No. 08-968

In the Supreme Court of the United States

JAMES E. HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly concluded that petitioner's sentence did not rest on any "clear error" that could be corrected pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure.

2. Whether the district court committed reversible plain error by sentencing petitioner without expressly considering other gambling-conspiracy sentences from the Northern Division of the Eastern District of Tennessee.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B55) is reported at 529 F.3d 743. The memorandum and order of the district court (Pet. App. D1-D13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2008. A petition for rehearing was denied on October 30, 2008 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on January 26, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a guilty plea in the United States District Court for the Eastern District of Tennessee, peti-

tioner was convicted of one count of conspiracy to conduct an illegal gambling business involving a numbers lottery, in violation of 18 U.S.C. 371 and 1955, and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h) and 1957(a). The district court sentenced petitioner to 12 months and one day of imprisonment, to be followed by three years of supervised release. Pet. App. C1-C6. The court of appeals affirmed. *Id.* at B1-B55.

1. Beginning in 2000, petitioner was the leader of an illegal gambling business in Tennessee and elsewhere. Petitioner's operation mimicked a legal state lottery; winners were paid according to the outcome of legal, state-run lotteries in Illinois and Georgia, but petitioner's payouts were better than those for the state lotteries. Petitioner and his subordinates laundered the proceeds from the illegal business operation by commingling them with legitimate proceeds and purchasing real estate in petitioner's name and nominee names. Gov't C.A. Br. 4-6; Presentence Investigation Report ¶¶ 10, 13 (PSR).

2. Petitioner was charged with one count of conspiracy to conduct an illegal gambling business involving a numbers lottery, in violation of 18 U.S.C. 371 and 1955, and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h) and 1957(a). Pursuant to a plea agreement, petitioner pleaded guilty to the charges and agreed to forfeit money and property obtained as a result of his gambling operation. The government agreed to file a motion for a downward departure at sentencing based on petitioner's substantial assistance to the government. Pet. App. B3-B4.

a. The PSR calculated petitioner's advisory Sentencing Guidelines range as 15 to 21 months, based on a total

offense level of 14 and a criminal history category of I. PSR ¶ 75. Petitioner filed a statement that he had no objections to the PSR's calculations.

Both in a written memorandum and at the sentencing hearing, petitioner requested a sentence of probation, based on his strong family ties, steady employment, community involvement, and minimal criminal history. Def.'s Sent. Mem. 2-14; Sent. Tr. 6-10. The government filed its substantial-assistance motion and represented that any "lawful sentence" would be acceptable. *Id.* at 10.

At a hearing on July 19, 2006, petitioner was sentenced. The district court complimented petitioner on his "good" sentencing memorandum, and it granted the government's motion for a downward departure. Sent. Tr. 6, 14. The court denied the request for a sentence of probation, however, and it imposed a sentence of 12 months and one day, to be followed by three years of supervised release.[1] The court stated that the sentence reflected that petitioner was the "main man" in the criminal enterprise and that it would provide "adequate deterrence" and "just punishment" so that petitioner would "never do this again." *Id.* at 16-17.

At the conclusion of sentencing, the district court asked whether the parties "ha[d] any objection to what [the court] said in the sentence." Sent. Tr. 20. Petitioner made no objection.

b. On July 24, 2006, five days after sentencing but before a written judgment was entered, petitioner moved for reconsideration of the sentence on the ground

[1] At petitioner's request, the district court imposed a term of imprisonment of 12 months and one day, rather than 12 months, so that petitioner would be eligible to earn good-time credit toward a shorter sentence. Sent. Tr. 19.

that his sentence was greater than necessary to comply with the purposes of 18 U.S.C. 3553(a)(2). Petitioner alleged that the district court had not adequately considered his history of strong family ties and good works. In addition, petitioner argued that his sentence was disproportionately harsh compared to sentences imposed on other similarly situated defendants in that division of the court, and that the district court should have made that comparison pursuant to 18 U.S.C. 3553(a)(6), which requires that a sentencing court consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Petitioner's attorney averred in an affidavit that he had handled gambling cases in the district court since 1988 and that in that time, no defendant in the Northern (Knoxville) Division of the Eastern District of Tennessee who had pleaded guilty to running a gambling business, cooperated, and received a downward departure for substantial assistance had ever been sentenced to a term of imprisonment. Finally, petitioner represented that the government did not oppose his motion for reconsideration. Pet. App. B5-B7; Mem. in Supp. of Mot. for Reconsideration of Sent. Decision 3, 5-6.

On July 27, 2006, the district court granted petitioner's motion, vacated the judgment, and imposed a sentence of two years of probation. See Pet. App. B7-B8, D3-D4. The court stated that it had "previously considered" petitioner's age, family ties, good works, substantial assistance, and forfeiture of assets involved in the criminal conspiracy. Mem. & Order 2 (July 27, 2006). The court found "most compelling," however, the affidavit from petitioner's attorney, which raised an issue of disparity that the court had not considered. *Ibid.* The

court stated that it had "independently researched" the question and had confirmed petitioner's factual contention. Accordingly, "under these unique circumstances," the court concluded that a prison term was too harsh and greater than necessary to achieve the purposes of sentencing. *Ibid.* On July 31, 2006, the court issued a written judgment.

c. On August 3, 2006, the government moved to strike the new judgment on several grounds. First, the government pointed out that the court's authority to resentence petitioner under Rule 35(a) of the Federal Rules of Criminal Procedure was limited to correcting "a mathematical, technical, or other clear error." Second, the government noted that petitioner had incorrectly stated the government's position on his Rule 35(a) motion, which had led the court to act on the motion without giving the government an opportunity to respond.[2] Third, the government asserted that at least six cooperating gambling defendants had received prison sentences in the Southern (Chattanooga) Division of the Eastern District of Tennessee, and that petitioner's gambling operation had been "far larger" than these defendants' operations. Pet. App. B8; Mot. to Strike Am. J. 1-3; see also Pet. App. D7.

d. The district court granted the government's motion, vacated the July 31, 2006, judgment, and reimposed the original sentence of 12 months and one day, to be followed by three years of supervised release. Pet. App. C4, C6, D1-D13. The court acknowledged that it had

[2] Although the government did not initially make clear to petitioner's counsel that it would oppose the motion, it requested the opportunity to approve any statement of its position; petitioner then inadvertently filed the motion, without further consultation, representing that the government did not oppose reconsideration. Pet. App. D9-D10.

been "acutely aware that it was on legal ground of questionable firmness" when it modified petitioner's sentence. *Id.* at D11. The court stated that it had nonetheless modified the sentence in light of the government's apparent acquiescence and because the court had not considered sentencing disparities within the Northern Division of the district. *Ibid.* Indeed, the court thought that 18 U.S.C. 3553(a)(6) "*requires*" it to consider that form of sentencing disparity and that it had erred at sentencing by not doing so. *Id.* at D11-D12. The court explained, however, that such an error was not a sufficient basis to grant resentencing under the limitations of Rule 35(a). See *id.* at D13.

3. The court of appeals affirmed by a divided vote. Pet. App. B1-B55.

a. The court of appeals first concluded that the district court was correct to strike the amended judgment. The court noted that the district court had committed no "arithmetical" or "technical" error, so that the only basis under Rule 35(a) for changing the sentence would be some "other clear error." Pet. App. B12, B13 (quoting Fed. R. Crim. P. 35(a)). The court of appeals discerned no clear error.

Petitioner presented two possible bases for finding clear error in the original sentence. First, petitioner argued that the district court had inadequately considered petitioner's mitigating circumstances. The court of appeals concluded that that contention was without merit, because the district judge had expressly said in granting the Rule 35(a) motion that he *had* considered those circumstances. Pet. App. B18; see *id.* at B7.

Second, petitioner relied on the sentencing comparisons that he had submitted in an affidavit from his counsel along with the motion for reconsideration. The court

of appeals concluded that any failure to consider purported disparities within the Northern Division was not clear error. "[T]he sentence disparities issue had not been raised by [petitioner] at the time of sentencing and there was no reason to believe it was particularly relevant." Pet. App. B21. And the court concluded that the district court was not *required* by Section 3553(a)(6) to consider disparities within a single division of the district court: while "[t]he district judge, in his discretion, might have considered local disparities to be a relevant consideration if timely raised," *id.* at B23, Section 3553(a)(6) "is concerned with *national* disparities," *id.* at B21 (quoting *United States* v. *Simmons*, 501 F.3d 620, 623 (6th Cir. 2007)). Relying on this Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007), the court of appeals explained that the district court had properly considered the question of national disparity by correctly applying the advisory Sentencing Guidelines. Pet. App. B22-B23 (citing *Gall*, 128 S. Ct. at 599). Accordingly, the court of appeals concluded that the district court had not committed any clear error, and that there was no basis for resentencing petitioner under Rule 35(a).

b. The court of appeals also determined that the purported failure to consider local sentencing disparities at the original sentencing did not warrant reversal for procedural unreasonableness. The court explained that petitioner had not timely objected to the district court's failure to consider this information, so he was limited to seeking review for plain error. Pet. App. B26-B27. Under that standard, the court of appeals concluded, petitioner could not show that the district court had committed reversible plain error, for essentially the same reasons that petitioner could not show clear error under

Rule 35(a): the sentence was "not procedurally infirm because [the district judge] failed to consider an unasserted, non-mandatory [sentencing] factor." *Id.* at B28.

c. Finally, the court of appeals concluded that petitioner's below-Guidelines sentence was substantively reasonable under all the circumstances and that the district court had "reasonably weighed the totality of the circumstances in arriving at a sentence." Pet. App. B35; see *id.* at B30-B36.

d. Judge Clay dissented. Pet. App. B38-B55. He concluded that petitioner's Rule 35(a) motion had preserved his sentencing challenges for *de novo* review rather than plain-error review. *Id.* at B50-B53. Applying that less deferential standard, he concluded that the district court had not adequately considered petitioner's personal history or explained the reasoning behind the sentence. *Id.* at B44-B45. Second, he concluded that the court had also failed to consider the existence of sentencing disparities under Section 3553(a)(6). *Id.* at B46-B50. Third, Judge Clay thought that the district court's later-vacated order in response to petitioner's Rule 35(a) motion, granting petitioner's requested sentence of probation, had also been procedurally unreasonable. He contended that the district court should have entertained new arguments and explained the new sentence more fully. *Id.* at B49-B50.

ARGUMENT

Petitioner contends that the courts of appeals are divided over the meaning of the terms "other clear error" in Rule 35(a) and "sentencing disparities" in Section 3553(a)(6). There is no conflict on either issue meriting this Court's review, and in any event petitioner's case would not implicate any such conflict. Petitioner

did not preserve his procedural-reasonableness claim; he cannot obtain relief under any interpretation of Rule 35(a); and he cannot show plain error on appeal. Further review therefore is not warranted.

1. Petitioner contends (Pet. 12-19) that further review is warranted to resolve a circuit conflict over the standard for showing "clear error" under Rule 35(a). That contention lacks merit.

a. Under 18 U.S.C. 3582(c)(1)(B), a sentencing court may not modify a term of imprisonment once it has been imposed, except as expressly permitted by Rule 35(a) or by statute. Rule 35(a) provides that within seven days after sentencing, a district court may correct a sentence that resulted "from arithmetical, technical, or other clear error." That authority is "very narrow," as the Rule's drafters explained. Fed. R. Crim. P. 35(c) advisory committee's note (1991) (1991 Note) (explaining that "[t]he authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which *an obvious error or mistake* has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court") (emphasis added).[3] As the advisory committee explained, Rule 35(a) was not intended "to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence." *Ibid.* Nor was Rule 35(a) intended to "relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing." *Ibid.*

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[3] Rule 35(a) was originally Rule 35(c) but was redesignated in 2002. Fed. R. Crim. P. 35(a) advisory committee's note (2002).

b. Those principles make clear that the district court was correct in determining that it could not revisit petitioner's sentence pursuant to Rule 35(a). While petitioner contends that there is a "circuit split" over what constitutes "clear error" under Rule 35(a), Pet. 12, he identifies no substantive difference between the standards applied in the cases he cites. And he identifies *no* court of appeals that would permit resentencing on the grounds petitioner has advanced.

Here, the court of appeals explained that establishing "clear error" under Rule 35(a) requires showing that the error "obviously 'would have resulted in remand by this Court.'" Pet. App. B14 (quoting *United States* v. *Arroyo*, 434 F.3d 835, 838 (6th Cir. 2006)). As petitioner notes, the Eleventh Circuit applies a similar standard. See *United States* v. *Lett*, 483 F.3d 782, 788 (2007), cert. denied, 129 S. Ct. 31 (2008). Petitioner contends (Pet. 17) that *Lett* and the decision below are contrary to the law of several other circuits. This Court denied a petition for a writ of certiorari in *Lett* that made similar assertions based on many of the same cases. In fact, no other court of appeals has adopted a materially different standard of permissible Rule 35(a) relief.

For instance, in *United States* v. *Donoso*, 521 F.3d 144 (2008) (per curiam), the Second Circuit followed the advisory committee's admonition that Rule 35(a) permits post-sentencing correction by the district court only in instances of "obvious error or mistake" that "would almost certainly result in a remand of the case to the trial court for further action." *Id.* at 146 (quoting *United States* v. *Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1995)). Although the court of appeals recognized that it had not previously answered the precise question of law that was the basis of the revised sentence in that case—whether

a district court may impose a consecutive sentence under certain circumstances, *id.* at 147—the court proceeded to hold that the reasoning of one of its precedents "in a slightly different context" "compel[led] the conclusion" that the district court lacked the authority to impose such a consecutive sentence, *id.* at 148, 149. The Second Circuit reached that conclusion not only because the district court had "erred" in imposing the consecutive sentence, but "[f]urther, because, on appeal from that sentence, [the court of appeals] would 'almost certainly' have remanded" in light of circuit precedent. The court therefore held that the initial sentence constituted "clear error" subject to correction under Rule 35(a). *Id.* at 149. That certainty-of-remand standard is consistent with the rule applied in this case and in *Lett*.[4]

The First Circuit's decision in *United States* v. *Goldman*, 41 F.3d 785 (1994), cert. denied, 514 U.S. 1007 (1995), is even less helpful to petitioner. The district court in that case sentenced Goldman based upon the court's mistaken impression that he had no prior drug conviction when, "[i]n fact," he did (which made the maximum sentence life imprisonment). *Id.* at 789. The district court found that its error was "clear" and imposed a longer sentence, and Goldman did not appeal the obvi-

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[4] Petitioner also cites (Pet. 15) an earlier Second Circuit decision, *United States* v. *Waters*, 84 F.3d 86 (per curiam), cert. denied, 519 U.S. 905 (1996). Even without the subsequent clarification of circuit law in *Donoso*, the decision in *Waters* would not create a conflict: the court of appeals simply upheld the district court's determination that it "clear[ly]" did not consider a Sentencing Commission policy statement that "courts are required to consider" in sentencing. *Id.* at 90. Petitioner identifies no inconsistency between that standard and the decision below.

ousness of the error; he contested the changed sentence on other grounds. *Ibid.*[5]

As explained below, see pp. 16-17, *infra*, there was no error in this case at all. But even if the district court had erred by not examining Northern Division sentencing history at petitioner's hearing, that error was not *clear* error under any circuit's approach to Rule 35(a). Accordingly, this is not an appropriate case in which to examine how fully consistent the circuits' approaches are.

2. Petitioner also contends that the courts of appeals are divided on whether the sentencing factor set out in Section 3553(a)(6) involves consideration of local as well as nationwide sentencing disparities. This Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007), has substantially resolved any dispute over what *may* be considered within the scope of Section 3553(a)(6). Petitioner suggests that uniformity of sentences within a particular division *must* be considered at every sentencing proceeding. This case does not squarely present any such question, because petitioner failed to preserve it and cannot establish reversible plain error.

a. In *Gall*, this Court reaffirmed that reducing sentencing disparity is one of the principal considerations that the Sentencing Commission takes into account in formulating the advisory Sentencing Guidelines. See 128 S. Ct. at 599 ("[A]voidance of unwarranted disparities was clearly considered by the Sentencing Commis-

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[5] Petitioner also cites (Pet. 16) *United States* v. *Ellis*, 417 F.3d 931 (8th Cir. 2005), which held that a defendant could object to the mandatory Sentencing Guidelines in a Rule 35(a) motion, *id.* at 933; and *United States* v. *Mejia-Pimental*, 477 F.3d 1100 (9th Cir. 2007), which did not involve Rule 35(a) at all. Neither case is apposite, and neither furnishes evidence of a circuit conflict on the questions presented.

sion when setting the Guidelines ranges."); see also, *e.g.*, *Rita* v. *United States*, 551 U.S. 338, 354 (2007). The Commission's work necessarily considers sentencing disparity on a nationwide scale, and it plainly was that disparity that principally motivated the Sentencing Reform Act, including Section 3553. See, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 250, 252, 253, 255, 256, 267 (2005); *id.* at 292 (Stevens, J., dissenting in part). Accordingly, the Court stated, a district court "necessarily [has given] significant weight and consideration to the need to avoid unwarranted disparities" when the court has "correctly calculated and carefully reviewed the Guidelines range." *Gall*, 128 S. Ct. at 599.

The Court also confirmed in *Gall*, however, that a district court *may* consider both "unwarranted disparities" and "unwarranted *similarities*" on a more individualized level, as when considering whether co-defendants should receive similar sentences for the same basic offense. 128 S. Ct. at 600. In *Gall*, the district court concluded that one defendant had voluntarily withdrawn from the conspiracy and therefore warranted a less severe sentence than the co-defendants, and this Court confirmed that consideration of that fact was procedurally proper. See *ibid.*

This Court's decision in *Gall* substantially resolved any pre-existing debate over whether sub-national sentencing disparity *may* be considered in the sentencing analysis, but *Gall* also confirmed that a district court may act entirely reasonably if it does not do so. The advisory Guidelines themselves take into account the concern with disparity, and a district court "necessarily g[ives] significant weight and consideration" to the Section 3553(a)(6) factor when it "correctly calculate[s] and

carefully review[s] the Guidelines range." *Gall*, 128 S. Ct. at 599.

Consistent with *Gall* and the decisions of other courts of appeals, the decision below confirms that a district court *may* consider evidence of local disparities of the sort petitioner belatedly raised. See Pet. App. B23 ("The district judge, in his discretion, might have considered local disparities to be a relevant consideration if timely raised."); accord *United States* v. *Presley*, 547 F.3d 625, 632 (6th Cir. 2008) (confirming that a district court may in its discretion, but is not required to, consider disparity between co-defendants); *United States* v. *Wittig*, 528 F.3d 1280, 1285-1286 (10th Cir. 2008) (same), cert. denied, No. 08-779 (Apr. 20, 2009).

Most of the cases on which petitioner relies considered disparity among co-defendants before this Court clarified the law in *Gall*, or disparities that were justified because the defendants were not similarly situated. See, *e.g.*, *United States* v. *Boscarino*, 437 F.3d 634, 637-638 (7th Cir. 2006) (rejecting argument that giving lower sentence to defendant who pleaded guilty was an impermissible "disparity"), cert. denied, 127 S. Ct. 3041 (2007). The remainder considered the entirely distinct question whether a district court may rely on factors specific to a particular setting or jurisdiction in evaluating the seriousness of a crime, and concluded that courts can do so *notwithstanding* the resulting disparity between districts. See, *e.g.*, *United States* v. *Cavera*, 550 F.3d 180, 195 (2d Cir. 2008) (en banc), petition for cert. pending, No. 08-1081 (filed Feb. 23, 2009). None of these cases considers a factor like the one petitioner wished the district court to weigh: a purported disparity among sentences handed down not within a single State or a single federal district, but within a single *division*

of a single district. And petitioner identifies no post-*Gall* case holding that a district court commits procedural error—despite thoroughly considering the applicable Guidelines range—simply because the court does not also consider the question of intra-division disparity, even in the absence of any submission on the subject from either party.

b. Even if there were a conflict on the question whether failure to consider intra-district disparity is procedural error, this would be an inappropriate case in which to consider it, because petitioner cannot satisfy the standard of review necessary to obtain reversal.

The court of appeals correctly concluded that petitioner forfeited his procedural-error claim and is limited to seeking review for plain error. Petitioner does not challenge that holding, and it is correct.[6] When, as here, the district court invites the parties at the conclusion of

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[6] Petitioner does not argue in this Court (as Judge Clay contended in his dissent below, Pet. App. B50-B53) that his motion for relief under Rule 35(a) properly preserved the sentencing-disparity issue for *de novo* review on appeal. Any such argument would lack merit. Rule 35(a) was not intended to "relax any requirement that the parties state all objections to a sentence *at or before* the sentencing hearing." 1991 Note (emphasis added). Because Rule 35(a) requires a showing of clear error, it is not a vehicle for belatedly preserving issues so as to avoid the plain-error standard of review on appeal. The Eighth Circuit's decision in *Ellis*, on which Judge Clay relied, is inapposite. After *Blakely* v. *Washington*, 542 U.S. 296 (2004), but before *Booker*, Ellis filed a Rule 35(a) motion to challenge the application of mandatory Sentencing Guidelines; the Eighth Circuit held that after *Booker*, the application of mandatory Guidelines *was* "clear error," and it therefore remanded for resentencing under the advisory Guidelines. *Ellis*, 417 F.3d at 933-934. *Ellis* does not support the notion that a Rule 35(a) motion, even if it does *not* meet the "clear error" standard for relief under that Rule (as petitioner's does not), can still preserve for *de novo* review a claim not timely made at sentencing.

sentencing to raise any objections to the procedure by which it arrived at and explained the sentence, a party who fails to object is thereafter limited to plain-error review. Fed. R. Crim. P. 52(b). "[N]o court of appeals * * * has rejected this * * * approach to clarifying objections to a criminal sentence." *United States* v. *Vonner*, 516 F.3d 382, 391 (6th Cir.) (en banc), cert. denied, 129 S. Ct. 68 (2008). Indeed, courts of appeals have expressly applied that approach to claims of failure to consider Section 3553(a)(6). See, *e.g.*, *United States* v. *Barron*, 557 F.3d 866, 868 (8th Cir. 2009). And this Court has denied numerous petitions for writs of certiorari contending that plain-error review should not apply to procedural errors forfeited at sentencing. See, *e.g.*, *Gomez* v. *United States*, 129 S. Ct. 1616 (2009) (No. 08-7778); *Vasquez-Rodriguez* v. *United States*, 129 S. Ct. 1612 (2009) (No. 08-7046); *Vaughn* v. *United States*, 129 S. Ct. 998 (2009) (No. 08-6064); *Commodore* v. *United States*, 129 S. Ct. 487 (2008) (No. 07-11206).

Petitioner cannot establish that the district court committed reversible plain error by failing to consider intra-division sentencing disparity. First, as the court of appeals pointed out, neither Section 3553(a)(6) nor the decisions interpreting it require district courts to discuss the unwarranted-disparities factor in *every* case, including one in which it is neither raised by a party nor obviously relevant on the face of the record. See Pet. App. B20-B21. Petitioner would have to establish that failure to consider all forms of disparity—"within a district court, across districts, within and across circuits, and nationally," Pet. 26—is not only "error," but "plain" error. See *United States* v. *Olano*, 507 U.S. 725, 732 (1993). Petitioner cannot make that showing. Cf. *Gall*, 128 S. Ct. at 599 ("Had [a party] raised the issue, spe-

cific discussion of [another Section 3553(a) factor] might have been in order, but it was not incumbent on the District Judge to raise every conceivably relevant issue on his own initiative.").

Second, even had the contents of petitioner's later submission been before the district court at sentencing, that submission would not have raised such significant evidence of disparity that the district court would have committed procedural error by not addressing it. Petitioner contended that, according to the knowledge of his attorney, "no individual who has pled guilty to involvement in an illegal gambling business, cooperated, and received a Motion for Downward Departure has ever been sentenced to a term of incarceration in the Northern Division." Aff. of David M. Eldridge 2 (Attach. to Mot. for Reconsideration of Sent. Decision). Petitioner offered no information about the number of defendants in the sample known to his attorney or about the scope of their activities. The government responded that it was "aware of at least six cases in the Eastern District of Tennessee, from the Chattanooga area alone, in which a cooperating gambling defendant was sentenced to active prison time." Mot. to Strike Am. J. 2. The government listed each case, *id.* at 2-3, and "further note[d] that [petitioner's] gambling operation was far larger than that of any of these gambling defendants," *id.* at 3. It is far from clear, therefore, that petitioner can even establish that his offense involved "similar conduct" to those he seeks to use as comparators. And petitioner's claim of disparity also depends on artificially limiting the scope to defendants in the Northern Division. As the government demonstrated, petitioner's contention is refuted by including data from just one of the district's three other divisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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