

No.

In the Supreme Court of the United States

ROBINSON WILLIAM RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a violation of the Sixth Amendment right to a trial by jury, as defined and remedied by *United States v. Booker*, 543 U.S. 220 (2005), is a structural error that defies analysis under the third prong of the plain-error test (FED. R. CRIM. P. 52(b)).

2. Whether the Eleventh Circuit, in conflict with a majority of the courts of appeals, erred by requiring petitioner to establish, based on the existing record, that a constitutional *Booker* error affected his substantial rights under the third prong of the plain-error test—or, alternatively, whether the court erred by concluding that petitioner had not, in fact, made a sufficient showing.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED.....	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
I. Because Constitutional <i>Booker</i> Error Is Structural, It Was Error to Require Petitioner To Show That His “Substantial Rights” Were Affected.....	7
A. The Eleventh Circuit ignored the <i>Booker</i> remedial opinion’s clear implication that constitutional <i>Booker</i> error is structural.	7
B. The Eleventh Circuit’s decision is inconsistent with this Court’s precedent concerning structural error.	9
C. The Court should grant the petition to clarify the plain-error test’s proper application in the structural error context.	18
D. The Court’s decision in <i>Washington v.</i> <i>Recuenco</i> will impact the resolution of this question.	19
II. The Court Should Grant The Petition To Resolve The Clear, Three-Way Circuit Split Concerning The Proper Analysis Of <i>Booker</i> Errors Under The Plain-Error Rule.	23

TABLE OF CONTENTS – continued

	Page
A. The circuit split as to the question presented affects thousands of federal criminal cases and requires a uniform rule of law.	23
B. The Eleventh Circuit’s approach is inherently unreliable and undermines rule-of-law values that are essential to the criminal justice system.	25
C. At a minimum, constitutional <i>Booker</i> errors should be presumptively prejudicial.....	28
CONCLUSION	29
APPENDIX A	1a
APPENDIX B.....	11a
APPENDIX C.....	13a
APPENDIX D	21a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998)	27
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	20
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991)	<i>passim</i>
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	3, 21
<i>Bollenbach v. United States</i> , 326 U.S. 607 (1946)	20
<i>Harris v. United States</i> , 536 U.S. 545 (2002)	27
<i>Johnson v. United States</i> , 520 U.S. 461 (1997)	5, 18
<i>Koon v. United States</i> , 518 U.S. 81 (1996)	11
<i>Neder v. United States</i> , 527 U.S. 1 (1999)	8, 21
<i>Rose v. Clark</i> , 478 U.S. 570 (1986)	17, 20
<i>Shepard v. United States</i> , 544 U.S. 13 (2006)	27
<i>State v. Allen</i> , 615 S.E.2d 256 (N.C. 2005)	9, 14
<i>State v. Esparza</i> , 660 N.E.2d 1194 (Ohio 1996)	8
<i>State v. Hughes</i> , 110 P.3d 192 (Wash. 2005)	8
<i>State v. Recuenco</i> , 110 P.3d 188 (Wash. 2005)	22
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	<i>passim</i>
<i>United States v. Adams</i> , 252 F.3d 276 (3d Cir. 2001)	28
<i>United States v. Ameline</i> , 409 F.3d 1073 (9th Cir. 2005) (en banc)	<i>passim</i>
<i>United States v. Antonakopoulos</i> , 399 F.3d 68 (1st Cir. 2005)	24
<i>United States v. Barnett</i> , 398 F.3d 516 (6th Cir. 2005)	15, 23, 28

TABLE OF AUTHORITIES – continued

	Page(s)
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	<i>passim</i>
<i>United States v. Carmona-Rodriguez</i> , 2005 WL 840464 (S.D.N.Y Apr. 11, 2005)	13
<i>United States v. Cartwright</i> , 413 F.3d 1295 (11th Cir. 2005)	4
<i>United States v. Coles</i> , 403 F.3d 764 (D.C. Cir. 2005)	24
<i>United States v. Colon-Pagan</i> , 1 F.3d 80 (1st Cir. 1993)	19
<i>United States v. Cotton</i> , 535 U.S. 625 (2002)	5, 18
<i>United States v. Crosby</i> , 397 F.3d 103 (2d Cir. 2005)	16, 24, 26
<i>United States v. David</i> , 83 F.3d 638 (4th Cir.1996)	19
<i>United States v. Davis</i> , 98 F.3d 141 (4th Cir.1996)	12
<i>United States v. Davis</i> , 407 F.3d 162 (3d Cir. 2005) (en banc)	14, 23, 26, 28
<i>United States v. Dazey</i> , 403 F.3d 1147 (10th Cir. 2005)	3, 24
<i>United States v. Fields</i> , 408 F.3d 1356 (11th Cir. 2005)	5
<i>United States v. Frazier</i> , 979 F.2d 1227 (7th Cir.1992)	12
<i>United States v. Gonzalez-Huerta</i> , 403 F.3d 727 (10th Cir. 2005) (en banc)	8, 23
<i>United States v. Greer</i> , 375 F. Supp. 2d 790 (E.D. Wisc. 2005)	13
<i>United States v. Heldeman</i> , 402 F.3d 220 (1st Cir. 2005)	24

TABLE OF AUTHORITIES – continued

	Page(s)
<i>United States v. Hughes</i> , 401 F.3d 540 (4th Cir. 2005)	23
<i>United States v. Mares</i> , 402 F.3d 511 (5th Cir. 2005)	14, 24
<i>United States v. Medrano-Duran</i> , 386 F. Supp. 2d 943 (N.D. Ill. 2005)	13
<i>United States v. Merlos</i> , 8 F.3d 48 (D. C. Cir. 1993).....	18
<i>United States v. Nellum</i> , 2005 WL 300073 (N.D. Ind. Feb. 3, 2005)	13
<i>United States v. Neufeld</i> , 154 Fed. Appx. 813 (11th Cir. 2005)	11
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	6, 18, 28, 29
<i>United States v. Oliver</i> , 397 F.3d 369 (6th Cir. 2005)	8
<i>United States v. Padilla</i> , 415 F.3d 211 (1st Cir. 2005) (en banc)	19
<i>United States v. Paladino</i> , 401 F.3d 471 (7th Cir. 2005)	15, 24, 26
<i>United States v. Pirani</i> , 406 F.3d 543 (8th Cir. 2005) (en banc)	16, 23, 24
<i>United States v. Ranum</i> , 353 F. Supp. 2d 984 (E.D. Wis. 2005).....	12
<i>United States v. Recio</i> , 371 F.3d 1093 (9th Cir.2004)	19
<i>United States v. Reyna</i> , 358 F.3d 344 (5th Cir. 2004) (en banc)	28
<i>United States v. Rodriguez</i> , 398 F.3d 1291 (11th Cir. 2005)	4, 16, 24

TABLE OF AUTHORITIES – continued

	Page(s)
<i>United States v. Rodriguez</i> , 406 F.3d 1261 (11th Cir. 2005)	<i>passim</i>
<i>United States v. Sanchez</i> , 269 F.3d 1250 (11th Cir. 2001) (en banc)	8
<i>United States v. Smith</i> , 359 F. Supp. 2d 771 (E.D. Wis. 2005).....	13
<i>United States v. Syme</i> , 276 F.3d 131 (3d Cir. 2002)	28
<i>United States v. Thompson</i> , 422 F.3d 1285 (11th Cir. 2005)	16, 26, 27, 28
<i>United States v. Valencia-Aguirre</i> , 409 F. Supp. 2d 1358 (M.D. Fla. 2006).....	15
<i>United States v. White</i> , 405 F.3d 208 (4th Cir. 2005)	23
<i>Washington v. Recuenco</i> (No. 05-83)	5, 19
 Constitutional Provisions, Statutes, Rules and Guidelines:	
8 U.S.C. § 1326	2, 20
28 U.S.C. § 1254(1).....	1
18 U.S.C. § 3553(a).....	<i>passim</i>
18 U.S.C. § 3553(b)(1).....	11
Fed. R. Crim. P. 52(a)	18
Fed. R. Crim. P. 52(b)	1, 18
U.S. CONST. amend. VI	1
U.S.S.G. § 2L1.2(a).....	2
U.S.S.G. § 2L1.2(b)(1)(A)	2
U.S.S.G. § 3C1.1	2, 9

TABLE OF AUTHORITIES – continued

	Page(s)
U.S.S.G. § 3C1.1 comment. (n.4(f) & (g)).....	4
Miscellaneous:	
Brief for the United States, <i>Rodriguez v. United States</i> , 125 S. Ct. 2935 (2005) (No. 04-1148).....	25
133 CONG. REC. 33110 (1987) (remarks of Sen. Biden).....	11
“ <i>How Judges Are Properly Implementing the Supreme Court’s Decision in United States v. Booker</i> ,” <i>Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the House Judiciary Comm.</i> (Mar. 16, 2006) (statement of Judge Paul G. Cassell), <i>available at</i> http://judiciary.house.gov/media/pdfs/cassell031606.pdf	27
Stephen Breyer, <i>Federal Sentencing Guidelines Revisited</i> , 11 FED. SENT’G REP. 180 (1999)	10, 25
Michael W. McConnell, <i>The Booker Mess</i> , 83 DENV. U. L. REV. 665 (2006)	13, 14
KATE STITH & JOSE A. CABRANES, <i>FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS</i> (1998)	11, 24

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robinson William Rodriguez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the court of appeals (App. 1a-10a, *infra*) is available at 2006 WL 14582 (11th Cir. Jan. 4, 2006). The judgment of the district court (reprinted in relevant part at App. 11a-12a, *infra*) is unreported. The transcript of petitioner's sentencing hearing is reprinted in relevant part in the Appendix, 13a-20a, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2006. On March 16, 2006, Justice Thomas extended the time within which to file this petition to May 4, 2006 (No. 05A851). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(b) provides:

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

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * .

United States Sentencing Guidelines (“U.S.S.G.”) § 3C1.1 (2003) provides in relevant part:

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant’s offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

STATEMENT

Customs inspectors in Jacksonville, Florida, discovered petitioner Robinson William Rodriguez stowed away aboard a ship arriving in Jacksonville from Venezuela. After it was determined that he had been deported previously, petitioner was indicted for being found in the United States in violation of 8 U.S.C. § 1326. A jury subsequently convicted him of violating § 1326.

In the presentence investigation report, the probation officer assigned a base offense level of 8 (U.S.S.G. § 2L1.2(a)), which was increased 16 levels because petitioner’s prior deportation followed a conviction for a crime of violence (*id.* § 2L1.2(b)(1)(A)), and recommended a two-level enhancement for obstruction of justice (*id.* § 3C1.1). The enhancement was based on petitioner’s statement at a pretrial evidentiary hearing that his name was Robinson Vente Viveros, after having identified himself as Robinson William Rodriguez at earlier pretrial appearances.¹ The court overruled petitioner’s

¹ Although the Eleventh Circuit stated that “Rodriguez admitted that he gave a false name before the court during the evidentiary hearing” (App., *infra*, at 9a), the transcript of the evidentiary hearing indicates that Vente Viveros *is* petitioner’s true name and that Rodriguez was the name under which he was deported previously. See App., *infra*, at 22a-23a.. A probable explanation for the incon-

objection to the enhancement. Based on a criminal history category III, the applicable guidelines range was 78 to 97 months imprisonment. The court sentenced petitioner to 78 months imprisonment—*i.e.*, the low end of the then-mandatory guideline range.²

One week after petitioner was sentenced, this Court held in *Blakely v. Washington*, 542 U.S. 296 (2004), that a defendant’s Sixth Amendment right to a trial by jury is violated whenever the court imposes a punishment that exceeds the maximum punishment authorized “*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Id.* at 303. In *United States v. Booker*, 543 U.S. 220 (2005), the Court extended *Blakely*’s constitutional holding

sistency between the evidentiary hearings and the earlier proceedings is that petitioner—who relied on an interpreter in the district court because of his of his limited ability to speak and understand English—was simply confused. See *ibid.* At a minimum, this is clearly a case in which a jury might well not have made the same finding as the district court, so that the *Blakely/Booker* error was highly prejudicial. See, *e.g.*, *United States v. Dazey*, 403 F.3d 1147, 1175 (10th Cir. 2005) (defendant establishes prejudice if there is a reasonable probability that a jury would not have made the same finding beyond a reasonable doubt).

² Petitioner requested a downward departure based on his family circumstances: he has two children, one of whom is in poor health. App., *infra*, at 18a-19a. The court denied his request (*id.* at 19a-20a):

With respect to the issue concerning the family and health of the child, the guidelines are clear that unless it is an extraordinary circumstance the Court should not downward depart because of a family situation. And I find that having two children and having one with severe medical problems is not [so] extraordinary that it wasn’t considered by the drafters of the guidelines. That is, the Sentencing Commission. And the law in the Eleventh Circuit is the same.

to the Sentencing Reform Act (“SRA”) and the Federal Sentencing Guidelines (“the Guidelines”). *Id.* at 226-27. To remedy the constitutional defect in the federal sentencing scheme, the Court severed the provision of the SRA that made the guidelines mandatory; “[s]o modified, * * * the Guidelines [are] effectively advisory.” *Id.* at 245.

In his opening brief to the court of appeals—which was filed after *Blakely* but before *Booker*—petitioner argued that the district court’s imposition of the obstruction-of-justice enhancement violated the Sixth Amendment.³ Because he raised this issue for the first time on appeal, review was for plain error. Although the court of appeals found that petitioner’s claim “presents an error that is plain,” it reasoned that “[t]he third prong of the plain error test * * * places a high burden on a defendant and requires that Rodriguez show that his sentence would have been different but for the mandatory application of the guidelines and the enhancement.” App., *infra*, 8a (citing *United States v. Rodriguez*, 398 F.3d 1291, 1298-1301 (11th Cir.), *cert. denied*, 125 S. Ct. 2935 (2005)). The court held that petitioner could not meet this “high standard” because “nothing in the record shows that the district court would have imposed a lower sentence had it known that the guidelines were advisory only.” App., *infra*, 8a. The court also reaffirmed its position that “[a] sentence at the low end of the guidelines, without more, does not meet this third prong of the plain error test.” App., *infra*, 8a (citing *United States v. Cartwright*, 413 F.3d 1295 (11th Cir.

³ Petitioner also challenged the enhancement on nonconstitutional grounds. Specifically, petitioner argued that the government failed to show that he hindered the prosecution. The court of appeals rejected this argument on the ground that “it is not relevant whether the false statement hindered prosecution because Rodriguez made the statement to a judge.” App., *infra*, 9a (citing U.S.S.G. § 3C1.1 comment. (n.4(f) & (g))).

2005), and *United States v. Fields*, 408 F.3d 1356 (11th Cir. 2005)).

Judge Tjoflat authored a separate opinion concurring in the judgment. He acknowledged that the decision was required by circuit precedent but stated that, “[w]ere [he] not bound to adhere to [that precedent], [he] would find plain error, vacate Rodriguez’s sentence, and remand the case for resentencing in accordance with *Booker*.” App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

1. Certain constitutional errors, by their nature, “defy analysis by ‘harmless-error’ standards.” *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). “Each of these constitutional deprivations is a * * * structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Id.* at 310. Consequently, any attempt to apply harmless-error analysis would amount to “pure speculation” as to what would have occurred in the absence of the error. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

This Court has already deemed worthy of review the question whether a *Blakely* Sixth Amendment sentencing violation is structural error. Review was granted on that question in *Washington v. Recuenco* (No. 05-83, argued April 17). This case presents the closely related issue whether constitutional *Booker* errors are structural and, if so, whether the third prong of the plain-error test applies to such errors.

Because *Booker* is fundamentally an extension of *Blakely*, a finding of structural error in *Recuenco* would require remand in this case. And if the Court decides *Recuenco* without reaching the structural error question, this case provides an excellent vehicle to consider the question. Moreover, as explained in Part I.D, *infra*, because constitutional *Booker* error presents an even clearer case of structural error,

the petition should be granted even if the Court in *Recuenco* holds that *Blakely* errors are not structural.

The fact that this case involves plain error, rather than harmless error, does not alter this analysis. Because harmless-error analysis and the third prong of the plain-error test involve essentially the same inquiry (*United States v. Olano*, 507 U.S. 725, 734 (1993)), structural errors also defy analysis under the latter standard. In any event, the question of the relationship between plain and structural errors is an important and recurring one that the Court noted but left unresolved in both *Johnson v. United States*, 520 U.S. 461, 468-69 (1997), and *United States v. Cotton*, 535 U.S. 625, 632 (2002). See Part I.C, *infra*.

In sum, this case should be held for *Recuenco* and then reversed or the petition granted, as appropriate in light of the disposition of that case.

2. Independent of the question whether the error in this case is structural, the proper application of the plain-error rule to cases pending on direct review at the time *Booker* was decided has generated an acknowledged, three-way circuit split (with further, subtle variations within each broad category). Contrary to the Eleventh Circuit, three circuits have held that a defendant's "substantial rights" were (at least presumptively) affected in every case in which the sentence exceeded that authorized by the jury verdict alone. Four other circuits have employed some type of "limited remand" procedure under which the district court, rather than the court of appeals, addresses the third prong of the plain-error test. This split affects an extraordinary number of cases, particularly in those circuits that have followed the Eleventh Circuit's approach, and undermines the SRA's goal of similar sentences for similarly situated defendants. It also reflects a more general, fundamental disagreement among the circuits as to the proper scope of plain-error review.

I. Because Constitutional *Booker* Error Is Structural, It Was Error to Require Petitioner To Show That His “Substantial Rights” Were Affected.

A. The Eleventh Circuit ignored the *Booker* remedial opinion’s clear implication that constitutional *Booker* error is structural.

As the court below recognized, there are two distinct types of *Booker* error: “constitutional error, which arises from the application of extra-verdict enhancements, and statutory error, which arises from the mandatory application of the guidelines” even in the absence of a constitutional violation. App., *infra*, 7a-8a. The concluding paragraph of the remedial opinion in *Booker* draws this distinction and strongly implies that appellate review of constitutional error differs from appellate review of mere statutory error:

[W]e must apply today’s holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review. *That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation.* Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the “plain-error” test. It is also because, *in cases not involving a Sixth Amendment violation*, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.

543 U.S. at 268 (emphasis added).

The logical implication of this paragraph—and its concluding sentence in particular—is that the harmless-error doctrine applies *only* “in cases not involving a Sixth

Amendment violation”—*i.e.*, *only* in “statutory error” cases. If the Court had intended for harmless-error analysis to apply to *all Booker* errors—statutory and constitutional—then this statement would have been superfluous. This further implies that constitutional *Booker* errors are considered structural.⁴

Post-*Booker*, several courts have recognized this implication of the opinion. *E.g.*, *United States v. Oliver*, 397 F.3d 369, 381 (6th Cir. 2005) (“the harmless-error doctrine ought to be applied on appellate review only in cases not involving a Sixth Amendment violation”); *State v. Hughes*, 110 P.3d 192, 207 n.11 (Wash. 2005) (en banc) (“the majority opinion written by Justice Breyer implied that harmless error analysis would not be applicable to * * * Sixth Amendment viola-

⁴ *Booker*’s distinction between constitutional and statutory error is consistent with previous statements by this Court suggesting that only constitutional errors can qualify as structural. See, *e.g.*, *Neder v. United States*, 527 U.S. 1, 7 (1999) (“Although [the harmless-error rule] by its terms applies to all errors * * * , we have recognized a limited class of fundamental *constitutional* errors that defy analysis by harmless error standards.” (emphasis added; internal quotation marks omitted)). In addition, several lower courts have held that only constitutional errors can be structural. See, *e.g.*, *United States v. Gonzalez-Huerta*, 403 F.3d 727, 734 (10th Cir. 2005) (en banc) (“[G]enerally speaking structural errors must, at a minimum, be constitutional errors”), *cert. denied*, 126 S. Ct. 495 (2005); *United States v. Sanchez*, 269 F.3d 1250, 1272 n.41 (11th Cir. 2001) (en banc) (“There is no separate category of structural error apart from constitutional error. The only question is whether any constitutional errors * * * rise to the level of structural error”); *State v. Esparza*, 660 N.E.2d 1194, 1196 (Ohio 1996) (“[T]he trial-error/structural-error distinction is irrelevant unless it is first established that *constitutional* error has occurred”). However, “[t]his question ... has engendered much disagreement within several other circuits.” *United States v. Rodriguez*, 406 F.3d 1261, 1285 n.6 (11th Cir. 2005) (Tjoflat, J., dissenting from the denial of reh’g en banc) (collecting a number of majority and dissenting opinions on the issue).

tions”); *State v. Allen*, 615 S.E.2d 256, 270 (N.C. 2005) (concluding “from context that Justice Breyer’s comment refers to appellate review of *statutory error*” only); see also *United States v. Rodriguez*, 406 F.3d 1261, 1284 (11th Cir. 2005) (Tjoflat, J., dissenting from the denial of reh’g en banc) (“[t]he logical implication” of the Court’s opinion is that “*Booker* constitutional error is structural error for only structural errors defy harmless-error analysis”).

In contrast, the Eleventh Circuit “make[s] no functional distinction between constitutional and statutory error.” *Id.* at 1262 (Carnes, J., concurring in the denial of reh’g en banc). In doing so, it has rendered much of *Booker*’s concluding paragraph superfluous or irrelevant. That is, according to the Eleventh Circuit, this Court’s statement that “not * * * every [pre-*Booker*] sentence gives rise to a Sixth Amendment violation” (*Booker*, 543 U.S. at 268) was purely an academic observation. And when the Court said to apply the harmless-error doctrine “in cases *not* involving a Sixth Amendment violation” (*ibid.*; emphasis added), it really meant that the doctrine should be applied in *all* cases—whether or not a Sixth Amendment violation has occurred.

B. The Eleventh Circuit’s decision is inconsistent with this Court’s precedent concerning structural error.

A structural error “is a * * * structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Fulminante*, 499 U.S. at 310. As a result, its “consequences * * * are necessarily unquantifiable and indeterminate” (*Sullivan*, 508 U.S. at 281-82), so that it “def[ies] analysis by ‘harmless-error’ standards” (*Fulminante*, 499 U.S. at 309). Constitutional *Booker* error is just such an error. *Booker* unquestionably altered the very framework within which sentencing proceeds in the federal courts. And, for two distinct but related reasons, appellate courts can do no more than speculate as to

what sentence a district court might have imposed under the new, constitutionally proper federal sentencing regime: First, as a direct result of *Booker*, the district court is no longer required to select a sentence within the applicable guideline range; rather, it must now “tailor the sentence in light of other statutory concerns as well.” *Booker*, 543 U.S. at 245-46. Second, because the Guidelines are now advisory, defendants who receive a new, constitutionally proper sentencing hearing will have incentives to raise new arguments that the record from the original hearing will not reflect.

The primary statutory section governing federal sentencing is 18 U.S.C. § 3553, which provides:

The court shall impose a sentence sufficient, but not greater than necessary * * * (A) to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

Id. § 3553(a)(2). This subsection directs courts to consider “the basic purposes of punishment, namely ‘just deserts,’ deterrence, incapacitation, and rehabilitation.” Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT’G REP. 180, 181 (1999). Section 3553 also directs courts to consider “the nature and circumstances of the offense and the history and characteristics of the defendant”; applicable guidelines and policy statements issued by the Sentencing Commission; “the need to avoid unwarranted sentence disparities among [similarly situated] defendants”; and “the need to provide restitution to any victims of the offense.” 18 U.S.C. § 3553(a)(1), (4)-(7).

Under the pre-*Booker* regime, however, judges’ discretion was limited to the applicable guideline range in all but

the rare cases in which the defendant established that he was outside the “heartland of typical cases.” *Koon v. United States*, 518 U.S. 81, 94 (1996); see 18 U.S.C. § 3553(b)(1). Atypicality was difficult to establish, however, because of the strong presumption that “the Sentencing Commission *has* already considered, and the Sentencing Guidelines *have* already factored in, many if not all circumstances that are arguably relevant to criminal sentencing * * * The Guidelines are, as Congress intended them to be, comprehensive[.]” KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 102 (1998) (emphasis in the original). Under the old model, if the Commission had already considered a given circumstance, the Commission’s judgment—as expressed in the Guidelines—as to the significance of that circumstance was unassailable. As one of the SRA’s chief supporters put it, the “notion of allowing the courts to, in effect, second-guess the wisdom of any sentencing guideline is plainly contrary to the act’s purpose of having a sentencing guidelines system that is mandatory.” 133 CONG. REC. 33110 (1987) (remarks of Sen. Biden).

Post-*Booker*, however, the Guidelines are but one of several statutory factors that judges weigh in selecting an appropriate sentence. While district courts must still *consider* the guidelines, they must also determine whether a guideline sentence, among other things, actually serves the traditional purposes of punishment embodied in the statute or adequately takes account of the characteristics of a particular defendant. See 18 U.S.C. § 3553(a); *Booker*, 543 U.S. at 245-46. Indeed, because the SRA requires district courts to select “a sentence sufficient, *but not greater than necessary*” to achieve statutory purposes (18 U.S.C. § 3553(a)(2) (emphasis added)), the court *must* impose a below-guideline sentence if a guideline sentence would be “greater than necessary.” See, e.g., *United States v. Neufeld*, 154 Fed. Appx. 813, 823 (11th Cir. 2005) (“Under the new advisory-

guidelines system, a more-than-adequate sentence would conflict with § 3553(a)'s injunction against greater-than-necessary sentences.”).

In addition to elevating § 3553(a)'s other factors to co-equal status with the Guidelines, *Booker* permits district courts to disagree with particular guidelines *as a matter of sentencing policy*, provided of course that the disagreement is reasonable. Because the “policy decisions [reflected in the Guidelines] are no longer mandatory, the sentencing judge is free to disagree with them.” *Booker*, 543 U.S. at 305 n.3 (Scalia, J., dissenting). “[T]he Commission’s view of what is ‘better’ is no longer authoritative, and district judges are free to disagree—as are appellate judges.” *Id.* at 306 n.4.

This characteristic of post-*Booker* sentencing poses a significant obstacle to appellate review of constitutionally defective pre-*Booker* sentences under the ordinary plain-error test: such policy-based arguments will rarely, if ever, be in the record because disagreement with the Sentencing Commission quite simply was not grounds for a departure pre-*Booker*. See, e.g., *United States v. Davis*, 98 F.3d 141, 145 (4th Cir.1996); *United States v. Frazier*, 979 F.2d 1227, 1231 (7th Cir.1992); see also *Rodriguez*, 406 F.3d at 1297 (Tjoflat, J., dissenting from the denial of reh’g en banc) (“although it was theoretically possible under the old model for a defendant to seek a sentence at the low end of a mandatory guideline range by presenting statistical evidence that the Sentencing Commission had overestimated the need for general deterrence with respect to his offense in his particular community, I personally never heard of such an argument being made”).

Post-*Booker*, district courts have exercised this new discretion to select below-guideline sentences on a wide variety of grounds—sometimes explicitly disagreeing with Commission policy judgments, and other times relying on factors that

were not ordinarily relevant pre-*Booker*.⁵ Indeed, in the year following *Booker*, “[t]he rate of judge-instigated downward departures or variances more than doubled, from 6% to 13%.” Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 672 (2006). Statistics from cases involving the “control group” of defendants who were sentenced pre-*Booker* and then re-sentenced post-*Booker* are even more striking. In one circuit, even in cases remanded for re-

⁵ See, e.g., *United States v. Medrano-Duran*, 386 F. Supp. 2d 943 (N.D. Ill. 2005) (imposing a below-guideline sentence after determining that the Guidelines create an “unwarranted disparity” between defendants who plead guilty to illegal reentry after deportation in districts with “fast-track” programs and the defendant, who pled guilty to the same crime in a district without such a program); *United States v. Smith*, 359 F. Supp. 2d 771, 781 (E.D. Wis. 2005) (imposing a below-guideline sentence after determining that the Guidelines “create unwarranted disparity between defendants convicted of possessing powder cocaine and defendants convicted of possessing crack cocaine” and also emphasizing the defendant’s community involvement, importance to his family, extraordinary assistance to the Government, and good post-arrest conduct); *United States v. Greer*, 375 F. Supp. 2d 790 (E.D. Wisc. 2005) (imposing a below-guideline sentence based on, *inter alia*, the defendant’s minor role in the offense and the effect a guideline sentence would have on her children); *United States v. Carmona-Rodriguez*, 2005 WL 840464, at *4 (S.D.N.Y. Apr. 11, 2005) (“In view of (1) the low probability that [the defendant] will recidivate and (2) her need for ongoing medical monitoring and treatment, it is determined that a non-Guidelines term of incarceration is warranted.”); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (imposing a below-guideline sentence based on, *inter alia*, the defendant’s low likelihood of recidivism, strong family ties, military service, and the sometimes “random nature” of guidelines based on drug quantity); *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005) (imposing a below-guideline sentence because, *inter alia*, defendant’s fraud was not motivated by personal gain and he was unlikely to recidivate).

sentencing under the relatively defendant-friendly harmless-error standard, the defendant received a lower sentence 50% of the time. *Id.* at 671-72. And in cases remanded under the plain-error standard, *every* defendant received a lower sentence, and more than half were granted reductions of 40% or more. *Ibid.*

It is thus clear that “*Booker* brought about sweeping changes in the realm of federal sentencing,” altering the very “framework” within which sentencing proceeds. *United States v. Davis*, 407 F.3d 162, 163 (3d Cir. 2005) (en banc).⁶ This is the very essence of structural error. See *Fulminante*, 499 U.S. at 310 (defining structural error as a “structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself”).⁷

⁶ See also, *e.g.*, *United States v. Mares*, 402 F.3d 511, 517 (5th Cir. 2005) (“The Court’s decision in *Booker*[] substantially altered the sentencing regime under the guidelines”), *cert. denied*, 126 S. Ct. 43 (2005); *Rodriguez*, 406 F.3d at 1286 (Tjoflat, J., dissenting from the denial of reh’g en banc) (“It is difficult to overstate the extent to which *Booker* affects the federal sentencing framework”).

⁷ While *Fulminante* refers to structural errors as errors “affecting the framework within which *trial* proceeds,” this is simply descriptive of the errors, collected in the opinion, that the Court had theretofore identified as structural. 499 U.S. at 310 (emphasis added). Nothing in the opinion implies that errors affecting the sentencing framework could not also be deemed structural. Nor could any such distinction be justified given that “the imposition of a constitutional punishment is just as important to a criminal defendant and to society as is a constitutional determination of the defendant’s guilt or innocence.” *Allen*, 615 S.E.2d at 268; accord *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005). Moreover, in terms of judicial and prosecutorial resources, the cost of deeming a sentencing error structural is far less than with respect to trial errors. See, *e.g.*, *United States v. Barnett*, 398 F.3d 516, 533-34 (6th Cir. 2005) (Gwin, J., concurring).

Moreover, while it is *certain* that the Eleventh Circuit’s approach will “condemn some unknown fraction of criminal defendants to serve an illegal sentence” (*United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005)), in the vast majority of cases the record will provide little, if any, reliable indication as to whether the district court would impose a different sentence after a new, constitutionally proper hearing. First, “[i]t would * * * be a mistake to infer from a district court’s [pre-*Booker*] silence that the district court would not have made a different decision under a different sentencing scheme.” *United States v. Ameline*, 409 F.3d 1073, 1082 (9th Cir. 2005) (en banc). Pre-*Booker*, there was no “need or incentive for sentencing courts * * * to note their objections and reservations in sentencing defendants under the then-mandatory Guidelines.” *United States v. Barnett*, 398 F.3d 516, 528-29 (6th Cir. 2005). Because such comments served no constructive purpose, record “[s]ilence often means nothing more than that an experienced judge underst[ood] his or her proper role in the criminal justice system”—*i.e.*, to enforce the law rather than to critique its wisdom or fairness. *United States v. Thompson*, 422 F.3d 1285, 1305 (11th Cir. 2005) (Tjoflat, J., specially concurring); accord *United States v. Valencia-Aguirre*, 409 F. Supp. 2d 1358, 1362 n.3 (M.D. Fla. 2006).

Second, even where the record is not altogether “silent,” “[i]t would be a mistake * * * to attribute fresh meaning to comments made in an entirely different context.” *Ameline*, 409 F.3d at 1082. Given that, when spoken, such comments had no impact on the defendant’s sentence, they may simply reflect “some encouraging words for the benefit of the defendant’s family” (*ibid.*), an attempt to influence the Sentencing Commission on matters of general policy, or even an effort to avoid personal responsibility for a particular sentence (*Thompson*, 422 F.3d at 1303 (Tjoflat, J., specially concurring)).

Finally, in either case—silence or comment—it is “impossible to tell what considerations counsel for both sides might have brought to the sentencing judge’s attention had they known that they could urge the judge to impose a non-Guidelines sentence.” *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005). That is, even accepting the dubious proposition that a judge’s silence or comments accurately reflect his or her impressions of the *original* sentencing hearing, they are still an unreliable predictor of the outcome of a *new, constitutionally proper* hearing following different evidence and argument based on the post-*Booker* federal sentencing model. For all these reasons, parsing the transcript for “magic words” on which to base speculations as to the outcome of a new sentencing hearing has proven to be an inherently “arbitrary” method of appellate review. *Thompson*, 422 F.3d at 1305 (Tjoflat, J., specially concurring); see also Part II.B, *infra*.

Indeed, the Eleventh Circuit does not deny that this sort of indeterminacy is common, if not the norm. Reviewing for plain error under *Booker*, the Eleventh Circuit has observed:

If the district court judge in this case had the liberty of increasing or decreasing [the defendant’s] sentence above or below the guidelines range, he might have given [him] a longer sentence, or he might have given a shorter sentence, or he might have given the same sentence. The record provides no reason to believe any result is more likely than the other. We just don’t know.

Rodriguez, 398 F.3d at 1301. As such, the court reasoned that it could only “speculate” as to whether a new sentencing hearing would produce a different sentence, ruling that under those circumstances the defendant could not satisfy the plain-error test. *Ibid.*; accord, *e.g.*, *United States v. Pirani*, 406 F.3d 543, 553 (8th Cir.) (en banc), *cert. denied*, 126 S. Ct. 266 (2005).

The Eleventh Circuit and courts that have followed its approach have taken the wrong lesson from this indeterminacy. Under this Court's precedents, this sort of uncertainty is a hallmark of structural error, not a reason for denying relief under the plain-error test. In *Sullivan*, this Court held that a defective reasonable-doubt instruction, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" 508 U.S. at 281-82. The Court reasoned that "[a] reviewing court [could] only engage in pure speculation—its view of what a reasonable jury would have done" had it been properly instructed. *Id.* at 281; see also *Rose v. Clark*, 478 U.S. 570, 589 (1986) (Stevens, J., concurring in the judgment) ("this is * * * not the kind of error with such an inherently imprecise effect that harmless-error inquiry is ill-advised").

The same is true here. Because there is no reliable way to predict what sentence the district judge would select under advisory guidelines—after a hearing at which the defendant could present additional or different arguments tailored to realities of the new sentencing regime—the effects of constitutional *Booker* error are inherently unquantifiable and indeterminate, and appellate courts can only speculate as to the possible result of a new, constitutionally proper hearing. If anything, the effect in this situation would appear *more* indeterminate than in *Sullivan*: while it is highly unlikely that an unconstitutional reasonable-doubt instruction would alter the trial record, it is far more likely that a defendant such as petitioner "would * * * do[] *something* different under the new model" of federal sentencing. *Rodriguez*, 406 F.3d at 1291 (Tjoflat, J., dissenting from the denial of reh'g en banc); cf. *Rose*, 478 U.S. at 579 n.7 ("[T]he error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced respondent thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence.").

C. The Court should grant the petition to clarify the plain-error test's proper application in the structural error context.

Recuenco is a harmless-error case, while this case involves plain error. That fact, however, simply enhances the importance of the question presented.

Federal Rule of Criminal Procedure 52(b) provides that “[a] plain error *that affects substantial rights* may be considered even though it was not brought to the court’s attention” (emphasis added). Rule 52(a), the harmless-error rule, provides that “[a]ny error, defect, irregularity, or variance *that does not affect substantial rights* must be disregarded” (emphasis added). This Court has previously noted the parallel between these provisions, stating that “Rule 52(b) normally requires the same kind of inquiry [as Rule 52(a)], with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Olano*, 507 U.S. at 734.

Given the parallel between the harmless- and plain-error rules, a structural error that “def[ies] analysis by ‘harmless-error’ standards” (*Fulminante*, 499 U.S. at 309) necessarily defies analysis under the third prong of the plain-error test. The “one important difference” between the two standards does not implicate this straightforward connection: if an error altogether *defies* analysis under the standard, then “who bears the burden of persuasion” is beside the point. See, e.g., *United States v. Merlos*, 8 F.3d 48, 51 (D. C. Cir. 1993) (“The fact that the burden of proof shifts in plain error cases is of no import here, as the analytical task of the reviewing court remains the same.”). This Court has assumed as much previously without addressing the issue directly. See, e.g., *Cotton*, 535 U.S. at 632 (assuming, without deciding, that structural errors necessarily affect substantial rights); *Johnson*, 520 U.S. at 468-69 (same). And the courts of appeals that have addressed the issue directly have held that the third

prong of the plain-error test does not apply to structural errors. See, e.g., *United States v. Recio*, 371 F.3d 1093, 1103 (9th Cir.2004); *United States v. David*, 83 F.3d 638, 646-47 (4th Cir.1996); *United States v. Colon-Pagan*, 1 F.3d 80, 81-82 (1st Cir. 1993) (Breyer, C.J.).

Nonetheless, the applicability of the third prong of the plain-error test to structural errors remains an open and important question in the courts of appeals. See, e.g., *United States v. Padilla*, 415 F.3d 211, 220 n.1 (1st Cir. 2005) (en banc) (“The Supreme Court has not yet reached the more sophisticated question of whether a structural error necessarily affects substantial rights, thereby automatically satisfying the third element of the plain error test.”). This case squarely presents the Court with an opportunity to resolve the issue.

D. The Court’s decision in *Washington v. Recuenco* will impact the resolution of this question.

This Court recently heard argument in *Washington v. Recuenco* (No. 05-83) on the question whether a “*Blakely* error” is structural. Because *Booker* merely extended *Blakely* to the Guidelines (543 U.S. at 226-27), a determination that *Blakely* error is structural will directly undermine the Eleventh Circuit’s approach to plain-error review. Moreover, as a result of the remedial approach taken in *Booker* and the nature of petitioner’s claim, the structural nature of the error in this case is even clearer than with the error in *Recuenco*. Therefore, this petition should be held for disposition (grant or remand) as appropriate in light of the outcome in that case.

To begin, petitioner agrees with the defendant-respondent in *Recuenco* that the constitutional violation that *Blakely* and *Booker* identify falls on the structural side of the line *Fulminante* and *Sullivan* draw between structural errors and trial errors. Trial errors are errors that “occur ‘during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented.’” *Sullivan*, 508 U.S. at 281 (quoting *Fulminante*, 499

U.S. at 307-308). Structural errors, on the other hand, are “defects in the constitution of the trial mechanism” itself. *Sullivan*, 508 U.S. at 281 (quoting *Fulminante*, 499 U.S. at 309). Here, the trial itself was constituted defectively because the wrong entity—the judge rather than the jury—convicted petitioner of the true offense for which he was punished. While the jury assuredly found that petitioner violated 8 U.S.C. § 1326, the district judge convicted him (by a preponderance of the evidence with respect to the crucial issue) of the greater offense of violating § 1326 *and then providing the court with materially false information*.

“[W]hen the term ‘sentence enhancement’ is used to describe an increase beyond the maximum [sentence] authorized [by the jury’s verdict], it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict. Indeed, it fits squarely within the usual definition of an ‘element’ of the offense.” *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000). Thus, in petitioner’s case, the court, not the jury, convicted him of the more serious offense for which he was punished. Such an error is structural. Cf. *Rose*, 478 U.S. at 578 (“harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury”); *Neder v. United States*, 527 U.S. 1, 17 n.2 (1999) (same); *Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946) (same).

For this reason, *Booker* error is unlike the error subjected to harmless-error review in *Neder*—*i.e.*, the trial court’s refusal to submit the issue of materiality to the jury. In *Neder*, the jury convicted the defendant of tax, mail, wire, and bank fraud after hearing “overwhelming” evidence that the defendant “failed to report over \$5 million in income.” 527 U.S. at 16. The Court noted that several circuits had held “that any failure to report income is material,” *ibid.* (internal quotation marks omitted), and Justice Stevens concluded that the “jury verdict * * * necessarily included a finding on that issue,” *id.* at 26 (Stevens, J., concurring in the judgment).

Given the interrelatedness of the evidence (which was before the jury) and findings as to fraud and materiality, the error in *Neder* is better understood as an erroneous jury instruction—*i.e.*, “material fraud” misdescribed as simply “fraud”—rather than as the functional equivalent of a directed verdict against the defendant, such as occurred here. See *id.* at 8-15 (concluding that the error was more akin to cases in which an element of the crime had been misdescribed than to the error in *Sullivan*). Indeed, in response to the dissent’s charge that *Neder*’s holding would justify harmless-error review of a directed verdict, the majority responded that, “[h]appily, [the] course of constitutional adjudication has not been characterized by this ‘in for a penny, in for a pound’ approach.” *Id.* at 17 n.2. As such, it had “no hesitation” reaffirming the principle that a directed verdict against a criminal defendant is structural error, while “at the same time * * * subject[ing] the *narrow class of cases like the present one* to harmless-error review.” *Ibid.* (emphasis added).

The present case is worlds apart from *Neder*. Here, the jury convicted petitioner of being found in the United States, and the judge then made the completely unrelated finding that he subsequently obstructed justice. The former determination bears no relation whatsoever to the latter. Indeed, in *Blakely* the Court specifically questioned “[w]hy perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries), is unclear.” *Blakely*, 542 U.S. at 307 n.11 (citation omitted). By convicting the petitioner of an “entirely separate offense,” the district court committed structural error. And to extend *Neder* beyond its “narrow” holding to present case, the Court would have to

“go in for a pound” and disavow the heretofore unchallenged principle that a directed verdict is structural error.⁸

In sum, the core constitutional violation identified in Justice Stevens’s opinion for the Court in *Booker* is a structural error. As explained in Part I.A-B, *supra*, however, that is only a small part of *Booker*’s structural impact. The remedy adopted in Justice Breyer’s opinion, which altered the basic framework of federal sentencing, erases any doubt that constitutional *Booker* errors are structural. “*Blakely* error,” of course, does not include this aspect of *Booker* error. As such, even assuming that it would be proper for a court reviewing *Blakely* error to review the record to determine whether the jury would have found the sentence-enhancing fact beyond a reasonable doubt, such a determination does nothing to quantify the effect of a *Booker* error. For even if evidence of the sentence-enhancing fact is overwhelming, the post-*Booker* sentencing model permits federal judges to discount its significance or impose a non-guidelines sentence on other grounds. Therefore, while the Court’s decision in *Recuenco* may, of its own force, undermine the Eleventh Circuit’s approach to plain-error review, the petition should be granted regardless of the outcome in that case.

⁸ On this point, petitioner’s claim is distinguishable from (and far stronger than) that of the defendant in *Recuenco*. In that case, the jury returned a special verdict that the defendant was armed with a “deadly weapon,” and the enhancement was based on the court’s finding that the “deadly weapon” in question was a firearm—the only arguably deadly weapon that the trial evidence concerned. *State v. Recuenco*, 110 P.3d 188, 189 (Wash. 2005).

II. The Court Should Grant The Petition To Resolve The Clear, Three-Way Circuit Split Concerning The Proper Analysis Of *Booker* Errors Under The Plain-Error Rule.

A. The circuit split as to the question presented affects thousands of federal criminal cases and requires a uniform rule of law.

There is a clear, three-way circuit split with respect to the proper application of the plain-error test in this context, with further, subtle variations within each broad category. *E.g.*, *Pirani*, 406 F.3d at 563 (Bye, J., dissenting) (describing the “split as a three-ring circus with twelve unique acts each attempting to dazzle us with its compelling logic”). “This wide ranging circuit split results in the disparate treatment of criminal defendants throughout the nation. Such uneven administration of justice cries out for a uniform declaration of policy by the Supreme Court.” *United States v. Gonzalez-Huerta*, 403 F.3d 727, 763 (10th Cir.) (en banc) (Lucero, J., dissenting), *cert. denied*, 126 S. Ct. 2495 (2005). While such a split would justify this Court’s review under any circumstances, review is essential here because this split “undermine[s] the sentencing statute’s basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.” *Booker*, 543 U.S. at 252.

The Third and Sixth Circuits have held that, at least presumptively, all *Booker* errors affect substantial rights. *Davis*, 407 F.3d at 163-66; *Barnett*, 398 F.3d at 526-29. The Fourth Circuit has held that while constitutional *Booker* errors necessarily affect substantial rights (*United States v. Hughes*, 401 F.3d 540, 548-55 (4th Cir. 2005)), a defendant claiming only statutory error must establish prejudice (*United States v. White*, 405 F.3d 208, 217-20 (4th Cir.), *cert. denied*, 126 S. Ct. 668 (2005)). Occupying a middle ground, the Second, Seventh, Ninth, and D.C. Circuits have all employed some sort of “limited remand” procedure under which the district

court rather than the court of appeals is tasked with determining whether the third prong of the plain-error test is met. *Crosby*, 397 F.3d at 117-20; *Paladino*, 401 F.3d at 483-84; *Ameline*, 409 F.3d at 1079; *United States v. Coles*, 403 F.3d 764, 769-771 (D.C. Cir. 2005). Finally, like the Eleventh Circuit, the First, Fifth, Eighth, and Tenth Circuits have all required the defendant to show that his sentence was affected by the mandatory application of the Guidelines. *United States v. Antonakopoulos*, 399 F.3d 68, 75 (1st Cir. 2005); *United States v. Mares*, 402 F.3d 511, 521 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005); *Pirani*, 406 F.3d at 550-53; *United States v. Dazey*, 403 F.3d 1147, 1175-77 (10th Cir. 2005).⁹

One of the primary purposes of the SRA was to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6); see also *STITH & CABRANES, supra*, at 104 (“Reduction of ‘unwarranted sentencing dis-

⁹ Even within this category, the Eleventh Circuit’s standard is exceptionally rigorous. For example, the First Circuit is not “overly demanding as to proof of probability where, either in the existing record or by plausible proffer, there is reasonable indication that the district judge might well have reached a different result under advisory guidelines.” *United States v. Heldeman*, 402 F.3d 220, 224 (1st Cir. 2005). And the Tenth Circuit applies its standard “less rigidly” in cases involving constitutional *Booker* error. *Dazey*, 403 F.3d at 1177. In such cases, it has held that a defendant can satisfy his burden by “show[ing] a reasonable probability that a jury applying a reasonable doubt standard would not have found the same material facts that a judge found by a preponderance of the evidence.” *Id.* at 1175. The Eleventh Circuit’s standard, in contrast, “is anything but easy” to satisfy (*Rodriguez*, 398 F.3d at 1299), looks solely to the existing record (*id.* at 1301), and “make[s] no functional distinction between constitutional and statutory error.” *Rodriguez*, 406 F.3d at 1262 (Carnes, J., concurring in the denial of reh’g en banc).

parities’ was a—probably *the*—goal of the Sentencing Reform Act of 1984”). Surely, a disparity attributable to nothing more than *where* the defendant was sentenced qualifies as an “unwarranted disparity.” Cf. Breyer, *supra*, 11 FED. SENT. REP. at 180 (stating that “Congress * * * intended to respond to complaints of unreasonable disparity in sentencing” and citing disparities between jurisdictions as one such example). Yet that is the upshot of the current circuit split: while defendants in seven circuits will receive a new, constitutionally proper sentencing hearing—or at least a “limited remand”—the vast majority of similarly situated defendants in the other five circuits will not. Thus, this circuit split is not only of surpassing constitutional importance (see Part I, *supra*), but it is also of critical importance to the consistent administration of justice under the SRA.¹⁰

B. The Eleventh Circuit’s approach is inherently unreliable and undermines rule-of-law values that are essential to the criminal justice system.

The Eleventh Circuit’s approach to this issue has been described succinctly as the “magic words” approach:

[W]e do not generally reverse a sentence unless the district court has stated on the record that the guideline sentence is too high * * * . That is, we vacate a sentence only where the judge has spoken some combination of these “magic words.” Thus, at oral argu-

¹⁰ Moreover, as the government has acknowledged, “[s]ome of the differences among the courts of appeals illuminate basic disagreements about the proper approach to plain-error review and they therefore have the potential to affect cases not involving *Booker* error.” Brief for the United States at 19, *Rodriguez v. United States*, 125 S. Ct. 2935 (2005) (No. 04-1148) (acquiescing in a grant of certiorari on this issue). The plain-error implications of this split thus extend far beyond the (sizable) class of cases involving *Booker* error.

ment, if defense counsel begins a plain-error *Booker* argument, I immediately ask whether we will find any “magic words” in the record; if the answer is “no,” then there is no reason for counsel to pursue the issue further.

Thompson, 422 F.3d at 1303 (Tjoflat, J., specially concurring).

This approach is inherently unreliable. As discussed in Part I.B, *supra*, a district judge’s comment or silence is a poor indicator of even the judge’s impressions of the *original* sentencing hearing. Not only that, but the record and the judge’s response will reflect only the evidence and argument presented at the pre-*Booker* hearing, *not* the evidence and argument that would be advanced under the post-*Booker* sentencing model.

Thus, as a matter of accuracy, the Eleventh Circuit’s approach has little to recommend it. Rather, “the surest way[] to determine whether [the defendant’s substantial rights were affected] is to ask the district judge,” either through a limited remand procedure (*Paladino*, 401 F.3d at 483), or by simply vacating and ordering re-sentencing. Furthermore, because a three-judge appellate panel need not scrutinize the record for subtle indications of prejudice, it is also “the shortest, the easiest, [and] the quickest * * * way.” *Ibid.*; accord *Ameline*, 409 F.3d at 1080; *Davis*, 407 F.3d at 166; *Crosby*, 397 F.3d at 117. As the Seventh Circuit put it, “Given the alternative of simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog, we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence.” *Paladino*, 401 F.3d at 484.

The message underlying the Eleventh Circuit’s rule is equally troubling. Whatever its intended purpose, a judge’s criticism of a sentence required by law does a disservice to

the defendant and undermines respect for the rule of law. If the defendant is told that his sentence is unduly harsh, he is less likely to accept it as just and enter prison focused on rehabilitation. *Thompson*, 422 F.3d at 1303 (Tjoflat, J., specially concurring); see also 18 U.S.C. § 3553(a)(2)(D) (“The court * * * shall consider the need for the sentence imposed * * * to provide the defendant with needed [rehabilitation] in the most effective manner”). He is, however, *more* likely to continue attacking the sentence in the courts. *Thompson*, 422 F.3d at 1303-04 (Tjoflat, J., specially concurring). “After all, why should the defendant not appeal a sentence that even the judge criticized as too severe?” *Id.* at 1304. And, at an even broader level, “by openly disparaging the defendant’s sentence, the judge fosters disrespect for the rule of law.” *Ibid.*; see also 18 U.S.C. § 3553(a)(2)(A) (“The court * * * shall consider the need for the sentence imposed * * * to promote respect for the law”).

The Eleventh Circuit’s rule encourages courts to continue to engage in such criticism. Although the Guidelines are no longer mandatory, the “magic words” approach creates an incentive for judges to criticize “unjust” mandatory minimums and career offender enhancements.¹¹ *Thompson*, 422

¹¹ See *Harris v. United States*, 536 U.S. 545, 567-68 (2002) (5-4 decision) (holding that mandatory minimums are constitutional); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (5-4 decision) (rejecting the argument that prior convictions that increase the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt); *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring) (“[A] majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. * * * [I]n an appropriate case, this Court should consider [its] continuing viability.” (citations omitted)); “*How Judges Are Properly Implementing the Supreme Court’s Decision in United States v. Booker*,” *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the House Judiciary Comm.*, at 2 (Mar. 16, 2006) (statement of Judge Paul G. Cassell), (“Many ob-

F.3d at 1304 (Tjoflat, J., specially concurring). Moreover, even if it did not create this incentive, the Eleventh Circuit at least appears to give its “imprimatur” to this sort of criticism, for a defendant will obtain a new sentencing hearing only where it is in the record. *Id.* at 1304-05. In short, in addition to being wrong, the Eleventh Circuit’s standard threatens significant negative consequences in the sentencing context.

C. At a minimum, constitutional *Booker* errors should be presumptively prejudicial.

In *Olano*, the Court acknowledged that, in addition to structural errors, there may be a category of “errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.” 507 U.S. at 735. Relying on this passage, “[c]ourts have presumed prejudice, and have thus found the third prong of plain error review satisfied, in cases where the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate” prejudice. *Barnett*, 398 F.3d at 526-27.¹²

The Third and Sixth Circuits have concluded that *Booker* error is such an error. *Davis*, 407 F.3d at 164-65 & n.4; *Barnett*, 398 F.3d at 526-29. Given that, pre-*Booker*, “it was very rare for a judge, within the record of an individual case, to express” frustration with the binding nature of the Guidelines (*Ameline*, 409 F.3d at 1079), this approach makes sense. Indeed, according to the Eleventh Circuit, petitioner was unable to establish prejudice even though he was sentenced at

servers believe that *Harris* is no longer good law.”), available at <http://judiciary.house.gov/media/pdfs/cassell031606.pdf>.

¹² See, e.g., *United States v. Reyna*, 358 F.3d 344, 351-52 (5th Cir. 2004) (en banc) (denial of the right to allocute presumptively prejudicial); *United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001) (same); *United States v. Syme*, 276 F.3d 131, 153-55 (3d Cir. 2002) (holding that a constructive amendment should be presumed prejudicial).

the bottom of the applicable guideline range, his sentence was enhanced based on debatable findings of fact, and the district court's comments at sentencing suggest that it might have considered a lesser sentence had it not been bound by the Guidelines (see *supra* notes 1-2).

Accordingly, even if constitutional *Booker* error is not deemed structural, the Court should grant the petition to consider whether it is one of those "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice" and to clarify the scope of this exception to the ordinary plain-error rule. *Olano*, 507 U.S. at 735.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2006

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee

V.

ROBINSON WILLIAM RODRIGUEZ, a.k.a., Robinson
Rodriguez, Defendant-Appellant

No. 04-13148

Non-Argument Calendar

D.C. Docket No. 03-00257-CR-J-20-TEM

Jan. 4, 2006

Before TJOFLAT and KRAVITCH, Circuit Judges, and
Lawson,* District Judge.

KRAVITCH, Circuit Judge:

Defendant-Appellant Robinson William Rodriguez appeals his conviction and sentence for being found in the United States after deportation, in violation of 8 U.S.C. § 1326. On appeal, Rodriguez raises five issues: (1) whether the district court properly denied his motion to dismiss the indictment because his prior deportation was invalid; (2) whether the district court properly denied the motion to suppress his statement because he was not advised of his rights under the Vienna Convention on Consular Relations (“VCCR”)¹; (3) whether the court abused its discretion by denying him the opportunity to raise a necessity or duress defense based on his fear that he would be killed if returned to Colombia; (4) whether the court committed plain error by

* Honorable Hugh Lawson, United States District Judge for the Middle District of Georgia, sitting by designation.

¹ Vienna Convention on Consular Relations, art. 36, Dec. 14, 1969, 21 U.S.T. 77, T.I.A.S. 6820.

applying an extra-verdict enhancement for obstruction of justice and by sentencing him under a mandatory guidelines scheme, in light of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); and (5) whether the enhancement for obstruction of justice was warranted under the facts of the case. After oral argument and a thorough review of the record, we affirm.

I. Background

Rodriguez, a Colombian citizen, was convicted of aggravated robbery in Texas in 1999, and deported after his release from prison. He later stowed away on a ship originating in Venezuela and traveling to Florida. After customs inspectors found Rodriguez on board the ship, he was indicted for a violation of § 1326. At his initial detention hearing, Rodriguez identified himself as Robinson Vente Viveros. Rodriguez subsequently appeared before a magistrate judge, identified himself as Robinson William Rodriguez, and entered a plea of not guilty.

Rodriguez filed numerous pretrial motions, in which he, inter alia, sought to suppress statements and dismiss his indictment. In support of his motion to suppress, Rodriguez claimed that when he was arrested after being found on the ship, border patrol officers failed to notify the Colombian consulate and inform him of his rights under the VCCR.²

² Under Article 36 of the VCCR,

if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; consular officers

With respect to his motion to dismiss the indictment, he challenged his prior deportation as having violated due process. Although he admitted that he had been convicted of aggravated robbery in Texas, he asserted that the government had not followed proper procedures for expedited removal of aggravated felons because he was not given a notice of intent, was not advised of his rights to challenge his deportation or seek review of the order, and never appeared before an immigration judge. He asserted that he would have requested asylum or withholding of removal had he been informed of his rights. Additionally, he claimed that he feared that he would be killed by paramilitaries if he were to be returned to Colombia. Rodriguez indicated, however, that after his deportation, he had escaped Colombia to Venezuela, where he spent 13 months before re-entering the United States.

At a hearing on the pre-trial motions, Rodriguez identified himself as Vente Viveros Robinson, a name he later admitted was false. The court heard evidence from the border patrol agent who processed Rodriguez that Rodriguez was given his rights and declined to contact the consulate. According to the agent, every alien is informed of his rights under the VCCR and the contact numbers of the various consulates were posted by the phone. The court also heard testimony from an immigration and customs agent that Rodriguez was given proper notice before his deportation, and

shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Article 36, section 1(b)-(c).

was informed that he must request permission before being allowed to re-enter the United States. Accordingly, the court denied the motions to dismiss the indictment and suppress the statements.

Before trial, the court granted the government's motion to prevent Rodriguez from arguing a necessity or duress defense to explain his re-entry. Rodriguez sought to offer testimony that he re-entered the United States because he feared death should he remain in Colombia. The jury convicted Rodriguez.

In the presentence investigation report ("PSI"), the probation officer assigned a base offense level of 26 with a two-level enhancement for obstruction of justice because Rodriguez gave false names before the court. With a criminal history category III, the corresponding guidelines range was 78 to 97 months imprisonment. Rodriguez objected to the obstruction-of-justice enhancement, but the court overruled the objection and sentenced Rodriguez to 78 months imprisonment. Rodriguez now appeals.

II. The Appeal

A. Motion to Dismiss

Rodriguez's arguments center on whether his prior deportation was unlawful because the proceedings were fundamentally unfair and he suffered prejudice as a result.

Dismissal of an indictment under § 1326 is proper if the alien defendant mounts a successful collateral attack on his prior deportation. *United States v. Zelaya*, 293 F.3d 1294, 1297 (11th Cir. 2002); see also 8 U.S.C. § 1326(d). To make such a showing, the defendant must prove that "(1) he exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceeding at which the order was issued improperly deprived him of an opportunity for judicial review; and (3) the entry of the order was fundamentally unfair." *Zelaya*, 293

F.3d at 1298. To establish that the proceeding was fundamentally unfair, the defendant must show that “specific errors prejudiced” him. *Id.*

Here, Rodriguez cannot meet his burden. First, the district court found that Rodriguez’s testimony was not credible. This court gives great deference to credibility determinations. *United States v. Gregg*, 179 F.3d 1312, 1316 (11th Cir. 1999). The district court credited testimony that Rodriguez had been advised of his rights, the charges against him, the reasons for his deportation, and his right to contest the order, but that Rodriguez refused to sign any acknowledgment of his rights. Thus, Rodriguez cannot meet the first two standards for his collateral attack.

Moreover, he cannot show that the proceeding was fundamentally unfair, as he does not identify any error that would have prevented his deportation or that prejudiced him. Notably, Rodriguez would not have been eligible for asylum or withholding of removal given his conviction for an aggravated felony. 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i). Accordingly, because Rodriguez cannot meet his burden, the district court properly denied the motion to dismiss the indictment.

B. Motion to Suppress

Rodriguez next asserts that his statement should have been suppressed because he was not advised of his rights under the VCCR. Although he admits that he was told of his right to contact the consulate, he contends that the VCCR requires that the consulate be informed that the phone call pertains to the arrest or detention of one of its citizens.

Article 36 of the Vienna Convention on Consular Relations requires that local authorities inform detained or arrested foreigners of the right to contact their consulate for assistance. See *United States v. Duarte-Acero*, 296 F.3d 1277, 1281 (11th Cir. 2002).

Here, the evidence established that Rodriguez was informed of his right to contact the Colombian consular, but that he declined to do so. We can find no case law supporting his claim that authorities were required to take additional steps after Rodriguez declined to exercise his right.

Nevertheless, even if authorities failed to notify Rodriguez of his rights under the VCCR, the proper remedy is not to suppress the statements. The Vienna Convention does not confer judicially enforceable *individual rights*.³ As this court explained in *Duarte-Acero*, the preamble of the Convention itself “disclaims any intent to create individual rights, stating that its purpose ‘is not to benefit individuals but to ensure the efficient performance of functions by consular posts.’” *Id.* at 1281-82 (quoting the Preamble to the Vienna Convention). Moreover, the State Department has expressed the view “that the only remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law.”⁴ *Id.* Accordingly, the district court properly denied the motion to suppress on these grounds.

³ We note that the U.S. Supreme Court has granted certiorari in a case addressing whether the Convention creates enforceable individual rights and whether suppression is the proper remedy for violations. *Sanchez-Llamas v. Oregon*, 108 P.3d 573 (Ore.), *cert. granted*, No. 05-51 (Nov. 7, 2005). In the present case, however, we conclude that the authorities properly advised Rodriguez of his rights under the Convention, but that Rodriguez did not invoke his rights. Therefore, the Supreme Court’s subsequent decision will not alter our analysis.

⁴ The State Department’s interpretation of the treaty is entitled to deference. See *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168, 119 S. Ct. 662, 671, 142 L. Ed. 2d 576 (1999). See also *Maharja v. Sec. Dep’t of Corrs.*, 04-14669, manuscript op. at 23-25 (11th Cir. Dec. 15, 2005) (discussing available remedy under the Convention).

C. Necessity and Duress Defenses

Rodriguez also argues that the court abused its discretion by denying him the opportunity to raise a necessity or duress defense based on his fear that he would be killed if returned to Colombia.

To establish a duress defense, “a defendant must show that he acted under an immediate threat of death or serious bodily injury, that he had a well-grounded fear that the threat would be carried out, and that he had no reasonable opportunity to escape or inform [the] police.” *United States v. Wattleton*, 296 F.3d 1184, 1196 n.20 (11th Cir. 2002). The “requirement of immediacy of the threat is a rigorous one in which fear of future bodily harm to one’s self or to others will not suffice.” *Id.* (internal citations omitted).

Here, the district court properly determined that the duress defense was inapplicable. Rodriguez testified that he had been living in Venezuela for over a year when he reentered the United States. Based on this testimony, the district court concluded that Rodriguez’s testimony concerning his fear lacked credibility. Because Rodriguez could not show that he faced an imminent threat, the district court properly granted the government’s motion to exclude such testimony.

D. *Booker*

Rodriguez submitted his appellate brief before the Supreme Court issued its opinion in *Booker*. He did, however, raise the issue of whether the application of an enhancement for obstruction of justice based on the district court’s factual findings would violate the Sixth Amendment. Because Rodriguez raised this issue for the first time on appeal, review is for plain error. Post-*Booker*, this court has held that there are two *Booker* errors: constitutional error, which arises from the application of extra-verdict enhancements, and statutory error, which arises from the mandatory application of the

guidelines. *United States v. Shelton*, 400 F.3d 1325, 1330-32 (11th Cir. 2005).

To establish plain error, Rodriguez must show there is: (1) error; (2) that is plain; (3) that affects his substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir.), *cert. denied*, 125 S. Ct. 2935 (2005).

Here, the district court imposed a two-level extra-verdict enhancement for obstruction of justice based on its own factual findings. In addition, the court applied the sentencing guidelines as mandatory. Therefore, Rodriguez's *Booker* challenge presents an error that is plain. See *Rodriguez*, 398 F.3d at 1298-99.

The third prong of the plain error test, however, places a high burden on a defendant and requires that Rodriguez show that his sentence would have been different but for the mandatory application of the guidelines and the enhancement. *Id.* at 1299-1301. Generally, this court looks for some statement of regret by the district court that it was bound to impose the sentence under the guidelines and that it would have sentenced the defendant differently but for the guidelines. See, e.g., *United States v. Martinez*, 407 F.3d 1170 (11th Cir. 2005).

A sentence at the low end of the guidelines, without more, does not meet this third prong of the plain error test. See *United States v. Cartwright*, 413 F.3d 1295 (11th Cir. 2005); *United States v. Fields*, 408 F.3d 1356 (11th Cir. 2005). Here, there is nothing in the record that shows that the district court would have imposed a lower sentence had it known the guidelines were advisory only.

Moreover, after *Booker* the court is still required to properly calculate the guidelines range, including any enhance-

ments. *United States v. Crawford*, 407 F.3d 1174 (11th Cir. 2005). As discussed below, the district court properly applied the enhancement for obstruction of justice, and, therefore, Rodriguez cannot show plain error in his sentence.

E. Obstruction of Justice

Finally, Rodriguez asserts that giving a false name to the court did not hinder an investigation, and, therefore, the enhancement for obstruction of justice was improper.

Under U.S.S.G. § 3C1.1, a two-level enhancement is appropriate if the defendant “provides materially false information to a judge or magistrate” or “provid[es] a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense.” U.S.S.G. § 3C1.1, comment. (n.4(f), (g)).

The guidelines draw a distinction between false statements made before a judge and those made before a law enforcement officer. Statements made before a judge need only be material and false; they do not have to hinder or obstruct an investigation or prosecution. *United States v. Ruff*, 79 F.3d 123, 125 (11th Cir. 1996).

Here, Rodriguez admitted that he gave a false name before the court during the evidentiary hearing. As it is not relevant whether the false statement hindered prosecution because Rodriguez made the statement to a judge, the court properly applied the enhancement.

III. Conclusion

For the foregoing reasons, we AFFIRM Rodriguez’s conviction and sentence.

TJOFLAT, Circuit Judge, specially concurring.

TJOFLAT, Circuit Judge.

I concur without reservation in the court's judgment affirming Rodriguez's conviction. I concur in the affirmance of Rodriguez's sentence because, under this circuit's precedent (which the court cites), the district court did not commit plain *Booker* error when it enhanced Rodriguez's base offense level for obstruction of justice. The court did not commit plain error because Rodriguez has not satisfied the third prong of the plain-error test; that is, he has not cited (from the record of his sentencing hearing) "some statement of regret by the district court that it was bound to impose the sentence under the guidelines and that it would have sentenced [him] differently but for the guidelines." *Ante* at [8a]. In *United States v. Thompson*, I referred to such statement of regret as "magic words," 422 F.3d 1285, 1302 (11th Cir.2005) (Tjoflat, J. specially concurring), and explained how a district court statement of regret "fosters disrespect for the rule of law." *Id.* at 1304. Were we not bound to adhere to this test, I would find plain error, vacate Rodriguez's sentence, and remand the case for resentencing in accordance with *Booker*.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA
v.
ROBINSON WILLIAM RODRIGUEZ

CASE NO. 3:03-cr-257(S1)-J-20TEM
USM Number 30271-018

Defendant's Attorney: Quentin T. Till, Esq. (cja)

THE DEFENDANT:

___ pleaded guilty to Count.

___ pleaded nolo contendere to Count which was accepted by the court.

X was found guilty on Count One of the Superceding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. 1326	Being found illegally in the United States after being previously deported.	August 2003	One

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

– vs –

ROBINSON WILLIAM RODRIGUEZ,
a/k/a Robinson Vente-Viveros
a/k/a Robinson Rodriguez
a/ka/ William Rodriguez,

Defendant.

CASE 3:03-cr-
257(S)-J-20TEM

Courtroom
Number 10C
June 17, 2004
3:00 p.m.

TRANSCRIPT OF SENTENCING PROCEEDINGS
before
THE HONORABLE HARVEY E. SCHLESINGER
United States District Judge

APPEARANCES:

For the Government: MICHAEL F. GALLAGHER, Esquire
Assistant United States Attorney
300 North Hogan Street, Suite 700
Jacksonville, Florida 32201

For the Defendant: QUENTIN T. TILL, Esquire
1301 Riverplace Boulevard
Jacksonville, Florida 32207

Also Present: ROBINSON WILLIAM RODRIGUEZ,
Defendant
YOLANDA VARGAS, Interpreter

Court Reporter: EVELYN G. ALDERMAN, R.P.R.
Post Office Box 244
Jacksonville, Florida 32202

* * * * *

THE COURT: Now, I have an addendum to the presentence report that's dated June 7th which indicates that there is an objection to paragraph 18 dealing with an obstruction of justice under 3C1.1.

Other than that objection, are there any objections to the factual accuracy of the report or the Probation Officer's calculation of the guidelines from the defendant?

MR. TILL: No, Your Honor.

THE COURT: From the government?

MR. GALLAGHER: None, Your Honor.

THE COURT: Okay. I'll listen to what anybody has to say with respect to that one objection.

MR. TILL: Judge, in regard to the objection to the adjustment for obstruction of justice, it's pretty well set out. I would say that I was not the attorney of record early on in this case, but I understand that there was a first appearance before the Magistrate.

But also from the trial, I -- I got the impression that within an hour or two from detention of Mr. Rodriguez they had already run an NCIC inquiry. Those documents were provided to me. His fingerprint match was -- his fingerprints were matched with the case regarding his deportation from Texas a few years prior.

So within a matter of hours, they knew who this individual was. Through the fingerprint match, they knew that he was deported from Texas. So to this day, I don't know what the man's real name is, to be very honest with you.

But did it impede the prosecution in this case or the investigation in this case? In other words, was it a material fact that really impeded the investigation in this case?

My contention is no, that it was brought out at trial that he gave different names. But to say that this obstructed and slowed down the process of prosecuting Mr. Rodriguez, I did not hear that, Your Honor.

So for that matter, just because a man gives a different name or an alias, there has to be a materiality element. And maybe Mr. Gallagher -- and I don't mean hypothetically. Well, it could have done this or it could have done that. Because the case law says that's not sufficient, but there has to actually be shown by the prosecution that this investigation was impeded materially.

That's the extent of my argument.

THE COURT: Mr. Gallagher.

MR. GALLAGHER: May it please the Court.

Your Honor, when the defendant was first encountered and attempted to be processed by the Border Patrol, he initially said his name was Jhon Jairo Castro-Garcia.

He buttressed that claim by claiming his father was Julio Castro and his mother was Maria Louisa Garcia.

He then changed to Jhon Jairo Rodriguez-Rodriguez. Then changed to Robinson Vente-Viveros, which was the name that he was ultimately charged under.

Then at the initial appearance that same day, on August 7th, 2003, he told Judge Morris that his name was not Robinson Vente-Viveros but it was really Robinson William Rodriguez. Then at the detention hearing on August 11th, 2003, he told his attorney, at that time Mr. Burke, as well as Judge Morris, that his name was not Robinson Vente-Viveros but was really Robinson William Rodriguez, which is the name that he went through the entire court proceedings when he was convicted in Harris County, Texas, on March 12th of 1999, under the name of Robinson William Rodriguez.

At the evidentiary hearing before this Court on February 5th, 2004, when Mr. Till put him on the stand and asked him to state his full name, then, having had the indictment changed to reflect the name of William -- excuse me -- Robinson William Rodriguez, he then said his name was Robinson Vente-Viveros.

He was identified during the initial processing by Border Patrol through the use of their IDENT automated fingerprint reader, which came back -- and all it does is it compares an individual to people previously encountered by Border Patrol. It doesn't identify them. It identifies who they claim to have been the last time.

And I would agree with Mr. Till that to this moment, I have no idea who this person really is. He may be Robinson William Rodriguez, as he claimed, and went through the entire court proceedings in Texas, up to and including sentencing.

He may be Robinson Vente-Viveros, as he claimed when he took the stand before this Court. Or he could be any of the other names he gave Agent Parrish when he was attempting to process him.

I guess ultimately though he was identified as somebody previously encountered and somebody previously deported. But I certainly think he made every effort to hide his identity.

As the Court is aware with this type of an incident where somebody's identified as a stowaway, there's great time pressure on the Immigration officials to process the person and return him to the ship for removal on that ship. And but for the fact that the system was working -- and it doesn't always work as quickly as it might -- he would have been back on the ship and out of Jacksonville before he was truly identified.

But the simple fact of the matter is that regardless what his name, he wasn't identified, although he certainly has

given numerous different names. And I would suggest to the Court that we -- and I think, as Mr. Till said, we still don't really know who he is.

I think that's the extent of the case. It didn't hinder the investigation. But certainly he made every effort to. And he either lied before -- even in federal court in this case, he either lied to Judge Morris or he lied to you when he took the stand here.

THE COURT: I don't have to make that choice.

MR. GALLAGHER: He may have been lying to both of you, Judge. He may not be either of those people.

THE COURT: Well, the facts in this case are clear that the defendant used several names at the time of his arrest, at the time of his initial appearance, at the time of his being indicted and at the time of his testifying in Court. And I don't believe that the law requires that this Court needs to determine which one is true or which one is false or whether they're all false.

With respect to 3C1.1, materiality with respect to the false statement means that if the information that's false, if it is believed, it would tend to influence or affect the issue under determination. That's what this Court would have to worry about.

And I conclude that the defendant did attempt to cloud his identity by using false names, and I'm going to overrule the objection to paragraph 18 in the presentence report.

Having made that finding, the Court adopts the position taken by the Probation Officer in the addendum and in the presentence report as its findings of fact and determines that the total offense level is 26; the Criminal History Category is III; the range of imprisonment is 78 to 97 months; the supervised release range is two to three years; the fine range is

\$12,500 to \$125,000. There's no restitution, and there's a \$100 special assessment.

The defendant on March 2nd of this year was found guilty by a jury of Count One of the superseding indictment charging him with being found illegally in the United States after being previously deported, in violation of Title 8 of the United States Code, Section 1326. And the Court accepts the verdict of the jury and adjudges the defendant guilty of that particular offense.

Does anybody know of any reason why we should not now proceed with the imposition of sentence?

MR. TILL: No, Your Honor.

MR. GALLAGHER: Mr. Gallagher?

MR. GALLAGHER: No, Your Honor.

THE COURT: Okay. Then I'll listen to any argument of counsel.

MR. TILL: Judge, I'm having a difficult time with the interpreter talking louder than you are to the defendant, and that's why I'm moving over here.

Did the Court concur with the two-level increase?

THE COURT: Yes.

MR. TILL: You did? Okay. Judge, I filed a motion for downward departure from the guidelines sentence * * * .

* * * * *

Reading the presentence investigation, he also has two children. One has had a lung removed. So based on -- based on the mitigating circumstances surrounding his reentry into the United States -- and it should be noted that there were no drugs found. There were no weapons found within that container. It would possibly support his contention that he was

back here for lawful purposes and not something -- not some illegal purpose.

Based on that, Your Honor, I'm asking the Court to consider either the low end of the guideline range, Level 26, or a downward departure * * * .

* * * * *

MR. GALLAGHER: * * * Also, Your Honor, with respect to the basis for the motion, the sick children and whatever else he has to say -- based on his testimony at the hearing where he was presenting inconsistent motions -- which I guess is nothing wrong with that.

* * * * *

MR. GALLAGHER: * * * But if the Court will recall, at the conclusion of the afternoon session of the hearing on February 5th of last, of this year -- excuse me -- and this was more close in time to when the Court heard the testimony of the Immigration witnesses, the government's witnesses and the defendant's testimony -- and on page 142, line 3, the Court concluded: "I find ..." -- speaking of the defendant -- "... his credibility totally worthless and I credit the testimony of the agents who testified." And it goes on from there.

* * * And I would ask the Court to find his representations to be incredible and to deny the motion for the downward departure.

THE COURT: Anything else?

MR. TILL: Nothing else, Your Honor.

THE COURT: * * * With respect to the issue concerning the family and the health of the child, the guidelines are clear that unless it is an extraordinary circumstance the Court should not downward depart because of a family situation. And I find that having two children and having one with severe medical problems is not extraordinary that it wasn't considered by the drafters of the guidelines. That is, the Sen-

tencing Commission. And the law in the Eleventh Circuit is the same.

The Court having denied the motion for downward departure and having asked the defendant why judgment should not now be pronounced and no cause to the contrary appearing to the Court, and the Court having heard from the defendant and his attorney, and having reviewed the presentence report, pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a period of 78 months.

* * * * *

* * * * *

CROSS-EXAMINATION

BY MR. GALLAGHER:

Q. Tell me again what your true name is.

A. Vente Viveros Robinson.

Q. Isn't it true that when you were first arrested, the criminal complaint charged you as Robinson Vente-Viveros? You told Judge Morris your name was Robinson William Rodriguez?

A. That was the name that I had when I was in Texas, because I had no documents. And the lady with whom I live used the name Willie.

Q. Didn't you tell --

A. Or William.

Q. Didn't you tell Judge Morris that your true name was Robinson William Rodriguez?

A. Who is that judge?

Q. He's the judge who was downstairs that you first appeared before and the only other judge that you've appeared before.

A. Not that I recall.

Q. You don't remember that? You don't remember having several hearings in front of Judge Morris?

A. Here?

Q. Downstairs in this building. You remember the original indictment against you charged you under the name William Vente-Viveros, and you said, That's not my name. My real name Robinson William Rodriguez.

A. I think what they asked me was: If that name is the name that was on the documents that I had used when I was jailed. And I said yes.

Q. You went through the entire court proceeding in Texas and misled the judge and everybody involved into believing your name was Robinson William Rodriguez; didn't you?

A. Yes, sir.

Q. And that was a lie; wasn't it.

A. Yes. Because that was the name that I had there. That was the name I had there.

Q. That was a lie. That's not your true name; is it?

A. Yes, sir.

Q. And you went to court in front of a judge there, didn't you, in Texas.

A. Yes, sir.

Q. And you lied to him about your name?

A. Because that was the name that I was using there, and that was the name that they had on my documents.

Q. Where did they get the name on your documents?

A. Because those were the names that I used.

Q. And those were not your true name. You were lying to them about your true name; weren't you?

A. Yes, sir.

Q. And you went through a whole court proceeding in Texas, including a trial, lying about who you really were?

A. Yes. Because they were not going to believe my name was another one, because I had no documents.

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