No. 14-8913

In The
Supreme Court of the United States

SAUL MOLINA-MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Where an error in the application of the United States Sentencing Guidelines results in the application of the wrong Guideline range to a criminal defendant, should an appellate court presume, for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b), that the error affected the defendant's substantial rights?

LIST OF PARTIES

1. United States of America.
2. Saul Molina-Martinez.

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OPINION BELOW

The opinion of the Court of Appeals (J.A. 45-49) is reported at 588 Fed. Appx. 333.

JURISDICTION

The judgment of the Court of Appeals (J.A. 50-51) was entered on December 17, 2014. The petition for a writ of certiorari was filed on March 16, 2015, and granted on October 1, 2015. (J.A. 52) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT OF THE CASE

On August 31, 2012, agents of the United States Bureau of Customs and Border Protection found petitioner Saul Molina-Martinez and eight other persons on the East Turcotte Ranch near Sarita, Texas. (Presentence Report ["PSR"] ¶ 4) It was determined that petitioner was a citizen and national of Mexico with no legal status in the United States. (PSR ¶ 4) He had unlawfully entered the United States without

inspection on August 26, 2012, by crossing the Rio Grande River near Hidalgo, Texas. (PSR ¶ 5) Petitioner had been previously deported from the United States to Mexico on February 5, 2007, and August 20, 2012. (PSR ¶ 5) Petitioner was arrested, and the Federal Public Defender for the Southern District of Texas was appointed to represent him. (J.A. 1)

On September 25, 2012, petitioner was indicted in the Brownsville Division of the Southern District of Texas for being found unlawfully present in the United States after deportation, in violation of 8 U.S.C. § 1326(a) and (b). (J.A. 12-13) On October 11, 2012, petitioner pleaded guilty to the indictment (J.A. 2-3), although he reserved the right to challenge whether he in fact had a qualifying pre-deportation "aggravated felony" conviction.[1]

The court ordered preparation of a presentence report ("PSR") to assist it in sentencing petitioner. (J.A. 3) Applying United States Sentencing Guideline ("USSG") § 2L1.2, the PSR calculated petitioner's total offense level as 21. (PSR ¶¶ 20, 22)

Examining petitioner's prior convictions, the PSR calculated petitioner's Guideline criminal history score to be 18, in the following manner:

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[1] A pre-deportation conviction for an "aggravated felony" elevates the statutory maximum sentence to 20 years. *See* 8 U.S.C. § 1326(b)(2).

Date of sentence	**Offense and sentence**	**USSG §**	**Points**	**PSR ¶**
3/6/02	Speeding/no driver's license: 18 days' custody	4A1.2(c)(1)	0	24
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(a)	3	25
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(e)	1	26
1/19/07	Illegal entry into the United States: time served (about 2 days)	4A1.1(c)	1	27
4/7/11	Aggravated burglary/theft of property over $1,000: 8 years' custody/2 years' custody	4A1.1(a)	3	28
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(a)	3	29
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	1	30
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	1	31

4/7/11	Aggravated burglary: 8 years' custody	4A1.1(a)	3	32
	On parole at the time of the commission of the instant offense	4A1.1(d)	2	34
Criminal history total			**18**	35

A total criminal history score of 18 placed petitioner in Guideline Criminal History Category VI (PSR ¶ 35), and, coupled with his total offense level of 21, this resulted in a recommended Guideline imprisonment range of 77 to 96 months. (PSR ¶ 74)

Although petitioner objected to the PSR's offense level calculation (J.A. 16-18), he did not object to the PSR's criminal history scoring. At the final sentencing hearing on March 14, 2013, the District Court overruled petitioner's objection to the PSR (J.A. 30) and adopted the PSR's Guideline calculations, including the PSR's criminal history scoring. (J.A. 33) Although the Government urged the District Court to sentence petitioner to 96 months' imprisonment (the top of the Guideline imprisonment range calculated by the PSR) (J.A. 30-31), the District Court rejected that request and instead sentenced petitioner to 77 months' imprisonment, the bottom of the Guideline imprisonment range calculated by the PSR. (J.A. 33,

38) The District Court also sentenced petitioner to a three-year term of supervised release. (J.A. 33, 39) The District Court declined to order a fine, and it also ordered the $100 special assessment remitted (forgiven) on motion of the Government. (J.A. 34, 43-44)

Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. (J.A. 6) Initially, appellate counsel filed a brief and a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). (J.A. 7) However, on January 14, 2014, the Fifth Circuit denied that motion without prejudice (J.A. 8), for the following reasons:

> The record reveals a potentially non-frivolous issue relating to the calculation of the criminal history category. The probation officer assessed 11 of Molina-Martinez's 18 criminal history points for five prior state sentences, although Molina-Martinez was sentenced in these cases on the same day. Prior sentences are counted as a single sentence if they were imposed on the same day, unless the "offenses . . . were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2(a)(2). Molina-Martinez committed four of the offenses in May 2009 and the other in May 2010, but he was arrested for these crimes in June and October 2010. Thus, it appears that a non-frivolous argument can be made that Molina-Martinez's offenses were not separated by an "intervening arrest" for one of the earlier offenses, and it is not clear

> whether the probation officer correctly assessed a total of 11 criminal history points for these sentences. Additionally, although Molina-Martinez was arrested in May 2009, following the commission of the first four offenses, this arrest was for an unrelated charge[,] and it is not clear whether this would constitute an "intervening arrest" for purposes of § 4A1.2.

Order, *United States v. Molina-Martinez*, No. 13-40324, at 1-2 (5th Cir. Jan. 14, 2014) (unpublished). Accordingly, the Fifth Circuit ordered counsel "to file a supplemental *Anders* brief or a brief on the merits addressing whether the criminal history category was accurately calculated and any other non-frivolous matters." *Id.* at 2.

Counsel then filed a merits brief arguing that the district court had plainly erred in scoring petitioner's criminal history under the Guidelines. Particularly, the brief argued that under the "single sentence" rule of USSG § 4A1.2(a)(2),[2] petitioner's Guideline

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[2] The Sentencing Guidelines provide that prior sentences received on the same day count as but a single sentence, unless they are separated by an intervening arrest:

> If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately

(Continued on following page)

criminal history score should have been calculated as follows (with lined-out text indicating where the PSR had erred in its scoring):[3]

Date of sentence	**Offense and sentence**	**USSG §**	**Points**	**PSR ¶¶**
3/6/02	Speeding/no driver's license: 18 days' custody	4A1.2(c)(1)	0	24
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(a)	3	25
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(e)	1	26
1/19/07	Illegal entry into the United States: time served (about 2 days)	4A1.1(c)	1	27

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unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. *See also* § 4A1.1(e).

USSG § 4A1.2(a)(2).

[3] Because the Government has never disputed this corrected calculation of petitioner's criminal history score, petitioner has not, in this brief, set out the somewhat convoluted Guideline applications underlying this corrected calculation. They are, however, set out in petitioner's opening brief in the Court of Appeals. *See* Pet. C.A. Br. 12-16.

4/7/11	Aggravated burglary/theft of property over $1,000: 8 years' custody/ 2 years' custody	4A1.1(a)	3	28
4/7/11	Aggravated burglary: 8 years' custody	~~4A1.1(a)~~ 4A1.1(e)	~~3~~ 1	29
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	1	30
4/7/11	Aggravated burglary: 8 years' custody	~~4A1.1(a)~~ 4A1.1(e)	~~1~~ 0	31
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	~~3~~ 0	32
	On parole at the time of the commission of the instant offense	4A1.1(d)	2	34
Criminal history total			**~~18~~ 12**	

With a total of 12 criminal history points, petitioner argued, he should have been placed in Criminal History Category V, not Criminal History Category VI. Moreover, he said, his Guideline imprisonment range should have been 70 to 87 months,

not the range of 77 to 96 months used by the District Court.

Before the Fifth Circuit, the Government conceded that the District Court had indeed erred as set out above, and that this error was "plain." (J.A. 47 [opinion below]; *see also* Resp. C.A. Br. 10, 13-16) The Government nevertheless contended that petitioner was not entitled to relief because he had not shown an effect on his substantial rights, *see* Resp. C.A. Br. 10-11, 16-20, and because he had likewise not shown a serious effect on the fairness, integrity, or public reputation of judicial proceedings. *See* Resp. C.A. Br. 11-12, 21-22.

The Fifth Circuit agreed that petitioner "ha[d] shown a plain or obvious error in the criminal history calculation." (J.A. 47) (citation omitted) The Fifth Circuit, however, found that petitioner had not shown that the error affected his substantial rights. (J.A. 47-49) Because the correct Guideline imprisonment range (70 to 87 months) overlapped with the incorrect range (77 to 96 months), and because petitioner was sentenced within the overlap (to 77 months' imprisonment), the Fifth Circuit applied its rule that petitioner had to come forward with "additional evidence" that his substantial rights were affected. (J.A. 48) (citing *United States v. Pratt*, 728 F.3d 463, 481-82 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1328 (2014)) Finding that petitioner had not adduced such

"additional evidence,"[4] the Fifth Circuit affirmed the judgment of sentence. (J.A. 48-49)

Along the way, "[petitioner] preserve[d] for possible further review his contention that an error that alters the Guideline range should be ***presumed*** prejudicial, even where the sentence actually imposed falls within the correct Guideline range." Pet. C.A. Br. 17 n.6 (emphasis in original; citing *United States v. Knight*, 266 F.3d 203, 207-10 (3d Cir. 2001)). In its opinion, the Fifth Circuit recognized this argument and that petitioner had preserved it for further review, but noted that it was foreclosed by Fifth Circuit precedent. (J.A. 47 n.1)

This Court granted certiorari on October 1, 2015. (J.A. 52)

[4] Petitioner argued that there was such "additional evidence" here in that (1) he received the bottom of what the District Court believed to be the applicable Guideline imprisonment range, notwithstanding the fact that the Government asked for the top of the range; and (2) the parties' arguments respecting the sentence were firmly anchored in the Guideline range. *See* Pet. C.A. Br. 17-18; Pet. C.A. Reply Br. 3-7. The Fifth Circuit, however, rejected that argument. (J.A. 48-49)

SUMMARY OF ARGUMENT

Given the unique centrality and influence of the United States Sentencing Guidelines to federal sentencing, errors in the calculation of the Guidelines are very likely to affect the sentence imposed on a federal criminal defendant. But, because district courts are not required to give much (or any) explanation for a within-Guidelines sentence, it may be difficult in a typical case for a defendant to make a case- and fact-specific showing that the error affected the sentence. For the reasons discussed in this brief, the Court should adopt a rebuttable presumption that obvious misapplications of the Guidelines, resulting in the application of an erroneous Guideline imprisonment range, affect a defendant's substantial rights, thus satisfying the third prong of plain-error review.

Pursuant to Federal Rule of Criminal Procedure 52(b), a court of appeals may correct a forfeited error that is plain and affects a defendant's substantial rights. This Court has held that, under Rule 52(b), in order to demonstrate an effect on substantial rights, a defendant must normally make a specific showing of prejudice flowing from the error. However, the Court has also said that there may be some "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *United States v. Olano*, 507 U.S. 725, 735 (1993).

The notion of a rebuttable presumption of harm or prejudice did not originate in *Olano*. Nearly 50 years before *Olano*, the Court in *Kotteakos v. United*

States, 328 U.S. 750 (1946), made clear that, at least in criminal cases, courts may make use of rebuttable presumptions that certain classes of errors are harmful where empirical evidence and experience demonstrate that the "natural effect" of the error is to affect a defendant's substantial rights. Together, *Olano* and *Kotteakos* suggest that it is appropriate to presume prejudice where (1) the "natural effect" of a particular type of error is to affect a defendant's substantial rights (*i.e.*, where empirical evidence and experience suggest that a particular type of error is, across the board, likely to have an effect on the outcome), and (2) the nature of the error makes it likely that "the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735.

Drawing the same conclusion, several federal courts of appeals have explicitly adopted a presumption of prejudice for a handful of errors where, in those courts' view, the "natural effect" of the error is to affect substantial rights, but the actual effect of the error in a given case is usually difficult to ascertain and prove. Most relevant to the instant case, the Third and Tenth Circuits have explicitly applied a presumption of prejudice to forfeited claims of misapplications of the Guidelines. *See United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014); *United States v. Knight*, 266 F.3d 203, 207-10 (3d Cir. 2001). And, other circuits appear to implicitly apply the functional equivalent of such a presumption, albeit not couched in presumption-type terms.

These circuits are correct: the use of an erroneous Guideline range is one of the limited class of errors for which prejudice should be presumed. First, case law (including this Court's decisions in *Gall v. United States*, 552 U.S. 38 (2007), *Rita v. United States*, 551 U.S. 338 (2007), and *Peugh v. United States*, 133 S. Ct. 2072 (2013)), empirical evidence, and experience demonstrate beyond peradventure that the "natural effect" of the Guidelines is to influence the length of the sentence imposed. Therefore, when a sentencing court uses an erroneously high Guideline range, it will likely skew the ultimate sentence higher than it otherwise would be, even if the court ultimately decides to go outside the Guidelines.

Furthermore, although the "natural effect" of an erroneous Guideline range is to affect the sentence ultimately imposed, it is generally very difficult for a defendant to make a case- and fact-specific showing of that effect. This is so because federal district courts have been told that a sentence within the Guidelines generally requires very little explanation. If, as in the instant case, the district court says little or nothing about the reasons for its choice of sentence, a defendant may be unable to make a case- and fact-specific showing of prejudice flowing from the use of an erroneous Guideline range, despite the great likelihood that the error ***did*** affect the sentence.

Because the proposed presumption is rebuttable, it will not be applied woodenly so as to compel reversals in cases where the error is obviously harmless. Moreover, a rebuttable presumption of prejudice has

several benefits. In addition to helping to remedy the profound injustice of excess imprisonment, a presumption of prejudice has the institutional benefit of allowing the district court to exercise its sentencing authority and discretion in light of the correct Guideline range. Additionally, correction of obvious sentencing errors promotes better ongoing development of the Guidelines.

Finally, a presumption of prejudice for errors resulting in the application of an incorrect Guideline range will not compromise the interests protected by the plain-error rule. The burden and cost of a resentencing are modest in comparison with the burden and cost of a retrial after reversal of a conviction. Furthermore, such a presumption will not, in the context of this particular class of errors, encourage defendants to withhold timely objections; rather, the presumption will facilitate redress for errors that escaped everyone's attention through inadvertence or oversight. And, even if the Government is, in a particular case, unable to rebut the presumption, appellate courts retain discretion under the fourth prong of plain-error review to take into account unusual circumstances that make the plain error nevertheless undeserving of correction.

If this Court agrees that such a presumption should apply, then the Court should reverse the judgment below and remand for application of that presumption and further proceedings consistent therewith. In the alternative, even if the Court does not adopt such a presumption, the Court should hold that

petitioner nevertheless met his burden of establishing an effect on his substantial rights, because the record shows at least a reasonable probability that the sentence would be lower under the correct Guideline range. For all these reasons, whether or not the Court holds that a presumption of prejudice is warranted, the Court should reverse the judgment of the Fifth Circuit and remand for further proceedings.

ARGUMENT

WHERE A CLEAR MISAPPLICATION OF THE UNITED STATES SENTENCING GUIDELINES RESULTS IN THE APPLICATION OF AN ERRONEOUS GUIDELINE RANGE TO A DEFENDANT, THE COURT OF APPEALS SHOULD APPLY A REBUTTABLE PRESUMPTION THAT THE ERROR AFFECTED THE DEFENDANT'S SUBSTANTIAL RIGHTS FOR PURPOSES OF APPLYING FEDERAL RULE OF CRIMINAL PROCEDURE 52(b).

A. Introduction.

Since 1987, the United States Sentencing Guidelines have been an integral part of the federal criminal-justice system. Even after *United States v. Booker*, 543 U.S. 220 (2005), when the Court held that the Guidelines were advisory, rather than mandatory, the Guidelines continue to occupy a uniquely central and influential role in federal sentencing. As a consequence, when errors occur in the calculation of the

Guideline range, such errors are quite likely to affect the sentence imposed.

But, because the Guidelines are so complex, it is unavoidable that some Guideline calculation errors will be overlooked in the district court; and if such errors are then raised for the first time on appeal, they will be subject to the stringent plain-error rule, which normally requires a case- and fact-specific showing that the error affected the sentence. In a typical case, it will be difficult or impossible to make such a showing, because sentences within what the district court believes to be the Guideline range have been held to require little or no explanation.

As more fully explained below, this Court should, in light of (1) the unique centrality of the Guidelines to federal sentencing and (2) the difficulty in showing, in a typical case, that an erroneous Guideline range affected the sentence, adopt a rebuttable presumption that clear misapplications of the Guidelines, resulting in the application of an erroneous Guideline range, affect a defendant's substantial rights, thus satisfying the third prong of plain-error review.

B. Plain-Error Review: *Olano* and Beyond.

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731

(1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). This contemporaneous-objection principle[5] gives the district court – which "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute," *Puckett v. United States*, 556 U.S. 129, 134 (2009) – the opportunity to "correct or avoid the mistake so that it cannot possibly affect the ultimate outcome." *Id.* In this way, the contemporaneous-objection principle promotes efficiency by "reduc[ing] wasteful reversals." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). "And of course the contemporaneous-objection rule prevents a litigant from '"sandbagging"' the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Puckett*, 556 U.S. at 134 (citations omitted).

On the other hand, the Court has also observed that "'[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice.'" *Olano*, 507 U.S. at 732 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); brackets and ellipsis by the *Olano* Court). And that is where the plain-error rule comes in. The plain-error

[5] In federal criminal law, this principle is codified in Federal Rules of Criminal Procedure 30(d) and 51(b) and Federal Rule of Evidence 103(a).

rule is meant to be a safety valve from the rigors of the unrelieved application of the contemporaneous-objection/forfeiture rule. *See, e.g.*, *United States v. Young*, 470 U.S. 1, 15 (1985) (plain-error rule "tempers the blow of a rigid application of the contemporaneous-objection requirement"); *United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996) ("The plain error rule is protective; it recognizes that in a criminal case, where a defendant's substantial personal rights are at stake, the rule of forfeiture should bend slightly if necessary to prevent a grave injustice."). In short, the plain-error rule reflects this Court's "insistence that obvious injustice be promptly redressed." *United States v. Frady*, 456 U.S. 152, 163 (1982).

These competing values explain why "Federal Rule of Criminal Procedure 52(b),[6] which governs on appeal from criminal proceedings, provides a court of appeals [only] a limited power to correct errors that were forfeited because not timely raised in district court." *Olano*, 507 U.S. at 731. In order for a forfeited error to be corrected under Rule 52(b), (1) there must be an "error," (2) that is "plain," and (3) that affects substantial rights. *See id.* at 732-34. If these first three requirements are met, the court of appeals has the discretion to correct the error, but "the court should not exercise that discretion unless the error seriously affects the fairness, integrity or public

[6] Rule 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." Fed. R. Crim. P. 52(b).

reputation of judicial proceedings." *Id.* at 732 (internal brackets, quotation marks, and citations omitted); *see also id.* at 735-37.

This case concerns the third prong of *Olano*'s plain-error test, namely, the requirement that the plain error have affected the party's substantial rights. "[I]n most cases [this requirement] means that the error must have been prejudicial: It must have affected the outcome of the district-court proceedings." *Id.* at 734. And, where a defendant seeks reversal under Rule 52(b), normally "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* In the normal case, this means that "the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights'[7] prong of Rule 52(b)." *Id.* at 735. And that showing requires that the defendant demonstrate a "reasonable probability" that, but for the error, the outcome of the proceeding would have been different. *See Dominguez Benitez*, 542 U.S. at 82-83. Put another way, "[a] defendant must thus 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

[7] In the current version of Rule 52(b), the phrase is "affects substantial rights." The change in verb form from the version of the rule quoted in *Olano* was "intended to be stylistic only." Fed. R. Crim. P. 52, Advisory Committee Notes (2002 Amendments).

outcome' of the proceeding." *Id.* at 83 (citations omitted).[8]

In *Olano*, however, the Court declined to "decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.'" *Olano*, 507 U.S. at 735. The Court first held that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome . . . ." *Id.* Second, the Court stated that it did not need to "address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.*

The Court nevertheless gave thorough consideration to whether either of these exceptions should apply in Olano's case. *See id.* at 737-41. The Court first determined that the particular error at issue there – namely, allowing alternate jurors to be present during jury deliberations – was "not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact." *Id.* at 737 (brackets in original); *see also id.* at 737-39. The Court also held that it would not "presume prejudice for purposes of the Rule 52(b) analysis," *id.* at 740, because the circumstances surrounding the error (especially the

[8] The Court cautioned that "[this] rule does not, however, foreclose relief altogether [because t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Dominguez Benitez*, 542 U.S. at 83 n.9 (citation omitted).

appropriate jury instructions to the alternate jurors, which they were presumed to have followed) did not create an inherently prejudicial situation. *See id.* at 740-41. Finding also that the respondent had not demonstrated case-specific prejudice arising from the error, *see id.* at 739-40, the Court held that the third prong of plain-error review had not been satisfied and therefore reversed the judgment of the court of appeals. *See id.* at 741.

There are important differences between *Olano*'s two exceptions to the normal requirement of case-specific prejudice. The Court has implied that the first *Olano* exception – namely, the "special category of forfeited errors that can be corrected regardless of their effect on the outcome," *Olano*, 507 U.S. at 735 – refers to the very limited class of errors known as "structural errors," *see, e.g.*, *United States v. Marcus*, 560 U.S. 258, 263 (2010); *United States v. Cotton*, 535 U.S. 625, 632 (2002), and that is how the federal courts of appeals have understood the first *Olano* exception. *See, e.g.*, *United States v. White*, 405 F.3d 208, 221 (4th Cir. 2005) ("We have recognized that this language refers to structural errors.") (citations omitted); *United States v. Barnett*, 398 F.3d 516, 526 (6th Cir. 2005) (same). Although the Court has not finally decided whether "structural errors" always satisfy the third prong of plain-error review (more on this below), such a holding would mean that prejudice is completely taken out of the equation, and that the "structural error" *ipso facto* affects substantial rights – in effect, conclusively, or irrebuttably, establishing

that substantial rights were affected. However, the Court need not decide that point here, because petitioner does not claim that the type of error at issue in this case is a "structural error" or otherwise fits into *Olano*'s first exception.

The second *Olano* exception is a horse of a different color. As *Olano* demonstrates, the second exception, unlike the first, does not dispense with the question of prejudice altogether. Rather, as the Court there said, "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry," namely, whether the error affected the outcome. *Olano*, 507 U.S. at 739. Thus, under the second *Olano* exception, instead of the "specific analysis" of prejudice that is the norm, a particular type of error may, even without such an analysis, be presumed to affect the outcome, because of the characteristics of the type of error at issue and the reasonable probability that, across the board, such errors will affect the outcome in cases in which they arise. *See id.* at 740-41. And, the use of the term "presumption" in describing the second *Olano* exception strongly suggests that the presumption of an effect on substantial rights is rebuttable by specific record evidence – in sharp contrast to the first *Olano* exception, which, as stated, appears to conclusively and irrebuttably satisfy the third prong of plain-error review.

Since *Olano*, the Court has several times returned to the question of the third prong of plain-error review generally, and the first *Olano* exception particularly, but the Court has never given further

guidance on the second *Olano* exception. In the first of these cases, *Johnson v. United States*, 520 U.S. 461 (1997), the petitioner argued that the error in her case (failing to submit to the jury the element of the materiality of an allegedly false statement) was a "structural error" that *ipso facto* affected substantial rights, irrespective of prejudice – in other words, the first *Olano* exception. *See Johnson*, 520 U.S. at 468. Expressing doubt that the error in question was in fact "structural," *see id.* at 469, the Court ultimately pretermitted the question whether the third prong of plain-error review was satisfied, holding that, even if it were, the petitioner could not show entitlement to relief under the fourth prong. *See id.* at 469-70.

To similar effect is the Court's decision in *Cotton*. In *Cotton*, the respondents argued that the error in their case (the failure of the indictment to charge a threshold drug quantity necessary to invoke a higher statutory maximum term of imprisonment) was a "structural error" falling within *Olano*'s first exception. *See Cotton*, 535 U.S. at 632. As in *Johnson*, the Court pretermitted the third prong, and held that, even if the third prong were satisfied, the respondents were not entitled to relief under the fourth prong of plain-error review. *See id.* at 632-34.

In *Dominguez Benitez*, the Court confronted a plain noncompliance with Federal Rule of Criminal Procedure 11 (governing the taking of guilty pleas in federal court). The Court briefly adverted to "structural errors," but then noted that the respondent had made no claim that the error in question was

"structural."[9] *See Dominguez Benitez*, 542 U.S. at 81. The Court then held that this particular type of error was subject to the usual rule that the party claiming error must show a specific effect on his substantial rights, and the Court provided further guidance on what that showing required. *See id.* at 81-83. The Court did not analyze – indeed, it did not even mention – the second *Olano* exception.

In *Puckett*, the Court again confronted a claim that the error in that case (breach of the petitioner's plea agreement with the Government) was "structural" and thus fell within the first *Olano* exception. *See Puckett*, 556 U.S. at 140. The Court again declined to decide whether "structural errors" *ipso facto* satisfied the third prong, *see id.* at 140-41, because it held that "breach of a plea deal is not a 'structural' error as we have used that term." *Id.* at 141. Rather, said the Court, a petitioner claiming that an unobjected-to breach of a plea agreement affected his substantial rights must make a specific showing of prejudice flowing from the breach. *See id.* at 141-42. The Court did not analyze or mention the second *Olano* exception.

Most recently, in *Marcus*, the respondent had raised, for the first time on appeal, a claim that he

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[9] The Court also said, however, that "[t]he argument, if made, would not prevail" because "[t]he omission of a single Rule 11 warning without more is not colorably structural." *Dominguez Benitez*, 542 U.S. at 81 n.6 (citation omitted).

had been unconstitutionally convicted on the basis of conduct that preceded the enactment of the statute under which he was charged. *See Marcus*, 560 U.S. at 260. The Court considered whether the error in question was "structural," and then concluded that it was not. *See id.* at 263-65. Finding that the court of appeals had applied an erroneously low standard of actual prejudice under the third prong of plain-error review ("any possibility [of prejudice], no matter how unlikely"), *see id.* at 260, 263, and also finding that the court of appeals' ruling was inconsistent with the Court's teachings on the fourth prong of plain-error review, *see id.* at 265-66, the Court reversed the court of appeals' judgment. *See id.* at 266. As in all of the preceding cases, the Court did not analyze or even mention the second *Olano* exception.

Consequently, *Olano*'s second exception to a specific showing of case-specific prejudice – namely, the exception for "errors that should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice," *Olano*, 507 U.S. at 735 – remains "essentially in the same place [it] w[as] after *Olano*." Brent Ferguson, *Plain Error Review and Reforming the Presumption of Prejudice*, 44 N.M. L. Rev. 303, 309 (2014). But *Olano* is not the Court's only guidance on presumptions of prejudice or harm. As will be demonstrated, the Court has spoken elsewhere about the appropriateness of such presumptions.

C. Under the Court's Case Law, It Is Appropriate, Especially in a Criminal Case, to Adopt a Rebuttable Presumption of Harm Where the "Natural Effect" of a Particular Class of Error Is to Affect a Defendant's Substantial Rights.

Almost half a century before *Olano*, in *Kotteakos v. United States*, 328 U.S. 750 (1946), the Court analyzed what it meant for an error to affect substantial rights.[10] The Court held that "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos*, 328 U.S. at 765.

The Court has "warned against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record." *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (citing *Kotteakos*, 328 U.S. at

[10] Although *Kotteakos* (and *Shinseki v. Sanders*, 556 U.S. 396 (2009)) discussed this topic in the context of harmless error, not plain error, the Court has held that the "affecting substantial rights" inquiry is the same in both contexts, except for the question of who bears the risk of nonpersuasion. *See Olano*, 507 U.S. at 734 ("Rule 52(b) normally requires the same kind of [prejudice] inquiry [as Rule 52(a)], with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.").

760). Nevertheless, the Court has also "made clear that courts may sometimes make empirically based generalizations about what kinds of errors are likely, as a factual matter, to prove harmful," *Shinseki v. Sanders*, 556 U.S. at 411 (citations omitted) – or, as the *Kotteakos* Court put it, errors "[whose] natural effect is to prejudice a litigant's substantial rights." *Kotteakos*, 328 U.S. at 765 (internal quotation marks omitted); *see also id.* at 765-66 ("The only permissible presumption would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice in the particular setting."). "And by drawing upon 'experience' that reveals some such '"natural effect,"' a court might properly influence, though not control, future determinations." *Shinseki v. Sanders*, 556 U.S. at 411 (citing *Kotteakos*, 328 U.S. at 760-61).

The takeaway of *Kotteakos*, as viewed through the prism of *Shinseki v. Sanders*, is that any presumption of harm should be based upon empirical evidence and experience that the "natural effect" of a particular type of error is to affect substantial rights. *See Shinseki v. Sanders*, 556 U.S. at 411; *Kotteakos*, 328 U.S. at 765-66. Moreover, any such presumption should not be conclusive or irrebuttable, *see Shinseki v. Sanders*, 556 U.S. at 407, 411, because conclusive presumptions compel "courts to find an error harmful, when, in fact, in the particular case before the court, it is not." *Id.* at 408 (citations omitted). Finally, it is more acceptable to place the burden of demonstrating harmlessness on the Government in a criminal case

because "[i]n criminal cases the Government seeks to deprive an individual of his liberty, thereby providing a good reason to require the Government to explain why an error should not upset the trial court's determination." *Id.* at 410.

In sum, these cases support the proposition that, at least in a criminal case, a rebuttable presumption that an error affects substantial rights may be appropriate where the "natural effect" of that particular type of error is to affect substantial rights. As will be demonstrated, that is the "natural effect" of the type of error at issue in this case.

D. Under the Foregoing Principles, a Rebuttable Presumption of Prejudice Is Warranted Where a Clear Misapplication of the Sentencing Guidelines Results in a Defendant's Being Sentenced Under an Erroneously High Guideline Range.

1. Introduction.

As noted above, the Court has not, since *Olano*, returned to the subject of *Olano*'s second exception to the requirement of a specific showing of case-specific prejudice, namely, the exception for "errors that should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735. Nevertheless, the cases discussed above – especially *Olano* itself and *Kotteakos* – suggest that a rebuttable presumption of prejudice is appropriate in a criminal case where

(1) the "natural effect" of a particular type of error is to affect a defendant's substantial rights (*i.e.*, where empirical evidence and experience suggest that a particular type of error is, across the board, likely to have an effect on the outcome), *see Shinseki v. Sanders*, 556 U.S. at 411; *Kotteakos*, 328 U.S. at 765-66, and (2) the nature of the error makes it likely that "the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735.

Drawing the same conclusion, some federal courts of appeals have explicitly adopted a presumption of prejudice for a handful of errors where, in those courts' view, the "natural effect" of the error is to affect substantial rights, but the actual effect of the error in a given case is usually difficult to ascertain and prove.[11] Most relevant to the instant case, the Third and Tenth Circuits have explicitly applied a

[11] The Third, Fifth, and Seventh Circuits have adopted a presumption of prejudice for forfeited claims that a defendant was denied his right to allocute at sentencing. *See United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007); *United States v. Reyna*, 358 F.3d 344, 350-52 (5th Cir. 2004) (*en banc*); *United States v. Adams*, 252 F.3d 276, 285-88 (3d Cir. 2001). The Third Circuit has adopted a presumption of prejudice for forfeited claims that the indictment was constructively amended. *See United States v. Syme*, 276 F.3d 131, 152-55 (3d Cir. 2002). And, in the wake of this Court's decision in *Booker*, which held the then-mandatory Sentencing Guidelines to be unconstitutional and remedied that unconstitutionality by rendering the Guidelines merely advisory, the Third and Sixth Circuits adopted a presumption of prejudice with respect to forfeited *Booker* claims. *See United States v. Davis*, 407 F.3d 162, 165 (3d Cir. 2005); *Barnett*, 398 F.3d at 526-29.

presumption of prejudice to forfeited claims of misapplications of the Guidelines. In *United States v. Knight*, 266 F.3d 203 (3d Cir. 2001), the Third Circuit held that "application of an incorrect guideline range resulting in a sentence that is also within the correct range [presumptively] affects substantial rights." *Id.* at 207; *see also id.* at 207-10. Likewise, in *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014), the Tenth Circuit explicitly adopted a rebuttable presumption that obvious Guideline errors affect a defendant's substantial rights. And, other circuits appear to implicitly apply the functional equivalent of such a presumption, albeit not couched in presumption-type terms.[12]

These decisions are correct. Because the "natural effect" of the application of an erroneous Guideline range is to affect substantial rights by skewing a defendant's sentence higher, and because the actual effect of such an error is typically difficult to discern and prove, the Court should adopt a rebuttable presumption that such an error has affected a

[12] *See, e.g.*, *United States v. Bonilla-Guizar*, 729 F.3d 1179, 1188-89 (9th Cir. 2013); *United States v. Agyepong*, 312 Fed. Appx. 566, 568-69 (4th Cir. 2009) (unpublished); *United States v. Story*, 503 F.3d 436, 440-41 (6th Cir. 2007); *United States v. Wallace*, 32 F.3d 1171, 1174-75 (7th Cir. 1994); *United States v. Plaza-Garcia*, 914 F.2d 345, 347-48 (1st Cir. 1990) (Breyer, C.J.).

defendant's substantial rights, thus satisfying the third prong of the plain-error test.[13]

2. The "Natural Effect" of an Error in Calculating the Guidelines Is to Affect a Defendant's Sentence.

Although no longer mandatory, the United States Sentencing Guidelines still have a unique and surpassingly important role in federal sentencing, as this Court's post-*Booker* decisions confirm. This Court has said that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," *Gall v. United States*, 552 U.S. 38, 49 (2007) (citing *Rita v. United States*, 551 U.S. 338, 347-48 (2007)), because "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall*, 552 U.S. at 49. "[F]ailing to calculate (or improperly calculating) the Guidelines range" is a "significant procedural error." *Id.* at 51.

Moreover, "district courts must [not only] begin their analysis with the Guidelines [but also] remain cognizant of them throughout the sentencing process." *Id.* at 50 n.6. "If [the sentencing judge] decides

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[13] Although such a presumption will most often inure to the benefit of criminal defendants, it may occasionally be of assistance to the Government too, in cases where the Government raises, for the first time on appeal, a challenge to the calculation of the Guideline range. *See, e.g.*, *United States v. Gordon*, 291 F.3d 181, 190-95 (2d Cir. 2002).

that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation [from the Guidelines] and ensure that the justification is sufficiently compelling to support the degree of the variance," *id.* at 50, and "a major departure should be supported by a more significant justification than a minor one." *Id.*

The Court also confirmed the central importance of the Sentencing Guidelines in *Rita.* After describing the process by which the Guidelines were developed and are updated, *see Rita*, 551 U.S. at 347-50, the Court held that "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve [18 U.S.C.] § 3553(a)'s [sentencing] objectives." *Id.* at 350. The Court thus permitted appellate courts to adopt a nonbinding appellate presumption that sentences within the Guidelines are substantively reasonable, *see id.* at 347, in recognition of "the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id.* at 350-51. The Court conceded that it "m[ight] be correct that the presumption w[ould] encourage sentencing judges to impose Guidelines sentences," *id.* at 354, but held that, even so, this would not mean that the presumption was unconstitutional. *See id.*

As the Court has summarized, "[t]he post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored

by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013) (citation omitted). Moreover, the requirements described above "mean that in the usual sentencing, . . . the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range." *Id.* (internal quotation marks, brackets, and citation omitted); *see also id.* at 2084 ("Common sense indicates that in general, this system will steer district courts to more within-Guidelines sentences."); *United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008) ("judges are more likely to sentence within the Guidelines in order to avoid the increased scrutiny that is likely to result from imposing a sentence outside the Guidelines") (citation omitted).

"Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, ***then the Guidelines are in a real sense the basis for the sentence***.'" *Peugh*, 133 S. Ct. at 2083 (emphasis in original; citation omitted). Thus, "[e]ven when the district court ultimately decides to impose a sentence outside the Guidelines range, an error in its Guidelines calculation may still taint the non-Guidelines sentence. For instance, the district court might settle upon a particular non-Guidelines sentence by doubling the maximum Guidelines range, or by starting with the Guidelines range and adding or subtracting a fixed

number of years." *United States v. Ibarra-Luna*, 628 F.3d 712, 718 (5th Cir. 2010). After surveying Sentencing Commission data, one recent commentator has concluded that "even when judges depart [from the Guidelines], they appear to mentally begin with the Guidelines range and then adjust slightly upward or downward from there." Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. Chi. L. Rev. 901, 950 (2015) (footnote omitted).

In reaching its conclusions, the Court in *Peugh* found "considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges." *Peugh*, 133 S. Ct. at 2084. Although the Court was drawing upon 2011 data from the United States Sentencing Commission, its observations are still generally true under the latest data (2014) from the United States Sentencing Commission. It is still true, for example, that "district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion." *Id.* (citation omitted). In 2014, in only 23.6% of the cases did district courts impose above- or below-Guidelines sentences without a Government motion. *See* United States Sentencing Commission, *2014 Annual Report and 2014 Sourcebook of Federal Sentencing Statistics*, p. S-63 (Figure G). And, within-Guidelines sentences still comprise 46% of sentences imposed. *See id.* (In the Fifth Circuit, where this case arose, the percentage of

within-Guidelines sentences for fiscal year 2014 was 60.7%. *See id.*, p. S-56 (Table N-5).)[14]

All these considerations drove the Court's resolution of the issue in *Peugh*, which was whether a retrospectively increased Guideline range "present[ed] a sufficient risk of increasing the measure of punishment attached to the covered crimes," so as to constitute a violation of the *Ex Post Facto* Clause. *Peugh*, 133 S. Ct. at 2082 (internal quotation marks and citations omitted). The Court answered that question in the affirmative, concluding that because "[t]he federal system adopts procedural measures

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[14] In fiscal year 2014, sentencing appeals raising issues pertaining to the calculation of the Guideline range comprised 53.2% of the total of 4,521 sentencing appeals in that year. *See 2014 Annual Report and 2014 Sourcebook of Federal Sentencing Statistics*, p. S-147 (Table 59). Of the 2,405 appeals raising issues pertaining to the calculation of the Guideline range, 80.2%, or about 1,928, were affirmed, meaning, presumably, that only approximately 477 cases were remanded for resentencing with a different Guideline range. *See id.*

Petitioner is not aware of any publicly available data documenting how often a remand for resentencing under a different Guideline range results in a different sentence. However, petitioner has compiled in the appendix to this brief a list of 53 cases where (1) the case was remanded because of a Guideline calculation error, and (2) the correct Guideline range overlapped with the incorrect range (as in the instant case). The final outcomes in these cases at least anecdotally support the proposition that a lower Guideline range on remand generally results in a lower sentence. Of these 53 cases, 46 resulted in a lower sentence (86.79%); six resulted in the same sentence (11.32%); and one (a government plain-error appeal) resulted in a higher sentence (1.89%).

intended to make the Guidelines the lodestone of sentencing[, a] retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation." *Id.* at 2084.

In sum, the authorities discussed above, experience, and empirical evidence all confirm that, even post-*Booker*, "sentencing decisions are anchored by the Guidelines" *id.* at 2083, and that "the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges." *Id.* at 2084; *see also*, *e.g.*, *Turner*, 548 F.3d at 1099 ("Practically speaking, applicable Sentencing Guidelines provide a starting point or 'anchor' for judges and are likely to influence the sentences judges impose.") (citations omitted).[15]

[15] The words "anchored" and "anchor" in the quoted language are significant, as some attribute district courts' continuing fealty to the Guidelines to be based in large part on the psychological phenomenon known as "anchoring." "Anchoring is overreliance on an initial numerical reference point that causes absolute judgments to assimilate toward the initial value." Daniel M. Isaacs, *Baseline Framing in Sentencing*, 121 Yale L. J. 426, 439 (2011) (internal quotation marks, brackets, and footnote omitted). Former United States District Judge Nancy Gertner has asserted that the Sentencing Guidelines "provid[e] ready-made anchors." Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 Yale L. J. Pocket Part 137, 138 (2006). And, United States District Judge Mark W. Bennett has observed that "[i]t is hardly surprising that the United States Sentencing Guidelines still act as a hulking anchor for most judges." Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 523 (2014) (footnote omitted); *see*

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"[T]he Guidelines continue to drive most federal sentences and bid fair to do so for years to come . . . ." Frank O. Bowman III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 Hous. L. Rev. 1227, 1270 (2014); *see also id.* at 1269 ("there is no reason to think that the Guidelines will not remain central to sentencing decisions indefinitely").

The Guidelines' continuing centrality and influence in federal sentencing provide compelling reasons for presuming that Guideline application errors affect a defendant's substantial rights. As the Third Circuit said as part of the justification for adopting just such a presumption, "it is beyond cavil that the Guidelines are intended to, and do, affect sentencing. Indeed, that is their very *raison d'être*." *Knight*, 266 F.3d at 207 (footnote omitted); *see also Sabillon-Umana*, 772 F.3d at 1333 (quoting this statement with approval in adopting such a presumption). "In the language of plain error's third prong, the whole point of the guidelines is to affect the defendant's 'substantial

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also United States v. Rushton, 738 F.3d 854, 861 (7th Cir. 2013) ("[T]he calculation of the defendant's guidelines sentencing range . . . has what psychologists call an 'anchoring' effect. The calculation . . . is likely to exert a not wholly conscious tug on the judge when . . . he is deciding what sentence to give . . . .") (citations omitted). *See generally* Isaacs, *supra*, at 429-43 (describing the cognitive phenomenon of "anchoring" when sentencing baselines are used) & 449 (suggesting that the "anchoring" effect of baselines like the United States Sentencing Guidelines is to steer sentencing judges toward "typical" [*i.e.*, Guideline] sentences).

rights' by guiding the district court's analysis of how much of his liberty he must forfeit to the government. When the court's starting point is skewed[,] a 'reasonable probability' exists that its final sentence is skewed too." *Sabillon-Umana*, 772 F.3d at 1333 (citations omitted). Put another way, as demonstrated by empirical evidence and experience, the "natural effect" of an erroneously high Guideline range is to skew the ultimate sentence higher than it otherwise would be. Accordingly, the Court should adopt a rebuttable presumption that such errors affect a defendant's substantial rights.

3. The Difficulty, in a Typical Case, of Demonstrating Case- and Fact-Specific Prejudice from an Error in Calculating the Guidelines Supports Adoption of a Rebuttable Presumption of Prejudice.

As discussed above, *Olano* suggests that a presumption of prejudice will be limited to the types of error for which it is likely that "the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735. Taking their cue from *Olano*, lower courts have held that another consideration in the decision whether to adopt a presumption of prejudice is whether "the inherent nature of the error ma[k]e[s] it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred." *Barnett*, 398 F.3d at 526-27. "[C]ourts have

been willing to presume prejudice, both implicitly and explicitly, in plain error review of . . . errors that, by their nature, keep the party from being able to demonstrate that, in the absence of that error, the outcome of his trial or sentence would have been different." *Id.* at 527.

The use of an erroneous Guideline range is one of this limited class of errors. "[A]bsent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the impact of an erroneous Guidelines range." *Knight*, 266 F.3d at 207. This difficulty is the result of a key feature of federal sentencing law, namely: that within-Guidelines sentences have been held to require little or no explanation.

The notion that a within-Guidelines sentence will often require very little explanation was confirmed by this Court in *Rita*, when the Court said that

> when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the [Sentencing] Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of [18 U.S.C.] § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under § 3553(a) – that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat

> certain defendant characteristics in the proper way – or argues for departure, the judge normally need say no more.

Rita, 551 U.S. at 356-57 (citation omitted).

The federal circuits have likewise validated the idea that within-Guidelines sentences require little or no explanation. Even though a federal sentencing court is directed to "state in open court the reasons for its imposition of the particular sentence," 18 U.S.C. § 3553(c), federal circuits prior to *Booker* found this requirement satisfied "when the court indicate[d] the applicable guideline range and how it [was] chosen,"[16] *United States v. Reyes-Lugo*, 238 F.3d 305, 310 (5th Cir. 2001) (citing *United States v. Georgiadis*, 933 F.2d 1219, 1222-23 (3d Cir. 1991)); *accord, e.g.*, *United States v. James*, 280 F.3d 206, 208 (2d Cir. 2002); *United States v. Strozier*, 981 F.2d 281, 282 n.1 (7th Cir. 1992). It does not appear that this minimal explanation requirement has changed

[16] Under 18 U.S.C. § 3553(c)(1), a more exacting explanation is required when the "spread" of the Guideline range (from minimum to maximum) "exceeds 24 months"; in such a case, the sentencing court must state "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. § 3553(c)(1). However, § 3553(c)(1) does not apply at all to the large part of the Guidelines table setting out ranges that are 24 months or less in spread. Moreover, even where § 3553(c)(1) applies, its enhanced explanation requirement may be honored more in the breach than in the observance. *See, e.g.*, *United States v. Reyna*, 54 Fed. Appx. 412 (5th Cir. 2002) (unpublished) (violation of § 3553(c)(1) did not require reversal of sentence on plain-error review).

post-*Booker*. *See, e.g.*, *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1199-1203 (10th Cir. 2007). Indeed, the Fifth Circuit has specifically held that "[w]hen the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required." *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *see also United States v. Newsom*, 428 F.3d 685, 688 (7th Cir. 2005) (same; relying on *Mares*).

Thus, federal district courts have been told, loud and clear, that sentences within the Guideline range generally require little or no explanation – and, as this very case illustrates, that message has not been lost on the district courts. Here the District Court simply adopted the PSR and then imposed a prison sentence of 77 months (the bottom of the range as calculated in the PSR), with no further explanation. (J.A. 33)

The instant case therefore illustrates why, in light of the minimal explanation requirement, a presumption of prejudice is necessary as a practical matter. Before the Fifth Circuit, petitioner argued that, even without a presumption of prejudice, the record established an effect on his substantial rights because: (1) the parties' arguments all focused on the erroneous Guideline imprisonment range; (2) the district court rejected the Government's recommendation for the high end of the erroneous range (96 months); and (3) the district court instead selected

the very bottom of the erroneous range (77 months).[17] (J.A. 48-49)

The Fifth Circuit disagreed. (J.A. 48-49) But, if the circumstantial evidence in this case did not suffice to establish an effect on substantial rights, it is unclear what would suffice other than an explanation by the district court of its reasoning behind its selection of the 77-month sentence imposed – an explanation that the district court was not legally compelled to give.

As this case well shows, "absent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the impact of an erroneous Guidelines range." *Knight*, 266 F.3d at 207. Consequently, in the typical case, "it would be exceedingly difficult for a defendant, such as [petitioner], to show that his sentence would have been different if the district court had sentenced him under [the correct Guideline range]." *Barnett*, 398 F.3d at 528. This difficulty, coupled with the high likelihood that the Guideline range does affect the sentence, makes this "an appropriate case in which to presume prejudice under [this] Court's decision in *Olano*." *Id.* at 527-28.

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[17] Indeed, as laid out in Section H below, petitioner continues to contend that, even without a presumption, this circumstantial evidence does establish the requisite effect on substantial rights. Accordingly, even if the Court does not agree that a presumption of prejudice should apply to this type of error, petitioner requests that the Court nonetheless still reverse the judgment of the Fifth Circuit.

"Both of these factors [ ] support [the] recognition of presumptive prejudice from application of the wrong Guidelines range." *Knight*, 266 F.3d at 207. Accordingly, "an error in application of the Guidelines that results in use of a higher sentencing range should be presumed to affect the defendant's substantial rights." *Id.*

E. A Rebuttable Presumption Will Not Inflexibly Require Remand for Undeserving Cases.

It is highly significant that the proposed presumption is ***rebuttable***. Unlike the mandatory, or conclusive, presumption of harm condemned by the Court in *Shinseki v. Sanders*, a rebuttable presumption of prejudice in this context would not prevent an appellate court from finding an error harmless "on the facts and circumstances of the particular case" or "require the reviewing court to find the [ ] error prejudicial even if that court, having read the entire record, conscientiously concludes the contrary." *Shinseki v. Sanders*, 556 U.S. at 408. And, it certainly would not require remand where it is "obvious from the record in the particular case that the error made no difference." *Id.* at 407.

As the Tenth Circuit has written,

> presumptions can be overcome and the presumption that obvious guidelines errors meet the [third prong] of the plain error test can be too. In some cases, the record will reveal a

> "fortuitous comment" from the sentencing judge making clear that its error in applying the guidelines didn't adversely affect the defendant's ultimate sentence. *Knight*, 266 F.3d at 207. For example, a district judge might proceed to analyze a case under alternative theories – one permissible, the other obviously mistaken – and arrive at the same sentencing conclusion either way.

Sabillon-Umana, 772 F.3d at 1334. Indeed, the jurisprudence contains numerous instances where courts of appeals have been able to affirmatively conclude that the use of an erroneous Guideline range was nonetheless harmless.[18]

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[18] *See, e.g.*, *United States v. Jimenez Piña*, 605 Fed. Appx. 150, 152 (4th Cir.) (unpublished), *cert. denied*, ___ U.S. ___, 2015 WL 3883581 (Oct. 5, 2015) (any error in calculating Guideline range did not affect defendant's substantial rights where district court "departed below the Guidelines to the statutory minimum sentence, the lowest sentence it could impose"); *United States v. Zabielski*, 711 F.3d 381, 388-89 (3d Cir. 2013) (any error in calculation of Guideline range was harmless where district court varied downward to a 24-month sentence, which was below even the arguably correct range, and the record showed that the Guidelines had no real bearing on the district court's selection of sentence); *United States v. Pantle*, 637 F.3d 1172, 1177-78 (11th Cir. 2011) (any error in calculation of Guideline range did not affect defendant's substantial rights, and was harmless, where district court stated that it believed that 120-month statutory maximum sentence was not long enough for defendant's crime); *United States v. Knight*, 606 F.3d 171, 179-80 (4th Cir. 2010) (any error in calculation of Guideline range was harmless where district court varied downward to a 60-month sentence, which was below even the arguably correct range, and the record

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In sum, making the proposed presumption of prejudice in this context rebuttable ensures that sentencing hearings do not become "impregnable citadels of technicality," *Kotteakos*, 328 U.S. at 759 (footnote omitted), leading to "wasteful reversals." *Dominguez Benitez*, 542 U.S. at 82. Rather, because the proposed presumption is rebuttable, it will "properly influence, though not control, future determinations" of the third prong of the plain-error test in the limited context of erroneous Guideline ranges. *Shinseki v. Sanders*, 556 U.S. at 411 (citation omitted).

F. A Rebuttable Presumption of Prejudice for Errors of this Type Has Substantial Benefits.

A presumption of prejudice for undisputed errors resulting in the application of an erroneous Guideline range has several benefits. First, the presumption will further the goal of remedying the profound injustice resulting from the imposition of a longer term of imprisonment than the district court would have imposed under the correct Guideline range. As the Tenth Circuit has said, "we can think of few things that affect an individual's substantial rights . . . more than a reasonable probability [that] an individual will linger longer in prison than the law demands only

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showed that the Guidelines had no real bearing on the district court's selection of sentence because the district court believed that at least a 60-month sentence was necessary to make sure defendant received necessary rehabilitative training).

because of an obvious judicial mistake." *Sabillon-Umana*, 772 F.3d at 1335. In addition, there are significant savings to the public fisc resulting from the trimming of excessive months or years from a prisoner's sentence.[19]

A presumption that an erroneous Guideline range affected a defendant's sentence also ensures that appellate courts do not usurp the institutional role of the district court. The duty of sentencing falls upon the district court, not the appellate court, and for good reasons:

> The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.

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[19] According to the Administrative Office of the United States Courts, in fiscal year 2014, the average annual cost to imprison a person after sentencing was $30,621, or $2,551.75 a month – almost eight times the cost of post-release supervision. United States Courts Website, "Did You Know? Imprisonment Costs 8 [T]imes More Than Supervision" (June 18, 2015), available at http://www.uscourts.gov/news/2015/06/18/did-you-know-imprisonment-costs-8-times-more-supervision (last visited Nov. 6, 2015).

Gall, 552 U.S. at 51-52 (internal quotation marks, brackets, and citations omitted).

Given the primacy of the district court's role in sentencing, appellate courts should not speculate that a different Guideline range – one of the factors the district court is mandated to consider in passing sentence, *see* 18 U.S.C. § 3553(a)(4) – would have made no difference. As the Third Circuit has held,

> [w]here we conclude that the District Court might have ended up with a different sentence had it started at the right point, giving the [District] Court the opportunity to reconsider the sentence and start at the right place in resentencing actually affords deference and respect for the District Court judge. Our failure to do so would be presumptuous on our part: it is not our role to say that the sentencing judge would consider the sentence he gave, which was at the low end of the incorrectly calculated range, to be appropriate when the correct Guideline range is lower than was assumed.

United States v. Langford, 516 F.3d 205, 220 (3d Cir. 2008).[20] Just so: unless it can be said with assurance that the use of an erroneous Guideline range had no effect on the district court's decision, it is more

[20] "Moreover," pointed out the Third Circuit, "insisting on a uniform point of departure from which all sentencing courts can exercise their discretion promotes uniformity in the sentencing of defendants with similar criminal history and offense levels." *Langford*, 516 F.3d at 220.

respectful of the district court's role as the sentencing body to allow the district court to reevaluate the sentence in light of the correct Guideline range.

Finally, correction of undisputed errors promotes better development of the Guidelines. As the Court observed in *Rita*, "[t]he [Sentencing] Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." *Rita*, 551 U.S. at 350. "The Commission will collect and examine the results [of these courts' work] . . . [a]nd it can revise the Guidelines accordingly." *Id.* (citations omitted). Allowing district courts to reassess a defendant's sentence in light of the correct Guideline range will result in a sentence that is a better data-point for the Sentencing Commission when it determines how the Guidelines should be amended.

G. A Rebuttable Presumption of Prejudice for this Limited Class of Errors Will Not Compromise the Interests Protected by the Contemporaneous-Objection Rule.

Any relaxation of the requirements for securing plain-error relief potentially raises the concerns animating the contemporaneous-objection rule, namely: (1) the burden and cost of corrective proceedings, and (2) the increased possibility of "sandbagging," *i.e.*, strategically withholding an objection in the district court as an "ace in the hole" for appeal in case things

do not turn out as the party wants. *See generally Puckett*, 556 U.S. at 134 (discussing these concerns). As will be demonstrated, however, neither of these concerns would follow from adopting a rebuttable presumption of prejudice for the limited class of error discussed here.

First, it is generally acknowledged that the burden and cost of remanding a case for resentencing is relatively modest, particularly in comparison to the burden and cost of reversing a conviction. "[T]he cost of correcting a sentencing error is far less than the cost of a retrial. A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005); *see also Barnett*, 398 F.3d at 533 (Gwin, J., concurring) ("By contrast [with a retrial], where a re-sentencing is at issue, the costs are far less.") (citation omitted). "[T]here is little reason not to correct plain sentencing errors when doing so is so simple a task. . . . Reversing a sentence does not require that a defendant be released or retried, but simply allows a district court to exercise properly its authority to impose a legally appropriate sentence." *United States v. Joseph*, 716 F.3d 1273, 1281 (9th Cir. 2013) (internal quotation marks and citations omitted).

Moreover, a new sentencing hearing will not always have to be held at all. If the parties are in

agreement as to the new sentence, the defendant can waive his rights to presence[21] and allocution,[22] and then resentencing can occur simply "on the papers" by motion and entry of a new judgment. *See Sabillon-Umana*, 772 F.3d at 1334 ("knowing that obvious guidelines errors are presumptively subject to correction should enable the parties to agree to their prompt resolution in the district court without the necessity of a lengthy appeal like the one before us") (footnote omitted). And, even if the result of a remand is a full resentencing, there is generally no risk of unavailability of witnesses or evidence, since reliable hearsay is fully admissible at a sentencing hearing. In sum, the modest cost of a resentencing proceeding is more than outweighed by the benefits of having the district court reweigh its sentence in light of the correct Guideline range.[23]

With respect to the second concern about "sandbagging," the proposed rebuttable presumption would not provide defendants with an incentive to withhold an objection to Guideline calculation error in the district court. In light of the well-documented "anchoring"

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[21] *See, e.g.*, *United States v. DeValle*, 894 F.2d 133, 137 (5th Cir. 1990); *United States v. Brown*, 456 F.2d 1112, 1114 (5th Cir. 1972).

[22] *See, e.g.*, *United States v. Washington*, 44 F.3d 1271, 1276-77 (5th Cir. 1995); *United States v. De La Paz*, 698 F.2d 695, 697 (5th Cir. 1983).

[23] Additionally, as discussed above, where the sentence is reduced on remand, there are significant offsetting cost-savings. *See supra* at 46 & n.19.

effect of the Sentencing Guidelines, it always behooves a defendant – even one who is hoping for a downward departure or a variance – to start the sentencing process with as low a Guideline range as possible. Consequently, "it is unlikely that a defendant would purposely withhold an argument that would provide him with a lower Guidelines sentence," Ferguson, *supra*, at 325, because there is no obvious strategic benefit from doing so. As the Court said in a slightly different context, "[i]f there is a lawyer who would deliberately forgo objection ***now*** because he perceives some slightly expanded chance to argue for 'plain error' ***later***, [one] suspect[s] that, like the unicorn, he finds his home in the imagination, not the courtroom." *Henderson v. United States*, 133 S. Ct. 1121, 1129 (2013) (emphasis in original).

Indeed, it seems likely that, at least in this limited context, the failure to object almost always results from inadvertence – simply overlooking the error – rather than a strategic choice to forgo objection. In this case, that conclusion is bolstered by the fact that almost everyone involved – district-court counsel, the Government, the Probation Office, the District Court, and, initially, even appellate counsel – missed a clear misapplication of the Guidelines.

In a recent case, the Seventh Circuit described a similar plain-error scenario as "a thoroughly botched sentencing in which the parties, the probation service, and the sentencing judge are all implicated." *United States v. Rushton*, 738 F.3d 854, 860 (7th Cir. 2013). But, said the Seventh Circuit, "[w]e can't

blame any of them too harshly, because the sentencing guidelines are absurdly complex."[24] *Id.* The Seventh Circuit concluded that, nonetheless, "the remedy is not speculation about what the judge would have done had he calculated the sentencing range accurately; it is a resentencing from scratch . . . ." *Id.* (citations omitted). A rebuttable presumption of prejudice facilitates that remedy, without providing any real disincentive to object below.

Finally, adoption of a rebuttable presumption of prejudice will not mean that the use of an erroneous Guidelines range will inevitably result in remand. Even if the Government is unable to rebut the presumption of prejudice in a given case, the appellate court retains its discretion under the fourth prong of

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[24] As early as 2002, Professor Douglas A. Berman noted the judicial and academic complaints about the complexity of the Guidelines, *see* Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 Iowa L. Rev. 435, 444 & nn.37-38 (2002); and he expressed the fear that the complexity of the Guidelines and interpretive case law created "significant challenges and burdens" for defense counsel, *id.* at 444-45, "as well as the serious risk that differences in the knowledge, experiences, and resources of defense counsel will produce significant variation in Guidelines sentencing outcomes." *Id.* at 445. Professor Berman quoted the former Federal Public Defender for the District of Massachusetts as saying that the Guidelines' "massive infusion of rules of law into the sentencing process" had created for defense attorneys "multifarious opportunities . . . for mistakes and malpractice." *Id.* (ellipsis in original; internal quotation marks omitted). Since 2002, these concerns have only become more acute.

plain-error review, and can decline to exercise that discretion where, for some unusual reason, a remand would not vindicate the "fairness, integrity or public reputation of judicial proceedings." *Cf. Henderson*, 133 S. Ct. at 1130 (observing that fourth prong helps screen out undeserving candidates for plain-error reversal).

H. In the Alternative, even if the Court Does Not Agree that a Presumption of Prejudice Should Apply to the Error in this Case, the Court Should Hold that, on the Facts of this Case, Petitioner Has Shown the Requisite Effect on his Substantial Rights.

The Fifth Circuit, consistent with its precedent, declined to apply a presumption of prejudice in this case. (J.A. 47 n.1) If this Court agrees that such a presumption should apply, then the Court should reverse the judgment below and remand for application of that presumption and further proceedings consistent therewith.

In the alternative, even if the Court does not adopt such a presumption, the Court should hold that petitioner nevertheless met his burden of establishing an effect on his substantial rights, because the record shows at least a reasonable probability that the sentence would be lower under the correct Guideline range. The Probation Office recommended the bottom of the incorrect range, specifically noting that it was "the low-end of the applicable custody guideline

range." *See* Sentencing Recommendation, at 1.[25] The parties' arguments as to the appropriate sentence focused on the Guideline imprisonment range. (J.A. 30-32) Significantly, although the Government urged the District Court to sentence petitioner to 96 months' imprisonment (the top of the Guideline imprisonment range calculated by the PSR) (J.A. 30-31), the District Court rejected that request and instead sentenced petitioner to 77 months' imprisonment, the bottom of the Guideline imprisonment range calculated by the PSR.[26] (J.A. 33, 38)

Under all these circumstances, there is at least a "reasonable probability" that, but for the error, the outcome of the proceeding would have been different, *see Dominguez Benitez*, 542 U.S. at 82-83; or, put another way, under these circumstances "the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Id.* at 83 (citations omitted). Accordingly, even without a presumption, the Court should reverse the Fifth Circuit's judgment, and remand for further consideration of petitioner's case.

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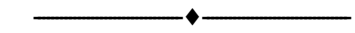
[25] Although the Probation Office's recommendation is typically filed under seal (as it is in this case), the District Judge presiding in this case makes the recommendation available to the parties.

[26] Statistically, 49.8% of within-Guidelines sentences are at the very bottom of the range; and 72% of within-Guidelines sentences are at the bottom of the range or in the lower half of the range. *See 2014 Annual Report and 2014 Sourcebook of Federal Sentencing Statistics*, p. S-85 (Table 29).

I. Summary.

In summary, in the unique context of an obvious misapplication of the Sentencing Guidelines resulting in the application of an erroneous Guideline range, the relevant considerations all favor adoption of a rebuttable presumption that the error affected the defendant's substantial rights. As Judge Gorsuch has written for the Tenth Circuit, a rebuttable presumption that obvious misapplications of the Guidelines affect a defendant's substantial rights is "sound," *Sabillon-Umana*, 772 F.3d at 1333, "sensible[,] and consistent" with plain-error doctrine and the interpretive case law. *Id.* at 1334. The Court should adopt such a presumption, reverse the Fifth Circuit's judgment, and remand for further consideration of petitioner's case in light of this presumption. In the alternative, even if the Court does not adopt such a presumption, the Court should hold that petitioner nevertheless met his burden of establishing an effect on his substantial rights, reverse the Fifth Circuit's judgment, and remand for further consideration of petitioner's case.



CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

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PLAIN-ERROR REVERSALS FOR GUIDELINE CALCULATION ERRORS THAT RESULTED IN OVERLAPPING CORRECT AND INCORRECT RANGES[1]

[1] This compilation contains a list, broken down by circuit, of only those cases that involved an error in the calculation of the Guideline imprisonment range that resulted in an overlap between the correct and incorrect Guideline ranges. The compilation does not contain cases from the Fifth Circuit (the circuit from which the instant case arose) or from the District of Columbia Circuit (from which no cases were found). There may be cases not captured by the general electronic-database search that was conducted. This list does not include cases involving remands of sentences imposed upon revocation of probation or supervised release, cases for which the standard of review was not clear, or cases lacking adequate information about the Guideline calculations.

FIRST CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Ortiz, 741 F.3d 288 (1st Cir. 2014)	21-27 months *36 months*	15-21 months *30 months*[2]
U.S. v. Correy, 570 F.3d 373 (1st Cir. 2009) (Def. Flores-Plaza)	292-365 months *292 months*	235-293 months *time served*[3]
U.S. v. Altagracia Castillo, 145 Fed. Appx. 683 (1st Cir. 2005) (unpub.)	210-262 months *210 months*	168-210 months *168 months*
U.S. v. Sedoma, 332 F.3d 20 (1st Cir. 2003)	235-293 months *293 months (293 + 60 concurrent)*	188-235 months *235 months (235 + 60 consecutive)*

[2] On remand for resentencing, docket sheet reflects that district court said that it was "not using the GSR [Guideline sentencing range] as a starting point."

[3] Defendant was indicted in 1995, originally sentenced in 2002, and resentenced in 2012. It is not clear when defendant was incarcerated. He was on bond pending trial and may have been imprisoned either upon finding of guilt in 1999 or upon sentencing in 2002. Time served was probably anywhere from 13 to 16 years (on an original sentence of just over 24 years).

SECOND CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. McCrimon, 788 F.3d 75 (2d Cir. 2015)	63-78 months *63 months*	51-63 months *51 months*
U.S. v. Candelario, 486 Fed. Appx. 907 (2d Cir. 2012) (unpub.) (Def. Carter)	140-175 months *175 months*	130-162 months *135 months*
U.S. v. Keigue, 318 F.3d 437 (2d Cir. 2003)	12-18 months *15 months (concurrent)*	10-16 months *15 months (concurrent)*
U.S. v. Pavlotskiy, 47 Fed. Appx. 590 (2d Cir. 2002) (unpub.)	37-46 months *46 months*	33-41 months *41 months*
U.S. v. Gordon, 291 F.3d 181 (2d Cir. 2002) (Gov't appeal)	97-121 months *97 months (concurrent)*	108-135 months or 121-151 months *108 months (concurrent)*

THIRD CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Tai, 750 F.3d 309 (3d Cir. 2014)	70-87 months (variance from 87-108 months) *72 months (concurrent)*	57-71 months (if same variance applied) *66 months (concurrent)*
U.S. v. Porter, 413 Fed. Appx. 526 (3d Cir. 2011) (unpub.)	33-41 months *35 months*	27-33 months *24 months*
U.S. v. Irvin, 369 F.3d 284 (3d Cir. 2004)	63-78 months *72 months*	57-71 months *time served*[4]
U.S. v. Knight, 266 F.3d 203 (3d Cir. 2001)	151-188 months *162 months*	140-175 months *140 months*
U.S. v. Knobloch, 131 F.3d 366 (3d Cir. 1997)	87-108 months *87 months*[5]	70-87 months *30 months*[6]

[4] Defendant was on bond until either his guilty plea (02/25/2000) or sentencing (06/12/2000). Time served therefore was probably either a few months short of, or just a little more than, five years of imprisonment (on an original 72-month – or six-year – prison sentence).

[5] Total original sentence with 60-month consecutive sentence was 147 months.

[6] Total sentence on remand was 55 months with 25-month consecutive sentence.

FOURTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Wallace, 403 Fed. Appx. 868 (4th Cir. 2010) (unpub.)	24-30 months *30 months*[7]	18-24 months *24 months*[8]
U.S. v. Taylor, 374 Fed. Appx. 392 (4th Cir. 2010) (unpub.)	37-46 months *46 months*[9]	30-37 months *37 months*[10]
U.S. v. Hardy, 322 Fed. Appx. 298 (4th Cir. 2009) (unpub.)	100-125 months *125 months (concurrent)*[11]	87-108 months *108 months (concurrent)*[12]

[7] Total original sentence with 24-month consecutive sentence was 54 months.

[8] Total sentence on remand with 24-month consecutive sentence was 48 months.

[9] Total original sentence with 24-month consecutive sentence was 70 months.

[10] Total sentence on remand with 24-month consecutive sentence was 61 months.

[11] Total original sentence with 60-month consecutive sentence was 185 months.

[12] Total sentence on remand with 60-month consecutive sentence was 168 months.

U.S. v. Agyepong, 312 Fed. Appx. 566 (4th Cir. 2009) (unpub.)	15-[21] months *15 months*[13]	12-18 months *12 months*[14]
U.S. v. Sanson, 85 Fed. Appx. 967 (4th Cir. 2004) (unpub.)	78-97 months *97 months*	70-87 months *60 months*
U.S. v. Moreno, 67 Fed. Appx. 161 (4th Cir. 2003) (unpub.)	188-235 months *220 months*	151-188 months *168 months*
U.S. v. Williams, 25 Fed. Appx. 175 (4th Cir. 2002) (unpub.)	24-30 months *30 months*	18-24 months *24 months*
U.S. v. Hawkins, 232 F.3d 891 (4th Cir. 2000) (table) (unpub.)	210-262 months *210 months*	188-235 months *188 months*
U.S. v. Windley, 217 F.3d 843 (4th Cir. 2000) (table) (unpub.)	188-235 months *188 months*	151-188 months *70 months*

[13] Total original sentence with 24-month consecutive sentence was 39 months.

[14] Total sentence on remand with 24-month consecutive sentence was 36 months.

U.S. v. Livingston, 21 F.3d 446 (4th Cir. 1994) (table) (unpub.)	92-115 months *92 months*[15]	77-96 months *77 months*[16]

[15] Total original sentence with 60-month consecutive sentence was 152 months.

[16] Total sentence on remand with 60-month consecutive sentence was 137 months.

SIXTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Baker, 559 F.3d 443 (6th Cir. 2009)	262-327 months *300 months*	235-293 months *200 months*
U.S. v. Lee, 288 Fed. Appx. 264 (6th Cir. 2008) (unpub.)	15-21 months *27 months (concurrent)*	12-18 months *24 months (concurrent)*
U.S. v. Story, 503 F.3d 436 (6th Cir. 2007)	346-405 months *300 months (concurrent)*	324-405 months *240 months (concurrent)*
U.S. v. Davis, 397 F.3d 340 (6th Cir. 2005)	33-41 months *33 months (concurrent)*	24-30 months or 30-37 months *1 day (concurrent)*
U.S. v. Johnson, 103 Fed. Appx. 866 (6th Cir. 2004) (Def. Byrd) (GVR on other grounds)	12-18 months *18 months*	4-10 months *10 months – time served*

SEVENTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Jenkins, 772 F.3d 1092 (7th Cir. 2014)	168-210 months *168 months*	135-168 months *135 months*
U.S. v. Williams, 742 F.3d 304 (7th Cir. 2014)	37-46 months *56 months (concurrent)*[17]	30-37 months *56 months (concurrent)*[18]
U.S. v. Doss, 741 F.3d 763 (7th Cir. 2013)	63-78 months *78 months (concurrent)*[19]	51-63 months *44 months (concurrent)*[20]
U.S. v. Garcia-Hernandez, 464 Fed. Appx. 535 (7th Cir. 2012) (unpub.)	46-57 months *57 months*	37-46 months *37 months*
U.S. v. Avila, 557 F.3d 809 (7th Cir. 2009)	324-405 months *396 months*	262-327 months *365 months*

[17] Total original sentence with 24-month consecutive sentence was 80 months.

[18] Total sentence on remand with 24-month consecutive sentence was 80 months.

[19] Total original sentence with 24-month consecutive sentence was 102 months.

[20] Total sentence on remand with 24-month consecutive sentence was 68 months.

U.S. v. Garrett, 528 F.3d 525 (7th Cir. 2008)	168-210 months *189 months*	151-188 months *121 months*
U.S. v. Ghosh, 190 Fed. Appx. 484 (7th Cir. 2006) (unpub.)	18-24 months *21 months (concurrent)*	15-21 months *21 months – time served (concurrent)*
U.S. v. Wallace, 32 F.3d 1171 (7th Cir. 1994)	168-210 months *168 months (concurrent)*	151-188 months *121 months (concurrent)*

EIGHTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Grandison, 781 F.3d 987 (8th Cir. 2015)	360 months-life *360 months*	292-365 months *300 months*
U.S. v. Plancarte-Vasquez, 450 F.3d 848 (8th Cir. 2006) (Def. Plancarte-Vasquez)	168-210 months *168 months (concurrent)*	135-168 months *168 months (concurrent)*
U.S. v. Weaver, 161 F.3d 528 (8th Cir. 1998)	120-150 months *120 months (concurrent)*	110-137 months *80 months (concurrent)*

NINTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Vargem, 747 F.3d 724 (9th Cir. 2014)	70-87 months *30 months (concurrent)*	57-71 months *30 months (concurrent)*
U.S. v. Bonilla-Guizar, 729 F.3d 1179 (9th Cir. 2013)	Def. 1: 188-235 months *188 months (concurrent)* Def. 2: 210-262 months *188 months (concurrent)*	121-151 months *144 months (concurrent)* 168-210 months *144 months (concurrent)*
U.S. v. Dietz, 360 Fed. Appx. 946 (9th Cir. 2010) (unpub.)	210-262 months *196 months (concurrent)*	188-235 months *174 months (concurrent)*
U.S. v. Mejia, 559 F.3d 1113 (9th Cir. 2009)	188-235 months *188 months (concurrent)*	168-210 months *160 months (concurrent)*
U.S. v. Lee, 308 Fed. Appx. 81 (9th Cir. 2009) (unpub.)	235-293 months *235 months (concurrent)*	210-262 months *210 months (concurrent)*
U.S. v. Ysassi, 282 Fed. Appx. 588 (9th Cir. 2008) (unpub.)	100-125 months *125 months (concurrent)*	92-115 months *115 months (concurrent)*

TENTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Chapple, 198 Fed. Appx. 745 (10th Cir. 2006) (unpub.)	27-33 months *33 months (concurrent)*	21-27 months *33 months (concurrent)*

ELEVENTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Perez, 572 Fed. Appx. 787 (11th Cir. 2014) (unpub.)	262-327 months *300 months*	235-293 months *293 months*
U.S. v. Bryant, 398 Fed. Appx. 561 (11th Cir. 2010) (unpub.)	151-188 months *151 months*	121-151 months *120 months*
U.S. v. Frazier, 605 F.3d 1271 (11th Cir. 2010) (Def. Roach)	108-135 months *135 months (concurrent)*	97-121 months *121 months (concurrent)*
U.S. v. Barrera-Cruz, 347 Fed. Appx. 475 (11th Cir. 2009) (unpub.)	30-37 months *30 months*	18-24 months *21 months*

U.S. v. Bennett, 472 F.3d 825 (11th Cir. 2006)	210-262 months *220 months*	188-235 months *194 months*
U.S. v. Oddo, 133 Fed. Appx. 632 (11th Cir. 2005) (unpub.)	15-21 months *17 months*	10-16 months *time served*[21]

[21] Defendant was on bond until his surrender date (06/18/2004). Time served until resentencing (06/28/2005) was probably slightly over one year.