No. 16-9493

In the Supreme Court of the United States

FLORENCIO ROSALES-MIRELES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in conducting plain-error review under Federal Rule of Criminal Procedure 52(b), a court of appeals should presume that an error in calculating a defendant's advisory Sentencing Guidelines range seriously affects the fairness, integrity, or public reputation of judicial proceedings.

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OPINION BELOW

The opinion of the court of appeals (J.A. 32-38) is reported at 850 F.3d 246.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2017. The petition for a writ of certiorari was filed on June 5, 2017. The petition for a writ of certiorari was granted on September 28, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION AND RULES INVOLVED

The pertinent statutory provision and rules are reproduced in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of illegally reentering the United States after

having been removed following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). J.A. 22-23. The district court sentenced him to 78 months of imprisonment, to be followed by three years of supervised release. J.A. 23-24. The court of appeals affirmed. J.A. 32-38.

A. Legal Background

Federal sentencing is governed by the overarching principle that the district court must impose a sentence "sufficient, but not greater than necessary," to serve the statutory purposes of sentencing. 18 U.S.C. 3553(a). "'[T]he starting point and the initial benchmark' for sentencing," is the calculation of a range under the advisory federal Sentencing Guidelines. *Beckles* v. *United States*, 137 S. Ct. 886, 894 (2017) (quoting *Gall* v. *United States*, 552 U.S. 38, 49 (2007)). To aid the court in that process, 18 U.S.C. 3552 requires that a U.S. probation officer conduct a presentence investigation of a defendant and, "before the imposition of sentence, report the results of the investigation to the court." 18 U.S.C. 3552(a); see Fed. R. Crim. P. 32(c) and (d) (describing presentence investigation and report). "The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines." *Rita* v. *United States*, 551 U.S. 338, 351 (2007).

Timely objections to the Guidelines interpretation contained in the presentence investigation report (PSR) are essential to the "focused, adversarial resolution" of sentencing disputes contemplated by the Federal Rules. *Burns* v. *United States*, 501 U.S. 129, 137 (1991); see generally Fed. R. Crim. P. 51(b) (requiring parties to "preserve a claim of error by informing the court—when the court ruling or order is made or sought—of

the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection"). Under Rule 32, the parties receive copies of the PSR at least 35 days before the sentencing hearing and then have 14 days to submit objections to the PSR's factual findings and sentencing recommendations. Fed. R. Crim. P. 32(e)(2) and (f)(1). At least seven days before sentencing, the probation officer must submit a final version of the PSR and an addendum stating any unresolved objections. Fed. R. Crim. P. 32(g). As late as the sentencing hearing, a party may still be permitted, "for good cause," "to make a new objection." Fed. R. Crim. P. 32(i)(1)(D). At the hearing, the parties must be allowed to comment on "matters relating to an appropriate sentence," Fed. R. Crim. P. 32(i)(1)(C), and if portions of the PSR remain in dispute, the district court must "rule on the dispute or determine that a ruling is unnecessary either because the [dispute] will not affect sentencing, or because the court will not consider [it] in sentencing," Fed. R. Crim. P. 32(i)(3)(B).

If a party does not make a timely objection to the Guidelines calculation contained in the PSR, it may not obtain relief from an alleged error in that calculation on appeal unless it establishes a reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1343 (2016). That standard requires the complaining party to establish (1) that the district court committed an error; (2) that the error is "clear" or "obvious" under existing law; and (3) that the error "affect[ed] [the party's] substantial rights." *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993) (citations omitted). If all three of those requirements are satisfied, "the court of appeals has authority to order correction" of the error, "but [it] is

not required to do so." *Id.* at 735. A reviewing court may exercise its discretion to correct the error only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)) (brackets in original).

B. The Present Controversy

1. Petitioner is a citizen of Mexico who entered the United States illegally in 1997. PSR ¶ 44. In January 2010, petitioner was removed to Mexico following a conviction in Texas state court for an aggravated assault in which he stabbed a man in the chest and shoulder. PSR ¶¶ 5, 6, 29. Later that month, petitioner reentered the United States illegally by wading across the Rio Grande near Laredo, Texas. PSR ¶ 7.

In June 2015, agents with the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) received information from the Travis County jail in Austin, Texas, that petitioner had been arrested for domestic violence. PSR ¶ 4. According to the arrest report, petitioner got into a physical altercation with his wife and 14-year-old son after an argument, during which he grabbed his wife by the hair and punched her in the face repeatedly. PSR ¶¶ 31, 47. After being convicted in Texas state court of assaulting his wife and son, petitioner was released to ICE custody. PSR ¶¶ 4, 31.

2. Following a guilty plea, petitioner was convicted of illegally reentering in the United States after having been removed following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). J.A. 22-23.

a. In accordance with Rule 32, the Probation Office conducted a presentence investigation and prepared a PSR for the district court. The Office determined that petitioner's base offense level under the Sentencing

Guidelines was eight. PSR ¶ 12 (citing Sentencing Guidelines § 2L1.2(a) (2015)). The Office recommended a 16-level increase under Section 2L1.2(b)(1)(A)(ii), because petitioner previously had been removed from the United States following a conviction for a felony crime of violence. PSR ¶ 13; see Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2015) (defining "[c]rime of violence" to include "aggravated assault"). It also recommended a three-level reduction of petitioner's offense level for acceptance of responsibility, resulting in a total offense level of 21. PSR ¶¶ 19-21.

The Probation Office further determined that petitioner had a criminal history score of 13, which placed him within criminal history category VI, the highest in the Guidelines. PSR ¶ 33. The Office noted that petitioner had several prior convictions, including the 2009 aggravated assault conviction that resulted in his initial removal, PSR ¶ 29; the 2015 conviction for assaulting his wife and son, PSR ¶ 31; and another conviction in January 2002 for assaulting his wife (who was then his girlfriend), PSR ¶ 25. The latter conviction should have been assessed two criminal history points, but the Probation Office mistakenly counted it twice and assessed it four points. PSR ¶¶ 25, 30.

The Probation Office also noted that petitioner had numerous prior arrests, including an arrest for choking his wife in March 2002. PSR ¶¶ 34-38. The Office observed that petitioner was not convicted of assault in connection with that offense due to a provision of Texas law that permitted him to admit his guilt to the March 2002 assault in connection with his sentencing for the January 2002 assault, have both crimes considered in

imposing a single sentence, and incur only one conviction. PSR ¶¶ 25, 38 (citing Tex. Penal Code Ann. § 12.45 (West 1994)).

Petitioner's total offense level of 21 and criminal history category of VI resulted in an advisory Sentencing Guidelines range of 77 to 96 months of imprisonment. PSR ¶ 60. The Probation Office further noted that petitioner's numerous convictions and arrests "demonstrated his blatant disregard toward society and the laws of this country," and thus could warrant an upward departure under Sentencing Guidelines § 4A1.3(a)(1). PSR ¶ 75. Petitioner did not object to any aspect of the PSR. Addendum to the PSR 1.

b. Prior to sentencing, petitioner filed a motion for a below-Guidelines sentence, requesting 41 months of imprisonment. D. Ct. Doc. 26 (Feb. 10, 2016). Petitioner contended that the lower sentence was appropriate in light of a proposed change to Section 2L1.2 that he argued would, if applied to him, lower his total offense level and thus lower his Guidelines range to 41 to 51 months. *Id.* at 1. He further argued that a lower sentence was warranted because his conviction for aggravated assault, which resulted in the 16-level increase to his total offense level, was based on 2001 conduct; his subsequent offenses were less serious; he had only one prior immigration conviction; and his family relied on him for support. *Id.* at 2-3.

3. The district court adopted the findings and Guidelines calculations in the PSR and sentenced petitioner to 78 months of imprisonment, to be followed by three years of supervised release. J.A. 12-21; Statement of Reasons 1.

The district court began the sentencing hearing by briefly summarizing the PSR. J.A. 14. It described petitioner's current offense and reviewed his criminal history, noting that petitioner had repeatedly assaulted his wife, stabbed a man, used multiple names and false social security numbers to avoid detection while he was illegally present in the United States, and had been removed from the United States on one occasion and apprehended for an immigration offense on another. *Ibid.* The court invited petitioner to address the court with "anything that [he] would like to say." J.A. 15; see J.A. 15-16. And, following a colloquy with petitioner, the court permitted petitioner's counsel to speak on his behalf, who reiterated petitioner's request for a 41- to 51-month sentencing range. J.A. 16-17.

The district court then announced petitioner's sentence. In rejecting petitioner's request for a 41- to 51-month sentencing range, the court stated that "under the consideration" set forth in Sentencing Guidelines § 4A1.3, which authorizes departures from the Guidelines based on criminal history, the court "would have not sentenced [petitioner] to anything less than the 78 months after * * * his conduct in these cases." J.A. 19. The court explained that a 78-month sentence was appropriate given the nature and the circumstances of the offense and history and characteristics of petitioner. J.A. 20. The court recounted petitioner's prior illegal entry, his attempts to hide in the United States through his use of multiple aliases and other false identification information, and his repeated "assaultive behavior" stretching back to 2001, making it "obvious" that petitioner was "a threat to the public." *Ibid.* The court also noted the need to promote respect for the law,

to provide just punishment for petitioner's offense, and to deter petitioner from committing further crimes. *Ibid.*

4. The court of appeals affirmed. J.A. 32-38. Petitioner argued, for the first time on appeal, that the district court erred in calculating his criminal history category by double counting his conviction for the January 2002 assault. Pet. C.A. Br. 8-12. He asserted that, absent that erroneous calculation, he would have had a criminal history category of V rather than VI and an advisory Guidelines range of 70 to 87 months of imprisonment, instead of 77 to 96 months. *Id.* at 11.

The court of appeals rejected petitioner's argument. It explained that, because petitioner did not object to the PSR's criminal history calculation before the district court, his claim was reviewable only for plain error. J.A. 33. The court concluded that petitioner had satisfied the first three prongs of that standard because he had established "(1) an error; (2) that was clear or obvious; and (3) that affected his substantial rights." *Ibid.* With respect to the first and second prongs, the court accepted petitioner's contention that the district court erred in double counting a single conviction and that the error was "clear from the language of the Guidelines." J.A. 33-34 (citation omitted). With respect to the third prong, the court agreed with petitioner's assertion that the error affected his advisory sentencing range, and because the district court had not "explicitly and unequivocally indicate[d] that [it] would have imposed the same sentence * * * irrespective of the Guidelines range," the court concluded that petitioner had satisfied his burden of showing that the error affected his substantial rights. J.A. 35 (citation omitted; brackets in original).

The court of appeals, however, "elect[ed] not to exercise [its] discretion" to correct the Guidelines error.

J.A. 37. It explained that such an exercise of discretion would be appropriate only if petitioner established that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." J.A. 35-36 (quoting *United States* v. *Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc)). The court noted that "[t]he fourth prong . . . is not satisfied simply because the 'plainly' erroneous sentencing guideline range yields a longer sentence than the range that, on appeal, we perceive as correct." J.A. 36 (quoting *United States* v. *Sarabia-Martinez*, 779 F.3d 274, 278 (5th Cir. 2015)). "Rather," the court observed, "'[t]he types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" *Ibid.* (quoting *United States* v. *Segura*, 747 F.3d 323, 331 (5th Cir. 2014) (brackets in original)). Noting that the district court had sentenced petitioner within the middle of the corrected range, the court of appeals concluded that the error in this case did not merit discretionary correction. J.A. 37.

SUMMARY OF ARGUMENT

On plain-error review under Federal Rule of Criminal Procedure 52(b), a forfeited claim of error in the calculation of a defendant's advisory Guidelines range should not warrant correction as a matter of course. Rather, such an error should be corrected only in exceptional cases in which, based on a review of the entire record, the court determines that the error seriously undermines the fairness, integrity, or public reputation of sentencing proceedings.

A. Rule 52(b) authorizes the correction of unpreserved claims of error only in exceptional circumstances.

The appellant must show that (1) the district court erred, (2) the error was plain, and (3) the error affected the appellant's substantial rights. *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993). Even when each of those requirements is met, an appellate court has discretion to correct the error only if it "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736 (citation omitted; brackets in original). The Court has made clear that this fourth prong of the plain-error standard imposes an independent barrier to relief that must be applied on "a case-specific and fact-intensive basis," *Puckett* v. *United States*, 556 U.S. 129, 142 (2009), to correct only "egregious errors," *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citation omitted). Further, a court of appeals' discretion should be exercised in a manner that enforces the policies that underpin Rule 52(b) generally, "to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004). Whether an exercise of that discretion is warranted in the context of a Guidelines error may turn on, among other things, the reasonableness of the sentence notwithstanding the error, the magnitude of the error in light of the sentencing as a whole, and whether the procedures used to determine the sentence were fundamentally fair.

B. Petitioner's contention that the fourth prong of the plain-error standard will be satisfied as a matter of course in cases involving a Guidelines calculation error is inconsistent with this Court's precedents and would render "the discretion afforded by Rule 52(b) * * * illusory." *Olano*, 507 U.S. at 737. In the context of a Guidelines error, petitioner's approach would collapse

the fourth prong into the third prong, eliminating it as an independent barrier to relief. It would make correction of such errors under plain-error review commonplace, rather than "exceptional." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). It would eliminate any meaningful "case-specific and fact-intensive" analysis of such errors. *Puckett*, 556 U.S. at 142. And it would eviscerate the "careful balanc[e]" that the plain-error standard establishes to "encourage all trial participants to seek a fair and accurate trial the first time around" and to eliminate unnecessary, wasteful reversals and remands. *United States* v. *Frady*, 456 U.S. 152, 163 (1982). None of petitioner's justifications for this drastic shift in the Court's approach to plain error is convincing.

C. Although the court of appeals' opinion inaccurately describes the fourth prong of the plain-error standard, its judgment reflects an appropriate exercise of discretion. The government agrees with petitioner's contention that the "shock the conscience" formulation stated in this case and a handful of other cases is an inaccurate description of the fourth plain-error prong. But this Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), and the court of appeals' decision to affirm petitioner's sentence notwithstanding his forfeited claim of error was within the bounds of the court's discretion. Petitioner's 78-month sentence is reasonable and reflects the district court's careful consideration of the facts of this case and the statutory purposes of sentencing. Moreover, the court could have calculated the same advisory range even without the error; the petitioner's sentence fell within the bottom half of both possible ranges; and the court indicated that it would not have sentenced pe-

titioner to less than 78 months based on his offense conduct and criminal history. Finally, petitioner was afforded ample procedural safeguards to ensure that his sentencing process was fair and that he had a sufficient opportunity to object to perceived errors in the PSR. Under these circumstances, the double-counting error petitioner belatedly identified is not so "particularly egregious," *Young*, 470 U.S. at 15 (citation omitted), that leaving his sentence intact seriously undermines the fairness, integrity, or public reputation of sentencing proceedings.

ARGUMENT

A FORFEITED GUIDELINES CALCULATION ERROR DOES NOT WARRANT CORRECTION UNDER THE FOURTH PRONG OF THE PLAIN-ERROR STANDARD AS A MATTER OF COURSE

If a defendant in a criminal case believes that a district court has erred, the Federal Rules of Criminal Procedure ordinarily require the defendant to either inform the court of his objection "when the court ruling or order is made or sought" or forfeit that claim. Fed. R. Crim. P. 51(b). A defendant who forfeits a claim of error may obtain relief from that error on appeal only by satisfying the rigorous requirements of the plain-error standard set forth in Federal Rule of Criminal Procedure 52(b), including by establishing that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 736 (1993) (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)) (brackets in original).

Petitioner contends (Br. 9-18) that the fourth prong of the plain-error standard should be interpreted to require courts of appeals to correct erroneous applications of the Sentencing Guidelines "in the ordinary case" and that exceptions to that rule should be permitted only

"occasional[ly]." Petitioner's proposed rule would upend the usual course of plain-error review by placing a heavy thumb on the scale in favor of correcting unpreserved Guidelines errors, relieving defendants of the consequences of their failure to object and eliminating their incentive to raise many clear Guidelines errors at sentencing. The plain-error rule exists to prevent those outcomes. This Court should instead reaffirm that Rule 52(b) authorizes the correction of unpreserved errors only in exceptional circumstances and that the fourth prong of the standard applies with equal rigor to Guidelines errors and other errors that may occur in a criminal case, subject to the case-specific and fact-intensive analysis that application of that standard normally entails.

A. Rule 52(b) Grants Courts Limited Authority To Correct Unpreserved Errors In Exceptional Circumstances

1. "'No procedural principle is more familiar to this Court than that' * * * a right of any * * * sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Rule 51(b)—the contemporaneous-objection rule—instructs parties how to avoid such a forfeiture in a criminal case: "by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). "Failure to abide by this contemporaneous-objection rule ordinarily precludes the raising on appeal of the unpreserved claim of trial error." *Puckett* v. *United States*, 556 U.S. 129, 135 (2009). Rule 52(b)—the plain-error rule—"tempers the blow of

a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by providing that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention," Fed. R. Crim. P. 52(b).

The contemporaneous-objection and plain-error rules strike a "careful balanc[e]" between the "need to encourage all trial participants to seek a fair and accurate trial the first time around" and "our insistence that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). In striking that balance, the rules "strictly circumscribe[]" an appellate court's "authority to remedy [a forfeited] error." *Puckett*, 556 U.S. at 134. An appellate court may correct such an error "only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted; brackets in original). The requirements of the plain-error rule are "as binding as any statute duly enacted by Congress," *Peguero* v. *United States*, 526 U.S. 23, 29 (1999) (citation omitted), and this Court has "repeatedly cautioned" that courts lack authority to create exceptions to the rule or to otherwise soften its application for certain types of errors, *Puckett*, 556 U.S. at 135. Meeting all four prongs of the plain-error standard "is difficult, 'as it should be.'" *Ibid.* (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

2. This case concerns an appellate court's discretionary decision to correct a forfeited error under the plain-error standard's fourth prong. By its terms, "Rule 52(b) is permissive, not mandatory." *Olano*, 507 U.S. at 735. The rule states that a "plain error that affects substantial rights *may* be considered," Fed. R. Crim. P. 52(b) (emphasis added), and thus even when the first three prongs of the plain-error standard are satisfied, "the court of appeals has the *discretion* to remedy the error." *Puckett*, 556 U.S. at 135; see *Olano*, 507 U.S. at 735 ("[T]he court of appeals has authority to order correction, but it is not required to do so."). As the Court has repeatedly explained, an "appellate court should exercise its discretion to correct plain error *only if* it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Jones* v. *United States*, 527 U.S. 373, 389 (1999) (emphasis added; citations omitted; brackets in original); see, *e.g.*, *Marcus*, 560 U.S. at 265-266; *Puckett*, 556 U.S. at 135; *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002). In describing how to apply that standard, the Court has avoided bright-line rules or specific criteria, leaving the determination instead to "the sound discretion of the court of appeals." *Olano*, 507 U.S. at 732. The Court has, however, articulated several guideposts that are applicable here.

First, the Court has made clear that the fourth prong of the plain-error standard imposes an independent barrier to relief on a forfeited claim of error. "[A] plain error affecting substantial rights does not, without more, satisfy the * * * standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." *Olano*, 507 U.S. at 737; see *United States* v. *Vonn*, 535 U.S. 55, 63 (2002) ("[B]ecause relief on plain-error review is in the discretion of the reviewing court, a defendant has

the further burden to persuade the court that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'") (citations and internal quotation marks omitted). The Court has thus repeatedly refused to correct plain errors, even where it found or assumed that each of the first three prongs of the plain-error standard was met. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 469 (1997) ("[E]ven assuming that the [plain error] 'affec[ted] substantial rights,' it does not meet the final requirement of *Olano*.") (third set of brackets in original); *Cotton*, 535 U.S. at 632-633 (same).

Second, the fourth prong of the plain-error standard must be applied on "a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142. This Court has consistently observed that "a '*per se* approach to plain-error review is flawed.'" *Ibid.* (quoting *Young*, 470 U.S. at 17 n.14). Rather, the Court has explained that "'each case necessarily turns on its own facts'" and that every claim of plain error must be evaluated "against the entire record." *Young*, 470 U.S. at 16 (citation omitted). "It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means." *Ibid.* Thus, in *Puckett*, the Court rejected the defendant's argument that the government's breach of a plea agreement that satisfied the first three plain-error prongs would necessarily satisfy the fourth prong of plain-error review. 556 U.S. at 142. "It is true enough," the Court explained, "that when the Government reneges on a plea deal, the integrity of the system may be called into question, but there may well be countervailing factors in particular cases." *Id.* at 142-143.

Third, a court of appeals may exercise its discretion to correct forfeited errors only in "exceptional circumstances." *Atkinson*, 297 U.S. at 160. "The plain error

rule is not a run-of-the-mill remedy." *Frady*, 456 U.S. at 163 n.14 (citation omitted). This Court has explained that a court's discretion to correct plain errors should be used "sparingly," *Jones*, 527 U.S. at 389, to set aside only "particularly egregious errors," *Young*, 470 U.S. at 15 (citation omitted). The Court has held, for example, that the fourth prong may justify denying relief even for clear and (assumedly) prejudicial constitutional errors such as failing to submit an offense element to the jury, *Johnson*, 520 U.S. at 469-470, and sentencing a defendant above the statutory maximum supported by the facts alleged in the indictment, *Cotton*, 535 U.S. at 632-633. Indeed, even where "policy interest[s]" make automatic reversal "essential" when a claim of error is preserved, the court will not "relieve the defendant of his usual burden" for a forfeited claim. *Puckett*, 556 U.S. at 141.

Finally, a court of appeals' discretion should be exercised in a manner that "enforce[s] the policies that underpin Rule 52(b) generally." *Dominguez Benitez*, 542 U.S. at 82. The balance struck by Rules 51(b) and 52(b) "serves to induce the timely raising of claims and objections, which gives the district court"—the court that "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute"—"the opportunity to consider and resolve" the objections without additional, wasteful proceedings. *Puckett*, 556 U.S. at 134. It "encourages the result that [trial] proceedings be as free of error as possible." *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). And it diminishes opportunities for gamesmanship by preventing a litigant from "'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Puckett*, 556 U.S. at 134; see *Vonn*,

535 U.S. at 73; *Wainwright*, 433 U.S. at 89. In short, the "point of the plain-error rule" is to "require[] defense counsel to be on his toes," *Vonn*, 535 U.S. at 73, and it must be applied with that goal in mind.

B. A Presumption That Guidelines Calculation Errors Satisfy The Fourth Plain-Error Prong "In The Ordinary Case" Has No Basis In Rule 52(b)

Petitioner's contention (Br. 9) that the fourth prong of the plain-error standard will "ordinarily be satisfied—and the courts of appeals therefore should exercise their discretion—when a defendant is sentenced under an incorrect Guidelines range," finds no support in the language or purposes of the plain-error rule. Claims that a sentencing court erred in its calculation of the advisory Guidelines range, like other errors in a criminal case, are subject to the stringent requirements of that rule. These include the requirement that a court exercise its discretion to remedy the error only in exceptional cases where, based on a careful review of the specific facts at issue, the court concludes that the particular error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citation omitted).

1. A forfeited Guidelines error warrants reversal only in exceptional cases based on a case-specific and fact-intensive review

As explained, a party wishing to preserve a claim of Guidelines error must inform the district court of its objection "when the court ruling or order is made or sought." Fed. R. Crim. P. 51(b). Federal sentencing procedures provide defendants (and the government) ample opportunity to object to any Guidelines calculation presented to the court in the PSR. See pp. 2-3, *supra*.

Accordingly, this Court has explained that, when a criminal defendant "fail[s] to object to the miscalculation [of the Guidelines range], appellate review of the error is governed by Federal Rule of Criminal Procedure 52(b)." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1343 (2016); cf. *Henderson* v. *United States*, 568 U.S. 266, 268-270 (2013) (applying plain-error standard to a forfeited objection to an above-Guidelines sentence); *Puckett*, 556 U.S. at 131-134 (applying plain-error standard to a forfeited objection that the government breached its agreement to request a Guidelines reduction at sentencing).

In *Molina-Martinez*, this Court concluded that an error in calculating the Guidelines range "can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error" for purposes of determining whether the defendant has established an effect on his substantial rights under the third prong of the plain-error standard. 136 S. Ct. at 1345. The Court noted that the Guidelines have a "central role in sentencing," *ibid.*, and "[i]n the usual case, * * * the systemic function of the selected Guidelines range will affect the sentence," *id.* at 1346. The Court explained, however, that even where a clear Guidelines error is shown to have affected substantial rights, "appellate courts retain broad discretion" under the fourth prong "in determining whether a remand for resentencing is necessary." *Id.* at 1348.

That discretionary determination requires courts to decide whether an error prejudiced the administration of justice as a whole by seriously undermining matters "essential to the fair and impartial conduct" of the proceeding. *Brasfield* v. *United States*, 272 U.S. 448, 450

(1926). The court's inquiry into whether the overall process is fair, impartial, and deserving of public respect is necessarily broad in scope, and this Court has repeatedly noted that errors found to prejudice the defendant do not necessarily or presumptively warrant the exercise of discretion under that standard. See, *e.g.*, *Olano*, 507 U.S. at 736-737. In the context of Guidelines errors, courts may consider a number of factors to determine whether the error impugns the sentencing process as a whole.

First, courts may consider whether the sentence reflects a reasonable application of the district court's sentencing discretion notwithstanding the error. The overarching requirement of federal sentencing is the direction to "impose a sentence sufficient, but not greater than necessary" to achieve the statutorily authorized purposes of sentencing. 18 U.S.C. 3553(a). In addition to the Guidelines, "Congress has directed [district courts] to consider a number of other factors in exercising their sentencing discretion," including the need for a sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence, and to protect the public from further crimes by the defendant. *Beckles* v. *United States*, 137 S. Ct. 886, 896 (2017) (citing 18 U.S.C. 3553(a)(1)-(3) and (5)-(7)). Sentencing courts must weigh those various factors as part of "an individualized assessment based on the facts presented," *id.* at 894 (citation omitted), and the resulting sentence is reviewed for reasonableness, *Gall* v. *United States*, 552 U.S. 38, 46 (2007). A sentence that is substantively unreasonable should be set aside regardless of the presence or absence of an objection, but on review for plain error, a sentence that is reasonable in light of all the relevant sentencing factors—despite the presence of a Guidelines error—is less likely

to indicate a serious injury to the fairness, integrity, or public reputation of judicial proceedings.

Second, and similarly, courts may consider the magnitude of the Guidelines error in light of the sentencing as a whole. A sentence that falls within the range applied by the district court and the range that would result from correction of the error may not warrant relief: in that circumstance, the sentence would reflect the Sentencing Commission's considered judgment—and may be presumed reasonable on appeal, see *Rita* v. *United States*, 551 U.S. 338, 347 (2007)—regardless of the error. Courts may also consider indications from the record that the district court was inclined to impose the same sentence regardless of the Guidelines range or believed that the sentence was appropriate based on other sentencing factors—both of which, in some circumstances, could also indicate a lack of effect on substantial rights. See *Molina-Martinez*, 136 S. Ct. at 1346-1347. Courts may additionally consider whether the sentencing court could have adopted the sentencing range it did through a proper application of the Guidelines (using the departure provisions in Sentencing Guidelines § 4A1.3 and Chapter 5, Part K, for example) absent the error.

Third, courts may consider whether the defendant was afforded procedural protections necessary to ensure the fairness and integrity of the sentencing proceeding. As explained, the Federal Rules require that defendants be afforded ample time to review the PSR and formulate objections and be given multiple opportunities to raise those objections with the court. See pp. 2-3, *supra*. Statutes and rules further provide that both the defendant and his attorney must be permitted to speak and offer information in mitigation, see Fed. R.

Crim. P. 32(i)(4); the court must rule on disputed issues, see Fed. R. Crim. P. 32(i)(3)(B); and the court must announce the sentence and the reasons supporting it in open court with the defendant present, see 18 U.S.C. 3553(c); Fed. R. Crim. P. 43(a)(3). Compliance with those requirements may mitigate the effect of a calculation error on the perceived fairness and public reputation of sentencing proceedings.

All of those factors, and others that may be relevant in particular cases, inform whether an unpreserved Guidelines calculation error qualifies as the sort of "exceptional" error that seriously impugns sentencing proceedings and may warrant correction in the court's discretion. A court cannot reliably make that determination without considering the full record of the sentencing and the grounds for the sentence imposed.

2. A presumption that Guidelines errors warrant reversal under the fourth plain-error prong is inconsistent with the plain-error standard

In arguing that most Guidelines errors should be deemed to satisfy the fourth prong as a matter of course, petitioner seeks to collapse the fourth prong into the third, paving the way for routine correction of such errors and rendering "the discretion afforded by Rule 52(b) * * * illusory." *Olano*, 507 U.S. at 737. Such a rule would be inconsistent with all four guideposts to the proper application of judicial discretion recognized in this Court's cases.

a. First, petitioner's rule would largely eliminate the fourth prong of plain-error review as an independent barrier to relief in Guidelines cases. Under petitioner's proposed rule, "'[i]n most cases,' * * * a showing that the district court 'mistakenly deemed applicable an incorrect, higher Guidelines range' should 'suffice for

relief.'" Pet. Br. 1 (quoting *Molina-Martinez*, 136 S. Ct. at 1346). But that is the standard for the third plain-error prong under *Molina-Martinez*, and it applies only "*if the other requirements of Rule 52(b) are met*." 136 S. Ct. at 1346 (emphasis added). Petitioner complains (Br. 23) that, without his rule, a defendant who met the first three prongs of plain-error review might "arrive at the fourth prong only to discover that his earlier showings" were insufficient to justify relief. That is, however, exactly what the plain-error standard permits. Satisfying the first three prongs is *necessary* to obtain discretionary relief, but it is not *sufficient*. See *Olano*, 507 U.S. at 737 ("[A] plain error affecting substantial rights does not, *without more*, satisfy the [plain-error] standard.") (emphasis added).

b. Second, petitioner's rule would be inconsistent with this Court's guidance that the correction of error under Rule 52(b) should be used "sparingly," *Jones*, 527 U.S. at 389, reserved for "exceptional circumstances," *Atkinson*, 297 U.S. at 160, and "particularly egregious errors," *Young*, 470 U.S. at 15 (citation omitted). As this Court has recognized, "[t]he Guidelines are complex." *Molina-Martinez*, 136 S. Ct. at 1342. Minor, technical errors in the calculation of a defendant's Guidelines range are not uncommon and do not present an "exceptional circumstance[]," particularly where the record of the case as a whole indicates that the sentence is substantively reasonable. And requiring reversal and remand for resentencing in almost every such case would hardly be a "sparing[]" use of that remedy.

c. Third, petitioner's rule would contravene this Court's instruction that the decision whether to exercise a court's discretion under the plain-error standard must be evaluated on "a case-specific" basis, *Puckett*,

556 U.S. at 142, and judged "against the entire record," *Young*, 470 U.S. at 16. Petitioner asserts that, under his rule, courts of appeals would "retain the discretion" to "decline to remand when 'countervailing factors' weigh against relief" in a particular case. Pet. Br. 17 (quoting *Puckett*, 556 U.S. at 143). But the general rule is that forfeited errors of any type are *not* corrected on appeal. See *Olano*, 507 U.S. at 731. The plain-error rule carves out a narrow exception to that general rule that may be justified on a "case-specific and fact-intensive basis," *Puckett*, 556 U.S. at 142, not the other way around.

In any event, petitioner's examples of "countervailing factors" that would prevent a Guidelines error from satisfying the fourth prong make clear that he is really advocating a near-blanket rule that such errors be corrected regardless of the facts and circumstances of each case. Petitioner identifies (Br. 17-18) three types of cases that, in his view, present the sort of "countervailing factors" necessary to avoid correcting an error: (1) cases in which the defendant waived the claim in a plea agreement, see *United States* v. *Corso*, 549 F.3d 921, 924 (3d Cir. 2008), cert. denied, 557 U.S. 915 (2009); (2) cases in which the defendant already completed his term of imprisonment, see *United States* v. *Westover*, 435 F.3d 1273, 1277 (10th Cir.), cert. denied, 547 U.S. 1169 (2006); and (3) cases where the defendant is still serving a concurrent term of imprisonment "such that remand to correct the Guidelines error in one sentence would accomplish nothing of any value."

In the first type of case, however, a court would not engage in plain-error review at all, as the case on which petitioner relies indicates. See *Corso*, 549 F.3d at 928 ("[W]e will not review the District Court's application of the sentencing enhancements, or otherwise review his

sentence for reasonableness, if he validly waived his right to that review."). In the third type, although plain-error review would apply, a court of appeals would likely never get to the fourth prong because the existence of a concurrent sentence would obviate any likelihood that the error affected the defendant's substantial rights under the third prong. See, *e.g.*, *United States* v. *Samas*, 561 F.3d 108, 111 (2d Cir.) (per curiam), cert. denied, 558 U.S. 937 (2009); *United States* v. *Ellis*, 326 F.3d 593, 600 (4th Cir.), cert. denied, 540 U.S. 907 (2003); *United States* v. *Burns*, 298 F.3d 523, 544-545 (6th Cir.), cert. denied, 537 U.S. 1061, 537 U.S. 1064 (2002), and 538 U.S. 953 (2003).

That leaves only petitioner's second exception—challenges to terms of imprisonment that are already completed by the time the appeal is heard. That circumstance is likely to arise only in rare cases involving short terms of imprisonment and unexpired terms of supervised release that "prevent th[e] appeal from being moot." *Westover*, 435 F.3d at 1277. Petitioner identifies no plausible reason why the drafters of Rule 52(b) would have intended to limit a court's "broad discretion" under the fourth plain-error prong, *Molina-Martinez*, 136 S. Ct. at 1348, to unusual cases of that sort while opening the door to the routine correction of other unpreserved sentencing errors.

d. Finally, petitioner's rule would eviscerate the "careful balanc[e]" that the plain-error standard establishes to "encourage all trial participants to seek a fair and accurate trial *the first time around*" and to eliminate unnecessary, wasteful reversals and remands. *Frady*, 456 U.S. at 163 (emphasis added); see *Puckett*, 556 U.S. at 135 ("We have repeatedly cautioned that '[a]ny unwarranted extension' of the authority granted

by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice.") (citation omitted; brackets in original).

The fourth prong is critical to maintaining that balance. This Court has repeatedly stated that giving parties greater leeway to satisfy other prongs of the plain-error standard is unlikely to subvert the incentive to object because the fourth prong remains an essential "screening criteri[on]" that enforces the contemporaneous-objection rule and conserves judicial resources. *Henderson*, 568 U.S. at 278; see *id.* at 275-276; *Molina-Martinez*, 136 S. Ct. at 1348-1349. Petitioner's proposed rule would undermine those protections and significantly diminish the incentives for defendants and their counsel to carefully scrutinize the PSR's Guidelines calculations and make timely objections. The limitations in Rule 52(b) that are designed to induce contemporaneous objections would "in the ordinary case" reduce to the fact that a clear error occurred.

Contemporaneous objections are vital as a general matter. See *Puckett*, 556 U.S. at 134. But the complexity of the Guidelines makes the need to encourage timely objections even more important. "[T]here will be instances when a district court[] sentenc[es] * * * a defendant within the framework of an incorrect Guidelines range." *Molina-Martinez*, 136 S. Ct. at 1342-1343. The proper way to minimize those errors is for the parties to address them when they occur and when they are easily remedied, through the detailed and comprehensive procedures provided by the Federal Rules. The type of error here—a miscalculation of a defendant's criminal history category—illustrates the point. Such errors involve determinations that the defendant is often best positioned to challenge.

Absent robust enforcement of the plain-error rule, a defendant would have little incentive to object to clear Guidelines errors, particularly minor or technical errors of the sort at issue here that result in only a modest change in the advisory range. Cf. Sentencing Guidelines Ch. 1, Pt. A, intro. comment. 1, § 4(h) (noting that, in such circumstances, "[b]oth prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes"). In that circumstance, the defendant could simply await the results of the sentencing and, if the sentence is not to his liking, raise the error on appeal. Because the error, by itself, will ordinary satisfy the third prong of the plain-error standard under *Molina-Martinez*, and would presumptively satisfy the fourth prong under petitioner's rule, the defendant would be virtually assured of resentencing. And by the time resentencing occurs, the passage of time may provide the defendant with additional arguments. See *Pepper* v. *United States*, 562 U.S. 476, 492 (2011) (noting that "evidence of [a defendant's] conduct since his initial sentencing constitutes a critical part of the 'history and characteristics' of a defendant that Congress intended sentencing courts to consider" during resentencing) (citation omitted). That result would undermine the plain-error rule's core purpose of ensuring that "defense counsel * * * be on his toes, not just the judge." *Vonn*, 535 U.S. at 73.

3. Petitioner's arguments to the contrary are unsound

None of petitioner's arguments justifies the drastic shift in this Court's approach to plain error that his rule would require.

a. Petitioner's principal argument for requiring courts of appeals to correct forfeited Guidelines errors is that

such errors implicate a defendant's liberty. He notes that "'any deprivation of liberty is a serious matter,'" and asserts that the Guidelines play a "singularly important" role "in determining how long a prison sentence will be." Pet. Br. 11 (quoting *Argersinger* v. *Hamlin*, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring in the result)).

That argument is misplaced. A "liberty interest * * * is always at stake in criminal cases." *Puckett*, 556 U.S. at 142 (citation omitted). And nearly any time a court exercises its discretion not to correct an error under the fourth prong of the plain-error standard, the defendant may end up remaining in prison longer than he would have if the error had been corrected. But this Court has repeatedly explained that such a concern, though weighty, does not warrant an exception to the ordinary operation of the contemporaneous-objection and plain-error rules. Those rules are a longstanding part of our law that serves important interests. See *Olano*, 507 U.S. at 731 ("'No procedural principle is more familiar to this Court than that' * * * a right of any * * * sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.'") (quoting *Yakus*, 321 U.S. at 444). Where a party—government or defendant—fails to abide by that rule, the law requires that party to accept the results unless the stringent requirements of the plain-error rule are met. Following those well-accepted rules does not impugn the fairness, integrity, or public reputation of judicial proceedings, but maintains it.

b. Petitioner contends (Br. 12-13) that the calculation of the advisory Guidelines range is "a critical part of the *judicial* process that *Olano*'s fourth prong seeks

to protect." But that is equally true of every other aspect of a criminal case during which an error might occur. The fourth prong of the plain-error standard applies to errors during grand jury proceedings, see *Cotton*, 535 U.S. at 632-634; plea proceedings, see *Vonn*, 535 U.S. at 62-63; and criminal trials, see *Johnson*, 520 U.S. at 469-470, just as much as errors in the "technical calculations behind Guidelines ranges," Pet. Br. 12. The question under the fourth prong is not whether an error in a criminal trial or sentencing implicates part of the judicial proceedings. It always will. And under the third prong, the error will have been sufficiently "critical" to those proceedings to give rise to a reasonable probability of having changed the outcome. The relevant question is whether enforcing the contemporaneous-objection rule with regard to a particular, prejudicial error in the context of a particular proceeding will seriously impugn the fairness, integrity, or public reputation of judicial proceedings as a whole. That a Guidelines calculation is an important part of federal sentencing proceedings does little to answer that question.

c. Petitioner notes (Br. 13-14) that remanding for resentencing would permit the district court to "properly discharge" its sentencing role. But, again, an analogous point could be made in every plain-error case. A reviewing court's decision that an error is not reversible plain error *necessarily* deprives the initial decisionmaker (be it the district court or jury) of the opportunity to perform its role absent the error. That is implicit in any plain-error (or harmless-error) rule for appellate review. The fault for that result, however, lies principally with the party who failed to raise the error before the initial decisionmaker. The enforcement of Rule 52(b)'s

requirements honors the district court's role by encouraging timely objections that will allow the court to "correct or avoid * * * mistake[s]" in the first instance. *Puckett*, 556 U.S. at 134.

d. Petitioner argues that failing to correct a forfeited Guidelines error frustrates the Guidelines' "overarching purpose" to achieve uniformity and proportionality in sentencing "'through a system that imposes appropriately different sentences for criminal conduct of different severity.'" Pet. Br. 14 (quoting *Rita*, 551 U.S. at 349). As this Court has previously recognized, however, there is "no evidence" that Congress sought to achieve those objectives "out of a concern with disparities resulting from the normal trial and sentencing process," of which the contemporaneous-objection and plain-error rules have long been a part. *Pepper*, 562 U.S. at 503. In any event, a similar criticism could be leveled at all uncorrected errors: a reviewing court's discretionary decision not to correct an instructional error "frustrates" the Sixth Amendment right to a jury finding on an element of the offense (*Johnson*); a reviewing court's decision not to correct an omission in an indictment "frustrates" the purpose of the Grand Jury Clause (*Cotton*); and a court of appeals' decision not to correct an error in a guilty plea proceeding "frustrates" the policy behind the requirements in Federal Rule of Criminal Procedure 11 (*Vonn*). Although the extent to which an uncorrected error undermines those purposes may reasonably factor into whether, in a given case, the fourth prong was satisfied, it provides no basis for circumventing that fact-specific inquiry.

e. Petitioner argues (Br. 14-15) that Guidelines errors may "reverberate beyond the length of imprison-

ment." But the same is true of a guilty plea and conviction. See *Sibron* v. *New York*, 392 U.S. 40, 55 (1968) ("Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected.") (citation omitted); see also *Padilla* v. *Kentucky*, 559 U.S. 356, 364-366 (2010). Such consequences are properly considered as a part of the fact-intensive fourth prong analysis; they are not reason to avoid it.

f. Petitioner cites (Br. 16) language in 18 U.S.C. 3742(f)(1) stating that a court of appeals "shall remand [a] case for further sentencing proceedings" if it determines that "the sentence was * * * imposed as a result of an incorrect application of the sentencing guidelines." That provision was enacted as part of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 213(a), 98 Stat. 2012, to address preserved errors in the application of the mandatory Guidelines that existed before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). Even assuming the provision applies to the advisory Guidelines, but see *Rita*, 551 U.S. at 383 (Scalia, J., concurring in part and concurring in the judgment), it would not affect the application of the plain-error standard. At the time the Sentencing Reform Act was enacted, the plain-error rule (like the cross-appeal rule) was "a solidly grounded rule of appellate practice." *Greenlaw* v. *United States*, 554 U.S. 237, 250 (2008). "The inference properly drawn," then, "is that Congress was aware of the [plain-error] rule, and framed § 3742 expecting that the new provision would operate in harmony with [it]." *Ibid.*; cf. *Puckett*, 556 U.S. at 141 (applying ordinary plain-error review to a forfeited claim that the government breached a plea

agreement despite a rule of automatic reversal for preserved claims).

g. Finally, petitioner argues (Br. 15-16) that courts of appeals should remand for resentencing in the ordinary case on the theory that resentencing is a "simple task." *Id.* at 15 (citation omitted). That is wrong. Although resentencing proceedings do not involve the same costs as those required in a retrial, they are not simple and the costs can be significant. The sentencing framework and procedures "appl[y] both at a defendant's initial sentencing and at any subsequent resentencing after a sentence has been set aside on appeal." *Pepper*, 562 U.S. at 490; see 18 U.S.C. 3742(g) ("A district court to which a case is remanded * * * shall resentence a defendant in accordance with section 3553."). As a result, "[r]esentencing imposes a significant burden on district courts: not only do they have to find time in their busy dockets to revisit errors that could have been resolved with a contemporaneous objection at the original sentencing but they also have the burden of reconvening the parties involved, including the defendant, attorneys, witnesses, and law enforcement authorities." *United States* v. *Flores-Mejia*, 759 F.3d 253, 258 n.6 (3d Cir. 2014) (en banc); cf. *United States* v. *Padilla*, 415 F.3d 211, 225 (1st Cir. 2005) (en banc) (Boudin, J., concurring) ("The time of a judge is scarcest of all judicial resources.").

Defendants in the federal system may be imprisoned anywhere in the United States and must be transported back to the sentencing court. See Fed. R. Crim. P. 43(a)(3). Victims of the crime have a right to be heard and may feel the need to voice their concerns again. See 18 U.S.C. 3771(a) (2012 & Supp. IV 2016); Fed. R. Crim. P. 32(i)(4)(B); see also *United States* v. *Lewis*, 823 F.3d

1075, 1081 (7th Cir. 2016) ("We also keep in mind the costs of remands for resentencing, especially the human costs imposed on victims."). And because "[n]o limitation" may be placed "on the information concerning the background, character, and conduct of a person convicted of an offense" which the court may consider, including information of post-sentencing conduct, resentencing proceedings may involve extensive adversarial proceedings requiring further judicial factfinding. 18 U.S.C. 3661; see *Pepper*, 562 U.S. at 489. Significant costs may also arise from second (or successive) appeals from the resentencing. Such unnecessary use of judicial and government resources—as well as the human costs—is precisely what the contemporaneous-objection and plain-error rules are meant to avoid.

C. Although The Court Of Appeals' Opinion Inaccurately Describes The Fourth Prong Of The Plain-Error Standard, Its Judgment Reflects An Appropriate Exercise Of Discretion

1. The fourth plain-error prong is not limited to errors that "shock the conscience"

In describing the fourth prong of the plain-error standard, the court of appeals stated that "[t]he types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." J.A. 36 (quoting *United States* v. *Segura*, 747 F.3d 323, 331 (5th Cir. 2014)) (brackets in original). That description of correctable errors originated in the dissenting opinion in *United States* v. *Escalante-Reyes*, 689 F.3d 415, 435 (5th Cir. 2012) (en banc) (Smith, J., dissenting), and has been incorporated

into a handful of Fifth Circuit decisions, largely without analysis. See, *e.g.*, *United States* v. *Mendoza-Velasquez*, 847 F.3d 209, 213 (2017) (per curiam); *United States* v. *Solano-Hernandez*, 847 F.3d 170, 178, petition for cert. pending, No. 16-9187 (filed May 1, 2017); *Segura*, 747 F.3d at 331.

The government agrees with petitioner's contention (Br. 18-23) that the "shock the conscience" formulation stated in this case and some other cases is an inaccurate description of the fourth plain-error prong. The "shock the conscience" standard is typically used to determine whether governmental action violates substantive due process under the Fifth or Fourteen Amendments. See *County of Sacramento* v. *Lewis*, 523 U.S. 833, 848 n.8 (1998) ("[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."). Conduct that satisfies that standard usually is "intended to injure in some way unjustifiable by any government interest." *Id.* at 849; see *Rochin* v. *California*, 342 U.S. 165, 172-174 (1952) (explaining that the standard is intended to remedy "brutal conduct" by government officials). As such, it is an inapt description of the circumstances in which a court of appeals has discretion to correct an inadvertent error that has occurred in a criminal proceeding under plain-error review.

As for errors that "serve as a powerful indictment against our system of justice" or that "seriously call into question the competence or integrity of the district judge," J.A. 36 (citation omitted), such errors likely would meet the standard for exercising a court's discretion under the fourth prong of the plain-error standard. But those descriptions alone do not accurately capture

the myriad case-specific factors a court must consider in deciding whether to exercise its discretion to correct an unpreserved claim of error under Rule 52(b), and adopting the Fifth Circuit's description as a general standard could lead to applications of that rule that are inconsistent with this Court's settled understanding of plain-error analysis. Cf. *Olano*, 507 U.S. at 736 (rejecting a heightened standard for correcting plain error that would apply only to "an actually innocent defendant").

That said, it does not appear that the Fifth Circuit's description of correctable errors is intended to substantively modify the existing plain-error standard. The Fifth Circuit frequently cites (as it did here) the fourth prong's usual definition as well, see J.A. 35-36; see also, *e.g.*, *Segura*, 747 F.3d at 331 ("We may exercise our discretion to reverse under plain error review only where 'the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'") (citation omitted; brackets in original), and the Fifth Circuit has regularly exercised its discretion under that prong without citing the description used in this case.[*] See also *United States* v. *Barbosa*, 698 Fed. Appx. 206, 206-207 (2017) (per curiam) (concluding that the "shock the conscience" description is inaccurate). Because this Court

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[*] See, *e.g.*, *United States* v. *Marroquin*, 874 F.3d 851, 855 (5th Cir. 2017); *United States* v. *Dias*, 682 Fed. Appx. 292, 295 (5th Cir. 2017) (per curiam); *United States* v. *Rojas-Ibarra*, 669 Fed. Appx. 269, 270 (5th Cir. 2016) (per curiam); *United States* v. *Miller*, 657 Fed. Appx. 265, 270-271 (5th Cir. 2016) (per curiam); *United States* v. *Santacruz-Hernandez*, 648 Fed. Appx. 456, 458 (5th Cir. 2016) (per curiam); *United States* v. *Martinez-Rodriguez*, 821 F.3d 659, 666-667 (5th Cir. 2016); *United States* v. *Hernandez*, 690 F.3d 613, 622 (5th Cir. 2012); *United States* v. *Alegria-Alvarez*, 471 Fed. Appx. 271, 275-276 (5th Cir. 2012) (per curiam); *United States* v. *Andino-Ortega*, 608 F.3d 305, 311-312 (5th Cir. 2010).

"reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), the relevant question in this case is whether the court of appeals' judgment reflects an appropriate exercise of discretion under Rule 52(b), not whether the court's description is apt.

2. The court of appeals properly declined to correct the Guidelines calculation error in this case

Under the proper case-specific and fact-intensive analysis of the fourth plain-error prong, the court of appeals' decision to affirm petitioner's sentence notwithstanding his forfeited claim of error was within the bounds of the court's discretion. Petitioner asserted for the first time in the court of appeals that the district court had erred in its calculation of his advisory sentencing range by double counting one of his prior assault convictions and thus adding two points to his criminal history. J.A. 32-33. Absent that error, petitioner claimed that his criminal history category would have been V, not VI, as the district court determined, and his advisory sentencing range would have been 70 to 87 months, not 77 to 96 months. J.A. 34; see Pet. C.A. Br. 11. In light of the entire record, the court of appeals permissibly concluded that the district court's error did not impugn "the fairness, integrity or public reputation of judicial proceedings." J.A. 35-36 (citations omitted).

Petitioner's 78-month sentence is reasonable and reflects the district court's careful consideration of the facts of this case and the statutory purposes of sentencing. Petitioner was convicted of illegally reentering the United States following a conviction for an aggravated felony, which is punishable by up to 20 years of imprisonment. See J.A. 22-23 (citing 8 U.S.C. 1326(a) and (b)(2)). As the district court explained at the sentencing

hearing, the nature and circumstances of petitioner's offense were "serious" and the "history and characteristics of the defendant are no better." J.A. 20. Petitioner committed his offense within weeks of being removed in 2010, PSR ¶ 7, and he managed to evade apprehension until 2015 through the use of "multiple names, * * * at least two birth dates," and "five false Social Security numbers," J.A. 14; see J.A. 20. Petitioner also has a long and violent criminal history that makes him an "obvious * * * threat to the public," J.A. 20, including multiple convictions for aggravated assault and assault of his wife and son, all of which involved acts of extreme violence, see J.A. 14; see also PSR ¶¶ 24-38. As the Probation Office concluded, petitioner has consistently "demonstrated his blatant disregard toward society and the laws of this country." PSR ¶ 75.

In imposing a 78-month sentence, the district court did not simply adopt the bottom of the Guidelines range. Instead, it selected a sentence within that range based on the sentencing factors identified in 18 U.S.C. 3553(a), including the "nature and the circumstance of the offense," "the history and characteristics of the defendant," and the need for the sentence to "promote respect for the law," to provide "just punishment for [petitioner's] offense," and to "keep [petitioner] from * * * returning to the United States to commit criminal conduct." J.A. 20. As the court explained after reviewing the considerations identified in Sentencing Guidelines § 4A1.3 governing departures based on criminal history, it "*would have not sentenced [petitioner] to anything less* than the 78 months" he received in light of his "conduct in these cases." J.A. 19 (emphasis added). And, because petitioner's 78-month sentence is also within the sentencing range petitioner claims was appropriate

(indeed, within the bottom half of that range), it would have been presumed reasonable on appeal even if he had timely raised his objection and the district court had adopted the lower range.

Moreover, even without the double-counting error petitioner identifies, the district court could still have properly applied the Guidelines to reach the same advisory sentencing range used in this case. As explained (pp. 5-6, *supra*), petitioner's January 2002 assault offense that was double counted *does* actually reflect two separate crimes. See PSR ¶¶ 25, 38. At the sentencing proceeding following petitioner's conviction for the January 2002 assault of his wife, petitioner admitted to having also assaulted his wife on a separate occasion in March 2002. Petitioner's sentence for the January 2002 assault incorporated the March 2002 assault; he merely avoided being formally convicted of the second offense due to the operation of a provision of Texas law that allows a defendant to admit his guilt to one offense during the sentencing for another, thereby avoiding a second conviction. See Tex. Penal Code Ann. § 12.45 (West 1994). Had the January 2002 assault not been counted twice in calculating petitioner's criminal history score, petitioner's admission to having committed the March 2002 assault may have provided a basis for an upward departure under the Guidelines. See Sentencing Guidelines § 4A1.3(a)(2)(E) (noting that upward departure in criminal history category may be authorized based on, *inter alia*, "[p]rior similar adult criminal conduct not resulting in a criminal conviction").

Finally, petitioner was afforded ample procedural safeguards to ensure that his sentencing process was fair and that he had a sufficient opportunity to object to

perceived errors in the PSR. Petitioner was represented by counsel, who received a copy of the PSR more than a month in advance of petitioner's sentencing hearing. J.A. 3-4. Petitioner and his attorney had approximately three weeks to review the PSR before needing to file any written objections, and petitioner was given a further opportunity to raise any concerns or provide any other relevant information to the district court, both personally and through counsel, at the sentencing hearing. See J.A. 3-4, 15-18.

In short, petitioner's sentence is reasonable, it could have been imposed under the Guidelines even if he had timely raised the error, and it was determined following a sentencing proceeding that was fundamentally fair. Under these circumstances, the double-counting error petitioner belatedly identified is not so "particularly egregious," *Young*, 470 U.S. at 15 (citation omitted), that leaving his sentence intact seriously undermines the fairness, integrity, or public reputation of sentencing proceedings. Indeed, "[t]he real threat * * * to the 'fairness, integrity, and public reputation of judicial proceedings' would be if [petitioner]," despite his offense conduct and criminal history, were to receive the benefits of resentencing "because of an error that was never objected to" before the district court. *Cotton*, 535 U.S. at 634.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3553(a) provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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

Sentencing and Judgment

* * * * *

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

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[1] So in original. The period probably should be a semicolon.

(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) Interviewing the Defendant. The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

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

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

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

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

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

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

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

(2) Additional Information. The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) Exclusions. The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

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

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

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

(f) Objecting to the Report.

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

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

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

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

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

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

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of

—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

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

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

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

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

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

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

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

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

* * * * *

3. Fed. R. Crim. P. 51 provides:

Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

4. Fed. R. Crim. P. 52 provides:

Harmless and Plain Error

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

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