No. 14-8913

In the Supreme Court of the United States

SAUL MOLINA-MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in conducting plain-error review under Federal Rule of Criminal Procedure 52(b), a court of appeals should presume that an error in calculating a defendant's advisory Sentencing Guidelines range affected the defendant's substantial rights.

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OPINION BELOW

The opinion of the court of appeals (J.A. 45-49) is not published in the Federal Reporter but is reprinted at 588 Fed. Appx. 333.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2014. The petition for a writ of certiorari was filed on March 16, 2015, and was granted on October 1, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES AND SENTENCING GUIDELINES INVOLVED

The pertinent statute, rules and Sentencing Guidelines provisions are reproduced in an appendix to this brief, App. A, *infra*, 1a-10a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, peti-

tioner was convicted of being unlawfully present in the United States after having been deported following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). J.A. 36. He was sentenced to 77 months of imprisonment, to be followed by three years of supervised release. J.A. 38-39. The court of appeals affirmed. J.A. 45-49.

A. Statutory Background

Federal sentencing is governed by the overarching principle in 18 U.S.C. 3553(a) that the district court must impose a sentence "sufficient, but not greater than necessary," to serve the statutory purposes of sentencing. "[T]he starting point and the initial benchmark" at sentencing is the calculation of a range under the federal Sentencing Guidelines. *Gall* v. *United States*, 552 U.S. 38, 49 (2008). Although the Guidelines are now advisory, not mandatory, *United States* v. *Booker*, 543 U.S. 220, 234 (2005), the district court must consider the Guidelines range along with the other factors in Section 3553(a) before imposing sentence. *Peugh* v. *United States*, 133 S. Ct. 2072, 2080 (2013).

In calculating the advisory range, "[t]he sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines." *Rita* v. *United States*, 551 U.S. 338, 351 (2007); see 18 U.S.C. 3552(a). Timely objections to that interpretation are central to the "focused, adversarial resolution" of sentencing disputes contemplated by the Federal Rules of Criminal Procedure. See *Burns* v. *United States*, 501 U.S. 129, 137 (1991). Under Federal Rule of Criminal Procedure 32, the parties receive copies of the presentence report (PSR) at least 35 days before the sentencing

hearing and then have 14 days to submit objections to the PSR's factual findings and sentencing recommendations. Fed. R. Crim. P. 32(e)(2) and (f)(1). At least seven days before sentencing, the probation officer must submit a final version of the PSR and an addendum stating any unresolved objections. Fed. R. Crim. P. 32(g). As late as the sentencing hearing, a party may still be permitted, "for good cause," "to make a new objection" to the Guidelines calculations or other matters. Fed. R. Crim. P. 32(i)(1)(D). At the hearing, the parties must be allowed to comment on "matters relating to an appropriate sentence," Fed. R. Crim. P. 32(i)(1)(C), and if portions of the PSR remain in dispute, the district court must "rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing," Fed. R. Crim. P. 32(i)(3)(B).

B. The Present Controversy

1. On August 31, 2012, United States Customs and Border Protection agents located petitioner near Sarita, Texas, as he was attempting to circumvent a border patrol checkpoint. PSR ¶ 4. Petitioner, who is a citizen and national of Mexico with no legal status in the United States, admitted that he had illegally entered the United States by crossing the Rio Grande River near Hidalgo, Texas, several days earlier. PSR ¶¶ 4-5. A records check revealed that petitioner had been convicted of aggravated burglary in Tennessee in 2002 and 2011 and previously had been deported from the United States to Mexico in 2007 and 2012. PSR ¶ 5.

a. Petitioner was charged in the Southern District of Texas with one count of being found unlawfully

present in the United States after having been deported following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). J.A. 12-13. He pleaded guilty without a plea agreement. J.A. 45-46.

The Probation Office prepared a PSR that calculated petitioner's base offense level as eight under Sentencing Guidelines § 2L1.2(a) (2012). PSR ¶ 13. The Probation Office recommended a 16-level increase in petitioner's offense level under Section 2L1.2(b)(1)(A)(ii) because petitioner previously had been deported after convictions for aggravated burglary, a felony crime of violence. PSR ¶ 14; see Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2012) (defining the term "crime of violence" to include "burglary of a dwelling"). With a three-level reduction in the offense level for acceptance of responsibility, the Probation Office calculated petitioner's total offense level as 21. PSR ¶¶ 19, 22.

The Probation Office determined that petitioner had 18 criminal history points, which placed him in criminal history category VI, the highest in the Guidelines. PSR ¶ 35. The PSR assessed four criminal history points for petitioner's two 2002 Tennessee aggravated burglary convictions, PSR ¶¶ 25-26; one criminal history point for a prior federal illegal-reentry conviction in 2007, PSR ¶ 27; and two additional points under Section 4A1.1(d) because, at the time of the instant offense, petitioner was still on parole for sentences imposed in 2011, PSR ¶ 34.

Those sentences had been imposed for a series of five aggravated burglaries that petitioner committed in May 2009 and May 2010 and for which he was sentenced to eight years of imprisonment on April 7, 2011. PSR ¶¶ 28-32. The Probation Office assessed a

total of 11 criminal history points for the five sentences. It assessed three points under Section 4A1.1(a) for each of three burglaries that petitioner committed on separate occasions and for which he was arrested on three different dates. PSR ¶¶ 28, 29, 32. It then added two more points for the remaining burglaries under Section 4A1.1(e), a provision that applies to "each prior sentence resulting from a conviction of a crime of violence that" does not otherwise receive any points under the Guidelines "because such sentence was counted as a single sentence." Sentencing Guidelines § 4A1.1(e); see PSR ¶¶ 30-31.

A total offense level of 21 and a criminal history category of VI resulted in an advisory Sentencing Guidelines range of 77 to 96 months of imprisonment. PSR ¶ 74. The Probation Office also noted that petitioner was subject to a statutory maximum term of 20 years of imprisonment under 8 U.S.C. 1326(a) and (b). PSR ¶ 73.

b. In November 2012, the PSR was disclosed to the parties. J.A. 3. The parties had 14 days from receipt of the PSR to file any written objections. See Fed. R. Crim. P. 32(f)(1). On December 7, 2012, the government filed a notice that it had no objections to the PSR. J.A. 14. On December 19, 2012, petitioner filed a written notice raising a single objection—*viz.*, that the Probation Office had erred in assessing a 16-level enhancement based on petitioner's prior aggravated burglary convictions, because none of those convictions qualified as a crime of violence under the relevant Sentencing Guidelines definition. J.A. 16. Petitioner did not object to the PSR's calculation of his criminal history score. *Ibid.*

On December 20, 2012, the Probation Office filed an addendum recommending that petitioner's objection to the 16-level crime-of-violence enhancement be overruled. Add. to PSR 1A-2A. It also submitted a sealed recommendation, disclosed to the parties and the district court, that petitioner be sentenced to "77 months [of] incarceration, the low-end of the applicable custody guideline range." Sealed Sent. Recommendation 1. The recommendation described petitioner's prior convictions, explained that petitioner "ha[d] been in continued contact with law enforcement authorities for the past 11 years," and stated that "prior sanctions ha[d] failed to deter him from continued criminal conduct." *Ibid.* The Probation Office concluded that "a sentence of 77 months [of] incarceration would best meet the sentencing objectives outlined in 18 U.S.C. § 3553(a)," *ibid.*, and recommended that the court pair that sentence with a three-year term of supervised release, which would "allow the [c]ourt to maintain a degree of leverage should [petitioner] return to the United States illegally." *Id.* at 2.

2. On January 14, 2013, the parties convened for the sentencing hearing. J.A. 19. Petitioner's counsel told the district court that he was "not satisfied with what" he had done to develop petitioner's objection to the 16-level enhancement and requested a 30-day continuance "to be[] able to present something to the [c]ourt." J.A. 20. The court granted the request. J.A. 22.

On March 14, 2013, after an additional continuance at petitioner's request, J.A. 5, the sentencing hearing resumed. J.A. 24. Petitioner's counsel presented argument on his objection to the 16-level enhancement, explaining that, although the "initial" ground

for objecting had been "cure[d]" by language in the charging documents that the government submitted to establish the convictions, the convictions did not qualify as crimes of violence on another ground. J.A. 26. After considering circuit precedent addressing the newly raised ground, the district court overruled the objection, concluded that petitioner's conviction qualified as a crime of violence, and adopted the PSR's calculation of an advisory range of 77 to 96 months. J.A. 26-30, 33.

The district court then sought the parties' positions on the appropriate sentence. The government urged the court to impose "a high end sentence of 96 months" in order "to protect the public from" petitioner, emphasizing that petitioner's multiple burglary convictions had involved "breaking into people's homes," including while armed. J.A. 30-31. Petitioner responded, through counsel, that he had not used violence during the burglaries and that he had committed those crimes to support his drug habit. J.A. 31-32. Petitioner's counsel stated that the 77-month term recommended by the Probation Office was "a severe sentence" that could be paired with a supervised-release term and asked that the court impose that sentence. J.A. 32. Petitioner then addressed the court, attributing his prior convictions to his drug addiction and asserting that he would no longer return to the United States. J.A. 32-33. The court sentenced petitioner to 77 months of imprisonment, to be followed by three years of supervised release. J.A. 33.

3. On appeal, petitioner's court-appointed appellate counsel filed a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), seeking to withdraw be-

cause "the appeal presents no legally nonfrivolous questions with regard to [petitioner's] sentence." Pet. C.A. *Anders* Br. ii. The brief stated, among other things, that "[t]he PSR correctly calculated [petitioner's] criminal history score" and reviewed those calculations in detail. *Id.* at 12-14.

Petitioner filed a pro se response asserting that the district court had erred in calculating his criminal history score because "there was no intervening arrest between" any of the five burglary offenses for which he was sentenced in April 2011. Pet. C.A. *Anders* Resp. Br. 6. As a result, petitioner suggested, at least one of his convictions had been improperly assessed three points under Sentencing Guidelines § 4A1.1(a), rather than one point under Section 4A1.1(e). Pet. C.A. *Anders* Resp. Br. 6.

On January 14, 2014, the court of appeals issued a single-judge order denying counsel's motion to withdraw because "it is not clear whether the probation officer correctly assessed a total of 11 criminal history points for [petitioner's burglary] sentences." 1/14/2014 Order 2. The court ordered counsel to file either "a supplemental *Anders* brief or a brief on the merits addressing whether the criminal history category was accurately calculated." *Ibid.*

Counsel filed a merits brief arguing that the district court had plainly erred in calculating petitioner's criminal history. Pet. C.A. Br. 12-16. The brief pointed to a provision in the Guidelines instructing courts that, when computing a defendant's criminal history category, sentences "imposed on the same day" are not counted separately, unless "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)." Sentencing Guidelines § 4A1.2(a)(2). Pet. C.A. Br. 12-14. Petitioner asserted that, absent the misapplication of that provision, he would have had a criminal history category of V rather than VI and an advisory Guidelines range of 70 to 87 months, instead of 77 to 96 months. *Id.* at 16. Petitioner argued that there was a reasonable probability that he would have received a lower sentence if the district court had applied the correct advisory Guidelines range, because the court had sentenced him at the low end of the incorrect range "despite the government's strongly worded plea for the maximum Guidelines prison sentence of 96 months." *Id.* at 17-18 (emphasis omitted).

In response, the government conceded that the district court had erred in calculating petitioner's criminal history category and that the error was plain. Gov't C.A. Br. 13-14. The government pointed out, however, that the correct Guidelines range overlapped substantially with the incorrect range, the district court imposed a sentence within the overlap, and the court had expressed no intention to impose the low end of any Guidelines range. *Id.* at 19. The government thus argued that petitioner had not shown the requisite reasonable probability of a lower sentence and that the court should not exercise its discretion to correct the error because the Guidelines themselves contemplate an upward departure when Section 4A1.2's single-sentence rule causes the advisory range to understate the seriousness (or frequency) of a defendant's criminal history. *Id.* at 19-21 (citing Sentencing Guidelines § 4A1.2, comment. (n.3)).

4. The court of appeals affirmed. J.A. 45-49. The court first held that, because petitioner did not raise

an objection to the criminal history calculation before the district court, his claim was reviewable only for plain error under Federal Rule of Criminal Procedure 52(b). J.A. 46. The court concluded that the district court had made "a plain or obvious error" in calculating petitioner's criminal history when it assessed 11 criminal history points for the five Tennessee aggravated burglary convictions for which petitioner was sentenced in April 2011. J.A. 46-47. The court explained that, under Section 4A1.2(a)(2) of the Guidelines, 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. J.A. 46. Because no arrest intervened between any of the five burglaries, the court concluded that petitioner should have received only five points for the five burglaries, resulting in a total of 12 criminal history points, a criminal history category of V, and an advisory Guidelines range of 70 to 87 months. J.A. 46-47.

The court of appeals concluded, however, that petitioner had not established that the error affected his substantial rights. Initially, the court rejected petitioner's contention that any error in calculating the Guidelines range "should be considered presumptively prejudicial." J.A. 47 n.1. It then held that he had not shown "a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence." J.A. 47 (quoting *United States* v. *Garcia-Carrillo*, 749 F.3d 376, 379 (5th Cir.), cert. denied, 135 S. Ct. 676 (2014)).

The court of appeals observed that petitioner's sentence of 77 months of imprisonment was at the bottom of the advisory Guidelines range that the district court had applied and in the middle of the correct Guide-

lines range. J.A. 47-48. Because petitioner's sentence fell within both Guidelines ranges, the court explained that petitioner was obligated "to point to 'additional evidence' in the record, other than the difference in ranges, to show an effect on his substantial rights." J.A. 48 (quoting *United States* v. *Pratt*, 728 F.3d 463, 482 (5th Cir. 2013), cert. denied, 134 S. Ct. 1328 (2014)). The court explained that petitioner could not make that showing based on "[t]he mere fact that" he had been sentenced at the low end of the incorrect range. J.A. 48-49. Nor, the court concluded, did "the parties' anchoring of their sentencing arguments in the Guidelines [or] the district court's refusal to grant the government's request for a high-end sentence" establish a reasonable probability of a lower sentence. J.A. 49.

SUMMARY OF ARGUMENT

On plain-error review under Federal Rule of Criminal Procedure 52(b), a party complaining of an error in the calculation of the advisory Guidelines range is not entitled to a presumption that the error affected substantial rights. Rather, the party must make the usual case-specific showing that the forfeited error had a reasonable probability of affecting the outcome.

A. As a general rule, a party who has forfeited a claim of error must carry the burden of showing that the error affected substantial rights by affecting the outcome of the proceeding. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The Court has held defendants to that burden for all errors that are capable of being assessed for harmlessness when the claim is preserved and the government must show that the error did *not* affect substantial rights under Federal Rule of Criminal Procedure 52(a).

Misapplications of the Sentencing Guidelines are such errors. Those errors were reviewed for harmlessness when the Guidelines were mandatory. *Williams* v. *United States*, 503 U.S. 193, 203 (1992). And even misapplications of the advisory Guidelines carrying constitutional implications can be harmless. *Peugh* v. *United States*, 133 S. Ct. 2072, 2088 n.8 (2013). A rebuttable presumption of prejudice that would favor a defendant who forfeited a claim of error would unsettle the established case-specific framework of Rule 52 by shifting the burden of persuasion back to the government despite the defendant's forfeiture—thereby erasing the main relevant difference between Rules 52(a) and 52(b). Although *Olano* reserved whether such a presumption could ever be employed, its analysis of the text of Rule 52 suggests that creation of a presumption (outside of cases where constitutional holdings recognize one) is not an appropriate implementation of the rule.

B. Assuming that such a non-constitutional presumption could be created, petitioner's arguments for a presumption of prejudice for Guidelines calculation errors lack merit. The proposed presumption is contrary to the general principle that appellate courts reviewing a closed record for harmlessness should do so based on the specific circumstances, without employing legal presumptions that normally would be used to aid the presentation of proof at trial. See *Shinseki* v. *Sanders*, 556 U.S. 396, 407 (2009) (citing *Kotteakos* v. *United States*, 328 U.S. 750, 760 (1946)). And an across-the-board presumption for all Guidelines errors would be unfounded as a practical matter. No one doubts that the Guidelines play a central role in structuring federal sentencing and that, "in gen-

eral, this system will steer courts to more within-Guidelines sentences." *Peugh*, 133 S. Ct. at 2084. But not all Guidelines errors are likely to have the same prejudicial effect, and a categorical rule would thus be empirically inaccurate. Reviewing courts are also fully capable of discerning prejudice in individual cases based on the nature and magnitude of the error at issue, and in light of other record information routinely developed in federal sentencing proceedings. Furthermore, preserving the rule that a party must show that a clear Guidelines error likely affected the outcome preserves the proper incentive of parties to make timely objections and focus their full attention on the matter when it is before the district court. A presumption of prejudice would erode that incentive. Accordingly, the Court should adhere to the normal rule calling for "case-specific application of judgment" by an appellate court, "based upon examination of the record." *Sanders*, 556 U.S. at 407.

C. Alternatively, petitioner contends that he is entitled to relief even absent a presumption of prejudice. That argument is not fairly encompassed by the question presented and would not necessarily resolve the case in his favor, because petitioner has not demonstrated that letting stand a sentence that is still within the Guidelines—and that would reflect the bottom of the range under an available criminal-history departure—would undermine the fairness or integrity of the proceedings. In any event, without the benefit of a presumption, petitioner cannot establish that the Guidelines error affected his substantial rights. Given that the Guidelines error changes the scoring but not the fact of his criminal history and that his sentence still falls within the correct range, it is not reasonably

probable that correction of the error would result in a lower sentence.

ARGUMENT

AN ERROR IN CALCULATING THE ADVISORY SENTENCING GUIDELINES RANGE SHOULD NOT BE PRESUMED TO AFFECT SUBSTANTIAL RIGHTS ON PLAIN-ERROR REVIEW

If a defendant in a criminal case forfeits a claim of error by failing to object at the time the error occurs, he may obtain relief on appeal only by satisfying the rigorous requirements of the plain-error standard set forth in Federal Rule of Criminal Procedure 52(b). That standard requires, among other things, that the error have "affect[ed] substantial rights." Fed. R. Crim. P. 52(b). In *United States* v. *Olano*, 507 U.S. 725 (1993), the Court held that a defendant seeking to satisfy that requirement "[n]ormally * * * must make a specific showing of prejudice," that is, a showing that the error "affected the outcome of the district court proceedings." *Id.* at 734-735. Although the Court mentioned the possibility that some errors could "be presumed prejudicial" under Rule 52(b), *id.* at 735, it declined to presume that the error in *Olano* was prejudicial and has not recognized any error as triggering a presumption of prejudice in the almost 25 years since.

Petitioner contends (Br. 21-53), however, that *Olano* and other decisions of this Court authorize courts of appeals to identify categories of errors as presumptively prejudicial and that a misapplication of the advisory Sentencing Guidelines falls within that category. This Court should reject those contentions. Errors in applying the Sentencing Guidelines have long been subject to harmless-error analysis when

timely raised, and they should be subject to Rule 52(b)'s usual case-specific prejudice analysis when forfeited.

A. To Obtain Relief Under Rule 52(b) For A Forfeited Claim Of Guidelines Error, A Defendant Must Show A Reasonable Probability That He Would Have Received A Lower Sentence

1. The Court's plain-error precedents have required a case-specific showing of prejudice for all non-structural errors

a. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other 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.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Rule 52(b)—the plain-error rule—"tempers the blow of a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by "provid[ing] a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court," *Olano*, 507 U.S. at 731. The rule thus strikes a "careful balanc[e]" between "our need to encourage all trial participants to seek a fair and accurate trial the first time around [and] our insistence that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982).

Rule 52(b) protects important values. It "serves to induce the timely raising of claims and objections, which gives the district court"—the court that "is ordinarily in the best position to determine the rele-

vant facts and adjudicate the dispute"—"the opportunity to consider and resolve" the objections. *Puckett* v. *United States*, 556 U.S. 129, 134 (2009); see *United States* v. *Vonn*, 535 U.S. 55, 73 (2002) ("[T]he value of finality requires defense counsel to be on his toes, not just the judge."); *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977) (contemporaneous-objection rule "encourages the result that [trial] proceedings be as free of error as possible"). It "reduce[s] wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004). And it diminishes opportunities for gamesmanship. See *Puckett*, 556 U.S. at 134; *Vonn*, 535 U.S. at 73; *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *Wainwright*, 433 U.S. at 89.

To achieve these objectives, Rule 52(b) imposes three "limitation[s] on appellate authority" to grant relief based on forfeited claims. *Olano*, 507 U.S. at 732. The rule states 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). In *Olano*, this Court held that, "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (brackets in original) (quoting *Olano*, 507 U.S. at 732). An appellant meets the first two of these prongs by showing an error that is clear at the time of the appeal, *Henderson* v. *United States*, 133 S. Ct. 1121, 1124-1125 (2013), and satisfies the third prong by showing a reasonable probability that, absent the error, the result of the proceeding would have been different.

See *Dominguez Benitez*, 542 U.S. at 81-82 (adopting the same standard for plain-error cases as for other "cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief" (citation omitted)). The reviewing court assesses the reasonable probability based on "the entire record." *Vonn*, 535 U.S. at 59, 68.

When all three of those requirements are satisfied, "the court of appeals has authority to order correction, but [it] is not required to do so." *Olano*, 507 U.S. at 735. Instead, a reviewing court "may * * * exercise its discretion to notice a forfeited error" only if a fourth condition is satisfied: "the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (brackets in original; citation omitted). This criterion "is meant to be applied on a case-specific and fact-intensive basis" that eschews "*per se*" rules. *Puckett*, 556 U.S. at 142 (citation omitted).

The Court has emphasized that "[m]eeting all four prongs" of the plain-error test "is difficult, 'as it should be.'" *Puckett*, 556 U.S. at 135 (quoting *Dominguez Benitez*, 542 U.S. at 83 n.9). And the Court "ha[s] repeatedly cautioned that '[a]ny unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice" and that "the creation of an unjustified exception to the Rule would be '[e]ven less appropriate.'" *Id.* at 135-136 (second and third brackets in original) (quoting *Young*, 470 U.S. at 15, and *Johnson*, 520 U.S. at 466).

b. The question presented here concerns the third of Rule 52(b)'s limitations—the requirement that an error "affect[] substantial rights."

i. In *Olano*, *supra*, the Court observed that Rule 52(b) uses "the same language" as the neighboring harmless-error provision applicable "[w]hen the defendant has made a timely objection to an error." 507 U.S. at 734. The Court explained that, when "Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record * * * to determine whether the error was prejudicial," which "in most cases" means that the error "must have affected the outcome of the district court proceedings." *Ibid.* "Rule 52(b)," the Court continued, "normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.* The Court explained that "[t]his burden shifting [wa]s dictated by a subtle but important difference in language" between Rule 52's two parts, with the harmless-error provision precluding relief "only if the error 'does *not* affect substantial rights'" and the plain-error rule "authori[zing] no remedy unless the error *does* 'affec[t] substantial rights.'" *Id.* at 734-735 (fourth set of brackets in original; citation omitted).

In describing the analysis applicable "in most cases," the Court in *Olano* stated that it "need not decide whether the phrase 'affect[s] substantial rights' is always synonymous with 'prejudicial.'" 507 U.S. at 735.[1] The Court thus reserved the question of whether "[t]here may be a special category of forfeited er-

[1] The Court in *Olano* quoted the word "affecting" from the version of Rule 52(b) then in effect. The current version of the rule uses the word "affects," but that change was "intended to be stylistic only." Pet. Br. 19 n.7 (quoting Fed. R. Crim. P. 52 advisory committee's note (2002) (Amendment)).

rors that can be corrected regardless of their effect on the outcome." *Ibid.* As petitioner observes (Br. 21), the Court has since suggested that this "special category" refers to the errors termed "structural" under the Court's precedents—that is, the small set of "errors that affect the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error." *United States* v. *Marcus*, 560 U.S. 258, 263 (2010) (brackets, citations, and internal quotation marks omitted); see *Puckett*, 556 U.S. at 140-141; *Johnson*, 520 U.S. at 468-469. "Errors of this kind include denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt." *United States* v. *Davila*, 133 S. Ct. 2139, 2149 (2013).

The Court in *Olano* concluded, however, that the error at issue in that case—the presence of alternate jurors during jury deliberations, in violation of Federal Rule of Criminal Procedure 24(c)—was not the kind of error that might "affec[t] substantial rights independent of prejudice." 507 U.S. at 737. The Court explained that it "generally ha[d] analyzed outside intrusions upon the jury for prejudicial impact" and that "reversal would be pointless" if the intrusion had resulted in "no harm." *Id.* at 738 (citation omitted).

The Court also declined to address whether there exists a class of "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735; see also *id.* at 739 (citing the jury-intrusion decisions in *Patton* v. *Yount*, 467 U.S. 1025 (1984) (potentially prejudicial pretrial publicity), and *Turner* v. *Louisiana*, 379 U.S. 466 (1965) (association of sequestered jurors with

deputy sheriffs who were witnesses at trial)). Instead, the Court concluded that the alternate-juror error did not warrant a presumption of prejudice even if one were possible. *Olano*, 507 U.S. at 740-741. The Court explained that, "[i]n theory," the presence of alternate jurors during jury deliberations might prejudice a defendant in two different ways: "because the alternates actually participated in the deliberations" or "because the alternates' presence exerted a 'chilling' effect on the regular jurors." *Id.* at 739. After finding no actual prejudice, the Court held that the court of appeals had incorrectly concluded that the Rule 24(c) violation was "inherently prejudicial." *Id.* at 740 (citation omitted). In so doing, the Court noted that the alternate jurors are assumed to have followed the district court's instruction that they not participate in the deliberations, *ibid.*, and it rejected the suggestion that "the mere presence of alternate jurors entailed a sufficient risk of 'chill' to justify a presumption of prejudice on that score." *Id.* at 741.

ii. Since *Olano*, the Court has not exempted any forfeited errors from the general rule that a defendant make a specific showing of prejudice to establish an effect on his substantial rights. The Court has instead required that particularized showing for a variety of "nonstructural error[s]," *Dominguez Benitez*, 542 U.S. at 82: violations of the Federal Rule of Criminal Procedure "meant to ensure that a guilty plea is knowing and voluntary," *Vonn*, 535 U.S. at 58; see *Dominguez Benitez*, 542 U.S. at 83; the government's breach of a plea agreement at sentencing, *Puckett*, 556 U.S. at 140-142; and jury-instruction errors in capital cases, *Jones* v. *United States*, 527 U.S. 373, 394-395 (1999), and where the error was claimed to be of con-

stitutional dimension, *Marcus*, 560 U.S. at 263-265 (error that could have caused jury to convict based on conduct not yet made criminal at the time). See also *Davila*, 133 S. Ct. at 2147-2150 (rejecting per se reversal for violating the prohibition on judicial participation in plea discussions in Fed. R. Crim. P. 11). And while the Court has continued to reserve the question whether "structural errors might affect substantial rights regardless of their actual impact on an appellant's trial," *Marcus*, 560 U.S. at 263 (brackets and internal quotation marks omitted); see *Puckett*, 556 U.S. at 140-141; *United States* v. *Cotton*, 535 U.S. 625, 632 (2002); *Johnson*, 520 U.S. at 468-469, it has never again suggested that some category of errors might be presumptively prejudicial under Rule 52(b).[2] Indeed, the most logical interpretation of *Olano* is that only those errors that might, in constitutional analysis, warrant a presumption of prejudice could be so treated under Rule 52(b). See 507 U.S. at 739 (citing *Yount*, *supra*, and *Turner*, *supra*). The possibility that courts could create such burden-shifting presumptions under Rule 52 itself would contradict *Olano*'s emphasis on the "important difference" between the two subparts of Rule 52, under which the burden is "shift[ed]" to the defendant under Rule 52(b) to show that a forfeited error affected his substantial rights. *Id.* at 734-735; see pp. 27-28, *infra*.[3]

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[2] The proper treatment of structural errors is not implicated here, because petitioner disclaims (Br. 21-22) any suggestion that a misapplication of the Sentencing Guidelines is a structural error.

[3] *Olano* itself did not have to resolve that question because the Court concluded that the error at issue there would not warrant a presumption of prejudice, assuming one could be recognized. 507 U.S. at 740-741; see pp. 19-20, *supra*.

The Court's subsequent decisions are consistent with that analysis. For example, in *Dominguez Benitez*, the Court reaffirmed that, outside of "certain structural errors" that "require[] reversal without regard to the mistake's effect on the proceeding," a party is entitled to "relief for error" under Rule 52 only if the error had "a prejudicial effect on the outcome of a judicial proceeding." 542 U.S. at 81. The Court stressed that "the burden of establishing entitlement to relief for plain error is on the defendant claiming it" and "should not be too easy" for defendants such as the respondent in that case, who sought to withdraw his guilty plea based on an unpreserved claim that the district court failed to give a warning required by Rule 11. *Id.* at 82. The Court therefore held that such a defendant "must show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83.

In *Puckett*, the Court held that a case-specific showing of prejudice is required for a forfeited claim that the government breached a plea agreement at sentencing, even though that error would have triggered automatic reversal on appeal had it been timely raised. 556 U.S. at 139-143. The Court explained that "breach of a plea deal is not a 'structural' error"—*i.e.*, an error that "affect[s] 'the framework within which the trial proceeds,'" *id.* at 140 (citation omitted)—and that it is no more difficult to assess the effect of "plea breaches at sentencing than" to assess the effect of "other procedural errors at sentencing, which are routinely subject to harmlessness review." *Id.* at 140-141 (citing *United States* v. *Teague*, 469 F.3d 205, 209-210 (1st Cir. 2006), which had held a misapplication of the career-offender guideline to be harmless error).

Because the error in *Puckett* was "*susceptible*, or * * * *amenable*, to review for harmlessness," the Court saw "no need to relieve the defendant of his usual burden of showing prejudice." *Id.* at 141.

In *Marcus*, the Court rejected a court of appeals rule under which defendants were entitled to relief on plain-error review if "any possibility" existed that they had been convicted based on conduct that had not yet been made criminal at the time of their actions. 560 U.S. at 263-266 (quoting and reversing *United States* v. *Marcus*, 538 F.3d 97, 102 (2d Cir. 2008)). In defending that rule, the defendant argued that the error was structural and that, in any event, it "should be presumed to be prejudicial especially because of the difficulty encountered by a defendant in being able to show he has suffered harm." Resp. Br. at 27, *Marcus*, *supra*, No. 08-1341 (Jan. 19, 2010); see *id.* at 32-33 (arguing, based on lower-court decisions involving denial of a defendant's right to allocute at sentencing, that "prejudice should be presumed if there is '*any possibility*' of a different outcome").[4]

The Court in *Marcus* declined to presume that the error satisfied the third and fourth prongs of plain-error review. It again noted "the possibility" that "structural errors[] might affect substantial rights regardless of their actual impact on an appellant's

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[4] In *Puckett*, the petitioner had likewise suggested that "a plea agreement breach is within the category of errors 'that should be presumed prejudicial,'" Pet. Br. at 25-26, *Puckett*, *supra*, No. 07-9712 (Nov. 17, 2008), and a supporting amicus made a similar argument. See Nat'l Ass'n of Criminal Def. Lawyers Amicus Br. at 14, *Puckett*, *supra* ("[E]ither there should be a presumption of prejudice when a plea agreement has been breached, or a reviewing court should not inquire into prejudice at all.").

trial." 560 U.S. at 263. But, the Court concluded, the error in *Marcus* was "'non-structural,'" and an appellate court could assess the "risk" to the defendant's rights created by the instructions, as it could with other non-structural errors in instructions. *Id.* at 263-264. The Court further observed that errors similar to the one in *Marcus* "come in various shapes and sizes," which means that "[t]he kind and degree of harm that such errors create can consequently vary." *Id.* at 265. Accordingly, the Court saw "no reason why this kind of error would automatically 'affect substantial rights' without a showing of individual prejudice." *Id.* at 264-265 (brackets omitted).

Most recently, in *Davila*, the Court rejected a court of appeals rule requiring automatic vacatur of a guilty plea for violations of Federal Rule of Criminal Procedure 11(c)(1), which bars judicial participation in plea discussions. 133 S. Ct. at 2143. The Court explained "that particular facts and circumstances matter," even if some serious violations of the rule would likely be prejudicial. *Id.* at 2149. The Court thus held that, whether conducting harmless- or plain-error review, an appellate court must "engage in [a] full-record assessment" to determine prejudice, *id.* at 2150—that is, "the impact of the error on the defendant's decision to plead guilty," *id.* at 2148.

2. Misapplications of the Guidelines are non-structural errors subject to a case-specific prejudice showing both when preserved and when forfeited

This Court's decisions thus establish two principles that suffice to resolve this case. First, when a non-structural error "come[s] in various shapes and sizes" and creates varying "degree[s] of harm," Rule 52(b)

requires the party that forfeited the claim of error to make "a showing of individual prejudice." *Marcus*, 560 U.S. at 265; see *Davila*, 133 S. Ct. at 2149-2150. Second, when a "procedural error[] at sentencing" is "amenable" to review for harmlessness, Rule 52(b) holds the defendant to his "usual burden of showing prejudice." *Puckett*, 556 U.S. at 141 (emphasis omitted). Both of those principles apply to misapplications of the Sentencing Guidelines.

a. Errors in applying the Guidelines "come in various shapes and sizes" and create varying "kind[s] and degree[s] of harm." See *Marcus*, 560 U.S. at 265. For example, an error may be of such numerical impact that a sentence the judge declared to be within the Guidelines now lies well above the correct advisory range. Another error, by contrast, might be minor enough that the correct and incorrect ranges overlap—the class of cases in which the Sentencing Commission itself recognized that the calculation "will not necessarily make a difference in the sentence that the court imposes." Sentencing Guidelines Ch. 1, Pt. A, intro. comment. 1, § 4(h), at 11 (2012). The error may be of a type that a reviewing court believes less likely to have affected the sentence because, for example, the error does not suggest that the sentencing judge misunderstood the underlying facts of the offense or their significance under the sentencing factors in 18 U.S.C. 3553(a). See *United States* v. *Zabielski*, 711 F.3d 381, 387-388 (3d Cir. 2013) (so concluding as to a two-level threat-of-death enhancement in a bank-robbery case). And, regardless of its nature, an error may be harmless simply because the record makes clear that the court would have imposed the same

sentence despite a lower advisory range. See Pet. Br. 44-45 n.18 (citing examples).

This Court's decision in *Peugh* v. *United States*, 133 S. Ct. 2072 (2013), confirms that the same principles hold true when the misapplication of the Guidelines has constitutional implications. In holding that the Ex Post Facto Clause applies to retrospective increases in the now-advisory Guidelines, the Court in *Peugh* concluded that an increase in a defendant's Guidelines range creates a significant risk that he will receive a higher sentence. *Id.* at 2083. *Peugh* also recognized, however, that the risk may not materialize in every case.[5] The Court thus explained that a district court's erroneous application of "newer, more punitive" Guidelines may be found harmless when "the record makes clear that" the same sentence would have been imposed "under the older, more lenient Guidelines." *Id.* at 2088 n.8 (citing *Chapman* v. *California*, 386 U.S. 18 (1967)).

b. The Court's precedents make equally clear that non-constitutional Sentencing Guidelines errors are procedural errors amenable to appellate review for prejudicial effect. See *Puckett*, 556 U.S. at 141 (citing with approval a court of appeals decision holding a misapplication of the career-offender guideline to be harmless error). Even when the Guidelines were mandatory, preserved claims that a district court had misapplied the Guidelines were subject to review for

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[5] One case decided after *Peugh* serves as an example. After the court of appeals reversed on plain-error review following *Peugh*, *United States* v. *Williams*, 742 F.3d 304, 306-307 (7th Cir. 2014), the district court reimposed the same above-Guidelines sentence despite the lower range. 09-cr-90 Docket entry No. 77 (N.D. Ind. Aug. 25, 2014) (reimposing 56-month sentence on relevant counts).

harmlessness under Rule 52(a), and a reviewing court could affirm a sentence if it "conclude[d], on the record as a whole, * * * that the error did not affect the district court's selection of the sentence imposed." *Williams* v. *United States*, 503 U.S. 193, 203 (1992); see *Koon* v. *United States*, 518 U.S. 81, 113 (1996). Petitioner does not dispute that the same harmless-error rule applies to the now advisory Guidelines. See Pet. Br. 44 & n.18; see also *Puckett*, 556 U.S. at 141. As a result, his Guidelines-misapplication claim should be subject to the normal case-specific prejudice analysis under Rule 52, with the only difference being that petitioner, not the government, bears the burden of persuasion under Rule 52(b). *Olano*, 507 U.S. at 734; see *Vonn*, 535 U.S. at 62-63 (on plain-error review, "the tables are turned" and the defendant must show an effect on substantial rights).

Petitioner's proposed presumption of prejudice, however, would shift the burden right back to the government. See *Black's Law Dictionary* 1376 (10th ed. 2014) ("A presumption shifts the burden of production or persuasion to the opposing party."); 2 Kenneth S. Brown et al., *McCormick on Evidence* § 343, at 681 (7th ed. 2013) ("A presumption shifts the burden of producing evidence, and may assign the burden of persuasion as well."); cf. *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932) ("A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof."). The presumption would thus eliminate what the Court has described as the "main difference" between the substantial-rights analyses called for by Rules 52(a) and (b), *Dominguez Benitez*, 542 U.S. at 82 n.8, and with it, a principal incentive for defendants to lodge contemporaneous objections to

the district court's Guidelines calculations. See *Vonn*, 535 U.S. at 63 (explaining that, if a defendant has "a right to subject the [g]overnment to the burden of demonstrating harmlessness," then he "loses nothing by failing to object to obvious * * * error when it occurs").

c. As the Court's decision in *Puckett* illustrates, the proposed presumption would also lead to an unjustified distinction in plain-error analysis depending on the reason that a defendant is subject to an erroneously high Guidelines range. The defendant in *Puckett* argued that the government had breached the plea agreement by failing to recommend a three-level reduction in the Guidelines offense level, including a one-level reduction that the sentencing judge cannot grant absent a government motion. 556 U.S. at 131-133; see Sentencing Guidelines § 3E1.1(b). This Court held that the defendant had to carry his "usual burden" of making a case-specific showing of prejudice, 556 U.S. at 141, and that "the 'outcome' he must show to have been affected is his sentence." *Id.* at 142 n.4. If petitioner's position were adopted, however, a defendant subject to a higher advisory range because the judge erred in construing the Guidelines would be entitled to a presumption of prejudice, whereas a defendant subject to a higher range because the government breached a Guidelines-related promise in a plea agreement—for example, to move for an offense-level reduction under Section 3E1.1(b) or for a substantial-assistance departure under Section 5K1.1—would be held to "his usual burden of showing prejudice." *Id.* at 141. Nothing in logic or this Court's precedents supports that disparate treatment.

B. Petitioner's Arguments For A Presumption of Prejudice Lack Merit

Although acknowledging that the Court has never found an error to be presumptively prejudicial for purposes of Rule 52(b), petitioner contends that a "rebuttable presumption of harm" is appropriate for errors in applying the Sentencing Guidelines because, he claims, "the 'natural effect'" of such errors is to have a likely effect on the outcome and, given the nature of the error, defendants will find it difficult to establish case-specific prejudice. Pet. Br. 26-43 (capitalization altered). Those contentions lack merit.

1. This Court's precedents do not support a category-wide presumption of prejudice based on an error's natural effect

a. As petitioner appears to recognize (Br. 26-27), adopting presumptions about the prejudicial effect of "particular class[es] of error[s]" runs contrary to general principles of harmless-error review. This Court has "previously 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* v. *United States*, 328 U.S. 750, 760 (1946)). The Court has instead construed the general federal harmless-error statute applicable to civil and criminal cases—which speaks of an error's effect on "substantial rights," 28 U.S.C. 2111—"as expressing a congressional preference for determining 'harmless error' without the use of presumptions." *Sanders*, 556 U.S. at 407-408. That preference, the Court has noted, aligns with Chief Justice Roger Traynor's admonition that appellate courts

reviewing a closed record for an error's effect upon the judgment "must do so without benefit of such aids as presumptions * * * that expedite fact-finding at the trial." Roger Traynor, *The Riddle of Harmless Error* 26 (1970) (*Traynor*); see *O'Neal* v. *McAninch*, 513 U.S. 432, 437 (1995). Chief Justice Traynor explained that those aids are "unsuited" to appellate review for harmlessness, *Traynor* 26, because at that stage the parties are not producing new evidence, but are "marshaling [existing] facts and evidence" to explain "why the erroneous ruling caused" (or did not cause) "harm." *Sanders*, 556 U.S. at 410; cf. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 359 n.45 (1977) (explaining that, at the trial stage, "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof").

b. Petitioner nevertheless contends (Br. 27) that the Court's decision in *Kotteakos*, *supra*, when "viewed through the prism of" a "qualification[]" in *Sanders*, 556 U.S. at 411, authorizes courts of appeals conducting plain-error review to adopt a "presumption of harm * * * based upon empirical evidence and experience that the 'natural effect' of a particular type of error is to affect substantial rights." Pet. Br. 27. Both of those decisions, however, weigh strongly against appellate court authority to adopt category-wide presumptions of prejudice under Rule 52(b).

i. The question in *Kotteakos* was whether a variance between the indictment and the evidence at the defendants' trial on a conspiracy charge had caused them "substantial prejudice." 328 U.S. at 752. In answering that question, the Court explained that it

had held that the same type of error in an earlier conspiracy case did not "'affect the substantial rights' of the accused," as required to reverse a conviction under the then-governing harmless-error statute, 28 U.S.C. 391. *Kotteakos*, 328 U.S. at 757 (quoting *Berger* v. *United States*, 295 U.S. 78, 82 (1935)). But the Court concluded that the distinct factual circumstances in *Kotteakos*—including the number of conspiracies proved and defendants involved, *id.* at 766, 772—made it "highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 776.

In describing its approach, the Court noted that the legislative history of the harmless-error statute stated that the burden of establishing (or disproving) an effect on substantial rights would vary depending on whether the error was "technical" or whether "its natural effect [wa]s to prejudice a litigant's substantial rights." *Kotteakos*, 328 U.S. at 760 (quoting H.R. Rep. No. 913, 65th Cong., 3d Sess. 1 (1919)). The Court did not, however, construe that language as licensing courts to adopt "presumptions" based on the type of legal error at issue. *Id.* at 765. To the contrary, the Court explained that the distinction intended by that language was "an injunction against attempting to generalize broadly, by presumption or otherwise," and that "[t]he 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*." *Id.* at 765-766 (emphasis added). The case-specific nature of the inquiry was what permitted the Court to conclude that the same type of error deemed harmless in *Berger* was prejudicial in the case before it. *Id.* at 766. And it is

why the Court has since understood *Kotteakos* to have "flatly rejected *per se* rules regarding particular errors." *United States* v. *Lane*, 474 U.S. 438, 448 (1986); see *id.* at 463 & n.6 (Brennan, J., concurring in part and dissenting in part).[6]

ii. The Court's decision in *Sanders*, *supra*, similarly provides no support for the creation of presumptions of harmfulness. In that case, the Court rejected a Federal Circuit rule requiring the Court of Appeals for Veterans Claims (Veterans Court) to presume that the denial of required notice to disability claimants was "prejudicial" and mandated reversal unless the United States Department of Veterans Affairs (VA) could "show that the error did not affect the essential fairness of the adjudication." 556 U.S. at 404 (quoting and reversing *Sanders* v. *Nicholson*, 487 F.3d 881, 889 (2007)). The Court faulted the Federal Circuit's framework for being "complex, rigid, and mandatory," *id.* at 407, and explained that it both "impose[d] an unreasonable evidentiary burden upon the VA" and shifted to the VA "the burden of showing that an er-

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[6] *Kotteakos* is also a particularly weak basis for establishing a presumption in a plain-error case, because the Court there applied a harmless-error statute that, unlike the later-enacted Rule 52(a), did not have a plain-error counterpart. Cf. *Kotteakos*, 328 U.S. at 757 n.9 (noting that Rule 52 had taken effect after the trial in that case). The Court therefore did not consider a provision that distinguished between preserved and forfeited error precisely by shifting the burden of persuasion to the party who forfeited the error below. Nor did it address how forfeiture of a claim of error affected the "substantial rights" analysis. Accordingly, the references in *Kotteakos* to the parties' burdens under the former harmless-error statute should have no implications for a plain-error case under Rule 52(b).

ror" was harmless—an inversion of the "ordinary" burdens in a civil case. *Id.* at 408-409.

Petitioner's proposed presumption suffers from some of the same flaws. As explained above, pp. 27-28, *supra*, the presumption would invert the allocation of the burden of persuasion "dictated by" the text of Rule 52. *Olano*, 507 U.S. at 734. It would thus require the government not simply to identify "parts of the record to counter any ostensible showing of prejudice the defendant may make," *Vonn*, 535 U.S. at 68, but to show "with assurance that the use of an erroneous Guideline range had *no effect* on the district court's decision." Pet. Br. 47 (emphasis added). Moreover, the presumption would be "mandatory," *Sanders*, 556 U.S. at 407, in that it would apply whatever the nature or magnitude of the Guidelines error and without regard to whether the district court ultimately imposed a within-Guidelines sentence. See Pet. Cert. Reply Br. 5 ("[P]etitioner is arguing for such a presumption *whenever* a defendant is sentenced under the incorrect Guideline range."). And, while petitioner emphasizes (Br. 26, 43) that his presumption would be "rebuttable," so too was the presumption rejected in *Sanders*.[7] See 556 U.S. at 407 (explaining that the rule required reversal "unless the VA" made one of two showings); see also *Nicholson*, 487 F.3d at 891 (holding that notice errors "should be presumed prejudicial" and that "[t]he VA has the burden of rebutting this presumption"). That pre-

[7] The Court's statement in *Sanders* that the presumption there was "mandatory," 556 U.S. at 407, did not mean, as petitioner appears to suggest (Br. 27, 43), that it was "conclusive" or "irrebutable." A presumption can be both "mandatory" and "rebuttable." Cf. *Francis* v. *Franklin*, 471 U.S. 307, 314 n.2 (1985).

sumption, the Court concluded, contributed to a framework that "increase[d] the likelihood of reversal in cases where, in fact, the error is harmless," and thus "diminishe[d] the public's confidence in the fair and effective operation of the judicial system." *Sanders*, 556 U.S. at 409.

Petitioner relies on the statement in *Sanders* "that courts may sometimes make empirically based generalizations about what kinds of errors are likely, as a factual matter, to prove harmful," and "might properly influence * * * future determinations" "by drawing upon 'experience' that reveals" the "natural effect" of such errors. Pet. Br. 27 (quoting 556 U.S. at 411, and citing *Kotteakos*, 328 U.S. at 760-761). The Court made that statement, however, in reserving the question of whether the Veterans Court—the specialized Article I court with "exclusive jurisdiction" over the class of disability claims, *Sanders*, 556 U.S. at 412—could itself adopt a presumption that shifted to the VA the burden of disproving prejudice for a single class of "notice errors." *Id.* at 411. That discussion does not suggest that federal courts of appeals reviewing criminal convictions may adopt presumptions that principally serve to relieve defendants of a burden "dictated by" the text of Rule 52. See *Olano*, 507 U.S. at 734.[8]

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[8] The presumption's incompatibility with the text of Rule 52 distinguishes this case from *Rita* v. *United States*, 551 U.S. 338 (2007), which held that courts of appeals may presume that a sentence within a properly calculated Guidelines range is reasonable. The Court in *Rita* interpreted not a statute or rule, but the standard of review that the Court itself had announced in *United States* v. *Booker*, 543 U.S. 220, 261-263 (2005). See 551 U.S. at 341. And the Court emphasized that the presumption at issue did not "hav[e] independent legal effect," *id.* at 350, because it did not

c. Petitioner proposes (Br. 27, 38) that courts of appeals determine the "natural effect" of a type of error based on "empirical evidence" and "experience." The courts of appeals to adopt a presumption of prejudice for Guidelines errors, however, have not done so based on those criteria. Rather, they have reasoned that every Guidelines misapplication risks affecting the sentence imposed because the "very *raison d'être*" of the Guidelines is to "affect sentencing." *Id.* at 37 (quoting *United States* v. *Knight*, 266 F.3d 203, 207 (3d Cir. 2001)); see *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014). That rationale is flawed. As the Court explained in *Puckett*, 556 U.S. at 142, any error can be "recast[]" in that manner. Plea-colloquy errors can be recast as violations of a rule whose very purpose is "to ensure that a guilty plea is knowing and voluntary," *Vonn*, 535 U.S. at 58, and errors in retaining alternate jurors described as violations of a rule whose very purpose is "to protect the jury's deliberations from improper influence," *Olano*, 507 U.S. at 738. But this Court has required defendants who forfeited those claims of error to show case-specific prejudice, and it should do the same for Guidelines errors.

In any event, petitioner's natural-effects test is ill-suited for determining classes of errors that could conceivably be deemed presumptively prejudicial under Rule 52(b), as the class of sentencing errors at issue in this case demonstrates. In the wake of the Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), for example, a court of appeals assessing the "natural effect" of erroneously treating the Guide-

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"insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case," *id.* at 347.

lines as mandatory would have had no relevant data to consult because district courts had just begun sentencing under advisory Guidelines. And even now, with a body of judicial experience and data on advisory Guidelines sentencing, empirical evidence still provides an unreliable and shifting basis for crafting legal presumptions that may long outlive empirical generalizations thought true at the time.

Petitioner relies (Br. 34-35) on an updated set of the national sentencing statistics considered in *Peugh* and a chart summarizing the results of plain-error remands in cases involving overlapping ranges. The Sentencing Commission data indicate—and the government does not dispute—that the Guidelines continue to play a central role in federal sentencing, as they must in a system that treats them as the "starting point" in every sentencing. See *Peugh*, 133 S. Ct. at 2083; *id.* at 2084 (2011 version of that data indicated that the Guidelines were "hav[ing] the intended effect of influencing the sentences imposed by judges"). Petitioner's "anecdotal[]" evidence (Br. 35 n.14), however, adds little to that general proposition. The raw fact that a sentence changed under a different range does not indicate whether that change was attributable—in whole, in part, or not at all—to the new range. In several of petitioner's cases, for example, the defendant was originally sentenced under the mandatory Guidelines but resentenced after *Booker* had rendered the Guidelines advisory.[9] The defendant in at least one other case submitted on remand evidence of post-sentencing rehabilitation, as permitted under *Pepper*

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[9] *E.g.*, *United States* v. *Irvin*, 369 F.3d 284 (3d Cir. 2004); *United States* v. *Davis*, 397 F.3d 340 (6th Cir. 2005); *United States* v. *Oddo*, 133 Fed. Appx. 632 (11th Cir. 2005).

v. *United States*, 562 U.S. 476 (2011).[10] In still other cases, the change in the range was substantial enough that the court would have had to vary (or depart, for pre-*Booker* cases) above the Guidelines to impose the original sentence.[11] And, of course, petitioner's survey does not account for the cases in which appellate courts have concluded that a lower sentence was not reasonably likely under a lower range, *e.g.*, *United States* v. *Ault*, 598 F.3d 1039, 1042-1043 (8th Cir. 2010), or that a Guidelines error was harmless because it would *not* result in a different sentence, see Pet. Br. 44 n.18 (citing some such cases). The empirical evidence in this case thus sheds little reliable light on the "natural effect" of Guidelines errors as a category.

As a practical matter, then, much of the work in petitioner's test is performed by his second criterion: appellate courts' "experience" (Br. 27, 38) with different types of errors. But petitioner has not shown that this experiential factor can be applied in a consistent fashion. To the contrary, errors that some courts of appeals have deemed presumptively prejudicial have generated judicial controversy or open conflict. For example, in the wake of *Booker*'s holding that mandatory Guidelines were unconstitutional, "a clear and deep multi-circuit conflict [developed] on the proper analysis of plain *Booker* error," including the availability of a presumption of prejudice. U.S. Br. at 19,

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[10] 11-cr-148 Docket entry No. 113, at 2-3, *United States* v. *Grandison* (W.D. Mo. July 23, 2015) (on remand from 781 F.3d 987 (8th Cir. 2015)).

[11] See, for example, three of the Fourth Circuit cases cited in petitioner's chart (Pet. Br. A-6)—*United States* v. *Sanson*, 85 Fed. Appx. 967 (2004); *United States* v. *Moreno*, 67 Fed. Appx. 161 (2003); and *United States* v. *Williams*, 25 Fed. Appx. 175 (2002).

Rodriguez v. *United States*, No. 04-1148 (May 20, 2005). And, although a number of courts have presumed prejudice from the denial of allocution at sentencing, see *United States* v. *Landeros-Lopez*, 615 F.3d 1260, 1264 n.4 (10th Cir. 2010) (collecting cases), that presumption has been questioned as unsound in light of this Court's recent precedents interpreting Rule 52(b). See *United States* v. *Noel*, 581 F.3d 490, 505-506 (7th Cir. 2009) (Easterbrook, C.J., concurring) (rejecting any presumption of prejudice), cert. denied, 562 U.S. 843 (2010); *United States* v. *Reyna*, 358 F.3d 344, 353-356 (5th Cir.) (en banc) (Jones, J., concurring) (same), cert. denied, 541 U.S. 1065 (2004).

Likewise, in the present context, although several courts have adopted a presumption of prejudice for at least some Guidelines errors (Pet. Br. 29-30), those courts differ on the specifics—in particular, whether the presumption applies in all cases or only in cases where a defendant is not sentenced within the overlap between the correct and incorrect ranges. Compare *United States* v. *Putnam*, No. 14-51238, 2015 WL 7694538, at *1 n.2 (5th Cir. Nov. 25, 2015) (noting overlapping-range rule), with *Knight*, 266 F.3d at 210 (3d Cir.) (rejecting that limitation); cf. *United States* v. *Butler*, 777 F.3d 382, 389 (7th Cir. 2015) (reaffirming that a "technical dispute" over which of two overlapping ranges applies can be left unresolved if the reviewing court can reasonably determine that the sentence would have been the same under either range (citation omitted)). That disagreement suggests that experience and intuition do not reliably support this Court's adoption of an across-the-board presumption, as opposed to the normal application of "case-

specific * * * judgment, based upon examination of the record." *Sanders*, 556 U.S. at 407.

2. A presumption is not warranted based on the asserted difficulty of proving case-specific prejudice

Contrary to petitioner's contention (Br. 38-43), a presumption of prejudice is not necessary because of any difficulty in establishing case-specific prejudice from a Guidelines error.

a. As an initial matter, the Court's decision in *Olano* demonstrates that the difficulty of proving prejudice would have to be, as petitioner puts it, "exceptional[]," before a presumption were appropriate. Pet. Br. 38 (quoting *United States* v. *Barnett*, 398 F.3d 516, 526-527 (6th Cir.), cert. dismissed, 545 U.S. 1163 (2005)). The Court in *Olano* explained that a defendant might point to two forms of prejudice arising from the error at issue there, which involved the presence of alternate jurors during deliberations: "the alternates actually participated in the deliberations," or their "presence exerted a 'chilling' effect on the regular jurors." 507 U.S. at 739. The Court recognized, however, that it was unclear that defendants would be able to establish such facts, because juror testimony about deliberations might be barred by Federal Rule of Evidence 606(b), see *id.* at 739-740; see also *Warger* v. *Shauers*, 135 S. Ct. 521, 524 (2014), and the Court had not decided "whether the courts of appeals have authority to remand for [evidentiary] hearings on plain-error review." *Olano*, 507 U.S. at 740. Notwithstanding those difficulties, the Court found no actual prejudice and declined to presume prejudice. *Id.* at 740-741; see *id.* at 742-743 (Kennedy, J., concurring) (acknowledging "these difficulties in proving prejudice," but concluding that "the operation

of Rule 52(b) does not permit a party to withhold an objection * * * and then to demand automatic reversal").

b. Petitioner argues (Br. 39-40) that defendants appealing Guidelines misapplications face such exceptional difficulties because a showing of prejudice depends on a comment by the sentencing judge and, in a "typical case" where the sentence is within the advisory Guidelines range, such a comment will be lacking because the judge is not legally required to give much explanation. Petitioner is mistaken.

A defendant's ability to establish a reasonable probability of a lower sentence does not necessarily depend on "a fortuitous comment by the sentencing judge." Pet. Br. 39 (quoting *Knight*, 266 F.3d at 207). The reviewing court will know, in every Guidelines misapplication case, the nature and magnitude of the error. That information may suggest that, despite the district court's selection of a particular sentence as justified under 18 U.S.C. 3553(a), the error is substantial enough and its impact significant enough that, absent other facts in the record, a reasonable probability exists that the judge would have imposed a different sentence with the correct range in mind. For example, the existing sentence might represent a significant upward variance from the correct range, and no facts might suggest that the court considered such a variance. Cf. *Gall* v. *United States*, 552 U.S. 38, 50 (2008) (finding it "uncontroversial that a major departure should be supported by a more significant justification than a minor one"). Or the Guidelines error may have led the court to over- or underemphasize relevant facts when selecting a sentence within the (incorrect) range. In such instances, de-

pending on the particular facts, "the circumstances of the case [may] make clear to the appellate judge that the ruling, if erroneous, was harmful." *Sanders*, 556 U.S. at 410.

Beyond the character of the Guidelines error, a reviewing court will have before it the array of information that is routinely developed during "the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 551 U.S. at 351. As explained above, pp. 2-3, *supra*, that procedure includes a PSR prepared by the Probation Office, the parties' objections, their resolution by the Probation Office, and eventually a determination by the district court. See Fed. R. Crim. P. 32(f)-(i). The Probation Office may also have recommended a variance or departure from the range that it calculates. See Fed. R. Crim. P. 32(d)(1)(E); cf. PSR ¶ 89 (section providing for such recommendation). The parties will often file sentencing memoranda responding to any such recommendation or proposing non-Guidelines sentences of their own. And, of course, the reviewing court will know whether the judge ultimately chose a within-range sentence, where in the range the sentence fell, and whether the judge structured any other aspect of the sentence to ensure a particular term of imprisonment. See, *e.g.*, *United States* v. *Mazarego-Salazar*, 590 Fed. Appx. 345, 350 (5th Cir. 2014) (judge's "careful * * * structuring" of a separate sentence made it "probable the [judge] would have sentenced [the defendant] differently under the correct Guidelines range"); *United States* v. *Valdez*, 726 F.3d 684, 698 (5th Cir. 2013) (court's decision to run sentences consecutively contributed to showing that Guidelines error was harmless). Parties can marshal all of that

information—as petitioner does here, Br. 42 n.17, 53-54—to establish (or refute) a likelihood of a different sentence under a different range.

Petitioner also errs in asserting (Br. 39) that the kind of comment providing insight into the sentencing judge's rationale will truly be "fortuitous" or rare. This Court's decision in *Rita*, on which petitioner relies, recognizes that even when judges are not obliged to say much, they will "often * * * speak at length to a defendant," a practice that "serve[s] a salutary purpose." 551 U.S. at 357. *Rita* further requires, as do the decisions of the courts of appeals, greater explanation when a judge rejects a party's non-frivolous request for a sentence outside the Guidelines range. *Ibid.*; see, *e.g.*, *United States* v. *Cantu-Ramirez*, 669 F.3d 619, 630 (5th Cir.) ("more [explanation] is required if the parties present legitimate reasons" for a non-Guidelines sentence), cert. denied, 132 S. Ct. 2759, and 133 S. Ct. 247 (2012); cf. *United States* v. *Poulin*, 745 F.3d 796, 800 (7th Cir. 2014) (applying circuit's rule that district court must address a defendant's "principal mitigating argument[s]"). Such requests are a routine part of an advisory Guidelines system in which district courts exercise broad "discretion at sentencing," *Peugh*, 133 S. Ct. at 2080, and may *not* presume that within-Guidelines sentences should be imposed. See *Nelson* v. *United States*, 555 U.S. 350, 352 (2009) (per curiam). Given that district courts impose variance sentences requiring greater explanation in almost a quarter of cases (Pet. Br. 34), have to explain their denials of variance requests in many others, and may choose to "speak at length" in still others, *Rita*, 551 U.S. at 357, it is hard to see why the "typical" federal sentencing

should be viewed as one in which the court will give "little or no explanation," Pet. Br. 39.[12]

For these reasons, demonstrating the prejudicial effect of a Guidelines error is no more difficult than in *Olano*, where the defendants faced potentially serious evidentiary hurdles. 507 U.S. at 740. It is no more difficult than in the context of a plea-colloquy error, where this Court has looked to comments that may not exist in every case and could therefore be dismissed as "fortuitous." See *Dominguez Benitez*, 542 U.S. at 84-85 (defendant's comments at a status conference and the sentencing hearing). And it is no harder than in other sentencing disputes where courts of appeals regularly discern prejudice (or its absence) by reviewing, "in typical appellate-court fashion," *Neder* v. *United States*, 527 U.S. 1, 19 (1999), the entire record. See, *e.g.*, *United States* v. *Sanchez*, 773 F.3d 389, 392-393 (2d Cir. 2014) (misapplication of a mandatory-minimum sentence); *United States* v. *Krul*, 774 F.3d 371, 382-383 (6th Cir. 2014) (Griffin, J., concurring in the judgment) (collecting cases in which courts found, depending on the facts, that sentencing error under *Tapia* v. *United States*, 131 S. Ct. 2382 (2013), either did or did not affect a defendant's substantial rights).

c. Even were petitioner correct about the need for and unlikelihood of finding a specific comment from the sentencing judge in the record, a presumption of prejudice would still be unwarranted. The principal

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[12] That the record in this case does not contain an explanation by the judge, see Pet. Br. 41-42, "does not mean it is categorically 'extraordinarily difficult' for defendant[s in Guidelines cases] to establish prejudice." *Barnett*, 398 F.3d at 537 (Boggs, C.J., concurring in part and dissenting in part).

effect of that presumption is to shift the burden to the government to show that the forfeited error was harmless. See pp. 27-28, *supra*. But assuming that the record in a "typical" forfeited-error case will not contain much evidence on that proposition, it will be hard for the government to carry its burden. Yet the defendant's failure to object would be the primary reason for the lack of evidence. That is because, had the defendant argued that a different range should apply, the judge could have addressed whether (or how) the other range would affect the sentence, thereby providing the evidence that might be needed to show that an error was harmless. See *Zabielski*, 711 F.3d at 389; *United States* v. *Abbas*, 560 F.3d 660, 666-667 (7th Cir. 2009). But without an objection, a judge would be less likely to address alternative ranges. The upshot of petitioner's presumption, therefore, is a rule that "makes it easier to reverse on plain-error review than on harmless-error review," *Noel*, 581 F.3d at 505 (Easterbrook, C.J., concurring), resulting in a windfall for the non-objecting defendant.

This Court's plain-error precedents do not countenance that result. Rather, those decisions make clear that placing "the risk of nonpersuasion" (Pet. Br. 26 n.10) on a forfeiting party is central to protecting the policies underlying Rule 52(b) and that the substantial-rights analysis under the rule therefore cannot devolve into "[w]hether the [g]overnment could have met its burden of showing the absence of prejudice" had the defendant timely objected. *Olano*, 507 U.S. at 741; see *id.* at 742-743 (Kennedy, J., concurring).

3. The policies underlying the plain-error rule weigh strongly against petitioner's proposed presumption

Petitioner contends (Br. 43-53) that a presumption of prejudice will not compromise the policies underlying the plain-error rule and serves salutary purposes. He is mistaken.

a. As explained above, pp. 15-17, *supra*, the plain-error rule reinforces the contemporaneous-objection requirement by providing a strong incentive for timely objections. Petitioner suggests (Br. 50-52) that his presumption does not undermine that interest because, even when defense counsel wants to argue for a variance sentence, it helps to start from a lower Guidelines range. But enforcing the plain-rule error encourages defense counsel to devote full attention to the potential complexities or debatable aspects of the Guidelines calculation at sentencing, which is the proper time for addressing them. Shifting the burden to the government on plain-error review can only weaken counsel's incentive to scrutinize the Probation Office's Guidelines calculations and make timely objections. See *Vonn*, 535 U.S. at 73.[13] Such objections are vital as a general matter. See *Puckett*, 556 U.S. at

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[13] Nothing in the Court's decision in *Henderson*, *supra*, is to the contrary. The Court there doubted that its interpretation of the second prong of the plain-error test would decrease incentives to object because any strategic advantage depended on contingent events—the law changing in a way favorable to the defendant between the time of trial and the time of appeal—and the defendant would still have to satisfy the third and fourth plain-error requirements. 133 S. Ct. at 1128-1129 (cited at Pet. Br. 51). The possibility of plain error in a Guidelines case does not depend on such contingent law-changing events, and the incentives to object provided by third-prong review are precisely what would be drawn into question by petitioner's proposed rule.

133-134. But they are particularly essential in the context of federal sentencing, where the Federal Rules of Criminal Procedure set forth a detailed scheme for presenting and resolving challenges to the PSR, see Fed. R. Crim. P. 32(f)-(i), the document that the district court normally first consults in making its Guidelines determinations. See *Rita*, 551 U.S. at 351; see also pp. 2-3, *supra*.

The asserted complexity of the Guidelines (Pet. Br. 52) makes the need to encourage timely objections all the greater. The type of error here—a miscalculation of a defendant's criminal history category—illustrates the point. Such errors involve determinations that the defendant is often best positioned to challenge. Yet those errors remain distressingly common; indeed, many of the recent Fifth Circuit decisions involving plain-error review in overlapping Guidelines cases feature criminal-history-calculation errors, including two other petitions for certiorari filed contemporaneously with this one. See *United States* v. *De La Torre-De La Torre*, 603 Fed. Appx. 301, 302, cert. denied, 135 S. Ct. 2892 (2015); *United States* v. *Garcia*, 596 Fed. Appx. 270, 272, cert. denied, 135 S. Ct. 2893 (2015).[14] This case thus underscores that, while the prosecutor and district court also failed to notice the errors in these cases, Pet. Br. 51, a case-specific prejudice requirement is necessary to ensure that "defense counsel [stays] on his toes, not just the judge." *Vonn*, 535 U.S. at 73.

b. Petitioner further contends (Br. 49-53) that a presumption is appropriate for these sentencing er-

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[14] See also, *e.g.*, *United States* v. *Blocker*, 612 F.3d 413, 415-417 (5th Cir.), cert. denied, 562 U.S. 1053 (2010); *United States* v. *Campo-Ramirez*, 379 Fed. Appx. 405, 407-410 (5th Cir. 2010).

rors because the costs of resentencing are "modest" in comparison to those resulting from reversal of a jury verdict after trial. This argument for relaxing Rule 52(b)'s strictures in sentencing cases rests on a dubious premise—*viz.*, that courts may hold a defendant to the normal plain-error rigors when the claimed error means the difference between liberty and incarceration, but should be more willing to grant relief that might shorten a duly-convicted defendant's term of imprisonment (or supervised release).

In any event, petitioner underestimates the costs involved. As the en banc Third Circuit recently explained, "[r]esentencing imposes a significant burden on district courts: not only do they have to find time in their busy dockets to revisit errors that could have been resolved with a contemporaneous objection at the original sentencing but they also have the burden of reconvening the parties involved, including the defendant, attorneys, witnesses, and law enforcement authorities." *United States* v. *Flores-Mejia*, 759 F.3d 253, 258 n.6 (2014). Petitioner suggests (Br. 49-50) that such costs could be minimized by having defendants waive their rights to allocute and appear at resentencing. See Fed. R. Crim. P. 32(i)(4)(A)(ii), 43(a)(3). But petitioner offers no reason to believe that defendants are likely to forgo those rights or the concomitant ability to develop evidence of post-sentencing rehabilitation, see *Pepper*, 562 U.S. at 481. Indeed, the government's review of the cases collected in petitioner's chart (Pet. Br. A-2 to A-15) indicates that resentencing hearings were held in all 53 of them.

Petitioner overlooks another significant cost of his rule—a second (or successive) appeal from the resentencing. At least 15 of the 53 cases in petitioner's

chart featured such appeals, see App. B, *infra*, and the case law contains numerous additional examples, see App. C, *infra*. Some of those decisions reveal yet another related cost: having to litigate the scope of a prior remand even in instances where the district court has reimposed the same sentence. See, *e.g.*, *United States* v. *Barnes*, 660 F.3d 1000 (7th Cir. 2011); cf. *Pepper*, 562 U.S. at 505 n.17 (noting authority of courts of appeals to "issu[e] limited remand orders").

Petitioner emphasizes (Br. 52-53) that his rule does not demand automatic reversal because courts retain "discretion under the fourth prong of plain-error review" not to remand. But his reliance on that constraint, too, may be illusory. Petitioner's principal lower-court authority held that Guidelines errors presumptively satisfy the fourth prong as well, *Sabillon-Umana*, 772 F.3d at 1334, even though that rule is in tension with this Court's instruction that "[t]he fourth prong is meant to be applied on a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142. While petitioner does not expressly urge that fourth-prong presumption, he acknowledges (Br. 53) that under his rule courts of appeals will exercise their discretion not to remand only in "unusual" cases. A significant number of the resulting reversals are bound to be "wasteful" ones, see *Dominguez Benitez*, 542 U.S. at 82. Petitioner's chart (Br. 35 n.14, A-2 to A-15) contains multiple examples of plain-error cases where the district court reimposed the same sentence despite a different range, and the same is true of cases involving preserved errors, see App. C, *infra*.[15]

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[15] The case that petitioner identifies (Br. 51) as requiring remand because of "a thoroughly botched sentencing," *United States* v. *Rushton*, 738 F.3d 854, 860 (7th Cir. 2013), provides a different

c. Petitioner's remaining arguments also do not support his proposed presumption. He suggests (Br. 46) that the presumption will actually be a cost-saver by shortening expensive prison sentences. Even putting aside the added costs discussed above, however, avoiding the monetary cost of incarceration is not even a proper ground for a sentencing judge to vary from the Guidelines in an individual case. See *United States* v. *Park*, 758 F.3d 193, 197-199 (2d Cir. 2014). It therefore should not be the basis for adopting a category-wide appellate presumption.

Finally, petitioner asserts (Pet. 46-48) that a preference for remands best respects "the primacy of the district court's role in sentencing." But enforcement of Rule 52(b)'s prejudice requirement honors that role by encouraging the timely objections that allow the district court to "correct or avoid the mistake so that it cannot possibly affect the" sentence that the court imposes. *Puckett*, 556 U.S. at 134. And although petitioner is correct that the district judge is in the best position to perform the sentencing calculus under Section 3553(a) in the first instance, that does not call into question reviewing courts' ability to apply the standards for prejudicial error that have long governed in the sentencing context. See, *e.g.*, *id.* at 141 (government breach of a plea agreement at sentencing); see also *Henderson*, 133 S. Ct. at 1130 (mentioning, in a plain-error case raising a sentencing error

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kind of example. On the defendant's appeal, the court of appeals noticed a Guidelines error that led to a higher advisory range on remand. *Id.* at 860-861. The district court, however, reimposed the same 96-month sentence. 12-cr-10037 Docket entry Nos. 40, 41 (C.D. Ill. Mar. 31, 2014) (Amended Judgment and Sealed Statement of Reasons).

under *Tapia*, that the defendant would have to show an effect on substantial rights).

C. Petitioner's Alternative Argument For Reversal Is Not Fairly Encompassed By The Question Presented And Lacks Merit

Petitioner argues in the alternative (Br. 42 n.17, 53-54) that he is entitled to relief under Rule 52(b) even absent a presumption of prejudice, "because the record shows at least a reasonable probability that the sentence would be lower under the correct Guideline range." That fact-bound argument is not "fairly included" in the question presented, Sup. Ct. R. 14.1(a); see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010), and, in any event, lacks merit.

1. The question in the petition asked only whether courts of appeals applying Rule 52(b) "should * * * presume" that a misapplication of the Sentencing Guidelines "affected the defendant's substantial rights." Pet. i. Having asked the Court to resolve that single legal question, petitioner did not develop in the petition any of the case-specific prejudice claims that he now presents; he mentioned them only in a footnote that summarized the arguments made to and rejected by the court of appeals. Pet. 7 n.2. That passing mention was insufficient to bring his argument before the Court. See *Wood*, 558 U.S. at 304 (even discussing in the text of a certiorari petition an issue not subsumed in the question presented does not bring that issue before the Court). It is also not the type of argument that the Court has reached in cases granted to resolve which legal standard applies in the first place. See *Fry* v. *Pliler*, 551 U.S. 112, 120-121 (2007) (where the Court granted review to resolve which of two harmless-error standards applied on

federal habeas review of a state conviction, petitioner's alternative argument that the court of appeals "misapplied [the more demanding] standard in this particular case" was "not fairly encompassed within the question presented").

Addressing petitioner's case-specific prejudice argument is also inappropriate here because it would not resolve whether petitioner is entitled to relief under the fourth prong on the plain-error test, which vests appellate courts with discretion to remedy an error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citation omitted). As the government argued in the court of appeals, the Guidelines error in this case does not rise to that level. Gov't C.A. Br. 20-22. In particular, the criminal-history scoring rules raised for the first time on appeal assign petitioner no points for two of the five burglaries that he committed in 2008 and 2009, see Pet. Br. 8, leaving him a single point below the criminal history category applied by the district court. See Sentencing Guidelines, Ch. 5, Pt. A (Sent. Tbl.). But the Guidelines themselves recognize that the scoring rules at issue can "result in a criminal history score that underrepresents the seriousness of the defendant's criminal history," and thus provide for an upward departure in the circumstances of this case. *Id.* § 4A1.2, comment. (n.3); see *id.* § 4A1.3(a). Accordingly, petitioner's 77-month sentence aligns with the advice of the Sentencing Commission whether treated as a sentence toward the low end of the range calculated on appeal (70-87 months), or when viewed as the low end of a new range that the district court could reach by departing. Cf. *Rita*, 551 U.S. at 351. In that circumstance, leav-

ing the sentence intact does not undermine the fairness or integrity of judicial proceedings.

2. In any event, petitioner's fact-bound prejudice argument provides no basis for reversal. Petitioner contends (Br. 53-54) that a lower sentence is reasonably probable because the district court sentenced him at the low end of the incorrect range (77-96 months), rejected the government's request for a high-end sentence of 96 months, and did so at a hearing where the parties' arguments "focused on the Guideline imprisonment range." The court's choice of a 77-month sentence, however, did not necessarily signal an intent to sentence petitioner at the low end of any range that might be found applicable on appeal—for example, the much lower range that could apply if petitioner had argued and prevailed on a challenge to his 16-level crime-of-violence enhancement, the one objection he preserved at sentencing. Nor does the parties' gearing of their arguments toward the Guidelines range indicate that a lower sentence would be likely, since petitioner's 77-month sentence remains in the lower half of the corrected (overlapping) range of 70 to 87 months—precisely the scenario in which the Sentencing Commission recognized that the difference in ranges "will not necessarily make a difference in the sentence that the court imposes." Sentencing Guidelines Ch. 1, Pt. A, intro. comment. 1, § 4(h), at 11 (2012). In short, while petitioner has raised a possibility that he would receive a lower sentence under the corrected range, taking into account the specific circumstances of this case, he has not demonstrated the requisite reasonable probability.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. 28 U.S.C. 391 (1940) provides:

(Judicial Code, section 269.) New trials; harmless error.

All United States courts shall have power to grant new trials, in cases where there has been a trial by Jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

2. Fed R. Crim. P. Rule 32 provides in pertinent part:

Sentencing and Judgment

* * * * *

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

* * * * *

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

* * * * *

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the

presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

* * * * *

3. Fed. R. Crim. P. Rule 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

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

4. U.S. Sentencing Guidelines Ch. 1 provides in pertinent part:

Chapter One-Introduction, authority, and general application principles

* * * * *

4. The Guidelines' Resolution of Major Issues (Policy Statement)

* * * * *

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the

maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

* * * * *

5. U.S. Sentencing Guidelines 4A1.1 provides:

§ 4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this subsection.

(d) Add **2** points if the defendant committed the instant offense while under any

criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of **3** points for this subsection.

6. U.S. Sentencing Guidelines 4A1.2 provides in pertinent part:

§ 4A1.2. Definitions and Instructions for Computing Criminal History

(a) Prior Sentence

* * * * *

(2) 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 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).

For purposes of applying § 4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

* * * * *

Commentary

Application Notes

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3. *Upward Departure Provision.—Counting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were counted as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.*

7. U.S. Sentencing Guidelines, Ch. 5, Part A provides:

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

APPENDIX B

CASES FROM PETITIONER'S CHART (A-2 TO A-15) IN WHICH THE DEFENDANT OBTAINED REVERSAL OF THE SENTENCE AND APPEALED FROM RESENTENCING

1. *United States* v. *Altagracia Castillo*, 145 Fed. Appx. 683 (1st Cir. 2005) (remanding for resentencing); Judgment, *United States* v. *Altagracia Castillo*, No. 06-1908 (1st Cir. June 12, 2007) (affirming new sentence).

2. *United States* v. *Wallace*, 403 Fed. Appx. 868 (4th Cir. 2010) (remanding); *United States* v. *Wallace*, 477 Fed. Appx. 136 (4th Cir. 2012) (appeal from resentencing).

3. *United States* v. *Hardy*, 322 Fed. Appx. 298 (4th Cir. 2009) (remanding); *United States* v. *Hardy*, 401 Fed. Appx. 850 (4th Cir. 2010) (appeal from resentencing).

4. *United States* v. *Agyepong*, 312 Fed. Appx. 566 (4th Cir. 2009) (remanding); *United States* v. *Agyepong*, 388 Fed. Appx. 343 (4th Cir. 2010) (appeal from resentencing).

5. *United States* v. *Livingston*, 21 F.3d 426 (4th Cir. 1994) (Tbl.) (remanding); *United States* v. *Livingston*, 56 F.3d 62 (4th Cir. 1995) (Tbl.) (appeal from resentencing).

6. *United States* v. *Williams*, 742 F.3d 304 (7th Cir. 2014) (remanding); Order, *United States* v. *Williams*, No. 14-2916 (7th Cir. Mar. 6, 2015) (remanding again on appeal from resentencing).

7. *United States* v. *Avila*, 557 F.3d 809 (7th Cir. 2009) (remanding); *United States* v. *Avila*, 634 F.3d 958 (7th Cir. 2011) (appeal from resentencing).

8. *United States* v. *Garrett*, 528 F.3d 525 (7th Cir. 2008) (remanding); *United States* v. *Garrett*, 307 Fed. Appx. 10 (7th Cir. 2009) (appeal from resentencing).

9. *United States* v. *Plancarte-Vasquez*, 450 F.3d 848 (8th Cir. 2006) (remanding); *United States* v. *Plancarte-Vasquez*, 251 Fed. Appx. 377 (8th Cir. 2007) (appeal from resentencing).

10. *United States* v. *Bonilla-Guizar*, 729 F.3d 1179 (9th Cir. 2013) (remanding); *United States* v. *Bonilla-Guizar*, No. 14-10166 (9th Cir. Apr. 4, 2014) (appeal from resentencing pending); *United States* v. *Calixtro-Bustamante*, No. 14-10241 (9th Cir. May 13, 2014) (appeal from resentencing pending).

11. *United States* v. *Ysassi*, 282 Fed. Appx. 588 (9th Cir. 2008) (remanding); *United States* v. *Ysassi*, 350 Fed. Appx. 149 (9th Cir. 2009) (appeal from resentencing).

12. *United States* v. *Chapple*, 198 Fed. Appx. 745 (10th Cir. 2006) (remanding); *United States* v. *Chapple*, 251 Fed. Appx. 553 (10th Cir. 2007) (appeal from resentencing).

13. *United States* v. *Perez*, 572 Fed. Appx. 787 (11th Cir. 2014) (remanding); *United States* v. *Perez*, No. 15-11920, 2015 WL 8022407 (11th Cir. Dec. 7, 2015) (appeal from resentencing).

14. *United States* v. *Bryant*, 398 Fed. Appx. 561 (11th Cir. 2010) (remanding); *United States* v. *Bryant*, 472 Fed. Appx. 894 (11th Cir. 2012) (appeal from resentencing).

15. *United States* v. *Bennett*, 472 F.3d 825 (11th Cir. 2006) (remanding); *United States* v. *Bennett*, 265 Fed. Appx. 753 (11th Cir. 2008) (appeal from resentencing).

APPENDIX C

RECENT EXAMPLES OF NON-PLAIN-ERROR CASES IN WHICH REIMPOSITION OF THE SAME SENTENCE WAS AFFIRMED ON APPEAL

1. *United States* v. *Barnes*, 660 F.3d 1000, 1002, 1004-1005 (7th Cir. 2011) (affirming reimposition of 292-month sentence as to one defendant and 188-month sentence as to another).

2. *United States* v. *Butters*, 588 Fed. Appx. 12, 12-13 (2d Cir. 2014) (affirming reimposition of 70-month sentence); see *United States* v. *Butters*, 513 Fed. Appx. 103, 104, 106 (2d Cir. 2013) (original 70-month sentence reversed).

3. *United States* v. *Chivers*, 559 Fed. Appx. 307, 308 (5th Cir. 2014) (affirming reimposition of 57-month sentence); see *United States* v. *Chivers*, 488 Fed. Appx. 782, 784, 789-790 (5th Cir. 2012) (original 57-month sentence reversed).

4. *United States* v. *Hollander*, 249 Fed. Appx. 767, 768 (11th Cir. 2007) (affirming reimposition of 51-month sentence).

5. *United States* v. *Jones*, 701 F.3d 328, 329-331 (8th Cir. 2012) (affirming reimposition of 384-month sentence).

6. *United States* v. *Lewis*, 496 Fed. Appx. 425, 426, 428-429 (5th Cir. 2012) (affirming reimposition of 360-month sentence).

7. *United States* v. *Rodriguez*, No. 12-41314, 2013 WL 3727214, at *1 (5th Cir. July 17, 2013) (affirming reimposition of 324-month sentence).

8. *United States* v. *St. Vallier*, 488 Fed. Appx. 628, 631-632 (3d Cir. 2012) (affirming reimposition of 204-month sentence).

9. *United States* v. *Vazquez*, 588 Fed. Appx. 596, 597-598 (9th Cir. 2014) (affirming reimposition of 144-month sentence); see *United States* v. *Gonzalez Vazquez*, 719 F.3d 1086, 1087, 1092-1093 (9th Cir. 2013) (original 144-month sentence reversed).

10. *United States* v. *Walpole*, 599 Fed. Appx. 56, 57 (3d Cir.) (affirming reimposition of 600-month sentence), cert. denied, 136 S. Ct. 155 (2015); see *United States* v. *Walpole*, 543 Fed. Appx. 224, 230-231 (3d Cir. 2013) (original 600-month sentence reversed).