No. 11-257

# In the Supreme Court of the United States

MARK HENRY PANTLE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

At sentencing in this case, the district court determined that petitioner had two prior convictions for "crime[s] of violence" under Sentencing Guidelines §§ 2K2.1(a)(2) and 4B1.2(a), which resulted in an advisory Guidelines range of 168 to 210 months of imprisonment. The district court sentenced petitioner to the statutory maximum sentence of 120 months, but indicated that a 120-month sentence was unreasonably low. On appeal, petitioner challenged the enhancement and argued that his advisory Guidelines range should have been 70 to 87 months. The court of appeals held that, in light of the district court's explanation at sentencing, petitioner had not shown a reasonable probability that he would have received a lower sentence. The question presented is whether the court of appeals correctly concluded that petitioner has not established reversible plain error on the facts of this case.

**TABLE OF CONTENTS**



**TABLE OF AUTHORITIES**

Cases:

Cases—Continued: Page



Statutes, guidelines and rules:

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## OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a-12a) is reported at 637 F.3d 1172.

## JURISDICTION

The judgment of the court of appeals was entered on April 4, 2011. A petition for rehearing was denied on May 27, 2011 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on August 25, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was found guilty on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He

was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-12a.

1. At approximately 4:30 a.m. on November 28, 2008, two police officers in Pensacola, Florida—Deputies Michael Milstead and Jeff Swanson—responded to the report of an armed disturbance. At the scene, Michael Sprinkle told Deputy Milstead that he had been sitting in his car with his girlfriend when a man struck his vehicle, displayed a silver revolver, and then entered a nearby residence. Deputy Swanson approached the residence and found the door open. Petitioner was sitting inside, close to the doorway. Deputy Swanson asked petitioner to step outside, at which point Sprinkle and his girlfriend identified petitioner as the individual with the gun. Deputy Milstead then entered the residence, spoke with the owner, and recovered a silver revolver from between some couch cushions. A grand jury sitting in the Northern District of Florida indicted petitioner on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), and a jury found him guilty of that offense. See Presentence Investigation Report (PSR) paras. 1-9.

2. The PSR calculated petitioner's base offense level as 24 pursuant to Sentencing Guidelines §§ 2K2.1(a)(2) and 4B1.2(a), because petitioner had two prior felony convictions for "crime[s] of violence": a 1997 Alabama conviction for first-degree attempted assault and a 2006 Florida conviction for felony battery. See PSR paras. 17, 43, 56. After enhancements for possessing a stolen firearm (two levels) and doing so in connection with the felony offense of aggravated assault with a deadly weapon with the intent to kill (four levels), the recommended total offense level was 30. See PSR paras. 18-19, 23.

Petitioner did not file any objections to the PSR. With an offense level of 30 and a criminal history category of VI, the advisory Guidelines range was 168 to 210 months of imprisonment. See PSR para. 107. The statutory maximum sentence, however, was 120 months of imprisonment, rendering that the recommended Guidelines sentence. See PSR paras. 106-107; Pet. App. 2a-3a.

3. At sentencing, petitioner did not object to the PSR, although he did seek to clarify that he had possessed the firearm in connection with the felony offense of aggravated assault with a deadly weapon without the intent to kill (rather than with the intent to kill). See Pet. App. 14a-15a. The district court made that correction, but the four-level enhancement still applied. *Id.* at 15a. The district court then adopted the findings and calculations in the PSR, stated that it had considered the sentencing factors set forth in 18 U.S.C. 3553(a), and imposed the statutory maximum sentence of 120 months of imprisonment. Pet App. 16a.

In imposing sentence, the court explained that it was "not willing to find that this sentence is reasonable." Pet. App. 16a. The court noted, however, that the sentence was "the maximum permitted" and thus "it will serve the sentencing purpose and meet the general goals of punishment and hopefully deter anyone else from similar criminal conduct." *Ibid.* Petitioner then asked the court to order the Bureau of Prisons to place him in a substance-abuse treatment program. The court responded that it had "no objections to any program that the Bureau might put [petitioner] in," but the court stated that it "would object to any program that would grant [petitioner] any type of early release." *Id.* at 18a.

4. The court of appeals affirmed. Pet. App. 1a-12a. On appeal, petitioner claimed for the first time that the

district court had erred in setting his base offense level at 24 based on his prior Alabama and Florida convictions, which, he asserted, did not qualify as "crime[s] of violence" under the Guidelines. *Id.* at 3a. Applying plain-error review, the court of appeals declined to decide that question, because it held that petitioner had not established that any error had affected his substantial rights. *Id.* at 11a-12a. The court reasoned that, even though petitioner's advisory Guidelines range without the enhancement would have been 70 to 87 months, the district court still would have been permitted to vary upward to the 120-month sentence. *Ibid.* The court thus did "not know that [petitioner] would not have received the same sentence without the (assumed) error." *Id.* at 12a. The court explained, however, that it could "go further than that," because "the record actually establishes a reasonable probability that [petitioner] would not have received a lower sentence. After all, the district court expressly indicated that it believed the 120-month sentence was not long enough but could not go higher because that was the statutory maximum." *Ibid.* As a result, the court of appeals concluded, petitioner had "failed to carry his burden of showing a reasonable probability of a different result." *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 12-18) that the court of appeals misapplied the plain-error rule by declining to find that the district court's application of the incorrect Guidelines range presumptively affected his substantial rights. He further contends (Pet. 18-26) that the district court insufficiently made clear that it would have imposed the same sentence absent the asserted error. On the facts of this case, however, the court of appeals cor-

rectly concluded that the district court would have imposed the statutory maximum sentence, whatever the applicable Guidelines range. Petitioner therefore cannot show that any error affected his substantial rights, and further review of that fact-bound question is not warranted.

1. The district court, without objection from petitioner, applied an advisory Guidelines range of 168 to 210 months of imprisonment. It then sentenced petitioner to the statutory maximum sentence of 120 months of imprisonment, which was also the recommended sentence under the Guidelines. See PSR para. 107. On appeal, petitioner contended for the first time that his Guidelines range should have been 70 to 87 months of imprisonment. The court of appeals declined to decide that question. Instead, the court correctly concluded that petitioner had not established an effect on his substantial rights from the asserted error in determining the Guidelines range, because the record as a whole demonstrated that it was not reasonably probable that petitioner would obtain a different sentence if he were resentenced under the correct Guidelines range. See Pet. App. 11a-12a.

a. To obtain relief on a forfeited claim, petitioner must meet the plain-error standard. Fed. R. Crim. P. 52(b). To show reversible plain error, petitioner must demonstrate that (1) the district court committed an error; (2) the error was "plain," "clear," or "obvious"; (3) the error "affect[ed] [his] substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732-736 (1993) (citations omitted). This Court has explained that, "in most cases," the requirement of an effect on substantial rights

"means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Id.* at 734.

Under the plain-error standard of Rule 52(b), unlike the harmless-error standard of Rule 52(a), "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Olano*, 507 U.S. at 734. The defendant's burden on plain-error review is to show a reasonable probability that, absent the error, the result of the proceeding would have been different. See, *e.g.*, *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (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," which "requir[es] the showing of 'a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different'") (citation omitted; second brackets in original).

b. Applying the third prong of plain-error review in this case, the court of appeals correctly held that petitioner had not met his burden of showing that any error in the application of the Guidelines affected his substantial rights. See Pet. App. 11a-12a. Although the advisory Guidelines range forms the "starting point and the initial benchmark," district judges "may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in [18 U.S.C.] 3553(a)." *Pepper* v. *United States*, 131 S. Ct. 1229, 1241 (2011) (citation omitted); see *ibid.* ("[A]lthough a sentencing court must 'give respectful consideration to the Guidelines,'" this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), "'permits the [sentencing] court to tailor the sentence in light of other statutory

concerns as well.'") (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007)).

Here, the court of appeals reasoned that, even though petitioner's advisory Guidelines range without the enhancement would have been 70 to 87 months, the district court still would have been permitted to vary upward to the 120-month sentence. See Pet. App. 11a-12a. The court thus did "not know that [petitioner] would not have received the same sentence without the (assumed) error." *Id.* at 12a. The court explained, however, that it could "go further than that," because "the record actually establishes a reasonable probability that [petitioner] would not have received a lower sentence. After all, the district court expressly indicated that it believed the 120-month sentence was not long enough but could not go higher because that was the statutory maximum." *Ibid.* As a result, petitioner had "failed to carry his burden of showing a reasonable probability of a different result." *Ibid.*

This case therefore is not a suitable occasion to address the first question on which petitioner seeks certiorari (Pet. 12-18): *i.e.*, whether a defendant's substantial rights are presumptively affected when the sentence imposed exceeds the high end of the correctly calculated Guidelines range. See Pet. Supp. Br. 1. Normally in that circumstance, the sentence actually imposed would reflect a departure (or variance) from the correct range when the court has not necessarily disagreed with the Guidelines' advice.[*] Cf. 18 U.S.C. 3553(c)(2) (requiring the court to give a "specific reason" for a non-Guidelines

[*] Even then, on plain-error review, reversal is not automatic. See, *e.g.*, *United States* v. *Dickson*, 632 F.3d 186, 191 (5th Cir.), cert. denied, 131 S. Ct. 2947 (2011); *United States* v. *Davis*, 602 F.3d 643, 649-650 (5th Cir. 2010).

sentence). Here, however, the district court made clear that it *did* disagree with the Guidelines' advice (assuming an advisory Guidelines range of 70 to 87 months), because it felt that the statutory maximum sentence of 120 months was unreasonably low. The court of appeals therefore correctly concluded, on the facts of this case, that petitioner had failed to demonstrate a reasonable probability that his substantial rights were affected by any error in the computation of his advisory Guidelines range.

c. Petitioner claims (Pet. 13-17) that the decision below is in conflict with the decisions of eight other courts of appeals, but petitioner overstates both the importance and degree of any conflict. As an initial matter, to the extent that the courts of appeals conduct plain-error analysis differently in cases involving alleged Guidelines errors, this Court has not insisted on rigid procedural uniformity in appellate review of sentences post-*Booker*. See *Rita* v. *United States*, 551 U.S. 338, 354 (2007) (permitting, but not requiring, courts of appeals to apply "a presumption of reasonableness" to a within-Guidelines-range sentence). This Court has not held that any error in calculating a defendant's Guidelines range presumptively affects the defendant's substantial rights, and the courts of appeals are entitled to take different approaches in dealing with that question.

In any event, no court of appeals has held that an error in calculating a defendant's Guidelines range affects the defendant's substantial rights where the district court makes clear that it would have imposed the same sentence absent the error. Petitioner contends (Pet. 13-14) that the Second, Fourth, and Sixth Circuits have found Guidelines miscalculations to constitute plain error *per se*, but that is incorrect. In those cases, the

courts of appeals set aside sentences that in reasonable probability had been influenced by district courts' Guidelines errors. See *United States* v. *Folkes*, 622 F.3d 152, 158 (2d Cir. 2010) (vacating because "the district court's determination of an appropriate sentence was influenced by [an incorrect] Guidelines range" and "[t]he Government admits that the district court's error was plain"); *United States* v. *Slade*, 631 F.3d 185, 191-192 (4th Cir. 2011) (vacating where the district court sentenced at the upper end of the incorrectly calculated Guidelines range and did not indicate that it would have imposed the same sentence absent the error); *United States* v. *Baker*, 559 F.3d 443, 454 (6th Cir. 2009) (vacating because the district court noted that a within-Guidelines sentence was appropriate and imposed a sentence in the middle of the incorrect range). None of those courts of appeals held that a Guidelines miscalculation constitutes plain error even if the district court makes clear that the miscalculation did not affect the defendant's sentence.

Petitioner further contends (Pet. 14-16) that the Third, Fifth, Seventh, Ninth, and Tenth Circuits have held—at least in a case like this where the Guidelines ranges do not overlap—that a Guidelines miscalculation presumptively affects the defendant's rights. But what rebuts that presumption is evidence in the record that "the error 'did not affect the district court's selection of a particular sentence.'" *United States* v. *Meacham*, 567 F.3d 1184, 1191 (10th Cir. 2009) (quoting *United States* v. *Avila*, 557 F.3d 809, 822 (7th Cir. 2009)). Here, the court of appeals did not say only that petitioner could not demonstrate a substantial effect on his rights because "[a]lthough his [G]uidelines range would be different, he could still receive the same 120-month sen-

tence because [Section] 3553(a) would permit the district court to vary upward to that sentence." Pet. App. 11a-12a. Rather, the court of appeals further held that "the record actually establishes a reasonable probability that [petitioner] would not have received a lower sentence." *Id.* at 12a. Petitioner's asserted conflict thus reduces in this case to a fact-bound dispute about whether other courts of appeals would have found this record evidence sufficient to rebut any presumption that petitioner's substantial rights were affected. See pp. 11-14, *infra*.

d. Petitioner incorrectly suggests (Pet. 37-38) that a procedural sentencing error of the type at issue here—*i.e.*, an alleged misapplication of the Guidelines—is a structural error that requires reversal without any case-specific showing of prejudice. When a defendant has the opportunity but does not object to a purported Guidelines error, he should not obtain reversal without establishing prejudice from the error. No court of appeals has adopted a rule of automatic reversal. Rather, the courts of appeals have consistently held that where a district court explains its sentence but commits a procedural sentencing error in calculating the advisory Guidelines range, that error is prejudicial under plain-error review only if the defendant can demonstrate a reasonable probability that he would have received a more favorable sentence if not for the error. See, *e.g.*, *United States* v. *Woodard*, 638 F.3d 506, 509 (6th Cir. 2011); *United States* v. *Vazquez-Lebron*, 582 F.3d 443, 446 (3d Cir. 2009); *Meacham*, 567 F.3d at 1190-1191.

Petitioner contends in a supplemental brief that this Court should hold his case pending its resolution of, or consider his case in tandem with, three other cases that "present a related question: whether a sentencing court

commits plain error by applying an incorrect Guidelines range and imposing a sentence that is *within* the correct Guidelines range." Pet. Supp. Br. 1. This Court recently declined to hear those three cases (as well as a fourth case) presenting that question. See *Hudson* v. *United States*, cert. denied, No. 11-5325 (Nov. 14, 2011); *Pacheco-Garcia* v. *United States*, cert. denied, No. 10-9445 (Oct. 17, 2011); *Guerrero-Campos* v. *United States*, cert. denied, No. 10-9746 (Oct. 17, 2011); and *Wesevich* v. *United States*, cert. denied, No. 10-10340 (Oct. 17, 2011). In those cases, each of the petitioners could not show a reasonable probability that any Guidelines error had affected his sentence. Here, by contrast, petitioner's case is even weaker, because the record contains affirmative evidence that any Guidelines error did *not* affect petitioner's sentence.

2. Petitioner also challenges (Pet. 18-26) the court of appeals' conclusion that he failed to establish a reasonable probability that he would have received a lower sentence absent any Guidelines error. According to petitioner, the district court's statement at sentencing—*i.e.*, that the statutory maximum sentence was unreasonably low—was insufficient to support the court of appeals' conclusion. That fact-bound question does not warrant this Court's review, and in any event petitioner unduly minimizes the record evidence demonstrating that the district court would have imposed the same sentence. Nor is there a circuit conflict (Pet. 20-22), because petitioner simply points to fact-specific decisions in which courts of appeals found the particular record evidence before them to be either sufficient or insufficient to show that a defendant's substantial rights were affected.

a. The district court twice indicated that the statutory maximum sentence of 120 months was not harsh enough. In imposing sentence, the court explained that it was "not willing to find that this sentence is reasonable." Pet. App. 16a. The court noted, however, that the sentence was "the maximum permitted" and thus "it will serve the sentencing purpose and meet the general goals of punishment and hopefully deter anyone else from similar criminal conduct." *Ibid*. Petitioner then asked the court to order the Bureau of Prisons to place him in a substance-abuse treatment program. The court responded that it had "no objections to any program that the Bureau might put [petitioner] in," but the court stated that it "would object to any program that would grant [petitioner] any type of early release." *Id*. at 18a. The district court thus made clear that, in its view, petitioner should not be eligible for any program that would result in less time in prison. In light of the district court's statements at sentencing, petitioner cannot show a reasonable probability that he would receive a lower sentence if he were resentenced.

Nor is there any basis in the record—such as any reference to the Guidelines range—to conclude that the district court viewed the statutory maximum sentence as unreasonably low because of the higher Guidelines range. See *United States* v. *Davis*, 602 F.3d 643, 649 (5th Cir. 2010) ("Davis has cited no statements in the record to indicate that the court—which was required only to consider the advisory range indicated by the policy statements and was permitted to impose any sentence within the statutory maximum when determining the sentence—relied on the incorrect advisory range in determining his sentence."). Petitioner bears the burden of showing a reasonable probability that any error

affected his sentence, and he cannot point to any evidence in the record that would support such a showing.

b. Petitioner cites (Pet. 20-21) two decisions from the Fifth Circuit in which the district courts made lengthier or more pointed statements indicating that a higher sentence was warranted. See *United States* v. *Dickson*, 632 F.3d 186, 191 (2011); *Davis*, 602 F.3d at 648-649. In neither case, however, did the Fifth Circuit say that the length or tenor of the district court's statements was necessary to conclude that the district court would have imposed the same sentence. Petitioner also relies (Pet. 21) on the Ninth Circuit's decision in *United States* v. *Hammons*, 558 F.3d 1100 (2009), but in that case the district court offered "no explanation" for the sentence it imposed: it neither "discuss[ed] the applicable guideline range, nor did the district court address any of the applicable sentencing factors set forth in [Section] 3553 and [Section] 3583." *Id.* at 1104. The court of appeals thus had no basis at all "to discern the district court's intentions." *Id.* at 1106. Here, by contrast, the district court's statements at sentencing negate any reasonable probability that petitioner's sentence was affected by any Guidelines error.

Petitioner also points (Pet. 22) to statements in decisions from the Third Circuit, but he concedes that those cases involved questions of harmless error (where the government must show that the sentence *was not* affected by the asserted Guidelines error) rather than plain error (where the defendant must show a reasonable probability that the sentence *was* affected). And although petitioner cites (Pet. 21-22) decisions from the Seventh and Tenth Circuits, he concedes that those "courts have not commented extensively on the amount of explanation required." Pet. 22. It would be more ac-

curate to say that no court of appeals has squarely held that the type of statements that the district court made at sentencing in this case are insufficient to sustain the sentence. In the end, petitioner's citations do not bear out his claim of a conflict, and his argument amounts to a fact-bound dispute about this particular record that does not warrant this Court's review.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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