No. 22-5540

IN THE SUPREME COURT OF THE UNITED STATES

DAVID VILLEGAS PEREZNEGRON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant who fails to contemporaneously object to the absence of a direct invitation from the district court to allocute at sentencing is entitled to plain-error relief on appeal without a need to demonstrate prejudice a provide any case-specific reason for remand.

ADDITIONAL RELATED PROCEEDINGS

U.S. District Court (S.D. Tex.):

United States v. Pereznegron, No. 20-cr-71 (Dec. 11, 2020)

U.S. Court of Appeals (5th Cir.):

United States v. Pereznegron, No. 20-20644 (June 9, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is available at 2022 WL 2073831.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2022. The petition for a writ of certiorari was filed on September 7, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of illegally reentering the United States after removal following a felony conviction, in violation of 8 U.S.C. 1326(a) and (b)(1). Judgment 1. He was sentenced to 48 months of imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. 1a-8a.

1. Petitioner, a citizen of Mexico, was removed from Texas to Mexico in 2012. Gov't C.A. Br. 3-4 (citing record evidence). Prior to his removal, petitioner had been convicted of driving while intoxicated (DWI) on four separate occasions. Ibid. He was convicted of two misdemeanor DWI offenses in December 2001, and sentenced to 15 days of confinement on each. Id. at 3. Five months later, in April 2002, petitioner was convicted of a third misdemeanor DWI, and sentenced to one year of confinement. Id. at 3-4. And in July 2012, petitioner was convicted of DWI a fourth time -- a felony charge under a recidivist statute that resulted in a sentence of two years of imprisonment. Id. at 4. In November 2012, following petitioner's felony DWI conviction, petitioner was removed to Mexico. Ibid.

Petitioner subsequently reentered the United States illegally. Gov't C.A. Br. 4. In June 2019, police arrested him near Houston, Texas, and charged him with another felony DWI -- his fifth DWI offense. Ibid. Petitioner pleaded guilty to that

felony DWI in state court and was sentenced to a term of three years of imprisonment. Pet. App. 2a.

2. While petitioner was serving his state sentence, a federal grand jury indicted him on one count of illegally reentering the United States after removal following a felony conviction, in violation of 8 U.S.C. 1326(a) and (b)(1). Indictment 1-2. In December 2020, petitioner pleaded guilty without a plea agreement. Pet. App. 2a.

With the district court's agreement, the parties waived the presentence investigation report and proceeded with sentencing at the rearraignment. See C.A. ROA 5. All agreed that petitioner's advisory guidelines range was 46 to 57 months of imprisonment, based on an offense level of 21 and criminal history category of III. Ibid.; Gov't C.A. Br. 5. Petitioner moved for a downward departure from that range based on time he had spent in state custody for the 2019 felony DWI conviction. Pet. App. 2a. Petitioner also submitted letters from his family and photographs of a house in Mexico that he intended to live in upon his release. Ibid.; Gov't C.A. Br. 6. The government, for its part, observed that petitioner's repeated misconduct presented a "very severe public safety problem" and warranted a sentence within the guidelines range. Pet. App. 2a.

The district court invited petitioner's counsel to speak. Pet. App. 2a. His counsel explained that petitioner had "learned

his lesson and would remain in Mexico this time because [petitioner's] family had lined up a job and a place to live" for him there. Ibid. (internal quotation marks omitted); Gov't C.A. Br. 6. The court then asked petitioner some questions about his fifth DWI offense and his landscaping job in the United States. Ibid. After receiving answers to those questions, the court imposed a 48-month sentence. Pet. App. 2a. Petitioner did not object to any aspect of that sentencing process. Ibid.

3. On appeal, petitioner argued for the first time that the district court had violated Federal Rule of Criminal Procedure 32(i)(4)(A)(ii) by not specifically inviting him to speak on his own behalf before the court announced his sentence. Pet. C.A. Br. 11; Pet. App. 2a. The court of appeals affirmed. Pet. App. 1a-8a.

a. Petitioner acknowledged that because he had forfeited his claim of allocution error by failing to raise it in district court, the claim was subject to plain-error review under Federal Rule of Criminal Procedure 52(b). Pet. C.A. Br. 11. The court of appeals observed that it has discretion to grant relief on plain-error review only for an error that is "plain" and that affects "substantial rights." Pet. App. 3a (citation omitted). It explained that where those requirements are satisfied, a reviewing court may grant relief if it determines that "failure to correct the error would seriously affect the fairness, integrity or public

reputation of judicial proceedings." Ibid. (quoting United States v. Muhammad, 14 F.4th 352, 363 (5th Cir. 2021), cert. denied, 142 S. Ct. 1458 (2022)); see United States v. Olano, 507 U.S. 725, 732-737 (1993).

The court of appeals determined that petitioner could not make the required showing to obtain plain-error relief. Pet. App. 3a-4a. It observed that circuit "precedent requires defendants 'to show some objective basis that would have moved the trial court to grant a lower sentence.'" Id. at 3a (quoting United States v. Magwood, 445 F.3d 826, 830 (5th Cir. 2006)). It noted that "[t]his legal standard sounds like it would fit better" in the substantial-rights component of the plain-error framework, "which requires a showing of prejudice," but that circuit precedent instead treats the standard as part of the determination of whether failure to correct the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. Id. at 3a n.†.

The court of appeals found that petitioner "ha[d] not made the required showing." Pet. App. 3a. The court explained that "[b]ased on th[e] letters" from his family, petitioner had asserted that "he would have allocuted on three topics if the court had allowed him: (1) his recidivist drunk driving; (2) his taking advantage of his family; and (3) his intention to stay in Mexico." Ibid. And it found that "'[m]ost of the arguments [petitioner] claims he would have made were raised either by [those letters] or

defense counsel at the sentencing hearing, and [petitioner] does not provide any new mitigating information in his appellate brief.'" Ibid. (citation omitted; first and third set of brackets in original).

In particular, the court of appeals observed that "the record shows" -- and "[petitioner] concedes" – "that the sentencing judge read the letters," and that petitioner's counsel had also explained at sentencing petitioner's reasons for staying in Mexico after release, including the fact that his "family had a home and a job for him in Mexico and that his children were adults who could visit him there." Pet. App. 4a. And the court of appeals further observed that the district court had "made clear that nothing in those letters or the information from [petitioner's] family would change the sentence." Ibid. The court of appeals emphasized the district court's determinations that petitioner "had 'no incentive to act right' because he has 'people here who will take him in and clean up his messes'"; had "betrayed" his family and community by driving drunk; "was a 'danger to everybody in town'"; and had in fact "'taken advantage' and 'mooched off' of his family." Ibid. (brackets omitted).

b. Judge Elrod dissented. Pet. App. 5a-8a. She explained that, under circuit precedent, "[f]or obvious allocution errors, our default is to vacate." Id. at 5a (discussing United States v. Reyna, 358 F.3d 344, 352-353 (5th Cir.) (en banc), cert. denied,

541 U.S. 1065 (2004)). She added that for the court "to affirm despite allocution error, '[t]he defendant must fail to present any objective basis upon which the district court would probably have changed its mind.'" Id. at 7a (quoting United States v. Figueroa-Coello, 920 F.3d 260, 266 (5th Cir. 2019) (per curiam)) (brackets in original). Because Judge Elrod believed that petitioner had satisfied that standard, she would have remanded for resentencing. Id. at 7a-8a.

ARGUMENT

Petitioner contends (Pet. 11-29) that the court of appeals erred in declining to require resentencing based on his forfeited claim that he was denied the opportunity to allocute. This Court has repeatedly denied petitions for writs of certiorari raising claims about the proper approach to appellate review of allocution errors. See Pittsinger v. United States, 138 S. Ct. 2600 (2018) (No. 17-7568); Chavez-Perez v. United States, 137 S. Ct. 2215 (2017) (No. 16-8118); Villa-Lujan v. United States, 137 S. Ct. 2212 (2017) (No. 16-7160); Moreira v. United States, 577 U.S. 1144 (2016) (No. 15-5613); Coleman v. United States, 555 U.S. 1104 (2009) (No. 08-6122); De Anda-Duenez v. United States, 543 U.S. 1004 (2004) (No. 04-5456); Reyna v. United States, 541 U.S. 1065 (2004) (No. 03-8903); Paz-Aguilar v. United States, 528 U.S. 1119 (2000) (No. 99-6633). The same result is warranted here.

1. Rule 32(i)(4)(A)(ii) of the Federal Rules of Criminal Procedure requires a district court, "[b]efore imposing sentence," to "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii). The district court here did not comply with that rule, but petitioner did not object to the court's omission. Accordingly, the court of appeals correctly applied the plain-error standard of review to petitioner's allocution claim.

Under Rule 52(b) of the Federal Rules of Criminal Procedure, a defendant who fails to make a timely objection may obtain relief on appeal only by showing that (1) the district court committed an error, (2) the error was "clear" or "obvious," (3) the error affected "substantial rights," and (4) the error seriously affected "the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-737 (1993) (citation and internal quotation marks omitted). In Johnson v. United States, 520 U.S. 461 (1997), this Court held that Rule 52(b) "by its terms governs direct appeals from judgments of conviction in the federal system," and that the Court has "no authority" to make "an exception to it." Id. at 466; see Olano, 507 U.S. at 731 (criminal defendant's "'constitutional right,'" or "right of any other sort," may be forfeited by the failure to make a timely objection) (citation omitted); see also, e.g., United States v.

Vonn, 535 U.S. 55, 65 (2002) (recognizing that Rule 52(b) "appl[ies] by its terms to error in the application of any other Rule of criminal procedure").

2. Petitioner does not dispute that plain-error review applies in this case. He appears, however, to advocate (Pet. 22-24) an approach to allocution errors under which appellate relief on plain-error review would be all but automatic. In his view (Pet. 24-26), a court of appeals is foreclosed from analyzing the potential effect of the allocution error on a defendant's sentence, and instead must simply presume "the reasonable potential for a lower sentence," Pet. 23. In support of that position, petitioner focuses (Pet. 16-17) on features present in every case of allocution error -- in particular, the absence of presentation directly from the defendant and an asserted perception of unfairness -- rather than any showing specific to his own case, to support his claim of an entitlement to appellate relief. Petitioner's approach cannot be squared with either the third or the fourth component of plain-error review, each of which conditions relief on a case-specific determination about the effect of the error in the particular circumstances in which it occurred and serves as an incentive to timely raise objections at the point in the process when errors can be most easily addressed.*

* In the court of appeals, the government conceded that petitioner had satisfied the third component of plain-error review

a. In applying the third component's requirement of an effect on substantial rights, this Court has consistently adhered to an individual-prejudice analysis, under which a defendant normally must show "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Greer v. United States, 141 S. Ct. 2090, 2096 (2021) (quoting Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-1905 (2018)). In United States v. Marcus, 560 U.S. 258 (2010), for example, the Court rejected an approach under which defendants would be entitled to plain-error relief whenever "any possibility" existed that they had been convicted based on conduct that had not yet been made criminal at the time of their actions. Id. at 263-266 (quoting and reversing United States v. Marcus, 538 F.3d 97, 102 (2d Cir. 2008) (per curiam)).

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under circuit precedent that "'presume[s]' that the defendant's substantial rights were affected if 'the record reveals that the district court did not sentence at the bottom of the guideline range.'" Gov't C.A. Br. 13 (quoting United States v. Chavez-Perez, 844 F.3d 540, 544 (5th Cir. 2016), cert. denied, 137 S. Ct. 2215 (2017)) (brackets in original). The government actively disputed whether any objective basis exists for concluding that the trial court in this case might have granted a lower sentence, however. Id. at 14. And as the court of appeals itself observed (Pet. App. 3a n.†), the government's argument that no such case-specific showing can be made "would fit better" in the substantial-rights component of the plain-error framework, were it not for the court's earlier decisions considering that question at the final step of the plain-error framework. This brief therefore addresses petitioner's inability to satisfy either the third or fourth requirement of plain-error review under this Court's governing precedents.

Similarly, in United States v. Davila, 569 U.S. 597 (2013), the Court rejected an approach under which defendants would automatically be entitled to plain-error relief whenever a district court had violated Federal Rule of Criminal Procedure 11(c)(1) by participating in plea discussions. 569 U.S. at 600-601. The Court explained the "essential point * * * that particular facts and circumstances matter," even if some serious violations of Rule 11(c)(1) would likely be prejudicial. Id. at 611; see also, e.g., Puckett v. United States, 556 U.S. 129, 140-142 (2009) (requiring particularized showing of prejudice for government's breach of plea agreement at sentencing); Vonn, 535 U.S. at 58 (same for violations of Federal Rule of Criminal Procedure "meant to ensure that a guilty plea is knowing and voluntary"); Jones v. United States, 527 U.S. 373, 394-395 (1999) (same for jury-instruction errors in capital cases).

"It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that * * * error requires reversal without regard to the mistake's effect on the proceeding." United States v. Dominguez Benitez, 542 U.S. 74, 81 (2004). Petitioner does not contend that allocution errors are structural in that sense, nor could he. In Hill v. United States, 368 U.S. 424 (1962), this Court held that the denial of the right of allocution under Rule 32 may not be raised in a collateral attack under 28 U.S.C. 2255. The Court explained that such a

violation is "neither jurisdictional nor constitutional," and "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." 368 U.S. at 428. For the same reasons, such an error does not necessarily affect substantial rights.

b. Even when a claim of error does affect substantial rights, the fourth prong of plain-error analysis requires an additional inquiry into whether, in the specific circumstances of the case before the court, the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Johnson, 520 U.S. at 469 (citation omitted; brackets in original). This Court has emphasized that the fourth plain-error component "is meant to be applied on a case-specific and fact-intensive basis" and that a "'per se approach to plain-error review is flawed.'" Puckett, 556 U.S. at 142 (quoting United States v. Young, 470 U.S. 1, 17 n.14 (1985) (emphasis omitted)). Notwithstanding that "the integrity of the system may be called into question" by a particular error, "there may well be countervailing factors in particular cases." Id. at 142-143. The Court has, for example, twice held that, even assuming a forfeited error was structural and affected a defendant's substantial rights, relief was unwarranted where the evidence of guilt was

overwhelming. See United States v. Cotton, 535 U.S. 625, 632-633 (2002); Johnson, 520 U.S. at 469-470.

The Court's holding in Hill that an allocution error "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure," 368 U.S. at 428, forecloses any argument that such errors automatically satisfy the fourth requirement of plain-error review. Instead, where the error had no demonstrable effect on the sentence, resentencing is not necessary to protect the integrity of the judicial process. Indeed, automatic appellate relief is particularly unwarranted in the context of forfeited allocution errors because it would provide strong incentives for sandbagging, which Rule 52(b) is designed to prevent. See Johnson, 520 U.S. at 470 ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process.") (citation omitted). On petitioner's theory, defendants and their counsel would have an incentive not to object if the district court neglects to offer a defendant allocution, because in that circumstance the defendant would have the option either to keep the sentence that was imposed or obtain an automatic resentencing, accompanied by an appellate admonishment about the importance of allocution.

c. Contrary to petitioner's contentions (Pet. 21-24, 27), this Court's recent decisions about plain-error relief in the

context of guidelines-calculations errors do not call for a different result.

In Molina-Martinez v. United States, 578 U.S. 189 (2016), this Court determined that "[w]hen a defendant is sentenced under an incorrect Guidelines range -- whether or not the defendant's ultimate sentence falls within the correct range -- the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error," as required to prove prejudice on plain-error review. Id. at 198. The Court was clear, however, "that courts reviewing sentencing errors cannot apply a categorical rule" regarding prejudice. Id. at 203. Justice Alito, joined by Justice Thomas, concurred in part and in the judgment, and observed that the Court's opinion was not "employing a strict presumption against the Government," id. at 209 n.4, because it conformed to plain-error precedent making clear that "particular facts and circumstances matter," ibid. (quoting id. at 200 (majority opinion) (quoting Davila, 569 U.S. at 611)).

Unlike with the guidelines-calculation errors at issue in Molina-Martinez, no sound basis exists for concluding that unobjected-to failures to invite allocution lead to "a reasonable probability of a different outcome" in "most cases." Molina-Martinez, 578 U.S. at 200. There, this Court relied on "the essential framework the Guidelines establish for sentencing proceedings," id. at 198, as well as recent statistics showing

that more than 80% of sentences imposed fall either within the guidelines range or in line with a government-sponsored downward departure, see id. at 198-200. Petitioner offers no comparable evidence here.

Molina-Martinez also recognized that a district court's "explanation could make it clear that the judge based the sentence he or she selected on factors independent of the Guidelines," in which case a reviewing court "consider[ing] the facts and circumstances of the case before it" would be free to deny plain-error relief. 578 U.S. at 200. Under petitioner's approach to allocution errors, however, a court of appeals would be barred from making any case-specific determination of whether allocution could have made any difference to the sentence imposed by the district court. See Pet. 22-26.

Petitioner's reliance (Pet. 22-24) on this Court's decision in Rosales-Mireles v. United States is likewise misplaced. In Rosales-Mireles, the Court held that where a Guidelines error "affect[ed] a defendant's substantial rights," it "ordinar[ily]" will also "seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief." 138 S. Ct. at 1903. As in Molina-Martinez, the Court relied on Guidelines-specific reasoning that has no analogue here. See 138 S. Ct. at 1907-1909.

Petitioner focuses (Pet. 21-22) on the Court's statement in Rosales-Mireles that relief under Rule 52(b) is not limited to circumstances "in which a miscarriage of justice would otherwise result" or that "shock the conscience." 138 S. Ct. at 1906 (citations and internal quotation marks omitted). But to the extent that the court of appeals has used "miscarriage of justice" terminology in this context, it has made clear that all it requires under the fourth plain-error component is "some objective basis that would have moved the trial court to grant a lower sentence; otherwise, it can hardly be said that a miscarriage of justice has occurred." United States v. Magwood, 445 F.3d 826, 830 (5th Cir. 2006) (citation omitted); see Pet. App. 3a. That requirement is fully consistent with this Court's recognition that, in order to obtain plain-error relief, a "defendant ordinarily must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Rosales-Mireles, 138 S. Ct. at 1904-1905 (citation and internal quotation marks omitted).

3. The court of appeals correctly declined to vacate petitioners' sentence under the standard described above based on his forfeited claim of allocution error, and its fact-bound disposition does not warrant this Court's review. As the court of appeals recognized, petitioner failed to identify any way in which his allocution would have resulted in a lower sentence. Pet. App. 4a.

First, most of the subjects that petitioner claims that he would have raised in allocution were already "raised either by [letters from petitioner's family] or defense counsel at the sentencing hearing." Pet. App. 3a. The record reflects that the district court read the letters written by petitioner's family, and petitioner's counsel explained petitioner's situation in Mexico and his family situation in the United States. Ibid. Not only did the court not view those factors as warranting a lower sentence, but it expressed that petitioner has "'no incentive to act right' because he has 'people * * * who will take him in and clean up his messes.'" Id. at 4a. Second, in determining the appropriate sentence, the court gave significant weight to the fact that petitioner's repeat DWI behavior rendered him "a 'danger [to] everybody in town.'" Ibid. (brackets in original). Accordingly, petitioner does not proffer any sound basis for concluding that the procedural error affected his sentence or called the integrity of the judicial proceeding into question, as plain-error relief would require.

4. Petitioner contends (Pet. 11-21, 28-29) that disagreement among the circuits on the question presented warrants this Court's review in this case. Although the circuits' approaches differ in certain respects, it is not clear that those differences will affect a wide range of cases. And this Court's intervention is not necessary to address the disagreement between

the majority and dissent below about whether the specific circumstances of this case warranted a remand for resentencing. See Pet. 25 (citing Pet. App. 3a-4a and id. at 6a-7a (Elrod, J., dissenting)).

a. Contrary to petitioner's suggestion (Pet. 16-18), the court of appeals' approach to the fourth plain-error requirement in this case does not squarely conflict with the approaches of the Fourth and Seventh Circuits. Like those circuits, the court below will "ordinarily remand for resentencing" for allocution errors that it deems prejudicial. United States v. Chavez-Perez, 844 F.3d 540, 543 (5th Cir. 2016) (citation and internal quotation marks omitted), cert. denied, 137 S. Ct. 2215 (2017); see United States v. Luepke, 495 F.3d 443, 451 (7th Cir. 2007) (stating that "in the vast majority of cases, the denial of the right to allocution is the kind of error that undermines the fairness of the judicial process"); United States v. Cole, 27 F.3d 996, 999 (4th Cir. 1994) (stating that the fourth component is satisfied "[w]hen a defendant was unable to address the court before being sentenced and the possibility remains that an exercise of the right of allocution could have led to a sentence less than that received"). And all three circuits look to the particular facts of the case to determine whether the error satisfies the fourth plain-error requirement. See United States v. Noel, 581 F.3d 490, 504 (7th Cir. 2009) (finding requirement not to be satisfied under

the circumstances), cert. denied, 562 U.S. 843 (2010); United States v. Muhammad, 478 F.3d 247, 250-251 (4th Cir. 2007) (finding requirement to be satisfied under the circumstances).

The decision below also does not conflict with the D.C. Circuit's decision in United States v. Abney, 957 F.3d 241 (2020). Abney found that the defendant had preserved his claim, see id. at 249, meaning that any discussion of plain error in that case would not be binding on a future panel presented with an unpreserved claim. And as the D.C. Circuit has itself recognized, Abney did not determine the appropriate framework in which to review allocution claims. See United States v. Lawrence, 1 F.4th 40, 45 (2021); Abney, 957 F.3d at 247.

b. The court below does, however, take a narrower approach to the fourth component of plain-error review than at least some other circuits. It has explicitly departed from the Third Circuit's approach, which it viewed as treating most, if not all, allocution errors as affecting the fundamental fairness of the underlying proceedings. See United States v. Reyna, 358 F.3d 344, 352 (5th Cir.) (en banc) (citing United States v. Adams, 252 F.3d 276, 288-289 (3d Cir. 2001)), cert. denied, 541 U.S. 1065 (2004); see also United States v. Prouty, 303 F.3d 1249, 1253 (11th Cir. 2002) (endorsing Third Circuit's approach).

And in United States v. Bustamante-Conchas, 850 F.3d 1130 (2017), the en banc Tenth Circuit disagreed with the Fifth

Circuit's requirement that a defendant "proffer an allocution statement to the appellate court" in order to obtain relief. Id. at 1143. The Tenth Circuit has instead adopted an approach under which a prejudicial allocution error will be deemed to satisfy the fourth component except in "rare circumstances," such as in cases of revocation of supervised release or when a defendant was able to "mak[e] a meaningful statement in an attempt to influence his sentence" and "had an opportunity to influence the sentence imposed," id. at 1142-1143 (citation omitted).

In addition, in United States v. Daniels, 760 F.3d 920 (2014), the Ninth Circuit "assume[d] without deciding" that plain-error review applies when a district court does not offer a defendant an opportunity to allocute before revoking his supervised release and the defendant fails to raise his allocution claim in the district court. Id. at 922-923. It then relied on precedent applying harmless-error, rather than plain-error, standards for the proposition that "when a district court could have lowered a defendant's sentence, we have presumed prejudice and remanded, even if we doubted that the district court would have done so." Id. at 925 (quoting United States v. Gunning, 401 F.3d 1145, 1149 (9th Cir. 2005)). And without offering any explicit reason why such an error would automatically satisfy Rule 52(b)'s additional requirement that an error have "seriously affected the fairness, integrity or public reputation of judicial proceedings" to warrant

relief, ibid. (citation omitted), the court remanded the case for resentencing, id. at 926.

To the extent the Ninth Circuit would apply a rule of automatic reversal for every forfeited claim of allocution error whenever a district court did not impose the lowest possible sentence, its approach would conflict with the court of appeals' approach in this case. In light of this Court's repeated rejections of such categorical rules, see pp. 9-13, supra, however, this Court should not lightly presume that the Ninth Circuit would in fact read or apply the decision that broadly.

c. Potential variations in the circuits' application of the fourth component of plain-error review to particularized fact scenarios do not require this Court's intervention. The court below has adopted a broad approach under which many defendants will benefit from a presumption that their allocution errors are prejudicial and a practice under which such errors "ordinarily" result in a remand for resentencing. Chavez-Perez, 844 F.3d at 543; see Pet. App. 5a (Elrod, J., dissenting) (observing that "[f]or obvious allocution errors, our default is to vacate"). Its fact-specific determination that this is the atypical case in which no such remand is necessary because the sentencing court has already "made clear" that nothing in petitioner's proposed allocution would change the sentence imposed, Pet. App. 4a, does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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