No. ____

# In the Supreme Court of the United States

FRANCISCO MUNOZ,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the court of appeals, in agreement with the First, Fifth, Eighth and Tenth Circuits, but in conflict with the District of Columbia, Second, Third, Fourth, Sixth and Seventh Circuits, erroneously refused to remand for further sentencing proceedings under *United States* v. *Booker*, 543 U.S. 220 (2005).

2. Whether the court of appeals, in agreement with the First and Eighth Circuits, but in conflict with the Second, Third, Fifth, Seventh and Tenth Circuits, erroneously failed to distinguish constitutional claims of error from non-constitutional claims for purposes of plain error review under FED. R. CRIM. P. 52(b) – a question that this Court granted, but did not decide, in *United States* v. *Robinson*, 485 U.S. 25, 30 (1988).

3. Whether the court of appeals, in agreement with the First and Eighth Circuits, but in conflict with the District of Columbia and Second Circuits, erroneously failed to apply a less exacting standard for plain error review where only a sentencing error, and not a trial error, was at issue.

## PARTIES TO THE PROCEEDING

In this Court, Francisco Munoz is the petitioner and the United States is the respondent. Alberto Llona was a co-defendant in the district court proceeding and an appellant before the United States Court of Appeals for the Eleventh Circuit, and is a respondent under Rule 12.6.

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## PETITION FOR A WRIT OF CERTIORARI

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### OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 430 F.3d 1357.

### JURISDICTION

The judgment of the court of appeals was entered on November 23, 2005, and rehearing was denied on January 19, 2006 (App., *infra*, 30a-31a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(b) is set forth at App., *infra*, 32a.

### STATEMENT

In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court held that it violates the Sixth Amendment to enhance a defendant's sentence under a mandatory Guidelines regime based on facts found only by the judge, not by a jury. There is no dispute in the present case that petitioner's sentence was enhanced in violation of the Sixth Amendment. Nevertheless, because the sentencing record did not, on its face, demonstrate that the trial court would have sentenced petitioner more leniently under an advisory Guidelines scheme, the court of appeals held that petitioner (who had not lodged a pre-*Booker* objection to the sentencing procedure) had failed to show that the Sixth Amendment violation "affect[ed] [his] substantial rights" for plain error purposes. FED. R. CRIM. P. 52(b).

The court of appeals' decision conflicts with those of other circuits, not only in its disposition of the particular sentencing issue, but also on two other, closely related issues: first, whether

plain error should be more freely noticed for *constitutional* (as opposed to *non-constitutional*) errors; and second, whether plain error should be more freely noticed for *sentencing* (as opposed to *trial*) errors.

1. Petitioner and his co-defendant were charged with engaging in a telemarketing scheme to sell anti-impotence treatments through radio advertising and infomercials. App., *infra*, 2a-8a. After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiracy to commit offenses against the United States (Count 1), six counts of mail fraud (Counts 3-8), six counts of introducing a misbranded prescription drug into interstate commerce (Counts 15-24), and two counts of misdemeanor-level misbranding of prescription drugs after shipment in interstate commerce (Counts 25-26). *Id.* at 8a-9a.

Petitioner was sentenced prior to the decision in *Booker*, which held that a mandatory Guidelines sentence that is enhanced based on facts not found by a jury or admitted by a defendant violates the Sixth Amendment. Applying the 1998 Guidelines, the district court assigned petitioner a base offense level of six under the fraud guideline. See U.S.S.G. § 2F1.1 (1998 ed.). The court then applied enhancements for more than minimal planning, the use of mass marketing, aggravating role, and loss amount. App., *infra*, 9a. It is undisputed that the loss amount (and the higher offense level that resulted) were based on facts not authorized by the jury verdict or admitted by petitioner. *Id.* at 27a. Petitioner was sentenced to 51 months of imprisonment – the bottom of the applicable guideline range – and three years of supervised release, and was ordered to pay $29,523.34 in restitution. *Id.* at 9a-10a.

2. The court of appeals affirmed. App., *infra*, 29a. With respect to petitioner's sentence, the court acknowledged that "a Sixth Amendment violation under *Booker* occurred as to the

loss amount in this case, and that *Booker* error is plain." *Id*. at 27a. "Indeed," the court of appeals explained, "it is undisputed that the loss amount used in determining [petitioner's] sentence[] was found by the sentencing judge based on facts not admitted by [petitioner] nor proved to a jury beyond a reasonable doubt, and that this loss amount was used to enhance [petitioner's] sentence[] under a mandatory guidelines system." *Ibid*. Because petitioner had failed to lodge a sufficient *Booker*–type objection at the time of his sentencing, however, the court reviewed petitioner's Sixth Amendment claim only for plain error under FED. R. CRIM. P. 52(b), pursuant to the Eleventh Circuit's decision in *United States* v. *Rodriguez*, 398 F.3d 1291, *reh'g denied,* 406 F.3d 1261 (11th Cir.), *cert. denied*, 125 S.Ct. 2935 (2005). See App., *infra*, 27a-28a.

In *Rodriguez*, the Eleventh Circuit had addressed the situation in which it is not possible to tell from the record whether the district court would have imposed a more lenient sentence under an advisory Guidelines regime. The court held – in a decision that now conflicts with six other circuits – that a defendant in such cases fails to meet his burden under the plain error doctrine "of showing a reasonable probability that the result would have been different but for the error." 398 F.3d at 1301. Applying the *Rodriguez* standard, the court below held that "the sentencing record provides no basis for a conclusion that under an advisory Guidelines scheme, there is a reasonable probability that [petitioner] would have received a more lenient sentence." App., *infra*, 28a. Accordingly, the court concluded, petitioner had failed to show plain error with respect to the conceded Sixth Amendment violation underlying his sentence. *Ibid.*

## REASONS FOR GRANTING THE PETITION

Petitioner's case presents three important and closely related questions. The first is whether a defendant who has

failed to lodge a pre-*Booker* objection at sentencing must establish – on the face of the sentencing record alone – a reasonable probability that the district court would have given him a more lenient sentence under an advisory Guidelines regime. Although this question is one on which the circuits are deeply divided, we recognize that this Court – even in the face of an acquiescence by the Solicitor General in *Rodriguez* – has consistently declined review. See, *e.g.*, *United States* v. *Holmes*, 406 F.3d 337 (5th Cir.), *cert. denied*, 126 S.Ct. 375 (2005); *United States* v. *Pirani*, 406 F.3d 543 (8th Cir.) (en banc), *cert. denied*, 126 S.Ct. 266 (2005); *United States* v. *Paladino*, 401 F.3d 471 (7th Cir. 2005), *cert. denied*, 126 S.Ct. 1343 (2006); *Rodriguez*, 398 F.3d 1291 (11th Cir.), *cert. denied*, 125 S.Ct. 2935 (2005).

The present case, however, presents two broader issues, on which the circuits are also divided, and which permeate the day-to-day practice of criminal law. First is the question whether claims of *constitutional* error should be more freely noticed under the plain error doctrine than claims involving *non-constitutional* error. This Court granted certiorari to review that very question in *United States* v. *Robinson*, 485 U.S. 25, 30 (1988), but ultimately did not decide it. In the years since, the conflict has deepened – and this case is an excellent vehicle for resolving it, once and for all.

This case also presents the question whether errors that affect only a defendant's *sentence*, not his *conviction*, should be subject to less exacting scrutiny under the plain error doctrine. At least two circuits explicitly apply a more relaxed standard for plain error in sentencing cases, recognizing that the institutional costs of doing so are substantially less severe than the costs of revisiting issues arising from trial error. Other circuits, including the court below, have refused to make any distinction between sentencing and trial issues for purposes of the plain error doctrine.

Because the present case affords the Court an excellent vehicle for resolving all three of these issues – the second and third of which will *not* abate even if the number of pre-*Booker* sentencing challenges does – the petition for a writ of certiorari should be granted.

I. Following settled Eleventh Circuit precedent, the court of appeals held that petitioner had failed to establish plain error because he could not show, on the face of the sentencing record alone, that the trial court would likely have given him a more lenient sentence had it been operating under an advisory Guidelines scheme. App., *infra*, 28a. In that respect, the decision below presents a question on which, as the Solicitor General acknowledged in *Rodriguez*, 04-1148 U.S. Br. 7, 11-18 (brief in response to petition for writ of certiorari), the courts of appeals are deeply divided – how to apply the plain error doctrine to violations in pre-*Booker* sentencing proceedings.

In *Booker*, the petitioner's sentence – as in the present case – was enhanced based on facts found only by the judge, not a jury. 543 U.S. at 227. This Court held that such an enhancement in a mandatory Guidelines regime violates the Sixth Amendment and remanded for resentencing. *Id.* at 233, 243-44. In the companion case of *United States* v. *Fanfan*, *id.* at 229, the petitioner's sentence was imposed under the then-mandatory Guidelines, but was based on facts authorized by the jury's verdict. This Court held that such a sentence in a mandatory Guidelines regime does not violate the Sixth Amendment but nonetheless remanded for resentencing. *Id.* at 267-68. In its remedial opinion, the Court invalidated the provision of the Sentencing Reform Act that made the Guidelines mandatory, thus rendering the Guidelines advisory. *Id.* at 258-60. With respect to cases pending on direct appeal as of *Booker*'s date of decision, the Court instructed the courts of appeals to apply "ordinary prudential doctrines" of plain error

and harmless error to cases involving sentencing error under *Booker*. *Id.* at 268.

The courts of appeals have taken, in *Booker*'s wake, widely divergent approaches to plain error review of pre-*Booker* sentencing claims. As the Solicitor General explained in *Rodriguez*, three conflicting tests have emerged among the circuits in determining whether a sentencing error affected substantial rights. 04-1148 U.S. Br. 11. At one end of the spectrum, the Eleventh Circuit has held that the defendant must show a "reasonable probability" that he would have received a more lenient sentence had the Guidelines been advisory before a sentencing error will be noticed as having affected substantial rights. *Rodriguez*, 398 F.3d at 1301. If the defendant cannot sustain that burden on the existing record, the Eleventh Circuit will decline – as it did here – to remand the sentence to the district court. The First, Fifth, Eighth and Tenth Circuits have adopted this approach. See, *e.g.*, *United States* v. *Antonakopoulos*, 399 F.3d 68, 78-79, 81 (1st Cir. 2005); *United States* v. *Mares*, 402 F.3d 511, 521 (5th Cir.), *cert. denied*, 126 S.Ct. 43 (2005); *United States* v. *Dazey*, 403 F.3d 1147, 1175-76 (10th Cir. 2005); *Pirani*, 406 F.3d at 551-52.

At the opposite end of the spectrum lies an approach adopted by the Third, Fourth, and Sixth Circuits. Where the district court imposed a sentence based on extra-verdict fact-finding under mandatory Guidelines, these circuits presume that the error affected the defendant's substantial rights. The Third, Fourth, and Sixth Circuits therefore have generally vacated pre-*Booker* sentences and afforded the district court an opportunity to reconsider the sentence. See, *e.g.*, *United States* v. *Davis*, 407 F.3d 162, 164-65 (3d Cir. 2005) (en banc); *United States* v. *Hughes,* 401 F.3d 540, 548-49, 560 (4th Cir. 2005); *United States* v. *Oliver*, 397 F.3d 369, 380-81 (6th Cir. 2005); *United States* v. *Barnett*, 398 F.3d 516, 527-29 (6th Cir.), *cert. dismissed*, 126 S.Ct. 33 (2005).

Finally, the District of Columbia, Second, Seventh, and Ninth Circuits have adopted a "limited remand" test. Under this approach, if the record does not indicate whether the district court would have imposed a lower sentence under an advisory Guidelines regime, the case is remanded for the limited purpose of posing the question directly to the district court. See, *e.g.*, *United States* v. *Coles*, 403 F.3d 764, 770-71 (D.C. Cir. 2005); *United States* v. *Crosby*, 397 F.3d 103, 117-20 (2d Cir. 2005); *United States* v. *Ameline*, 409 F.3d 1073, 1078-80, 1084-85 (9th Cir. 2005) (en banc); *Paladino*, 401 F.3d at 483-85.

Notwithstanding the deep division in the circuits, the Solicitor General pointed out in *Rodriguez* that this particular conflict likely "involves a transitional issue that may have limited continuing importance once the cases in which sentences were imposed before *Booker* have become final." 04-1148 U.S. Br. 7.[1] The present case, however, presents two broader issues on which the circuits are also divided. We turn to those next.

II. The court of appeals acknowledged that petitioner's sentence was *unconstitutionally* enhanced because it resulted from a loss determination, in the context of a mandatory sentencing regime, that was not rooted in the jury's verdict. App., *infra*, 27a. Nevertheless, drawing no distinction between constitutional and non-constitutional claims, the court of appeals imposed on petitioner the burden to locate some affirmative indication in the record that his sentence would have been different had a non-mandatory sentencing regime been in

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[1] Of course, in the meantime there are numerous outstanding cases evincing *Booker* error. For instance, on February 4, 2005, the Second Circuit issued an order listing more than 200 pending appeals to which its approach to *Booker* errors (outlined in *Crosby*) would apply. *In re Special Order of Inquiry to Appellants Regarding Remand Pursuant to United States* v. *Crosby* (2d Cir. Feb. 4, 2005), available at http://www.ca2.uscourts.gov/. That is but a fraction of all pending sentencing appeals across the nation.

force. *Id.* at 28a. Because petitioner could not sustain that burden, the court of appeals affirmed the sentence notwithstanding the Sixth Amendment violation. *Ibid.* The court of appeals' failure to distinguish constitutional from non-constitutional claims for purposes of plain error review reflects a fundamental divide that cuts across all areas of day-to-day criminal practice.

A. Federal Rule of Criminal Procedure 52(b) states that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." See generally *United States* v. *Olano*, 507 U.S. 725, 731-735 (1993). Nearly twenty years ago, in *United States* v. *Robinson*, 485 U.S. 25 (1988), the Solicitor General asked this Court to review the question whether the standard for noticing plain error should be different for claims of constitutional error. The government's certiorari petition noted that "the circuits [were] divided on whether Rule 52(b) incorporates a more generous standard of review for constitutional errors." 86-937 Pet. 10. On the one hand, the government explained, "several courts of appeals [had] endorsed" the proposition that there is "a distinction between constitutional and non-constitutional objections" for purposes of plain error review. *Id*. at 20 (citing cases). "Other circuits," the Solicitor General observed, "make no such distinction." *Ibid*. Because this conflict was "of considerable and recurring significance" (*id*. at 10), the Solicitor General asked this Court to review the question.

The Court granted the petition but ultimately "conclude[d] that there was no constitutional error at all." 485 U.S. at 30. It therefore had no occasion to resolve the plain error question on which review had been granted. In the years since, the conflict identified by the Solicitor General has not abated – if anything, it has deepened.

1. For example, the Tenth Circuit had previously expressed doubt that there was any plain error distinction between constitutional and non-constitutional claims. See *United States* v. *Popejoy*, 578 F.2d 1346, 1350 (10th Cir.) ("[w]e believe that evidentiary objections with a constitutional footing can be waived in a case like this by failure to object, particularly where the basic factual and legal predicate for them was available"), *cert. denied*, 439 U.S. 896 (1978). That court has now endorsed precisely the opposite standard, stating that reviewing courts in applying the plain error rule are "compelled to conduct this analysis less 'rigidly'" because of the "constitutional nature of the error." *Dazey*, 403 F.3d at 1174, 1177. Accord *United States* v. *Chavez*, 229 F.3d 946, 951 (10th Cir. 2000) (where a potential constitutional violation is alleged, "the rigidity of the plain error rule is relaxed somewhat"); *United States* v. *Clark*, 415 F.3d 1234, 1242 (10th Cir. 2005) (applying the plain error test less rigidly because the error alleged was constitutional); *United States* v. *James*, 257 F.3d 1173, 1182 (10th Cir. 2001); *United States* v. *Lindsay*, 184 F.3d 1138, 1140 (10th Cir. 1999); *United States* v. *Jefferson*, 925 F.2d 1242, 1254 (10th Cir. 1991). In contrast, the Tenth Circuit has explained, where the alleged error is non-constitutional in nature, the court applies the "traditional full-rigor plain error analysis." *United States* v. *Brown*, 316 F.3d 1151, 1155 (10th Cir. 2003).

The Fifth Circuit continues to draw a distinction between constitutional and non-constitutional errors for plain error purposes. See 86-937 Pet. 20 (identifying the Fifth Circuit as among the courts of appeals that notice constitutional plain error more freely); *United States* v. *Rogers*, 126 F.3d 655, 658 (5th Cir. 1997) ("increased scrutiny will be given in plain error review when a constitutional right is at stake"); accord *United States* v. *Lopez*, 923 F.2d 47, 50 (5th Cir. 1991) ("Errors of constitutional dimension will be noticed more freely under the

plain error doctrine"); *United States* v. *Brown*, 555 F.2d 407, 420 (5th Cir. 1977) (same).

The Second, Third, and Seventh Circuits have taken the same view, holding as a general matter that "'errors of constitutional magnitude will be noticed more freely under the plain error rule than less serious errors.'" *United States* v. *Torres*, 901 F.2d 205, 228 (2d Cir. 1990). Accord *United States* v. *Gore*, 154 F.3d 34, 48 (2d Cir. 1998); *Virgin Islands* v. *Smith*, 949 F.2d 677, 682 (3d Cir. 1991) ("'[t]he constitutional nature of the error certainly makes it easier to conclude that fundamental fairness requires reversal'" under the plain error test) (citation omitted); *United States* v. *Lilly*, 37 F.3d 1222, 1225 (7th Cir. 1995) (same); *United States* v. *Shue*, 766 F.2d 1122, 1132 (7th Cir. 1985) (for purposes of the plain error test, "[e]rrors of constitutional dimension * * * are more freely noticed than are less serious, non-constitutional errors"); *United States* v. *Calfon*, 607 F.2d 29, 31 (2d Cir. 1979) ("[a] nonconstitutional error is generally less 'substantial,' within the meaning of FED.R.CRIM.P. 52(b), than a constitutional error") (citation omitted). See also *Virgin Islands* v. *Smith*, 949 F.2d at 688 (Alito, J., dissenting) (agreeing that it is appropriate to consider as one factor "whether an alleged plain error implicates a constitutional right"). *Cf. United States* v. *Feliciano,* 223 F.3d 102, 125 (2d Cir. 2000) (rejecting various constitutional challenges under the plain error test).

2. By contrast, as the Solicitor General noted in *Robinson*, several other circuits make no distinction between constitutional and non-constitutional claims in assessing plain error. The Eleventh Circuit, as reflected in the decision below, treats both classes of errors identically. See, *e.g.*, *United States* v. *Swatzie*, 228 F.3d 1278, 1283 (11th Cir. 2000) ("The standard for prejudice in plain-error review, regardless of the error's constitutional nature, is not whether the error is harmless beyond a reasonable doubt * * *, [but is instead the] ordinary

harmless error standard"); *United States* v. *Foree*, 43 F.3d 1572, 1577-79 (11th Cir. 1995) (defendant alleging Confrontation Clause error did not meet his "heavy burden" under the plain error test). So too do the First and Eighth Circuits. *United States* v. *Jensen*, 423 F.3d 851, 854-55 (8th Cir. 2005) (applying ordinary plain error analysis to due process violation and finding that defendant failed to prove that his substantial rights were affected); *United States* v. *Wolk*, 337 F.3d 997, 1004-05 (8th Cir. 2003) (applying ordinary plain error analysis to defendant's constitutional claim and finding that defendant did not meet his burden of proving prejudice); *United States* v. *Soto-Beniquez*, 356 F.3d 1, 49-50 (1st Cir. 2003) (alleged constitutional claim did not, under ordinary plain error analysis, affect defendant's substantial rights), *cert. denied*, 541 U.S. 1074 (2004).

B. Not only does the decision below deepen a longstanding conflict – it is also mistaken. Nearly 100 years ago, this Court explained that it is more willing to recognize errors as plain "when rights are asserted which are of such high character as to find expression and sanction in the Constitution or Bill of Rights." *Weems* v. *United States*, 217 U.S. 349, 362 (1910). Indeed, in the closely related setting of *harmless* error under FED. R. CRIM. P. 52(a), this Court has expressly adopted a different standard for cases of constitutional error that recognizes the special role that constitutional rights play in our criminal justice system. Under that longstanding distinction, a constitutional error must result in reversal unless the government shows that the error was harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967). By contrast, a non-constitutional error results in reversal only where a reviewing court has "grave doubt" about whether the error substantially influenced the judgment. *Kotteakos* v. *United States*, 328 U.S. 750, 760, 765 (1946).

Given the special place occupied by constitutional rights in the operation of our criminal justice system, this Court should reiterate to the lower courts that different standards apply under Rule 52(b) with respect to claims of constitutional and non-constitutional error. As *Olano* states, the language in Rule 52(b) providing that a court may consider an unpreserved error that "affects substantial rights" is:

> the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings. * * * Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.

507 U.S. at 734 (citations omitted). Just as the government bears a heavier burden of proving harmless error under Rule 52(a) when a constitutional right has been violated, *Chapman*, 386 U.S. at 24, so too should a defendant's burden of persuasion under Rule 52(b) reflect our legal system's greater concern about the violation of constitutional rights.

The failure to make the basic distinction between constitutional and non-constitutional claims is especially troubling in cases like the present one. In most pre-*Booker* sentencing cases, the record will shed no light on what a district court would have done in an advisory Guidelines regime, "since at the time of sentencing, the district court and the parties were operating under the reasonable belief that the Guidelines were mandatory." *Ameline*, 409 F.3d at 1078-79. Therefore, unless a district court has taken the highly unusual and "entirely inappropriate" step of making "quintessentially political statements" that "publicly criticiz[e] the law that required him to impose the sentence," *United States* v. *Thompson*, 422 F.3d 1285, 1304, n.2, 1305 (11th Cir. 2005) (Tjoflat, J., specially

concurring), it is virtually impossible for a defendant to carry his burden of persuading a court of appeals that he probably would have received a lower sentence in an advisory sentencing regime. Where constitutional rights are at stake, that burden is simply too severe.

C. As the Solicitor General pointed out in *Robinson*, the question whether constitutional errors should be more freely noticed is enormously important and is raised with extraordinary frequency in the daily practice of criminal law. Rule 52(b) applies in every case in which a defendant raises on appeal an issue that he did not preserve in the underlying proceedings. As the many cases cited above indicate, see pp. 9-11, *supra*, the issue is a recurring one, and has arisen often enough that the circuits have fallen into conflict over the correct plain error approach to alleged constitutional violations.

This case presents an excellent vehicle for resolving that conflict. As the court below recognized, petitioner was sentenced in violation of his Sixth Amendment right to trial by jury; the sentence was enhanced based on a loss amount found only by the judge, and imposed under a mandatory Guidelines regime. App., *infra*, 27a. Nevertheless, the Eleventh Circuit applied the plain error test with full rigor and held that, because the record did not show that "[t]he district court * * * was dissatisfied with the sentence or the Guidelines range," petitioner had failed to demonstrate that the constitutional error affected his substantial rights under Rule 52(b). *Id.* at 28a. Had the Eleventh Circuit applied a less onerous standard for plain error review of a constitutional claim, there is little doubt that it would have vacated the sentence, which had been imposed at the bottom of the Guidelines range, and remanded to the district court for reconsideration under the advisory regime. See, *e.g.*, *United States* v. *Sanders*, 404 F.3d 980, 988 (6th Cir. 2005) (deeming "case for remand * * * particularly strong" where

district court imposed a sentence at the low end of the Guidelines range).

Indeed, that is the very approach adopted by the Fourth Circuit in evaluating pre-*Booker* sentencing claims under the plain error standard. That court has held that, where a sentence was enhanced based on facts found by the district court in violation of the Sixth Amendment, the plain error test is satisfied, and the court will remand for resentencing. *Hughes*, 401 F.3d at 548-56. By contrast, where the underlying sentencing error is *non*-constitutional in nature, the Fourth Circuit does not presume prejudice and instead requires the defendant to demonstrate that "the treatment of the guidelines as mandatory 'affect[ed] the district court's selection of the sentence imposed.'" *United States* v. *White*, 405 F.3d 208, 223 (4th Cir. 2005) (citation omitted).[2]

III. This case also provides the Court with an opportunity to resolve a third important and recurring question of law: whether plain error review of *sentencing* issues should be less exacting than review of *trial* issues. Here, too, the circuits are in conflict. See Charles A. Wright, *Federal Practice and Procedure* § 856, at 511-12 (2004) ("[S]ome have suggested that errors in sentencing, unraised below, should be reviewed

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[2] Not surprisingly, given the larger conflict on plain error generally, here too the circuits are divided. See *Rodriguez*, 406 F.3d at 1262 (refusing to draw, on rehearing, a "functional distinction" between *Booker* constitutional and statutory error under "reasonable probability" test); *Davis*, 407 F.3d at 164-65 (applying "presumption of prejudice" approach to constitutional and non-constitutional errors without distinction); see also *United States* v. *Castillo*, 406 F.3d 806, 826-27 (7th Cir. 2005) (Easterbrook, J., dissenting) (improper to apply the "limited remand" approach to "no-constitutional-error situations" because "a sentence lengthened [due to] a constitutional violation * * * is unjust. One cannot say the same when there has been no violation of the Constitution").

with a less deferential standard as the costs of resentencing are lower than the costs of retrial").

A. The District of Columbia Circuit has sharply distinguished sentencing from trial issues in applying the plain error doctrine. The leading case is *United States* v. *Saro*, 24 F.3d 283 (D.C. Cir. 1994). The defendant in *Saro* challenged the offense level adopted by the trial court in imposing sentence. Because the defendant had failed to object at the time of sentencing, the D.C. Circuit reviewed the challenge only for plain error. "In the special context of sentencing errors," the court held (*id*. at 287), a reviewing court's consideration of whether the error affected substantial rights "should be slightly less exacting than it is in the context of trial errors." The court explained that the interest in the finality of judgments and institutional cost issues are far less implicated in the sentencing arena than they are in the trial context. *Id.* at 287-88.

Applying this "somewhat lighter" standard, the D.C. Circuit concluded in *Saro* that defendant's sentencing was, indeed, erroneous, and it remanded for further consideration of the applicable offense level. *Id*. at 288, 292. Accord *United States* v. *Gomez*, 431 F.3d 818, 823 (D.C. Cir. 2005) ("somewhat more relaxed" plain error standard applies "in the area of sentencing," and thus a limited remand would be ordered where the record did not reveal whether a pre-*Booker* sentence would have been lower); *United States* v. *Williams*, 358 F.3d 956, 966 (D.C. Cir. 2004) ("the prejudice requirement under the plain error standard is 'slightly less exacting than it is in the context of trial errors'"); *United States* v. *Bolla*, 346 F.3d 1148, 1153 (D.C. Cir. 2003) (Roberts, J.) ("our application of plain error review in the sentencing context allows a somewhat relaxed standard for showing prejudice under the third prong of the plain error test"); *United States* v. *Joaquin*, 326 F.3d 1287, 1290, 1293-94 (D.C. Cir. 2003) (finding plain error under the "'slightly less exacting'" standard applicable to sentencing issues).

The Second Circuit has also adopted a more relaxed plain error standard for sentencing issues, although only where (as in cases like petitioner's) the defendant lacked advance notice that the issue might arise. The leading case is *United States* v. *Sofsky*, 287 F.3d 122 (2d Cir. 2002), involving a challenge to the conditions of supervised release. The Second Circuit noted that "[o]n occasion" it had "reviewed unobjected to sentencing errors without rigorous application of plain error standards." *Id*. at 125. Surveying its prior decisions, the court held that where a defendant "had no prior knowledge" that a particular issue might arise, and the error in question "relates only to sentencing," the Second Circuit would "entertain [the] challenge without insisting on strict compliance with the rigorous standards of Rule 52(b)." *Id*. at 125-26. Dispensing with the plain error doctrine entirely, the Second Circuit reached the merits and set aside the challenged condition on supervised release. Accord *United States* v. *Simmons*, 343 F.3d 72, 80 (2d Cir. 2003) (a "departure from the strict application of plain error review [is] warranted" where an alleged error relates only to sentencing and the defendant lacked notice). On the other hand, where a litigant does *not* lack notice that the issue might arise – where, for example, the sentencing issue was fully vetted in the Presentence Report and by the district judge – the Second Circuit applies "the full rigor of traditional plain error review." *United States* v. *Gordon*, 291 F.3d 181, 191 (2d Cir. 2002).

B. The Eighth Circuit has flatly rejected the "more relaxed" standard for sentencing errors. In *United States* v. *Ristine*, 335 F.3d 692 (8th Cir. 2003), the defendant challenged on appeal certain conditions of supervision that he had not objected to below. The Eighth Circuit acknowledged that the Second Circuit in *Sofsky* had "decided to 'relax the otherwise rigorous standards of plain error review'" with respect to sentencing issues about which the defendant lacked prior notice. The Eighth Circuit nevertheless "decline[d] to read [its]

precedent to call for a relaxed standard based on these justifications." *Id*. at 694. Applying ordinary plain error analysis, the court of appeals affirmed the conditions of release.

The First Circuit has adopted the same position. In its en banc decision in *United States* v. *Padilla*, 415 F.3d 211 (1st Cir. 2005), the First Circuit applied ordinary plain error analysis in rejecting a defendant's claim that the district court had improperly delegated to a probation officer the determination of the maximum number of drug tests to which the defendant would be subject during his period of supervised release. Over a dissent that cited the Second Circuit's ruling in *Sofsky* (*id*. at 228-29), and which contended that "in the sentencing context, we have been able to adapt traditional plain error review to unusual circumstances" (*id*. at 229), the court insisted on the strictest application of plain error. Anything less rigorous would violate "the assumption that parties must take responsibility for protecting their legal rights," whether at sentencing or at trial. *Id*. at 223.

The Eleventh Circuit's decision in the present case is squarely in accord with the decisions of the Eighth and First Circuits. In rejecting petitioner's challenge to his sentence, the court below applied ordinary plain error analysis. App., *infra*, 27a-28a. As a result, it required petitioner to demonstrate, on the basis of the sentencing record alone, that he likely would have received a more lenient sentence under an advisory Guidelines regime. By contrast, had petitioner been sentenced in the D.C. Circuit – where sentencing claims are subject to a "somewhat more relaxed" standard of plain error review – he would at the very least have secured a limited remand to the district court. Compare *Gomez*, 431 F.3d at 823.

C. The D.C. and Second Circuits have much the better view on the matter. As Judge Williams stated for the D.C. Circuit in *Saro*, "[t]he interest in finality," while certainly

"significant for sentencing as well as trials," is nevertheless less compelling in the former context than in the latter. 24 F.3d at 288. Judge Williams explained:

> The rigor of the plain error standard is designed to protect the finality of judgments, and with good reason; a broad readiness to excuse contemporaneous objection would invite counsel to withhold claims, looking forward either to an acquittal – which if it occurs will be invulnerable – or, in the event of a conviction, to a replay if the newly unveiled claim convinces the appellate court. Moreover, apart from some unfairness to the state in allowing the defendant a second bite at the apple, each bite is costly. * * * When an error in sentencing is at issue, however, the problem of finality is lessened, for a resentencing is nowhere near as costly or as chancy an event as a trial.

*Id.* at 287-88 (citations omitted). The Solicitor General made that very point in his merits brief in *United States* v. *Robinson*, in distinguishing this Court's decision in *Weems* v. *United States*, 217 U.S. 349 (1910). *Weems*, the Solicitor General acknowledged, "suggest[s] that plain error may more readily be noticed for constitutional claims." 86-937 U.S. Br. 35, n.21 (brief on the merits). But as the Solicitor General noted, "the *Weems* case involved a sentencing decision," where "the policies mandating contemporaneous objection are less compelling." *Id*. at 35-36, n.21.

Indeed they are. Because the Eleventh Circuit takes the opposite view – and because, had the D.C. Circuit or Second Circuit rule applied instead, petitioner would have been entitled at least to a remand to the district court and possibly an outright resentencing – further review is warranted.

*   *   *

This case affords the Court an opportunity not only to resolve the lingering conflict regarding pre-*Booker* challenges, but also to answer two longstanding – and important – legal questions: whether plain error should be noticed more freely where the underlying claim is constitutional in nature; and whether plain error should be noticed more freely in sentencing cases. Further review is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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