

NO. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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VIOREL PRICOP,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
For the Ninth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED FOR REVIEW**

Did the Ninth Circuit misconstrue this Court's precedent on the difference between a "claim" and an "argument" when it ruled Mr. Pricop's sentencing claim was waived on appeal?

## **INTERESTED PARTIES**

Petitioner is Viorel Pricop, an inmate at the Federal Correctional Institution in Victorville, California. Mr. Pricop was the defendant in the district court and the appellant below. Respondent is the United States.

**RULE 14.1(b)(iii) STATEMENT**

There are no proceedings directly related to the case in this Court.

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## INTRODUCTION

Viorel Pricop respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming his conviction and sentence after jury trial on six counts of arson.

## OPINIONS BELOW

The Ninth Circuit's unpublished memorandum affirming Mr. Pricop's conviction and sentence is unreported but available at 2025 WL 3091133 (9th Cir. 2025) and included in the Appendix ("Appx.") at 1a. Its January 15, 2026 order denying Mr. Pricop's petition for panel rehearing and rehearing en banc is unreported and included in the Appendix at 6a.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered its judgment in favor of respondent on November 5, 2025, denied the petition for panel rehearing and rehearing en banc on January 15, 2026, and issued its mandate on January 23, 2026. This petition is timely. Sup. Ct. R. 13.3.

## U.S. SENTENCING GUIDELINE INVOLVED

United States Sentencing Guideline § 4A1.2(c) states:

### **(c) Sentences Counted and Excluded**

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

- (1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

Careless or reckless driving  
Contempt of court  
Disorderly conduct or disturbing the peace  
Driving without a license or with a revoked or suspended license  
False information to a police officer  
Gambling  
Hindering or failure to obey a police officer  
Insufficient funds check  
Leaving the scene of an accident  
Non-support  
Prostitution  
Resisting arrest  
Trespassing.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Fish and game violations  
Hitchhiking  
Juvenile status offenses and truancy  
Local ordinance violations (except those violations that are also violations under state criminal law)  
Loitering  
Minor traffic infractions (e.g., speeding)  
Public intoxication  
Vagrancy.

### **STATEMENT OF THE CASE**

I. **Mr. Pricop's criminal history score under the Sentencing Guidelines is increased due to a misdemeanor conviction resulting in a \$757 fine.**

Following a sixteen-day jury trial, Mr. Pricop was convicted of six counts of arson of vehicles and property used in interstate commerce, in violation of 18 U.S.C. § 844(i). The Presentence Investigation Report ("PSR") prepared for sentencing determined that the total offense level under the U.S. Sentencing Guidelines ("U.S.S.G.") was 28.

It also concluded Mr. Pricop had four criminal history points, and so was in criminal history category III. It determined Mr. Pricop should receive one criminal history point for a July 11, 2012 conviction for misdemeanor “theft” for which he was sentenced to pay a \$757 fine. According to the PSR, Mr. Pricop was cited for siphoning 130 gallons of fuel from a semi-truck that was worth approximately \$540. Receiving one criminal history point for that misdemeanor theft conviction moved Mr. Pricop from criminal history category II to III, which increased the Sentencing Guideline range from 87-108 months (if Mr. Pricop was in criminal history category II) to the 97-121 month range set forth in the PSR.

At sentencing on June 7, 2024, the district court imposed a high-end Guidelines range sentence of 121 months.

**II. Mr. Pricop challenges his sentence on appeal but the Ninth Circuit finds the claim waived.**

On appeal, Mr. Pricop challenged the Sentencing Guidelines calculation, and specifically the PSR’s calculation of his criminal history.

He argued the PSR incorrectly determined Mr. Pricop was in criminal history category III by assigning one criminal history point for the prior theft conviction where he was sentenced to pay a fine. He explained that under U.S.S.G. § 4A1.2(c)(1), sentences for certain “prior offenses and offenses similar to them, by whatever name they are known,” are only counted if “(A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense.” Amongst those offenses listed in the Guidelines is “insufficient funds check.” *Id.*

The opening brief noted the PSR did not indicate what specific statute Mr. Pricop was convicted under, so he believed it was for a conviction under Ohio law. That was due to the PSR’s notation that Mr. Pricop had a conviction for misdemeanor theft from “Fayette County Circuit Court, Vandalia, OH; Docket No.: 12-CM-70.”

In *United States v. Lopez-Pastrana*, 244 F.3d 1025 (9th Cir. 2001), the Ninth Circuit held the crime of shoplifting under Nevada law was “similar” to the crime of “insufficient funds check” in § 4A1.2(c)(1). 244 F.3d at 1026. It reversed a sentence for a defendant whose criminal history score—and his corresponding Guidelines range—was increased due to a prior shoplifting conviction where he was sentenced to sixteen hours of community service and fined \$200. *Id.* at 1031. It noted that shoplifting and insufficient funds check were punished under the same provisions of Nevada law and had the same penalty, which was dependent on the value of the property taken. *Id.* at 1028. It also explained the two crimes “share many of the same elements” and ultimately both required “the conversion of the property of another” with the “specific intent to deprive the owner of the value of that property.” *Id.* at 1029.

The Ninth Circuit has also noted, in passing, “that petty theft (like shoplifting) is similar to other minor theft offenses (like insufficient funds check).” *Lopez-Pastrana*, 244 F.3d at 1030 (citing *United States v. Sandoval*, 152 F.3d 1190 (9th Cir. 1998)). Thus, convictions for minor theft offenses like shoplifting, petty theft and passing bad checks cannot score criminal history points unless the

defendant was placed on probation for at least a year, was sentenced to serve at least 30 days in jail, or the prior offense is similar to the instant federal offense. *See United States v. Bad Marriage*, 392 F.3d 1103, 1106 (9th Cir. 2004) (noting under *Lopez-Pastrana*, “shoplifting offenses should be excluded from computation under U.S.S.G. § 4A1.2(c)(1).”).

Applying this law, Mr. Pricop argued he should not have received one criminal history point for the theft conviction. His instant offense of arson was obviously dissimilar to a theft offense. Instead, like the shoplifting offense in *Lopez-Pastrana*, Mr. Pricop was convicted of a minor theft offense involving “the conversion of the property of another” with “the specific intent to deprive the owner of the value of that property.” 244 F.3d at 1029. Because the theft conviction was similar to the offense of “insufficient funds check,” it should not have received any criminal history points because Mr. Pricop was only sentenced to pay a \$757 fine. U.S.S.G. § 4A1.2(c)(1). In turn, Mr. Pricop should only have been in criminal history category II, not III. The opening brief explained how the error prejudiced Mr. Pricop because it increased the Guidelines range from 87-108 months to 97-121 months.

In its answering brief, the government argued that because Mr. Pricop did not object to the PSR or its Guidelines calculation at sentencing, the issue could only be reviewed for plain error. The government asserted Mr. Pricop had failed to show “any error, plain or otherwise, because he hasn’t shown that he was convicted of the Ohio offense on which he bases his argument.” It explained the PSR “stated that the conviction came from a court in Vandalia, Ohio, but the narrative states

that the details from the case came from an Illinois police department,” and “the PSR states that the conviction came from Fayette County Circuit Court; there’s a Fayette County and a Vandalia in Ohio, but Vandalia isn’t in Fayette County. There is a Vandalia, Illinois, and it’s in Fayette County, Illinois.” After consulting a “public court database outside the record,” the government asserted the conviction was from Illinois, not Ohio. It concluded because there was no objection before the district court, the arguments in the opening brief were “irrelevant” and so Mr. Pricop “hasn’t shown error.” In a footnote, the government asserted if Mr. Pricop raised “a new argument about Illinois law in his reply brief, the Court should decline to consider it.”

In his reply brief, Mr. Pricop agreed with the government that the Ninth Circuit could look outside the record to determine the conviction was from Illinois, not Ohio. He argued his sentencing claim was not waived and could be considered even if the wrong statute was analyzed in the opening brief. Looking at the Illinois statute, Mr. Pricop explained why, like the Ohio statute analyzed in the opening brief, it should not have received criminal history points. The Illinois theft statute covers minor thefts of property, not from the person, and not exceeding \$500 in value. 720 ILCS 5/16-1(a)(1). Such thefts are Class A misdemeanors, with a maximum punishment of up to 364 days in jail and a fine of no more than \$2,500. 730 ILCS 5/5-4.5-55(a), (e). All other thefts under the statute are felonies. *See* 720 ILCS 5/16-1(b)(1.1)-(11). Because this Illinois theft crime is not similar to the federal crime of arson, and because Mr. Pricop was not placed on probation for at

least a year or sentenced to serve at least 30 days in jail, the conviction should not have received one criminal history point under U.S.S.G. § 4A1.2(c)(1). He also argued that, at a minimum, the appellate court should vacate the sentence and remand to the district court for a new sentencing hearing due to a significant sentencing procedural error that prejudiced Mr. Pricop.

The Ninth Circuit heard oral argument on October 22, 2025 and on November 5, 2025, issued a memorandum affirming Mr. Pricop's convictions and sentence. Mem. 1. It found the sentencing issue waived since Mr. Pricop "neither raised it below nor properly pressed it in his opening brief (as he relied on the wrong state's law there)" and continued that it would not consider an "argument" raised for the first time in a reply brief. Appx. 5a.

### **REASONS FOR GRANTING THE WRIT**

The Ninth Circuit misconstrued this Court's precedent on what it means to present a claim when it deemed Mr. Pricop's sentencing claim waived. This Court has long held that as long as a claim is brought to a court's attention, it has been fairly presented even if the specific argument in support of the claim changes.

Mr. Pricop consistently presented the claim on appeal that his criminal history score under the Sentencing Guidelines was incorrectly increased due to a prior theft conviction where he was sentenced to pay only a \$757 fine. The fact that his opening brief relied on the wrong state's law—an error stemming from an incorrect notation in the Probation office's PSR—did not mean he waived the issue, or raised the claim for the first time in his reply brief. At a minimum, the Ninth Circuit should have

reviewed the sentencing claim under the plain error standard of review, which would have likely resulted in Mr. Pricop's sentence being vacated.

This Court should grant a petition for a writ of certiorari to provide guidance to federal appellate courts about the difference between a “claim” and an “argument” when it comes to Sentencing Guidelines errors to ensure federal appellate courts correctly and consistently apply this Court's precedent distinguishing between the two concepts.

I. **The Ninth Circuit misconstrued this Court's precedent when it found Mr. Pricop's sentencing claim waived.**

The Ninth Circuit incorrectly accepted the government's argument—made in a footnote on the last page of its brief—that Mr. Pricop's sentencing claim was waived because it was raised for the first time in a reply brief. Appx. 5a.

This Court has drawn a distinction between a “claim” and an “argument,” explaining “Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992). It has explained “no particular form of words or phrases is essential” for presenting a claim as long as it is “brought to the attention” of the court “with fair precision and in due time.” *Hemphill v. New York*, 595 U.S. 140, 148 (2022). A claim is not waived when a litigant presents “a new argument to support what has been his consistent claim.” *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Mr. Pricop satisfied that requirement. His opening brief raised the claim that his prior theft conviction should not have received criminal history points under the

Sentencing Guidelines. He argued a minor theft conviction was similar to the crime of “insufficient funds check” in U.S.S.G. § 4A1.2(c)(1) under Ninth Circuit law. He explained he was not sentenced to a year of probation or a term of imprisonment of at least 30 days as required by U.S.S.G. § 4A1.2(c)(1) because he was only sentenced to pay a \$757 fine. He continued that since he was sentenced to only pay a fine, the conviction should not have received criminal history points. Finally, he argued this error was prejudicial because it raised the Guidelines range, and thus he likely received a higher sentence because of the error.

His reply brief presented the same exact claim: that the prior theft conviction should not have received criminal history points under the Sentencing Guidelines. That a minor theft conviction was similar to the crime of “insufficient funds check” in U.S.S.G. § 4A1.2(c)(1). That since he was not sentenced to a year of probation or a term of imprisonment of at least 30 days, the conviction should not have scored. And that the error was prejudicial because it likely caused him to receive a higher sentence.

The Ninth Circuit, however, conflated the concepts “claim” and “argument” to deem Mr. Pricop’s claim waived because the specific argument about the state statute of conviction changed between the opening and reply briefs. This was a significant misinterpretation of this Court’s precedent.

While Mr. Pricop’s opening brief was wrong about the precise statute—due to an error in the PSR—the claim which formed the basis of Mr. Pricop’s sentencing argument on appeal never changed: the theft conviction should not have increased

his criminal history score because he was only sentenced to pay a \$757 fine. That was enough to satisfy this Court's requirement that an issue be presented "with fair precision and in due time." *Hemphill*, 595 U.S. at 148. The fact that the specific argument about the state of the underlying conviction changed between the opening and reply brief was irrelevant because it was merely "a new argument to support what has been his consistent claim:" that his Sentencing Guidelines range was incorrectly increased due to an incorrectly scored prior conviction. *Lebron*, 513 U.S. at 379.

Thus, the Ninth Circuit misapplied this Court's law when it conflated the concepts of "claim" and "argument" in declining to review Mr. Pricop's sentencing claim. Certiorari is thus necessary to give the Ninth Circuit guidance on how to properly distinguish between these two concepts.

**II. This case is an ideal vehicle to grant certiorari because Mr. Pricop was prejudiced by the Ninth Circuit's refusal to consider a plain sentencing error.**

The Ninth Circuit's error had a major impact on Mr. Pricop because the Sentencing Guidelines mistake was not merely some technical error: it likely added one additional year of incarceration on Mr. Pricop.

As an initial matter, there is no question the sentence was based on a factual mistake made by the Probation office. The PSR identified the wrong state for the theft conviction, as the government itself conceded. It is a "significant procedural error" when a district court's sentence and calculation of the Sentencing Guidelines range is premised on "clearly erroneous facts." *Gall v. United States*, 552 U.S. 38, 51 (2007).

This error rises to the level of “plain error” under Federal Rule of Criminal Procedure 52(b), which permits an appellate court to review a claim not raised before the district court. *See* Fed. R. Crim. P. 52(b) (“A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.”); *see also Puckett v. United States*, 556 U.S. 129, 135 (2009). Plain error means “(1) error, (2) that is plain, and (3) that affects substantial rights.” *Johnson v. United States*, 520 U.S. 461, 462 (1997).

This Court has repeatedly held that when “a defendant is sentenced under an incorrect Guidelines range...the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.” *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016). Likewise, a “miscalculation of the United States Sentencing Guidelines range...will in the ordinary case...seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief” under plain error review. *Rosales-Mireles v. United States*, 585 U.S. 129, 132 (2018).

So the Ninth Circuit’s interpretation of this Court’s precedent on presenting a claim allowed a Sentencing Guidelines calculation unquestionably based on a factual mistake—and as Mr. Pricop explained in both of his briefs, based on a legal mistake—to go unreviewed. Sentencing Guidelines mistakes are considered significant procedural errors that, even under plain error review, result in the reversal of sentencings. Had the Ninth Circuit reviewed Mr. Pricop’s properly raised claim, it would have found plain error, as the incorrectly scored conviction moved him from

criminal history category II to III, raising the Sentencing Guidelines range from 87-108 months to 97-121 months. Mr. Pricop received a sentence at the high end of the range, 121 months; so but for the plain error, it is likely Mr. Pricop would have received a sentence of 108 months instead.

In short, given that Mr. Pricop was clearly prejudiced by a sentencing error the Ninth Circuit incorrectly declined to review, this case is an ideal one for this Court to review to ensure appellate courts do not conflate sentencing claims with arguments, and allow plain Sentencing Guidelines errors to go uncorrected.

### **CONCLUSION**

The petition for a writ of certiorari should be granted.

Dated: April 15, 2026

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