No. 17-8476

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DAVID SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in applying harmless-error review to a claim that the district court violated Federal Rule of Criminal Procedure 32(i)(1)(A), which requires district courts to verify at sentencing "that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 877 F.3d 42.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2017. A petition for rehearing was denied on January 11, 2018 (Pet. App. 8a). The petition for a writ of certiorari was filed on April 10, 2018. 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 District of Massachusetts, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 1a-2a. Petitioner committed that offense while on pretrial release in a pending case. Ibid. The district court imposed a sentence of 41 months of imprisonment based on the new conviction. Id. at 2a. That sentence consisted of a 29-month sentence for wire fraud, to be served concurrently with petitioner's sentences in his earlier case, and a 12-month sentence for committing a felony while on release, see 18 U.S.C. 3147, to be served consecutive to petitioner's other sentences. Pet. App. 2a. The district court also ordered $265,535 in restitution. C.A. App. 105. The court of appeals affirmed. Pet. App. 1a-7a.

1. Petitioner was a licensed real estate broker in Massachusetts. Presentence Investigation Report (PSR) ¶ 13. In 2010, a grand jury in the District of Massachusetts indicted petitioner on mail and wire fraud charges stemming from a mortgage-fraud scheme that resulted in more than $11 million in losses to the victims. PSR ¶ 87; see 877 F.3d 30, 35, cert. denied, No. 17-8767 (June 11, 2018). In May 2015, petitioner pleaded guilty and was sentenced to 135 months of imprisonment. Pet. App. 1a-2a.

While petitioner was on pretrial release in the mortgage-fraud case, petitioner engaged in additional fraud. See PSR ¶ 11.

He persuaded a married couple ("TW" and "DQ") to give him $199,000 that he represented would be held in escrow for the purchase of three residential properties. PSR ¶¶ 9-40, 75. Instead, petitioner routed the money to his own bank accounts, his family members, or people to whom he owed money. PSR ¶¶ 17, 18, 24, 25. When TW demanded her money back, petitioner sent her a fraudulent document purporting to show that he had wired her $36,000, when in fact he had wired her only $36. PSR ¶¶ 37-38. Petitioner similarly defrauded a religious organization and two individuals ("ZM" and "BM") of funds that those victims had provided to petitioner in connection with real-estate transactions. PSR ¶¶ 41-67.

2. In March 2014, while petitioner's original mortgage-fraud case was pending, a grand jury indicted petitioner on five counts of wire fraud in violation of 18 U.S.C. 1343, in connection with his defrauding of TW and DQ. D. Ct. Doc. 3 (Mar. 20, 2014). In January 2016, after petitioner had pleaded guilty and been sentenced in his original mortgage-fraud case, petitioner pleaded guilty to one of the new wire fraud counts under a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). PSR ¶¶ 2-3. The plea agreement provided that petitioner would receive a one-year sentence, with six months to run concurrent to the already-imposed 135-month sentence in the mortgage-fraud case, and six months to run consecutive to the earlier sentence. Pet. App. 2a. The agreement called for restitution of $49,000 to TW and DQ,

but it did not call for petitioner to pay attorney's fees or interest to those victims, and it did not include restitution for the victims of the uncharged related conduct. Ibid.; see PSR ¶ 155.

The district court "conducted a change-of-plea hearing and conditionally accepted the plea agreement, but noted that it would reserve final acceptance or rejection until it had considered the PSR." Pet. App. 2a. After the change-of-plea hearing, "a group of victims filed a sentencing memorandum urging the district court to reject the proposed plea agreement and impose, at a minimum, a consecutive prison term of at least twelve months and a restitution award that included attorneys' fees and interest." Ibid. The district court then filed a notice advising the parties that it intended to reject the agreed-upon sentence under Rule 11(c)(1)(C), because it had concluded after consideration of the PSR and the victims' memorandum that "any consecutive sentence of incarceration of less than 12 months is insufficient." Ibid. (ellipsis omitted).

Petitioner elected not to withdraw his guilty plea and to instead proceed with sentencing. Pet. App. 2a. The district court then sentenced petitioner to a total of 41 months of imprisonment. Ibid. That sentence consisted of 29 months on the wire fraud charge, to be served concurrently with petitioner's prior sentences, and an additional one-year sentence under 18 U.S.C.

3147 for committing a violation while on release, to be served consecutive to petitioner's other sentences. Ibid.; see 18 U.S.C. 3147 ("A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense, to * * * a term of imprisonment of not more than ten years if the offense is a felony" that "shall be consecutive to any other sentence of imprisonment"). The court also ordered total restitution of $265,535, including restitution for TW, DQ, and the additional victims ZM, BM, and the religious organization. C.A. App. 105.

At the conclusion of the sentencing hearing, the parties and the Probation Officer had the following exchange with the district court:

> MR. GLEASON [counsel for petitioner]: Judge, [petitioner] wants to wish to express to the Court that he did not see the Presentence Report and that he was not aware of initials and people being owed money on initials as being an issue for purposes of the restitution.
>
> DEFENDANT: Yes.
>
> THE COURT: Does Probation wish to respond to that?
>
> MS. ROFFO [representative from the probation office]: Your Honor, the Presentence Report was disclosed to counsel, and counsel is to share it with his client.
>
> THE COURT: Mr. Gleason, you got the Presentence Report, correct?
>
> MR. GLEASON: Yes, we did, your Honor.
>
> THE COURT: All right. Anything further, Mr. Wild?

> MR. WILD [Assistant U.S. Attorney]: Only on the question that's usually asked, your Honor, by the Court, is whether counsel and the defendant have discussed it, and I'm assuming they have.
>
> THE COURT: You discussed the Presentence Report with your client?
>
> MR. GLEASON: I have, your Honor, I discussed it. I discussed it with the original and that it was the additional facts which were presented relative to this charge.
>
> THE COURT: Thank you. We're adjourned.

Pet. App. 2a-3a.

3. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. 1a-7a. Petitioner argued on appeal, among other things, that his sentence should be reversed because the district court failed to comply with Federal Rule of Criminal Procedure 32(i)(1)(A), which requires that the court "verify at the sentencing hearing 'that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report.'" Id. at 5a (quoting Fed. R. Crim. P. 32(i)(1)(A)).

The court of appeals determined that even if the district court fell short under Rule 32(i)(1)(A), the error was harmless on the facts of petitioner's case. Pet. App. 5a. The court of appeals observed that it had stated that the "better practice" under Rule 32 is for the district court to "address the defendant directly in order to establish that he or she has had the opportunity to read the PSR and to discuss it with his/her counsel." Ibid. (quoting United States v. DeLeon, 704 F.3d 189, 196 (1st Cir. 2013)). Because the district court "did not do so here," the court of appeals wrote that it "cannot say that it is clear that [petitioner] was familiar with the substance of the final PSR." Ibid.

The court determined, however, that "the record is clear that any error was harmless." Pet. App. 5a. It observed that the only potential prejudice that petitioner had identified was that the PSR "contained three uncharged relevant matters that added an additional $142,500 to the restitution amount" and that he "had no opportunity to challenge" that part of the award. Ibid. But the court observed that even on appeal, petitioner had "not identified any deficiency in these readily verifiable calculations" nor had he made any "legal argument that this uncharged conduct could not serve as the basis for a restitution award." Ibid. In sum, the court wrote, petitioner had "made no argument to this court that the result would have been any different had he read the PSR in full." Ibid. Under these circumstances, the court concluded, "if there was error in how the district court treated [petitioner's] statement regarding the PSR, it was harmless." Ibid.

ARGUMENT

Petitioner contends (Pet. 9-17) that this Court should grant certiorari to decide whether a district court's failure to "verify that the defendant and the defendant's attorney have read and discussed the presentence report," Fed. R. Crim. P. 32(i)(1)(A), is subject to harmless-error review. The court of appeals correctly applied harmless-error review to an alleged violation of Rule 32(i)(1)(A), and its holding does not implicate any conflict warranting this Court's intervention. This Court has previously denied petitions asserting that violations of Rule 32(i)(1)(A) are not amenable to plain-error review, see Soltero v. United States, 555 U.S. 829 (2008) (No. 07-9900); Ramirez-Meza v. United States, 535 U.S. 1059 (2002) (No. 01-8346); Esparaza-Gonzalez v. United States, 535 U.S. 991 (2002) (No. 01-7544), and the same result is warranted here in the closely related harmless-error context.

1. Petitioner contends that violations of Rule 32(i)(1)(A) should trigger automatic reversal in order to ensure "literal compliance" with the rule and a "fair sentencing process." Pet. 9, 16. The court of appeals correctly determined that, to the contrary, violations of Rule 32(i)(1)(A) should be reviewed for harmlessness.

Errors in district court proceedings are generally subject to harmless-error review pursuant to Federal Rule of Criminal Procedure 52(a), which states that "[a]ny error * * * that does not affect substantial rights must be disregarded." When a defendant preserved a claim of error in the district court, the government has the burden of establishing under Rule 52(a) that the error was harmless because it did not affect substantial rights. United States v. Davila, 569 U.S. 597, 607 (2013). An error generally "affect[s] * * * substantial rights," Fed. R. Crim. P. 52(a), only if it "affect[s] the outcome of the district court proceedings," United States v. Marcus, 560 U.S. 258, 262 (2010) (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)). When a defendant presses on appeal a claim that he did not raise in the district court, "the tables are turned" and the defendant must "show that his 'substantial rights' were affected" as part of demonstrating reversible plain error. United States v. Vonn, 535 U.S. 55, 62-63 (2002) (citation omitted); see Fed. R. Crim. P. 52(b).

Petitioner errs in contending that errors under Rule 32(i)(1)(A) warrant automatic reversal, without analysis of whether they "affected the outcome of the district court proceedings." Marcus, 560 U.S. at 262. This Court has recognized "a very limited class" of "structural errors" that cannot be reviewed for harmlessness under Rule 52(a), id. at 263, because such errors "defy analysis by 'harmless error' standards," Neder v. United States, 527 U.S. 1, 7 (1999) (citation omitted). This Court has cautioned, however, that structural errors are only those errors that "affect[] the framework within which the trial proceeds." Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (citation omitted). The Court has further stated that "'if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred' are not 'structural errors.'" Marcus, 560 U.S. at 265 (citation omitted); see Neder, 527 U.S. at 8-9.

The court of appeals did not err in reviewing petitioner's claim of Rule 32(i)(1)(A) error for harmlessness under these principles. Petitioner has offered no basis to displace the "strong presumption" in favor of harmlessness review. Marcus, 560 U.S. at 265. And no sound reason exists to conclude that violations of Rule 32(i)(1)(A), are structural errors that cannot be subject to harmlessness review, when courts review for harmlessness errors such as "instructing a jury as to an invalid alternative theory of guilt," "omitting mention of an element of an offense," or "erroneously instructing the jury on an element." Id. at 264. The prejudice analysis of a Rule 32(i)(1)(A) claim is certainly no more difficult, and is likely easier, given that the defendant is in a good position to inform the court about what he might have done differently had the court inquired about his opportunity to read the PSR and discuss it with his counsel.

2. Petitioner's contention that violations of Rule 32(i)(1)(A) are immune from harmless-error analysis does not present a conflict warranting this Court's review. No court of appeals has held that violations of Rule 32(i)(1)(A) are structural errors that are not subject to review for harmlessness under Rule 52(a). While several courts have ordered resentencing without analyzing harmlessness, those decisions do not contain any

analysis of Rule 52(a), harmlessness principles, or the distinction between structural and non-structural errors, and no indication exists that the government presented evidence sufficient to establish harmlessness on the records in those cases. Cf. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 385-386 & n.2 (2008) (cautioning against the assumption that a lower court applied an incorrect legal rule). Moreover, recent decisions of those courts signal that they do not regard violations of Rule 32(i)(1)(A) as structural errors that are not amenable to a harmlessness inquiry.

More specifically, petitioner errs in suggesting (Pet. 10-12) that the Sixth Circuit adopted an automatic-reversal rule for errors under Rule 32(i)(1)(A) in United States v. Mitchell, 243 F.3d 953 (2001), and United States v. Osborne, 291 F.3d 908 (2002). In both of those cases, the court determined that a district court had failed to comply with the requirement that it verify that the defendant and his counsel read and discussed the PSR, and then remanded the case for a new sentencing hearing. In reaching that conclusion in Mitchell, the court rejected the government's argument that a defendant bears the burden of "show[ing] actual prejudice as a result of the error"; emphasized that Rule 32 "requir[es] literal compliance"; and concluded that the failure in of the court below "require[d] resentencing." 243 F.3d at 955. The Sixth Circuit's later decision in Osborne then cited Mitchell in ordering a resentencing. Osborne, 291 F.3d at 911 ("When a district court does not comply with [the relevant portion of Rule 32], the defendant's sentence must be vacated and the case must be remanded for re-sentencing.") (citing Mitchell, 243 F.3d at 955).

Those decisions are not best read to establish that a violation of Rule 32(i)(1)(A) is a structural error requiring automatic reversal even if the government meets its burden of establishing harmlessness under Rule 52(a). Neither decision discussed Rule 52(a) or analyzed whether violations of Rule 32(i)(1)(A) fall within the narrow category of structural errors that defy harmlessness analysis. Further, in both cases, the defendants argued that their presentence reports contained errors that affected their ultimate sentences, and there is no indication that the government put forward evidence sufficient to establish harmlessness notwithstanding those arguments. See Br. in Opp. at 14 n.4, Soltero v. United States, No. 07-9900 (citing Appellant's C.A. Br. at 7, Mitchell, supra, No. 99-4272 (May 16, 2000); Appellant's C.A. Br. at 12-24, Osborne, supra, No. 00-6763 (Aug. 21, 2001)).*

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* Mitchell and Osborne likewise are not best read as holding that Rule 32(i)(1)(A) errors are subject to automatic reversal even in the plain-error context where the defendant bears the burden of demonstrating the absence of prejudice. See Fed. R. Crim. P. 52(b). Neither decision discussed plain-error analysis or Rule 52(b). And the Sixth Circuit has subsequently made clear that it does apply plain-error review to unpreserved Rule 32(i)(1)(A) claims. See, e.g., United States v. Tate, 516 F.3d 459, 465-466 (6th Cir.), cert. denied, 555 U.S. 847 (2008).

Moreover, in subsequent decisions, the Sixth Circuit has indicated that Rule 32(i)(1)(A) errors may be analyzed for prejudice. The court held in the context of addressing violations of Rule 32(e)(2) and (g) -- which likewise relate to review of a PSR -- that although "district courts must be in 'literal compliance' with the requirements of Rule 32" and the court has "emphasize[d] the importance of Rule 32's mandate, [the court] review[s] violations for harmless error." United States v. Roberge, 565 F.3d 1005, 1011 (6th Cir.) (citation omitted), cert. denied, 558 U.S. 924 (2009).

In addition, the court of appeals has assessed whether a defendant's substantial rights were affected by a Rule 32(i)(1)(A) violation in the context of unpreserved claims reviewed for plain error. United States v. Tate, 516 F.3d 459, 465-466 (6th Cir.) ("We need not determine * * * whether the district court actually failed to comply with Rule 32(i)(1)(A) because, even if there was obvious error, it did not affect [the defendant's] substantial rights."), cert. denied, 555 U.S. 847 (2008); United States v. Burleson, 419 Fed. Appx. 649, 651-652 (6th Cir. 2011) (unpublished); United States v. Tarpley, 295 Fed. Appx. 11, 16-17 (6th Cir. 2008) (unpublished). In each of those cases, the court analyzed the record of the sentencing to determine whether an alleged error caused prejudice. Tate, 516 F.3d at 466; Burleson, 419 Fed. Appx. 651-652; Tarpley, 295 Fed. Appx. at 17. Those cases thus belie petitioner's contention that Rule 32(i)(1)(A) errors trigger automatic reversal or are not amenable to prejudice analysis.

At minimum, it is not clear that the Sixth Circuit's approach conflicts with that of the court below, given the Sixth Circuit's recent case law and the absence of any analysis in Mitchell and Osborne of jurisprudence concerning Rule 52, harmlessness, or structural error. The fact that Mitchell and Osborne were each decided more than 15 years ago -- before decisions such as Marcus and Weaver -- provides additional reason to doubt the Sixth Circuit would treat Mitchell or Osborne as controlling today on the question presented here.

Similarly, United States v. Miller, 849 F.2d 896, 897-898 (4th Cir. 1988), does not establish a conflict warranting this Court's review. That 30-year-old decision remanding a case for resentencing after finding a violation of Rule 32(i)(1)(A) is not best read to reject harmless-error analysis with respect to violations of Rule 32(i)(1)(A). While the court of appeals stated that the defendant was "not required to establish prejudice in order to secure his rights under Rule 32," id. at 898 n.1, the court did not analyze whether a remand was necessary when the government had established harmlessness under Rule 52(a). The decision did not contain any discussion of Rule 52, harmlessness, or structural-error principles. And it is not clear that any harmlessness question was presented, because the defendant had "contend[ed] that the presentence investigation report contain[ed] an error as to the amount of cocaine which he distributed, and that as a result of that error, he is less likely to receive an early parole." Ibid.

Moreover, in a more recent case, the Fourth Circuit has determined that courts can conduct record-based analysis of whether an error under Rule 32(i)(1)(A) affected a defendant's substantial rights, expressly rejecting the argument that Rule 32(i)(1)(A) errors are a special class of mistake that are automatically deemed to affect a defendant's substantial rights. See United States v. Lockhart, 58 F.3d 86, 89 & n.* (1995) (determining that a defendant had not established that an error affected his substantial rights and that he was not entitled to relief under plain-error review). In light of that more recent precedent, the absence of analysis of harmlessness in Miller, and the fact that Miller predates much of this Court's relevant jurisprudence, Miller does not present a conflict warranting this Court's intervention.

Petitioner fares no better in pointing (Pet. 12-13) to the Third Circuit's unpublished decision in United States v. Mark, 533 Fed. Appx. 83, 88 (2013). That decision ordered a resentencing based on a Rule 32(i)(1)(A) violation when the district court failed to inquire as to whether the defendant or his counsel had reviewed the PSR, and the defendant had stated that he had "not had an opportunity to read" the document. Ibid. As a non-precedential opinion, Marks cannot create a circuit conflict. Moreover, the Third Circuit has treated errors under Rule 32(i)(1)(A) as susceptible to prejudice analysis in a published decision, United States v. Stevens, 223 F.3d 239, 241-246 (2000), cert. denied, 531 U.S. 1179 (2001). Stevens concluded, after an in-depth analysis, that a violation of Rule 32(i)(1)(A) does not qualify as the sort of structural error that eludes harmlessness review. Id. at 244-245. The court also identified and relied on cases from other circuits establishing that Rule 32(i)(1)(A) violations warrant reversal only if the defendant suffered prejudice, under either plain-error or harmless-error review. Id. at 242-243.

3. In any event, this case would be a poor vehicle for deciding whether violations of Rule 32(i)(1)(A) are amenable to harmlessness review under Rule 52(a). The court of appeals did not determine that a violation of Rule 32(i)(1)(A) did in fact occur on the record in petitioner's case. Pet. App. 5a. And the import of the relevant colloquy in the district court is not clear. While petitioner objected that he did not "see the PSR," defense counsel then stated that "we did" receive the report, and that he discussed the report with petitioner. Id. at 2a. A case in which the underlying error is itself in doubt does not provide a suitable

context for considering whether or how a defendant might prove prejudice from such an error. Among other things, it is possible that if certiorari were granted, the Court would find no violation of Rule 32(i)(1)(A), and would therefore not reach the question whether Rule 32(i)(1)(A) errors can be reviewed for harmlessness. And even if the Court were to agree with petitioner on the question presented and remand the case, petitioner has never identified any basis to challenge any portion of the PSR. See _id._ at 5a. Accordingly, there is simply no ground to believe that if petitioner prevailed on the question presented, it would have any effect on the outcome in petitioner's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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