No. 04-1387

In the Supreme Court of the United States

MARK R. TUGMAN, 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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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit abused its discretion by applying a longstanding procedural bar rule to decline to consider a claim of error under *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), because petitioner did not raise that argument in his opening brief.

2. Whether the district court committed plain error in petitioner's criminal trial by allowing testimony about settlement negotiations in a related civil lawsuit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported. The order denying petitioner's motion for bail pending appeal (Pet. App. 14) is unreported. The order denying petitioner's motion to re-brief the appeal, and granting the government's motion to strike petitioner's supplemental brief (Pet. App. 33-34), is unreported. The order denying petitioner's motion for a limited remand for resentencing (Pet. App. 38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2005. The petition for a writ of certiorari was filed on April 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted, following a jury trial, of one count of conspiracy to possess forged securities, to make false statements for the purpose of influencing a financial institution in acting upon a loan or application, and to engage in unlawful monetary transactions, in violation of 18 U.S.C. 371; 12 counts of possessing forged securities, in violation of 18 U.S.C. 513(a); two counts of making false statements for the purpose of influencing a financial institution in acting upon a loan or application, in violation of 18 U.S.C. 1014(a); and two counts of engaging in unlawful monetary transactions, in violation of 18 U.S.C. 1957. Pet. 3-4; Gov't C.A. Br. 3-4. The court of appeals affirmed. Pet. App. 1-3.

1. Cheri Searcy, who was petitioner's mistress (and later his wife), embezzled nearly $2 million from her employer, Patrick K. Neal and Associates, between 1991 and 2000. Pet. C.A. Br. 4. She and petitioner used the funds obtained to support an extravagant lifestyle, purchasing luxury cars, a speedboat, airplanes, and a house. In December 2000, petitioner and his wife were served with a civil complaint filed by Neal and Associates. In November 2002, a federal grand jury returned a criminal indictment.

At the criminal trial, two witnesses from Neal and Associates, and the firm's attorney, testified about a meeting they had with petitioner and his wife on December 18, 2000. James Schier testified that petitioner agreed to turn over certain assets to Neal and Associates. Pet. C.A. Br. 26. Patrick Neal testified that his "overall impression [from the meeting] was that [petitioner] would give up all of the assets * * * if [Mr. Neal] would agree that there would be no criminal pro-

ceedings." *Ibid*. The attorney, Chuck Johnson, testified that petitioner suggested that if he repaid all of the money, a criminal prosecution would not be necessary. *Id*. at 27. Petitioner did not object at trial to the introduction of that testimony.

Pursuant to the Sentencing Guidelines, the district court imposed a sentence of 41 months of imprisonment, and ordered petitioner to forfeit an airplane, a boat, and approximately $2 million. Gov't C.A. Br. 4-5.

2. On appeal, petitioner raised 12 claims of error involving his trial and sentencing. See Pet. C.A. Br. 10-35. Among other things, petitioner claimed for the first time that the district court had committed plain error by permitting the prosecution to introduce evidence of civil settlement negotiations, which he argued violated Federal Rule of Evidence 408. *Id*. at 25-29. Petitioner raised no constitutional claim with respect to judicial factfinding in his sentencing in the district court or in his opening brief on appeal. Pet. 4.

After the petitioner's opening brief was filed, this Court issued its decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), holding that judicial factfinding that increased a state guidelines sentence violated the Sixth Amendment. Petitioner then filed a second renewed motion for bond pending appeal raising a *Blakely* challenge to his sentence. Pet. App. 4-6.[1] The court of appeals denied that motion, citing circuit precedent establishing that the court ordinarily will not consider issues not raised in an opening brief. See Pet. App. 14 (citing *United States* v. *Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001), cert. denied, 535 U.S. 1098 (2002); *United States*

[1] Petitioner's earlier motion for release on bond pending appeal did not raise any *Blakely*-type claim.

v. *Ardley*, 242 F.3d 989, 990 (11th Cir.), cert. denied, 533 U.S. 962 (2001) and 535 U.S. 979 (2002); *United States* v. *Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001)). The court denied petitioner's subsequent motions to strike the existing briefs to allow rebriefing, or in the alternative to remand for resentencing. Pet. App. 33. The court of appeals affirmed petitioner's conviction and sentence, *id.* at 1-3, concluding that there was "no merit to any of the arguments [petitioner] makes in this appeal." *Id.* at 2.

3. In *United States* v. *Booker*, 125 S. Ct. 738 (2005), this Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *Id.* at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (Breyer, J., for the Court).

4. In *United States* v. *Dockery*, 401 F.3d 1261 (2005) (per curiam), the Eleventh Circuit held, in a case that this Court had remanded for reconsideration in light of *Booker*, that the defendant would be deemed to have abandoned his Sixth Amendment challenge to the Guidelines by failing to raise it in his opening brief. *Id.* at 1262-1263. The court of appeals stated that it saw nothing

> in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the * * * issue had been timely raised in this Court. In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-established rule that

> issues and contentions not timely raised in the briefs are deemed abandoned.

Ibid. (quoting *Ardley*, 242 F.3d at 990); accord, *e.g.*, *United States* v. *Mosley*, No. 04-11189, 2005 WL 1317026 (11th Cir. June 2, 2005) (reinstating original judgment after this Court granted certiorari, vacated judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Senn*, 128 Fed. Appx. 96 (11th Cir. 2005) (same).

ARGUMENT

Petitioner contends (Pet. 7, 10-14) that the Eleventh Circuit's practice of treating as abandoned *Booker* and *Blakely* claims that are not raised in a party's initial brief contravenes the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), and is inconsistent with traditional plain-error review (Pet. 7, 14-19). Petitioner contends that the Eleventh Circuit's "non-discretionary rule" (Pet. 7) "conflicts with the law in every other circuit." Pet. 8. Petitioner also argues (Pet. 22-27) that the district court committed reversible plain error by permitting testimony at his criminal trial about settlement negotiations in the related civil suit by Neal and Associates. Petitioner's contentions lack merit, and further review is not warranted.

1. a. In *Griffith*, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in *Griffith* had preserved the claim on which he sought review, the Court did not have occasion to consider the interplay between the retroactivity rule adopted in that case and principles of waiver, forfeiture, and other prudential doctrines. See *id.* at 317, 318.

Application of procedural default rules is consonant with the retroactivity principle of *Griffith*. *Griffith* concluded that retroactive application of new rules on direct appeal was necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 322-323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" (*id*. at 323) to those who have. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system" and "[t]he other has not"). Application of procedural bar rules does not offend principles requiring the retroactive application of new constitutional rules to cases open on direct review.

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situation because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and com-

> mands underlying the issue that is held to be defaulted.

United States v. *Ardley*, 273 F.3d 991, 992 (11th Cir. 2001) (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 533 U.S. 979 (2002).

On several occasions, this Court has indicated that the retroactivity principle embodied in *Griffith* is in no way inconsistent with the application of procedural default rules. In *Shea* v. *Louisiana*, *supra*, for example, the Court held that the rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. 470 U.S. at 59. In doing so, the Court explicitly noted that the retroactive application of *Edwards* was "subject, of course, to established principles of waiver, harmless error, and the like." *Id*. at 58 n.4. Similarly, in *Booker* itself, the Court stated that while courts were bound to apply its holding "to all cases on direct review," 125 S. Ct. at 769 (citing *Griffith*, 479 U.S. at 328), "we expect reviewing courts to apply ordinary prudential doctrines," including, specifically, the plain error doctrine for claims that have not been preserved. *Ibid*. See also *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (noting that rule of *United States* v. *Gaudin*, 515 U.S. 506 (1995), applied retroactively under *Griffith*, but unpreserved claims were subject to review only for plain error); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 104 n.1 (1993) (Scalia, J., concurring) (noting, as the Court extended the holding of *Griffith* to civil cases, that "a party may procedurally default on a claim in either [the civil or

criminal] context").[2] This Court has never suggested the contrary.

b. Petitioner contends (Pet. 14-19) that the decision below is inconsistent with the principles of plain error review reflected in Rule 52(b) of the Federal Rules of Civil Procedure. That argument lacks merit. As the Court observed in *United States* v. *Olano*, 507 U.S. 725 (1993), "'[n]o 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.'" *Id.* at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). In *Olano*, this Court observed that Rule 52(b) provides only "a limited power to correct errors that were not timely raised in district court." *Ibid.* The Court did not indicate that Rule 52(b) prescribed the *sole* procedural bar rule that courts could employ and that courts could adopt no additional procedural requirements. And in *Booker*, the Court said that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test." 125 S. Ct. at 769 (emphasis added). *Booker*'s language clearly implied that "plain error" is

[2] Accord, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 442 (6th Cir. 2002) (noting that although *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to plain error review); *United States* v. *Outen*, 286 F.3d 622, 634 (2d Cir. 2002) (same); *United States* v. *Wheat*, 278 F.3d 722, 739 (8th Cir. 2001) (same), cert. denied, 537 U.S. 850 (2002); *United States* v. *Keys*, 133 F.3d 1282, 1285-1286 (9th Cir.) (en banc) (holding that although rule of *Gaudin* applied retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to review only for plain error), cert. denied, 525 U.S. 891 (1998).

only one of a number of "prudential doctrines" that may preclude relief; abandonment is another.

Although this Court observed in *Olano* that "Rule 52(b) should be employed in those circumstances in which a miscarriage of justice would otherwise result," 507 U.S. at 736 (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)), nothing in the Eleventh Circuit's application of its procedural bar rule is inconsistent with that statement. Petitioner contends (Pet. 13) that the Eleventh Circuit's procedural bar rule "precludes its panels from even *deciding* whether a manifest injustice would occur" and that the rule is therefore "the equivalent of an absolute jurisdictional bar to review of a manifest injustice." Pet. 17; see also Pet. 12 (stating that rule "bars *all* review, including * * * review for manifest injustice"); Pet. 7, 8 (stating that rule is "non-discretionary"); Pet. 19 ("the Eleventh Circuit's rule allows for no exceptions, is non-discretionary and essentially jurisdictional in nature"). That contention is incorrect. For example, the court of appeals has addressed claims of *Booker* error although they were not raised in the defendant's opening brief where the government has conceded the error. See *United States* v. *Dacus*, No. 04-15319, 2005 WL 1017985, at *1 (11th Cir. May 3, 2005) (per curiam) ("Although we ordinarily refuse to consider an argument not raised in an initial brief, we consider the argument that Dacus's sentence was erroneous under *Booker* because both parties have joined the issue without objection.") (citing *United States* v. *Levy*, 379 F.3d 1241, 1242-1243 (11th Cir. 2004), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005)). In addition, the Eleventh Circuit has explicitly recognized that it has the authority to relieve litigants of the consequences of failing to raise an issue in an opening brief and to address

an issue on the merits where manifest injustice would otherwise result.[3] The court specifically determined that no manifest injustice would result if it declined to consider untimely *Blakely* claims. See *Levy*, 379 F.3d at 1243 n.3 ("'there would be no miscarriage of justice if we decline to address' *Blakely*-type issues not raised in opening briefs on appeal").

2. Petitioner also contends (Pet. 8) that the Eleventh Circuit's application of its procedural bar rule "conflicts with the law in every other circuit" and that this Court's review is necessary to resolve the circuit conflict.

a. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have without exception interpreted that provision to establish a general prudential rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." *Playboy Enters.* v. *Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[4] The courts

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[3] See, *e.g.*, *United States* v. *Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2 of the Federal Rules of Appellate Procedure, considering an issue raised only in co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's arguments); *Gramegna* v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) (vacating judgment based on issue raised sua sponte by the court, pursuant to Rule 2); see also *United States* v. *Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does."), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005).

[4] Accord, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argu-

of appeals have recognized that that rule is not jurisdictional and therefore that courts have authority, in the exercise of their discretion, to address issues not timely raised by the parties. See, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (5th Cir. 2001) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion" and that the court may consider an issue that was not

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ment unless manifest injustice otherwise would result.") (internal citations and quotation marks omitted); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000) ("It is well settled that if an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting *Kost* v. *Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993)) (alterations omitted); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir. 2001) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting *Priddy* v. *Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.) (finding arguments not raised in initial brief waived), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Fort Smith*, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (holding that "[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing); *Becton Dickinson & Co.* v. *C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) ("an issue not raised by an appellant in its opening brief * * * is waived").

timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review issue not raised in the brief where manifest injustice would otherwise result); *Leer* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (same). See also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause"). As noted above, see pp. 9-10, *supra*, the Eleventh Circuit has recognized that it has the authority to relieve litigants of the consequences of default and address an issue on the merits where manifest injustice would otherwise result. In the exercise of its discretion, however, the Eleventh Circuit has declined to exempt *Booker* and *Blakely* claims from the operation of its longstanding rule that it will not consider claims unless they were timely raised in the appellant's opening brief. See, *e.g.*, *Dockery*, 401 F.3d at 1262-1263; *Levy*, 379 F.3d at 1243 n.3; see also *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.) (declining to exempt claims under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), from operation of rule), cert. denied, 533 U.S. 962 (2001).

Petitioner asserts (Pet. 8-9 & nn.3-4) that the Eleventh Circuit's application of the procedural bar rule "conflicts with the law in every other circuit" (Pet. 8) because other courts have reviewed the merits of challenges based on the intervening decisions of this Court in *Booker*, *Blakely*, and *Apprendi*, even if those challenges were not raised in the defendant's opening brief. The vast majority of the decisions that petitioner cites are inapposite. A few of the cited opinions simply conclude that it was appropriate under the circumstances to consider those claims in that posture because this Court recently had clarified the law, without citing or discuss-

ing the ordinary rule that courts will not entertain issues not raised in a party's opening brief.[5] Most of the others simply discuss (and often reject) claims raised in supplemental briefs without addressing the appropriateness of reviewing tardily raised claims.[6] Thus, it appears that most courts that have addressed claims in this posture have not explicitly declined to apply the procedural bar rule, and thus those decisions cannot be said to "conflict" with the decision below.

Petitioner cites only one 20-year-old case (Pet. 8 & n.3) in which a court of appeals entertained a claim raised for the first time in supplemental briefing in light of intervening decisions of this Court, in which the appellate court explicitly considered whether to apply the

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[5] See *United States* v. *Oliver*, 397 F.3d 369, 377 n.1 (6th Cir. 2005) (concluding that it was appropriate to consider claim raised in letter filed pursuant to Fed. R. App. P. 28(j)); *United States* v. *Castro*, 382 F.3d 927, 929 & n.3 (9th Cir. 2004) (concluding that it was appropriate to consider claim sua sponte).

[6] See *United States* v. *Fox*, 396 F.3d 1018 (8th Cir. 2005); *United States* v. *Bruce*, 396 F.3d 697 (6th Cir.), vacated in part on reh'g, 405 F.3d 1034 (6th Cir. 2005); *United States* v. *Burgess*, 119 Fed. Appx. 852 (8th Cir. 2005); *United States* v. *Schaefer*, 384 F.3d 326, 330-331 (7th Cir. 2004); *United States* v. *Moore*, 109 Fed. Appx. 503, 505 n.2 (3d Cir. 2004) (denying motion to file supplemental brief "as futile" because claims of error were clearly meritless); *United States* v. *Delgado*, 256 F.3d 264, 280 (5th Cir. 2001); *United States* v. *Cernobyl*, 255 F.3d 1215 (10th Cir. 2001); *United States* v. *Terry*, 240 F.3d 65, 72-73 (1st Cir.), cert. denied, 532 U.S. 1023 (2001); *United States* v. *Poulack*, 236 F.3d 932, 935-938 (8th Cir.), cert. denied, 534 U.S. 864 (2001); *United States* v. *Rogers*, 118 F.3d 466, 471 (6th Cir. 1997). *United States* v. *Hammoud*, 381 F.3d 316, 344 & n.14 (4th Cir. 2004) (en banc), vacated on other grounds, 125 S. Ct. 1051 (2005), is inapposite because the supplemental briefing on *Blakely* in that case merely supported a timely *Apprendi* challenge to judicial factfinding under the Guidelines that the defendant had already raised in his opening brief.

ordinary prudential rule that issues not raised in an opening brief will be deemed abandoned. That purported conflict does not warrant this Court's consideration. The case discussed the issue only briefly in a footnote, see *United States* v. *Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984), and the court may have exercised its discretion to proceed to the merits of the argument in that case only because the court concluded it clearly lacked merit. See 740 F.2d at 1118 ("obvious" that conditions necessary for relief not met); *id.* at 1121 (noting claim has been "uniformly rejected by other circuits"). More recent decisions of that court suggest that it does not consider itself obligated to consider tardily raised claims based on intervening precedent. See *Kinney* v. *District of Columbia*, 994 F.2d 6, 10 (D.C. Cir. 1993) (citing *Byers* for the proposition that "we have indicated that we *might* entertain a new argument on appeal if it were justified by * * * an intervening change in the law") (emphasis added).

Review also is not warranted at this time because several courts of appeals currently are refining their analysis of when it is appropriate to consider tardily raised claims based on intervening precedent. The Fifth Circuit, which previously had entertained tardily raised claims based on intervening Supreme Court precedents,[7] recently has followed Eleventh Circuit precedent to conclude that "absent extraordinary circumstances, we will not consider *Booker* issues raised for the first time in a petition for rehearing." *United States* v. *Taylor*, No. 03-10167, 2005 WL 1155245 (5th Cir. May 17, 2005) (per curiam) (citing, *inter alia*, *Ardley*); *United States* v.

[7] See *Miranda*, 248 F.3d at 443-444 (discussing *Apprendi* claim although defendant did not raise claim in opening brief); *United States* v. *Garcia*, 242 F.3d 593, 599 & n.5 (5th Cir. 2001) (same).

Hernandez-Gonzalez, 405 F.3d 260, 261-262 (5th Cir. 2005) (per curiam) (citing, *inter alia*, *Levy*, 379 F.3d at 1242, and *Ardley*); see also *United States* v. *Lewis*, No. 04-10102, 2005 WL 1394949 (5th Cir. June 14, 2005) (per curiam) (following *Taylor*). The First Circuit, on the other hand, only last month concluded that the "substantial change in the applicable law wrought by the Supreme Court's decisions in *Blakely* and *Booker* * * * constitutes an 'exceptional circumstance'" in which the court would decline to apply its general rule that tardily raised issues "are generally considered waived." *United States* v. *Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005).[8]

b. Even if the courts of appeals were to settle on differing approaches to when to address claims not raised in a defendant's opening brief, rules governing the consideration of unpreserved claims may appropriately be viewed as local rules that can differ from circuit to cir-

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[8] The Fourth Circuit recently stated in a footnote, and without briefing or argument by the parties on the issue, that "[a]lthough appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review.'" *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) (citation omitted) (quoting *Booker*, 125 S. Ct. at 769 (Breyer, J., for the Court)). The court failed to note that, in the very same paragraph, *Booker* made clear that "we expect reviewing courts to apply ordinary prudential doctrines" in determining whether resentencing was warranted in a given case. 125 S. Ct. at 769 (Breyer, J., for the Court). The government was unable to seek rehearing in that case because the court of appeals, after the time for filing a petition for rehearing had expired, denied the timely filed joint motion of the parties for an extension of time in which to file a rehearing petition. The Fourth Circuit should be given an opportunity to reconsider that erroneous conclusion in an appropriate case.

cuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [such] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). Indeed, this Court specifically has acknowledged the power of courts of appeals to adopt rules restricting the consideration of issues not raised in a timely manner. In *Thomas* v. *Arn*, *supra*, the Sixth Circuit had promulgated a rule providing that failure to file objections with the district court to a magistrate's recommendation waived the right to appellate review of a district court judgment adopting that recommendation. This Court held that the Sixth Circuit had not abused its discretion by adopting that rule. The Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." 474 U.S. at 147-148, 155. Noting that such a rule was supported by sound considerations of judicial economy, *id.* at 148, this Court concluded that the courts of appeals had authority to adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.* at 146-147 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)).

Procedural bar rules of the sort at issue here promote efficiency by avoiding piecemeal briefing of appeals and ensuring that the appellee has the opportunity to respond to all issues raised by the appellant without supplemental briefing. Such rules are especially impor-

tant because of the courts of appeals' increasingly heavy caseloads. Petitioner contends (Pet. 13 n.4, 22) that the court of appeals' rule should be rejected because it would give litigants an incentive to raise numerous claims that are precluded by existing precedent. Although the same could be said of any procedural default rule that attaches consequences to the failure to raise a claim, this Court rejected the position that the futility of raising a claim under existing law wholly excuses a litigant from preserving it. See, *e.g.*, *Johnson*, 520 U.S. at 467-468 (reviewing unpreserved claim only for plain error although the argument was foreclosed by "near-uniform precedent both from this Court and from the Courts of Appeals"). See also *United States* v. *Levy*, 391 F.3d 1327, 1332 (11th Cir. 2004) (Hull, J., concurring in the denial of rehearing en banc) ("If defendants were going to raise a long and useless laundry list of objections, they already would have been doing exactly that in the district court so objections could receive full *de novo* review [on appeal], rather than plain-error review."), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005); *id.* at 1333 (noting that "numerous defendants" had properly preserved their claims by "rais[ing] *Apprendi*-type arguments in their challenges to enhancements under the federal Sentencing Guidelines") (collecting cases).

This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decisions in *Blakely* or *Apprendi* solely because it was not raised in the petitioner's opening brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284), and denied

review in several cases that specifically challenged application of the procedural bar rule in that context. See, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (challenging application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

3. This Court has granted, vacated, and remanded for further consideration in light of *Booker* in other cases raising the same issue. See *Hembree* v. *United States*, No. 04-1210, 2005 WL 575559 (June 13, 2005); *Dixon* v. *United States*, No. 04-8932, 2005 WL 540062 (June 6, 2005); *Levy* v. *United States*, No. 04-8942, 2005 WL 540692 (June 6, 2005). Because the court of appeals confirmed in *Dockery* that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned, see 401 F.3d at 1262, there is no reason for this Court to remand petitioner's case for reconsideration in light of *Booker*. Accord, *e.g.*, *United States* v. *Mosley*, No. 04-11189, 2005 WL 1317026 (11th Cir. June 2, 2005) (reinstating original judgment after this Court granted certiorari, vacated judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Senn*, 128 Fed. Appx. 96 (11th Cir. 2005) (same); see also *Taylor*, 2005 WL 1155245 (on remand from this Court for

reconsideration in light of *Booker*, Fifth Circuit reinstated original judgment because defendant raised *Booker* argument for the first time in petition for a writ of certiorari and "extraordinary circumstances" did not warrant relief); *Lewis,* 2005 WL 1394949 (same).

4. Petitioner also contends (Pet. 22-27) that the district court committed reversible plain error by allowing the prosecution to introduce testimony at his criminal trial on settlement negotiations in a related civil law suit. Because petitioner did not timely object to the testimony at trial, that claim is reviewed only for plain error. See *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). To prevail under that standard, petitioner must demonstrate that there was "(1) 'error' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' * * * If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 467 (quoting *Olano*, 507 U.S. at 732). That standard has not been met here.

Three circuits have held that Rule 408 does not apply to criminal cases. See *United States* v. *Logan*, 250 F.3d 350, 367 (6th Cir.) (holding that "the plain language of Rule 408 makes it inapplicable in the criminal context."), cert. denied, 534 U.S. 895, 997 (2001); *Manko* v. *United States*, 87 F.3d 50, 54-55 (2d Cir. 1996) (holding that "[t]he policy favoring the encouragement of civil settlements, sufficient to bar their admissions in civil actions, is insufficient * * * to outweigh the need for accurate determinations in criminal cases where the stakes are higher"); *United States* v. *Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) ("Nothing in Rule 408 specifically prohibits the receipt of evidence in criminal proceedings concern-

ing the admissions and statements made at a conference to settle claims of private parties."). As petitioner notes (Pet. 24), two other circuits have reached the contrary conclusion. See *United States* v. *Bailey*, 327 F.3d 1131, 1144 (10th Cir. 2003) (holding that Rule 408 applies to criminal and civil trials); *United States* v. *Hays*, 872 F.2d 582, 588-589 (5th Cir. 1989) (same). The Eleventh Circuit has not yet resolved the question; the unpublished summary disposition below did not indicate whether the court's resolution of this claim was based on its conclusion that Rule 408 is inapplicable to criminal cases (and thus there was no "error" in this case), or that relief was inappropriate under one of the other elements of plain-error review. See Pet. App. 2.

Further review is not warranted in this case. To begin with, petitioner has not established that any error was "clear" or "obvious." *Johnson*, 520 U.S. at 467. Although the Federal Rules of Evidence generally apply to criminal proceedings as well as civil ones, see Fed. R. Evid. 1101(b), the text of Rule 408 states that evidence of offers to compromise a claim are "not admissible to prove *liability for or invalidity of the claim* or its amount." Fed. R. Evid. 408 (emphasis added). The rule explicitly states that "[t]his rule does not require exclusion when the evidence is offered for another purpose." *Ibid*. Guilt for a criminal offense "do[es] not in ordinary parlance constitute * * * a 'claim' over which there is a dispute as to 'validity' or amount.'" *United States* v. *Baker*, 926 F.2d 179, 180 (2d Cir. 1991); cf. also Fed. R. Evid. 408 advisory committee notes to 1972 proposed rules ("An effort to 'buy off' the prosecution or a prosecuting witness in a criminal case is not within * * * the rule of exclusion."). Thus, any error was not "plain." See *United States* v. *Gerrow*, 232 F.3d 831, 835 (11th

Cir. 2000) (error cannot be "plain" where Supreme Court has not resolved the issue and courts of appeals are divided), cert. denied, 534 U.S. 830 (2001); *United States* v. *Williams*, 53 F.3d 769, 772 (6th Cir. 1995) ("[a] circuit split precludes a finding of plain error"), cert. denied, 516 U.S. 1120 (1996).

Morever, petitioner has not demonstrated that he would be entitled to relief even under the rule he advocates, because he has not shown that any error affected his substantial rights. The evidence of petitioner's guilt was overwhelming. Despite the fact that he was unemployed for most of the time he was involved with Searcy, and despite the fact that Searcy only earned approximately $40,000 per year, see Gov't C.A. Br. 13, petitioner took part in the purchase of more than a million dollars of luxury goods and real estate for his use. See *id*. at 7. Neal and Associates checks worth hundreds of thousands of dollars were altered to make them payable to petitioner and deposited into petitioner's accounts. *Ibid*. The evidence at trial demonstrated that petitioner blackmailed Searcy to make her continue to embezzle funds to support his lavish lifestyle. *Id*. at 12. That petitioner was involved in the fraud, and not simply the unknowing beneficiary of Searcy's largesse, is also demonstrated by the fact that, in applying for loans to purchase his speedboat and two airplanes, petitioner falsely claimed to be a project manager for Neal and Associates earning between $84,000 and 108,000 per year. *Id*. at 8-13. Petitioner therefore cannot demonstrate that the claimed error "affected the outcome of the district court proceedings," *Olano*, 507 U.S. at 734, much less that the error so "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" that it warrants discretionary relief under Rule 52(b). *Id*. at 736.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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