IN THE

SUPREME COURT OF THE UNITED STATES

No. ____________

OCTOBER TERM, 2026

PAUL HORTON SMITH, Sr.

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, in the context of plain error review, a defendant must demonstrate prejudice in order to obtain reversal of his sentence due to a district court's Fed. R. Crim. Pro. 32(i)(1)(A) error?

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 27, 2026. [Ex. "A"]. The Ninth Circuit Court of Appeals denied his petition for rehearing and suggestion for rehearing en banc on April 29, 2026. [Ex. "B"]

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Paul Horton Smith, Sr., as Petitioner

United States of America, as Respondent

JURISDICTION AND CITATION OF OPINION BELOW

On January 27, 2026, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on April 29, 2026. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

FEDERAL RULE OF CRIMINAL PROCEDURE AT ISSUE

Fed. R. Crim. Pro. 32(i)(1)(A):

(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;

Fed. R. Crim. Pro. 32(i)(1)(A).

INTRODUCTION

Fed. R. Crim. Pro. 32(i)(1)(A) requires a district court, prior to imposing sentence, to "verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report." Fed. R. Crim. Pro. 32(i)(1)(A). In this case, the Ninth Circuit agreed that the district court violated this rule at sentencing, but it declined to order resentencing because it found Petitioner was not prejudiced by this plain error. [Ex. "A"]. Petitioner asks the Court to grant review in the instant case to resolve a circuit split concerning whether a defendant must demonstrate prejudice in order to secure reversal of a sentence due to a district court's failure to comply with Fed. R. Crim. Pro. 32(i)(1)(A). The Sixth Circuit does not require a specific showing of prejudice by the defendant to obtain reversal and a new sentencing hearing on account of a Rule 32(i)(1)(A) plain error. The remainder of the circuits–including the Ninth Circuit–require a specific showing of prejudice by a defendant in order to obtain reversal. Petitioner asks the Court to grant review of this case in order to resolve this circuit split, and provide guidance to lower courts regarding a proper application of the fundamental Rule 32(i)(1)(A) sentencing requirement.

STATEMENT OF FACTS AND CASE

In September 2022, Petitioner was charged in a first superseding indictment with multiple counts of wire fraud, in violation of 18 U.S.C. §1343. [ER-113-18]. The indictment alleged that Petitioner, who had owned an estate planning business for twenty years, obtained money from investors for another business venture which he claimed would create returns for the investors. Contrary to Petitioner's statements to investors, he deposited virtually all of the money he received into non-interest-bearing checking accounts, and he used money from new investors to pay earlier investors. Id. Petitioner pled guilty to the charge. [ER-94-95].[1]

A. Presentence Report and Sentencing Filings

In the pre-sentence report ("PSR"), the probation officer made reference to a loss of investor funds which Petitioner had suffered because he himself had been the victim of fraudulent conduct by another person. Paragraph 53 of the PSR provided:

> [Petitioner] also provided a written statement stating the following: "I have accepted a plea agreement. I whole heartedly regret my attempt to personally restore funds lost

[1] "ER" refers to Appellant's excerpts of record filed in the Ninth Circuit. "PSR" refers to the presentence report. "CR" refers to the district court's clerk's record.

> to the Les Murdock scheme in Nuevo, Ca. That decision resulted in the Nortstar Private Annuity Program. I gave all including my personal assets to make that work and restore lost funds. I failed and that failure has caused injury to those involved. I am sincerely sorry for their pain and loss and will spend the rest of my life trying to make them whole. It has been so painful to be barred from communicating with them throughout this terrible time."

[PSR ¶ 53].

U.S. Probation found an advisory guideline range of 151-188 months. [PSR ¶¶ 76, 120]. Defense counsel asked the district court to vary downward and impose a sentence of 60 months in custody. [CR 73]. Counsel mentioned the aforementioned loss in his sentencing papers, albeit without any detail or specificity, writing only that Petitioner "suffered unexpected losses." [CR 73 at 4]. This loss also was raised in one of the twenty-two letters submitted in support of Petitioner. In a letter from Petitioner's wife, she stated that Petitioner "said several times that he should have just taken out bankruptcy when things went badly with Les Murdock's scheme." [CR 73-1 at 7].

The government recommended a sentence of 188 months in custody, a low-end recommendation based on its recommended guideline calculations which were two levels higher than Petitioner's recommendation. [CR 72].

B. Sentencing Hearing

At sentencing, the district court began by going through the applicable guidelines, and then it invited defense counsel to argue. [ER-41-44]. The district court never asked counsel for Petitioner, or Petitioner, whether they had read and discussed the PSR prior to sentencing. Id.

At the beginning of his sentencing argument, defense counsel stated that Petitioner had good intentions when he took money to invest, but he "suffered losses in the beginning that he couldn't admit to." [ER-42]. At that point, the district court stopped counsel to discuss this loss suffered by Petitioner:

> THE COURT: So I read that. So can you amplify on that? He invested that initial money –
>
> MR. KIM: Yes, Your Honor.
>
> THE COURT: – in what?
>
> MR. KIM: Your Honor, he was defrauded himself.
>
> THE COURT: How so?
>
> MR. KIM: That's the initial investment, he thought he was investing in a real investment. It wasn't real.
>
> THE COURT: And he didn't go to the authorities to report the alleged fraud?
>
> MR. KIM: No, Your Honor.

THE COURT: And how much was that initial investment that he lost? How much?

MR. KIM: I'm sorry, Your Honor.

(Counsel and the defendant confer.)

MR. KIM: I apolgize, Your Honor. Mr. Smith has just clarified for me that there was a prosecution in that case. I believe it was $1.7 million total. I don't have the facts in front of me, though.

THE COURT: Okay. So why don't you – I want to know sort (sic) of this. And you may choose not to provide this information, but this is what I'm interested in if you can provide it. So I'm going to take a break, have you speak to your client, and then if you can provide me that information, then you will.

I want to know what time frame this happened. And the $1.7 million did he invest? Was there any prosecution of that case? Was there any restitution ordered? And was that the only instance in which he made an investment that he lost on? And then what happened to sort of the monies that were alleged to have been taken or taken by the victims for which there are no records because they're too old aside from that $1.7 million until the time that the Government can trace the funds? Do you understand my inquiry?

MR. KIM: Yes, Your Honor.

THE COURT: Okay. So take a few minutes, and then I'll be back.

(Recess)

> THE COURT: Be seated, please.
>
> Mr. Kim.
>
> MR. KIM: I apologize, Your Honor. I don't – I'm not going to be able to provide details to the Court at the moment. So if the Court wants further details, I would have to ask for a continuance of the sentencing.
>
> THE COURT: Is there any additional information you can provide now?
>
> MR. KIM: Your Honor, Mr. Smith did speak to this in the presentence report. I believe it's paragraph 56 on page 11. 53. There's a name in there of the defendant in that case, which initially created the hole.
>
> THE COURT: Right, but that's not a lot of information. But we can proceed without it. Continue your argument.

[ER-42-44].

Later in the hearing, Petitioner addressed his loss from the Murdock scheme:

> I know that I was wrong. I know that this is my fault. I haven't attempted to make excuses for that. I would appreciate it if you would allow us the opportunity to provide you the information that my attorney offered to take some time and provide you, even a day. We could get you the facts and figures on how this all started. . . .

[ER-55].

The district court did not respond to Petitioner's request to continue the sentencing hearing in order to obtain this information about the Murdock loss. The district court found an advisory guideline range of 151-188 months, and imposed a high-end sentence of 188 months, to be followed by three years of supervised release. [ER-63-64].

C. Direct Appeal

Petitioner raised two claims related to the Murdock fraud evidence on appeal. First, Petitioner claimed that the district court abused its discretion by denying his request to continue the sentencing hearing so that he could provide the district court with the requested evidence related to the fraud. Second, Petitioner pointed out that the district court violated Fed. R. Crim. Pro 32(i)(1)(A) because it never confirmed that Petitioner and his counsel had read and discussed the pre-sentence report prior to sentencing. Petitioner argued as to both claims that he was prejudiced by these errors because information regarding the Murdock loss was crucial mitigating evidence in the case and there was a reasonable probability that Petitioner would have received a lower sentence had specific information about this loss been presented to the district court.

The Ninth Circuit rejected both claims. With respect to the Rule 32(i)(1)(A) claim, the panel agreed that the district court violated this rule when it failed to verify that counsel had fully reviewed the presentence report with Petitioner.

Id. The panel declined to find an effect on Petitioner's substantial rights, however, writing that Petitioner's "assertion that, absent the error, he would have produced additional evidence about the fraud against him does not show prejudice because there is no reasonable probability that any such evidence would have caused the district court to impose a lower sentence." Id. at 3-4.

ARGUMENT

REVIEW OF THIS PETITION IS WARRANTED TO ALLOW THE COURT TO RESOLVE THE CIRCUIT SPLIT REGARDING WHETHER A DEFENDANT MUST MAKE A SHOWING OF PREJUDICE TO SECURE REVERSAL DUE TO A PLAIN RULE 32(i)(1)(A) ERROR BY THE DISTRICT COURT

Fed. R. Crim. P. 32(i)(1)(A) requires a district court 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." Fed. R. Crim. Pro. 32(a)(1)(A). The purpose of this rule is "to ensure that the defendant [has] the opportunity to read the report and then clarify or dispute personal information contained" therein. Fed. R. Crim. P. 32(i)(1)(A), advisory committee's notes (1983) ("[T]he failure to disclose the report to the defendant, or to require counsel to review the report with the defendant, significantly reduces the likelihood that false statements will be discovered, as much of the content of the [PSR] will ordinarily be outside the knowledge of counsel.").

A. The Circuit Split

The approach by eleven of the twelve circuits, and the one in place in the Ninth Circuit, is that a defendant must make a specific showing of prejudice in order to secure reversal due to a district court's plain Rule 32(i)(1)(A) violation. See, e.g., United States v. Soltero, 510 F.3d 858, 863 (9th Cir. 2007) (declining to reverse because defendant did not show he was prejudiced by plain Rule 32(i)(1)(A) error); see also United States v. Acevedo-Sueros, 826 F.3d 21, 26 (1st Cir. 2016) (same); United States v. Gates, 84 F.4th 496, 507 (2d Cir. 2023) (same); United States v. Stevens, 223 F.3d 239, 242 (3d Cir. 2000) (same); United States v. Jarigese, 999 F.3d 464, 472-73 (7th Cir. 2021) (applying harmlessness test to Rule 32(i)(1)(A) error); United States v. Batemon, 782 F.3d 1004, 1005 (8th Cir. 2015) (same); United States v. Romero, 491 F.3d 1173, 1179-80 (10th Cir. 2007) (same, with court noting that Sixth Circuit does not require a defendant to demonstrate prejudice resulting from a district court's error in failing to verify that the defendant had the opportunity to read and discuss the PSR under Rule 32(i)). In the Ninth Circuit, an unpreserved Rule 32(i)(1)(A) error prejudices a defendant's substantial rights when there is a "reasonable probability" that the defendant would have received a different sentence had the district court not erred. See United States v. Ceja, 23 F.4th 1218, 1227 (9th Cir. 2022).

The Sixth Circuit has come out the other way on this Rule 32(i)(1)(A) prejudice question. In United States v. Mitchell, 243 F.3d 953, 955 (6th Cir. 2001), defendant claimed that resentencing was required because the district court failed to comply with Rule 32(i)(1)(A). Defendant had not raised a Rule 32 objection at sentencing. Id. Without looking to whether defendant had been prejudiced by the error, the Sixth Circuit reversed, finding that the district court's failure to "determine that Mitchell and his attorney had read and discussed Mitchell's presentence report . . . requires resentencing." Id. at 955. See also United States v. Osborne, 291 F.3d 908, 911 (6th Cir. 2002) (same)

B. The Sixth Circuit's Approach is the Correct One

The Court should align with the Sixth Circuit's handling of a Rule 32(a)(1)(A) plain error. "Although sentencing judges are afforded wide discretion in determining what sentence to impose, 'there are distinct limits to this discretion, and they include a defendant's due process right to be sentenced based on accurate information.'" United States v. Doe, 938 F.3d 15, 19 (2d Cir. 2019) (quoting United States v. Juwa, 508 F.3d 694, 700 (2d Cir. 2007)). "[A] defendant clearly has a due process right not to be sentenced on the basis of materially incorrect information." United States v. Petty, 982 F.2d 1365, 1369 (9th Cir. 1993); see also Townsend v. Burke, 334 U.S. 736, 741 (1948) (recognizing that due process requires that a convicted person not be sentenced on "materially untrue" assumptions or "misinformation"); USSG § 6A1.3(a) (providing that when any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor).

Circuit courts have noted the importance of this requirement: "We take this occasion to emphasize the importance of the requirement that a district court verify that a defendant and her counsel have both read and discussed the PSR. Indeed, the Rule reflects the vital role the PSR plays in sentencing." Gates, 84 F.4th at 506; see also United States v. Palta, 880 F.2d 636, 640 (2d Cir. 1989) ("[A]n accurate presentence report is crucial both to ensure the fairness of an individual defendant's sentence and to enhance the overall goal of uniformity in sentencing."); United States v. Fletcher, 134 F.4th 708, 713 (2d. Cir. 2025) (Rule 32(i)(1)(A) and the Due Process Clause forbid a district court from relying on erroneous information at sentencing). This import of this rule is due to the fact that "information in a presentence report may be unfounded malicious gossip, inaccurate, or materially false," so "sentencing courts must tread warily, without acting blindly upon serious allegations, absent guarantees of reliability." United States v. Pugliese, 805 F.2d 1117, 1124 (2d. Cir. 1986).

In determining which approach is proper, the Court should look to the approach circuits courts have taken in connection with the right of allocution which is also addressed in Rule 32. Fed. R. Crim. P. 32(i)(4)(A)(ii) requires a district court to "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence" before imposing sentence. Fed. R. Crim. Pro. 32(i)(4)(A)(ii). Circuit courts generally hold that for Rule 32(i)(1)(A) errors, prejudice should be presumed.[2] See, e.g., United States v. Gonzalez-Melendez, 594 F.3d 28, 37 (1st Cir. 2010) (violation of allocution rule can almost never be regarded as harmless); United States v. Adams, 252 F.3d 276, 289 (3rd Cir. 2001) (prejudice should be presumed; United States v. Reyna, 358 F.3d 344, 353 (5th Cir. 2004) (same); United States v. George, 872 F.3d 1197, 1209 (11th Cir. 2017) (same).

There is no reason for the prejudice approach for Rule 32(i)(4)(A)(ii) violations to be different from Rule 32(i)(1)(A) errors given the substantial uncertainty as to the impact of the error which exists with in both situations. With regard to allocution violations, it is impossible to know on appeal what the defendant would have said, and what his demeanor would have been, if he had been provided

[2] An exception to this rule is if the defendant received a sentence at the exact mandatory minimum (i.e. - 120 months when a 10-year mandatory minimum applied), and there was no possibility for a lower sentence. See United States v. Quintana, 300 F.3d 1227, 1232 (11th Cir. 2002).

the opportunity to address the court. Nor is there a way to know how an allocution would have impacted the sentence imposed by the district court. Would it have moved the district court to impose the same sentence, a lower sentence, or perhaps even a higher sentence? Despite this uncertainty which is inherent in any Rule 32(i)(4)(A)(ii) appeal, circuit courts have applied a presumed prejudice approach to those errors because the right at issue is fundamental. See Adams, 252 F.3d at 289 (presumed prejudice).

Rule 32(i)(1)(A) violations should receive the same treatment. The right of a criminal defendant to address the judge at the sentencing hearing is no more fundamental or important than the right to be sentenced based only on correct information. A district judge formulates a very strong idea of what sort of person is before him or her, and what the nature of the offense is, prior to the sentencing hearing after reading the presentence report and any objections filed. A defendant who has not read it himself, and discussed it with counsel, however, has no opportunity to correct errors or omissions which may be unduly prejudicial to him. Like with a violation of the right to address the district court, it is impossible to know what impact a corrected or clarified point would have had on the sentence; however, the possibility that compliance with Rule 32(i)(1)(A) would have led to a different result is no less than it is with a Rule 32(i)(4)(A)(ii) deprivation.

This is not the only prejudice from a Rule 32(i)(1)(A) violation. In addition to adversely affecting a defendant's ability to correct mistakes in a presentence report, a Rule 32(i)(1)(A) error necessarily affects a defendant's ability to allocute effectively. A defendant cannot give a knowing and complete allocution at sentencing if he has not been able to review the presentence report which contains a vast amount of information the district court will rely on to impose sentence. Compliance with Rule 32(i)(1)(A) does not just allow for identifying and correcting erroneous information which may be in the report, it also allows the defendant to know what information is in the report so that he can address such information as part of his allocution. In the Ninth Circuit, for instance, a prejudice analysis focuses on whether a defendant can point to "any fact in the PSR he would have disputed had the sentencing judge afforded him the opportunity." Soltero, 510 F.3d at 863. But this approach ignores the fact that, along with correcting mistakes, a defendant knowing what is in the PSR is another reason this rule exists. Given this substantial interplay between Rules 32(i)(1)(A) and 32(i)(4)(A)(ii), it is irrational to have such disparate prejudice approaches for violations of these two rules.

Just like "[d]istrict courts have a clear, well-established, affirmative obligation to invite defendants to exercise their right to speak on their own behalf before sentencing," United States v. Abney, 957 F.3d 241, 246 (D.C. Cir. 2020), so do district courts have the obligation to confirm that a defendant is fully aware of the information in his presentence report, including that it is accurate. And just as the right of allocution is deeply rooted in our legal tradition, id., so too is the right of a defendant to be sentenced only based on reliable and accurate information. An indispensable component of this constitutional protection is for a district court to confirm that the defendant has had a chance to review the report and discuss it with his attorney, as "much of the content of the [PSR] will ordinarily be outside the knowledge of counsel." Fed. R. Crim. Pro. 32(i)(1)(A), advisory committee's notes (1983). Without a district court fulfilling this simple and straightforward obligation, the resulting sentencing proceeding is unacceptably unreliable. See Petty, 982 F.2d at 1369 (defendant has clear has due process right not to be sentenced based on incorrect information). For the above reasons, the proper approach for a Rule 32(i)(1)(A) violation is to presume prejudice.

C. The Sixth Circuit's Approach Would Have Led to a Just Result in the Instant Case

At sentencing, the district court agreed with the 151-188 month advisory guideline range submitted by Petitioner. [ER-41-42]. Counsel for Petitioner recommended a sentence of 60 months custody based on a section 3553(a) application, while the government recommended a 188-month sentence. Because an application of the section 3553(a) factors was going to control the district court's selection of its sentence in light of these recommendations, it was imperative for Petitioner to present all mitigating factors for this analysis. Principle on this list of such factors was how and why Petitioner fell into arrears with his investors' money soon after he solicited the investments.

It was also clear that the loss from the Murdock fraud was a salient point for the district court because it was the district court which specifically raised this issue at sentencing. While the Murdock fraud was only briefly mentioned in the PSR, [PSR ¶ 53], as well as in defense counsel's sentencing memorandum, [CR 73], the district court focused on this issue early in the sentencing hearing, telling defense counsel that it wanted to know this information, and that this was "what [it was] interested in if you could provide it." [ER-43]. This information was germane to the district court's section 3553(a) analysis, and in a favorable way to Petitioner.

The district court's request makes sense given the nature of this case. In a Ponzi case, the circumstances surrounding the nature of the defendant's conduct, including what led to the unlawful conduct in the first place, are central issues at sentencing. Did the defendant from the outset solicit investments with the intent to defraud investors and enrich himself? Or did the defendant begin with the intent to benefit his investors through legitimate investments, but then an unintended loss of investor funds led the defendant to engage in unlawful conduct to try and recoup the lost money? These are different types of circumstances which often call for very different penalties, and the district court appeared to understand this when it specifically asked for details about the loss to the Murdock fraud. Although "[t]he PSR is especially important in cases such as this one, where the defendant pleaded guilty and no details of the crime came out at trial," United States v. Horvath, 522 F.3d 904, 912 (9th Cir. 2008), this information was never provided to the district court.

Under the Sixth Circuit rule, Petitioner would receive a new sentencing hearing at which time this information about the losses from the Murdock fraud would be placed before the district court. If the district court were able to understand fully what led to this offense conduct, there is a very strong probability that Petitioner would receive at least a mid-range or low-end guideline sentence, which could lessen Petitioner's penalty by as much as three years. The record contained other mitigating information, including the fact that Petitioner never used any investor money on himself, he lived a modest life, and he had no criminal history. But evidence about the Murdock fraud was the only information which explained how Petitioner fell in the hole financially early in the process, and how this led to the misconduct as he tried to recoup these losses. This should have been the centerpiece of Petitioner's sentencing mitigation argument, but it instead was a mere aside in the sentencing proceeding, as the district court noted when it stated that what additional information defense counsel was able to provide was "not a lot of information." [ER-44]. Applying the Sixth Circuit rule to this case will result in Petitioner receiving the fair sentencing hearing to which he is entitled.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: July 14, 2026

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