 (2002), and *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004); and Rules 11(h) and 52. It creates the possibility that any prosecution involving plea bargaining—which describes the vast majority of prosecutions—could result in a vacated conviction or sentence, based on error that the government did not cause, that the government was powerless to prevent, and that neither the government nor the district court can remedy without appellate intervention. This case squarely presents the court of appeals' aberrant approach for further review, and this Court should grant certiorari.

A. The Court Of Appeals Erroneously Grants Automatic Appellate Relief For Rule 11(c)(1) Error, Irrespective Of Prejudice

1. Respondent defends the court of appeals' approach by characterizing it as folding the prejudice prong of plain-error review into the assessment of whether a Rule 11(c)(1) violation occurred in the first place. See Br. in Opp. 8-14. Respondent's description of the decision below, and of circuit law more generally, is inaccurate. And even if it were accurate, it would make review by this Court all the more imperative, because it would demonstrate that the court of appeals' erroneous approach to appellate review has seriously distorted the operation of Rule 11(c)(1).

Rule 11(c)(1) does not, and could not, incorporate prejudice analysis of the sort that Rules 11(h) and 52 require. That prejudice analysis is retrospective. As this Court has made clear, plain-error review of a Rule 11 claim encompasses the "whole record," *Vonn*, 535 U.S.

at 59, including events that occurred *after* the Rule 11 violation, such as a defendant's statements at sentencing, *Dominguez Benitez*, 542 U.S. at 84-85. Rule 11(c)(1) itself, however, is forward-looking: it prescribes a procedure for courts to follow in cases involving plea negotiations, and, like many prophylactic procedural rules, its primary purpose is to prevent violations from happening in the first place. Because a judge needs to know ahead of time whether certain comments would be permissible, the assessment of a Rule 11(c)(1) violation cannot depend on the retrospective inquiry into whether a defendant could "satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Dominguez Benitez*, 542 U.S. at 83 (citation and internal quotation marks omitted).

The court of appeals appreciates the difference between the focused inquiry into whether a district court participated in plea negotiations in particular proceedings (the province of Rule 11(c)(1)) and the whole-record inquiry into whether such participation affected the outcome of the proceeding so as to warrant appellate relief (the province of Rule 52). And it consciously dispenses with the latter inquiry. While the decision below expressly analyzed whether the magistrate judge's comments violated Rule 11(c)(1), Pet. App. 3a-4a, it deliberately excused respondent from having to "show any individualized prejudice" to obtain appellate relief, *id.* at 5a; see *id.* at 3a. Nowhere did the decision address the government's argument—made at length in its appellate brief—that respondent could not show "a reasonable probability that, but for the error, he would not have entered the plea" because (1) three months elapsed be-

tween the magistrate judge's comments and the plea (during which respondent expressly requested a speedy trial); (2) a different judge presided over the plea; and (3) respondent expressly denied any coercion or pressure to plead, represented that he pleaded for strategic reasons, and never once mentioned the magistrate judge's comments (either on his own or through counsel) until the court of appeals uncovered them. Gov't C.A. Br. 15 (quoting *Dominguez Benitez*, 542 U.S. at 83); see *id.* at 11-12, 15-19. Instead, all that mattered to the court of appeals was that "the magistrate judge's comments * * * amounted to judicial participation in plea discussions" and respondent "pled guilty after these comments were made." Pet. App. 5a.

Other circuit decisions similarly dispense with prejudice analysis. See, *e.g.*, *United States* v. *Tobin*, 676 F.3d 1264, 1304 (11th Cir.) (vacating sentence and stating that "it is not necessary for a defendant to show that he was actually prejudiced"), cert. denied, No. 12-6353 (Nov. 26, 2012); *Corbitt*, 996 F.2d at 1135 (vacating plea and stating that "the defendant need not show actual prejudice"). Respondent's citations (Br. in Opp. 12) to a decision interpreting Rule 11(c)(1) not to cover certain comments that did not address the potential consequences of a plea, *United States* v. *Johnson*, 89 F.3d 778, 779-784 (11th Cir. 1996), and a decision recognizing that a Rule 11(c)(1) violation in one criminal proceeding does not necessarily constitute reversible error in another criminal proceeding, *Casallas*, 59 F.3d at 1179, do not show otherwise. Indeed, the court of appeals expressly relied on both of those decisions in discussing why respondent could obtain relief without showing prejudice. Pet. App. 3a.

Nor do *United States* v. *Diaz*, 138 F.3d 1359 (11th Cir.), cert. denied, 525 U.S. 913 (1998), or *United States* v. *Tobin*, *supra*, disprove the existence of the automatic-vacatur rule. See Br. in Opp. 12-14. In both of those cases, the defendant went to trial following the judicial-participation error, so the primary issue was whether to vacate the sentence, not whether to vacate a plea. *Diaz* "held that the remedy of re-sentencing * * * was not necessary," reasoning in large part that the sentencing had not raised impartiality concerns because "the district court was constrained by the sentencing guidelines." *Tobin*, 676 F.3d at 1308 (discussing *Diaz*); see *Diaz*, 138 F.3d at 1364. *Tobin*, however, found *Diaz* to be a relic of the days when the Sentencing Guidelines were mandatory, and the court *did* order resentencing, stating that "the presence or absence of actual bias or prejudice is irrelevant." 676 F.3d at 1308 n.26.

Tobin thus not only effectively overruled *Diaz*, but also illustrates the extent to which the court of appeals has taken its automatic-vacatur approach. In the court of appeals' view, a defendant is always entitled to appellate relief whenever a judge's comments might be seen to have encouraged a plea—even if the defendant decided *not* to plead, had a full and fair trial, and can identify no prejudice in his sentencing. *Tobin*, 676 F.3d 1303-1308. Although respondent correctly notes (Br. in Opp. 13-14) that *Tobin* vacated the sentence of only one of three relevant defendants, that was not because of any prejudice analysis, but instead simply because the others "ha[d] not challenged their sentences in any way." *Id.* at 1308 n.27.

2. To the extent respondent acknowledges the possibility that the decision below reflects an automatic-vacatur approach to Rule 11(c)(1) violations, he offers

little defense of that approach. See Br. in Opp. 29-32. He can identify no decision of this Court that elevates the violation of a Federal Rule of Criminal Procedure to the pantheon of errors this Court has deemed to be structural. See Pet. 12-13. Had the drafters of the Rule intended such a novel result, they presumably would have said so—and surely would not have included a harmless-error provision in the text of Rule 11 itself. See Fed. R. Crim. P. 11(h). As the petition explains, Rule 11(h) was added in 1983 precisely to "end the practice * * * of reversing automatically for any Rule 11 error." *Vonn*, 535 U.S. at 66. Neither the text of Rule 11(h) nor the accompanying advisory committee's notes admits of an exception for Rule 11(c)(1) violations. See, *e.g.*, Fed. R. Crim. P. 11 advisory committee's note (1983) ("Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11.").

Contrary to respondent's suggestion (Br. in Opp. 30-31), a court is not free to disregard Rule 11(h) simply because it thinks Rule 11(c)(1) errors are "worth correcting." See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988) (recognizing that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by" a federal rule); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (declining to "creat[e] out of whole cloth * * * an exception" to Fed. R. Crim. P. 52(b), "an exception which we have no authority to make").[*] In any event, a Rule 11(c)(1) error, like almost every other error in the federal criminal system, is not "worth correcting" when the

[*] This Court rejected a similar effort to carve out an exception to plain-error review for breaches of a plea agreement in *Puckett* v. *United States*, 556 U.S. 129, 134-136 (2009). If that is true for a constitutional error, it is surely true for a rule-based error.

defendant is not prejudiced. See Fed. R. Crim. P. 52; *Dominguez Benitez*, 542 U.S. at 81-82; see also Pet. 13-14. That is particularly true where, as here, the requested "correct[ion]"—a chance to proceed before a fresh judge—duplicates procedure that the defendant has already received. See Pet. 19; pp. 8-9, *infra*.

B. The Conflicting Approaches Of Different Courts Of Appeals Warrant This Court's Review

As the petition demonstrates (Pet. 16-20), and as the court of appeals itself acknowledged (Pet. App. 3a), the court of appeals' automatic-vacatur approach conflicts with the decisions of several other circuits. Respondent's contrary view (Br. in Opp. 14-19) is largely premised on his misconstruction of the decision below and his failure to acknowledge the distinction between whole-record "prejudice" review and the inquiry into whether particular comments violated Rule 11(c)(1).

Respondent's argument also reads the Eleventh Circuit's Rule 11(c)(1) precedents too constrictively. If anything, the Eleventh Circuit's view of what constitutes Rule 11(c)(1) error is broader, not narrower, than that of other circuits. See Pet. 19. The Eleventh Circuit considers Rule 11(c)(1) to be a "bright line rule" that "prohibits 'the participation of the judge in plea negotiations under any circumstances . . . and admits of no exceptions.'" Pet. App. 3a (quoting *Johnson*, 89 F.3d at 783) (brackets omitted). It thus "usually refrain[s] from inquiring into the degree of judicial participation." *Id.* at 4a (citing *Casallas*, 59 F.3d at 1178). In *Casallas*, for example, the Eleventh Circuit found a Rule 11(c)(1) violation, and vacated a plea, merely because a judge—in an "innocuous" attempt "to insure that [the defendant] was making an informed decision"—pointed out the obvious fact that the mandatory minimum ten-year sen-

tence under the plea was "a lot better" than a mandatory minimum 15-year sentence if the defendant were found guilty at trial and suggested that the defendant "talk to his lawyer some and see if that is really what he wants to do." 59 F.3d at 1177; see *Corbitt*, 996 F.2d at 1133-1135 (concluding that judge violated Rule 11(c)(1) by saying, "They want to go out and get arrested, they come in here and they'll get a fair trial, and if they get found guilty, they'll also get a fair sentence, fairly high."); see also *Tobin*, 676 F.3d at 1303-1307 (discussing other Rule 11(c)(1) precedent and concluding that judge violated Rule 11(c)(1) by encouraging informed plea negotiations).

Respondent accordingly lacks foundation for asserting (Br. in Opp. 16-18) that the Eleventh Circuit would find no error at all in *United States* v. *Pagan-Ortega*, 372 F.3d 22 (1st Cir. 2004), and *United States* v. *Ebel*, 299 F.3d 187 (3d Cir. 2002). Both cases involved judicial comments at least as intrusive as the comments in *Casallas*: the judge in *Pagan-Ortega* told the defendant that the plea agreement was a "super break" and "really . . . a good deal," 372 F.3d at 26-27, and the judge in *Ebel* told the defendant he would sentence him "to the low end of the sentencing range if he pled guilty," 299 F.3d at 191. The First and Third Circuits nevertheless left the pleas in place based on plain-error and harmless-error analysis. *Pagan-Ortega*, 372 F.3d at 27-28; *Ebel*, 299 F.3d 191-192. The Eleventh Circuit would have done otherwise.

Similarly unfounded is respondent's suggestion (Br. in Opp. 20-23) that he would prevail in this case even if plain-error review were applied. See Pet. 19. Among other things, respondent has no answer for the petition's observation (*ibid.*) that the procedure he received in the

district court—the passage of time (three months) and a new judge—is identical to the appellate remedy that everyone (including respondent and the Eleventh Circuit) agrees would remove any taint of Rule 11(c)(1) error. Nothing in law or logic suggests that respondent needs to start over with yet another judge, or that reassignment is an effective remedy only when a court of appeals orders it. If that were so, then district courts would be powerless to fix Rule 11(c)(1) errors on their own.

Respondent does not and cannot deny that the circuits vary in whether they apply plain-error and harmless-error review to Rule 11(c)(1) errors, and his characterization of the conflict as reflecting only "modest semantic differences" (Br. in Opp. 19) is not borne out by the results of the cases. Notwithstanding some circuits' purely theoretical skepticism (*id.* at 15) that Rule 11(c)(1) error can be non-prejudicial, the foregoing discussion illustrates that application of prejudice analysis has outcome-determinative consequences in actual cases—including this one. As the petition explains (Pet. 20-21), cases of non-prejudicial Rule 11(c)(1) error may well become more common as district courts follow the suggestion of *Missouri* v. *Frye*, 132 S. Ct. 1399, 1406-1407 (2012), to conduct more robust colloquies into the effective assistance of counsel during plea negotiations. The circuit conflict over how to review such non-prejudicial violations will not resolve itself and requires this Court's intervention. See Pet. 19-20.

C. This Case Is An Ideal Vehicle For Reviewing The Question Presented

Respondent's vehicle arguments (Br. in Opp. 19-26) lack merit. Respondent primarily contends (*id.* at 20-23) that this case is an unsuitable vehicle because he would

prevail even if plain-error review applied. For reasons discussed above (pp. 8-9, *supra*), and in the petition (Pet. 19), that contention is incorrect. In any event, the prejudice issue here is at the very least a close one that would require careful scrutiny of the entire record by the court of appeals. The question presented asks whether the court of appeals erred in concluding that it could skip such prejudice analysis entirely. See Pet. i. Nothing would impede this Court from answering that question and remanding to the court of appeals for application of the plain-error test. *United States* v. *Marcus*, 130 S. Ct. 2159, 2167 (2010); see *Dominguez Benitez*, 542 U.S. at 86; *Vonn*, 535 U.S. 76.

Respondent also contends (Br. in Opp. 24-26) that it is unclear whether plain-error review, as opposed to merely harmless-error review, applies to Rule 11(c)(1) errors. But that poses no obstacle to further review in this case, because the court of appeals concluded that *neither* standard applies. Pet. App. 3a. In any event, respondent forfeited any argument on this point by adverting to it only in a parenthetical quotation attached to a "Cf." citation in a footnote of his opening appellate brief. Resp. C.A. Br. 19 n.7; see *Asociacion de Empleados del Area Canalera* (*ASEDAC*) v. *Panama Canal Comm'n*, 453 F.3d 1309, 1316 n.7 (11th Cir. 2006) (finding argument to be "waived because it appears only in a footnote in [the] initial brief and is unaccompanied by any argument"). Respondent identifies no circuit that has actually held that harmless-error review would apply in this situation, and the government is aware of none. The government should not be forced to await the development of a circuit conflict on this subsidiary issue, which has significance only if the Eleventh Circuit's au-

tomatic-vacatur approach is wrong, before it can obtain review of the automatic-vacatur approach itself.

Respondent finally contends (Br. in Opp. 23-24) that certain practical concerns that the petition raises about the automatic-vacatur approach are not present in this case. That is not a meaningful argument about the suitability of this case as a vehicle for addressing the question presented. The decision below is based solely on the automatic-vacatur approach, and nothing would prevent the Court from using this case to review that approach. In any event, this case does indeed illustrate many of the approach's problems. The court of appeals vacated a valid guilty plea, notwithstanding respondent's representation that the plea was a "strategic decision" rather than the product of coercion, his failure to ever mention the magistrate judge's comments until the court of appeals unearthed them, and his already having received materially the same remedy that the court of appeals decided to grant (reassignment of the case). See Pet. 6-8, 19. The decision cannot be reconciled with the Federal Rules of Criminal Procedure, this Court's jurisprudence, or sound principles of judicial administration. This Court should grant certiorari and reverse.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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